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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 J & J Sports Productions Incorporated,

10 Plaintiff,

11 v.

12 Adrian Mosqueda, individually and doing
13 business as Adrian's Restaurant,

14 Defendant.

No. CV-12-0523 PHX DGC

ORDER

15 Plaintiff J & J Sports Productions Incorporated has filed a motion for summary
16 judgment. Doc. 25. The motion is fully briefed. Docs. 26, 28. No party has requested
17 oral argument. For the reasons set forth below, the Court will grant Plaintiff's motion in
18 part and deny it in part.

19 **I. Background.**

20 A boxing match titled "*The Event*": *The Manny Pacquiao v. Joshua Clottey WBO*
21 *Welterweight Championship* ("the Program") was telecast nationwide on March 13, 2010.
22 Doc. 25-1 ¶ 1; Doc. 26 at 2. Plaintiff owned the exclusive commercial distribution rights
23 to the Program, including undercard events and all color commentary. Doc. 25-1 ¶ 2.
24 Plaintiff's investigator Frank Balkcom, Sr., observed the Program being displayed at
25 Adrian's Restaurant on March 13, 2010. *Id.* ¶ 7. Defendant did not pay a commercial
26 licensing fee to Plaintiff to broadcast the Program (Doc. 25-1 ¶ 4; Doc. 26 at 2), and did
27 not have permission from Plaintiff to broadcast the Program at Defendant's commercial
28 establishment (Doc. 25-1 ¶ 5; Doc. 26 at 2).

1 **II. Legal Standard.**

2 A party seeking summary judgment “bears the initial responsibility of informing
3 the district court of the basis for its motion, and identifying those portions of [the record]
4 which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*
5 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the
6 evidence, viewed in the light most favorable to the nonmoving party, shows “that there is
7 no genuine dispute as to any material fact and the movant is entitled to judgment as a
8 matter of law.” Fed. R. Civ. P. 56(a). Summary judgment is also appropriate against a
9 party who “fails to make a showing sufficient to establish the existence of an element
10 essential to that party’s case, and on which that party will bear the burden of proof at
11 trial.” *Celotex*, 477 U.S. at 322. Only disputes over facts that might affect the outcome
12 of the suit will preclude the entry of summary judgment – the disputed evidence must be
13 “such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v.*
14 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

15 **III. Analysis.**

16 **A. Claims under 47 U.S.C. §§ 553 and 605.**

17 Plaintiff brings claims under 47 U.S.C. § 553 and § 605. Section 605 prohibits the
18 “unauthorized publication or use of communications.” The Ninth Circuit has clarified
19 that communications protected by § 605(a) include satellite television signals. *DirectTV*
20 *v. Webb*, 545 F.3d 837, 844 (9th Cir. 2008). Section 553 prohibits the unauthorized
21 reception of cable service. There is some disagreement as to the extent of the overlap
22 between the two statutes, but the Court need not resolve the issue to decide this case.
23 *Kingvision Pay Per View, Ltd. v. Guzman*, No. CV-07-0963-PHX-PGR, 2008 WL
24 1924988, at *1 (D. Ariz. Apr. 30, 2008) (“The position taken by a majority of courts is
25 that signals broadcast through the air via radio and satellite are generally within the
26 purview of § 605, including programming transmitted via satellite to cable operators for
27 their transmission to cable subscribers, and signals broadcast through a coaxial cable
28 system are generally within the purview of § 553.”). Even where both sections are

1 applicable, damages typically are awarded only under § 605. *Id*; see also *Kingvision*
2 *Pay-Per-View. Ltd. v. Backman*, 102 F. Supp. 2d 1196, 1197 (N.D. Cal. 2000).

3 “[T]o be held liable for a violation of section 605, a defendant must be shown to
4 have (1) intercepted or aided the interception of, and (2) divulged or published, or aided
5 the divulging or publishing of, a communication transmitted by plaintiff.” *Nat’l*
6 *Subscription Television v. S & H TV*, 644 F.2d 820, 826 (9th Cir. 1981); see also *DirecTV*
7 545 F.3d at 844 (“Section 605(a) of the Communications Act prohibits the unauthorized
8 receipt and use of radio communications for one’s ‘own benefit or for the benefit of
9 another not entitled thereto.’”).

10 In support of its motion for summary judgment, Plaintiff submits the affidavit of
11 its president, Joseph M. Gagliardi. Doc. 25-5. Gagliardi asserts that Plaintiff purchased
12 and retained the commercial exhibition licensing rights to the Program and thereafter
13 sublicensed those rights to its commercial customers. *Id* ¶ 3. Gagliardi states that
14 domestic commercial establishments who wished to broadcast the Program were required
15 to pay Plaintiff a commercial sublicense fee based on the size of the establishment.
16 *Id* ¶ 8. For an establishment with a capacity of less than 100 persons, like Adrian’s
17 Restaurant, the fee for the Program was \$1,800. *Id*. (citing Doc. 25-5 at 18.). Gagliardi
18 states that Defendant did not purchase a license to broadcast the Program. *Id*.
19 Furthermore, according to Gagliardi, the nature of the broadcast is such that it could not
20 be inadvertently intercepted by a commercial establishment. *Id*. ¶ 9

21 Plaintiff also submits the affidavit of private investigator Frank Balkcom, Sr., who
22 states that he entered Adrian’s Restaurant on the night the Program was telecast,
23 March 13, 2010, at approximately 9:50 p.m. Doc. 25-4 at 4. Balkcom states that he
24 observed the Pacquiao-Clottey fight (the Program’s “main event”) displayed on a
25 television with approximately 80 persons inside the establishment. *Id*. At the time he
26 entered the restaurant, Balkcom believed the fight to be in its third round. *Id*.

27 Plaintiff’s evidence tends to show that Defendant (1) intercepted or aided the
28 interception of the Program and (2) divulged or published, or aided the divulging or

1 publishing of the Program without Plaintiff’s authorization. Although the evidence of
2 interception is circumstantial, the Ninth Circuit has held that circumstantial evidence can
3 be sufficient to support a factual finding, particularly in cases of signal piracy. *DirectTV,*
4 *Inc.*, 545 F.3d at 844 (“The law does not require direct evidence to support a factual
5 finding. Circumstantial evidence may be sufficiently persuasive. Signal piracy is by its
6 very nature a surreptitious venture and direct evidence may understandable be hard to
7 come by.”).

8 Defendant’s only evidence is his own affidavit. Doc. 27 at 5-6. In the affidavit,
9 Defendant states that he “does not recall” being present in his restaurant on March 13,
10 2010. *Id* at 5. He also states: “I believe that the boxing match at my Restaurant may
11 have been tape delayed because I have no records of a purchase of this broadcast.” He
12 further states that the restaurant did not have cable service, but rather “Dish or Direct TV,
13 but [he is] confident it was Dish TV.” *Id.* at 6.

14 Speculative averments do not constitute facts for purposes of a summary judgment
15 motion. *See Harris Tech. Sales, Inc. v. Eagles Test Sys., Inc.*, No. 06-02471-PHX-RCB,
16 2008 WL 343260, at *2 (D. Ariz. Feb. 5, 2008). Defendant’s statement that he
17 “believe[s]” the boxing match “may have been” shown on tape delay (Doc. 27 at 5) is
18 speculative and therefore insufficient to raise a genuine issue of fact. Even if the
19 broadcast was tape-delayed, however, “[a] tape-delayed broadcast without authorization
20 is still a violation of the [Federal Communications Act].” *Nat’l Satellite Sports, Inc. v.*
21 *Garcia*, No. Civ.A. 301CV1799D, 2003 WL 21448375 (N.D. Tex. June 18, 2003)
22 (citations omitted).

23 Defendant’s assertion that the restaurant received television service through a
24 satellite rather than cable creates a genuine issue of fact on the § 553 claim because § 553
25 applies only to cable broadcasts. But, as Plaintiff concedes, even if both sections were
26 applicable, damages would be awarded only under § 605. Doc. 25-1 at 10; *see*
27 *Kingvision Pay-Per-View. Ltd.*, 102 F. Supp. 2d at 1197. Thus, the Court’s inability to
28 grant summary judgment for Plaintiff on the § 553 claim will not affect the ultimate

1 outcome of the case. Defendant’s affidavit confirms the use of a satellite and the
2 applicability of § 605. Accordingly, the Court will grant summary judgment, award
3 damages under the §605 claim, and dismiss the § 553 claim as moot.

4 **B. Conversion.**

5 “Conversion is any act of dominion wrongfully asserted over another’s personal
6 property in denial of or inconsistent with his rights therein.” *Scott v. Allstate Ins. Co.*,
7 553 P.2d 1221, 1225 (Ariz. Ct. App. 1976). It is not disputed that Plaintiff had exclusive
8 commercial distribution rights over the Program and that a license for Adrian’s
9 Restaurant would have cost \$1,800. Defendant has produced no evidence to refute that
10 the Program was broadcast at Adrian’s Restaurant without authorization. Accordingly,
11 the Court grants summary judgment on the conversion claim. *See J & J Sports*
12 *Productions., Inc. v. Vargas*, No. CV-11-02229-PHX-JAT, 2013 WL 1249206, at *3-4
13 (D. Ariz. Mar. 27, 2012) (holding that a similar showing was a conversion under Arizona
14 law and awarding damages).

15 **C. Damages.**

16 **1. Statutory Damages.**

17 Plaintiffs have elected to pursue statutory damages. Statutory damages are
18 appropriate when actual damages cannot be easily proven. *J & J Sports Productions, Inc.*
19 *v. Canedo*, No. C 09–01488 PJH, 2009 WL 4572740, *5 (N.D. Cal. 2009). “Under
20 § 605(e)(3)(C)(i)(II), an aggrieved party may recover ‘a sum not less than \$1,000 or more
21 than \$10,000, as the court considers just’ for each violation.” *J & J Sports Productions*
22 *Inc. v. Miramontes*, No. CV–10–02345–PHX–FJM, 2011 WL 892350, at * 2 (D. Ariz.
23 March 14, 2011) (internal citation omitted). Further, “[a]n award of damages should
24 deter future conduct but not destroy the business.” *Id.* (quoting *Kingvision Pay-Per-*
25 *View v. Lake Alice Bar*, 168 F.3d 347, 360 (9th Cir.2009)).

26 Courts consider a number of factors when awarding statutory damages. In a recent
27 case with similar facts in this District, the court considered “the maximum capacity of the
28 commercial establishment, the total number of patrons present at the time of the

1 unauthorized showing, and the amount defendant would have paid if it had purchased the
2 rights to show the broadcast.” *Vargas*, 2013 WL 1249206 at * 3.

3 Plaintiff has presented evidence that the Program was broadcast on one television
4 in a room with approximately 80 people. Doc. 25-4 at 4. Defendant stated in his
5 deposition that the maximum capacity of his restaurant under the City of Phoenix Fire
6 Marshall’s order was 40 persons. Doc. 27 at 5. Even if the Court accepts Defendant’s
7 assertion as true, it does not refute Balkom’s testimony, particularly because Defendant
8 admitted that he “did not recall being present” at the restaurant on March 13, 2010. *Id.*
9 Defendant has not created a genuine issue of fact with respect to the number of people in
10 the restaurant.

11 In *Vargas*, the court awarded \$4,000 dollars in statutory damages against an
12 establishment that showed an intercepted broadcast on five televisions to between 125-
13 130 patrons. *Vargas*, 2013 WL 1249206 at * 3. Here, the Program was broadcast on a
14 single television and to a significantly smaller number of people. The Court finds that an
15 award of \$2,000 to be just under the circumstances.

16 **2. Conversion Damages.**

17 Plaintiff requests conversion damages in the amount of \$1,800. Doc. 25-1 at 20.
18 Under Arizona law, “the measure of conversion damages includes not only the value of
19 the property taken, but also other damage suffered because of the wrongful detention or
20 deprivation of property.” *Collins v. First Fin. Servs., Inc.*, 815 P.2d 411, 413 (Ariz. Ct.
21 App. 1991). Plaintiff has provided undisputed factual support for the claim that it
22 charges a commercial sublicense fee of \$1,800 for a business the size of Adrian’s
23 Restaurant. Doc. 25-5 at 3, 18; *see J & J Sports Productions, Inc., v. Diaz*, No. CV 11-
24 02224-PHX-FJM, 2012 WL 1134904, at * 2 (D. Ariz. Apr. 4, 2012) (awarding only
25 nominal damages where Plaintiff had failed to provide factual support for damages on a
26 similar conversion claim). Accordingly, the Court awards damages in the amount of
27 \$1,800.00 for the conversion claim.

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1 **3. Enhanced Damages.**

2 Section 605(e)(3)(C)(ii) provides that the Court may also award enhanced
3 damages of up to \$100,000 upon “a showing that defendant acted willfully and for the
4 purpose of direct or indirect commercial advantage or private financial gain.” *J & J*
5 *Sports Productions Inc. v. Miramontes*, No. CV-10-02345-PHX-FJM, 2011 WL
6 892350, at * 2 (D. Ariz. Mar. 14, 2011). Relevant factors for courts to consider when
7 awarding enhanced damages include: repeat violations, substantial unlawful monetary
8 gains, significant actual damages, advertising, cover charges, or premium prices. *Id.*
9 Additionally, some courts find “the mere unauthorized showing of a program sufficient to
10 award enhanced damages because given the low probability of accidentally showing it, it
11 must have been done willfully and for profit.” *Id.* (quoting *Entertainment By J & J, Inc.*
12 *v. Al-Waha Enter., Inc.*, 219 F. Supp. 2d 769, 776 (S.D. Tex. 2002)).

13 There is no evidence in this case of repeat violations, substantial unlawful
14 monetary gains, advertising, cover charges, or premium prices. Moreover, the mere fact
15 that the Program was shown at Defendant’s restaurant does not foreclose the possibility
16 that an employee or patron was primarily responsible for displaying the Program. A lack
17 of evidence of the owner’s personal involvement is irrelevant under § 605’s strict liability
18 scheme, but it is not irrelevant to the willfulness determination required for special
19 damages. Furthermore, Defendant has since closed his restaurant and retired to take care
20 of his sick wife, making specific deterrence less of a consideration. Doc. 27 at 5.
21 Defendant is already liable for \$1,800 in damages for conversion of the Program and an
22 additional \$2,000 in statutory damages. The Court finds the total amount of \$3,800
23 sufficient to serve the purposes of the statute and provide general deterrence to potential
24 infringers.

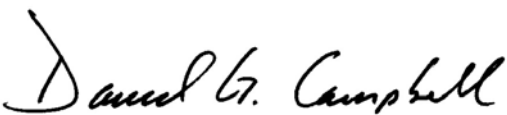
25 **IT IS ORDERED:**

- 26 **1.** Plaintiff’s motion for summary judgment (Doc. 25) is **granted in part and**
27 **denied in part.** Summary judgment is granted with respect to all claims
28 except the claim under § 553, which is **denied as moot.**

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- 2. Defendant is ordered to pay \$3,800 in damages.
- 3. Plaintiff shall submit a request for costs and attorneys' fees pursuant to 47 U.S.C. § 605(e)(3)(V)(iii) and Local Rule 54.1 and 54.2 to the Court within 14 days.

Dated this 11th day of June, 2013.



David G. Campbell
United States District Judge