



regarding the above, please refer to the attached Memorandum of Law in Support of Defendant's Motion to Dismiss.

WHEREFORE the Defendant requests this Honorable Court to Dismiss Count III of the Plaintiff's Complaint for failing to state a cause of action.

 Defendant

By WILLIAMS & McCARTHY

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whether a plaintiff may maintain a private cause of action against a defendant based on the alleged violation of 18 U.S.C. § 2512.

### Law and Argument

Although Title 18 of the United States Code is generally considered the “criminal code,” 18 U.S.C. § 2520, a portion of the Electronic Communications Privacy Act, provides for private causes of action in *limited* situations. As demonstrated below, the Act does not authorize a private cause of action for the violation of 18 U.S.C. § 2512.

**I. A private cause of action under 18 U.S.C. § 2512 does not exist, thus requiring this Court to dismiss Count III of Plaintiff’s Complaint.**

18 U.S.C. § 2512, states as follows:

[A]ny person who intentionally ... *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.

18 U.S.C. 2512 (emphasis added). 18 U.S.C. § 2512 is a criminal statute. Nowhere in 18 U.S.C. § 2512 is there reference to, or mention of, “damages” or “private causes of action.” Nothing in § 2512 suggests that Congress intended to provide a private cause of action for the violation of the statute.

On the other hand, 18 U.S.C. § 2520 does provide for a civil cause of action for certain specific violations of the Act. For example, § 2520 states:

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.

18 U.S.C. § 2520(a) (emphasis added). 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 device.

Although the Seventh Circuit has not directly addressed this issue (whether there is 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 a plaintiff from asserting a civil cause of action against a defendant for violations of 18 U.S.C. § 2512. *See Flowers v. Tandy Corp.*, 773 F.2d 585 (4th Cir. 1985). In *Flowers*, the court stated 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 reaching this conclusion, the *Flowers* court stated:

Looking first to the language of the statute, we find no merit in appellee's 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 the argument that a private cause of action is implied in § 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. For the same reasons as stated above, this Court should hold that no private cause of action exists based on the violation of 18 U.S.C. § 2512.

## II The Electronic Communications Privacy Act does not Supercede the *Flowers* Holding

Portions of 18 U.S.C. § 2520 have been amended since the *Flowers* decision. However, these amendments do not provide for a private cause of action for the violation of § 2512. The amendments do not add damages for violations of 18 U.S.C. § 2512. The amendments to § 2520 only dealt with the issue of whether or not a civil action could be maintained against one for procuring allegedly unlawful actions. The “holding in *Flowers*, that no private cause of action lies under § 2520 for violations of § 2512, has not been affected by subsequent statutory amendments.”

*DirectTV, Inc., v. Amato*, 2003 WL 21537206, \*4 (E.D. Va., June 20, 2003)

Following the amendments to § 2520, the court in *The Ages Group, L.P. v. Raytheon Aircraft Co., Inc.*, stated that:

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 [the plaintiff] showed that there is a material question of fact as to whether [the defendant] possessed equipment which it knew or reasonably should have known was designed primarily for surreptitious acquisition of communications under § 2512, [the plaintiff] must also create a question of facts 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.*

*The Ages Group, L.P. v. Raytheon Aircraft Co., Inc., et al.*, 22 F.Supp.2d 1310 (M.D.Ala. 1998) (emphasis added). The *Amato* case and the *Ages* case clearly demonstrate that courts still apply and follow the holding in *Flowers*, and that a plaintiff still has no private cause of action based on violations of § 2512.

Furthermore, the public policy and common sense rationale stated by the *Flowers* court to support its holding still applies and still supports the conclusion that no private cause of action exists for the violation of § 2512. The plaintiff is not damaged (an integral component of any lawsuit) unless its communications have been unlawfully intercepted. 18 U.S.C. § 2511 covers unlawful interception and § 2520 provides a means to recover for damages incurred through one's illegal interception.

Quite separate from interception, 18 U.S.C. § 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. Allowing a private cause of action under § 2512 would provide the plaintiff with 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 the possession of the same device which results in double, triple, etc., payment.

Two cases (*DirecTV, Inc. v. EQ Stuff, Inc.*, and *Oceanic Cablevision, Inc. v. M.D. Electronics*) have "apparently" disagreed with the *Flowers* court and the *Ages* court. In both cases, the court determined that a civil cause of action existed, pursuant to 18 U.S.C. § 2520, based on the

violation of § 2512. *DirectTV, Inc. v. EQ Stuff, Inc.*, 207 F.Supp. 1077 (C.D.CA. 2002); *Oceanic Cablevision, Inc. v. M.D. Electronics*, 771 F.Supp. 1019 (D. Neb. 1991).

In reaching this conclusion, the *EQ Stuff* court relied on the *Oceanic* decision. In *Oceanic*, the defendant brought a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss plaintiff's allegation that the defendant violated 18 U.S.C. § 2512. This Motion was based on the argument that § 2520 provides no private cause of action to cable companies against parties engaged in the sale of descrambling equipment. The *Oceanic* court stated 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. *Id.* at 1028. The *Oceanic* court concluded that the sale of such devices was illegal and was in violation of § 2512, and thus the defendant's Motion to Dismiss should not be granted. *Oceanic*, 771 F.Supp. At 1028-29.

While reaching its conclusion, the *Oceanic* court never discussed 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 cause of action*. For this reason, besides that the *EQ Stuff* case and the *Oceanic* case are not being binding on this Court, the cases provide little guidance to our discussion. *See also Amato*, 2003 WL at \*3-\*4.

### III. Plaintiff's Fail to State a Cause of Action under 18 U.S.C. § 2512.

As discusses above, 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. § 2512.

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

Assuming these facts, the 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 cause 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 and 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.

### Conclusion

For all of the above reasons, 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.

 Defendant

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IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF ILLINOIS  
WESTERN DIVISION

DIRECTV, Inc.,

Plaintiff,

V.

RICK WESTENDORF, MARK WILKEN,  
[REDACTED] JAKE WITTMER, and  
BOB WOODS,

Defendants.

No. 03 C 50210

NOTICE

TO: See Service List Attached

YOU ARE HEREBY notified that on the **25th day of July, 2003, at 1:30 o'clock P.M.**, or soon thereafter as Counsel may be heard, I shall appear before his Honor, Judge Mahoney, in the room usually occupied by him as a Court Room, or in his absence, before any other Judge that may be presiding in said Court Room, in the Federal Court House in Winnebago County at 211 S. Court Street, Rockford, Illinois, and then and there: **Present Motion to Dismiss and Memorandum of Law in Support of Defendant's Motion to Dismiss**, a copy of which is attached hereto.

At which time and place you may appear, if you so desire.

Dated: July 16, 2003

[REDACTED] Defendant

By WILLIAMS & McCARTHY

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U.S. DISTRICT COURT  
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