

Docket No. 03-15313-B

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

DIRECTV, INC.,
a California corporation,
Plaintiff/Appellant

v.

MIKE TREWORGY,
Defendant/Appellee

APPEAL

**ON ORDER FROM
THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION
CASE NO. 2:03-CV-428-FTM-29SPC**

**AMICUS CURIAE BRIEF IN SUPPORT OF
APPELLEE MIKE TREWORGY REQUESTING
AFFIRMANCE**

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Amicus Curiae ELECTRONIC FRONTIER FOUNDATION, hereby
discloses the following pursuant to FRAP 26.1:

Judge

The Honorable John E. Steele, United States District Judge, United
States District Court, Middle District of Florida.

Attorneys

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Parties

Docket No. 03-15313-B

DIRECTV, Inc. v. TREWORGY

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT (CONT.)**

DIRECTV, Inc., a California corporation, *Plaintiff/Appellant*

Mike Treworgy, *Defendant/Appellee*

Entities related to Mike Treworgy

Amicus Curiae

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**STATEMENT OF AMICUS CURIAE'S IDENTITY, INTEREST
AND AUTHORITY TO FILE**

Electronic Frontier Foundation (EFF) is a nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. With over 10,000 members, EFF represents the interests of technology users in both court cases and the broader policy debates surrounding the application of law in the digital age. EFF opposes misguided legislation, initiates and defends court cases preserving individuals' rights, launches global public campaigns, introduces leading edge proposals and papers, hosts frequent educational events, engages the press regularly, and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world, www.eff.org.

EFF has a particular interest in this case because it presents important issues regarding the legality of certain new technologies and the potential liability for numerous American consumers, innovators, and researchers who use these technologies for legitimate purposes. EFF respectfully submits this brief to aid the Court in understanding the greater context of the underlying dispute between the parties and its potential impact on others similarly situated. All parties have consented to the filing of this brief.

STATEMENT OF THE ISSUES

The sole question presented in this case is whether private parties have a valid cause of action under 18 U.S.C. § 2520(a) against individuals who possess, but never use, devices subject to 18 U.S.C. § 2512(1)(b) of the

Electronic Communications Privacy Act (“ECPA”).

SUMMARY OF ARGUMENT

This is a case about the difference between possessing a device and actually using it. Several years ago, DirecTV began a nationwide campaign to “crack down” on satellite piracy among American consumers. It began its campaign by targeting equipment vendors who were touting “smart card” technology¹ to the public as a means for intercepting DirecTV’s satellite signal. As part of these “vendor” cases, DirecTV seized hundreds of thousands of invoices and records, including the names and addresses of numerous consumers who had purchased the smart card devices.

Now, having dispensed with the vendors, DirecTV has turned its attention to the consumers themselves, sending out over 150,000 demand letters and filing over 15,000 lawsuits in federal courts against individual defendants like Mike Treworgy.² The difference between these suits and the vendor suits, however, is that while there was direct evidence that the vendors marketed their devices for illegal purposes, here DirecTV lacks any proof that the people who bought the devices actually used them to steal DirecTV’s signal. Rather, in making its case against these individual

¹ A “smart card” is essentially a credit card with a computer chip on it. The chip can be used to store information such as one’s bank account balance, a security code for entering a private building, or, in the case of DirecTV’s satellite system, the codes for unlocking its programming so one can watch it on one’s television.

² See Kevin Poulsen, *Security Focus*, “DirecTV Dragnet Snares Innocent Techies,” July 17, 2003, available at <<http://securityfocus.com/news/6402>>.

defendants, DirecTV relies solely on the fact that defendants purchased the technology from particular vendors and therefore, at one point, possessed it.

Based on this paltry evidence, DirecTV's campaign counts on the fact that most targeted individuals will lack the resources to contest the claims, opting instead to settle for between \$3500 and \$7500. Thanks to this strategy, DirecTV's "anti-piracy" campaign is itself a profit-making venture for the company. The linchpin to its profitability is the ability to state a federal claim based solely on possession of the accused devices. This permits DirecTV to fire off hundreds of thousands of demand letters without having to lift a finger to develop individualized evidence of signal piracy.

Such an approach suffers from serious overbreadth. It sets aside the traditional standard of individual culpability in favor of a "guilt by purchase" theory. The innocent are swept up into DirecTV's dragnet along with the guilty and pressured into paying settlements for "signal piracy" that they have never committed. In the past year alone, over 60 individuals who purchased and possess the technology at issue for legal purposes have contacted EFF and the Center for Internet and Society at Stanford Law School ("CIS") to complain about DirecTV's accusations. These individuals have never used their devices to intercept or steal any DirecTV. Rather, they purchased these devices for legitimate uses, such as to secure their homes or computers, and merely chose the vendors they did because the vendors happened to have the lowest prices. Because the expense of retaining counsel to defend these cases frequently outstrips DirecTV's settlement

demands, these innocent individuals often have little practical recourse other than paying DirecTV.³

It is in these cases that the distinction between possession of technology and use of technology has become all-important. For those who are stealing DirecTV signal, DirecTV has causes of action available to it for appropriate relief under 47 U.S.C. § 605(a) and 18 U.S.C. § 2511(1)(a). However, for those who have never used the devices illegally – those who have never harmed DirecTV in any way – DirecTV’s attempt to prosecute them for simply possessing the technology under 18 U.S.C. § 2512(1)(b), and attempt to claim damages and relief under § 2520(a) is legally unfounded.

Such conduct defies not only the legal construction of §2520(a) but also the fair and equitable role of the Courts and the intention of Congress. First and foremost, this campaign against mere possessors of technology is unfair and inequitable because these individuals have not harmed DirecTV or any of its interests. Second, because it has not been harmed, DirecTV lacks standing to recover under §2520(a) for mere possession of these devices. Third, recognizing a right to initiate such actions without a demonstration of actual interception will subject defendants to duplicative liability by numerous untold plaintiffs, including DirecTV’s competitors and

³ ECPA does not provide for attorneys fees for prevailing defendants, leaving these innocent defendants with no way to recoup their legal costs, even should they succeed in demonstrating their innocence.

associates. Finally, to allow a private cause of action for mere possession imposes excessive penalties on those subject to DirecTV's unfocused crusade. This is certainly not what Congress had in mind when amending §2520(a). Amicus EFF respectfully requests that this Court affirm the District Court below and rule that §2520(a) is restricted solely to causes of action for actual interception, thereby restoring private prosecution under the ECPA to its proper scope – pursuing those who have actually harmed the class of plaintiffs the Act was designed to protect.

ARGUMENT

I. DIRECTV'S "MERE POSSESSION" CAMPAIGN THREATENS DOZENS OF INNOCENT DEVICE PURCHASERS

As noted above, dozens of individuals have contacted EFF and CIS as a result of letters, threats, and law suits by DirecTV. None of them have ever used their devices to harm DirecTV and all had legitimate, legal reasons to purchase them. For example, Clay Sullivan of Sardis, Mississippi and his mother bought a smart card "reader/writer" and several smart cards from one of the vendors to build a security box for a gate protecting their hunting lands from unauthorized use. Upon receiving a demand letter from DirecTV, Mr. Sullivan contacted DirecTV and explained his project, even offering to send in the schematics and photographs of his project so that DirecTV could verify that his project had nothing to do with intercepting its signal. DirecTV so far has refused to dismiss the Sullivans from its investigation and has indicated that it intends to file suit against them soon.

Another example is Anthony Patt of Tennessee. Mr. Patt applied for a license to start a security business and subsequently purchased several smart card devices for use in that business. However, he then had to take in his ailing brother and mother and was forced to put his business plans on hold. The devices were never used.

Mr. Scott Swenka of Gilbert, Arizona is the Chief of Computer Security and Lead Security Analyst for a non-profit health care provider. As part of his employment, he purchased devices to develop a smart card security system for desktops and terminals. This security system was developed to satisfy regulations for computer security under the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 201. He also helped his parents purchase a smart card device to secure their personal computer. Both Mr. Swenka and his parents have been sued by DirecTV for merely possessing these smart card devices, even though these devices were never used to intercept a single second of its satellite television programming.

And the list goes on. These are real people, none of who have ever intercepted DirecTV's signal or harmed DirecTV in any way; yet all of them have been threatened by DirecTV merely for possessing the devices at issue. Much the way that our judicial system rejects notions of "guilty until proven innocent" and "guilt by association", this "guilt by purchase" campaign must also be rejected. To allow a private cause of action under 2520(a) for mere possession means that each of these individuals will be held liable regardless

of the fact they have not caused anyone harm, let alone the specific harms contemplated under the ECPA. The statutory history clearly indicates that Congress intended that ECPA would not be utilized in such a sweeping manner. This Court should reject such an overbroad attempt to impose liability.

Moreover, allowing DirecTV to outlaw possession of smart card technology cripples innovation in this emerging field. New smart card devices are being researched, developed, and tested every day by people like Messrs. Sullivan, Patt, and Swenka. They are being used in a wide variety of businesses, from laundry mats (replacing coins and coin-collecting machines) to call-in centers (replacing punch cards and time sheets), coffee shops, and parking garages. These new uses benefit our society both economically and technologically. Yet such innovation cannot happen if mere possession of these devices is outlawed.

II. A CIVIL ACTION FOR MERE POSSESSION CANNOT EXIST UNDER 18 U.S.C. §2520(A) BECAUSE A WELL-PLEAD COMPLAINT WOULD STILL LACK SUFFICIENT ACTUAL INJURY TO GRANT PLAINTIFF STANDING

There also cannot be a private cause of action under 18 U.S.C. § 2520(a) for mere possession of an illegal device because of the standing requirement mandated by the Constitution. In order to have standing for judicial jurisdiction under Article III of the U.S. Constitution, a plaintiff must show a concrete and particularized “actual injury” caused by the defendant’s conduct and redressable by a decision favorable to plaintiff.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The injury must be “distinct and palpable,” and not “abstract,” “conjectural,” or “hypothetical.” *Allen v. Wright*, 468 U.S. 737, 751 (1984). It must also be more than a future possibility, *Lujan*, 504 U.S. at 560.

The plain language of 18 U.S.C. §2520(a) meets this Constitutional requirement, since it only allows “persons whose wire, oral, or electronic communication **is intercepted, disclosed, or intentionally used**” to seek “such **relief** as may be appropriate” from the person or entity that engaged in “**that** violation.” 18 U.S.C. § 2520(a) (emphasis added). Thus, in order to have standing to bring a private cause of action under §2520(a), one *must* show actual injury under §2511(1)(a) – in other words, that the defendants’ actual interception, disclosure, or intentional use caused plaintiff actual harm.

Here, it is undisputed that the mere possession of a device cannot inflict actual injury upon DirecTV.⁴ A device alone cannot intercept, disclose, or use a satellite signal. Moreover, the term “relief” in the ECPA

⁴ DirecTV has acknowledged in numerous depositions and court filings that in order to successfully intercept its satellite signal, a defendant needs to use the accused device in conjunction with special software, a satellite dish, a specially designed Integrated Receiver Decoder (IRD) and a current or former DirecTV access card. *See also DirecTV v. Amato*, 269 F.Supp.2d 688, 691 (E.D. Va. 2003) (“the *use* of an eavesdropping device, as outlawed by § 2511, creates a victim, thereby justifying a private cause of action, but the mere *possession* of such a device, as banned by § 2512, creates no individualized harm, and thus, no justification for private recovery.” (emphasis in original)).

statute refers to damages awarded for actual injury from the interception, disclosure, or intentional use of communication; without actual injury, there would be no “relief” for plaintiff to seek. Standing is not granted to hypothetical or future injuries. *Lujan, supra*; *Allen, supra*. Thus mere possession without actual injury is legally insufficient to meet the constitutional requirements of standing for a § 2520(a) cause of action.

In this appeal, the Court is presented with two alternative statutory constructions. Appellee argues that Section 2520(a) civil suits are limited to cases of actual interception; Appellant DirecTV argues that Section 2520(a) also allows suits for mere possession. Yet only Appellee’s construction squares with both the plain statutory language and Article III’s requirement of “actual injury.” DirecTV’s construction, on the other hand, would result in cases where the plaintiff could plead “mere possession” but still fail to satisfy Article III’s standing requirement. This second construction cannot be what Congress intended. *See Florida Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1326 (11th Cir. 2001) (holding statutes should be construed narrowly to avoid constitutional infirmities). Congress is presumed not to have intended absurd results in its lawmaking, *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1529 (11th Cir. 1996), and therefore could not have intended to create a cause of action that fails Constitutional standing requirements. Rather, the only logical conclusion is what the plain language and legislative history suggest: That 2520(a) only confers upon private parties a civil action for actual interception, disclosure, or use of their

electronic communications – the acts that cause the actual injury for which predicate standing would arise.

Two district courts have attempted to explore this issue, *DirectTV v. Perez*, 279 F.Supp.2d 962 (N.D.Ill. Aug. 27, 2003) and *DirectTV v. Miller*, No. 6:03-cv-1027-Orl-10KRS (M.D.Fla. Sept. 16 2003),⁵ each arriving at a different result and establishing conflicting standards for standing under 18 U.S.C. § 2520(a). The *Perez* court set a low threshold: A plaintiff who alleges that its communication has been intercepted has standing to seek civil recovery “from a violation of any of the subsections of Chapter 119 of Title 18” including mere possession. 279 F.Supp.2d at 964.⁶ However, in setting such a low standard, the *Perez* Court ignored any analysis of whether the plaintiff suffered actual Article III injury. The *Miller* Court critiques the decision in *Perez* for this omission, as it reasoned:

Private causes of action are designed to redress individualized harm, which a plaintiff like DirecTV suffers only when someone unlawfully intercepts its signals. A plaintiff has *standing* to sue, in other words, only when it has an actual, rather than hypothetical injury. What injury does DirecTV suffer when someone merely possesses a pirate access device? There is no injury at all. Indeed, there is no set of circumstances in which the simple possession of pirate access devices gives rise to any individualized harm to DirecTV. The *Perez* Court got it exactly backwards because a *standing* analysis under subsection 2512(1)(b) leads to the conclusion that DirecTV has no standing at all.

⁵ See Appendix A to this brief.

⁶ See also *DirectTV v. Gatsiolis*, 2003 WL 22111097 (N.D. Ill., Sept. 10, 2003) (Coar, J.) (following his own opinion in *Perez*).

Miller, Appendix A at 5-6. Without actual injury, DirecTV has suffered no actual harm, thus, it has no standing to sue.

The *Miller* Court went on to discuss the absurdity of granting standing to a party when there has been no interception, asking “Even if Plaintiff were permitted to proceed civilly for a violation of 2512, how could its actual damages ever be more than zero? And if zero damages is the theoretical upper limit to what it could recover, what would be the point in suing?” *Id.* at 6 n.2. Thus, actual injury must logically be an element of establishing standing for a §2520(a) cause of action.

III. IMPOSING LIABILITY FOR MERE POSSESSION OF A DEVICE WOULD EXPOSE DEFENDANTS TO AN AVALANCHE OF SUITS FROM NUMEROUS POTENTIAL PLAINTIFFS

In addition, the requirement of actual injury as an element of standing under §2520(a) also serves a prudential purpose – preventing defendants from being subject to burdensome litigation by multiple parties. If mere possession is sufficient to create standing for civil liability, it would be possible for multiple plaintiffs to pursue a lone defendant for possessing a device capable of intercepting their signals, even though the defendant never used the device to intercept any signals. For example, if DirecTV is successful in suing Defendant Treworgy for mere possession, there is nothing preventing the DISH Network – a competitor of DirecTV – from also filing suit against Treworgy for mere possession. After all, it too might have its satellite signals intercepted someday by the same device. Other

satellite and cable companies could soon follow as well. Such duplicative liability in the absence of any actual harm would be highly inequitable and cannot have been Congress' intent under 2520(a); thus, for prudential purposes, actual harm must also be required to limit the size of the potential plaintiff class.⁷

IV. CONGRESS CHOSE NOT TO EXTEND PENALTIES UNDER 18 U.S.C. §2520 TO MERE POSSESSION OF AN UNLAWFUL DEVICE BECAUSE OF CONCERNS ABOUT EXCESSIVE PENALTIES FOR MERE POSSESSORS

In determining whether a private cause of action exists for the mere possession of an unlawful device, some courts have supported the idea of civil liability for mere possession under 18 U.S.C. § 2512 because “granting this right of action decreases the burden on already overextended federal prosecutors to pursue criminal convictions under this statute.” *DIRECTV, Inc. v. Gatsiolis*, 2003 WL 22111097 at *2 (N.D.Ill., Sept. 10, 2003). This framework, however, fails to take into account Congress's intent to formulate a more balanced approach to Section 2520(a) that tempers the penalties available to a private plaintiff to prevent them from being excessive. This balanced approach was followed in *DIRECTV, Inc. v. Beecher*, 2003 WL 23094715 at *2 (S.D.Ind., Nov. 7, 2003), where the court found that “[t]he extensive body of law concerning implied and express private causes of action under federal statutes shows, however, that more

⁷ This is handled appropriately and analogously in the criminal context under the Fifth Amendment's Double Jeopardy protections.

thorough and effective enforcement of the law is not the only value that the law should be interpreted to promote.” The *Beecher* Court sought to restrain overzealous private plaintiffs, by limiting types of violations that triggered civil liability:

For a case of mere possession of an unlawful device, Congress might well have concluded that making such stringent penalties available to the private plaintiff would be excessive.... The interpretation of Section 2520(a) adopted by this court and others requiring proof that the defendant participated in actual interception, disclosure, and/or intentional use reflects a view that Congress chose a more complex mixture of criminal and civil enforcement, and public and private remedies, for different types of violations of the federal wiretap statutes.

Beecher at *5.

The dozens of innocent possessors who have contacted EFF and Stanford Law School’s CIS provide clear examples of exactly why such a balanced interpretation is necessary. These individuals have done nothing to harm DirecTV or its business interest in any way. They have never intercepted any DirecTV signal. Yet under its broad interpretation of § 2520(a), DirecTV has gone ahead as its own “private attorney general” and threatened them with expensive and burdensome litigation, solely because they purchased a device that is theoretically capable of harm. As a profit-driven party, DirecTV has no incentive to use the balanced prosecutorial discretion that the Department of Justice relies upon to determine which public harms are worth prosecuting. To the contrary, it has every incentive to do exactly what it has done here: send hundreds of thousands of demand

letters and file blanket cases against thousands of individuals, using the threat of liability by mere possession to force thousands of settlements and en mass capitulation.

But this is not the balance that was struck by Congress. Private attorney generals are empowered to protect the public interest through private suit in order to assist in the redress of actual injury. They are not empowered to deploy profit-driven litigation dragnets that sweep in innocent defendants along with the guilty. Limiting §2520(a) civil suits to §2511(1)(a) violations restores this balance, allowing private attorney generals to target only those who are actually harming them without imposing excessive burdens and penalties on those who have committed no injury.

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V. CONCLUSION

For the foregoing reasons, Amicus EFF respectfully requests this Court to affirm the decision of the District Court below and hold that there is no private cause of action for mere possession of a device under 18 U.S.C. § 2520(a).

DATED this 12th day of January, 2004.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,445 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 version 9 in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of January, 2004, the undersigned served two (2) true and correct copies of the foregoing AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE MIKE TREWORGY REQUESTING AFFIRMANCE by Federal Express overnight delivery to counsel for Plaintiff/Appellant **Douglas C. Spears, Esq.**, Stump Storey, Callahan & Detrich, P.A., 37 North Orange Avenue, Ste. 200, Orlando, Florida 32801, and to counsel for Defendant/Appellee **Albert A. Zakarian, Esq.**, and **Anthony G. Woodward, Esq.**, Anthony G. Woodward, P.A., 2024 Cleveland Street, Tampa, Florida 33606.

I further certify that, on the same date, the undersigned dispatched the foregoing AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEE MIKE TREWORGY REQUESTING AFFIRMANCE to the Clerk of this Court by Federal Express overnight delivery.

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