

PRIVACY PROTECTION FOR PROGRAMMING: IS MODIFYING
SATELLITE DESCRAMBLERS A VIOLATION OF THE WIRETAP
LAW?

United States v. Hux, 940 F.2d 314 (8th Cir. 1991)

In *United States v. Hux*¹ the Eighth Circuit concluded that the Wiretap Law² did not proscribe the modification of satellite descramblers to receive encrypted programming.³

On two occasions, an undercover agent requested that the defendant, Austin Jerry Hux, modify a satellite descrambler module⁴ to receive premium pay television channels without the user paying the provider of the program.⁵ Hux performed both of these modifications and received \$400 for each.⁶

A Federal Grand Jury returned a four-count indictment against Hux: two counts of manufacturing an electronic device for the purpose of surreptitiously intercepting electronic communications under the Wiretap

1. 940 F.2d 314 (8th Cir. 1991).

2. See 18 U.S.C. §§ 2510-2521 (1988); 18 U.S.C. § 2512(1)(b) (1988).

3. This Comment is limited to whether the Wiretap Law should apply to the modification of satellite descramblers to receive encrypted television programming; it does not cover the unlawful interception of other types of communication such as cable television (CATV), multi-point distribution system (MDS), or subscription television (STV). See Michael E. Di Geronimo, *Protecting Wireless Communications: A Detailed Look at Section 605 of the Communications Act*, 38 COMM. L.J. 411, 415-20 (1987).

4. 940 F.2d at 315. Hux modified a General Instruments VideoCipher II Satellite Descrambler Module. People alter these common descramblers so frequently that General Instruments offered buyers of the illegally modified units an opportunity to replace them with legitimate units at a reasonable price. *Nationwide Program to Convert Owners of Illegally Modified Satellite TV Descramblers Extended*, Business Wire, June 9, 1989, available in LEXIS, Nexis Library, Major Papers File. The Satellite Broadcasting and Communications Association estimates that roughly half of the 800,000 satellite descrambler boxes in use have been illegally modified. Sheila B. Mangel, *Home Satellite Viewers' Rights Revisited*, 12 COMM. AND THE LAW, Dec. 1990, at 15, 28 (citing *SPCA Sits on Feud Over Program Access*, MULTICHANNEL NEWS, Nov. 6, 1989, at 32).

5. 940 F.2d at 315. The FBI analyzed the descrambler and found that Hux had modified its computer chip intentionally. Thus the descrambler could receive all encrypted channels. *Id.* This type of communication is called television-receive only (TVRO), and viewers need the descrambler to receive those channels the cable company encrypts. The companies encrypt popular channels such as HBO, Showtime, Cinemax, and The Movie Channel for which cable or satellite companies charge a premium beyond the standard monthly rate. Di Geronimo, *supra* note 2, at 430-31. See *Home Box Office, Inc. v. Corinth Motel, Inc.*, 647 F. Supp. 1186, 1188 (N.D. Miss. 1986).

6. 940 F.2d at 315. The FBI also obtained a search warrant for Hux's business, and the agents found modified computer chips, programs to modify computer chips, and the tools necessary to perform the modifications. *Id.*

Law,⁷ and two counts of copyright infringement.⁸ At trial the jury convicted Hux on all four counts and the trial court sentenced him to three years' probation⁹ and a \$40,000 fine.¹⁰ On appeal, the Eighth Circuit affirmed the copyright infringement counts, but reversed the convictions under the Wiretap Law.¹¹ The Eighth Circuit relied on the law's legislative history,¹² prior caselaw,¹³ principles of statutory construction, and the direct applicability of section 605 of the Communications Act¹⁴ to hold that the government may not prosecute a person under the Wiretap Law for modifying a satellite descrambler to receive encrypted programming.¹⁵

To be convicted under section 2512(1)(b) of the Wiretap Law, a person

7. 18 U.S.C. § 2512(1)(b) (1988). Section 2512(1)(b) criminally sanctions anyone who intentionally "manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications. . . ." *Id.* See *infra* notes 25-30.

8. 940 F.2d at 315. The copyright infringement claim was brought under 17 U.S.C. § 506(a) (1988). *Id.*

9. 940 F.2d at 315. Hux served six months of this probation in an in-home detention program. *Id.*

10. *Id.*

11. *Id.* at 318.

12. S. REP. NO. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 2112, 2183; S. REP. NO. 541, 99th Cong., 2d Sess., reprinted in 1986 U.S.C.C.A.N. 3555.

13. *United States v. Herring*, 933 F.2d 932 (11th Cir. 1991). See also *Greek Radio Network of America, Inc. v. Vlasopoulos*, 731 F. Supp. 1227, 1232 (E.D. Pa. 1990) (sale of decoders allowing unauthorized reception of radio communication not punishable under the Wiretap Law); *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376, 382 (N.D. Ohio 1983) (use of unauthorized cable television descrambler not punishable under the Wiretap Law). *But cf.* *United States v. McNutt*, 908 F.2d 561 (10th Cir. 1990) (sale of modified descramblers is punishable under the Wiretap Law), *cert. denied*, 111 S. Ct. 955 (1991).

14.

Any person who manufactures, assembles, modifies, imports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming . . . shall be fined not more than \$500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. . . .

47 U.S.C. § 605(e)(4) (1988).

Hux's type of conduct could be subject to civil and criminal penalties under § 605 of the Communications Act. See *Cable/Home Communications Corp. v. Network Prods., Inc.*, 902 F.2d 829, 848 (11th Cir. 1990) (§ 605 "readily applies to proscribe pirate chips and other unauthorized decoding devices, which enable third parties to receive television satellite transmissions intended for paying subscribers") (citations omitted); *ON/TV of Chicago v. Julien*, 763 F.2d 839, 842-43 (7th Cir. 1985) (sale of subscription television decoder kits violates § 605); *National Subscription Television v. S. & H. TV*, 644 F.2d 820, 825 (9th Cir. 1981) (same). See also *infra* notes 42-43 and accompanying text.

15. 940 F.2d at 318.

must "intentionally" produce or sell a device knowing¹⁶ that the design makes it "primarily useful" for the surreptitious interception of oral, wire, or electronic communications.¹⁷ Courts have interpreted the "primarily useful" language to mean that the device in question must have few, if any, legitimate uses.¹⁸ *Hux* focused on whether section 2512(1)(b) required that the modified satellite descrambler was "primarily useful" for surreptitious interception of electronic communications, or was merely used in a surreptitious manner to intercept electronic communications. The court also analyzed the applicability of both section 605 of the Communications Act and section 2512 of the Wiretap Law to modifying satellite descramblers.¹⁹

Because of the advances in technology that had taken place since the Wiretap Law's original enactment in 1968,²⁰ Congress amended the Wiretap Law²¹ in 1986 to protect against unauthorized interception of

16. 18 U.S.C. § 2512(1)(b) (1988). The person may also be convicted if they have reason to know of these characteristics. *Id.* See *supra* note 7.

17. 18 U.S.C. § 2512(1)(b) (1988). The section also requires that "such device or any component portion thereof has been or will be sent through the mail or transported in interstate or foreign commerce." *Id.* See *supra* note 7. Section 2512(1)(b) principally allows prosecution for the possession or manufacture of devices designed to intercept personal communications without authorization. See *United States v. Schweih*, 569 F.2d 965, 968 (5th Cir. 1978). See also *Flowers v. Tandy Corp.*, 773 F.2d 585, 588-89 (4th Cir. 1985) (§ 2512 cannot be used to create a civil cause of action under § 2520 of the Wiretap Act).

18. *United States v. Herring*, 933 F.2d 932, 934 (11th Cir. 1991) (citing *United States v. Schweih*, 569 F.2d 965, 968 (5th Cir. 1978)).

19. 940 F.2d at 317-18. See generally *Di Geronimo*, *supra* note 3.

20. Congress originally promulgated the Wiretap Law in 1968 to protect the privacy of wire and oral communications and to provide uniform conditions under which courts may authorize the interception of such communications. S. REP. NO. 1097, *supra* note 12, at 2153. Congress drafted Title III, the Wiretapping and Electronic Surveillance section of the Omnibus Crime Control and Safe Streets Act of 1968, to meet the standards the Supreme Court set down in *Katz v. United States*, 389 U.S. 347 (1967). S. REP. NO. 1097, *supra* note 12, at 2153. Congress intended to combat organized crime by allowing only law enforcement officers to conduct electronic surveillance. *Id.* at 2154-57. Congress specifically intended § 2512 to curtail the supply and availability of devices particularly suited to wiretapping and eavesdropping. *Id.* at 2183. The law prohibits the narrow category of devices whose principal use is likely for wiretapping or eavesdropping. Congress gave examples of these prohibited devices: the martini olive transmitter; the spike mike; the infinity transmitter; and the microphone disguised as a wristwatch, picture frame, cuff link, or cigarette pack. However, since Congress did not want to interfere with the production or distribution of legitimate electronics equipment, they required that the device be primarily useful for surreptitious listening. *Id.*

21. S. REP. NO. 541, *supra* note 12, at 3555. The substantive changes replaced "willfully" with "intentionally" and added the phrase "or electronic" to the section. *Id.* at 3574-77. The later 1986 amendment served "to update and clarify federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." *Id.*

electronic communications.²² Although the legislative history of the 1986 amendment directly discusses several areas of new coverage, such as electronic mail, cellular telephones, and electronic bulletin boards, it left the private viewing of the satellite pay-television industry to the Communications Act.²³ Courts have interpreted the effect of the changes in the statute differently.²⁴

The Fifth Circuit established the standard for applying pre-amendment section 2512(1)(b) to intercepting devices in *United States v. Schweih*s.²⁵ The court determined that Congress intended section 2512(1)(b) to ban the manufacture, possession, or sale of a narrow category of devices that by design are *primarily* useful for eavesdropping and wiretapping.²⁶ The court, relying on the legislative history of section 2512,²⁷ concluded that a violation of the section required the possession of a device designed for covert listening, rather than the surreptitious use of a legitimate electronic device.²⁸ The defendant used an ordinary amplifier, with undisputed legitimate uses,²⁹ to monitor alarm signals in the course of a robbery. Because of the legitimate uses that the defendant

22. S. REP. NO. 541, *supra* note 12, at 3555-57.

23. *Id.* at 3562-63. "[P]rivate viewing of satellite cable programming, network feeds and certain audio subcarriers will continue to be governed exclusively by section 705 of the Communications Act of 1934 [codified at 47 U.S.C. § 605 (1988)], and not by [the Wiretap Law]." *Id.* at 3576. *See* 47 U.S.C. § 605(e)(4) (1988).

24. It is not clear whether the pre-1986 version of the Wiretap Law would apply to the manufacture of satellite cable programming decoders. The Eleventh Circuit, in *United States v. Herring*, 933 F.2d 932, 934 (11th Cir. 1991), found that the pre-amendment version of § 2512(1)(b) did not apply to a person modifying such a descrambler. However, in *United States v. McNutt*, 908 F.2d 561, 565 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 955 (1991), the Tenth Circuit determined that the legislative history was ambiguous and held that the plain language of § 2512(1)(b) supported a cause of action for the same activities. *See infra* notes 31-37 and accompanying text. *But see* 47 U.S.C. § 605 (1988); *infra* note 42.

25. 569 F.2d 965 (5th Cir. 1978). At trial in the District Court for the Southern District of Florida, the jury convicted Schweih's of willful and knowing possession of an electronic device that, by virtue of its design, was primarily useful for the surreptitious interception of wire or oral communications. *Id.* at 966.

26. *Id.* at 968. *See also* *United States v. Pritchard*, 773 F.2d 873, 879 (7th Cir. 1985) (the design of the device must render it primarily useful for surreptitious listening, but the device need not be disguised in order to be prohibited), *cert. denied*, 474 U.S. 1085 (1986).

27. S. REP. NO. 541, *supra* note 12, at 2183-84.

28. 569 F.2d at 969. *See also* *Flowers v. Tandy Corp.*, 773 F.2d 585, 588-89 (4th Cir. 1985) (legitimate uses of device remove it from the proscription of § 2512).

29. 569 F.2d at 969-70. The court reasoned that an ordinary amplifier's primary uses are, *by design*, legitimate and thus its possession could not be the basis of a violation. On the other hand, a proscribed device is one whose primary uses, *by design*, are surreptitious interception of private communications. *Id.* at 970-71.

could have made of the amplifier, the court reversed Schweih's conviction under the Wiretap law.³⁰

The Tenth Circuit was the first circuit to apply the amended section 2512(1)(b) to modifying satellite descramblers. In *United States v. McNutt*,³¹ the court held that the defendant properly could be charged under the Wiretap Law for altering satellite descramblers to allow unauthorized interception of satellite programming.³² The defendant argued that section 2512(1)(b)'s legislative history indicated that satellite programming was not electronic communication under the definition of the Wiretap Law and, therefore, that the section should not apply.³³ The court disagreed, finding the legislative history ambiguous.³⁴ The court further determined that the Wiretap Law's definition of electronic communications³⁵ encompassed satellite television signals and thus ruled that

30. *Id.* at 971.

31. 908 F.2d 561 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 955 (1991). In the United States District Court for the Northern District of Oklahoma, the jury convicted McNutt of: 1) conspiring to traffic in a counterfeit access device, in violation of 18 U.S.C. § 1029 (1988); and 2) conspiring to manufacture, possess, or sell a surreptitious interception device in violation of 18 U.S.C. § 2512(1)(b) (1988). *Id.* at 562.

32. 908 F.2d at 565. To receive a scrambled satellite transmission, a satellite dish owner must purchase a descrambler box. A legally purchased descrambler includes its own unique encoded "address." To descramble the signal, the descrambler-box owner must pay the proper company a fee and report to the company his descrambler-box "address" number. The company then includes in its encrypted signal a code that allows the descrambler box with the authorized address to descramble the subscribed satellite signal. Since no two legally purchased descrambler boxes contain the same "address," this system allows the satellite transmission to restrict descrambling of its signals to only those descrambler boxes authorized to receive the signal. *Id.* at 562-63.

McNutt, by cloning a descrambler box, was copying the "unique" address number from one descrambler box into other descrambler boxes. Consequently, as long as the owner of the original descrambler box continued to pay for an unscrambled signal, all of the cloned descrambled boxes would be able to descramble the signal as well. *Id.*

33. *Id.* See S. REP. NO. 541, *supra* note 12, at 3566-69. See *infra* notes 80-83 and accompanying text.

34. 908 F.2d at 564. The legislative history states that a "communication is an electronic communication protected by the Federal Wiretap Law if it is not carried by sound waves and cannot be fairly characterized as containing the human voice." S. REP. NO. 541, *supra* note 12, at 3568. Communications consisting solely of data and those that are transmitted only by radio are examples of electronic communications. *Id.* The juxtaposition of the "cannot be fairly characterized as containing the human voice" language with the listing of video teleconferencing as an example of protected communication confused the Tenth Circuit, because video teleconferencing undoubtedly includes the human voice. 908 F.2d at 564. The court also noted repeated references in the legislative history to the problems associated with the unauthorized interception of satellite television broadcasts. *Id.* at 564-65. See S. REP. NO. 541, *supra* note 12, at 3560-61, 3573.

35. Electronic communication is "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic,

section 2512 did apply.³⁶ The court determined that the interception was sufficiently surreptitious to fall within the condemnation of section 2512 because the providers of the satellite service were unaware that the users of the descramblers were intercepting their programming.³⁷

The Eleventh Circuit reached the opposite conclusion in *United States v. Herring*.³⁸ In *Herring* a group of defendants sold to the public modified descramblers that would intercept encrypted satellite programming.³⁹ The court examined section 2512 in pre-amendment and post amendment form and determined that neither version applied to the defendants' conduct.⁴⁰ Noting that a device must have few, if any, nonsurreptitious and legitimate uses to be prohibited by section 2512, the court held that the modified descrambler had legitimate uses⁴¹ and, therefore, that neither version of section 2512 prohibited it. The court then determined, however, that section 605(e)(4) of the Communications Act⁴² clearly prohibited the defendants' conduct of modifying the satellite descramblers.⁴³

The Eleventh Circuit proceeded to compare the application of the two statutes to the defendant's conduct and determined that section 605(e)(4)

photoelectronic or photooptical system that affects interstate or foreign commerce." 18 U.S.C. § 2510(12) (1988). See S. REP. NO. 541, *supra* note 12, at 3568-69.

36. 908 F.2d at 564. "The clarity of the statutory language contrasted with the ambiguity in the legislative history obliges us to follow the plain wording of the statute." *Id.* at 565.

37. *Id.*

38. 933 F.2d 932 (11th Cir. 1991). In the United States District Court for the Middle District of Alabama, the jury convicted three of four defendants of both conspiracy to violate and a violation of § 2512(1)(b). The jury convicted the fourth defendant on the conspiracy count only. *Id.* at 933.

39. *Id.* at 932.

40. *Id.* at 935. The court noted the absence of discussion about satellite pay television in the statute, and determined that there was also no evidence of intent to "broaden the meaning of 'surreptitious' to encompass devices that have legitimate uses but whose owners use them illegitimately. . . ." *Id.* at 935. See S. REP. NO. 541, *supra* note 12, at 3574-77 (the only changes to § 2512 were minor).

41. 933 F.2d at 934. There was testimony that the decoders were useful to receive scrambled signals that did not require authorization. *Id.* It is, however, questionable whether there are legitimate uses for an illegally modified descrambler. See *infra* notes 75-78.

42. 47 U.S.C. § 605 (1988). See H.R. REP. NO. 934, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4746.

43. 933 F.2d at 935-37. The legislative history to § 605 states that if a person not authorized to receive an encrypted satellite program intercepts a program, the programmer can use the strengthened penalties and remedies provided in § 605. The language specifically includes those who assist in receiving such communications through the sale or manufacture of illegal equipment. See 130 CONG. REC. 14286, reprinted in 1984 U.S.C.C.A.N. 4655, 4745-46 (statement of Sen. Robert W. Packwood). See also 933 F.2d at 935 (the better interpretation prohibits both viewing and assisting in viewing unauthorized satellite programming); S. REP. NO. 541, *supra* note 12, at 3576.

was more appropriate for three reasons.⁴⁴ First, the court cited the rule that courts must interpret ambiguous criminal statutes in favor of the accused.⁴⁵ Second, the court noted the absence of any discussion of satellite pay-television in the 1986 amendment to the Wiretap statute.⁴⁶ Finally, the court applied the rule that a newly enacted statute drawn in general terms does not negate the efficacy of an earlier, more specific statute.⁴⁷ Although the court then determined that the statutes did not overlap,⁴⁸ it further reasoned that, even if they did, section 2512(1)(b)'s ambiguity would require prosecution under the more specific section 605.⁴⁹ Thus the Eleventh Circuit held that a person who modified a satellite descrambler could not be charged under section 2512.⁵⁰

The current version of section 605 clearly prohibits the use, manufacture, and sale of devices that allow the unauthorized reception of television programming.⁵¹ In *Cox Cable Cleveland Area v. King*⁵² a federal district court in Ohio determined that the sale, installation, and use of devices intended for unauthorized reception of premium cable channel programming violated the original section 605.⁵³ The defendants sold decoders that allowed users to receive scrambled cable programming without paying the monthly subscription fee.⁵⁴ The court held that the Wiretap Law⁵⁵ did not apply to this conduct and specifically stated that

44. 933 F.2d. at 937. The court also noted, in support of its analysis, that the greater fiscal penalties for violations of § 605 are consistent with its prohibition of primarily economic conduct, in contrast with the higher levels of imprisonment § 2512(1)(b) establishes, which accord with its goal of deterring the more invasive crime of intercepting personal communications. *Id.* at 937-38.

45. *Id.* at 937 (citing *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

46. *Id.* at 935.

47. *Id.* at 938 (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

48. *Id.* at 938. *See* S. REP. NO. 541, *supra* note 12, at 3573 ("if an individual violates the criminal prohibitions in section 633 of the Communications Act, he cannot also be charged under chapters 119 or 121 of title 18"). *See also* *United States v. Batchelder*, 442 U.S. 114 (1979) (prosecutor has the right to choose the statute under which an indictment will be brought if statutes overlap).

49. 933 F.2d at 938. *See* *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

50. 933 F.2d at 935.

51. *See* *United States v. Stone*, 546 F. Supp. 234, 239 (S.D. Tex. 1982) (criminal provisions of § 605 apply to sellers of devices that intercept microwave pay-television transmissions); *United States v. Westbrook*, 502 F. Supp. 588, 592 (E.D. Mich. 1980) (same). *See also* *ON/TV of Chicago v. Julien*, 763 F.2d 839, 843 (7th Cir. 1985) (those who manufacture or sell unauthorized descramblers for subscription television are liable under the civil provisions of § 605); *National Subscription Television v. S & H TV*, 644 F.2d 820, 826 (9th Cir. 1981) (same); *Cox Cable Cleveland Area v. King*, 582 F. Supp. 376, 380 (N.D. Ohio 1983) (same).

52. 582 F. Supp. 376 (N.D. Ohio 1983).

53. *Id.* at 380.

54. *Id.* at 378-79.

55. *Id.* *See* 18 U.S.C. §§ 2510-2521 (1988).

the Wiretap Law prohibited only private surveillance.⁵⁶ Thus the Wiretap Law prohibits surreptitious efforts to learn the contents of private business or personal communications, but not the unlawful interception of public communications such as cable television programming.⁵⁷

In *Greek Radio Network of America v. Vlasopoulous*,⁵⁸ a federal district court in Pennsylvania held that amended section 605, and not the Wiretap Law, prohibited the unauthorized interception of subscription radio services.⁵⁹ The defendants modified and sold radio units that allowed unauthorized listeners to obtain the programming carried on a separate radio channel unavailable to the public.⁶⁰ The court followed *Cox Cable* in deciding that the Wiretap Law prevented unlawful surveillance of private business or personal communications and did not provide a plaintiff with a cause of action for the unauthorized interception of its radio transmissions.⁶¹

In *United States v. Hux*⁶² the Eighth Circuit explicitly followed the Eleventh Circuit's reasoning in *Herring* to determine that section 2512(1)(b) does not apply to the modification of satellite descramblers.⁶³ The defendant argued that section 2512(1)(b) did not proscribe his conduct and that prosecution was limited to section 605(e)(4).⁶⁴ Hux relied

56. 582 F. Supp. at 382.

57. *Id.* The *Cox Cable* court relied on legislative history contained in the reports for the 1968 wiretap statute to conclude that the wiretap statutes were enacted with the exclusive purpose of protecting private communications.

See also *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 583 (11th Cir. 1983) (a private call cannot be intercepted; a business exception to the Wiretap Law exists only to determine the nature of a call and never its contents); *Edwards v. State Farm Ins. Co.*, 833 F.2d 535, 540 (5th Cir. 1987) (the Wiretap Law requires a subjective expectation of privacy that is justifiable under the circumstances; because user of cellular phone did not have such expectation, no violation of pre-1986 Wiretap Law); *Flowers v. Tandy Corp.*, 773 F.2d 585, 589 (4th Cir. 1985) (§ 2512 does not imply a private cause of action against a manufacturer or seller of a device primarily useful for wiretapping); *Greek Radio Network of America, Inc. v. Vlasopoulous*, 731 F. Supp. 1227 (E.D. Pa. 1990) (Wiretap Law does not provide a cause of action for interception of scrambled radio transmissions).

58. 731 F. Supp. 1227 (E.D. Pa. 1990).

59. *Id.* at 1230-32.

60. *Id.* at 1229. The plaintiff sent out programming on a separate subcarrier frequency that could be received only with a special unit, or one of the illegally modified units.

61. See *supra* notes 55-57 and accompanying text. Before Congress amended § 605 of the Communications Act, courts implied a private cause of action through the application of a four-part test set out in *Cort v. Ash*, 422 U.S. 66 (1975). See *Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 466 (6th Cir. 1980) (private cause of action implied under § 605 for television programmer against seller of unauthorized decoder boxes).

62. 940 F.2d 314 (8th Cir. 1991).

63. *Id.* at 318.

64. *Id.* at 316.

on the Fifth Circuit analysis in *Schweih's*, which held that a device must have few, if any, legitimate uses to violate section 2512(1)(b),⁶⁵ and on the Eleventh Circuit analysis in *Herring*, which specifically held that section 2512(1)(b) did not apply to the modification of satellite descramblers.⁶⁶ The government contended, on the other hand, that the language of section 2512(1)(b) indeed proscribed Hux's conduct and that the charge was proper,⁶⁷ arguing that *McNutt* supported the position that section 2512(1)(b) applied to the modification of satellite descramblers.⁶⁸

The *Hux* court cited several factors in deciding to follow the reasoning of *Herring*. First, the Eighth Circuit looked to the legislative history of 2512(1)(b), deciding to read the statute to prohibit devices designed for use in a surreptitious manner, rather than to prohibit the surreptitious use of a legitimate device.⁶⁹ Second, the language of section 605, and its designation as the sole authority governing "the private viewing of satellite cable programming" in the legislative history of section 2512(1)(b),⁷⁰ convinced the court that section 605 directly applied to the modification of descramblers, while section 2512(1)(b)'s application was speculative at best.⁷¹ The persuasiveness of the principles of statutory construction used in *Herring*,⁷² and the lack of depth in the *McNutt* analysis,⁷³ led the Eighth Circuit to hold section 2512(1)(b) inapplicable and to reverse Hux's conviction under that section.⁷⁴

The dissent believed the majority's interpretation of section 2512(1)(b) and its legislative history to be too narrow.⁷⁵ The dissent disagreed with the majority's reasoning that a modified satellite descrambler had sufficient legitimate uses to prevent the application of section 2512(1)(b).⁷⁶ Instead, the dissent argued that the specifically surreptitious characteris-

65. See *supra* notes 25-30 and accompanying text.

66. 940 F.2d at 317. See *supra* notes 38-50 and accompanying text.

67. 940 F.2d at 317.

68. *Id.* See *supra* notes 31-37 and accompanying text.

69. 940 F.2d at 317. See *supra* notes 26-29.

70. See S. REP. NO. 541, *supra* note 12, at 3576.

71. 940 F.2d at 316.

72. See *supra* notes 38-50 and accompanying text.

73. 940 F.2d at 318. The Eighth Circuit agreed with the Eleventh Circuit that *McNutt* incorrectly interpreted the word "surreptitiously" for the purpose of § 2512(1)(b). *Id.*

74. *Id.*

75. *Id.* at 319 (Ross, J., dissenting). See also S. REP. NO. 541, *supra* note 12, at 3566-70.

76. 940 F.2d at 320. The majority in *Hux* relied on testimony from *Herring* stating that modified descramblers had legitimate uses. *Id.* at 317 (citing *United States v. Herring*, 933 F.2d 932, 934 (11th Cir. 1991)).

tic of the counterfeit descrambler was the fact that it facially appeared to be a legitimate descrambler, and further that the device had no legitimate use.⁷⁷ On these grounds, the dissent asserted that Hux's actions fell within the prohibition that the language and legislative history of section 2512(1)(b) established, and that his conviction should stand.⁷⁸

While the *Hux* court reached the correct result, it did not employ the best reasoning. Although both statutes appear to apply on their face, proper statutory interpretation requires that a defendant be charged only with a section 605 violation for modifying satellite descramblers.

Considering the language of the 1984 amendment and the legislative history of section 605, it is clear that section 605 directly proscribes the modification of satellite descramblers.⁷⁹ On the other hand, the Wiretap Law seeks to prevent unauthorized interception of personal or point-to-point communication.⁸⁰ Satellite transmissions of the type involved in *Hux*, while not open to the public,⁸¹ are, nevertheless, not electronic communications in the same sense as private individual communication or the transfer of corporate data. "Electronic communication" may, in its broadest terms, encompass the transmission of such television programming; but the legislative history, subsequent caselaw, and the comparison with section 605 precludes that conclusion.⁸² The legislative history of the Wiretap Law supports this analysis⁸³ and indicates congressional intent to charge defendants only with violations of the more precise statute.⁸⁴

Given the rules of statutory construction,⁸⁵ the Eighth Circuit soundly determined that Hux could be charged with a section 605 violation alone. However, the court should have relied solely on this statutory compari-

77. *Id.* at 319-20 (Ross, J., dissenting).

78. *Id.* at 320.

79. *See supra* note 14. The language of § 605 clearly prohibits the exact conduct of the *Hux* defendants. 47 U.S.C. § 605(3)(4) (1988).

80. *See supra* notes 52-57, 58-61 and accompanying text.

81. The encryption of such programming indicates that it is not open to the public. H.R. REP. NO. 934, *supra* note 42, at 4746. *See United States v. Westbrook*, 502 F. Supp. 588 (E.D. Mich. 1980); *Home Box Office, Inc. v. Corinth Motel, Inc.*, 647 F. Supp. 1186 (N.D. Miss. 1986).

82. *See supra* notes 42-50, 69-74 and accompanying text.

83. A defendant who violates the Communications Act by intercepting or assisting in the interception of cable television without authorization can only be charged with the Communications Act violation and not a Wiretap Law violation. *See S. REP. NO. 541, supra* note 12, at 3573. It appears in this instance that both statutes apply to the conduct, but that Congress intended the more direct statute to control. *See also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).

84. *Radzanower*, 426 U.S. at 153.

85. *See supra* notes 44-50 and accompanying text.

son, rather than on a questionable characterization that modified descramblers have legitimate uses, to conclude that section 2512 does not apply to the modification of satellite descramblers.⁸⁶

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86. *See supra* notes 76-77 and accompanying text.

