

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

AMERICAN CHEMICAL SOCIETY,

Plaintiff,

v.

SCI-HUB d/b/a WWW.SCI-HUB.CC,
JOHN DOES 1-99,

Defendants.

No. 1:17-cv-00726-LMB-JFA

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION
FOR ENTRY OF DEFAULT JUDGMENT**

Pursuant to Fed. R. Civ. P. 55(b)(2), Plaintiff American Chemical Society (“Plaintiff” or “ACS”) by counsel, submits this Memorandum in Support of its Motion for Default Judgment: (i) seeking entry of Judgment against Defendant Sci-Hub d/b/a www.sci-hub.cc (“Sci-Hub”) on Counts I (Copyright Infringement) and III (Trademark Counterfeiting) of the First Amended Verified Complaint (“FAVC”); (ii) dismissing all remaining claims against Defendant Sci-Hub without prejudice; and (iii) dismissing all claims against Defendants John Does 1-99 without prejudice, and in support thereof states as follows:

I. INTRODUCTION

ACS has filed a Motion with this Court under Fed. R. Civ. P. 55(b)(2) for a default judgment against Defendant Sci-Hub for copyright infringement and trademark counterfeiting after Sci-Hub improperly created websites through which it knowingly copies, distributes, alters, and/or displays original content from ACS’s peer-reviewed journals and eBooks in connection with ACS’s registered trademarks—without authorization from, and to the substantial detriment

of, ACS. Although ACS only seeks judgment at this time on Counts I and III of the FAVC and only as to Defendant Sci-Hub, it reserves the right to pursue its additional claims.

Defendant Sci-Hub has been properly served and is aware of this action, but nevertheless has chosen not to respond. As directed by the Court in its Order authorizing service by publication and e-mail, ACS served Defendant Sci-Hub by publication in *The Washington Times* and by e-mail to the e-mail addresses currently used by ACS as well as those found to have provided actual notice in a recent action against Sci-Hub in the U.S. District Court for the Southern District of New York.¹ In addition, although under no obligation to do so, ACS served Defendant Sci-Hub through the Secretary of the Commonwealth of Virginia and through direct message on social media. Sci-Hub appears to have received actual knowledge of the lawsuit, as evidenced by a June 28, 2017 “tweet” from the @Sci_Hub Twitter account stating: “American Chemical Society files suit against Sci-Hub . . .” which included a link to ACS’s press release about this litigation. Despite actual notice, Sci-Hub did not file a response, and the Clerk has entered default.

By its default, Sci-Hub has conceded the truth of the allegations of the FAVC. There is no genuine issue of fact remaining in this suit, and default judgment should be entered against Defendant Sci-Hub providing for permanent injunctive relief as well as an award of statutory damages.

II. FACTUAL BACKGROUND

A. Plaintiff ACS And Its Intellectual Property Rights.

Plaintiff ACS is a Congressionally-chartered corporation that publishes over 50 peer-reviewed journals with cutting-edge articles across a broad spectrum of scientific disciplines.

¹ See *Elsevier Inc. v. Sci-Hub*, No. 1:15-cv-4282-RWS [Dkt. No. 87] (S.D.N.Y. June 21, 2017).

FAVC ¶¶ 5, 21. Every year, over 100,000 authors and their research teams from the community of scientists worldwide submit their work for consideration in these journals. *Id.* ¶ 22. Last year, ACS published more than 40,000 of the most significant submissions. *Id.*

As one of the first publishers to provide online editions of its journal content, ACS has always been at the forefront in the publication of peer-reviewed scientific articles. *Id.* ¶ 24. Today, virtually all ACS publications are disseminated digitally via electronic licenses over the internet. *Id.* ACS journals and eBooks reside on the access restricted publications platform of the ACS website, acs.org, which is hosted in the district. *Id.* Last year, some 27 million unique visitors came to the publications platform, performed 51 million searches, and made 94 million separate article requests. *Id.* ACS journals and eBooks are accessible to authorized users/viewers electronically at more than 5,000 academic, business, and corporate institutions worldwide. *Id.* ¶ 25. In addition, ACS's nearly 157,000 members have specified electronic access to articles from ACS journals and eBooks as a benefit of membership. *Id.*

ACS's aforementioned publications contain creative material wholly original to ACS and include substantial copyrightable subject matter under the copyright laws of the United States. *Id.* ¶ 27. The U.S. Copyright Office database reports that ACS publications are covered by over 9,000 copyright registrations issued by the U.S. Copyright Office. *Id.* ¶ 28 & Ex. E. At all times relevant hereto, ACS has been and still is the owner and proprietor of all right, title, and interest in and to ACS's copyrighted works. *Id.* ¶ 29.

ACS promotes and provides its publications to consumers through use of distinctive trademark titles that have been registered with the U.S. Patent and Trademark Office (collectively the "ACS Marks"). *Id.* ¶¶ 30-31 & Exs. F-G. The ACS Marks are *conclusive* or

prima facie evidence of the validity of the marks and of ACS's exclusive right to use the marks in association with the registered goods/services throughout the United States. *Id.* ¶ 31.

B. Defendant Sci-Hub and Its Unlawful Activities.

Defendant Sci-Hub is an individual or organization engaged in the operation of a website promoted under the name "Sci-Hub" that is engaged in intellectual property piracy on a massive scale (the "Sci-Hub Website"). *Id.* ¶ 8. The Sci-Hub Website is presently accessible through the domain name "sci-hub.cc" and related subdomains. *Id.* On the Sci-Hub Website, Sci-Hub proclaims a purpose antithetical to the Copyright Act and the United States Copyright laws, claiming to "challeng[e] the status quo" by providing "access to *hundreds of thousands [of] research papers every day*, effectively bypassing any paywalls and restrictions." *Id.* ¶ 33. In furtherance of this "mission," Sci-Hub created and operates two websites located at <http://pubs.acs.org.sci-hub.cc> and <http://acs.org.secure.sci-hub.cc> (collectively, "the Pirated/Spoofed Site") which are nearly identical to ACS's website in form and content, including hosting and providing copies of hundreds of thousands of copyright-protected scientific journals that are owned by ACS, as well as replicating ACS's registered trademarks. *Id.* ¶ 4.

Upon information and belief, the sub-domains pubs.acs.org.sci-hub.cc and acs.org.secure.sci-hub.cc were created by Sci-Hub to imitate ACS's legitimate website through use of the ACS Marks and ACS's legitimate domain name, acs.org, within the sub-domains. *Id.* ¶ 38. The Pirated/Spoofed Site that Sci-Hub is making available at pubs.acs.org.sci-hub.cc and acs.org.secure.sci-hub.cc is nearly identical to Plaintiff's website, located at acs.org and includes prominent misuse of the ACS trademark. *Id.* ¶ 39. The Pirated/Spoofed Site appears to almost completely replicate the content of Plaintiff's website, including ACS's searchable database of

copyright protected scientific journals. *Id.* ¶¶ 41-42. The Pirated/Spoofed Site also replicates Plaintiff's website by allowing access to unauthorized copies of ACS's Copyrighted Works by searching by topic. *Id.* ¶ 44. The Pirated/Spoofed Site also repeatedly uses the ACS Marks without authorization. *Id.* ¶ 46. On information and belief, Sci-Hub previously published the Sci-Hub Website at sci-hub.org before this domain name was disabled, and Sci-Hub has previously and/or is now publishing the Sci-Hub Website via other "sci-hub" formative domain names such as sci-hub.net, sci-hub.io, sci-hub.ac and/or sci-hub.onion. *Id.* ¶ 50.

According to records in the WHOIS database of domain name registrations, the sci-hub.cc domain name being used by Sci-Hub to operate the Sci-Hub Website and the Pirated/Spoofed Site was registered on June 26, 2015, to Zhuhai Yingxun Keji Limited under the contact email address service@todaynic.com. FAVC ¶ 11 & Ex. A. The mailing address for the registrant of the sci-hub.cc domain name is Zhuhai, Yingxun Keji Limited, Zhuhai 5190000 in China. *See id.* On the Sci-Hub Website, Sci-Hub provides links to its social media accounts, including Twitter ([@Sci_Hub](https://twitter.com/Sci_Hub)). *Id.* ¶ 12 & Ex. B. Sci-Hub's webpage at vk.com/sci_hub lists a contact email address of admin@sci-hub.io. *Id.* ¶ 14 & Ex. D.

C. The Instant Proceeding.

Plaintiff filed this action against Defendants Sci-Hub and John Does 1-99 on June 23, 2017. *See* ECF No. 1. The Complaint seeks a permanent injunction preventing against the copying, distributing, altering, displaying, hosting, selling, and/or promoting by Defendants of ACS's Copyrighted Works, as well as an award of actual, compensatory, and/or statutory damages, costs, and fees. *Id.* On July 7, 2017, Plaintiff amended the Complaint to, *inter alia*, name Defendant Sci-Hub. *See* FAVC.

On July 17, 2017, ACS filed a Motion for Service by Publication. *See* ECF Nos. 5-7. That day, the Court granted ACS's Motion and ordered ACS to provide notice to Defendants by: (1) publishing the Order in *The Washington Post* or *The Washington Times* once within fourteen (14) days after the entry of the Order; and (2) serving a copy of the Order on Defendants via the e-mail addresses service@todaynic.com, admin@sci-hub.io, support@sci-hub.org, sci-hub.org@gmail.com, 522ab14bo3mfc7dy@5225b4d0pi3627q9@private.whois.net. *See* ECF No. 8. The Order further directed ACS to file a declaration within twenty (20) days after the entry of the Order describing the steps that ACS had taken to comply with the Order. *Id.*

ACS caused the Order of Service by Publication to be published in *The Washington Times* on July 27, 2017 and to be served by electronic mail on July 17, 2017, via the e-mail addresses service@todaynic.com, admin@sci-hub.io, support@sci-hub.org, sci-hub.org@gmail.com, 522ab14bo3mfc7dy@5225b4d0pi3627q9.private.whois.net. *See* Declaration of Ari Meltzer (ECF No. 7). ACS filed its declaration describing compliance with the Order on August 1, 2017. *Id.*

Although not required to do so, ACS also: (1) served the FAVC upon the Secretary of the Commonwealth of Virginia on August 4, 2017, *see* ECF No. 14; Va. Code Ann. § 8.01-329; and (2) sent Defendant Sci-Hub direct messages on Twitter on July 17, 2017 and July 26, 2017. According to Twitter, two of the three direct messages sent by Plaintiff's counsel have been viewed. *See* Declaration of David E. Weslow (ECF No. 12-1) ¶ 6 & Ex. A (Aug. 17, 2017) ("Weslow Decl."). Defendants appear to have received actual knowledge of the lawsuit, as evidenced by a June 28, 2017 "tweet" from the @Sci_Hub Twitter account stating: "American Chemical Society files suit against Sci-Hub . . ." *See* Weslow Decl. Ex. A.

On August 21, 2017, the Clerk entered a default against Defendant Sci-Hub. *See* ECF No. 13.

III. ARGUMENT

A. This Court Has Jurisdiction to Enter Default Judgment Against Defendant Sci-Hub.

The Court has jurisdiction to grant ACS's motion and enter default judgment against Defendant Sci-Hub because the Court has subject matter jurisdiction over this action as well as personal jurisdiction over Sci-Hub. The Court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 (federal question jurisdiction), 1338(a) (any act of Congress relating to patents, copyrights, and trademarks), and 1367 (supplemental jurisdiction). *See* FAVC ¶ 16.

This Court has personal jurisdiction over Defendant Sci-Hub due to the substantial efforts by Sci-Hub directed at this district, including use of computers and domain names maintained in this district and tortious conduct within this district. Federal courts analyzing personal jurisdiction over a nonresident consider whether the assertion of jurisdiction satisfies the forum state's long-arm statute and is consistent with due process. *See Tire Eng'g & Distribution, LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 301 (4th Cir. 2012) (citing *CFA Inst. v. Inst. of Chartered Fin. Analysts of India*, 551 F.3d 285, 292 (4th Cir. 2009)); *Thousand Oaks Barrel Co., LLC v. Deep S. Barrels LLC*, --- F. Supp. 3d ---, No. 1:16-CV-1035, 2017 WL 1074936, at *3 (E.D. Va. Mar. 20, 2017). Under Virginia's long-arm statute, the exercise of jurisdiction is proper where a defendant "transact[s] any business in this Commonwealth" or "caus[es] tortious injury by an Act of omission in this Commonwealth." Va. Code § 8.01-328.1(A). The Fourth Circuit has explained that Virginia's long-arm statute "extends the jurisdiction of its courts as far as federal due process permits." *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 176 (4th Cir. 2002). Accordingly, the "statutory inquiry necessarily merges with the constitutional inquiry, and the

two inquiries essentially become one.” *Id.* (internal quotation marks omitted); *see also Consulting Eng'rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 276–77 (4th Cir. 2009). The due process clause permits the exercise of jurisdiction where the defendant has “certain minimum contacts [with the state] . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Although personal jurisdiction can be established under either general or specific jurisdiction, because the basis for the litigation arises from Defendant Sci-Hub’s contact with the forum, specific jurisdiction is appropriate. *See ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002). The factors for consideration of whether specific jurisdiction exists are: “(1) the extent to which the defendant ‘purposefully avail[ed]’ itself of the privilege of conducting activities in the State; (2) whether the plaintiff’s claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally ‘reasonable.’” *Id.* (citing *Christian Science Board of Directors of the First Church of Christ, Scientist v. Nolan*, 259 F.3d 209 (4th Cir. 2001)). As described below, each of these factors is satisfied in the case *sub judice*.

First, Defendant Sci-Hub has purposefully availed itself of the privilege of conducting activities in the Commonwealth of Virginia. Sci-Hub directed the acts complained of in the FAVC toward this district and utilized instrumentalities in this district in that Defendant appears to have gained unauthorized access to ACS’s password-protected website maintained on computers in this district so as to copy and distribute ACS’s intellectual property through the Pirated/Spoofed Site that operates on a domain name that is also maintained in this district. *Id.* ¶ 18. These actions, which caused injury in the district, are sufficient to establish personal

jurisdiction over Defendant Sci-Hub. *See* VA Code § 8.01-328.1(B) (declaring that “[u]sing a computer or computer network located in the Commonwealth shall constitute an act in the Commonwealth”); *Microsoft Corp. v. Does 1-2*, 1:16-cv-00993-GBL-TCB, at *3 [Dkt. No. 59] (Aug. 1, 2017) (finding personal jurisdiction proper “because defendant availed themselves of the privilege of conducting business in Virginia by engaging in the alleged harmful acts through computers, internet websites and instrumentalities in Virginia), *adopted by* 2017 WL 3605317, 1:16-cv-00993-GBL-TCB (Aug. 22, 2017); *Citigroup Inc. v. Malik*, No. CIV.A.1:07CV1168, 2009 WL 874497, at *2 (E.D. Va. Mar. 24, 2009) (finding personal jurisdiction based on registration of domain name residing in Virginia); *Aitken v. Commc'ns Workers of Am.*, 496 F. Supp. 2d 653, 659–60 (E.D. Va. 2007) (finding personal jurisdiction for use of servers in the district to commit tortious acts of email spamming); *Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 610 (E.D. Va. 2002) (same).

In *United States v. Batato*, the Fourth Circuit recently examined the scope of the due process clause as it relates to the use of computer services to engage in copyright infringement. 833 F.3d 413 (4th Cir. 2016). There, a grand jury returned an indictment against a number of claimants for criminal copyright infringement and money laundering relating to the use of public websites to facilitate the illegal reproduction and distribution of copyrighted movies, software, television programs, and music using servers located within the Eastern District of Virginia. *Id.* at 417-18. In finding that the intentional use of instrumentalities in this district satisfied constitutional due process, the Fourth Circuit explained that its earlier decisions in *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 397 (4th Cir. 2003) and *Christian Science Board of Directors of First Church of Christ, Scientist v. Nolan*, 259 F.3d 209 (4th Cir. 2001) did not establish a *de minimis* test for contacts between an out-of-state defendant and a

web server. *Id.* at 424. The court went on to hold that because the contacts with the forum state were integral to the claims, the purposeful avancement test was satisfied.

The case of *CYBERSitter, LLC v. People's Republic of China* is particularly informative. 805 F. Supp. 2d 958 (C.D. Cal. 2011). There, a computer software distributor alleged that foreign defendants “intentionally stole its copyrighted software—the very basis of its business—and conspired to distribute it to Chinese-speaking customers throughout China and the United States.” *Id.* at 971. The court found that the defendants’ contacts with California were not “‘random,’ ‘fortuitous,’ and/or attenuated,’” but, rather, that they “were intentional, tortious, and aimed at” the Plaintiff. *Id.* at 971-72. Such is the case here. The Pirated/Spoofed Site operated by Defendant Sci-Hub reproduces nearly the entire contents of Plaintiff’s legitimate website, acs.org, which is hosted on servers controlled by ACS in Ashburn, Virginia and Vienna, Virginia. FAVC ¶ 17. As in *CYBERSitter*, “[w]hen Defendants commit intentional copyright infringement with knowledge of plaintiff’s residency . . . they should reasonably anticipate being haled into court” there. 805 F. Supp. 2d at 971 (internal quotation omitted). The intentional nature of Defendant Sci-Hub’s actions is readily apparent from its website, which professes that Sci-Hub is “challenging the status quo” by providing “access to *hundreds of thousands [of] research papers every day*, effectively bypassing any paywalls and restrictions.” FAVC ¶ 33. Further, Defendant Sci-Hub targeted ACS by gaining unauthorized access to ACS’s password-protected website maintained in this district so as to copy and distribute ACS’s intellectual property through the Pirated/Spoofed Site that operates on a domain name that is also maintained in this district. FAVC ¶ 18. Through these activities, Defendant Sci-Hub purposely availed itself of the privilege of conducting activities in Virginia.

Second, ACS's claims arise out of the activities directed toward this district. Plaintiff's claims all stem directly from the theft of ACS's copyrighted materials from computers in this district and its unauthorized use of the ACS Marks in connection with those materials.

Finally, the exercise of jurisdiction over Defendant Sci-Hub is constitutionally "reasonable." Where, as here, a defendant has purposefully directed his activities at a forum, he "must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

Defendant Sci-Hub has not made any such case. Nevertheless, to determine constitutional reasonableness, courts look to "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)) (internal quotation marks omitted). There is no factual record to suggest that the burden of litigation in Virginia is extraordinary. Sci-Hub's website emphasizes its global reach, claiming to be "the first pirate website in the world to provide mass and public access to tens of millions of research papers" and emphasizing its mission of "advocat[ing] for the cancellation of intellectual property, or copyright laws, for scientific and educational resources." FAVC ¶ 34. The website further seeks donations "to the battle against copyright laws and information inequality." *Id.* ¶ 35. While Sci-Hub "certainly face[s] a greater disadvantage litigating in Virginia than" does ACS, "this is not dispositive." *Tire Eng'g*, 682 F.3d 292, 304 (4th Cir. 2012). Virginia, meanwhile, has an "interest in ensuring that the nation's copyright and trademark laws are not violated within its borders." *Id.* at 305. And ACS has a substantial

interest in obtaining relief for Sci-Hub's unapologetic disregard for its intellectual property rights. *See id.* Accordingly, exercise of personal jurisdiction over Sci-Hub is constitutionally reasonable.

B. The Clerk Appropriately Entered Default as to Defendant Sci-Hub.

The Clerk of this Court enters a default “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise.” Fed. R. Civ. P. 55(a). The Clerk's entry of default against Defendant Sci-Hub was required here because, as the docket reflects, the time for filing a responsive pleading had passed.

On July 17, 2017, ACS filed a Motion for Service By Publication. *See* ECF Nos. 5-7. On that day, the Court granted ACS's Motion and ordered ACS to provide notice to Defendants by: (1) publishing the Order in *The Washington Post* or *The Washington Times* once within fourteen (14) days after the entry of the Order; and (2) serving a copy of the Order on Defendants via the e-mail addresses service@todaynic.com, admin@sci-hub.io, support@sci-hub.org, sci-hub.org@gmail.com, 522ab14bo3mfc7dy@5225b4d0pi3627q9@private.whois.net. The Court's Order stated that “the foregoing steps shall be deemed to constitute service of the Verified Complaint on Defendants Sci-Hub and John Does 1-99 pursuant to the Federal Rules of Civil Procedure.” *See* ECF No. 8.

ACS caused the Order of Service by Publication to be published in *The Washington Times* on July 27, 2017 and to be served by electronic mail on July 17, 2017, via the e-mail addresses service@todaynic.com, admin@sci-hub.io, support@sci-hub.org, sci-hub.org@gmail.com, 522ab14bo3mfc7dy@5225b4d0pi3627q9.private.whois.net. *See* Declaration of Ari Meltzer (ECF No. 7). *See* Declaration of Ari Meltzer (ECF No. 7). ACS filed

a declaration describing compliance with the Order on August 1, 2017. *Id.* ACS also served the FAVC upon the Secretary of the Commonwealth of Virginia on August 4, 2017, *see* ECF No. 14; Va. Code Ann. § 8.01-329.

These facts, supported by the uncontroverted declarations filed in this action, clearly demonstrate that Defendant Sci-Hub had both constructive and actual notice of this suit yet failed to enter an appearance or otherwise defend this action. Therefore, the Clerk appropriately entered default as to Defendant pursuant to Rule 55(a) of the Federal Rules of Civil Procedure.

C. Plaintiff is Entitled to a Default Judgment Against Defendant Sci-Hub.

By failing to appear or otherwise defend against the Complaint, Defendant Sci-Hub is deemed to have admitted every allegation therein, and the Court must only determine whether the Complaint properly states a claim for relief. *See GlobalSantaFe Corp. v. Globalsantafe.com*, 250 F. Supp. 2d 610, 612 n.3 (E.D. Va. 2003). This Court should conclude that Defendant Sci-Hub has admitted the well-pled allegations set forth in Plaintiff's Complaint that establish Plaintiff's entitlement to judgment for copyright infringement and trademark counterfeiting.

1. *Sci-Hub's Copyright Infringement.*

The uncontested allegations establish Defendant Sci-Hub's liability for copyright infringement. To prevail on a claim for copyright infringement, a plaintiff must show: (1) that it owned the copyright to the work that was allegedly copied; and (2) that the defendant copied protected elements of the work. *See Towler v. Sayles*, 76 F.3d 579, 581 (4th Cir. 1996) (citing *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991)). Here, each of those elements is easily satisfied.

First, ACS owns the copyrights in the infringed works. ACS publishes over 50 peer-reviewed journals with cutting-edge articles across a broad spectrum of scientific disciplines.

FAVC ¶ 21. Every year, over 100,000 authors and their research teams from the community of scientists worldwide submit their work for consideration in these journals. *Id.* ¶ 22. Last year, ACS published more than 40,000 of the most significant submissions. *Id.* In addition, ACS publishes approximately 30 new eBooks each year. *Id.* ¶ 23. These publications contain creative material wholly original to ACS and include substantial copyrightable subject matter under the copyright laws of the United States. *Id.* ¶ 27. ACS's Bylaws provide: "For any writing of an author published by the SOCIETY in any of its books, journals, or other publications, the SOCIETY shall own the copyright for the original term and any renewal thereof except (1) in the case of a work prepared by an officer or employee of the United States Government as part of that person's official duties, or (2) in the case of a work prepared solely by employee(s) of a foreign country's government, or entity thereof, which reserves copyright as directed by the laws of that country, or (3) in those instances in which the SOCIETY's Executive Director deems the owning or acquisition of copyright in a given work to be impractical or impossible." *Id.* ¶ 28. The U.S. Copyright Office database reports that ACS publications are covered by over 9,000 copyright registrations issued by the U.S. Copyright Office (the "ACS Copyrighted Works"). *Id.* & Ex. E. ACS has been and still is the owner and proprietor of all right, title, and interest in and to ACS's Copyrighted Works. *Id.* ¶ 29.

Second, Defendant Sci-Hub has copied not only protected elements of the ACS Copyrighted Works, but in many cases the entirety of those works. The Pirated/Spoofed Site that Defendants are making available at pubs.acs.org.sci-hub.cc and acs.org.secure.sci-hub.cc is nearly identical to Plaintiff's website. *Id.* ¶ 39. Importantly, the Pirated/Spoofed Site appears to almost completely replicate the content of Plaintiff's website including ACS's searchable database of copyright protected scientific journals. *Id.* ¶¶ 41-42. The Pirated/Spoofed Site also

allows access to unauthorized copies of all, or substantially all, of ACS's Copyrighted Works for free download. *Id.* ¶¶ 44-45. These uncontested allegations establish that Defendant Sci-Hub has systematically infringed ACS's copyrighted works.

2. *Sci-Hub's Trademark Counterfeiting.*

The uncontested allegations also establish Defendant Sci-Hub's liability for trademark counterfeiting. A party is liable for trademark counterfeiting if, without consent of the registrant, that party "reproduce[s], counterfeit[s], cop[ies], or colorably imitate[s] a registered mark and appl[ies] such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptables or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114(1)(b). A counterfeit mark is "a mark that is registered on the principal register in the United States Patent and Trademark Office for such goods or services sold, offered for sale, or distributed and that is in use, whether or not the person against whom relief is sought knows such mark was so registered." 15 U.S.C. § 1116(d)(1)(B)(i).

Here, ACS promotes and provides its publications to consumers through use of the ACS Marks, which are registered in the United States Patent and Trademark Office and serve as *conclusive* or *prima facie* evidence of the validity of the marks and of ACS's exclusive right to use the marks in association with the registered goods/services throughout the United States. FAVC ¶¶ 30-31 & Exs. F-G; 15 U.S.C. §§ 1057(b); 1115(a); *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1529 (4th Cir.1984). The sub-domains pubs.acs.org.sci-hub.cc and acs.org.secure.sci-hub.cc imitate ACS's legitimate website through use of the ACS Marks and ACS's legitimate domain name acs.org within the subdomains. *Id.* ¶ 38. The Pirated/Spoofed

Site appears to almost completely replicate the content of Plaintiff's website, including the ACS Marks, creating the impression that the Pirated/Spoofed Site is associated with ACS. *Id.* ¶¶ 41, 46. Through these actions, Defendant Sci-Hub is attempting to divert users and revenues away from ACS by using the ACS Marks in association with the distribution of third-party publications and unauthorized versions of ACS's Copyrighted Works. *Id.* ¶ 47. Defendant Sci-Hub's unauthorized use of the ACS Marks is likely to: (a) cause confusion, mistake and deception; (b) cause the public to believe that Sci-Hub's distribution of the ACS scientific articles and/or third-party publications is authorized, sponsored or approved by ACS or that Sci-Hub is affiliated, connected or associated with or in some way related to ACS; and (c) result in Sci-Hub unfairly benefiting from ACS's advertising and promotion and profiting from the reputation of ACS and the ACS Marks. *Id.* ¶ 70. Accordingly, Defendant Sci-Hub is liable for trademark counterfeiting.

D. Plaintiff is Entitled to a Permanent Injunction Against Defendant Sci-Hub.

A plaintiff is entitled to a permanent injunction on "such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). "Under this provision, a copyright holder that establishes past infringement and a substantial likelihood of future infringement is ordinarily entitled to a permanent injunction against the infringer." *Phoenix Renovation Corp. v. Rodriguez*, 461 F. Supp. 2d 411, 424 (E.D. Va. 2006), *aff'd*, 258 F. App'x 526 (4th Cir. 2007); *Seoul Broad. Sys. Int'l, Inc. v. Young Min Ro*, No. 1:09CV433 LMB/IDD, 2011 WL 3207024, at *6 (E.D. Va. July 27, 2011). A plaintiff is entitled to a permanent injunction for infringement of a trademark right pursuant to 15 U.S.C. § 1116(a). *See Microsoft Corp. v. Does I-2*, 1:16-cv-00993-GBL-TCB, at *3 [Dkt. No. 59] (Aug. 1, 2017); *Teaching Co. P'ship v. Unapix Entm't, Inc.*, 87 F. Supp. 2d 567, 587 (E.D. Va. 2000).

In determining whether a permanent injunction is appropriate, courts consider whether: (1) the plaintiff has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction. *Phelps & Associates, LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007) (citing *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)). Here, a permanent injunction is necessary to reduce the threat of future infringements.

First and second, ACS has suffered an irreparable injury for which it has no adequate remedy at law. ACS has demonstrated that Sci-Hub has unabashedly stolen thousands of ACS Copyrighted Works—works typically available only to authorized users/viewers and/or ACS’s nearly 157,000 members—and made them available for free over the Internet in connection with the counterfeit ACS Marks. FAVC ¶¶ 21-25, 42-45. Where, as here, the infringed work is not a tangible item that can be retrieved or destroyed, courts recognize that “[t]he harm cannot be ‘repaired,’ which makes such harm irreparable.” See *EMI Apr. Music, Inc. v. White*, 618 F. Supp. 2d 497, 510 (E.D. Va. 2009). Furthermore, money damages are inadequate. As this Court has recognized, “[t]he lack of appropriate response from defendant shows a threat of continued infringement, and also suggests that defendant will not cooperate in any future suits for money damages.” *Hilton Worldwide, Inc. v. Glob. Advert., Inc.*, No. 1:15CV1001, 2016 WL 8223436, at *8 (E.D. Va. Apr. 8, 2016), *report and recommendation adopted sub nom. Hilton Worldwide, Inc v. Glob. Advert., Inc.*, No. 1:15CV01001GBLTCB, 2016 WL 8231154 (E.D. Va. May 19, 2016). ACS has demonstrated a substantial likelihood of future infringement, as evidenced by

Sci-Hub's professed purpose of "challenging the status quo" by providing "access to *hundreds of thousands [of] research papers every day*, effectively bypassing any paywalls and restrictions."

FAVC ¶ 33; *Seoul Broad.*, 2011 WL 3207024, at *6 (relying on history of copyright infringement to demonstrate "a sufficiently strong likelihood of future infringement").

Moreover, because damages for future infringements would require "speculation and guesswork" (not to mention an extensive global policing effort), money damages are inadequate. *See Phelps*, 492 F.3d at 544.

Third, the balance of equities strongly favors a permanent injunction, which will prohibit Defendant Sci-Hub from using ACS's Copyrighted Works and the ACS Marks without authorization. "[T]he only hardship suffered by [Sci-Hub] if an injunction is entered is an obligation to follow trademark law and [copyright law]." *Hilton Worldwide, Inc.*, 2016 WL 8223436 at *9. This factor clearly favors an injunction.

Finally, public interest favors an injunction. "It is easy to understand that the public interest reflected in the Constitutional protection of copyright, and the congressional enactment of the Copyright Act, is enhanced by issuance of a permanent injunction where copyright infringement has taken place." *White*, 618 F. Supp. 2d at 511. "On the other hand, it is difficult to conceive of how such a permanent injunction will harm a defendant who has willfully violated the copyright law." *Id.* Given the public interest in enforcement of copyright and trademark laws, this factor also strongly favors an injunction.

Because all four elements are satisfied, the Court should impose the requested permanent injunction.

E. Plaintiff is Entitled to an Award of Maximum Statutory Damages for Copyright Infringement.

Under the Copyright Act, a copyright owner may elect statutory damages instead of actual damages at any time prior to final judgment. *See* 17 U.S.C. § 504(c)(1); *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1996); *Graduate Mgmt. Admission Council v. Raju*, 267 F. Supp. 2d 505, 511 (E.D. Va. 2003). The purpose of statutory damages is not only to compensate the copyright holder for any injury but to deter future infringement.” *Broad. Music, Inc. v. Fossils, Inc.*, No. L:14-CV-755 LMB/IDD, 2015 WL 4127622, at *2 (E.D. Va. July 7, 2015) (quoting *EMI Apr. Music, Inc. v. White*, 618 F.Supp.2d 497, 508 (E.D. Va.2009)). As the Supreme Court has explained:

[A] rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes.

F.W. Woolworth Co. v. Contemporary Arts, 344 U.S. 228, 233 (1952).

In the event of innocent infringement, a plaintiff shall be entitled to statutory damages of “not less than \$750 or more than \$30,000” for “all infringements involved in the action, with respect to any one work ... as the court considers just.” 17 U.S.C. § 504(c)(1). If, however, the “infringement was committed willfully,” the court may increase the award of statutory damages up to a sum of \$150,000 per infringed work. 17 U.S.C. § 504(c)(2). The Copyright Act allows district courts wide discretion in setting damage amounts. *See Arista Records LLC v. Gaines*, 635 F. Supp. 2d 414, 418 (E.D.N.C. 2009) (citing *F.W. Woolworth Co.*, 344 U.S. at 231–32 (1952)).

Here, ACS seeks a judgment against Sci-Hub in the amount of \$4,800,000—which is based on infringement of a representative sample of publications containing the ACS

Copyrighted Works multiplied by the maximum statutory damages of \$150,000 for each publication.² Although ACS publications are covered by over 9,000 copyright registrations, FAVC ¶ 28, ACS has identified a representative sample of 32 publications that Sci-Hub has infringed and continues to infringe. *See* Declaration of David E. Weslow ¶ 5 & Attach. 1 (Sept. 1, 2017) (“Second Weslow Decl.”), attached hereto as Exhibit A. These publications include a total of 2,225 registered copyrights. *See id.* ¶¶ 6-7. For the reasons described below, ACS’s request is reasonable, appropriate, and consistent with the Congress’s goals in providing for statutory damages.

Sci-Hub’s unabashed flouting of U.S. Copyright laws merits a strong deterrent. This Court has awarded a copyright holder maximum statutory damages where the defendant’s actions were “clearly willful” and maximum damages were necessary to “deter similar actors in the future.” *See Graduate Management Admission Counsel v. Raju*, 267 F. Supp. 2d. 505 (E.D. Va. 2003). The U.S. District Court for the District of New Jersey awarded maximum statutory damages on a remarkably similar fact pattern in *Axact (PVT), Ltd. v. Student Network Res., Inc.*, No. CIV.A. 07-5491 (FLW), 2008 WL 4754907 (D.N.J. Oct. 22, 2008). There, the defendant/counterclaimant operated research sites that contained original, copyrighted works. *Id.* at *1. The plaintiff/counterdefendant operated websites based in Pakistan that sold, among other things, “term papers and other academic works” that infringed upon the counterclaimant’s copyrights. *Id.* In awarding maximum statutory damages, the court found that the counterdefendant “demonstrate[d] an indifference to U.S. copyright law” based on the facts that: (1) it took steps to avoid detection; (2) it engaged in repeated infringement; and (3) it admitted to the theft and delivery of the copyrighted works. *Id.* at *2.

² Although ACS reasonably could have sought damages of well over \$300 million based on the total number infringed works in the representative publications, as a demonstration of restraint, it is only seeking statutory damages per publication infringed. ACS also is not seeking damages for trademark counterfeiting or attorney’s fees at this time.

The factors upon which the court relied in *Axact* are only magnified in the instant case. First, Sci-Hub operates its website through multiple domain name registries to avoid identification and being shut down. FAVC ¶ 50. Second, Sci-Hub is engaged in repeated infringement, as evidenced both by the number of publishers it infringes (including ACS and Elsevier) and the plethora of works that it infringes from each publisher. Third, Sci Hub admits to the theft and distribution of copyrighted works, bragging on its website that it is “challenging the status quo” by providing “access to *hundreds of thousands [of] research papers every day*, effectively bypassing any paywalls and restrictions.” *Id.* ¶ 33. Finally, an award of maximum statutory damages is necessary to deter Sci-Hub and similar infringers. Even after receiving a default judgment against it in the Southern District of New York in the amount of \$15 million (\$150,000 for 100 copyrights), Sci-Hub continues to infringe copyrighted works, including those of ACS. Under these circumstances, a statutory damages award of \$4.8 million is reasonable and appropriate.

IV. CONCLUSION

For the foregoing reasons, ACS respectfully requests that the Court grant this Motion for Default Judgment; enter judgment against Defendant ACS for copyright infringement and trademark counterfeiting; permanently enjoin Defendant Sci-Hub from infringing the ACS Marks or ACS Copyrighted Works consistent with the Proposed Order; award Plaintiff ACS statutory damages pursuant to 15 U.S.C. § 1117(c) and 17 U.S.C. § 504(c) in an amount equal to \$4,800,000; award Plaintiff ACS pre-judgment interest and post-judgment interest on the above damages awards; dismiss all remaining claims and defendants without prejudice; and grant such further relief as this Court deems proper.

Dated: September 1, 2017 By: /s/ Attison L. Barnes. III /s/
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CERTIFICATE OF SERVICE

I, Attison L. Barnes, III, hereby certify that on September 1, 2017, I electronically filed the foregoing by using the CM/ECF system. I also sent a copy to the following postal and email addresses associated with Defendant Sci-Hub:

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