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November 7, 2005

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RE: DIRECTV, Inc. v. Cimiluca, et al.
No.: 03-2422 (JWB)

Dear Messrs. Wolin and Sobel:

This arbitration was heard on September 19, 2005 and written summations were received on or before October 25, 2005. Testifying for the Plaintiff, DIRECTV, was Larry Rissler, hereinafter known as Rissler, who is a retired FBI agent and presently working as a consultant in the commercial setting, investigating piracy claims. Testifying for the Defendants were Gary Hemberger and Paul Hemberger. Further, a number of exhibits were entered into evidence, including emulators, unloopers, smart cards and a receiver.

The facts established that Plaintiff DIRECTV is a California based company in the business of distribution of satellite television broadcast throughout the United States. DIRECTV's signal is beamed up to a satellite which then transmits the signal to its subscribers in

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encrypted format. DIRECTV subscribers receive the signals through the use of DIRECTV hardware, including a small satellite dish, an integrated receiver/decoder ("IRD"), and a DIRECTV access card and cabling. A legitimate subscriber's DIRECTV access card has a computer chip and based upon the number of channels to which a person subscribes, the computer chip is programmed to allow decryption of the signals for those channels when the DIRECTV access card is slid into the IRD.

In this arbitration proceeding, DIRECTV alleges that the Defendants Gary Hemberger and Paul Hemberger pirated DIRECTV's signals. DIRECTV has three (3) counts that they allege against the Defendants for violation of 47 U.S.C. 605(a), 18 U.S.C. 2511(1)(a) and 18 U.S.C. 2512(1)(b). These statutes prohibit parties from receiving, intercepting or endeavoring to intercept electronic communications, such as DIRECTV signals without authorization to do so.

In the satellite television broadcast arena, when one obtains programming for which they have not subscribed to and paid for, a piracy occurs. It is alleged that Gary and Paul Hemberger used the internet to download software and also purchase illegal pirate access devices in order to pick up DIRECTV signals. During the time in question both Gary Hemberger and Paul Hemberger had all of the equipment necessary to view and pirate DIRECTV. For example, they each had DIRECTV accounts, emulators and unloopers. To combat the use of illegal pirating devices, occasionally DIRECTV satellites transmit electronic countermeasures (ECMs). These ECMs disable access cards that have been illegally modified. To counter that disabling affect, the pirate community developed and sold devices such as unloopers to reverse the disabling done by the ECMs. The emulators are also used to illegally obtain DIRECTV programming and also replicate and modify DIRECTV access cards.

A number of companies were engaged in the internet sale of illegal equipment designed to modify or circumvent DIRECTV's scrambling and disabling technology. One such company was Vector Technologies. Vector sold over the internet various types of pirate access devices including unloopers and emulators. As a result of litigation commenced by DIRECTV, DIRECTV was able to execute a writ of seizure upon facilities owned by Vector and as a result, DIRECTV obtained sales records listing sales of the illegal equipment to individuals and obtained other records from Vector. According to these records, on March 20, 2001, Gary Hemberger purchased three (3) emulators from Vector which were shipped to Gary's address in Tinton Falls, New Jersey. On May 1, 2001, Gary purchased three (3) more emulators and three (3) unloopers from Vector. These six (6) devices were shipped to Gary's address and billed to his brother's Paul credit card. These nine (9) devices cost \$831.00. Additionally, a shipping company Fulfillment Plus records were also obtained which show packing slips identical to the order placed by Gary and shipped to Gary's address from Vector Technologies. Further, there is also a packaging slip from Fulfillment Plus dated May 1, 2001 for the three (3) Vector emulators and three (3) unloopers that were also sent to Gary Hemberger's home address in Tinton Falls. On the slip, there were two (2) phone numbers, one belonging to Paul Hemberger and the other belonging to Gary Hemberger and the packing slips also contained Gary Hemberger's email

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address. Again, the order on the packing slip is identical to the order number on the Vector Technology records. Additionally, the credit cards of both Gary Hemberger and Paul Hemberger were used to make the purchases from Vector Technologies. Gary Hemberger purchased items from Vector Technologies totaling \$227.00 and Paul Hemberger used his credit card to purchase items totaling \$604.00.

DIRECTV contends that the unloopers have no other use than to pirate DIRECTV programs. They further contend that emulators can also be used in assisting DIRECTV piracy as stated above. Both Gary and Paul Hemberger had all the necessary equipment to engage in this piracy. It is also important to comment on what became known in this industry as Black Sunday. Apparently on a late January 2001 Sunday, DIRECTV transmitted electronic countermeasures, (ECMs) to disable illegally modified access cards. Subsequent to this date, the use of emulators to steal DIRECTV programming became popular. The Vector emulators were purchased by Gary and Paul Hemberger in March and May of 2001.

Another important area for consideration was the evidence produced on the pirate's den which was a piracy based website that advertised from companies such as Vector Technologies and contained software and programming that individuals (so called pirates) could download and program their illegal access cards. This website had bulletin boards, chat rooms, and online forums where individuals could exchange information about how to use these pirate devices in order to steal these DIRECTV programs. When DIRECTV shut down the pirate's den, it came upon voluminous amounts of data associated with people who corresponded with this pirate's den. The email address of Gary Hemberger showed up on the following postings; there were 48 postings and 6 private messages. The email address is hemgar@yahoo.com. The references in these postings were to an RCA receiver IRD known as a "RCA 303ra," on a variety of dates in March of 2001. Further, there were a number of postings in February, March, April, May and August of 2001, referring to Vector unloopers, Vector EMUs which are emulators seeking information as to how to get these items to function properly.

In reviewing the testimony of Gary Hemberger and Paul Hemberger, it certainly leaves one wondering about their ability to recollect information. For example, Gary Hemberger stated he does not recall ordering these devices on March 20, 2001 and did not recall these devices being charged to his credit card. He stated that he was a DIRECTV customer or subscriber for eight (8) years, but when DIRECTV sued him, he discontinued his subscription. He further testified that he started with one DIRECTV device and then purchased another a few years later. He further testified that he had been an HBO subscriber for a long period of time, never rents pay-per-view movies and belongs to a Hollywood video store, where he rents movies. He was shown an emulator, see P29 in evidence and said he never saw one of these items before and contends he never received three (3) of these devices in March of 2001. Gary also testified that his brother Paul comes and goes as he pleases in his house. There was also some discussion that Gary threw Paul out of his house on at least one occasion. That was testified to on cross examination when his deposition testimony was referred to. Gary also said that he changed his

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email address because it was compromised. He denied having any knowledge of the pirate den or the postings on the pirate den belonged to him. He also denied knowing the language that was used in the postings on the pirate's den. Further, it appears that both Gary and Paul had access to Gary's email address and Gary's computer.

Paul Hemberger testified that he resides with his parents at 120 Evergreen Terrace in Middletown, New Jersey. He said he has an old and slow Dell computer and admitted that he would stay at Gary's house once in a while. He contends that he has been a DIRECTV subscriber since 1996 and has the sports package which provides him with NFL, NHL, NBA. They stated he has two (2) receivers. Paul contends that his parents watch one DIRECTV and Paul watches the other TV. When asked about being billed for three (3) emulators, Paul indicated he did not know what an emulator is and does not know what an unlooper is. Yet, he was billed on his credit card for those items. He also indicated that he never orders Pay-Per-View. When confronted with the postings at his brother's email address namely Hemgar@yahoo.com, he said he does not understand this computer language. He contends that he never bought these devices and said in his deposition testimony, it is a purchase I did not make or remember. When asked about the purchase of another receiver, he said that receiver may be in the attic. In explaining the credit card expenditure of \$604.00 to Vector Technologies, he contends that he did not notice it, and he had other charges on the charge card. So we have Gary and Paul Hemberger purchasing a total of nine (9) items delivered to Gary's house, a total of six (6) emulators and three (3) unloopers. Credit card accounts belonging to both Gary and Paul were respectively billed for these items, packaging slips showing shipments to Gary's house plus Gary's email address on the packaging slips and the order forms. Yet, Gary and Paul Hemberger deny knowledge of these items and Gary denies any involvement with Pirate's Den. There certainly is no real evidence submitted by Gary and Paul to dispute the above-referenced facts.

Defendant Gary Hemberger raises an argument that Paul Hemberger admitted to him that he made the purchasers and that he would take responsibility for his actions. It is obvious that Gary and Paul are brothers and perhaps brothers feel they would take responsibility for the actions of the other. However, this is not a believable or mitigating factor in this case. What I find with respect to the Defendants' collective testimony is that they produced virtually no evidence to support their defense. The only testimony that Paul Hemberger provided is that based on his account history and the fact that he has a sports package and a cable subscription, there is no reason to pirate DIRECTV programs. Although this raises an issue regarding Paul's culpability, I do not find that these factors would exculpate him from liability and responsibility in this case.

Defense counsel on behalf of Paul Hemberger asserts that the statute of limitations is a defense to DIRECTV's claims under § 2511 and 2512, namely counts 2 and 3 of Plaintiff's amended complaint. §2520(e) provides "a civil action under this Section may not be commenced later than two (2) years after the date upon which the clamant first has a reasonable opportunity

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to discover that violation." It appears that the only evidence obtained by DIRECTV in 2001 regarding the Hembergers are exhibits 14 and 15 in the Plaintiff's arbitration notebook. Item 14 does not mention Paul Hemberger at all and exhibit 15 has a reference to Paul Hemberger in the "Bill To" section of the document. However, all of the shipments were sent to Gary Hemberger's home address and the order was made with Gary Hemberger's email address. Nothing, with the exception of 'bill to' Paul Hemberger, would lead anyone to any belief that Paul Hemberger was involved. Further, as Plaintiff's counsel points out, Gary Hemberger's interrogatory responses and Rule 26 disclosure make no mention of Paul Hemberger. It was only at Gary Hemberger's deposition of June 14, 2004 that DIRECTV first became aware that Paul allegedly made all of the purchases. At that time, Gary stated that Paul acknowledged that he would take responsibility for his actions relating to the DIRECTV matter. It was then in the summer of 2004, that DIRECTV became reasonably aware of Paul's participation in the purchase of these devices. I therefore find that DIRECTV was not reasonably aware of Paul Hemberger's involvement until June of 2004 and its claims against Paul Hemberger are therefore timely.

I find as a fact that Gary Hemberger and Paul Hemberger both engaged in piracy of DIRECTV's programs. The Defendants argue that under 47 U.S.C.S. 605(a), the Plaintiff cannot sustain a right of recovery since they have not proven the Defendants received or otherwise assisted in the unauthorized interception, reception or exhibition without authorization of Plaintiff's programs. Defendants claim the mere purchase of six (6) emulators and three (3) unloopers in and of itself is not sufficient to find them responsible under the statute. It may be an argument that DIRECTV cannot prove by direct evidence that their signals were received or intercepted by the Defendants. However, circumstantially, they have proved that the Defendants Gary Hemberger and Paul Hemberger are liable under this statute. Gary's computer was used, items were mailed to Gary's address, his brother Paul had access to his computer, Gary's email address were on the shipping records and both Gary and Paul's credit cards were used to make purchases of these items. Additionally, it is incredible that neither Paul nor Gary have a recollection of making these purchases. Further, the pirate den communications also bring Gary and perhaps Paul into discussions in attempting to gather information as to how to make these emulator and unloopers function properly. Paul Hemberger eventually admitted to purchasing another receiver which he claims may be in the attic if he still has possession of it. All of this evidence coupled with the understanding that these items can only be used to pirate DIRECTV satellite signals certainly leads one to the conclusion that Gary Hemberger and Paul Hemberger are liable to the Plaintiffs' under §605A of the Federal Statute.

In assessing damages under §605(e), the court can award damages between \$1,000.00 and \$10,000.00 against the Defendants. I am awarding the Plaintiff DIRECTV an arbitration award in the amount of \$5,000.00 against the Defendant Gary Hemberger and \$5,000.00 against the Defendant Paul Hemberger.

A legal question arises as to whether or not §2511 and §2512 apply in this case. Counsel for the Defendant argues that when Congress adopted these sections they did not intend to create

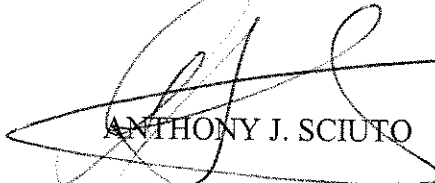
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a private right of action for §2511 and 2512 when read in pari-materia with §2520. If one applies the penalties under §2520, §605 would be superfluous. I agree with the persuasive argument of Judge Martini in the case of DIRECTV vs. Gary Kane, et al. Civil Action No. 03-CV-5632 (WJM) in ruling on a judgment against the Defendant Robert Criscione. In this case, I cannot find that the Defendants Gary and Paul Hemberger utilized these devices for any other use than their own use. I cannot jump to the conclusion that ten (10) devices were up and running, therefore they were selling them to third parties for profit. That is a quantum leap I cannot make and I would need more than the scintilla of circumstantial evidence that exists on this issue. Therefore, I will not issue a substantial damage award to DIRECTV. I am dismissing the claims under § 2511 and 2512 and I am of the opinion that (a) a private right of action does not exist under these sections and (b) even if one were to hold that a private action did exist under these sections, the conduct of Gary and Paul Hemberger was not and I quote Judge Martini as he stated in his persuasive opinion "truly reprehensible conduct on the part of the Defendant".

My opinion is that the Plaintiff DIRECTV is entitled to damages in the amount of \$5,000.00 from Gary Hemberger and \$5,000.00 from Paul Hemberger. Since joint and several liability was not plead in the amended complaint, I will not order joint and several liability in this case.

Counsel for the Plaintiff is also seeking attorneys' fees and costs. It is requested that counsel submit for my review a copy of his bill outlining the time spent in this matter so that I may review and determine the reasonableness of the bill. Additionally, Mr. Sobel after receipt of Plaintiff's counsel's billing statement, can submit whatever opposition he deems appropriate to me for my consideration in this matter.

Very truly yours,



ANTHONY J. SCIUTO

AJS/dml