

FILED

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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DIRECTV, INC., a California corporation,

Plaintiff,

vs.

JEFF THACKER, HAROLD HOOVER, PETER SMITH, SUSAN TRIPP, and BENNETT LEVE
Defendant.

Case No.: 06-03CV239ORL28AABA
TAMPA, FLORIDA

**DEFENDANT BENNETT LEVE
MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS**

TO: THE HONORABLE JOHN ANTOON
United States District Court, Middle District of Florida

The Defendant, Bennett Leve ("Defendant"), by and through his undersigned counsel, submits this Memorandum of Law in Support of his Motion to Dismiss Count III of Plaintiff's, DirecTV's ("Plaintiff's") Complaint and states:

STATEMENT OF THE CASE

Quite simply, the issue presented to this Court for review is whether 18 U.S.C. § 2520 provides a private right of action under alleged violations of 18 U.S.C. §2512. Plaintiff filed an action against Defendant for alleged violations of common law and numerous federal statutes. Plaintiff generally alleges defendant purchased an allegedly illegal device, and either intercepted or assisted others in illegally intercepting plaintiff's satellite transmissions. Plaintiff bases its entire complaint on a suspected purchase of a device that, although has never been ruled illegal¹,

¹ Defense counsel cannot find any statute, case law, or any example of any governmental entity ruling the alleged devices *illegal per se*.

may be used to intercept a satellite television signal by an unscrupulous individual. Plaintiff's third cause of action requests relief based on alleged violations of 18 U.S.C. §2512(1)(b), a subsection of the Electronic Communications Privacy Act. Defendant now moves this Court to dismiss (pursuant with Fed. R. Civ. P. 12(b)(6)) Plaintiff's third cause of action relating to private causes of action under 18 U.S.C. §2512.

LAW AND ARGUMENT

Although Title 18 of the United States Code is generally considered the "criminal code," the portion known as the Electronic Communications Privacy Act permits limited civil action based on proved violations of the Act's express provisions. However, as is set forth in more detail below, the Act only authorizes a private cause of action for the recovery of damages in limited situations.

I. A PRIVATE CAUSE OF ACTION UNDER 18 U.S.C.A. §2512 DOES NOT EXIST, THUS REQUIRING THIS COURT TO DISMISS PLAINTIFF'S THIRD CAUSE OF ACTION.

The relevant portion of 18 U.S.C.A. §2512 (1) titled, **Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited**, which plaintiff asserts in its third claim states:

- (1) Except as otherwise specifically provided in this chapter, any person who intentionally --
- (b) **manufactures, assembles, possesses, or sells** any electronic, mechanical or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communication, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce;

shall be fined under this title or imprisoned not more than five

years, or both. [Emphasis added]

Nowhere in 18 U.S.C.A. § 2512 is there reference to, or mention of, “damages” or “private causes of action”—it is a criminal statute. 18 U.S.C.A. § 2520, however, does allow a civil right of action for some violations of the Act:

(1) 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 added]

18 U.S.C. § 2512(a). Thus, the Electronic Communications Privacy Act provides a private cause of action when a party’s electronic communication is intercepted, disclosed, or intentionally used, but nowhere is there a private cause of action for mere possession of a devise.

Although the Eleventh Circuit has not directly addressed this issue (is there a private cause of action under 18 U.S.C. § 2520 for violations of 18 U.S.C. § 2512), guidance can be found from other circuits. The Fourth Circuit clearly prohibits plaintiff from asserting a civil cause of action against a defendant for alleged violations of 18 U.S.C.A. § 2512. *See generally Flowers v. Tandy Corp.* 773 F.2d 585 (4th Cir. 1985). In Flowers, the Fourth Circuit Court of Appeals addressed this issue in an appeal from the South Carolina District. Id. The Flowers’ plaintiff alleged that civil recovery, as set forth in 18 U.S.C.A. §2520, applied to violations of 18 U.S.C.A. §2512. Judge Matthew Perry agreed with the Flowers plaintiff and the Appellate Court reversed, stating, “At the outset we hold that the district court erred in permitting the jury to consider the criminal statute, 18 U.S.C. §2512 as a basis for imposing civil liability.” Id. at 588. In its analysis, the Court stated:

Looking first to the language of the statute, we find no merit in appellees’ assertion that §2520 expressly provides a

private cause of action for violations of the criminal proscriptions of §2512. Though §2520 provides an action for any person whose communication is “intercepted, disclosed or used *in violation of this chapter*,” (emphasis added), the language defining the class of persons liable is not comparably broad. The statute expressly limits those against whom the private action lies to the person who “intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications.” This language tracks very closely the criminal offenses set out in §2511, whereas the criminal offenses set out in §2512 are defined in such terms as “manufacture,” “assemble,” “possess,” and “sell.” *Id.*

The Flowers Court also rejected Appellants’ pleas to imply the presence of a private cause of action under the provisions of §2512, stating

It is of course true that “provision of a criminal penalty does not necessarily preclude implication of a private cause of action for damages,” . . . nevertheless, implied causes of action are disfavored and should be found only where a statute clearly indicates that the plaintiff is one of a class for whose benefit the statute was enacted and there is some indication that Congress intended such a cause of action to lie. . . . Congressional intent may be gleaned from the language of the statute, the legislative history, and the purpose and focus of the statute. (Citations only omitted)

We believe that neither criterion is satisfied in the statute in issue here. Though any criminal statute is in part enacted for the benefit of the victims of the crime, . . . §2512 appears to have been designed for benefitting the public as a whole by removing such devices from the market. Section 2511, which makes criminal the actual practice of wiretapping, is more properly aimed at protecting the particular victim, and indeed, Congress recognized that purpose by expressly providing in §2520 a private cause of action for victims of acts made criminal in §2511. (Citations only omitted). *Id.* at 589.

II. THE ELECTRONIC COMMUNICATIONS PRIVACY ACT DOES NOT SUPERCEDE THE FLOWERS HOLDING.

This Court should note portions of the Flowers case were superceded by amendments to 8 U.S.C. §2520. See Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir 2000). However, that

amendment only dealt with the issue of whether or not a civil action could be maintained against one for procuring allegedly unlawful actions. The Fourth Circuit still follows the portion of Flowers which prohibits a private cause of action under § 2512. The rationale clearly follows public policy and common sense. In order to suffer damage, (an integral component of any lawsuit), such damage only comes from unlawful interception. 18 U.S.C.A. § 2511 covers unlawful interception and § 2520 provides a means to recover for damages incurred through one's illegal interception.

18 U.S.C.A. § 2512 addresses those who manufacture, assemble, possess, or sell unlawful devices. These actions do not create a direct economic damage to plaintiffs. Only when such devices are illegally used is there economic damage, which §2511 satisfactorily addresses. Under no circumstances may plaintiff gain a windfall by allowing double recovery for the actual theft and secondly for possession. Allowing a private cause of action under §2512 also opens the door for numerous plaintiffs to recover against a single defendant for possession of the same device which results in double, triple, etc. payment. Accordingly, the logic behind Flowers clearly follows public policy and common sense as the Court stated, “§2512 appears to have been designed for benefiting the public as a whole by removing such devices from the market. Section 2511, which makes criminal the actual practice of wiretapping, is more properly aimed at protecting the particular victim” Id. at 589.

Nothing in the language of the amendments added damages for violations of 18 U.S.C. § 2512, nor do the changes to § 2520 add damages to the provisions of § 2512. Furthermore, in 1998, since the enactment of the amendments, at least one Federal Court held;

claims must be for conduct which falls within the private right of action in § 2520. Section 2520 provides that any person

whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of the statute may recover in a civil action from the person or entity which engaged in that violation such relief as may be appropriate. 18 U.S.C. § 2520. Therefore, even if AGES showed that there is a material question of fact as to whether Wackenhut [Defendant] possessed equipment which it knew or reasonably should have known was designed primarily for surreptitious acquisition of communications under § 2512, AGES [Plaintiff] must also create a question of fact as to whether communications were intercepted, disclosed, or intentionally used. *See Flowers v. Tandy Corp.*, 773 F.2d 585 (4th Cir. 1985) (holding that the express language of § 2520 does not provide a cause of action for one who engages in conduct which is a violation of § 2512, but which is not violative of § 2511). **In other words, a plaintiff does not have a private right of action against a defendant based on evidence that the defendant possessed surveillance equipment within the meaning of the statute.** [Emphasis added]

The Ages Group, L.P., v. Raytheon Aircraft Co., Inc., et al., 22 F. Supp 2d 1310 (M. D. Ala. 1998).

The Ages case clearly demonstrates that long after the amendments to the act, the courts still apply and follow Flowers. Accordingly, Ages shows that jurisdictions following the Flowers line of reasoning still find the holding by the Fourth Circuit valid despite any amendments to the Act. Id.

There are, however, two cases that have “apparently” disagreed with the Flowers court and the Ages Court. In DirecTV, Inc. v. EQ Stuff, Inc., 207 F. Supp 1077 (C.D.CA. 2002). In this matter, DirecTV sued the Defendant for apparently manufacturing and/or selling and marketing illegal pirating devices. The California District Court followed Oceanic Cablevision, Inc. v. M.D. Electronics, 771 F. Supp. 1019 (D. Neb. 1991) and agreed that the sale of “cloned” satellite television descramblers was prohibited under § 2512. Before discussing the Oceanic matter, it is important to note that the EQ Stuff court seemed

to differentiate Flowers based upon procedural issues. In Flowers, the Defendant brought their action to do away with the § 2512 claim(s) under an appeal of a directed verdict. In EQ Stuff, the Defendant brought its claim in a Motion to Dismiss (the Ages' Defendant brought this issue under summary judgment). The EQ Stuff Court, in siding with Oceanic, states that it finds that, "the procedural posture and the facts of Oceanic analogous to the instant case." Thus, to properly gauge the EQ Stuff holding, one must analyze the Oceanic case, both procedurally and factually.

In Oceanic, the Defendant moved to dismiss the Plaintiff's § 2512 claim(s) under Federal Rules of Procedure 12(b)(6) (the same rule being invoked in this Motion and Memorandum). Simply stated, in Oceanic, a cable television provider brought suit against defendants who had allegedly distributed descrambling devices to provider's customers to enable customers to obtain premium channels free of charge from provider. *See Oceanic Cablevision, Inc. v. M.D. Electronics*, 771 F. Supp. at 1022. The Defendant brought a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss Plaintiff's allegation that the Defendant was in violation of 18 U.S.C. § 2512. The Defendant's Motion was predicated on the argument that § 2520 provides no private right of action to cable companies, such as Plaintiff, against parties engaged in the **sale of descrambling equipment**.

The Oceanic court properly set forth that the 1986 amendments to § 2512 extended the statute's scope to prohibit the selling of devices capable of being used in the interception of electronic communications, an allegation that is not present in the instant matter. *Id.* at 1028. The Oceanic court properly concluded that the sale of such devices was illegal and was in violation of § 2512. But, what the Oceanic court failed to discuss in its analysis was

why such wrongdoings were actionable by a private party. Thus, both the EQ Stuff case and the Oceanic case set out that a motion to dismiss is not proper when a private party is bringing a cause of action under § 2512 against a Defendant for selling unscrupulous devices, without explanation as to how either § 2512 or § 2520 provides such a private right of action.

It is the Defendant's position that both of the above referenced cases are not authoritative on the matter at hand. In this case, the Defendant is accused of possessing a pirate access device. *See* Plaintiff's Complaint at paragraph 19a. There is no accusation that the Defendant was selling such devices (procuring others), thus, from a factual standpoint, the cases are quite distinguishable. Furthermore, the 1986 amendments to 18 U.S.C. 2520 **eliminated** the procurement portion of the statute, so that now, "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."² 1986 Amendments. Pub.L. 99-508, § 103. Procurement is no longer a basis for civil liability under Chapter 18.

III. IN THE INSTANT CASE, PLAINTIFF FAILS TO STATE A CAUSE OF ACTION UNDER 18 U.S.C. § 2512.

In the instant case, the law, public policy, and common sense clearly prohibit plaintiff from maintaining a private cause of action against defendant based on suspected violations of 18 U.S.C.A. §2512. That option and right rests solely with the United States Attorney's

² 18 U.S.C. 2520, prior to the 1986 amendments stated, "[a]ny person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses or procures any other person to intercept, disclose, or use such communications."

Office, not DIRECTV, Inc.

In ruling on this Fed. R. Civ. P. 12(b)(6) motion, this Court must review the evidence in the light most favorable to the non-moving party. A complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Accordingly, for the purpose of this motion only, the Court may assume;

- 1) defendant manufactured, assembled, possessed, or sold devices;
- 2) the device(s) were unlawful; and
- 3) such actions violate §2512.

Assuming these facts, which goes well beyond the *most favorable light* standard, plaintiff may not recover on its 18 U.S.C. §2512 cause of action as a matter of law. 18 U.S.C. § 2520 provides a private right of action for violations of Chapter 18, United States Code, only when a person's wire, cable or electronic communication is unlawfully intercepted, unlawfully disclosed, or unlawfully intentionally used by a third party. 18 U.S.C. § 2512 makes it criminally illegal to manufacture, assemble, possess, or sell such devices. Thus, 18 U.S.C. § 2520 does not afford a private right of action for violations of 18 U.S.C. § 2512.

It is further important to note that the undersigned is well aware of this Court's policy of disfavorment with motions to dismiss. Yet, in this matter, the granting of such a motion will greatly assist the parties in the correct evaluation of the merits of this case, provide greater focus in discovery, and potentially lead to swift resolution of the issues. The Plaintiff has numerous other theories with which it may proceed, most notably under 18 U.S.C. § 2511 in concert with 18 U.S.C. § 2520. Thus, the dismissal of the § 2512 claims will not prejudice

the Plaintiff in going forward, will provide clarity to this litigation, will benefit the judicial economy of the case, and will greatly assist the parties in defining the scope and direction of discovery.

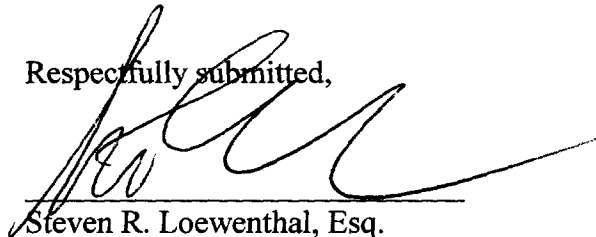
CONCLUSION

For the reasons set forth above, the Defendant is requesting this Court to dismiss Count III of the Plaintiff's Complaint for failing to state a cause of action under 18 U.S.C. § 2512.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent, via facsimile and U.S. Mail, to James A. Boatman, Jr., Esq., attorney for Plaintiff, 37 North Orange Avenue, Suite 200, Orlando Florida 33801, this 31st day of March, 2003.

Respectfully submitted,



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