

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF TEXAS
 EL PASO DIVISION

Filed 11-15-07
 Clerk, U. S. District Court
 Western District of Texas
 By [Signature]
 Deputy

**J & J SPORTS PRODUCTIONS, INC.,
 as Broadcast Licensee of the February
 25, 2006 Mosley/Vargas Program,**

Plaintiff,

**v.
 PEI CHUAN KUO, PEI HENG LIU, and
 YUNG PO LIU, Individually, and as
 officers, directors, shareholders, and/or
 principals of ANDALE RESTAURANT,
 INC. dba ANDALE MEXICAN GRILL
 aka ANDALE aka ANDALE’S, and
 ANDALE RESTAURANTS, INC. dba
 ANDALE MEXICAN GRILL aka
 ANDALE aka ANDALE’S,**

Defendants.

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EP-07-CA-075-FM

MEMORANDUM OPINION AND ORDER:
(1) STRIKING DEFENDANT KUO AND ANDALE’S ANSWER;
(2) GRANTING PLAINTIFF’S MOTION FOR DEFAULT JUDGMENT
AGAINST DEFENDANTS KUO AND ANDALE; AND
(3) AWARDING DAMAGES

Before the Court is Plaintiff J&J Sports Productions, Inc.’s (“Plaintiff”) “Motion for Default Judgment” [Rec. No. 21], filed through counsel in this cause on September 10, 2007. Therein, Plaintiff asks the Court to enter a default judgment against the remaining defendants in this case, namely, Pei Chuan Kuo (“Kuo”) and Andale Restaurants, Inc. d/b/a Andale Mexican Grill aka Andale aka Andale’s (“Andale”).¹ To date, neither Kuo nor Andale have filed a response to Plaintiff’s Motion for Default Judgment. Also before the Court is Kuo and Andale’s “Original Answer of Defendants Pei Chuan Kuo and Andale Restaurants, Inc.” (“Answer”) [Rec.

¹ In an Order [Rec. No. 25] dated September 19, 2007, the Court accepted Plaintiff’s Notice of Partial Dismissal as to defendants Pei Heng Liu and Yung Po Liu and dismissed them from this lawsuit.

No. 26], filed through counsel on September 20, 2007, after the Clerk's Entry of Default [Rec. No. 24] on September 17, 2007. For the reasons discussed below, the Court finds that, by virtue of the Clerk's Entry of Default against them, Kuo and Andale had no right to file their Answer. The Court will accordingly strike their Answer from the record in this cause. There being no motion to set aside the Clerk's Entry of Default and no response from Kuo and Andale to Plaintiff's Motion for Default Judgment, the Court will also grant Plaintiff the relief it seeks by entering a default judgment against Kuo and Andale and awarding damages.

I. BACKGROUND

The record shows Plaintiff initiated this lawsuit on February 27, 2007, by filing its Complaint [Rec. No. 2]. Plaintiff states it had the contractual right to distribute the February 25, 2006 Mosley/Vargas boxing match ("the Program") via closed circuit television and encrypted satellite signal. Plaintiff alleges it entered agreements with various entities within the State of Texas allowing the entities to exhibit the Program to their patrons. Plaintiff contends it had no such agreement with the defendants named in its Complaint. Plaintiff further alleges the defendants unlawfully intercepted and/or de-scrambled the satellite signal and then exhibited the Program for their patrons for direct or indirect commercial advantage or private financial gain. Plaintiff asserts the defendants' alleged conduct gives rise to a private federal cause of action under 47 U.S.C. § 605(a), which prohibits the unauthorized publication or use of communications.

On May 15, 2007, Plaintiff filed executed affidavits of service regarding all four defendants named in its Complaint [Rec. Nos. 11-14]. Therein, Plaintiff's process server affirmed that he personally served each of the four defendants with Summons and a copy of the Complaint on April 9, 2007. The defendants accordingly had twenty days, or until April 30,

2007, to file a timely answer.² Although it was untimely by one day, defendants Yung Po Liu and Pei Heng Lui filed their “Original Answer” [Rec. No. 9] on May 1, 2007, without objection from Plaintiff. Despite evidence showing that they were also served on April 9, 2007, Kuo and Andale did not file an answer by or remotely near the deadline established by the applicable rules of federal procedure.

On September 10, 2007, Plaintiff filed a Notice of Partial Dismissal (“Notice”) [Rec. No. 22], informing the Court that it wished to dismiss its lawsuit without prejudice as to defendants Yung Po Liu and Pei Heng Lui, pursuant to Federal Rule of Civil Procedure 41(a)(2).³ On the same day, Plaintiff filed a request for the Clerk’s Entry of Default and a Motion for Default Judgment [Rec. No. 21] against Kuo and Andale.

In the Motion for Default Judgment, Plaintiff asserts Kuo and Andale are jointly and severally liable to it. Plaintiff asks for the following in damages against Kuo, individually: (1) up to ten thousand dollars (\$10,000.00) under 47 U.S.C. § 605(e)(3)(C)(i)(II); (2) up to one hundred thousand dollars (\$100,000.00) under 47 U.S.C. § 605(e)(3)(C)(ii) for his allegedly willful violation of 47 U.S.C. § 605(a); and (3) full costs and attorney’s fees associated with prosecuting this lawsuit, pursuant to 47 U.S.C. § 605(e)(3)(B)(I). Plaintiff seeks the same amount of damages from Andale. Plaintiff supports each request through the Affidavit of Joseph

² See FED. R. CIV. P. 12(a)(1)(A) (stating that unless a different time is prescribed by federal statute a defendant shall serve an answer within twenty days after being served with the summons and complaint); FED. R. CIV. P. 6(a) (setting forth the method for calculating time under the Federal Rules of Civil Procedure); see also FED. R. CIV. P. 5(b)(2)(A) (describing service by personal delivery). Because Plaintiff personally served the defendants, see FED. R. CIV. P. 5(b)(2)(A), rather than serving them by means provided for in Rules 5(b)(2)(B), 5(b)(2)(C), or 5(b)(2)(D), the defendants were not entitled to extend the period for filing an answer by three additional days. See FED. R. CIV. P. 6(e) (adding three days to the prescribed period for action when service is made by means set forth in Federal Rule of Civil Procedure 5(b)(2)(B), 5(b)(2)(C), or 5(b)(2)(D)).

³ See *supra* text accompanying note 1.

Gagliardi (“Gagliardi”),⁴ its President, and the Piracy Affidavit of investigator Luis R. Navedo (“Navedo”),⁵ as well as through the Affidavit of Julie Cohen Lonstein (“Lonstein”),⁶ Plaintiff’s counsel.

The Clerk made his Entry of Default as to Kuo and Andale on September 17, 2007. Thereafter, on September 20, 2007, Kuo and Andale filed their Answer [Rec. No. 26]. As noted previously, to date, Kuo and Andale have not attempted to set aside the entry of default and there is no response on file to Plaintiff’s Motion for Default Judgment.

II. APPLICABLE LAW

A. *Entry of Default Pursuant to Federal Rule of Civil Procedure 55(a)*

“When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by [the Federal Rules of Civil Procedure] and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party’s default.”⁷ Once the Clerk enters a default against a defendant pursuant to Federal Rule of Civil Procedure 55(a), that entry cuts off the defendant’s right to file any document other than a motion to set aside the entry of default, pursuant to Federal Rule of Civil Procedure 55(c).⁸ To set aside an entry of default, the defendant must either show that: (1) the Clerk incorrectly found the defendant to be in

⁴ Pl.’s Mot. for Def. J., Rec. No. 21-2, (Gagliardi Aff.).

⁵ Pl.’s Mot. for Def. J., Rec. No. 21-2, Ex. C (Navedo Aff.).

⁶ Pl.’s Mot. for Def. J., Rec. No. 21-3 (Lonstein Aff.).

⁷ FED. R. CIV. P. 55(a).

⁸ *See New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996) (explaining that the entry of default cuts off the defendant’s right to file any other document other than a motion for relief from the default); *Greyhound Exhibitgroup v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 160-61 (2d Cir. 1992) (discussing the repercussions of default); *see also* FED. R. CIV. P. 55(c) (permitting a district court to set aside an entry of default upon the defaulting defendant’s showing of good cause).

default;⁹ or (2) although the Clerk's entry of default was proper, "good cause" (as defined in Rule 55(c) and applicable case law) exists for setting aside the entry of default.¹⁰ In addition, the defendant must attach the pleadings he proposes to file if the Court grants his motion.¹¹

B. Entry of Default Judgment Pursuant to Federal Rule of Civil Procedure 55(b)

Federal Rule of Civil Procedure 55(b) provides two means by which a plaintiff may obtain an entry of default judgment.¹² The plaintiff may apply to the Clerk or the court for the entry of default judgment when the defendant has defaulted by failing to appear; the defendant is not an infant or incompetent person; and the plaintiff's claim is for a sum certain or for a sum which can be made certain by computation.¹³ In all other cases, the party entitled to a judgment by default must apply to the court.¹⁴ Rule 55(b) gives the court discretion to convene an evidentiary hearing on the issue of damages.¹⁵ The court should hold an evidentiary hearing to ascertain the amount of damages where those damages are unliquidated or incapable of

⁹ See FED. R. CIV. P. 55(a) (stating the prerequisites for entry of default).

¹⁰ See *CJC Holdings v. Wright & Lato*, 979 F.2d 60, 64 (5th Cir. 1992) (noting the factors a court considers when adjudicating a motion to set aside an entry of default); *Merrill Lynch Mortg. Corp. v. Narayan*, 908 F.2d 246, 252 (7th Cir. 1990) ("Under Rule 55(c), a district court may set aside its ruling prior to entry of default judgment if the party seeking vacation of the order presents the following: 'good cause for their [sic] default; (2) quick action to correct it; and (3) a meritorious defense to the plaintiff's complaint.'"); see also FED. R. CIV. P. 55(c).

¹¹ *Brown*, 84 F.3d at 143.

¹² FED. R. CIV. P. 55(b).

¹³ FED. R. CIV. P. 55(b)(1).

¹⁴ FED. R. CIV. P. 55(b)(2).

¹⁵ See FED. R. CIV. P. 55(b)(2) ("If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper....").

mathematical calculation.¹⁶

III. DISCUSSION

A. *Default*

The record shows that the Clerk made an entry of default as to Kuo and Andale on September 17, 2007. Kuo and Andale therefore had no right to file any document other than a motion to set aside the entry of default.¹⁷ The Court will accordingly direct the Clerk to strike their Answer from the record in this cause.

Turning now to Plaintiff's Motion for Default Judgment, the Court finds that the allegations in Plaintiff's Complaint, taken as true, are more than sufficient to establish a violation of 47 U.S.C. § 605(a). There being an entry of default, no motion to set that entry of default aside, and no response to Plaintiff's Motion for Default Judgment on file, the Court will therefore grant Plaintiff's request and enter default judgment against Kuo and Andale pursuant to Federal Rule of Civil Procedure 55(b). A default judgment being a judgment on the merits that conclusively establishes a defendant's liability, the Court now considers the amount of damages it should award Plaintiff against Kuo and Andale.¹⁸

¹⁶ See *James v. Frame*, 6 F.3d 307, 310 (5th Cir. 1993) ("As a general proposition, in the context of a default judgment, unliquidated damages normally are not awarded without an evidentiary hearing. That rule, however, is subject to an exception where the amount claimed is a liquidated sum or one capable of mathematical calculation."); *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979) ("The law is clear that a judgment by default may not be entered without a hearing unless the amount claimed is a liquidated sum or one capable of mathematical calculation.").

¹⁷ *Brown*, 84 F.3d at 143; *Greyhound Exhibitgroup*, 973 F.2d at 160-61.

¹⁸ *United States v. Shipco General, Inc.*, 814 F.2d 1011, 1014 (5th Cir. 1987). "After a default judgment, the plaintiff's well-pleaded factual allegations are taken as true, except regarding damages." *Id.*; *Nishimatsu Construction Co. v. Houston National Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). Here, Plaintiff alleges Kuo is an officer, shareholder, and/or principal of Defendant Andale and had supervisory capacity and control over the activities occurring within Defendants' establishment on February 25, 2006. Pl.'s Compl., Rec. No. 2, at ¶¶ 9-10. Thus, Kuo and Andale are jointly and severally liable for the Court's single award of damages attributable to the violation of section 605 found in this case. *Cnty. Tv Sys. v. Caruso*, 284 F.3d 430, 436 (2d Cir. 2002) ("[W]e think section 605 is sensibly

B. Award of Damages

Title 47 U.S.C. § 605 prohibits the unauthorized publication or use of communications; section 605(a) delineates the specific practices the statute renders unlawful.¹⁹ Section 605(e) imposes various penalties for individuals or entities who violate § 605(a).²⁰

Here, Plaintiff specifically seeks damages under 47 U.S.C. § 605(e)(3)(C)(i)(II) and 47 U.S.C. § 605(e)(3)(C)(ii). Title 47 U.S.C. § 605(e)(3)(C)(i)(II) permits the aggrieved party to “recover an award of statutory damages for each violation of subsec. (a) involved in the action in a sum of not less than \$1,000 or more than \$10,000, as the court considers just”²¹ Title 47 U.S.C. § 605(e)(3)(C)(ii) provides,

[i]n any case in which the court finds that the violation was committed willfully and for the purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages . . . by an amount of not more than \$100,000 for each violation of subsection(a) [sic].²²

As a threshold issue, the Court finds an evidentiary hearing is not necessary on the issue of damages under 47 U.S.C. § 605(e)(3)(C)(i)(II) and 47 U.S.C. § 605(e)(3)(C)(ii). Although the damages provided for under those sections are not liquidated, the Court finds that they are readily

construed to create joint and several liability among those found liable for a single award of damages attributable to [a violation of the statute]. . . . [I]n the absence of proof of actual damages, those liable are fairly adjudged jointly and severally liable for one award of statutory damages.”)

¹⁹ 47 U.S.C. § 605.

²⁰ 47 U.S.C. § 605(e).

²¹ 47 U.S.C. § 605(e)(3)(C)(i)(II).

²² 47 U.S.C. § 605(e)(3)(C)(ii).

capable of mathematical calculation from Gagliardi's Affidavit and Navedo's Piracy Affidavit.²³

The amount of attorney's fees and costs is also readily calculable from Lonstein's Affidavit, making an evidentiary hearing similarly unnecessary.

To assess the appropriate amount of damages, the Court must determine: (1) the number of times Kuo and Andale violated section 605(a);²⁴ (2) the amount of statutory damages the Court should award per violation; (3) whether Kuo and Andale willfully violated § 605(a) for purposes of direct or indirect commercial advantage or private financial gain;²⁵ and (4) and if so, the amount by which the Court should increase the statutory damages pursuant to 47 U.S.C. § 605(e)(3)(C)(ii).

Here, the uncontested evidence shows that Plaintiff's investigator, Navedo, entered the defendants' establishment at 7:55 p.m. on February 25, 2006. He departed at 10:15 p.m. Navedo paid no cover charge to enter the establishment. He did not observe a satellite dish on the

²³See *James v. Frame*, 6 F.3d 307, 310 (5th Cir. 1993) ("As a general proposition, in the context of a default judgment, unliquidated damages normally are not awarded without an evidentiary hearing. That rule, however, is subject to an exception where the amount claimed is a liquidated sum or one capable of mathematical calculation."); *United Artists Corp. v. Freeman*, 605 F.2d 854, 857 (5th Cir. 1979) ("The law is clear that a judgment by default may not be entered without a hearing unless the amount claimed is a liquidated sum or one capable of mathematical calculation.").

The Court notes that the Fifth Circuit Court of Appeals has found similar statutory language, establishing a discretionary range of damages, to require an evidentiary hearing on the issue of damages before the entry of default judgment when there is no detailed affidavit establishing the necessary facts. *Cf. Freeman*, 605 F.2d at 857 ("Here, the amount of damages certainly was not liquidated or capable of mathematical calculation. Statutory damages for copyright infringement are set at 'not less than \$250 or more than \$10,000 as the court considers just.' 17 U.S.C.A. § 504(c). In this case, the Court awarded \$35,000 damages for 36 infringements (or \$972.22 per violation). Clearly these damages should not have been awarded without a hearing or a demonstration by detailed affidavits establishing the necessary facts."). In this case, however, Plaintiff has submitted detailed affidavits, rendering its damages easily calculable. The Court therefore finds no hearing is necessary, despite section 605(e)'s language establishing a discretionary range of damages.

²⁴ See 47 U.S.C. § 605(e)(3)(C)(i)(II) (authorizing recovery of statutory damages for each violation of the statute).

²⁵ See 47 U.S.C. § 605(e)(3)(C)(ii) (authorizing an increase in statutory damages awarded where a defendant willfully violates the statute).

premises.

The establishment consists of a restaurant area and bar area. Navedo observed six television sets: four in the bar area and two in the restaurant area. All the sets were playing the Program, with the "HBO PPV" logo at the bottom. Navedo was able to see a cable box over the bar, but unable to see the channel to which it was tuned.

Navedo estimated the total capacity of the establishment to be 150 people. Navedo took three separate head counts in the bar area, counting 44 on the first count, 47 on the second count, and 57 patrons on the third count. Navedo stated that the restaurant area was filled to near capacity, or about 90 people.

Gagliardi asserts in his Affidavit that his company's programming cannot be mistakenly or innocently intercepted, but rather, such interception requires affirmative action. He describes some of the methods by which so-called "signal pirates" unlawfully intercept and broadcast programs. According to Gagliardi, these methods include, but are not limited to: (1) using a "black box," which when installed on a cable television line, allows one to de-scramble and receive pay-per-view broadcasts; (2) purposefully misrepresenting a commercial establishment as a residential property, which would allow the establishment to purchase the pay-per-view broadcast at the residential price of \$54.95; (3) using an illegal cable drop or splice from an apartment or home adjacent to the commercial establishment, purchasing the program at the residential rate, and diverting the program to the commercial establishment; and (4) taking the above-described actions with respect to a "DSS Satellite Systems" or C-Band Satellite System."

1. Statutory Damages

Based on the evidence set forth above, the Court finds Kuo and Andale violated section 605(a) once when they broadcast the Program on February 25, 2006, without a license from

Plaintiff.²⁶ Plaintiff is therefore entitled to statutory damages of between \$1,000 and \$10,000.²⁷

Courts have developed two approaches for determining statutory damages under section 605. The first method calculates the damages award based on the number of patrons in the establishment at the time of the violation.²⁸ The second method merely awards a flat sum for damages.²⁹ In any event, the amount of damages that a court should assess pursuant to section 605 rests within its sound discretion.³⁰

Here, the Court elects to employ the first method. Since there is no evidence that the defendants charged a cover to view the Program or a premium for food and beverages their patrons purchased during the broadcast, the Court will merely multiply the number of patrons at the defendants' establishment (147 total) by the residential pay-per-view rate for the boxing match (\$54.95), for a total of \$8077.65 in statutory damages.

2. Enhanced Damages Based on Wilfulness

The Court finds Plaintiff is also entitled to an enhancement of the statutory damages award based on the wilfulness of Kuo and Andale's conduct. "Signals do not descramble spontaneously, nor do television sets connect themselves to cable distribution systems."³¹ To

²⁶ See *Joe Hand Promotions, Inc. v. Angry Ales*, No. 3:06cv73, 2007 U.S. District LEXIS 79984, at *10 (W.D. N.C. Oct. 29, 2007) (finding one violation of section 605 when the defendants showed the same boxing match simultaneously over seven television sets at their establishment).

²⁷ 47 U.S.C. § 605(e)(3)(C)(i)(II).

²⁸ See *Time Warner Cable v. Taco Rapido Restaurant*, 988 F. Supp. 107, 111 (E.D. N.Y. 1997) (collecting cases).

²⁹ *Id.*

³⁰ 47 U.S.C. § 605(e)(3)(C)(i)(II).

³¹ *Angry Ales*, 2007 U.S. Dist. 79984, at *12 (quoting *Time Warner Cable of New York City v. Googies Luncheonette*, 77 F. Supp.2d 485, 490 (S.D. N.Y. 1999)).

have received Plaintiff's program, it is self-evident that Kuo and Andale "had to have engaged in some deliberate act, such as using an unauthorized decoder or altering the cable service in some way, so as to receive and view the scrambled transmission."³² Further, the Court finds that Kuo and Andale engaged in this deliberate conduct for the purposes of direct or indirect commercial advantage or private financial gain. The undisputed evidence supports a finding that Kuo and Andale illegally intercepted and broadcast the Program to attract patrons to their establishment and to encourage those patrons to prolong their stay and consumption of food and beverages.

Although the statute permits the Court to increase the statutory damages award by up to \$100,000,³³ the Court finds that awarding the maximum amount would operate to destroy Kuo and Andale rather than deter them from future violations of section 605.³⁴ Because there is no evidence that Kuo and Andale demanded a cover charge of their patrons, charged a premium for the food and drink they sold during the broadcast, or have repeatedly intercepted programs in violation of section 605, the Court finds that the appropriate amount of enhanced damages under section 605(e)(3)(C)(ii) is \$1000. This amount is sufficient to ensure that Kuo and Andale have entirely disgorged their profits derived from illegally intercepting and broadcasting Plaintiff's Program

3. Attorney's Fees and Costs

An award of costs, including attorney's fees, is mandatory under section 605.³⁵ Lonstein

³² *Id.* (quoting *Taco Rapido Restaurant*, 988 F. Supp. at 111).

³³ 47 U.S.C. § 605(e)(3)(C)(ii).

³⁴ *See Interforever Sports, Inc. v. Rivera*, No. H-06-CV-2359, 2006 U.S. Dist. LEXIS 89991, at *7 (S.D. Tx. 2006) ("While the purpose of [section 605's enhanced damages provision] is to deter future violations, a fine [in the amount of \$100,000, the statutory maximum] is more likely to destroy than deter.")

³⁵ 47 U.S.C. § 605(e)(3)(B)(iii).

reports Plaintiff's litigation costs in this action as \$550.00 (expenses for filing fees and service of process) and \$600.00 (attorney's fees). Her Affidavit details 2.25 hours of her work at \$200 per hour, and 2.00 hours of paralegal work at \$75 per hour. The Court finds that the hourly rate Lonstein requests is reasonable for litigating a lawsuit of this nature in this district, and the amount of time spent was not excessive. The expenditure of 2 hours of paralegal work at the rate of \$75 per hour in this action was likewise reasonable. Accordingly, the Court will award attorney's fees and costs in the amount of \$1,150.

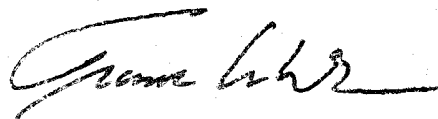
IV. CONCLUSION AND ORDERS

For the reasons discussed above, the Court enters the following Orders:

1. The Clerk of the Court shall **STRIKE** Kuo and Andale's Answer [Rec. No. 26] from the record in this cause.
2. Plaintiff's Motion for Default Judgment [Rec. No. 21] is hereby **GRANTED**.
3. Plaintiff is hereby **AWARDED** \$8077.65 in statutory damages, \$1,000 in enhanced damages, and \$1,150 in attorney's fees and costs, for a total award of \$10,227.65.
4. Plaintiff's "Motion for Leave to File Amended Complaint" [Rec. No. 27] is hereby **DENIED AS MOOT**, Plaintiff having obtained a full recovery by virtue of the Court's judgment against Kuo and Andale.

SO ORDERED.

SIGNED this 15th day of November, 2007.



FRANK MONTALVO
UNITED STATES DISTRICT JUDGE