

8-1-1985

North Carolina's Theft of Cable Television Service Statute: Prospects of a Brighter Future for the Cable Television Industry

Walter D. Fisher Jr.

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Walter D. Fisher Jr., *North Carolina's Theft of Cable Television Service Statute: Prospects of a Brighter Future for the Cable Television Industry*, 63 N.C. L. REV. 1296 (1985).Available at: <http://scholarship.law.unc.edu/nclr/vol63/iss6/25>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

North Carolina's Theft of Cable Television Service Statute: Prospects of a Brighter Future for the Cable Television Industry

The past few decades have witnessed what appropriately may be termed a revolution in the telecommunications industry in the United States. The advent of new technologies and changes in the tastes of the consuming public have resulted in an unprecedented demand for the wares of the telecommunications industry. Epitomizing this phenomenon is the cable television industry,¹ which has blossomed from a status of virtual nonexistence in the early 1950s to a multibillion dollar contemporary enterprise whose services are used by a rapidly increasing portion of the United States citizenry.²

Cable television's commercial success story has been tainted, however, by an increase in the theft of cable services without payment of a fee to the cable companies.³ The incidence of cable service theft transcends the basic problem of individual homeowners surreptitiously attaching their television sets to the cables; rather, an entire industry has sprouted that produces and markets devices designed to enable a viewer to receive all of the premium programming of a cable company without paying for it.⁴ Cable companies, unlike traditional broadcasters,⁵ are supported primarily by the fees paid by subscribing customers in return for cable services.⁶ It has been estimated, however, that "pirates" are "stealing . . . 900 million dollars a year from cable and pay-TV providers."⁷

1. For a description of the cable television industry, see *infra* notes 15-20 and accompanying text.

2. See, e.g., Wheeler, *Cable Television: Where It's Been, Where It's Headed*, 56 FLA. B.J. 228, 228-29 (1982) ("Today, approximately 4,600 [cable] systems serve 23 million TV homes, and the number of cable subscribers is growing at a rate of more than 250,000 per month. It is expected that by 1985 the cable industry will have wired more than 40 percent of American homes."); Comment, *Pay Television Legal Protections Against Interception: Backyard Earth Stations Amplify Current Imperfections*, 87 DICK. L. REV. 95, 99 n.22 (1982) (citing figures indicating that in 1980 44% of all American television households had access to cable and of that 44%, 50% of the homes subscribed to cable).

3. See, e.g., 2 C. FERRIS, F. LLOYD & T. CASEY, *CABLE TELEVISION LAW* § 26.04 (1984); 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, 362 (1981) [hereinafter cited as Comment, *Decoding Section 605*]; Comment, *Pay Television Piracy: Does Section 605 of the Federal Communications Act of 1934 Prohibit Signal Piracy—And Should It?*, 10 WM. MITCHELL L. REV. 531, 531 (1984) [hereinafter cited as Comment, *Pay Television Piracy*].

4. See, e.g., Comment, *Pay Television and Section 605 of the Communications Act of 1934: A Need for Congressional Action*, 38 WASH. & LEE L. REV. 1249, 1249-50 (1981) [hereinafter cited as Comment, *Pay Television and Section 605*]; Comment, *Pay Television Piracy*, *supra* note 3, at 531.

Without a decoder, only basic cable service can be received. See *infra* notes 18-20 and accompanying text.

5. See Comment, *Pay Television and Section 605*, *supra* note 4, at 1249-50.

6. See, e.g., Comment, *Decoding Section 605*, *supra* note 3, at 362; Comment, *Pay Television and Section 605*, *supra* note 4, at 1249-50.

7. 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 26.04.

Considering the long-term effects on the willingness of currently paying customers to continue paying, the problem of cable piracy is even greater than the magnitude of immediate revenue losses indicates. Knowledge that many of their friends and relatives are successfully receiving services and avoiding payment for them will engender apathy and an incentive not to pay in those who ordinarily would pay the cable fees.

Also, theft of cable service indirectly results in a loss of revenues to state and local governments

The North Carolina General Assembly responded to the behests of the cable industry and in 1978 enacted a statute devoted solely to combatting cable service theft.⁸ The 1978 statute was completely rewritten by the general assembly in 1984.⁹ The new statute strengthens the criminal penalties against those who obtain cable services illegally and those who sell or distribute devices designed to assist purchasers in such illegal activity.¹⁰ In addition, cable companies now are permitted to instigate civil actions for injunctive and monetary relief against persons who previously were subject only to criminal prosecution under the statute.¹¹

This Note analyzes North Carolina's new theft of cable service statute by comparing and contrasting it with its predecessor and with similar statutes in other states, by addressing its potential constitutional infirmities, by assessing some of its limitations and inadequacies, and by exploring the possibility of overlapping federal causes of action. The Note also discusses whether federal statutes concerning theft of cable television service preempt North Carolina's statute.

It is imperative for analytical purposes to understand the primary distinctions between the cable television industry and other similar industries that are plagued by many of the same problems. Currently, four basic methods exist for distributing pay television.¹² Three of the systems use the airwaves to deliver their signals to the home. With two of the over-the-air systems, multipoint distribution service (MDS) and direct broadcast satellites (DBS), the coded signal is received by an antenna and unscrambled by a decoding device located between the antenna and the television.¹³ The other over-the-air pay TV system, subscription television (STV), transmits its scrambled signals using the facilities of

because state and local taxes and fees levied against cable companies generally are based on the gross receipts of the cable companies. These revenues are reduced to the extent that thieves would become paying customers if they were prevented from stealing cable service. See *Ciminelli v. Cablevision*, 583 F. Supp. 144, 151 (E.D.N.Y. 1984).

8. See Act of June 16, 1978, ch. 1185, 1977 N.C. Sess. Laws 86 (codified at N.C. GEN. STAT. § 14-118.5 (1981)). The 1978 statute superseded, for purposes of cable television, a theft of service statute applicable to a variety of telecommunications services. See Act of May 22, 1973, ch. 648, 1973 N.C. Sess. Laws 962 (codified at N.C. GEN. STAT. § 14-155 (Supp. 1977)). Mr. John Jerose, a representative of the cable television industry, testified before a House committee regarding the impending threat to the industry posed by service thieves and the inadequacy of the 1983 Act in dealing with the problem. See *Minutes, North Carolina House Committee on Judiciary II*, at 1 (June 8, 1978).

A number of states have passed legislation during the past few years in an effort to deter the activity of cable service thieves. See, e.g., *Ciminelli v. Cablevision*, 583 F. Supp. 144, 158 (E.D.N.Y. 1984) (providing citations for state theft of cable service statutes); 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.03[1] (noting that approximately 25 states have cable theft statutes).

9. See Act of July 5, 1984, ch. 1088, 1984 N.C. Sess. Laws 264 (codified at N.C. GEN. STAT. § 14-118.5 (Supp. 1984)).

10. See N.C. GEN. STAT. § 14-118.5(a), (b) (Supp. 1984); *infra* notes 30-35 and accompanying text.

11. See N.C. GEN. STAT. § 14-118.5(c) (Supp. 1984); *infra* notes 41-53 and accompanying text.

12. See Comment, *supra* note 2, at 98. The four pay television systems are multipoint distribution service (MDS), direct broadcast satellites (DBS), subscription television (STV), and cable television. *Id.*

13. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶¶ 19.02, 20.02; Comment, *supra* note 2, at 101; Comment, *Subscription Television Decoders: Can California Prohibit Their Manufac-*

commercial television stations, and thus only a special decoder is required for interception.¹⁴ The final pay television delivery system, cable television,¹⁵ is transmitted to the home through wires or coaxial cables.¹⁶ The primary subject

ture and Sale?, 22 SANTA CLARA L. REV. 839, 843 (1982) [hereinafter cited as Comment, *Subscription Television*].

MDS signals are sent from the MDS operator to a satellite which transmits the signals to a distributor. A microwave transmitter at the distributor's facilities sends the signals to the homes of individual subscribers. The MDS signal is generally only intelligible on a conventional television set if the viewer has a special "directive" antenna to intercept the signal and a decoder to decipher and transform it. See Comment, *supra* note 2, at 100; Comment, *Subscription Television*, *supra*, at 843 (special antenna required because MDS signals travel outside the spectrum of the standard television broadcast signal).

The FCC recently approved a multiple channel capacity for MDS systems, but MDS systems are still much more limited than cable television systems in channel capacity. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, §§ 19.01, 19.09. As a result of its multiple channel capacity, comparable reception costs, and lower capital investment requirements, MDS should compete well with the other pay television delivery systems. See *id.* § 19.09.

DBS is the newest and least developed pay television system. See Comment, *supra* note 2, at 101; Comment, *Subscription Television*, *supra*, at 843. The DBS system is predicated on a satellite network concept. "[T]he [DBS] system will transmit from four orbiting satellites, one serving each time zone The satellite signal will be picked up by a dish-shaped antenna . . . [that] must be properly aligned and focused in the direction of a particular satellite." *Id.* One of the small antennas must be located at each subscriber's home. See Comment, *supra* note 2, at 101. It has been estimated that the DBS antenna will be mass-produced and sold for approximately \$200, putting it within the financial reach of private homeowners. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 20.02 n.4.

The prospects for commercial success for DBS are good. DBS has multichannel capacity, see 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 20.02, and it is superior to the other pay television technologies because of its more concentrated signal, which results in clearer reception. See Comment, *supra* note 2, at 101.

14. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 18.02.

STV is the only pay TV service that operates in the "standard broadcast frequency spectrum." Comment, *Subscription Television*, *supra* note 13, at 839. "The [STV] signals are receivable on standard television sets equipped for ultra high frequencies (UHF), but are encoded so that only subscribers whose televisions are equipped with decoding devices receive a comprehensible message." Comment, *Decoding Section 605*, *supra* note 3, at 362. The STV companies rent the decoder devices to paying customers. See Comment, *supra* note 2, at 101. STV systems do not use satellites. *Id.*

STV is at a competitive disadvantage because it is limited to a single channel capacity of pay programming, and consequently STV's commercial success has begun to wane in recent years when contrasted with the other pay TV technologies. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 18.05 (decline of STV attributed primarily to multichannel capabilities of competitors).

15. See Comment, *Subscription Television*, *supra* note 13, at 841-44.

16. Every cable television system has one or more antennas located on high ground to pick up signals to be sent to the "head-end" for processing. See Wheeler, *supra* note 2, at 229. One antenna is used "to receive local over the air broadcast signals. Other antennas pick up distant television station or specialized cable network signals transmitted from microwave relay stations or communications satellites." 1 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 5.02. The "head-end" is a processing center that receives the signals from the antenna, amplifies them for "maximum strength and clarity," and then converts them into cable television frequencies for transmission over the cable system. See, e.g., *id.*; Donaldson, *Minnesota's Approach to the Regulation of Cable Television*, 10 WM. MITCHELL L. REV. 413, 414 n.4 (1984).

A network of cables connects each receiver to the "head-end" or source of the signal. A "trunk" line conducts the signals from the head-end through major streets or thoroughfares. Those signals then travel through smaller "feeder" lines into individual homes. Ultimately, each subscriber has a separate line to the cable.

Stern, *The Evolution of Cable Television Regulation: A Proposal for the Future*, 21 URB. L. ANN. 179, 181-83 (1981); see also 1 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, §§ 5.02-5.03 (providing an excellent description of the cable television system and a synopsis of the historical development of cable television); Donaldson, *supra*, at 414 n.4 (discussing the components of a cable television system).

of this Note is cable television.¹⁷

All cable television subscribers pay a minimum periodic fee which entitles them to receive basic service.¹⁸ In addition, most cable television operators offer optional channels and premium services for an additional fee; in return for payment of the fee, subscribers receive one or more mechanical devices that enable reception of the additional broadcasts.¹⁹ Theft of cable television service may be theft of basic service, theft of premium service, or both.²⁰

While the terminology and designations employed above are the ones most commonly used in discussing the pay television industry, some commentators use the phrase "cable television" generically to refer collectively to all the pay television technologies.²¹ For purposes of analyzing the North Carolina statute, it is important to ascertain the meaning attributed to "cable television system" by the general assembly. Although the 1984 theft of cable service statute does not expressly define "cable television system," a complete definition is found in North Carolina General Statutes section 160A-319.

"[C]able television system" means any system or facility that, by means of a master antenna and wires or cables, or by wires or cables alone, receives, amplifies, modifies, transmits, or distributes any television, radio, or electronic signal, audio or video or both, to subscribing

17. In its early years, cable television was referred to as community antenna television (CATV) because of its initial development to provide television service to small communities that were unable to receive ordinary broadcast signals. See, e.g., Comment, *Pay Television: The Pendulum Swings Toward Deregulation*, 18 WASHBURN L.J. 86, 86 n.1 (1978).

18. See *Ciminelli v. Cablevision*, 583 F. Supp. 144, 148 (E.D.N.Y. 1984).

"[C]able companies offer, as a minimum level of service, what is referred to as basic service. While the content of basic service varies from one cable company to another, it generally consists of local broadcast television signals, and local government and public access programming." *Id.*

19. See *id.*; Comment, *supra* note 2, at 99-100; Comment, *supra* note 17, at 86 n.1.

To receive the premium cable services, viewers usually must connect a converter and a decoder to their television sets. A converter increases the channel capacity of the television set, and a decoder unscrambles the premium service signals so that they will be intelligible. Cable companies provide these devices to paying subscribers. See *Ciminelli v. Cablevision*, 583 F. Supp. 144, 148 (E.D.N.Y. 1984); *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376, 378 (N.D. Ohio 1983); Comment, *supra* note 17, at 86 n.1. "These pay services offer programs and features not otherwise available to television viewers, such as first-run movies, special entertainment programs, boxing and other programs." *Ciminelli v. Cablevision*, 583 F. Supp. 144, 148 (E.D.N.Y. 1984).

20. North Carolina's theft of cable service statute is broad enough to encompass both types of theft. See N.C. GEN. STAT. § 14-118.5(a), (b) (Supp. 1984).

Theft of basic service occurs when a homeowner attaches a cable from his home to the system's trunk line or to the feeder line of a neighbor or when a homeowner who at some time in the past has received cable service and has a cable attached to his home that was installed by the cable company reconnects his television set to the cable television wire. Premium service is stolen by procuring "black-market" converters and decoders to attach to the cable wire inside the home. For a discussion of the various methods of stealing cable television service, see H.R. REP. NO. 934, 98th Cong., 2d Sess. 83 (1984), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4655, 4720; 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, § 26.01; Comment, *Electronic Piracy: Can the Cable Television Industry Prevent Unauthorized Interception?*, 13 ST. MARY'S L.J. 587, 592 (1982).

21. See Comment, *supra* note 20, at 587 n.1. ("[C]able television is any television service that is provided for a fee and interception of that service without compensation deprives the originator of a source of income."). One commentator referred to STV as "cable television" but acknowledged that this usage of the term was "actually a misnomer because STV is devoid of cable in its carriage of the television signal." Note, *National Subscription Television v. S & H TV: The Problem of Unauthorized Interception of Subscription Television—Are the Legal Airwaves Unscrambled?*, 9 PEPERDINE L. REV. 641, 641 n. (1981).

members of the public for compensation.²²

The statutory requirement that "wires or cables" be an integral part of the system automatically excludes the three over-the-air methods²³ for distributing pay television signals. There being no indication in the theft of cable service statute that a different definition is to apply, this Note will presume that the narrow, traditional definition of "cable television" expresses the intent of the general assembly and, therefore, that the theft statute does not apply to any over-the-air pay television signals.²⁴ This analysis is implicitly supported by a provision in the new statute that states: "The receipt, decoding or converting of a signal from the air by the use of a satellite dish or antenna shall not constitute a violation of this section."²⁵

North Carolina's 1984 amendment of its theft of cable service law is a total redraft of the prior statute.²⁶ In addition to strengthening the criminal sanctions against violators, it creates a civil cause of action against cable service thieves. The statute, codified as section 14-118.5 of the North Carolina General Statutes, defines and prohibits two general categories of conduct that contribute to the theft of cable service. First, the statute prohibits unauthorized connections to the cables or other equipment of a cable television system for the purpose of receiving cable service.²⁷ This basic provision is in all statutes that specifically prohibit cable service theft because the conduct prohibited is the actual gaining of unauthorized access to cable service. A second and extremely important pro-

22. N.C. GEN. STAT. § 160A-319 (1982). Section 160A-319 grants authority to municipalities to award franchises to cable companies for operation within the city.

Even though the definition of cable television system given in § 160A-319 is preceded by the language "[f]or the purposes of this section," because no definition was provided in either the original or the amended version of the theft of cable service statute, it is reasonable to infer that the general assembly intended for the definition in § 160A-319 to apply.

23. See *supra* notes 13-14 and accompanying text.

24. This definition is compatible with the preceding textual discussion of cable television. See *supra* notes 16-20 and accompanying text. For a discussion of whether North Carolina's theft of cable service statute should be extended to cover other types of pay television systems, see *infra* notes 80-84 & 128-37 and accompanying text.

25. N.C. GEN. STAT. § 14-118.5(f) (Supp. 1984). Cable companies frequently purchase premium viewing materials that are conveyed to the cable company "head-ends" in the form of over-the-air transmissions for processing to be sent to the cable television subscribers over the cable system. See, e.g., *Cablevision v. Annasonic Elec. Supply*, No. 83-5159 (E.D.N.Y. Feb. 10, 1984) (relevant part included as appendix in *Ciminelli v. Cablevision (Ciminelli II)*, 583 F. Supp. 158, 163 (E.D.N.Y. 1984)); *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376, 378-79 (N.D. Ohio 1983); Comment, *supra* note 2, at 99-100. Given this common purchasing arrangement, § 14-118.5(f) apparently was included to indicate unambiguously that the new statute does not cover all signal transmissions of proprietary interest to cable companies but rather only actual cable transmissions.

26. Compare N.C. GEN. STAT. § 14-118.5 (1981) (earlier statute) with N.C. GEN. STAT. § 14-118.5 (Supp. 1984) (amendment).

27. See N.C. GEN. STAT. § 14-118.5(a) (Supp. 1984). The statute states:

Any person . . . who . . . knowingly and willfully attaches or maintains an electronic, mechanical or other connection to any cable, wire, decoder, converter, device or equipment of a cable television system or removes, tampers with, modifies or alters any cable, wire, decoder, converter, device or equipment of a cable television system for the purpose of intercepting or receiving any programming or service transmitted by such cable television system which person . . . is not authorized by the cable television system to receive, is guilty of [violating this statute].

Id.

hibition in section 14-118.5 makes illegal the act of "knowingly and willfully, without the authorization of a cable television system, distribut[ing], sell[ing], attempt[ing] to sell or possess[ing] for sale in North Carolina any converter, decoder, device, or kit, that is designed to decode or descramble any encoded or scrambled signal transmitted by [a] cable television system. . . ." ²⁸ This type of provision is in many state theft of cable service statutes. ²⁹

The 1984 amendment to section 14-118.5 provides for somewhat harsher criminal sanctions than did the earlier version. ³⁰ A person convicted of violating the 1978 statute was guilty of a misdemeanor and could be compelled to pay a fine of up to \$300, to serve a jail sentence of up to sixty days, or both. ³¹ The amended version of the statute provides different penalties for the two different violations. ³² If a person illegally attaches to or tampers with the cable or equipment of a cable company, then that person has committed a misdemeanor and may be fined up to \$500, placed in jail for up to thirty days, or both. ³³ On the other hand, if the defendant is convicted of selling or possessing for sale any of the enumerated devices, the maximum imprisonment increases to six months. ³⁴ Even though the criminal penalties permitted by the 1984 amendment strengthen the prior law, North Carolina's criminal penalties are still relatively mild compared to those allowed in some other states. ³⁵

The new statute, when contrasted with its predecessor, is unabashedly sympathetic to the plight of North Carolina cable companies in their battle against those who receive cable service without paying for it. ³⁶ The inclusion of a provision against the sale of decoding devices is quite significant for purposes of enforcing the policy behind the statute because as a practical matter it is much simpler to detect the public marketing of devices than it is to detect their illegal use in the home. ³⁷ Also, proscribing the activity of the sellers of such devices

28. *Id.* § 14-118.5(b). For a brief discussion regarding the importance of such devices, see *supra* note 19 and accompanying text.

29. See, e.g., CAL. PENAL CODE § 593d(b) (West Supp. 1984); GA. CODE ANN. § 46-5-3 (1981); Act of Sept. 26, 1980, art. 1, § 23, ILL. ANN. STAT. ch. 38, § 16-10(a)(4) (Smith-Hurd Supp. 1984-85); OKLA. STAT. ANN. tit. 21, § 1737(A)(4) (West Supp. 1984-85); R.I. GEN. LAWS § 11-35-24 (1981).

30. See N.C. GEN. STAT. § 14-118.5(a), (b) (Supp. 1984).

31. See *id.* § 14-118.5(d) (1981).

32. See *id.* § 14-118.5(a), (b) (Supp. 1984).

33. *Id.* § 14-118.5(a).

34. *Id.* § 14-118.5(b). See *infra* notes 37-38 and accompanying text for the likely rationale behind imposing harsher sanctions on this type of conduct.

35. See, e.g., CAL. PENAL CODE § 593d (West Supp. 1984) (\$1,000 or 90 days in jail or both for unauthorized interception, and \$10,000 or jail term or both for selling devices); OKLA. STAT. ANN. tit. 21, § 1737(A) (West Supp. 1984-85) (\$1,000 or six months in jail or both).

36. As one would expect, the indications are that the cable industry has lobbied for protection from service thieves. See *supra* note 8.

37. See *State v. Scott*, 8 Ohio App. 3d 1, 6, 455 N.E.2d 1363, 1369 (1983). Commenting on the sufficiency of the evidence against the private homeowner defendant, the court said:

[T]he evidence . . . tended to prove mere possession of the [converter] device, not actual acquisition by the appellant of the cable television service. The evidence of possession consisted of . . . observations of the converter unit on the appellant's television set and appellant's admission of possession and that the unit was connected to his television set [N]o evidence [was] presented from which a jury could reasonably infer that appellant actually acquired the cable television service.

facilitates enforcement; an action against a single seller attacks the problem earlier and at its root.³⁸

Regardless of how extreme the threatened punishment, however, without aggressive enforcement by law enforcement officials, the punishment factor becomes illusory and the deterrent effect is diluted. It has been suggested that theft of cable services is considered a low priority crime by law enforcement authorities.³⁹ Considering the vast number of urgent, life-threatening crimes that occur, the limited resources of most law enforcement agencies, and the difficulty of detecting basic cable service theft,⁴⁰ this conclusion is not surprising.

Unquestionably, therefore, the most significant feature of the amended stat-

Id.; see also *infra* note 40 (discussing detection methods); 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.04 (discussing methods employed by cable companies to discover unauthorized recipients of cable services).

Some of the electronic surveillance techniques now used by pay TV distributors to detect unauthorized interception devices in homes raise intriguing invasion of privacy questions. In *Movie Sys., Inc. v. Heller*, 710 F.2d 492 (8th Cir. 1983), an MDS distributor used electronic surveillance to discover that an individual was using a microwave antenna and a special converter to intercept MDS signals illegally. When sued by the MDS company, Heller counterclaimed, arguing that plaintiff's use of electronic surveillance was a violation of Heller's fourth and fourteenth amendment privacy rights. In rejecting defendant's privacy argument, the court said, "Heller's constitutional claim is without merit because the constitutional prohibitions of the fourth and fourteenth amendments do not apply to actions by private persons . . . [and] Heller has alleged no facts nor does the record reveal any facts which would support a finding of state action." *Id.* at 496. The court also rejected a state invasion of privacy claim on grounds that the state did not recognize a privacy cause of action. *Id.*

Such a claim could not, of course, be dismissed as not involving state action in cases in which a criminal defendant claimed a fourth amendment violation by police using electronic surveillance of cable theft. Use of electronic surveillance in the past has been found to violate the fourth amendment. See, e.g., *Katz v. United States*, 389 U.S. 347, 350-53 (1967) (holding that plaintiff's fourth amendment rights were infringed by the enforcement agent's use of an electronic device to listen to plaintiff's conversation in public telephone booth); see also 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.04 (briefly mentioning possible invasion of privacy problems arising from electronic detection methods).

38. In effect, these statutory provisions prohibit activity (i.e., marketing of devices) that ultimately enables the actual theft of premium services to occur.

39. See N.Y. PENAL LAW § 165.15(4) commentary on 1983 amendment (McKinney Supp. 1984-85) ("The problem is not that the statute needed explication and tightening but that the public and law enforcement agencies are not particularly distressed about the problems facing the cable television entrepreneurs. Avoiding cable television charges is widely viewed in the same light as creative income tax calculation.").

A very plausible explanation for the lax enforcement of criminal sanctions against individual homeowners who illegally receive cable services is the difficulty in detecting offenses and the danger of a fourth amendment privacy violation by a law enforcement official. See *supra* note 37 and accompanying text. This reasoning is particularly strong in the case of a homeowner who subscribes to basic service, see *supra* notes 18 & 20 and accompanying text, but purchases a converter/decoder and illegally connects it so that he can receive premium service, see *supra* notes 19-20 and accompanying text, without paying the subscription fee. In this situation the only evidence of the criminal activity is inside the home.

There is no similarly persuasive argument to justify the lack of enforcement against those who illegally manufacture and sell cable converter/decoder devices. The detection problems are not nearly as acute in this context.

40. In spite of the difficulty of detecting unauthorized receipt of cable television services, "cable . . . companies are developing ways to detect unauthorized receivers. Detections are made through electronic surveillance, through spot, rooftop inspections for illegal antennas and earth stations, and through in-house inspection with the homeowner's permission, the latter usually made in conjunction with a 'service call.'" 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.04.

The use of electronic surveillance to detect unauthorized receipt of cable services raises fourth amendment and state invasion of privacy issues. See *supra* note 37.

ute is its provision allowing cable companies to instigate civil suits against service thieves and those who aid them.⁴¹ This concept is relatively novel and is found in only a few state statutes.⁴² Under section 14-118.5(c), cable companies are authorized to bring civil suits to enjoin⁴³ violations of substantive prohibitions of the statute⁴⁴ and to recover damages.⁴⁵ The statute mandates that a cable company that establishes a violation be awarded the greater of "actual damages"⁴⁶ trebled⁴⁷ or a fixed default amount, which is dependent upon the type of violation.⁴⁸ Furthermore, section 14-118.5(d) clarifies the damage provision by stating, "It is not a necessary prerequisite to a civil action instituted pursuant to this section that the plaintiff has suffered or will suffer actual damages."⁴⁹ Thus, even if the cable company is unable to prove any real loss or legal

41. See N.C. GEN. STAT. § 14-118.5(c) (Supp. 1984). Authorization of the civil suit should compensate for many of the deficiencies in criminal sanctions and criminal enforcement. See *supra* notes 35 & 39 and accompanying text. Although the detection problems, see *supra* note 37 and accompanying text, are still present, the remedies available in the civil action should provide an incentive for cable companies to devote substantial funds and manpower to the task of discovering cable service theft. An assessment of the ultimate impact in North Carolina of the newly created civil action is of course speculative, but the statute's patent slant in favor of cable companies, see *supra* notes 8 & 36 and accompanying text; *infra* notes 54-55 and accompanying text, would lead one to conclude that cable entrepreneurs will pursue legal remedies aggressively. Evaluating the reaction of cable companies to the theft of service problem, one commentator said:

[P]lay and cable companies, supported by state theft-of-cable service statutes, are waging a war on piracy. The battles are being fought through the media (public awareness programs, television commercials, and newspaper advertisements informing the public that use of unauthorized intercepting devices violates the law); through amnesty programs for consumers who turn in their unauthorized devices; and through prosecution.

2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.04.

42. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.03[1] ("With the exception of a few states . . . , the applicable state theft of [cable] service laws only provide for criminal liability.").

Civil action provisions, however, are becoming more common in cable service theft statutes. See CAL. PENAL CODE § 593d(c)-(e) (West Supp. 1984); Act of June 22, 1983, § 1, ILL. ANN. STAT. ch. 38, § 16-13 (Smith-Hurd Supp. 1984-85); OKLA. STAT. ANN. tit. 21, § 1737(C) (West Supp. 1984-85).

North Carolina's new statute, although certainly a product of this trend, is in many respects more progressive from the viewpoint of cable companies than most of its counterparts in other jurisdictions.

43. See N.C. GEN. STAT. § 14-118.5(c) (Supp. 1984).

44. See *id.* § 14-118.5(a), (b).

45. *Id.* § 14-118.5(c)(1)-(2).

46. The statute does not define "actual damages." The term has, however, been defined by the North Carolina Supreme Court. "Actual damages means 'compensation for injuries and losses which are the direct and proximate result of the [wrong] . . . ' " *Godwin v. Vinson*, 254 N.C. 582, 587, 119 S.E.2d 616, 620 (1961). "[A]ctual damages refer to compensation for injury and losses which are the proximate and direct result of a wrong Thus, loss of profits may be recovered if plaintiff introduces evidence from which the amount of such loss can be ascertained by the jury with reasonable certainty." 5 N.C. INDEX 3D *Damages* § 2 (1977).

47. Treble damages are the maximum civil damages allowed in any state theft of cable service statute. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.03[1].

48. See N.C. GEN. STAT. § 14-118.5(c)(1)-(2) (Supp. 1984). When the culpable conduct is the actual theft of cable services, see *id.* § 14-118.5(a), then the default damage amount is \$300; if the defendant's conduct involves the manufacturing or selling of cable interception devices, see *id.* § 14-118.5(b), then the default damage amount is \$1000. *Id.* § 14-118.5(c)(1)-(2).

49. *Id.* § 14-118.5(d). For a discussion of the meaning of "actual damages," see *supra* note 46. Other treble damages theft of cable service statutes similarly state that a recovery by the plaintiff is not dependent upon proof of "actual damages." See, e.g., CAL. PENAL CODE § 593d(e) (West Supp. 1984); Act of June 22, 1983, § 1, ILL. ANN. STAT. ch. 38, § 16-13(d) (Smith-Hurd Supp. 1984-85); OKLA. STAT. ANN. tit. 21, § 1737(E) (West Supp. 1984-85).

injury as a result of defendant's activity,⁵⁰ it shall nevertheless be granted the statutory default damage amount.⁵¹ Absent, however, from the North Carolina theft of cable service statute is a provision, found in the statutes of some other states, expressly providing for the recovery of attorney's fees and costs by a cable company in a successful civil action.⁵² Considering the comprehensive nature of the new statute, it seems doubtful that this absence was merely an oversight by the general assembly.⁵³

Even though the new North Carolina statute makes liable only those who knowingly and willfully violate its terms, there is a statutory presumption of knowledge on the part of the defendant once basic proof of a violation is introduced.⁵⁴ This *prima facie* presumption represents the general assembly's recognition of the extreme difficulty in many cases of proving that the defendant actually played a role in illegally gaining access to the cable system.⁵⁵ Cases in other jurisdictions, however, have raised serious questions about the constitu-

50. See *supra* note 46.

51. See N.C. GEN. STAT. § 14-118.5(c) (Supp. 1984).

52. See, e.g., CAL. PENAL CODE § 593d(c)(2) (West Supp. 1984) (reasonable attorney's fees); Act of June 22, 1983, § 1, ILL. ANN. STAT. ch. 38, § 16-13(b) (Smith-Hurd Supp. 1984-85) (all costs plus reasonable attorney's fees to the prevailing party); N.M. STAT. ANN. § 63-10-2 (1978) (costs plus attorney's fees); OKLA. STAT. ANN. tit. 21, § 1737(C)(2) (West Supp. 1984-85) (attorney's fees).

53. There is a well-established rule in North Carolina that "a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute." *Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980). Therefore, it is unlikely that a trial judge would exercise discretion to award attorney's fees to a plaintiff who prevails in an action under North Carolina's theft of cable service statute.

54. The statute states:

Proof that any equipment, cable, wire, decoder, converter or device of a cable television system was modified, removed, altered, tampered with or connected without the consent of such cable system in violation of this section shall be *prima facie* evidence that such action was taken knowingly and willfully by the person or persons in whose name the cable system's equipment, cable, wire, decoder, converter or device is installed or the person or persons regularly receiving the benefits of cable services resulting from such unauthorized modification, removal, alteration, tampering or connection.

N.C. GEN. STAT. § 14-118.5(e) (Supp. 1984). An analogous presumption provision has been a part of North Carolina statutory law prohibiting the theft of electric, gas, and water services since 1977. See *Id.* § 14-151.1(b) (1981) (proof of tampering with meter is *prima facie* evidence of violation).

The theft of cable service statutes of some other states contain presumptions very much like the one found in North Carolina's new statute. See, e.g., Act of June 22, 1983, § 1, ILL. ANN. STAT. ch. 38, §§ 16-11(d), -12(d) (Smith-Hurd Supp. 1984-85); N.Y. PENAL LAW § 165.15(5) (McKinney Supp. 1984-85); OKLA. STAT. ANN. tit. 21, § 1737(B) (West Supp. 1983-84); VA. CODE § 18.2-165.1 (1982).

55. In a New Jersey case involving a theft of utility services statute that contained a presumption very similar to North Carolina's, the court said, "It is apparent that . . . the presumption was adopted by the Legislature because of the practical impossibility of proving by direct evidence the actual participation of the consumer in the illegal activity." *State v. Curtis*, 148 N.J. Super. 235, 240, 372 A.2d 612, 615 (Crim. Ct. 1977). In *State v. Robinson*, 97 Misc. 2d 47, 56, 411 N.Y.S.2d 793, 799 (Crim. Ct. 1978), the court, discussing this presumption in its theft of utility services statute, stated:

This presumption was reinstated when the Legislature recognized the difficulty of obtaining proof of actual tampering. "Such proof can be produced only in the rare instance where one is caught red-handed altering the electrical circuit to by-pass a meter." . . . [citations omitted] If tampering was to be effectively deterred then the presumption was . . . essential.

Id. (quoting *State v. Mendez*, 94 Misc. 2d 447, 449, 404 N.Y.S.2d 977, 979 (Crim. Ct. 1978)). For a description of the practical effect upon plaintiff's case of not having the presumption, see *State v.*

tionality of such a statutory presumption.⁵⁶ Similar presumptions have been challenged primarily on the ground that they deny defendants their fourteenth amendment due process rights.⁵⁷

In *State v. Scott*⁵⁸ the Ohio Court of Appeals struck down as unconstitutional a provision in Ohio's theft of cable service statute⁵⁹ that provided for a prima facie presumption of intent.⁶⁰ The Ohio court distinguished between mandatory and permissive presumptions⁶¹ and held that the language of the Ohio statute unambiguously revealed that the presumption was mandatory.⁶² After noting that mere proof of the unauthorized possession of a device for receiving cable services compelled the fact-finder to find all the remaining essential elements of the offense, the court applied the test for determining the constitutionality of such presumptions and concluded that "we cannot say with substantial assurance that the presumed facts . . . [are] more likely than not to flow from the proved fact"⁶³

In assessing the constitutionality of the North Carolina statute's presumption of intent, it is important also to look to the line of authority that rejects the rationale and result in *Scott*. In *State v. Robinson*⁶⁴ the New York court upheld a presumption that was, for purposes of this analysis, substantially similar to the Ohio statutory provision in *Scott*.⁶⁵ Like the statutes in North Carolina and

Scott, 8 Ohio App. 3d 1, 5, 455 N.E.2d 1363, 1369 (1983); see also *supra* note 37 (discussing the difficulties in obtaining sufficient evidence against the homeowner defendant).

A careful reading of § 14-118.5(e), which does not refer to the distribution of devices, reveals that the presumption applies only to the type of conduct prohibited in § 14-118.5(a). In other words, the presumption applies only to the actual theft of cable service and not to the selling of converter/decoder devices, which is proscribed by § 14-118.5(b). The limited application of the presumption makes sense because the activity of selling mechanical devices is much easier to detect and prove than the use of such devices inside the home to steal cable services. See *supra* notes 37-38 and accompanying text.

56. See *State v. Curtis*, 148 N.J. Super. 235, 372 A.2d 612 (App. Div. 1977); *State v. Robinson*, 97 Misc. 2d 47, 411 N.Y.S.2d 793 (Crim. Ct. 1978); *State v. Scott*, 8 Ohio App. 3d 1, 455 N.E.2d 1363 (1983).

57. See *State v. Curtis*, 148 N.J. Super. 235, 239-40, 372 A.2d 612, 614-15 (App. Div. 1977); *State v. Robinson*, 97 Misc. 2d 47, 57, 411 N.Y.S.2d 793, 799 (Crim. Ct. 1978).

58. 8 Ohio App. 3d 1, 5, 455 N.E.2d 1363, 1369 (1983).

59. See Act of July 13, 1977, H.B. No. 271, 1977 Ohio Laws 2278 (repealed 1984).

60. See *id.* (repealed 1984).

61. *Scott*, 8 Ohio App. 3d at 4-5, 455 N.E.2d at 1368. A permissive presumption *permits* the factfinder to infer the "elemental fact" after the "basic fact" is established. With a mandatory presumption, the factfinder is *required* to "find" the "elemental fact" upon proof of the "basic fact." *Id.*

62. *Id.* at 4, 455 N.E.2d at 1368 (presumption is mandatory on its face). The statute construed in *Scott* stated:

The existence, on property in the actual possession of the accused, of any connection, wire, conductor, or any device whatsoever, which effects the use of cable television service without the same being reported for payment as to service, . . . shall be prima-facie evidence of intent to violate and of the violation of this section by the accused.

Act of July, 13, 1977, H.B. No. 271, 1977 Ohio Laws 2278 (repealed 1984).

63. *Scott*, 8 Ohio App. at 5, 455 N.E.2d at 1367-69; see also *MacMillan v. State*, 358 So. 2d 547, 549-50 (Fla. 1978) (declaring unconstitutional provision in theft of service statute providing for presumption of intent to violate).

64. 97 Misc. 2d 47, 411 N.Y.S.2d 793 (Crim. Ct. 1978).

65. See N.Y. PENAL LAW § 165.15(4) (McKinney Supp. 1984-85). The relevant portion of the New York statute states:

[P]roof . . . that telecommunications equipment, including, without limitation, any cable

Ohio, the New York statute provided that proof of an illegal connection to a utility service "shall be presumptive evidence" that the recipient of the service was responsible for the unlawful connection.⁶⁶ The *Robinson* court, however, interpreted the statutory language as creating a permissive, rather than a mandatory, presumption.⁶⁷ Furthermore, the *Robinson* court held that the presumption satisfied constitutional requirements because the defendant's receipt of the utility services as a result of the illegal tampering provided a sufficient "rational connection between the presumed fact and the proven fact."⁶⁸ In effect, the New York court in *Robinson* employed an analysis and reached a decision diametrically opposed to the analysis and decision in *Scott*.

As the *Scott* and *Robinson* cases illustrate, there are plausible and compelling arguments both for and against the constitutionality of the section 14-118.5(e) presumption. Should the new presumption be found unconstitutional, it would be possible to sever section 14-118.5(e) without invalidating the entire statute.⁶⁹ Although the remainder of the statute logically could stand without the presumption, the practical effect of severing the presumption provision would be to assure victory for many defendants.⁷⁰ Without the benefit of the presumption, plaintiffs or prosecutors would prevail only if they could present affirmative evidence that defendants "knowingly and willfully" tapped on to the cable system "for the purpose of intercepting or receiving . . . programming or service."⁷¹ In most cases this would be a difficult burden to satisfy.⁷²

The federal antitrust laws present a second potential challenge to the North Carolina theft of cable service statute; in prohibiting all parties except cable companies from selling and distributing converter and decoder devices, the stat-

television converter, descrambler, receiver, or related equipment, has been connected to the equipment of the supplier of the service without the consent of the supplier of the service, shall be presumptive evidence that the resident to whom the service which is at the time being furnished by or through such equipment has, with intent to avoid payment by himself or another person for a prospective or already rendered service, created or caused to be created with reference to such equipment, the condition so existing.

Id.

66. *See id.*

67. 97 Misc. 2d at 61, 411 N.Y.S.2d at 802 (rejecting defendant's argument that the statutory presumption effected a shift in the ultimate burden of proof).

68. 97 Misc. 2d at 59, 411 N.Y.S.2d at 800-01. Reaching the same result on a New Jersey statutory presumption in a substantially similar context, the court in *State v. Curtis* said:

[I]t is more likely than not that the customer [defendant] participated in the tampering resulting in the failure of the meter to record fully the current supplied to that customer Such an inference is rational when tested by human conduct and experience, for the only person who would usually be motivated to tamper with a meter is the one who would profit financially

148 N.J. Super. 235, 239-40, 372 A.2d 612, 615 (App. Div. 1977).

69. For a case in which the court declared a similar presumption unconstitutional, severed the stricken part, and allowed the remainder of the statute to stand, see *MacMillan v. State*, 358 So. 2d 547, 550 (Fla. 1978).

70. Of course, invalidation of the presumption would not substantially affect actions in which the defendant is accused of dealing in converter/decoder devices under § 14-118.5(b). *See supra* note 55 and accompanying text.

71. N.C. GEN. STAT. § 14-118.5(a) (Supp. 1984).

72. *See State v. Curtis*, 148 N.J. Super. 235, 240-41, 372 A.2d 612, 615 (App. Div. 1977); *see also supra* note 55 and accompanying text (discussing the need for a presumption provision).

ute might violate the antitrust laws by giving a monopoly in the marketing of such mechanisms to cable companies.⁷³ Such a challenge, however, probably would fail. Plaintiff in *Ciminelli v. Cablevision*⁷⁴ was prevented from selling converter and decoder devices by a New York statutory provision⁷⁵ similar to North Carolina's section 14-118.5(b).⁷⁶ He sued to enjoin enforcement of the state statute, arguing that it was preempted by the Sherman and Clayton federal antitrust statutes.⁷⁷ Using reasoning that would be applicable to an antitrust challenge to section 14-118.5(b), the United States District Court for the Eastern District of New York rejected the claim. The court noted that the state action immunity doctrine provides an exemption from the antitrust laws when "*the activities constitute the action of the state in its sovereign capacity.*"⁷⁸ Finding that the New York Legislature enacted the statute in its sovereign capacity and that the statute served a legitimate state interest, the court ended its inquiry and upheld the validity of the state law.⁷⁹ This same reasoning probably would protect North Carolina's statute from a similar antitrust challenge.

An apparent flaw in the North Carolina statute is its failure to cover the primary noncable forms of pay television.⁸⁰ Theft of pay television service statutes in some states prohibit the unauthorized interception of both over-the-air pay television signals and cable services.⁸¹ The phenomenal growth and promising future of noncable pay television systems⁸² raises the question whether the North Carolina General Assembly was shortsighted in not extending protection in section 14-118.5 to over-the-air pay television transmissions. If the general assembly was shortsighted, its omission could be remedied easily by either amending the statute to cover all pay television signals or by enacting a new statute specifically to protect over-the-air signals. The omission, however, was

73. See *Ciminelli v. Cablevision*, 583 F. Supp. 144, 152-58 (E.D.N.Y. 1984).

74. 583 F. Supp. 144 (E.D.N.Y. 1984).

75. See N.Y. PENAL LAW § 165.15(4) (McKinney Supp. 1984-85).

76. N.C. GEN. STAT. § 14-118.5(b) (Supp. 1984).

77. *Ciminelli*, 583 F. Supp. at 152.

78. *Id.* at 156.

79. *Id.* at 157. The court said:

The evidence shows that faced with a growing problem of theft of cable television services, the State of New York, as sovereign, enacted legislation to combat the problem. . . . [W]e find no merit to the argument that [the statute] serves no legitimate state interest and instead authorizes defendants to violate the antitrust laws by declaring their action lawful. Thus, we conclude that the state action exemption applies to this cause of action.

Id.

80. See *supra* notes 21-25 and accompanying text.

81. See CAL. PENAL CODE § 593e (West Supp. 1985); TEX. PENAL CODE ANN. §§ 31.12, 31.13 (Vernon Supp. 1985).

82. See, e.g., Comment, *Subscription Television*, *supra* note 13, at 839; Comment, *Pay Television Piracy*, *supra* note 3, at 531.

Over-the-air systems are often commercially feasible when cable systems are not. "Unlike cable television, over-the-air pay TV does not require burdensome initial outlays of time and capital. [citations omitted] Laying underground or aboveground cable is a time-consuming and expensive process. [citations omitted]" *Id.* at 531 n.3. Generally, there must be at least 30 homes per mile to make an area potentially profitable for cable companies. See Comment, *supra* note 2, at 99 n.23; Note, *The Piracy of Subscription Television: An Alternative to the Communications Law*, 56 S. CAL. L. REV. 935, 935 n.3 (1983).

justifiable when the current version of the North Carolina theft of cable service statute was passed. Even though at that time theft of over-the-air signals was a substantial problem for STV and MDS operators, the willingness of the federal courts to grant relief for such piracy under the Communications Act of 1934⁸³ made it less urgent for state legislative bodies to provide a remedy. By contrast, the availability of comparable federal relief for cable companies was quite uncertain.⁸⁴

Soon after the new North Carolina theft of cable service statute was passed, however, Congress responded to those who argued that the main body of law regulating communications, the Communications Act of 1934,⁸⁵ was severely outdated and not capable of being adapted to modern communications technologies.⁸⁶ In October 1984 Congress passed the Cable Communications Policy Act of 1984⁸⁷ which significantly amended the Communications Act of 1934.⁸⁸ The 1984 amendments address the problem of piracy of both over-the-air and cable pay television signals. Although the 1984 statute does not resolve all the issues, it goes far toward clarifying the uncertainties and ambiguities of the 1934 Act as applied to modern pay television technologies.⁸⁹ Like the North Carolina theft of cable service statute, section 633 of the 1984 Act provides for criminal⁹⁰ and

83. 47 U.S.C. §§ 151-157 (1982) (amended 1984). An implied private cause of action under § 605 has been recognized for many years. See *Reitmeister v. Reitmeister*, 162 F.2d 691, 694 (2d Cir. 1947) (holding that § 605 created an implied civil action under which plaintiff could sue defendant for secretly recording plaintiff's voice on the telephone and then "publishing" the communication by playing the tape in court). The courts have granted relief in private § 605 actions for the unauthorized interception of both STV and MDS signals. See, e.g., *Movie Sys., Inc. v. Heller*, 710 F.2d 492 (8th Cir. 1983) (MDS signals); *National Subscription Television v. S & H TV*, 644 F.2d 820 (9th Cir. 1981) (STV signals).

84. Until 1984 there was much controversy over whether the 1934 Communications Act applied to the unauthorized theft of cable television service. See, e.g., 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.02[1][b]; Comment, *Decoding Section 605, supra* note 3, at 364-66 & n.20.

Although the Communications Act of 1934 had been interpreted by courts as creating a private cause of action and STV and MDS operators had been allowed to recover against thieves of their over-the-air signals, see *supra* note 83 and accompanying text, the Act was not applied to cable until the year immediately preceding passage of the 1984 amendment to the North Carolina cable theft statute. In 1984 two federal district courts granted relief to cable companies in private civil actions under § 605. See *Cablevision v. Annasonic Elec. Supply*, No. 83-5159 (E.D.N.Y. Feb. 10, 1984) (included as appendix in *Ciminelli v. Cablevision (Ciminelli II)*, 583 F. Supp. 158, 163-64 (E.D.N.Y. 1984)); *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376 (N.D. Ohio 1983).

85. 47 U.S.C. §§ 151-157 (1982) (amended 1984).

86. See, e.g., Comment, *Subscription Television: Should the Government Prohibit Unauthorized Reception?*, 18 CAL. W.L. REV. 291, 291 (1982); Comment, *supra* note 2, at 97.

87. The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2779 (to be codified at 47 U.S.C. §§ 151-157).

88. 47 U.S.C. §§ 151-157 (1982) (Communications Act as it appeared before the 1984 amendments).

89. See *supra* note 84 and accompanying text.

90. A person who intentionally intercepts cable services or assists another in doing so in violation of § 633 will face a fine of up to \$1,000 or a prison term of six months or less or both. Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796 (to be codified at 47 U.S.C. § 553(b)(1)). When the violation of § 633 is intentional and "for the purposes of commercial benefit or private financial gain," the defendant "shall be fined not more than \$25,000 or imprisoned for not more than 1 year, or both, for the first such offense and shall be fined not more than \$50,000 or imprisoned for not more than 2 years, or both, for any subsequent offense." *Id.* (to be codified at 47 U.S.C. § 553(b)(2)). "Private financial gain" is defined so as to require more than the mere avoidance of fee payments by a private individual who pirates cable services for viewing in the "individ-

private civil actions against thieves of cable television service⁹¹ and explicitly includes within its purview the manufacturers and distributors of unauthorized cable interception devices.⁹²

The civil action created by section 633(c)(1) is very broad in scope and may be pursued in any state court or federal district court.⁹³ The class of potential plaintiffs in a section 633 civil action is defined expansively to include "[a]ny person aggrieved by any violation of [the substantive portion of section 633]."⁹⁴ Civil remedies include injunctive, compensatory, and punitive relief.⁹⁵ Compensatory relief may include attorney's fees in addition to damages, which may be either the "actual damages" suffered by the plaintiff plus any additional profits earned by the violator as a result of the violation or a statutory default amount.⁹⁶ Section 633 accords a great deal of discretion to the trial court. If the court finds that the defendant violated section 633 "willfully and for purposes of commercial advantage or private financial gain," then the court may add to the civil compensatory damages a punitive award of up to \$50,000.⁹⁷ Conversely, if the court "finds that the violator was not aware and had no reason to believe that his acts constituted a violation of . . . section [633], the court in its discretion may reduce the award of damages to a sum of not less than \$100."⁹⁸

ual's dwelling unit." Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802 (to be codified at 47 U.S.C. § 605(c)(5)).

91. Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796-97 (to be codified at 47 U.S.C. § 553). The substantive prohibition is found in § 633(a)(1):

No person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.

Id. (to be codified at 47 U.S.C. § 553(a)(1)).

Section 633 applies only "to theft of a service from the point at which it is actually being distributed over a cable system." See H.R. REP. NO. 934, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 4655, 4720.

92. Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796 (to be codified at 47 U.S.C. § 553). Section 633(a)(2) states:

For the purpose of this section, the term 'assist in intercepting or receiving' shall include the manufacture or distribution of equipment intended by the manufacturer or distributor . . . for unauthorized reception of any communications service offered over a cable system in violation of subparagraph (1).

Id. (to be codified at § 553(a)(2)). The manufacturer or distributor is liable (or guilty) under § 633 only if he created or sold the devices with the intention that they would be used to intercept signals in violation of § 633(a)(1). See H.R. REP. NO. 934, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 4655, 4720-21; 1 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 8.03 (Special Supp. 1985).

93. Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796-97 (to be codified at 47 U.S.C. § 553(c)).

94. *Id.* (to be codified at 47 U.S.C. § 553(c)(1)).

95. *Id.* (to be codified at 47 U.S.C. § 553(c)).

96. *Id.* (to be codified at 47 U.S.C. § 553(c)(3)(A)). The default amount is between \$250 and \$10,000, determined on a case by case basis. *Id.* (to be codified at 47 U.S.C. § 553(c)(2)(C), (c)(3)). In proving profits earned by the defendant as a direct result of the cable service theft, the plaintiff only has to show the defendant's gross revenues, and the burden then shifts to the defendant to establish "his deductible expenses and the elements of profit attributable to factors other than the violation." *Id.* (to be codified at 47 U.S.C. § 553(c)(3)(A)(i)).

97. *Id.* (to be codified at 47 U.S.C. § 553(c)(3)(B)).

98. *Id.* (to be codified at 47 U.S.C. § 553(c)(3)(C)). Compare this broad discretion given to the

Of tremendous importance to states like North Carolina that have adopted statutes proscribing the unauthorized reception of cable television signals and the marketing of devices designed to facilitate such service thefts is section 633(c)(3)(D) of the 1984 federal statute. Section 633(c)(3)(D) specifically states that the federal statute does not preempt state laws that prohibit the theft of cable television service.⁹⁹ Also, the legislative history of the 1984 Act indicates that section 633 was not intended to circumscribe or preempt the application of what was previously known as section 605 of the Communications Act of 1934 or other existing laws that provide remedies for the theft of cable service.¹⁰⁰ Thus, neither the availability of a state claim nor the federal case law predicated on the Communications Act of 1934 was affected by the 1984 changes.¹⁰¹

Since the new federal statute has not preempted North Carolina's theft of service statute, it is useful to compare the statutes' provisions in determining

judge under the federal statute to increase or decrease the damage award with the rigid method for calculating damages under the North Carolina theft of cable service statute. See *supra* notes 45-51 and accompanying text.

99. Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796-97 (to be codified at 47 U.S.C. § 553(c)(3)(D)). The official legislative history explains the rationale behind § 633(c)(3)(D):

The Committee recognizes that a number of states have enacted statutes which provide criminal penalties and civil remedies for the theft of cable service, and the Committee applauds those efforts. [Such state laws] are not affected by this section, even if such laws impose higher penalties or sanctions than those set forth in this section. The Committee believes that this problem is of such severity that the Federal penalties and remedies contained herein must be available in all jurisdictions (and enforceable in state or Federal court) as part of the arsenal necessary to combat this threat.

H.R. REP. NO. 934, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4721.

It is apparent, therefore, that North Carolina's theft of cable service statute is not preempted by the new federal law.

100. See H.R. REP. NO. 934, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4720 ("Nothing in this section is intended to affect the applicability of existing Section 605 [§ 705(a) after the 1984 Act] to theft of cable service, or any other remedies available under existing law for theft of service.").

101. See *supra* note 84. In addition to the Communications Act of 1934, the Omnibus Crime Control and Safe Streets Act of 1968 occasionally has been mentioned as a potential source of relief for cable companies plagued by cable television signal thieves. See Comment, *supra* note 2, at 117-18; Comment, *Decoding Section 605*, *supra* note 3, at 363 n.3, 365-66 & n.20. The 1968 Act's provisions prohibit both the unauthorized interception of wire and oral communications and the manufacture and distribution of devices designed to facilitate unauthorized interception of such communications. See 18 U.S.C. §§ 2511-2512 (1982).

Even though some commentators practically take for granted that the Crime Control Act's protection of wire communications affords cable companies a cause of action against service thieves and those who assist them, see Comment, *supra* note 2, at 117-18; Comment, *Decoding Section 605*, *supra* note 3, at 363 n.3, 365-66 & n.20, there is no case support for such a position. See 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.02[2]. In fact, two federal district courts have explicitly rejected the Omnibus Crime Control and Safe Streets Act of 1968 as a means for providing remedies to cable television operators harmed by thefts of service. See *Cablevision v. Annasonic Elec. Supply*, No. 83-5159 (E.D.N.Y. Feb. 10, 1984) (included as appendix in *Ciminelli v. Cablevision* (Ciminelli II), 583 F. Supp. 158, 163-164 (E.D.N.Y. 1984)); *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376, 382-83 (N.D. Ohio 1983). The original motivation for passing the Crime Control Act apparently was to prohibit "wire-tapping and electronic surveillance by persons other than duly authorized law enforcement officials." *Id.* at 382; see S. REP. NO. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. & AD. NEWS 2112-13; 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.02[2]. Other than the actual language of the statute, which has been strictly interpreted with the Act's purpose in mind, there is little reason to believe that the Act can be used by cable companies to protect their economic interests against service thieves. See *id.*

which claim is best for different plaintiffs. There are two major differences between the North Carolina statute and section 633 of the 1984 federal statute. First, the federal act, unlike the North Carolina statute,¹⁰² does not contain a provision creating a *prima facie* presumption of unlawful activity upon proof that the defendant actually received the benefit of the illegally obtained services. This apparent advantage to a plaintiff in an action under North Carolina statute's section 14-118.5 over a plaintiff in a federal action becomes somewhat illusory, however, when one compares the definitions of the substantive offenses under the two statutes. The North Carolina statute describes the offense as an intentional act of connecting to a cable system or tampering with a cable system for the purpose of receiving cable service;¹⁰³ the new federal statute, however, defines a violation as the mere unauthorized interception or receipt of cable services.¹⁰⁴ On its face, the North Carolina statute requires a higher degree of proof of active wrongdoing by the defendant. The absence of a statutory presumption in section 633, therefore, may not make the North Carolina statute a more attractive basis for an action than section 633. Second, the North Carolina statute, in section 14-118.5(b), makes it unlawful for a party to distribute or sell devices "designed to decode or descramble any encoded or scrambled signal transmitted by [a] cable television system."¹⁰⁵ The language of the North Carolina statute does not clearly require proof that the defendant distributor or seller of interception devices specifically anticipated and intended that the devices would be used to intercept cable signals illegally. Section 633(a)(2) of the new federal statute, by contrast, requires proof that a manufacturer or distributor of devices capable of illegally intercepting cable signals actually intended for the devices to be used in such an illegal manner.¹⁰⁶

Although both the North Carolina statute and the new federal statute create causes of action for theft of cable services, North Carolina's statute apparently does not extend to theft of over-the-air pay television services.¹⁰⁷ The federal statutes, on the other hand, have been applied to STV and MDS systems¹⁰⁸ and should continue to apply in the future. Applicability of the federal statutes to interception of aerial signals by satellite dishes, however, is more complex. Section 605 of the Communications Act of 1934, before the 1984 amendments, generally had proved inadequate to deal with the issue whether the

102. See *supra* notes 54-72 and accompanying text.

103. See N.C. GEN. STAT. § 14-118.5(a) (Supp. 1984); see also *supra* note 27 and accompanying text (giving language of § 14-118.5(a)).

104. See Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796 (to be codified at 47 U.S.C. § 553(a)(1)); see also *supra* note 91 (giving language of § 633(a)(1)).

105. See N.C. GEN. STAT. § 14-118.5(b) (Supp. 1984); see also *supra* note 28 and accompanying text (giving language of § 14-118.5(b)).

106. See Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796 (to be codified at 47 U.S.C. § 553(a)(2)); see also *supra* note 92 (giving language of § 633(a)(2)). Of course, this analysis and distinction between the new federal statute and North Carolina's theft of cable service statute would be irrelevant if the devices defendant was accused of manufacturing or selling had no legitimate uses.

107. See *supra* notes 21-25 and accompanying text; notes 80-84 and accompanying text.

108. See *supra* note 83 and accompanying text.

use of satellite dish antennas to intercept satellite transmissions was legal.¹⁰⁹ While "[a] federal district court in Florida [had] held that satellite transmissions of live NFL football games transmitted to a specific audience were protected under Section 605 from unauthorized reception by earth stations owned and operated by a restaurant for commercial benefit,"¹¹⁰ there apparently was no recovery under section 605 against a private individual using a home satellite dish for noncommercial purposes.¹¹¹

The 1984 federal cable act redesignated section 605 in the Communications Act of 1934 as section 705(a) and added provisions to this section.¹¹² Section 705(b) provides an exemption from liability under section 705(a) for the interception for private use of certain "satellite cable programming" signals.¹¹³ "Satellite cable programming" is narrowly defined by the statute as signals transmitted by satellite "primarily . . . for the direct receipt by cable operators for their retransmission to cable subscribers."¹¹⁴ Under the section 705(b) ex-

109. See, e.g., 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.02[1]; Comment, *supra* note 2, at 103. In enacting its theft of cable service statute, the North Carolina General Assembly resolved the issue by simply specifying that the use of satellite antennas would not be a violation of the statute. See N.C. GEN. STAT. § 14-188.5(f) (Supp. 1984); see also *supra* note 25 and accompanying text (giving language of § 14-118.5(f)).

110. 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.02[1] (referring to National Football League v. The Alley, Inc., No. 83-0701 (S.D. Fla. 1983)).

111. See *id.*

112. See Pub. L. No. 98-549, §§ 5-6, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802-04 (to be codified at 47 U.S.C. § 605). The use of the phrase "section 705" in this discussion refers to § 705 of the Communications Act of 1934 as it appears after the 1984 amendment. Section 705 of the Communications Act of 1934 corresponds to 47 U.S.C.A. § 605 (Supp. 1985).

Section 705(d) creates criminal and civil actions and remedies identical to those found under § 633(b) and (c). See *supra* notes 90-98 and accompanying text. Prior to the 1984 Act, private civil actions under § 605 [§ 705(a) after 1984 Act amendments] were merely implied. See 1 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 8.02[2] (Special Supp. 1985); *supra* note 83.

113. See Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802 (to be codified at 47 U.S.C. § 605(b)).

Although § 705 does not clearly state that the interception of aerial pay television signals by satellite dish antennas is generally unlawful, such a conclusion is compelled by the narrow exemption created by § 705(b). The logical implication of the integrated statutory scheme is that the interception of aerial signals by satellite dish antennas is illegal unless the interception satisfies the exemption requirements of § 705(b).

114. Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802 (to be codified at 47 U.S.C. § 605(c)(1)). The official legislative history explains that:

The interception of the "satellite cable programming" must in fact be directly from the satellite feed in order to come within the terms of the exemption to liability set forth in subsection (b). Unauthorized interception of such programming in its retransmitted form, where the form of retransmission is otherwise protected under subsection (a) or other relevant law, is clearly prohibited. Thus, if the programming interception is transmitted, for instance, by means of . . . MDS . . . or STV, liability for such interception shall apply regardless of whether [the conditions for the § 705(b) exemption have been met].

H.R. REP. NO. 934, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4748-49. Limiting the § 705(b) private interception exemption for satellite transmissions to those satellite transmissions intended primarily for receipt by cable companies comports with Congress' desire not to affect prior case law under § 605 [§ 705(a) after 1984 Act amendments]. It seems somewhat arbitrary, however, to give the benefit of the § 705(b) exemption to private individual satellite antenna owners whose antennas happen to intercept signals categorized by the statute as "satellite cable programming" while at the same time denying the exemption to satellite owners whose satellite antennas intercept other signals. The inequity of this situation would be much less severe if satellite antenna owners were able to ascertain whether the signals being intercepted by their antennas were eligible for the § 705(b) exemption; then, the satellite antenna owners could determine whether their

emption, no violation occurs when "satellite cable programming" signals are intercepted for private viewing if the signals are not scrambled and if a marketing system has not been created to allow individual satellite antenna owners to pay for the right to intercept the signals.¹¹⁵ North Carolina's cable television theft statute specifically excludes satellite dish antennas from its prohibitions.¹¹⁶ Because the "purpose of section 705(b) is to facilitate a marketplace solution to the specific situation in which an individual using a backyard [satellite dish antenna] intercepts . . . unencrypted satellite cable programming,"¹¹⁷ section 705(b) would likely preempt any state statutes governing this type of interception.¹¹⁸

The North Carolina General Assembly reacted intelligently to the growing contemporary problem of theft of cable television service by enacting a comprehensive amendment to the state's theft of cable service statute.¹¹⁹ The statute's current provisions indicate that the general assembly made a realistic appraisal of the scope of the theft problem and the plight of cable companies victimized by service thieves. Cable companies that take advantage of the new civil action¹²⁰ will have the benefit of a logical presumption that the recipient of the illegally

activities were in violation of § 705(a) and could make conscious choices about how to structure their behavior.

115. See Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802 (to be codified at 47 U.S.C. § 605(b)); H.R. REP. NO. 934, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4745-46.

116. See *supra* note 109; note 25 and accompanying text.

117. H.R. REP. NO. 934, 98th Cong., 2d Sess., reprinted in 1984 U.S. CODE CONG. & AD. NEWS 4747.

118. The expansive nonpreemption language of § 633(c)(3)(D), *supra* note 99 and accompanying text, is limited by its terms to provisions of title VI. The nonpreemption language of title VII found in § 705(d)(6) is not broad enough to encompass state laws governing signal interception by satellite antennas. Section 705(d)(6) explicitly states that the new federal statute does not preempt state or local laws prohibiting "the importation, sale, manufacture, or distribution of equipment by any person with the intent of its use to assist in the interception or receipt of radio communications prohibited by [§ 705(a)]." Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2803 (to be codified at 47 U.S.C. § 605(d)(6)). Furthermore, § 633(c)(3)(D), which provides that nothing in title VI of the federal statute bars states from enacting and enforcing laws "regarding the unauthorized interception or reception of any cable service or other communication service," *id.* at 2797 (to be codified at 47 U.S.C. § 553(c)(3)(D)), clearly does not prevent title VII's provisions concerning satellite signal reception from preempting state statutes attempting to regulate the unauthorized receipt of satellite transmissions. It is logical, therefore, to presume that state statutes prohibiting interception of satellite signals could not define as illegal an activity permitted under § 705(b). See *supra* notes 113-15 and accompanying text. If the federal statute did not preempt state statutes dealing with aerial signal interception by satellite dish antennas, at least to the extent of the exemption provided in § 705(b), then each state could effectively thwart the purpose underlying § 705(b). See *supra* notes 117-18 and accompanying text. In this regard, it is important to remember the very narrow scope of the § 705(b) exemption for satellite antenna interceptions. See *supra* notes 114-15 and accompanying text.

Any potential conflict between North Carolina's theft of cable service statute and the § 705(b) exemption in the federal act is avoided because of the explicit provision in the North Carolina statute that excludes satellite dish antennas from its prohibitions. See N.C. GEN. STAT. § 14-118.5(f) (Supp. 1984); *supra* note 109; notes 25 & 116 and accompanying text. The possibility of such a conflict, however, certainly would become relevant should the North Carolina General Assembly adopt a statute to regulate or prohibit the interception of aerial signals by satellite dish antennas.

119. See N.C. GEN. STAT. § 14-118.5 (Supp. 1984).

120. See *id.* § 14-118.5(c); *supra* notes 41-53 and accompanying text.

obtained service was responsible for the theft,¹²¹ and a plaintiff who successfully establishes the elements of a civil claim is entitled to recover substantial statutory damages even if actual damages cannot be proved or are less than the statutory amount.¹²² Also, by including as permissible defendants distributors and sellers of devices designed to enable unauthorized access to cable television services,¹²³ the North Carolina General Assembly has attempted to maximize the efficiency and enforceability of the statute's provisions.

The significance of the North Carolina theft of cable service statute is somewhat overshadowed by the adoption of the new federal statute¹²⁴ aimed at the same activity. Because the federal statute expressly provides, however, for the coexistence of state causes of action governing theft of cable service,¹²⁵ it is clear that the North Carolina statute has not been preempted. Even though there are a few obvious differences between the federal and the North Carolina theft of cable service statutes,¹²⁶ the ramifications of these distinctions and the relative benefits of proceeding under each statute will be realized only as the statutes are interpreted by courts. The existence of the new federal statute, however, should not cause North Carolina judges to give a restrictive construction to North Carolina's theft of cable service statute, nor should the terms of the federal law be looked upon as a limitation when applying the North Carolina statute.¹²⁷

Section 14-118.5 may be criticized on grounds that it should not be limited to protection of cable television signals but should also encompass over-the-air pay television signal transmissions. Such criticism is at least partially persuasive. Denying protection under state law to MDS and STV signals, which are fully covered by section 705(a) of the federal Communications Act,¹²⁸ while granting protection to cable television signals, may no longer be justifiable because the disparity that once existed in the protection given cable television signals and over-the-air pay television signals by federal law has now been eliminated.¹²⁹ If the intent of the general assembly was to protect MDS and

121. See N.C. GEN. STAT. § 14-118.5(e) (Supp. 1984); *supra* notes 54-55 and accompanying text.

122. See N.C. GEN. STAT. § 14-118.5(c) (Supp. 1984); *supra* notes 45-51 and accompanying text.

123. See N.C. GEN. STAT. § 14-118.5(b) (Supp. 1984); *supra* note 28 and accompanying text.

124. See *supra* note 91.

125. See *supra* note 99 and accompanying text.

126. For a brief discussion of some of the basic differences between the two statutes, see *supra* notes 98 & 102-06 and accompanying text. Another distinction is that the federal statute provides for the recovery of attorney's fees and costs by a prevailing plaintiff whereas the North Carolina statute does not. See Pub. L. No. 98-549, § 633, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2796 (to be codified at 47 U.S.C. § 553(c)(2)(C)); N.C. GEN. STAT. § 14-118.5(c) (Supp. 1984).

127. See *supra* note 99.

128. See *supra* notes 83 & 114 and accompanying text.

129. See *supra* notes 80-84 and accompanying text.

The over-the-air pay TV delivery systems, especially MDS, are expected to continue to grow and expand, see *supra* notes 13-14, and the injury suffered by MDS and STV operators who are victimized by service thefts is analogous to the injury inflicted upon cable television operators whose services are stolen. Also, the federal case law developed under old § 605 [current § 705(a)] provides complete protection to MDS and STV signals, see *supra* notes 83 & 114, in much the same way that § 633 provides unadulterated protection to cable television signals. See *supra* notes 90-98 and accompanying text. There are no categorical exceptions to or exemptions from the MDS and STV

STV companies as well as cable providers, the definition of "cable system" in the existing statute¹³⁰ could be amended to include them. An even better solution, whatever the general assembly's original intent, would be to enact a separate statute, providing remedies similar to those in the new theft of cable service statute, for thefts of over-the-air pay television signals involving devices other than satellite dish antennas.¹³¹

Given, however, the nature of the unique statutory scheme in the new federal statute dealing with the interception of aerial signals by satellite antennas¹³² and considering the potential constitutional implications of such regulation,¹³³ it

signal protection under § 705(a) as there are for satellite to cable company signals under § 705(b), see *supra* notes 113-15 and accompanying text; see also *infra* notes 132-37 and accompanying text (discussing prudence of not enacting state statute to regulate interception of signals by satellite antennas at least until § 705(b)'s exception provisions are litigated).

130. See *supra* notes 21-25 and accompanying text.

131. The proposed statute would apply primarily to the interception of over-the-air signals by decoder and converter devices. Therefore, an interception system composed of a satellite antenna combined with a decoder or converter would be covered by the statute because of the use of the descrambling device.

STV and MDS signals generally require a decoder or descrambler device for intelligible interception. See *supra* notes 13-14.

Even if the North Carolina General Assembly rejects the idea of enacting a statute making illegal the unauthorized interception of aerial signals by devices other than satellite dish antennas, it should at least consider proscribing the manufacture, distribution, sale, and possession for sale of such aerial signal interception devices. See CAL. PENAL CODE § 593e (West Supp. 1985).

Adopting a separate statute to cover the interception of aerial pay television signals is preferable to merely expanding the scope of the cable service statute because of the differences in the technologies and modes of delivery of the over-the-air systems on the one hand and of cable television systems on the other. The issues and problems that arise in each context, although definitely similar, are not identical and could possibly merit very different treatment.

132. Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802-03 (to be codified at 47 U.S.C. § 605(b)); see *supra* notes 113-15 and accompanying text.

133. Although the amendment of the Communications Act of 1934 to prohibit some types of satellite signal transmission interception by satellite dish antennas may have been necessary in order to protect those who have a proprietary interest in such signals, some commentators have warned that such a change in the law inevitably will create new privacy concerns. See, e.g., Piscitelli, *Home Satellite Viewing: A Free Ticket to the Movies?*, 35 FED. COM. L.J. 1, 36 (1983). Their argument is predicated on the fact that, unlike unauthorized decoder and converter devices, satellite dish antennas have many legitimate uses. *Id.*; see also 2 C. FERRIS, F. LLOYD & T. CASEY, *supra* note 3, ¶ 26.02[1][b] (noting that interception of "community-sponsored and advertiser-sponsored programming" is a totally legitimate function of satellite dish antennas). Therefore, the existence on a person's property of a satellite dish is not an absolute assurance that it is used to receive protected transmissions. See Piscitelli, *supra*, at 35. From this basis, the critics assert that the means required to confirm the use of home satellite dish antennas for illegal purposes pose major constitutional questions regarding the privacy rights of the antenna owners. *Id.*

Conceding the logical appeal of such arguments, upon closer scrutiny it is difficult to distinguish between the invasion of privacy implications of the methods employed to detect the use of a decoder or converter device inside the home, see *supra* note 37, and the methods employed to detect the use of a satellite antenna to gain access to protected signals. The fact that satellite antennas have some legitimate uses and that decoder and converter devices do not is largely irrelevant to the present analysis since converter and decoder devices are generally out of public view inside the home, and often electronic surveillance is required to detect unauthorized interception of pay TV signals by converter and decoder devices. Such use of electronic surveillance by a cable company to discover a decoder device being employed to gain illegal access to MDS signals has been upheld against a constitutional privacy challenge by at least one court. See *Movie Sys., Inc. v. Heller*, 710 F.2d 492, 496 (8th Cir. 1983); *supra* notes 37 & 40 and accompanying text. The point of this discussion is not to suggest that there are no valid constitutional objections to the use of electronic surveillance or other techniques to discover the illegal interception of pay television signals by decoder devices or by satellite antennas, but rather to recognize that the privacy issues presented by each method of signal

would be prudent for the state to refrain from regulating the use of satellite dish antennas to intercept over-the-air signals at least until the new federal law has had an opportunity to develop. While the unauthorized interception of MDS and STV signals under the federal statute¹³⁴ is unconditionally illegal¹³⁵ and thus no major conflicts between the federal and state laws prohibiting the unauthorized interception of such signals would exist, section 705(b) creates a relatively complex exception when satellite antennas are used to intercept unscrambled aerial signals. The enactment at the present time of a state statute regulating the interception of signals by satellite antennas would only contribute to the inevitable confusion that will occur as the federal statute is applied¹³⁶ and would raise questions of substantive conflict between the federal and state statutes.¹³⁷

Finally, it appears that the North Carolina General Assembly erred in not including within the prohibitions of section 14-118.5(b) the actual manufacture of devices designed to decode scrambled cable television signals. Section 14-118.5(b) prohibits the distribution, sale, attempt to sell, and possession for sale of the enumerated devices;¹³⁸ the failure to proscribe the manufacture of such devices seems an illogical omission and could create an unnecessary loophole.

North Carolina's new theft of cable television service statute offers a number of significant weapons to cable television companies in their fight against cable service pirates. The statute is progressive and well-designed; by creating a civil action with the potential for a recovery of treble damages, prospects for achieving the ultimate goal of deterring cable theft activity appear to be excellent.

WALTER D. FISHER, JR.

interception are substantially similar. Thus, the privacy concerns are no more compelling in one situation than in the other and therefore should not be a catalyst for singling out satellite dish antennas for preferential treatment.

134. Pub. L. No. 98-549, § 5, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 2802 (to be codified at 47 U.S.C. § 605(a)).

135. See *supra* notes 83 & 112-115 and accompanying text.

136. For example, there will almost certainly be a great deal of controversy over what constitutes a "marketing system" under § 705(b)(2) in determining whether the § 705(b) exemption is available.

137. See *supra* note 118 and accompanying text.

138. See N.C. GEN. STAT. § 14-118.5(b) (Supp. 1984).