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## Tampering With Satellite TV Decoders to Steal Scrambled Shows Violates Federal Wiretap Law

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The court found Kraft's claims material because Kraft surveys found 71 percent of respondents rated calcium content to be an extremely or very important factor in their decisions to buy Singles. Furthermore, evidence existed that Kraft designed the advertisements with the intent to capitalize on consumer concerns about calcium deficiency.

Kraft further claimed that the cease and desist order issued by the FTC was overly broad and should have been modified or set aside because it banned constitutionally protected commercial speech and was not rationally related to Kraft's violation of the act. Kraft asserted that the advertisements were potentially misleading and, therefore, the FTC should have chosen a less restrictive method to sanction Kraft. The court held the advertisements to be actually, not potentially, misleading and that the order was sufficiently narrow by banning only the advertisements as currently designed and requiring that future nutrient claims be based on reliable scientific evidence.

Kraft finally argued that the scope of the order was not reasonably related to Kraft's violation because it included in products that were not part of the challenged advertisements. The court, however, supported the broad order because of the size and duration of the ad campaign and the ready transferability of the violation in question to other Kraft cheese products. Therefore, the court found the FTC's order justified despite Kraft's clean record in the past.

### ***Concurrence Advocates Guidelines for Advertisers***

The concurring judges, while agreeing with the opinion of the court, expressed concern that the FTC procedure allowed it to avoid extrinsic evidence merely by concluding that a deceptive, implied claim was facially apparent. Because consumers were the ultimate beneficiaries of the FTC's actions, the FTC should consider consumer surveys to make objective deter-

minations about potential violations of the FTC Act.

The concurrence also argued that the current FTC procedure threatened to chill nonmisleading, protected speech. They stated that the flow of information from producer to consumer was jeopardized by allowing FTC commissioners to make subjective interpretations of whether an ad, while literally true, implied a false message. As a result, not only would advertisers be unable to predict whether the FTC will find a particular ad misleading, surveys taken to prove that ad is not misleading might be disregarded by the FTC.

Instead, the concurrence suggested that the FTC develop a consumer methodology which advertisers may use to determine whether their advertisements contain implied, deceptive claims. ❖

— *B. James Slater, Jr.*

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## **Tampering with Satellite TV Decoders to Steal Scrambled Shows Violates Federal Wiretap Law**

In *United States v. Lande*, 968 F.2d 907 (9th Cir. 1992), the United States Court of Appeals for the Ninth Circuit held that modification of satellite descrambler units to receive scrambled subscription television programming without payment of a subscription fee violated the Electronic Communication Privacy Act of 1986 ("the Wiretap Law"), 18 U.S.C. §§ 2510-2521.

### ***All For One, One For All***

Jack Lande ("Lande") modified commercially available satellite descrambler units to receive scrambled subscription programming without paying a subscription fee. Lande changed the descramblers by placing a clone of a paid subscriber's computer chip with a

new chip in the nonsubscribing descrambler. This difference allowed the people with Lande's units to receive all satellite stations, not just those of the cloned subscriber, for free. This method of duplication is called the "Three Musketeers" technique due to its "all-for-one and one-for-all" nature of modification.

Lande's modification practice was discovered, and he was charged with violating three separate provisions of the Wiretap Law. Lande moved to dismiss the charges, arguing that Congress did not intend the Wiretap Law to apply to satellite television piracy. The district court of Montana, however, denied the motion.

Lande then pleaded guilty to violating three sections of the Wiretap Law: § 2511(1)(a), which prohibits intentional interception of "any wire, oral or electronic communications;" § 2512(1)(a), which covers commercial dealings in devices whose design renders them primarily useful for surreptitiously intercepting such communications; and § 2512(1)(b), which prohibits the manufacture, assembly, possession, or sale of such devices. Lande was sentenced to thirty-five months in prison.

Lande's guilty pleas, however, gave him the right to appeal the denial of his motion to dismiss to the United States Court of Appeals for the Ninth Circuit. On appeal, Lande claimed that Congress did not intend to apply the Wiretap Law to satellite television piracy; and therefore, his motion to dismiss the charges should be granted.

The Court of Appeals, however, affirmed the denial of Lande's motion to dismiss. It reasoned that the plain language of the Wiretap Law applied to the interception of satellite television signals and that contrary legislative intent was ambiguous at best.

### ***What Did Congress Say?***

The Court of Appeals for the Ninth Circuit first considered the language of the Wiretap Act to determine whether Lande's acts were included within the statute. The court of appeals found that

Lande's violations were in fact included within the plain meaning of §§ 2511 and 2512 and therefore affirmed the lower court in this respect.

The appellate court first considered the applicability of § 2511 of the Wiretap Law. This section prohibits the intentional interception and disclosure of wire, oral and electronic communications "except as . . . specifically provided." Among the specific exceptions provided by the statute were the unauthorized viewing of cable television and the viewing of certain unscrambled satellite programming. The court, however, found no specific exception for the unauthorized interception of scrambled satellite signals. Therefore, it concluded that the plain meaning of § 2511 applied to Lande's interception of scrambled satellite signals.

Next, the court considered § 2512 of the Wiretap Law. This section regulates those devices whose design makes them "primarily useful for . . . the surreptitious interception of wire, oral or electronic communications." Focusing on the design, the court reasoned that by modifying the descramblers to unscramble all satellite programming, Lande had rendered them of use to unauthorized viewers. Furthermore, the court found that Lande's interception of satellite programming was surreptitious because the producers of the programming had no way of knowing that their signals were being intercepted. Therefore, the court reasoned that the plain meaning of § 2512 applied to Lande's violations.

#### **What Did Congress Mean?**

Having concluded that the plain language of the Wiretap Law applies to satellite interceptions, the court then considered Lande's argument that Congress did not actually intend the law to apply in this manner.

First, Lande argued that the legislative history of the law showed an intent to exclude from its purview "satellite cable programming," as defined in the Communications Act at 47 U.S.C. §

605, which regulates the unauthorized publication and use of communications. In the Communications Act, the term "satellite cable programming" is expressly defined as "video programming . . . transmitted via satellite and . . . primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers." The Ninth Circuit, however, concluded that the drafters of the Wiretap Law were not referring to the Communications Act definition. Instead, the court stated that the most natural interpretation of the legislators' statements was that they indicate an intention to exclude from the Wiretap Law not all satellite programming, but only unscrambled satellite programming. Lande was charged with pirating scrambled satellite programs.

Next, Lande argued that the Communications Act already criminalized satellite television piracy, and that it was unlikely that Congress intended to override that law with § 2511 or to have the two overlap. The court also rejected this argument, finding that Congress intended to avoid overlap with some, though not all, existing statutes. The court pointed out that the Wiretap Law treats different statutes differently and also cited evidence of legislative history that the two laws were in fact intended to overlap.

Third, Lande argued that even if the statutes did overlap, it would be contrary to Congressional intent to allow prosecution under either of the two because the penalties differed significantly. Under the Communications Act, a simple conviction carried a sentence of up to six months; under § 2511, a violation could bring a term of up to five years. The appellate court rejected this argument, finding that when the same conduct could be prosecuted under either of two statutes, prosecutors have the discretion to decide which to pursue.

Finally, the court turned to the absence of specific discussions of satellite piracy in the legislative history of the Wiretap Law. The court focused upon

*United States v. Herring*, 933 F.2d 932 (11th Cir. 1991), a decision that gave considerable weight to the absence of specific discussions. In *Herring*, the Eleventh Circuit concluded that by omitting mention of such a significant technology from a debate that included consideration of a range of other specific technologies, Congress indicated that the Wiretap Law did not to apply to satellite television. The Ninth Circuit, however, found this argument unpersuasive because, although Congress provided specific exemptions that even covered some unscrambled satellite television transmissions, it made no specific exemption for scrambled signals. The appellate court further stated that this could not have been an oversight because Congress was well aware of such technology and had in fact held hearings on signal scrambling in response to complaints from satellite dish owners. ♦

— Timothy Stanton

## **Restrictions on the Transferability of Frequent Flyer Awards Enforced**

In *American Airlines v. Christensen*, 967 F.2d 410 (10th Cir. 1992), the United States Court of Appeals for the Tenth Circuit enforced frequent flyer "no-sale" rules that prohibited the resale of frequent flyer awards. The court found that a business which brokered frequent flyer program awards interfered with contractual relations and engaged in unfair competition. Additionally, the court held that the airline whose travel awards are brokered suffers real damages for which each individual member of the brokering corporation was liable.