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## Electronic Piracy: Can the Cable Television Industry Prevent Unauthorized Interception.

Kevin W. Grillo

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## COMMENTS

### ELECTRONIC PIRACY: CAN THE CABLE TELEVISION INDUSTRY PREVENT UNAUTHORIZED INTERCEPTION?

Kevin W. Grillo

I. Development of the Cable Television Industry .....	588
II. Regulation of Cable Television .....	590
III. The Problem of Unauthorized Interception of Cable Television Signals .....	591
IV. Effective Solutions Used by the Cable Television Industry to Prevent Unauthorized Interception .....	593
A. Judicial Solutions .....	593
B. Copyright Infringement .....	594
C. State Statutes .....	596
1. Other State Remedies .....	596
2. The Texas Remedy .....	596
V. Proposal For Federal Statute .....	598
VI. Conclusion .....	599

Over the past several decades, the cable television<sup>1</sup> industry has grown from an obscure business into a billion dollar enterprise.<sup>2</sup> Rapid growth of the industry has led to inconsistent regulation.<sup>3</sup> The existing regulation

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1. A cable television system is defined as "a non-broadcast facility . . . that distributes or is designed to distribute to subscribers the signals of one or more broadcast stations." See Cable Television Service, 47 C.F.R. § 76.5(a). In the context of this comment, cable television is any television service that is provided for a fee and interception of that service without compensation deprives the originator of a source of income.

2. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 162-63 (1968). Cable television entered the commercial market in the early 1950's. See *id.* at 162. Today, it is estimated that annual revenue exceeds \$2.5 billion and cable television encompasses 30% of the television households in the United States. See generally *Newsweek Magazine*, Aug. 24, 1981 at 44-49.

3. See *Clay Broadcasting Corp. of Texas v. United States*, 464 F.2d 1313, 1321 (5th Cir. 1972) (FCC's efforts to regulate community antennae television inconsistent).

has focused primarily on supporting two Federal Communication Commission (FCC) policies: protecting local broadcasting from unfair competition by cable television and insuring public access to broadcast television.<sup>4</sup> Specific regulation regarding unauthorized interception of cable television have not been enacted by Congress or the FCC.<sup>5</sup> This lack of regulation concerning electronic piracy has allowed entrepreneurs to develop means of intercepting cable television signals without compensation to the transmitting companies.<sup>6</sup> The cable television industry has thus been forced to seek varied legal solutions to the electronic piracy problem.<sup>7</sup> This comment will discuss the dilemma of illegal interception of cable television with consideration given to current solutions utilized by the cable television industry. Additionally, a proposal will be offered for federal legislation directed toward resolution of the electronic piracy problem.

### I. DEVELOPMENT OF THE CABLE TELEVISION INDUSTRY

The cable television industry began as a technological effort to bring television signals to remote communities.<sup>8</sup> Community antennae television systems (CATV) were the first major efforts to transmit television via cable.<sup>9</sup> As technology advanced, the cable television concept became more attractive due to improved reception and greater variety of programming fare.<sup>10</sup> Recognition of the economic potential of cable televi-

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4. See *United States v. Midwest Video Corp.*, 406 U.S. 649, 667 (1972). See generally 71 F.C.C.2d 1004, 1020-21 (1979).

5. See *Winter, Is the Air Free When It Carries TV?*, 67 A.B.A.J. 409, 409 (1981) (Communications Act of 1934 insufficient to prevent unauthorized interception of cable television).

6. See *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 461 (6th Cir. 1980) (appellees made available to the public electronic devices that allowed persons to receive appellant's programming without paying subscription fees).

7. See, e.g., *National Subscription Television v. S & H TV*, 644 F.2d 820, 821 (9th Cir. 1981) (selling unauthorized decoders violates § 605 of Communications Act of 1934); *Ortho-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 683 (S.D.N.Y. 1979) (interception of subscription television service is theft of service); *Home Box Office, Inc. v. PAY TV, Inc.*, 467 F. Supp. 525, 526 (E.D.N.Y. 1979) (pirating of plaintiff's television programming constitutes copyright infringement).

8. See *United States v. Midwest Video Corp.*, 406 U.S. 649, 651 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161-63 (1968). See generally P. MacAvoy, *Deregulation of Cable Television* 4-5 (1977).

9. See 2 F.C.C.2d 725, 728 (1968).

10. See *United States v. Midwest Video Corp.*, 406 U.S. 649, 650 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 161 (1968); *Fortnightly Corp. v. United Artists Television Inc.*, 392 U.S. 390, 391 (1968). See generally Berman, *CATV Leased-Access Channels and the FCC: The Intractable Jurisdiction Question*, 51 NOTRE DAME LAW. 145, 147 (1975).

sion<sup>11</sup> led to rapid development of three systems of cable television signal transmission: direct broadcast satellites (DBS), which require transmission of a television signal from earth to a satellite and retransmission to an earth station receiver;<sup>12</sup> multipoint distribution service (MDS), which involves transmission of the television signal via microwave transmitters;<sup>13</sup> and cable television, which transmits a television signal via a co-axial cable<sup>14</sup> to specific subscribers of the cable service.<sup>15</sup> Electronic piracy of cable television signals transmitted by satellite or microwave had not been a major concern of the cable television industry in the past, due to expense and complex technology.<sup>16</sup> Recent advances in technology, however, have made it physically simpler and financially feasible for an individual to acquire the equipment necessary to intercept satellite and microwave transmissions.<sup>17</sup> Therefore, the enigma of illegal interception is common to all three systems of transmission and any viable remedy utilized by the cable television industry may be applied to any form of illegal interception.<sup>18</sup>

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11. See generally Berman, *CATV Leased-Access Channels and the FCC: The Intractable Jurisdiction Question*, 51 NOTRE DAME LAW. 145, 147-48 (1975).

12. See 74 F.C.C.2d 205, 205 (1979). Prior to 1978, the FCC required a license for anyone operating a receive-only satellite earth station. *Id.* at 205. This restriction has been removed and the use of individual receivers has increased. See generally *Broadcast Magazine*, Dec. 22, 1980 at 31-33.

13. See *Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315, 318 (D. Idaho 1961). Microwave is generally used to transmit the television signal to a receiver which then transfers the signal via co-axial cable to individual subscribers. *Id.* at 318-19.

14. A co-axial cable consists of a metal conductor surrounded by a second metal conductor (i.e. wire). These conductors are separated by insulation. The prime benefit of a co-axial cable is that it is less susceptible to interference than other transmission techniques. See L. GROSS, *SEE/HEAR: AN INTRODUCTION TO BROADCASTING* 335 (1979).

15. See *United States v. Midwest Video Corp.*, 406 U.S. 649, 650 n.1 (1972); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 392 (1968).

16. See 71 F.C.C.2d 951, 1013-16 (1979). See generally *Broadcasting Magazine*, Dec. 22, 1980, at 31-33.

17. See 86 F.C.C.2d 280, 299 (1981). The FCC is considering new regulations concerning satellite and microwave transmissions of cable television due to increased use and availability. *Id.* at 299. The cost of satellite receivers is expected to drop to \$205 in the mid 1980's compared to about \$14,000 in the mid 1970's. See generally *Time Magazine*, Sept. 7, 1981 at 70.

18. See, e.g., *National Subscription Television v. S & H TV*, 644 F.2d 820, 821 (9th Cir. 1981) (defendants enjoined from producing devices to intercept subscription television); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 467 (6th Cir. 1980) (preliminary injunction issued to prevent manufacture and sale of unauthorized decoding device); *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 687 (S.D.N.Y. 1979) (defendant enjoined from intercepting microwave cable television signals).

## II. REGULATION OF CABLE TELEVISION

The FCC acquired its authority to regulate television through the Communications Act of 1934.<sup>19</sup> Because cable television was an unexpected offspring of the television industry, Congress had not expressly provided for its regulation.<sup>20</sup> Thus, when first faced with the opportunity to regulate cable television, the FCC declined to do so based on the lack of specific statutory authority.<sup>21</sup> As conflicts arose between federally regulated television broadcasters and unregulated cable television operators, the FCC acknowledged limited authority to regulate cable television systems utilizing microwave transmissions.<sup>22</sup> Eventually, the FCC determined that regulation of all aspects of cable television would support the Commission's goals of availability and programming diversity.<sup>23</sup> The United States Supreme Court has agreed with the FCC, and has interpreted the Communications Act of 1934 as allowing FCC regulation of the cable television industry.<sup>24</sup> Although the FCC has power to regulate the industry, it has not issued any specific regulations through which cable television broadcasters could base a cause of action for electronic piracy.<sup>25</sup> The Commission has actually hindered the development of a cause of action for illegal interception by interpreting cable television as broadcasting

19. See *United States v. Midwest Video Corp.*, 406 U.S. 649, 675-76 (1972) (Burger, J., concurring). The Communications Act of 1934 was originally passed to allow regulation of radio transmissions and has been interpreted to include television. See *Allen B. Dumont Laboratories v. Carrol*, 184 F.2d 153, 155 (3rd Cir. 1950), *cert. denied*, 340 U.S. 929 (1951).

20. See Berman, *CATV Leased-Access Channels and the FCC: The Intractable Jurisdiction Question*, 51 NOTRE DAME LAW. 145, 145 (1975).

21. See 26 F.C.C. 403, 427-31 (1959) (FCC concluded it could not regulate cable television because its transmission medium was by wire rather than by radio as described in § 301 of the Communications Act of 1934).

22. See 38 F.C.C. 683, 688-90 (1965). Generally, connection to a cable system requires removal of the antennae of the receiving television thereby eliminating some local broadcasting control. See *id.* at 688.

23. See 23 F.C.C.2d 825, 828 (1970) (codified in 47 C.F.R. § 76.225 (1975)) (FCC specifically recognized jurisdiction of all aspects of cable television).

24. See *United States v. Midwest Video Corp.*, 406 U.S. 649, 651 n.4 (1972) (FCC first acquired authority to regulate through Act of 1934); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968) (Communications Act of 1934 granted jurisdiction to FCC of all interstate communications by wire and radio and included cable television); see also *General Tele. Co. v. F.C.C.*, 431 F.2d 390, 401 (D.C. Cir. 1969) (cable was link in interstate chain of communication and under jurisdiction of FCC). See *Communication Act of 1934*, 47 U.S.C. § 152(a) (1962) (the Act extends to "all interstate and foreign communication by wire or radio").

25. See Berman, *CATV Leased-Access Channels and the FCC: The Intractable Jurisdiction Question*, 51 NOTRE DAME LAW. 145, 145 (1975). Cable television and its regulation is unique in that Congress has done little to promulgate policy or law in the area. *Id.* at 145-56.

meant for the general public.<sup>26</sup> This interpretation has often been used as a defense by parties accused of illegally intercepting cable transmissions.<sup>27</sup> Further, it is unlikely that the cable television industry will receive any regulatory support in the battle with electronic pirates in view of the move by the FCC to deregulate cable television.<sup>28</sup> The lack of any specific regulatory basis for a cause of action arising from illegal interception of cable television signals, exemplifies the problems faced by the cable television broadcaster.<sup>29</sup>

### III. THE PROBLEM OF UNAUTHORIZED INTERCEPTION OF CABLE TELEVISION SIGNALS

Any cable television signal can be received if the receiving party has the proper equipment.<sup>30</sup> In order to derive income from providing cable television programming, the cable industry has had to develop means of controlling access to the cable television signal.<sup>31</sup> One method of transferring the signal to the individual subscriber is through the use of a cable.<sup>32</sup>

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26. See 3 F.C.C.2d 1, 8-11 (1966). The FCC held that subscription television was broadcasting within the meaning of the Communications Act of 1934 and that the purpose of broadcasting was to provide service to as many members of the public as possible. *Id.* at 8-11. This view that subscription television was broadcasting was affirmed by the FCC in a subsequent report. See 15 F.C.C.2d 466, 472 (1968). See also 47 U.S.C. § 153 (1976). Broadcasting is defined as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations." *Id.* § 153(o) (1976).

27. See, e.g., *National Subscription Television v. S & H TV*, 644 F.2d 820, 822-23 (9th Cir. 1981) (defendants claimed subscription television is broadcasting in accord with FCC ruling); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 464-65 (6th Cir. 1980) (defendants claimed subscription television is broadcasting for the public); *United States v. Westbrook*, 502 F. Supp. 588, 589 (E.D. Mich. 1980) (defense alleged subscription television signal constitutes broadcasting under 47 U.S.C. § 153(o)).

28. See *Malrite T.V. of New York v. F.C.C.*, 652 F.2d 1140, 1142-43 (2d Cir. 1981). The FCC, in a major policy reversal, deregulated certain aspects of cable television because conflicts with unregulated broadcasters was no longer a significant problem. See *id.* at 1142, 1146-47; see also 71 F.C.C.2d 951, 1004 (1979).

29. See *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 461-64 (6th Cir. 1980) (FCC regulations concerned primarily with licensing of cable television).

30. See generally Special Project, *The Development of Video Technology*, 25 N.Y.L. Sch. L. Rev. 789, 789-812 (1980).

31. See, e.g., *National Subscription Television v. S & H TV*, 644 F.2d 820, 821 (9th Cir. 1981) (audio and visual subscription television signals encoded separately); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 461 (6th Cir. 1980) (video portion of television signal scrambled); *United States v. Westbrook*, 502 F. Supp. 588, 589 (E.D. Mich. 1980) (subscribers to service require decoders to unscramble signals). Although the encoding feature has not been used in satellite transmissions, the availability of receivers may provide economic incentives for broadcasters to encode their transmission to prevent unauthorized reception. See generally *Broadcasting Magazine*, Dec. 22, 1980 at 31-33.

32. See *HBO, Inc. v. PAY TV Inc.*, 467 F. Supp. 525, 526 (E.D. N.Y. 1979) (affiliates

Cable transmission can be intercepted through direct connection to the cable.<sup>33</sup> Due to the overt nature of this method, state legislatures have enacted statutes to solve direct connection interception.<sup>34</sup> More complex issues have arisen as a result of development of a method of encoding a cable television signal.<sup>35</sup> An encoded signal can be received by an ordinary television set, but the reception is unintelligible.<sup>36</sup> A device which decodes the transmission to give a clear video and audio signal must be attached to the receiving television set.<sup>37</sup> Leasing of decoding devices to individual subscribers accounts for a portion of cable broadcaster's income.<sup>38</sup> The FCC protects this system by forbidding the sale of decoders by subscription television broadcasters.<sup>39</sup> The technology involved, however, is not extremely complex and decoding devices can be reproduced by private individuals.<sup>40</sup> Some small companies have taken advantage of the relatively simple technology by manufacturing unauthorized decoders and selling them to the public.<sup>41</sup> In New York, it is estimated that over 100,000 people received cable television without paying for the service.<sup>42</sup>

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receive signal via microwave and retransmit to individual subscribers by cable).

33. Direct connection has proved to be a problem where the cable company has disconnected a cable due to discontinued service and an individual reconnects to the cable line. Individuals charge past subscribers to conduct this illegal connection and thereby deprive the cable companies of income. Telephone Interview with Gil Varela, United Artists-Columbia Cable Representative, San Antonio, Texas (Sept. 28, 1981).

34. See ARIZ. REV. STAT. ANN. § 13-3709 (1980) (physical connection with cable television system class 2 misdemeanor); FLA. STAT. ANN. § 812.14 (West 1980) (tampering with cable television service first degree misdemeanor); WASH. REV. CODE ANN. § 9.45.250 (1977) (connection to cable television system constitutes fraud in obtaining services).

35. See *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 461 (6th Cir. 1980).

36. See *id.* at 461.

37. See *id.* at 461.

38. See 71 F.C.C.2d 951, 1016 (1979) (leasing of decoders made up seven per cent of total revenues of cable television industry in 1977).

39. See *Over-the-Air Subscription Television Operations-Licensing Policies*, 47 C.F.R. § 73.642(f)(3) (1979). The regulation focuses on licensing policies rather than criminal penalties and is based on FCC consumer protection policy. See *National Subscription Television v. S & H TV*, 644 F.2d 820, 825 n.7 (9th Cir. 1981).

40. See *National Subscription Television v. S & H TV*, 644 F.2d 820, 821 (9th Cir. 1981) (appellees made and distributed unauthorized decoding devices). See *generally* *Broadcast Magazine*, Dec. 22, 1980 at 92.

41. See *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 461 (6th Cir. 1980). The defendants in *Chartwell* sold unauthorized decoders which would allow viewing of plaintiff's subscription television service without paying a monthly fee. *Id.* at 461. *Chartwell* (plaintiff) obtained an injunction to halt the sale of these decoders. *Id.* at 467.

42. See N.Y. PENAL LAW § 165.15(4) practice commentary, (McKinney 1975). The FCC estimated in 1977 the average cable television subscriber rate was \$6.85. This figure multiplied by 100,000 people in New York would result in a \$685,000 loss of revenue per month to cable companies. See 71 F.C.C.2d 951, 1016 (1979).

Loss of income due to unauthorized interception of cable television signals prompted the cable television industry to seek viable remedies.<sup>43</sup>

#### IV. EFFECTIVE SOLUTIONS USED BY THE CABLE TELEVISION INDUSTRY TO PREVENT UNAUTHORIZED INTERCEPTION

##### A. Judicial Solutions

Lack of federal regulations concerning interception of cable television signals has prompted the industry to seek favorable judicial interpretation of the Communications Act of 1934.<sup>44</sup> Several federal courts have recently held that cable television is not "broadcasting for the use of the general public" under section 605 of the Communications Act.<sup>45</sup> These decisions allow cable broadcasters to claim that unauthorized interception of cable television signals is a violation of section 605.<sup>46</sup> Having found a violation of this section, the cable broadcasters can then sue for damages based on past decisions holding that a violation of section 605 provides a private right of action.<sup>47</sup>

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43. See, e.g., *National Subscription Television v. S & H TV*, 644 F.2d 820, 821 (9th Cir. 1981) (plaintiff claimed defendant's selling unauthorized decoders violated § 605 of the Communications Act of 1934); *Orth-O-Vision, Inc. v. Home Box Office, Inc.*, 474 F. Supp. 672, 680, 683, 687 (S.D.N.Y. 1979) (plaintiff claimed defendant's unauthorized interception of its cable television signals violated Federal Communications Act; constituted theft of service, unfair competition and violated copyright law); *Home Box Office, Inc. v. PAY TV Inc.*, 467 F. Supp. 525, 527 (E.D.N.Y. 1979) (plaintiff filed suit to prevent pirating of cable television service and protect copyrights).

44. See *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 462-66 (6th Cir. 1980). The circuit court in *Chartwell* reversed a District Court dismissal of plaintiff's motion for a preliminary injunction. Since there was no federal regulation of interception of cable television, the circuit court interpreted section 605 of the Communications Act to give plaintiff a cause of action. *Id.* at 462-66, 467. See Communications Act of 1934, 47 U.S.C. § 605 (1976). See generally Berman, *CATV Leased-Access Channels and the FCC: The Intractable Jurisdiction Question*, 51 NOTRE DAME LAW. 145, 145-48 (1975).

45. See, e.g., *National Subscription Television v. S & H TV*, 644 F.2d 820, 822-24 (9th Cir. 1981) (cable television is not broadcasting meant for the general public); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 462-65 (6th Cir. 1980) (STV broadcasting not intended for use by the general public); *Home Box Office, Inc. v. PAY TV Inc.*, 467 F. Supp. 525, 528 (E.D.N.Y. 1979) (programs intended only for paying subscribers).

46. See *Home Box Office, Inc. v. PAY TV Inc.*, 467 F. Supp. 525, 528 (E.D.N.Y. 1979) (§ 605 of the Communications Act of 1934 prohibits unauthorized interception of signals carrying cable program service).

47. See, e.g., *Guido v. City of Schnectady*, 404 F.2d 728, 730 (2d Cir. 1968) (implied right of action under § 605); *Reitmeister v. Reitmeister*, 162 F.2d 611, 614 (2d Cir. 1947) (private right of action for injury from violation of § 605); *KMLA Broadcast Corp. v. Twentieth Century Cigarette Vending Corp.*, 264 F. Supp. 35, 38 (C.D. Cal. 1967) (violation of section 605 gives action for damages).

Several problems exist, however, in relying on this course of action as a remedy. First, the cable television broadcaster must overcome the presumption that subscription broadcast services are broadcasts for the general public.<sup>48</sup> Additionally, there is no specific statute or regulation on which a broadcaster could base a cause of action for illegal interception of cable television signals.<sup>49</sup> Finally, the broadcaster must seek an injunction and damages based on judicial interpretation of the Communications Act of 1934 rather than specific remedies provided by statute.<sup>50</sup> The delay involved in this convoluted process of seeking relief from electronic piracy simply adds to the economic loss suffered by the cable television broadcaster.<sup>51</sup>

### B. Copyright Infringement

Another theory advanced by the cable television industry is that unauthorized interception of cable television programming constitutes copyright infringement.<sup>52</sup> This argument has been successful in a case in which a party intercepts cable television then retransmits the signal for compensation.<sup>53</sup> The United States Supreme Court, in *Fortnightly Corp.*

48. See *Functional Music, Inc. v. F.C.C.*, 274 F.2d 543, 548 (D.C. Cir. 1958). *Functional Music* (plaintiff) was an FM radio station which provided background music to businesses. *Functional* had designed a system to limit broadcast reception to paying subscribers. Plaintiff brought suit to contest FCC regulations restricting FM radio stations from providing subscription service. The Court held the FCC could regulate subscription FM radio service. Even though only a limited segment of the public could receive the broadcast, the plaintiff's broadcast was "meant for the general public" in accord with the Communications Act. *Id.* at 544, 548; see also 15 F.C.C.2d 466, 472 (1968).

49. See *National Subscription Television v. S & H TV*, 644 F.2d 820, 820-22 (9th Cir. 1981). The plaintiffs were forced to rely on section 605 of the Communications Act of 1934 which did not expressly deal with cable television. Further, the plaintiffs had to rely on reversal of the district court's dismissal of their suit based on its finding that there was no cause of action under section 605. See *id.* at 820-22.

50. See *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 467 (6th Cir. 1980). To obtain an injunction, plaintiff must show there is a substantial likelihood of winning on the merits, a cause of action under section 605 and irreparable harm if an injunction is not obtained. *Id.* at 467; see also FED. R. CIV. P. 65 (federal requirements for a preliminary injunction).

51. See *Main Event Prod. v. Pirate Video Microwave*, No. 81-45595 (Dist. Ct. of Harris County, 157th Judicial District of Texas, Sept. 23, 1981). The state district judge issued an injunction to prevent a pirated showing of a cablecast prizefight after a federal district judge refused to issue an injunction because plaintiff could not show irreparable harm. The injunction was not served until after the prizefight was shown. Telephone interview with Mark Davidson, Attorney, Sowell, Ogg & Hinton, Houston, Texas, Sept. 29, 1981.

52. See *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 684-87 (S.D.N.Y. 1979) (permanent injunction issued because of copyright infringement).

53. See *id.* at 678.

*v. United Artists Television, Inc.*,<sup>54</sup> however, has held that passive reception of broadcast copyrighted material does not violate copyright laws or give the owners of the copyright an action for retransmission of the material.<sup>55</sup> The Supreme Court focused on the fact that viewers did not "perform" the material.<sup>56</sup> Performance of copyrighted material requires some action be involved, such as electronic signal transmission.<sup>57</sup> Since the viewer did not "perform" the material, the Supreme Court concluded the viewer did not violate the copyright law.<sup>58</sup> The Copyright Act of 1976,<sup>59</sup> passed after *Fortnightly*, follows the view that mere reception of copyrighted material does not violate the Act as long as there is not compensation required nor further retransmission.<sup>60</sup> The Ninth Circuit Court of Appeals, however, in *Universal City Studios, Inc. v. Sony Corp.*,<sup>61</sup> has given more credence to the copyright remedy. The *Universal* court held that home videotape recording of copyrighted material violates the copyright law.<sup>62</sup> The Ninth Circuit based their decision on reproduction of copyrighted material in contrast to the passive reception argument on which the Supreme Court based its decision in *Fortnightly*.<sup>63</sup> Although electronic piracy involves both passive reception and retransmission of cable television signals, the copyright infringement remedy will be limited to the electronic pirate who retransmits the cable television signal.<sup>64</sup>

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54. 392 U.S. 390 (1968).

55. *Id.* at 395.

56. *Id.* at 396-400.

57. *Id.* at 399. Performance is closely tied into secondary transmission although this is not clearly stated by the Copyright Act of 1976. Legislative history and congressional intent would prompt the court to decide that secondary transmission would qualify as performance. See *Orth-O-Vision, Inc. v. Home Box Office, Inc.* 474 F. Supp. 672, 685 (S.D.N.Y. 1979).

58. See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399-400 (1968).

59. Copyright Act of 1976, 17 U.S.C. §§ 101-810 (Supp. II 1978).

60. See *id.* § 110(5) (1978).

61. 659 F.2d 963 (9th Cir. 1981).

62. *Id.* at 969.

63. Compare *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399-400 (1968) (passive reception of copyrighted material does not violate copyright laws) with *Universal City Studios, Inc. v. Sony Corp.*, 659 F.2d 963, 969-74 (9th Cir. 1981) (off-the-air copying of copyrighted material from television broadcasts for noncommercial use violates copyright law).

64. See *Orth-O-Vision, Inc. v. Home Box Office, Inc.*, 474 F. Supp. 672, 684-87 (S.D.N.Y. 1979). Although plaintiff based his action on violation of section 605 of the Communications Act of 1934, state theft of service law and copyright infringement, the court issued the injunction based on the fact that retransmission of copyrighted works violated copyright law. *Id.* at 687.

### C. State Statutes

#### 1. Other State Remedies

State criminal statutes have been enacted to make unauthorized interception of cable television signals illegal, thereby providing relief in state courts.<sup>65</sup> Cable television has been considered to be a telecommunication service.<sup>66</sup> Thus, in absence of specific statutes, state theft of service statutes can be judicially interpreted to include theft of cable television signals, thereby allowing the cable television industry to use existing statutes as a basis for preventing unauthorized interception.<sup>67</sup> Further, state legislatures could amend theft of service statutes to include telecommunications services.<sup>68</sup>

#### 2. The Texas Remedy

A more effective state statutory solution would be to enact a law which specifically deals with the manufacture, sale and use of unauthorized devices which allow individuals to receive cable television signals without compensation to the cable television broadcaster.<sup>69</sup> In Texas, a law was recently enacted which provides criminal penalties for the manufacture and sale of unauthorized devices and lesser penalties for the use of such devices.<sup>70</sup> In addition to providing penalties for the illegal use of a device to decode subscription television signals,<sup>71</sup> the Texas statute raises the criminal penalty for the use of an unauthorized device for which the user

65. See CAL. PENAL CODE §§ 593d, 593e (Deering 1980) (criminal penalties for theft of cable television signals); FLA. STAT. ANN. § 812.14 (West 1980) (criminal penalties for tampering with cable television service); WASH. REV. CODE ANN. § 9.45.250 (1977) (connection to cable television system constitutes fraud in obtaining services).

66. See H.R. 7747, 96th Cong., 2d Sess. (1980) (cable television included in proposed bill under classification of telecommunications service).

67. See *Orth-O-Vision, Inc. v. Home Box Office, Inc.*, 474 F. Supp. 672, 682-83 (S.D. N.Y. 1979) (plaintiff sought cause of action based on New York theft of services law).

68. See N.Y. PENAL LAW § 165.15(4) (McKinney 1975) (New York amended its theft of services statute to include telecommunications services).

69. See *Orth-O-Vision, Inc. v. Home Box Office, Inc.*, 474 F. Supp. 672, 684 (S.D. N.Y. 1979). The court held that plaintiff's theft of service claim under state law was not effective because plaintiff failed to show intent and failed to show authority in support of judicial decisions allowing a private cause of action for violating the statute. *Id.* at 684.

70. See TEX. PENAL CODE ANN., §§ 31.12, 31.13 (Vernon Supp. 1982). The Texas law makes the use of an unauthorized interception device a class B misdemeanor. If the use of the device is for remuneration, the offense becomes a class A misdemeanor. See *id.* § 31.12(c). The statute limits the applicability of the law to a service where the receiving public pays a fee. See *id.* § 31.12(b). The statute also makes the manufacture, sale or distribution of interception devices a class A misdemeanor. See *id.* § 31.13(c). Upon showing a violation of the statute, an injunction may be issued. A prevailing plaintiff additionally may be awarded treble damages and attorney's fees. See *id.* § 31.12.

71. See *id.* § 31.12(a).

receives remuneration.<sup>72</sup> Although the statute will probably not be effective in stopping individuals who already have unauthorized devices,<sup>73</sup> it should be effective in preventing retransmission of the signal.<sup>74</sup> The statute also makes the manufacture and sale of these devices illegal, thereby preventing widespread use of unauthorized interception devices.<sup>75</sup>

The most important aspect of the law is its provision for the issuance of an injunction upon a showing of a violation of the statute.<sup>76</sup> This is significant because it eliminates some of the prerequisites normally required to obtain an injunction.<sup>77</sup> Reduced requirements to obtain an injunction allows a plaintiff to quickly enjoin a party from intercepting cable television signals.<sup>78</sup> The economic significance of these reduced requirements are magnified where the plaintiff seeks to enjoin a party from pirating a unique cablecast event.<sup>79</sup>

Finally, the Texas statute provides for award of attorney's fees and

72. See *id.* § 31.12(c). The statute raises the penalty from a class B to a class A misdemeanor. *Id.* There may be some question as to whether this section of the statute is preempted by the Federal Copyright Act of 1976. See *Orth-O-Vision, Inc. v. Home Box Office, Inc.*, 474 F. Supp. 672, 684 (S.D.N.Y. 1979) (district court failed to resolve copyright preemption issue due to question of fact regarding intent to avoid payment for cable television service).

73. See *Broadcasting Magazine*, Aug. 18, 1980 at 52 (there may be invasion of right of privacy if law enforcement agencies investigate a charge of pirating cable television).

74. See *Main Event Prod. v. Pirate Video Microwave*, No. 81-45595 (Dist. Ct. of Harris County, 157th Judicial District of Texas, Sept. 23, 1981) (state district court issued an injunction to prevent unauthorized interception of cablecast prizefight).

75. See TEX. PENAL CODE ANN. § 31.13 (Vernon Supp. 1982).

76. See *id.* § 31.12 n. (Vernon Supp. 1982).

77. See *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 467 (6th Cir. 1980). To obtain a preliminary injunction, a plaintiff must show a substantial likelihood that he will prevail, a basis for a cause of action and irreparable injury if the injunction is not issued. *Id.* at 467. The Texas statute specifically eliminates the requirements of showing irreparable injury, inadequate remedy at law and likelihood that plaintiff will prevail. Plaintiff merely must show a *prima facie* violation of the statute. See TEX. PENAL CODE ANN. § 31.12 n. (Vernon Supp. 1982).

78. See *Main Event Prod. v. Pirate Video Microwave*, No. 81-45595 (Dist. Ct. of Harris County, 157th Judicial Dist. of Texas, Sept. 23, 1981). In *Main Event*, the plaintiffs sought an injunction in federal district court to prevent the defendant from showing a "pirated" cable television transmission of the Sugar Ray Leonard-Thomas Hearns fight. The federal judge refused to issue the injunction because plaintiff had failed to show irreparable harm. The state district judge issued the injunction based on the Texas statute. The plaintiff has subsequently refiled in the federal district court based on a violation of section 605 of the Communications Act. Telephone interview with Mark Davidson, Attorney, Sowell, Ogg & Hinton, Houston, Texas, Sept. 29, 1981.

79. See *Main Event Prod. v. Pirate Video Microwave*, No. 81-45595 (Dist. Ct. of Harris County, 157th Judicial Dist. of Texas, Sept. 23, 1981) (plaintiff sought injunction to prevent defendant from showing cablecast prizefight which would be in competition with a closed circuit presentation of that fight).

treble damages to a prevailing plaintiff, thereby eliminating speculation as to what monetary recovery should be awarded to the prevailing plaintiff.<sup>80</sup> This statute serves as model legislation in the area of unauthorized interception of cable television by defining the criminal activity, granting injunctive relief to prevent further damages and providing an incentive to halt the manufacture, sale or use of illegal devices through the award of treble damages.<sup>81</sup>

#### V. PROPOSAL FOR A FEDERAL STATUTE

As the cable television industry continues to expand, the problem of electronic piracy of cable television signals will intensify.<sup>82</sup> A national solution is required to provide uniform relief from the problem of illegal interception.<sup>83</sup> The remedy to electronic piracy is congressional legislation.<sup>84</sup> An amendment to the Communications Act of 1934 explicitly defining illegal interception of cable television and specifically excluding cable television from "broadcasting for the general public" would clarify issues the courts must grapple with in each case.<sup>85</sup> A comprehensive federal law would prevent unauthorized interception from becoming widespread in areas that have not dealt with the problem judicially or by statute.<sup>86</sup> Moreover, due to the national character of many of the cable

80. See TEX. PENAL. CODE ANN. § 31.13 (Vernon Supp. 1982).

81. See *id.* §§ 31.12, 31.13.

82. See *United States v. Columbia Pictures*, No. 80 Civ. 4438 (S.D.N.Y. Dec. 31, 1980). By 1985, it is estimated that the pay television audience will encompass 16-25 million households compared to 8.3 million in 1980. *Id.*

83. See *Orth-O-Vision, Inc. v. Home Box Office, Inc.*, 474 F. Supp. 672, 682, 684 (S.D.N.Y. 1979) (plaintiff failed to obtain relief from illegal interception based on either state or federal statute).

84. See H.R. 7747, 96th Cong., 2d Sess. (1980). Former Representative Richardson Preyer (D-N.C.) introduced legislation to amend the Communications Act of 1934 to prohibit unauthorized interception of subscription telecommunication. The bill was passed by the House Commerce Committee but lapsed after being attached with the House rewrite bill (H.R. 6121). There is still effort being utilized by facets of the pay television industry (National Cable Television Association, National Association of MDS Service Company, Microband, Inc., Time, Inc.) to revive such legislation. See generally *Broadcasting Magazine*, Apr. 6, 1981 at 125-26.

85. See *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 462 (6th Cir. 1980). In *Chartwell*, the court first had to determine that cable television was not broadcasting for the public and that plaintiff had a cause of action based on section 605 of the Communications Act of 1934. The court then had to determine that the plaintiff had met the requirements for issuance of a preliminary injunction. This circuit court also had to contend with the federal district court's ruling that plaintiff did not have a cause of action. *Id.* at 462, 467. See generally *Broadcasting Magazine*, Aug. 18, 1980 at 51-52.

86. See 71 F.C.C.2d 1004, 1013-16 (1979) (not all parts of the United States have extensive cable television networks).

television companies, a federal statute would provide uniform relief in federal court.<sup>87</sup> Such a statute should also provide for civil liabilities for manufacturing and selling of unauthorized interception devices to eliminate mass production of such devices.<sup>88</sup> Further, substantial criminal penalties would serve to hinder the individual entrepreneur from using unauthorized devices.<sup>89</sup> The federal statute should also provide for issuance of a preliminary injunction on a prima facie showing of violation of the statute.<sup>90</sup> Relaxed requirements for obtaining an injunction and explicit, substantial civil and criminal liability will serve as an invaluable aid to curtailing the economic loss caused by electronic piracy.

## VI. CONCLUSION

Cable television continues to lose a significant portion of income through unauthorized interception of cable television. To alleviate this loss, federal courts must confront complex issues regarding unauthorized interception in each action brought in federal court. Lack of clear guidelines in this area has caused inconsistent interpretation of the existing statutes and regulations. Federal legislation is essential to give the courts uniform guidelines regarding interception of cable television. A national solution is also necessary to serve as model legislation for states desiring to improve remedies available in state court. A federal statute coupled with technological innovation will be an effective solution to curtail unau-

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87. See *United States v. Columbia Pictures*, No. 80 Civ. 4438 (S.D.N.Y. Dec. 31, 1980). The pay television industry is dominated by three companies: Home Box Office (HBO), which has 69% or 6 million subscribers; Showtime Entertainment, which has 1.4 million subscribers; and The Movie Channel, 460,000 subscribers. *Id.*

88. See H.R. 7747, 96th Cong., 2d Sess. § 6(b)(1)(A) (1980). Congressman Preyer's bill would have allowed a party aggrieved by unauthorized interception to sue for damages in federal district court without regard of the amount in controversy. The bill also provided for award of punitive damages should a plaintiff substantially prevail. *Id.* See also TEX. PENAL CODE ANN. § 31.12 n. (Vernon Supp. 1982) (treble damages to prevailing plaintiff).

89. See *United States v. Westbrook*, 502 F. Supp. 588, 589 (E.D. Mich., 1980). In *Westbrook*, the District Court held that defendant's selling of unauthorized interception devices violated 47 U.S.C. § 302(a), which provides criminal penalties for sale of devices that emit radio waves and interfere with radio communications. The penalties for violation of the section are a maximum fine of ten thousand dollars; one year imprisonment, or both. *Id.* at 589. Defendant's devices however did not clearly fit the statute in that they did not emit radio waves that interfere with radio communications. *Id.* at 589-92. See also H.R. 7747, 96th Cong., 2d Sess., § 6(c)(1) (1980). Congressman Preyer's bill provided for criminal penalties of up to a one million dollar fine and forty months imprisonment. *Id.*

90. Compare TEX. PENAL CODE ANN. § 31.13 (Vernon Supp. 1982) (plaintiff only has to show violation of statute for injunction; not required to show irreparable injury, inadequate remedy at law or likelihood of success on the merits) with H.R. 7747, 96th Cong., 2d Sess., § 6(c) (1980) (can seek injunction but must meet federal requirements for issuance of injunction (FED. R. CIV. P. 65)).

thorized interception of cable television.<sup>91</sup>

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91. See *Wall Street Journal*, July 24, 1981 at 19, col. 1. (pay television developing computer assisted scrambling system which will require complex decoder to interpret cable television signals).