

1 **I. Findings of the Magistrate Judge**

2 The Magistrate Judge found that application of the factors set forth by the Ninth Circuit in
3 Eitel v. McCool for the entry of default judgment weighed in favor of entry of default. See Eitel, 782
4 F.2d 1420, 1472-72 (9th Cir. 1986). First, Plaintiff would have no other alternative by which to
5 recover damages suffered as a result of Defendants’ actions. See J & J Sports Prods. v. Rodriguez,
6 2010 U.S. Dist. LEXIS 20288, at *7 (E.D. Cal. March 5, 2010). Second, the Magistrate Judge found
7 that Plaintiff stated claims for a violation of the Federal Communications Act of 1934, arising in 47
8 U.S.C. § 605(a), and for conversion against Defendants. Third, in considering the sum of money at
9 stake, the Magistrate Judge found the significant sum requested would weigh against entry of default
10 if the Court were inclined to enter judgment in the amount requested. See, e.g., Joe Hand
11 Promotions v. Streshly, 655 F.Supp.2d 1136, 1136 (S.D. Cal. 2009) (amount requested of \$100,875
12 was “manifestly excessive under existing law”). Fourth, the Magistrate Judge found that there is
13 little possibility of dispute of material facts regarding the liability of the parties as Defendants have
14 not made an effort to challenge the Complaint or otherwise defend. Finally, the Magistrate Judge
15 found that it was unlikely that defaults entered were the result of excusable neglect. See Shanghai
16 Automation Instrument Co., Ltd. v. Kuei, 194 F.Supp.2d 995, 1005 (N.D. Cal. 2001).

17 **Statutory Damages**

18 After weighing the Eitel factors, the Magistrate Judge turned to the amount of damages to be
19 awarded. Under the Federal Communications Act of 1934 (“Communications Act”), a plaintiff may
20 recover actual or statutory damages “not less than \$1,000 or more than \$10,000, as the court
21 considers just.” 47 U.S.C. § 605(e)(3)(C)(i)(II). Determining a proper amount of statutory damages
22 to be awarded, the Magistrate Judge considered factors such as the size and number of televisions
23 upon which the pirated program was broadcast, the capacity of the restaurant, the number of people
24 present during the broadcast, the lack of a cover charge and advertising, and the piracy history of
25 Defendants. (Doc. 13 at 9-10). The Magistrate Judge noted Arriagas Mexican Restaurant & Cantina
26 had a capacity of 75 people and ten to thirteen people were present during the program, which was
27 broadcast in the bar area on one big screen television and one small television. Defendants did not
28 charge an entry fee, nor did they advertise the pirated broadcast. Finally, Plaintiff did not provide

1 evidence that Defendants had a history of signal piracy. Given an “absence of . . . aggravating facts,”
2 the Magistrate Judge found an award of the statutory minimum was just. Id.

3 Enhanced Damages

4 The Magistrate Judge noted that for damages to be enhanced, a violation must be “committed
5 willfully and for the purposes of direct or indirect commercial advantage or private financial gain.”
6 47 U.S.C. § 605(e)(3)(C)(ii). In its application for default judgment, Plaintiff argued that a court
7 may infer “willingness” from a defendant’s failure to appear and defend. (Doc. 10-1 at 15-16). The
8 Magistrate Judge declined to infer that Defendants acted willfully because factual allegations
9 regarding damages must be proven, and they were not. (Doc. 13 at 11, citing Pope v. States, 323
10 U.S. 1, 22 (1944), Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir. 1977)). In
11 addition, the Magistrate Judge found there was no evidence that Defendants acted for commercial
12 advantage or financial gain, given the lack of a cover charge or advertising, and the small number of
13 people present in the establishment. Id. Therefore, the Magistrate Judge recommended that the
14 Court not enhance the damages award.

15 Damages for Conversion

16 The Magistrate Judge found an establishment the size of Arriagas Mexican Restaurant &
17 Cantina would have been required to pay \$2,200 for a sublicense to broadcast the program with
18 Plaintiff’s permission. Therefore, the Magistrate Judge found Plaintiff was entitled to this amount
19 for the tort of conversion

20 Attorney’s Fees

21 Plaintiff sought the award of costs and attorneys fees pursuant to 47 U.S.C. § 605. However,
22 although it made the request, the application did not contain any support for the request, and failed to
23 present any evidence of costs or fees to the Court. Therefore, the Magistrate Judge declined to
24 recommend the award of attorneys fees and costs.

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27 **II. Objections by Plaintiff**

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1 Plaintiff argues, “damages *significantly* over the minimum” have been awarded when
2 circumstances were not egregious, including in cases within the Eastern District.² (Doc. 14 at 7),
3 citing Joe Hand Promotions, Inc. v. Tidmarsh, 2009 U.S. Dist. LEXIS 54412, 2009 WL 1845090
4 (E.D. Cal. June 26, 2009) (awarding the maximum statutory damages, and \$10,000 in enhanced
5 damages where the investigator saw the program on a single television, the capacity was fifty people,
6 and there were up to 29 patrons); J & J Sports Productions, Inc. v. Esquivel, 2008 U.S. Dist. LEXIS
7 92140, 2008 WL 4657741 (E.D. Cal. Oct. 20, 2008) (awarding \$10,000 under both § 553 and § 605,
8 in addition to enhanced damages where the capacity was 75 people, there were 35 individuals
9 present, and the program was shown on a single television). Plaintiff concludes that an award of
10 \$10,000 “is an appropriate award.” Id. at 10, citing Joe Hand Promotions, Inc v. Carranza, 2009
11 U.S. Dist. LEXIS 109590, 2009 WL 4254460 (E.D. Cal. Nov. 24, 2009); J & J Sports Productions,
12 Inc. v. Villalobos, 2009 U.S. Dist. LEXIS 116345, 2009 WL 5030137 (E.D. Cal. Dec. 15, 2009); Joe
13 Hand Promotions, Inc v. Haddock, 2009 U.S. Dist. LEXIS 63048, 2009 WL 2136117 (E.D. Cal.
14 July 14, 2009). In addition, Plaintiff argues that enhanced damages are warranted because the
15 Declaration of Joseph Gagliardi, president of J & J Sports Productions, Inc., “explains that
16 Defendants must have taken some deliberate act to intercept the Program.” (Doc. 14 at 9).

17 With regard to the award of attorneys fees, Plaintiff states it was not its intention to waive its
18 right for recovery. (Doc. 14 at 13). Plaintiff asserts 47 U.S.C. § 605 mandates the award of costs
19 and fees to a prevailing party.

20 **III. Discussion**

21 The Magistrate Judge addressed the holdings in Tidmarsh and Esquivel, finding facts in the
22 cases were distinguishable (See Doc. 13 at 10). Similarly, the cases cited by Plaintiff in its
23 Objections in support of an award of the statutory maximum of \$10,000, demonstrate more
24 egregious facts than are presented here. For example, in Carranza, the Court found the defendants

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26 ²In taking this position, it appears that Plaintiff believes there are no circumstances that would justify the minimum
27 award and that every case justifies, not only the maximum award, but an enhanced award also. To the contrary, the Court
28 is not permitted to take this approach and, instead, must be guided by Kingvision Pay-Per-View v. Lake Alice Bar, 168 F.3d
347, 350 (9th Cir. 2009), in which the Ninth Circuit held that the award should deter future conduct but not destroy the
business.

1 acted willfully and for commercial advantage because the pirated program was displayed on nine
2 televisions and on a big-screen projector, and the defendant charged a \$10 entry fee. Carranza, 2009
3 U.S. Dist. LEXIS 109590, at *6. Likewise, in Villalobos, the program was shown on a large
4 projection screen in an establishment with the approximate capacity of 100 to 150 individuals, and
5 the defendants had a prior violation of the Communications Act. Villalobos, 2009 U.S. Dist. LEXIS
6 116345, at *6-7. In Haddock, the Court considered the size of the establishment, which had a
7 capacity of 150³, and the “fact that the Program was shown on five televisions” in its determination
8 that the statutory maximum, plus \$15,000 enhanced damages, was a just award. Haddock, 2009 U.S.
9 Dist. LEXIS 63048, at *5.

10 Plaintiff’s Objections fail to acknowledge that enhanced damages may be awarded only
11 where Defendants acted “willfully *and* for the purposes of direct or indirect commercial advantage or
12 private financial gain.” 47 U.S.C. § 605(e)(3)(C)(ii) (emphasis added). Assuming Defendants acted
13 willfully, there is no evidence to support the assertion that Defendants acted for “commercial
14 advantage or private financial gain.” As noted by the Magistrate Judge, several courts in the Ninth
15 Circuit have declined to award enhanced damages where there were few patrons, no entry fee was
16 charged, and the defendant did not advertise the program while finding that these facts indicated
17 defendants did not act for advantage or financial gain. (Doc. 13 at 11-12), citing, e.g., Integrated
18 Sports Media, Inc. v. Naranjo,⁴ 2010 U.S. Dist. LEXIS 81264 (E.D. Cal. Aug. 11, 2010); J & J
19 Sports Productions v. Miranda, 2009 U.S. Dist. LEXIS 112415 (N.D. Cal. Nov. 16, 2009); J & J
20 Sports Productions v. Hernandezsilva, 2010 U.S. Dist. LEXIS 96891 (S.D. cal. Sept. 15, 2010).
21 Notably, Plaintiff does not address these cases in its Objections.

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24 ³ See Haddock, Case No. 1:09-cv-00290-LJO-DLB (E.D. Cal), Doc. 11-3 at 3. The Court may take notice of facts
25 that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
26 Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993). As such, the docket of the Court
is subject to judicial notice.

27 ⁴ Plaintiff asserts that Integrated Sports Media was decided by Magistrate Judge Jennifer L. Thurston, who made
28 the Findings and Recommendations now before the Court. However, that recommendation for an award of \$1,500 in
Integrated Sports Media was made by Magistrate Judge Sandra M. Synder, and adopted by District Judge Anthony W. Ishii.

1 Finally, the recommendation to deny attorneys' fees and costs was made without prejudice to
2 Plaintiff filing a later motion. This was due to Plaintiff's request for fees and costs but its complete
3 failure to support, or even address, this request in the application.

4 **IV. Conclusion and Order**

5 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(C) and Britt v. Simi Valley
6 United School Dist., 708 F.2d 452, 454 (9th Cir. 1983), this Court has conducted a *de novo* review of
7 the case. Having carefully reviewed the entire file, and the Objections of Plaintiff, the Court finds
8 that the Findings and Recommendations are supported by the record and by proper analysis. As
9 observed by the Ninth Circuit, and noted by the Magistrate Judge, "The range in the statutory award
10 [under § 605] might allow for a sanction that deters but does not destroy." Pay-Per-View v. Lake
11 Alice Bar, 168 F.3d 347, 350 (9th Cir. 2009). By adding the \$1,000 statutory minimum to the award
12 of \$2,200 for the tort of conversion, the total damages award is \$3,200. This amount both
13 compensates Plaintiff and acts as a deterrent for Defendants.

14 Accordingly, IT IS HEREBY ORDERED that the Findings and Recommendations filed
15 January 21, 2011, are **ADOPTED IN FULL**. Judgment shall be entered accordingly. Plaintiff's
16 counsel shall submit a proposed form of judgment consistent with this decision within five(5)
17 days following the date of electronic service of this decision.

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21 IT IS SO ORDERED.

22 **Dated: February 17, 2011**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE