



10-1-1982

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Recommended Citation

David Hasper, *Receive-Only Satellite Earth Stations and Piracy of the Airwaves*, 58 Notre Dame L. Rev. 84 (1982).

Available at: <http://scholarship.law.nd.edu/ndlr/vol58/iss1/3>

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NOTE

Receive-Only Satellite Earth Stations and Piracy of the Airwaves

Recent technological advances have had a dramatic impact upon the sophistication and capability of virtually all forms of communication technology.¹ This enhanced technological capability has not only improved existing communication services, but has given rise to new communication systems. Unfortunately, this technological leap has also helped some people develop refined tools suitable for unauthorized interception of, and tampering with, communication services.²

Receive-only satellite earth stations (earth stations) are a product of the new technological age.³ These disc-shaped antennas can receive signals transmitted by satellites, amplify them, and convert them to a frequency that can be received by conventional television sets.⁴ Initially, earth stations were used only on a large scale basis for business and communication purposes.⁵ However, advances in technology have brought lower prices and made earth stations a feasible and practical alternative for a wide range of users.⁶ Individuals are currently purchasing earth stations for use as high powered home antennas. Owners of apartment houses, hotels, mobile home parks, and related facilities are also increasingly using these stations as master antennas.⁷ Most of these new owners have been poorly ad-

1 In re: Amendment of Part 90 of the Commission's Rules and Regulations to allow use of Digital Voice Modulation in the Power Radio Service, 86 F.C.C.2d 405 (1981).

2 *Id.* at 405-06. Among these new tools are sensitive monitoring devices and interception systems. *Id.*

3 *Id.* at 405-06.

4 *Home Box Office, Inc. v. Advanced Consumer Technology*, No. 81 Civ. 569 (S.D.N.Y. Nov. 6, 1981).

5 In the matter of Regulation of Domestic Receive-Only Satellite Earth Stations, 74 F.C.C.2d 205, 207 (1979). Initially, earth stations were used only by common carriers to supply multiple users.

6 *Id.*

7 Telephone conversation with Copyright Office, Washington, D.C. (Aug. 27, 1982). As used in the context of this note, "master antenna" means a single antenna used to receive signals and distribute them to multiple units. Owners of apartment complexes, hotels, or related facilities often use master antennas for receiving signals and distributing them to their guests. This note does not address master antenna use in general, but only the case in which a receive-only satellite earth station is used as the master antenna. Throughout this note, this combination is referred to as a "master antenna-earth station."

vised on the legality of their actions.⁸ The new owners have often neither complied with area licensing procedures⁹ nor reimbursed the copyright owners for using these owners' work.¹⁰ If this increasing, unauthorized, interception of airwaves continues, many cable companies may face financial ruin.¹¹

Individuals are unaware of the law relating to earth stations, partially due to its extreme complexity and ambiguity. While legislatures have addressed the piracy question with regard to cable services,¹² multipoint distribution services (MDS),¹³ and subscription television (STV),¹⁴ no court has addressed the applicability of these holdings to an earth station's interception of domestic satellite signals. This note explores various legal theories and discusses their potential use by cable companies, or other interested parties, to prevent unauthorized signal interception by earth stations. Part I examines section 605 of the 1934 Communications Act;¹⁵ Part II discusses the 1976 Revised Copyright Act;¹⁶ Part III reviews state and local legislation;¹⁷ and Part IV analyzes the need for new legislation.

8 Sellers of earth stations often profess their legality to the consumer. As this note illustrates, the law in this area is rather gray and clearly does not support such claims.

9 *See, e.g.*, text accompanying notes 102-103 *infra*.

10 *See* notes 59-64 *infra* and accompanying text. Licensing and copyright are not the only areas of law of which the owner should be aware; an earth station operator should also realize the need to obtain a license from the municipality and pay copyright fees.

11 *National Subscription Television v. S & H TV*, 644 F.2d 820, 826 (9th Cir. 1981); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 467 (6th Cir. 1980).

12 *See* notes 98-100 *infra* and accompanying text. Cable service is the earliest form of cable television and involves the distribution of signals by co-axial cable or wire.

13 Decisions addressing the privacy question with regard to MDS include *American Television and Communications Corp. v. Western Techtronics*, 529 F. Supp. 617 (D. Colo. 1982); *Home Box Office, Inc. v. Advanced Consumer Technology*, No. 81 Civ. 559 (ADS) (S.D.N.Y. Nov. 4, 1981); *Orth-O-Vision, Inc. v. Home Box Office, Inc.*, 474 F. Supp. 672 (S.D.N.Y. 1979); and *Home Box Office, Inc. v. Pay TV of Greater New York, Inc.*, 467 F. Supp. 525 (E.D.N.Y. 1979). A multipoint distribution service (MDS) transmits microwave signals toward numerous fixed receivers capable of picking up the signal and translating it into a frequency that a standard television set can display. *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 464 n.3 (6th Cir. 1980).

14 Decisions addressing the privacy question with regard to STV include *National Subscription Television v. S & H TV*, 644 F.2d 820 (9th Cir. 1981); and *Chartwell Communications Group v. Westbrook*, 637 F.2d 459 (6th Cir. 1980). Subscription television (STV) involves broadcasting similar to regular television broadcasting, except that the signal has been encoded or scrambled and cannot be viewed except by paying customers with decoder boxes. 644 F.2d at 821.

15 47 U.S.C. § 605 (1976).

16 17 U.S.C. §§ 101-810 (Supp. II 1978) [hereinafter cited as Revised Act].

17 *See* notes 95-103 *infra* and accompanying text.

I. Section 605 of the 1934 Communications Act

Section 605 of the 1934 Communications Act prohibits parties not entitled to radio and television communications from using, divulging, or publishing them.¹⁸ This provision does not apply, however, to a broadcast or transmission intended for use by the general public.¹⁹ The ambiguity of the phrase "intended for use by the general public," combined with the peculiar nature of pay television,²⁰ has bred a great deal of litigation.²¹

Courts were initially split on the question of whether section 605 protected subscription television transmissions.²² The two earliest subscription television cases involved section 605 claims by Home Box Office, Inc. (HBO). In those cases, *Home Box Office v. Pay TV of Greater New York*²³ and *Orth-O-Vision v. Home Box Office*,²⁴ two New York federal district courts reached opposite conclusions upon similar facts.

In both *Pay TV* and *Orth-O-Vision*, HBO transmitted subscription programming using MDS.²⁵ After affiliates began receiving and selling HBO programming without paying for it, HBO brought ac-

18 Although section 605 is a criminal statute, a private right of action has been implied. *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 466 (6th Cir. 1980).

19 Section 605 provides:

. . . No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. *This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.*

47 U.S.C. § 605 (1976) (Emphasis added by the author).

20 Pay television's peculiarity derives from its dual nature: while available to the entire public, it is intended to be received by paying customers only. *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 465 (6th Cir. 1980).

21 See notes 22-38 *infra* and accompanying text.

22 For an in-depth case analysis of Section 605 as a remedy to piracy of the airwaves, see Comment, *Decoding Section 605 of the Federal Communications Act: A Cause of Action for Unauthorized Reception of Subscription Television*, 50 U. CIN. L. REV. 362 (1981).

23 467 F. Supp. 525 (E.D.N.Y. 1979).

24 474 F. Supp. 672 (S.D.N.Y. 1979).

25 467 F. Supp. at 526; 474 F. Supp. at 675.

tions to enjoin the affiliates from intercepting the television transmissions.²⁶

In *Pay TV*, the court concluded that section 605 applied, and enjoined the affiliates from intercepting HBO transmissions.²⁷ The court based its decision upon an ordinary television set's inability to receive microwave frequencies that have not been modulated by special equipment.²⁸ The court reasoned that since these services are receivable only with special equipment, HBO must have intended receipt by paying customers only, and not "the general public."²⁹

The court in *Orth-O-Vision*, however, relying upon a 1966 Federal Communications Commission (F.C.C.) decision,³⁰ held that section 605 does not protect subscription television transmissions. The court reasoned that HBO intended to make services available to as many persons as possible; therefore, the transmission constituted a broadcast for the general public.³¹

No other court has followed *Orth-O-Vision's* holding and rationale.³² Instead, subsequent decisions have been strongly influenced by the reasoning in *Chartwell Communications Group v. Westbrook*³³ and have followed the holding in *Pay TV*. In *Chartwell*, the United States Court of Appeals for the Sixth Circuit considered the legality of decoders used to intercept coded television signals intended only for paying customers.³⁴ There the court pointed out the significant difference between making a service available to the general public and

26 467 F. Supp. at 528; 474 F. Supp. at 675.

27 467 F. Supp. at 530.

28 467 F. Supp. at 528. See note 13 *supra*.

29 467 F. Supp. at 528.

30 In the Matter of Amendment of Part 73 of the Commissions Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service, 3 F.C.C.2d 1 (1966). This decision stated that, for licensing purposes, STV was broadcasting.

The court in *Orth-O-Vision* reasoned that since STV was broadcasting, it must have been intended for the general public because 47 U.S.C. § 153(a),(b),(o) (1976) defines "broadcasting" as the "dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." 47 U.S.C. § 153 (a),(b),(o) (1976). The FCC has since taken the opposite stance in the section 605 context. 74 F.C.C.2d at 214.

31 474 F. Supp. at 682.

32 The *Orth-O-Vision* decision was followed by the Federal District Court for the Central District of California in *National Subscription Television v. S & H TV*, No. 80-829 (C.D. Cal. Aug. 4, 1980); however, the Ninth Circuit reversed that decision in *National Subscription Television v. S & H TV*, 644 F.2d 820 (9th Cir. 1981).

33 637 F.2d 459 (6th Cir. 1980). Other decisions that have followed *Chartwell* include *National Subscription Television v. S & H TV*, 644 F.2d 820 (9th Cir. 1981); *American Television and Communications Corp. v. Western Techtronics*, 529 F. Supp. 617 (D. Colo. 1982); *Home Box Office, Inc. v. Advanced Consumer Technology*, No. 81 Civ. 559 (ADS) (S.D.N.Y. Nov. 4, 1981).

34 637 F.2d at 460-61.

intending such service for general public use.³⁵ The court noted that subscription television companies must receive payment for their services if they are to survive financially.³⁶ Subscription television, while available to the general public, is meant to be used only by those who pay for its services.³⁷ The court concluded by holding that subscription television was not intended to be broadcast for general public use and that section 605 prohibited intercepting such transmissions.³⁸

No court has specifically addressed the issue of whether section 605 prohibits an earth station's interception of pay television signals. However, *Chartwell's* rationale would likely apply since subscription television signals transmitted to earth stations cannot be distinguished from the signals involved in the *Chartwell* line of cases.³⁹

Moreover, the F.C.C. has indicated that section 605 applies to the interception of any signal transmitted by a domestic satellite to an earth station.⁴⁰ The F.C.C. concluded that section 605 applies to this situation because the domestic satellites that transmit signals to

35 The court in *Chartwell* stated:

. . . there is an important distinction between making a service available to the general public and intending a program for the use of the general public. The whole point of STV is to provide the service to as many members of the public as are interested. If the services could not be widely distributed there would be no business. However, the dual nature of STV is that while it may be available to the general public, it is intended for the exclusive use of paying subscribers. Availability and use are separate concepts.

637 F.2d at 465.

36 *Id.*

37 *Id.*

38 *Id.*

39 Earth stations, in addition to many other types of signals, receive pay television signals. These signals, as in *Chartwell*, are intended to be received only by paying customers. Some of the signals are encoded as in *Chartwell*. However, this factor is not significant enough to distinguish these cases, since courts have determined that although scrambling may temporarily interfere with airwave pirates' activities, it will eventually only result in the pirates adding decoders to their equipment. *American Television and Communications Corp. v. Western Techtronics*, 529 F. Supp. 617, 621 (1982).

40 In the *Matter of Regulation of Domestic Receive-Only Satellite Earth Stations*, 74 F.C.C.2d 205, 216 (1979). This report is also significant because it establishes the voluntary licensing procedures for earth stations. These licenses do not affect an earth station's legality but merely serve as a means to protect an earth station from terrestrial interference. *Id.* at 217. The licensing procedure consists of three steps and may involve considerable expense. These steps are: (1) frequency coordination, which is an analytical process designed to resolve potential interference problems; (2) construction permit application; and (3) license application. *Id.* at 208. This voluntary license is not to be confused with municipal franchise licensing, which is discussed later as a possible means of preventing an earth station's use. See notes 102-103 *infra* and accompanying text.

earth stations operate in a band allocated to fixed satellites only.⁴¹ Transmissions in the fixed satellite service, by definition, are between fixed points.⁴² Because transmissions between fixed points are not intended for the general public,⁴³ section 605 prohibits the interception of such signals.⁴⁴

The decisions above deal only with interception by commercial entities. However, section 605 draws no distinction between commercial and private entities, and one can easily analogize the cases interpreting section 605 to a private party interception.⁴⁵ Therefore, section 605 should be an effective tool for combating all types of unauthorized signal interception. However, section 605 does have drawbacks. The Act was drafted in 1934 and is applicable to piracy of pay cable television only through court action.⁴⁶ Any new technological developments will probably result in increased litigation. Additionally, section 605 does not provide for financial reimbursement of cable systems or copyright owners. This is a dilemma because the Copyright Act does not provide financial help in all situations in which cable systems or copyright owners might need protection.

II. Copyright Law

For many years, the 1909 Copyright Act⁴⁷ was the sole source of relief available to a party seeking reimbursement for a cable system's retransmission of his works.⁴⁸ Understandably, the Act's drafters did not contemplate today's technological advancements and the accom-

41 74 F.C.C.2d at 214. Upon a motion that existing domestic satellites be redesignated as broadcasting satellites, the Commission pointed out that redesignation would not be possible since satellites operate in the 4GHz band. The 4GHz band is allocated to fixed-satellite transmissions. Such transmissions are viewed as being between fixed points and therefore can not be "intended for the general public." *Id.*

42 *Id.*

43 *Id.*

44 *Id.*

45 In fact, section 605 specifically states that no *person* shall intercept any radio communication. *See* note 19 *supra*. The cases discussed in this note ruled that pay television signals are protected by section 605 since they are not intended for the general public. The status of the pay television signals was the major issue in these cases and the fact that private entities are the infringing parties should not affect the courts' conclusion.

46 *See* notes 22-38 *supra* and accompanying text.

47 Copyright Act, ch. 320, 35 Stat. 1075 (1909). (Current version at 17 U.S.C. §§ 101-810 (Supp. II 1978)).

48 Section 605 of the 1934 Communications Act was available only to *enjoin* the cable system's retransmission. The 1909 Copyright Act was the only source of relief for a party seeking reimbursement for the use of his work product. The 1909 Act, among other things, prohibited the unauthorized performance of copyrighted acts. Copyright Act, ch. 320, 35 Stat. 1075 (1909).

panying complications. Although the Copyright Act was ripe for revision,⁴⁹ Congress proceeded slowly, trying to balance several conflicting interests. The three most prominent interest groups were: first, the copyright owners of movies, plays, and other works; second, the broadcasters of those works; and third, the cable systems. After much compromise, Congress passed the 1976 Revised Copyright Act,⁵⁰ an extremely complex statute.

A. *Supreme Court Influence*

While Congress struggled to formulate the 1976 Copyright Act, the Supreme Court of the United States considered whether a cable system's use of signals constituted a performance of copyrighted works and therefore copyright infringement. In two decisions, *Fortnightly Corp. v. United Artists Television*⁵¹ and *Teleprompter Corp. v. CBS.*,⁵² the Supreme Court effectively denied copyright owners any recourse against a cable system's alleged infringements.

In *Fortnightly*, motion picture copyright owners sued a cable system engaged in retransmitting broadcast signals to a community which otherwise could not have received the signals due to the mountainous terrain.⁵³ The Court held that no copyright infringement existed since the cable system's retransmission did not constitute a "performance" under the 1909 Copyright Act.⁵⁴ The Court reasoned that the cable system's activities were actually those of a passive viewer, not a broadcaster.⁵⁵

49 In 1924 and 1940 Congress had proposed revising the Copyright Act in the face of new technologies. However, competing interests prevented any action. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 47, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5660.

50 17 U.S.C. §§ 101-810 (Supp. II 1978).

51 392 U.S. 390 (1968).

52 415 U.S. 394 (1974).

53 392 U.S. at 391. *Fortnightly Corp.* owned and operated a community antenna television system (CATV) in Clarksburg and Fairmont, West Virginia. The hilly terrain surrounding these communities prevented signal reception by ordinary roof top antennas. *Fortnightly's* antenna system picked up television signals from five broadcasting stations in neighboring communities and retransmitted them to Clarksburg and Fairmont. While the five broadcasting stations paid royalty fees to United Artists for use of their movies, *Fortnightly* paid nothing. United Artists subsequently brought this action against *Fortnightly*. *Id.*

54 *Id.* at 402. The Court stated, however, that the inquiry could not be limited to ordinary meaning and legislative history, since the 1909 statute was drafted long before cable television was developed. *Id.* at 395. Despite this attitude, the court proceeded to narrowly construe "performance". *Id.* at 399.

55 The Court stated:

When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located an-

In *Teleprompter*, the Court applied the *Fortnightly* reasoning to a situation in which a cable system retransmitted signals from a distant community.⁵⁶ The Court found no basis for distinguishing the *Fortnightly* decision, and held that the distance between a broadcast station and the viewer is irrelevant in determining whether the activity constitutes a "performance".⁵⁷ The Court, however, recognized that the 1909 Act was outdated in a technological age and strongly urged Congress to enact new legislation.⁵⁸

B. *The 1976 Revised Copyright Act*

The long-awaited 1976 Revised Copyright Act reversed the trend of the *Fortnightly* and *Teleprompter* decisions by redefining a "performance" to include cable systems' retransmissions to its subscribers.⁵⁹ The Act further grants a copyright owner exclusive control over performance of motion pictures, audiovisual works, and other works "publicly."⁶⁰

tenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer.

Id. at 399.

56 415 U.S. at 400. In *Teleprompter*, the operators and producers of copyrighted television programs brought suit against Teleprompter Corp., alleging that Teleprompter's CATV systems infringed upon their copyrights. The situation differed from *Fortnightly's* since rooftop antennas would have been effective in these communities.

57 *Id.* at 409.

58 *Id.* at 414.

59 Revised Act § 101 states:

To 'perform' a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

17 U.S.C. § 101 (Supp. II 1978).

60 Revised Act § 106 provides:

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following. . .

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to *perform* the copyrighted work *publicly*; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works including the individual images of a motion picture or other audiovisual work, to *display* the copyrighted work *publicly*.

17 U.S.C. § 106 (Supp. II 1978) (Emphasis added by the author).

1. Application to Users of Earth Stations

Despite the changes the Revised Act instituted, however, individuals operating earth stations for home viewing still do not violate the copyright law. Although the act of viewing copyrighted works within the home now constitutes a "performance,"⁶¹ such viewing does not constitute a "public performance" as contemplated by the Revised Act's section 106.⁶² For home viewers, a performance will not be public unless viewed by a substantial number of persons outside of the family circle and normal family acquaintances.⁶³

An earth station's use by a hotel, apartment house, or similar establishment, however, constitutes a public performance and therefore comes within the Copyright Act.⁶⁴ Whether such activity constitutes copyright infringement, however, requires a close inspection of section 111.⁶⁵

2. Section 111

Section 111 reflects the compromise Congress made between broadcasters, copyright owners, and cable system operators.⁶⁶ Acknowledging the impracticability of requiring cable operators to obtain every copyright owner's consent before transmitting the owner's work, Congress introduced the compulsory license.⁶⁷ The compulsory license provisions, in effect, strip the copyright owner of his right

61 H.R. REP. NO. 1476, 94th Cong., 2d Sess. 63, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5677.

62 Revised Act § 106 grants the copyright owner the exclusive right to perform the work publicly. *See* note 60 *supra* and accompanying text. Revised Act § 101 provides:

To perform or display a work "publicly" means -

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101 (Supp. II 1978).

63 *Id.*

64 *Id.*

65 Revised Act § 111 deals directly with the ability to copyright secondary transmissions by cable systems.

66 H.R. REP. NO. 1476, 94th Cong., 1d Sess. 90, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5706. *See* notes 49-50 *supra* and accompanying text.

67 H.R. REP. NO. 1476, 94th Cong., 2d Sess. 89, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5704.

to refuse the performance of his work.⁶⁸ Under the compulsory licensing provisions, a cable operator may perform any work as long as he provides periodic accountings and makes payments to the copyright office.⁶⁹

Not all secondary transmissions are eligible for a compulsory license. Congress has enumerated three categories of secondary transmissions: first, those completely exempted from copyright liability;⁷⁰

68 The compulsory license provisions strip the copyright owner of his right to prohibit the use of his work. As long as the conditions set out in the Act are met, cable systems may use others' works.

69 See Revised Act § 111(c)-(d). More specifically, the compulsory license procedures require that a cable system pay a royalty fee twice yearly. This fee is determined according to a cable system's receipts from subscribers. Revised Act § 111(d)(2). Under a compulsory license, an operator may retransmit only the unaltered signals of those United States television and radio stations that it is authorized to carry under the rules, regulations, or authorizations of the Federal Communication Commission (F.C.C.). *Id.* § 111(c)(1). If the operator complies with the above procedures, he has met the copyright obligations for retransmitting copyrighted material contained in television and radio broadcasts. *Id.* § 111(c)(d). The operator pays the fees to the copyright office, which distributes these fees annually to copyright owners through the Copyright Royalty Tribunal, a separate agency. *Id.* § 111(d)(3),(4).

70 Those secondary transmissions exempted are: (1) transmissions from a master antenna to hotel guests; (2) secondary transmissions for educational purposes; (3) secondary transmissions by a carrier that does not control the transmission's contents; and (4) secondary transmissions by a nonprofit organization or governmental agency. These exemptions are subject to many technical limitations and a close reading of the statute is necessary. Revised Act § 111(a) reads:

(a) Certain Secondary Transmissions Exempted. - The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if -

(1) the secondary transmission is not made by a cable system and consists entirely of the relaying, by the management of a hotel, apartment house or similar establishment, of signals transmitted by a broadcast station licensed by the Federal Communications Commission, within the local service area of such station to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission; or

(2) the secondary transmission is made solely for the purpose and under the conditions specified by clause (2) of section 110; or

(3) the secondary transmission is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others; *Provided* that the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions; or

(4) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

17 U.S.C. § 111(a) (Supp. II 1978) (Emphasis added by the author).

second, those eligible for compulsory licensing;⁷¹ and finally, those subject to full copyright protection.⁷²

Section 111(a) describes those secondary transmissions which are exempt from copyright liability. The section, however, does not apply to the use of a master antenna-earth station.⁷³ Section 111(a)(1) applies directly to the use by a hotel, apartment house, or similar establishment of a master antenna that receives and distributes signals to the private lodgings of guests or residents.⁷⁴ However, the exemption does not apply unless the signals received and retransmitted by a cable system were primarily transmitted⁷⁵ by an F.C.C.-licensed broadcast station located within the local service area.⁷⁶ Because earth stations are capable of receiving transmissions from outside of the local service area⁷⁷ and because such transmissions often include signals not transmitted by an F.C.C.-licensed broadcast

71 See notes 67-69 *supra* and accompanying text. Transmissions subject to compulsory licensing include programming from FCC-licensed broadcast stations. Thus, network and syndicated programming, when retransmitted, are subject to compulsory licensing.

72 Secondary transmissions subject to full copyright protection provide the owner with the right to bring an action for infringement if his works are publicly performed without his permission. The performance or display of such works is actionable as an act of infringement pursuant to Revised Act section 501. The copyright owner has several available remedies for the infringement, including: an injunction pursuant to section 502, impounding and disposition of the infringing articles pursuant to section 503, damages and profits pursuant to section 504, attorney costs under section 505, and possible criminal penalties pursuant to section 506.

Revised Act § 111(b)-(c) enumerates those transmissions subject to full copyright protection under all circumstances. § 111(b) states that, in order to be subject to compulsory licensing, the carriage of signals comprising the secondary transmission must be permissible under F.C.C. rules, regulations, or authorizations. § 111(c)(3) states that a secondary transmission is unlawful if the cable system alters the programming's content through changes, deletions, or additions. § 111(c)(4) generally proscribes a secondary transmission that is a retransmitted signal from a foreign television or radio station. Perhaps most importantly, retransmission of pay television or subscription television is subject to full copyright liability under § 111(b), which provides:

(b) Secondary Transmission of Primary Transmission to Controlled Group. - Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display of a work is actionable as an act of infringement under section 501 . . . if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public.

17 U.S.C. § 111(b) (Supp. II 1978).

73 See note 7 *supra*.

74 See note 70 *supra*.

75 *Id.*

76 *Id.* The local service area of a primary transmitter is that area in which the station is entitled to insist upon its signal being retransmitted by a cable system under F.C.C. rules, regulations and authorizations. Revised Act § 111(f).

77 *Id.*

station,⁷⁸ the exemption does not apply to earth station-master antennas.

Because the exemption does not apply, the second inquiry is whether the earth station-master antenna can operate subject to the compulsory licensing provisions.⁷⁹ Those secondary transmissions that are neither exempt nor subject to full copyright protection will be eligible for compulsory licensing.⁸⁰ If eligible for compulsory licensing, the operator of an earth station-master antenna can secondarily transmit signals without the copyright owner's permission.⁸¹ Under the compulsory license, the copyright owner has no power to withhold the use of his works as long as the operator complies with the compulsory licensing procedures.⁸² If all the signals received are eligible for compulsory licensing and the operator follows the compulsory licensing procedures, a master antenna-earth station will be in full compliance with copyright law.⁸³

To determine a master antenna-earth station's ability to come within the compulsory licensing provisions, two inquiries must be made. One must ask, first, whether a master antenna-earth station is a "cable system" as required by section 111;⁸⁴ and second, whether the earth station's ability to pick up signals not intended for the general public prevents the compulsory licensing provisions from applying.

Section 111(c) allows only "cable systems" to receive compulsory licensing.⁸⁵ Section 111(f) defines a "cable system" as a facility that "receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service."⁸⁶ Master antenna-earth stations substantially comply with this defini-

78 Earth stations are capable of receiving all or most of the signals that are now transmitted by satellites, including pay television signals and private telephone conversations. Such signals are not transmitted by F.C.C. licensed broadcast stations. 74 F.C.C.2d at 216.

79 See notes 66-69 *supra* and accompanying text.

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 See note 85 *infra*.

85 Revised Act § 111(c) provides that "[s]econdary transmissions by a *cable system* of a primary transmission . . . shall be subject to compulsory licensing upon compliance with the requirements of subsection (d)"

86 Revised Act § 111(f).

tion, except that it is unclear whether renters or guests in hotels or apartment houses constitute "subscribing members of the public." Apparently, such renters or guests are considered "subscribing members of the public," since a few hotels and apartment complexes with master antenna-earth stations have received compulsory licensing.⁸⁷ Nevertheless, operators should consider compliance with the statutory definition as a possible issue.

Even if a master antenna-earth station meets the "cable system" definition, an operator may still be outside the compulsory licensing provisions and thus violate copyright law if the earth station receives pay television signals.⁸⁸ Section 111(b) subjects secondary transmissions controlled and limited to reception by particular members of the public (rather than the public at large) to full copyright protection.⁸⁹ The subsection prohibits interception of pay television transmissions and disallows any type of compulsory licensing for them.⁹⁰ When pay television signals are involved, the operators of master antenna-earth stations must directly negotiate with the pay television companies to legally receive their signals.⁹¹

In summary, the 1976 Revised Copyright Act's provisions have no impact upon the home viewer using an earth station because no public performance occurs.⁹² When the owner of a hotel, apartment complex, or similar establishment uses an earth station as a master antenna, however, he needs a compulsory license for most signals.⁹³ In addition, full copyright protection results from using pay or subscription television signals, since the compulsory licensing provisions do not apply.⁹⁴

III. State and Local Law

While the 1934 Communications Act⁹⁵ and the 1976 Revised Copyright Act⁹⁶ remain the most potent sources of law regarding

87 Telephone conversation with Copyright Office, Licensing Division, Washington D.C. (Aug. 27, 1982).

88 Revised Act § 111(b). See note 72 *supra*.

89 *Id.*

90 *Id.*

91 Compulsory licensing provisions do not apply to pay television, therefore, parties using pay television signals must separately negotiate directly with the pay television companies. HBO and other pay television companies will allow the interception if a certain fee is paid.

92 See notes 61-63 *supra* and accompanying text.

93 See notes 79-87 *supra* and accompanying text.

94 See note 72 and text accompanying note 89 *supra*.

95 Specifically section 605.

96 Specifically section 111.

airwave interception, those who wish to prevent an earth station's use should initially consider state and local law. Enforcement through state and local measures is often quicker and more economical than bringing an action under the ambiguous federal provisions.⁹⁷

Many states and municipalities have enacted legislation imposing criminal sanctions for tampering with cable television services.⁹⁸ Most of these statutes and ordinances address only physical tampering with cable wiring.⁹⁹ However, others speak in more general terms and prohibit defrauding a cable company or intercepting its services.¹⁰⁰

Local zoning ordinances may also affect an earth station's establishment. The establishment of an earth station, especially one used as a master antenna, may be viewed as a commercial enterprise. Assuming that the property's current zoning prohibits such a commercial enterprise, a city could enjoin the system's operation. Likewise, many municipalities presently have zoning ordinances that prohibit individuals from reducing a residential neighborhood's aesthetic qualities.¹⁰¹ Ordinances regulating the size of antennas, fences, or signs may apply and authorize injunctions to prevent installation of earth stations, or cause their removal.

Finally, a state or municipality may prohibit the earth station's establishment under its licensing or franchising provisions. *Meridian*

97 A local ordinance can be enforced through the municipality and will seldom necessitate protracted litigation.

98 For example, an Indiana law provides:

Deception - (a) A person who:

(6) With intent to defraud another person furnishing electricity, gas, water, telecommunication or cable TV service, or any other utility service, avoids a lawful charge for that service by fraud or device or by tampering with facilities or equipment of the cable system furnishing the service

IND. CODE ANN. § 35-43-5-3 (Burns 1979).

99 *Id.* See also M. HAMBURG, ALL ABOUT CABLE A-374 (1981).

100 For example, the Muskegon, Michigan Municipal Code provides:

(b) Any person who, with the intent to avoid payment. . . or with the intent to defraud another person of the lawful charge for any cable television service, obtains or attempts to obtain such service. . . or avoids or attempts to avoid payment. . . by means of making or using, or attempting to make or use unauthorized connections, whether physically, electrically, acoustically, inductively or otherwise, or without authority or permission attaches or attempts to attach any device or devices to any cable, wire, microwave or other component of a cable television system duly licensed by this city commission, or to a television set, shall be punished by a fine of not more than one hundred dollars (\$100.00) or by imprisonment in the county jail for not more than thirty (30) days or by both such fine and imprisonment.

MUSKEGON, MICH., CODE § 12-27(b)(1980).

101 SOUTH BEND, IND., CODE § 25-180 (1980).

*Charter Township v. Roberts*¹⁰² a recent Michigan Court of Appeals decision, held that a municipality's licensing ordinance reached a cable television service operating exclusively within a private apartment complex.¹⁰³ If *Meridian* is followed as precedent, a municipality could enjoin an earth station's operation even though the earth station operates completely on private property.

IV. The Need for New Legislation

The communications and copyright law governing airwave piracy is unclear. Although Congress took commendable action in enacting the 1976 Copyright Act, legislation which satisfied the various interest groups,¹⁰⁴ ambiguities still plague the law. Extending the Copyright Act to completely cover the airwave piracy problem would require a major change in longstanding copyright policy. Therefore, section 605 of the 1934 Communications Act should be revised so that the law regulating airwave piracy may be brought into line with current technology.

The Revised Copyright Act resolved many conflicting interests through compulsory licensing. The broadcasters, who believed that cable systems were receiving an undue business advantage, approved of compulsory licensing because it imposed royalty fees upon the cable systems retransmitting their broadcasts.¹⁰⁵ The copyright owners received royalties under the compulsory licensing provisions for the retransmission of their works.¹⁰⁶ Finally, the cable system operators were satisfied because they could now retransmit without obtaining each separate copyright owner's permission.¹⁰⁷

The Revised Copyright Act's application to receive-only satellite earth stations remains limited.¹⁰⁸ A cable system's retransmission to the public is subject to copyright liability under the Act, but when a private party uses an earth station, no copyright liability will result.¹⁰⁹ Nevertheless, a private party's use of an earth station is quite

102 114 Mich. App. 802 (1982). See also *City of Liberal v. Teleprompter Cable Service, Inc.*, 218 Kan. 289, 544 P.2d 330 (1975); *Borough of Scottsdale v. National Cable Television Corp.*, 218 Pa. Commw. 387, 368 A.2d 1323 (1977).

103 114 Mich. App. at 810.

104 See notes 105-107 *infra* and accompanying text.

105 H. R. REP. NO. 1476, 94th Cong., 2d Sess. 89-90, *reprinted in* 1976 U. S. CODE CONG. & AD. NEWS 5659, 5703-5704.

106 *Id.*

107 *Id.*

108 See notes 61-63 *supra* and accompanying text.

109 *Id.*

different from his use of an ordinary home antenna.¹¹⁰ Considering the multitude of services an earth station can receive,¹¹¹ the decreasing cost of earth stations,¹¹² and the serious impact earth station use can have upon the pay cable industry,¹¹³ present legislation should be reassessed.

By using the Copyright Act to impose liability on private earth station users, Congress would be formulating new communications policy.¹¹⁴ As Congress has indicated, revision of communications policy is a role better suited for communications regulations than for copyright law.¹¹⁵ Congress should, therefore re-examine present communication policies and promulgate new legislation to resolve the current problems.

The new legislation should update section 605 to ensure liability for piracy of the airwaves in those areas not affected by copyright law.¹¹⁶ Congress should expressly disallow the use of earth stations, even by private parties.¹¹⁷ The new section 605 should also enumerate the protected airwaves and establish guidelines to help courts decide how section 605 applies to future technology. Finally, the revised section 605 should provide for both injunctive and damage remedies.

Presently, copyright owner's receive no copyright protection unless the user performs the work publicly.¹¹⁸ Therefore, there is no financial reimbursement for a signal interception by a private party. Rather than amend copyright law to redefine a public performance, Congress should create a remedy of monetary damages in section 605 to protect copyright owners from private, unauthorized use of the owner's work. A revised section 605 will reduce the present ambiguity surrounding the piracy of the airwaves law and provide new remedies without disrupting present copyright law.

110 Unlike a normal home antenna, an earth station is capable of receiving a variety of signals not broadcast in the local broadcasting area. *See* note 78 *supra*.

111 *Id.*

112 *See* note 6 *supra* and accompanying text.

113 *See* note 11 *supra* and accompanying text.

114 Presently, no copyright liability is imposed on private earth station users. *See* notes 61-63 *supra* and accompanying text.

115 H. R. REP. NO. 1476, 94th Cong., 2d Sess. 89-90, *reprinted in* 1976 U. S. CODE CONG. & AD. NEWS 5659, 5703-5704.

116 The area referred to is the interception of pay television signals by an earth station operated by a home viewer. *See* notes 61-63 *supra* and accompanying text.

117 Considering the decreasing price of earth stations and the resulting increase in their use, the financial consequences to pay television companies of unrestricted use of earth stations could be devastating. *See* note 11 *supra* and accompanying text.

118 *See* notes 61-63 *supra* and accompanying text.

V. Conclusion

Three major bodies of law address the issue whether a receive-only satellite earth station's interception of airwaves by private parties constitutes piracy of the airwaves. First, section 605 of the 1934 Communications Act has been interpreted to apply to subscription television signal interception: section 605 therefore prohibits private parties from intercepting such signals. Second, the 1976 Revised Copyright Act allows private parties to view earth station reception at home without copyright liability. However, the Act prohibits a master antenna-earth station from intercepting signals without obtaining a compulsory license and negotiating an agreement with pay television facilities. Finally, state criminal statutes and municipal ordinances provide simple alternatives to complicated federal litigation and legislation. If Congress can coordinate F.C.C. policy and copyright legislation, and provide coherent policy guidelines, the existing legal ambiguities and inconsistencies will be eliminated. Congress should therefore revise the Communication Act's section 605 to cure ambiguities in the law and provide remedies not attainable through the Revised Copyright Act.

David Hasper