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Unscrambling the Broadcasting Status of Over-the-Air Subscription Television

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COMMENTS

Unscrambling the Broadcasting Status of Over-the-Air Subscription Television Under 47 U.S.C. § 605

I. INTRODUCTION

Over-the-air subscription television (STV) is a unique form of pay television.[1] STV stations send scrambled video transmissions that can be received only in distorted form by a normal television set. The audio portion of the transmission is sent by a subfrequency which cannot be received by a normal television or radio receiver.[2] Several different methods of scrambling the audio and video signals are used.[3] These signals are unscrambled into usable form by decoders that are leased to subscribers.[4]

STV was born amid controversy caused by fears that it

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1. In addition to over-the-air transmission of scrambled signals, there are also subscription TV systems that use a cable from point of transmission to point of destination. Amendment of Part 73 of the Comm'n's Rules & Regs. (Radio Broad. Servs.) To Provide for Subscr. TV Serv. (Notice of Inquiry) 3 F.C.C.2d 1, 1 n.1 (1966) [hereinafter cited as Amendment of Part 73: Notice of Inquiry]; W. JONES, CASES AND MATERIALS ON ELECTRONIC MASS MEDIA 477 (1979). In this Comment *STV* refers only to scrambled-signal, over-the-air subscription television.

2. Chartwell Communications Group v. Westbrook, 637 F.2d 459, 461 (6th Cir. 1980); Landfear, *Build This Pay-TV Decoder,* RADIO ELECTRONICS, Jan. 1981, at 41.

3. Landfear, *supra* note 2, states:

> Presently, five different encoding schemes have been authorized by the FCC: at least three of them are in use now. All of those systems use essentially the same approach to encoding the signal. Either the audio channel is taken off the main channel and put on a subcarrier, or another audio channel is added somewhere in the composite signal, usually below the video carrier. The video is encoded by removing, suppressing, or masking the sync pulses: that disables the receiver's sync-separator circuit. A viewer who received such a scrambled signal on a normal receiver would see no coherent picture . . . .

Id. at 41.

4. The rationale for requiring the decoding device to be leased rather than sold to subscribers is two-fold: first, it protects subscribers from investing in expensive equipment that may become obsolete; second, because decoders are not interchangeable between broadcasting stations, it encourages competition by allowing the consumer to switch to other STV broadcasters without losing money. National Subscr. TV v. S & H TV, 644 F.2d 820, 825 n.7 (9th Cir. 1981).

would destroy conventional television broadcasting by siphoning off network programs and audiences.[5] The Federal Communications Commission (FCC) established strict regulations designed to protect conventional television against a nationwide STV system.[6] However, STV broadcasters are now fighting for their own survival because their signals are being decoded and used free of charge by nonsubscribers. Certain electronics outlets now make available equipment capable of decoding STV transmissions, enabling individuals who do not and never will pay for the service to receive and view STV broadcasts.[7] In an effort to combat this nationwide "piracy" of their programming, stations have initiated litigation against many of the electronics outlets that are selling decoders.[8]

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5. Whether the FCC had authority to authorize an experimental STV system and subsequently a nationwide STV system was hotly contested in FCC hearings and in the federal courts. An experimental and ultimately a nationwide STV system was finally approved by the FCC, subject to specific regulations, and these decisions were upheld in the federal courts. For cases and hearings dealing with these controversies, see generally National Ass'n of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); Connecticut Comm. Against Pay TV v. FCC, 301 F.2d 835 (D.C. Cir.), *cert. denied*, 371 U.S. 186 (1962); Amendment of Part 73 of the Comm'n's Rules & Regs. (Radio Broad. Servs.) To Provide for Subscr. TV Serv. (Fourth Report), 15 F.C.C.2d 466 (1968) [hereinafter cited as Amendment of Part 73: Fourth Report]; Amendment of Part 3 of the Comm'n's Rules & Regs. (Radio Broad. Servs.) To Provide for Subscr. TV Serv. (Third Report), 26 F.C.C. 265 (1959); Amendment of Part 3 of the Comm'n's Rules & Regs. (Radio Broad. Servs.) To Provide for Subscr. TV Serv. (Second Report), 16 Rad. Reg. (P & F) 1539 (1958); Amendment of Part 3 of the Comm'n's Rules & Regs. (Radio Broad. Servs.) To Provide for Subscr. TV Serv., 23 F.C.C. 532 (1957) [hereinafter cited as Amend. of Part 3: First Report].

A comprehensive history of STV development may be found in W. JONES, *supra* note 1, at 475-504.

6. National Ass'n of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), describes these restrictions as follows:

> In brief, the Commission provided that STV stations could be established only in communities located entirely within the Grade A contours of five or more commercial broadcast stations, and that only one STV station could be located in each such community; that each STV station must broadcast at least twenty-eight hours per week of free programming; and that STV stations must observe detailed restrictions on the kind and quantity of subscription programs broadcast in order to prevent "siphoning." Rules were also established governing the technical specifications and *modus operandi* of STV stations.

Id. at 197-98 (citations omitted).

7. There are estimates of 100,000 signal snatchers of both cable and over-the-air subscription systems nationwide. In Miami alone 10,000 subscribers are matched by about 10,000 nonsubscribers receiving usable transmissions. Taylor, *Crossing Swords With The "TV Pirates,"* U.S. NEWS & WORLD REPORT, May 25, 1981, at 65.

8. American Television and Communications, Inc., a Time subsidiary, has sued 17 Miami dealers. *Id.* at 65. *See also* Waters, *Tuning in Pay TV Paylessly*, NEWSWEEK, Feb.

The fundamental claim of STV broadcasters in this litigation is that they are entitled to protection from signal theft under section 605 of the Communications Act of 1934. Section 605 prohibits the unauthorized reception and use of communications that are not broadcast "for the use of the general public."[9] In order to qualify for protection under section 605, a broadcaster must be classified by the FCC as one transmitting communications that are not intended for public use. The FCC has labeled this type of transmission as point-to-point communications.[10] Communications that are classified as broadcasting (rather than point-to-point communications) are not protected under section 605.[11] The STV broadcasters claim that their transmissions are not broadcasts to the general public and that they therefore should be protected by section 605.

However, STV has been classified by the FCC as broadcasting and, therefore, is not within section 605's protection from signal theft.[12] The FCC made this classification in a case that challenged its authority to establish a nationwide STV system.[13] The FCC ruled that it had jurisdiction over any broadcast service offered without discrimination to all members of the public, and classified STV as broadcasting because it offered its subscription service to the general public.[14] The FCC later used this same offering of service test to classify STV as broadcasting under section 605.[15] However, as illustrated below, this test is a

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11, 1980, at 93.

9. 47 U.S.C. § 605 (1976). The section reads in pertinent part:

> [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication . . . or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . . [T]his section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

10. In KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35 (C.D. Cal. 1967), the court noted that the FCC defines point-to-point communications as "broadcasting to specific listeners." *Id.* at 41.

11. The term *broadcasting* is used here in a technical sense. The exact meaning of *broadcasting* when used in this technical sense is the subject of this Comment. In some parts of this Comment, *broadcasting* will also be used as a layman would use it.

12. Amendment of Part 73: Fourth Report, *supra* note 5, at 575-76; Amendment of Part 73: Notice of Inquiry, *supra* note 1, at 8-11.

13. Amendment of Part 73: Notice of Inquiry, *supra* note 1, at 8-11.

14. *Id.*

15. Amendment of Part 73: Fourth Report, *supra* note 5, at 575-76.

drastic departure from the test the FCC traditionally has used to determine broadcast status under section 605. The FCC's traditional test classifies a transmission as broadcasting if the broadcaster intends his signal to be received by the general public, rather than by a specific audience.

Since the FCC's classification of STV, only five cases have addressed the issue of whether STV is entitled to protection under section 605. Three of these cases will be discussed here.[16] The first is *National Subscription Television v. S & H TV (NST Trial)*[17] in which the United States District Court for the Central District of California ruled that the FCC has correctly classified STV as broadcasting for purposes of section 605 and that STV is not entitled to section 605's protection.[18] The second is *Chartwell Communications Group v. Westbrook*,[19] which granted STV protection under section 605. In *Chartwell* the United States Court of Appeals for the Sixth Circuit found that the FCC's classification of STV as broadcasting need not apply to section 605 because that classification was made only to establish the Commission's authority to set up an STV system.[20] The third case is *National Subscription Television v. S & H TV (NST Appeal)*,[21] in which the Ninth Circuit reversed the *NST Trial* decision. The court in *NST Appeal* agreed with the Sixth Circuit's analysis in *Chartwell* that the FCC had not classified STV as broadcasting for purposes of section 605.[22]

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16. Omitted from this discussion is United States v. Westbrook, 502 F. Supp. 588 (E.D. Mich. 1980), a criminal case using essentially the same analysis as Chartwell Communications Group v. Westbrook, 637 F.2d 459 (6th Cir. 1980), discussed *infra*. Also omitted is the unpublished district court decision in *Chartwell*, which was overruled by the Sixth Circuit. *Id.*

Although not involving STV, the case of Home Box Office, Inc. v. Pay TV of Greater New York, Inc., 467 F. Supp. 525 (E.D.N.Y. 1979), also dealt with unauthorized interception of subscription signals. The case involved a multipoint distribution service (MDS), a type of service which uses high frequency microwaves to send signals which can be received by a normal television only through a special antenna device (a *down converter*). *Home Box Office* classified multi-point distribution as point-to-point communications under section 605. This case will be referred to below because of the similarities between STV and MDS transmissions. Another case dealing with classification of MDS transmissions under section 605 is Orth-O-Vision v. Home Box Office, 474 F. Supp. 672 (S.D.N.Y. 1979), which classified MDS as broadcasting by relying on the FCC's classification of STV as broadcasting.

17. No. CV 80-829-LTL (C.D. Cal. Aug. 4, 1980).

18. *Id.*

19. 637 F.2d 459 (6th Cir. 1980).

20. *Id.* at 464.

21. 644 F.2d 820 (9th Cir. 1981).

22. *Id.* at 823-25.

A careful analysis of these three cases and the relevant law demonstrates that: (1) the courts in *Chartwell* and *NST Appeal* incorrectly concluded that the FCC has not classified STV as broadcasting for purposes of section 605; (2) the FCC classification of STV as broadcasting for purposes of section 605 is erroneous and should be overruled; and (3) the classification of STV as point-to-point communication will not undermine the FCC's power to authorize a nationwide STV system.

II. The Key Precedents

A. *The* NST Trial *Case*

Plaintiffs, an STV partnership and an STV broadcasting station, filed suit against several electronics firms that were selling components, plans and schematics to aid in the creation of devices capable of receiving plaintiff's transmissions in usable form.[23] The case was tried before the Federal District Court for the Central District of California. Defendants moved for dismissal alleging plaintiffs had failed to state a claim upon which relief could be granted. Defendants argued that plaintiffs were not entitled to protection under section 605 for any one of three reasons: (1) a private right of action was not available under section 605; (2) defendants had not violated the prohibitions of section 605; and (3) STV was broadcasting for purposes of section 605 and therefore was not entitled to protection under that section.[24] In deciding whether plaintiffs were entitled to protection under section 605, the court first concluded that a private right of action did exist under the section. The court utilized the four-step test of *Cort v. Ash*[25] and cited two other precedents to support this conclusion.[26] It also determined that if STV was protected by the Act, the electronics outlets had violated the provisions of that section by aiding persons in the interception and use of

23. No. CV 80-829-LTL, slip op. at 1-2. The partnership involved here was National Subscription TV doing business in California as "ON-TV" and "ON Subscription TV." The broadcasting station was Oak Broadcasting Systems, Inc. *Id.*

24. *Id.* at 3-4.

25. 422 U.S. 66, 78 (1975). This is the test traditionally used by the Supreme Court in determining whether a federal private right of action can be inferred from a federal statute that does not specifically provide for a private right of action.

26. The court cited Touche Ross & Co. v. Redington, 422 U.S. 560 (1979), and Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979). No. CV 80-829-LTL, slip op. at 3.

plaintiff's signals.[27]

The court's decision thus turned on whether STV was broadcasting "for use of the general public" under section 605, since such broadcasting is not entitled to the section's protection. In construing the language of section 605, the court turned to 47 U.S.C. § 153(o), which defines broadcasting, for purposes of the Communications Act, as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."[28] The court found that section 153(o) gave the appropriate definition of broadcasting for section 605 cases and construed the sections together to conclude that transmissions not intended for the use or receipt of the public are protected from interception under section 605.[29] It also stated that by classifying STV as broadcasting under section 153(o), the FCC had clearly implied that STV is also broadcasting under section 605.[30] The court relied on the test used by the FCC to classify STV as broadcasting: "the primary touchstone of a broadcast service is the intent of the broadcaster to provide radio or television program service without discrimination to as many members of the general public as can be interested in the particular program . . . ."[31] The court found the FCC ruling determinative with regard to STV's broadcast status. It decided that in light of the FCC's classification of STV as broadcasting under section 605, only Congress could provide protection to the industry from unauthorized use of STV signals.[32] Having thus determined that no remedy existed for plaintiffs, the court granted defendants' motion to dismiss.[33]

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27. *Id.* The section 605 prohibition applies to those who aid in the reception of the signals. 47 U.S.C. § 605 (1976). This also includes interception of intrastate transmissions. KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35, 41 (C.D. Cal. 1967).

28. No. CV 80-829-LTL, slip op. at 4 (quoting 47 U.S.C. § 153(o) (1976)).

29. *Id.* at 4-6. The court compared the language of section 605 to the language of section 153(o) and found no distinction between "the general public" in the one and "the public" in the other. This language variation was not considered sufficiently significant to prevent the use of section 153(o) in defining broadcasting under section 605. *Id.* at 4.

30. *Id.* at 5-6. FCC hearings on the establishment of a nationwide STV system were cited as the source of these classifications, specifically Amendment of Part 73: Notice of Inquiry, *supra* note 1, and Amendment of Part 73: Fourth Report, *supra* note 5.

31. Amendment of Part 73: Notice of Inquiry, *supra* note 1, at 9.

32. No. CV 80-829-LTL, slip op. at 7.

33. *Id.*

B. The Chartwell *Case*

The facts in this case parallel those in *NST Trial.* In June 1979, Chartwell Communications Group established an STV business in the greater metropolitan Detroit area under the name of "ON-TV."[34] In May 1980 Westbrook and Moser, doing business as Pony Electronics and Video Vend respectively, began selling devices capable of decoding Chartwell's transmissions.[35]

On July 8, 1980, Chartwell sought and received a temporary restraining order against Westbrook and Moser to prevent them from selling devices capable of unscrambling Chartwell's transmissions.[36] On August 14, 1980, Judge Robert E. DeMascio of the United States District Court for the Eastern District of Michigan granted defendants' motion to dismiss on the ground that section 605 of the Communications Act does not provide a private right of action by which Chartwell could seek redress.[37] The United States Court of Appeals for the Sixth Circuit reversed and remanded in an opinion written by Judge Bailey Brown.[38]

In finding that Chartwell had a private right of action under section 605, the court of appeals first had to decide whether STV was broadcasting under that section. To find the test that should be used to make the classification, the court referred to earlier cases that had classified various types of transmissions under section 605. The cases referred to were *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*[39] and *Home Box Office, Inc. v. Pay TV of Greater New York, Inc.*[40] which dealt with classification of FM subcarrier frequencies and multipoint distribution service (MDS) signals respectively.[41] The

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34. 637 F.2d at 460.
35. *Id.* at 461.
36. *Id.*
37. *Id.* at 461-62.
38. *Id.* at 467.
39. 264 F. Supp. 35 (C.D. Cal. 1967).
40. 467 F. Supp. 525 (E.D.N.Y. 1979).
41. FM subcarrier frequencies are separate from FM main channel broadcasts and usually transmit background music. The transmissions can be picked up only with the aid of special receivers. 264 F. Supp. at 37-38. MDS signals are microwaves transmitted at higher frequencies than a normal TV can receive. Normally, only a very large antenna can receive these signals, but with the aid of a device called a *down converter*, a normal antenna can receive these signals for the subscriber's TV. MDS transmissions are usually not encoded. 637 F.2d at 464 n.3; Taylor, *supra* note 7, at 65. In New York apartment complexes, the signals are received by special receivers on top of the buildings and the

test used in these precedents and adopted by *Chartwell* is essentially that broadcasting classifications ought to concentrate on whether the transmission is "intended for the use of the general public."[42] Judge Brown emphasized that content, mass appeal, and mass availability are all factors to be considered in determining if a transmission is broadcasting, but concluded that these factors could be negated by "clear, objective evidence that the programming is not intended for the use of the general public."[43]

The court rejected the argument of Westbrook and Moser that the FCC already had classified STV as broadcasting for purposes of section 605. It found that the FCC made that classification only in the context of its authority to establish a nationwide STV system and not necessarily with regard to section 605.[44] Judge Brown distinguished "for use of the general public" in section 605 from "intended to be received by the public" in section 153(o) by finding a difference "between making a service *available* to the general public and intending a program for the *use* of the general public."[45] He concluded that the FCC's classification of STV as broadcasting under section 153(o) could be justified by STV's function in making a service available to the general public, but since STV intended its signals to be used only by STV subscribers, STV did not intend its programs "for the use of the general public."[46] The court also cited a recent FCC staff report which criticized the FCC's classification of STV as broadcasting. Judge Brown found the report persuasive, even though it did not reflect the official views of the FCC.[47] In the event that the FCC had classified STV as broadcasting under section 605, the court stated its willingness to overrule the FCC.[48]

After concluding STV should be classified as point-to-point

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transmissions are relayed to subscribers below by cable. 467 F. Supp. at 526.

42. 637 F.2d at 459, 465. The meaning of this test will be developed more fully below. Essentially, the test concentrates on the intent of the broadcaster with regard to the destination of the transmission.

43. *Id.* (citation omitted).

44. *Id.* at 464.

45. *Id.* at 465 (emphasis added).

46. *Id.*

47. *Id.*

48. *Id.* at 464-65. The court cited as support for its ability to overrule the FCC the case of Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

communications under section 605, the court determined that Westbrook and Moser were in violation of that section because, by selling decoders and schematics for decoders, they had aided in the unauthorized reception and use of Chartwell's signals.[49] The court then applied the four-step test of *Cort v. Ash*[50] to determine that a private right of action was available to Chartwell under section 605 and reversed the district court's dismissal.[51]

C. *The* NST Appeal *Case*

After *Chartwell,* the United States Court of Appeals for the Ninth Circuit overruled *NST Trial.*[52] In rejecting the district court's classification of STV as broadcasting under section 605, the appellate court relied heavily on the analysis in *Chartwell. NST Appeal* held that section 153(o) was not the definition of *broadcasting* to be applied in construing what constitutes broadcasting "for use of the general public" under section 605.[53] Rather a distinction was drawn between the language of the two sections: "We think that an individual might 'broadcast'—*i.e.,* transmit a signal over the airwaves with the intent that it be received by the public within the meaning of section 153(o)—without such broadcasting being for the use of the public within the meaning of [section 605]."[54]

Because of its conclusion that the definition of broadcasting for section 605 was different from the definition for section 153(o), the court denied appellants' request that the FCC's classification of STV as broadcasting be overruled. The appellants requested that the FCC classification be overruled because they agreed with appellees that section 153(o) determines the meaning of broadcasting under section 605 and that the FCC had classified STV as broadcasting under section 605.[55] The court

49. 637 F.2d at 466.

50. 422 U.S. 66 (1975).

51. 637 F.2d at 466. The court also cited several cases that had found a private right of action under section 605: Guido v. City of Schenectady, 404 F.2d 728 (2d Cir. 1968), *cert. denied,* 395 U.S. 962 (1969); Pugach v. Dollinger, 277 F.2d 739 (2d Cir. 1960), *aff'd per curiam on other grounds,* 365 U.S. 458 (1961); Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); Home Box Office, Inc. v. Pay TV of Greater N.Y., Inc., 467 F. Supp. 525 (E.D.N.Y. 1979); KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35 (C.D. Cal. 1967).

52. 644 F.2d at 827.

53. *Id.* at 824.

54. *Id.*

55. *Id.* at 821.

stated that though the implication could be drawn from past precedents that section 153(o)'s definition of broadcasting is determinative for section 605 as well, the *Chartwell* decision had made it clear that these two sections should be treated separately,[56] and that therefore there was no need to overrule the FCC's classification.

The court decided that STV transmissions are point-to-point communications under section 605, relying on the intent test that the *Chartwell* court used to make the same determination.[57] Finally, the court concluded that the electronics firms had violated the prohibitions of section 605 and reversed the district court's dismissal of the plaintiffs' cause of action.[58]

III. Analysis

A. An Overview

Even though the courts in *Chartwell* and *NST Appeal* properly granted STV protection under section 605, they based their holdings on two erroneous assumptions. These assumptions were: (1) that the FCC has not classified STV as broadcasting for purposes of section 605, but has done so only in the context of its authority to establish a nationwide STV system; and (2) that the definition of *broadcasting* in section 153(o) should not be used to construe what constitutes broadcasting under section 605. Because of these two errors, *Chartwell* and *NST Appeal* offer no guarantee that STV will receive similar protection from other courts.

Contrary to the assumption made in *Chartwell* and *NST Appeal*, the FCC has in fact classified STV as broadcasting under section 605. The test traditionally used by the FCC to classify communications under section 605 (to determine whether they are broadcasting and thus not entitled to that section's protection) concentrates on the intended destination of the broadcaster's signal. The FCC used this intended destination test in all classifications under section 605 up to the time it classified STV. However, the FCC used a different test to classify STV as broadcasting under section 605. The test used to classify STV concentrated on whether the broadcaster intended to offer his service to the public generally. This is an arbitrary

56. *Id.* at 823-24.
57. *Id.* at 824-26.
58. *Id.* at 826-27.

and unfair deviation from the test traditionally used by the FCC.

Soon after its STV ruling, the FCC returned to its traditional test for section 605 classifications of broadcasting. The FCC has since used the traditional test for all broadcast classifications under section 605, which indicates that it is still the correct test. Therefore, courts that rely on the test used to classify STV as broadcasting will be using an incorrect test and will reach erroneous results. The only sure way to avoid the confusion caused by the existence of these conflicting tests and thus guarantee consistent classifications of all types of communications under section 605 is to overrule the FCC's use of an improper test to classify STV as broadcasting for purposes of section 605.[59]

B. Chartwell *and* NST Appeal *Incorrectly Concluded that the FCC Has Not Classified STV as Broadcasting Under Section 605*

1. Section 153(o) defines broadcasting for purposes of section 605

Although *NST Appeal* held that broadcasting under section 153(o) does not control classifications under section 605, the court realized that the opposite conclusion could be inferred from previous cases. It argued that this inference was defeated because *Chartwell* had made it clear that there was a difference in the wording and meaning of the two sections.[60] But before *Chartwell*, both the courts and the FCC had consistently ruled that section 153(o) does define broadcasting for section 605.

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59. *Chartwell* reserved reversal of the FCC as an option in the event the FCC had classified STV as broadcasting under section 605. 637 F.2d at 464-65.

60. 644 F.2d at 823-24. *NST Appeal*'s interpretation of *Chartwell* is strongly supported by the distinction that *Chartwell* drew between intent to make a service available to the public generally and intent to restrict the use of the service to specific individuals. *Chartwell*, however, did not explicitly state that section 153(o) does not define broadcasting under section 605. The *Chartwell* court possibly found the FCC's classification of STV as broadcasting acceptable because, although section 153(o) defines broadcasting for section 605, section 153(o) can be construed differently when used in other contexts.

Since the *Chartwell* court concluded that the FCC had never classified STV, it accepted the possiblility that STV could be classified as broadcasting under section 153(o) when viewed in the context of the FCC's authority to authorize an STV system, and yet also be classified as point-to-point communications under section 153(o) when viewed in the context of section 605.

If this is the proper reading of *Chartwell*, it is subject to the same criticism (made later in this Comment) that applies to *NST Appeal*'s interpretation of *Chartwell*.

The leading case in the area is *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*[61] The case dealt with the section 605 classification of subcarrier FM transmissions. These transmissions are broadcast on different frequencies than standard channel FM transmissions so that they cannot be received by normal FM radio receivers. Subscribers are provided with special equipment capable of receiving the transmissions.[62] The issue in *KMLA* was whether these signals could be lawfully intercepted by nonsubscribers in light of section 605.[63] To define broadcasting under section 605 the court looked to section 153(o): "As to what constitutes 'broadcasting,' 47 U.S.C. § 153(o) states: ' "Broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.' "[64] The *KMLA* court clearly found the section 153(o) definition of broadcasting controlling for purposes of section 605.

In construing the meaning of "intended for public use" in section 153(o), the court emphasized the intended destination of the broadcaster's signal and sustained the FCC's classification of these frequencies as point-to-point communications.[65] The

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61. 264 F. Supp. 35 (C.D. Cal. 1967).

62. *Id.* at 37-38. This type of broadcasting, called *multiplexing*, provides background music for commercial establishments.

63. *Id.* at 36.

64. *Id.* at 39. *See also id.* at 42, where the court also explicitly applies section 153(o) to make classifications under section 605.

65. The FCC first expressed its opinion that multiplexing is point-to-point communications under section 605 in Amendment of Parts 2, 3 & 4 of the Comm'n's Rules & Reg., 11 Rad. Reg. (P & F) 1590 (1955). Specifically, the FCC stated:

> [T]he service directed to the special points or subscribers would clearly appear to be the key to the over-all operation. A background music or storecast operation employing telephone wires is concededly providing an industrial point-to-point service; we cannot conclude that the essential nature of such an operation is changed because of the use of radio transmissions. It is our view that the operation—in so far as the programming is directed to the special interests of the industrial, mercantile, transportation, or other subscribers and is not primarily intended for reception by the general public—must be characterized as *predominantly* non-broadcast in nature.

Id. at 1591 (emphasis in original). This analysis was formulated with regard to functional music or simplex operations—main channel radio broadcasts accompanied by sub-audible signals which permit special receivers to delete advertisements and announcements. The FCC applied this analysis to multiplexing as follows:

> [I]t is our opinion that section 605 would be contravened by the unauthorized reception of the FM signal only when such signal is being transmitted only for reception by the special interests of the industrial, mercantile, transportation or other subscribers without any *intention* of reception by the general public. This would be the case with all transmissions on a multiplex basis.

KMLA court stated that the test for classifying communications under section 605 was "whether KMLA intended a dissemination of its multiplex radio communications to the general public."[66] The court had no difficulty concluding that the subcarrier FM transmissions were not broadcasting:

> The main channel broadcasts of FM stations are intended for the public and may be heard without charge by anyone having a radio. On the other hand the background music program of the plaintiffs, like those of other FM stations, as transmitted over a multiplex channel, is not intended for the public but is intended solely for paying subscribers; the background music can't be heard by the public.[67]

The test used in *KMLA* for section 605 classifications concentrates on the broadcaster's intent with respect to the destination of his signal. The FCC originally classified subcarrier FM frequencies as point-to-point communications using the intended destination test.[68] In addition, the FCC has cited *KMLA*

Id. at 1599 (emphasis in original).

The language about the predominant nature of the broadcast in the first quotation above had no application to multiplexing, but referred to simplexing. The FCC decided that simplexing transmissions were broadcasting under section 605 except for the subaudible signals, which it classified as point-to-point communications. *Id.* at 1599. The simplexing portion of the classification was later overruled in Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959). *Functional Music* did not criticize the test, but only its application, and the test was fully approved in *KMLA*. As will be illustrated, this traditional analysis conflicts with the analysis used by the FCC in the classification of STV transmissions.

In addition to the specific application illustrated above, *KMLA* states:

> The Commission over a long period of time has interpreted the statutory term "broadcasting" not to include transmission such as here involved, and has in fact held that a radio station engaged in broadcasting material of interest only to a particular person or persons [here the transmission of background music is not intended for the general public] is not broadcasting.

264 F. Supp. at 41 (brackets in original). It is apparent that the FCC had taken this position for some time prior to its classification of STV.

66. 264 F. Supp. at 40 (footnote omitted).

67. *Id.* at 37-38. *See also id.* at 42.

68. For a discussion of the FCC's analysis in making this classification, see *supra* note 65. In addition, there is language in *KMLA* which indicates that in classifying multiplexing as point-to-point communication, the FCC used the definition of broadcasting in section 153(o) to determine classifications of transmissions under section 605:

> The ruling of the Commission that multiplex transmissions as here involved, pursuant to the Commission's rules on subsidiary communications authorizations, do not have the essential attributes of broadcasting within the meaning of 47 U.S.C. § 153(o) and that *consequently* "Section 605 of the Communications Act is contravened by the unauthorized reception of FM multiplex programs intended solely for reception by industrial, mercantile and other subscribers" is a reasonable determination.

with approval on several occasions, even after its classification of STV as broadcasting.[69] This demonstrates that FCC's approval of both the use of section 153(o) to define broadcasting under section 605, and *KMLA*'s interpretation of the intent phrase of section 153(o)—an interpretation previously developed by the FCC itself. Other courts also agree with the *KMLA* approach.[70]

Sound reasons support the use of the intended destination test. Since section 153(o) defines broadcasting for the entire Communications Act, it is the most logical place to turn to in deciding the meaning of broadcasting under section 605. Unless there is some reason not to apply the definition contained in section 153(o) to section 605, it should be the controlling definition for section 605 and all other sections of the Act. No reason appears on the face of the Communications Act for rejecting this approach nor does there appear to be any valid logical basis for doing so. Section 153(o) speaks of "the dissemination of radio communications intended to be received by the public."[71] This language focuses on an intent to send a transmission to the general public, not on an offer of service to as many individuals as can be attracted to subscribe to a transmission. Therefore, it seems appropriate to interpret this section as defining broadcasting as the dissemination of transmissions that are intended for the receipt and use of the general public as opposed to specific individuals.

The court in *NST Appeal* admitted that the precedent cases did imply that section 153(o) was determinative for purposes of section 605, but stated that *Chartwell* indicated that the two sections should be treated separately.[72] *Chartwell* was the only authority cited by the court in *NST Appeal* to support this conclusion. The problem with reliance on *Chartwell* to support this position is that *Chartwell* rested on the premise that

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264 F. Supp. at 41 (emphasis added).

69. Regulation of Domestic Receive-only Satellite Earth Stations, 74 F.C.C.2d 205, 216 & n.20 (1979); Applications of Midwest Broadcasting Co., 70 F.C.C.2d 1506, 1547 & n.11 (1978); Request by Greater Wash. Educ. Telecomm. Ass'n, Inc., 49 F.C.C.2d 948, 948-49 (1974); Application of WFTL Broadcasting Co., 45 F.C.C.2d 1152, 1153-54 (1974).

70. *See* Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959), which uses the same analysis as the *KMLA* court in classifying simplexing signals as broadcasting, including the use of section 153(o) to define broadcasting for purposes of section 605. 274 F.2d at 548 & n.17. *See also* Home Box Office, Inc. v. Pay TV of Greater N.Y., Inc., 467 F. Supp. 525 (E.D.N.Y. 1979); *and* the FCC decisions cited *supra* note 69.

71. 47 U.S.C. § 153(o) (1976).

72. 644 F.2d at 823-24.

the FCC had classified STV as broadcasting only in the context of its authority to establish a nationwide STV system and not in the context of section 605.[73] This simply is not true.

2. *The FCC has classified STV as section 605 broadcasting*

NST Trial correctly found that the FCC had classified STV as broadcasting for purposes of section 605.[74] In 1966 the FCC classified STV as broadcasting under section 153(o) and then addressed the question whether all broadcasting rules, particularly section 605, would apply to STV in the same way they apply to regular broadcasting.[75] At that time the FCC called for briefs on the matter and postponed its decision to a later date.[76]

The FCC addressed the issue again in *Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) To Provide for Subscription Television Service (Fourth Report)*.[77] After examining the briefs of several parties, the FCC decided that all of the rules and regulations applicable to all broadcasting (again listing section 605 specifically) should apply to STV in the same way as they apply to regular broadcasting unless waived by the Commission in issuing STV authorizations.[78] The qualification was added because the Commission admitted that there may be differences between conventional television and subscription television that would justify exempting STV from certain regulations; however, future experience would dictate the propriety of such exemptions.[79] Since section 605 was specifically listed as applying to STV in the same way as to regular broadcasting, the FCC refused to grant STV section 605 protection against unauthorized reception.[80]

The test used by the FCC to classify STV as broadcasting was totally different from the traditional test it used in previous and subsequent section 605 classifications. The analysis used by the FCC to classify STV as broadcasting was developed in *Amendment of Part 73 of the Commission's Rules and Regulations (Radio Broadcast Services) To Provide for Subscription*

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73. 637 F.2d at 464.
74. Amendment of Part 73: Notice of Inquiry, *supra* note 1.
75. *Id.* at 11.
76. *Id.*
77. 15 F.C.C.2d 466 (1968).
78. *Id.* at 575.
79. *Id.* at 575-76.
80. *Id.* at 573-74.

Television Service (Notice of Inquiry) in response to a challenge of the FCC's authority to permit the establishment of a subscription television service.[81] After stating that the source of advertising revenue or subscription fees should not be a factor in determining broadcast status,[82] the Commission stated its test under section 153(o):

> It would appear that the primary touchstone of a broadcast service is the intent of the broadcaster to provide radio or television program service without discrimination to as many members of the general public as can be interested in the particular program as distinguished from a point-to-point message service to specified individuals . . . . [W]hile particular subscription programs might have a special appeal to some segment of the potential audience, this is equally true of a substantial portion of the programming now transmitted by broadcasting stations.[83]

This offer of service test ties broadcasting to the sender's intent to expand his service to as many members of the public as possible in contrast to the traditional intended destination test which ties broadcasting to the sender's intent with respect to the destination of his signal. In considering whether STV was broadcasting under section 605, the FCC used this new construction of the intent phrase of section 153(o).[84] This further supports the proposition that section 153(o) is determinative for purposes of section 605 even though the FCC, in classifying STV, used a different construction of the intent phrase of section 153(o).

As mentioned above, the FCC did reserve the right to make exceptions to the broadcasting classification of STV where necessary. This reservation itself shows the weakness of the FCC's classification because it implies that it is possible that STV is not broadcasting. However, the FCC has not only failed to make an exception but has explicitly stated that STV is not protected under section 605. The FCC recently made this admission in *Regulation of Domestic Receive-only Satellite Earth Stations.*[85] In that case the FCC classified cablevision satellite transmis-

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81. 3 F.C.C.2d 1, 8-11 (1966).

82. *Id.* at 9.

83. *Id.* (quoting Comments of the Federal Communications Commission on H.R. 6431, F.C.C. 54-601, at 1-2 (May 6, 1954)).

84. 15 F.C.C.2d at 573-76.

85. 74 F.C.C.2d 205, 216 (1979).

sions[86] as point-to-point communications using the intended destination test.[87] In its analysis justifying use of the traditional test, the FCC criticized *Orth-O-Vision, Inc. v. Home Box Office*[88] because the court classified MDS transmissions as broadcasting under section 605 using the same analysis that the FCC had itself used to classify STV as broadcasting under section 605 (i.e., the offer of service test).[89] The FCC criticized the opinion because it "appears to reach a contrary result with regard to the significance of the intended audience as a determinant of the applicability of Section 605 [the intended destination test]."[90] Ironically, *Orth-O-Vision* had used the offer of service test to classify MDS transmissions as broadcasting in reliance on the FCC's use of the same test under similar facts.[91] The FCC's criticism of *Orth-O-Vision*'s use of the offer of service test, coupled with the fact that the FCC used the intended destination test to classify cablevision satellite transmissions as point-to-point communications, demonstrates that the FCC has continued to use the traditional intended destination test in its broadcast classifications under section 605 subsequent to its STV classification. This means that the FCC recognizes the intended destination test as the proper test to use whenever section 605 classifications are made.

Continuing its criticism of the *Orth-O-Vision* decision, the FCC did not deny that it had classified STV as broadcasting under section 605. It merely stated that *Orth-O-Vision*'s conclusion that there was little to distinguish STV from MDS transmissions was dicta, and was not relevant to the FCC's classification of cablevision satellite transmissions.[92] The FCC did not attempt to distinguish STV from MDS transmissions or cablevision satellite transmissions, but merely criticized *Orth-O-Vision*'s comparison of STV and MDS signals. At the same time,

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86. Cable stations often use satellites to get long-distance signals for the exclusive use of their subscribers. The receive-only earth stations pick up the satellite transmissions and feed them to cable lines. Regulation of Domestic Receive-only Satellite Earth Stations, 70 F.C.C.2d 1460, 1460 & n.1 (1979).

87. 74 F.C.C.2d at 216.

88. 474 F. Supp. 672 (S.D.N.Y. 1979).

89. The implication is that the FCC considers MDS transmissions as point-to-point communications. The Commission also cited with approval Home Box Office, Inc. v. Pay TV of Greater N.Y., Inc., 467 F. Supp. 525 (E.D.N.Y. 1979), which classified MDS transmissions as point-to-point communications. 74 F.C.C.2d at 216 n.20.

90. 74 F.C.C.2d at 216 n.20.

91. 474 F. Supp. at 682.

92. 74 F.C.C.2d at 216 n.20.

the FCC explicitly stated that "Section 605 is not applicable to pay TV."[93]

Like *NST Trial, Orth-O-Vision* recognized that the FCC classified STV as broadcasting under section 605. The FCC has stated explicitly that STV has been so classified. Moreover, since the FCC staff report cited in *Chartwell* criticizes the FCC's separate treatment of STV from subcarrier FM frequencies and MDS transmissions, the report implicitly concluded that the FCC had already classified STV as broadcasting under section 605.[94]

The FCC may have felt that the offer of service test was necessary to overcome the challenge to its authority to establish a nationwide STV system. If so, then the FCC was clearly wrong. The FCC has full power to authorize a nationwide STV system even if STV is classified as point-to-point communication.

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93. *Id.* (parentheses omitted). That "pay TV" refers specifically to STV is clear from the context.

94. 637 F.2d at 465. *Chartwell* describes and quotes the report:

> A recent staff report of the FCC's Office of Plans and Policy entitled "Policies for Regulation of Direct Broadcast Satellites" questions the wisdom of the FCC's classification of STV as broadcasting, at least for section 605 purposes. At page 124, fn.17 the report states:
>
> > Based upon its recognition of their "point-to-point" service characteristics, the Commission has concluded that FM radio and MDS subscription programming services are within the purview of Section 605. . . . It also seems clear that there is no distinguishing factor that would justify the exclusion of STV programming, but not the subscription programming transmitted by other licensees, from the protection afforded by Section 605. For example, it is apparent that the content of FM subscription radio transmissions is not more "private" than STV transmissions and is not for that reason more entitled to Section 605 protection. Although many types of subscription radio services are highly specialized, they are not inherently confidential in nature. Indeed, as one court has noted, Section 605 was intended to protect persons from having their communications received by those not entitled to receive them, and STV operators can only operate their businesses if they can restrict viewers to paying subscribers.
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> *Id.* (citations omitted).

C. *The Federal Courts Can and Should Overrule the FCC's Offer of Service Test as an Arbitrary and Improper Construction of Sections 153(o) and 605*

1. The offer of service test is arbitrary and capricious agency action

Even though a court should give deference to a regulatory agency's findings,[95] it does have authority to overrule an agency decision under proper circumstances. The FCC's formulation of the offer of service test was an interpretation of the statutory provisions of sections 153(o) and 605 of the Communications Act made in the course of an informal rulemaking proceeding.[96] The Administrative Procedure Act[97] states that in reviewing an agency decision, a court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[98] The Act then states the court's scope of review: "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."[99]

In reviewing agency decisions under this standard, the United States Supreme Court has required an agency to adhere to its own precedents. The Court has stated that a deviation from former precedent will be overturned when the agency "has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision."[100] In its classification of STV as broadcasting under section 605,

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95. National Subscr. TV v. S & H TV, No. CV 80-829-LTL, slip op. at 6 (C.D. Cal. Aug. 4, 1980); Orth-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672, 682 n.10 (S.D.N.Y. 1979); KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35, 41-42 (C.D. Cal. 1967).

96. Formal rulemaking decisions are those required by Congress to be made on the record. 5 U.S.C. § 553(c) (1976). No such requirement appears in the Communications Act. That the FCC was involved here in informal rulemaking is supported by a statement of Professors Robinson and Gellhorn: "The only cases of formal rulemaking in the FCC are common carrier rate cases." G. ROBINSON & E. GELLHORN, THE ADMINISTRATIVE PROCESS 188 n.14 (1974).

97. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 6362, 7562 (1976).

98. 5 U.S.C. § 706 (1976).

99. *Id.*

100. Secretary of Agriculture v. United States, 347 U.S. 645, 653 (1954). *See also* W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW, CASES AND COMMENTS 393-95 (1979) [hereinafter cited as W. GELLHORN].

the FCC deviated from its previous construction of section 605. The FCC failed to give any justification for this departure and failed to even mention that a different test had previously been utilized. In addition, the FCC's total abandonment of the offer of service test and return to the intended destination test after its classification of STV, coupled with its criticism of the use of the offer of service test in *Orth-O-Vision,* clearly shows the FCC itself does not view that test as the proper construction of sections 153(o) and 605. Without some rational explanation for the deviation, the FCC's singular use of the offer of service test in classifying STV is arbitrary, capricious, and an abuse of discretion.

In addition to requiring an agency to adhere to its precedents, the courts have also required an explanation when an agency treats similarly situated parties differently.[101] Certainly subcarrier FM transmissions, MDS over-the-air transmissions, and cablevision satellite transmissions could be classified as broadcasting under the offer of service test even though they have been classified as point-to-point communications under the intended destination test. It would be easy to classify all three types of transmissions as broadcasting under the offer of service test because, like STV, the stations transmitting them obviously want to expand their market to as many people as possible because increased subscription fees lead to increased profits.[102] Like STV, these stations may attract only specific audience groups. Also, all of these systems transmit their signals through the public airwaves rather than totally by cable. Since the FCC has never drawn a distinction between STV and these other types of subscription services, and since no apparent distinction exists, consistency demands that all of these transmissions be treated the same; all must be either broadcasting or point-to-point communications under section 605. This conclusion is supported by the FCC staff report discussed previously.[103]

If, as the FCC has indicated, the intended destination test is the proper construction of sections 153(o) and 605, then it should be applied to STV and all other forms of communication.

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101. Contractors Transport Corp. v. United States, 537 F.2d 1160, 1162 (4th Cir. 1976). *See also* W. GELLHORN, *supra* note 100, at 395.

102. MDS transmissions were indeed classified as broadcasting using the offer of service test in the *Orth-O-Vision* case, even though they were classified as point-to-point communications under the traditional intended destination test in *Home Box Office.*

103. The FCC Staff report is discussed *supra* note 94.

STV could easily be classified as point-to-point communications under the traditional test because, like the broadcasters of the three types of transmissions discussed above, STV broadcasters do not intend to have their transmissions received by the general public. Though the service is offered to the public as a whole, the actual transmissions are only intended for individual subscribers.

The FCC has shown no willingness to change the classification of STV or any other transmissions to make its policy consistent. Nor has it justified its treatment of STV by distinguishing STV factually or otherwise from these other forms of transmissions. The FCC did attempt to explain its classification of STV as broadcasting by analogizing STV to conventional forms of broadcasting:

> [I]t may be observed that "intent" may be inferred from the circumstances under which material is transmitted, and that the number of actual or potential viewers is not especially important. For example, . . . "[a] color broadcast by a television station or a broadcast by a new UHF station in a VHF market or a broadcast by an 'educational' television station are [classified as broadcasting] although disseminated with the knowledge that only a highly limited number of persons possessing special equipment will receive the broadcast."[104]

The obvious distinction that the FCC failed to address is that anyone can obtain the equipment to receive the broadcasts mentioned without paying the broadcaster to receive the signal. In the FCC's example, the broadcaster wants everyone to receive the message. In contrast, the STV broadcaster wants only those who have the necessary equipment and who have paid the subscription fees to receive and use the transmissions. Moreover, the FCC's analysis could be applied to any of the three types of transmissions discussed above. The resulting inconsistent treatment of these various types of transmissions is compelling evidence that the FCC's classification of STV is arbitrary, capricious, and an abuse of discretion.

2. *The offer of service test is not in accordance with law*

In addition to inconsistencies in theory and result between the two tests, the offer of service test is "not in accordance with

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104. 3 F.C.C.2d at 9 (quoting Brief for Petitioners Zenith & Teco).

law."[105] This is true for two reasons. First, no precedent supports the offer of service test; rather it is contrary to the previous precedents that all adopt the traditional intended destination test as the proper construction of sections 153(o) and 605. Second, the two tests cannot coexist because the analysis justifying the offer of service test completely undermines the analysis which supports the intended destination test. The only reason the FCC gave to support the offer of service test was that the rationale in *Functional Music, Inc. v. FCC*[106] supports it. However, that construction of *Functional Music* is in direct conflict with its construction in *KMLA* and other decisions that interpret *Functional Music* to support the intended destination test.[107] In order to see why this conflict arises, *Functional Music* must be described and the FCC's reliance on that case in classifying STV as broadcasting must be analyzed.

Functional Music dealt with the classification under section 605 of a system which provided FM background music to businesses. The system was called simplexing and involved broadcasting the same FM radio transmissions to the public as to private subscribers. The private subscribers, however, had special equipment to delete advertisements and other messages.[108] *Functional Music* found that simplexing was broadcasting under section 605 and, therefore, not protected from unauthorized reception.[109] After *Functional Music* the FCC ordered the elimination of simplexing and had it replaced with multiplexing,[110] which involves transmission of FM signals on a subcarrier frequency that cannot be received by a normal radio. Multiplexing has been classified as point-to-point communications since the signals are sent specifically to subscribers and the rest of the public cannot receive them.[111] STV is closer in character to the

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105. 5 U.S.C. § 706 (1976).

106. 274 F.2d 543 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

107. *KMLA* distinguished *Functional Music*. In *Functional Music* the transmissions were intended to be received by all, with a portion of them to be deleted by some, but in the multiplexing situation of *KMLA* the signals were not intended to be received by everyone. The *KMLA* court emphasized that *Functional Music* had utilized the same test and that the FCC erred in applying the test. 264 F. Supp. at 40 n.1.

108. 274 F.2d 544-45.

109. *Id.* at 548.

110. Amendment of Part 73 (Radio Broad. Servs.) To Proscribe the "Simplex" Transmission of Subscriber Background Music by FM Broad. Stations, 2 Rad. Reg. 2d (P & F) 1683 (1964).

111. *KMLA* classified multiplexing as point-to-point communications after distinguishing *Functional Music*. *See supra* note 107.

multiplexing system than to the simplexing system because it involves transmission of a signal to a specific audience.[112] The signal in both cases can be received only through the use of special receiving equipment. In addition, both STV and multiplex broadcasters would be injured financially if nonsubscribers could legally intercept their signals. Simplexing, on the other hand, involves the transmission of signals to the general public. No special receiving equipment is needed to receive and use simplex signals. Simplexing stations would be destroyed financially without large audiences because large audiences are necessary for advertising revenue.

Despite STV's similarity to multiplexing, the FCC classified it as broadcasting. The Commission did this by accepting the reverse of *Functional Music* as true. The Commission concluded that if broadcasting stayed in the public domain even though a portion of it could be deleted by some segments of the public, then "broadcasting remains broadcasting even though a segment of the public is unable to view programs without special equipment."[113] If this analysis were accepted it would totally contradict the analysis which supports the classification of multiplexing as nonbroadcasting.[114] This contradictory analysis would require a reclassification of multiplexing as broadcasting, which the FCC has seemed unwilling to do. *Functional Music* is therefore of little help in justifying the FCC's classification of STV as broadcasting since no distinctions have been drawn between STV and multiplexing. The weakness of the FCC's analysis in developing the offer of service test and its inconsistency with precedent offers compelling evidence that the FCC's classification of STV is not in accord with law.

Moreover, *Functional Music* was cited by *Chartwell* as authority that it could overrule the FCC's STV classification.[115] This is because *Functional Music* found that the FCC's classification of simplexing as point-to-point communications under the traditional intended destination test was erroneous. Rather, the intended audience of simplex transmissions was the general

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112. U.S. v. Westbrook, 502 F. Supp. 588, 591 (E.D. Mich. 1980), supports this distinction between STV and simplexing.

113. 3 F.C.C.2d at 10.

114. The very reason *KMLA* and the FCC classified multiplexing as point-to-point communications was that multiplex signals are intended to be received only by those having special equipment. The *KMLA* court used the traditional intended destination test after factually distinguishing *Functional Music*. *See* 264 F. Supp. at 40.

115. 637 F.2d at 465.

public because everyone received the same transmissions though some persons could delete portions of it.[116] Because the nature of the broadcast was contrary to the traditional test's requirement of a broadcast signal intended for a specific audience, the court found the FCC classification to be "clearly erroneous."[117] This same analysis is applicable to the classification of STV as broadcasting. Under the intended destination test, STV is clearly point-to-point communications. Thus, the FCC classification of STV as broadcasting is clearly erroneous under the *Functional Music* approach.

3. The offer of service test will continue to cause confusion if not overruled

The traditional intended destination test is compatible with the goals of the FCC with regard to STV and other subscription services. *NST Appeal* points out that protecting the STV stations is essential to the FCC's efforts to establish an STV system.[118] Yet STV cannot survive without the protection of section 605. The intended destination test furthers FCC policies while the offer of service test runs directly counter to them.

Because the FCC has not replaced the intended destination test with the offer of service test, its one-time use of the latter test to classify STV as broadcasting under section 605 has created a great deal of confusion among the courts. The *NST Appeal* and *Chartwell* courts formulated a distinction between classifications of communications under sections 153(o) and 605 in order to reconcile the conflict between the two contradictory tests. *NST Trial* and *Orth-O-Vision,* on the other hand, either ignored or were not aware of the traditional intended destination test, and mistakenly adopted the offer of service test as the proper test for all broadcast classifications under section 605 and not just for STV.[119]

The confusion caused by the FCC's inconsistent use of the offer of service test was not corrected by *NST Appeal* or *Chartwell*; indeed, the confusion was compounded. It is very likely that other courts will make the same mistake that the

116. 274 F.2d at 548.

117. *Id.*

118. 644 F.2d at 825.

119. The appellees in both *NST Appeal* and *Chartwell* also argued that the offer of service test should be used for all broadcast classifications under under section 605. 637 F.2d at 464; 644 F.2d at 820, 823.

NST Trial and *Orth-O-Vision* courts made and apply the offer of service test to all transmissions under section 605 because of the FCC's explicit classification of STV as broadcasting under sections 153(o) and 605. This confusion could persist even if the FCC exercised its option to make an exception for STV under section 605 (which is highly unlikely since it has already explicitly stated STV is not protected under section 605). That is, the offer of service test might still be seen as the proper test for classifying STV and might still be adopted by other courts acting under the impression that it is the proper test for all forms of communication. Unless the FCC's classification of STV as broadcasting under section 605 and the inconsistent test the FCC used to make that classification are overruled, some courts will continue to classify a form of communication as broadcasting under the offer of service test and others will classify the same form of communication as point-to-point communications under the traditional intended destination test. This is, in fact, exactly what happened in the classification of MDS transmissions.[120]

Furthermore, if courts adopt the approach of *Chartwell* and *NST Appeal,* anomalous results will occur because those decisions distinguish section 153(o) from section 605 while the FCC does not. When the FCC makes a classification under section 153(o) it implicitly makes the same classification under section 605. Courts adopting the *Chartwell* and *NST Appeal* approach would defeat that implication by making a different classification under section 605 than the FCC had made under section 153(o). This would create confused results and would circumvent the FCC's true intent. The only way to permanently eliminate this confusion is to utilize the option reserved by *Chartwell* to reverse the FCC's classification of STV as broadcasting by overruling the offer of service test as an arbitrary and improper construction of sections 153(o) and 605.

D. Classification of STV as Point-to-Point Communications Will Not Undermine the FCC's Authority to Authorize a

120. *Orth-O-Vision* concluded that MDS transmissions are broadcasting, while *Home Box Office* classified them as point-to-point communications under section 605. This was because *Orth-O-Vision* used the offer of service test while *Home Box Office* used the intended destination test.

Nationwide System

The conclusion that the FCC's classification of STV should be overruled raises the question whether the FCC will still have authority to permit the establishment of a nationwide STV system when STV is reclassified as point-to-point communications. Because the challenge to the FCC's authority to authorize an STV system can be answered without classifying STV as broadcasting, and because courts have ruled that the FCC has authority to authorize an STV system without regard to whether STV is classified as section 605 broadcasting, that question should be answered in the affirmative.

1. The challenge to the FCC's authority to authorize an STV system can be answered without classifying STV as broadcasting

The FCC created the offer of service test and classified STV as broadcasting thereunder to refute a challenge to its authority to authorize a nationwide STV system.[121] The argument supporting the challenge began by citing section 151 of the Communications Act which states that the FCC was created "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, as far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges."[122] In order to determine the meaning of the nationwide communication service described in section 151, the challengers used the definition of broadcasting in section 153(o). That section defines broadcasting for purposes of the Communications Act as the "dissemination of radio communications intended to be received by the public."[123] The challengers reached the conclusion—based on these two sections of the Act—that any broadcast service authorized by the FCC would have to be a service that intends its signals to be received by the general public. They argued that a broadcast service intended only for subscribers could not be considered a nationwide public broadcast service.[124] The FCC refuted this argument by emphasizing that a pay-only service,

121. 3 F.C.C.2d at 8-9; *see also* 637 F.2d at 464.
122. 3 F.C.C.2d at 8 (emphasis omitted) (quoting 47 U.S.C. § 151 (1976)).
123. *Id.* at 8-9 (emphasis omitted) (quoting 47 U.S.C. § 153(o) (1976)).
124. *Id.*

such as STV, was broadcasting under section 153(o) and therefore the FCC had authority to permit the establishment of a nationwide STV system.[125] The FCC found that STV was broadcasting under section 153(o) by construing that section to mean that a transmission was "intended to be received by the public" if a broadcaster intended to offer his service, without discrimination, to the public generally.[126] Essentially, the FCC accepted the challengers' premise that section 153(o) helps define what is meant by a nationwide communications service that is made available to all persons in the United States as described in section 151. However, the FCC's construction of section 153(o) differed from the challengers' construction and its own past construction.

The challenge to the FCC's authority should never have been accepted as valid and clearly did not require the adoption of the offer of service test to refute it. The argument challenging the FCC's authority misconstrues section 151 because it tries to equate service with broadcasting under section 153(o), and the two cannot be equated logically. The word *broadcasting* does not appear in section 151, so there was no justification for turning to section 153(o) to define it. Instead, the language of section 151 concentrates on all forms of both communications and communications services when it speaks of a nationwide communication service available to all people. This is the most reasonable interpretation of the section because obviously no single broadcasting station of any kind is without limitations as to the number of people it can reach. Distance alone imposes a limitation on the number of persons any broadcaster can service. Only by combining the effect of all broadcast services could a nationwide communication service available to all persons be established. If the FCC could authorize only those types of systems that were by themselves capable of providing services to everyone in the United States, then the FCC would not have authority under the Communications Act to authorize any type of broadcasting service in existence today. The purpose of the Act is to ensure that the FCC will authorize the establishment of various broadcast services to meet the interests of all.[127]

Under this interpretation of section 151, the broadcaster

125. *Id.* at 9-10.
126. *Id.* at 8-10.
127. W. JONES, *supra* note 1, at 16-17.

need not have an intent to provide a service that is available to the public unconditionally under section 153(o). The traditional intended destination test's interpretation of section 153(o) which defines *broadcasting* in terms of a broadcaster's intent with respect to the destination of his signal is consistent with the combined services construction of section 151. If a broadcaster has intent to broadcast his transmissions to a particular group of persons only, in order to meet their particular interests, that broadcaster is still helping to provide one part of a vast communications system for the entire public. Part of the purpose of subscription broadcasting is to provide communication services in areas that traditional forms of broadcasting were incapable of servicing. This was the original purpose for cable television.[128] Another way that subscription services help provide a nationwide communication service is by meeting the special needs or desires of some individuals that may not be shared by every member of the public. Subcarrier FM frequencies fulfill such a need by providing businesses with uninterrupted music for customer enjoyment.[129] STV also satisfies a special need some members of the public have for more diversified programming and a greater selection of channels at any given time. One of the purposes for establishing STV was to satisfy those needs for diversity and increased channel selection.[130] Not everyone shares either or both of these needs, but because there are some who do, a broadcast service like STV should be one part of a complete nationwide broadcasting system to service the general public.

2. Courts have ruled that the FCC has authority to authorize an STV system without regard to whether STV is classified as section 605 broadcasting

Many courts have held that, regardless of STV's section 605 status, the FCC does have authority to authorize STV. These decisions have turned on the language and history of the Communications Act. The broadcast status of STV was not relevant to the decisions and a change in STV's status would not affect the outcome of those cases.

The United States Court of Appeals for the District of Co-

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128. *Id.* at 24-26.

129. *Id.* at 476.

130. National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 197 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

lumbia sustained the FCC's finding that it had authority to establish a nationwide STV system in *National Association of Theatre Owners v. FCC*.[131] No mention was made of any significance being attached to the classification of STV as broadcasting or point-to-point communications. The court examined the history of the Communications Act and of broadcasting in general, the protections the FCC provided against siphoning of "free" television programming by STV broadcasters, and the purposes for establishing an STV system. The court found that there was nothing in the legislative history of the Act that in any way reflected an intention to prohibit the FCC from authorizing subscription television services.[132] The court also found that Congress had given the FCC broad authority to oversee the development of a nationwide communications service:

> [W]e are unable to agree that the Communications Act absolutely precludes the Commission from approving a system of direct charges to the public as a means of financing broadcasting services. Rather, the Act seems designed to foster diversity in the financial organization and *modus operandi* of broadcasting stations as well as in the content of programs, and we feel that the Commission did not exceed its authority in concluding that subscription television is entirely consistent with these goals.[133]

The court also found that subscription broadcast services were not unprecedented—the FCC had already established a subscription radio service which had been found to be within the scope of its authority.[134]

The court also found that the FCC had provided adequate safeguards against the possibility that STV would become a monopoly and would siphon off the programming of traditional broadcasters.[135] In evaluating whether there was an adequate justification for the FCC to establish STV, the court found that the service would significantly contribute to broadcasting as a

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131. *Id.*

132. *Id.* at 202. Indeed, some language in the legislative history of the Act indicates approval of subscription broadcasting services. *Id.* at 201.

133. *Id.* at 202.

134. *Id.* at 200. The court stated that the Commission and the courts had approved this system. Though the court did not make the argument, the fact that Congress has not passed legislation forbidding subscription programming after the establishment of subscription radio indicates that Congress also has acquiesced in the Commission's claim of authority in this area.

135. *Id.* at 197-98.

whole.[136] Nothing in the court's analysis or holding was in any way related to STV's classification as broadcasting or point-to-point communications.

Further support of the FCC's authority to establish STV without regard to its broadcasting classification is given in *Connecticut Commission Against Pay TV v. FCC*.[137] In this case the D.C. Circuit sustained the FCC's authority to establish STV on a trial basis.[138] The broadcast classification of the FCC definitely played no part in that decision because the FCC did not make its classification of STV as broadcasting until four years after the decision was made. Furthermore, the FCC itself stated in its first report on subscription television[139] that it did not matter how STV was classified because the FCC had authority to authorize nonbroadcast uses of the radio spectrum.[140] The statement, which was heavily documented,[141] was made in response to the same argument that gave rise to the anomalous offer of service test in a later hearing.[142] Why the FCC felt it necessary to change its analysis on this issue is unclear.

The weakness of the challenge to the FCC's authority coupled with the precedents discussed above show that reclassifying STV as point-to-point communications should not affect the FCC's authority to establish an STV system.

IV. Conclusion

The courts in both *NST Trial* and *Chartwell* recognized a private right of action under section 605 according to the principles of *Cort v. Ash* and other precedents. These courts, as well as the *NST Appeal* court, found that the defendants in each case had violated section 605 by selling decoders or by selling parts and schematics to build decoders. There is little or no controversy on these two points, and the precedent and analysis used by the courts seems more than adequate to support them.

The cause of the confusion concerning STV's entitlement to

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136. *Id.* at 197.

137. 301 F.2d 835 (D.C. Cir. 1962).

138. *Id.* at 838.

139. Amendment of Part 3: First Report, *supra* note 5.

140. *Id.* at 541.

141. *Id.* at 535-40. The FCC discussed several provisions of the Communications Act and the Act's legislative history to arrive at the conclusion that the broadcasting status of STV has no bearing on the FCC's authority to authorize STV.

142. *Id.* at 538.

protection under section 605 has been the FCC's classification of STV as broadcasting. Because STV must have protection from unauthorized reception of its signals in order to survive financially, it is important that its rights, if any, under section 605 be clearly established. While according important rights to STV, the decisions of the *NST Appeal* and *Chartwell* courts do not rest on solid ground because they rely solely on the misapprehension that the FCC had not yet classified STV as broadcasting in the context of section 605. Unfortunately, courts which recognize that weakness may turn to the analysis of the *NST Trial* and *Orth-O-Vision* decisions and adopt the offer of service test as the appropriate test for section 605 classifications. This will lead to results inconsistent with other FCC classifications under the traditional intended destination test. Moreover, courts following *NST Appeal* and *Chartwell* may also make classifications that are inconsistent with those made under the traditional test. This is because *Chartwell* and *NST Appeal* classify broadcasting differently under sections 153(o) and 605, while the traditional test makes the same classifications under both. The only way this confusion can be resolved and future protection be guaranteed in this area is to overrule the FCC's classification of STV. This would in effect reclassify STV as point-to-point communications. It should in no way disturb the recognition of the FCC's authority to establish an STV system.

Granting protection to STV under section 605 will not solve all of the problems related to the unlawful interception of STV signals. For example, a home electrician could still circumvent this system through his own skills and expertise. But STV broadcasters' major concern is the commercial availability of unauthorized decoders and schematics. Consumers of these products constitute the largest percentage of offenders.[143] By stopping the unauthorized sale of decoders and schematics by electronics firms, the problem will be largely eliminated. As to those who already have decoding devices, technology may eventually frustrate their ability to unscramble STV signals.[144]

The FCC has recognized that STV is an important supple-

143. Taylor, *supra* note 7, at 65.

144. Stations already are combatting the use of unauthorized decoders by using more sophisticated coding systems. *Id.* Of course, developing such systems is expensive. This expense can be greatly reduced if these efforts can be limited to foiling decoders that have already been sold. If future sales of decoders are stopped, the need to develop increasingly sophisticated coding systems can be eliminated altogether.

ment to conventional TV broadcasting.[145] Consequently, STV broadcasters should be entitled to any legal protections available that will help protect them from signal theft. Overruling the FCC's classification of STV as broadcasting should ensure STV's legal protection under section 605.

Einar William Johnson

145. Amendment of Part 73: Fourth Report, *supra* note 5, at 484.