

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

J&J SPORTS PRODUCTIONS, INC.,)	Case No.: 12-CV-05766-LHK
)	
Plaintiff,)	ORDER GRANTING MOTION FOR
)	DEFAULT JUDGMENT
v.)	
)	
JESUS CISNEROS ORTIZ, et al.,)	
)	
Defendants.)	

On January 25, 2013, the Clerk of the Court entered default against defendants Jesus Cisneros Ortiz, Maria Cisneros Ortiz, and Ventura Ortiz, individually and doing business as El Alteno (“Defendants”), after Defendants failed to appear or otherwise respond to the Summons and Complaint in this case within the time prescribed by the Federal Rules of Civil Procedure. *See* ECF No. 13. Before this Court is the Motion for Default Judgment filed by J&J Sports Productions, Inc. (“Plaintiff”). *See* Mot. Default J. (“Mot.”), ECF No. 14. Defendants, not having appeared in this action to this date, have not opposed the motion. Pursuant to Civil Local Rule 7-1(b), the Court finds this matter appropriate for determination without oral argument. Accordingly, the hearing and the case management conference set for October 10, 2013, are VACATED. For the reasons discussed below, Plaintiff’s Motion for Default Judgment is GRANTED.

I. BACKGROUND

Plaintiff J&J Sports Productions, Inc. is a sports and entertainment programming

1 distributor, and alleges it secured the domestic commercial distribution rights to broadcast the
2 “Manny Pacquiao v. Juan Manuel Marquez III, WBO Welterweight Championship Fight Program”
3 (the “Program”), which telecast nationwide on November 12, 2011. *See* Compl. ¶ 20, ECF No. 1.
4 Plaintiff then entered into sub-licensing agreements with various commercial entities throughout
5 the United States, wherein it granted limited public exhibition rights to these entities in exchange
6 for licensing fees. *See* Compl. ¶ 21. On November 12, 2011, investigator Mary Gallant observed
7 the Program being displayed at Defendants’ commercial establishment, El Alteno, located in
8 Watsonville, California. *See* Compl. ¶¶ 7-13; Mot. at 2. Plaintiff alleges that Defendants
9 intercepted the Program unlawfully, and intentionally exhibited it for the purpose of direct or
10 indirect commercial advantage. *See* Compl. ¶¶ 23-24.

11 On November 9, 2012, Plaintiff filed this action against Defendants for: (1) violation of the
12 Federal Communications Act of 1934, as amended, 47 U.S.C. §§ 605, *et seq.*; (2) violation of the
13 Cable Television Consumer Protection and Competition Act of 1992, as amended, 47 U.S.C.
14 §§ 553, *et seq.*; (3) conversion; and (4) violation of California Business and Professions Code
15 §§ 17200, *et seq.* *See* ECF No. 1. On November 25, 2012, Plaintiff served Defendants with a copy
16 of the Summons, Complaint, and related documents. *See* ECF Nos. 5, 6, and 7. Pursuant to
17 Federal Rules of Civil Procedure Rule 12(a)(1)(A)(i), Defendants were thereby required to file and
18 serve their responses to Plaintiff no later than December 17, 2012. However, Defendants failed to
19 appear and also failed to file any responsive pleading. *See* Decl. Thomas P. Riley Supp. Pl.’s Appl.
20 Default J. (“Riley Decl.”) ¶ 2, ECF No. 14-2.

21 On January 25, 2013, the Clerk of the Court granted Plaintiff’s request and entered default
22 against Defendants. *See* ECF No. 13. Plaintiff now moves for entry of default judgment pursuant
23 to Rule 55(b) of the Federal Rules of Civil Procedure. *See* ECF No. 14.

24 **II. DISCUSSION**

25 **A. Default Judgment**

26 The Court finds that default judgment is appropriate in the instant case. If a defendant fails
27 to answer a complaint in a timely manner, a plaintiff may move the court for an entry of default
28 judgment. Fed. R. Civ. P. 55(b)(2). The district court’s decision whether to enter a default

1 judgment is discretionary. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (per
2 curiam). When deciding whether a default judgment is warranted, a court may consider the
3 following factors:

4 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's
5 substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at
6 stake in the action[,] (5) the possibility of a dispute concerning material facts[,] (6)
7 whether the default was due to excusable neglect, and (7) the strong policy
8 underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

9 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Generally, default judgments are
10 disfavored because “[c]ases should be decided upon their merits whenever reasonably possible.”
11 *Id.* at 1472.

12 Here, many of the *Eitel* factors favor entry of default judgment. First, Plaintiff will likely
13 be prejudiced if default judgment is not entered. Because Defendants have refused to take part in
14 the litigation, Plaintiff will be denied the right to adjudicate the claims and obtain relief if default
15 judgment is not granted. *See PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D.
16 Cal. 2002). Additionally, there is no indication that Defendants' default is due to excusable neglect
17 or that material facts are disputed since Defendants have not presented a defense or otherwise
18 communicated with the Court. Moreover, though public policy favors decisions on the merits,
19 litigation of the merits is simply not possible in light of Defendants' refusal to litigate.

20 In contrast, Plaintiff's request for maximum statutory damages weighs against granting an
21 entry of default judgment, particularly because the amount requested appears disproportionate to
22 the harm alleged. *See Eitel*, 782 F.2d at 1472. However, given that the Court may address the
23 reasonableness of Plaintiff's request when deciding the question of damages, the Court need not
24 deny default judgment on this factor alone. *See, e.g., Joe Hand Promotions, Inc. v. Mujadidi*, No.
25 11-5570, 2012 WL 3537036, at *3 (N.D. Cal. Aug. 14, 2012) (noting that a request for maximum
26 possible statutory damages “is not enough on its own to bar a default judgment . . . as it may be
27 addressed by the Court in deciding what damages should be awarded, assuming that a default
28 judgment is otherwise appropriate.”).

The second and third *Eitel* factors, involving the merits of Plaintiff's substantive claim and
the sufficiency of the Complaint, warrant a closer analysis by the Court. Although Plaintiff's

1 complaint alleges violations of (1) 47 U.S.C. § 605, (2) 47 U.S.C. § 553, (3) California’s law
2 against conversion, and (4) California Business and Professions Code §17200, Plaintiff’s Motion
3 for Default Judgment only seeks damages under 47 U.S.C. § 605 and for conversion. *Compare*
4 *Compl. at 5-10 with Riley Decl. ¶ 7.*

5 Section 605 of the Federal Communications Act of 1934 “prohibits the unauthorized receipt
6 and use of radio communications for one’s ‘own benefit or for the benefit of another not entitled
7 thereto.’” *DirecTV, Inc. v. Webb*, 545 F.3d 837, 844 (9th Cir. 2008) (citing 47 U.S.C. § 605(a)).
8 “[T]he ‘communications’ protected by § 605(a) include satellite television signals.” *Id.* Section
9 553 of the Cable Television Consumer Protection and Competition Act of 1992, however, prohibits
10 the unauthorized reception or interception of “any communications service offered over a *cable*
11 system, unless specifically authorized to do so” 47 U.S.C. § 553(a)(1) (emphasis added). It
12 follows that, generally, “a plaintiff may not recover under both § 605 and § 553 as it is highly
13 unlikely that a pirate used a satellite dish and a cable box to broadcast a single program
14 simultaneously.” *Mujadidi*, No. 11-5570, 2012 WL 3537036, at *3 (internal citation omitted).

15 Plaintiff states that Defendants violated Section 605 because, “[w]ith full knowledge that
16 the Program was not to be intercepted . . . displayed, and/or exhibited by commercial entities
17 unauthorized to do so, . . . Defendants . . . did unlawfully intercept . . . display, and/or exhibit the
18 Program at the time of its transmission at his commercial establishment” *Compl. ¶ 23.* The
19 declaration of Plaintiff’s investigator, Mary Gallant, affirmatively states that the establishment “has
20 a satellite dish,” and that a “cable box was not visible.” *See Decl. of Affiant*, ECF 14-3. However,
21 Plaintiff fails to state the actual means of signal transmission used, which is necessary to determine
22 whether Plaintiff has sufficiently stated a claim pursuant to either Section 605 or Section 553. *See*
23 *Mot. at 8* (stating “Plaintiff cannot determine the precise means that the Defendants used to receive
24 the Program unlawfully”).

25 When the means of signal transmission used is uncertain, courts have been split on whether
26 to apply Section 553 or Section 605 in the context of a motion for default judgment.¹ The Court

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28 ¹ *Compare, e.g., J&J Sports Prods., Inc. v Ro*, No. 09-02860, 2010 WL 668065, at *3 (analyzing
the defendant’s violation under Section 553, despite an investigator “[not having seen] a cable box
and [having seen] a satellite dish” at the establishment, because “without better homework by the

1 need not resolve this issue here as Plaintiff’s allegations suffice to demonstrate that Defendants
2 violated either Section 553 or Section 605, and both statutes provide a discretionary range of
3 possible damage awards that partially overlap. As discussed in Part II.B, the Court awards Plaintiff
4 damages that fall within both statutory ranges. Therefore, for the purposes of this particular case,
5 any uncertainty as to whether Defendants violated Section 553 or 605 is immaterial; the statutory
6 award in the same amount is equally appropriate in either case. *See G&G Closed Circuit Events,*
7 *LLC v. Castro*, No. 12-01036, 2012 WL 3276989, at *3 (N.D. Cal. Aug. 9, 2012) (finding, in the
8 context of a similar case, that “[a]ny uncertainty as to whether [Defendants] in fact violated Section
9 605 is immaterial in light of the fact that a statutory award in the same amount is equally
10 appropriate in the event [Defendants] actually violated Section 553.”).

11 Finally, the Court finds that default judgment on Plaintiff’s conversion claim is also
12 appropriate in the instant case. The elements of conversion are: (1) ownership of a right to
13 possession of property; (2) wrongful disposition of the property right of another; and (3) damages.
14 *See Tyrone Pacific Int’l, Inc. v. MV Eurychili*, 658 F.2d 664, 666 (9th Cir. 1981) (citing *Hartford*
15 *Financial Corp. v. Burns*, 96 Cal. App. 3d 591, 598 (1979)). Plaintiff properly alleges ownership
16 of the distribution rights to the Program, misappropriation of those rights by Defendants’ unlawful
17 interception, and damages. *See* Compl. ¶¶ 34-37. Therefore, Plaintiff’s allegations regarding
18 liability, which are taken as true in light of the Clerk’s entry of default, are sufficient to entitle
19 Plaintiff to damages.

20 Accordingly, the Court GRANTS Plaintiff’s Motion for Default Judgment.

21 **B. Requests for Relief**

22 Plaintiff requests \$10,000 in statutory damages for violation of 47 U.S.C.
23 § 605(e)(3)(C)(i)(II), and \$100,000 in enhanced damages for willful violation of 47 U.S.C.

24 _____
25 investigator, the Court will not rule out the presence of a cable box”), and *J&J Sports Prods., Inc. v*
26 *Ayala*, No. 11-05437, 2012 WL 4097754, at *2 (N.D. Cal. Sept. 17, 2012) (finding that “[b]ecause
27 sufficient facts have not been alleged” and “Plaintiff [has not] presented any affidavit evidence of a
28 satellite, . . . 47 U.S.C. § 605 does not apply” and instead “[construing] this motion as solely
seeking damages under § 553”), with *G&G Closed Circuit Events, LLC v. Castro*, No. 12-01036,
2012 WL 3276989, at *2 (N.D. Cal. Aug. 9, 2012) (finding that when “there is an insufficient basis
to conclude with certainty which of the two statutes would support an award of statutory damages,”
it is “unsatisfactory” to presume a violation of § 553 as opposed to § 605 where Plaintiff has not
sought damages under § 553).

1 § 605(e)(3)(C)(ii). Mot. at 11, 14. Plaintiff also seeks \$4,200 in conversion damages, the amount
2 Defendants allegedly would have been required to pay had Defendants licensed the Program from
3 Plaintiff. *See* Mot. at 20.

4 While a court must assume that all well-pleaded allegations regarding liability are true once
5 the Clerk of Court enters default, this same presumption does not apply to a plaintiff's request for
6 damages. *See Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977); *see also Pope*
7 *v. United States*, 323 U.S. 1, 12 (1944) ("It is a familiar practice and an exercise of judicial power
8 for a court upon default, by taking evidence when necessary or by computation from facts of
9 record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment
10 accordingly.").

11 1. Statutory Damages

12 Plaintiff requests maximum statutory damages available under Section 605, noting that the
13 court has discretion to award significant damages "even in . . . cases of commercial signal piracy
14 where there has been no egregious circumstance noted[.]" Mot. at 11. Section 605(e)(3)(C)(i)(II)
15 provides that an aggrieved party may recover a sum of not less than \$1,000 and not more than
16 \$10,000 for each violation of § 605(a), as the Court considers just. Section 553(c)(3)(A)(ii) also
17 provides that an aggrieved party may recover a sum up to \$10,000 for each violation, but affords
18 courts discretion to award as little as \$250. "A traditional method of determining statutory
19 damages is to estimate either the loss incurred by the plaintiff or the profits made by the
20 defendants." *Joe Hand Promotions v. Kim Thuy Ho*, No. 09-01435, 2009 WL 3047231, at *1
21 (N.D. Cal. Sept. 18, 2009) (internal quotation marks and citation omitted).

22 Plaintiff submits evidence that a commercial license for the broadcast of the Program would
23 have cost Defendants approximately \$4,200, based on the estimated 150-person capacity of
24 Defendants' commercial establishment. *See* Pl.'s Aff. Supp. Appl. Default J. ("Gagliardi Decl.")
25 ¶ 8, ECF No. 16; *see id.*, Ex. 1 (advertising that to order the *Manny Pacquiao v. Juan Manuel*
26 *Marquez III* fight on November 12, 2011, the rate was \$2,200 for seating up to 100 people and
27 \$4,200 for seating between 100 and 200 people). Additionally, as evidence of Defendants'
28 potential profit, Plaintiff submits evidence that during Plaintiff's investigation of El Altano, there

1 were approximately fifty patrons and there was no cover charge. *See* Decl. of Affiant at 1-2.
2 Because the amount that Defendants made during the alleged unlawful exhibition of the Program is
3 difficult to determine, the Court shall base statutory damages on the cost of the commercial license.

4 Accordingly, the Court finds that Plaintiff is entitled to \$4,200 in statutory damages.

5 **2. Enhanced Damages**

6 Plaintiff also requests enhanced damages pursuant to Section 605(e)(3)(C)(ii). Mot. at 14.
7 This section authorizes the Court to award up to \$100,000, in its discretion, upon finding that the
8 violation “was committed willfully and for purposes of direct or indirect commercial advantage or
9 private financial gain.” In contrast, 47 U.S.C. § 553(c)(3)(B) authorizes the Court discretion to
10 award up to \$50,000.

11 Here, Plaintiff has not submitted any evidence of significant “commercial advantage or
12 private financial gain.” 47 U.S.C. § 605(e)(3)(C)(ii). Plaintiff has presented evidence that
13 Defendants had one television in their commercial establishment that displayed the Program. *See*
14 Decl. of Affiant at 1-2. Plaintiff asserts that there were approximately 50 patrons present. *Id.*
15 However, there is no evidence that Defendants advertised the fight, assessed a cover charge, had a
16 minimum purchase requirement, or had a special premium on food and drink on the night of the
17 fight. *See Kingvision Pay-Per-View, Ltd. v. Backman*, 102 F. Supp. 2d 1196, 1198 n.2 (N.D. Cal.
18 2000) (stating that “[a]n establishment that does not promote itself by advertising the Program,
19 does not assess a cover charge, and does not charge a special premium for food and drinks hardly
20 seems like the willful perpetrators envisioned by the statute’s framers.”); *but cf. J&J Sports Prods.,*
21 *Inc. v. Mosley*, No. 10-5126, 2011 U.S. Dist. LEXIS 56220, at *12-15 (N.D. Cal. Apr. 13, 2011)
22 (awarding \$2,500 in enhanced damages under Section 553, where 17 patrons were present, there
23 was no cover charge).

24 Furthermore, Plaintiff has not submitted evidence that Defendants are repeat offenders,
25 which is another factor that would indicate that Defendants’ actions were willful, and thus justify
26 an award of enhanced damages. *See, e.g., Kingvision Pay-Per-View, Ltd.*, 102 F. Supp. 2d at 1198-
27 1199 (noting that “a higher statutory award may be justified in cases where defendants are repeat
28 offenders who have pirated similar Programs on previous occasions, and who need an especially

1 severe financial deterrent.”). Defendants’ lack of repeated violations leans against a finding of
2 willfulness that would warrant a greater enhanced damages award.

3 In light of these facts, the Court does not agree with Plaintiff that the maximum enhanced
4 damages award is warranted. Although Plaintiff cites to several out-of-district cases to support its
5 request for maximum enhanced damages possible, *see* Mot. at 14-19, Plaintiff has not cited any
6 binding precedent or identified any specific circumstances that justify such a high award.

7 Therefore, the Court GRANTS Plaintiff’s request for enhanced damages, but concludes that
8 an award of \$1,000 is more than adequate and just to compensate Plaintiff for lost profits and to
9 deter Defendants’ future infringement.

10 3. Damages for Conversion

11 Plaintiff also seeks \$4,200 in damages for conversion under California Civil Code § 3336.
12 Mot. at 20. Damages for conversion are based on the value of the property at the time of
13 conversion. *See Tyrone Pac. Intern., Inc.*, 658 F.2d at 666. As noted in Part II.B.1., the
14 commercial license allegedly would have cost Defendants \$4,200. *See* Gagliardi Decl. ¶ 8, ECF
15 No. 16. Thus, Plaintiff’s request is appropriate.

16 Accordingly, the Court finds that Plaintiff is entitled to \$4,200 in damages for conversion.

17 III. CONCLUSION

18 For the reasons discussed above, Plaintiff’s Motion for Default Judgment is GRANTED.
19 Judgment shall be entered in favor of Plaintiff J&J Sports Productions, Inc., and against
20 Defendants Jesus Cisneros Ortiz, Maria Cisneros Ortiz, and Ventura Ortiz, individually and doing
21 business as El Altano. Plaintiff shall recover \$9,400 in total damages.² The Clerk shall close the
22 file.

23 **IT IS SO ORDERED.**

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26 ² Although Plaintiff’s Complaint requests attorney’s fees pursuant to 47 U.S.C. § 553(c)(2)(C) and
27 47 U.S.C. § 605(e)(3)(B)(iii), Compl. at 6-7, Plaintiff’s Motion for Default Judgment does not
28 specifically request these fees and costs, nor does it provide any evidence to support providing such
an award. Thus, the Court declines to award attorney’s fees and costs at this time. If Plaintiff’s
counsel wishes to recover attorney’s fees and costs, he must file an affidavit and supporting
documentation within 30 days of the date of this Order, including a curriculum vitae or resume as
well as billing and cost records to justify such an award.

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Dated: October 7, 2013



LUCY H. KOH
United States District Judge