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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

J & J SPORTS PRODUCTIONS, INC.,
Plaintiff,
v.
ALFREDO GARCIA,
Defendant.

Case No. 1:15-cv-01732-DAD-SAB

**FINDINGS AND RECOMMENDATIONS
RECOMMENDING THAT PLAINTIFF’S
MOTION FOR DEFAULT JUDGMENT BE
PARTIALLY GRANTED**

(ECF No. 13)

Currently before the Court is Plaintiff J & J Sports Productions, Inc.’s (“Plaintiff”) motion requesting entry of default judgment. (ECF No. 13.)

The Court, having reviewed the record, finds this matter suitable for decision without oral argument. See Local Rule 230(g). Accordingly, the previously scheduled hearing set for March 23, 2016, will be vacated and the parties will not be required to appear at that time. For the reasons set forth below, the Court recommends that Plaintiff’s motion be partially granted and judgment be entered in favor of Plaintiff in the amount of \$3,000.00.

I.

BACKGROUND

Plaintiff filed the complaint in this matter on November 16, 2015. (ECF No. 1.) Plaintiff’s complaint alleges that Defendant Alfredo Garcia (“Defendant”) is the owner and/or operator of La Perla Restaurant, which is located at 36953-36955 S. Lassen Avenue, Huron,

1 California 93234. (Compl. ¶ 7.)

2 Plaintiff is the exclusive nationwide commercial distributor of the “Manny Pacquiao v.
3 Chris Algieri WBO Welterweight Championship Fight Program” (“the Program”) which was
4 telecast on Saturday, November 22, 2014. (Compl. ¶ 14.) Plaintiff alleges that Defendant
5 illegally intercepted and displayed the Program at his commercial establishment. (Compl. ¶ 17.)
6 Plaintiff contends that Defendant’s actions violated 47 U.S.C. § 605 and 47 U.S.C. § 553.
7 (Compl. ¶¶ 13-27.) Plaintiff also asserts a conversion claim and a claim under California
8 Business and Professions Code § 17200 against Defendant. (Compl. ¶¶ 28-41.)

9 Defendant failed to file a responsive pleading.¹ On January 15, 2016, Plaintiff requested
10 an entry of default against Defendant, which the Clerk of the Court entered on January 19, 2016.
11 (ECF Nos. 10-11.) On February 19, 2016, Plaintiff filed the present motion for default judgment.
12 (ECF No. 13.)²

13 Plaintiff’s investigator submitted an affidavit pertaining to the alleged illegal telecast.
14 (ECF No. 13-3.) Jeff Lang was at La Perla Restaurant on November 22, 2014, at approximately
15 7:55 p.m. (Decl. of Affiant (“Lang Decl.”), ECF No. 13-3 at 2.) Mr. Lang indicated that he
16 observed 3 television sets, describing them as “an older model 46” (+/-) flat screen Sony” and
17 two “older model, unknown brand, 21” (+/-) units.” (Id.) Mr. Lang further observed the
18 televisions broadcasting an onscreen graphic comparing punch totals landed between fighters
19 Vasyl Lomachenkmo and Chonlatarn Piriypinyo from the previous fight. (Id.) Mr. Lang saw
20 additional onscreen graphics promoting “STILL TO COME” matches including the one between
21 Manny Pacquiao and Chris Algieri. (Id.)

22 Mr. Lang described La Perla Restaurant as “a medium sized Mexican cuisine style
23 restaurant in good condition,” “[s]ituated within the incorporated city limits of Huron” in Fresno
24 County. (Id.) Mr. Lang stated that “[i]t appeared as if the common wall separating suites 36953

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26 ¹ The Court notes that on December 11, 2015, Plaintiff filed proof of service of the summons and complaint, which indicated that Defendant was personally served on December 3, 2015. (ECF No. 4.)

27 ² The Court notes that Plaintiff filed proof of service of the notice of application and application for default judgment by the Court, which indicated that the fully sealed envelope with pre-paid postage was placed in Plaintiff’s counsel’s
28 law firm’s outbound mail receptacle on February 19, 2016. (ECF No. 13 at 4.)

1 and 36955 had been removed, thus creating a larger suite which the restaurant now occupied.”
2 (Id.) Mr. Lang stated “its’ [sic] clientele appeared to primarily consist of Spanish speaking
3 members of the community.” (Id.) Mr. Lang described the capacity of the establishment as
4 approximately 50 people and had counted 22 people at the establishment while he was there. (Id.
5 at 3.) Mr. Lang wrote that he left at approximately 8:01 p.m., which indicates that he was there
6 for approximately six minutes. (Id. at 3.)

7 Plaintiff submitted an affidavit from Joseph M. Gagliardi, Plaintiff’s president, describing
8 Plaintiff’s damages. (ECF No. 13-4.) Mr. Gagliardi stated that the commercial sublicense fee for
9 a commercial establishment with a maximum fire code occupancy of 50 persons would have been
10 \$2,000.00. (Pl.’s Aff. in Supp. of Pl.’s App. for Def. J. by the Court (“Gagliardi Affidavit”), ECF
11 No. 13-4 at 3.)

12 II.

13 LEGAL STANDARDS FOR DEFAULT JUDGMENT

14 Entry of default judgment is governed by Federal Rule of Civil Procedure 55(b), which
15 states, in pertinent part:

16 (2) **By the Court.** In all other cases³, the party must apply to the
17 court for a default judgment. A default judgment may be entered
18 against a minor or incompetent person only if represented by a
19 general guardian, conservator, or other like fiduciary who has
20 appeared. If the party against whom a default judgment is sought
21 has appeared personally or by a representative, that party or its
22 representative must be served with written notice of the application
23 at least 7 days before the hearing. The court may conduct hearings
24 or make referrals—preserving any federal statutory right to a jury
25 trial—when, to enter or effectuate judgment, it needs to:

- 26 (A) conduct an accounting;
- 27 (B) determine the amount of damages;
- 28 (C) establish the truth of any allegation by evidence; or
- (D) investigate any other matter.

24 Upon entry of default, the complaint’s factual allegations regarding liability are taken as
25 true. Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir. 1977); Microsoft Corp. v.
26 Nop, 549 F. Supp. 2d 1233, 1235 (E.D. Cal. 2008). However, the complaint’s factual allegations

27 ³ Rule 55(b)(1) governs entry of default judgment by the clerk in cases where the plaintiff’s claim is for a sum certain
28 or a sum that can be made certain by computation, which does not apply in this case.

1 relating to the amount of damages are not taken as true. Geddes, 559 F.2d at 560. Accordingly,
2 the amount of damages must be proven at an evidentiary hearing or through other means.
3 Microsoft Corp., 549 F. Supp. 2d at 1236. Per Federal Rule of Civil Procedure 54(c), “[a] default
4 judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings.”

5 Entry of default judgment is committed to the Court’s discretion. Eithel v. McCool, 782
6 F.2d 1470, 1471 (9th Cir. 1986).

7 III.

8 DISCUSSION

9 Plaintiff seeks default judgment totaling \$112,000.00. (Decl. of Thomas P. Riley in Supp.
10 of Pl.’s App. for Def. J. by the Court (“Riley Decl.”), ECF No. 13-2.) Plaintiff only seeks to
11 recover relief on his 47 U.S.C. § 605 claim and his conversion claim. (Id.)

12 A. Default Judgment on Plaintiff’s 47 U.S.C. § 605 Claim

13 Plaintiff seeks the maximum amount (\$10,000.00) in statutory damages pursuant to 47
14 U.S.C. § 605(e)(3)(C)(i)(II) (hereinafter referred to as “Damages”). (Mem. of P. & A. in Supp. of
15 Pl.’s Appl. for Def. J. by the Court (“Pl.’s MPA”) ECF No. 13-1 at 8-14.) Plaintiff also seeks the
16 maximum amount (\$100,000.00) in statutory “enhanced⁴” damages pursuant to 47 U.S.C. §
17 605(e)(3)(C)(ii) (hereinafter referred to as “Enhanced Damages”). (Pl.’s MPA at 14-20.)

18 Both Damages and Enhanced Damages stem from violations of 47 U.S.C. § 605(a).
19 Section 605(a) prohibits the unauthorized interception and distribution of communications. 47
20 U.S.C. § 605(a). “[L]iability under section 605 requires proof that a defendant has (1) intercepted
21 or aided the interception of, and (2) divulged or published or aided the divulging or publishing of,
22 a communication transmitted by the plaintiff.” California Satellite Systems v. Seimon, 767 F.2d
23 1364, 1366. (9th Cir. 1985). Plaintiff’s complaint states a claim for a violation of Section 605.
24 See J and J Sports Productions v. Coyne, 857 F. Supp. 2d 909, 914 (N.D. Cal. 2012) (commercial

25
26 ⁴ Although the term “enhanced” does not appear anywhere in the statute, courts have characterized the damages
27 under Section 605(e)(3)(C)(ii) as “enhanced” damages. See, e.g., J&J Sports Productions v. Lua, 1:14-cv-01350-
28 MCE-SAB, 2015 WL 1509004, at * 4-5 (E.D. Cal. April 1, 2015); Joe Hand Promotions, Inc. v. Streshly, 655 F.
Supp. 2d 1136 (S.D. Cal. 2009); Kingvision Pay-Per-View, Ltd. v. Backman, 102 F. Supp. 2d 1196 (N.D. Cal. 2000).
Accordingly, the Court will use the same term when referencing damages under this section.

1 establishment violated Section 605 by broadcasting pay-per-view boxing match without
2 authorization).

3 1. Claim for Damages

4 Plaintiff requests the maximum amount of statutory damages available under 47 U.S.C. §
5 605(e)(3)(C)(i)(II), which states:

6 (3)(A) Any person aggrieved by any violation of subsection (a) of
7 this section or paragraph (4) of this subsection may bring a civil
8 action in a United States district court or in any other court of
9 competent jurisdiction.

10 ...

11 (C) (i) Damages awarded by any court under this section shall be
12 computed, at the election of the aggrieved party⁵, in accordance
13 with either of the following subclauses;

14 ...

15 (II) the party aggrieved may recover an award of statutory
16 damages for each violation of subsection (a) of this section
17 involved in the action in a sum of not less than \$1,000 or
18 more than \$10,000, as the court considers just....

19 Courts have taken several different approaches when establishing the appropriate amount
20 of Damages. In Kingsvision Pay-Per-View, Ltd. v. Backman, 102 F. Supp. 2d 1196, 1198 (N.D.
21 Cal. 2000), the Court awarded the statutory minimum of \$1,000 and reasoned that “distributors
22 should not be overcompensated and statutory awards should be proportional to the violation.” In
23 J & J Sports Productions, Inc. v. Betancourt, No. 08CV937 JLS (POR), 2009 WL 3416431, at *4
24 (S.D. Cal. Oct. 20, 2009), the Court considered the statute’s policy of deterring future violations
25 and looked at whether the circumstances were egregious or unusual.

26 The Court finds that an award of \$1,000 is appropriate in this action and that any amount
27 over \$1,000, based upon this record, would overcompensate the distributor. The Court notes that
28 the record submitted by Plaintiff is sparse. There is no evidence which explains Defendant’s
involvement in the alleged interception and unauthorized broadcast of the Program. It is unclear
if Defendant was directly involved in the piracy or whether it was an employee or some other
subordinate. It is unclear if Defendant was even aware of the piracy. The evidence pertaining to
Defendant appears to be limited to the fact that Defendant’s name appears on the liquor license

⁵ The alternative method of calculating damages, which was not elected by Plaintiff, is the “actual damages suffered
... as a result of the violation.” 47 U.S.C. § 605(e)(3)(C)(i)(I).

1 for La Perla Restaurant.

2 There is also little to no evidence regarding the extent of the commercial advantage gained
3 by Defendant as a result of the alleged piracy. Plaintiff's private investigator reports that
4 approximately 22 patrons were present at La Perla Restaurant when the Program was broadcast,
5 but that information fails to convey much information to the Court in terms of the extent of the
6 commercial advantage gained by Plaintiff since the Court has no information regarding how
7 many patrons are present under normal circumstances when no fight is broadcast. There is no
8 evidence that the broadcast was advertised. The Court notes that, in order to obtain commercial
9 advantage, Defendant would have had to let potential customers know of the broadcast, and it is
10 unclear whether such advertising and promotion of the illegally pirated broadcast took place, or to
11 what extent it took place. Plaintiff admits that there was no cover charge. All-in-all, there is little
12 evidence in this case to support a large Damages award.

13 The Court finds that a \$1,000 Damages award, considered in combination with the
14 \$2,000.00 award on Plaintiff's conversion claim, as stated in further detail below, and the
15 additional amount in attorneys' fees and costs, is appropriate. The \$2,000.00 award on the
16 conversion claim plus attorneys' fees and costs effectively put Plaintiff in the position he would
17 have been if Defendant paid the license fee to legally broadcast the Program. The additional
18 \$1,000 in Damages serves the statute's purpose of deterring future violations. Future violations
19 by the same Defendant may warrant higher amounts of Damages. Therefore, the Court
20 recommends that Plaintiff be awarded \$1,000 in Damages.

21 2. Claim for Enhanced Damages

22 Plaintiff requests the maximum amount of Enhanced Damages available under 47 U.S.C.
23 § 605(e)(3)(C)(ii), which states:

24 In any case in which the court finds that the violation was
25 committed willfully and for purposes of direct or indirect
26 commercial advantage or private financial gain, the court in its
27 discretion may increase the award of damages, whether actual or
statutory, by an amount of not more than \$100,000 for each
violation of subsection (a) of this section.

28 The Enhanced Damages are analogous to punitive damages, as they are awarded at the

1 Court's discretion in cases where a defendant's actions are willful and for the purpose of financial
2 gain. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 580 (1996) (purpose of punitive
3 damages is to punish and deter egregiously improper conduct). Factors considered by courts in
4 assessing (C)(ii) Enhanced Damages include (1) repeat violations, (2) the extent of the unlawful
5 monetary gains, (3) actual damages to the plaintiff, (4) the defendant's advertising for the
6 broadcast of the event, (5) charging cover to enter the establishment to view the event, or (6)
7 charging a premium for food or drinks during the event. See, e.g., Kingsvision Pay-Per-View,
8 Ltd. v. Gutierrez, 544 F. Supp. 2d 1179, 1185 (D. Colo. 2008); Kingsvision Pay-Per-View, Ltd. v.
9 Backman, 102 F. Supp. 2d at 1198.

10 For the same reasons discussed above, with respect to (C)(i)(II) Damages, the Court finds
11 that (C)(ii) Enhanced Damages are not appropriate. The Court is also disturbed that Plaintiff
12 requests the maximum allowable penalty despite the fact that the facts here do not justify such an
13 award and despite previous admonitions by this Court.

14 In J&J Sports Productions, Inc. v. Garcia, 1:12-cv-01510-LJO-SAB, 2013 WL 636707, at
15 * 4 at n.6 (E.D. Cal. Feb. 15, 2013), Plaintiff's counsel was advised that:

16 [i]n future requests for default judgment submitted in this Court,
17 any request for the maximum amount of statutory penalties should
18 be accompanied by an evidentiary showing justifying the maximum
19 amount. The Court is cognizant of prior cases where the judgment
20 requested was not in line with the evidence supporting the request.
21 See, e.g., Joe Hand Promotions, Inc. v. Streshly, 655 F. Supp. 2d
22 1136, 1139 (S.D. Cal. 2009). Accordingly, Plaintiff is hereby
23 forewarned that the Court will not entertain future requests for
24 judgment that are patently unreasonable based upon the evidence
25 submitted.

22 In J&J Sports Productions, Inc. v. Montano, 1:12-cv-00738-AWI-SAB, 2013 WL
23 1680633, at * 2 at n.4 (E.D. Cal. April 17, 2013), the Court stated:

24 In a prior case, J&J Sports Productions, Inc. v. Richard Jesus
25 Garcia, Case No. 1:12-cv-01510-LJO-SAB, this Court admonished
26 Plaintiff and Plaintiff's counsel for requesting the maximum
27 amount of statutory penalties when such a request did not appear to
28 have any justification based upon the circumstances specific to the
case and the evidence presented. Since the Court's admonishment
occurred before Plaintiff filed the present motion for default
judgment in this action, the Court will not take any action against
Plaintiff for again requesting maximum statutory penalties with

1 little factual or legal basis for doing so. However, Plaintiff is again
2 forewarned that future requests for maximum statutory penalties
3 that are not justified by the facts of the case will not be entertained
4 by this Court.

5 The cases cited by Plaintiff make clear that the factors relevant in assessing the amount of
6 (C)(ii) Enhanced Damages do not exist here or Plaintiff did not investigate those factors. There is
7 no suggestion that Defendant is a repeat violator. There is no evidence of the extent of
8 Defendant's unlawful monetary gains. Although Defendant's investigator counted 22 patrons
9 during the broadcast, there is no evidence that this number was attributable to the Program.
10 Notably, Plaintiff could have sent its investigator back to the same establishment to perform
11 headcounts at the same time on the same day of the week on days when there was no illegal
12 broadcast for comparative purposes, but Plaintiff chose not to do so. There is no evidence of any
13 advertising for the illegal broadcast. There was no cover charge or evidence of any premium
14 charged for food or drinks during the broadcast. In fact, there is no evidence that Defendant was
15 charging anything for food or drinks, as Mr. Lang's affidavit does not state that he attempted to
16 order food or drinks, and does not specifically reference observing any food or drink sales.

17 Plaintiff argues that larger damage awards are justified to combat piracy. While the Court
18 understands Plaintiff's economic arguments and the fact that piracy will not be deterred if
19 offenders are required to only pay license fees in the small fraction of cases where they are caught
20 pirating broadcasts, the Court is nonetheless is governed by the plain language of the statute and
21 is authorized to impose Enhanced Damages in situations where "the violation was committed
22 willfully and for purposes of direct or indirect commercial advantage or private financial gain."
23 47 U.S.C. § 605(e)(3)(C)(ii). As discussed above, there is insufficient evidence that Defendant's
24 actions were committed willfully for purposes of commercial advantage or private financial gain.

25 Given the lack of evidence that Defendant profited, directly or indirectly, from the
26 allegedly illegal display of the Program and Plaintiff's failure to present more detailed evidence
27 or conduct a more thorough investigation, the Court finds that Plaintiff failed to carry its burden
28 in demonstrating that Enhanced Damages are proper. Therefore, the Court recommends that
Plaintiff's request for Enhanced Damages be denied.

1 ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections
2 within the specified time may constitute a waiver of the right to appeal the District Court's order.
3 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d
4 1391, 1394 (9th Cir. 1991)).

5
6 IT IS SO ORDERED.

7 Dated: March 18, 2016


UNITED STATES MAGISTRATE JUDGE

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