

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

**ZUFFA, LLC, d/b/a THE ULTIMATE
FIGHTING CHAMPIONSHIP (UFC),**

Plaintiff,

-against-

THOMAS JOSEPH CATHCART and **MANUEL P.
OLIVAREZ**, Individually, and as officers, directors,
shareholders, and/or principals of OLICAT GROUP
LLC, d/b/a HOOLEY'S TAVERN AND GRILL, a/k/a
HOOLEY'S TAVERN,

and

OLICAT GROUP LLC, d/b/a HOOLEY'S TAVERN
AND GRILL, a/k/a HOOLEY'S TAVERN,

Defendants.

Plaintiff, ZUFFA, LLC, d/b/a THE ULTIMATE FIGHTING CHAMPIONSHIP (UFC),

hereby moves for Default Judgment as follows:

1. Plaintiff is the owner of the distribution rights to the May 29, 2010 UFC #114 Program which was broadcast either by encrypted broadcast signal, closed circuit television or by encrypted satellite signal or broadband. (See Applications for Certificates of Registration attached to the Plaintiff's Affidavit, Appendix 1, page numbers 7-14). Plaintiff thereafter marketed the broadcast to commercial establishments in the State of Texas and elsewhere for a fee. Therefore, for a fee, commercial establishments could legitimately receive the broadcast, enabling them to view the program by contracting with the Plaintiff, or its authorized agent for commercial distribution, Joe Hand Promotions, Inc. The Defendants herein did not purchase the

rights to intercept and exhibit this encrypted boxing match from the Plaintiff or its agent, but intercepted and exhibited same without legal authorization.

2. On any given occasion when an encrypted program is being broadcast, such as a prize fight, independent auditors identify commercial establishments intercepting and exhibiting the program without paying the Plaintiff for the right to do so. In advance, Plaintiff provides the auditors with a list of legal paying locations within Texas and a team of auditors visit any commercial establishment within any particular territory which is not named on the legal list during the time of the transmission of the prize fight. Attached to the Plaintiff's Affidavit, Appendix 1, page numbers 56-58 is a copy of the Affidavit of the witness verifying the exhibition of the UFC program at the establishment listed in the within Motion for Default Judgment. Also included within Appendix 1, page number 59, is a video showing the program being exhibited within defendants' establishment on May 29, 2010.

3. This action was commenced pursuant to 47 U.S.C. §605, *et seq.* Copies of the First Amended Summons and Complaint were served on Defendants, MANUEL P. OLIVAREZ, Individually, and as officer, director, shareholder, and/or principal of OLICAT GROUP LLC, d/b/a HOOLEY'S TAVERN AND GRILL, a/k/a HOOLEY'S TAVERN, and OLICAT GROUP LLC, d/b/a HOOLEY'S TAVERN AND GRILL, a/k/a HOOLEY'S TAVERN, on December 29, 2010 as set forth in the proofs of service which were filed with the Court on January 4, 2011 ECF Document Numbers 11 and 12.

4. The time within which the Defendants may answer or otherwise move with respect to the Complaint herein has expired. The Defendants have not answered or otherwise moved with respect to the Complaint, and the time for the Defendants to do so has not been extended.

5. Said Defendants are not infants or incompetents. Upon information and belief, the Defendants are not presently in the military service of the United States.

6. Said Defendants, MANUEL P. OLIVAREZ, Individually, and as officer, director, shareholder, and/or principal of OLICAT GROUP LLC, d/b/a HOOLEY'S TAVERN AND GRILL, a/k/a HOOLEY'S TAVERN, and OLICAT GROUP LLC, d/b/a HOOLEY'S TAVERN AND GRILL, a/k/a HOOLEY'S TAVERN, are indebted to the Plaintiff in the following manner:

Plaintiff is the owner of the distribution rights to the May 29, 2010 UFC #114 Program which was broadcast either by encrypted broadcast signal, closed circuit television or by encrypted satellite signal or broadband. Pursuant thereto, plaintiff entered into subsequent agreements with various entities in the State of **Texas**, allowing them to publicly exhibit the program to their patrons. Plaintiff thereafter marketed the broadcast to commercial establishments in the State of Texas and elsewhere for a fee. Therefore, for a fee, commercial establishments could legitimately receive the broadcast, enabling them to view the program by contracting with the Plaintiff or its authorized agent.

In order for a commercial establishment to obtain lawful authority to exhibit the Program, a license would have to be issued by Plaintiff or its exclusive commercial distributor, Joe Hand Promotions, Inc.

Defendants, and/or its/their agents, servants, workmen or employees, with full knowledge that said closed circuit program was not to be received and/or exhibited by entities unauthorized to do so, did, at the time of its transmission, exhibit the closed circuit program at its principal places of business willfully, and for purposes of direct or indirect commercial advantage or private financial gain and with the intent of willfully defrauding the Plaintiff of revenue.

As a result thereof, Plaintiff was damaged as follows:

STATUTORY CLAIMS

A. Your deponent indicates to the court that, pursuant to 47 U.S.C., § 605 (e)(3)(C)(i)(II), Defendants are indebted to the Plaintiff for the unlawful exhibition for commercial advantage of the closed circuit television signal of the UFC #114 program on May 29, 2010, in the sum of \$10,000.00. See Subscription Television of Greater Washington v Kaufman, B.C., D.C. 606 F. Supp. 1540 (1985); International Cablevision, Inc. v. Sykes, 997 F. 2d 998 (2nd Cir. 1993).

B. In addition, the Plaintiff is entitled to the maximum statutory damage amount of \$100,000.00 for the intentional unlawful interception of the closed circuit television signal of the UFC #114 program on May 29, 2010, pursuant to 47 U.S.C. §605(e)(3)(C)(ii).

(1) The defaulting Defendants willfully and knowingly violated said federal statute. Their actions in purposely defrauding the Plaintiff were affirmative and could only have been accomplished by overt acts done to avoid paying the legal subscription rate for a commercial establishment.

(2) The fact that the exhibition of the event was witnessed by the Auditor in Defendant commercial establishment demonstrates that it was a *de facto* illegal showing, as said establishment was not a legal subscriber to Plaintiff's programming.

(3) Defendants' overt acts included one or more of the following four scenarios:
use of illegal deciphering chip (descrambler) in a satellite receiver; possession of a pirate cable box commonly known as a "black box"; registering the commercial establishment as a residential account instead of a commercial account; or ordering the event for their residence and moving

their residential box to the commercial location.

(4) Any of the above mentioned acts were intentional and were done for commercial financial gain and all required scheming and overt acts justifying the imposition of the maximum statutory damages.

(5) Based on the foregoing, Plaintiff respectfully requests that statutory damages in an amount of up to \$100,000.00 be awarded against each defaulting Defendant as allowed under 47 U.S.C. § 605(e)(3)(c)(i)(II) and (e)(3)(C)(ii).

7. Plaintiff requests judgment by default on each cause of action against each Defendants, jointly and severally, as follows:

Against, MANUEL P. OLIVAREZ, Individually, and as officer, director, shareholder, and/or principal of OLICAT GROUP LLC, d/b/a HOOLEY'S TAVERN AND GRILL, a/k/a HOOLEY'S TAVERN, a total award of TWENTY SEVEN THOUSAND SEVEN HUNDRED TEN DOLLARS AND NO (\$27,710.00);

and

Against, OLICAT GROUP LLC, d/b/a HOOLEY'S TAVERN AND GRILL, a/k/a HOOLEY'S TAVERN, a total award of TWENTY SEVEN THOUSAND SEVEN HUNDRED TEN DOLLARS AND NO (\$27,710.00);

8. The Judgments requested herein are for a sum certain in the discretion of the Court and therefore no inquest is necessary.

9. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, there is no just reason for delay in these default judgments as the interest of justice require the issuance of judgment as requested without further delay.

10. We respectfully ask the Court to accept the following statutory authority for the

damage requested.

I. APPLICABLE STATUTORY AUTHORITIES

1. Plaintiff respectfully submits that the statutory authority for the request of damages is calculated as follows:

2. Plaintiff seeks damages pursuant to 47 U.S.C. §605 (e)(3)(C)(ii), which states as follows:

In any case which the court finds that the violation was committed wilfully 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 \$ 100,000.00 for each violation of subsection (a).

3. Subsection (a) as referred to above, prohibits the unauthorized reception (“interception”) and divulgence (“publication/dissemination”) of said broadcast.

4. Plaintiff also seeks the same award of damages as authorized by 47 U. S. C. §605 (e)(3)(C)(i)(II), which provides as follows:

the party aggrieved may recover an award of statutory damages for each violation of subsec. (a) of this section involved in the action in a sum of not less than \$ 1,000.00 or more than \$10,000, as the court considers just, and for each violation of paragraph (4) of this subsection involved in this 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.

5. Paragraph (4) as referred to above prohibits the “modification” of equipment used to assist in the reception of broadcasts such as that presently before this Court.

6. In sum, plaintiff seeks recovery from these defendants upon the following authorities:

FOR VIOLATION OF 47 U.S.C. §605 (a) “INTERCEPTION & PUBLICATION”

- A. 47 U. S. C. §605 (e)(3)(C)(ii)- Statutory award increase of up to \$100,000.00

FOR VIOLATION OF 47 U.S.C. §605 (e)(4) “MODIFICATION”

- A. Statutory damages of up to \$100,000.00.

AUTHORITY FOR STATUTORY AWARD

7. In Time Warner Cable of New York City, v. Ivan Olmo, 977 F. Supp. 585 (E.D.N.Y. 1997), Judge Trager adopted the recommendation of Magistrate Judge Levy that he award increased statutory damages.
8. The Olmo decision concerns claims against Mr. Olmo for which he admitted violations of both statutes being litigated herein. Although dealing with his admitted modification of two devices, the court increased the damage award pursuant to statute against the defendant by holding as follows:

In addition, the court may draw an inference of willfulness from a defendant’s failure to appear and defend an action in which the plaintiff demands increased statutory damages based on allegations of willful conduct. Fallaci v. The New Gazette Literary Corp., 568 F. Supp. 1172, 1173 (S.D.N.Y. 1983) (inferring willfulness from Defendant’s default in a copyright infringement case).

Olmo at 589.

9. It is respectfully submitted that, Defendants’ default must be deemed an admission of the facts alleged in the complaint. Greyhound Exhibitgroup v. E.L.U.L. Realty Group, 973 F.2d 155 (2nd Cir. 1992), Twist & Shout Music v. Longneck Xpress, N.P., 441 F. Supp. 2d 782, 2006 U.S. Dist. LEXIS 43898 (E.D. Tex. 2006). Given Defendants’ failure to answer the complaint, “the court has the authority to accept all well-pleaded facts in plaintiff’s complaint as true and to award the relief sought by Plaintiff.” J&J Sports Productions, Inc. v. El

Bocadito, Inc. et al., 2010 U.S. Dist. LEXIS 56677 (S.D.TX, June 8, 2010). Furthermore, in accordance with D.C. Comics, Inc., v. Mini Gift Shop, 912 F. 2d 29 (2d Cir. 1990), the burden of proof shifts to the defendant once he admits the allegations contained in the complaint by his default, Fed. R. Civ. P. 8 (d); *see also* 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2688 at 444 (2d ed. 1983)

10. This rationale has been adopted by the Second Circuit as it interpreted the analogous copyright law 17 U.S.C. §101, *et seq.* DC Comics, Inc., *supra*.

11. In this vein, Courts have considered this factor as in a copyright infringement action to justify the awarding of enhanced damages against a defaulting defendant. In BMI, Inc., v. R Bar of Manhattan, Inc., 919 F. Supp. 656 (S.D.N.Y. 1996), Magistrate Grubin, in recommending an enhanced damage award, wrote the following:

an award of statutory damages totaling \$ 12,000 (\$ 1,500 per song) is appropriate to compensate the copyright owners herein and to provide a deterrent for defendants and other would-be infringers. That sum is approximately five times what BMI license fees would have been plus plaintiffs' investigative expenses. That multiple of license fees is at the upper range of statutory damage awards in similar cases and ***is high enough to deter others from calculating that it would be cheaper to violate the copyright laws than to obtain an appropriate license agreement*** (emphasis ours).

BMI at 660.

12. This is the exact argument presented to this Court. Plaintiff requests that it be granted an award pursuant to statute which not only acts as restitution for the wrongs perpetrated upon its rights by the defendant, but, also to deter similar piracy in Texas and elsewhere. This very argument was specifically made by Judge Chin in Cablevision Systems New York City Corporation v. Fascitti, 1996 U. S. Dist. LEXIS 1212 at *6; 38 U. S. P. Q. 2d (BNA) 1156

(S.D.N.Y. Feb. 7, 1996), wherein the Court insightfully opined as follows:

In light of the nature of the violation alleged in this case, however, I find that a higher award is necessary to deter future violations of the communications law. Faschetti's violation was willful and flagrant, and his failure to appear in the action illustrates his indifferent attitude toward the communications law, (citation omitted). In addition it is likely that Faschetti's interception cost Cablevision more than simply the fees it would have received if those in the tavern had purchased the right to view the fight legitimately. Many non-subscribers may feel no need to subscribe to Cablevision when they can access programming such as pay-per-view at commercial establishments.

13. Likewise, the Court in Entertainment by J&J, Inc. v. Al-Waha Enterprises, Inc., 219 F. Supp. 2d 769, 2002 U.S. Dist. LEXIS 16247 (S.D. Tx. 2002), noted that deterrence is one of the goals of 47 U.S.C. §605 and that to require the offending establishment to pay the price it would have paid had it legally contracted to exhibit the event "would do nothing to accomplish this objective of the statute." Id. at 776. The Court further addressed willfulness in its opinion, awarding enhanced damages:

Based on the limited methods of intercepting closed circuit broadcasting of pay-per-view events and the low probability that a commercial establishment could intercept such a broadcast merely by chance, however, courts have held conduct such as that of [defendant] in this case to be willful and for the purposes of direct or indirect commercial advantage or private financial gain.

Id. at 776 (citations omitted).

14. The Court further noted that "willfulness has been defined by the Supreme Court as 'disregard for the governing statute and an indifference for its requirements.'" Cablevision Sys. N.Y. City Corp. v. Lokshin, 980 F. Supp. 107, 114 (E.D.N.Y. 1997) (*quoting* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 126, 83 L. Ed. 2d 523, 105 S. Ct. 613 at 613027 (1985)). As such, the court awarded Plaintiff \$15,000 in enhanced damages.

In a recent Decision within the Southern District, Judge Rosenthal awarded \$10,000.00 in statutory damages and an additional \$50,000.00 in enhanced damages. See Joe Hand Promotions, Inc. v. Rodriguez, et al, Civ. No. H-07-1542 (S.D.TX, October 29, 2007). Therein the Judge listed several factors it considered in granting the maximum statutory award including the following: the record established that defendant broadcast the event and failed to appear in the suit; the record established the use of an unlawful device, making the violations willful; the difficulty in detecting unlawful interception, the widespread problem of piracy, the projected loss to plaintiff, and the need for an award sufficient to deter future piracy by the defendant and others. Id. In addition, Judge Rosenthal granted enhanced damages in the amount of \$50,000.00 as he found the violation was committed willfully and for the purpose of direct or indirect commercial advantage or private financial gain based upon the following: the record showed the establishment contained seating for approximately 100 people and approximately 27 people were present.

In a recent Decision within the Western District of Louisiana, Judge James T. Trimble, Jr., awarded \$10,000.00 in statutory damages and an additional \$50,000.00 in enhanced damages as well as costs and attorneys fees. See J&J Sports Productions, Inc. v. Papania, et al, 2010 U.S. Dist. LEXIS 29154 W.D. LA, March 26, 2010). Therein, the record showed that the defendant exhibited the program without authority to approximately 58 patrons.

15. Furthermore, as the Court in Time Warner Cable of New York City v. Googies Luncheonette, 77 F. Supp.2d 485, 487 (S.D.N.Y. 1999), opined, “[s]ignals do not descramble spontaneously, nor do television sets connect themselves to cable distributions systems.” Such deliberate and willful misconduct must have dire consequences.

16. This is the exact form of market erosion Plaintiff, Zuffa, LLC,

has, and continues to suffer in the commercial pay-per-view market due to piracy.

17. It is clear, as discussed above, the copyright law, 17 U.S.C. §101, *et seq.*, is analogous to 47 U.S.C. §605, so much so that actions have been brought under both laws. Top Rank, Inc. v. Allerton Lounge, Inc., 1998 U. S. Dist. LEXIS 2394 (S.D.N.Y. 1998).

18. We respectfully request that judgment be entered in favor of Plaintiff and against Defendants in the manner stated herein.

WHEREFORE, Plaintiff, ZUFFA, LLC, d/b/a THE ULTIMATE FIGHTING CHAMPIONSHIP (UFC), requests that the default of the Defendants be noted and that judgment be entered in favor of Plaintiff and against the Defendants in the manner stated herein.

Dated: March 9, 2011
Ellenville, NY 12428

**ZUFFA, LLC d/b/a THE ULTIMATE
FIGHTING CHAMPIONSHIP (UFC)**

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