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Notes and Comments

Who Gets the Signal? — Unauthorized Interception and Section 605 Now Section 705 of the Communications Act

I. Introduction

When broadcasting¹ started in 1920,² communications regulation³ was just beginning.⁴ As broadcasting emerged as a new commercial use of radio transmissions,⁵ communications regulation was adapted to meet the needs of broadcasters for the widespread dissemination and reception of broadcast signals.⁶ Section 605 of the Communications Act of 1934 was enacted to guide the use of radio transmissions.⁷ Section 605 makes the un-

1. Broadcasting is defined as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153(o) (1982).

2. Broadcasting was born in 1920 when Frank Conrad, a Westinghouse engineer, started transmitting music which other ham radio operators tuned in on, and subsequently began making suggestions on musical selections. *The Development of Video Technology*, 25 N.Y.L. SCH. L. REV. 789, 789 (1980).

3. Communications regulation as used herein, refers generally to both the Communications Act and the rules and regulations promulgated by the Federal Communications Commission. However, for the purposes of this Comment, the focus is on § 605, now § 705, of the Communications Act.

4. Communications regulation began with the Radio Act of 1912, ch. 287, 37 Stat. 302 (1912). Jones & Quinlan, *Broadcasting Regulation: A Very Brief History*, 37 FED. COM. L.J. 107, 107 (1985). See also *infra* notes 53-58 and accompanying text.

5. Radio transmissions were previously used for private, commercial purposes to transmit confidential messages. See *Home Box Office, Inc. v. Advanced Consumer Technology*, 549 F. Supp. 14, 18 (S.D.N.Y. 1981). In general, radio communications were originally viewed as an alternative to the telegraph. See *The Development of Video Technology*, *supra* note 2, at 790.

6. Broadcasters were concerned that their signals reach the general public, and that interception and reception not violate federal law. *Advanced Consumer Technology*, 549 F. Supp. at 19.

7. For a brief discussion of the history of § 605, see *infra* text accompanying notes 61-66. Although § 605 was based upon provisions in the Radio Act of 1927, for the pur-

authorized reception of a radio transmission illegal, unless the transmission is broadcast for the use of the general public.⁸ While section 605 remained virtually unchanged for fifty years,⁹ the communications industry did not.¹⁰

In 1934, broadcasting was in its infancy;¹¹ subscription

poses of this Comment, references are made to the § 605 language used in all relevant subscription broadcasting cases.

8. Section 605 provides:

Except as authorized by Chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena [sic] issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. *No person not being authorized by the sender shall intercept any radio communications and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.*

47 U.S.C. § 605 (1982) (redesignated as § 705(a) in Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(a), 98 Stat. 2779, 2804 (1984)) (emphasis added).

9. Congressman Wirth, Chairman of the Telecommunications Subcommittee, referred to the new Act as "the first major revision of the Communications Act of 1934 . . ." 130 CONG. REC. H12239-40 (daily ed. Oct. 12, 1984) (statement of Rep. Wirth).

10. Throughout this period, with the introduction of television in the late 1930's, pay television in the 1950's, and the use of satellite transmissions in the 1960's, the communications industry grew rapidly. See, e.g., TV GUIDE ALMANAC 383-404 (C.T. & P.G. Norback ed. 1980).

11. Although the first radio broadcasting started in 1920, the early developments in radio were all on the AM wavelength; FM broadcasting did not appear until the 1930's. *The Development of Video Technology*, *supra* note 2, at 791. Further, the first regular

broadcasting,¹² which limits the reception of a broadcast signal to paying subscribers, did not yet exist¹³ and was therefore not directly addressed in section 605 of the 1934 Communications Act.¹⁴ As subscription broadcasting became available, it was left to the courts to determine what legal protection was available against unauthorized interception of a subscription broadcast signal.¹⁵

Although subscription broadcasting systems have existed for over thirty years,¹⁶ subscription television services (pay television)¹⁷ have experienced explosive growth in this country during only the last fourteen years.¹⁸ This growth was fostered by the

daily television schedule in the United States did not begin until 1939. TV GUIDE ALMANAC, *supra* note 10, at 383.

12. Subscription broadcasting, as used in this Comment, refers to an alternative form of commercial broadcasting which sells programming directly to subscribers. See L. BROWN, THE NEW YORK TIMES ENCYCLOPEDIA OF TELEVISION 326 (1977).

13. Although this author could find no specific date when subscription broadcasting began, the first subscription broadcasting case, determining that an FM broadcast licensee could superimpose a subscription radio service on its signal, involved a station which began subscription broadcasting in 1949. See *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958) (FM licensee that had restricted its program format to background music since 1949, and subsequently superimposed a subscription radio service, was not restricted from offering subscription services as an FM broadcast licensee).

14. Section 605 was largely a redraft of provisions of the Radio Act of 1927. See *infra* text accompanying notes 65-66. There is, however, some language in the legislative history of the 1927 Act suggesting that some Senate members contemplated the possibility of subscription broadcasting. See Westover, *Subscription Television and Section 605 of the Communications Act — The Pathology of an Antiquated Statute*, 12 GOLDEN GATE U.L. REV. 1, 5 n.17 (1982) (discussing the legislative history of the 1912 Act).

15. Courts often look to the FCC when interpreting § 605. See, e.g., *American Television & Com. Corp. v. Western Techtronics, Inc.*, 529 F. Supp. 617, 620 (D. Colo. 1982) (noting the court's reliance on the FCC suggestion that subscription television is broadcasting, citing *National Subscription Television v. S & H TV*, 644 F.2d 820, 825 (9th Cir. 1981); *Chartwell Com. Group v. Westbrook*, 637 F.2d 459, 465 (6th Cir. 1980); *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 681-82 (S.D.N.Y. 1979). But, the FCC itself noted early on that the applicability of § 605 would be decided in the courts. *KMLA Broadcast Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35, 41 (C.D. Cal. 1967).

16. *Chartwell Com. Group v. Westbrook*, 673 F.2d 459, 462 (6th Cir. 1980).

17. Pay television is an alternative form of commercial television which sells programming directly to subscribers either over the air (for example, STV or MDS) or on cable television. L. BROWN, *supra* note 12, at 326.

18. Bienstock, *Theft of Service of Over-The-Air Pay TV: Are the Airwaves Free?*, FLA. B.J., Mar. 1982, at 240 (stating that the pay television industry has had explosive growth only during the last ten years).

technological advances within cable television,¹⁹ the development of technological alternatives to cable television — such as subscription television (STV),²⁰ multipoint distribution services (MDS),²¹ and the widespread use of earth stations²² and satellites²³ to transmit and receive signals.²⁴ However, technological advances were not restricted to the pay television industry; a parallel industry also began to manufacture and sell equipment designed to receive pay television signals.²⁵ Although this parallel industry depends upon the existence of pay television to survive, it is not authorized by the pay television industry, and thus, has been deemed “signal piracy.”²⁶

“Signal piracy” has had a growing economic impact on pay television,²⁷ and as a result, pay television companies have

19. Note, *National Subscription Television v. S & H TV: The Problem of Unauthorized Interception of Subscription Television — Are the Legal Airwaves Unscrambled?*, 9 PEPPERDINE L. REV. 641, 643-50 (1982) (reviewing the historical development of pay television technology).

20. STV utilizes a broadcast channel, usually a UHF station, to transmit pay television programming during the evening hours. Although use of a broadcast channel means that the signal can be received on a regular television set, the pay television signal is encoded or scrambled (encrypted) so that only people with decoding equipment (such as STV subscribers), can watch the programming in intelligible form. Bienstock, *supra* note 18, at 240.

21. MDS transmits pay television programming via microwave from a centrally located transmitter. Microwave transmissions are omnidirectional (radiating in all directions), thus, anyone with the appropriate equipment (microwave antenna, down-converter and power supply), located within line of sight to the transmitter can receive the signal. MDS signals may or may not be scrambled (encrypted). *Id.*

22. Earth station refers to a station to transmit or receive electronic communications between earth and a space satellite. L. BROWN, *supra* note 12, at 129.

23. Satellite refers to a space vehicle used to relay television signals, and other communications, across oceans and domestically. These vehicles are located 22,300 miles above the equator, and are geosynchronous (travel at the same rotation speed as the earth so that it remains “stationary”). L. BROWN, *supra* note 12, at 379.

24. See generally Piscitelli, *Home Satellite Viewing: A Free Ticket to the Movies?*, 35 FED. COM. L.J. 1, 1-2 (1983).

25. Bienstock, *supra* note 18, at 241. See also *Advanced Consumer Technology*, 549 F. Supp. at 17.

26. Note, *Receive-Only Satellite Earth Stations and Piracy of the Airwaves*, 58 NOTRE DAME L. REV. 84, 84 (1982).

27. Cable television distribution represents the largest portion of all pay television subscribers — with a reported 29 million subscribers by year end 1984. Goldstein, *Pay Television: Threatened by an Alien*, CHANNELS OF COMMUNICATION — THE ESSENTIAL 1985 FIELD GUIDE TO THE ELECTRONIC MEDIA, Nov.-Dec. 1984, at 38. Within cable television, the National Cable Television Association “estimates that the nationwide theft-of-service epidemic cost the cable industry close to \$165 million in 1981, \$240 million in

sought protection of their businesses and signals under section 605 of the Communications Act of 1934.²⁸ In response, courts have consistently upheld section 605 protection of pay television signals²⁹ from STV,³⁰ MDS,³¹ and cable television.³² These cases have upheld section 605 protection against a myriad of arguments seeking to limit the protection of subscription broadcast

1982, \$350 million in 1983 and is likely to exceed \$600 million by the end of [1984]." McCloskey, *Cable Bill Fuels the Fight Against Pirates*, CABLEVISION, Nov. 5, 1984, at 86. Although the cable television industry figures presumably include both basic cable and pay television channels, one pay service, Showtime/The Movie Channel, has estimated losses of \$500 million a year. See Baig, *Scrambling TV Signals*, FORTUNE, Nov. 11, 1985, at 107.

28. Home Box Office, Inc. v. Pay TV of Greater N.Y., Inc., 467 F. Supp. 525, 528 (E.D.N.Y. 1979). See also Comment, *Decoding Section 605 of the Federal Communications Act: A Cause of Action for Unauthorized Reception of Subscription Television*, 50 U. CIN. L. REV. 362, 370 (1981). In addition, protection from signal piracy has been sought under federal copyright law, state theft of service and unfair competition laws, and various common law torts. See Bienstock, *supra* note 18, at 241. This Comment, however, focuses on the federal interception law. For an interesting argument that the theory of unfair competition provides an alternative to § 605 protection, see generally Note, *The Piracy of Subscription Television: An Alternative to the Communications Law*, 56 S. CAL. L. REV. 935 (1983).

29. The only inconsistent case is Orth-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672 (S.D.N.Y. 1979). See *infra* text accompanying notes 92-100.

30. National Subscription Television v. S & H. T.V., 644 F.2d 820 (9th Cir. 1981) (The definition of broadcasting in § 153(o) of the Communications Act does not control the reach of § 605. The issue is whether a signal was intended for the use of the general public.); Chartwell Com. Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980) (§ 605 protects signals the transmitter does not intend for the use of the general public); United States v. Westbrook, 502 F. Supp. 588 (E.D. Mich. 1980) (§ 605 violation is the same either in a civil or criminal case).

31. Movie Sys., Inc. v. Heller, 710 F.2d 492 (8th Cir. 1983) (crucial factor in § 605 protection is whether the transmitter intends the signals for use of the general public); Hoosier Home Theatre, Inc. v. Adkins, 595 F. Supp. 389 (S.D. Ind. 1984) (receipt and use of a signal not intended for the use of the general public violates § 605); United States v. Stone, 546 F. Supp. 234 (S.D. Tex. 1982) (the precedential value of the civil cases interpreting § 605 in a criminal proceeding was established by United States v. Westbrook, 502 F. Supp. 588 (E.D. Mich. 1980)); American Television & Com. Corp. v. Western Techtronics, Inc., 529 F. Supp. 617 (D. Colo. 1982) (§ 605 protects signals not intended for the use of the general public); Home Box Office, Inc. v. Advanced Consumer Technology, 549 F. Supp. 14 (S.D.N.Y. 1981) (§ 605 was designed to protect communications which the sender intends to restrict to limited receipt, even though equipment for unauthorized reception is readily available).

32. Ciminelli v. Cablevision, 583 F. Supp. 158 (E.D.N.Y. 1984) (§ 605 protects signals not intended for the use of the general public); Cox Cable Cleveland Area, Inc. v. King, 582 F. Supp. 376 (N.D. Ohio 1983) (the fact that the signal is transmitted in a manner that is meaningless without special equipment negates a finding that it was intended for the use of the general public under § 605).

signals based upon: 1) the unavailability of statutory protection for subscription broadcast signals,³³ 2) public use of "public air-waves" with immunity from liability,³⁴ 3) the benefits of competition,³⁵ 4) the alleged violation of antitrust laws,³⁶ 5) the availability of technological protection for the signals,³⁷ 6) "free speech" extension to the "right to receive,"³⁸ and 7) privacy rights of individuals.³⁹ While the cases through 1984 upheld protection of pay television signals, some of these arguments may warrant further consideration in the future.⁴⁰ In part, the concern lies with questions of policy and equity — to what extent should the interest of one industry (pay television distributors)⁴¹ be recognized as legally superior to that of another industry (antenna, earth station and decoder manufacturers and sellers),⁴² or the rights of private individuals?⁴³

These policy and equity considerations were highlighted with the passage of the Cable Communications Policy Act of 1984.⁴⁴ The Cable Act significantly amended section 605, redesignating and expanding section 605 into section 705 of the Com-

33. See *infra* text accompanying notes 104-15. See also *infra* text accompanying notes 326-30.

34. See *infra* text accompanying notes 337-40.

35. See *infra* text accompanying notes 356-57.

36. See *infra* text accompanying notes 358-69.

37. See *infra* text accompanying notes 326-30.

38. See *infra* text accompanying notes 341-45.

39. See *infra* text accompanying notes 346-49.

40. See *e.g.*, *infra* text accompanying notes 281-85.

41. For purposes of this Comment, pay television distributors refers generally to Cable Television, STV, and MDS operators and distributors (*e.g.* Home Box Office).

42. This industry will be collectively referred to as "signal pirates" or "pirates." See Piscitelli, *supra* note 24, at 37 (concluding that imposing liability on *manufacturers and distributors* of earth stations for the *individual use* of the equipment is at best inequitable because of the possibilities for legal use of the equipment). But see *infra* text accompanying notes 354-55.

43. See Comment, *Pay Television Piracy: Does Section 605 of the Federal Communications Act of 1934 Prohibit Signal Piracy — and Should It?*, 10 WM. MITCHELL L. REV. 531 (1984) (reviewing *Movie Sys., Inc. v. Heller*, 710 F.2d 492 (8th Cir. 1983) and arguing against enforcement of § 605 against home viewers primarily because of privacy rights; urging regulation of manufacturers and sellers and mandated scrambling of signals).

44. The Cable Communications Policy Act of 1984 was enacted on October 30, 1984. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 5b, 98 Stat. 2779, 2802 (1984).

munications Act.⁴⁵ In addition, the Cable Act created an exception to section 705 (section 605 amended) protection, allowing for the private viewing of any cable satellite programming that is neither encrypted⁴⁶ nor has established a marketing system to authorize private viewing.⁴⁷ While there has been little case law subsequent to the adoption of these amendments,⁴⁸ at least one court has interpreted the amendments as a dramatic shift in policy.⁴⁹

Unfortunately, Congress has provided the courts with little guidance on how to reconcile the issues of policy and equity raised in pay television cases.⁵⁰ Thus, given the highly technical

45. Section 605 was redesignated as § 705(a), and subsections 705(b)-(e) were added. See *infra* notes 237-55 and accompanying text.

46. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984). See *infra* note 239 and accompanying text.

47. *Id.*

48. See *infra* notes 259-302 and accompanying text.

49. *People v. Babylon*, 39 Cal. 3d 70, 702 P.2d 205, 216 Cal. Repr. 123, *reprinted as mod.* 39 Cal. 3d 719 (1985) (although the modified decision removes the reference to new § 705, the remainder of the opinion is unchanged). See *infra* notes 292-300 and accompanying text.

50. In discussing the Cable Communications Policy Act of 1984, Senator Goldwater said in part:

I will emphasize that nothing in section 705 is meant to foreclose consideration by the courts of whether particular transmissions not clearly satellite cable programming are considered for the use of the general public or are protected by the first amendment and are thus exempt from the provisions of section 705.

130 CONG. REC. S14284 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater).

Further, the legislative history, as printed in the Congressional Record, says in part:

By adopting this provision there is no intention to pass judgment on any particular case that was, or was not decided under section 605 of the Communications Act as that section presently exists (prior to this amendment). The amendments made by this legislation are intended, however, to provide satellite cable program suppliers in the future with two clear alternatives for the protection of their satellite transmissions.

130 CONG. REC. S14287 (daily ed. Oct. 11, 1984) (explanation of § 705 as redesignated and amended by H.R. 4103).

But see

H.R. 4103 as reported by Committee recodifies without modification § 605 to the Communications Act of 1934 as new § 705(a). In amending existing § 605, it is intended to leave undisturbed the case law that has developed confirming the broad reach of § 605 as a deterrent against piracy of protected communications. Over the years federal courts, consistent with congressional intent, have recognized that § 605 provided broad protection against the unauthorized interception of various forms of radio communications. It is the Committee's intention that the amendment preserve these broad protections; that all acts which presently constitute a violation of present § 605 shall continue to be unlawful under that section

nature of the industry,⁵¹ the massive economic interests arrayed on both sides of the issue,⁵² and the inherent complexities of using old concepts to deal with new and ever-changing realities, the courts are likely to be struggling with these issues for some time to come.

This Comment will review the development of section 605 and section 705 of the Communications Act as well as the subscription broadcasting cases interpreting these provisions, with an emphasis on the arguments that have been raised to limit subscription broadcast signal protection. This Comment concludes that existing section 605 case law forms an appropriate framework for the courts to decide future section 705 cases, in which the courts will balance the various interests of subscription broadcasters, "signal pirate" manufacturers/sellers, and private individuals.

as amended and redesignated by H.R. 4103. . . . For example, existing § 605 provides protection against the unauthorized reception of subscription television (STV), multipoint distribution service (MDS), and satellite communications. This amendment . . . is intended to preserve this broad reach of existing § 605 and to make clear that all communications covered under § 605, will continue to be protected under new section 705(a).

Id. (explanation of § 705 as redesignated and amended by the House of Representatives). See also, Lloyd, *New Cable Law Takes Aim Against Pirates*, N.Y.L.J. Dec. 29, 1984, at 5, col. 1.

51. See generally Note, *supra* note 26, at 85 (discussing the application of § 605 and federal copyright laws to various technologies, noting that legislatures have addressed cable television piracy, courts have addressed STV and MDS piracy, but the law as to earth stations is unclear, and sellers often profess their legality to consumers).

52. In 1984, there were approximately 31 million pay television subscriber homes. Goldstein, *supra* note 27, at 38. Assuming that each subscriber paid an average monthly charge of only \$8.00, projected annual revenues amount to \$2,976 million. On the other side, in the area of earth stations alone, there are 1.5 million Americans who own earth stations which cost upward of \$1,500 — a total investment of \$2,250 million. See Kaplan, *Scrambling TV Signals From Space*, N.Y. Times, Oct. 10, 1985, at C23, col. 1. Further, during the last two years, sales have accelerated to an estimated 40,000-50,000 dishes sold per month, which projects to a minimum \$75 million a year. This figure does not include manufacturers of converters, microwave antennas, etc. that are used to receive non-satellite programming. *Id.*

II. Background

A. Section 605 of the Communications Act

The precursor to section 605 can be found in the Radio Act of 1912.⁵³ In 1912, radio communications in the United States consisted of "point-to-point" transmissions,⁵⁴ providing an alternative to the telegraph.⁵⁵ Since the equipment to receive radio signals was not widely available,⁵⁶ the main concern of commercial radio communications users was the potential for unauthorized disclosure of the communications by someone directly involved in the transmission process.⁵⁷ This concern was codified in the Radio Act of 1912 by a provision prohibiting anyone involved in, or with knowledge of, radio communications operations, from divulging or publishing any transmissions, except to the person to whom the transmission was directed.⁵⁸

When the Radio Act of 1927 was passed,⁵⁹ the prohibitions against unauthorized publication or divulgence⁶⁰ were expanded to include the unauthorized reception or use of radio transmissions.⁶¹ At the same time, a proviso was added that the prohibi-

53. Radio Act of 1912, ch. 287, 37 Stat. 302 (1912) (current version Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(a), 98 Stat. 2779 (1984)). Regulation 19 of the Act provided in part: "No person or persons engaged in or having knowledge of the operation of any station or stations, shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed . . ." *Id.* at 307.

54. "Point-to-point" radio transmissions are transmissions of electromagnetic energy sent between two points without the use of connecting wires. *See The Development of Video Technology*, *supra* note 2, at 789-90.

55. *Id.*

56. *Home Box Office, Inc. v. Advanced Consumer Technology*, 549 F. Supp. 14, 18 (S.D.N.Y. 1981).

57. *Id.*

58. *See Westover*, *supra* note 14, at 3. *See also Advanced Consumer Technology*, 549 F. Supp. at 18.

59. The Radio Act of 1927 was passed because, although the 1912 Act required licensing, it did not provide the power to withhold licenses and failed to address the problems of chaos of the airwaves which were causing electronic interference. *See Jones & Quinlan*, *supra* note 4, at 107.

60. Radio Act of 1912, ch. 287, 37 Stat. 302 (1912) (current version Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(a), 98 Stat. 2779, 2802).

61. Section 27, 44 Stat. 1162 (1927) (current version Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(a), 98 Stat. 2779, 2802 (1984)) provides in relevant part:

no person not being entitled thereto shall receive or assist in receiving any radio

tions "shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public" ⁶² Although the legislative history does not explain this revision, ⁶³ it is reasonable to assume that, in broadening the 1912 language to include reception and use, the legislators added the proviso exempting certain transmissions to ensure that reception of the broadcasters' signals would not violate federal law. ⁶⁴

Section 605 of the Communications Act of 1934 was based upon the provisions in the Radio Act of 1927. ⁶⁵ Reports from committees in both the Senate and House indicate that there were no real changes between the 1927 Radio Act and section 605 of the Communications Act of 1934. ⁶⁶ Section 605 is therefore aimed at restricting the unauthorized reception of radio communications which are not broadcast while enabling commercial broadcasts to be freely received by the general public. ⁶⁷ However, the provision did not address the possible restrictions against the unauthorized reception of a subscription broadcast signal which the transmitter did not intend the general public to

communication and use the same or any information therein contained for his own benefit or the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of same or any part thereof, knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, that this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress.

Id. at 1172 (emphasis in original).

62. *Id.*

63. The legislative history merely stated that § 27 was a necessary redraft of existing law. See Westover, *supra* note 14, at 4 n.15.

64. See *Advanced Consumer Technology*, 549 F. Supp. at 19.

65. Both the Senate and House Committee reports stated that § 605 was based on § 27 of the Radio Act of 1927, although the § 27 provisions were expanded to include wire communications. H.R. REP. No. 1850, 73d Cong., 2d Sess. 9 (1934); S. REP. No. 781, 73d Cong., 2d Sess. 11 (1934).

66. H.R. REP. No. 1850, 73d Cong., 2d Sess. 9 (1934); S. REP. No. 781, 73d Cong., 2d Sess. 11 (1934).

67. See *Advanced Consumer Technology*, 549 F. Supp. at 20.

receive.⁶⁸ This issue was left to the courts.⁶⁹

B. *The Cases Under Section 605*

1. *Laying the Ground Work*

Although the first pay television case was not decided until 1979,⁷⁰ the first subscription broadcast case, *KMLA Broadcast Corp. v. Twentieth Century Cigarette Vendors Corp.*,⁷¹ was decided twelve years earlier, in 1967. In *KMLA*, a subscription radio service providing background music to industrial and commercial establishment subscribers, sought to enjoin the manufacture, distribution, sale or use of equipment which would receive KMLA's multiplex⁷² radio transmissions.⁷³ The controversy arose from Twentieth Century's provision of a background music service at little or no charge to commercial establishments in which their cigarette vending machines were located.⁷⁴ This service was provided by Twentieth Century through the installation of equipment which was designed to receive the multiplex transmissions of KMLA and other area subscription radio services, without the authorization of the subscription services.⁷⁵ Once the equipment was installed by Twentieth Century, the commercial establishments could receive and use KMLA's subscription radio service without paying the subscription fee. KMLA sought a declaratory judgment, stating that its subscription radio broadcasts constituted non-public radio communications entitled to protection from unauthorized reception under

68. See *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35 (C.D. Cal. 1967) (seeking declaratory judgment that subscription radio service transmissions were protected under § 605). See also *supra* notes 12-15 and accompanying text.

69. The FCC itself noted early on that the applicability of § 605 would be decided in the courts. *KMLA Broadcast Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35, 41 (C.D. Cal. 1967).

70. See *infra* text accompanying notes 82-84.

71. 264 F. Supp. 35 (C.D. Cal. 1967).

72. A multiplex transmission involves the use of a separate subcarrier frequency, added to a main radio broadcast frequency, which transmits or can transmit separate musical programming on the "multiplex" channel at the same time as the main frequency is broadcasting. *Id.* at 37.

73. *Id.* at 38-39.

74. *Id.*

75. *Id.*

section 605 of the Communications Act of 1934.⁷⁶ In addition, KMLA sought an injunction to enjoin further distribution of Twentieth Century's unauthorized equipment. While agreeing that KMLA had no intention of broadcasting its subscription radio service to the general public, Twentieth Century argued that the transmission nevertheless constituted "broadcasting,"⁷⁷ and was therefore exempt from section 605 protection under the provision which excluded broadcast signals from protection.⁷⁸ In rejecting Twentieth Century's argument, the court found the fact that transmissions could not be received on conventional radios, and were geared to commercial institution subscribers, negated any intent by the transmitter that the signals be received by the general public.⁷⁹ Holding that the *intent* of the transmitter not to broadcast the signal to the general public was determinative, the signals were protected from unauthorized interception under section 605.⁸⁰

By focusing on the *intent* of the transmitter, the *KMLA* court established the test for the early pay television cases. The intent of the transmitter to have his signal received by the general public was determinative of the issue of whether the transmitter was protected under section 605 of the Communications Act.⁸¹

2. *The Beginning of Pay Television Protection*

The first two pay television cases, filed under the jurisdiction of section 605, were brought when Home Box Office (HBO) terminated the contracts of two of its affiliates⁸² who marketed

76. *Id.* at 36.

77. Section 605 provided in relevant part: "[t]hat this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public" *KMLA Broadcast Corp.*, 264 F. Supp. at 39 (quoting Communications Act of 1934). For the definition of broadcasting under the Communications Act see *supra* note 1.

78. *Id.*

79. *Id.* at 42.

80. *Id.*

81. See *infra* text accompanying notes 95-100 and notes 107-15.

82. The term affiliate as used here means a party under contract to HBO (the supplier), who is authorized to act as a "middleman," selling the service to individual subscribers and providing the necessary interception equipment for a monthly fee. L. BROWN, *supra* note 12, at 9.

HBO through MDS systems.⁸³ In these 1979 cases, decided in adjoining districts in New York, the courts split on the issue of whether section 605 prohibited the unauthorized reception or interception of the HBO signal.⁸⁴

In *Home Box Office, Inc. v. Pay TV of Greater N.Y., Inc.*,⁸⁵ HBO sought temporary and permanent injunctive relief and damages from Pay TV's continued use of the HBO signal without authorization.⁸⁶ The case arose from the inability of HBO and Pay TV to reach agreement on a new contract whereby Pay TV would distribute HBO's signal in the New York City area.⁸⁷ When Pay TV continued to distribute the HBO signal and collect subscription fees without payment to HBO despite a written demand by HBO to cease distribution, HBO brought suit alleging that Pay TV's continued distribution of the HBO signal violated section 605.⁸⁸ In examining HBO's section 605 claim, the court noted that Pay TV did not deny that section 605 prohibited the unauthorized interception of the HBO signals, but rather that Pay TV's interception of HBO's signal was authorized⁸⁹ because HBO consented to its interception of the signal. The court rejected Pay TV's argument, stating that HBO's written demand that Pay TV cease distribution of the HBO signal clearly showed a lack of consent to Pay TV's continued interception of HBO's signal.⁹⁰ Thus, the court granted HBO's motion for a preliminary injunction against the interception of their signal under section 605 of the Communications Act of 1934.⁹¹

In another suit between HBO and a former affiliate, *Orth-*

83. *Home Box Office, Inc. v. Pay TV of Greater N.Y., Inc.*, 467 F. Supp. 525 (E.D.N.Y. 1979); *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672 (S.D.N.Y. 1979).

84. *Compare Home Box Office, Inc. v. Pay TV of Greater N.Y., Inc.*, 467 F. Supp. 525 (E.D.N.Y. 1979) with *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672 (S.D.N.Y. 1979).

85. 467 F. Supp. 525 (E.D.N.Y. 1979).

86. *Id.* at 526.

87. *Id.* at 527.

88. *Id.* at 527-28. HBO also argued that Pay TV's actions violated the copyright laws. *Id.* A discussion of the interface between copyright and § 605 is beyond the scope of this Comment.

89. *Id.* at 528.

90. *Id.* at 529.

91. *Id.* at 529-30.

O-Vision, Inc. v. Home Box Office,⁹² Orth-O-Vision brought suit against HBO and other defendants alleging a conspiracy to limit and destroy plaintiff's business because HBO refused to grant Orth-O-Vision rights to market HBO in large areas of Queens or grant Orth-O-Vision exclusive marketing rights in other areas.⁹³ HBO counterclaimed, alleging that Orth-O-Vision's continued distribution of HBO's signal, after HBO terminated its affiliate agreement with Orth-O-Vision authorizing such a distribution constituted unauthorized interception in violation of section 605.⁹⁴ In examining HBO's section 605 claim, the court stated that the determinative issue was whether the HBO signal was intended to be received by the general public.⁹⁵ If the HBO signal was intended to be received by the general public, it would not be protected from unauthorized reception under section 605.⁹⁶ Looking to the factual record, the court found that the HBO signal was available to anyone who paid the subscription fee.⁹⁷ In fact, the court noted that the intent of any subscription service was to be available to the public.⁹⁸ Furthermore, HBO's programming content (for example, movies), was similar to conventional broadcast material since it was intended to appeal to a mass audience.⁹⁹ Thus, having found that HBO intended to appeal to a mass audience, and having found the mass availability of the signal, the court denied HBO's claim for protection of its signal under section 605 holding that the signal was transmitted for use by the general public.¹⁰⁰

Despite the differing conclusions on section 605 protection of the HBO signal, neither *Pay TV* nor *Orth-O-Vision* offer significant contributions to the development of law interpreting section 605.

92. 474 F. Supp. 672 (S.D.N.Y. 1979).

93. *Id.* at 676-78.

94. *Id.* at 680-81.

95. *Id.* at 681.

96. *Id.* at 681-82.

97. *Id.* at 682 (citing Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service, 3 F.C.C.2d 1 (1966)).

98. *Id.*

99. *Id.*

100. *Id.*

3. *Defining the Scope of Protection*

a. *Civil Cases Against Manufacturers/Sellers*

The *Orth-O-Vision* court left open the question of whether all transmissions of mass appeal would be denied section 605 protection. This question was subsequently resolved in *Chartwell Communications Group v. Westbrook*,¹⁰¹ the seminal case granting section 605 protection against claims of a manufacturer/seller of unauthorized equipment.

In *Chartwell*, an STV¹⁰² operator sought to enjoin the sale of electronic decoding equipment which could be used by non-subscribers to receive STV programs.¹⁰³ The *Chartwell* court identified two threshold questions: 1) whether the section 605 proviso removed *Chartwell's* transmissions from protection;¹⁰⁴ and 2) whether defendants' actions constituted a violation of section 605, and were therefore properly subject to an injunction.¹⁰⁵

In determining the reach of the section 605 proviso, the *Chartwell* court looked to *KMLA*¹⁰⁶ and determined that the critical factor was the *intent* of the station providing the service.¹⁰⁷ In examining the issue of intent, the court noted that subscription broadcasting has a dual nature, in that while it may be *available* to the general public, it is only intended for the *use* of paying subscribers.¹⁰⁸ Thus, "availability and use are separate concepts."¹⁰⁹ Therefore, the *Chartwell* court found that the crucial factor in determining the intent to broadcast was whether or not the signal was intended for the *use* of the general public.¹¹⁰ The court rejected the *Orth-O-Vision* court's reliance on mass

101. 637 F.2d 459 (6th Cir. 1980).

102. Subscription television (STV) offers pay television programming by scrambling the broadcast signal. See *supra* note 20.

103. *Chartwell Com. Group*, 637 F.2d at 461.

104. *Id.* at 462.

105. *Id.*

106. 264 F. Supp. 35 (C.D. Cal. 1967). See *supra* text accompanying notes 71-80.

107. *Chartwell Com. Group*, 637 F.2d at 463-64. The *KMLA* court held that it was the intent of the transmitter *not* to broadcast its signal that provided protection under § 605. *KMLA Broadcast Corp.*, 264 F. Supp. at 40.

108. *Chartwell Com. Group*, 637 F.2d at 465.

109. *Id.*

110. *Id.*

availability as determinative of the intent to broadcast.¹¹¹ Thus, while the *Chartwell* court noted that content, mass appeal and mass availability were factors weighing in favor of a finding of "broadcasting," they could be "negated by clear, objective evidence that the programming is not intended for the use of the general public."¹¹² Turning to the question of whether *Chartwell* intended its signal for the use of the general public, the court found that the requirement of special equipment to view the STV signal provided objective evidence that *Chartwell* did not intend to transmit its signal for the use of the general public.¹¹³ Finding "an important distinction between making a service available to the general public and intending a program for the use of the general public,"¹¹⁴ the *Chartwell* court held that the STV signal was protected by section 605 because it did not intend to broadcast its signal for the use of the general public.¹¹⁵

Having found that the STV signal was protected under section 605, the *Chartwell* court turned to the question of whether defendants' actions of selling decoding equipment violated section 605.¹¹⁶ Westbrook argued that they were not assisting in receiving the signal, as required for a section 605 violation,¹¹⁷ but rather they were merely helping to clarify signals that had already been received when they sold equipment to decode the signal.¹¹⁸ Finding this argument unpersuasive, the court held that by selling decoders or decoder schematics, Westbrook was clearly assisting third parties in receiving unauthorized communications.¹¹⁹

111. *Id.* at 465-66. The court stated in part that while "[m]ass appeal and mass availability are factors which weigh in favor of finding that a particular activity is broadcasting . . . [T]hose factors may be negated by clear, objective evidence that the programming is not intended for the use of the general public." *Id.* at 465.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 466.

116. *Id.*

117. Section 605 provides in part: "No person not being entitled thereto shall receive or assist in receiving any . . . communication . . . and use such communication . . . for his own benefit or for the benefit of another not entitled thereto." 47 U.S.C. § 605 (1982) (redesignated as § 705(a) in Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(a), 98 Stat. 2779, 2804 (1984)).

118. *Chartwell Com. Group*, 637 F.2d at 465.

119. *Id.*

In delineating the "availability versus use" test the *Chartwell* court rejected the *Orth-O-Vision* court's emphasis on program content,¹²⁰ and in so doing followed the *KMLA* court's emphasis on examining the intent of the transmitter in order to determine whether a signal was transmitted for use by the general public.¹²¹ Thus, the "availability versus use" test was whether the transmitter intended the signal for the use of the general public, not whether the transmitter intended that it be available to the general public which was the standard established by the *Orth-O-Vision* court.¹²² Therefore, even though *Chartwell's* programs were intended to appeal to a mass audience, and were available to the general public, they were intended for the use of only those who paid the fee.¹²³ Thus, section 605 protected the signal from unauthorized use because the signal was not broadcast for use by the general public. Although the *Chartwell* court determined that not all signals of mass appeal and mass availability were transmitted "for the use of the general public," and therefore excluded from section 605 protection,¹²⁴ the issue of whether subscription services constituted broadcasting for the use of the general public was not ultimately resolved until *National Subscription Television v. S & H TV*.¹²⁵

When *Chartwell* was decided by the Sixth Circuit Court of Appeals, *National Subscription Television*,¹²⁶ (NST) also an STV case, was pending appeal in the Ninth Circuit.¹²⁷ In *NST*, an STV operator sought an injunction against the makers and distributors of unauthorized decoders which could be used by non-subscribers to receive the STV programs.¹²⁸ The appellee makers and distributors argued that the widespread programming appeal of STV programs and the existing signal delivery

120. See *Orth-O-Vision*, 474 F. Supp. at 672.

121. See *KMLA Broadcasting Corp.*, 264 F. Supp. at 40.

122. *Chartwell Com. Group*, 637 F.2d at 465.

123. See generally *id.* at 464-65.

124. See *supra* note 111.

125. 644 F.2d 820 (9th Cir. 1981).

126. *Id.*

127. *Chartwell Com. Group* was decided on Dec. 29, 1980. See *Chartwell Com. Group*, 637 F.2d 459, 459 (6th Cir. 1980). *National Subscription Television* was argued and submitted on Jan. 9, 1981. See *National Subscription Television*, 644 F.2d 820, 820 (9th Cir. 1981).

128. *National Subscription Television*, 644 F.2d at 821.

capabilities for the widespread availability of such signals should determine whether STV signals were transmitted for use by the general public and thus whether the signals were protected from unauthorized interception under section 605 of the Communications Act of 1934.¹²⁹ S & H TV argued that the programming appeal of a signal and the signal delivery capabilities of such a signal had previously been used as a basis for finding that a particular signal constituted broadcasting.¹³⁰ In addition, since the Communications Act itself defined broadcasting in relevant part as "radio communications intended to be received by the public," once a signal was found to have mass appeal and mass availability, it was deemed broadcasting.¹³¹ Therefore, the signal was not protected by section 605 since it was "intended to be received by the public," making it exempt from section 605 protection.¹³² In rejecting this argument, the *NST* court concluded that only broadcasting intended "for the use of the general public" was exempt from section 605 protection.¹³³ Finding that *NST* intended to deny use of its signal by the general public by requiring special receiving equipment,¹³⁴ the court stated that *NST* programming was not broadcast for the use of the general public,¹³⁵ and was therefore entitled to section 605 protection.

Having found that the STV signal was not exempt from section 605 protection because it was not deemed to be broadcasting for the use of the general public, the *NST* court then examined the other arguments raised against signal protection, such as: the airwaves belong to the public,¹³⁶ STV operators could protect themselves with technology,¹³⁷ and that the defendants' business of manufacturing and selling decoders provided needed competition in the manufacture of decoders.¹³⁸

129. *Id.* at 823.

130. *Id.* at 821.

131. *Id.*

132. *Id.* See *supra* note 8 where § 605 is set forth in full.

133. *Id.* at 824 (quoting 47 U.S.C. § 605 (1982) (redesignated as § 705(a) in Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(a), 98 Stat. 2779, 2804 (1984)).

134. *Id.* at 824.

135. *Id.*

136. *Id.* at 826.

137. *Id.* See also *infra* note 330 and accompanying text.

138. *National Subscription Television*, 644 F.2d at 826.

The *NST* defendants argued that granting section 605 protection to the *NST* signal would be equivalent to granting *NST* monopoly control over a particular frequency,¹³⁹ and that since the airwaves belong to the public, monopoly control could not be granted without congressional approval.¹⁴⁰ In response, the court noted that, although the airwaves belong to the public, the airwaves are regulated by Congress and the FCC "in the public interest."¹⁴¹ In regulating the airwaves in the public interest, Congress and the FCC grant licenses giving the license holder the right to prevent others from using their assigned frequency.¹⁴² Further, granting section 605 protection to a license holder does not grant a monopoly because it does not prevent other license holders from entering and competing in a given broadcast market.¹⁴³ Finally, if an STV operator did not have section 605 protection to control public viewing of its signal, the operating income from subscriber fees would be reduced, which would ultimately discourage capital investment in STV operations.¹⁴⁴ Thus, the public interest would not be served "by the demise of a product for which there is clearly considerable consumer demand."¹⁴⁵ Therefore, protecting the STV signal is consistent with regulating the publicly owned airwaves in the public interest.¹⁴⁶

Next, the *NST* defendants argued that Congress intended that STV operators protect themselves by means of technology.¹⁴⁷ Rejecting this argument, the court concluded that no authority was offered to support a congressional requirement of such technological protection. In fact, the court noted that "even the most technologically sophisticated decoder can be copied by processes of reverse engineering."¹⁴⁸ Thus, requiring technological protection would not necessarily protect the signal from un-

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 825.

145. *Id.* at 826.

146. *Id.*

147. *Id.*

148. *Id.*

authorized interception.¹⁴⁹ Finally, the *NST* court examined the argument that defendants' actions did no more than provide needed competition in the manufacture of decoders.¹⁵⁰ In rejecting this argument, the court concluded that defendants' activities did not constitute competition because defendants' competitive success would prevent *NST* from operating as a commercially viable enterprise, and eventually force *NST* out of business;¹⁵¹ without *NST* there would be no reason to manufacture decoders in the first place.¹⁵²

The *NST* court then considered the question of whether defendants' actions in manufacturing and selling decoders violated section 605. The court determined that a section 605 violation required a showing of: 1) intercepting or assisting in the interception of protected signals, and 2) divulgence or publication or aiding in the divulgence or publication of the protected transmission.¹⁵³ The court followed *Chartwell*, holding that the manufacture and sale of decoders clearly assisted third parties in receiving unauthorized communications in violation of section 605.¹⁵⁴ The court stated "[t]he act of receiving an *NST* program on a television set equipped with an unauthorized decoder amounts to disclosure of the 'existence, contents, substance, purport, effect or meaning of *NST*'s signal to nonsubscribers [sic]."¹⁵⁵ Therefore, the court found that the sale of the equipment and its use by the purchasers of the equipment to receive *NST*'s signal constituted assistance in interception and divulgence of *NST*'s transmission in violation of section 605. The *NST* court therefore followed *Chartwell* in rejecting the argument that the mass appeal and the mass availability of a signal constituted a transmission for the use of the general public.¹⁵⁶ In so doing, the *NST* court established that a "broadcast" signal was not automatically excluded from section 605 protection; only signals broadcast for the use of the general public were un-

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 827.

155. *Id.*

156. See *supra* text accompanying notes 131-35.

protected under section 605.¹⁵⁷ In examining whether a signal was intended for the use of the general public, however, both *Chartwell* and *NST* found that the need for special equipment to receive the signal negated a finding that the signal was intended for the use of the general public.¹⁵⁸ This left open the question of whether mass availability of the requisite "special equipment" would exempt a signal from section 605 protection — an issue raised in *Home Box Office, Inc. v. Advanced Consumer Technology (ACT)*.¹⁵⁹

In *ACT*, HBO sought to enjoin ACT's manufacture and nationwide sales of antennas and converters.¹⁶⁰ These antennas and converters allowed non-subscribers to receive HBO programming without paying a subscription fee.¹⁶¹ In opposition, defendants argued that the HBO signal was not protected by section 605 because the signal could be received by "technologically simple"¹⁶² equipment that was readily available to the general public.¹⁶³ Thus, ACT argued that because HBO had chosen not to scramble its signal or otherwise make the signal unintelligible without further equipment,¹⁶⁴ HBO must be deemed to have made the signal available for use by the general public, and therefore HBO's signal was not protected under section 605.

The *ACT* court examined the legislative history and case law interpreting section 605's applicability to pay television signals,¹⁶⁵ and concluded that section 605 was designed to protect communications which the transmitter intended to protect,¹⁶⁶ even though "unauthorized recipients could readily obtain the technological capacity to intercept the signal involved."¹⁶⁷ Fur-

157. *National Subscription Television*, 644 F.2d at 826.

158. See *supra* text accompanying notes 113 and 134.

159. 549 F. Supp. 14 (S.D.N.Y. 1981).

160. A converter is a device to convert a signal from one frequency to another. For any encrypted television services, a converter generally provides an intelligible signal for a television set.

161. *Advanced Consumer Technology*, 549 F. Supp. at 15-16.

162. *Id.* at 16.

163. *Id.* at 21.

164. *Id.* at 16. A scrambled signal will not show a clear video picture without use of equipment to "decode" the signal.

165. *Id.* at 17.

166. *Id.* The court added the proviso that the transmitter had to be authorized by the FCC to protect the signal (based on a license, etc.). *Id.*

167. *Id.* at 17. In ruling that program content does not control § 605 protection, the

ther, the court found no indication that Congress required the transmitter to take affirmative steps, such as scrambling, to protect transmissions from unauthorized interception.¹⁶⁸ In fact, the court noted that scrambling would be expensive, and that "scrambling, or any technical protection now available, might not substantially enhance signal security,"¹⁶⁹ because "all practicable forms of scrambling are subject to descrambling."¹⁷⁰ The court held that as long as commercial television sets were incapable of receiving the signal, HBO could reasonably assume that ordinary, law-abiding citizens would not unilaterally purchase equipment to intercept the HBO signal.¹⁷¹ Therefore, the HBO signal was entitled to section 605 protection because it was not made available for use by the general public.¹⁷²

The ACT court therefore resolved the issue of whether mass availability of the signal in conjunction with mass availability of the "special equipment" designed to receive the signal, would remove the signal from section 605 protection. After ACT, it is clear that the manufacturers and sellers of equipment designed to receive a pay television signal without authorization from the transmitter violate section 605.¹⁷³ As a result, pay television suppliers could stop unauthorized manufacturers and sellers from providing the equipment necessary to receive their signal by bringing an action under section 605 for injunctive relief.¹⁷⁴ However, the pay television suppliers' success in stopping the manufacture and sale of equipment designed to intercept the HBO signal led to the argument raised in *Ciminelli v. Cablevision*.¹⁷⁵

court implicitly overruled *Orth-O-Vision*, 474 F. Supp. 672, although the court attempted to distinguish this case. *Advanced Consumer Technology*, 549 F. Supp. at 24.

168. *Advanced Consumer Technology*, 549 F. Supp. at 21.

169. *Id.* at 22.

170. *Id.*

171. *Id.*

172. *Id.* at 25. The court also stated without discussion that ACT's actions violated the statute, unless the signal was not protected under § 605. *Id.* at 16-17.

173. See *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376 (N.D. Ohio 1983) (sale of devices capable of, and used for, unauthorized interception of cable television signals violates § 605); *American Television & Com. Corp. v. Western Techtronics Inc.*, 529 F. Supp. 617 (D. Colo. 1982) (sale of unauthorized MDS equipment plus oral instructions on use constitutes assistance in unauthorized interception in violation of § 605).

174. *Advanced Consumer Technology*, 549 F. Supp. at 25.

175. 583 F. Supp. 158 (E.D.N.Y. 1984).

In *Ciminelli*, the seller of equipment designed to receive cable television signals brought an action against several cable companies alleging illegal tying¹⁷⁶ between cable television service and equipment, in violation of the antitrust laws.¹⁷⁷ In opposition, defendant cable companies (e.g. Cablevision) argued that their actions of controlling equipment were necessary to protect their signal from unauthorized interception under section 605.¹⁷⁸ In ruling on plaintiff *Ciminelli*'s motion to dismiss the section 605 arguments, the *Ciminelli* court first rejected the argument that section 605 does not apply to cable television signals, citing *Chartwell*, which applied section 605 protection to signals not intended for the use of the general public.¹⁷⁹ Thus, having found section 605 protection for the cable signals, the court refused to dismiss that part of the counterclaim by the cable companies alleging that any tying arrangements between cable television operators and cable television reception equipment (i.e. converters, decoders, etc.) were justified by the need to protect against signal piracy (theft).¹⁸⁰ The court stated that "[w]hile we are not aware of any case, and Cablevision admits that it has found none, recognizing protection from theft as justification for an otherwise illegal tying arrangement, we think the record should be developed before we consider the sufficiency of such a defense."¹⁸¹ The *Ciminelli* court thereby refused to dismiss the section 605 claim, although the court stressed that defendant cable companies carried a heavy burden of establishing a justification defense, including the absence of less restrictive alternatives to protect their signal.¹⁸²

Thus, in evaluating the rights of pay television companies to

176. "Tying" or a "tie-in arrangement" is an arrangement where the seller will sell one product (where the seller has monopoly control) only on condition that the buyer also purchase another product (usually one which is available competitively). Such "tying" is illegal under § 3 of the Clayton Act, 15 U.S.C. § 3 (1982). See generally *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936). In *Ciminelli*, the plaintiff alleged that the cable operators had tied the cable television service (in which they had a monopoly) to the reception equipment. *Ciminelli*, 583 F. Supp. at 161.

177. *Ciminelli*, 583 F. Supp. at 160.

178. *Id.* at 162.

179. *Id.* at 161 (the court also cites other pay television cases).

180. *Id.* at 162.

181. *Id.*

182. *Id.*

protect their signals under section 605, the courts have relied on *Chartwell's* "availability versus use" test,¹⁸³ and have held that assisting third parties to receive protected communications without the authorization of the transmitter is not justified by any countervailing social or policy consideration, such as, the possibility of technological protection,¹⁸⁴ the promotion of competition,¹⁸⁵ or the use of public airwaves to transmit the protected signal.¹⁸⁶

b. *Civil Cases Against Individual Users*

Although the vast majority of section 605 cases have been brought against the manufacturers and sellers of unauthorized equipment, there are two reported cases against individual owners of unauthorized equipment who used the equipment to receive pay television signals without having paid the transmitter. In *Movie Systems, Inc. v. Heller*,¹⁸⁷ an MDS operator brought an action to enjoin an individual who had installed unauthorized equipment in his home from using the equipment to receive the MDS signal without paying a fee.¹⁸⁸ Defendant Heller argued that: the MDS transmissions were not protected under section 605 because of their mass appeal and mass availability;¹⁸⁹ the alleged electronic surveillance used by the MDS operator to detect the unauthorized interception of the MDS signal violated his privacy rights;¹⁹⁰ and the requirement that the receiving equipment be installed and operated by the MDS operator constituted an illegal tying arrangement in violation of antitrust laws.¹⁹¹

Relying on the decisions in *Chartwell* and *NST*, the Eighth

183. The "availability versus use" test is used to determine whether a signal is protected by § 605 based on whether the transmitter intends to make the signal *available* to the general public, or intends the signal for the *use* of the general public. The crucial factor in § 605 is whether the signal was intended for the *use* of the general public. See *supra* text accompanying notes 109-10.

184. See *supra* text accompanying notes 147-49 and notes 165-71.

185. See *supra* text accompanying notes 150-52.

186. See *supra* text accompanying notes 139-46.

187. 710 F.2d 492 (8th Cir. 1983).

188. *Id.* at 492-93.

189. *Id.* at 494.

190. *Id.* at 496.

191. *Id.* See also *supra* note 176 and accompanying text.

Circuit rejected Heller's claim that the MDS signal was not protected under section 605.¹⁹² The court held that the crucial question in determining whether a signal was protected under section 605 was not the mass appeal or mass availability of the signal, but rather whether the transmitter intended the signal to be available for the use of the general public.¹⁹³ Finding that the MDS signal could not be received on conventional television sets, but rather required special equipment, the unauthorized interception of the MDS signal was prohibited under section 605 because it was not intended for the use of the general public.¹⁹⁴

In examining Heller's affirmative defenses, the court first examined the argument that the alleged use of electronic equipment to detect the unauthorized reception of MDS signals, constituted an invasion of privacy.¹⁹⁵ In rejecting this argument, the court noted that there was no showing of the requisite "state action" necessary to bring the action within the purview of the fourth and fourteenth amendments to the Constitution, and that the state (Minnesota) had never recognized a cause of action for invasion of privacy.¹⁹⁶ Therefore, Heller did not have an invasion of privacy claim against the MDS operators.

Next, the court addressed Heller's claim that Movie Systems, Inc.'s requirement that it install, maintain and control the MDS receiving equipment constituted an illegal tying arrangement under antitrust laws. The court rejected this argument, stating that the tying resulted from an FCC mandate that the receiving equipment be under the control of the MDS operator.¹⁹⁷ Therefore, because it was not the MDS operator, but rather the FCC that required a "tie" between the service and the equipment, the antitrust claim against the MDS operator had no merit.¹⁹⁸

The *Heller* court therefore found a section 605 violation in

192. *Heller*, 710 F.2d at 494.

193. *Id.* See *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35 (C.D. Cal. 1967); see also *supra* notes 109-10 and accompanying text (discussing this aspect of the *Chartwell* decision).

194. *Heller*, 710 F.2d at 495.

195. *Id.* at 496.

196. *Id.*

197. *Id.*

198. *Id.*

defendant's installation and use of equipment to receive the protected MDS signal in his home without authorization from the transmitter.¹⁹⁹

Similarly, in *Hoosier Home Theater, Inc. v. Adkins*²⁰⁰ the District Court for the Southern District of Indiana found a section 605 violation where an individual assembled unauthorized receiving equipment from standard electronic parts and used the equipment to receive the pay television signal in his home without paying the transmitter.²⁰¹

In *Hoosier*, the defendant did not argue that his use of the MDS signal was authorized, but rather that his unauthorized use did not constitute a section 605 violation because the signal was available at his home without any active solicitation on his part; thus, the signal should be deemed a "gift."²⁰² Further, he argued that his actions in installing and using the equipment in his own home did not violate section 605 because while his interception of the signal was unauthorized, he had not divulged the contents of the signal as required for a section 605 violation.²⁰³

In rejecting the defendant's arguments, the court held that the fact that Adkins had to install equipment to receive the signal negated his claim that the signal was a "gift."²⁰⁴ Further, rejecting Adkins' claim that without divulgement there was no section 605 violation, the court held that the "unauthorized receipt and use of the signal for [defendant's] own benefit" was enough to constitute a section 605 violation, and therefore no divulgence was necessary.²⁰⁵

In both *Heller* and *Hoosier*, the courts were willing to apply section 605 against individual users of equipment on the same basis as section 605 was applied against manufacturers and sellers. Both the *Heller* and *Hoosier* courts followed the reasoning of earlier pay television cases against manufacturers/sellers,

199. *Id.*

200. 595 F. Supp. 389 (S.D. Ind. 1984).

201. *Id.* at 393.

202. *Id.* at 394.

203. *Id.* at 394-95.

204. *Id.* at 396. While the court rejected Adkins' argument that the signal should be deemed a gift, the court later notes that, based on the ease with which the signal was acquired, anyone might reach the conclusion that the action was harmless, or that any law to the contrary would be unenforceable. *Id.* at 398-99.

205. *Id.*

holding that the unauthorized interception and use of a pay television signal violated section 605.

c. *Criminal Cases*

Since section 605 of the Communications Act is a criminal statute,²⁰⁶ an obvious question is whether the unauthorized interception and use of a signal also constitutes a criminal violation. In the two criminal cases applying section 605 — *United States v. Westbrook*²⁰⁷ and *United States v. Stone*²⁰⁸ — the unauthorized interception and use of a signal was held to be sufficient for a finding of criminal liability.

United States v. Westbrook was a criminal proceeding which charged the *Chartwell* defendants, manufacturers and sellers of unauthorized STV equipment, with violations of section 605.²⁰⁹ In *Westbrook*, the court looked at the defendants' actions of selling the electronic decoding equipment, used by non-subscribers for unauthorized reception of Chartwell's STV programs, to determine if the charge of a section 605 violation could withstand a motion to dismiss for failure to charge an offense.²¹⁰ In bringing the motion to dismiss, the defendants argued that because the signal constituted broadcasting, it was not subject to section 605 protection,²¹¹ and that they also lacked the sufficient mens rea for the crime charged.²¹² The court stated that while STV transmissions can be received by the general public, the transmissions cannot be used by the public without special equipment, and that, the STV operators' ability to send selectively received signals brings the STV signal within section 605 protection.²¹³ Thus, criminal sanctions are appropriate.²¹⁴

In evaluating defendants' argument, that, even though their actions in selling such unauthorized equipment might amount to interference with business relations, they should not be subject

206. *Advanced Consumer Technology*, 549 F. Supp. at 18.

207. 502 F. Supp. 588 (E.D. Mich. 1980).

208. 546 F. Supp. 234 (S.D. Tex. 1982).

209. *United States v. Westbrook*, 502 F. Supp. at 589.

210. *Id.*

211. *Id.*

212. *Id.* at 590.

213. *Id.* at 591.

214. *Id.* at 592.

to criminal liability,²¹⁵ the court held that the language of section 605 should be applied equally in civil and criminal cases.²¹⁶ However, since this case represented the first criminal prosecution for the unauthorized manufacture and sale of decoders,²¹⁷ the court concluded that it needed to further examine the degree of mens rea necessary to establish criminal liability and therefore, the court denied the motion to dismiss.²¹⁸

In holding that the language of section 605 should be applied equally to both civil and criminal cases, the *Westbrook* court laid the groundwork for *United States v. Stone*.²¹⁹ In *Stone*, the defendants were charged with selling unauthorized MDS equipment which was used to receive pay television signals.²²⁰ Defendants argued that receiving an omnidirectional²²¹ transmission did not constitute interception, and that the alleged divulgence was a form of free speech protected by the first amendment.²²²

The *Stone* court summarily rejected defendants' argument, holding that there was ample support in case law and the legislative history of section 605 to find a section 605 violation in the interception and disclosure of MDS transmissions.²²³

Secondly, in examining the defendants' free speech argument, the court noted that the MDS communications did not originate with the defendants, but rather were private communications among parties other than defendants.²²⁴ As such, defendants had intercepted otherwise private communications without authorization.²²⁵ Further, the court held that the interception and divulgence constituted non-communicative *conduct*, not *speech*.²²⁶ Therefore, defendants' actions in intercepting and di-

215. *Id.* at 593.

216. *Id.*

217. *Id.* at 592.

218. *Id.* at 593.

219. 546 F. Supp. 234 (S.D. Tex. 1982).

220. *Id.* at 236.

221. Omnidirectional means radiating out in all directions from a single transmission site.

222. *Stone*, 546 F. Supp. at 236.

223. *Id.* at 240.

224. *Id.*

225. *Id.*

226. *Id.*

vulging private MDS communications by selling unauthorized equipment to intercept the MDS signal, were not shielded by the first amendment.²²⁷ Thus, the defendants' motion to dismiss the indictment was denied.²²⁸

From 1979 through 1984, courts, with the single exception of the *Orth-O-Vision* court,²²⁹ found that pay television signals were protected from unauthorized interception and use. In addition, manufacturers, sellers²³⁰ and individual home users²³¹ were found liable for unauthorized interception.²³² Furthermore, courts have held that section 605 applies similarly to both criminal and civil cases.²³³ Thus, in both civil and criminal cases, signals not intended for the use of the general public were protected from unauthorized interception under section 605 of the Communications Act of 1934.

C. Section 605 Becomes Section 705(a) — The 1984 Amendments

1. The "New" Law

On October 30, 1984, Congress passed The Cable Communications Policy Act of 1984.²³⁴ The Cable Act, which established national policies on cable television operations and communications,²³⁵ incorporated the first major revision to section 605 in fifty years.²³⁶ In revising section 605, the Cable Act redesignated and expanded section 605 into section 705 (section 605 became section 705(a)).²³⁷ The new Cable Act was promulgated to ad-

227. *Id.*

228. *Id.*

229. *Ortho-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672 (S.D.N.Y. 1979). See *supra* notes 92-100 and accompanying text. But see *supra* note 167 and accompanying text.

230. See *supra* note 173 and accompanying text.

231. See *supra* notes 187-205 and accompanying text.

232. See *supra* text following note 205.

233. See *supra* text accompanying notes 215-16.

234. Pub. L. No. 98-549, 98 Stat. 2779 (1984).

235. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 601, 98 Stat. 2779, 2780 (1984).

236. See *supra* note 9 and accompanying text.

237. See Lloyd, *New Cable Law Takes Aim Against Pirates*, N.Y.L.J., Dec. 29, 1984, at 5, col. 1. See also 47 U.S.C. § 605 (1982) (redesignated as § 705(a) in Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(a), 98 Stat. 2779, 2804

dress such issues as, "the growing practice of individuals taking down satellite programming for private, home viewing by means of privately owned backyard earth stations, as well as the increasing need to adopt stronger penalties and remedies for the unauthorized interception of signals prohibited under section 605."²³⁸

a. *Private Home Satellite Viewing*

The new section 705 specifically excludes from protection the unauthorized interception of satellite cable programming for private viewing, as long as the programming is neither encrypted nor has a marketing system whereby an individual can obtain authorization to intercept the programming.²³⁹ Further, the new

(1984)).

238. 130 CONG. REC. S14286-87 (daily ed. Oct. 11, 1984).

239. The new sections provide in pertinent part:

§ 705(b). The provisions of subsection (a) shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if —

(1) the programming involved is not encrypted; and

(2) (A) a marketing system is not established under which — (i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and (ii) such authorization is available to the individual involved from the appropriate agent or agents; or (B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming have obtained authorization for private viewing under that system.

(c) For the purposes of this section —

(1) the term "satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers;

(2) the term "agent," with respect to any person, includes an employee of such person;

(3) the term "encrypt," when used with respect to satellite cable programming, means to transmit such programming in a form whereby the aural and visual characteristics (or both) are modified or altered for the purpose of preventing the unauthorized receipt of such programming by persons without authorized equipment which is designed to eliminate the effects of such modification or alteration;

(4) the term "private viewing" means the viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite; and

(5) the term "private financial gain" shall not include the gain resulting to any individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use.

Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(b)-(c), 98 Stat. 2779, 2802 (1984).

section 705 provides immunity to individuals, such as equipment manufacturers and sellers, who assist in the unauthorized interception of *unprotected* cable satellite programming.²⁴⁰ However, while limiting statutory protection over private home viewing of cable satellite programming, the amendments assist anti-piracy efforts by clearly providing legal protection to protected transmissions in civil suits.²⁴¹

240. See Lloyd, *New Cable Law Takes Aim Against Pirates*, N.Y.L.J., Dec. 29, 1984, at 5, col. 2.

241. The new section provides in pertinent part:

§ 705(d)(1). Any person who willfully violates subsection (a) shall be fined not more than \$1,000 or imprisoned for not more than 6 months, or both.

(2) Any person who violates subsection (a) willfully and for purposes of direct or indirect commercial advantage or private financial gain shall be fined not more than \$25,000 or imprisoned for not more than 1 year, or both, for the first such conviction and shall be fined not more than \$50,000 or imprisoned for not more than 2 years, or both, for any subsequent conviction.

(3)(A) Any person aggrieved by any violation of subsection (a) may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(B) The court may —

(i) grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a);

(ii) award damages as described in subparagraph (C); and

(iii) direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

(C) (i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

(I) The party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

(II) the party aggrieved may recover an award of statutory damages for each violation involved in the action in a sum of not less than \$250 or more than \$10,000, as the court considers just.

(ii) In any case which the court finds that the violation was committed willfully and for the purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than \$50,000.

(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than \$100.

Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(d)(1)-(3), 98 Stat. 2779, 2802 (1984).

b. *Expansion of Civil Anti-Piracy Weapons*

The former section 605 did not specifically provide for a private cause of action against the unauthorized interception of protected signals, although this right was found in early section 605 cases.²⁴² The new section 705 provides that any aggrieved person may bring a civil action in any district court.²⁴³ Therefore, although the exact definition of an "aggrieved person" is unclear from the legislative history,²⁴⁴ this section codifies the

242. Although subject to repeated questioning in the early cases, a private right of action under § 605 was first recognized in 1947 in the landmark case of *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1947). See also Spraul, *Decoding Section 605 of the Federal Communications Act: A Cause of Action for Unauthorized Reception of Subscription Television*, 50 CIN. L. REV. 362, 367 (1981). By 1984, the private right of action was so well recognized that at least one court merely stated that it existed. *Hoosier Home Theater, Inc. v. Adkins*, 595 F. Supp. 389, 395 (S.D. Ind. 1984). The earlier disputes on the existence of a private right of action have now been largely eliminated by § 705(d)(3)(A) which explicitly provides a private cause of action. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(d)(3)(A), 98 Stat. 2779, 2803 (1984). See *supra* note 241. See also Lloyd, *New Cable Law Takes Aim Against Pirates*, N.Y.L.J., Dec. 29, 1984, at 5, col. 1. While this provision explicitly establishes a private right of action, this may still be subject to argument with regard to whether a party is truly "aggrieved." See, e.g., *Air Capital Communications, Inc. v. Starlink Communications Group, Inc.*, 601 F. Supp. 1568 (D. Kan. 1985) (two cable television operators have no standing, under the new Act, to bring § 605 claim against satellite dish equipment manufacturers/sellers who do not receive signals from the cable companies' transmissions). Although a claim of no private cause of action based on standing may therefore still be made, evaluation of this claim is beyond the scope of this Comment.

243. See § 705(d)(3)(A), *supra* note 241.

244. Compare the legislative history, as printed in the Congressional Record for the House, which says in part:

Under subsection [d](3)(A), the term 'any person aggrieved' shall be broadly interpreted by the courts in such cases and shall include those with any rights in the intercepted radio communications. Such persons would include but are not limited to, owners of the programming being transmitted as well as senders of the signal embodying the programming transmitted.

130 CONG. REC. H12238 (daily ed. Oct. 11, 1984) (explanation of § 705 as redesignated and amended by the House of Representatives); with the remarks of Sen. Goldwater discussing

the terms 'Any person aggrieved,' 'aggrieved party,' and 'party aggrieved' in 705(d)(3), relative to civil actions. These terms may be broadly construed to include all those who own the rights in the programming being transmitted, as well as those who own the rights for satellite transmission. But it does not include those entities which possess limited rights of reception and retransmission to the programming

130 CONG. REC. S14284 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater). See also Lo Frisco, *Television Piracy*, 199 PRAC. L. INST. 87 (1985).

case law creating an implied private right of action²⁴⁵ and should prevent any narrowing of private rights of action under the Communications Act.²⁴⁶

In addition, section 705 continues the prohibition against unauthorized interception of protected signals for both private and commercial purposes,²⁴⁷ thereby broadening the prohibitions against commercial ventures that import, manufacture, sell or distribute equipment intended to be used for the unauthorized interception of signals.²⁴⁸

Finally, the new section 705 provides for specific statutory remedies, including: (1) granting temporary and permanent injunctive relief;²⁴⁹ (2) damage awards, where the plaintiff may elect either actual or statutory damages;²⁵⁰ (3) increasing damages awards where the section 705(a) (formerly section 605) violation is undertaken for commercial advantage or private financial gain;²⁵¹ (4) reducing damages to \$100 where the pirate had no reason to believe his actions violated section 705;²⁵² (5) awarding recovery of full costs including reasonable attorney's fees.²⁵³ Because section 605 did not provide for any private right of action, section 605 remedies were based on an amalgam of remedies borrowed from other statutes such as the Copyright Act.²⁵⁴ Section 705 eliminates this need by providing specific

245. See generally *Lo Frisco*, *supra* note 244.

246. *Id.* at 94.

247. *Id.* at 103.

248. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(d)(3)(C)(ii), 98 Stat. 2779, 2803 (1984) (set forth in full *supra* note 241).

249. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(d)(3)(B)(i), 98 Stat. 2779, 2803 (1984) (set forth in full *supra* note 241). See also *Lo Frisco*, *supra* note 244, at 98-99.

250. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(d)(3)(C), 98 Stat. 2779, 2803 (1984) (set forth in full *supra* note 241). See also, *Lo Frisco*, *supra* note 244, at 98-99.

251. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(d)(3)(C)(ii), 98 Stat. 2779, 2803 (1984) (set forth in full *supra* note 241). See also *Lo Frisco*, *supra* note 244, at 101.

252. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(d)(3)(C)(iii), 98 Stat. 2779, 2803 (1984) (set forth in full *supra* note 241). See also *Lo Frisco*, *supra* note 244, at 100.

253. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(d)(3)(B)(ii), (iii), 98 Stat. 2779, 2803 (1984) (set forth in full *supra* note 241). See also *Lo Frisco*, *supra* note 244, at 98.

254. See *Lo Frisco*, *supra* note 244, at 97-98. See also *Lloyd*, *New Cable Law Takes*

remedies for the unauthorized interception of signals.²⁵⁵

Therefore, although the 1984 amendments were designed primarily to codify existing case law,²⁵⁶ the changes have done far more than just codify existing law. The Cable Act provided new piracy provisions and a new, and sometimes conflicting, legislative history²⁵⁷ for the courts to apply.²⁵⁸

2. Cases Interpreting Section 705

Since the amendments to section 605 became effective on December 29, 1984, only two federal courts have decided cases based on section 705(a) claims; one of these cases involved the seller of equipment, and the other case involved the individual user of unauthorized equipment.

In *Air Capital Cablevision, Inc. v. Starlink Communications Group*,²⁵⁹ a Kansas district court considered the first reported case of a section 605²⁶⁰ claim against an earth station dis-

Aim Against Pirates, N.Y.L.J., Dec. 29, 1984, at 5, col. 1.

255. See *supra* notes 248-53 and accompanying text.

256. The legislative history of the Cable Communications Policy Act of 1984, as printed in the Congressional Record, says in part:

H.R. 4103 as reported by Committee recodifies without modification § 605 to the Communications Act of 1934 as new § 705(a). In amending existing § 605, it is intended to leave undisturbed the case law that has developed confirming the broad reach of section 605 as a deterrent against piracy of protected communications. Over the years federal courts, consistent with congressional intent, have recognized that § 605 provided broad protection against the unauthorized interception of various forms of radio communications. It is the Committee's intention that the amendment preserve these broad protections: that all acts which presently constitute a violation of present § 605 shall continue to be unlawful under that section as amended and redesignated by H.R. 4103. . . . For example, existing § 605 provides protection against the unauthorized reception of subscription television (STV), multipoint distribution service (MDS), and satellite communications. This amendment . . . is intended to preserve this broad reach of existing § 605 and to make clear that all communications covered under § 605, will continue to be protected under new § 705(a).

130 CONG. REC. S14287 (daily ed. Oct. 11, 1984) (legislative history of The Cable Telecommunication Act) (emphasis added). See also Lloyd, *New Cable Law Takes Aim Against Pirates*, N.Y.L.J., Dec. 29, 1984, at 5, col. 1.

257. See *supra* notes 50 and 244.

258. The new provisions in § 705(b)-(e) took effect on December 29, 1984. See Lloyd, *New Cable Law Takes Aim Against Pirates*, N.Y.L.J., Dec. 29, 1984, at 5, col. 1.

259. 601 F. Supp. 1568 (D. Kan. 1985).

260. *Id.* at 1571.

tributor.²⁶¹ In *Air Capital* two cable television operators sued an earth station distributor, claiming that the sale of earth stations violated section 605 by assisting in the unauthorized reception of satellite transmissions.²⁶² The *Air Capital* opinion, dated February 1985, considered three issues: 1) whether the amendments to section 605 removed the distributor's actions in selling earth stations from section 705 protection;²⁶³ 2) whether the distributor should be required to advise potential customers on authorized uses for earth stations;²⁶⁴ and 3) whether the distributor had valid antitrust claims against the cable operators.²⁶⁵

In evaluating whether the 1984 amendments allowed the sale of earth stations, the court stated that: "[t]he legislative history of the [Cable Act] makes [it] clear that in the absence of encrypted programming or an established marketing system, the manufacture, sale or distribution of earth station satellite dishes does not violate the Act."²⁶⁶ Therefore, defendants' actions in selling earth station satellite dishes did not in itself constitute a violation of section 705 because the earth stations were sold for the private viewing of unprotected signals.²⁶⁷

In evaluating plaintiff cable television operators' motion to amend their complaint to require defendant to notify its customers on the authorized and unauthorized uses of earth stations,²⁶⁸ the court noted that "the statute imposes no duty upon [earth station sellers] to advise its customers about authorized or unauthorized use of the equipment"²⁶⁹ and that "the seller is not liable for the customers' violations of section 705 unless . . . the seller willfully assists in the violation."²⁷⁰ Therefore, the court denied plaintiff's motion.

Finally, the court addressed the earth station distributor's counterclaim that the cable operators were attempting to mo-

261. An earth station distributor is someone who sells earth stations. See *supra* note 22 for definition of "earth station."

262. *Air Capital Cablevision, Inc.*, 601 F. Supp. at 1569.

263. *Id.* at 1569-71.

264. *Id.* at 1572.

265. *Id.* at 1572-73.

266. *Id.* at 1570.

267. *Id.* at 1570-72.

268. *Id.* at 1572.

269. *Id.*

270. *Id.*

monopolize the means of home reception of satellite television programming distribution to consumers,²⁷¹ by instituting the *Air Capital* suit against the earth station seller, and threatening lawsuits against the seller's customers.²⁷² In examining the monopolization claim,²⁷³ the court noted that the claim consisted of two elements: 1) the possession of monopoly power in the relevant market, and 2) overt acts constituting the purposeful acquisition or maintenance of monopoly power.²⁷⁴ Starlink argued that the relevant product market was that of providing facilities for home viewing of satellite cable programming,²⁷⁵ and that *Air Capital* was attempting to monopolize that market through baseless litigation.²⁷⁶ The court held that Starlink had alleged a relevant product market sufficient to survive *Air Capital*'s motion to dismiss, leaving only the antitrust counterclaim to be decided through litigation.²⁷⁷

Air Capital was the first case to examine the applicability of section 705(a) to satellite transmissions; and it differs from prior section 605 cases in that the parties seeking to protect the transmission, cable operators, were not the originators of the transmission,²⁷⁸ but rather they were authorized receivers of the transmission.²⁷⁹ As such, while the case is interesting in setting the stage for further development in the area of satellite transmissions, it does not alter the rationale of the section 605 cases which gave a pay television supplier section 605 protection against those who received their transmission without authorization.²⁸⁰

271. *Id.* at 1573.

272. *Id.*

273. To determine whether there is monopolization, a court must first delineate a relevant market in order to determine whether the alleged monopolist controls the price and competition in the market for such part as they are charged with monopolizing. *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 388 (1956).

274. *Air Capital Cablevision, Inc.*, 601 F. Supp. at 1572 (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

275. *Id.* at 1573.

276. *Id.*

277. *Id.*

278. *Id.* at 1571.

279. *Id.*

280. In general, pay television suppliers sell directly to subscribers, either transmitting the signal directly, such as in *Pay TV*, *Orth-O-Vision*, and *Advanced Consumer Technology*; or in retransmitting a signal, such as in *Ciminelli*.

In *California Satellite Systems v. Seimon*²⁸¹ an MDS operator sought an injunction against an individual who installed microwave equipment to intercept the MDS signal without authorization from the MDS operator.²⁸² In opposition, defendant Seimon argued that he had not violated section 705 because he had a first amendment right of access to public radio signals and that the equipment could be used to receive public radio signals.²⁸³ Acknowledging the *potential* validity of such a claim, where both protected and unprotected signals could be received on the same equipment, the court, nevertheless, found the argument unpersuasive because the defendant used the equipment exclusively for the unauthorized interception of the MDS signal.²⁸⁴ Thus, the court rejected defendant's first amendment argument.²⁸⁵

Neither *Air Capital* nor *Seimon* represent dramatic departures from the reasoning of the pre-section 705 cases.²⁸⁶ Although the *Air Capital* court held that certain cable satellite programming was unprotected against private home use,²⁸⁷ this issue had not been previously addressed in the section 605 cases.²⁸⁸ Further, there is evidence in the legislative history of the new section 705 that allowing private home use of certain cable satellite programming was one of the major reasons behind the 1984 amendments.²⁸⁹ Even so, the *Seimon* court, evaluating a case substantially similar to earlier section 605 cases, had no difficulty in finding protection for the MDS signal.²⁹⁰ These two cases, therefore, are indicative of the reasoned decisions anticipated by section 705.²⁹¹

281. 767 F.2d 1364 (9th Cir. 1985).

282. *Id.* at 1365. MDS transmits pay television programming via microwave from a centrally located transmitter. *See supra* note 21.

283. *California Satellite Sys.*, 767 F.2d at 1365. Seimon claimed that the equipment could also be used for non-infringing purposes — such as receipt of nonsubscription educational programming — and that he has a first amendment right to listen to the non-infringing communication. *Id.*

284. *Id.* at 1368.

285. *Id.*

286. *See supra* notes 229-33 and accompanying text.

287. *See supra* notes 266-67 and accompanying text.

288. *See supra* note 260 and accompanying text.

289. *See supra* note 238 and accompanying text.

290. *See supra* notes 281-85.

291. *See supra* note 50.

Conversely, at least one *state* court has found a dramatic policy shift in the 1984 amendments. In *The People v. Babylon*,²⁹² the Supreme Court of California held that unencoded MDS transmissions were outside the scope of California's *state* law against signal piracy,²⁹³ reversing their earlier position that unencoded MDS transmissions were protected under section 605.²⁹⁴

In *Babylon* the defendant sold an investigator an "HBO system."²⁹⁵ He told her that there was no law against her owning or using the system, but that if she told him she was going to use it for HBO, he would not sell it to her.²⁹⁶ When the investigator asked what other programs the system would receive, defendant Babylon told her that only HBO could be received in her area.²⁹⁷ Despite this, the California court concluded that California state law did not prohibit the sale of equipment which was "designed merely to receive in intelligible form unencoded microwave transmissions broadcast by a multipoint distribution service" (MDS)²⁹⁸ even though such equipment would be used to intercept unauthorized signals. In examining state law in light of federal law, the court noted that:

[S]ection 705 offers considerably less protection to transmissions which are unencoded than to encoded, scrambled, or addressed signals. It rewards those operators who invest substantial effort and money in an attempt to protect their signals, leaving other operators with the choice of establishing a satisfactory authorization program or risk economic loss due to "video piracy."²⁹⁹

292. 39 Cal. 3d 70, 702 P.2d 205, 216 Cal. Rptr. 123, *reprinted as modified* 39 Cal. 3d 719 (1985) (although the modified decision removes the reference to new § 705, the remainder of the opinion is unchanged).

293. The original opinion evaluated the new § 705 amendments as part of the reasoning for their holding. 39 Cal. 3d 70, —, 702 P.2d 205, 210, 216 Cal. Rptr. 123, —, *reprinted as modified* 39 Cal. 3d 719 (the modified decision removed the reference to § 705 leaving the remainder of the reasoning and opinion unchanged).

294. 39 Cal. 3d 70, —, 702 P.2d 205, 210, 216 Cal. Rptr. 123, —.

295. 39 Cal. 3d 70, —, 702 P.2d 205, 207-08, 216 Cal. Rptr. 123, —. (The "HBO system" consisted of the equipment necessary to receive the MDS signal, including microwave antenna and converter).

296. 39 Cal. 3d 70, —, 702 P.2d 205, 208, 216 Cal. Rptr. 123, —.

297. *Id.*

298. 39 Cal. 3d 70, —, 702 P.2d 205, 210, 216 Cal. Rptr. 123, —.

299. 39 Cal. 3d 70, —, 702 P.2d 205, 211, 216 Cal. Rptr. 123, —.

The court refrained from deciding whether the HBO franchise agreement (an exclusive area franchise from HBO to the MDS operator) satisfied the requirements of an "authorization program," which would have protected the programming signal under section 705.³⁰⁰

Although the *Babylon* court modified its original opinion to eliminate the section 705 references, the court did not alter the outcome or rationale of the case. This rationale, if followed by federal courts, would require that all transmitters use at least some minimal level of technological protection in order to fall under the purview of section 705 protection.³⁰¹ Such a construction would represent a radical departure from existing case law developments in the area of signal protection.³⁰²

III. Analysis

In determining the applicability of section 605 (now section 705(a)), the federal courts established a working methodology to determine whether a signal was protected from unauthorized interception under section 605 based on a three part "test": 1) Can the transmitter show by clear objective evidence that his signals are not intended for the *use* of the general public?³⁰³ 2) Are the "pirates'" activities sufficient to bring them within the scope of proscribed activity?³⁰⁴ 3) Does the alleged "pirate" have a valid defense that would remove the activities from proscribed conduct?³⁰⁵

300. *Id.* See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(b)(2), 98 Stat. 2779, 2802 (1984) (set forth in full *supra* note 239).

301. The *Babylon* court stated that the Cable Act "which radically reshaped federal law in this area . . . clearly distinguishes between encoded and unencoded transmissions, affording a lesser degree of protection to the latter." *Babylon*, 39 Cal. 3d 70, —, 702 P.2d 205, 211, 216 Cal. Rptr. 123, —.

302. See *supra* text accompanying notes 229-33 and 286-90.

303. This part of the "test" began in *Chartwell Com. Group v. Westbrook*, 637 F.2d 459 (6th Cir. 1980) and has continued to be applied by the courts. See *supra* text accompanying note 112-115.

304. Compare *United States v. Westbrook*, 502 F. Supp. 588 (E.D. Mich. 1980) (receipt and use constitute violation) with *Air Capital Cablevision, Inc. v. Starlink Com. Group*, 601 F. Supp. 1568 (D. Kan. 1985) (manufacture, sale or distribution of earth stations to home users *alone* does not constitute a violation).

305. See *California Satellite Sys.*, 767 F.2d at 1368 (first amendment argument might have validity in the abstract but not when applied to the facts of the particular case). See *supra* text accompanying notes 281-85.

The 1984 amendments, however, changed section 605 by giving the added protection of harsher penalties to protected signals,³⁰⁶ while removing certain cable satellite programming signals from section 705(a) (formerly section 605) protection.³⁰⁷ To determine what effect the amendments should have on the methodology or results of prior section 605 cases, it is important to analyze why the law was amended, the current status of communications' protection, and the proscribed activities under the law.

A. *Why Amend?*

1. *The Real World*

By year end 1984, an estimated one million people in the United States owned, and presumably used, earth stations to receive satellite transmissions.³⁰⁸ Although the law did not prohibit private ownership or installation of earth stations, the question of whether an earth station owner's unauthorized interception of satellite transmissions might violate section 605 was unclear.³⁰⁹ While it was clear that earth stations could be used to receive dozens of legally unprotected signals,³¹⁰ it was equally clear that a large number of earth station owners enjoyed pay television programming which the transmitter did not intend for their use.³¹¹ Also, some commentators on section 605 expressed concern that harsh penalties for the unauthorized interception

306. See *supra* text accompanying notes 242-55.

307. See *supra* text accompanying notes 239-40.

308. See *supra* note 52 and accompanying text. See also 130 CONG. REC. S14283 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater) (the legislative history of the Cable Act states that in the five or six years home satellite technology has been available, "nearly one million home satellite antennas have been sold.")

309. The *Air Capital* court, evaluating whether the defendants' activities in selling earth stations violated § 605 as amended, stated in relevant part: "Numerous courts had held that § 605 prohibited the manufacture, sale and distribution of equipment that enabled home users to intercept or decode programming transmitted or retransmitted by subscription television companies or by cable television companies." *Air Capital Cablevision, Inc.*, 767 F.2d at 1569. Further "[i]t is crystal clear to this court that the 1984 amendments to the Communications Act of 1934 were enacted specifically to protect enterprises such as [the sale of earth stations for private home use]. *Id.* at 1570. See also, *Lo Frisco*, *supra* note 245, at 105-06.

310. See *Bienstock*, *supra* note 18, at 245 n.40.

311. *Warshaw*, *The Latest Dish*, PHILADELPHIA, Oct. 1985, at 105, 107.

of satellite programming would create a problem for private earth station owners unless: 1) they could readily determine which satellite transmissions were protected from such unauthorized interception (perhaps through scrambling of protected transmissions);³¹² and unless 2) there was a means established whereby earth station owners could pay for the protected transmissions which they wanted to receive.³¹³ Further, the legislative history of section 705 makes it clear that Congress was concerned about the effect of any changes on private earth station owners.³¹⁴ Thus, Congress exempted the private use of unencrypted satellite cable programming from section 605 protection, provided no marketing system was established for such programming.³¹⁵ In this way, Congress addressed the concerns of earth station buyers and sellers,³¹⁶ while nevertheless ensuring the continued protection of pay television signals in general.³¹⁷

2. Damages as a Deterrent

All the section 605 and section 705 cases seek injunctive relief to stop the unauthorized interception of protected signals. The reasons for this are clear. By allowing people to receive programming for which they do not pay, signal piracy affects the viability of the pay television distribution system in that it reduces potential revenues.³¹⁸ At the same time, monetary damages for signal piracy are often difficult to ascertain (e.g. in the case of equipment sellers, the damage calculation would be based on the number of units sold, the length of time they were in use, etc.).³¹⁹ Thus, in this environment, there is an incentive for pirates to enter the market to sell unauthorized equipment

312. Westover, *supra* note 14, at 22 n.112.

313. *Id.*

314. See *supra* text accompanying note 238.

315. See § 705(b)(2) *supra* note 239.

316. See *supra* text accompanying note 238.

317. See *supra* note 50.

318. Note, *supra* note 19, at 641-42.

319. Home Box Office, Inc. v. Advanced Consumer Technology, 549 F. Supp. 14, 25 (S.D.N.Y. 1981) (defendants exploitative business operation threatens the viability of MDS transmissions); American Television & Com. Corp. v. Western Techtronics, Inc., 529 F. Supp. 617, 621 (D. Colo. 1982) ("Defendants conduct is prohibited by § 605, and it is no defense that some of them have chosen as a vocation a business that has turned out to be unlawful.").

until they are ordered to stop. In this way, the "pirate" attains short-term profits while the pay television supplier sustains long-term harm.³²⁰ By providing harsher remedies³²¹ the new law aims at deterring signal piracy through a reduction or elimination of the pirate's short-term profits.

3. *The Role of the States*

The amendments specifically provide that section 705 does not preempt any state or local laws pertaining to signal piracy (otherwise known as theft of service).³²² Since virtually all states have theft-of-service laws,³²³ the new federal law provides a forum for signal protection cases³²⁴ while allowing individual states to develop laws specifically targeted to piracy problems.³²⁵

B. *What is Protected?*

Section 705 protects all signals not broadcast for the use of the general public, *except* for cable satellite programming signals which are neither encrypted nor have a marketing authorization program established to allow private home authorizations.³²⁶ However, the courts' emphasis on the need for special equipment to receive protected signals indicates that they are not prepared to enforce any law which protects a signal that has become readily accessible.³²⁷ Both Congress, in enacting the 1984 amendment, and the courts, have indicated to the pay television

320. The "pirate" could sell decoding equipment to receive a pay television supplier's signal without payment of the fee until such time as a court enjoined further sale. At that point, the "pirate" was barred from any further profits. However, the purchasers of the "pirate" equipment could continue to use the equipment on the system unless a further injunction against the individual was obtained.

321. Lloyd, *New Cable Law Takes Aim Against Pirates*, N.Y.L.J., Dec. 29, 1984, at 5, col. 3. See also *supra* notes 242-58.

322. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705 (d)(6), 98 Stat. 2779, 2803 (1984). See also Lloyd, *New Cable Law Takes Aim Against Pirates*, N.Y.L.J., Dec. 29, 1984, at 5, col. 3.

323. See NEW YORK STATE CABLE TELEVISION ASSOCIATION, CABLE THEFT MANUAL (1983).

324. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(d)(3)(A), 98 Stat. 2779, 2802 (1984); *supra* note 241.

325. See *supra* note 322.

326. See *supra* text accompanying notes 240-41.

327. See *supra* text accompanying note 158.

distributors that some technological protection of transmissions may be required for continued section 705 protection.³²⁸ Thus, the courts may well be asked to decide what level of technology is required to protect a signal,³²⁹ and whether subscription broadcasters will be periodically required to upgrade their technological protection.³³⁰

C. *What is the Proscribed Activity?*

1. *In General*

Prior to the 1984 amendments, the courts held that receipt of the transmission plus the use of the transmission constituted a violation of section 605.³³¹ In fact, a section 605 violation had even been found in *Hoosier Home Theatre, Inc. v. Adkins*,³³² where a private individual assembled, installed and used microwave equipment within his own home to receive MDS transmissions.³³³ As of 1984, however, section 705(b) now creates an exception for the home use of cable satellite programming, and there are already signs that pirates will attempt to expand this exception.³³⁴ While the legislative history of the 1984 amendments makes it clear that the cable satellite programming exception is specific and limited,³³⁵ courts will continue to decide

328. See *supra* note 50 and note 204.

329. See *supra* text accompanying notes 200-04.

330. As Senator Goldwater noted, earth station technology has existed for private home use for only five to six years. 130 CONG. REC. S14283 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater). See *supra* note 308. Further, he states that:

[i]f our Nation is to hold its lead in this and other areas of high technology, we must encourage this type of initiative and competition. We cannot favor one technology over another and we must take care that Government laws do not interfere with progress and stifle the development of excellent products, such as those represented by Earth stations at private dwellings. For these reasons, I am pleased that many of [these] concepts . . . are now incorporated into [§ 705(b)].

130 CONG. REC. S14284 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater). If "pirate" technology is to be encouraged, then must transmitters continually upgrade technology to maintain protection? See also text accompanying notes 165-67.

331. See *supra* note 31.

332. 595 F. Supp. 389 (S.D. Ind. 1984).

333. See *supra* text accompanying notes 204-05.

334. See *supra* text accompanying notes 298-99.

335. The legislative history of the Cable Communications Policy Act of 1984, as printed in the Congressional Record, says in part:

Section 705 will provide a strengthened statutory basis for deterring satellite video piracy. At the same time, it provides a *specific, limited exception* under which

cases based on prior case law as modified by the new section 705 changes.³³⁶

a. *Public Airwaves*

Pirates have argued that the "airwaves belong to the public," and that they therefore have a right of access to signals transmitted over public airwaves.³³⁷ In general, courts have responded by pointing out that while the airwaves belong to the public, Congress and the FCC are charged with regulating them in the public interest.³³⁸ At the same time, some commentators have argued that such a view is overly simplistic, and thus, does not adequately reflect a societal view on the rights and interests of all parties.³³⁹ However, because Congress is mandated to regulate the airwaves in the public interest, any balancing of the rights and interests of the different parties should be done in Congress. Therefore, any transmission not protected by section 705 is in the public domain, and as such, can be intercepted and used with impunity.³⁴⁰

b. *Free Speech*

Because the same equipment used for the unauthorized interception of pay television signals can be used for other legal purposes, pirates have argued that section 705 protection implicates the free speech provision of the first amendment.³⁴¹ In addition, commentators have argued that the Supreme Court has recognized a first amendment right to receive information and ideas.³⁴² These commentators suggest that there is a conflict

individual satellite dish owners can be authorized to receive unscrambled signals without being subject to liability. *In that respect, the intent of new section 705 is the creation of an efficient, non-burdensome marketplace mechanism to authorize satellite dish owners to receive unencrypted satellite programming.*

130 CONG. REC. S14287 (daily ed. Oct. 11, 1984) (Explanation of § 705 as redesignated and amended by the House of Representatives) (emphasis added).

336. See *supra* text accompanying notes 286-91.

337. See *supra* text accompanying notes 139-46.

338. See *supra* text accompanying notes 139-46.

339. See Comment, *Subscription Television: Should the Government Prohibit Unauthorized Reception?*, 18 CAL. W.L. REV. 291, 305 (1982).

340. *Accord*, *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348, 350 (9th Cir. 1964).

341. See *supra* text accompanying notes 281-85.

342. See Comment, *supra* note 339, at 333.

when the means of communication are protected, such that the *speaker* can claim a first amendment right to speak or refrain from speaking, and the *recipient* can claim a first amendment right to receive communications.³⁴³ However, the Supreme Court has noted that “[b]alancing the various First Amendment interests involved in the broadcast media and determining what best serves the public’s right to be informed is a task of great delicacy and difficulty.”³⁴⁴ At the same time, the Court noted “[T]he First Amendment does not reach acts of private parties in every instance where the Congress . . . has merely permitted or failed to prohibit such acts.”³⁴⁵ In terms of section 705, therefore, it would seem that Congress has struck a “balance” between what acts it will permit or prohibit from both transmitters and pirates, and thus, the first amendment should not be construed in such a way that it defeats this balance.

c. *Privacy*

Pirates³⁴⁶ and at least one commentator³⁴⁷ have argued that the means employed to detect piracy violate the privacy rights of both pirates and innocent citizens by determining electronically whether or not a given pay television signal is being received.³⁴⁸ Although this argument has some merit, it is less persuasive when one considers that few such measures are currently used to detect theft.³⁴⁹ It is probably reasonable to assume, therefore, that as electronic surveillance technology and signal piracy technology advance, the courts will address this issue and find a balance, but it may not be in the near future.

343. *Id.* at 334.

344. *Columbia Broadcasting Sys., Inc. v. Democratic National Comm.*, 412 U.S. 94, 102 (1973).

345. *Id.* at 119.

346. *See supra* text accompanying notes 195-96.

347. *See Comment, supra* note 43, at 549 (the court’s interpretation of § 605 (in *Heller*) is in effect unconstitutional because the means employed to detect piracy violates the privacy rights of pirates and innocent citizens).

348. *Id.*

349. *See* NEW YORK STATE CABLE TELEVISION ASSOCIATION, CABLE THEFT MANUAL (1983).

D. *Who May Be Liable Under Section 705*

Under section 605, equipment manufacturers/sellers as well as private individual users were held liable for section 605 violations.³⁵⁰ However, in creating a limited exception for private earth station owners,³⁵¹ Congress also exempted those who manufactured and sold such equipment to private owners for home use.³⁵² The issue then becomes how far along the continuum of commerce the exemption continues — since, in any case, it is the consumer who actually *receives* and *uses* the signal.³⁵³ One commentator has noted that, under section 605, liability becomes increasingly untenable as we proceed along the continuum of commerce away from the consumer who actually receives the signal.³⁵⁴ The same argument can be made about the exemption in section 705; as we proceed along the continuum of commerce away from the private owner, exemption becomes increasingly strained because the exemption was created to allow for the private home use of otherwise protected signals. Indeed, it may be that the same individual who sells earth stations to private home viewers also sells to non-private home users, and thus, some of the equipment ends up in the hands of the unauthorized recipients of protected signals. The question then becomes whether the seller should be liable for the unauthorized use of the equipment, and then at what point does liability attach (for example, should a showing of actual knowledge be required).³⁵⁵ Further, if all satellite cable programming is either encrypted or subject to a marketing system, and thus entitled to section 705(a) protection, will a manufacturer who sells *unauthorized* receiving equipment be immune from liability?

350. See *supra* text following note 205.

351. See *supra* note 335.

352. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(b), 98 Stat. 2779, 2802 (1984) (set forth in full *supra* note 239).

353. See Note, *Encoded Subscription Television Signals Find Protection Under Section 605 of the Federal Communications Act* — National Subscription Television v. S & H TV, 4 WHITTIER L. REV. 349 (1982).

354. *Id.* at 364.

355. See *supra* text accompanying notes 240 and 268-70. See also Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(d)(c)(ii), 98 Stat. 2779, 2803 (1984); *supra* note 241.

E. *The Arguments Against Protection*

1. *Competition*

Pirates have argued that they provide competition for the transmitters,³⁵⁶ but courts and commentators alike have generally found this argument unconvincing because the "competition" could force the transmitter out of business, through removing the revenue base of the transmitter by enabling the unauthorized receipt of the signal without payment to the provider.³⁵⁷

2. *Antitrust*

There have recently been two major cases in which antitrust claims have been raised by signal pirates. In *Ciminelli v. Cablevision*,³⁵⁸ the plaintiff signal pirate argued that the restrictions imposed on the sale of equipment designed to receive a cable television signal, constituted illegal tying under the antitrust laws.³⁵⁹ More recently, in *Air Capital Cablevision*,³⁶⁰ defendant earth station distributors argued that the plaintiff cable operators brought the suit as part of an attempt at monopolization.³⁶¹ In evaluating these two antitrust claims, it is necessary to look at what is protected by section 705 and whether there is a business justification for limiting receiving equipment.

In *Goldman v. United States*,³⁶² the Court of Appeals for the Second Circuit examined whether overhearing and divulging the contents of what was said into a telephone receiver constituted a violation of section 605 (now section 705(a)).³⁶³ In denying protection, the *Goldman* court held that section 605 protected the telephone lines as the "means of communication," not the "secrecy of the conversation."³⁶⁴ As such, protection is af-

356. See *supra* text accompanying note 150.

357. See Comment, *supra* note 339 at 315. See also Bienstock, *supra* note 18, at 244 n.2.

358. 583 F. Supp. 158 (E.D.N.Y. 1984).

359. See *supra* text accompanying notes 176-82.

360. 601 F. Supp. 1568 (D. Kan. 1985).

361. See *supra* text accompanying notes 274-77.

362. 316 U.S. 129 (1942).

363. *Id.* at 133.

364. *Id.*

forded to the message "throughout the course of its transmission by the instrumentality or agency of transmission."³⁶⁵ Applying these findings to *Air Capital*, it is clear that what the cable operators sought to protect was the "secrecy of the conversation" (the transmission they received from the satellite), and not the "means of communication" (the security of the cable system).³⁶⁶ Because the cable operators' ability to protect the signal in the cable system was not implicated, the cable operators did not have a valid claim under either section 605 or section 705. In order to have a valid section 605 or section 705 claim, the operators needed an interception of their signal as it was transmitted across the cable.

On the other hand, when one examines the *Ciminelli* case in light of the *Goldman* distinction between the "secrecy of the conversation" and the "means of communication," *Ciminelli* yields the opposite result. In *Ciminelli*, the defendant cable operators argued that there was a business justification for any "tying" arrangement involving cable related equipment, because cable operators needed such an arrangement to protect their transmission.³⁶⁷ Because the cable operators sought only to protect themselves by controlling equipment that could be used on their cable system ("means of communication"), they did not go beyond the ambit of section 605 (now section 705(a)) by seeking to protect the "secrecy of the conversation" beyond that portion of it which they originated. Further, given the difficulty of detecting signal pirates³⁶⁸ and the improbability of a pirate turning himself in,³⁶⁹ it would appear that there is a business justification for limiting the sale of unauthorized equipment.

Thus, *Goldman* provides an appropriate basis on which to distinguish between what means may be necessary and proper to protect transmissions under section 705.

365. *Id.*

366. See *supra* text accompanying notes 278-79.

367. See *supra* text accompanying notes 180-82.

368. See Comment, *supra* note 339, at 341 (noting that the problem lies in the public's desire to cooperate with the pirates).

369. See *American Television & Com. Corp. v. Western Techtronics, Inc.*, 524 F. Supp. 617, 621 (D. Colo. 1982) ("those persons intercepting the MDS signals without paying for them are not likely to volunteer that they are doing so, since criminal penalties are provided for willfully violating § 605 [now § 705(a)]").

IV. Conclusion

In *Hoosier Home Theater, Inc. v. Adkins*,³⁷⁰ Judge Barker concluded that:

since 1980, the amount of law on [unauthorized reception of subscription television signals] has increased but the public understanding of these statutes and their interpretations seems nonetheless to have lagged. [The] Court is faced, therefore, with a situation where its function is as much to explain the applicable law, as to decide the immediate controversy. In doing so, and primarily because of the problems which enforcement of the rights protected by Section [705] portends, it is hoped that this ruling will serve as an aid to understanding by those who otherwise would err through inadvertence or confusion and a deterrent to those who otherwise would allow themselves to be in violation of these statutes.³⁷¹

While section 705 changed the law on the unauthorized reception of pay television signals, it carved out only a narrow exception by allowing private home use of individual earth stations within certain guidelines (where the signal was neither encrypted nor a marketing system established allowing for authorized use by individual private home users). In amending section 605, Congress created a balance between the rights of different parties, weighing current realities such as the widespread use of private home earth stations with the public interest in the continuing economic viability of the pay television industry and that industry's need to protect its signal. The federal courts have created a balance between ensuring the continued viability of pay television operations through protection of transmissions, while taking into account the other policy considerations (such as antitrust) which serve to limit the availability of protection, in a consistent line of cases under section 605 and section 705. It is hoped that the federal courts will continue to maintain this balance, and that the state courts will interpret state laws to maintain a similar balance.

Susan M. Hart

370. 595 F. Supp. 389 (S.D. Ind. 1984).

371. *Id.* at 399.