



1 (closed-circuit) rights to “*Honor + Glory*” *Saul Alvarez v. Erislandy Lara Championship Fight*  
2 *Program* (the “Program”) telecast nationwide on Saturday, July 12, 2014. (Compl. ¶ 14.) Plaintiff  
3 entered into sublicensing agreements granting public exhibition rights to various commercial entities  
4 throughout the United States, and within the State of California. (Compl. ¶ 15.) Plaintiff expended  
5 substantial monies marketing, advertising, promoting, administering, and transmitting the Program to  
6 these commercial entities. (Compl. ¶ 16.)

7 On Saturday, July 12, 2014, Jeff Lang (“Lang”) entered La Perla Restaurant in Huron,  
8 California, at approximately 8:20 p.m. *See* Affidavit of Jeff Lang (“Lang Decl.”) (Doc. 10-3 at 2.)  
9 While in La Perla Restaurant, Lang noted one 46” flat screen television showing the Program. He  
10 estimated the establishment’s capacity as 45-50 people, and counted at least 30 patrons before leaving  
11 at 8:26 p.m. (Lang Decl., Doc. 10-3 at 2-3.)

12 Plaintiff alleges that Defendant knowingly and unlawfully intercepted, received, published,  
13 divulged, displayed, and/or exhibited the Program at the time of its transmission at the commercial  
14 establishment, La Perla Restaurant, owned and operated by Defendant. (Compl. ¶ 17.) Plaintiff  
15 further alleges Defendant did so willfully and for purposes of direct and/or indirect commercial  
16 advantage and/or private financial gain, in violation of 47 U.S.C. § 605, et seq. (Compl. ¶¶ 18-19.)  
17 Plaintiff seeks statutory damages for each violation in the amount of \$10,000 pursuant to 47 U.S.C. §  
18 605(e)(3)(C)(i)(II), statutory damages for each willful violation in the amount of \$100,000 pursuant to  
19 47 U.S.C. § 605(e)(3)(C)(ii), and attorneys’ fees and costs pursuant to 47 U.S.C. § 605(e)(3)(B)(iii).  
20 (Compl. ¶ 22.)

21 On October 20, 2015, after Defendant failed to file an answer, Plaintiff requested entry of  
22 default against Defendant, which was entered by the Clerk of the Court on the same day. (Docs. 7, 8.)  
23 On November 19, 2015, Plaintiff filed the present motion for default judgment. (Doc. 10.) Plaintiff’s  
24 motion requests that the Court enter default judgment against Defendant for damages in the amount of  
25 \$111,400.00. Defendant has not appeared or otherwise defended this action.

## 26 LEGAL STANDARD

27 Pursuant to Federal Rule of Civil Procedure 55, default may be entered against a party against  
28 whom a judgment for affirmative relief is sought who fails to plead or otherwise defend against the

1 action. *See* Fed. R. Civ. P. 55(a). However, “[a] defendant’s default does not automatically entitle the  
2 plaintiff to a court-ordered judgment.” *PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1174  
3 (C.D. Cal. 2002) (*citing Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986)). Instead, the  
4 decision to grant or deny an application for default judgment lies within the district court’s sound  
5 discretion. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In making this determination, the  
6 court considers the following factors:

7 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s substantive  
8 claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the  
9 action[,] (5) the possibility of a dispute concerning material facts[,] (6) whether the  
default was due to excusable neglect, and (7) the strong policy underlying the Federal  
Rules of Civil Procedure favoring decisions on the merits.

10 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Default judgments are ordinarily disfavored.  
11 *Id.* at 1472.

12 Generally, once default is entered, well-pleaded factual allegations in the operative complaint  
13 are taken as true, except for those allegations relating to damages. *TeleVideo Sys., Inc. v. Heidenthal*,  
14 826 F.2d 915, 917-18 (9th Cir. 1987) (*per curiam*) (*citing Geddes v. United Fin. Group*, 559 F.2d 557,  
15 560 (9th Cir. 1977) (*per curiam*)); *accord Fair Housing of Marin v. Combs*, 285 F.3d 899, 906 (9th  
16 Cir. 2002). In addition, although well-pleaded allegations in the complaint are admitted by a  
17 defendant’s failure to respond, “necessary facts not contained in the pleadings, and claims which are  
18 legally insufficient, are not established by default.” *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261,  
19 1267 (9th Cir. 1992) (*citing Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)); *accord*  
20 *DIRECTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 854 (9th Cir. 2007) (stating that a defendant does not  
21 admit facts that are not well-pled or conclusions of law); *Abney v. Alameida*, 334 F. Supp. 2d 1221,  
22 1235 (S.D. Cal. 2004) (“[A] default judgment may not be entered on a legally insufficient claim.”). A  
23 party’s default conclusively establishes that party’s liability, but it does not establish the amount of  
24 damages. *Geddes*, 559 F.2d at 560.

## 25 DISCUSSION

### 26 1. Adequacy of Service of Process

27 As a general rule, the Court considers the adequacy of service of process before evaluating the  
28 merits of Plaintiff’s Motion for Default Judgment. *See BR North 223, LLC v. Gliberman*, No. 1:10-

1 cv-02153 LJO-BAM, 2012 WL 639500, at \*3 (E.D. Cal. Feb. 27, 2012). According to Plaintiff's  
2 allegations, Defendant Alfredo Garcia is an owner, operator, licensee, permittee, person in charge or  
3 an individual with dominion, control, oversight and management of the commercial establishment  
4 doing business as La Perla Restaurant. (Compl. ¶ 7.) Defendant Alfredo Garcia is the sole individual  
5 specifically identified on the California Alcoholic Beverage and Control license issued for La Perla  
6 Restaurant (ABC #326573). (Compl. ¶ 8.)

7 Under Federal Rule of Civil Procedure 4(e), an individual, such as Defendant Alfredo Garcia,  
8 may be served by:

- 9 (1) following state law for serving a summons in an action brought in courts of general  
10 jurisdiction in the state where the district court is located or where service is made; or
- 11 (2) doing any of the following:
  - 12 (A) delivering a copy of the summons and of the complaint to the individual  
13 personally; or
  - 14 (B) leaving a copy of each at the individual's dwelling or usual place of abode with  
15 someone of suitable age and discretion who resides there; or
  - 16 (C) delivering a copy of each to an agent authorized by appointment or by law to  
17 receive service of process.

18 Fed. R. Civ. P. 4(e).

19 Plaintiff contends that service of the summons and complaint in this action was made on  
20 Defendant Alfredo Garcia by personal service pursuant to federal law on September 23, 2015.  
21 Plaintiff's proof of service indicates that process server Jeff Lang served Alfredo Garcia at 36955 S.  
22 Lassen Avenue, Huron, California 93234, at 11:57 a.m. A true and correct copy of the Proof of  
23 Service was filed with this Court on October 5, 2015. (Doc. 6.) Based on the Proof of Service,  
24 Plaintiff effectuated service on Defendant Alfredo Garcia pursuant to Federal Rule of Civil Procedure  
25 4(e)(2)(A).

26 Defendant is not an infant, incompetent, or a person in military service or otherwise exempted  
27 from default judgment under the Soldiers' and Sailors' Civil Relief Act of 1940. (Declaration of  
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1 Thomas P. Riley (“Riley Decl.”), Doc. 10-2, ¶ 3.) Accordingly, the Court finds that Plaintiff properly  
2 served the summons and complaint in this matter.

3 **2. The *Eitel* Factors Favor Entry of Default Judgment**

4 The Court finds the *Eitel* factors weigh in favor of granting Plaintiff’s application for default  
5 judgment. With regard to the first *Eitel* factor, if Plaintiff’s application for default judgment were to  
6 be denied, it would leave Plaintiff without a remedy and Plaintiff would be prejudiced. This factor  
7 therefore weighs in favor of default judgment. *See J & J Sports Prods, Inc. v. Concepcion*, No. C-10-  
8 CV-05092 WHA, 2011 WL 2220101, at \*2 (N.D. Cal. June 7, 2011).

9 As to the second and third *Eitel* factors, Plaintiff’s substantive claims appear meritorious and  
10 the complaint is sufficiently pled. Plaintiff has alleged that Defendant violated sections of Title 47 and  
11 set forth the activities supporting substantive violations. Plaintiff also set forth the applicable laws  
12 pursuant to which the court may provide relief. These factors weigh in favor of default judgment.

13 As to the fourth factor, the damages in this case cannot exceed the amounts specified in 47  
14 U.S.C. § 605 and the maximum amount allowable for the tort of conversion. Accordingly, statutory  
15 damages cannot exceed \$10,000, and enhanced damages may not exceed \$100,000. *See* 47 U.S.C. §§  
16 605(e)(3)(C)(i)(II), 605(e)(3)(C)(ii). Plaintiff is seeking a total of \$110,000 in statutory and enhanced  
17 damages, along with \$1,400 in damages for conversion (or the amount Defendant would have been  
18 required to pay to order the Program). Although Plaintiff seeks the maximum statutory and enhanced  
19 damages available, the relatively small sum of money at stake and the Court’s discretion in awarding  
20 enhanced damages weigh in favor of granting default judgment.

21 As to the fifth factor, there is no dispute of material fact since Defendant failed to respond to  
22 either the Complaint or this motion. This factor weighs in favor of default judgment.

23 As to the sixth factor, it is unlikely that default was the result of excusable neglect. Defendant  
24 was properly served and has not appeared in this case. (*See* Docs. 6, 8.) This factor weighs in favor of  
25 default judgment.

26 Finally, the seventh factor supports a default judgment because “although federal policy favors  
27 decisions on the merits, Rule 55(b)(2) permits entry of default judgment in situations such as this  
28 where defendants refuse to litigate.” *Concepcion*, 2011 WL 2220101, at \*2. Therefore, this general

1 policy is outweighed by the more specific considerations, and the motion to enter default judgment  
2 will be granted.

3 Accordingly, the Court RECOMMENDS that Plaintiff's Motion for Default Judgment be  
4 GRANTED.

5 **3. Calculation of Damages**

6 Plaintiff requests \$10,000 in statutory damages for violation of 47 U.S.C. § 605(a) and  
7 \$100,000 in enhanced damages for willful violation pursuant to 47 U.S.C. § 605(e)(3)(C)(ii). (*See*  
8 Doc. 10-1 at 11-19.) Plaintiff also seeks \$1,400 in conversion damages, the minimum amount  
9 Defendant allegedly would have been required to pay Plaintiff for a commercial sublicense to publicly  
10 exhibit the Program. (Doc. 10-1 at 20.)

11 **A. Statutory Damages**

12 Plaintiff requests \$10,000 in statutory damages as a result of the alleged violation of 47 U.S.C.  
13 § 605(a), which “prohibits commercial establishments from intercepting and broadcasting to its  
14 patrons satellite cable programming.” *J & J Sports Prods., Inc. v. Ro*, No. 09-CV-02860, 2010 WL  
15 668065 at \*3 (N.D. Cal. Feb. 19, 2010) (quoting *J & J Sports Prods., Inc. v. Guzman*, No. 08-CV-  
16 05469, 2009 WL 1034218 at \*2 (N.D. Cal. Apr. 16, 2009)). The statute provides statutory damages  
17 ranging from \$1,000 to \$10,000 for each violation. 47 U.S.C. § 605(e)(3)(C)(i)(II).

18 Plaintiff alleges that Defendant violated Section 605 because “[w]ith full knowledge that the  
19 *Program* was not to be intercepted, received, published, divulged, displayed, and/or exhibited by  
20 commercial entities unauthorized to do so, . . . Defendant . . . did unlawfully intercept, receive,  
21 publish, divulge, display, and/or exhibit the *Program* at the time of its transmission at his commercial  
22 establishment....” (Compl. ¶ 17) (italics in original). However, Plaintiff fails to identify the means of  
23 signal transmission, which is necessary to determine whether Plaintiff should be awarded maximum  
24 statutory damages pursuant to Section 605. *See J & J Sports Prods., Inc. v. Deleon*, No. 5:13-CV-  
25 02030-EJD, 2014 WL 121711, at \*3 (N.D. Cal. Jan. 13, 2014). Plaintiff admits that it “cannot  
26 determine the precise means that the Defendant used to receive the *Program* unlawfully.” (Doc. 10-1  
27 at 8) (italics in original). The Court notes that the declaration of Plaintiff’s affiant, Jeff Lang, includes  
28 a photo of a satellite dish, but there is no indication that this dish was connected to La Perla

1 Restaurant. (Doc. 10-3 at 9.) According to Mr. Lang’s description, La Perla Restaurant was located in  
2 a small strip mall type structure. (Lang Decl. at 1.) There is no evidence that La Perla Restaurant was  
3 the only business housed in the strip mall. Despite these facts, Plaintiff contends the court has  
4 discretion to award significant damages “[e]ven in . . . cases of commercial signal piracy where there  
5 has been no egregious circumstances noted[.]” (Doc. 10-1 at 11.)

6 Additionally, it is undisputed that Defendant did not charge a cover for patrons to enter La  
7 Perla Restaurant to watch the Program, and there is no evidence that Defendant increased prices or  
8 required food and drink purchases. Additionally, there was only one television broadcasting the  
9 Program. (See Lang Decl. at 1.) Plaintiff also presents no evidence Defendant is a repeat offender.  
10 Given these facts, the Court in its discretion finds the minimum statutory damage amount to be  
11 appropriate. See, e.g., *J & J Sports Prods., Inc. v. Salgado Barajas*, No. 5:13-cv-05557-BLF, 2014 WL  
12 3053485, at \*3 (N.D. Cal. Jul. 3, 2014) (awarding statutory minimum where defendant was first-time  
13 offender, displayed the program on one television in a room that accommodated one-hundred people,  
14 did not charge a cover and there were at most sixty-nine people in the establishment); *J & J Sports*  
15 *Prods., Inc. v. Rodriguez*, No. 5:13-cv-05551-BLF, 2014 WL 2931218, at \*3 (N.D. Cal. Jun. 27, 2014)  
16 (awarding minimum statutory damages where defendant did not charge a cover or require the purchase  
17 of food drink, there were three television sets in the restaurant, there were more than 100 people in the  
18 restaurant and there was no evidence that defendant was a repeat offender); *J & J Sports Prods., Inc. v.*  
19 *Deleon*, No. 5:13-cv-02030-EJD, 2014 WL 121711, at \*3 (N.D. Cal. Jan. 13, 2014) (awarding  
20 minimum statutory damages where defendants did not charge a cover, increase prices or require food  
21 and drink purchases, there were a maximum of 23 people in the restaurant, only three televisions and  
22 one projector broadcast the program and defendants were not repeat offenders);

23 Accordingly, the Court RECOMMENDS that Plaintiff be awarded the minimum statutory  
24 damages allowed, \$1,000.

25 **B. Enhanced Damages**

26 Plaintiff also requests enhanced damages pursuant to Section 605(e)(3)(C)(ii). (Doc. 10-1 at  
27 14-19.) This section authorizes the Court to award up to \$100,000, in its discretion, upon finding that  
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1 the violation “was committed willfully and for purposes of direct or indirect commercial advantage or  
2 private financial gain.” 47 U.S.C. § 605(e)(3)(C)(ii).

3 The Ninth Circuit has not set forth controlling factors for the determination of when enhanced  
4 damages are appropriate in this context, but various factors specific to this unique line of cases have  
5 been considered by district courts. These include the “use of cover charge, increase in food price  
6 during programming, presence of advertisement, number of patrons, number of televisions used, and  
7 impact of the offender’s conduct on the claimant.” *Concepcion*, 2011 WL 2220101, at \*4. Enhanced  
8 damages have also been awarded when the defendant has violated Section 605 on previous occasions.  
9 *See J & J Sports Prods., Inc. v. Paniagua*, No. 10-CV-05141-LHK, 2011 WL 996257, at \*2 (N.D. Cal.  
10 Mar. 21, 2011).

11 The Court does not find an award of maximum damages under Section 605 appropriate. There  
12 is no evidence of significant “commercial advantage or private financial gain” in this instance.  
13 Plaintiff has presented evidence that Defendant had only one television set in the commercial  
14 establishment that displayed the Program, and the affiant asserts that there were approximately 30  
15 patrons present during the entirety of the investigation. (*See Lang Decl.* at 1-2.) Further, as already  
16 discussed, there is no evidence that Defendant assessed a cover charge, required a minimum purchase  
17 from patrons, or had a special premium on food and drinks on the night of the fight. *See Kingvision*  
18 *Pay-PerView, Ltd. v. Backman*, 102 F. Supp. 2d 1196, 1198 n.2 (N.D. Cal. 2000) (stating that “[a]n  
19 establishment that does not promote itself by advertising the Program, does not assess a cover charge,  
20 and does not charge a special premium for food and drinks hardly seems like the willful perpetrators  
21 envisioned by the statute’s framers.”). Plaintiff also has failed to present evidence that Defendant has  
22 violated Section 605 on prior occasions.

23 In light of the above mentioned facts, the Court does not agree that the maximum enhanced  
24 damages award is warranted. Although Plaintiff cites primarily to several out-of-district cases to  
25 support its request for maximum enhanced damages (*see Doc. 10-1* at 14-18), Plaintiff has not cited  
26 any binding precedent or identified any specific circumstances that justify such a high award here.  
27 Accordingly, the Court concludes that an award of \$1,400—the value of the commercial license to air  
28 the program—is more than adequate and just to compensate Plaintiff for lost profits and to deter



1 Defendant's future infringement. *See, e.g., Joe Hand Promotion, Inc. v. Munoz*, No. 5:13-CV-05926-  
2 EJD, 2014 WL 4100724, at \*3 (N.D. Cal. Aug. 20, 2014) (awarding enhanced damages equal to the  
3 value of the commercial license where defendant did not charge a cover, there was no evidence of  
4 increased prices or required purchases, two televisions displayed the event and 50 patrons were  
5 present); *Deleon*, 2014 WL 121711, at \*4 (awarding enhanced damages equal to the value of the  
6 commercial license where no evidence of cover charge, minimum purchase or special premium,  
7 program displayed on three televisions and one projector, and between 9 to 23 patrons present).

8 Therefore, the Court RECOMMENDS that Plaintiff be awarded \$1,400 in enhanced damages.

### 9 C. Damages for Conversion

10 Plaintiff also seeks \$1,400 in damages for conversion under California Civil Code § 3336.  
11 (Doc. 10-1 at 20.) Damages for conversion are based on the value of the property at the time of  
12 conversion. *See Tyrone Pac. Intern., Inc. v. MV Eurychili*, 658 F.2d 664, 666 (9th Cir. 1981). Here,  
13 Plaintiff has shown that it owns the right to distribute the Program at issue and has properly alleged the  
14 misappropriation of the right to distribute the Program. As to damages, the "value of the property"  
15 was the commercial sublicense fee amount Defendant would have been required to pay, or \$1,400.  
16 (Affidavit of Plaintiff, Doc. 10-4, ¶ 8 and Ex. 2.)

17 Accordingly, the Court RECOMMENDS that Plaintiff be awarded \$1,400 in damages for  
18 conversion.

## 19 CONCLUSION AND RECOMMENDATIONS

20 Based on the foregoing, IT IS HEREBY RECOMMENDED that Plaintiff's application for  
21 default judgment (Doc. 10) be GRANTED and judgment be entered in favor of Plaintiff and against  
22 Defendant in the amount of \$3,800 in total damages.

23 The Clerk of the Court is directed to SERVE a copy of these findings and recommendations by  
24 mail on Defendant Alfredo Garcia, individually and d/b/a La Perla Restaurant, at the following  
25 address: 36955 S. Lassen Avenue, Huron, California 93234.

26 These findings and recommendations are submitted to the district judge assigned to this action,  
27 pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within **fourteen (14) days** of  
28 service of this recommendation, any party may file written objections to these findings and

1 recommendations with the Court and serve a copy on all parties. Such a document should be  
2 captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are  
3 advised that failure to file objections within the specified time may result in the waiver of the “right to  
4 challenge the magistrate’s factual findings” on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th  
5 Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

6 IT IS SO ORDERED.

7 Dated: January 6, 2016

8 /s/ Barbara A. McAuliffe  
9 UNITED STATES MAGISTRATE JUDGE  
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