

1 **I. BACKGROUND**

2 DISH Network provides copyrighted satellite television programming to millions
3 of paying customers throughout the United States. (*Duval Decl.* [Doc. 5-18], ¶ 7.) In
4 order to prevent the unauthorized reception of its programming, DISH Network
5 encrypts the satellite signals so that viewing requires the use of a provided receiver and
6 smart card. (*Id.*, ¶¶ 8–11.) The receiver processes the signal by locating an encrypted
7 part of the transmission—known as the entitlement control message—and forwards that
8 message to the smart card. (*Id.* ¶ 13.) The smart card then uses its decryption keys to
9 unlock the message, uncovering a control word that is transmitted back to the receiver
10 to decrypt the satellite signal, and allowing the customer to view the program. (*Id.* ¶¶
11 13–14.)

12 Various devices have been manufactured to allow individuals to steal or “pirate”
13 DISH Network’s programming. (*Duval Decl.*, ¶ 15.) Among the devices are Sonicview
14 receivers and iHub adapters. (*Id.*, ¶ 17–18.) The receivers are programmed with pirate
15 software and connected to the internet via an iHub adapter or a built-in Ethernet port.
16 (*Id.*, ¶17–18.) The internet connection allows the Sonicview receiver to obtain the
17 DISH Network control words from a server and allow viewing of the DISH Network
18 programming. (*Id.*, ¶ 19.)

19 In 2009, DISH Network filed a lawsuit against Sonicview alleging violations of
20 the Digital Millennium Copyright Act (“DMCA”) and related statutes (the “Sonicview
21 Lawsuit”) based on its distribution of piracy devices, such as the Sonicview receiver and
22 iHub adapter. (*See Hagan Decl.* [Doc. 5-2], ¶ 8.) On August 14, 2009, DISH Network
23 filed a motion for preliminary injunction seeking, among other things, to enjoin the sale
24 of these piracy devices. On March 29, 2010, the court entered an order (the “Sonicview
25 Order”) enjoining Sonicview and others from “designing, manufacturing, developing,
26 trafficking, selling, and marketing . . . Sonicview iHubs, and Piracy Software at any
27 physical address or on the Internet. . . .” (*See Hagan Decl.*, Ex. 7 at 12:5–12.)
28

1 Defendant Whitcomb is a former Sonicview employee. (*Hagan Decl.*, ¶ 7; Ex. 6
2 at 120:2–124:4.) At the time the Sonicview Order was entered, Whitcomb was engaged
3 in selling the Sonicview iHub on eBay. (*Id.*, ¶ 6; Ex. 5.) In an effort to evade the order,
4 DISH Network alleges that Whitcomb eventually began selling a “re-packaged” iHub
5 under the name “Sonicview SV Lan” and “New Link.” (*P&A* [Doc. 5-1], 4:27–5:2
6 (citing *Jaczewski Decl.* [Doc. 5-16], ¶ 4; and *Hagan Decl.*, ¶¶ 3–5, Exs. 2–4).)

7 On February 17, 2011, DISH Network filed this lawsuit against Whitcomb
8 asserting causes of action for violation of the DMCA, Communications Act, and
9 Electronic Communications Privacy Act. The lawsuit alleges that Whitcomb unlawfully
10 manufactures, distributes, and traffics devices intended to facilitate the unauthorized
11 reception and decryption of DISH Network’s satellite television programming. (*Compl.*
12 [Doc. 1], ¶ 1.)

13 On February 18, 2011, DISH Network filed the present motion for a preliminary
14 injunction.

16 **II. LEGAL STANDARD**

17 Under Rule 65 of the Federal Rules of Civil Procedure, a district court has the
18 authority to issue a preliminary injunction in the exercise of its equitable powers. Fed.
19 R. Civ. P. 65. “The standard for granting a preliminary injunction balances the
20 plaintiff’s likelihood of success against the relative hardship to the parties.” Clear
21 Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003). The
22 Ninth Circuit recognizes two tests for granting preliminary injunctive relief. Save Our
23 Sonoran, Inc. v. Flowers, 408 F.3d 1113, 1120 (9th Cir. 2005).

24 To obtain a preliminary injunction under the first, “traditional,” test, a plaintiff
25 must show ““(1) a strong likelihood of success on the merits, (2) the possibility of
26 irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of
27 hardships favoring the plaintiff, and (4) advancement of the public interest (in certain
28 cases).” Save Our Sonoran, 408 F.3d at 1120 (quoting Johnson v. Cal. State Bd. of

1 Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995)).

2 To obtain a preliminary injunction under the second, “alternative,” test, a
3 plaintiff must demonstrate *either* (1) a combination of probable success on the merits
4 and the possibility of irreparable injury *or* (2) that serious questions are raised and the
5 balance of hardships tips sharply in his favor. Save Our Sonoran, 408 F.3d at 1120
6 (citing Johnson, 72 F.3d 1430); Immigrant Assistance Project of the L.A. County of
7 Fed’n of Labor v. INS, 306 F.3d 842, 873 (9th Cir. 2002). “These two formulations
8 represent two points on a sliding scale in which the required degree of irreparable harm
9 increases as the probability of success decreases. They are not separate tests but rather
10 outer reaches of a single continuum.” Baby Tam & Co. v. City of Las Vegas, 154 F.3d
11 1097, 1100 (9th Cir. 1998). Thus, “the greater the relative hardship to the moving
12 party, the less probability of success must be shown.” Immigrant Assistant Project, 306
13 F.3d at 873 (citations). “Conversely, it has been held that a preliminary injunction may
14 be granted even though the harm factor favors defendant if plaintiff demonstrates a
15 substantial likelihood that he will ultimately prevail.” Id. (citations).

16 “In cases where the public interest is involved, the district court must also
17 examine whether the public interest favors the plaintiff.” Fund for Animals, Inc. v.
18 Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992); *see also* Caribbean Marine Servs. Co., Inc.
19 v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988) (“Under either test, however, the district
20 court must consider the public interest as a factor in balancing the hardships when the
21 public interest may be affected.”).

22 23 **III. DISCUSSION**

24 **A. Probability of Prevailing**

25 In order to prevail under section 1201(a)(2) of the DMCA, DISH Network must
26 prove that the SV Lan and New Link adapters satisfy one of the following criteria:
27 (1) the devices are designed or produced for circumventing a measure that controls
28 access to a copyrighted work; (2) the devices have limited commercial purpose or use

1 other than circumventing an access control measure; or (3) the devices are marketed
2 for use in circumventing an access control measure. 17 U.S.C. § 1201(a)(2).

3 In order to establish a likelihood of prevailing on the DMCA claim, DISH
4 Network provided the declaration of Nigel Jones, an engineer with over 25 years of
5 experience designing and analyzing sophisticated electronic systems. (*Jones Decl.* [Doc.
6 5-14], ¶¶ 3.) Jones has analyzed numerous satellite piracy devices, and has substantial
7 knowledge of security systems implemented to protect satellite signals from piracy
8 devices. (*Id.*, ¶ 3.)

9 Jones analyzed the SV Lan and New Link adapters and, based on his findings,
10 concluded that the devices “are designed explicitly to circumvent the DISH Network
11 security system and intercept DISH Network programming . . .” and that they “have
12 no legitimate commercial application.” (*Jones Decl.*, ¶¶ 15–16, 27b–c.) Specifically,
13 Jones found that neither the SV Lan nor New Link adapter comes with a user manual
14 or any other type of instructions for using the device, which is contrary to how serial-to-
15 Ethernet adapters are typically sold. (*Id.*, ¶¶ 15, 24.) Each device also lacks “plug and
16 use” capabilities because, for among other reasons, there is no means provided for
17 powering or configuring the serial communications parameters for the devices, there is
18 no direct means for ascertaining the devices’ IP address, and no driver to establish a
19 COM port through which communications may be exchanged with either the SV Lan
20 or New Link adapters. (*Id.*, ¶¶ 16, 24.)

21 Jones also opined that the lack of a power supply severely limits the types of
22 devices with which the SV Lan and New Link may be used; specifically, they may only
23 be used with receivers that incorporate a non-standard serial port. (*Id.*, ¶¶ 17, 18, 24.)
24 And although the devices are advertised for use in connection with Sonicview receivers,
25 Jones found that the SV Lan only functioned if the Sonicview receiver was loaded with
26 piracy software. (*Id.*, 18.)

27 Because the SV Lan and New Link adapters are designed to explicitly circumvent
28 the DISH Network security system, and have no legitimate commercial application,

1 DISH Network has demonstrated a substantial likelihood of prevailing on the merits of
2 its DMCA claim.¹

3
4 **B. Balance of Hardships / Irreparable Harm**

5 Defendant Whitcomb has not opposed the preliminary-injunction motion, and
6 thus there is no evidence that he will suffer any hardship or irreparable harm by the
7 proposed preliminary injunction. In contrast, DISH Network has established that if
8 Whitcomb is allowed to continue selling the piracy devices and dispose of his assets,
9 DISH Network will continue to suffer irreparable harm due to the lost profits and
10 subscribers resulting from Whitcomb's conduct. Additionally, without the preliminary
11 injunction, DISH Network's ability to recover any of its damages will be further
12 diminished. Accordingly, the Court finds the balance of hardships and irreparable harm
13 heavily favor DISH Network.

14
15 **C. The Public Interest**

16 The public has a strong interest in enforcing anti-piracy legislation, such as the
17 DMCA and Communications Act. See Coxcom, Inc. v. Chaffee, 536 F.3d 101, 112 (1st
18 Cir. 2008) ("the fourth factor, the public interest, further supports the issuance of the
19 injunction; the public has an interest in the enforcement of federal statutes."); Comcast
20 Cable Commc'ns v. Narcisi, 2007 WL 895702, * 6 (D.J.N Mar. 20, 2007) ("Permitting
21 individuals like Defendant to misappropriate the goods and services of others unscathed
22 would diminish the incentive to produce or market those products for the benefit of the
23

24
25 ¹Jones also opined that the "SV-Lan and New Link adapters are simply an improved
26 iHub." (*Jones*, ¶¶ 8–14, 27a.) In the Sonicview Lawsuit, the court found that the iHub "has
27 only limited commercially significant purpose or use other than' circumventing [DISH
28 Network's] encryption and other security measures, and appears to be 'primarily designed or
produced for' piracy or assisting Sonicview customers in piracy." (*See Sonicview Order*,
8:27–9:2.) The Sonicview Order, therefore, also supports this Court's finding that DISH
Network has a substantial likelihood of succeeding on its DMCA claim.

1 public at large.”). Accordingly, the Court finds that the public interest favors DISH
2 Network.

3
4 **IV. CONCLUSION AND ORDER**

5 For the reasons discussed above, the Court **GRANTS** DISH Network’s motion
6 for a preliminary injunction [Doc. 5], and **ORDERS** as follows:

7 1. Defendant Christopher Whitcomb, and all directors, officers, agents,
8 servants, employees, attorneys and all persons and entities in active
9 concert or participation therewith, including, but not limited to,
10 manufacturers, distributors, retailers and cooperative members are
11 enjoined and must restrain from directly or indirectly:

12 (a) manufacturing, developing, importing, offering to the public
13 (including, but not limited to, through internet websites or
14 auctions), promoting, distributing, providing or otherwise
15 trafficking in Sonicview iHubs, SV Lan adapters, New Link
16 adapters, or any other device designed to connect to internet
17 key sharing servers for the purpose of receiving DISH
18 Network programming without authorization;

19 (b) manufacturing, developing, importing, offering to the public
20 (including, but not limited to, through internet websites or
21 auctions), promoting, distributing, providing or otherwise
22 trafficking in serial numbers, authorization codes, or upgrades
23 for Sonicview iHubs, SV Lan adapters, New Link adapters, or
24 any other device designed to connect to internet key sharing
25 servers for the purpose of receiving DISH Network
26 programming without authorization;

27 (c) receiving or assisting others in receiving without
28 authorization DISH Network’s satellite signals or other

1 electronic communications originating from DISH Network's
2 system;

3 (d) transferring, removing, encumbering, or permitting
4 withdrawal of any assets or property belonging to Defendant
5 and related to Defendant's trafficking in Sonicview iHubs,
6 SV Lan adapters, New Link adapters, and serial numbers,
7 authorization codes, or upgrades for Sonicview iHubs, SV
8 Lan adapters, and New Link adapters, whether real or
9 personal, tangible or intangible, including cash, bank
10 accounts of any kind, stock accounts, bonds, and title to
11 Defendants' business property; and

12 (e) destroying, hiding, or altering any books or records, whether
13 in hard copy or electronic form, concerning the satellite
14 receiver business or finances of Defendant, including
15 invoices, purchase orders, receipts, shipping records, banking
16 or investment records, or any documents that identify
17 manufacturers, exporters, importers, dealers, or purchasers of
18 Sonicview receivers, 8PSK Turbo Boards or modules,
19 Sonicview iHubs, SV Lan adapters, New Link adapters,
20 software for these devices, and serial numbers, authorization
21 codes, or upgrades for Sonicview iHubs, SV Lan adapters,
22 and New Link adapters, or persons involved in operating any
23 IKS server or receiving control words from same.

24 2. No later than three (3) court days from the filing of this Order, Defendant
25 must provide DISH Network a written accounting of all assets and
26 property belonging to Defendant, which in the case of any bank account
27 shall include the account name, number, current balance, and location of
28 the bank or other custodian holding such account.

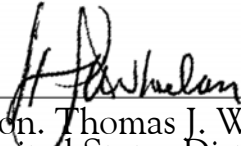
3. No bond shall be required.

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

This preliminary injunction shall take effect immediately and remain in effect pending entry of a final judgment or further order of the Court.

IT IS SO ORDERED.

DATED: April 25, 2011



Hon. Thomas J. Whelan
United States District Judge