

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA – FRESNO DIVISION

JOE HAND PROMOTIONS, INC.,

Plaintiff,

v.

ALBERT JOSEPH LABONTE II,  
INDIVIDUALLY and d/b/a TONY  
ROMAS,

Defendant.

CASE NO. 1:10-cv-02164-LJO-SKO

**FINDINGS AND  
RECOMMENDATIONS ON  
PLAINTIFF'S MOTION FOR  
DEFAULT JUDGMENT**

(Docket No. 12)

**OBJECTIONS, IF ANY, DUE WITHIN  
15 DAYS**

---

**I. INTRODUCTION**

On March 25, 2011, Plaintiff Joe Hand Promotions, Inc. (“Plaintiff”) filed the present motion for default judgment against Defendant Albert Joseph Labonte II, individually and dba Tony Romas (“Defendant”). (Doc. 12.) The motion was referred to this Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

**II. FACTUAL BACKGROUND**

Plaintiff filed the instant action on November 19, 2010. (Doc. 1.) The complaint alleges violations of 47 U.S.C. §§ 605 and 553, as well as causes of action for conversion and for violation of the California Business and Professions Code section 17200, *et. seq.* The suit is based on Defendant’s alleged unlawful interception, receipt, and exhibition of “*Ultimate Fighting*

1 *Championship 106: Tito Ortiz v. Forrest Griffin II*’ (the “Program”), a mixed martial arts match,  
2 including all under-card bouts and fight commentary, that was telecast nationwide on November 21,  
3 2009. (Doc. 1, ¶¶ 9, 12.) According to the complaint, Plaintiff was the exclusive commercial  
4 distributor of the Program. (Doc. 1, ¶ 9.)

5 Count I of the complaint asserts a violation of 47 U.S.C. § 605 (Unauthorized Publication  
6 or Use of Communications) alleging that Defendant knowingly intercepted, received, and exhibited  
7 the Program for purposes of direct or indirect commercial advantage or private financial gain. (Doc.  
8 1, ¶¶ 8-17.) Plaintiff seeks \$100,000 in statutory damages as well as attorneys’ fees and costs. (Doc.  
9 1, ¶ 17.) Count II alleges a violation of 47 U.S.C. § 553 (Unauthorized Reception of Cable Services)  
10 based upon the same allegations. (Doc. 1, ¶¶ 18-22.) Plaintiff requests \$60,000 in statutory  
11 damages, as well as attorneys’ fees and costs. (Doc. 1, ¶ 22.) Count III states a claim for conversion  
12 alleging that Defendant tortiously obtained possession of the Program and wrongfully converted it  
13 for his own benefit. (Doc. 1, ¶¶ 23-26.) As to Count III, Plaintiff seeks compensatory damages,  
14 exemplary damages and punitive damages. (Doc. 1, ¶ 26.) Count IV of the complaint alleges a  
15 violation of the California Business & Professions Code § 17200, *et. seq.* (Doc. 1, ¶¶ 27-36.) As  
16 to Count IV, Plaintiff seeks restitution, declaratory relief, injunctive relief, attorneys’ fees, and costs  
17 of suit. (Doc. 1, ¶¶ 35-36.)

18 On January 26, 2011, the summons as to Defendant Albert Joseph Labonte II was returned  
19 showing that service of the summons and complaint was executed on January 4, 2011. (Doc. 5.)  
20 Defendant failed to respond to the complaint by the January 25, 2011, due date. On February 22,  
21 2011, pursuant to Plaintiff’s request, the Clerk entered default against Defendant. (Doc. 9.) On  
22 March 25, 2011, Plaintiff filed this motion for default judgment against Defendant. (Doc. 12.)  
23 Defendant did not oppose the motion.

### 24 III. DISCUSSION

#### 25 A. Legal Standard

26 Federal Rule of Civil Procedure 55(b)(2) provides that judgment may be entered as follows:

27 By the Court. In all other cases, the party must apply to the court for a default  
28 judgment. A default judgment may be entered against a minor or incompetent person  
only if represented by a general guardian, conservator, or other like fiduciary who has

1 appeared. If the party against whom a default judgment is sought has appeared  
2 personally or by a representative, that party or its representative must be served with  
3 written notice of the application at least 7 days before the hearing. The court may  
conduct hearings or make referrals—preserving any federal statutory right to a jury  
trial—when, to enter or effectuate judgment, it needs to:

- 4 (A) conduct an accounting;
- 5 (B) determine the amount of damages;
- 6 (C) establish the truth of any allegation by evidence; or
- 7 (D) investigate any other matter.

8 Upon default, the well-pleaded allegations of the complaint relating to liability are taken as  
9 true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987); *Dundee Cement Co.*  
10 *v. Highway Pipe & Concrete Prods., Inc.*, 722 F.2d 1319, 1323 (7th Cir. 1983).

11 “Factors which may be considered by courts in exercising discretion as to the entry of a  
12 default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s  
13 substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at stake in the action;  
14 (5) the possibility of a dispute concerning material facts; (6) whether the default was due to  
15 excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring  
16 decisions on the merits.” *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

## 17 **B. Analysis**

18 Service of summons and complaint in this action was made on Defendant on January 4, 2011.  
19 A copy of the Proof of Service was filed with this Court on January 26, 2011. Defendant failed to  
20 respond to the complaint or otherwise appear in the action. The Clerk of the Court entered default  
21 against Defendant on February 22, 2011. Defendant is not an infant or incompetent person, and is  
22 not in the military service or otherwise exempted under the Soldiers’ and Sailors’ Civil Relief Act  
of 1940. (Doc. 12-2, ¶ 3.)

23 In its motion, Plaintiff seeks default judgment and an award of damages pursuant to  
24 47 U.S.C. § 605(e)(3)(C)(i)(II) (statutory damages) and 47 U.S.C. § 605(e)(3)(C)(ii) (enhanced  
25 statutory damages) in the amount of \$110,000 against Defendant for unlawfully intercepting,  
26 receiving, and exhibiting the Program on November 21, 2009, at his restaurant/bar. Plaintiff also  
27 seeks damages in the amount of \$1,300 for its state law conversion claim.  
28

1           **1.     Statutory Damages Pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II) and Enhanced**  
2           **Statutory Damages Pursuant to 47 U.S.C. § 605(e)(3)(C)(ii)**

3           Plaintiff seeks statutory damages pursuant to 47 U.S.C. § 605(e)(C)(i)(II) and enhanced  
4           statutory damages pursuant to Section 605(e)(3)(C)(ii). (Doc. 12-1, 11:15-16; 15:1-2.) Pursuant to  
5           Section 605(a), “no person receiving, assisting in receiving, transmitting, or assisting in transmitting,  
6           any interstate or foreign communication by wire or radio shall divulge or publish the existence,  
7           contents, substance, purport, effect, or meaning thereof, except through authorized channels of  
8           transmission of reception. . . .” Those who violate this Section are subject to the following civil  
9           penalty:

10                   [T]he party aggrieved may recover an award of statutory damages for each violation  
11                   of subsection (a) of this section involved in the action in a sum of not less than  
12                   \$1,000 or more than \$10,000, as the court considers just, and for each violation of  
                    paragraph (4)<sup>1</sup> of this subsection involved in the action an aggrieved party may  
                    recover statutory damages in a sum not less than \$10,000, or more than \$100,000, as  
                    the court considers just.

13           47 U.S.C. § 605(e)(3)(C)(i)(II).

14           Plaintiff attests that it is a closed-circuit distributor of sports and entertainment programming  
15           that purchased and retained the exclusive commercial exhibition licensing rights to the Program.  
16           (Doc. 12-4, ¶ 3.) Plaintiff marketed the sub-licensing (commercial exhibition) rights in the Program  
17           to its commercial customers. (*Id.*) Plaintiff contends that persistent signal piracy of its programming  
18           costs the company, its customers, and the community millions of dollars annually. (*Id.* at ¶ 12.)  
19           Plaintiff believes that the continued signal piracy is caused, in part, from the perceived lack of  
20           consequences (including nominal or minimal damage awards by the courts who hear its cases) for  
21           such unlawful interception and exhibition by the commercial signal pirates. (*Id.*) As such, Plaintiff  
22           requests that it be awarded the maximum allowance for statutory violations, totaling \$10,000.

23           Plaintiff contends that significant enhanced statutory damages should be awarded under  
24           Section 605(e)(3)(C)(ii) because Defendant’s actions were willful and done for a commercial  
25           advantage. Section 605(e)(3)(C)(ii) provides that where “the court finds that the violation was  
26

---

27                   <sup>1</sup> Paragraph 4 relates to persons who manufacture, assemble, modify, import, export, sell, or distributed any  
28                   device or equipment knowing that the equipment is primarily of assistance in the unauthorized description of satellite  
                    cable programming. Plaintiff does not assert that Paragraph 4 is applicable in this case.

1 committed willfully and for purposes of direct or indirect commercial advantage or private financial  
2 gain, the court in its discretion may increase the award of damages, whether actual or statutory, by  
3 an amount of not more than \$100,000 for each violation of subsection (a) of this section.”  
4 Emphasizing the need for deterrence as to this Defendant and others, Plaintiff requests that it be  
5 awarded \$100,000 in enhanced statutory damages.

6 Here, the summons and the complaint were properly served upon Defendant, his default was  
7 properly entered, and the complaint is sufficiently well-pled. *See Eitel*, 782 F.2d at 1471-72. By  
8 his default, Defendant admitted to willfully violating Section 605 for the purposes of commercial  
9 advantage. *See TeleVideo Sys., Inc.*, 826 F.2d at 917-18. The facts before the Court indicate that  
10 Defendant’s establishment had a maximum capacity of 200 people. (Doc. 12-3.) Dominique  
11 Vargas, Plaintiff’s investigator, noted that there were four large, flat screen televisions on the night  
12 the Program was broadcast. (*Id.*) All four were located on the walls of the bar, toward the top. (*Id.*)  
13 Vargas conducted three head-counts in the bar while she was there, with fifty people in the first  
14 count, fifty-five people in the second count, and fifty-five people in the last count. (*Id.*)

15 The amount of damages awarded should be in an amount that is adequate to deter this  
16 Defendant and others from committing similar acts in the future. Therefore, the Court recommends  
17 that the maximum allowable statutory damages be awarded pursuant to 47 U.S.C.  
18 § 605(e)(3)(C)(i)(II) in the amount of \$10,000.

19 With regard to enhanced statutory damages, several factors militate against a substantial  
20 award. There is no evidence that Defendant (1) advertised the broadcast of the Program to entice  
21 a larger crowd, (2) charged a cover to enter the establishment, or (3) charged a premium for food and  
22 drinks on the night the broadcast was shown. Further, the headcounts during the Program indicate  
23 approximately fifty-five people were present in the establishment, approximately one-quarter of the  
24 establishment’s capacity. (Doc. 12-3.) Moreover, Defendant has not been shown to be a repeat  
25 offender with regard to signal piracy.

26 Plaintiff contends that the courts have placed undue weight on the promotion of the program  
27 rather than the exhibition of the program, arguing that pirates do not generally advertise that they will  
28 exhibit programming unlawfully, do not generally increase the price of food and drinks, and do not

1 generally charge a cover so as to undercut establishments who do broadcast the program lawfully.  
2 (Doc. 12-4, ¶¶ 14-17.) The Court has considered these arguments and finds that there is an impact  
3 based on Defendant’s conduct and limited enhanced damages will produce the appropriate deterrent  
4 effect. There is no evidence that Defendant’s financial resources would require a large judgment to  
5 achieve the desired deterrent effect. However, the Court is also mindful that minimal damage  
6 awards may result in a perceived lack of consequences for signal piracy. (See Doc. 12-4, ¶¶ 11-13.)  
7 Considering these factors, the Court recommends that enhanced statutory damages be awarded  
8 pursuant to Section 605(e)(3)(C)(ii) in the amount of \$5,000.

9 **2. Damages for Conversion**

10 Plaintiff seeks \$1,300 in conversion damages – the value of the property at the time of the  
11 conversion.

12 Under California law, conversion is the wrongful exercise of dominion over the property of  
13 another. The elements of conversion are, “the plaintiff’s ownership or right to possession of the  
14 property at the time of the conversion; the defendant’s conversion by a wrongful act or disposition  
15 of property rights; and damages.” *Greka Integrated, Inc. v. Lowrey*, 133 Cal. App. 4th 1572, 1581  
16 (2005); see also *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 906 (9th  
17 Cir. 1992). “Because conversion is a strict liability tort, questions of the defendant’s good faith, lack  
18 of knowledge, motive, or intent are not relevant.” *Gilman v. Dalby*, 176 Cal. App. 4th 606, 615 n.1  
19 (2009). Exclusive right to distribute a broadcast signal to commercial establishments constitutes a  
20 “right to possession of property” for purposes of conversion. See *Don King Prods./Kingvision v.*  
21 *Lovato*, 911 F.Supp. 419, 423 (N.D. Cal. 1995) (misappropriation of intangible property without  
22 authority from owner is conversion); see also *DIRECTV, Inc. v. Pahnke*, 405 F. Supp. 2d 1182, 1189  
23 (E.D. Cal. 2005) (concluding that the right to distribute programming via satellite constituted a right  
24 to possession of personal property for purposes of a conversion claim under California law.)

25 Here, Plaintiff was granted the exclusive domestic commercial exhibition licensing rights to  
26 the Program, and thus had the right to possession of the property at the time of the conversion.  
27 Because Defendant did not legally purchase the Program, the exhibition of the fight in Defendant’s  
28 Tony Romas restaurant on November 21, 2009, constituted conversion by a wrongful act or

1 disposition of property rights. Finally, the rate card<sup>2</sup> for the Program at an establishment with a  
2 seating capacity of between 151 and 200, which would apply to Defendant's establishment, indicates  
3 the sub-license fee for the Program would have been \$1,300. (Doc. 12-4, ¶ 8, Exh. 1.) Thus,  
4 Plaintiff is entitled to damages for conversion in the amount of \$1,300.

#### 5 IV. RECOMMENDATION

6 Based on a consideration of the declarations, pleadings, and exhibits to the present motion,  
7 the Court RECOMMENDS as follows:

- 8 1. Plaintiff's motion for default judgment be GRANTED;
- 9 2. Judgment be entered in this action against Defendant Albert Joseph Labonte II,  
10 individually and dba Tony Romas as follows:
  - 11 a. \$10,000 statutory damages for violation of 47 U.S.C. § 605;
  - 12 b. \$5,000 enhanced statutory damages for violation of 47 U.S.C. § 605; and
  - 13 c. \$1,300 for the tort of conversion.

14 These findings and recommendations are submitted to the district judge assigned to this  
15 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within fifteen (15)  
16 days of service of this recommendation, any party may file written objections to these findings and  
17 recommendations with the Court and serve a copy on all parties. Such a document should be  
18 captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge  
19 will review the magistrate judge's findings and recommendations pursuant to 28 U.S.C.  
20 § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may  
21 waive the right to appeal the district judge's order. *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir.  
22 1991).

23 IT IS SO ORDERED.

24 **Dated: May 6, 2011**

25 **/s/ Sheila K. Oberto**  
26 **UNITED STATES MAGISTRATE JUDGE**

27 <sup>2</sup> The rate card indicates the amount Plaintiff charges an establishment to sub-license and purchase the broadcast  
28 the Program. (Doc. 12-4, ¶ 8, Exh. 1.) The rates charged are based upon the capacity of the establishment. In this  
instance, for an establishment with a capacity of 151-200 people, the rate to sub-license and broadcast the Program is  
\$1,300. (*Id.*)