INTRODUCTION

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American television is the most highly developed commercial system in the world. It has provided a powerful model for the rest of the world, setting standards for the industry. These guidelines are rooted in the principles set forth by the Communications Act of 1934[1] ("1934 Act"), which requires broadcasters to serve "the public interest, convenience, and necessity." The definition of the *public interest* has been widely debated in the United States, within the media industry, the government, and the courts. Legislators, industry leaders, and public advocates around the world have joined their United States counterparts in grappling with questions of social responsibility in television.

Technological advances continue to expand the channel capacity of both cable and broadcast systems, while video server technology promises individualized consumer choices through access to "electronic video stores." On the business front, the growing list of media mergers gives new meaning to the term "multimedia." Questions about how to define, insure, or promote social responsibility in television once again have risen to prominence on legislators' agendas across the world and across the political spectrum.

This intensified interest provided the backdrop for a meeting of thirty noted television industry experts, government regulators, scholars, and representatives of public interest groups in the United States and Germany. The Columbia Institute for Tele-Information ("CITI") and the Bertelsmann Foundation convened this symposium in New York City to provide a forum for discussion of the American experience in television self-regulation and ownership-regulation, and its lessons for Germany, a country currently in the process of reformulating its media law with the goal of meeting the challenges of the future. The symposium was followed by a public forum to discuss the conclusions drawn from the earlier ses-

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

sions. The event facilitated a unique exchange of ideas and viewpoints from the standards and practices departments of the commercial television networks, the Federal Communications Commission ("FCC"), and noted academics, journalists, media critics, and public interest advocates.

CITI is a non-profit communications research center at Columbia University, the first at an American school of management. Since 1983, CITI has earned a world-wide reputation for excellence by conducting unbiased research focusing on economic policy and business strategy issues which affect American and international media, telecommunications, and information systems. CITI does not engage in consulting or proprietary studies and takes seriously its independence from interest groups. The authors of the papers were not selected to represent any particular point of view, but rather on the basis of their expertise and reputation in television policy and industry.

I. The Issues

The 1934 Act serves as the basis for American television regulation, but that law (with all of its amendments and other related communications legislation, such as the Cable Television and Consumer Protection Act of 1992[2]) is limited in its application to today's emerging new media environment. This is one underlying premise of the current overhaul of the 1934 Act in Congress. The basic principles still apply, but there is no consensus on the best way to achieve those aims in the current environment.

In their introductory article,[3] Prof. Dr. Bernd-Peter Lange and Runar Woldt of the European Institute for the Media provide the context of the inquiry for European policy makers who face an increasing presence of commercial television in their countries. In Germany, for example, a dual system of public and commercial television was introduced only ten years ago. Since then, the rapid growth of commercial television has been accompanied by concern about the apparent decline in the quality of programming. At the same time, a few large media firms' actions to control larger market shares have raised red flags about the possible detrimental effects ownership concentration may have on diversity. The authors ask whether the United States offers a model of self-regulation in

[2] Cable Protection Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.).

[3] Bernd-Peter Lange & Runar Woldt, *The European Interest in the American Experience in Self-Regulation*, 13 Cardozo Arts & Ent. L.J. 657 (1995).

the audiovisual industry, to what extent self-regulation can co-exist with government regulation, and what impact government limits have had on media ownership concentration.

Broadcasters in the United States, not surprisingly, have shown a preference for self-regulation over regulation imposed from outside the industry, yet industry-wide enforcement of self-regulatory measures also poses a problem. As Mark MacCarthy, a senior officer with The Wexler Group, formerly of ABC and of the House Commerce Committee staff, observes, the Code of the National Association of Broadcasters ("NAB") enjoyed growing influence as the self-regulatory guidelines of American broadcasting until the mid-1970s. At that time concern about protecting the individual rights of broadcasters and promoting competition prompted law suits challenging certain aspects of the Code, leading the NAB to abandon it entirely in 1983.[4] While the NAB responded to a renewed outcry against violence on television by introducing "voluntary programming principles" in 1990, MacCarthy concludes that the current level of self-regulation is "susceptible to erosion under competitive pressures." He notes that self-regulation works best when there is a genuine possibility of enforceable government regulation, but that the better role for government is to publicize the industry's shortcomings in meeting its own standards.

In the debate over how well self-regulation can guide television to serve the public interest, it is useful to reflect on the development of the print media where the absence of government regulation has been met by the development of a system of self-regulation that must sustain itself despite competitive pressures. Such a system must uphold the rights of individual publishers while maintaining standards for the industry. Everette E. Dennis, Executive Director of the Freedom Forum Media Studies Center, notes that industry formulation of codes of ethics, the creation of press councils, the rise of critical journalism reviews, and the reliance on public opinion polls of attitudes toward the American press all serve as useful tools in the press's effort to balance freedom with accountability.[5] These measures define success in terms of both credibility and economic profits. It follows then that publishers must be responsive to criticism and maintain standards to continue

[4] Mark M. MacCarthy, *Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour, and Television Violence*, 13 Cardozo Arts & Ent. L.J. 667 (1995).

[5] Everette E. Dennis, *Internal Examination: Self-Regulation and the American Media*, 13 Cardozo Arts & Ent. L.J. 697 (1995).

to appeal to the public (and maintain or expand their market share).

Yet relying on self-regulation and adverse publicity to promote higher industry standards may be too optimistic. Les Brown of the Center for Communications, and former editor of the media journal *Channels* and television correspondent for the *New York Times*, argues that public outcry may not be enough to force the industry to adopt tougher voluntary rules.[6] It will, however, induce Congress and the FCC to regulate the industry. He observes that market forces which focus attention on maximizing audiences for advertisers will not yield programs that serve the public interest unless one defines the public as the eighteen to forty-nine year-old age bracket—the main age group sought by advertisers. That leaves the young and elderly underserved even in a time when scarcity of frequencies is no longer an issue.

The concept of a spectrum allocation of a finite number of licensed frequencies was an early underlying factor in the restrictions placed on multiple ownership of media outlets. In tracing the FCC's record of ownership regulations, Henry Geller, Markle Foundation Fellow and former General Counsel of the FCC and Assistant Secretary of Commerce for Telecommunications and Information, stresses that the government's aim of insuring diversity of sources of information, especially at the critical local level, and not necessarily diversity of programming, has guided restrictions on the number of television and radio stations one entity can own, as well as regulating vertical integration of media giants.[7] However, Geller adds that antitrust government policy must continue to balance this concern for diversity against the competitive advantage that relaxed restrictions would give to American companies in the global marketplace of the digital age.

The historically limited diversity of programming in American television is addressed by Benjamin Compaine, Bell Atlantic Professor of Telecommunications, and Chairman, Center for Information Industry Research at Temple University. He observes that while public television in the United States has encouraged programming that is distinctive from commercial television, the program content of commercial television has been a "mainstream

6 Les Brown, *Self-Regulation in American Television in Areas Aside from Program Content*, 13 CARDOZO ARTS & ENT. L.J. 705 (1995).

7 Henry Geller, *Ownership Regulatory Policies in the U.S. Telecom Sector*, 13 CARDOZO ARTS & ENT. L.J. 727 (1995).

sort of diversity."[8] This model has been altered by today's technology, allowing more programming choices than ever before. Meanwhile, antitrust laws currently in place can continue to be used to hold the line on excessive concentration even as that line is redrawn in the midst of technological progress.

The question remains as to what America's past experience means for the future of television. The most helpful kind of regulation is the kind that promotes service in the public interest, a term for which the definition changes with time. This positive sort of regulation diverges from the history of negative restrictions imposed from within the industry and outside, as documented by the authors. A regulatory stance that focuses on achieving social responsibility through assuring choice of positive programs rather than limiting negative programs is therefore key to the progression of television, a progression that continues unabated. Will such a television of the future meet the demands for social responsibility?

II. From the Television of the Past to the Television of the Future

It helps to understand how television evolves in several stages. The first two stages are well understood, the third rarely is recognized. The first stage is *limited television*, followed by the second stage, *multi-channel television*. Television currently is in the second stage, but it is not the end of its evolution. The third stage is *distributed television*, the television of the future. Most governments, and most established media industries, still are resisting the emergence of the second stage, when they already should be focusing on the third stage.

Limited television is itself composed of four distinct phases. In Europe, as in many other countries, a very brief period of *early private radio* was followed by *state broadcasting* in the 1920s and early 1930s. Radio was a tool of government. It is easy to see this for the various dictatorships of the era, but even in pre-war Britain, Winston Churchill never was allowed to raise his warnings against the policy of appeasement over the BBC.

In the late 1950s, European societies began to become less polarized. Transfers of power and even coalitions among moderate left and moderate right parties became more common. As democracies stabilized, government-controlled television became less acceptable, and shared control was introduced. Thus, the

8 Benjamin Compaine, *The Impact of Ownership on Content: Does it Matter?*, 13 CARDOZO ARTS & ENT. L.J. 755 (1995).

governmental control of broadcasting was relaxed through much of Europe in the 1960s in favor of a more independent status. State broadcasting moved into the phase of *independent television*, the golden age of public broadcasting characterized by programs of high quality, but was still within a limited channel choice and part of institutions that were often politicized along party lines.

But this system of independent television did not last. Many viewers did not feel it met their program preferences; others were turned off by political wrangling over broadcasting jobs, or by a perceived bias in reporting. This dissatisfaction was the background for the emergence of pressures that moved the broadcast system into a *limited private television* based on a mixed system of public and privileged commercial television.

Technology played a function in this change, but it would be inaccurate to ascribe to technology a central role and to hide basic societal decisions behind the alleged relentlessness of technology. Technology was enabling but not determinative. Terrestrial broadcasting and cable television required licensing, not new technology.

Despite strenuous internal resistance by governments, the political left, conservative traditionalists, and established media institutions, within the 1980s, almost all European countries opened up in a tidal wave: Germany in 1984; France and Iceland in 1986; Belgium in 1987; Denmark and Ireland in 1988; Spain in 1989; Israel, Netherlands, Greece, and Norway in 1990; and Portugal and Sweden in 1991.

With these liberalizations, the European countries moved towards the system that had existed in the United States for several decades. This system should not be confused with an open system. *Limited private television* was merely a partial opening. It was privileged in the sense that entry was still highly restrictive, and governments allocated channels for reasons of politics and favoritism, without clear criteria and explanation.

In the United States, the first three decades of commercial television, the stage of limited television, were characterized as an oligopoly of three national networks: CBS, NBC, and a fairly weak ABC. Public broadcasting was merely a footnote. The three networks, physically located in close proximity in New York and continuously interacting, were at once fiercely competitive with each other for audiences and talent, but cooperated with each other on issues of mutual self-interest, such as barriers to additional entrants.

The system was highly profitable for the handful of broadcasters nationally and in each local market. But it had one vulnerability: it rested on a government-awarded license, which could, at least in theory, be withdrawn for misbehavior or inadequate performance. In a very real sense, the foundation of a media enterprise is a piece of paper issued by the government to some and denied to others. A television of privilege is a television of limited independence. The absence of independence does not mean that these television channels will extol the government in power, but it leads to caution on the part of broadcasters in being identified as oppositional. The television of privilege tries to make no political waves.

Given the major financial value of licenses, broadcasters protected them by consciously cultivating community goodwill through various forms of service, and by avoiding controversy and/or imbalance in programs. All this led to cautious, middle-of-the-road programs and behavior. It led to social responsibility as a rational business policy.

Guarding the system was the FCC, set up as an independent commission not subject to direct political directive. The FCC's independence worked sometimes, but at other times the agency was excessively close to the industry and saw its role as a protector of broadcasting. The lesson is that the legal status of independence of an agency is a necessary but not sufficient condition for actual independent behavior. For true independence, the nature of the political appointments, an agency's internal culture, the transparency of its process, and its set of policy principles are essential. One of the strengths of the FCC in America was that it covered the main forms of electronic media rather than having different agencies concentrate separately on telephone, cable, or broadcasting, as other countries did. As media technology and businesses converge, the regulatory agencies must converge too, or each becomes the protector of "its" industry.

Perhaps the best one can say about privileged entry is that it permits society and other parts of the media system to adjust gradually to a more open system. Another positive aspect of privileged entry is that it is generally more palatable to opponents of openness in television, who tend to believe that the less there is of it, the better. But actually the opposite is the case; the most questionable system is a highly profitable medium under the protection of the government and run by its private-sector beneficiaries.

The point of an open media system is only partly to provide more entertainment. The other important part is to provide diversity and choice. This can be accomplished structurally only to a minor extent in a limited private system. Economic logic leads the television of privilege to be limited in terms of cultural standards and choice.

Those who observe such a culturally disappointing performance of the limited commercial system often tend to believe that the less there is of it, the better. Actually the opposite is the case; the most problematic television system is a commercial system that is limited, that depends on government to protect its scarce licenses from competitors, and due to its scarcity, serves only the center of the taste distribution. Others believe that the high profits of the limited system are required for high-quality productions. That assumes that artistic creativity is based on a patronage system in which rich institutions can pass on some of their resources to the artistic community. Genuine creativity, however, is most likely to flourish in an environment of many avenues of production and distribution, serving numerous tastes.

Is the system of limited private television stable? After all, the monopoly broadcast system already has broken down in most countries. Would the oligopoly system prove more resilient? The answer is no. For all the efforts that they expend, government regulators are subject to the same forces that led to the demise of the entrenched state monopoly—entrepreneurial innovation, audience demand, producer dissatisfaction, multichannel delivery on cable and direct broadcast satellite ("DBS"), imported channels, and so on. But it takes time for those forces to lead to the next phase of television, the multi-channel *open television* system.

With open entry, the development of television programming increased dramatically. In the United States, the number of satellite-delivered channels has increased from four in 1976, to forty-three in 1983, to ninety-nine in 1994. New program channels emerged. They took on a different format than the broadcast programming. Whereas the broadcast channels had a "full-service" program philosophy, based on economic logic as well as regulation requiring the service to the community at large, the new channels were format-based. This trend continues unabated. In 1992, twenty new program channels were offered to cable operators. In the first half of 1994 alone, over seventy were offered, covering an astonishing array of subjects, from computers to games, and from romance to history.

What is missing? Specialized instructional programs, programs in languages without a concentrated United States base of speakers, foreign channels, and there is not yet an interactive channel of merit. The beginnings of interactivity are in shopping and games and, in the future, probably in adult programs. There are

no significant controversial political channels of extreme left or right wing programs, though some are available through local non-profit public access channels. There are no channels for Native Americans (Indians). But in particular, there are no new channels for children. There is no "Fairy Tale Channel" or "Elementary School Channel." Thus, market forces will supply much but not everything. There still is room for non-profit public and educational broadcasting.

It is tempting to believe that, as this trend continues, we will move to the mega-channel television. But this would be an incorrect extrapolation. Actually, the opposite will happen: we will move into the third stage of television, *distributed television.* The key technologies in the third stage are video servers, broadband switching, and navigational agents. Fiber lines are important but not essential. The technology can rely on upgraded copper wire, using encoding and noise-reduction techniques that permit the use of a telephone line as a video conduit. Although fiber helps, it is the switching that is important. Video servers are large computer-like storage devices, storing thousands of films, documentaries, and other kinds of programs. Many companies will operate these video servers, charging a varying mix of usage fees, subscription charges, transaction fees, advertising charges, and sales commissions. There will be customized ads, based on customer demographics and on customer transaction data. These servers will be interconnected through phone and cable in the way that the Internet today links computers and their databases. Together, they form a "distributed" form of television program availability.

Distributed television means an extraordinary choice of program options. When given an abundance of choices, how do people react? They seek simplification and convenience. In the United States, for example, few people go through the trouble of ordering films by pay-per-view. In the future, they will simplify the selection task by "navigators" and personalized menus. In that world, channels will disappear, or rather become "virtual" channels. This leads to the emergence of an individualized "me channel" ("canal moi," "Kanal Ich") based on a viewer's expressed interest, his past viewing habits, recommendations from critics he trusts or from delegated selection agents, and a bit of built-in randomness. The future will not be one of 50, 500, or 5000 channels. Much worse. It will be a future of only *one* channel, a personalized channel for each individual. The simultaneous mass medium experience will be replaced by individualized experience. This is not narrow-casting. It is custom-casting.

The Internet computer network system is a harbinger of this trend. It is now becoming commercialized on its way to a mass medium. To be video capable on a large scale, it needs to expand its capacity and it needs to establish a pricing mechanism. These issues are technical and can be readily resolved by advanced encryption techniques.

There are negative aspects to this trend, too. It leads to the politics of fifteen second sound-bites, to everyone being famous for no more than fifteen minutes, and to shortened attention spans. It will cost consumers much more in terms of a monthly "video-bill," away from the essentially free system of the past to perhaps more than $100 in the future. However, viewers also will get a vastly greater choice.

Will video, given such abundance, push print out to a secondary role? Will we experience the age of video culture? Probably not. Print works well for abstractions, whereas for images, television is superior. Thus, each information stream and presentation has some advantages. What we need to do is to try to combine the best of them. This is the logic behind multimedia technology. Thus, the medium of the future may well be the comic strip. Or rather, the "hyper" comic strip: panels of text with still pictures, some of them moving like film when you touch the screen. There will be sound, and even smell. The text will go into deeper details and connect with other text, like hypertext. One can skim this hyper comic strip or navigate in it. This will be on flat and light display panels that one holds like a book, and one could write notes on it, store, and send it to other locations.

This leads to an entirely new form of what a work of art is, what literature is, and what film is. All these creative endeavors are based on a technology. When a new technology emerges, human creativity will have a new tool.

All these changes in the nature of media also change the ability of government to control, and lead to the question: what is the government's continuing role? The traditional licensing role of the state becomes irrelevant and virtually impossible. But governments are not entirely irrelevant. They are needed to assure some basic interconnectivity of networks, and to assure universality of access, among other goods. The question of how to prevent the emergence of a class of "information-poor," though often raised, is fairly easy to solve. It makes sense for providers to use differentiating pricing, according to the customer's ability to pay, and set price above marginal cost, which is close to zero. All that is needed is a technology that makes arbitrage difficult. Access, on the other

hand is a more difficult issue, and it raises the question of whether gatekeeper powers remain to restrict unpopular types of information. Last, government may be needed to assure program supply for educational and children's programs if the market fails. Thus, while a regulatory agency with maximum independence and a clear set of legal principles and procedures is essential for the first two stages of television, it is likely to fade away with the advent of the third stage.

Distributed television will open new and creative uses in television. It will be an entirely different medium. Exciting opportunities lie ahead for both commercial and non-profit program providers. The traditional broadcasters—public and private ones—need to recast themselves, and they cannot do so as long as they are still fighting against the second stage of television—*multichannel television*—instead of focusing on their real problem, the third stage.

Thus, in the future, the electronic hearth around which entire societies congregate nightly will be no more. But this communal experience of constant information sharing has been only an ephemeral episode in the history of mankind. It clashes with a more individualistic media past and a more information-rich future. It is a system based on scarcity of content production and scarcity of conduits. As these conditions change, the structure of television evolves. In time we shall experience a television of openness, open to the access of new voices—commercial and nonprofit—open across frontiers, and open to viewer choices. It will contain some that is good, much that is bad, and most that is casual.

Open television cannot, by itself, lead us to the ideal of public interest television. Individualized choice means the ascendancy of the demand side over the supply side. Programs that fail to offer content deemed valuable to any particular segment of viewers will not survive in the marketplace. This puts some of the responsibility for public interest television on the public interest for such programs. In other cases, for marginal audiences, market forces may be inadequate in that they may exclude some types of programs, and deny access and interconnection to some content providers and networks.

The move to a limited government role is reflected in today's political and legal environment, which encourages an easing of restrictions. The rapid development and convergence of technology and the intricacies of the multimedia world make it increasingly difficult to regulate such an industry. Furthermore, as electronic media diversify and resemble the print model, it becomes questionable why they should have less protection from regulation than print publications.

The American experience shows that public policy is slower to change than the media, that it is often used by the established media to block change, and that it has great difficulty formulating new approaches while remaining faithful to traditional public interest goals. Thus, with market forces only partly providing public interest television, and with state intervention receding, industry self-restraint and self-regulation become increasingly important, and yet less attainable than ever.