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PAY TELEVISION PIRACY: DO PIRATES WALK THE PLANK? *PEOPLE V. BABYLON** AND *PEOPLE V. PATTON*

Pay television is a term used to describe pay-for-viewing programming. It includes cable television ("CTV"), subscription television ("STV"), and multipoint distribution service ("MDS") signals.[1] Public demand for these programs has increased dramatically since 1975, when Time Incorporated's Home Box Office ("HBO") used a communications satellite to distribute its pay television service.[2] Currently, it is estimated that thirty-four million homes are linked to pay television, with the average American family viewing more than seven hours of television per day.[3]

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* This case was initally reported at 39 Cal. 3d 70, 702 P.2d 205, 216 Cal. Rptr. 123 (1985). A modification of the opinion was filed by the California Supreme Court on August 29, 1985. It was reported at 85 Daily Journal D.A.R. 3025 (1985). The modification is as follows:

> The opinion herein, appearing at 39 Cal. 3d 70, is modified as follows:
>
> 1. Strike the section beginning on page 78 with the words "Our construction of section 593e is consistent with current federal legislation . . ." and ending with the last sentence of page 79, which concludes with the words " . . . federal policy reflected in section 705(b)." Strike all footnotes accompanying this section (fns. 10,11,12,13, and 14).
>
> 2. Strike the first two sentences on page 80, beginning with the words "In sum, we have concluded . . ." and ending with the words ". . . initiated under old section 593e" and substitute the following sentence: Although defendants were originally prosecuted under the 1980 statute, the 1984 amendments to section 593e contain no saving clause which might preserve prosecutions initiated under old section 593e.
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> 3. On page 80, renumber footnote 15 as footnote 10.

This casenote discusses the modified opinion reported at 39 Cal. 3d 719, — P.2d —, — Cal. Rptr. — (1985). It appears Justice Kaus mistakenly concluded that his construction of 593e (i.e., nonprotection of MDS signals) was consistent with current federal law (*see infra* note 57). That conclusion, and all references to federal law were striken from the opinion.

1. Cable television is delivered to customers by local franchisees via a coaxial cable. Usually the signals originate from "earth stations" around the country. "Earth stations" are common carriers of broadcast signals licensed by the Federal Communications Commission ("FCC"). The signals are transmitted, via communications satellites, to other earth stations throughout the country. These stations then retransmit the signals to the local franchisees.

Subscription television uses conventional television frequencies (i.e., VHF or UHF) to deliver its programming material to viewers. The signals are transmitted in a scrambled format and the viewer must have special decoding equipment to receive an intelligible program.

Multipoint distribution services transmit their programming material via microwave frequencies. Microwave transmissions cannot be received by the ordinary television set and antenna. A viewer must be equipped with a microwave antenna and power converter to receive an intelligible program.

2. 1985 Y.B. BROADCASTING CABLECASTING, at A-6.

3. *Id.* at A-2.

There are several companies[4] that provide programming to the public for a fee.[5] Unauthorized reception (i.e., "piracy") is one of the biggest problems for the pay television industry.[6] It has caused substantial revenue loss each year because viewers, who might otherwise pay to receive the programs, pirate the signals/transmissions.[7] *People v. Babylon*[8] and *People v. Patton*[9] are California's leading cases on pay television piracy.

During the early development of this industry, the California Legislature passed several laws prohibiting certain acts related to television piracy. In 1975, Penal Code section 593d[10] was enacted to prohibit unauthorized connections to cable television systems. Currently, this section imposes civil and criminal liability on individuals who tap into cable systems without authorization.[11]

As the pay television industry continued to develop, other piracy issues arose. Individuals armed with advanced technology began intercepting pay television transmissions directly from the airwaves *instead of* tapping into cable systems. As a way of combating this problem, the industry and legislature focused on entrepreneurs who supplied the necessary equipment to pirate pay television. In 1980, the California Legislature added Penal Code section 593e.[12] This legislation prohibited the

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4. For example: Arts & Entertainment, Black Entertainment Television, Cable News Network, Entertainment and Sports Programming Network, Financial News Network, Lifetime, Music Television, Nickelodeon, USA Network, WGN-TV Chicago, WOR-TV New York, WTBS(TV) Atlanta, ON Television, Select Television.

5. 1985 Y.B. BROADCASTING CABLECASTING, at A-6, 7.

6. *Scrambling: The Battle Has Just Begun*, 1 TV SATELLITE VIDEOWORLD 40, 78-80 (Nov. 1985).

7. *Id.* Telephone conversation with Manual Zamorano, Legislative Assistant to State Senator Joseph B. Montoya and Associate Consultant to the Senate Subcommittee on Cable Television (Sacramento, California, Oct. 18, 1985).

8. 39 Cal. 3d 719, — P.2d —, — Cal. Rptr. — (1985).

9. 147 Cal. App. 3d Supp. 1, 194 Cal. Rptr. 759 (1983).

10. CAL. PENAL CODE § 593d (West Supp. 1985).

11. *Id.* Section 593d(a) states:

> Every person who knowingly and willfully makes or maintains an unauthorized connection or connections, whether physically, electrically, or inductively, or purchases, possesses, attaches or maintains the attachment of any unauthorized device or devices to any cable, wire or other component of a franchised or otherwise duly licensed cable television system or to a television cable or set, or makes or maintains any modification or alteration to any device installed with the authorization of a franchised or otherwise duly licensed cable television system, for the purpose of intercepting or receiving any program or other service carried by a franchised or otherwise duly licensed cable television system which such person is not authorized by that cable television system to receive, is guilty of a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding 90 days, or both. For the purposes of this section, each such purchase, possession, connection or attachment shall constitute a separate violation of this section.

12. *See* CAL. PENAL CODE § 593e(a) (West Supp. 1985).

manufacture, distribution, or sale of any device which enabled unauthorized reception of subscription television.[13] Before the recent 1984 amendment to 593e,[14] the California Court of Appeals held that the statute protected MDS as well as STV.[15] In defense, those accused of piracy claimed that 593e was unconstitutional because it was vague and overbroad,[16] and was preempted by federal law.[17] In two recent cases, *People v. Babylon*[18] and *People v. Patton*,[19] the California courts addressed these issues.

In *Babylon*, the California Supreme Court held that suppliers of *microwave antennas and power converters* were not guilty of violating the amended section 593e.[20] In addition, the court implicitly held that the amended section 593e was not unconstitutionally vague or overbroad.[21] In *Patton*, the Appellate Department of the Superior Court held that section 593e was not preempted by federal law, and that sellers of *decoding devices* may be prosecuted under the California statute.[22]

In December 1980, Harold Babylon and Douglas Hyatt were separately accused of violating California Penal Code section 593e.[23] Specifically, the owners of Babylon Electronics and Hijack TV[24] were arrested for selling microwave equipment that enabled the unauthorized reception of MDS transmissions.[25] Both Bablyon and Hyatt sold devices which enabled their customers to receive HBO as it was being relayed from Sacramento Microband (a licensed MDS carrier) to paying customers in the Sacramento area.[26]

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13. *Id.*

14. CAL. PENAL CODE § 593e (West Supp. 1985).

15. People v. Babylon, — Cal. App. 3d — (*not reported, hearing granted*), 194 Cal. Rptr. 134 (1983).

16. *Babylon*, 39 Cal. 3d at 725, — P.2d at —, — Cal. Rptr. at —.

17. *Id. See also* People v. Patton, 147 Cal. App. 3d Supp. 1, 4, 194 Cal. Rptr. 759, 760 (1983).

18. 39 Cal. 3d 719, — P.2d —, — Cal. Rptr. — (1985).

19. 147 Cal. App. 3d Supp. 1, 194 Cal. Rptr. 759 (1983).

20. *Babylon*, 39 Cal. 3d at 722, — P.2d at —, — Cal. Rptr. at —.

21. Although the court did not address the constitutional claim, it ruled on the merits of the amended statute, thus implicitly holding the new statute was not vague or overbroad. *Babylon*, 39 Cal. 3d at 725, — P.2d —, — Cal. Rptr. —.

22. *Patton*, 147 Cal. App. 3d Supp. 1, 194 Cal. Rptr. 759.

23. *Babylon*, 39 Cal. 3d at 723-24, — P.2d at —, — Cal. Rptr. at —.

24. Carrizosa, *Sale of Pay TV Interceptor Dishes Gets Go-Ahead From High Court*, L.A. Daily Journal, July 26, 1985, at 20, col. 1.

25. *Babylon*, 39 Cal. 3d at 723-24, — P.2d at —, — Cal. Rptr. at —.

26. *Id.* at 723, — P.2d at —, — Cal. Rptr. at —. The customers receive the transmissions from Microband, but are in fact customers of CALSAT, a California corporation which holds no license or permit from the FCC. CALSAT charged a monthly rental fee for the receipt and use of HBO programs. *Babylon* at 723, — P.2d at —, — Cal. Rptr. at —.

The trial court found Babylon and Hyatt guilty of violating Penal Code section 593e; and both appealed.[27] "[T]he appellate department [sic] of the superior court reversed, finding section 593e 'unconstitutionally vague and overbroad as applied [to these defendants].'"[28] The People of California appealed, and the Court of Appeals reversed,[29] holding that: (1) 593e was not unconstitutionally vague because it intended to prohibit the unauthorized interception and use of subscription television transmissions; (2) the legislative history did not distinguish between STV and MDS transmissions and therefore, the defendants violated 593e; and (3) federal law did not preempt 593e because there was no conflict between state and federal law, and furthermore, Congress did not intend to occupy the field.[30]

Again Babylon and Hyatt appealed. Finally, the California Supreme Court ruled that Babylon and Hyatt were not guilty of piracy based upon the 1984 amendment to 593e.[31] The court used the amended statute to decide the case because "absent a saving clause, a criminal defendant is entitled to the benefit of a change in the law during the pendency of his appeal."[32] The amendment did not provide a saving clause, thus, an analysis of the former 593e was not necessary.[33]

The court reasoned that Babylon and Hyatt were guilty only if the signal sent by Microband was *encoded*, *scrambled*, or *nonstandard* as defined by the statute.[34] As the court noted, and the parties agreed, the present issue did not concern *encoded* or *scrambled* transmissions; but rather, whether the signal was *nonstandard* since it was transmitted on a microwave frequency.[35] The court relied on new subdivision (g) which

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27. *Babylon* at 721, — P.2d at —, — Cal. Rptr. at —.

28. *Id.*

29. *People v. Babylon*, — Cal. App. 3d — (*not reported, hearing granted*), 194 Cal. Rptr. 134, 140 (1983).

30. *Id.*

31. *Babylon*, 39 Cal. 3d at 722, — P.2d at —, — Cal. Rptr. at —.

32. *Id.* at 722, — P.2d at —, — Cal. Rptr. at — (citing People v. Rossi, 18 Cal. 3d 295, 555 P.2d 1313, 134 Cal. Rptr. 64 (1976)). In *Rossi*, the court concluded:

> As the United States Supreme Court has observed, it is "the universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding which, at the time of the supervening legislation, has not yet reached final dispositon in the highest court authorized to review it." (Bell v. Maryland (1964) 378 U.S. 226, 230 [12 L.Ed.2d 822, 826, 84 S.Ct 1814].) In the instant case, this "universal common-law rule" mandates the reversal of defendant's conviction.

Rossi, 18 Cal. 3d at 304, 555 P.2d at 1318, 134 Cal. Rptr. at 69.

33. *Babylon* at 725, — P.2d at —, — Cal. Rptr. at —.

34. *Id.* at 725, — P.2d at —, — Cal. Rptr. at —.

35. *Id.* at 724-25, — P.2d at —, — Cal. Rptr. at —.

states that:

> an encoded, scrambled, or other nonstandard signal shall include, without limitation, *any type of distorted signal or transmission* that is not intended to produce an intelligible program or service without use of special devices or information provided by the sender for the receipt of such signal or transmission. (Italics added).[36]

The court concluded that the HBO transmission was nonstandard only if it was distorted. And this transmission was not distorted because its waveform was not intentionally altered by HBO or Microband.[37]

The court also noted that "special devices," as used in subdivision (g), were not needed by the customer to receive the transmissions. The court reasoned that microwave antennas and down converters were not "special devices" under the statute because they had been publically marketed for over twenty years. Any person with the proper equipment could receive the transmission without Microband's assistance.[38]

Lastly, the court held that the People's contention that the signal was scrambled because it could not be received by an ordinary television set, missed the mark.[39] The court re-emphazied its conclusion that distorting a signal meant doing somthing *to* the transmission, and a signal was not rendered distorted merely because it was transmitted on a microwave frequency.[40]

This decision significantly affects the MDS segment of the pay television industry because MDS transmissions will not receive protection unless they are encoded, scrambled, or distorted. This requirement of distorting the signals will increase the transactional costs for MDS operators. Presumably, these additional costs will be passed on to their customers. Thus, Microband and others similarly situated, will be forced to distort their signals and provide additional unscrambling equipment to the viewers. The alternative is to risk continued revenue losses caused by piracy. Practically speaking, these preventative measures will require substantial time and capital investment. Money will be needed to finance the additional distortion of the signals, the development and acquisition of decoding devices for viewers, and the distribution and installation of these decoding devices in the home. Meanwhile, individuals such as Bab-

36. *Id.* at 725-26, — P.2d at —, — Cal. Rptr. at — (citing CAL. PENAL CODE § 593e(g) (West Supp. 1985)).

37. *Babylon*, at 726, — P.2d at —, — Cal. Rptr. at —.

38. *Id.*

39. *Id.*

40. *Id.*

ylon and Hyatt continue to sell pirating equipment and the industry continues to lose. Companies may go out of business,[41] and the state and federal government will forego needed tax revenue. Ironically, this is what the industry and legislature tried to prevent by enacting section 593e.[42]

The industry believed that MDS would be a viable method of delivering pay television, but the *Babylon* decision leaves the future of MDS in question. The facts indicate that MDS was an easier and more profitable way to transmit pay programming to home viewers. It eliminated the additional costs and technological problems of STV decoding devices. It also eliminated the tremendous costs associated with CTV, such as laying cable and hooking-up customers in a large city.

Further, the *Bablyon* decision may place MDS and all pay television operators in a CATCH 22. In order to protect their signals, scrambling of the transmissions is required. Currently, the entire pay television industry is contemplating scrambling signals.[43] The Justice Department is currently looking into the possibility that such a move might be a violation of the federal antitrust laws.[44] Therefore, MDS operators face the unenviable choices of continued financial losses, possibly going out of business, or assisting in the violation of federal antitrust laws where treble damages are available.

Justice Kaus's opinion probably arrived at the correct result. The subsequent legislative action of amending 593e could be viewed as a reaction to the Court of Appeal's decision, dated August 23, 1983.[45] How-

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41. Microband and CALSAT have stopped providing all services to Sacramento, primarily due to pirating operations. Currently, Sacramento has no provider of HBO and does not receive any pay programs.

42. *See* Legislative Counsel Digest, 1984 Cal. Stat. 335, and SENATE DEMOCRATIC CAUCUS, CONFERENCE COMMITTEE REPORT No. 012301 on S.B. No. 387, 1983-1984 Session, at 2 (Sept. 13, 1983).

43. *Scrambling Issue Coming Into Clearer Focus*, BROADCASTING, Nov. 11, 1985 at 86.

44. *Id.* at 87. Antitrust violations may arise in two situations: First, the pay television operators (the local franchisees) might give program suppliers (i.e., HBO) the alternative of scrambling all transmissions or face removal from the pay television systems owned by the pay television operators. The pay operators' actions may be motivated by individual earth station (satellite dish) owners who presently receive free unscrambled pay programs, to the dismay of those operators. This could be viewed by the Justice Department as a group refusal to deal, which is a violation of section 1 of the Sherman Act. 15 U.S.C. § 1 (1890). Secondly, scrambling by all program suppliers may be viewed as an illegal tying arrangement which is a violation of section 3 of the Clayton Act. 15 U.S.C. § 14 (1914). Scrambling signals may force present and future customers to purchase additional decoding devices in order to receive an intelligible program. *See generally* M. HANDLER, H. BLAKE, R. PITOFSKY & H. GOLDSCHMID, TRADE REGULATION (1983).

45. People v. Babylon, — Cal. App. 3d — (*not reported, hearing granted*), 194 Cal. Rptr. 134 (1983).

ever, this is an argument of first impression since the Senate Final History indicates that the amendment was first introduced on February 15, 1983,[46] and the Court of Appeal's decision was dated some five months later. The scant legislative history of the amended 593e[47] suggests that the amendment was intended as an expansion of the law and not a restriction.[48] Oddly enough, Justice Kaus acknowledged the "major revision and expansion of the old statute"[49] but ignored the legislative history of the old and new laws, instead opting to interpret the amendment by using technical communication and radio dictionaries.[50]

In addition, there is a second reason the decision might be correct. The statute was sponsored by Oak Industries's ON TV,[51] an STV service that transmitted a *distorted* signal on a *commercial* frequency. *Babylon* involved an MDS station that transmitted an *undistorted* signal on a *microwave* frequency. It is unlikely that ON TV intended to protect a competitor that used a substantially different method of program distribution.[52]

Nevertheless, there are several analytical flaws in the court's reasoning. First, relying on subdivision (g), the court dismissed the argument that the transmission was nonstandard because it was broadcast on a microwave frequency.[53] The court's interpretation of subdivision (g) focused on the statutory language "distorted signal or transmission"[54] to conclude that "nonstandard" meant "distorted." The scope of section 593e(g) appears broader than the court's interpretation. The phrase "any type of" prefaces the phrase "distorted signal or transmission" [55] indicating that *any* distorted signals not intended by the sender to produce an intelligible program are protected. All pay television signals are distorted once they leave the transmission point. Technically speaking, the signals are distorted by the atmosphere and surrounding environment e.g., mountain ranges and buildings.[56] The court limited the statute's

46. SENATE FINAL HISTORY, 1983-1984, 256 (1984).

47. LEGISLATIVE COUNSEL'S DIGEST, 1983-1984 Session, Cal. Stat. 336 (1984).

48. *See Babylon*, 39 Cal. 3d 719, 722, — P.2d —, — Cal. Rptr. — (1985).

49. *Id.* at 725, — P.2d at —, — Cal. Rptr. at —.

50. *Id.* at 726 & n.7, — P.2d at —, — Cal. Rptr. at —.

51. SENATE DEMOCRATIC CAUCUS, CONFERENCE REPORT NO. 012301 on S.B. No. 387, 1983-1984 Session, at 2 (Sept. 13, 1983).

52. Telephone conversation with Manual Zamorano, legislative assistant to to State Senator Joseph Montoya (the sponsor of 593e), and an associate consultant to the state Subcommittee on Cable Television (Sacramento, California, Oct. 18, 1985).

53. *Babylon*, 39 Cal. 3d at 725-26, — P.2d at —, — Cal. Rptr. at —.

54. CAL. PENAL CODE § 593e(g) (West Supp. 1985).

55. *Id.*

56. Telephone conversation with Dr. John Page, Professor of Electrical Engineering and

application to the additional and intentional distortion performed by the sender before the signal leaves the transmission point. STV intentionally distorts their signals in this manner. But subdivison (g) is not limited to intentional distortion; it plainly says "any type of" distorted signal or transmission. Presumably this would include unintentional enviromental distortion. Federal law, which is similar to the California statute, provides protection to MDS transmissions based on similar reasoning.[57]

Second, the court reasoned that microwave transmissions were not protected because subdivision (g) required the use of special equipment or information provided by the sender.[58] The court noted that microwave antennas and down converters had been available for over twenty years, and could not be considered special equipment under the law.[59]

Computer Science, Loyola Marymount University, Department Chair (Los Angeles, California Nov. 21, 1985).

57. The unauthorized sale and distribution of microwave antennas and power converters, designed to intercept pay television has been enjoined by federal courts. *See generally* Movie Systems v. Heller, 710 F.2d 492 (8th Cir. 1983), American Television and Communications Corp. v. Western Techtronics, 529 F. Supp. 617 (D. Colo. 1982), and Home Box Office v. Advanced Consumer Technology, 549 F. Supp. 14 (S.D.N.Y. 1981). Additionally, the 1984 amendments to section 605 of the Federal Communication Act reaffirmed these earlier federal cases. The legislative history states that:

> In amending existing section 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 section 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 section 605 shall continue to be unlawful under that section as amended and redesignated by H.R. 4103.*
>
> Section 605 not only prohibits unauthorized interception of traditional radio communications, but also communications transmitted by means of new technologies. *For example, existing section 605 provides protection against the unauthorized reception of subscription television (STV), multipoint distribution services (MDS)*, and satellite communications. This amendment made by section 5 of the bill is intended to preserve this broad reach of existing section 605 and to make clear that all communications covered under section 605 will continue to be protected under new section 705(a).
>
> Moreover, existing section 605 is not limited to holding liable only those who, without authorization, actually receive a particular communication. Those who "assist" (*including sellers and manufacturers*) in receiving such communications are similarily liable under section 605, and it is intended that this liability also remain undisturbed by this amendment.

H.R. REP. NO. 549, 98th Cong., 2d Sess. 5, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 4745, 4746 (emphasis added).

58. CAL. PENAL CODE § 593e(g) (West Supp. 1985) states:

> For the purpose of this section, an encoded, scrambled, or other nonstandard signal shall include, without limitation, any type of distorted signal or transmission that is not intended to produce an intelligible program or service *without the use of special devices or information provided by the sender* for the receipt of such signal or transmission. (Emphasis added.)

59. *Babylon*, 39 Cal. 3d at 726, — P.2d at —, — Cal. Rptr. at —.

But this analysis does not consider the legislative intent found in the plain meaning of the statute. The statute was enacted to prevent distribution of microwave antennas which are intended to intercept pay television transmissions. The fact that the antennas were available to the public some twenty years before should not limit the interpretative scope of legislation geared toward protecting a new and important industry. The sale of microwave antennas during the past twenty years is irrelevant. Thus, section 593e(g) should be read to prohibit the sale of microwave antennas that are used to intercept pay television.

Third, in determining whether there had been a distortion of the transmission, the court's focus on the lack of change in the waveform between Microband and the consumer[60] was too narrow an analysis of the infraction. A closer examination of the facts indicates that there was a change in the waveform which would render the signal *distorted* under the court's analysis. The HBO signal originated in New York and was sent via satellite to an earth station near Sacramento.[61] From there, the signal was sent to Microband who converted the signal into a microwave frequency,[62] and then retransmitted it to the viewers.[63] Thus, Babylon's equipment intercepted a signal whose waveform had been changed.

Fourth, the court used conclusionary and circular reasoning in dismissing the argument that MDS transmissions are "distorted" since they could not be received in intelligible form by an ordinary television set.[64] Using its own definition of distorted[65] the court simply concluded that if this argument was accepted, all microwave transmissions would be regarded as distorted.[66] However, classifying all microwave transmissions as "distorted" would not cause confusion in the law since the statute only addresses the interception of subscription television services.[67] Other mi-

60. *Id.* at 726, — P.2d at —, — Cal. Rptr. at —.

61. *Id.* at 723, — P.2d at —, — Cal. Rptr. at —.

62. *Id.*

63. *Id.*

64. *Id.* at 726, — P.2d at —, — Cal. Rptr. at —.

65. *Id.* The court stated: "[T]hat something must be done *to* the signal to render it 'distorted.' "

66. *Id.* at 726, — P.2d at —, — Cal. Rptr. at —.

67. CAL. PENAL CODE § 593e(b) (West Supp. 1985) states: "Every person who, without the express authorization of a *subscription television system*, knowingly and willfully manufactures, . . . distributes, [or] sells . . . any device . . . designed in whole or in part to decode, descramble, [or] intercept . . . any encoded, scrambled, or other nonstandard signal carried by that *subscription television system*, is guilty . . . ." (Emphasis added.)

Subsection (h)(1) defines subscription television and states:

For the purposes of this section, a "subscription television system" means a television system which sends an encoded, scrambled, or other nonstandard signal over the air

crowave transmissions carrying nonsubscription television are of no consequence to this statute or its interpretation.

Fifth, the court also erred when it stated:

> [T]o suggest that a transmission is "distorted" merely by virtue of the sender's use of a particular frequency or frequency band would ignore both the plain and technical meanings of the word "distorted," for that language clearly implies that something must be done *to* the signal to render it "distorted."[68]

It is a *non sequitur* to state that something is clearly implied. More often than not, something is clear because it is express, not implied. Further, the language[69] the court relied upon implies that something must be done to the signal. As discussed above, the technical language relied upon by the court does not indicate what must be done to the signal in order to distort it. If we accept that the enviroment distorts signals, then the MDS transmissions are distorted under the court's analysis. Thus, the signal was distorted based on a reasonable interpretation of the language used by the court.

Finally, notwithstanding the court's interpretation of 593e, it incorrectly dismissed the possibility that section 593f could have applied to Babylon and Hyatt.[70] The court noted that the equipment "neither decoded nor addressed the MDS signals—it merely received and down converted them."[71] However, the court failed to analyze the meaning of the term "address," as it had analyzed the terms "nonstandard" and "distorted" in 593e. An analysis of the legislative history of 593f may have been valuable. The Legislative Counsel's Digest stated:

> This bill [593f] would . . . punish every person who for profit knowingly and willfully manufactures, distributes, or sells any device or plan or kit for a device, or printed circuit containing

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which is not intended to be received in an intelligible form without special equipment provided by or authorized by the sender.

As in subdivision (g), the determinative factor is whether the MDS transmission is a nonstandard signal not intended to be received without special equipment provided by the sender.

68. *Babylon*, 39 Cal. 3d at 726, — P.2d at —, — Cal. Rptr. at —.

69. *Id.*, n. 7 states:

> See, e.g., Smith, Glossary of Communications (1971) ("distortion" defined as "Any difference between the wave shape of an original signal, and the wave shape after the signal has traversed the transmission circuit"); Weik, Communications Standard Dictionary (1983) "(distortion" [sic] defined as "the amount by which an output waveform or pulse differs from the input waveform or pulse"); Pannett, Dictionary of Radio and Television (1967) ("distortion" as defined as "dissimilarity in the waveform between the output and input of an amplifier"). See, generally, Ryder, Electronics Fundamentals and Applications (1975).

70. *Babylon*, n. 9 at 727-28, — P.2d at —, — Cal. Rptr. at —.

71. *Id.*

> circuitry for decoding or addressing with the purpose or intention of facilitating decoding or addressing of any over-the-air transmission by a Multi-point Distribution Service . . . which is not authorized by the Multi-point Distribution Service . . . .[72]

It appears from the plain language of the legislative history that 593f was intended to prohibit Babylon and Hyatt from selling microwave antennas and down converters. Furthermore, the sponsor of 593f, former State Senator Ollie Speraw, intended "593f to prohibit any and all distribution and sale of microwave antennas used for the purpose of intercepting any pay television."[73]

In *People v. Patton*, Ralph Patton was accused of a different violation within section 593e: the selling of *decoding devices* which enabled home viewers to *unscramble* and receive STV signals without leasing the devices from operators.[74] The trial court dismissed the case on the grounds that the field was preempted by federal law. Thus, on appeal the only issue was whether the California statute was preempted.[75]

Relying on a number of state and federal cases,[76] the court noted that concurrent state and federal legislation did not automatically invalidate state law.[77] A finding of preemption required an actual conflict between the two schemes of regulation, or evidence of congressional intent to preempt the field.[78] The court held that there was no conflict between the federal and state legislation.[79] Since California and federal law prohibited the sale of decoding devices,[80] the regulatory schemes were in

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72. LEGISLATIVE COUNSEL'S DIGEST, 1983-1984 Cal. Stat. 833 (1984).

73. Telephone conversation with former State Senator Ollie Speraw (Sacramento, California, Oct. 31, 1985).

74. *Patton*, 147 Cal. App. 3d Supp. at 4, 194 Cal. Rptr. at 760 (1983).

75. *Id.* at 4-5, 194 Cal. Rptr. at 760-61. The doctrine of preemption is the invalidation of state law by federal legislation. The source of this doctrine is found in Congress's constitutional power to make laws and in the supremacy clause of Article VI of the U.S. Constitution. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1981).

76. *Patton*, 147 Cal. App. 3d Supp. at 6-7, 194 Cal. Rptr. at 762, the court cited California v. Zook, 336 U.S. 725 (1949), People v. Conklin, 12 Cal. 3d 259, 522 P.2d 1049, 114 Cal. Rptr. 241 (1974), *In re* Dixon, 41 Cal. 2d 756, 264 P.2d 513 (1953), People v. Grosofsky, 73 Cal. App. 2d 15, 165 P.2d 757 (1946), People v. Kelly, 38 Cal. 145 (1869). *See also* Capital Cities Cable, Inc. v. Crisp, — U.S. —, 104 S.Ct. 2694 (1984), where the United States Supreme Court reaffirmed the preemption analysis used in the previous cases.

77. *Patton*, 147 Cal. App. 3d Supp. at 7, 194 Cal. Rptr. at 762.

78. *Id.*

79. *Id.* at 8, 194 Cal. Rptr. at 762-63.

80. *Id. See also* National Subscription Television v. S & H TV, 644 F.2d 820 (9th Cir. 1981), Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980), United States v. Westbrook, 502 F. Supp. 588 (E.D. Mich. 1980) (imposing a civil remedy to section 605).

agreement.

Finally, the court held that Congress had not intended to retain exclusive jurisdiction in this area. When Congress enacted the Communications Act in 1934 it could not have envisioned the technical advancements in radio and television, and the need for protection of property rights in this area.[81] Thus, state regulations strengthened the federal statute and were welcomed in the area.[82]

Although the court's holding in *Patton* appeared to give protection to the subscription television industry, it may have had a reverse impact. *Patton* helped to establish a legal monopoly in the sale and distribution of decoding devices; thus closing out all competition in that area. If this monopoly had never been established STV would have been forced to focus its revenue generating efforts on sponsor-paid advertising, and not on the protection of decoding devices. Several other pay television stations have turned to such advertising to offset competition from regular programming and other pay television channels.[83] As a result STV companies have stagnated with their newly acquired protection and have fallen into a false sense of security. In the late 1970's there were approximately 1.4 million subscribers to STV; currently the numbers have sunk to 500,000.[84] Thus, *Patton* and Penal Code Section 593e have actually done little to help the STV industry in California.

The court's decision in *Patton* was correct, notwithstanding the contrary view taken by one commentator who maintained that 593e was preempted by federal law.[85] Subsequent to the *Patton* decision, Congress's 1984 amendment to the Communications Act of 1934 expressly granted the states concurrent regulatory powers in the field.[86] Thus, the amended California statute is constitutionally sound and able to with-

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81. *Patton*, 147 Cal. App. 3d at 9, 194 Cal. Rptr. at 763.

82. *Id.*, 194 Cal. Rptr. at 764.

83. 1985 BROADCASTING CABLECASTING YEARBOOK, D-1 states: "Some [referring to pay stations], like Home Box Office and Showtime, are supported by monthly subscriber fees; *others, like ESPN and Cable News Network, are supported primarily by advertising dollars.*" (Emphasis added.)

84. 1985 BROADCASTING CABLECASTING YEARBOOK, A-7.

85. *See* Comment, *Subscription Television Decoders: Can California Prohibit Their Manufacture and Sale?*, 22 SANTA CLARA L. REV. 839, 869 (1982).

86. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 705(d)(6), 47 U.S.C. § 605 (West Supp. 1985) (Section 605 was redesignated section 705 by the Cable Communication Policy Act of 1984.) Section 705(d)(6) states that:

> Nothing in this subsection shall prevent any State, or political subdivision thereof, from enacting or enforcing any laws with respect to the importation, sale, manufacture, or distribution of equipment by any person with the intent of its use to assist in the interception or receipt of radio communications prohibited by subsection (a).

stand a preemption defense.[87] Regardless of Congress's grant of concurrent state regulatory power, the preemption defense is not likely to be raised in California courts now or in the future since current federal law has added criminal and heavier civil penalties for these acts.[88] Babylon and Patton raised the preemption defense because at that time the federal statute did not impose criminal sanctions, and civil damages were left to the court's discretion.[89] Thus, Babylon, Hyatt, and Patton probably would not raise the preemption defense today for fear of being subjected to the harsher federal penalties.

Sellers of microwave antennas and power converters, and MDS operators, should note that Congress has made clear its intention to protect unencoded MDS signals regardless of California law.[90] Federally based injunctive relief or civil damages may be awarded in the state or federal courts.[91] Federal criminal sanctions may be initiated by the United States Attorney's Office. Furthermore, sellers might not be protected by their business or home insurance for subsequent damages awarded to MDS operators.[92] Thus, the financial and criminal penalties imposed by Congress may effectively eliminate the sale and distribution of microwave antennas used for pay television piracy.

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87. *See Babylon*, 39 Cal. 3d at 719, — P.2d at —, — Cal. Rptr. at —, and *Patton*, 147 Cal. App. 3d Supp. at 8, 194 Cal. Rptr. at 762-63.

88. 47 U.S.C. § 605 (d)(2) (West Supp. 1985) states:

> Any person who violates subsection (a) of this section 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 not more than 2 years, or both, for any subsequent conviction.

89. *See* 47 U.S.C. § 605 (West 1981) and cases implying a civil remedy: National Subscription Television v. S & H TV, 644 F.2d 820 (9th Cir. 1981), Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980), and United States v. Westbrook, 502 F. Supp 588 (E.D. Mich. 1980).

90. *See supra* note 57.

91. California Satellite Sys., Inc. v. Nichols, 170 Cal. App. 3d 56, — Cal. Rptr. — (1985) (upheld the state court's subject matter jurisdiction to enforce federal law).

92. Nichols v. Great Am. Ins. Companies, 169 Cal. App. 3d 766, — Cal. Rptr. — (1985) (business liability insurers were not obligated to defend or indemnify the sellers of microwave antennas and power converters, in a suit against them by the MDS operators).