

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

| | | |
|-----------------------|---|---------------------|
| DIRECTV, Inc., | : | |
| | : | CIVIL ACTION |
| vs. | : | NO. 04-2657 |
| | : | |
| DENNIS CARTER, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| Defendant. | : | |

ORDER AND MEMORANDUM

ORDER

AND NOW, this 29th day of October, 2004, upon consideration of Defendant Dennis Carter's Motion to Dismiss Counts II, III, and IV of Plaintiff's Amended Complaint for Failure to State a Claim upon which Relief can be Granted Pursuant to F.R.C.P. 12(b)(6) (Document No. 4, filed July 9, 2004), and plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss for Failure to State a Claim (Document No. 5, filed July 26, 2004), **IT IS ORDERED** that Defendant Dennis Carter's Motion to Dismiss Counts II, III, and IV of Plaintiff's Amended Complaint for Failure to State a Claim upon which Relief can be Granted Pursuant to F.R.C.P. 12(b)(6) is **GRANTED IN PART AND DENIED IN PART**, as follows:

1. Defendant's Motion to Dismiss Counts II and IV of Plaintiff's Amended Complaint is **DENIED**; and,
2. Defendant's Motion to Dismiss Count III of Plaintiff's Amended Complaint is **GRANTED**.¹

¹In its Memorandum of Law in Opposition to Defendant Dennis Carter's Motion to Dismiss, plaintiff consented to the dismissal of Count III of its Amended Complaint.

IT IS FURTHER ORDERED that a Preliminary Pretrial Conference will be scheduled in due course.

MEMORANDUM

I. BACKGROUND

Plaintiff, Directv, on June 16, 2004, filed a five count Amended Complaint against defendant, Dennis Carter. Defendant moved to dismiss Counts II, III and IV pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff filed a Memorandum of Law in Opposition to Defendant's Motion to Dismiss in which it consented to the dismissal of Count III. Therefore, this Order and Memorandum addresses only Count II, which alleges the unauthorized interception of electronic communications in violation of 18 U.S.C. § 2511 of the Electronic Communications Privacy Act of 1986, 18 U.S.C.S. § 2510 et seq., and Count IV, which alleges the unauthorized assembly or modification of satellite programming devices in violation of § 605(e)(4) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 605(e)(4).

Directv is a California-based company in the business of distributing satellite television programming throughout the United States. To prevent unauthorized reception and use of Directv's broadcasts, Directv uses encryption technology to digitally scramble its digital signal, making it unusable until it is unscrambled by a satellite receiver. A removable "Access Card" manages the opening and closing of television channels offered by Directv. Once a Directv customer pays a subscription fee, Directv electronically directs the Access Card to unscramble portions of the satellite signal allowing customers to view channels. Directv's main source of revenue is the payment by authorized users for satellite programming.

This case arises out of defendant's alleged possession and use of illegal devices and equipment designed to intercept and decrypt Directv's protected satellite communications. According to Directv, defendant purchased and used illegal "Pirate Access Devices" that were designed to permit viewing of Directv's television programming without authorization by, or payment to, Directv.

On May 25, 2001, Directv executed Writs of Seizure at the shipping facility used by distributors of Pirate Access Devices. Local law enforcement officials seized records confirming defendant's purchase of Pirate Access Devices. This action was filed based on these records.

Directv seeks injunctive relief to restrain defendant from engaging in the alleged conduct. Additionally, Directv seeks damages for defendant's violations of 18 U.S.C. § 2511 and 47 U.S.C. § 605(e)(4) and punitive damages, attorneys' fees, and pre- and post-judgment interest.

II. STANDARD OF REVIEW

Rule 12(b)(6) of the federal rules of civil procedure provides that, in response to a pleading, a defense of "failure to state a claim upon which relief can be granted" may be raised by motion. Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). Only those facts alleged in the complaint may be considered in deciding such a motion. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Therefore, the facts alleged in plaintiff's Amended Complaint are accepted as true in deciding this motion.

III. DISCUSSION

A. Count II - Damages for Violations of 18 U.S.C. § 2511

In Count II of its Amended Complaint, Directv alleges that defendant intentionally intercepted or endeavored to intercept electronic communications from Directv and 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 18 U.S.C. § 2511. (Complaint, ¶27).

Section 2511(1)(a) provides that a person commits a federal offense if he “intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.” 18 U.S.C. § 2511(1)(a). Section 2520 provides a civil remedy for violations of § 2511. It reads in pertinent part: “[a]ny 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 . . . engaged in that violation such relief as may be appropriate.” 18 U.S.C. § 2520(a). Appropriate relief includes: (1) preliminary and other equitable or declaratory relief; (2) damages under subsection (c) and punitive damages in appropriate cases; and (3) reasonable attorneys’ fees and other litigation costs reasonably incurred. Id. § 2520(b). Subsection (c) provides for the computation of damages as follows: “if the conduct in violation of this chapter . . . is the private viewing of a private satellite video communication that is not scrambled or encrypted . . . then the court assesses damages in one manner.² Id. § 2520(c)(1). “*In any other action,*” the court assesses

² The full text of § 2520 (c) provides:

(1) In an action under this section, if the conduct in violation of this chapter, is the

damages in another manner. Id. §2520(c)(2)

Carter argues that Count II of the Amended Complaint should be dismissed on the ground that § 2520 does not create a private right of action for violations of 18 U.S.C. § 2511(1)(a), where, as in this case, satellite video communications are scrambled or encrypted. In support of this position, Carter cites an unreported case in the Eastern District of North Carolina. See In re Directv, Inc., 2004 U.S. Dist. LEXIS 16801 (E.D.N.C. Jan. 16, 2004). In that case, the court held that Directv could not assert a private cause of action under 18 U.S.C. § 2520 for defendants'

private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

- (A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than \$ 50 and not more than \$ 500.
- (B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than \$ 100 and not more than \$ 1000.

(2) *In any other action under this section*, the court may assess damages whichever is the greater of -

- (A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
- (B) statutory damages of whichever is the greater of \$ 100 a day for each day of violation or \$ 10,000.

18 U.S.C. § 2520(c) (emphasis added).

alleged violation of § 2511(1)(a) because § 2520 applied only to *unscrambled* or *unencrypted* private satellite video communications. Id. Because Directv's signal is scrambled and encrypted, Carter argues that § 2520 does not create a private right of action.

The majority of courts have declined to follow the reasoning of the District Court in North Carolina in In re Directv and have held that 18 U.S.C. § 2520 provides a private right of action for violations of § 2511. See Flowers v. Tandy Corp., 773 F.2d 585 (4th Cir. 1985); Directv, Inc. v. Barker, 2004 U.S. Dist. LEXIS 14743, at *2 (E.D. Pa. July 27, 2004); Directv, Inc. v. Lewis, 2004 U.S. Dist. LEXIS 8864 (W.D.N.Y. Jan. 6, 2004); Directv, Inc. v. Barnes, 302 F. Supp. 2d 774, 778 (W.D. Mich., 2004); Directv v. Zink, 2004 U.S. Dist. LEXIS 19102, at *6-7 (E.D. Mich. Sept. 23, 2004); Directv, Inc. v. Childers, 274 F. Supp. 2d 1287, 1288-89 (D. Ala. 2003); Directv, Inc. v. Westendorf, 2003 U.S. Dist. LEXIS 16236 (N.D. Ill. Sept. 15, 2003); Directv v. Cavanaugh, 321 F. Supp. 2d 825 (E.D. Mich. Nov. 18, 2003); but see Directv v. Decroce, 2004 U.S. Dist. LEXIS 16710 (D.N.J. Aug. 19, 2004) (holding that § 2520 does not authorize civil relief for violations of § 2511). Several courts have presumed that a private right of action exists and, therefore, did not even analyze the issue before deciding the issue of damages. See e.g., Directv, Inc. v. Crumlish, 2004 U.S. Dist. LEXIS 13680 (E.D. Pa. July 16, 2004); Directv v. Meinecke, 2004 U.S. Dist. LEXIS 12659 (S.D.N.Y. July 9, 2004); Directv, Inc. v. Perrier, 2004 U.S. Dist. LEXIS 9258 (W.D.N.Y. Mar. 15, 2004).

In the North Carolina case upon which defendant relies, the court focused solely upon § 2520(c)(1), which authorizes damages for the interception of unencrypted or unscrambled satellite communications, and did not reference § 2520(c)(2), which provides for damages “*in any other action.*” Directv, Inc. v. Marinac, 2004 U.S. Dist. LEXIS 16126, at *9 (D. Minn. Aug.

16, 2004). When § 2520 is read in its entirety, with particular focus on subsection (c), Carter's interpretation is contrary to the plain language of the statute. Barker, 2004 U.S. Dist. LEXIS 14743, at *2.

If the statutory language is "plain and unambiguous, further inquiry is not required, except in the extraordinary case where a literal reading of the language produces an absurd result." Idahoan Fresh v. Advantage Produce, 157 F.3d 197, 202 (3d Cir. 1998). Based on the plain language of § 2520, the court concludes that 18 U.S.C. § 2520 creates a private right of action for violations of § 2511(1)(a).

Carter also argues that Directv has failed to state a cause of action under 18 U.S.C. § 2511(1)(a) because "mere possession" of a Pirate Access Device does not support a finding of liability under § 2511(1)(a). (Defendant's Motion to Dismiss, 9). While "mere possession" may not support a finding of liability, Directv alleges more than "mere possession" of the device in its Amended Complaint – it alleges that Carter intentionally intercepted, endeavored to intercept, or procured other persons to intercept Directv's satellite communications. (Complaint, ¶27).

At this procedural juncture, the court reviews only the sufficiency of the allegations and not the sufficiency of the evidence to support a finding of liability. The Federal Rules of Civil Procedure require only that plaintiff include a "short and plain statement" of the claim and do not require him to set out in detail the facts upon which he bases his claim. See Conley v. Gibson, 355 U.S. 41, 47 (1957). The Court concludes Directv has sufficiently alleged a cause of action under § 2511 in Count II of the Amended Complaint.

B. Count IV - Damages for violation of 47 U.S.C. § 605(e)(4)

In Count IV of its Amended Complaint, Directv seeks damages under 47 U.S.C. § 605(e)(4) of the Communications Cable Policy Act of 1984. Section 605(e)(4) provides, *inter alia*, that anyone who manufactures, assembles, modifies, sells, or distributes 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.

Carter argues that Directv has not adequately alleged a violation of § 605(e)(4). That argument is rejected. Paragraph 35 of the Complaint alleges that, “[d]efendant knowingly, manufactured, assembled, modified, sold or distributed electronic, mechanical or other devices or equipment, knowing or having reason to know that the devices or equipment were used primarily in the assistance of the unauthorized decryption of Satellite Programing” The court concludes such allegations state a violation of § 605(e)(4). Accordingly, defendant's Motion to Dismiss Count IV of the Amended Complaint is denied.

IV. CONCLUSION

For the forgoing reasons, defendant’s Motion to Dismiss Counts II and IV of the Amended Complaint is denied. Plaintiff has consented to the dismissal of Count III. Therefore, defendant’s Motion to Dismiss Count III is granted.

BY THE COURT:

/s/ Honorable Jan E. DuBois
JAN E. DUBOIS, J.