



---

11-1-1986

## Who Owns the Air: Unscrambling the Satellite Viewing Rights Dilemma

Robert D. Haymer

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

---

### Recommended Citation

Robert D. Haymer, *Who Owns the Air: Unscrambling the Satellite Viewing Rights Dilemma*, 20 Loy. L.A. L. Rev. 145 (1986).

Available at: <https://digitalcommons.lmu.edu/llr/vol20/iss1/7>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact [digitalcommons@lmu.edu](mailto:digitalcommons@lmu.edu).

# WHO OWNS THE AIR? UNSCRAMBLING THE SATELLITE VIEWING RIGHTS DILEMMA

## I. INTRODUCTION

The newspaper advertisement reads: "Only On Satellite . . . Over 100 Free Channels—Showtime, Disney, Select TV, The Movie Channel."<sup>1</sup> The prospective purchaser of the satellite system is led to believe that with a one time purchase will come anything and everything that might travel the airwaves. This poses a yet unsolved problem for the pay television industry: whether programs that are transmitted by satellites and other over-the-air technology are fair game to anyone who can intercept them.

What has developed is a modern day "range war," with pay television signal providers battling satellite dish owners. Like farmers of the nineteenth century, pay television companies seek to "fence off" their property and control the public's access to the satellite signals they send. Satellite dish owners, like cattlemen, want the "range" open, permitting access to any signal their satellite dishes can receive. In the middle stand Congress, the courts and the Federal Communications Commission, acting as sheriff, trying to equitably decide who should prevail. On the side lines, waiting for the outcome, stand cable television companies who see their market share being eroded by the satellite industry, and satellite dish promoters, who want to see their investment in the burgeoning industry reach its full potential.

Until recently, this area of pay television communication was regulated under the Communications Act of 1934 (Act).<sup>2</sup> For many years the Act, originally intended to regulate broadcasting, was employed to address problems that arose in protecting new pay television technology. In 1984 Congress amended the Act<sup>3</sup> to enable the law to more closely reflect the technology.<sup>4</sup> As part of this amendment, Congress attempted to balance the rights of the parties on all sides of the controversy.

This Comment will examine some of the policy reasons for protect-

---

1. L. A. Times, Oct. 4, 1985, pt. 3, at 18, col. 5.

2. 47 U.S.C. §§ 151-609 (1962). There are also state laws which impose both criminal and civil penalties for illegal signal interception. *See, e.g.*, CAL. PENAL CODE § 593e (West Supp. 1986) and discussion *infra* notes 116-63 and accompanying text.

3. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

4. At the same time, the California Legislature was amending California Penal Code § 593e.

ing satellite signals. It will then review how the signals were protected under the Act before the 1984 amendments, outline the protections and exemptions prescribed by Congress in the amended Act, and finally look at the effect of the amendments and examine what Congress or the Federal Communications Commission intends to do, or should do, to deal with those effects.

## II. EXPLANATION OF THE TECHNOLOGY

Before discussing the legal aspects of satellite technology, it will be helpful to explain generally how the technology works and to define some of the terms which will be used throughout this Comment.

A viewer can receive pay television through four basic methods. The first is Cable Television. Cable Television is a method in which a signal, dispatched from various sources, is first received by the cable company's antenna. The company then sends the signal to the individual's television set through a cable. The signal of cable pay stations, such as Home Box Office, is scrambled while the signal of commercial stations remains unscrambled. A cable subscriber can receive the unscrambled pay signal by paying an extra fee.

The second method of reception is Subscription Television (STV). With STV, the subscription company sends a scrambled or encoded signal over the air which is received by all television sets. However, the television set alone cannot decipher the scrambled signal which it receives. To enable the viewer to decipher the signal, the STV company leases a decoder to the individual for a subscription fee.

The third method of receiving pay television is through a Multipoint Distribution System (MDS).<sup>5</sup> With this system, signals are received from a satellite by a MDS station, which then re-transmits the signal omnidirectionally. Individuals within range receive the signal with the aid of microwave antennas which are often leased from the pay television company. Signals sent by MDS are of a very high frequency.<sup>6</sup> In order for a normal television set to "understand" the signal, it must first be "down converted" to a lower frequency. This requires a down converter and a power supply to operate it, which are both usually supplied by the pay television company.

Finally, individuals may receive pay television from a Direct Broad-

---

5. An MDS is a common carrier licensed by the Federal Communications Commission (FCC).

6. MDS signals are transmitted at frequencies of anywhere from 2150 megahertz to 2162 megahertz, as opposed to a normal commercial signal which is transmitted at a frequency between 54 megahertz and 890 megahertz.

cast Satellite (DBS). This method uses equipment very similar to the MDS system, except that the DBS company transmits the signal directly from a satellite to the viewer, who receives the signal using a satellite dish antenna. Thus, the DBS system avoids the intervening step of a ground transmitter. This method is becoming increasingly popular as the prices for satellite dishes decrease. Satellite dishes are capable of receiving pay television signals as well as commercial television feeds.<sup>7</sup>

### III. THE POLICY REASONS FOR PROTECTION OF TELEVISION SIGNALS

The primary question presented is whether television signals should be protected at all. If signals are going to be protected, one must reach the conclusion that there is a property right in signals. In order to better understand the existence of a property right in signals, it will be helpful to explore the nature of property rights in general. These concepts will then be applied to television signals to determine what specific rights exist, why the rights need to exist and to whom these rights belong.

#### A. *The Nature of Property Rights*

What are property rights? They are in reality bundles of different rights. Among them are the right to exclusive possession, the right to do what one wishes with property and the right to exclude others from using property or engaging in activity which harms it.

Why are there property rights? Early legal scholars differed respecting how and why property rights existed. Blackstone adopted a doctrine of a primitive community of goods and declared "that while the earth continued bare of inhabitants, it is reasonable to suppose that all was common among them, and everyone took from the public stock to his own use such things as his immediate necessities required."<sup>8</sup> In other words, when there was plenty of everything to go around, there was no need for property rights. Conversely, others believed that individual ownership was an inherent right which humans were born with and reflected the law of their nature.<sup>9</sup> Thus, a classic "chicken or egg" question is posed: Is protection given because property rights exist, or do property rights exist because things need protection?

The theory that property rights are extrinsic found support in Pro-

---

7. For discussion of an issue relating to the interception of commercial television feeds, see *infra* note 190.

8. C. GRAVES, SUMMARY OF TITLE TO PERSONAL PROPERTY § 1 (1897) (citing 2 W. BLACKSTONE, COMMENTARIES\* 3).

9. *Id.* (citing 2 J. SCHOUER, PERSONAL PROPERTY § 6 n.2 (2d ed.)).

fessor Demsetz's work in *Toward a Theory of Property Rights*.<sup>10</sup> Professor Demsetz explored the emergence of property rights in society and noted that new technologies and modes of doing things can have both harmful and beneficial effects on society.<sup>11</sup> For example, the dam which helps one person cultivate her land will also cut off another's access to water. Thus, new technologies and their effects will often give rise to new property rights.

Professor Demsetz examined property rights in land among the American Indians,<sup>12</sup> and found there was a close relationship between the development of private rights in land and the development of the commercial fur trade. Before the fur trade developed, hunting was primarily a means for obtaining food. However, as a result of the fur trade, animal furs became more valuable to the Indians and the scale of hunting activity increased sharply. This increase in hunting in turn created a scarcity of animals, resulting in a need for private rights in land. Animals needed to be husbanded and protected from poachers in order that the supply would not dwindle to extinction.<sup>13</sup> Demsetz concluded that property rights will arise when it becomes economic for people to have property rights, allowing them to take advantage of their resources in the most efficient way. These rights will allow property owners to gain the benefit of acts that affect them or their property and force property users to bear the burden of those acts.<sup>14</sup>

The foregoing theory, that property rights are exogenous, mandates that protection for television signals must be a consequence of an external force—the need for protection. If, like the animals of the Indians,

---

10. Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

11. *Id.* at 350.

12. *Id.* at 351. Demsetz based his theories on Leacock, *The Montagnes "Hunting Territory" and the Fur Trade*, 56 AM. ANTHROPOLOGIST, No. 5, pt. 2, Memoir No. 78 and Speck, *The Basis of American Indian Ownership of Land*, OLD PENN WEEKLY REV. Jan. 16, 1915, at 491. These studies examined Indians of the Labrador Peninsula who had a long-established tradition of property rights in land.

13. Demsetz, *supra* note 10, at 351-52. For another view of the scarcity issue, see *infra* notes 18-22 and accompanying text.

14. Demsetz, *supra* note 10, at 351-52. Demsetz characterized property rights as arising when "it becomes economic for those affected by externalities to internalize benefits and costs." *Id.* at 354. Demsetz sees externalities as an ambiguous concept that encompasses external costs and external benefits that are non-pecuniary as well as pecuniary. He sees no harmful or beneficial act as external to the world—there is always someone enjoying the effects of an act. These effects become "external" when the cost of bringing the effects to bear on the decisions of the interacting persons is too high to make it worthwhile to internalize them. "Internalizing" effects is a process, like a change in property rights, that enables the effects in question to be borne by all of the interacting parties. *Id.* at 348. Others have tried to explain externalities in various ways. See W. HIRSCH, *LAW AND ECONOMICS; AN INTRODUCTORY ANALYSIS* 9-11 (1979).

television signals are an exhaustible resource, these signals are a resource that must be protected. Therefore, there needs to be some sort of property right in the signal. In the case of television signals, the relevant property right is the right to exclude others or, conversely, the right to be free from exclusion.<sup>15</sup> The determination of this conflict will depend on how the right is characterized and to whom the right is allocated.

### B. *Communal Ownership v. Private Ownership*

Property rights can be characterized as either communal or private.<sup>16</sup> Communal ownership guarantees everyone in the defined community an equal access to the property in question. The community denies the state or individuals the right to interfere with any one person's exercise of the communally owned rights. For example, certain types of water, such as percolating waters, are subject to communal ownership. Conversely, private ownership recognizes the right of the private owner to exclude others from exercising the owner's right.<sup>17</sup> An example of this would be the right to pick fruit off of a tree on one's land or to exclude others from doing so.

The following illustration makes clear the distinctions between communal and private rights. Assume there is a lake full of fish. Assume further that the surrounding landowners share equal communal rights in the lake and the fish, including the right to fish the lake.

If each person wants to receive the maximum benefit of her property she will attempt to capture as many fish as possible. The assumption made is that others will absorb the cost of one person's over-fishing by controlling the amount of fish they take, or by removing no fish at all. However, if all owners try to "maximize" in the same way, the fish supply will be rapidly exhausted, leaving the lake of little or no value to anyone.<sup>18</sup>

This result can be averted if all of the owners can agree on a system for efficient and proportional use. However, there are problems in arriving at such an agreement. Foremost of these are holdouts who will refuse to agree, believing that they can "ride free" while other owners make

---

15. This right to be free from exclusion might be characterized as an entitlement. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

16. Demsetz, *supra* note 10, at 354. Demsetz also recognizes a third category, state ownership, but does not examine it in detail.

17. *Id.*

18. "Ruin is the destination to which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom of the commons brings ruin to all." Hardin, *The Tragedy of the Commons*, SCI., Dec. 13, 1968, at 1243.

sacrifices and compromises. Additionally, assuming that an agreement *is* reached, it will be difficult to enforce, to decide who will police it, how it will be policed and what punishment to impose for non-compliance. Finally, these owners, in their effort to look out for themselves, may not take into account the future of the lake beyond their ownership. These factors represent transaction costs<sup>19</sup> which may be too high to facilitate agreement.

Conversely, if the same lake is owned by one private owner, she will be more likely to take into account both the present and the future of the resource, because part of the lake's value is in its longevity.<sup>20</sup> Since a private owner knows that the future of the lake is under her control, she has incentive to invest in the lake and rely on that investment. This highlights one of the disadvantages of communal ownership. Because of an absence of personal future stake, the effect of one person's actions on her neighbors and on subsequent generations is not taken into account.<sup>21</sup>

When these concepts are applied to television signals it becomes apparent that true communal ownership cannot work. The "supply" of the product would have to be maintained by the communal owners. No one person would want to "invest" if she knew that another member of the commune could deplete the supply without paying. This is what makes the signals an exhaustible resource. If the signal is like the air, belonging to the community and available for everyone's use, there must be some way to pay for, and hence insure, the availability of the resource, or else the supply will dwindle and die. A communal owner who takes advantage of the product would have to make sure that the product supply is not depleted.

Those who are of the opinion that the air is free and that the signals, therefore, should be communal property, assume that an inexhaustible supply of signals exists. If the supply was unlimited, the problems would not be so serious. However, the product carried on the signal, the programs themselves, are expensive to produce and send out. Thus, the supply *is* limited. Transaction costs of negotiation, policing and holdouts make communal ownership of television signals unfeasible. If everyone is free to snatch out of the air whatever they can get their dishes on, it

---

19. Professor (now Judge) Posner defines transaction costs simply as "the costs affecting a transfer of rights." R. POSNER, *ECONOMIC ANALYSIS OF LAW* 30 (2d ed. 1979).

20. See Coase, *The Nature of the Firm* 4 *ECONOMICA* 386 (1937).

21. Demsetz sees the private owner "as a broker whose wealth depends on how well he takes into account the competing claims of the present and the future." Demsetz, *supra* note 10, at 355. There is no broker with communal rights; this gives the present generation too much influence in how intensely the land is worked. Because future generations have no agent, there is no one to speak for their rights. *Id.*

will no longer be economically efficient to put anything up *in* the air at all. Everyone will have access to the lake, but there will be no fish. The property right in the signal must be a private one.

Thus, it is established that a property right exists and that that right should be a private right. Next, a critical question arises: To whom should that property right belong, the sender or the receiver?

### C. Allocation of Ownership

#### 1. *Ferae naturae*—The rule of capture

The average person might contend that even though the right to the signals is to be a private right, it should still be the private right of anyone who can receive the signals—like the air we breathe: free to anyone who can get it into her lungs.<sup>22</sup> This instinctual initial reaction to the issue finds legal roots in the common law notion of *ferae naturae*. At common law, for purposes of ownership, animals were classified as either *ferae naturae*, those animals which were wild by nature, or *ferae domitae*, those animals which were by nature tame.<sup>23</sup> Animals *ferae naturae* could only become property if they were captured and controlled.<sup>24</sup> One who had dominion over such an animal forfeited the qualified ownership to that property when she lost dominion and returned it to a wild state.<sup>25</sup> Thus, a wild animal became the property of anyone who could capture it. In contrast, an animal *domitae* was tame and was the absolute property of the owner regardless of whether there was any exercise of dominion by the owner.<sup>26</sup>

Arguably, television signals are analogous to the wild animals described above. Like those animals, the signals freely migrate when sent out, and have no set constraints except those dictated by the nature of their wavelength. Before the sender transmits the signal she has dominion over it. However, once the signal is transmitted, the sender has no physical control over it. The sender has, in effect, relinquished dominion

---

22. This is the opinion of many satellite dish owners. See N.Y. Times, Jan. 15, 1986, at 1, col. 1.

23. See J. SCHOULER, A TREATISE ON THE LAW OF PERSONAL PROPERTY 64 (5th ed. 1918).

24. *Id.* at 64-65.

25. See R. BROWN, THE LAW OF PERSONAL PROPERTY 16 (2d ed. 1955).

26. See J. SCHOULER, *supra* note 23, at 64. The rationale for this concept was that all animals in nature had a natural state of liberty. If man takes this liberty away, and the animal is compelled to servitude, this natural liberty is suppressed but not extinguished. Therefore, the property right is qualified. Conversely, a tame animal was considered to have voluntarily surrendered its liberty, thereupon becoming the subject of absolute ownership. *Id.* at 65.



and control over the signal. This would mean that the "freed" signal should now be the property of whoever can capture it.

There are two reasons why this analysis is not valid. First, television signals may be uncontrollable waves, but they are waves that carry content. It is impossible to separate waves themselves from what is carried over them. At common law, it was possible for an animal *ferae naturae* to be tamed, converting it to a animal *domitae*.<sup>27</sup> Arguably, the content of the signals "tames" them. The signals are thus analogous to domesticated animals and remain the property of the original owner no matter where they wander and no matter who captures them.

Alternatively, even if the signals are considered "wild," another broadcast practice may remove them from the concept of *ferae naturae*. This practice is scrambling, whereby the transmitter distorts the normal signal in such a way that the normal television set cannot understand it. By scrambling a signal the sender has arguably retained dominion and control because in theory, only those who have the sender's permission may receive the intelligible signal. The "animal" is on a long leash, still controlled by the owner.<sup>28</sup> Because the signal has not been indiscriminately released into the air, it is still the property of the sender.<sup>29</sup>

The foregoing analysis illustrates that ancient concepts are sometimes inadequate to deal with modern problems.<sup>30</sup> There must be an alternative way to allocate the property right in the signal.

## 2. An economic approach to allocation

An economic approach to allocation would vest the property right where it can be most efficiently used. Ronald Coase believed that in a world with zero transaction costs it would not matter to whom an initial property right is given.<sup>31</sup> The party to whom it was most valuable would ultimately gain control of the property and use it in the most efficient way.<sup>32</sup>

For example, *A* owns a farm that has a yearly profit of ten dollars

---

27. See F. CHILDS, PRINCIPLES OF THE LAW OF PERSONAL PROPERTY 127 (1914).

28. This is a strong argument in favor of the scrambling of signals. See discussion *infra* note 168 and accompanying text.

29. There is another possible argument why the concept of *ferae naturae* does not apply to the signals. One explanation for the development of *ferae naturae* is perhaps necessity. There was no way to identify the wild animals so it made sense to allow the animals to be the property of whoever had dominion over them. This same rationale does not apply to television signals since there is no problem in identifying the sender of the signal.

30. See Tunick & Schechter, *State Taxation of Computer Programs: Tangible or Intangible?* 63 TAXES 54 (1985).

31. See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

32. *Id.* at 15.

and *B* is a cattle rancher who makes a profit of one hundred dollars annually. *B*'s cattle must cross *A*'s farm, and in doing so ruin all of *A*'s crops. If *A* has the right to exclude *B*, *A* will make his ten dollars but *B* will lose his hundred dollars, resulting in a net loss of ninety dollars. If *B* can pay *A* ten dollars for the right to cross *A*'s farm *A* will be compensated for the loss of the crops and *B* will still make one hundred dollars, resulting in a net gain of ninety dollars. Thus, even if the right is initially given to *A*, it will eventually end up with *B* because that is where it can be used most efficiently. Unfortunately, as even Coase admits,<sup>33</sup> a world with zero transaction costs is unrealistic. If *A* knows that *B* stands to lose one hundred dollars, *A* can hold out for more than the ten dollars that will be lost, thus throwing the efficiency out of balance. To prevent inefficiency, sometimes decisions must be made as to where and to whom a right should be vested.

Like the decision that must be made with the cattle, whether to let the cattle cross *then* pay or pay *to* cross, a choice must be made whether to allow the recipient of a television signal to receive *then* pay or pay *to* receive. The former option, reception first—payment second, allocates the property right to the receiver of the signal, giving that receiver a right to receive any signal which is put into the air. As the lake and fish analogy illustrates,<sup>34</sup> this might not be efficient since the receiver is less likely to pay for and replenish the supply of the product. Because the receiver is not going to actually put programs in the air, the only feasible way to replenish the supply is to require payment for the service. If the right is vested in the receiver and payment is necessary, in the absence of some sort of pay-per-view technology, paying for the programs would have to be on an honor system<sup>35</sup>—a system that, in light of “free riders,” would not seem to be very efficient. Thus, a more feasible option must be found.

This option is to allocate the right to the sender, who is more likely to ensure that it is used efficiently. Thus, it becomes clear that there is a property right, and that the right is a private one that is most efficiently allocated to the sender. However, problems may arise in enforcing this right. Technological advances make it easy for anyone with a dish to intercept transmissions. Thus, there may be an imperfect appropriability of rights. This means that, for a variety of reasons, a property owner is either unable to use her property in the best way or exclude someone else from using it.<sup>36</sup> Appropriability may be imperfect because of technologi-

---

33. *Id.*

34. See *supra* notes 18-19 and accompanying text.

35. See *infra* notes 171-72 and accompanying text.

36. See W. HIRSCH, *supra* note 14, at 21.

cal or other characteristics of the rights in question. The ease of reception of the signal by satellite dishes makes the property right in the signal difficult to protect in turn creating an imperfect appropriability of the right.

The foregoing discussion has described a right which appears to bounce back and forth between sender and receiver. At first glance the ownership right is seen as belonging to everyone. However, principles of economic efficiency indicate that this does not make sense and that the right should be vested in an individual—the signal's sender. However, technology creates an imperfect appropriability of rights because the ease of interception of the signal in effect reallocates the rights to the receiver. When this imperfect appropriability occurs, outside forces, such as the courts or the legislature, must act to ensure the right is once again distributed efficiently. As one court noted: "[A]lthough the public owns the airwaves, Congress . . . [is] charged with regulating them in the public interest. That interest would seemingly not be served by the demise of a product for which there is clearly considerable consumer demand."<sup>37</sup> A middle ground must be found which will balance the competing interests of the receiver, who wants the right of access, and the sender, who wants the right to be compensated.

The following sections examine how Congress and the courts have attempted, or are attempting, to balance these concerns and allocate the rights involved.

#### IV. THE ACT OF 1934

The Communications Act of 1934 (Act) provided television signals with their first protection.<sup>38</sup> The Act was originally enacted to serve numerous purposes. First, Congress wanted broad regulation of foreign and interstate commerce in communication by wire and radio.<sup>39</sup> Moreover, Congress intended to establish a rapid, efficient nationwide and worldwide communication service that would furnish adequate facilities at reasonable prices for the purpose of securing national defense, and to centralize authority that had previously rested in various separate agencies.<sup>40</sup> The Act also created the Federal Communications Commission (FCC) empowering it to enforce the Act and its provisions.

---

37. *National Subscription Television v. S & H TV*, 644 F.2d 820, 826 (9th Cir. 1981).

38. Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151-609 (1962)).

39. For an excellent discussion of the history of the Act and its original purposes, see *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

40. Pub. L. No. 73-416, tit. I, § 1, 48 Stat. 1064 (1934).

### A. *The Language of Section 605*

Section 605 of the Act stated in part:

No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purpose, effect or communication of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any . . . communication by radio and use such communication . . . for his own benefit or for the benefit of another . . . . This section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication which is transmitted . . . for use of the *general public* . . . .<sup>41</sup>

The purpose of section 605 was to protect certain private communications, such as governmental and ship-to-ship communications, from being intercepted.<sup>42</sup> Thus, section 605 expressly stated that its provisions did not apply to communications intended for the general public.

With the growth of the pay television industry, a necessity arose for protection of its product. Pay television companies needed protection from interceptors and courts saw section 605 as providing a legal basis for that protection. Conversely, interceptors sought to establish loopholes in section 605 which would enable them to receive pay television signals for free.

### B. *Case Law Under Section 605*

#### 1. The "broadcast proviso" exemption

Most cases which challenged the protection of pay television signals under the Act focused on the claim that pay television was "broadcasting" under the Act and therefore not protected. The broadcast proviso of the Act stated that section 605 would "not apply . . . to any . . . communication which is transmitted . . . for the use of the general public . . . ."<sup>43</sup> As stated above,<sup>44</sup> it was originally the privacy interest in

---

41. 47 U.S.C. § 605 (1962), amended by 47 U.S.C. § 705(a) (Supp. 1986) (emphasis added).

42. For an excellent legislative history of § 605 see *Home Box Office v. Advanced Consumer Technology*, 549 F. Supp. 14 (S.D.N.Y. 1981). It is interesting to note that one of the original purposes of § 605 was to protect private radio signals. This protection is analogous to the protection of private telephone signals. Individuals have little problem accepting this protection even though these signals travel over the same "private" air. This must mean that the "air" is only "free" if there are no competing interests to dictate otherwise.

43. 47 U.S.C. § 605 (1962), amended by 47 U.S.C. § 705(a) (Supp. 1986).

44. See *supra* note 42 and accompanying text.

certain government communications that gave rise to the protections of section 605, and any "broadcast" for the general public was beyond the scope of that policy.

*Orth-O-Vision Inc. v. Home Box Office*<sup>45</sup> was the first case to squarely address the broadcast exemption problem. Home Box Office (HBO) had contracted with Orth-O-Vision to function as a middleman in furnishing HBO programming to residents of apartment buildings.<sup>46</sup> After a stormy relationship in which contracts were rescinded and renegotiated, and in which payments to HBO were not made, HBO terminated the agreement. However, because HBO could not physically prevent Orth-O-Vision from receiving the signal, Orth-O-Vision continued marketing HBO's programming to the apartments.<sup>47</sup> HBO sought an injunction restraining Orth-O-Vision from appropriating its programming, claiming that section 605 prohibited Orth-O-Vision's acts.<sup>48</sup>

A principal issue in the case involved whether "HBO's . . . communications [were] 'broadcast', i.e., intended to be received by the general public and, therefore, exempted from the protection of § 605."<sup>49</sup> HBO argued that its intent to limit the audience to only those who paid a fee indicated that the signal was not broadcast. Orth-O-Vision, responding to this contention, asserted that since the HBO programs were "of interest" to the general public they were "broadcasting" intended for the general public.

The *Orth-O-Vision* court sought to define what constituted "broadcasting" under section 605. Although there were no decisions directly addressing the issue, the court examined two sources it found persuasive. The first was *Functional Music, Inc. v. FCC*.<sup>50</sup> *Functional Music* involved a pay radio system in which the subscribers received a device which could delete all commercials from the programming. The *Functional Music* court held that program specialization was determinative of intent to broadcast to the general public.<sup>51</sup> According to the court, "[b]roadcasting remains broadcasting even though a segment of those capable of receiving the broadcast signal are equipped to delete a portion of

---

45. 474 F. Supp. 672 (S.D.N.Y. 1979).

46. *Id.* at 675.

47. *Id.* at 675-78.

48. *Id.* at 677-78.

49. *Id.* at 681.

50. 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959). The *Functional Music* court overruled an FCC determination which reasoned that because the service's format was highly specialized, directly adaptable to subscriber needs and it was charged for, it was not broadcasting. *See infra* note 59.

51. *Id.* at 548.

that signal."<sup>52</sup> The service was of general interest to the "general" radio audience and, therefore, a broadcast.<sup>53</sup>

The second precedent examined by the *Orth-O-Vision* court was an FCC decision which had considered whether intent to limit the scope of the transmission of a subscription television signal meant that the signal was not "broadcast."<sup>54</sup> The FCC had rejected the contention that limiting transmission to those individuals willing to pay could exempt the transmission from the definition of "broadcasting."<sup>55</sup> Relying on these decisions, the *Orth-O-Vision* court concluded that HBO's programs, which differed little from conventional broadcast fare, were obviously intended to appeal to a mass audience. Therefore, HBO transmissions constituted broadcasting to the general public and were not within the protection of section 605. As a result, *Orth-O-Vision* was free to intercept the signals.<sup>56</sup>

The Sixth Circuit Court of Appeals addressed the same issue a year later in *Chartwell Communications Group v. Westbrook*.<sup>57</sup> *Chartwell*, a provider of STV service, sought to enjoin defendants from selling decoder boxes which could unscramble the STV signal which was received by all televisions. The *Chartwell* court defined broadcasting as "dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."<sup>58</sup> In confronting the issue of whether STV constituted broadcasting for the purposes of section 605, the court refused to follow the *Orth-O-Vision* court's reasoning.

The Sixth Circuit first considered and distinguished *Functional Music*.<sup>59</sup> The court noted that *Functional Music* had overruled an earlier FCC determination that FM stations with electronically deleted commercials were *not* broadcasting.<sup>60</sup> The *Chartwell* court distinguished the

---

52. *Id.*

53. *Id.*

54. *In re* Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Serv.) To Provide For Subscription Television Serv., 3 F.C.C.2d 1 (1966) [hereinafter Amendment for Subscription Television Serv.].

55. The FCC stated:

The evident intention of any station transmitting subscription programs would be to make them available to all members of the public within range of the station. . . .

. . . .  
. . . "[I]ntent" may be inferred from the circumstances under which material is transmitted, and . . . the number of actual or potential viewers is not especially important.

*Id.* at 9.

56. *Orth-O-Vision*, 474 F. Supp. at 682.

57. 637 F.2d 459 (6th Cir. 1980).

58. *Id.* at 462 (quoting 47 U.S.C. § 153(o) (1962)).

59. *Id.* at 463.

60. *Id.* See, e.g., *In re* Amendment of Parts 2, 3, and 4 of the Commission's Rules and

case, noting that the main reason for the finding of broadcasting in *Functional Music* was that Functional Music had intended its programming for the general public, and that the general public had received most of the programming—the specialized subscribers only got less of what was offered to the general public.<sup>61</sup>

The *Chartwell* court then analyzed the FCC determination upon which the *Orth-O-Vision* court had relied.<sup>62</sup> It noted the context in which this determination had been made. Specifically, the FCC rendered its decision in response to television networks which did not want subscription television signals carried over channels meant for broadcasting.<sup>63</sup> Although the networks claimed that subscription television was not broadcasting, the FCC decided that intent to provide service without discrimination to as many members of the general public as can be interested in the particular program was broadcasting.<sup>64</sup> The *Chartwell* court held that the FCC had not decided whether subscription television was broadcasting for the purposes of section 605.<sup>65</sup> Unlike the *Orth-O-Vision* court, *Chartwell* did not read the FCC decision out of context.<sup>66</sup>

The *Chartwell* court found support for its conclusion in *KMLA Broadcast Corp. v. Twentieth Century Cigarette Vending Corp.*<sup>67</sup> *KMLA* was an early case dealing with the question of whether a radio communication was broadcasting for the purposes of section 605. The court in *KMLA* agreed with the FCC determination which *Functional Music* had overruled.<sup>68</sup> The FCC had found that subscription services that could not be received by the general public without the aid of special equipment were not broadcasting and thus were protected by section 605.<sup>69</sup> Since viewing STV required special equipment, *Chartwell* argued that

---

Regulations and the Standards of Good Eng' Practice Concerning FM Broadcast Stations to Permit FM Broadcast Stations to Engage in Specified Non-Broadcasting Activities on a Simplex and/or Multiplex Basis, 44 F.C.C. 1010 (1955) (FCC allowed an FM station to broadcast functional music even though the FCC did not consider such music broadcasting).

61. *Chartwell*, 637 F.2d at 463.

62. *Id.* at 464. See Amendment for Subscription Television Serv., *supra* note 54.

63. *Chartwell*, 637 F.2d at 464.

64. Amendment for Subscription Television Serv., *supra* note 54, at 8-11.

65. *Chartwell*, 637 F.2d at 464.

66. *Id.* The court stated that even if the FCC had determined that STV was broadcasting and not protectable by § 605, it was not bound by the FCC's determination. *Id.* at 464-65. The court noted that *Functional Music* had overruled a prior FCC decision. *Id.* at 465.

67. 264 F. Supp. 35 (C.D. Cal. 1967). *KMLA* provided background music to subscribers on a frequency which could not be picked up by a normal radio. *KMLA* provided equipment to subscribers allowing them to receive the transmissions. The defendant in the case provided similar equipment to establishments which would house defendant's cigarette machines.

68. See *supra* note 59 and accompanying text.

69. *KMLA*, 264 F. Supp. at 40.

the court should follow the reasoning of *KMLA* and hold that the subscription television signals were not "broadcast" and therefore were protected by section 605.<sup>70</sup> The *Chartwell* court agreed, reasoning that while STV might be available to the general public, "it is intended for the exclusive use of paying subscribers . . . [and] *not* broadcasting intended for use by the general public within the meaning of . . . Section 605."<sup>71</sup> Thus, the STV signals were within the protection of section 605.<sup>72</sup>

The same "broadcast" challenge was levied at MDS signals in *Movie Systems v. Heller*.<sup>73</sup> The defendant, Heller, had installed his own antenna and down converter which allowed him to receive plaintiff's entertainment programming. The plaintiff detected the interception and brought suit under section 605, when Heller failed to pay a subscription fee. The Eighth Circuit Court of Appeals affirmed the district court's decision to grant the plaintiff summary judgment and enjoined Heller from intercepting the programs.<sup>74</sup> Disregarding Heller's claims that *Orth-O-Vision* controlled, the court instead followed the reasoning of *Chartwell* and held that the "MDS transmissions [were] not broadcasting for the use of the general public and thus section 605 prohibit[ed] unauthorized interception of the MDS signal."<sup>75</sup>

Thus, with the exception of a district court opinion in the Second Circuit, all three courts of appeals which addressed the question held that pay television signals were not broadcasting for the purposes of section 605.<sup>76</sup> This possible loophole in the statute was, for all practical

---

70. *Chartwell*, 637 F.2d at 464. *Chartwell* also asked the court to follow *Home Box Office v. Pay TV of Greater New York*, 467 F. Supp. 525 (E.D.N.Y. 1979) (an unauthorized reception of an MDS signal was violation of § 605). According to the *Chartwell* court, the court in *Home Box Office* must have assumed that MDS was not broadcasting in order to find that there had been a violation. *Chartwell*, 637 F.2d at 464 n.3.

71. *Chartwell*, 637 F.2d at 465 (emphasis in original).

72. *Id.* at 466. Shortly thereafter, this holding was followed by the Ninth Circuit Court of Appeals in *National Subscription Television v. S & H TV*, 644 F.2d 820 (9th Cir. 1981).

73. 710 F.2d 492 (8th Cir. 1983).

74. *Id.* at 495.

75. *Id.* The *Heller* court did not agree with *Orth-O-Vision's* reliance on the "mass appeal of programming" analysis in determining whether the programming is broadcast. *Id.* See also *American Television & Communications Corp. v. Western Techtronics, Inc.*, 529 F. Supp. 617 (D. Colo. 1982).

76. See *Chartwell* (6th Cir.), *supra* notes 56-71 and accompanying text; *Heller* (8th Cir.), *supra* notes 72-74 and accompanying text; *National Subscription Television* (9th Cir.), *supra* note 71. This leaves *Orth-O-Vision*, a district court case, as the only real contrary authority. Perhaps it is possible to distinguish that decision as the court did in *Home Box Office v. Advanced Consumer Technology*, 549 F. Supp. 14 (S.D.N.Y. 1981). The court there noted that the *Orth-O-Vision* court's holding that HBO programs were intended to be received by the general public was "unnecessary to its disposition of the case." *Id.* at 24. This is perhaps true—the court in *Orth-O-Vision* enjoined the defendant from retransmitting HBO's signals



purposes, closed and senders of the signals had continued protection of their property right.

## 2. Allowing for a private right of action

Another issue important to the protection of signals was whether section 605 afforded a private right of action. An allocation of any right is not worth much without the ability to enforce it. In addressing this issue, the *Chartwell* court applied the Supreme Court's analysis from *Cort v. Ash*.<sup>77</sup> *Cort* considered whether violation of a criminal statute by a corporation allowed a shareholder a private right of action against the corporation. In determining whether a private right of action may be implied from a federal statute, the Supreme Court articulated a four-part test:

- (1) Does the statute create a federal right in favor of the plaintiff?
- (2) Is there any indication of legislative intent to create or deny a private remedy?
- (3) Is a private remedy consistent with the underlying purpose of the legislation?
- (4) Is the cause of action one traditionally relegated to state law?

The *Chartwell* court applied this test to section 605.<sup>78</sup> The court found that because section 605 protected those who communicate by radio from having their communications intercepted by other persons, a federal right was created in favor of *Chartwell*.<sup>79</sup> Although legislative history was silent on the question of intent to create or deny a private remedy, the court found that a private remedy was clearly consistent with the underlying purposes of the legislation.<sup>80</sup> According to the court, if section 605 did not confer an implied private cause of action, parties to communications would have no means of protecting themselves from unauthorized interception; a private remedy was necessary to ensure adequate enforcement of the statute.<sup>81</sup> The court also noted that the regulation of radio and television had long been an area of federal

---

based on a copyright claim; therefore there was no reason for the plaintiff to appeal. *See Orth-O-Vision*, 474 F. Supp. at 685-86. It should also be noted that *National Subscription Television* reversed the lower court decision which had specifically relied on *Orth-O-Vision*.

77. 422 U.S. 66 (1975).

78. *Chartwell*, 637 F.2d at 466.

79. *Id.* The court cited a long line of precedent finding an implied right of action under § 605 and saw no reason to deviate. *Id.*

80. *Id.*

81. *Id.*

concern and not one relegated to state law.<sup>82</sup> The *Chartwell* court concluded that the plaintiff had a private right of action based on section 605.<sup>83</sup>

Thus, at the time Congress decided to amend the Act, the courts had interpreted section 605, which had been enacted before the advent of pay television technology, to protect the pay television signals. The Courts of Appeals in the Sixth, Eighth, and Ninth Circuits found pay television signals not to be "broadcasting" for the purposes of section 605 and, therefore, protected from unlawful signal interception. Courts had also given signal senders a means to enforce the protection by allowing a private right of action. With the exception of one district court opinion, the courts had engaged in a judicial allocation of rights and, had vested the property right in the sender of the signal. Although the courts did not express their analysis in those terms, this allocation seemed to be the most efficient way to allocate the rights.

## V. CURRENT PROTECTION OF PAY TELEVISION SIGNALS

### A. *The Cable Communications Policy Act of 1984*

During the early 1980s, Congress realized that the Act could no longer accommodate the changes in cable television technology and its related industries. In 1984, Congress enacted the Cable Communications Policy Act of 1984 (Cable Act).<sup>84</sup> The Cable Act's main goal was to establish a national policy consolidating the then existing system of local, state and federal regulation of cable television.<sup>85</sup> By enacting the Cable Act, Congress sought to deal with the regulation, franchising and programming of cable television.<sup>86</sup> The Cable Act also addressed the need to regulate competing technologies such as MDS, DBS and STV.<sup>87</sup>

#### 1. Section 705(b)—the narrow exception

The Cable Act amended section 605 of the 1934 Act and

---

82. *Id.*

83. *Id.*

84. Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C. §§ 601-611 (Supp. 1985)).

85. H.R. Rep. No. 934, 98th Cong. 2d Sess. 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4656.

86. One of the main concerns of Congress was that the bidding wars that had occurred during the cable boom would not recur when franchise agreements expired or new agreements were sought. *Id.* at 4659.

87. *Id.* See *supra* notes 5-7 and accompanying text for an explanation of the various technologies.

redesignated it as section 705.<sup>88</sup> The amendment acknowledged the practice of individuals intercepting satellite-delivered programming for private use.<sup>89</sup> Section 705(a) merely recodified section 605; Congress intended that all of the case law developed under section 605 remain undisturbed.<sup>90</sup> However, Congress added a new provision. Section 705(b) of the Cable Act provides that the protections given to parties under section 705(a) (former section 605)

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 has [sic] obtained such authorization for private viewing under that system.<sup>91</sup>

According to Congress, section 705(b) is intended to prescribe “a very limited exception to liability . . . enabl[ing] an individual to receive authorization to intercept or receive satellite cable programming that is unencrypted. . . .”<sup>92</sup>

Thus, under the Cable Act, scrambled signals will *always* be protected. However, unscrambled signals are protected only if the sender of the signal creates a valid system whereby the signal is marketed.<sup>93</sup>

Congress created this exception for unscrambled signals in response to the recognition that many Americans who live in rural or out of the way locations do not have access to the programs that cable subscribers

88. Some cases decided after the amendment still refer to § 705 as § 605. See *infra* note 114.

89. Explanation of Section 705 as Redesignated and Amended by H.R. 4103, 130 CONG. REC. H12237 (daily ed. Oct. 11, 1984).

90. See 130 CONG. REC. S14286-87 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4746.

91. 47 U.S.C. § 705(a) (Supp. 1985).

92. 130 CONG. REC. S14287 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 4747.

93. For a discussion of what this “valid” system might entail, see *infra* notes 164-68 and accompanying text.

receive. Congress noted that every month thousands of persons purchase satellite dishes because that is their only way to view these programs.<sup>94</sup> Section 705(b) seeks to protect these people<sup>95</sup> and at the same time protect the companies which provide the pay television services.

The mechanism by which the companies can protect themselves under section 705(b) is founded on a market control theory.<sup>96</sup> If a company chooses not to scramble or encrypt its signal<sup>97</sup> it must create some sort of "marketing system." Although the legislative history does not describe "system," or how it should work, the plan must be developed in good faith and must actually provide access to the satellite dish owners.<sup>98</sup> It cannot be a sham or an avoidance scheme designed to deny individuals the opportunity to view the programming.<sup>99</sup> If a marketing plan is put into effect, the viewer must seek and obtain authorization to view the programs or else risk liability under section 705(a). If a pay television company does not choose the "scrambling" option or the "marketing" option, the owner of the satellite dish will be free to intercept the signals without incurring liability.<sup>100</sup> Thus, in effect, Congress has taken a slice out of the property right of the sender and reallocated it to the receiver.

Congress was very careful to keep the "slice" limited, stating that "[t]he interception of the 'satellite cable programming' *must* in fact be directly from the satellite feed in order to come within the terms of the

---

94. 130 CONG. REC. H10443 (daily ed. Oct. 1, 1984) (statement of Rep. Gore). Representative Gore of Tennessee predicted "that before the end of the century this method of receiving television signals is going to be a technology of choice." *Id.*

95. Senator Goldwater believed that "individuals sitting in their own dwelling units have the right to receive unscrambled satellite-transmitted television signals falling on their dwellings and to view the programming offered by such signals." 130 CONG. REC. S14283 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater). The Senator believed that this new industry, which originated in rural America, was encouraged and fostered by numerous small manufacturers and dealers willing to take a risk on a new and untried venture. He felt 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 not favor one technology over another which would have the effect of stifling excellent products. *Id.*

96. *See infra* notes 164-68 and accompanying text.

97. The explanation to § 705 states:

One of the underlying premises of the subsection (b) exemption is that the marketplace is fully capable of reaching, without any government intervention, a solution to the problem of unauthorized interception and receipt of encrypted satellite cable programming. . . . [A]ccordingly, the narrow exception . . . applies only to . . . receipt or interruption [of] unencrypted or unaltered satellite cable programming.

130 CONG. REC. H12237-38 (daily ed. Oct. 11, 1984).

98. 130 CONG. REC. H10446 (daily ed. Oct. 1, 1984) (statement of Rep. Tanzin).

99. *Id.* For a discussion of what this marketing plan might entail, see *infra* notes 164-68 and accompanying text.

100. Perhaps Congress' logic was that the pay television companies would be less likely to market in the rural areas, thereby allowing rural individuals access to the signal.

exemption to liability set forth in subsection (b)."<sup>101</sup> It was stressed that if signals were intercepted from MDS or STV systems, liability would apply regardless of whether those controlling the programming established a system under subsection (b)(2).<sup>102</sup> This would be consistent with Congress' interest in protecting the rural viewers. If a STV or a MDS signal is intercepted, it must mean that the signal is being transmitted close to the area of the interception, since these are only short range systems. If this is so, there must be some other way, besides a satellite dish, for the viewer to receive the signal. Thus, there should be no unrestricted right to access to these signals and no reason for the sender to establish a marketing system—because presumably there is one.

Thus, the activity in *Chartwell Communications Group v. Westbrook*, the interception of MDS signals, which was found to be a violation of section 605, would also be a violation under the newly enacted Cable Act.

*a. federal interpretation of section 705(b)*

The only federal case to consider the exception of 705(b) is *Air Capital Cablevision, Inc. v. Starlink Communications Group, Inc.*<sup>103</sup> In *Air Capital*, two cable television companies sued a distributor of earth station satellite antennae claiming an unlawful interception of satellite signals.<sup>104</sup> The defendant, Starlink, moved for a partial summary judgment on the grounds that, because it had intercepted unscrambled programming directly from a satellite, it was exempted from liability by section 705(b).<sup>105</sup> The court relied on the language and legislative history of section 705(b)<sup>106</sup> and concluded that it was crystal clear that the 1984 amend-

---

101. 130 CONG. REC. H12238 (daily ed. Oct. 11, 1984) (emphasis added). See also 47 U.S.C. § 705(c) (Supp. 1985) which states: "For 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."

102. 130 CONG. REC. H12238 (daily ed. Oct. 11, 1984).

103. 601 F. Supp. 1568 (D. Kan. 1985). One recent case arising under § 705 did not address the exception. See *ON/TV of Chicago v. Julien*, 763 F.2d 839 (7th Cir. 1985). In *ON/TV*, the defendant was accused of advertising and selling "decoder kits" to unscramble a STV signal which came directly through the television on a UHF channel. The court found that the signal was not broadcast, relying on the reasoning of *Heller*, *Chartwell* and *National Subscription TV*. *Id.* at 843-44.

104. This is exactly the situation that the § 705(b) exception was designed to cover. Congressman Rose of North Carolina even mentioned the case in discussions of the amendment on the House floor. See 130 CONG. REC. H10446 (daily ed. Oct. 1, 1984) (statement of Rep. Rose).

105. *Air Capital*, 601 F. Supp. at 1569.

106. See *supra* notes 91-102 and accompanying text.

ments were enacted specifically to protect enterprises, such as Starlink, which sell satellite dishes.<sup>107</sup> The court distinguished the case from those in which decoders are used to intercept STV,<sup>108</sup> and those in which microwave antennae and down converters are used to intercept MDS signals<sup>109</sup> and granted Starlink's motion for summary judgment.<sup>110</sup>

*b. California interpretation of section 705(b)*

The California Court of Appeal was called on to interpret section 705 in *California Satellite Systems v. Nichols*.<sup>111</sup> There, defendants sold equipment used to intercept a pay television signal. Unlike *Starlink*, the signal in question was intercepted from a MDS station on the ground on its way to subscribers' homes.<sup>112</sup> Plaintiff sought to enjoin the defendants from making and selling the equipment used to receive the signal. The court held that defendants' assisting in the interception of MDS signals neither fell within the broadcast proviso exception of 705(a)<sup>113</sup> nor the narrow satellite reception exception of section 705(b),<sup>114</sup> and granted an

---

107. *Air Capital*, 601 F. Supp. at 1571.

108. *See, e.g.*, *National Subscription TV v. S & H TV*, 644 F.2d 820 (9th Cir. 1981); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459 (6th Cir. 1980).

109. *Air Capital*, 601 F. Supp. at 1571. *See, e.g.*, *Movie Sys. v. Heller*, 710 F.2d 492 (8th Cir. 1983).

110. *Air Capital*, 601 F. Supp. at 1572. The court also addressed the issue of *Air Capital's* standing to sue under § 705. In doing so it identified two separate rights. First was the right to manufacture, sell, distribute and use equipment that enables a home viewer to receive the vast number of programs transmitted via satellite. Second, the court recognized the right of a cable television programming distributor, who has a license from a program producer such as HBO, to retransmit to subscribers for a fee. *Id.* at 1571. The fact that a cable company has the right to retransmit does not give it the exclusive right to receive the signal from the satellite. Since the signal had been intercepted before *Air Capital* had received it, the court held that *Air Capital* had no standing to sue under the Cable Act. *Id.*

The court did not address the question of whether a company like HBO, who sent the intercepted signal, would have had standing in this case. The court's reasoning indicated that HBO would have had standing to challenge the interception and that the marketing plan requirement would apply. This reasoning forces a company like *Air Capital* to have its supplier (e.g., HBO) sue to protect its interests and the right for which it has paid. This analysis of the two property rights is erroneous. An exclusive license to transmit the signal should carry with it the right to exclude others from receiving the signal. Otherwise, the license is not worth much.

111. 170 Cal. App. 3d 56, 216 Cal. Rptr. 180 (1985).

112. *Id.* at 62, 216 Cal. Rptr. at 182.

113. *Id.* at 69, 216 Cal. Rptr. at 185-86. The court looked at the intent of the programmers instead of the character of the programming to determine that the signal was not a broadcast intended for the general public.

114. *Id.* at 68, 216 Cal. Rptr. at 186. Here the court applied newly amended § 705(b) but still called it § 605. All references will be to § 705. The court found that the narrow exception of § 705(b) applies only to signals intercepted directly from the satellite. Since the signal in

injunction.<sup>115</sup>

Thus, between *Starlink* and *Nichols*, the courts seem to have outlined the parameters of protection and exemption for satellite signals under section 705. The signal is protected if it is from STV or MDS, or if it is scrambled, or if it is unscrambled and the pay television company develops and institutes a system to market the signal. A satellite dish owner may receive an unscrambled signal if it comes *directly* from the satellite and the receiver pays for the signal—if the signal is marketed by the pay television company. There is still some question as to who has standing to assert a private right of action for an unlawful interception of the signal.

*B. State Protection of Signals—People v. Babylon & California Penal Code Section 593e*

Recently, some states have enacted laws which are intended to supplement federal protection of pay television signals. One of these states is California, which enacted Penal Code section 593e.<sup>116</sup> Originally enacted in 1980, section 593e sought to protect pay television companies from theft of service. The section, which like the Communications Act, was amended in 1984, prohibits attaching, manufacturing or selling devices to intercept or decode transmissions by subscription television services.<sup>117</sup> The purpose of the amendment, as State Senator Montoya stated, was to raise the amount of the fine, to impose criminal penalties for the unauthorized attachment of equipment to a television set for the purpose of unauthorized interception, and to create a civil remedy for the subscription television system.<sup>118</sup> The amended statute reads in part:

---

question was intercepted from a MDS station on the ground, the defendants did not fall within the exception.

115. *Id.* at 72-73, 216 Cal. Rptr. at 189. The court rejected defendants' claim that plaintiff's cause of action was based on copyright law and was therefore preempted by the Copyright Act. Although one section of the Copyright Act, 17 U.S.C. § 301 (1982), concerns preemption, the court interpreted it to deal only with preemption of *state* laws, holding that nothing in the Copyright Act limited any other federal statute. 170 Cal. App. 3d at 64, 216 Cal. Rptr. at 184. The court also relied on earlier decisions, such as *Chartwell*, and held that § 705 afforded a private right of action. *Id.* See *supra* notes 77-83 and accompanying text. The court reasoned that, in the absence of any express language giving federal courts jurisdiction, actions arising under § 705 could be brought in state court. 170 Cal. App. 3d at 66, 216 Cal. Rptr. at 184-85. The court also examined the language of the amended act which stated that an action could be brought in a United States District Court or any other court of competent jurisdiction. *Id.*

116. CAL. PENAL CODE § 593e (West Supp. 1985). See also, e.g., LA. REV. STAT. ANN. § 14:222 (West Supp. 1986); N.Y. PENAL LAW § 165.15 (McKinney Supp. 1986).

117. CAL. PENAL CODE § 593e (West 1980) (amended 1984).

118. Cal. S.B. 387, 1983-84 Reg. Sess. (1984).

(a) Every person who knowingly and willfully makes or maintains an unauthorized connection . . . or . . . assists others in or maintains the attachment of any unauthorized device or devices to a television set . . . for the purpose of intercepting, receiving or using any . . . service carried by the subscription television system which the person is not authorized by that subscription television system to receive or use, is guilty of a misdemeanor. . . .

(b) Every person who, without the express authorization of a subscription television system, knowingly and willfully manufactures, imports into this state, assembles, distributes, sells, offers to sell, possesses, advertises for sale . . . any device . . . designed in whole or part to *decode, descramble, intercept*, or otherwise make intelligible any *encoded, scrambled or other nonstandard signal* . . . is guilty of a misdemeanor.<sup>119</sup>

The following discussion of a recent application of section 593e, as amended, will illustrate the differences between the state and the federal law.

1. *People v. Babylon*: The amendment applied?

The California Supreme Court interpreted the newly amended section 593e in *People v. Babylon*.<sup>120</sup> There, the defendants were accused of selling devices to be used for the unauthorized reception of an over-the-air transmission that was broadcast by a company called Sacramento Microband (Microband).<sup>121</sup> Microband was a licensed MDS that transmitted Home Box Office (HBO) for California Satellite Systems (CALSAT). CALSAT was the exclusive licensee for HBO in the Sacramento area.<sup>122</sup> HBO transmitted the program signal by satellite to Microband which in turn sent out the signal omni-directionally. CALSAT leased a microwave antenna, an amateur down converter, and a power supply to each member of the public who wished to see the programming and charged an installation fee and a monthly fee for the personal use of the service.<sup>123</sup>

On December 10, 1980, an inspector approached defendant Babylon and attempted to purchase an "HBO system."<sup>124</sup> Babylon told the in-

---

119. CAL. PENAL CODE § 593e (West Supp. 1985) (emphasis added).

120. 39 Cal. 3d 719, 702 P.2d 205, 216 Cal. Rptr. 123 (1985).

121. *Id.* at 723, 702 P.2d at 207-08, 216 Cal. Rptr. at 125.

122. *Id.* at 723, 702 P.2d at 208, 216 Cal. Rptr. at 125.

123. *Id.*

124. *Id.* at 724, 702 P.2d at 208, 216 Cal. Rptr. at 126.



spector that he was not allowed to sell systems for HBO use and he would not sell the system if "told" that such would be the purpose of its use.<sup>125</sup> Babylon was asked what other programs the system would receive and he replied that the only signal received "around here" was HBO, and then demonstrated and sold the inspector a dish antenna, a down converter and a power supply.<sup>126</sup> Babylon was issued a citation for a violation of section 593e.<sup>127</sup>

On December 15, 1980, another inspector approached defendant Hyatt and purchased all of the equipment for a "system."<sup>128</sup> At the proposed site of the installation, Hyatt told the investigators that he was installing the equipment in a way that would receive HBO and that receiving HBO was the intended use of the system.<sup>129</sup> Both of the defendants later stipulated that they knew the equipment was capable of receiving the HBO signal from Microband and that it would be used for that purpose. They also stipulated that they did not have CALSAT's permission to sell the equipment for profit.<sup>130</sup>

The court of appeal reversed the lower court's finding that section 593e was unconstitutionally vague and overbroad as it applied to the defendants.<sup>131</sup> The California Supreme Court granted a hearing.

During the pendency of the appeal, the California legislature amended section 593e.<sup>132</sup> The original appeal was based on the theory that section 593e as enacted in 1980 was ambiguous and overbroad and was preempted by the Communications Act of 1934.<sup>133</sup> The California Supreme Court concluded that it need not address either of these issues but should reverse because the new section did not proscribe the defendants' activities.<sup>134</sup>

The court looked at the language in the amended statute which pro-

---

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 723, 702 P.2d at 208-09, 216 Cal. Rptr. at 126.

129. *Id.* at 723, 702 P.2d at 209, 216 Cal. Rptr. at 126.

130. *Id.*

131. *People v. Babylon*, 146 Cal. App. 3d 386, 194 Cal. Rptr. 134 (1983), *rev'd*, 39 Cal. 3d 719, 702 P.2d 205, 216 Cal. Rptr. 123 (1985). The court of appeal found that the prohibition of interception of subscription television applied to subscription television signals sent by MDS and therefore the statute applied to defendants. 194 Cal. Rptr. 138-39 (1984), *rev'd*, 39 Cal. 3d 719, 702 P.2d 205, 216 Cal. Rptr. 123 (1985).

132. Cal. S.B. 387, 1983-84 Reg. Sess. (1984).

133. *Babylon*, 39 Cal. 3d at 725, 702 P.2d at 209, 216 Cal. Rptr. at 127.

134. *Id.* at 727, 702 P.2d at 211, 216 Cal. Rptr. at 128-29. The court based the reversal on the "well-established principle that, absent a saving clause, a defendant is entitled to the benefit of a more recent statute which mitigates the punishment for the offense or decriminalizes the conduct altogether." *Id.* at 725, 702 P.2d at 209, 216 Cal. Rptr. at 127 (citing *People v. Rossi*,

hibits selling any device designed “to decode, descramble, intercept, or otherwise make intelligible *any encoded, scrambled, or other nonstandard signal carried by that subscription television system.*”<sup>135</sup> Because the transmission at issue was neither encoded nor scrambled the court found that section 593e did not apply, rejecting the prosecution’s argument that the transmissions were “nonstandard” merely because they were on a microwave frequency.<sup>136</sup>

Section 593e(g) defines nonstandard signals as “includ[ing], 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.”<sup>137</sup> The court concluded that “[u]nder this definition, HBO transmissions [could] be regarded as *nonstandard* only if they are *distorted*.”<sup>138</sup> There was no evidence in the case that the MDS transmission varied in waveform or was distorted in any other way to render it unintelligible.<sup>139</sup> The court thus rejected the prosecution’s contention that the signal was distorted because it could not be received in an intelligible form by a normal television set.<sup>140</sup> This proposition, the court determined, “simply bypasses the requirement that a ‘nonstandard’ *signal* be ‘distorted’ and is in no way supported by the language of the statute.”<sup>141</sup> Based on this analysis the court concluded that:

[T]he MDS transmission at issue was neither encoded, scrambled, nor otherwise “distorted” so as to render it “nonstan-

---

18 Cal. 3d 295, 555 P.2d 1313, 134 Cal. Rptr. 64 (1976); *In re Estrada*, 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965)).

135. *Id.* (emphasis in original) (quoting CAL. PENAL CODE § 593e(b) (West 1980)).

136. *Babylon*, 39 Cal. 3d at 726, 702 P.2d at 210, 216 Cal. Rptr. at 127-28.

137. CAL. PENAL CODE § 593e(g) (West Supp. 1985) (emphasis added).

138. *Babylon*, 39 Cal. 3d at 726, 702 P.2d at 210, 216 Cal. Rptr. at 127 (emphasis in original). The court explained that a distorted signal requires some sort of alteration, modulation or interference which makes the program unintelligible without the use of some sort of device. It noted, basing its conclusion on various communications dictionaries and glossaries, that with respect to signal transmissions, distortion usually involves changes in the wave form as opposed to the wave length. *Id.*, 702 P.2d at 210, 216 Cal. Rptr. at 128 (citing E. SMITH, GLOSSARY OF COMMUNICATIONS (1971) (“distortion” defined as “[a]ny difference between the wave shape of an original signal, and the wave shape after the signal has traversed the transmission circuit”)).

139. *Id.* at 726, 702 P.2d at 210, 216 Cal. Rptr. at 128.

140. *Id.* The court stated that, under such reasoning, any microwave transmission would have to be called distorted. This the court added, would ignore the plain meaning of the word “distorted” which implies that something must be done *to* the signal. *Id.*

141. *Id.* (emphasis in original). The court noted that the use of microwaves in communications is by no means nonstandard in the sense of being rare or exotic, as they are used in radio, telephone and television as well as radar, military communications and astronomy. *Id.* at 727, 702 P.2d at 210, 216 Cal. Rptr. at 128.

dard” as defined by the statute. Nor does the mere selection of a microwave frequency automatically result in “nonstandard” transmission. Accordingly . . . section 593e does not prohibit the sale of equipment designed merely to receive in intelligible form unencoded microwave transmissions broadcast by a multipoint distribution service.<sup>142</sup>

## 2. Analysis of *Babylon*

The California Supreme Court recognized that section 593e prohibits the selling of any device designed “to decode, descramble, intercept, or otherwise make intelligible *any encoded, scrambled, or other nonstandard signal carried by that subscription television system.*”<sup>143</sup> The court focused on the “encoded, scrambled or other nonstandard signal” language of section 593e without considering that section’s parallel language: “decode, unscramble or intercept.”<sup>144</sup> A pairing of the terms shows that, “encoded” relates to “decode,” “scrambled” relates to “unscrambled,” and “*other nonstandard signal*” relates to “*intercept.*” If section 593e protects only scrambled signals, this last pair would seem to be superfluous. The parallel use of terms suggests that the statute protects more than merely scrambled signals.<sup>145</sup>

The *Babylon* court equated the term “nonstandard” exclusively with the term “distorted.” Section 593e states that “[f]or the purposes of this section . . . nonstandard signal[s] 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.”<sup>146</sup> The court gave section 593e(g) a narrow reading, finding that only distorted signals could be nonstandard and ignored the language stating that the definition is not limited to such signals.<sup>147</sup>

---

142. *Id.* (footnote omitted).

143. *Id.* at 725, 702 P.2d at 209, 216 Cal. Rptr. at 127 (emphasis in original) (quoting CAL. PENAL CODE § 593e (West 1980)).

144. *Id.* (quoting CAL. PENAL CODE § 593e(a) (West 1980)).

145. This reasoning was employed by Justice Evans in the appellate opinion of *Babylon*. *People v. Babylon*, 146 Cal. App. 3d 386, 194 Cal. Rptr. 134, *rev'd*, 39 Cal. 3d 719, 702 P.2d 205, 216 Cal. Rptr. 123 (1985). Although that opinion preceded the amendment of § 593e, the wording of the statute was similar. Justice Evans found that his conclusion had support in the wording of the statute. He initially determined that the words “decoding” and “interception” in the statute obviously referred to two different means of pirating signals. Moreover, Justice Evans concluded that “interception” referred to the piracy of MDS signals and that the equipment sold by the defendants was used to intercept. 194 Cal. Rptr. at 137-38.

146. CAL. PENAL CODE § 593e(g) (West Supp. 1985) (emphasis added).

147. *Babylon*, 39 Cal. 3d at 726, 702 P.2d at 210, 216 Cal. Rptr. at 127-28.

When 593e(b) and (g) are viewed together, the supreme court's interpretation of the newly amended statute appears too narrow. As a result, under California law, defendants who willfully sell equipment which they know will be used to intercept a signal without permission, will escape liability. However, the person who bought the system, relying on the seller,<sup>148</sup> will alone be subject to liability.<sup>149</sup>

### 3. Preemption of section 593e

In *People v. Patton*,<sup>150</sup> the defendant challenged pre-amendment section 593e on the ground that it was preempted by federal law. The court found that section 593e was not invalid merely because it attempted to regulate the same subject as federal law.<sup>151</sup> The court outlined four principles which the United States Supreme Court has expressed regarding the doctrine of preemption: (1) there should be an attempted reconciliation of federal and state statutory schemes rather than an exclusion of one or the other;<sup>152</sup> (2) there will be a preemption if there is Congressional intent to blanket the field, or there is a direct conflict between the state and federal schemes, or any state intervention would burden or frustrate the objectives or purposes of Congress;<sup>153</sup> (3) preemption should exist to the extent required to serve the purposes and objectives of Congress;<sup>154</sup> and (4) there is preemption where state law places an unreason-

---

148. *See supra* note 1.

149. Section 593e(a) provides that anyone who:

[P]urchases, possesses, attaches, causes to be attached, assists others in or maintains the attachment of any unauthorized device . . . to a television set . . . for the purpose of intercepting, receiving, or using any program or other service carried by the subscription television system which the person is not authorized . . . to receive or use, is guilty of a misdemeanor.

CAL. PENAL CODE § 593e(a) (West Supp. 1985). Intercepting is sufficient to impose liability on the person who receives the signal, but not for the person who sells the intercepting device knowing how it will be used. It is possible that Babylon and Hyatt could have been guilty under this statute for assisting the attachment. Although the penalty for this misdemeanor is less than the penalty for violation of § 593e(b), § 593e(a) might be a way to stop the sale of such equipment.

150. 147 Cal. App. 3d Supp. 1, 194 Cal. Rptr. 759 (1983).

151. *Id.* at 6, 194 Cal. Rptr. at 762.

152. *Id.* (citing *Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973)).

153. *Id.* (citing *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 93, 603 P.2d 1329, 1331, 160 Cal. Rptr. 733, 735 (1979) (citing *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141 (1947), *cert. denied*, 449 U.S. 820 (1980))). The court stated that "[t]he controlling inquiry on the preemption issue is determining whether the state action stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Greater Westchester Homeowners Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 93, 603 P.2d 1329, 1332, 160 Cal. Rptr. 733, 735 (1979) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 57, 67 (1941), *cert. denied*, 449 U.S. 820 (1980))).

154. *Id.* at 5, 194 Cal. Rptr. at 761 (citing *Greater Westchester Homeowners Ass'n v. City*

able burden or discrimination on interstate commerce or touches an area of commerce which requires a uniform national rule.<sup>155</sup>

The *Patton* court rejected the contention that Congress, in enacting the Communications Act of 1934, assumed exclusive jurisdiction over the area of communications.<sup>156</sup> Because section 593e prohibited the same activity as the federal law, the court concluded that the state law acted in furtherance of, not in conflict with or as an obstacle to, the accomplishment of the purposes of Congress.<sup>157</sup>

Now that both the Cable Act and section 593e have been amended, the question of preemption should be reexamined. Has the California Supreme Court in *Babylon* construed section 593e in a way that results in its preemption? Although Congress has not explicitly precluded state protection,<sup>158</sup> the state law is arguably in conflict with the federal law.<sup>159</sup> While it is possible to obey both laws by not breaking either, section 593e, as interpreted by the California Supreme Court, confuses the area of regulation. A viewer could intercept an unscrambled MDS or STV signal and be in violation of federal law while not in violation of state law. A viewer who intercepts a signal that is covered by a valid marketing system will face the same inconsistent standards. This confusion "stands as an obstacle to the accomplishment of and execution of the full purposes and objectives of Congress."<sup>160</sup> If section 593e is not an obstacle, it certainly does not supplement the federal law.

---

of Los Angeles, 26 Cal. 3d 86, 94, 603 P.2d 1329, 1332, 160 Cal. Rptr. 733, 735 (1979) (citing *Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973), *cert. denied*, 449 U.S. 820 (1980))).

155. *Id.* at 6, 194 Cal. Rptr. at 761 (citing *Greater Westchester Homeowner's Ass'n v. City of Los Angeles*, 26 Cal. 3d 86, 94, 603 P.2d 1329, 1332, 160 Cal. Rptr. 733, 735 (1979) (citing U.S. CONST. art. I, § 8, cl. 3), *cert. denied*, 449 U.S. 820 (1980)).

156. *Id.* at 10, 194 Cal. Rptr. 759.

157. *Id.*

158. See 130 CONG. REC. § 14287 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4738, 4746.

159. See *supra* notes 135-49 and accompanying text.

160. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Note that the California Supreme Court modified its original opinion in *Babylon*. In the first opinion, *People v. Babylon*, 39 Cal. 3d 70, *modified*, 39 Cal. 3d 719, 702 P.2d 205, 216 Cal. Rptr. 123 (1985), the court reasoned that its construction of § 593e was consistent with the recently enacted federal Cable Act. The court used § 705(b) to support its conclusion and would not venture to say whether or not HBO was a "marketing system" for the purposes of the Act in the absence of any federal judicial construction. The court read § 705(b) as giving less protection to unencoded signals, rewarding those who invest money in protection of the signals and protecting those who sell systems from liability for assisting in the unauthorized use of unencoded signals. *Id.* at 80. The court noted that § 705(b) of the Cable Act clearly distinguished between encoded and unencoded transmissions, offering less protection to unencoded signals. *Id.* The modified opinion completely left this section out. Viewing *Babylon* in light of *Nichols* and *Starlink*, it becomes apparent that the federal statute treats unscrambled signals differently only within a very narrow category of

Even if section 593e is not preempted by federal law, its utility remains questionable. Now that both statutes authorize a private right of action, so that a plaintiff can bring suit under the more protective federal law in either state or federal court,<sup>161</sup> will section 593e ever be used?<sup>162</sup> In *Patton*, the court found that section 593e supplemented and strengthened federal law.<sup>163</sup> Since, in effect, state law will never be used, the statute as interpreted no longer serves this purpose.

To summarize, federal law currently protects all scrambled satellite signals and those unscrambled satellite signals which are marketed. State law affords somewhat less protection, encompassing only those signals which are scrambled.

## VI. REACTION TO THE CABLE ACT

### A. *Reaction from the Pay Television Companies*

Section 705(b) presents television companies with two ways to assure protection of their transmissions. One choice is to engage in a marketing system. There is little legislative history to indicate what constitutes a "marketing system" which will satisfy the section. The only real guidance given in the legislative history of the Act is negative—a marketing system cannot be a sham to deny access or a system to tax or get royalties.<sup>164</sup>

One possible marketing system which would satisfy section 705(b) is point-of-sale licensing systems. The seller of the system would sell permission to view as an agent of the companies.<sup>165</sup> This kind of system could work something like the compulsory license system of the Copyright Act.<sup>166</sup> This would entail a one-time payment by each receiver into a pool to be divided by the senders of the signals.<sup>167</sup>

Alternatively, some companies, such as MTV, have aired commercials requesting that satellite viewers send away for their MTV license.<sup>168</sup>

---

signals—those coming directly from a satellite. Perhaps the *Babylon* court realized that its construction of § 593e was not consistent with § 705.

161. *See supra* notes 77-83 and accompanying text.

162. When the suit in *Babylon* was brought, § 593e did not authorize a private right of action. Now that both the federal and state law explicitly authorize a private right of action, this question becomes relevant.

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

164. *See* 130 CONG. REC. H10446 (daily ed. Oct. 1, 1984) (statement of Rep. Tanzin).

165. *Id.* at H10443 (statement of Rep. Gore).

166. *See, e.g.*, 17 U.S.C. § 111(d) (1982).

167. The fact that it would be a one-time payment might not be acceptable to the television companies.

168. MTV offered to grant a license for a number of months for under twenty dollars and, along with the license, the licensee would receive a MTV t-shirt. The problem with this type of

Whether or not these forms of marketing systems will be acceptable or feasible remains to be seen.

In fact, concern over the marketing system might prove to be irrelevant. This is because the second method of ensuring signal protection under section 705(b) is to scramble the signal. The pay television companies, when faced with the alternative of developing a "marketing system" or scrambling the signal, have chosen the latter option. On January 15, 1986, HBO and Cinemax, the two largest pay television suppliers, began transmitting a scrambled signal.

Congress' effort to aid rural satellite dish owners created an exception to liability for unlawful signal interception. However, rather than second guess Congress' idea of a marketing system, pay television companies have scrambled all of their signals. Thus, the people whom the exception was intended to benefit, the rural satellite dish owners, will now have less access to the signal than they did before. These rural viewers, like their urban counterparts, cannot intercept and decode scrambled signals. Congress, in an attempt to cut a slice out of the property right of the sender, in effect gave away the whole pie. The scrambling of the signal reclaims that taken right.

### *B. Reaction from Congress*

Congress is attempting to react to the scrambling of the signals. In anticipation of scrambling, bills were introduced in both houses to remedy the situation created by the scrambling. One bill, entitled the "Satellite Viewing Rights Act of 1985" (Satellite Act),<sup>169</sup> seeks to clarify the policies regarding the right to receive satellite programming. Section 701 of the Satellite Act declares the bill's purpose is to: (1) foster widespread availability of satellite programming; (2) ensure reasonable availability to scrambled programming; (3) encourage competition among manufacturers and distributors of equipment; and (4) provide for a method of establishing prices, terms and conditions for viewing rights.<sup>170</sup>

In reality, the bill would remove the senders' right to protect their signals by scrambling them. If a company chooses to scramble its signal, it must allow reception to anyone who wishes to receive the signal—as long as that person has complied with prices and conditions.<sup>171</sup> On its face this proposal appears to be fair, but the sender would have *no* con-

---

system is that it depends totally on the voluntary compliance of the satellite dish owner. If the owner does not send away for the license, there is not much the company can do.

169. H.R. 1840 & S. 1618, 99th Cong., 1st Sess. (1985).

170. *Id.* § 701.

171. Presumably, this could work very much like cable television where the company

trol over *how* the signal would be unscrambled. Proposed section 702(c) would not allow any person's right to receive the programming to be conditioned on the purchase or lease of unscrambling devices from specific sources. If the sender has no control over *how* the signal can be unscrambled, there is little point in scrambling it in the first place. If a satellite dish owner can purchase an unscrambler from someone other than the sender, the only way that a sender can be compensated for the programming is if the receiver *decides* to pay. This kind of "honor system" is impractical, inefficient and unfair to the sender of the signal.<sup>172</sup> In effect, the Satellite Act will return the industry to where it was before the Cable Act, with pay companies having to go after those who refuse to pay for the signals.

If Congress' intent is to ensure that a "slice" of the property right is vested in the receiver, it must find a way to do so without burning down the house to save the front door.<sup>173</sup>

### C. Reaction from the Public and the Dish Sellers

Reaction from the public has been varied. The most direct impact has been a decrease in sales of satellite dishes.<sup>174</sup> A more sensational reaction was an antic by someone calling himself "Captain Midnight." On April 27, 1986, a Home Box Office broadcast of the movie "The Falcon and the Snowman" was interrupted by a message which read: "Goodevening HBO from Captain Midnight. \$12.95 a month? No way! (Showtime-Movie Channel Beware)."<sup>175</sup> This intruder replaced the HBO signal with his own to protest the scrambling.<sup>176</sup>

---

charges per service received or for the whole package. A pay-per-view system could only work if descramblers are sophisticated enough to vary the scrambling and descrambling.

172. See *supra* notes 31-35 and accompanying text.

173. Congress has also introduced a bill which would place a two-year moratorium on scrambling of signals. H.R. 1769, 99th Cong., 1st Sess. (1985). The purpose of this bill is to allow the receivers to get for free what Congress is trying to get them to pay for. When the moratorium ends, and these receivers have to pay for the programming, there will probably be screams from the dish owners that they should not have to pay for something that has always been free. It would be better psychologically to allow the companies to continue scrambling the signals until the system giving access to the dish owners is established.

174. See *Pay-TV Scrambling Hurts Dish Makers*, L.A. Times, June 5, 1985, pt. 2, at 1, col. 2. Some industry sources said that sales in 1986 were as much as 70% off from the previous year. *Id.*

175. *Video Pirate Disrupts Movie on HBO With a Message*, N.Y. Times, Apr. 28, 1986, at 17, col. 1.

176. The intruder was eventually caught, but not before a bill was introduced to stiffen the penalties for this kind of technological terrorism. The "Satellite Communications Protection Act of 1986" would impose a prison term of up to ten years and a fine of up to \$250,000. See *Captain Midnight Bill Targets Signal Interruption*, Variety, June 11, 1986, at 1, col. 4.



The most vocal representative of the satellite dish industry is the Society for Private and Commercial Earth Stations (SPACE). Recently SPACE has taken a softer position on the issue of scrambling than it had earlier. SPACE has taken the position that it never publicly opposed the scrambling of signals per se, as long as the consumer could receive the signals at a fair price.<sup>177</sup> However, SPACE is still insisting that parties other than the programmers sell signals to the dish owners.<sup>178</sup>

#### D. A Proposal for Compromise

In order to ensure survival of the product a compromise must be reached which will balance the sender's property right and the receiver's right of access. In order to reach a compromise, Congress must rework the proposed bill. Congress' plan is to take away the sender's right to *totally* exclude a potential satellite receiver, even one who is willing to pay. If Congress intends to reach its goal by forcing pay television companies to market their scrambled signals, Congress *must* allow the companies to control the unscrambling.

What Congress has done has been to defer to the FCC. On August 7, 1986, the FCC launched an inquiry to examine the effects of scrambling.<sup>179</sup> This inquiry is a result of Congressional resistance to giving any legislative aid to the satellite dish industry.<sup>180</sup> As one source was quoted as saying: "Adopting legislation to rescue home dishes will ultimately result in more legislation to rescue some other industry. There is no end to this once it starts."<sup>181</sup>

The FCC's inquiry will most likely have one of two results. First will be a decision to do nothing. This would be in deference to the marketplace. There is support for this result among signal providers. In a speech to SPACE, Stephan Wm. Schulte, Showtime Senior Vice-President of direct broadcast development, called scrambling a "dead is-

---

177. *SPACE makes its case*, Broadcast, June 2, 1986, at 80.

178. *Id.* This creates the same problem of enforcement discussed *supra* at notes 164-68 and accompanying text.

179. *See FCC ponders signal scrambling issue*, The Hollywood Rep., Aug. 8, 1986, at 1, col. 2. The FCC will seek information on the development of descrambling equipment, the marketing plans of channels, competition among the different carriers such as cable and satellite providers and the public benefit of scrambling. *Id.* at 7, col. 2. Another interesting topic that the FCC is seeking comment on is whether scrambling treats copyright owners fairly by providing them with control over their intellectual property. *Id.* The discussion of policy and the resulting proposals of this Comment should show how scrambling cannot help but benefit copyright owners.

180. *See Industry, Congress resist any legislative aid to dish owners*, The Hollywood Rep., June 13, 1986, at 1, col. 2.

181. Cooper, *Scrambling Woes*, Radio-Electronics, July 1980, at 78.

sue.”<sup>182</sup> The reasons for this conclusion were as follows: (1) all of the major providers had already scrambled, (2) consumers are aware of the scrambling, and (3) programmers are starting to market the signals competitively.<sup>183</sup>

The second possible result of the inquiry will be the promulgation of rules regulating the scrambling and unscrambling of signals. If the FCC takes its cue from Congress' concerns in enacting both the Cable Act and proposing the Satellite Act, the Commission will hopefully seek to balance the concerns of the parties.

Section 703 of the Satellite Act authorizes the FCC to establish prices, terms and conditions for viewing rights.<sup>184</sup> There is no reason why the FCC cannot also control the way in which the signals are unscrambled. The FCC could allow the pay television companies to own and lease out the scramblers to the satellite dish owners. The FCC would then develop rules which would control the prices and availability of the descramblers. The pay television company would not be allowed to charge an unreasonable price for the leasing of an unscrambler. If unreasonable charges were made, in effect precluding access, the FCC could establish maximum prices that could be charged.

This system could work in much the same way that pay television companies control reception over cable. Through the cable operator, the pay television company collects a fee for the service. No one has complained that the cable companies have retained control over the unscrambling of their signals.<sup>185</sup> The principle is the same—if a satellite dish owner wishes to receive the pay service, she will rent the unscrambler and pay for the service. The satellite viewer would then have the same opportunity as the cable viewer to view the programming.

One way to determine the reasonableness of the fee is to compare it to the fee charged for cable service. In Los Angeles, one cable service charges \$17.86 per month for a basic package.<sup>186</sup> Perhaps, some of the

---

182. *Scrambling a 'dead issue' Showtime vp Schulte says*, The Hollywood Rep., July 2, 1986, at 11, col. 2.

183. *Id.* This final reason might be the most important. Showtime-The Movie Channel has enlisted the aid of six satellite equipment distributors to tell dish owners how to purchase decoders and subscribe to the services. *See S/TMC Signs Six Dish Firms In Decoder Push*, Variety, July 7, 1986, at 8, col. 5.

184. H.R. 1840 & S. 1618, 99th Cong., 1st Sess. § 702 (1985).

185. The satellite dish owners have of course been up in arms. One owner was quoted as saying: "It's just plain wrong . . . I know they've got the argument that they own the program, but they don't own the sky." *Scrambling of Signals Today Thwarts TV Dish Antennas*, N.Y. Times, Jan. 15, 1986, at 1, col. 1.

186. Prices in this discussion obtained from telephone interview with a sales representative from Communicom Cable in Los Angeles (Mar. 17, 1986).

services in this package would be scrambled,<sup>187</sup> so a percentage of the basic fee could be charged to satellite dish owners for services which are available on basic cable. The cable company also charges separately for special pay services such as HBO and Showtime.<sup>188</sup> There is no reason why the fees for satellite descrambling of the signal should be any less. The charge could be adjusted to compensate for the rental of the unscrambler. This seems reasonable because the satellite owner, unlike the cable subscriber, is not having to pay for basic cable in order to have access to the pay channels.<sup>189</sup>

Assuming the goal is to give the rural viewer the same opportunity to receive the same programming as those who live in areas serviced by cable, this method would achieve such a result. The receiver would have a right to access, but the right would be conditioned on payment. The sender would have a limited right to exclude by not furnishing the unscrambled signal to those unwilling to pay.<sup>190</sup> If there is another goal, that of helping the fledgling satellite industry compete with the more established cable television industry, it has not been articulated.

## VII. CONCLUSION

Once it is established that television signals are a resource worth protecting, it only makes sense to allow the sender to protect them. The advent of satellite dishes created a new way around that protection. This opening up of the airwaves necessitated the creation of a technological padlock—scrambling. This lock, however, must be used with discretion. This discretion, if not created by the natural forces of the marketplace should be imposed by Congress, the courts or the FCC.

New technologies create new tensions in society. Those tensions, in turn, create a need for resolutions by either the parties involved or by third parties. The satellite viewing rights dilemma has the senders and the receivers at war. If the participants cannot find the answer in the marketplace, others will step in. If Congress, the courts or the FCC step in to settle the dispute, they will have to carefully balance the needs of all

---

187. For example, MTV is offered on some basic cable systems, but is also being scrambled.

188. Communicom charges \$11.50 for one pay service, \$20.00 for two pay services, and \$27.00 for three pay services.

189. Communicom also charges an installation fee and deposit totaling \$56.45.

190. An interesting corollary issue, which has not been discussed, is whether these new amendments would apply to commercial television signals. Commercial stations, tiring of satellite dish owners intercepting feeds, have started motions to scramble those feeds. This scrambling is especially upsetting to sports viewers, who use their dishes to receive sports programming from around the world—even programming which is specifically blacked out in their city. See *The Scrambling Dilemma*, L.A. Times, Feb. 3, 1986, pt. 3, at 10, col. 6.

concerned. A tip of the scale too far in one direction will cut off all access to the resource. A tip of the scale too far the other way will cause the resource to perish.

*Robert D. Haymer*

