

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DIRECTV, INC.
Plaintiff,

v.

TORÉ ALBRIGHT,
Defendant

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**CIVIL ACTION
NO. 03-4603**

MEMORANDUM OPINION

RUFE, J.

December 9, 2003

Presently before the Court is Defendant’s Motion for Default Judgment. Plaintiff has failed to appear or otherwise defend this action. Accordingly, the Court grants Defendant’s Motion pursuant to Federal Rule of Civil Procedure 55(b)(2). Although Plaintiff seeks damages in excess of \$110,000, the Court will enter judgment against Defendant in the amount of \$1,240.

BACKGROUND

One consequence of the entry of a default judgment is that “the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.” Comdyne I, Inc. v. Corbin, 908 F.2d 1142, 1149 (3d Cir. 1990) (quoting 10 Charles Alan Wright, et al., Federal Practice and Procedure § 2688 at 444 (2d ed. 1983)); see also Fed. R. Civ. P. 8(d). Accordingly, the following factual recitation, taken from the Complaint, is deemed admitted and accurate.

Plaintiff is DirecTV, a provider of direct broadcast satellite television programming such as cable network broadcasts, studio movies and special events. DirecTV encrypts, or electronically scrambles, its satellite transmissions to prevent unauthorized viewing of its television programming. Its programming is available on a subscription and pay-per-view basis only.

Subscribers must obtain from DirecTV certain system hardware that enables them to view the particular programming they purchased from DirecTV.

Defendant Tore Albright subscribed to DirecTV's services. In November 2000, Defendant purchased one Next Gen and UL Pro with SU2 Code Combo (the "Next Gen") from Vector Technologies. The Next Gen is a pirating device specifically designed for enabling unauthorized access to DirecTV's programming by defeating DirecTV's electronic security countermeasures, *i.e.*, descrambling the encryption. Defendant used the Next Gen to receive DirecTV's satellite transmissions without authorization or making payment therefor.

Defendant was properly served with the Complaint on August 23, 2003 and failed to respond within the time prescribed by Federal Rule of Civil Procedure 12(a). The Clerk entered default against Defendant on November 10, 2003 in accordance with Federal Rule of Civil Procedure 55(a). Plaintiff filed an application for default judgment and supporting materials that same day.

DISCUSSION

DirecTV's Complaint alleges that Defendant violated both the Communications Act of 1934, 47 U.S.C. § 605, and the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521 ("Federal Wiretap Laws"). However, its Motion for Default Judgment proceeds only on its Communications Act claims.¹

DirecTV first contends that Defendant violated section 605(a) of Title 47, which provides, in relevant part:

¹ The undersigned is aware that this civil action is one of DirecTV's dozens, if not hundreds, of lawsuits targeting purchasers of pirating devices all across the country. The undersigned is presently presiding over four such actions. This may explain why DirecTV's pleadings and memoranda tend to be boilerplate and not always narrowly tailored to the case at bar. For example, DirecTV's Memorandum in Support of Default makes occasional mention of Defendant's violations of the Federal Wiretap Laws. However, it is clear that the thrust of its Motion for Default Judgment rests on violations of the Communications Act alone.

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.

The device Defendant purchased has no legitimate use. *McGinnis Aff.* ¶ 17. Rather, its sole purpose is to illegally pirate DirecTV's satellite transmissions, enabling the user to receive all of DirecTV's television programming without authorization or making payment therefor. *Id.* ¶¶ 9-10; Complaint ¶¶ 6-7, 12. Defendant purchased one of these devices, leading to the natural inference that he used it to pirate DirecTV's television transmissions for his own personal benefit. *See Yang v. Hardin*, 37 F.3d 282, 286 (7th Cir. 1994) ("In the context of a default judgment, the district court is obliged to accept as true all facts alleged by the plaintiff and all reasonable inferences contained therein."). Accordingly, Defendant violated § 605(a) and default judgment is appropriate.

DirecTV also contends that Defendant violated section 605(e)(4) of Title 47. That provision states:

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, or is intended for any other activity prohibited by subsection (a), shall be fined not more than \$500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the

prohibited activity established herein as it applies to each such device shall be deemed a separate violation.

47 U.S.C. § 605(e)(4). DirecTV makes no attempt to explain in its Memorandum how Defendant violated this provision but nonetheless baldly asserts that he did, and that through § 605(e)(3)(C)(i)(II), see discussion *infra*, DirecTV is entitled to an additional \$100,000 in damages.

The Complaint contains no allegations that would support a finding that Defendant manufactured, assembled, modified, imported, exported, sold or distributed any pirating devices. In its “Prayer for Relief,” DirecTV asks the Court to find that Defendant “import[ed]” pirating devices, but there are no factual allegations to support such a finding. DirecTV merely alleges that Defendant purchased the device from Vector Technologies, and it provides no indication that the Next Gen was delivered from outside the United States to Defendant. See Black’s Law Dictionary 759 (7th ed. 1999) (defining “import” as “[t]he process of bringing foreign goods into a country”). A reasonable reading of this provision demonstrates that § 605(e)(4) targets upstream manufacturers and distributors, not the ultimate consumer of pirating devices, such as Defendant. Accordingly, the Court cannot conclude that Defendant violated 47 U.S.C. § 604(e)(4).

The issue of damages requires some discussion. To fix the amount of damages, the Court may conduct a hearing, see Fed. R. Civ. P. 55(b)(2), but it is not required to do so “as long as it ensure[s] that there [is] a basis for the damages specified in the default judgment.” Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 111 (2d Cir. 1997).

Section 605(e) allows a plaintiff to elect pursuit of either actual damages, 47 U.S.C. § 605(e)(3)(C)(i)(I), or statutory damages, id. § 605(e)(3)(C)(i)(II). DirecTV has elected the latter. Section 605(e)(3)(C)(i)(II) provides:

[T]he party aggrieved may recover an award of statutory damages for each violation of subsec. (a) 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.

Id. § 605(e)(3)(C)(i)(II). Having purchased one (1) pirating device, Defendant committed a single violation of subsection (a). Therefore, the Court may award damages between \$1,000 and \$10,000. The amount of damages assessed rests in the sound discretion of the Court. Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d 829, 852 (11th Cir. 1990). “In its broad discretion for determining statutory damages, the district court should consider both the willfulness of the defendant’s conduct and the deterrent value of the sanction imposed.” Id.

There is no evidence in the record concerning the “willfulness” of Defendant’s conduct.² Accepting as true DirecTV’s allegations, the Court may reasonably conclude that

² DirecTV asks this Court to draw an inference of willfulness from Defendant’s failure to appear and defend against this action. Some courts have adopted this approach. See, e.g., Cablevision of S. Conn., Ltd. P’ship v. Smith, 141 F. Supp. 2d 277, 286 (D. Conn. 2001); Century ML-Cable Corp. v. Diaz, 39 F. Supp. 2d 121, 125 (D.P.R. 1999); Time Warner Cable of New York City v. Olmo, 977 F. Supp. 585, 589 (E.D.N.Y. 1997).

Other courts have rejected this approach and even deemed it “extremely problematic.” Kingvision Pay-Per-View, Ltd. v. Langthorne, Civ. A. No. 01-11079-NG, 2001 U.S. Dist. LEXIS 20721, at *3, 2001 WL 1609366, at *1 (D. Mass. Nov. 28, 2001); see also Entertainment By J & J v. Perez, No. C99-4261 TEH, 2000 WL 890819, at *2 (N.D. Cal. June 30, 2000); Kingvision Pay-Per-View, Ltd. v. Backman, 102 F. Supp. 2d 1196, 1198 (N.D. Cal. 2000). These courts reason that where a plaintiff’s allegations of willfulness bear directly on the question of damages, the mere assertion that a defendant acted willfully is insufficient to justify enhanced damages. This is consistent with the general rule that upon default the factual allegations of a complaint relating to liability are taken as true, but those allegations relating to the amount of damages suffered ordinarily are not. See Credit Lyonnais Securities (USA), Inc. v. Alcantara, 183 F.3d 151, 155 (2d Cir. 1999); Comdyne I, 908 F.2d at 1149; Dundee Cement Co. v. Howard Pipe & Concrete Prods., Inc., 722 F.2d 1319, 1323 (7th Cir. 1983); Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977); Fed. R. Civ. P. 8(d)(“Averments in a pleading to which a responsive pleading is required, *other than those as to the amount of damages*, are admitted when not denied in the responsive pleading.”) (emphasis added). The Court finds this rationale persuasive, so it will not infer willfulness merely from Defendant’s failure to defend this action.

One possible set of circumstances concerns the Court and provide an additional reason to reject the rationale of those courts willing to draw an inference of willfulness from a defendant’s failure to appear in a civil action. According to § 604(e)(4), an individual may be subject to criminal prosecution for violations of § 605. It may be that DirecTV is pursuing these civil actions before any criminal action proceeds. If that is the case, there are troubling Fifth Amendment consequences that attach to any defendant who actively defends a case such as this. The Court cannot discount the possibility that a defendant would choose to ignore a civil action in order to preserve his

Defendant purchased the Next Gen in order to pirate DirecTV's transmissions. Yet, the case at bar is distinguishable from those cases where courts have looked to a defendant's willful and flagrant disregard of the law to justify a higher damage award. See, e.g., Olmo, 977 F. Supp. at 589 (imposing \$21,000 in statutory damages against defendant who acted deliberately for private financial gain when he charged undercover investigators \$265 to modify two cable television boxes); Cablevision Systems New York City Corp. v. Fascitti, 94 Civ. 6830 (DC), 1996 U.S. Dist. LEXIS 1212, at *6 (S.D.N.Y. Feb. 7, 1996) (imposing \$20,000 in statutory damages on tavern owner who intercepted boxing match and charged patrons \$10 to enter and view the fight).

The Court must also fashion a statutory penalty sufficient to deter similar conduct. Any individual contemplating the purchase of an illegal pirating device undoubtedly compares the cost of a DirecTV subscription with the cost of a pirating device. There is nothing in the record concerning the former, but DirecTV has submitted various Internet advertisements for some pirating devices. They range in price from \$149 for the Guardian II/White Knight to \$325 for a "package" that can activate over 900 channels for twelve months. See McGinnis Aff. Ex. A. (There is no evidence concerning the price of a Next Gen.) In light of this evidence, and considering the nature of Defendant's conduct, the Court believes that a statutory penalty of \$1,000 is appropriate. This award is proportionate to those imposed in other jurisdictions. See, e.g., Universal Sports Network, Inc. v. Jimenez, No. C-02-2768-SC, 2002 WL 31109707, at *2 (N.D. Cal. Sept. 18, 2002) (awarding \$1,000 for violation of § 605(a)); Langthorne, 2001 U.S. Dist. LEXIS 20721, at *4 (same); Perez, 2000 WL 890819, at *2 (same); Backman, 102 F. Supp. 2d at 1199 (same).

constitutional rights against self-incrimination. As such, the Court is unwilling to infer willfulness from a failure to appear when some other legitimate motive may be at work.

Finally, DirecTV seeks to recoup its litigation costs under 47 U.S.C. § 605(e)(3)(B)(iii), which states that the Court “shall direct the recovery of full costs . . . to an aggrieved party who prevails.” Defendant has requested an Order directing payment of \$240 in costs (\$150 filing fee plus \$90 process fee). That request is granted. DirecTV also seeks prejudgment interest running from the date Defendant purchased the Next Gen, but § 605 does not provide for such an award.

An appropriate Order follows.

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TORE ALBRIGHT,

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**CIVIL ACTION
NO. 03-4603**

ORDER

AND NOW, this 9th day of December, 2003, upon consideration of Plaintiff's Motion and Affidavit in Support of Default [Doc. # 9], Plaintiff's Memorandum of Law in Support of Default [Doc. # 10], Plaintiff's Statement for Judgment [Doc. # 8], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Plaintiff's Motion is **GRANTED**. Judgment by Default is hereby **ENTERED** in favor of DirecTV, Inc. and against Tore Albright. Damages are hereby **AWARDED** to DirecTV in the amount of \$1,240: \$1000 in statutory damages and \$240 in costs.

The Clerk of Court shall close this case for statistical purposes.

It is so **ORDERED**.

BY THE COURT:

CYNTHIA M. RUFÉ, J.