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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

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FILED IN FLORIDA DIVISION

DIRECTV, INC., a California corporation,

Plaintiff,

vs.

Case No. 2:03-cv-428-FtM-29SPC

MIKE TREWORGY,

Defendant.

ORDER

This matter comes before the Court on defendant's Amended Motion to Dismiss (Doc. #16), filed on July 21, 2003. Defendant seeks to dismiss Count III of the Complaint for failure to state a claim upon which relief can be granted. Plaintiff filed a Response in Opposition (Doc. #17) on July 28, 2003.

I.

In deciding a motion to dismiss, the Court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff. Christopher v. Harbury, 536 U.S. 403, 122 S. Ct. 2179, 2181 (2002). A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts that would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted); Marsh v. Butler County, Alabama, 268 F.3d 1014, 1022 (11th Cir. 2001) (en banc). To

satisfy the pleading requirements of Fed. R. Civ. P. 8, a complaint must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). However, dismissal is warranted under Fed. R. Civ. P. 12(b)(6) if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue which precludes relief. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Brown v. Crawford County, Ga., 960 F.2d 1002, 1009-10 (11th Cir. 1992).

II.

Plaintiff DIRECTV, Inc. (DIRECTV) is an electronic communication service using satellites to deliver television and other programs to paying subscribers. The satellite transmissions are electronically scrambled to prevent unauthorized use by those not paying for a subscription or on a pay-per-view basis. DIRECTV alleges that various companies and individuals have manufactured and used signal pirating devices designed to unscramble its transmission signal and allow its broadcasts to be viewed without payment to DIRECTV. Defendant Treworgy is alleged to be a person who purchased and used such a pirating device.

Count III is titled "Possession of Pirate Access Devices in Violation of 18 U.S.C. 2512(1)(b)." (Doc. #1, p. 9). Section 2512(1)(b) is a criminal statute contained in Chapter 119 of Title 18, which relates to "Wire and Electronic Communications

Interceptions and Interception of Oral Communications," more commonly referred to as the Federal Wiretap statute. Section 2512(1)(b) provides that,

[E]xcept 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 communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce;

is subject to five years imprisonment and a fine. It is clear that, standing alone, this criminal statute provides no private civil cause of action under the factors set forth in Cort v. Ash, 422 U.S. 66, 78 (1975). DIRECTV v. Cardona, Case No. 6:03-cv-675-Orl-22KRS (J. Conway, Doc. #12, pp. 18-21). See also Local Div. 732, Amalgamated Transit Union v. Metropolitan Atl. Rapid Transit Auth., 667 F.2d 1327, 1334 n. 10 (11th Cir. 1982); Jackson v. Birmingham Bd. of Educ., 309 F.3d 1333, 1338 n. 5 (11th Cir. 2002);

Congress has provided a civil cause of action, however, for some violations of Chapter 119 of Title 18. Section 2520(a) provides: "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." Appropriate relief includes equitable and

declaratory relief, damages, and attorney fees and costs. 18 U.S.C. § 2520(b). Plaintiff argues that the conduct charged in Count III is made a civil cause of action by § 2520(a). The Court disagrees.

As stated above, § 2512(1)(b) makes it an offense to manufacture, assemble, possess or sell the pirating device. Paragraph 35 of Count III tracks the statutory language of § 2512(1)(b), as it relates to Treworgy, and charges that Treworgy possessed a pirating device. Section 2520(a), on the other hand, provides that DIRECTV has a civil cause of action against an individual or entity which intercepts, discloses, or intentionally uses its electronic communication in violation of Chapter 119. Section 2512(1)(b) does not require the interception, disclosure or use of the device, and therefore § 2512(1)(b) is not within the scope of § 2520(a). The Court agrees with Cardona on this point, despite existing non-binding authority to the contrary. While plaintiff does allege that Treworgy used its electronic communications, this allegation is surplusage to the § 2512(1)(b) claim, which does not include usage as an element. United States v. Biro, 143 F.3d 1421, 1428 (11th Cir. 1998) ("The statute makes no reference to the customer's intended use of the product."); United States v. Schweihs, 569 F.2d 965, 969 (5th Cir. 1978)¹("Section

¹In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted as binding precedent (continued...)

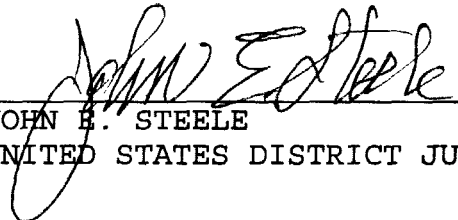
2512(1)(b), however, does not prohibit the surreptitious use of an electronic device."). The Court concludes that § 2520(a) does not afford a private right of action for violations of § 2512(1)(b).

Accordingly, it is now

ORDERED:

Defendant's Amended Motion to Dismiss (Doc. #16) is **GRANTED**, and Count III is dismissed. The Clerk of the Court shall withhold entry of judgment until the conclusion of the case.

DONE AND ORDERED at Fort Myers, Florida, this 17th day of August, 2003.



JOHN B. STEELE
UNITED STATES DISTRICT JUDGE

Copies:

Counsel of record

¹(...continued)
all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

F I L E C O P Y

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