

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DIRECTV, INC.,

Plaintiff - Appellant,

v.

RANDALL MINOR,

Defendant - Appellee.

On Appeal from the United States District Court
for The Western District of Texas, San Antonio Division

BRIEF OF APPELLANT DIRECTV, INC.

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October 4, 2004

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FOR THE FIFTH CIRCUIT

DIRECTV, INC.,)
)
)
 Plaintiff-Appellant,)
)
 v.) No. 04-50793
)
 RANDALL MINOR,)
)
)
 Defendant-Appellee.)

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

Parent Companies of Appellant DIRECTV, Inc.

- DIRECTV, Inc. is a wholly owned subsidiary of **DIRECTV Enterprises, LLC**, a Delaware limited liability company.
- DIRECTV Enterprises, LLC is a wholly owned subsidiary of **DIRECTV Holdings, LLC**, a Delaware limited liability company.
- DIRECTV Holdings, LLC is a wholly owned subsidiary of **The DIRECTV Group, Inc.**, a publicly traded Delaware corporation.
- **Fox Entertainment Group, Inc.**, a publicly traded Delaware corporation, owns 34% of **The DIRECTV Group, Inc.**

- Fox Entertainment Group, Inc. is approximately 82% owned indirectly by **The News Corporation Limited**, a publicly traded corporation.

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A handwritten signature in black ink, appearing to read 'H. Rubin', written over a horizontal line.

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NOTICE OF RELATED CASE

Pursuant to Fifth Circuit Local Rule 46.3, DIRECTV provides the following update regarding the pendency of related cases in this Circuit:

When undersigned counsel of record for DIRECTV entered his appearance in this case on August 19, 2004, DIRECTV notified the Court that it had filed a Notice of Appeal in a related case, DIRECTV, Inc. v. Robson, No. 04-0269-A (W.D. La. July 27, 2004). DIRECTV's appeal in Robson has now been docketed in this Court as No. 04-30861.

In Robson, as here, DIRECTV has appealed a district court's grant of summary judgment in favor of a defendant who DIRECTV alleges engaged in acts of satellite piracy in violation of the Cable Act, 47 U.S.C. §§ 605(a) and 605(e)(4), and the Wiretap Act, 18 U.S.C. § 2511(1)(a). Among the issues DIRECTV may challenge in Robson is whether the district court improperly dismissed DIRECTV's claim under 47 U.S.C. § 605(e)(4) on the grounds that "[s]ection 605(e)(4) is a provision relating to manufacturers and sellers, rather than to individual users as Defendant is alleged to be." Robson, slip op. at 11. That issue of statutory construction is not presented in the instant appeal. DIRECTV may also raise in Robson the issue of whether the evidence it submitted in opposition to Robson's motion for summary judgment on DIRECTV's § 605(a) and § 2511(1)(a) claims raised a genuine issue of material fact regarding Robson's interception or

attempted interception of DIRECTV's satellite transmissions. This latter issue is one that is being presented to this Court in the instant appeal with respect to DIRECTV's § 605(a) and § 2511(1)(a) claims against defendant-appellee Randall Minor.

DIRECTV's appellant's brief in Robson is due to be filed with this Court on November 2, 2004.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant DIRECTV, Inc. (“DIRECTV”) requests oral argument. This case raises important issues of first impression in this Court relating to the proper interpretation of the Cable Communications Policy Act of 1984 (“Cable Act”) and the Electronic Communications Privacy Act of 1986 (“Wiretap Act”). Specifically, the case raises questions regarding the elements of civil claims arising under those statutes, and the amount of evidence a plaintiff must present to withstand a motion for summary judgment pursuant to Fed. R. Civ. P. 56. The Court’s ruling in this appeal will likely affect other cases currently pending in the district courts within this Circuit in which DIRECTV has filed suit against other individuals it believes are illegally intercepting or endeavoring to intercept its satellite transmissions and assembling, modifying and distributing devices for the purpose of illegally intercepting those transmissions. DIRECTV believes that oral argument will illuminate the issues on appeal and the reasons this Court should reverse the judgment below.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over DIRECTV's claims for violations of the Cable Act, 47 U.S.C. §§ 605(a) and 605(e)(4), and Wiretap Act, 18 U.S.C. §§ 2511 and 2512, under 28 U.S.C. § 1331, because the causes of action arise under provisions of federal law. The district court had jurisdiction over DIRECTV's claims for civil conversion and violation of Tex. Civ. Prac. & Rem. Code § 123.002 under 28 U.S.C. § 1367, because those claims are so related to DIRECTV's claims for violations of the Cable Act and Wiretap Act that they form part of the same case or controversy under Article III of the United States Constitution.

On June 29, 2004, the district court granted appellee Randall Minor's motion for summary judgment, dismissed all of DIRECTV's causes of action with prejudice, and issued a final and appealable judgment in Randall Minor's favor. (R.324-332, DTV R.E. 012-019, 010.)¹ DIRECTV filed a timely notice of appeal on July 27, 2004. (R.334-335, DTV R.E. 008-009.) This Court has jurisdiction under 28 U.S.C. § 1291.

¹ Citations throughout this brief are made to the page in the original record ("R. __") and to the page in DIRECTV's record excerpts ("DTV R.E. __"). DIRECTV's record excerpts contain 58 pages of optional contents, which is 18 more pages than permitted under this Circuit's rules. Accompanying this brief is a motion for leave to file optional record excerpts in excess of 40 pages. Counsel for appellee Randall Minor has consented to the motion.

STATEMENT OF ISSUES

1. Did the district court err by requiring DIRECTV to prove that its satellite transmission was illegally intercepted to qualify as a “person aggrieved” with standing to bring a claim for violation of 47 U.S.C. § 605(e)(4), which prohibits, inter alia, the assembly or modification of a device primarily of assistance in the unauthorized decryption of direct-to-home satellite services?

2. Did the district court err by ruling that DIRECTV had not presented sufficient evidence to create a genuine issue of material fact with respect to its claims that Minor illegally intercepted or endeavored to intercept DIRECTV’s satellite transmissions in violation of 47 U.S.C. § 605(a) and 18 U.S.C. § 2511(1)(a)?

STATEMENT OF THE CASE

I. The Nature of the Case.

This appeal arises from an action brought by DIRECTV under the Cable Act and Wiretap Act against defendant-appellee Randall Minor to obtain civil remedies for his satellite “piracy” and related violations of these statutes.² DIRECTV filed this case, and has filed numerous similar cases, to stem the theft of its programming by home viewers, website owners and operators and individuals and

² In the Report of the Committee on Energy and Commerce on the Satellite Home Viewer Act of 1988, the Committee defined “piracy” as “the decoding or decryption of scrambled programming without the authorization of the programmer nor payment for the programming.” H.R. Rep. No. 100-887 (II), 1988 U.S.C.C.A.N. 5577, 5642.

companies who create, market, sell and use devices designed to illegally intercept DIRECTV's satellite transmissions without paying for the receipt of those transmissions.

DIRECTV brought two types of claims against Randall Minor. The first focuses on the devices used to engage in piracy, rather than the actual interception of satellite transmissions. Thus, DIRECTV brought a claim against Minor for the illegal assembly and/or modification of such devices in violation of the Cable Act, 47 U.S.C. § 605(e)(4).³ The second type of claim focuses on the interception of DIRECTV's satellite transmissions. For this conduct, DIRECTV brought claims against Minor for illegal interception of its satellite transmissions under the Cable Act, 47 U.S.C. § 605(a) and the Wiretap Act, 18 U.S.C. § 2511(1)(a).⁴

This appeal comes to this Court from the district court's grant of summary judgment to Minor on these claims. DIRECTV asks the Court to reverse the district court's decision for two primary reasons. First, the district court misinterpreted the Cable Act when it granted summary judgment to Minor on DIRECTV's claim under 47 U.S.C. § 605(e)(4) for modification or assembly of a device that is primarily of assistance in decrypting direct-to-home satellite services

³ Specifically, DIRECTV alleges that Minor violated 47 U.S.C. § 605(e)(4) by using a device called an unlooper to illegally modify a DIRECTV access card to enable the access card to decrypt DIRECTV's satellite transmissions.

⁴ For ease of reference, DIRECTV includes as Attachment A to this brief a statutory addendum with the relevant provisions of the Cable Act, 47 U.S.C. § 605, and the Wiretap Act, 18 U.S.C. §§ 2511, 2520.

such as those made available by DIRECTV. The district court conflated this claim with DIRECTV's claims for illegal interception and incorrectly required DIRECTV to prove illegal interception as a predicate to its § 605(e)(4) claim. The Cable Act's plain terms, legislative history and framework all establish that this was an error by the district court.

The district court's second error arises from its failure to adhere to this Court's standards for evaluating evidence on summary judgment. The district court held that DIRECTV failed to present evidence that Minor intercepted a satellite transmission. To the contrary, DIRECTV presented evidence that Minor purchased and received a "pirate access device," a device specifically designed for the purpose of illegally intercepting a satellite broadcast. DIRECTV also presented evidence that Minor had a DIRECTV satellite dish attached to his house, even though he has never paid for DIRECTV programming. This and other evidence presented by DIRECTV was sufficient to create a genuine issue of material fact under this Court's precedents. In this appeal, this Court will determine the amount and types of evidence a plaintiff must present in support of its claims under the Cable Act and Wiretap Act to withstand summary judgment.

II. Congress' Response to Satellite Piracy.

The unauthorized viewing of satellite broadcasts, or "piracy," has long been a problem. Congress detailed the history of satellite piracy in the Report of the

Committee on Energy and Commerce (“Committee”) on the Satellite Home Viewer Act of 1988 (“Satellite Act”). According to the Committee, piracy began in 1976, when “Home Box Office, Inc. began delivering its movies to cable television operators by satellite.” H.R. Rep. No. 100-887 (II), 1988 U.S.C.C.A.N. 5577, 5639. Court decisions throughout the early 1980’s established that reception of such signals by owners of “backyard satellite dishes was not authorized by law.” Id. The Federal Communications Commission (“FCC”) concurred with these courts. Id.

Congress enacted a new regulatory framework for the reception of satellite programming with the passage of the Cable Act in 1984. “The Cable Act expressly legalized the sale and use of backyard dishes” to receive programming that was not encrypted (digitally scrambled); but it also substantially increased penalties for “unauthorized signal reception,” i.e., piracy of encrypted broadcasts. Id. Congress desired to make clear its intent to “leave undisturbed the case law that has developed confirming the broad reach of section 605 as a deterrent against piracy of protected communications.” Statement of Senator Robert W. Packwood, Chairman of the Comm. on Commerce, Science and Transp., 1984 U.S.C.C.A.N. 4742, 4746. By creating a legal distinction between the reception of unencrypted and encrypted broadcasts, Congress hoped that the “increased penalties for unauthorized reception of cable services would allow cable programmers to obtain

payment for their programming more easily.” H.R. Rep. No. 100-887 (II), 1988 U.S.C.C.A.N. 5577, 5639; see also 1984 U.S.C.C.A.N. 4742, 4746 (stating these goals for the Cable Act at the time of its enactment).

Congress’ plan to create a legal market for satellite broadcast programming worked – in part. By 1988, just four years later, the home satellite system industry had experienced “explosive growth.” H.R. Rep. No. 100-887 (II), 1988 U.S.C.C.A.N. 5577, 5639. “The number of backyard satellite earth stations in operation in the United States increased from an estimated 5,000 in 1980 to over 2 million” *Id.* Home systems that once sold for as much as \$36,000 could be purchased for as little as \$1,000. *Id.* As the legitimate market for satellite programming grew, however, so too did the black market for piracy. The Committee noted, based on information received from the Satellite Broadcasting and Communications Association, that almost one-half of the satellite receiving systems in use were modified to illegally decrypt, *i.e.*, pirate, satellite transmissions. *Id.* at 5642; see also Apr. 5, 2004 Aff. of Larry Rissler (“Rissler Aff.”), Special Counsel & Vice President of DIRECTV Office of Signal Integrity, at 2-3 (DTV R.E. 027-028).⁵

⁵ The district court numbered the pages of the record, but omitted the exhibits to DIRECTV’s opposition to Minor’s motion for summary judgment, including Mr. Rissler’s affidavit, from its pagination. DIRECTV therefore cannot refer to these exhibits by their page numbers in the original record as is required by Fifth Circuit Local Rule 28.2.3. Rather, references to these

(Continued)

These statistics were corroborated by testimony during the Congressional hearings for the Satellite Act. According to the Committee, the testimony “demonstrated that piracy has become an increasingly distressing problem to the satellite industry and seriously threatens to undermine the industry’s survival.” Id. The testimony established that two categories of participants in the satellite broadcast market were threatened: legitimate satellite equipment dealers and “satellite programmers.” H.R. Rep. No. 100-887 (II), 1988 U.S.C.C.A.N. at 5643. As of 1989, piracy was estimated to cost the satellite television industry \$100 million annually. (Rissler Aff. at 2-3; DTV R.E. 027-028.)

As a result of the prevalence of piracy, the FCC “increased enforcement efforts” and “recommended that the Congress raise the civil and criminal penalties” for satellite broadcast piracy “to emphasize the importance of stopping piracy and enhance the ability of law enforcement authorities and aggrieved private parties to deter piracy.” H.R. Rep. No. 100-887 (II), 1988 U.S.C.C.A.N. 5577, 5643. Congress, in turn, reacted by passing the Satellite Act, which, among other things, amended the provisions of the Cable Act that “pertain[] to the piracy of satellite cable programming.” Id. at 5657. Through the Satellite Act’s amendments to the Cable Act, Congress sought “to deter piracy practices by (1)

exhibits are made pursuant to Fed. R. App. P. 30(e) to the page of the original document, and, for the Court’s convenience, to their place in DIRECTV’s Record Excerpts.

stiffening applicable civil and criminal penalties, (2) expanding standing to sue, and (3) making the manufacture, sale, modification, importation, exportation, sale or distribution of devices or equipment with knowledge that its primary purpose is to assist in unauthorized decryption of satellite cable programming expressly actionable as a criminal act.” Id.

III. The Instant Action.

DIRECTV filed the instant action against Randall Minor and five other defendants on May 22, 2003. (Civil Docket for Case No. 03-CV-782, DTV R.E. 003.) Three of the six counts alleged in the complaint are relevant to this appeal.⁶ Count I seeks damages, inter alia, for unauthorized interception of DIRECTV’s satellite programming in violation of the Cable Act, 47 U.S.C. § 605(a), pursuant to the Cable Act’s civil enforcement provision, Id. § 605(e)(3)(C). Count II similarly seeks damages for unauthorized interception or attempted interception of DIRECTV’s satellite programming under the Wiretap Act, 18 U.S.C. § 2511, and its civil enforcement provision § 2520(a). Count IV seeks statutory damages for the assembly or modification of a device used primarily for the unauthorized decryption of satellite programming or direct-to-home satellite services in violation of the Cable Act, 47 U.S.C. §§ 605(e)(4) and 605(e)(3)(A).

⁶ DIRECTV previously dismissed its claim for civil conversion (Count V) and does not challenge in this appeal the district court’s rulings pertaining to claims brought under 18 U.S.C. § 2512 (Count III) and Tex. Civ. Prac. & Rem. Code § 123.002 (Count VI).

On March 5, 2004, Minor moved for summary judgment. (Civil Docket for Case No. 03-CV-782, DTV R.E. 005.) On April 7, 2004, DIRECTV moved to dismiss voluntarily its claim against Minor for Texas common law conversion and filed its response to Randall Minor's motion for summary judgment. (Id.) With that response, DIRECTV filed eight exhibits, totaling 113 pages. These exhibits include affidavits from DIRECTV's expert witnesses and investigators, documents showing that Minor purchased a device designed primarily for the illegal interception of DIRECTV satellite transmissions, pictures showing a DIRECTV satellite dish installed on Minor's house and the transcript of Minor's deposition. Minor filed a reply brief in support of his motion for summary judgment on April 16, 2004.

On June 29, 2004, the district granted Minor's motion for summary judgment on DIRECTV's remaining claims in an eight-page order ("Opinion"). (R.324-331, DTV R.E. 012-019.) The district court granted summary judgment to Minor on Counts I, II and IV of DIRECTV's complaint based on one finding of fact – that DIRECTV failed to establish that Minor had the equipment necessary to illegally intercept DIRECTV's signal. (Opinion at 4, 7, 8, R.327, 330, 331, DTV R.E. 015, 018, 019.)

In its ruling, the district court bundled its analysis of DIRECTV's three distinct claims for violations of 47 U.S.C. § 605(a) (Count I), 18 U.S.C. §

2511(1)(a) (Count II) and 47 U.S.C. § 605(e)(4) (Count IV). The district court's analysis of DIRECTV's claim under 47 U.S.C. § 605(e)(4) is limited to three sentences (two sentences on page two and one sentence on page five). With regard to all of these claims, the district court held that "DIRECTV must prove that Minor received, assisted in receiving, or intercepted DIRECTV's proprietary satellite transmissions." (Opinion at 2, R.325, DTV R.E. 013.) The district court never explained why DIRECTV had to prove interception of its transmission in order to prevail on its claim that Minor had violated § 605(e)(4) – a statutory provision that, on its face, deals with conduct other than interception and that, in conjunction with § 605(e)(3)(A), provides legitimate satellite system distributors, like DIRECTV, a civil cause of action for conduct other than interception. Instead, the district court devoted its analysis solely to the question of whether DIRECTV presented evidence of interception.

In its opinion, the district court acknowledged that evidence of interception existed. It observed that "Minor admittedly purchased a Vector Fusion unlooper..." which "has no commercially significant purpose other than to modify DIRECTV's access cards for the purpose of pirating DIRECTV's signal." (Opinion at 3, R.326, DTV R.E. 014.) The court also noted that Minor "admits that he has a satellite dish attached to [his] house" and that "DIRECTV submitted evidence that the dish is a DIRECTV dish capable of receiving DIRECTV satellite

programming.” (Id.) The district court also found that DIRECTV “submitted evidence that Minor joined an internet site called ‘Pirate’s Den,’ which was operated for the purpose of offering and distributing software and services designed to enable consumers to circumvent DIRECTV’s security system and receive DIRECTV’s signals without authorization or charge.” (Id.)

Nonetheless, the district court held that statements made by Minor in his affidavit “that he has never been a subscriber to DIRECTV’s services and that he does not have and has never had a DIRECTV receiver/decoder or a DIRECTV access card” were “undisputed evidence.” (Opinion at 3, R.326, DTV R.E. 014.) Based on Minor’s affidavit, the district court held that “DIRECTV has failed to meet its burden to raise a fact issue that Minor actually intercepted” a DIRECTV satellite transmission and granted summary judgment to Minor on all of DIRECTV’s claims. (Opinion at 5, 8, R.328, 331, DTV R.E. 016, 019.) The district court relied on no evidence other than Minor’s affidavit in rendering its decision. (Opinion at 3-8, R.326-331, DTV R.E. 014-019.) On June 29, 2004, the clerk for the district court entered final judgment in favor of Minor consistent with its order granting summary judgment. (R.332, DTV R.E. 010.)

STATEMENT OF FACTS

I. DIRECTV's Business.

DIRECTV is the nation's leading direct broadcast satellite programming provider, delivering programming to more than 12 million customers. (Rissler Aff. at 4, DTV R.E. 029) DIRECTV's system, introduced in 1994, is the first high-powered direct broadcast system in the United States. (Id.) When launched, it enabled subscribers, for the first time, to receive satellite programming in digital quality via a small 18 inch satellite dish rather than the large (six to eight feet in diameter) dishes that were popular in the 1980's and 1990's. (Id.)

DIRECTV delivers a wide variety of programming, over 225 channels of digital entertainment and information, to its subscribers. DIRECTV programming includes major cable networks, local stations, studio movies and sports and other special events programming. (Rissler Aff. at 4, DTV R.E. 029.) DIRECTV offers this programming to residential and business customers on a subscription and pay-per-view basis. (Id.) The subscription packages for residential customers range from \$36.99 a month to \$87.99 a month, depending on the level of programming. (Id. at 5, DTV R.E. 030.) Pay-per-view events range from \$3.99 for a movie to \$49.00 for a championship boxing match.

To receive DIRECTV's programming, a subscriber must possess a DIRECTV satellite dish, an integrated receiver/decoder and an access card.

(Rissler Aff. at 4, DTV R.E. 029.)⁷ The DIRECTV dish is unique, and not interchangeable with other satellite broadcast systems.⁸ DIRECTV distributes access cards and receiver/decoders as part of its business. (See Rissler Aff. at 6, DTV R.E. 031.)

DIRECTV's broadcast system has three basic steps. First, the programming that DIRECTV has licensed is delivered to DIRECTV's broadcast centers in Castle Rock, Colorado and Los Angeles, California, where DIRECTV digitizes and compresses the programming for transmission. (Rissler Aff. at 5, DTV R.E. 030.) Second, DIRECTV encrypts the programming to prevent unauthorized viewing by people who have not paid to subscribe. (Id.) Third, DIRECTV transmits the signal to satellites located in stationary orbit, which relay the encrypted signal back to earth to be enjoyed by DIRECTV subscribers. (Id. at 6, DTV R.E. 031.)

DIRECTV spent more than \$1.25 billion to develop its direct broadcast satellite system. (Rissler Aff. at 4, DTV R.E. 029.) In addition, DIRECTV must pay program providers, such as cable networks, motion picture distributors, local television affiliates and sports leagues, for a license to exhibit the programming it

⁷ See also March 30, 2004 Affidavit of Michael Barr ("Barr Aff."), an electrical engineer with a formal background in computer science and a decade of programming, teaching and business experience who offered expert testimony on DIRECTV's behalf, at 1-2 (DTV R.E. 020-021). This affidavit was attached as Exhibit A to DIRECTV's response to Minor's motion for summary judgment.

⁸ See April 5, 2004 Affidavit of Kent P. Mader ("Mader Aff."), Director of DIRECTV's End User Development Group, at 2-3 (DTV R.E. 042-043). This affidavit was attached as Exhibit C to DIRECTV's response to Minor's motion for summary judgment.

broadcasts. (Id. at 5, DTV R.E. 030.) Because DIRECTV generates its revenues through sales of subscription packages and pay-per-view events, it must be able to condition access to its programming on the purchase of legitimate subscriptions. (Id. at 5-6, DTV R.E. 030-031, Barr Aff. at 2, DTV R.E. 021.)

DIRECTV accomplishes this by encrypting – electronically scrambling – its satellite transmissions. (Rissler Aff. at 5, DTV R.E. 030.) These transmissions are received by the subscriber’s satellite dish, and transmitted by wire to the subscriber’s receiver/decoder. (Id. at 6, DTV R.E. 031.) The subscriber’s receiver/decoder then acts as a filter that processes the signal and uses an access card that has been “activated” by DIRECTV to decrypt the signal for viewing. (Id.) DIRECTV activates an access card by giving it the information it needs to decrypt DIRECTV’s programming. (Id. at 7, DTV R.E. 032.)

As Congress recognized when it passed the Satellite Act, satellite broadcasters such as DIRECTV are frequently victimized by “pirates” who circumvent DIRECTV’s encryption to gain unlimited access to DIRECTV programming, including pay-per-view events, without paying a fee. (Barr Aff. at 3, DTV R.E. 022.) All known methods of receiving DIRECTV’s signals without authorization rely upon modifying the access card to simulate subscription authorization. (Id.) Satellite piracy companies design, manufacture, market and sell hardware devices (commonly known as “pirate access devices”) for modifying

DIRECTV access cards to decrypt DIRECTV's broadcasts without authorization. (Id. at 3, DTV R.E. 022; Rissler Aff. at 7, DTV R.E. 032.) Pirate access devices include modified access cards that are able to intercept DIRECTV's programming without authorization and devices that are designed to modify DIRECTV's access cards. (Barr Aff. at 3-4, DTV R.E. 022-023.)

A would-be-pirate seeking to steal DIRECTV's programming can find ample instruction through easily available sources, including the internet. Numerous websites exist to distribute information and software and serve as a "forum" for the dissemination and exchange of information pertaining to piracy techniques and technology. (Rissler Aff. at 9, DTV R.E. 034.) These web sites typically include instructions regarding how to pirate DIRECTV programming, chat rooms where users can post information to assist other pirates, and links to websites that sell piracy technology.⁹ (Id.)

DIRECTV combats piracy with the technology available to it. DIRECTV periodically changes its decryption keys to deny illegally modified smartcards the information needed to receive programming illegally. (Barr Aff. at 2, DTV R.E. 021.) DIRECTV introduces new access card models and disables older models. (Id. at 3, DTV R.E. 022.) Additionally, DIRECTV uses electronic counter

⁹ To the extent such websites are offering information to assist would-be-pirates in intercepting DIRECTV's satellite transmissions, DIRECTV has successfully brought actions against them pursuant to 47 U.S.C. § 605(a).

measures (“ECMs”) sent as part of the satellite transmission to disable access cards that have been illegally modified to receive DIRECTV programming without authorization. (Rissler Aff. at 8, DTV R.E. 033.) DIRECTV’s practice of sending these ECMs is referred to as “looping” because the ECMs create an endless loop within the programming of modified access cards that prevents them from functioning. (Barr Aff. at 4, DTV R.E. 023.)

Technology alone is insufficient to stop determined pirates. Pirates can purchase new modified access cards, and pirates have developed new pirate access devices to circumvent DIRECTV’s security measures. One such device is called an “unlooper.” An unlooper is a device specifically designed to restore functionality to DIRECTV access cards disabled by DIRECTV’s ECMs. (*Id.* at 4, DTV R.E. 023; Rissler Aff. at 8, DTV R.E. 033.) Once this device is used to “unloop” a disabled access card, the card will once again allow the pirate to receive DIRECTV’s programming illegally. (Rissler Aff. at 8, DTV R.E. 033.)

II. Randall Minor’s Piracy of DIRECTV’s Satellite Transmissions.

Randall Minor is no neophyte when it comes to technology, particularly computer systems. He is a professional network engineer and website administrator.¹⁰ He has a degree in computer information systems (Minor Dep. at

¹⁰ See March 18, 2004 Deposition of Randall Minor (“Minor Dep.”) at 9 (DTV R.E. 064). This transcript was attached as Exhibit H to DIRECTV’s response to Minor’s motion for summary judgment.

10, DTV R.E. 064.) He holds advanced Microsoft certifications. (Id.) Since graduating from college, Minor has taken “a lot of classes” and attended “a lot of different courses.” (Id. at 10-11, DTV R.E. 064.) He maintains a library of materials from these courses. (Id. at 11, DTV R.E. 064.)

A. Randall Minor’s Purchase of a Pirate Access Device and Possession of a DIRECTV Satellite Dish.

DIRECTV first became aware of Minor following its execution of a Writ of Seizure at a mail shipping facility used by a pirate access device merchant named PC Ease. (Rissler Aff at 7, DTV R.E. 032.) Subsequent to the raids, DIRECTV acquired sales records, shipping records, e-mail communications, credit card receipts and other records from PC Ease. (Id.) These records indicate that Minor purchased a “Vector Fusion” unlooper from PC Ease on or about April 11, 2001, and that the unlooper was shipped to Minor’s home address. (Id.; Minor Dep. at 14, DTV R.E. 065.)¹¹ The Vector Fusion unlooper is primarily designed, marketed and distributed to gain unauthorized access to DIRECTV satellite programming. (Rissler Aff. at 8, DTV R.E. 033.) DIRECTV’s expert, Michael Barr, testified that the Vector Fusion unlooper has no commercially significant purpose other than to modify DIRECTV access cards. (Barr Aff. at 4-5, DTV R.E. 023-025.) Based on

¹¹ See also the “Packing Slip” attached as Exhibit A to the April 5, 2004, Affidavit of Janie Van Winkle (“Winkle Aff.”) (DTV R.E. 053). The Affidavit of Janie Van Winkle, and all exhibits thereto, were attached as Exhibit G to DIRECTV’s response to Minor’s motion for summary judgment.

the evidence of Minor's purchase of an unlooper, DIRECTV investigated Minor further and discovered that Minor had a DIRECTV dish installed on the outside of his house. (Mader Aff. at 2, DTV R.E. 042.)¹² Minor was not a DIRECTV subscriber.¹³

B. Minor's Explanations for Why He Possessed a Vector Fusion Unlooper and DIRECTV Satellite Dish.

Minor was asked about his possession of the Vector Fusion unlooper and DIRECTV satellite dish at his deposition. Minor testified that he did not recognize the names Vector Fusion or PC Ease. (Minor Dep. at 13-14, DTV R.E. 065.) Minor did not dispute the validity of the packing slip obtained by DIRECTV in its raid of PC Ease. (Id. at 13-14, DTV R.E. 065.) In fact, Minor admitted to ordering a "programming device" at that time, and he did not deny that the device he purchased was a Vector Fusion unlooper. (Id.) He stated that he purchased this "programming device" to prevent "my son, kids, anybody in the family from accessing my [computer] system when I wasn't home." (Id. at 17, DTV R.E. 066.)¹⁴ Minor testified that he discovered this "programming device" while researching computer security on the internet. (Id. at 14, DTV R.E. 065.) He

¹² See also March 23, 2004 Affidavit of Robert C. Hill ("Hill Aff.") at 1 and exhibit 1 thereto (DTV R.E. 045-046). This affidavit was attached as Exhibit D to DIRECTV's response to Minor's motion for summary judgment.

¹³ See March 1, 2004 Affidavit of Randall Minor ("Minor Aff.") at 2. (R.190-191, DTV R.E. 076-077.)

¹⁴ Minor's son, his only child, was 20 years old when Minor purchased the Vector Fusion unlooper and did not live with Minor. (Minor Dep. at 7-8, DTV R.E. 063.)

could not remember any of the sites he had visited. (Id. at 15, DTV R.E. 065.)

When Minor, a computer network engineer by trade, was asked if he had tried using a simple password log-in procedure to secure his computer, he testified: “I didn’t have any set on it. It could have been done that way, but I didn’t configure it that way.” (Id. at 19, DTV R.E. 066.) Minor also testified that he did not investigate other options to secure his computer. (Id. at 20, DTV R.E. 066.) Minor testified that he currently secures his computer by locking the door to the room that contains his computer. (Id. at 32, DTV R.E. 069.)

Minor testified that he paid between \$100 and \$300 for the Vector Fusion unlooper. (Id. at 28, DTV R.E. 068.) He testified that he was unable to make the Vector Fusion unlooper work to secure his computer. (Id. at 29-30, DTV R.E. 069.) According to Minor, after he was unsuccessful in soliciting help via telephone from the company from which he had purchased the Vector Fusion unlooper, he threw the device away. (Id. at 30, DTV R.E. 069.)

As for the DIRECTV satellite dish attached to his house, Minor testified that he had “a company come in and do – wiring... for telephone, cable, I mean, any possible communications.” (Id. at 33, DTV R.E. 070.) Minor later described this “company” as “just workers in the area that needed some extra money.” (Id. at 35, DTV R.E. 070.) “I paid them 100 bucks, and they did all of the wiring for me.” (Id.) He could not remember their names, only that “[t]hey were Hispanic.” (Id. at

37, DTV R.E. 071.) He testified that the dish “was to be used as an antenna. There’s a round device over the top of it that – that gathers reception for local channels.” (Id. at 33, DTV R.E. 070.) He testified that these workers did not have the dish with them when he hired them, but that “[i]t was up there when all – it was all finished.” (Id. at 36, DTV R.E. 070.) Minor speculated that “they could have got it at the flea market down the street. I mean, there’s – everywhere you go, you see equipment, wires or whatever.” (Id.) Minor testified that he has never seen these workers since. (Id. at 37, DTV R.E. 071.)

DIRECTV presented undisputed testimony that the satellite dish attached to Minor’s house is incapable of functioning as an antenna to receive terrestrial (local station broadcast) television programming. (Mader Aff. at 3, DTV R.E. 043.) This dish could only be used to receive DIRECTV satellite programming. (Id.)

In the course of its investigation of Minor, DIRECTV also discovered that someone subscribed to a website named “Pirates’ Den” under the alias “Knight_Rider” using the e-mail address “randall.minor@mail.va.gov.”¹⁵ Minor has identified this e-mail address as his work e-mail address. (Minor Dep. at 8, DTV R.E. 063.) The registration occurred on June 24, 2003. (Stoabs Aff. at 3,

¹⁵ See April 5, 2004 Aff. of Michael G. Stoabs (“Stoabs Aff.”), Senior Consultant at the Internet Crimes Group, Inc., at 2-3 (DTV R.E. 048-049). This affidavit was attached as Exhibit E to DIRECTV’s response to Minor’s motion for summary judgment.

DTV R.E. 049.)¹⁶ The Pirates' Den was a website devoted to the exchange of information and tools for the piracy of DIRECTV satellite signals. (Rissler Aff. at 10, DTV R.E. 035.) The website offered a wealth of information to help the aspiring pirate, including: the "Pirates Den Top 100" websites selling piracy technology and related service; "ECM Analysis" which provides information regarding DIRECTV's ECMs; information on the current status of DIRECTV access cards and "ECM Activity"; product reviews for pirate access devices; and links to similar websites offering information to help users pirate DIRECTV's broadcast. (Id. at 11-12, DTV R.E. 036-037.)

At his deposition, Minor denied that he had "ever registered at a website in order to find out information about digital satellite or [his] case." (Minor Dep. at 48, DTV R.E. 073.) He denied ever using the handle "Night [sic] Rider." (Id.) He stated that the only person who might have access to his e-mail address was his son, who has never lived in the house with the satellite dish attached. (Id. at 48, DTV R.E. 073.) To this day, Minor has not offered an explanation for how a registration to Pirates' Den became associated with his work e-mail address.

¹⁶ The evidence indicates that this registration occurred after DIRECTV filed its complaint against Minor, thus DIRECTV does not proffer it as evidence of piracy. Rather, DIRECTV refers this Court to Minor's denial of this registration because, as we explain more fully in Section II(D) of the argument, it bears on Minor's credibility, which is particularly important in this case because the district court granted summary judgment based solely on Minor's affidavit.

SUMMARY OF ARGUMENT

In disposing of DIRECTV's claims, the district court failed to comply with the standards this Court has set for the interpretation of statutes and the evaluation of evidence for purposes of summary judgment. The district court's ruling should be reversed for two reasons.

1. The district court erred by granting summary judgment to Minor on DIRECTV's claim in Count IV that Minor violated the Cable Act, 47 U.S.C. § 605(e)(4), by assembling or modifying a pirate access device. The district court's ruling is based exclusively on its determination that DIRECTV can not establish that it is a "person aggrieved" with standing to file a suit for a violation of § 605(e)(4) unless it establishes interception of its transmission. This analysis of "person aggrieved" and the scope of causes of action for violations of § 605(e)(4) is flawed in three respects.

First, the district court disregarded the plain terms of the statute. The definition in 47 U.S.C. § 605(d)(6) begins with the phrase "any person aggrieved" shall include." As this Court has held, the term "include" indicates that a list is descriptive rather than exhaustive. Argosy Ltd. v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968); Ruiz v. Estelle, 161 F.3d 814, 820 n.10 (5th Cir. 1998). Similarly, when the district court discussed DIRECTV's status as a "person aggrieved," it failed to recognize that the definition of "person aggrieved" in § 605(d)(6)

expressly includes entities, like DIRECTV, that are “engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.” See National Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 912 (6th Cir. 2001). Numerous courts have held that DIRECTV qualifies as a “person aggrieved” for purposes of bringing a civil action for violations of § 605(e)(4) based on this language. DIRECTV, Inc. v. Hoverson, 319 F. Supp. 2d 735, 738-39 (N.D. Tex. 2004); DIRECTV, Inc. v. Boonstra, 302 F. Supp. 2d 822, 829 n.4 (W.D. Mich. 2004).

Second, the district court failed to consider relevant legislative history which, consistent with the Cable Act’s plain terms, makes clear that Congress’ definition of “person aggrieved” was intended to expand civil enforcement of the Cable Act as a deterrent to satellite piracy. By significantly reducing the types of plaintiffs who can qualify as a “person aggrieved,” the district court’s opinion frustrates Congress’ intent.

Third, the district court’s interpretation of “person aggrieved” must be incorrect because it undermines the framework of the Cable Act. The Cable Act criminalizes several kinds of behavior related to satellite piracy, not just illegal interception, and the Cable Act’s civil enforcement mechanism expressly states that a cause of action will exist for any such violation, including violations of § 605(e)(4). See 47 U.S.C. § 605(e)(3). By requiring a showing of illegal

interception in all such causes of action, the district court effectively bars civil actions for violations of the Act arising out of the manufacture, distribution, sale, modification or assembly of illegal devices, unless interception is also demonstrated.

2. The district court erred when it granted summary judgment to Minor on DIRECTV's claims for illegal interception of its satellite transmission in violation of 47 U.S.C. § 605(a) and 18 U.S.C. § 2511(1)(a). Rather than viewing the evidence in the light most favorable to DIRECTV, the district court turned a blind eye to DIRECTV's evidence, failed to draw reasonable inferences in DIRECTV's favor, and ignored the serious questions that DIRECTV's evidence raised about Minor's veracity as a witness.

The district court based its judgment on one finding of fact: that there is "no evidence, direct or circumstantial, that Minor has ever possessed the other equipment necessary for receiving DIRECTV's transmissions, namely, a receiver/decoder and an access card." (R.327, DTV R.E. 015.) To the contrary, DIRECTV presented undisputed evidence that Minor spent \$100-\$300 for an unlooper, a device designed and marketed for the purpose of illegally intercepting DIRECTV's broadcasts and which has no commercially significant purpose other than to modify access cards. DIRECTV also presented evidence that Minor's satellite dish can only be used to view DIRECTV programming. Minor's

testimony regarding his motives in acquiring these devices was contradicted by DIRECTV's uncontested expert testimony, which demonstrated that Minor's testimony cannot be credited.

The precedents of this Court addressing the consideration of evidence on a motion for summary judgment make clear that the district court was required to draw an inference that Minor pirated DIRECTV's satellite transmissions from this evidence. See Newport Ltd. v. Sears, Roebuck & Co., 6 F.3d 1058, 1064 (5th Cir. 1993) (a district court must "indulge every reasonable inference from the facts in favor of" the non-movant) and United States v. Harrell, 983 F.2d 36, 38 (5th Cir. 1993) (discussing the inferences to be drawn from acquisition of a pirate access device). This Court's precedents also required the district court to disregard Minor's denials on summary judgment, as a "jury is not required to believe" them. Thomas v. Great Atlantic & Pacific Tea Co., 233 F.3d 326, 329 (5th Cir. 2000). The district court did not even consider the potential inferences that could be drawn from Minor's acquisition of the unlooper and DIRECTV satellite dish. Nor did the district court address the questions raised by DIRECTV's evidence regarding Minor's credibility. Instead, the district court embraced an uncorroborated affidavit submitted by Minor, labeled Minor's conclusory denials therein "undisputed evidence," and relied on those denials as the sole evidentiary basis for its decision to grant summary judgment.

The district court should not have disposed of DIRECTV's claims in Counts I, II and IV. The grant of summary judgment should be reversed and the case remanded to the district court for further proceedings.

ARGUMENT

This Court reviews the district court's grant of summary judgment de novo. Goswami v. American Collections Enter. Inc., 377 F.3d 488, 492 (5th Cir. 2004).

I. The District Court Erred in Granting Summary Judgment to Minor on DIRECTV's 47 U.S.C. § 605(e)(4) Claim.

The district court misconstrued the terms of the Cable Act when it required DIRECTV to "prove that Minor received, assisted in receiving, or intercepted DIRECTV's proprietary satellite transmissions" to succeed on its claim against Minor for illegal modification or assembly of a pirate access device in violation of 47 U.S.C. § 605(e)(4). (See R.325, DTV R.E. 013.) The district court improperly conflated DIRECTV's claim that Minor used an unlooper to illegally modify a DIRECTV access card in violation of 47 U.S.C. § 605(e)(4) with DIRECTV's claims that Minor illegally intercepted DIRECTV's satellite transmissions in violation of a different provision of the Cable Act, 47 U.S.C. § 605(a), and the Wiretap Act, 18 U.S.C. § 2511(1)(a).¹⁷ In granting summary judgment for Minor,

¹⁷ The district court's grant of summary judgment for Minor on DIRECTV's claim for violation of 47 U.S.C. § 605(e)(4) was based solely on its determination that DIRECTV did not have standing as a "person aggrieved" because DIRECTV, in the opinion of the district court, failed to present evidence that Minor "actually intercepted" DIRECTV's satellite transmissions. The

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the district court ignored the Cable Act’s plain language, legislative history and overall framework and rendered an interpretation of the Cable Act that essentially bars civil enforcement of certain of its provisions, including § 605(e)(4).

The Cable Act prohibits, among other things, the modification and assembly of a pirate access device:

“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) of this section, shall be fined not more than \$500,000 for each violation, or imprisoned for not more than 5 years for each violation or both.”
47 U.S.C. § 605(e)(4).

Although § 605(e)(4) is a criminal provision, DIRECTV has a cause of action against Minor because § 605(e)(3)(A) creates a civil action on behalf of any “person aggrieved” by a violation of 47 U.S.C. § 605, including § 605(e)(4).

“Any person aggrieved by any violation of subsection (a) of this section or paragraph (4) of this subsection may bring a civil action in a United States district court or in any other court of competent jurisdiction.”
47 U.S.C. § 605(e)(3)(A).

district court did not conclude that DIRECTV failed to present sufficient evidence that Minor assembled or modified a device in violation of § 605(e)(4); nor did Minor move for summary judgment on that basis.

Initially, Congress did not define the term “person aggrieved.” However, in 1988, § 605 was amended by the Satellite Act to add the following definition of a “person aggrieved” in § 605(d)(6):

“the term ‘any person aggrieved’ shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming, and, in the case of a violation of paragraph (4) of subsection (e) of this section, shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.” 47 U.S.C. § 605(d)(6) (emphasis added).

Congress’ stated purpose in amending the Cable Act was, among other things, to expand the standing of plaintiffs to sue for violations of the Cable Act. See H.R. Rep. No. 100-887 (II), 1988 U.S.C.C.A.N. 5577, 5657.

The district court quoted and relied upon the definition of “person aggrieved” in § 605(d)(6) (minus the underlined text) to hold that DIRECTV was not a person aggrieved for purposes of its claim for violation of § 605(e)(4), stating “DIRECTV has failed to meet its burden to raise a fact issue that Minor actually intercepted then divulged its communication.” (R.328, DTV R.E. 016.) The district court’s interpretation of these provisions is erroneous for three reasons: (1) the plain language of the statute’s definition of “person aggrieved” makes clear that claims for violations of § 605(e)(4) are not reserved only for plaintiffs who establish a proprietary right to an intercepted broadcast, and it expressly provides a

cause of action to persons, like DIRECTV, who engage “in the lawful manufacture, distribution or sale of equipment necessary to authorize or receive satellite cable programming” irrespective of whether they possess a proprietary right to an intercepted broadcast; (2) the statute’s legislative history establishes that Congress intended to expand, not restrict, standing to sue for satellite piracy; and (3) the district court’s decision collapses the distinctions between § 605(e)(4) and § 605(a).

A. Congress Did Not Limit Status as a “Person Aggrieved” to Broadcasters Whose Transmissions are Intercepted.

“[A]bsent any indication that doing so would frustrate Congress’s clear intention or yield patent absurdity [the district court’s] obligation is to apply the statute as Congress wrote it.” See Dunn v. Commodity Futures Trading Comm’n, 519 U.S. 465, 470 (1997) (internal quotation marks and citation omitted). Here, the district court interpreted “person aggrieved” to require that plaintiffs prove actual interception of their broadcasts. This restrictive reading of “person aggrieved” is contrary to the plain language of § 605(d)(6), which makes clear that it is not an exhaustive list of those persons who qualify as a “person aggrieved” by beginning with the phrase “any person aggrieved shall include any person . . .” (emphasis added). Additionally, § 605(d)(6) expressly includes legitimate distributors of home satellite equipment, such as DIRECTV, in the definition of person aggrieved. The district court omitted this language from the definition of

“person aggrieved” in its opinion, and erred when it failed to recognize that this language also makes DIRECTV a “person aggrieved.”

1. The District Court’s Interpretation of § 605(d)(6) as an Exclusive Definition of “Persons Aggrieved” Is Wrong Because It Ignores the Term “Include.”

In the Fifth Circuit, the term “include,” when used in a statute, has a specific meaning. “‘The word “includes” is usually a term of enlargement, and not of limitation.’ It therefore conveys the conclusion that there are other items includable, though not specifically enumerated by the statutes.” Argosy Ltd. v. Hennigan, 404 F.2d 14, 20 (5th Cir. 1968) (citation omitted); see also Ruiz v. Estelle, 161 F.3d 814, 820 n.10 (5th Cir. 1998).

Although this Court has not previously interpreted Congress’ use of the word “include” in § 605(d)(6), the U.S. Court of Appeals for the Sixth Circuit has applied the logic of Argosy and Ruiz to conclude that § 605(d)(6)’s “statutory phrase ‘any person aggrieved shall include any person . . .’ does not mean that only persons who meet that definition have standing to sue.” National Satellite Sports, Inc. v. Eliadis, Inc., 253 F.3d 900, 912 (6th Cir. 2001) (holding that a plaintiff is not required to show interception of a broadcast in which it has proprietary rights in order to establish itself as a “person aggrieved”), cert. denied, 534 U.S. 1156 (2002).

When the district court interpreted § 605(d)(6), it ignored the phrase “shall include.” In so doing, it violated the “cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” TRW, Inc. v. Andrews, 534 U.S. 19, 31 (2001) (citation omitted). The district court proffered no argument as to why § 605(d)(6) should be considered an exclusive list despite Congress’ explicit use of the phrase “shall include”; it did not discuss Argosy and Ruiz, much less attempt to distinguish those cases; nor did it attempt to distinguish the Sixth Circuit’s ruling in Eliadis on the precise legal issue being considered here. Instead, it overlooked the phrase “shall include” and presumed, without warrant, that “DIRECTV must prove that Minor received, assisted in receiving, or intercepted DIRECTV’s proprietary satellite transmissions.”

(Opinion at 2, R.325, DTV R.E. 013.) This was an error.

2. Congress Explicitly Included Persons Like DIRECTV Who are Engaged in the Lawful Distribution or Sale of Home Satellite Equipment as “Persons Aggrieved.”

In evaluating whether DIRECTV qualifies as a “person aggrieved” under § 605(d)(6), the district court only considered one half of Congress’ definition. It quoted the portion of § 605(d)(6) that states that any “‘person aggrieved’ shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable

programming,” but it omitted the remainder of the subsection, which states: “and, in the case of a violation of paragraph (4) of subsection (e) of this section, shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.”

(Opinion at 2, R.325, DTV R.E. 013.) This definition reflects Congress’ intent to empower aggrieved manufacturers, distributors and sellers of legitimate home satellite equipment, in addition to satellite broadcasters, to combat piracy. H.R. Rep. No. 100-887 (II), 1988 U.S.C.C.A.N. 5577, 5643.

The district court’s oversight is substantial. Numerous courts have relied on the portion of § 605(d)(6) that the district court in this case ignored to hold that DIRECTV is a “person aggrieved” entitled to bring a civil action for violation of § 605(e)(4). See, e.g., DIRECTV, Inc. v. Hoverson, 319 F. Supp. 2d 735, 738-39 (N.D. Tex. 2004); DIRECTV, Inc. v. Boonstra, 302 F. Supp. 2d 822, 829 n.4 (W.D. Mich. 2004).¹⁸ In this case, as in Hoverson and Boonstra, there is no

¹⁸ The courts in Hoverson and Boonstra correctly ruled that DIRECTV is a “person aggrieved” under § 605(d)(6), even though the company is not engaged in the manufacture, distribution, or sale of equipment necessary to authorize or receive “satellite cable programming,” as that term is defined in § 605(d)(1). See Hoverson, 319 F. Supp. 2d at 739; Boonstra, 302 F. Supp. 2d at 829 n.4. Both courts recognized that Congress did not restrict the term “any persons aggrieved” to the categories of persons that follow the words “shall include” in § 605(d)(6). Hoverson, 319 F. Supp. 2d at 739; Boonstra, 302 F. Supp. 2d at 829 n.4. As the court in Hoverson explained, § 605(d)(6) “is not a true definition but, instead, merely is a description of two categories of persons who come within the broad term ‘any person aggrieved.’” Hoverson, 319 F. Supp. 2d at 739; see id. (“Congress did not intend to restrict the term ‘any person aggrieved’ to the categories of persons that follow the words ‘shall include.’”), citing Argosy, 404 F.2d 14, 20 (5th Cir.). It is eminently reasonable to read the definition of “person aggrieved” in § 605(d)(6) as

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question of fact as to whether DIRECTV distributes equipment necessary for its subscribers to receive its satellite broadcasts. DIRECTV presented uncontroverted evidence that it distributes integrated receivers and access cards to its customers that are used to receive DIRECTV's programming. (See Rissler Aff. at 6, DTV R.E. 031) The district court erred in disregarding, without discussion, the second sentence of § 605(d)(6) in the face of such evidence.

B. Congress Enacted the Satellite Act to Expand Rather Than Contract Standing to Sue for Satellite Piracy.

As this Court stated in Argosy and Ruiz, “when Congress amends a law, the amendment is made to effect some purpose.” Argosy, 404 F.2d at 20; Ruiz 161 F.3d at 820. This is particularly true when Congress uses the word “include.” Argosy, 404 F.2d at 20; Ruiz 161 F.3d at 820.¹⁹ Under such circumstances,

encompassing a provider of “direct-to-home satellite services,” such as DIRECTV, given that § 605(e)(4) makes it unlawful inter alia, to manufacture, assemble or modify “any electronic, mechanical or other device or equipment . . . primarily of assistance in the unauthorized decryption of direct-to-home satellite services” 47 U.S.C. § 605(e)(4) (emphasis added). See also United States v. Harrell, 983 F.2d 36, 39 (5th Cir. 1993) (“The [Cable Act] prohibits the surreptitious interception of any encrypted satellite signal intended for private use, either directly to the individual or indirectly through a cable operator. The statute’s purpose is to proscribe the piracy of programming signals whether they be for commercial or personal use.”).

¹⁹ In Argosy and Ruiz, this Court bolstered its reliance upon the plain meaning of the term “include” with a discussion of Congress’ intent in enacting the provision at issue. And in both of those cases, like this case, the provision at issue was an amendment to an existing statute made for a specific purpose.

“Courts must also look to the logic of Congress and to the broad national policy which prompted the legislation.” Argosy, 404 F.2d at 20.²⁰

Here, the district court ignored Congress’ purpose in amending the Cable Act through its passage of the Satellite Act. The district court interpreted “person aggrieved” to restrict the class of plaintiffs who can sue for a violation of the Cable Act to broadcasters who can prove that their transmissions were intercepted. (R. 325, DTV R.E. 013.) This reading undermines Congress’ fundamental purpose in enacting the Satellite Act – to deter satellite piracy by stiffening civil and criminal penalties and expanding standing to sue. The House Report accompanying the Satellite Act explains the Act’s purpose as follows:

“Section 5 of the [Satellite] Act amends Section 705 of the Communications Act [47 U.S.C. § 605] pertaining to the piracy of satellite cable programming. The Committee’s amendment is intended to deter piracy practices by (1) stiffening applicable civil and criminal penalties, (2) expanding standing to sue, and (3) making the manufacture, sale, modification . . . of devices or equipment with knowledge that its primary purpose is to assist in unauthorized decryption of satellite cable programming expressly actionable as a criminal act.” H.R. Rep. No. 100-887 (II), 1988 U.S.C.C.A.N. 5577, 5657 (emphasis added).

²⁰ Thus, in Argosy, this Court construed the jurisdiction of the Customs Court broadly to effect “the Congressional purpose to provide ‘a complete system of corrective justice with respect to matters arising under the customs laws.’” Argosy, 404 F.2d at 20. In Ruiz, this Court held that individual state legislators had standing to intervene in actions brought pursuant to the Prison Litigation Reform Act because it found that it was Congress’ purpose in amending that statute to provide such standing. See Ruiz, 161 F.3d at 820 n.10.

In National Satellite Sports, Inc. v. Eliadis, Inc., 253 F.2d 900 (6th Cir. 2001), the Sixth Circuit reversed a district court decision, substantively indistinguishable from the opinion below in this case, that construed § 605(d)(6) to require illegal interception. Eliadis, 253 F.3d at 912. The Sixth Circuit quoted the above piece of legislative history and held:

“Limiting the availability of civil actions to those persons who meet the definition of a ‘person aggrieved’ in § 605(d)(6), and requiring that they have ‘proprietary rights in [an] intercepted communication,’ is inconsistent with the intent of Congress as expressed in the Cable Communications Policy Act of 1984 and the Satellite Home Viewer Act in 1988. Both acts were intended to expand the scope of protection provided by the Communications Act, not limit it. In particular, Time Warner’s argument flies in the face of Congress’s explicit interest in ‘expanding standing to sue’ under the Act.” Eliadis, 253 F.3d at 912.

In Argosy and Ruiz, this Court expressed a similar commitment to heed Congress’ intent, particularly when interpreting statutory amendments. See Argosy, 404 F.2d at 20; Ruiz 161 F.3d at 820. In this case, Congress’ purpose in amending the Cable Act is unmistakable – to expand civil enforcement. This Court should therefore join the Sixth Circuit in recognizing that the definition of “person aggrieved” in § 605(d)(6) must be read expansively to effectuate Congress’ intent.

C. The District Court’s Construction of “Person Aggrieved” is Inconsistent with the Framework of the Cable Act.

The district court’s construction of “person aggrieved” to require a showing of illegal interception in all claims arising under 47 U.S.C. § 605, including claims arising under § 605(e)(4), is also impermissible because it “contravene[s] the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” Department of Revenue of Oregon v. ACF Indus., 510 U.S. 332, 340-341 (1994) (internal quotation marks and citation omitted); see also Forsyth v. Barr, 19 F.3d 1527, 1543 (5th Cir. 1994) (refusing to interpret the Wiretap Act in a manner that would “render parts of a statute inoperative or superfluous”). The Cable Act prohibits more than just illegal interception. The first sentence of § 605(a) makes it illegal for a person who lawfully receives a communication to divulge or publish it without the permission of the broadcaster (subject to exceptions). Illegal interception is not part of the offense. Likewise, as we have discussed, § 605(e)(4) makes it illegal to “manufacture[], assemble[], modif[y] . . . or distribute[]” any pirate access device independent of whether the particular device has intercepted a transmission.

The plain terms of the Cable Act’s civil enforcement provision, § 605(d)(3)(A), make clear that a cause of action exists for each of these violations, and specifically violations of § 605(e)(4), not just illegal interception: “Any person aggrieved by any violation of subsection (a) of this section or paragraph (4)

of this subsection may bring a civil action in a United States district court or in any other court of competent jurisdiction.” 47 U.S.C. § 605(d)(3)(A) (emphasis added.) This plain language is in accord with Congress’ stated intent to expand civil enforcement of the Cable Act against satellite pirates. See H.R. Rep. No. 100-887 (II), 1988 U.S.C.C.A.N. 5577, 5657.

By interpreting the phrase “person aggrieved” to require interception, the district court conflated these different and independent causes of action into one cause of action for violation of the second sentence of § 605(a), which prohibits illegal interception. In so doing, the court impermissibly rendered these other provisions “mere surplusage.” Dunn v. Commodity Futures Trading Comm’n., 519 U.S. 465, 472 (1997). Given Congress’ express statement that a cause of action will exist for “any violation” and its specific reference to an independent cause of action for violation of § 605(e)(4), the district court’s grant of summary judgment in favor of Minor on Count IV should be reversed and the case remanded to the district court for further proceedings.

II. The District Court Erred in Granting Summary Judgment to Minor on DIRECTV’s Claims for Violation of 47 U.S.C. § 605(a) and 18 U.S.C. § 2511(1)(A).

The district court failed to apply the Fifth Circuit’s well-settled law concerning the evaluation of evidence for purposes of summary judgment. This is not a case where DIRECTV has moved for summary judgment. Nor has

DIRECTV presented its case to a jury. At this point in the case, DIRECTV bears no burden of persuasion. See Caboni v. General Motors Corp., 278 F.3d 448, 451 (5th Cir. 2002) (district court must “not weigh the evidence”). The question before the district court on summary judgment was not whether Minor intercepted DIRECTV’s satellite transmissions, but whether DIRECTV presented sufficient evidence to establish a genuine issue of material fact. Id.

The district court was permitted by the precedents of this Court to grant summary judgment “only ‘if 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.’” Caboni, 278 F.3d at 451. (citation omitted). The district court was required to “consider the evidence in the light most favorable to the non[-] movant,” – here DIRECTV – and to “indulge every reasonable inference from the facts in favor of [DIRECTV].” Id. at 452; Newport Ltd. v. Sears, Roebuck & Co., 6 F.3d 1058, 1064 (5th Cir. 1993). Summary judgment is “‘improper even though the basic facts are undisputed if the parties disagree regarding the material factual inferences that properly may be drawn from these facts.’” Winters v. Highlands Ins. Co., 569 F.2d 297, 299 (5th Cir. 1978) (citation omitted). Moreover, in considering a motion for summary judgment, the district court was required to “disregard all evidence favorable to the moving party

that the jury is not required to believe.” Thomas v. Great Atlantic & Pacific Tea Co., 233 F.3d 326, 329 (5th Cir. 2000).

The district court disregarded these rules when it granted summary judgment for Minor on DIRECTV’s claims for illegal interception of satellite broadcasts under 47 U.S.C. § 605(a) and 18 U.S.C. § 2511(1)(a). To prove a claim of illegal interception in violation of § 605(a), a plaintiff must prove that the defendant received, assisted in receiving, or intercepted proprietary satellite transmissions. A claim for violation of 18 U.S.C. § 2511(1)(a) has similar elements, requiring a plaintiff to prove that the defendant “intentionally intercept[ed], endeavor[ed] to intercept, or procure[ed] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.”²¹

The district court granted summary judgment to Minor on the sole ground that “DIRECTV has come forward with no evidence that Minor purchased or possessed all the necessary equipment to intercept DIRECTV’s signal.” (R.328, DTV R.E. 016) In so ruling, the district court overlooked or ignored evidence of interception proffered by DIRECTV, refused to draw inferences from the evidence in favor of DIRECTV, drew inappropriate inferences in favor of Minor, and granted summary judgment to Minor based solely on Minor’s uncorroborated, self-

²¹ There is no dispute in this case that 47 U.S.C. § 605(e)(3) creates a private cause of action for violations of § 605(a) and that 18 U.S.C. § 2520(a) creates a private cause of action for violations of § 2511(1)(a).

serving and conclusory affidavit. These failures violate the standards for summary judgment set by the Supreme Court and this Circuit and mandate reversal.

A. DIRECTV Presented Sufficient Evidence to Create a Genuine Issue as to Whether Minor Intercepted DIRECTV's Transmissions.

1. The District Court Failed to Give Proper Weight to Minor's Purchase of a Pirate Access Device.

It is uncontested that Minor purchased a pirate access device – a Vector Fusion unlooper. (Rissler Aff. at 7-8, DTV R.E. 032-033; VanWinkle Aff. at Ex. A, DTV R.E. 053; Minor Dep. at 8, DTV R.E. 063.) As the district court recognized, this device has no commercially significant purpose other than to intercept DIRECTV's broadcasts. (Opinion at 3, R.326, DTV R.E. 014; Rissler Aff. at 9, DTV R.E. 034; Barr Aff. at 6, DTV R.E. 025.)

This Court's decision in United States v. Harrell, 983 F.2d 36, 38 (5th Cir. 1993) indicates that this fact, by itself, is sufficient to create an inference of piracy. Harrell involved the criminal prosecution of a defendant who modified computer chips for satellite receiver/decoders to intercept satellite programming illegally. In the course of upholding the defendant's conviction, this Court considered the proper inferences to be drawn from the purchase of a pirate access device:

“We find it unreasonable to believe that an individual, having illegally spent about \$300 for the modified chip, will still primarily limit himself to his originally paid programming. These air communication pirates consciously transgress the law because they want to

watch specific scrambled programs such as newly released movies or timely sporting events. The modified modules are rendered incapable of any service because the observed tampered seal would subject the users to the risk of being reported to the proper authorities. The modules, also, cannot have their official programming changed because their assigned address computer chips have been replaced. Therefore, the modules cannot be serviced, changed, sold or even given away in fear that the user's piracy be found out. The broken seal has relegated the modules to secrecy, unable to reenter the legal mainstream." Harrell, 983 F.2d at 38.

This Court is not alone in finding it unreasonable to assume that a person would purchase a pirate access device, but not use it for piracy. The United States District Court for the Middle District of Florida considered similar circumstances in DIRECTV, Inc. v. Spokish, No. 6:03-cv-680-Orl-22DAB, 2004 U.S. Dist. LEXIS 4092, at *12 (M.D. Fla. Feb. 19, 2004) (Attachment B hereto). In that case, the defendant purchased the same type of pirate access device that Minor purchased – an unlooper. Id. at* 10-11. Like Minor, the defendant in Spokish denied using the unlooper to intercept DIRECTV's broadcasts. The court held that "a reasonable jury could reject Mr. Spokish's self-serving testimony and instead conclude that wiretap violations occurred." Id. at *11. The Spokish court explained "it would also be a strange world if people like the Defendant purchased pirate access devices intending to use them for a purpose other than that for which they were exclusively designed: pirating [DIRECTV] Television." Id. at *12.

Minor's purchase of a Vector Fusion unlooper is indistinguishable from the circumstances in Harrell and Spokish. Minor spent a significant amount of money to purchase the device, \$100 to \$300. (Minor Dep. at 8; DTV R.E. 068.) The device, when used in conjunction with a digital receiver and satellite dish, will enable a pirate to illegally intercept encrypted satellite broadcasts. (Rissler Aff. at 8, DTV R.E. 033; Barr Aff. at 4-5, DTV R.E. 023-024.) And most importantly, the Vector Fusion unlooper, like the hacked computer chip and receiver/decoder in Harrell, has no commercially significant purpose other than to pirate satellite broadcasts. (Rissler Aff. at 9, DTV R.E. 034; Barr Aff. at 6, DTV R.E. 025; Opinion at 3, R.326, DTV R.E. 014.)

Harrell and Spokish exhibit a thoughtful consideration of the proper inferences to be drawn from evidence that is lacking in the district court's opinion. The district court's opinion is limited merely to noting facts. The court notes that Minor purchased an unlooper for \$100 to \$300 and it notes that DIRECTV presented uncontested evidence that an unlooper has only one commercially significant purpose, to pirate DIRECTV satellite transmissions. (Opinion at 3, R.326, DTV R.E. 014.) Yet the district court's opinion is devoid of any consideration of the proper inferences to be drawn from these facts. This Court in Harrell and the Middle District of Florida in Spokish contemplated and discussed the practical implications of spending a significant amount of money to purchase

such a device, and found “it unreasonable to believe” that an individual would not thereafter use it to pirate satellite broadcasts. Harrell, 983 F.2d 36; Spokish, 2004 U.S. Dist. LEXIS 4092 at *12. The district court’s opinion contains no similar discussion.

2. The District Court Ignored Additional Evidence of Minor’s Piracy that Made Summary Judgment Improper.

The district court also failed to give weight to additional evidence presented by DIRECTV of Minor’s piracy. DIRECTV proved, with pictures and affidavits, that Minor had a DIRECTV satellite dish attached to his house. (Mader Aff. at 2, DTV R.E. 042; Hill Aff. at Ex. 1, DTV R.E. 046.) The DIRECTV dish is distinct and distinguishable from the satellite dishes used by DIRECTV’s competitor. (Mader Aff. at 2, DTV R.E. 042.) It is uncontested that a DIRECTV satellite dish can only be used to receive DIRECTV’s signal and that Minor has never paid for DIRECTV’s programming; yet the district court refused to consider Minor’s possession of this dish to be evidence that Minor pirated DIRECTV’s signal. (Mader Aff. at 2, DTV R.E. 042; Opinion at 4, R. 327, DTV R.E. 015 (stating that there is “no evidence”).)

The district court also ignored inconsistencies in Minor’s stories about how and why he acquired the DIRECTV satellite dish and Vector Fusion unlooper. This Court has previously observed that “[c]learly the credibility of a witness is a

factual issue which precludes summary judgment.’” Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 81 (5th Cir. 1987) (citation omitted).

Minor originally testified that his DIRECTV dish was installed on his house when he had “a company come in and do – wiring... for telephone, cable, I mean, any possible communications.” (Minor Dep. at 33, DTV R.E. 070.) Later in his testimony this “company” became “just workers in the area that needed some extra money.” (Id. at 35, DTV R.E. 070.) He testified that the dish “was to be used as an antenna. There’s a round device over the top of it that – that gathers reception for local channels.” (Id. at 33, DTV R.E. 070.) DIRECTV presented unchallenged testimony that the satellite dish attached to Minor’s house is incapable of functioning as an antenna to receive terrestrial (standard local channel broadcast) television programming; in fact, it can only receive DIRECTV satellite programming. (Mader Aff. at 3, DTV R.E. 043.)

Minor’s claim that he purchased the Vector fusion unlooper to prevent “my son, kids, anybody in the family from accessing my [computer] system when I wasn’t home” also rings false. (Minor Dep. at 17, DTV R.E. 066.) DIRECTV presented undisputed evidence that the Vector Fusion unlooper has no commercially significant purpose other than pirating DIRECTV’s satellite transmissions. (Barr Aff. at 6, DTV R.E. 025.) Minor pleads ignorance of the fact that a Vector Fusion unlooper is not a computer security device, yet he is a

professional computer network administrator with a degree in computer information systems, substantial post-graduate experience and a personal library of books he has collected while attending additional computer courses. (Minor Dep. at 9-11, DTV R.E. 064.) Minor even admits that he researched the Vector Fusion unlooper on the internet before he purchased it (although he can not remember a single website he visited). (Id. at 14, DTV R.E. 065.)

Finally, Minor's credibility is called into question by his denial, in the face of irrefutable evidence, that he registered under the alias "Knight_Rider" with "Pirates' Den," a website devoted to the piracy of DIRECTV's satellite broadcasts. (Rissler Aff. at 10, DTV R.E. 035.) DIRECTV has produced unchallenged documentation that someone subscribed to Pirates' Den under the alias "Knight_Rider" using Minor's work e-mail address, "randall.minor@mail.va.gov." (Stoabs Aff. at 3, DTV R.E. 049; Minor Dep. at 8, DTV R.E. 063.) Minor failed to explain how or why someone else used his e-mail address to subscribe to Pirates' Den.

These facts raise serious questions regarding Minor's credibility, yet the district court does not even address them in its opinion. (See Opinion at 3-4, R.326-327, DTV R.E. 014-015.) The district court drew no inferences, whatsoever, from Minor's repeated attempts to offer implausible – and in the case

of his claim that he used a DIRECTV dish to obtain terrestrial programming, impossible – explanations for his actions. This too is an error.

This Court's decision in Harrell and the Middle District of Florida's decision in Spokish make clear that it is, at least, reasonable to infer illegal interception from possession of a pirate access device. Harrell, 983 F.2d at 38; Spokish 2004 U.S. Dist. LEXIS 4092 at *12. Where, as here, such evidence is corroborated by possession of a DIRECTV dish (but no subscription) and testimony by the alleged pirate that is suspicious (at the very least), the district court had no choice but to draw this inference in DIRECTV's favor. See Anderson v. Liberty Lobby Inc., 477 U.S. 255 (1986), (requiring Courts to indulge every reasonable inference in favor of the party opposing summary judgment); accord Caboni, 278 F.3d at 452. It is not relevant that the district court did not find this evidence sufficiently persuasive for DIRECTV to prevail at trial. McPherson v. Rankin, 736 F.2d 175, 178 (5th Cir. 1984), cert. granted, 479 U.S. 913 (1986), aff'd, 483 U.S. 378 (1987); Jones v. Western Geophysical Co., 669 F.2d 280, 283 (5th Cir. 1982).

DIRECTV does not yet bear a burden of persuasion. It has not moved for summary judgment, nor has it submitted its case to a jury. Rather, DIRECTV is only required to show a genuine dispute regarding a material fact. Anderson, 477 U.S. at 242; Caboni, 278 F.3d at 452. In this case, a reasonable juror could infer illegal interception from this evidence; reasonable judges in Harrell and Spokish

did so under similar circumstances. At the very least, there is a disagreement “regarding the material factual inferences that properly may be drawn from these facts,” making summary judgment improper. See Winters, 569 F.2d at 299 (holding that such a disagreement precludes summary judgment). The failure of the district court to draw such inferences in DIRECTV’s favor, much less discuss the inferences that might be drawn from this evidence, is error.

B. The District Court Erred in Requiring DIRECTV to Present Direct Evidence that Minor Possessed Each and Every Piece of Equipment Necessary to Pirate DIRECTV’s Transmission.

This Court has repeatedly instructed district courts not to disregard or overlook circumstantial evidence in granting summary judgment. For example, in Thomas v. Great Atlantic & Pacific Tea Co., 233 F.3d 326 (5th Cir. 2000), this Court held that direct evidence does not “trump” circumstantial evidence, particularly where the direct evidence “is weak or highly suspect.” Id. at 329; accord, La Day v. Catalyst Tech., Inc., 302 F.3d 474, 477 (5th Cir. 2002); Stephens v. Witco Corp., 198 F.3d 539, 542-543 (5th Cir. 2000).

Circumstantial evidence is particularly important in wiretapping and satellite piracy cases. In Walker v. Darby, 911 F.2d 1573 (11th Cir. 1990), the Eleventh Circuit considered whether, for purposes of a claim for violation of 18 U.S.C. § 2511, a plaintiff must provide direct evidence of the contents of the intercepted communication. Walker, 911 F.2d at 1577-78. The Court held that requiring such

direct evidence placed an unreasonable burden on plaintiffs, and it held that circumstantial evidence of interception was all that was required. Id. at 1578.

Specifically, the court ruled that:

“[D]efendant’s argument flies in the face of the statute and the nature of the tort. . . . the fact that most of the plaintiffs have no personal, first-hand knowledge that any particular phone call was tapped is not remarkable The intentional tort of wiretapping created by 18 U.S.C. § 2520 is obviously one which by its very nature is unknown to the plaintiff.’ . . . ‘Direct evidence may not have been available based on the stealthiness of the invasion.’” Id. (citations omitted).

The Fifth Circuit has previously relied on Walker for the proposition that direct evidence of the content of the intercepted communication is not required to state a civil claim for violation of 18 U.S.C. § 2511. See Forsyth v. Barr, 19 F.3d 1527, 1535 n.16 (5th Cir. 1994).

Like a traditional wiretap, the piracy of satellite broadcasts is by its very nature secretive. This Court has described the practice as “surreptitious” and noted that the tools employed are “delegated . . . to secrecy.” United States v. Harrell, 983 F.2d 36, 38 (5th Cir. 1993). Other courts considering claims brought by DIRECTV against pirates have also recognized that DIRECTV is not required to produce direct evidence to establish that its broadcast was intercepted, but may rely upon circumstantial evidence to do so. See, e.g., Spokish, 2004 U.S. Dist. LEXIS

4092, at *11-12 (M.D. Fla. 2004) (Attachment B hereto); DIRECTV, Inc. v. Boonstra, 302 F. Supp. 2d 822, 832-833 (W.D. Mich. 2004).

Indeed, the district court in this case recognized that DIRECTV was entitled to rely on circumstantial evidence – and it cited Walker for that proposition, yet the district court then paid no heed to that evidence in granting summary judgment for Minor. (Opinion at 3, 8, R.326, 331, DTV R.E. 014, 019.) Although the district court acknowledged Walker and its progeny in words, it violated them in substance when it ignored DIRECTV’s evidence. Specifically, the district court stated that there is “no evidence, direct or circumstantial, that Minor has ever possessed the other equipment necessary for receiving DIRECTV’s transmissions, namely, a receiver/decoder and an access card.” (Opinion at 4, R.327, DTV R.E. 015.)

To the contrary, DIRECTV presented the following circumstantial evidence that Minor possessed a DIRECTV receiver/decoder:

- Minor possessed a Vector Fusion unlooper, which can only be used in conjunction with an access card. (Rissler Aff. at 8-9, DTV R.E. 033-034; Barr Aff. at 6, DTV R.E. 025.)
- Minor possessed a DIRECTV satellite dish, which can only be used in conjunction with a DIRECTV receiver/decoder. (Rissler Aff. at 6, DTV R.E. 31; Barr Aff. at 2, DTV R.E. 021.)
- DIRECTV’s evidence establishes that the alternative purposes for which Minor claims to have acquired these devices are implausible, if not impossible. (Compare Minor Dep. at 17, 33, DTV R.E. 066, 070 with Barr Aff. at 6, DTV

R.E. 025 and Mader Aff. at 3, DTV R.E. 043.)

The “district court was obliged to resolve all reasonable factual inferences from the record in favor of [DIRECTV], the nonmovant.” Galindo v. Precision Am. Corp., 754 F.2d 1212, 1216 (5th Cir. 1985). Here, the district court was obliged to infer that Minor possessed a receiver/decoder from the fact that DIRECTV proved that Minor possessed other equipment that was useless without it. Instead, the district court silently adopted the “unreasonable . . . belie[f]” that Minor expended time, money and effort to acquire these devices but did not use them for their intended purpose. See Harrell, 983 F.2d at 38; Spokish, 2004 U.S. Dist. LEXIS 4092, at *12.

C. Minor’s Self-Serving Affidavit is Not a Sufficient Basis for Summary Judgment, Particularly in Light of the Questions DIRECTV Raised Regarding His Credibility.

The district court contradicted the law of this Circuit by granting summary judgment to Minor largely on the strength of Minor’s affidavit. A district court must “disregard all evidence favorable to the moving party that the jury is not required to believe.” Thomas v. Great Atlantic & Pacific Tea Co., 233 F.3d 326, 329 (5th Cir. 2000). “While the mere claim that an affidavit is perjured is insufficient, where specific facts are alleged that if proven would call the credibility of the moving party’s witness into doubt, summary judgment is improper.” Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 81

(5th Cir. 1987). “This is especially so where the affidavit alleged to be perjured is an essential element of the [the movant’s] case and is not corroborated by other evidence.” Id. This is particularly the case when the affiant is “anything but an entirely disinterested witness.” Thomas, 233 F.3d at 331.²² Thus, “when the circumstances are conducive to lying, well-supported suspicion of mendacity may serve as a legitimate basis for the factfinder’s reasonable inferences concerning the ultimate facts at issue.” Id.

The sole piece of evidence relied upon by the district court in its summary judgment ruling is Minor’s conclusory affidavit. (See Opinion at 3, R. 326, DTV R.E. 014.) In that affidavit, Minor makes blanket denials that he “made,” “attempted” or “assisted in an unauthorized or illegal interception of any broadcast, satellite transmission or otherwise, by DirecTV, Inc., or any of its affiliates or predecessors.” (Minor Aff. at 1, R.189, DTV R.E. 076.) Minor also alleged that he purchased the Vector Fusion unlooper “to be used for possible computer encryption and authentication,” that he threw it away, and that he “lack[s] the

²² Affidavits also should be disregarded when they are conclusory. See Galindo, 754 F.2d 1212, 1216 (5th Cir. 1985). Summary judgment cannot be based solely upon a conclusory affidavit, even when the non-movant proffers no evidence, whatsoever, in response. Benton-Volvo-Metairie, Inc. v. Volvo Southwest, 479 F.2d 135, 139 (5th Cir. 1973). “[I]n summary judgment proceedings affidavits containing mere conclusions have no probative value.” Id. Indeed, conclusory affidavits are not even sufficient to forestall summary judgment for the opposing party. See Richardson v. Oldham, 12 F.3d 1373, 1378 (5th Cir. 1994).

equipment capable of receiving DirecTV.” (Minor Aff. at 1-2, R.189-190, DTV R.E. 076-077.)

DIRECTV countered Minor’s affidavit with specific facts that are more than sufficient to demonstrate that the “circumstances are conducive to lying,” and create a “well-supported suspicion of mendacity.” Thomas, 233 F.3d at 331. DIRECTV presented undisputed testimony to establish that Minor’s Vector Fusion unlooper and DIRECTV satellite dish were not designed for the purposes for which he claims to have acquired them (and in the case of the satellite dish cannot be used for the purpose Minor identified). (Barr Aff. at 6, DTV R.E. 025; Mader Aff. at 3, DTV R.E. 043.) Minor denies registering with the Pirate’s Den website or ever using the alias “Knight_Rider,” yet he offers no explanation for how or why someone else used his work e-mail, randall.minor@mail.va.gov., to register for that site using that alias. (Minor Dep. at 48, DTV R.E. 073; Stoabs Aff. at 3, DTV R.E. 049.)

This evidence is more than sufficient to draw Minor’s credibility into question. See Lodge Hall Music, Inc., 831 F.2d at 81. In light of this evidence, the district court should have disregarded Minor’s affidavit, or at least found it to be disputed, because it was potentially perjurious and the jury was not required to believe it. See id.; Thomas, 233 F.3d at 331. Instead, the district court embraced Minor’s affidavit, labeled Minor’s allegations therein “undisputed evidence,” and

made the affidavit the sole evidentiary basis for its grant of summary judgment.

The district court's grant of summary judgment in favor of Minor on Counts I and II should be reversed and the case remanded for further proceedings.

CONCLUSION

For the foregoing reasons, DIRECTV requests that this Court (1) reverse the district court's June 29, 2004 order granting summary judgment to Minor on DIRECTV's claims under 47 U.S.C. § 605(a) (Count I), 18 U.S.C. § 2511(1)(a) (Count II) and 47 U.S.C. § 605(e)(4) (Count IV); and (2) remand the case to the district court for further proceedings with respect to Counts I, II and IV.

Respectfully submitted,



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October 4, 2004

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2004, I caused two true and correct copies of the foregoing Brief of Appellant DIRECTV, Inc. and accompanying Record Excerpts, as well as one electronic copy of the Brief of Appellant DIRECTV, Inc., in PDF format on a 3 ½ inch computer readable diskette, to be served, via Federal Express, upon the following counsel for Appellee Randall Minor:

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Howard R. Rubin

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,005 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced font that includes serifs using Microsoft Word in 14 point Time New Roman font.

A handwritten signature in black ink, appearing to read 'H. Rubin', written over a horizontal line.

Howard R. Rubin
Attorney for Appellant DIRECTV, Inc.

October 4, 2004