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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

J & J SPORTS PRODUCTIONS INC,  
Plaintiff,  
v.  
GABRIEL CANEDO, et al.,  
Defendants.

No. C 09-1488 PJH (JL)

**REPORT AND RECOMMENDATION RE  
MOTION FOR DEFAULT JUDGMENT  
(Docket # 9)**

**I. Introduction**

Plaintiff's motion for default judgment was referred by the district court (Hon. Phyllis J. Hamilton) pursuant to 28 U.S.C. §636(b). This Court finds the matter to be suitable for submission without oral argument pursuant to Civil Local Rule 7-1(b). Plaintiff, J & J Sports Productions, Inc. (hereinafter "Plaintiff") is an international distributor of sports and entertainment programming. By contract, Plaintiff purchased the domestic commercial exhibition rights to broadcast the "Sworn Enemies," Floyd Mayweather, Jr. v. Zab Judah Welterweight Championship Fight Program, telecast nationwide on Saturday, April 8, 2006. This Program included the main event (between Floyd Mayweather, Jr. and Zab Judah) along with undercard (preliminary) bouts, televised replay, and color commentary, hereinafter collectively referred to as the "Program." (Declaration of Plaintiff's owner, Joseph Gagliardi)

1 Plaintiff thereafter entered into sublicensing agreements with commercial entities  
2 throughout the United States and its territories, wherein it granted limited public exhibition  
3 rights to these entities (sublicensees) for the benefit and entertainment of the patrons within  
4 their respective establishments (i.e., hotels, racetracks, casinos, taverns, bars, restaurants,  
5 social clubs, etc.). The interstate transmission of the Plaintiff's Program was encrypted and  
6 made available only to Plaintiff's customers (commercial locations which paid Plaintiff the  
7 requisite closed-circuit (commercial) license fees to exhibit the Program). The typical  
8 license fee for an establishment such as Defendants' which is licensed for no more than 50  
9 occupants, would have been \$1,200.00. (*Id.*)

10 On April 8, 2006 an investigator, Gary Gravelyn, observed the unlawful exhibition of  
11 Plaintiff's Program at the Defendants' commercial establishment. The investigator's  
12 observations were later documented in a sworn affidavit now before this Court. (See  
13 Declaration of Affiant Gary Gravelyn.) Plaintiff alleges only this one violation by Defendants  
14 and under the statutes invoked below, this one violation would subject Defendants to  
15 statutory penalties in a range from \$1,000 to \$10,000. Plaintiff in this case requests entry of  
16 judgment for enhanced statutory damages for at least triple the minimum, or for an amount  
17 in a range from \$50,000 to \$100,000 for this single violation.

18 On April 6, 2009, Plaintiff filed suit against Gabriel Canedo, individually and d/b/a  
19 Lara's Bar (hereinafter "Defendants") after Plaintiff's efforts to resolve this matter informally  
20 failed. The thrust of Plaintiff's Complaint is that Defendants, and their employees and  
21 agents, unlawfully intercepted and intentionally exhibited the Program at the Defendants'  
22 establishment for the purpose of direct or indirect commercial advantage, thereby violating  
23 Section 605 of the Federal Communications Act of 1934, as amended, as well as Title 47  
24 U.S.C. §553. Plaintiff's complaint also includes a pendant common-law claim of  
25 Conversion.

26 Neither the Defendants nor anyone acting on the Defendants' behalf filed an Answer  
27 or any other responsive pleading to Plaintiff's duly served complaint. Accordingly, on June  
28 12, 2009, following Plaintiff's Request, the Court entered default against the Defendants in

1 this action. Plaintiff respectfully requests this Court to enter judgment against the  
2 Defendants.

3 Plaintiff argues that, as a result of theft by the Defendants and others, Plaintiff has  
4 lost and will continue to lose its legitimate commercial customers which are unwilling and  
5 financially unable to compete with those unauthorized locations, such as LARA'S BAR,  
6 which exhibit sports and other closed-circuit programming in an unlicensed manner.  
7 Because these unauthorized commercial establishments offer programming to their patrons  
8 for no fee (or for a fee which is less than the authorized establishments charge), the  
9 legitimate commercial establishments cannot attract paying customers to offset their  
10 sizeable investments in commercial licensing and event promotion, and as a result, and  
11 incur substantial financial loss. Plaintiff also contends such practices eliminate the prospect  
12 that establishments like LARA's will continue purchasing commercial exhibition licenses  
13 from the Plaintiff in the future. Plaintiff presents no evidence that this has actually  
14 happened.

15 Plaintiff contends that theft of closed-circuit broadcasts, such as the Program, by  
16 unauthorized commercial establishments, such as LARA'S BAR, adversely impacts both  
17 Plaintiff and its lawful customers. Plaintiff pays substantial fees to the promoters of the  
18 events to obtain the exhibition rights to sublicense the broadcast of closed-circuit  
19 programming to authorized commercial establishments. Plaintiff's exclusive source of  
20 revenue is the sublicense fees which it charges to authorized commercial establishments  
21 for the right to broadcast closed-circuit boxing and entertainment programming such as the  
22 Program. The corrosive effect of commercial signal interception permanently destroys  
23 Plaintiff's lawful customer base. *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376,  
24 381 (E.D. Ohio 1983). Again, Plaintiff presents no evidence in support of this contention,  
25 other than the declaration of its owner, Joseph Gagliardi, which contains no dollar amounts  
26 or percentages of lost profits.

27 Plaintiff also argues that, as a direct and proximate result of piracy, Plaintiff suffers  
28 severe damage to its goodwill and professional reputation, and has invariably lost its right

1 and ability to control and receive fees for transmission of the Program. *Quincy*  
2 *Cablesystems, Inc. v. Sully's Bar, Inc.*, 640 F.Supp. 1159, 1161 (D.Mass., 1986) When  
3 negotiating sublicense fees, Plaintiff represents to commercial establishments that it  
4 exercises supervision over the commercial distribution of its programming. When an  
5 unauthorized commercial establishment intercepts, receives, and broadcasts closed-circuit  
6 programming, such as the Program, Plaintiff's reputation and goodwill allegedly suffers  
7 irreparable harm with existing and prospective commercial customers from what appears to  
8 be a misrepresentation of its ability to supervise its programming. Plaintiff further alleges  
9 that ultimately, piracy devalues the product being lawfully developed, marketed, licensed,  
10 or sold to the detriment and injury of all. Plaintiff asks this Court to find that it should be  
11 awarded just and substantial compensation from the Defendants for these losses suffered.  
12 It asserts that modest awards of statutory damages are insufficient to accomplish those  
13 goals and that damages calculated on the ill-gotten gains are also insufficient. Rather, the  
14 success of Plaintiff's small family business concern depends upon the willingness of  
15 commercial establishments to pay the Plaintiff sublicense fees for its programming and the  
16 courts' commitment to deal fairly but firmly with the rising tide of theft of Plaintiff's  
17 intellectual property.

18 Plaintiff presents no evidence of loss of reputation or any other monetary or other  
19 harm suffered from Defendants' alleged theft of Plaintiff's Program.

20 Plaintiff concedes that it may be unconventional to award the Plaintiff the amount of  
21 damages it now prays for from a defendant in a default setting. He argues that piracy is  
22 nothing less than outright theft and a firm judicial hand is required to stop this predatory  
23 behavior and compensate the aggrieved accordingly.

24 Plaintiff requests that this Court enter judgment in its favor and that damages be  
25 awarded to it, as follows:

- 26 a. Violation of Title 47 U.S.C. 605 (e)(3)(B)(iii) and (c)(ii): \$ 50,000.00
- 27 b. Violation Title 47 U.S.C. 553 (b)(2) and (c)(2)(c): \$ 50,000.00
- 28 c. Tort of Conversion: \$ 1,200.00

1 Total Amount of Requested Judgment: \$ 101,200.00

2 **II. Analysis**

3 **A. Plaintiff argues that it is entitled to enhanced statutory damages.**

4 **1. In the event of a defendant's default, the Court must accept  
Plaintiff's allegations as to the defendant's liability.**

5 Once a default judgment is entered, it generally is treated as a conclusive and final  
6 adjudication of the issues necessary to justify the relief awarded and is given the same  
7 effect between the parties as a judgment rendered after a trial on the merits. Wright, Miller  
8 & Kane, Federal Practice and Procedures, §2684, p. 4-19-20. Plaintiff argues that  
9 Defendants' default serves as an admission of Plaintiff's well-pled allegations of fact.  
10 *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978). Accordingly, the only issue  
11 remaining to be decided in this case is the amount of damages, attorneys' fees, and costs  
12 to which Plaintiff is entitled from the Defendants for the unauthorized exhibition of Plaintiff's  
13 Program. This Court, however, is not obliged to accept Plaintiff's allegations as to its  
14 damages or the appropriateness of a particular award.

15 On entry of default, while the complaint's factual allegations regarding liability are  
16 taken as true, allegations regarding the amount of damages must be proven. Fed.Rules  
17 Civ.Proc.Rule 55, 28 U.S.C.A . Federal Civil Procedure 170A 2421 170A Federal Civil  
18 Procedure 170AXVII. Entry of default judgment is governed by federal civil rule governing  
19 default and is left to the trial court's sound discretion. Fed.Rules Civ.Proc.Rule 55, 28  
20 U.S.C.A . A defendant's default does not automatically entitle a plaintiff to a court-ordered  
21 judgment, since granting or denying default judgment relief is entirely within court's  
22 discretion. Fed.Rules Civ.Proc.Rule 55, 28 U.S.C.A .

23 Title 47 U.S.C. Section 605 protects companies such as the Plaintiff against the theft  
24 of its proprietary communications such as the Program. *National Subscription Television v.*  
25 *S & H TV*, 644 F.2d 820 (9th Cir. 1981). Courts have found that Section 605 applies to  
26 cases where the end-user offender obtained a proprietary broadcast by way of a satellite  
27 (rather than cable) television programming system. Title 47 U.S.C. §553 was designed to  
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1 provide a remedial scheme for unauthorized reception of cable communication. *Home Box*  
2 *Office v. Gee-Co Inc.*, 838 F.Supp. 436 (E.D. Mo. 1993). In this case, Plaintiff's investigator  
3 testified in his statement that Lara's Bar had no satellite dish; therefore, section 605 does  
4 not apply. He testified that he did not see a cable box, but in the absence of a satellite dish,  
5 and in light of the statement of Plaintiff's owner, Joseph Gagliardi, that the Program was  
6 not available on commercial stations, the Court finds that Defendants must have obtained  
7 the Program via cable.

8       **2 Plaintiff is entitled to either statutory or actual damages.**

9           A party aggrieved under the Statutes may, at its discretion, recover either actual or  
10 statutory damages. §553(c)(3)(A). Statutory damages may be awarded up to \$10,000.00  
11 for each violation. §553(c)(3)(A)(ii). Additionally, if this Court determines the violations were  
12 committed "willfully and for purposes of direct or indirect commercial advantage or private  
13 financial gain," the Court may award enhanced damages of up to \$50,000.00 under  
14 §553(c)(3)(B)(III).

15           Plaintiff contends that, as an aggrieved party under these Statutes, (see §553 (C)(1)  
16 and 605(D)(6)), Plaintiff is entitled to damages from the Defendants. LARA'S BAR is a  
17 commercial establishment, and could only lawfully obtain the Program if Plaintiff had  
18 contracted with Defendants for the rights to show the Program. However, this lawful  
19 approach was not taken. Therefore, Defendants must have undertaken specific wrongful  
20 actions to intercept or receive and broadcast the encrypted telecast. (See Plaintiff's  
21 Affidavit in Support of Plaintiff's Application for Default Judgment by the Court concurrently  
22 filed with this Memorandum (hereinafter "Plaintiff's Affidavit")). Since the Defendants must  
23 have committed wrongful acts in order to intercept, receive, and broadcast the Program,  
24 Plaintiff seeks substantial statutory damages from the Court in this action.

25       **3. Statutory damages are appropriate where actual damages are difficult to  
26 prove.**

27           The lack of adequate proof of any particular element causes the Court to rely, within  
28 its discretion, on the statutory limitations. *F.W. Woolworth Co. v. Contemporary Arts, Inc.*,

1 344 U.S. 228, 233 (1952). In the instant case, as more fully discussed infra, it would be  
2 impossible to calculate the full extent of the profits lost and the additional damages  
3 sustained by Plaintiff as a result of the Defendants' unlawful actions. Accordingly, it is  
4 appropriate for Plaintiff to elect to receive statutory damages.

5 In order to deter the unlawful use of communications such as the Program,  
6 Congress specifically designed the Statutes to provide "both Prosecutor[s] and civil plaintiffs  
7 [with] the legal tools they need to bring piracy under control." Trademark & Satellite Acts,  
8 P.L.-6678, 1988 U.S. Cong. & Admin. News 7, 5577, 5658; *U.S. v. Scott*, 783 F. Supp. 280,  
9 281 (N.D. Miss. 1992). To accomplish these goals, the statutes include severe penalties,  
10 both civil and criminal, for those who intercept, receive or broadcast protected  
11 communications. *Scott*, 783 F. Supp. at 281; § 553(b) and 605(e). Moreover Congress has  
12 equated a violation of the Statutes to theft of service. See 1988 U.S. Code Cong. & Admin.  
13 News 7, 5577, 4642-43. In 1988, in an effort to further deter theft, Congress amended the  
14 Statutes to provide for more severe penalties for violations. *Id.* at 5657.

15 Plaintiff's Affidavit asserts that the Defendants' interception, receipt, and broadcast  
16 of the encrypted Program was not inadvertent. Both §553(c)(3)(C) and 605(e)(3)(C)(iii)  
17 provide for limited damages to the aggrieved party "[i]n any case where the court finds that  
18 the violator was not aware and had no reason to believe that his acts constituted a violation  
19 of this section . . . .", but as stated by Congress, this type of situation occurs rarely:

20 [i]t is not intended that this provision serve in any way as a defense to determination  
21 of liability under subsection (a), but rather only as a provision to be exercised in the  
court's discretion for those rare instances of ignorance of the law on the part of one  
adjudged to have violated it.

22 Cable Communications Policy Act, P.L. 98-549, 5 U.S. Cong. News. .84 Bd. Vol. 8, 4745,  
23 4751. Instead, when Congress enacted the Statutes, it was specifically cognizant of the  
24 severe impact of theft of various wire communications, including closed-circuit  
25 programming, such as the Program.

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1 As stated in the House Bill:

2 "Theft of services deprives the cable industry of millions of dollars of revenue each  
3 year which it should otherwise be receiving. The Committee believes that theft of  
4 cable service poses a major threat to the economic viability of cable operators and  
5 cable programmers, and creates unfair burdens on cable subscribers who are forced  
6 to subsidize the benefits that other individuals are getting by receiving cable service  
7 without paying for it".

8 Cable Communications Policy Act of 1984, House Report No. 98-934, 5 U.S. Cong. News.

9 .84 Bd. Vol. -6, 4655, 4720. Moreover, according to Congress, these incidents threaten to  
10 undermine the satellite industry and adversely impact legitimate satellite dealers and  
11 satellite programmers who otherwise should be receiving payment for their programming or  
12 descrambling devices. *U.S. v. Scott*, 783 F.Supp. at 281 (quoting 1984 U.S. Code Cong. &  
13 Admin. News 4655, 4746).

14 In light of the above observations, as its first basis for relief, Plaintiff requests  
15 statutory damages pursuant to 47 U.S.C. § 553(c)(3)(A)(ii) and 605(e)(3)(C)(i)(II).

16 Section 553 deals with interception of commercial cable broadcasts and provides for  
17 damages, in pertinent part:

18 (1) Any person who willfully violates subsection (a)(1) of this section shall be fined  
19 not more than \$1,000 or imprisoned for not more than 6 months, or both.  
20 (2) Any person who violates subsection (a)(1) of this section willfully and for  
21 purposes of commercial advantage or private financial gain shall be fined not more  
22 than \$50,000 or imprisoned for not more than 2 years, or both, for the first such  
23 offense and shall be fined not more than \$100,000 or imprisoned for not more than 5  
24 years, or both, for any subsequent offense.

25 . . .

26 (2) The court may--

27 (A) grant temporary and final injunctions on such terms as it may deem reasonable  
28 to prevent or restrain violations of subsection (a)(1) of this section;

29 (B) award damages as described in paragraph (3); and

30 (C) direct the recovery of full costs, including awarding reasonable attorneys' fees to  
31 an aggrieved party who prevails.

32 (3)(A) Damages awarded by any court under this section shall be computed in  
33 accordance with either of the following clauses:

34 (i) the party aggrieved may recover the actual damages suffered by him as a result  
35 of the violation and any profits of the violator that are attributable to the violation  
36 which are not taken into account in computing the actual damages; in determining  
37 the violator's profits, the party aggrieved shall be required to prove only the violator's

1 gross revenue, and the violator shall be required to prove his deductible expenses  
2 and the elements of profit attributable to factors other than the violation; or

3 (ii) the party aggrieved may recover an award of statutory damages for all violations  
4 involved in the action, in a sum of not less than \$250 or more than \$10,000 as the  
court considers just.

5 (B) In any case in which the court finds that the violation was committed willfully and  
6 for purposes of commercial advantage or private financial gain, the court in its  
discretion may increase the award of damages, whether actual or statutory under  
7 subparagraph (A), by an amount of not more than \$50,000.

8 (C) In any case where the court finds that the violator was not aware and had no  
9 reason to believe that his acts constituted a violation of this section, the court in its  
discretion may reduce the award of damages to a sum of not less than \$100.

10 47 U.S.C.A. § 553; *Cable/Home Communication Corp. v. Network Production, Inc.*, 902  
11 F.2d 829, 850 (11th Cir. 1990).

12 Plaintiff cites a case for the proposition that where both statutes have been violated,  
13 some Ninth Circuit courts have chosen to award damages pursuant only to  
14 §605(e)(3)(C)(i)(II). *Kingvision Pay-Per-View, Ltd. v. Ortega*, 2002 WL 31855367(N.D. Cal.  
15 2002)(Judge Illston). In fact, Judge Illston in that case declined to award enhanced  
16 damages against a defaulting defendant:

17 This Court declines to grant plaintiff's request for the statutory maximum. The  
18 allegations in a complaint regarding the monetary amount of damages that should  
be granted in a default judgment are not controlling, and "the mere assertion that  
19 defendants acted willfully is insufficient to justify enhanced damages." *Kingvision*  
*Pay-Per-View Ltd. v. Backman*, 102 F.Supp. 1196, 1198 (N.D.Cal.2000). Courts that  
have awarded enhanced damage awards due to willful violations of the  
20 Communications Act have cited such factors as the repeated violation of the Act, the  
intent to profit from the violations and actual profit derived from the violation. *Id.*, at  
21 1197-1198. Here there is no evidence that the violation occurred multiple times, that  
the establishment intended to directly profit from the violation or that it actually  
22 profited from the violation. "Courts in this district have considered several cases  
involving pirating of closed-circuit sports broadcasts and, absent a showing of  
23 egregious wrongdoing, generally have awarded damages slightly over the statutory  
minimum." *Universal Sports Network v. Jimenez*, 2002 U.S. Dist. Lexis 17709, \*3  
(N.D.Cal.2002). Therefore the Court finds that an enhanced damage award is not  
24 warranted under the statute.

25 *Kingvision Pay Per View, Ltd. v. Ortega* 2002 WL 31855367, 2.

26 Section 605 deals with interception of satellite broadcasts and provides for  
27 damages, in pertinent part:

28 (1) Any person who willfully violates subsection (a) of this section shall be fined not  
more than \$2,000 or imprisoned for not more than 6 months, or both.

(2) Any person who violates subsection (a) of this section willfully and for purposes of direct or indirect commercial advantage or private financial gain shall be fined not more than \$50,000 or imprisoned for not more than 2 years, or both, for the first such conviction and shall be fined not more than \$100,000 or imprisoned for not more than 5 years, or both, for any subsequent conviction.

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

(B) The court—

(i) may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a) of this section;

(ii) may award damages as described in subparagraph (C); and

(iii) shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

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

(I) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

(II) the party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in a sum of not less than \$1,000 or more than \$10,000, as the court considers just, and for each violation of paragraph (4) 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.

(ii) In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its 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.

(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than \$250.

47 U.S.C.A. § 605

In this case, Plaintiff's investigator testified that Lara's Bar had "no satellite dish," and therefore this Court finds that section 605 does not apply.

1        Nevertheless, Plaintiff asks this Court to take note that it is not unheard of for courts  
2 in this circuit to award damages pursuant to both statutes. *Spencer Promotions Inc. v. 5th*  
3 *Quarter Enterprises Inc.*, 1996 WL 438789 (N.D. Cal. 1996) (Judge Wilken). This citation is  
4 to the outcome of a bench trial; the judgments against defaulting defendants were entered  
5 separately and Judge Wilken only ordered entry of judgment including damages under both  
6 statutes after making findings of fact and conclusions of law. That is not the situation here.  
7 This Court finds no justification in this case for awarding damages under both statutes.  
8 Plaintiff alleges that its Program was broadcast via “closed circuit television” (Application for  
9 Default Judgment at 2:15), which presumably was transmitted to Defendants’ bar by cable,  
10 since there was no satellite dish. Plaintiff does not specify how the transmission was  
11 received by Defendants.

12        **4. Certain factors favor enhanced damages.**

13        To determine appropriate statutory awards, Ninth Circuit courts have considered  
14 many factors, and these factors often overlap with the factors for enhancing damages.  
15 *Universal Sports Network, Inc. v. Jimenez*, 2002 WL 31109707 (N.D. Cal. 2002)(Judge  
16 Conti) (considering intent to realize personal gain, repeat offenses, and the extent of the  
17 rebroadcast); *Kingvision Pay-Per-View, Ltd. v. Rivers*, 2000 WL 356378 (N.D. Cal. 2000)  
18 (Judge Breyer) (considering repeat offenses, and awarding the statutory minimum only  
19 where one defendant was already out of business). Some courts will award the minimum  
20 amount automatically if the defendant profited less than \$1,000.00 from pirating the fight.  
21 *Entertainment by J&J, Inc. v. Montecinos*, 2002 WL 1735384 (N.D. Cal. 2002) (Judge  
22 Chesney). Other courts will award anywhere from \$2,000.00 to \$10,000.00 as a starting  
23 point. *Joe Hand Promotions, Inc. v. Dailey*, 2003 WL 1342998 (N.D. Cal. 2003)(Judge  
24 Breyer); *Spencer Promotions Inc., Id.*

25        In this case, there is no evidence of any cover charge or admission charge which  
26 would have led to increased profit, or of any rebroadcast. In fact, Plaintiff’s investigator  
27 testified that he paid no admission charge, no cover charge, presumably no minimum  
28 number of drinks, since he testified that he didn’t order anything from the bartender and stayed only three minutes in the bar. There were 14 people there when he arrived and 16

1 when he left, in a bar that is limited to 50, and it was already the sixth round of the fight.  
2 The Court finds it unlikely that the number of customers increased dramatically after the  
3 investigator left.

4 Plaintiff asks this Court to find that the most important factor in assessing damages  
5 is the deterrent effect of the award. See generally Trademark & Satellite Acts, P.L.-6678,  
6 1988 U.S. Cong. & Admin. News 7, 5577, 5658. Many courts factor deterrence into their  
7 damage enhancement. for Section 605(e)(3)(C)(ii), although it may be more appropriate for  
8 the statutory damage calculation pursuant to Section 605(e)(3)(C)(II). *Joe Hand*  
9 *Promotions, Inc. v. Pete*, 1999 WL 638215 (N.D. Cal. 1999)(Judge Walker) (awarding  
10 \$5,000.00 to deter future transgressions).

11 Plaintiff draws the Court's attention to one case where the enhanced statutory  
12 damages were awarded, based solely on the deterrent effect, at more than three times  
13 what the transgressor would have paid to properly license the event. *Entertainment By J&J,*  
14 *Inc. v. Al-Waha Enterprises, Inc.*, 219 F. Supp. 2d 769, 777 (S.D. Tex. 2002). As noted by  
15 the court in that case, requiring the Defendants "to pay the price it would have been  
16 charged to obtain legal authorization to display the Event does nothing to accomplish this  
17 objective of the statute." *Id.*

18 In sum, based on the summary judgment record, including evidence of a single  
19 unauthorized transmission, the fact that Jenkins observed only seventy-five people  
20 in the establishment during the broadcast, the lack of evidence that Al-Waha  
repeatedly committed such violations and will likely continue to violate the law, and  
EJJ's affidavit in support of damages, the court finds that a statutory award of  
\$15,000 under 47 U.S.C. § 605(e)(3)(C)(i)(II) and (ii) is warranted in this case.

21 219 F.Supp.2d at 777.

22 Accordingly, Plaintiff asks this Court to find in this case that the enhanced statutory  
23 minimum (\$10,000.00) is a necessary baseline amount this Court should consider adopting  
24 to effectively deter parties such as the Defendants from stealing proprietary programming.

25 However, this Court observes that the *Al-Waha Enterprises* case was not a default,  
26 but was decided on a motion for summary judgement, where the defendant had an  
27 opportunity to defend itself. Also, the court only awarded triple the minimum statutory  
28 damages, and did so in a conclusory fashion, employing an analysis that would result in an

1 enhanced award for virtually every violation. This Court concludes that it is not obliged to  
2 accept Plaintiff's argument for enhanced statutory damages based on the *Al-Waha*  
3 *Enterprises* case.

4 Next, Plaintiff requests enhanced damages pursuant to Sections 553(c)(3)(B) and  
5 605(e)(3)(C)(ii). Section 605(e)(3)(C)(ii) advises awarding up to \$100,000.00 where "the  
6 violation was committed willfully and for the purposes of direct or indirect commercial  
7 advantage or private financial gain . . ." Again, this Court notes that section 605 applies to  
8 illegal interception of satellite broadcasts and Plaintiff's own investigator testified that Lara's  
9 Bar had "no satellite dish," so section 605 does not apply here. Section 553(c)(3)(B) will  
10 award an aggrieved Plaintiff up to \$50,000.00. Willfulness has been defined by the  
11 Supreme Court as "disregard for the governing statute and an indifference for its  
12 requirements.." *Cablevision Sys. N.Y. City Corp. v. Lokshin*, 980 F. Supp. 107, 114  
13 (E.D.N.Y. 1997) (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985)).

14 To determine intent for commercial or private gain, 9th Circuit courts often look for  
15 evidence of a cover charge, increased price of food/drinks, advertisements, or the number  
16 of patrons in attendance. *Entertainment By J&J, Inc. v. Perez*, 2000 WL 890819 (N.D. Cal.  
17 2000)(Judge Henderson); *Kingvision Pay-Per-View, Ltd. v. Arias*, 2000 WL 20973 (N.D. Cal.  
18 2000)(Judge Illston). There is no such evidence in this case. Plaintiff's investigator found  
19 no evidence of a cover charge, increased prices for food or drink, or advertisements. All he  
20 says is that there were approximately 14 people in the bar when he arrived at 7:45 p.m.,  
21 during Round Six of the fight being broadcast as part of Plaintiff's program and 16 when he  
22 left, three minutes later, at 7:48. There is no indication whether this was more than the  
23 usual number for that night of the week.

24 Nevertheless, Plaintiff asks this Court to find that such requirements are largely  
25 "illogical and inconsistent with the very nature of the infringing activity," and that commercial  
26 signal pirates are looking to avoid, not attract, detection for their unlawful acts, and have no  
27 financial investment in the programming they are unlawfully exhibiting. This Court finds this  
28 contention to be absurd; if Defendants were seeking to enhance their profits by stealing  
Plaintiffs' broadcast, than surely they would have advertised it.

1 Plaintiff asks this Court to look instead at the act of interception itself rather than  
2 promotion of the event in calculating appropriate damages. For instance in *Al-Waha*, the  
3 plaintiff did not provide evidence of a cover charge or advertisements of the subject fight.  
4 219 F. Supp. 2d at 776. Nevertheless, the court awarded enhanced damages to the  
5 aggrieved party plaintiff. *Id.* at 777. “Based on the limited methods of intercepting  
6 closed-circuit broadcasting of pay-per-view events and the low probability that a  
7 commercial establishment could intercept such a broadcast merely by chance, however,  
8 courts have held conduct such as that of [the Defendants] . . . to be willful and for the  
9 purposes of direct or indirect commercial advantage or private financial gain.” *Id.* at 776.  
10 Plaintiff again cites the *Al-Waha Enterprises* case for the proposition that enhanced  
11 statutory damages of anywhere from \$30,000 to \$100,000 should be awarded in this case.

12 The Court remains unconvinced that this would be appropriate, especially in the  
13 context of a default, where there is no evidence of increased profit to Defendants resulting  
14 from the unlawful broadcast of Plaintiff’s Program, no indication of wilfulness, no evidence  
15 of actual damage to Plaintiff, other than the \$1,200.00 license fee for the Program it would  
16 have received from an establishment of Defendants’ size.

17 Accordingly, this Court concludes that enhanced statutory damages should not be  
18 awarded in the instant action. Plaintiff has met its burden of proof of showing, by affidavit of  
19 its investigator, that Defendants did unlawfully broadcast Plaintiff’s program on one  
20 occasion, constituting a single violation of the pertinent statutes. However, Plaintiff fails to  
21 present any convincing law or evidence which would justify an award of enhanced  
22 damages.

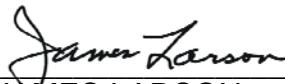
23 **III. Conclusion**

24 Accordingly, this Court recommends that Judgment be entered for Plaintiff in the  
25 amount of \$1,200.00, representing statutory damages for a single violation of 47 U.S.C.  
26 §553(c)(3)(A)(ii). In addition, Plaintiff shall submit a declaration justifying its request for an  
27 award of a specific minimal amount for attorney’s fees and costs, pursuant to 47 U.S.C.  
28 §553(2)(C).

**United States District Court**

For the Northern District of California

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2       Respectfully submitted,  
3 DATED: September 14, 2009  
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JAMES LARSON  
United States Magistrate Judge

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