SELF-REGULATION IN AMERICAN TELEVISION IN AREAS ASIDE FROM PROGRAM CONTENT

Les Brown*

Background

From the earliest days of television, and indeed dating to the advent of commercial radio in the United States, there was a tension within the industry between broadcasting as a profession and broadcasting as a business. For the first three decades, most television practitioners considered their field to be something of both. Station and network operators were determined to make money and increase their profits every year, but always within the professional parameters and in accordance with the industry ethos. Most owners and managers spoke proudly of being professional broadcasters in the service of their communities, though most produced very little locally, beyond newscasts, in the normal course of things. They meant that they did not shirk their responsibilities in times of social crisis or natural catastrophe. No company prided itself on professionalism more than the CBS network in the 60s and 70s, while at the same time boasting of being "the world's largest advertising medium."

To a great extent federal regulation dictated professional behavior. Licenses were awarded on the promise of serving "the public interest, convenience and necessity,"[1] and they were renewed on evidence that the promise was substantially fulfilled during the license term.[2]

---

* Television historian; reported on the electronic media industries since 1953 as an editor of *Variety*, correspondent for *The New York Times*, editor-in-chief of *Channels Magazine*, and founder-columnist of Television Business International. Author of seven books, including the landmark Televi$ion: The Business Behind the Box (1971) and Les Brown's Encyclopedia of Television (3d ed. 1992). The author currently conducts seminars in media at the Columbia and Fordham Graduate Schools of Business. He previously taught at Yale, Hunter College, and The New School for Social Research. The author was also a Poynter Fellow at Yale, a Presidential Fellow of the Aspen Institute, and a resident Senior Fellow of the Freedom Forum Media Studies Center at Columbia.

The author is deeply grateful to Marc E. Szafran for contributing the copious footnotes and citations so valuable to this article with a sophistication that belies his being a third-year law student. The author also wishes to thank Joseph Bartel, who diligently assisted in researching the citations. This article was written in connection with the conference entitled *Television Self-Regulation and Ownership Regulation: The American Experience*, held at the Columbia Institute for Tele-Information, Columbia University, New York City, March 10, 1995.

[1] Communications Act of 1934, ch. 652, 48 Stat. 1064 (1934) (codified at 47 U.S.C. §§ 151-610 (1988 & Supp. V 1993)).

[2] *Id.* § 307.

Unsponsored educational, cultural, public affairs, and religious programs were considered license protectors, though they were seldom favored with choice time periods. News, children's programs, and public service announcements, the key services, were usually more prominent in the schedules. Such loss leaders (news was considered one until the 70s) were a small price to pay for what the media baron Lord Thompson of Fleet once called "a license to print money."[3]

Regulation designated broadcasters as public trustees.[4] They were to deal with important public issues fairly by airing all contrasting viewpoints and, during election campaigns, to abide by rules designed to treat all qualified candidates equally and without bias.[5]

But beyond Federal Communications Commission ("FCC") regulation, professionalism was best enunciated by the Television Code[6] administered by the National Association of Broadcasters (the "Code").[7] This set of standards, created as a mechanism for industry self-regulation and general community responsibility,[8]

3 *See* PENGUIN DICTIONARY OF TWENTIETH CENTURY QUOTATIONS 371 (1993) (quoting Lord Roy Herbert Thomson of Fleet Street commenting on profit and commercial T.V. in Britain "[a] stake in commercial television is the equivalent of having a license to print money . . .").

4 47 C.F.R. § 73.1 (1995) (designating broadcasters as public trustees); *see also* NATIONAL ASSOCIATION OF BROADCASTERS' BY-LAWS art. 2 (1981) stating that:

> The object of this Association shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms . . . [and] to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.

5 47 U.S.C. § 315.

6 NATIONAL ASS'N OF BROADCASTERS, TELEVISION CODE (22 ed. 1981) (pertinent provisions *reprinted in* United States v. National Ass'n of Broadcasters, 1982-83 Trade Cas. (CCH) ¶ 65,049, 70,846 app. A (D.D.C. 1982) (consent decree)) [hereinafter TELEVISION CODE].

7 The National Association of Broadcasters ("NAB"), a trade association of radio and television broadcasters, was established in 1923 and was first headed by Paul B. Klugh. Initially created in response to radio broadcasters' discontent with the American Society of Composers, Authors, and Publishers ("ASCAP"), NAB has evolved into a powerful lobbying force in Washington. The organization sought to establish codes of ethics within the broadcast industry by creating guidelines for self regulation. NAB's Television Code (originally created in 1937 and revised several times since) delineated industry wide standards for a variety of issues dealing with children's programs, political telecasts, religious programs, advertising, and treatment of news and public events. *See* David R. Mackey, *The Development of the National Association of Broadcasters*, 1 J. BROADCASTING 305 (1957); *see also* Children's Television Report and Policy Statement in Docket No. 19142, 50 F.C.C.2d 1, 13 ¶ 42 (1974), *reconsideration denied*, 55 F.C.C.2d 691 (1975), *aff'd sub nom.* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (commending the self-regulatory practices of the television broadcasting industry, noting that the NAB has a "responsive and responsible attitude . . . toward [its] public service obligations").

8 The TELEVISION CODE's pertinent section on community responsibility read: "Television broadcasters and their staffs occupy positions of unique responsibility in their communities and should conscientiously endeavor to be acquainted fully with the community's

spelled out time limits for commercials,[9] banned the advertising of certain products,[10] and forbade smut and vulgarity,[11] gratuitous violence,[12] self-destructive behavior such as drug usage or gambling,[13] and behaviors in children's programs that might frighten the young.[14] Around seventy percent of stations subscribed to the

needs and characteristics in order better to serve the welfare of its citizens." TELEVISION CODE, *supra* note 6, § III.1.

9 *See* Dean K. Cherchiglia, *Changing Channels in Broadcast Regulation: Leaving Television Advertising to Containment by Market Forces*, 34 CASE W. RES. L. REV. 465 (1984) (citing TELEVISION CODE, *supra* note 6, § 14.2.A(1)-B):

> The time standards mandated that network-affiliated stations not exceed 9 1/2 minutes of commercial time per hour during "prime time" (plus an extra 30 seconds for promotional announcements), and sixteen minutes per hour during the rest of the broadcast day. The Code defined prime time as "three consecutive hours per broadcast day . . . between . . . 6:00 p.m. and midnight."

TELEVISION CODE, *supra* note 6, §§ 14.2.A(1), 15.2.

The FCC adopted guidelines resembling the Code's time standards. These guidelines prescribe sixteen minutes of commercial time per hour as a maximum. 47 C.F.R. § 0.283(a)(6)(1982) (repealed 1984).

10 For example, liquor, condoms, and female undergarments.

11 *See* TELEVISION CODE, *supra* note 6, stating:

> OBSCENITY; PROFANITY. Subscribers shall not broadcast any material which they determine to be obscene, profane or indecent.
>
> Above and beyond the requirements of law, broadcasters must consider the family atmosphere in which many of their programs are viewed.
>
> There shall be no graphic portrayal of sexual acts by sight or sound. The portrayal of implied sexual acts must be essential to the plot and presented in a responsible and tasteful manner.
>
> Subscribers are obligated to bring positive responsibility and reasoned judgment to bear upon all those involved in the development, production, and selection of programs.

TELEVISION CODE, *supra* note 6, § IV.8.

12 *See* TELEVISION CODE, *supra* note 6, § IV.1, stating:

> 1. VIOLENCE; CONFLICT. A. Violence, physical or psychological, may only be projected in responsibly handled contexts, not used exploitatively. Programs involving violence should present the consequences of it to its victims and perpetrators.
>
> Presentation of the details of violence should avoid the excessive, the gratuitous and the instructional.
>
> The use of violence for its own sake and the detailed dwelling upon brutality or physical agony, by sight or by sound, are not permissible.

TELEVISION CODE, *supra* note 6, § IV.1.

13 *See* TELEVISION CODE, *supra* note 6 stating:

> SELF-DESTRUCTIVE BEHAVIOR: DRUGS; GAMBLING; ALCOHOL.
>
> A. Narcotic addiction shall not be presented except as a destructive habit. The use of illegal drugs or the abuse of legal drugs shall not be encouraged or shown as socially acceptable.
>
> B. The use of gambling devices or scenes necessary to the development of plot or as appropriate background is acceptable only when presented with discretion and in moderation, and in a manner which would not excite interest in, or foster, betting nor be instructional in nature.
>
> C. The use of liquor and the depiction of smoking in program content shall be de-emphasized. When shown, they should be consistent with plot and character development.

TELEVISION CODE, *supra* note 6, § IV.3.

14 *See* TELEVISION CODE, *supra* note 6, § II.

Code.[15] Violation was punishable only by denying the station the right to post the Seal of Good Practice on the screen.[16]

The Code was adopted in 1952 as the industry's response to congressional concerns about crime shows on television and their possible contribution to juvenile delinquency. In 1982 a federal court outlawed the Code on antitrust grounds.[17] The thirty years between marked the period in which broadcasters might rightfully have considered themselves professionals.

The abolition of the Code coincided with the FCC's determination during the Reagan Administration to deregulate broadcasting.[18] In the Washington mood at the time, Republicans and Democrats alike embraced the principles of a market economy that viewed democracy in consumer terms. With the emergence of cable and other video technologies, television was perceived as a cultural democracy in which people regulated the medium for themselves by means of the dial or the remote-control tuner.

"Let the market rule" and "get government off of business's back" became the shibboleths of the 80s. Their effect was to transform the citizen into the consumer, which was necessary to facilitate deregulation. It became possible then to define the public interest as what the public is interested in. The assumption was that people would tune out, and thus kill off, whatever programs they deemed offensive or excessively exploitative. It followed from that line of thinking that the most profitable stations were by definition the ones serving the public best.

The disappearance of the Television Code, the government's embrace of market democracy, competition from the rainstorm of satellite channels for cable, and substantial deregulation all combined to resolve the decades-old industry tension in favor of business. By 1986 no one spoke of television as a profession. An

15 The NAB has subsequently discarded the Television Code.

16 In his book, John R. Bittner states:

> A continuing, willful or gross violation of any of the provisions . . . of the Code can result in revocation of a station's membership in the Code. Prior to this revocation, however, the Code Authority and the subscriber can follow administrative procedures to examine and respond to the issues before them. If appropriate, they may have counsel present.

JOHN R. BITTNER, BROADCAST LAW AND REGULATION 363 (1982); *see* also TELEVISION CODE, *supra* note 6, § VI.8(c).

17 *See* United States v. National Ass'n. of Broadcasters, 536 F. Supp. 149 (D.C. Cir. 1982) (holding Code was not voluntary and "government's documents demonstrated that the Code was not a mere set of advisory standards but a contractual arrangement to which participants were obligated to adhere.").

18 *See* WILLIAM B. RAY, FCC: THE UPS AND DOWNS OF RADIO-TV REGULATION 162 (1990) (documenting that in 1981, with Mark Fowler as President Ronald Reagan's newly appointed chairman of the FCC, the Commission "busily reinterpret[ed] the Communications Act so as to dismantle much of the structure of broadcast regulation").

important fifth factor in the resolution of this tension was the wholesale transfer of ownership to a new generation of broadcaster. All three networks changed hands that year, following most of the venerable station groups whose founders either cashed out for retirement or died. By and large the new owners were no-nonsense businessmen who had no exposure to the defunct Code and were attracted to broadcasting because it had become largely deregulated, making it a more agreeable business.

At the networks primarily, and principally in the news divisions where the sense of professionalism was strongest, the new owners' first act was to cut staff. And, as it appeared, the first to go were the personnel who were so indoctrinated with the old ideals that they might have difficulty adapting to the new mode of operation.

I. TELEVISION IN THE REGULATED MODE

Television broadcasting[19] grew out of radio and inherited most of the regulation that was created for the older medium dating to the late 20s.[20] As with radio, U.S. policy was to have a system based on localism built by private industry. Regulating these media was a delicate matter in light of the First Amendment[21]—the free speech/free press Constitutional provision that is a most distinguishing feature of American democracy—and the FCC was prohibited from creating rules that bore directly on content or that were in any respect censorial.[22]

Public service content was of course a consideration in granting and renewing licenses, but in the main it was looked at quantitatively by the commission rather than qualitatively. The agency adhered to a policy of trusting the licensee to determine what was best for his community.[23] While the FCC has no regulatory authority over the networks, since they are independent program services and not licensed entities (in theory anyone can start a network, as

19 *See* 47 U.S.C. § 153(o) (defining broadcasting as the "dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations").

20 *See* LEO BOGART, THE AGE OF TELEVISION 9 (1956) (noting that "[t]elevision broadcasting developed swiftly under the aegis of the major radio networks who invested millions of dollars in . . . [the] enterprise.").

21 U.S. CONST. amend. I (relevant provision states "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

22 The First Amendment guarantees free speech and free press. In spite of this guarantee, however, the government has traditionally regulated broadcast media. Although the First Amendment and the Fairness Doctrine both work to limit this regulation, they cannot completely stifle it. *See generally* John R. Bittner, *The Day the First Amendment Died*, 44 VITAL SPEECHES 24 (Oct. 15, 1977).

23 *See* 47 U.S.C. § 310 (granting the FCC broad authority to regulate broadcasting in the "public convenience, interest, and necessity").

Paramount and Warner Bros. now have), it has historically dealt with them through their owned stations.

That broadcasters did not share the full First Amendment freedoms of print publishers was defended by the scarcity of spectrum and the argument that the airwaves belonged to the public.[24] Broadcasting was differentiated from print as a privilege differs from a right. Because broadcasters were loaned a public resource for commercial purposes, they were held to be public trustees, and differed also in that respect from newspaper and book publishers.

Created by the Communications Act of 1934,[25] the FCC is a government agency, administered today by five commissioners, that reports to Congress; it is responsible for regulating interstate and foreign communications by radio, television, telephone, cable, microwave, satellites, and newer electronic technologies.[26] Licenses or construction permits cannot be transferred or sold without FCC permission, and when a license is challenged by some entity desiring a particular frequency, the agency, after holding comparative hearings, must judge which is the most deserving applicant. In 1995 the FCC began awarding portions of the spectrum

24 The argument that the "airwaves belong to the public" has been summarized by Leo Bogart in THE AGE OF TELEVISION as follows:

> The responsibility of the broadcasting industry to serve the public interest first and foremost has been stressed by the Federal Communications Commission and accepted by the broadcasters themselves . . . on the *quid pro quo* principle that the industry has been granted access to the public domain. This implies that [broadcasters have] an educational, almost missionary, function of lifting the level of popular taste by making programs available of a type which most people might not be particularly interested in at first blush.

BOGART, *supra* note 20, at 308.

25 Communications Act § 1 reads:

> TITLE I - GENERAL PROVISION
> PURPOSE OF ACT; CREATION OF FEDERAL COMMUNICATIONS COMMISSION
> SECTION 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

47 U.S.C. § 1.

26 The Commission, however, has minimal control over the actual content of the broadcast. Although programming which is considered obscene and/or indecent may be regulated, other aspects of content regulation may violate freedom of speech and thus invoke First Amendment protection. Similarly, the Commission does not have power to regulate broadcast signals which emanate from other countries and across United States boundaries. In addition, the FCC has no jurisdiction over national or local news-gathering organizations, such as the Associated Press. *See* FCC, FCC BROADCAST BUREAU PUB. NO. 8310-100, THE FCC AND BROADCASTING (1988).

for Personal Communications Systems ("PCS") and certain forms of wireless communications by auction rather than by comparative hearings.[27]

TV licenses were originally granted for three-year terms,[28] after which they were subject to an elaborate renewal procedure[29] and open to challenge by competing applicants. Such challenges were rare because they took years to resolve and therefore were costly, and because historically the FCC tended to favor the incumbent. More common in the late 60s and during the 70s were challenges by citizen activist groups.[30] Known as *petitions to deny*, these were actions that charged the licensees with failure to meet the public trust or with egregious violations of the regulations. The petitioning groups did not seek to obtain licenses for themselves but rather to cause the operator to lose the privilege of broadcasting.[31]

27 In the initial broadband PCS license auction, access was offered to the big 30-MHz spectrum blocks which cover the major trading areas ("MTAs"). Each of the 51 U.S. MTAs carries with it two 30-MHz licenses: an A-block and a B-block license. At the end of 111 rounds of bidding for the 99 available 30-MHz MTA licenses, the U.S. Treasury collected over seven billion dollars worth of claims. Eighteen bidders secured licenses, but the main bidders were Wireless Co., AT&T, and PCS PrimeCo. *See* Matt Davis, *Tying the Knot—Cable TV Making Telephone Connections*, TELEPHONY, June 12, 1995, at 38; Dan O'Shea, *Gauging Value*, TELEPHONY—PCS SPECIAL: BIDDING ON THE FUTURE, May 15, 1995, at 3; Paula Bernier, *Taking Stock of the PCS Networks*, TELEPHONY—PCS SPECIAL: BIDDING ON THE FUTURE, May 15, 1995, at 12; Pat Blake, *Beyond the Bidding Process: The Promise of Services*, TELEPHONY—PCS SPECIAL: BIDDING ON THE FUTURE, May 15, 1995, at 18; Sim Hall, *Battle of the Telecom Titans—What's Happening With the Broadband PCS Auction?*, TELEPHONY, Jan. 30, 1995, at 24; *Cable Television's Entree into Personal Communication Services (PCS)*, SPECS TECHNOLOGY, Mar. 1995, at 1; *Is PCS Still In The Cards?—Telecom Giants on Their Way to Market, But Small Guys Have to Stay Home*, WASHINGTON UPDATE-PUBLIC ISSUES IN COMPETITIVE TELECOMMUNICATIONS, Mar. 20, 1995, at 2.

28 These licenses are also called "station authorizations" or "instruments of authorization." The licenses dictate the authorized power of the station, operational hours, technical specifications of the transmitter and antenna being used, location of transmitter, latitude and longitude of antenna, and name and address of licensee. *See* FCC, FCC BROADCAST OPERATORS HANDBOOK, BROADCAST STATION LICENSE (1978).

29 The FCC requires stations seeking license renewal to file an Ownership Report. This Report provides information to the Commission pertaining to station ownership, shareholder information, and voting privileges. The FCC uses this Report to monitor potentially monopolistic practices and possible cross-ownership violations. *See* 6 FCC ANN. REP. 37 (1974).

30 Citizen activist groups have the authority to intervene and play an active role in proceedings which involve broadcasters and the FCC. These groups are most commonly not-for-profit organizations seeking reform in many areas of broadcasting, including those that deal with minorities, license renewals, equal access, and childrens' programming. Some of the most influential and active groups include Action for Childrens' Television ("ACT"), National Citizens' Committee for Broadcasting ("NCCB"), the National Citizens' Communications Lobby ("NCCL"), and the Citizens' Communications Center ("CCC"). *See generally The Struggle over Broadcast Access*, BROADCASTING, (Cahner's Publishing, Wash., D.C.), Sept. 27, 1971, at 24.

31 Petitions to deny are usually complicated and expensive undertakings requiring significant time as well as legal counsel. While citizens' groups often use these petitions to challenge general broadcasting issues, they also devote attention to other direct broadcast-

The most spectacular such petition was that filed in 1964 against WLBT in Jackson, Mississippi for openly discriminating against African-Americans and proponents of the civil rights movement. The Office of Communication of the United Church of Christ[32] monitored the station to accumulate evidence that the station was using its airtime to promote a segregationist philosophy while shunning the viewpoints of the African-American community, which comprised forty percent of the city's population. In 1966 the case was brought to the Court of Appeals for the District of Columbia.[33]

Five years later the case was resolved, and Lamar Life Insurance Company, owner of the station, was forced to sell WLBT. This propelled the broadcast reform movement by establishing the right of citizen groups to make their views part of the license-renewal proceedings. The case set a precedent in that it defined the role of citizen groups in the context of the broadcasting industry while also giving these organizations the authority to help shape broadcasting regulatory policy.[34]

Much of FCC regulation was intended to bolster localism and ensure the integrity of the license. Character was an important criterion in awarding licenses; the FCC would reject applications from persons with criminal records and could revoke the licenses of companies or individuals convicted of wrongdoing.[35] Among other things, the character criterion served to keep organized crime out of the lucrative broadcasting business.

The FCC's anti-trafficking rule prohibited a new licensee from

ing activities. Common subjects of petitions to deny include employment discrimination and unbalanced coverage of certain controversial political or social topics. *See Blacks Continue Renewal Pressures in Tennessee and Indiana*, BROADCASTING, (Cahner's Publishing, Wash., D.C.), July 12, 1976, at 28.

32 The Office of Communication of the United Church of Christ was one of the first organizations which actively fought for regulatory reform within the broadcast industry. It challenged controversial issues of broadcast programming and sought to educate the public about their rights as broadcast consumers. *See Religious Groups Make Plea for Community Service*, BROADCASTING, (Cahner's Publishing, Wash., D.C.), May 31, 1976, at 50.

33 United Church of Christ v. FCC, 359 F.2d 944 (D.C. Cir. 1966) (holding that the FCC must conduct a hearing into the allegations presented by the Office of Communication of the United Church of Christ).

34 *See id.* at 944.

35 *See* 47 U.S.C. § 311 (provision of act granting Commission power to refuse licenses and permits to stations and/or individuals based on criminal record, fraud, unlawful monopolization, and other unfair methods of competition); *see also, e.g.*, WOKO, Inc. v. FCC, 153 F.2d 623, 629 (D.C. Cir. 1946) (holding FCC may revoke license for false statements); United Broadcasting Co., Inc. v. FCC, 55 F.C.C.2d 416 (1976) (court upheld refusal to renew license on the ground that long history of persistent violations of FCC operating rules was sufficient); Mester v. FCC, 70 F. Supp. 118 (E.D.N.Y. 1947) (court upheld FCC's right to deny transfer of license based on purchaser's character qualifications); WADECO, Inc. v. FCC, 628 F.2d 122 (D.C. Cir. 1980) (affirmation of FCC's decision to deny license for misrepresenting and withholding of substantial information).

selling the station within the first license term of three years. This was to ensure the seriousness of the broadcaster's intentions and to keep out speculators who would buy a station and turn it over quickly for a neat profit.[36]

Throughout most of its history, the FCC guarded against the establishment of media monopolies with limits on station ownership and prohibitions against media cross-ownership (primarily the ownership of a TV station and newspaper in the same city, except where "grandfathered" from the early years).[37]

Until the late 80s, broadcast groups were limited to owning seven TV stations, but no more than five stations on the VHF band.[38] It was felt that to allow for larger ownership groups would be harmful to the ideal of localism as well as to the wish for a diversity of voices. As for cross-ownership, the concern was that a company with multiple communications outlets in a municipality would have extraordinary political influence and an unfair advantage with advertisers.

Stations were held responsible by the FCC for all they broadcast, including the programs sent out by the networks. Local broadcasters were implicitly encouraged to preempt network programming they deemed unsuitable for their audiences and to substitute programs of their own. They were not to enter into contracts under which the networks effectively controlled their airtime. These restrictions gave the stations a small but not insignificant voice in network programming, since substantial rejection by the affiliates could doom a new series.

The FCC also maintained strict rules for contests[39] and lotter-

36 REPORT AND ORDER BC DOCKET NO. 81-897, 52 Rad. Reg. 2d (P&F) 1081 (Nov. 18, 1992).

37 *See, e.g.*, National Citizens' Comm. v. FCC, 436 U.S. 775 (1978) (Supreme Court upheld FCC policy grandfathering most existing cross-ownerships of newspaper broadcasting, disallowing future cross-ownerships and requiring breakup of "egregious" cross-ownership situations).

38 In fact, the Commission first issued rules on ownership in the early 1940s determining that no single individual or company may own more than three television stations and six FM radio stations. These stipulations were changed continually until 1954, when they took the form they currently maintain. With the advent of the "seven-seven-seven" rule individuals and companies are allowed to own no more than seven AM stations, seven FM stations, and seven television stations. *See generally* DON R. PEMBER, MASS MEDIA LAW 573 (1981).

39 The FCC has defined the term contest as a "scheme in which a prize is offered or awarded based upon chance, diligence, knowledge or skill, to members of the public." These station-conducted contests have evolved into lucrative marketing tools which frequently increase commercial sponsorship and the viewing audience, and are widely used by broadcasters throughout the industry. It is because of this widespread use that the FCC has instituted various safeguards to protect the "public interest." In 1976 the Commission released a Public Notice delineating guidelines which would deem a contest inappropriate:

ies.[40] It imposed fines and other more severe sanctions for promotions and programs that intentionally deceived audiences. It also discouraged program-length commercials (advertisements masquerading as full-blown programs), especially in the children's sphere.

Rules for political advertising were extensive,[41] ranging from a provision that requires charging candidates a station's lowest rate for airtime[42] to one that prohibits the broadcaster from interfering

1. Disseminating false or misleading information regarding the amount or nature of prizes;
2. Failing to control the contest to assure a fair opportunity for contestants to win the announced prize;
3. Urging participation in a contest, or urging persons to stay tuned to the station in order to win, at times when it is not possible to win prizes;
4. Failing to award prizes, or failing to award them within a reasonable time;
5. Failing to set forth fully and accurately the rules and conditions for contests;
6. Changing the rules or conditions of a contest without advising the public or doing so promptly;
7. Using arbitrary or inconsistently applied standards in judging entries;
8. Providing secret assistance to contestants or predetermination of winners;
9. Stating that winners are chosen solely by chance, when in fact chance played little or no part;
10. Broadcasting false clues in connection with a contest; and
11. Conducting contests without adequate supervision.

See FCC Public Notice, Mar. 1974, *cited in License-conducted Contests*, NAB Legal Memorandum, Oct. 1976 (L-612).

[40] The Commission has defined a "lottery" as the broadcast of a contest which involves: (1) prize, (2) chance, and (3) consideration. Under FCC Rules, section 73.656, a contest which encompasses these three categories is punishable by law. The statute which governs lotteries and under which violations are prosecuted is found in the United States Code § 1304. This section states that:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined no more than $1,000 or imprisoned not more than one year, or both. Each day's broadcasting shall constitute a separate offense.

18 U.S.C. § 1304 (1994); *see also, e.g.*, Cosmopolitan Broadcasting, 581 F.2d 917 (D.C. Cir. 1978) (WHBI, despite an outstanding record of public service, had its license revoked in 1976 for numerous violations, including, primarily, promoting lotteries); Metropolitan Broadcasting Corp., 5 F.C.C. 501 (1938) (WMBQ's request for license renewal was denied because it carried information concerning lotteries); Smith Broadcasting Co., Memorandum Opinion and Order, 87 F.C.C.2d 1132 (1981) (even the fact that proceeds of a local lottery were donated to local civic and charitable organizations did not absolve the licensee, who was still heavily fined).

[41] For example, political candidates must be provided reasonable access to the station and opportunities to be heard which are equivalent to their opponents. If a political editorial is broadcast within 72 hours prior to the day of election, the station must provide the opposing candidate a reasonable opportunity to prepare and present a response. *See* Bittner, *supra* note 16, at 151, 241.

[42] When purchasing commercial time, political candidates are offered a station's lowest unit advertising charge during the months preceding election (forty five days preceding a primary election and sixty days preceding a general election). This charge remains favorable no matter how many commercials are purchased. *Id.*

with the content of a political commercial, even if it contains profanity the station would not otherwise allow on the air.[43]

Central to this set of rules is the Equal Time Law,[44] which requires broadcasters to give free or paid airtime to a political candidate to afford equivalent opportunities and time to all qualified candidates for that office.

Despite the FCC's efforts to foster localism, the three networks became the dominant force in television during the 60s, claiming some sixty percent of the affiliates' airtime and exercising such control over the program market that few opportunities existed for independent suppliers or for local stations to create their own programs.

When they purchased or commissioned programs from Hollywood producers, the networks typically negotiated equity positions for themselves and syndication rights to the reruns. The syndication arms of ABC, CBS, and NBC dominated the field. Moreover, the networks would not release programs for syndication until they had run their course in prime time and their essential popularity drained. By the time the reruns went to independent stations, their ratings power was so slight that they posed no competitive threat to the networks.

The power and arrogance of the networks prompted the FCC to restructure the television system in 1970. The Commission's Prime Time Access Rule[45] limited the networks' claim to the peak viewing hours to three hours per night (8-11 p.m. in the eastern and western time zones and 7-10 p.m. in the midwest). An additional half hour was granted for network news. That left thirty minutes per night of choice airtime open to other suppliers or, as the

[43] *See, e.g.*, Port Huron Broadcasting Co., 12 F.C.C. 1069 (1948) (stating that a "station does not have [the] right to censor talk by [a] Political Candidate even if defamatory and not liable for such remarks.").

[44] § 315 of the Communications Act provides:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect.

47 U.S.C. § 315.

[45] *See* Bittner, *supra* note 16, at 120 (documenting that the 1975 Prime Time Access Rule emanated from the FCC's concern over major network programming dominance). In 1971, measures were introduced to insure that alternative programming would be aired during prime evening viewing hours. Furthermore, the Rule was refined by the United States Second Circuit Court of Appeals when the court held that the Rule was designed to: "(1) give independent producers and syndicators a market for their programming and (2) encourage local stations to develop creative programming." *See* National Ass'n of Indep. Television Producers and Distribs. v. FCC, 516 F.2d 760 (D.C. Cir. 1975).

FCC had hoped, to original local production.[46]

A companion regulation, The Financial Interest and Syndication Rule,[47] which became popularly known as Fin-Syn, barred the networks from taking a financial interest in the programs they put on the air and from engaging any longer in domestic syndication. The networks were permitted to lease the programs they commissioned from Hollywood for only a first and second run, and not permitted to share at all in the after-markets. Another companion rule also barred the networks from owning cable systems in order to allow that emerging industry to grow freely.

In 1971, a year after the adoption of the rules, CBS spun off its syndication and cable units into a new company called Viacom, which has grown to become one of the most formidable players in the field, especially since acquiring Paramount Pictures in 1995. ABC sold its syndication business to its employees, who named it Worldvision. It too has flourished, especially internationally, and has changed hands several times. NBC sold off its syndication properties to a number of distributors, so that NBC Films has no successor.

The Prime Time Access Rule proved a great boon to the syndication industry by opening a whole new market for original production. It also added greatly to local station profits, since a non-network half hour can carry more commercials than a network half-hour is allowed. But the FCC's hope that it would foster exciting new works for television died when the choice time period wrested from the networks was given over predominantly to gameshows stripped over five or six nights a week (*Wheel of Fortune* and *Password*, notably), and in latter years to tabloid newsmagazines like *A Current Affair*.

Fin-Syn served to transfer the power over programs from the networks to the major Hollywood studios. They determined when network reruns could enter the syndication market—usually in the fifth network year—so that enormously successful shows like *M*A*S*H* and *The Cosby Show* could be sold to independent stations while they were at peak popularity on the networks. The reruns could be scheduled against the networks and bite into their ratings, even as the networks continued to popularize those shows in their weekly first-runs.

[46] *See* Mt. Mansfield v. FCC, 442 F.2d 470 (2d Cir. 1971) (holding that the Prime Time Access Rule prohibiting networks from using more than three hours of prime time each night was constitutional and consistent with FCC obligations under the First Amendment to promote diversity of program sources).

[47] 47 C.F.R. § 73.659 (1990).

Having the hot reruns not only gave the studios dominance in domestic syndication, but also allowed them to profit hugely from sales abroad when European, Latin American, and Asian markets opened more widely to commercial television in the late 80s. Some program series derived more than one million dollars per episode from foreign sales. Even programs that turned out to be failures on the American networks were able to recoup their costs in offshore sales.

For all the restrictions against them, however, and despite the growing competition from cable, the networks managed to thrive because they remained the most efficient way for national advertisers to span the entire country with a single commercial. No matter how many new cable channels came on stream, the networks were still the main streets of the electronic village.

Though Fin-Syn and the Prime Time Access Rule rank with the FCC's most ambitious undertakings, the agency's most controversial and beleaguered rule by far is the Fairness Doctrine,[48] whose origins date to the Commission's Editorializing Report of 1949. Codified in 1959, the Doctrine was an FCC rule requiring broadcasters to dedicate a reasonable amount of broadcast time to the fair and open-minded discussion of important public issues. It became an actual instrument of the FCC in 1962.[49] In essence, the Fairness Doctrine was intended to serve the First Amendment ideal of robust, wide-open debate, yet it was opposed by avid First Amendment adherents because it imposed a duty on what they believed should be a media of free expression.[50]

The Fairness Doctrine was two-faceted. First it required, as a condition of keeping the license, that broadcasters actively involve themselves on air with controversial issues of public importance. Then it required that, in dealing with those issues, broadcasters behave fairly, affording reasonable opportunity for all opposing viewpoints to be heard. A companion was the Personal Attack Rule, which required broadcasters to notify people who were severely criticized by speakers on air and to give them opportunity to

[48] As a result of a 1981 ruling by the United States Court of Appeals for the District of Columbia, the Doctrine is not as broad, nor as powerful as it was originally intended to be. *See* National Comm. for Responsive Philanthropy v. FCC, 652 F.2d 189 (D.C. Cir. 1981) (holding that the Doctrine only applies when a broadcast statement amounts to advocacy of a position on one side of an ongoing debate and obviously and substantially addresses that issue in a meaningful way).

[49] *See* PEMBER, *supra* note 38, at 588.

[50] *See* Rasky v. CBS, 431 N.E.2d 1055 (Ill. App. Ct. 1982) (holding that the term "slumlord" referring to a landlord in a news documentary is not strictly defamatory when the term can be construed, under the innocent construction rule, to depict an individual who owns buildings in a "poor/dirty" neighborhood).

respond.[51]

The Fairness Doctrine played a part in the success of the civil rights, women's rights, and gay rights movements. It became the cornerstone for citizens' rights in the broadcast media. That was why it was so unpopular with broadcasters.

II. Unbinding the Medium

Deregulation of the broadcast media had been contemplated by certain members of Congress and FCC chairmen during the 1970s, because the scarcity factor—an underlying rationale for regulation—seemed obviated by the emergence of cable and other new video technologies. But it was in the Reaganite climate of the 80s that the process began. The chief engineer of the demolition was Reagan's FCC chairman Mark Fowler, whose disdain for the agency's body of rules protecting the citizenry was epitomized by a memorable remark made in a major address, that television was nothing so much as "a toaster with a picture."[52]

Fowler acted quickly to clear away the underbrush of rules that had stood for years and had scant relevance in the 80s. Then, with libertarian zeal, he moved to eliminate all content-oriented regulations and other restraints on the operation of free-market forces in broadcasting, notably those that had served as the levers for citizen participation. Thus silenced, most organizations that had made up the citizens reform movement vanished in a wave.

Aided by a conservative Congress, Fowler also achieved a relaxation of the ownership rules, an extension of the three-year license term to five years, a simplification of the renewal procedure that amounted to little more than completing a postcard, and repeal of the trafficking rules. The latter made it possible for speculators to buy and sell stations as rapidly as real estate.

But by far his most significant act was to revoke the concept of public trusteeship, which had provided the justification for broadcast regulation for fifty years. Fowler called the public's ownership of the airwaves a myth and argued in virtually every speech that the public interest would be better served by market forces than by bureaucrats in a federal agency.

Fowler was not completely successful at deregulation. He was thwarted in his attempt to do away with rules giving preference to minority and female applicants for new stations. Nor was he even-handed in abolishing outdated regulations. For example, Fowler allowed the Prime Time Access Rule to stand undisturbed, apparently because it was favored by most broadcasters, having developed into a lush profit center for them.

After starting to attack Fin-Syn, Fowler suddenly backed away from it. His change of heart came after a private meeting with President Reagan. That raised the suspicion that the White House had intervened on behalf of the Hollywood production industry, the primary beneficiary of the rule and, of course, Reagan's former milieu. But in broaching Fin-Syn's possible elimination, Fowler touched off a heated battle between the networks and the studios on the issue which took a decade to resolve. It was ultimately decided in the courts rather than by the commission. Fin-Syn was given an official termination date of November 10, 1995.

That not only radically shifts the balance of power in programming, but promises to have a seismic effect on the entire television business. Predictably, one or more networks will merge with a studio,[53] operating in the manner of 20th Century-Fox and the Fox Network, which had been exempted from Fin-Syn in the FCC's eagerness to promote the growth of a fourth network. In owning or having an equity stake in the programs they air, the networks will have reason to pay heed to what succeeds abroad, since the revenues from offshore sales could affect the fate of programs in the

[51] *See* Straus v. FCC, 530 F.2d 1001 (1976) (finding that "[the] personal attack rule does not apply to every personal attack, but only to a personal attack broadcast during the presentation of views on a controversial issue of public importance."); *see also* Educational Broadcasting Corp. (WNET), Memorandum Opinion and Order, 65 F.C.C.2d 152 (1977) (holding that personal attack on landlord as "slumlord" by news documentary is not exempt from personal attack rules).

[52] Mark Fowler, appointed as chairman of the Federal Communications Commission by President Ronald Reagan in 1981, headed a Commission that, while accused of idleness, actually busied itself reinterpreting the Communications Act of 1934 to dismantle much of the structure of broadcast regulation. His Commission refused to enforce the "Fairness Doctrine," ultimately declaring it "unconstitutional." Fowler summarily rejected all complaints on the subject of the broadcast of indecent language, though he himself misunderstood the nature of the Supreme Court's ruling on that issue, and continually ignored the fraudulent practices of TV evangelist Jim Bakker. *See* Ray, *supra* note 18, at 162.

[53] Indeed, two mega-mergers of August 1995 displayed just such tendencies. First, the nineteen billion dollar stock-and-cash acquisition of Capital Cities/ABC Inc. by the Walt Disney Co. created a global entertainment production and distribution behemoth. Disney (which operates Walt Disney Pictures, Touchstone Pictures, Hollywood Pictures, and Miramax Films) can now provide movies and other entertainment in addition to controlling the means of their distribution. The emergence of this larger, vertically-integrated company was a prospect that had previously eluded Disney. Disney, a major producer of network programming, agreed to buy Capital Cities/ABC partly from fear that it would have trouble selling its programs. This fear was a result of broadcast networks no longer being bound by federal regulations that limited their ability to produce in-house programming. The merger set off a new wave of seismic shifts in the media industry as rivals scrambled to make new deals and alliances to match the firepower of Walt Disney Co.

The second major entertainment mega-merger occurred one day after the announcement of the Disney acquisition. Westinghouse Electric Corp. acquired CBS for $5.4 billion creating a broadcast empire that will include fifteen television and thirty-nine radio stations reaching more than one-third of U.S. households.

prime time schedules. If ABC had owned *Twin Peaks*, for example, the series might not have been cancelled when its ratings flagged in the United States, because it was still enjoying great popularity in Europe.

Mark Fowler's boldest move was an attempt to repeal the Fairness Doctrine, the very cornerstone of trusteeship. This prompted a number of attempts by Congress to codify the rule into law, but each bill met with a Presidential veto. A circuit court of appeals ruling in 1987 established that the commission had discretion to overturn the rule on its own, which was promptly done by the FCC under Fowler's successor, Dennis Patrick. To appease Congress, Patrick retained certain aspects of the doctrine, including those related to elections, station editorials, and personal attacks.

It is worth noting that the category left virtually untouched was the one concerning political broadcasting and advertising, though the First Amendment arguments for abolishing the Fairness Doctrine would apply equally to them. It was as if market principles could be trusted for all but what the lawmakers themselves live by.

III. The Effects of Deregulation

The easing of the ownership rules, coming at a time when the founders of local stations were of age to retire, transformed the broadcast landscape. In the permissive climate, companies that would have eschewed an industry that was subject to the vagaries of regulation found television an attractive business to enter.

Long-established broadcast groups such as Storer, Taft, King, Wometco, Field, and Metromedia vanished in the buying spree, their knots of stations broken apart and sold to various new group entrants in the field.

Acquisition activity went into high gear in 1985, the year the FCC expanded ownership limits from seven stations to twelve, provided that the full complement covered no more than twenty-five percent of the country's population. Stations were usually acquired on borrowed money with confidence that economic growth would continue indefinitely.

Speculators and takeover specialists like Kohlbert, Kravis, and Roberts & Co., taking immediate advantage of the elimination of trafficking rules, made quick fortunes buying and then re-selling station properties. The usual practice was to improve a station's cash-flow simply by cutting staff and then "flipping" it, that is, turning the station over to a new buyer for a substantial profit. To help reduce their debt load, the new buyers would also immediately cut

staff. The many who financed their purchases with high-risk junk bonds lost the stations when the junk bond market collapsed, causing yet another turnover in ownership.

The ideal of localism was not well served by the loss of continuity from the transactions. Moreover, with the expansion of ownership limits and a virtual release from accountability for local service, most of the new station groups adopted a system of centralized management under which the entire unit was run by a cadre at headquarters. Among the traditional job designations that disappeared at many local stations were those of program director and manager of public affairs.

Act III Broadcasting, for example, manages its eight stations and purchases all programs for them from a small office in New York City, though none of its stations are based there. Like a number of other groups that entered the field in the 80s, the Act III stations provide no local news.

News, however, is an important staple of most of the larger and long established stations, because it has become both a profitable form of programming and the key to a station's overall popularity as the expression of its personality. Local news programs were offered as loss leaders for the sake of the license in the early years, but by the mid-60s the top ten ratings in most midwestern markets (where prime time network service ends at 10 p.m.) were dominated by the leading station's evening news. Studies of local markets found that stations with the most popular newscasts tended to be first in the ratings generally, regardless of network affiliation.

It remains a given, then, that local markets will be amply served with news, even without regulation that in effect demands it, because local news gives TV stations an edge on cable channels and other competitors, and in fact has become the essential business of local television. Because that is the case, and because the idea of localism has come down to merely providing a news service, the FCC is able to consider another expansion of ownership limits, allowing coverage of around one-third of the country.

From its desire to encourage competition for the three networks, the FCC gave various kinds of special dispensation to Rupert Murdoch. After purchasing the 20th Century-Fox studio, the Australian media tycoon became an American citizen in record time to qualify for purchasing the Metromedia station group from John Kluge. These were well-established VHF stations with no network affiliation, and they provided an aspiring new network with

anchorage in the three key population centers—New York, Los Angeles, and Chicago.

While ABC, CBS, and NBC were prohibited from owning entertainment programs or entering the domestic syndication business, Murdoch was allowed to start the Fox Network with connections to the Fox studio, one of the largest players in syndication. The FCC did this simply by creating an ad hoc definition of a network, namely one that broadcast fewer than fifteen hours of programming in prime time, a threshold that Fox had barely reached. Murdoch was also given cross-ownership waivers in New York and Boston where he sought to purchase newspapers.

The fledgling Fox Network did indeed create competition for the other networks, becoming especially popular with youth, but except for one or two admirable programs like *The Simpsons* its influence can hardly be characterized as positive. Having no news division, its main contribution in that sphere has been the tabloid news magazine, *A Current Affair,* a series whose popularity inspired others of the kind in syndication, leading to a program genre the critics dubbed "trash television." In programming generally, Murdoch's network took the low road, and in the permissive post-regulatory climate, much of the industry followed.

Late in 1994, Murdoch became a more troublesome competitor of the networks by staging a raid on their affiliates, many in major markets. One of his tactics was to provide financial backing for outside companies to buy stations and switch their affiliation to Fox. His raids created such turmoil in the industry that the other networks, to secure their national infrastructures, made costly long-term deals with their key affiliates.

These arrangements would not have been permitted in the era of strict regulation, because they involve guaranteed carriage of the entire network schedules with no preemptions except in times of emergency. Thus the stations give up their autonomy to the networks—another blow to localism. That the FCC did not object to the terms signifies that the easing of the rules no longer holds licensees responsible for all they put on the air.

IV. A Self-Regulating Structure

Each of the three major American networks has slightly more than two hundred affiliates. These local stations represent the networks' infrastructure, covering the entire heterogeneous country where mores vary region by region. Viewers in the Bible Belt, which cuts across much of the South, will not tolerate using the Lord's name in vain, for example. Thus the networks refrain from expressions like "Goddamn" or risk losing carriage of the program. Wherever a program is not carried its rating is zero, which can be punishing to the national rating average. The networks have to accommodate these mores, and so there is a built-in check on language used and sometimes also in subject matter.

Commercial television's dependency on advertising imposes another system of checks. Advertisers spend millions on the networks to make friends, not enemies. Therefore, they will back away from programs that antagonize significant parts of the viewership. For example, the rights to Franco Zeffirelli's mini-series *Jesus of Nazareth* had been purchased by General Motors ("GM") for the 1977 Easter season. But when a number of evangelical groups in the South threatened to boycott the automobile company because Jesus was being portrayed as an ordinary human being, GM dropped its sponsorship at a loss of four and a half million dollars. NBC carried the program anyway, with Procter & Gamble as the sponsor, and did very well with it.

That same year, religious groups also organized a campaign against *Soap,* a weekly prime time series on ABC that spoofed the themes of soap operas—adultery, premarital sex, transvestism, voyeurism, and other moral blemishes—and scared off most of the charter advertisers with threats of consumer boycotts. Such organized threats have caused many of the large advertisers to advise their agencies to keep them out of certain kinds of programs.[54] With the knowledge of advertiser resistance to these kinds of programs the networks generally have rejected them.

An exception has been *NYPD Blue,* produced for ABC in the 90s by noted Hollywood hit-maker Steven Bochco. His insistence on using street language and showing partial nudity kept many blue-chip advertisers away the first two seasons, but they relented in 1995 when the ratings showed the series doing exceedingly well with young adults.

Bochco had special dispensation, however. Many another series died before the pilot stage because the networks did not want to risk losing affiliate clearances, advertising revenues, or viewer loyalties.

An even more vital mechanism for industry self-regulation is the competition between the networks and their affiliated stations for the seventeen billion dollars annually spent on TV by national advertisers. Typically the money breaks down to around half for

[54] For example, gratuitously violent, sexually aberrant, or blasphemous subjects.

the networks and half for national spots. The latter half is so vital to the economies of local stations that they will not allow the networks to claim more of it by increasing advertising slots in prime time.

Networks cannot readily add to their prime time inventories without the permission of their affiliates, who generally demand additional ad time for themselves to offset what is conceded to the networks. Maintaining the balance between network and spot advertising from the national pot makes for a network-station relationship that is lacking in public television.

V. The Flaw in the Market Approach

If Mark Fowler and his Reaganite colleagues understood the true nature of the market, they might not have acted in such haste to dispose of rules that had been created with good reason after lengthy debate by honorable and well-meaning commissioners.[55] Though television is a mass-audience medium, the plain fact is that it is not ruled by a mass viewership but by a limited segment of the audience, people in the age range of eighteen to forty-nine.

This is the demographic group most advertisers want to reach, and for which they will pay the highest rates—typically around fifteen or sixteen dollars per thousand—because it represents the young homemakers who buy the kinds of products best sold by means of television spots. Older and younger viewers command some fifty percent less per thousand, though the cost of reaching them is the same. Performers, production, distribution, and marketing do not make allowances for less desirable populations.

The disparity is reflected in the profit picture for 1994, which was a boom year for all the broadcast networks. CBS did least well, because for all its efforts to attract the young it continued to draw the largest over-fifty audience. The advertising industry is unshakable in its conviction that the older generations cannot readily be persuaded to change brands or try new products. Though CBS may at times have reached more people totally, its air time had less value in the market than ABC's or NBC's. That is intolerable not only to corporate CBS and its shareholders, but also to CBS affiliates.

All entertainment media pursue the young adult population—networks, TV stations, radio stations, cable networks, motion pictures, record companies, and even the online computer services. The very audience that television pursues is the one that most

[55] *See* Ray, *supra* note 18, at 162 ("[t]he Reagan Commission: A National Disgrace").

often goes to the movies, listens to rock or country radio stations, and buys popular recordings. In all earlier times, culture was handed down to the young by the older generations. Today, because they are commercially the arbiters of popular entertainment, the young hand up culture to the old.

So the market is not as open and all-encompassing as it is thought to be by anti-regulators, and television is by no means a cultural democracy in which, as Fowler and others imagined, viewers vote with the dial or remote-control tuner. Not when the only votes that really count are those of persons in the eighteen to forty-nine age range or, better, in the eighteen to thirty-five group.

In the mid-60s, the radio industry, battered by television, appealed to the FCC to relieve radio stations of the obligation to serve the entire public and to allow each station to provide a single consistent day-long service for a particular audience. In agreeing, the FCC imagined that each station would select an audience niche, so that horizontally across the dial each segment of the public would be served. Instead, virtually every station sought a format to reach young adults. In markets like New York and Los Angeles, with upwards of fifty stations on AM and FM, the great majority offered some form of rock music. To this day, thirty years later, not a single radio station in the country programs expressly for children, and only a relative handful (outside of public radio) offer a single program for children. And there are no stations that openly court the elderly.

The writer of this paper some years ago appeared on a call-in radio talk show that had only young callers. When the program was over, the writer expressed his surprise to the host that the show had such youthful appeal. The host pointed to the producer in the control booth and explained that he was the one who screened all the calls, never putting through the people with creaky voices. We don't want any advertisers who might be listening to think we're a program that gets the old folks, the host said. This was a station owned by Group W, one of the topflight and most professional broadcast groups.

Some Observations in Conclusion

Self-regulation thus far has a spotty record in broadcasting and cable. Deregulation has indeed energized the industry and enlivened the broadcast economy, but it has not contributed to greater employment or to an higher overall level of programming.

The early aspirations of the American system for localism and

a diversity of ownership have clearly gone by the boards. Religious programming by the major faiths has long since given way to "paid religion," air time purchased by evangelical and fundamentalist showmen to raise money for their electronic ministries. Educational and cultural programming have been abandoned with impunity to public television and such cable networks as A&E, Bravo, The Learning Channel, and Mind Extension University.

But some social issues persist and, if anything, have been heightened rather than resolved by market forces. Sex and violence, which have haunted television since the 50s, remain such a problem that Congress has once again called upon the industry to police itself or risk some manner of intervention by government.[56]

Public outrage over television's exploitation of the child market has revived regulatory activity in that sphere and led to Congress passing the Children's Television Act of 1990,[57] requiring stations to provide programs that nourish the minds of the young. Only a few years after cable was deregulated, Congress, responding to the din of complaints from their constituents over poor service and constant rate increases, ordered the FCC to re-regulate the industry and impose price controls.

While Americans readily accept their political designation as consumers, they cannot help behaving at times as citizens. And when they do, Congress and the FCC will always respond. Regulation has a future.

[56] The latest attempt from Capital Hill to "crack down" on and regulate television violence and sexually oriented programs comes in the form of high tech solution known as the "V-chip" (also known as violent-screening circuitry). The V-chip is a microchip which would allow viewers (particularly parents of young children) to block out objectionable programs. The device is actually installed inside a television set and "reads" an electronic rating system. The V-chip is then able to block out programs which are rated as violent or sexually explicit.

[57] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990) (codified in scattered sections of 47 U.S.C.).

OWNERSHIP REGULATORY POLICIES IN THE U.S. TELECOM SECTOR

Henry Geller*

I. Multiple Ownership Regulation in the Broadcast Field 728
A. Radio ... 728
1. FCC Actions, 1940-1983 ... 728
2. FCC Actions since 1983 ... 731
B. Television ... 733
II. Local Cross-Ownership of Television Broadcast Stations and Newspapers or Cable Television ... 737
III. Cable Ownership Restrictions ... 739
IV. Telco Ownership Limitations ... 743
A. The 1984 Cable Act Limitation ... 743
B. The MFJ ... 747
V. Foreign Ownership Restrictions ... 748
Conclusion ... 749
Addendum ... 750
Appendix ... 752

Since the early 1940s, the United States has had multiple ownership policies in the telecommunications ("telecom") sector. The main focus of these policies has been the broadcasting field, because until recently telephone was a common carrier monopoly sector, and because other electronic media like cable television have arrived on the scene in full force only in the last two decades. This paper, therefore, first will address the broadcast field, and then will turn to cable television, telephone ("telco"), and related matters. It will trace the history of the regulatory pattern, describe its present status, and then set out views and some predictions.

As will be developed, great change is in the offing for the telecom field because of the dynamic nature of the technology and the convergence with the digital computer sector. The focus here, however, will be on policy issues in the near term—that is, the next five to ten years.

In treating these issues, the emphasis will be on the Communi-

* Communications Fellow, The Markle Foundation; Senior Fellow, The Annenberg Washington Program. This article was written in connection with the conference entitled *Television Self-Regulation and Ownership Regulation: The American Experience*, held at the Columbia Institute for Tele-Information, Columbia University, New York City, March 10, 1995.