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Recommended Citation
https://scholarship.law.umn.edu/mlr/2302
Note

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“[T]he satellite-television revolution . . . has the potential to transform the world.” Indeed, satellite antennas can receive more information than coaxial cable wires and can service the television needs of millions of Americans who will never have access to cable television. Unfortunately for programmers and others who stand to profit from satellite broadcasts, viewers throughout America can enjoy this vast array of satellite-carried programming without paying anything. Hundreds of thousands of home earth station owners have purchased unauthorized satellite descramblers, devices that enable them to receive programming without paying the requisite subscription fees. The use of unauthorized descramblers now deprives sat-

2. Dawn Stover, The Satellite TV Puzzle: Legal Issues Over Scrambling Telecommunications, POPULAR SCI., Nov. 1985, at 96. However, technology still being developed—“video compression”—will increase the number of cable channels by at least four times. Tim W. Ferguson, Programming for Professors, if Cable Survives the Midterm, WALL ST. J., Feb. 11, 1992, at A17.
3. Because phone wires are incapable of fully transmitting television signals, cable television systems use coaxial cable wire to carry the signals they receive via satellite directly to the homes of paying subscribers. LYNNE S. GRoss, THE NEW TELEVISION TECHNOLOGIES 19 (2d ed. 1986).
4. An estimated 30 million Americans will never be able to receive cable television. Stover, supra note 2, at 96.
5. Estimates vary, but in 1988 Congress suggested that there were about 330,000 descrambler units “compromised by black market decoding chips.” H.R. REP. No. 887(II), 100th Cong., 1st Sess. 28-29 (1988), reprinted in 1988 U.S.C.C.A.N. 5638, 5657-58. As of 1991, this number had increased more than one and one-half times. See Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Earth Station Receivers, 6 F.C.C.R. 725, 727 (1991) (asserting that about “500,000 units have been modified to receive encrypted signals without authorization”).
6. See infra note 41 and accompanying text.
7. See infra note 59 and accompanying text.
ellite programmers of millions of dollars in revenue each year.8

Despite this popularity, the manufacture and sale of unauthorized satellite descramblers is illegal. Under section 705 of the Communications Act of 19349—as amended by the Cable Communications Policy Act of 1984 (CCPA) and the Satellite Home Viewer Act of 1988 (SHVA)—sellers of pirated descramblers face heavy fines and substantial prison sentences.10 These statutory provisions, along with the Electronic Communications and Privacy Act of 1986 (ECPA),11 reflect Congress’s effort, in the face of rapidly evolving technology, to modernize laws addressing the security of communications.12

This formidable array of statutory weapons indicates that Congress intended to outlaw pirated descramblers. It is unclear, however, whether the Communications Act is the only statute banning such devices. Federal circuit courts are divided

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8. In 1990, the home earth station industry reported that unauthorized descramblers were costing it $100 million dollars a year. FBI: Turn in Illegal Satellite Decoders, CHI. TRIB., Dec. 25, 1990, at 3; see also ON/TV of Chicago v. Julien, 763 F.2d 839, 843 (7th Cir. 1985) (asserting that “[s]ales of devices solely designed to intercept protected communications threaten the viability of the subscription television industry”); H.R. REP. No. 887(11), supra note 5, at 14, reprinted in 1988 U.S.C.C.A.N. at 5642 (“[P]iracy has become an increasingly distressing problem to the satellite industry and seriously threatens to undermine the industry’s survival.”); Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, 3 F.C.C.R. 1202, 1205 (1988) [hereinafter Scrambling of Signals] (“Unchecked piracy could . . . halt satellite-to-home program distribution.”).


10. In addition to civil remedies, the CCPA provided for jail time of up to two years as well as fines of $50,000. 47 U.S.C. § 705(d)(2), (4) (Supp. III 1985). The SHVA increased the provision’s criminal penalties, providing for imprisonment of up to five years and fines of up to $500,000 for each device sold. 47 U.S.C. § 705(e)(4) (1988).


about whether section 2512 of the ECPA also applies to pirated descramblers. Section 2512 prohibits the manufacture and sale of devices the design of which renders them "primarily useful for the purpose of the surreptitious interception of . . . electronic communications."14

The question of the proper interpretation of section 2512 affects the ECPA's capacity to protect unforeseen methods of communication in the future. This Note suggests that both the ECPA and the Communications Act prohibit unauthorized descramblers because Congress intended each statute to regulate the commercial communications that descramblers intercept. Part I describes Congress's recent statutory response to increasingly sophisticated modes of communication. Part II surveys judicial interpretations of the ECPA in cases involving satellite descramblers. Part III critiques these interpretations and suggests that the context and structure of the ECPA compel the conclusion that the statute, like the Communications Act, has a hybrid effect—that it governs both two-way private communications and one-way commercial communications. This Note concludes that construing the ECPA to ban illicit


15. Some commentators deny that bodies such as legislatures can form an identifiable collective intent. See, e.g., Frank H. Easterbrook, Statutes' Do- mains, 1983 U. Chi. L. Rev. 533, 547 ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable . . . . The body as a whole . . . has only outcomes."). In this Note, the phrase "congressional intent" and other like phrases are used for convenience to indicate the meaning that the enacting legislators most likely assigned to the statute.

16. As used in this Note, the term "commercial communications" generally refers to communication signals which are available to the public for a subscription fee and which usually consist of entertainment, sports, and news programming. Cable television, subscription television, multipoint distribution service, and direct broadcast satellite all fit this description, although each involves different technology and operating characteristics. See Gross, supra note 3, at 53-136 (describing the development of and the differences between these forms of commercial broadcasting). Commercial communications must be distinguished from "commercial speech," a form of expression which is essentially advertising for First Amendment purposes. See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980).
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I. UNAUTHORIZED INTERCEPTION OF COMMUNICATIONS: THE STATUTORY FRAMEWORK

A. TITLE III: PROTECTION OF COMMUNICATIONS PRIVACY

Throughout this century, Congress has acted to protect the sanctity of both private and public communications. The most prominent of the earlier statutes was the Communications Act of 1934, which generally prohibited the interception and divulgence of both wire and radio communications. In the late 1960s, however, it became apparent that existing legislation failed adequately to balance the demands of effective law enforcement with communications privacy. Attempting to achieve this balance, Congress in 1968 reformulated the limits

17. As originally enacted, § 605 of the Communications Act provided:
No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof . . . ; and no person not being authorized by the sender shall intercept any communication . . . ; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio . . . . Communications Act of 1934, ch. 652, § 605, 48 Stat. 1103 (codified as amended at 47 U.S.C. § 705(a) (1988)). The Supreme Court initially held that this provision barred the use of intercepted communications in federal criminal trials. Weiss v. United States, 308 U.S. 321, 331 (1939); Nardone v. United States, 302 U.S. 379, 382 (1937). The Court later ruled that only parties to intercepted conversations had standing to suppress such evidence. Goldstein v. United States, 316 U.S. 114, 122 (1942).

In the modern era, courts have held that satellite transmissions constitute "radio communications" within the purview of the Communications Act. E.g., Home Box Office, Inc. v. Corinth Motel, Inc., 647 F. Supp. 1186, 1189 (N.D. Miss. 1986); Entertainment & Sports Programming Network, Inc. v. Edinburg Community Hotel, Inc., 735 F. Supp. 1334, 1338 (S.D. Tex. 1986); see also Di Geronimo, supra note 9, at 415 (asserting that courts have "stretched" the original provision to include television, satellite, and microwave broadcasts).

on the interception of such communications by enacting Title III of the Omnibus Crime Control and Safe Streets Act (Title III).\footnote{19}

Title III originally protected wire and oral communications from unauthorized aural interception\footnote{20} and delineated the procedures that law enforcement officials must follow to receive permission from courts to tap phone lines.\footnote{21} Although Con-

\footnote{19. Pub. L. No. 90-351, 82 Stat. 212 (codified as amended in scattered sections of 18 U.S.C.). The Supreme Court provided the immediate impetus for congressional action by declaring that the government could tap phone lines upon satisfying rigid Fourth Amendment conditions. See Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967). The \textit{Katz} Court found that the government's bugging of a phone booth constituted a search within the meaning of the Fourth Amendment. \textit{Id.} at 353. The Court thus recognized that the privacy interests at stake in wiretap cases are significant enough to invoke constitutional protections. The Court held such searches generally require a warrant based on probable cause. \textit{Id.} at 356. Title III essentially codified the Court's constitutional mandates. See S. REP. No. 1097, supra note 18, at 75, reprinted in 1968 U.S.C.C.A.N. at 2163 ("Working from the hypothesis that any wiretapping and electronic surveillance legislation should include . . . constitutional standards, the subcommittee has used the \textit{Berger} and \textit{Katz} decisions as a guide in drafting [Title III.").}

\footnote{20. 18 U.S.C. § 2511 (1982), amended by 18 U.S.C. § 2511 (1988). "Interceptions" under Title III were confined to "aural acquisition[s]" of the contents of wire and oral communications and thus did not include the acquisition of data or other information by sight or other methods. See 18 U.S.C. § 2510(4) (1982), amended by 18 U.S.C. § 2510(4) (1988). This restrictive definition often produced absurd results, tacitly condoning certain invasions of privacy. For example, the statute did not apply to pen registers, devices that decode electric phone line impulses, because the registers "do not hear sound" and therefore "do not accomplish the 'aural acquisition' of anything." United States v. New York Telephone Co., 434 U.S. 159, 167 (1977). Similarly, the Fourth Circuit found Title III inapplicable to the interception of communications between two computers because the word "aural" requires some kind of sound element. United States v. Seidlitz, 589 F.2d 152, 157 (4th Cir. 1979), cert. denied, 441 U.S. 922 (1979); see also Michigan Bell Tel. Co. v. United States, 565 F.2d 385, 388 (6th Cir. 1977) (holding that devices which neither hear nor monitor conversations "do not accomplish an 'aural acquisition' "); United States v. Gregg, 629 F. Supp. 958, 962 (W.D. Mo. 1986) (holding that Title III did not prohibit the interception of telex communications because such interception does not entail the "aural acquisition" of communications).

gress intended Title III to aid the government in apprehending criminals, the other overriding purpose of the statute was to prevent unauthorized interception of private person-to-person communications. Thus, Congress sought to ensure privacy of communications transmitted by wire and those made orally by criminalizing their interception and by conferring upon aggrieved parties a civil right of action against individuals who intercept protected communications.

To bolster Title III's protection of privacy, section 2512 of Title III outlawed the sale or manufacture of devices designed to intercept wire and oral communications. The legislative intent was to buttress the fight against organized crime.

See S. Rep. No. 1097, supra note 18, at 66, reprinted in 1968 U.S.C.C.A.N. at 2153; see also Fein, supra note 21, at 56 (asserting that "the overarching purpose of Title III was to establish standards and procedures for the investigative use of wiretapping or electronic eavesdropping"); Cori D. Stephens, Note, All's Fair: No Remedy Under Title III for Interspousal Surveillance, 57 Fordham L. Rev. 1035, 1040 (1989) (arguing that Congress enacted Title III to buttress the fight against organized crime).

22. See S. Rep. No. 1097, supra note 18, at 66, reprinted in 1968 U.S.C.C.A.N. at 2153; see also Fein, supra note 21, at 56 (asserting that "the overarching purpose of Title III was to establish standards and procedures for the investigative use of wiretapping or electronic eavesdropping"); Alan Gadlin, Note, Title III Protection for Wireless Telephones, 1985 U. Ill. L. Rev. 143, 152 (explaining that the "congressional drafters expressed concern with protecting conversation, not one-way commercial broadcasts").


25. (1) Except as otherwise specifically provided in this chapter, any person who willfully . . . (b) 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 or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

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history states that this provision bans devices such as microphones disguised as cuff links or other objects which can secretly record conversation.\textsuperscript{27} The Fifth Circuit Court of Appeals in 1978 offered the first detailed construction of section 2512.\textsuperscript{28} In \textit{United States v. Schweihis},\textsuperscript{29} the court reversed a conviction under section 2512(1)(b), which prohibits possession of eavesdropping devices.\textsuperscript{30} Schweihis used an ordinary amplifier to construct a device that would evade an electronic alarm system during a burglary.\textsuperscript{31} He argued that the amplifier was "not by design primarily useful for surreptitious interception such as granted no corresponding private right of action against the manufacturers of such equipment. See 18 U.S.C. § 2520 (1982), \textit{amended by} 18 U.S.C. § 2520 (1988) ("Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications."); Flowers v. Tandy Corp., 773 F.2d 585, 589 (4th Cir. 1985).

\textsuperscript{27} S. REP. NO. 1097, \textit{supra} note 18, at 95, \textit{reprinted in} 1968 U.S.C.C.A.N. at 2183. Congress intended to limit the application of § 2512 to devices, though having innocent uses, whose principal function was to intercept protected communications:

The statutory phrase is intended to establish a relatively narrow category of devices whose principal use is likely to be for wiretapping or eavesdropping. A device will not escape the prohibition merely because it may have innocent uses. The crucial test is whether the design of the device renders it \textit{primarily} useful for surreptitious listening.

\textit{Id.} The Report then gave examples of prohibited devices: "[T]he martini olive transmitter, the spike mike[,] . . . and the microphone disguised as a wristwatch, picture frame, cuff link, tie clip, fountain pen, stapler, or cigarette pack." \textit{Id.}

\textsuperscript{28} Prior to this time, Title III had withstood attacks on constitutional grounds. Congress enacted Title III pursuant to its authority under the Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3. In \textit{United States v. Reed}, 489 F.2d 917 (6th Cir. 1974), the court upheld defendant's conviction under 18 U.S.C. § 2512(1)(b) for possession of an instrument (a tape recorder connected to insulated conductor wire with a phone plug and two alligator clips) knowing that it was "'primarily useful for surreptitious interception of wire . . . communications,' and that it had previously moved in interstate commerce." \textit{Id.} at 918. The court found § 2512 a proper exercise of Congress's authority, as it "was clearly Congress'[s] intention to respond to a national problem intimately affecting interstate commerce by a national solution." \textit{Id.} at 919. That the "possession, manufacture, distribution, advertising, and use of [such] devices [were] facilitated by interstate commerce" further supported the court's conclusion. \textit{Id.} at 920; see also \textit{United States v. Novel}, 444 F.2d 114, 114 (9th Cir. 1971) (per curiam) (holding that § 2512 is not unconstitutionally vague and ambiguous).

\textsuperscript{29} 569 F.2d 965 (5th Cir. 1978).

\textsuperscript{30} \textit{Id.} at 967.

\textsuperscript{31} \textit{Id.}
is proscribed by [section 2512]."32 The court agreed, holding that although the device was capable of intercepting protected communications, it was distinguishable from the devices that Congress listed in the legislative history because it "reveal[ed] no design characteristics which suggest surreptitious listening as its primary function."33 Thus, because the amplifier’s design did not render it "primarily useful" for surreptitious interception, it fell outside of section 2512.34

B. COMMUNICATIONS TECHNOLOGY OUTPACES CONGRESS

In the years following the passage of Title III, rapid advances in communications technology quickly rendered the statute obsolete.35 In the 1970s and 1980s, businesses and consumers began using a wide variety of communication networks that Title III was ill-equipped to regulate: cellular telephones, electronic pagers, electronic bulletin boards and computers, among others.36 By the early 1980s, use of these new modes of communication rivaled that of phone calls and face-to-face conversation.37 Although such modern communications are readily

32. Id.
33. Id. at 969. The court found that the device was "basically an ordinary amplifier" that could be "used in conjunction with radios, phonographs, and other audio equipment." Id. Thus, its design rendered it useful mainly for legitimate activities.
34. Id. In United States v. Bast, 495 F.2d 138 (D.C. Cir. 1974), another federal court held that "surreptitious interception" simply means "secret listening." Id. at 143.
35. Robert W. Kastenmeier et al., Communications Privacy: A Legislative Perspective, 1989 WIS. L. REV. 715, 718, 719; see also Fein, supra note 21, at 67-80, 90-93 (arguing that technological and market changes had so altered prevailing conditions that the literal application of Title III produced absurd or conflicting results).
36. One commentator suggested that "the applicability of Title III to cellular [and cordless telephone] transmissions . . . was ambiguous at best." Russell S. Burnside, The Electronic Communications Privacy Act of 1986: The Challenge of Applying Ambiguous Statutory Language to Intricate Telecommunication Technologies, 13 RUTGERS COMPUTER & TECH. L.J. 451, 497 & n.304 (1987). Moreover, the limited definition of "interception" deprived many types of communications, including text, digital, and machine communications, of protection. See Kastenmeier et al., supra note 35, at 718. Finally, not only did Title III leave electronic communications unprotected, it also exposed wire communications transmitted by "noncommon carrier[s]" to interception because it protected only those wire communications transmitted by "common carriers." 18 U.S.C. § 2510(1) (1982), amended by 18 U.S.C. § 2510(1) (1988). Since AT&T's court-ordered divestiture in the early 1980s, callers place most local calls through such noncommon carriers. Fein, supra note 21, at 66.
37. "American citizens and American businesses are using these new forms of technology [communications transmitted by new noncommon carrier
susceptible to interception, the 1968 Act offered them questionable protection because of its confined scope.

The rapid evolution in technology not only changed the nature of two-way communications but also gave rise to a new form of one-way commercial communication: satellite television broadcasting. By the late 1970s, many pay-television channels began relying on satellites for transmitting their broadcasts. The development of antennas to receive these signals corresponded with the boom in satellite broadcasting. These antennas, known as "home earth stations" or "satellite communication services or new forms of telecommunications and computer technology in lieu of, or side-by-side with, first class mail and common carrier telephone services." S. Rep. No. 541, 99th Cong., 2d Sess. 5 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3559. For example, "data transmission and computer systems have become a pervasive part of the business and home environments." Kastenmeier et al., supra note 35, at 726.


39. See Owen, supra note 1, at 47-48. Although networks transmitted special events to American television via satellite as early as 1964, programmers did not begin to use satellites for regular broadcasting until the mid-1970s. Id. at 47. "Television was not a priority of early communications satellites, which had to shut down all their other transmissions . . . in order to carry a single channel of television." Id. at 46. But in 1974, Western Union launched "America's first genuine domestic-communications satellite," the Westar I. Id. at 47. CBS began using Westar during the same year to broadcast pay programs. Sheila B. Mangel, Home Satellite TV Viewers: Pirates or Just Aiming in the Right Direction?, COMM. & L., Feb. 1988, at 31, 33. In 1975, the entertainment network, Home Box Office (HBO), began transmitting regular programming via Westar I to its cable affiliates. Owen, supra note 1, at 47.

Satellites were put in "geosynchronous" orbits to optimize their use. Geosynchronous satellites orbit the earth at an altitude of 22,300 miles. At this altitude, the satellite's orbital period is the same as the earth's, thus allowing a programmer to transmit through the same satellite at all times without being blocked by the curvature of the earth. Id.

40. HBO made its first broadcast by satellite on September 30, 1975 when it aired the "Thrilla in Manila," the heavyweight title fight between Muhammad Ali and Joe Frazier. Owen, supra note 1, at 47. Soon after this broadcast, H. Taylor Howard, a Stanford electrical engineering professor, constructed the
dishes," receive satellite signals that conventional television sets can recognize.41

The dish industry soon flourished because antennas allow private homes to intercept satellite signals intended for cable affiliates,42 thus circumventing the monthly charges affiliates impose on their customers who receive signals through coaxial cable wire.43 By the early 1980s, thousands of individuals across the country received dozens of premium channels for one lump-sum payment—the cost of a satellite dish.44

The explosion of dish sales in the early 1980s raised a host of troubling political and legal questions. Because the Commu-

first home earth station. Id. Taylor offered to pay HBO for the free programming he began receiving, but the company failed to respond to his offer. Id.


42. Mangel, supra note 39, at 36. More generally, "[t]hrough the use of this exciting technology, Americans in even the remotest corners of our land have been able to fully participate in and benefit from a revolution in communications . . . . Through the use of home satellite antennas, individuals are able to view scores of channels of programming, much of which was undreamed of just a decade ago." Hearings on H.R. 3378 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary, House of Representatives, 99th Cong., 1st Sess. 392 (1986) (statement of Richard L. Brown, General Counsel, Satellite Television Industry Association, Inc. (SPACE)).

43. By using a home earth station in conjunction with a frequency tuner, a dish owner is able to intercept signals directly from a communications satellite and receive the programming on a conventional television set. Indeed, "most of the programs [we]re simply snatched from the more than two dozen communication satellites." Di Geronimo, supra note 9, at 414.

44. Initially, satellite dishes were prohibitively expensive for the average American. In 1980, for example, Neiman-Marcus offered packages for about $36,000. Mangel, supra note 39, at 31. Prices dropped precipitously as demand grew, so much so that by 1985 a complete system cost less than $2,500. Owen, supra note 1, at 50. While consumers bought only 5,000 dishes in 1980, by 1985 there were one million operating across the country. Bishop & Eads, supra note 41, at 67.

"The classic TVRO . . . owner lives in a rural, uncabled area with access to fewer than three over-the-air television signals . . . . [Sixty-one] percent [of dish owners] said their primary reason [for purchasing a system] was to have access to a wider variety of programming." Mangel, supra note 39, at 32.
Communications Act of 1934 prohibited interception of radio signals, it arguably criminalized the use of home earth stations. Indeed, satellite dishes enabled their owners to "steal" the property of program suppliers. The only way programmers could ensure payment for the viewing of their signals was "signal scrambling," a technique by which programmers render dishes useless without the purchase of a special "descrambler" unit that translates the now-unintelligible signal. The dish industry and its customers consequently feared the devaluation of their substantial investment by programmers using scrambling. Thus, besides outpacing Title III and exposing private communications to ready intrusion, technological advances created

45. See supra note 17 and accompanying text.
46. Even before Congress amended § 705 of the Communications Act in 1984, courts suggested that it prohibited the interception of satellite transmissions by commercial establishments, which used the broadcasts to attract customers but neglected to pay programmers for them. See, e.g., National Football League v. Cousin Hugo's, Inc., 600 F. Supp. 84, 87 (E.D. Mo. 1984); National Football League v. Alley, Inc., 624 F. Supp. 6, 9-10 (S.D. Fla. 1983). The unanswered question, however, was whether the reception of signals for private viewing at home violated § 705.
47. See Robert D. Haymer, Comment, Who Owns the Air? Unscrambling the Satellite Viewing Rights Dilemma, 20 Loy. L.A. L. Rev. 145, 145 (1986) (arguing that private property rights exist in television signals because the product carried on the signals is expensive to produce and disseminate and broadcasts would no longer be aired if signals were free for all to access); cf. Cable/Home Communication v. Network Prods., 902 F.2d 829, 850 (11th Cir. 1990) (explaining that First Amendment right of access to transmitted signals does not extend to subscription television); California Satellite Sys. v. Seimon, 767 F.2d 1364, 1367-68 (9th Cir. 1985) (same).
48. Programmers realized that dish owners were receiving signals for no charge. Thus, by 1982 HBO announced plans for signal scrambling. Stover, supra note 2, at 71. The scrambling systems operate as follows:

[F]orward [P]rogrammers . . . beam their signals up to satellites using equipment by General Instrument Corp., a San Diego firm that also sells the descrambling boxes, called VideoCiphers, used by dish owners. The programmers send scrambled signals to their satellites keyed to each dish owner's box. The signal can "talk" to each box, telling it whether the programming has been paid for and whether to receive it.

Terry Carter, Satellite TV Pirates Flying the Airwaves, Nat'l L.J., Oct. 12, 1987, at 1, 37. M/A-Com, Inc. developed the first descrambler system, known as the VideoCipher II. Stover, supra note 2, at 71. General Instruments Corporation manufactures descramblers using this system, which has become the industry standard. Scrambling of Signals, supra note 8, at 1204-05.

Because of the security problems inherent in many modern telecommunications systems such as cellular phones, experts suggest that scrambling is also the only way to ensure the privacy of such communications. See Privacy Protections, Comm. Daily, June 13, 1991, at 4.
confusion over the allocation of various property interests in commercial communications.

C. CONGRESSIONAL RESPONSE: THE MODERNIZATION OF COMMUNICATIONS LEGISLATION

Congress reacted to the communications revolution by enacting curative legislation. In 1984, Congress passed the Cable Communications Policy Act of 1984 (CCPA), \(^{49}\) taking a first step toward addressing property rights in commercial communications. Section 705 of the CCPA amended the Communications Act and attempted to balance the competing interests of dish owners and programmers. It expressly legalized the use of dishes \(^{50}\) and the reception of unscrambled signals, and it extended protection to scrambled satellite signals. \(^{51}\) The CCPA thus allowed satellite programmers to protect their property rights through signal scrambling. \(^{52}\) Moreover, the CCPA created criminal and civil liability for manufacturers of unauthor-

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50. "The main purpose behind the enactment of section [705(b) was to '[make] it clear that the manufacture, sale and home use of earth stations are legal activities.'" Sioux Falls Cable Television v. South Dakota, 838 F.2d 249, 252 (8th Cir. 1988) (quoting 130 CONG. REC. H10,446 (daily ed. Oct. 1, 1984) (statement of Rep. Rose)).

51. Section 705(a) of the CCPA adopted the language of the Communications Act of 1934, which provided broad protection to radio signals. See supra note 17 and accompanying text. Section 705(b) stated that § 705(a) would not apply to the interception of satellite cable programming for private viewing if "the programming involved is not encrypted" and the programmer has not established a marketing system under which "an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals." 47 U.S.C. § 705(b) (1988). Thus, the provisions of § 705(a) apply to the interception of encrypted signals. See Di Geronimo, supra note 9, at 429. Moreover, the exception the CCPA created for private viewing of protected transmissions does not apply "to the receipt of satellite signals for commercial advantage, retransmission, or public display." Id.

One commentator has argued, however, that despite strong precedent to the contrary, courts should construe § 705 to protect only private communications and that the more appropriate cause of action for piracy of pay programming is under copyright law. See Lauritz S. Helland, Section 705(a) in the Modern Communications World: A Response to Di Geronimo, 40 FED. COMM. L.J. 115, 128-27 (1988).

52. "The amendments made by this legislation are intended . . . to provide satellite cable program suppliers in the future with two clear alternatives for the protection of their satellite transmissions. They may either scramble their signal, or [formally market their broadcasts]." 130 CONG. REC. S14,286 (daily
ized satellite descramblers\textsuperscript{53} and cable decoders.\textsuperscript{54}

As programmers began scrambling their signals in response to the CCPA,\textsuperscript{55} home earth station sales rapidly declined\textsuperscript{56} because dish owners now had to purchase descrambler units and pay monthly fees to programmers.\textsuperscript{57} Enterprising tinkerers exploited consumer anger\textsuperscript{58} caused by these extra costs.

Some courts had held that the Communications Act of 1934 by its own terms proscribed the black market sale of such devices. For a comprehensive collection of such cases, see United States v. Herring, 933 F.2d 932, 933 n.2 (11th Cir. 1991). One commentator criticized the application of the Communications Act to unauthorized decoding devices before the 1984 amendments, arguing that doing so required unduly broadening the statute's language. See Russell W. Chittenden, Note, The Piracy of Subscription Television: An Alternative to the Communications Law, 56 S. Cal. L. Rev. 935, 941 (1983); see also Telerate Sys., Inc. v. Caro, 689 F. Supp. 221, 231 (S.D.N.Y. 1988) (explaining that courts applied a legal fiction to bring interception devices within the ambit of former § 605); Brown & Helland, supra note 21, at 664 (criticizing courts for applying former § 605 to the sale of unauthorized cable decoders).

55. Soon after the CCPA's passage in 1984, HBO became the first major programmer to protect its broadcasts through signal scrambling. Carter, supra note 48, at 37.

56. While dish sales totalled 90,000 per month as of September, 1985, by February of 1986 they had dropped to 16,000. Moreover, nearly one half of all home earth station dealers went out of business in 1986. Stover, supra note 2, at 71.

57. After programmers began scrambling, the dish industry and home earth station owners expressed concern over the availability and pricing of broadcasts. The legislative history to the SHVA discussed the issue:

Many home dish owners have stated objections to the scrambling and current marketing practices of satellite delivered video programming because they believe that they have a right to receive satellite programming at a price comparable to that paid by cable system subscribers to the same programming. Some consumers have expressed concern about the cost of descrambling devices; price discrimination for programming services available to dish owners, and access to the programming available to cable subscribers.


58. A satellite dish retailer interrupted an HBO program for several min-
by developing a successful black market in descrambler units.\textsuperscript{59} As a result, programmers continued to lose millions of dollars in revenue annually.\textsuperscript{60}

Congress emphasized the protection of privacy interests in its next communications legislation. In 1986, Congress amended Title III by enacting the Electronic Communications Privacy Act (ECPA).\textsuperscript{61} The ECPA corrected defects in Title III which had exposed many business and personal communications to unauthorized interception.\textsuperscript{62} Indeed, Congress sought

utes with a message in protest of the high cost of receiving scrambled signals. The media dubbed this event the "Captain Midnight" incident, after the pseudonym used by the retailer. Mangel, \textit{supra} note 39, at 41-42.

59. The purchase of an unauthorized descrambler enables the buyer to pay a one-time fee and avoid subscription payments. As of 1990, estimates indicated that from 50\% to 80\% of dish owners did not pay for the satellite programming they received. \textit{The Need for a Universal Encryption Standard for Satellite Cable Programming}, 5 F.C.C.R. 2710, 2714 (1990); see also Peter D. Lambert, \textit{SBCA: Programmers, Piracy, Compression}, \textit{Broadcasting}, Jan. 28, 1991, at 54 (indicating that a large but unknown number of dish owners pirate signals).

One common method of altering descramblers—"cloning"—works as follows:

[A] "master" decoder is legally authorized to receive all scrambled services (by payment of regular subscription fees to the programmers). Then, information on the "master" decoder's authorization is extracted. That information is programmed into pirate chips that are then sold. Buyers of the pirate chips can attach them to \textit{their} decoders, and those decoders will be authorized to receive all services for which the "master" decoder has a current subscription.

\textit{Scrambling of Signals}, \textit{supra} note 8, at 1205. By cloning a chip from one legitimate unit, pirates can produce great numbers of unauthorized systems at little expense. Carter, \textit{supra} note 48, at 37. Another method, known as the "Three Musketeers" technique, involves subscribing to one programming service and using a pirated chip to receive all other services without payment. \textit{See} Cable/Home Communication v. Network Prods., 902 F.2d 829, 835 (11th Cir. 1990). The legal remedies available against those who produce and sell pirated chips also include actions for copyright infringement. \textit{See id.} at 842-47.

Descrambler pirates even began to organize, founding an organization called the Digital Encryption Standard Users Group (DESUG). Carter, \textit{supra} note 48, at 37. The group is dedicated to devising a "standalone descrambler that would decode the signals without the dish owner's having to buy and alter the VideoCipher device." \textit{Id.}

60. \textit{See supra} note 8 and accompanying text.


to protect communications transmitted electronically from intrusion.63 These included video teleconferences, electronic mail, pager messages, and other, similar communications.64

The ECPA's definition of "electronic communications" is broad.65 The ECPA expanded section 2512 to proscribe devices designed for the surreptitious interception of electronic communications in addition to wire and oral communications.66 Moreover, the ECPA broadened its predecessor's restrictive definition of "interception." Congress amended the definition to include not only "aural" but "other acquisition[s]" of protected communications.67 Taken as a whole, the ECPA thus

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63. "The purpose of the legislation is to amend [Title III] to prohibit the interception of certain electronic communications." H.R. Rep. No. 647, 99th Cong., 2d Sess. 16 (1986). One conspicuous exception is cordless radio telephone communications. Because Congress considered such transmissions too easily accessible to the general public, it declined to make interception of them a criminal offense. See Burnside, supra note 36, at 496-97.

Congress brought cellular phone calls within the ECPA’s protection by amending the definition of "wire communications." Id. at 497. One commentator has argued that, because cellular phone calls are also easy to intercept with standard electronic scanners and because detecting interceptions is next to impossible, the ECPA has "absolutely no effect on the security of cellular telephones." Robert Corn-Revere, Cellular Phones: Only the Illusion of Privacy, NETWORK WORLD, Aug. 28, 1989, available in LEXIS, Nexis Library, Communications News File.


65. "Electronic communication" includes "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, photoelectric or photocentral system that affects interstate or foreign commerce . . ." 18 U.S.C. § 2510(12) (1988) (emphasis added).

The Senate Report states that "[a]s a general rule, a communication is an electronic communication protected by [the ECPA] if it is not carried by sound waves and cannot fairly be characterized as containing the human voice." S. Rep. No. 541, supra note 37, at 14, reprinted in 1986 U.S.C.C.A.N. at 3568. The Report later suggests, however, that the term includes video teleconferences. Id. Video teleconferences contain the human voice. See United States v. McClintock, 908 F.2d 561, 564 (10th Cir. 1990), cert. denied, 111 S. Ct. 955 (1991). Thus, the precise scope of the term “electronic communications” is unclear.


67. See 18 U.S.C. § 2510(4) (1988); see also S. Rep. No. 541, supra note 37, at 13, reprinted in 1986 U.S.C.C.A.N. at 3567 ("Th[e] amendment clarifies that it is illegal to intercept the non-voice portion of a wire communication. For example, it is illegal to intercept the data or digitized portion of a voice com-
embodied Congress's desire that "the law . . . advance with technology." 68

While the ECPA provided modernized privacy protection, Congress believed that neither it nor the CCPA had adequately resolved the dilemma over property rights in commercial communications. For this reason, Congress returned to the issue of access rights to satellite pay-television transmissions by enacting the Satellite Home Viewer Act of 1988 (SHVA). 69 The Act amended section 705 of the Communications Act in several respects. First, it raised the penalties provided by the CCPA for acts related to piracy of satellite programming. 70 Moreover, the SHVA amended the CCPA's broad prohibition of interception devices by adding language outlawing the sale or manufacture of devices "primarily of assistance in the unauthorized decryption of satellite cable programming." 71 Finally, the statute expanded private standing to sue in order to "encourag[e] inter-industry effort to deal with piracy." 72 In addition to deterring piracy, the SHVA sought to ensure dish owners fair access to satellite pay-television programming. 73 By so extending the provisions of the CCPA, Congress took another step toward modernizing the law as it relates to property rights in commercial satellite broadcasts.

Congressional efforts in the 1980s clarified the problems associated with the advances in communications technology following the enactment of Title III. The privacy of most two-way electronic communications is now beyond dispute; dish owners may intercept unencrypted programming for private viewing with impunity. The manufacture of unauthorized descramblers, however, has not abated. Descrambler pirates now constitute a more imposing threat than ever for the satellite television industry. 74

With this new definition, the statute now protects all types of information which are susceptible to "non-aural" interception, such as data communications, digital communications, video communications, and electronic mail. See Burnside, supra note 36, at 501-02.

73. Id. at 10, reprinted in 1988 U.S.C.C.A.N. at 5638.
74. "Clearly the VideoCipher II has been a disaster from a security point
II. THE ECPA IN THE COURTS

By amending section 705 of the Communications Act under both the CCPA and the SHVA, Congress created one obvious means of combating descrambler piracy. Prosecutors, however, have seemed to ignore section 705, but have brought charges against descrambler pirates under the ECPA.\textsuperscript{75} The federal circuits are now in conflict over whether the ECPA applies to the marketing of unauthorized descramblers.\textsuperscript{76}

The interpretive dilemma over the ECPA became evident soon after the passage of the Act. In 1988, the Federal Communications Commission\textsuperscript{77} suggested that both the ECPA and the Communications Act prohibit unauthorized descramblers\textsuperscript{78} but it also ignored the ECPA in a discussion about descrambler piracy.\textsuperscript{79} The FCC's own ambivalence foreshadowed the difficulties courts would have in construing the ECPA.

In 1990, the Tenth Circuit became the first appeals court to address the ECPA's application to descramblers. The court held in \textit{United States v. McNutt}\textsuperscript{80} that section 2512 of the ECPA outlawed the sale and manufacture of unauthorized satellite descramblers.\textsuperscript{81} It upheld McNutt's conviction for cloning of view . . . . Unless we come up with better scrambling systems, satellite to home broadcasting as a supplement to cable in low-density areas is \textit{absolutely doomed}." \textit{Malone Looks to the Future with Cable Labs}, \textit{Broadcasting}, June 5, 1989, at 76, 77 (emphasis added). Robert Caird, the chairman of the industry's trade association, the Satellite Broadcasting and Communications Association (SBCA), warned that "the 'pollution' of signal theft 'left unchecked . . . can wipe out any potential role [that satellite broadcasters] can play in the telecommunications industry.'" Lambert, supra note 59, at 55.

\textsuperscript{75} See United States v. Herring, 933 F.2d 932, 935 (11th Cir. 1991) (explaining that an attorney for the government asserted in oral argument that "only section 2512(1)(b) proscribed the manufacture and sale of [unauthorized] satellite descramblers").

\textsuperscript{76} \textit{See supra} note 13 and accompanying text.

\textsuperscript{77} The Federal Communications Commission (FCC) is the agency to which Congress delegated policymaking authority in communications. \textit{See} Communications Act of 1934, ch. 652, §1, 48 Stat. 1064, 1064 (1934) (codified at 47 U.S.C. § 151 (1988)).

\textsuperscript{78} \textit{See FCC Issues Warning Against Theft of Satellite Programming}, 65 Rad. Reg. 2d (P & F) 36, 37 (July 21, 1988) (asserting that "the marketing of technology which is intended to be used for . . . the surreptitious interception of [satellite programming] violates section 705(d)(4) of the [Communications] Act and . . . 18 USC § 2512(1)").

\textsuperscript{79} \textit{See Scrambling of Signals, supra} note 8, at 1205 (mentioning only § 705 in a discussion of ways to combat proliferation of unauthorized descramblers).

\textsuperscript{80} 908 F.2d 561 (10th Cir. 1990), \textit{cert. denied}, 111 S. Ct. 955 (1991).

\textsuperscript{81} Id. at 565. Dissenting in \textit{United States v. Hux}, 940 F.2d 314 (8th Cir. 1991), Judge Ross reached the same conclusion. He felt that modified
the electronic "addresses" of legitimate decoder units and inserting them into unapproved models. Analyzing the ECPA, the court found that the plain wording of section 2510(12), which broadly defines "electronic communications," encompasses satellite transmissions. The court then held that unauthorized descramblers intercept these electronic communications and that, because programmers are unaware of this, "such interception is surreptitious."

The Eleventh and Eighth Circuits have also recently addressed the question of the ECPA's scope. Both courts criticized McNutt and reversed convictions under section 2512. In United States v. Herring, the Eleventh Circuit suggested that the 1986 amendments to the ECPA did not change its analysis, analogizing unauthorized descramblers to the common amplifier at issue in Schweihis. It found that the design of the descramblers have "no legitimate use other than to facilitate the unauthorized interception of satellite television signals." Id. at 320. Because "[t]his is not simply the surreptitious use of a legitimate electronic device," the court should have convicted the defendant for conduct "fall[ing] squarely within the plain language of the statute and the legislative history." Id. In Oceanic Cablevision, Inc. v. M.D. Elecs., 771 F. Supp. 1019 (D. Neb. 1991), the plaintiff cable programmer brought an action under § 2520 of the ECPA for the defendant's alleged violations of § 2512, claiming that the defendant had sold unauthorized descrambling equipment. Id. at 1022. The court, relying on McNutt, held that the plaintiff's complaint withstood a Federal Rules of Civil Procedure 12(b)(6) motion. Id. at 1029. The court thus suggested that unauthorized descrambler sales violate § 2512 and that § 2520 grants a private right of action for victims of such violations.

82. McNutt, 908 F.2d at 562.
83. Before addressing the ECPA, the court first concluded that McNutt had not violated a federal statute prohibiting traffic in counterfeit access devices. Id. at 563-64. The court found that 18 U.S.C. § 1029 (1988) did not apply to McNutt's sale of descramblers because McNutt's conduct did not result in "direct accounting losses," which is an essential element of a § 1029 violation. Id. at 564.
84. See supra note 65 and accompanying text.
85. McNutt, 908 F.2d at 564. "It is undisputed that satellite television transmissions contain sounds and images and are carried via radio waves; therefore they constitute electronic communications under § 2510(12)." Id.
86. Id. at 565. Because the legislative history is ambiguous on this issue, the court stated that it would follow the plain statutory language because of the language's "clarity." Id.
88. 933 F.2d 932 (11th Cir. 1991).
89. The court first reviewed § 2512 as it would have applied before Congress's 1986 amendments. Id. at 933-34. It found that Title III would not have prohibited unauthorized descramblers. Id. at 934. It also found that the ECPA did not apply. Id. at 935. This suggests that the court found that the 1986 amendments neither changed the nature of the statute nor its analysis of Title
descramblers did not render them “primarily useful” for surreptitious interception because of their potential for legitimate use, namely descrambling “‘soft scrambled’ signals.” Because such signals constitute ninety percent of satellite television signals and their reception requires no authorization, the court reasoned, the design of unauthorized descramblers gives the devices “significant nonsurreptitious and legitimate uses.”

The court then examined the context within which Congress enacted the amended version of section 2512. The legislative history, the court suggested, shows that Congress “fairly clearly” intended to protect two-way personal and business communications by passage of the ECPA and that it had not meant to broaden the meaning of “surreptitious.” For these reasons, and because it suggested that satellite television piracy is covered exclusively by section 705 of the Communications Act, the court held that the ECPA did not apply. In reaching the same result, the Eighth Circuit closely followed this analysis in United States v. Hux.

III. Indeed, while acknowledging the ECPA “take[s] into account new technologies,” id., the court noted that “[t]he amendments simply changed ‘willfully’ to ‘intentionally’ and added the phrase ‘or electronic’ to the section.” Id. at 934. The court concluded that “Congress did not change the meaning of the word ‘surreptitious’ in its 1986 amendments to [Title III].” Id. at 935.

90. See id. at 934.
91. Id. at 935. More specifically, Congress did not intend for the term “surreptitious” to “encompass devices that have legitimate uses but whose owners use them illegitimately.” Id. The court felt that Congress’s silence on this issue essentially compelled adherence to the meaning ascribed to “surreptitious” by the court in United States v. Schweihls, 569 F.2d 965 (5th Cir. 1978).
92. Herring, 933 F.2d at 935-37. Because the conduct at issue in Herring occurred between November, 1987 and June, 1988, the court relied on the CCPA’s version of § 705, which prohibited the manufacture or sale of equipment “with the intent of its use to assist” in the interception of protected communications. Id. at 936.
93. Id. at 935. The court bolstered its conclusion by invoking traditional principles of statutory construction. The court first cited the rule of lenity in support of its conclusion, reasoning that the criminal penalties at stake dictated a lenient interpretation of the ECPA’s ambiguity. See id. at 937. The court also employed the principle ejusdem generis. See id. at 937-38 (suggesting that satellite broadcast technology differs from the technologies that Congress stated the ECPA covers). Recognizing that the CCPA preceded the ECPA, the court further based its ruling on the canon disfavoring the submergence of specific statutes by subsequent general statutes. Id. at 938. Finally, the court cited Congress’s decision to increase the penalties provided by the Act but to leave the ECPA’s penalties alone. Id. It determined that this suggests that Congress did not believe that the ECPA applies to descrambler sales. Id.
94. 940 F.2d 314 (8th Cir. 1991). The court first examined the statutory
III. THE ECPA AND EVOLVING COMMUNICATIONS TECHNOLOGY

The circuit conflict over the application of section 2512 reveals two primary sources of confusion surrounding congressional intent and the ECPA. The first source of confusion is whether the statute even governs satellite cable broadcasts, the type of communications which descramblers intercept. The second issue is the standard of liability courts should use to identify devices prohibited under section 2512. In failing to address these issues adequately, courts have left the statute's scope, and its capacity to evolve with technology, in question. Although pirated descramblers are illegal under section 705 of the Communications Act, the question of the ECPA's applicability encapsulates the broader issue of the proper interpretation of statutes in light of rapidly advancing technology.

A. THE ECPA'S APPLICATION TO SATELLITE CABLE COMMUNICATIONS

Section 2512 bans certain devices that intercept "electronic communications." Courts agree that pirated descramblers intercept commercial satellite broadcasts but are divided over whether satellite broadcasts constitute "electronic communications" and thus fall within the scope of the ECPA. While the Tenth Circuit in United States v. McNutt held simply that the "plain wording of [the definition of 'electronic communications'] encompasses satellite television signals," the Eleventh Circuit in United States v. Herring suggested that Congress intended that the statute regulate only private satellite communications authority, contrasting the ECPA with the SHVA. Id. at 316. The court then reviewed both the McNutt and Herring opinions. Id. at 317. As in Herring, the court noted that Congress apparently intended that the private viewing of satellite programming fall exclusively under § 705. Id. Moreover, the court suggested that the absence of any mention by Congress of scrambled satellite signals in the ECPA's legislative history also tended to favor Herring's result. Id. Acknowledging the difficulty of the interpretive issue, the court found that the many factors that the Herring court relied upon compelled a reversal of Hux's conviction under the ECPA. Id. at 318. The court found Herring the "better reasoned approach in considering the past and present legislative history, prior case law, principles of statutory construction, and the provisions of 47 U.S.C. § [7]05." Id.

96. See id. at 315; Herring, 933 F.2d at 932; United States v. McNutt, 908 F.2d 561, 562-63 (10th Cir. 1990), cert. denied, 111 S. Ct. 955 (1991).

97. McNutt, 908 F.2d at 564. The court relied on § 2510(12) of the ECPA, which broadly defines "electronic communications." See supra note 65.
The Herring court reasoned that the legislative history of the ECPA indicates that the Communications Act alone governs satellite pay-television piracy. Thus, the crux of the confusion over what communications the ECPA protects is that the broad, plain language appears to conflict with the legislative history, suggesting a more restrictive definition of "electronic communications."

A more thorough analysis compels the conclusion that the ECPA protects both private and commercial satellite communications. The Herring court overstated the effect that the legislative history should have on construing the statute. While the legislative history of the ECPA certainly emphasizes privacy protection, it also discusses the statute's protection of commercial satellite and cable broadcasts. Moreover, the statute

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98. See Herring, 933 F.2d at 935; see also Greek Radio Network of Am. v. Vlasopoulos, 731 F. Supp. 1227, 1233 (E.D. Pa. 1990) (holding that ECPA does not protect subscription radio transmissions, even though "not intended for the use of the general public," because such transmissions do not include "'private, business, or personal communications'" (quoting Cox Cable Cleveland Area, Inc. v. King, 582 F. Supp. 376, 382 (N.D. Ohio 1983))).

99. See Herring, 933 F.2d at 935, 937-38.

100. Many courts accord substantial weight to committee reports in construing statutes. See, e.g., Hishon v. King & Spalding, 467 U.S. 69, 75 (1984); Guaranty Fin. Servs., Inc. v. Ryan, 928 F.2d 994, 1004 (11th Cir. 1991); Mills v. United States, 713 F.2d 1249, 1252 (7th Cir. 1983), cert. denied, 464 U.S. 1069 (1984). But see Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring) (arguing that committee reports should carry little weight because Congress neither approves them nor relies on them for explanation of a statute's details).

101. The Senate and House committee reports suggest that the ECPA is limited to private communications. The Herring court focused on one statement in the Senate Report on the ECPA: "The private viewing of satellite cable programming . . . will continue to be governed exclusively by [the amended] Communications Act . . . and not by [the ECPA]." S. Rep. No. 541, supra note 37, at 22, reprinted in 1986 U.S.C.C.A.N. at 3576 (emphasis added). Moreover, throughout the same report, the Judiciary Committee emphasized the need to protect "the security and privacy of business and personal communications." Id. at 2, reprinted in 1986 U.S.C.C.A.N. at 3556. The House Judiciary Committee expressed concern with new surveillance techniques unregulated by statute. H.R. Rep. No. 647, supra note 63, at 16-19, 28. Both reports suggest that the Act was designed to preserve Fourth Amendment privacy rights. See id. at 16, 19; S. Rep. No. 541, supra note 37, 1-2, 5, reprinted in 1986 U.S.C.C.A.N. at 3555-56, 3559; see also 131 Cong. Rec. S11800 (daily ed. Sept. 19, 1985) (statement of Sen. Mathias) (asserting that "the goal of the legislation is a familiar and enduring one: To protect the privacy of Americans against unwanted and unwarranted intrusion.").

provides evidence of congressional intent to regulate satellite cable communications beyond the general definition of “electronic communications.” 103

For example, section 2511, which governs interception of protected communications, permits private not-for-profit viewing of unencrypted satellite programming. 104 This exception has two implications. First, it indicates section 2511 grants a cause of action against those who intercept unscrambled broadcasts for profit. Second, because Congress did not also exempt scrambled broadcasts from the general definition of “electronic communications,” section 2511 by its terms prohibits intercepting such communications. 105 In addition, Congress chose to exempt all interception of cable television programming from the provisions of section 2511, leaving exclusive governance of cable piracy to the Communications Act. 106 While it could have provided similarly for satellite programming, Congress chose instead to make the ECPA and section 705 of the Communications Act complementary, not mutually exclusive. 107 Thus, the various provisions of the ECPA, taken as a whole, suggest that Congress contemplated the statute’s protection of commercial satellite communications.

The amendments Congress made to the Communications Act contemporaneously with the passage of the ECPA do not alter the conclusion that the latter protects satellite program-

103. See supra note 65 and accompanying text.


105. Section 2511 prohibits interception of “any wire, oral, and electronic communications.” Id. § 2511(1)(a). The broad definition of “electronic communication” encompasses all satellite broadcasts on its face. See supra note 65. Herring indicated that the legislative history compels a more narrow reading which excludes commercial satellite cable programming. See supra notes 92-93 and accompanying text. The exemption for private viewing of unscrambled programming, however, shows that Congress considered “electronic communications” to include all satellite broadcasts. Since it did not also exempt scrambled broadcasts from the broad definition, Congress intended that § 2511 prevent interception of such communications.


In both 1984 and 1988, Congress amended section 705 of the Communications Act to address the issue of satellite television piracy. While the McNutt court relegated discussion of the Communications Act to a footnote, the Herring court thoroughly analyzed section 705 and its relationship to the ECPA, which Congress enacted in 1986. The Herring court reasoned that it was unlikely that Congress intended the ECPA to duplicate coverage of satellite communications piracy already contained in the Communications Act. Such an analysis ignores specific extrinsic evidence showing that Congress did not consider the statutes mutually exclusive. The legislative history of the SHVA—the 1988 amendment to the Communications Act—states that both section 705 and section 2511 of the ECPA protect commercial satellite broadcasts.

In addition, the statutory scheme governing communications is neither as neat nor as logical as the Herring court suggested. Congress enacted the principal statutes, the Communications Act and Title III, when communications tech-

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108. One commentator has argued that courts should not look to other statutes in attempting to discern the meaning of one. See Easterbrook, supra note 15, at 547 (asserting that it is "impossible to reason from one statute to another").

109. See supra notes 49-54 and 69-73 and accompanying text.


111. See United States v. Herring, 933 F.2d 932, 935-38 (11th Cir. 1991).

112. See id. at 938.

113. See H.R. Rep. No. 887(II), supra note 5, at 14, reprinted in 1988 U.S.C.C.A.N. at 5643 (asserting that "[§] 2511(1) [of the ECPA] ... prohibit[s] the unauthorized interception and use of satellite-delivered cable programming"). This is not a case where subsequent legislative history bears on the intent of the earlier Congress. See, e.g., Consumer Prod. Safety Comm’n v. GTE Sylvania, 447 U.S. 102, 117-18 (1980); Sierra Club v. Clark, 755 F.2d 608, 617 (9th Cir. 1985); Montana Wilderness Ass’n v. United States Forest Serv., 655 F.2d 951, 957 (9th Cir. 1981), cert denied, 455 U.S. 989 (1982). Rather, the statement that the ECPA prohibits unauthorized interception of satellite television signals suggests that Congress was fully conscious of the overlap between the statutes in 1988, contrary to the Herring court’s finding.

114. See Burnside, supra note 36, at 495-503 (explaining inconsistencies in the protections of the ECPA); Helland, supra note 51, at 116-17 & n.9 (asserting that neither amendments to § 705 nor the legislative history accompanying them “explain in any significant detail the purpose or parameters of the provision” and noting the “absence of congressional direction” with regard to the provision); Meyer, supra note 38, at 434-37 (arguing that ECPA’s protection of cellular phone communications without similar protection for cordless phone communications is irrational because both “transmit unencrypted signals which may be intercepted easily with readily available technologies”). As an example of the wiretap law’s seemingly random structure, consider the fact that Congress did not provide a private cause of action against § 2512 violators
nology did not approach today's sophistication. As technology advanced, Congress amended each statute in response to many concerns, including lost privacy, lost revenues, and law enforcement needs. The resulting statutes are hybrid products of differing eras. They contain a myriad of exceptions and qualifications appended to the original statutory text. The statutes overlap in some areas but retain exclusive governance in others. They use broad, sweeping language in some places and narrow, specific language in others. For these reasons, any attempt to impose an artificial order on this patchwork of rules is fraught with danger.

The ECPA and the Communications Act are overlapping statutory schemes for combatting property rights violations and privacy intrusions in communications. Congress has, perhaps inadvertently, created an embryonic, flexible package of rules capable of confronting communications issues in various ways. Courts should recognize that, despite its title, the Electronic Communications Privacy Act governs commercial, as well as private, communications.

under either Title III or the ECPA, although it did provide such a right of action against violators of § 2511.

One commentator asserts that courts cannot assume that legislatures act reasonably because such bodies respond in seemingly unreasonable ways to various pressures in the political process. See Richard A. Posner, The Federal Courts: Crisis and Reform 288-89 (1985).

115. Indeed, one commentator asserts that § 705(a), enacted in 1934, is a provision “not created to promote any modern interests, not designed in recognition of modern technology, and not equipped to resolve or reconcile modern conflicts.” Helland, supra note 51, at 129. Modern amendments to the Communications Act have added subsections to § 705 which clarify the original text's application to satellite cable communications. See supra notes 49-54 and 69-73 and accompanying text.

116. See supra notes 35-46 and accompanying text.

117. See, e.g., 18 U.S.C. § 2511(2)(g)(iii) (1988) (providing that the Communications Act alone governs the unauthorized interception of cable television and the sale of pirated cable decoders, despite the ECPA's regulation of “wire communications,” and that both § 705 of the Communications Act and the ECPA allow private viewing of unscrambled satellite programming).

B. THE STANDARD OF LIABILITY

Deciding that the ECPA protects satellite television communications, however, is only the first step in analyzing the statute’s application to unauthorized descramblers. Section 2512 of the ECPA prohibits the manufacture or sale of any device the “design [of which] renders it primarily useful for the purpose of the surreptitious interception of [protected communications].”119 Courts are in conflict over the proper application of this standard of liability.

The McNutt court’s analysis relied predominantly on the text of section 2512 in finding pirated descramblers to be prohibited by the ECPA.120 While it described the design of such descramblers in its background section,121 the court isolated two illicit features of the devices which it found brought them within section 2512: that they intercept electronic communications and that they do so without the knowledge of programmers.122 The McNutt court’s terse analysis leaves the scope of section 2512 in doubt, offering no principles that limit liability other than the requirement that the device secretly intercept protected communications.123

While the rationale of the McNutt court’s decision would unduly broaden liability under section 2512, the Herring court’s opinion would render the provision obsolete, as emerging technology did to Title III.124 Based on United States v. Schweiks,125 the Herring court identified two factors important to determining whether devices violate section 2512.126 The first focuses on the physical appearance of devices in question, asking whether their “design show[s] that they [have] few if

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120. See United States v. McNutt, 908 F.2d 561, 565 (10th Cir. 1990), cert. denied, 111 S. Ct. 955 (1991); see also United States v. Hux, 940 F.2d 314, 320 (8th Cir. 1991) (Ross, J., dissenting) (relying on plain language to find that § 2512 prohibits pirated descramblers).
121. McNutt, 908 F.2d at 562-63.
122. Id. at 565.
123. The court’s finding that descramblers “intercept” electronic communications means that devices need only be “useful,” and not “primarily useful,” for the prohibited purpose to fall under § 2512. Such a standard would criminalize the sale of all electronics equipment capable of intercepting protected communications, thus expanding liability to merchants of legitimate devices.
124. See supra notes 35-38 and accompanying text.
125. 569 F.2d 965 (5th Cir. 1978).
126. United States v. Herring, 933 F.2d 932, 934 (11th Cir. 1991). The Herring court considered the Schweiks analysis applicable to the ECPA. See supra note 92 and accompanying text.
any legal purposes." Descramblers with cloned chips do not fall under this test, the court indicated, because "their design is identical to [devices] that are legitimate." The Fifth Circuit decided Schweiks prior to 1986, when the statute concerned devices that intercept wire and oral communications. Under the ECPA, which Herring applied, however, Congress broadened the scope of section 2512. The court’s concern with the physical similarity between authorized and unauthorized descramblers ignores the expansion of section 2512 and the possibility of a concomitant expansion of the "design" inquiry.

The second, and related, test which the Herring court considered calls for an examination of the potential uses of the devices. The statute prohibits devices that are "primarily useful" for illicit interception, thus permitting devices with "significant nonsurreptitious and legitimate uses." While the enactment of the ECPA did not alter this test, the court found that the capacity of pirated descramblers for intercepting "soft scrambled signals," which require no payment or authorization to receive, gave the devices "significant legitimate uses." This reasoning is defective in light of the devices Congress originally stated that section 2512 prohibits, devices such as microphones disguised as cuff links. While a hidden microphone has innumerable legitimate uses, it substitutes for a standard

127. Herring, 933 F.2d at 934; see also United States v. Shriver, 782 F. Supp. 408, 411 (C.D. Ill. 1992) (holding that the term "surreptitious" in § 2512 "refers to the design of the interception device, not its use").

128. Herring, 933 F.2d at 934.

129. Under Title III, which limited the term "interception" to "aural acquisition" of protected communications, the legislative history suggests that prohibited devices must be designed to conceal their interception capabilities upon visual inspection. See supra note 27. The legislative history indicates that Congress was concerned mainly with devices that enabled others to record or transmit conversations—to "aurally acquire" such exchanges—without detection. See S. REP. No. 1097, supra note 18, at 95, reprinted in 1968 U.S.C.C.A.N. at 2183-84 (stating that a prohibited device "would . . . have to possess attributes that give predominance to the surreptitious character of its use, such as the spike in the case of the spike mike or the disguised shape in the case of the martini olive transmitter"); see also United States v. Pritchard, 745 F.2d 1112, 1123 (7th Cir. 1984) (affirming conviction under § 2512(1)(b) of a defendant who used a tape recorder disguised as a briefcase because the "apparatus was designed in such a way as to conceal its electronic components and make its principal use that of surreptitiously listening to oral communications").

130. See supra notes 66-67 and accompanying text.

131. Herring, 933 F.2d at 934.

132. See id.

133. United States v. Hux, 940 F.2d 314, 318 (8th Cir. 1991); Herring, 933 F.2d at 934.

134. See supra note 27 (quoting Senate Report’s list of prohibited devices).
microphone primarily to record conversation secretly. The hidden microphone's many potential legitimate uses do not take it outside of section 2512. Similarly, the primary reason dish owners purchase pirated descramblers is to receive premium programming for no charge. That such descramblers also happen to intercept soft scrambled signals is merely incidental to the primary reason pirates sell thousands every year: the unauthorized interception of satellite pay-television broadcasts. Indeed, Congress used language strikingly similar to section 2512 when it enacted the SHVA, which explicitly prohibits unauthorized descramblers. Such use of language indicates that Congress considered pirated descramblers "primarily useful" for accessing satellite cable broadcasts without permission.

135. This conclusion, at least, is apparently what Congress presumed to be the case with the devices listed in the Senate Report. See supra note 27. Each of these devices could be used in the many legitimate ways that people use standard microphones, but their deceptive design gives them special uses which provide the incentive for their purchase. Standard microphones, of course, may be used in illicit ways, but Congress did not consider such "legitimate electronics equipment . . . primarily useful for surreptitious listening." S. Rep. No. 1097, supra note 18, at 95, reprinted in 1968 U.S.C.C.A.N. at 2183.

136. In relevant part, the SHVA prohibits the sale and manufacture of devices which are "primarily of assistance in the unauthorized decryption of satellite cable programming." 47 U.S.C. § 705(e)(4) (1988) (emphasis added).

137. Cf. United States v. Frakes, 563 F.2d 803, 805 (6th Cir. 1977) (using definition of the term "stolen" from one statute to supply definition for another statute), vacated, 435 U.S. 911 (1978). The House Report on the SHVA confirms that Congress intended to prohibit descramblers which have been "compromised by black market decoding chips." H.R. Rep. No. 887(11), supra note 5, at 28-29, reprinted in 1988 U.S.C.C.A.N. at 5657-58. If the court's reasoning were applied to the SHVA, all unauthorized descramblers would be legal because, as the Herring court concluded, dish owners may use them primarily to decrypt signals for which no authorization is required, i.e., "soft scrambled signals." Such an absurd result would in effect repeal the SHVA.

138. The Herring court relied on the "rule of lenity" in determining that the ECPA called for a strict construction. See 933 F.2d at 937. This interpretive canon, under which courts are to construe criminal statutes narrowly, applies most forcefully when the accused does not have adequate notice that her conduct is prohibited. See Crandon v. United States, 110 S. Ct. 997, 1002-03 (1990); United States v. Powell, 423 U.S. 87, 93 (1975). Here, however, those who sell unauthorized descramblers do have adequate notice that their conduct is illegal, based both on accepted community standards of behavior and the clarity of § 705 of the Communications Act following enactment of the SHVA. See John C. Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 VA. L. REV. 189, 231 (1985) (arguing that "criminal liability should be permitted . . . where a law-abiding person would have known better"); cf. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 2.2(d), at 78 (2d ed. 1986) (asserting that "strict construction should not be carried to extremes; it is not necessary that the statute be given its 'narrowest meaning'"
the potential use test undermines section 2512.

The proper interpretation of section 2512 takes into account the evolving nature of communications technology. The plain language of section 2512 is certainly applicable to descramblers. Yet, when statutes address complex technological issues, as here, courts should consult other sources to inform the statutory text. Although Congress did not mention satellite descramblers by name in the ECPA's legislative history, Senator Mathias stated that the statute should "anticipate further technological developments." This purpose is apparent from the amendments Congress made to Title III in 1986. First, Congress expanded the term "intercept" to include visual, as well as aural, acquisition of protected communica-

139. The starting point for analyzing any statute, of course, is the statutory text itself. The Supreme Court's traditional practice has been to follow a statute's plain language unless doing so produces an absurd or unjust result. See, e.g., Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982); United States v. American Trucking Ass'ns, 310 U.S. 534, 542-43 (1940); Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940). There is no specific test for determining when a particular result is "absurd," but the Supreme Court requires something extraordinary. Cf. Griffin, 458 U.S. at 574-75 (finding that a damage award of over $300,000 to compensate plaintiff for withheld wages of $412.50 was not an absurd result).

140. Congress thoroughly assessed new communications technology in crafting the ECPA. It held multiple hearings on communications privacy and received information from dozens of experts and organizations throughout the country. See H.R. REP. No. 647, supra note 63, at 28-30; S. REP. No. 541, supra note 37, at 3-5, reprinted in 1986 U.S.C.C.A.N. at 3556-60. Moreover, Congress encountered great difficulties in formulating the ECPA. See 131 CONG. REC. S11,800 (daily ed. Sept. 19, 1985) (statement of Sen. Mathias) ("[T]his legislative foray into uncharted territory requires us to confront difficult legal and technical issues.").

141. Justice Frankfurter succinctly captured the essence of this sentiment: "[T]he real meaning of seemingly plain words must be supplied by a consideration of the statute as a whole as well as by an inquiry into relevant legislative history." Interstate Commerce Comm'n v. J-T Transp. Co., 368 U.S. 81, 107 (1961) (Frankfurter, J., dissenting); see also American Trucking Ass'ns, 310 U.S. at 544 (finding that "acceptance of a literal interpretation dogma...withholds from the courts available information for reaching a correct conclusion").

142. Indeed, the only statement on § 2512 in the Senate Report to the ECPA simply recites the pertinent portion of the text, omitting any further clarification. See supra note 66.

tions. Second, Congress broadened section 2512 to prohibit devices that intercept electronic, as well as wire and oral, communications. Devices that intercept electronic communications do not necessarily give unauthorized access through the same design features as do eavesdropping and wiretapping devices. Unauthorized descramblers, for instance, secretly intercept communications through pirated chips, and not through a deceptive appearance like microphones disguised as cuff links. Thus, in order to fulfill the statute's purpose of evolving with technology, courts must make a broader inquiry into a device's design than did the Herring court.

The purpose behind section 2512 of Title III was to prohibit devices designed mainly for unauthorized access to protected communications. The qualifying term "primarily useful" ensures that legitimate electronics equipment, such as radio scanners which can be used to intercept protected communications, remain legal. While the Schweighs court asked whether a device has "significant legitimate uses," Congress cautioned that "[a] device will not escape the prohibition merely because it may have innocent uses." Construing this phrase thus requires a common sense inquiry into the likely reason that the device was produced and purchased. For the "primarily useful" test, courts should ask whether the device would be produced

144. See supra note 67 and accompanying text.
145. See supra note 67 and accompanying text.
146. Cf. Olmstead v. United States, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (asserting that construction of the Fourth Amendment must recognize technological changes and "have a . . . capacity of adaptation to a changing world"), overruled by Berger v. New York, 388 U.S. 41 (1967). The Herring court essentially interpreted the statute as if Congress had never amended it. The court's approach is problematic for several reasons. First, it undermines the legislative process. Amending a statute is a long and difficult process. Congress is thus inefficient in addressing unresolved questions raised by technological advances. Fein, supra note 21, at 49. There are great lapses of time between the passage of a statute addressing technology and its amendment, and even a small number of legislators can sabotage attempts to amend. Id. By ignoring the expansion of Title III, the Herring court ignored the implications of this delicate process. Second, obsolete statutes afford the judiciary substantial policymaking authority which is beyond their proper judicial role. Id. at 48. The Herring court assumed such authority by unduly restricting the ECPA.
147. The eavesdropping devices listed in the Senate Report to Title III are all intended for transmitting the spoken words of others without the speaker's knowledge or consent. See supra note 27 and accompanying text.
149. See United States v. Hux, 940 F.2d 314, 320 (8th Cir. 1991) (Ross, J., dissenting).
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but for the prohibited purpose. Descramblers, like the disguised microphones that Congress discussed under Title III, fall within this definition.150

Fighting descrambler piracy under the ECPA concededly is a less attractive method than using the Communications Act. The penalty provisions of the Communications Act call for broader remedies than do those of the ECPA.151 Indeed, Congress designed the SHVA—the most recent amendment to section 705—specifically to address satellite pay television piracy, but it did not narrowly tailor section 2512 to this purpose. The language of section 2512, rather, has a wider application than this explicit ban on descramblers.152 The Herring court’s interpretation leaves gaps in section 2512 which Congress would have to fill by again amending the statute when unforeseen interception devices hit the black market in the future. Because updating statutes takes time, these devices could jeopardize the security of communications for years before Congress acts.

Although pirated descramblers look the same as legitimate models, their illicit design features and obvious purpose place them within the class of devices that Congress intended to prohibit. This interpretation recognizes the fundamental changes that the ECPA wrought in the scope of Title III and ensures that the statute, unlike its predecessor, does not become obsolete in the face of advancing communications technology.

CONCLUSION

The Electronic Communications Privacy Act of 1986, along with 1984 and 1988 amendments to the Communications Act, modernized statutory protection of communications. Federal circuit courts are divided over whether the ECPA prohibits unauthorized satellite descramblers. Interpreting the ECPA to

150. See id.

151. Those who sell illicit devices face a maximum under § 2512 of five years of imprisonment and a fine of $10,000. 18 U.S.C. § 2512(1) (1988). Section 705 provides for imprisonment of up to five years and fines of $500,000 for each device sold. 47 U.S.C. § 705(e)(4) (1988). Moreover, § 705 provides a civil right of action against those who sell illicit devices. 47 U.S.C. § 705(e)(3)(A) (1988). The ECPA, however, apparently provides such a right only against those who actually intercept protected communications. See supra note 26 (explaining that Title III offered no private right of action against sellers of illegal interception devices).

152. The second clause of § 705 also has a generalized scope, not being limited to pirated descramblers as is the first clause. See 47 U.S.C. § 705(e)(4) (1988) (prohibiting devices "intended for any . . . activity prohibited by [§ 705(a)]").
ban pirated descramblers and similar devices provides certainty in the law by recognizing the independence of the ECPA and the Communications Act. More importantly, this interpretation gives substance to the changes that Congress made to modernize the statute in 1986, ensuring that the statute can confront uncertain developments in the future.