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Brian Fleming
Boston College Law School, brian.fleming.3@bc.edu

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“WIRE” CIRCUIT COURTS SPLIT ON CABLE PIRACY: THE FIFTH CIRCUIT EXAMINES FEDERAL TELECOMMUNICATIONS LAW IN *J&J SPORTS PRODUCTIONS, INC. v. MANDELL FAMILY VENTURES*

Abstract: On May 2, 2014, in *J&J Sports Productions, Inc. v. Mandell Family Ventures, LLC*, the U.S. Court of Appeals for the Fifth Circuit overturned the lower court’s decision and held that section 605 of the Communications Act of 1934 does not apply to the unauthorized reception of cable wire transmissions originating as radio communications. The Fifth Circuit joined the Seventh and Third Circuits in maintaining that section 553 of the Communications Act of 1934 exclusively regulates this unauthorized reception after analyzing the legislative history and congressional intent behind the federal regulation. The Second Circuit, alternatively, has ruled that section 605 does regulate such transmissions. This Comment argues that the Fifth Circuit’s interpretation of the Communications Act of 1934 is correct. To rule otherwise would unreasonably impose the obligation on customers to take the additional step to verify that their cable provider has a license to provide the cable program. Furthermore, to apply section 605 would irrationally limit section 553 to only the regulation of local cable providers.

INTRODUCTION

Federal telecommunications laws distinguish between the regulation of cable wire transmissions and radio transmissions with respect to cable piracy.¹ Section 553 of the Communications Act of 1934 governs cable wire transmissions, and section 605 governs radio transmissions.² After Congress amended section 605 in 1968 and then enacted section 553 in 1984, circuit courts have struggled with applying these separate provisions to modern multi-step transmission pro-

¹ See Communications Act of 1934, 47 U.S.C. §§ 553(a), 605(a) (2012). “Radio transmissions” refers to communications sent over-the-air via radio waves or satellite, whereas cable wire transmissions are defined as communications sent via hard wire or coaxial cable. See *id.* § 153(40), (59); *Charter Commc’ns Entm’t I, DST v. Burdulis*, 460 F.3d 168, 173 (5th Cir. 2006) (discussing definitions of radio transmissions and cable wire transmissions); see also Babette E.L. Boliek, *FCC Regulation Versus Antitrust: How Net Neutrality Is Defining the Boundaries*, 52 B.C. L. REV. 1627, 1651 n.118 (2011) (stating that cable is the delivery of television broadcast signals over coaxial cable, or wire, and the government’s regulation of cable communication is ancillary to the regulation of over-the-air, or radio, communications).

² See 47 U.S.C. §§ 553(a), 605(a).

cesses involving both mediums.³ Specifically, courts have struggled to apply these regulations where a cable provider sends programming via radio which is then retransmitted through cable wire to the customer.⁴ In 2014, in *J&J Sports Productions, Inc. v. Mandell Family Ventures*, the U.S. Court of Appeals for the Fifth Circuit joined the Seventh and Third Circuits in holding that section 605, the radio transmission section, does not apply to this multi-step retransmission process.⁵ The court concluded that section 553, the cable wire transmission section, exclusively governs these multi-step communications when the reception by the customer occurs after the radio signal is retransmitted via cable wire.⁶ Alternatively, the Second Circuit has interpreted section 605 to apply to this multi-step retransmission process after reviewing the relevant case law and expressed legislative intent accompanying the enactment of section 553 in 1984.⁷

This Comment argues that the Fifth Circuit appropriately reversed the lower court's application of section 605, thereby avoiding the imposition of an unreasonable obligation on cable customers and irrationally limiting section 553 to only the regulation of local cable programming.⁸ This Comment also argues that, on remand, the lower court should dismiss the claims against the defendants.⁹ Part I of this Comment discusses the factual and procedural history of *J&J*

³ See Cable Communications Policy Act of 1984, Pub. L. No 98-549, 98 Stat. 2779, 2796 (codified as amended at 47 U.S.C. § 553); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 223 (codified as amended at 47 U.S.C. § 605); *J&J Sports Prods., Inc. v. Mandell Family Ventures, LLC*, 751 F.3d 346, 351 (5th Cir. 2014); *Prostar v. Massachi*, 239 F.3d 669, 673 (5th Cir. 2001). The development of satellite transmission technology led to tremendous growth of the national cable industry, allowing cable providers to create complex transmission processes to access more parts of the country. See *TKR Cable Co. v. Cable City Corp.*, 267 F.3d 196, 204 (3d Cir. 2001).

⁴ Compare *J&J Sports*, 751 F.3d at 351 (holding that section 605 does not regulate cable wire communications) and *TKR Cable*, 267 F.3d at 207 (same), with *Int'l Cablevision, Inc. v. Sykes*, 75 F.3d 123, 133 (2d Cir. 1996) (holding section 605 regulates cable wire communications).

⁵ See *J&J Sports*, 751 F.3d at 352–53; *TKR Cable*, 267 F.3d at 207; *United States v. Norris*, 88 F.3d 462, 469 (7th Cir. 1996).

⁶ See *J&J Sports*, 751 F.3d at 352–53. In these multi-step transmission processes, courts apply section 553 or section 605 depending upon when the unauthorized reception occurs. See *id.* If the unauthorized reception occurs during the initial radio transmission, courts apply section 605, but if the unauthorized reception occurs after the radio signal is retransmitted via cable wire, courts are split in applying section 605 or section 553. See *id.* Compare *Int'l Cablevision*, 75 F.3d at 133 (holding that section 605 applies to piracy of cable wire transmission which originated as radio or satellite transmission), with *Norris*, 88 F.3d at 469 (holding only section 553, not section 605, applies to unauthorized reception of cable services even if originating as radio or satellite transmission).

⁷ See *Int'l Cablevision*, 75 F.3d at 133 (applying section 605 to hold defendant liable for selling cable television descramblers which pirate cable wire communications); H.R. REP. NO. 98-934, at 83–84 (1984), reprinted in 1984 U.S.C.C.A.N. 4656, 4720–21.

⁸ See *infra* notes 69–92 and accompanying text; see also *J&J Sports Prods., Inc. v. Mandell Family Ventures, LLC*, No. 3:10-CV-02489-BF, 2012 WL 4757694, at *5 (N.D. Tex. Oct. 5, 2012) (holding that section 605 regulates multi-step retransmission processes).

⁹ See *infra* notes 87–92 and accompanying text.

Sports and reviews the legislative history of the relevant statutes.¹⁰ Part II explains the split among U.S. Circuit Courts of Appeal in determining whether section 605 regulates modern multi-step retransmission processes such as those in *J&J Sports*.¹¹ Finally, Part III argues that the Fifth, Seventh, and Third Circuits correctly interpreted Congress's intent by holding that section 553 exclusively governs the unauthorized reception of cable wire transmissions to protect innocent cable customers such as the defendants in *J&J Sports*.¹²

I. THE LEGISLATIVE HISTORY OF FEDERAL TELECOMMUNICATIONS REGULATIONS AND *J&J SPORTS*

Over the course of the development national television industry, Congress has responded to issues of cable piracy with sweeping regulation.¹³ This regulation, however, has not occurred without setbacks—courts have struggled to apply the cable piracy provisions to modern industry practices because of the ambiguous development of the Communications Act of 1934.¹⁴ Section A of this Part examines the ambiguous development of the Communications Act since 1964 and the effect of this ambiguity on courts around the country.¹⁵ Section B of this Part details the U.S. Court of Appeals for the Fifth Circuit's interpretation of the relevant provisions.¹⁶

A. *History of the Communications Act of 1934*

The ambiguous development of the Communications Act since 1964 has left courts divided in interpreting the application of section 605 of the Act, which regulates radio communications, and section 553, which regulates cable wire

¹⁰ See *infra* notes 13–44 and accompanying text.

¹¹ See *infra* notes 45–68 and accompanying text.

¹² See *infra* notes 69–92 and accompanying text.

¹³ See, e.g., Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. §§ 151 *et seq.* (2012)) (establishing provisions regulating the unauthorized reception of cable wire and radio transmissions); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 223 (codified as amended at 47 U.S.C. § 605) (removing references to cable wire transmissions in section 605); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 2796 (codified as amended at 47 U.S.C. § 553) (enacting section 553 to regulate cable wire transmissions); see also *Norris*, 88 F.3d at 469 (detailing the history of federal telecommunications regulation concerning cable piracy).

¹⁴ See Andrew Russell, Comment, *Placeshifting, the Slingbox, and Cable Theft Statutes: Will Slingbox Use Land You in Prison?*, 81 TEMP. L. REV. 1239, 1254–55 (2008) (detailing the circuit split regarding the application of the Communications Act to cable piracy). Compare *Int'l Cablevision*, 75 F.3d at 133 (holding that section 605 applies to piracy of cable wire transmission which originated as radio or satellite transmission), with *Norris*, 88 F.3d at 469 (holding only section 553, not section 605, applies to unauthorized reception of cable services even if originating as radio or satellite transmission).

¹⁵ See *infra* notes 17–25 and accompanying text.

¹⁶ See *infra* notes 26–44 and accompanying text.

transmissions, to modern multi-step transmission processes.¹⁷ Section 605 requires higher statutory damages than section 553, but both sections hold customers strictly liable for their unauthorized reception, which imbues great significance on the ambiguous application of sections 553 and 605.¹⁸ The separation of the regulation of radio and cable wire communications dates back to 1968 when Congress amended section 605(a) to remove references to cable wire transmissions in the two relevant portions of the provision.¹⁹ In doing so, Congress left cable wire transmissions to be regulated by a different set of statutes.²⁰ In 1968, the new telecommunication law created a gap in cable wire regulation, causing some courts to apply section 605 to cable transmissions.²¹

The gap ultimately led to the adoption of the Cable Communications Policy Act of 1984, which established section 553 to regulate cable wire piracy.²² Since

¹⁷ See 47 U.S.C. §§ 553(a), 605. Compare *Int'l Cablevision*, 75 F.3d at 133 (holding that section 605 applies to piracy of cable wire transmission which originated as radio or satellite transmission), with *Norris*, 88 F.3d at 469 (holding only section 553, not section 605, applies to unauthorized reception of cable services even if originating as radio or satellite transmission). Congress enacted these new telecommunications regulations in an attempt to combat cable piracy caused by the rapid growth of the television industry in the 1970s after the advent of satellite programming. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 2796 (codified as amended at 47 U.S.C. § 553) (enacting section 553 to regulate cable wire transmissions); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 223 (codified as amended at 47 U.S.C. § 605) (removing references to cable wire transmissions in section 605); *TKR Cable*, 267 F.3d at 204 (describing these developments).

¹⁸ See Russell, *supra* note 14, at 1266 (noting that cable providers continued to use section 605 in lawsuits against cable pirates even after Congress enacted section 553). Compare 47 U.S.C. § 605(e)(3)(B)(iii)–(C)(iii) (requiring higher statutory minimum damages and mandatory attorney's fees), with § 553(c)(2)(C)–(3)(C) (requiring lower statutory minimum damages and discretionary attorney's fees).

¹⁹ See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 223 (codified as amended at 47 U.S.C. § 605(a)); *Norris*, 88 F.3d at 465. The 1968 amendments to section 605(a) changed the words “any communication” to “any radio communication” in the second sentence of the provision and deleted reference to communication “by wire” in the third sentence, while leaving a reference to cable wire transmission in the first sentence which regulates acts by communication personnel. See Pub. L. No. 90-351, 82 Stat. at 223; *Int'l Cablevision*, 75 F.3d at 130 (detailing this amendment to section 605).

²⁰ See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 212–13 (codified as amended at 18 U.S.C. § 2510 *et seq.* (2012)) (providing regulations for the interception of oral and wire communications); *Norris*, 88 F.3d at 465.

²¹ See *Norris*, 88 F.3d at 465–66; *Int'l Cablevision*, 75 F.3d at 130. Relegating cable wire transmissions to regulations under title 18 created this gap, as these provisions do not apply to cable television providers. See 18 U.S.C. § 2510(1) (defining the wire communications regulated under title 18 as only those transmitted through a wire or cable facility operated by a common carrier); *United States v. Sw. Cable Co.*, 392 U.S. 157, 169 n.29 (1968) (holding that cable television providers are not common carriers); see also *Norris*, 88 F.3d at 455–66 (reviewing the statutory and case law developments resulting in this gap).

²² Pub. L. No. 98-549, 98 Stat. 2779, 2796 (codified as amended at 47 U.S.C. § 553); see *Norris*, 88 F.3d at 466. The growth of satellite technology and its importance in the growth of the national cable industry led to the use of home satellite systems to illegally intercept television programs, contributing to the need for Congress to enact the Cable Communications Policy Act of 1984. See David

the Act's enactment, courts around the country have struggled with the application of federal telecommunications laws to the modern, multi-step retransmissions processes involving both radio and cable wire that are practiced by companies such as Time Warner Cable.²³ As a result, courts are divided on whether section 605 applies to the scenario where a cable provider sends programming via radio that is then retransmitted through cable wire to a customer, at which time the unauthorized reception occurs.²⁴ The U.S. Court of Appeals for the Fifth Circuit confronted this issue after the defendants in *J&J Sports Productions, Inc. v. Mandell Family Ventures, LLC* were sued for unauthorized reception of a Floyd Mayweather fight.²⁵

B. The Background of *J&J Sports Productions, Inc. v. Mandell Family Ventures*

In 2010, J&J Sports filed suit against the defendants, seeking to hold them strictly liable under section 553 and section 605 of the Communications Act for their unauthorized reception of the Floyd Mayweather fight.²⁶ On December 8, 2007, the Greenville Avenue Pizza Company, owned by Mandell Family Ventures, LLC, paid for and received the pay-per-view Welterweight Championship boxing fight between Floyd "Money" Mayweather and Ricky Hatton.²⁷ Mandell Family Ventures ordered the fight through their cable provider Time Warner Ca-

V. Lampman, II, *The Unusual Suspects: Unscrambling Satellite Piracy*, 22 CARDOZO ARTS & ENT. L.J. 553, 565–67 (2004) (detailing the growth and effect of satellite television technology and the impact on widespread cable piracy).

²³ See, e.g., *J&J Sports*, 751 F.3d at 352 (holding that section 553 exclusively governs these communications); *Norris*, 88 F.3d at 465–66 (same); *Int'l Cablevision*, 75 F.3d at 130 (holding that section 553 exclusively governs these communications).

²⁴ Compare *Int'l Cablevision*, 75 F.3d at 133 (holding section 605 applies to piracy of cable wire transmission which originated as radio or satellite transmission), with *Norris*, 88 F.3d at 469 (holding only section 553, not section 605, applies to unauthorized reception of cable services even if originating as radio or satellite transmission).

²⁵ See *J&J Sports*, 751 F.3d at 348.

²⁶ See 47 U.S.C. §§ 553(a), 605(a) (2012); *J&J Sports*, 2012 WL 4757694, at *2. Plaintiffs commonly argue for a violation of section 605 because the statutory damages are higher in section 605 than in section 553, and section 605 requires an award of attorney's fees, while section 553 gives the court discretion in awarding attorney's fees. Compare 47 U.S.C. § 605(e)(3)(B)(iii)–(C)(iii) (requiring higher statutory minimum damages and mandatory attorney's fees), with § 553(c)(2)(C)–(3)(C) (requiring lower statutory minimum damages and discretionary attorney's fees). Ultimately, the court awarded J&J Sports statutory damages in the amount of \$350 as well as costs and attorney's fees in the amount of \$26,780.30. See *J&J Sports*, 2012 WL 4757694 at *5. The district court awarded damages according to both section 605 and section 553, as both provisions allow the court to exercise its discretion to reduce damages for innocent, good faith defendants. See 47 U.S.C. § 553(c)(3)(C) (allowing a reduction to \$100); § 605(e)(3)(C)(iii) (allowing a reduction to \$250); *J&J Sports*, No. 3:10-CV-02489-BF, 2012 WL 4757694 at *5.

²⁷ *J&J Sports*, 2012 WL 4757694, at *5. The restaurant did not advertise the event, nor did the bar have a liquor license or charge a commission to view the fight in their establishment. *Id.*

ble, (“TWC”).²⁸ TWC, whose communications processes begin as satellite transmissions that are then retransmitted via cable wire and sent to the customer, mistakenly authorized and transmitted the program to Mandell Family Ventures.²⁹ TWC transmitted the program despite only having the license to broadcast the fight to venues not accessible to the public.³⁰ Instead, the plaintiff, J&J Sports Productions, owned the license to broadcast the boxing match to closed-circuit commercial entities such as Mandell Family Ventures.³¹ The district court granted the J&J Sports’ motion for summary judgment without specifically indicating whether Mandell Family Ventures was liable under section 553 or section 605.³² On appeal, the Fifth Circuit reviewed whether summary judgment was appropriate in this case under either section 553 or section 605.³³

The Fifth Circuit held that a dispute of material fact existed as to whether Mandell Family Ventures violated section 553, holding that J&J Sports’ motion for summary judgment could not survive under this provision.³⁴ Although section 553 imposes strict liability for the unauthorized reception of communications delivered via cable wire, the provision includes a “safe harbor” exclusion that protects a majority of cable customers from liability.³⁵ Courts have interpreted this safe harbor to apply to cable customers who are specifically authorized by their cable operator to receive the service, regardless of whether or not that cable operator had the license to transmit the program to the customer.³⁶

The Fifth Circuit then analyzed whether the J&J Sports’ motion for summary judgment would survive under section 605.³⁷ Ultimately, the Fifth Circuit held that section 605 does not apply to the receipt of an unauthorized cable wire

²⁸ See *J&J Sports*, 751 F.3d at 347.

²⁹ *Id.* at 347, 352.

³⁰ *Id.* at 347.

³¹ *Id.* In Texas, the fight could legally be displayed only in theaters, bars, clubs, lounges, and restaurants if the establishment had an agreement with J&J Sports. See *J&J Sports*, 2012 WL 4757694 at *2.

³² *J&J Sports*, 751 F.3d at 348.

³³ *Id.* at 347.

³⁴ *Id.* at 350. The court ruled a dispute of material fact existed because Mandell Family Ventures was specifically authorized by TWC to receive the fight and a reasonable jury could find that they fall within the safe harbor in section 553. See *id.*

³⁵ See 47 U.S.C. § 553(a)(1) (2012) (providing that “no person shall intercept or receive or assist in the intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law”) (emphasis added).

³⁶ *J&J Sports*, 751 F.3d at 348–50; see also *J&J Prods., Inc. v. Schmalz*, 745 F. Supp. 2d 844, 851 (S.D. Ohio 2010) (holding customer need only receive program from a cable operator, not an authorized or licensed cable operator, in order to receive protection from section 553 safe harbor). The court ruled a dispute of material fact existed because the defendants were specifically authorized by TWC to receive the fight and a reasonable jury could find that they fall within the safe harbor in section 553. See *J&J Sports*, 751 F.3d at 350.

³⁷ See *J&J Sports*, 751 F.3d at 350

communication that originated via radio or satellite.³⁸ The court noted that section 605 does not contain a safe harbor and recognized that courts are divided as to the applicability of this section to transmissions via cable wire.³⁹ Both J&J Sports and Mandell Family Ventures used this circuit split to bolster their arguments on appeal.⁴⁰ J&J Sports argued that Mandell Family Ventures was liable under section 605 because the transmission of the Mayweather fight originated via radio and was therefore “incidental” to the radio transmission so as to invoke section 605.⁴¹ Alternatively, Mandell Family Ventures argued that section 605 prohibits the unauthorized receipt of only radio or satellite communications, not the cable wire transmissions through which they received the boxing match.⁴² Mandell Family Ventures pointed to the relevant statutory language which only refers to radio transmissions without mentioning cable wire transmissions.⁴³ Accordingly, the court held that J&J Sports’ motion for summary judgment could not survive under either section 605 or section 553, and thus reversed the lower court’s decision and remanded the case for further proceedings.⁴⁴

II. CIRCUITS STRUGGLE WITH INTERPRETING CONGRESS’S CHANGES TO FEDERAL COMMUNICATIONS LAW

Following the amendments to section 605 in 1968 and the enactment of section 553 in 1984, courts have struggled to apply federal communications regulations to multi-step transmission processes of modern national cable providers involving both radio and cable wire transmissions.⁴⁵ In 1996, the U.S. Courts of

³⁸ *Id.* at 353. The Fifth Circuit reasoned that J&J’s argument of an incidental transmission “unacceptably blurs the lines” between radio and cable wire communications, and the statutory framework of the federal telecommunications laws with separate provisions for radio and cable wire transmissions support their decision. *See id.* at 352–53.

³⁹ *See id.* at 351; *Prostar*, 239 F.3d at 673 (recognizing the divide among courts as to the applicability of sections 553 and 605 to modern multi-step retransmission processes).

⁴⁰ *See J&J Sports*, 751 F.3d at 350–52.

⁴¹ *See id.* at 352; *see also* 47 U.S.C. § 153(40) (2012) (defining radio communication as the transmission by radio of writing, signs, signals, pictures, and sounds of all kind, including all instrumentalities, facilities, apparatus, and services incidental to such transmission).

⁴² *See J&J Sports*, 751 F.3d at 350–51.

⁴³ *See* 47 U.S.C. § 605(a) (2012) (stating “no person not entitled thereto shall receive or assist in receiving any interstate or foreign communication by *radio* and use such communication” (emphasis added)); *J&J Sports*, 751 F.3d at 350–51. The Fifth Circuit reasoned that J&J’s argument of an incidental transmission “unacceptably blurs the lines” between radio and cable wire communications, and noted that the statutory framework of the federal telecommunications laws—with separate provisions for radio and cable wire transmissions—supports their decision. *See J&J Sports*, 751 F.3d at 352–53.

⁴⁴ *J&J Sports*, 751 F.3d at 353.

⁴⁵ *See J&J Sports Prods., Inc. v. Mandell Family Ventures, LLC*, 751 F.3d 346, 351 (5th Cir. 2014); *United States v. Norris*, 88 F.3d 462, 465–66 (7th Cir. 1996); *Int’l Cablevision, Inc. v. Sykes*, 75 F.3d 123, 133 (2d Cir. 1996). This is different from local cable programming, which usually transmits only through cable wire. *See TKR Cable Co. v. Cable City Corp.*, 267 F.3d 196, 205 (3d Cir. 2001).

Appeals for the Seventh and Second Circuits heard cases implicating section 605 and its application to the unauthorized receipt of cable wire transmissions which originated as radio communication, and reached different conclusions.⁴⁶ Section A of this Part examines the Second Circuit's decision to apply Section 605 to this unauthorized reception (the "inclusive approach").⁴⁷ Section B details the different interpretation of section 605 reached by the Seventh and Third Circuits holding that section 553 exclusively regulates this multi-step retransmission process of cable providers when the unauthorized reception occurs after the cable wire retransmission, ("the exclusive approach").⁴⁸

A. The Inclusive Approach: Applying Section 605 to Multi-Step Retransmission Processes

In 2001, in *International Cablevision, Inc. v. Sykes*, the U.S. Court of Appeals for the Second Circuit held that section 605 regulates the unauthorized reception of cable wire transmissions originating as radio communications.⁴⁹ The court relied on pre-1984 case law and Congress' expressed intent to hold that section 605 governs these multistep retransmission processes.⁵⁰ First, although the court acknowledged that the 1968 amendments to section 605 could be read to eliminate the provision's applicability to cable wire transmissions, the court instead deferred to a significant body of case law across the country that continued to apply section 605 to cable wire transmission after these amendments.⁵¹

⁴⁶ Compare *Int'l Cablevision*, 75 F.3d at 133 (holding section 605 applies to piracy of cable wire transmission which originated as radio or satellite transmission), with *Norris*, 88 F.3d at 469 (holding only section 553, not section 605, applies to unauthorized reception of cable services even if originating as radio or satellite transmission). Both *International Cablevision* and *Norris* involved claims made against defendants attempting to sell cable decoding equipment that would allow cable customers to steal unauthorized premium cable. See *Int'l Cablevision*, 75 F.3d at 126; *Norris*, 88 F.3d at 463.

⁴⁷ See *infra* notes 49–57 and accompanying text. This Comment uses the term "inclusive approach" to describe the Second Circuit's approach of applying both section 553 and section 605 to these multi-step communication where a radio signal is retransmitted over cable wire at which time the unauthorized reception occurs. See *Int'l Cablevision*, 75 F.3d at 126; see, e.g., *infra* notes 69, 81 (employing this terminology).

⁴⁸ See *infra* notes 58–68 and accompanying text. This Comment uses the term "exclusive approach" to describe the approach of the Third, Fifth, and Seventh Circuits, which apply section 553 exclusively to multi-step retransmissions. See *J&J Sports*, 751 F.3d at 351; *TKR Cable*, 267 F.3d at 205; *Norris*, 88 F.3d at 469; see, e.g., *infra* notes 64, 68 and accompanying text (employing this terminology).

⁴⁹ See *Int'l Cablevision*, 75 F.3d at 133 (reviewing case against a defendant who sold cable television descramblers which allow cable piracy).

⁵⁰ See *id.*

⁵¹ See *id.* at 130 (detailing four cases, *Ciminelli v. Cablevision*, 583 F. Supp. 158 (E.D.N.Y. 1984), *Cablevision Sys. Dev. Co. v. Annasonic Elec. Supply*, No. CV-83-5159, 1984 WL 254933 (E.D.N.Y. Feb. 10, 1984), *Porter Cnty. Cable Co. v. Moyer*, 624 F. Supp. 1 (N.D. Ind. 1983), and *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376 (N.D. Ohio 1983), which applied section 605 to unauthorized reception of cable wire television). Before 1968, section 605 included references to "communication by wire or radio" but after the amendments these references were removed in the

The Second Circuit held that these cases reinforced the plausibility of interpreting section 605 to regulate cable wire transmissions.⁵² The court ultimately adopted this interpretation after reviewing the statements made by Congress in connection with the enactment of section 553 in 1984.⁵³

Second, the court in *International Cablevision* held that Congress's expressed intent regarding the pre-1984 case law supports the conclusion that section 605 applies to cable wire transmissions.⁵⁴ The Second Circuit relied on a statement from Congress elaborating on the intended application of section 553 noting that the enactment of section 503 should not affect the applicability of section 605 to cable piracy.⁵⁵ The court also highlighted a note from the committee chair responsible for the enactment of section 553, which stated that the enactment of section 553 should not affect existing case law applying section 605 to acts of cable piracy.⁵⁶ These statements, coupled with the supporting pre-1984 case law, led the Second Circuit to hold that section 605 governs the unauthorized reception of cable wire communications that originate as a radio transmission.⁵⁷

B. The Exclusive Approach: Section 553 Alone Governs the Multi-Step Retransmission Processes

As an alternative to the Second Circuit's "inclusive" approach, in 1996, in *United States v. Norris*, the U.S. Appeals Court for the Seventh Circuit ruled that section 605 does not apply to the unauthorized reception of cable wire transmissions that originate as radio communications.⁵⁸ Like the Second Circuit, the

relevant portions dealing with cable piracy. Compare 47 U.S.C. § 605 (1964) (including references to wire or radio communications), with § 605 (2012) (omitting these references in current version of the law as amended by 1968 Act).

⁵² See *Int'l Cablevision*, 75 F.3d at 131. The court in *International Cablevision* acknowledged that these cases did not thoroughly analyze section 605's language as amended in 1968, noting this as an attenuated statutory construction. See *id.*

⁵³ See *id.* at 132–33.

⁵⁴ See *id.*; H.R. REP. NO. 98-934, at 83–84 (1984), reprinted in 1984 U.S.C.C.A.N. 4656, 4720–21.

⁵⁵ See *Int'l Cablevision*, 75 F.3d at 132; H.R. REP. NO. 98-934, at 83–84, reprinted in 1984 U.S.C.C.A.N. at 4720–21 (stating “[n]othing in [section 553] is intended to affect the applicability of existing Section 605 to theft of cable service”).

⁵⁶ See 130 CONG. REC. S14287 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood), (stating that “[section 553] is intended to leave undisturbed the case law that has developed confirming the broad reach of section 605 as a deterrent against piracy of protected communications”). Senator Packwood continued to state that “[i]t is the Committee's intention that the amendment preserve these broad protections [provided by section 605]; that all acts which presently constitute a violation of [section 605] shall continue to be unlawful under that section” See *id.*

⁵⁷ See *Int'l Cablevision*, 75 F.3d at 133 (“[I]n light of this legislative history and the uniform pre-1984 judicial interpretation of §605 . . . we conclude that §605 continues to apply.”).

⁵⁸ See 88 F.3d at 469. The U.S. government appealed only the trial court's dismissal of criminal charges under section 605, as opposed to section 605 and section 553, because section 605 has harsher

Seventh Circuit analyzed the legislative history and congressional intent to evaluate the applicability of section 605.⁵⁹ In *Norris*, the court concluded that Congress intended for section 553, and not section 605, to govern this situation.⁶⁰ The court held that allowing both section 553 and section 605 to apply to the retransmission of a radio communication via cable wire would render Congress's enactment of section 553 superfluous, because section 605 would still regulate these multi-step transmissions.⁶¹

Although the Seventh Circuit acknowledged the extensive case law and legislative history utilized by the Second Circuit, the court disagreed with its sister court's interpretation, declaring that the Second Circuit took this judicial history and legislative intent out of context.⁶² The Seventh Circuit noted that the Second Circuit analyzed the phrase "[n]othing in [Section 553] is intended to affect the applicability of existing section 605 to theft of cable service" without considering this sentence's meaning within its context.⁶³ Accordingly, the Seventh Circuit held that, in a multi-step retransmission process, Congress intended for section 605 to govern if reception occurred during the radio transmission step, whereas section 553 would apply when the unauthorized reception occurs during the cable wire transmission step.⁶⁴

punishments for defendants that modify and sell cable television descrambler equipment. *Id.* at 463–64.

⁵⁹ *See id.* at 464–66.

⁶⁰ *See id.* (using the history of federal communications legislation, from the Radio-Communications Act of 1912, Pub. L. No. 62-264, 37 Stat. 302, to the Cable Communications Policy Act of 1984, Pub. L. No 98-549, 98 Stat. 2779, to demonstrate the history of regulating radio and cable wire transmissions separately).

⁶¹ *See id.* at 468 (reviewing legislative history in analyzing the separation of radio and cable wire telecommunication regulation). The Seventh Circuit acknowledged that courts around the country invoked section 605 to regulate cable wire transmissions as an attempt to judicially fill the gap in cable wire regulation caused by the 1968 Omnibus Crime Control and Safe Streets Act, prior to the enactment of section 553 in 1984. *See id. See generally Ciminelli*, 583 F. Supp. 158 (rejecting the argument that section 605 does not apply to the unauthorized interception of cable wire transmissions); *Cox Cable*, 582 F. Supp. 376 (N.D. Ohio 1983) (holding that section 605 still regulates cable wire communications); *Porter Cnty. Cable*, 624 F. Supp. 1 (applying section 605 to hold defendant liable for unauthorized interception of cable transmissions).

⁶² *See Norris*, 88 F.3d at 468–69.

⁶³ *See id.*; H.R. REP. NO. 98-934, at 83–84 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4656, 4720–21. In addition to this statement, Congress elaborated that situations involving both radio and wire transmissions “continue to be subject to resolution under section 605 to the extent reception or interception occurs prior to or not in connection with, distribution of the service over a cable system.” H.R. REP. NO. 98-934, at 83, *reprinted in* 1984 U.S.C.C.A.N. at 4720 (emphasis added).

⁶⁴ *See Norris*, 88 F.3d at 469. By contrast, the Second Circuit in *International Cablevision* interpreted this same language to mean that section 605 exclusively governs the radio transmission step, and both sections 605 and 553 regulate the cable wire transmission step. *See* 75 F.3d at 132. The Seventh Circuit, on the other hand, held that the context of this statement demonstrated Congress's true intent for section 553 to exclusively govern when the unauthorized reception occurs after the retransmission via cable wire. *See Norris*, 88 F.3d at 469.

In 2001, in *TKR Cable Company v. Cable City Corporation*, the U.S. Court of Appeals for the Third Circuit reinforced the Seventh Circuit's reasoning by adopting this "exclusive" approach, holding that section 605 does not regulate these multi-step retransmission processes.⁶⁵ In addition to relying on the Seventh Circuit's reasoning, the Third Circuit also pointed out that Congress enacted section 553 in 1984 in response to the rapid growth of the cable industry spawned by satellite television transmissions which utilized both radio and cable wire communications.⁶⁶ The court believed this reinforced Congress's intent to enact section 553 to exclusively regulate this retransmission via cable wire.⁶⁷ In 2014, in *J&J Sports Productions, Inc. V. Mandell Family Ventures, LLC*, The U.S. Court of Appeals for the Fifth Circuit joined the Seventh and Third Circuits, holding that section 605 does not regulate the unauthorized reception of a cable wire retransmission which originated as a radio communication.⁶⁸

III. THE FIFTH CIRCUIT'S VIRTUE AND WHAT HAPPENS NEXT

The United States Court of Appeals for the Fifth Circuit correctly adopted the exclusive approach in holding that section 553 alone should govern the regulation of cable piracy in a multi-step transmission process after the communication is transmitted via cable wire.⁶⁹ First, this Part argues that the Fifth Circuit's approach appropriately refuses to impose the unreasonable obligation on customers to verify that they are receiving programming from a licensed cable operator.⁷⁰ Next, this Part argues that the Fifth Circuit also ruled correctly in adopting the exclusive approach because the inclusive approach irrationally limits section 553 to only local cable programming.⁷¹ Furthermore, this Part argues that the inclusive approach is flawed because the Second Circuit misinterpreted Con-

⁶⁵ See 267 F.3d 196, 207 (2d Cir. 2001). *TKR Cable* also involved a suit against defendants caught selling cable television descramblers out of an office in Manhattan. See *id.* at 197. The court agreed that legislative history and congressional intent demonstrate that section 553 exclusively regulates these transmissions because to apply section 605 would blur the lines between radio and wire communications and render section 553 superfluous. See *id.* at 205–06. The Third Circuit also criticized the Second Circuit's interpretation of Congress's statement that section 605 regulates cable wire transmissions originating as radio communications "only to the extent reception occurs prior to or not in connection with distribution via cable wire." See *id.* at 206–07; H.R. REP. NO. 98-934, at 83–84, reprinted in 1984 U.S.C.C.A.N. 4656, 4720–21; *supra* notes 58–61 and accompanying text (discussing this point).

⁶⁶ See *TKR Cable*, 267 F.3d at 204; H.R. REP. NO. 98-934, at 83–84, reprinted in 1984 U.S.C.C.A.N. at 4720–21 (explaining Congress' concern with the growing problem of cable piracy).

⁶⁷ See *TKR Cable*, 267 F.3d at 204.

⁶⁸ See *J&J Sports*, 751 F.3d at 353. The Fifth Circuit adopted the exclusive approach reasoning that "we agree with the Third and Seventh Circuits that [the inclusive approach] unacceptably blurs the lines between radio and wire communications." See *id.* at 352 (internal quotations omitted).

⁶⁹ See *J&J Sports Prods., Inc. v. Mandell Family Ventures, LLC*, 751 F.3d 346, 352 (5th Cir. 2014).

⁷⁰ See *infra* notes 74–77 and accompanying text.

⁷¹ See *infra* notes 78–80 and accompanying text.

gress' intent behind the enactment of section 553.⁷² This Part then argues that, on remand, the United States District Court for the Northern District of Texas should dismiss J&J Sport's claim against the defendants, and the U.S. Supreme Court, if presented with the opportunity, should resolve the circuit split by adopting the exclusive approach.⁷³

First, the Fifth Circuit ruled correctly in *J&J Sports* because allowing section 605 to regulate the unauthorized reception of a cable wire retransmission imposes an unreasonable obligation on cable customers to verify that they are ordering from a licensed cable provider.⁷⁴ Although section 553 contains a safe harbor provision that could excuse innocent defendants such as Mandell Family Ventures from strict liability, section 605 contains no such safe harbor—under this provision Mandell Family Ventures would likely be liable for statutory damages for innocently receiving an unauthorized program.⁷⁵ As a result, allowing section 605 to regulate these situations functionally imposes the obligation on the consumer to take the additional step to verify that their cable provider has the license to provide the program.⁷⁶ Accordingly, the Fifth Circuit correctly ruled that section 605 does not apply to these multi-step retransmission processes to avoid imposing this unreasonable obligation on cable customers.⁷⁷

Second, the Fifth Circuit was correct to eschew the Second Circuit's inclusive approach, because that interpretation of the statute irrationally limits section 553 to the regulation of only local cable programming.⁷⁸ If the court held that

⁷² See *infra* notes 81–86 and accompanying text.

⁷³ See *infra* notes 87–92 and accompanying text.

⁷⁴ See *J&J Sports*, 751 F.3d at 348–49. The court noted that “the statute does not hinge liability on the cable customer taking additional steps.” *Id.* at 349.

⁷⁵ See *id.* at 349; see also *J&J Prods., Inc. v. Mandell Family Ventures, LLC*, No. 3:10-CV-02489-BF, 2012 WL 4757694, at *5 (N.D. Tex. Oct. 5, 2012) (implying that defendants can be liable for statutory damages under section 605).

⁷⁶ See *J&J Sports*, 751 F.3d at 348–49. In *J&J Sports*, the plaintiff argued that the safe harbor of section 553 extends only to receipt of cable services not authorized by an *authorized* cable operator, and the court found it unreasonable to impose the additional step on the customer of verifying that the cable operator is licensed to provide the program. See *id.* Accordingly, to extend liability under section 605 would impose this same obligation on customers to ensure that they are legally receiving an authorized program so as to avoid liability under federal communications laws. See *id.* Requiring a customer to take this extra step is completely unreasonable and not supported by any language in the relevant laws. See 47 U.S.C. §§ 553, 605 (2012); *J&J Sports*, 751 F.3d at 348–49.

⁷⁷ See *J&J Sports*, 751 F.3d at 348–49; see also *supra* notes 37–39 and accompanying text (explaining the Fifth Circuit's holding in *J&J Sports*, which adopted the Seventh Circuit's exclusive approach).

⁷⁸ See *TKR Cable Co. v. Cable City Corp.*, 267 F.3d 196, 204–05 (3d Cir. 2001). Congress enacted section 553 in response to the rapid growth of the cable industry, and the corresponding increase in cable piracy, caused by the development of satellite cable delivery. See *id.* at 204; H.R. REP. NO. 98-934, at 83–84 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4656, 4720–21. Satellite cable delivery made it economically feasible to transmit national cable programming to local cable systems by utilizing different mediums in a multi-step transmission process. See *TKR Cable*, 267 F.3d at 204; H.R. REP. NO. 98-934, at 83–84, *reprinted in* 1984 U.S.C.C.A.N. at 4720–21.

section 605 applies to these multi-step transmissions, section 553 would be confined to regulation of local cable programming that utilizes cable wire technology, which represents a relatively minor portion of the national cable industry.⁷⁹ Moreover, had the Fifth Circuit adopted the Second Circuit's application of section 605, section 553 would not regulate the very section of the cable industry which the Cable Communications Policy Act of 1984 was intended to govern—the national satellite television market.⁸⁰

Third, the Fifth Circuit appropriately refused to adopt the inclusive approach because the Second Circuit's interpretation of congress's expressed intent is flawed.⁸¹ The Second Circuit concluded that congress intended for section 605 to exclusively govern the radio transmission step and allow both sections 553 and 605 to regulate the cable wire step.⁸² Analyzing the relevant passage of legislative history as a whole, it becomes clear that congress intended section 605 to govern the radio transmission step of a multi-step process, and section 553 to exclusively regulate the cable wire step, as held by the Third and Seventh Circuits.⁸³ Moreover, *International Cablevision* reviewed section 605 as it applies to a defendant's wrongful actions selling cable descramblers which allow customers to pirate unauthorized premium programming.⁸⁴ Alternatively, *J&J Sports* involved an innocent cable customer facing strict liability as a result of their cable provider's mistake, as opposed to a defendant's wrongful actions en-

⁷⁹ See *TKR Cable*, 267 F.3d at 205 (examining the historical context surrounding the enactment of section 553 in response to the growth of national cable industry); see also Lampman, *supra* note 22, at 565–66 (highlighting satellite technology as a fast growing industry driving the growth and development of the television industry).

⁸⁰ See *TKR Cable*, 267 F.3d at 204–05 (examining the context of Congress's enactment of section 553 after the growth of the national cable industry); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779, 2796 (codified as amended at 47 U.S.C. § 553 (2012)).

⁸¹ See *United States v. Norris*, 88 F.3d 462, 469 (7th Cir. 1996); *Int'l Cablevision, Inc. v. Sykes*, 75 F.3d 123, 126, 132 (2d Cir. 1996); *supra* notes 51–53 and accompanying text (detailing the reasoning behind the Second Circuit's inclusive approach).

⁸² See *Int'l Cablevision*, 75 F.3d at 132.

⁸³ See *id.* (analyzing the language, “[multi-step retransmission processes] continue to be subject to resolution under [§ 605] to the extent reception or interception occurs prior to or not in connection with, distribution of the service over a cable system” that appeared in House Report 98-934); H.R. REP. NO. 98-934, at 83, reprinted in 1984 U.S.C.C.A.N. 4656, 4720. The court ignored, however, the immediately preceding sentence in the House Report, which stated Congress's intent to have Section 553 govern “theft of a service from the point at which it is actually being distributed over a cable system.” H.R. REP. NO. 98-934, at 83, reprinted in 1984 U.S.C.C.A.N. at 4720; see *TKR Cable*, 267 F.3d at 207; *Norris*, 88 F.3d at 469; *Int'l Cablevision*, 75 F.3d at 132.

⁸⁴ See *Int'l Cablevision*, 75 F.3d at 126. In this case, the Second Circuit gave deference to pre-1984 case law applying section 605 to cable wire transmissions for similar wrongful actions. See *id.* at 130. *J&J Sports* is also distinguishable from *International Cablevision* because *J&J Sports* involved an innocent consumer whereas *International Cablevision* involved a defendant who wrongfully sold television descramblers to aid in cable piracy. See *J&J Sports*, 751 F.3d at 347; *Int'l Cablevision*, 75 F.3d at 126.

abling cable piracy.⁸⁵ *International Cablevision* is distinguishable, therefore, because the defendant's conduct was wrongful, whereas Mandell Family Ventures was an innocent cable customer, further supporting the Fifth Circuit's decision to follow the Seventh Circuit's exclusive approach to protect the innocent consumer.⁸⁶

On remand, the trial court, following the exclusive approach and the instruction of the Fifth Circuit, should dismiss J&J Sport's claims against Mandell Family Ventures because of the safe harbor provision in section 553, and the U.S. Supreme Court, if presented with the chance to address the issue, should resolve the split by adopting the exclusive approach.⁸⁷ With the Fifth Circuit holding that Section 605 does not apply, the district court will only consider section 553.⁸⁸ Under that provision, the court should find that Mandell Family Ventures falls squarely within the current safe harbor because they were specifically authorized to receive the program from their cable provider, Time Warner Cable.⁸⁹ This finding would not frustrate the legislative intent to maintain strict regulation of cable piracy, because Mandell Family Ventures is an innocent consumer who paid for a program from their normal cable provider.⁹⁰ Instead, this finding will justly protect innocent consumers from facing strict liability under section 553 as a result of their cable provider's mistaken authorization of a cable program.⁹¹ Furthermore, if presented with the opportunity to review the circuit split regarding the application of section 605, the U.S. Supreme Court should recognize the flaws of the inclusive approach and adopt the exclusive approach in order to protect innocent consumers such as Mandell Family Ventures.⁹²

⁸⁵ See *J&J Sports*, 751 F.3d at 347 (detailing that defendants paid for and received the program from their authorized cable provider and did not attempt to pirate the program); see also Susan C. Portin, Comment, *Piracy and the Law: It's Time to Clear Up the Confusion*, 33 EMORY L.J. 825, 862 (1984) (noting that the target for enforcement of federal piracy regulation should be those who pirate for profit such as manufacturers and distributors of unauthorized interception equipment).

⁸⁶ See *J&J Sports*, 751 F.3d at 347; see also Russell, *supra* note 14, at 1266 (stating that Congress enacted section 553 to prevent cable piracy and regulate black-boxes which permit piracy, not to provide cable companies with "extremely fine-grained control" over customer's use of an authorized program).

⁸⁷ See *J&J Sports*, 751 F.3d at 348–50 (analyzing the safe harbor provision of section 553).

⁸⁸ See *id.* at 353 (holding that section 605 does not apply and remanding for further proceedings according to section 553).

⁸⁹ See *id.* at 348–50 (reviewing the safe harbor provision of section 553). J&J Sports argued that the safe harbor provision of section 553 should be limited to customers who are authorized by a licensed cable provider, as opposed to any cable provider, but the Fifth Circuit refused to adopt this view of the provision. See *id.*

⁹⁰ See *id.* at 348–49 n.3 (noting that the safe harbor protects only the innocent recipient, like Mandell Family Ventures, and that plaintiffs are not without recourse as the unauthorized cable provider may be liable for authorizing the broadcast).

⁹¹ See *id.* at 348–50.

⁹² Cf. *id.* (adopting the exclusive approach and holding that section 553 exclusively regulates unauthorized reception of a cable transmission which has been retransmitted from a radio communication).

CONCLUSION

Section 605 of the Communications Act of 1934 should not regulate the unauthorized reception of a cable transmission that has been retransmitted from a radio communication. Accordingly, the Fifth Circuit correctly ruled that section 553 exclusively governs these modern, multi-step retransmission processes, such as those involved in *J&J Sports Productions, Inc. v. Mandell Family Ventures, LLC*. Allowing section 605 to regulate these transmissions would unreasonably require a cable customer to take the additional step to verify that their cable provider is licensed to provide the programming and would irrationally limit section 553 to the regulation of only local cable programming and not national satellite programming. On remand, the court should dismiss J&J Sports' claims against Mandell Family Ventures, and the Supreme Court of the United States should resolve the circuit split by adopting the exclusive approach.

BRIAN FLEMING

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