Sports Bars' Interception of The National Football League's Satellite Signals: Controversy or Compromise?

INTRODUCTION

With the advent of satellite television,[1] two forms of entertainment merged to become a popular pastime for sports fans: televised games and drinking establishments. Before professional sports leagues could sort out the legalities of this phenomenon, sports fans were gathering at local taverns to watch satellite transmissions of games that could only be seen through the use of dish antenna systems.

In 1990, the National Football League (NFL) announced a plan to scramble the satellite signals carrying its games.[2] This announcement, along with the NFL's lawsuit against four Florida bars, sparked a virtual uprising among football fans and "sports bars" across the country.[3]

These sports bars are accused of "piracy"[4] because they pick up distant network satellite signals of football games. This can interfere with league revenues when the sports bars intercept copyrighted sig-

---

1. Satellite television involves the use of satellites for distributing television signals which are then received by dish antennas. MARTIN CLIFFORD, THE COMPLETE GUIDE TO SATELLITE TV 10 (1984). Because satellites orbit the earth at such high altitudes and are able to transmit signals more efficiently, they have become the chosen method for distributing television signals worldwide. *Id.* at 11.

2. *See* Vito Stellano, *NFL Has Signals Crossed in Satellite Dish Issue*, SPORTING NEWS (Mo.), Sept. 10, 1990, at 34. When used with respect to satellite cable programming, the terms "scramble" and/or "encrypt" mean to "transmit such programming in a form whereby the aural and visual characteristics (or both) are modified or altered for the purpose of preventing the unauthorized receipt of such programming. . . ." 47 U.S.C.A. § 605(d)(3) (West Supp. 1985).

3. *See* Mark Robichaux, *How Sports Bars Huddled and Beat an NFL Blitz*, WALL ST. J., Nov. 9, 1990, at B1. In December 1989, the NFL filed suit against four Florida bars for showing out-of-market games. *Id.* Two of the bars, Hooligan's and Uncle Al's, fought back while two others settled. *Id.* Two months after the suit was filed, the owners of Hooligan's formed the United Sports Fans of America. *Id.* Another group, the Association of Sports Fans Rights, was formed shortly after the NFL announced the plan to scramble satellite signals. *Id.* These groups led a boycott of Anheuser Busch and were planning a boycott of Miller Beer when the NFL backed down on its plan to scramble. *Id. See also infra* notes 197-200 and accompanying text. "Sports bars" are drinking and eating establishments that feature the display of sports entertainment programs to patrons via the use of satellite dish antennas. Philip R. Hochberg, *The Sports-Bar Scramble*, SPORTSINC (N.Y.), Jan. 25, 1988, at 42.

4. *See generally* Home Box Office, Inc. v. Pay TV of Greater New York, 467 F. Supp. 525, 526 (E.D.N.Y. 1979). "Piracy" is a term of art meaning that one has stolen transmissions for

nals.[5] Over 100,000 sports bars across the nation use satellite dish antennas so that patrons can watch the game of their choice on Sundays.[6]

The NFL would like to discourage the practice because the integrity of its television contracts may be affected. The controversy involves "out-of-market" games. For example, a distant telecast of a Houston-Los Angeles game can be seen in a Miami sports bar, and patrons are not subjected to the local commercials.[7] When the signal is not scrambled, fans are able to watch the commercial-free or "backhaul" feed of any game being played in the country.[8] Consequently, getting together at a sports bar to see their favorite team has become a popular Sunday past-time for fans.

However, the NFL claims that because of this practice the value of broadcast rights, which the networks bid for, has diminished.[9] In contrast, the sports bars argue that they are merely promoting the NFL and other sports leagues, thus bolstering the value of these rights.[10] Even though the bars have stated that they are willing to pay a reasonable price for descramblers and the league's authorization, the NFL refuses to consider it, pointing out that the networks

---

oneself or others without paying or receiving permission from the senders of the transmissions. *Id.*

5. *See* Robichaux, *supra* note 3, at B2. There are three types of individuals that can be labeled "pirates": 1) those who take signals for their private use without paying for a subscription; 2) those who use unauthorized signals for commercial gain and competitive purposes, and, 3) those who manufacture and distribute special equipment for the sole purpose of stealing transmissions. Susan C. Portin, Comment, *Pay TV - Piracy and the Law: It's Time to Clear Up the Confusion*, 33 EMORY L.J. 825, 831-32 (1984).

6. Robichaux, *supra* note 3, at B2. For an explanation of satellite dish antennas, see *infra* notes 20-22 and accompanying text.

7. *See infra* notes 23-31 and accompanying text.

8. *See* National Football League v. The Alley, Inc., 624 F. Supp. 6, 8 (S.D. Fla. 1983); *see also* Robert Alan Garrett & Philip R. Hochberg, *Sports Broadcasting, in* SPORTS LAW 18-1, 23-1 (G. Uberstine ed., 1991).

9. *Alley*, 624 F. Supp. at 8.

10. Stellano, *supra* note 2, at 34. *See also* Christopher Kilbourne, *Baseball Takes Swing at Bistro*, RECORD (N.J.), Nov. 5, 1989, at 1. Major League Baseball sued a sports bar in Hoboken, New Jersey for displaying out-of-market games between the Texas Rangers and the Boston Red Sox. *Id.*

already own the broadcast rights.[11] To this day, the stalemate continues.[12]

This comment will address the two major legal issues involved in the controversy, and will include an in-depth summary of two decisions where the NFL and member clubs have sued sports bars for satellite piracy. The first part will be an overview of the history and technology of the satellite dish industry followed by a brief dialogue of the various views and perspectives of the parties. The second part will cover the legal issues and cases and then conclude with a proposal for the future.

HISTORY AND TECHNOLOGY

Television broadcasts of sports events are generally created through contracts whereby broadcasters agree to pay leagues and team owners a fee for the right to show games to a specific audience located in a defined geographic area.[13] Before broadcasters began using satellite communications, the area of signal coverage was limited to the line-of-sight path between a broadcaster's transmitter and a receiver's antenna.[14] Because this area could be defined, both the broadcasters and the leagues were able to contractually control and limit the area that could receive a broadcast.[15] Since then, however,

---

11. *See* Albert J. Parisi, *Baseball League Sues on Broadcast Piracy*, N.Y. TIMES, Dec. 17, 1989, at 22-23. The owner of the Madison Square Sports Bistro in Hoboken stated that he would be willing to pay for access to games that were exclusively broadcast in other market areas. *Id.* at 23. Sports bars say they would pay a reasonable price to be able to show out-of-market games. However, they fear the price will be $300 per game because this is the amount charged to receive certain college football games. Robichaux, *supra* note 3, at B2; *see also* Mel Antonen, *Dish Owners To Have Fewer Home Plates*, USA TODAY, Jan. 8, 1988, at C3. Bar owners expressed hope that Major League Baseball would offer previously unscrambled signals for sale. *Id.*

12. As of the date of this publication, the NFL has not implemented its plan to scramble satellite signals. However, this will change if and when the league decides to implement pay-per-view.

13. *See* Judith S. Weinstein, *International Satellite Piracy: The Unauthorized Interception and Retransmission of United States Program Carrying Satellite Signals in the Caribbean, and Legal Protection for United States Program Owners*, 15 GA. J. INT'L & COMP. L. 1, 2 (1985).

14. CLIFFORD, *supra* note 1, at 5. In this context, line-of-sight means there are no intervening objects to block the signals between a conventional transmitter and a receiver. *Id.* This transmission is referred to as conventional or "over-the-air" broadcasting. *Id.* Anyone having a conventional antenna within range of the transmitter's signal is able to receive these broadcasts. *Id.*

15. Weinstein, *supra* note 13, at 2 (citing the Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 384 (1983)). The Caribbean Basin Initiative was a package of trade

satellite technology came into being; its use has greatly expanded the range of signal coverage beyond that of conventional broadcasting.

Early satellite transmissions of television entertainment consisted of rare special-events programs like presidential visits and the Olympic Games.[16] All this changed in 1975 when Home Box Office (HBO) telecast the "Thrilla from Manilla" bout between Muhammad Ali and Joe Frazier.[17] The following year, Ted Turner's Atlanta television station, WTBS, began uplinking its signals to satellite.[18] Since then, dozens of communications satellites have been sent into orbit and now beam down everything from television programs and radio shows to telephone transmissions and computer data.[19]

The piracy of unauthorized satellite transmissions escalated along with the accessibility and popularity of satellite dish antennas. Before 1979, when the Federal Communications Commission (FCC) removed the licensing requirement for receiving satellite signals,[20] it was not possible for the average individual to purchase a dish antenna on the retail market.[21] However, as early as 1975, individuals were experimenting with home-made versions of satellite dishes and by 1978, several experimenters were bringing satellite television programs into their own living rooms.[22] Within a span of five years, satellite dish systems were not only being installed in private homes, but in restaurants and drinking establishments all over the country.

---

initiatives proposed by former President Reagan to assist countries in revitalizing their economies. *Id.*

16. Stewart Schulze, *The Satellites*, SATELLITE ORBIT (N.C.), Special Edition 1990, at 5.

17. Mark Long, *Satellite TV: The Early Years*, SATELLITE ORBIT (N.C.), Special Edition 1990, at 17 [hereinafter *Early Years*].

18. *Id.* "Uplink" is the term used to describe the transmission of signals up to satellites with a frequency range of 5.9 to 6.4 gigahertz (1,000 megahertz or 1,000 million cycles per second). CLIFFORD, *supra* note 1, at 246.

19. Schulze, *supra* note 16, at 5. For a listing of telecommunications satellites that transmit television programming, see *id.* at 26.

20. CLIFFORD, *supra* note 1, at 36. The FCC regulated both the transmission and reception of all satellite communications by requiring licenses for both phases of operation. *Id.* On October 10, 1979, the FCC abandoned this requirement for Television Receive Only (TVRO) Earth Stations, more commonly referred to as satellite dish antennas. *Id.* TVRO earth stations can only receive signals, they cannot transmit them. *Id.* The FCC continued to require licenses for earth stations that transmit signals. *Id.*

21. Mark Long, *Ten Events That Changed Satellite TV History*, SATELLITE ORBIT (N.C.), Special Edition 1990, at 15 [hereinafter *Ten Events*].

22. *Early Years*, *supra* note 17, at 17. A British television engineer, Stephen Birkill, used window screens to build a five-foot dish and made his own receiver to capture remote satellite signals. *Id.* Shortly thereafter, Americans began experimenting and building their own satellite earth stations. *Id.*

Backhaul feeds are the primary issue in lawsuits against sports bars.[23] A backhaul feed is the transmission of a sports event or game from a remote location back to the network's studios.[24] For example, a live football game between a traveling Houston team and a home Los Angeles team is transmitted via satellite from the mobile unit located outside the Los Angeles stadium back to the network's control center, usually in New York.[25] The signal that is transmitted, a backhaul feed, is without any commercials or graphics.[26] The instant the feed is received by the control room at the studios, nationwide commercials, sports news updates and promotional announcements are added to the original transmission to become a "fronthaul" or dirty feed.[27] This, also known as the distribution feed, is instantaneously transmitted to cable systems and local network affiliates via satellite, microwave transmission or telephone lines.[28] Local television stations and cable companies then insert their own commercials and other material, with the cable company sending the signal to its subscribers via coaxial cable and the local station sending it out over the air to any conventional antennas within reach of its signal.[29] The distribution feed, when not transmitted via satellite, is restricted by the network and is only sent to in-market areas of the country, these

---

23. *See* National Football League v. Christopher-Neatherton, Inc., No. H-87-3818 (S.D. Tex. Dec. 24, 1987)(granting preliminary injunction); National Football League v. Addison Airport Restaurant & Lounge, Inc., No. CA3-87-2739-H (N.D. Tex. Dec. 1, 1987)(granting permanent injunction); National Football League v. Red Bastille Lounge, No. 86-5255 (E.D. La. Apr. 15, 1987)(granting permanent injunction); National Football League v. Rosie O'Grady's Irish Pub, No. 85-CV-71374-DT (E.D. Mich. June 10, 1986)(granting permanent injunction); National Football League v. Scoreboard Sports Bar & Grill, No. CA3-84-1354-R (N.D. Tex. June 24, 1985)(granting permanent injunction); National Football League v. S & P Assoc., Inc., No. 84-0983 (W.D.N.Y. Nov. 21, 1984; Oct. 23, 1984) (granting permanent injunction); National Football League v. Campagnolo Enter., No. 83-1205-Civ-T-13 (M.D. Fla. Oct. 25, 1984) (granting consent judgment). Actions involving Major League Baseball include: The Office of the Comm'r of Baseball v. G.S.F. Sports, Inc. (Madison Square Sports Bistro), No. 89-4448 (D.N.J. Oct. 23, 1989) (granting permanent injunction and consent order); Minnesota Twins Partnership v. Rand Bar, Inc., No. 4-87-Civ-828 (D. Minn. Feb. 1, 1988) (consent judgment).

24. Laura M. Fries, *The Shows*, SATELLITE ORBIT (N.C.), Special Edition 1990, at 9.

25. *See* National Football League v. The Alley, Inc., 624 F. Supp. 6, 8 (S.D. Fla. 1983).

26. *Id.*

27. *Id.*

28. *Id.* The distribution feed, while containing national commercials and network promotional announcements, is left with gaps so that the local television and cable stations can insert local commercials, news and station identification announcements. *Id.*

29. *Id. See generally* David M. Rice, *Calling Offensive Signals Against Unauthorized Showing of Blacked-Out Football Games: Can The Communications Act Carry the Ball?*, 11 COLUM.-VLA J.L. & ARTS 413 (1987).

usually being the travelling team's home market and the area where the game is being played (if it has not been blacked out there).[30]

Sports bars that are located in areas where the game is not being broadcast, intercept the backhaul feed and show the commercial-free transmission to customers who may be fans of those particular teams.[31] Throughout the past decade, the NFL and other sports leagues have prevailed in lawsuits against the bars and restaurants that have intercepted these unauthorized transmissions,[32] sometimes winning substantial monetary judgments.[33] However, no penalties have been imposed against home satellite dish (HSD) owners, who in their private enjoyment, watch the same transmissions.[34]

VIEWS AND PERSPECTIVES

As supplier of game telecasts, the NFL has a valid interest in controlling their distribution.[35] In a purely monetary sense, the tele-

30. National Football League v. The Alley, Inc., 624 F. Supp. 6, 8 (S.D. Fla. 1983).

31. *See* Stellano, *supra* note 2, at 34.

32. *See generally supra* note 23.

33. Hochberg, *supra* note 3, at 42. Generally, sports interests have stopped interception of unauthorized signals through injunctions and, in cases brought by pay-television programmers, have signed up the offending sports bars as subscribers. *Id.* However, in recent cases brought by leagues and teams, plaintiffs are seeking and recovering punitive monetary damages. *Id.* For example, in the *Minnesota Twins* case, the consent judgment provided for $20,000 in statutory damages to the plaintiff team. Minnesota Twins Partnership v. Rand Bar, Inc., et al, No. 4-87-Civ.-828 (D. Minn. Feb. 1, 1988).

34. DAVID B. MELTON, LEGAL AND FINANCIAL, SATELLITE TV & YOU (N.C.) 1, 7 (1990) (satellite dish brochure, available at retail locations nationwide). The liability of HSD owners in receiving unauthorized network signals has been a much debated issue. *Id.* Before leaving office, former President Reagan signed into law the Satellite Home Viewer Copyright Act of 1988, Pub. L. No. 100-667, § 206, 17 U.S.C. § 119, *reprinted in* 1988 U.S.C.C.A.N. 5577, which assures that HSD owners have a right to receive the unscrambled network and independent broadcast signals. *Id.* Even before protective legislation was introduced, no league bothered to file a lawsuit against HSD owners for receiving their copyrighted signals because private viewing in the home is generally not considered an infringement of the copyright owner's exclusive right to publicly perform the work. *See generally* Francis M. Nevins, Jr., *Antenna Dilemma: The Exemption from Copyright Liability for Public Performance Using Technology Common in the Home*, 11 COLUM.-VLA J.L. & ARTS 403 (1987). Even if homeowners were not using their satellite dishes for private viewing, it would be virtually impossible to police the activities of millions of HSD owners. *Id. See also* Sydnee Robin Singer, *Satellite/Dish Antenna Technology: A Copyright Owner's Dilemma*, 59 IND. L.J. 417 (1984).

35. *See* National Football League v. The Alley, Inc., 624 F. Supp. 6, 8 (S.D. Fla. 1983). Please note that in the context used here, the use of the acronym, NFL, not only represents league executives and the league itself, it is meant to emphasize control by all of the individual teams as well.

casts have more value in certain market areas than in others.[36] From the league's perspective, value is partially determined by the amount of money networks are willing to pay for the broadcast rights.[37] From the networks' perspective, the amount of money they will bid depends a large part on the market demand by advertisers for commercial air-time.[38] Since sports, football in particular, deliver a very reliable and efficient "male-target" audience, advertisers are willing to pay the premium price for this time.[39]

In 1990, the three over-the-air networks, ABC, CBS, NBC, and two cable networks, ESPN and TNT, agreed to pay the NFL a combined $3.6 billion in a four-year deal for the exclusive right to broadcast NFL games.[40] The networks claim that when they are unable to

---

36. *See generally* Stellano, *supra* note 2; Robichaux, *supra* note 3; Garrett & Hochberg, *supra* note 8. *Cf.* Joe Lapointe, *Television Lavishes Money On Sports, But Does It Pay?*, N.Y. TIMES, Dec. 3, 1989, at C1 (proposing that networks will not be able to recoup the money they pay to sports leagues for exclusive broadcasting rights).

37. Lapointe, *supra* note 36, at C1. Networks are obviously willing to pay millions as evidenced by their broadcast deals with leagues and the NCAA. *Id. See also* Joshua Hammer, *Betting Billions on TV Sports*, NEWSWEEK, Dec. 11, 1989, at 67 ("[S]ports can boost a network's cachet, shore up ratings, please affiliates, entice advertisers and allow heavy promotion of prime-time shows").

38. Hammer, *supra* note 37, at 67. *Cf.* Lapointe, *supra* note 36, at 7. Lapointe states that advertisers will be scared off by the amount of money networks will charge for commercial air-time during sports events. *Id.* Even so, in uncertain times with the economy and market unstable, sports programming is dependable in drawing ratings. *Id.* The attraction to sports by the public increases demand by advertisers. *Id. See also* Hammer, *supra* note 37, at 67.

39. Lapointe, *supra* note 36, at 7. For example, the 1989 Super Bowl was viewed by 43.5 percent of all United States homes equipped with televisions. Hammer, *supra* note 37, at 67. This generated approximately $25,000 per second in advertising revenues. *Id.* To fully comprehend the NFL's popularity, Super Bowls hold the record for history's top 10-rated live TV shows. Bill Carter, *New TV Contracts for N.F.L.'s Games Total $3.6 Billion*, N.Y. TIMES, Mar. 10, 1990, at 1. Even more convincing is the fact that advertisers paid $1.2 million a minute for air-time during the 1990 Super Bowl. *Id.*

40. *See* Carter, *supra* note 39, at 1. The author commented:

> Each of the 28 teams in the league will make about $32 million from the deal every season, which is almost double the $17 million each team made annually from the television package that covered the last three years. Without even one customer buying a seat or a hot dog, the professional football teams will be able to meet all expenses, and even earn hefty profits, from television income alone.

Id. CBS paid $1.05 billion for the exclusive right to broadcast Sunday afternoon NFC games, second-round NFC playoffs and NFC championships, as well as the 1992 Super Bowl. NBC paid $752 million for the right to broadcast Sunday afternoon AFC games, the second-round AFC wild-card game, AFC playoffs, AFC championships, and the 1993 Super Bowl. It should be noted that the right to broadcast AFC games is not as valuable as NFC games because NFC teams are based in larger cities (market areas). ABC agreed to pay $950 million for broadcasting Monday Night Football, the 1991 Super Bowl and first-round AFC and NFC wild-card games. *Id.* The cable networks, ESPN and TNT each will pay $450 million for the rights to broadcast Sunday night games with ESPN covering one half of the season and TNT covering

attract enough local viewers they suffer a loss in advertising revenue.[41] The interception of backhaul feeds by sports bars and HSD owners has been cited as a factor that contributes to this loss.[42] In its effort to prevent satellite dish owners from undercutting the regional format, the NFL's new $3.6 billion contract included the provision to scramble signals.[43] Without a descrambling device to decode the encrypted feed,[44] sports bars will not be able to display the regional out-of-market games.

Unlike the NFL, sports bars are not suppliers of a product, but instead are providers of a service.[45] Displaced fans who are visiting another city or fans who have moved to new cities and want to watch their former city's team play, are the major benefactors of this service.[46] Sports bars believe their use of the dishes is good for the NFL because it bolsters overall enthusiasm for the league and for the individual teams.[47] They say that now because of greed, the NFL will smother this enthusiasm.[48]

In viewing the issue objectively, it appears that the bars are also greedy. Have not they been profiting from the interception of unfet-

---

the other half. *Id. See also* Stellano, *supra* note 2, at 34. The author cites CBS and NBC as the two networks that may arguably be harmed by sports bars' display of out-of-market games. *Id.*

41. *See* Stellano, *supra* note 2, at 34.

42. *Id.*

43. *Id.* For more details about the NFL's contract, see Carter, *supra* note 39, at 1. *See also supra* notes 1-3 and *infra* notes 197-200 with accompanying text (discussing the NFL's plan to scramble its satellite signals and sports bars' reactions).

44. The type of descrambler needed depends on the encryption method which the NFL and networks choose. JAY HYLSKY, SUBSCRIPTION CHANNELS, SATELLITE ORBIT (N.C.) Special Edition 1990, at 6. If the league does not want to make out-of-market games available to HSD owners and sports bars, it will most likely use the same technology that Major League Baseball (MLB) now uses, VideoCiphe. Rudy Martzke, *Baseball Has TV Viewers Scrambling*, USA TODAY, Jan. 8, 1988, at C2. This particular method only allows those possessing a special decoder (different than the consumer-marketed VideoCipher II) to unscramble and receive the transmission clearly. *Id.* The scrambling process used by MLB was developed by General Instruments Corporation and is implemented by the Hughes Television Network of New York. *Id.* For more about the consequences of MLB scrambling backhaul feeds, see Steve Weinstein, *TV Stations Cry Foul Over Baseball's Plan to Scramble Signals*, L.A. TIMES, Feb. 4, 1988, at A1.

45. *See* Stellano, *supra* note 2, at 34. Sports bars provide a place for displaced fans to go to when they are not otherwise able to see their home team play. *Id. See also* Robichaux, *supra* note 3, at B1 (supporting the proposition that sports bars provide a service).

46. *See* Stellano, *supra* note 2, at 34.

47. *Id.* It could be argued that when the amount of fans that follow a particular team increases, so do the marketing revenues from the sales of that team's logo. Furthermore, one person's "enthusiasm" for a team may foster another person's enthusiasm for that same team. *Id.*

48. *Id. See also* Parisi, *supra* note 11, at 22. Parisi quotes the owner of a sports bar who says that he is promoting enthusiasm for sports. *Id.*

tered signals without paying any consideration?[49] Admittedly, sports bars have profited,[50] yet they have continually said that they are willing to pay for the right to receive the signals,[51] thereby leaving the ball in the NFL's court. However, with law on its side, the league has not made many concessions.[52]

Development of Communications Law

To understand how federal law has been used to protect the league's satellite signals, a discussion of the relevant statutes is helpful. There are currently two major federal statutes which are used in conjunction to protect the NFL's satellite signals from unauthorized interception by sports bars: the Communications Act of 1934[53] and the Copyright Act of 1976.[54] The first, section 605, now section 705, of the Communications Act, was originally enacted to protect the contents of private wire and radio communications.[55] The section was revised in 1984 to specifically include a mechanism for protection of satellite and cable communications.[56] The second major statute used to protect satellite signals, the 1976 Copyright Act, was enacted to

---

49. *See generally* Stellano, *supra* note 2, at 34; National Football League v. McBee & Bruno's, Inc., 792 F.2d 726 (8th Cir. 1986); National Football League v. The Alley, Inc., 624 F. Supp. 6 (S.D. Fla. 1983).

50. *See McBee*, 792 F.2d at 729 (citing testimony by owner of bar that 160 more patrons were served on a day when a blacked out game was shown then on a regular Sunday); *Alley*, 624 F. Supp. at 9 (finding that sports bars benefitted by showing out-of-market and blacked out games).

51. *See generally supra* note 11.

52. *See infra* notes 89-94 and accompanying text for discussion of a situation where the league once conceded to outside pressures by lifting its old black-out rule for home-game broadcasts.

53. 47 U.S.C.A. § 605 (West Supp. 1985).

54. 17 U.S.C. §§ 101-810 (1982).

55. The origination of § 605 is found in § 4, Regulation 19, of the Radio Act of 1912, Pub.L. No. 62-264, § 4, 37 Stat. 302 (1912). The 1984 revision of § 605(a) provides in part:

> No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, . . . 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. . . . This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

47 U.S.C.A. § 605(a) (West Supp. 1985).

56. The new addition is referred to as section 705, but is still cited as section 605. *See infra* notes 110-115 and accompanying text.

create a more unified system of copyright protection.[57] It was also the result of lobbying by sports leagues that were seeking copyright protection for the broadcasts of their games.[58]

Although section 705 of the Communications Act is a formidable weapon for program suppliers like the NFL, this was not always the case. Before Congress amended the section, it contained a controversial proviso which made it inapplicable to the transmissions "of any radio communication which is broadcast or transmitted . . . for the use of the general public."[59] Throughout the legislative history of the section, no substantive changes were made to the exception, which seemed to emphasize the original purpose of protecting only private communications.[60] The basic controversy surrounding the proviso has come from its interpretation by the federal courts and by the Federal Communications Commission (FCC) over the last decade.[61] Their interpretation has allowed the NFL to consistently prevail in suits against sports bars.

Even before implementing satellite transmission, signal piracy posed a problem for pay-television (pay-TV) programmers.[62] At the time, programmers relied on three methods of distributing exclusive live sporting events and entertainment features to subscribers:[63] cable television[64] (CATV), multipoint distribution[65] (MDS), and sub-

---

57. In 1986, federal copyright law was completely revised to unite common law and statutory theories of protection. *See* ARTHUR R. MILLER & MICHAEL DAVIS, INTELLECTUAL PROPERTY IN A NUTSHELL 286-87 (1990). *See also* Note, *Toward a Unified Theory of Copyright Infringement for an Advanced Technological Era*, 96 HARV. L. REV. 450 (1982)[hereinafter *Unified Theory*].

58. *See* H.R. REP. No. 1476, 94th Cong., 2nd Sess. 52, (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665. It was concluded that sports broadcasts are works of authorship entitled to copyright protection because a director chooses and guides the order of electronic images that cameramen pick up. *Id.*

59. 47 U.S.C.A. § 605 (1982). *See generally* Rice, *supra* note 29, at 414; Comment, *Protecting Wireless Communications: A Detailed Look at Section 605 of the Communications Act*, 38 FED. COMM. L.J. 411 (1987); Gary E. Bishop & Scott Eads, Comment, *The Home Satellite Dish Antenna: Will the Cable Communications Policy Act of 1984 Descramble the Unauthorized Viewing Controversy?* 25 WASHBURN L.J. 66, 72 (1985).

60. *See* Rice, *supra* note 29, at 414.

61. *Id.*

62. James C. Robinson, Comment, *Private Reception of Satellite Transmissions by Earth Stations*, 48 ALB. L. REV. 426 (1984). The term "pay-TV" generally refers to the industry which provides sports and entertainment programming services. *Id.* There is a fourth method of distribution, direct broadcast satellite (DBS), *id.*, which will be mentioned briefly in footnotes to concluding statements, see *infra* note 211. *See also* Portin, *supra* note 5, at 825.

63. Robinson, *supra* note 62, at 431.

64. *Id.* Cable television is sometimes referred to as "Community Antenna Television" (CATV) because only one receiver (earth station) is needed to receive the signals for an entire

scription television[66] (STV). Pirates were able to receive pay-TV signals by either physically "tapping" into the coaxial cable,[67] subscribing to a service and then attaching an illegal decoder to the television set,[68] or by installing an antenna-decoder to reconstruct the scrambled signals that are transmitted over broadcast and microwave frequencies.[69]

In the mid-1970's, the pay-TV industry began using satellite transmission as a means of delivering its signals to the CATV, MDS, and STV operators.[70] The efficiency of transmitting via satellite became a contributing factor to the growth and popularity of subscription programming.[71] However, as pay-TV became more popular, so did signal piracy. At first, programmers tried to protect their signals from pirates by using state law remedies.[72] Because there was a lack of uniformity and conflicting applications, the industry turned to fed-

---

community. *Id.* The television signals are then distributed to households by wire, rather than through the air (conventional broadcasting). *See generally* CLIFFORD, *supra* note 1, at 16; MONROE E. PRICE & JOHN WICKLEIN, CABLE TELEVISION: A GUIDE FOR CITIZEN ACTION (1972); REPORT OF THE SLOAN COMMISSION, ON THE CABLE: THE TELEVISION OF ABUNDANCE (1971).

65. Robinson, *supra* note 62, at 431. Multipoint distribution system operators transmit signals on microwave frequencies which requires use of a converter (by a subscriber) to view the signal on a television set. *Id.* These signals are not "scrambled", they are merely a different frequency. *Id.*

66. *Id.* Subscription television is the transmission of a "scrambled" signal over a commercial television channel (conventional airwaves) which requires a subscriber to use a descrambling device to make the signal intelligible. *Id.*

67. Portin, *supra* note 5, at 831. Pirates are able to physically or electronically tap into the cable running past homes or inside apartment complexes. *Id.* This is the most frequently used method in pirating CATV television services. *Id.*

68. *Id.* This type of pirating involves the attachment of an illegal or "black market" decoder to a television set. *Id.* The pirate legitimately subscribes to a limited service and then the decoder electronically unscrambles the signals of the channels not included in the ordered subscription. *Id.* For more information on the liability and use of black market devices, see *infra* note 205.

69. Portin, *supra* note 5, at 831. The third type of piracy can only be accomplished through using the STV and MDS transmissions. *Id.* A fourth type of piracy, not listed in accompanying text, is signal theft by use of Television Receive Only (TVRO) earth stations, *id.*, which is the subject of this comment.

70. Rice, *supra* note 29, at 416. Before the mid-1970's, pay-TV was not commercially viable because of the limited methods of distribution and difficulty in increasing access to the public. *Id. See also* CLIFFORD, *supra* note 1, at 11. Satellite-transmitted programming was later used to expand the amount and range of services. *Id.*

71. For a discussion of the advantages in satellite transmission, see CLIFFORD, *supra* note 1, at 11. *See also* E. Gabriel Perle, *Is the Bird Pie in the Sky? — Communications Satellites and the Law*, 27 BULL. COPYRIGHT SOC'Y 325, 328 (1980).

72. *See* Rice, *supra* note 29, at 416-17 nn.21-24. *See also* Bishop & Eads, *supra* note 59, at 82 nn.121-23.

eral law: specifically section 605, and then later, section 705 of the Communications Act.

The first hurdle plaintiff programmers had to overcome was the limiting proviso. In the early decisions, they were defeated by defendants' arguments that programmers and distributors try to enlarge their audience as much as possible using mass-appeal,[73] and therefore their transmissions are meant "for the use of the general public."[74] Additionally, because MDS signals were unscrambled[75] and STV operators used broadcast stations to distribute,[76] the courts effectively excluded pay programming transmissions from section 605 protection.

Pay programmers were finally able to overcome the hurdle of section 605's conclusory proviso in the appellate decision of *Chartwell Communications Group v. Westbrook*.[77] In *Chartwell*, the court distinguished the statutory definition of "broadcasting"[78] from transmissions which are "broadcast . . . for the use of the general public." The majority focused upon the intent of the programmer, saying that "while [STV] may be available to the general public, it is intended for the exclusive use of paying subscribers. . . ."[79] This reasoning was adopted in several subsequent decisions, finally establishing the applicability of section 605 to those transmissions which the programmer does not intend to be "freely" used by the general public.[80]

In 1979, the pay-TV industry was faced with its biggest challenge yet: the FCC removed the licensing restriction for all Television-Receive-Only (TVRO) earth stations (satellite dish antennas).[81]

---

73. Rice, *supra* note 29, at 418. Pay-TV programmers have generally offered sports and entertainment programming that appeals to the overall public so that more people will subscribe. *Id.*

74. *See, e.g.*, National Subscription Television v. S & H TV, 644 F.2d 820 (9th Cir. 1981); Orth-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672 (S.D.N.Y. 1979); *But see, e.g.*, Home Box Office, Inc. v. Pay TV of Greater N.Y., Inc., 467 F. Supp. 525 (E.D.N.Y. 1979) (holding that § 605 applied to MDS transmissions based on 1979 determination by FCC).

75. *See generally supra* note 65.

76. *See generally supra* note 66.

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

78. Section 153(o) of the Communications Act 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(o) (1982).

79. *Chartwell*, 637 F.2d at 465. The court was persuaded by the fact that "special equipment" was needed to receive the signal intelligibly and that plaintiff's intent was to lease or sell the equipment for a fee. *Id.*

80. *See infra* note 85 for a partial list of subsequent decisions.

81. *See supra* note 20 and accompanying text.

Prompted by first amendment considerations[82] and a determination that section 605 protected satellite signals,[83] the FCC deregulated satellite reception completely. As a result, a new kind of signal piracy emerged.

This piracy involved dish owners who intercepted the satellite signals transmitted by programmers to local cable, MDS and STV distributors.[84] The industry reacted by filing lawsuits against those defendants it could reasonably ascertain: commercial establishments.[85] These cases helped to build a solid foundation for the application of section 605, and later section 705, of the Communications Act.

Of course, the pay-TV industry was not alone in fighting the phenomenon of satellite piracy. The NFL also used section 605 in its lawsuits against sports bars. A primary issue in these cases was whether section 605, and later 705, applied to the backhaul feeds of live broadcasts.[86] The issue was directly addressed in *National Football League v. The Alley, Inc.*[87] In *Alley*, Miami bars were displaying to their customers the satellite transmissions of local Dolphin's games.[88] Although NFL telecasts of these games were "broadcast" to television audiences in various other areas of the country, they were

---

82. *See* In Re Regulation of Domestic Receive-Only Satellite Earth Stations, 74 F.C.C.2d 205, 215-16 (1979) (first report and order). For a comprehensive discussion of the first amendment issue, see Robinson, *supra* note 62, at 445. Restrictions upon the manufacture, sale or use of satellite dish antennas may be violative of the first amendment because some satellite communications are intended for free use by the general public. *Id.* For example, Christian Broadcast Network (CBN) and C-SPAN make their transmissions available to the public without expecting compensation. *Id.*

83. *In Re Satellite Earth Stations*, 74 F.C.C.2d at 215.

84. *See* Rice, *supra* note 29, at 424.

85. Some of the actions brought against commercial establishments include: Pro Am Sports Sys. v. Larry Simone, Inc. 738 F.2d 440 (6th Cir. 1984) (mem. decision) (reversing denial of injunction), injunction granted, No. 84-2032DT (E.D. Mich. Jan. 15, 1986)(sports leagues filed an amicus brief on behalf of plaintiffs); American Television & Communications Corp. v. Floken, Ltd., 629 F. Supp. 1462 (M.D. Fla. 1986); Quincy Cablesystems, Inc. v. Sully's Bar, Inc., 640 F. Supp. 1159 (D. Mass. 1986); Home Box Office, Inc. v. Corinth Motel, Inc. 647 F. Supp. 1186 (N.D. Miss. 1986); Entertainment & Sports Programming Network, Inc. v. Edinburg Community Hotel, 623 F. Supp 647 (S.D. Tex. 1985). Even cable systems and operators who receive and distribute (satellite) programming were held to have standing under § 705(a) and § 605. Quincy Cablesystems, Inc. v. Sully's Bar, Inc. 650 F. Supp. 838, 843-44 (D. Mass. 1986); *Corinth*, 647 F. Supp. at 1189; *Floken*, 629 F. Supp. at 1469-72; *Edinburg*, 623 F. Supp at 651; Contra Air Capital Cablevision, Inc. v. Starlink Communications Group, 601 F. Supp. 1568, 1572 (D. Kan. 1985).

86. *See supra* note 23 for a list of actions brought by the NFL against sports bars.

87. 624 F. Supp. 6 (S.D. Fla. 1983).

88. *Id.* at 8.

being "blacked out" in the Miami area.[89] The "black-out rule" is a prime example of the NFL's controlling the distribution of its product.[90] Before 1973, the NFL's practice was to black out all local games to insure high gate receipts for the home team.[91] When Washington politicians grew weary of not being able to watch the Redskins play on television, they passed temporary legislation that prohibited the black-out of (NFL) home games if tickets are sold out seventy-two hours before kick-off time.[92] The provision was allowed to expire based on the league's promise to continue home telecasts of sold-out games.

The NFL kept its promise.[93] However, the increasing incidences of interception and display of blacked-out games by sports bars in home territories became a direct threat to the efficacy of the policy.[94] The *Alley* case is an example of the NFL's effort to discourage commercial establishments from undermining its control.[95]

In *Alley*, the court determined that the exclusive contracts the NFL had with the broadcast networks served the economic interests of the league "in controlling the distribution of the sports entertainment product. . . ."[96] Further, District Judge Kehoe stated that such contracts, with their black-out agreements, fostered "development of a local following for individual clubs."[97] For purposes of standing, the court found the league to have an important and valid interest in the integrity of the communications system that distributed its product.[98] Therefore, because such interests were within the "protective

---

89. *Id.*

90. *See generally id.* at 8.

91. *See* Rice, *supra* note 29 at 427 nn.92-93 (explaining the NFL's previous practice and the policy reasoning behind the new black-out rule). *See also* National Football League v. McBee & Bruno's, Inc., 621 F. Supp. 880, 883 (E.D. Mo. 1985), *aff'd in part and rev'd in part*, 792 F.2d 726 (8th Cir. 1986)(holding that the NFL's black-out policy is evidence of intent that its satellite signals are not meant for use by the general public).

92. *See* Communications Act of 1934, § 331, Act of Sept. 14, 1973, Pub. L. No. 93-107, § 1, 87 Stat. 350, *repealed by*, Act of Sept. 14, 1973, Pub. L. No. 93-107, § 2, 87 Stat. 351 (effective Dec. 31, 1975).

93. The NFL had no qualms in keeping its promise because the new policy increased the league's TV ratings, and therefore increased the money it was able to get from the networks. *See* Stellano, *supra* note 2, at 34.

94. Rice, *supra* note 29, at 427 n.94.

95. *See supra* note 85 for other cases.

96. National Football League v. The Alley, Inc., 624 F. Supp. 6, 8 (S.D. Fla. 1983).

97. *Id.* Critics of the black-out rule have argued that the practice does not foster a local following for the home team, and in fact, home telecasts may encourage a bonding between the team and local residents. *See* Rice, *supra* note 29, at 426-28 n.94.

98. *Alley*, 624 F. Supp. at 9.

sphere" of section 605, and such concerns were "not logically distinguishable from those of the transmitting networks," the NFL was found to have standing.[99]

Next, the court turned to the issue of whether the intercepted satellite transmissions fell within the proviso that exempted section 605 protection. It found that they did not.[100] First, Judge Kehoe reasoned that because the feeds were within the C-band frequency range, which the FCC restricts for use between "point-to-point" communications, they were not broadcasts.[101] Second, the necessity of using "special and expensive receiving equipment" to receive the signals was viewed as an indication that they were not intended for use by the general public.[102] After determining the transmissions were protected,[103] the court examined the defendants' activities. Based upon the evidence submitted at the lower court, it was held that each defendant's activities violated the express language of section 605.[104] In reaching this conclusion, the court found particularly persuasive the admission that donations were solicited as well as the fact that the blacked-out games were used to entice sports fans.[105]

Curiously, there were two "out-of-market" games cited within the decision as subject to section 605 protection.[106] Although these games were not blacked out, they were also listed as being protected. This leads to the conclusion that any display of an out-of-market game in an area that the NFL does not intend to show the game is a violation of section 605 of the Communications Act. When the FCC deregulated satellite reception in 1979, the dish market was not re-

---

99. *Id.* Under § 705: "Any person aggrieved by any violation of [section 705(a)] may bring a civil action in a United States district court or in any other court of competent jurisdiction." Communications Act of 1934, § 705(d)(3)(A), 47 U.S.C. § 605(d)(3)(A) (Supp. II 1984). For a more in-depth discussion of standing, see Rice, *supra* note 29, at 435-37.

100. *Alley*, 624 F. Supp. at 8.

101. *Id.* The C-band frequencies are not used in conventional broadcasts, but are restricted by the FCC to "point-to-point" communications. *See* In Re Regulation of Domestic Receive-Only Earth Stations, 74 F.C.C.2d. 205, 216 (1979) (first report and order). *See also* CLIFFORD, *supra* note 1, at 36.

102. *Alley*, 624 F. Supp. at 8. The equipment was found to be special because it picked up C-band frequency signals that "ordinary home television equipment" did not. *Id.* Also, it was found expensive because each system cost approximately $6,000-$6,500. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* The court found that one defendant charged admission and solicited donations from patrons who wished to view the intercepted telecasts. *Id.* Further, the court determined that customers were attracted to the establishments by the telecasts. *Id.*

106. *Id.*

stricted to just commercial enterprises.[107] Indeed, homeowners became one of the industry's most valued customers. It was not unusual that cable programmers and distributors became increasingly concerned and frustrated about signal piracy. In 1984, they confronted Congress, wanting stronger penalties for the unauthorized interception of cable communications.[108]

Meanwhile, the satellite dish industry and HSD owners became a formidable voice in Washington, defending the rights of dish owners to receive satellite signals.[109] In its effort to balance the competing interests of the cable and satellite dish industries, Congress enacted the Cable Communications Policy Act of 1984[110] (CCPA). The CCPA is now referred to as section 705; instead of formally adding a whole new section, Congress simply "amended" section 605 of the Communications Act.[111]

---

107. CLIFFORD, *supra* note 1, at 36. The term "commercial enterprises" refers to hotels, motels, bars, restaurants, hospitals, high-rise apartment houses and condominiums. *Id.* The 1979 FCC ruling has been interpreted to mean that TVROs can be used for in-home television viewing by commercial entities, but cannot be put to an unauthorized commercial use. *Id.*

108. Bishop & Eads, *supra* note 59, at 83 n.130.

109. *See Early Years*, *supra* note 17, at 18. The organization that championed the rights of home satellite dish owners was Society for Private and Commercial Earth Stations (SPACE). Bishop & Eads, *supra* note 109, at 71 n.43.

110. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (amending 47 U.S.C. § 605 (1982)). *See generally* Bishop & Eads, *supra* note 59, at 72; Long, *supra* note 17, at 18.

111. 47 U.S.C. § 605 (1984). "In amending section 605, it is intended to leave undisturbed the case law that has developed confirming the broad reach of section 605 as a deterrent against piracy of protected communication." *Cable Communications Policy Act of 1984: Hearing on House Amendments to S. 66 Before the Comm. on Commerce, Science and Transportation*, 98th Cong., 2nd Sess., *reprinted in* 1984 U.S.C.C.A.N. 4746 (statement of Senator Robert W. Packwood). Due in part to the lobbying efforts by the satellite dish industry and home satellite dish owners, § 605(b) of the Communications Act of 1934 (§ 705(b) of the CCPA) provides favorable exceptions to the general provisions of subsection (a):

> 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 obtained authorization for private viewing under that system.

47 U.S.C.A. § 605(b) (West Supp. 1985).

While the additional language provides stronger penalties for violations,[112] it does not make the reception of cable communications signals by HSD owners illegal;[113] instead, it exempts from liability their reception of "satellite cable programming" if such programming is not scrambled and if there is no "marketing system" set up to which the HSD owner can subscribe.[114] At the same time Congress worked out this compromise for private dish owners, it reaffirmed prior case law and made it clear that unauthorized reception of signals for public use and commercial gain was strictly prohibited.[115]

One of the many ironies in the sports bar piracy issue comes from the fact that sports fans who have the dish system at home are exempt from liability, while those who provide the service to the less fortunate fans, are not. The existence of the exempting provision of section 705 might have even prompted reception of backhaul feeds by HSD owners.[116] While the purpose of section 705 is a valid one, it still creates an unfair result for the individuals who cannot afford to purchase and install dish antennas in their homes.

Application of Copyright Law

The Copyright Act of 1976 (Act) is as formidable a weapon for the NFL as the Communications Act. Because the Act applies to "original works of authorship fixed in any tangible medium,"[117] which

---

112. *See* 47 U.S.C.A. § 605(d) (West Supp. 1985). Fines of up to $1,000 are imposed if an individual "willfully" violates section 705(a) and harsher penalties of up to $25,000 may be imposed if the willful violation is for commercial advantage or "public financial gain." *Id.* Section 705(d) also provides for criminal penalties with six months to a year imprisonment. *Id.*

113. *Id.* Section 705 is not a blanket immunity, it provides only a limited exception from otherwise illegal unauthorized interception. *See infra* note 205 and accompanying text.

114. 47 U.S.C.A. § 605(b) (West Supp. 1985).

115. *Id. See also supra* notes 77-80 and accompanying text.

116. Satellite TV guides and magazines explain how to receive backhaul feeds of sports telecasts, using this as part of a marketing package to sell satellite dish antennas. *See, e.g.*, Stewart Schulze, *Satellite TV Primer*, Satellite Orbit (N.C.), Special Edition 1990, at 28.

117. 17 U.S.C. § 102(a) (1982) provides in part:

> Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, form which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
> (1) literary works;
> (2) musical works, including any accompanying words;
> (3) dramatic works, including any accompanying music;
> (4) pantomimes and choreographic works;
> (5) pictorial, graphic, and sculptural works;
> (6) motion pictures and other audiovisual works; and
> (7) sound recordings.

encompasses "motion pictures and other audiovisual works,"[118] the NFL's telecasts are eligible for protection.[119] Such telecasts are specifically covered because the NFL "fixes" the audiovisual transmission of live games by simultaneously recording[120] each one on videotape and filing them with the copyright office in Washington.[121]

Just as section 705 of the Communications Act specifically addresses the use of unauthorized signals for commercial purposes as opposed to private viewing, section 111 of the Copyright Act also addresses the different uses of copyrighted television signals.[122] In section 111, Congress recognizes the impracticality of policing all activities of commercial entities, such as cable system operators, that have access to copyrighted television signals.[123] As a solution, Congress created a provision for compulsory licenses whereby cable operators are permitted to broadcast or "perform" any copyrighted work, otherwise known as secondary transmissions, as long as accountings are provided and payments are made to the copyright office.[124]

Although Congress, in effect, took away the copyright owners' right to refuse performance of secondary transmissions, it did not make the compulsory license provision applicable to all secondary transmissions.[125] Section 111 lists three categories of secondary transmissions:[126] the first category are those transmissions exempted from copyright liability;[127] the second, are those eligible for compulsory li-

---

Id.

118. 17 U.S.C. § 102(a)(6) (1982).

119. *See supra* note 58.

120. 17 U.S.C. § 101 states that "work consisting of sounds, images, or both, that are being transmitted, is 'fixed' . . . if a fixation [or recording] of the work is being made simultaneously with its transmission." *Id.*

121. *See* 17 U.S.C. § 408 for provisions on registering copyrighted works.

122. *See* 17 U.S.C. § 111.

123. David Hasper, Note, *Receive-Only Satellite Earth Stations and Piracy of the Airwaves*, 58 NOTRE DAME L. REV. 84, 92 (1982).

124. *Id. See also* 17 U.S.C. § 111.

125. Hasper, *supra* note 123, at 93.

126. *Id. See also* 17 U.S.C. § 111.

127. 17 U.S.C. § 111(a) enumerates four kinds of secondary transmissions that are completely exempted from copyright liability: 1) transmissions of licensed area broadcasts from a master antenna to hotel guests provided no direct charge is made; 2) transmissions made only for educational purposes; 3) transmissions made by a licensed carrier if the carrier does not control the contents of the transmission or make changes to it; and 4) transmissions by a nonprofit organization or governmental agency. *Id.*

censing[128] and the third, are those which are subject to full copyright protection.[129]

Sports bars' use of satellite transmissions fall under the third category, which provides the copyright owner, the NFL, with the right to bring an action for infringement if the owner's works are publicly performed without permission.[130] For purposes of illustrating the application of the 1976 Copyright Act in actions by the NFL against sports bars, the following section will discuss the landmark case, *National Football League v. McBee & Bruno's, Inc.*[131]

The facts in *McBee* involved several owners of St. Louis restaurants displaying St. Louis Cardinals' home games that had been blacked out.[132] They received the games with satellite dish antennas that picked up the network's backhaul clean feeds.[133] After a trial on the merits, the district court entered a permanent injunction against the bars based upon violations of section 705 of the Communications Act and section 101 of the Copyright Act.[134] The defendant bars appealed the district court's decision on the Copyright Act.

The defendants' first argument was that neither the league nor the Cardinals team had shown the requisite injury to justify a permanent injunction.[135] They claimed that plaintiffs' evidence of injury was inadequate to sustain an action for copyright infringement under *Sony Corp. of America v. Universal City Studios, Inc.*,[136] which they said required factual evidence of harm.[137] The court responded to this argument by stating that the defendants had read *Sony* too

---

128. 17 U.S.C. § 111(b) states that secondary transmissions eligible for compulsory licensing include those made by FCC-licensed broadcast stations. *Id.* This would include network and syndicated programming that is retransmitted by cable systems. *See* Hasper, *supra* note 123, at 94 n.71.

129. 17 U.S.C. § 111(b)-(c) enumerates the kinds of secondary transmissions that are subject to full copyright protection, including those works which the performance or display of are actionable pursuant to § 501. *Id. See also* 17 U.S.C. § 501.

130. *See* Hasper, *supra* note 123, at 94 n.72.

131. 792 F.2d 726 (8th Cir. 1986). *McBee* is a "landmark" case in the sports bar piracy issue because it is the first to come before the court of appeals.

132. *Id.*

133. *Id.*

134. National Football League v. McBee & Bruno's, Inc., 621 F. Supp. 880 (E.D. Mo. 1985), *aff'd in part and rev'd in part*, 792 F.2d 726 (8th Cir. 1986).

135. *McBee*, 792 F.2d at 729.

136. 464 U.S. 417 (1984). The *Sony* case involved a claim brought by Universal City Studios and Walt Disney Productions against Sony Corporation and others, alleging that the manufacturers of video tape recorders were liable for copyright infringement because they marketed the product that was used by consumers to record their copyrighted works. *Id.*

137. *McBee*, 792 F.2d at 729.

broadly.[138] The majority found that irreparable injury was presumed when the exclusive rights of the copyright owner are infringed.[139] The court stated that *Sony* limits the presumption of injury only when the infringing use is for a noncommercial purpose.[140] Therefore, if the present infringing use is for commercial gain, as was found by the district court, then the likelihood of future harm may be presumed.[141]

Section 106 of the Copyright Act grants copyright owners the exclusive right to "perform" and "display" their copyrighted work "publicly."[142] In *McBee*, the district court concluded that the sports bars' public display of plaintiffs' copyrighted telecasts constituted infringement.[143] The defendants did not dispute the fact that they displayed the telecasts publicly, however, they argued that there was no actual harm caused by viewing games that had been blacked out.[144] At trial, the NFL had produced testimony "that more persons attend the games if a televised showing is not available than if it is."[145] The league claimed that a full stadium not only meant more ticket sales, it also meant "a more exciting—and therefore more marketable television entertainment program."[146] The district court accepted this as an adequate basis for presuming injury and the Eighth Circuit agreed.[147]

Although the Copyright Act does grant a copyright owner certain exclusive rights, it does not grant him absolute control over his copyrighted work.[148] The Act contains a specific exemption that bars a finding of infringement when the transmission is received by equipment similar to the type "commonly used in private homes."[149] This

---

138. *Id.*

139. *Id. See, e.g.*, American Metropolitan Enter. of New York, Inc. v. Warner Bros. Records, 389 F.2d 903, 905 (2d Cir. 1968).

140. *McBee*, 792 F.2d at 729 (citing *Sony*, 464 U.S. at 451). In *Sony*, the district court had held that a noncommercial use by the public was a fair use and did not infringe copyright. *Sony*, 464 U.S. at 432. On certiorari, the Supreme Court upheld the lower court's ruling. *Id. See infra* notes 195-196 for more reference to the "fair use" doctrine of copyright law.

141. *See McBee*, 792 F.2d at 729 (citing *Sony*, 464 U.S. at 451).

142. 17 U.S.C. § 106 (1982).

143. *McBee*, 792 F.2d. at 726.

144. *Id.* at 729. The defendant restaurant owners claimed that the league's evidence was mere "bluster". *Id.*

145. *Id.* at 728.

146. *Id.*

147. *Id.*

148. *See* Sony Corp. of America v. Universal Studios, Inc., 464 U.S. 417, 432 (1984). The Supreme Court stated: "[Copyright law] has never accorded the copyright owner complete control over all possible uses of his work." *Id. See, e.g.*, 17 U.S.C. §§ 107-113 (1982).

149. 17 U.S.C. § 110(5) (1982).

provision, section 110(5), is otherwise known as the "home-use" exemption.[150] On its face, this exemption appears to apply to sports bars' use of satellite dish antennas.

In *McBee*, the defendants used the "home-use" exemption as a defense. However, the district court held that satellite dish antennas were outside the scope of the statutory exemption.[151] District Judge Limbaugh reasoned that such equipment was not commonly used in the home because at the time, television sets outnumbered them "by more than 100-to-one."[152] The sports bars challenged Judge Limbaugh's application of the law, arguing that exemption by section 110(5) depended not on the equipment, but whether it was used inside the premises to enhance the sound or visual quality of the copyrighted performance.[153]

The court of appeals rejected this argument. Eighth Circuit Judge Arnold conceded that most broadcast piracy cases focused on the enhancement factor in determining whether the use was exempt; however, he distinguished those cases from the present case.[154] The judge reasoned that the plaintiffs in those cases had required commercial establishments of a certain kind to obtain a license to play copyrighted music through a subscription service.[155] In contrast, the plaintiffs in the present case intended that their blacked-out signals not be received and displayed at all. The court relied upon the legis-

---

150. National Football League v. McBee & Bruno's, Inc., 792 F.2d 726, 730 (8th Cir. 1986). Along with noncommercial "fair use", this is another use that is exempted from liability. This use may have a semi-commercial purpose, but as long as the type of equipment used is the kind "commonly found in private homes," it is exempt from copyright infringement. 17 U.S.C. § 110(5). *See also* H.R. REP. No. 94-1476 at 87, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.C.C.A.N. 5659, 5701 (explaining the purpose of the clause).

151. *See McBee*, 792 F.2d. at 730.

152. *Id.*

153. *Id.* The defendant bars claimed that "[a]ll published cases on section 110(5) take this approach." *Id.*

154. *Id. See* Rogers v. Eighty-Four Lumber Co., 617 F. Supp. 1021, 1022-1023 (W.D. Pa. 1985); Sailor Music v. The Gap Stores, Inc., 516 F. Supp. 923, 924-925 (S.D.N.Y.), *aff'd* 668 F.2d. 84 (2d Cir. 1981), *cert. denied*, 456 U.S. 945 (1982). The *McBee* court stated that while it was true that most cases involving the § 110(5) exemption dealt with enhancement of the performance, they should be distinguished from the present case. Those cases did not deal with interception of blacked-out TV programming, "where the difficulty is in intercepting a signal, but [instead they dealt] with the playing of music for which no royalties have been paid." *McBee*, 792 F.2d. at 731.

155. *McBee*, 792 F.2d. at 731. The court went on to say that in those cases the issue was whether the defendant establishment was of the size and kind that Congress would expect to obtain a license (through a subscription music service). *Id. See Sailor Music*, 668 F.2d at 86; Springsteen v. Plaza Roller Dome, Inc., 602 F. Supp. 1113, 1119 (M.D.N.C. 1985). *See also* H.R. CONF. REP. No. 94-1733, 94th Cong., 2d Sess. 75, *reprinted in* 1976 U.S.C.C.A.N. 5810, 5816.

lative history of the Act.[156] It noted that the Supreme Court's decision in *Twentieth Century Music Corp. v. Aiken*[157] was the catalyst for the creation of section 110(5).

The court stated that at the time the 1976 Copyright Act was being drafted, legislators intended to codify the result that was reached in *Aiken* without making the home-use exemption overly broad.[158] In looking at *Aiken*, the legislators concluded that the defendant's action of playing a conventional radio through four ceiling speakers in his small restaurant would be considered a public performance.[159] However, in deciding whether it was an infringement, the drafters focused on the type of equipment that was used.[160] Because the *Aiken* defendant used "a home receiver with four ordinary speakers . . . [his actions fell within] the outer limit of the exemption."[161]

In the present case, the Eighth Circuit affirmed the district court's finding that the bars' use was not exempt based upon the dubious determination that satellite dish antennas were not commonly used in private homes.[162] The appellate court refused to overrule the

---

156. *See McBee*, 792 F.2d at 731. *See also* H.R. CONF. REP. No. 94-1733, *supra* note 155, at 75, *reprinted in* 1976 U.S.C.C.A.N. at 5816.

157. 422 U.S. 151 (1975). In *Aiken*, the owner of a chain of small restaurants in the Pittsburgh, Pa. area was using ordinary home stereo equipment in the restaurants to provide music for his customers. *Id.* Plaintiffs claimed that this use was an infringement of copyright because it violated the exclusive right of the copyright owner to publicly perform (or license the performance of) his work. *Id.* The Supreme Court held that the use was exempt from coverage of the (1909) copyright laws because of the size and nature of the establishments in question. *Id.* As a result of this exemption, Congress enacted § 110(5) of the 1976 Copyright Act. The purpose was to limit the exemption to protect rights granted to copyright owners under § 106. *McBee*, 792 F.2d at 731 (citing H.R. CONF. REP. No. 94-1733, *supra* note 155, at 75, *reprinted in* 1976 U.S.C.C.A.N. at 5816). *See also Springsteen*, 602 F. Supp. at 1113.

158. *See* H.R. REP. No. 94-1476, *supra* note 150, at 87, *reprinted in* 1976 U.S.C.C.A.N. at 5701.

159. *Id.*

160. *Id.* The drafters said:

> the clause would exempt small commercial establishments whose proprietors merely bring onto their premises standard radio or television equipment and turn it on for their customers' enjoyment, but it would impose liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus . . . into the equivalent of a commercial sound system.

Id.

161. *Id.*

162. National Football League v. McBee & Bruno's, Inc., 792 F.2d 726, 731 (8th Cir. 1986). Judge Arnold, in determining whether dish antennas were of the kind commonly used in private homes, framed the issue as ". . . how likely [is] the average patron who watches a blacked-out Cardinals game at one of the defendant restaurants . . . to have the ability to watch the same game at home?" *Id.* If it is likely, then § 110(5) applies. *Id.* The appellate court

district court's decision because it was not clearly erroneous.[163] However, Judge Arnold acknowledged defendants' testimony that the number of dish antennae was rapidly growing and opined that "some day these antennae may be commonplace."[164]

The bars' third argument on appeal was that their interception of the clean feed was not an infringement because it was the dirty feed that was "fixed."[165] They relied on the statutory definition of fixation[166] as well as the provision that states "each draft version of a work 'prepared over a period of time,' . . . constitutes a separate work."[167] They argued that the clean feed was a different work and therefore not protected.[168] The district court did not give much merit to this argument.[169] First, the district court stated that defendants ignored one of the purposes of the Copyright Act was to give protection to live broadcasts by satellite transmission.[170] Second, the district court claimed that defendants failed to consider that only the game and not the commercials and station breaks that were inserted, "constituted the work of authorship."[171]

The Eighth Circuit agreed,[172] citing plaintiffs' testimony that the game action and noncommercial elements of the game were the subject of copyright.[173] Judge Arnold also reasoned that Congress must have been aware of the nature in which the images and sounds were transmitted. Therefore any finding that the images and sounds con-

---

accepted the district court's finding that less than 1,000,000 dish systems were in use (with many being in commercial establishments), and that they cost $3,000 to $6,000 (for desired reception) as compared to television sets that cost $100 or more. *Id.* Based on these comparisons, and a determination that District Judge Limbaugh's methodology was not clearly erroneous, the appellate court affirmed the lower court's holding that dish antennas were not commonly used in private homes. *McBee*, 792 F.2d at 731.

163. *Id.*

164. *Id.*

165. *Id* at 731. *See also supra* note 120 (explaining how a work is 'fixed' for copyright protection purposes).

166. *See Id.* (citing 17 U.S.C. § 101 (1982)).

167. *Id.* (citing a third provision of 17 U.S.C. § 101).

168. *Id.* at 732.

169. *See Id.*

170. *Id.*

171. *Id. See also supra* notes 58, 117-121 and accompanying text for discussion of how live telecasts of [football] games are considered works of authorship and their transmissions are protected under the Copyright Act.

172. National Football League v. McBee & Bruno's, Inc., 792 F.2d 726, 732 (8th Cir. 1986).

173. *Id.*

stituted two separate works would violate the legislative purpose of the Act.[174]

Finally, the defendant sports bars challenged the lower court's issuance of the permanent injunction.[175] The defendants argued that section 411(b) only allows the copyright owner to institute an action, either before or after fixation, "if the alleged infringer received notice ten to thirty days before the broadcast."[176] Because of this provision, the defendants' claimed, permanent injunctive relief should not be issued.[177] The appellate court dismissed this argument and held that it was an appropriate remedy.[178] The court reasoned that in copyright actions, the granting of permanent injunctions is common "once liability is established and a continuing threat to the copyright exists."[179] Additionally, since the purpose of section 411(b) was to protect live telecasts,[180] it would undermine Congressional intent to deny permanent injunctive relief where there is a threat of continued infringement.[181] Furthermore, the court found the notice requirement was met by the fact that the Cardinals' home games were pre-scheduled and the blackout decisions made "on a well-known standard."[182]

The Eighth Circuit's decision effectively affirmed the district court regarding three of the five restaurants that were sued.[183] However, it reversed the finding of copyright infringement as to the other two defendants.[184] In Section III of the appellate decision, the court determined that the one defendant used his dish antenna to intercept a blacked out game, however, this defendant was not found to be in

---

174. *Id. See also* H.R. 94-1476, *supra* note 150, at 52, *reprinted in* 1976 U.S.C.C.A.N. at 5665.

175. *McBee*, 792 F.2d at 732.

176. *Id.* (citing 17 U.S.C. § 411(b) (1982)). For a more in-depth discussion of the anticipatory infringement doctrine (§ 411(b)), see Charles R. McManis, *Satellite Dish Antenna Reception: Copyright Protection of Live Broadcasts and the Doctrine of Anticipatory Infringement*, 11 COLUM.-VLA J.L. & ARTS 387 (1987).

177. *McBee*, 792 F.2d at 732.

178. *Id.* The court stated that defendants' argument ignores the general grant of remedial authority given in § 502(a), "which permits a court to 'grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.'" *Id.* (citing 17 U.S.C. § 502(a)).

179. *McBee*, 792 F.2d at 732 (citing Pacific & Southern Co., Inc. v. Duncan, 744 F.2d 1490, 1499 (11th Cir. 1984), cert. denied, 471 U.S. 1004 (1985)).

180. *McBee*, 792 F.2d at 732 (citing H.R. 94-1476, *supra* note 150, at 157, *reprinted in* 1976 U.S.C.C.A.N. at 5773).

181. *McBee*, 792 F.2d at 732.

182. *Id.*

183. *Id.* at 733.

184. *Id.*

violation of the Copyright Act.[185] Judge Arnold reasoned that because his business was not open on Sundays, and only a few friends and he watched the game, "no injury . . . [resulted] to plaintiffs different from the arguable injury they sustain from the few satellite dishes installed in private homes."[186]

As to the owners of the other bar, the court found that they did nothing that could conceivably be considered a violation of the Copyright Act or Communications Act.[187] In absence of further findings by the district court, the Eighth Circuit refused to impose liability because the evidence indicated that customers in the bar watched the games as they were broadcast by the CBS affiliate in a town more than seventy-five miles away from the stadium.[188]

While the *McBee* decision was a defeat for the defendant sports bar that intercepted backhaul feeds for its patrons' enjoyment, the decision presents a "light at the end of the tunnel" for sports bars who may become defendants in future actions by the league. This "light" is apparent in the *McBee* defendants' home-use exemption defense.[189] The discussion by Judge Arnold in his opinion seemed to indicate a reluctance to recognize District Judge Limbaugh's methodology and consequent finding that satellite dish antennas are not commonly used in the home.[190] Judge Arnold refused to reverse Judge Limbaugh's holding because it was not "clearly erroneous," yet at the same time he offered his own methodology for determining whether dish antenna equipment was commonly used in private

---

185. *Id.* The court found that no public performance in violation of the Copyright Act took place. *Id.* However, the court opined that "[t]he legal possibility remains open that this incident did involve a violation of the Communications Act," and refused to reach the issue because the special facts of the case made it inappropriate for a court of equity to do so. *Id.*

186. *Id.* This particular defendant did not do business on Sundays because he did not have a Sunday liquor license. *Id.* The court reasoned:

> It is conceivable that the owner and a few friends may gather again on an occasional Sunday and use the satellite dish, but even if they do so, no injury will result to plaintiffs different from the arguable injury they sustain from the few satellite dishes installed at private homes. This sort of injury has never been the focus of the present lawsuit, and there is no evidence that, standing alone, it would work a sufficient irreparable harm to justify injunctive relief.

Id.

187. *Id.*

188. *Id.* Since the games that were shown in this defendant's bar were not blacked-out clean feeds, the court found no reason to impose permanent injunctive relief, and vacated the injunctive relief that was previously granted. *Id.*

189. *See* Nevins, *supra* note 34, at 403.

190. *See Id.* at 407-10. *See also* National Football League v. McBee & Bruno's Inc., 792 F.2d 726, 730 (8th Cir. 1986).

homes.[191] Based upon the language of his opinion, it would seem that Judge Arnold has left an open invitation for future defendants to challenge the finding that satellite dish antenna systems are not commonplace in private homes.

Although sports bars' use of satellite dish antennas may someday be found exempt under copyright laws, defendants will still have to face the likelihood that their use is illegal under communications law. As they have done with communications law, Congress and the courts have attempted to keep copyright law up-to-date with the technological advancements of a very modern and innovative society.[192] Most complications regarding application of the law arise from the use of entertainment equipment.[193] The real dilemma has been in balancing the interests of the public and the market with those of the copyright owner and licensee.[194] In balancing these interests, Congress and the courts have erred in favor of noncommercial uses.[195] In fact, there seems to be a general bias for home satellite dish owners who are statutorily immunized from liability but a general prejudice against commercial establishments that lack any meaningful statutory defense.[196] Therefore, if sports bars are to continue in existence, their fight must be waged outside of the courts.

---

191. *See* Nevins, *supra* note 34, at 410. *See also supra* note 162 (describing Judge Arnold's own method for determining home use).

192. *See generally* Singer, *supra* note 34, at 417; *Unified Theory*, *supra* note 57, at 450; McManis, *supra* note 176, at 387.

193. *See* Perle, *supra* note 71, at 325; David Bollier, *Copyright Cracks Up*, CHANNELS, Mar. 1988, at 64.

194. *See* Bollier, *supra* note 193, at 64.

195. *Id. See also* Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 430-31 (1984). The Court stated: "From its beginning, the law of Copyright has developed in response to significant changes in technology . . . Congress has the constitutional and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by . . . new technology." *Id.*

196. The only meaningful statutory defense sports bars can invoke is the "home-use" exemption. *See supra* notes 189-91 and accompanying text. However, this defense will carry little weight until a court determines that satellite dish antennas are commonplace. *Id.* Commercial establishments might be able to argue that there is no real "harm" in displaying backhaul signals, but this would be a difficult task since courts can presume irreparable injury. *See supra* notes 135-45 and accompanying text. Finally, bars could argue that their use is a "fair use". However, the fact that bars draw in more business and profits from their display of copyrighted signals, may work against such an argument. *See* 17 U.S.C. § 107(1) (1982). All of these possible defenses apply to copyright claims, and not to communications violations. As is evident by the harsher penalties and congressional intent of § 705, it would be virtually impossible for sports bars to argue that network backhaul feeds are not protected. *See* National Football League v. McBee & Bruno's, Inc., 621 F. Supp. 880 (E.D. Mo. 1985) (finding that live telecasts are protected under the Communications Act based upon the intent of the NFL and networks).

Sports Bars Fight Back

Realizing that they have no legal defense, bars have taken the offensive and turned to strength in numbers to form two organizations.[197] In 1990, after the NFL announced it would scramble its satellite signals, these organizations led a boycott against Anheuser-Busch, the league's largest buyer of advertising time.[198] The boycott had enough impact that Anheuser executives went to the NFL and the networks to express their concern.[199] Shortly thereafter, the NFL announced that it would not scramble satellite signals for the 1990 season.[200]

Although the boycott was a big victory for sports bars, it may be short-lived. The NFL has plans to introduce pay-per-view telecasts by 1993,[201] with part of the package including four regular-season games.[202] Naturally, if the NFL uses pay-per-view, it will scramble signals and this may hurt the sports bars. On the other hand, if the league offers pay-per-view subscriptions to these establishments, it may well be the best way to end the on-going controversy.

Conclusion

The satellite dish industry has had tremendous growth over the last decade.[203] Advancements in technology continue to change the way people receive television. It used to be that satellite dish antennas were "special" and "expensive," now they are almost commonplace. Congress has attempted to keep up with the rapid growth by developing laws that continue to protect copyright owners and cable distributors, yet not discourage the consumer market for new technology. Although sports leagues such as the NFL have taken full advantage of the laws that protect their signals, there may come a time in the near future when bars are able to invoke exemptions for their use of satellite dish antennas.[204] Until then, sports bars must rely on

---

197. *See* Robichaux, *supra* note 3. The organizations are the United Sports Fans of America and the Association of Sports Fans Rights. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. Harry Benson, *Hitting the Fan*, Sports Illust'd, Mar. 4, 1991, at 11.

202. *Id.*

203. *See* Perle, *supra* note 71, at 325.

204. The future of the satellite dish industry involves Direct Broadcast Satellites (DBS). Already, in Europe and Japan, small dish antennas no larger than two feet in diameter receive television programming by direct broadcast satellites. Plans are being made in the United States to launch a DBS and begin marketing of the tiny dishes on a large-scale basis. *See* Mark

public sentiment and strength in numbers to continue their existence.

An agreement between the bars and the NFL would be in both parties' best interests. As was evidenced by the boycott, there is a very large demand for out-of-market games; the utilization of pay-per-view could be the compromise that satisfies both sides. However, for pay-per-view to be successful, several factors must be considered and decided upon fairly.

First, the NFL should offer pay-per-view to individual cable subscribers, HSD owners, as well as sports bars with cable and satellite dishes. Second, the NFL should meet with dish industry representatives and with the sports bars' organizations to work out a fixed price for certain packages. The price should be reasonable and proportionate to the type of subscriber, commercial or private. Third, the method of subscribing should be flexible. Sports bars should be able to choose a package of regular-season games each week. For example, if an owner of a Miami bar thinks the upcoming Raiders-Oilers game will be a crowd-pleaser, he should be able to call up a week or so ahead of time and order the package that includes that game. Fourth, the NFL should work out a deal with the networks so that they will continue to broadcast regional games to in-market areas via conventional television, but allow their broadcasts to be distributed on a pay-per-view basis to those areas that are out-of-market. Finally, the NFL should create an enforcement and monitoring system to implement the pay-per-view programming effectively. This system should take into account the kind of scrambling technology that will be used, how descramblers will be distributed, leased or sold and the method by which people can subscribe.

Of course pay-per-view will be a costly venture at first, but in the end it will be profitable for everyone. The NFL will be able to make more money on regional games, it will increase the popularity and enthusiasm for the game and individual teams, and it will lower the

---

Long, *2001: A Satellite Odyssey*, SATELLITE ORBIT (N.C.), Special Edition 1990, at 23; Joshua Hammer, *Next: A Dish for Every Home?*, NEWSWEEK, May 21, 1990 at 67-68; *But see* Lewyn, *Satellite Broadcasting: Stuck on the Launchpad?*, BUSINESS WEEK, Dec. 3, 1990, at 158 (problems are arising that may keep DBS off the ground for several more years). If the future has every household, bar and restaurant installing small dish antennas, public sentiment may force Congress to create an exemption for sports bars' use of the technology. Even so, the current proliferation of existing dishes might force courts to recognize that bars are at least entitled to the home-use exemption of copyright law. *See* National Football League v. McBee & Bruno's, Inc., 792 F.2d 726, 731 (8th Cir. 1986) (stating that someday satellite dish antennas may be commonplace).

legal expenses of having to bring actions against sports bars. In fact, the only legal battle the NFL might conceivably need to fight would be against pirates who develop, manufacture and distribute "black market" descrambling devices.[205] As for the sports bars, they would be able to continue their service to sports fans legitimately. Pay-per-view telecasts would afford them the ability to advertise a particular game a week before it is shown and thus, bring in more business. The ultimate beneficiaries of pay-per-view would be the average sports fans. They would have the choice of receiving pay-per-view telecasts at home with a dish system or cable or perhaps going to a local bar that offers the pay-per-view games.

Hopefully, the NFL will have the foresight to make pay-per-view available to sports bars. Until a compromise is reached, the league should not scramble satellite signals and smother the enthusiasm that sports bars foster for the game of football.

Lynne S. Sutphen

205. Programmers and copyright owners continually crack down on individuals who create, promote, distribute and use pirate (black market) computer software chips and devices that unscramble pay-TV programming. *See, e.g.*, Cable/Home Communication Corp. v. Network Productions, Inc. and Shaun Kenny, 902 F.2d 829 (11th Cir. 1990). These defendants are usually found to be in violation of both federal communications and federal copyright laws. *Id.*