Arrr! Sever Thee Transmitters! Making Radio Pirates Walk the Plank with Aiding and Abetting Liability

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TABLE OF CONTENTS

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I. INTRODUCTION

Since the dawn of broadcasting, interference has been the Achilles' heel of wireless technology. A 1907 report decried the resulting chaos and difficulty of management:

> WIRELESS AND LAWLESS—According to advices from Washington, the apparent condition that there is no law giving authority to government officers to protect official wireless stations in the exchange of messages is giving a great deal of trouble to the station at the Washington navy yard. A youth living near by . . . has set up a station of his own, and takes delight in interpolating messages during official exchanges . . . The local police authorities were appealed to, but said they had no power to interfere with the young man's experiments. A possible remedy, justified by the political situation, would be to declare a state of war to be existing in the vicinity of the White House.[1]

The first third of the 20th century was marked by a series of experiments in radio regulation, punctuated by the sinking of the Titanic, World War I, and the birth of the Federal Communications Commission (FCC).[2] While in the United Kingdom, regulations secured government control and censorship of the airwaves,[3] in the United States, regulations evolved according to an inverse priority: access.[4] To this day, the fundamental obstacle to efficient use of wireless spectrum is interference from broadcasters competing for access to the airwaves.[5]

At the time of the first broadcast regulations, radio was a newer technology than the Internet is today,[6] yet more than 100 years later, the same physical limitation impedes wireless broadcasting: two signals cannot occupy the same frequency, at the same time, in the same geographic space without causing interference – one signal degrading or destroying the other.[7] To guard against such interference, the FCC was founded with the mandate to "maintain control of the United States over all channels of radio

1. *Current News and Notes: Wireless and Lawless*, 49 ELECTRICAL WORLD 1023, 1023 (1907), https://archive.org/stream/electricalworld49newy#page/1022/mode/2up.

2. *See generally* JIM COX, AMERICAN RADIO NETWORKS: A HISTORY 116-21 (2009).

3. BURTON PAULU, BRITISH BROADCASTING: RADIO AND TELEVISION IN THE UNITED KINGDOM 3 (1956).

4. HUGH R. SLOTTEN, RADIO AND TELEVISION REGULATION: BROADCAST TECHNOLOGY IN THE UNITED STATES 6 (2000).

5. Christian Herter, *The Electromagnetic Spectrum: A Critical Natural Resource*, 25 NAT. RESOURCES J. 651, 658 (1985).

6. The "World Wide Web" as we know itcame into being in the 1990s. *The Invention of The Internet*, http://www.history.com/topics/inventions/invention-of-the-internet (last visited Apr. 8, 2015).

7. Herter, *supra* note 5, at 655.

transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time."[8] By establishing the jurisdiction of a federal agency to manage access to the wireless spectrum, Congress sought to ameliorate pervasive interference.[9] The Communications Act further mandated that "No person shall operate any apparatus for the transmission of . . . communications signals by radio . . . except with a license . . . granted under the provisions of this chapter."[10] In so doing, Congress restricted access to the wireless spectrum to only those broadcasters with express consent from the FCC.

Once, unauthorized access was limited by high costs of entry and the physical requirement of proximity of the broadcaster to a transmission source. Neither barrier exists today. A radio transmitter can be installed cheaply and quickly with off-the-shelf parts, while the pirate himself is located well out of range of detection or the jurisdiction of United States law and regulatory enforcers.[11] With barriers to entry low and likelihood of detection slim, there is little to deter pirates from transmitting their unauthorized broadcasts. In circumstances where agents do locate illegal broadcasters, they may be met with judgment-proof defendants who are unable or unwilling to comply with imposed sanctions.[12] Just as the barriers to unauthorized AM-FM broadcasting have decreased as the technology has matured, so too are more advanced wireless technologies progressing toward an enforcement quagmire. Two looming challenges are cellular phone service and mobile broadband.

To reassert its regulatory control of the wireless spectrum, the FCC should seek authority to hold aiders and abettors of unauthorized radio broadcasting liable for violations of the Communications Act. Aiding and abetting has long been a staple of criminal law enforcement, with roots in American law tracing back to 1790.[13] Judge Learned Hand articulated the foundational test for such liability in 1938: the defendant must "in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, [and] that he seeks by his action to make it succeed."[14] Despite its ubiquity in criminal law, secondary liability has infrequently been included in civil statutes, and the Supreme Court has forbade general application of the modern criminal aiding and abetting provision to civil violations.[15]

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8. 47 U.S.C. § 301 (2012).

9. SLOTTEN, *supra* note 4, at 15.

10. 47 U.S.C. § 301.

11. *See* PIRATE RADIO USA 00:22:35 (Deface the Nation Films 2008) (discussing broadcast strategy to prevent the FCC or law enforcement from discovering the origin of an unauthorized radio broadcast).

12. *See, e.g.*, Brandon Watson, *FCC to Radio Pirates: $15,000 Arrgh!*, AUSTIN CHRON. (July 11, 2014), www.austinchronicle.com/news/2014-07-11/fcc-to-radio-pirates-15000-arrgh.

13. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (citing Act of Apr. 30, 1790, § 10, 1 Stat. 112, 114).

14. *Id.*

15. Central Bank of Denver v. First Interstate Bank, 511 U.S. 164, 190 (1994).

This Note will argue that mechanisms to bring enforcement actions or prosecutions against aiders and abettors of Section 301 violations are within reach. Part II provides an overview of the history and necessity of structural broadcast regulations. Part III explains the challenge of holding unauthorized broadcasters accountable, and how secondary liability would undermine pirates' ability to stay on the air. Finally, Part IV explores three avenues to establish secondary liability for violations of Section 301, including: (1) a statutory grant of authority by Congress, (2) exercise of rulemaking authority by the Commission, and (3) application of existing criminal law to prosecute violations of Section 301, thereby making aiders and abettors subject to the Criminal Code's general provision for secondary liability.

II. THE INTERTWINED FATE OF BROADCAST REGULATION AND PIRATE RADIO

For the first several decades of wireless broadcasting, the field was unregulated.[16] Initially, there was sufficient spectrum for all broadcasters to experiment with the new technology.[17] But as the wireless spectrum's utility became evident and demand for access grew, it became crowded, and interference quickly evolved from an afterthought, to a nuisance, to an obstruction.[18] The regulatory experiments of the early 20th century culminated in the modern system of spectrum management and the birth of a class of subversive broadcasters later known as "pirates."

A. Origins of Radio Broadcast Regulation in the United States

Electromagnetic spectrum is a unique natural resource.[19] It exists whether or not organized broadcasts of electricity and magnetism are transmitted through it.[20] While it can be neither created nor destroyed, it can be degraded by irresponsible use like water and air.[21] For that reason, spectrum is known as a "scarce" resource.[22] However, unlike water or air, the moment spectrum stops being used, it reverts to its natural state.[23] Without regulation, spectrum suffers from the tragedy of the commons.[24] Individual users have no incentive to use spectrum efficiently because to do

16. *See* SLOTTEN, *supra* note 4, at 7.
17. *Id.* at 2.
18. *Id.* at 15.
19. Herter, *supra* note 5, at 653.
20. *Id.*
21. *Id.* at 655.
22. *Id.*
23. *See id*. at 653.
24. Kevin Werbach, *Supercommons: Toward a Unified Theory of Wireless Communications*, 82 TEX. L. REV. 863, 944 (2004). Some spectrum intentionally remains unregulated, but this resource is not the focus of this Note. *See* 47 C.F.R. § 90.473 (2015); 47 U.S.C. § 307(c) (2012).

so earns them no savings or advantage.[25] A rational self-interested actor would instead seek to secure maximum use of the spectrum for himself.[26]

The first attempt at spectrum regulation, the 1910 Wireless Ship Act, granted priority access to spectrum for public safety applications, but did not address the burgeoning crisis of scarcity and interference.[27] Two years later, the Titanic sank along with 1,500 passengers.[28] When it was discovered that rescue efforts were delayed by interference with the Titanic's radio distress calls, Congress responded by passing the Radio Act of 1912, which required the Commerce Department to license radio operators.[29] The Act assigned portions of the spectrum to certain uses and authorized the Department to allocate frequencies to avoid interference.[30] During World War I private radio transmissions were prohibited, and in 1917 the military temporarily acquired complete control over the spectrum.[31] When the public regained access in 1919, the Commerce Department, which had authority only to manage allocation of spectrum but not restrict access to it, was ill-suited to manage the surge in demand.[32]

In 1927, Congress responded to the overwhelming demand for spectrum access with the Radio Act of 1927, which reflected a philosophical shift in U.S. spectrum management.[33] Unlike the 1912 Act, which presumed that all citizens had a right to a license, the 1927 Act emphasized that broadcasting was a privilege given to individuals based on their commitment to "public interest, convenience, and necessity."[34] The Act established the Federal Radio Commission (FRC), and imbued it with authority to issue broadcast licenses only to stations that could demonstrate they were broadcasting in the public interest.[35] In 1934 President Roosevelt urged Congress to consolidate communications regulation in a single agency.[36] Later that year, Congress passed the Federal Communications Act, which merged the FRC and the remaining communications-by-wire regulatory functions of the Commerce Department in the FCC, instituting the spectrum regulatory regime in place today.[37]

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25. NAT'L TELECOMMS. & INFO. ADMIN., REGULATING THE USE OF THE SPECTRUM, http://www.ntia.doc.gov/book-page/regulating-use-spectrum (last visited Apr. 8, 2015).

26. *Id.*

27. *See* SLOTTEN, *supra* note 4, at 6.

28. *See id.* at 7.

29. *See id.* at 8.

30. *See id.*

31. COX, *supra* note 2, at 117-18.

32. *See* SLOTTEN, *supra* note 4, at 39 ("[T]he lack of legal authority for the regulation of radio broadcasting resulted in near chaos of the spectrum.").

33. *Id.* at 40.

34. *Id.*

35. *Id.*

36. FRANKLIN D. ROOSEVELT, RECOMMENDING THAT CONGRESS CREATE A NEW AGENCY TO BE KNOWN AS THE FEDERAL COMMUNICATIONS COMMISSION, S. DOC. NO. 73-144 (1934).

37. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended in scattered sections of 47 U.S.C.).

B. Pirates of the (Air)waves: The Swell of Unauthorized Broadcasting

The technology of pirate radio is similar to that of authorized broadcasting. Every radio station needs a live or recorded content source, an amplifier to boost electric current, a transmitter to organize current into radio waves, and an antenna to broadcast the signal.[38] Unlike unauthorized broadcasting in the United Kingdom (U.K.), which peaked in the 1960s in response to a government-sanctioned monopoly on broadcasting, pirate radio in the United States did not become common until the 1990s, emerging as rebellion to corporate dominance of the airwaves.[39] To this day, the FCC's licensing system includes a renewal expectancy – leaving little opportunity for new entrants in markets where all available spectrum has been allocated.[40]

Although pirates in the 1990s claimed a First Amendment right to broadcast, it is long settled doctrine that there is no "unabridgeable . . . right to broadcast."[41] The Supreme Court held in the 1943 case *NBC v. United States* that "the right to free speech does not include . . . the right to use the facilities of radio without a license."[42] In *Red Lion Broadcasting v. FCC*,[43] the Supreme Court held that "it is the right of viewers and listeners, not the right of broadcasters, which is paramount."[44] In the 1990s, a group of pirates challenged the authority of the FCC to enjoin "micro broadcasters" from unauthorized transmission, but in *United States v. Dunifer*,[45] the United States District Court for the Northern District of California rejected their assertion, affirming the FCC's authority to impose a licensing system to manage the wireless spectrum.[46]

In these cases, which challenged the Commission's authority limit access to the spectrum, courts recognized that without regulation of the wireless commons, the radio spectrum would fail for everybody—broadcasters and consumers alike. In an attempt to alleviate tension between micro broadcasters and regulators, in 2000 the FCC issued the first set of Low Power FM ("LPFM") licenses.[47] LPFM established a new category of broadcasting, limited to non-commercial stations, and restricted to

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38. *See generally* ZEKE TEFLON, THE COMPLETE MANUAL OF PIRATE RADIO (Sharp Press, 4th ed, 1994).

39. *See generally* PIRATE RADIO USA, *supra* note 11.

40. *Id.* (discussing the "perpetual licensing cycle"); *see also* 47 C.F.R. § 90.473 (2015); 47 U.S.C. § 307 (2012).

41. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969).

42. *See* Nat'l Broad. Co. v. United States, 319 U.S. 190, 227 (1943).

43. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

44. *Id.* at 390.

45. United States v. Dunifer, 997 F. Supp. 1235 (N.D. Cal. 1998).

46. *See id.* at 1238; *see also* Ted M. Coopman, *U.S. v. Dunifer: A Case Study of Micro Broadcasting*, 7 J. RADIO STUDIES 287, 299 (2000).

47. ERIC KLINEBERG, FIGHTING FOR AIR 255 (2007); *see also* FCC, LOW POWER FM RADIO SERVICE, http://transition.fcc.gov/mb/policy/lpfm/ (last accessed Apr. 8, 2015).

broadcasting at 100 watts or less, sufficient for a 3.5 mile range.[48] The conundrum of LPFM is that any applicant found to have previously made unauthorized broadcasts is ineligible for a LPFM license, shutting out the most zealous community of micro broadcasters.[49]

C. From Radio Pirates to Cellular Ninjas: The Future of Unauthorized Broadcasting

Although AM-FM radio is a mature technology and Internet radio offers an appealing alternative to clandestine broadcasting, the FCC's enforcement challenge remains as relevant today as it was at pirate radio's peak. The FCC's authority to license wireless spectrum derives from Section 301 of the Communications Act, which authorizes the FCC to "maintain control . . . over all channels of radio transmission" and prohibits any person from "operat[ing] any apparatus for the transmission of energy or communications or signals by radio . . . except . . . with a license."[50] Therefore, traditional radio regulation is not all that Section 301 authorizes. It is the source of authority for regulation of all licensed wireless technology, including broadcast and satellite television, cellular phone service, mobile broadband, and other technologies that rely on wireless spectrum to transmit information.[51]

The wireless devices that connect our society depend on reliable access to spectrum that is free from interference.[52] Initiatives like the digital television transition, spectrum incentive auctions, and innovative mobile broadband technologies are only possible because of compliance by licensees with the regulatory framework enforced by the FCC.[53] Until now financial and technological barriers have deterred pirates from encroaching on these advanced frequency ranges.[54] However, just as cheap and common equipment enables radio pirates to broadcast on AM-FM bands, as the technology needed to construct and maintain advanced wireless networks decreases in price and complexity, it becomes more and more likely that unauthorized broadcasting will spread to these previously unencumbered bands.

The seeds of unauthorized broadcasting in spectrum allocated to advanced wireless services have already been planted. The 2012 "Def Con"

48. FCC, *supra* note 47.

49. KLINEBERG, *supra* note 47, at 256; *see also* PIRATE RADIO USA, *supra* note 11, at 00:40:15, 01:08:20.

50. 47 U.S.C. § 301 (2012).

51. *Id.* ("all channels of radio transmission"). It is important to distinguish regulated wireless technology from *unregulated* wireless technology, such as Wi-Fi, Bluetooth, cordless telephones, and "microbroadcasting," which is not the focus of this Note. *See generally* 47 C.F.R. § 15 (2015).

52. Interview with David Donovan, President, New York Association of Broadcasters, in Washington, D.C. (Apr. 10, 2015) (for example: cellular telephones, mobile broadband internet, broadcast television, digital broadcast satellites, and broadcast radio).

53. *Id.*

54. *Id.*

hacker convention in Las Vegas, Nevada featured a homemade cellular network called "Ninja-Tel," which provided cellular services to nearly 650 convention attendees.[55] The equipment was entirely contained within a single van.[56] In Mexico, a nonprofit called Rhizomatica has been installing local cellular networks; each capable of providing service to remote villages for a total cost less than $6,000.[57] The towns where Rhizomatica has invested are too small to attract speculation by traditional providers and would otherwise be left behind as the rest of their nation becomes connected.[58]

Ninja-Tel and Rhizomatica are the inevitable products of the decreasing barriers to developing advanced wireless networks that are independent of existing providers.[59] It is only a matter of time before consumers begin seeking alternatives to established providers, and unauthorized broadcasters using cheap technology, step in to meet the demand, bringing with them the same interference challenges that plagued radio broadcasting for decades. The FCC should assert its authority and develop strategies to enforce its regulatory system now, in preparation for the next generation of unauthorized broadcasters.

III. UNAUTHORIZED BROADCASTING POSES A UNIQUE ENFORCEMENT CHALLENGE THAT MAY BE ADDRESSED BY ESTABLISHING AUTHORITY TO CRACK DOWN ON AIDERS AND ABETTORS OF PIRATE BROADCASTERS

Pirate radio poses a unique enforcement challenge. Unlike many resources, which risk permanent depletion with use, wireless spectrum cannot be destroyed, yet its value can still be diminished by overuse.[60] Employing new technology, accessing the spectrum requires minimal investment and rudimentary technical knowledge.[61] But doing so can cause interference, severely degrading the value of licenses acquired by authorized broadcasters at great expense and hampering the ability of fledging stations to garner investment necessary to acquire licenses in the first place.[62] Pirates

55. Elinor Mills, *Hackers Build Private 'Ninja Tel' Phone Network at Defcon*, CNET (July 28, 2012, 5:47 PM PDT), http://www.cnet.com/news/hackers-build-private-ninja-tel-phone-network-at-defcon/.

56. *Id.*

57. Lizzie Wade, *Where Cellular Networks Don't Exist, People are Building Their Own*, WIRED (Jan. 14, 2015, 6:30 AM), http://www.wired.com/2015/01/diy-cellular-phone-networks-mexico/.

58. *Id.*

59. *See* 47 U.S.C. § 307(c) (2012); *see also* ROBERT BRITT HORWITZ, THE IRONY OF REGULATORY REFORM: THE DEREGULATION OF AMERICAN TELECOMMUNICATIONS 167 (1989).

60. *See* Herter, *supra* note 5, at 653, 655.

61. *See* TEFLON, *supra* note 38, at 1.

62. *See, e.g.*, Letter from National Association of Black Broadcasters (letter on file with author) ("It is patently unfair for NABOB members to invest substantial sums

themselves need not be in close proximity to the apparatus transmitting their signals, and the equipment used to transmit can be replaced economically enough to make forfeiture a viable alternative to capture.[63] However, as evasive as pirate operators themselves may be, they rely on resources that are not so elusive: landlords supply space and electricity, advertisers purchase airtime and publicize the station, content providers supply broadcast material, and manufacturers produce equipment modifiable for unauthorized use. Unlike pirate operators, this support network is exposed and vulnerable to enforcement action.

A. The FCC's Enforcement Procedure for Unauthorized Broadcasters Is an Inadequate Deterrent to Pirates

From the first days of radio until the turn of the 21st century limited technology tethered pirates to their transmitters by wires carrying electricity from source, to amplifier, to transmitter. If the transmission source could be identified, the operator likely was nearby. Today however, with Internet access, a radio pirate can construct his transmitter in one place and operate the station from anywhere in the world.[64] Furthermore, because of notification procedures mandated by the Communications Act and carried out by the Enforcement Bureau, there is little to deter an aspiring radio pirate from setting up and broadcasting from a location until being discovered by FCC agents.[65] Once warned, a determined pirate can comply temporarily, only to resume broadcasting from a new location or on a different frequency.[66]

Section 301 of the Communications Act authorizes the FCC to issue broadcast licenses and prohibits certain transmissions without one.[67] The FCC has only three general remedies for violations of provisions of the Act: license suspension,[68] denial of license renewal,[69] or sanctions issued pursuant to Section 501, including monetary forfeiture and imprisonment.[70]

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purchasing and operating radio stations only to discover that they must compete against illegal operators who do not live the by the same rules. These operators do not have to build or purchase a facility that meets the Commission's engineering or operating standards.").

63. PIRATE RADIO USA, *supra* note 11, at 00:37:35 (separating the transmitter from the studio site and connecting them using the internet allows a radio pirate to avoid capture by the FCC or law enforcement).

64. *Id.*

65. *See* 47 C.F.R. § 1.80(d) (2015); 47 U.S.C. § 503(b)(5) (2012).

66. C*ompare, e.g.*, 17 Webster Place Association, LLC, *Notice of Unlicensed Operation*, EB-09-NY-0237 (2009), https://apps.fcc.gov/edocs_public/attachmatch/DOC-292938A1.pdf (broadcasting from 17 Webster Place, Clifton, N.J. on 99.9 MHz), *with* 17 Webster Place Association, LLC, *Notice of Unlicensed Operation*, EB-09-NY-0358 (2009), https://apps.fcc.gov/edocs_public/attachmatch/DOC-295358A1.pdf (broadcasting from 17 Webster Place, Clifton, N.J. on 107.9 MHz). There is no indication that either warning resulted in further enforcement action.

67. *See* 47 U.S.C. § 301 (2012).

68. *See* 47 U.S.C. § 303(m) (2012); *see also* 47 U.S.C. § 312(a) (2012).

69. *See* 47 U.S.C. § 307 (2012).

70. *See* 47 U.S.C. § 501 (2012).

Pirate broadcasters have no license to suspend or revoke, leaving sanctions as the only remedial option.[71] Before action is taken against a pirate, the FCC's rules instruct the Enforcement Bureau to issue a warning.[72] Only after a pirate ultimately refuses to comply does the Act direct the FCC to refer the matter to the Department of Justice (DOJ) for litigation.[73]

Under Commission rules, the Enforcement Bureau is responsible for resolving "complaints regarding unauthorized . . . operation of communications facilities."[74] The procedure for a violation of Section 301 follows a four-step process, which can be terminated upon compliance at any stage: (1) Notice of Unauthorized Operation (NOUO), (2) Notice of Apparent Liability (NAL), (3) Forfeiture Order, and ultimately (4) referral to DOJ for litigation.[75] The FCC has published online a data set of enforcement actions taken between January 8, 2003, and May 26, 2016.[76] It is referred to below to illustrate the progression.

The process generally begins with a warning delivered by field agents or an NOUO issued by the Enforcement Bureau.[77] Although this informal notice is required for individuals who do not already "hold a license . . . issued by the Commission,"[78] the Act does not require a such a warning if the pirate "is engaging in activities for which a license . . . is required . . . [and] the . . . [pirate] is transmitting on frequencies assigned for use [by an authorized station]."[79] Rather than relying entirely on compulsory action against pirates who interfere with assigned frequencies as authorized, the Enforcement Bureau evidently relies largely on the voluntary compliance option. During the sample period 1,469 NOUOs were issued, "informing a party that radio stations must be licensed . . . and directing the party to discontinue operation . . . immediately."[80] According to data in the sample, 90 percent of proceedings did not advance beyond this stage.[81] It is important to note that of the 1,469 NOUOs issued in the sample period, roughly 200 were issued to the same 89 unique parties.[82] These pirates' recurrent violations illustrate the potentially ephemeral nature of NOUO compliance.

71. *See* Sonderling Broad. Corp., *Memorandum Opinion and Order*, 69 F.C.C.2d 289, 292 (1977).
72. *See* 47 C.F.R. § 1.80 (2015).
73. 47 U.S.C. § 504(a) (2012).
74. 47 C.F.R. § 0.111(a)(9) (2015).
75. 47 C.F.R. § 1.80.
76. FCC, FCC ENFORCEMENT ACTIONS AGAINST PIRATE RADIO BY LOCATIONS (last visited June 12, 2016), http://www.fcc.gov/maps/fcc-enforcement-actions-against-pirate-radio-location [hereinafter *Enforcement Map*].
77. *Id.*
78. 47 C.F.R. § 1.80(d) (2015).
79. 47 U.S.C. § 503(b)(5) (2012).
80. *See Enforcement Map*, *supra* note 76.
81. *Id.*
82. *Id.*

Next, if the party fails to comply with the NOUO, the Enforcement Bureau issues a NAL, as required by both the Act and the FCC's rules.[83] The NAL is "a preliminary decision . . . proposing a monetary forfeiture against a party that has apparently willfully or repeatedly violated the . . . Act."[84] At this stage, the respondent is expected to pay the fine or to submit an explanation for why the penalty should be revoked or reduced.[85] The FCC reports having issued 159 NALs to alleged radio pirates during the sample period, with proposed penalties totaling $1,995,000.[86] Of these, about half were evidently resolved before proceeding to the forfeiture stage.[87]

If a pirate does not comply with the NAL, the Commission issues a Forfeiture Order, "concluding that the party has willfully or repeatedly violated the . . . Act . . . and imposing a monetary forfeiture."[88] During the sample period, 88 Forfeiture Orders were issued, assessing a total of $975,850 in fines.[89] Once an Order is issued, if the forfeiture is not paid voluntarily, FCC rules direct the case to be referred to DOJ for judicial enforcement and collection under Section 504(a) of the Act.[90] The FCC itself does not possess litigation authority to compel compliance.[91] Instead, Section 504(a) instructs that "[i]t shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures."[92]

This published enforcement data suggests that for some unauthorized broadcasters, the Enforcement Bureau's voluntary compliance procedures are effective. For many, however, these numbers may not show the whole picture. In a 2015 letter to Congressman Chris Collins, a member of the House Energy and Commerce Committee, FCC Chairman Tom Wheeler explained:

> [P]irate radio presents persistent enforcement issues. Although some pirate operators cease operations after receiving an initial warning letter, they are often quickly replaced by other pirates. Many other pirate operators may ignore the warning or resume broadcasting from another location. Even monetary penalties and equipment seizures do not deter the most aggressive pirate

83. 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f) (2015).

84. *See Enforcement Map*, *supra* note 76.

85. *See* 47 C.F.R. § 1.80(f)(3).

86. *Enforcement Map*, *supra* note 76.

87. *See id.* (reflecting the disparity between the fines proposed in NALs and the total forfeitures ordered in lieu of publicly available information regarding how many proposed fines were paid, reduced, or revoked).

88. *Id.*

89. *Id.* (although the *Enforcement Map* indicates the total dollar amount of fines assessed, there is no indication of how much was actually collected at this, or subsequent stages of the proceeding).

90. 47 C.F.R. § 1.80(f)(5).

91. 47 U.S.C. § 504(a) (2012).

92. *Id.*

> operators, who simply refuse to pay the FCC forfeitures and obtain cheap replacement equipment online.[93]

An alternate possible explanation for the dramatic reduction, from 1,469 NOUOs to only 159 NALs, is a strategic decision not to pursue enforcement proceedings against every unauthorized broadcaster with the knowledge that many will not be litigated to completion.[94] Of the pirates who are served Forfeiture Orders, those that do not comply are referred to the DOJ.[95] Unlike other regulatory enforcement issues, the DOJ lacks a division dedicated to litigating broadcast violations.[96] Instead, responsibility for prosecution is distributed to United States Attorneys' offices, which exercise prosecutorial discretion over whether and how to litigate.[97] Of the Forfeiture Orders that are litigated at all, many result in default judgments against the pirate broadcasters, rather than compliance and payment of penalties resulting from primary proceedings.[98] This final group is the hard core of judgment-proof pirates who might finally be thwarted using aiding and abetting liability, dissuading curious unauthorized broadcasters from dipping a toe into the sea of illegal pirate radio.

B. Aiding and Abetting Liability Would Cut the Supply Chain of Essential Resources to Unauthorized Broadcasters

While unauthorized broadcasters themselves may be elusive or judgment-proof, like any enterprise they rely on external resources, including space, utilities, equipment, content, and revenue. The people who provide the resources constitute an exposed flank in the pirates' defenses. While a pirate can abandon his transmitter when agents investigate an illegal

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93. Letter from Tom Wheeler to Rep. Chris Collins (July 27, 2015) (letter on file with author).

94. *See generally* Interview with David Donovan, *supra* note 52; *see also* Comm. Ajit Pai, Remarks at the PLI/FCBA 33rd Annual Institute on Telecommunications Policy & Regulation, Washington, D.C. (Dec. 3, 2015) ("[T]he FCC currently has little interest in doing bread-and-butter enforcement work . . . Indeed, a whistleblower within the Enforcement Bureau gave me an October 28, 2014 email from the Bureau's Northeast Regional Director to field agents that included the following instructions: 'We are scaling back on our response to pirate operations.'").

95. 47 U.S.C. § 504(a) (2012).

96. *See, e.g.*, DEP'T OF JUSTICE, AGENCY LISTING (including the Antitrust Division, Environment and Natural Resource Division and Tax Division), http://www.justice.gov/agencies.

97. Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (explaining that the decision not to prosecute is the result of a "complicated balancing of a number of factors within its expertise," including "whether a violation has occurred, how to allocate agency resources, likelihood of success, overall agency policies, whether agency has sufficient resources to prosecute at all.").

98. *See, e.g.*, United States v. Watkins, Docket No. 1:14-cv-04173 (S.D.N.Y. June 10, 2014) (default judgment); United States v. Morris, Docket No. 1:13-cv-12384 (D. Mass. Sept. 26, 2013) (default judgment); United States v. Toussaint, Docket No. 1:08-cv-11870 (D. Mass. Nov. 07, 2008) (default judgment).

signal or choose to risk prosecution for noncompliance, the pirate's support network may not be capable of such evasion. Two key examples provide insight into the use of aiding and abetting liability to quash resilient radio pirates: the response of British Parliament to the first generation of pirate radio in the 1960s,[99] and the evolution of aiding and abetting liability for violations of the Securities Exchange Act.[100] Each provides a relevant point of comparison.

1. How the United Kingdom Sank Pirate Radio

The term "radio pirate" first appeared in the British Parliament in the 1960s to describe the armada of ships broadcasting without authorization off the English coast.[101] From radio's inception, the United Kingdom maintained a legal monopoly over the airwaves.[102] Their regulatory method was influenced by observing two afflictions of American broadcasting: chaos and commercialism.[103] In 1922, the British Post Office, to which Parliament had delegated radio regulation, received 24 license applications.[104] Rather than choosing between applicants, the Post Office—for the sake of administrative convenience and to avoid American pitfalls, persuaded the applicants to form a single company: the British Broadcasting Company ("BBC").[105]

By the 1960s, public tolerance for government monopoly was waning.[106] In 1964, the first pirate radio station dropped anchor three miles off the British coast to fill the vacuum, close enough to broadcast into the United Kingdom, but beyond the reach of Parliament's territorial control.[107] At its height, more than a dozen stations were broadcasting from the "high seas" off the coast of England.[108] At first the United Kingdom found itself powerless to take action. Parliament was bound by its own centuries old tradition as protector of "freedom of the high seas."[109] England had never claimed authority over any other nation's vessels at sea, with only two exceptions: pirates (i.e., the swashbuckling, gold-thieving kind) and slavers.[110] Despite frustration with the radio pirates, Parliament remained

99. Kimberly Peters, *Sinking the Radio "Pirates": Exploring British Strategies of Governance in the North Sea, 1964-1991*, 43 AREA 281 (2011).

100. Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135 (2006).

101. Peters, *supra* note 99, at 281.

102. PAULU, *supra* note 3, at 13-14.

103. *Id*.

104. *Id.*

105. *Id*.

106. Peters, *supra* note 99, at 282.

107. *Id.*

108. *Id.*

109. J. C. Woodliffe, *The Demise of Unauthorized Broadcasting from Ships in International Waters*, 1 INT'L J. ESTUARINE & COASTAL L. 402, 402 (1986).

110. Peters, *supra* note 99, at 283.

averse to "strong-arm action," which it feared could undermine England's foreign policy of non-intervention at sea.[111]

Instead, the United Kingdom concentrated on gathering international support for intervention, culminating in the 1965 Strasburg Agreement "for the prevention of broadcasts transmitted from stations outside national territories." [112] The agreement obligated signing nations, including the United Kingdom, to take domestic action against broadcasts emanating from extraterritorial sources, including steps to make collaboration with pirates an offense, including providing and maintaining equipment, transportation, content production, and advertising.[113]

Although it did not go so far as to enable regulation of the offshore pirate broadcasters, the new obligation gave Parliament the justification it needed to impose sanctions on its own citizens who supported the radio pirates.[114] In 1967, Parliament passed the Marine Broadcasting Offenses Act (MBO), which severed lifelines between broadcast ships and the shore.[115] Modeled on the Strasburg Agreement, the MBO prohibited British citizens from providing services or supplies to unauthorized broadcasters.[116] One commenter noted: "By these means the stations, cut off from the nearest and most convenient source of equipment, supplies, transport and . . . advertising-revenue, would be dealt a rapid deathblow." [117] In the end, Parliament's deathblow sank nearly all of the radio pirates.[118]

2. Aiding and Abetting Liability for Securities Violations

Secondary liability is an evolving component of American securities regulation. While the SEC has long acted with the assumption that it had authority to bring enforcement actions against aiders and abettors of violations, the authority was made explicit only recently. [119] Two key controversies shaped secondary liability for securities enforcement and serve as guideposts for similar liability under the Communications Act. First, in 1994, the Supreme Court held that there is no implied liability for

111. Woodliffe, *supra* note 109, at 403.

112. European Agreement for the Prevention of Broadcasts Transmitted from Stations outside National Territories, Council of Europe, Jan. 22, 1965, E.T.S. No. 53, http://conventions.coe.int/Treaty/en/Treaties/Html/053.htm.

113. *Id.*

114. Peters, *supra* note 99, at 283.

115. *Id.; see also*, Marine Broadcasting Offences Act 1967, c. 41 (UK) [hereinafter *MBO*].

116. Peters, *supra* note 99, at 284.

117. Woodliffe, *supra* note 109, at 403.

118. The only station that survived the *MBO* was "Radio Caroline" which continued broadcasting until 1991. Peters, *supra* note 99, at 286.

119. R. Daniel O'Connor et al., *Dodd-Frank, Aiding-and-Abetting Scienter, and Principles Fairness: Why the SEC Should Not be Allowed to Apply Section 20(e) Retroactively*, 43 SEC. REG. & L. REP. 1422 (2011).

aiding and abetting securities violations.[120] More recently, after action by Congress, the Second Circuit offered clarification about the elements of secondary liability in SEC enforcement actions.[121]

In response to the 1929 stock market crash, Congress adopted new securities legislation, including Section 10(b) of the Securities Exchange Act, making it "unlawful for any person, directly, or indirectly… [to] purchase or [sell] any security . . . in contravention of such rules and regulations as the SEC may prescribe."[122] For decades this provision acted as the foundation to assert aiding and abetting liability for SEC violations.[123] In 1994, the Supreme Court considered whether such liability could properly be implied in *Central Bank of Denver v. First Interstate Bank*.[124] The Court concluded that the Act provided neither a private right of action against aiders and abettors nor generally authorized the SEC to take enforcement action against them.[125] The Court reached its conclusion by reviewing provisions of other financial regulatory statutes, many of which explicitly provided secondary liability, and held that "the fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere."[126] The Court held that in such circumstances "it is not plausible to interpret the statutory silence as tantamount to an implicit congressional intent to impose . . . aiding and abetting liability."[127]

In 1995, in response to *Central Bank*, Congress passed the Private Securities Litigation Reform Act (PSLRA), amending the Exchange Act and explicitly restoring the SEC's previously-implied authority to bring aiding and abetting enforcement actions against a defendant who "knowingly provides substantial assistance to another person in violation of [the Act]."[128] The PSLRA, however, did not establish a private cause of action against aiders and abettors—despite calls to do so—confirming congressional intent to limit aiding and abetting liability to enforcement actions by the SEC.[129]

When the United States economy stalled again in 2007, Congress responded by passing the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which among many provisions, expanded the secondary liability intent requirement for securities violations from knowledge to "knowingly or recklessly"—substantially broadening the

120. Central Bank of Denver v. First Interstate Bank, 511 U.S. 164 (1994).

121. SEC v. Apuzzo, 689 F.3d 204 (2d Cir. 2012).

122. *Central Bank of Denver*, 511 U.S. at 170-71 (citing Securities Exchange Act of 1934, 15 U.S.C. § 78j).

123. *See id.*

124. *Id.* ("We granted certiorari to resolve the continuing confusion over the existence and scope of the § 10(b) aiding and abetting action.").

125. *Id.* at 183-84.

126. *Id.* at 184.

127. *Id.* at 185.

128. Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 104, 109 Stat. 737, 757 (codified as amended at 15 U.S.C § 78t(e) (2000)).

129. O'Connor, *supra* note 119, at 2.

scope of liability.[130] Congress had dismissed suggestions by the SEC to include recklessness in 1995, but inclusion of the standard in Dodd-Frank reflects Congress' evolving view on secondary liability.[131] The lower bar for prosecution has lead commentators to deem the role of Chief Financial Officer the "Most Dangerous Job in Corporate America."[132]

In 2012, the Second Circuit addressed a remaining point of contention in *SEC v. Appuzzo.*[133] It was well established, even before *Central Bank*, that the elements of aiding and abetting liability for a securities violation enforcement were: the existence of a violation by the primary party; the aider and abettor's knowledge of the primary violation; and substantial assistance by the aider and abettor in the achievement of the primary violation.[134] In *Apuzzo*, the Second Circuit evaluated the third element—the meaning of "substantial assistance."[135] The Court noted that, unlike a private action in which a plaintiff seeks damages from the defendant, in an enforcement action, the purpose is deterrence, not compensation.[136] Relying on that distinction, the Court determined that "proximate cause" was not the appropriate standard for substantial assistance.[137] Instead, the Court looked to the origins of aiding and abetting liability, adopting Judge Hand's three-part standard.[138] To satisfy the substantial assistance element, the Second Circuit held that the SEC must prove that a defendant had: (1) associated himself with the venture, (2) participated in it as in something he wished to bring about, and (3) sought by his action to make it succeed.[139] While the holding of *Appuzzo* may lower the bar for SEC enforcement action against aiders and abettors, its decision is still limited by *Central Bank's* conclusion that secondary liability cannot be implied where Congress has foreclosed secondary liability in private actions.[140]

130. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, §§ 933, 1036, 124 Stat. 1883-84, 2010-11 (2010).

131. O'Connor, *supra* note 119, at 2.

132. John Carney, *CFO: Most Dangerous Job in Corporate America*, CFO.COM (Feb. 26, 2013), http://ww2.cfo.com/regulation/2013/02/cfo-most-dangerous-job-in-corporate-america/.

133. SEC v. Apuzzo, 689 F.3d 204, 206 (2d Cir. 2012).

134. *Id.*

135. *Id.*

136. *Id.* at 212.

137. *Id.* at 206.

138. *Id.* at 212. The *Peoni* formulation had already been adopted by the Supreme Court. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949).

139. *Id.*

140. Central Bank of Denver v. First Interstate Bank, 511 U.S. 164, 184 (1994).

IV. THREE WAYS TO CRACK DOWN ON AIDERS AND ABETTORS OF UNAUTHORIZED BROADCASTING: STATUTE, RULEMAKING, AND EXISTING CRIMINAL LAW

Although the FCC currently possesses neither the United Kingdom's MBO-based primary liability authority, nor the SEC's secondary liability authority, the Commission is not without recourse to crack down on pirate radio aiders and abettors. There are two routes through which the FCC could acquire new authority to hold pirate radio aiders and abettors liable: congressional statute or agency rulemaking. Alternatively, the FCC could coordinate with DOJ to hold broadcasters who violate Section 301 of the Act criminally liable for conversion of public property, thereby exposing aiders and abettors to the secondary liability provision of the Criminal Code (as described in Section IV.C, *infra*).

A. Congress Should Grant Statutory Authority to the FCC to Bring Primary or Secondary Liability Enforcement Actions Against Aiders and Abettors of Pirate Radio

The most straightforward solution would be for Congress to pass a statute augmenting the authority of the FCC to crack down on pirate radio aiders and abettors.[141] There are two ways Congress could address the issue. First, borrowing from the model employed by the United Kingdom, Congress could establish primary liability for certain behaviors known to enable pirate broadcasters. Alternatively, Congress could replicate the SEC enforcement provisions of the PSLRA, establishing similar secondary liability for aiders and abettors of Communications Act violations.

1. Primary Liability: The United Kingdom Model

Rather than imposing aiding and abetting liability, Congress could adopt a statute modeled on the MBO, later incorporated into the United Kingdom Broadcasting Act, which effectively terminated the original radio pirates off the coast of England.[142] Unlike the PSLRA, which accomplishes

141. On March 22, 2016, FCC Chairman Wheeler delivered a statement to the House Subcommittee on Communications and Technology during an oversight hearing, requesting legislation from Congress to aid the FCC's enforcement mission by amending the Communications Act to specifically authorize the FCC to take action against landlords that aid and abet pirate radio operators. *Oversight of the Federal Communications Commission: Hearing Before the Subcomm. on Commun. & Tech. of the H. Comm. of Energy & Commerce*, 114th Cong. (2016) (statement of Tom Wheeler, Chairman, Federal Communications Commission), http://docs.house.gov/meetings/IF/IF16/20160322/104714/HHRG-114-IF16-Wstate-WheelerT-20160322.pdf.

142. Broadcasting Act 1990, c. 42, part VII (UK) (incorporating key provisions of the *MBO*).

its objective through secondary liability for the offenses of a principle offender, the MBO makes it a primary offense to take actions known to support unauthorized broadcasting.[143] Congress could develop a specific list of offenses similar to the U.K. prohibitions, or delegate to the FCC authority to define infractions.

The MBO successfully forced unauthorized broadcasters off the air, despite the broadcasters themselves being out of range of the U.K.'s territorial control, by cutting off access to necessary inputs from within the U.K.'s jurisdiction.[144] All of the MBO's prohibitions include a scienter requirement that a party have "reasonable cause to believe," that their action is supporting an unauthorized station.[145] While the MBO includes a prohibition on unauthorized broadcasting, the bulk of the legislation is dedicated to prohibitions on activities *supporting* such broadcasting.[146] Prohibited activities include: managing, operating, or financing an illicit station; supplying or maintaining equipment; supplying content or participating in a broadcast; and advertising, including buying and selling air time, as well as promoting the station itself.[147]

The benefit of a solution of this nature is that it does not rely on the successful conviction of a radio pirate before legal action can be taken against supporters. In the case that litigation against a judgment-proof pirate is not pursued, action could still be taken against a landlord, advertiser, or other enabler. The downside to such a system, delineating specific violations, is that it is vulnerable to "loopholing."[148] Radio pirates are resourceful. If obvious resources are cut off, they may resort to harder to detect alternatives, potentially driving the industry underground.[149]

2. Secondary Liability: The SEC Model

Alternatively, if Congress would prefer to enact a method more familiar to United States regulators, it could amend the Communications Act to explicitly authorize the FCC to take enforcement actions based on secondary liability. Congress could model the provision on the aiding and abetting liability established by the PSLRA and bolstered by Dodd-Frank.[150] Dodd-Frank explicitly grants to the SEC authority to bring secondary liability claims for aiding and abetting securities violations, establishing that

143. *Id.*

144. Woodliffe, *supra* note 109, at 403.

145. *See, e.g.*, Broadcasting Act 1990, c. 42, §§ 168, 169, 170 (UK).

146. Broadcasting Act 1990, c. 42, § 170 (listing more than a dozen specific instances of prohibited activities).

147. *Id.*

148. *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 482-83 (1996) (stating that common law systems help prevent loopholes by not specifying or defining certain provisions).

149. *See, e.g.*, Mary Meehan, *Outlaws Making Air Waves*, ORLANDO WEEKLY (July 9, 1998), www.orlandoweekly.com/orlando/outlaws-making-air-waves/Content?oid=2264182.

150. *See generally* 15 U.S.C. § 78t(e) (2012) (consisting of the PRSLA and Dodd-Frank). *See also supra* text accompanying notes 130 and 132.

"any person that knowingly or recklessly provides substantial assistance to another person in violation of any provision of this chapter . . . shall be deemed to be in violation . . . to the same extent as the person to whom such assistance is provided."[151]

A point of contention regarding the authority granted to the SEC by Dodd-Frank is whether "recklessness" is an appropriate standard for aiding and abetting liability in enforcement actions.[152] Nevertheless, in the context of FCC enforcement actions against aiders and abettors of pirate radio broadcasting, even if the "recklessness" standard was omitted and secondary liability applied only to those who "knowingly" assist, that limited standard likely would be sufficient.[153] While a recklessness standard would strengthen the provision, encouraging diligence and caution by possible aiders and abettors, if the FCC continues its current procedure of providing NOUO warnings before proceeding with enforcement actions, there likely would be sufficient grounds to satisfy the knowledge standard.

If Congress grants authority to the FCC to take enforcement actions against aiders and abettors of unauthorized broadcasting – either via a system of primary liability modeled on the MBO, or secondary liability modeled on the PSLRA – it would alter the risk analysis for the network of pirate radio support industries. In addition to delivering a "deathblow" to America's remaining radio pirates, as the MBO did U.K. radio pirates, either approach would supply the FCC with enforcement tools to repel the next wave of potential unauthorized broadcasters.

B. The FCC's Rulemaking Authority Is Sufficient to Support a Regulation Holding Pirate Radio Aiders and Abettors Secondarily Liable for Violations of Section 301 of the Communications Act

If Congress does not act, the FCC has sufficient rulemaking authority to adopt regulations to similar effect. The Commission's rulemaking authority comes from two sources: a specific statutory grant from Congress and the Communications Act's "ancillary authority."[154] Whether a rule cracking down on pirate radio aiders and abettors relies on statutory or ancillary authority depends on whether such a rule is deemed to be an interpretation of the Act's statutory command that the FCC "maintain

151. *Id.*

152. O'Connor, *supra* note 119, at 2.

153. *See, e.g.*, Michael O'Rielly, *A Draft Pirate Radio Policy and Enforcement Statement*, FCC BLOG (Sept. 24, 2015, 12:12 PM) (remarking on educational and enforcement efforts to "those entities that may knowingly or unknowingly assist pirate radio operations in any capacity"), https://www.fcc.gov/news-events/blog/2015/09/24/draft-pirate-radio-policy-and-enforcement-statement.

154. Am. Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005).

control,"[155] or whether reining in aiders and abettors is deemed an ancillary measure, necessary to accomplishing that assignment.[156]

The Communications Act assigned to the FCC "the purpose of regulating . . . communication by wire and radio."[157] Recognizing that communications was a field of rapid growth and innovation, the 1934 Congress built flexibility into the Communications Act.[158] Shortly after its adoption, in *FCC v. Pottsville Broadcasting*, the Supreme Court observed, "[u]nderlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."[159] To accomplish its regulatory mission, the FCC's enforcement scope must evolve to include aiders and abettors of modern radio pirates.

1. The FCC Has Two Sources of Authority to Take Action Against Radio Pirates: Statutory and Ancillary Authority

Until the 1980s, most administrative agencies were left to their wits to prove that administrative actions – whether adjudication or rulemaking – were within the authority granted to them by Congress. According to the then-reigning standard of *Skidmore v. Swift*, a court was to review agency action by considering thoroughness, validity, consistency, and "all those factors which give it power to persuade."[160] Under the *Skidmore* rule, the burden was on the agency to justify its action and outcomes were uncertain.[161] In 1984, the Supreme Court offered a new barometer by which to assess the authority of an agency to act: *Chevron* deference.[162] In *Chevron v. NRDC* the court formulated a new two-step test. Step one: had Congress spoken unambiguously with respect to the challenged action? If so, "that is the end of the matter."[163] If not, proceed to step two: if Congress's express intent does not foreclose the exercised authority, the court considers whether the agency action was reasonable.[164] Under this deferential standard the

155. 47 U.S.C. § 301 (2012)
156. United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968).
157. 47 U.S.C. § 151 (2012).
158. FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940).
159. *Id.*
160. Skidmore v. Swift, 323 U.S. 134, 140 (1944).
161. United States v. Mead, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting) ("The Court has largely replaced *Chevron*, in other words, with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th' ol' 'totality of the circumstances' test.").
162. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
163. *Id.* at 842.
164. *Id.* at 843.

court defers to the expertise and experience of the agency vested with the responsibility for a certain matter.[165]

For almost 20 years this was the standard. However, a series of cases over the next two decades questioned the efficacy of *Chevron*.[166] Finally, in 2001 in *United States v. Mead*, the Supreme Court adopted a new threshold test: "Step Zero."[167] *Mead* established a pre-*Chevron* inquiry into whether Congress had delegated to the agency authority to act with the force of law in the specific challenged manner in the first place, and whether the agency had in fact done so.[168] If the answer to both inquiries is affirmative – the examination proceeds to *Chevron* analysis. If not, the *Mead* Court held, *Chevron* no longer applies.[169] Under *Mead*, without a specific congressional delegation – most agencies are limited to their "power to persuade."[170]

For many agencies, failure of *Mead's* "Step Zero" results in relegation to the uphill battle of *Skidmore*. However, the FCC is vested with an additional and unique power: "ancillary authority."[171] In what has been referred to as the FCC's "necessary and proper" clause,[172] Section 154(i) of the Communications Act grants to the Commission the duty and power to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions."[173] Ancillary authority, however, is not a blank check. The Supreme Court interprets ancillary authority to function only in conjunction with specific jurisdiction granted to the Commission.[174] In *United States v. Southwestern Cable*, the Supreme Court held that the while the FCC had been given a "comprehensive mandate, with not niggardly but expansive powers," its authority "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities."[175] In *American Library Association v. United States*, the D.C. Circuit distilled *Southwestern's* principle into a two-part rule, limiting the Commission's jurisdiction over services not directly within its purview.[176] First, the subject of the regulation must be covered by the Commission's general grant of

165. *Id.* at 844.

166. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

167. *See* United States v. Mead, 533 U.S. 218, 226-27 (2001); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 188-91 (2006).

168. *Mead*, 533 U.S. at 226-27; *see also* Daniel A. Lyons, *Tethering the Administrative State: the Case Against Chevron Deference for FCC Jurisdictional Claims*, 36, J. CORP. L. 823, 831 (2011) ("*Mead* teaches that before deferring to an agency's interpretation of a statute, the Court must first satisfy itself that Congress intended it to do so.").

169. *Mead*, 533 U.S. at 266-27.

170. *Id.*

171. United States v. Sw. Cable Co., 392 U.S. 157, 178 (1968).

172. Motion Picture Ass'n of Am., Inc. v. FCC, 309 F.3d 796, 807 (DC Cir. 2002).

173. 47 U.S.C. § 154(i) (2012).

174. *Sw. Cable*, 392 U.S. at 181.

175. *Id.*

176. Am. Library Ass'n v. FCC, 406 F.3d 689, 692-93 (D.C. Cir. 2005).

jurisdiction under the Act.[177] Second, the subject of the regulation must be ancillary to the Commission's performance of its duties.[178]

American Library arose out of the DTV transition.[179] Like the subject of this note, the motivating concern was "piracy," but of a different sort.[180] Television broadcasters and content producers were concerned that without the natural quality degradation symptomatic of reproducing analog content, there would be no way to prevent unauthorized duplication of broadcasted content.[181] As a remedy, the Commission promulgated the broadcast flag rules, requiring devices capable of receiving DTV broadcast signals include technology enabling them to recognize a code embedded in the broadcast stream to prevent unauthorized redistribution.[182] While the Commission argued that the broadcast flag was essential – ancillary – to carrying out the transition, the Court premised its rejection of the Order on the first prong of the *Southwestern* test: the jurisdictional hook.[183] The Court looked to the Act, noting that the statute did not grant the FCC authority to regulate all devices, but rather, specified: "apparatus . . . incidental to . . . transmission."[184] Based on that observation the Court struck down the broadcast flag order – noting that recognition of the broadcast flag by a receiver is unrelated to signal transmission, and therefore inapplicable.[185]

2. A Regulation Against Aiding and Abetting Unauthorized Broadcasting Would Survive Scrutiny Under Either Standard

An FCC rule holding supporters of pirate radio broadcasters secondarily liable as aiders and abettors of violations of Section 301 would likely survive scrutiny under either the *Chevron* deference standard or under the *American Library* test as a valid exercise of the FCC's ancillary authority. The first question is, under *Mead*, whether Congress delegated authority for the Commission to act with the force of law in such a manner, and whether the Commission has in fact done so.[186] If a reviewing court finds that yes, Congress intended the Commission to act with the force of law to "maintain control . . . of channels of radio transmission," it would also likely find that inclusion of aiders and abettors of Section 301 violations, who are otherwise immune from prosecution, is a reasonable extrapolation from the ambiguous command to "maintain control."[187] As

177. *Id.*
178. *Id.*
179. *Id.* at 691.
180. *Id.*
181. *Id.* at 693-94.
182. *Id.* at 691.
183. *Id.* at 708.
184. *Id.* at 698; 47 U.S.C. § 153(40) (2012).
185. *Am. Library Ass'n*, 406 F.3d at 705.
186. United States v. Mead, 533 U.S. 218, 226-27 (2001).
187. *See* 47 U.S.C § 301 (2012).

confirmation that Congress contemplated aggressive intervention and enforcement against interference by unauthorized broadcasters on otherwise licensed channels of wireless spectrum, the Act explicitly carves an exception for such broadcasters, relieving the Commission of the standard warning requirement before proceeding with enforcement action.[188]

Alternatively, if a court determines that a rule against aiding and abetting Section 301 violations fails *Mead* because Congress had only anticipated actions against primary violators of the Act and therefore could not have explicitly delegated the authority, the regulation would likely survive scrutiny under *American Library* rather than receive condemnation under *Skidmore*. Secondary liability for facilitating unauthorized radio broadcasting is essential to the FCC's responsibility to regulate the wireless spectrum. Unlike *American Library*, here the authority to impose secondary liability on aiders and abettors of pirate radio flows directly from the statement of purpose in the Communications Act: "For the purpose of regulating . . . communication by wire and radio . . . there is created . . . the Federal Communications Commission, which shall . . . execute and enforce the provisions of this [act]."[189] Furthermore, unlike the order struck down by *American Library*, cracking down on pirate radio aiders and abettors undermines the ability of pirates to *transmit* unauthorized radio signals – without need to consider reception of those illicit signals.[190]

C. Aiders and Abettors of Pirate Radio Could Be Prosecuted Under the Criminal Code if Radio Pirates Are Prosecuted for Conversion of Public Property

In *Central Bank*, the Supreme Court warned that there is no universal aiding and abetting liability provision and that application of Section 2 secondary liability from the Criminal Code, to a civil enforcement action, would be an error.[191] Rather than viewing this as a prohibition on criminal prosecution for aiding and abetting Communications Act violations, regulators and prosecutors should interpret *Central Bank* as an instruction: if the only general source of aiding and abetting liability is in the Criminal Code, regulators and prosecutors should bring criminal charges against unauthorized broadcasters in place of, or in addition to, standard enforcement actions under the Communications Act.

Section 641 of the Criminal Code makes embezzlement, theft, or "knowing conversion" of public property a crime.[192] Judicial interpretation of "public property" for application of Section 641 has not relied on traditional property rights, allowing courts to apply a more flexible standard

188. 47 U.S.C. § 503(b)(5) (2012).

189. 47 U.S.C. § 151 (2012).

190. *Cf. Am. Library Ass'n*, 406 F.3d at 693, 698.

191. Central Bank of Denver v. First Interstate Bank, 511 U.S. 164 190 (1994); *see also* 18 U.S.C. § 2 (2006).

192. 18 U.S.C. § 641 (2012).

based on the government's intended control of the alleged stolen property.[193] While scholars, engineers, and politicians once debated the wisdom of applying property rights to "the ether" of wireless spectrum,[194] the Communications Act itself leaves little room for doubt about the government's intent to control all channels of radio transmission.[195]

1. Wireless Spectrum Is Public Property, Conversion of Which Violates the Criminal Code

Section 641 of Title 18 of the U.S. Code establishes, "Whoever . . . knowingly converts to his use or the use of another . . . [a] thing of value of the United States . . . shall be fined under this title or imprisoned."[196] When applying Section 641, courts consider two essential factors: the government's intent to exert control over the converted property,[197] and the defendant's bad faith in converting it.[198] The express language of the Communications Act, "to maintain control . . . over all channels of radio communication," satisfies the first factor.[199] The second factor, bad faith, is established as a matter of course when the FCC notifies violators of unauthorized operation and apparent liability for violation of Section 301. Taken together, it is evident that broadcasting without authorization is conversion of public property.

a. The Government's Intent to Exert Control over Spectrum

The clearest element of conversion of public property is the prerequisite of government intent to retain control of the converted resource. After acknowledging that most previous applications of Section 641 had involved government interest in tangible objects, the Fifth Circuit, in *United States v. Evans*, held that "the critical factor in determining the sufficiency of the federal interest in intangible interests . . . is the basic philosophy of ownership reflected in relevant statues and regulations."[200] The Fifth Circuit distinguished *Evans* from *United States v. Farrell*.[201] In *Farrell* the District Court dismissed a Section 641 indictment for theft of a school television after finding "the basic philosophy of the legislation [providing funds to

193. *See* United States v. Evans, 572 F.2d 455, 471 (5th Cir. 1976).
194. SLOTTEN, *supra* note 4, at 6.
195. 47 U.S.C. § 301 (2012).
196. 18 U.S.C. § 641 (2012).
197. *See Evans*, 572 F.2d at 455.
198. *See* Morrisette v United States, 342 U.S. 246 (1952).
199. 47 U.S.C. § 301 (2012).
200. *Evans*, 572 F.2d at 471 (finding liability for theft of government property where the relevant statutes indicated an underlying Congressional intent that the agency in question retain regulatory control of funds to which federal capital contributions were made).
201. *Id.* at 474.

purchase the television] seems to be to place as little federal control as possible over the actual administration of the programs and projects."[202] The Court held that in Section 641 actions "the government must establish a property interest . . . in order to prevail," and dismissed the indictment.[203] The *Evans* Court modified *Farrell's* analysis, describing a dichotomy: for tangible property, such as *Farrell's* stolen television, the government must have "title, possession, or control over the tangible object involved . . . however for intangible interests, the key factor . . . is the supervision and control contemplated and manifested on the part of the government."[204]

Though drafted half a century earlier, Section 301 of the Communications Act speaks directly to the Fifth Circuit's standard for control, establishing that "[i]t is the purpose of this act . . . to maintain control of the U.S. over all channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority."[205] Not only does the Act reserve control of the spectrum for the FCC, it prohibits reassignment of that control in any form but a temporary limited license.

Early in the radio era, there was substantial debate over how spectrum should be managed. At one extreme, advocates called for a private ownership model – as land in the American West had been distributed in the previous century, encouraging investment in an underutilized resource.[206] At the other extreme were concerns that private property rights would enable consolidation of control, yielding an unfair capacity to shape public opinion.[207] At first, the former dominated, and early radio policy was premised on the idea that spectrum belonged to the public and that everybody had a right to access it.[208] However, as early as 1907 officials recognized open access was unworkable, as illustrated in the *Electric World* bulletin in the introduction of this Note.[209] As the 19th century progressed, and radio entered prominence, it became evident that spectrum was a finite resource, in need of regulation for society to extract is maximum potential.[210]

Over the next three decades, Congress steadily tightened federal control of the spectrum. Constraints began with the 1910 Wireless Ship Act, which set the first access priorities, and the Radio Act of 1912, authorizing the Commerce Department to issue operator licenses and to allocate

202. United States v. Farrell, 418 F. Supp. 308, 310 (M.D. Pa. 1976) (finding that a teacher who had stolen a television purchased with federal funds channeled to the local school district was not liable for theft of public property because the legislation granting the funds purposefully delegated control of the funds away from the federal government).

203. *Id.*

204. *Evans*, 572 F.2d at 471.

205. 47 U.S.C. § 301 (2012).

206. SLOTTEN, *supra* note 4, at 6.

207. *Id*.

208. *Id*.

209. *Current News and Notes*, *supra* note 1.

210. SLOTTEN, *supra* note 4, at 6 ("[A]ll citizens might own the ether, but if everyone tried to use it its value would be destroyed.").

spectrum.[211] They progressed to the Radio Act of 1927, which established the FRC, and for the first time assigned particular frequencies to licensees.[212] Ultimately control was consolidated in the FCC by the Communications Act of 1934.[213] The latter legislation established the lasting notion that spectrum access is a privilege granted based on "public interest, convenience, and necessity."[214]

The Fifth Circuit in *Evans* and Pennsylvania's Middle District in *Farrell* each looked to the relevant statute to determine whether the government had manifested intent to control a particular resource when divining whether or not a resource qualifies as government property.[215] Here, there is little doubt from the history and text of the Communications Act that the intent of the 1934 Congress was to maintain "supervision and control" of the wireless spectrum.

b. The Pirate's Bad Faith Intent To Convert Spectrum

The second clear element of conversion of public property is the defendant's bad faith, or intent to convert the property to his own possession. In *Morissette v. United States*, the Supreme Court considered Section 641, warning that if applied to all conversions, without qualification for intent, the provision would extend more broadly than Congress had intended.[216] The Court held that "knowing conversion requires more than knowledge that defendant was taking the property into his possession. He must have knowledge of the facts, though not necessarily the law, that made the taking a conversion."[217] The court distinguished between stealing (taking illegally without intent to return), embezzlement (taking lawfully with unlawful intent not to return), and conversion, which "may be consummated without any intent to keep and without any wrongful taking," to highlight the importance of Section 641's framers' inclusion of "knowing" as a qualification to "conversion."[218]

This important limitation means that Section 641 can apply to spectrum only if a radio pirate broadcasts with knowledge that the spectrum occupied by that broadcast has been lawfully licensed to another broadcaster and is aware of his violation of the Communications Act in derogation of the government's manifest intent to control the spectrum. In *United States v.*

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211. *Id.* at 6-8.

212. *Id.* at 40.

213. Communications Act of 1934, 47 U.S.C. § 605(a) (2012).

214. SLOTTEN, *supra* note 4, at 40.

215. *See* United States v. Evans, 572 F.2d 455, 471 (5th Cir. 1976); *see also* United States v. Farrell, 418 F. Supp. 308, 310 (M.D. Pa. 1976).

216. Morrisette v United States, 342 U.S. 246, 271-72 (1952).

217. *Id.* at 270-71 (finding that it was a question of fact to be determined by a jury, whether a man who collected scrap metal from government property, had done so with or without knowledge that metal had not been abandoned by the government, regardless of whether or not he was aware of the prohibition against collecting it).

218. *See id.* at 271-72.

McPhilomy, the Tenth Circuit held that "good faith is an affirmative defense that would negate the required mental state" for violation of Section 641.[219] With this "good faith" exception, an unauthorized broadcaster who transmits without knowledge of the interference he is causing, or necessity of the license he is operating without, would likely not be liable for violation of Section 641.

While both *Morissette* and *McPhilomy* qualified "conversion" with the requirement of intent, *Morissette* included an additional caveat that cuts against pirates: while guilt for stealing requires intent to wrongfully keep what a defendant has unlawfully taken, "conversion . . . may be consummated without any intent to keep and without any wrongful taking." [220] This caveat eliminates the potential defense of a pirate broadcaster that the interfered-with-spectrum would be "returned" to its lawful owner, in the same state it was in before the conversion, as soon as the transmitter is powered down. Conversion encompasses unlawful use of property regardless of whether a defendant intended to restore the property to its owner.

McPhilomy contemplated an additional criminal violation: Section 1361, which imposes the same penalty as Section 641 for "[w]hoever willfully injures or commits any depredation against any property of the United States . . . ."[221] By interfering with licensed spectrum, a radio pirate diminishes the value of a particular license, and degrades the reliability of the spectrum regulatory system as a whole. In addition, while Section 1361 raises the scienter standard from "knowingly" to "willfully," it also imposes liability for attempted depredation.[222] Section 1361 could enable prosecutors to bring criminal action against would-be radio pirates, or cellular ninjas, who try and fail to transmit illicit broadcasts.

Section 301 of the Act expressly states the government's intent "to maintain the control of the Unites States over all the channels of radio transmission."[223] Although the Act instructs the FCC to "provide use of such channels" it restricts the Commission from conferring "ownership" – thereby retaining control over the spectrum in all circumstances.[224] When a radio pirate transmits unauthorized broadcasts on a portion of the spectrum licensed to another operator, the pirate not only deprives the licensee of his valuable access, but also converts the portion of spectrum from government control to his own use. If the pirate does so with knowledge of the

219. United States v. McPhilomy, 270 F.3d 1302, 1307 (10th Cir. 2001) (finding that defendants who mined for minerals on federal land despite warnings of non-compliance, for failing to wait a required period of time, and failing to pay an annual fee, could be found guilty for violation because they had, beyond a reasonable doubt, not been engaged in a "good faith pursuit of a mining claim").

220. *Morissette*, 342 U.S. at 271-72 (providing as examples: unauthorized use of property lawfully in one's possession; or commingling money taken into a custodian's custody with the custodian's own).

221. *See McPhilomy*, 270 F.3d at 1307 (considering 18 U.S.C. § 1361 (2012)).

222. 18 U.S.C. § 1361 (2012).

223. 47 U.S.C. § 301 (2012).

224. *Id.*

government's intent to control the spectrum, he has acted in bad faith, satisfying the intent requirement of Section 641 and possibly Section 1361.

2. Application of Criminal Liability to Aiders and Abettors of Pirate Radio

If a primary violation is established under Sections 641 or 1361 by satisfying the elements of "public property" elaborated above, prosecutors may be able to establish secondary liability for aiders and abettors of the criminal conversion or depredation of electromagnetic spectrum. Section 2 of the U.S. Criminal Code provides secondary liability for "[w]hoever commits an offense against the United States or aids [or] abets . . . its commission."[225] To determine aiding and abetting liability, courts rely on the construction elaborated by Judge Hand, and applied by the Second Circuit in *Apuzzo*: the defendant must "in some sort associate himself with the venture, that he participate in it as in something he wishes to bring about, [and] that he seeks by his action to make it succeed."[226]

In modern practice, the DOJ has developed a set of four elements to be satisfied when bringing a charge of aiding and abetting: that the accused (1) had specific intent to facilitate the commission of a crime by another; (2) had requisite intent of the underlying substantive offense; (3) assisted in the underlying substantive offense; and finally (4) that someone committed an underlying offense in the first place.[227] The United States Attorneys Manual indicates unanimity among the circuits on this test for criminal liability of an aider and abettor to be convicted as a principal violator of the underlying offense.[228] Like securities violations, the purpose of prosecuting aiders and abettors of unauthorized broadcasting is more deterrence than compensation, justifying the omission of proximate cause from this standard.[229]

With these factors in mind, the FCC can tailor its enforcement protocol to facilitate criminal prosecution of both primary and secondary violators of Section 301. In addition to issuing warning NOUOs to pirate operators, the Enforcement Bureau should make a point of issuing warnings to any known or likely facilitators – including landlords, advertisers, and

225. 18 U.S.C. § 2 (2012).

226. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

227. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL: CRIMINAL RESOURCE MANUAL § 2474 (1998).

228. *Id*. (citing United States v. DePace, 120 F.3d 233 (11th Cir. 1997); United States v. Chavez, 119 F.3d 342 (5th Cir. 1997); United States v. Powell, 113 F.3d 464 (3d Cir. 1997); United States v. Sayetsitty, 107 F.3d 1405 (9th Cir. 1997); United States v. Leos-Quijada, 107 F.3d 786 (10th Cir. 1997); United States v. Stands, 105 F.3d 1565 (8th Cir. 1997); United States v. Pipola, 83 F.3d 556 (2d Cir. 1996); United States v. Chin, 83 F.3d 83 (4th Cir. 1996); United States v. Lucas, 67 F.3d 956, 959 (D.C. Cir. 1995); United States v. Spinney, 65 F.3d 231 (1st Cir. 1995); United States v. Spears, 49 F.3d 1136 (6th Cir. 1995); *see also* United States v. Griffin, 84 F.3d 912, 928 (7th Cir. 1996)).

229. SEC v. Apuzzo, 689 F.3d 204, 212 (2d Cir. 2012).

suppliers – establishing knowledge of the underlying Section 301 violation, and providing notice of possible criminal sanctions. In *McPhilomy*, the court emphasized the fact that defendants had not only violated relevant regulations, but had done so after receiving warnings that their continued actions were impermissible.[230]

A possible objection to this tactic is that the existence of a statutory plan specifically addressing spectrum regulation forecloses extension of criminal law to the same category of offenses. The Ninth Circuit has considered this potential conflict regarding the Lacey Act, a statute that has seen little change since its adoption in 1900.[231] The Lacey Act established federal criminal penalties for violations of state and foreign environmental and conservation laws and regulations – regardless of whether or not the underlying offense is criminal or civil in nature.[232] In *United States v. Cameron*, the Ninth Circuit held that "two statutes can govern the same conduct without running afoul . . . [An act] is not interpreted as repealing, superseding, or modifying' the other law, unless the other law reserves exclusive control over the conduct at issue."[233]

Here, there is no conflict between the Communications Act and the Criminal Code. The Act neither reserves exclusive control nor assigns exclusive enforcement authority to the FCC. Rather, the Act explicitly contemplates Section 301 and the Criminal Code working in tandem[234] and delegates litigation authority to the Attorney General to compel compliance.[235] The Act establishes the government's intent to control the wireless spectrum through the FCC, and where the Act's internal provisions are insufficient to maintain that control, the Criminal Code supplies federal prosecutors additional, though perhaps underapplied, tools to crack down on pirates and the aiders and abettors who support them.

V. CONCLUSION: A WATERY GRAVE FOR PIRATE RADIO

On April 8, 2015, FCC Commissioner Michael O'Rielly issued a statement calling for a renewed emphasis on pirate radio enforcement. He declared, radio pirates "are not cute; they are not filling a niche; they are not innovation test beds; and they are not training grounds for future broadcasters . . . . [P]irate radio causes unacceptable economic harm to legitimate and licensed American broadcasters."[236] Between them, the FCC

230. United States v. McPhilomy, 270 F.3d 1302, 1308 (10th Cir. 2001).

231. United States v. Cameron, 888 F.2d 1279 (9th Cir. 1989).

232. Lacey Act of 1900, 16 U.S.C. §§ 3371-78 (2006).

233. *Cameron*, 888 F. 2d at 1284 (finding that criminal penalties of the Lacey act were not in conflict with underlying state laws, because the Act neither augmented, not diminished the scope of the state laws); *see also* United States v. Sohappy, 770 F.2d 816 (9th Cir. 1985).

234. *See, e.g.*, 47 U.S.C. § 312 (2012).

235. 47 U.S.C. § 401 (2012).

236. Michael O'Rielly, *Consider a New Way to Combat Pirate Radio Stations*, FCC BLOG (Apr. 8, 2015, 10:43 AM), http://www.fcc.gov/blog/consider-new-way-combat-pirate-radio-stations.

and DOJ have at their disposal the tools, or the means to acquire the tools, to cut the legs out from beneath unauthorized pirate radio broadcasters once and for all. Liability for aiders and abettors would fundamentally alter the risk calculation of pirate radio enablers, severing relationships that provide essential services, supplies, and content. The effectiveness of this strategy was proven in the U.K., and Congress has demonstrated its tolerance for such tactics in securities regulation enforcement. Though the urgency of securing the AM-FM radio bands may appear diminished as Internet radio has gained prominence, the next wave of pirates is on the horizon, with America's vital advanced wireless networks in their sights. It is essential that the FCC develop methods to secure the wireless spectrum today, in order to encourage development of the wireless technologies for tomorrow. If Congress is unwilling to act, and if the Commission is unable to regulate, together the Enforcement Bureau and DOJ can use existing criminal law to target aiders and abettors of unauthorized broadcasters, landing a decisive blow against the scourge of pirate radio.