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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ECHOSTAR SATELLITE, L.L.C., a
Colorado Limited Liability Company,
et al.,

Plaintiffs,

vs.

VIEWTECH, INC., a California
Corporation, et al.,

Defendants.

CASE NO. 07-CV-1273 W (AJB)

**ORDER GRANTING
PRELIMINARY INJUNCTION**

Plaintiffs EchoStar Satellite, L.L.C., EchoStar Technologies Corporation and NagraStar, L.L.C. (collectively, "EchoStar") have filed a motion for a preliminary injunction. EchoStar seeks to freeze Defendant Jung Kwak's assets pending resolution of this matter.

On May 6, 2010, EchoStar and Kwak's attorney appeared for oral argument. Having read and considered the parties' moving and opposing papers, as well as counsel's arguments at the hearing, the Court will **GRANT** EchoStar's motion for a preliminary injunction.

1 **I. BACKGROUND**

2 EchoStar provides a variety of video, audio, and data services to consumers
3 throughout the United States via a Direct Broadcast Satellite system. (*Compl.*, ¶12.)
4 EchoStar operates this broadcast system under the trade name “DISH Network.” (*Id.*,
5 ¶13.) EchoStar uses satellites to broadcast movies, sports, and entertainment
6 programming to consumers who have been authorized to receive the services for a
7 subscription fee or the purchase price of a pay-per-view movie. (*Id.*, ¶12.) To obtain the
8 copyrighted material that EchoStar broadcasts, EchoStar contracts and purchases the
9 distribution rights of copyrighted programming from providers such as network affiliates,
10 pay and specialty broadcasters, cable networks, motion picture distributors, sports
11 leagues, event promoters, and other content providers. (*Id.*, ¶13.)

12 In order to prevent the unauthorized reception of the DISH Network
13 programming, EchoStar utilizes a management and security system that encrypts
14 (electronically scrambles) EchoStar’s satellite signals using proprietary security keys and
15 technology codes. (*Compl.*, ¶¶5-6.) A customer who wishes to subscribe to the
16 programming must first have the necessary equipment, including a satellite-dish
17 antenna, an integrated receiver/decoder, and a credit-card sized EchoStar Access Card.
18 (*Id.*, ¶17.) The Access Card enables the receiver to process and descramble EchoStar’s
19 satellite signals using the data and technology housed within an embedded
20 microprocessor. (*Id.*, ¶¶6, 18-19.) Absent a subscription to DISH Network, EchoStar
21 will not provide a consumer an Access Card or authorize access to encrypted DISH
22 Network programming. (*Id.*, ¶19.)

23 On July 13, 2007, EchoStar filed this lawsuit against Defendants Kwak and
24 Viewtech. In essence, EchoStar alleges that Defendants directly, and as part of a
25 conspiracy, were engaged in manufacturing, trafficking and the sale of devices (referred
26 to a Viewsat receivers), software and other technologies designed to circumvent
27 EchoStar’s security measures and allow for the unauthorized reception of DISH
28 Network programming. EchoStar’s Complaint asserts five causes of action for:

1 (I) violation of the Digital Millennium Copyright Act (“DMCA”), 17 U.S.C. §§
2 1203(b)(1)–(2); (II) violation of the Communication Act, 47 U.S.C. § 605(e)(4);
3 (III) violation the Electronic Communications Privacy Act, 18 U.S.C. §§ 2511(1)(a);
4 (IV) unfair competition under California Business & Professions Code § 17200; and
5 (V) unjust enrichment.

6 After this case was filed, Defendant Kwak – the principal, founder and president
7 of Viewtech – was indicted and pled guilty to one count of conspiracy to violate the
8 DMCA. On or about January 29, 2010, Kwak was sentenced to eighteen months in
9 federal prison.

10 On March 26, 2010, EchoStar filed a motion for a temporary restraining order
11 (“TRO”), seeking to freeze Kwak’s and Viewtech’s assets pending resolution of this case.
12 On April 1, 2010, however, Viewtech filed for bankruptcy, thereby staying all civil
13 proceedings against it. The same day, Kwak filed his opposition to EchoStar’s motion
14 for a TRO.

15 On April 16, 2010, this Court granted the TRO against Defendant Kwak, and
16 scheduled the preliminary-injunction hearing. On April 26, 2010, Kwak filed his
17 opposition. On April 29, 2010, Echostar filed its reply. On May 6, 2010, the parties,
18 through their counsel, appeared at the preliminary-injunction hearing.

19
20 **II. LEGAL STANDARD**

21 Under Rule 65 of the Federal Rules of Civil Procedure, a district court has the
22 authority to issue a preliminary injunction in the exercise of its equitable powers. Fed.
23 R. Civ. P. 65. “The standard for granting a preliminary injunction balances the
24 plaintiff’s likelihood of success against the relative hardship to the parties.” Clear
25 Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003). The
26 Ninth Circuit recognizes two tests for granting preliminary injunctive relief. Save Our
27 Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1120 (9th Cir. 2005).

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1 To obtain a preliminary injunction under the first, “traditional,” test, a plaintiff
2 must show “(1) a strong likelihood of success on the merits, (2) the possibility of
3 irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of
4 hardships favoring the plaintiff, and (4) advancement of the public interest (in certain
5 cases).” Save Our Sonoran, 408 F.3d at 1120 (quoting Johnson v. Cal. State Bd. of
6 Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995)).

7 To obtain a preliminary injunction under the second, “alternative,” test, a
8 plaintiff must demonstrate *either* (1) a combination of probable success on the merits
9 and the possibility of irreparable injury *or* (2) that serious questions are raised and the
10 balance of hardships tips sharply in his favor. Save Our Sonoran, 408 F.3d at 1120
11 (citing Johnson, 72 F.3d 1430); Immigrant Assistance Project of the L.A. County of
12 Fed’n of Labor v. INS, 306 F.3d 842, 873 (9th Cir. 2002). “These two formulations
13 represent two points on a sliding scale in which the required degree of irreparable harm
14 increases as the probability of success decreases. They are not separate tests but rather
15 outer reaches of a single continuum.” Baby Tam & Co. v. City of Las Vegas, 154 F.3d
16 1097, 1100 (9th Cir. 1998). Thus, “the greater the relative hardship to the moving
17 party, the less probability of success must be shown.” Immigrant Assistant Project, 306
18 F.3d at 873 (citations). “Conversely, it has been held that a preliminary injunction may
19 be granted even though the harm factor favors defendant if plaintiff demonstrates a
20 substantial likelihood that he will ultimately prevail.” Id. (citations).

21 “In cases where the public interest is involved, the district court must also
22 examine whether the public interest favors the plaintiff.” Fund for Animals, Inc. v.
23 Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992); see also Caribbean Marine Services Co.,
24 Inc. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988) (“Under either test, however, the
25 district court must consider the public interest as a factor in balancing the hardships
26 when the public interest may be affected.”).

27

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1 **III. DISCUSSION**

2 **A. Probability of Prevailing.**

3 Although Kwak filed an “opposition,” he does not argue that EchoStar failed to
4 establish a probability of prevailing on the merits.¹ Additionally, the record before the
5 Court confirms that there is a substantial likelihood that EchoStar will prevail against
6 Kwak.

7 EchoStar alleges that Defendant Kwak violated the DMCA. Based on Kwak’s
8 guilty plea in his criminal case, there is a substantial likelihood that EchoStar will prevail
9 on this claim.

10 On or about October 19, 2009, Kwak signed a Plea Agreement with the United
11 States. (See *EchoStar’s P&A, Ex. 1* [Doc. 126-1].) Under the terms of the agreement,
12 Kwak pled guilty to one count of conspiracy to violate the DMCA. (*Id.*, 1:23–26.) As
13 part of the factual basis for the plea, Kwak admitted to conspiring to attempt to
14 circumvent EchoStar’s security measures designed to prevent the unauthorized
15 reception of DISH Network Programming:

16 . . . In November 2007, Echostar’s DISH Network announced that it
17 would begin a slow deployment of a new smart card to be used by their
18 subscribers based upon a new encryption scheme known variously as
19 “Nagra 3” and “rom 240.” In order for FTA receivers, like Viewtech’s
20 Viewsat to continue to receive DISH programming without subscription,
21 the Nagra 3 encryption needed to be cracked and disseminated. . . .

22 Beginning at least by March 2008, in order to continue selling Viewsat
23 FTA receivers to the large community of purchasers wanting to receive
24 satellite television without a subscription, defendant determined to fund
25 efforts to break the Nagra 3 encryption and to reward success. . . .

26 (*Id.*, 4:11–5:2.) The Plea Agreement goes on to describe Defendant Kwak’s efforts to
27 “break” EchoStar’s security measures. (*Id.*, 5:5–22.) Defendant then specifically admits
28 “that he and his co-defendants were working together in order to crack Nagra 3[,]” that

¹Nor did Kwak’s “opposition” to the motion for a TRO argue that EchoStar failed to establish a probability of prevailing.

1 once cracked, Kwak “and his co-defendants would cause computer code to be published
2 on the Internet that would allow owners of Viewsat FTA boxes to receive DISH
3 Network programming without having . . . a subscription[,]” and that Kwak “knew that
4 DISH Network presents copyrighted works and that his plan was to defeat DISH’s
5 efforts to protect that work. . . .” (*Id.*, :23–6:5.) Based on these admissions, the Court
6 finds that EchoStar has established a substantial probability of prevailing on the DMCA
7 cause of action.

8 In addition to Kwak’s Plea Agreement, EchoStar has submitted evidence,
9 including declarations from confidential informants filed under seal that further confirm
10 Kwak’s efforts to circumvent EchoStar’s security measures, and profit from the sale of
11 devices and technologies that allow for the unauthorized reception of DISH Network
12 programming. For these reasons, the Court finds that EchoStar has also established a
13 substantial likelihood of success on the merits of other causes of action included in the
14 Complaint.

15
16 **B. Balance of Hardships / Irreparable Harm.**

17 Defendant Kwak has failed to argue, much less demonstrate, that he will suffer
18 any hardship or irreparable harm by the proposed preliminary injunction. In contrast,
19 EchoStar has established that if Kwak is allowed to dispose of his assets, EchoStar will
20 continue to suffer irreparable harm due to the lost profits and subscribers resulting from
21 Defendant Kwak’s conduct. Additionally, without the preliminary injunction,
22 EchoStar’s ability to recover any of its damages will be further diminished. Accordingly,
23 the Court finds the balance of hardships and irreparable harm heavily favor EchoStar.

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25 **IV. CONCLUSION AND ORDER**

26 For the reasons discussed above, the Court **GRANTS** EchoStar’s motion for a
27 preliminary injunction and **ORDERS** as follows:
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1. Defendant Jung Kwak, and those acting in active concert or participation with him who receive actual notice of this Order are enjoined and must restrain from directly or indirectly:

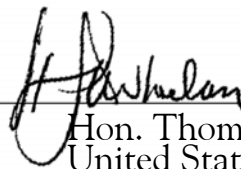
(a) transferring, removing, encumbering, or permitting withdrawal of any assets or property belonging to Jung Kwak wherever located, whether real or personal, tangible or intangible, including cash, bank accounts of any kind, stock accounts (including but not limited to any stock interest Jung Kwak may possess in the entity Sonicview, Inc.), bonds, accounts receivable, inventory (including all Viewsat branded receivers and their component parts and accessories), membership interests, and title to Jung Kwak's business property; and

(b) destroying, hiding, or altering any books or records, whether in hard copy or electronic form, concerning the satellite receiver business or finances of Jung Kwak, including invoices, purchase orders, receipts, shipping records, banking or investment records, or any other documents that identify Jung Kwak's assets;

This preliminary injunction shall take effect immediately and remain in effect pending entry of a final judgment or further order of the Court.

IT IS SO ORDERED.

DATED: May 6, 2010



Hon. Thomas J. Whelan
United States District Judge