



1 for and purchases the distribution rights” for its programs. (*Id.* at 3, ¶¶ 11-12.) Plaintiffs allege  
2 Defendant decrypted its transmissions, and received “DISH Network’s satellite broadcasts of  
3 copyrighted television programming without payment of the required subscription fee.” (*Id.* at 2, ¶ 8.)  
4 Accordingly, Plaintiffs filed their complaint against Defendant on March 10, 2014, alleging violations  
5 of the Digital Millennium Copyright Act, 17 U.S.C. § 1201(a)(1); the Federal Communications Act, 47  
6 U.S.C. § 605(a); and the Electronic Communications Privacy Act, 18 U.S.C. §§2511(1)(a) and 2520.  
7 (*Id.* at 6-7.)

8 Defendant was served with the complaint, but failed to respond within the time prescribed by  
9 the Federal Rules of Civil Procedure. Upon application of Plaintiff, default was entered against  
10 Defendant pursuant to Fed. R. Civ. P. 55(a) on April 10, 2014. (Docs. 6, 7.) Plaintiffs filed the motion  
11 for default judgment now pending before the Court on April 24, 2014. (Doc. 8.)

## 12 **II. Legal Standards for Default Judgment**

13 The Federal Rules of Civil Procedure govern the entry of default judgment. When default was  
14 entered because “a party against whom a judgment for relief is sought has failed to plead or otherwise  
15 defend,” the party seeking relief may apply to the court for a default judgment. Fed. R. Civ. P. 55(a)-  
16 (b). Upon the entry of default, well-pleaded factual allegations regarding liability are taken as true, but  
17 allegations regarding the amount of damages must be proven. *Pope v. United States*, 323 U.S. 1, 22  
18 (1944); *see also Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977). In addition,  
19 “necessary facts not contained in the pleadings, and claims which are legally insufficient, are not  
20 established by default.” *Cripps v. Life Ins. Co. of North Am.*, 980 F.2d 1261, 1267 (9th Cir. 1992)  
21 (citing *Danning v. Lavine*, 572 F.2d 1386, 1388 (9th Cir. 1978)).

22 Granting or denying a motion for default judgment is within the discretion of the Court. *Aldabe*  
23 *v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). The entry of default “does not automatically entitle the  
24 plaintiff to a court-ordered judgment. *Pepsico, Inc. v. Cal. Sec. Cans*, 238 F.Supp.2d 1172, 1174 (C.D.  
25 Cal 2002), *accord Draper v. Coombs*, 792 F.2d 915, 924-25 (9th Cir. 1986). The Ninth Circuit  
26 determined:

27 Factors which may be considered by courts in exercising discretion as to the entry of a  
28 default judgment include: (1) the possibility of prejudice to the plaintiff, (2) the merits of  
plaintiff’s substantive claim, (3) the sufficiency of the complaint, (4) the sum of money

1 at stake in the action, (5) the possibility of a dispute concerning material facts, (6)  
2 whether the default was due to excusable neglect, and (7) the strong policy underlying  
the Federal Rules of Civil Procedure favoring decisions on the merits.

3 *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986). As a general rule, the issuance of default  
4 judgment is disfavored. *Id.* at 1472.

5 **III. Plaintiff's Factual Allegations**

6 Plaintiffs assert that “DISH Network uses high-powered satellites to broadcast . . . movies,  
7 sports, and general entertainment services to consumers who have been authorized to receive such  
8 services after payment of a subscription fee, or in the case of a pay-per-view movie or event[,] the  
9 purchase price.” (Doc. 1 at 3, ¶ 10.) According to Plaintiffs, the programs DISH Network broadcasts  
10 are copyrighted, and “DISH Network contracts for and purchases the distribution rights for most of the  
11 programming broadcast on the DISH Network platform from providers such as network affiliates,  
12 motion picture distributors, pay and specialty broadcasters, cable networks, sports leagues, and other  
13 holders of programming rights.” (*Id.* at 3, ¶¶ 11-12.)

14 Plaintiffs allege that the “programming is digitized, compressed, and scrambled prior to being  
15 transmitted.” (Doc. 1 at 3, ¶ 13.) Through the NagraStar system, DISH Network is able “to ‘turn on’  
16 and ‘turn off’ programming a customer has ordered, cancelled, or changed.” (*Id.*, ¶ 16.) In addition,  
17 NagraStar control words “descramble DISH Network’s satellite signal, which . . . prevents unauthorized  
18 decryption of DISH Network.” (*Id.* at 4, ¶ 16.) Plaintiffs explain the transmission as follows:

19 The EchoStar Technologies receiver processes an incoming DISH Network  
20 satellite signal by locating an encrypted part of the transmission known as the  
21 NagraStar entitlement control message and forwards it to the smart card. Provided the  
22 subscriber is tuned to a channel he is authorized to watch, the smart card uses its  
decryption keys to unlock the message, uncovering a NagraStar control word. The  
control word is then transmitted back to the receiver to decrypt the DISH Network  
satellite signal.

23 Together, the EchoStar Technologies receiver and NagraStar smart card convert  
24 DISH Network’s encrypted satellite signal into viewable programming that can be  
displayed on the attached television of an authorized DISH Network subscriber.

25 (Doc. 1 at 4, ¶¶ 17-18.) Plaintiffs allege that Defendant circumvented the system, and he received  
26 transmissions of “DISH Network’s satellite broadcasts of copyrighted television programming without  
27 payment of the required subscription fee.” (*Id.* at 2, ¶ 8.)

28 According to Plaintiffs, this was accomplished by Defendant “subscribing to two pirate

1 television services known as IKS Rocket and Nfusion Private Server ('NFPS')." (Doc. 1 at 2, ¶ 8.)  
2 Plaintiffs assert that Defendant purchased a subscription to IKS Rocket from Thomas Dixon, whose  
3 records show Defendant subscribed to IKS Rocket on or about January 11, 2012. (*Id.* at 5, ¶ 26.) In  
4 addition, Plaintiffs allege Defendant "subscribe[d] to NFPS in or around February 2013." (*Id.*)  
5 Plaintiffs explain: "Through IKS Rocket and NFPS, Defendant illegally obtained DISH Network's  
6 control words or 'keys,' which he then used to decrypt DISH Network's satellite signal and view DISH  
7 Network programming without authorization." (*Id.*, ¶¶8, 27.)

8 For these acts, Plaintiffs alleged violations of 17 U.S.C. § 1201(a)(1), 47 U.S.C. § 605(a), and  
9 18 U.S.C. §§ 2511(1)(a) and 2520. However, in the motion for default judgment, Plaintiffs request  
10 damages only for the violation of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2511(1)(a)  
11 and 2520(a). (*See* Doc. 8-1.) Therefore, the Court will address only this claim.

#### 12 **IV. Application of *Eitel* Factors**

13 Applying the factors articulated by the Ninth Circuit in *Eitel*, the Court finds factors weigh in  
14 favor of granting Plaintiff's motion for default judgment.

##### 15 **A. Prejudice to Plaintiff**

16 The first factor considers whether the plaintiff would suffer prejudice if default judgment is not  
17 entered, and potential prejudice to the plaintiff weighs in favor of granting a default judgment. *See*  
18 *Pepsico, Inc.*, 238 F. Supp. 2d at 1177. Generally, where default has been entered against a defendant, a  
19 plaintiff has no other means by which to recover damages. *Id.*; *Moroccanoil, Inc. v. Allstate Beauty*  
20 *Prods.*, 847 F.Supp.2d 1197, 1200-01 (C.D. Cal. 2012). Therefore, the Court finds Plaintiffs would be  
21 prejudiced if default judgment is not granted.

##### 22 **B. Merits of Plaintiff's claims and sufficiency of the complaint**

23 Given the kinship of the factors, the Court considers the merits of Plaintiffs' substantive claims  
24 and the sufficiency of the complaint together. *See Premier Pool Mgmt. Corp. v. Lusk*, 2012 U.S. Dist.  
25 LEXIS 63350, at \*13 (E.D. Cal. May 4, 2012). The Ninth Circuit has suggested that, when combined,  
26 these factors require a plaintiff to "state a claim on which the plaintiff may recover." *Pepsico, Inc.*, 238  
27 F.Supp.2d at 1175 (citation omitted). Notably a "defendant is not held to admit facts that are not well-  
28 pleaded or to admit conclusions of law." *DIRECTV, Inc. v. Huynh*, 503 F.3d 847, 854 (9th Cir.2007).

1           The Electronic Communications Privacy Act (“ECPA”) prohibits “intentionally intercept[ing],  
2 endeavor[ing] to intercept, or procur[ing] any other person to intercept, or endeavor to intercept, any  
3 wire, oral, or electronic communication.” 18 U.S.C. § 2511(1)(a). Although § 2511 is a criminal  
4 provision, 18 U.S.C. § 2520(a) provides “a private cause of action for violation of Section 2511(1)(a).”  
5 *EchoStar Satellite, L.L.C. v. Viewtech, Inc.*, 543 F.Supp.2d 1201, 1208 (S.D. Cal. 2008). Specifically,  
6 pursuant to § 2520(a) states: “any person whose wire, oral, or electronic communication is intercepted,  
7 disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person  
8 or entity. . . which engaged in that violation such relief as may be appropriate.” 18 U.S.C. § 2520(a).  
9 The Ninth Circuit has determined that “electronic communications” include satellite television signals.  
10 *DIRECTV, Inc. v. Webb*, 545 F.3d 837, 844 (9th Cir.2008) (citing *United States v. Lande*, 968 F.2d 907,  
11 913 (9th Cir.1992) (acknowledging that § 2511(1)(a) prohibits “the unauthorized viewing of satellite  
12 pay television”). Thus, to state claim under § 2520(a), a plaintiff must allege facts sufficient to  
13 establish that the defendant intentionally intercepted the plaintiff’s satellite television programming  
14 without proper authorization. *See id.*; 18 U.S.C. §§ 2511(1)(a), 2520(a).

15           Here, Plaintiffs assert they obtained the distribution rights for the programing on DISH  
16 Network, and the “programming is digitized, compressed, and scrambled prior to being transmitted.”  
17 (Doc. 1 at 3, ¶¶11-13.) Plaintiffs allege that Defendant intercepted DISH Network satellite television  
18 programming unlawfully, through subscriptions to NFPS and IKS Rocket, which were accessed using  
19 an unauthorized receiver. (*Id.*, ¶¶ 8, 27.) Consequently, Plaintiffs have adequately set forth a claim  
20 under 18 U.S.C. § 2520(a) for a violation of § 2511.

21           C. Sum of money at stake

22           In considering this factor, the Court “must consider the amount of money at stake in relation to  
23 the seriousness of Defendant’s conduct.” *Pepsico, Inc.*, 238 F.Supp.2d at 1176. Here, Plaintiff prays  
24 for statutory damages for Defendant’s conduct in the amount of \$10,000. (Doc. 8-1 at 4-5). Pursuant  
25 to 18 U.S.C. § 2520(c)(2)(B), the Court may award “statutory damages of whichever is the greater of  
26 \$100 a day for each day of violation *or* \$10,000.” 18 U.S.C. § 2520(c)(2) (emphasis added). Because  
27 the statute authorizes an award of \$10,000 – or more – the amount requested relates directly to the  
28 Defendant’s conduct and does not weigh against Plaintiff’s motion for default judgment.

1           D. Possibility of dispute concerning material facts

2           The Court considers also the possibility of dispute as to any material facts in the case. Here,  
3 there is little possibility of dispute concerning material facts because (1) based on the entry of default,  
4 the Court accepts allegations in Plaintiff’s Complaint as true and (2) though properly served, Defendant  
5 has failed to defend the case. *See Pepsico, Inc.*, 238 F.Supp.2d at 1177; *see also Elektra Entm’t Group,*  
6 *Inc. v. Crawford*, 226 F.R.D. 388, 393 (C.D. Cal. 2005) (“Because all allegations in a well-pleaded  
7 complaint are taken as true after the court clerk enters default judgment, there is no likelihood that any  
8 genuine issue of material fact exists”). Therefore, this factor does not weigh against default judgment.

9           E. Whether default was due to excusable neglect

10           Generally, the Court will consider whether Defendant’s failure to answer is due to excusable  
11 neglect. *See Eitel*, 782 F.2d at 1472. In this case, Defendant was served with the Summons and  
12 Complaint, as well as the motion for default judgment. (*See* Doc. 8-7.) Given these facts, it is unlikely  
13 that Defendant’s actions were the result of excusable neglect. *See Shanghai Automation Instrument*  
14 *Co., Ltd. v. Kuei*, 194 F.Supp.2d 995, 1005 (N.D. Cal. 2001) (finding no excusable neglect because the  
15 defendants “were properly served with the Complaint, the notice of entry of default, as well as the  
16 papers in support of the instant motion”). Accordingly, this factor does not weigh against default  
17 judgment.

18           F. Policy disfavoring default judgment

19           As noted above, default judgments are disfavored because “[c]ases should be decided on their  
20 merits whenever reasonably possible.” *Eitel*, 782 F.2d at 1472. Defendant’s failure to answer the  
21 Complaint makes a decision on the merits impractical. Consequently, the policy underlying the Federal  
22 Rules of Civil Procedure favoring decisions on the merits does not weigh against default judgment.

23           **V. Damages**

24           Having accepted the well-pleaded allegations as true, Plaintiffs established the elements of a  
25 violation of the ECPA. Therefore, Plaintiffs are entitled to damages for Defendant’s intentional  
26 interception of the satellite programing. As noted above, the Court may award “statutory damages of  
27 whichever is the greater of \$100 a day for each day of violation *or* \$10,000.” 18 U.S.C. § 2520(c)(2)  
28 (emphasis added). The Court has the discretion to award either the statutory sum or no damages at all,

1 but may not elect an award somewhere between the two. *DIRECTV, Inc. v. Griffin*, 290 F.Supp.2d  
2 1340, 1347–48 n. 28 (M.D. Fla. 2003) (“Although a district court has the discretion to award the full  
3 amount of statutory damages authorized under § 2520(c)(2) or none at all, Congress did not grant  
4 district courts authority to prescribe an amount falling between those two choices”). In other words,  
5 where the plaintiff elects to receive statutory damages but presents no evidence of the number of days  
6 violations occurred, the only choice for the court is whether to award \$10,000 in damages, or no  
7 damages at all. See *DIRECTV, Inc. v. Walsh*, 540 F.Supp.2d 553, 561 (M.D. Pa. 2008) (explaining the  
8 court is faced with the question “whether to award no damages or \$10,000”); *DIRECTV, Inc. v.*  
9 *Hedger*, 322 F.Supp.2d 879, 882 (W.D. Mich.2004) (“the Court may exercise its discretion to either  
10 award [the plaintiff] \$10,000 or to award no damages at all”).

11 Here, Plaintiffs alleged Defendant purchased the IKS Rocket subscription in January 2012 and  
12 acknowledged in an online forum that he was still using the subscription 11 months later. (See Doc. 8-1  
13 at 9.) Plaintiffs observe that Defendant probably continued the use “even longer based on [a] post [i]n  
14 February 2013 stating NFPS and ‘another’ service recently ‘worked great.’” (*Id.*, citing Rogers Decl. ¶  
15 7, Exh.5.) Nevertheless, Plaintiffs acknowledge that “[t]he exact period of time Defendant used NFPS  
16 and IKS Rocket to steal DISH Network programming cannot be determined from the evidence  
17 available.” (*Id.* at 8.) Because the precise number of days on which violations occurred is unknown—  
18 although it may be inferred Defendant intentionally intercepted programs for more than a year—the  
19 Court finds the damage request of \$10,000 to be appropriate, and recommends it be awarded.

## 20 **VI. Injunctive Relief**

21 The ECPA authorizes injunctive relief, permitting the Court to grant “preliminary and other  
22 equitable or declaratory relief as may be appropriate.” 18 U.S.C. § 2520(b)(1). Plaintiffs seek a  
23 permanent injunction to prevent Defendant from further violations of Plaintiffs’ rights under the ECPA.  
24 (Dco. 1 at 8; Doc. 8-1 at 10-14.) Specifically, Plaintiffs request an injunction that “enjoins Defendant,  
25 and anyone acting in concert or participation with Defendant, from” (1) “circumventing or assisting  
26 others in circumventing DISH Network’s security system, or intercepting or assisting others in  
27 intercepting DISH Network’s satellite signal;” and (2) “testing, analyzing, reverse engineering,  
28 manipulating, or otherwise extracting codes, data, or information from DISH Network’s satellite

1 receivers, smart cards, satellite data stream, or any other part or component of the DISH Network  
2 security system.” (Doc. 8-1 at 14.)

3 Injunctive relief is appropriate when a party establishes “(1) that it has suffered an irreparable  
4 injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for  
5 that injury; (3) that, considering the balance of hardships between plaintiff and defendant, a remedy in  
6 equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”  
7 *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also MAI Systems Corp. v. Peak*  
8 *Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993) (explaining that, in general, “a permanent injunction  
9 will be granted when liability has been established and there is a threat of continuing violations”).

10 In this action, as discussed above, Plaintiffs have established Defendant’s liability for violations  
11 of the ECPA. Further, the facts demonstrate Defendant’s violations were despite his knowledge that he  
12 lacked authorization to access DISH Network programming, and required the use of pirated  
13 subscription services. Damages alone appear inadequate to prevent future piracy by Defendant, who  
14 would be enjoined from engaging in further criminal activity. Further, “the public has an interest in the  
15 enforcement of ... statutes” such as the ECPA. *See Coxcom, Inc. v. Chafee*, 536 F.3d 101, 112 (1st Cir.  
16 2008). Therefore, injunctive relief is appropriate to prevent Defendant from intercepting DISH  
17 Network programming in the future, and from assisting others in similar endeavors.

## 18 **VII. Findings and Recommendations**

19 The *Eitel* factors weigh in favor of granting default judgment, and the entry of default judgment  
20 is within the discretion of the Court. *See Aldabe*, 616 F.2d at 1092. Further, the damages requested are  
21 reasonable, and it appears a permanent injunction is appropriate to prevent further violations of the  
22 ECPA by Defendant. Accordingly, **IT IS HEREBY RECOMMENDED:**

- 23 1. Plaintiffs’ motion for default judgment (Doc. 8) be **GRANTED**;
- 24 2. Damages for Plaintiff’s violations of the ECPA be **AWARDED** in the amount of  
25 \$10,000;
- 26 3. Plaintiffs’ request for permanent injunctive relief be **GRANTED**; and
- 27 4. Defendant be enjoined from (1) circumventing or assisting others in circumventing  
28 DISH Network’s security system, or intercepting or assisting others in intercepting



1 DISH Network's satellite signal and (2) testing, analyzing, reverse engineering,  
2 manipulating, or otherwise extracting codes, data, or information from DISH Network's  
3 satellite receivers, smart cards, satellite data stream, or any other part or component of  
4 the DISH Network security system.

5 These Findings and Recommendations are submitted to the United States District Judge  
6 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local  
7 Rules of Practice for the United States District Court, Eastern District of California. Within fourteen  
8 days of the date of service of these Findings and Recommendations, any party may file written  
9 objections with the court. Such a document should be captioned "Objections to Magistrate Judge's  
10 Findings and Recommendations." The parties are advised that failure to file objections within the  
11 specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153  
12 (9th Cir. 1991).

13  
14 IT IS SO ORDERED.

15 Dated: May 27, 2014

/s/ Jennifer L. Thurston  
16 UNITED STATES MAGISTRATE JUDGE