

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

DIRECT TV, INC.,)	
)	
Plaintiff,)	
)	
VS.)	No. 03-1071-T
)	
ROBERT LEGANS,)	
)	
Defendant.)	
)	

ORDER DENYING DEFENDANT’S MOTION TO DISMISS

Plaintiff DIRECTTV, Inc., a California corporation, has brought this action against Robert Legans pursuant to the Federal Communications Act of 1934, 47 U.S.C. § 605, the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986 and the Communications Assistance for Law Enforcement Act of 1994, 18 U.S.C. §§ 2510-21 (“Federal Wiretap Laws”), T.C.A. § 39-13-601 (“Tennessee Wiretapping Statutes”), T.C.A. § 39-14-104 and § 7-59-109 (“Tennessee Theft of Services Statutes”), and Tennessee common law. Plaintiff alleges that Defendant purchased and used illegally modified access cards and other devices that are designed to permit viewing of Plaintiff’s television programming without authorization by or payment to Plaintiff.

Defendant, *pro se*, has filed a motion to dismiss count five of the complaint which alleges that Defendant violated 18 U.S.C. § 2512. Defendant contends that this section is a criminal statute that does not provide for civil penalties. For the reasons set forth below, Defendant's motion is DENIED.

A complaint should not be dismissed for failure to state a claim unless it is clear that the plaintiff would not be entitled to relief even if the factual allegations were proven. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The factual allegations must be taken as true, Hammond v. Baldwin, 866 F.2d 172, 175 (6th Cir. 1989), and it must be apparent that the plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Hammond, 866 F.2d at 175. The complaint must be read in the light most favorable to the plaintiff. Allard v. Weitzman (In re Delorian Motor Co.), 991 F.2d 1236, 1240 (6th Cir. 1993).

Count five of the complaint alleges that Defendant illegally possessed and used pirate access devices to view Plaintiff's satellite transmissions of television programming in violation of 18 U.S.C. § 2512(1)(b). Section 2512 provides, in pertinent part, as follows:

[A]ny person who intentionally ... manufactures, assembles, possesses, or sells any ... 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 ... electronic communications, and that such device ... has been or will be sent through the mail or transported in interstate ... commerce ... shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2512(1)(b) .

Section 2520(a) of Title 18 creates a private right of action for certain violations of the Federal Wiretap Laws. This section provides 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 any person or entity ... which engaged in that violation....” The question before the court is whether the prohibitions of § 2512 are within the purview of § 2520 so as to create a civil remedy for violations of § 2512.

Courts which have addressed this question are split almost evenly. The courts holding that § 2512 does not provide a civil remedy have reasoned that § 2520's civil remedy is limited to violations of § 2511 because the words “intercepted, disclosed, or intentionally used,” as used in § 2520(a), are the activities prohibited by § 2511 and cannot be read to encompass those prohibited by § 2512 - i.e., the manufacture, assembly, distribution, and possession of interception devices. Thus, those courts construe § 2520 as providing for civil recovery only with respect to activities prohibited by § 2511 (the actual interception, disclosure, and/or use of the victim's communication), and not those prohibited by § 2512 (the mere possession or assembly of an interception device). See, e.g., DIRECTV, INC. v. Jerolleman, 2003 WL 22697177 (E.D. La.) (“[T]he person ... which engaged in that violation’ can only mean the person who ‘*intercepted, disclosed, or intentionally used* [the victim's electronic communication] in violation of this chapter [119].” (emphasis in original)); DIRECTV, Inc. v. Hosey, 289 F. Supp.2d 1259 (D. Kan. 2003) (the plain language of § 2520(a) creates a private cause of action only against those who intercept,

disclose, or intentionally use wire, oral, or electronic communication); DIRECTV, Inc. v. Childers, 274 F. Supp.2d 1287 (M.D. Ala.2003) (rejecting the argument that a private cause of action exists for both §§ 2512 and 2511; “mere proof of possession of ‘pirating’ equipment may establish a violation of the criminal statute, but cannot support a civil action for damages”); DIRECTV, Inc. v. Cardona, 275 F. Supp.2d 1357 (M.D. Fla.2003) (“the plain and unambiguous language of § 2520(a) limits those against whom a civil action lies to persons who intercept, disclose, or use electronic communications; that class of persons does not include manufacturers, assemblers, possessors, and sellers of satellite decrypters”); DIRECTV, INC. v. Amato, 269 F. Supp.2d 688 (E.D. Va. 2003) (The express language of § 2520 cannot be construed to provide a cause of action against one who manufactures or sells a device in violation of § 2512 because § 2520 “expressly limits [the class of persons] against whom the private action lies to the person who ‘intercepts, discloses, or uses ... such communications.’”); Ages Group, L.P. v. Raytheon Aircraft Co., Inc., 22 F. Supp.2d 1310 (M.D. Ala.1998) (“[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.”); *cf.* Flowers v. Tandy Corp., 773 F.2d 585 (4th Cir.1985) (interpreting § 2520(a) as it read prior to the 1986 amendments and holding that the statute provided no private right of action for violations of § 2512).

Courts holding that § 2512 does not provide a civil remedy have also found that the use of an illegal electronic device, as prohibited by § 2511, creates a victim, thereby

justifying a private cause of action under that section, but the mere possession of such a device, as prohibited by § 2512, creates no individualized harm and, thus, no justification for private recovery. E.g., Flowers, 773 F.2d at 589. These courts have also relied on the fact that § 2512(1)(b) already provides for an enforcement mechanism through criminal sanctions (violators shall be “fined ... or imprisoned not more than five years, or both”) which “is problematic because the express provision of one method of enforcement suggests that Congress intended to preclude others.” Cardona, 275 F. Supp.2d at 1368.

Courts holding otherwise have focused on § 2520's use of the term “in violation of this chapter” in finding that § 2520 creates a private civil cause of action for any violation of Chapter 119, Title 18, including § 2512. See, e.g., DIRECTV, Inc. v. Gatsiolis, 2003 WL 22111097 (N.D. Ill.) (a plaintiff with standing can “pursue relief from the appropriate defendant ... for a violation of any of the subsections of Chapter 119”); DIRECTV, Inc. v. Drury, 282 F. Supp.2d 1321 (M.D. Fla. 2003) (section 2520 “defines the class of potential defendants as any person or entity ‘engaged in’ a violation of this chapter” and section 2512 “lies within the covered chapter”). Accord DIRECTV, Inc. v. Calamanco, 2003 WL 21956187 (N.D. Iowa); DIRECTV, Inc. v. EQ Stuff, Inc., 207 F. Supp.2d 1077 (C.D. Cal. 2002) (following Oceanic Cablevision, Inc. v. M.D. Electronics, 771 F. Supp. 1019, 1026-28 (D. Neb.1991)).

Some courts which have found that § 2512 does provide for a civil remedy have read into the statute the requirement that the plaintiff not only plead and prove that the defendant

possessed the illegal device but also that he used the device. In DIRECTV, INC. v. Karpinsky, 269 F. Supp.2d 918, *vacated on other grounds*, 274 F. Supp.2d 918 (E.D. Mich. 2003), the defendant contended that he could not be held liable under § 2511(1)(a) or § 2512(1)(b) because these statutes do not provide for civil liability. In denying the defendant's motion to dismiss, the court reasoned as follows:

Where “the statute's language is plain, ‘the sole function of the courts is to enforce it according to its terms.’” 47 U.S.C. § 605(a) plainly states that a person violates the statute by “receiving,” “assisting in receiving,” or “intercept[ing]” electronic transmissions without proper authorization. 47 U.S.C. § 605(e)(3) permits any person aggrieved by such a violation to file a civil action seeking injunctive relief, damages, and reasonable attorney fees. 18 U.S.C. § 2511(1)(a) plainly states that a person violates the statute by intentionally “intercept[ing],” “endeavor[ing] to intercept,” or “procur[ing] any other person to intercept or endeavor to intercept” an electronic communication. 18 U.S.C. § 2512(1)(b) makes it a crime to merely “possess[] any electronic ... 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 ... electronic communications” Under the plain language of 18 U.S.C. § 2520(a), a “person” may file a civil suit premised on violations of § 2511(1)(a) and/or § 2512(1)(b) only if that person's “electronic communication is intercepted, disclosed, or intentionally used” in violation of § 2511(1)(a) and/or § 2512(1)(b).

Pursuant to the plain language of the statutes cited above, DirecTV must prove that Karpinsky received, assisted in receiving, or intercepted DirecTV's satellite transmissions to prevail under Count I alleging violations of 47 U.S.C. § 605(a), and that DirecTV's electronic satellite communications were intercepted, disclosed, or intentionally used by Karpinsky to prevail under Counts II and III alleging, respectively, violations of 18 U.S.C. § 2511(1)(a) and 18 U.S.C. § 2512(1)(b) vis-a-vis 18 U.S.C. § 2520(a). United States v. Pritchard, 773 F.2d 873 (7th Cir.1985), a criminal case relied upon by DirecTV involving an affirmed conviction under 18 U.S.C. § 2512(1)(b) for simple possession of a device primarily designed for the surreptitious interception of electronic devices, did not involve the civil enforcement remedies of 18 U.S.C. § 2520(a), and the statute's plain requirement that a civil plaintiff's

communication be intercepted, disclosed, or intentionally used.

269 F.2d at 925-926 (some citations omitted). See also DIRECTV, INC. v. Moreno, 2003 WL 22927883 (D.N.J.) (Plaintiff stated a civil cause of action under § 2512 by alleging possession as well as use of an illegal device. “Congress already lists an exemption from civil liability in § 2520(a), by excluding those assisting law enforcement pursuant to § 2511(2)(a)(ii). If Congress also intended to exempt those who violated § 2511(1)(a) or § 2512(1)(b), it would have done so. Where Congress passes a remedial statute such as the ECPA and creates a private cause of action therein, the purposes of the statute are served by private civil enforcement of the type sought here.”)

This court agrees with those courts holding that § 2512 provides for civil as well as criminal liability. However, in order for civil liability to attach under § 2512, in accordance with Karpinsky and Moreno, a plaintiff must show that the defendant not only possessed an illegal device but also used that device. In the present case, Plaintiff has alleged that Defendant Legans purchased and used illegally modified access cards and other devices that are designed to permit viewing of Plaintiff’s television programming without authorization by or payment to Plaintiff. Therefore, Plaintiff has stated a claim under 18 U.S.C. § 2512, and Defendant’s motion to dismiss is DENIED.

IT IS SO ORDERED.

JAMES D. TODD
UNITED STATES DISTRICT JUDGE

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