

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

Atkinson, Ha
FILED

DEC 12 2003

WILLIAM E. GUTHRIE
Clerk, U.S. District Court

By: _____
Deputy Clerk

DIRECTV, INC.,

Plaintiff,

v.

SHERWIN KAHN,

Defendant.

Case No. CIV-03-507-WH

ORDER

In its Original Complaint, DIRECTV alleges five statutory causes of action against Defendant Kahn, as well as one common law cause of action for civil conversion/misappropriation. DIRECTV also requests injunctive relief.

As its basis for these claims against Defendant Kahn, DIRECTV alleges that on approximately June 21, 2001, Defendant Kahn purchased a Viper Smart Card Reader/Writer from White Viper Technologies. The Plaintiff also alleges Defendant Kahn purchased an H U Loader from H-Card.org. DIRECTV claims it obtained this information through the business records of manufacturers/distributors of these so-called "Pirate Access Devices." For purposes of this motion, the Court takes as true DIRECTV's allegations that Defendant Kahn purchased the Pirate Access Devices and that those devices are primarily useful for the surreptitious interception of electronic communications.

Pursuant to Fed. R. Civ. P., Rule 12(b)(6), Defendant Kahn requests an Order of this Court dismissing Plaintiff's cause of action under 18 U.S.C. § 2512 as set forth in Count 3 of DIRECTV's Original Complaint. Defendant claims that Count 3 must be dismissed because § 2512 is a criminal

statute that does not provide a private right of action. For the reasons set forth below, Defendant's motion is GRANTED.

Count 3 alleges that Defendant Kahn possessed, manufactured and/or assembled a device designed so that it is primarily useful for the purpose of the surreptitious interception of electronic communications, in violation of 18 U.S.C. § 2512(1)(b). Thus, Count 3 is viable only if DIRECTV can recover for a defendant's mere possession (or manufacture or assembly) of a prohibited device, without proof that the defendant participated in actual interception, disclosure, or intentional use of a protected communication.

To pursue civil remedies under § 2512, DIRECTV relies on 18 U.S.C. § 2520(a), which authorizes civil remedies for some violations of the federal wiretapping laws. Whether § 2520(a) requires proof that the Defendant has participated in actual intercepting, disclosing or using protected communications – as opposed to merely possessing a so-called Pirate Access Device – is the issue at the heart of Defendant Kahn's motion to dismiss. Thus, the issue is solely one of statutory interpretation.

The analysis begins with the observation that § 2512(1)(b) is violated merely by a person possessing an electronic device primarily useful for the purpose of surreptitious interception of electronic communications. The key point is that § 2512(1)(b) does not require the proof of actual interception of communications. Thus, simple possession of the prohibited device may be punished by criminal prosecution.

To support its claims for civil remedies in Count 3, however, DIRECTV relies on 18 U.S.C. § 2520(a) which provides:

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).

From its plain language, § 2520(a) authorizes relief only for actual interception, disclosure or intentional use in violation of law. The statute does not authorize civil remedies for mere possession of an unlawful device, in the absence of proof of actual unlawful interception, disclosure or use. Thus, this Court need look no further than the actual words of the statute to find Defendant Kahn's motion is meritorious.

DIRECTV argues, however, that language added to § 2520(a) as an amendment in 1986 now defines the class of potential defendants as any person "engaged in" a "violation of this chapter." Prior to the 1986 amendment, in Flowers v. Tandy Corp., 773 F.2d 585 (4th Cir. 1985), the Fourth Circuit Court of Appeals had already found no merit in the assertion that § 2520 provides a private cause of action in violation of the criminal proscriptions of § 2512. DIRECTV's subsequent attempts to refute the Flowers holding have been deemed "illogical." DIRECTV v. Jerolleman, 2003 WL 22697177, *2 (E.D.La. 2003). Likewise, DIRECTV's argument that the 1986 amendment to § 2520 permits a civil cause of action for a violation of § 2512 has been described as "an obvious and critical distortion of the statutory language." DIRECTV v. Beecher, Case No. 1:03-cv-0309 (S.D. Ind. Nov. 7, 2003).

This Court is obliged to agree. Indeed, DIRECTV's imaginative interpretation of the plain language of § 2520 borders on the surreal. See also DIRECTV v. Hosev, __ F.Supp.2d __, 2003 WL 22463055 (D. Kan. 2003); DIRECTV v. Jerolleman, 2003 WL 22697177, *2 (E.D.La. 2003); DIRECTV v. Beecher, Case No. 1:03-cv-0309 (S.D. Ind. Nov. 7, 2003); DIRECTV v. Bloomquist,

Case No. 03-1170 (D. Ill. Nov. 7, 2003); DIRECTV v. Moore, 3:03CV260 (W.D.N.C. Oct. 3, 2003); DIRECTV v. Delaney, Case No. 03-C-344 (N.D. Ill. Nov. 21, 2003); DIRECTV v. Kopytko, Case No. 6:03-cv-1066-Orl (M.D. Fl. Oct. 2, 2003); DIRECTV v. Bush, Case No. H-03-1765 (S.D. Tex. Oct. 27, 2003).

In short, this Court believes that Congress did not provide a civil cause of action against a person merely in possession of a so-called Pirate Access Device. Therefore, Defendant Kahn's Motion to Dismiss Count 3 of Plaintiff DIRECTV's Original Complaint is hereby granted.

Dated this 12th day of December, 2003.



Ronald A. White
United States District Court Judge