

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DIRECTV, INC.,)	JUDGE PAUL R. MATIA
)	
Plaintiff,)	CASE NO. 5:02CV00706
)	
-vs-)	<u>MEMORANDUM OF OPINION</u>
)	<u>AND ORDER</u>
MARK DISALVATORE, et al.,)	
)	
Defendants.)	

This case is before the Court upon plaintiff DIRECTV's four separate motions for summary judgment against defendants Mark DiSalvatore (Doc. 132), Dan Hill (Doc. 133), Michael Tempera (Doc. 134) and Eric Lovejoy (Doc. 135). All of these motions are unopposed. For the reasons set forth below, the Court determines that the plaintiff's summary judgment motions should be granted in their entirety.

I. Background¹

Plaintiff DIRECTV, Inc. is "the nation's leading direct broadcast satellite system, delivering over 225 channels of television and other programming to more than 10 million homes and businesses in the United States." (Doc. 132, Exh. 1, at 1). DIRECTV originally brought this action against 23 defendants on April 16, 2002. Currently, seven defendants remain in this action, and plaintiff DIRECTV has moved for summary judgment against four of these defendants.

This action is based on the defendants' alleged violations of the Federal Communications Act of 1934 ("FCA"), 47 U.S.C. § 605; the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. §§ 2510-2521; Ohio Revised Code §§ 2913.041 and 2307.62, as well as an Ohio common law conversion claim. The

¹The facts set forth in this section are taken from the plaintiffs' Complaint (Doc. 1) and summary judgment motion briefing. When a summary judgment motion is unopposed, it is appropriate for the Court to rely on the facts advanced by the movant. See *Cacevic v. City of Hazel Park*, 226 F.3d 483, 491 (6th Cir. 2000), citing *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 407, n. 5 (6th Cir. 1992).

Moreover, on December 21, 2002, plaintiff DIRECTV served written discovery on the defendants. Although written responses were due to be served on or before January 23, 2003, none of the defendants responded to the requests, nor did any of them request an extension of time to respond. The defendants' failure to respond to the requests for admissions results in the relevant matters' being deemed admitted. See Fed. R. Civ. P. 36(a); *In re Niswonger*, 116 B.R. 562, 566 (Bankr. S.D. Ohio 1990)(failure to respond to request for admissions was an appropriate basis for granting summary judgment).

defendants purportedly violated these provisions through their purchase and use of devices designed to surreptitiously intercept DIRECTV's satellite television programming.

The relevant facts relating to each defendant are relatively similar. In this section, the Court briefly sets forth the general facts relevant to the action and facts essential to determining the action against each of the defendants.

Plaintiff DIRECTV encrypts its satellite transmissions in order to prevent unauthorized viewing of its satellite television programming. That programming is available to customers on a subscription and pay-per-view basis only. DIRECTV provides each customer with a DIRECTV Access Card and necessary system hardware. Each customer must create an account with DIRECTV. Once DIRECTV activates the access card, a customer can receive and view the channels to which the customer has subscribed.

Numerous individuals and companies have illegally manufactured and sold devices designed to circumvent DIRECTV's security measures. On May 25, 2001, with the help of local law enforcement, DIRECTV executed Writs of Seizure at a mail shipping facility used by several sources of pirate technologies. DIRECTV thus acquired sales records, shipping records, e-mail communications, credit card receipts and other records. Based on

those records, DIRECTV determined that the defendants had acquired and used illegal devices designed to access DIRECTV's programming without authorization. This action followed.

A. Defendant Mark DiSalvatore

On March 2, 2001, Mark DiSalvatore purchased over the internet a Terminator Boot Loader Board from Vector Technologies. DiSalvatore used a credit card to complete the purchase, and the device was shipped to DiSalvatore at his home address of 1010 West Prospect Road, Ashtabula, OH 44004.

According to James Wells, the Director of DIRECTV's Office of Signal Integrity (Doc. 138, at 5), bootloaders are devices that are designed and primarily used for the unauthorized reception of DIRECTV satellite television programming. Based on DiSalvatore's purchase of the bootloader device and its widely known function, DIRECTV asks the Court to presume that defendant DiSalvatore used the device to illegally intercept DIRECTV's satellite programming.

B. Defendant Dan Hill

On March 15, 2001, Dan Hill purchased over the internet three Vector SMT & Vector X Code Super Unloopers from Vector Technologies. Defendant Hill completed the transaction using a credit card, and the devices were shipped to Hill's home address of 712 9th Street NE, Massillon, OH 44646.

According to James Wells, the Director of DIRECTV's Office of Signal Integrity (Doc. 138, at 3-4), unloopers are devices that are designed and primarily used for the unauthorized reception of DIRECTV satellite television programming. Based on DiSalvatore's purchase of the devices and their widely known function, DIRECTV asks the Court to presume that defendant DiSalvatore used the devices to illegally intercept DIRECTV's satellite programming.

C. Defendant Michael Tempera

On April 23, 2001, Michael Tempera purchased a "Terminator T-5 Typhoon Loader/Unlooper" from DSS-Stuff. On April 25, 2001, Tempera purchased a "Wildthing Unlooper," and on May 16, 2001 he purchased a "Terminator P.S.B.," also from DSS-Stuff. The transactions were completed by credit card, and the devices were shipped to Tempera's home address of 2430 Montclair, Wooster, OH 44691.

According to DIRECTV's expert, Dr. Philip Koopman (Doc. 139, Exh. G, at 4, 3), the Terminator T-5 and Terminator P.S.B., as well as the unlooper device, are devices that are designed and primarily used for the unauthorized reception of DIRECTV satellite television programming. Based on Tempera's purchase of the devices and their widely known function, DIRECTV

asks the Court to presume that defendant Tempera used the devices to illegally intercept DIRECTV's satellite programming.

D. Defendant Eric Lovejoy

On December 28, 2000, Eric Lovejoy purchased a "Dual Pro Unlooper" from DSS-Shutt. The transaction was completed by credit card, and the device was shipped to defendant Lovejoy's home address of 1838 Wymore Avenue, Cleveland, OH 44112.

According to James Wells, Director of DIRECTV's Office of Signal Integrity (Doc. 138, at 3-4), unlooper devices are devices that are designed and primarily used for the unauthorized reception of DIRECTV satellite television programming. Based on Lovejoy's purchase of the device and its widely known function, DIRECTV asks the Court to presume that defendant Lovejoy used the device to illegally intercept DIRECTV's satellite programming.

II. Standard of Review

Summary judgment is appropriately granted when "... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" Fed. R. Civ. P. 56(c). *See also Meade v. Pension Appeals & Review Committee*, 966 F.2d 190, 192-93 (6th Cir. 1992).

In reviewing the motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party when deciding whether a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *White v. Turfway Park Racing Ass'n*, 909 F.2d 941, 943-44 (6th Cir. 1990).

In determining whether a factual issue is "genuine," the Court must decide whether the evidence is such that reasonable jurors could find that the non-moving party is entitled to a verdict. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The existence of a mere scintilla of evidence in support of the non-moving party's position ordinarily will not be sufficient to defeat a motion for summary judgment. See *id.* at 252.

The absence of a response to a summary judgment motion does not lessen the burden of a moving party to demonstrate the appropriateness of summary judgment. See *Cross v. Northwest Airlines*, 998 F. Supp. 803, 805 (N.D. Ohio 1998), citing *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 410 (6th Cir. 1992). The failure of the non-moving party to oppose a summary judgment motion does not automatically entitle the moving party to a grant of summary judgment. See *Gaines v. Farese*, 798 F.2d 1414,

*6 (6th Cir. 1986). Rather, the Court must carefully examine the submissions of the moving party to determine whether that party is entitled to judgment as a matter of law.

As the Sixth Circuit has stated:

In the absence of a response, the court must review carefully those portions of the submitted evidence designated by the moving party. Neither the trial nor appellate court, however, will *sua sponte* comb the record from the partisan perspective of an advocate for the non-moving party. Rather, in the reasoned exercise of its judgment the court may rely on the moving party's unrebutted recitation of the evidence, or pertinent portions thereof, in reaching a conclusion that certain evidence and inferences from evidence demonstrate facts which are "uncontroverted."

Guarino, 980 F.2d at 410. Accordingly, the Court has reviewed the plaintiff's evidentiary filings carefully and has concluded that no material factual issues remain for determination in this case. Under the undisputed facts, plaintiff DIRECTV is entitled to summary judgment.

III. Discussion

Plaintiff DIRECTV alleges that the defendants' actions violate two federal statutes, as well as Ohio statutory and common law. The Court addresses each of these contentions below. With

respect to each claim, the Court finds that plaintiff DIRECTV is entitled to summary judgment.

A. Federal Communications Act

The Federal Communications Act ("FCA"), 47 U.S.C. § 605(a), provides that "[n]o person not being entitled thereto shall receive ... any interstate ... communication by radio and use such communication ... for his own benefit or for the benefit of another not entitled thereto." 47 U.S.C. § 605(a). The Sixth Circuit has held that section 605(a), although explicitly addressed to radio communications, applies to satellite transmissions as well. See *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001)(relying on § 605(d)(6) and its definition of a "person aggrieved").

The undisputed evidence demonstrates that the defendants engaged in actions that violated the FCA. As noted above, the defendants failed either to respond to discovery or to oppose DIRECTV's summary judgment motions. Thus, the Court is compelled to view DIRECTV's evidence as undisputed. DIRECTV has presented receipts and/or invoices for the alleged transactions (Doc. 136, Exhs. A-F), as well as an expert opinion as to the primary use of the devices purchased (Doc. 139, Exh. G).²

²The Court acknowledges that Dr. Koopman's report does not in all cases deal with devices identical to those purchased by the defendants. Dr. Koopman does, however, explain the function of

DIRECTV argues that the purchase of a device primarily designed for illegal interception of satellite television, in the absence of any evidence to the contrary, allows the Court to presume the defendants' use of such devices. See *Community TV Sys., Inc. v. Caruso*, 134 F. Supp. 2d 455, 460 (D. Conn. 2000)(absent evidence of non-use or a legitimate use, "the most reasonable inference is that each such transaction was engaged in ... so the descrambler could be used for its intended purpose"), *aff'd in relevant part*, 224 F.3d 430 (2d Cir. 2000).

Without explicitly adopting the *Community Television* rule, the Court notes that, in any case, the defendants' failure to answer requests for admissions results in the defendants' being deemed to have admitted those matters. The discovery requests sent to each of the defendants asked the defendants to admit use of the illegal devices, and the defendants failed to respond to those requests. (Doc. 139, Exh. B, at 7;

"bootloading" and "unloader" devices. This serves as at least some evidence that the bootloading and unlooping devices purchased by the defendants operated in the same manner as those studied by Dr. Koopman. See also Wells Decl., Doc. 138, at 3-5.

Moreover, the defendants have provided no evidence to refute the contention that these devices were designed for illegal use; thus, the Court finds as an undisputed fact that the devices purchased by the defendants were primarily useful for purposes of allowing free unauthorized access to satellite programming.

Exh. C., at 7; Exh. D, at 7; Exh. E, at 7, 11, 15). Thus, with or without the presumption of use, the undisputed evidence shows that the defendants violated the FCA. Plaintiff DIRECTV is entitled to summary judgment on this claim.

B. Electronic Communication Privacy Act

The Electronic Communication Privacy Act ("ECPA"), 18 U.S.C. § 2511(1)(a), prohibits the intentional interception, attempted interception, or procurement of an interception by others, of any wire, oral, or electronic communication. Although the federal circuits are split on whether the ECPA applies to the interception of satellite transmissions, the Sixth Circuit has held that the coverage of this statute does extend to the use of modified descramblers to intercept such transmissions. See *United States v. One Macom Video Cipher II*, 985 F.2d 258, 261 (6th Cir. 1993)(holding that the unambiguous language of the statute indicates no intent to exempt satellite television programming). Further, 18 U.S.C. § 2520 provides a private right of action for violation of the ECPA.³ See also *DIRECTV, Inc. v. EQ Stuff, Inc.*, 207 F. Supp. 2d 1077, 1084 (C.D. Cal. 2002), citing *Oceanic Cablevision, Inc. v. M.D. Electronics*, 771 F. Supp. 1019, 1027-28

³"[A]ny person whose ... electronic communication is intercepted ... or intentionally used in violation of this chapter may in a civil action recover from the person or entity ... which engaged in that violation such relief as may be appropriate." 18 U.S.C. § 2520(a).

(D. Neb. 1991)(upholding private right of action in the satellite television context).

The undisputed facts noted above in the discussion of the FCA claim are equally relevant to the ECPA claim. Again, it is undisputed that the defendants purchased and intentionally used devices designed primarily for illegal interception of DIRECTV's satellite transmissions.⁴

Additionally, the Court finds that the defendants violated section 2512(1)(b) of the ECPA, which prohibits the manufacture, assembly, possession or sale of any electronic device, knowing or having reason to know that the device's design renders it primarily useful for the surreptitious interception of electronic communications and that the device had been or would be sent in interstate commerce. 18 U.S.C. § 2512(1)(b). As noted above, the defendants' possession of the devices, as well as the devices' illegal purpose and the defendants' knowledge of that illegal purpose, are undisputed facts. The Court further finds that the invoices containing the defendants' shipping addresses (Doc. 136, Exhs. A-F), which indicate the purchases through online

⁴Moreover, the defendants' knowledge of the illegal purpose of the devices is undisputed. The defendants' failure to respond to requests for admissions results, pursuant to Fed. R. Civ. P. 36(a), in the defendants' being deemed to have admitted the matters at issue. (Doc. 139, Exh. B, at 7; Exh. C., at 7; Exh. D, at 7; Exh. E, at 6, 10, 14.)

vendors and shipping to the defendants' homes, constitute sufficient evidence that defendants caused the devices at issue to be shipped in interstate commerce. Plaintiff DIRECTV is entitled to summary judgment on the ECPA claim.

C. Ohio Revised Code Violations

Plaintiff DIRECTV alleges that the defendants are liable for violating O.R.C. § 2913.041(A), which prohibits the knowing possession of any device used for gaining access to cable television service without first obtaining authorization from or paying compensation to the operator or owner of the system that provides the service. O.R.C. § 2913.041(A). A private right of action also exists for violation of this section pursuant to O.R.C. § 2307.62(B)(1)(a)-(c), which permits an owner or operator of a cable television system aggrieved by violations of § 2913.041 to commence a civil action and recover compensatory, punitive, liquidated or exemplary damages, as well as costs and attorney's fees. O.R.C. § 2307.62(B)(1)(a)-(c).

DIRECTV's programming includes major cable networks, as well as movies and other types of programming. (Wells Decl., Doc. 138, at 1-2). Thus, DIRECTV is the operator of a system that provides cable television services.

As noted above, there is no dispute that the defendants knowingly gained access to devices designed to provide

access to cable television services. Moreover, the defendants' failure to respond to DIRECTV's requests for admissions results in the defendants' being deemed to admit the matters therein, including the fact that the defendants' reception of DIRECTV's programming was "unauthorized." (Doc. 139, Exh. B, at 8; Exh. C., at 8; Exh. D, at 8; Exh. E, at 7, 11, 15). The defendants are liable for violating § 2913.041(A), and plaintiff DIRECTV is entitled to summary judgment on this claim.

D. Common Law Conversion Claim

DIRECTV alleges that the defendants' actions were inconsistent with its rights in its own satellite transmissions, and thus that the defendants' actions constituted conversion under Ohio law. Conversion is "the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *State ex rel. Toma v. Corrigan*, 92 Ohio St. 3d 589, 592 (2001).⁵ Some courts have restated this standard to allow a conversion action where the defendant has wrongly asserted dominion or control over the plaintiff's property "under a claim inconsistent with [the plaintiff's] rights." *Central Benefits Mut.*

⁵Although DIRECTV's interest in its satellite transmissions is an intangible interest, recent Ohio courts have held that intangible interests may be converted, at least in some instances. See *Schafer v. RMS Realty*, 138 Ohio App. 3d 244, 283 (2d App. Dist. 2000).

Ins. Co. v. RIS Adm'rs Agency, 93 Ohio App. 3d 397, 402 (10th App. Dist. 1994).

It is not immediately obvious that the common law conversion claim for taking of personal property has been expanded to the point of allowing a claim for the taking of an interest that is neither tangible nor exclusive.⁶ Nonetheless, it is clear both that DIRECTV has an interest in the intercepted signals and that the defendants' interception of those signals was an unlawful act inconsistent with DIRECTV's rights. At least a few courts have applied state conversion law to encompass a claim such as that before the Court today. See *Don King Prods./King Vision v. Lovato*, 911 F. Supp. 419, 423 (N.D. Cal. 1995)(upholding a conversion claim for unlawful interception and broadcast of a boxing fight). Furthermore, the Court believes that finding the defendants liable for conversion in this circumstance is appropriate. Plaintiff DIRECTV is entitled to summary judgment on the conversion claim.

⁶By stating that DIRECTV's interest is not "exclusive," the Court intends to express that, although DIRECTV has rights in its own programming, it has granted interests in that programming to its authorized subscribers, who all may view DIRECTV programming simultaneously.

E. Relief

Plaintiff DIRECTV seeks statutory damages under the FCA and ECPA, as well as damages for the state law violations,⁷ injunctive relief, attorney's fees and costs. The Court considers each of these forms of relief below.

1. FCA Statutory Damages

The FCA, 47 U.S.C. § 605, provides that an aggrieved party may seek damages as follows:

(E)(3)(C)(i)(II) the party aggrieved may recover an award of statutory damages for each violation of subsec. (a) involved in this action in a sum of not less than \$1,000, or more than \$10,000, as the Court considers just

(E)(3)(B)(iii) [the court] shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

47 U.S.C. § 605(e)(3). This section permits the Court to award, at the plaintiff's election, either actual or statutory damages. *See Kingvision Pay-Per-View, Ltd. v. Scott E's Pub, Inc.*,

⁷DIRECTV indicates that, if it is awarded statutory damages for the federal law violations, it likely will defer seeking actual damages for the state law violations. The Court requests that DIRECTV set forth its position with respect to damages for the state law violations in its materials to be filed with the Court on or before June 2, 2003.

146 F. Supp. 2d 955, 958 (E.D. Wis. 2001). DIRECTV requests that, in the event the Court finds liability under section 605 only, the Court award damages against each defendant in the maximum amount allowable under the statute, \$10,000.

2. ECPA Statutory Damages

With respect to violations of the ECPA, 18 U.S.C. § 2520 provides for civil damages as follows:

(a) In general. Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) Relief. In an action under this section, appropriate relief includes—

(1) such preliminary or other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of Damages.

...

(2) In any other action under this section, the Court may assess as damages whichever is the greater of
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(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of \$100.00 a day for each day of violation or \$10,000.00.

18 U.S.C. § 2520. In this action, DIRECTV requests an award of statutory rather than actual damages. Since subsection (c)(2)(B) of the statute mandates that the Court award the greater of \$100.00 per day or \$10,000, DIRECTV requests that the Court award the statutory measure of \$10,000 against each defendant.

3. State Law Damages

According to DIRECTV, the Ohio statutes (§§ 2913.041 and 2357.62) do not provide for statutory damages. DIRECTV requests that the Court schedule a hearing to determine the appropriate damages for violations of the Ohio statutes and for the common law conversion claim. DIRECTV also indicates, however, that it may defer seeking damages on the state law claims if it is awarded statutory damages for the federal violations.

4. Attorney's Fees and Costs

DIRECTV maintains that it is entitled to an award of attorney's fees and costs pursuant to both the FCA and ECPA.

The FCA provides that the Court "shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails." 47 U.S.C. § 605(e)(3)(B)(iii). The ECPA states that "[i]n an action under this section, appropriate relief includes ... a reasonable attorney's fee and other litigation costs reasonably incurred." 18 U.S.C. § 2520(b)(3). DIRECTV asserts that the Court should first determine liability for a reasonable attorney's fee pursuant to these sections and then allow DIRECTV to submit evidence as to the amount of attorney's fees and costs.

5. Injunctive Relief

Finally, both the FCA and the ECPA provide for injunctive relief. The FCA states that "[t]he court may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a)" 47 U.S.C. § 605. The ECPA provides for "such preliminary and other equitable or declaratory relief as may be appropriate." 18 U.S.C. § 2520(b)(1).

6. Relief Awarded

Plaintiff DIRECTV requests in its brief a total of \$10,000 against each defendant for statutory damages, as well as permission to submit additional materials regarding state law damages, attorney's fees and costs. The Court determines that

\$10,000 is an appropriate award against each defendant for violations of the federal statutes, pursuant to the legal principles set forth above, provided no additional damages are sought for the violations of state law. If plaintiff DIRECTV wishes to pursue an award of damages for state law violations, it shall file materials relating to state law damages with the Court on or before June 2, 2003.

The Court determines that, based on their violations of the FCA and ECPA, the defendants are liable for reasonable attorney's fees. DIRECTV shall file with the Court, on or before June 2, 2003, its evidence relating to the appropriate amount of attorney's fees and costs. Plaintiff DIRECTV also shall submit proposed injunctive orders for entry against each defendant on or before June 2, 2003.

IV. Conclusion

For the foregoing reasons, plaintiff DIRECTV's motions for summary judgment (Docs. 132, 133, 134, 135) are granted in their entirety.

On or before June 2, 2003, plaintiff DIRECTV shall submit to the Court its materials relating to state law damages, attorney's fees and costs, and the proposed injunctive orders. Judgment will be entered in favor of plaintiff DIRECTV and against

defendants Mark DiSalvatore, Dan Hill, Michael Tempera and Eric Lovejoy in an appropriate order.

IT IS SO ORDERED.

s/ PAUL R. MATIA
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum of Opinion and Order was filed electronically this 21st day of May, 2003. Notice of this filing will be sent to David A. Wallace, Esq. and Sandra J. Robinson, Esq. by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. A copy of the foregoing Order also has been sent by regular U.S. mail, this 21st day of May, 2003, to Leo J. Talikka, Esq., Talikka Law Office, Ste. 100, 2603 Riverside Drive, Painesville, OH 44077; Dan Hill, 712 Ninth Street NE; Massillon, OH 44646; Eric R. Lovejoy, 1838 Wymore Ave., Cleveland, OH 44112; Michael Tempera, 2430 Montclair 2430M, Wooster, OH 44691.

s/ PAUL R. MATIA
JUDGE PAUL R. MATIA
CHIEF JUDGE
UNITED STATES DISTRICT COURT