

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

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MIDDLE DISTRICT OF FLORIDA  
ORLANDO, FLORIDA

DIRECTV, Inc., a California corporation,

Case No. 6:03-CV-239-ORL-28 DAB

Plaintiff,

v.

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

Defendants.

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**DIRECTV, INC.'S OPPOSITION TO  
BENNETT LEVE'S MOTION TO DISMISS  
COUNT III**

**I. INTRODUCTION**

Defendant BENNETT LEVE ("LEVE") has moved for dismissal of Count III of Plaintiff, DIRECTV's Complaint for failure to state a claim under Rule 12(b)(6). The Motion is based on the argument that no private cause of action exists under 18 U.S.C. § 2512. The following facts and law, however, establish that a private cause of action *does* exist under 18 U.S.C. §2512, and, therefore, LEVE's Motion to Dismiss should be denied.

**II. Case Background**

As alleged in its Complaint, DIRECTV is a direct satellite broadcast system delivering television and other programming to its subscribers. DIRECTV's satellite transmissions are encrypted (electronically scrambled) to prevent unauthorized and unpaid viewing of its programming. Its transmissions may be lawfully viewed only by its customers on subscription or pay-per-view basis.

In order to profit illegally from DIRECTV's broadcast system, various companies and individuals have engaged in the manufacture and sale of signal pirating devices designed to defeat DIRECTV's encryption security measures, allowing purchasers of these products to decrypt (unscramble) DIRECTV's signal and view broadcasts without paying the subscription or pay-per-view fees. The manufacture and sale of these devices and the purchase, possession and use of these devices violates federal law. See, the Federal Communications Act of 1934, as amended, 47 U.S.C. § 605; and the Electronic Communications Privacy Act ("Federal Wiretap Laws"), 18 U.S.C. §§ 2510-2521.

DIRECTV's pursuit of its civil remedies provided under federal law is focused at both the manufacturers of these signal pirating devices and their customers who purchase the devices. In most circumstances, an action is filed in federal court against companies or individuals discovered to be engaged in the business of selling signal pirating products. Under a civil writ of seizure the property, inventory and sales records of the defendant device dealers are seized. These records include customer records detailing the sale of devices, including the identities of the purchasers, products purchased, and shipping information. Action is then taken against the purchasers based in large part on these business records. The suit against Defendant Leve, herein, arose out of just such a process.

### **III. DISCUSSION**

#### **A. *A private cause of action does exist under 18 U.S.C. § 2512.***

Defendant contends that Count III of the Complaint must be dismissed because DIRECTV cannot bring a civil cause of action under the Wiretap Act for Defendant's possession of devices in violation of 18 U.S.C. §2512. On a motion to dismiss under

Rule 12(b)(6), the court must presume the truth of the factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party. *See, e.g., Ellen S. v. The Florida Board of Bar Examiners*, 859 F.Supp. 1489, 1492 (S.D. Fla. 1994). Dismissal under 12(b)(6) is appropriate only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *See, e.g. Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Here, because a civil cause of action is permitted by 18 U.S.C. § 2520, Defendant's motion should be denied.

18 U.S.C. § 2520 provides, in relevant part, that "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 . . . which engaged in that violation such relief as may be appropriate." The civil cause of action provided in § 2520 is not confined to violations of any particular provision of the Wiretap Act. On the contrary, the statute specifically refers to violations of "this chapter." Following a 1986 amendment to the Wiretap Act, Courts have recognized that the sale of illegally modified satellite television descramblers is a violation of the chapter, specifically § 2520. *See United States v. McNutt*, 908 F.2d 561 (10<sup>th</sup> Cir. 1990).

The only question, therefore, is whether a Plaintiff may bring a civil action against a user or possessor of devices under 18 U.S.C. §§ 2511 and 2512, or whether such individuals can only be pursued criminally. The only two courts to have considered this specific question after the 1986 amendments to the Wiretap Act answered in the affirmative, denying defendants' Rule 12(b)(6) motions to dismiss. *Oceanic Cablevision, Inc. v. M.D. Elec.*, 771 F. Supp. 1019 (D. Neb. 1991) and *DIRECTV, INC. v. EQ STUFF, Inc.*, 207 F.Supp, 1077 (C.D. CA 2002). Prior to the 1986 amendments, the court in

*Flowers v. Tandy Corp*, 773 F.2d 585, 588 (4<sup>th</sup> Cir. 1985) reached a different conclusion on the same question. Yet even the decision in *Flowers* supports the existence of a valid cause of action in this case.

Here, DIRECTV has alleged that the Defendant knowingly possessed a device, the design of which made it primarily useful for the purpose of the surreptitious interception of satellite communications. See Complaint ¶18. DIRECTV has also alleged, however, that the Defendant *used* this illegal devices to unlawful intercept satellite communications. See *id.* The absence of similar allegations in *Flowers* was the cause of the dismissal. See *Flowers* 773 F.2d at 589 ("the express language of § 2520 is therefore not susceptible to a construction which would provide a cause of action against one who manufactures or sells a device in violation of § 2512 but does not engage in conduct violative of § 2511"); *Ages Group*, 23 F. Supp.2d at 1315 ("even if Defendant possessed equipment which it knew or reasonably should have known was designed primarily for surreptitious acquisition of communications under § 2512, AGES must also create a question of fact as to whether communications were intercepted, disclosed, or intentionally used."). Thus, even under the reasoning in *Flowers* and *Ages Group*, DIRECTV can state a cause of action against the Defendant because DIRECTV has created a question of fact as to whether the devices possessed by the Defendant were also used for the purpose of intercepting satellite communications.

Because 18 U.S.C. § 2520 provides for a civil cause of action against any entity whose communications were intercepted by virtue of conduct that violates the Wiretap Act, and because DIRECTV has alleged that its communications were improperly

intercepted by the devices possessed and used by the Defendant, Defendant's Rule 12(b)(6) motion should be denied.

**IV. CONCLUSION**

For the foregoing reasons, Plaintiff, DIRECTV, respectfully requests that this Court deny Defendant, Leve's Motion to Dismiss.

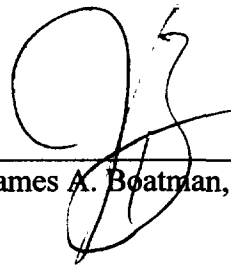


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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the above and foregoing has been furnished by Regular U.S. Mail this 9<sup>th</sup> day of April, 2003 to **Bennett Leve, c/o Steven R. Lowenthal, Esquire, 209 South Howard Avenue, Tampa, Florida 33609, Susan Tripp, Pro Se, 250 Grouper Court, Kissimmee, Florida 34759, and Harold Hoover, Pro Se, 2936 Midsummer Drive, Windermere, Florida 34786.**



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James A. Boatman, Jr., Esquire