Pay Television Piracy: Does Section 605 of the Federal Communications Act of 1934 Prohibit Signal Piracy—And Should It?

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COMMENT

PAY TELEVISION PIRACY: DOES SECTION 605 OF THE FEDERAL COMMUNICATIONS ACT OF 1934 PROHIBIT SIGNAL PIRACY—AND SHOULD IT?

[Movie Systems v. Heller, 710 F.2d 492 (8th Cir. 1983)].

I. INTRODUCTION

In the past twenty years, the telecommunications industry has benefited the public by developing new alternatives to public television¹ (free TV). The growth of over-the-air pay television² (pay TV) has been the most dramatic of these new alternatives.³ The industry's success, however, is currently threatened by vendors who sell equipment capable of "pirating"⁴ pay TV transmissions.⁵ Attempts to sell the equipment have


² Over-the-air pay TV signals are transmitted through the airwaves, not through cable. See generally In re Amendment of Part 3 of the Comm'n Rules & Reg. (Radio Broadcast Serv.) to Provide for Subscription Telev. Serv., 23 F.C.C. 532 (1957) (three-year trial period approved for over-the-air subscription television systems) [hereinafter cited as First Report and Order]. For a discussion of specific over-the-air systems, see infra notes 16-25 and accompanying text.

³ Pay TV's popularity is due mainly to pay TV companies' ability to quickly set up operations and commence business. Unlike cable television, over-the-air pay TV does not require burdensome initial outlays of time and capital. See Bienstock, Theft of service of over-the-air pay TV: Are the airwaves free?, 56 FLA. B.J. 240, 240 (1982). Laying underground or aboveground cable is a time-consuming and expensive process. See Wonsetka's Pay TV Bonanza, BUS. Wk., Sept. 3, 1979, at 138.

⁴ This Comment defines pirating as the unauthorized reception of pay TV signals. People receiving these signals without permission are termed "pirates."

been curtailed by court decisions consistently holding these vendors in violation of section 605 of the Communications Act of 19346 (the Act). Nevertheless, many companies continue to advertise and sell equipment to consumers.7 Consequently, the pay TV industry remains threatened by pirates who purchase or have purchased equipment from these


7. See, e.g., National Subscription Telev. v. S & H TV, 644 F.2d 820, 825 (9th Cir.
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vendors.8 Although pirates have existed since the late 1960's, the August 1983 case of Movie Systems v. Heller9 is the first published decision against a pirate.10 In Heller, the Eighth Circuit Court of Appeals extended the application of section 60511 to individuals who receive unauthorized pay TV transmissions.12

This Comment addresses the ramifications of the Eighth Circuit's decision in Heller. Through an analysis of section 605's statutory language, history, and case law, the Comment suggests that the extension of section 605's application from manufacturers and sellers of pirating equipment to individual pirates lacks support. Close examination of Heller reveals imminent problems which militate against the decision effectively protecting the pay TV industry or the constitutional13 rights of citizens, especially their right to privacy.14 This Comment concludes with a recommendation that Congress mandate scrambling of pay TV signals and strict regulation of the manufacture and sale of pirating equipment. This approach appropriately balances the concerns of the pay TV industry and the rights of citizens.


Although air piracy presumably threatens the interests of the pay TV industry, several courts have observed a contrary conclusion. These decisions reason that no economic detriment is incurred because many pirates would elect against subscription if pirating were prohibited. See American Telev. & Communications Corp. v. Pirate T.V., Inc., No. 81-969-CIV-EBD, slip op. at 9 (S.D. Fla. Aug. 24, 1981) ("[O]ne must deal in the area of conjecture to try to determine whether purchasers of unauthorized equipment would otherwise have been regular subscribers if the pirate market did not exist."); California Satellite Sys. v. Nichols, No. 294843 (Super. Ct. Cal. Sacramento County May 12, 1981) (notice of ruling on preliminary injunction) ("It would be virtually impossible to prove that those who bought from [unauthorized antenna retailers] would necessarily have become customers of plaintiff's service.").

8. See, e.g., RADIO-ELECTRONICS, March 1984, at 110, 121 (advertisements for pay TV antennae); see also infra note 43.


10. See Viera, supra note 5, at 166. But see Movie Sys. v. MWH Enter., No. 82-C-321 (E.D. Wis. June 10, 1982) (order granting preliminary injunction) (court examined only company's unauthorized sale of pirating equipment notwithstanding defendant partner's reception of unauthorized transmissions).

11. Section 605 addresses the issue of unauthorized publication or use of communications. See 47 U.S.C.S. § 605 (Law. Co-op. 1983); infra note 67 (text of section 605).

12. See Heller, 710 F.2d at 494-95.

13. Governmental attempts to enforce section 605 may constitute an illegal search and seizure, thus violating both the fourth and fourteenth amendments. See infra notes 168-78 and accompanying text.

14. No constitutional infringement occurs when private parties enforce section 605. See Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (in the absence of state action, private activities do not result in constitutional violations). Private enforcement of section 605, however, may violate a right to privacy recognized under common law, see infra note 182 and accompanying text, or statutory law, see infra notes 183-86 and accompanying text.

Published by Mitchell Hamline Open Access, 1984
II. THE HELLE R DECISION

The plaintiff, Movie Systems, Inc. (MSI), was a Home Box Office (HBO) licensee which transmitted HBO programming to customers via multipoint distribution service (MDS), one of three types of over-the-air pay TV. Unlike free TV, MDS relies on paying subscribers rather than commercial advertisers for financial support. MDS companies raise revenue by charging subscribers monthly fees and selling or leasing equipment necessary to receive MDS programming. Subscribers receive news, sporting events, movies and other special programming. MDS programming is transmitted through high frequency

15. Home Box Office, Inc. (HBO) licensed pay TV programming services, including motion pictures, sporting events, and special programming. See Heller, 710 F.2d at 493. In 1982, HBO granted MSI an exclusive license to distribute HBO programming in the Twin Cities area. See id. Previously, Twin Cities Home Theater (Twin Cities) had been the exclusive HBO affiliate licensee in the Minneapolis-St. Paul area. Id. Twin Cities failed to sue homeowners whom it knew were pirating its signal. See id. at 495. Homeowners were refused service and those inquiring about putting up their own equipment were told that they could do so, without paying a subscriber fee. Memorandum in Opposition of Plaintiff's Motion for Summary Judgment at 1-2, Movie Sys. v. Heller, No. 3-82-933, slip op. (D. Minn. Oct. 20, 1982). After receiving its license, MSI sought to begin collecting subscriber fees from homeowners. See Heller, 710 F.2d at 494.


17. The other two types of over-the-air pay TV are STV and DBS. See supra note 1. STV is similar to free TV. The STV signal is broadcast over a regular television station, but encoded or scrambled so that it is intelligible only to paying subscribers. In re Amendment of Part 73 of the Comm'n Rules & Reg. (Radio Broadcast Serv.) to Provide for Subscription Telev. Serv., 15 F.C.C.2d 465 (1968) [hereinafter cited as Fourth Report and Order]; First Report and Order, supra note 2; Bienstock, supra note 3, at 240; Comment, Subscription TV, supra note 5, at 292-95; Note, An Alternative, supra note 5, at 935-37.

DBS is a system whereby programming is broadcast to homes from satellites orbiting the earth. The FCC recently authorized DBS services on an experimental basis. See In re Inquiry into the dev. of regulatory policy in regard to Direct Broadcast Satellites for the period following the 1983 Regional Admin. Radio Conf., 90 F.C.C.2d 676 (1982); see also In re Application of Satellite Telev. Corp. for Authority to Construct an Experimental Direct Broadcast Satellite Sys., 92 F.C.C.2d 1053 (1982) (granting license for first phase of DBS).


19. For example, plaintiff MSI charged a $19.95 per month subscription fee. See Appeals court upholds ruling HBO signal not fee for taking, Minneapolis Star & Trib., July 1, 1983, at 1B, col. 1.

20. MDS transmissions may or may not be scrambled. Monthly fees vary depending upon whether decoding equipment is needed and whether the equipment is purchased or leased. See infra note 163.

microwave signals which cannot be viewed on a regular television set without special equipment. A microwave antenna, a down converter, and a power supply are needed.

In April 1981, pro se defendant, Edward Heller III, purchased and installed reception equipment in his suburban Minneapolis home. Heller used the equipment to receive MSI's MDS signal transmitted in the Minneapolis-St. Paul area. After detecting his equipment, MSI contacted Heller and demanded payment of the monthly subscription fee. When Heller refused to subscribe, MSI filed suit against him asking the federal district court to permanently enjoin Heller from receiving its programming without paying the subscription fee. Heller counterclaimed, alleging that MSI had violated his fourth and fourteenth amendment rights and his right to privacy by monitoring the television viewing preferences he made within the privacy of his home.

22. The MDS programming is omni-directionally broadcast from MSI's local transmitter into the airwaves. See Heller, 710 F.2d at 493. Anyone with the necessary equipment living within the range of these signals can receive the programming. See infra notes 23-25 and accompanying text. Programming originates in non-local studios and is transmitted through microwave links to “up-link stations.” These stations relay the programming via satellite to centrally located “down-link stations” across the country. See Appellee’s Brief and Appendix at 5-6, Movie Sys. v. Heller, 710 F.2d 492 (8th Cir. 1983). These down-link receivers relay the programming through microwave links to local transmitters such as MSI’s. Id. at 6.

23. Antennae receive microwave signals much like antennae for radio or television sets.

24. A down converter reduces the microwave signal frequency to that of a regular unused television channel. E.g., Heller, 710 F.2d at 493; Bienstock, supra note 3, at 240.

25. A power supply powers the entire receiving system. See Bienstock, supra note 3, at 240.

26. See Heller, 710 F.2d at 494.

27. The local transmitter, owned by Microband Corporation of America, is located on the top of the Investors Diversified Services (IDS) tower in downtown Minneapolis. See id. at 493.

28. Although MSI may have observed Heller’s antenna, evidence suggests that MSI learned of Heller’s pirating after monitoring his neighborhood with electronic detection equipment. See First Affidavit of Jeffery Sutliff at 1, Appellee’s Brief and Appendix, supra note 22, at A.79; Dawson, Van full of electronic equipment sniffs out ‘pirate’ TV antennas, Minneapolis Star & Trib., July 21, 1982, at 1A, col. 4 [hereinafter cited as ‘Pirate’ TV Antennas]; see also Dawson, Battle starts over use of ‘illegal’ antennas to catch flicks at home, Minneapolis Star & Trib., June 2, 1982, at 13A, col. 1 (public comments made by Heller about his pirating activities) [hereinafter cited as ‘Illegal’ Antennas].


30. In addition to refusing to pay subscription fees, Heller publicly asserted a constitutional right to receive any broadcast signal within the privacy of his own home. See ‘Illegal’ Antennas, supra note 28, at 13A, col. 1.

31. See Heller, 710 F.2d at 494; see also Heller, No. 3-82-933, slip op. at 1.

32. See Heller, 710 F.2d at 496; see also Heller, No. 3-82-933, slip op. at 4-5.
the plaintiff had violated antitrust laws.33

After both parties filed motions for summary judgment, the court dismissed Heller's counterclaims and motion and granted MSI's motion for summary judgment.34 Heller was enjoined from receiving or conspiring to receive plaintiff's communications without its authorization.35 On appeal, the Eighth Circuit affirmed the district court's decision.36

MSI's action alleged that Heller violated section 605 of the Communications Act of 1934.37 Section 605 prohibits the unauthorized interception or reception of any wire or radio communication that is divulged, published, or beneficially used.38 After noting Heller's admission that he had received MSI's signals without paying the subscription fee, the district court summarily held that a violation of section 605 had occurred.39

Heller denied liability and contended that MSI's signals were excluded from the Act's protection by a proviso in section 605.40 The proviso states that section 605 does not apply to radio signals transmitted for use by the general public.41 Heller argued that because MSI's transmissions were unscrambled42 and could be received by equipment generally

33. Heller's antitrust claim concerning illegal tying is beyond the scope of this Comment. See Heller, 710 F.2d at 495; Heller, No. 3-82-933, slip op. at 5-6. Heller claimed that MSI was precluded from collecting subscriber fees from pirates informed by Twin Cities that they could install their own equipment without charge. This claim was premised upon the privity relationship between MSI and Twin Cities. See Heller, 710 F.2d at 495; Heller, No. 3-82-933, slip op. at 5-6; see also supra note 15 (discussing the relationship between MSI and Twin Cities).
34. See Heller, No. 3-82-933, slip op. at 6.
35. Id.
36. See Heller, 710 F.2d at 496.
37. Id. at 494. Section 605 provides individuals with a private cause of action for injuries arising from a violation of that section. See, e.g., National Subscription Telev. v. S & H TV, 644 F.2d 820 (9th Cir. 1981); Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); American Telev. & Communications Corp. v. Western Techtronics, Inc., 529 F. Supp. 617 (D. Colo. 1982).
38. See infra note 67 (text of section 605).
39. Heller, No. 3-82-933, slip op. at 3 n.3. The court's decision was summary because the mere presence of an interception or a reception is not sufficient to violate section 605. See infra notes 68-70 and accompanying text. In addition to reception or interception, either divulgence, publication, or beneficial use must occur. See id. By omitting discussion of these requirements, the district and Eighth Circuit courts impliedly held that Heller's reception and personal use of MSI's programming violated section 605. Such a holding would be incorrect. See infra notes 92-107.
40. See Heller, 710 F.2d at 494.
41. The proviso in section 605 states:
[The statute] 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 station operator or by a citizen's band radio operator.
42. MDS transmissions may be scrambled or unscrambled. See, e.g., Report and Order,
available to the public, they were broadcast for the use of the general public and exempted from protection. The court rejected this argument stating that MSI's transmissions were intended exclusively for subscriber use despite their accessibility to the general public.

After declaring Heller in violation of section 605, the court examined his counterclaims. Heller contended that MSI's monitoring of his television viewing preferences violated his fourth and fourteenth amendment rights, as well as privacy rights afforded him by state law. The court dismissed Heller's constitutional claims, noting that the constitutional prohibitions of the fourth and fourteenth amendments do not apply to actions by private individuals. Finally, Heller's privacy claim was rejected because "Minnesota has never recognized, either by legislative or court action, a cause of action for invasion of privacy, even though many other states have done so." On appeal, Heller also claimed abridgment of his first amendment right to the airwaves by the application of section

supra note 16, at 620-21; Bienstock, supra note 3, at 240. MSI's transmissions are unscrambled and may be received by any television with an antenna capable of receiving the microwave frequency band. Subscribers of other pay TV companies receive scrambled signals which must be unscrambled by a decoder in order to be intelligible.

43. Although local retailers have been successfully enjoined from selling pirating equipment, similar equipment is readily available from wholesalers and mail order houses in other states. See You Can Watch That Secret Movie Channel, 73 MAG. RADIO AMATEURS 32 (1979).

44. See Heller, 710 F.2d at 494; see also Heller, No. 3-82-933, slip op. at 3.

45. See Heller, 710 F.2d at 494; see also Heller, No. 3-82-933, slip op. at 4-4.

46. See Heller, No. 3-82-933, slip op. at 4-5; see also Heller, 710 F.2d at 496. Heller also claimed that MSI's activities violated title 18, sections 241 and 242, and title 42, section 1983 of the United States Code. See Heller, No. 3-82-933, slip op. at 4-5. The district court dismissed the former claim, noting that sections 241 and 242 are criminal statutes which do not permit a civil cause of action. Id. at 5. The latter claim was rejected by the court because Heller was unable to establish that there had been any action "under color of state law." Id.

47. See Heller, 710 F.2d at 496; Heller, No. 3-82-933, slip op. at 5.


Because Minnesota has yet to recognize a common law right to privacy, Heller requested that the circuit court certify his privacy claim as important and doubtful, permitting review by the Minnesota Supreme Court. The court, however, declined to certify the issue because it was "not without guidance from state courts on the issue and the case [was] . . . primarily based on federal law." Heller, 710 F.2d at 496 n.9.

Unlike the Eighth Circuit, the district court rejected Heller's privacy argument holding that Heller did not have "a protectible privacy interest in 'backwash' emitted by an antenna placed in plain view atop his home." Heller, No. 3-82-933, slip op. at 5. "Backwash" is the electronic signal emitted by the oscillator in a television set or down-converter. This signal may be monitored by electronic surveillance equipment. See Brief for Appellant at 8, Movie Sys. v. Heller, 710 F.2d 492 (8th Cir. 1983); Connor, supra note 5, at 56; 'Pirate' TV Antennas, supra note 28, at 5A, col. 4. The district court's conclusion that Heller had no privacy interest at stake was summary, and its apparent reliance on the plain view doctrine is questionable. See infra notes 154-56 and accompanying text.
605 to his activities. The Eighth Circuit declined to address the issue because the first amendment claim was not raised in the district court.

With the exception of the first amendment argument, the Heller decision seems to have settled the legality of piracy. Future problems will arise, however, when states or pay TV companies attempt to enforce section 605 of the Act. First, as MSI has experienced, enforcement will be an expensive and time-consuming process. Pay TV companies in many states will be reticent or unable to enforce their rights under section 605; most states recognize a cause of action for the invasion of privacy, and other states have enacted statutes that prohibit pay TV companies from monitoring what people watch on television. Second, the state will seldom be able to establish probable cause for conducting electronic surveillance in search of pirates because microwave antennae

49. See Heller, 710 F.2d at 495 n.8; Brief for Appellant at 14-18.
50. See Heller, 710 F.2d at 445 n.8.

53. See Note, supra note 48, at 175 n.56.
55. Knowledge of pirating activities may occur via informers, coerced public declarations, see Illegal' Antennas, supra note 28, at 13A, col. 1 (disclosure prompted by threatened litigation), or unsolicited public declarations. See Katz v. United States, 389 U.S. 347, 351 (1967) (no reasonable expectation of privacy exists if one publicly exposes private informa-
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may be concealed. Since most pirates will hide their antennae, the state would have to resort to indiscriminate electronic searches. This would entail violations of the general public's fourth and fourteenth amendment rights.

III. REGULATION OF THE OWNERSHIP AND USE OF MICROWAVE ANTENNAE AND SECTION 605

Citizens are entitled to purchase, own, and protect personal property. The right to own a microwave antenna capable of being used in an illegal manner is not excluded. Ownership of microwave antennae is not per se illegal because there are legitimate uses for this equipment.

Notwithstanding the right to own microwave dishes, the state may regulate their use under its police power. Such regulation, however, can only be justified by the presence of a valid public interest. The Federal Communications Commission (FCC) has stated that protection of pay TV is in the public interest. Pay TV companies are more responsive to subscribers' programming demands than free TV is to the preferences of
the non-paying public.66 Thus, pay TV's competition with free TV benefits the public by increasing the diversity and quality of all television programming.

The courts have safeguarded the public interest in the pay TV industry by enjoining vendors of pirating equipment under section 605.67 Section 605 is a criminal statute which sets forth a conjunctive test for determining when an unauthorized use or publication of radio signals is illegal.68 The first requirement is that an unauthorized person intercept, receive, or assist other unauthorized persons in receiving communica-

66. Pay TV is supported only by subscribers. Movie Sys. v. MWH Enter., No. 82-C-0321, slip op. at 3 (E.D. Wis. Aug. 2, 1982); R. NOLL, M. PECK & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 135 (1978). Therefore, pay TV viewers have more potential than commercial television viewers to influence television programming. If a pay TV company did not provide a subscriber with the type of programming he desired, he would either subscribe to a different pay TV service or terminate his pay TV service altogether.

67. See supra note 5. Section 605 concerns the unauthorized publication or use of communications:

Except as authorized by chapter 119, title 18, United States Code [18 USCS §§ 2510 et seq.] no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpoena[sic] issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.


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69. See infra notes 78-87 and accompanying text.
70. See infra notes 88-107 and accompanying text.
72. Id. § 605 (Law. Co-op. Supp. 1983). For the full text of the proviso in section 605, see supra note 41.

73. One view holds that the nature of the programming and its mode of transmission control, regardless of whether the transmission is intended for the public. See Functional Music, Inc. v. FCC, 274 F.2d 543, 548 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959). The other view is that the intent of the sender controls. See Chartwell Communications Corp. v. Western Techtronics, Inc., 529 F. Supp. 617, 619-21 (D. Colo. 1982).


75. Those courts did not specifically discuss the conjunctive requirement of beneficial use. See National Subscription Televis. v. & H TV, 644 F.2d 820, 826-27 (9th Cir. 1981); Home Box Office, Inc. v. Advanced Consumer Tech., No. 81 Civ. 559, slip op. at 4 (S.D.N.Y. Nov. 4, 1981); American Televis. & Communication Corp. v. Pirate T.V., Inc., No. 81-969-CIV-EDB, slip op. at 7 (S.D. Fla. Aug. 24, 1981); supra note 67. Beneficial use

As the above cases indicate, Orth-O-Vision has been strongly questioned by both the FCC and every appellate court to consider the issue. See In re Regulation of Domestic Receive-only satellite earth stations, 74 F.C.C.2d 204, 216 n.20 (1979) (Orth-O-Vision case is not of decisional significance).
IV. APPLICABILITY OF SECTION 605 TO PIRATES

The applicability of section 605 to pirates, unlike vendors, is questionable. This is not evidenced, however, by either the district or Eighth Circuit opinions in Heller. Both the trial and appellate courts merely footnoted the defendant's admissions and, without applying the conjunctive test, summarily held that section 605 had been violated. After a close look at the statute's conjunctive requirements, this Comment reveals problems which militate against the Eighth Circuit's summary extension of section 605's prohibitions to pirates.

A. Intercepting, Receiving, and Assisting in Receiving

The trial and appellate courts assumed that Heller's acts constituted an interception within the meaning of section 605. The assumption is questionable in light of the Supreme Court's definition of "interception" under section 605. In Goldman v. United States, the Supreme Court defined a section 605 interception as a seizure before the intended reception of a communication. The Supreme Court stated:

[Interception] indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment it leaves the possession of

was clearly present because the vendors financially gained by selling the equipment. See infra notes 94-107 and accompanying text.

76. Although pirates clearly receive radio transmissions, section 605 fails to define the terms interception and beneficial use, which constitutes the applicable section half of section 605's conjunctive requirement. See infra notes 89-107 and accompanying text.

While several commentators have noted the need for amendments to section 605, none have sought statutory clarification of the above term. See generally FCC Public Notice, supra note 5, at 1; Note, Subscription Television And Section 605 Of The Communications Act—The Pathology Of An Antiquated Statute, 12 GOLDEN GATE 1 (1982); Note, supra note 18.

77. Heller, No. 3-82-933, slip op. at 3, aff'd, 710 F.2d at 494; supra note 39.

78. Heller, No. 3-82-933, slip op. at 3 n.3, aff'd, 710 F.2d at 494 n.5. In a footnote, the court observed that “[d]efendant admits that he has intercepted [MSI's] signals and received HBO programming without paying the monthly subscription fee.” See Heller, No. 3-82-933, slip op. at 3 n.2 (emphasis added). Heller's admission, however, merely stated “[d]efendant admits said antenna has received MSI's programming.” Defendant's Answer and Counterclaim at 2, Movie Sys. v. Heller, No. 3-82-933, slip op. (D. Minn. Oct. 20, 1982) (emphasis added).

79. See infra notes 81-87 and accompanying text. Past court decisions have broadly construed the term "interception," declining to require a physical trespass. See Katz v. United States, 389, U.S. 347 (1967); infra notes 168-71 and accompanying text. No court, however, has used this broad definition in the context of section 605. Moreover, the language of section 605 still differentiates between a reception and an interception. See infra note 67 (text of section 605). Contra 18 U.S.C.S. § 2510(4) (Law. Co-op. 1979) (wiretapping statute) (“intercept means the aural acquisition of any wire or oral communication through the use of any electronic, mechanical, or other device”).

80. 316 U.S. 129 (1942) (use of detectaphone to eavesdrop on telephone conversation not an interception within meaning of section 605).

81. Id. at 134.
the proposed sender, or after, or at the moment, it comes into the pos-
session of the intended receiver. Applying this definition to pirates such as Heller, it is apparent that a
pirate receives a pay TV signal at the same moment as intended receiv-
ers. No seizure occurs before the programming’s arrival at subscribers’
homes. Rather, the microwave signals emitted by MDS companies are
received simultaneously by all owning microwave equipment.

The Supreme Court later added the invasion of privacy to the defini-
tion of a section 605 interception. In Rathbun v. United States, the Court
held that the mere unauthorized reception of a communication did not
constitute an interception when it was a risk within the contemplation of
the complaining party. It should follow, therefore, that a broadcast of
an unscrambled omnidirectional signal into the public domain does not
create a reasonable expectation of privacy. Such a broadcast is made
subject to the risk that pirates might receive the transmission.

Pirates also do not “assist others in receiving” within the meaning of
the statute. Pirates satisfy the statute’s first requirement because their
monitoring involves the reception of unauthorized communications.
Nevertheless, “the mere monitoring of a radio transmission does not vi-
late section 605.” Whether a pirate violates the statute hinges on the
presence of the second half of the conjunctive requirement.

B. Divulgence, Publication, and Beneficial Use

In order to meet the second conjunctive requirement, a pirate such as
Heller must beneficially use an unauthorized communication. The alter-
native requirements of divulgence and publication are rarely present

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82. Id.
83. See supra note 22. Although some pirates may receive a transmission slightly
before subscribers living farther from the local transmitter, this technical fact is probably
insufficient to constitute an interception. Such an analysis of interception would depend
on whether a subscriber or a pirate lived closer to the local transmitter and thus received
the signal first.
84. 355 U.S. 107 (1957).
85. Id. at 110-11; accord United States v. Hall, 488 F.2d 193, 196 (9th Cir. 1973) (no
constitutional protection where speaker is cognizant of an eavesdropper).
86. See supra note 77.
view office).
88. “Divulgence” within the meaning of section 605 requires the unauthorized disclo-
sure of a communication to third parties. See Nardone v. United States, 302 U.S. 379, 381-
82 (1937) (courtroom recitation of message constitutes divulgence); see also United States
v. Fuller, 202 F. Supp. 356 (N.D. Cal. 1962) (disclosure by news agency of police radio
broadcasts subject to section 605).

In addition to divulgence, either a reception or interception is necessary to violate
section 605. Since a reception does not occur until the pirate perceives the communica-
tion, and since his friends and family also perceive the programming at the same time,
only reception occurs. Classifying this as both a reception and a divulgence lessens the
because most pirates simply monitor unauthorized communications.

No court has ascertained the meaning of "beneficial use" within the context of section 605. The district court's interpretation of section 605 in *Heller* avoided this issue by interpreting section 605 to provide that no unauthorized person "shall receive or assist in receiving any interstate or foreign communication . . . for his own benefit or for the benefit of another not entitled thereto." By using the ellipsis in this quotation, the court omitted the second part of the statute's conjunctive test found in the phrase "by radio and use such communication." In an unpublished private letter, the FCC has stated that beneficial use includes the personal enjoyment of a communication. A pirate's unauthorized monitoring thus appears to violate section 605. The FCC's statement, however, lacks support from other sources, and the FCC has issued no regulations or public notices on section 605 which take that position.

The legislative history of section 605 suggests that beneficial use requires the act of using a communication for financial or commercial threshold needed for a violation by eliminating one of the statute's necessary conjunctive requirements. See infra note 93.

89. Although section 605's requirement of divulgence includes a disjunctive prohibition against publication, publication will not be discussed because pirates merely receive transmissions and do not generally publish them to third parties.

90. *Heller*, No. 3-82-933, slip op. at 3.

91. The court's quote from the statute should have read "shall receive or assist in receiving any interstate or foreign communication by radio and use such communication for his own benefit or for the benefit of another not entitled thereto." See supra note 67 (text of section 605).


93. In a Public Notice, the FCC stated:

Because material transmitted over stations is not intended to be 'broadcast' material within the meaning of section 605, authority for its reception and use must be given by the sender. Therefore, persons will be in violation of the law if they divulge, publish or use for their own benefit any MDS communications which they were not authorized to receive.

FCC Public Notice, supra note 5, at 2 (emphasis added). This statement, however, merely confirms the statute's conjunctive requirements of reception and beneficial use. While personal enjoyment implicitly satisfies the requirement of reception, the FCC's notice does not specifically state that personal enjoyment constitutes beneficial use.

The FCC's unofficial position, see supra text accompanying note 92, that personal enjoyment is beneficial use has no legal support. Equating personal enjoyment with beneficial use eliminates section 605's conjunctive requirement because reception and personal enjoyment are indistinguishable. Both reception and personal enjoyment occur at the same instant that a pirate first perceives pay TV programming.

The argument that reception and personal enjoyment constitute a violation of section 605 is also unsupported by the legislative history. When passing the Act, Congress contemplated beneficial use as financial gain. See infra notes 94-103 and accompanying text.

94. See generally 4 B. SCHWARTZ, supra note 6, at 2373-546 (legislative history of the 1934 Act); Note, supra note 6, at 739-43 (discussion of legislative history).
gain. At the time of enactment, radio was relatively new and was available to all who could afford reception equipment. Although Congress recognized the possible development of a pay TV industry, it did not consider pay TV a viable enterprise. Thus, Congress never intended that the personal enjoyment derived from reception of transmissions would be a violation of section 605. Rather, Congress realized that unauthorized reception of private radio communications was inevitable because of the limited number of broadcast frequencies and the relatively easy access to radio receivers. As Senator Dill stated when introducing the predecessor of the Act to the Senate: "First, and most important of all, radio in the United States is free. It is so free to the listener-in that anybody anywhere may listen in to any broadcasting whatsoever."

A determination that personal enjoyment meets the beneficial use requirement of section 605 contradicts the legislative intent of the statute. If the threshold of the statute were lowered so that reception and personal enjoyment constituted a violation of section 605, the effect of the statute would be much broader than Congress intended. Such an interpretation of section 605 would be unconstitutional as applied because it would subject persons to liability who lawfully receive unauthorized communications without using them beneficially. Moreover, because the state could rarely establish probable cause against such persons, it would be impossible to enforce section 605 without illegally searching for or seizing evidence.

MSI argued that Heller beneficially used its programming by not paying the monthly subscription fee. Although Heller avoided paying MSI's nominal subscription fee by pirating, no beneficial use occurred.
because Heller was not using the signal for pecuniary gain. The only "beneficial use" was the personal enjoyment Heller received from watching the programming. Such personal enjoyment, however, is inherent in the reception of any television programming and not a separate beneficial use within the meaning of section 605. The plaintiff's argument and the court's opinion are inaccurate because personal enjoyment cannot satisfy the conjunctive requirement of section 605.

The Heller court's interpretation of section 605 is questionable because courts should construe statutes only in a way that gives meaning to each phrase, and does not render any phrase superfluous. A prohibition against monitoring a transmission for one's personal enjoyment would render superfluous the conjunctive requirement of beneficial use. If the unauthorized personal enjoyment of radio transmissions was intended to be illegal, the language of section 605 could be greatly simplified; the statement "no person shall receive or aid in the reception of any unauthorized radio transmission" would suffice.

V. THE DEFENSE FOR PIRACY

Pirates argue that their activities should be allowed because "the airwaves are free." Although the airwaves are part of the public domain, they are a limited resource whose use is validly regulated by the government pursuant to the commerce clause. The government's regulatory licensing scheme traditionally has been justified by the fact that there are more broadcasters than audio frequencies. Under the regulations, a licensee has an exclusive right to transmit over a particular frequency, but ownership rights in that frequency are expressly denied and the granting of a license is conditional upon whether the public interest, con-

105. Although Heller was saving money by pirating, it was not the type of beneficial use Congress intended to prohibit. See supra note 93 and accompanying text.
106. Id.
110. See Note, supra note 109, at 648-49; National Broadcasting Co. v. United States, 319 U.S. 190, 212-13 (1943). The Radio Act of 1927 was enacted in response to the confusion generated by a dramatic increase in the number of broadcasters. Id.
112. Title 47, section 301 of the United States Code provides that:
   It is the purpose of this chapter, among other things, to maintain control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.
Because pay TV is in the public interest, and because piracy threatens the economic existence of pay TV, those individuals who pirate pay TV signals abuse their right to use the airwaves. A pirate’s use is iminical to both pay TV companies and paying subscribers who are deprived by the diminished diversity and quality of pay TV programming. Although everyone has the right to use the public airwaves to some degree, the adverse effect of pirates’ actions exceeds this degree. The argument that the “airwaves are free” alone is, therefore, not enough to justify piracy.

Pirates have also argued that there is a first amendment right to use antennae to receive programming. While using an antenna is not speech, the right to receive information is an adjunct within the scope of the first amendment. As an adjunct, however, the right to receive information is incidental to the right to speak; the first amendment’s primary focus is the speaker.

The first amendment “right” to pirate pay TV programming was examined recently in United States v. Stone. In Stone, the defendants, who were engaged in the business of advertising and selling microwave antennae, down converters, and other equipment capable of receiving MDS transmissions, were charged with violating section 605 for selling pirating


114. Because airwaves are part of the public domain, the right to their use must be balanced. Industry proponents argue that financial injuries caused by pirating mandate a balancing that restricts the rights of pirates. Enforcement problems and the existence of a less restrictive alternative, however, militate in favor of acquiescing to piracy.

115. Subscribers also have first amendment interests that demand consideration. Should revenue losses from pirating bankrupt pay TV, subscribers would lose a significant source of information. Those pay TV companies escaping bankruptcy could only provide lower caliber, less diverse programming.


118. See Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (first amendment includes right of married persons to receive information); Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (freedom of speech and press embraces the right to receive as well as distribute literature); see also Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (protection of Bill of Rights goes beyond specific guarantees and includes the right to receive communist publications).

119. See Comment, supra note 17, at 334; see also United States v. Stone, 546 F. Supp. at 240 (first amendment does not protect unauthorized interception by defendants of private communications of adverse party).

equipment to potential subscribers.\textsuperscript{121} The court held that the defendants had no first amendment right to free MDS programming.\textsuperscript{122} Emphasizing the preferred status afforded speakers, the court stated that the "communications defendants are alleged to have divulged did not originate with the defendants but were private communications among parties other than the defendants."\textsuperscript{123} The court concluded that the actions of the defendants constituted conduct rather than speech, noting that the defendants had not alleged that there was any communicative element to their conduct which brought the first amendment into play.\textsuperscript{124}

Despite the holding in Stone, first amendment arguments will deserve serious consideration in future suits against pirates.\textsuperscript{125} Unlike the defendant electronic store in Stone, a pirate's argument that he has the right to receive the increasingly diverse\textsuperscript{126} information broadcast on pay and free TV raises conduct with communicative elements sufficient to bring the first amendment into play.\textsuperscript{127} Although it is a closer question whether individuals have a first amendment right to pirated programming,\textsuperscript{128} catching offenders in the act would necessarily entail threaten-

\begin{itemize}
  \item \textsuperscript{121} Id. at 236.
  \item \textsuperscript{122} Id. at 240.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Unlike Heller, defendants in other actions involving MSI will assert a first amendment defense. See Dawson, supra note 51, at 12A, col. 2.
  \item \textsuperscript{126} Pay TV fosters competition with free television, benefitting the public by increasing the diversity and quality of television programming. See Fourth Report and Order, supra note 17, at 517.
  \item \textsuperscript{127} Pay TV subscribers have a first amendment right to receive programming because pay TV companies intend that their subscribers receive its programming. See Martin v. City of Struthers, 319 U.S. 141, 146-47 (1943) ("Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that . . . it must be fully preserved."); see also Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch." (citation omitted)); Lamont v. Postmaster Gen., 381 U.S. 301, 307-08 (1965) (Brennan, J., concurring) (protection of Bill of Rights goes beyond specific guarantees). A subscriber's assertion that he has the right to this programming would thus certainly raise communicative elements of conduct.
  \item \textsuperscript{128} Under a broad interpretation of the first amendment, pirates have a right to receive programming. See, e.g., Street v. New York, 394 U.S. 576, 610 (1969) (Black, J., dissenting); Konigsberg v. State Bar, 366 U.S. 36, 60-61, 63, 68 (1961) (Black, J., dissent-
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ing the rights of subscribers\textsuperscript{129} and innocent citizens who have first amendment rights to receive the programming.\textsuperscript{130}

Since the conduct of individual pirates and subscribers occurs within the privacy of the home, the right of pirates and innocent citizens to receive programming broadcast over pay TV "takes on an added dimension."\textsuperscript{131} Thus, although a first amendment claim by pirates, without more, may not be a successful defense, such a claim, when balanced against the problems of enforcement discussed below, supports the conclusion that section 605's application to pirates will raise constitutional questions in future cases.

VI. ENFORCEMENT

A. Introduction

The most serious questions posed by the Eighth Circuit's application of section 605 to individuals relate to enforcement problems. Although facially valid, the court's interpretation of section 605 is in effect unconstitutional because the means employed to detect microwave antennae necessarily violate the fourth amendment and privacy rights of pirates as well as innocent citizens.\textsuperscript{132} These enforcement problems arise both when a pirate's microwave antenna is in plain view, and when it is concealed.\textsuperscript{133}

Even when an antenna is in plain view, enforcement problems exist because there are alternative legitimate uses for antennae\textsuperscript{134} and practical problems\textsuperscript{135} which militate against finding sufficient probable cause

\textsuperscript{129} Subscribers as well as innocent citizens have a right to be free from electronic surveillance amounting to an invasion of privacy. \textit{See infra} note 130.

\textsuperscript{130} Surveillance equipment can monitor the viewing preferences of both pirates and innocent citizens, thereby threatening the privacy rights of non-pirates.

\textsuperscript{131} \textit{See} Stanley v. Georgia, 394 U.S. at 564 (first amendment right to receive information and ideas takes on an added dimension in the context of materials possessed in the privacy of one's home).

\textsuperscript{132} \textit{See infra} notes 148-78 and accompanying text.

\textsuperscript{133} \textit{See infra} notes 138-42 and accompanying text.


\textsuperscript{135} For example, homemade microwave antennae substitutes can receive signals and
to issue a search warrant. The *Heller* decision is problematic because the electronic search necessary to ascertain whether an antenna is receiving free MDS transmissions would constitute an illegal search and seizure or an invasion of privacy.

Section 605 enforcement problems are magnified when the statute is enforced against persons whose antennae are not in plain view. These problems arise because antennae may be concealed or placed inside homes without significantly affecting reception. The effect of the *Heller* decision is to force pirates to conceal their antennae from public view. Absent an informer's tip, the government could not establish the probable cause needed for a warrant allowing electronic surveillance of concealed antennae. Without probable cause, attempting to enforce section 605 would necessarily entail the use of electronic equipment in

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136. Under the fourth amendment, "Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. Issuing a warrant for an electronic search raises interesting questions. See *Berger v. New York*, 388 U.S. 41, 59-60 (1967). Unlike normal warrants, more than one search may be required, since it is difficult to predict when suspects may be watching television. Unless special provisions are made (blanket or day-long warrants), a new warrant will be required after each unsuccessful search. Observing the ramifications of government searches, the *Berger* court noted that: "The proceeding by search warrant is a drastic one ... and must be carefully circumscribed so as to prevent unauthorized invasions of the sanctity of a man's home and the privacies of life." *Id.* at 58.

137. See *infra* notes 143-78 and accompanying text; cf. *Universal City Studios v. Sony Corp.*, 480 F. Supp. 429, 446 (1979), modified, 659 F.2d 963 (9th Cir. 1981), rev'd, 104 S. Ct. 774 (1984) ("Congress did not find that protection of copyright holders' rights over reproduction of their works was worth the privacy and enforcement problems which restraint of home-use recording would create.").

138. See *supra* note 56.

139. Reception depends upon the number of obstructions between one's home and the local transmitting point. The fewer the obstructions, the more leeway one has in antenna placement. See Affidavit of Donald G. Krantz at 1, *Appellee's Brief and Appendix at A.76, Movie Sys. v. Heller*, 710 F.2d 492 (8th Cir. 1983).

140. Absent any outward indicia of illegal activity, only informants or admissions would sufficiently establish the requisite probable cause to issue a search warrant.

141. In Minneapolis, MSI conducted random electronic surveillance of entire neighborhoods searching for pirates. See *Pirate' TV Antennas*, *supra* note 28, at 1A, col. 4. The electronic surveillance equipment necessary to detect pirates is located inside mobile vans. A main antenna mounted on the van is tuned to the desired frequency and picks up signals emitted by a microwave antenna. Peaks on the screen of an oscilloscope inside the van represent antennae behind chimneys and trees and even inside homes. By calibrating the exact frequency of electronic "backwash" received from the antenna, it is possible to prove an antenna is tuned to a certain frequency. *Id.* The possibility that the van is picking up backwash from other antennae is eliminated by triangulating. After using a VHF antenna to ascertain the VHF frequency of the television set, the two frequencies are subtracted from each other and a determination is made whether the suspect antenna is being used to pirate the MDS transmission. See *Brief for Appellant, supra* note 48, at 8.
an indiscriminate illegal manner. Specifically, monitoring the homes and television viewing habits of both innocent and guilty parties would constitute either an unreasonable search and seizure in the case of state action, or an invasion of privacy when carried out by private parties such as pay TV companies.

B. Governmental Enforcement of Section 605

Katz v. United States established the standard for determining whether an unreasonable search and seizure has occurred within the meaning of section 605. The protection provided by the fourth and fourteenth amendments against unreasonable searches and seizures depends upon the presence of a reasonable expectation of privacy. Under Katz, a reasonable expectation of privacy requires an actual subjective expectation of privacy which society is prepared to recognize as reasonable and objectively justifiable under the circumstances. What constitutes a reasonable expectation of privacy thus depends upon the particular facts of each case, and "whether the area [involved] was one in which there was a reasonable expectation of freedom from government intrusion." As the following analysis will show, both pirates and innocent individuals who are monitored by electronic surveillance have the requisite expectation of privacy necessary to merit both privacy and fourth amendment protection.

1. An Actual Subjective Expectation of Privacy

The fact that people watch television in their homes implies an actual subjective expectation to keep private what they are viewing. At the core of the fourth amendment is the right of a person "to retreat into his home and there be free from unreasonable governmental intrusion." The penumbras of this right arguably extends to the right to maintain the

142. See supra note 130 and accompanying text.
144. Id. at 361 (Harlan, J., concurring).
145. Id.
privacy of communications received in the home. Like all citizens, a pirate has a reasonable subjective expectation of privacy when watching television in his home.

This expectation may not be compromised by private party or governmental attempts to monitor the home. For example, a pirate does not need to obstruct a potential telescopic viewing of his television screen or antenna in order to maintain a reasonable subjective expectation of privacy. As the Supreme Court has stated, "any enhanced viewing of the interior of a home...impair[s] a legitimate expectation of privacy and encounters the fourth amendment's warrant requirement..." A pirate's reasonable expectation of privacy may also not be violated through the use of electronic surveillance. In Heller, MSI allegedly confirmed the defendant was a pirate by using electronic surveillance to monitor his "backwash." Backwash is an electronic signal given off by oscillators in television sets and down converters. Because the effect of electronically detecting backwash is no different from telescopically viewing what one watches on television, both innocent viewers and pirates have a reasonable expectation to keep their television viewing preferences private.

The district court's summary conclusion that Heller had no protectible privacy interest in backwash emitted from an antenna in plain view is questionable in light of the above analysis. Neither the backwash nor what Heller was watching on television were in plain view. In addition, the presence of alternative uses for Heller's microwave dish militate against the district court's apparent reliance on the plain view doctrine.


151. Even in the sanctity of the home, a reasonable expectation of privacy would not be present if one knowingly exposed to the public what one claimed to keep private. Katz, 389 U.S. at 357. It follows that unless a person publicly displays his antenna or prominently places his television screen within public view, a reasonable subjective expectation to keep private what one watches on television exists.


153. Taborda, 635 F.2d at 139 (emphasis added).

154. See supra note 48.

155. In each instance, a person has both a subjective and objective reasonable expectation of privacy that no one is monitoring what they are watching on television. Furthermore, electronic equipment will soon be able to tape record a picture of pirated programming. See 'Pirate' TV Antennas, supra note 28, at 5A, col. 3.

156. See supra note 48.


158. See supra note 61.
2. A Reasonable and Objectively Justifiable Expectation of Privacy

The subjective expectation to keep private one's television viewing preferences is one which society recognizes as reasonable and objectively justifiable. Watching television involves the reception of communications within the privacy of the home, an action protected by the first amendment. Furthermore, a home is a person's castle, historically viewed as immune from unwarranted searches and seizures.

A comparison of the privacy expectations involved in a surveillance also supports an objectively reasonable expectation of privacy. Television viewers have a greater expectation of privacy than pay TV companies which broadcast unscrambled programming into the public airwaves. When a pay TV company is aware that a significant number of pirates exists, it is objectively unreasonable to expect that only subscribers will receive their unscrambled signal.

Pirates have a reasonable expectation of privacy because they meet both requirements of the *Katz* test. It may be objectively disturbing that pirates receive free a service paid for by others. State acquiescence, however, extends to other similar "illegal" activities which occur within the sanctity of the home. The Supreme Court has explained the rationale behind this acquiescence by stating: "while the states retain the broad power to regulate... that power simply does not extend to [regulating]...
the individual in the privacy of his own home.”167 Because pirates have a reasonable expectation of privacy, their activities may legitimately be regulated only indirectly by methods which do not invade the privacy of the home.

C. Reasonableness of the Search and Seizure

Assuming a reasonable expectation of privacy, the next question presented is whether electronic surveillance without a search warrant constitutes an unreasonable search and seizure under the fourth amendment. Case law suggests that the use of electronic equipment to detect pirates is unconstitutional under the fourth and fourteenth amendments.

Until 1967, the determination of whether electronic surveillance constituted a search and seizure was based upon physical trespass. With Katz v. United States,168 the Supreme Court dispensed with the notion of trespass, instead emphasizing one’s reasonable expectation of privacy. In light of recent technological developments, it is unnecessary to distinguish between electronic surveillance carried out by means of a physical trespass and surveillance penetrating a private area without a technical trespass.169 “The ingenious mind of man can conjure up subtle methods of search through modern electronics as reprehensible as kicking down a door.”170

Backwash is an intangible item protected under the fourth amendment. Since Katz, the Supreme Court has held that intangible items are subject to the constraints of the fourth amendment.171 Monitoring backwash is a violation of the fourth amendment because people have a reasonable expectation to keep their backwash private. There is a subjective expectation of privacy because backwash is imperceptible and emanates from the privacy of the home.172 An objective expectation of privacy

167. Id. at 568. First amendment considerations clearly militate against regulating the distribution of pornographic materials. See generally Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). Regulating the sale of pirating equipment is permissible, however, because the first amendment protects the right to receive programming. See supra note 127 and accompanying text.


The degree of its remoteness from the inside of the house — is not the measure of the injury. There is in each such case a search that should be made, if at all, only on a warrant issued by a magistrate . . . . But neither should the command of the fourth amendment be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be whether the privacy of the home was invaded.

Id.


171. See Berger v. New York, 388 U.S. 41 (1967) (conversation may be seized within meaning of fourth amendment).

172. United States v. Taborda, 635 F.2d 131, 138 (2d Cir. 1980) (“The very fact that a
exists because the surveillance of backwash is in effect the surveillance of what one watches on television. Therefore, a person has a reasonable expectation to keep his television preferences private and need not shield backwash from electronic surveillance.

In *Heller*, MSI took the position that no search occurred because its electronic equipment could only sense the backwash emanating from Heller's antenna. It argued that the equipment merely received signals and did not beam radio waves through people's homes. Although the substance of this argument would have had merit under the physical trespass analysis, it was invalidated by *Katz* and its progeny.

The Eighth Circuit's decision in *Heller* is problematic because the electronic surveillance of backwash necessary to enforce section 605 constitutes an unreasonable search and seizure within the meaning of the fourth amendment. The court's implied authorization of "the indiscriminate use of [electronic] devices in law enforcement raises grave constitutional questions under the fourth [amendment]."

**D. Private Enforcement of Section 605**

Although section 605 is a criminal statute, private parties such as pay TV companies can and are perhaps more likely to attempt enforcement of the statute than the government. Even though the substance and effect of private action is no less devastating than state action, the courts have never subjected private actions to the restraints of the Constitution. Nevertheless, enforcement problems will arise in future cases

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173. See 'Pirate' TV Antennas, supra note 28, at 5A, col. 3 (electronic equipment soon will be able to tape record picture of pirated programming from television sets).

174. Cf United States v. Taborda, 635 F.2d 131, 138 (2d Cir. 1980) (expectation of privacy to be free from telescopic surveillance in one's home not affected by failure to close curtains).

175. Appellee's Brief and Appendix, supra note 22, at 40.


177. The *Heller* decision will be questioned in future cases because it impliedly authorizes the private indiscriminate use of electronic devices by pay TV companies. *Accord* Berger v. New York, 388 U.S. 41, 58 (1967) (New York statute authorizing the indiscriminate use of electronic surveillance devices held unconstitutional).


179. See supra note 37 and accompanying text.

180. The situation is clearly more threatening to pay TV companies than to the general public. Although the government has brought criminal actions under section 605, see, e.g., United States v. Stone, 546 F. Supp. 234 (S.D. Tex. 1982), it is more likely that the pay TV companies will be the concerned parties.

because most states, unlike Minnesota, recognize a cause of action for the invasion of privacy. 182

As of December 1983, two states have also expressed their concern over electronic surveillance by enacting legislation prohibiting pay TV companies from monitoring what individuals watch on television. A Wisconsin statute, specifically geared toward cable television, acknowledges the serious threat to privacy posed by technological advances in the pay TV industry. 183 Under the statute, subscribers may ensure their privacy by requiring a cable pay TV company to install a device which allows the subscriber to prevent reception and transmission of messages by his equipment. 184 An Illinois statute prohibits pay TV companies from possessing or using electronic equipment capable of aurally or visually monitoring their subscribers. 185 The language of the statute is very broad and impliedly prohibits pay TV companies from monitoring what pirates watch on pay TV. 186 Because of these statutes and the right to sue private parties for the invasion of privacy, pay TV companies must be cautious when seeking to enforce section 605 by a civil action in other states.

VII. CONCLUSION

The Heller decision is not the last word on piracy. The protection it affords pay TV companies is limited. First, the state will be unable to constitutionally enforce section 605 because pirates will conceal their antennae. Second, the probability of valid counterclaims and the time and expense of litigation will discourage pay TV companies from initiating civil actions under section 605. Further judicial or congressional action is necessary to adequately protect the pay TV industry.

In Heller, the Eighth Circuit strained the language and intent of section 605 in an attempt to solve the problems facing the pay TV industry. In doing so, the court has reached the limits of its power. It is now time for Congress to act because it can best balance the competing interests implicated by pay TV piracy. As the Supreme Court recently stated, "In

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182. See Note, supra note 48, at 175. The Minnesota Supreme Court has yet to recognize the tort for invasion of privacy. See Hendry v. Connor, 303 Minn. 317, 226 N.W.2d 921 (1975) (per curiam) (unnecessary for disposition of this case to decide whether a cause of action for invasion of privacy should be recognized in Minnesota).
184. See id. § 134.43(1)(a).
186. The statute prohibits pay TV companies from utilizing equipment capable of electronically monitoring the viewing preferences of their subscribers. Id.
a case like this, in which Congress has not plainly marked our course, [the Court] must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests. 187

Amending section 605 of the Communications Act of 1934 is not the best solution. The constitutional problems encountered upon enforcement would still be present. Moreover, there is the likelihood of more states providing their citizens a statutory or common law cause of action against pay TV companies that conduct electronic surveillance.

The best solution is for Congress first to regulate strictly the manufacture and sale of pirating equipment.188 As with pornography and home video-taping, it is impossible to enforce constitutionally a law against piracy which occurs in the privacy of the home. Second, to thwart pirates, Congress should also require that all pay TV companies scramble their signals. Fewer pirates would then be able to obtain the equipment necessary to unscramble MDS programming. Pirates who are able to buy covertly or build decoders cannot legitimately be enjoined because governmental or private party enforcement would infringe upon the rights of countless citizens. If these pirates cause the pay TV industry economic harm, such losses should be looked upon merely as a risk of using the public airwaves to conduct a for-profit business.


188. California adopted legislation in 1980 which forbids the manufacture, sale, and distribution of any devices capable of receiving over-the-air and cable TV transmissions. California Penal Code section 593e states:

    Every person who for profit knowingly and willfully manufactures, distributes, or sells any device or plan or kit for a device, or printed circuit containing circuitry for interception or decoding with the purpose or intention of facilitating interception or decoding of any over-the-air transmission by a subscription television service made pursuant to authority granted by the Federal Communications Commission which is not authorized by the subscription television service is guilty of a misdemeanor punishable by a fine not exceeding two thousand five hundred dollars ($2500) or by imprisonment in the county jail not exceeding 90 days, or both.


Enactment of section 593e generated substantial controversy. See Comment, Television Decoders, supra note 5, at 846-49. The criticism focuses on the poor wording of the statute, and its effect as a prior restraint on the freedom of the press. Id. at 847-48. Because of these problems, one commentator recommends that the FCC, not the individual states, should resolve the problems of piracy. Id. at 870.