

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DIRECTV, INC., : CIVIL ACTION
Plaintiff, :
 :
v. :
 :
 :
DANA R. KITZMILLER, :
Defendant. : No. 03-3296

MEMORANDUM AND ORDER

J. M. KELLY, J.

MARCH 31, 2004

Presently before the Court is a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) filed by Defendant Dana R. Kitzmiller ("Kitzmiller" or "Defendant") in this matter initiated by Plaintiff DIRECTV, Inc. ("DIRECTV" or "Plaintiff") against Kitzmiller and several other named defendants,¹ alleging that Defendant purchased a device commonly used by persons to assist in the unauthorized interception of DIRECTV's satellite programming ("device" or "pirate access device") in violation of

¹ Plaintiff's Complaint originally named twelve defendants, several of whom have been terminated from the Court's docket. The motions now pending before the Court have come to us from Defendant Dana R. Kitzmiller only, whose Motion to Sever (Doc. No. 24) has been granted by the Court in a separate Order.

Also pending before the Court is Kitzmiller's Motion for More Definite Statement Pursuant to Federal Rule of Civil Procedure 12(e), which provides that a party may move for a more definite statement before interposing a responsive pleading if the pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. See Fed. R. Civ. P. 12(e). Since we grant in part and deny in part Kitzmiller's Motion to Dismiss, finding that Plaintiff's Complaint sufficiently states claims upon which relief can be granted, we **DISMISS AS MOOT** Kitzmiller's Motion for More Definite Statement.

federal and state statutory, and state common law. Plaintiff's Complaint seeks damages and injunctive relief against Defendant on six counts, including: Count 1 - Damages for Violations of Cable Communications Policy Act, 47 U.S.C. § 605(e)(3)(C); Count 2 - Damages for Violations of 18 U.S.C. § 2511; Count 3 - Damages for Possession, Manufacture, and/or Assembly of Electronic, Mechanical or Other Device or Equipment, 18 U.S.C. § 2512; Count 4 - Damages for Willful Assembly or Modification of Devices or Equipment, 47 U.S.C. § 605(e)(4); Count 5 - Civil Conversion under Pennsylvania law; and Count 6 - Possession of Devices for Theft in Violation of Pennsylvania Consolidated Statutes, 18 Pa. Cons. Stat. § 910. For the following reasons, Kitzmiller's Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND

DIRECTV is a California-based company in the business of distributing satellite television broadcasts throughout the United States by relaying digital signals from within the United States up to satellites hovering thousands of miles above Earth, which signals are then broadcast back to Earth and are received through the use of a fixed outdoor satellite dish designed to capture the satellite signals. The satellite dish is connected by cable to an indoor satellite receiver which is then connected by cable to a television monitor.

To prevent unauthorized reception and use of DIRECTV's broadcasts by individuals who have not paid for the service, DIRECTV uses encryption technology to digitally scramble the signal making the signal unusable until it is unscrambled by a satellite receiver, which contains a removable access card that manages the opening and closing of television channels offered by DIRECTV. When a DIRECTV customer pays a subscription fee, DIRECTV electronically directs the access card to unscramble portions of the satellite signal allowing customers to view programs on their television and/or listen to certain high quality audio programs communicated by satellite. DIRECTV's main revenue source is from payment by authorized users for its satellite programming.

In its Complaint, Plaintiff alleges that Defendant purchased a device, from a distributor of such devices, to surreptitiously pirate its satellite signals, and effected unauthorized interception and receipt of Plaintiff's satellite programming in violation of federal telecommunication and wiretapping laws and state statutory and common law. Specifically, Plaintiff alleges that, on or about August 17, 2001, Defendant purchased a combination package invoiced as a "X-Terminator Unlooper/Vector Next Generation Programmer Combo," which consisted of an unlooper and a smart card programmer. (Compl. ¶ 20.) Plaintiff also alleges that the unlooper is designed to repair access cards that

have been rendered unusable by illegitimate use, and is specifically designed for use with certain software further permitting the illegal programming of valid DIRECTV access devices. (Id.) Further, Plaintiff alleges that the programmer is primarily designed to permit the illegal programming of valid DIRECTV access cards for the sole purpose of obtaining access to DIRECTV satellite programming without paying for the service. (Id.)

Defendant filed a Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiff responded, and Defendant replied thereto. We address the sufficiency of each of DIRECTV's claims against Defendant in turn.

II. STANDARD OF REVIEW

The purpose of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is to test the legal sufficiency of a complaint. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). We therefore accept all factual allegations in the complaint as true and give the pleader the benefit of all reasonable inferences that can be fairly drawn therefrom. Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). We are not, however, required to accept legal conclusions either alleged

or inferred from the pleaded facts. Kost, 1 F.3d at 183. In considering whether to dismiss a complaint, courts may consider those facts alleged in the complaint as well as matters of public record, orders, facts in the record and exhibits attached to a complaint. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994). A court may dismiss a complaint only if the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

A. **Count 1 - 47 U.S.C. § 605(e)(3)(C)**

Plaintiff seeks damages for violations of 47 U.S.C. § 605, which prohibits the illegal interception of radio transmissions, including satellite transmissions. See 47 U.S.C. § 605. A person violates § 605 by "receiving," "assisting in receiving" or "intercepting" radio transmissions without proper authorization. § 605(a).² Accordingly, to prevail on the merits of this count in the Complaint, Plaintiff must prove that Defendant "received, assisted in receiving or intercepted" Plaintiff's satellite transmission. See id.

Defendant argues that this count of Plaintiff's Complaint

² Section 605(e)(3)(C) authorizes the award of damages for violations of § 605(a).

must be dismissed because the Complaint alleges only possession of the pirate access device, which, alone, is insufficient to establish a violation of § 605.³ Plaintiff's Complaint does

³ Relying on TKR Cable Company v. Cable City Corp., 267 F.3d 196 (3d Cir. 2001), Defendant also argues that Third Circuit Court of Appeals' caselaw does not permit recovery under § 605. In that case, TKR provided "cable television services" to subscribers, which involved transmitting signals through a network of cable wiring and equipment. Id. at 197. The defendant in that case sold cable television piracy decoders that would enable its purchasers to intercept the cable signals without paying for them. Id. at 198. The Third Circuit focused on whether the pirated TKR signals were wire communications (i.e. cable) or radio communications (i.e. satellite), and determined that TKR distributed its signals in a two-step process, with its programming originating in satellite signals that were then sent over cable lines. Id. at 203-04. The Third Circuit held that § 605 is directed solely at radio transmissions to the extent that reception or interception occurs prior to or not in connection with cable distribution, at which point, § 605 no longer applies. Id. at 206-07.

In this case, the signals are alleged to be communicated solely through satellite transmissions, from a space satellite directly to a satellite dish at a person's home, without the use of a cable distribution system. In accordance with Third Circuit caselaw, § 605 controls claims of satellite piracy, which is the case here as alleged by Plaintiff.

Alternatively, Defendant argues that Plaintiff has failed to properly aver the manner in which its signal is distributed, whether by cable or satellite. Plaintiff's Complaint clearly sets forth the manner of transmission: "This lawsuit involves the surreptitious possession and use of illegal devices and equipment designed to intercept and decrypt DIRECTV's protected satellite communications." (Compl. ¶ 1.) Plaintiff's Complaint also avers that: "DIRECTV relays digital signals from within the United States up to satellites hovering thousands of miles above Earth. The signals are then broadcast back to Earth. DIRECTV's Satellite Programming is received through the use of a fixed outdoor satellite dish . . . connected by [a] cable to an indoor satellite receiver . . . connected by [a] cable to a television monitor." (Compl. ¶ 2.) We find that Plaintiff's Complaint sufficiently pleads the manner in which its signal is

allege that Defendant purchased a combination package invoiced as a "X-Terminator Unlooper/Vector Next Generation Programmer Combo," which consisted of an unlooper, designed to repair access cards for use with certain software further permitting the illegal programming of valid DIRECTV access devices, and a programmer, primarily designed to permit the illegal programming of access cards for unauthorized receipt of DIRECTV's services. (Compl. ¶ 20.)

Upon further review, however, Plaintiff's Complaint alleges more than mere possession of the device. Plaintiff also pled that, "Defendant, illegally and without authorization, intercepted, received and exhibited, or otherwise assisted in the unauthorized interception, reception or exhibition of Satellite Programming transmitted by DIRECTV." (Compl. ¶ 34.) A reasonable inference that can be drawn from Plaintiff's allegations is that Defendant intercepted DIRECTV's signal without its permission, and that the device purchased by Defendant was used in intercepting that signal. Since, on a motion to dismiss, we must accept all allegations and reasonable inferences therefrom as true, Count 1 of Plaintiff's Complaint survives dismissal.

distributed. See Joe Hand Promotions, Inc. v. Rennard Street Enterprises, Inc., 954 F. Supp. 1046 (E.D. Pa. 1997).

B. Count 2 - 18 U.S.C. § 2511

The plain language of 18 U.S.C. § 2511 provides that a person violates the statute when he intentionally "intercepts," "endeavors to intercept," or "procures any other person to intercept or endeavor to intercept" an electronic communication. 18 U.S.C. § 2511(1)(a). A person also violates the statute when he "intentionally uses, endeavors to use or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication," "intentionally discloses," or "intentionally uses the contents of such communication, knowing or having reason to know that the information was obtained through the interception of electronic communication in violation of this subsection." § 2511(b)-(d).

In its Complaint, Plaintiff has alleged that "Defendant[] intentionally intercepted, endeavored to intercept, or procured other persons to intercept electronic communications from DIRECTV." (Compl. ¶ 39.) Plaintiff also alleged that "Defendant[] further disclosed or endeavored to disclose to others the contents of electronic communications knowing, or having a reason to know, that the information was obtained through the interception of electronic communications in violation of 18 U.S.C. § 2511." (Id.) Plaintiff further alleged that "[u]pon information and belief, Defendant[] further intentionally used or endeavored to use the contents of

electronic communications knowing, or having reason to know, that the information was obtained through the interception of electronic communications in violation of 18 U.S.C. § 2511.”

(Id.)

Defendant contends that Plaintiff has failed to state a claim pursuant to § 2511 because it has alleged only that Defendant has endeavored to intercept DIRECTV’s signal, and not that DIRECTV’s signal was indeed intercepted by Defendant. At this procedural juncture, however, where we review only the sufficiency of the allegations, and not the sufficiency of the evidence to support a finding of liability on the merits, we conclude that Plaintiff’s Complaint states a claim pursuant to 18 U.S.C. § 2511. Accordingly, Count 2 survives Defendant’s Motion to Dismiss.

C. Count 3 - 18 U.S.C. § 2512

Defendant moves for dismissal of Count 3 of Plaintiff’s Complaint on the basis that no private cause of action is available for violations of 18 U.S.C. § 2512,⁴ a criminal

⁴ Section 2512(1)(b) provides:

(1) Except 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

statute. While Title 18 of the United States Code is generally considered to constitute the criminal code, a portion of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2520,⁵ authorizes recovery of civil damages in certain circumstances. See 18 U.S.C. § 2520. Defendant agrees that this portion of the ECPA provides a private cause of action when a party's electronic communication is intercepted, disclosed or intentionally used, but disagrees that mere possession of a device creates liability, and, further, argues that the Fourth Circuit Court of Appeals' decision in Flowers v. Tandy Corp., 773 F.2d 585 (4th Cir. 1985) compels such a result.

Until recently, a majority of courts followed the Fourth

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 . . .

shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2512(1)(b).

⁵ Section 2520 provides, in relevant part:

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).

Circuit's decision in Flowers, which held that the ECPA does not provide a private cause of action against those who possess an intercepting device in violation of § 2512. Flowers reasoned that the plain language of § 2520(a) does not provide a civil remedy against one who merely possesses an intercepting device, and found that "[t]he express language of § 2520 is therefore not susceptible to a construction which would provide a cause of action against one who manufactures or sells a device in violation of § 2512 but does not engage in conduct violative of § 2511." Id. at 589. The Third Circuit has not passed upon this issue.

Our sister court in the District of New Jersey, however, has recently followed the newly developed majority view that § 2520(a) does allow for the recovery of damages against one who possesses an intercepting device. DIRECTV, Inc. v. Dougherty, No. Civ. A. 02-5576, 2003 U.S. Dist. LEXIS 23654, at *7 (D.N.J. Oct. 8, 2003) (Wolfson, J.). The court acknowledged numerous recent decisions supporting that view, concluding that "it appears that the majority position, and the better view, is that the ECPA allows for recovery of civil damages against one who possesses an intercepting device in violation of § 2512." Id. at *5-7 (citing to numerous (unpublished) decisions in which district courts have implicitly or explicitly rejected Flowers by finding that § 2520 does subject possessors of intercepting

devices to civil liability).

The court reasoned that a suit may be brought under § 2520(a) by "any person whose wire, oral or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter," which phrase confers standing on plaintiffs, rather than limits the potential class of defendants. Id. at *6. Thus, anyone who violates a provision of the ECPA is a potential defendant. Id. The court was further persuaded that if Congress had intended to exempt from civil liability those who violated § 2512, it would have specifically listed that exception in § 2520(a), along with the exception for § 2511(2)(a)(ii). Id. at *6-7. For substantially the same reasons, we are persuaded that this newly-developed majority view is the better approach.

Nevertheless, as discussed above, Plaintiff's Complaint alleges more than mere possession of the device by Defendant and, accepting Plaintiff's allegations as true, we find that Plaintiff states a claim under § 2512. Accordingly, we deny Defendant's Motion to Dismiss as to Count 3 of Plaintiff's Complaint.

D. Count 4 - 47 U.S.C. § 605(e)(4)

Section 605(e)(4) provides, inter alia, that anyone who modifies any electronic device or equipment "knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable

programming, or direct-to-home satellite services," is subject to penalty. 47 U.S.C. § 605(e)(4). Defendant does not argue for dismissal of this count of Plaintiff's Complaint and, therefore, Count 4 remains before the Court.

E. Count 5 - Civil Conversion

Plaintiff asserts a claim of civil conversion under Pennsylvania law, alleging that Defendant procured Plaintiff's satellite signals without concomitant payment to DIRECTV. Defendant appears to argue that a satellite transmission is not tangible property and, therefore, not chattel subject to conversion under Pennsylvania law.

Pennsylvania courts continue to hold that only tangible property, or intangible property rights which have merged with, or are otherwise connected to, a document, are subject to conversion. See Northcraft v. Edward C. Michener Assoc., 466 A.2d 620, 625 (Pa. Super. Ct. 1983) ("The process of expansion [of the tort of conversion] has stopped with the kind of intangible rights which are customarily merged in, or identified with some document."); see also, Famology.com, Inc. v. Perot Sys. Corp., 158 F. Supp. 2d 589, 591 (E.D. Pa. 2001) (holding that conversion action could not be brought under Pennsylvania law for misappropriation of internet domain names because such domain names do not constitute tangible property). In this case, the

property at issue are satellite signals, which cannot be seen nor felt, and, thus, do not seem to fall within the ambit of tangible property subject to conversion. DIRECTV, Inc. v. Frick, Civ. A. No. 03-6045, 2004 U.S. Dist. LEXIS 4316, at *7 (E.D. Pa. Mar. 3, 2004). Accordingly, Plaintiff's claim for conversion fails to state a claim upon which relief can be granted, and Defendant's Motion to Dismiss is granted as to Count 5 only.

F. Count 6 - 18 Pa. Cons. Stat. Ann. § 910

Damages may be sought pursuant to 18 Pa. Cons. Stat. Ann. § 910, which provides for civil penalties for those who make, possess, assemble, distribute or use an unlawful telecommunication device, or modify a lawful telecommunication device, which can be used for theft of a telecommunication service. §§ 910(a), (e). Satellite service is included in the definition of telecommunication service. § 910(e).

Defendant appears to argue that the device in his possession was not an illegal telecommunication device pursuant to the statute. However, Section 910 defines an unlawful telecommunication device as:

any telecommunication device which is capable of or has been altered, designed, modified, programmed or reprogrammed, alone or in conjunction with another telecommunication device or devices so as to be capable of facilitating the disruption, acquisition, receipt, transmission or decryption of a telecommunication service without the consent or knowledge of the telecommunication service provider.

Id. Plaintiff's Complaint alleges that Defendant possessed a pirate access device that is primarily designed to permit illegal programming of access cards for the sole purpose of obtaining access to Plaintiff's satellite programming. Accepting Plaintiff's allegations as true, Defendant's Motion to Dismiss as to Count 6 must be denied.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART** to the extent that Count 5 of Plaintiff's Complaint is dismissed for its failure to state a claim for conversion under Pennsylvania law. All other counts of Plaintiff's Complaint remain before the Court.

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v.	:	
	:	
DANA R. KITZMILLER,	:	
Defendant.	:	No. 03-3296

O R D E R

AND NOW, this day of March, 2004, in consideration of the Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (Doc. No. 22) and Exhibit A to the Motion to Dismiss (Doc. No. 25) filed by Defendant Dana R. Kitzmiller ("Defendant"), the Response in Opposition filed by Plaintiff DIRECTV, Inc. ("Plaintiff") (Doc. No. 30), and Defendant's Reply thereto (Doc. No. 34), **IT IS ORDERED** that Defendant's Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART** to the extent that Count 5 of Plaintiff's Complaint is **DISMISSED**. All other counts contained in Plaintiff's Complaint remain before the Court.

IT IS FURTHER ORDERED THAT, upon consideration of the Motion for More Definite Statement pursuant to Federal Rule of Civil Procedure 12(e) (Doc. No. 23) and Exhibit A to that Motion (Doc. No. 26) filed by Defendant, and Plaintiff's Response thereto (Doc. No. 29), and this Court's determination that Plaintiff's Complaint sufficiently pleads claims upon which relief can be granted, Defendant's Motion for More Definite Statement is

DISMISSED AS MOOT.

BY THE COURT:

JAMES MCGIRR KELLY, J.