

NOT INTENDED FOR PRINT PUBLICATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

BLUEFIELD DIVISION

DIRECTV, INC.,

Plaintiff,

v.

CIVIL ACTION NO. 1:03-2146

JOHN BORICH,

Defendant.

ORDER

Pending before the court is the Plaintiff's Motion for Entry of Judgment By Default Against Defendant John Borich [Docket 9]. A review of the motion and of the court's file indicates that the defendant, John Borich, has failed to answer or otherwise defend this action in a timely manner. Accordingly, the court **DIRECTS** the Clerk to enter a default, pursuant to *Fed. R. Civ. P. 55(a)*, against Mr. Borich.

Attached to the plaintiff's motion are the affidavits of Jaime Sichler, Clement Carter, and Richard W. Hunter, Jr. The motion and affidavits set forth the amount allegedly due DIRECTV, Inc. and state that the defendant is not a member of the United States Military. Based upon its review of the motion and affidavits, the court has determined that a hearing on this matter is unnecessary. In accordance with *Fed. R. Civ. P. 55(b)(2)*, therefore, the court **ENTERS** default judgment against the defendant, John Borich, in the sum of \$1,000, plus an additional \$1,573, which represents the

reasonable attorney's fees and costs incurred by DIRECTV. The court also permanently **ENJOINS** the defendant, John Borich, from receiving, possessing, or using any pirate access device.

I. Background

As the court has stated previously in *Directv, Inc. v. Boggess*, 300 F. Supp. 2d 444, 445 (S. D. W. Va. 2004), DIRECTV, Inc. (DIRECTV) is a California-based company that distributes satellite television programming to over ten million customers in the United States. To prevent the unauthorized reception and use of its programming, DIRECTV digitally scrambles its programming using encryption technology. DIRECTV's customers use satellite receivers and access cards to unscramble the programming. Access cards are the size of credit cards and contain chips that unscramble DIRECTV's satellite programming and monitor DIRECTV customers' pay-per-view programming purchases. To prevent the unauthorized use of access cards, DIRECTV periodically transmits streams of data that disable unauthorized access cards.

Although DIRECTV encrypts its television programming and disables unauthorized access cards, devices exist that allow individuals to circumvent DIRECTV's protective efforts. These black market devices, known as pirate access devices, are readily available through Internet retailers. Pirate access devices use both hardware and software to restore the ability of disabled access cards to unscramble DIRECTV's programming.

In the instant case, DIRECTV alleges that on or about August 14, 2000, the defendant, Mr. Borich, purchased one pirate access device, known as a "(Combo) Viper Reader/Writer & Whiteviper Unlooper," from the Internet retailer Whiteviper Technologies. Complaint [Docket 1] at ¶ 19a. Based on this purchase, the Complaint alleges that Mr. Borich is liable for civil conversion and for violations of the Cable Communications Policy Act of 1984 (47 U.S.C. § 521, *et seq.*) and

the Electronic Communications Policy Act of 1986 (18 U.S.C. § 2510, *et seq.*). Mr. Borich has failed to answer the complaint or defend this lawsuit in any way.

II. Analysis

According to Federal Rule of Civil Procedure 55(a), “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party’s default.” Rule 55(b)(1) provides for entry of judgment by default by the clerk of the court “[w]hen the plaintiff’s claim against a defendant is for a sum certain or for a sum which can by computation be made certain,” which is not the situation here. Rule 55(b)(2) states that “[i]n all other cases the party entitled to a judgment by default shall apply to the court therefor.”

In *Ryan v. Homecomings Financial Network*, 253 F.3d 778 (4th Cir. 2001), the Fourth Circuit Court of Appeals quoted the Fifth Circuit for the proposition that “[t]he defendant, by his default, admits the plaintiff’s well-pleaded allegations of fact,” but that “[t]he defendant is not held . . . to admit conclusions of law. In short, despite occasional statements to the contrary, a default is not treated as an absolute confession by the defendant of his liability and of the plaintiff’s right to recover.” *Id.* at 780 (quoting *Nishimatsu Constr. Co., Ltd. v. Houston Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975)). Accordingly, the court must examine in further detail the defendant’s liability under the various causes of action alleged in the plaintiff’s complaint. *See* 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 3688, at 63 (3d ed. 1998) (noting that “even after default, however, it remains for the court whether the unchallenged facts constitute legitimate cause of action, since a party in default does not admit mere conclusions of law”).

A. Liability

Section 605(e)(3) of the Cable Communications Policy Act (Communications Act), 47 U.S.C. § 521, et. seq., provides a civil remedy for any person aggrieved by violations of Sections 605(a) or 605(e)(4) of the Communications Act. Count one of the present Complaint alleges a violation of Section 605(a). This section of the Communications Act states that “[n]o 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.” 47 U.S.C. § 605(a). DIRECTV alleges that the defendant “illegally and without authorization, intercepted, received and exhibited, or otherwise assisted in the unauthorized interception, reception, and exhibition of Satellite Programming transmitted by DIRECTV,” and that the defendant “used such communications for his own benefit or for the benefit of others who were not entitled to such communications.” Complaint at ¶ 27. The court **FINDS** that DIRECTV has adequately alleged that the defendant intercepted its satellite communications in violation of Section 605(a), and further **FINDS** that the defendant, by his default, has admitted this allegation.

Section 605(e)(3) of the Communications Act also provides a civil remedy for any person aggrieved by a violation of Section 605(e)(4). Section 605(e)(4) of the Communications Act refers to: “Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services” Count four of the Complaint states that the defendant “knowingly manufactured, assembled, or modified an electronic, mechanical or other

device or equipment knowing or having reason to know, that the device or equipment is used primarily to facilitate the unauthorized decryption of Satellite Programming, or direct-to-home satellite services, or is intended for any other prohibited activity,” and that the defendant “actively programmed and reprogrammed DIRECTV Access Cards and designed electronic systems for use in surreptitiously obtaining DIRECTV Satellite Programming.” Complaint at ¶ 40. Further, “by removing and inserting Pirate Access Devices and/or inserting illegally programmed Access Cards into valid DIRECTV Receivers, defendant engaged in the unlawful assembly and/or modification of devices primarily of assistance in the unauthorized decryption of Satellite Programming.” *Id.*

According to Fourth Circuit precedent, the defendant’s default should not be treated as an absolute confession of his liability and of the plaintiff’s right to recover. *See Ryan*, 253 F.3d at 780. The court must consider whether the well-pleaded facts—which the defendant admitted to by operation of his default—support the relief sought. *Id.* The relevant well-pleaded fact in this case is that the defendant purchased a single pirate access device from Whiteviper, Inc. *See* Complaint at ¶ 19a. Other courts have found, and this court agrees, that Section 605(e)(4) “targets upstream manufacturers and distributors, not the ultimate consumer of pirating devices.” *Directv, Inc. v. Albright*, No. 03-4603, 2003 U.S. Dist. LEXIS 23811, at *7 (E.D. Pa. December 9, 2003). Accordingly, the court does not find that the defendant’s purchase of the pirate access device alone establishes liability under Section 605(e)(4) of the Communications Act. Further, the court does not find that the act of “removing and inserting Pirate Access Devices and/or inserting illegally programmed Access Cards into valid DIRECTV Receivers” is the type of assembly or modification prohibited by the statute. Borich purchased a single pirate access device known as a “(Combo) Viper Reader/Writer & Whiteviper Unlooper” from “a Pirate Access Device distributor operating under

the name ‘Whiteviper.’” Complaint at ¶ 19a. Borich’s act of installing and activating the pirate access device does not convert him into the type of manufacturer or distributor of these devices contemplated by Section 605(e)(4). *See Directv, Inc., v. Albright*, 2003 U.S. Dist. LEXIS 23811, at *7. Because the complaint does not contain any allegations that would support a finding that Borich manufactured, modified, assembled, imported, exported, sold or distributed pirate devices within the meaning of Section 605(e)(4), the court **FINDS** that DIRECTV has not adequately alleged a violation of Section 605(e)(4). The court further **FINDS** that the defendant has not admitted this allegation.

Count two of the Complaint is brought pursuant to the Electronic Communications Policy Act of 1986, 18 U.S.C. § 2510, et seq. Section 2511 of that Act refers to “any person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication” Section 2520 states that “any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.” In Count two of the Complaint, DIRECTV alleges that the defendant “intentionally intercepted, endeavored to intercept, or procured other persons to intercept electronic communications from DIRECTV.” The court **FINDS** that DIRECTV has adequately alleged that the defendant intercepted its electronic communication in violation of Section 2511, and further **FINDS** that the defendant, by his default, has admitted this allegation.

Count three of the Complaint is brought pursuant to Section 2512 of the Electronic Communications Policy Act of 1986. In *Directv, Inc., v. Boggess*, 300 F. Supp. 2d 444 (S.D. W. Va. 2004), this court determined that the Fourth Circuit’s decision in *Flowers v. Tandy Corp.*, 773 F.2d

585 (4th Cir. 1985), holding that Section 2520 does not provide a private cause of action for violations of Section 2512, has not been superceded by amendments to Section 2520. For the reasons stated in *Boggess*, 300 F. Supp. 2d at 448, the court **FINDS** that there is no private cause of action for violations of Section 2512. Thus, this court **FINDS** that count three of the Complaint fails to state a claim for which relief can be granted.

Count five of the Complaint alleges that the defendant “has unlawfully converted DIRECTV’s property for defendant’s use and benefit.” This court is of the opinion that DIRECTV cannot satisfactorily allege a cause of action based on the conversion of its satellite signal. *See Directv, Inc., v. Swisher*, No. 03-00079, 2004 U.S. Dist. LEXIS 9176 (W. D. Va., Apr. 30, 2004) (holding that Virginia law does not recognize a cause of action for conversion of intangible property that is unconnected to a tangible document); *Directv, Inc., v. Kitzmiller*, No. 03-3296, 2004 U.S. Dist. LEXIS 5263 (E.D. Pa., Mar. 31, 2004) (concluding that only tangible property is subject to conversion and denying DIRECTV conversion claim); *Directv, Inc., v. Sampey*, No. 03-8520, 2004 U.S. District LEXIS 16506 (N.D. Ill., Aug. 18, 2004) (noting that although district is split on whether claim exists for conversion of intangibles, no conversion existed in present case because DIRECTV was not deprived of use of signal). Conversion has been defined by the Fourth Circuit as “any wrongful exercise or assumption of authority, personally or by procurement, over another’s goods *depriving him of their possession.*” *McCormick v. AT & T Tech., Inc.*, 934 F.2d 531 (4th Cir. 1991) (emphasis added). The West Virginia Supreme Court of Appeals has further defined the state law tort of conversion as “*any distinct act of dominion* wrongfully exerted over the property of another, and in denial of his rights, or inconsistent therewith....” *Rodgers v. Rodgers*, 399 S.E.2d 664 (W. Va. 1990) (emphasis added). DIRECTV has not shown that they were deprived of the use or value of

their satellite signal during the time period when defendant allegedly intercepted the signal. Furthermore, DIRECTV has failed to demonstrate the defendant's dominion over the signal. Although defendant's use of the signal may be inconsistent with DIRECTV's ownership and may have caused DIRECTV to lose potential subscriber fees, DIRECTV has failed to allege any loss of control or use of its signal. For these reasons, the court **FINDS** that DIRECTV has not alleged a claim for conversion and **FINDS** that this count of the Complaint fails to state a claim for which relief can be granted.

B. Damages

Having found that the defendant, by his default, is liable to DIRECTV for violations of 47 U.S.C. § 605(a) and 18 U.S.C. § 2511, the court must determine the damages to be awarded. DIRECTV has moved for damages "in the amount of \$10,000 in accordance with 47 U.S.C. § 605(e)(3) and 18 U.S.C. § 2520(c)(2)," or, in the alternative, for "actual damages in the amount of \$5,114.00 for each pirate device in use, which represents \$204.56 per month from date of purchase to commencement of the instant action, for a total of \$5114.00." Plaintiff's Motion for Entry of Judgment of Default [Docket 9] at ¶ 19e. Violations of Section 605(a) of the Communications Act are calculated in accordance with Section 605(e)(3)(C)(I), which states in relevant part:

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 . . . ; or (II) the party aggrieved may recover an award of statutory damages for each violation . . . involved in the action in 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). Courts have considered a number of factors in determining a just imposition of damages:

(1) whether the defendant profited as a result of his violation; (2) whether the defendant assisted or induced others in violating the statute; (3) whether the defendant's violation was willful or flagrant; (4) whether the damage award will be sufficient to deter similar conduct; and (5) whether the damage award is comparable to awards in similar cases.

Directv, Inc. v. Huynh, 318 F. Supp. 2d 1122, 1131 (M.D. Ala. 2004) (citations omitted).

Violations of Section 2511 of the Electronic Communications Policy Act of 1986 are calculated in accordance with Section 2520(c)(2), which states, in relevant part, that "the court may assess as damages whichever is the greater of (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or (B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000." 18 U.S.C. § 2520(c)(2). Contrasting Congress' use of the phrase "the court may assess as damages" in Section 2520(c)(2) with its use of the phrase "the court shall assess as damages" in Section 2520(c)(1), the Fourth Circuit has concluded that Section 2520(c)(2) embodies "a congressional intent to grant courts the discretion to decline to award damages in all but the particular circumstances covered by § 2520(c)(1)." *Nalley v. Nalley*, 53 F.3d 649, 651 (4th Cir. 1995). As stated by the *Nalley* court, a close reading of 18 U.S.C. § 2511 "reveals that it does not mandate that every violator of the Act be punished . . ." *Id.* at 652. Other courts have come to the same conclusion. *See, e.g., Dorris v. Absher*, 179 F.3d 420, 429-30 (6th Cir. 1999); *Direct v. Brown*, 371 F.3d 814 (11th Cir. 2004). The following factors are often considered by courts exercising their discretion under Section 2520(c)(2):

(1) whether the defendant profited by his violation; (2) whether there was any evidence that the defendant actually used his pirate access devices; (3) the extent of DIRECTV's financial harm; (4) the extent of the defendant's violation; (5) whether the defendant had a legitimate reason for his actions; (6) whether an award of damages would serve a legitimate purpose; and (7) whether the defendant was also subject to another judgment based on the same conduct.

Huynh, 318 F. Supp. 2d at 1132 (citations omitted).

Considering the circumstances of this case, the court **FINDS** that an award of \$1,000 in damages for the defendant's violation of 47 U.S.C. § 605(e)(3) is just. The plaintiff has not introduced any evidence that the defendant profited as a result of his violation, or that he assisted or induced others to violate the statute. Furthermore, an award of \$1,000 will deter similar conduct. The court declines to award DIRECTV damages for the defendant's violation of 18 U.S.C. § 2511. As in *Huynh*, "[f]oremost among the court's reasons is that DIRECTV will receive a judgment against [the defendant] for his violation of § 605, a violation premised on the same underlying conduct." *Huynh*, 318 F. Supp. 2d at 1132. The court further notes that other courts have awarded similar damages in comparable cases. *See, e.g., Directv, Inc., v. Decroce*, No. 03-5199, 2004 U.S. Dist. LEXIS 16710 (D. N.J., Aug. 19, 2004) (granting default judgment, permanent injunctive relief and awarding minimum statutory damages under §605); *Directv v. Huynh*, 318 F. Supp. 2d at 1122 (granting default judgment, awarding minimum statutory damages under §605, and exercising its discretion to award no damages under §2511).

C. Attorney's Fees and Costs:

DIRECTV also seeks an award of reasonable attorney's fees and other litigation costs in accordance with 18 U.S.C. §2520(b)(3) and 47 U.S.C. 605(e)(3)(B)(iii). Section 605 provides that the court "shall direct the recovery of full costs, including awarding reasonable attorneys' fees to any aggrieved party." 47 U.S.C. § 605(e)(3)(B)(iii). Although this statute provides that the court *shall* award attorney's fees, the determination of the fee amount is left to the court's discretion. The plaintiff has provided the court with an Affidavit of Clement D. Carter Regarding Fees and Costs as well as an itemized description of the basis for the fees and costs, which total \$1573. The court

FINDS these costs and fees are reasonable and thus **ENTERS** judgment against defendant in the amount of \$1573.

D. Injunctive Relief:

The court further **FINDS** that DIRECTV is entitled to the permanent injunctive relief that it has requested in its Complaint and Motion for Entry of Judgment by Default. Section 605 authorizes the court to grant temporary and final injunctions on such terms as it deems reasonable to prevent or restrain violations of subsection (a). 47 U.S.C. §605(e)(3)(B)(i); *see Directv, Inc. v. Kaas*, 294 F. Supp. 2d 1044 (N.D. Iowa 2003). Although a party prevailing on a Section 605 claim is entitled to recover costs and attorney's fees, the court has discretion as to the grant of injunctive relief. In the present case, DIRECTV alleges that "unless restrained by this court, the Defendant will continue to receive, intercept, transmit, and exhibit the Satellite Programming . . . in violation of 47 U.S.C. §605. Complaint at ¶ 48. DIRECTV further alleges that it has no adequate remedy at law and will suffer irreparable harm without an injunction from this court. *Id.* at ¶ 49-50. For these reasons, the court **ENJOINS** the defendant, Borich, from receiving, possessing, or using any pirate access device.

III. Conclusion

Pursuant to these findings, the court **ENTERS** default judgment against the defendant, John Borich, in the sum of \$1,000, plus an additional \$1,573, which represents the reasonable attorney's fees and costs incurred by DIRECTV. The court also permanently **ENJOINS** the defendant, John Borich, from receiving, possessing, or using any pirate access device.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party, and **DIRECTS** the Clerk to post this unpublished opinion at <http://ww.wvsc.uscourts.gov>.

ENTER: September 17, 2004

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