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SATELLITE TRANSMISSIONS: THE LAWS AND POLICIES THAT AFFECT THE PROGRAMMERS, INDIVIDUAL EARTH STATIONS AND SMATV (PRIVATE CABLE) OWNERS

BARRY L. MILLER*

I. INTRODUCTION

Modern technology has enabled most Americans to gain access to a growing amount of information and entertainment through new media sources. Video disk and tape players, cable television, and home computers are just a few of these new media sources. This article focuses on the new media of satellite receiving equipment.

Circling the earth are dozens of satellites acting as a midpoint in long distance communications. A sender on earth employs an earth station known as an up-link, which has the capability of sending information by electronic signal to the satellite. The up-link is positioned at an angle so that the satellite can receive the signal from earth. Once the signal reaches the satellite, approximately 22,000 miles in space, it transmits the signal back to earth. The signal is transmitted over a very large area on earth known as a footprint. An earth station (called a dish or down-link) within the footprint area receives the signal from the satellite. Most satellites are situated above the earth such that the center of the footprint is broadcast over the central United States. The farther away from the center of the footprint, the larger the dish needs to be.

Satellite receiving equipment is referred to in the communications industry as either earth station units or television receive only (TVRO) units. While both terms refer to receiving equipment, earth station is the more common reference. This equipment is used in military, governmental, business, and private applications. There is great concern regarding private use, particularly by home owners (including condominium owners) and multi-unit residents. The primary issue is the legality of receiving programming directly

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from the satellite without authorization, depending on the circumstances. In some circumstances the consensus is that viewing is permissible. However, under other circumstances the answer is unresolved.

When an earth station is used in multi-unit buildings (apartments) the system is generally referred to as satellite master antenna television (SMATV). SMATV operation is essentially the same as a cable company. It offers various programming to residents for a fee. There are, however, two differences. First, the SMATV operator can bypass the franchise (licensing) requirements imposed by local municipalities on cable operators and many SMATV systems are exempt from federal regulation.¹ Second, the earth station is located on the premises insuring a quality picture, while the cable company must string out the cable for miles, thus detracting from the quality.²

The individual home owner utilizing an earth station has the advantages of a studio quality picture and a program selection from the various satellites. There are many systems available for home owners. The more money invested, the more sophisticated the system.

Demand for earth station systems is growing. The price of the equipment has decreased dramatically in the past two years.³ The largest demand is from rural communities without cable service and in those areas where over-the-air television reception is poor.⁴ Condominiums and other housing associations utilize the systems because of the superior reception quality and cost efficiency.

Those who utilize earth stations to intercept signals from pay-television channels without permission from the programmer are called pirates. Programmers claim that anyone receiving (viewing) programs whether pay or non-pay, without authorization is a pirate. Others refer to these viewers as raiders or thieves.⁵ All earth station users are not "pirates" because many transponders (channels) are free to anyone wishing to view. The Christian Broadcasting Network (CBN) is an example of a channel that does not

1. *SMATV: The Medium That's Making Cable Nervous*, BROADCASTING, June 21, 1982, at 33, 34.

2. *Id.* at 33.

3. Landro, *Time's HBO Plans to Scramble TV Signals In Bid to Block Unauthorized Reception*, Wall St. J., Feb. 16, 1982, at 10, col. 3.

4. Iversen, *Home Earth Stations Start to Catch On*, ELECTRONICS, June 30, 1982, at 50.

5. Taylor, *Crossing Swords with the "TV Pirates"*, U.S. NEWS & WORLD REP., May 25, 1981, at 65.

charge for receiving their signal.

An alternate view of the piracy issue was espoused by the coordinator of motion picture control at the Brooklyn Center for the Performing Arts, who is also a member of the Society of Motion Picture and Television Engineers. "When corporations begin using the public airwaves for private gain while demanding that the public be forbidden access to them, *this* is piracy."⁶

The piracy problem is not found exclusively in satellite to earth station transmissions. It is also a problem for cable, CATV,⁷ subscription televisions (STV),⁸ and multi-point distribution service (MDS) operators. These other systems are distinguishable from and exclusive of the earth station applications.

"Cable television is the distribution of radio-frequency television signals to subscribers' television sets via cable or (most recently) by an optical fiber instead of over-the-air."⁹ Cable systems, which obtain programming from antennae, satellite, over-the-air television, and microwave transmissions, have the capability to provide dozens of channels to the viewer. The cable which relays the signal is buried underground or strung along utility poles. Since the signal is sent over long distances, amplifiers are necessary to boost the signal.¹⁰

STV is essentially an over-the-air station, usually broadcast over the UHF band, which scrambles its signal so that only those who pay can receive the station in an intelligible form. A decoder is installed to unscramble the signal for subscribing viewers.¹¹ The service is limited as it only provides one channel.

MDS is a common carrier which utilizes low power microwave signals to distribute information.¹² The service takes non-local programming it receives via satellite relay or locally received programming and distributes the signal to the service area.¹³

6. Letters, MOD. PHOTO., July 1981, at A3 (in Special Bonus Supplement-Video Today and Tomorrow).

7. See Comment, *Electronic Piracy: Can the Cable Television Industry Prevent Unauthorized Interception*, 13 ST. MARY'S L.J. 587 (1982).

8. See Comment, *Decoding Section 605 of the Federal Communications Act: A Cause of Action for Unauthorized Reception of Subscription Television*, 50 U. CIN. L. REV. 362 (1981).

9. Wheeler, *Cable Television: Where It's Been, Where It's Headed*, 56 FLA. B.J. 227, 229 (1982).

10. *Id.*

11. Bienstock, *Theft of Service of Over-the Air Pay TV: Are the Airwaves Free?*, 56 FLA. B.J. 240, 240 (1982).

12. Siddall, *Unauthorized Home Over-the-Air Reception of Entertainment Programs*, CONG. RESEARCH SERV. 16 (Jan. 5, 1982).

13. Bienstock, *supra* note 11 at 240.

That signal undergoes a frequency change to a microwave range that cannot be received on a regular television set without special equipment. The signal may or may not also be scrambled. That signal is then retransmitted from a centrally located microwave transmitter in a omnidirectional (radiating in all directions) line-of-sight path to the service area. The system operator then leases to the customer a special microwave antenna, a down converter (to reduce the signal frequency to that of a regular, unused television channel), and power supply (to power the entire system), for a monthly charge.¹⁴

Currently only two channels are permitted by the Federal Communications Commission (FCC) per city.¹⁵

Finally, Direct Broadcast Service (DBS) is the newest of the new media, but will not be operational until 1986.¹⁶ With a few exceptions, DBS will operate on the same basis as earth station systems. The signals will be beamed by high powered satellites¹⁷ allowing receivers to utilize small or mini earth stations. The system will send three to five channels¹⁸ which will most likely be scrambled. The service charge will be about eighteen dollars per month; installation and purchase will be approximately one hundred dollars.¹⁹ Since this service is not yet operational, it is difficult to determine how competitive it will be with the other services.

In late 1979 the FCC repealed the licensing requirement for receive-only satellite receivers.²⁰ This action spawned a new industry; new manufacturers produced equipment which had previously been limited to commercial quality and use. Entrepreneurs pounced on the sales aspect of earth stations.²¹ Since the FCC has repealed the licensing requirements, it has been reluctant to regulate the programmer-earth station user situation; "[t]he [c]ommission has indicated it will not get involved in the situation."²² It seems that the Commission recently has become involved. According to a newspaper story on back-yard antennas: "one legal aspect is clear: you cannot use your satellite dish to in-

14. *Id.*

15. *The Pack of Competitors Cable Must Keep at Bay*, BUS. WK., Nov. 1, 1982, at 108.

16. *Id.* at 109.

17. *Id.*

18. *Id.*

19. *Id.*

20. Regulation of Domestic Receive-only Satellite Earth Stations, 74 F.C.C.2d 205 (1979).

21. As evidence of the large number of new entrepreneurs, several publications, such as SAT GUIDE and PRIVATE CABLE, have emerged.

22. *A David-Goliath Threat to Cable*, BUS. WK., Aug. 16, 1982, at 106.

tercept signals for financial benefit. That is a violation of federal law, said John Theimer, engineer in charge of the FCC's Miami office."²³

There have been no cases dealing directly with the legality of receiving satellite transmissions in the home. There are a few theories on the reasons programmers have not brought legal action to prevent unauthorized reception. One is the proof problem. How can the programmer prove that the viewer was watching its restricted program? Another, and probably more important, is the programmers' fear of losing in court. The ramifications of unsuccessful litigation will not only allow all individuals to view the programming free of charge but, SMATV and cable franchises may also refuse to pay the programmers.

The purpose of this article is to analyze the controversies surrounding the ultimate questions:

1) Are owners of earth stations entitled to receive programming?

2) If they are, should they pay for it?

3) Must the programmers offer their services to earth station users who want to pay?

The analysis includes: the Federal Communications Act of 1934 to determine if satellite transmissions are broadcasting or common carrier services; the effect of copyright laws on earth station users; the effects of anti-trust laws on programmers; the right of programmers to refuse earth station users permission to view, even if they offer to pay; and the future ramifications of the legal trends regarding this situation.

II. BROADCASTING VS. COMMON CARRIER

A paramount issue is whether satellite transmissions are broadcasting or common carrier communications. This writer does not believe that the classification is material to the problem because no matter how the transmission is classified, additional problems arise.²⁴

A common carrier is defined in the Federal Communications Act of 1934 (the Act) as "a person engaged . . . for hire, in interstate or foreign communication by wire or radio."²⁵ Telephone companies and telegraph companies such as Western Union are

23. Creelman, *Take-off! Backyards Go Sky High*, Miami Herald, Oct. 24, 1982, (Neighbors Section, N. Miami Beach ed.), at 22, col. 4.

24. See *infra* sections III, IV & V for further discussion of these problems.

25. 47 U.S.C. § 153(h) (1982).

primary examples of common carriers. Common carriers are also said to be "a conduit, that is, the entity transmitting the communication for another."²⁶

At first glance it would seem that those who transmit their signals via satellite do not fit into the common carrier definition. A programmer does not transmit his product for another, like a telephone company. It transmits for the public at large, not as a conduit for another. Some have concluded that the programmers using satellites are common carriers²⁷ because their intent is not to have free public viewing, but only viewing by those granted permission by the programmer.

Section 202(a) of the Act "prohibits common carriers from making any 'unjust or unreasonable discrimination' in connection with its charges, facilities, services or other areas of its operation."²⁸ Assuming that satellite transmissions are a common carrier function, section 202(a) would be grossly violated by many of the premium channel programmers. The programmers are refusing service to many individuals and SMATV operators.²⁹

Broadcasting is defined in the Act as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."³⁰ Satellite transmissions are closer to the broadcasting definition than to that of the common carrier. The objective of a programmer is to have the public view its product. The satellite is the "relay" referred to in section 153(o) of the Act.

Broadcasting and common carrier services are easily distinguishable. Broadcasting is equated with entertainment for the public; common carrier services are equated with the transmission of private messages.³¹ The two transmissions are considered mutually exclusive. A system cannot be both a common carrier and a broadcaster according to the statutory definition.³²

Another factor in this problem is the applicability of section 605 of the Act entitled, "Unauthorized publication or use of communication."³³ The restrictions of this section do not apply to

26. Bienstock, *supra* note 11, at 241.

27. Siddall, *supra* note 12, at 34.

28. Frey, Cutter & Lipman, *Telecommunications Policy in the 1980's and Beyond*, 56 FLA. B.J. 219, 220 (1982) (quoting 47 U.S.C. § 202(a) (1982)).

29. See *infra* section V for further discussion of this issue.

30. 47 U.S.C. § 153(o) (1982).

31. Siddall, *supra* note 12, at 18.

32. *Id.* at 12.

33. Section 605 provides:

Except as authorized by chapter 119, title 18, no person receiving, assisting

transmissions for the general public. As previously stated, the programmers' objective is to reach as many viewers as possible. Some programmers however, expect compensation for service (such as The Movie Channel and Home Box Office) while some do not (the Christian Broadcasting Network).

MDS and STV transmissions are not meant for the general public. STV signals are scrambled illustrating that the programmers do not intend the transmission for the general public, but only for subscribers. Most MDS signals are scrambled and those that are not are private, point to point communications. Thus, there is an expectation of privacy with both MDS and STV signals. Satellite transmissions, which beam their signals over a broad area and do not scramble their signals, do not have as great an expectation of privacy.

Some argue that satellite transmissions are not intended for use by the "general public" as defined in section 605 and therefore, permission must be obtained to use the signals.³⁴ Others argue that the transmissions are "for the use of the general public" due to the wide range beam that emanates from the satellite.³⁵ Direction from

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 issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not 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 broadcast or transmitted by amateurs or others for the use of the general public, or which relates to ships in distress.

47 U.S.C. § 605 (1982).

34. See *Home Box Office, Inc. v. Advanced Consumer Technology, Movie Antenna, Inc.* 549 F. Supp. 14 (S.D.N.Y. 1981) (involving MDS transmissions).

35. See *Orth-O-Vision, Inc., v. Home Box Office, Inc.*, 474 F. Supp. 672 (S.D.N.Y.

the courts or Congress is needed to provide interpretation of section 605's intent. As one premium channel executive said, section 605 is "a shark with no teeth."³⁶

Another assertion that can be made is that an individual who receives transmissions does not, as described in section 605, "divulge or publish" the material. Nor does he "use" it for his own benefit and financial gain. Therefore, section 605's exception for general public transmissions is applicable. It is clear that section 605 does not protect SMATV operators. Its application does "divulge and publish"; the "use" is for a pecuniary gain. However, if the *general public* exception is applicable, then payment is not in order.

If it is determined that satellite transmissions do not fall under the exception to section 605, the problem of enforcement arises. The FCC has taken a hands-off attitude towards any enforcement. A private right of action by the programmer may be the only alternative. "The second circuit has specifically held . . . that a private cause of action exists. However, recent decisions of the Supreme Court indicate increased reluctance to imply private causes of action in a variety of contexts."³⁷

While examining this controversy one must keep in mind that traditionally, "it has generally been considered legal for one to personally utilize radio equipment to receive whatever signals one may hear upon the airwaves."³⁸ While this generality has been refined somewhat, it is currently the position taken by individual earth station users.

Unauthorized receiving is an evil which could destroy the entire pay-tv scheme. If one can receive the service without payment and the practice becomes widespread the programmer will be unable to receive a proper return and thus will go out of business. In theory, all transmissions that utilize the airwaves are susceptible to interception. But in reality, if no compensation is given to the programmer there will be no transmission because he will simply go out of business.

Perhaps the appropriate approach is to examine the intent of the transmitting party. The intent can determine if the transmis-

1979). *But see* National Subscription Television v. S & H TV, 644 F.2d 820 (9th Cir. 1981); Movie Systems, Inc. v. Heller, 710 F.2d 492 (8th Cir. 1983).

36. Douglas S. Dexter, Director of Special Markets for Warner Amex Satellite Entertainment Co., Remarks at the National Satellite Cable Association Conference (Jan. 25, 1983).

37. Home Box Office, Inc. v. Advanced Consumer Technology, 549 F. Supp. at 14.

38. Siddall, *supra* note 12, at ii.

sion should be classified as broadcasting under section 153(o) or as a common carrier service under section 202(a).³⁹ The judiciary can make this determination or the FCC should take a stand to end this controversy.

III. COPYRIGHTS

Another issue in this controversy is the infringement of copyrighted material. Some contend that both the individual and the SMATV users are infringing, while others argue that individuals are exempt from the copyright laws.⁴⁰

The individual earth station owner who receives satellite signals does so for his own use and there is no further transmission (unlike some SMATV applications). Therefore the Copyright Act is not violated. Section 106 of the Copyright Act sets forth the fundamental rights of copyright owners.⁴¹ Section 110(5), which sets out exemptions, must also be examined in conjunction with section 106.⁴²

Section 106 deals with the owner of copyright. The owner may authorize the display of audiovisual work for public viewing. An individual receiving a copyrighted work via his earth station is not considered to be within the public. On the contrary, it is a private

39. *Home Box Office, Inc. v. Advanced Consumer Technology*, 549 F. Supp. at 14; see also *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir.), cert. denied, 361 U.S. 813 (1958).

40. For a general background of the new (1976) Copyright Act and its effect on cable, see M. HAMBURG, *ALL ABOUT CABLE*, § 6.03 (rev. ed. 1981).

41. Section 106 provides in part:

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

.....

(5) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 106 (1982).

42. Section 110(5) provides in part:

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

.....

(5) communication of a transmission embodying the performance or display of a work by the public receiving apparatus of a kind commonly used in private homes, unless

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public.

17 U.S.C. § 110(5) (1982).

display within one's home. The legislative history of the section uses an example which is applicable: "[a] person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance."⁴³ The individual earth station owner acquires material (it is assumed the programmer has acquired consent from the copyright holder) and does not engage in renting. Section 110 and its legislative history indicates that an individual's viewing does not need authorization from the copyright holder.

Section 110(5) states that mere reception is not an infringement. Exception (B) would not affect individual receivers because they do not retransmit. Exception (A) however, may apply. This section appears to apply to an STV or scrambled picture transmission because special equipment is needed to receive the signal and a fee is paid to descramble the signal. This section could also be interpreted to apply to satellite transmissions that are viewed by customers paying for service. Currently, individual earth station users are not *charged directly* for viewing the transmissions, as the legislative history discusses.⁴⁴

From these two sections it can be inferred that an individual is not infringing on a copyright by mere receiving. However, section 110(5)(A) may prove to be a stumbling block in the future for premium channel reception if this issue ever reaches litigation.

SMATV system operators may be subject to copyright provisions; the application will determine if it falls under these provisions. The legislative history of section 110 specifically states that subsection (5) is not applicable to cable television systems. Section 111(f) defines a cable system as:

43. H.R. REP. NO. 1476, 94th Cong., 2d Sess. (1976); see 17 U.S.C. § 110 (1982).

44. The legislative history provides that:

[C]ause (5) is not to any extent a counterpart of the "for profit" limitation of the present statute. It applies to performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use.

The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed. In the vast majority of these cases no royalties are collected today, and the exemption should be made explicit in the statute. This clause has nothing to do with cable television systems and the exemptions would be denied in any case where the audience is charged directly to see or hear the transmission.

17 U.S.C. § 110 (1982) (citing H.R. REP. NO. 1476, 94th Cong., 2d Sess. (1976)).

A facility, located in any State, Territory, Trust Territory, or Possession, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service.⁴⁵

The legislative history further explains this definition.⁴⁶ Certain SMATV systems, such as those in apartment complexes, will fall within these guidelines.

By contrast, where condominium owners jointly own an earth station and no fees are charged thus no financial benefit occurs, a "cable system" may be considered not to exist. Some maintain that since the households are unrelated, the viewing is a public and not a private performance.⁴⁷ This writer contends that condominium or co-op ownership is a private performance. The owners own and maintain the equipment equally and there is not pecuniary interest involved. The system should be treated the same as an individual home system in which no further transmission occurs.

Even if the system is considered to be retransmitting, section 111(a)(4) appears to exempt any infringement.⁴⁸ The legislative history further explains the nonprofit exemption.⁴⁹ Since condo-

45. 17 U.S.C. § 111(f) (1982).

46. Cable television systems are commercial subscription services that pick up broadcasts of programs originated by others and retransmit them to paying subscribers. A typical system consists of a central antenna which receives and amplifies television signals and a network of cable through which the signals are transmitted to the receiving sets of individual subscribers. In addition to an installation charge, the subscribers pay a monthly charge for the basic service averaging about six dollars. A large number of these systems provide automated programming. A growing number of CATV systems also originate programs, such as movies and sports, and charge additional fees for this service (pay-cable).

17 U.S.C. § 111 (1982) (citing H.R. REP.No. 1476, 94th Cong., 2d Sess. (1976)).

47. Neitert, *Earth Stations: Are They Legal*, TWO-WAY RADIO DEALER, Apr. 1981, at 28, 29.

48. The statute provides an exemption for "[c]ertain secondary transmissions":

The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if -

(4) the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.

17 U.S.C. § 111 (1982).

49. Clause (4) would exempt the activities of secondary transmitters that operate on a completely nonprofit basis. The operations of nonprofit "translators"

miniums do not have to register as cable systems, section 111 appears applicable and the transmission is not an infringement. In the section of the House Report that deals with secondary transmissions to controlled groups, the last paragraph suggests an infringement on the premium channel's copyright.⁵⁰ This returns us to the question of whether the transmission is intended for use by the general public?

In light of the uncertain status of a condominium, its owners may want to register with the copyright office. The yearly fee would be minimal because it is a nonprofit operation. The advantage of registering is that future litigation by copyright holders may be avoided.⁵¹

SMATV systems which operate for a profit and provide a service based on a fee appear to fall within the Copyright Act's definition of a cable system.⁵² The operator is retransmitting to his customers, for a fee, which constitutes a public performance. The operator is entitled to a compulsory license and must pay into the royalty trust fund.⁵³

The cable television industry was granted a compulsory license

or "boosters," which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception, would be exempt if there is no "purpose of direct or indirect commercial advantage," and if there is no charge to the recipients "other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service." This exemption does not apply to a cable television system.

Notwithstanding the provisions of subsections (a) and (c), the secondary transmission to the public of a primary transmission embodying a performance or display is actionable as an act of infringement if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public. Examples of transmissions not intended for the general public are background music services such as MUZAK, closed circuit broadcast to theatres, pay television (STV) and pay cable.

17 U.S.C. § 111 (1982) (citing H.R. REP. NO. 1476, 94th Cong., 2d Sess. (1976)).

50. *Id.*

51. Note that a condominium or a co-op may not qualify as a cable system under the FCC definition:

A non-broadcast facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment, under common ownership and control, that distributes or is designed to distribute to subscribers the signals of one or more television broadcast stations, but such term shall not include (1) any such facility that serves fewer than 50 subscribers, or (2) any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management.

417 C.F.R. § 76.5(a) (1983).

52. 17 U.S.C. § 111 (1982).

53. SMATV, *supra* note 1, at 34; 17 U.S.C. § 111(c) (1982).

for distant broadcast signals, which eliminated the need for individual negotiations with broadcast stations for the right to retransmit their signals over the cable system, and substitutes a royalty fee arrangement based upon a percentage of gross receipts received by the cable system operator and administered by the Copyright Royalty Tribunal. . . . In exchange for this compulsory license grant, the cable system operator is required to carry local area television broadcast signals at no charge to the broadcaster.⁵⁴

It should be noted that the license only permits retransmitting by over-the-air stations.⁵⁵ This license does not entitle an SMATV operator the right to receive other programming on the satellite.

In summary, the private, individual owner of an earth station is probably not infringing on a copyright. Moreover, common ownership of equipment by multi-housing units, such as condominiums, are most likely not violating the act.⁵⁶ SMATV operators are, however, subject to the act; they must obtain a compulsory license and contribute to the royalty fund.

IV. ANTITRUST

A new and emerging aspect of this controversy is the claim, that programmers (such as HBO) and the cable companies are violating anti-trust regulations. At the forefront of this controversy are SMATV operators who are refused the right to offer the programmers' service. The programmers contend that when they have an exclusive contract with a cable company, they will not sell their service to an SMATV operator in the same area.⁵⁷

The laws applicable in the antitrust field are the Sherman Antitrust Act⁵⁸ and the Clayton Act.⁵⁹ Under the Sherman Act, possible violations include section 1, which forbids restraint of trade and section 2, dealing with monopolies. Other antitrust/anticompetition issues which may arise include price fixing, boycotting of SMATV operations and price discrimination.

When programmers refuse to have business dealings with SMATV operators under the guise of an exclusive contract with a

54. Lane, *On Patrol Against Video Pirates*, NAT'L L.J., Oct. 4, 1982, at 11, col. 2.

55. For example, superstations such as WTBS, Atlanta and WOR, New York are sent by satellite to cable operators but are also broadcast over the air.

56. See 47 C.F.R. § 76.5(a) (1983).

57. See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* (1977) for general background information regarding antitrust law.

58. 15 U.S.C. § 1 (1982).

59. 15 U.S.C. § 12 (1982).

cable franchisee, the SMATV dealer is precluded from conducting a business. This conduct by the programmer denies service to those individuals who do not have cable. "If a firm were to obtain or preserve monopoly power at one level of distribution by entering into agreements with its suppliers or customers not to deal with others, such agreements would violate [s]ection 1 and the consequent power would violate [s]ection 2."⁶⁰ This is precisely what is occurring in the satellite communications industry today. The cable franchisees secure exclusive contracts from the programmers and thus create a monopoly for themselves. This refusal by the programmers to do business with SMATV operators violates the Sherman Act.

Under the Clayton Act, various violations may be alleged. For example, section 2(b) prohibits any discrimination in service. The programmers are blatantly discriminating by refusing service to everyone except franchised cable companies.

Another factor which needs to be brought to light is the premise of vertical ownership arrangements which may frustrate the antitrust laws. "A vertical arrangement involves an attempt by a seller—usually of a unique or patented product or service—to impose price or other restraints upon buyers."⁶¹ Some sectors of the industry are vertically integrated. For example, Warner Brothers, a motion picture producer, owns an interest in a programmer, Nickelodeon, and also controls cable companies (120 franchises).⁶² Although these arrangements are not illegal per se,⁶³ they tend to give the appearance of monopolistic activity because a corporation controls everything from start to finish.

Litigation is emerging that directly involves the antitrust issue. Two Arizona cases have been consolidated. The first case involved an SMATV operator (Mehl Cable Systems) who has a cable franchise in another part of the state. Mehl alleged that he was denied service for his SMATV systems due to pressure from the area cable operators. The suit is against Showtime, Storer Broadcasting, Storer Cable, and Warner Amex. Mehl's position is that Showtime denied him service in areas where cable franchises exist. The decision by Showtime, a programmer, not to sell was apparently the result of pressure by Storer, a cable company.⁶⁴

60. L. SULLIVAN, *supra* note 57, at 98.

61. Botein, *Jurisdictional and Antitrust Considerations in the Regulation of the New Communications Technologies*, 25 N.Y.L. SCH. L. REV. 863, 888 (1980).

62. M. HAMBURG, *supra* note 40, at § 5.06.

63. Botein, *supra* note 61, at 888.

64. Society for Private and Commercial Earth Stations (SPACE) Newsletter 5 (June

The second case was brought by the Arizona Attorney General. The complaint alleges that the programmers and cable companies are monopolizing the cable TV market. It further states that the programmers and cable companies are refusing SMATV operators access to the premium movie channels. People in areas that are not served by a cable company can receive a service via an SMATV system. The Attorney General is contending that the defendants' activities are preventing those without cable from access to these services. The action was brought under the Sherman Act (claiming violations of sections 1 and 2), the Arizona Antitrust Act, and the Clayton Act.⁶⁵ The court refused to grant a preliminary injunction against the defendants.⁶⁶

In Illinois, Warner Amex gave Leader Communications, an SMATV operator, authorization to show The Movie Channel, Nickelodeon and Music Television (MTV), all of which were owned by Warner Amex. Later, Warner Amex refused to grant permission for the use of these channels. Leader claims \$250,000 damages, \$750,000 treble damages plus attorneys' fees and court costs.⁶⁷

If the plaintiffs in these cases are successful, it could be a turning point in the SMATV-programmer controversy. If successful, programmers may be forced to sell their product to SMATV and individual earth station owners.

V. "CATCH 22": PROGRAMMERS REFUSE PAYMENT OF VIEWERS WILLING TO PAY

Many SMATV operators and individual earth station owners realize one should not get something for nothing. So, some individuals have attempted to compensate the programmers. Their remuneration attempts have been rejected.⁶⁸ The programmers claim that they have exclusive contracts with cable systems and any interference will harm their business relationships.⁶⁹ Some programmers, such as HBO, also complain that they are not set up for individual or SMATV systems; their accounting departments can only accommodate cable and pay-tv distribution. They contend the

1982).

65. *Id.* at 5, 8.

66. SPACE Newsletter 8 (July 1982).

67. SPACE, *supra* note 64, at 5.

68. Taylor, *supra* note 5, at 65.

69. A David and Goliath Threat to Cable, *supra* note 22.

bookkeeping would be too burdensome.⁷⁰

Despite their refusal to accept payment the programmers complain about their losses. The largest premium movie service estimates its losses at \$3.2 million a year due to unauthorized interception of their program.⁷¹

Many SMATV operators and viewers are willing to pay. They have unfortunately been denied service. Many feel this is unjust. Congressman Charles Rose of North Carolina testified during hearings on the piracy issue that "if a person buys an earth station and wants to pay for a signal, we [the Congress] ought to be flexible enough to allow that."⁷²

Receivers of satellite signals may claim a first amendment right of access to satellite signals. Residents in areas with no other alternative means to such service have a viable argument. They contend they have a constitutional right of access mandated by the first amendment and that currently they are being deprived of this right.⁷³ A leading organization representing individual earth station users, the Society for Private and Commercial Earth Stations (SPACE), encourages its members to ask programmers, such as HBO, for permission to receive their signals and to pay subscription fees.⁷⁴

The earth station owner is in a "Catch 22" situation. Although the viewers are willing to pay and the programmers contend they are losing revenues due to earth stations, programmers refuse the viewers' money. Where does this leave the earth station user? Some have taken the funds refused by programmers and deposited them in escrow accounts to use if the programmers decide to bring legal action or demand payment.**

70. Taylor, *supra* note 5, at 65.

71. Landro, *supra* note 3, at 10, col. 3.

72. Hill Swashbucklers TV Piracy Issue, BROADCASTING Nov. 22, 1982 at 48.

73. Siddall, *supra* note 12, at 33.

74. Landro, *supra* note 3, at 10, col. 3.

** At the time this article went to press, Congress had passed the Cable Deregulation Bill, H.R. 4103, 98th Cong., 2d Sess. (1984); S. 66, 98th Cong., 2d Sess. (1984). President Reagan signed the Act of Oct. 30, 1984, Pub. L. No. 98-549, but at this time the government publication is not available.

Both bills prohibit interception of any cable service signal without express authorization. Neither bill however, provides for direct payment by earth station owners to programmers. Whether Public Law 98-549 deals directly with the private earth station owners' interception of signals and payment to programmers or the programmers anticipate such a broad construction by the courts to require payment by earth station owners remains to be seen.

VI. THE FUTURE TRENDS

There are several options and alternatives available to deal with the unauthorized interception of satellite signals and the ownership of individual earth stations. Examination of some of these options and alternatives and examination of local action being initiated concerning earth stations, uncovers some present possible solutions.

One possible option is to outlaw earth stations, and only issue permits for cable companies and businesses utilizing a satellite service. This would stifle unauthorized viewing. There are several problems with this approach. A first amendment issue arises because the government cannot restrict ownership when some programmers freely give permission to view while others sell their programming to earth station owners.⁷⁵ Prohibition is neither a viable alternative nor one seriously considered by any of the parties involved in the controversy.

Another possible option, for those programmers who object to earth stations which receive their signal without authorization, is to have a system of technical control (scrambling of the signal). HBO has been promising, or threatening, to scramble for years.⁷⁶ The drawbacks to this option are the cost and possibility that illegal decoders will be used. HBO estimates it will cost between \$8 and \$10 million to put a scrambling system in place.⁷⁷ The Movie Channel estimates the cost to be between \$13 and \$15 million for video scrambling and \$1 to \$2 million for audio scrambling.⁷⁸ Even if a system is put into effect, there is always a strong possibility that someone will design a decoder and sell it on the "black market".⁷⁹

A point-of-sale fee, similar to the plan proposed for video cassetts, is a possible alternative and solution to the problem. The manufacturers of earth station equipment could collect (as a surcharge) a given amount upon each sale. The funds would then be divided among the programmers according to a prearranged formula.

Another alternative is simply for programmers to accept annual fees from earth station owners. These fees would be compara-

75. Siddall, *supra* note 12, at 34.

76. Landro, *supra* note 3, at 10, col. 2.

77. Boyle, *HBO Will Scramble Signal In August With M/A-COM Units*, *Multichannel News*, Jan. 24, 1983, at 1, col. 4.

78. Statement of Douglas S. Dexter, *supra* note 36.

79. This is essentially what is occurring with STV and MDS.

ble to those programmers charge a cable company. An attorney of an earth station trade group agrees with this alternative. The attorney stated that buyers of earth stations should pay annual royalty fees.⁸⁰ Unfortunately, the "Catch 22" problem prevails.

Earth station ownership is becoming more commonplace with deregulation and affordable prices. Therefore, local municipalities have found it necessary to do some regulating of their own under the guise of zoning ordinances. In Snellville, Georgia, a city ordinance which prohibited earth stations from front yards was upheld by the Georgia Supreme Court.⁸¹ Despite a first amendment argument by the appellant-owner, the court sustained the zoning regulation. The court held that the state may regulate the non-communicative aspects of earth stations and that the violations to the owners' first amendment rights was minimal. Furthermore, many municipalities concerned with the physical attributes of earth stations are limiting their manner of installation and location through ordinances.⁸²

A possible solution which would satisfy all sides may be to establish a nonprofit organization which is charged with composing a payment plan for SMATV and individual earth station owners. The funds collected could be turned over to the programmers and thus not burden their accounting departments. This organization should be controlled by a board of directors consisting perhaps of one representative from each of the following groups: the FCC, the programmers, the manufacturers of the equipment, SMATV operators and individual owners of earth stations. If the parties could not voluntarily agree to this arrangement, then legislative action could be taken to establish such an organization.

The trend seems to be toward establishing some type of happy medium rather than the present extreme views. Congress has been slow, as usual, in proposing a solution. Many programmers do not want to suffer the added expense of scrambling nor do they desire to expand their accounts receivable departments. The earth station owners want to view and usually have no objection to paying. The parties would be wise to create a solution rather than have Congress create a more complicated problem.

Although the problems presented may seem voluminous and

80. Tynan, *Are You a Signal Napper?*, MOD. PHOTO., Feb. 1981, at A2, A16 (in Video Today and Tomorrow).

81. *Gouge v. City of Snellville*, 287 S.E.2d 539 (Ga. 1982).

82. See, e.g., *Satellite Dish Ordinance*, The Voice of the Hallandale [Fla.] United Citizens, Inc., Newsletter No. 9 (Sept. 1982).

insurmountable, there is some light at the end of the tunnel. SMATV operators now have quality programming available through a cooperative arrangement. The National Satellite Cable Association (NSCA) is a trade organization of SMATV owners, operators and equipment suppliers. The group has established a co-op which acts as a purchasing agent to secure programming for SMATV systems. At the group's annual meeting in Dallas, during January, 1983, Oak Media Development Corporation and Telstar Corporation announced the first available premium channel programming to SMATV operators. The service, ON-TV, is currently operating STV stations across the country. The signal is scrambled to eliminate unauthorized reception. The co-op, known as the National Satellite Programming Cooperative, has program arrangements with over twenty-five different programmers. The co-op functions as a middleman between the operator and programmer. It collects and accounts for the subscription fees from operators and then pays the various programmers.

This new avenue seems to be the antidote for an industry which may have become deathly sick in its infancy. The SMATV industry is still a new and emerging industry and with the programming now available it can compete against traditional cable. This organization and its co-op are relatively new. The system is not a sure success; it will be plagued with many problems. SMATV operators may be reluctant to join and subscribe, and other premium programmers may decide to compete and enter the SMATV market.

VII. CONCLUSION

The industry discussed is new; the technology is changing and the problems will grow. As outlined in this article, the problems are multifaceted and are mostly due to the lack of direction by Congress, the courts, and the FCC. Although the SMATV operator appears to have a solution to programming, the individual earth station owner is still left out in the cold.

Many have preached for years that the Communications Act should be revamped and rewritten in order to cure all the problems. This, however, is still but a dream; one day it may come true. For now, the FCC, Congress, the courts and the telecommunications industry must work within the present guidelines in order to find solutions.