

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DIRECTV, INC.,

No. C 03-04139 WHA

Plaintiff,

v.

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS SECTION 2512 CLAIM**

JIM COTTLE, JASON MARLAR,
and EDWARD MAHER,

Defendants.

INTRODUCTION

In this case, DIRECTV alleges that defendants unlawfully intercepted and used its encrypted satellite television broadcasts in violation of federal and common law. Defendant Jim Cottle now moves under Rule 12(b)6 to dismiss plaintiff's third claim, brought under 18 U.S.C. 2512, on the ground that there is no private right of action thereunder. This order **GRANTS** defendant's motion.

STATEMENT

DIRECTV, Inc. broadcasts satellite television, encrypting the signals so that only paying customers may enjoy them. Increasingly, devices are publicly available which permit people to unlawfully intercept, de-scramble and view these satellite signals without paying DIRECTV.

To discourage this illegal trend, DIRECTV has invoked federal wiretap and other laws in a widespread campaign to impose civil liability on violators. In the course of cracking down

1 on manufacturers and retailers who supply these devices, DIRECTV gathered data about
2 purchasers. That is how DIRECTV learned that Jim Cottle, in January 2001, purchased a
3 “Dual PRO All-In-One Combo” from retailer White Viper. This device allegedly can
4 unlawfully unscramble DIRECTV’s broadcasts.

5 DIRECTV sued Cottle on four theories of liability, including two claims under federal
6 wiretap laws, alleging both that he possessed an unlawful device and that he used it to intercept
7 plaintiff’s satellite broadcasts. Defendant now moves under Rule 12(b)6 to dismiss plaintiff’s
8 third claim, brought under 18 U.S.C. 2512, for failure to state a claim upon which relief may be
9 granted.

10 Defendant argues that Section 2512 is a criminal statute which does not authorize a
11 private right of action against those who merely possess violative devices. Plaintiff opposes the
12 motion, arguing that Section 2520 provides the necessary private right of action for violations
13 of Section 2512. (All section references are to Title 18 of the United States Code unless
14 otherwise noted.)

15 ANALYSIS

16 1. GOVERNING STANDARD.

17 Under Rule 12(b)6, dismissal for failure to state a claim is proper only if “it appears
18 beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle
19 him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This order must take all material
20 facts alleged in the complaint as true and construe them in the light most favorable to the
21 non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996).

22 2. SECTION 2512 DOES NOT GIVE RISE TO A PRIVATE RIGHT OF ACTION.

23 The federal wiretap laws, 18 U.S.C. 2510 et seq., provide a scheme of criminal penalties
24 in part to control the interception and use of private electronic communications. Section 2512
25 criminalizes the manufacture, assembly, possession, sale and distribution of devices primarily
26 useful for surreptitiously intercepting electronic communications. Section 2511 criminalizes
27 the actual interception and use of electronic communications with such a device. Both sections
28

1 are unquestionably criminal in nature, and neither explicitly authorizes a private right of action
2 on its own.

3 Section 2520, however, provides in relevant part: “. . . any person whose . . . electronic
4 communication is intercepted, disclosed, or intentionally used in violation of this chapter may
5 in a civil action recover from the person or entity . . . which engaged in that violation such relief
6 as may be appropriate.” Obviously, those whose electronic communications are actually
7 intercepted have a right of action for violations of Section 2511.

8 The clear and unambiguous language of Section 2520 limits the class of people liable in
9 a civil action to those who actually intercept, disclose or intentionally use the plaintiff’s
10 electronic communication. The phrase “is intercepted, disclosed, or intentionally used” is
11 modified by “in violation of this chapter.” Only actual interception, disclosure or use *in*
12 *violation of chapter 119* results in civil liability. Also, the phrase “that violation” clearly refers
13 back to the earlier clause, “is intercepted, disclosed, or intentionally used.”

14 This language in Section 2520 closely tracks the language of Section 2511, which
15 focuses on actual interception and use of electronic communications. It does not reference,
16 however, the core terms of Section 2512, which focus on the manufacture, sale, possession and
17 distribution of unlawful devices. The clear and unambiguous meaning of Section 2520,
18 therefore, authorizes a private right of action for actual interception of electronic
19 communications in violation of Section 2511 but not for mere possession of an unlawful device
20 in violation of Section 2512.

21 **3. PLAINTIFF’S WILLINGNESS TO PROVE BOTH POSSESSION**
22 **AND INTERCEPTION DOES NOT PERMIT A PRIVATE RIGHT**
OF ACTION UNDER SECTION 2512.

23 Plaintiff contends it would avoid the foregoing result by offering to prove both
24 possession of an unlawful device under Section 2512 and actual interception of its satellite
25 broadcast under Section 2511. This, it says, would warrant recovery under Section 2512
26 (as well as Section 2511, the latter being uncontested). Plaintiff argues that the Electronic
27 Communications Privacy Act of 1986 shifted the focus of Section 2520 from the class of
28 permissible defendants to the class of permissible plaintiffs. This shift, DIRECTV argues,

1 broadened the conduct for which plaintiffs may recover. This argument, and plaintiff's
2 authorities, are not persuasive.

3 The fact remains that the structure of the statute creates a private right of action under
4 Section 2520 for violations where an element thereof is actual interception. Only Section 2511
5 calls out actual interception. Section 2512, on the other hand, does not reference interception or
6 use but only (for instant purposes) possession. A plaintiff cannot amend the statute, in effect,
7 by offering to prove extra elements. Section 2512 lacks the interception, disclosure and use
8 elements which Section 2520 requires. That is the end of it.

9 A word about the *Flowers* case and its progeny is in order, however. In that case, the
10 plaintiff sought damages from the Tandy Corporation under Sections 2511 and 2512 for selling
11 a phone-tapping device to her ex-husband. The Fourth Circuit held that no civil liability could
12 be predicated on a violation of Section 2512, because the express language of Section 2520
13 limited potential liability to one who "intercepts, discloses, uses, or procures any other person to
14 do the same." The court held that "one who manufactures or sells a device in violation of
15 Section 2512 but does not engage in conduct violative of Section 2511" could not be found
16 liable under Section 2520. The court refused to imply a private right of action under
17 Section 2512. *Flowers v. Tandy Corp.*, 773 F.2d 585, 588-589 (4th Cir. 1985). This is the only
18 circuit decision of relevance.

19 Congress later amended the wiretap laws via the Electronic Communications Privacy
20 Act of 1986, as observed by plaintiff. It significantly rearranged the language of Section 2520.
21 The arguably ambiguous language in *Flowers* quoted above, as well as the subsequent
22 amendments, have led some courts to hold that a defendant who violates Section 2512 may also
23 be held liable under Section 2520. For the reasons stated, however, this order goes the other
24 way.

25 Plaintiff cites to the line of decisions stemming from *Oceanic Cablevision, Inc. v. M.D.*
26 *Electronics* to support its argument that the Electronic Communication Privacy Act of 1986
27 broadened the category of conduct giving rise to civil liability. In that decision, the plaintiff
28 alleged that the defendant sold devices in violation of Section 2512. The court permitted that

1 claim, reasoning without much analysis that Section 2520 authorized civil claims for violations
2 of the criminal proscriptions in both Sections 2511 and 2512 by virtue of the phrase “in
3 violation of this chapter.” 771 F. Supp. 1019, 1027 (D. Nebr. 1991).

4 Some courts, in decisions on facts essentially similar to the instant case, have adopted
5 the reasoning of the *Oceanic* decision. See *DIRECTV, Inc. v. EQ Stuff, Inc.*, 207 F. Supp. 2d
6 1077 (C.D. Cal. 2002) (finding, without analysis, *Oceanic* more persuasive than *Flowers*);
7 *DIRECTV, Inc. v. Drury*, 2003 WL 22245388 (M.D. Fla. 2003) (finding a private cause of
8 action under Section 2512, upon allegations of possession and interception, after analyzing the
9 statutory text, case law, and amendments); *DIRECTV, Inc. v. Perez*, 279 F. Supp. 2d 962 (N.D.
10 Ill. 2003) (same); *DIRECTV, Inc. v. Karpinsky*, 269 F. Supp. 2d 918 (E.D. Mich. 2003) (finding
11 allegations of mere possession sufficient to state a claim under Section 2512). The reasoning of
12 these decisions, where it is more than cursory, is nevertheless unpersuasive for the reasons set
13 forth above.

14 On the other hand, many courts, on facts also similar to the instant case, have followed
15 *Flowers* and reached the same result as here. One such decision explicitly rejected the
16 argument that the Electronic Communications Privacy Act of 1986 expanded the conduct giving
17 rise to liability under Section 2520. That decision compared the amended version of Section
18 2520 to the version in force in 1985 and determined that nothing in the amendments affected the
19 *Flowers* analysis. *DIRECTV, Inc. v. Amato*, 269 F. Supp. 2d 688, 690-691 (E.D. Va. 2003);
20 accord *DIRECTV, Inc. v. Cardona*, 275 F. Supp. 2d 1357 (M.D. Fla. 2003) (“While the Wiretap
21 Act’s amendments may have broadened the criminal proscriptions in [Section 2512], it can be
22 stated with relative ease that such amendments did not expand the conduct subjecting
23 individuals to liability under [Section 2520]”); *DIRECTV, Inc. v. Childers*, 274 F. Supp. 2d
24 1287 (M.D. Ala. 2003) (persuaded by the reasoning of *Flowers* over that of *Oceanic*);
25 *DIRECTV, Inc. v. Hosey*, 289 F. Supp. 2d 1259 (D. Kan. 2003) (persuaded by the reasoning of
26 *Cardona* over that of *Oceanic*).

27 This Court, after reviewing all these cases and dozens more, is convinced that the
28 *Flowers* decision properly guides the analysis. Nothing in the Electronic Communications

1 Privacy Act of 1986 expanded the scope of the right of action authorized by Section 2520. The
2 potential class of defendants is still restricted to those who actually intercept, disclose or use
3 plaintiff's electronic communications. Therefore, a plaintiff may recover in a civil action under
4 Section 2520 for violations of Section 2511, but not Section 2512.¹

5 Of course, this outcome will not deny plaintiff recovery. DIRECTV clearly has a
6 private right of action for Cottle's alleged violation of Section 2511. At the hearing on this
7 matter, the Court inquired into what hangs on the issue. The lawyers were unhelpful. Plaintiff
8 obviously may recover for actual and unlawful interception and use of its satellite signals under
9 Section 2520(c)(2). Arguably, recovery under Section 2512 might enhance damages over those
10 recoverable under Section 2511. That possibility cannot, however, change the analysis.

11 **CONCLUSION**

12 For the foregoing reasons, defendant's motion to dismiss plaintiff's Section 2512 claim
13 under Rule 12(b)6 is **GRANTED**.

14
15 **IT IS SO ORDERED.**

16
17 Dated: February 24, 2004

S/ WILLIAM ALSUP

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

18
19
20
21
22
23
24
25 ¹ The Court has reviewed the committee reports and other legislative history of the Electronic
26 Communications Privacy Act of 1986. In a report of the House Judiciary Committee, the portion concerning
27 Section 2520 begins by noting that the legislation "amends — largely by recodifying — the existing section
28 2520 of Title 18 to incorporate violations involving interception, disclosure, or willful use of . . . electronic
communications." *Electronic Communications Privacy Act: Hearing on H.R. 4952 Before the H. Comm. on the
Judiciary*, 99th Cong. 99-647 (June 19, 1986) (footnote omitted). This language indicates only actual
interception gives rise to civil liability under Section 2520. Any mention of civil suits arising from other
violations of federal wiretap laws is conspicuously absent from this committee report. Other legislative history
reveals little more.