
PLACESHIFTING, THE SLINGBOX, AND CABLE THEFT STATUTES: WILL SLINGBOX USE LAND YOU IN PRISON?

I. INTRODUCTION

The Slingbox is a small box that connects to a television—or any other video source—and makes the content available at another place on a home network, or outside the home wherever a broadband Internet connection is available.¹ The Slingbox owner uses a personal computer,² laptop, or mobile phone³ to connect to the Slingbox and see his or her own television, live and complete with the ability to change channels via a simulated virtual remote.⁴ The Slingbox’s creators invented the device out of a desire to see sporting events while traveling or when living in areas where the games had been blacked out,⁵ and the device is marketed to “the traveling businessman who is also a die-hard sports fan,” among others.⁶ The Slingbox has achieved great success,⁷ and many Slingbox owners buy the device with other uses in mind.⁸ Competitors have developed their own devices with similar “placeshifting” functionality, but none have matched the success of Sling Media, Inc. (“Sling Media”), the company that created the Slingbox.⁹ While Sling Media has worked with some content

1. David Pogue, *TV Anytime or Place: The Sequel*, N.Y. TIMES, Nov. 1, 2007, at C1.

2. The device can be a computer running either Microsoft Windows or Apple Mac OS X. *Id.*

3. Only certain cell phones currently work, including phones with operating systems from Apple; Microsoft; Palm, Inc.; Research In Motion; and Symbian, Ltd. *Id.*; Sling Media, SlingPlayer Mobile Overview, <http://www.slingmedia.com/go/spm> (last visited July 2, 2009).

4. Pogue, *supra* note 1. Sling Media includes virtual on-screen remotes for over 5,000 models of video equipment. *Id.*

5. Arash Markazi, *A Whole New View*, SI.COM, Dec. 22, 2006, http://sportsillustrated.cnn.com/2006/writers/arash_markazi/12/22/slingbox.qa/index.html.

6. Gregory Solman, *Hub Strategy Unveils Slingbox TV Push*, ADWEEK, Nov. 8, 2007, http://www.adweek.com/aw/regional/west/article_display.jsp?vnu_content_id=1003670152.

7. Blake Krikorian, CEO of Sling Media, Inc., says the public response to the Slingbox has been “fantastic,” and that the device is now sold in “Canada, the United Kingdom, Taiwan, Japan, Hong Kong, Sweden, Norway, Denmark and Brazil.” Markazi, *supra* note 5. It is particularly popular in the United Kingdom and the United States. *Id.*

8. See *infra* Part II.A.3 for a list of popular Slingbox uses other than the viewing of sporting events.

9. See John P. Falcone, *Review: Sony’s LocationFree TV No Match for Slingbox*, CNN.COM, Nov. 7, 2007, <http://edition.cnn.com/2007/TECH/ptech/11/07/sony.locationfree> (noting Slingbox leads in placeshifting industry). See *infra* Part II.A.2 for a description of Sling Media’s competitors.

providers,¹⁰ including at least one sports league,¹¹ others, such as Major League Baseball¹² and Home Box Office, Inc.,¹³ have threatened suit.¹⁴

When content owners and other interested parties eventually decide to take action against this emerging technology, consumers may be impacted. Federal statutes designed to deter cable and satellite television theft supply content providers with a cause of action against many users of placeshifting devices.¹⁵ Part II.A of this Comment gives an overview of the current market for placeshifting devices and their functions. Parts II.B to II.G outline the cable theft statutes that may entangle consumers. Part III examines the capabilities of the Slingbox and other, similar devices, as well as their real-world applications, to determine a functional definition of “placeshifting,”¹⁶ and describes a framework with which to analyze possible violations of the cable theft statutes. Finally, Part III includes a brief analysis of enforcement issues, and concludes that, while many uses of placeshifting are probably lawful, the technology still represents a legal grey area with pitfalls for unwary consumers.¹⁷

II. OVERVIEW

This Overview outlines the functional characteristics of the Slingbox and of placeshifting devices from other manufacturers, as well as their real-world uses, and then describes two applicable cable and satellite theft laws: 47 U.S.C. § 605, which prohibits interception and redirection of satellite television signals, and 47 U.S.C. § 553, which prohibits the unauthorized reception of cable television signals.

10. Press Release, Sling Media, CBS Corporation Announces the Creation of the CBS Interactive Audience Network (Apr. 12, 2007), available at http://www.slingmedia.com/get/io_1176396028640.html.

11. Press Release, Sling Media, National Hockey League Becomes First Professional Sports League to Team with Sling Media Inc. Around Forthcoming “Clip and Sling” Service (June 6, 2007), available at http://www.slingmedia.com/get/io_1181141533709.html.

12. Eric Bangeman, *Major League Baseball Throws High Hard One at Slingbox over Placeshifting*, ARS TECHNICA, May 29, 2007, <http://arstechnica.com/news.ars/post/20070529-major-league-baseball-throws-high-hard-one-at-slingbox-over-placeshifting.html>.

13. Nate Anderson, *Will Hollywood Sue the Slingbox Out of Existence?*, ARS TECHNICA, Apr. 27, 2006, <http://arstechnica.com/old/content/2006/04/6691.ars>.

14. See Vered Yakovee & Shaun Crosner, *Spotlight on Slingbox*, 25 ENT. & SPORTS LAW., Fall 2007, at 33, 33–34 (chronicling history of sports leagues’ anti-Slingbox attitude and actions).

15. Two federal statutes potentially impose civil liability and criminal penalties for placeshifters: 47 U.S.C. § 605 and 47 U.S.C. § 553. Section 605 prohibits interception and redirection of satellite television signals in addition to, as interpreted in some circuits, cable television signals. 47 U.S.C. § 605(a) (2006). Section 553 prohibits the unauthorized reception of cable television signals. *Id.* § 553(a). See *infra* Part II.B for an overview of both statutes.

16. See *infra* Part III.A for the reasoning behind the functional definition that placeshifting is the transfer of a multimedia signal from a source to a receiver over a computer network simultaneously with the signal’s generation at the source.

17. See *infra* Part III.B for descriptions of potentially unlawful uses of placeshifting technology.

A. *The Slingbox and Placeshifting*

1. Placeshifting in General

There is little legal scholarship regarding placeshifting,¹⁸ and no court has yet addressed the issue. While many devices on the market today are referred to as placeshifting devices,¹⁹ there is no authoritative technical definition of what exactly placeshifting is, although the manufacturers of such devices have put forth marketing-oriented definitions. For instance, according to Sling Media, makers of the Slingbox, “placeshifting[]’ allow[s] consumers to watch live TV programming from wherever they are, by turning virtually any networked laptop or Internet-connected device into a personal TV.”²⁰ Similarly, according to Monsoon Multimedia, makers of the HAVA placeshifting device, “place-shifting devices . . . allow customers to view and control their live TV on PCs connected to the home network or from anywhere in the world using a broadband-connected PC or mobile phone.”²¹ While these definitions are true, they fail to encompass all of the relevant aspects of placeshifting technology. After the following overview of placeshifting devices, their uses, and the relevant law, this Comment attempts to determine a functional definition that includes all of placeshifting’s relevant characteristics.²²

2. Placeshifting Devices

While Sling Media’s Slingbox is only one of many placeshifting devices on the market, it serves as a helpful illustration of what placeshifting is and the characteristics of a placeshifting device.²³ Its capabilities are limited. It takes a

18. Three scholarly articles focus on the Slingbox and placeshifting, all in the context of copyright law. See generally Adi Schnaps, *Do Consumers Have the Right to Space-Shift, as They Do Time-Shift, Their Television Content? Intellectual Property Rights in the Face of New Technology*, 17 SETON HALL J. SPORTS & ENT. L. 51 (2007) (analyzing rights of consumers to placeshift under copyright law and Digital Millennium Copyright Act); Dominic H. Rivers, Note, *Paying for Cable in Boston, Watching It on a Laptop in L.A.: Does Slingbox Violate Federal Copyright Laws?*, 41 SUFFOLK U. L. REV. 159 (2007) (determining placeshifting infringes copyright but may be protected by fair use under some circumstances); Jessica L. Talar, Comment, *My Place or Yours: Copyright, Place-Shifting, & the Slingbox: A Legislative Proposal*, 17 SETON HALL J. SPORTS & ENT. L. 25 (2007) (proposing statutory reforms requiring placeshifting devices to operate under copyright law’s compulsory licensing scheme). This Comment does not address copyright issues.

19. E.g., Pogue, *supra* note 1; Press Release, Sling Media, Sling Media’s Newly-Released Slingbox™ Uses Microsoft Windows Media and Texas Instruments Digital Media Technology to Deliver On-the-Go Entertainment (June 30, 2005), available at http://www.slingmedia.com/get/io_1157566629962.html; Bangeman, *supra* note 12; Falcone, *supra* note 9.

20. Press Release, Sling Media, *supra* note 19.

21. Press Release, Monsoon Multimedia, Monsoon Multimedia Announces Retail Availability of HAVA Gold and HAVA Platinum HD (July 2, 2007), available at <http://www.monsoonmultimedia.com/press.html> (scroll down to July 2, 2007 press release).

22. See *infra* Part III.A for a functional definition of placeshifting.

23. This refers to the original “Slingbox.” Sling Media has discontinued the original Slingbox, and split the product line into two different players with substantially the same capabilities as the original. See Sling Media, *Selecting the Right Slingbox Is Easy*, <http://slingmedia.com/go/help-me-choose> (last

video and audio signal from a source and sends the signals to a single receiver for display, and allows that receiver to send control information back to the source to change the channel.²⁴ The source of the video and audio signals can be anything with one of several standard output interfaces.²⁵ Televisions, cable boxes, satellite receivers, digital video recorders (“DVRs”), DVD or VHS machines, and video game consoles normally have compatible standard outputs; any such device will work with a Slingbox,²⁶ and a Slingbox can connect to as many as four sources at a time.²⁷

Nearly any laptop or desktop computer connected to a broadband Internet connection can receive the Slingbox’s signal and display it on the screen, as long as the computer has the SlingPlayer software installed.²⁸ The software saves the information to connect to a user’s home Slingbox and can be configured to connect to multiple Slingboxes.²⁹ A Slingbox, however, can only broadcast the signal to one receiver at a time.³⁰ The software’s major functions are to present the video and audio from the source at the destination, and to show the user a virtual remote control to change channels.³¹ The SlingPlayer software does not allow a user to record or save the signal that is sent to the computer.³² In fact, Sling Media has taken steps to prevent users from adding such functionality through third-party software.³³ The company chose to change the Slingbox after release to encrypt all video signals before they are sent, so that only the

visited July 2, 2009) (describing Slingbox PRO-HD as capable of managing multiple devices at a time and Slingbox SOLO as cheaper alternative, capable of managing one device).

24. John P. Falcone, *Sling Media Slingbox: CNET Editors’ Review*, CNET.COM, Mar. 22, 2006, http://reviews.cnet.com/video-players-and-recorders/sling-media-slingbox/4505-6463_7-31423815.html.

25. The Slingbox supports several standard inputs, including coaxial, composite, and S-Video. *Id.*

26. Sling Media, *Frequently Asked Questions*, <http://www.slingmedia.com/go/faq> (last visited July 2, 2009). Much of the cabling and other equipment is similar, for example, between satellite and cable television. See Ed Tittel, *FAQ: Cable vs. Satellite TV*, http://www.digitallanding.com/TV-HDTV/article_display.cfm/article_id/4393 (last visited July 2, 2009) (explaining both satellite and cable television services generally require physical cable connected to a set-top box accompanying television).

27. Falcone, *supra* note 24. Newer model Slingboxes can also connect to high definition sources, and the Slingbox PRO can connect to up to four sources at a time. Sling Media, *Slingbox PRO Overview*, <http://slingmedia.com/go/slingbox-pro> (last visited June 28, 2009); Sling Media, *supra* note 23.

28. Falcone, *supra* note 24. The SlingPlayer software is available for computers running Windows 2000 or later and Mac OS X. John P. Falcone, *Sling Media Slingbox Pro: CNET Editors’ Review*, CNET.COM, Sept. 27, 2006, http://reviews.cnet.com/video-players-and-recorders/sling-media-slingbox-pro/4505-6463_7-32084879.html.

29. Sling Media, *Getting Started with SlingPlayer*, <http://winhelpus.slingmedia.com/get/HLP-005374.html> (last visited July 2, 2009).

30. Falcone, *supra* note 28; *Monsoon Multimedia’s HAVA Tries to One-Up Slingbox*, CNET.COM, Jan. 6, 2006, http://reviews.cnet.com/8301-10921_7-6414329-4.html.

31. Falcone, *supra* note 28.

32. Natali T. Del Conte, *Slingbox Encryption Upgrade Infuriates Customers, Developer*, PCMAG.COM, July 19, 2006, <http://www.pcmag.com/article2/0,1895,1991289,00.asp>.

33. *Id.*

SlingPlayer software can connect to a Slingbox and decode the signals.³⁴ The company's efforts failed, however, and commercial software is now available that can record the signal from a Slingbox.³⁵ Sling Media recently added official fast-forward, pause, and rewind features to the software.³⁶

The Slingbox was not the first placeshifting device. Sony sold a similar device prior to the Slingbox, although its functionality was initially more limited.³⁷ Called the LocationFreeTV, it was designed as a small LCD television that users would bring along when traveling, which would receive their home television signal from a Slingbox-like "base station" set up at home.³⁸ After the success of the Slingbox, Sony changed the base station so that it could broadcast to devices other than the original LocationFreeTV.³⁹ Sony's LocationFreeTV base station now supports broadcast to the same sorts of devices as the Slingbox does, plus it can broadcast to Sony's PlayStation Portable gaming device via a wireless Internet connection.⁴⁰

In terms of function, the current iteration of Sony's LocationFreeTV is very similar to the Slingbox. It forwards a video and audio signal from a single source to a single receiver, and allows the receiver to change the channel on the source.⁴¹ One difference of note, though, is that the LocationFreeTV's client software, unlike the Slingbox, takes steps to prevent the user from capturing even still images of the content of the player.⁴²

Another player in this market, Monsoon Multimedia, sells a placeshifting device with a capability that few others have: multicasting.⁴³ A multicasting device can send a signal simultaneously to multiple computers.⁴⁴ Monsoon restricts its player from multicasting to computers connected via the Internet, but allows multicasting to an unlimited number of computers on a home network

34. *Id.* This change upset Slingbox users. Ken Fisher, *Place-Shifting: Challenges Present and Future Paint a Rough Picture for Innovation*, ARS TECHNICA, July 26, 2006, <http://arstechnica.com/articles/culture/placeshifting.ars>.

35. See Applian Technologies, *At-Large Recorder FAQ*, <http://www.applian.com/at-large-recorder/support/faq.php> (last visited July 2, 2009) (noting that Applian Technologies, Inc.'s recording software "works with most current versions of Slingbox").

36. Posting of John P. Falcone to Crave – CNET, http://news.cnet.com/8301-17938_105-10009807-1.html (Aug. 7, 2008, 9:00 PDT). Sling Media had planned these additions for some time. Pogue, *supra* note 1.

37. Seth Schiesel, *Sony Also Tries to Give the TV a Life Outside the Living Room*, N.Y. TIMES, Dec. 2, 2004, at G9.

38. *Id.*

39. See Caroline McCarthy, *Sony Expands LocationFree Lineup*, CNET.COM, Sept. 5, 2006, http://www.news.com/Sony-expands-LocationFree-lineup/2100-1041_3-6112278.html (noting Sony added support for non-Sony devices after release).

40. *Id.*

41. *Id.*

42. Bill Howard, *Sony LocationFree TV*, PCMAG.COM, Jan. 11, 2006, <http://www.pcmag.com/article2/0,2704,1911938,00.asp>.

43. Press Release, Monsoon Multimedia, *Monsoon Multimedia Announces the HAVA Titanium HD* (Nov. 7, 2007), available at <http://www.monsoonmultimedia.com/press.html>.

44. *Id.*

while simultaneously streaming the same signal to one computer connected via the Internet.⁴⁵

Additionally, Monsoon includes DVR and DVD recorder functionality, but only if the receiving device is connected on a home network.⁴⁶ The device's software can "record, store, pause, rewind and fast forward stored video," as well as schedule recordings for future times.⁴⁷ Recordings can be copied, uploaded to the Internet, burned to a DVD, or transferred to other devices, subject to some restrictions.⁴⁸

Another emerging subset of devices and software will possess the basic Slingbox functionality, but in reverse: they shift a signal from a computer to a television.⁴⁹ Sling Media recently released such a device, called the SlingCatcher.⁵⁰ Once the device's software has been installed on a computer, the SlingCatcher will mirror the contents of the computer screen on a television display to which it is attached.⁵¹ The device can also act as a receiver for Slingbox signals, allowing the content of one television to be mirrored on another television without a personal computer anywhere in the mix.⁵² Similar devices from other manufacturers are already on the market.⁵³ Apple makes a device called the Apple TV with similar capabilities, but unlike the Slingbox and other

45. *Id.*

46. John P. Falcone, *Monsoon Multimedia Hava Wireless HD: CNET Editors' Review*, CNET.COM, Nov. 8, 2006, http://reviews.cnet.com/video-players-and-recorders/monsoon-multimedia-hava-wireless/4505-6463_7-32136346.html.

47. Press Release, Monsoon Multimedia, *supra* note 43.

48. *Id.*; Press Release, Monsoon Multimedia, *supra* note 21. Monsoon's HAVA follows Microsoft's Digital Right Management ("MSDRM") rules to restrict where and under what circumstances content can be copied. See Press Release, Monsoon Multimedia, Monsoon Announces HAVA - A Significant Advance in Wireless Video Streaming and Integrating Place and Time Shifting Technologies (June 26, 2006), available at <http://www.monsoonmultimedia.com/press.html> (scroll down to June 26, 2006 press release) (noting HAVA follows MSDRM rules for analog video).

49. See Frank Caron, *Software Review: Orb 2.0 - Console-Based Location-Free Media Streaming*, ARS TECHNICA, Mar. 23, 2007, <http://arstechnica.com/journals/thumbs.ars/2007/03/23/orb-software-location-free-media-streaming-for-all-your-consoles> (summarizing current availability of reverse placeshifting devices).

50. Posting of John P. Falcone to Crave - CNET, http://news.cnet.com/8301-17938_105-10060898-1.html (Oct. 8, 2008, 21:07 PDT); Press Release, Sling Media, Sling Media Announces SlingCatcher (Jan. 8, 2007), available at http://us.slingmedia.com/object/io_1168286861787.html. Sony has announced a similar device, called the LocationFree TV Box. Falcone, *supra* note 28.

51. Press Release, Sling Media, *supra* note 50.

52. *Id.*

53. The software from Orb Networks, for example, will allow a user to stream content, including high-bandwidth video, to video game consoles on the user's home network. Posting of John P. Falcone to Crave - CNET, http://crave.cnet.com/8301-1_105-9708848-1.html (Apr. 16, 2007, 6:45 a.m. PDT). Microsoft's Windows Media Center Edition also allows a user to stream high-bandwidth video to Microsoft's Xbox 360 gaming system, although Microsoft's system is not designed to work over the Internet. See Windows Vista: Media Center Extender FAQ, <http://www.microsoft.com/windows/products/winfamily/mediacenter/extenderfaq.aspx> (last visited July 2, 2009) (follow "What are all the pieces that I need to make this all work?" hyperlink) (requiring that both PC and Xbox 360 be connected to home network).

placeshifting devices,⁵⁴ the Apple TV does not stream the content.⁵⁵ Instead, it contains an internal hard drive, and the user stores content on the device before playing it back on a television screen.⁵⁶ The Slingbox, on the other hand, merely buffers the content as it is streamed in real time; it does not permanently store the content.⁵⁷

Software solutions also exist. Orb Networks provides a partially web-based software client that duplicates the function of a Slingbox.⁵⁸ Rather than buying a box to connect to the source (the television, cable box, or satellite dish), the user installs Orb's software on any computer or laptop, which is then connected permanently to the source and placeshifts the source's content to the Internet.⁵⁹ The software requires that the computer have a "TV tuner,"⁶⁰ a device that converts a television input into a signal that the computer understands.⁶¹ The Orb software, once installed on a computer connected to the source, forwards the signal to a home network or to the Internet for reception by another computer, phone, or device, much like a Slingbox would.⁶² The Orb software can also forward other media, such as pictures, recorded music, and documents. Other companies provide similar software.⁶³

3. Uses of Placeshifting Devices

Individual consumers placeshift television content for a variety of purposes.⁶⁴ The Slingbox was invented to help sports fans catch local sporting events while away from home on business trips or vacations, and as a way to get

54. See *Slingbox-Watch Your Home TV Anywhere*, SMARTPHONE & POCKET PC, Apr./May 2007, available at http://www.pocketpcmag.com/_archives/Apr07/slingbox.aspx (describing buffering process for streamed video content).

55. Jacqui Cheng & Clint Ecker, *Apple TV: An In-Depth Review*, ARS TECHNICA, Mar. 27, 2007, <http://arstechnica.com/reviews/hardware/appleTV.ars>.

56. *Id.*

57. *Slingbox-Watch Your Home TV Anywhere*, *supra* note 54. The SlingPlayer software stores video in a buffer as it is streamed to the computer to prevent video skipping and "drop-outs." Jason Snell, *Slingbox: Slick Hardware and Software Lets You Watch Your TV over the Internet*, MACWORLD.COM, June 19, 2007, <http://www.macworld.com/article/58439/2007/06/slingbox.html>. When the viewer interacts with a television through the Slingbox, by changing channels or otherwise, the video quality will degrade while the computer rebuilds the buffer. *Slingbox-Watch Your Home TV Anywhere*, *supra* note 54.

58. See Falcone, *supra* note 24 (comparing Orb software to Slingbox).

59. See Caron, *supra* note 49 (describing Orb software setup process).

60. Falcone, *supra* note 24.

61. PC World (Australia), TV Tuner Cards, <http://www.pcworld.idg.com.au/index.php/id;1003410815> (last visited July 2, 2009).

62. Troy Dreier, *Orb: CNET Editors' Review*, CNET.COM, May 10, 2005, http://reviews.cnet.com/online-software-services/orb/4505-9239_7-31338425.html.

63. See Caron, *supra* note 49 (detailing other software placeshifting solutions).

64. Some of the devices described in Part II.A.2 above can placeshift content other than television signals. In particular, the Orb Networks software, Windows Media Center, and the SlingCatcher can all display most sorts of media found on a computer, such as images, music, and games, in addition to movies and television signals. See *supra* Part II.A.2 for more information about these devices. This Comment, however, focuses on placeshifting in the television content.

around local sports “blackout” provisions.⁶⁵ Leagues use blackout provisions to restrict local broadcast of sporting events to encourage attendance at the actual event, or to protect the rights of local broadcasters.⁶⁶ A Slingbox user with a friend living outside of the blackout zone can install a Slingbox at the friend’s house and send the game back to the Slingbox user’s home.⁶⁷ Many consumers also use Slingboxes on their home wireless network to watch television on a laptop computer in rooms in which they do not have a TV set.⁶⁸ Sling Media suggests a variety of other uses on their website, including watching television during long train commutes, while on international trips, and while “kicking back in the hot tub” in the backyard.⁶⁹

Others use their Slingboxes in even more innovative ways. CBS News stations in San Francisco and Foster City, California use Slingboxes, combined with cellular data services, to transfer live video back to the station from their reporters and stationary cameras in the field.⁷⁰ The Slingbox-based system provides the video at “much less cost and much more convenience” than traditional microwave-based systems.⁷¹ Microwave-based systems “cost around \$8 a minute,” plus the cost of a truck, generator, operator, and other equipment, and require an FCC license to operate.⁷² The Slingbox system costs only the “\$59 dollars a month plus tax” for the cellular data service, and requires no operator, no microwave towers or dishes, and no FCC license.⁷³ According to the station, “this kind of technology is such an advance over what we’ve had that sooner or later it is going to proliferate.”⁷⁴

Other companies use Slingboxes as well. Disney uses Slingboxes during film postproduction to forward video from video postprocessing machines to offsite

65. Markazi, *supra* note 5. Note, however, that the Slingbox user agreement now prohibits a user from placing his or her Slingbox in someone else’s house, or connecting to someone else’s Slingbox, although the software does not enforce either rule. Rob Pegoraro, *The Slingbox Puts Your TV Set Online. But Why?*, WASH. POST, July 17, 2005, at F07.

66. See David Barron, *Thanks to NFL Rules, the Colts-Patriots Matchup That Has Fans Abuzz Won’t Be on Network TV in the Area. But Never Fear*, HOUSTON CHRON., Nov. 2, 2007, § 5, at 1, available at http://www.chron.com/CDA/archives/archive.mpl?id=2007_4453856 (encouraging readers to utilize friend outside of blackout areas and placeshift in blocked National Football League games); Richard Sandomir, *N.F.L.’s Blackout Rule Fills the Seats, Usually*, N.Y. TIMES, Dec. 27, 1996, at B10.

67. Barron, *supra* note 66.

68. Markazi, *supra* note 5.

69. Sling Media, *Slingbox in Action*, <http://www.slingmedia.hk/page/slingboxinaction.html> (click on “Now that’s relaxing!” hyperlink) (last visited July 2, 2009).

70. Press Release, Sling Media, *CBS 5 and Sling Media Partner to Deliver Live, Remote, On-the-Go Broadcasts for Viewers* (June 26, 2007), available at http://www.slingmedia.com/get/io_1182876635766.html.

71. *Video: Broadcast News Saves Big Using Slingbox* (CNET News.com webcast May 8, 2007), <http://www.news.com/1606-2-6182261.html>.

72. *Id.*

73. *Id.* No FCC license is required because the station is no longer operating a microwave transmitter. *Id.*

74. *Id.*

employees and employees located in offices away from the machines.⁷⁵ According to Sling Media CEO Blake Krikorian, “We’ve had fire departments starting to use Slingboxes so that when they are out fighting fires they can use a cell phone or laptop to view what helicopter cameras from the local news are showing.”⁷⁶ Another Slingbox customer used the device to stream live baseball games to a tablet PC mounted in his kayak while he waited in the San Francisco Bay outside AT&T Park, hoping to catch a home run.⁷⁷

One British company, THETELLY.NET, provides a Slingbox hosting service for customers who want to see British television over the web.⁷⁸ The company operates a data center in the United Kingdom where it hosts a user’s Slingbox for a fee.⁷⁹ The user need not set foot in Britain; all he or she needs is the SlingPlayer software on his or her PC, Mac, or mobile phone.⁸⁰

B. *The Relevant Statutes*

The law provides a means for content owners, cable companies, or the government to snare many of these placeshifters. At least two federal statutes, intended to combat cable and satellite television theft,⁸¹ potentially impose civil liability and criminal penalties for placeshifters: 47 U.S.C. § 605 and 47 U.S.C. § 553.⁸² Section 605 prohibits interception and redirection of satellite television signals as well as, in some circuits, cable television signals.⁸³ Section 553 prohibits the unauthorized reception of cable television signals.⁸⁴ As explained below, both statutes prohibit the manufacture of devices intended for unauthorized signal reception.⁸⁵

1. Section 605, the Satellite Television Theft Statute

Congress enacted the first statute designed to protect against unauthorized signal interception in the Communications Act of 1934.⁸⁶ That Act created what

75. Howard Greenfield, *Tech Visions: TV Extends Its Reach*, SILICON.COM, Oct. 24, 2007, <http://networks.silicon.com/webwatch/0,39024667,39168922,00.htm>.

76. *Id.*

77. *Watching TV in a Kayak* (CBS 5 television broadcast Aug. 6, 2007), available at <http://www.slingmedia.com/get/sling-on-kayak.html>.

78. THETELLY.NET, <http://www.thetelly.net> (last visited July 2, 2009).

79. THETELLY.NET, Frequently Asked Questions, <http://www.thetelly.net/faq.cfm> (last visited July 2, 2009). When the user cancels their service, THETELLY.NET will ship the hardware back to the user. *Id.*

80. *Id.*

81. *United States v. Norris*, 88 F.3d 462, 466 (7th Cir. 1996).

82. Other federal statutes, including copyright laws, may have legal implications for placeshifters and device manufacturers, but they are outside of the scope of this Comment. For a discussion of Slingbox copyright issues, see generally Schnaps, *supra* note 18, and Rivers, *supra* note 18.

83. 47 U.S.C. § 605 (2006). See *infra* Part II.E for a discussion of the circuit split.

84. 47 U.S.C. § 553.

85. See *infra* Part III.C for a discussion of these statutory sections and the potential liability of device manufacturers.

86. *Norris*, 88 F.3d at 464–65.

would become 47 U.S.C. § 605(a).⁸⁷ Entitled “Unauthorized publication or use of communications,” it provides:

[N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, . . . to any person other than the addressee, his agent, or attorney

No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.⁸⁸

This code section contains several defined terms. Section 153(33) of Title 47 defines “radio communication” and “communication by radio” as “the transmission *by radio* of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.”⁸⁹ Similarly, the statute defines “wire communication” and “communication by wire” as

the transmission of writing, signs, signals, pictures, and sounds of all kinds *by aid of wire, cable, or other like connection between the points of origin and reception of such transmission*, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.⁹⁰

Section 605(a) furnished the initial means for cable providers to disrupt cable pirates.⁹¹ It creates both a criminal penalty⁹² for violators and a civil cause of action against violators.⁹³ The civil cause of action carries “severe” statutory damages.⁹⁴

87. *Id.* at 465; 47 U.S.C. § 605(a).

88. 47 U.S.C. § 605(a) (line breaks inserted for clarity).

89. *Id.* § 153(33) (emphasis added).

90. *Id.* § 153(52) (emphasis added).

91. See *Int'l Cablevision, Inc. v. Sykes (Sykes II)*, 75 F.3d 123, 130 (2d Cir. 1996) (discussing four cases in which courts held that § 605(a) prohibits the unauthorized interception of cable television services).

92. 47 U.S.C. § 605(e)(1)–(2).

93. *Id.* § 605(e)(3)(A).

94. *Int'l Cablevision, Inc. v. Sykes (Sykes I)*, 997 F.2d 998, 1007 (2d Cir. 1993). The statute provides between \$1,000 and \$10,000 in statutory damages per violation, plus a discretionary award of up to \$100,000 in damages. 47 U.S.C. § 605(e)(3)(C)(i)–(ii). See *infra* Part II.D.2.b for more information about damages under §§ 605 and 553.

Modern-day cable systems did not exist when Congress enacted § 605(a) in 1934.⁹⁵ Other purposes motivated Congress to enact the statute.⁹⁶ Part of the statute, for example, addresses communications divulged by an individual “to the master of a ship under whom he is serving.”⁹⁷ The statute as a whole originally covered both “wire” and “radio” communication; however, Congress removed references to “wire” communication from the second and third sentences of § 605 as part of the 1968 Omnibus Crime Control Act, to make it easier for telephone line owners—companies such as AT&T—to allow the government to tap their customers’ phone lines.⁹⁸

2. Section 553, the Cable Television Theft Statute

In 1984, as a result of the removal of the “wire” communication language from § 605,⁹⁹ Congress enacted a new section for the prosecuting of unauthorized access to cable television wires, i.e., cable theft. The Cable Communications Policy Act of 1984¹⁰⁰ created 47 U.S.C. § 553, which specifically targets cable theft. Congress enacted it “in an effort to deal with ‘a problem which [wa]s increasingly plaguing the cable industry—the theft of cable service,’ including ‘gaining access to premium movie and sports channels without paying for the receipt of those services.’”¹⁰¹ Section 553(a) states that “(1) No person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.”¹⁰² The statute, however, fails to define “intercept,” “receive,” and “communication service.”¹⁰³

Like § 605, this statute provides both criminal penalties¹⁰⁴ and a civil cause of action with statutory damages and attorneys’ fees.¹⁰⁵ The civil cause of action is available to “[a]ny person aggrieved by any violation of subsection (a)(1),”¹⁰⁶

95. See *Manhattan Cable Television, Inc. v. Cable Doctor, Inc.*, 802 F. Supp. 1103, 1106 (S.D.N.Y. 1992), *vacated*, 824 F. Supp. 34 (S.D.N.Y. 1993) (noting “[t]he Communications Act of 1934 could not have been intended to regulate the cable television industry at the time of its enactment”).

96. See *id.* (suggesting that Congress designed § 605(a) to prohibit disclosure of certain interstate wire and radio communications).

97. 47 U.S.C. § 605(a)(4).

98. *Id.* § 605(a); *United States v. Norris*, 88 F.3d 462, 465–66 (7th Cir. 1996); see also Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 803, 82 Stat. 197, 223 (codified as amended at 47 U.S.C. § 605).

99. *Norris*, 88 F.3d at 466.

100. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended in scattered sections of 47 U.S.C.).

101. *Int’l Cablevision, Inc. v. Sykes*, 997 F.2d 998, 1003 (2d Cir. 1993) (alteration in original) (citing H.R. REP. NO. 98-934, at 83 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4720).

102. 47 U.S.C. § 553(a).

103. Michael I. Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 GA. L. REV. 543 (1985).

104. 47 U.S.C. § 553(b).

105. *Id.* § 553(c).

106. *Id.* § 553(c)(1).

however, unlike § 605, the statute does not define the meaning of that phrase.¹⁰⁷ The courts have held that the civil cause of action created by this section “parallels” the cause of action provided in § 605.¹⁰⁸ Because § 605 provides for larger damage awards than § 553, and award of attorneys’ fees under § 553 is not mandatory,¹⁰⁹ cable providers continued to use § 605 to pursue cable pirates even after the enactment of § 553.¹¹⁰

Section 553 provides a rigid right of recovery for the cable providers.¹¹¹ The courts have ruled out a good-faith defense against liability for violation of the statute, although they may reduce the damages award if the defendant “‘had no reason to believe that his acts constituted a violation.’”¹¹² Further, the courts may enforce this statute against an individual regardless of whether he or she makes a “business” of violating the statute; a single sale by an individual of a prohibited device, even when it was obtained by a businessman for legitimate purposes and sold only to recover costs, constitutes a violation of the statute.¹¹³

C. *Liability of Device Manufacturers*

Both § 553 and § 605 provide liability for device manufacturers.¹¹⁴ Section 605 provides a prohibition on device manufacture and distribution:

(4) Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than \$500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both.¹¹⁵

Penalties for a device maker under § 605 turn on whether the equipment is “primarily” of use for decryption or “intended for” an activity prohibited by § 605(a).¹¹⁶ At least one circuit has held a manufacturer not liable when the device has a legitimate purpose and must be modified to decrypt satellite

107. *Kingvision Pay-Per-View, Ltd. v. Rocca*, 181 F. Supp. 2d 29, 34 (D. N.H. 2002). Compare 47 U.S.C. § 605(d) (defining “any person aggrieved” to include “any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming”), with 47 U.S.C. § 553 (lacking definition of “any person aggrieved”).

108. *Int’l Cablevision, Inc. v. Sykes (Sykes I)*, 997 F.2d 998, 1007 (2d Cir. 1993); *Adelphia Cable Partners, L.P. v. E&A Beepers Corp.*, 188 F.R.D. 662, 665 n.1 (S.D. Fla. 1999).

109. *Sykes I*, 997 F.2d at 1007 (noting that penalties under § 605 are “far more severe . . . than those of § 553(c)”).

110. See, e.g., *id.* at 1007–09 (allowing plaintiff to sue cable pirate under § 605); *Adelphia Cable Partners*, 188 F.R.D. at 665 (same).

111. *Sykes I*, 997 F.2d at 1004.

112. *Id.* (quoting 47 U.S.C. § 553(c)(3)(C)).

113. *Id.* at 1003–05.

114. 47 U.S.C. §§ 553(a)(2), 605(e)(4) (2006).

115. *Id.* § 605(e)(4).

116. *Id.*

programming.¹¹⁷ Section 605, unlike § 553, does not provide a civil cause of action for the mere *manufacture* of a decrypting device.¹¹⁸ “To prevail on its claims for violations of § 605(a) . . . [a plaintiff] must demonstrate that [the defendant] intercepted or otherwise unlawfully appropriated [the plaintiff’s satellite] transmission.”¹¹⁹

Section 553 states:

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

(2) For the purpose of this section, the term “assist in intercepting or receiving” shall include the manufacture or distribution of equipment intended by the manufacturer or distributor (as the case may be) for unauthorized reception of any communications service offered over a cable system in violation of subparagraph (1).¹²⁰

Liability for a device manufactured under § 553 turns on the “intended” purpose of the equipment.¹²¹ “The fact that [a defendant’s devices] had legal uses does not insulate it from civil liability where the evidence establishes that [the defendant] knew and intended the [devices] to be used for the unauthorized reception of cable television programming.”¹²² The statute provides both a criminal penalty and a civil cause of action.¹²³

D. Penalties and Damages Under § 605 and § 553

1. Criminal Penalties

While § 553 originally carried lighter penalties than § 605, Congress’s 1992 amendment to § 553 equalized most of the criminal penalties between the statutes.¹²⁴ Both statutes dictate that “[a]ny person who willfully violates . . . this section shall be fined . . . or imprisoned for not more than 6 months, or both.”¹²⁵ Both sections also provide increased penalties for violations made for financial gain:

117. Allarcom Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 386–87 (9th Cir. 1995).

118. DIRECTV, Inc. v. Robson, 420 F.3d 532, 537 (5th Cir. 2005).

119. *Id.*

120. 47 U.S.C. § 553(a)(1)–(2).

121. *Id.* § 553(a)(2).

122. Cont’l Cablevision, Inc. v. Poll, 124 F.3d 1044, 1048 (9th Cir. 1997); *see also* United States v. Gardner, 860 F.2d 1391, 1397–99 (7th Cir. 1988) (holding criminal defendant could have violated statute even if devices he sold had “both legal and illegal uses”).

123. 47 U.S.C. § 553(b)–(c).

124. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

125. 47 U.S.C. §§ 553(b)(1), 605(e)(1). There is a slight difference in the fines imposed: § 553 provides for fines of not more than \$1,000 and § 605 allows fines to reach up to \$2,000. *Id.*

Any person who violates . . . this section willfully and for purposes of commercial advantage or private financial gain shall be fined not more than \$50,000 or imprisoned for not more than 2 years, or both, for the first such offense and shall be fined not more than \$100,000 or imprisoned for not more than 5 years, or both, for any subsequent offense.¹²⁶

Both statutes allow for the stacking of multiple criminal offenses, with each sale of an infringing device constituting a separate offense for sentencing purposes.¹²⁷

Section 605(e)(4)'s criminal penalties differ only by more severely punishing those involved in creating or distributing satellite piracy tools. They face a fine of "\$500,000 for each violation," imprisonment for up to five years for each violation, or both.¹²⁸ Each violation of § 605(e)(4) adds to the cumulative penalty.¹²⁹

2. Civil Causes of Action

a. *Standing Under § 553 and § 605*

Section 605 explicitly grants standing to "[a]ny person aggrieved by any violation of subsection (a)."¹³⁰ According to the definitions section of § 605, "the term 'any person aggrieved' shall include any person with proprietary rights in the intercepted communication by wire or radio."¹³¹ Section 553 lacks this explicit definition, although it too grants standing to "[a]ny person aggrieved."¹³²

Courts vary in their tests for standing to file suit under the civil causes of action created by § 553 and § 605.¹³³ For example, in *Kingvision Pay-Per-View, Ltd. v. Rocca*,¹³⁴ the District of New Hampshire held that the plaintiff, a pay-per-view provider with exclusive rights to provide access to a cable TV sporting event, could not recover under § 553 against a bar that had broadcast the event

126. *Id.* § 553(b)(2). Section 605(e)(2) uses nearly identical language, but refers to "direct or indirect commercial advantage" and uses "conviction" in place of "offense." *Id.* § 605(e)(2).

127. 47 U.S.C. §§ 553(b)(3), 605(e)(3)(C)(i)(II).

128. *Id.* § 605(e)(4). At least one circuit has held that this provision does not apply when the device must be modified to decrypt such programming. *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 386 (9th Cir. 1995).

129. 47 U.S.C. § 605(e)(4).

130. *Id.* § 605(e)(3)(A).

131. *Id.* § 605(d)(6). The statute lists examples, including "wholesale or retail distributors of satellite cable programming" and "any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming." *Id.* However, these examples do not limit the breadth of the statute. *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 526–28 (5th Cir. 2005).

132. 47 U.S.C. § 553(c)(1).

133. *Compare Kingvision Pay-Per-View, Ltd. v. Rocca*, 181 F. Supp. 2d 29, 34 (D. N.H. 2002) (holding noncable provider has no standing to sue under § 553), *with Gen. Instrument Corp. of Del. v. Nu-Tek Elecs. & Mfg., Inc.*, 197 F.3d 83, 86–89 (3d Cir. 1999) (holding noncable provider does have standing to sue under § 553).

134. 181 F. Supp. 2d 29 (D. N.H. 2002).

to patrons without authorization.¹³⁵ The court opined, without citing any authority other than a reference to “the legislative history of § 553,” that “Congress did not intend to confer standing under § 553 on a plaintiff who is not a cable operator.”¹³⁶ Other jurisdictions, however, have held that aggrieved parties under § 553 may include entities other than cable providers.¹³⁷ The Third Circuit held that a manufacturer of cable descrambler devices had standing to bring a claim under § 553 and § 605 when it claimed the defendant was in the business of altering the plaintiff’s legitimate cable descramblers into illegal cable descramblers.¹³⁸ Other courts have held that entities even further removed from the cable infrastructure business have standing as well. The Sixth Circuit, for example, held that § 605 gave a television network standing to sue a cable provider.¹³⁹

However, when a plaintiff content provider that claims to be “aggrieved” cannot demonstrate that it had “exclusive” licensing rights for the geographic area and the event in question, the plaintiff lacks standing.¹⁴⁰ Similarly, a cable provider must show that a maker of prohibited descrambling devices distributed devices that were actually used in the provider’s geographic market area.¹⁴¹

b. Damages Under § 605 and § 553

Both § 605 and § 553 provide for injunctive relief as well as a choice between actual or statutory damages.¹⁴² Section 553 provides for either actual damages or statutory damages of “not less than \$250 or more than \$10,000.”¹⁴³ Courts have interpreted § 553 to allow only a recovery of the \$10,000 maximum in statutory damages per civil action, regardless of the actual number of violations,¹⁴⁴ plus a discretionary award of up to \$50,000 for cases where the violation was committed “willfully and for purposes of commercial advantage or private financial gain.”¹⁴⁵ A plaintiff may, however, bring multiple suits: one for each violation.¹⁴⁶

135. *Kingvision Pay-Per-View, Ltd.*, 181 F. Supp. 2d at 31, 34.

136. *Id.* at 34.

137. *Nat’l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 914 (6th Cir. 2001); *Gen. Instrument Corp. of Del.*, 197 F.3d at 86–89.

138. *Gen. Instrument Corp. of Del.*, 197 F.3d at 86–89.

139. *Nat’l Satellite Sports, Inc.*, 253 F.3d at 914.

140. *Joe Hand Promotions, Inc. v. Conroy*, 167 F. Supp. 2d 536, 539 (N.D.N.Y. 2001).

141. *V Cable, Inc. v. Guercio*, 148 F. Supp. 2d 236, 241–42 (E.D.N.Y. 2001).

142. 47 U.S.C. § 605(e)(3)(B)(i), (C)(i)(I)–(II) (2006); *id.* § 553(c)(2)(A), (3)(A)(i)–(ii); *Gen. Instrument Corp. of Del.*, 197 F.3d at 93–95.

143. 47 U.S.C. § 553(c)(3)(A)(ii).

144. *Charter Commc’ns Entm’t I, DST v. Burdulis*, 460 F.3d 168, 178 (1st Cir. 2006); *Gen. Instrument Corp. of Del.*, 197 F.3d at 95; *Cont’l Cablevision, Inc. v. Poll*, 124 F.3d 1044, 1048–50 (9th Cir. 1997).

145. 47 U.S.C. § 553(c)(3)(B); *Gen. Instrument Corp. of Del.*, 197 F.3d at 94.

146. *Charter Commc’ns Entm’t I, DST*, 460 F.3d at 179–80 (noting § 553 “does, in many cases, permit a cable operator to bring separate § 553(c) civil actions with respect to each individual violation and secure multiple awards, at an increased cost in party and judicial resources”).

Section 605 allows for increased damages over § 553, including either actual damages¹⁴⁷ or statutory damages of “not less than \$1,000 or more than \$10,000;”¹⁴⁸ plus, if the “violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain,” the court may increase damages by up to \$100,000 per violation.¹⁴⁹ For each violation of § 605(e)(4), which forbids involvement with descrambler tools, the statute mandates an award of “not less than \$10,000, or more than \$100,000.”¹⁵⁰

E. The Circuit Split

The federal circuits have split over whether, following the 1984 enactment of 47 U.S.C. § 553, cable television signals qualify as “radio communication” under § 605, and thus whether both statutes, or only § 553, continue to apply to cable television piracy.¹⁵¹ In *International Cablevision, Inc. v. Sykes*,¹⁵² the Second Circuit held that both statutes apply in a cable theft case.¹⁵³ The court first noted that the majority of courts at that time held § 605 applicable to cable theft, although most did so “without extended consideration of the issues.”¹⁵⁴ It found such an application logical because “[t]he continued transmission of radio signals via cable after their receipt at the headend of a cable television system can be regarded as the ‘receipt, forwarding, and delivery of [radio] communications . . . incidental to [the transmission]’ of the pictures and sounds transmitted by those communications,” per § 605.¹⁵⁵ Thus, a cable theft defendant may be liable under both statutes; however, if the defendant proves that the programming in question did not originate as radio communication, he or she will be liable only under § 553, and not § 605.¹⁵⁶

The *Sykes* court found support for this interpretation in the legislative history of the statute.¹⁵⁷ The court noted that this was the courts’ implicit interpretation of the statute prior to the 1984 Act, and it applied the canon of statutory construction that “[t]his interpretation may be deemed to have been adopted by Congress when it reenacted § 605(a) without change.”¹⁵⁸

The Seventh Circuit disagreed with the Second Circuit’s *Sykes* interpretation of the statute. In *United States v. Norris*,¹⁵⁹ the court held that the

147. 47 U.S.C. § 605(e)(3)(C)(i)(I).

148. *Id.* § 605(e)(3)(C)(i)(II).

149. *Id.* § 605(e)(3)(C)(ii).

150. *Id.* § 605(e)(3)(C)(i)(II).

151. See *Int’l Cablevision, Inc. v. Sykes (Sykes II)*, 75 F.3d 123, 133 n.6 (2d Cir. 1996) (listing courts that have applied § 605 to cable privacy and others that have not).

152. 75 F.3d 123 (2d Cir. 1996).

153. *Sykes II*, 75 F.3d at 133.

154. *Id.* at 133 n.6.

155. *Id.* at 131 (alterations in original) (quoting 47 U.S.C. § 153(33)).

156. *Id.* at 131 n.5; see also *id.* at 133 (noting that Congress, rather than courts, must clarify any confusion in overlap of §§ 553 and 605).

157. *Sykes II*, 75 F.3d at 131.

158. *Id.*

159. 88 F.3d 462 (7th Cir. 1996).

definitions of “wire” and “radio” communications in the act were mutually exclusive—defendants in criminal cases can only be charged under one or the other.¹⁶⁰ Further, “cable television programming transmitted over a cable network is not a ‘radio communication’ as defined in § 153(b), and thus its unlawful interception must be prosecuted under § 553(a) and not § 605.”¹⁶¹ The court noted the clarity and precision of the legislative definitions of “radio” and “wire” communication and observed that nothing in the legislative history indicates an intent to alter the distinction.¹⁶² It quoted the legislature’s comments to § 553, which stated:

Nothing in this section is intended to affect the applicability of existing section 605 to theft of cable service

. . . .

The Committee intends the phrase “service offered over a cable system” [in § 553] to limit the applicability of [sec. 553] to theft of a service from the point at which it is actually being delivered over the cable system. Thus, situations arising with respect to the reception of services which are transmitted over-the-air (or through another technology), but which are also distributed over a cable system, 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.¹⁶³

The *Norris* court then cited *Sykes*, and addressed the Second Circuit’s holding that § 605(a) applies to programming originally transmitted via satellite.¹⁶⁴ It found that such a holding “unacceptably blurs the line between radio and wire communications,” and that “[t]he fatal difficulty with the Second Circuit’s analysis . . . is that it plucks one sentence of § 553(a)’s legislative history out of context and assigns that sentence a meaning completely at odds with the context.”¹⁶⁵

The Third Circuit agreed with the Seventh Circuit when it held in *TKR Cable Co. v. Cable City Corp.*¹⁶⁶ that “a cable television descrambler does not facilitate the interception of ‘communications by radio’” for the purposes of § 605(a).¹⁶⁷ The court acknowledged that, prior to the 1968 amendment, the statute did govern cable piracy, but the amendment “removed the critical language granting § 605 authority over such conduct.”¹⁶⁸ The court also

160. *Norris*, 88 F.3d at 467.

161. *Id.* at 469.

162. *Id.* at 464–66; see also 47 U.S.C. § 153(33), (52) (2006) (defining “radio” and “wire” communication).

163. *Norris*, 88 F.3d at 469 (alterations in original) (quoting H.R. REP. NO. 98-934, at 83–84 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4720–21).

164. *Id.* at 468–69.

165. *Id.* at 467–69 (referring to sentence reading “[n]othing in this section is intended to affect the applicability of existing section 605 to theft of cable service”).

166. 267 F.3d 196 (3d Cir. 2001).

167. *TKR Cable Co.*, 267 F.3d at 197.

168. *Id.* at 201.

addressed the plaintiff's argument that the cable was merely "incidental" to the transmission of what is actually satellite programming as received by the cable provider.¹⁶⁹ The court found that "the entire cable transmission infrastructure of a city or suburban area, a structure that provides a foundation for a significant business, such as that of [the plaintiff], or any other major cable service provider, cannot be considered a mere instrumentality to transmission."¹⁷⁰ Finally, the court buffered its arguments with an extensive analysis of the history of the statute, its context in the code, and an argument that a contrary reading of § 605 would "render § 553 superfluous."¹⁷¹

Recently, in *Charter Communications Entertainment I, DST v. Burdulis*,¹⁷² the First Circuit followed the Third Circuit's *TKR Cable Co.* decision. The First Circuit addressed, and disagreed with, an argument not touched upon by the prior courts: that the multiple references to "wire communication" in the section of § 605 that defines standing indicated Congress's intent to apply the statute to cable television theft in addition to satellite television theft.¹⁷³ The court determined that Congress's purpose with this wording was "expanding standing to sue" and that the addition of § 553 to the code makes clear Congress's intent that § 605 not regulate cable television signals.¹⁷⁴ Finally, the court rejected plaintiff's policy argument that it was unfair to punish cable pirates less severely than satellite television pirates;¹⁷⁵ the court refused to disturb the legislative judgment that satellite theft is the more severe problem.¹⁷⁶

Overall, only the Second Circuit applies both §§ 605 and 553 simultaneously in cable theft cases.¹⁷⁷ The Seventh, Third, and First Circuits have held that § 605 does not apply to cable, as opposed to satellite, signal theft, and apply only § 553 to cable signal theft.¹⁷⁸

F. *The Private Use Exception to § 605*

Section 605 contains a private use exception,¹⁷⁹ which Congress enacted to "[make] it clear that the manufacture, sale, and home use of earth stations are legal activities."¹⁸⁰ The exception reads:

169. *Id.* at 202.

170. *Id.*

171. *Id.* at 202–06.

172. 460 F.3d 168 (1st Cir. 2006).

173. *Charter Commc'ns Entm't I, DST*, 460 F.3d at 173–76.

174. *Id.* at 173–74 (quoting H.R. REP. NO. 100-887(II), at 28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5657).

175. *Id.* at 177–78.

176. *Id.* at 178.

177. *Int'l Cablevision, Inc. v. Sykes (Sykes II)*, 75 F.3d 123, 132–33 (2d Cir. 1996).

178. *Charter Commc'ns Entm't I, DST*, 460 F.3d at 173–78; *TKR Cable Co. v. Cable City Corp.*, 267 F.3d 196, 197 (3d Cir. 2001); *United States v. Norris*, 88 F.3d 462, 466–69 (7th Cir. 1996).

179. 47 U.S.C. § 605(b) (2006).

180. 130 CONG. REC. 27,986 (1984) (statement of Rep. Rose).

The provisions of subsection (a) . . . shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if—

- (1) the programming involved is not encrypted; and
- (2) (A) a marketing system is not established under which—
 - (i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and
 - (ii) such authorization is available to the individual involved from the appropriate agent or agents; or
- (B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming has [sic] obtained authorization for private viewing under that system.¹⁸¹

The statute defines “private viewing” as “viewing for private use in an individual’s dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite.”¹⁸² Section 553 has no equivalent exception.

Some defendants have prevailed, after facing a civil suit under § 605(a), by invoking the “private use exception” under § 605(b).¹⁸³ One case, *Sioux Falls Cable Television v. South Dakota*,¹⁸⁴ involved a prison that installed a satellite dish to receive the plaintiff television company’s satellite signal, and then provided the signal via a cable system to all of the prison’s inmates.¹⁸⁵ The inmates had previously paid the television company individually for the service, but the prison administration prohibited the practice after it resulted in “regulatory and extortion problems within the penitentiary.”¹⁸⁶ The court found that the signal was not encrypted,¹⁸⁷ and that there was no “appropriate marketing system” because the prison officials had banned individual satellite subscriptions among the inmates.¹⁸⁸ The unique set-up made the prison’s system not a “private cable system” under the case law.¹⁸⁹ As also required by the statute,¹⁹⁰ the system was private because it went only to the inmates’ individual

181. 47 U.S.C. § 605(b).

182. *Id.* § 605(d)(4).

183. See *Sioux Falls Cable Television v. South Dakota*, 838 F.2d 249, 256 (8th Cir. 1988) (affirming dismissal, under private viewing exception, of claim against prison that provided satellite television to inmates); *Pro Am Sports Sys., Inc. v. Green DOT Inv. Co.*, No. 87-CV-73471-DT, 1988 U.S. Dist. LEXIS 17898, at *5–6 (E.D. Mich. Oct. 18, 1988) (dismissing claim against lounge that displayed sporting events via satellite when service was not otherwise available).

184. 838 F.2d 249 (8th Cir. 1988).

185. *Sioux Falls Cable Television*, 838 F.2d at 250–51.

186. *Id.* at 251.

187. *Id.* at 253.

188. *Id.*

189. *Id.* at 253–54.

190. 47 U.S.C. § 605(d)(4) (2006). For a particular use to be considered private viewing under the exception, the signal must be transmitted directly into the “individual’s dwelling unit” on equipment “owned or operated by such individual.” *Id.*

cells,¹⁹¹ and the system was “owned or operated” by the inmates because the money to purchase the system came from the inmates’ collective commissary purchases.¹⁹² Thus, the plaintiff had no claim to the fees that it had lost when the inmates stopped paying for the service.¹⁹³

G. Relevant Applications of § 553 and § 605 in the Courts

Courts have applied these statutes to situations involving television signal forwarding. For example, in *That’s Entertainment, Inc. v. J.P.T., Inc.*,¹⁹⁴ a bar owner strung a single television cable from an upstairs residential housing unit into his commercial establishment below.¹⁹⁵ The owner paid for cable television service to the residential unit but rerouted the connection to the bar.¹⁹⁶ He ordered pay-per-view sporting events like a regular residential customer through the automated pay-per-view system that had been installed in his home, but displayed them to the crowds at the bar.¹⁹⁷ The plaintiff, owner of the exclusive right to publicly broadcast a particular sporting event everywhere within the state, brought suit under 47 U.S.C. § 605 after that event was broadcast at the bar.¹⁹⁸ The court held on summary judgment that the plaintiff had a right to recover.¹⁹⁹ Despite the defendant’s assertions to the contrary, his moving of the cable box from the upstairs residence to the bar constituted an “interception” under § 605, and the bar’s patrons were not “authorized” recipients.²⁰⁰ Further, even if the defendant had not “intercepted” the communications, the defendant violated the statute because “the first and third sentences of [§ 605(a)] do not similarly require an ‘interception’ of a cable transmission and clearly proscribe the unauthorized divulgence or use of communications which have been ‘received’ legally for certain purposes.”²⁰¹

A Sixth Circuit case, *National Satellite Sports, Inc. v. Eliadis, Inc.*,²⁰² concerned a similar situation. Eliadis, Inc. operated a commercial bar that showed television content purchased through a Time Warner cable subscription.²⁰³ Time Warner erroneously served Eliadis as a residential customer, and allowed Eliadis to order pay-per-view sporting events at residential prices.²⁰⁴ Plaintiff National Satellite Sports, Inc. (“NSS”) owned the

191. *Sioux Falls Cable Television*, 838 F.2d at 255.

192. *Id.* at 255–56.

193. *Id.* at 256.

194. 843 F. Supp. 995 (D. Md. 1993).

195. *That’s Entm’t, Inc.*, 843 F. Supp. at 997–98.

196. *Id.*

197. *Id.*

198. *Id.* at 996–99.

199. *Id.* at 1000.

200. *That’s Entm’t, Inc.*, 843 F. Supp. at 999–1000.

201. *Id.* at 999 (citing 47 U.S.C. § 605(a)).

202. 253 F.3d 900 (6th Cir. 2001).

203. *Nat’l Satellite Sports, Inc.*, 253 F.3d at 904.

204. *Id.* at 905.

exclusive right to broadcast a particular boxing match within Eliadis's state.²⁰⁵ Time Warner sold the event to Eliadis for the residential rate,²⁰⁶ and Eliadis then displayed the event to its patrons.²⁰⁷

NSS brought suit against Time Warner under § 605 and won,²⁰⁸ and the verdict was affirmed on appeal.²⁰⁹ Time Warner argued that NSS lacked standing to bring suit under § 605.²¹⁰ Section 605 grants standing to "any person aggrieved," which "shall include any person with proprietary rights in the *intercepted* communication by wire or radio, including wholesale or retail distributors of satellite cable programming,"²¹¹ which, according to Time Warner, excluded actions against defendants who did not "intercept[]" and "divulge[]" communications.²¹² The court held that the definition of "any person aggrieved" was nonexclusive, and granted standing to NSS.²¹³ Time Warner then argued that the statute covered the *means*, not the *content*, of the transmission; the court held that both are protected under § 605.²¹⁴ According to the court, NSS had a proprietary interest in "the *transmission* of the *content* of the boxing match, regardless of the satellite transfers or encryptions that the transmission[] underwent in the process."²¹⁵

The court determined that Time Warner's actions did not constitute an "interception."²¹⁶ The court noted that "[t]he Supreme Court has defined an interception for the purposes of § 605 to be a 'taking or seizure by the way or before arrival at the destined place.'"²¹⁷ The first sentence of § 605, however, does not require an "interception."²¹⁸ Thus, "[a]n authorized intermediary of a communication (such as Time Warner) violates the first sentence of § 605(a) when it divulges that communication through an electronic channel to one 'other than the addressee' intended by the sender (such as [the producer of the event])."²¹⁹ The court agreed with Time Warner that its actions did not violate the second and third sentences of § 605, but Time Warner was "unable to escape

205. *Id.* at 904.

206. *Id.* at 905. Time Warner charged the residential rate of \$39.95, but the correct fee for a commercial customer was \$987.50. *Id.*

207. *Nat'l Satellite Sports, Inc.*, 253 F.3d at 904.

208. *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 65 F. Supp. 2d 662, 667–69 (N.D. Ohio 1999).

209. *Nat'l Satellite Sports, Inc.*, 253 F.3d at 918.

210. *Id.* at 911.

211. *Id.* at 911–12 (emphasis added); 47 U.S.C. § 605(d)(6) (2006).

212. *Nat'l Satellite Sports, Inc.*, 253 F.3d at 913 (quoting *Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740, 741 (6th Cir. 1973)).

213. *Id.*

214. *Id.* at 914–15.

215. *Id.* at 915.

216. *Id.*

217. *Nat'l Satellite Sports, Inc.*, 253 F.3d at 915 (citing *Goldman v. United States*, 316 U.S. 129, 134 (1942)).

218. *Id.* (quoting 47 U.S.C. § 605(a)).

219. *Id.* at 916 (quoting 47 U.S.C. § 605(a)). The court also rejected Time Warner's argument that "at all times it was transmitting the event through fully authorized channels," because "Time Warner was not authorized to transmit the event to commercial establishments." *Id.* at 916.

liability under the first sentence of § 605(a) for divulging the communication that it was authorized to distribute on a limited basis only, when one of the recipients of that transmission was an unauthorized addressee of . . . the sender.”²²⁰

In *Manhattan Cable Television, Inc. v. Cable Doctor, Inc.*,²²¹ the Southern District of New York held that a cable television provider had no cause of action under either § 605 or § 553 against a cable repair company that installed a new cable television outlet in a subscriber’s home, even though the service’s terms specifically disallowed the practice unless the subscriber paid an additional fee.²²² In holding § 605 inapplicable, the court noted:

The language of the section quite clearly covers the installation of devices which allow the interception and descrambling of encoded cable programming because they can be used to divulge or publish cable programming to persons other than the intended customer. In contrast, the installation of a second outlet on the premises of a party who is already a customer of a cable operator involves neither publishing nor divulging the content of cable programming. Moreover, as [defendant] points out, the customer is the intended addressee of the cable programming. No one else gains access to the content of the transmission through the installation of a second outlet.²²³

The court also held § 553 inapplicable after examining the legislative intent and history of the section.²²⁴ The court noted that 47 U.S.C. § 521 provides that one of the purposes of the subchapter is to “promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.”²²⁵ The court also found this purpose evident in the House committee report for § 553, which states that

paragraph (a)(2) [of § 553] is primarily aimed at preventing the manufacture and distribution of so-called “black boxes” and other unauthorized converters which permit reception of cable service without paying for the service. However, the Committee does not intend that this section be used as a bar to the development of competition for equipment used in the reception of services by subscribers of a cable system, to the extent use of customer premises cable equipment other than that supplied by the cable operator is otherwise permissible under applicable law.²²⁶

Thus, considering “the centrality of so-called ‘black boxes’ to Congress’ concerns, as well as the aim of promoting competition in the cable industry, there

220. *Id.* at 917 (citing 47 U.S.C. § 605(a)).

221. 802 F. Supp. 1103 (S.D.N.Y. 1992).

222. *Manhattan Cable*, 802 F. Supp. at 1104.

223. *Id.* at 1106. The court also noted that, because the legislation predated the cable industry, the legislature could not possibly have intended to limit this practice, and “[t]he application of the Act to television therefore proceeds in waters uncharted by legislative intent.” *Id.*

224. *Id.* at 1106–08.

225. *Id.* at 1107 (quoting 47 U.S.C. § 521).

226. *Manhattan Cable*, 802 F. Supp. at 1107 (alteration in original) (quoting H.R. REP. NO. 98-934, at 84 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4721).

is little support in the legislative history” for the cable service’s claim.²²⁷ At least one court, however, has held § 553 and § 605 applicable when the defendant accessed the cable signal without authorization but also without special “black box” equipment.²²⁸

The court in *Manhattan Cable* later vacated its opinion after it determined that Congress had amended a related statute three days prior to the ruling.²²⁹ Congress had changed 47 U.S.C. § 543, a “distinct but related provision” entitled “Regulation of Rates,” to say that state regulation of “communications service provided over a cable system to cable subscribers” may include regulation of the “installation and monthly use of connections for additional television receivers.”²³⁰ The court found this language equivalent to that of § 553, which states that “[n]o person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.”²³¹

H. Enforcement

Even in the realm of traditional cable and satellite piracy, enforcement presents a challenge for the rights holders. Descrambler devices for cable are difficult to detect without access to homes.²³² Unauthorized satellite television receivers are by nature undetectable—the satellite signal is a one-way street.²³³ Cable providers have solved this problem by pursuing the device manufacturers, getting their records, and then going after their customers.²³⁴ Satellite providers have done the same,²³⁵ and it has resulted in a large number of lawsuits,²³⁶ as

227. *Id.* at 1107–08. The court also noted that the decision was consistent with *Shenango Cable TV, Inc. v. Tandy Corp.*, 631 F. Supp. 835 (W.D. Pa. 1986), but that decision has since been overruled by an amendment to § 605. *Manhattan Cable*, 802 F. Supp. at 1107–08. See *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 384 (9th Cir. 1995) (noting that “[i]n 1988, after *Shenango* was decided, Congress amended [§ 605] by adding language that prohibited distributing a device while ‘knowing or having reason to know’ that the device is ‘primarily of assistance’ in piracy” (quoting 47 U.S.C. § 605)).

228. *Int’l Cablevision, Inc. v. Cancari*, 960 F. Supp. 28, 30 (W.D.N.Y. 1997).

229. *Manhattan Cable Television, Inc. v. Cable Doctor, Inc.*, 824 F. Supp. 34, 35–36 (S.D.N.Y. 1993).

230. *Id.* (quoting Cable Television Consumer Protection and Competition Act of 1992, sec. 3(a), § 623(b)(3), 106 Stat. 1460, 1466).

231. *Id.* at 35 (quoting 47 U.S.C. § 553(a)).

232. *TKR Cable Co. v. Cable City Corp.*, 267 F.3d 196, 197 (3d Cir. 2001) (noting defendant cable provider must access thieves’ homes to detect or prevent programming service theft).

233. Karim Nice & Tom Harris, *How Satellite TV Works*, HOWSTUFFWORKS.COM, <http://electronics.howstuffworks.com/satellite-tv6.htm>.

234. See, e.g., *Charter Commc’ns Entm’t I, DST v. Burdulis*, 460 F.3d 168, 170 (1st Cir. 2006) (noting cable provider used “court-ordered productions of business records from manufacturers of illegal cable descrambling devices” to track down and sue individuals who had purchased equipment).

235. See, e.g., *DIRECTV, Inc. v. Baker*, 318 F. Supp. 2d 1113, 1115 (M.D. Ala. 2004) (noting plaintiff brought suit for use of satellite descrambling device based on purchase records).

236. *DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 850 (9th Cir. 2007) (noting “DirecTV’s fight

well as many individuals being targeted who claimed to have never actually pirated the service.²³⁷ Holders of exclusive broadcast rights, on the other hand, have resorted to private investigators to find violators.²³⁸

III. DISCUSSION

Applying §§ 605 and 553 to the placeshifting methods outlined in the Overview reveals numerous potential conflicts, depending on the meaning given to “placeshifting” and the factual circumstances involved. Part III discusses the various placeshifting devices laid out in the Overview to determine a functional definition of placeshifting, then uses that definition along with an analysis of common purposes for placeshifting to determine a framework under which to analyze potential violations of the statutes. Finally, it discusses potential enforcement issues that may provide some breathing room for placeshifters who violate the statutes.

A. *A Functional Definition of Placeshifting*

A functional definition of placeshifting is necessary for an analysis of its legal implications. While many of the devices described in Part II.A.2 possess abilities beyond placeshifting, they each exhibit certain functional characteristics from which the basic definition of placeshifting becomes clear. Analysis of the characteristics of such devices reveals the following definition: Placeshifting is the transfer of a multimedia signal from a source to a receiver over a computer network simultaneously with the signal’s generation at the source.²³⁹ Each placeshifting device performs, at a minimum, this simple function.²⁴⁰ A source can be anything that generates a multimedia signal—often a cable television box or satellite receiver, but also a computer, DVR, or other device, and multiple sources may be connected at once.²⁴¹ The “receiver” of the placeshifted signal can be similarly varied, and includes software running on personal computers, laptops, cell phones, and video game consoles, or hardware designed specifically

against piracy makes frequent use of the courts,” and that DirecTV claims to have taken antipiracy litigation actions against 25,000 defendants).

237. Kevin Poulsen, *DirecTV Dragnet Snares Innocent Techies*, SECURITYFOCUS, July 17, 2003, <http://www.securityfocus.com/news/6402>.

238. *E.g.*, *Kingvision Pay-Per-View Ltd. v. Autar*, 426 F. Supp. 2d 59, 63–64 (E.D.N.Y. 2006) (noting rights holder used private investigator to gather evidence against bar for unauthorized display of rights holder’s pay-per-view event).

239. Commentators have implicitly defined placeshifting before, and this definition comports with theirs. *See Rivers*, *supra* note 18, at 176 (explaining that, according to Sling Media, “placeshifting” . . . refer[s] to Slingbox’s ability to shift live content from a cable television box to an internet-enabled device such as a laptop or mobile phone”); Schnaps, *supra* note 18, at 53 n.6, 78–79 (equating placeshifting with copyright “spaceshifting,” but also noting Slingbox’s inability to record and its limitation to a single user).

240. *See supra* Part II.A.2 for a description of the various placeshifting devices.

241. *Falcone*, *supra* note 24.

to receive placeshifted signals, such as the SlingCatcher.²⁴² A receiver may be able to send control information back to the source.²⁴³

The requirement that the transmission be “simultaneous” eliminates from the definition devices such as the Apple TV, which actually copies the movies, music, pictures or other data to be displayed on the screen to a hard disk drive in the device.²⁴⁴ Such devices are inherently different—instead of forwarding the signal simultaneously with its generation at the source, they copy a saved signal, which can be played later or multiple times. While all of the devices explored in Part II.A.2 use some sort of buffer system to compensate for network congestion, the buffer system functions differently than the system used in the Apple TV. Rather than store the data for later or repeated viewing, a buffer system traditionally holds only a few seconds of the video until it is displayed and then discards the information.²⁴⁵ In sum, placeshifting devices transfer a multimedia signal from a source to a receiver over a computer network simultaneously with the signal’s generation at the source.

B. A Framework for Determining Liability and Culpability of Placeshifters

Analysis of §§ 605 and 553 reveals that individuals who merely placeshift a cable signal back to themselves outside of the home or to other family members within a home should not face liability under §§ 553 and 605 for the following reasons: (1) the statutes focus on *persons* rather than *places* authorized to receive a signal, so a placeshifted signal that ultimately returns only to an authorized person does not violate the statute, regardless of that person’s location; (2) in enacting these statutes Congress expressed a clear purpose to advance cable technology, and placeshifting devices represent just such an advancement; and (3) the industry tacitly accepts the practice of sharing a cable signal within a household, even if other individuals within the household are not explicitly “authorized.”²⁴⁶ Individuals who do share a signal with other recipients outside the individual’s home, however, may face severe criminal and civil penalties, along with the recipient of the signal, especially if the recipient compensates the originator.²⁴⁷

242. The Slingbox supports broadcast to SlingPlayer software on a personal computer, laptop, or mobile phone, Pogue, *supra* note 1, or to a SlingCatcher, Press Release, Sling Media, *supra* note 50. The Sony LocationFree TV can broadcast to computers, laptops, and mobile phones, and also to Sony’s PlayStation Portable gaming device. McCarthy, *supra* note 39. Orb Networks’ software also supports such devices. Dreier, *supra* note 62.

243. The Slingbox, Monsoon Multimedia’s HAVA, and Sony’s LocationFree TV all support sending information back to change channels at the source. See Falcone, *supra* note 46 (noting HAVA’s ability to change channels); *Slingbox-Watch Your Home TV Anywhere*, *supra* note 54 (describing Slingbox’s channel-changing process).

244. Cheng & Ecker, *supra* note 55.

245. *Slingbox-Watch Your Home TV Anywhere*, *supra* note 54; Snell, *supra* note 57.

246. See *infra* Part III.B.1–3 for a discussion of each of these premises.

247. See *infra* Part III.B.4 for a discussion of the potential criminal penalties.

1. Sections 605 and 553 Focus on Persons, Not Places or Means

Liability for a placeshifter under § 605 turns on whether he or she is “entitled” to receive a signal, not the particular physical location at which he or she chooses to receive it.²⁴⁸ Section 605 states:

[N]o *person* receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, . . . to any *person* other than the addressee, his agent, or attorney

No *person* not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any *person*.

No *person* not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for *his own benefit* or for the benefit of *another* not entitled thereto.²⁴⁹

The first and second sentences do not apply to placeshifting as defined above. Both require another person to be involved in order for a violation to occur.²⁵⁰ This is explicit in the first sentence—“to any *person* other than the addressee, his agent, or attorney”²⁵¹—and implicit in the second. A person cannot “divulge or publish”²⁵² the content of a transmission from herself to herself.

Applicability of the second sentence of § 605 depends on whether the court decides to construe placeshifting as “interception.” Section 605’s second sentence prohibits a “person not being authorized by the sender” from “intercept[ing]” and sending a signal “to any person.”²⁵³ The United States Supreme Court has defined “interception”²⁵⁴ for the purposes of § 605:

[Interception] indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver.²⁵⁵

The Supreme Court referenced both the communication’s arrival “at the destined place” and “the moment[] it comes into the possession of the intended

248. 47 U.S.C. § 605 (2006).

249. *Id.* § 605(a) (emphasis added) (line breaks inserted for clarity).

250. *Id.*

251. *Id.* (emphasis added).

252. *Id.*

253. 47 U.S.C. § 605(a).

254. *Goldman v. United States*, 316 U.S. 129, 134 (1942) (defining interception in the context of 47 U.S.C. § 605), *overruled on other grounds by Katz v. United States*, 389 U.S. 347 (1967).

255. *Id.* (citing *United States v. Yee Ping Jong*, 26 F. Supp. 69, 70 (W.D. Pa. 1939), *overruled on other grounds by Katz v. United States*, 389 U.S. 347 (1967)).

receiver” as the endpoint of a communication for the purposes of “interception” under § 605.²⁵⁶ In the case of placeshifting, however, these could be two very different events. A satellite program could arrive at an intended receiver’s home Slingbox, which placeshifts the program to the same intended receiver’s actual location. Even in such a circumstance, however, the literal terms of the Supreme Court’s interception definition are met: the redirection occurred *after* the program reached its destined place, and no person other than the intended receiver obtained the program.²⁵⁷

Other case law protects signals forwarded by the intended recipient to another person from classification as “intercepted.” In *National Satellite Sports, Inc. v. Eliadis, Inc.*,²⁵⁸ the court, facing an analogous situation, rejected the idea that such a signal was “intercepted” and applied a more appropriate term: redirected.²⁵⁹ The court addressed a suit against a cable provider, authorized to receive specific content, who retransmitted the content to a customer not authorized by the content provider.²⁶⁰ Regardless of the fact that the customer was not authorized to receive the signal, the court noted, the cable provider had not “intercepted” the communication within the meaning of the statute, it had “simply redirected the authorized transmission” after receiving it.²⁶¹ Similarly, placeshifting can only occur once the signal arrives with the intended recipient. A placeshifted transmission, therefore, when forwarded on to someone other than the intended recipient, is “redirected,” not “intercepted,” and even a liberal construction of § 605’s second sentence will not impose liability.

Sentence three of § 605 represents the crux of the statute, then, for placeshifters’ purposes. It prohibits any person “not being entitled thereto” from “receiv[ing] or assist[ing] in receiving . . . interstate or foreign communication by radio . . . for his own benefit or for the benefit of *another not entitled thereto.*”²⁶² Liability for a placeshifter under the statute depends on whether he or she is “entitled” to receive the signal. Assuming that a cable or satellite customer is “entitled” to their home television service (otherwise he or she would be in violation of the statute even absent placeshifting), a placeshifter redirecting the signal to him- or herself outside of the home could not be in violation of sentence three. No other person is involved, and the statute does not reference the place or location of reception.²⁶³ A placeshifter who redirects the signal to *another* recipient, however, may face liability under sentence three of § 605, if the other is not “entitled” to the signal.²⁶⁴

256. *Id.*

257. *Id.*

258. 253 F.3d 900 (6th Cir. 2001).

259. *Nat’l Satellite Sports, Inc.*, 253 F.3d at 915.

260. *Id.* at 914.

261. *Id.* at 915.

262. 47 U.S.C. § 605 (2006) (emphasis added).

263. *Id.*

264. See *infra* Part III.B.4 for a discussion of potential § 605 liability for placeshifting a signal to other recipients who are not “entitled” to receive the signal.

Congress similarly focused on the “person” authorized to receive a signal when it designed § 553.²⁶⁵ Under § 553, “[n]o person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law.”²⁶⁶ Like § 605, liability here turns on whether the person receiving the signal is “specifically authorized to do so”; the statute does not contemplate place or means.²⁶⁷ Also like § 605, § 553 does not define “intercept,” “receive,” or “specifically authorized.”²⁶⁸ The Supreme Court’s definition of “interception” helps placeshifters little here; § 553 applies equally to interception and reception,²⁶⁹ and placeshifting certainly involves “reception” of a signal.

Liability under § 553 may depend on whether a content provider can “specifically authorize[]” a placeshifter to receive a signal inside the home, but not to redirect it outside the home.²⁷⁰ An interpretation of the statute that allowed a content provider to do so would be directly contrary to the legislature’s intent. Congress passed § 553 to prevent cable piracy,²⁷¹ not to provide cable companies with extremely fine-grained control over customers’ use of video signals that they are authorized to receive. Congress included the statute in an act intended to “promote competition in cable communications and minimize unnecessary regulation”;²⁷² it aimed § 553 in particular at “regulat[ing] so-called ‘black boxes’ which permit the unauthorized interception of cable programs.”²⁷³ A “black box” allows the user to decrypt cable content that the user did not pay for.²⁷⁴ This comports with §§ 553 and 605’s focus on “person[s]” rather than places or means. In the absence of actual cable theft, interpreting the

265. 47 U.S.C. § 553.

266. *Id.* (emphasis added).

267. *Id.*

268. *Id.*; see also *id.* § 522 (listing definitions relevant to this section but lacking definitions for “intercept,” “receive,” and “specifically authorized”).

269. 47 U.S.C. § 553.

270. *Id.*

271. *Int’l Cablevision, Inc. v. Sykes (Sykes I)*, 997 F.2d 998, 1008 (2d Cir. 1993) (citing H.R. REP. NO. 98-934, at 83 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4720); *Adelphia Cable Partners, L.P. v. E & A Beepers Corp.*, 188 F.R.D. 662, 665 (S.D. Fla. 1999) (noting that purpose of §§ 605 and 553 is to fight signal piracy).

272. 47 U.S.C. § 521(6).

273. *Manhattan Cable Television, Inc. v. Cable Doctor, Inc.*, 802 F. Supp. 1103, 1107 (S.D.N.Y. 1992) (citing H.R. REP. NO. 98-934, at 84 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4721). The court in *Manhattan Cable* held that Congress intended § 553 to “promote competition in cable communications and minimize unnecessary regulation,” as stated in § 521(6), and was otherwise aimed at regulating unauthorized interception of cable programs via converter boxes. *Id.* (citing 47 U.S.C. § 521(6); H.R. REP. NO. 98-934, at 84). While the court later vacated its holding, it did so because Congress specifically amended a related statute to allow regulation of the behavior in question (the installation of additional cable outlets), not due to a flaw in the original reasoning. *Manhattan Cable Television, Inc. v. Cable Doctor, Inc.*, 824 F. Supp. 34, 35 (S.D.N.Y. 1993).

274. *Manhattan Cable*, 802 F. Supp. at 1107 (citing H.R. REP. NO. 98-934, at 84) (describing “black boxes” as “unauthorized converters which permit reception of cable service without paying for the service”).

statute to provide such control would run counter to the legislature's expressed purpose of promoting "development of competition for equipment used in the reception of services by subscribers of a cable system."²⁷⁵ Placeshifting devices, when used in this context, are the epitome of such equipment—they provide an innovative alternative to previous equipment solutions for the problem of moving a television signal from one place to another. Such devices are quite different from the "black boxes" targeted by Congress, which did not represent technological advances at all, but merely modifications of existing commercial cable technology for the purpose of inequitable gain.²⁷⁶

The same analysis carries some weight when analyzing § 605. Much of the technology that Congress intended to promote with the act that created § 553, including standard television parts, coaxial cabling technology, and, of course, placeshifting devices like the Slingbox, is identical between satellite and cable television.²⁷⁷ Further, Congress enacted § 605 long before satellite television technology existed, and while Congress has amended the statute to prohibit satellite television piracy,²⁷⁸ it has not seen fit to add a provision giving satellite providers fine-grained control over how consumers use properly purchased satellite equipment.

2. Multicasting

Multicasting—the practice of placeshifting content from one source to multiple receivers—evokes the situation in *Manhattan Cable Television, Inc. v. Cable Doctor, Inc.*,²⁷⁹ where a cable television provider tried, and failed, to recover under § 553 and § 605 against a cable technician who added a cable outlet for a subscriber when the subscriber's contract with the cable provider required the subscriber to pay for any additional outlets.²⁸⁰ The multicast placeshifter actually gets less of a benefit from the placeshifting than a regular cable user would get from having additional cable outlets installed. Each of the multicast placeshifter's computers would be forced to display the same channel, and if any of the receivers changed the channel, it would change everywhere.²⁸¹

275. *Id.* (quoting H.R. REP. NO. 98-934, at 84).

276. *Id.*

277. Tittel, *supra* note 26.

278. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 803, 82 Stat. 197, 223 (codified as amended at 47 U.S.C. § 605 (2006)).

279. 802 F. Supp. 1103 (S.D.N.Y. 1992).

280. *Manhattan Cable*, 802 F. Supp. at 1104. As noted earlier, the court later vacated its decision after Congress amended a related statute to cover "installation and monthly use of connections for additional television receivers." *Manhattan Cable Television, Inc. v. Cable Doctor, Inc.*, 824 F. Supp. 34, 36 (S.D.N.Y. 1993) (quoting 47 U.S.C. § 543(b)(3)). It is arguable whether Congress intended the amendment to mean that *cable providers*, rather than states, could prohibit consumers from installing additional "television receivers." The court never issued a final opinion on the issue. Such a reading would mean that a consumer who installed a second television against the cable provider's wishes would be subject to criminal penalties. In any case, the consumer here is not installing further cable outlets. See *supra* Part I for a discussion of the purpose of the Slingbox.

281. Pogue, *supra* note 1.

A subscriber who installs additional cable outlets for each room can change channels independently.²⁸² If a subscriber can install additional televisions without facing liability, the multicast placeshifter ought to be able to use his or her more limited technique as well.²⁸³

Courts should consider the practice of multicasting in light of Congress's focus on authorized persons rather than places or means.²⁸⁴ Plaintiffs or prosecutors could make the argument that the only persons "authorized" to receive a signal are those named in the cable or satellite subscriber agreement. However, custom suggests that the industry accepts the practice of splitting a cable or satellite television signal between multiple rooms; if nothing else, the ubiquity of coaxial cable splitters and "cable ready" televisions²⁸⁵ reflects the industry's tacit acceptance of the practice. While cable companies do generally charge a small monthly fee to lease additional cable boxes for other rooms, cable providers do not require subscribers to list the names of those who are to be "authorized" to view the boxes. To the contrary, cable providers would charge even a single person who wanted to maintain multiple cable boxes a fee to do so.²⁸⁶ This illustrates a gap between industry practice and the statutory regime. Industry practice, to the extent that it shows interest at all, focuses on the number of cable boxes in the home, while the statutory regime focuses on who is authorized to view the boxes.

Courts should not construe the "entitled to" and "specifically authorized to" language of the statutes as endowing cable providers with the ability to fine tune exactly how subscribers may make use of their services. Such a construction could lead to bizarre results, and would only serve to give statutory force to what should be covered by common law contracts alone. For example, such a construction would mean that cable providers could say that subscribers are only "authorized" to view their cable signals between the hours of six and eight p.m.,

282. Once the customer splits the cable signal into multiple rooms, each television can individually tune the channels. Stefanie Olsen, *Broadband Users Cut into Cable*, CNET.COM, June 3, 2002, http://news.cnet.com/Broadband-users-cut-into-cable/2100-1023_3-930356.html?tag=mncol.

283. A search reveals no reported cases other than *Manhattan Cable*, 802 F. Supp. at 1107, where a court addressed the liability of a cable or satellite customer who split his or her signal to feed multiple rooms. The wide availability of such splitters suggests that this is a common practice. See DSLReports.com, *Cable Modems and Wiring Issues: Splitters*, http://www.dslreports.com/faq/cabletech/4_Splitters (last visited July 2, 2009) (describing use and availability of coaxial cable splitters); Lowe's, *Installing Multiple Video Connections*, <http://www.lowes.com/lowes/lkn?action=howTo&p=Improve/VideoInstall.html> (last visited July 2, 2009) (describing common method for splitting cable).

284. See *supra* Part III.B.1 for a discussion of Congress's focus on authorized persons rather than places or means.

285. Cable-ready televisions incorporate receivers that allow the owner to circumvent the cable provider's requirement that an individual cable box be used for each additional television. See Comcast FAQs: *Are all TVs "Cable Ready"?*, <http://www.comcast.com/customers/faq/FaqDetails.aspx?ID=112> (last visited July 2, 2009) (describing meaning of "cable ready"). A Westlaw search reveals no reported cases where a cable provider sued a subscriber for watching television with his or her neighbor.

286. Comcast FAQs: *Do I Need a Separate Digital Cable Box for Every TV?*, <http://www.comcast.com/Customers/FAQ/FaqDetails.aspx?Id=222> (last visited July 2, 2009).

or only while not also using the Internet, or only without skipping the commercials. Regular contract law better serves to enforce these limitations—cable providers are free to contract for such limits and pursue regular remedies for breach of contract. Sections 605 and 553 target only activities related to signal theft.²⁸⁷

Similarly, placeshifting between members of a household otherwise authorized to receive the cable or satellite signal should not run afoul of §§ 605 and 553. Courts should construe the “entitled to” and “specifically authorized to” language in the statutes as limiting only the persons authorized to receive the signal. When deciding which “persons” a cable or satellite provider has authorized to view a signal in the context of placeshifting, courts should consider Congress’s intent to promote the development of such cable technology, and the industry’s acceptance of other technologies that similarly allow multiple persons within a household to view cable signals simultaneously. The industry tacitly accepts the practice of sharing cable between rooms in a house via a coaxial cable splitter, and multicast placeshifting provides less functionality than a regular splitter.²⁸⁸ It would be absurd to apply criminal penalties to parents who set up cable-ready televisions in their children’s bedrooms, and similarly absurd to do so to parents who placeshift their television signal to their children’s computers.

3. Placeshifting to Others May Lead to Liability

Unlike the practice of sharing a cable or satellite signal between members of a single household, sharing a cable or satellite signal with others represents a clear violation of §§ 605 and 553, and falls squarely within the ambit of activities that Congress intended to criminalize. Both the person who houses the placeshifting device and the person who receives the placeshifted signal will be liable to the content owner and the cable provider because § 553 and § 605 prohibit both receiving unauthorized service and assisting others in receiving unauthorized service.²⁸⁹

287. See *supra* Part II.B for a discussion of the scope of §§ 605 and 553.

288. Multicast placeshifting requires all televisions receiving a signal to view the same channel, while coaxial splitters allow each receiver to view channels independently of each other and the source. See *supra* Part II.A for further discussion of the different capabilities of multicast placeshifting and coaxial splitters.

289. See 47 U.S.C. § 553(a) (2006) (stating “[n]o person shall . . . receive or assist in . . . receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator”); 47 U.S.C. § 605(a) (stating “[n]o person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto”). Section 605 also prohibits a person from divulging the contents of “any interstate or foreign communication by wire or radio” to another. *Id.* § 605(a).

a. *Section 553*

Unless the cable or satellite provider's agreement "specifically authorized" the person outside the home who receives the signal to do so, then both the person housing the placeshifting device and the person receiving the signal will face liability under the plain language of § 553.²⁹⁰ Section 553 provides that "[n]o person shall intercept or receive or assist in intercepting or receiving any communications service offered over a cable system, unless specifically authorized to do so by a cable operator or as may otherwise be specifically authorized by law."²⁹¹ The person receiving the placeshifted signal has no claim to being "specifically authorized," and the person housing and operating the placeshifting device necessarily assists the person receiving the signal, and thus also violates the statute.

Unlike the intra-household placeshifting outlined in Part III.B.2, this conduct falls inside the category of conduct that Congress intended to prohibit via § 553. The difference between this and regular cable theft is insignificant: here, the "redirector" must maintain a cable box of some sort at the source, rather than just splitting a wire. On the other hand, this technique has a significant advantage over regular cable theft: very little, if any, physical wiring is necessary to effectuate the extension of the signal, and the signal has unlimited range through the Internet.²⁹² A person in Bangkok could conceivably collaborate with someone from Montana to "steal" cable, while such an arrangement would be impossible via traditional cable theft methods.²⁹³ This represents a significant improvement on previous cable theft techniques, and it may inspire cable companies to react aggressively.

b. *Section 605*

Placeshifting is less analogous to traditional satellite theft.²⁹⁴ Satellite theft does not normally involve stringing cables along; usually, satellite signals are stolen directly from the air via specialized equipment or modified provider equipment.²⁹⁵

Placeshifting makes satellite theft easier to accomplish, and harder for satellite providers to detect. Rather than purchasing specialized equipment and fighting satellite provider's encryption technology, would-be pirates need only purchase an off-the-shelf placeshifting device and find a current satellite

290. *Id.* § 553.

291. *Id.*

292. See *supra* Part II.A for an overview of placeshifting capabilities.

293. Traditional cable theft requires a physical connection to the cable provider's network. *Manhattan Cable Television, Inc. v. Cable Doctor, Inc.*, 802 F. Supp. 1103, 1107 (S.D.N.Y. 1992).

294. In the Second Circuit, where § 605 applies to cable as well as satellite theft, the concerns expressed in Part III.B.3.a apply. See *supra* Part II.E for a description of the circuit split with regard to whether § 605 applies to cable, in addition to satellite, signal theft.

295. Christopher Keough, *DirecTV Gets Aggressive on Signal Theft*, L.A. BUS. J., Dec. 17, 2001, at 1.

customer willing to share the signal.²⁹⁶ Further, current satellite piracy enforcement techniques involve tracking down those who purchase the specialized equipment required to accomplish the task, because the equipment has limited legitimate uses.²⁹⁷ Placeshifting devices, however, have plenty of legitimate uses,²⁹⁸ so a placeshifter who pirates a satellite signal has a much lower risk of detection and prosecution than a traditional thief.²⁹⁹ Further, satellite companies are less likely to also be Internet service providers for Slingbox users because satellite broadband is ill-equipped for Slingbox hosting,³⁰⁰ so satellite companies are at a disadvantage compared to cable companies in determining who may be placeshifting.³⁰¹

4. Damages and Culpability

Courts award damages for each instance of a violation of the statute.³⁰² While actual damages are likely to be small, statutory damages could be large, depending on the law of the circuit and the plaintiff's choice of statute.³⁰³ If the plaintiff brings suit under § 553, the court must award "not less than \$250 or more than \$10,000[.]" as the court considers just,"³⁰⁴ although the plaintiff may bring separate suits for each violation.³⁰⁵ Under § 553(c)(3)(C), however, if "the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than \$100."³⁰⁶ The court may also

296. See *supra* Part II.A.2 for a description of how placeshifting devices work.

297. See *DirecTV, Inc. v. Hoa Huynh*, 503 F.3d 847, 850 (9th Cir. 2007) (describing DirecTV's efforts to stop piracy through courts by filing upwards of 25,000 claims); TechFAQ.com, What Do DirecTV and Dish Network Do to Stop Signal Theft?, <http://www.tech-faq.com/signal-theft.shtml> (last visited July 2, 2009) (describing DirecTV strategies to prevent signal theft, including filing lawsuits).

298. See *supra* Part II.A.3 for more information about the myriad of legitimate uses for placeshifting technology.

299. The placeshifter faces a lower risk of prosecution because satellite providers will not be able to sift the potential satellite signal pirates from the legitimate purchasers of placeshifting devices.

300. A Slingbox, for example, requires 256 kbps of upload bandwidth, while satellite broadband provides between 30 and 80 kbps. DSLReports.com, What Sort of Upload Speed Can I Expect?, <http://www.broadbandreports.com/faq/2000> (last visited July 2, 2009) (noting satellite broadband upload bandwidth is only between thirty and eighty kbps); Sling Community, General Frequently Asked Questions, <http://www.slingcommunity.com/article/27116/General-Frequently-Asked-Questions/> (last visited July 2, 2009) (noting Slingbox's requirement of 256 kbps upload bandwidth).

301. See *infra* Part III.C for a discussion of enforcement issues generally.

302. See, e.g., *That's Entm't, Inc. v. J.P.T., Inc.*, 843 F. Supp. 995, 997-98 (D. Md. 1993) (awarding damages for single instance of violation of statute).

303. The plaintiff's choice of statute would, of course, be limited by the type of signal involved: cable or satellite.

304. 47 U.S.C. § 553(c)(3)(A)(ii) (2006).

305. *Charter Commc'ns Entm't I, DST v. Burdulis*, 460 F.3d 168, 179 (1st Cir. 2006) (noting § 553 "does, in many cases, permit a cable operator to bring separate § 553(c) civil actions with respect to each individual violation and secure multiple awards, at an increased cost in party and judicial resources").

306. 47 U.S.C. § 553(c)(3)(C).

award attorneys' fees and costs.³⁰⁷ Damages under § 605 are more severe. Under § 605, the plaintiff would be awarded "not less than \$1,000 or more than \$10,000" against each defendant per blacked-out game watched, plus mandatory attorneys' fees and costs.³⁰⁸ Both statutes also allow injunctive relief.³⁰⁹

Finally, both the person receiving the signal and the person who hosts the placeshifting device may be subject to criminal penalties under either statute.³¹⁰ The penalties are similar for both statutes: "[a]ny person who willfully violates . . . this section shall be fined . . . or imprisoned for not more than 6 months, or both."³¹¹ If, however, the receiver *pays* the device host for the service, the device host could be subject to increased penalties. Both statutory sections provide that "[a]ny person who violates . . . this section willfully and for purposes of commercial advantage or private financial gain shall be fined not more than \$50,000 or imprisoned for not more than 2 years, or both."³¹² Thus, a device host who is paid for the trouble may be a felon.

5. One Potential Exception: The Satellite "Private Viewing" Exception

If the source of a placeshifted signal is a satellite subscription, defendants may raise § 605's "private viewing"³¹³ exception as a defense. The exception has three requirements: there must not be a marketing system available to the defendant through which he could buy the programming, the programming must not be encrypted, and the programming must be used by the defendant solely for "private viewing."³¹⁴

The statute defines "private viewing" as "viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, *capable of receiving satellite cable programming directly from a satellite.*"³¹⁵ No placeshifting device currently on the market is "capable of receiving satellite cable programming directly from a satellite."³¹⁶ This is somewhat similar to *Sioux Falls Cable Television v. South Dakota*,³¹⁷ where the defendant prison officials received a satellite signal at a central location in their prison and distributed the signal throughout the prison via a regular cable

307. *Id.* § 553(c)(2)(C).

308. *Id.* § 605(e)(3)(C)(i)(II) (awarding between \$1,000 and \$10,000 per violation); *id.* § 605(e)(3)(B)(iii) (mandating award of attorney fees and costs).

309. *Id.* §§ 553(c)(2)(A), 605(e)(3)(B)(i); *see also* Gen. Instrument Corp. of Del. v. Nu-Tek Elecs. & Mfg., Inc., 197 F.3d 83, 93–95 (3d Cir. 1999) (discussing penalty provisions of both statutory sections in detail).

310. *See* 47 U.S.C. §§ 553(b), 605(e) (listing criminal penalties).

311. *Id.* § 553(b)(1); *see id.* § 605(e)(1) (providing for larger maximum fine of \$2,000 but same maximum imprisonment).

312. *Id.* § 553(b)(2). Section 605(e)(2) employs almost identical language.

313. *See supra* Part II.F for the statutory text of this section.

314. 47 U.S.C. § 605(b).

315. *Id.* § 605(d)(4) (emphasis added).

316. *See supra* Part II.A.2 for an overview of how placeshifting devices function.

317. 838 F.2d 249 (8th Cir. 1988). *See supra* notes 184–93 and accompanying text for a discussion of this case.

system.³¹⁸ While the court found that their actions did fall under the “private use” exception,³¹⁹ such a result is less likely in the case of placeshifting. The court relied on the “unique circumstances” of the situation in broadly interpreting the rule.³²⁰ Such an interpretation would run counter to the expressed legislative purpose—to “[make] it clear that the manufacture, sale and home use of earth stations are legal activities.”³²¹

C. Enforcement Issues

As the situation stands, cable and satellite television providers cannot determine via their respective networks whether a user is placeshifting his or her television content.³²² This creates an obvious enforcement problem: how can cable and satellite providers determine who might be placeshifting?

A satellite television provider will have to rely on the same methods currently used to track down regular satellite television pirates, who are also undetectable via electronic means.³²³ A cable television provider that also provides cable Internet service, however, could potentially determine which subscribers use placeshifting devices by investigating the content of the customer’s Internet communications. The privacy and monopolistic implications of such practices are outside of the scope of this Comment, other than to say that cable providers could potentially put language in their subscriber agreements to sidestep the privacy implications.³²⁴ Cable providers that also provide Internet data services could take the further step of intentionally disrupting outgoing placeshifting traffic, so that placeshifting devices simply will not work for that company’s subscribers.³²⁵ Precedent exists for this practice: Comcast recently began throttling BitTorrent and other peer-to-peer network traffic to discourage this often copyright-infringing activity.³²⁶ Placeshifters who rely on the cable

318. *Sioux Falls Cable Television*, 838 F.2d at 251.

319. *Id.* at 252–53.

320. *Id.*

321. *Id.* at 252 (alteration in original) (quoting 130 CONG. REC. H10, 446 (daily ed. Oct. 1, 1984) (statement of Rep. Rose)).

322. Placeshifting devices are just as separate from the cable and satellite networks as descrambling devices are, and descrambling devices are difficult to detect. See *TKR Cable Co. v. Cable City Corp.*, 267 F.3d 196, 197 (3d Cir. 2001) (noting defendant cable provider could not “detect or prevent the theft of its programming services” without access to thieves’ homes).

323. See *supra* Part II.H for an explanation of why satellite pirates are difficult to detect.

324. Subscriber agreements are contracts between the cable provider and the subscriber, so the customer may choose to sacrifice any privacy claims in exchange for cable television service.

325. Providers have demonstrated an ability and a desire to use quality of service techniques to filter subscribers’ Internet content based on type. Rob Frieden, *Network Neutrality or Bias?—Handicapping the Odds for a Tiered and Branded Internet*, 29 HASTINGS COMM. & ENT. L.J. 171, 196–97 (2007). They maintain “the ability to create or simulate [network] congestion and the necessity for dropping [Internet traffic] when no real congestion takes place,” to disable transmission of content or services that they feel subscribers should not have access to. *Id.* at 206.

326. Annalee Newitz, *Comcast’s Secret War on File-Sharing*, ALTERNET, Dec. 5, 2007, <http://www.alternet.org/workplace/69779>. Comcast says that it uses network technology to slow, but not completely block, transmission of some files for the purpose of “reasonable network

provider for Internet service as well as cable television service will be out of luck, because placeshifting requires a broadband Internet connection. Legal implications of such actions are also outside of the scope of this Comment.

IV. CONCLUSION

Placeshifting is an emerging technology³²⁷ where consumers can easily and inadvertently run afoul of existing laws.³²⁸ Although watching home television while on vacation is most likely legal,³²⁹ other seemingly innocuous uses, such as blackout avoidance, are almost certainly not.³³⁰ The law remains somewhat grey even in the best of circumstances,³³¹ and under the worst, Slingbox use may, in fact, land you in prison.³³² The nature of placeshifting means that consumers can use the technology for both lawful and clearly unlawful purposes, and the best thing for device manufacturers to do is inform customers about the potential pitfalls. Consumers should be made aware that they may face criminal and civil liability when they use placeshifting to view content that they are not authorized to view, and that they are particularly likely to encounter liability if they placeshift content to other persons outside of their home.³³³ Cable companies and content providers may not find the enforcement issues insurmountable, and, like cable television thieves and peer-to-peer music thieves, consumers who live on the edge should not rest on the idea that “they don’t know that I’m doing it.”³³⁴

Going forward, courts should take care to maintain Congress’s focus on “persons” authorized to view content, rather than places or means.³³⁵ The

management.” Yinka Adegoke, *Comcast Gets US FCC Notice on Blocking Web Traffic*, REUTERS, Jan. 15, 2008, <http://www.reuters.com/article/technology-media-telco-SP/idUSN1444533920080115>. The FCC recently began investigating Comcast’s practices. *Id.*

327. See *supra* Part II.A for a description of placeshifting, the Slingbox, and uses for the technology. While the Slingbox epitomizes the technology, placeshifting should be defined as the transfer of a multimedia signal from a source to a receiver over a computer network simultaneously with the signal’s generation at the source. See *supra* Part III.A for an explanation of this definition.

328. See *supra* Part II.B–G for a description of existing law, and Part III.B.3 for an analysis of some of the ways that placeshifters can run afoul of the law.

329. See *supra* Part III.B.1 for an analysis of placeshifting from place to place or between family members.

330. See *supra* Part III.B.3 for a discussion of why placeshifting to other persons violates the statutes.

331. The statutes could be interpreted to provide liability even when placeshifting from a single person to the same person within the same home. See *supra* Part III.B.1 for more information.

332. See *supra* Part II.D.1 for a description of the potential felony-grade criminal penalties under the cable and satellite television theft statutes.

333. See *supra* Part III.B.3 for an explanation of why placeshifting to other persons will more likely lead to liability.

334. See *supra* Part III.C for a discussion of potential enforcement issues.

335. See *supra* Part III.B.1 for a discussion of §§ 605 and 553’s focus on “persons” rather than places or means.

distinction serves both of Congress's intentions for the statutes: to prevent signal theft, and to encourage the development of new technology.³³⁶

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336. See *supra* Part III.B.1–3 for a discussion of Congress's intent with §§ 605 and 553.

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