

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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DIRECTV, LLC,

Plaintiff,

ORDER

v.

12-cv-790-wmc

WAYNE GARSKI, individually, and as  
officer, director, shareholder, and/or principal  
of Tomeks Tavern LLC, d/b/a Tomek's Tavern,  
and TOMEKS TAVERN LLC, d/b/a TOMEK'S  
TAVERN

Defendants.

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On February 27, 2013, the clerk of court entered default against defendants Wayne Garski, individually and as an officer, director, shareholder, and/or principal of Tomeks Tavern LLC, d/b/a Tomek's Tavern, and Tomeks Tavern LLC, d/b/a Tomek's Tavern, pursuant to Federal Rule of Civil Procedure 55(a). (Dkt. #19.) Plaintiff DIRECTV also filed a motion for default judgment. (Dkt. #11.) Today, the court held a hearing on plaintiff's motion for default judgment, at which defendant Garski appeared for the first time in this lawsuit on behalf of himself personally, but not his company, Tomeks Tavern LLC, by virtue of his not being qualified to do so.<sup>1</sup>

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<sup>1</sup> In support of any motion for default judgment, a plaintiff must file an affidavit showing each individual defendant's military status, or attesting that plaintiff is unable to determine such status. 50 U.S.C. App. § 521(b). Here, plaintiff's counsel avers that "[u]pon information and belief, Defendants are not presently in the military service of the United States." (Affidavit of Julie Cohen Lonstein ("Lonstein Aff.") (dkt. #13) ¶ 7.) Though no representation was made as to any actual search of data bases, Mr. Garski confirmed today in open court that he was in fact not a part of the military.

## BACKGROUND

Plaintiff DIRECTV filed this action alleging that defendants knowingly and willfully violated certain provisions of the Cable Communications Policy Act of 1984, 47 U.S.C. § 605, by ordering programming for residential use and subsequently displaying the programming in a commercial establishment for commercial gain without authorization. (Compl. (dkt. #1) ¶ 24.)

Because default was entered against defendants, the court accepts as true all of the factual allegations in the complaint, except those relating to damages. *In re Catt*, 368 F.3d 789, 793 (7th Cir. 2004). Plaintiff DIRECTV, LLC is a major distributor of satellite programming, providing 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 DIRECTV in return for a subscription. (Compl. (dkt. #1) ¶ 5.)

Defendant Wayne Garski is an officer, director, shareholder or principal of Tomeks Tavern LLC d/b/a Tomek's Tavern, located at 3168 State Highway 66, Rosholt WI 54473. (*Id.* at ¶ 6.) Defendant Garski also resides at the same address. (*Id.* at ¶ 9.) Plaintiff alleges that Garski served in a supervisory capacity and had control over the activities at Tomek's Tavern, and received a financial benefit from the operations, on November 5, 2011.

DIRECTV provides services to homes based on residential rates and to commercial establishments under commercial rates. (*Id.* at ¶ 17.) On or about November 5, 2011, defendants did not have a valid commercial account with DIRECTV

at Tomek's Tavern. (*Id.* at ¶ 18.) On or about that date, defendants, without entitlement, without prior permission or authorization from DIRECTV, and without having paid DIRECTV for the right to receive broadcast, use or display DIRECTV's satellite programming in a commercial establishment, Tomek's Tavern, received and displayed the content and substance of DIRECTV satellite programming. (*Id.* at ¶ 20.) Plaintiff further alleges that defendants' acts were willful and for purposes of direct or indirect commercial advantage or private financial gain. (*Id.*) As a person aggrieved by defendants' violations of 47 U.S.C. § 605, plaintiff seeks statutory damages, attorneys' fees and costs pursuant to § 605(e)(3)(A).

In support of default judgment, DIRECTV's Vice President of Risk Management Kent Mader, submitted an affidavit, in which he describes and attaches an affidavit of an auditor Scott M. Lange. (Mader Aff. (dkt. #12) ¶ 10 & Ex. A (dkt. #12-1).) Lange visited Tomek's Tavern at approximately 1:08 p.m. on November 5, 2011. He observed two televisions displaying DIRECTV satellite programming for public viewing. (*Id.*) He also observed that Tomek's Tavern had an estimated occupancy between 50 and 100 patrons. Lange recorded a video of the premises and also took photographs of the premises showing a commercial establishment with a residence attached. (*Id.*; Mader Aff, Exs. B & C (dkt. ##12-2, 12-3).) After receipt of Lange's affidavit, DIRECTV conducted a search of its records and determined that Garski had a residential account, but did not have a commercial account. (Mader Aff. (dkt. #12) ¶ 11; *id.*, Ex. D (dkt. #12-3).)

Under 47 U.S.C. § 605(e)(3)(C)(i)(II), the court may award statutory damages ranging from a minimum of \$1,000 to a maximum of \$10,000. Additionally, “[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 has the discretion to award enhanced damages up to \$100,000. 47 U.S.C. § 605(3)(3)(C)(ii). Plaintiff requests each of these maximums, totaling \$110,000, plus \$2,170.40 in attorney’s fees and \$750.00 in costs pursuant to 47 U.S.C. § 605(e)(B)(iii). (Lonstein Aff. (dkt. #13) ¶ 8.)

The court indicated during the hearing that it would only consider granting a substantially reduced damages award consistent with past practice with respect to other default judgment actions involving violations of 47 U.S.C. § 605. *See Joe Hand Promotions, Inc. v. Dewey’s Roadhouse, LLC*, No. 11-cv-486-wmc (W.D. Wis. March 21, 2012) (awarding damages of approximately \$55 per patron, for illegal use of pay-per-view programming); *J & J Sports Prod., Inc. v. Montero*, No. 10-cv-757-wmc (W.D. Wis. March 16, 2011) (same); *J & J Sports Prod., Inc. v. Sunsets On Sand, LLP*, No. 10-cv-12-wmc (W.D. Wis. July 7, 2010) (same); *see also J & J Sports Productions, Inc. v. Aguilera*, No. 09-cv-4719, 2010 WL 2362189, at \*2 (N.D. Ill. June 11, 2010); *J & J Sports Production, Inc. v. Ramirez*, No. 08-c-3354, Minute Order at 1-2 (N.D. Ill. Sept. 18, 2008).

Because these cases all involved the unlawful display of a particular program (for example, a boxing match), the analogy is not perfect. On the one hand, a pay-per-view program may well draw a substantial crowd, particularly where (as is often the case) the patron advertises its display of the event. On the other hand, defendants here may have

displayed DIRECTV's satellite programming on an ongoing basis, attracting crowds not just on one day, but generally, as well as for special events (like football games). But plaintiff's allegations and supporting documents simply describe unlawful display on a particular date, November 5, 2011. Moreover, plaintiff has given the court no guidance to assess the value of the right to carry broadcasts generally in a commercial setting (e.g., what a standard monthly charge would be for an entity like Tomek's Tavern, which had a capacity of between 50 and 100 people) understanding this would only be a starting point for imposing statutory penalties.

Mr. Garski's appearance today -- however late -- further complicates matters in at least two respects: (1) he would like relief from his personal default, though he offers little grounds other than his recent revelation that the charges here are serious; and (2) he disputes any award of damages (presumably, the difference between what he paid and a fair charge for commercial services) is warranted based on representations made to him by the DIRECTV or its representative at installation.

Accordingly, the court will hold an evidentiary hearing on April 26, 2013, to determine (1) whether Garski should be relieved of the entry of default as to his personal liability; (2) if so, whether he is liable, individually or as an officer, director, shareholder and/or principal of Tomeks Tavern LLC, d/b/a Tomek's Tavern; and (3) the amount of damages to be awarded to plaintiff against defendant Tomeks Tavern LLC, d/b/a Tomek's Tavern, and, if liable, defendant Garski.

ORDER

IT IS ORDERED that an evidentiary hearing will be held on April 26, 2013, at 9:00 a.m.

Entered this 3rd day of April, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge