UNITED STATES OF AMERICA -v- THE SPY FACTORY, INC. d/b/a "Spy Factory," RONALD KIMBALL, MARLIN RICHARDSON, a/k/a "Brud," and TRACY EDWARD FORD, Defendants.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

951 F. Supp. 450*; *1997 U.S. Dist. LEXIS 108

January 8, 1997, Decided
January 9, 1997, FILED

AMENDED OPINION AND ORDER

SONIA SOTOMAYOR, U.S.D.J.

Defendants move, pursuant to *Fed. R. Crim. P. 21(b)*, to change the venue of this action from the Southern District of New York to the Western District of Texas. Further, defendants move to dismiss a portion of Count 1, as well as Counts 2 through 16 and 17 through 31 of the Indictment on the ground that the statute upon which the prosecution of these counts is based, *18 U.S.C. ß 2512*, is unconstitutionally vague. For the reasons to be discussed, defendants' motions are **DENIED.**

BACKGROUND

The Spy Factory "is a retail store concept developed in 1989 to sell personal protection devices and personal security items to the general public and law enforcement agencies." (Defs.' Vagueness Mem. at 3) [1]. "At the time of the initial searches and arrests in this case, Spy Factory, which is headquartered in Texas, had 16 stores located throughout the United States." (Id.).

1 The defendants and the Government agreed to file their pretrial motions together. Defendants, however, submitted separate memoranda of law addressing the various issues raised in their pretrial motions. One memorandum of law, entitled "Memorandum of Law in Support of Defendant the Spy Factory, Inc.'s Pre-Trial Motions," addressed the constitutionality of *Section 2512*. It will hereinafter be referred to as "Defs.' Vagueness Mem." A separate memorandum of law, entitled "Defendants' Joint Motion for Change of Venue and Incorporated Memorandum of Law," addressed the motion for a change of venue and will hereinafter be referred to as "Defs.' Venue Mem." Finally, the defendants' remaining issues of law pertaining to suppression and discovery issues were briefed in a third memorandum of law which will hereinafter be referred to as "Defs.' Discovery Mem." The Government submitted one memorandum of law which addressed all of the defendants' pretrial motions. It will hereinafter be referred to as "Govt Mem."

"In 1993, the United States Customs Service ... began an investigation of illegal bugging and wiretapping devices that were imported into the United States and sold by various so-called 'spy shops.'" (Govt Mem. at 2). According to the Government, "Spy Factory was and is the largest chain of retail spy shops' in the country." (Id.) Working across the country, but centralizing its efforts in New York City, the Government used undercover agents and confidential informants to gather evidence to prosecute the Spy Factory and the individually-named defendants for "violations of customs laws, *Section 2512* of Title III, and the Communications Act of 1934." (Govt Mem. at 4).

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II.

B. ASSESSING THE VAGUENESS OF *SECTION 2512* AS APPLIED TO DEFENDANTS

Even though the Court must assess the vagueness of *Section 2512* as it applies to the specific conduct of defendants and not according to the facial vagueness of the terms of the statute itself, the Court nevertheless must first look to the plain meaning of the terms of the statute in order to discern whether those terms impart sufficient clarity to a person of ordinary intelligence. The following is an excerpt from the relevant portion of the statute:

***ß 2512*. Manufacture, distribution, possession, and advertising of wire, oral, or electronic communication intercepting devices prohibited**

(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 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; ....

18 U.S.C. ß 2512(1)(b) (emphasis added).

Defendants are correct that there has been no extensive examination of whether *Section 2512* is unconstitutionally vague. The few cases that have considered the proposition have concluded in conclusory terms that the statute is not vague, however. See e.g., *United States v. Martin, 1 F.3d 1250, 1993 WL 298884*, *1-*2 (10th Cir. 1993) (unpublished disposition) (concluding in a satellite scrambler case that "the language of *ß 2512(1)(b)* was sufficiently clear to put [the defendant] on notice that his conduct was prohibited."); id. at *2 (providing that "where, as here, the language of the statute plainly covers the defendant's actions, the statute need not have been previously held applicable on the same facts to survive a vagueness attack."); *United States v. Novel, 444 F.2d 114 (9th Cir. 1971)* (concluding in a one paragraph opinion "that the statute is not unconstitutionally vague and ambiguous"); cf. *United States v. Bast, 161 U.S. App. D.C. 312, 495 F.2d 138, 144 (D.C. Cir. 1974)* (rejecting the argument that *ß 2512* and *ß 2511* are in conflict rendering either one inscrutable but providing that "any claim that fair notice is lacking is ... appropriately reached on a more complete record, after the Government has had an opportunity to establish scienter, for the scienter requirement needed for willful conduct may rescue a statute from the infirmity of vagueness."). But see *United States v. Hochman, 809 F. Supp. 202, 204 (E.D.N.Y. 1992)* (noting that the language in the statute providing that the devices are "primarily useful for the purposes of surreptitious interception" is "troublesome."). Because the proposition has not been conclusively established by any court and certainly has not received any significant analysis, I consider the question of *ß 2512*'s vagueness, if any, to be of first impression in this Circuit.

Defendants point to two crucial concepts within the statute that render its meaning inscrutable to the person of ordinary intelligence: "primarily useful" and "surreptitious." Defendants contend that the pivotal term of the section, "surreptitious" is nowhere defined in the statute and that its plain meaning or dictionary definition "engender intractable ambiguity." (Defs' Vagueness Mem. at 1). Defendants also argue that the modifier "primarily" renders the statute vague. Although they concede that the modifier "primarily" has been permitted in other contexts, they contend that it has only been permitted when accompanied by explanatory language, guidelines, and examples that further elucidate the use at issue.

While I recognize that the each of these concepts hinge on one another and that in order to establish the full meaning of the statute, the relevant provisions must be read as a whole, and their ambiguities, if any, must be taken together, I analyze each of the defendants' criticisms of the statute in turn.

1. *The "Primarily Useful" Language*

a) Plain Meaning/ Dictionary Definition

As defined by Webster's Third New International Dictionary Unabridged, "primarily" is an adverb meaning "first of all: fundamentally, principally . . . in the first place: originally." Webster's Third New International Dictionary 1800 (3d. ed. 1986). It is not a word that is unfamiliar to the common speaker; rather we invoke it in common parlance and seldom stop to consider its ambiguity. However, because the term "primarily" imports gradations of degree and can only be defined by reference to its position on a continuum, upon first inspection, the phrase "primarily useful" in *Section 2512* appears to be precisely the sort of "classic term of degree" that the Supreme Court rebuked in Gentile. See *Gentile, 501 U.S. at 1047* (providing that statute allowing criminal defense attorney to describe to the public the "general nature of the defense without elaboration" was problematic because "general" and "elaboration" "are both classic terms of degree" that do not provide sufficient guidance to the public in determining where their conduct is unlawful.)

Yet despite the term's inherent relativity, in none of the cases in which "primarily intended or designed for use" has been considered has any court found such language unconstitutionally vague. See, e.g., Posters ' *N' Things, Ltd v. United*

States, 511 U.S. 513, 114 S. Ct. 1747, 1750, 128 L. Ed. 2d 539 (1994); *Hoffman Estates, 455 U.S. at 500-01*. But see *Hochman, 809 F. Supp. at 204 (E.D.N.Y. 1992)* (noting that the language in the statute providing that the devices are "primarily useful for the purposes of surreptitious interception" is "troublesome."). Supreme Court precedent in the cases construing various drug paraphernalia statutes is particularly instructive. In these cases, the Supreme Court has assessed the vagueness of linguistically similar statutes which, for example, restrict retailers from selling "any equipment, product, or material of any kind which is *primarily intended or designed for use"* with illegal drugs. Posters ' *N' Things, 114 S. Ct. at 1750* (emphasis added).

In *Hoffman Estates, 455 U.S. at 500-01*, the Supreme Court construed the "designed for use" language of a local drug paraphernalia ordinance. The Court found it "plain that the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer." *Id. at 501*. The Court emphasized that "[a] business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer. It is also sufficiently clear that items which are principally used for nondrug purposes, such as ordinary pipes, are not 'designed for use' with illegal drugs." Id.

Similarly, in Posters ' *N' Things, 114 S. Ct. at 1751*, the Supreme Court held that the federal drug paraphernalia statute's "primarily intended for use" language should be construed with reference to "a product's likely use rather than to the defendant's state of mind." When construed in this light, the Supreme Court found the language unproblematic. By construing "primarily" in an objective fashion with reference to a standard of how customers in general use the product rather than how any particular customer might use it the Supreme Court avoided the sort of troubling subjectivity inherent in the Gentile and Kolender concepts of degree implicated by the phrases "general" and "credible and reliable." Cf. *Gentile, 501 U.S. at 1048-49* ("The right to explain the 'general' nature of the defense without 'elaboration' provides insufficient guidance because 'general' and 'elaboration' are both classic terms of degree."); *Kolender, 461 U.S. 352, 75 L. Ed. 2d 903, 103 S. Ct. 1855* (holding that loitering statute that had been construed by the courts to require individuals to provide "credible and reliable identification" to police officers was unconstitutionally vague because of the undefined nature of those subjective terms). Instead, in evaluating an object's "primary use," the Supreme Court has emphasized the objective determination of a device's most probable use. This objective standard is substituted for the more individualistic and thereby problematic determination of what the device's "primary" use to any one consumer might be.

It is true, however, as defendants remind the Court, that the statute at issue in Posters 'N' Things is distinguishable from the instant statute in that the Posters 'N' Things statute contained a nonexhaustive list of examples of *per se* drug paraphernalia [10] as well as a list of "objective criteria for assessing whether items constitute drug paraphernalia." Posters ' *N' Things, 114 S. Ct. at 1754*. [11] These additional elements, the Court pointed out, "minimize the possibility of arbitrary enforcement and assist in defining the sphere of prohibited conduct under the statute." Id. This additional level of notice to potential lawbreakers, as well as to the law enforcement community, is missing from the instant statute. It is troubling that *Section 2512* does not provide a list of prohibited devices, nor does is provide "objective criteria" from which citizens and law enforcement officers could discern what devices are prohibited.

10 *21 U.S.C. ß 857(d)* provides the following list of items that are deemed per se drug paraphernalia:

> The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act ... It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as -- (1) metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls; (2) water pipes; (3) carburetion tubes and devices; (4) smoking and carburetion masks; (5) roach clips; meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand; (6) miniature spoons with level capacities of one-tenth cubic centimeter or less; (7) chamber pipes; (8) carburetor pipes; (9) electric pipes; (10) air-driven pipes; (11) chillums; (12) bongs; (13) ice pipes or chillers; (14) wired cigarette papers; or (15) cocaine freebase kits.

[61]**

11 *Section 857(e)* provides the following list of objective criteria to be used in determining whether a device

constitutes drug paraphernalia:

> In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered: (1) instructions, oral or written, provided with the item concerning its use; (2) descriptive materials accompanying the item which explain or depict its use; (3) national and local advertising concerning its use; (4) the manner in which the item is displayed for sale; (5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items in the community, such as a licensed distributor or dealer of tobacco products; (6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise; (7) the existence and scope of legitimate uses of the item in the community; and (8) expert testimony concerning its use.

21 U.S.C. ß 857(e).

However, in the Senate Report accompanying *Section 2512* there is a nonexhaustive list of items intended to be prohibited under the statute. The Report provides the following examples of devices whose design renders them primarily useful for surreptitious interceptions. It states:

> The prohibition will thus be applicable to, among others, such objectionable devices as the martini olive transmitter, the spike mike, the infinity transmitter, and the microphone disguised as a wristwatch, picture frame, cuff link, tie clip, fountain pen, stapler, or cigarette pack.

S. Rep. No. 90-1097, 90th Cong., 2d. Sess., 95 U.S.C.C.A.N. 2112, 2183 (1968). While the Court recognizes that the inclusion of examples in a Senate Report is a far cry from an inclusion of a list in the statute itself, and the Court harbors some doubt whether knowledge of a Senate Report that is not endorsed by the full Congress can be imputed to the average citizen, [12] the Court finds that the instant defendants can be charged with knowledge of the Senate Report because references to the Report itself were found within their possession.

12 See e.g., *Green v. Bock Laundry Machine Co., 490 U.S. 504, 528, 104 L. Ed. 2d 557, 109 S. Ct. 1981 (1989)* (Scalia, J., concurring in the judgment) ("The meaning of the terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated. . . ."). See generally, Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 Harv. J. L. & Pub. Pol'y 401, 401 (1994). But see *United States v. Nadi, 996 F.2d 548, 550 (2d Cir. 1993)* (plain meaning of statutory language can be confirmed by legislative history); *Information Providers' Coalition for Defense of the First Amendment v. Federal Communications Commission, 928 F.2d 866, 874 (9th Cir. 1991)* (legislative history made clear that statutory term had judicially recognized meaning that was not unconstitutionally vague); *United States v. Gavin, 959 F.2d 788, 791 (9th Cir. 1992)* (court considered legislative history in determining that statute was not unconstitutionally vague as applied), cert. denied, *506 U.S. 1067, 122 L. Ed. 2d 164, 113 S. Ct. 1017 (1993)*; *United States v. Desurra, 865 F.2d 651, 653 (5th Cir. 1989)* (legislative history made clear that drug was a "controlled substance" within meaning of statute).

When documents from the Spy Factory headquarters were seized by the Government, among the documents collected was an article on *Section 2512* that made reference to the Senate Report at issue. Appended to that article was a post-it note from Marlin Richardson requesting that an employee return the article to his box when he was done reading it. (Arman Aff. Exh. J.) On this basis, at least Defendants Spy Factory, Inc. and Marlin Richardson can be charged with constructive knowledge of the Report. Cf. *Hoffman Estates, 455 U.S. at 494-95* ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.").

Hence, because the concept of "primarily" has not been recognized as unconstitutionally vague in analogous situations and because the defendants cannot deny that they knowingly walked precariously on the line between lawful and unlawful conduct, I conclude that the phrase "primarily useful" is not unconstitutionally vague as applied to their conduct.

2. *The "Surreptitious" Language*

a) Plain Meaning/ Dictionary Definition

According to Webster's Third New International Dictionary, "surreptitious" means:

> 1. marked or accomplished by fraud or suppression of truth. 2a. executed, obtained, used, done, or attended with often clever or deft circumvention of proper standards, sanction or authority: enjoyed by stealth: clandestine. b.: of fraudulently, spurious, or unauthorized issue: made or introduced fraudulently. c. acting in secret or by stealth: doing something clandestinely: sly, stealthy.

Webster's Third New International Dictionary 2302 (3d. ed. 1986) see also *United States v. Herring, 993 F.2d 784, 786* (11th Cir.) (providing that "although the term 'surreptitious' is not defined in the statute itself, its dictionary definition is well established: secret and unauthorized; clandestine; action by stealth or secretly.") (citing Shorter Oxford English Dictionary 2092 (3d ed. 1959), cert. denied, *510 U.S. 933, 126 L. Ed. 2d 312, 114 S. Ct. 347 (1993)*. This term, while perhaps not as commonly invoked as "primarily," has a clear meaning to the average person. It is not a term of degree; it does not even require one to distinguish between different levels of secrecy. In fact, it is not even possible to be partially "surreptitious." Reduced to a single synonym, surreptitious merely means secret or clandestine.

For the present purposes, the only real difficulty with the term surreptitious arises from its connection to the concept of authority. As the dictionary definition underscores, when an actor acts in a surreptitious manner, he or she "execute[s] . . . with often clever or deft circumvention of proper standards, sanction or *authority."* Webster's Third New International Dictionary 2302 (3d. ed. 1986) (emphasis added). As noted, in construing *Section 2512* in a satellite device case, the Eleventh Circuit also emphasized this notion of a lack of authority as crucial to the concept of surreptitiousness: "Although the term 'surreptitious' is not defined in the statute itself, its dictionary definition is well established: secret and *unauthorized,* clandestine; action by stealth or secretly." *Herring, 993 F.2d at 786* (emphasis added). The difficulty in importing the concept of "authority" into "surreptitious" is that it begs the question of who or what is capable of granting "authority" in this context. Does authority mean authority under the law or does it mean the authority of the person or persons involved in the communication that is the subject of the interception implicating *Section 2512*? Do one or all of the participants in the "communication" have to grant "authority" in order for there to have been no "surreptitious" interception of the communication?

Clearly, it would be illogical if the authority concept in surreptitious referred to authority under the law. First, it does not make sense for a word in common parlance to require a familiarity with the law to invoke. Second, such a construction of authority does not comport with the common understanding of the term. Certainly there are situations in which particular conduct is authorized by the law but is nonetheless surreptitious: as, for example, with an undercover police officer. Surely his or her work is authorized by the law, but it is nonetheless patently surreptitious.

Then, if the authority in surreptitious does not refer to authority under the law, to what authority does it refer? The answer must be that it refers to the authority of all persons involved in the communication. To take an apposite example, consider the following scenario: Jane and John are having a conversation and Jane is secretly recording everything John is saying. Meanwhile, Bill, without Jane *or* John's consent, is recording the same conversation. Who is "surreptitiously" recording? The obvious answer is that both Jane *and* Bill are surreptitiously recording. Bill is recording surreptitiously because he clearly has no person's authority to record the conversation. Jane, too, however, is recording surreptitiously because she does not have John's authority to record the conversation -- even though she may have self-authority or even legal authority to do so. One could never say that just because Jane was a party to the conversation, her recording of John was not surreptitious. If, however, we changed the scenario, and both John and Jane agreed to record one another or they agreed for Bill to record them, then, clearly no one would be acting surreptitiously because there would be full authority to record -- perhaps even if such a recording were forbidden under the law.

What does this tell us, then, about the plain meaning of "surreptitious" under the act? From this, we can discern that surreptitious as used in *Section 2512* can only reasonably mean an interception that is accomplished without the consent, i.e., authority, of all persons to the communication. As unsettling as this result might be on a pragmatic level -- because devices primarily intended to record surreptitiously have become commonplace in the market -- this is unequivocally the "plain meaning" of *Section 2512*.

In fact, the legislative history of the statute comports with this construction of the term surreptitious. Among the prohibited devices that are included in the Senate Report to the bill, are "the microphone disguised as a wristwatch, ... cuff link, [and] tie clip ...." S. Rep. No. 90-1097, 90th Cong., 2d. Sess., 95 U.S.C.C.A.N. 2112, 2183 (1968). These devices, which are deemed *per se* surreptitious by the Report, are patently devices that, in order to be used, most logically require the consent or authority of at least one party to the conversation. Unlike a picture frame, fountain pen, stapler, or cigarette pack, which are also mentioned in the list of prohibited devices, a wristwatch, cuff link and tie clip cannot merely be left behind to record the conversation of others. Rather, these devices, to be used, must more likely than not be worn by at least one party to the conversation. The fact that these devices are included within the intended purview of the act supports the conclusion that the act was intended to cover any device whose design renders it primarily useful for the interception of communications *without the consent or "authority" of all parties to that communication.*

b) *Section 2512*'s Purported Conflict with *Section 2511*

Defendants approach the alleged vagueness of *Section 2512* from a different vantage point, however. They contend that any natural clarity to the term surreptitious is obfuscated by the conflict between *Section 2512*'s prohibition of surreptitious *devices* and *Section 2511*'s permission of some forms of surreptitious *interceptions.* They claim that the term "surreptitious" in *Section 2512* is vague because it conflicts [13] with *Section 2511(2)(d)* which explicitly permits the interception of communications so long as least one party to the conversation consents to such interception. [14] The relevant portion of *Section 2511* provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. ß 2511(2)(d). "Intercept" is defined under the statute to mean "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 21 U.S.C. ß 2510(4). Defendants argue that this provision renders *Section 2512*'s term "surreptitious" inscrutable because a person of ordinary intelligence could not discern what devices are legal and what devices are illegal under the statute. They contend that:

> there is not any distinction in 'surreptitiousness' as that word is defined, between legal (one-party consensual) interceptions and illegal interceptions. As a result, there is not any way for a person (and defendants herein) to distinguish between the primary design of a device intended for legal "surreptitious" recording or monitoring, i.e., a concealable or disguised tape recorder and transmitter, and such a device designed for illegal 'surreptitious' purposes.

(Defs' Vagueness Mem. at l4). [15] Defendants insist that the disparate results in interpretation that arise from the apparent inconsistency between *Section 2512* and *Section 2511* "appear to depend more on context -- the merchant from whom the item is purchased, and its ultimate use by the purchaser -- rather than on any 'primary' design characteristics."(Defs. Mem. at 15-16). These facts, they insist, "illustrate the unpredictability and inconsistency a citizen faces in determining in advance just what 'surreptitious' recording devices are proscribed by *ß 2512*." (Id.).

13 Cf. *Chalmers v. Los Angeles, 762 F.2d 753 (9th Cir. 1985)* (striking down ordinance regulating vending activity on vagueness grounds where ordinance was in clear conflict with other city ordinance); *Mid-Fla. Coin Exchange, Inc. v. Griffin, 529 F. Supp. 1006, 1027 (M.D. Fla. 1981)* (providing that "related to the 'fair notice' requirement is the rule that inexplicably contradictory commands in statutes providing for criminal penalties will not be given legal effect.") (citing *Raley v. Ohio, 360 U.S. 423, 438, 3 L. Ed. 2d 1344, 79 S. Ct. 1257 (1959)*; *United States v. Cardiff, 344 U.S. 174, 176, 97 L. Ed. 200, 73 S. Ct. 189 (1952))*; *529 F. Supp. at 1029* (striking down statute requiring both that records be preserved for three years after purchase and that records be submitted to the county sheriff within 24 hours of the purchase). See generally, Eric W. Treene, Note, Prayer-Treatment Exemptions to Child Abuse and Neglect Statutes, Manslaughter Prosecutions, and Due Process of Law, 30 Harv. J. Legis. 135, 171 (1993) (discussing vagueness and contradictory statutory commands).

14 The most common example of this form of interception would be if a person were to record a conversation in which he or she were a party. In addition, the statute also expressly permits the interception of conversations

where one party to the conversation has previously consented to such interception.

15 Defendants' reliance upon *United States v. Gass, 936 F. Supp. 810 (ND. Ok. 1996)* for the proposition that a conflict in a similar statute suggests that *Section 2512* unconstitutionally vague is misplaced. Gass involved *47 U.S.C. ß 605(a)*, the predecessor to the communications act at issue here. *Section 605(a)* provided that "except as authorized by chapter 119, Title 18,... no person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." *47 U.S.C. ß 605(a)*. The defendant in Gass was indicted and convicted of "modifying radio equipment and selling the devices to news organizations in Tulsa, for the purpose of eavesdropping on Tulsa's trunked radio system, including all of Tulsa's police frequencies and fire department communications." *Gass, 936 F. Supp. at 810-11*. After Gass was convicted under the Act, he moved for a judgment of acquittal on the ground that chapter 119 specifically provided that "it shall not be unlawful to intercept any radio communication which is transmitted 'by any governmental, law enforcement, civil defense, private land mobile, or public safety communications system, including police and fire, readily accessible to the general public.'" *Id. at 811*. The Court concluded that this exception in chapter 119 should be read into the act and therefore that "the indictment against Gass cannot be criminal unless the government proves that the radio communications which Gass sought to intercept were not readily accessible to the general public." *Id. at 813*. In reaching its conclusion, the Court explained:

> If this Court were to give effect to the government's argument, then the governmental radio interception exception contained in Chapter 119 makes no sense; a person would be permitted under Chapter 119 to intercept police radio transmissions only to be subject to criminal prosecution under *ß 605*. Why would Congress impose a ban on the interception and divulgence of radio communications in one statute, while allowing for a specific exception in another, if it did not intend for the statutes to be read together? The only way to avoid absurdity in such a case is to interpret the conflicting statutes to complement one another, thereby giving effect to the specific exception.

Id. at 812. Clearly, the purported conflict between *Sections 2511* and *2512* does not rise to the level of conflict at issue in Gass, where there was no other possible way to resolve the tension between the two provisions. Rather, in the instant case, as will be discussed, there is no conflict between the two provisions. In fact, the Court in Gass specifically noted in a footnote that "this is not a case in which the particular federal law 'criminalizes the manufacture of items while leaving legal the use of such items'" -- which is precisely the case here. See *id. at 815, n.3* (emphasis added).

The Government, in response, maintains that the so-called "consent exception" of *Section 2511* should not be read into *Section 2512* because the two provisions deal with entirely different matters: *Section 2512* prohibits certain devices while *Section 2511* authorizes certain conduct. Thus, the Government argues, there is no conflict between the two provisions because they deal with separate matters. [16]

16 At oral argument, the Government also maintained that even considering the defendants' argument regarding the conflict between *Sections 2511* and *2512*, under a vagueness-as-applied analysis, the defendants challenge would still fail because the devices at issue here all have a design which renders them primarily useful for illegal surreptitious interceptions i.e., interceptions without the consent of any party to the communication. Even if the Court had accepted defendant's contention that *Section 2511* limits *Section 2512*, the Government is correct that the defendants' vagueness challenge would fail if the Government were to prove at trial, as they maintain they would be prepared to do, that the devices seized from the defendants had no other primary purpose than illegal interceptions.

The obvious difficulty with the Government's position is that it necessarily implies that Congress intended to make a device illegal while simultaneously protecting the use to which the device could or most likely would be put. Such an outcome appeared unpalatable to the Government at oral argument when it refused to say that certain devices sold by Radio Shack -- which were largely indistinguishable from the devices sold by defendants -- were prohibited by *Section 2512*. A construction of *Section 2512* that does not incorporate *Section 2511* significantly broadens the reach of *Section 2512*. However, even if the outcome might seem somewhat troublesome, (perhaps even imprudent for citizens accustomed to the availability of such devices for lawful consensual interceptions), it cannot be deemed illogical or irrational under the law. In fact, the legislative history overwhelmingly supports this construction.

As previously explained, the Senate Report lists as prohibited certain devices such as the cuff link, tie clip or wristwatch, which primarily function when used in a one-party consent situation. The only possible use for any of these devices is a perfectly legal interception under *Section 2511*. Nevertheless, even though they are by design not likely to be used to intercept unlawfully under *Section 2511*, the devices are nonetheless prohibited by *Section 2512*. The Senate Report provides some measure of explanation for this result. It explains that "by banning these devices, a significant source of equipment highly useful for illegal electronic surveillance will be eliminated." S. Rep. No. 90-1097, 90th Cong., 2d. Sess., 95 U.S.C.C.A.N. 2112, 2183 (1968). While these words are not a model of clarity themselves, it is reasonable to conclude from them that it was Congress's intent in enacting *Section 2512* to remove from the market a wide range of devices, some of which might be "primarily" useful for legal "surreptitious" interceptions under *Section 2511* so that the greater good of preventing illegal interceptions might be more easily accomplished. Such an empirical and policy determination is certainly within the province of Congress to make and may not, without more evidence of a clear contradiction, be questioned here.

The D.C. Circuit Court of Appeals has reached a similar conclusion in a somewhat analogous case in 1974. There, the Court was concerned with the interplay between *Sections 2512* and *2511* in the context of a prosecution for advertising devices that were prohibited under *Section 2512*. An argument much like the one offered here was offered by the defendants in that case. The district court held that "the advertising prohibition of *ß 2512* should not be read to prohibit the promotion of uses apparently lawful in light of the 'consent exception' of *ß 2511(2)(d)*." *United States v. Bast, 161 U.S. App. D.C. 312, 495 F.2d 138, 141 (D.C. Cir. 1974)*. The Circuit Court reversed this ruling, noting that:

> The mere fact that a device may be used for interceptions that do not violate *ß 2511* does not mean that its manufacture and advertising are compatible with *ß 2512*. *Section 2512(1)(b)* prohibits the manufacture, sale and possession of devices primarily useful for the purpose of secret interception, even though the devices may be used for other and lawful interceptions. The intent of Congress is discernable and sensible, and there is no reason to consider the doctrines that indicate that when plain meaning leads to an absurd result it does not signify applicable legislative intent. Similarly, there is no anomaly in Congress's apparent attempt, in the advertising prohibition of *ß 2512(1)(c)(ii)*, to reach promotion of device for secret interception, even though the manufacture or possession of the device is not banned by *ß 2512(1)(b)* as one "primarily" useful for secret interception. It may be unusual but it is not unprecedented for Congress to prohibit the advertising of a product even though it has not prohibited the product or its use per se. An example that looms large currently is the prohibition of advertising of cigarettes on radio or television.... The legislative history supports the interpretation of *ß 2512* without limitation by the exceptions contained in *ß 2511*.... Thus, the manufacture, sale and possession prohibition was intended to ban particular devices, among them eavesdropping equipment which could be worn on the person by a party to a conversation, and hence used in a manner which would not violate *ß 2511* because of its "consent exception."

Id. at 143-44.

In sum, despite the unattractive result of such a broad construction of *Section 2512* to many stores and consumers in the marketplace, the Court finds no ambiguity in the term "surreptitious" because there is no conflict between *Sections 2511* and *2512*. Defendants nevertheless maintain that because *Section 2512* begins with the words "except as otherwise specifically provided in this chapter," *Section 2511* must be read into *Section 2512*. These words, however, are only important if a separate section of the chapter provides a different instruction. Such is not the case with *Section 2511*. The two provisions do not conflict because they speak to different methods and different purposes. *Section 2512* casts a wide net over a variety of devices so that end of *Section 2511* -- the prohibition of nonconsensual wiretapping -- can be effectuated. [17] In the end, the plain meaning of "surreptitious" is clear -- even if it might produce a bitter result for those searching to effect the authority granted to them under *Section 2511*. Such persons are left with recording their conversations with perhaps cumbersome devices, like dictaphones and tape recorders, and prohibited from using more efficient and less cumbersome devices like bugs. *Section 2512*, however, authorizes only electronic communications providers and government officials to manufacture, sell or possess the more efficient bug devices, see *18 U.S.C. 2512(2)*, while *Section 2511* permits electronic communications providers, government officials and private parties with consent, to intercept communications.

17 Further support for the contention that *Sections 2512* and *2511* were not to be read in conjunction with one another lies in the fact that the two sections provide duplicative exceptions which would have been unnecessary if Congress had intended to have the sections read in light on one another. Compare *18 U.S.C. ß 2512(2)* with *18 U.S.C. ß 2511(2)*.

3. *The Potential for Arbitrary and Discriminatory Enforcement*

Invoking the second element of the vagueness-as-applied test, the defendants assert that the inherent vagueness of *Section 2512* is evidenced by the arbitrary and discriminatory enforcement of the statute that has occurred to date. Defendants note that other merchants sell and advertise the same or virtually similar products, yet the Government has not prosecuted them. At oral argument, defense counsel showed the Court products from well-known stores, like Radio Shack and Hammacher Schlemmer, which defense counsel argued were virtually indistinguishable from the devices at issue here (12/13/96 Tr. at 93-101). In their submission, defendants ask the rhetorical question, "Does a product become primarily useful for surreptitious interception under 2512 by virtue of the store in which it is sold?" (Defs' Vagueness Mem. at 21). The defendants also point to the fact that some of the very items[18] that were charged in the Indictment, and which were seized in the April 5, 1995 searches and seizures of the Spy Factory Stores in Seattle, were returned by Customs officials to Spy Factory several months later. At oral argument, defense counsel claimed that this was compelling evidence of the ambiguity of *Section 2512*, arguing that "the government's reading of 2512 virtually renders [the devices] contraband, because the mere possession of it, knowing its surreptitious use, is a felony. So, if it's contraband, why is the regional counsel ordering it returned?" (12/13/96 Tr. at 118). Defendants claim that the return of these devices amounts to "classic vagueness in the form of arbitrary and discriminatory enforcement: two law enforcement officers, applying the same statute to the same item, reach different conclusions as to its legality." (Defs.' Vagueness Mem. at 2). [19]

18 Defendants state that "four of [the products returned] were identified specifically in Agent De Arman's Affidavit as ESIDs: (1) VT-75 transmitter ...; (2) Micro CAL-201 calculator/transmitter ...; (3) Micro TX-6 telephone transmitter ...; and (4) pen microphone.... In addition, other items returned also closely resemble the type of devices Agent De Arman's Affidavit considers ESIDs: transmitters; ... an 'artificial plant transmitter' ...; a 'phone clip' ...; and 'telephone interception devices..." (Defs.' Vagueness Mem. at 18).

19 As further evidence of the ambiguity of the statute, defendants point to the fact that the Senate Report accompanying the statute commends the use of expert testimony to determine what devices are covered under the statute. See S. Rep. No. 90-1097, 90th Cong., 2d. Sess., 95 U.S.C.C.A.N. 2112, 2183 (1968) ("Obviously, the sort of judgment called for here in close cases would warrant the use of expert testimony."). Defendants claim that "obviously, if expert opinion is required, arbitrary and discriminatory enforcement in the field is effectively guaranteed." (Defs. Mem. at 18-19). However, the use of expert testimony to provide concreteness to the gray areas at the margin of statutes is well recognized in the law. See e.g., *United States v. Santos, 64 F.3d 41 (2d Cir. 1995)* (relying in part on expert testimony at trial to determine that weapon used was a "silencer" within meaning of statute found not unconstitutionally vague), vacated on other grounds, *116 S. Ct. 1038 (1996)*; *United States v. Jackson, 968 F.2d 158, 162* (2d Cir.) (in context of vagueness challenge, placing emphasis on fact that "according to expert testimony, 'cocaine base' has a precise definition in the scientific community."), cert. denied, *506 U.S. 1024 (1992)*.

The Government explains that "the reason devices were returned to the Spy Factory in Seattle was not based on a determination that the devices in question were not [covered by the statute]. Rather, the Customs Service's district counsel in Seattle, Washington, erroneously determined that, inter alia, absent a conviction, there was no basis for forfeiture of the [devices], and the Western District of Washington had declined prosecution of the local store employees." (Govt Mem. at 34). This response, of course, does not answer the defendants' argument that if the statute were sufficiently clear, such devices would self evidently be contraband, and no ambiguity regarding potential forfeiture should have existed, as it would not have existed in the case of illegal drugs, for example. [20] However, as the Government points out in its Memorandum of Law, "the fact that differing minds may reach different results when applying the statutory factors 'does not render a statute void for vagueness.'" (Govt Mem. at 33 (citing *United States v. 3520 Brighton Boulevard, 785 F. Supp. 141, 144 (D. Colo. 1992))*. "The 'Constitution prohibits arbitrary and discriminatory application of the law; it does not insist upon mathematical certainty." Id.

20 I note, as did defendants, that at oral argument, the lead assistant United States attorney hesitated at length and could not provide a quick or confident answer as to whether a certain device bought from Radio Shack fell under the statute or whether the term "surreptitious" included both legal and illegal interceptions under *Section 2511*. (12/13/96 Tr. at 128-132). I am troubled by the assistant United States attorney's hesitancy, but in the end I attribute it to misplaced caution in committing himself without the contextual facts rather than to any lack of certainty regarding the correct interpretation of *Section 2512*.

In summary, although I am somewhat troubled by aspects of the enforcement of this law -- particularly given the broad construction of the statute I find myself impelled to accept -- I cannot find that the actions by either the law enforcement community or the prosecutors is "arbitrary or discriminatory," as that concept is understood in the vagueness context. There is a perfectly understandable reason why officers and prosecutors seek convictions of defendants like the Spy Factory and not institutions like Radio Shack and Hammacher Schlemmer: because the Spy Factory, by its very name, and in countless other ways evidenced in the Government's papers, sets itself out as a place where one might be more likely to locate devices that can be used for illegal, rather than legal, purposes.

The Supreme Court has noted that the "primary" use of an item may be discernable in part from where it is sold and how it is marketed. The Court said in a footnote in Posters 'N' Things, "thus, while scales or razor blades as a general class may not be designed specifically for use with drugs, a subset of those items *in a particular store* may be 'primarily intended' for use with drugs by virtue of the circumstances of their display and sale." Posters ' *N' Things, Ltd v. United States, 511 U.S. 513, 114 S. Ct. 1747, 1752 n. 11, 128 L. Ed. 2d 539 (1994)* (emphasis added) (also providing that "it is the likely use of customers generally, not any particular customer, that can render a multiple-use item drug paraphernalia."). See also *United States v. Schneiderman, 968 F.2d 1564, 1566 (2d Cir. 1992)* ("To show a defendant 'primarily intended' to sell drug paraphernalia, the government need not show that the items would necessarily be used in connection with illegal drugs, but it must prove that the defendant knew there was a strong probability the items would be so used."), cert. denied, *507 U.S. 921, 122 L. Ed. 2d 676, 113 S. Ct. 1283 (1993)*. This insight speaks strongly to the defendants' contention that Radio Shack, Hammacher Schlemmer and other stores have not been prosecuted for selling equipment similar to the instant devices. (12/13/96 Tr. at 93-100). Therefore, even though *Section 2512* might permit the prosecution of Radio Shack and Hammacher Schlemmer and other institutions selling similar devices, [21] it is perfectly rational, and perhaps even prudent, for law enforcement officials to concentrate their efforts on the defendants who are not only most likely to be convicted, but also are most likely to serve a clientele bent on illegal practices. Cf. *Richmond Boro Gun Club, Inc. v. City of New York, 97 F.3d 681, 686 (2d Cir. 1996)* ("New York City may choose to limit enforcement of the local law to weapons clearly proscribed by the law ...."); *United States v. Wynn, 633 F. Supp. 595, 604 (C.D. Ill. 1986)* (in prosecution under *Section 2512*, addressing argument that defendant's devices were "equivalent to the commercially available Radio Shack FM Wireless Microphone," the court provides that "even assuming that the items are similar -- which this court can easily see they are not -- this in no way rebuts the fact that they [fall under *ß 2512*].... 'The fact that one person is not prosecuted for his possible criminal conduct does not immunize another for engaging in the same or similar conduct.'"). For these reasons, I do not find that the defendants have shown the potential for arbitrary and discriminatory enforcement that is of the sort necessary to strike the statute for vagueness.

21 And this should have been the Assistant United States Attorney's immediate response to my inquiry at oral argument, given the Government's position in its written submissions.

4. *Scienter*

As previously noted, it is well established that "'the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea.... In fact, the inclusion of an intent provision will often save an otherwise vague statute. *United States v. Schneiderman, 968 F.2d 1564, 1566 (2d Cir. 1992)*. *Section 2512* provides such a scienter requirement. Although it is true, as defendants argue, that the "knowing or having reason to know" language means little if the term "surreptitious" is unclear, given that the Court has found that the terms "surreptitious" and "primarily useful" are clear upon their plain meanings, the scienter requirement of *Section 2512* is yet another factor supporting a rejection of defendants' vagueness challenge. Further, as applied, there is a great deal of evidence proffered by the Government suggesting that the defendants were aware that there were treading perilously close to the line of lawful conduct. (Govt Mem. at 22-27). See *United States v. Strauss, 999 F.2d 692, 698 (2d Cir. 1993)* (vagueness challenge "'may be overcome in any specific case where reasonable persons **[*478]** would know that their conduct is at risk.'") (quoting *Maynard v. Cartwright, 486 U.S. 356, 361, 100 L. Ed. 2d 372, 108 S. Ct. 1853 (1988))*; *Boyce v. Motor Lines, 342 U.S. 337, 340, 96 L. Ed. 367, 72 S. Ct. 329 (1952))*. While this evidence and any counter-evidence will be more appropriately presented at trial, for the moment I find that the statute as applied to these defendants is not unconstitutionally vague.

CONCLUSION

For the reasons provided, the defendants' motion for a change of venue is **DENIED,** and defendants's motion to dismiss portions of the Indictment premised on *Section 2512* on the ground of vagueness is **DENIED.**

SO ORDERED.

Dated: New York, New York

January 8, 1997

SONIA SOTOMAYOR

U.S.D.J.