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RECENT DEVELOPMENTS

UNAUTHORIZED INTERCEPTION OF SATELLITE PROGRAMMING: DOES SECTION 705's "PRIVATE VIEWING" EXEMPTION APPLY TO CONDOMINIUM AND APARTMENT COMPLEXES?

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Unauthorized reception of pay-television programming continues to cost the pay-television industry hundreds of millions of dollars a year.¹ A National Cable Television Association study conducted in 1983 placed the industry losses at a staggering \$897 million, and estimated a nationwide total of 6.75 million unauthorized users, comprising 12.5 percent of all cable service.²

One of the key provisions of the Cable Communications Policy Act of 1984 (hereinafter referred to as "the Act"), section 705,³ not only established stronger penalties and remedies for the unauthorized interception of satellite-delivered signals⁴ from program originators, but also legalized the reception of unscrambled satellite programming by owners of backyard home earth stations, under limited circumstances. Prior to 1980, many receive-only earth stations cost between \$25,000 and \$100,000. But since 1980, the average price of backyard dishes has dropped 50 percent each year, bringing the price down to between \$1,500 and \$3,000.⁵ As a result

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1. *Service Theft Continues to Cost Cable Millions*, *Multichannel News*, March 10, 1986 at 1.

2. *Id.*

3. 47 U.S.C. § 705 (1984).

4. H.R. Rep. No. 98-934, 98th Cong. 2d Sess., reprinted in 1984 U.S. Code Cong. & Ad. News 4655, 4745. [hereinafter cited as "U.S. Code News"].

5. Barbieri, *Backyard Dishes: Helping Themselves to Everything in Sight*, *CHANNELS*

of the partial legalization of their use and drastic decrease in price, observers expected that 60,000 new dishes would be installed each month in 1985.⁶

However, it seems that more than home owners are attempting to utilize section 705's "private viewing" exemption⁷ in order to install and use earth stations on their premises. Multiple dwelling unit entities, such as condominiums and apartment complexes, on a recurring basis have installed satellite dishes, in essence, establishing private cable systems or Satellite Master Antenna Television (SMATV) systems, yet have not paid for or obtained authorization for use of the programming services.

If the condominium association or apartment management fails to receive authorization from, and make payments to, the program originator or its agent lawfully designated for the purpose of authorizing such reception, is it violating section 705(a), or can it seek solice in the exemption from liability provided in section 705(b)? This article will analyze the application of the so-called "private viewing" exemption to the multiple dwelling unit, and will assume that the signals received are unscrambled and that no marketing system is in place to serve such residential units.⁸

The Cable Communications Policy Act of 1984, *inter alia*, amended section 605 of the Communications Act of 1934 in order to deal with "[t]he growing practice of individuals taking down satellite delivered programming for private, home viewing by means of privately owned backyard earth stations, as well as the increas-

FIELD GUIDE '85, 64 (1985).

6. *Id.*

7. 47 U.S.C. § 705(b) (1984).

8. If the programming involved is encrypted and/or the program originator has a marketing system established in the area where the multiple dwelling unit is located, this article's analysis is moot since such a marketing system defeats the private viewing exemption. Once such a system is established, all individuals within that system's area must "obtain authorization for private viewing. . . ." 47 U.S.C. Section 705(b)(2)(B) (1984). However, "subsection (b) envisions a licensing mechanism that is put forward in good faith and is truly operational and is not a mere sham or avoidance scheme to deny individuals the opportunity to privately view unencrypted satellite cable programming free from liability." 130 Cong. Rec. S14286 (October 11, 1984) (Statement of Sen. Packwood, Chairman of the Committee on Commerce, Science and Transportation on the House Amendments to S.66) [hereinafter cited as Statement of Sen. Packwood]. Similarly, another legislator commented that:

[I]f a programmer that sells cable programming wishes to market unscrambled signals to home earth station users and establishes a good faith system to do so, then there is a lawful requirement for payment. The intention of the legislation, however, is that there must be realistic selling of the programming and there cannot be an attempt to deprive any individual of satellite viewing rights.

98 Cong. Rec. H10446 (daily ed., Oct. 1, 1984) (Comments of Rep. Tauzin).

ing need to adopt stronger penalties and remedies for the unauthorized interception of signals prohibited under section 605."⁹ To reach this goal of strengthening the remedies and penalties for unauthorized interception of signals, section 605 was redesignated as section 705(a), and subsections (b) (the private viewing exemption), (c) (definitions) and (d) (remedies and penalties) were added.

Section 705(b) provides:

(b) Exceptions

The provisions of subsection (a) of this section shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if -

- (1) the programming involved is not encrypted; and
- (2) (A) a marketing system is not established under which -
 - (i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and
 - (ii) such authorization is available to the individual involved from the appropriate agent or agents; or
 (B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming have obtained authorization for private viewing under that system.¹⁰

The policy behind the authorization of private viewing was to strike a balance between the rights of backyard satellite dish owners and those with proprietary interests in the satellite cable programming.

The amendments made by this legislation are intended, however, to provide satellite cable programming suppliers in the future with two clear alternatives for the protection of their satellite transmissions. They may either scramble their signal, or leave their signal unscrambled and establish a marketing system that results in individuals being authorized to receive the satellite cable programming through a compensation scheme . . . Unauthorized use liability, in the context of unencrypted satellite programming, would not attach to either the individual dish owner or the manufacturer, importer, distributor or seller if an authorization program for the receipt of payment is not established and made available.¹¹

9. Statement of Sen. Packwood, *supra* note 8.

10. 47 U.S.C. § 705(b) (1984).

11. Statement of Sen. Packwood, *supra* note 8.

However, on the face of the statute, it appears that the limited section 705(b) exemption is inapplicable to a multiple dwelling unit since it is not an "individual" engaged in "private viewing." Since there is no case law directly on this issue¹² and since the statute does not clearly resolve the question, the analysis must turn to the legislative history of the Act.

A major purpose of the limited exemption to section 705(a), contained in section 705(b), was to permit individuals in rural areas to receive satellite cable programming until such time as a marketing system is established to serve them. As Representative Albert Gore, Jr. of the House Subcommittee on Telecommunications, Consumer Protection and Finance, stated: "This bill . . . protects the interests of programmers and protects and promotes the interest of the many hundreds of thousands of rural Americans who are buying satellite dishes."¹³ Nowhere in the legislative history can it be shown that Congress intended section 705(b) to apply to condominium or apartment complexes or other multiple dwelling units that have historically paid for satellite cable programming. In fact, the clear language of the statute itself as well as the legislative history is to the contrary.

As is set forth more fully above, the language of section 705(b) makes it clear that the exemption from liability afforded by that section applies only "to the interception or receipt by any *individual* . . . of any satellite cable programming for private viewing"¹⁴ Further, the 1984 Act defines "private viewing" as "the viewing for private use in *an individual's* dwelling unit by means of *equipment owned or operated by such individual*, capable of receiving satellite programming directly by satellite."¹⁵ The legislative history defines an "individual's dwelling unit" to include "a vacation home, an individual's mobile home unit (but not a mobile

12. *But see* American Television And Communications Corp. v. Floken, Ltd., 429 F. Supp. 1462 (M.D. Fla. 1986) (order granting preliminary injunction) (J. Sharp acknowledged this exception to liability, but stated that it "is little solace to defendant [hotel/motels] . . . [because it] was created to protect individual owners of backyard earth stations. . . ."). *See also* Entertainment and Sports Programming Network v. Edinburg Community Hotel, Inc., 623 F. Supp. 647 (S.D. Tex. 1985). Recently, however, two lawsuits were filed against multiple dwelling units, a condominium association and an apartment complex, for the unauthorized use of a satellite dish for receiving and redistributing satellite signals. Thus, this particular issue may receive judicial interpretation in the near future. *See* Showtime/The Movie Channel, Inc. v. Covered Bridge Condominium Association, Inc., Case No. 85-8676-CIV-ROETTGER (S.D. Fla. 1986); Centel Communications Company v. Westlake Champions Park, Ltd., Case No. H-86-1096 (S.D. Tex. 1986).

13. 98 Cong. Rec. H10443 (daily ed. Oct. 1, 1984) (statement of Rep. Gore).

14. 47 U.S.C. § 705(b) (1984) (emphasis added).

15. 47 U.S.C. § 705(c)(4) (1984) (emphasis added).

home park), an individual's recreational motor home vehicle or boat which is designed with sleeping accommodations for no more than a few people."¹⁶

The explicit language of the Act demonstrates that the intent of Congress was to allow only *individuals* who own or operate their *own* backyard satellite receiving equipment to fall within this narrow and limited exemption. The multiple dwelling unit, however, is not "an individual," but rather is an operator of a SMATV system that redistributes programming to hundreds of residents.

Furthermore, the legislative history explains that private viewing "is *not* intended [to] . . . include any retransmission by so-called "private cable" or "*satellite master antenna television*" systems. Nor is it contemplated that *an individual may redistribute programming* received by his satellite equipment to the homes or residences of his neighbors."¹⁷ Since Congress has defined a SMATV system as a "private cable system . . . [which] serves only residential apartment, cooperative, condominium and any other multiple unit dwelling complexes,"¹⁸ it further supports the view that that section 705(b) does not apply in these circumstances.

In an unauthorized interception case, a defendant condominium or apartment may defensively raise the section 705(b) exemption, arguing that a residential condominium is composed of private dwelling units and the viewing within the condominium by its residents of unencrypted satellite cable programming received on a commonly owned earth station is private viewing within the meaning of section 705(b). As one legislator stated regarding the legislative intent in enacting section 705(b), "[i]t is my understanding that the intention of this legislation places limitations on the right to view satellite television programming in one's home or other dwelling place."¹⁹ Additionally, one commentator has stated that "Congress created a 'safe harbor' within which consumers, using satellite earth stations to view unscrambled satellite cable programming in the privacy of their homes, would be freed from charges that they were 'pirates,' using their earth stations to obtain booty in violation of Federal law."²⁰

16. U.S. Code News *supra* note 4, at 4741.

17. U.S. Code News *supra* note 4, at 4749-50.

18. REPORT OF THE SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION S.66, Report No. 98-67, 98th Cong., 1st Sess., at 19 (1983).

19. 98 Cong. Rec. H10446 (daily ed., Oct. 1, 1984) (Comments of Rep. Tauzin).

20. Brown and Helland, "Section 605 of the Communications Act; Teaching a Salty Old Sea Dog New Tricks," 34 CATH. U.L. REV. 635 (1985).

Nonetheless, this reasoning is not only unsupported by the language of the Act, but is contrary to its legislative history. Even Senator Goldwater, Chairman of the Communications Subcommittee and sponsor of the Senate bill, commenting recently on the Act, stated that the "cable companies won severe penalties for theft of their services by motels, *apartment projects*, bars and the like" ²¹

In sum, the distribution system established by multiple dwelling units — a single satellite dish distributing the programming to many condominium or apartment units — is a classic SMATV system. Thus, it must obtain authorization to intercept and redistribute satellite cable programming from program originators, such as Home Box Office, Inc., Showtime/The Movie Channel Inc., or ESPN, Inc., or their authorized licensees, such as the local cable television system operator.

It further appears from the legislative history that one goal of the Act is to foster SMATV systems in order to promote competition in the communications marketplace. The legislature felt that SMATV systems are an "important component . . . [and] have great potential in competing in the communications marketplace." ²² This portion of the legislative history is additional support for this conclusion. Allowing an apartment or condominium to receive satellite cable programming without authorization or license would be contrary to the policy of promoting SMATV systems, which must obtain authorization from the program originators to distribute their signals. A legal SMATV could never effectively compete in the marketplace with a competitor which does not incur the same programming costs.

Finally, expanding the section 705(b) exemption to include an apartment or condominium will result in the exemption swallowing the rule. Every condominium apartment complex, mobile home park, apartment building and private home development with a satellite dish would qualify. To follow such an interpretation would not be a step, but a giant leap, toward destroying the viability of the satellite programming industry and undermining the narrow backyard satellite dish exemption.

Indeed, Representative Timothy Wirth, Chairman of the House Subcommittee on Telecommunications, Consumer Protection and Finance and author of section 705 of the Cable Communications Policy Act of 1984, highlighted the very narrow scope of

21. Lyon, *Barry Goldwater Still Speaking His Mind*, Dish Magazine 8 (Nov., 1985).

22. U.S. Code News *supra* note 4, at 4719.

the exemption afforded by section 705(b) and concluded, "[t]o expand this narrow interpretation is to dilute drastically the very strong disincentives Congress intended to aim at those who would intercept programming without paying for it, which, if left unchecked, will deal a serious blow to programming services."²³

Thus, based upon the above analysis, a condominium association or apartment complex management cannot successfully utilize the "private viewing" exemption as an affirmative defense against a section 705(a) claim for unauthorized reception and distribution of unencrypted satellite cable programming.

23. Letter from Representative Wirth to Mark S. Fowler, Chairman, Federal Communications Commission (Nov. 26, 1985) (discussing Section 705).