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

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COMMENTS

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

Kevin W. Grillo

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

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. Specific regulation regarding unauthorized interception of cable television have not been enacted by Congress or the FCC. This lack of regulation concerning electronic piracy has allowed entrepreneurs to develop means of intercepting cable television signals without compensation to the transmitting companies. The cable television industry has thus been forced to seek varied legal solutions to the electronic piracy problem. 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. Community antennae television systems (CATV) were the first major efforts to transmit television via cable. As technology advanced, the cable television concept became more attractive due to improved reception and greater variety of programming fare. Recognition of the economic potential of cable televi-

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).
sion 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;\(^1\) multipoint distribution service (MDS), which involves transmission of the television signal via microwave transmitters;\(^2\) and cable television, which transmits a television signal via a coaxial cable\(^3\) to specific subscribers of the cable service.\(^4\) 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.\(^5\) 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.\(^6\) 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.\(^7\)

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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 coaxial cable to individual subscribers. Id. at 318-19.

14. A coaxial 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 coaxial cable is that it is less susceptible to interference than other transmission techniques. See L. gross, SEE/HEAR: AN INTRODUCTION TO BROADCASTING 335 (1979).


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.

II. REGULATION OF CABLE TELEVISION

The FCC acquired its authority to regulate television through the Communications Act of 1934.19 Because cable television was an unexpected offspring of the television industry, Congress had not expressly provided for its regulation.20 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.21 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.22 Eventually, the FCC determined that regulation of all aspects of cable television would support the Commission's goals of availability and programming diversity.23 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.24 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.25 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).
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.
25. See Berman, CATV Leased-Access Channels and the FCC: The Intractible 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. This interpretation has often been used as a defense by parties accused of illegally intercepting cable transmissions. 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. 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.

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. 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. One method of transferring the signal to the individual subscriber is through the use of a cable.

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).


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).


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

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).


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).


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.43

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 1934.44 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.45 These decisions allow cable broadcasters to claim that unauthorized interception of cable television signals is a violation of section 605.46 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.47


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).


47. See, e.g., Guido v. City of Schenectady, 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. 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. 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. 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.

B. Copyright Infringement

Another theory advanced by the cable television industry is that unauthorized interception of cable television programming constitutes copyright infringement. This argument has been successful in a case in which a party intercepts cable television then retransmits the signal for compensation. The United States Supreme Court, in *Fortnightly Corp.*
v. United Artists Television, Inc., 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. The Supreme Court focused on the fact that viewers did not "perform" the material. Performance of copyrighted material requires some action be involved, such as electronic signal transmission. Since the viewer did not "perform" the material, the Supreme Court concluded the viewer did not violate the copyright law. The Copyright Act of 1976, 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. The Ninth Circuit Court of Appeals, however, in Universal City Studios, Inc. v. Sony Corp., has given more credence to the copyright remedy. The Universal court held that home videotape recording of copyrighted material violates the copyright law. 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. 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.

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).
60. See id. § 110(5) (1978).
61. 659 F.2d 963 (9th Cir. 1981).
62. Id. at 969.
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.65 Cable television has been considered to be a telecommunication service.66 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.67 Further, state legislatures could amend theft of service statutes to include telecommunications services.68

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.69 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.70 In addition to providing penalties for the illegal use of a device to decode subscription television signals,71 the Texas statute raises the criminal penalty for the use of an unauthorized device for which the user

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 renumeration. Although the statute will probably not be effective in stopping individuals who already have unauthorized devices, it should be effective in preventing retransmission of the signal. The statute also makes the manufacture and sale of these devices illegal, thereby preventing widespread use of unauthorized interception devices.

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. This is significant because it eliminates some of the prerequisites normally required to obtain an injunction. Reduced requirements to obtain an injunction allows a plaintiff to quickly enjoin a party from intercepting cable television signals. The economic significance of these reduced requirements are magnified where the plaintiff seeks to enjoin a party from pirating a unique cablecast event.

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

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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).


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.80 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.81

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.82 A national solution is required to provide uniform relief from the problem of illegal interception.83 The remedy to electronic piracy is congressional legislation.84 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.85 A comprehensive federal law would prevent unauthorized interception from becoming widespread in areas that have not dealt with the problem judicially or by statute.86 Moreover, due to the national character of many of the cable

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.
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, Midband, 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, 1015-16 (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. Such a statute should also provide for civil liabilities for manufacturing and selling of unauthorized interception devices to eliminate mass production of such devices. Further, substantial criminal penalties would serve to hinder the individual entrepreneur from using unauthorized devices. The federal statute should also provide for issuance of a preliminary injunction on a prima facie showing of violation of the statute. 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-
Authorized interception of cable television. 91

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).