

1 Plaintiff, default was entered against Defendant on February 2, 2015. (Docs. 10-11.) Plaintiff filed the
2 application for default judgment now pending before the Court on March 2, 2015. (Doc. 12.)

3 **II. Legal Standards Governing Entry of Default Judgment**

4 The Federal Rules of Civil Procedure govern the entry of default judgment. After default is
5 entered because “a party against whom a judgment for relief is sought has failed to plead or otherwise
6 defend,” the party seeking relief may apply to the court for a default judgment. Fed. R. Civ. P. 55(a)-
7 (b). Upon the entry of default, well-pleaded factual allegations regarding liability are taken as true, but
8 allegations regarding the amount of damages must be proven. *Pope v. United States*, 323 U.S. 1, 22
9 (1944); see also *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977). In addition,
10 “necessary facts not contained in the pleadings, and claims which are legally insufficient, are not
11 established by default.” *Cripps v. Life Ins. Co. of North Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992)
12 (citing *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)).

13 Entry of default judgment is within the discretion of the Court. *Aldabe v. Aldabe*, 616 F.2d
14 1089, 1092 (9th Cir. 1980). The entry of default “does not automatically entitle the plaintiff to a court-
15 ordered judgment. *Pepsico, Inc. v. Cal. Sec. Cans*, 238 F.Supp.2d 1172, 1174 (C.D. Cal 2002), accord
16 *Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986). The Ninth Circuit determined:

17 Factors which may be considered by courts in exercising discretion as to the entry of a
18 default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of
19 plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the sum of money
20 at stake in the 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.

21 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). As a general rule, the issuance of default
22 judgment is disfavored. *Id.* at 1472.

23 **III. Plaintiff’s Factual Allegations**

24 The factual assertions of Plaintiff are taken as true because default has been entered against
25 Defendant. See *Pope*, 323 U.S. at 22. Plaintiff alleges that by contract, it was granted exclusive
26 domestic commercial distribution rights to the Program and, pursuant to that contract entered into
27 sublicensing agreements with various commercial entities throughout North America to broadcast the
28 Program within their establishments. (Doc. 1 at 4-5, ¶¶ 17-19.) Plaintiff asserts each defendant was

1 “an owner, and/or operator, and/or licensee, and/or permittee, and/or person in charge, and/or an
2 individual with dominion, control, oversight and management of the commercial establishment doing
3 business as Las Fuentes Restaurant and Bar.” (Id. at 3, ¶¶ 7-8.)

4 Plaintiff alleges Defendants broadcast the Program in Las Fuentes Restaurant and Bar without
5 purchasing a proper sublicense from Plaintiff. (Doc. 1 at 3-4, ¶¶ 12-13.). For this act, Plaintiff alleged
6 violations of 47 U.S.C. §§ 553 and 605, conversion, and a violation of the California Business and
7 Professions Code. (Id. at 4-9.) In the application for default judgment, Plaintiff requests damages for
8 the violation of 47 U.S.C. § 605 and conversion. (See Doc. 12-1.) Therefore, the Court will address
9 only these claims.

10 **IV. Discussion and Analysis**

11 Applying the factors articulated by the Ninth Circuit in Eitel, the Court finds the factors weigh
12 in favor of granting Plaintiff’s motion for default judgment.

13 **A. Prejudice to Plaintiff**

14 The first factor considers whether the plaintiff would suffer prejudice if default judgment is not
15 entered, and potential prejudice to the plaintiff weighs in favor of granting a default judgment. See
16 *Pepsico, Inc.*, 238 F. Supp. 2d at 1177. Generally, where default has been entered against a defendant,
17 a plaintiff has no other means by which to recover damages. *Id.*; *Moroccanoil, Inc. v. Allstate Beauty*
18 *Prods.*, 847 F. Supp. 2d 1197, 1200-01 (C.D. Cal. 2012). Therefore, the Court finds Plaintiff would be
19 prejudiced if default judgment is not granted.

20 **B. Merits of Plaintiff’s claims and the sufficiency of the complaint**

21 Given the kinship of these factors, the Court considers the merits of Plaintiff’s substantive
22 claims and the sufficiency of the complaint together. See *Premier Pool Mgmt. Corp. v. Lusk*, 2012 U.S.
23 *Dist. LEXIS 63350*, at *13 (E.D. Cal. May 4, 2012). The Ninth Circuit has suggested that, when
24 combined, the factors require a plaintiff to “state a claim on which the plaintiff may recover.” *Pepsico,*
25 *Inc.*, 238 F. Supp. 2d at 1175.

26 **1. Claim arising under 47 U.S.C. § 605**

27 The Federal Communications Act of 1934 (“Communications Act”) “prohibits the unauthorized
28 receipt and use of radio communications for one’s ‘own benefit or for the benefit of another not entitled

1 thereto.” *DirecTV, Inc. v. Webb*, 545 F.3d 837, 844 (9th Cir. 2008) (citing 47 U.S.C. § 605(a)). In
2 pertinent part, the Communications Act provides, “No person not being authorized by the sender shall
3 intercept any radio communication and divulge or publish the . . . contents . . . of such intercepted
4 communication to any person.” 47 U.S.C. § 605(a). Thus, Plaintiff must establish it was the party
5 aggrieved by Defendants’ actions. 47 U.S.C. § 605(e)(3)(A). Plaintiff must also show Defendants
6 intercepted a wire or radio program and published it without permission. 47 U.S.C. § 605(a).

7 a. Party aggrieved

8 Under the Communications Act, a “person aggrieved” includes a party “with proprietary rights
9 in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite
10 cable programming.” 47 U.S.C. § 605(d)(6). In the Complaint, Plaintiff asserted that J & J Sports
11 Productions was granted the exclusive, nationwide commercial distribution rights to the Program.
12 (Doc. 1 at 4). In support of this assertion, Joseph Gagliardi, President of J & J Sports Productions
13 produced the Closed Circuit Television License Agreement between Golden Boy Promotions, LLC and
14 Plaintiff, granting Plaintiff “the exclusive license to exhibit . . . [the] live telecast” of the Program.
15 (Doc. 12-4 at 10-15.) Accordingly, the Court finds Plaintiff was the party aggrieved within the
16 meaning of § 605.

17 b. Interception and publication of the Program

18 Plaintiff acknowledges it “cannot be certain of the method of interception.” (Doc. 12-1 at 8).
19 Similarly, in *Joe Hand Prod. v. Behari*, 2013 U.S. Dist. LEXIS 37277 (E.D. Cal. Mar. 18, 2013), the
20 plaintiff was unable to identify the nature of the transmission. This Court observed: “Plaintiff’s
21 inability to allege the precise nature of the intercepted transmission in this case . . . raises a question
22 regarding the scope of 47 U.S.C. § 605(a) and the sufficiency of plaintiff’s claim under that provision.”
23 *Id.*, 2013 U.S. Dist. LEXIS 37277 at *7. Nevertheless, Plaintiff provided evidence that Defendants
24 broadcast the Program in their establishment, because an investigator witnessed the Program broadcast
25 at Las Fuentes Restaurant and Bar. (Doc. 12-2.)

26 Because Plaintiff was a party aggrieved, and Defendants intercepted the Program and published
27 it without permission, Plaintiff has established the elements of a claim under the Communications Act.

28 ///

1 **D. Possibility of dispute concerning material facts**

2 Here, there is little possibility of dispute concerning material facts because (1) based on the entry
3 of default, the Court accepts allegations in Plaintiff’s Complaint as true and (2) though properly served,
4 Defendants failed to appear. See *Pepsico, Inc.*, 238 F.Supp.2d at 1177; see also *Elektra Entm’t Group,*
5 *Inc. v. Crawford*, 226 F.R.D. 388, 393 (C.D. Cal. 2005) (“Because all allegations in a well-pleaded
6 complaint are taken as true after the court clerk enters default judgment, there is no likelihood that any
7 genuine issue of material fact exists”). Therefore, this factor does not weigh against default judgment.

8 **E. Whether default was due to excusable neglect**

9 Generally, the Court will consider whether Defendants’ failure to answer is due to excusable
10 neglect. See *Eitel*, 782 F.2d at 1472. Here, Defendants were served with the Summons and Complaint,
11 as well as the motion for default judgment. (See Doc. 18-1 at 20.) Given these facts, it is unlikely that
12 Defendants’ actions were the result of excusable neglect. *Shanghai Automation Instrument Co., Ltd. v.*
13 *Kuei*, 194 F.Supp.2d 995, 1005 (N.D. Cal. 2001) (finding no excusable neglect because the defendants
14 “were properly served with the Complaint, the notice of entry of default, as well as the papers in
15 support of the instant motion”). Accordingly, this factor does not weigh against default judgment.

16 **F. Policy disfavoring default judgment**

17 As noted above, default judgments are disfavored because “[c]ases should be decided on their
18 merits whenever reasonably possible.” *Eitel*, 782 F.2d at 1472. Here, however, the policy underlying
19 the Federal Rules of Civil Procedure favoring decisions on the merits does not weigh against default
20 judgment because Defendants’ failure to appear before the Court and defend in this action makes a
21 decision on the merits impractical.

22 **V. Damages**

23 Under the Communications Act, a party aggrieved may recover actual damages or statutory
24 damages “not less than \$1,000 or more than \$10,000, as the court considers just.” 47 U.S.C. § 605(e)
25 (3)(C)(i)(II). When the Court determines a violation was “committed willfully and for the purposes of
26 direct or indirect commercial advantage or private financial gain,” a court may award enhanced
27 damages by increasing the awarded damages up to \$100,000.00 for each violation. 47 U.S.C. §
28 605(e)(3)(C)(ii). The Court has “wide discretion” to determine the proper amount of damages to be

1 awarded. *DirecTV Inc. v. Le*, 267 Fed. App'x 636 (9th Cir. 2008) (citation omitted).

2 The Court may consider a number of factors in its determination of the amount of damages,
3 including any promotional advertising by the defendant, the capacity of the establishment, the number
4 of patrons present at the time of the broadcast, the imposition of a cover charge, the number and size of
5 the televisions used for the broadcast, and whether a premium was charged on food or drink. *J & J
6 Sports Productions v. Sorondo*, 2011 U.S. Dist. LEXIS 99951, at * 10-11 (E.D. Cal. Sept. 6, 2011)
7 (citing *Kingvision Pay-Per-View, Ltd. v. Backman*, 102 F.Supp.2d 1196, 1198 (N.D. Cal. 2000)).

8 Rodney Forney, Plaintiff's investigator, noted a handwritten sign was on the front window
9 advertising the fight at Las Fuentes Restaurant and Bar, and no cover charge was required. (Doc. 12-2
10 at 3.) Mr. Forney noted the Program was displayed on two televisions, including one television "over
11 the bar" and one television at the "front of [the] room." (Id.) Mr. Forney did not estimate the capacity
12 of the establishment, but noted he "counted approximately 30" patrons. (Id. at 2.) Given these factors,
13 the Court finds an award of \$10,000, which is almost five times the cost of a proper sublicense and the
14 maximum that may be awarded, is appropriate.¹

15 Although Plaintiff asserts a right to enhanced damages, allegations regarding the amount of
16 damages must be well-plead and supported by factual allegations. See *Pope*, 323 U.S. at 22; *Geddes*,
17 559 F.2d at 560. "The mere assertion that Defendant acted willfully is insufficient to justify enhanced
18 damages." *Sorondo*, 2011 U.S. Dist. LEXIS 99951, at *10 (quoting *Kingvision Pay-Per-View, Ltd. v.
19 Backman*, 102 F.Supp.2d 1196, 1198 (N.D. Cal. 2000)). Here, Plaintiff alleged: "Said unauthorized
20 interception, reception, publication, exhibition, divulgence, display, and/or exhibition by the each of the
21 Defendants was done willfully and for purposes of direct and/or indirect commercial advantage and/or

22
23
24 ¹ Courts in this district have found that the statutory maximum is not an appropriate award for a first-time offender
25 and in the absence of aggravating factors. See, e.g., *J & J Sprots Prod. v. Corona*, 2013 U.S. Dist. LEXIS 96462 (E.D. Cal.
26 July 10, 2013) (awarding \$7,000 in damages where the defendant broadcast the program on two televisions, there was no
27 premium for food or drink).

28 *Joe Hand Promotions v. Brown*, 2010 U.S. Dist. LEXIS 119435 (E.D. Cal. Oct. 27, 2010) (awarding \$4,000 in
damages where the program was broadcast on six 60-inch televisions, and there was no premium for food or drink); *J & J
Sports Productions, Inc. v. Morales*, 2012 U.S. Dist. LEXIS 30942 (E.D. Cal. March 8, 2012) (awarding \$4,400 in statutory
damages where the sublicense cost \$2,200 for the broadcast that the defendants displayed on three televisions, ranging in
size up to 54"); *J & J Sports Productions v. Sorondo*, 2011 U.S. Dist. LEXIS 99951 (E.D. Cal. Sept. 6, 2011) (awarding
\$3,600 in statutory damages, an amount two times the cost of a sublicense).

1 private financial gain.” (Doc. 1 at 5, ¶ 21.) Importantly, there are no factual allegations in the
2 complaint to support the legal conclusion that Defendants’ actions were willful or for the purpose of
3 financial gain.² Previously, the Court explained:

4 To adequately state a claim against a defendant, a plaintiff must set forth the legal and
5 factual basis for his or her claim. Detailed factual allegations are not required, but
6 “[t]hreadbare recitals of the elements of the cause of action, supported by mere
7 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009),
8 citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While factual
9 allegations are accepted as true, legal conclusions are not. *Iqbal*, 556 U.S. at 678. A
10 plaintiff must set forth “the grounds of his entitlement to relief,” which “requires more
than labels and conclusions, and a formulaic recitation of the elements of a cause of
action.” *Twombly*, 550 U.S. at 555-56 (internal quotation marks and citations omitted).
In its complaint, Plaintiff simply alleged a legal conclusion: “Said unauthorized
interception, reception, publication, exhibition, divulgence, display, and/or exhibition by
each of the Defendant [sic] was done willfully and for purposes of direct and/or indirect
commercial advantage and/or private financial gain.”

11 *Joe Hand Promotions, Inc. v. Hathcock*, 2012 U.S. Dist. LEXIS 101208, at *2-3 (E.D. Cal. July 20,
12 2012). Consequently, the Court found Plaintiff “failed to allege facts establishing the grounds of
13 entitlement to enhanced damages.” *Id.* at *3.

14 Though the evidence submitted demonstrates that there was a sign advertising for a fight at 5:00
15 p.m., and the fight was being displayed on two televisions, Mr. Forney indicated he did not have to pay
16 an admission fee to enter Las Fuentes Restaurant and Bar. (Doc. 12-2 at 2, 6.) There is no indication
17 that food or drink prices were increased because of the fight or that the number of people in the location
18 was unusual or could be attributed to the fight. (See generally Doc. 12-2.) Moreover, the complaint
19 now before the Court contains the same language as the complaint in *Hathcock*, and suffers the same
20 infirmities. Because there is insufficient evidence to demonstrate the piracy was done for purposes of
21 commercial or private gain, enhanced damages are not recommended.

22 Finally, because Plaintiff chose to receive statutory damages rather than actual damages under
23 the Communications Act, damages for conversion are subsumed into the total award of \$10,000. See,
24 e.g., *Joe Hand Promotions, Inc. v. Behari*, 2013 U.S. Dist. LEXIS 37277 at *8, n.2 (E.D. Cal. Mar. 18,
25 2013) (explaining damages conversion would not be awarded “because the recommended statutory
26 damages will sufficiently compensate plaintiff such that an award for conversion damages would be

27
28 ² In light of the fact that there was a handwritten note in the window advertising the fight, the Court accepts that
the piracy was willful.

1 duplicative”); J &J Sports Productions v. Mannor, 2011 U.S. Dist. LEXIS 32367, at *7 (E.D. Cal. Mar.
2 28, 2011) (declining to award damages for conversion because “plaintiff has been sufficiently
3 compensated through the federal statutory scheme” where the award total was \$3,200 and the cost of
4 the proper license was \$2,200); J & J Sports Productions v. Bachman, 2010 U.S. Dist. LEXIS 44884, at
5 *22 (E.D. Cal. May 7, 2010) (declining conversion damages because statutory damages “sufficiently
6 compensate[d]” the plaintiff).

7 **VI. Findings and Recommendations**

8 The Eitel factors weigh in favor of granting default judgment, and the entry of default judgment
9 is within the discretion of the Court. See Aldabe, 616 F.2d at 1092. However, the damages requested
10 are disproportionate to Defendants’ actions. Importantly, when determining the amount of damages to
11 be awarded for signal piracy, “the principle of proportionality governs.” Backman, 102 F.Supp.2d at
12 1198. Under this principle, “distributors should not be overcompensated and statutory awards should
13 be proportional to the violation.” Id.

14 Accordingly, the Court recommends the award of \$10,000 for Defendants’ wrongful acts. This
15 amount both compensates Plaintiff for the wrongful act and is a suitable deterrent against future acts of
16 piracy. See Kingvision Pay-Per-View v. Lake Alice Bar, 168 F.3d 347, 350 (9th Cir. 1999) (observing
17 that a lower statutory award may deter while not destroying a business).

18 Based upon the foregoing, **IT IS HEREBY RECOMMENDED:**

- 19 1. Plaintiff’s application for default judgment (Doc. 12) be **GRANTED IN PART AND**
20 **DENIED IN PART AS FOLLOWS:**
 - 21 A. Plaintiff’s request for statutory damages for the violation of the Communications
22 Act be **GRANTED** in the amount of \$10,000;
 - 23 B. Plaintiff’s request for enhanced damages be **DENIED**;
 - 24 C. Plaintiff’s request for damages for the tort of conversion be **DENIED**;
- 25 2. Judgment be entered in favor of Plaintiff J & J Sports Productions, Inc. and against
26 Defendants Maria D. Garcia and Ruben Samudio Garcia, individually and doing
27 business as Las Fuentes Restaurant and Bar; and
- 28 3. Plaintiff be directed to file any application for attorney’s fees pursuant to 47 U.S.C. §

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

605 no later than fourteen days from the entry of judgment.

These Findings and Recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within fourteen days of the date of service of these Findings and Recommendations, any party may file written objections with the court. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991); *Wilkerson v. Wheeler*, 772 F.3d 834, 834 (9th Cir. 2014).

IT IS SO ORDERED.

Dated: April 17, 2015

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE