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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

J & J SPORTS PRODUCTIONS, INC.,

Plaintiff,

CIV. NO. S-10-3023 LKK GGH

vs.

DAVID MICHAEL DAY, individually  
and d/b/a NICK'S NIGHTCLUB AND BAR  
a/k/a OFF LIMITS,

ORDER AND  
FINDINGS AND RECOMMENDATIONS

Defendant.

Presently before the court is plaintiff's application for entry of default judgment against defendant David Michael Day, d/b/a Nick's Nightclub a/k/a Off Limits, filed April 21, 2011.<sup>1</sup> Upon review of the motion and the supporting documents, and good cause appearing, the court issues the following order and findings and recommendations.

BACKGROUND

On November 9, 2010, plaintiff filed the underlying complaint in this action against defendant David Michael Day, d/b/a Nick's Nightclub a/k/a Off Limits, alleging

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<sup>1</sup> The matter was originally scheduled for hearing on May 26, 2011; however, it was vacated after the court determined that a hearing was not necessary. Order, filed May 19, 2011.

1 defendant unlawfully intercepted and exhibited a broadcast of a program entitled, “Firepower:  
2 Manny Pacquiao v. Miguel Cotto, WBO Welterweight Championship Fight Program,”  
3 (“Program”), in his establishment for commercial advantage without obtaining a sublicense from  
4 plaintiff for its use, in violation of the Communications Act, 47 U.S.C. § 605, the Cable  
5 Communications Policy Act, 47 U.S.C. § 553, and state law. The complaint alleges defendant  
6 exhibited the Program on November 14, 2009. The summons and complaint were served on  
7 defendant by personal service on February 24, 2011. Fed. R. Civ. P. 4(e)(2). Pacific Atlantic  
8 Trading Co. v. M/V Main Express, 758 F.2d 1325, 1331 (9th Cir. 1985) (default judgment void  
9 without personal jurisdiction). Defendant David Michael Day has failed to file an answer or  
10 otherwise appear in this action. The clerk entered default against defendant on March 30, 2011.

11 Request for entry of default and the instant motion for default judgment and  
12 supporting papers were served by mail on defendant at his last known address. Defendant did  
13 not file an opposition to the motion for entry of default judgment. Plaintiff seeks an entry of  
14 default judgment in the amount of \$112,200 against defendant David Michael Day.

15 DISCUSSION

16 Entry of default effects an admission of all well-pleaded allegations of the  
17 complaint by the defaulted party. Geddes v. United Financial Group, 559 F.2d 557 (9th Cir.  
18 1977). The court finds the well pleaded allegations of the complaint state claims for which relief  
19 can be granted. Anderson v. Air West, 542 F.2d 1090, 1093 (9th Cir. 1976).

20 The complaint requests, in the event of default, an award of damages pursuant to  
21 47 U.S.C. § 605 *et seq.* (The Communications Act) and 47 U.S.C. § 553, *et seq.* (The Cable  
22 Communications Policy Act), as well as compensatory and punitive damages for conversion, and  
23 restitution for violation of Cal. Bus. & Prof. Code § 17200, *et seq.* (Complaint at 3-7.) The  
24 instant motion for default judgment requests damages pursuant to 47 U.S.C. § 605 in the amount  
25 of \$10,000 in statutory damages, \$100,000 in enhanced statutory damages based on the  
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1 wilfulness of the conduct, and \$2,200 in compensatory damages for conversion.<sup>2</sup> Section 605  
2 prohibits the unauthorized publication or use of communications such as the Program. Section  
3 605(e)(3)(A) also provides for a private civil action for a violation of 605(a). National  
4 Subscription Television v. S&H TV, 644 F.2d 820, 821 n. 1 (9th Cir. 1981).

5 The court deems defaulting defendant, by his failure to appear or defend this  
6 action, to have waived any objections to the statutory source of the damages prayed for in the  
7 instant motion. The memorandum of points and authorities and affidavits filed in support of the  
8 motion for entry of default judgment supports the finding that plaintiff is entitled to the relief  
9 requested. There are no policy considerations which preclude the entry of default judgment of  
10 the type requested. See Eitel v. McCool, 782 F.2d 1470, 1471-1472 (9th Cir. 1986).

11 One of the factors the court is free to consider in exercising its discretion to grant  
12 or deny default judgment is the sum of money at stake. See J & J Sports Productions, Inc. v.  
13 Betancourt, No. 08cv937 JLS (POR), 2009 WL 3416431, at \*3 (S.D. Cal. Oct. 20, 2009).

14 Under section 605, statutory damages may be awarded between \$1,000 and  
15 \$10,000 for violation of the Federal Communications Act and up to \$100,000 when the violation  
16 “was committed willfully and for purposes of direct or indirect commercial advantage or  
17 financial gain.” 47 U.S.C. § 605(e)(3)(C)(i)-(ii). Plaintiff has referenced one other action in the  
18 Eastern District against this defendant for the same violations. (Riley Supp. Decl., ¶¶ 4-5, Ex. 1,  
19 dkt. #17-4.) See Joe Hand Promotions, Inc. v. Ray, Civ.S. 10-0095 GEB KJN. This other filing  
20 does not prove defendant’s willfulness because defendant was not served with the complaint in  
21 that action until February 23, 2010, *after* he exhibited the Program in this case. Nevertheless, the  
22 court has considered other factors, including that the Program was shown on three television sets,  
23 albeit to an audience of only 15 to 17 people, and in a relatively small city with a population of  
24 less than 100,000. There was no cover charge; however, the showing of the Program was

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25 <sup>2</sup> Because plaintiff has eliminated his request for damages under § 553 and for restitution  
26 under state law, these damages will not be addressed.

1 intended to increase business. (Slay Aff., dkt. #17-3.) See Joe Hand Promotions, Inc. v. Cat's  
2 Bar, Inc., 2009 WL 700125, \*2 (C.D. Ill. 2009).

3           The undersigned has considered the plethora of cases cited by plaintiff which  
4 document the enhanced award, and appreciates the briefing. The undersigned has also  
5 considered plaintiff's statement that "nominal" damages have not alleviated the piracy problem.  
6 However, some of us do not live in the world where \$10,000.00 is nominal, and this may well be  
7 true for David Michael Day, proprietor of Nick's Night Club a/k/a Off Limits. In rethinking the  
8 amount of enhanced damages that others and the undersigned may have recommended in the past  
9 for willful violations of the anti-digital piracy law, and without excusing at all the nature of the  
10 violation and the refusal to defend in court, the damages awarded will be substantially less than  
11 the \$100,000.00 requested by plaintiff.

12           Plaintiff also suggests that the damages could be calculated by multiplying the  
13 probable fee which would have been charged if defendant had acted lawfully (\$2,200) by the  
14 number of observed patrons (see fn. 5 of plaintiff's brief) which would determine the enhanced  
15 amount of damages at \$34,474.00. Of course, if earlier paid, the \$2,200 fee would have covered  
16 all the patrons. The undersigned believes the multiple fee in addition to statutory damages as too  
17 much. A total of \$30,000.00 (\$10,000 and \$20,000) should be enough to compensate "plus"  
18 plaintiff in this case.

19           This court therefore will recommend statutory damages under section 605 in the  
20 amount of \$10,000 and enhanced statutory damages in the amount of \$20,000. Inasmuch as the  
21 award of \$30,000 in statutory damages will be permitted, plaintiff's request for damages for  
22 conversion should be denied.

23           Insofar as the application for default judgment seeks attorneys' fees and costs but  
24 the memorandum in support does not contain argument in support of this request, and there is no  
25 declaration supporting this request, it is denied without prejudice to its renewal after entry of  
26 judgment.

1 CONCLUSION

2 IT IS ORDERED that the Clerk of the Court shall serve these findings and  
3 recommendations on the defaulting defendant at the address indicated on plaintiff's proof of  
4 service of the instant motion.

5 In view of the foregoing findings, IT IS RECOMMENDED that plaintiff's motion  
6 for entry of default judgment, (dkt. # 17), be GRANTED in part. Judgment should be rendered  
7 in the amount of \$10,000 in statutory damages and \$20,000 in enhanced statutory damages for a  
8 total award of \$30,000.

9 These findings and recommendations are submitted to the United States District  
10 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
11 fourteen (14) days after being served with these findings and recommendations, any party may  
12 file written objections with the court and serve a copy on all parties. Such a document should be  
13 captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the  
14 objections shall be served and filed within fourteen (14) days after service of the objections. The  
15 parties are advised that failure to file objections within the specified time may waive the right to  
16 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

17 DATED: 08/15/2011

/s/ Gregory G. Hollows

18  
19 GREGORY G. HOLLOWES  
UNITED STATES MAGISTRATE JUDGE

20 GGH:076/J&JSports3023.def.wpd

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