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PRIVACY PROTECTION FOR PROGRAMMING: IS MODIFYING SATELLITE DESCRAMBLERS A VIOLATION OF THE WIRETAP LAW?

United States v. Hux, 940 F.2d 314 (8th Cir. 1991)

In United States v. Hux 1 the Eighth Circuit concluded that the Wiretap Law2 did not proscribe the modification of satellite descramblers to receive encrypted programming.3

On two occasions, an undercover agent requested that the defendant, Austin Jerry Hux, modify a satellite descrambler module4 to receive premium pay television channels without the user paying the provider of the program.5 Hux performed both of these modifications and received $400 for each.6

A Federal Grand Jury returned a four-count indictment against Hux: two counts of manufacturing an electronic device for the purpose of surreptitiously intercepting electronic communications under the Wiretap

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1. 940 F.2d 314 (8th Cir. 1991).
3. This Comment is limited to whether the Wiretap Law should apply to the modification of satellite descramblers to receive encrypted television programming; it does not cover the unlawful interception of other types of communication such as cable television (CATV), multi-point distribution system (MDS), or subscription television (STV). See Michael E. Di Geronimo, Protecting Wireless Communications: A Detailed Look at Section 605 of the Communications Act, 38 COMM. L.J. 411, 415-20 (1987).
5. 940 F.2d at 315. The FBI analyzed the descrambler and found that Hux had modified its computer chip intentionally. Thus the descrambler could receive all encrypted channels. Id. This type of communication is called television-receive only (TVRO), and viewers need the descrambler to receive those channels the cable company encrypts. The companies encrypt popular channels such as HBO, Showtime, Cinemax, and The Movie Channel for which cable or satellite companies charge a premium beyond the standard monthly rate. Di Geronimo, supra note 2, at 430-31. See Home Box Office, Inc. v. Corinth Motel, Inc., 647 F. Supp. 1186, 1188 (N.D. Miss. 1986).
6. 940 F.2d at 315. The FBI also obtained a search warrant for Hux's business, and the agents found modified computer chips, programs to modify computer chips, and the tools necessary to perform the modifications. Id.
Law, and two counts of copyright infringement. At trial the jury convicted Hux on all four counts and the trial court sentenced him to three years' probation and a $40,000 fine. On appeal, the Eighth Circuit affirmed the copyright infringement counts, but reversed the convictions under the Wiretap Law. The Eighth Circuit relied on the law's legislative history, prior caselaw, principles of statutory construction, and the direct applicability of section 605 of the Communications Act to hold that the government may not prosecute a person under the Wiretap Law for modifying a satellite descrambler to receive encrypted programming. 

To be convicted under section 2512(1)(b) of the Wiretap Law, a person

7. 18 U.S.C. § 2512(1)(b) (1988). Section 2512(1)(b) criminally sanctions anyone who intentionally "manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications. . . ." Id. See infra notes 25-30.

8. 940 F.2d at 315. The copyright infringement claim was brought under 17 U.S.C. § 506(a) (1988). Id.

9. 940 F.2d at 315. Hux served six months of this probation in an in-home detention program.

Id.

10. Id.

11. Id. at 318.


14. Any person who manufactures, assembles, modifies, imports, 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 . . . shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. . . .


Hux's type of conduct could be subject to civil and criminal penalties under § 605 of the Communications Act. See Cable/Home Communications Corp. v. Network Prods., Inc., 902 F.2d 829, 848 (11th Cir. 1990) (§ 605 "readily applies to proscribe pirate chips and other unauthorized decoding devices, which enable third parties to receive television satellite transmissions intended for paying subscribers") (citations omitted); ON/TV of Chicago v. Julien, 763 F.2d 839, 842-43 (7th Cir. 1985) (sale of subscription television decoder kits violates § 605); National Subscription Television v. S. & H. TV, 644 F.2d 820, 825 (9th Cir. 1981) (same). See also infra notes 42-43 and accompanying text.

15. 940 F.2d at 318.
must “intentionally” produce or sell a device knowing that the design makes it “primarily useful” for the surreptitious interception of oral, wire, or electronic communications. Courts have interpreted the “primarily useful” language to mean that the device in question must have few, if any, legitimate uses. Hux focused on whether section 2512(1)(b) required that the modified satellite descrambler was “primarily useful” for surreptitious interception of electronic communications, or was merely used in a surreptitious manner to intercept electronic communications. The court also analyzed the applicability of both section 605 of the Communications Act and section 2512 of the Wiretap Law to modifying satellite descramblers.

Because of the advances in technology that had taken place since the Wiretap Law’s original enactment in 1968, Congress amended the Wiretap Law in 1986 to protect against unauthorized interception of

16. 18 U.S.C. § 2512(1)(b) (1988). The person may also be convicted if they have reason to know of these characteristics. Id. See supra note 7.

17. 18 U.S.C. § 2512(1)(b) (1988). The section also requires that “such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce.” Id. See supra note 7. Section 2512(1)(b) principally allows prosecution for the possession or manufacture of devices designed to intercept personal communications without authorization. See United States v. Schweihs, 569 F.2d 965, 968 (5th Cir. 1978). See also Flowers v. Tandy Corp., 773 F.2d 585, 588-89 (4th Cir. 1985) (§ 2512 cannot be used to create a civil cause of action under § 2520 of the Wiretap Act).

18. United States v. Herring, 933 F.2d 932, 934 (11th Cir. 1991) (citing United States v. Schweihs, 569 F.2d 965, 968 (5th Cir. 1978)).


20. Congress originally promulgated the Wiretap Law in 1968 to protect the privacy of wire and oral communications and to provide uniform conditions under which courts may authorize the interception of such communications. S. Rep. No. 1097, supra note 12, at 2153. Congress drafted Title III, the Wiretapping and Electronic Surveillance section of the Omnibus Crime Control and Safe Streets Act of 1968, to meet the standards the Supreme Court set down in Katz v. United States, 389 U.S. 347 (1967). S. Rep. No. 1097, supra note 12, at 2153. Congress intended to combat organized crime by allowing only law enforcement officers to conduct electronic surveillance. Id. at 2154-57. Congress specifically intended § 2512 to curtail the supply and availability of devices particularly suited to wiretapping and eavesdropping. Id. at 2183. The law prohibits the narrow category of devices whose principal use is likely for wiretapping or eavesdropping. Congress gave examples of these prohibited devices: the martini olive transmitter; the spike mike; the infinity transmitter; and the microphone disguised as a wristwatch, picture frame, cuff link, or cigarette pack. However, since Congress did not want to interfere with the production or distribution of legitimate electronics equipment, they required that the device be primarily useful for surreptitious listening. Id.

21. S. Rep. No. 541, supra note 12, at 3555. The substantive changes replaced “willfully” with “intentionally” and added the phrase “or electronic” to the section. Id. at 3574-77. The later 1986 amendment served “to update and clarify federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies.” Id.
electronic communications. 22 Although the legislative history of the 1986 amendment directly discusses several areas of new coverage, such as electronic mail, cellular telephones, and electronic bulletin boards, it left the private viewing of the satellite pay-television industry to the Communications Act. 23 Courts have interpreted the effect of the changes in the statute differently. 24

The Fifth Circuit established the standard for applying pre-amendment section 2512(1)(b) to intercepting devices in United States v. Schweih's. 25 The court determined that Congress intended section 2512(1)(b) to ban the manufacture, possession, or sale of a narrow category of devices that by design are primarily useful for eavesdropping and wiretapping. 26 The court, relying on the legislative history of section 2512, 27 concluded that a violation of the section required the possession of a device designed for covert listening, rather than the surreptitious use of a legitimate electronic device. 28 The defendant used an ordinary amplifier, with undisputed legitimate uses, 29 to monitor alarm signals in the course of a robbery. Because of the legitimate uses that the defendant

23. Id. at 3562-63. "[P]rivate viewing of satellite cable programming, network feeds and certain audio subcarriers will continue to be governed exclusively by section 705 of the Communications Act of 1934 [codified at 47 U.S.C. § 605 (1988)], and not by [the Wiretap Law]." Id. at 3576. See 47 U.S.C. § 605(e)(4) (1988).
24. It is not clear whether the pre-1986 version of the Wiretap Law would apply to the manufacture of satellite cable programming decoders. The Eleventh Circuit, in United States v. Herring, 933 F.2d 932, 934 (11th Cir. 1991), found that the pre-amendment version of § 2512(1)(b) did not apply to a person modifying such a descrambler. However, in United States v. McNutt, 908 F.2d 561, 565 (10th Cir. 1990), cert. denied, 111 S. Ct. 955 (1991), the Tenth Circuit determined that the legislative history was ambiguous and held that the plain language of § 2512(1)(b) supported a cause of action for the same activities. See infra notes 31-37 and accompanying text. But see 47 U.S.C. § 605 (1988); infra note 42.
25. 569 F.2d 965 (5th Cir. 1978). At trial in the District Court for the Southern District of Florida, the jury convicted Schweih's of willful and knowing possession of an electronic device that, by virtue of its design, was primarily useful for the surreptitious interception of wire or oral communications. Id. at 966.
26. Id. at 968. See also United States v. Pritchard, 773 F.2d 873, 879 (7th Cir. 1985) (the design of the device must render it primarily useful for surreptitious listening, but the device need not be disguised in order to be prohibited), cert. denied, 474 U.S. 1085 (1986).
28. 569 F.2d at 969. See also Flowers v. Tandy Corp., 773 F.2d 585, 588-89 (4th Cir. 1985) (legitimate uses of device remove it from the proscription of § 2512).
29. 569 F.2d at 969-70. The court reasoned that an ordinary amplifier's primary uses are, by design, legitimate and thus its possession could not be the basis of a violation. On the other hand, a proscribed device is one whose primary uses, by design, are surreptitious interception of private communications. Id. at 970-71.
could have made of the amplifier, the court reversed Schweihis' conviction under the Wiretap law.\textsuperscript{30}

The Tenth Circuit was the first circuit to apply the amended section 2512(1)(b) to modifying satellite descramblers. In \textit{United States v. McNutt},\textsuperscript{31} the court held that the defendant properly could be charged under the Wiretap Law for altering satellite descramblers to allow unauthorized interception of satellite programming.\textsuperscript{32} The defendant argued that section 2512(1)(b)'s legislative history indicated that satellite programming was not electronic communication under the definition of the Wiretap Law and, therefore, that the section should not apply.\textsuperscript{33} The court disagreed, finding the legislative history ambiguous.\textsuperscript{34} The court further determined that the Wiretap Law's definition of electronic communications\textsuperscript{35} encompassed satellite television signals and thus ruled that

\textsuperscript{30} \textit{Id.} at 971.


\textsuperscript{32} 908 F.2d at 565. To receive a scrambled satellite transmission, a satellite dish owner must purchase a descrambler box. A legally purchased descrambler includes its own unique encoded "address." To descramble the signal, the descrambler-box owner must pay the proper company a fee and report to the company his descrambler-box "address" number. The company then includes in its encrypted signal a code that allows the descrambler box with the authorized address to descramble the subscribed satellite signal. Since no two legally purchased descrambler boxes contain the same "address," this system allows the satellite transmission to restrict descrambling of its signals to only those descrambler boxes authorized to receive the signal. \textit{Id.} at 562-63.

McNutt, by cloning a descrambler box, was copying the "unique" address number from one descrambler box into other descrambler boxes. Consequently, as long as the owner of the original descrambler box continued to pay for an unscrambled signal, all of the cloned descrambler boxes would be able to descramble the signal as well. \textit{Id.}

\textsuperscript{33} \textit{Id.} See S. REP. NO. 541, \textit{supra} note 12, at 3566-69. \textit{See infra} notes 80-83 and accompanying text.

\textsuperscript{34} 908 F.2d at 564. The legislative history states that a "communication is an electronic communication protected by the Federal Wiretap Law if it is not carried by sound waves and cannot be fairly characterized as containing the human voice." S. REP. NO. 541, \textit{supra} note 12, at 3568. Communications consisting solely of data and those that are transmitted only by radio are examples of electronic communications. \textit{Id.} The juxtaposition of the "cannot be fairly characterized as containing the human voice" language with the listing of video teleconferencing as an example of protected communication confused the Tenth Circuit, because video teleconferencing undoubtedly includes the human voice. 908 F.2d at 564. The court also noted repeated references in the legislative history to the problems associated with the unauthorized interception of satellite television broadcasts. \textit{Id.} at 564-65. See S. REP. NO. 541, \textit{supra} note 12, at 3560-61, 3573.

\textsuperscript{35} Electronic communication is "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic,
section 2512 did apply. The court determined that the interception was sufficiently surreptitious to fall within the condemnation of section 2512 because the providers of the satellite service were unaware that the users of the descramblers were intercepting their programming.

The Eleventh Circuit reached the opposite conclusion in United States v. Herring. In Herring a group of defendants sold to the public modified descramblers that would intercept encrypted satellite programming. The court examined section 2512 in pre-amendment and post amendment form and determined that neither version applied to the defendants’ conduct. Noting that a device must have few, if any, nonsurreptitious and legitimate uses to be prohibited by section 2512, the court held that the modified descrambler had legitimate uses and, therefore, that neither version of section 2512 prohibited it. The court then determined, however, that section 605(e)(4) of the Communications Act clearly prohibited the defendants’ conduct of modifying the satellite descramblers.

The Eleventh Circuit proceeded to compare the application of the two statutes to the defendant’s conduct and determined that section 605(e)(4)
was more appropriate for three reasons. First, the court cited the rule that courts must interpret ambiguous criminal statutes in favor of the accused. Second, the court noted the absence of any discussion of satellite pay-television in the 1986 amendment to the Wiretap statute. Finally, the court applied the rule that a newly enacted statute drawn in general terms does not negate the efficacy of an earlier, more specific statute. Although the court then determined that the statutes did not overlap, it further reasoned that, even if they did, section 2512(1)(b)'s ambiguity would require prosecution under the more specific section 605. Thus the Eleventh Circuit held that a person who modified a satellite descrambler could not be charged under section 2512.

The current version of section 605 clearly prohibits the use, manufacture, and sale of devices that allow the unauthorized reception of television programming. In Cox Cable Cleveland Area v. King a federal district court in Ohio determined that the sale, installation, and use of devices intended for unauthorized reception of premium cable channel programming violated the original section 605. The defendants sold decoders that allowed users to receive scrambled cable programming without paying the monthly subscription fee. The court held that the Wiretap Law did not apply to this conduct and specifically stated that

44. 933 F.2d. at 937. The court also noted, in support of its analysis, that the greater fiscal penalties for violations of § 605 are consistent with its prohibition of primarily economic conduct, in contrast with the higher levels of imprisonment § 2512(1)(b) establishes, which accord with its goal of deterring the more invasive crime of intercepting personal communications. Id. at 937-38.  
45. Id. at 937 (citing Rewis v. United States, 401 U.S. 808, 812 (1971)).  
46. Id. at 935.  
47. Id. at 938 (citing Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976)).  
48. Id. at 938. See S. REP. No. 541, supra note 12, at 3573 ("if an individual violates the criminal prohibitions in section 633 of the Communications Act, he cannot also be charged under chapters 119 or 121 of title 18"). See also United States v. Batchelder, 442 U.S. 114 (1979) (prosecutor has the right to choose the statute under which an indictment will be brought if statutes overlap).  
50. 933 F.2d at 935.  
53. Id. at 380.  
54. Id. at 378-79.  
the Wiretap Law prohibited only private surveillance.\textsuperscript{56} Thus the Wiretap Law prohibits surreptitious efforts to learn the contents of private business or personal communications, but not the unlawful interception of public communications such as cable television programming.\textsuperscript{57}

In \textit{Greek Radio Network of America v. Vlasopoulous},\textsuperscript{58} a federal district court in Pennsylvania held that amended section 605, and not the Wiretap Law, prohibited the unauthorized interception of subscription radio services.\textsuperscript{59} The defendants modified and sold radio units that allowed unauthorized listeners to obtain the programming carried on a separate radio channel unavailable to the public.\textsuperscript{60} The court followed \textit{Cox Cable} in deciding that the Wiretap Law prevented unlawful surveillance of private business or personal communications and did not provide a plaintiff with a cause of action for the unauthorized interception of its radio transmissions.\textsuperscript{61}

In \textit{United States v. Hux}\textsuperscript{62} the Eighth Circuit explicitly followed the Eleventh Circuit’s reasoning in \textit{Herring} to determine that section 2512(1)(b) does not apply to the modification of satellite descramblers.\textsuperscript{63} The defendant argued that section 2512(1)(b) did not proscribe his conduct and that prosecution was limited to section 605(e)(4).\textsuperscript{64} Hux relied

\begin{itemize}
\item \textsuperscript{56} 582 F. Supp. at 382.
\item \textsuperscript{57} Id. The \textit{Cox Cable} court relied on legislative history contained in the reports for the 1968 wiretap statute to conclude that the wiretap statutes were enacted with the exclusive purpose of protecting private communications.
\item See also Watkins v. L.M. Berry & Co., 704 F.2d 577, 583 (11th Cir. 1983) (a private call cannot be intercepted; a business exception to the Wiretap Law exists only to determine the nature of a call and never its contents); Edwards v. State Farm Ins. Co., 833 F.2d 535, 540 (5th Cir. 1987) (the Wiretap Law requires a subjective expectation of privacy that is justifiable under the circumstances; because user of cellular phone did not have such expectation, no violation of pre-1986 Wiretap Law); Flowers v. Tandy Corp., 773 F.2d 585, 589 (4th Cir. 1985) (§ 2512 does not imply a private cause of action against a manufacturer or seller of a device primarily useful for wiretapping); Greek Radio Network of America, Inc. v. Vlasopoulous, 731 F. Supp. 1227 (E.D. Pa. 1990) (Wiretap Law does not provide a cause of action for interception of scrambled radio transmissions).
\item \textsuperscript{58} 731 F. Supp. 1227 (E.D. Pa. 1990).
\item \textsuperscript{59} Id. at 1230-32.
\item \textsuperscript{60} Id. at 1229. The plaintiff sent out programming on a separate subcarrier frequency that could be received only with a special unit, or one of the illegally modified units.
\item \textsuperscript{61} See supra notes 55-57 and accompanying text. Before Congress amended § 605 of the Communications Act, courts implied a private cause of action through the application of a four-part test set out in Cort v. Ash, 422 U.S. 66 (1975). See Chartwell Communications Group v. Westbrook, 637 F.2d 459, 466 (6th Cir. 1980) (private cause of action implied under § 605 for television programmer against seller of unauthorized decoder boxes).
\item \textsuperscript{62} 940 F.2d 314 (8th Cir. 1991).
\item \textsuperscript{63} Id. at 318.
\item \textsuperscript{64} Id. at 316.
\end{itemize}
on the Fifth Circuit analysis in *Schweihis*, which held that a device must have few, if any, legitimate uses to violate section 2512(1)(b),\(^{65}\) and on the Eleventh Circuit analysis in *Herring*, which specifically held that section 2512(1)(b) did not apply to the modification of satellite descramblers.\(^{66}\) The government contended, on the other hand, that the language of section 2512(1)(b) indeed proscribed Hux’s conduct and that the charge was proper,\(^{67}\) arguing that *McNutt* supported the position that section 2512(1)(b) applied to the modification of satellite descramblers.\(^{68}\)

The *Hux* court cited several factors in deciding to follow the reasoning of *Herring*. First, the Eighth Circuit looked to the legislative history of section 2512(1)(b), deciding to read the statute to prohibit devices designed for use in a surreptitious manner, rather than to prohibit the surreptitious use of a legitimate device.\(^{69}\) Second, the language of section 605, and its designation as the sole authority governing “the private viewing of satellite cable programming” in the legislative history of section 2512(1)(b),\(^{70}\) convinced the court that section 605 directly applied to the modification of descramblers, while section 2512(1)(b)’s application was speculative at best.\(^{71}\) The persuasiveness of the principles of statutory construction used in *Herring*,\(^{72}\) and the lack of depth in the *McNutt* analysis,\(^{73}\) led the Eighth Circuit to hold section 2512(1)(b) inapplicable and to reverse Hux’s conviction under that section.\(^{74}\)

The dissent believed the majority’s interpretation of section 2512(1)(b) and its legislative history to be too narrow.\(^{75}\) The dissent disagreed with the majority’s reasoning that a modified satellite descrambler had sufficient legitimate uses to prevent the application of section 2512(1)(b).\(^{76}\) Instead, the dissent argued that the specifically surreptitious characteris-

\(^{65}\) See supra notes 25-30 and accompanying text.

\(^{66}\) 940 F.2d at 317. See supra notes 38-50 and accompanying text.

\(^{67}\) 940 F.2d at 317.

\(^{68}\) Id. See supra notes 31-37 and accompanying text.

\(^{69}\) 940 F.2d at 317. See supra notes 26-29.

\(^{70}\) See S. REP. No. 541, supra note 12, at 3576.

\(^{71}\) 940 F.2d at 316.

\(^{72}\) See supra notes 38-50 and accompanying text.

\(^{73}\) 940 F.2d at 318. The Eighth Circuit agreed with the Eleventh Circuit that *McNutt* incorrectly interpreted the word “surreptitiously” for the purpose of § 2512(1)(b). Id.

\(^{74}\) Id.

\(^{75}\) Id. at 319 (Ross, J., dissenting). See also S. REP. No. 541, supra note 12, at 3566-70.

\(^{76}\) 940 F.2d at 320. The majority in *Hux* relied on testimony from *Herring* stating that modified descramblers had legitimate uses. Id. at 317 (citing United States v. Herring, 933 F.2d 932, 934 (11th Cir. 1991)).
tic of the counterfeit descrambler was the fact that it facially appeared to be a legitimate descrambler, and further that the device had no legitimate use. 77 On these grounds, the dissent asserted that Hux's actions fell within the prohibition that the language and legislative history of section 2512(1)(b) established, and that his conviction should stand. 78

While the Hux court reached the correct result, it did not employ the best reasoning. Although both statutes appear to apply on their face, proper statutory interpretation requires that a defendant be charged only with a section 605 violation for modifying satellite descramblers.

Considering the language of the 1984 amendment and the legislative history of section 605, it is clear that section 605 directly proscribes the modification of satellite descramblers. 79 On the other hand, the Wiretap Law seeks to prevent unauthorized interception of personal or point-to-point communication. 80 Satellite transmissions of the type involved in Hux, while not open to the public, 81 are, nevertheless, not electronic communications in the same sense as private individual communication or the transfer of corporate data. "Electronic communication" may, in its broadest terms, encompass the transmission of such television programming; but the legislative history, subsequent caselaw, and the comparison with section 605 precludes that conclusion. 82 The legislative history of the Wiretap Law supports this analysis 83 and indicates congressional intent to charge defendants only with violations of the more precise statute. 84

Given the rules of statutory construction, 85 the Eighth Circuit soundly determined that Hux could be charged with a section 605 violation alone. However, the court should have relied solely on this statutory compari-

77. Id. at 319-20 (Ross, J., dissenting).
78. Id. at 320.
80. See supra notes 52-57, 58-61 and accompanying text.
82. See supra notes 42-50, 69-74 and accompanying text.
83. A defendant who violates the Communications Act by intercepting or assisting in the interception of cable television without authorization can only be charged with the Communications Act violation and not a Wiretap Law violation. See S. REP. No. 541, supra note 12, at 3573. It appears in this instance that both statutes apply to the conduct, but that Congress intended the more direct statute to control. See also Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976).
84. Radzanower, 426 U.S. at 153.
85. See supra notes 44-50 and accompanying text.
son, rather than on a questionable characterization that modified descramblers have legitimate uses, to conclude that section 2512 does not apply to the modification of satellite descramblers.\textsuperscript{86}

Thomas N. FitzGibbon

\textsuperscript{86} See supra notes 76-77 and accompanying text.