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Richard L. Brown

Lauritz S. Helland

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## ARTICLES

### SECTION 605 OF THE COMMUNICATIONS ACT: TEACHING A SALTY OLD SEA DOG NEW TRICKS

*Richard L. Brown\**  
*and Lauritz S. Helland\*\**

For over fifty years, section 605 of the Communications Act<sup>1</sup> has stood, with considerable judicial assistance, as a stalwart sentinel defending the secrecy of many communications transmitted via the public spectrum. Then, in 1984, as if in direct defiance of Orwellian predictions, Congress lifted the shroud of secrecy by proclaiming that satellite cable programming was not protected by section 605 from viewing by home satellite earth station consumers. In so acting, 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.

The safe harbor that was created stands as a snug haven offering protection from the stormy seas created by expansionist judicial interpretations of section 605. The safe harbor manifests congressional recognition of the political reality of the rapid growth of home earth stations among consumers all over the nation. But, rather than resolving all problems that have developed under this ancient statute, the safe harbor has provided but one port in a storm. Periodic squalls will inevitably continue as earth station users, as well as others, continue to test the meaning and effect of this old and enigmatic statute.

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\* Senior Partner, Brown & Finn, chartered. B.A. 1966, Emory University; J.D. 1969, New York University.

\* Associate, Brown & Finn, chartered. B.A. 1970, University of Washington; J.D. 1973, University of Washington.

1. The Communications Act of 1934, Pub. L. No. 73-416, § 605, 48 Stat. 1103 (1934) (codified at 47 U.S.C. § 605 (1982)).

## I. HISTORY OF HOME SATELLITE EARTH STATIONS

Five years ago, consumer use of satellite earth stations (often simply called satellite dishes) and the industry spawned by such use, did not exist. Today, more than one million consumer-owned satellite dish antennas have been installed at homes in all parts of the United States<sup>2</sup> enabling earth station owners to have direct access to a rich variety of information, entertainment, cultural and educational programming transmitted by satellite. Many of these consumers traditionally have been unserved or underserved by conventional broadcast or cable television services. Deregulation by the Federal Communications Commission, which removed licensing and size restrictions of dish antennas,<sup>3</sup> coupled with technological developments in the late 1970's making possible the construction of relatively inexpensive but reliable earth stations, led to a proliferation in the use of such satellite dish antennas.<sup>4</sup> This proliferation occurred first in rural areas<sup>5</sup> and then, as the benefit of direct access to satellite transmissions became more widely known, in more populated parts of the country.

These developments were not welcomed by some within the telecommunications establishment. Satellite program distributors, whose principal customers were cable television systems, initially adopted a position that the sale and use of earth station equipment to view their programming without permission infringed copyrights and violated section 605.<sup>6</sup> At the same time, most satellite programmers established policies refusing to authorize viewing by consumer dish owners.<sup>7</sup> Local franchised cable television systems viewed earth station dealers and their customers as "pirates." One cable system in Wichita, Kansas, sued an earth station retailer, Starlink Communications Group, Inc., for ten million dollars, claiming that the dealer's sales of earth stations to consumers violated section 605 and the Copyright Act.<sup>8</sup>

Despite this opposition, the home earth station market continued to grow.

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2. 131 CONG. REC. S1216 (daily ed. Feb. 6, 1985) (statement of Sen. Goldwater).

3. Deregulation of Receive-only Earth Stations, 74 F.C.C.2d 204 (1979).

4. *Unauthorized Reception of Subscription Television: Hearings on S. 66 Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the Senate Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 106 (statement of Richard L. Brown, Partner, Brown & Finn.) [hereinafter cited as *Unauthorized Reception*].

5. *Id.* at 8 (statement of Hon. Charles Rose).

6. See, e.g., Letters from HBO to Don Linn and National Microtech, reprinted in *Unauthorized Reception*, *supra* note 4, at 127-29.

7. *Id.* at 121-46.

8. *Air Capital Cablevision, Inc. v. Starlink Communications Group*, 601 F. Supp. 1568 (D. Kan. 1985). Shortly after the action was filed, the cable system voluntarily dismissed its Copyright Act claims. On Feb. 13, 1985, the district court ruled that the cable system had no standing to pursue its Communications Act claims, and that the earth station retailer did not violate former § 605 or new § 705 of the Act. *Id.*

By 1984, 60,000 earth stations were being sold to consumers nationwide each month.<sup>9</sup> Threatened by the *Starlink* case and by several legislative attempts between 1980 and 1984 to, in effect, outlaw home satellite earth station use, the industry sought congressional relief.

## II. THE SAFE HARBOR

Relief came through enactment of the Cable Communications Policy Act of 1984.<sup>10</sup> Section 5 of the Act evidences a congressional recognition of the legality and legitimacy of home satellite earth stations.<sup>11</sup> In addition, the Act is a forceful congressional response to attempts to use the Communications Act's secrecy provision to prevent the continued development of the industry.<sup>12</sup>

The new law redesignates section 605 of the Communications Act as section 705(a) and adds a new section 705(b) specifically to exclude from section 705(a) the "interception or receipt by any individual" of "any satellite cable programming for private viewing if the programming involved is not encrypted [scrambled]" and if a "marketing system" for nonencrypted programming has not been established.<sup>13</sup> If a "marketing system" is established, it takes precedence over the safe harbor.<sup>14</sup>

"Satellite cable programming" is defined by section 705(c)(1) as "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."<sup>15</sup> "Private viewing" is not defined, but the legislative history associated with the 1984 Act reveals that the term "is intended to describe a situation whereby an individual purchases or otherwise acquires satellite receiving equipment and uses such equipment to receive satellite cable programming which he views within his private dwelling place."<sup>16</sup> The term "marketing system" is likewise not defined. The legislative history reveals, however, that the provision's drafters contemplated a marketing plan developed by "good faith marketplace negotiation" between representa-

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9. See *supra* note 2.

10. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C.A. §§ 521-611 (West Supp. 1985)).

11. 130 CONG. REC. S14283-85 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater).

12. *Id.*; see also 130 CONG. REC. H10443 (daily ed. Oct. 1, 1984) (statement of Rep. Gore); 130 CONG. REC. H10446 (daily ed. Oct. 1, 1984) (statement of Rep. Rose).

13. Cable Communications Policy Act, *supra* note 10, at § 5(b) (to be codified at 47 U.S.C. § 705(b)).

14. *Id.*

15. Cable Communications Policy Act, *supra* note 10, at § 5(c) (to be codified at 47 U.S.C. § 705(c)).

16. 130 CONG. REC. S14288 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood).

tives of programmers and viewers.<sup>17</sup> Such a "marketing system" for unscrambled signals may not be imposed unilaterally, nor employed as a means to deny viewers access to satellite programming.<sup>18</sup> The burden of establishing such a system rests with those who control the satellite programming.<sup>19</sup> Unless a marketing system meeting the requisites of the Act is established, exposure to liability under section 705(a) for individual receptions of unscrambled satellite cable programming will not occur.<sup>20</sup>

As noted, section 705(b) protects only "individual" receptions of satellite cable programming for "private viewing."<sup>21</sup> Commercial uses of satellite earth stations are not protected by the new provision, but are relegated to the murky seas of the rechristened section 705(a).

By adopting a safe harbor approach, Congress has recognized and legitimized the recent rapid proliferation in the use of consumer-owned satellite dish antennas to receive most existing television transmissions from communications satellites. At the same time, Congress has for the first time imposed specific criminal penalties on persons found to have violated the provision. Section 705(d)(1) provides that any person willfully violating section 705(a) "shall be fined not more than \$1,000 or imprisoned for not more than six months, or both."<sup>22</sup> Section 705(d)(2) states that any person violating section 705(a) "willfully and for purposes of direct or indirect commercial advantage or private gain" shall be fined "not more than \$25,000 or imprisoned for not more than one year" for first convictions, and "not more than \$50,000 or imprisoned not more than two years" for subsequent convictions.<sup>23</sup>

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17. 130 CONG. REC. S14284 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater); see also 130 CONG. REC. H10446 (daily ed. Oct. 1, 1984) (statement of Rep. Rose); 130 CONG. REC. H10443 (daily ed. Oct. 1, 1984) (statement of Rep. Gore).

18. 130 CONG. REC. S14284 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater).

19. 130 CONG. REC. S14287 (Oct. 11, 1984).

20. *Id.*

21. See *supra* note 16.

22. See Cable Communications Policy Act, *supra* note 10, at § 5(d)(1) (to be codified at 47 U.S.C. § 705(d)(1)).

23. See Cable Communications Policy Act, *supra* note 10, at § 5(d)(2) (to be codified at 47 U.S.C. § 705(d)(2)). Some concern has been expressed that penalties for violations of the statute may be much higher. On Oct. 12, 1984, the new Comprehensive Crime Control Act of 1982, Pub. L. No. 98-473, became law. 18 U.S.C. § 3551 (1982) of that Act states that "[e]xcept as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute" shall be sentenced to probations, fines and imprisonments as provided elsewhere in the Act. 18 U.S.C. § 3571 (1982) authorizes fines as high as \$250,000 for individuals and \$500,000 for organizations. While the sentencing provisions of the Crime Control Act would appear to apply by their general terms to violations of § 705(a), it is a well established rule of statutory construction that where one statute deals with a subject in general terms and another deals with it in a more specific way, the more specific statute will control. *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Crooker v. Bureau of Alcohol, Tobacco &*

The creation of the safe harbor and the addition of criminal sanctions for violations of section 705 will likely give the statute new significance as courts begin to wrestle with issues presented by the rapid emergence of the new communications technologies. As the courts begin to address these issues, problems in interpreting and applying the statute—problems created in large part because of its enigmatic language and limited legislative history, augmented by varying judicial attempts, mostly by lower courts, to decipher its meaning and purpose—could intensify until higher courts, or Congress, are forced to reexamine the entire concept of secrecy in mass communications.

Short of such a reexamination, the statute can be interpreted and applied in a manner that is consistent with both the discernible purpose of its drafters and the concerns voiced by courts construing its terms. Such an interpretation would find liability only when communications have been “intercepted and divulged” or “received and used” without permission from their senders after reasonable efforts have been made by the senders to safeguard them from such interception or reception. This interpretation should assist senders of communications in their reasonable attempts to protect their transmissions from unauthorized and unwarranted intrusions, but not to the point of penalizing persons who receive transmissions that are attractive, easy to receive and technically unprotected from mass reception. The interpretation would facilitate the statute’s principal objective of safeguarding the means of transmission while discouraging its use as an ersatz “copyright” law by those seeking to protect interests in communications too limited to warrant protection under the Copyright Law. To understand why the suggested interpretation is consistent with the purpose and evolution of section 705(a), a review of its legislative and judicial history is appropriate.

#### A. *Legislative History*

The first thing revealed by an examination of section 705(a)’s legislative history is that it does not shed much light upon the statute’s meaning or purpose. The United States District Court for the District of Columbia has noted that the history is “of minimal help in clarifying the ambiguity that

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Firearms, 670 F.2d 1051 (1981). See 2 A. SUTHERLAND, STATUTORY CONSTRUCTION § 51.05 (4th ed. 1973). This rule is particularly applicable to criminal statutes in which specific provisions relating to particular subjects carry smaller penalties than general provisions. *Robinson v. United States*, 142 F.2d 431 (8th Cir. 1944). Applying this principal, the Supreme Court has held that general sentencing statutes could not be applied to more specific criminal statutes with their own sentencing provisions. *Busic v. United States*, 446 U.S. 398 (1980); *Simpson v. United States*, 435 U.S. 6 (1978). Because § 705(d) imposes specific penalties for violations of § 705(a), the more general penalties set forth in the Crime Control Act would not appear to apply.

plagues [its] meaning . . . ."<sup>24</sup> A California District Court agreed, noting that "the legislative history surrounding [the statute] is uncertain and we are precluded from utilizing the usual canon that the scope of a provision is determined by its purpose."<sup>25</sup> Nonetheless, some facts can be adduced from a review of the statute's history.

The statute was drafted in response to the International Wireless Telegraph Convention, which was executed by the United States and other nations at Berlin on November 3, 1906 (the Berlin Convention) and ratified by the United States Senate on April 3, 1912.<sup>26</sup> The principal objective of the Convention was to establish international standards for the regulation of ship-to-shore wireless telegraphic communications and to establish networks of coastal stations connected to the established line telegraph systems.<sup>27</sup> The service regulations adopted with the Convention required shipboard stations to be licensed by the government with which the vessel was registered.<sup>28</sup> These regulations required shipboard operators to hold government certificates attesting to their professional efficiency and stating "that the Government has bound the operator to secrecy with regard to the correspondence."<sup>29</sup>

### 1. *Radio Act of 1912*

A bill to regulate radio communication, drafted jointly by the former Department of Commerce and Labor, the War Department, the Department of the Navy and the Department of the Treasury was initially introduced and passed in the Senate in 1910.<sup>30</sup> A similar bill, although favorably reported, did not pass the House of Representatives.<sup>31</sup>

These bills were reintroduced in substantially identical form in both houses in 1911 and were referred to the Senate Commerce Committee and the House Committee on the Merchant Marine and Fisheries, where hearings were scheduled in early 1912.<sup>32</sup> The House bill included a regulation to protect the secrecy of messages: "Every operator shall be obligated in his

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24. *Reston v. FCC*, 492 F. Supp. 697, 706 (D.D.C. 1980).

25. *National Subscription Television v. S & H TV*, No. CV 80-829-LTL (C.D. Cal. Aug. 4, 1980).

26. International Wireless Telegraph Convention, Nov. 3, 1906; 37 Stat. 1565 (1912).

27. 37 Stat. at 1565-66.

28. Convention, Serv. Reg. VI, 1; 37 Stat. at 1583.

29. *Id.* at 4; 37 Stat. at 1584.

30. S. REP. NO. 698, 62d Cong., 2d Sess. 2 (1912); *To Regulate Radio Communications: Hearings on H.R. 15,357 Before the House Comm. on the Merchant Marine & Fisheries*, 62d Cong., 2d Sess. 5, 124 (1912).

31. S. REP. NO. 698, 62d Cong., 2d Sess. 2 (1912).

32. *Id.* at 2-3.

license, and shall preserve faithfully, the secrecy of radiograms which he may receive or transmit, and for failure to preserve such secrecy his license may be canceled.”<sup>33</sup> The House committee explained the reason for the regulation in its report: “Secrecy of messages. This is required by the Berlin convention and has been urged by commercial concerns at hearings before committees of Congress.”<sup>34</sup> It should be noted that, as originally drafted, this provision applied only to licensed operators. The narrow objective the drafters sought to achieve can be discerned from the Senate report accompanying the legislation: “The bill does not interfere in any way with the hearing of messages by amateurs at all times and places as they may elect.”<sup>35</sup>

As finally enacted, Regulation 19, expanded to include persons “having knowledge of” as well as those “engaged in” the operations of a station, was embodied as part of section 4 of the Radio Act of 1912:

No person or persons engaged in or having knowledge of the operation of any station or stations, shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court.<sup>36</sup>

While Regulation 19 penalized the publication or disclosure of private (principally ship-to-shore) transmissions by station operators or persons having knowledge of station operations, it expressly refrained from imposing any restriction or control on the mere reception of wireless signals by any person possessing the requisite equipment.<sup>37</sup>

## 2. *Radio Act of 1927*

When Congress passed the 1912 Act, radio communication consisted al-

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33. H.R. REP. NO. 582, 62d Cong., 2d Sess. 5 (1912).

34. *Id.* at 16. The drafters had originally considered controlling the confidentiality of messages by licensing all receivers. This suggestion was opposed by industry representatives and was dropped after committee hearings. See *Bills to Regulate Radio Communication: Hearings on S. 3620 & S. 5334 Before the Subcomm. of the Sen. Comm. on Commerce*, 62d Cong., 2d Sess. 22-25 (1912).

35. S. REP. NO. 698, 62d Cong., 2d Sess. 14 (1912).

36. Radio Act of 1912, Pub. L. No. 62-264, § 4, 37 Stat. 302, 307 (1912).

37. *Id.*



most exclusively of wireless telegraphy and its use in transmitting messages between coastal stations and ships at sea. "Broadcasting" as we know it today was unknown and was not even contemplated. The growth of experimental and amateur use of the radio spectrum was rapid, however, and the Secretary of Commerce began to issue licenses to prevent interference between such use and commercial telegraphy.<sup>38</sup> In the early 1920's, licensed stations began to transmit news and entertainment programming intended for reception by the general public. By 1926, in addition to the thousands of amateur, ship, point-to-point and transoceanic transmitting stations, there were 536 broadcasting stations in the United States<sup>39</sup> transmitting to an estimated 15,000,000 receiving sets.<sup>40</sup> It was estimated that in 1925 alone, \$450,000,000 was expended for radio equipment in the United States.<sup>41</sup>

By this time, there was a consensus that revision of the 1912 Act was necessary, but there was no consensus regarding what role the federal government should play in radio regulation. It was undecided whether monopolistic and anticompetitive practices by companies such as RCA and General Electric had occurred or should be tolerated and whether a broadcasting license should vest its holder with any recognizable property interest.<sup>42</sup> Legislation addressing these issues was introduced, but not passed in the 67th and 68th Congresses.<sup>43</sup>

Legislation to broaden the 1912 Act was introduced in both houses of Congress in 1926 and a conference bill was enacted on February 23, 1927, as the Radio Act of 1927.<sup>44</sup> The secrecy provision of the 1912 Act was embodied as section 27:

No person receiving or assisting in receiving any radio communication shall divulge or publish the contents, substance, purport, effect, or meaning thereof except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a telephone, telegraph, cable or radio station employed or authorized to forward such radio communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the radio communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority;

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38. S. REP. NO. 772, 69th Cong., 1st Sess. 1 (1926).

39. H.R. REP. NO. 404, 69th Cong., 1st Sess. 6 (1926).

40. 68 CONG. REC. 4109 (1927).

41. H.R. REP. NO. 404, 69th Cong., 1st Sess. 6 (1926).

42. *Id.* at 6-32.

43. *Id.* at 6-7, 14-16.

44. Pub. L. No. 69-632, §§ 1-41, 44 Stat. 1162 (1927).

and no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person; and no person not being entitled thereto shall receive or assist in receiving any radio communication and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress.<sup>45</sup>

Because the drafters believed the section to be primarily a redraft of existing law,<sup>46</sup> they did not attempt to explain the significant modifications that appeared for the first time in the section.

For example, the statute was now comprised of four independent clauses, each proscribing subtly different activities:

1. The first clause prohibited persons "receiving or assisting in receiving any radio communication" from "divulg[ing]" or "publish[ing]" its contents except through designated authorized channels to authorized receivers;
2. The second clause prohibited persons "not being authorized by the sender" from "intercept[ing]" any message and "divulg[ing]" or "publish[ing]" its contents to any person;
3. The third clause prohibited persons "not being entitled thereto" from "receiv[ing] or assist[ing] in receiving any radio communication" and "us[ing] the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto";

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45. 44 Stat. at 1172.

46. S. REP. NO. 772, 69th Cong., 1st Sess. 5 (1926) states: "The provisions regarding the protection of ship signals and messages against reception and use by unauthorized persons are largely a redraft of existing law and seem necessary and proper provisions." Similarly, H.R. REP. NO. 404, 69th Cong., 1st Sess. 4 (1926) states: "The bill also seeks to protect messages and the contents thereof against reception and use by unauthorized persons. The section is a redraft of a provision of existing law. It seems to the committee a proper and a necessary provision."

4. The fourth clause prohibited persons "having received such intercepted radio communication or having become acquainted with [its] contents" from divulging or publishing its contents or using it or its substance for his own benefit or for the benefit of another not entitled thereto.<sup>47</sup>

Nothing in the legislative history of the 1927 Act explains the purpose or meaning of the separate clauses. Similarly, no explanation is given for a new proviso inserted to exempt communications "broadcasted or transmitted by amateurs or others for the use of the general public or relating to ships in distress."<sup>48</sup> Its language is similar to a clause contained in the secrecy provision of a 1924 House bill, which provided that it would "not apply to the receiving, divulging, publishing or utilizing the contents of any radio conversation transmitted for the use of the general public or relating to ships in distress."<sup>49</sup> A Senate bill introduced the same year contained a similar clause.<sup>50</sup> Neither bill was enacted. Similar language appeared in a 1925 House bill that, likewise, was not enacted.<sup>51</sup> While no legislative history associated with the 1927 Act or these earlier bills reveals the purpose of or the policy behind the proviso, the reference in Senate Report 772 to section 27 as "the provisions regarding the protection of ship signals and messages"<sup>52</sup> may have reflected an intention to continue to limit the constraints upon "divulgence" or "use" to communications similar in form and usage to the wireless telegraphy protected by the 1912 Act.

### 3. *Communications Act of 1934*

The Communications Act of 1934 was enacted on June 19, 1934.<sup>53</sup> One of the principal purposes of the Act was to consolidate jurisdiction over wire and radio communications in a new Federal Communications Commission.<sup>54</sup> Previously, jurisdiction had been exercised by four different entities: the Federal Radio Commission; the Department of Commerce; the Post Office; and the Interstate Commerce Commission.<sup>55</sup> Much of the Act, including most provisions in title III (covering radio broadcasting), is a redraft of

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47. Radio Act of 1927, *supra* note 44, at § 27, 44 Stat. at 1172.

48. *Id.*

49. H.R. 7357, 68th Cong., 1st Sess. § 12 (1924).

50. S. 2930, 68th Cong., 1st Sess. § 16 (1924).

51. H.R. 5589, 69th Cong., 1st Sess. § 14 (1925). For a discussion of the origins of the proviso, see *Reston v. FCC*, 492 F. Supp. 697 (D.D.C. 1980).

52. *See supra* note 46.

53. Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-609 (1982)).

54. 48 Stat. at 1064 (codified at 47 U.S.C. § 151 (1982)).

55. D. SIDDALL, UNAUTHORIZED HOME OVER-THE-AIR RECEPTION OF ENTERTAINMENT PROGRAMS 7 (Cong. Research Serv., Library of Congress, January 5, 1982).

the 1927 Act.<sup>56</sup> Title II (governing common carriers) was adapted from the Interstate Commerce Act.<sup>57</sup>

The Act contained a new section 605, which provided:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.<sup>58</sup>

The new section incorporated, with minor changes and no enlightenment, the four clauses and the proviso first created in the 1927 Act. Because the amendments to the 1927 provision were viewed as insubstantial, discussion of section 605 in the reports accompanying the 1934 legislation is scant.<sup>59</sup>

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56. S. REP. NO. 781, 73d Cong., 2d Sess. 11 (1934).

57. *Id.* at 2, 3.

58. 48 Stat. 1064, 1103-04, § 605 (1934).

59. S. REP. NO. 781, 73rd Cong., 2d Sess. 11 (1934) notes that "Section 605, prohibiting unauthorized publication of communications, is based upon section 27 of the Radio Act and extends it to wire communications." Similarly, H.R. REP. NO. 1850, 73d Cong., 2d Sess.

#### 4. *The 1968 Amendments*

No further legislative modification of the statute was made until 1968, when Congress enacted the Omnibus Crime Control and Safe Streets Act (Crime Control Act).<sup>60</sup> Section 803 of the Crime Control Act amended section 605 to delete references to wire communications from all but the first clause and to authorize certain interceptions permitted by other provisions of the Crime Control Act.<sup>61</sup>

The Senate Report accompanying this legislation stated that the modification was "not intended merely to be a reenactment of section 605" but, rather "as a substitute."<sup>62</sup> While the "new" section 605 would "regulate the conduct of communications personnel," the "regulation of the interception of wire or oral communications in the future" would be governed by the new chapter 119 of title 18 of the United States Code (i.e., title III of the Crime Control Act).<sup>63</sup>

#### 5. *The 1982 Amendments*

In 1982, section 605 was further amended by the Communications Amendments Act of 1982<sup>64</sup> to remove amateur radio transmissions from its protection. The amendment was precipitated by *Reston v. FCC*,<sup>65</sup> in which the plaintiff, James Reston, sought an order requiring the Federal Communications Commission to produce, under the Freedom of Information Act, recordings of amateur transmissions between members of the People's Temple cult in Guyana and their colleagues in San Francisco. The Commission opposed disclosure of the tapes contending that the transmissions were not "broadcast or transmitted by amateurs or others for the use of the general public" and thus were protected from disclosure by section 605.<sup>66</sup> Reston argued that all amateur transmissions were exempted from section 605 by the last paragraph of the statute. Noting that the legislative history of section 605 was "of minimal help in clarifying the ambiguity that plagues the meaning of the phrase 'amateurs or others for the use of the general public,'" <sup>67</sup> the court concluded that the more logical interpretation of the sec-

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(1934) states that "Section 605, prohibiting unauthorized publication of communications, is based upon section 27 of the Radio Act, but is also made to apply to wire communications."

60. Pub. L. No. 90-351, 82 Stat. 197 (1968).

61. *See id.* at § 803, 82 Stat. at 223.

62. S. REP. NO. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2112, 2196.

63. *Id.* at 2196-97.

64. Pub. L. No. 97-259, § 126, 96 Stat. 1087, 1099 (1982).

65. 492 F. Supp. 697 (D.D.C. 1980).

66. *Id.* at 701 n.3.

67. *Id.* at 707.

tion, considering the actual phrasing and punctuation used, would exempt only transmissions, whether by amateurs or not, that were "for the use of the general public."<sup>68</sup> The Senate Report accompanying the 1982 amendments explains that the proviso to section 605 was modified specifically to overrule this holding.<sup>69</sup>

As amended by the 1982 Act, and as currently codified in section 705(a),<sup>70</sup> the statute provides:

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

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68. *Id.*

69. S. REP. NO. 191, 97th Cong., 2d Sess., reprinted in 1982 U.S. CODE CONG. & AD. NEWS 2237, 2246.

70. Section 6 of the Cable Communications Policy Act of 1984, simply recodifies § 605 as § 705(a) without making any substantive modification to its language. *See supra* note 10.

aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.<sup>71</sup>

## B. Judicial Construction of Section 605

### 1. Section 605 as a Rule of Evidence

As a sweater that has lost its form through overuse, section 605 has been judicially stretched for more than fifty years to serve a variety of functions and perform a variety of activities not likely envisioned by its authors. What little illumination the legislative history provides indicates that Congress had attempted to draft a confidentiality provision. When section 605 made its maiden appearance in the courts, however, it was interpreted as a federal rule of evidence.

In *Olmstead v. United States*,<sup>72</sup> the Supreme Court decided that the tapping of telephone wires and the use of the intercepted messages did not constitute an unreasonable search and seizure under the fourth amendment. Nine years later, however, the Court held in *Nardone v. United States*,<sup>73</sup> that section 605 prohibited the use of wiretapped evidence in a federal criminal trial. Rejecting the government's arguments that the legislative history was devoid of any evidence that Congress intended the statute to serve this purpose,<sup>74</sup> the Court concluded that the "plain" words of the statute mandated its conclusion.<sup>75</sup>

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71. Cable Communications Policy Act of 1984, *supra* note 10, at § 5(a) (to be codified at 47 U.S.C. § 705(a)).

72. 277 U.S. 438 (1928).

73. 302 U.S. 379 (1937).

74. In fact, the government argued that Congress was presumably aware of the *Olmstead* decision and, therefore, had specifically failed to enact bills that would have proscribed wiretap activities. The Court acknowledged this in its opinion:

True it is that after this court's decision in the *Olmstead* case congressional committees investigated wiretapping activities of federal agents. Over a period of several years bills were introduced to prohibit the practice, all of which failed to pass. An Act of 1933 included a clause forbidding this method of procuring evidence of violations of the National Prohibition Act. During 1932, 1933, and 1934, however, there was no discussion of the matter in Congress, and we are without contemporary legislative history relevant to the passage of the statute in question. It is also true that the committee reports in connection with the Federal Communications Act dwell upon the fact that the major purpose of the legislation was the transfer of jurisdiction over wire and radio communication to the newly constituted Federal Communications Commission. But these circumstances are, in our opinion, insufficient to overbear the plain mandate of the statute.

302 U.S. at 382-83.

75. We nevertheless face the fact that the plain words of § 605 forbid anyone, unless authorized by the sender, to intercept a telephone message, and direct in equally clear language that 'no person' shall divulge or publish the message in substance to

Although the Court justified its decision as a technical application of the language of the statute, revisionism soon began to set in and, in the second *Nardone* case,<sup>76</sup> Justice Frankfurter, writing for the Court, held that section 605 prohibited the use not only of the wiretap evidence itself but also of the evidence procured with the aid of wiretaps (i.e., “fruit of the poisonous tree”).<sup>77</sup> Reaching this conclusion, the Court determined that a narrower reading of the statute

would largely stultify the policy which compelled our decision in [the first *Nardone* case]. That decision was not the product of a merely meticulous reading of technical language. It was the translation into practicality of broad considerations of morality and public well being. . . . A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose.<sup>78</sup>

The United States Court of Appeals for the Third Circuit made an early attempt to discern some distinction in the application and purpose of the statute’s different clauses in *Sablowsky v. United States*.<sup>79</sup> At issue in the case was whether the statute proscribed the use of tapped *intrastate* as well as *interstate* telephone conversations in federal criminal trials. In concluding that such use was proscribed, the court noted that omission of the limiting phrase “interstate or foreign” from the second and fourth clauses of the statute was significant:

The *first* and *third* clauses of Section 605 . . . [which] deal with acts prohibited to employees of communications agencies may be considered to be part of regulation of the carriers as well as constituting a rule of evidence. . . . If the *first* and *third* clauses . . . are intended to relate to a phase of regulation as well as to constitute a rule of evidence, the limiting phrase “interstate or foreign” placed prior to the word “communication” in both of these clauses was aptly used by Congress to bring such regulation within the power of Congress under the Commerce clause. Upon the other hand the provisions of the *second* and *fourth* clauses of Section 605, which upon their face purport to relate to all persons, do not relate to the regulation of communication carriers and therefore consti-

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‘any person.’ To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government’s arguments.

302 U.S. at 382.

76. *Nardone v. United States*, 308 U.S. 338 (1939).

77. *Id.* at 342.

78. *Id.* at 340-41.

79. 101 F.2d 183 (3d Cir. 1938).



tute a rule of evidence in the purest sense.<sup>80</sup>

One year later, the Third Circuit's reasoning and holding was adopted by the Supreme Court in *Weiss v. United States*:<sup>81</sup>

[E]ach clause of § 605 is complete in itself; . . . in the first and third clauses, which deal with divulgence of messages by persons engaged in receiving or transmitting them, the communications are specified as 'any interstate or foreign communication,' whereas, in the second and fourth clauses, which deal with interception and divulgence of communications, the phrases used are 'any communication' and 'such intercepted communication.' . . .

The petitioners further urge that there is good reason for the distinction in the phrasing of the clauses in § 605 since persons employed by communication companies can distinguish between interstate and intrastate messages which they handle, whereas, inasmuch as messages of both sorts pass indiscriminately over the same wires, the interceptor cannot make a similar distinction and the only practicable way to protect interstate messages from interception and divulgence is to prohibit the interception of all messages.<sup>82</sup>

This case constitutes one of the few times that any court, in applying the provisions of section 605, has taken the time to analyze its different clauses. In so doing, the Court was handicapped by the absence of any legislative history and was forced to imply meaning where none was sufficiently evident. The Court indicated "[w]e cannot conclude that the change in the wording of two of the four clauses of the section was inadvertent."<sup>83</sup>

## 2. "Interception" Under the Statute

In *Goldman v. United States*,<sup>84</sup> the Supreme Court had an opportunity to consider what constituted an "interception." This case involved the admissibility of a transcription of a defendant's telephone conversation that was overheard by federal agents (with the aid of listening devices) from the next room. The Court held that the transcription was not the product of an "intercepted" wire communication within the meaning of section 605:

What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission. Words written by a person and intended ultimately to be carried as so written to a telegraph office do not constitute a communication

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80. *Id.* at 189 (emphasis added) (citation omitted).

81. 308 U.S. 321 (1939).

82. *Id.* at 327-28.

83. *Id.* at 329 (emphasis added).

84. 316 U.S. 129 (1942).

within the terms of the Act until they are handed to an agent of the telegraph company. Words spoken in a room in the presence of another into a telephone receiver do not constitute a communication by wire within the meaning of the section. Letters deposited in the Post Office are protected from examination by federal statute, but it could not rightly be claimed that the office carbon of such letter, or indeed the letter itself before it has left the office of the sender, comes within the protection of the statute. The same view of the scope of the Communications Act follows from the natural meaning of the term 'intercept.' *As has rightly been held, this word indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver.*<sup>85</sup>

These principles were applied to radio communications in *United States v. Sugden*.<sup>86</sup> Sugden, an Arizona cotton farmer, was indicted for concealing and shielding illegal immigrants. Much of the evidence against him consisted of transcriptions of shortwave broadcasts he made to his field hands, which were monitored by an FCC field engineer.<sup>87</sup> The court concluded that section 605 proscribed the use of the transcriptions:

[I]t is to be observed that Section 605 nowhere within its own corners is designated as a rule of evidence. It has certain civil and criminal significance by virtue of other sections of the Federal Communications Act. It becomes, however, a rule of evidence for federal courts by judicial construction. Further, Section 605 has applicability to intrastate messages as pointed out in *Weiss v. United States* . . . .

. . . .  
. . . [T]he very limited privacy which Section 605 gives the user of radio for communication may tend to encourage the dispatch of messages via radio over and above the use that would be made of the means if personal messages were part of the public domain available tomorrow, for example, for the commercial purveyor of gossip.

While the telephone does have more privacy than private radio, yet we think that the government agent who monitors cannot make use of the fruits of his monitoring if he finds the station legally on

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85. *Id.* at 133-34 (emphasis added) (citations omitted).

86. 226 F.2d 281 (9th Cir. 1955).

87. *Id.* at 282. At the time the transmissions were monitored, the station was licensed but Sugden's operator's license, while applied for, had not been received. *Id.* at 283.

the air and the persons using the station legally authorized to operate it. . . .

. . . .

We think here that unless the Congress orders otherwise, the exclusionary rules of *Weiss* and *Goldman* . . . are to be applied to listening in (at least as a point away from the sender and receiver and without the consent of either) on non-public broadcasts by both private individuals and all public officers . . . .<sup>88</sup>

In *Rathbun v. United States*,<sup>89</sup> the Supreme Court was asked to decide whether Section 605 barred the admission of the contents of a telephone call, overheard on an extension phone by police officers listening with the permission of one of the parties. The Court held that the statute did not bar the use of the evidence:

We hold that Section 605 was not violated in the case before us because there has been no 'interception' as Congress intended that the word be used. . . .

The telephone extension is a widely used instrument of home and office, yet with nothing to evidence congressional intent, petitioner argues that Congress meant to place a severe restriction on its ordinary use by subscribers, denying them the right to allow a family member, an employee, a trusted friend, or even the police to listen to a conversation to which a subscriber is a party . . . .

The clear inference [of the language of the statute] is that one entitled to receive the communication may use it for his own benefit or have another use it for him. The communication itself is not privileged, and one party may not force the other to secrecy merely by using a telephone.

. . . .

Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. Consequently, one element of Section 605, *interception*, has not occurred.<sup>90</sup>

Cases following *Rathbun* have held that section 605 does not prohibit the admission of transcriptions recorded by, or made with, the permission of one of the parties to the conversation.<sup>91</sup> In one of these cases, for example, the Court held that obtaining and using such transcriptions in these circum-

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88. *Id.* at 284-85 (citations omitted).

89. 355 U.S. 107 (1957).

90. *Id.* at 109-11.

91. *See, e.g., Davis v. United States*, 413 F.2d 1226 (5th Cir. 1969); *Rogers v. United*

stances does not constitute an unlawful search and seizure under the fourth amendment because a person has no reasonable expectation that the person to whom he speaks will preserve the confidentiality of his communication.<sup>92</sup>

### 3. Cases Construing the Proviso and Defining "Broadcasting"

The wiretap cases discussed above involved receptions or interceptions of transmissions that were point-to-point transmissions. Consequently, applicability of section 705(a)'s proviso, which exempts transmissions "for the use of the general public," was not in issue. In *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*,<sup>93</sup> the applicability of this proviso was in issue. KMLA owned and operated an FM radio station in Los Angeles and also transmitted, over a subcarrier frequency, a commercial-free background music service to commercial and industrial subscribers for a monthly fee.<sup>94</sup> The defendant purchased multiplex receivers capable of receiving the subcarrier transmissions and installed them for little or no charge on the premises of establishments where its cigarette vending machines were placed. The defendant had not obtained and did not seek KMLA's consent to receive its subcarrier signal. KMLA commenced an action and the court held that the defendant's activity violated section 605:

The question of whether KMLA's multiplex transmissions over its subcarrier frequency constitute "broadcasting" so as to make the protections of Section 605 inapplicable because of the *proviso* . . . hinges on whether KMLA intended a dissemination of its multiplex radio communications to the general public.

*Here the parties have agreed that neither of the plaintiffs had or has intent to transmit their background music program to the general public.* It has been held that Section 605 prohibits the interception and divulging by an unauthorized person of radio communication not intended for the use of the general public or not relating to ships in distress. . . .

The Commission over a long period of time has interpreted the

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States, 369 F.2d 944 (10th Cir. 1966); *Carnes v. United States*, 295 F.2d 598 (5th Cir. 1961), *cert. denied*, 369 U.S. 861 (1962).

92. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967) (White, J., concurring).

When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard . . . . It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another.

*Id.* at 363 n.\*.

93. 264 F. Supp. 35 (C.D. Cal. 1967).

94. The subscribers were provided special receivers, speakers, amplifiers, volume controls and related equipment. KMLA serviced and retained ownership in the receivers. *Id.* at 37.

statutory term "broadcasting" not to include transmission such as here involved, and has in fact held that a radio station engaged in broadcasting material of interest only to a particular person or persons [here the transmission of background music is not intended for the general public] is not broadcasting.

. . . .

The nature of FM multiplex transmission negates any intention that they be received by the public. Multiplex transmissions cannot be received on conventional FM sets, since they are disseminated not over the main broadcast channel but over a subcarrier frequency that can be received only with special equipment not part of the ordinary radio receiving set. Multiplex operations are specifically geared to the special requirements of commercial institutions, industrial plants, retail shops, and other subscribers equipped with this special FM receiving apparatus. Fundamentally, then, multiplexing is a point-to-point communication service, directed to subscribers at specified locations.

. . . .

The facts establish that FM multiplex transmissions of background music do not constitute broadcasting as that term is defined in the Communications Act, 47 U.S.C. § 153(o), and that the unauthorized reception and use of such multiplex transmissions by one other than an authorized subscriber is in violation of Section 605 of the Communications Act.<sup>95</sup>

Although the parties' stipulation, that KMLA's subcarrier transmissions were not intended for the general public, made the court's discussion largely superfluous, the court's analysis of the term "broadcasting" was inconsistent with earlier judicial and Commission treatments.

In *Functional Music, Inc. v. FCC*,<sup>96</sup> the United States Court of Appeals for the District of Columbia Circuit vacated rules prohibiting FM stations from "simplexing"<sup>97</sup> background or "functional" music to subscribers on the grounds that such a transmission was not "broadcasting" as defined in the Act. To justify its rules, the Commission argued that presentation of highly specialized program formats, the deletion of advertising from subscribers' receivers, and the exaction of a charge to subscribers, dictated a finding that the simplexing of a "functional" music service constituted point-

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95. *Id.* at 40-42 (emphasis added) (citations omitted).

96. 274 F.2d 543 (D.C. Cir. 1958), *cert. denied sub nom.* United States v. Functional Music, Inc., 361 U.S. 813 (1959).

97. "Simplexing" was a process through which a station would transmit one FM signal capable of receipt by both the general public and subscribers and would supply subscribers with special reception equipment which, when actuated by the transmission of an inaudible tone, would delete commercial material. 274 F.2d at 545 n.4.

to-point communication.<sup>98</sup> The D.C. Circuit, however, disagreed:

[T]he Communications Act specifies that broadcasting is 'the dissemination of radio communications intended to be received by the public . . . .' And program specialization and/or control is not necessarily determinative of this requisite intent, and therefore dispositive of broadcasting status, as the Commission assumed. Broadcasting remains broadcasting even though a segment of those capable of receiving the broadcast signal are equipped to delete a portion of that signal. In contrast to the objectionable service in the cited cases, which by its very nature negates an intent for *public* distribution, functional programming can be, and is, of interest to the *general* radio audience. Petitioner [a Chicago simplexer], for example, has acquired a high degree of popularity with the Chicago free listening audience. Moreover, it receives substantial and growing revenues from advertisers specifically desiring to reach that audience. In this light, a finding that the programming of petitioner and broadcasters comparably situated is not directed to, and intended to be received by, the public generally is clearly erroneous. Transmitted with the intent contemplated by § 3(o), such programming therefore has the requisite attributes of broadcasting.<sup>99</sup>

The Federal Communications Commission relied upon the *Functional Music* rationale in support of its 1966 conclusion that subscription television was "broadcasting" and that it therefore had the authority to allow STV services to use frequencies allocated for broadcasting:

It might be argued that such programs (subscription programs) are not 'intended to be received by the public' since their intended receipt would be limited to members of the public willing to pay the specified price. But, absence of any charge for the program is not made a prerequisite of 'broadcasting' operations under the present language of Section 3(o). And the reliance of the broadcasting industry upon advertising revenue, rather than upon direct charge to the public as its principal source of revenue, has not been the result of any action by either Congress or the Commission, but rather the result of the natural development of the industry. *It would appear that the primary touchstone of a broadcast service is the intent of the broadcaster to provide radio or television program service without discrimination to as many members of the general public as can be interested in the particular program as distinguished from a point-to-point message service to specified individuals*

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98. *Id.* at 548.

99. *Id.* In *KMLA*, the court distinguished *Functional Music* by noting that the parties before it stipulated that public dissemination was not intended. *KMLA*, 264 F. Supp. at 40 n.1.

. . . . While particular subscription programs might have a special appeal to some segment of the potential audience, this is equally true of a substantial portion of the programming now transmitted by broadcasting stations.

. . . [I]t may be observed that 'intent' may be inferred from the circumstances under which material is transmitted, and that the number of actual or potential viewers is not especially important.<sup>100</sup>

Noting the District of Columbia Circuit's conclusion in *Functional Music* that "broadcasting remain[ed] broadcasting" even though some persons receiving a signal were equipped to delete portions of it, the Commission stated "[w]e believe that the reverse also holds, namely, that broadcasting remains broadcasting even though a segment of the public is unable to view programs without special equipment."<sup>101</sup>

This definition of "broadcasting" influenced the decision in *Orth-O-Vision, Inc. v. Home Box Office*.<sup>102</sup> Home Box Office (HBO), a program distributor, had leased a Multipoint Distribution Service (MDS) channel in New York and used it to transmit its programming for a fee to a number of affiliates such as Orth-O-Vision, which, in turn, distributed the programming for a fee to individual subscribers.<sup>103</sup> A series of contractual disputes brought the parties into federal court, where Orth-O-Vision claimed that HBO had wrongfully terminated Orth-O-Vision's contract and had conspired with others to restrain trade in violation of the federal antitrust laws.<sup>104</sup> HBO counterclaimed and alleged, inter alia, that Orth-O-Vision's continued distribution of HBO's programming after termination of the contract violated section 605.<sup>105</sup> Denying HBO's motion for partial summary judgment on its section 605 claim, the court held that its MDS transmissions constituted "broadcasting" for the purposes of the statute: "The issue presented in this case is whether the converse of the rule in *Functional Music* is also true: does the transmission of programming which is of interest to the general

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100. *In re* Amendment of Part 73 of the Commission's Rules and Regulations to Provide for Subscription Television Service, 3 F.C.C.2d 1, 9 (1966) (emphasis added).

101. *Id.* at 10.

102. 474 F. Supp. 672, 681 (S.D.N.Y. 1979). *But see* *Movie Systems v. Heller*, 710 F.2d 492, 495 (8th Cir. 1982) (MDS transmission held not to be "broadcasting" within the meaning of § 605); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459 (6th Cir. 1980) (same).

103. 474 F. Supp. at 675. Multipoint Distribution Service (MDS) is a single-channel, common carrier service used to transmit pay television programming to subscribers. The subscribers are equipped by the senders with specialized reception equipment to receive and decode the signal.

104. *Id.* at 675-80.

105. *Id.* at 675, 680-81.

public constitute 'broadcasting' even though one cannot view the programs without paying a fee for special equipment?"<sup>106</sup> Discussing the FCC's rationale for its decision that subscription television (STV) constituted broadcasting, the court noted:

From the factual record before the court on this motion for summary judgment, there is little to distinguish HBO's MDS transmissions from those of STV systems. Both media involve the transmission of radio communications that members of the general public cannot receive without the installation of special equipment for a fee. More significantly, HBO's programming, consisting of recent movies, sports events and variety shows, differs little from conventional broadcast fare and is obviously intended to appeal to a mass audience.

One of the important circumstances from which HBO's 'intent' might be inferred is the extent to which MDS facilities are technologically capable of reaching the general public. The technological limitations of MDS may be such as to render the analogy to over-the-air subscription television inapt, but no such showing has been made by HBO. Accordingly, HBO's motion for partial summary judgment on its Federal Communications Act claim must be denied.<sup>107</sup>

Three months before the *Orth-O-Vision* decision, another court reached a different conclusion in a similar contract dispute between HBO and another New York City affiliate, Pay TV of Greater New York:

Defendant does not deny that Section 605 prohibits an unauthorized person from intercepting the signals carrying plaintiff's program service. The wording of the section proscribes the interception and use of such signals not intended for broadcast to the general public. . . .

Here the multipoint distribution service station operates on microwave radio frequencies of such height that the signal is not receivable by conventional television sets until it is modulated by special equipment. The programs are *thus* intended to be received not by 'the general public,' but only by paying subscribers.<sup>108</sup>

The principal distinction between the two cases appears to be that, in *Pay TV*, the affiliate did not contend that the MDS transmissions were "for the

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106. *Id.* at 681-82.

107. *Id.* at 682 (citations omitted). The court did conclude, however, that *Orth-O-Vision* was infringing HBO's copyrights and granted its motion for summary judgment and permanent injunction on that basis. *Id.* at 687.

108. *Home Box Office v. Pay TV*, 467 F. Supp. 525, 528 (E.D.N.Y. 1979) (emphasis added) (citations omitted).



use of the general public" but rather, conceded the applicability of the statute and relied upon a defense that HBO had consented to its redistributions.

The applicability of section 605 to over-the-air subscription television (STV) was at issue in *National Subscription Television v. S & H TV*.<sup>109</sup> There, the plaintiffs that transmitted a program service in scrambled form over UHF channel 52 in Los Angeles brought an action against several retail electronic outlets that sold components, plans, and schematics designed to facilitate the decoding of the plaintiffs' transmissions. The United States District Court for the Central District of California concluded that the encoded signal was "broadcast or transmitted . . . for the use of the general public":

Plaintiffs' arguments that their signals are not intended to be received by the public and are therefore not broadcast under the exception to Section 605 are unpersuasive. *The crucial consideration is whether the programming is of interest to a large segment of the population.* Program specialization or control are not necessarily determinative of the requisite intent nor dispositive of broadcasting status. Broadcasting remains broadcasting even though a segment of those capable of receiving the broadcast signal are equipped to delete a portion of that signal as in *Functional Music*, or to otherwise decode it. Such programming can be, and is, of interest to the general TV audience.<sup>110</sup>

In reaching its conclusion, the district court was influenced by the FCC's determination that STV constitutes broadcasting:

Unfortunately, the legislative history surrounding the exception [to section 605] is uncertain and we are precluded from utilizing the usual canon that the scope of a provision is determined by its purpose. However, when faced with problems of statutory construction, courts have shown great deference to the interpretations given by the agency charged with its administration. Here, the agency interpretation appears to exclude subscription TV from the prohibition of Section 605 and places it within the proviso excepting it from application of Section 605.<sup>111</sup>

#### 4. *When Broadcasting is Not Broadcasting*

The United States Court of Appeals for the Ninth Circuit reversed the district court's determination in *National Subscription Television* and held

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109. No. CV 80-829-LTL (C.D. Cal. Aug. 4, 1980) (unpublished opinion), *rev'd*, 644 F.2d 820 (9th Cir. 1981).

110. *Id.* (emphasis added) (citations omitted).

111. *Id.*

that STV transmissions did not fall within the “use of the general public” exception to section 605:

[We] conclude that section 153(o) [which defines ‘broadcasting’] does not control the reach of the *proviso*. The *proviso* does not remove all broadcasting from the protection of section 605, but only communications broadcast ‘for the use of the general public.’ We think that an individual might ‘broadcast’—*i.e.*, transmit a signal over the airwaves with the intent that it be received by the public within the meaning of section 153(o)—without such broadcasting being for the use of the public within the meaning of the *proviso*. For example, the operator of an STV service offers his product to any member of the public willing to pay the subscription price. Like any entrepreneur, the STV operator hopes that his product becomes popular and is subscribed to by most, if not all, of the public. Thus, the programming of STV is calculated to attract the largest possible audience, and the method of transmitting STV is premised on being able to accommodate widespread demand. It is in this sense that STV is ‘intended to be received by the public’—*i.e.*, ‘broadcast’—under section 153(o).

Nevertheless, it does not follow that STV is ‘broadcast . . . for the use of the general public’ within the meaning of the *proviso*. *Indeed, the manner in which STV operators such as NST attempt to control their signals suggests the opposite.* The visual signal is useless and the audio signal not receivable without special equipment supplied by the operator. Moreover, without the capability of monitoring program viewing through use of such equipment, it is doubtful that any STV operation can survive as a viable commercial enterprise. We conclude, therefore, that STV operators such as NST broadcast their programming, not for the use of anyone who is somehow able to receive their signals, but only for the use of paying subscribers.<sup>112</sup>

In determining that for the purpose of applying the *proviso* to section 605 it could distinguish between communications that were “broadcast” and those that were “broadcast for the use of the general public,” the Ninth Circuit did not break new ground. Five months previously, the Sixth Circuit reached a similar conclusion on a similar set of facts in *Chartwell Communications Group v. Westbrook*.<sup>113</sup> In deciding that STV transmissions were protected by section 605, the court distinguished “broadcasting” as that term had been defined in *Functional Music* and by the Federal Communications Commis-

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112. *National Subscription Television v. S & H TV*, 644 F.2d 820, 823-24 (9th Cir. 1981) (emphasis added) (citations omitted).

113. 637 F.2d 459 (6th Cir. 1980). See *ON/TV v. Calumet Elec. Supply*, No. 83 C4072 (N.D. Ill. 1984).

sion in its STV considerations, and concluded that transmissions that were "broadcasts" for other purposes did not necessarily fall within the exception to section 605 protection:

For purposes of the proviso to Section 605 the crucial factor in determining whether programming is broadcasting is whether it is intended for the use of the general public. Although program content is a factor to be considered in making the determination, it is not dispositive. Mass appeal and mass availability are factors which weigh in favor of finding that a particular activity is broadcasting. However, those factors may be negated by clear, *objective* evidence that the programming is not intended for the use of the general public. *The fact that STV is transmitted in such a manner that the signal is meaningless without the use of special equipment negates a finding that STV is intended for the use of the general public.*

We think STV is *not* broadcasting intended for use by the general public within the meaning of the proviso to Section 605. There is no meaningful distinction between the communications at issue in *KMLA* and those at issue here. We disagree with the conclusions reached by the courts in *Orth-O-Vision* and [the district court in] *NST*, and hold that Chartwell's communications are protected by Section 605.<sup>114</sup>

In other words, broadcasting may be "broadcasting" for classification purposes under the Commission's rules, but not "broadcasting" intended for use of the general public for purposes of the proviso.

##### 5. *The Role of Signal Protection*

In *United States v. Westbrook*,<sup>115</sup> the United States District Court for the Eastern District of Michigan, in concluding that a transmission was not intended for "the use of the general public," emphasized the fact that the transmission was scrambled:

The Court in *Home Box Office, Inc. v. Pay TV of Greater New York, Inc.*, concluded, as I do, that subscription television does not fall within the exemption in Section 605 for broadcasting transmitted for the use of the general public. Noting that the signals are 'not receivable by conventional television sets until . . . modulated by special equipment,' the court held that the subscription programs 'are thus intended to be received not by "the general public" but only by paying subscribers.' The logic of this analysis incorporates the flexibility necessarily required of a statute designed to

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114. 637 F.2d at 465-66 (emphasis added) (citations omitted).

115. 502 F. Supp. 588 (E.D. Mich. 1980).

promote, protect, and regulate technological advances in radio communications.

The reasoning of the *Pay TV* decision recognizes the limited access intended by STV broadcasters and in my judgment is a more appropriate analytical approach than that which focuses on the wide appeal of STV broadcasting.<sup>116</sup>

In *Home Box Office, Inc. v. Advanced Consumer Technology*,<sup>117</sup> HBO sought to enjoin the sale of equipment designed for the sole purpose of intercepting MDS transmissions of HBO in New York City. The court granted injunctive relief and rejected the defendants' arguments that their activities were not proscribed by section 605. In so acting, the court rejected arguments that HBO and its MDS affiliate had not undertaken reasonable steps to protect the signal from unauthorized reception; the court stated "[c]ommercial television sets produced at this time are as yet incapable of receiving MDS without supplementary equipment. So long as this is so . . . HBO may reasonably assume that the ordinary, law-abiding citizen will not unilaterally take steps to intercept MDS."<sup>118</sup> The court recognized, on the other hand, that:

HBO might face difficulties, for example, in enforcing section 605 against a manufacturer or purchaser of a television receiver or other related device that enables consumers in general to receive MDS among a wide range of previously designated 'point-to-point' transmissions. Those difficulties need not now be examined, however. ACT, its President, and its distributors have knowingly sought to sell the products at issue for the specific (if not the sole) purpose of 'bootlegging' HBO's signal in the New York area. They do not claim otherwise. The antenna involved is so designed that it receives frequencies on which MDS is transmitted, and nothing else. As applied to these defendants, therefore, and the product they sell, the FCC's position is reasonable and clearly within the purpose of section 605.<sup>119</sup>

In *American Television and Communities Corp. (ATC) v. Western Electronics, Inc.*,<sup>120</sup> ATC, an HBO affiliate leasing an MDS channel to distribute HBO programming in the Denver area, brought an action seeking injunctive relief and damages against the defendants who advertised and sold microwave antennas, down converters and related reception equipment which ena-

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116. *Id.* at 591 (citations omitted) (discussing HBO v. Pay TV, 467 F. Supp. 525 (E.D.N.Y. 1979)).

117. 549 F. Supp. 14 (S.D.N.Y. 1981).

118. *Id.* at 22.

119. *Id.* at 25.

120. 529 F. Supp. 617 (D. Colo. 1982).

bled purchasers to receive ATC's transmissions. The defendants did not deny that they sold equipment that facilitated the interception of ATC's signal, but contended that its MDS transmissions were "intended for the general public's use" and that ATC, as a "mere licensee" of HBO, had no standing to bring the suit. The court rejected the defendants' standing argument and held that ATC's transmissions were within the protection of section 605.<sup>121</sup> In reaching its conclusion, the court was influenced by the fact that MDS stations are classified as common carriers and by the mutually exclusive categorization of "broadcasters" and "common carriers" in section 3(h) of the Communications Act.<sup>122</sup> The court was also persuaded by the reasoning of the Sixth Circuit in *Chartwell* and the Ninth Circuit in *National Subscription Television*<sup>123</sup> that the financial survival of the operation in question depended upon restricting the transmissions from general public use.<sup>124</sup>

*United States v. Stone*<sup>125</sup> involved a prosecution under section 605 of individuals engaged in the business of selling microwave antennas, down converters, and components that enabled purchasers to receive MDS transmissions. The defendants filed a motion to dismiss the section 605 counts, arguing that "[s]uch an application has no support in the legislative history of the statute; receiving an omnidirectional radio communication is not the same as an 'interception,' finally, such communications should be considered as being for the 'use of the general public' and thus exempt from the prohibitions of the law."<sup>126</sup> The court denied the defendants' motion, finding that "[t]here is ample support in case law and in the legislative history of the statute to support an application of Section 605 to prohibit the interception and subsequent disclosure of transmissions of a MDS station."<sup>127</sup> The court found defendants' argument that MDS transmissions were broadcasting intended for the use of the general public to be "nugacious."<sup>128</sup>

In *Movie Systems v. Heller*,<sup>129</sup> an HBO MDS affiliate sued an individual who had installed a microwave antenna and down converter to receive its transmissions in his home without paying any fee. The Eighth Circuit af-

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121. *Id.* at 620-21.

122. *Id.* at 619-20.

123. *Id.* Although *Chartwell* and *NST* involved STV, the court found MDS and STV to be "analytically indistinguishable" for § 605 purposes. *Id.* at 620 n.4.

124. *Id.* at 620.

125. 546 F. Supp. 234 (S.D. Tex. 1982).

126. *Id.* at 236.

127. *Id.* at 240.

128. *Id.*

129. 710 F.2d 492 (8th Cir. 1983).

firmed the district court's order granting the affiliate's motion for summary judgment:

Although the content of HBO programming 'may be of interest to the general public, access to that programming cannot be gained with traditional television sets.' The MDS microwave signal operates at such a high frequency that the signal cannot be received without the use of special equipment such as the microwave antenna and the down converter. We hold that MDS transmissions are not broadcasting for the use of the general public and thus Section 605 prohibits unauthorized interception of the MDS signal.<sup>130</sup>

#### 6. *The Recent Cases—Falling Asleep at the Tiller*

Because so many of the recent cases brought under section 605 have involved the unauthorized interception of MDS and STV signals, some courts are beginning to consider as resolved the issue of whether the statute proscribes such activity. For example, in *Hoosier Home Theater, Inc. (TVQ) v. Adkins*,<sup>131</sup> MDS affiliate TVQ brought an action under the statute against an individual who assembled a microwave antenna and down converter from standard electronic parts and used the equipment to receive, without permission, TVQ's signal at his home. The United States District Court for the Southern District of Indiana summarily awarded judgment for the plaintiff on the question of section 605 liability:

Applying the facts of this case to the Federal Communications Act raises issues which are not novel and have been passed on in substance by many other courts. . . . [T]he applicability of Section 605 to unauthorized receipt and use of the MDS signal is consistent with the holdings in the overwhelming majority of similar cases.<sup>132</sup>

Some recent cases have even suggested a degree of impatience and have engaged in superficial analysis in considering defenses that have been raised and rejected repeatedly. For example, as previously noted in *United States v. Stone*, the defendants' argument that the intercepted MDS transmissions were within the proviso of section 605 was rejected as "nugacious."<sup>133</sup> Similarly, in *Ciminelli v. Cablevision, Brookhaven Cable TV Service*,<sup>134</sup> the United States District Court for the Eastern District of New York summarily rejected the argument that intercepted cable transmissions fell within the

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130. *Id.* at 495 (citations omitted).

131. 595 F. Supp. 389 (S.D. Ind. 1984).

132. *Id.* at 397-98.

133. 546 F. Supp. at 240.

134. 583 F. Supp. 144 (E.D.N.Y. 1984).

proviso to the statute by noting that the cable systems transmissions "are simply not intended for the use of the general public."<sup>135</sup>

This impatience has resulted in application of the statute to activities not proscribed by its literal terms. As noted above, all references to wire communications were deleted from all but one clause of section 605 by the Omnibus Crime Control Act of 1968.<sup>136</sup> These deletions notwithstanding, the court in *Cox Cable Cleveland Area v. King*,<sup>137</sup> applied section 605 in a cable theft-of-service case, holding that "[s]ection 605 prohibits the divulgement or publication of wire communications that are not intended for the general public."<sup>138</sup> Although this case was wrongly decided, it has produced offspring. In *Ciminelli v. Cablevision, Brookhaven Cable TV Service*,<sup>139</sup> the court cited *King* in rejecting the argument that section 605 is not applicable to the theft of cable television services.<sup>140</sup>

The high water mark of judicial expansionism may have been reached in the *King* and *Ciminelli* cases. This mark may be higher than most commentators have anticipated, for it can be argued convincingly that section 605 never created a civil remedy in favor of persons aggrieved by its violation. In *Cort v. Ash*,<sup>141</sup> the Supreme Court identified four factors to be considered in determining whether a private remedy is implicit in a statute not providing one:

First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted' . . . . Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?<sup>142</sup>

In *Touche Ross & Co. v. Redington*,<sup>143</sup> the Court overturned a long line of cases and clarified that the determination of congressional intent must be accorded primacy:

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135. *Id.* at 161.

136. *See supra* note 60. The only proscription upon the divulgence or use of wire communications remaining in the statute is contained in the first clause, which by its language applies only to communications personnel.

137. 582 F. Supp. 376 (N.D. Ohio 1983).

138. *Id.* at 380.

139. 583 F. Supp. at 144.

140. *Id.* at 161.

141. 422 U.S. 66 (1975).

142. *Id.* at 78.

143. 442 U.S. 560 (1979).

It is true that in *Cort v. Ash*, the Court set forth four factors that it considered 'relevant' in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.<sup>144</sup>

*Reitmeister v. Reitmeister*,<sup>145</sup> a case that has been cited for the proposition that section 605 created a private remedy, found only the first of the four factors identified in *Cort v. Ash*. More recently, in *Chartwell Communications Group v. Westbrook*,<sup>146</sup> the Sixth Circuit, presented with the opportunity to apply the principles of *Cort v. Ash* and *Touche Ross* to section 605, conceded that the language of the statute and its legislative history did not support the creation of a private remedy, but avoided the issue by noting that a remedy under the statute has long been implied by other courts.<sup>147</sup> Thus, despite its acceptance and its progeny, it can well be argued that, applying the principles of *Touche Ross*, the *Chartwell* decision was wrongly decided and section 605 did not provide the basis for a civil remedy until its amendment in 1984.

### III. THE *STARLINK* CASE AND THE NEW LAW: SATELLITE PROGRAMMING IS DIFFERENT

In *Air Capital Cablevision, Inc. v. Starlink Communications Group*,<sup>148</sup> two Wichita, Kansas cable television companies sought to use section 605 as the basis for enjoining a retailer from selling satellite dish antennas to consumers residing in the cable systems' franchise areas. In granting a summary judgment dismissing all of the cable companies' section 605 (new section 705(a)) claims, the United States District Court for the District of Kansas concluded that because "[s]atellite dish equipment does not hook into a cable company's telecommunications network and pirate away or decode the cable company's transmissions," the case was distinguishable from section 605 cases where "the offending equipment intercepted or decoded television signals that were originated by or retransmitted by" the complaining parties.<sup>149</sup> Because the cable companies had no part in originating or retransmitting the satellite signals that the dish antennas were capable of receiving, the court

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144. *Id.* at 575.

145. 162 F.2d 691 (2d Cir. 1947).

146. 637 F.2d at 459.

147. *Chartwell*, 637 F.2d at 466; see *Reitmeister*, 162 F.2d at 691.

148. 601 F. Supp. 1568 (D. Kan 1985). The case was pending when the Cable Communications Policy Act of 1984 was enacted.

149. *Id.* at 1571.



concluded that the cable companies "simply [had] no standing to claim violations under former § 605 of the Communications Act."<sup>150</sup>

In reaching this decision, the court noted that the facts before it were distinguishable from the facts in the cases applying the statute to interceptions of STV or MDS programming:

The problems inherent in the case at bar, as originally filed under former § 605, are largely a function of judicial attempts to stretch the language of the 1934 statute to apply to the advanced technology of the 1980's.

Numerous courts [have] held that the former § 605 prohibited the manufacture, distribution, and sale of electronic decoding equipment that enabled home viewers to intercept original transmissions or retransmissions by subscription television distributors, cable television distributors, or other television programming distributors. . . .

None of [those] cases involve the issue presented in the case at bar: [t]he right to manufacture, distribute, sell, and use equipment that enables a home user to receive the vast number and varied character of television programs transmitted via satellite. . . . This case involves access of the public to the large number of programs and information available via satellite signals by virtue of technological advances.<sup>151</sup>

The growth in the use of home dish antennas has been explosive. Congress' recent clarification of the legal rights of home dish owners promises to spur even more growth in the future. Because the safe harbor provided by Congress in section 705(b) does not encompass all potential uses of consumer-owned dishes, it is reasonable to assume that courts, in the near future, may be provided with opportunities to consider the scope of the new law as amended.

In the *Starlink* case, the district court ended fifty years of judicial engraftment to section 605.<sup>152</sup> The *Starlink* court was the first to become sensitive to the technological differences between satellite transmissions and communications that have received judicial protection in the past. If courts in future cases do not follow this trend, and if they are too quick in rejecting defenses previously raised without carefully reexamining the merits of such defenses, their decisions could significantly hamstring activities Congress has

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150. *Id.* at 1572. Standing to pursue claims under § 605 has always been limited to the "senders" of the allegedly intercepted communications. See *Goldstein v. United States*, 316 U.S. 114 (1942); *Reitmeister v. Reitmeister*, 162 F.2d 691 (2d Cir. 1979).

151. *Starlink*, 601 F. Supp. at 1570-71.

152. *Id.* at 1568.

sought to protect and could seriously retard the development of one of the most efficient and dynamic methods of mass communications yet developed.

#### IV. BOUNDARIES OF THE SAFE HARBOR

One limitation of section 705(b) is that the protection applies to the interception or receipt of satellite cable programming. Section 705(c)(1) defines satellite cable programming as "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."<sup>153</sup>

Not all video transmissions by satellite, however, may be defined as satellite cable programming. Internal network programming feeds or closed-circuit teleconferences as well as nonvideo services such as radio programming or teletext may be outside the scope of the definition. Additionally, because the definition of satellite cable programming depends upon the "primary intent" of its sender, it is possible that section 705(b)'s applicability to any particular program service could vary over time, depending upon the programmer's "intent" which, in turn, might be affected by fluctuating market conditions.

Because "satellite cable programming" is likely to be provided on channels adjacent to those providing programming which may not be so defined, a dilemma results. A consumer may be required to tune across a "forbidden" signal in order to reach a "safe" one. If he or she does so, has he or she violated section 705(a)? If he or she is momentarily attracted by what is seen on a forbidden channel and views it for a while before moving on, is the violation "willful" and will he or she be subject to the heightened criminal penalties imposed by section 705(d)?

Of course, an individual accused of liability under these circumstances may argue that he or she has not "divulged" the substance of the intercepted communication to anyone and has, therefore, not violated the second clause, the "intercept . . . and divulge" clause, of section 705(a). The Supreme Court has held that the third clause of the statute, which proscribes the unauthorized "receiv[ing] . . . and use" of radio communications, applies only to communications personnel. The clause, therefore, is not applicable to a home earth station use.<sup>154</sup> Just as a football quarterback knows the difference between a "reception" and an "interception," the cable programming sender can distinguish between intended and unintended receivers of cable communications. The home earth station viewer is an unintended "intercep-

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153. Cable Communications Policy Act of 1984, *supra* note 10, at § 5(c)(1) (to be codified at 47 U.S.C. § 705(c)(1)).

154. *See, e.g., Weiss v. United States*, 308 U.S. 321 (1939).

tor" and not an intended "receiver." He or she thus can be held liable, if at all, only under the second clause of the statute, which prohibits only "interceptions" coupled with "divulgences." Despite its logic, this argument has been rejected without explanation by some courts.<sup>155</sup> Indeed, most courts construing the statute have tended to ignore the subtle differences in its clauses and have applied the terms "intercept," "receive," "divulge," and "use" interchangeably and without analysis.

Another obvious limitation of the safe harbor is that it protects only "individual" reception of satellite cable programming "for private viewing." Will a restaurant or bar owner with a dish antenna who allows his patrons to view an unscrambled satellite cable program be liable under section 705(a)? This activity does not appear to be within the safe harbor provision, but it still may not violate section 705(a).

These questions and many others will surely arise as the satellite spectrum becomes increasingly congested with senders and receivers of television signals. As the courts begin to face these issues, confusion and disarray may result unless some logical interpretation of section 705(a) is finally developed to provide clear and consistent guidance in its application to emerging technologies.

#### V. TOWARD A COMMON SENSE APPROACH

Such an interpretation can be derived from the statute's language and its judicial history: Any sender who transmits a radio communication under circumstances that make its susceptibility to mass reception reasonably foreseeable, and who does not take reasonable steps to protect the communication from such reception, should be deemed to have intended the communication for the use of the general public.

This assertion is consistent with the line of cases beginning with *Chartwell Communications Group, Inc. v. Westbrook*,<sup>156</sup> which applied section 605 to the unauthorized reception of STV programming:

Mass appeal and mass availability are factors which weigh in favor of finding that a particular activity is broadcasting. However, those factors may be negated by clear, objective evidence that the programming is not intended for the use of the general public. . . . The fact that STV is transmitted in such a manner that the signal is meaningless without the use of special equipment negates a finding that STV is intended for the use of the general

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155. See, e.g., *Hoosier Home Theater, Inc. (TVQ) v. Adkins*, 595 F. Supp. 389 (S.D. Ind. 1984).

156. 637 F.2d 459 (6th Cir. 1980).

public.<sup>157</sup>

Similarly, courts applying the statute to the interception of MDS transmissions have been impressed by the fact that individuals who wished to intercept the signals had to undertake deliberate actions with specially designed equipment which had few if any "authorized" purposes: "the multipoint distribution service station operates on microwave radio frequencies of such height that the signal is not receivable by conventional television sets until it is modulated by special equipment. The programs are thus intended to be received not by 'the general public' but only by paying subscribers."<sup>158</sup>

While it is true that some courts have concluded that the statute cannot be construed to require a sender to scramble its signal,<sup>159</sup> courts have recognized that they "might face difficulties" in enforcing the statute against the purchasers of receivers or other devices that enable consumers to receive unauthorized signals among a wide range of previously designated authorized signals.<sup>160</sup>

Furthermore, imposing an obligation upon a sender to undertake some reasonable effort to protect its signal when its susceptibility to mass reception can easily be foreseen would be fully consistent with the policies of the Federal Communications Commission. As the FCC has stated, "it has long been the Commission's view that the initial responsibility for signal protection should be on the signal originator who is in the best position to protect the signal against unauthorized interception and use."<sup>161</sup>

The requirement that a sender undertake some effort to protect its signal when circumstances warrant should be imposed to limit liability under section 705(a) whether the unauthorized interception resulting from the lack of protection is individual or public, private or commercial. Unauthorized public or commercial displays of copyrighted programming are proscribed by the Copyright Act, which sets forth the full extent of protection Congress has been willing to provide for program owners.<sup>162</sup> These protections will

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157. *Id.* at 465.

158. *Home Box Office v. Pay TV*, 467 F. Supp. at 528.

159. *See, e.g., Home Box Office v. Advanced Consumer Technology*, 549 F. Supp. at 14; *United States v. Stone*, 546 F. Supp. at 240.

160. *HBO v. Advanced Consumer Technology*, 549 F. Supp. at 25.

161. *Michael Reynolds*, 89 F.C.C.2d 450, 455 (1982).

162. If the courts continue to accede to the growing practice by copyright owners and licensees of using § 705(a) to protect their interests, they will convert the statute into an ersatz "copyright law" unhindered by the limitations and exceptions, such as the "fair use" exception, that Congress and the courts have seen fit to impose upon copyright liability:

'The general rule of law,' says Mr. Justice Brandeis, 'is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communications to others,' free as the air to common use. The Constitution and Congress have made some exceptions to this general rule, by the patent and

not be affected by the interpretation suggested. The suggested interpretation will help to clear up the blurred distinction between protecting the ownership rights in programming, a copyright function, and protecting the means of its transmission, a section 705 function.

The interpretation suggested will promote the continued application of section 705(a) as a useful tool to assist programmers in proscribing and penalizing activities all parties recognize as "signal piracy" without unfairly and unreasonably circumscribing legitimate uses of revolutionary new communications technologies. If the courts reject this interpretation and instead adopt a broad application of the statute designed only to protect the narrow interests of satellite programmers, they will be helping to retard the growth and development of new technologies necessary to create and sustain new markets for those programmers.

## VI. CONCLUSION

The safe harbor created by section 705(b) provides a haven from judicial tempests of the past. Whether this protection is permanent or merely the eye of the hurricane will depend on future judicial interpretations. By adopting a common sense approach and requiring all satellite programmers to protect their signals, the courts can help to ensure that the tempests of the future will be confined to teapots.

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copyright laws. They have rewarded inventors and authors for their creativeness by granting them monopolies for a limited time and under carefully fixed conditions. The courts will be creating new and perpetual monopolies of their own if they enjoin . . . appropriation of unpatented and uncopyrighted material. This they are properly reluctant to do.

Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1318 (1940). Section 705(a) has had a long and varied life as a secrecy protector and as a rule of evidence. To turn it into a copyright law would be unwarranted at this late date.