

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.: 13-CV-02002-LHK
	)	
Plaintiff,	)	ORDER GRANTING MOTION FOR
	)	DEFAULT JUDGMENT
v.	)	
	)	
LEE DUONG, et al.,	)	
	)	
Defendants.	)	

On August 13, 2013, the Clerk of the Court entered default against defendant Lee Duong, individually and doing business as Nha Em (“Defendant”),<sup>1</sup> after Defendant 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. 14. Before this Court is the Motion for Default Judgment filed by J&J Sports Productions, Inc. (“Plaintiff”). *See* Mot. Default J. (“Mot.”), ECF No. 17. Defendant, not having appeared in this action to this date, has 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 January 16, 2014, are VACATED. For the reasons discussed below, Plaintiff’s Motion for Default Judgment is GRANTED.

<sup>1</sup> Plaintiff also named Satom, LLC, an unknown business entity doing business as Nha Em, as a defendant in the Complaint. ECF No. 1. However, Plaintiff and Satom, LLC, reached a settlement and Satom, LLC, was subsequently dismissed from the case. *See* ECF Nos. 9 and 15.

1 **I. BACKGROUND**

2 Plaintiff J&J Sports Productions, Inc. (“Plaintiff”) is a sports and entertainment  
3 programming distributor. Plaintiff alleges it secured the domestic commercial distribution rights to  
4 broadcast the “Floyd Mayweather, Jr. v. Miguel Cotto, WBA Super World Light Middleweight  
5 Championship Fight Program” (the “Program”), which telecast nationwide on May 5, 2012. *See*  
6 Compl. ¶ 16, ECF No. 1. Plaintiff then entered into sub-licensing agreements with various  
7 commercial entities throughout the United States, wherein it granted limited public exhibition  
8 rights to these entities in exchange for licensing fees. *See* Compl. ¶ 17. On May 5, 2012,  
9 investigator Gary Gravelyn observed the Program being displayed at Defendant’s commercial  
10 establishment, Nha Em, located in San Jose, California. *See* Compl. ¶¶ 7-14; Mot. at 2. Plaintiff  
11 alleges that Defendant intercepted the Program unlawfully, and intentionally exhibited it for the  
12 purpose of direct or indirect commercial advantage. *See* Compl. ¶¶ 19-20.

13 On May 1, 2013, Plaintiff filed this action against Defendant for: (1) violation of the  
14 Federal Communications Act of 1934, as amended, 47 U.S.C. §§ 605, *et seq.*; (2) violation of the  
15 Cable Television Consumer Protection and Competition Act of 1992, as amended, 47 U.S.C.  
16 §§ 553, *et seq.*; (3) conversion; and (4) violation of California Business and Professions Code  
17 §§ 17200, *et seq.* *See* ECF No. 1. On June 7, 2013, Plaintiff served Defendant with a copy of the  
18 Summons, Complaint, and related documents. *See* ECF No. 5. Pursuant to Federal Rule of Civil  
19 Procedure 12(a)(1)(A)(i), Defendant was thereby required to file and serve his response to Plaintiff  
20 no later than June 28, 2013. However, Defendant failed to appear and also failed to file any  
21 responsive pleading. *See* Decl. Thomas P. Riley Supp. Pl.’s Appl. Default J. (“Riley Decl.”) ¶ 2,  
22 ECF No. 17-2.

23 On August 13, 2013, the Clerk of the Court granted Plaintiff’s request and entered default  
24 against Defendant. *See* ECF No. 14. Plaintiff now moves for entry of default judgment pursuant to  
25 Rule 55(b) of the Federal Rules of Civil Procedure. *See* ECF No. 17.

26 **II. DISCUSSION**

27 **A. Default Judgment**

28 The Court finds that default judgment is appropriate in the instant case. If a defendant fails

1 to answer a complaint in a timely manner, a plaintiff may move the court for an entry of default  
2 judgment. Fed. R. Civ. P. 55(b)(2). The district court's decision whether to enter a default  
3 judgment is discretionary. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (per  
4 curiam). When deciding whether a default judgment is warranted, a court may consider the  
5 following factors:

6 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's  
7 substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at  
8 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.

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 Defendant has refused to take part in the  
14 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 Defendant's default is due to excusable neglect  
17 or that material facts are disputed since Defendant has 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 Defendant's 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.").

1           The second and third *Eitel* factors, involving the merits of Plaintiff’s substantive claim and  
2 the sufficiency of the Complaint, warrant a closer analysis by the Court. Although Plaintiff’s  
3 complaint alleges violations of (1) 47 U.S.C. § 605, (2) 47 U.S.C. § 553, (3) California’s law  
4 against conversion, and (4) California Business and Professions Code §17200, Plaintiff’s Motion  
5 for Default Judgment only seeks damages under 47 U.S.C. § 605 and for conversion. *Compare*  
6 *Compl. at 4-9 with Riley Decl. ¶ 7.*

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

17           Plaintiff states that Defendant violated Section 605 because, “[w]ith full knowledge that the  
18 Program was not to be intercepted . . . displayed, and/or exhibited by commercial entities  
19 unauthorized to do so, . . . Defendant[] . . . did unlawfully intercept . . . display, and/or exhibit the  
20 Program at the time of its transmission at [his] commercial establishment . . . .” *Compl. ¶ 19.* The  
21 declaration of Plaintiff’s investigator, Gary Gavelyn, states that the establishment “does not have a  
22 satellite dish,” and that a “cable box was not visible.” *See Decl. of Affiant, ECF No. 17-3.*  
23 However, Plaintiff fails to state the actual means of signal transmission used, which is necessary to  
24 determine whether Plaintiff has sufficiently stated a claim pursuant to either Section 605 or Section  
25 553. *See Mot. at 8* (stating “Plaintiff cannot determine the precise means that the Defendant used  
26 to receive the Program unlawfully”).

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

12 Finally, the Court finds that default judgment on Plaintiff’s conversion claim is also  
13 appropriate in the instant case. The elements of conversion are: (1) ownership of a right to  
14 possession of property; (2) wrongful disposition of the property right of another; and (3) damages.  
15 *See Tyrone Pacific Int’l, Inc. v. MV Eurychili*, 658 F.2d 664, 666 (9th Cir. 1981) (citing *Hartford*  
16 *Financial Corp. v. Burns*, 96 Cal. App. 3d 591, 598 (1979)). Plaintiff properly alleges ownership  
17 of the distribution rights to the Program, misappropriation of those rights by Defendant’s unlawful  
18 interception, and damages. *See* Compl. ¶¶ 30-33. Therefore, Plaintiff’s allegations regarding  
19 liability, which are taken as true in light of the Clerk’s entry of default, are sufficient to entitle  
20 Plaintiff to damages.

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

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23 <sup>2</sup> Compare, e.g., *J&J Sports Prods., Inc. v Ro*, No. 09-02860, 2010 WL 668065, at \*3 (analyzing  
24 the defendant’s violation under Section 553, despite an investigator “[not having seen] a cable box  
25 and [having seen] a satellite dish” at the establishment, because “without better homework by the  
26 investigator, the Court will not rule out the presence of a cable box”), and *J&J Sports Prods., Inc. v*  
27 *Ayala*, No. 11-05437, 2012 WL 4097754, at \*2 (N.D. Cal. Sept. 17, 2012) (finding that “[b]ecause  
28 sufficient facts have not been alleged” and “Plaintiff [has not] presented any affidavit evidence of a  
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           **B.       Requests for Relief**

2           Plaintiff requests \$10,000 in statutory damages for violation of 47 U.S.C.  
3           § 605(e)(3)(C)(i)(II), and \$100,000 in enhanced damages for willful violation of 47 U.S.C.  
4           § 605(e)(3)(C)(ii). Mot. at 11, 14. Plaintiff also seeks \$2,200 in conversion damages, the amount  
5           Defendant allegedly would have been required to pay had Defendant licensed the Program from  
6           Plaintiff. See Mot. at 20.

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

14                   **1.       Statutory Damages**

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

25          Plaintiff submits evidence that a commercial license for the broadcast of the Program would  
26          have cost Defendant approximately \$2,200, based on the estimated 50-person capacity of  
27          Defendant's commercial establishment. See Pl.'s Aff. Supp. Appl. Default J. (“Gagliardi Decl.”)  
28          ¶ 8, ECF No. 19; see *id.*, Ex. 1 (advertising that to order the *Floyd Mayweather, Jr. v. Miguel Cotto*

1 fight on May 5, 2012, the rate was \$2,200 for seating up to 100 people and \$4,200 for seating  
2 between 100 and 200 people). Alternatively, as evidence of Defendant’s potential profits, Plaintiff  
3 submits evidence that three separate head counts, at various times, revealed that the total number of  
4 patrons were 9, 9, and 9, and that there was no cover charge. *See* Decl. of Affiant at 1-3. As there  
5 is no evidence of how much Defendant made during the unlawful exhibition of the Program, the  
6 Court shall base statutory damages on the cost of the commercial license.

7 Accordingly, the Court finds that Plaintiff is entitled to \$2,200 in statutory damages.

8 **2. Enhanced Damages**

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

14 Here, Plaintiff has not submitted any evidence of significant “commercial advantage or  
15 private financial gain.” 47 U.S.C. § 605(e)(3)(C)(ii). Plaintiff has presented evidence that  
16 Defendant had one television in their commercial establishment that displayed the Program. *See*  
17 Decl. of Affiant at 2. Plaintiff asserts that there were approximately 9 patrons present during its  
18 investigation of Nha Em. *Id.* at 2-3. However, there is no evidence that Defendant advertised the  
19 fight, assessed a cover charge, had a minimum purchase requirement, or had a special premium on  
20 food and drink on the night of the fight. *See Kingvision Pay-Per-View, Ltd. v. Backman*, 102 F.  
21 Supp. 2d 1196, 1198 n.2 (N.D. Cal. 2000) (stating that “[a]n establishment that does not promote  
22 itself by advertising the Program, does not assess a cover charge, and does not charge a special  
23 premium for food and drinks hardly seems like the willful perpetrators envisioned by the statute’s  
24 framers.”); *but cf. J&J Sports Prods., Inc. v. Mosley*, No. 10-5126, 2011 U.S. Dist. LEXIS 56220,  
25 at \*12-15 (N.D. Cal. Apr. 13, 2011) (awarding \$2,500 in enhanced damages under Section 553,  
26 where 17 patrons were present, there was no cover charge).

27 Furthermore, Plaintiff has not submitted evidence that Defendant is a repeat offender,  
28 which is another factor that would indicate that Defendant’s actions were willful, and thus justify

1 an award of enhanced damages. *See, e.g., Kingvision Pay-Per-View, Ltd.*, 102 F. Supp. 2d at 1198-  
2 1199 (noting that “a higher statutory award may be justified in cases where Defendants are repeat  
3 offenders who have pirated similar Programs on previous occasions, and who need an especially  
4 severe financial deterrent.”). Defendant’s lack of repeated violations leans against a finding of  
5 willfulness that would warrant a greater enhanced damages award.

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

10 Therefore, the Court GRANTS Plaintiff’s request for enhanced damages, but concludes that  
11 an award of \$500 is more than adequate and just to compensate Plaintiff for any lost profits from  
12 having Defendant show the Program on one television to 9 patrons and to deter Defendant’s future  
13 infringement.

### 14 3. Damages for Conversion

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

20 Accordingly, the Court finds that Plaintiff is entitled to \$2,200 in damages for conversion.

### 21 III. CONCLUSION

22 For the reasons discussed above, Plaintiff’s Motion for Default Judgment is GRANTED.  
23 Judgment shall be entered in favor of Plaintiff J&J Sports Productions, Inc., and against Defendant  
24 Lee Duong, individually and doing business as Nha Em. Plaintiff shall recover \$4,900 in total  
25 damages.<sup>3</sup> The Clerk shall close the file.


26 <sup>3</sup> Although Plaintiff’s Complaint requests attorney’s fees and costs pursuant to 47 U.S.C. §  
27 553(c)(2)(C) and 47 U.S.C. § 605(e)(3)(B)(iii), Compl. at 5-6, Plaintiff’s Motion for Default  
28 Judgment does not 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



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**IT IS SO ORDERED.**

Dated: January 8, 2014

  
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LUCY H. KOH  
United States District Judge

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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.