

FEB 21 2008

*DirecTV, Inc. v. Le*  
05-35259

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

RYMER, Circuit Judge, concurring.

I agree that awarding statutory damages is within a court's discretion (and so I concur), but I am concerned that in these cases the district judge simply concluded (as he had in other cases) that he was not going to award statutory damages absent evidence that the defaulting defendant actually intercepted DirecTV's transmissions or assisted others in doing so. To the extent this is so, the district court's practice comes close to being a per se rule disallowing *any* statutory damages in *all* cases against individuals who default. Establishing a per se rule would be a failure to exercise discretion, and in these types of piracy cases would have adverse policy consequences as well.

In a default scenario, it is unlikely that evidence can ever be adduced showing actual or attempted access beyond what the default concedes. It is unclear to me how much wiggle room there is between actual damages, and statutory damages, for the district court's practice. This said, at least in these cases, I am not convinced the bounds of discretion were exceeded and so, with some reservations, I concur.