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ONE OR MORE WIRELESS NETWORKS ARE AVAILABLE: CAN ISPS RECOVER FOR UNAUTHORIZED WI-FI USE UNDER CABLE TELEVISION PIRACY LAWS?

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After getting cable internet installed, you configure your wireless router to supply your house with wireless internet access. You decide against turning on encryption on the router, possibly because it appears too complex, because of apathy, or because you want to allow neighbors to use your wireless signal. If your neighbors "piggyback" on your wireless internet, rather than subscribing themselves, a result may be that the ISP loses customers. Could you be liable to the ISP for this apparent lost revenue? Could your neighbors be liable?

Unauthorized use of Wireless Fidelity (Wi-Fi) signals is becoming commonplace in many parts of the country,[1] coinciding with the growth in popularity of Wi-Fi technology[2] and the continued refusal by private individuals to secure their networks.[3] While wardrivers, wartalkers,

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1. *Man Arrested For Stealing Wi-Fi*, CBS NEWS.COM, July 7, 2005, http://www.cbsnews.com/stories/2005/07/07/tech/main707361.shtml (stating that unauthorized use of Wi-Fi signals is a "fairly common practice"). Not only is unauthorized piggybacking commonplace, but authorized piggybacking is becoming more commonplace as community wireless-sharing arrangements gain popularity. Nancy Gohring, *Wi-Fi Spreading Internet Access to the Masses*, SEATTLE TIMES, Dec. 9, 2002, http://archives.seattletimes.nwsource.com/cgibin/texis.cgi/web/vortex/display?slug=wifi09&date=20021209 (discussing Wi-Fi enthusiasts "who were planning 'community Wi-Fi' initiatives in which groups of people—in, say, a neighborhood—would be connected to networks"); David Pogue, *Do We Suffer From Wi-Fi Security Paranoia?*, NYTIMES.COM, May 20, 2004, http://www.nytimes.com/2004/05/20/technology/circuits/20POGUE-EMAIL.html ("[M]any apartment dwellers deliberately organize wireless-sharing arrangements to save money and wiring.").

2. *See* Richard Shim, *Wi-Fi Arrest Highlights Security Dangers*, CNET NEWS.COM, Nov. 28, 2003, http://news.com.com/2102-1039_3-5112000.html?tag=st.util.print (stating that shipments of Wi-Fi routers are expected to hit 47.4 million by 2007); Corilyn Shropshire, *Hot Spots for Hackers: Wireless Networks*, POST-GAZETTE.COM, Mar. 27, 2005, http://www.post-gazette.com/pg/05086/477876.stm (estimating that 10 million American houses currently have Wi-Fi networks).

3. *See* Shim, *supra* note 2 (stating that two-thirds of Wi-Fi networks are unencrypted despite the fact that most wireless routers come with security options); Shropshire, *supra*

hackers, and others with malignant purposes will likely receive all the attention from prosecutors,[4] it is inevitable that piggybacking on another's unencrypted wireless signal will have a significant economic impact on Internet service providers (ISPs).[5] ISPs have not yet attempted to bring a cause of action based on unauthorized Wi-Fi use,[6] but legal solutions may be necessary as more people decide to use a neighbor's unencrypted signal rather than subscribe to the service themselves.[7]

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note 2 (quoting a company that sets up Wi-Fi networks as saying only half of its customers ask about security).

4. *See* Alex Leary, *Wi-Fi Cloaks a New Breed of Intruder*, ST. PETERSBURG TIMES ONLINE, July 4, 2005, http://www.sptimes.com/2005/07/04/State/Wi_Fi_cloaks_a_new_br.shtml (discussing the arrest of a man for wardriving). Wardriving is the act of driving around an area to find open wireless access points and takes its name from a similar activity, "war calling," which was made famous in the movie *WarGames*. *Id.* In *WarGames*, "Matthew Broderick's character uses a computer to call hundreds of phone numbers in search of computer dialups." *Id.*

5. *See infra* notes 213-15. That ISPs explicitly prohibit unsecured wireless access points on their networks shows that that activity has a significant economic effect. *Id.* Further evidence that piggybacking has a significant economic effect on ISPs is the fact that ISPs, in some instances, warn subscribers when it is believed that they may be sharing their service with non-subscribers. *See, e.g.*, Jennifer Duffy, *Wi-Fi Signals Come Calling*, ARIZ. DAILY STAR, Nov. 30, 2004, *available at* http://www.azstarnet.com/dailystar/printDS/50443.php (discussing woman who had been threatened by her ISP with suspension of service because her roommate, who was borrowing her connection, was using the connection to download pirated movies); Gohring, *supra* note 1 ("Time Warner Cable sent letters to some cable-modem customers in New York City who use Wi-Fi, warning them that sharing Internet access with those who don't subscribe to Time Warner's service didn't comply with the cable system's terms of use."). *But see id.* (noting that some ISPs are happy to allow subscribers to share a connection with non-subscribers). When discussing ISPs that allow subscribers to share signals, Gohring makes it obvious that these rare ISPs do not have provisions in the acceptable-use agreements that prohibit piggybacking. *Id.* That in a few rare cases piggybacking isn't prohibited, and is, in fact, encouraged, proves that these particular ISPs thought it was beneficial to their business. Furthermore, theft of cable television caused cable companies to lose millions in revenue, and theft of cable broadband would logically have the same effect. *See* H.R. REP. NO. 98-934, at 83 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4720.

> Theft of service is depriving the cable industry of millions of dollars of revenue each year which it should otherwise be receiving. The Committee believes that theft of cable service poses a major threat to the economic viability of cable operators and cable programmers, and creates unfair burdens on cable subscribers who are forced to subsidize the benefits that other individuals are getting by receiving cable service without paying for it.

Id.

6. *See generally* Robert V. Hale II, *Wi-Fi Liability: Potential Legal Risks in Accessing and Operating Wireless Internet*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 543 (2005) (discussing legal issues relating to Wi-Fi networks, but not mentioning cases where ISP sought damages for unauthorized Wi-Fi use).

7. *See supra* note 1; *see also* Shropshire, *supra* note 2 ("Consumers are rapidly setting up [wireless access points], but many are unaware that unsecured, their home

The problem ISPs may encounter is that there are no statutes that specifically allow recovery for unauthorized Wi-Fi access.[8] There are, however, statutes originally intended to regulate a different, yet related, area of law that may be applied to causes of action by ISPs for unauthorized access.[9] Sections of the Communications Act of 1934 (Communications Act)[10] most commonly used for theft of cable television services[11] may furnish causes of action for unauthorized access to a Wi-Fi network when that Wi-Fi network is serviced by a broadband cable ISP.[12]

This Comment will first explore the sections of the Communications Act that apply to the theft of cable television. This Comment will then analyze whether any of those provisions apply to the unauthorized use of broadband cable internet. This Comment will then review the concept of standing and how it applies to cable television theft and the Communications Act. Next, this Comment evaluates other legal theories related to Wi-Fi theft. Lastly, this Comment will investigate the application of the cable television statutes to unauthorized Wi-Fi use by examining potential defendants and whether the ISPs have standing against each.

I. FEDERAL PROHIBITION OF UNAUTHORIZED ACCESS TO CABLE TELEVISION

The Cable Communications Policy Act of 1984 (CCPA),[13] which amended the Communications Act,[14] was established for the purpose of "establish[ing] a national policy concerning cable communications," "promot[ing] competition," minimizing regulation, and "encourag[ing] growth and development of cable systems."[15] Sections 553 and 605(e)(4)

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wireless networks can be tapped into accidentally by neighbors surfing the Web or intentionally by criminals eager to hack into a personal computer.").

8. *See* Hale, *supra* note 6 (discussing current legal issues in Wi-Fi technology).

9. *See infra* note 11 and accompanying text.

10. Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C.).

11. *See* 47 U.S.C. §§ 553, 605 (2000 & Supp. 2002); 74 AM. JUR. 2D Telecommunications § 190 (2001).

12. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688, 2710 (2005) (discussing an FCC ruling, which declared that DSL is a telecommunications service, on a telecommunications system). Because DSL is not supplied by a "cable operator" or over a "cable system," DSL providers are not able to use provisions of the Communications Act that allow for recovery of damages for unauthorized interception of cable television. *See infra* Part I.A and text accompanying note 56.

13. Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of U.S.C. Titles 15, 18, 46, 47, and 50).

14. *Id.*; *see also* 47 U.S.C. §§ 553, 605.

15. 47 U.S.C. § 521 (2000).

of Title 47 U.S.C., established by the CCPA, and § 605(a) of Title 47 U.S.C., established by the original Communications Act, are the statutory sections that cable television companies use to recover for theft, or for assisting the theft of cable signals.[16] Section 553 is used where there is unauthorized access to a wire-borne signal.[17] Section 605(e)(4) applies to the distribution of devices that assist in the decryption of cable television programming.[18] Courts are split on when to apply § 605(a); some reasoning that § 605(a) only applies to airborne signals,[19] and others applying it to wire-borne signals that originate as airborne signals.[20]

> The purposes of this subchapter are to–
>
> (1) establish a national policy concerning cable communications;
>
> (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
>
> (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
>
> (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
>
> (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and
>
> (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

Id.

16. *See, e.g.*, Int'l Cablevision, Inc. v. Sykes (*Sykes I*), 997 F.2d 998, 1003-08 (2d Cir. 1993) (discussing §§ 553, 605(a), and 605(e)(4)).

17. *Id.* at 1009.

18. Int'l Cablevision, Inc. v. Sykes (*Sykes II*), 75 F.3d 123, 133 (2d Cir. 1996) ("A violation of § 605(e)(4) occurs upon the distribution of a descrambler with knowledge (or reason to know) 'that the [descrambler] is primarily of assistance in the unauthorized decryption of satellite cable programming,'" or programming prohibited by section 605(a) (second alteration in original)). The Second Circuit in *Sykes II* found two individuals in violation of § 605(e)(4) who sold "black boxes" meant for descrambling cable television signals that were being transmitted on coaxial cable by the cable company after being received from a satellite by the cable company. *Id.* at 126, 133.

19. *See, e.g.*, TKR Cable Co. v. Cable City Corp., 267 F.3d 196, 202-04 (3d Cir. 2001) (holding that § 553 was enacted by Congress specifically to address cable television piracy and therefore § 605 did not apply to any transmissions over wire); United States v. Norris, 88 F.3d 462, 469 (7th Cir. 1996) (finding that "cable television programming transmitted over a cable network is not a 'radio communication' as defined in § 153(b), and thus its unlawful interception must be prosecuted under § 553(a) and not § 605"); CSC Holdings, Inc. v. Kimtron, Inc., 47 F. Supp. 2d 1361, 1362-64 (S.D. Fla. 1999) (noting that the Eleventh Circuit had not yet ruled on the issue, and deciding to follow the Seventh Circuit in *Norris* by holding that § 605(a) only applies to the "'interception of cable programming through the air'" (quoting *Norris*, 88 F.3d at 469)).

20. *Sykes II*, 75 F.3d at 130 (discussing rationales for concluding that § 605(a) applies to wires); *see also* Cmty. Television Sys., Inc. v. Caruso, 284 F.3d 430, 435 (2d Cir. 2002) (noting that, although two other circuits had disagreed with *Sykes II*, the court is "bound

A. Section 553

Section 553 deals with the "[u]nauthorized reception of cable service."[21] It specifically prohibits the interception or reception of "any communications service offered over a cable system" without authorization from a "cable operator."[22] Section 553 also prohibits assisting in the interception or reception of communications services.[23] The statute defines "assist[ing] in intercepting or receiving" as "the manufacture or distribution of equipment intended by the manufacturer or distributor . . . for unauthorized reception of any communications service offered over a cable system."[24]

Actions brought pursuant to this section have primarily been brought by cable television companies against manufacturers, distributors, or sellers of devices designed to descramble cable television signals, or against individuals who steal the signal by using a descrambling device or

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by *Sykes II*" and must apply § 605(a) to wire communications that originated as airborne communications).

Sykes I provided that § 605(a) would apply to interception of radio signals and that only § 553 would apply to interception of signals transmitted by coaxial cable. *Sykes I*, 997 F.2d at 1009. *Sykes II* modified this ruling by reviewing extensive legislative history that showed that § 605(a) should apply to wire borne signals that originated as airborne signals. *Sykes II*, 75 F.3d at 131-33. In following the ruling in *Sykes II*, the *Caruso* court noted many areas where §§ 553 and 605(a) did not overlap when § 605(a) is applied to wire communications that originated as airborne communications. *Caruso*, 284 F.3d at 434 n.5 (noting that § 605 limits the court when "individuals violat[e] the act for their private use" and that § 553 has no such limitation).

The Seventh Circuit decided *Norris* six months after the decision in *Sykes II*. *Sykes II*, 75 F.3d at 123; *Norris*, 88 F.3d at 462. This allowed the court in *Norris* to directly rebut the findings in *Sykes II*. *Id.* at 467-69. The main argument in *Norris* against *Sykes II* was that the court in *Sykes II* based its argument on what *Norris* considers a misinterpretation of legislative history. *Id.* at 468-69. Unfortunately, a 1968 amendment to the Communications Act modified the wording of § 605(a) (what was then § 605), which left a gap that invites differing interpretations. *Id.* at 465-66.

21. 47 U.S.C. § 553 (2000).

22. *Id.* § 553(a)(1). The text of the statute specifically reads: "No person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law." *Id.*

23. *Id.*; *see also Sykes II*, 75 F.3d at 132 ("'[Section 553(a)(1)] prohibits any person from intercepting or receiving, or from assisting in the interception or reception of, *any service offered over a cable system*, unless the cable operator specifically authorizes the reception, or it is otherwise specifically authorized by law.'" (quoting H.R. REP. NO. 98-834, *reprinted in* 1984 U.S.C.C.A.N. 4655) (emphasis added) (alteration in original)).

24. 47 U.S.C. § 553(a)(2). The text of the statute specifically reads: "For the purpose of this section, the term 'assist in intercepting or receiving' shall include the manufacture or distribution of equipment intended by the manufacturer or distributor (as the case may be) for unauthorized reception of any communications service offered over a cable system in violation of subparagraph (1)." *Id.*

other means.[25] Courts have held that economic gain is not a requirement to demonstrate that a violation of § 553 occurred.[26] Furthermore, courts have held that neither good faith, acting foolishly, nor lack of intent can be used as defenses against claims arising under § 553.[27]

1. Key Definitions in § 553

Due to the language of the statute,[28] an analysis of whether § 553 applies to a particular set of facts often involves one or more of the following questions: Can the service that is provided be categorized as a "cable service"?[29] Is the infrastructure upon which the service is delivered considered to be a "cable system?"[30] Is the person or entity supplying the service a "cable operator"?[31]

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25. *See, e.g.*, TKR Cable Co. v. Cable City Corp., 267 F.3d 196, 196 (3d Cir. 2001) (sale of cable television descramblers); *Norris*, 88 F.3d at 463 (modification and sale of television descramblers); Kan. City Cable Partners v. Espy, 250 F. Supp. 2d 1296, 1297 (D. Kan. 2003) (theft of cable television using "'compatible bootleg "pirate" converter-decoder devices'"); CSC Holdings, Inc. v. Kimtron, Inc., 47 F. Supp. 2d 1361, 1362 (S.D. Fla. 1999) (sale of cable television descramblers).

26. *See, e.g.*, Int'l Cablevision, Inc. v. Sykes (*Sykes I*), 997 F.2d 998, 1004 (2d Cir. 1993). The court stated that:

> Though the damages portion of § 553 contains a reference to economic "gain," stating that the court may "increase the award of damages" if it finds that a willful violation was committed for purposes of "private financial gain," there is no suggestion whatever in § 553(a)(1) that in the absence of financial gain there is no violation; and, indeed, there is no suggestion even in § 553(c)(3)(B) that "gain" means only a *net* gain.

Id. (citations omitted).

27. *See, e.g.*, *id.* The court in *Sykes I* stated that:

> [T]here is no suggestion in § 553(a)(1) that an unaware person even as thus described in § 553(c)(3)(C) is exempted from liability, much less any suggestion of such an exemption for one who 'foolishly' sold the unauthorized device with the knowledge and intent that it would be used for a prohibited purpose.

Id. (citation omitted). The court went on to conclude that "§ 553 . . . in no way suggests that there is no violation if an unauthorized sale for a prohibited purpose is knowing and intentional yet somehow in good faith." *Id.* The court based this conclusion on an analysis of the legislative history and committee reports. *Id.* The court took note of a statement from Sen. Bob Packwood, who said that giving the court discretion to lower an award to $100 in cases where the violator did not know he was violating the law, was not meant to serve as a defense. *Id.*

28. *See supra* note 22 (reciting language of § 553, which refers to a "cable system" and a "cable operator"). Although the activities prohibited by § 553(a)(1) do not mention "cable service," the terms "cable system" and "cable operator" are both defined by their relation to a "cable service." 47 U.S.C. § 522(5), (7) (2000); *see also infra* notes 69, 71 and accompanying text.

29. *See* 47 U.S.C. § 522(5), (7); *infra* Part I.A.1.a.

30. *See* 47 U.S.C. § 522(7); *infra* Part I.A.1.b.

31. *See* 47 U.S.C. § 522(5); *infra* Part I.A.1.c.

a. What Is a Cable Service?

The CCPA definition, found in 47 U.S.C. § 522, describes a "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[32]

i. Historical Treatment of Cable Broadband as a Cable Service

In 2000, the Ninth Circuit was faced with the question of how to classify cable modem service.[33] In *AT&T Corp. v. City of Portland*, AT&T brought an action challenging a local ordinance requiring AT&T to allow other ISP companies to use its cables.[34] The authority for the ordinance was based on a reading of the Communications Act that AT&T should be treated as a "common carrier" because it provides a telecommunications service.[35] The court held that cable modem service is not a cable service, but is instead part "information service" and part "telecommunications service."[36] The court determined that cable modem

32. 47 U.S.C. § 522(6).

33. AT&T Corp. v. City of Portland, 216 F.3d 871, 876 (9th Cir. 2000). The main issue in the case was "whether a local cable franchising authority may condition a transfer of a cable franchise upon the cable operator's grant of unrestricted access to its cable broadband transmission facilities for [ISPs] other than the operator's proprietary service." *Id.* at 873. To make that determination, it was first necessary to determine whether cable modem service is a "cable service" because a cable service is not treated as a common carrier, where a "telecommunications service" is. *Id.* at 875-77; *see also* FCC v. Midwest Video Corp., 440 U.S. 689, 696-709 (1979) (stating that cable systems cannot be regulated as common carriers and thus cannot be forced to make channels, equipment, and facilities available to third parties).

34. *AT&T Corp.*, 216 F.3d at 875. AT&T, a telecommunications operator, was merging with TCI, a cable operator that, in some areas, provided cable modem service. *Id.* at 874. AT&T wanted to expand the cable modem service offered by TCI into areas where TCI had previously only offered cable television service. *See id.* The Mount Hood Cable Regulatory Commission recommended the approval of the merger on the condition that there be an "open access requirement," which forces operators of telecommunications systems to allow other companies to use their systems at a fair price. *Id.* at 875.

35. *See id.* at 875, 877. The definition of common carrier can be found at 47 U.S.C. § 153(10).

> The term 'common carrier' . . . means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

47 U.S.C. § 153(10) (2000).

36. *AT&T Corp.*, 216 F.3d at 878 ("To the extent [a cable broadband provider] is a conventional ISP, its activities are that of an information service. However, to the extent that [a cable broadband provider] provides its subscribers Internet transmission over its

service is not a cable service because cable modem service is a two-way transmission, where the definition of cable service requires a one-way transmission.[37] The court noted that the Communications Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[38] The court found that cable modem service fit within this definition, and further reasoned that it is a telecommunications service, because the information service could not exist without the backbone of the telecommunications service.[39]

At approximately the same time, the United States District Court for the Eastern District of Virginia faced a similar issue but produced a very different result.[40] In *MediaOne Group, Inc. v. County of Henrico*, MediaOne objected to the county's authority to pass an ordinance requiring MediaOne to allow other ISPs access to its physical cable lines.[41] The district court held that the county did not have the authority to require MediaOne to share its cable lines with other ISPs because cable modem service is not a telecommunications service under the Communications Act, and thus is not subject to common carrier regulation.[42] The district court based this decision on its finding that cable modem service is a cable service as defined in the Communications Act.[43] In affirming the district court, the Fourth Circuit deferred to the Federal Communication Commission's (FCC) judgment as to whether or not cable modem service is a cable service.[44]

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cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.").

37. *Id.* at 876 (noting that the Communications Act defines "cable service" as a "one-way transmission" and that "[t]he essence of cable service . . . is one-way transmission of programming to subscribers").

38. *Id.* at 877 (quoting 47 U.S.C. § 153(20)).

39. *Id.* at 877-78. The court says that what is important is what the ISP provides in relation to the public. *Id.* at 877. And the ISP does not provide a cable service or telecommunications service to the public, but an information service. *Id.*

40. MediaOne Group, Inc. v. County of Henrico, 97 F. Supp. 2d 712 (E.D. Va. 2000), *aff'd*, 257 F.3d 356 (4th Cir. 2001).

41. *MediaOne*, 97 F. Supp. 2d at 712-14.

42. *See id.* at 715-16 ("[T]he Henrico Ordinance requiring MediaOne . . . to provide indiscriminate access to its cable facilities to all ISPs is prohibited common carrier regulation.").

43. *Id.* at 715 ("MediaOne's . . . service contains news, commentary, games, and other proprietary content with which subscribers interact as well as Internet access, and therefore it falls under the statutory definition of 'cable service.'").

44. *MediaOne*, 257 F.3d at 365 (noting that the FCC "has diplomatically reminded us [in its amicus brief] that it has jurisdiction over all interstate communications services, including high-speed broadband services").

Based upon these conflicting decisions, the FCC issued a notice of inquiry (NOI) on September 28, 2000.[45] This NOI asked for comments on whether cable modem service should be classified "as a cable service subject to Title VI [of the Communications Act]; as a telecommunications service under Title II; as an information service subject to Title I; or some entirely different or hybrid service subject to multiple provisions of the Act."[46]

In March of 2002, "after receiving some 250 comments . . . the FCC issued its Declaratory Ruling along with a notice of proposed rulemaking."[47] The FCC pronounced in the Declaratory Ruling that cable modem service is only an information service; it is *neither* a cable service nor a telecommunications service.[48] In reaching this decision, the FCC reasoned that the label given to a particular service should describe the function given to the customer, not the facilities used in providing that service.[49] Accordingly, the FCC concluded that no telecommunications service was being provided to the end users, even if telecommunications were used in the transmission.[50]

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45. Notice of Inquiry, Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 65 Fed. Reg. 60,441 (Oct. 11, 2000) (containing a summary of the inquiry); *see also* Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1125-26 (9th Cir. 2003) (traversing legal history of the interpretation of cable modem service as a cable, information, or telecommunications service), *rev'd sub nom.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688 (2005).

46. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, 15 F.C.C.R. 19,287, 19,293 (2000) [hereinafter Inquiry Concerning High-Speed Access]; *see also Brand X*, 345 F.3d at 1126. The FCC was seeking comment on the classification of cable modem service in the context of the "regulatory treatment . . . [that] should be accorded to cable modem service and the cable modem platform used in providing this service." Inquiry Concerning High-Speed Access, *supra*, at 19,287.

47. *Brand X*, 345 F.3d at 1126. The Declaratory Ruling can be found at Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet over Cable Declaratory Ruling, 67 Fed. Reg. 18,907 (Apr. 17, 2002).

48. Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities; Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798, 4819 (2002) [hereinafter Declaratory Ruling]. The FCC's analysis began with the "language of the statute," followed by the factual record in the proceeding, and ended with looking at "descriptions by cable operators and others of how cable modem service is provided today and what functions it makes available to subscribers and to ISPs." *Id.*

49. Declaratory Ruling, *supra* note 48, at 4821. The FCC concluded that "the classification of cable modem service turns on the nature of the functions that the end user is offered." *Id.* at 4822. The FCC further declared that "cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications." *Id.* The Declaratory Ruling went on to say that the telecommunications piece is "integral" to the cable service, and not a separate offering. *Id.* at 4823.

50. *Id.*

In finding that cable modem service was not a cable service, the FCC applied cable modem service to various phrases within the definitions in the Communications Act.[51] Regarding the requirement for "one-way transmission to subscribers," the FCC noted that the definition of cable service in the Communications Act was meant to encompass "mass communication" where the same video content was transmitted to all subscribers.[52] With respect to the "other programming service" clause, the FCC referenced legislative history that showed Congress intended this clause to apply to "non-video information having the characteristics of traditional video programming," which does not describe cable modem service.[53] Regarding the "subscriber interaction" clause, the FCC reasoned that the clause was intended to apply to "simple menu-selection" that would provide information about the programming, but would not tailor the programming to the subscriber's request.[54]

Seven petitions were filed for review of the Declaratory Ruling in three different circuits.[55] All petitioners accepted the FCC's ruling that cable modem service is an information service, but all believed that the FCC should have also classified it as a cable service, a telecommunications service, or instead, given DSL the same "information service" classification.[56] In April 2002, a multi-jurisdictional

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51. *Id.* at 4833; *see also* 47 U.S.C. § 522(7) (2000).

52. Declaratory Ruling, *supra* note 48, at 4833. The FCC noted that when the definition of cable service was added to the Communications Act in 1984 as part of the CCPA, "cable systems designed for the traditional one-way delivery of programming were developing the capability to provide '"two-way" services, such as the transmission of voice and data traffic, and transactional services such as at-home shopping and banking.'" *Id.* The Declaratory Ruling explored legislative history that indicated Congress' intention to have a clear separation between the traditional one-way cable service and the new-in-1984 two-way cable service. *Id.*

53. *Id.* at 4835. "Other programming service" is defined as "information that a cable operator makes available to all subscribers generally." *Id.* Moreover, "'[o]ther programming service' does not include information that is subscriber specific." *Id.*

54. *Id.* The FCC cited legislative history that specifically stated that "offering the capacity to engage in transactions or off-premises data processing, including unlimited keyword searches or the capacity to communicate instructions or commands to software programs stored in facilities off the subscribers' premises, would not be [cable services]." *Id.* (footnotes omitted).

55. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1127 (9th Cir. 2003) (noting that petitions "were filed in the Third, Ninth, and District of Columbia Circuits"), *rev'd sub nom.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688 (2005).

56. *Id.* One group of petitioners "argue[d] that cable modem service is both an information service and a telecommunications service, and is therefore subject to regulation on a common-carriage basis." *Id.* Another group "assert[ed] that cable modem service is both an information service and a cable service, and therefore is subject to regulation by local authorities as provided in the [Communications] Act." *Id.* The last petitioner, Verizon, "argu[ed] that the [FCC] was correct to classify cable modem service

panel consolidated the petitions into one case, *Brand X Internet Services v. FCC*, and directed the case to the Ninth Circuit.[57]

In *Brand X*, the Ninth Circuit had before it an even broader issue than the categorization of cable modem service.[58] The main question that the Ninth Circuit needed to address was whether it should adhere to stare decisis or accept the FCC's interpretation of cable modem service.[59] The Ninth Circuit in *AT&T Corp.* held that cable modem service is both a telecommunications service and an information service, whereas the FCC ruling considered cable modem service simply an information service.[60] Notwithstanding the FCC's interpretation, the court held that Ninth Circuit precedent must be followed, and, in turn, reversed the FCC's ruling to the extent that it did not define cable modem service as a telecommunications service.[61] The court did, however, uphold the FCC's ruling defining cable modem service as an information service.[62] The Supreme Court granted certiorari in December of 2004.[63]

On March 29, 2005, the Supreme Court heard arguments in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*[64] on the issue of the proper statutory classification of cable modem service.[65] The

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as solely an information service, but should have taken the additional step of conferring the same designation on the DSL service provided by telephone companies." *Id.*

57. *See id.*

58. *See id.* at 1123.

59. *Id.* at 1130-32. An administrative agency has the power to interpret statutes that it is responsible for administering. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984). According to the Supreme Court's ruling in *Chevron*, there are two steps necessary in reviewing an administrative agency's interpretation of a statute. *Id.* The first step is to determine whether the intent of Congress is clear in the text of the statute; if it is, then the agency has no power to interpret. *Id.* at 842-43. If the intent of Congress is not clear, or if the statute is silent, it is the duty of the court to determine whether the agency's interpretation was "based on a permissible construction of the statute." *Id.* at 843. In an interpretation of the Communications Act, the FCC categorized cable modem service in a way that differed from a Ninth Circuit ruling, forcing the *Brand X* court to choose between two conflicting rules. *Brand X*, 345 F.3d at 1127-29.

60. AT&T Corp. v. City of Portland, 216 F.3d 871, 877-78 (9th Cir. 2000); Declaratory Ruling, *supra* note 48, at 4823.

61. *See Brand X*, 345 F.3d at 1128-32 (applying a Ninth Circuit rule that disregards precedent "in favor of subsequent agency interpretation 'only where the precedent constituted deferential review of [agency] decisionmaking'" (quoting Mesa Verde Constr. Co. v. Northern California District Council of Laborers, 861 F.2d 1124, 1136 (9th Cir. 1988)) (alteration in original)).

62. *See Brand X*, 345 F.3d at 1130-32.

63. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 543 U.S. 1018 (2004).

64. 125 S. Ct. 2688 (2005).

65. *Id.* at 2695. The Court said it needed to decide the legality of the FCC's interpretation of the Communications Act that ruled cable modem service was not a telecommunications service. *Id.*

Court did not consider "cable service" in its analysis because certiorari was granted only on the issue of whether cable modem service is a telecommunications service.[66] In a six-to-three decision, the Court reversed the Ninth Circuit's decision and upheld the FCC Declaratory Ruling that cable modem service is only an information service.[67] The result of all of the FCC rulings and court decisions is that cable modem service is not a "cable service" as applied to the CCPA.[68]

b. What Is a Cable System?

The definition of "cable system" is much less nebulous than the definition of "cable service." Title 47 of the United States Code, as amended by the CCPA, defines "cable system" as a system that provides a "cable service."[69] This definition states further that a cable system is

66. *Cf. id.*

67. *Id.* at 2694-95, 2708. The Supreme Court based its decision on a rationale similar to that followed by the FCC in the Declaratory Ruling. First, the Court determined that deference should be given to the FCC's ruling as a federal agency if the ruling is reasonable. *Id.* at 2708. Applying the two-part test in *Chevron*, the Court first found that the statute was silent on this issue and that it was permissible for the FCC to "fill the consequent statutory gap." *Id.*

Next, the Court concluded that the FCC's ruling was reasonable insofar as it classified the type of service based on the customer's perspective. *Id.* at 2703-04. The Court analyzed the meaning of the term "offering" and determined that it means that a service was provided "stand-alone." *Id.* at 2704. The Court concluded that a stand-alone telecommunications service is never offered, so cable modem service is in no way a telecommunications service. *Id.* at 2704-05. Applying the second part of the *Chevron* test, the Court then held that the FCC's interpretation was a "reasonable policy choice." *Id.* at 2708.

One line of reasoning upon which the Court based this conclusion was the analysis of whether there is sufficient integration between the transmission component of cable modem service with the service received by the customer to consider them a single, integrated service. *Id.* at 2704-05. The Court decided that the factual background of the technology should be looked at, rather than the text of the statute, in order to determine whether there is sufficient integration. *Id.* at 2705. The Court refused to interpret these highly technical facts, preferring to leave "federal telecommunications policy in this technical and complex area to be set by the [FCC], not by warring analogies." *Id.*

The Court concluded that there was sufficient integration between the two components because neither cable nor telecommunications companies "offer" the transmission of the information, but the "finished service" that the customers see. *Id.* at 2705.

68. *See supra* notes 33-67 and accompanying text.

69. 47 U.S.C. § 522(7) (2000). The text of § 522(7) specifically says that "the term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." *Id.*

not a facility that simply retransmits television signals or "serves subscribers without using any public right-of-way."[70]

c. What Is a Cable Operator?

For purposes of the CCPA, a cable operator is defined as an entity that provides a cable service.[71] The term "cable operator" also includes "any person who (i) is owned or controlled by, or under common ownership or control with, a cable operator, and (ii) provides any wire or radio communications."[72]

The Fifth Circuit has developed two tests for classifying a cable operator: the ownership test and the control test.[73] The Fifth Circuit has held that one of the two tests must be met to qualify as a cable operator.[74] Under the ownership test, an individual qualifies as a cable operator if he or she is "a person or a member of a group of persons who either 'directly or through one or more affiliates owns a significant interest' in a 'cable system.'"[75] In contrast, to be classified as a cable operator under the control test, the court looks at whether the entity "'controls, or is responsible for, through any arrangement, the management and operation' of the 'cable system.'"[76]

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70. *Id.* § 522(7)(A)-(E). The definition specifically states that the following are not considered a cable system:

> (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier . . . except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system . . . or (E) any facilities of any electric utility used solely for operating its electric utility system.

Id.

71. *Id.* § 522(5). The text of § 522(5) specifically reads:

> [T]he term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

Id.

72. 47 U.S.C. § 551(a)(2)(C) (2000).

73. City of Austin v. Sw. Bell Video Servs., Inc., 193 F.3d 309, 311-12 (5th Cir. 1999).

74. *Id.*

75. *Id.* at 311-12 (quoting 47 U.S.C. § 522(5)(A)). The court in this case held that owning or controlling "only some components of a 'cable system'—satellite dishes, a tower and antennae, and 'headend'"—was not sufficient to qualify as a "significant interest" in a cable system. *Id.* at 312.

76. *Id.* at 312 (quoting 47 U.S.C. § 522(5)(B)). This case dealt with a telecommunications operator that had an affiliate that was a cable operator. *See id.* at

Many courts have linked the definition of "cable operator" to "cable system." The Fifth Circuit, for example, has declared that simply being a cable system does not necessarily mean the entity is a cable operator.[77] In another instance, a district court in Texas started the analysis by questioning whether there is a cable system.[78] This court held that if no cable system can be found, then there is no cable operator.[79] If, however, a cable system is found to exist, the entity is a cable operator if it "owns or controls the cable system."[80] Even if the entity does not own or control the cable system, the entity can be a cable operator if is it "'owned or controlled by, or under common ownership with' such a cable operator."[81]

B. Section 605(a)

Section 605(a) of Title 47 U.S.C., created by the Communications Act, prohibits anyone "receiving, assisting in receiving, transmitting, or assisting in transmitting, any . . . communication by wire or radio" from publishing the communication to unauthorized persons.[82] Section 605(a)

310-11. The court concluded that the telecommunications company was not a cable operator simply because an affiliate is. *Id.* at 312.

77. *Id.* at 311. With two affiliates that share infrastructure, one being a cable operator and the other not, the court declared that "even if the arrangement between [two affiliates] is a 'cable system,' that fact alone is insufficient to establish [either] as a 'cable operator.'" *Id.* (footnote omitted).

78. Santellana v. Nucentrix Broadband Networks, Inc., 211 F. Supp. 2d 848, 852 (S.D. Tex. 2002).

79. *Id.*

80. *Id.*

81. *Id.* (quoting 47 U.S.C. § 551(a)(2)(C) (2000)).

82. 47 U.S.C. § 605(a) (2000). Section 605(a) specifically reads:

> [N]o 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 . . . . 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.

Id.

is not violated if the communication is unencrypted and the person receiving the communication has authorization.[83] Because of the circuit split on the application of § 605(a), this section is used in some circuits primarily for illegal use of satellite television, and in other circuits it is used for cable television theft.[84]

C. Section 605(e)(4)

Section 605(e)(4) prohibits "[a]ny person who manufactures, assembles, modifies, imports, exports, sells, or distributes" any device and has "reason to know that the device . . . is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by [§ 605(a)]."[85] The Second Circuit has held that § 605(e)(4) applies to individuals who know, or have reason to know, that devices they distribute will be used in the unauthorized decryption of cable television signals where those signals originate from a satellite and are intercepted either directly from the satellite or from a wire that receives transmissions from the satellite.[86]

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83. *Id.* § 605(b). Section 605(b) specifically provides:

> The provisions of subsection (a) of this section shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if—
>
> (1) the programming involved is not encrypted; and
>
> (2)(A) a marketing system is not established under which—
>
> (i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and
>
> (ii) such authorization is available to the individual involved from the appropriate agent or agents; or
>
> (B) a marketing system described in subparagraph (A)
>
> is established and the individuals receiving such programming has [sic] obtained authorization for private viewing under that system.

Id.

84. *See, e.g.*, Cmty. Television Sys., Inc. v. Caruso, 284 F.3d 430, 432 (2d Cir. 2002) (theft of cable services by means of illegal descramblers); Cablevision of S. Conn., Ltd. P'ship v. Smith, 141 F. Supp. 2d 277, 279 (D. Conn. 2001) (sale of cable descramblers).

85. 47 U.S.C. § 605(e)(4). Section 605(d)(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." *Id.* § 605(d)(1).

86. Int'l Cablevision, Inc. v. Sykes (*Sykes II*), 75 F.3d 123, 133 (2d Cir. 1996).

D. Damages

1. Section 553

There are two types of damages that may be awarded under § 553: actual and statutory.[87] A plaintiff, however, may not seek recovery of both types of damages.[88] Actual damages are computed by subtracting the violator's deductible expenses from the violator's gross revenue.[89] In contrast, statutory damages can be adjusted according to the violator's mens rea.[90] For each violative act, the court may award no less than $250 and no more than $10,000 per act.[91] If the violator willfully committed an act for commercial advantage or private financial gain, the court may raise the maximum penalty under the provision to $50,000 per act.[92] If the violator was unaware, however, the court may, in its discretion, reduce the minimum penalty per act to $100.[93] Finally, courts have no

87. 47 U.S.C. § 553(c)(3)(A) (2000). Section 553(c)(3)(A) reads:

> Damages awarded by any court under this section shall be computed in accordance with either of the following clauses:
>
> (i) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or
>
> (ii) the party aggrieved may recover an award of statutory damages for all violations involved in the action, in a sum of not less than $250 or more than $10,000 as the court considers just.

Id.

88. *Id.*

89. *Id.* § 553(c)(3)(A)(i). The text of § 553(c)(3)(A) is provided *supra* note 87.

90. 47 U.S.C. § 553(c)(3)(B)-(C). The text of § 553(c)(3)(B)-(C) is provided *infra* notes 92-93.

91. 47 U.S.C. § 553(c)(3)(A)(ii). The text of § 553(c)(3)(A) is provided *supra* note 87.

92. 47 U.S.C. § 553(c)(3)(B). Section 553(c)(3)(B) reads:

> In any case in which the court finds that the violation was committed willfully and for purposes of commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory under subparagraph (A), by an amount of not more than $50,000.

Id.

93. *Id.* § 553(c)(3)(C). Section 553(c)(3)(C) states that: "In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $100." *Id.*

discretion to deny all damages; they must award at least the minimum for each violation.[94]

2. Sections 605(a) and 605(e)(4)

Violations of either § 605(a) or § 605(e)(4) allow recovery of actual or statutory damages.[95] Actual damages under either subsection are calculated by subtracting the violator's "deductible expenses" from the violator's gross revenue.[96] Each of the two subsections, however, presents a different way of calculating statutory damages.[97]

For a violation of § 605(a), there is a minimum of $1,000 and a maximum of $10,000 per act.[98] Where a defendant willfully violated § 605(a), the maximum penalty per act is increased to $100,000.[99] Where a defendant is unaware of his violation, the minimum penalty may be decreased to $250.[100] Because § 605(e)(4) is aimed at the perceived greater wrong of stealing satellite signals directly from the satellite before they are rebroadcast to the subscriber,[101] the minimum penalty for

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94. *See* Int'l Cablevision, Inc. v. Sykes (*Sykes I*), 997 F.2d 998, 1006 (2d Cir. 1993). The court in this case held that an aggrieved party may not be denied all damages because the violator acted foolishly or in good faith. *Id.*

95. 47 U.S.C. § 605(e)(3)(C)(i) (2000); *see also infra* notes 96-102.

96. 47 U.S.C. § 605(e)(3)(C)(i)(I). Section 605(e)(3)(C)(i)(I) reads:

> [T]he party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation.

Id.

97. *See infra* notes 98-102.

98. 47 U.S.C. § 605(e)(3)(C)(i)(II) ("[T]he party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in a sum of not less than $1,000 or more than $10,000, as the court considers just . . . .").

99. *Id.* § 605(e)(3)(C)(ii). Section 605(e)(3)(C)(ii) reads:

> In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $100,000 for each violation of subsection (a) of this section.

Id.

100. *Id.* § 605(e)(3)(C)(iii) ("In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $250.").

101. *See* Int'l Cablevision, Inc. v. Sykes (*Sykes I*), 997 F.2d 998, 1008-09 (2d Cir. 1993) (citing legislative history from 1988 that discusses that § 605 should be amended to include

a violation of this section is $10,000, and the maximum penalty is $100,000.[102]

3. Factors To Consider When Determining Damages

Circuit courts have established factors to consider when determining the amount of damages.[103] Courts should consider whether there were "repeated violations over an extended period of time," whether the defendant realized "substantial unlawful monetary gains," and whether the defendant failed to offer a "defense or evidence in mitigation."[104] Courts should also consider whether the plaintiff suffered "significant actual damages" and whether those actual damages can be determined.[105] If the actual damages cannot be determined, a court may award lesser damages.[106]

II. STANDING

A. A Discussion of Standing, Generally

Notwithstanding the availability of a provision under which to bring a cause of action, it is hornbook law that one may not bring a cause of action without being an aggrieved party.[107] Accordingly, it is necessary to discuss the doctrine of standing under the Constitution in order to better ascertain whether ISPs have a valid cause of action under the statute.[108]

Article III of the United States Constitution limits the jurisdiction of the federal courts to the resolution of "cases" and "controversies."[109] The

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harsher penalties for § 605(e)(4) "to deter persons who reap average profits of $1,000 or more per sale of unauthorized satellite dishes").

102. 47 U.S.C. § 605(e)(3)(C)(i)(II) ("[F]or each violation of paragraph (4) of this subsection involved in the action an aggrieved party may recover statutory damages in a sum not less than $10,000, or more than $100,000, as the court considers just."); *see also* Int'l Cablevision, Inc. v. Sykes (*Sykes II*), 75 F.3d 123, 133 (2d Cir. 1996) ("A violation of § 605(e)(4) . . . . incurs the heavier penalties . . . .").

103. *See infra* notes 104-06 and accompanying text.

104. Cablevision of S. Conn., Ltd. P'ship v. Smith, 141 F. Supp. 2d 277, 287 (D. Conn. 2001) (using defendant's refusal to offer "any defense or evidence in mitigation" as a factor to determine damages); Home Box Office v. Champs of New Haven, Inc., 837 F. Supp. 480, 484 (D. Conn. 1993) (finding "no allegations of repeated violations" or "substantial unlawful monetary gains by the defendants").

105. *See Smith*, 141 F. Supp. 2d at 286; *Home Box Office*, 837 F. Supp. at 484.

106. *See Smith*, 141 F. Supp. 2d at 286-87.

107. 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 101.40 (3d ed. 1997).

108. *See* U.S. CONST. art. III, § 2. The text of Article III, Section 2 is provided *infra* note 109. As with any statute, under the Communications Act an ISP cannot successfully bring a cause of action without standing. *See* U.S. CONST. art. III, § 2.

109. *See* U.S. CONST. art. III, § 2, cl. 1:

term controversies is less comprehensive than the term cases, and only includes civil suits.[110] The idea of standing "involves [these] constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise."[111] Standing is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right."[112] Standing is the "threshold question" in every case—a plaintiff must show that there is a case or controversy between him and the defendant to bring the case to a federal court.[113]

There are essentially two strands of standing jurisprudence.[114] The first, Article III standing, "enforces the Constitution's case or controversy requirement."[115] Article III standing requires a plaintiff to show conduct by the defendant that caused an injury in fact and that will be redressed by a favorable judgment.[116] The second, prudential standing, "embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'"[117]

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

See also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982).

110. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 (1937).

111. Warth v. Seldin, 422 U.S. 490, 498 (1975). The Court further explained, "[i]n both dimensions [the question of standing] is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Id.*

112. BLACK'S LAW DICTIONARY 1442 (8th ed. 2004).

113. *Warth*, 422 U.S. at 498; *see also* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) ("[T]he standing question in its Art. III aspect 'is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" (quoting *Warth*, 422 U.S. at 498-99)).

114. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004).

115. *Id.*

116. *Id.* at 12.

117. *Id.* at 11-12 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). Prudential standing, more abstract and less defined than Article III standing, encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen*, 468 U.S. at 751.

To achieve standing, a plaintiff must satisfy three elements.[118] First, a plaintiff must "show that he personally has suffered some actual or threatened injury" in fact, a harm that is concrete and not conjectural or hypothetical.[119] Allegations of possible future injury are not sufficient, and a threatened injury must be "certainly impending."[120] Second, a plaintiff must further show that the injury is "fairly traceable" to the challenged action of the defendant and is not caused by a third party not before the court.[121] Lastly, a plaintiff must show a "substantial likelihood," as opposed to a mere speculation, that his injury will be redressed by the requested remedy.[122]

The burden of establishing the elements of standing falls on the party invoking federal jurisdiction.[123] The burden of proof for a plaintiff requires "facts from which it reasonably could be inferred that," but for the defendant's actions, "there is a substantial probability" that a plaintiff would not have suffered the injury and that the injury will be redressed if the requested relief is granted.[124]

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118. McConnell v. FEC, 540 U.S. 93, 225-26 (2003) ("On many occasions, we have reiterated the three requirements that constitute the "'irreducible constitutional minimum'" of standing." (quoting Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 771 (2000))).

119. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982); *see also McConnell*, 540 U.S. at 225 ("[A] plaintiff must demonstrate an 'injury in fact,' which is 'concrete,' 'distinct and palpable,' and 'actual or imminent.'" (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990))); *Stevens*, 529 U.S. at 771 ("First, [a plaintiff] must demonstrate 'injury in fact'—a harm that is both 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" (quoting *Whitmore*, 495 U.S. at 155)).

120. *Whitmore*, 495 U.S. at 156-58 (denying standing to a death row inmate because the possibility that he could be retried and then sentenced again to death was not sufficiently imminent) (citing Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979)).

121. *McConnell*, 540 U.S. at 225 ("Second, a plaintiff must establish 'a causal connection between the injury and the conduct complained of—the injury has to be "fairly trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] some third party not before the court."'" (alterations in original) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992))).

122. *McConnell*, 540 U.S. at 225-26 (citing *Stevens*, 529 U.S. at 771); *Lujan*, 504 U.S. at 561 (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43 (1976)); *Valley Forge Christian Coll.*, 454 U.S. at 472 (citing *Simon*, 426 U.S. at 38, 41).

123. *Lujan*, 504 U.S. at 561; *see also* Warth v. Seldin, 422 U.S. 490, 508 (1975) ("We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no broader than required by the precise facts to which the court's ruling would be applied.'" (quoting Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 221-22 (1974))) (footnote omitted).

124. *Warth*, 422 U.S. at 504.

Aside from the cases-or-controversies limitation, the Supreme Court has limited who may be a plaintiff.[125] The first limitation imposed by the Court is that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."[126] Second, the Court has held that a plaintiff must assert his own legal rights, not those of a third party, even if the cases-or-controversies requirement is met.[127] Without these limitations, the Court may be called upon "to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the[se] questions."[128] The Court has found exceptions for these rules, mostly in cases where constitutional rights will be infringed upon if the rules are followed.[129] Also Congress may grant a right of action where none exists under the rules for standing.[130] As long as all other requirements are satisfied and Congress has expressly or impliedly granted a right of action, a plaintiff may, in some cases, "invoke the general public interest in support of [his] claim."[131]

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125. *Id.* at 499.

126. *Id.*; *see also Ex parte* Levitt, 302 U.S. 633, 633-34 (1937) (dismissing motion by a private citizen that Justice Black was not qualified to be a Supreme Court Justice because simply being a citizen or a member of the bar did not give the plaintiff standing).

127. *Warth*, 422 U.S. at 499; *see also* Tileston v. Ullman, 318 U.S. 44, 46 (1943) (dismissing appeal because of lack of standing of physician who objected to state laws regarding contraception because of health effects on his patients).

128. *Warth*, 422 U.S. at 500; *see also* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976) (stating that a court exercising its power without standing would be gratuitous).

129. United States v. Raines, 362 U.S. 17, 22-23 (1960). These exceptions include cases where "the constitutional rights of one not a party would be impaired, and where he has no effective way to preserve them himself." *Id.* at 22 (citing NAACP v. Alabama, 357 U.S. 449, 459-60 (1958)). Another exception is where the act itself inhibits the freedom of speech. *Id.* (citing Smith v. California, 361 U.S. 147, 151 (1959)).

130. *Warth*, 422 U.S. at 501. When Congress expressly grants a right of action where none would exist, only the "prudential" strand of standing is satisfied and the Article III tests must still be met. *Id.*

131. *Id.* at 501; *see also* FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477 (1940) (holding that a radio station had standing to question an FCC ruling because it can be implied that one who is economically affected by an administrative ruling has standing to appeal that ruling). *But see* Sierra Club v. Morton, 405 U.S. 727, 729-30, 739-41 (1972) (holding that organization did not have standing to ask for injunction preventing development of ski resort in national game refuge despite apparent public interest in the environmental preservation).

B. How Courts Have Applied Standing to the Communications Act

Federal courts have dealt with the issue of standing as applied to the Communications Act.[132] One such example can be found in *American Television & Communications Corp. v. Floken, Ltd.*[133]

American Television and Communications Corporation (ATC) is a cable company that received video programming from satellites and rebroadcasted that programming to its subscribers via coaxial cable.[134] Home Box Office (HBO), Entertainment and Sports Programming Network (ESPN), and Southern Satellite Systems, Inc. (SSS) are providers of programming that broadcasted their programming via satellite.[135] This programming was intended only for those cable companies that were under contract with HBO, ESPN, and SSS.[136] ATC was under such a contract with HBO, ESPN, and SSS to rebroadcast the programming to ATC's subscribers.[137]

The defendants were all hotels that used satellite equipment for the unauthorized reception of HBO, ESPN, SSS, and other pay programming.[138] The defendants all purchased satellite antennas and retransmission equipment to receive the programming from the satellites for retransmission to the rooms of the hotels.[139] Many of the defendants "advertised the availability of these subscription television services in order to attract customers."[140] The plaintiffs were unable to detect when customers of the hotel were watching particular channels without paying and were unable to terminate or prevent the defendants' unauthorized reception.[141]

HBO, ESPN, SSS, and others filed a claim in the United States District Court for the Middle District of Florida alleging, among other claims,

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132. *E.g.*, Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 650 F. Supp. 838, 842-44 (D. Mass. 1986); Am. Television & Commc'ns Corp. v. Floken, Ltd., 629 F. Supp. 1462, 1469-72 (M.D. Fla. 1986).

133. 629 F. Supp. 1462 (M.D. Fla. 1986).

134. *Id.* at 1464.

135. *Id.* at 1465.

136. *Id.* ("HBO and ESPN contract with subscription television operators, such as ATC, to receive their satellite feeds and to distribute their programming services to the local operator's customers by means of cable television, master antenna, direct satellite reception, or microwave distribution service . . . . SSS retransmits the television signal of WTBS to local cable operators, including ATC, which have contracted for its carrier signal services and which pay fees for the right to receive the WTBS signal via satellite.").

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 1465-66.

141. *Id.* at 1466-67.

that the hotels violated 47 U.S.C. § 605.[142] Specifically, plaintiffs alleged that "[d]efendants' unauthorized reception, use, and retransmission [of the television programming] ha[d] deprived plaintiffs of the value of their business investment, business opportunities, reputation, and goodwill."[143] Furthermore, plaintiffs claimed to "have lost the value, benefits, and profits derived from cable retransmission to defendants and their patrons [and that] [e]ach time the defendants intercept[ed], use[d], or retransmit[ted] plaintiffs' programming, plaintiffs irretrievably los[t] a customer for such retransmission and the revenues derived from retransmission."[144]

The court noted that the satellite broadcasts that were intercepted by the defendants did not satisfy the § 605 exception where the broadcast was for the use of the general public because "subscription television is intended only for those who purchase it."[145] Further, the court concluded that the defendants intercepted the plaintiffs' satellite transmission without authorization and were thus in violation of § 605(a).[146]

Having decided that the defendants violated the statute, the court then analyzed the defendants' claim that ATC had no standing under § 605(a).[147] Specifically, the defendants claimed that ATC could not have standing because they did not broadcast the signal that was being

142. *Id.* at 1464. Most of the court's analysis dealt with the pre-CCPA § 605 where there was no explicit right of recovery. *Id.* at 1467-68. Before the CCPA, § 605 consisted only of what is now § 605(a). *Id.* The CCPA altered § 605 by labeling the original text of § 605 as "605(a)" and adding subsections (b) through (e). Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 5, 98 Stat. 2779, 2802 (codified at 47 U.S.C. § 605 (2000)). It was subsection (d) that explicitly provided for a right of civil recovery. *Id.* However, the court did analyze the post-CCPA § 605 and came to the same conclusion, noting that the only real difference is that the post-CCPA § 605 explicitly describes civil remedies. *Floken*, 629 F. Supp. at 1468-69.

Although the facts of this case appear to be a standard application of § 605(e)(4), this case was tried before § 605 was amended in 1988 to include harsher penalties for violations of § 605(e)(4). *See supra* note 101. Without harsher penalties for § 605(e)(4) and the resulting circuit court decisions that created more explicit distinctions between the applications of § 605(a) and § 605(e)(4), the lines that separated the situations to which § 605(a) and § 605(e)(4) would apply were less clear.

143. *Floken*, 629 F. Supp. at 1466.

144. *Id.* Defendants also refused to pay for the service when asked by plaintiffs. *Id.* Plaintiffs claimed that defendants' conduct also hindered their ability to sell the service to other hotels in the area. *Id.*

145. *Id.* at 1468.

146. *Id.* at 1468-69. The court held that "defendants have deliberately intercepted transmissions without authorization, and have divulged or published the intercepted programs without authorization for their own benefit and the benefit of their guests," and thus violated the pre-CCPA § 605. *Id.* at 1468. The court reasoned that the post-CCPA leaves § 605(a) intact, and "defendants [sic] conduct remains illegal under the newly enacted legislation." *Id.* at 1469.

147. *See id.* at 1469-72 (analyzing ATC's standing under the Communications Act).

intercepted.[148] The court concluded that ATC had standing because it satisfied all of the elements required to establish standing.[149] The court found that ATC had suffered an "injury in fact" that was the direct result of defendants' conduct because "[d]efendants' unauthorized reception, use, and retransmission" caused ATC to lose customers.[150] Further, the court found that ATC's claims were within the "zone of interests intended to be protected by [§ 605(a)]" because § 605(a) "protects communications from unauthorized reception, use, and retransmission"

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148. *Id.* at 1469. The court noted that there have been many cases where defendants were found liable for intercepting or assisting to intercept signals from broadcasters. *See id.* Then the court noted that, in this case, the defendants have not intercepted, or assisted in intercepting, a signal that was broadcast by ATC. *Id.*

149. *Id.* at 1470-72 ("Although ATC's role as intended, authorized, recipient of the intercepted signals admittedly does not fall within the literal language of either the former or the amended § 605, the Court concludes that ATC has standing to seek redress for violations of § 605."); *see also* Entm't & Sports Programming Network, Inc. v. Edinburg Cmty. Hotel, Inc., 735 F. Supp. 1334, 1338 (S.D. Tex. 1986) (holding that a cable company that was the intended receiver of an intercepted signal and the originator of the transmitted signal both had standing against a hotel that was intercepting the satellite signal under § 605); Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 650 F. Supp. 838, 843-44 (D. Mass. 1986) (finding standing for cable company that was the intended receiver of a satellite signal intercepted by local bar). *But see* Air Capital Cablevision, Inc. v. Starlink Commc'ns Group, Inc., 601 F. Supp. 1568, 1572 (D. Kan. 1985) ("The cable company simply has no standing to claim violations under former § 605 of the Communications Act because the users of the earth station satellite dishes were not intercepting a transmission originated by or retransmitted by the cable company.").

Although the *Starlink* court failed to find standing for the cable company, it appears that the *Starlink* court failed to consider the economic effect on the cable company. *Id.* The standing analysis was only as long as the above quotation--leaving the court's reasoning a mystery. *Id.* It is important to note, however, that standing was not the major issue in this case because the court had already found for the defendant based upon the inapplicability of defendant's conduct to the Communications Act. *See id.* at 1571-72. Another pertinent fact is that the plaintiffs in *Starlink* were not suing an interceptor of a signal, but rather were suing a distributor of satellite dishes that were used for unauthorized interception. *Id.* at 1569.

The court in *Quincy* specifically addressed the holding in *Starlink* before coming to a different conclusion. *Quincy*, 650 F. Supp. at 840-44. *Quincy* first noted that the *Starlink* court incorrectly applied the "not encrypted" and "private viewing" exceptions in § 605(b) to the definition of any "person aggrieved" in § 605(d). *Id.* at 841-42. The other reason *Quincy* found that the decision in *Starlink* was incorrect was that the court in *Starlink* "ignored the standard standing analysis." *Id.* at 842.

150. *Floken*, 629 F. Supp. at 1471. The court concluded that ATC's contract to receive the signals was a "significant proprietary interest" that was "damaged by defendants' pirating of signals." *Id.*; *see also Quincy*, 650 F. Supp. at 843 (finding cable company suffered an "injury in fact" because "[d]efendants' unauthorized interception and use of the . . . transmissions will likely deprive [the cable company] of customers"). Quoting an earlier decision, the *Quincy* court further stated, "'Quincy loses an unascertainable number of potential customers for the retransmission of . . . programming each time a defendant exhibits the programs in his tavern.'" *Id.* (quoting Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 640 F. Supp. 1159, 1161 (D. Mass. 1986)).

and ATC sought to further this purpose.[151] Regarding "zone of interests," the court also noted that ATC, as a local distributor, was harmed more by unauthorized use of the transmissions than the originators of the signal because the originators (ESPN, HBO, etc.) would be paid by ATC whether or not the unauthorized reception occurred.[152] Finally, the court concluded that finding in ATC's favor would redress the injury because the defendants would be forced to pay for services that they had previously been receiving for free.[153]

Accordingly, this case and many others[154] show that a plaintiff need not broadcast the intercepted signal to have standing under the Communications Act.[155] A non-broadcasting plaintiff can establish standing by showing that there is an injury in fact, that the claims are within the zone of interest of the Communications Act, and that a ruling in favor of the plaintiff would redress the injury suffered by the plaintiff.[156]

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151. *Floken*, 629 F. Supp. at 1471; *see also Quincy*, 650 F. Supp. at 844 ("Quincy, as a cable system operator, has *significant economic and professional interests* in the integrity of the communications systems." (emphasis added)).

152. *Floken*, 629 F. Supp. at 1471. ("[T]he greatest immediate impact from unauthorized reception is on local distributors, such as ATC."); *see also Quincy*, 650 F. Supp. at 844 (agreeing with *Floken* that cable companies suffer the "'greatest immediate impact'" when a satellite transmission is intercepted (quoting *Floken*, 629 F. Supp. at 1471))).

153. *Floken*, 629 F. Supp. at 1473. This case only addressed ATC's motion for a preliminary injunction. *Id.* at 1464. Therefore, the court found that injunctive relief that forced defendants to discontinue their unauthorized interception of the signals was likely to redress ATC's injury. *Id.* at 1473. As the court limited itself to the discussion of the injunction, it did not discuss whether damages would redress the plaintiff's injury. *Id.* However, it is likely that the same logic used by the court would apply to damages as well. *See also Quincy*, 650 F. Supp. at 844 (finding that the cable company's injury was "likely to be redressed by a favorable decision"). The court in *Quincy* explained that the enactment of the CCPA as amendments to the Communications Act provided standing because it "explicitly provid[ed] for a private right of action," which could "reasonably be considered [an] expan[sion of] standing" by Congress. *Id.* at 843.

154. *See, e.g.*, *Edinburg*, 735 F. Supp. at 1338 (holding that a cable company that was the intended receiver of an intercepted signal had standing against an interceptor under the Communications Act); *Quincy*, 650 F. Supp. at 839, 844 (finding standing for cable company who was the intended receiver of a satellite signal that was intercepted by local bar).

155. *See supra* notes 147-53 and accompanying text.

156. *See supra* notes 150-53 and accompanying text.

III. ANALYSIS OF A RECENT DISCUSSION REGARDING WI-FI LEGAL ISSUES

In March 2005, Robert V. Hale addressed the subject of unauthorized access to Wi-Fi networks.[157] In addressing unauthorized Wi-Fi access, Hale analyzed the application of the Counterfeit Access Device and Computer Fraud and Abuse Act of 1984 (CADCFAA), the Electronic Communications Privacy Act of 1986 (ECPA), trespass to chattels, and breach of service agreement.[158] Though he discussed compelling legal issues that may arise as a result of unauthorized Wi-Fi use,[159] Hale focused on legal options available to the subscriber whose Wi-Fi network is accessed, and on the criminal liability of the violator,[160] but not on the ISPs who are more likely to suffer harm as a result of the unauthorized use.[161]

The CADCFAA punishes anyone who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer if the conduct involved an interstate or foreign communication."[162] In his analysis of the phrase "without authorization," Hale looked from two different perspectives: service agreements and implicit authorization or lack of authorization.[163]

Regarding service agreements, Hale cited case law that found unauthorized access where there was a violation of a service agreement,[164] even where the service agreement was not read by the

157. Hale, *supra* note 6.

158. *See id.* at 544, 550, 552, 555-56.

159. *See infra* notes 162-84 and accompanying text.

160. *See infra* notes 162-84 and accompanying text.

161. Hale, *supra* note 6, at 549-50; *see also* Am. Television & Commc'ns Corp. v. Floken, Ltd., 629 F. Supp. 1462, 1471 (M.D. Fla. 1986). *Floken* noted that cable companies suffer more harm than the broadcasters of the signal because the cable companies lose customers, whereas the broadcasters of the signal are paid by the cable company whether the signal is intercepted or not. *Id.* Though the cable companies in the present circumstance are not the intended receiver as in *Floken*, the cable companies in the present circumstance still have a significant economic interest in unauthorized use because the violators are potential customers who do not pay for the service.

162. 18 U.S.C. § 1030(a)(2)(C) (2000). Another section of the CADCFAA prohibits "intentionally access[ing] a protected computer without authorization, and as a result of such conduct, caus[ing] damage." 18 U.S.C. § 1030(a)(5)(B)(iii) (2000 & Supp. 2002). As a result, this section is not likely to be the focus of piggybacking jurisprudence because unauthorized use of a Wi-Fi signal, where that use is simply piggybacking on a neighbor's Wi-Fi network, is normally not harmful. *See* Shropshire, *supra* note 2 ("[M]ost consumers would not notice if a neighbor tapped into their network to surf the Web because it would not affect the speed or strength of their Internet connection.").

163. Hale, *supra* note 6, at 545-48.

164. *Id.* at 546 (citing Am. Online, Inc. v. LCGM, Inc., 46 F. Supp. 2d 444, 450 (E.D. Va. 1998)).

violator.[165] He also pointed to case law that showed that a third party may violate terms of service without explicitly agreeing to the terms.[166]

With respect to implicit authorization, Hale mentioned many factors that may imply authorization,[167] but stressed an overriding factor for implying no authorization.[168] He noted that lack of encryption of the signal may imply authorization as no passwords are required for access.[169] Hale also stated that recent technology allows for boosting wireless signals so that they may be transmitted up to seventy-five miles away, further implying that the use of the signal is authorized.[170] Conversely, he described a ruling in *EF Cultural Travel BV v. Zefer Corp.*,[171] a First Circuit case where the court found an "implicit lack of authorization, rejecting the view that there exists a 'presumption' of open access to the Internet."[172] Hale ended his analysis of the CADCFAA by concluding that, although civil suits under the CADCFAA thus far have involved malevolent hacking, the CADCFAA may begin to be used more often by individuals seeking to prevent others from using their wireless signals.[173]

Hale, however, did not mention whether or not the ISP may use the CADCFAA to recover for lost profits and only discussed the right of action of an ISP's subscriber.[174] Furthermore, he mentioned that it is possible that a subscriber may only be able to recover under the CADCFAA where there was damage to his computer, either by

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165. *Id.* at 548 (finding a company liable for unauthorized access to uncopyrighted material where it did not read the service agreement because there was "manifested assent" when a request was made).

166. *Id.* at 546, 548 (noting that a spammer was liable for unauthorized access of AOL servers because a service agreement was breached, which the spammer claims never to have read). Hale extrapolates the ruling in *LCGM*, 46 F. Supp. 2d at 444, to apply to "Wi-Fi interloper[s]" who have "no privity of contract and no notice of the terms." Hale, *supra* note 6, at 548.

167. *See* Hale, *supra* note 6, at 545-47.

168. *Id.* at 546 (citing EF Cultural Travel BV v. Zefer Corp., 318 F.3d 58, 63 (1st Cir. 2003)).

169. *Id.* at 546-47. Even if lack of password implies authorization for the unauthorized user, this does not absolve the subscriber from liability to the ISP who agrees not to allow third parties to access his Wi-Fi network. *See infra* notes 215-17 and accompanying text.

170. Hale, *supra* note 6, at 547.

171. 318 F.3d 58 (1st Cir. 2003).

172. Hale, *supra* note 6, at 546.

173. *See id.* at 550 ("Although prosecutors have tended to use the [CADCFAA] solely to punish theft-related acts involving computers, the proliferating use of Wi-Fi could change this, or provoke related activity at the state level or under federal wiretap laws, such as the Electronic Communications Privacy Act." (footnote omitted)).

174. *See id.* at 549 (discussing the "damage" that a piggybacker would have to inflict on a neighbor's computer system to be found liable under CADCFAA).

malevolent hacking or high-bandwidth downloads that slow the subscriber's computer system by exhausting resources.[175]

Hale then applied the ECPA to unauthorized Wi-Fi use.[176] The ECPA states that "[i]t shall not be unlawful . . . for other users of the same frequency to intercept any radio communication made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system, if such communication is not scrambled or encrypted."[177] He noted that there are five elements necessary for a violation of the ECPA: "(1) intentionally (2) intercept, endeavor to intercept, or procure another person to intercept (3) the contents of (4) an electronic communication (5) using a device."[178] Hale, however, only briefly mentioned that civil penalties are available, and did no further analysis on whether a subscriber, let alone an ISP, can recover under the ECPA.[179]

Hale then investigated the use of California's trespass to chattels law for unauthorized Wi-Fi use.[180] In California, "an action for trespass to chattels arises when an intentional interference with the possession of personal property causes injury."[181] He provided California case law the held that trespass to chattels did not apply to "'an electronic communication that neither damages the recipient computer system nor impairs its functioning.'"[182] Given this declaration, Hale offered that an

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175. *See id.* ("Courts have held that prohibited conduct under the [CADCFAA] that causes slowdowns and diminished capacity of computers, thereby impairing the availability of the system, also constitutes 'damage' under the statute." (citing Am. Online, Inc. v. Nat'l Health Care Disc., Inc., 121 F. Supp. 2d 1255, 1274 (N.D. Iowa 2000))).

176. *See id.* at 550.

177. 18 U.S.C. § 2511(2)(g)(v) (2000).

178. Hale, *supra* note 6, at 550.

179. *Id.* (noting that "[t]he ECPA also imposes federal penalties, both criminal and civil").

180. *Id.* at 551-53.

181. *Id.* at 552.

182. *Id.* (quoting Intel Corp. v. Hamidi, 71 P.3d 296, 300 (Cal. 2003)).

Another possibility not discussed by Hale is state theft of services statutes. *See* 50 AM. JUR. 2D *Larceny* § 67 (1995 & Supp. 2003) (discussing state theft of service statutes). The New York theft of services statute, N.Y. PENAL LAW § 165.15 (McKinney 1999), only applies to unauthorized use of a computer "that is offered for use as a service in a commercial setting, such as for lease or hire, and was not designed to make it a crime for a public or private employee to use his employer's internal office equipment without permission." People v. Weg, 450 N.Y.S.2d 957, 959 (N.Y. Crim. Ct. 1982). The Model Penal Code contains a theft of services statute, which states:

> (1) A person is guilty of theft if he purposely obtains services which he knows are available only for compensation, by deception or threat, or by false token or other means to avoid payment for the service. "Services" include labor, professional service, transportation, telephone or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, use

action for trespass to chattels is not likely to be successful under California law unless the violator is using a large portion of bandwidth by downloading music, video, and other large files, or actually accesses a neighbor's computer and causes damage to the system.[183] Again, he offered that there may be implied consent where there is no password required and the network is not encrypted, and that the implication may be refuted by the assumption against authorization in *Zefer*.[184] Once more, all of Hale's analysis is directed at harm suffered by the subscriber, and not the ISP.[185]

After briefly describing possible vicarious liability of the ISP,[186] Hale concluded that, while it is unlikely that a violator will be found criminally or civilly liable, people should refrain from piggybacking on another's unencrypted Wi-Fi signal.[187] Hale ended by saying that ISPs should encourage piggybacking and develop a price structure around it.[188]

IV. RECOVERY BY CABLE MODEM ISPS UNDER THE COMMUNICATIONS ACT

The question presented here is whether an ISP has a cause of action under the CCPA and Communications Act. This raises issues of standing, and against whom, if anyone, would the ISP have a cause of action.

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of vehicles or other movable property. Where compensation for service is ordinarily paid immediately upon the rendering of such service, as in the case of hotels and restaurants, refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception as to intention to pay.

(2) A person commits theft if, having control over the disposition of services of others, to which he is not entitled, he knowingly diverts such services to his own benefit or to the benefit of another not entitled thereto.

MODEL PENAL CODE § 223.7 (1980). Moreover, a Pennsylvania theft of services statute allows civil damages to the "extent of injury suffered by the victim, the victim's request for restitution as presented to the district attorney . . . and such other matters as it deems appropriate." 18 PA. CONS. STAT. ANN. § 1106(c)(2) (West 1998 & Supp. 2005).

183. *See* Hale, *supra* note 6, at 552.

184. *Id.* at 553-54.

185. *See id.*

186. *See id.* at 555-57.

187. *Id.* at 557 ("As a general matter, until the courts and legislatures better define the legal status of Wi-Fi arrangements, the piggybacking Wi-Fi user should simply stop the practice of accessing others' open WLANs, absent an explicit agreement or notice.").

188. *Id.* at 559 ("[R]ather than pursuing WAP operators who violate terms of service with open access points, ISPs may find more success in encouraging such activity as much as possible and allowing ensuing demand to drive appropriate pricing structures in the brave new world of Wi-Fi.").

As stated above, it is possible that an ISP would have a cause of action under the CCPA.[189] Because 47 U.S.C. § 553 deals directly with signals sent across a cable system, this is the section most likely to be utilized.[190] Section 605(a) may also be a viable option because some circuits apply it to signals transmitted over a wire that originated as a satellite-borne signal.[191] It is also possible that § 605(e)(4) may apply against router manufacturers and distributors or companies that develop operating systems, if it can be shown that they knew or should have known that their product would facilitate unauthorized Wi-Fi use.[192]

A. Under § 553, is an ISP a "Cable Operator" That Manages a "Cable System" and Offers a "Cable Service"?

Due to the Supreme Court's holding in *Brand X*[193] that a cable modem service is an information service and the Ninth Circuit's holding that it is also not a cable service, it is not likely that courts will consider a cable modem service to be a cable service for purposes of the Communications Act.[194]

Whether or not an ISP is a cable system may depend upon whether it provides a cable service.[195] The definition of cable system requires that it be "designed to provide a cable service."[196] Although the cable modem service that an ISP provides is not a *cable service*,[197] if the ISP is a provider of cable modem service—as opposed to DSL or another type of internet service—it certainly *provides* a cable service using the same infrastructure that it uses to provide the cable modem service. Furthermore, courts have referred to the system on which a cable

189. *See supra* note 12 and accompanying text; *see also infra* notes 190-92 and accompanying text.

190. *See* 47 U.S.C. § 553 (2000).

191. 47 U.S.C. § 605(a) (2000); *see also* Int'l Cablevision, Inc. v. Sykes (*Sykes II*), 75 F.3d 123, 129 (2d Cir. 1996); Int'l Cablevision, Inc. v. Sykes (*Sykes I*), 997 F.2d 998, 1003-08 (2d Cir. 1993); *supra* note 20.

192. 47 U.S.C. § 605(e)(4); *see also Sykes II*, 75 F.3d at 129; *Sykes I*, 997 F.2d at 1007-09; *supra* note 18 and accompanying text (discussing the applicability of § 605(e)(4)).

193. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688 (2005).

194. *See id.* at 2704-08 (holding that a cable modem service is only an information service).

195. *See* 47 U.S.C. § 522(6)-(7) (2000) (defining cable service and cable system); *supra* notes 32, 69-70 and accompanying text.

196. *See* 47 U.S.C. § 522(7); *supra* note 69 and accompanying text. Because "cable operator" is defined as one who supplies a cable service, if a cable modem service provider does not also supply a cable service, that provider is not likely to be classified as a cable operator and, therefore, these statutes will not apply. 47 U.S.C. § 522(5).

197. *See supra* notes 33-68 and accompanying text.

modem service is provided as a cable system.[198] As a result, a system that provides cable modem service is a cable system.

Similarly, an ISP may be a "cable operator" even though it appears that "cable operator" is limited by the fact that it is defined in terms of "cable service" and "cable system."[199] According to the CCPA, a cable operator is either an entity that provides a cable service or an entity that manages and maintains a cable system.[200] Following logic similar to the cable system analysis, even though a cable modem service is not a cable service,[201] if the ISP supplying that service also provides cable television, that ISP still provides a cable service. Therefore, because an ISP that provides cable modem service also provides cable service, that ISP is a "cable operator."

Though cable modem service is not a cable service as applied to the CCPA,[202] an ISP that provides cable modem service is a cable operator, and the infrastructure that transmits the cable modem service is a "cable system." Because § 553 prohibits the interception of "any communications service offered over a cable system" without authorization from a "cable operator," § 553 will likely apply to the unauthorized use of wireless internet.[203] Accordingly, a cause of action may be brought for unauthorized Wi-Fi use under the CCPA by using § 553.[204]

B. Possible Defendants

One issue that a harmed ISP may face is who to bring a cause of action against. The obvious defendant would be the unauthorized user who is, in effect, stealing the signal from a subscriber.[205] Another option would be to bring an action against the subscriber who does not encrypt his signal, and thus allows another to use it.[206] These options would not be likely to provide large awards, but the potential effect of deterrence would be invaluable.[207] Less obvious, but possibly no less viable, options

198. *See, e.g.*, AT&T Corp. v. City of Portland, 43 F. Supp. 2d 1146, 1152 (D. Or. 1999) ("Plaintiffs contend that the mandatory access provision is preempted because it regulates plaintiffs' *cable system* as a common carrier" (emphasis added)), *rev'd*, 216 F.3d 871 (9th Cir. 2000).

199. *See infra* notes 200-01.

200. 47 U.S.C. § 522(5).

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

202. *See supra* notes 37, 68 and accompanying text.

203. 47 U.S.C § 553(a)(1) (2000).

204. *Id.*; *see also supra* notes 21-81.

205. *See infra* Part IV.B.1.

206. *See infra* Part IV.B.2.

207. *Cf.* Hugh Prestwood, *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online*, COLLEGIATE PRESSWIRE, Sept. 8, 2003,

for defendants are the manufacturers or distributors of the wireless routers and the developers of the operating systems.[208]

1. Unauthorized Users

As the party who is not subscribing to the ISP's service, but obtaining the benefit, unauthorized users would be the most obvious defendant.[209] Unauthorized users can be broken down into two groups, those who intentionally or knowingly use another's wireless signal and those who do so without knowledge or intent.[210]

Intentional, willful, or knowing unauthorized users can be found liable under the Communications Act.[211] Such a user would search for an unencrypted signal and connect to it, or simply assent to connecting to it if asked by his computer.[212] Intent could also be established with the existence of recurring violations combined with the absence of a subscription to an ISP. With respect to justicibility, the ISP would likely be able to prove standing because the loss in revenue would be the direct result of the defendant using a subscriber's unencrypted signal.[213]

An ISP may have less success bringing a cause of action against a user that unintentionally or unknowingly accesses another's wireless signal. This defendant would be the person who turns on his computer and the computer automatically connects to a neighbor's unencrypted wireless signal or he is asked if he would like to connect and chooses "OK"

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http://www.cpwire.com/archive/2003/9/8/1377print.asp (noting that in 2003, the Recording Industry Association of America (RIAA) sued individuals who illegally downloaded music on the Internet). These lawsuits were principally meant to deter others from illegally downloading music. *Id.* (quoting RIAA president Cary Sherman who said, "[w]e hope to encourage even the worst offenders to change their behavior, and acquire the music they want through legal means"); *see also id.* (quoting the president of the Gospel Music Association who said, "[i]t's unfortunate that the music industry has had to resort to prosecution to *deter* theft" (emphasis added)). This same logic could be applied to unauthorized Wi-Fi use.

208. *See infra* Part IV.B.3.

209. *See* Hale, *supra* note 6, at 544-55 (discussing many civil and criminal liabilities of an unauthorized user).

210. *See* 47 U.S.C §§ 553(c)(3)(B)-(C), 605(e)(3)(C)(ii)-(iii); *supra* notes 92-93, 99-100 (discussing provisions in §§ 553 and 605 that have different amounts of damages for intentional or unintentional violations).

211. *See* 47 U.S.C. §§ 553(b)-(c), 605(e)(1)-(3); *infra* text accompanying notes 212-13.

212. *See* Hale, *supra* note 6, at 543, 545 (noting that agreeing to a computer's request to connect to another's network could amount to intentional access).

213. *See supra* note 150 and accompanying text. The court in *Floken* held that ATC had standing under the Communications Act because they stood to lose more money than the entity that was actually broadcasting the signal that was being intercepted. Am. Television & Commc'ns Corp. v. Floken, Ltd., 629 F. Supp. 1462, 1471 (M.D. Fla. 1986). In the piggybacking scenario, the ISP certainly stands to lose more money than the subscriber who is actually broadcasting the signal.

because he is ignorant of computer networking. The unintentional or unknowing violator is less likely to repeatedly violate because a reasonable person would at some point realize that Internet service is not free and that they should pay for it. On the issue of standing, the ISP may have trouble proving that their harm was caused by the actions of the defendant because the defendant may not have done anything, or known that he did anything.[214]

Bringing a cause of action against an unauthorized user would certainly present enforcement challenges. In order to bring a cause of action against an unauthorized user, the ISP must first find someone who is accessing the network without authorization. However this is done, it will cost the ISP money to implement, but may be worth the cost if it is outweighed by the revenue gained by enforcement.

2. Subscribers Who Do Not Encrypt Signals

Another option for an ISP may be to bring a cause of action against the subscriber who does not encrypt his wireless signal.[215] By facilitating and assisting in the unauthorized use by a third party, the intentional or unintentional violator would be in violation of §§ 553 and 605(a).[216] In the case of intentional violations, damages would be awarded under §§ 553(c)(3)(B) and 605(e)(3)(C)(ii).[217] Unintentional violations, however, would allow lesser damages under §§ 553(c)(3)(C) and 605(e)(3)(C)(iii).[218] Regardless of the intent, a subscriber who does not encrypt his wireless signal is in violation of the ISP's service agreement, which proves that the ISP is not authorizing use by the third party.[219]

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214. *See supra* notes 116, 121 and accompanying text (stating that standing requires showing that the defendant caused the harm suffered).

215. *See* Shim, *supra* note 2 (quoting an attorney, Joseph Burton, who said that "home owner[s] can be liable for a lack of security on a wireless network . . . if they are negligent in setting up security").

216. *See* 47 U.S.C. §§ 553(a)(1), 605(a) (2000); *supra* notes 22, 82 and accompanying text (discussing behavior prohibited by §§ 553 and 605(a)).

217. *See* 47 U.S.C §§ 553(c)(3)(B), 605(e)(3)(C)(ii); *supra* notes 92, 99 and accompanying text (discussing damages available for willful or knowing violations of §§ 553 and 605(a)).

218. *See* 47 U.S.C §§ 553(c)(3)(C), 605(e)(3)(C)(iii); *supra* notes 93, 100 and accompanying text (discussing damages available for unintentional violations of §§ 553 and 605(a)).

219. *See* Adelphia Internet Acceptable Use Policy, § 2, http://www.adelphia.com/esafety/service_agreements.cfm (follow "Adelphia HSI Service Agreement & Acceptable Use Policy" hyperlink) (last visited June 9, 2006) (instructing customers "not to use, or allow Users to use, the Adelphia Broadband Service, the Adelphia Network, the Equipment or the Software . . . to operate a WI-FI or other form of wireless network that allows others who are not in your household to use your Adelphia Broadband Service"); Comcast High-Speed Internet Acceptable Use Policy, http://www.comcast.net/terms/use.jsp (last visited June 9, 2006) ("Prohibited uses include, but are not limited to, using

3. Manufacturers and Distributors of Wireless Routers

Manufacturers and distributors of wireless routers may also be liable under the CCPA and Communications Act because both acts have commonly been used to bring civil actions against manufacturers and distributors of devices meant for the interception of cable television.[220] Both §§ 553 and 605(a) prohibit assisting in the interception of a transmission, and courts have frequently applied these sections to manufacturers and distributors of cable television descrambling devices.[221] The distinguishing factor is that the wireless router was presumptively not intended by the manufacturers or distributors to be used to violate the CCPA and Communications Act, while the cable descrambling devices most often were.[222] The greater damages under § 605(e)(4) can be available if the ISPs can prove that the router manufacturers or distributors knew or should have known that their routers would be primarily used for violation of § 605(a).[223]

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the Service, Customer Equipment, or the Comcast Equipment to . . . make available to anyone outside the Premises the ability to use the Service (i.e. wi-fi, or other methods of networking) . . . ."); Cox Communications Acceptable Use Policy, § 9, http://www.cox.com/policy (last visited June 9, 2006) (noting that customers "are responsible for securing any wireless (WiFi) networks connected to your Cox service. Any wireless network installed by the customer or a Cox representative that is unsecured or 'open' and connected to the Cox network [is prohibited]"); Time Warner Cable, Cable Modem Service Subscription Agreement § 5(a), http://help.twcable.com/html/twc_sub_agreement.html (last visited June 9, 2006) ("Subscriber will not resell or redistribute (whether for a fee or otherwise) the ISP service . . . ."). It is clear that cable operators prohibit the use of unencrypted wireless routers. Although a subscriber who fails to encrypt his signal is clearly in breach of the service agreement and liable for resulting damages, breach of contract claims are beyond the scope of this paper.

220. *See* Am. Television & Commc'ns Corp. v. Floken, Ltd., 629 F. Supp. 1462, 1469 (M.D. Fla. 1986).

221. *See, e.g.*, TKR Cable Co. v. Cable City Corp., 267 F.3d 196, 205-07 (3d Cir. 2001) (applying § 553 to sale of descramblers); United States v. Norris, 88 F.3d 462, 469 (7th Cir. 1996) (applying § 553 to modification and sale of descramblers); Int'l Cablevision, Inc. v. Sykes (*Sykes II*), 75 F.3d 123, 133 (2d Cir. 1996) (applying § 605(a) and § 605(e)(4) to sale of descramblers).

222. *See* 47 U.S.C. § 553(a)(2) (stating that the prohibited conduct is "the manufacture or distribution of equipment *intended* by the manufacturer or distributor . . . for unauthorized reception" (emphasis added)); *TKR*, 267 F.3d at 204-05 (noting Congress' concern with the use of descrambling devices).

223. *See* 47 U.S.C. § 605(e)(4); *supra* note 85. Section 605(e)(4) applies to "any person who manufactures . . . any . . . device . . . knowing or having reason to know that the device . . . is primarily of assistance in . . . activity prohibited by [§ 605(a)]." 47 U.S.C. § 605(e)(4). Because the statute requires that the device is *primarily* used for violation of § 605(a), ISPs would need to prove that most wireless routers are manufactured with the knowledge that they assist in unauthorized Wi-Fi use. *See id.*

4. Developers of Operating Systems

Developers of operating systems could potentially be found liable as well under the same "assistance" clause as the wireless router manufacturers and distributors.[224] When an inexperienced user turns on a laptop and the operating system automatically connects to any unencrypted wireless network that it finds, that would seemingly put more liability on the developer of the operating system than on the unauthorized user.[225] As with the wireless router manufacturers and distributors, a plaintiff bringing a cause of action against developers of operating systems must show that the defendants knew or should have known that the operating systems would be used to violate § 605(e)(4).[226] This could be difficult, however, given that automatically discovering Wi-Fi networks serves significant legitimate purposes.[227]

V. CONCLUSION

If the threat of being found liable under the CCPA does not encourage router manufacturers and distributors to ensure that signals are encrypted, the ISPs may have to act on their own to recover the lost revenue resulting from potential customers using a neighbor's wireless network for free. ISPs may seek to recover from unauthorized users or irresponsible subscribers, but these lawsuits would be costly and would only serve the purpose of deterrence. Recovering from unauthorized users or irresponsible subscribers may also be expensive to enforce because the ISP would need a system to determine when unauthorized users were on the network. However it is enforced, knowing that the Communications Act is a tool to recover lost profits or simply deter unauthorized use may allow ISPs to better structure their pricing.

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224. *See supra* notes 223-26 and accompanying text.

225. *See supra* text accompanying note 116. Because the concept of standing requires that a plaintiff's injuries be caused by the defendant, an operating system that automatically connects a computer to another's Wi-Fi network would seemingly be a more proximate cause of the ISP's lost revenue than an uninformed user. *Id.* It is reasonable to assume that an operating system would be developed for both experienced and inexperienced users.

226. *See supra* note 26. ISPs must prove that operating systems are primarily used for unauthorized Wi-Fi use to recover under § 605(e)(4). *Id.*

227. *See* Hale, *supra* note 6, at 547. It would be hard for an ISP to prove that an operating system was primarily used for violation of § 605(a).