

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

**DIRECTV, INC.**  
**Plaintiff**

vs.

**[REDACTED], et al,**  
**Defendants**

**CIVIL ACTION NO. [REDACTED]**

**DEFENDANT [REDACTED]'S MOTION FOR SUMMARY JUDGMENT**

**BRIEF IN SUPPORT OF MOTION**

1. Defendant [REDACTED] moves for judgment on Plaintiff's claims pursuant to Fed. R. Civ. P. 56, and in support thereof would show as follows:

**1 – MOTION FOR SUMMARY JUDGMENT**

2. Defendant is entitled to judgment on Plaintiff's claims for relief under 47 U.S.C. §§ 605(e)(3)(C), and all subparts thereof, in that the summary judgment evidence demonstrates that plaintiff is not an "aggrieved person" as defined by 47 U.S.C. § 605(d)(6). In particular, the summary judgment evidence establishes that Defendant lacks the reception equipment, computer software and specialized knowledge necessary to interfere with Plaintiff's proprietary rights in its satellite programming by intercepting such communications in violation of law.

3. Defendant is further entitled to judgment on Plaintiff's claims for damages under 18 U.S.C. § 2520 in that the summary judgment evidence demonstrates that plaintiff is not a person whose wire, oral, or electronic communications have been intercepted, disclosed, or intentionally used in violation of 18 U.S.C. §§ 2511, 2512, or other provision of Title 18 U.S.C. Chapter 119. In particular, the

summary judgment evidence demonstrates that Defendant lacks the reception equipment, computer software and specialized knowledge necessary to intercept, disclose or intentionally use Plaintiff's satellite programming signals in violation of such statutes.

4. Pleading further, and without waiver of the foregoing, Defendant is entitled to judgment on Plaintiff's claims for damages arising from alleged violations of 18 U.S.C. § 2512. Section 2512 provides solely for criminal penalties and does not give rise to any civil cause of action in favor of Plaintiff.

5. Pleading further, and without waiver of the foregoing, Defendant is entitled to judgment on Plaintiff's claims for damages arising from alleged violations of 18 U.S.C. § 2512 in that the summary judgment evidence demonstrates that no factual basis exists to support Plaintiff's claims that the devices identified in paragraph 24 of its Original Complaint are "primarily designed to gain unauthorized access to its satellite signals."

6. Defendant is further entitled to judgment on Plaintiff's claims for damages by reason of conversion in that the summary judgment evidence demonstrates that plaintiff's property has not been wrongfully appropriated by Defendant. In particular, the summary judgment evidence establishes that Defendant lacks the reception equipment, computer software and specialized knowledge necessary to wrongfully appropriate Plaintiff's satellite programming signals.

7. Defendant is further entitled to judgment on Plaintiff's claims for damages under Tex. Civ. Prac. & Rem. Code Chapter 123 in that the summary judgment evidence demonstrates that Defendant lacks the reception equipment, computer software and specialized knowledge necessary to intercept, attempted to intercept, or employ or obtain another to intercept or attempt to intercept Plaintiff

satellite programming communications.

8. Defendant is further entitled to judgment on Plaintiff's claims for injunctive relief in that the summary judgment evidence demonstrates that Defendant has not unlawfully intercepted Plaintiff's satellite programming signals, lacks the equipment and software necessary to intercept such signals, and lacks the specialized knowledge required to intercept such signals. As such, Plaintiff has not suffered any past financial loss or damage as a result of any actions by Defendant, and further cannot demonstrate a threat of future losses or damages.

9. This Motion is based on Fed. R. Civ. P. 56; on the attached affidavit of [REDACTED]; on the attached party admissions and statements by Plaintiff; and on the arguments and authorities set forth in the following Brief in Support of Motion.

## 2 – BRIEF IN SUPPORT OF MOTION

*“They can go down to Radio Shack and legitimately purchase these devices.”*  
Robert Mercer, DirecTV Spokesman, Corpus Christi Caller-Times, August 4, 2003.<sup>1</sup>

## A – SUMMARY OF THE ARGUMENT

10. Defendant is one of more than eight thousand persons nationwide who have been sued in federal district courts as a result of Plaintiff's management and security lapses. This particular civil action has been instituted on grounds that Plaintiff has allegedly obtained records showing that Defendant was shipped three ISO-7816-compliant “smart card” programming devices. Complaint at Paragraph 4. Plaintiff does not appear to have performed any other investigation prior to filing

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<sup>1</sup> See, Exhibit 1, Page 2.

this civil action, as the remainder of their allegations are based on “information and belief.”

11. The basis for Defendant’s Motion is very straightforward. She does not possess the devices as alleged by Plaintiff. She does not possess a receiver, access card, or antenna required to intercept Plaintiff’s satellite signals. She does not possess the additional software needed to program the access card to circumvent Plaintiff’s encryption. She does not possess the specialized knowledge necessary to program the access card if she did have this equipment.

12. Finally, assuming for purposes of this motion that Plaintiff’s allegations regarding receipt of the IS0-7816 devices are correct,<sup>2</sup> Defendant would show that there is no basis for Plaintiff’s assertion that these devices are “primarily designed to gain unauthorized access to [Plaintiff’s] communication signals.”

#### **B – SUMMARY JUDGMENT STANDARD**

13. The purpose of summary judgment procedure is to pierce the pleadings in an effort to assess whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). That is, the summary judgement procedure is designed to isolate and dispose of factually unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). To be entitled to summary judgement, the movant must either: (1) prove there is no genuine issue about any material fact and that it is entitled to judgment as a matter of law; or (2) show that there is an absence of evidence to support the non-moving party's case. Fed. R. Civ. P. R. 56(c); *See also, Celotex*, 477 U.S. at 325.

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<sup>2</sup> Defendant has denied receipt of the devices in her answer. Paragraph 2 of her affidavit further shows that the address cited as her residence is actually her employer’s business address, and that any mail or deliveries addressed to her at that address go through a central mail room.

14. Although the Court must view the evidence and inferences in the light most favorable to the non-movant, a non-moving plaintiff cannot establish a genuine issue of material fact by resting on the mere allegations in a complaint or unsubstantiated assertions. *Reese v. Anderson*, 926 F.2d 494, 498 (5th Cir. 1991). Instead, the non-movant must "identify specific evidence in the record and articulate the 'precise manner' in which the evidence support[s] [his] claim." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir.), *cert. den'd*, *Forsyth v. Vines*, 513 U.S. 871 (1994). As noted in *Anderson v. Liberty Lobby, Inc.*, "[t]he 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." 477 U.S. 242, 252 (1986).

#### C – THE SUMMARY JUDGMENT EVIDENCE

15. As noted above, paragraph 24 of Plaintiff's Complaint alleges that Defendant received three ISO-7816 programmers. These devices are not themselves capable of illegally intercepting Plaintiff's satellite programming signals. Review of the Complaint shows that the following additional items are required:

A satellite "dish" antenna, receiver and connecting cables. Complaint at paragraph 53.

An "access card." Complaint at paragraphs 3 – 5.

"SU2 Code." Complaint at paragraph 24.<sup>3</sup>

Unspecified "certain software permitting illegal programming." Complaint at paragraph 24.

It is obvious that the person in possession of the above materials must also possess the specialized knowledge necessary to actually use the components as a system.

16. With the preceding as a template, the affidavit of [REDACTED] demonstrates the following:

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<sup>3</sup> While the Complaint alleges that certain other Defendants purchased the "SU2" code, no such allegations are made with respect to [REDACTED].

She does not possess an ISO-7816 “pirate access device.” Affidavit at paragraph 3

She does not possess a DirecTV receiver or other equipment. Affidavit at paragraph 4.

She does not possess a DirecTV access card. Affidavit at paragraph 4.

She does not possess any software with which to program a DirecTV access card. Affidavit at paragraph 5.

She does not know how to program a DirecTV access card. Affidavit at paragraph 5.

She does not know any of the other defendants and has not acted in concert with them. Affidavit at paragraph 6.

Without the necessary equipment, software and specialized knowledge it is impossible for Defendant to have illegally accessed Plaintiff’s satellite programming communications. The burden of bringing forth credible evidence on each of these matters now rests with Plaintiff. *Anderson v. Liberty Lobby, Inc., supra.*

17. Finally, Defendant would show that Plaintiff’s assertion that the devices identified in paragraph 24 of Plaintiff’s Complaint is not factually justified. Affidavit at paragraph 3, Exhibit A, Page 3. Further, Exhibit 1 to this Motion demonstrates that, notwithstanding the allegations in Plaintiff’s Complaint to the contrary, Plaintiff has admitted that “[Defendant] can go down to Radio Shack and legitimately purchase these devices.”

**D – DISCUSSION**

**COUNT I – 47 U.S.C. § 605(e)(3)(C)**

18. Count I of Plaintiff’s Complaint contends that damages may be awarded pursuant to 47 U.S.C. § 605(e)(3)(C).<sup>4</sup> Complaint at paragraphs 30 – 35. To recover under § 605(e)(3)(C), however, Plaintiff must first demonstrate that it is a “person aggrieved” as defined by 47 U.S.C. § 605(d)(6):

“[T]he term “any person aggrieved” shall include any person with proprietary rights *in the intercepted communication* by wire or radio, including wholesale or retail distributors of satellite cable programming, and, in the case of a violation of paragraph (4) of subsection (e) of this section, shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.”

[Emphasis supplied.]

19. The statute clearly requires that Plaintiff demonstrate the interception of a communication to be entitled to relief. As discussed in the preceding subsection C of this brief, the summary judgment

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<sup>4</sup> “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, and for each violation of paragraph (4) of this subsection involved in the action an aggrieved party may recover statutory damages in a sum not less than \$10,000, or more than \$100,000, as the court considers just.

evidence establishes that Defendant could not have illegally intercepted Plaintiff's satellite programming signals due to the lack of the required equipment, software and specialized knowledge. Plaintiff therefore cannot be a "person aggrieved" under 47 U.S.C. § 605 and is not entitled to relief under the statute.

**COUNT 2 – 18 U.S.C. § 2511**

20. Analysis of Plaintiff's claims under 18 U.S.C. § 2511 is essentially the same as for the claims in Count 1. The civil remedies for violations of § 2511 appear at 18 U.S.C. § 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."*

[Emphasis supplied.]

21. Again, Plaintiff's entitlement to relief requires a showing that its electronic communications have been "intercepted, disclosed, or intentionally used" in an illegal manner. The summary judgment evidence establishes that such conduct could not have occurred.

**COUNT 3 – 18 U.S.C. § 2512**

22. Analysis of Plaintiff's claims under 18 U.S.C. § 2512 is, in the first instance, precisely the same as for the claims in Count 2. In addition, Defendant would also show that: (1) no private cause of action exists in favor of Plaintiff by virtue of § 2512; and, (2) that the summary judgment evidence demonstrates that no factual basis exists to support Plaintiff's claims that the devices identified in Paragraph 24 of its complaint are "primarily designed to gain unauthorized access to its satellite communications signals."

23. As to the issue of private causes of action under 18 U.S.C. § 2512, Defendant is aware that the Court has denied motions asserting this defense in other pending cases and may not wish to reconsider the matter here. Defendant would therefore incorporate by reference the language contained in Section III of the Memorandum and Opinion attached as Exhibit 2.

24. As to the issue of the devices in question being primarily designed for illegal purposes, paragraph 3 and Exhibit A, Pages to Defendant's affidavit demonstrate the many uses for ISO-7816 programmers, including programming "smart cards" for security, access, accounting, credit card, cash-less telephone, toll road and health care record application. Notwithstanding Plaintiff's conclusory allegations, satellite television cannot even be shown to be use a majority of the smart

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cards produced in recent years. *See*, <http://www.sdlogic.com/resources.asp>.<sup>5</sup> If Plaintiff's industry combined does not use a majority of the smart card devices produced, it seems illogical to claim that smart card programmer could be said to be designed "primarily" for the purpose of stealing satellite signals.

25. More importantly, however, Plaintiff's admissions as reported in the press demonstrates the true motivation behind their claims. Plaintiff's spokesman Robert Mercer has stated, "[H]ow innocent is someone who goes to a website that is clearly identified as a pirate website [to purchase equipment]." [REDACTED] affidavit, Exhibit A, Page 4, Paragraph 1. More recently however,

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<sup>5</sup> The following statistics for smart card use are provided at the URL:

Smart Card (non-memory only) Applications (in millions of units worldwide)							
	1999	2000	2001E	2002E	2003E	2004E	CAGR 1999- 2004E
Wireless Communication	235.3	317.0	417.1	519.8	649.8	807.8	28.0%
Financial Cards	113.8	175.9	238.5	324.0	395.5	459.3	32.2%
Health Cards	28.7	29.4	26.8	33.5	65.6	82.6	23.6%
Pay TV	17.5	21.5	26.6	35.1	43.9	55.3	25.9%
Transport	0.3	0.6	1.7	2.5	3.9	6.2	81.1%
ID Cards	14.1	24.5	34.7	57.9	83.0	95.7	46.7%
Network Security	0.7	4.6	15.6	48.4	102.2	169.4	196.0%
Other	21.3	24.2	30.3	35.9	53.5	82.3	31.0%
Total Units (millions)	431.7	597.7	791.3	1,057.1	1,397.4	1,758.6	32.4%
Source: Gartner Dataquest (June 21, 2000)							

Mercer has candidly admitted that consumers can “go down to Radio Shack and legitimately purchase these devices.” Corpus Christi Caller-Times, August 4, 2003 [attached as Exhibit 1, Page 2].

26. It is clear from these wholly irreconcilable statements that Plaintiff cannot credibly argue that an ISO-7816 programmer is, *per se*, primarily designed for illegal uses. Plaintiff would instead have the Court believe that the *source* of the device is relevant when determining whether it is a “pirate access device.” Stated differently, Mr. Mercer would apparently have no problem with the purchase of a programmer at Radio Shack, but would claim that the device is illegal when it is sold at “DSSbadboys.com.” This position is again defies logic since the actual devices would be indistinguishable. Section 2512 is addressed to the physical characteristics of the device, not the motivation of the buyer or the seller.

**COUNT 4 – 47 U.S.C. § 605(e)(4)**

27. The basis for Plaintiff’s claims under Count 4 cannot materially be distinguished from its claims under Count 1, and the discussion from Count 1 is incorporated here in by reference. Again, the summary judgment evidence establishes that Plaintiff is not a “person aggrieved” entitled to relief under § 605.

**COUNT 5 – CIVIL CONVERSION  
COUNT 6 – TEX. CIV. PRAC. & REM. CODE CHAPTER 123**

28. Plaintiff’s state law claims of civil conversion and unlawful interception of communications also fail for the same reason as Plaintiff’s federal claims. The summary judgment evidence demonstrates that Defendant lacks the equipment or ability to intercept the satellite programming at issue, or to have another person intercept it on her behalf. She must therefore also lack the ability

to convert Plaintiff's programming to her own use. The conclusory allegations in Plaintiff's Complaint are insufficient to raise a material issue of fact as to these claims.

#### **E – SUMMARY**

29. DirecTV's oft-repeated mismanagement of security issues has led Forbes Magazine to dub the company a corporate "fixer-upper." *Id.*, Stealing the Show, May 29, 2003 [attached as Exhibit 3, Page 2]. It is clear that Plaintiff is suffering significant revenue losses as a result of its security and management decisions. Defendant does not contend that these shortcomings would in any way justify the theft of Plaintiff's programming. Conversely, however, Plaintiff's inability to secure its systems in no way justifies the filing of a federal lawsuit based merely on a third party's unverified shipping records of a device that has not been shown to be illegal.

30. The dearth of evidence supporting Plaintiff's case begs the question whether this suit and others like it genuinely seek justice, or whether they are a cynical attempt to use the federal courts as a salvage operation. Defendant asks that this litigation be summarily dismissed for the reasons set forth above.

#### **3 – PRAYER FOR RELIEF**

31. Wherefore, premises considered, Defendant REDACTED prays that upon consideration of this Motion the Court enter its judgment that Plaintiff take nothing by its claims, that Defendant be discharged without liability to Plaintiff, and that Defendant receive such other and further relief to which she may be entitled.

Respectfully submitted:

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Daniel M. "Matt" Burns  
State Bar No. 03443900

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the preceding instrument was served on August 5, 2003 via U.S. Mail and/or facsimile:

[SERVICE LIST REDACTED]

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Daniel M. "Matt" Burns

Attachments:

Affidavit of [REDACTED] - 2 pages  
Exhibit A to Affidavit - 4 pages [ [ <http://www.securityfocus.com/news/6402>

Exhibit 1 - "DirecTV Sues Area Residents," Corpus Christi Caller-Times, August 4, 2003 - 2 pages.

[http://www.caller.com/ccct/local\\_news/article/0,1641,CCCT\\_811\\_2157521,00.html](http://www.caller.com/ccct/local_news/article/0,1641,CCCT_811_2157521,00.html)

Exhibit 2 - Memorandum Opinion, Cause No. 3:03ev355, *DirecTV vs. Amato*, U.S. District Court, Eastern District of Virginia, Richmond Division - 7 pages.

Exhibit 3 - "Stealing The Show," Forbes.com, May 29, 2003 - 2 pages. [http://forbes.com/2003/05/29/cz\\_dp\\_0529directv.html](http://forbes.com/2003/05/29/cz_dp_0529directv.html)

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**DIRECT TV, INC.  
Plaintiff**

**vs.**

**[REDACTED], et al,  
Defendants**

**CIVIL ACTION NO. A-03-CA-XXXXXX**

**AFFIDAVIT OF [REDACTED]**

Before me, the undersigned official, appeared [REDACTED], known to me to be the person whose signature appears below, and having first been sworn upon her oath, stated as follows:

1. My name is [REDACTED]; I am over the age of 18; I have never been convicted of a felony offense; and I am competent to make this affidavit. I have personal knowledge of the facts set forth herein and they are each true and correct.
2. I do not reside at \_\_\_\_\_, Texas, as alleged in Plaintiff's Complaint. This address is my employer's office address. Any mail or deliveries addressed to me must come through a central mail room and are not delivered directly to me.
3. I do not possess an ISO-7816 programming device, referred to as a "pirate access device" in Plaintiff's complaint. I have a bachelor's degree in Computer Science from the Oklahoma State University and am generally familiar with computer and electronic data processing devices. An ISO-7816 programmer has potentially millions of security, access, accounting, credit card, cash-less telephone, toll road, health care records and other applications. Such devices can be purchased from any number of retailers on the internet. The article attached to this affidavit as Exhibit A (<http://www.securityfocus.com/news/6402>) summarizes the irresponsible manner in which Direct TV summarily claims that such devices are used "primarily" for illegal purposes.
4. I do not possess any Direct TV equipment or other equipment suitable for receiving Direct TV signals. In particular, I do not possess a Direct TV receiver or access card. I have never subscribed to Direct TV's services.

5. I do not possess any software with which to program a Direct TV access card. While I have general knowledge of computer programming and have specific expertise in certain programming languages and applications, I do not know how to program a Direct TV access card to receive Direct TV's signals.
  
6. I do not know any of the other defendants in this matter. I have never met any of the other defendants in this matter, either personally or professionally. I have never spoken with any of the other defendants in this matter and have no knowledge of their actions. I have never participated with any person to distribute or sell equipment capable of intercepting Direct TV programming, and have not done so myself.

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Sworn and subscribed before me on the 30<sup>th</sup> day of July, 2003, to certify which witness my hand and seal of office.

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Notary Public in and for the State of Texas