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Pay Television and Section 605 of the Communications Act of 1934: A Need for Congressional Action

PAY TELEVISION AND SECTION 605 OF THE COMMUNICATIONS ACT OF 1934: A NEED FOR CONGRESSIONAL ACTION

Over the past two decades television viewers have enjoyed a proliferation of new video broadcast technologies.[1] Specialized video programming has supplemented conventional over-the-air television broadcasting.[2] While advertisers or contributors support conventional television, pay television (pay TV) depends upon subscribers for revenue.[3] Consequently, pay TV companies offering multipoint distribution service (MDS)[4] or subscription television (STV)[5] limit their audiences to subscribers by transmitting a special signal that only subscribers can receive through equipment that the companies provide.[6] Competitors

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[1] *See* OFFICE OF PLANS AND POLICY, FEDERAL COMMUNICATIONS COMMISSION, POLICIES FOR REGULATION OF DIRECT BROADCAST SATELLITES, 11 (1980) [hereinafter cited as STAFF REPORT]; Elder, *Subscription Television, The FCC, and the Courts*, 15 ST. LOUIS L.J. 283, 283 (1970).

[2] STAFF REPORT, *supra* note 1, at 11. Some pay television (pay TV) companies transmit programming via a multipoint distribution service (MDS). *E.g.*, Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 675 (S.D.N.Y. 1979); Home Box Office, Inc. v. Pay TV of Greater New York, 467 F. Supp. 525, 526 (E.D.N.Y. 1979). A company offering MDS services transmits a high frequency signal that conventional television sets cannot receive. 467 F. Supp. at 526. Company affiliates at designated distribution points receive the signal, convert it to a lower frequency that conventional sets can receive, and retransmit the signal to subscribers' homes. *Id.* Pay TV companies offering subscription television services (STV) transmit a scrambled video signal and a special audio signal directly to subscribers' homes. *E.g.*, Chartwell Communications Group v. Westbrook, 637 F.2d 459, 461 (6th Cir. 1980); National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 379 (C.D. Cal. 1980). Since conventional television sets cannot receive STV signals without special equipment, subscribers rent decoding devices from an STV company. 637 F.2d at 461. MDS and STV programming consists of recent movies and sporting events. STAFF REPORT, *supra* note 1, at 22.

Other video technologies that supplement conventional television include cable television, video cassettes, and video discs. *Id.* at 10. Cable systems transmit programming from an originating site through a cable and into homes. *Id.* at 17. All cable systems transmit local television broadcasts, and many carry movies and sporting events not shown on conventional television. *Id.* at 17, 21. Some cable companies offer channels devoted exclusively to news, sports, and children's programming. *Id.* at 21. Video cassettes and discs operate through players attached to regular television sets and mainly offer movie programming. *Id.* at 18, 22-23.

[3] STAFF REPORT, *supra* note 1, at 11. Typically, pay TV company revenues come from receiver or player equipment installation and rental charges and from monthly subscription fees. *Id.* Pay TV companies do not derive revenue from commercial advertisers. *Id.* at 11-15.

[4] *See* note 2 *supra*.

[5] *See id.*

[6] *See* Note, *Federal Communications Law And Unfair Competition*, 56 CAL. L. REV. 526, 536-37 (1968) [hereinafter cited as *Unfair Competition*].

who "pirate"[7] a pay TV company's programming and sell it to nonsubscribing viewers, or who provide the public with devices capable of decoding the company's signals enable viewers to enjoy pay TV programming without remunerating the transmitting company.[8] Program pirating can deprive a pay TV company of potential customers and cause its business to decline.[9] Recently, several pay TV companies offering MDS or STV programming have sought to employ section 605 of the Communications Act of 1934 to gain protection from unauthorized reception and use of their transmissions.[10]

The Communications Act (Act)[11] established the Federal Communications Commission (FCC)[12] and granted the FCC regulatory authority over wire and radio communications.[13] Section 605 is a criminal statute

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[7] "Piracy" of pay TV programming is the unauthorized reception and use of pay TV transmissions. *See* Home Box Office, Inc. v. Pay TV of Greater New York, 467 F. Supp. 525, 526-28 (E.D. N.Y. 1979) (suit for damages and injunction against unauthorized reception and use of plaintiff's pay TV transmissions); Henry, *The Convention Relating To The Distribution Of Programme-Carrying Signals Transmitted By Satellite: A Potshot at Poaching*, 7 INT'L L. & POL. 575, 576 (1974) [hereinafter cited as Henry] (dicussing pay TV signal piracy in context of satellite broadcasts).

[8] *See, e.g.*, Chartwell Communications Group v. Westbrook, 637 F.2d 459, 461 (6th Cir. 1980) (suit to enjoin defendants from distributing to viewers devices to receive plaintiff pay TV company's programming); Home Box Office, Inc. v. Pay TV of Greater New York, 467 F. Supp. 525, 526-27 (E.D.N.Y. 1979) (suit for damages and to enjoin defendant from pirating and selling plaintiff's pay TV programming to nonsubscribing viewers).

[9] *See* Henry, *supra* note 7, at 576 (companies transmitting television programming from satellites could suffer from signal piracy).

[10] *See* Chartwell Communications Group v. Westbrook, 637 F.2d 459, 461 (6th Cir. 1980); National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 379 (C.D. Cal. 1980); Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 681-82 (S.D.N.Y. 1979); Home Box Office, Inc. v. Pay TV of Greater New York, 467 F. Supp. 525, 528 (E.D.N.Y. 1979); text accompanying notes 52-87 *supra*.

[11] 47 U.S.C. §§ 151-609 (1976).

[12] *Id.* § 151(a). The Communications Act of 1934 (Act) charges the Federal Communications Commission (FCC) with regulation of interstate and foreign communications by wire and radio. *Id.* § 153(b). The Act directs the FCC to exercise its regulatory power to provide efficient wire and radio communications services at reasonable rates, to aid national defense, and to promote safety of life and property through the use of communications. *Id.* Television programming is included under the Act's classification of radio communications. Allen B. DuMont Laboratories v. Carroll, 184 F.2d 153, 155 (3d Cir. 1950); 47 U.S.C. § 153(b) (1976). The Communications Act amended the Radio Act of 1927, ch. 1969, 44 Stat. 1162 (1927) (amended 1934), which applied only to radio communications. *See* Nardone v. United States, 302 U.S. 379, 381-82 (1937). The Communications Act directs the FCC to classify radio stations and to assign each station a broadcast frequency. 47 U.S.C. § 303(a), (c) (1976). In addition, the FCC must promulgate regulations necessary to carry out the provisions of the Act and study new uses for radio to encourage increased use of radio in the public interest. *Id.* § 303(f), (g). The Act also empowers the FCC to grant radio station licenses if the Commission believes the stations will serve the public interest, convenience, and necessity. *Id.* §§ 307(a), 309(a). The FCC may revoke any station license for cause. *Id.* § 312(a).

[13] 47 U.S.C. § 151 (1976). The Act broadly defines wire communications as the transmission of writing, signs, signals, pictures, and sounds by wire or other connection between the points of origin and reception of the transmission. *Id.* § 153(a). The definition of

prohibiting unauthorized persons from intercepting, receiving, or assisting in receiving any interstate or foreign communication by wire or radio, and forbidding a person from using such communication for personal benefit.[14] Although section 605 does not provide an express civil remedy, courts readily have granted an implied private cause of action for persons claiming harm by violators of the statute.[15] Section 605 excludes from its protection radio communication broadcasts intended for

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radio communication is identical to the definition of wire communication, except that the transmission medium for radio communications is radio waves and not a physical connector. *See id.* § 153(b).

[14] *Id.* § 605. The United States Supreme Court has determined that § 605 applies to intrastate and interstate communications. Weiss v. United States, 308 U.S. 321, 329 (1939). Violators of the statute face a fine of not more than $10,000 or imprisonment up to one year, or both. 47 U.S.C. §§ 501, 605 (1976). In the past, courts have invoked § 605 primarily to exclude wiretap evidence at trial. *See, e.g.*, Benanti v. United States, 355 U.S. 96, 100 (1957) (evidence obtained through wiretapping by state law enforcement officials inadmissible in federal court as violating § 605); Nardone v. United States, 302 U.S. 379, 382 (1937) (evidence obtained through wiretapping by federal officials inadmissible in federal court as violating § 605). *But cf.* Rathbun v. United States, 355 U.S. 107, 108-09 (1975) (police officers who overheard phone conversation by listening on extension at request of one party to conversation did not violate § 605 because no interception occurred). Some courts reasoned that one of the major purposes of § 605 was to counteract the Supreme Court's decision in Olmstead v. United States, 277 U.S. 438, 466 (1928). *E.g.*, United States v. Hill, 149 F. Supp. 83, 85 (S.D.N.Y. 1957); United States v. Sullivan, 116 F. Supp. 480, 481 (D.D.C. 1953). *Olmstead* held that the fourth and fifth amendments of the United States Constitution did not prohibit wiretapping or the use of wiretap evidence at trial. 277 U.S. at 466. The Supreme Court's decision in Katz v. United States, 389 U.S. 347 (1967), however, superceded § 605 as the basis for excluding evidence obtained through wiretapping. *See id.* at 359. *Katz* overruled *Olmstead* and held that the warrantless use of an electronic device to overhear a private telephone conversation violated a defendant's fourth amendment expectation of privacy, and that evidence so obtained was inadmissible at trial. *Id.* at 353, 359.

[15] *See, e.g.*, Chartwell Communications Group v. Westbrook, 637 F.2d 459, 466 (6th Cir. 1980) (Pay TV company granted private right of action under § 605 against persons who sold equipment capable of receiving company's signals); Pugach v. Dollinger, 277 F.2d 739, 741 (2d Cir.), *aff'd*, 365 U.S. 458 (1960) (victim of wiretap in violation of § 605 had implied cause of action under statute); KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35, 43 (C.D. Cal. 1967) (subscription radio station granted private cause of action under § 605 against company that distributed equipment capable of receiving station's signal). In granting a private cause of action under § 605, the Sixth Circuit has reasoned that Congress intended § 605 to protect people who communicate by wire and radio from having their communications received by unauthorized persons. 637 F.2d at 466. Thus, § 605 creates a federal right in favor of persons who communicate by wire or radio. *Id.* Furthermore, while the legislative history of § 605 is silent on the question of intent to create or deny a private remedy, such a remedy is consistent with the underlying purpose of the statute to protect wire and radio communications. *Id.* Finally, a cause of action under § 605 is not one relegated to state law, since communications regulation is a federal concern. *Id.* The foregoing analysis follows the steps that the Supreme Court has set out for finding an implied private remedy in a federal statute. *See* Cort v. Ash, 422 U.S. 66, 78 (1975). Private parties have sought various remedies under § 605 including damages and injunctive relief. *See, e.g.*, Chartwell Communications Group v. Westbrook, 637 F.2d 459, 461 (6th Cir. 1980) (injunction); Home Box Office, Inc. v. Pay TV of Greater New York, 467 F. Supp. 525, 526 (E.D.N.Y. 1979) (damages and injunction); note 14 *supra* (suppression of evidence).

the general public.[16] A determination of the scope of section 605 protection thus requires an interpretation of the term "broadcasting."[17]

The Act defines "broadcasting" as the transmission of radio communications that the broadcaster intends the public to receive.[18] Pay TV companies have argued that because their programming is intended only for paying subscribers and not for the general public, pay TV does not fall within the Act's definition of "broadcasting."[19] The companies have maintained that section 605 prohibits unauthorized interception of pay TV programming by nonsubscribers.[20] Persons accused of pirating company signals have responded that section 605 does not protect pay TV since pay TV transmissions are broadcasts intended for the public.[21] In addressing this conflict, courts have referred to a number of judicial and administrative discussions of the meaning of "broadcasting" under the Act.[22] Resolving the issue of whether pay TV programming constitutes "broadcasting," and consequently, whether section 605 applies to pay TV, requires an examination of several attempts by the FCC and the federal courts to construe the Act's definition of "broadcasting" in the context of radio services.

In several early broadcast station licensing decisions, the FCC observed two general classifications of radio communications.[23] "Broadcast" services were unaddressed communications of general interest to the public.[24] "Point-to-point" communications were addressed to a particular listener or a limited class of listeners.[25] The FCC concluded in these early licensing decisions that messages intended for specific listeners in a broadcast station's audience were not broadcasting but point-to-point communications not authorized by a broadcast license.[26]

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[16] 47 U.S.C. § 605 (1976).

[17] *See, e.g.*, Chartwell Communications Group v. Westbrook, 637 F.2d 459, 462 (6th Cir. 1980) (construing Act's definition of "broadcasting" to determine whether § 605 applicable to STV); Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 680-82 (S.D.N.Y. 1979) (construing Act's definition of "broadcasting" to determine whether § 605 applicable to MDS).

[18] 47 U.S.C. § 152(o) (1976).

[19] *See* Chartwell Communications Group v. Westbrook, 637 F.2d 459, 465 (6th Cir. 1980); Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 681, 682 n.10 (S.D.N.Y. 1979).

[20] *See, e.g.*, Chartwell Communications Group v. Westbrook, 637 F.2d 459, 461, 465-66 (6th Cir. 1980); Orth-O-Vision, Inc. v. Home Box Office, Inc. 474 F. Supp. 672, 682 & n.10 (S.D.N.Y. 1979).

[21] *See* Chartwell Communications Group v. Westbrook, 637 F.2d 459, 464 (6th Cir. 1980); National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 381 (C.D. Cal. 1980).

[22] *See* text accompanying notes 23-50 *infra*.

[23] Adelaide Lillian Carrell, 7 F.C.C. 219 (1939); Bremer Broadcasting Co., 2 F.C.C. 79 (1935); Scroggin & Co. Bank, 1 F.C.C. 194 (1935).

[24] Adelaide Lillian Carrell, 7 F.C.C. 219, 222 (1939).

[25] *Id.*

[26] *See id.* (local police department messages not broadcasting); Bremer Broadcasting

The first judicial interpretations of "broadcasting" arose in attempts to classify two types of FM subscription radio music,[27] simplex systems[28] and multiplex systems.[29] With simplex transmissions of background, or "functional" music,[30] subscribers received an FM station's regularly scheduled programs over their radios.[31] Subscribers received both music and spoken material.[32] The FCC determined that simplexing was not "broadcasting" under the Communications Act because the transmissions were directed to subscribers and not primarily intended for public reception.[33] The FCC concluded that a radio station licensed solely to provide broadcasting services to the public could not provide simplex services.[34] In *Functional Music, Inc. v. F.C.C.*,[35] the United States Court of Appeals for the District of Columbia Circuit reversed the FCC's ruling and held that simplexing did constitute "broadcasting" under the Act.[36] The court reasoned that the FM signal was intended for public reception, even though a segment of the audience could delete portions of the broadcast.[37] The *Functional Music* court found the requisite intent to

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Co., 2 F.C.C. 79, 83 (1935) (coded horse race results not broadcasting); Scroggin & Co. Bank, 1 F.C.C. 194, 195-96 (1935) (answers to listeners' personal problems not broadcasting). In *Carrell*, the FCC stated in dictum that its regulations and the terms of broadcast station licenses authorized only the transmission of a broadcast service of interest to the general public. 7 F.C.C. at 222. The FCC concluded that any transmission intended for a specific listener or a limited class of listeners was point-to-point communication which the station must discontinue. *Id.* The FCC acknowledged the distinction between broadcasting and point-to-point communications in a 1963 decision holding that a licensed broadcast station should not transmit messages requesting that a specific doctor call the physicians bureau. KFAB Broadcasting Co., 1 RAD. REG. (P&F) 403, 404 (FCC 1963). The FCC reasoned that such private transmissions constituted use of a broadcast station for the transmission of point-to-point messages. *Id.*

[27] Functional Music, Inc. v. F.C.C., 274 F.2d 543 (D.C. Cir.), *cert. denied*, 361 U.S. 813 (1959); KMLA Broadcast Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35 (C.D. Cal. 1967).

[28] *See* text accompanying notes 30-32 *infra*.

[29] *See* text accompanying notes 40-43 *infra*.

[30] Background, or "functional" music is FM music without commercials or other spoken messages, used by subscribers in their places of business. Functional Music, Inc. v. F.C.C. 274 F.2d 543, 544 & n.1 (D.C. Cir. 1969).

[31] *Id.* at 544.

[32] *Id.* Simplex stations emitted a supersonic signal that activated a special device installed in the subscriber's radio. *Id.* This supersonic "bleep" cut off the broadcast signal when the station aired spoken material and then reconnected the signal when the programming returned to music. *Id.*

[33] *See Report and Order*, 11 RAD. REG. (P&F) 1590, 1591 (1955), *construed in* STAFF REPORT, *supra* note 1, at 120-21 & n.10. The FCC determined that simplex transmissions constituted point-to-point communications. *Id.* The Commission concluded, therefore, that an FM licensee's overall operations were predominantly nonbroadcasting, even though both subscribers and the general public received the licensee's programming. *Id.*

[34] *Id.*

[35] 274 F.2d 543 (D.C. Cir. 1958).

[36] *Id.* at 548.

[37] *Id. Functional Music* did not involve § 605. The only issue was whether the FCC had

transmit to the public,[38] because simplex programming was popular with the free listening audience, and because the station derived substantial revenues from advertisers desiring to reach that audience.[39]

After *Functional Music*, the United States District Court for the Central District of California held in *KMLA Broadcast Corp. v. Twentieth Century Cigarette Vendors Corp.*[40] that multiplex transmissions were not "broadcasting" under the Act.[41] The multiplex system involved two programs transmitted over two distinct frequencies.[42] The FCC required a multiplex station to transmit regular FM broadcast signals for the general public over one frequency.[43] The station then transmitted a separate program of commercial-free background music over another frequency that conventional FM radios could not receive.[44] Subscribers payed a fee for the station to install and maintain special equipment to

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erred in ruling that simplexing was not "broadcasting" under the Act, and that FM stations licensed to broadcast could not offer simplex services. *See id.*

[38] *See* text accompanying notes 16 & 18 *supra* (Act's definitions of broadcasting).

[39] 274 F.2d at 548. The *Functional Music* court examined the early FCC decisions on the nature of broadcasting, note 26 *supra*, and stated that these decisions did not form a basis for holding that simplexing was not broadcasting. *Id.* The court observed that the contents of the objectionable radio services in the early rulings negated an intent for public distribution, but that simplexing services were of interest to the general radio audience. *Id.* According to the court, the FCC could not bar licensed broadcasting stations from offering simplex services, because simplexing was a broadcasting service. *Id.* at 548-59. The *Functional Music* court stated, however, that its ruling did not preclude the FCC from barring simplex transmissions on other grounds. *Id.* at 549. Accordingly, the FCC adopted rules prohibiting simplex services on the ground that a broadcasting licensee's contractual relationship with his simplex subscribers could diminish his control over the program selection. *FM Simplex Operations*, 2 RAD. REG. 2d (P&F) 1683, 1690-91 (1964); *see* 47 C.F.R. §§ 73.276(a), (b) (1964) (FCC regulations prohibiting FM licensees from offering simplex services). The Commission reasoned that a licensee's contractual relationship with simplex subscribers could prevent him from providing adequate service to his nonsubscription listeners. 2 RAD. REG. 2d (P&F) at 1691.

[40] 264 F. Supp. 35 (C.D. Cal. 1967).

[41] *Id.* at 42. The *KMLA* court considered the status of multiplex systems in order to answer the question of whether § 605 protected multiplex programming from unauthorized reception and use. *Id.* at 39-40; *see* text accompanying notes 14-16 *supra* (discussing § 605). KMLA Broadcast Corporation transmitted FM background music to subscribers who paid a monthly subscription charge. *Id.* at 38. Twentieth Century Cigarette Vendors Corporation purchased Japanese-built multiplex receivers and tuned them to receive KLMA's multiplex subchannel frequency. *Id.* Twentieth Century installed the receivers, without KMLA's permission, in various commercial establishments which allowed Twentieth Century to place its vending machines on their premises. *Id.* at 38-39. KMLA sued Twentieth Century under § 605 for damages and for an injunction against further distribution of the receivers without KMLA's consent. *Id.* at 36. KMLA joined as a defendant one of the businesses that received and used KMLA's programming without permission. *Id.* The court held that § 605 protected KMLA's transmissions, which were nonbroadcast communications. *Id.* at 42.

[42] *Id.* at 37.

[43] *Id.* Licensed FM broadcast stations must broadcast to the general public on their main channel, because the FCC requires licensed stations to serve the public interest. *Id.*

[44] *Id.* at 37-38.

receive multiplex transmissions.[45] The *KMLA* court characterized multiplex transmissions as point-to-point communications, and stated that the nature of FM multiplexing negated any public reception intent.[46] As evidence that the multiplex station did not intend to broadcast its signals to the general public, the court noted that the multiplex signals traveled on a subcarrier frequency,[47] and that subscribers needed special equipment to receive the programming.[48] In addition, the court observed that the multiplex station geared its program content to subscribers' needs rather than to the general public's listening taste.[49] The *KMLA* court also based its conclusion on the FCC's determination that multiplex signals were not "broadcasting" because multiplexers intended their signals only for subscribers and not for the public generally.[50]

Courts addressing the question of whether section 605 protects pay TV transmissions from unauthorized reception and use have relied on *Functional Music* and *KMLA* as the leading precedents for the statutory definition of "broadcasting."[51] The earliest pay TV cases involved section 605 claims by Home Box Office, Inc. (HBO).[52] HBO transmitted subscription programming via an MDS system.[53] The MDS system transmitted the program signal on a microwave frequency from a central transmitting location to specific reception points.[54] HBO affiliates received the

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[45] *Id.* at 38.

[46] *Id.* at 42. The *KMLA* court distinguished *Functional Music*, stating that the simplex station in *Functional Music* intended public dissemination of its broadcasts. *Id.* at 40 n.1.

[47] 264 F. Supp. at 42. The multiplex station in *Functional Music* transmitted background music over a subcarrier frequency that was separate from regular FM channels. *Id.* at 37. Conventional FM radios could not receive the subcarrier frequency. *Id.* at 38.

[48] *Id.* at 42.

[49] *Id.*; *cf.* text accompanying notes 35-39 *supra* (*Functional Music* decision that simplexing is broadcasting).

[50] 264 F. Supp. at 41; *see* 11 RAD. REG. (P&F) 1599 (1955) (FCC opinion that multiplex signals are not broadcasting). Recently, the FCC changed its opinion that subscription FM radio services are exclusively point-to-point communications. *Report and Order*, 61 F.C.C.2d 113, 117-18 (1976). The FCC now recognizes subscription FM radio as a "hybrid" form of communication, with characteristics of both broadcasting and point-to-point communications. *Id.*; text accompanying notes 24 & 25 *supra* (discussing distinction between broadcasting and point-to-point services). Unlike broadcast communications, however, subscription radio transmissions fall under § 605's protection against unauthorized reception and use of radio transmissions not intended for the public. 264 F. Supp. at 42.

[51] *See, e.g.*, Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 681 (S.D.N.Y. 1979) (relying on *Functional Music*); Home Box Office, Inc. v. Pay TV of Greater New York, 467 F. Supp. 525, 528 (E.D.N.Y. 1979) (relying on *KMLA*).

[52] *See* Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 675 (S.D.N.Y. 1979); Home Box Office, Inc. v. Pay TV of Greater New York, 467 F. Supp. 525, 526 (E.D.N.Y. 1979). Home Box Office's (HBO) programming consisted of motion pictures, sporting events, and other special programs of general public appeal. 474 F. Supp. at 682.

[53] Home Box Office, Inc. v. Pay TV of Greater New York, 467 F. Supp. 525, 526 (E.D.N.Y. 1979).

[54] *Id.* at 526-57.

signal at these points and converted it into a lower frequency which regular television sets could receive.[55] The affiliates transmitted the modulated program signal by cable to subscribers who paid monthly fees for program service.[56]

In two separate actions, HBO sued affiliates under section 605 for receiving and selling HBO's programming to subscribers without remitting payments to HBO.[57] Although the FCC had determined that MDS transmissions were point-to-point communications subject to section 605 protection,[58] two New York federal district courts reached opposite conclusions regarding whether MDS services were "broadcasting."[59] In *Orth-O-Vision, Inc. v. Home Box Office, Inc.*,[60] the United States District Court for the Southern District of New York applied *Functional Music's* reasoning.[61] Observing that HBO programming was of interest to the general public, the *Orth-O-Vision* court concluded that HBO transmissions constituted "broadcasting," even though persons could not view the programs without leasing special equipment.[62] Since HBO broadcasts

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[55] *Id.*

[56] *Id.*

[57] Orth-O-Vision, Inc. v. Home Box Office, Inc. 474 F. Supp. 672, 677 (S.D.N.Y. 1979); Home Box Office, Inc. v. Pay TV of Greater New York, 467 F. Supp. 525, 527-28 (E.D.N.Y. 1979). In both cases, HBO claimed that its affiliates were pirating its program signals in violation of § 605. 467 F. Supp. at 528; *see* 474 F. Supp. at 681; text accompanying notes 14-16 *supra* (discussing scope of § 605); note 15 *supra* (basis for private cause of action under § 605).

[58] FCC Public Notice No. 11850, Jan. 24, 1979 (FCC determination that MDS transmissions are point-to-point communications).

[59] Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 682 (S.D.N.Y. 1979) (MDS is broadcasting); Home Box Office, Inc. v. Pay TV of Greater New York, 467 F. Supp. 525, 528 (E.D.N.Y. 1979) (MDS is not broadcasting). The *Orth-O-Vision* court reasoned that the FCC determined that MDS services were not broadcasting because of the primary use of MDS had been to provide commercial subscribers with specialized communications suited specifically to their needs. 474 F. Supp. at 682 n.10; *see* Midwest Corp., 53 F.C.C.2d 294, 300 (1975); Midwest Corp., 38 F.C.C.2d 897, 899 (1973). Consequently, the court in *Orth-O-Vision* stated that the FCC's conclusions did not preclude a finding that MDS services used to provide television programming of general appeal and marketed to large numbers of the public constituted "broadcasting." 474 F. Supp. at 682 n.10.

[60] 474 F. Supp. 672 (S.D.N.Y. 1979).

[61] *Id.* at 681-82; *see* text accompanying notes 35-39 *supra*.

[62] 474 F. Supp. at 681-82. The *Orth-O-Vision* court distinguished *KMLA*, stating that the FM radio station in *KMLA* intended its background subscription programming for business establishments only. *Id.* at 682 n.9. *Orth-O-Vision* held that because KMLA did not intend its programming to appeal to a mass audience, the multiplex transmissions were not "broadcasting." *Id.* at 682 & n.9. The court gave weight to the mass appeal of the MDS program content in determining that MDS signals were "broadcasting" intended for the general public. *See id.*

The *Orth-O-Vision* court also based its decision on the FCC's determination that subscription television, which differs from MDS, is broadcasting under the Act. *Id.*; *see* note 2 *supra* (discussing subscription television technology). The court reasoned that both MDS and subscription television transmissions require viewers to rent special receiving equipment, and both consist of programming that appeals to mass audience. 474 F. Supp. at 682.

to the public, the court held that section 605 did not protect HBO transmissions.[63] Contrary to the holding in *Orth-O-Vision*, however, the District Court for the Eastern District of New York held in *Home Box Office, Inc. v. Pay TV of Greater New York*[64] that section 605 did protect HBO's MDS transmissions.[65] The *Pay TV* court found *KMLA* persuasive.[66] Noting that viewers could not receive MDS transmissions on conventional television sets until special equipment converted the signal, the court reasoned that HBO intended that only subscribers receive its signals.[67] Therefore, HBO's transmissions were not "broadcasting" under the Act.[68]

Disagreement concerning the applicability of section 605 to pay TV transmissions has not been limited to the HBO/MDS cases.[69] Subsequent to the HBO cases, two pay TV companies offering STV services brought section 605 actions in federal court.[70] The companies sought injunctive relief against the manufacture and sale of devices capable of pirating the companies' program signals.[71] Two federal courts reached conflicting conclusions on the issue of whether section 605 protects an STV company from the unauthorized sale of decoders that enable viewers to enjoy the company's programming without paying subscription fees.[72] Unlike an MDS system which transmits a signal to specific points where receiving affiliates modulate the signal for television reception,[73] the STV system transmitted a scrambled signal directly to viewers' television sets.[74] Conventional sets received the signal, but the resulting image

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Therefore, the court concluded that subscription television transmissions are "broadcasting." *Id.*

[63] 474 F. Supp. at 682.

[64] 467 F. Supp. 525 (E.D.N.Y. 1979).

[65] *Id.* at 528.

[66] *See id.* The *Pay TV* court reasoned that since *KMLA* applied § 605 to subscription radio transmissions, the statute also applied to subscription television transmissions. *Id.* The *Pay TV* court's discussion appears gratuitous, however, since the defendant did not contest the applicability of § 605 to HBO's signals. *See id.*

[67] *Id.*

[68] *Id.*

[69] *See* text accompanying notes 51-68 *supra.*

[70] *See* Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980); National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379 (C.D. Cal. 1980).

[71] *See* Chartwell Communications Group v. Westbrook, 637 F.2d 459, 461 (6th Cir. 1980); National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 379 (C.D. Cal. 1980). In *National Subscription Television*, the plaintiff company sought both injunctive relief and punitive damages. *Id.* at 380.

[72] *See* Chartwell Communications Group v. Westbrook, 637 F.2d 459, 465-66 (6th Cir. 1980) (§ 605 protects STV); National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 381 (C.D. Cal. 1980) (§ 605 does not protect STV).

[73] *See* note 2 *supra.*

[74] Chartwell Communications Group v. Westbrook, 637 F.2d 459, 461 (6th Cir. 1980). Subscription television programming, like HBO programming, consists of movies, sports events and other programs of interest to a large audience. *Id.* at 460; *see* note 52 *supra.*

was unintelligible.[75] Subscribers leased decoding devices from the company to unscramble the program signal.[76]

In *Chartwell Communications Group v. Westbrook*[77] (*Chartwell*), the Sixth Circuit held that section 605 protects STV because STV transmissions are not "broadcasting" within the meaning of section 605.[78] The *Chartwell* court reasoned that although an STV company broadcasts programming to the general public, the company intends its programs for the exclusive use of subscribers.[79] Noting that an STV company transmits a signal that viewers can receive only through special equipment, the court concluded that STV is not intended for use by the general public.[80] The Sixth Circuit in *Chartwell* refused to follow the FCC's conclusion that STV is "broadcasting."[81]

In contrast to the Sixth Circuit's *Chartwell* decision, the District Court for the Central District of California displayed "great deference" to the FCC's determination that STV is "broadcasting."[82] The district court stated in *National Subscription Television v. S&H TV*[83] (*NST*) that the crucial factor to consider in determining whether STV is "broadcasting" is that STV programming is of interest to a large segment of the general public.[84] An STV company intends to broadcast its signal to the

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[75] Chartwell Communications Group v. Westbrook, 637 F.2d 459, 461 (6th Cir. 1980).

[76] *Id.*

[77] 637 F.2d 459 (6th Cir. 1980).

[78] *Id.* at 465-66.

[79] *Id.* at 465. The *Chartwell* court stated that availability and use are "separate concepts." *Id.*

[80] *Id.* The *Chartwell* court observed that STV programming had mass appeal and was available to anyone who wished to pay a subscription fee. *Id.* The court stated that while these factors favored a finding that STV is "broadcasting" under § 605, the inability of viewers to enjoy STV transmissions without special equipment negated such a finding. *Id.* The court cited *KMLA* as authority for its reasoning. *Id.*; *see* text accompanying notes 44-46 *supra.*

[81] 637 F.2d at 464-65; *see* Further Notice of Proposed Rulemaking and Notice of Inquiry, 3 F.C.C.2d 1, 8-11 (1966) [hereinafter cited as Further Notice]. The *Chartwell* court stated that the FCC's conclusion that STV is broadcasting was for regulatory purposes only. 637 F.2d at 464. The FCC determined that STV is broadcasting in response to charges by major television networks that the FCC lacked the power to authorize and regulate STV. *Id.*; Further Notice, *supra*, at 8-9. The Commission did not decide that STV was broadcasting within the meaning of § 605, but only that STV fit within the Act's general definition of broadcasting. 637 F.2d at 464; Further Notice, *supra*, at 8-10; *see* 47 U.S.C. § 153(o) (1976). The FCC concluded that it had authority to regulate STV as a broadcast service. Further Notice, *supra*, at 8-10. The *Chartwell* court found, however, that the FCC's ruling that STV is broadcasting for regulatory purposes is not binding authority for courts addressing the issues of whether STV is "broadcasting" in the context of § 605 and whether § 605 protects STV transmissions from unauthorized reception and use. 637 F.2d at 464-65.

[82] National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 381 (C.D. Cal. 1980).

[83] *Id.*

[84] *Id.*; *see* Further Notice, *supra* note 81, at 9 (FCC opinion that touchstone of broadcasting is intent of broadcaster to provide television service to as many members of public

public,[85] even though viewers need special equipment to decode the signal.[86] Accordingly, the *NST* court ruled that an STV company could not state a claim under section 605 for protection from distribution of devices capable of decoding the company's signal.[87]

The sharp disagreement among courts and the FCC over whether pay TV services constitute "broadcasting" exempt from section 605 protection suggests that radio communications technology has burgeoned beyond the scope of the Communications Act.[88] Pay TV technologies do not fit well into either of the two general classifications of radio communications existing when Congress enacted section 605.[89] MDS and STV services have characteristics of both point-to-point communications, which section 605 protects,[90] and broadcast communications, which section 605 excludes from its protective scope.[91] Consequently, courts applying section 605 to protect pay TV companies from signal pirates have emphasized that pay TV, like other point-to-point services, transmits a signal to specific persons.[92] Courts wishing to exclude pay TV from sec-

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as are interested); Fourth Report and Order on Subscription Television, 15 F.C.C. 2d 465, 472 (1968) (approving decision in Further Notice), *aff'd*, National Ass'n of Theater Owners v. F.C.C., 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

[85] The court in *National Subscription Television* (*NST*) found no distinction between the words "general public" in § 605 and "public" in § 153(o) of the Act. 48 RAD. REG. 2d at 380; *see* text accompanying notes 16 & 18 *supra*.

[86] 48 RAD. REG. 2d at 381. The *NST* court cited *Functional Music* as controlling authority on the question of whether STV programming is broadcasting under the Act. *Id.*; *see* text accompanying note 37 *supra*.

[87] 48 RAD. REG. 2d at 381.

[88] *See* National Ass'n of Theater Owners v. F.C.C., 420 F.2d 194, 198 (D.C. Cir. 1980) (responding to argument that FCC exceeded authority under Communications Act in authorizing STV because Act did not contemplate STV); Note, *Subscription Television, The FCC, And The Courts*, 15 ST. LOUIS U.L.J. 283, 288 (1970) (noting technological revolution in communications and suggesting that Act did not contemplate television).

[89] *See* STAFF REPORT, *supra* note 1, at 123-27 (suggesting that FCC should classify STV as hybrid technology with characteristics of both point-to-point and broadcasting services); First Report on Subscription Television Service, 23 F.C.C. 532, 541 (1957) (FCC proposal to classify STV as neither broadcasting nor point-to-point service for regulatory purposes); text accompanying notes 24 & 25 *supra* (discussing broadcasting and point-to-point communications). The FCC ultimately decided to classify STV as broadcasting for regulatory purposes. Further Notice, *supra* note 81, at 9; Fourth Report and Order on Subscription Television, 15 F.C.C. 2d 465, 472 (1968). The Sixth Circuit has decided, however, that STV has sufficient nonbroadcasting characteristics to merit § 605 protection. Chartwell Communications Group v. Westbrook, 637 F.2d 459, 465-66 (6th Cir. 1980); *see* text accompanying notes 77-81 *supra* (discussing *Chartwell*).

[90] Pay TV resembles point-to-point communication in that companies transmit program signals to a particular class of listeners. *See* text accompanying notes 53-56, 73-76 *supra*.

[91] Pay TV resembles broadcasting in that the program content has mass appeal and companies offer their service to all persons who wish to subscribe to it. *See* text accompanying notes 62, 63, 84 & 85 *supra*.

[92] Chartwell Communications Group v. Westbrook, 637 F.2d 459, 465 (6th Cir. 1980); Home Box Office, Inc. v. Pay TV of Greater New York, 467 F. Supp. 525, 528 (S.D.N.Y. 1979); text accompanying notes 64-68, 77-80 *supra*.

tion 605 protection have emphasized that pay TV companies, like other broadcasters, transmit programming of mass appeal for as many members of the public as wish to view the service.[93]

The hybrid nature of pay TV technologies raises a serious question of whether MDS and STV fall within the coverage of section 605.[94] The legislative history of section 605 does not elucidate the statute's purpose.[95] Courts have attributed various purposes to the provision. The purposes attributed to section 605 include protecting defendants from the admission at trial of evidence obtained through wiretapping,[96] protecting short-wave radio transmissions from unauthorized interception and divulgence,[97] and protecting telephone and telegram communications from divulgence by operators.[98] The suggested purposes of section 605 imply a general congressional intent that the statute should protect private messages transmitted via radio and wire between two persons or among a group of persons.[99] Typically, courts and the FCC have labeled such private messages as point-to-point communications.[100] Thus, a strong argument exists for the proposition that Congress' sole purpose in enacting section 605 was to protect the integrity of the nation's point-to-point communications system, including telephone, telegraph, and private radio transmissions.[101] By applying section 605 to pay TV, courts stretch the statute beyond its proper scope, since pay TV services are not strictly point-to-point communications.[102]

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[93] National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 381 (C.D. Cal. 1980); Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 681-82 (E.D.N.Y. 1979); text accompanying notes 60-63, 83-87 *supra.*

[94] *See* text accompanying notes 89-91 *supra.*

[95] *E.g.*, National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 381 (C.D. Cal. 1980); United States v. Russo, 250 F. Supp. 55, 58 n.2 (E.D. Pa. 1966); United States v. Hill, 149 F. Supp. 83, 85 (S.D.N.Y. 1957).

[96] United States v. Hill, 149 F. Supp. 83, 85 (S.D.N.Y. 1957); *see* note 14 *supra* (suggesting wiretap protection of § 605 no longer needed).

[97] United States v. Fuller, 202 F. Supp. 356, 358 (N.D. Cal. 1962).

[98] United States v. Russo, 250 F. Supp. 55, 58-59 (E.D. Pa. 1966); United States v. Sullivan, 116 F. Supp. 480, 481 (D.D.C. 1953).

[99] *See, e.g.*, United States v. Fuller, 202 F. Supp. 356, 358 (N.D. Cal. 1962) (Congress intended § 605 to protect all private radio communications); United States v. Sullivan, 116 F. Supp. 480, 481 (D.D.C. 1953) (Congress intended § 605 to protect wire communications such as telephone and telegraph).

[100] *E.g.*, Functional Music, Inc. v. F.C.C., 274 F.2d 543, 548 (D.C. Cir. 1959); National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 380 (C.D. Cal. 1980); Adelaide Lillian Carrell, 7 F.C.C. 219, 222 (1939).

[101] *See, e.g.*, United States v. Hill, 149 F. Supp. 83, 85 (S.D.N.Y. 1957) (§ 605 intended to protect privacy of telephone communications); United States v. Sullivan, 116 F. Supp. 480, 481 (D.D.C. 1953) (§ 605 intended to protect private message via telephone, telegraph, and private radio); text accompanying notes 96-98 *supra.*

[102] *See* notes 90 & 91 *supra.* Pay TV not only fails to come within § 605's coverage of point-to-point communications but also fails to come within § 605's exclusionary clause, since pay TV companies do not intend their signals for the use of the general public. *See id.*; text accompanying note 16 *supra.*

Courts invoking section 605 to protect pay TV companies from signal pirates regulate the pay TV market by discouraging competition that is harmful to the pay TV companies.[103] Nothing in the statute's legislative or judicial history suggests, however, that Congress intended courts to use section 605 to set market policy.[104] Congress alone has the authority to establish economic policy in the communications industry.[105] Accordingly, courts should not invoke section 605 to prohibit signal piracy.[106]

Without protection under section 605, however, pay TV companies have little defense against signal pirates. Companies that transmit programming to subscribers via MDS systems[107] can claim federal copyright protection from unauthorized retransmissions of their programming by affiliates.[108] Under the Copyright Act of 1976,[109] a pay TV company owning copyrighted program material[110] has the exclusive right to "perform"

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[103] National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 381 (C.D. Cal. 1980).

[104] *See* text accompanying notes 95-98 *supra.*

[105] Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348, 353 (9th Cir. 1964) (dictum), *cert. denied*, 379 U.S. 989 (1965); National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 381 (C.D. Cal. 1980). The commerce clause, U.S. CONST. art. I, § 8, cl. 3, grants Congress the power to regulate the communications industry. Fisher's Blend Station, Inc. v. State Tax Comm'n, 297 U.S. 650, 655 (1936); *see* Olson & Obserstein, *Aspects of Pay Television: Regulation, Constitutional Law, Antitrust*, 53 CAL. L. REV. 1378, 1384 (1965) [hereinafter cited as Olson & Oberstein]. Radio and television transmissions fall within Congress' power over interstate commerce. *See* 297 U.S. at 655 (Congress can regulate broadcasting under commerce clause, since broadcasting transcends state lines and is national in scope). Thus Congress has authority to regulate STV transmissions which travel freely through the airways and can easily cross state borders. *See id.*; note 2 *supra* (discussing STV technology). Even MDS transmissions which reach subscribers by cable and remain within state borders "affect" interstate commerce and thus come within the commerce clause, because much of the programming, such as sports events and movies, originated in other states. Olson & Oberstein, *supra*, at 1385; *see* note 2 *supra* (discussing MDS technology). In addition, local STV or MDS transmissions compete with other television programming and thus have a substantial economic impact on the television industry. Olson & Oberstein, *supra*, at 1385. This economic effect brings local pay TV transmissions within Congress' commerce power. *Id.*; *see* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (Congress can regulate local activity that has substantial economic effect on interstate commerce).

[106] National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 381 (C.D. Cal. 1980); *cf.* Cable Vision, Inc. v. KUTV, Inc., 335 F.2d 348, 353 (9th Cir. 1964) (suggesting in dictum that public policy alone not justification for granting cable television company judicial relief from unauthorized use of programming).

[107] *See* note 2 *supra* (discussing MDS systems).

[108] Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 675, 684-86 (S.D.N.Y. 1979); *see* text accompanying note 57 *supra* (discussing unauthorized retransmission of pay TV programming).

[109] 17 U.S.C. §§ 101-810 (Supp. II 1978).

[110] Under the Copyright Act of 1976, 17 U.S.C. §§ 101-810 (Supp. II 1978), copyright protection extends to motion pictures and other audiovisual works. *Id.* § 102(6). The Copyright Act broadly defines audiovisual works as works that consist of related images and which one can show by the use of projectors, viewers, or electronic equipment. *Id.* § 101. Thus, pay TV programming consisting of motion pictures and recorded sporting events is copyrightable material. 474 F. Supp. at 684.

the material publicly.[111] Thus, any unauthorized public performance of the company's copyrighted material infringes the company's exclusive right.[112] An affiliate's retransmission of a pay TV company's MDS signal is a public "performance" of the company's material.[113] Therefore, such a secondary transmission,[114] if unauthorized, violates the company's copyright in its material.[115]

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[111] 17 U.S.C. § 106(4) (Supp. II 1978). Under the Copyright Act, exhibition of a motion picture or other audiovisual work constitutes a "performance" of the work. *Id.* § 101. Transmitting a performance of a work to the public by means of any device is a "public performance" under the Act. *Id.*

[112] Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 685 (S.D.N.Y. 1979); 17 U.S.C. § 501(a) (Supp. II 1978). Unauthorized use of copyrighted material constitutes infringement only if the use violates an exclusive right of the copyright owner under the Copyright Act. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 154-55 (1975); 474 F. Supp. at 685; *see* 17 U.S.C. § 501(a) (Supp. II 1978). A copyright owner who has registered his copyright in the Copyright Office has standing to sue for infringement. 474 F. Supp. at 685; 17 U.S.C. §§ 410(a), 411(a), 501(b) (Supp. II 1978). Remedies for infringement include temporary and final injunctions against further infringing activity, and damages. *Id.* §§ 502, 504.

[113] Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 685 (S.D.N.Y. 1979); 17 U.S.C. § 501(a) (Supp. II 1978); 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.18[B] (1980) [hereinafter cited as NIMMER]; *see* note 111 *supra*. A pay TV company's MDS transmission to an affiliate is a "primary transmission" under the Copyright Act of 1976. 17 U.S.C. § 111(f) (Supp. II 1978). The affiliate's retransmission of the MDS signal to viewers is a "secondary transmission." *Id.* Although the Copyright Act's definition of "performance," *id.* § 101, *see* note 111 *supra*, does not expressly include secondary transmissions, authorities agree that the Act's structure and legislative history indicate that Congress intended secondary transmissions of copyrighted works, including pay TV programming, to constitute "performances" of the works. 474 F. Supp. at 685; 2 NIMMER, *supra*, § 8.18[B] at 8-197, § 8.18[D] at 8-206; H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 92, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5707.

Under the Copyright Act of 1909, which preceded the 1976 Act, the retransmission of copyrighted material did not constitute a "performance" of the material. Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); 474 F. Supp. at 685. *Fortnightly* and *Teleprompter* held that cable television companies did not "perform" copyrighted works when the companies retransmitted broadcast signals from television stations to viewers. 415 U.S. at 408-09; 392 U.S. at 399-401; *see* note 2 *supra* (discussing cable television). Since retransmissions of copyrighted material did not constitute "performances" of the material, the retransmissions did not infringe the copyright owner's exclusive right to perform his works. 415 U.S. at 412-15; 392 U.S. at 402; *see* text accompanying note 111 *supra*. While the Copyright Act of 1976 makes retransmissions of copyrighted material "performances," the Act provides that retransmissions by cable companies with FCC licenses do not infringe copyright. 17 U.S.C. §§ 111(c), (d) (Supp. II 1978); 2 NIMMER, *supra*, § 8.18[d] at 8-206 at 8-207.

[114] *See* note 113 *supra*.

[115] Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 685 (S.D.N.Y. 1979); *see* 2 NIMMER, *supra* note 113, § 8.18[B] at 8-195 to 8-198 (unauthorized secondary transmissions of copyrighted works constitute "performances" and infringe copyrights). While the Copyright Act of 1976 exempts some secondary transmissions from infringement status, a secondary transmission of copyrighted material constitutes infringement if the primary transmission is limited to reception by particular members of the public. 17 U.S.C. §§ 111, 111(b) (Supp. II 1978). Pay TV transmissions to receiving affiliates are primary transmis-

Although the Copyright Act protects a pay TV company offering MDS services, the Act apparently does not protect a company that transmits STV programming against unauthorized reception of its signal.[116] An STV company transmits its scrambled signal into the airways for subscribers to receive and unscramble with equipment rented from the company.[117] Unauthorized persons who use pirate devices to receive a company's transmissions intercept the signal and unscramble it.[118] STV pirates do not retransmit a company's programming, and thus do not "perform" a company's copyrighted works.[119] Therefore, STV pirates do not infringe a company's exclusive right to perform its copyrighted material.[120]

Before the Copyright Act of 1976, pay TV companies could have claimed protection from unauthorized reception and use of their transmissions under state common law of unfair competition.[121] The doctrine of unfair competition rests on the theory that one party should not reap the benefits of another party's expenditures of labor, skill and money.[122] A pay TV company that labors to compile and transmit its programming expects to realize profits from subscription and equipment rental fees.[123]

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sions within the meaning of § 111(b) of the Copyright Act. 2 NIMMER, *supra* note 113, § 8.18[D] at 8-206 to 8-207; *see* 474 F. Supp. at 685. Therefore, an unauthorized secondary transmission of copyrighted pay TV programming constitutes infringement. 474 F. Supp. at 685; 2 NIMMER, *supra* note 113, § 8.18[D] at 8-206.

[116] *See* note 2 *supra* (discussing STV). No court opinions have addressed the issue of whether STV companies can claim copyright protection from signal pirates.

[117] *Id.*

[118] *See* Chartwell Communications Group v. Westbrook, 637 F.2d 459, 461 (6th Cir. 1980) (suit by STV company against signal pirates).

[119] *See* text accompanying note 113 *supra.*

[120] *See* text accompanying notes 113 & 114 *supra.* Even if a court would consider the reception of STV transmissions by unauthorized persons as a "performance" under the Copyright Act, such reception by individuals or groups of viewers does not constitute a "public performance" of copyrighted works. *See* 2 NIMMER, *supra* note 113, § 8.18[C], at 8-200 to 8-201 (reception of television or radio signals in private homes, hotels or motels not "public performance" of transmitted material); text accompanying note 111 *supra.* Only unauthorized public performances of copyrighted works infringe the exclusive right of the owner of copyrighted audiovisual works. 17 U.S.C. §§ 106(4), 501(a) (Supp. II 1978); *see* text accompanying notes 111 & 112 *supra.*

[121] *See* KLMA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35, 44 (C.D. Cal. 1967) (subscription radio company granted unfair competition relief from unauthorized use of programming).

[122] International News Serv. v. Associated Press, 248 U.S. 215, 239-40 (1918). International News Service (INS) pirated news that Associated Press (AP) had compiled through its own effort and expense. *Id.* at 231. INS sold the news to competitors of AP. *Id.* The United States Supreme Court stated that INS had appropriated the fruits of AP's labors. *Id.* at 239-40. The Court held that INS had competed unfairly by diverting AP's profits. *Id.* at 240. The policy underlying unfair competition theory is that every competitor in the market should exercise his own skill and resources, and not appropriate the product of another person's efforts. 2 R. CALLMAN, THE LAW OF UNFAIR COMPETITION AND TRADEMARKS 876 (2d ed. 1950). *See generally* 9 ARIZ. L. REV. 315 (1967).

[123] *See* text accompanying note 3 *supra.*

Persons who sell devices capable of receiving the company's signals to nonsubscribers, or who transmit the company's programming to nonsubscribers without remitting revenues to the company, benefit from the company's expenditures of labor, skill, and money.[124] Such interference with a business at the point where a company expects to realize its profits constitutes unfair competition.[125]

The Copyright Act, however, preempts state unfair competition claims by pay TV companies.[126] The Act expressly abolishes all state law rights in copyrightable material that are "equivalent" to any of the exclusive rights of copyright owners under the Act.[127] The exclusive rights of copyright owners include the rights to reproduce, perform, distribute, or display their works.[128] The right that a pay TV company seeks to protect through a state unfair competition claim is the right to transmit its programming for a profit.[129] The right of a pay TV company to transmit its programming for a profit is "equivalent" to a company's exclusive right under the Copyright Act to exhibit its copyrighted material.[130] Consequently, the Copyright Act preempts state unfair competition claims by pay TV companies against signal pirates, even though STV com-

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[124] *See* KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35, 44 (C.D. Cal. 1967) (unauthorized persons who received and marketed plaintiff subscription radio station's transmissions intended for subscribers appropriated fruits of plaintiff's labor and expense).

[125] International News Service v. Associated Press, 248 U.S. 215, 240 (1918); KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35, 44 (C.D. Cal. 1967). Two Supreme Court cases subsequent to *International News Service* have restricted state unfair competition theory. *Unfair Competition*, *supra* note 6, at 534; *see* Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 238-39 (1964); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231-32 (1964). The companion cases of *Sears* and *Compco* held that when an article is unprotected under federal patent or copyright laws, state unfair competition law may not prevent persons from copying the article. 376 U.S. at 238-39; 376 U.S. at 231-32. Since pay TV program material is subject to copyright, *Sears* and *Compco* would not bar companies from asserting unfair competition claims against pirates. *See* note 110 *supra*.

[126] Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 683-84 (S.D.N.Y. 1979); 17 U.S.C. § 301(a) (Supp. II 1978). The supremacy clause of the United States Constitution, U.S. CONST. art. VI, § 2, invalidates state law that is contrary to or addressed by federal legislation. *E.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

[127] 17 U.S.C. § 301 (Supp. II 1978); *see* Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 683-84 (S.D.N.Y. 1979).

[128] 17 U.S.C. § 106 (Supp. II 1978).

[129] Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 684 (S.D.N.Y. 1979); *see* text accompanying note 123 *supra* (generally describing operation of pay TV company).

[130] Orth-O-Vision, Inc. v. Home Box Office, Inc. 474 F. Supp. 672, 684 (S.D.N.Y. 1979); *see* 1 NIMMER, *supra* note 113, § 1.01[B][1] at 1-9 to 1-11 (citing *Orth-O-Vision*). Even though a right that state law protects is not identical to an exclusive right under the Copyright Act, the state law is preempted if the right it protects "comes within the general scope of copyright." 474 F. Supp. at 684; *see* 1 NIMMER, *supra* note 113, § 1.01[B][1] at 1-9 to 1-11.

panies cannot gain copyright protection against pirates.[131]

Pay TV companies have few legal remedies for signal piracy.[132] Thus Congress should act to ensure the continued success of pay TV, either by amending section 605 or by enacting legislation specifically prohibiting piracy of pay TV programming.[133] Congressional response to the need for pay TV protection could have great impact on the development of a future television service, direct broadcast satellites (DBS).[134] A DBS system involves the transmission of television signals to a satellite which transmits the signals to receivers installed at individual subscribers' homes.[135] The receiver consists of a parabolic dish antenna and equipment to convert the signals to a lower frequency for conventional television reception.[136]

Because of the enormous costs of introducing DBS to the communications market, the success of the satellite industry will depend upon its ability to attract large numbers of subscribers willing to purchase receivers.[137] DBS will experience intense competition from existing forms of pay TV and can ill afford additional competition from makers of pirate satellite receivers.[138] DBS, like pay TV, is a hybrid communications service which will not fit within the protective scope of section 605.[139] In addition, the FCC has announced an intention to pursue a hands-off policy in regulating DBS.[140] Therefore, if DBS is to become a viable entertainment option for the American television audience, Con-

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[131] Orth-O-Vision, Inc. v. Home Box Office, Inc., 474 F. Supp. 672, 684 (S.D.N.Y. 1979); *see* 1 NIMMER, *supra* note 113, § 1.01[B][1] at 1-17 (Copyright Act preempts state unfair competition doctrine of misappropriation); text accompanying notes 116-20 *supra* (reason STV companies cannot claim copyright protection). Although the behavior that a pay TV company seeks to enjoin under state law does not violate the Copyright Act, the Act preempts the state law if the state law protects a right "equivalent" to a right protected under the Act. 1 NIMMER, *supra* note 113, § 101[B][1] at 1-11.

[132] *See* text accompanying notes 107-31 *supra.*

[133] *See* National Subscription Television v. S&H TV, 48 RAD. REG. 2d (P&F) 379, 381 (C.D. Cal. 1980) (dictum) (unless Congress amends § 605, courts should not grant relief under § 605 against signal piracy).

[134] *See* Henry, *supra* note 7, at 576-77 (discussing international use of direct boradcast satellites (DBS) and stating that DBS survival will require international legal protection against piracy).

[135] STAFF REPORT, *supra* note 1, at 7. A direct broadcast satellite would orbit the earth 22,300 miles above the equator. *Id.* The satellite could transmit signals covering entire time zones, or could transmit spot beams covering smaller areas. *Id.* at 9. With numerous satellites in orbit, subscribers could enjoy many channels of DBS programming. *Id.*

[136] *Id.* at 7-8.

[137] *Id.* at 9. If produced in high volume, DBS receiving equipment would cost subscribers between $200 and $500. *Id.* at 8. The financial success of DBS will require that several million households purchase or rent receiving equipment. *Id.*

[138] *See* STAFF REPORT, *supra* note 1, at 10.

[139] *See id.* at 129; text accompanying notes 89-102 *supra.*

[140] BROADCASTING, Oct. 6, 1980, at 24. The FCC has stated that the highly competitive nature of the communications market precludes the need for heavy regulation of DBS. *Id.*

gress should take immediate steps to protect the industry from signal piracy.[141]

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[141] *See* note 134 *supra.*