

TO BE PUBLISHED
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

DIRECTV, LLC,

Plaintiff,

vs.

JASON KLINGENBERG, et al.,

Defendants.

No. C13-4097-LTS

**REPORT AND
RECOMMENDATION**

This case is before me on plaintiff's motion (Doc. No. 24) for entry of judgment by default against defendant Last Call Saloon, L.L.C., d/b/a Last Call Saloon (Last Call). The motion is supported by two affidavits and a brief. *See* Doc. Nos. 24-1 through 24-3. No party has filed a resistance. The motion is fully submitted.

BACKGROUND

Plaintiff DIRECTV, LLC (DTV) filed this action on October 17, 2013. The complaint names Last Call as a defendant along with two additional, individual defendants: Jason Klingenberg and Kristi Klingenberg. Doc. No. 2. DTV alleges that Jason Klingenberg and Kristi Klingenberg are "officers, directors, shareholders, principals, managers and/or members" of Last Call and that the defendants operate the Last Call Saloon in George, Iowa (the Establishment). DTV further alleges that the defendants, without obtaining valid commercial exhibition rights from DTV, displayed DTV programming at the Establishment. DTV contends this conduct violated various federal statutes and was tortious under Iowa law. DTV seeks declarative and injunctive relief, along with statutory damages, punitive damages, costs and attorney fees.

On November 27, 2013, defendant Kristi Klingenberg (now known as Kristi Habben), filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Doc. No. 9. In its response to that motion, DTV agreed that dismissal was appropriate. Doc. No. 10. As such, Kristi Klingenberg was dismissed from this case by order filed April 3, 2014. Doc. No. 21.

Meanwhile, defendant Jason Klingenberg filed an answer to the complaint on January 9, 2014. Doc. No. 13. On February 28, 2014, I entered a scheduling order and discovery plan that was jointly submitted by DTV and Jason Klingenberg (and approved by Kristi Klingenberg before she was dismissed from this case). Doc. Nos. 18, 19. That document included the parties' express statement of consent to trial, disposition and judgment by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c)(3). Doc. No. 19. As such, the Honorable Mark W. Bennett, United States District Judge, referred this case to me on February 28, 2014. *Id.*

Last Call has never appeared in this case, despite being duly served. Doc. No. 8. DTV moved for, and obtained, the entry of default against Last Call in January 2014. Doc. Nos. 14, 15. On May 9, 2014, DTV filed its present motion for judgment by default against Last Call. Doc. No. 24. Because Last Call has not appeared in this case, it has not expressly consented to trial, disposition and judgment by a United States Magistrate Judge. Thus, Judge Bennett's referral of this case to me is not effective as against Last Call. *See Henry v. Tri-Services, Inc.*, 33 F.3d 931, 933 (8th Cir. 1994). I will therefore address DTV's motion in this Report and Recommendation, which will then be subject to review by Judge Bennett pursuant to 28 U.S.C. § 636(b).

ANALYSIS

A. *Applicable Standards*

Federal Rule of Civil Procedure 55 provides, in relevant part:

(a) **ENTERING A DEFAULT.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) **ENTERING A DEFAULT JUDGMENT.**

(1) *By the Clerk.* If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) *By the Court.* In all other cases, the party must apply to the court for a default judgment. . . . If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

- (A) conduct an accounting;
- (B) determine the amount of damages;
- (C) establish the truth of any allegation by evidence; or
- (D) investigate any other matter.

Fed. R. Civ. P. 55(a)-(b). Thus, as Judge Bennett has explained:

“Entry of a default under Federal Rule of Civil Procedure 55(a) is not, as such, entry of a judgment; it merely permits the plaintiff to move for a default judgment under Rule 55(b)(2), assuming that the default is not set aside under Rule 55(c).” Moreover, “a default judgment cannot be entered until the amount of damages has been ascertained.” . . . Thus, if the judgment sought is not for a sum certain, Rule 55(b)(2) provides that “the court may conduct such hearings or order such references as it deems necessary and proper” in order to “enable the court to enter judgment.” . . .

In short, as this court has explained, Rule 55 “requires two steps before entry of a default judgment: first, pursuant to Fed.R.Civ.P. 55(a), the party seeking a default judgment must have the clerk enter the default by submitting the required proof that the opposing party has failed to plead or otherwise defend; second, pursuant to Fed.R.Civ.P. 55(b), the moving party may seek entry of judgment on the default under either subdivision (b)(1) or (b)(2) of the rule.”

Hayek v. Big Brothers/Big Sisters of America, 198 F.R.D. 518, 520 (N.D. Iowa 2001) [citations omitted]. Here, DTV successfully completed the first step by making the showing necessary for the entry of Last Call’s default pursuant to Rule 55(a). Doc. Nos. 14, 15. Upon entry of default, “the factual allegations of a complaint (except those relating to the amount of damages) are taken as true, but ‘it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law.’” *Murray v. Lene*, 595 F.3d 868, 871 (8th Cir. 2010) (quoting 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2688 at 63 (3d ed. 1998)). Thus, in determining whether DTV is entitled to a default judgment against Last Call, I will first have to consider whether the factual allegations set forth in DTV’s complaint, when accepted as true, establish Last Call’s liability.

If so, the next step will be ascertaining the amount of damages. DTV seeks entry of judgment by the court pursuant to Rule 55(b)(2). This requires a determination as to the amount of damages to which DTV is entitled. The Supreme Court has observed: “It is a familiar practice and an exercise of judicial power for a court upon default, by taking evidence when necessary or by computation from facts of record, to fix the amount which the plaintiff is lawfully entitled to recover and to give judgment accordingly.” *Pope v. United States*, 323 U.S. 1, 12 (1944). Because the facts alleged in the complaint are not accepted as true for purposes of determining the amount of damages, the plaintiff must prove those facts “in a supplemental hearing or proceeding.” *Am. Red Cross v. Cmty. Blood Ctr.*, 257 F.3d 859, 864 (8th Cir. 2001). The court has discretion to

determine if an evidentiary hearing is necessary for this purpose. *Stephenson v. El-Batrawi*, 524 F.3d 907, 916 (8th Cir. 2008). When the amount of damages is supported by documentary evidence, it is not an abuse of discretion for the court to find that an evidentiary hearing is unnecessary. *Id.* The district court's findings concerning damages are reviewed for clear error. *Id.*

B. Discussion

1. Jurisdiction

As a threshold matter, I must confirm that this court has subject matter jurisdiction over this action and personal jurisdiction over Last Call before determining whether a default judgment is appropriate. *See, e.g., Mitchell v. Media Com*, 511 F. App'x 595 (8th Cir. 2013) (per curiam) (district court properly denied motion for default judgment based on lack of subject matter jurisdiction); *Smith v. Ghana Commercial Bank, Ltd.*, 379 F. App'x 542 (8th Cir. 2010) (per curiam) (district court properly denied motion for default judgment because plaintiff failed to properly serve defendants and court therefore lacked personal jurisdiction). Subject matter jurisdiction plainly exists here pursuant to 28 U.S.C. § 1331, as DTV asserts claims arising under federal law and, indeed, seeks judgment on its claim that Last Call violated 47 U.S.C. § 605(a).

As for personal jurisdiction, DTV has shown by affidavit that Last Call's designated agent for service was personally served with the summons and complaint on November 5, 2013. Doc. No. 24-2 at 3, ¶ 5. DTV filed its proof of service (Doc. No. 8) on November 6, 2013. DTV has further shown by affidavit that Last Call's principal place of business is within the state of Iowa, that Last Call's unlawful conduct occurred in this state and that Last Call otherwise has had sufficient contacts with the state of Iowa to be subject to this court's personal jurisdiction. Doc. No. 24-2 at 4, ¶ 10. There are no jurisdictional barriers to the entry of judgment against Last Call.

2. *Has DTV Demonstrated That Last Call Is Liable?*

a. *The Facts*

Accepting the factual allegations of the complaint as true for purposes of considering whether DTV has a legitimate cause of action against Last Call,¹ DTV has established the following facts:

DTV is a major distributor of satellite programming doing business throughout the United States. Through its operations, DTV provides interstate direct broadcast satellite programming to subscribers with specialized satellite receiving equipment who pay for programming via a subscription fee and obtain a programming license from DTV in return for a subscription. The result of a user subscription is that users can then watch programs on their televisions and/or listen to certain high quality audio programs communicated electronically by DTV via satellite (the Satellite Programming). DTV holds proprietary rights to the Satellite Programming it transmits and DTV is the owner of and/or a lawfully designated distribution agent for such Satellite Programming.

To prevent unauthorized entities and persons from viewing its Satellite Programming, DTV encrypts the satellite transmissions. Upon payment of the appropriate subscription or license fees, DTV authorizes and enables the subscriber to unscramble and receive the Satellite Programming. DTV provides services to homes based on residential rates and to commercial establishments under commercial rates. Because equipment used with DTV services can be moved from residential locations to commercial establishments without DTV's knowledge, owners of commercial establishments wishing to use DTV's programming for their own commercial gain, at the lower residential rates, can surreptitiously gain access to DTV programming without

¹ While I am permitted to accept the facts alleged in the complaint as true for purposes of considering Last Call's liability to DTV, those allegations are supported and expanded upon by the affidavit of Kent P. Mader, DTV's Vice President of Risk Management, along with documentary evidence submitted with that affidavit. Doc. No. 24-1.

proper authorization by subscribing to DTV services under a residential account and then installing/moving the equipment to their businesses and utilizing those services in a commercial environment.

On or about November 19, 2012, Last Call was a commercial establishment that did not have a valid commercial account with DTV. On or about that same date, Last Call, without obtaining valid commercial exhibition rights, willfully received and displayed DTV Satellite Programming to the public and for commercial benefit or financial gain, at the Establishment. Such Satellite Programming was displayed without authorization from DTV to exhibit in that location.

Last Call, without entitlement, without prior permission or authorization from DTV, and without having paid DTV for the right to receive, broadcast, use or display DTV's Satellite Programming in the Establishment, has received, assisted in receiving, transmitted, assisted in transmitting, divulged, published and displayed the content and substance of DTV's Satellite Programming at the Establishment. Last Call's actions were unauthorized, willful, and for purposes of direct or indirect commercial advantage or private financial gain.

DTV has been damaged in that (a) DTV has been denied subscription fees for commercial use of its Satellite Programming; (b) DTV's sales revenues have been reduced through Last Call's unfair competition; and (c) DTV's proprietary rights in the Satellite Programming have been impaired. In addition, Last Call profited and gained commercial advantage from the unauthorized and willful use of DTV's Satellite Programming. DTV has been required to retain attorneys to prevent Last Call's wrongful acts and to prosecute this action. *See* Doc. No. 2 at ¶¶ 5, 15, 17-23.

b. The Law

DTV contends that these facts establish a cause of action pursuant to the Cable Communications Policy Act of 1984, 47 U.S.C. § 521, *et seq.* (the Act). Section 605(a) provides, in relevant part:

[N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception,

- (1) to any person other than the addressee, his agent, or attorney,
- (2) to a person employed or authorized to forward such communication to its destination,
- (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed,
- (4) to the master of a ship under whom he is serving,
- (5) in response to a subpoena issued by a court of competent jurisdiction, or
- (6) on demand of other lawful authority.

No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such

communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

47 U.S.C. § 605(a). As one federal district court has explained, to establish a violation of Section 605(a) a satellite television provider must demonstrate that the defendant: “(1) received; (2) an interstate communication; (3) by way of wire or radio; (4) and that he divulged or published such communication; (5) other than through designated or authorized channels; (6) to unauthorized receivers.” *DIRECTV, Inc. v. Spokish*, No. 6:03-cv-680-ORL-22DAB, 2004 WL 741369, at *3 (M.D. Fla. Feb. 19, 2004); *see also Nat’l Satellite Sports, Inc. v. Eliadis, Inc.* 253 F.3d 900, 916-17 (6th Cir. 2001) (defendant authorized to divulge communication to residential customers violated Section 605(a) by divulging the communication to a commercial establishment without authorization). The facts set forth above meet the elements of a Section 605(a) claim, as on November 19, 2012, Last Call received an interstate communication (DTV’s signal) by way of radio and, for commercial advantage, divulged or published that communication, other than through designated or authorized channels, to unauthorized recipients.

While DTV’s complaint includes other causes of action, including a claim under the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2511, *et seq.*, its supporting brief addresses only the Communications Act claim. Doc. No. 24-3. As such, and because DTV has shown that Last Call is liable under Section 605(a), I will not analyze DTV’s other claims.

3. Damages

Relying on Section 605(e)(3), DTV seeks two forms of damages to remedy Last Call’s November 19, 2012, violation of Section 605(a). Section 605(e)(3)(C) states, in relevant part:

- (i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses:
 - (I) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or
 - (II) the party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in a sum of not less than \$1,000 or more than \$10,000, as the court considers just, and for each violation of paragraph (4) of this subsection involved in the 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.
- (ii) In any case in which the court finds that the violation was committed willfully 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 for each violation of subsection (a) of this section.
- (iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than \$250.

47 U.S.C. § 605(e)(3)(C). Thus, DTV may elect one of the two categories of damages described in subpart (i) and, upon making the required showing, may receive enhanced damages pursuant to subpart (ii).

Section 605(e)(3)(C)(i). Under subpart (i), DTV seeks statutory damages as opposed to actual damages. *See* Doc. No. 24-3 at 10. This means “a sum of not less than \$1,000 or more than \$10,000, as the court considers just.” 47 U.S.C. § 605(e)(3)(C)(i)(II). For purposes of determining the appropriate amount of damages, I do not treat the allegations of DTV’s complaint as true but, instead, must consider the evidence DTV has submitted. *See, e.g., Murray*, 595 F.3d at 871. DTV has submitted no evidence quantifying any actual harm or injury that accrued to it as a result of Last Call’s violation of Section 605(a) on November 19, 2012. Instead, DTV’s supporting affidavit states:

The unauthorized use of DIRECTV programming through fraudulent conduct has a negative effect upon DIRECTV and lawful commercial customers. Furthermore, commercial misappropriation of DIRECTV residential programming results in significant loss of revenue and places legitimate commercial subscribers at a disadvantage by having to compete with businesses like Last Call Saloon who unlawfully acquire DIRECTV Satellite Programming without paying the commercial rates.

Doc. No. 24-1 at 5-6, ¶ 14. DTV acknowledges that defendant Jason Klingenberg had an active, legitimate *residential* account as of November 19, 2012. *Id.* at 5, ¶¶ 12-13. Thus, as DTV states, the violation at issue here involved paying the residential account rate on that date while displaying DTV’s programming on one television in a commercial establishment capable of hosting 50-100 viewers. *Id.* at 4, ¶ 10.

DTV has offered no evidence as to the price difference between its commercial and residential subscription rates.² Thus, there is no way for me to determine the additional revenue DTV would have received if Mr. Klingenberg had purchased a commercial subscription for the date in question. The amount is presumably less than \$1,000, given DTV’s election to seek statutory damages rather than actual damages.

² DTV only states that the residential subscription rate is “substantially lower.” *Id.* at 4, ¶ 7.

Nor has DTV established violations on any dates other than November 19, 2012. Instead, on that date a DTV auditor spent approximately 10 minutes at the Establishment, observed the display of DTV programming on one television and memorialized the circumstances with photographs and a video recording. *Id.* at 8-15. The photographs indicate that the Establishment was virtually empty at the time of the auditor's visit, with only two other individuals being present. *Id.* at 10, 12-13.

DTV has offered no evidence of the profits, if any, Last Call realized as a result of its unauthorized display of DTV's programming on November 19, 2012. DTV does not state, for example, that Last Call imposed a cover charge or otherwise realized revenue as a direct result of providing its patrons with the opportunity to view that programming. Again, based on the evidence DTV has submitted, the availability of DTV programming at the Establishment had not successfully attracted customers, at least while the auditor was present.

I agree with DTV, and the authorities it cites, that deterrence is an appropriate objective and that no deterrence effect would be achieved if Last Call is simply ordered to pay what it should have paid for a commercial license on November 19, 2012. Doc. No. 24-3 at 10 (citing cases). At the same time, however, a single violation that is not shown to have caused more than minimal injury should not result in financial ruin. *See, e.g., DIRECTV, Inc. v. Kaas*, 294 F. Supp. 2d 1044, 1049 (N.D. Iowa 2003) (discussing statutory damages pursuant to both Section 605(e)(3)(C)(i) and 18 U.S.C. § 2520(c)(2)) (citing *Reynolds v. Spears*, 93 F.3d 428, 435 (8th Cir. 1996)). Here, in light of the evidence DTV has presented, I find that an award of statutory damages in the amount of \$10,000 would be excessive. Instead, I find that the just amount of damages for the sole violation DTV has established is the statutory minimum amount of \$1,000. As such, I

will recommend the entry of judgment against Last Call for statutory damages, pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II), in that amount.³

Section 605(e)(3)(C)(ii). DTV also seeks enhanced damages. As noted above, if “the violation was committed willfully and for 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.” 47 U.S.C. § 605(e)(3)(C)(ii). I find that DTV has made the showing necessary to allow consideration of enhanced damages. As noted earlier, this finding is compelled by accepting the allegations of DTV’s complaint as true.⁴ In addition, this finding is supported by the evidence DTV has submitted. Mr. Klingenberg activated a residential DTV account on October 31, 2007, for an address on Jackson Avenue in George, Iowa. Doc. No. 24-1 at 5, ¶ 12, and at 17. The Establishment is located on North Main Street in George, Iowa. *Id.* at 5, ¶ 11. Neither Last Call nor Mr. Klingenberg activated a commercial DTV account for the Establishment or otherwise obtained DTV’s authorization to display DTV programming there. Yet DTV has shown that at some point on or before November 19, 2012, Last Call arranged to have the satellite dish, receiver and other equipment necessary to display DTV programming installed and

³ DTV cites an unpublished decision from the Eastern District of New York for the proposition that \$10,000 should be the “presumptive” amount awarded for a single violation. Doc. No. 24-3 at 10-11 (citing *J&J Sports Prods., Inc. v. Gutierrez*, 11 Civ. 2651 (BMC), Doc. 11, (E.D.N.Y. July 26, 2011)). DTV did not provide a Westlaw or LEXIS citation for this decision, nor did it provide a copy. Moreover, DTV has cited no decision of the Eighth Circuit Court of Appeals declaring \$10,000 to be the “presumptive” award of statutory damages and I have located no such decision in the course of my independent research. Finally, even if \$10,000 is the “presumptive” award, for the reasons set forth herein I nonetheless find, based on the evidence of record, that the “just” award is \$1,000.

⁴ While those allegations are not accepted as true for purposes of the *amount* of a default judgment, they are accepted as true for all other purposes. *Murray*, 595 F.3d at 871. Thus, I must consider all of DTV’s factual allegations to be true in determining whether DTV has made the showing necessary to recover some amount of enhanced damages.

operated at the Establishment. DTV has easily demonstrated that this constituted a willful violation of Section 605(a).

Moreover, given the Establishment's capacity and the nature of its business, DTV has shown that this willful violation was untaken for purposes of direct or indirect commercial advantage. Obtaining DTV's programming at a residential rate reduced Last Call's expenses and gave it an advantage over competitors that behaved lawfully by paying commercial rates. DTV is entitled to consideration of enhanced damages under Section 605(e)(3)(C)(ii).

The amount of those damages is left to the court's discretion. Many courts choose to assess enhanced damages based on some multiple of the statutory damages. *See, e.g., Joe Hand Prods., Inc. v. Zafaranloo*, No. 12-CV-3828, 2014 WL 1330842, at *4 (E.D.N.Y. Apr. 1, 2014) (noting that enhanced damages are normally calculated by trebling the statutory damages); *J & J Sports Prods., Inc. v. Zevallos*, No. 10-CV-4049(ILG)(RML), 2011 WL 1810140, at *4 (E.D.N.Y. Apr. 22, 2011) (recommending enhanced damages of two times the statutory damages), *adopted by* 2011 WL 1807243 (E.D.N.Y. May 11, 2011); *Joe Hand Promotions, Inc. v. La Nortena Rest. Inc.*, No. 10-CV-4965 (NGG), 2011 WL 1594827, at *5 (E.D.N.Y. Mar. 28, 2011) (same), *adopted by* 2011 WL 1598945 (E.D.N.Y. Apr. 27, 2011).

DTV notes that some courts have awarded large amounts of enhanced damages under circumstances DTV considers to be similar. For example, it refers to an award of \$30,000 in *DIRECTV, LLC v. Flaig*, No. 4:12-cv-00325-HDV-TJS (S.D. Iowa Feb. 25, 2013), and an award of \$25,000 in *Zuffa, LLC v. Mohammed Azmath*, No. 2:11-cv-00652-RAJ (W.D. Wash. May 4, 2012). As with the unpublished decision discussed in note 3, *supra*, DTV provided no Westlaw or LEXIS citation for these decisions, nor did it provide courtesy copies. This is poor practice. In any event, my independent survey of enhanced damages awards confirms that there are myriad ways to exercise the discretion conveyed by Section 605(e)(3)(C)(ii). Just as when considering statutory

damages, courts must balance the need for deterrence against the premise that “a single violation is not so serious as to warrant putting the restaurant out of business.” *Kingvision Pay-Per-View Ltd. v. Autar*, 426 F. Supp. 2d 59, 64 (E.D.N.Y. 2006) (quoting *Garden City Boxing Club, Inc. v. Polanco*, No. 05 Civ. 3411(DC), 2006 WL 305458, at *5 (S.D.N.Y. Feb. 7, 2006) (internal quotation marks and alteration omitted)).

For the reasons discussed earlier, with regard to statutory damages, I find that an enhanced damage award greater than \$3,000 would be excessive and unwarranted. DTV has established a single violation. While that violation occurred wilfully and for the purpose of commercial advantage, there is no evidence that any hoped-for commercial advantage actually materialized. The Establishment was virtually empty at the time of the violation and DTV has shown no gain to Last Call, or loss to DTV, beyond the price difference between a commercial account and a residential account. While Last Call acted illegally, its single violation does not warrant a penalty that could cripple or destroy its business.

Deterrence is, no doubt, an important consideration. Indeed, but for the legitimate goal of deterrence, it would be difficult to justify even \$3,000 in enhanced damages given the evidence of record. I find that total damages of \$4,000 (\$1,000 in basic statutory damages and \$3,000 in enhanced damages), plus costs and attorney fees as discussed *infra*, provides sufficient deterrence against like conduct. I therefore will recommend the entry of judgment against Last Call for enhanced damages, pursuant to 47 U.S.C. § 605(e)(3)(C)(ii)(II), in the amount of \$3,000.

4. *Costs and Attorney Fees*

DTV seeks to recover costs and attorney fees in the total amount of \$5,053.30. Section 605(e)(3) provides, in relevant part, that the court “shall direct the recovery of full costs, including awarding reasonable attorneys’ fees to an aggrieved party who

prevails.” 47 U.S.C. § 605(e)(3)(B)(iii). DTV has submitted the affidavit of one of its attorneys, Dawn M. Conklin, in support of its request for costs and attorney fees. Doc. No. 24-2.

Costs. DTV’s request for an award of costs is based on the following expenses:

- a. Filing Fees - \$ 400.00
- b. Service of Process - \$16.00
- c. *Pro Hac Vice* Fee - \$75.00
- d. Certificate of Good Standing - \$ 5.00

Doc. No. 24-2 at 5, ¶ 13. I find that these requested costs are reasonable and appropriate. As such, I recommend entry of judgment against Last Call for costs pursuant to 47 U.S.C. § 605(e)(3)(B)(iii) in the amount of \$496.00.

Attorney Fees. DTV’s request for an award of attorney fees is itemized in Ms. Conklin’s affidavit, and can be summarized as follows:

- Partner Time: 1.99 hours at \$350 per hour - \$696.50
- Associate Time: 13.87 hours at \$250 per hour - \$3,467.50
- Paralegal Time: 4.14 hours at \$95 per hour - \$393.30

Id. at 5-9, ¶13. These fees total \$4,557.30. I have carefully reviewed DTV’s itemization and find that the services performed and amount of hours requested are reasonable and appropriate. I also find that the requested hourly rates for partner time, associate time and paralegal time are reasonable.⁵ As such, I recommend entry of judgment against Last Call for attorney fees pursuant to 47 U.S.C. § 605(e)(3)(B)(iii) in the amount of \$4,557.30.

⁵ As DTV notes, Judge Bennett found that an hourly rate of \$350 was appropriate in awarding attorney fees pursuant to statute in *Fraserside IP L.L.C. v. Faragalla*, No. C11-3032-MWB, 2012 WL 453237, at *6 (N.D. Iowa Feb. 13, 2012).

CONCLUSION AND RECOMMENDATION

For the reasons set forth herein, I RESPECTFULLY RECOMMEND that plaintiff DIRECTV, LLC's motion (Doc. No. 24) for entry of judgment by default against defendant Last Call Saloon, L.L.C., d/b/a Last Call Saloon be **granted** and that judgment be entered in favor of the plaintiff, and against defendant Last Call Saloon, L.L.C., d/b/a Last Call Saloon, as follows:

- (a) pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II), basic statutory damages in the amount of One Thousand Dollars (\$1,000.00);
- (b) pursuant to 47 U.S.C. § 605(e)(3)(C)(ii), enhanced damages in the amount of Three Thousand Dollars (\$3,000.00);
- (c) pursuant to 47 U.S.C. § 605(e)(3)(B)(iii), costs in the amount of Four Hundred Ninety Six Dollars (\$496.00); and
- (d) pursuant to 47 U.S.C. § 605(e)(3)(B)(iii), attorney fees in the amount of Four Thousand Five Hundred Fifty Seven Dollars and Thirty Cents (\$4,557.30);

resulting in a total judgment, including costs and attorney fees, in the amount of Nine Thousand Fifty Three Dollars and Thirty Cents (\$9,053.30).

Objections to this Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b) must be filed within fourteen (14) days of the service of a copy of this Report and Recommendation. Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* Fed. R. Civ. P. 72. Failure to object to the Report and Recommendation waives the right to *de novo* review by the district court of any portion of the Report and Recommendation as well as the right to appeal from the findings of fact contained therein. *United States v. Wise*, 588 F.3d 531, 537 n.5 (8th Cir. 2009).

IT IS SO ORDERED.

DATED this 20th day of June, 2014.



**LEONARD T. STRAND
UNITED STATES MAGISTRATE JUDGE**