Subcription Television Decoders: Can California Prohibit Their Manufacture and Sale?

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SUBSCRIPTION TELEVISION DECODERS: CAN CALIFORNIA PROHIBIT THEIR MANUFACTURE AND SALE?

I. INTRODUCTION

In the past decade, the telecommunications industry has experienced phenomenal growth. Commercial television's gross revenues have more than doubled,¹ those of cable television have quadrupled,² and cable systems now are linked to over fifteen million subscribers, twenty percent of the nation's television households.³

New television ventures such as over-the-air subscription television and Direct Broadcast Satellite (DBS) television offer viewers additional programming alternatives and investors new product markets. There are presently twenty-four subscription television (STV) stations on the air; there were none as late as 1977.⁴ Industry analysts project a 20 percent annual growth rate over the next decade.⁵

STV, alone among the new television ventures, operates in the standard broadcast frequency spectrum of 470-890 MHz.⁶ To date, only STV has been classified as "broadcasting" by the Federal Communications Commission (FCC).⁷ Ironically, STV licensees, who only 20 years ago fought for this status and argued before the FCC that "broadcasting re-

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¹ 1980 Broadcasting Yearbook A-2.
² Id. at G-3.
³ Id.
⁴ Id. at B-147. See also Broadcasting, Oct. 5, 1981 at 24.
⁶ Domestic broadcast frequencies are allocated as follows:

- 535 - 1,605 KHz - am radio
- 54 - 72 Mhz - tv channels 2-4 (VHF)
- 76 - 88 Mhz - tv channels 5-6 (VHF)
- 88 - 108 Mhz - fm radio
- 174 - 216 Mhz - tv channels 7-13 (VHF)
- 470 - 890 Mhz - tv channels 14-83 (UHF)

⁷ In re Part 73 of the Commission's Rules and Regulations to Provide for Subscription Television Service, 3 F.C.C.2d 1, 8 (1966) [hereinafter cited as Further Notice].
mains broadcasting even though a segment of the public is unable to view programs without special equipment," today argue that STV programming is "intended for the exclusive use of paying customers" and, therefore, is not broadcasting. This sudden about-face is due, in part, to the emergence of home terminal and decoder distributors, labelled by STV operators as "pirates." These distributors manufacture and sell receivers capable of unscrambling the STV signal, thereby permitting direct reception of subscription programming. STV operators fear they could lose up to a quarter of a million dollars each year in subscriber revenues if home terminal decoder dealers continue to sell their product.

Many people were surprised when, on September 30, 1980, California Governor Jerry Brown acted against the recommendation of his Legal Affairs Department and signed into law A.B. 3475, adding section 593(e) to the California Penal Code. The statute prohibits the manufacture and sale of any device used to intercept or decode any over-the-air subscription television station transmission. In its first court challenge, in which an electronics retailer sought to enjoin enforcement of the statute by the City of Anaheim, section 593(e) was upheld as a valid exercise of the State's police power. Recent federal circuit courts of appeals decisions have held that the sale of STV decoders is prohibited by the

8. Id. at 10.
11. Id.
12. 1980 Cal. Stat. ch. 1332 (codified at CAL. PENAL CODE § 593(e)).
13. CAL. PENAL CODE § 593(e) reads in full:
Every person who for profit knowingly and willfully manufactures, distributes, or sells any device or plan of kit for a device, or printed circuit containing circuitry for interception or decoding with the purpose or intention of facilitating interception or decoding of any over-the-air transmission by a subscription television service made pursuant to authority granted by the Federal Communications Commission which is not authorized by the subscription television service is guilty of a misdemeanor punishable by a fine not exceeding two thousand five hundred dollars ($2,500) or by imprisonment in the county jail not exceeding 90 days, or both.
Federal Communications Act of 1934.\textsuperscript{18}

The purpose of this comment is threefold. First, it will review the legislative history of A.B. 3475 and analyze the statute's wording. Second, the comment will address the issue of whether the Federal Communications Act\textsuperscript{16} preempts state action in this field. Finally, the first amendment issues raised by broadcasting regulation are discussed in the context of a framework for future technological developments in the broadcast industry.

II. What is STV?

To place STV in its proper context, it is important to distinguish it from other communications media, such as cable television, Multi-Distribution Point Services (MDS), and Direct Broadcast Satellite Service (DBS).

A. STV Broadcasting

Subscription television is a form of broadcasting. It is characterized by the transmission of programming in scrambled or encoded form, and its intelligible reception requires an "unscrambling" device.\textsuperscript{17} Presently, the FCC requires STV licensees to lease decoders to subscribers,\textsuperscript{18} but the Commission is reexamining this requirement.\textsuperscript{19} STV subscribers are charged a flat monthly fee by the licensee for the privilege of program-viewing and as a rental charge for the unscrambling device. There is no novel technology inherent in subscription television broadcasting. The STV "unscrambling" device, called a decoder, can be attached to any standard television set.

While consideration of subscription television began in 1927,\textsuperscript{20} it was not until June, 1962 that the first STV televi-
sion station commenced limited operations. All STV licensees operate within the standard broadcast frequency band, and most are licensed to UHF channels.

B. Cable TV Operations

Cable television began in the early 1950’s as a substitute for over-the-air television in communities where, as a result of mountainous terrain, broadcast signals could not be received. Cable television completely dispenses with the over-the-air radiation of electromagnetic signals, utilizing instead co-axial cable to carry its signal to subscribers. The FCC classifies cable television systems as “non-broadcast” facilities. Cable systems operate not only as master community antennas for the reception of television broadcast signals, they also originate their own programming, referred to as “cablecasting.” Cable television systems serving communities with over 3500 subscribers must maintain a minimum twenty channel capacity. Cable technology also permits the reservation of certain channels for subscription programming.

C. MDS Communications

MDS is a common carrier service operating in the 2150 - 2162 Mhz frequency band which transmits omnidirectionally to fixed receivers with directive antennas. MDS signals are broadcast, in the sense that electromagnetic signals are trans-

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22. All presently licensed STV stations operate on UHF channels. See 1980 BROADCASTING YEARBOOK B-147. See also In re Amendment of Part 3 of the Commissions Rules and Regulations to Provide for Subscription Television Service — Third Report, 26 F.C.C. 265 (1959) [hereinafter cited as Third Report]: “If Subscription Television successfully demonstrated a capacity to make a desirable contribution to the television service, it might well provide fresh impetus to the utilization of many of the now idle UHF channels.” Id. at 268.
25. Id. at § 76.252(a)(1).
mitted over the air and dissipate as they travel outwards. The propagation characteristics of the high frequency MDS signal requires a "directive" antenna, differentiating it from the standard television broadcast signal. The FCC classifies MDS as point-to-point transmission. The MDS operator may not become substantially involved in program production or exert any influence over the transmission's content. Neither broadcasters nor cable television operators share this status. Home Box Office makes extensive use of the MDS service for program distribution to licensees who down-convert the microwave signal and redistribute it to subscribers via cable.

D. **DBS and Satellite Communications**

Still in its infancy is a proposed DBS network. When operational, the system will transmit from four orbitting satellites, one serving each time zone, and operate in the 12.2 - 12.7 Ghz frequency band. The satellite signal will be picked up by a dish-shaped antenna, referred to as an "earth station". As is the case with MDS antennas, each earth station must be properly aligned and focused in the direction of a particular satellite. Attached to the earth station will be a down-converter to convert the 12 Ghz signal to one which can be received by a television set. The signal bandwidth is also large — 16 Mhz. This distinguishes DBS from conventional and subscription television broadcasting, as the latter operate within a 6 Mhz bandwidth on standard broadcast frequency channels.

Domestic satellite communication service started in 1973. Today, all four United States television networks as well as numerous individual programmers beam news, sports, movies, advertising and stock reports to and from earth satellites. All existing domestic satellites, however, are classified...
as "fixed" satellites and operate as common carriers.\footnote{Satellite Deregulation, supra note 30, at 216.} Recently, the FCC deregulated ownership of receive-only earth stations,\footnote{Id. at 217.} greatly expanding the potential for domestic satellite communications. As a consequence, over 30 companies have begun manufacturing, selling and installing these dish-shaped antennas. Now, earth station entrepreneurs share many of the legal problems faced by STV decoder manufacturers.\footnote{Three types of earth stations are used in domestic satellite systems: (a) transmit and receive; (b) receive only; (c) transmit only. In re Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities — Report and Order, 22 F.C.C.2d 86, 137 (1970). By definition, receive-only earth stations do not transmit; they are used only for the reception of satellite communications. Satellite Deregulation, supra note 30, at 217.}

In contrasting STV with cable, MDS, or DBS, subscription television represents the only service operating in the standard broadcast frequency spectrum. Whereas STV authorizations are issued only to commercial television broadcast stations,\footnote{Cable Television Cross Ownership, 47 C.F.R. § 76.501 (1980).} cable television system ownership by commercial television licensees is severely restricted.\footnote{Over-The-Air Subscription Television Operation, 47 C.F.R. § 73.643(b) (1980).} Although the FCC expressly extended the "rules and policies applicable to regular television . . . to subscription television operations,"\footnote{A.B. 3475, Cal. Legis., 1979-80 Reg. Sess., 2 ASSEMBLY FINAL HISTORY 1953 (1980). Assemblyman Levine represents the 44th District, in Los Angeles.} it regulates cable, MDS and satellite communications as non-broadcast facilities. In enacting section 593(e), the California Legislature overlooked these distinctions, and enacted a statute which undermines 25 years of FCC regulation over subscription television.

### III. LEGISLATIVE HISTORY OF A.B. 3475

California State Assemblyman Meldon Levine introduced Assembly Bill 3475 on May 1, 1980.\footnote{Over-The-Air Subscription Television Operations, 47 C.F.R. § 73.642(a)(1) (1980).} A constituent and attor-
ney, Arthur Greenberg, suggested the proposed legislation.39 Interestingly, one of Greenberg’s clients is National Subscription Television, which operates KBSC-TV, channel 52, a subscription television station in Los Angeles. The legislation was referred to the Committee on Criminal Justice where it was amended twice.40 Published Committee hearings are unavailable and pronouncements concerning legislative intent are limited.

According to Legislative Assistant Annette Porini, the principal drafter of the statute, the legislation was introduced to provide protection for a growing concern in California’s entertainment industry. Unauthorized STV decoders were endangering the STV economic base by thwarting fee collections and the legislation was intended to protect the STV licensees’ property rights.41 California, which presently proscribes unauthorized connection to franchised cable television systems,42 sought to provide similar protections for subscription television licensees by enacting AB 3475. Since STV was inadequately protected against unauthorized reception, Assemblyman Levine labeled the bill an urgency measure, which enabled it to take immediate effect upon enactment.43

The FCC reviewed an initial draft of the proposed legislation and found the proposed statute “not inconsistent with the Communications Act of 1934. Such legislation will assist in addressing the potentially serious and growing problem of theft of Subscription Television services.”44

The Assembly Committee on Criminal Justice analysis of AB 3475 noted “the purpose of this bill is to facilitate the control of piracy of subscription television broadcasts . . . . The unauthorized interception and decoding of subscription television broadcasts deprives the television service and the parties owning transmission rights for broadcasts such as mo-

41. Conversation with Legislative Assistant to Assemblyman Levine, Ms. Annette Porini (Sacramento, Dec. 22, 1980).
42. CAL. PENAL CODE § 593(d) (West Supp. 1980).
44. Telegram from Federal Communications Commission to Assemblyman Mel dop Levine (June 6, 1980) (on file with the Santa Clara Law Review).
tion pictures and sporting events of potential income." The report also noted that the proposed legislation would operate to prohibit the sale, distribution and manufacture of "plans" for such decoders. "This type of prohibition could readily impinge on First Amendment rights by having a chilling effect on the exchange of ideas and publication of information relating to the technology of intercepting and decoding devices." Clearly, the committee was not unreservedly endorsing the proposed statute.

The entertainment industry widely supported the legislation. Letters of support were received from the National Association of Broadcasters, the Motion Picture Association of America, the Producers Guild of America, Walt Disney Productions and the Screen Actors Guild. Ms. Kay Peters, Chairperson, Screen Actors Guild Telecommunications Committee, testified before the Criminal Justice Committee in support of A.B. 3475. Analogizing the problem facing STV operators to car theft, Ms. Peters asked: "if someone is capable of duplicating the key to your car, does that give them the right to take your car?"

The State Assembly passed on June 26, 1980 the bill, only three weeks after the first committee hearing by the Criminal Justice Committee. The Senate passed its version of the bill on August 27, 1980. The Assembly approved a joint conference committee report on August 30, 1980 and the Senate followed suit the next day.

On September 10, 1980 Governor Jerry Brown received the proposed legislation. Two weeks later, the Governor's Legal Affairs Department recommended the Governor veto the legislation, noting that "strong arguments" could be made in three areas:

1. Private reception of transmissions broadcast on public airways should not be restricted;

46. Id.
47. Conversation with Legislative Assistant to Assemblyman Levine, Ms. Annette Porini (Sacramento, Dec. 22, 1980).
50. Id.
2. Assuming, *arguendo*, that the broadcaster does have a proprietary interest in the signal transmitted, this interest should be protected through the statutes governing copyrights and unfair competition, not the California Penal Code;

3. Even if the policy decision is made to impose criminal sanctions on unauthorized access to the airwaves, this bill is poorly drafted and may well result in the taking of existing business inventories without due process of law.\(^{51}\)

Despite the legal arguments raised by the Enrolled Bill Report and the growing controversy over the legislation as reported in the press,\(^ {52}\) Governor Brown signed the bill into law on September 30, 1980.\(^ {53}\)

As the Enrolled Bill Report suggests, the statute is poorly worded. Section 593(e) is limited to persons who engage in the willful manufacture, distribution and sale of decoders "for profit."\(^ {54}\) Following enactment of section 593(e), a Santa Clara entrepreneur incorporated as a non-profit corporation and sold its decoders as part of a contributor's membership fee.\(^ {55}\) Furthermore, the statute does not deal with an entrepreneur who sells a decoder at a loss and, thus, operates outside the statute's scope.

The prohibition against selling any "plan" with the intent to facilitate decoding of STV transmissions potentially violates first amendment freedom of the press protections since it acts as a prior restraint. For example, *Radio Electronics* contains an article entitled "Build This Pay-TV Decoder";\(^ {56}\) it provides complete schematics and a parts list for the construction of a simple decoder. The article offers readers step

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53. 1980 Cal. Stat. 1332 (codified at *CAL. PENAL CODE § 593(e)* (West Supp. 1982)).

54. *CAL. PENAL CODE § 593(e).*


by step instructions to build a decoder and lists mail order suppliers who offer necessary parts. 73 Magazine contains a similar article outlining the steps necessary to build an MDS receiver. While MDS transmissions are, strictly speaking, outside the scope of section 593(e), STV licensees often receive their programming via a MDS common carrier and subsequently rebroadcast the program to their subscribers. Hence, the problem presented is the same.

The presumption of unconstitutionality which the U.S. Supreme Court has consistently applied to prior restraints on expression, raises serious questions whether the statute applies to the publication of plan "facilitating interception or decoding of any over-the-air transmission by an STV service . . . ." The FCC, faced with a similar complaint following publication of the 73 Magazine article, held that FCC regulations did not prohibit the publication of articles which might ultimately lead to the commission of acts prohibited by the Federal Communications Act.

The statute’s prohibition against any device facilitating decoding of any over-the-air transmission by a subscription television service potentially affects all standard VHF/UHF television receivers sold in the United States. The FCC expressly requires all STV licensees to broadcast, in addition to their subscription broadcasts, “minimum hours of non-subscription programming.” The minimum number of non-subscription programming hours varies depending on the number of months a station has been in operation, but reaches 28 hours per week after 36 months. Penal Code section 593(e) does not distinguish between “subscription television broadcast programming” and “non-subscription programming.”

The statute’s broad sweep of “any over-the-air transmission”


62. Id.
clearly encompasses non-subscription programming and would require that express authorization be granted to all television manufacturers.

The statute raises a more serious problem in its attempt to prohibit "decoding." What is television reception if not "decoding"? A television receiver is a decoder. The receiver is manufactured to decode electronic pulses and signals and direct the triggering of an electron beam located inside a cathode ray tube in accordance with the respective signal voltages. The electron beam gun scans a light sensitive screen at the rate of 525 lines every 1/30th of a second. In order to produce a coherent image, the transmissions of all TV broadcast stations are encoded with vertical, horizontal and blanking pulses, referred to as synchronizing pulses. These pulses ensure that the electron gun of the cathode ray tube begins each scan at precisely the same time.

There is no novel technology inherent in STV broadcasting. STV transmissions use the same technology but alter the voltages of the synchronizing pulses so that standard television receivers are incapable of properly reconstituting the video image. The STV decoder recognizes the non-standard synchronizing pulse and feeds that information to the electron gun.

To summarize, an understanding of television electronics is important in placing the legislation in its proper perspective. Section 593(e) does not protect contract or property rights; it directly regulates broadcasting. "Broadcasting remains broadcasting even though a segment of the public is unable to view programs without special equipment."

IV. FEDERAL PREEMPTION: THE "OBSTACLE TO ACCOMPLISHMENT" TEST

In enacting the Federal Communications Act of 1934

63. "A television camera is a device that accepts information concerning the scene to which it is exposed, including the sound that accompanies that scene, and encodes it in the form of an electric current. A television receiver is a matching device that decodes the electric current and converts it into a succession of pictures on a cathode ray tube. . . ." SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE 11 (1971).
64. G. KRAVITZ, BASIC TV COURSE 47-48 (1962).
65. Landfair, supra note 56, at 42.
66. Further Notice, supra note 7, at 10.
(FCA), Congress established the Federal Communications Commission "for the purpose of regulating interstate . . . commerce in communications by . . . radio so as to make available, so far as possible, to all the people of the United States, a rapid, efficient, nationwide, and worldwide . . . radio communication service." The U.S. Supreme Court has consistently upheld the broad authority and comprehensive mandate of the FCC to regulate all forms of electrical communications and to develop an appropriate system of local television broadcasting. While it has been held that Congress, in enacting the FCA, "completely occupied and preempted the field of interstate communications in radio and television," it is now generally conceded that the FCA and the FCC have not preempted the entire field of radio communications.

No infallible constitutional litmus test exists by which section 593(e)'s validity can be measured. As the United States Supreme Court remarked over 40 years ago in voiding the Pennsylvania Alien Registration Act in Hines v. Davidowitz, the primary consideration in testing the state laws' validity against the constitutional command of the Supremacy Clause "is to determine whether, under the circumstances of this particular case, [the state statute] stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." The Court still follows this test in resolving preemption issues.

The United States Supreme Court has enunciated a series of well defined tests for determining whether state legislation is preempted by federal law. In Florida Lime & Avocado Growers, Inc. v. Paul, the Court upheld a California law which set minimum standards for retail sales of avocados. Federal regulations, enacted by the Department of Agriculture, also set minimum standards for the marketing of avoca-

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72. 312 U.S. 52 (1940).
73. Id. at 67.
In discussing whether the state statute must yield to the federal superintendence of the field, the Court interpreted the *Hines* directive to mean that there must either be "such actual conflict between the two schemes of regulation that both cannot stand in the same area . . . [or] . . . evidence of a congressional design to preempt the field." As other courts have noted, the *Florida Lime* Court established a two part preemption test. Actual conflict between the two schemes of regulation could be shown by (a) physical impossibility, or (b) the nature of the subject matter which demanded exclusive federal regulation. Congressional design to preempt could only be sustained by an explicit declaration of congressional intent to displace state regulation. While the Court embraced the *Hines* preemption standard, it also limited its reach. Justice Brennan, writing for a majority of five justices, commented that "[t]he test . . . is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." Clearly, this statement referred to the *Hines* directive which considered the "full purposes and objectives" of Congress.

*Head v. New Mexico Board of Examiners* further refined the *Hines/Florida Lime* preemption test. In *Head*, the Court upheld a state law regulating radio advertising in the face of arguments that Congress had preempted the field by enacting the Federal Communications Act. Justice Stewart, writing for the majority, cursorily referred to the "obstacle to accomplishment" analogy of *Hines* and *Florida Lime*, arguing instead that the state statute directly addressed the protection of public health, an area traditionally within the state's police power.

Justice Brennan, in a concurring opinion, set out three separate tests for sustaining federal preemption. The first two tests paralleled those he enunciated in *Florida Lime*. Under

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75. *Id.* at 139. See 22 Fed. Reg. 6205 (1955), (codified at 7 C.F.R. § 51.3050-51.3053, 51.3064 (1980)).
76. 373 U.S. at 141.
78. 373 U.S. at 142 (1963).
79. *Id.*
81. *Id.* at 428.
the third test, preemption would be sustained by a showing of "a conflict either in purpose or in operation between the state and federal regulations involved." The reference to a "conflict in purpose" was again directed at Hines and reflected a retreat from his comments in Florida Lime. Justice Brennan's opinion in Head v. New Mexico gave the "obstacle to accomplishment" test an independent footing in subsequent analyses of federal preemption issues.

A decade later, in De Canas v. Bica, the Court confronted the issue of whether the Immigration and Nationality Act (INA) preempted a California statute concerning employment of illegal aliens. The Court held that no clear and manifest demonstration existed which showed that Congress had intended to oust all state authority to regulate the area, the second Florida Lime test. The Court, however, remanded the case to determine whether the state statute was unconstitutional because it impeded "the accomplishment and execution of the full purposes and objectives of Congress" in enacting the INA.

Jones v. Rath Packing Co. firmly established the "obstacle to accomplishment" preemption test. The Court held that the Federal Meat Inspection Act (FMIA) preempted a California statute which regulated the weight of packaged consumer commodities. The Court cited an explicit preemption provision in the FMIA and held that its decision in Florida Lime mandated preemption where "Congress' command is explicitly stated in the statute's language." When faced with whether the Federal Packaging and Labelling Act (FPLA) preempted the same California statute as applied to a different commodity, the Court did not resolve the explicit preemption issue and found the manufacturers possessed no "physical impossibility" in meeting both the state and federal packaging requirements. Instead, the Court held that state enforcement would prevent "the accomplishment and execu-

82. Id. at 445 (Brennan, J., concurring).
84. Id. at 352-53.
85. Id. at 363.
87. Id. at 525. Explicit Congressional command is not the only situation which mandates preemption. The result is compelled when Congressional command is "implicitly contained" in the statute. Id.
88. Id. at 534.
tion of the full purposes and objectives of Congress" in passing the FPLA and that the state law must yield to the federal. The Court found a conflict of purpose between the state and federal regulations. The FPLA goal was to facilitate value comparisons among similar products. Enforcement of the state regulation would frustrate this goal.

When FCC regulation of STV is considered in the context of these United States Supreme Court preemption tests, the issue of whether section 593(e) must yield to the federal superintendence of the field can be easily framed. There is neither an explicit declaration of congressional design in the FCA to displace state regulation in its entirety, nor is the subject matter one "by its very nature admitting only of national supervision." The real question is whether enforcement of Penal Code section 593(e) stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress in enacting the FCA and awarding the FCC jurisdiction over STV. While the courts have upheld FCC authority to regulate STV, apparently no court has decided the narrower issue of whether FCC regulation of STV preempts state and local regulation of STV, in general, and STV receiver equipment, specifically.

89. Id. at 543. See also Ray v. Atlantic Richfield Co., 435 U.S. 151 (1977) (following Jones v. Rath Packing Co., 430 U.S. 519 (1977)).

90. See also Mobil Oil Corp. v. Dubno, 492 F. Supp. 1004 (D. Conn. 1980), aff'd, 639 F.2d 919 (2d Cir.), cert. denied, 452 U.S. 967 (1981); Mobil Oil Corp. v. Tully, 499 F. Supp. 888 (N.D.N.Y. 1980) aff'd, 653 F.2d 497 (2d Cir. 1981) vacated as moot, 455 U.S. 245 (1982), invalidating New York and Connecticut taxes on oil company revenues derived from business activities conducted within the state, based on the Supremacy Clause:

[I]t should be noted that a state law cannot escape invalidation on preemption grounds because its purpose promotes a valid state interest if its effect 'frustrates the full effectiveness of federal law.' Perez v. Campbell, 402 U.S. 637, 651-52 (1971). Applying the Hines test, the Court has persistently invalidated state legislation that 'frustrates the full effectiveness of federal law,' [citation omitted] that betrays a 'general incompatibility with basic federal objectives,' . . . [citation omitted] . . . or whose 'consequences sufficiently injure the objectives of the federal program' to result in 'frustration to federal policy' . . . [citation omitted].

Id. at 897.

91. Head, 374 U.S. at 442 (Brennan, J., concurring).

V. FCC Pronouncements and History of STV

Active FCC consideration of subscription television began in February 1955, with a “Notice of Proposed Rulemaking” inviting public comment relative to the Commission’s authority to license subscription television operations. The Commission received over 25,000 letters in response to its invitation. In May 1957, the Commission concluded it had “the authority to authorize the use of television broadcast frequencies for subscription television operations if . . . it would be in the public interest to do so.” Five months later the FCC issued its First Report on subscription television.

The Commission summarized the legal basis for its conclusion that it had statutory authority to regulate STV. The Report cited the Federal Communications Act, which mandates that “the Commission, from time to time, as public convenience, interest, or necessity requires, shall . . . (e) [r]egulate the kind of apparatus to be used . . . and (g) [s]tudy new uses for radio . . . and generally encourage the larger and more effective use of radio in the public interest.” With this statutory basis, the Commission authorized the beginning of limited STV trial operations.

In February 1958, the Commission issued its Second Report and Order suspending processing of STV applications until the end of 1958. In a Third Report and Order issued in March 1959, the Commission set forth additional conditions for STV trial operations. The Commission also concluded that STV receiving equipment would be leased to the public, so as not to require the public to purchase additional equipment not needed for the reception of “free television broadcasts.”

In June 1962, WHCT in Hartford, Connecticut, began

95. Id.
96. First Report, supra note 20, at 265.
97. 47 U.S.C. § 303(e) (1976). The Commission specifically cited to 47 U.S.C. §§ 301, 303(b), (e), (g) and 307 as statutory authority for its ruling. First Report, supra note 20, at 536.
98. See Third Report, supra note 22. The one year suspension was subsequently extended until the end of the 86th Congress in 1959. Id. at 265.
99. Id. at 270-74.
100. Id. at 266.
limited STV operations. The Commission first reviewed the preliminary data of the Hartford experiment in its “Further Notice of Proposed Rulemaking and Notice of Inquiry,” in March 1966. In this report the FCC held STV to be “broadcasting” within the meaning of section 153(o) of the FCA.

The primary touchstone of a broadcast service is the intent of the broadcaster to provide radio and television program service without discrimination to as many members of the general public as can be interested in the particular program. While particular subscription programs might have a special appeal to some segment of the potential audience, this is equally true of a substantial portion of the programming now transmitted by broadcasting stations.

The Commission also observed that a broadcaster’s requisite intent may be inferred “from the circumstances under which material is transmitted.” Neither the number of potential viewers nor the fact that a charge is collected from subscribers was determinative.

The Commission’s Fourth Report and Order was adopted in December 1968. It is the single most important document in the history of STV regulation because the FCC concluded it was in the public interest to establish a permanent, nationwide STV system. In addition to reaffirming that the Commission had authority to regulate STV operations and that STV was indeed “broadcasting” within the meaning of the FCA, the Report held STV licensees were bound by all rules applicable to free TV broadcast stations and discussed the need for competition among STV decoder entrepreneurs.

Codification of the Fourth Report and Order extended

102. Id. FCC authority to authorize the experimental Hartford STV operation was upheld in Connecticut Comm. Against Pay TV v. FCC, 301 F.2d 835 (D.C. Cir. 1958), cert. denied, 371 U.S. 816 (1962).
103. Further Notice, supra note 7, at 9.
104. Id.
105. Id.
107. Id. at 505.
108. Id. at 575-76.
109. 47 C.F.R. § 73.643(d) (1969) (current version at 47 C.F.R. § 73.643(b) (1980)).
all rules applicable to regular television broadcasting to STV. There the Commission interpreted broadcasting as an "intent" to provide programming without discrimination to all members of the general public. The Commission would infer the "intent" to broadcast by applying the fairness doctrine, the equal-time doctrine, chain broadcasting rules, license renewal regulations and prohibitions against unauthorized publication of communications except broadcast communications.

The Commission also adopted rules requiring that STV decoder equipment be leased to subscribers. A closer reading of the Fourth Report reveals that these rules were promulgated to protect subscribers, not licensees.\(^{110}\) The FCC limited the exclusive decoder leasing franchise granted STV licensees by noting that "should STV flourish and become a regular part of the television scene, a continued leasing requirement could mean that subscribers would pay in continued rental fees more than it would cost to buy the decoding equipment."\(^ {111}\) The Commission was concerned that if licensees were always allowed to lease decoders, their control over reception equipment could add to the local STV licensees' monopoly power; the Commission was committed to letting "the marketplace . . . regulate the charges that are paid" for STV.\(^ {112}\)

The FCC issued a Fifth Report and Order concerning over-the-air subscription television in June 1969.\(^ {113}\) In it, the Commission adopted rules governing Commission acceptance of STV technical systems and STV licensee applications.

A. *National Association of Theatre Owners v. FCC*

FCC jurisdiction over subscription television was upheld in *National Association of Theatre Owners v. FCC*.\(^ {114}\) The case is noteworthy because it discusses the expansive powers Congress granted the Commission in enacting the Federal Communications Act. Citing *National Broadcasting Co. v.*

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111. *Id.* at 552.
112. *Id.* at 548.
United States, the circuit court reemphasized that the Act gave the Commission "not niggardly, but expansive powers . . . [in order to] . . . encourage the larger and more effective use of radio in the public interest." The court held that the FCA was designed to foster diversity in the organization and operation of broadcasting stations and that the Commission "did not exceed its authority in concluding that subscription television is entirely consistent with these goals."

The court also noted that the idea of paying for broadcast services through direct charges was not without precedent in the United States. In reviewing the legislative history of the Act and its predecessor, the Radio Act of 1927, the court found nothing which "preclude[d] the Commission from approving a system of direct charges to the public as a means of financing broadcasting services."

B. FCC Preemption of State Regulation in Other Pay TV Media

The courts have carved out certain areas in which the FCA and FCC do preempt local regulation of television and radio broadcasting. Brookhaven Cable TV, Inc. v. Kelly was the first case to discuss the issue of FCC authority to preempt state and local regulation of programming for which per-channel charges were made. The case concerned the New York state legislature’s attempt to regulate franchising and

115. 319 U.S. 190 (1943).
116. 420 F.2d at 199.
118. 420 F.2d at 202.
119. Id.
120. See Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1957) (FCC has exclusive jurisdiction over broadcast license grants, revocations and transfers); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 474-75 (1940) (FCA preempts state regulation of radio frequency allocations); Brookhaven Cable TV, Inc. v. Kelly, 573 F.2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979) (FCC has authority to preempt state price regulation of pay cable programming and pay cable programming); North Carolina Util. Comm’n v. FCC, 537 F.2d 787 (4th Cir. 1976), cert. denied, 429 U.S. 1927 (1976), aff’d, 552 F.2d 1036 (4th Cir. 1977) (FCC authority to regulate equipment used for both interstate and local communications preempts state and local regulation of same equipment); Allen B. Dumont Labs v. Carroll, 184 F.2d 153 (3d Cir. 1950), cert. denied, 340 U.S. 929 (1951) (FCA preempted state regulation of censorship and broadcast programming content). But see Schroeder v. Municipal Ct., 73 Cal. App. 3d 841, 141 Cal. Rptr. 85 (1977) (local land use regulations of antenna height were not precluded by FCC regulation of radio transmissions).
121. 573 F.2d 765 (2d Cir. 1978), cert. denied, 441 U.S. 904 (1979).
rate setting procedures of pay or subscription cable services. The court reviewed FCC pronouncements in the area of special pay cable programming and concluded that the FCC intended to refrain from imposing rate regulation for such services so as to permit special programming development free of price restraints and thereby foster program diversity.

The court held that "the FCC has the authority to preempt state and local price regulation of special pay cable programming [and] that it has exercised this authority . . . ."123 The court based its holding on the analysis of United States v. Southwestern Cable Co.124 and United States v. Midwest Video Corp.125 These United States Supreme Court cases upheld FCC authority to regulate cable television to the extent that such regulation was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."126 The Brookhaven court interpreted these two decisions to mean that the FCC had the authority to preempt state and local regulation in any specific area in which the Commission's regulations furthered a goal it was entitled to pursue in the broadcasting field. FCC authority to preempt was exercised by pronouncements evidencing an attempt to preempt state and local regulation.

Less than seven months later, the FCC cited the Brookhaven and National Association of Theatre Owners decisions in a Memorandum Opinion and Order, In re Orth-O-Vision, Inc.,127 holding that state regulation of MDS services and facilities was preempted. The FCC stated that "[n]o state may regulate an intrastate entity where its regulation would interfere with the reception of interstate radio communications."128 Furthermore, the Commission held that even if the explicit provisions of the Communications Act could not be considered to preempt the state regulations in question, preemption should be inferred along the lines of Jones v. Rath Packing Co. and the obstacle to accomplishment test.129

122. Id. at 767.
127. Id. at 668.
128. Id. at 669.
While *Brookhaven* concerned cable TV, and the FCC Memorandum in *Orth-O-Vision* concerned MDS service, their holdings should be extended and applied to STV. Both decisions recognize the broad congressional mandate granted the Commission. California Penal Code section 593(e) exemplifies state regulation in an area where the Commission has exercised its authority to preempt by means of "policy statements" concerning the regulation of STV decoders.\(^{129}\)

C. FCA Prohibition Against Unauthorized Interception of Radio Communications Exempts STV Transmissions

When the FCC concluded, in its Fourth Report and Order, that the rules applicable to regular broadcasting would apply to subscription television, it expressly referred to section 605.\(^{130}\) Derived primarily from its counterpart in the Radio Act of 1927,\(^{131}\) section 605 provides that "no person not entitled thereto shall receive or assist in receiving any interstate . . . communication by radio and use such communication . . . for his own benefit . . . ."\(^{132}\) The final sentence of the statute exempts "any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public"\(^{133}\) from the prohibition of the section.

To what extent section 605's protections extend to STV decoder retailers and manufacturers depends on whether STV is "broadcasting." If STV is considered "broadcasting" within the meaning of section 605, STV decoder manufacturers and

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\(^{129}\) The *Brookhaven* court stated: "[W]e do not believe that the FCC's choice to proceed by means of policy statements and interpretations rather than formal regulations vitiates its attempt to preempt." 573 F.2d at 768.


\(^{132}\) 47 U.S.C. § 605 (1976). The relevant portions provide:

No person not being authorized by the sender shall intercept any radio communication and divulge or publish the . . . contents . . . or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate . . . communication by radio and use such communication . . . for his own benefit or for the benefit of another not entitled thereto . . . .


\(^{133}\) 47 U.S.C. § 605. "This section shall not apply to the receiving, divulging, publishing or utilizing [of] the contents of any radio communication which is broadcast or transmitted by amateurs or others for the use of the general public." *Id.*
retailers can assist others in receiving interstate communications without fear of federal prosecution. The Commission has repeatedly found STV to be "broadcasting" within the meaning of the FCA and has specifically held section 605 to be as applicable to STV as it is to regular television. The general rule is that a statute's construction "should be followed unless there are compelling indications that it is wrong." The common sense application of this rule requires that STV be included within the definition of "broadcasting" for the purposes of section 605.

_Chartwell Communications Group v. Westbrook_, the leading case on the application of section 605 to subscription television, rejected this argument. Plaintiffs in the case were licensees of WXON-TV, channel 20, a Detroit, Michigan subscription television station. Defendants were various electronics equipment retailers, who were also selling decoders. The court granted plaintiff's motion enjoining defendants from selling decoders, holding that STV is not broadcasting within the meaning of section 605 of the FCA. The court found an important distinction between making a service available to the general public and intending a program for the use of the general public. The dual nature of STV is that while it may be available to the general public, it is intended for the exclusive use of paying subscribers. Availability and use are separate concepts.

The court's discussion of the "intent" of STV licensees is contrary to FCC analysis of the issue undertaken in its 1966 Further Notice and 1968 Fourth Report. As previously noted, "in-

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135. 637 F.2d 459 (6th Cir. 1980).
136. Id. at 465. While no case appears to have dealt with the issue, an argument can be made that the phrase "for the use of the general public," in the proviso of section 605, does not modify "broadcast" but rather "radio communications transmitted by amateurs or others." Such a construction would be in line with section 605 as enacted, Federal Communications Act ch. 652, § 605, 48 Stat. 1103 (1934): "This section shall not apply to the receiving . . . of any radio communications broadcast, or transmitted by amateurs or others for the use of the general public, . . ." (The comma following "broadcast" was deleted by Pub. L. 90-351, Title III, § 803, 82 Stat. 223 (1968), current version at 47 U.S.C. § 605 (1976)). Interpretation of section 605 so as to read "for the use of the general public" as modifying "broadcast" is redundant. Broadcasting is defined in section 153(o) of the Communications Act to include "dissemination . . . intended to be received by the public." No basis exists for differentiating between the language of the two statutes.
137. 637 F.2d at 465 (6th Cir. 1980).
tent" is to be inferred from the circumstances under which
the material is transmitted, including whether or not FCC
rules applicable to "regular" broadcasting are applicable to
the service in question. The subjective "intent" of the STV
licensee that its programming is for the exclusive use of pay-
ing subscribers is not determinative. Furthermore, the court's
finding that "the FCC has not ruled specifically on the ques-
tion whether STV is to be considered 'broadcasting' for the
purposes of section 605" is clearly erroneous.

Even if STV is not considered broadcasting within the
meaning of section 605, judicial precedent upholds the sec-
tion's prohibitions as inapplicable to interception of STV sig-
nals. In Weiss v. United States, the United States Supreme
Court focused on the language of section 605. While the case
centered on the wiretapping of phone conversations, the Court
found the statutory construction of section 605 was just as ap-
licable to interception of radio transmissions. The Court
noted that section 605 "consists of four clauses separated by
semicolons," each clause complete in itself. The first and
third clauses, now sentences, deal with divulgence of
messages by authorized persons engaged in receiving or trans-
mitting radio signals. These clauses are inapplicable to STV
decoder manufacturers as they are not persons authorized to
receive and transmit radio signals. Clauses two and four con-
cern interception of radio transmissions. Clause two is also in-
applicable to STV decoder manufacturers as it requires two
separate acts — interception and divulgence. STV decoder
manufacturers do not personally divulge the existence, con-
tents or meaning of any intercepted communication. It is sec-
tion 605's fourth clause, prohibiting one who has "become ac-
quainted with the contents . . . or meaning of such commu-
nication [or any part thereof] knowing that such commu-
nication was intercepted . . . [from] . . . us[ing] such commu-
nication . . . for his own benefit or the benefit of another
not entitled thereto," which appears to control the STV de-

138. Id. at 464. See supra note 130 and accompanying text.
139. 308 U.S. 321 (1939).
140. Id. at 327.
(1934)).
142. See, Home Box Office, Inc. v. Pay TV, Inc., 467 F. Supp. 525, 528
(E.D.N.Y. 1979); KMLA Broadcast Corp. v. Twentieth Century Cigarette Vending
coder manufacturers' conduct.

Historically, section 605 has been used as an evidentiary rule to determine the admissibility of testimony or transcripts of telephone wiretaps or radio transmission interceptions. It has not been used to prohibit the sale or manufacture of articles of commerce. In fact a number of radio devices sold are capable of violating section 605, such as shortwave radios and police and fire scanner devices. It would stretch section 605 to absurd lengths to argue that the section should be used to prohibit the manufacture and sales of “staple items” of commerce.

143. See, Benati v. United States, 355 U.S. 96 (1957) (testimony as to the existence of intercepted phone conversations obtained by tapping telephone wires inadmissible under § 605) (“. . . the plain words of the statute created a prohibition against any persons violating the integrity of a system of telephonic communication and that evidence obtained in violation of this prohibition may not be used to secure a federal conviction”); Weiss v. United States, 308 U.S. 321 (1939) (transcripts of intercepted telephone conversations obtained by tapping telephone wires inadmissible under § 605); Nardone v. United States, 302 U.S. 379 (1937) (testimony as to the content of intercepted phone messages obtained by tapping telephone wires inadmissible under § 605); United States v. Covello, 410 F.2d 536 (2d Cir. 1969), cert. denied, 396 U.S. 879 (1969) (records of toll calls placed from telephone obtained from telephone company admissible under § 605); United States v. Sugden, 226 F.2d 281 (9th Cir. 1955), aff’d, 351 U.S. 916 (1956) (recordings and transcripts of intercepted radio transmissions obtained by monitoring defendant’s transmissions inadmissible under § 605) (Judge Chambers notes that while § 605 is not designated as a rule of evidence, “it becomes, however, a rule of evidence for federal courts by judicial construction.” Id. at 284).

144. In KMLA Broadcast Corp. v. Twentieth Century Cigarette Vending Corp., 264 F. Supp. 35 (C.D. Cal. 1967), the defendant, a cigarette vendor, offered to supply its accounts with radio tuners capable of receiving background music broadcasts of plaintiff. These background music broadcasts, licensed by the FCC as Subsidiary Communications Authorization [SCA] operations, had been held by the Commission to be point to point communications and not broadcasting within the meaning of § 153(o). Defendant provided the tuners to its accounts free of charge and serviced the tuners. Id. at 39. Hence, the defendant had a continuing involvement in the unauthorized interception of its customers. The case can therefore be distinguished from outright sales of equipment. Interestingly, the manufacturer of the tuners was not joined in the action. See also L.D. O’Neill, Interception of MDS/Satellite Communication, United States Dept. of Commerce (Jan. 18, 1980) (on file with the Santa Clara Law Review).

145. This argument was originally advanced in Universal City Studios v. Sony Corp., 480 F. Supp. 429 (C.D. Cal. 1979), rev’d, 659 F.2d 963 (9th Cir. 1981) cert. granted, 102 S.Ct. 2926 (1982). There, plaintiffs were film and television program producers who alleged that sales of defendant’s Betamax product, which enabled consumers to record, edit and playback television programs, would act to decrease the value of their copyrights. Plaintiffs charged Sony with contributory copyright infringement in manufacturing and selling videotape recorders capable of being used for copyright infringement purposes. The district court held that defendant’s sales of
The *Chartwell* opinion also disapproved of two recent federal district court opinions, *National Subscription Television v. S&H TV* and *Orth-O-Vision, Inc. v. H.B.O.* The facts in the NST controversy paralleled those in *Chartwell*. National Subscription Television filed suit against S&H TV and six retail electronics outlets for manufacturing and selling components and plans to be utilized in intercepting plaintiff’s STV signals. The district court held that the FCC had “clearly implied that subscription TV would be exempt from the prohibition of section 605” and correctly cited both the 1966 Further Notice and the 1968 Fourth Report. The *Orth-O-Vision* opinion, which was concerned with MDS transmissions, accepted that STV was broadcasting within the meaning of section 605 and also cited the FCC Fourth Report discussion on “intent.”

In an opinion which relied heavily on *Chartwell*, the Ninth Circuit Court of Appeals reversed the district court decision in NST. Attorneys for National Subscription Television willingly conceded that programming which meets the requirements of section 153(o) broadcasting also constitutes broadcasting within the meaning of the proviso to section 605. The court, however, citing *Chartwell*, held that one could broadcast with the intent that its signal be received by the public within the meaning of section 153(o) “without such broadcasting being for the use of the public within the mean-

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480 F. Supp. at 461. The court of appeals expressly rejected the applicability of the “staple item of commerce” theory to the manufacture and sale of video tape recorders. 659 F.2d at 975.

151. *Id.* at 823.
ing of the proviso [to section 605]." The opinion fails to distinguish between the licensee's subjective intent in transmitting programming "for the use of the general public" and the FCC's objective criteria in inferring "the intent of the broadcaster to provide radio or television service without discrimination to as many members of the general public as can be interested in the particular program. . . ." The broadcaster's subjective intent cannot control determination of whether programming is broadcasting as this would undermine all FCC regulation of television and radio.

Additionally, the Ninth Circuit opinion misconstrues the public policy arguments recognized by the FCC in promoting STV. The prohibition against STV licensee sales of receivers was not promulgated to protect "the economic viability of the STV industry." The FCC always intended STV to compete in the open market with commercial television. Moreover, the activities of the defendant in NST do not threaten the economic viability of the STV industry any more than sales of video cassettes of first run movies threaten the economic viability of the movie theatre industry.

While FCC regulations prohibiting the sale of STV receivers by station licensees arguably protect subscribers from investing large sums of money in a device which is likely to become obsolete and give subscribers flexibility to choose among various STV decoders, this argument does not extend to non-STV subscribers freely purchasing STV decoders from non-STV licensees. In fact, the FCC has historically encouraged such sales so as to let free marketplace forces control STV.

The United States Supreme Court has not defined "broadcasting" but it has identified the attributes of "broadcasters." Specifically, broadcasters procure and select the programs to be viewed and propogate them to the public. While this definition was offered in the context of distinguishing broadcasting from cable television, the Court's desire for

152. Id. at 824.
154. 644 F.2d 820, 825 (9th Cir. 1981).
155. Fourth Report, supra note 106, at 548. See supra notes 110-12 and accompanying text.
an uncomplicated definition belies the Chartwell approach of splitting hairs, especially since "the Communications Act is not notable for the precision of its substantive standards." 157

D. FCC Deregulation of Satellite Earth Stations

The FCC has completely deregulated the ownership and use of receive-only earth stations, for reception of satellite communications. 158 Licensing is now voluntary and the risks of signal interference are now borne exclusively by the earth station operator. In adopting this position, the Commission ruled that receive-only earth station facilities should be exempt from regulation and would be ignored in future spectrum management decisions. 159 The Commission rejected the programmers' and satellite subscribers' argument that the FCC retain the option of revoking an operator's license under section 605 if the dish owner intercepted satellite radio communications. The Commission concluded that since all domestic satellites are classified as "fixed," not broadcasting satellites, effective civil remedies existed to enforce section 605.

The FCC's deregulation of receive-only earth station satellites to allow "marketplace forces to function freely in an unregulated arena" 160 reflects an overall trend towards deregulation of signal reception equipment and makes it more difficult to justify further delay in deregulating STV decoder sales. A recent FCC Public Notice ambiguously cautioned manufacturers and sellers of non-approved STV decoders. 161 While the Commission warned that STV decoders are part of a complete communications system required to be approved by the FCC, it did not refer to its own rules which require the leasing of subscription television decoders. In addition, the Commission failed to refer specifically to section 605; however, it did rely on sections 302a and 303e.

Section 302a was added to the FCA in 1968. 162 The pur-

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158. See Satellite Deregulation, supra note 30.
159. Id. at 213.
160. Id. at 214.
pose of the legislation was to give the FCC authority to deal with radio interference problems caused by the expanding use of devices emitting radio frequency signals. Section 302a(b) prohibits the manufacture and sale of such devices which fail to comply with FCC "type approval" technical requirements. The technical performance regulations do not require the consent of individual STV licensees prior to FCC approval. As the Commission noted, its regulations concerning subscription television equipment "are predicated on considerations of spectrum efficiency, prevention and minimization of harmful interference to authorized radio and television, as well as protection of the consumer against products which will degrade television reception performance." Noticeably absent in this policy pronouncement is a concern over the contract rights of STV station licensees.

VI. RECENT LITIGATION

The constitutionality of section 593(e) was upheld in its first court challenge, Robbins v. Hicks. Though the case facts paralleled those in Chartwell and National Subscription Television, the decision's basis is unclear. The court's two page order denying plaintiff's motion for a temporary restraining order staying prosecution under section 593(e) states: "§ 593(e) of the Penal Code is an exercise of the police power [of the state] in an area not fully preempted by federal law." The State Attorney General's office and the Orange County Prosecutor argued that section 593(e) did not interfere with any federal purpose. The arguments advanced by

164. See STV Equipment and Technical System Performance Requirements, 47 C.F.R. § 73.644(b) (1979) ("system type acceptance" regulations applicable to STV decoders).
166. No. 34-30-12 (Orange County Super. Ct., Nov. 26, 1980).
167. Stephen Robbins, the plaintiff in Robbins, was also a named defendant in Chartwell and National Subscription Television.
168. No. 34-30-12, slip op. at 2.
169. Points and Authorities for Defendant George Deukmejian, as Attorney General, State of California at 7-9, Robbins v. Hicks, No. 34-30-12 (Orange County Super. Ct., Nov. 26, 1980); Points and Authorities for Defendants Cecil Hicks and William Hopkins at 4-11, Robbins v. Hicks, No. 34-30-12 (Orange County Super. Ct., Nov. 26, 1980).
both parties relied heavily on *People v. Conklin*, a preemption case dealing with state and federal wiretapping laws. While the Conklin court correctly applied the "obstacle to accomplishment" test in holding California's Invasion of Privacy Act not preempted by the Omnibus Crime Control and Safe Streets Act of 1968, the case is still distinguishable. In Conklin, there was no conflict between the state and federal regulations, both were geared to protecting the privacy of wire and oral communications. The purpose of section 593(e) in prohibiting the sale of STV decoders is to protect the property and contract rights of STV licensees and to combat what the state and STV licensees feel is "piracy." The purpose behind FCC regulation of STV television decoders is to protect the consumer and subscriber.

Section 593(e) criminal charges were filed against the same Santa Ana electronics retailer in *People v. Robbins*. The complaint was originally dismissed, based on "reservations concerning the law's validity" and the NST district court opinion. The Orange County District Attorney appealed and the Municipal Court judgment was reversed. On remand, the defendant was found guilty of contempt of court; the section 593(e) charges were dropped.

In *People v. Abel*, another section 593(e) criminal prosecution filed in Orange County, undercover police officers entered defendant's television and stereo shop and purchased a STV decoder kit from Mr. Abel. Section 593(e) charges were

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171. Id. at 269-70, 522 P.2d at 1055-56, 114 Cal. Rptr. at 247-48.
172. Characterization of decoder entrepreneurs as "pirates" is unwarranted. If reception of STV transmissions is protected under section 605 of the Communications Act, then decoder distributors are merely acting as merchants attempting to exploit a new market. Independent telephone receiver manufacturers are not considered "pirates," despite the fact their product can only be used in connection with a subscription service: the local telephone system. The success of independent telephone receiver manufacturers has forced Pacific Telephone Company to recompute its rate structure to allow for a discount for individuals who own their own phone rather than lease it from the telephone system.
brought against the defendant but the charges were subsequently dropped under a court sanctioned compromise pursuant to California Penal Code section 1378.178

In California Satellite Systems v. Nichols,179 Sacramento Superior Court Judge Richard Tuttle dismissed section 593(e) charges brought against a local TV repair shop and nine other named defendants for selling directional antennas and down converters capable of intercepting MDS transmissions. The court held there had been no violation of section 593(e) because interception of MDS signals was not included within the statutory proscription against interception of subscription television programming.180 Instead, Judge Tuttle issued a temporary injunction against the defendant's sales of such merchandise based on section 605 of the FCA.

VII. A TELEVISION VIEWER'S FIRST AMENDMENT RIGHTS

In addition to the potential impact of Penal Code section 593(e) on first amendment protections against prior restraints,181 other issues raised by the statute include whether individual purchasers of STV decoders are subject to prosecution under section 593(e). The statute is carefully worded so as to avoid subjecting individual purchasers of STV decoders from prosecution. The statute is limited in scope to those persons "who, for profit, knowingly and willfully manufacture, distribute or sell" decoders.182 Any attempt to extend the legislative reach of the statute into the privacy of the home would create practical and legal problems.

Practically speaking, it may already be impossible to halt the widespread distribution of STV decoders for personal home use. The technology is commonplace and the parts are readily available at local electronics outlets.183

The United States Supreme Court, in Red Lion Broad-

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180. Id.
181. See supra note 58, and accompanying text.
182. CAL. PENAL CODE § 593(c) (West Supp. 1980).
183. Radio-Electronics, supra note 56, provides the necessary schematics for building an STV decoder, lists the addresses and telephone numbers of two such outlets, noting "Visa and Mastercard accepted. . . . All prices postpaid within contiguous 48 states." Id. at 43.
casting Co. v. FCC, also argues against restricting the television viewers' right of access to the airwaves. There the Court upheld FCC authority to enact the "fairness doctrine," requiring broadcasters to discuss both sides of an issue in presenting programming to the public. In sustaining the FCC regulation, the Court characterized the broadcasting medium as one where "the right of the viewers and listeners, not the right of the broadcasters . . . is paramount." Section 593(e) is a step in the opposite direction, protecting the broadcaster's contract rights in a manner which grants the licensee a monopoly over the frequency and the market. The exclusive license granted broadcasters to operate on a certain frequency protects the licensee against unauthorized interference from other potential broadcasters, not against viewers exercising their right to receive broadcast signals.

VIII. Conclusion

Section 593(e) impedes the full implementation of the Federal Communications Act's goal of protecting the public interest in broadcasting and impairs the jurisdiction and authority of the Federal Communications Commission in regulating subscription television operations. The thrust of the Commission's regulation of STV has been to integrate the service into the general marketplace of regular broadcasting; section 593(e) reverses this trend by supplanting state regulation for competition. California Penal Code section 593(e) enacts a subjective standard of licensee approval of reception equipment in contrast to the objective standards of radio communications interference established in FCA section 302a.

Section 593(e) legislates in an area of critical importance in the field of television communications — reception of radio transmissions. It raises troubling first amendment concerns, is poorly drafted and cannot be enforced effectively.

The problem which section 593(e) addresses is consequential. Unauthorized reception of radio communications is a development which confronts not only subscription television licensees, but also subscription satellite broadcasters, who face similar obstacles in marketing their service to the public. One

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185. Id. at 390.
solution is to use more sophisticated scrambling technology.\textsuperscript{186} Individual states, however, cannot effectively handle the problem. Congress has mandated the FCC to regulate all forms of electrical communication and to develop an appropriate system of local television broadcasting. Furthermore, it granted the FCC comprehensive and expansive powers for the effective performance of its responsibilities. Therefore, only the FCC can attack this issue.

The unauthorized reception problem, coupled with recent technological advancements which have further expanded the usable broadcast frequency spectrum, focus attention on the need to redefine broadcasting and the rights of viewers, licensees and programmers. Penal Code section 593(e) does not offer a reasoned solution.

\textit{M. Manuel Fishman}

\textsuperscript{186} Perle, \textit{supra} note 31, at 337.