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WESTERN DISTRICT OF TENNESSEE**

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Subject: 2:03-cv-02376

Comments:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

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ROBERT R. DI TROLIO
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W.D. OF TN, MEMPHIS

DIRECTV, INC., a California Corp.,)

Plaintiff,)

vs.)

No. 03-2376 DV

CAMERON TAYLOR,)

Defendant.)

MEMORANDUM OPINION

I. Introduction

On May 23, 2003, Plaintiff DIRECTV ("Plaintiff") filed a complaint alleging that Defendant Cameron Taylor ("Defendant") possessed and used illegal devices to intercept and decrypt Plaintiff's satellite communications, in violation of 47 U.S.C. § 605, 18 U.S.C. §§ 2511 and 2512, civil conversion, and Tenn. Code Ann. §§ 39-13-601, 39-14-104, and 7-59-109. The Court has jurisdiction pursuant to 28 U.S.C. § 1331.

On September 28-29, 2004, the Court conducted a bench trial on the merits of the case. After consideration of the testimony of the witnesses, the exhibits, and the briefs of the parties, the Court makes the following findings of fact and conclusions of law.

II. Findings of Fact¹

1. Plaintiff is a California-based company in the business of distributing satellite television broadcasts throughout the United States, including Memphis, Tennessee.

2. Plaintiff developed a satellite system capable of transmitting various digitized video and audio signals to homes and businesses nationwide to be used for entertainment purposes (the "satellite programming"). Tr. 134-136. Plaintiff's satellite programming is received through the use of a fixed outdoor satellite dish designed to capture satellite signals. Tr. at 136. The satellite dish is connected by cable to an indoor satellite receiver, which is then connected by cable to a television monitor. Tr. at 136-137. Plaintiff sells its satellite programming to subscribers for a monthly fee or on a "pay-per-view" basis. Tr. at 139.

3. To prevent the unauthorized interception and use of the satellite programming by individuals who have not paid for the service, Plaintiff uses encryption technology to digitally scramble the satellite programming signal, making the signal unusable until it is unscrambled. Tr. at 137-139. The satellite receiver is the component that makes descrambling possible, but another device, an access card, is required to complete the process. Id.

¹The Court first finds that Defendant's credibility was impeached numerous times via introduction of prior, sworn statements he made at his deposition which were inconsistent with statements he made while testifying at trial. For example, Defendant testified at trial that he had purchased the devices at issue. During his deposition, however, he denied purchasing the devices Tr. at 38-40. The Court finds that this and other prior inconsistent statements impeach and undermine the credibility of Defendant as a witness. United States v. Hale, 422 U.S. 171, 175 (1975) ("A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness."); Kasuri v. St. Elizabeth Hosp. Med. Ctr., 897 F.2d 845, 854 (6th Cir. 1990) (finding that introduction of deposition testimony was proper to impeach the credibility of the plaintiff who changed her story between the time her deposition was taken and the time she testified at trial). Accordingly, where there are inconsistencies between the testimony provided by Plaintiff and the testimony provided by Defendant, the Court construes those inconsistencies in favor of Plaintiff.

4. Once a DIRECTV customer pays a subscription fee, Plaintiff electronically directs the access card to unscramble portions of the satellite programming signal, allowing customers to view certain channels on their televisions. Id.

5. On or about January 22, 2001, Defendant purchased an emulator. Tr. at 41. The emulator was designed for the purpose of intercepting Plaintiff's satellite programming without authorization from Plaintiff or payment to Plaintiff.

6. On or about February 6, 2001, Defendant purchased one or more reader/writers from White Viper. Tr. at 54. These products were designed for the purpose of intercepting Plaintiff's satellite programming without authorization from Plaintiff or payment to Plaintiff.

7. On or about February 19, 2001, Defendant purchased a "Super Unlooper." Tr. at 41. Such a device is designed for the purpose of intercepting Plaintiff's satellite programming without authorization from Plaintiff or payment to Plaintiff.

8. On or about April 10, 2001, Defendant purchased a Cobalt Emulator and an MK2 Unlooper-WTXB. Tr. at 41-42. Those devices were designed for the purpose of intercepting Plaintiff's satellite programming without authorization from Plaintiff or payment to Plaintiff.

9. On or about September 5, 2001, Defendant purchased a T911 Whiz Loader. Tr. at 39-40. The Whiz Loader was designed for the purpose of intercepting Plaintiff's satellite programming without authorization or payment to Plaintiff.

10. The Defendant became a DIRECTV paid subscriber in April, 2002. Tr. at 19.

11. There are website forums located on the internet dedicated to exchanging information about pirating DIRECTV satellite programming and providing links to obtain the necessary software applications to effectively steal such satellite programming. Tr. at 181-183.

12. One such website forum is called PirateDen.com (Pirate Den). Pirate Den had its headquarters in Canada. Tr. at 176-177. On June 26, 2003, Plaintiff obtained a Canadian court order known as an Anton Pillers Writ to search and seize the computer servers from Pirate Den. Tr. at 177.

13. During the seizure, Plaintiff discovered that on October 12, 2001, there was a post on the Pirate's Den website from Defendant's e-mail address that constituted an admission that he had successfully intercepted Plaintiff's satellite programming without authorization from Plaintiff or payment to Plaintiff. Tr. at 197-208.

14. Defendant asserts that he did not make the post on the Pirate's Den website.

15. Defendant maintains that he was investigating the feasibility of starting a LAN gaming business. Tr. at 55-56. He testified that he purchased the emulator, the super unlooper WTX, the cobalt emulator, the MK2 unlooper WTXBS, the T911 whiz loader and White Viper reader/writers for use in the LAN gaming business. Tr. at 55. However, he never consulted with anyone about what equipment he should purchase and admitted that he did not know how to use the devices he purchased for use in the LAN gaming business. Tr. at 55-57.

III. Conclusions of Law

A. Claim Raised Pursuant to 47 U.S.C. § 605

Plaintiff asserts a claim against Defendant for violation of 47 U.S.C. § 605. Section 605(a), Title 47 of the United States Code makes it unlawful for any unauthorized person "to receive or assist in receiving any interstate or foreign communication by radio and [to] use such communication (or any information therein contained) for his own benefit or for the benefit of another [unauthorized user]." Courts have repeatedly recognized that satellite television transmission falls within the

definition of “radio.” See, e.g., National Satellite Sports, Inc. v. Eliadas, Inc., 253 F.3d 900 (6th Cir. 2001).

Defendant purchased illegal pirate access devices via the Internet. Moreover, Defendant used the devices to assist in receiving unauthorized reception of Plaintiff’s satellite programming. In Community Television Systems, Inc. v. Caruso, 134 F.Supp. 2d 455 (D. Conn. 2000), aff’d 224 F.2d 430 (2d Cir. 2000), the court determined that although there was no direct evidence that the defendants had used illegal access devices which they had purchased, “use” of the devices is presumed from the purchase of the devices “absent evidence of non-use or any other use.” Id. at 456, 461. Defendant’s purchase and use of the device, therefore, establishes that he received Plaintiff’s satellite signal in violation of 47 U.S.C. § 605.

Furthermore, Defendant placed a post on the Pirate’s Den website admitting that he had used the devices to successfully view Plaintiff’s programming illegally. Moreover, as discussed *supra*, the Court does not find that Defendant’s proffered reason for purchasing the devices is credible. Accordingly, the Court finds that Defendant received the unauthorized reception of Plaintiff’s satellite programming for his own benefit, thus violating 47 U.S.C. § 605.

B. Claim Raised Pursuant to 18 U.S.C. § 2511

Plaintiff next asserts a claim against Defendant for violation of 18 U.S.C. § 2511. Section 2511(1)(a), Title 18 of the United States Code provides that anyone who “intentionally intercepts, endeavors to intercept, or procures any other persons to intercept, any wire, oral, or electronic communication” is subject to civil and criminal liability pursuant to 18 U.S.C. § 2520(a).² See, e.g.,

²Title 18, Section 2520(a) of the United States Code provides that

[e]xcept as provided in section 2511(2)(a)(ii), any person whose

Smith v. Cincinnati Post and Times-Star, 475 F.2d 740 (6th Cir. 1973).

Plaintiff asserts, and Defendant does not dispute, that Defendant purchased at least eight illegal access devices. As noted *supra*, the Court finds that Defendant purchased the devices with the intent to intercept Plaintiff's satellite signals. Moreover, it is undisputed that these devices are designed to circumvent Plaintiff's access controls to permit the offender to view or obtain DIRECTV programming without paying for it.

The Court therefore finds that Defendant intentionally intercepted wire communications in violation of 18 U.S.C. § 2511.

C. Claim Raised Pursuant to 18 U.S.C. § 2512

Plaintiff contends that Defendant illegally possessed and used pirate access devices to view Plaintiff's satellite transmissions of television programming in violation of 18 U.S.C. § 2512(1)(b).

Title 18 of the United States Code § 2512(1)(b) prohibits the possession of a device that has traveled in interstate commerce and is primarily used for the purpose of "surreptitious interception of wire, oral, or electronic communications." Courts have determined, pursuant to 18 U.S.C. § 2520(a), that a violation of 18 U.S.C. § 2512(1)(b) permits a party to seek a civil remedy. See DIRECTV, INC. v. Karpinsky, 269 F. Supp. 2d 918, vacated on other grounds, 274 F. Supp. 2d 918 (E.D.Mich. 2003); DIRECTV, INC. v. Moreno, 2003 WL 22927883 (D. N.J. Dec. 11, 2003). In order for civil liability to attach under § 2512, however, a plaintiff must show that the defendant not

wire, oral or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter [18 U.S.C. §§ 2510-2522] may in a civil action recover from the person or entity, other than the United States, which engages in that violation such relief as may be appropriate.

18 U.S.C. § 2520(a).

only possessed an illegal device but also used that device. Id.

Several courts have held, and this Court agrees, that satellite television descrambling devices are inherently “designed primarily for surreptitious interception” of satellite television communication. See United States v. McNutt, 908 F.2d 561, 565 (10th Cir. 1990); United States v. Lande 968 F.2d 907, 910-11(9th Cir. 1992). Plaintiff asserts that devices such as those purchased by Defendant were specifically designed to permit the use of access cards that were previously disabled by Plaintiff. Use of devices such as those purchased by Defendant circumvents the damaged portion of the access card and allows viewing of Plaintiff’s satellite programming without authorization from or payment to Plaintiff.

Defendant admitted that he purchased the devices. The devices he purchased were primarily used to surreptitiously intercept Plaintiff’s satellite television signal. Plaintiff therefore has established that Defendant possessed devices that traveled in interstate commerce and are primarily used for the purpose of surreptitiously intercepting satellite communications. Furthermore, Defendant posted a note on the Pirate’s Den website asking for help in utilizing the devices to their fullest pirating potential. Accordingly, the Court finds that Defendant illegally possessed and used pirate access devices to view Plaintiff’s satellite transmissions of television programming in violation of 18 U.S.C. § 2512.

D. Claim Raised Pursuant to Tenn. Code Ann. § 39-13-601(1)(A)

Plaintiff next contends that Defendant violated Tenn. Code Ann. § 39-13-601. Section 39-13-601(a)(1)(A) of the Tennessee Code Annotated provides that anyone who “intentionally intercepts, endeavors to intercept, or procures any other persons to intercept, any wire, oral, or electronic communication” is subject to state penalties or suit.

Defendant admitted that he purchased the pirating devices. As discussed *supra*, satellite television descrambling devices are inherently designed for surreptitious interception. Although Defendant contends that he purchased the devices for the purpose of starting a LAN gaming business, his testimony was not credible. Instead, the Court finds that the Defendant intentionally intercepted Plaintiff's satellite transmissions of television programming using the pirate devices that he purchased. That leads to a factual inference that Defendant illegally intercepted or endeavored to intercept Plaintiff's communication. See Caruso, 284 F.3d at 436.

Moreover, Defendant's post on the Pirate's Den website indicates that Defendant did, in fact, successfully intercept Plaintiff's communication illegally. Plaintiff has established, therefore, that Defendant violated Tenn. Code Ann. § 39-13-601(a)(1)(A).

E. Claim Raised Pursuant to Tenn. Code Ann. §§ 39-14-104 and 7-59-109

Plaintiff maintains that Defendant violated Tenn. Code Ann. §§ 39-14-104 and 7-59-109. Section 39-14-104 of the Tennessee Code Annotated prohibits a person from intentionally avoiding payment for services by obtaining those services by means of "deception, fraud, coercion, false pretense, or any other means. . . ." As further defined:

A person also commits the theft of services as prohibited by § 39-14-104, who knowingly: (1) obtains or attempts to obtain cable television services from a company by trick, artifice, deception, or other fraudulent means with the intent to deprive such company of any or all lawful compensation for rendering each type of service obtained.

Tenn. Code Ann. § 7-59-109(a)(1). Thus, obtaining or attempting to obtain cable television by any means, with the intent to deprive the cable television company of any or all lawful compensation constitutes theft of services as prohibited by section 39-14-104. Furthermore, merely possessing a

device designed to descramble a cable television company's satellite signals with the intention of using the device for theft of cable television services constitutes theft of services in Tennessee. See Tenn. Code Ann. § 7-59-109(a)(5)(A).

Plaintiff has demonstrated that by possessing and using the pirating devices, Defendant intentionally obtained or attempted to obtain Plaintiff's programming services by trick, artifice, deception, or other fraudulent means. Plaintiff has established, therefore, that Defendant violated Tenn. Code Ann. §§ 39-14-104 and 7-59-109. Accordingly, the Court holds that Defendant intentionally avoided payment for Plaintiff's cable television services in violation of Tenn. Code Ann. §§ 39-14-104 and 7-59-109.³

F. Claim of Conversion

Finally, Plaintiff asserts that Defendant committed the tort of conversion. Conversion is "in the sense of the law of trover, the appropriation of the thing to the party's own use and benefit, by exercise of dominion over it, in defiance of [the] plaintiff's right." Paehler v. Union Planter's Nat'l Bank, 971 S.W.2d 393, 398 (Tenn. Ct. App. 1997), (citing Mammoth Cave Prod. Credit Ass'n v. Oldham, 569 S.W.2d 833, 836 (Tenn. Ct. App. 1977)). Defendant used pirate access devices to appropriate Plaintiff's signal, in defiance of Plaintiff's rights, thus intentionally and unlawfully converting to his own use and benefit property belonging to DIRECTV, resulting in damages to the Plaintiff. Accordingly, the Court holds that Defendant committed the tort of conversion.

³Section 7-59-109 of the Tennessee Code Annotated was repealed effective July 1, 2004. As of that date, the guiding statute is Tenn. Code Ann. § 39-14-149. However, the acts that led to this suit and the filing of the complaint occurred prior to the effective date of the repeal. Therefore, Tenn. Code Ann. 7-59-109 remains in effect for this case.

IV. DAMAGES

Having established that Defendant violated the statutes asserted by Plaintiff, the Plaintiff contends that it is entitled to damages, costs, and attorney fees. First, Plaintiff contends that Title 47 of the United States Code, section 605(e)(3)(C)(i) provides for damages and gives the aggrieved party the option of actual or statutory damages. If statutory damages are chosen, the aggrieved party is entitled to “a sum of not less than \$1,000 or more than \$10,000, as the court considers just. . .” for each violation. 47 U.S.C. § 605(e)(3)(C)(i). Plaintiff has opted for statutory damages.

Plaintiff also maintains that it is entitled to damages pursuant to 18 U.S.C. § 2520, because of Defendant’s violations of 18 U.S.C. §§ 2511 and 2512. Section 2520 states that the court may assess actual damages or statutory damages of \$10,000, whichever is greater.

Additionally, Plaintiff asserts that it is entitled to damages, pursuant to Tenn. Code Ann. § 39-13-603, which states in pertinent part that

any aggrieved person whose wire, oral, or electronic communication is intentionally intercepted, disclosed, or used in violation of §39-13-601 . . . may in a civil action recover from the person or entity which engaged in that violation the following relief:

- (1) The greater of:
 - (A) The sum of the actual damages . . .
 - (B) Statutory damages of . . . ten thousand dollars (\$10,000) . . .; and
- (2) Punitive damages; and
- (3) A reasonable attorney’s fee and other litigation costs reasonably incurred.

Tenn. Code Ann. §39-13-603(a).

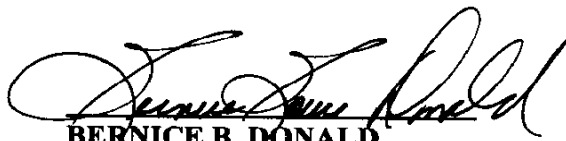
Each of the statutes relied upon by the Plaintiff states that the Court *may* assess damages. DIRECTV has offered no evidence of its actual damages, nor has it offered evidence of how many days Defendant used the pirate access devices. Therefore, the presumptive award of damages is

\$10,000 under 18 U.S.C. § 2520, \$10,000 under Tenn. Code Ann. § 39-13-603, and \$1,000 - \$10,000 for each violation under 47 U.S.C. § 605. Although the Court does find that Plaintiff is entitled to an award of damages, the Court finds that to award the minimum under the three statutes, which would be a total of \$28,000, is excessive under these facts. In Reynolds v. Spears, 93 F.3d 428 (8th Cir. 1996), the court held that it is "logical that Congress chose to make the award of such damages discretionary, given the potential of the law to bring financial ruin to persons of modest means, even in cases of trivial transgressions." 93 F.3d at 435. There is no evidence that Defendant profited from the pirate access devices, other than the money he saved from not paying for the services. The Court therefore exercises its discretion to award no damages under 47 U.S.C. § 605 and no statutory damages under T.C.A. §39-13-603, and awards DIRECTV statutory damages of \$10,000 pursuant to 18 U.S.C. § 2520. Finally, pursuant to Tenn. Code Ann. § 39-13-603, the Court awards reasonable attorney fees and litigation expenses. Plaintiff has thirty (30) days from the date of this opinion to submit proof of fees and expenses incurred in pursuing this litigation.

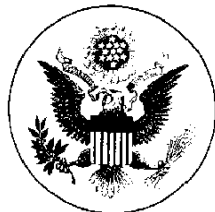
V. ORDER AND JUDGMENT

In accordance with the Memorandum Opinion entered on this day in this cause, **JUDGMENT** is hereby rendered in favor of the Plaintiff and against the Defendant.

IT IS SO ORDERED this 14th day of January, 2005.


BERNICE B. DONALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT - WESTERN DISTRICT OF TENNESSEE



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Honorable Bernice Donald
US DISTRICT COURT