National Subscription Television v. S & H, TV: The Problem of Unauthorized Interception of Subscription Television—Are the Legal Airwaves Unscrambled?

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National Subscription Television v. S & H, TV: The Problem of Unauthorized Interception of Subscription Television—Are the Legal Airwaves Unscrambled?

The unending stream of technological innovations that best exemplifies the electronic media has left the law in its wake. Because of rapid advancements in the forms communications may take, the law has sometimes been slow in effectively and rationally affording protection against the piracy of these new types of electronic media. One such type of electronic media is the transmission of over-the-air scrambled broadcasts, more properly "subscription" television, wherein a party pays a subscription fee to receive nonstandard television programming. National Subscription Television v. S & H, TV, in view of prior divided case law, settled the question of whether a subscription television operator is entitled to legal protection against the unauthorized interception and/or use of his transmissions. The author traces the historical development of cable TV and the particularized technologies thereof, the rules and policies of the Federal Communications Commission as they relate to subscription television, and lastly, makes some forecasts as to the implications of the National decision.

I. INTRODUCTION

Just as the entertainment industry, as a whole, has suffered from the pains of copyright infringement, so too, certain cable television services have experienced their own unique brand of product pilferage. The problem which confronts cable television, particularly "subscription television" (STV), is the sanctity of the STV signal. Shortly after STV had achieved some sort of prominence as an entertainment product, devices capable of accessing and decoding STV emissions became available both in the black and open markets. Those interested in pirating the transmissions of STV operations provided a ready market for these independently produced and marketed devices. Thus, these devices,

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1. The use of the term "cable" television when referring to subscription television (STV) is actually a misnomer because STV is devoid of cable in its carriage of the television signal. See note 12 infra and accompanying text.
2. In this area of unauthorized interception of encoded visual signals, "piracy" is a term of art connoting the usurpation of STV broadcasts for oneself or for others, without consideration paid to the sender and with or without the permission of the sender. See generally Home Box Office, Inc. v. Pay TV, 467 F. Supp. 525, 526 (E.D.N.Y. 1979).
3. These signal converters were produced and marketed independently of
once placed in the stream of commerce, were consumed rapidly by the public. The STV industry perceived this independent production and sale of decoders, if left unchecked, as potentially causing the ruin of STV as a viable cable television system. Simply put, the industry asked how an STV oriented cable enterprise could remain economically feasible if its signal was subject to virtually free viewing.

In response to the threat of piracy, STV operators sought relief from the courts. Early decisions considering this problem, however, failed to provide STV operator/plaintiffs adequate relief. Adding further to the plight of both the courts and the STV industry, the Federal Communications Commission (FCC) failed to assist in the clarification of the Communications Act of 1934 and its effect on the STV industry. The most recent case to address this issue of unauthorized interception of STV emissions was *National Subscription Television v. S & H, TV*. In *National*, the United States Court of Appeals for the Ninth Circuit held that an STV operator was entitled to relief under the Communications Act where the defendants had been distributing for profit devices capable of decoding the operator's broadcast. Seemingly, the decision rendered in *National* has put an end to the question of whether STV operations are entitled to the protections afforded by the Communications Act.

Cable television systems, as they exist presently, are normally of two types. The first is known as subscription television, while the second is referred to as "cablecasting." The former, being the cable technology discussed in *National*, involves a scrambled...
video signal broadcast, while the latter carries television programming directly to a customer's home via a closed cable system, thus avoiding the over-the-air transmission process. STV operators lease decoders to their subscribers enabling them to unscramble and view the STV broadcast signal.12 These decoders, after attachment to a conventional television set, allow the viewer to intelligently13 view the STV programming. Analogous to regular television signals, any television set is capable of receiving the STV signal, though in scrambled form. The ability of STV to be received by all television sets, even in the absence of modifying devices, has proven problematical to the FCC, the courts, and the STV industry.14

This note will discuss STV as a species of cable television technology. The primary focus of the text will be upon the legal aspects inherent to this specialized form of communication. Also to be considered is the impact of the National decision on the cable television industry at large, placing special emphasis on the historical, linguistic, and decisional elements underlying the court's disposition of the case.

II. HISTORICAL BACKGROUND

A. The Emergence of Cable Television

Cable television was originally developed in an effort to provide satisfactory television viewing opportunities in those areas of the United States where conventional, advertiser-supported television reception was poor or nonexistent.15 Although many of the larger cities and communities had their own television stations, most of the outlying areas of the country were without television service.
Compounding the matter, not only did those areas have no television station(s) of their own because of their inability to economically support such a business, but due to the topography and/or location of the community, signal reception from distant television stations was impossible without special equipment. Thus, those remote communities began to implement the first type of cable television: community antenna television (CATV). A CATV system operates by using a low cost community antenna which, after picking up the distant television transmissions, redistributes the signal by a network of cable directly to the viewer’s home. CATV was widely accepted because it made available, at low cost, distant television programming for those in television-starved communities.

Following CATV’s emergence, broadcasters developed the STV system of cable television. STV subscribers could receive originally produced programming in addition to distant conventional television service. By charging for the service, independent broadcasters had an economically feasible method of transmitting television to remote communities of small size. Without the ability to charge for the service, the operation of an independent station would have been foreclosed because of economic realities.

Those who were engaged in CATV operations began to realize

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16. Advertiser supported television could not subsist in a community of small size because advertisers of any means (and they were usually the advertisers who were willing to pay the advertising fees required if a station were to be viable) took their business to television stations in larger communities that had access to a greater population base. Moreover, even if a station ventured to operate in one of these small communities and did not originate its own programming which was costly, it had to pay for the use of “network” programming which was many times prohibitively expensive.

17. Conceivably, a resident of one of these remote communities could track and receive distant television signals if he installed a special antenna, but few did so.


19. “CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers.” United States v. Southwestern Cable Co., 392 U.S. 157, 161 (1968).

[They] perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible, and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antenna.

Id. at 163. See also United States v. Midwest Video Corp., 406 U.S. at 650 n.1 (1972).

20. In 1952 there were 70 CATV systems in operation, and by 1959 there were 560. 39 TELEVISION FACTBOOK 72a, 79a (Television Digest, 1972).


22. The reasoning was if a proposed television station was precluded because it could not rely solely on advertiser revenue, a station might be able to succeed if its audience paid a monthly fee for its television service. See note 18 supra.
that STV systems and their programming mix of original and distant broadcasts were marketable. They began to apply this program and marketing technique to their own cable systems. Cablecasting, as it came to be known, continued to provide reproduction of distant broadcasts. Additionally, however, it offered original programming, for an increased fee, similar to STV type operations. That form of cable television offered its customers first-run movies, sporting events, and special features without commercial interruption.

In summary, CATV, the forerunner of cable television, was conceived in the 1950's. STV took the idea of rebroadcasting distant television signals and expanded on it by supplementing rebroadcasts with original programming, all for a price. Cable television evolved even further in the early 1970's when the coupling of CATV and STV methodologies produced cablecasting. Cablecasting provided both distant broadcasts and original programming by cable for a fee. So, within a span of twenty years, cable television more resembled an independent producer of programs than a mere middleman for the reproduction of distant television signals.

B. Cable Television and the Role of the Federal Communications Commission

The discovery of radio signals and their component technology spawned a new industry in the early 1920's. The radio broadcast media provided business entrepreneurs, for the first time, not only widespread access to potential customers, but also, unlike the printed media, the opportunity to enter the home and appeal to customers orally. Thus, radio stations began to appear and...

23. Cablecasting, in effect, is STV without over-the-air broadcasting. Cablecasting provides the same types of programs as STV, but differs in the means used to transmit the programming to the subscriber’s home.

24. The dominant form of cable TV today is of this type. See HAMBURG, supra note 15, at 20-26.

25. See LEDUC, supra note 18.

26. STV was like CATV in that it retransmitted television programs of distant television stations. However, it was different in that it used scrambled signals broadcast over-the-air and supplemented its retransmissions with original programming of its own selection.


prosper without the apparent need for state regulation.\textsuperscript{29}

Within a short time, however, radio operations had materialized at such a prolific rate that the industry was crippling itself.\textsuperscript{30} Broadcasters transmitted their programs using whatever frequency they desired. In the absence of state regulation of a limited broadcast spectrum,\textsuperscript{31} broadcasters were encroaching upon one another's signals at the expense of none of them being heard clearly. Ghosting of signals,\textsuperscript{32} signal overlap,\textsuperscript{33} and occasional total loss of signal was the norm, not the exception.\textsuperscript{34} The situation deteriorated to such an extent that Congress was compelled to intervene by passing the Radio Act of 1927\textsuperscript{35} in an attempt to regulate access to the limited broadcast spectrum.

As technology continued to improve and expand, Congress was again forced to evaluate the status of the telecommunications industry,\textsuperscript{36} ultimately deciding that the Radio Act of 1927 was inadequate and that a new communications act was needed. Responding to this need, Congress promulgated the Communications Act of 1934.\textsuperscript{37} The Act mandated that the Federal Communications Commission was to be created and empowered to oversee the rates and services provided by communications common carriers and broadcast licensees.\textsuperscript{38} The purpose behind the Act was "to make available, so far as possible, to all people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges . . . ."\textsuperscript{39}

\textsuperscript{29} During the formative years of radio, there were so few radio stations in operation that there was no immediate need to regulate the use of the airwaves. Room was left for random broadcasting with no possibility of interference with other operators.


\textsuperscript{31} There is a technologically limited broadcast spectrum, and only so many frequencies may be simultaneously used without causing interference with each other.

\textsuperscript{32} Ghosting of signals is an unwanted secondary signal that is received in conjunction with the stronger primary signal.

\textsuperscript{33} Signal overlap is caused where two transmissions using the same frequency are broadcast simultaneously.

\textsuperscript{34} See National Broadcasting Co. v. United States, 319 U.S. 190, 212 (1943).

\textsuperscript{35} 44 Stat. 1162 (1927).

\textsuperscript{36} President Franklin D. Roosevelt, by letter to Congress on February 26, 1934, requested that Congress in its next session abolish the Federal Radio Commission and replace it with the Federal Communication Commission giving such Commission the authority over "services [relying] on wires, cables, or radio as a medium of transmission." President's Message to Congress Recommending Creation of the FCC, — submitted to Barbara.


Soon after the enactment of the Communications Act, broadcast television began to flourish. Television presented the same problems that early radio had on the use of the airwaves, i.e., electrical interference and the need to utilize a limited broadcast spectrum.\(^{40}\) It seemed natural that the FCC would become the regulating authority of television broadcasting because the source of the FCC's authority emanated from a congressional intent to have controlled access to the limited broadcast spectrum.\(^{41}\) Furthermore, the Communications Act had specifically provided for the regulation of radio transmitted pictures.\(^{42}\) The birth of community antenna television would later retest the scope of the FCC's regulating authority over electronic communications.

Although cable television had been in existence since the 1940's,\(^{43}\) it was not until 1952 that the FCC first directed its regulating eye toward CATV. In that year, the Commission issued a memorandum which raised two fundamental issues: "(1) Do such operations\(^{44}\) constitute broadcasting within the meaning . . . of the Act . . . or (2) do such operations constitute interstate common carrier operations within the meaning . . . of the Act."\(^{45}\) The resolution of these questions and their consequences would come to be of enormous importance to the young cable television industry. The FCC, pursuant to the Communications Act, had express jurisdiction only over common carriers\(^{46}\) or broadcasters.\(^{47}\)

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40. See note 30 supra and accompanying text.
41. See note 31 supra.
42. The FCC was entrusted to regulate "'Radio communication' . . . [meaning] transmission by radio of writing, signs, signals, pictures, and sounds of all kinds . . ." (emphasis added). 47 U.S.C. § 153(b).
43. See generally Marticorena, Recent Developments in Cable Television Law, 6 ORANGE COUNTY B.J. 152 (1979).
44. It must be noted that in the early part of the 1950's, cable television consisted almost exclusively of cablecasting, and STV was of little consequence. Therefore, the FCC determined that it could not regulate cable TV, which meant CATV or cablecasting operations, not STV. The FCC held that Title III of the Communications Act did not apply because CATV operations were not broadcasting; they were using point-to-point communications (microwave) and cable delivery systems. The discretionary area was whether these types of electronic communications constitute common carriage. Apparently, at this time, the FCC did not believe so. See notes 38 supra & 51 infra; see also HAMBURG, supra note 15, at 6.
46. See note 38 supra.
47. Id.
If cable television was held to be outside of either classification, the Commission was without authority to regulate cable television. Initially, the FCC declined to involve itself in the overseeing of the cable television industry, perhaps due to limited resources\(^\text{48}\) rather than a loss of concern for such regulation. Nevertheless, the FCC did issue certain regulations\(^\text{49}\) in 1956 concerning permissible levels of electronic transmissions by cable television operators.

While the FCC was attempting to formulate its cable television policy with respect to CATV, subscription television services appeared. Subscription television, which was broadcast directly into the atmosphere like conventional television broadcasting, was promptly held by the FCC to be within the parameters of the Communications Act.\(^\text{50}\)

Contrary to what appeared to be a propensity to assume regulation of CATV, as indicated by the 1956 regulations, the FCC in 1958 refused to assert regulatory authority over cable television, denying that CATV was a form of common carriage and thus subject to Title II of the Communications Act.\(^\text{51}\) The rationale behind the FCC staff decision was that the subscribers of CATV were unable to select the messages (programming) they might receive.\(^\text{52}\) The FCC also decided that cable television operations did not constitute broadcasting pursuant to Title III of the Communications Act.\(^\text{53}\)

Those events were followed in 1959 by the First Report and Order\(^\text{54}\) drafted by the FCC regarding the influence, \textit{inter alia}, of cable television on the evolution of conventional broadcast television. In essence, the "Report" displayed the FCC's reluctance to promulgate any rules concerning the cable television industry ab-

\(^{48}\) The FCC might have been reluctant to act because of its limited staff. It might have believed that because of this limitation it could not adequately remedy the problems claimed to exist due to the growth of cable television. \textit{See} Hamburg, \textit{supra} note 15, at 6.


\(^{50}\) First Report and Order, 23 \textit{F.C.C.} 532 (1957), wherein the FCC determined it had the authority to require STV operators to obtain licensing, which required trial demonstrations of such service before commencing operations.


\(^{52}\) This rationale was also offered in support of the FCC's refusal to assert jurisdiction over CATV in Frontier Broadcasting Co. v. Collier, 24 \textit{F.C.C.} 251 (1956).

\(^{53}\) This section authorized the FCC to regulate broadcasters using the limited broadcast spectrum. \textit{See} 24 \textit{F.C.C.} at 255-56. \textit{See also} note 43 \textit{supra}.

sent congressional impetus. Pressure began to mount at this time for the FCC to take action. Television broadcasters were claiming that the incredible growth of cable television systems, primarily CATV systems, was threatening their existence, and the FCC should act to curb the unfettered expansion of the cable television industry. Camouflaging their response to this call for assistance, the FCC's Broadcast Bureau, in 1961, denied a cable operator a microwave license to service an additional community. The Commission denied the license because it first wanted to study the impact the proposed cable introduction would have on the already existing conventional television station within the targeted community. The Commission found that the expansion, if consummated, would have an adverse effect economically on the existing television station and therefore refused to grant the microwave license. By so regulating the issuance of microwave transmitting licenses, the FCC had asserted vicarious authority over CATV without having to make a formalized assertion of regulating authority.

The FCC promulgated another First Report and Order and issued a Notice of Inquiry and Notice of Proposed Rulemaking in 1965. Those documents notified cable operators that the FCC was formally asserting jurisdiction over all types of "cable" television systems, but they did not specify the degree of authority to be exerted by the FCC. A Second Report and Order was adopted in 1966; it annotated the 1965 rules and had the effect of further regulating the cable television industry. In 1968 the

55. Id. at 1604.
57. This decision was upheld in Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir. 1963) aff'g 52 F.C.C. 459 (1962), cert. denied, 375 U.S. 951 (1963).
58. By restricting CATV's access to microwave facilities, the FCC could indirectly regulate microwave dependent CATV. There appears to be no reason, other than the exigencies of the Carter Mountain case, that would indicate why the FCC chose this method of regulation instead of directly promulgating a set of rules to control the CATV situation, as it eventually did in 1965 when the FCC adopted its First Report and Order and issued a Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 45 (1965).
59. Id.
60. 6 RAD. REG. (P & F) ¶ 1717 (1966).
61. This ruling was subsequently amended in 1968 with the issuance of Notice of Inquiry and Notice of Proposed Rulemaking, in (Docket 18397) FCC 68-1176 (released December 12, 1968).
Commission developed a nationwide scheme of STV regulation\textsuperscript{62} and in 1972 published its Cable Television Rules,\textsuperscript{63} which, as amended, are the basic rules and regulations presently effecting the federal regulation of cable television.

C. The Meaning of Broadcast

1. Sections 605 and 153(o)

During cable television's birth and subsequent development, the regulating authorities (the FCC, municipalities, and the courts) were preoccupied with protecting the public interest.\textsuperscript{64} Therefore, those authorities concentrated their efforts on devising regulations which would be broad enough to foster the beneficial growth of the cable television industry, but also narrow enough to protect the public interest. The issue of whether STV, as a form of cable television, was to be entitled legislative or court originated protection from the unauthorized use of its transmissions was not discussed.\textsuperscript{65} Left for another day, the eventual answer to that question would be a collage of judicial interpretations pooling the meaning of broadcast; how a broadcaster's choice of delivery system evidenced his intent, or lack of intent, to broadcast to the general public; and how the rulings made by the FCC related to the concept of broadcasting.

Section 605 of the Communications Act provides:

\begin{quote}
Except as authorized by chapter 119, title 18,\textsuperscript{66} no person . . . assisting in receiving . . . any interstate . . . 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, [further] . . . [n]o 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 . . . communication by radio
\end{quote}


\textsuperscript{63} Cable Television Report and Order, 36 F.C.C.2d 143 (1972). The FCC, by asserting its jurisdiction over cable operations, triggered many lawsuits challenging such authority. The leading case disposing of the question is United States v. Southwestern Cable, 392 U.S. 157 (1968), where the Supreme Court affirmed the jurisdiction of the FCC over cable operators stating "the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its responsibilities." \textit{Id.}

\textsuperscript{64} \textit{See Marticorena, supra} note 43, at 155-56.

\textsuperscript{65} The first judicial decision to discuss the issue of whether STV was within the reach of section 605 was Home Box Office, Inc. v. Pay TV, 467 F. Supp. 525 (E.D.N.Y. 1979). \textit{See} text accompanying note 90 \textit{infra}.

\textsuperscript{66} Sanctions Against Interception of Wire and Oral Communications, 18 U.S.C. §§ 2510-20 (1968). This chapter describes when it is lawful to intercept private communications. This section was enacted to allow for law enforcement agencies to have a means to intercept communications.
and use [of] such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto . . . [with the proviso that] [t]his section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public . . . . 67

That section prohibits any interception, either personally or by aiding others in the interception, of communications made by wire or radio68 without the permission of the sender, unless the subject communication is broadcast by the sender for the use of the general public.

Section 153(o) of the Communications Act defines broadcasting as “the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.”69 Thus, because section 605 does not define what is meant by broadcasting, and the legislative history fails in the same respect,70 most courts have presumed that section 153(o)’s definition of broadcast was the correct view of what constituted broadcasting for the use of the general public.71

2. The Sender's Intent

The premiere case discussing the problem of distinguishing between broadcast telecommunications and nonbroadcast telecommunications within the meaning of section 153(o) was Functional Music, Inc. v. FCC.72 As an FM radio station, Functional Music provided commerical businesses with a music subscription service wherein commercials and nonmusical segments of the station's regular broadcast were electronically edited from the broadcast by devices specially installed to the subscriber's radio receiver.73 Functional Music employed a “simplex”74 mode of

68. In Allen B. DuMont Laboratories v. Carrol, 184 F.2d 153 (3d Cir. 1950), cert. denied, 340 U.S. 929 (1951), it was held that television broadcasts were within the regulatory reach of the FCC.
70. See note 144 infra and accompanying text.
73. Id. at 545 n.4 defined a simplex system as an “allocated FM channel supporting but one FM signal. Licensees engaged in a functional music service emit-
broadcasting, which required the use of special equipment capable of simultaneously transmitting FM and electronic signals to the hybrid receivers immediately before and after each nonmusic interruption. In 1955, the FCC ruled that licensed FM broadcasters could not superimpose a simplex signal on an FM signal and that a simplex signal was considered a form of point-to-point communication. The "1955 Rules" were postulated on the premise that background music programs were produced for the interests of a limited group of listeners, and, as such, simplex signals were not produced in the interest of the general public. Therefore, because the FCC issued licenses to broadcast on the FM band based on promoting the public interest, a new licensing process was necessary if the public interest were to be protected. Disturbed by the 1955 Rules, Functional Music sued the FCC. At trial the FCC argued that its decision to view simplex as point-to-point communication instead of broadcasting pursuant to section 153(o) was founded on "[Functional Music's] presentation of a highly specialized program format, deletion of advertising from subscriber's receivers, and exaction of a charge for these services . . . ." The court of appeals rejected the FCC's conclusions, holding that simplex transmissions were broadcasts as defined by section 153(o) because the signals transmitted by Functional Music were intended for the receipt by the public. Finding Functional Music urged the court to "expunge" the multiplexing requirements of the FCC, because it seemed inconsistent with the FCC's authorization of subscription television services on frequencies normally allocated to conventional broadcast television. 

74. Id. at 548-49. The court stated further that although Functional's simplex programming was specialized, this was just another factor to be weighed in deter-

75. See 274 F.2d at 545 n.5. Later codified as 47 C.F.R. §§ 73.1150 (1978), 73.293 (1963), and 73.295 (1964), these rules were first referred to as the "1955 Rules" and directed functional music programmers (those programmers using simplex) to phase out simplex and to begin using multiplex, which allowed for the transmission of multiple signals upon one allocated FM channel without the need to superimpose the signals on one another.

76. Point-to-point transmissions are made directly from the sender to receiver and are generally immune from reception by conventional receiving devices.

77. This reasoning proves to be unsound because the music portion of the program was heard by all listeners regardless of whether they were a simplex subscriber or not. To say that commercials and announcer portions of the program make the program more beneficial to the general public is illusory. See Functional Music, 274 F.2d at 545.

78. The Commission created a Subsidiary Communications Authorization (SCA) wherein a licensed FM broadcaster could engage in functional music programming under certain conditions. 47 C.F.R. § 73.293 (1980). See also 274 F.2d at 545 n.5.

79. Functional Music urged the court to "expunge" the multiplexing requirements of the FCC, because it seemed inconsistent with the FCC's authorization of subscription television services on frequencies normally allocated to conventional broadcast television. 274 F.2d at 545 n.6.

80. 274 F.2d at 548.

81. Id. at 548-49. The court stated further that although Functional's simplex programming was specialized, this was just another factor to be weighed in deter-
tional's simplex transmissions within the ambit of section 153(o), the court said, "broadcasting remains broadcasting even though a segment of those capable of receiving the broadcast signal are equipped to delete a portion of that signal."82 After the Functional decision, it appeared that if one intended to broadcast his signal to the general public it would constitute "broadcasting" as envisioned by section 153(o).

In 1967, a case was handed down in the Central District of California which also addressed the issue of whether a subscription radio program was broadcasting within the meaning of section 153(o). KMLA Broadcast Corp. v. Twentieth Century Cigarette Vendors Corp.83 involved a multiplex84 broadcaster, KMLA, which furnished background music programming to commercial establishments. Like Functional Music, KMLA rented special equipment to its subscribers so they could receive its background music program. However, unlike Functional Music's use of a simplex system, KMLA's multiplex system could not be picked up by conventional radio sets absent the modifying devices supplied by KMLA. Twentieth Century was in the business of supplying and servicing cigarette vending machines, primarily to restaurants. As an incentive to prospective customers, Twentieth Century offered to provide special receiving devices, without KMLA's approval, which would enable its customers to receive the multiplex program transmitted by KMLA. After discovering the acts of Twentieth Century, KMLA instituted an action to enjoin Twentieth Century from continuing its activities under section 605. Finding for KMLA, the court agreed with the FCC ruling, which was rejected by the Functional court, that multiplex and similar radio subscription services (i.e. simplex) should be regarded as point-to-point communications and not as "broadcasting."85 Furthermore, the court cited a ruling made by the FCC with respect to the relationship between section 605 and multiplex programming, wherein the FCC determined that section 605 would be contravened if multiplex signals were intercepted absent authorization from the sender.86 The KMLA court formulated its concept of

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82. Id. at 548.
84. See note 75 supra.
85. 264 F. Supp. at 41. See also note 75 supra.
86. The Commission stated at 11 RAD. REG. (P & F) ¶ 1599 (1955), that:

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broadcasting, as embodied in the exception to section 605 and, as the \textit{Functional} court had done, on the basis of the sender's intent.\footnote{264 F. Supp. at 40.} The court said "[t]he question of whether KMLA's multiplex transmissions over its subcarrier frequency constitute 'broadcasting' so as to make the protections of section 605 inapplicable because of the proviso . . . hinges on whether KMLA intended dissemination of its multiplex radio communication to the general public."\footnote{\textit{Id.}} If KMLA intended to transmit its program to the general public, the exception to section 605 was activated, but if this intent was lacking, the protections of section 605 were effective. Thus, after \textit{KMLA}, the intent of the subscription service operator was the crucial element to be analyzed in determining if section 605 was to be effective in cases of unauthorized interceptions or whether the exception would become controlling, thereby removing the subject transmission from the reach of section 605.\footnote{Following KMLA, other decisions also focused their inquiries on § 153(o) and its definition of what broadcasting meant, never once questioning if § 153(o)'s definition of broadcasting was really applicable to the word broadcasting as it was found in § 605. \textit{See} note 71 \textit{supra}.}

3. MDS Systems and Cable Television

Whereas \textit{Functional} and \textit{KMLA} considered the rights of subscription radio services, later cases would involve the rights of subscription television operators. The first of these television cases was \textit{Home Box Office v. Pay TV of Greater New York}.\footnote{467 F. Supp. 525 (E.D.N.Y. 1979).} In that case, Home Box Office (HBO), which used a Multipoint Distribution Service (MDS), sought an injunction against a former li-

\begin{quote}
Although we have considered the applications of Section 605 in this matter, we wish to note that the question of the applicability of this Section will, in all probability, be determined by court actions. However, it is our opinion that Section 605 would be contravened by the unauthorized reception of the FM signal only when such a signal is being transmitted only for reception by the special interests of the industrial, mercantile, transportation, or other subscribers \textit{without any intention of reception by the general public}. This would be the case with all transmissions on a multiplex basis.
\end{quote}

The Commission's statement was cited with approval in 264 F. Supp. at 41 (emphasis added).

\footnote{87. 264 F. Supp. at 40. It should be noted that Functional Music wanted the court to view its programming as intended for the use of the general public and, as such, broadcasting. Functional wanted this interpretation to be made by the court so that Functional could avoid the impact of the FCC rules requiring that simplex operators switch over to a multiplex system. In contrast, KMLA desired the court to find its operation as nonbroadcasting because KMLA did not intend its programming for the use of the general public and needed the protections afforded by § 605. Functional Music might well have acted as KMLA did with respect to its court request if its service was being intercepted and made use of against their interests as a subscription radio service. \textit{See also} 264 F. Supp. at 40 n.1.}

\footnote{88. \textit{Id.}}

\footnote{89. 654}
licensed affiliate preventing it from intercepting its transmissions. The MDS system used by HBO transmitted a high frequency signal from HBO's main antenna to its affiliates' authorized reception points nearby. After signal receipt, HBO licensees would retransmit the signal at a lower frequency to allow for reception by HBO subscribers. Finding Pay TV in violation of section 605, the court cited an FCC ruling which had determined that MDS transmissions were protected from unauthorized interception, presumably because that type of transmission was considered to be point-to-point. Furthermore, citing KMLA with approval, the court reasoned that section 605 applied because "[t]here is no reason why the result [(finding a violation of section 605)] should be different in the case of television transmissions."

Another case decided in 1979, Orth-O-Vision, Inc. v. Home Box Office (HBO), on facts practically identical to those in Pay TV, the court reached an opposite result concerning the viability of a claim that MDS type subscription television transmissions were protected from unauthorized interceptions under section 605. The court stated: "[t]he principle issue raised by this claim [that Orth-O-Vision's unauthorized use of HBO's MDS signal was in violation of section 605] is whether HBO's radio communications are 'broadcast', i.e., intended to be received by the general public and, therefore, exempted from the protections of § 605."

In answering that question, the Ortho-O-Vision court looked...
Recognizing that it needed to meet the issue of what constituted “broadcasting,” the court cited the *Functional Music* doctrine that a transmission was still to be considered broadcasting, even where the interplay of special devices is considerable, if the originator intended the transmission to be received by the public. Questioning whether the converse of the above rule is true, the court asked: “does the transmission of programming which is of interest to the general public constitute ‘broadcasting’ even though one cannot view the programs without paying a fee for special equipment?” The court solved the question based on a passage of an FCC ruling made in 1966. The FCC, in the court’s opinion, had determined *STV type* subscription transmissions to be broadcasting as contemplated by section 153(o). Utilizing this FCC ruling, the court disposed of HBO’s section 605 claim by analogizing HBO’s MDS system to the operating characteristics of STV. The court believed that STV was broadcasting for the purposes of section 605’s exception and presumably in the opinion of the FCC. Therefore, because the MDS format was sufficiently similar to STV, according to the *Orth-O-Vision* court, it was broadcasting outside the scope of section 605.

The *Orth-O-Vision* court professed to be in search of HBO’s intent, but in fact the court disregarded that completely. The court chose instead to adopt an FCC ruling, made in a different context, which is unsatisfactory when used to invalidate a finding.

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102. *Id.* at 680.
103. *Id.* at 681-82.
104. *Id.*
105. *In re* Amendment of Part 73 of the Commission’s Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service, 3 F.C.C. 2d 1 (1966). This report provides:

> the evident intention of any station transmitting subscription programs would be to make them available to all members of the public within range of the station. . . . [T]he primary touchstone of a broadcast service is the intent of the broadcaster to provide radio or television service without discrimination to as many members of the general public as can be interested in the particular program as distinguished from a point-to-point message service [i.e., multiplex radio service] to specified individuals . . . . '[I]ntent' may be inferred from the circumstances under which material is transmitted . . . (emphasis added).

474 F. Supp. at 682.

106. Later decisions noted that the FCC made this determination in response to television broadcasters who claimed that the FCC could not allow STV to use allocated television frequencies because STV was not broadcasting and not in regard to whether or not STV was broadcasting for purposes of the proviso. See Chartwell Communications Group v. Westbrook, 637 F.2d 459, 464-66 (6th Cir. 1980).
108. The FCC never specifically stated in the 1966 report that it was deciding whether STV was broadcasting for § 605 purposes. See 637 F.2d at 464.
109. 474 F. Supp. at 682. See also note 106 supra.
that MDS transmissions should be accorded protective status under section 605. The FCC ruling used by the court did not even address the issue of whether STV was incapable of protection by section 605.\textsuperscript{110} Furthermore, though STV and MDS are both television transmissions, the comparison is short-lived. STV signals can be received by any conventional television set\textsuperscript{111} and are broadcast to be received by many subscribers. In contrast, MDS signals, as used by HBO, cannot be picked up by any television set but can, generally, only be received by special antennas manufactured to receive those high frequency signals. Moreover, HBO’s MDS system was designed to and did transmit to only a handful of licensed affiliates, unlike STV, which generally broadcasts to many thousands of subscribers. It would seem that the court should have followed the lead of the Pay TV court and held HBO’s MDS transmissions to be point-to-point transmissions within the protective sphere of section 605.\textsuperscript{112}

The law was in a state of flux after the Pay TV and Orth-O-Vision decisions. Not until Chartwell Communications Group v. Westbrook,\textsuperscript{113} decided in 1980, did the law begin to stabilize into a cogent approach to the unauthorized use of subscription television broadcasts. Chartwell was the first case to decide the issue of whether STV broadcasts were protected from unauthorized interception.\textsuperscript{114} Chartwell involved an STV operator who filed suit against defendant Westbrook, alleging that Westbrook had been engaged in selling unauthorized electronic decoding equipment capable of allowing non-Chartwell subscribers to receive Chartwell’s STV broadcast in enjoyable form.

The court refused to adhere to the ruling as set forth by the Orth-O-Vision court concerning STV and its relationship to sections 605 and 153(o).\textsuperscript{115} The Chartwell court stated:

\begin{quote}

The FCC has not ruled specifically on the question of whether STV is to be considered “broadcasting” for the purposes of Section 605 . . . [and] [w]e do not read the FCC’s pronouncements on this matter to foreclose a
\end{quote}

\textsuperscript{110} Id.
\textsuperscript{111} See note 14 supra and accompanying text.
\textsuperscript{112} See notes 90-97 supra and accompanying text.
\textsuperscript{113} 637 F.2d 459 (6th Cir. 1980).
\textsuperscript{114} Id. at 462. Functional and KMLA both involved radio subscription services. The former used a simplex system and the latter used a multiplex system. Pay TV and Orth-O-Vision involved subscription television services, but the service involved was an MDS system which is similar to STV but not completely correlative. See notes 73-75 supra and accompanying text.
determination that STV is protected by Section 605 . . . [f]urthermore, even if the FCC's determination could be interpreted as a ruling that STV is broadcasting for Section 605 purposes, we are not bound by the agency's interpretation.\textsuperscript{116}

In analyzing the case before it, the \textit{Chartwell} court was the first court to scrutinize the exception in section 605 as it stood.\textsuperscript{117} \textit{Chartwell} focused on the language of the exception, "for the use of the general public," instead of substituting in section 153(o)'s "intent" definition of broadcasting.\textsuperscript{118} The \textit{Chartwell} court admitted that STV broadcasting was aimed at a large audience but refused to agree with the contention made by Westbrook that the transmissions made by Chartwell were \textit{intended for the use of the general public} (free of charge).\textsuperscript{119} The \textit{Orth-O-Vision} court, by failing to do that, fell into the pitfall of holding subscription televi-

\begin{table}[h!]
\centering
\begin{tabular}{|c|c|c|c|c|c|}
\hline
Type of Communication & \multicolumn{2}{|c|}{Radio} & \multicolumn{2}{|c|}{Television} & \\
\cline{2-6}
 & Technology & Simplex & Multiplex & STV & Cablecasting & CATV \\
\hline
Case & Functional & KMLA & National & Pay TV & Midwest & \\
 & Music & & Westbrook & Orth-O-Vision & Video Corp. & \\
\hline
\textbf{Availability of signal to the general public} & & & & & & \\
\textbf{All could receive.} & & & & & & \\
\textbf{All could receive, but signal in unintelligible form.} & & & & & & \\
\hline
Nature of Service & Special devices deleted unwanted portions of normal FM broadcast. Allowed for "background" music service. & Programming was produced with no commercial interruptions. Special devices allowed for reception of preselected "background" music program. & & & & \\
\hline
FCC Status and Protection Policy & Point-to-point. Section 605 applies. & Point-to-point. Section 605 applies. & Broadcast. No section 605 applies. & Broadcast. Section 605 applies. & Point-to-point. Section 605 applies. \\
\hline
Signal Delivery System & Broadcast over-the-air. & Broadcast over-the-air. & Broadcast over-the-air. & Broadcast over-the-air. & Direct transmission by network of cable. \\
\hline
\end{tabular}
\end{table}

\textsuperscript{116} 637 F.2d at 464-65.

\textsuperscript{117} \textit{Chartwell} analyzed the section in terms of the use of the general public instead of whether the broadcast was intended to be received by the general public. \textit{Id.}

\textsuperscript{118} "[T]here is an important distinction between making a service available to the general public and intending a program for the use of the general public." 637 F.2d at 465.

\textsuperscript{119} \textit{Id.}

658
sion services as outside the scope of section 605 simply because the signal was appealable to a mass audience, and the inference was made that because of the large appeal it was intended to be received by the public.\textsuperscript{120}

Considering the \textit{Chartwell} decision, the state of the law with regard to section 605 protection of electronic subscription services seemed unified, excepting the decision reached in \textit{Orth-O-Vision}. Although the jurisdictions that had examined the question of electronic subscription service interception were generally in agreement, those cases were few and, in regard to subscription type television services, the cases were mixed. Therefore, before the law would become cohesive, another decision on the problem would be needed.

\section*{III. National Subscription Television v. S & H, TV}

The greater Los Angeles metropolitan area is a prime source of revenue for those businesses catering to the entertainment demands of the people of that area. Not only is the city the third largest in the United States,\textsuperscript{121} but it is also the acknowledged leader in this nation, and most would agree the world, in the entertainment field. With this backdrop, cable television companies entered the Los Angeles market with great expectations in the 1970's. One of those companies was National Subscription Television (NST).

NST was the owner and operator of a subscription television service marketed under the copyrighted name of "ON TV." To facilitate the transmission of its signal, NST entered into an agreement with Oak Broadcasting Systems, Inc. (Oak Broadcasting), whereby Oak Broadcasting would allow NST to transmit its STV program using the transmission facilities of Oak Broadcasting. Oak Broadcasting was licensed to broadcast television signals on its designated UHF frequency\textsuperscript{122} and permitted NST the use of its transmitter during certain hours of the day.\textsuperscript{123}

Decoding devices were provided to NST subscribers on a rental basis enabling them to view the programming. Because the signal transmitted by NST was carried on a special subfrequency carrier

\textsuperscript{120} See note 192 infra.
\textsuperscript{122} The frequency is UHF Channel 52 in Los Angeles.
\textsuperscript{123} These hours are primarily from early afternoon to late evening.
wave, adequate reception of “ON TV” programming was limited


to those who were NST subscribers or those who were in posses-


sion of equipment capable of decoding NST’s signal. With the


special signal and the customer’s use of the decoding devices,


NST had hoped to prevent unauthorized access to its


programming.


S & H, TV124 was a producer and distributor of decoding devices


functionally equivalent to those supplied to NST customers.


However, NST had not authorized S & H, TV to produce or dis-


tribute those devices. This “bootlegging” activity allowed S & H,


TV customers to “pirate” the NST scrambled signals without hav-


ing to pay NST’s subscription rate. Those pirates then were able
to intercept the programming of “ON TV” with no cost to them-


selves, except monies expended for the purchase of the decoders.


Learning of the acts committed by S & H, TV, NST and Oak


Broadcasting filed an action in the federal district court request-


ing injunctive and compensatory damage relief pursuant to sec-


tion 605.125 Upon a hearing of the case, it was determined that


section 605 was not applicable to the facts of the case and that


the acts of S & H, TV were, therefore, not in violation of federal


rights granted by that section.126 In applying section 605 to the


case, the district court felt that the exception was controlling


and, therefore, the signals broadcast by NST were outside the


blanket of protection offered by section 605.127 Dissatisfied with


the result, NST appealed to the Ninth Circuit Court of Appeals.


IV. ANALYSIS OF NATIONAL


A. The Parties’ Contentions


S & H, TV argued that “NST's programming is of interest to a


mass audience” and that such programming was capable of being


received by anyone who owned a television set.128 Because of


NST's transmission format, which was directed to a mass audi-


dence, S & H, TV contended that NST was broadcasting within the


124. The complaint named S & H, TV as a defendant along with many others.

National Subscription Television v. S & H, TV, No. CV 80-829-LTL (C.D. Cal. Aug. 4,

1980). For the purpose of simplicity, “S & H, TV” will be used hereinafter to refer

to the defendants collectively.

125. In conjunction with the federal claim NST filed numerous state claims.

126. Upon a hearing of the case at the district court level, it was determined

that § 605 was not applicable to the facts of the case. In so holding, the court

granted S & H, TV’s request that the case be dismissed pursuant to the Federal

Rule of Civil Procedure 12(b) (6). National Subscription Television v. S & H, TV


127. Id.

128. 644 F.2d at 821.
parameters of section 153(o). Moreover, S & H, TV asserted that broadcasting, as defined by section 153(o), was synonymous with the meaning of the word *broadcasting* found in the exception to section 605. Therefore, according to S & H, TV, if the signals transmitted by NST were considered as broadcasting pursuant to section 153(o) and if *all* section 153(o) broadcasting was considered broadcasting for the purposes of section 605's exception, then those types of signals were "unprotected by the general prohibition against signal interception in section 605."  

The first contention by S & H, TV, that NST's signals should be considered as section 153(o) broadcasting, was a reasonable one in view of prior case law, i.e., *Functional Music*. However, the argument loses much of its force when the qualification of "only for those who are willing to pay the subscription fee" is introduced.

Assuming arguendo the first contention is valid, then are all section 153(o) broadcasts necessarily broadcasts as contemplated by section 605's exception? Section 153(o) defines broadcasts as those "intended to be received by the public," whereas the section 605 exception limits broadcasts to broadcasts transmitted for the use of the general public. It is possible to have an electronic communication fall within the context of section 153(o) and still be outside of the section 605 exception, even if the concept of broadcast, as it is found in section 605, is defined by section 153(o). STV is a good example. STV transmissions are intended to be received by the (general) public subject to the qualification that those broadcasts are meant only for those willing to pay the subscription fee. Given this, merely because a broadcast is made with the intent that it be received by the general public does not mean that it is meant for the *use* of that audience. The strength of this position revolves around what is the meaning of *for the use of the general public*. Because the purpose of the section 605 exception was to exempt advertisement based television

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129. Similar to prior cases, *National* assumed that § 153(o) was determinative of what the proviso meant by "broadcasting." *Id.* See also notes 102-08 *supra* and accompanying text.

130. 644 F.2d at 821. *See also* note 129 *supra*.

131. *Id*.

132. *See* notes 81 & 82 *supra* and accompanying text.


134. *See* note 67 *supra* and accompanying text.

135. *See* note 187 *infra* and accompanying text.
and radio from the application of section 605,\textsuperscript{136} then, inferentially, \textit{for the use of the general public} means broadcasts transmitted for the public's use free of charge. This would entail that STV could be broadcast with the intent to be received by the general public, but remain within the exception because it is not intended for the use of the general public.\textsuperscript{137} Thus, the contention by S & H, TV, that broadcasting under sections 605 and 153(o) is synonymous, was not a tenable one.

NST also grounded its argument on the basis of section 153(o) and its \textit{intent} component.\textsuperscript{138} NST argued that the mass appeal of its programming should be ignored by the court and that the court should instead look to the intent of NST behind its broadcasts. NST averred that because it had instituted measures attempting to "restrict reception of its signals to paying subscribers,"\textsuperscript{139} there could be no justified finding of section 153(o) intent. Furthermore, NST stressed that because there was no intent to broadcast as provided by section 153(o), the exception was ineffective and their signal was thus entitled to protection via section 605.\textsuperscript{140} What was problematical was the reasonableness in deducing that NST intended its programming to be received by the public, although conditioned on the payment of a subscription fee.

The arguments made by both parties were oriented toward section 153(o)'s definitive correlation to the exception of section 605. Neither party attempted to distinguish section 153(o)'s definition of broadcasting from the concept of broadcasting as found within the exception.\textsuperscript{141} The parties believed that the case would turn on whether the court found NST to have intended its programming for the use of the general public. The court, however, drew a distinction between broadcasting as defined by section 153(o) and broadcasting as contemplated by the section 605 exception.\textsuperscript{142} NST's intent was relied upon in conjunction with the distinction the court made in deciding the case, with neither the court's own conclusions regarding the relationship between sections 605 and 153(o) or NST's intent carrying more weight than the other.\textsuperscript{143}

\textsuperscript{136} Brief for Appellant at 4, National Subscription Television v. S & H, TV, 644 F.2d 820 (9th Cir. 1981).
\textsuperscript{137} See note 187 infra and accompanying text.
\textsuperscript{138} 644 F.2d at 821.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} The appellants' brief indicated their awareness of the distinction, although no mention is made of this in the case as reported.
\textsuperscript{142} 644 F.2d at 824. See note 187 infra and accompanying text.
\textsuperscript{143} The court did review the importance of the sender's intent, but because it also found section 153(o) to be noncontrolling of the scope of section 605, it was
B. Applicable Legislative and Decisional Law

Surveying the available law relevant to a proper disposition of the case, the National court observed that there was marginal case law on the subject and that the legislative history of section 605 had made no mention of whether STV transmissions were within its protective sphere. KMLA was cited by the National court as the first reported decision to discuss the relationship between section 605 and subscription broadcasting. Evaluating KMLA, where that court had found the particular communication at issue to be protected by section 605, the National court made a comparison of the programming format used in KMLA (multiplexing) and the format used by NST (STV). NST, like the subscription operator in KMLA, contended that its signal was not broadcast to be received by the general public and should be treated as within the protections of section 605. The National court emphasized that the ruling arrived at in KMLA was premised on the sender's lack of intent to make the broadcast available for the use of the general public rather than on the mass appeal of the service offered. However, the KMLA court had a stronger factual foundation than the NST court to find that the subscription operator lacked intent to broadcast to the general public. The subscription operator in KMLA used a multiplex system of broadcasting, making it impossible for conventional radios to receive the signal. NST's signal, however, was capable of being received by any television set, albeit in scrambled form. Therefore, because of this fundamental difference in the operating nature of the two services, more would have to be shown if the National court were to make a strong analogy between its own case and KMLA. Accomplishing that end, the court noted that NST's signal, though capable of being received by all conventional television sets, was transmitted in scrambled form, requir-

144. Presumably this included all subscription oriented television transmissions, not only STV. 644 F.2d at 822.
145. Id.
146. Id. The court did not make an obvious comparison of the two subscription services, but was drawing an analogy for its later discussion of a broadcaster's intent.
147. Id. This was evidenced by the need for special equipment if the public wished to receive the signal.
148. 264 F. Supp. at 41-42.
149. See note 83 supra and accompanying text.
ing the need for special devices if one desired to intelligently view the programming. Therefore, though the burden of showing broadcaster lack of intent was greater, NST could be viewed as lacking intent to have its signal used by the general public because of the additional restraints placed on its signals. Thus, the court's rationale remained consistent with the decision in KMLA.150

The National court viewed Pay TV151 to be of limited comparative value because the defendant in that case, Pay TV of Greater New York, had failed to argue that the plaintiff's signal (HBO’s MDS transmissions) were encompassed by the exception to section 605.152 Pay TV was of more than limited significance, especially in the area probed and discussed by the court in National. The Pay TV court said “[n]o court appears heretofore to have had occasion to apply . . . section [605] to television transmissions.”153 On that basis alone the case was of great importance. True, Pay TV did not assert the common defense, claimed by similarly situated defendants,154 that the communications made by HBO were section 153(o) broadcastings and, therefore, within the reach of the exception. However, the Pay TV court did mention that the plaintiff's did “not deny that Section 605 prohibits an unauthorized person from intercepting the signals carrying [HBO's] program service.”155

Continuing to keep the issue of programming mass appeal versus broadcaster intent at the forefront of the case, the National court reviewed the applicability of the Orth-O-Vision decision.156 National noted that the Orth-O-Vision court had pushed aside the fact that special equipment was needed for the receipt of the plaintiff's signal and, alternatively, had decided to direct its attention to the character of the plaintiff's (HBO's) programming and the signal delivery system's capabilities.157 The National court then proceeded to discuss the Functional Music158 case and the FCC report made in 1966,159 citing both to have been relied on by the Orth-O-Vision court in its decision.160

150. Both cases relied on the broadcaster-plaintiff's lack of intent in deciding their respective cases. See 644 F.2d at 824.
151. See note 90 supra and accompanying text.
152. 644 F.2d at 822.
153. 467 F. Supp. at 528.
155. 467 F. Supp. at 528.
156. See also note 98 supra and accompanying text.
157. 644 F.2d at 822-23.
158. 644 F.2d at 823. See also note 72 supra and accompanying text.
159. Id. See note 105 supra.
160. 644 F.2d at 822.
National interpreted Functional Music as standing for the proposition that, although contrary to a previously rendered FCC ruling on point,161 a simplex subscription music service was broadcasting for the purposes of section 153(o), and notwithstanding that some persons using Functional Music’s program were able to delete portions of the program, the program was still to be considered as appealing to a widespread radio audience.162 That explains why S & H, TV and the Orth-O-Vision court attached so much significance to a program’s audience appeal.163

The 1966 FCC report was used by the National court in its analysis of how much weight should be given to a sender’s restriction of programming access when determining the sender’s intent.164 The National court found the FCC decision to hold that an STV broadcaster’s restriction of a signal is not enough to negate a finding of STV transmissions as section 153(o) broadcasting.165

National credited the Chartwell166 and United States v. Westbrook167 decisions as the most recent cases decided concerning STV transmissions, unauthorized interception of this type of communication, and the availability of section 605 and its prohibition against unauthorized interceptions.168 Of special value was the court’s recognition of the almost identical factual situations of Chartwell, Westbrook, and its own case.169 The National court also stated that both decisions had found STV as not susceptible

161. Id. at 823.
162. Does widespread appeal necessarily mean widespread appeal to the general public, or could it mean additionally widespread appeal only to those who would be predisposed to purchase the service offered?
163. Functional Music has been acknowledged as the leading case to discern what the legal definition of broadcasting entails. In arriving at this conclusion, the Functional Music court used both broadcaster intent and appealability of the service in holding a type of subscription service as broadcasting within the ambit of section 153(o). 274 F.2d at 548. See also note 81 supra and accompanying text.
164. 644 F.2d at 823.
165. Id.
166. 637 F.2d 459 (6th Cir. 1980).
167. 502 F. Supp. 588. Westbrook involved a criminal prosecution by the FCC against some individuals who were marketing decoders capable of unscrambling STV emissions. The FCC based its case on several suppositions. It argued that federal regulations required that STV decoders be leased and inspected before distribution. The FCC also asserted that the defendants had violated section 605 in assisting others in the interception of broadcasts not intended for the general public. This prosecution by the FCC is consistent with its Staff Report, see note 206 infra and accompanying text (but is not consistent with its still official position espoused in 1965, see note 105 supra and accompanying text).
168. 644 F.2d at 823.
169. Id.
to inclusion within the section 605 exception and, as such, was to be accorded protected status under section 605.\textsuperscript{170}

The \textit{National} court analyzed the positive (lack of intent) and the negative (widespread appeal) attributes of STV broadcasts; and how those characteristics had been interpreted by previous decisions. \textit{Orth-O-Vision} had relied heavily on the audience appeal of STV. While the \textit{Orth-O-Vision} court had denied section 605 relief for STV type transmissions, the \textit{Chartwell} and \textit{Westbrook} decisions had given relief to STV transmissions under section 605 irrespective of audience appeal, insisting that the sender's intent was all important.\textsuperscript{171} The \textit{National} court followed the lead of the \textit{Chartwell} court by directing its inquiry more toward NST's intent than toward its wholesale appeal to a mass audience.

C. \textit{Section 605 Protection}

1. Distinguishing the meaning of broadcast under section 605 from section 153(o)

The \textit{National} court refused to consider NST's broadcasts as outside the protections of section 605. The court stated that the framework of analysis employed by

\begin{quote}
[s]ome of the cases dealing with sections 153(o) and 605 is that transmissions that constitute broadcasting within the meaning of 153(o) fall within the [exception] . . . [sic] [of] 605, and, therefore, are unprotected, whereas transmissions that do not amount to 153(o) broadcasting are out of the [exception's] reach, and thus are protected by 605.\textsuperscript{172}
\end{quote}

The court found NST to be in agreement with that analysis.\textsuperscript{173} However, NST had asked the court to specifically overrule the FCC's determination that STV was broadcasting for the purposes of section 153(o).\textsuperscript{174} In support of its request, NST cited \textit{Functional Music}, which had specifically overruled an FCC ruling on point. Such authority seemed to be appealing at first but turned out to be quixotical. In \textit{Functional Music}, the FCC had said that the programming found in \textit{Functional Music}\textsuperscript{175} did not constitute broadcasting as interpreted by the Commission and, therefore, could not be legally broadcast via Functional's allocated FM frequency.\textsuperscript{176} In reversing that FCC holding, the \textit{Functional Music} court declared that the \textit{intent} to broadcast within the meaning of

\begin{footnotes}
\item\textsuperscript{170} \textit{Id}.
\item\textsuperscript{171} \textit{Id}. \ 637 F.2d at 465; 502 F. Supp. at 590-92.
\item\textsuperscript{172} \textit{Id}. \ 644 F.2d at 823.
\item\textsuperscript{173} \textit{Id}.
\item\textsuperscript{174} \textit{Id}.
\item\textsuperscript{175} See note 73 supra.
\item\textsuperscript{176} \textit{Id}. 274 F.2d at 545.
\end{footnotes}
section 153(o) could not be discounted merely due to the station's specialized programming. Functional sought to be considered as broadcasting transmissions intended to be received by the general public in opposition to the applicable FCC determination.177

In National, however, NST sought just the opposite classification. The FCC regulation at issue in National stated STV was broadcasting for the purposes of section 153(o)178 based on the supposed intent of NST that its signal be received by the general populace, and was, hence, within the exception. NST asked that the FCC ruling be overruled or limited because if STV were found to be broadcasting pursuant to the exception, it would be vulnerable to outright acts of piracy with no federal prohibitions to restrain such activities.179 NST desired to be considered as broadcasting only to a limited extent, enough to be within the ambit of section 605, but not quite enough to be withdrawn from the section's protections by the exception. Therein lies the distinction between National and Functional Music. Both plaintiffs in the respective cases wanted the applicable FCC rulings overturned, but they pursued that result for entirely different reasons. Functional wanted its broadcasting to be considered as intended for the use of the general public, while NST did not want its broadcasting to be so classified.

Conveniently side stepping the issue of whether the court should overrule the FCC decision that STV was 153(o) broadcasting, the court found that section 153(o) was nondispositive of the scope of the section 605 exception.180 The National court was intimating that section 153(o) broadcasting and broadcasting as encompassed by the exception of section 605 could have different meanings.181 Besides holding that section 153(o) was not the conclusive definition of what constituted broadcasting under the section 605 exception,182 the court cited the Chartwell decision183 in support of its decision not to address the merits of the FCC decision directly. The Chartwell decision had clarified the context within which the FCC determination was made. The purpose of the FCC's report was to decide whether STV should be granted

177. 274 F.2d at 545-46.
178. 644 F.2d at 823. See note 159 supra.
179. See note 68 supra and accompanying text.
180. 644 F.2d at 823-24.
181. See note 187 infra and accompanying text.
182. See note 19 supra.
183. 644 F.2d at 824.
permanent access to national markets, and if so, whether the FCC had the authority to govern STV. The issue of whether STV should be protected from unauthorized interception was not addressed by the FCC's ruling. The Chartwell court refused to find the FCC report as determinative of whether STV was to be protected by section 605. Because the National court relied on Chartwell, it could not be said that it was attempting to avoid making a ruling on the FCC report; Chartwell, for all its rhetoric, simply said, "we are not bound by the [FCC's] interpretation."

The National court observed that "an individual might 'broad-cast'—i.e., transmit a signal over the airwaves with the intent that it be received by the public within the meaning of section 153(o)—without such broadcasting being for the use of the [general] public within the meaning of the [exception]." That reasoning would become the all controlling thought which reduced the problem to a simple issue. Did STV broadcast its signal for the use of the general public? In answering that question the National court made a number of observations.

Like most profit motivated enterprises, the court argued, an STV operator will develop his product to appeal to a large group of consumers. Therefore, it only makes sense to conclude that STV is produced and intended to be marketed to a large pool of customers. Moreover, the court reasoned, even though STV is aimed at the general populace, it does not necessarily follow that STV operators intend STV programming for the use of that mass audience without a charge for the service. Taking judicial notice of the economics and financial elements of the case, the court shored up its position further when it posited that an STV operation would be inviable without the assistance of encoded signals and decoding devices, supplied to subscribers, for protecting the transmission from easy accessibility. Finally, the court held that "STV operations such as NST broadcast their programming, not for the use of anyone who is somehow able to receive their signals, but only for the use of paying subscribers." By viewing NST's operations in that manner, the court allowed for a reasonable inference to be drawn, namely that NST did not intend its broadcasts for the use of the general public. By refusing to distin-

184. 637 F.2d at 464.
185. Id. at 464-65.
186. Id. at 465.
187. 644 F.2d at 824.
188. Id.
189. Id.
190. Id.
191. Id.
guish between intent to have the public receive a certain broadcast and intent for the public to use a particular broadcast, the National court avoided a pitfall which the Orth-O-Vision court had fallen into.192 Implicit in the National court's argument is the notion that STV operators only intend that their programs be used by those of the public willing to pay for the service.

Discussing further differences between sections 153(o) and 605, the court addressed a contention made by S & H, TV. S & H, TV argued that if the court were to keep separate the phrases "intended to be received by the public" and "broadcast . . . for the use of the general public," the purpose of the exception would be misconstrued by the court. S & H, TV stressed that the word broadcast as embodied in the exception was a distinct term and that the phrase for the use of the general public was meant to qualify transmitted, not broadcast, because those words were arranged within the phraseology of the exception.195 The court dismissed S & H, TV's claim. The court admitted that the language of the section 605 exception might be strained. In spite of that, the language imparts the principle that providing programming for the general public at a price, on one hand, and intending that the program be used by the general public free of cost, on the other hand, are diametrically opposed.197

2. Public Policy Consideration

Policy considerations of promoting the public interest and protection of the consumer were also viewed as important by the National court. Entrusted with the implementation of those policies, the FCC issued some preliminary reports and statements of policy with regard to the STV industry in the 1960's. In 1980, the FCC issued a Staff Report which evidenced a change in FCC policy with respect to STV. The 1980 Staff Report announced that the FCC believed STV to be in the public interest because it

192. See note 118 supra and accompanying text.
195. 644 F.2d at 824.
196. Id. at 825.
197. Id.
198. Id.
199. See notes 59 & 60 supra and accompanying text.
was an alternative programming source in which the public had shown interest. Additionally, the Staff Report, which had not been adopted as the official position of the FCC, stated that there was no reason not to include STV within the protective realm of section 605 like other forms of communication had been. Another rule promulgated by the FCC was that an STV operator could not sell decoding devices but had to lease them instead. Applying these FCC rulings to the facts of the case, the court held that S & H, TV was in violation of public policy, and, as such, their acts of manufacturing and marketing decoders could not be tolerated. By using public policy, the court made a novel interpretation in its discussion of unauthorized interception of STV broadcasts. Public policy, combined with the economic factors cited earlier by the court, made for a strong decision that STV operations were to be protected under section 605. Three countervailing policy arguments posed by S & H, TV, were also discussed in National. Those policy considerations were: (1) that the airwaves belong to the general public, and therefore those who do transmit over the airwaves, such as NST, should be prevented from exercising monopolistic control over the airwaves absent congressional approval; (2) Congress intended that STV programmers use technological means to prevent access to their signal; and (3) the actions of S & H, TV helped to foster needed competition in the manufacture of decoders.

Responding to the first issue of whether Congress should have to approve of the use of the public airwaves by STV operators, the

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201. In reaching its conclusion [In re Amendment of Part 73] that STV is broadcasting, the Commission stated that it regarded a [broadcasting] licensee's 'intent to provide a radio or television service without discrimination to as many members of the general public as can be interested in the programs' as of primary importance to its determination. However, this conclusion appears to ignore the fact that, although a licensee's overall service (including adapter, decoder, or converter) may be offered to the public generally, nevertheless, his actual radio transmissions, by themselves, may not be intended for general public reception . . . . It also seems clear that there is no distinguishing factor that would justify the exclusion of STV programming, but not the subscription programming transmitted by other licensees, from the protections afforded by Section 605 . . . .

644 F.2d at 824 n.5. See note 119 supra.

202. Id.

203. See note 12 supra.

204. 644 F.2d at 825.

205. Generally, other courts dealing with the subject did not invoke policy to make a decision, but rather concentrated their efforts on the linguistic and conceptual applications of §§ 153(o) and 605.

206. 644 F.2d at 826.
court addressed several factors. As a licensed broadcaster, Oak Broadcasting already had the right to refuse or allow access to those wishing to use its allocated frequency, and that right nullified any argument that Oak Broadcasting was exercising a right it did not have. Expanding on that, the court noted that section 605 does not grant any broadcaster, including STV operators, a monopoly over the airwaves because it does not prevent other broadcasters from entering the market. Furthermore, the FCC and Congress were charged with overseeing the use of the public airwaves to insure that they be used in the public's best interest. Delegating its authority, Congress granted the FCC the power to regulate the public airwaves in its best judgment. STV broadcasting was a communications medium recognized by the FCC as entitled to the use of the limited broadcast spectrum. Therefore, there was no reason why Congress needed to specifically authorize the use of the airwaves by STV operators.

In reply to the second argument, the court discounted as speculative and unsubstantiated the contention that Congress intended STV operators to protect their signals solely by the use of special electronic equipment. The court stated that “even the most technologically sophisticated decoder can be copied by processes of reverse engineering.”

The last contention of policy made by S & H, TV, that their activities provided needed competition in the manufacture of decoders, was held to be untenable by the court. If S & H, TV was allowed to continue in the manufacture of decoders capable of transceiving NST's encoded signal, such activity would eventually have the effect of causing NST and other STV operators to cease business operations and “would eliminate the reason for acquiring [(referring to the consumer)] the decoder in the first place.”

207. Id. See also text accompanying note 211 infra.
208. 644 F.2d at 826.
209. Id.
210. Id.
211. See note 105 supra and accompanying text.
212. 644 F.2d at 826.
213. Id.
214. Id.
215. Id.
D. No Violation of 605?

Notwithstanding that NST's signals were protected by section 605, the National court examined the possibility that the lower court's dismissal of the case might be correct if S & H, TV were found not to have intercepted the signal of NST.\(^{216}\) Under section 605, one is not accountable until it is proven that he intercepted, divulged, or published the transmission, or aided others in the intercepting, divulging, or publishing of the transmission.\(^{217}\) S & H, TV attempted to escape liability under section 605 by theorizing: one, all television sets in the Los Angeles area could already receive NST's signals, and therefore, S & H, TV had no opportunity to intercept or aid in the interception of those signals; and two, they did not divulge, publish, or aid in the interception of NST's signals.\(^{218}\) The National court found these arguments to be unconvincing. The court used common sense in stating that S & H, TV was obviously aiding others in the interception of NST programming. Almost casually, the court suggested that S & H, TV may have had a good argument if they had asserted that the decoders sold had never been used.\(^{219}\)

V. Impact of the Case

National may well have been the final judicial impetus necessary for the FCC to reverse its prior official position with respect to subscription television.\(^{220}\) Given this judicial prodding, the FCC should adopt a new posture, as was urged in its own 1980 Staff Report.\(^{221}\) If the FCC would act in that way, courts which had placed great weight on the 1966 ruling of the FCC\(^{222}\) would probably make an about face and move to protect STV broadcasts from unauthorized interception. Despite the current FCC stance concerning STV as a telecommunications medium, some courts have refused to blindly follow the FCC and, to their credit, have taken the initiative in placing STV within the protective scheme of section 605.\(^{223}\) The National decision, in accepting and adopting the logic and policy of the Chartwell, Westbrook, Functional,

\(^{216}\) Id.
\(^{217}\) See note 67 supra and accompanying text.
\(^{218}\) 644 F.2d at 826.
\(^{219}\) Id. at 827.
\(^{220}\) Although the FCC first recognized STV as a broadcast transmission for purposes of licensing, defendants in such cases continue to argue that § 605 should not apply. See notes 62 & 105 supra.
\(^{221}\) See notes 200-02 supra and accompanying text.
\(^{222}\) Few courts were completely swayed by the FCC ruling in 1966, i.e. Orth-O-Vision, but many were cognizant of its value in detailing the Commission's position on the matter, i.e., Westbrook, Chartwell, and National.
\(^{223}\) See notes 93 & 116 supra and accompanying text.
and KMLA decisions, gives further weight to the decisions in those cases. In light of those foregoing cases, it appears that there is now an ample body of case law dealing with the subject of unauthorized interception of broadcasts as contrasted to the situation the early courts had found themselves confronted with—scarce case law and unmalleable FCC determinations.

After the National decision, most courts should severely limit the persuasiveness of the Orth-O-Vision decision. Orth-O-Vision should be looked upon as an anomalous decision where a court refused to consider the dire economic consequences that follow when the 1966 ruling of the FCC is applied mechanically. The cable industry will breath a sigh of relief when Orth-O-Vision is relegated to that debilitated status by the courts, although few courts have done so to this date.224

Although the technology already exists which allows cable television subscribers to “talk back”225 to their television, “shop at home,”226 and leave home while the house is protected from unwanted intruders,227 cable television, as a technology, is still in its infancy. Soon people will be able to accomplish their banking, record keeping, and schooling through the use of cable television networks. These current and future innovations will all give rise to new problems. Currently, it is the STV originator of television programming who is most concerned with the undue interception of STV signals, but with the expansion of subscription television capabilities there will be others interested in the prevention of unauthorized interception of STV or STV type signals. Housewives, homeowners, and businessmen, all of whom may transmit or receive sensitive information, may all be in need of the protections established under section 605. Hopefully, future courts, when confronted with any one of those possibilities, will not refrain from adopting the law so clearly illustrated in National. The law, if it is to be effective, should not be lagging behind the needs of a technologically inspired civilization.

Finally, the reverberations to be felt throughout the STV industry should be widespread and penetrating. In an industry in-

227. See note 225, supra.
volved so much in capital investment and royalty fees, it is imperative that the courts act to protect the very lifeline that permits the industry to exist. *National* allows STV operators a chance to conduct their livelihoods without fear of judicially sanctioned pirating. Practically speaking, few cases after *National*, in which these same types of practices are involved, should reach the trial stage of litigation. The law in this area is so well defined subsequent to the STV cases that a potential defendant is virtually assured of losing based on this body of law, where the facts are plain and show a clear instance of unauthorized interception or the aiding of others in the interception of STV broadcasts.

VI. Conclusion

Although it appears that the question of whether subscription television is protected by section 605 of the Communications Act has been answered, there still remains the nagging question of damages. None of the decisions rendered in this area can effect a complete remedy. An attempt at complete rectification would prove to be impractical because it is difficult to measure the economic loss incurred in the past and continuing to be incurred in the present when possibly thousands of decoders are still in circulation with no reasonable means of tracing their current whereabouts. Furthermore, how can those who purchased and used the decoders to intercept STV broadcasts be adequately reprimanded or forced to compensate the injured STV operator? These questions cannot be adequately remedied by the courts due to inherent practical limitations. It seems likely, then, that the courts will continue to administer injunctive relief and compute monetary damages in an arbitrary fashion, at least until a method is developed which can measure, as near as possible, the true extent of the injury suffered by the STV operator because of the unauthorized interceptions of his signal.

Those problems aside, who is to benefit the most by this development in the law? On its face it would appear that subscription television operators stand to benefit the most. But in reality, the public will derive the bulk of the benefits to be realized. The STV

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228. The *National*, *Chartwell*, and *Westbrook* decisions dealt with STV transmissions directly, whereas the other television subscription cases involved MDS broadcasts.

229. It appears that the only possible way for an STV operator to cease providing continual free programming to the holders of the spurious decoders is to revamp their broadcasting modulation and either modify their present decoders or exchange new decoders for the old decoders previously supplied to subscribers. As one can well imagine, this process could be very expensive, awkward, and inconvenient for thousands of customers.
industry will continue to gain tremendous revenues, especially if its signals are protected by the law, but the public, by the processes of the open market, will be able to purchase alternative programming to that of commercially sponsored television. This will enable the public to decide which product it prefers. The courts, as epitomized by the National decision, have given the consumer the opportunity to reject or accept STV type programming in the open market by disallowing the manufacture or distribution of unauthorized decoders by those who would wish to capitalize on that form of communication piracy.

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