

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 17-3528-MWF (JPRx)

Date: October 17, 2017

Title: Dish Network L.L.C. et al. v. Paul Jimenez

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:
Rita Sanchez

Court Reporter:
Not Reported

Attorneys Present for Plaintiff:
None Present

Attorneys Present for Defendant:
None Present

Proceedings (In Chambers): ORDER GRANTING MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT PAUL JIMENEZ [16]

Before the Court is Plaintiffs Dish Network L.L.C.’s and NagraStar LLC’s (together, “Plaintiffs” or “Dish Network”) Motion for Default Judgment against Defendant Paul Jimenez, filed on August 21, 2017. (Docket No. 14).

The Court has read and considered the papers filed in connection with this Motion and held a hearing on **October 16, 2017**. Defendant did not appear at the hearing.

For the reasons set forth below, the Motion is **GRANTED**. The Motion satisfies the procedural requirements for a default judgment and is supported by the *Eitel* factors. Therefore, the Court awards Plaintiffs the requested damages and injunctive relief.

I. BACKGROUND

Plaintiffs’ Complaint contains the following allegations, which are deemed admitted by the defaulting Defendant. *See* Fed. R. Civ. P. 8(b)(6); *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 617 (9th Cir. 2016) (“[U]pon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true.” (internal quotation marks and citations omitted)).

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Dish Network “is a multi-channel video provider that delivers video, audio, and data services to approximately 14 million customers throughout the United States, Puerto Rico, and the U.S. Virgin Islands via a direct broadcast satellite system.” (Complaint ¶ 8). Dish Network broadcasts copyrighted programming to customers who pay a subscription fee and who have a Dish Network receiver and other required equipment. (*Id.* ¶¶ 9-13). The “programming is digitized, compressed, and scrambled prior to being transmitted to multiple satellites ... above Earth ..., which ... relay the encrypted signal back to Earth where it can be received by [Dish Network] subscribers...” (*Id.* ¶ 12).

Dish Network alleges that “Defendant has been circumventing [Dish Network’s] security system and receiving [Dish Network’s] satellite broadcasts of copyrighted television programming without payment of the required subscription fee.” (*Id.* ¶ 7). “Defendant accomplished this in part by subscribing to a pirate television service known as NFusion Private Sever [“NFusion”],” through which “Defendant illegally obtained [Dish Network’s] control words or “keys,” which he then used to decrypt [Dish Network’s] satellite signal and view [Dish Network] programming without authorization.” (*Id.*). Specifically, Dish Network alleges that Defendant circumvented its encryption systems through a form of satellite piracy known as “Internet key sharing” or “IKS,” which involves pirated software being “loaded onto an unauthorized receiver” that the end-user connects to over the internet. (*Id.* ¶¶ 18, 19). Defendant purchased a subscription to NFusion, “which consisted of a passcode to access the IKS service” from an entity called Digital TV. (*Id.* ¶ 22). Dish Network obtained Digital TV’s records, which revealed that “Defendant purchased at least three IKS Server Passcodes on or about January 3, 2012 and January 6, 2013.” (*Id.*).

The Complaint asserts three claims for relief: (1) violation of the Digital Millennium Copyright Act, 17 U.S.C. § 1201(a)(1) (*id.* ¶¶ 25-28); (2) violation of the Federal Communications Act, 47 U.S.C. § 605(a) (*id.* ¶¶ 30-33); and (3) violation of the Electronic Communications Privacy Act (“ECPA”), 18 U.S.C. §§ 2511 (1)(a), 2520(a) (*id.* ¶¶ 34-41). With respect to each of its claims, Dish Network sought the greater of its actual or statutory damages and injunctive relief. Dish Network seeks default judgment only in connection with its ECPA claim.

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Dish Network commenced this action on May 10, 2017 and served Defendant with a summons and Complaint on June 13, 2017. (Docket Nos. 1, 8). The Clerk entered Defendant's default on July 21, 2017. (Docket No. 11). Dish Network filed this Motion on August 21, 2017 and served Defendant with its Motion papers by mail on the same day. (Docket No. 16). Defendant has not appeared in this action.

II. DISCUSSION

A. Entry of Default Judgment

Having reviewed the filings in this action, the Court is satisfied that Dish Network has met all procedural requirements for obtaining a default judgment.

Dish Network properly served Defendant with a summons and Complaint by (1) personally serving copies upon an adult co-worker at Defendant's place of business and explaining the nature of the papers on June 13, 2017; and (2) mailing copies by first-class mail to Defendant at the same business address the next day, in conformity with California Code of Civil Procedure § 415.20 and Federal Rule of Civil Procedure 4(h)(1)(A). (Docket No. 8).

As a matter of discretion, the Court also requires that a plaintiff serve a motion for default judgment on relevant defendant(s). The Court does not require service under Rule 4, but does require that the service is reasonably likely to provide notice to the defendants. On August 21, 2017, Dish Network served Defendant with the Motion papers by mailing them to Defendant's business address. (Docket Nos. 16-6). Moreover, during the hearing, Plaintiffs' counsel indicated that an attorney putatively representing Defendant recently contacted Plaintiffs' counsel, but indicated that Defendant did not intend to appear in this action. The Court is thus satisfied that service was proper and that Defendant has actual notice of both this action and Plaintiffs' Motion.

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Federal Rule of Civil Procedure 55(b) permits a court-ordered default judgment following the entry of default by the clerk under Rule 55(a). Having reviewed the filings in this action, the Court determines that the five procedural requirements of Federal Rule of Civil Procedure 55 and Local Rule 55-1 are met: (1) the Clerk entered Defendant’s default on July 21, 2017; (2) Defendant failed to respond to the Complaint; (3) Defendant is not an infant or incompetent person; (4) Defendant is not serving in the military and thus the Service Members Civil Relief Act does not apply; and (5) Dish Network served Defendant with notice of this Motion and supporting papers on August 21, 2017, in a manner deemed appropriate by the Court. (Docket Nos. 11, 16-6; Declaration of David Van Riper (“Van Riper Decl.”) ¶¶ 2-5).

The choice as to whether a default judgment should be entered is at the sole discretion of the trial court. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The Ninth Circuit has determined that a court should consider seven discretionary factors before rendering a decision on motion for default judgment. *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986).

The seven factors are: (1) the possibility of prejudice to the plaintiff, (2) the merits of the plaintiff’s substantive claim, (3) the sufficiency of the Complaint, (4) the sum of money at stake in the action, (5) the possibility of a dispute concerning material facts, (6) whether the default was due to excusable neglect, and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring a decision on the merits. *Id.* In this action, the seven factors weigh in favor of entering default judgment against Defendant on Dish Network’s ECPA claim.

All of the *Eitel* factors weight in favor of entering default judgment, apart from the policy favoring a decision on the merits.

B. Monetary Damages and Attorneys’ Fees

When a plaintiff seeks money damages in a default judgment, “the plaintiff must ‘prove-up’ its damages.” *Amini Innovation Corp. v. KTY Int’l Mktg.*, 768 F. Supp. 2d

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1049, 1053–54 (C.D. Cal. 2011) (citations omitted). The ECPA allows a plaintiff to elect between actual and statutory damages. 18 U.S.C. § 2520(c)(2). Dish Network seeks statutory damages in the sum of \$10,000 pursuant to section 2520(c)(2)(B). (Complaint at 8; Mot. at 7).

Damages may be assessed at the default judgment stage without a hearing if “the amount claimed is a liquidated sum or capable of mathematical calculation.” *Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981). Section 2520(c)(2) allows for damages in the fixed sum of \$10,000 where a defendant intentionally intercepted an encrypted satellite transmission. *See* 18 U.S.C. § 2520(c)(1)-(2). An award of damages under section 2520 is discretionary, meaning a “[c]ourt may elect to award either the statutory sum or no damages at all. The court may not, however, award an amount that falls between those two figures.” *Dish Network L.L.C. v. Gonzalez*, No. 1:13-cv-00107-LJO-SKO, 2013 WL 2991040, at *18 (E.D. Cal. Jun. 14, 2013); *see also DelVecchio*, 831 F. Supp. 2d at 601 (“Congress wrote § 2520(c)(2) to give discretion to the Court in determining whether to award damages, but the plain language of the statute does not... authorize the Court to grant anything other than the damages permitted by the statute.”).

While the Ninth Circuit has not provided specific guidance for the exercise of discretion under the statute, courts within this Circuit have followed a six-factor test set forth by the Fourth Circuit in *DIRECTV, Inc. v. Rawlins*, 523 F.3d 318 (4th Cir. 2008). The factors are as follows: “(1) the severity or minimal nature of the violation; (2) whether there was actual damage to the victim; (3) the extent of any intrusion into the victim’s privacy; (4) the relative financial burdens of the parties; (5) whether there was a reasonable purpose for the violation; and (6) whether there is any useful purpose to be served by imposing the statutory damaged amount.” *Gonzalez*, 2013 WL 2991040, at *8 (citing *Rawlins*, 523 F.3d at 325-26). The relevant *Rawlins* factor militate in favor of awarding Dish Network \$10,000 in statutory damages.

The Complaint alleges that Defendant purchased a subscription to NFusion, “which consisted of a passcode to access the IKS service” from an entity called Digital TV. (Complaint ¶ 22). Dish Network obtained Digital TV’s records, which revealed

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that “Defendant purchased at least three IKS Server Passcodes on or about January 3, 2012 and January 6, 2013.” (*Id.*). In addition, between January 7, 2012 and May 3, 2014, Defendant posted comments and questions on the website “www.ftazeta.com” indicating that he was using NFusion decryption service to intercept Dish Network programming. (Mot. at 8; Declaration of Christopher Ross (“Ross Decl.”) ¶¶ 6-9, Exhs. 1-9). This indicates that Defendant was intercepting Dish Network’s satellite signal without authorization for more than two years. Had Defendant responded to the Complaint, giving Dish Network the chance to conduct discovery, more extensive ECPA violations may have been shown. In any event, two-plus years of unauthorized access is substantial.

Dish Network has suffered harm as a result of Defendant’s actions, as “[p]iracy jeopardizes Dish Network’s security system and requires costly security updates, damages the reputations and goodwill of Dish Network ... which is vital to [its] business, and leads to lost programming revenues and lost profits that are customarily gained from the sale of subscription packages and equipment to authorized Dish Network subscribers.” (Mot. at 9); *see Gonzalez*, 2013 WL 2991040, at *9 (“Plaintiffs have sufficiently demonstrated that they suffered actual damages from Defendant’s actions through the loss of a legitimate subscriber for the period Defendant accessed the encrypted signal.”).

Dish Network has lost programming revenues, and, by way of the actions of Defendant and other satellite data pirates, has suffered some injury to its business reputation and security system. Dish Network also incurs litigation expenses to combatting piracy. Conversely, the only burden on Defendant is that he must stop stealing satellite data.

Defendant received notice of this action but chose not to appear. Dish Network’s well-pleaded allegations of Defendant’s unauthorized interception of Dish Network programming are accepted as true. *TeleVideo Sys., Inc.*, 826 F.2d at 917-18. As the *Gonzalez* court held, “[i]f the allegations are deemed to be true, there can be no legitimate reason for Defendant’s actions.” 2013 WL 2991040, at *9 (citing *DISH*

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Network LLC v Rounds, No. 11-241-Erie, 2012 WL 1158798, at *3 (W.D. Pa. Apr. 6, 2012)).

Awarding damages will serve the legitimate purpose of compensating Dish Network for its loss, and in addition will act to deter Defendant and others from intercepting Dish Network’s programming without authorization. In *Gonzalez*, the court held that this factor weighed “strongly in favor of awarding statutory damages” because “no damages would effectively reward Defendant for wrongful actions by allowing the misconduct to remain unsanctioned.” 2013 WL 2991040, at *10.

Accordingly, the relevant *Rawlins* factors militate in favor of awarding Dish Network **\$10,000** in statutory damages for Defendant’s violation of the ECPA.

Finally, Dish Network seeks attorneys’ fees in the amount of **\$1,200.00**, pursuant to 18 U.S.C. § 2520(b)(3) and calculated according to Local Rule 55-3. (Mot. at 15; Complaint at 9). Having prevailed on its ECPA claim in the amount of \$10,000, Dish Network is also entitled to \$1,200.00 for attorneys’ fees.

Therefore, the Court awards Plaintiff monetary damages in the sum of **\$11,200**.

D. Injunctive Relief

Dish Network also seeks a permanent injunction preventing Defendant from: 1) “circumventing or assisting others to circumvent Dish Network’s security system, or otherwise intercepting or assisting others to intercept Dish Network’s satellite signal”; or 2) “testing, analyzing, reverse engineering, manipulating, or otherwise extracting codes, data, or information from Dish Network’s satellite receivers, smart cards, satellite stream, or any other part or component of the Dish Network security system.” (Mot. at 15; Complaint at 8).

In order to obtain injunctive relief, the plaintiff must show that (1) it has suffered an irreparable injury; (2) remedies available at law are inadequate to compensate for injury; (3) the balance of hardships favors such relief; and (4) the public interest is not

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disserved by an injunction. *Geertson Seed Farms v. Johanns*, 570 F.3d 1130, 1136 (9th Cir. 2009).

The Ninth Circuit has recognized that loss of good will, loss of ability to control business reputation, and lost profits each establish irreparable harm. *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). As such, actual loss is not required to demonstrate irreparable harm; rather “evidence of threatened loss of prospective customers or goodwill” is sufficient. *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001) (recognizing companies stand to lose customers and accompanying goodwill and revenue from ongoing infringement).

Dish Network provides encrypted satellite broadcasts of copyrighted television programming to its fee-paying customers and invests millions of dollars each year to protect against unauthorized viewing. (Declaration of Gregory Duval (“Duval Decl.”) ¶¶ 5-10, 18). Its business reputation is, in large part, built on the delivery of secured content. (*Id.* ¶ 20). It follows that piracy harms its reputation, causes it to incur expenses fighting piracy, and causes it to lose revenue that it would otherwise earn from fee-paying customers. Dish Network has established that piracy generally, and Defendant’s piracy specifically, has caused it irreparable harm. Monetary damages cannot fully compensate for the harm because it is impossible to quantify the loss of revenue and goodwill Dish Network incurs as a result of piracy.

With respect to the balance of hardships, a defendant may not complain of harm merely because they are being prevented from engaging in illegal activity. *Triad Sys. Corp. v. Se. Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995) (“[Defendant] cannot complain of the harm that will befall it when properly forced to desist from its infringing activities.”); *Gonzalez*, 2013 WL 2991040, at *10 (holding similarly situated defendant “would suffer no hardship [from a permanent injunction], since he would only be prevented from engaging in illegal activity”). Given that the burden placed on Defendant by the requested injunction would consist only foregoing illegal conduct, the balance of hardships favors an injunction.

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The public interest is served by preventing the “misappropriation of the skills, creative energies, and resources which are invested in protected work.” *Apple Computer, Inc v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983). Defendant’s piracy undermines the integrity of the copyright system. *Gonzalez*, 2013 WL 2991040, at *10 (“[T]he public interest would be served by protecting copyrights and aiding the enforcement of federal law.”); *DISH Network LLC v. Whitcomb*, No. 11-CV-0333 W(RBB), 2011 WL 1559825, at *4 (S.D. Cal. Apr. 25, 2011) (recognizing public interest in having anti-piracy legislation enforced).

Each of the requirements for an injunction are met. Accordingly, the Court will issue the requested permanent injunction.

III. CONCLUSION

The Motion is **GRANTED**.

Defendant must pay Plaintiff a total of \$11,200 in statutory damages and attorneys’ fees.

Defendant is also permanently enjoined from: 1) circumventing or assisting others to circumvent Dish Network’s security system, or otherwise intercepting or assisting others to intercept Dish Network’s satellite signal; or 2) testing, analyzing, reverse engineering, manipulating, or otherwise extracting codes, data, or information from Dish Network’s satellite receivers, smart cards, satellite stream, or any other part or component of the Dish Network security system.

A separate Judgment and Injunction will issue.

IT IS SO ORDERED.