

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JOE HAND PROMOTIONS, INC.,

Plaintiff,

v.

VAN T. NGUYEN,

Defendant.

Case No.: 5:10-CV-05856 EJD

**ORDER GRANTING MOTION FOR
DEFAULT JUDGMENT**

Plaintiff Joe Hand Promotions, Inc. ("Plaintiff") moves for entry of default judgment in the amount of \$111,100.00 against Defendant Van Nguyen a/k/a Bich T. Nguyen, individually and d/b/a Got Hong ("Defendant"). Plaintiff seeks damages stemming from Defendant's alleged violation of 47 U.S.C. § 605(a) and conversion of Plaintiff's property. The court has considered the moving papers and the oral argument of Plaintiff's counsel presented at the hearing on September 23, 2011. For the reasons discussed below, the motion will be GRANTED.

I. BACKGROUND

A. Procedural history

Plaintiff filed the instant action on December 23, 2010. After Defendant was served with process and failed to respond (Docket No. 11) Plaintiff moved for entry of default and served the motion by mail. (Docket No. 12). The clerk entered default on April 27, 2011. (Docket No. 13). Plaintiff moved for default judgment on June 16, 2011, and has provided proof of service

1 indicating that a copy of the notice and application for default judgment were mailed to Defendant.
2 (Docket No. 20). Defendant did not appear at the hearing.

3 **B. Factual history**

4 Plaintiff is a distributor of sports and entertainment programming. It purchased the rights to
5 broadcast a January 2, 2010 fight between Rashad Evans and Thiago Silva, together with undercard
6 bouts, televised replay, and color commentary (collectively, the “Program”). It then entered into
7 sublicenses with third parties such as casinos, bars, and social clubs, allowing the sublicensees to
8 exhibit the Program to their patrons. The Program was broadcast in interstate commerce by means
9 of an encrypted transmission, and only Plaintiff’s sublicensees were entitled to decrypt that
10 transmission.

11 On the day of the broadcast, Jeff Kaplan (“Kaplan”), an investigator hired by Plaintiff,
12 observed an exhibition of the Program in Got Hong. Defendant was not a sublicensee entitled to
13 exhibit the Program. Kaplan entered the premises without paying a cover charge and observed the
14 Program on four televisions. (Decl. of Affiant at 2). Between 8:45 p.m. and 9:15 p.m., he
15 performed three headcounts, noting the presence of twenty-three, thirty, and thirty-one people by
16 each respective count. (*Id.* at 3). The declaration indicates the capacity of Got Hong as sixty and
17 did not state whether Kaplan observed either a satellite dish or a cable box. (*Id.*)

18 **II. DISCUSSION**

19 Plaintiff seeks \$10,000 in statutory damages pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II),
20 \$100,000 in enhanced damages pursuant to 47 U.S.C. § 605(e)(3)(C)(ii), and \$1,100 in damages
21 for conversion. Plaintiff also alleges that Defendant has violated 47 U.S.C. § 553(a), which
22 provides for statutory damages pursuant to subsection (c)(3)(A)(ii) and enhanced damages pursuant
23 to subsection (c)(3)(B).

24 **A. Whether to apply 47 U.S.C. § 605 or 47 U.S.C § 553**

25 “[U]pon default the factual allegations of the complaint, except those relating to the
26 amount of damages, will be taken as true.” *Geddes v. United Fin. Group*, 559 F.2d 557, 560 (9th
27 Cir. 1977) (citing *Pope v. United States*, 323 U.S. 1 (1944); *Flaks v. Koegel*, 504 F.2d 702, 707 (2d
28 Cir. 1974)). Plaintiff seeks damages pursuant to § 605, which “requires proof that a defendant has

1 ‘(1) intercepted or aided the interception of, and (2) divulged or published, or aided the divulging
2 or publishing of, a communication transmitted by the plaintiff.’” California Satellite Systems v.
3 Seimon, 767 F.2d 1364, 1366 (9th Cir. 1985) (citing National Subscription Television v. S & H
4 TV, 644 F.2d 820, 826 (9th Cir. 1981)). Plaintiff alleges in its complaint that it transmitted the
5 Program, that Defendant unlawfully intercepted the Program, and that Defendant exhibited the
6 Program. (Compl. ¶¶ 9-13.)

7 However, § 605 applies only to intercepted “radio” communications or broadcasts through
8 the air, such as satellite broadcasts. J & J Sports Productions, Inc. v. Man Thi Doan, No. C-08-
9 00324 RMW, 2008 WL 4911223, at *2 (N.D. Cal. Nov.13, 2008) (citing United States v. Norris,
10 88 F.3d 462 (7th Cir. 1996)). The pleadings do not allege that Defendant intercepted a satellite
11 broadcast, and Kaplan does not state that he observed a satellite dish at Got Hong. (Decl. of
12 Affiant). Plaintiff contends that it has been unable to ascertain whether Defendant utilized a
13 satellite dish only because Defendant has refused to answer and appear in the instant case.
14 Nonetheless, the Court may not enter default judgment if the factual allegations in the pleadings are
15 insufficient to establish liability.

16 However, the complaint also asserts a claim under 47 U.S.C. § 553, which “prohibits a
17 person from ‘intercept[ing] or receiv[ing] or assist[ing] in intercepting or receiving any
18 communications service offered over a cable system.’” Man Thi Doan, 2008 WL 4911223 at *2
19 (quoting 47 U.S.C. § 553(a)(1)) (alterations in the original). While Kaplan does not state that he
20 observed a cable box, (Decl. of Affiant), it is undisputed that Defendant intercepted the broadcast
21 by some means, and a cable box is hidden more easily than a satellite dish. Accord J & J Sports
22 Productions, Inc. v. Guzman et al., 3:08-cv-05469-MHP, 2009 WL 1034218, at *2 (N.D. Cal. April
23 16, 2009). Accordingly, Plaintiff’s allegations are sufficient for present purposes to establish
24 Defendant’s liability under § 553(a)(1).

25 **1. Statutory damages pursuant to 47 U.S.C. § 553(c)(3)(A)(ii)**

26 An aggrieved party may recover either actual damages pursuant to § 553(c)(3)(A)(i) or
27 statutory damages pursuant to § 553(c)(3)(A)(ii). A court may award statutory damages of “not less
28 than \$250 or more than \$10,000 as the court considers just.” 47 U.S.C. § 553(c)(3)(A)(ii). While

1 the violation in the instant case does not appear to be particularly egregious, Plaintiff requests the
2 statutory maximum. Plaintiff contends that the maximum award against Defendant is necessary to
3 deter future violations.

4 Plaintiff has presented evidence of the capacity of the establishment as sixty. The
5 establishment served twenty-three, thirty, and thirty-one persons during Kaplan's headcounts, and
6 the Program was shown on four televisions. These factors suggest that maximum damages are
7 unwarranted. The Court finds that an award of \$5,000 is sufficient under the circumstances.

8 **2. Enhanced damages pursuant to 47 U.S.C. § 553(c)(3)(B)**

9 47 U.S.C. § 553(c)(3)(B) provides that in the case of a willful violation for purposes of
10 commercial advantage or private gain, "the court in its discretion may increase the award of
11 damages . . . by an amount of not more than \$50,000." Plaintiff alleges that Defendants'
12 interception of the program was willful and for purposes of commercial advantage or private gain.
13 (Compl. ¶ 13). Facts alleged in the pleadings are binding upon the defaulting party. Geddes, 559
14 F.2d at 560.

15 "Courts in this district have considered several cases involving pirating of closed-circuit
16 sports broadcasts and, absent a showing of egregious wrongdoing, generally have awarded
17 damages slightly over the statutory minimum." J & J Sports Productions, Inc. v. Basto, et al., No. C
18 10-1803, 2011 WL 566843, at 2 (N.D.Cal. Feb. 14, 2011) (citing Universal Sports Network v.
19 Jimenez, 2002 WL 31109707, at *1 (N.D.Cal. Sept. 18, 2002)). Although Plaintiff has brought to
20 the attention of the court another case pending in which similar conduct is alleged, that case was
21 filed after the events at issue in this action and therefore is not particularly probative of the
22 Defendant's willfulness or purpose during the events at issue here. Additionally, in light of the fact
23 that there was no cover charge and the establishment was filled to only half-capacity, the record is
24 unclear whether Defendant made a profit. Thus, the Court concludes that this is not an appropriate
25 situation for the Court to exercise its discretionary authority to impose enhanced damages.

26 **B. Damages for conversion**

27 As a result of Defendant's default, the facts alleged in the pleadings are sufficient to
28 establish that Defendant wrongfully denied Plaintiff ownership of the right to control the exhibition

1 the Program and therefore are sufficient to establish that Defendant is liable for the tort of
2 conversion. See Culp v. Signal Van & Storage, 142 Cal.App.2d Supp. 859, 862 (Cal. App. Dep't
3 Super. Ct.1956). Pursuant to Cal. Civ. Code § 3336, Defendant is liable for the value of the
4 property at the time of the conversion. Accordingly, Plaintiff is entitled to recover the sublicensing
5 fee of \$1,100.

6 **III. CONCLUSION**

7 Plaintiff's motion is granted in part. Plaintiff shall recover \$5,000 in statutory damages
8 pursuant to 47 U.S.C. § 553(c)(3)(A)(ii) and \$1,100 pursuant to Cal. Civ. Code § 3336.

9 IT IS SO ORDERED.

10 Dated: September 30, 2011

11 
12 EDWARD J. DAVILA
13 United States District Judge