

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

J & J SPORTS PRODUCTIONS, INC.,

Plaintiff,

v.

MARK THOMAS BAILEY, individually
and d/b/a MADD BAILEYS,

Defendant.

No. 1:14-cv-01353-DAD-JLT

ORDER DENYING BOTH PARTIES
CROSS-MOTIONS FOR SUMMARY
JUDGMENT WITHOUT PREJUDICE AND
REOPENING DISCOVERY

(Doc. Nos. 13 and 14)

This action arises from the alleged interception and exhibition of “*The One*” Floyd Mayweather, Jr. v. Saul Alvarez WBC Light Middleweight Championship Fight Program. The action was initiated on August 28, 2014 by plaintiff, J & J Sports Productions, Inc. (“J & J”), against defendant Mark Bailey, alleging violations of the Communications Act (47 U.S.C. § 605), the Cable Television Consumer Protection and Competition Act (47 U.S.C. § 553), the California Business and Professions Code § 17200, and conversion. Before the court now are cross-motions for summary judgment filed on October 5 and 21, 2015 by plaintiff J & J and defendant Bailey, respectively. (Doc. Nos. 13 and 14.) Both parties filed oppositions to the other’s motion. (Doc. No. 15 and 19.) Both parties filed replies. (Doc. Nos. 20 and 21.) On June 21, 2016, the motions came before the court for hearing. (Doc.

1 No. 29.) Attorney Matthew Pare appeared at the hearing telephonically on behalf of
2 defendant. Attorney Thomas Riley appeared telephonically on behalf of plaintiff. (*Id.*)
3 After oral argument, the cross-motions were taken under submission. For the reasons set
4 forth below, the parties' cross-motions for summary judgment are denied without prejudice
5 and discovery and law and motion are reopened in this action.

6 **BACKGROUND**

7 **A. Statement of Facts**

8 Both parties have submitted statements of disputed facts. (Doc. Nos. 13-1 and 14-6)
9 Both parties filed responses to the other's statement of disputed facts. (Doc. Nos. 15-1 and
10 19-1.) In addition, plaintiff submitted the declaration of Joseph Gagliardi, president of J & J,
11 and the affidavit of investigator David Kelly. (Doc. Nos. 13-2 and 13-4.) Defendant Mark
12 Bailey has submitted his own declaration. (Doc. No. 14-1.) Both parties have also submitted
13 declarations by their respective counsel indexing evidence to be considered in connection
14 with the pending motions. (Doc. Nos.13-3 and 14-2.) This evidence submitted on summary
15 judgment establishes the following.

16 Joseph M. Gagliardi is the president of J & J. (Doc. No. 13-4 at 1.) J & J had the
17 right to license "*The One*" *Floyd Mayweather, Jr. v. Saul Alvarez WBC Light Middleweight*
18 *Championship Fight Program* ("the Program"), along with all undercard bouts and
19 commentary, on September 14, 2013. (*Id.* at 3-4.) Madd Baileys is a small pub located in
20 Pine Mountain Club, California with, according to defendant Mark Bailey, a capacity of
21 twenty-eight people. (Doc. No. 14-1 at 1.) Bailey has been the owner of Madd Baileys at all
22 times relevant to this suit. (Doc. No. 13-3 at 7.)

23 On September 14, 2013, investigator David Kelly went to Madd Baileys for fifteen
24 minutes. (Doc. No. 13-2 at 1.) He was not required to pay a cover charge to enter the
25 establishment. (*Id.*) He encountered a waitress but did not order anything. (*Id.*) There,
26 Kelly watched round two of the Cano vs. Theophane fight, one of the undercard bouts of the
27 Program, on one of the ten television sets he observed inside of Madd Baileys. (*Id.*) Kelly
28 noted several distinguishing elements inside the establishment: the entrance on the east wall,

1 the bar on the north wall, a pool table in the southwest corner, a karaoke stand in the
2 southeast corner, a stairway to the downstairs in the center of the room, and tables and chairs
3 scattered throughout. (*Id.*) Kelly took three head counts while he was inside of Madd
4 Baileys finding that there were four, three, and four people in the establishment at the time of
5 those counts. (*Id.*) He estimated the capacity of the establishment to be fifty people and
6 observed six cars in the parking lot. (*Id.*)

7 When the Cano vs. Theophane fight was shown, defendant Mark Bailey was not at
8 the pub. (Doc. No. 14-1 at 1.) There was no advertising that the fight would be shown at the
9 establishment that night. (Doc. No. 14-1 at 2.) There was no increase in sales revenue on
10 the day of the exhibition as compared to similar days. (*Id.*) The gross revenue at the
11 establishment was \$1,381.25, which is typical for Madd Baileys on a Saturday. (*Id.*) The
12 Program was available for purchase on the internet the day of the fight. (Doc. No. 14-3 at 9.)

13 Domestic commercial establishments were required to pay a commercial sublicense
14 fee to broadcast the Program. (Doc. No. 13-4 at 3.) For a commercial establishment such as
15 Madd Baileys, the commercial sublicense fee was \$2,200. (*Id.*) Mark Bailey, however,
16 never lawfully licensed the Program from J & J. (*Id.*) Madd Baileys had an account with
17 DirecTv at the time the Program was shown. (Doc. No. 14-1 at 1.) The DirecTv system was
18 professionally installed at the place of business. (*Id.*) Mark Bailey stated in his declaration
19 that he relied upon the provider to provide a lawful signal and charge him the correct price
20 given the nature of his establishment. (*Id.*) Madd Baileys, however, has commercial
21 accounts with the telephone and electric companies for those utilities at the pub. (Doc. No.
22 13-3 at 26.) Mark Bailey has not previously been accused of TV signal piracy. (Doc. No.
23 14-1 at 2.) Mark Bailey also declared that he did not authorize the piracy or know that the
24 Program was going to be displayed at Madd Baileys on the night in question. (*Id.*)

25 **LEGAL STANDARD**

26 Summary judgment is appropriate when the moving party “shows that there is no
27 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
28 law.” Fed. R. Civ. P. 56(a).

1 In summary judgment practice, the moving party “initially bears the burden of
2 proving the absence of a genuine issue of material fact.” *In re Oracle Corp. Sec. Litig.*, 627
3 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).
4 The moving party may accomplish this by “citing to particular parts of materials in the
5 record, including depositions, documents, electronically stored information, affidavits or
6 declarations, stipulations (including those made for purposes of the motion only),
7 admissions, interrogatory answers, or other materials” or by showing that such materials “do
8 not establish the absence or presence of a genuine dispute, or that the adverse party cannot
9 produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1)(A), (B). When
10 the non-moving party bears the burden of proof at trial, “the moving party need only prove
11 that there is an absence of evidence to support the non-moving party’s case.” *Oracle Corp.*,
12 627 F.3d at 387 (citing *Celotex*, 477 U.S. at 325.); *see also* Fed. R. Civ. P. 56(c)(1)(B).
13 Indeed, summary judgment should be entered, after adequate time for discovery and upon
14 motion, against a party who fails to make a showing sufficient to establish the existence of an
15 element essential to that party’s case, and on which that party will bear the burden of proof at
16 trial. *See Celotex*, 477 U.S. at 322. “[A] complete failure of proof concerning an essential
17 element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* In
18 such a circumstance, summary judgment should be granted, “so long as whatever is before
19 the district court demonstrates that the standard for the entry of summary judgment . . . is
20 satisfied.” *Id.* at 323.

21 If the moving party meets its initial responsibility, the burden then shifts to the
22 opposing party to establish that a genuine issue as to any material fact actually does exist.
23 *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In
24 attempting to establish the existence of this factual dispute, the opposing party may not rely
25 upon the allegations or denials of its pleadings but is required to tender evidence of specific
26 facts in the form of affidavits, and/or admissible discovery material, in support of its
27 contention that the dispute exists. *See* Fed. R. Civ. P. 56(c)(1); *Matsushita*, 475 U.S. at 586
28 n.11; *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) (“A trial court can

1 only consider admissible evidence in ruling on a motion for summary judgment.”). The
2 opposing party must demonstrate that the fact in contention is material, i.e., a fact that might
3 affect the outcome of the suit under the governing law, *see Anderson v. Liberty Lobby, Inc.*,
4 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d
5 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a
6 reasonable jury could return a verdict for the nonmoving party. *See Wool v. Tandem*
7 *Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987).

8 In the endeavor to establish the existence of a factual dispute, the opposing party need
9 not establish a material issue of fact conclusively in its favor. It is sufficient that “the
10 claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing
11 versions of the truth at trial.” *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the “purpose of
12 summary judgment is to ‘pierce the pleadings and to assess the proof in order to see whether
13 there is a genuine need for trial.’” *Matsushita*, 475 U.S. at 587 (citations omitted).

14 “In evaluating the evidence to determine whether there is a genuine issue of fact,” the
15 court draws “all inferences supported by the evidence in favor of the non-moving party.”
16 *Walls v. Central Costa Cty. Transit Auth.*, 653 F.3d 963, 966 (9th Cir. 2011). It is the
17 opposing party’s obligation to produce a factual predicate from which the inference may be
18 drawn. *See Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244–45 (E.D. Cal. 1985),
19 *aff’d*, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the
20 opposing party “must do more than simply show that there is some metaphysical doubt as to
21 the material facts. . . . Where the record taken as a whole could not lead a rational trier of
22 fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita*, 475
23 U.S. at 587 (citation omitted).

24 DISCUSSION

25 1) *Claims Brought Under 47 U.S.C. §§ 605 and 553*

26 Plaintiff moves for summary judgment in its favor on its §§ 605 and 553 claims
27 arguing that there is no genuine issue of material fact that defendant unlawfully intercepted
28 and broadcasted its program at Madd Baileys. (Doc. No. 13.) Conversely, defendant moves

1 for summary judgement on these claims arguing *inter alia*: (1) plaintiff lacks evidence of the
2 type of signal that was allegedly used to exhibit the Program at Madd Baileys, and (2) there
3 was no signal interception. (Doc. No. 14.)

4 A. *Type of Signal under 47 U.S.C. §§ 605 and 553.*

5 Defendant seeks summary judgment on the section 605 and 553 claims due to
6 plaintiff's alleged failure to meet its burden of distinguishing whether the Program was
7 exhibited via a cable signal or a satellite signal. (Doc. No. 14 at 5.) Plaintiff responds that
8 because Madd Baileys had DirecTv, there is sufficient evidence of a satellite violation under
9 § 605. (Doc. Nos. 13 at 5 and 19 at 3.) Plaintiff's argument that the cited evidence is
10 sufficient to establish a violation and to entitle it to summary judgment is not persuasive.

11 The Federal Communications Act states in part:

12 No person not being authorized by the sender shall intercept
13 any radio communication and divulge or publish the existence,
14 contents, substance, purport, effect, or meaning of such
15 intercepted communication to any person. No person not
16 being entitled thereto shall receive or assist in receiving any
interstate or foreign communication by radio and use such
communication for his own benefit or for the benefit of another
not entitled thereto.

17 47 U.S.C. § 605(a). Similarly, the Cable Television Consumer Protection and Competition
18 Act states that “[n]o person shall intercept or receive or assist in intercepting or receiving any
19 communications service offered over a cable system, unless specifically authorized to do so
20 by a cable operator or as may otherwise be specifically authorized by law.” 47 U.S.C.
21 § 553(a)(1).

22 Sections 605 and 553 are mutually exclusive. *J & J Sports Prods., Inc. v. Sandana*,
23 No. 1:13-cv-00842-AWI-JLT, 2014 WL 3689283, *3 (E.D. Cal. July, 23, 2014) (“Plaintiff
24 cannot recover under both Section 605 and Section 553 for the same alleged interception.”);
25 *J & J Sports Prods., Inc. v. Manzano*, No. 5:08-cv-01872-RMW, 2008 WL 4542962, *2
26 (N.D. Cal. Sept. 29, 2008) (“A signal pirate violates section 553 if he intercepts a cable
27 signal, he violates section 605 if he intercepts a satellite broadcast. But he cannot violate
28 both by a single act of interception.”). Where the evidence allows, courts have made

1 determinations as to which statute applies and subsequently denied motions for summary
2 judgment with respect to a claim brought by a plaintiff under the other statute. *See e.g. J & J*
3 *Sports Prods., Inc., v. Delgado*, No. 2:10-cv-02517-WBS-KJN, 2012 WL 371630, *3 (E.D.
4 Cal. Feb. 3, 2012) (holding plaintiff was not entitled to summary judgment on the § 553
5 claim because the evidence demonstrated that the Program was accessed via satellite making
6 § 605 the relevant statute); *Manzano*, 2008 WL 4542962, at *3 (declining to award damages
7 under § 605 where the evidence established the defendant used his cable box to watch the
8 fight in violation of § 553, and there was no indication that a satellite dish was used).

9 Nonetheless, a plaintiff in such a case must come forward with some evidence as to
10 whether the alleged violation was a radio communication or a cable communication because
11 that is a material fact with respect to the determination of which statute applies. Where the
12 plaintiff fails to come forward with such evidence on summary judgment, courts have denied
13 motions for summary judgment. *See e.g., Sandana*, 2014 WL 3689283, at *4 (“Because
14 Plaintiff has failed to present any evidence that the alleged interception was either a radio
15 communication or a cable communication, Plaintiff has not met its burden.”); *J & J Sports*
16 *Prods., Inc. v. Torres*, No. 2:10-cv-03009-KJM-KJN (PS), 2012 WL 761926, *7 (E.D. Cal.
17 Mar 6, 2012) (holding the plaintiff’s motion for summary judgment was defective because it
18 did not allege, or demonstrate through evidence, whether the transmission was via cable or
19 satellite).

20 Circumstantial evidence may provide a sufficient basis to support a factual finding in
21 signal piracy cases. *DirecTV, Inc. v. Webb*, 545 F.3d 837, 844 (9th Cir. 2008) (“[C]ourts
22 have correctly concluded that direct evidence of signal piracy is not required to prove
23 unlawful interception.”) However, the court in *Webb* also recognized that evidence a person
24 possessed a device that *could* have been used for signal piracy does not establish that the
25 device *was* used for that purpose. *Id.* (“Evidence that a person possessed a pirate access
26 device, by itself, may not be enough to infer actual interception of a signal.”) Here, plaintiff
27 has presented evidence on summary judgment that defendant had DirecTV service at the
28 establishment the night of the alleged piracy, investigator Kelly observed the broadcast of the

1 Program at Madd Baileys, and plaintiff did not authorize Madd Baileys to exhibit the
2 Program. (Doc. Nos. 13 at 9; 13-2 at 1; 13-4 at 2.) However, there is no evidence before this
3 court on summary judgment suggesting that defendant did not also have cable service at the
4 establishment. *Compare Joe Hand Promotions, Inc. v. Albright*, No. 11-cv-02260 WBS
5 CMK, 2013 WL 2449500, *5 (E.D. Cal. June 5, 2013) (“[T]here was an antenna and satellite
6 dish at the Saloon, and *while it never had cable service*, it did have a lawful television
7 service. The reasonable inference from this evidence is that the Program was intercepted via
8 satellite service.”) (emphasis added). There is also no evidence before the court on summary
9 judgment establishing that defendant purchased a non-commercial license from DirecTV to
10 view the Program. Likewise, there is no evidence before the court on summary judgment
11 that defendant possessed or purchased any type of device that would allow it to unlawfully
12 decrypt the satellite transmissions. Finally, defendant Mark Bailey has declared under
13 penalty of perjury that “there was no interception or theft of a TV signal” of the Program at
14 the establishment. (Doc. No. 14-1 at 1.)

15 Given the evidence before the court on summary judgment, the plaintiff has not come
16 forward with adequate evidence establishing a link between the TV service and the
17 exhibition of the Program at Madd Baileys. *See J & J Sports Prods., Inc. v. Tamayo*, No.
18 2:14-cv-01997-KJM-CKD, 2016 WL 2855126, *5 (E.D. Cal. May 16, 2016) (“Where the
19 moving party will have the burden of proof at trial, it must affirmatively demonstrate that no
20 reasonable trier of fact could find other than for the moving party.”) It is appropriate to deny
21 cross motions for summary judgment where neither party meets its burden. *See Tamayo*,
22 2016 WL 2855126, at *5. In *Tamayo*, the court found that a reasonable jury could find that
23 the defendants did not intercept the program in question, but that the defendants also had not
24 come forward with evidence ruling out a possible interception, thereby creating a genuine
25 dispute of material fact. *Id.* In the instant case, plaintiff has not come forward with evidence
26 on summary judgment establishing that Madd Baileys’ DirecTv service was used to view the
27 fight. On the other hand, defendant has not come forward with evidence ruling out that
28 possibility. Because neither party has met its burden in moving for summary judgment in its

1 favor, both motions will be denied as to this claim.

2 *B. Signal Interception*

3 Defendant also seeks summary judgment in its favor on plaintiff's §§ 605 and 553
4 claims due to the plaintiff's alleged failure to come forward with evidence of an interception
5 on summary judgment. (Doc. No. 14 at 6.) Conversely, plaintiff argues there is no genuine
6 dispute of material fact regarding whether defendant unlawfully intercepted and broadcast
7 the Program at Madd Baileys. (Doc. No. 13 at 8.) Specifically, plaintiff contends that
8 intercepting, receiving, assisting in receiving, divulging, and publishing a closed circuit
9 program are all prohibited by §§ 605 and 553, making defendant liable. (Doc. No. 19, at 12.)

10 However, the "dispositive legal point is that in order for there to be a violation . . .
11 there must be an 'interception' of a signal or transmission." *Premium Sports, Inc. v. Connell*,
12 No. 10-cv-3753-KBF, 2012 WL 691891, *2 (S.D.N.Y. Mar. 1, 2012). In this regard, a
13 knowing violation of the law is not required to establish liability. *See J & J Sports Prods.,*
14 *Inc. v. Delgado*, No. 2:10-cv-2517 WBS, 2012 WL 371630, at *3 (E.D. Cal. Feb. 3, 2012);
15 *Sandana*, 2014 WL 3689283, at *4. Nonetheless, it remains unclear whether a good faith
16 purchase of a satellite or cable service may provide a defense to such a claim. *See J & J*
17 *Sports Prods. Inc. v. Gidha*, No. CIV-S-10-2509 KJM-KJN, 2011 WL 3439205, at *3
18 (E.D. Cal. Aug. 4, 2011) (finding defendants could have a meritorious defense where they
19 alleged that they maintained a commercial account, but the cable provider improperly billed
20 them at the residential rate); *J & J Productions, Inc. v. Schmalz*, 745 F. Supp. 2d 844, 851
21 (S.D. Oh. 2010) (holding defendants were not liable under § 553 where they purchased
22 program from cable provider on commercial account, were billed and paid for such service
23 as commercial customers, but received cable broadcast only authorized for residential
24 customers). In any event, in order to prevail on summary judgment plaintiff must
25 demonstrate that there is no genuine issue that defendant committed an act of interception.
26 *See Sandana*, 2014 WL 3689283, at *4

27 Here, plaintiff has presented evidence on summary judgment only that defendant had
28 DirecTv service at the establishment the night of the alleged piracy, investigator Kelly

1 observed the broadcast of the Program at Madd Baileys, and plaintiff did not authorize Madd
2 Baileys to exhibit the Program at a commercial establishment. (Doc. Nos. 13 at 9; 13-2 at 1;
3 13-4 at 2.) Defendant has admitted that he is the owner of Madd Baileys. (Doc. No. 13-3 at
4 7.) Defendant, however, has declared that he did not intercept the signal, did not authorize
5 an interception, was not present at Madd Baileys the night of the Program, and did not know
6 the Program was going to be displayed at Madd Baileys. (Doc. No. 14-1 at 1-2.) At
7 summary judgment the court is to draw all inferences from the evidence presented in favor of
8 the non-moving party. *See Anderson*, 477 U.S. at 250. This includes accepting the evidence
9 presented by the non-moving party as true. *Id.* In light of defendant's declarations there is a
10 genuine dispute as to whether defendant intercepted the signal of the Program. Therefore,
11 the motions for summary judgment brought on behalf of both parties as to the signal
12 interception claim must also be denied.

13 **2) Conversion**

14 Defendant seeks summary judgment on plaintiff's conversion claim due to plaintiff's
15 alleged inability to establish (1) that defendant intentionally and substantially interfered with
16 plaintiff's property by taking possession of the property, preventing plaintiff from having
17 access to it, or destroying and refusing to return the property; (2) that plaintiff was harmed;
18 and (3) that the defendant's conduct was a substantial factor in causing plaintiff's harm.
19 (Doc. No. 14 at 8.) Plaintiff also seeks summary judgment in its favor on its conversion
20 claim and in opposition to defendant's motion contends that defendant has no reason to
21 assume that plaintiff cannot support these elements of conversion. (Doc. Nos. 13 at 12 and
22 19 at 17.)

23 The elements of conversion in California are: (1) the plaintiff's ownership or right to
24 possession of the property; (2) the defendant's conversion by a wrongful act or disposition of
25 property rights; and (3) damages. *Burlesci v. Petersen*, 68 Cal. App. 4th 1062, 1066 (1998).
26 As a strict liability tort, the knowledge, intent, good faith, and motive of the defendant are
27 immaterial to a conversion claim. *L.A. Fed. Credit Union v. Madatyan*, 209 Cal. App. 4th
28 1383, 1387 (2012). For purposes of such a claim, broadcast signals and rights constitute

1 property. *J & J Sports Prods., Inc. v. Bath*, No. 1:11-cv-1564- SAB, 2013 WL 5954892, *8
2 (E.D. Cal. Nov. 7, 2013); *DirecTV, Inc. v. Pahnke*, 405 F. Supp. 2d 1182, 1189 (E.D. Cal.
3 2005).

4 Here, neither party is entitled to summary judgment on plaintiff's claim for
5 conversion due to the existing disputes of material fact as to the signal source and signal
6 interception. *See, e.g., Sandana*, 2014 WL 3689283, at *5 (finding a genuine dispute of
7 material fact where the plaintiff established a right of possession but could not establish that
8 the conversion was committed by a wrongful act); *Torres*, 2012 WL 761926, at *10 (denying
9 summary judgment where the plaintiff established that it owned exclusive commercial rights
10 but failed to establish that defendant converted the broadcast signal or that plaintiff suffered
11 damages as a result thereof).

12 **3) California Business and Professions Code Section 17200**

13 Defendant also seeks summary judgment on plaintiff's § 17200 claim, arguing that
14 the only remedy available to plaintiff, aside from injunctive relief, is restitution.¹ (Doc. No.
15 14, at 11.) Defendant argues that because the evidence on summary judgment establishes
16 that no profit was generated from the exhibition of the Program at Madd Baileys, no
17 restitution is available for plaintiff and that summary judgment in his favor as to this claim is
18 appropriate. (Doc Nos. 14-1 at 2; 14 at 11.)

19 In opposition, plaintiff argues that because defendant only addressed the damages
20 involved with the claim, not the claim itself, and the claim is derivative of the other claims,
21 summary judgment is not appropriate. (Doc. No. 19 at 20–21.)

22 California Business and Professions Code § 17203 provides:

23 Any person performing or proposing to perform an act of unfair
24 competition within this state may be enjoined in any court of
25 competent jurisdiction. The court may make such orders or
26 judgments . . . as may be necessary to restore to any person any
money or property, real or personal, which may have been
acquired by means of such unfair competition.

27 _____
28 ¹ Plaintiff has not moved for summary judgment in its favor with respect to this claim. (Doc.
No. 13 at 12, n.3.)

1 A private plaintiff's remedy is limited to injunctive relief and restitution. *Kasky v. Nike, Inc.*,
2 27 Cal. 4th 939, 950 (2002) (quoting *Cel-Tech Commc'ns, Inc. v. LA Cellular Tel. Co.*, 20
3 Cal. 4th 164, 179 (1999)).

4 As noted by plaintiff, in moving for summary judgment plaintiff contends only that
5 restitution is unavailable in this case but fails to address injunctive relief which is also
6 available with respect to this claim. Accordingly, defendant has not established that he is
7 entitled to summary judgment as to this claim and his motion with respect to this claim will
8 be denied.²

9 **4) Reopening Discovery**

10 Although both parties here are represented by counsel, the court finds that additional
11 relevant evidence likely remains to be discovered. *See Jones v. Blanas*, 393 F.3d 918, 930
12 (9th Cir. 2004) ("summary judgment is disfavored where relevant evidence remains to be
13 discovered, particularly in cases involving confined *pro se* plaintiffs.") Specifically, plaintiff
14 has presented no evidence that defendant's DirecTv account purchased a non-commercial
15 license to watch the Program. If such a non-commercial license was indeed used, there is no
16 evidence of who authorized such a purchase. However, there is no evidence that defendant
17 possessed or purchased any type of device that would allow it to unlawfully decrypt the
18 satellite transmissions. Finally, there is no evidence suggesting that defendant did not have a
19 cable service at Madd Baileys on the night of the alleged piracy. Such evidence is
20 potentially discoverable by the parties and could well be dispositive of the issues presented
21 by this action.

22 Consequently, in the interest of justice, the court will *sua sponte* reopen discovery
23 and law and motion in order to allow the parties to conduct further discovery and renew their
24 motions for summary judgment if warranted. *See Puletu v. Fishing Co. of Alaska*, No.

25
26
27 ² Plaintiff does not oppose summary adjudication with respect to its claim of attorneys' fees
28 in connection with this claim. (Doc. No. 19 at 21.) However, at this time the court declines
to resolve the claims in such a piecemeal fashion.

1 C05-1752RSM, 2007 WL 2712965, at *7 (W.D. Wash. Sept. 13, 2007) (reopening discovery
2 *sua sponte* in the interest of justice).³


3 **CONCLUSION**

4 For all of the reasons set forth above:

- 5 1) Plaintiff's motion for summary judgment (Doc. No. 13) is denied without
6 prejudice to the renewal of the motion after further discovery is conducted;
- 7 2) Defendant's motion for summary judgment (Doc. No. 14) is denied without
8 prejudice to the renewal of the motion after further discovery is conducted;
- 9 3) Discovery in this action is reopened and shall be conducted so as to be
10 completed⁴ by Tuesday January 17, 2017;
- 11 4) Law and motion is reopened so that renewed motions for summary judgment may
12 be filed on or before Tuesday February 7, 2017 and noticed for hearing in keeping
13 with the Local Rules of this court; and
- 14 5) Final Pretrial Conference and Trial dates will be scheduled following the close of
15 the re-opened law and motion period if necessary.

16 IT IS SO ORDERED.

17 Dated: November 9, 2016

18 
19 _____
20 UNITED STATES DISTRICT JUDGE

21
22
23
24 ³ Counsel are encouraged to either complete the discovery necessary to present fully
25 supported renewed motions for summary judgment or to otherwise bring this litigation to a
26 conclusion in a timely manner.

27 ⁴ Completed means that all additional discovery is propounded and/or conducted in a timely
28 fashion so that any disputes regarding discovery can be presented and resolved by the
assigned magistrate judge and that any discovery orders can be complied with and discovery
produced pursuant to any such orders by the January 17, 2017 deadline.