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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOE HAND PROMOTIONS, INC.,

Plaintiff,

v.

ESTEBAN GARCIA PACHECO, *et*
al.,

Defendant.

Case No. 18-cv-1973-BAS-KSC

**ORDER GRANTING IN PART
PLAINTIFF’S MOTION FOR
DEFAULT JUDGMENT**

[ECF No. 12]

Presently before the Court is Plaintiff Joe Hand Promotions, Inc.’s Motion for Default Judgment against Esteban Garcia Pacheco and Alina Santamaria, individually, and d/b/a Birrieria El Primo. (“Mot.,” ECF No. 12.) The Court finds this Motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the reasons stated below, the Court **GRANTS IN PART** Plaintiff’s Motion.¹

I. BACKGROUND

Plaintiff filed a complaint against Defendants Esteban Garcia Pacheco, Alina Santamaria, and d/b/a Birrieria El Primo (“Defendants”) alleging copyright

¹ Plaintiff also filed a motion for leave for permission to file a CD-rom of the videotape of the inside of the Establishment non-electronically. (ECF No. 14.) The Court **DENIES** this request as moot. The CD-rom proffered by Plaintiff is not necessary for the Court’s determination of this Motion.

1 infringement and unauthorized reception of cable service, and unauthorized
2 publication or use of communications. (“Compl.,” ECF No. 1.) On November 3,
3 2018, Plaintiff filed affidavits of service indicating that Defendants Esteban Garcia
4 Pacheco and Alina Santamaria had been served. (ECF Nos. 4, 5.) Plaintiff received
5 a clerk’s entry of judgment, and then filed the Motion for Default Judgment now
6 before the Court.

7 Plaintiff is a Pennsylvania Corporation that promotes and distributes
8 commercial licenses to broadcast certain television events. (Compl. ¶ 5.) Plaintiff
9 claims it is the sole owner of the commercial copyright and distribution rights to a
10 televised match between boxing superstars Floyd Mayweather, Jr., and Conor
11 McGregor, aired live on August 26, 2017 (the “Broadcast”). (*Id.* ¶ 6.) To air the
12 Broadcast, commercial establishments were required to pay Plaintiff a fee and obtain
13 a license. (*Id.* ¶ 25.) Plaintiff also provides access to its programming for non-
14 commercial, private viewing at a significantly discounted price to the commercial
15 license rate schedule. (*Id.* ¶ 26.) The non-commercial option includes copyright
16 language that alerts purchasers that “unauthorized reproduction or distribution of the
17 copyrighted work is illegal.” (*Id.* ¶ 27.) Unscrupulous business owners can usurp
18 Plaintiff’s commercial license requirement by purchasing the private-viewing option
19 and displaying it on monitors in commercial establishments. (*Id.*)

20 Defendants allegedly aired the Broadcast live in their restaurant, Birrieria El
21 Primo. (*Id.* ¶ 28.) Plaintiff claims it never authorized Defendants to exhibit the
22 Broadcast at Defendants’ restaurant, and that Defendants never paid Plaintiff for the
23 commercial rights to the Broadcast.² (*Id.*) Plaintiff also alleges that Defendants
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25 ² Plaintiff discusses the fact that without discovery, it is unable to determine how Defendants gained
26 access to the Broadcast. (Compl. ¶ 30.) It notes that there “are multiple . . . unauthorized methods
27 of accessing the Broadcast,” including splicing a cable line, purchasing a residential pay-per-view
28 license instead of a commercial license, or using a residential-use cable box to access the Broadcast.
(*Id.*) There are also apparently newer methods of streaming the Broadcast made possible by the
advent of social media platforms. (*Id.*) Plaintiff asserts that, regardless of how Defendants acquired
the Broadcast, the fact remains that Defendants did not purchase a commercial license from

1 advertised the Broadcast on social media prior to the airing. (*Id.*) Plaintiff attached
2 three exhibits to its Complaint that appear to be screenshots of Birrieria El Primo’s
3 Facebook page, showing Defendants advertised that the restaurant planned to air the
4 Broadcast. (Exhibit B to Compl., ECF No. 1-3.)

5 **II. LEGAL STANDARD**

6 Federal Rule of Civil Procedure Rule 55 governs the two-step process for
7 obtaining a default judgment. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986).
8 First, Rule 55(a) provides: “When a party against whom a judgment for affirmative
9 relief is sought has failed to plead or otherwise defend, and that failure is shown by
10 affidavit or otherwise, the clerk must enter the party’s default.” Second, after the
11 clerk enters default, a party must seek entry of default judgment under Fed. R. Civ.
12 P. 55(b). The decision whether to grant default judgment pursuant to Rule 55(b) is
13 within the discretion of district courts. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092
14 (9th Cir. 1980). In exercising its discretion to grant or deny a motion for default
15 judgment, the Court considers the following factors:

- 16 (1) the possibility of prejudice to the plaintiff; (2) the merits of
17 plaintiff’s substantive claim; (3) the sufficiency of the complaint; (4) the
18 sum of money at stake in the action; (5) the possibility of a dispute
19 concerning material facts; (6) whether the default was due to excusable
20 neglect; and (7) the strong policy underlying the Federal Rules of Civil
Procedure favoring decisions on the merits.

21 *Eitel*, 787 F.2d at 1471-72.

22 **III. DISCUSSION**

23 **A. Procedural Matters**

24 Plaintiff has satisfied the procedural requirements for default judgment
25 pursuant to Rules 55 and 54(c) of the Federal Rules of Civil Procedure. Both
26 Defendants were personally served with the summons and Complaint and failed to
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Plaintiff but did air the Broadcast in their restaurant, which itself gives rise to Plaintiff’s claims.

1 plead or otherwise defend this action. (ECF Nos. 4, 5.) *See Travelers Cas. & Sur.*
2 *Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9th Cir. 2009) (“A federal court is
3 without personal jurisdiction over a defendant unless the defendant has been served
4 in accordance with Federal Rule of Civil Procedure 4.”) The Court has personal
5 jurisdiction by virtue of Defendants’ personal service. *Burnham v. Superior Court*
6 *of Cal., Cnty. of Marin*, 495 U.S. 684 (1990) (holding that the exercise of personal
7 jurisdiction based on service of process comports with traditional notions of fair play
8 and substantial justice). Finally, the Court has federal question subject matter
9 jurisdiction over this case because it involves federal questions. 28 U.S.C. § 1331.

10 **B. Default Judgment**

11 Before entering default judgment, the Court must review the factors
12 enumerated in *Eitel*.

13 **1. Factors One and Six: Prejudice and Excusable Neglect**

14 The first and sixth *Eitel* factors weigh in favor of granting Plaintiff’s Motion.
15 Plaintiff, who is “likely without other recourse for recovery,” would be prejudiced if
16 this Court denies its motion. *See PepsiCo, Inc. v. Cal. Sec. Cans*, 238 F. Supp. 2d
17 1172, 1177 (C.D. Cal. 2002). Furthermore, Defendants have inexplicably failed to
18 appear in this action. Default judgments are granted more often where the defendant
19 has never appeared in the action and no reasonable excuse for their absence has been
20 proffered. *See, e.g., Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*,
21 840 F.2d 685, 690 (9th Cir. 1988) (finding that default judgment was proper where
22 the defendant had notice of the action and still failed to answer). Plaintiff submitted
23 proof that Defendants were properly served, indicating that Defendants have actual
24 notice of this action. (ECF Nos. 4, 5.) The Court has not received evidence
25 suggesting an excuse for Defendants’ absence.

26 **2. Factors Two and Three: Merits and Sufficiency**

27 The second and third *Eitel* factors address the substantive merits of the claim
28 and the sufficiency of the complaint and are often analyzed together. *See Dr. JKL*

1 *Ltd. v. HPC IT Educ. Ctr.*, 749 F. Supp. 2d 1038, 1048 (N.D. Cal. 2010). The Ninth
2 Circuit has suggested that these factors require that a plaintiff “state a claim on which
3 the [plaintiff] may recover.” *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978).
4 The Court will analyze each of Plaintiff’s legal claims.

5 **a. 47 U.S.C. §§ 553 and 605**

6 47 U.S.C. §§ 553 and 605 deal with two approaches to the same problem.
7 Section 553 prohibits unauthorized interception or receipt of communications via
8 cable service, and section 605 prohibits the same via satellite service. *See J & J*
9 *Sports Prods., Inc. v. Manzano*, No. C-08-1872 RMW, 2008 WL 4542962, at *2
10 (N.D. Cal. Sept. 29, 2008) (“A signal pirate violates section 553 if he intercepts a
11 cable signal, he violates section 605 if he intercepts a satellite broadcast.”). Often,
12 when a plaintiff sues alleging a commercial establishment exhibited protected media
13 such as the Broadcast in the present case, the plaintiff will claim violation of both
14 sections 553 and 605 because he has yet to determine the exact means by which the
15 defendant acquired unauthorized access to the broadcast. *See, e.g., J & J Sports*
16 *Prods., Inc. v. Ro*, No. C 09-2860 WHA, 2010 WL 668065, at *3 (N.D. Cal. Feb. 19,
17 2010). Restaurant owners are liable for unauthorized airings of copyrighted
18 programming merely by virtue of their management powers and vested financial
19 interests in the fruits of such activities. *See J&J Sports Prods. v. Owens*, No. 09-cv-
20 1614 JLS-CAB, 2010 WL 11519395, at *2 (S.D. Cal. Mar. 2, 2010).

21 Upon entry of default, the factual allegations in Plaintiff’s Complaint, except
22 those relating to damages, are deemed admitted. *Televideo Sys., Inc. v. Heidenthal*,
23 826 F.2d 915, 917–18 (9th Cir. 1987). Here, Plaintiff has alleged that Defendants
24 own and operate Birrieria El Primo, that Plaintiff has the exclusive right to distribute
25 the Broadcast to commercial establishments, that Plaintiff did not authorize
26 Defendants to air the Broadcast in their establishment, and that Plaintiffs did in fact
27 air the Broadcast. (Compl. ¶¶ 6, 9, 10–15, 28–30.) This is sufficient to show
28 unauthorized interception or receipt of communications.

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b. Copyright Infringement

“Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright.” 17 U.S.C. § 501(a) (the “Copyright Act”). For Plaintiff to prevail on its claim for copyright infringement, it must prove: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1296 (1991).

On the first prong, Plaintiff alleges that it “is the copyright owner of the exclusive rights of distribution and public performance as to commercial establishments to the Broadcast, including . . . the entire television Broadcast . . . via closed circuit television and via encrypted satellite signal.” (Compl. ¶ 43.) Plaintiff provided an issued copyright registration number to support its claim. (*Id.*); *see United Fabrics Intern., Inc. v. C&J Wear, Inc.*, 630 F.3d 1255 (9th Cir. 2011) (“A copyright registration is ‘prima facie evidence of the validity of the copyright and the facts stated in the certificate.’” (quoting 17 U.S.C. § 410(c)). Accepting the allegations as true, Plaintiff has satisfied the first prong.

Plaintiff further alleges that Defendants advertised the Broadcast on their Facebook page and exhibited the Broadcast in their establishment without a license. (Compl. ¶¶ 46–47.) Accepting the allegations as true, Plaintiff has satisfied the second prong. The merits and sufficiency of the allegations favor entering judgment on Plaintiff’s claim for violation of the Copyright Act.

3. Factor Four: Sum of Money at Stake

The fourth *Eitel* factor examines the amount of money at issue. 782 F.2d at 1471. “[T]he court must consider the amount of money at stake in relation to the seriousness of Defendant’s conduct.” *PepsiCo*, 238 F. Supp. 2d at 1176–77. “The Court considers Plaintiff’s declarations, calculations, and other documentation of damages in determining if the amount at stake is reasonable. Default judgment is disfavored when a large amount of money is involved or unreasonable in light of the

1 potential loss caused by the defendant’s actions.” *HICA Educ. Loan Corp. v. Warne*,
2 No. 11-CV-04287-LHK, 2012 WL 1156402, at *3 (N.D. Cal. Apr. 6, 2012) (citations
3 and internal quotation marks omitted).

4 Here, Plaintiff seeks statutory damages, which are alleged in the Complaint.
5 Although ultimately the amount of statutory damages sought may weigh against
6 entry of default judgment, as discussed below, the Court finds it appropriate to reduce
7 the amount of damages requested by Plaintiff in the Motion. Therefore, this factor
8 does not weigh against granting the Motion.

9 **4. Factor Five: Possibility of Dispute over Material Facts**

10 The fifth *Eitel* factor examines the likelihood that the material facts in the
11 complaint are disputed. 782 F.2d at 1471–72. “Upon entry of default, all well-
12 pleaded facts in the complaint are taken as true, except those relating to damages.”
13 *PepsiCo*, 238 F. Supp. 2d at 1177 (citing *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d
14 915, 917–18 (9th Cir. 1987)). Because Defendants have not answered, there is
15 unlikely to be a dispute of material facts in this case.

16 **5. Factor Seven: Policy Considerations**

17 The seventh *Eitel* factor concerns “the general rule that default judgments are
18 ordinarily disfavored.” 782 F.2d at 1472. “While the public policy favoring
19 disposition of cases on their merits weights against default judgment, that single
20 factor is not enough to preclude imposition of this sanction” on its own. *Rio Props.,*
21 *Inc. v. Rio Intern. Interlink*, 284 F.3d 1007, 1022 (9th Cir. 2002). “Moreover, [a]
22 Defendant’s failure to answer Plaintiff’s Complaint makes a decision on the merits
23 impractical, if not impossible.” *PepsiCo*, 238 F. Supp. 2d at 1177. Thus, while this
24 factor weighs against default, this Court is not precluded from entering default
25 judgment in this action.

26 **6. Weight of the Factors**

27 Based on the foregoing analysis, the Court finds that the *Eitel* factors in favor
28 of granting default judgment outweigh the strong public policy favoring decisions on

1 the merits. The Court **GRANTS** Plaintiff's Motion for Default Judgment on
2 Plaintiff's claims.

3 **C. Damages Calculation**

4 Plaintiff requests a total award of \$75,000 under all alleged statutes, plus costs
5 and attorney's fees. (ECF No. 12-6.) Under Rule 8(a)(3), a plaintiff's demand for
6 relief must be specific, and he "must 'prove up' the amount of damages." *Philip*
7 *Morris USA Inc. v. Banh*, No. CV 03-4043 GAF (PJWx), 2005 WL 5758392, at *6
8 (C.D. Cal. Jan. 14, 2005); *Elektra Entm't Grp., Inc. v. Bryant*, No. CV 03-6371 GAF
9 (JTLx), 2004 WL 783123, at *5 (C.D. Cal. Feb. 13, 2004). Rule 54(c) limits the
10 relief that can be sought in a motion for entry of default judgment to that identified
11 in the complaint. Fed. R. Civ. Proc. 54(c) ("A default judgment must not differ in
12 kind from, or exceed in amount, what is demanded in the pleadings.") Also, as noted,
13 a defaulting defendant is not deemed to have admitted facts concerning damages
14 alleged in the complaint. *PepsiCo.*, 238 F. Supp. 2d at 1177 ("Upon entry of default,
15 all well pleading facts in the complaint are taken as true, except for those relating to
16 damages." (citing *Televideo Sys.*, 826 F.2d at 917-18)).

17 Where the amount of damages claimed is a liquidated sum or capable of
18 mathematical calculation, the court may enter default judgment without a hearing.
19 *Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981). When it is necessary for the
20 plaintiff to prove unliquidated or punitive damages, the court may require plaintiff to
21 file declarations or affidavits providing evidence for damages in lieu of a full
22 evidentiary hearing. *Transportes Aereos De Angola v. Jet Traders Invest. Corp.*, 624
23 F. Supp. 264, 266 (D. Del. 1985).

24 **1. 47 U.S.C. §§ 553 and 605**

25 Under 47 U.S.C. §553(c)(3)(A)(ii), a court may award statutory damages of
26 \$250 to \$10,000 "as the court considers just." Furthermore, if the offense was
27 committed willfully for the purpose of direct commercial advantage, "the court in its
28 discretion may increase the award of damages" to not more than \$50,000.

1 §553(c)(3)(B). Under 47 U.S.C. § 605(e)(3)(C)(i) & (ii), a court may award statutory
2 damages in the amount of \$1,000 to \$10,000 with an additional \$100,000 if the court
3 finds the conduct was willful and for the purpose of direct commercial advantage.

4 “A signal pirate violates section 553 if he intercepts a cable signal [and] he
5 violates section 605 if he intercepts a satellite broadcast. But he cannot violate both
6 by a single act of interception.” *Joe Hand Prods. v. Holmes*, No. 2:12-cv-535-SU,
7 2015 WL 5144297, at *4 (D. Oregon Aug. 3, 2015). Plaintiff recognizes that it
8 cannot recover under both 47 U.S.C. §553 and §605, but, states it “elects” to recover
9 under section 605. (Mot. at 11.) Plaintiff makes it clear it cannot determine whether
10 Defendants intercepted the Broadcast via satellite or cable. As district courts have
11 pointed out in other cases involving this plaintiff, if a plaintiff does not make an
12 adequate showing of which statute was violated, generally the court will opt for the
13 lower limits. *See Holmes*, 2015 WL 5144297, at *4. In this case that would limit
14 damages to \$10,000 in actual damages and \$50,000 in enhanced damages.³

15 The guidelines for measuring statutory damages are not clearly delineated.
16 The Ninth Circuit has mentioned consideration of the nature of the copyright and the
17 circumstances of the infringement. *Peer Intern. Corp. v. Pausa Records, Inc.*, 909
18 F.2d 1332, 1336 (9th Cir. 1990). In addition, whether the act involves a single act of
19 piracy and whether the Defendant is a repeat offender could be significant. Finally,
20 Plaintiff provides evidence of actual damages, that is, the amount of the licensing fee
21 if Defendants had properly licensed the Broadcast (\$3,700) and the potential profit
22 the night of the Broadcast. (\$15.00 cover charge with a capacity for 51 to 100
23 patrons). (ECF No. 12-2, Exhs. A, C, and D.) Ultimately, the amount of damages is
24 up to the Court’s discretion and “a sense of justice.” *Peer Intern. Corp.*, at 1336.

25 A quick review of the cases involving this same Plaintiff and default judgment
26 with similar circumstances demonstrate that the district courts are unanimous in
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28 ³ Although the Court calculates Plaintiff’s damages under section 553, the Court’s analysis would result in the same award under section 605.

1 finding that Plaintiff’s request for the maximum or close to the maximum in statutory
2 damages is unreasonable. *See e.g. Joe Hand Promotions, Inc. v. Streshly*, 655 F.
3 Supp. 2d 1136 (S.D. Cal. 2009) (accusing Plaintiff of reaching for the stars and
4 rejecting the request for \$100,875 in statutory damages); *Joe Hand Prods. v. Holmes*,
5 No. 2:12-cv-535-SU, 2015 WL 5144297 (D. Oregon Aug. 3, 2015) (rejecting request
6 for \$210,800 and granting \$1900); *Joe Hand Promotions, Inc. v. Be*, No. 11-cv-1333
7 LHK, 2011 WL 5105375, at *1 (M.D. Pa. Oct. 26, 2011) (“As it has in countless
8 similar actions filed around the country, plaintiff seeks the maximum statutory
9 damages,” but was awarded \$2,900); *Joe Hand Promotions, Inc. v. Tu Minh Nguyen*,
10 No. 10-cv-3504-LHK, 2011 WL 164 2306 (N.D. Cal. May 2, 2011) (rejecting request
11 for \$100,000 and awarding \$4,925).

12 In this case, the Court considers a variety of factors presented by Plaintiff.
13 Plaintiff points out that legal licensing of this Broadcast would have cost the
14 Defendants \$3,700. (ECF No. 12-2, Exh. A.) Therefore, the Court finds it
15 appropriate to award Plaintiff at least \$3,700 in statutory damages.

16 The Court concurs, however, that simply awarding the licensing fee would be
17 insufficient to deter future violations. Although there is no proof of how many people
18 actually paid the cover charge on the night of the Broadcast, Plaintiff does provide
19 evidence that Defendants charged \$15 per person and that the fire code capacity of
20 the bar was between 51 and 100 people, rendering potential profits of \$765 to \$1,500.
21 (ECF No. 12-2, Exh. C and D.) Therefore, the Court finds it is appropriate to award
22 an enhanced amount since Plaintiff has shown the offense was committed willfully
23 for the purpose of direct commercial advantage. However, the Court notes that the
24 Broadcast only occurred on one night, and there is no evidence that Defendants are
25 repeat offenders. Exercising its discretion, the Court determines that a just award
26 under all the circumstances of this case would be \$5,200. This reflects statutory
27 damages of \$3,700 and enhanced damages of \$1,500.

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1 **2. Copyright Infringement**

2 Similarly, under 17 U.S.C. § 502(a)(1), the Court may award statutory
3 damages in amount between \$750 and \$30,000 “as the court considers just.” And, if
4 the Court finds the violation was done willfully, the Court may award an additional
5 amount not to exceed \$150,000. Assessing all the factors as discussed above, the
6 Court awards an additional \$750 in statutory damages for copyright infringement and
7 declines, in its discretion, to award any enhanced damages under this section.

8 **D. Attorney’s Fees and Costs**

9 Under section 553, the Court may, but is not required to, award costs and
10 attorney’s fees. 47 U.S.C. §553(c)(2)(C). The Court, in its discretion, agrees costs
11 in the amount of \$850 should be awarded in this case. Plaintiff requests an additional
12 amount to cover the costs of the undercover investigation before it filed this
13 Complaint.

14 “Courts have used their discretion to come to different conclusions on the issue
15 of investigative costs.” *Bertram Music Co. v. Yeager Holdings of Calif., Inc.*, No. S-
16 07-1766 LEW GGH, 2008 WL 2055480, at *3 (E.D. Cal. May 6, 2008) (listing
17 cases). This Court agrees with the conclusion in *Bertram Music* “that investigative
18 costs are part of actual damages.” *Id.* Since Plaintiff has elected to seek statutory
19 damages, the Court declines to include investigative costs in the costs awarded in this
20 case.

21 Additionally, the Court will award Plaintiff attorney’s fees in the amount of
22 \$385. Plaintiff requests additional attorney’s fees for “anticipated” time preparing
23 for the hearing on the default motion and “anticipated” time spent appearing in court
24 on this Motion. However, the Court did not require an appearance for this Motion,
25 so declines to award the requested attorney’s fees for any court appearance.


26 **IV. CONCLUSION**

27 For the foregoing reasons, the Court **GRANTS IN PART** Plaintiff’s Motion
28 for Default Judgment (ECF No. 12), **DENIES AS MOOT** Plaintiff’s motion to file

1 a CD-Rom exhibit non-electronically (ECF No. 14), and **ORDERS** the Clerk of the
2 Court to enter judgment in favor of Plaintiff and against both Defendants jointly and
3 severally in the amount of \$5,950, plus \$850 in costs and \$385 in attorney's fees, for
4 a total of \$7,185. The Clerk is directed to close this case.

5 **IT IS SO ORDERED.**

6 **DATED: May 23, 2019**


7 **Hon. Cynthia Bashant**
8 **United States District Judge**

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