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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

DIRECTV, INC., a California corporation,)	C. A. No. 0:02-3198-18
)	
)	
Plaintiff,)	
)	
-versus-)	<u>REPORT AND RECOMMENDATION</u>
)	
CHARLES HARNATKIEWICZ and)	ENTERED
DARYL PARTYKA,)	<u>7-23-03</u>
Defendants.)	

This action alleging damages and seeking relief pursuant to the Communications Act of 1934, 47 U.S.C. 151 et. seq., as amended by the Telecommunications Act of 1996, 47 U.S.C. § 605, and provisions of the Electronic Communications Privacy Act of 1986, as amended, 18 U.S.C. § 2511, et. seq., among other causes of action which are no longer relevant¹, was brought by DIRECTV, Inc., a California Corporation in the business of selling television programming via satellite transmission. The defendants are individuals whose names appear on the shipping records of dealers of signal pirating devices and whom the plaintiff asserts have stolen their satellite transmissions. The defendants Charles R. Harnatkiewicz and Daryl Partyka moved for summary judgment asserting that there is no evidence that they received or assisted others in receiving DIRECTV's satellite

¹ The only real remaining cause of action is under 47 U.S.C. § 605. The plaintiff has conceded that its other allegations are not viable. Specifically the common law conversion cause of action fails because there is not proof of actual damages, and the claims under § 2512 fail because the section does not provide for private rights of action.

transmission of television programming without authorization in violation of 47 U.S.C. § 605(a).

The pertinent portions of the United States Code of Laws read as follows:

Title 47

§ 605. Unauthorized publication or use of communications

(a) Practices prohibited

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney,

(3) (A) Any person aggrieved by any violation of subsection (a) of this section or paragraph (4) of this subsection may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(B) The court--

(i) may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a) of this section;

(ii) may award damages as described in subparagraph (C); and

(iii) shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

(C) (i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

(I) the party aggrieved 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; or

(II) the party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in a sum of not less than \$1,000 or more than \$10,000, as the court considers just

(ii) In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than \$100,000 for each violation of subsection (a) of this section.

(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than \$250.

Title 18

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who--

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when--

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been

sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

§ 2520.

(a) In general.--Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) Relief.--In an action under this section, appropriate relief includes--

- (1) such preliminary and other equitable or declaratory relief as may be appropriate;
- (2) damages under subsection (c) and punitive damages in appropriate cases; and
- (3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages.--(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less

than \$50 and not more than \$500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than \$100 and not more than \$1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of--

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of \$100 a day for each day of violation or \$10,000.

This action was filed on September 26, 2002; the period for discovery expired on June 19, 2003. The defendants Harnatkiewicz and Partyka moved for summary judgment on June 5 and June 12, 2003, respectively, and the plaintiff filed opposition on June 23rd. Supplemental memorandums was submitted on July 9, 2003. A hearing was scheduled on the motion for July 23, and on July 18, 2003, the plaintiff filed a consent order substituting counsel. Also on July 18, 2003, the plaintiff moved for a continuance of the hearing on the motion. However, since discovery is complete and all of the pleadings in support of the motion have been filed, the hearing was cancelled, and the parties advised that the motion would be decided on the pleadings.

Summary Judgment Standard

Pursuant to Fed.R.Civ.P. 56(c), a district court must enter judgment against a party who, "after adequate time for discovery ... fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). Where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law," entry of summary judgment is mandated. Fed.R.Civ.P. 56(c). To avoid summary judgment on a defendants' motion, a plaintiff must produce evidence creating a genuine issue of material fact. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986). In determining whether a genuine issue of material fact is in dispute, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, at 255, 106 S.Ct. at 2513-14.

FACTS

The facts, either uncontested or taken in the light most favorable to the plaintiff as the non-moving party, and all

reasonable inferences therefrom, to the extent supported by the record, are as follow.

Defendant Harnatkiewicz never subscribed to DIRECTV service and denies ever intercepting DIRECTV signals by the use of any device or assisting anyone to intercept the signals. (McKay Aff.). The plaintiff has submitted what appears to be e-mails indicating that the defendant's credit card was used to purchase electronic devices. According to another affidavit, these devices are used to assist in circumventing DIRECTV's security system. (Izadshenas Aff.).

Defendant Partyka subscribed to DIRECTV service in the past, but denies ever intercepting DIRECTV signals by the use of any device or assisting anyone to intercept the signals. (McKay Aff.). The plaintiff has submitted what appears to be e-mails indicating that the defendants' credit cards were used to purchase electronic devices. According to another affidavit, these devices are used to assist in circumventing DIRECTV's security system. (Izadshenas Aff.).

DISCUSSION

The issue before the court is whether there is a genuine issue of material fact as to whether the plaintiff's "wire, oral, or electronic communication [was] intercepted, disclosed, or intentionally used..." in violation of the Electronic Communications Privacy Act by the defendants, 18 U.S.C. § 2520,

or whether either of the defendants "receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio [did] divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception." 47 U.S.C. § 605.

The plaintiff's case is a circumstantial one, but to be sure, liability may be established by circumstantial evidence. Still the evidence must be more than a suspicion or conjecture to justify submission to the jury. Here the adequately supported motion for summary judgment by the defendants shifted to the plaintiff's the responsibility to produce facts, as distinguished from allegations, sufficient to show that it will be able to prove its claim at trial.

The principal fact upon which the plaintiff opposes summary judgment is the claim that the defendants purchased devices to aid in circumventing DIRECTV's security. However the plaintiff presents only unverified e-mails.

Rule 56(e) of the Federal Rules of Civil Procedure provides,

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit

affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Here there is no affidavit accompanying the proffered e-mails, and the e-mails themselves are not sworn to or certified. The e-mails do not rise to the level of evidentiary quality, and there is no explanation as to why.² Thus the e-mails alone may not be used to withstand summary judgment, and there is nothing else linking the defendants to any causes of action claimed by the plaintiff.

However, by way of a supplemental memorandum, the defendant Partyka has submitted a copy of his deposition in which he admits that the e-mails accurately reflect his credit card, address and e-mail address. He also admits that he never contested a charge to his charge card in the amount reflected in the e-mails was

² On June 23, 2003, at a hearing on Directv, Inc.v. Bill Collins, Robbie Free, David Hurst, Derrick Hodge, Elijah Cromedy, Gail Ferguson, Steve Franks, Shirley W. Nichols, Richard Comedy, Jack Goynes, C. A. No. 2:02-3041-18, the plaintiff conceded that an unverified receipt or e-mail was insufficient to withstand summary judgment with regard to Shirley W. Nichols. Still they persist in presenting such unverified evidence in opposition to summary judgment without explanation.

charged for the electronic devices. He also admits that he continues to possess equipment for receiving DIRECTV signals. (Partyka Deposition pp. 15-23). This is clearly sufficient circumstantial evidence to place his denials in controversy.

Likewise a supplemental memorandum was presented on behalf of Defendant Harnatkiewicz, attached to that memorandum is the defendant's deposition in which he takes the Fifth Amendment with regard to virtually every question, with the exception of those to which his answer was that he did not recall.

The assertion of Fifth Amendment privilege to avoid answering substantive questions in a civil proceeding is not without consequences. ePlus Technology, Inc. v. Aboud, 313 F.3d 166 (4th Cir. 2002). A fact-finder is entitled to draw adverse inferences from a defendant's invocation of the privilege against self incrimination in a civil case. Baxter v. Palmigiano, 425 U.S. 308, 319, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976) ("[S]ilence in the face of accusation is a relevant fact not barred from evidence by the Due Process Clause."). On this evidence, the jury could reasonably find for the plaintiff, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986), and summary judgment is unwarranted.

Accordingly, for the reasons stated above, finding that there exist genuine issues of material fact, the defendants are not entitled to judgment as a matter of law, and it is

recommended that this court enter an Order denying their motions for summary judgement.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert S. Carr". The signature is written in a cursive, somewhat stylized font.

Robert S. Carr
United States Magistrate Judge

Charleston, South Carolina

July 22, 2003