

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

J & J SPORTS PRODUCTIONS, INC.,)	Case No.: 1:10-cv-02249 - LJO - JLT
)	
Plaintiff,)	FINDINGS AND RECOMMENDATIONS
)	GRANTING PLAINTIFF'S MOTION FOR
v.)	DEFAULT JUDGMENT
)	
JOSE ALFREDO GOMEZ, et al.,)	(Docs. 19, 23)
)	
Defendants.)	
)	

J & J Sports Productions, Inc., ("Plaintiff") seeks the entry of default judgment against Aurelio Cortez, individually and doing business as Los Manajares Restaurant ("Defendant"). (Doc. 19). The motion is unopposed. For the following reasons, the Court recommends Plaintiff's motion for default judgment be **GRANTED**.

I. Procedural History

On December 3, 2010, Plaintiff filed its complaint against Jose Alfredo Gomez and Silvia C. Gomez, individually and doing business as Los Manjares Restaurant. (Doc. 1). Upon application of Plaintiff, default was entered against these defendants pursuant to Fed. R. Civ. P. 55(a) for their failure to answer. (Docs. 9-10). However, Jose Gomez and Silvia Gomez filed a "Notice of Filing Bankruptcy" on April 20, 2011. (Doc. 13).

Plaintiff filed its First Amended Complaint against Jose Gomez, Silvia Gomez, and Aurelio Cortes, individually and doing business as Los Manjares Restaurant on May 17, 2011. (Doc. 14).

1 According to Plaintiff, the company secured nationwide commercial exhibition rights to broadcast
2 “Oscar De La Hoya v. Manny Pacquiao Welterweight Championship Fight Program” (the “Program”).
3 (Doc. 14 at 4). However, Plaintiff contends the Program was broadcast in Los Manjares Restaurant
4 without the purchase of a proper sublicense. *Id.* at 5.

5 Defendant Aurelio Cortes was properly served with the First Amended Complaint, but failed to
6 respond within the time prescribed by the Federal Rules of Civil Procedure. Upon application of
7 Plaintiff, default was entered against Defendant pursuant to Fed. R. Civ. P. 55(a) for his failure to
8 answer on April 16, 2012. (Doc. 18). On July 19, 2012, Plaintiff filed the motion now pending before
9 the Court seeking default judgment against Defendant. (Doc. 19).

10 The Court reviewed the motion on August 21, 2012, and observed Plaintiff sought default
11 judgment on a claim arising under the Federal Communications Act of 1934, arising under 47 U.S.C. §
12 605. (Doc. 22). Noting this claim is not present in Plaintiff’s First Amended Complaint, which
13 alleges violations of the Copyright Act, the Court directed Plaintiff to file supplemental briefing is
14 required on the alleged violations of the Copyright Act and the award amount requested by Plaintiff.
15 *Id.* at 2-3. Accordingly, Plaintiff filed a brief on September 4, 2012, and addressed the Copyright Act
16 and conversion claims. (Doc. 23).

17 **II. Legal Standards for Default Judgment**

18 The Federal Rules of Civil Procedure govern the entry of default judgment. When default was
19 entered because “a party against whom a judgment for relief is sought has failed to plead or otherwise
20 defend,” the party seeking relief may apply to the court for a default judgment. Fed. R. Civ. P. 55(a)-
21 (b). Upon the entry of default, well-pleaded factual allegations regarding liability are taken as true,
22 but allegations regarding the amount of damages must be proven. *Pope v. United States*, 323 U.S. 1,
23 22 (1944); *see also Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977). In addition,
24 “necessary facts not contained in the pleadings, and claims which are legally insufficient, are not
25 established by default.” *Cripps v. Life Ins. Co. of North Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992)
26 (citing *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)).

27 Granting or denying a motion for default judgment is within the discretion of the Court.
28 *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The entry of default “does not automatically

entitle the plaintiff to a court-ordered judgment. *Pepsico, Inc. v. Cal. Sec. Cans*, 238 F.Supp.2d 1172, 1174 (C.D. Cal 2002), *accord Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986). The Ninth Circuit opined:

Factors which may be considered by courts in exercising discretion as to the entry of a default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff's substantive claim, (3) the sufficiency of the complaint, (4) the sum of money at 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.

Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). As a general rule, the issuance of default judgment is disfavored. *Id.* at 1472.

III. Plaintiff's Factual Allegations

The factual assertions of Plaintiff are taken as true because default has been entered against Defendant. *See Pope*, 323 U.S. at 22. Plaintiff alleges that by contract, it was granted exclusive domestic commercial distribution rights to the Program. (Doc. 14 at 4). Pursuant to that contract, Plaintiff reports the company entered into sublicensing agreements with various commercial entities throughout North America to broadcast the Program within their establishments. *Id.*

According to Plaintiff, each defendant "is an owner, and/or operator, and/or licensee, and/or permittee, and/or person in charge, and/or an individual with dominion, control, oversight and management of the commercial establishment doing business as Los Manjares Restaurant..." (Doc. 14 at 3). Plaintiff alleges Defendant broadcast the Program in the establishment without purchasing a proper sublicense. *Id.* at 4-5. For this act, Plaintiff alleged violations of the Copyright Act and conversion. *Id.* at 3-7.

IV. Application of Eitel Factors

Applying the factors articulated by the Ninth Circuit in *Eitel*, the Court finds factors weigh in favor of granting Plaintiff's motion for default judgment.

A. Prejudice to Plaintiff

The first factor considers whether the plaintiff would suffer prejudice if default judgment is not entered, and potential prejudice to a plaintiff militates in favor of granting a default judgment. *See Pepsico, Inc.*, 238 F.Supp.2d at 1177. In general, where default has been entered against a defendant,

1 a plaintiff has no other means by which to recover damages. *Id.*; *J & J Sports Prods. v. Rodriguez*,
2 2010 U.S. Dist. LEXIS 20288, at * 7 (E.D. Cal. March 5, 2010). Therefore, the Court finds Plaintiff
3 would be prejudiced if default judgment is not granted.

4 B. Merits of Plaintiff's claims and sufficiency of the complaint

5 Given the kinship of these factors, the Court considers the merits of Plaintiff's substantive
6 claims and the sufficiency of the complaint together. *See J & J Sports Productions v. Hernandez*,
7 2010 U.S. Dist. LEXIS 48191, at *3, n. 4 (E.D. Cal. May 17, 2010). The Ninth Circuit has suggested
8 that, when combined, these factors require a plaintiff to "state a claim on which the plaintiff may
9 recover." *Pepsico, Inc.*, 238 F.Supp.2d at 1175 (citing *Kleopping v. Fireman's Fund*, 1996 U.S. Dist.
10 LEXIS 1786, at *6 (N.D. Cal. Feb. 14, 1996)).

11 I. Copyright Act Violation

12 "Under copyright law, only copyright owners and exclusive licensees of copyright may enforce
13 a copyright or a license." *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir.
14 2008) (citing 17 U.S.C. § 501(b)) (conferring standing only to the "legal or beneficial owner of an
15 exclusive right who is entitled . . . to institute an action for any infringement . . . while he or she is the
16 owner of it" (internal quotation marks omitted)). An owner of a copyright has the exclusive rights to
17 authorize reproductions of the copyrighted work, prepare derivative works, display the copyrighted
18 work publicly, and distribute copies "by sale or other transfer of ownership, or by rental, lease, or
19 lending." 17 U.S.C. § 106. To establish a claim for copyright infringement, a plaintiff: (1) "must
20 show ownership of the allegedly infringed material" and (2) "demonstrate that the alleged infringer[]
21 violate[d] at least one exclusive right granted to copyright holders." *A&M Records, Inc. v. Napster*,
22 *Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

23 Here, Plaintiff alleges the company held "the exclusive nationwide commercial distribution
24 (closed-circuit) rights" for the Program broadcast on December 6, 2008. (Doc. 14 at 4). In addition,
25 Plaintiff asserts that it was "the assignee of the copyright to the Program for enforcement purposes."
26 *Id.* Thus, Plaintiff contends the company is "the party with lawful standing to prosecute claims of
27 piracy and infringement against the legal operators of commercial investments who are identified
28 exhibiting the Program without the requisite closed-circuit (commercial) license." *Id.* Because

1 Plaintiff alleges it held the exclusive rights to the national broadcast, the company may enforce an
2 alleged copyright violation. *See Sybersound Records*, 517 F.3d at 1144.

3 Plaintiff alleges Defendant infringed upon the company's exclusive rights by intercepting the
4 Program transmission and publicly exhibiting the Program without authorization from Plaintiff. (Doc.
5 15 at 5). In addition, Plaintiff contends Defendant made a secondary transmission of the Program,
6 which infringed upon Plaintiff's rights pursuant to 17 U.S.C. § 111(b). *Id.* Thus, Plaintiff alleges
7 Defendant violated its exclusive right publicly broadcast, or distribute, the Program. Consequently,
8 Plaintiff has alleged facts supporting the claim of a violation of the Copyright Act.

9 2. Conversion

10 As recognized by the Ninth Circuit, conversion has three elements under California Law:
11 "ownership or right to possession of property, wrongful disposition of the property right and
12 damages." *G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Services, Inc.*, 958 F.2d 896, 906 (9th Cir.
13 1992); *see also Greka Integrated, Inc. v. Lowrey*, 133 Cal.App.4th 1572, 1581 (2005) ("elements of a
14 conversion are the plaintiff's ownership or right to possession of the property at the time of the
15 conversion; the defendant's conversion by a wrongful act or disposition of property rights; and
16 damages"). Possession of the "[e]xclusive right to distribute a broadcast signal to commercial
17 establishments constitutes a 'right to possession of property' for purposes of conversion." *G & G*
18 *Closed Circuit Events, LLC v. Saddeldin*, 2010 U.S. Dist. LEXIS 77585, at *10 (E.D. Cal. Aug. 2,
19 2010) (citing *Don King Prods./Kingsvision v. Lovato*, 911 F. Supp. 429, 423 (N.D. Cal. 1995)).
20 Therefore, to state a claim for conversion, Plaintiff is required to have the exclusive ownership of, or
21 the exclusive right to license, the broadcasting of the Program.

22 Given that Plaintiff established it held the exclusive distribution right, Plaintiff held a "right to
23 possession of property." In addition, Plaintiff has alleged Defendant engaged in signal piracy by
24 broadcasting the program without purchasing a sublicense from Plaintiff. The rate sheet attached to
25 the affidavit of Joseph Gagliardi, President of J & J Sports Productions, indicates a sublicense would
26 have cost \$2,200 for an establishment with the capacity of Los Manjares Restaurant. (Doc. 20, Exh.
27 1). Consequently, Plaintiff has established monetary damages and stated a claim for conversion
28 against Defendant.

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