Nos. 05-16361 & 05-16362
CONSOLIDATED

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIRECTV, INC.,

Plaintiff - Appellant,

v.

HOA HUYNH,

Defendant - Appellee.

DIRECTV, INC.,

Plaintiff - Appellant,

v.

CODY OLIVER,

Defendant - Appellee.

On Appeal from the United States District Court
for the Northern District of California

REPLY BRIEF OF APPELLANT DIRECTV, INC. TO BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION

Howard R. Rubin
Sonnenschein Nath & Rosenthal LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, D.C. 20005
(202) 408-6400
Counsel for Appellant DIRECTV, Inc.

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DIRECTV, INC., Plaintiff - Appellant, v. HOA HUYNH, Defendant - Appellee.	)	No. 05-16361
DIRECTV, INC., Plaintiff - Appellant, v. CODY OLIVER, Defendant - Appellee.	)	No. 05-16362

APPELLANT DIRECTV'S SUPPLEMENTAL CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(b), appellant DIRECTV, Inc. provides the following supplement to the disclosure statement it

filed with its opening brief on October 31, 2005. DIRECTV identifies the following parent companies:[1]

- 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.
- The DIRECTV Group, Inc. is 37% owned by **Fox Entertainment Group, Inc.**, a Delaware corporation.
- Fox Entertainment Group, Inc. is a wholly owned subsidiary of **News Corporation**, a publicly traded company.

Respectfully submitted,

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Howard R. Rubin
Sonnenschein Nath & Rosenthal LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, D.C. 20005
Tel: (202) 408-6400
Fax: (202) 408-6399
Counsel for Appellant DIRECTV, Inc.

December 19, 2006

[1] The only parent company identified in this Supplemental Disclosure that had not been disclosed previously to the Court is Fox Entertainment Group, Inc.

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INTRODUCTION

Appellant DIRECTV, Inc. submits this Reply Brief to respond to the arguments made in the brief submitted by *amicus curiae* the Electronic Frontier Foundation ("EFF").[1] As DIRECTV explained in its opening brief, the only issue for this Court to resolve in these consolidated appeals is whether the district court erred in ruling that 47 U.S.C. § 605(e)(4) only targets "upstream manufacturers and sellers" of piracy devices and does not cover the modification or assembly of such devices by individuals. (DIRECTV Br. at 19.) DIRECTV identified three flaws in the district court's interpretation of § 605(e)(4) that warrant a partial reversal of the judgment below: (1) the district court's narrow reading of § 605(e)(4) violates the plain words of the statute (DIRECTV Br. at 16, 19-23); (2) the limitation the district court placed on the words of the statute runs afoul of the statute's legislative history (id. at 17, 23-26); and (3) the district court's analysis

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[1] The defendant-appellees in these consolidated appeals, Hoa Huynh and Cody Oliver, defaulted below and have not appeared in this Court. In the absence of briefing from Huynh and Oliver, on November 30, 2005, EFF filed a motion for leave to file an amicus brief favoring affirmance. In a response filed with this Court on December 9, 2005, DIRECTV consented to EFF's motion on the condition, agreed to by EFF, that DIRECTV be permitted to file a standard reply brief in response to EFF's amicus brief. This Court has not yet ruled on EFF's consent motion to participate as amicus curiae. DIRECTV is filing the instant Reply Brief along with a consent motion requesting leave to file the Reply. If the Court grants EFF's motion to participate as amicus curiae, DIRECTV asks the Court to grant the accompanying consent motion for leave to file this Reply Brief and to consider DIRECTV's responses in this Reply to the arguments made in EFF's amicus brief.

contravenes the reasonable public policy decision that Congress made in subjecting individuals to greater damage awards when they modify or assemble pirate access devices than when they intercept satellite transmissions (id. at 18, 26-28).

In its *amicus* brief, EFF defends the district court's interpretation of § 605(e)(4) and, in doing so, makes some of the same mistakes that the district court made in its decisions. We focus in this Reply on the three main flaws in EFF's argument.

First, EFF's interpretation of § 605(e)(4) cannot be reconciled with the plain words of the statute. The statutory provision unambiguously applies to "[a]ny person who manufactures, assembles, modifies, imports, exports, sells, or distributes any" pirate access device. 47 U.S.C. § 605(e)(4) (emphasis added). EFF does not confront the fact that § 605(e)(4) covers all persons who assemble and modify pirate access devices, not just those engaged in commercial activities. Simply put, the plain words of § 605(e)(4) do not support EFF's central claim that the provision targets "commercial actors" who create pirate access devices "for others." (See EFF Br. at 10, 13, 16, 18, 20, 21, 26.)

Second, EFF's assertion that § 605(e)(4) does not apply to individuals who assemble or modify pirate access devices is at odds with relevant legislative history of the statute. As DIRECTV showed in its opening brief, the 1988 Satellite Act amendments to the Communications Act added the terms "modify" and

"assemble" to the list of prohibited conduct in § 605(e)(4) and "expand[ed] standing to sue." (DTV Br. at 24-26.) EFF ignores this relevant history and relies, instead, on a statement of legislative history applicable to § 605, generally, that was made at the time of passage of the 1984 Cable Act — four years before the relevant amendments were made to § 605(e)(4). (EFF Br. at 19.)

Third, EFF does not offer this Court a compelling reason to create a circuit split with the Fifth Circuit's unanimous decision in DIRECTV, Inc. v. Robson, 420 F.3d 532 (5th Cir. 2005), which addressed the precise issue before this Court. In Robson, the Fifth Circuit ruled that "§ 605(e)(4) in its disjunctive list of prohibited activities, clearly covers the modification or assembly of pirate devices as separate and self-contained offenses by whoever commits them." 420 F.3d at 543 (emphasis added). The Robson court explained that "[w]hile such activities are, no doubt, commonly within the purview of a 'manufacturer' or 'seller,' there is no indication that the statute is intended to condone it when the actor is instead an 'individual user.'" Id. at 544.

After DIRECTV submitted its opening brief to this Court, the Fourth Circuit considered the same issue in DIRECTV, Inc. v. Pernites, No. 04-2483, 2006 WL 2711978 (4th Cir. Sept. 21, 2006). In Pernites, a unanimous panel of the Fourth Circuit, albeit in an unpublished decision, found the Fifth Circuit's reasoning in Robson "persuasive" and followed Robson's holding. Id. at * 1. This Court

should join the analysis set forth in Robson and Pernites, give effect to the plain words of § 605(e)(4), and reverse the district court's default judgment ruling with respect to DIRECTV's claims in Count III of its complaints against Huynh and Oliver for violations of § 605(e)(4).

ARGUMENT

I. EFF's Interpretation of 47 U.S.C. § 605(e)(4) Cannot Be Reconciled with the Plain Words of the Statute.

In its amicus brief, EFF contends that the district courts' decisions are supported by "the plain language of the statute." (EFF Br. at 10.) EFF construes that "plain language" as providing that only "commercial actors who manufacture, assemble, or modify interception devices intended to assist others in intercepting satellite signals" can be found liable for violating 47 U.S.C. § 605(e)(4). (EFF. Br. at 10 (emphasis added).) EFF advocates this construction as the "plain meaning" of 47 U.S.C. § 605(e)(4), even though it is based on two limiting phrases — "commercial actors" and "assist others" — that do not appear anywhere in the text of 47 U.S.C. § 605(e)(4). This is no mere slip of the pen. EFF repeatedly asserts that § 605(e)(4) is limited to commercial actors. (See EFF Br. at 10, 14, 15, 20.) EFF also contends throughout its brief that § 605(e)(4) only applies to individuals who engage in the prohibited activities to "assist others" or "for others." (See EFF Br. at 10, 11, 13, 15-18.) EFF purports to distill this "plain meaning" interpretation from the "context" provided by the words surrounding "modify" and "assemble."

(See EFF Br. at 13-16.) According to EFF, the commercial nature of terms such as "manufacture" and "sell" limit "modify" and "assemble" to "commercial" transactions to "assist others" as well. (See id.) There are three flaws with EFF's analysis.

To begin with, EFF completely ignores the first two words of 47 U.S.C. § 605(e)(4) — "any person" — which on their own compel this Court to reverse the district courts' decisions below. EFF cannot ignore these words as it seeks to place the words "modify" and "assemble" in context. (See DIRECTV Br. at 20 (noting that the "'first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case'"), quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).) As the Supreme Court has explained, "[t]he preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what is says there.'" Bedroc Ltd. v. United States, 541 U.S. 176, 183 (2004) (citation omitted).

Here, the particular dispute is whether individual users who modify or assemble pirate access devices for their own use are persons who can be held liable for violating § 605(e)(4). There is no ambiguity in § 605(e)(4) regarding this dispute. Section 605(e)(4) unambiguously applies to "[a]ny person who manufactures, assembles, modifies, imports, exports, sells, or distributes any"

pirate access device. 47 U.S.C. § 605(e)(4) (emphasis added). In turn, the Communications Act's civil remedies provision, confers standing to sue upon "[a]ny person aggrieved by any violation of * * * paragraph (4) of this subsection." 47 U.S.C. § 605(e)(3)(A) (emphasis added). EFF inappropriately seeks to limit the types of persons who can be held liable for violating the prohibitions of § 605(e)(4) by looking to the terms "modify" and "assemble," rather than the more obvious words that begin the provision — "any person." As the Fifth Circuit recognized in Robson, in rejecting the theory being espoused by EFF here, § 605(e)(4) applies equally to individual users and commercial manufacturers and sellers because § 605(e)(4) expressly "provides that '[a]ny person' who engages in the prohibited activities is liable." 420 F.3d at 543-544, quoting 47 U.S.C. § 605(e)(4). EFF's failure to even acknowledge that the words "any person" are in § 605(e)(4), much less offer a compelling argument for why the Court should read those words out of the statute, is fatal to its interpretation.

EFF's interpretation not only ignores the words "any person" at the front end of § 605(e)(4), but it also impermissibly adds words to § 605(e)(4) that do not appear in the text. As this Court recognized in United States v. Watkins, "a court should not read words into a statute that are not there." 278 F.3d 961, 965 (9th Cir. 2002). EFF contends that § 605(e)(4) applies only to "commercial actors" who engage in prohibited activities to "assist others" in piracy. However, the terms

"commercial actors" and "assist others" are nowhere to be found in § 605(e)(4). Indeed, as EFF pointed out in its amicus brief, "Congress constructed § 605(e)(4) to prohibit *actions*." (EFF Br. at 17.) Congress did not, however, limit the prohibitions of § 605(e)(4) based on the reason why or for whom the prohibited "actions" are taken. As the Fifth Circuit recognized in Robson, "[n]othing on the face of § 605(e)(4) suggests such a limitation." 420 F.3d at 543.

EFF also errs in relying upon a cannon of construction, *noscitur a sociis*, when the language of § 605(e)(4) is clear regarding the particular dispute in this case. (See EFF Br. at 13-15.) According to EFF, the cannon of *noscitur a sociis* requires that the terms "modify" and "assemble" take on a commercial character because other piracy-related activities prohibited in § 605(e)(4), such as "manufacture" and "sell," have a commercial character. (EFF Br. at 13-15.) EFF errs by looking to this cannon in the face of the unambiguous use of "any person" at the start of § 605(e)(4). As this Court recognized in Campbell v. Allied Van Lines, Inc., "'[w]here the language [of a statute] is plain and admits of no more than one meaning the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.'" 410 F.3d 618, 620-21 (9th Cir. 2005), quoting Caminetti v. United States, 242 U.S. 470, 485 (1917).

The cases cited by EFF in support of its reliance upon *noscitur a sociis* demonstrate that the cannon has no bearing on this case. In Babbit v. Sweet Home

Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995), the Supreme Court reversed a decision by the United States Court of Appeals for the D.C. Circuit for improperly applying the cannon of *noscitur a sociis* to come to an interpretation at odds with the text, purpose and legislative history of the statute at issue. (See id. at 694, 697-98, 701-02.) Similarly, in United States v. Merino, 190 F.3d 956 (9th Cir. 1999), this Court relied on Sutherland on Statutes and Statutory Construction, § 47.16, for the proposition that "[i]f the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases." Id. at 958 (emphasis added) (citations omitted).[2]

Rather than looking to *noscitur a sociis*, a cannon of construction that, as applied by EFF, contradicts the plain language of § 605(e)(4), this Court should instead follow the lead of the Fifth Circuit's unanimous decision in DIRECTV v. Robson. In Robson, the Fifth Circuit specifically refused to limit "assemble" and "modify" to commercial applications based on the commercial nature of the

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[2] This Court has issued rulings that suggest that *noscitur a sociis* should not be applied to items listed disjunctively in a statute, such as the prohibited activities listed in the disjunctive in § 605(e)(4). As this Court held in In re Pac.-Atl. Trading Co., "[i]n construing a statute, a court should interpret subsections written in the disjunctive as setting out separate and distinct alternatives." 64 F.3d 1292, 1302 (9th Cir. 1979); see also Tillema v. Long, 253 F.3d 494, 500 (9th Cir. 2001) (holding that "controlling rules of statutory construction" "'require that terms connected by a disjunctive be given separate meanings'"), quoting Reiter v. Sonotone Corp., 442 U.S. 330, 338-39 (1979).

surrounding terms "manufacture" and "sell," holding that "[w]hile such activities are, no doubt, commonly within the purview of a 'manufacturer' or 'seller,' there is no indication that the statute is intended to condone it when the actor is instead an 'individual user.'" 420 F.3d at 544. In short, EFF's reading of § 605(e)(4) cannot be reconciled with the plain words of the statute.

II. EFF's Reading of § 605(e)(4) Is Not Supported by Legislative History.

EFF's interpretation of § 605(e)(4) should also be rejected because it renders Congress's 1988 Satellite Act amendments to the Communications Act meaningless. "It is a fundamental rule of statutory construction that '[w]e should avoid an interpretation of a statute that renders any part of it superfluous and does not give effect to all of the words used by Congress.'" Nevada v. Watkins, 939 F.2d 710, 715 (9th Cir. 1991), quoting Beisler v. Comm'r, 814 F.2d 1304, 1307 (9th Cir. 1987). The Supreme Court has recognized that this "fundamental rule" has particular importance when a court is analyzing the effect of Congress's amendment of a statute, holding that "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." Stone v. I.N.S., 514 U.S. 386, 397 (1995).

As DIRECTV noted in its opening brief, prior to the Satellite Act, the Communications Act only prohibited the manufacture, sale or distribution of pirate access devices. (DIRECTV Br. at 24-25.) Congress amended the

Communications Act in 1988 by enacting the Satellite Act to impose civil and criminal liability upon "[a]ny person who * * * assembles, modifies, * * * [or] exports" pirate access devices. (DTV Br. at 25, citing Pub. L. No. 100-667, 102 Stat. 3935, 3960 (1988).) The legislative history demonstrates that Congress specifically enacted the Satellite Act amendments to "expand [] standing to sue" because the then current level of enforcement was inadequate. (Id., quoting H.R. Rep. No. 100-887 (II), at 28 (1988), reprinted in 1988 U.S.C.C.A.N. 5577, 5657.) EFF's interpretation of § 605(e)(4) essentially renders this amendment meaningless by failing to give real effect to the terms "assembles" and "modifies" and limiting § 605(e)(4), in effect, to the same categories of commercial actors who could have been held liable prior to the 1988 Satellite Act amendments — commercial actors — who were already captured by § 605(e)(4)'s pre-existing prohibitions against "sell[ing], manufacturing and distribut[ing]" pirate access devices. As DIRECTV noted in its opening brief, the Fifth Circuit specifically rejected the interpretation of § 605(e)(4) advocated by EFF, ruling in Robson, that "'the district court's reading effectively nullifies these [1988] additions, and, indeed, all of the terms listed in § 605(e)(4) other than "manufactures" and "sells."'" (DTV Br. at 22, quoting 420 F.3d at 544.)

The conflict between EFF's interpretation of § 605(e)(4) and the 1988 Satellite Act amendments is most apparent with regard to Congress's amendment

of § 605(e)(4) to prohibit "assembly." The primary difference between "assembly" and "manufacture," (which was already prohibited by the Communications Act before amendment) is that manufacture connotes commercial production. Webster's Dictionary defines manufacture as "the making of goods and articles by hand or, esp., by machinery, often on a large scale and with a division of labor." Webster's New World Dictionary 824 (3d ed. 1988). In contrast, Webster's defines "assemble" as having a simpler and broader meaning — "to fit or put together the parts of." Webster's at 82. The importance of the distinction between assemble and manufacture is further highlighted in the legislative history for the Satellite Act amendments to the Communications Act, in which Congress explicitly stated its intent to "expand standing to sue." H.R. Rep. No. 100-887 (II), at 28 (1988), reprinted in 1988 U.S.C.C.A.N. 5577, 5657. By limiting § 605(e)(4)'s prohibition of "assembl[y]" to upstream commercial production, EFF's and the district court's interpretation impermissibly renders the term "assemble" indistinguishable from manufacture and therefore surplusage. The Supreme Court and this Court have repeatedly rejected similar constructions that render terms or provisions of a statute meaningless. See Babbitt, 515 U.S. at 701-02; United States v. Reina-Rodriguez, 468 F.3d 1147, 1156-57 (9th Cir. 2006); Nevada v. Watkins, 939 F.2d 710, 715 (9th Cir. 1991). EFF's interpretation likewise runs afoul of the Supreme Court's decision in Stone v. I.N.S., in which the

Court rejected an interpretation of an amendment to a statute that would have limited the amendment's application to extraordinary or unlikely circumstances. See Stone, 514 U.S. at 397.

Despite this history of § 605(e)(4), EFF alleges that legislative history supports its interpretation of 47 U.S.C. § 605(e)(4) as applying only to commercial actors who assist others in piracy. EFF concedes that Congress enacted the 1988 Satellite Act Amendments and added the terms "modify" and "assemble" to § 605(e)(4) to "expand standing to sue." (See EFF Br. at 19.) Nevertheless, EFF claims support from legislative history based on one statement made by Senator Robert W. Packwood, Chairman of the Committee on Commerce, Science and Transportation:

> "[E]xisting section 605 is not limited to holding liable only those who, without authorization, actually receive a particular communication. Those who 'assist' (including sellers and manufacturers) in receiving such communications are similarly liable under section 605, and it is intended that this liability remain undisturbed by this amendment." (EFF Br. at 19, quoting 1984 U.S.C.C.A.N. 4742, 4746.)

Senator Packwood's statement is irrelevant to the particular dispute in this case — whether individual users who "modify" or "assemble" pirate access devices can be held liable for violating § 605(e)(4). Senator Packwood made his statement in 1984, four years before Congress enacted the 1988 Satellite Act amendments, which expanded standing to sue under § 605(e)(4) by adding the terms "modify" and "assemble" to the statute. Additionally, Senator Packwood's

statement says nothing about whether an individual user who modifies or assembles a pirate access device can be held liable for violating § 605(e)(4). Rather, Senator Packwood's statement was about the scope of § 605 as a whole and did not address, in any way, the scope of liability under § 605(e)(4).

Nevertheless, EFF attempts to stretch Senator Packwood's statement to constitute evidence of an "interceptor-manufacturer dichotomy" between §§ 605(a) and 605(e)(4). According to EFF, § 605(a) is limited to individual users and § 605(e)(4) is limited to commercial actors that assist others' piracy. (See EFF Br. at 19-20.) EFF invented this so-called "dichotomy." There is no basis in Senator Packwood's statement or in the legislative history of the Communications Act as a whole to support inferring such a dichotomy. More importantly, the plain text of §§ 605(a) and 605(e)(4) belies the existence of EFF's proffered distinction. Section 605(a) applies on its face to "any person receiving <u>or assisting in receiving</u>" transmissions, and therefore is not limited to "interceptors" as EFF wrongly suggests. See 47 U.S.C. § 605(a) (emphasis added). Section 605(e)(4) is equally clear, applying to "any person," not just those who assist others. Aside from inventing this "dichotomy," EFF has presented this Court with nothing in the legislative history of the Communications Act that suggests that the plain text of § 605(e)(4) should not be applied exactly as it is written to punish any person, including an individual user, who modifies or assembles a pirate access device.

III. EFF's Policy Arguments Do Not Justify Ignoring the Plain Text of § 605(e)(4).

EFF tries to bolster its interpretation of § 605(e)(4) by presenting policy arguments that run counter to the plain words and legislative history of the statute. First, EFF argues that applying § 605(e)(4) as written chills innovation and experimentation with legal smart card technology. (EFF Br. at 1-2.) Second, EFF argues that applying § 605(e)(4) as written enables DIRECTV to recover greater damages from individual users than commercial manufacturers. (EFF Br. at 2, 10, 16-18.) Neither of EFF's policy arguments has merit.

Applying 47 U.S.C. § 605(e)(4) exactly as it is written to punish any person, including an individual user who assembles or modifies pirate access devices, will not chill innovation or experimentation with legal smart card technology. Section 605(e)(4), by its express terms, only applies to persons "knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming." 47 U.S.C. § 605(e)(4). This requirement prevents § 605(e)(4) from being applied to punish activities regarding legal devices. See Allarcom Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385-386 (9th Cir. 1995) (holding that a manufacturer of legal satellite decoder boxes could not be held liable for the modification of its boxes by others to steal satellite programming).

Additionally, EFF's suggestion that the pirate access devices at issue in this case had legitimate uses other than stealing DIRECTV's programming is not supported by the record. The district court in Huynh included a detailed explanation regarding the attributes that distinguish pirate access devices (such as those purchased by Huynh and Oliver here) from legal devices employing ordinary smart card technology. (See ER 98-101.) Specifically, the Huynh court found that "[u]nloopers are constructed in a manner so specific to DIRECTV piracy as to create a strong presumption that an individual who buys the device is using it for that purpose." (ER 98-99.) The Huynh court also found that because "[e]mulators are designed to be compatible with DIRECTV's atypical insertion design * * * possession of an emulator suggests use for piracy." (ER 100.) These factual findings are not challenged on appeal.

EFF wrongly asserts that applying § 605(e)(4) to individual users would "impose a heavier penalty on individual users than it would on those who do much more to further piracy by assisting others in interception." (EFF Br. at 18.) EFF comes to this conclusion by reasoning that individual users can be held liable under § 605(a) and § 605(e)(4) — thereby enabling DIRECTV to "double dip" — while manufactures can be held liable only under § 605(e)(4). (EFF Br. at 18.) EFF asserts that "[u]nder this regime, an individual who uses an unlooper solely within the confines of his home would be subject to statutory damages of up to $110,000

for violating both sections * * * whereas the piracy website, Kick Ass Clones, which actually manufactured, sold, distributed and financially profited from thousands of unlooper devices would only be subject to the § 605(e)(4) damage cap of $100,000 per violation." (Id. at 18 (emphasis added).)

In making this argument, EFF once again ignores the plain language of the statute. Section 605(e)(4) states that "[f]or purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each such device shall be deemed a separate violation." 47 U.S.C. § 605(e)(4) (emphasis added). Because each device provides the basis for a separate violation, a commercial manufacturer or distributor that sold or distributed hundreds or thousands of pirate access devices would have a damage cap dramatically higher than an individual user such as Huynh or Oliver, each of whom purchased two devices. Moreover, the statute makes clear that awards of damages are discretionary, thereby enabling a court to find a defendant liable for violations of § 605(a) and § 605(e)(4) while limiting a damages award, if appropriate, to cover only one of the two violations. 47 U.S.C. § 605(e)(3)(B)(ii).

IV. EFF Has Not Provided this Court with a Legitimate Basis for Creating a Circuit Split with the Fourth and Fifth Circuits on the Meaning of § 605(e)(4).

Two federal appellate courts have considered the precise issue before this Court — whether 47 U.S.C. § 605(e)(4) applies to individual users who modify or

assemble pirate access devices. See Robson, 420 F.3d at 543-544; DIRECTV v. Pernites, No. 04-2483, 2006 WL 2711978, *1 (4th Cir. Sept. 21, 2006). Both courts held that § 605(e)(4) applies to such individual users. This Court should join the analysis articulated in those cases.

EFF wrongly suggests that Robson is not on-point, alleging that "Robson is consistent with the District Courts' rulings below" (EFF Br. ay 24) and that "Robson specifically did not address the question before this court" (id. at 26). EFF's suggestion that Robson is not directly on-point is indefensible. This Court cannot affirm the district court's flawed interpretation of 47 U.S.C. § 605(e)(4) without creating a circuit split with the Fifth Circuit's decision in Robson, which the Fourth Circuit followed in its unpublished decision in Pernites.

The Oliver district court based its decision on the false premise that "47 U.S.C. § 605(e)(4) is meant to target upstream manufacturers and/or distributors of illegal pirating devices." (ER 88.) The Huynh district court similarly relied upon decisions from other district courts erroneously holding that § 605(e)(4) "only targets commercial activities such as manufacturing and distribution." (ER 111.)

The Fifth Circuit in Robson rejected such an interpretation of 47 U.S.C. § 605(e)(4) and held that § 605(e)(4) must instead be applied as it is written to "any person," including individual users, who engages in the prohibited activities listed therein. As the Robson court explained:

> "We are persuaded that the district court erred by categorically removing all 'individual users' from the reach of § 605(e)(4). A number of courts have adopted a similar construction, holding that § 605(e)(4) exempts individual users — that is, the provision 'targets upstream manufacturers and distributors, not the ultimate consumer of pirating devices.' We reject this view. Nothing on the face of § 605(e)(4) suggests such a limitation. Indeed, it provides that '[a]ny person' who engages in the prohibited activities is liable. Section 605(e)(4), in its disjunctive list of prohibited activities, clearly covers the modification or assembly of pirate devices as separate and self-contained offenses by whoever commits them. While such activities are, no doubt, commonly within the purview of a 'manufacturer' or 'seller,' there is no indication that the statute is intended to condone it when the actor is instead an 'individual user.' Lending weight to our interpretation, we have previously noted in a different context that 'it is clear that [§ 605(e)(4)] pertains to commercial as well as individual users.'" Robson, 420 F.3d at 543-544 (emphasis added).

Given the persuasiveness of the analysis in Robson, this Court should join the Fifth Circuit, as a panel of the Fourth Circuit did in Pernites, and reverse the decisions of the district courts below.[3]

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[3] In an apparent effort to find circuit-level authority to offset Robson, EFF miscites Int'l Cablevision v. Sykes, 75 F.3d 123 (2d Cir. 1996), as supporting its argument that § 605(e)(4) does not apply to individual users. EFF wrongly suggests that in Sykes the Second Circuit held that § 605(e)(4) is limited to violations involving distribution of pirate access devices, quoting Sykes for the proposition that "[a] violation of § 605(e)(4) occurs upon the distribution of a descrambler with knowledge (or reason to know) 'that the [descrambler] is primarily of assistance in the unauthorized decryption of satellite cable programming, or is intended to for any other activity prohibited by § 605(a).'" (See EFF Br. at 21, quoting Sykes, 75 F.3d at 133.) EFF fails to note that it, rather than the Second Circuit, added the emphasis to the word "distribution" in the above-quoted text. Compare id. with 75 F.3d at 133. More importantly, EFF also fails to disclose that there is nothing in the Sykes decision suggesting that the Second Circuit intended to limit § 605(e)(4) to violations involving distribution. Rather, the Second Circuit referred to distribution in the language quoted by EFF

CONCLUSION

For the reasons stated herein and in DIRECTV's opening brief, DIRECTV requests that this Court: (1) hold that DIRECTV can bring claims for violations of 47 U.S.C. § 605(e)(4) against individuals who modify or assemble pirate access devices; (2) reverse the district court's denial of DIRECTV's motions for default judgment with respect to DIRECTV's claims in Count III of the complaints filed against Huynh and Oliver based on violations of § 605(e)(4); and (3) remand the cases for entry of awards of statutory damages against Huynh and Oliver based on their violations of § 605(e)(4).

Respectfully submitted,

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Howard R. Rubin
Sonnenschein Nath & Rosenthal LLP
1301 K Street, N.W.
Suite 600, East Tower
Washington, D.C. 20005
(202) 408-6400
Counsel for Appellant DIRECTV, Inc.

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because in that case the defendant did not contest that he had distributed a pirate access device to an undercover investigator. Sykes, 75 F.3d at 126. Thus, the Second Circuit spoke of distribution not because it construed § 605(e)(4) as limited to cases of distribution, as EFF wrongly suggests, but rather because distribution was the specific form of prohibited conduct at issue in that case.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This reply brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 4,838 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 Times New Roman font.

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Howard R. Rubin
Counsel for Appellant DIRECTV, Inc.

December 19, 2006

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on December 19, 2006, I caused the original and fifteen copies of the foregoing Reply Brief of Appellant DIRECTV, Inc. to Brief of Amicus Curiae Electronic Frontier Foundation to be filed with the U.S. Court of Appeals for the Ninth Circuit by Federal Express, overnight, addressed to:

Clerk, United States Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

On this date, I also caused two copies of the foregoing Reply Brief of Appellant DIRECTV, Inc. to Brief of Amicus Curiae Electronic Frontier Foundation to be served, via Federal Express, upon each of the following:

Hoa Huynh
2514 E. 22nd Street
Oakland, CA 94601
Pro se Appellee

Cody Oliver
1065 Yerba Buena Avenue
Emeryville, CA 94608
Pro se Appellee

Jennifer Stisa Granick, Esq.
Stanford Law School Cyberlaw Clinic
559 Nathan Abbott Way
Stanford, California 94305-8610
Counsel for Movant-Amicus Curiae EFF

____
Howard R. Rubin