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*Private Rights of Action and the Wiretap Act: The DirecTV
Litigation*

Todd B. Tatelman, American Law Division

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Private Rights of Action and the Wiretap Act: The “DirecTV” Litigation

Todd B. Tatelman
Legislative Attorney
American Law Division

Summary

Attempts by DirecTV to reduce the piracy of its satellite broadcast signal have garnered significant legal and congressional interest. Over the past several years DirecTV has been engaged in an aggressive campaign to prevent the theft and piracy of its satellite television signal. One element of this campaign has been to bring civil lawsuits against individuals who possess certain devices that apparently can be used to intercept satellite transmissions. DirecTV has brought these lawsuits primarily pursuant to the civil remedies section of the Electronic Communications Piracy Act (Wiretap Act), arguing that the statute allows them to bring a civil suit for any violation of the Wiretap Act. Numerous defendants to these suits have responded by arguing that DirecTV’s use of this civil remedy is inappropriate because the act does not provide the statutory authority to bring a civil lawsuit for violations of other sections of the Wiretap Act. Rather, they contend that the civil remedy is limited to the specific violations listed in the statute. This argument has been met with inconsistent results among the federal district courts that have ruled on its merits. Recently, the Eleventh Circuit Court of Appeals became the first federal court of appeals to address this specific issue, holding that the plain language of the Wiretap Act does not provide DirecTV with a private right of action for alleged violations of other sections of the Wiretap Act.¹ This report will be updated.

Background

DirecTV is a direct satellite broadcast system that uses encryption methods to scramble its satellite signal and prevent theft of its programming.² To legally obtain a DirecTV signal, customers must establish an account with DirecTV and obtain the required system hardware. Included in the required hardware is a DirecTV access device, which upon payment and activation allows the customer to view the satellite signal in a

¹ *DirecTV, Inc. v. Treworgy*, 373 F.3d 1124 (11th Cir. 2004).

² *Id.* at 1125.

decrypted (unprotected) format.³ These access devices have become the focal point of the litigation, as DirecTV alleges that individuals are able to circumvent their encryption system for the purpose of viewing DirecTV's signal without payment. This can be accomplished, according to DirecTV, by either procuring "pirate access devices" from private, non-DirecTV affiliated companies or developing them independently.⁴

To combat the illegal pirating of its signal, DirecTV has targeted consumers that it alleges have intentionally intercepted, or endeavored to intercept DirecTV's transmission in violation of the Electronic Communications Privacy Act (Wiretap Act).⁵ The Wiretap Act contains numerous provisions, several of which are relevant to these proceedings. First, section 2511(1)(a) prohibits both the interception and attempted interception of wire, oral, or electronic communications.⁶ In addition, section 2512(1)(a) of the Wiretap Act forbids the manufacture, assembling, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices, if the person knows or has reason to know that the primary purpose of the device is the pirating of such communications.⁷ Finally, section 2520(a) of the Wiretap Act provides the following civil remedy:

(a) In General. – 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.⁸

DirecTV has consistently argued that the civil remedy provided in section 2520(a) creates a private right of action for violations of sections 2511(1) and 2512(1)(b), and therefore, it can pursue these individual defendants in federal court.⁹ Numerous defendants have asserted that the civil remedy section does not create a private right of action against persons simply in possession of "pirate access devices." To date this question has produced inconsistent results. Several federal district courts either expressly or implicitly have held that section 2520(a) does create a private right of action,¹⁰ while

³ *Id.*

⁴ *Id.*

⁵ Electronic Communications Privacy Act, P.L. 99-508, § 101-102, 100 Stat. 1849-53 (Oct. 21, 1986) (codified as amended at 18 U.S.C. § 2510 *et seq.*).

⁶ 18 U.S.C. § 2511(1)(a) (2004) (providing that "any person who - (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; ... shall be punished as provided in subsection (4), or shall be subject to suit as provided in subsection (5)").

⁷ 18 U.S.C. § 2512(1)(b) (2004) (stating that "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 surreptitious interception of wire, oral, or electronic communications, ... shall be fined under this title or imprisoned for not more than five years or both").

⁸ 18 U.S.C. § 2520(a) (2004).

⁹ *See Treworgy*, 373 F.3d at 1125.

¹⁰ *See, e.g., DirecTV, Inc. v. Drury*, 282 F.Supp.2d 1321, 1323-24 (M.D. Fla.2003); *DirecTV, Inc.* (continued...)

an almost equal number have reached the opposite conclusion.¹¹ The case before the Eleventh Circuit represents the first federal court of appeals decision on the merits of DirecTV's arguments.

The Eleventh Circuit Ruling: *DirecTV, Inc. v. Treworgy*

In this case, DirecTV had brought an action against Mike Treworgy for allegedly possessing and using specific "pirate access devices" to steal DirecTV's satellite signal.¹² DirecTV argued that Mr. Treworgy's possession of these devices was in violation of sections 2511(1) and 2512(1)(b) and that pursuant to section 2520(a) it had the statutory right to bring a private civil action against him for money damages. Mr. Treworgy responded by arguing that section 2520(a) did not create a private right of action for DirecTV, and therefore, the complaint should be dismissed. The district court agreed with Mr. Treworgy and granted a partial motion to dismiss.¹³

In defense of its position before the Eleventh Circuit, DirecTV made three distinct arguments. First, it contended that the mere fact that its communications have been intercepted affords it the right to sue for violations of the Wiretap Act. This right exists, according to DirecTV, regardless of whether a particular defendant actually committed any interception.¹⁴ Second, DirecTV attempted to argue that because Congress specifically excluded only certain violations of the Wiretap Act as a basis for civil liability, any other violation of the Wiretap Act gives them the right to sue pursuant to section 2520(a).¹⁵ Finally, DirecTV asserted that the existence of a private right of action better effectuates the purpose of the Wiretap Act by encouraging private parties to aid in the act's enforcement.¹⁶

The Eleventh Circuit began its analysis with a review of the plain language of the statutes in question. According to the court, section 2520(a) clearly defines victims as the persons whose communication is intercepted or intentionally used, and the offenders as

¹⁰ (...continued)

v. Karpinsky, 274 F.Supp.2d 918, 919 (E.D. Mich.2003); *DirecTV, Inc. v. Dougherty*, 2003 U.S. Dist. LEXIS 23654, at *5-*7 (D. N.J. 2003); *DirecTV, Inc. v. Gatsiolis*, No., 2003 U.S. Dist.1126 LEXIS 15801, at *5-* 6 (N.D. Ill. 2003); *DirecTV, Inc. v. Megar*, 2003 U.S. Dist. LEXIS 23814, at *2 (S.D.Fla. 2003).

¹¹ *See, e.g., DirecTV, Inc. v. Lorenzen*, 299 F.Supp.2d 789, 792-93 (N.D. Ohio 2004); *DirecTV, Inc. v. Baker*, 318 F.Supp.2d 1113 (M.D. Ala. 2004); *DirecTV, Inc. v. Gemmell*, 317 F.Supp.2d 686, 689 (W.D. La. 2004); *DirecTV, Inc. v. Cope*, 301 F.Supp.2d 1303, 1305 (M.D. Ala. 2003).

¹² Specifically, Mr. Treworgy was said to have purchased a "PT2 Pocket Pal Programmer" and a "PT2 Pocket Pal Upgrade Chip" from a California-based mailing facility called Fulfillment Plus. *See Treworgy*, 373 F.3d at 1125.

¹³ *See DirecTV, Inc. v. Treworgy*, 2003 WL 23532190, *2 (M.D. Fla. 2003)

¹⁴ *See Treworgy*, 373 F.3d at 1127.

¹⁵ *Id.*

¹⁶ *Id.* at 1128.

the persons or entities engaged in the violation.¹⁷ Conversely, section 2512(1)(b) provides for criminal punishment simply for engaging in the trafficking of interception devices and is silent with respect to the availability of civil remedies. Thus, the plain language of the statute makes clear that it was “the intent of Congress to limit liability to a certain class of defendants.”¹⁸ Responding directly to DirecTV’s interpretation of section 2520(a), the court pointed out that such a reading of the statute would potentially create constitutional problems. Given that the federal courts are courts of limited jurisdiction, according to the court, it is difficult to see how DirecTV could establish a “case or controversy” and invoke the jurisdiction of the court “without an allegation that the wrongdoer against whom DirecTV seeks relief actually injured or directly threatened to injure DirecTV.”¹⁹ Therefore, the court was required by controlling precedent to avoid a construction of the statute that raised potential constitutional issues.²⁰

With respect to DirecTV’s second argument, the court again referred to the plain meaning of the statute and pointed out that the exception provided by section 2511(2)(a)(ii)²¹ is limited to interceptions that assist law enforcement and in no way expands the scope of the available civil remedy. Relying on *Flowers v. Tandy Corp.*, a Fourth Circuit decision holding that under a previous version of section 2520(a) there was no private right of action for violations of other Wiretap Act sections, the court was able to point to nothing in either the new streamlined statutory language or the legislative history that requires a different reading of the statute.²²

Finally, the court addressed DirecTV’s final argument regarding the need for private enforcement of the statute and its effectiveness as an enforcement tool. As the court clearly points out, this argument contains a basic flaw, namely, that “‘courts may not create [a private right of action], no matter how desirable that might be as a policy matter, or how compatible with the statute,’ because that is a determination Congress alone can make.”²³

Although the decision by the Eleventh Circuit is controlling precedent for only Alabama, Florida, and Georgia, the ruling nevertheless potentially deals a blow to DirecTV’s overall litigation strategy. According to the court, DirecTV represented that it had approximately 1800 cases pending in the federal district courts of Florida alone, and hundreds more in various federal courts around the country.²⁴ While it is far from certain that courts outside the Eleventh Circuit will adopt the reasoning of this opinion, the

¹⁷ *Id.* at 1126.

¹⁸ *Id.* at 1126.

¹⁹ *Id.* at 1127 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

²⁰ *Id.* (citing *Vt. Agency of Natural Res. v. United States ex rel Stevens*, 529 U.S. 765, 787 (2000)).

²¹ This provision specifically exempts the interception of electronic or wire communications by persons authorized by law to intercept such communications or otherwise conduct electronic surveillance. See 18 U.S.C. § 2511(2)(a)(ii) (2004).

²² *Id.* at 1128 (citing *Flowers v. Tandy Corp.*, 773 F.2d 585, 588-89 (4th Cir. 1985)).

²³ *Id.* at 1129 (citing *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)).

²⁴ *Id.* at 1126.

existence of such a ruling will likely be cited by defendants to DirecTV lawsuits around the country. Thus, it is only a matter of time before another court of appeals issues a decision on the availability and scope of a private right of action pursuant to section 2520(a) of the Wiretap Act.

In addition to further judicial action, Congress could undertake a revision of the statute, clearly providing in the text that such a right of action exists for any and all violations of the Wiretap Act. While there are numerous bills currently pending before Congress relating to both the pirating of intellectual property, and electronic communications,²⁵ at this time there does not appear to be any legislative proposals that expand the private right of action afforded by the Wiretap Act.

²⁵ *See, e.g.*, Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003, H.R. 1066, 108th Cong. (2003); Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004); E-mail Privacy Act of 2004, H.R. 4956, 108th Cong. (2004); E-mail Privacy Protection Act of 2004, H.R. 4977, 108th Cong. (2004); Computer Software Privacy and Control Act, H.R. 4255, 108th Cong. (2004); Television Viewer Privacy Act of 2003, H.R. 3631, 108th Cong. (2003); Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003, S. 1608, 108th Cong. (2003).