NOTE: FILED UNDER SEAL
BY ORDER OF THE COURT

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

COMCAST OF ILLINOIS X, LLC, an Illinois Limited Liability Company, Plaintiff, vs. JUNG KWAK, individually and d/b/a MATINEE TV, an unregistered trade name, and d/b/a Outkast Performance, an unregistered trade name, and d/b/a UST, an unregistered trade name; and ABENDANO BRUCE DIN, individually, Defendants.	CV No. 03-00962 DAE-PAL

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On June 18, 2010, the Court heard Plaintiff's Motion for Summary Judgment Against Defendant Jung Kwak. Jeffrey R. Platt, Esq., appeared at the hearing on behalf of Plaintiff; Defendant did not appear at the hearing.[1] After

[1] Three calls were made in the hallway for Defendant, with no response.

reviewing the motion and the supporting and opposing memoranda, the Court **GRANTS** Plaintiff's Motion. (Doc. # 159.)

BACKGROUND

On July 10, 2009, Plaintiff filed a Second Amended Complaint ("SAC"), alleging, inter alia, that Defendant Jung Kwak ("Defendant") was involved in the sale of illegal cable descrambler equipment in violation of various state and federal laws. (Doc. # 120.) Defendant is sued individually and doing business as Matinee TV, doing business as Outkast Performance, doing business as UST. Plaintiff alleges that Defendant manufactured, modified, sold, and distributed unauthorized "pirate" cable television descrambling devices and equipment for unauthorized interception of Plaintiff's cable television programming services. (Id. at 2, 7.)

Plaintiff brings five causes of action in its SAC. Count I alleges violation of the Cable Communications Act, 47 U.S.C. § 553. Counts II and III alleges that Defendant violated the Digital Millennium Copyright Act, sections 17 U.S.C. § 1201(a)(2) and § 1201(b)(1), respectively. Count IV is a claim for unjust enrichment. Count V requests imposition of a constructive trust.

Defendant, represented by counsel, filed an Answer on August 4, 2009. (Doc. # 121.) On March 16, 2010, Magistrate Judge Peggy A. Leen granted counsel's motion to withdraw. (Doc. # 158.) Kwak is now proceeding pro se.

On April 5, 2010, Plaintiff filed a Motion for Summary Judgment Against Defendant Jung Kwak. (Doc. # 159.) Defendant's opposition was due by April 20, 2010, but Defendant failed to file any response to Plaintiff's motion. Plaintiff's motion for summary judgment is therefore unopposed.

During the hearing on the matter, the Court instructed Plaintiff to submit supplemental evidence of the existence of copyrighted material relevant to Plaintiff's motion. Plaintiff was granted until July 2, 2010, to file supplemental briefing. Defendant was granted until July 12, 2010, to respond to any supplemental evidence submitted by Plaintiff. Plaintiff submitted the affidavit of Richard Killian on July 1, 2010. (Doc. # 164.) Defendant filed no response.

STANDARD OF REVIEW

Rule 56 requires summary judgment to be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Porter v. Cal. Dep't

of Corr., 419 F.3d 885, 891 (9th Cir. 2005); Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000).

Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial. See id. at 323. The burden initially falls upon the moving party to identify for the court those "portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp., 477 U.S. at 323).

Once the moving party has carried its burden under Rule 56, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial" and may not rely on the mere allegations in the pleadings. Porter, 419 F.3d at 891 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)). In setting forth "specific facts," the nonmoving party may not meet its burden on a summary judgment motion by making general references to evidence without page or line numbers. S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 889 (9th Cir. 2003); Local Rule 56.1(f) ("When resolving motions for summary judgment, the court shall have no independent duty to search and consider any part of the court record not otherwise referenced in the separate concise statements of the parties."). "[A]t least some 'significant probative evidence'" must be

produced. T.W. Elec. Serv., 809 F.2d at 630 (quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 290 (1968)). "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." Addisu, 198 F.3d at 1134. "Conclusory allegations unsupported by factual data cannot defeat summary judgment." Rivera v. Nat'l R.R. Passenger Corp., 331 F.3d 1074, 1078 (9th Cir. 2003).

DISCUSSION

Plaintiff moves this Court to rule that Defendant, individually and d/b/a MatineeTV, and d/b/a Outkast Performance, and d/b/a UST, distributed illegal cable descrambler boxes in violation of the Cable Communications Act ("CCA"), 47 U.S.C. § 553(a)(1), and the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201 et seq.

I. Evidence in Support of Motion for Summary Judgment

The evidence and factual assertions presented in Plaintiff's motion are unopposed by Defendant. Because the evidence is unopposed, the Court must conclude that there are no genuine issues of material fact. See Addisu, 198 F.3d at 1134. The Court summarizes below that evidence pertinent to disposition of the instant motion.

During the course of Plaintiff's investigation of this case, Plaintiff allegedly discovered that Defendant was operating a website "matineetv.com" that sold illegal cable descramblers.[2] (Mot. at 8.) According to the affidavit of Richard Killian, an Investigator hired by Plaintiff, the website advertises various descramblers for purchase. (Killian Mot. Aff. ¶ 7.)

Plaintiff argues that Defendant's PayPal and bank records confirm that Defendant was operating MatineeTV through two street addresses and several email addresses: 1596 Gold Dust Ave., Las Vegas, NV 89119 and 2620 S. Maryland Parkway, Suite 160, Las Vegas, NV 89101; and clearmax6000@aol.com, clearmax6000@hotmail.com, and catvjapan@hotmail.com. (Mot. Ex. B at Ex. C.) The Court has reviewed the PayPal statement attached by Plaintiff and agrees that it indicates that Jung Kwak, with the above listed emails and street addresses, is registered as a business account holder under PayPal for Kwak Inc., and MatineeTV. (Id.)

Killian also uncovered two emails allegedly sent by Defendant regarding descrambler boxes. (Killian Mot. Aff. ¶ 6; Killian Mot. Aff. Ex. 2.) On December 13, 2002, an email from Jung states: "there is a email going around,

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[2] Plaintiff also learned that Defendant was a sales employee of The Pyxis Group, another defendant in this case. (Mot. at 2-3, 7; Kwak Mot. Dep. at 14:17-25.)

Saying jung and Geno was busted [sic]. This is not true. I have great price on raw or complete systems. Raw www.cable-descrambler-inc.com." (Killian Mot. Aff. Ex. 2 at 1 (emphasis added).) The email is sent from the address "clearmax6000@hotmail.com," which is registered to Defendant on his PayPal account. A telephone number, 1-877-237-8155, is also listed in the email near Defendant's electronic signature. On April 14, 2003, an email sent from the same email account says "This is Jon, wholesaler. www.cable-descrambler-inc.com." (Killian Mot. Aff. Ex. 2 at 1.) Although the email is sent from someone identifying himself as "Jon," Defendant has admitted that he goes by the name "Jon" or "John" because people have difficulty pronouncing his Korean name "Jung." (Kwak Mot. Dep. at 10:20-11:8.)

Defendant also testified during his deposition that he "put up" the cable-descrambler-inc.com website. (Kwak Mot. Dep. at 33:11-16.) Defendant stated that "[i]t was all converters, everything, just for wholesale," and he "had every converter on there." (Id. at 33:15-19.) Defendant states that he "didn't sell retail out of there. I didn't do anything. It was just a phone number and a plain site, saying there was just – you know, it was just – just for converters. I had every converter there." (Id. at 33:21-25.) Plaintiff does not provide the full transcript and Defendant's statement is not complete in the record now before the Court. It

is nevertheless apparent from the record that Defendant was involved in running or operating the website.

Killian's investigation links Defendant with the MatineeTV website selling cable descrambler devices. Killian engaged in online transactions to demonstrate that a descrambler could be purchased from the website. (Mot. at 3, 10-12.) Exhibits of the MatineeTV website features various devices for sale, including the "XTC Pro" and the "ClearMax 6000," which are advertised as having "descrambler technology." (Killian Mot. Aff. Ex. 3 at 3, 13.) Killian attests that the "About Us" section of the website indicated that MatineeTV's address is 2620 S. Maryland Pkwy # 160, Las Vegas, NV 89109. (Killian Mot. Aff. ¶ 8.) This address matches the address listed on Defendant's PayPal account, as described above. (Mot. Ex. B at Ex. C.) Plaintiff further demonstrates that the phone number listed on the MatineeTV website, 1-877-237-8155, is the same telephone number listed on the December 13, 2002 email from Defendant. (Mot. at 10; Killian Mot. Aff. at Ex. 3.)

Killian purchased a ClearMax 6000 on the MatineeTV website in order to purchase a cable decoder. (Mot. at 11.) The package was delivered by Federal Express on July 1, 2003. (Id. at 12.) After hooking up the unit, Killian found that the "descrambler was capable of receiving Comcast scrambled

programming without the knowledge or authorization of Comcast." (Killian Mot. Aff. ¶ 12.)

Plaintiff's witness, Michael A. Muller, also tested the cable box that was ordered by Killian. (Mot. at 12; Mot. Ex. G.) Muller found that the "descrambler [was] an addressable access control CATV converter/decoder that has an additional board added to the original circuitry. The purpose of this additional board is to enable the indiscriminate descrambling of any scrambled/encoded signal." (Muller Mot. Aff. ¶ 3.) Based on his review of Defendant's PayPal records, MatineeTV's website content, Defendant's bank records, the log if items seized by the U.S. Federal Marshals, and computer records seized in the raid on Pyxis, Muller concluded that Defendant "was engaged in the distribution of cable descrambling devices intended to be utilized for the illegal interception of cable television programming without the knowledge or consent of the CATV system operator." (Id. ¶ 5.)

II. Violation of the Cable Communications Act (Count I)

The Cable Communications Act prohibits the unauthorized reception of cable service. The CCA provides that:

> No person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system,

> unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.

47 U.S.C. § 553(a)(1) (emphasis added). To "assist in intercepting or receiving" includes "the manufacture or distribution of equipment intended by the manufacturer or distributor . . . for unauthorized reception of any communications service offered over a cable system in violation of subparagraph (1)." Id. § 553(a)(2) (emphasis added).

Under the CCA, liability arises from the distributor's intent at the time of the sale or distribution, not from the buyer's intent. The statute does not require that the equipment actually be used to receive unauthorized services in order a court to find liability. "Because converter-decoders indeed have lawful uses, the statute requires a showing that defendants have the intent to assist in the unauthorized interception or reception to establish liability under § 553." Continental Cablevision, Inc. v. Poll, 124 F.3d 1044, 1047 (9th Cir. 1997). Both the Ninth Circuit and the Seventh Circuit have squarely addressed this issue. In United States v. Gardner, 860 F.2d 1391, 1397 (7th Cir. 1988), the Seventh Circuit refuted the proposition that responsibility for the illegal use of the box rests on the purchaser. Citing the express language of § 553 that defined "illegal assistance" to include the intent of the distributor, the Seventh Circuit held that a jury need only

be instructed that it was required to find that the defendant "intended the black boxes to be used for the unauthorized reception of cable services when [the defendant] sold the boxes." Id. at 1399.

A 1997 Ninth Circuit case, Continental Cablevision, Inc. v. Poll, 124 F.3d 1044 (9th Cir. 1997), is factually similar to the case now before this Court. In Poll, the plaintiff was a cable television operator that encrypted its channels to prevent subscribers from receiving services for which they had not paid. Id. at 1045. A converter-decoder, or "black box," was required to view any scrambled channels. Id. The defendant manufactured and distributed cable converter-decoders, which had been modified to be "non-addressable" and "bullet-proof." Id. at 1046. The defendant was found liable for manufacturing, selling, and distributing the boxes "while intending that the devices be used for the unauthorized reception of cable television programming." Id. at 1046. The Ninth Circuit reviewed the evidence in the record demonstrating the defendant's intent. First, the defendant was not registered with the FCC to sell cable boxes. Id. at 1047. Second, the distributed boxes were modified to descramble all channels including premium and pay-per-view. Id. Third, the boxes were "non-addressable." Id. Fourth, the boxes were advertised as alternatives to the cable company boxes. Id. Fifth, the boxes were advertised as "bullet proof," meaning

that they could defeat anti-cable theft security measures. Id. Sixth, the defendant received letter from customers. Id. Seventh, the investigator hired by Continental found that the defendant's boxes could descramble all of the channels. Id. The Ninth Circuit concluded that the "fact that [the defendant's] boxes had legal uses does not insulate [the defendant] from civil liability where the evidence establishes that [the defendant] knew and intended the 'black boxes' to be used for the unauthorized reception of cable television programming." Id. at 1048.

Based on the uncontroverted facts in the record, this Court finds that Defendant distributed the converter boxes with the intent to assist in unauthorized intercepting or receiving communications services. As in Poll, Defendant's boxes were modified to descramble any scrambled TV channel. (Muller Mot. Aff. ¶ 3.) The MatineeTV website advertises the decoders as stand-alone products, not secondary products to be used along with legal cable boxes. (Killian Mot. Aff. Ex. 3.) The MatineeTV website clearly advertises the decoders as "100% bullet-proof" and "non-traceable." (Id. at 3-13.) The experiment conducted by Killian and Muller confirmed that the boxes were capable of descrambling Plaintiff's channels. (Killian Mot. Aff. ¶ 12; Mot. Ex. G.) Although it is not clear from the record whether Defendant is registered with the FCC, or whether Defendant received

communication from customers, the Ninth Circuit has not indicated that these factors are required in order to find liability.[3]

The aforementioned undisputed facts, viewed in conjunction with the fact that the emails, mailing addresses, and phone numbers associated with the distribution centers were all registered to Defendant via his PayPal account, are convincing to this Court. It is evident that Defendant distributed the boxes and that Defendant did so with the requisite intent for liability. Accordingly, Plaintiff's motion for summary judgment is GRANTED against Defendant as to liability under the Cable Communications Act.

III. Violations of the Digital Millennium Copyright Act (Counts II & III)

Section 1201(a)(2) of the DMCA prohibits manufacturing, offering to the public, or otherwise trafficking in any technology or device that

> (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; [or]

[3] Plaintiff briefly addresses whether Defendant may use a disclaimer to shield himself from liability. (Mot. at 18.) The Court notes various cases have found that a defendant's use of a disclaimer is not a shield from liability. E.g., Time Warner Cable of New York City v. Cable Box Wholesalers, Inc., 920 F. Supp. 1048, 1053 (D. Ariz. 1996). Because Defendant has not raised this defense, however, the Court declines to reach this issue.

> (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title.

17 U.S.C. § 1201(a)(2). Therefore, to establish a violation of § 1201(a)(2), a plaintiff must show (1) a defendant trafficked in device that (2) is designed, or has limited uses other than, to circumvent a technological measure that controls access to a protected work. See 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085, 1095-99 (N.D. Cal. 2004).

Section 1201(b)(1) of the DMCA is substantially similar to section 1201(a)(2), but it prohibits devices used to circumvent protection afforded a copyright owner. No person may manufacture a technology or device that "is primarily designed . . . for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner" or that has "only limited commercially significant purpose . . . other than to circumvent [such] protection." 17 U.S.C. § 1201(b)(1). Therefore, in addition to meeting the two requirements of section 1201(a)(2), a plaintiff must also establish that a defendant violated a right of a copyright owner.

A television "scrambler" is an acknowledged "technological measure" as intended by the DMCA. See United States v. Whitehead, 532 F.3d 991, 992 (9th Cir. 2008) (access cards allowing customers to access digital satellite feed

without paying for it circumvented a technological measure); 321 Studios, 307 F. Supp. 2d at 1095-99; CSC Holdings, Inc. v. Kelly, 374 F. Supp. 2d 303, 303-04 (E.D.N.Y 2005).

Muller testified that there is no legitimate purpose for Defendant's devices, other than to descramble the channels without authorization from Plaintiff. Defendant has presented no argument or evidence to counter Plaintiff's assertions that the descrambling was unauthorized or that the device was designed to circumvent Plaintiff's rights. See Chamberlain Group, Inc. v. Skylink Tech., Inc., 381 F.3d 1178, 1193 (Fed. Cir. 2004); see also Storage Tech. Corp. v. Custom Hardware Eng'g, 421 F.3d 1307, 1318 (Fed. Cir. 2005).

Plaintiff is also required to show that its technological measures are for a "work protected under" the DMCA and that there is a valid copyright on the work. See Chamberlain, 381 F.3d at 1202; Ticketmaster LLC v. RMG Tech., Inc., 507 F. Supp. 2d 1096, 1111 (C.D. Cal. 2007) (citing Chamberlain, 381 F.3d at 1203). During the hearing on this matter, the Court questioned Plaintiff's counsel whether Plaintiff had actually argued in its motion that the rights Plaintiff seeks to protect are copyrighted "works protected" under the DMCA. The Court's own review of the briefing submitted by Plaintiff revealed that Plaintiff had not actually pled or submitted evidence of this basic component to Plaintiff's DMCA claim.

The Court granted Plaintiff fourteen days within which to submit some evidence of the existence of the copyrighted material, which Plaintiff provided by way of affidavit of Richard Killian. The Court further granted Defendant ten days within which to respond to the evidence produced by Plaintiff, but Defendant failed to do so.

Killian attests to the fact that there are a number of copyrighted television programs for the Home Box Office premium channel during the time span 2000-2005. (Killian Aff. ¶ 4.) Plaintiff also offers pay-per-view programming, allowing subscribers to purchase individual movies and other entertainment on a per-event payment basis. (Id. ¶ 5.) Killian states that Plaintiff contracted and purchased the distribution rights of copyrighted programming from entities including Cinemax, Home Box Office, and Showtime. (Id. ¶ 7.) Plaintiff has therefore satisfied the final prong of the analysis.

Accordingly, Plaintiff's motion for summary judgment is GRANTED against Defendant as to liability under the DMCA.

IV. Damages

Having found liability, the Court will now evaluate Plaintiff's request for damages.

A. Damages under the CCA

Under the CCA, a plaintiff must "elect either to prove actual damages and profits of the violator attributable to the violation, or to claim statutory damages." Poll, 124 F.3d at 1049 (citing 47 U.S.C. § 553(c)(3)(A)) (emphasis added). Further, "[i]n any case in which the court finds that the violation was committed willfully and for purposes of commercial advantage or private financial gain, the court in its discretion may increase the award of damages . . . by an amount of not more than $50,000." 47 U.S.C. § 553(c)(3)(A)(ii).

Plaintiff seeks a judgment against Defendant in the amount of his gross profits from the sale of his illegal descramblers through MatineeTV and Outkast Performance. A party may

> recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation.

Id. § 553(c)(3)(A)(i).

Plaintiff moves for an award in the amount of $264,438.81, which is equal to the amount Defendant has allegedly profited from his illegal sales.[4] (Mot. at 20-21.) Plaintiff submits lengthy bank records and PayPal records as evidence of Defendant's revenues. (Mot. Ex. B at Ex. C-F.) Based on the evidence submitted by Plaintiff, and lack of any objection by Defendant, the Court GRANTS Plaintiff's motion as to Defendant's profits.

Plaintiff also moves this Court to increase the damages amount by $50,000, which is the discretionary award allowable in any case in which a court finds that the violation was committed willfully and for the purpose of commercial advantage or financial gain. 47 U.S.C. § 553(c)(3)(B). The Court, in its discretion, declines to award Plaintiff these additional damages.

B. Damages under the DMCA

Plaintiff seeks statutory damages for each prohibited device sold or distributed by Defendant in violation of the DMCA. (Mot. at 22.) Under the DMCA, a plaintiff may elect to collect statutory damages (instead of actual damages) in the amount of no less than $200 and up to $2,500 per illegal device.

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[4] Plaintiff alleges that Defendant's PayPal records indicate he netted at least $112,412.33 from sales through MatineeTV and that Defendant's Wells Fargo Bank records indicate he netted $152,026.48 from sales through Outkast Performance, totaling $264,438.81. (Mot. at 20.)

17 U.S.C. § 1203(c)(3)(A). Plaintiff alleges that "the Defendants have sold and/or distributed at least one thousand one hundred and twelve (1,112) illegal cable descramblers." (Mot. at 22.) Plaintiff asks for a total award of $2,780,000.00, which is equal to $2,500 for each of the 1112 descramblers.

Plaintiff attaches Exhibit H as evidence of the 1112 illegal cable descramblers sold and distributed by Defendant. (Mot. at 14-15; Mot. Ex. H.) Exhibit H is a fifty-page spreadsheet listing various transactions from 2001 through 2003. Defendant has offered no argument or evidence to refute the evidence.

It is within the Court's discretion to allocate a value between $200 and $2,500 for each illegal sale or distribution. The Court believes that $200 is adequate in this case. The Court awards Plaintiff $222,400 in total damages for Defendant's sale or distribution of prohibited devices in violation of the DMCA.

V. Motion for Attorneys' Fees and Costs

Plaintiff has filed a motion for attorneys' fees and costs as part of its motion for summary judgment. The Court does not address the motion for attorneys' fees and costs herein, because such a request does not go to the merits of the motion for summary judgment. Plaintiff is directed to file a separate motion for attorneys' fees and costs.

CONCLUSION

For the reasons stated above, the Court: GRANTS Plaintiff's motion for summary judgment. The Clerk of the Court is directed to enter judgment in favor of Plaintiff. Plaintiff is hereby awarded a total of $486,838.81 in damages for violations of the CCA and the DMCA.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 14, 2010.

DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

Comcast of Illinois X, LLC vs. Kwak, et al., CV-S-03-0962 DAE-PAL;
ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT