

Consolidated Case Nos. 05-16361 and 05-16362
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

**BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION
FAVORING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* Electronic Frontier Foundation states that it is a nonprofit corporation that has no parent companies, subsidiaries, or affiliates that have issued stock to the public in the United States or abroad.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Electronic Frontier Foundation (“EFF”) is a nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990, EFF has over 8,000 paying members and represents the interests of technology users in court cases and in the broader policy debates surrounding the application of law in the digital age. EFF publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world, <<http://www.eff.org>>. EFF, together with the Stanford Law School Center for Internet and Society Cyberlaw Clinic, runs the DirecTV Defense website, <<http://www.directvdefense.org>>, a resource for individuals who DirecTV has threatened with legal action for purchasing smart card devices. Nonetheless, the EFF has filed amicus in support of DirecTV in another action. *See* Brief of Amicus Curie in Support of Appellants, *Snow v. DirecTV, Inc.*, No. 05-13687 (11th Cir. Sept. 30, 2005). EFF has a particular interest in the cases at bar because of the weighty public policy implications this case has for scientists, researchers, ordinary computer users, and consumers of digital technology everywhere. Specifically, EFF is concerned with two primary areas:

First, adopting Appellant’s interpretation of 47 U.S.C. § 605(e)(4) would seriously hamper legitimate smart card and encryption research. In order to

understand how new technologies work, researchers and scientists need to install software on smart cards and explore their functionality. Under DirecTV's reading of § 605(e)(4), this normal research activity could be punished as "assembling" or "modifying" a technology capable of signal interception. This interpretation would chill research, inhibit innovation, degrade security, and retard scientific knowledge, even if the device was never used for more than research purposes. Congress did not intend to prohibit such activities via § 605(e)(4); rather Congress only meant to stop commercial production and distribution of signal pirating technologies – the real threat to DirecTV's business.

Moreover, holding individual users of smart card technology liable under both § 605(a) and § 605(e)(4) gives DirecTV an unintended and disproportionate remedy. Section 605(a), which prohibits the unauthorized interception of an encrypted satellite signal, carries with it statutory damages of up to \$10,000 for non-willful violations, whereas § 605(e)(4) carries substantially larger penalties up to \$100,000. Applying both provisions to a single act of interception would allow DirecTV to "double dip" and over-penalize individuals to a far greater extent than Congress intended, creating not only a disproportionate penalty for interceptors, but also a significant chilling effect on legitimate research and innovation in the field.

Second, affirming the decision below preserves a technologically-neutral reading of the statute. An individual who intercepts DirecTV’s signal without authorization is clearly liable under § 605(a). What DirecTV contends, however, is that this individual would *also* be liable under § 605(e)(4) for taking the *minimum steps necessary* for interception, simply because the technology required additional steps to intercept the signal. DirecTV asserts that the difference between § 605(a) and § 605(e)(4) depends on the nature of the technology (i.e. whether several steps are required for interception) instead of the actions of the defendant (i.e. whether he was intercepting the signal for himself or enabling others’ interception). This interpretation is wrong. Both statutory language and common sense dictate that whether the defendant is intercepting or is creating tools for others determines whether he is liable under § 605(a) or § 605(e)(4), not the type of technology he is using. To hold otherwise would destroy the technologically-neutral reading of the statute. The above two reasons are why EFF takes great interest in this case and has submitted this brief.

INTRODUCTION AND BACKGROUND

Several years ago DirecTV launched a litigation campaign to crack down on piracy. The company executed Writs of Seizure against a group of companies—many of which had names suggestive of piracy such as “Kick Ass Clones” and “White Viper”—that sold or distributed piracy devices that could be used in the

interception of DirecTV's signal. *See, e.g.*, Complaint at 3, *DirecTV, Inc. v. Huynh*, No. 04-CV-03496 (N.D. Cal. Sept. 1, 2004); Complaint at 3-4, *DirecTV, Inc. v. Oliver*, No. 04-CV-03454 (N.D. Cal. Sept. 1 2004). As part of these lawsuits, DirecTV obtained the vendors' customer lists. *Id.* Armed with new lists of potential defendants, DirecTV sent out over 170,000 demand letters and brought suit against over 25,000 individuals nationwide who they claimed were using the devices they purchased to intercept DirecTV's signal. *See Anti-Fraud and Anti-Piracy Enforcement Actions*, <http://www.hackhu.com> (last visited Nov. 21, 2005) (a website run by DirecTV chronicling the breadth of their litigation enforcement actions).

DirecTV's approach was generally to tell individuals they could settle for \$3,500 or face claims of \$10,000 in a lawsuit which was provided under the statutory damage provision of 47 U.S.C. § 605(a). A substantial number of individuals chose to settle rather than hire an attorney to defend themselves or face a more severe penalty. Several people have criticized the aggressive campaign; one judge in particular found DirecTV to be using "litigation tactics aimed at hindering discovery and forcing monetary settlements from those unable to fight a

drawn-out legal battle.” *DirecTV, Inc. v. Bonilla*, 2005 WL 851273 at *2 (C.D. Cal. 2005).¹

In this appeal DirecTV’s attempts to expand its litigation arsenal and increase its leverage to force pre-litigation settlements on individuals. DirecTV seeks to “double dip” and recover damages under two provisions of § 605 – one for illegally intercepting DirecTV’s signal (47 U.S.C. § 605(a)) and another for “modifying” or “assembling” a device that enables interception (47 U.S.C. § 605(e)(4)). Because interception requires activating the smart card technology inside DirecTV’s satellite equipment, DirecTV claims that the steps necessary for interception are also assembling and manufacturing of a device. If adopted, this view allows DirecTV to recover an additional \$10,000 to \$100,000 in statutory damages for the § 605(e)(4) violation on top of the \$10,000 they were already entitled to claim under § 605(a).

The cases at bar are instances where DirecTV sought to apply this new litigation tactic against unsophisticated individuals who failed to hire counsel or even appear in court. The District Courts denied DirecTV’s request for recovery under § 605(e)(4) and only awarded damages under § 605(a). This denial was

¹ In *DirecTV, Inc. v. Blanchard*, 123 Cal.App.4th 903 (2004), the company was successful in getting a class-action suit over their litigation tactics dismissed under California’s anti-SLAPP provisions. However, the dismissal turned on the fact that the demand letters DirecTV sent were protected under the litigation privilege, rather than a finding that DirecTV’s tactics were not coercive, especially to an innocent smart card user.

appropriate. DirecTV's arguments for reversal misinterpret the statute and its legislative history and mischaracterize the holdings of several courts which have addressed this issue, especially the Fifth Circuit in *DirecTV, Inc. v. Robson*, 420 F.3d 532 (5th Cir. 2005). For the above reasons, amicus respectfully asks the Court to affirm the District Courts' holdings.

STATEMENT OF FACTS

Mr. Oliver and Mr. Huynh are two defaulting defendants who violated the Communications Act by using devices they purchased to aid them in the unauthorized interception of DirecTV's signal.² DirecTV alleges Mr. Huynh purchased a "Viper Super Unlooper" and a "Viper Reader/Writer" from the now defunct website "White Viper." Transcript of Proceedings at 55, *DirecTV, Inc. v. Huynh*, No. 04-CV-03496 (N.D. Cal. Mar. 17, 2005); Plaintiff's Exhibit 6(A)(1), *DirecTV, Inc. v. Huynh*, No. 04-CV-03496 (N.D. Cal. Mar. 17, 2005). It alleges that Mr. Oliver purchased a "Cube," which is a type of an unlooper and a "loader" from DSS Pro and Easybuy. Complaint at 15(a)-(b), *Oliver*, No. 04-03454. Both complaints simply allege that Appellees purchased one or more devices which he personally used to intercept DirecTV's signal. Complaint at 13(a), *Huynh*, No. 04-

² The District Court entered default judgment against both defendants; consequently the facts alleged by DirecTV are assumed to be true. Memorandum and Order, *DirecTV, Inc. v. Oliver*, No. 04-03454 (N.D. Cal. May 12, 2005); Memorandum and Order, *DirecTV, Inc. v. Huynh*, No. 04-CV-03496 (N.D. Cal. May 31, 2005).

03496; Complaint at 7, *Oliver*, No. 04-03454. DirecTV further alleges that by “removing and inserting Pirate Access Devices and/or inserting illegally programmed Access Cards” into a valid receiver, Appellees engaged in the “modification” or “assembly” of devices used in the unauthorized decryption of satellite programming. Complaint at 23, *Huynh*, No. 04-03496; Complaint at 25, *Oliver*, No. 04-3454. It is important to note that DirecTV only alleged that Defendants engaged in interception themselves; the complaints contained no allegation that Defendants provided or created tools for others. *Id.*

Upon default, the facts of the complaint that establish the defendant’s liability are accepted as true. However, the court has significant discretion not to just accept the complaint on its face but to consider other factors such as the merits of the plaintiff’s substantive claim or the possibility of a dispute concerning material facts when entering a default judgment. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). For this reason, the District Court appropriately held an evidentiary hearing to assess the validity of DirecTV’s claims.

At the hearing, Appellant’s expert witness explained the minimum steps necessary to use the unlooper devices purchased by defendants. A person would first purchase the hardware off the Internet, and plug it into his computer using a plug-and-play USB port. He would then download the necessary software from

one of several websites and install it on his computer. The next step is to remove the access card from the DirecTV receiver, inserted into the unlooper and reprogram it by following the software program prompts. Finally, the user would re-insert the card into the DirecTV receiver. Transcript of Proceedings at 76, *Huynh*, No. 04-03496 (Mar. 17, 2005). DirecTV alleged that Appellees took these minimum steps for the purpose of illegally intercepting DirecTV's signal. Complaint at 23, *Huynh*, No. 04-03496; Complaint at 25, *Oliver*, No. 04-03454.

Periodically, the user must take additional steps to continue to operate the piracy device. From time to time, DirecTV launches a series of electronic countermeasures ("ECMs") through its satellite system to prevent the sort of reprogramming described above. These ECMs are designed to render inoperable pirated Access Cards by corrupting their software. Transcript of Proceedings at 34-36, *Huynh*, No. 04-03496 (Mar. 17, 2005). If a user's card is disabled by a newly launched ECM, the device will be inoperable until the user takes additional minimum steps to restore its functionality. Appellant's expert witness testified that in such a situation, a user could simply buy a new computer chip for the unlooper to begin intercepting again. Most chips come ready to use with their software pre-loaded, yet as DirecTV's expert explained, even if the person buys a blank chip and loads the software himself, this can be done by "an individual with little technical knowledge." Expert Report and Disclosures of David Simon of Netrino

at 10, Plaintiff's Exhibit 9, *Huynh*, No. 04-3496. Instructions on the Internet and freely available piracy software "reduce[] almost to zero the work and technical knowledge required to load and use [such devices]." *Id.* Although there are some differences, a "loader" functions much in the same way as an "unlooper." *See* Which Devices Are Threatened?, <http://www.directvdefense.org/threat> (last visited Nov. 21, 2005).

The White Viper Reader/Writer device at issue requires the user to take similar minimum steps to operate the device and intercept DirecTV's signal. A person would first have to attach the device to his personal computer and then download free software. The software has an interface that allows the user to easily modify the DirecTV access card inserted into the device. Expert Report: White Viper Reader/Writer at 8, Plaintiff's Exhibit 9B, *Huynh*, No. 04-03496. The user would then re-insert the card into the DirecTV receiver. *Id.* Many of the same steps apply to the Reader/Writer as they do to the unlooper, however, Reader/Writer technology is "a fairly generic device that can be used for other things [than piracy]" Transcript of Proceedings at 89, *Huynh*, No. 04-03496.

DirecTV did not put on *any* evidence that the defendants used these devices to aid others in interception.

ARGUMENT

I. Section 605(e)(4) Does Not Apply to Individuals Who Used Interception Devices Solely for Personal Use

The plain language of the statute, the statutory structure and the legislative history demonstrate that the modification and assembly prohibitions in 47 U.S.C. § 605(e)(4) simply do not apply to personal use of a device. Section 605(e)(4) targets commercial actors who manufacture, assemble, or modify interception devices intended to assist others in intercepting satellite signals, not those who modify or assemble devices incident to innocent research activities or even to their own interception activities. To hold otherwise would vitiate Congress' clear intent to impose different penalties on the personal non-commercial acts of § 605(a) and the more public harms caused by those who supply tools to others in violation of §605(e)(4).

Statutory interpretation should vindicate Congressional intent. *See* Norman J. Singer, *Sutherland Statutory Construction* § 45.05 (6th ed. 2000). In attempting to divine Congressional intent, courts first look at the plain meaning and of the statute, then apply various intrinsic aids such as *noscitur a sociis*, and finally, if need be, turn to extrinsic aids such as the legislative history. Every one of these factors indicate that Congress did not intend to permit plaintiffs to “double dip” and apply § 605(e)(4) to the personal use of pirate access devices.

A. The Plain Meaning of the Statute Indicates that § 605(e)(4) Applies Only to Those Who Create Piracy Tools for Others and not to the Personal Use of Pirate Access Devices for Interception

The plain text of the statute supports the District Court’s conclusion that “Congress sought to treat differently different participants in the market for piracy products” and, therefore, holding § 605(e)(4) applicable to personal use of a device “would nullify the distinction [between personal use and creating tools for others] built into the statute.” Memorandum and Order at 16, *Huynh*, No. 04-03496. The first principle of statutory interpretation is to look at the plain meaning of the statute. *See Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). Although every word of a statute should be given effect, *see Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), doing so should not render any part of the statute inoperative or superfluous, void or insignificant or such that one section destroys another. *See TRW v. Andrews*, 534 U.S. 19 (2001); *American National Red Cross v. S.G.*, 505 U.S. 247 (1992); *Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427 (9th Cir. 1991). Here, it is necessary to look at two aspects of the plain text of the statute: the meaning of the words “modify” and “assemble,” which are ambiguous, and the structure of § 605, which clearly indicates Congress’ intent to create two distinct categories of offense.

1. *The Context of the Words “Modify” and “Assemble” Shows the Words Apply to the Commercial Conduct of Creating Interception Devices for Others*

The ordinary meaning of the words “modify” and “assemble indicate that Congress did not intend them to apply to the personal act of interception. Congress did not explicitly define these words in the Communications Act; therefore, the Court should give these words their ordinary usage. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994). In this case, the ordinary usage of these words varies. Assemble is defined as: (1) the process of bringing together to a particular place for a particular purpose, and (2) to fit together the parts of a device, tool, data set etc. *Miriam-Webster Online Dictionary*, <http://www.miriamwebster.com>. The second definition’s common usage can also have two connotations: (1) a commercial or manufacturing activity (such as assembly plant for a car), (2) an individual, non-commercial activity (such as assembling a toy for one’s child). Adopting the first meaning would imply that the statute was written to cover only “upstream” manufactures, whereas the second meaning would cover individuals as well. Similarly, the word “modify” can have several different meanings: (1) to make less extreme (to modify a stance on an issue), (2) to limit or restrict the meaning, (3) to make changes in a product (modify a car engine). *Miriam-Webster Online Dictionary*, <http://www.miriamwebster.com>. Each of these different definitions is an “ordinary meaning” of the word, which would give the statute a

very different meaning. We must, therefore, look further to determine Congressional intent.

The context of the word is extremely important in determining statutory meaning. This Court has traditionally held to the maxim articulated by Lord Blackburn in 1877 that, “In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further... for the meaning of the word varies according to the circumstances with respect to which they were used.” *River Wear Com'rs v. Adamson*, LR 2 AC 743 (1877); *see also, e.g., Lavin v. Marsh*, 644 F.2d 1378 (9th Cir. 1981). In examining the context, courts should apply intrinsic tools—such as the principle *noscitur a sociis*, that “it is known by its associates,”—to aid in divining Congressional intent.

The context of the words “modify” and “assemble” indicate that they apply only to conduct in which individuals create piracy tools for others. The principle of *noscitur a sociis* is a widely accepted intrinsic tool of statutory construction to help the adjudicator discern Congressional intent. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Neal v. Clark*, 95 U.S. 704 (1877); *Tasini v. NY Times Co.*, 206 F.3d 161 (2nd Cir. 2000), *aff'd* 533 U.S. 483 (2001); *U.S. v. Merino*, 190 F.3d 956 (9th Cir. 1999). Sister circuits have held similarly determining that “even apparently plain words, divorced from

the context in which they arise and which their creators intended them to function, may not accurately convey the meaning the creators intended to impart. It is only within context that a word, any word, can communicate an idea.” *Leach v. F.D.I.C.*, 860 F.2d 1266, 1270 (5th Cir. 1988); *see also O’Connell v. Shalala*, 79 F.3d 170 (1st Cir. 1996); *Greenpeace, Inc. v. Waste Technologies Industries*, 9 F.3d 1174 (6th Cir. 1993).

Thus, in order to understand the meaning of “modify” and “assemble,” courts must look at the words which surround them. *Utility Elec. Supply, Inc. v. ABB Power T & D Co, Inc.*, 36 F.3d 737 (8th Cir. 1994) (holding that a word may be defined by an accompanying word and the coupling of words denotes and intention that they should be understood in the same general sense). Section 605(e)(4) reads, in part:

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... shall be fined... or imprisoned... or both. 47 U.S.C. § 605(e)(4).

The words “manufacture,” “import,” “export,” “sell,” and “distribute” give the appropriate meaning to “assemble” and “modify”. Each of these words describes some part in the chain of commerce from the creation of a product to its sale to customers in return for some sort of remuneration. “Sale” denotes one party receiving remuneration for a product or service which they have transferred to

another person. “Export,” “import,” and “distribute” describe the movement of goods across geographical space and borders from one individual to another through some sort of transportation network. Finally “manufacture” connotes creating a new product for commercial sale. It is difficult to think of an ordinary meaning or usage for “sale,” “export,” “import,” “distribute,” or “manufacture” that would only involve a personal use of a product, whereas their normal meanings clearly indicate a transaction between more than one individual.

The words “assemble” and “modify,” when read in context, connote a transaction between more than one individual. Congress intended to punish personal use of a product (mere interception) differently from the creation piracy tools for others. Modifying a smart card for one’s own personal use bears no relation to “sell,” “import,” “export,” “distribute,” or “manufacture.”

Consequently, the assembly of the requisite components of an unlooper to get the device to work solely for personal use does not have the requisite commercial link to be punished under §605(e)(4), where providing others with piracy devices would. See *DirecTV, Inc. v. McDougall*, 2004 U.S. Dist. LEXIS 23013 (W.D. Tex. 2004); *DirecTV, Inc. v. Adkins*, 311 F.Supp.2d 544 (W.D. Va. 2004).

In the cases before this court, Appellees only purchased one of each type of device and used it in the confines of their own homes for personal interception. Neither bought or created large numbers of the devices, which would suggest a

plan for a larger distribution. Furthermore, Appellants did not allege any action beyond the personal use of the devices which would indicate that Defendants created piracy tools for others. As such, the District Courts were correct in holding that § 605(e)(4) is inapplicable.

2. *DirecTV's Interpretation is Contrary to the Structure and Meaning of § 605.*

Using smart card technology to modify access cards for personal interception cannot be a violation of § 605(e)(4) for three reasons. Congress distinguished between interception and creating tools for others. Congress did not provide a cause of action for mere possession of tools, regardless of how many steps it takes to use them. And Congress could not have intended the absurd result of punishing people like the defendants herein more harshly than commercial pirate device distributors like Kick Ass Clones or White Viper.

First, the structure of the statute and legislative history clearly indicates Congress' intent to create two separate categories—one for interception and the other for those who create piracy tools for others. Congress created separate provisions with separate causes of action and different statutory damages for each act. Appellant's argument that Mr. Oliver and Mr. Huynh are liable under both provisions when there is no evidence that they created tools for others, would collapse these two categories. Appellant's interpretation renders § 605(a) meaningless. As the District Court below correctly observed, “[b]ecause all

DirecTV pirates must reprogram a smart card or emulator in order to illegally receive DirecTV's signal, classifying such conduct under § 605(e)(4) would nullify the distinction built into the statute." Memorandum and Order at 16, *Huynh*, No. 04-03496. Adopting Appellant's argument would make every smart card user *de facto* liable under both provisions regardless of whether their interception was personal, or whether they created devices for others.

Second, Congress constructed § 605(e)(4) to prohibit *actions* not tools. Appellees simply took the *minimum steps necessary* to intercept DirecTV's signal. Though individuals "who use unloopers have the capacity to engage in more widespread piracy by modifying other individuals' DirecTV access cards," Brief of Appellant at 18, there's no evidence they did so. To hold defendants liable under §605(e)(4) merely for utilizing unloopers creates liability for possession of that particular device, rather than for a prohibited act. Congress explicitly did not provide a private cause of action for mere possession of devices capable of interception. Mere possession is not illegal under Title 47, nor actionable in a civil suit under 18 U.S.C. § 2520. *DirecTV, Inc. v. Treworgy*, 373 F.3d 1124 (11th Cir. 2004).

Finally, Appellant's interpretation would reach an absurd result. DirecTV would impose a heavier penalty on individual end users than it would on those who do much more to further piracy by assisting others in interception.

Under 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 (and up to \$200,000 if the violation were found to be willful), 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. *See* 47 U.S.C. § 605(e)(3)(C)(ii). Even DirecTV's hypothetical person who bought a pirated access card, would be liable under § 605(e)(4) for merely *inserting the card into the receiver*, even if the individual did not re-program the card himself.

Consequently, *every* individual interceptor liable under § 605(a) would de facto become liable under § 605(e)(4) by simply taking the *minimum steps necessary* to get the device to work (be it reprogramming a card or just inserting the pirate card into the receiver).

The plain meaning and structure of § 605 shows that Congress intended § 605(e)(4) to apply solely to those who create tools for others, not individuals who take the minimum steps necessary for interception.

B. The District Courts' Rulings Are Consistent with Recent Legislative History

The legislative histories of the 1984 and 1988 amendments to the Communications Act indicate that Congress intended to create a distinction between interception and assisting others to intercept under § 605(a) and creating

interception tools under § 605(e)(4). In 1984 when Congress added what is currently § 605(e)(4), the Chairman of the Committee on Commerce, Science and Transportation clearly outlined these two categories, “[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.” *Statement of Senator Robert W. Packwood, Chairman of the Comm. On Commerce, Science and Transp.*, 1984 USCCAN 4247, 4746. Thus, Congress provided a cause of action against third parties who were not involved in interception and, therefore, would not be liable under existing provisions of § 605.

Congress intended to create two distinct groups of individuals—one category of interceptors and their assistants, and one category of manufacturers, importers and sellers of the equipment necessary to conduct unauthorized interceptions. The 1988 Amendments confirm Congress’ intent to create two separate categories of violators with § 605(a) and § 605(e)(4). Appellant correctly notes that the purpose of the 1988 Amendments were to (1) stiffen applicable civil and criminal penalties, (2) expand standing to sue, and (3) create criminal liability for the manufacture, sale, modification, importation, exportation, sale or distribution of equipment whose primary purpose is the unauthorized decryption of

satellite signals. Brief of Appellant at 25, *quoting* H.R. Rep. No. 100-887 (II), at 28 (1988), *reprinted in* 1988 USCCAN 5577, 5657. Congress met its stated goal of increasing penalties for piracy by raising the statutory damages under *both* § 605(a) and § 605(e)(4), not by applying (e)(4) to individual users. In 1988, Congress raised the minimum statutory damages for private right of actions for violations of § 605(a) from \$250 to \$1,000 per violation, and the maximum for willful violations committed for purposes of direct or indirect commercial advantage or private financial gain from \$50,000 to \$100,000. Congress also raised the minimum statutory damages for violations of the distribution tool provision, formerly § 605(d)(4), now (e)(4), from \$250 to \$10,000 per violation and the maximum from \$10,000 to \$100,000. 134 Cong. Rec. H10411-02 (October 19, 1988) (enacted); Pub. L. 98-549 (b)(C)(i)(II). Given that Congress significantly increased damages, it is absurd to imply that they additionally intended to stiffen penalties by making every violator of § 605(a) also subject to § 605(e)(4).

Second, Congress increased standing to sue by adding § 605(e)(4), not by applying it to individual users. The legislative history in the 1988 Amendments does not suggest that Congress intended to erase the interceptor-manufacturer dichotomy it set up in the 1984 Amendments. Congress could, and did, expand standing under § 605(e)(4) simply by adding additional activities which would qualify as creating piracy devices for others. A person who modified or assembled

pirate devices for others became subject to the provision, whereas earlier the activity may not have been prohibited. The legislative history show that the amendments expanded standing to sue for “creating devices for others.”

II. Current Case Law Supports the District Courts’ Rulings.

Nearly every court that has directly addressed this issue has held that § 605(e)(4) may apply to individuals who manufacture, distribute or sell pirate devices, but does not apply to individuals engaged in mere personal interception. The Second Circuit has held that a defendant liable under § 605(e)(4) because he sold a television unscrambler. Although the court was primarily concerned whether § 605 was applicable to a device that intercepted a cable signal, at the end of the opinion, they court stated “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 for any other activity prohibited by § 605(a).’ Thus the act of distribution for either of the above purposes incurs the heavier penalties provided [for a violation of § 605(e)(4) by § 605(e)(3)(C)(i)(II), while the subsequent act of interception (or assistance in the interception) is a violation of the third sentence of § 605(a) and incurs the lesser penalties provided by § 605(e)(3)(C)(i)(II).” *International Cablevision, Inc. v. Sykes*, 75 F.3d 123, 133 (2nd Cir. 1996).

Some courts have distinguished between violators of § 605(a) and § 605(e)(4) based on whether the individual or company was making personal use of the device or creating piracy tools for others. *See DirecTV, Inc. v. Albright*, 2003 U.S. Dist. LEXIS 23811, at *7 (E.D. Pa. 2003) (holding that § 605(e)(4) “targets upstream manufacturers and distributors, not the ultimate consumer of pirating devices”); *see also e.g., DirecTV, Inc. v. Neznak*, 371 F.Supp.2d 130, 133 (D.Conn. 2005) (holding that “Congress intended in [§ 605(e)(4)] to penalize manufacturers and distributors, not mere consumers of pirate access devices.”).

Other courts have found liability because the defendants’ actions have moved beyond personal use. *See, e.g., DirecTV, Inc. v. Carpenter*, 2005 U.S. Dist. LEXIS 5124 (N.D. Cal. 2005) (holding that § 605(e)(4) does not target the ultimate consumers of pirate access devices); *DirecTV, Inc. v. Estrada*, 2005 WL 2372066, *3 (S.D. Tex. 2005) (holding the defendant liable for two violations of the statute because he had purchased with the requisite knowledge *two* “unloopers” and *three* “programmers” from White Viper which suggested defendant’s plans went beyond personal use and included facilitating other’s unauthorized reception of DirecTV’s encrypted satellite signal); *DirecTV, Inc. v. Little*, 2004 U.S. Dist. LEXIS 16350 (N.D. Cal. 2004) (holding that three elements must be shown to establish a violation of § 605(e)(4): (1) that the defendant distributed or sold equipment, (2) the equipment was primarily of assistance in decrypting satellite signals without

permission, and (3) that defendant knew or had reason to know that the equipment was primarily used for that purpose),³ *DirecTV, Inc. v. McDougall*, 2004 U.S. Dist. LEXIS 23013, at *8 (W.D. Tex. 2004) (noting that “courts that have addressed this issue have concluded that mere purchasing and use of pirate access devices does not constitute a violation of section 605(e)(4)” but also determining that the defendant’s purchase of eight devices implies an enterprise to distribute and sell the devices, which is prohibited by the section.); *DirecTV, Inc. v. Borich*, 2004 U.S. Dist. LEXIS 18899 at *8-9 (S.D.Va. 2004) (finding that “the court does not find that the act of ‘removing and inserting Pirate Access Devices and/or inserting illegally programmed Access Cards into valid DirecTV Receivers’ is the type of assembly or modification prohibited by the statute....Borich’s act of installing and activating the pirate access device does not convert him into the type of manufacturer or distributor of these devices contemplated by § 605(e)(4).”); *DirecTV, Inc. v. Adkins*, 311 F.Supp.2d 544, 546 (W.D. Va. 2004) (holding a defendants liable because the fact that they respectively purchased 205, 15, 20 and 82 “bootloaders” indicated an intent to distribute or resell); *DirecTV, Inc. v. Morris* 357 F.Supp.2d 966, 973 (E.D. Tex. 2004) (noting that § 605(e)(4) “deals with

³ The *Little* court based its § 605(e)(4) test on its reading of this Court’s decision in *Allercom Pay Television, Ltd. v. General Instrument Corp.*, 69 F.3d 381, 385-86 (9th Cir. 1995). In *Allercom*, this Court dismissed complaints against the two defendants because the plaintiff had not adequately shown either knowledge or that the defendant manufactured or sold the device. *Little*, 2004 U.S. Dist. LEXIS at *17.

conduct of merchants in the pirate trade, not necessarily the ultimate end users,” but the plaintiff perhaps “could argue that an individual end user could be liable for modification of equipment....Mere possession cannot rise to a finding of modification.”). Affirming the District Court would be consistent with almost every court that has addressed this issue.⁴

The Fifth Circuit ruling in *DirecTV, Inc. v. Robson* is consistent with the District Courts’ rulings below. The District Courts held that § 605(e)(4) applies only to “upstream manufacturers and/or distributors of illegal pirating devices.” Brief of Appellant at 17. Appellant than asserts that this approach is expressly rejected by the Fifth Circuit in *Robson*, when held that the trial court had “erred by categorically removing all ‘individual users’ from the reach of § 605(e)(4).” *Id.* DirecTV’s argument is a straw man because it misreads both the lower courts herein and *Robson*.

⁴ Two District Courts in Texas and one on Pennsylvania have held defaulting defendants liable under § 605(e)(4), but did not explore what elements are required to establish liability. The Western District of Texas held that DirecTV had standing to bring the suits in two instances, but did not reach the merits of the issue. *DirecTV, Inc. v. Spillman*, 2004 WL 1875045 (W.D. Tex. 2004), *DirecTV, Inc. v. Gonzalez*, 2004 WL 1875046 (W.D. Tex. 2004). In *Frick*, the court simply denied defendant’s motion to dismiss because the court felt that DirecTV alleged a violation of § 605(e)(4) by stating that the “defendant actively programmed and reprogrammed DirecTV access cards” and there was liability under the definition of “modify.” *DirecTV, Inc. v. Frick*, 2004 WL 438663, *2 (E.D. Pa. 2004). Yet, the court did not state whether the programming and re-programming was personal for others. If it was for personal use, it would be a violation of § 605(a), but if it were for others, it could potentially be a § 605(e)(4) violation.

First, the District Courts below did not categorically exclude all individuals from the reach of § 605(e)(4). Rather, Judge Breyer held that the provision “only targets commercial activities *such as* manufacturing and distribution, and does not encompass the mere purchase of piracy equipment for personal use.”

Memorandum and Order at 16, *Huynh*, No. 04-03496, emphasis added. Judge Armstrong in *Oliver* similarly holds that the mere purchase of a pirate access device is not a violation of § 605(e)(4) unless something else occurs that would constitute creating tools to assist others in piracy. Judge Armstrong focuses on “sale or distribution,” two of the enumerated actions under § 605(e)(4).

Memorandum and Order at 5-6, *Oliver*, No. 04-03454. By listing manufacturing, sale and distribution as examples of conduct that would fit under § 605(e)(4), the lower Courts’ opinions do not suggest that these are the *only* activities that can generate liability under the provision. Rather, they apply *noscitur a sociis* to find that liability arises when a person moves beyond the mere purchase or personal use of a device and begins producing devices for distribution to others.

Second, the Fifth Circuit holding is consistent with the District Court’s ruling in *Huynh*. In *Robson*, the defendant had purchased two devices, an emulator and an “unlooper.” *Robson*, 420 F.3d at 535. Giving a cursory reading to the case law, the trial court had ruled that the defendant was an individual who could not be liable under §605(e)(4). *Robson* held that the District Court was wrong to

categorically excluding “individual users” from § 605(e)(4) liability, but that there is “conspicuously no civil action for merely purchasing or possessing a pirate access device.” *Id.* at 538, 543-44. Individuals must take steps beyond the mere possession of the devices to generate liability and the *Robson* court explicitly did not determine whether the defendant’s alleged actions of “inserting a chip into an emulator qualify as ‘assembl[y]’ or whether the alleged use of an unlooper to alter a DTV access card qualifies as ‘modifi[cation]’ within the meaning of § 605(e)(4)” *Id.* at 545. The court, rather, remanded to allow the District Court to consider these issues in the first instance. *Robson* specifically did not address the question before this court.

CONCLUSION

Amicus EFF requests that this court: (1) hold that 47 U.S.C. § 605(e)(4) only applies to situations where the defendant assists others in piracy and does not apply to the personal use of a pirate access device, and (2) affirm the District Court’s denial of DirecTV’s motion for default judgment with respect to DirecTV’s claims in Count III of the complaints filed against Mr. Huynh and Mr. Oliver based on violations of 47 U.S.C. § 605(e)(4). This result is required not only by the construction and plain meaning of the statute, and by legislative intent, but also by the prevailing case law. It also promotes the public interest. By ensuring that purchasers of smart card devices are not threatened by double dipping and are

treated equally under a technology-neutral reading of the statute, Title 47 protects the interests of satellite companies while avoiding unnecessary burden on future scientific and technological innovations.

Dated: November 30, 2005

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NOS. 05-16361 & 05-16362**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I
certify that the attached brief is proportionally spaced, has a typeface of 14 points,
and contains 6,288 words.

Dated: November 30, 2005

Jennifer S. Granick
Attorney for *Amicus Curiae*
Electronic Frontier Foundation

CERTIFICATE OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On November 30,2005, I served the foregoing **BRIEF OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION FAVORING AFFIRMANCE** on all persons identified below by placing two true and correct copies thereof

- in a sealed envelope, with postage fully prepaid, in the United States Mail at Stanford, California, addressed as follows:

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- for facsimile transmission to each recipient identified below to the facsimile number appearing after such recipient's name and mailing address.

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed November 30, 2005 at Stanford, California.

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