AN ANALYSIS OF CABLE TELEVISION REGULATION IN VIEW OF THE FIRST AMENDMENT

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AN ANALYSIS OF CABLE TELEVISION REGULATION

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CHAPTER I

INTRODUCTION

The First Amendment to the United States Constitution reads in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."[1] The right to communicate free of governmental intervention is essential to the maintenance of a free and democratic society. Throughout history, freedom of speech and the press has been recognized as the foundation on which all other Constitutional liberties rest. In delivering the opinion of the Court in Palko v. Connecticut,[2] Justice Benjamin Cardozo stated that freedom of speech ". . . is the matrix, the indispensable condition, of nearly every other form of freedom."[3]

The very essence of the First Amendment's speech and press clause prohibits any governmental control over the communications media except in narrowly limited circumstances, which have traditionally been determined by the courts. Unfortunately, current governmental restraints imposed on the cable television industry depart from this fundamental provision. Those who have chosen to communicate by cable television have been unconstitutionally burdened by layer upon layer of local, state and federal regulation.

Cable television is simply a different type of technology that utilizes both words and pictures to communicate, much the same way as other communications media do.[4] Thus, the fact stands to reason that it

should be granted the same constitutional protection that is awarded to other forms of speech and press. According to legal expert Philip Kurland, "Cable television is nothing other than the communication from a willing speaker to a willing listener. . . . It requires no more, and perhaps less, regulation for the protection of health, safety and welfare of the citizenry than do newspapers, radio, books, movies or broadcast television."[5]

Statement of the Problem

Many of the restraints imposed on the cable television industry exceed the bounds established by the First Amendment for permissible government intervention. The underlying thesis of this paper is that cable operators are being stripped of the liberty to perform the same functions that First Amendment principles always have been held to protect: the right to speak and communicate freely through all available mediums of expression. The cable television industry must be allowed to communicate free of governmental intervention if the indispensable, democratic freedoms of the the First Amendment are to prevail.

Purpose of the Study

The purpose of this study is to examine the governmental restraints imposed on the cable television industry in view of the First Amendment. Specifically, this study will focus on those restraints which pose Constitutional challenges to cable regulation in the areas of content, access and franchising. The restraints will be constitutionally challenged on the basis of their imposition and according to the power and propriety of the federal, state and local governments to enforce them.

Significance of the Study

The First Amendment was designed to protect all forms of communication from government interference. This protection has become even more paramount as new technological advancements rapidly increase the communicative abilities of various media. Although cable television is a relatively new technology, it promises to be one of the most influential in days to come if it is allowed to develop free of governmental restraints.

The significance of this study is the provision of awareness. The nation's communications media is suffering from a tremendous loss of freedom by allowing the government to excessively control the cable industry. Hopefully, this flagrant compromise of First Amendment principles will be rectified in the near future. Cable operators have their own contributions to make in the "marketplace of ideas." Judge Learned Hand observes the importance of a "free" interchange of opinions and information:

> Vital to all general interests is the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.[6]

Although Judge Hand's observation focuses primarily on the news, the entertainment function of cable systems is no less threatened by unwarranted regulation. According to author Philip Kurland, entertainment "is no less a necessity for human development. The lessons of life are to be found in fiction no less than in fact."[7] Clearly, the principles of the First Amendment will be better served if cable television regulation is

left to the competition of the marketplace rather than a handful of federal, state and local government officials.

A Brief History of Cable Television Regulation

The first cable television systems began operating in the late 1940s and early 1950s as a means of providing television signals to communities where normal television reception was poor or nonexistent.[8] In many areas, television signals could only be received from antennae mounted on high towers or located on nearby hilltops.[9] Persons not living in elevated areas, or without access to tall towers for receiving antennae, were unable to receive television signals. Sensing the demand for adequate television service, early cable operators began to build antennae at favorable locations and installed cables to carry the signals throughout their communities. For a fee, any subscriber could get their television set connected to the cable.

Although early cable systems had limited channel capacity and were able to provide their subscribers with the signals of relatively few television stations, the Federal Communications Commission (FCC) imposed a freeze from 1948 to 1952 on broadcast television stations and created an even greater demand for cable television.[10] During this time, while the FCC was deciding how the station frequencies should be allocated, the inception of new television stations was prohibited. The only way for people to receive television if they were not within the broadcast path of one of the 108 stations already transmitting over-the-air was to install an antenna and "catch the signals as they were flying through the air."[11]

During the decade of the 1950s, cable television became more sophisticated and, in addition to importing signals into areas where there was no television, began distant signal importation into areas where there was little television.[12] Subsequently, this development brought about the first objections to cable television. Existing broadcast stations began to experience reductions in their viewing audiences due to the importation of distant signals. As a result, these local stations were no longer able to sell their advertisements for as high a price as they had before the importation. Although some of the stations in areas affected by cable television appealed to Congress and the FCC to help them in their plight, it was 1958 before any government regulation was finally initiated.

On May 22, 1958, the FCC made its first inquiry into the regulation of cable television and concluded that it could find "no present basis" for asserting jurisdiction or authority over cable television systems.[13] In the same proceeding, the FCC also considered the regulatory implications of the fact that it had previously just began licensing communication common carriers to relay television signals via microwave to cable television systems. Microwave enabled cable systems to provide their subscribers with numerous signals, including those signals from major metropolitan areas which could not be received over-the-air.[14] Because the use of microwave facilities required a license from the FCC, television interest groups insisted that the FCC uphold the authority to regulate the number of signals and the manner of carriage of cable television systems based on the public interest determination required of the FCC prior to the issuance of all radio licenses.[15] However, the FCC ignored the microwave applications and concluded that "it is neither proper,

pertinent nor necessary . . . to consider the specific lawful use which the common carrier subscriber may make of the facilities of the carrier."[16]

The FCC's decision to remain uninvolved in cable television regulation was short-lived due to the growing competitive threat that cable systems were posing for local broadcasters. In 1962, the FCC opened the jurisdictional door and asserted its authority in the Carter Mountain decision,[17] which placed restraints upon microwave common carrier facilities that fed distant signals to cable television systems.[18] The following year, the Court of Appeals upheld the FCC's power to refuse licenses to microwave carriers in order to prevent serious economic harm to local commercial broadcasters.

In April of 1965, the FCC issued a "Notice of Inquiry and Notice of Proposed Rulemaking" to further protect existing and potential broadcast services. The "First Report and Order" covered two main areas: (1) All cable systems using microwave to import distant signals were required to carry the signal of any station within approximately 60 miles of its system and, (2) Cable television systems were prohibited from duplicating programming of local stations during a period of 30 days before and after presentation (this was later reduced to 15 days).[19] The rule of local carriage, which became known as the must-carry provision, caused little concern because most cable systems were more than willing to carry signals of local stations. However, the 30-day provision caused "bitter protest" from cable operators for it limited the programming they could offer on their distant imported stations.[20] This rule, which later became known as syndicated exclusivity, meant that a cable television company could not carry a syndicated show on a distant sta-

tion if a local station had the contractual right to broadcast the show sometime within 15 days before the distant station was scheduled to broadcast the show.[21]

The "Second Report and Order" in March of 1966 represented the FCC's first comprehensive attempt to regulate cable television. More extensive regulation was viewed by the FCC as "necessary to neutralize the competitive threat and to contribute to its goals for the continued development of free, over-the-air service."[22] Specifically, the second report reaffirmed the rule of compulsory carriage and the nonduplication provision of the first report and, in addition, introduced the following restrictions: (1) A cable television system may not import signals into the 100 largest television markets and, (2) The FCC desired to eliminate or greatly limit the origination of programming by cable television systems but stated that it would ask Congress for legislation on the subject.[23]

Soon after the FCC issued the "Second Report and Order" to ensure that cable television would not replace over-the-air service, its authority to impose restraints on the cable television industry was challenged in the courts. In 1968, Southwestern Cable Company filed suit against the FCC claiming that it lacked statutory authority to regulate the number of distant signals a cable system could import.[24] Although the lower court decided that the FCC did not have jurisdiction over cable television, the Supreme Court ruled that the Communications Act of 1934 authorized the FCC to take such actions which are "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."[25] This

decision by the Court firmly established the regulatory view that cable was a supplementary service to television broadcasting.

In October of 1969, the FCC declared that "program origination on cable television is in the public interest"[26] and issued a rule that required all cable television systems with over 3500 subscribers to originate local programming by April 1, 1971.[27] In addition, the fairness and equal time provisions were made applicable to such broadcasting. Despite the FCC's efforts to promote local programming in areas where it did not exist, its rule was never enforced because many cable operators lacked sufficient funds to obtain the necessary facilities, equipment and manpower to engage in local origination. In 1971, the FCC decided only to require that systems with over 3500 subscribers make equipment and channel time available to those wishing to produce programs.[28] This type of programming became known as public access.

In 1972, the FCC issued its most comprehensive set of rules governing cable television. The rules set up standards of technical performance and reliability for cable systems, established minimum requirements for local franchising, and more closely defined the regulatory relationship among federal, state and local governments.[29] For instance, basic-cable rates were determined to be under the jurisdiction of state and local governments while pay cable was deemed the responsibility of the FCC. In addition, the policy changed the "must-carry" rule from all stations within 60 miles of the cable television to within 35 miles plus other local stations viewed frequently by people in the area.[30] Syndicated exclusivity also was reconfirmed and detailed guidelines were established regarding the importation of distant television signals. The guidelines were based on market size, location and the number of stations in the

area.[31] In the area of franchising, four access channels became a requirement for cable operators in the top 100 markets: one for public use, one for educational purposes, one for government use and one for leased access.[32]

Throughout the 1970s, the FCC steadily withdrew from cable television regulation and left more of its jurisdiction in the hands of local municipalities. By 1980, the FCC had eliminated all franchising standards (except for the limit on municipal fees), the mandatory access requirement and the syndicated exclusivity and distant signal importation rulings. Although few federal regulations remain intact, at least 40 states enforce one or more cable laws, which commonly deal with franchising procedures, theft of services, pole attachments, taxation, or rate regulation.[33] In all but a few states, however, cable operators also must negotiate with municipal authorities over the terms of the franchised use of public streets and rights of way. As a result, municipalities have attained vast control over the cable television industry.

Although many attempts were made to pass comprehensive cable legislation since the FCC began regulating cable television in 1966, the first national cable television policy statement was not enacted by Congress until 1984. "The Cable Communications Policy Act of 1984"[34] established policies concerning regulation, franchise operations, the promotion of broadband telecommunications and the maintenance of competition among franchises within the same area. Clearly, restraints on the cable television industry remain despite the general trend toward deregulation. Cable television operators continue to have their First Amendment rights infringed upon by federal, state and local governments in the regulatory areas of content, access and franchising.

ENDNOTES

[1]U.S. Constitution, Amendment I (1791).

[2]302 U.S. 319 (1937).

[3]Ibid., p. 327.

[4]Philip B. Kurland, James P. Mercurio, and George H. Shapiro, Cable Speech: The Case for First Amendment Protection (New York, 1983).

[5]Kurland et al., p. viii.

[6]52 F. Supp. 372 (1943).

[7]Kurland et al., p. vii.

[8]Ibid., p. 1.

[9]Mary Louise Hollowell, Cable Handbook, 1975-1976: A Guide to Cable and New Communications Technologies (Washington, D.C., 1975), p. 17.

[10]Lynne Schafer Gross, The New Television Technologies (Dubuque, Iowa, 1983), p. 41.

[11]Ibid.

[12]Ibid.

[13]Felix Chin, Cable Television (New York, 1978), p. 156.

[14]Hollowell, p. 18.

[15]Ibid.

[16]Ibid.

[17]321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963).

[18]Mary Alice Mayer Phillips, CATV: A History of Community Antenna Television (Evanston, Ill., 1972), p. 74.

[19]Gross, p. 43.

[20]Ibid.

[21]Ibid.

[22]Stephen B. Borko, "The History of Cable Regulations," Public Management, Vol. LIV (July 1972), p. 15.

[23]Harold G. Barnett and Edward Greenberg, "Regulating CATV Systems: An Analysis of FCC Policy and An Alternative," Law and Contemporary Problems, Vol. XXXIV, No. 2 (Summer/Autumn 1969), p. 566.

[24]Frank J. Kahn, Documents of American Broadcasting (Englewood Cliffs, N.J., 1978), p. 366.

[25]Ibid.

[26]Don R. Le Duc, Cable Television and the FCC: A Crisis in Media Control (Philadelphia, 1973), p. 180.

[27]Rolla Edward Park, The Role of Analysis in Regulatory Decision-making (Lexington, Mass., 1973), p. 90.

[28]Gross, p. 45.

[29]G. Kent Webb, The Economics of Cable Television (Lexington, Mass., 1983), p. 33.

[30]Gross, p. 44.

[31]Ibid.

[32]Webb, p. 34.

[33]Ibid., p. 39.

[34]U.S. Congress, Senate, "The Cable Communications Policy Act of 1984," S.66, 98th Cong., 2nd Sess., 1984.

CHAPTER II

REVIEW OF THE LITERATURE

Introduction

The review of literature was divided into three main categories: (1) regulatory background of cable television; (2) current regulatory framework of cable television at the federal, state and local levels of government; and (3) First Amendment interpretations, particularly those of the judicial system. This division follows.

Regulatory Background

First, an investigation into the regulatory background of cable television seemed necessary to gain an understanding of the technology and the subsequent development of its regulation. According to author Don Le Duc, "The basic nature of the interactions between the cable medium and its regulator should be revealed most clearly through historical perspective."[1] Indeed, most of the literature available on cable television regulation focuses on the medium's historical relationship with the FCC.

One of the most comprehensive publications concerning cable regulation as a derivative history is Cable Television and the FCC: A Crisis in Media Control.[2] Author Don Le Duc examines the structure and operations of the FCC and identifies certain factors that have dictated the agency's attitude and behavior toward cable, as well as other technolo-

gical advances in the field of communications. According to Le Duc, the public interest standard is frequently a contributing factor to FCC policymaking:

> All federal regulatory decisions relating to cable have involved some variation of this single theme of public interest, balancing the value of communications service furnished by the existing industry against the potential value in newer techniques challenging its predominance. Thus, a case history of commission deliberations weighing this factor seems to provide a unique perspective for determining whether a series of cable actions, each apparently justified in itself, might betray in its totality a pattern of regulatory behavior consistently sacrificing broader service goals to maintain industry stability.[3]

Le Duc further questions the FCC's competency to effectively regulate the communications media in this time of continuous technological change:

> The underlying question in determining whether a critical situation exists in communications control is not whether the commission has consistently opposed change, but whether, operating in an era of communications revolution, it has retained the capacity to evaluate, rather than react instinctively to, challenge; and to formulate policy encouraging the maximum service consistent with its broad public interest mandate.[4]

Another book which focuses on the historical perspective of cable regulation grew out of a dissertation submitted to the Graduate School of Northwestern University by Mary Alice Mayer Phillips. CATV: A History of Community Antenna Television[5] not only traces the regulatory history of cable television through time, but also provides a detailed account of the first cable system to operate in the United States. Phillips recounts the first contact the cable industry ever had with the FCC and examines the development of their relationship through the early 1970s.

The Cable Handbook,[6] edited by Mary Louise Hollowell, is a compilation of papers donated by experts in many areas of cable and new communication technologies. Legal expert George H. Shapiro contributes much valuable information in his paper titled "Federal Regulation of Cable Television." Shapiro presents a chronological and detailed account of FCC rules and policies that govern the cable television industry. In addition, he provides details on relevant FCC documents dating from 1959 to 1974.

The most up-to-date publication used by this researcher to gather information on the regulatory background of cable is The New Television Technologies[7] by Lynne Schafer Gross. It traces the historical development of cable television through the early 1980s and focuses particular attention on the actions of the FCC. Other literature on the regulatory background of cable television was found in journals, magazines, law reviews and other books.[8]

Current Regulatory Framework

The review of literature on the current regulatory framework of cable television involved a review of federal standards established by Congress and the FCC and an investigation into the role of state and local authorities. The regulatory relationship between the federal and local government is based on a concept of "dual jurisdiction."[9] By this approach, the FCC manages certain aspects of cable regulation while local authorities handle others under the laws of their particular states. Author Steven R. Rivkin comments on the significance of the federal-local relationship:

> The growth of cable television impinges on the concerns of each major echelon of American government. . . . This emergence of cable requires alignment of functions among governmental echelons that will ensure both its growth and its responsiveness to public controls.[10]

The most comprehensive and up-to-date literature on cable regulation at the federal level was naturally provided in various government documents. The Code of Federal Regulations and the Federal Communications Commission Reports present extensive and detailed information on the rules and regulations promulgated by the FCC. The first national cable policy ever to be enacted by Congress concerning cable is the "Cable Communications Policy Act of 1984"[11] (also known as S.66). This national cable policy act established franchise standards as well as procedures and guidelines for federal, state and local regulation. Moreover, the legislation provided that competition in cable communications would be encouraged and promoted to assure the "widest possible diversity of information sources and services to the public."[12]

Aside from legal documents, a publication noted for its extensive coverage of federal regulation is Cable Television: A Guide to Federal Regulations[13] by Steven R. Rivkin. Based on a four-year study conducted by the Rand Corporation, this book discusses, in depth, the cable television rules adopted by the FCC in 1972 as well as other federal regulations that apply to cable. A compendium of documents relevant to cable also is provided. Although Rivkin focuses primarily on the aspect of federal regulation, he also includes the role of state and local authorities in addressing cable's regulatory framework. Rivkin emphasizes the importance of an "intergovernmental" relationship, stating that a cooperative approach to cable regulation is necessary due to the "limited

resources of the federal regulatory agency and the familiarity of local governments with the particular social and economic circumstances prevailing in their localities."[14]

A more recent publication addressing cable television regulation is G. Kent Webb's book, The Economics of Cable Television.[15] Although he provides a brief but informative summary of federal regulation, Webb devotes most of his discussion to the regulatory role of municipalities. According to Webb, the municipal franchise agreement represents the most pervasive control over cable television. He further contends that municipalities have "circumvented the intent of the federally regulated limit on franchise fees."[16]

Another relevant book to grow out of the Rand Corporation study is Cable Television: Franchising Considerations.[17] This comprehensive volume edited by Walter S. Baer explores in detail cable technology and the issues of planning, franchising and regulating a cable system. With regard to cable regulation as applied in this researcher's study, some specific areas discussed in this publication include signal carriage, allocation of channels, minimum channel capacity, facilities for public access, subscription rates and franchise fees.

First Amendment Interpretations

The search for First Amendment interpretations of the judicial system naturally involved pursuing numerous legal reference materials. Among those utilized most frequently include the Supreme Court Reporter, Federal Supplement, U.S. Law Week and Federal Reporter. In addition to these references, various publications on mass media law were invaluable.

Mass Media and the Supreme Court,[18] edited by Kenneth S. Devol, traces major Supreme Court decisions through 1981. Another collection of court decisions relating to the mass media is Marc A. Franklin's The First Amendment and the Fourth Estate.[19] In the preface, Franklin states his book's primary purpose:

> To clarify the major legal doctrines that affect mass media, to explain their origins and asserted justifications, and to evaluate their soundness. In these efforts we focus upon the language of the Supreme Court of the United States, whose interpretations of the First Amendment provide the essential starting point.[20]

A third book, Documents of American Broadcasting,[21] edited by Frank J. Kahn, serves the need for a collection of primary source materials in the field of broadcast history, regulation and public policy. Aside from judicial decisions, other literature offers First Amendment interpretations applicable to the cable industry.

In his book, The First Amendment Under Siege,[22] Richard E. Labunski analyzes the constitutional situation of the electronic media in light of their status as enterprises licensed by the government. Labunski questions the extent to which the First Amendment permits regulation of broadcasting:

> Almost no one argues that broadcasting should be totally unregulated. But contemporary debate centers on whether the federal government should be involved in matters other than the technical aspects of broadcasting, particularly decisions that affect programming and news content. . . . Such regulatory policies as the Fairness Doctrine, personal attack rules, Equal Opportunity Doctrine, and other rules raise the most serious First Amendment questions.[23]

Although Labunski focuses on broadcasting, the arguments he raises also can be applied to the cable television industry.

The richest source of literature on cable television and the First Amendment is CableSpeech: The Case for First Amendment Protection.[24] In this book, Philip B. Kurland, James P. Mercurio and George H. Shapiro focus on the constitutionality of current cable regulations. Kurland offers the following contention:

> There is no greater threat to freedom and democracy, no more certain signal of tyranny, than government control over the communications media. Nor is it satisfactory to suggest that proposed invasions are only small ones. Any required obeisance by the media or any part of them as to what may be communicated or how it may be communicated or when it may be communicated is a dire threat to free and representative government and to freedom for the life of the mind.[25]

As legal experts, these three authors present numerous judicial decisions relating to the cable television industry. In addition to his literary contribution in CableSpeech: The Case for First Amendment Protection, Shapiro also addresses First Amendment issues in Current Developments in CATV 1981,[26] published by the Practicing Law Institute. Shapiro focuses on the constitutional significance of three different cases relating to the regulation of cable television. Specifically, he presents the opinions of the Court in Home Box Office, Inc. v. FCC,[27] and FCC v. Midwest Video Corp.[28] and also includes the proceedings of Cape Cod Cablevision Corp. v. Community Antenna Television Commission and the Commonwealth of Massachusetts,[29] which dealt with rate regulation.

Although numerous articles were utilized from law reviews and journals, the following articles were particularly relevant to this study. First, "Cable Television and the First Amendment,"[30] published in the Columbia Law Review, examines the rationales that have been suggested to justify control over television programming stricter than that constitu-

tionally permissible in other media and the applicability of these theories to a cable-based system. A second article, "Regulating Cable Television,"[31] was found in the Washington Law Review. Nicholas Miller and Alan Beals analyze the functional characteristics of cable and compare them to characteristics of other media. In addition, they discuss the significance of these characteristics and distinctions in light of the First Amendment.

Two articles focus exclusively on the constitutionality of government mandated access to cable television systems. Although he departs from the underlying thesis of this paper in concluding that access requirements are not inconsistent with the First Amendment, Michael I. Meyerson's article in the Journal of Communications and Entertainment Law provides an in-depth exploration of the proposed classifications of the access requirement: a local regulation of a locality's public streets; as a regulation of a scarce communications medium; as a time, place, or manner restriction; as an attempt to encourage diversity in mass communications; and as an incidental restriction on the rights of the cable television operator.[32] Meyerson contends that access rules meet the constitutional requirements of each classification.

In another article, "Deregulation of Cable Television and the Problem of Access Under the First Amendment,"[33] Robert A. Kreiss examines the interaction between cable systems and government, and the First Amendment interests of three groups: (1) cable operators; (2) those seeking access to cable systems; and (3) the cable audience. In his study, Kreiss concludes that the constitutionality of access depends "upon one's view of the underlying premise of the First Amendment."[34] He identifies one view as the "noninterference" premise:

> The First Amendment prevents government interference with communication between willing parties, except in specified situations or where unavoidable. . . . Under this interpretation the First Amendment requires that federal or state governments ensure minimum access to and diversity on cable systems.[35]

A second view cited by Kreiss is:

> The First Amendment gives federal and state governments wide latitude in placing requirements on cable operators for the purposes of fostering discussion, exchanging ideas, and informing viewers.[36]

In summary, Kreiss' article supports the conservative view that the First Amendment provides constraints on governmental action.

An article in the Federal Communications Law Journal applies First Amendment analysis to cable franchising. William Owen Knox argues that the Constitution prohibits state and local governments from using the franchising process to choose who will provide cable service to specific communities. He further contends that the franchising process is "too broad for the justification upon which it stands (use of the public ways and economic scarcity)."[37] As for franchising contracts, Knox states that they are:

> Unconstitutional in and of themselves as they involve the limitation of a constitutionally guaranteed right in exchange for a franchise. It is for the marketplace to determine which cable operators will be successful, not a government agency.[38]

Knox concludes that the cable television industry should be regulated according to the stricter First Amendment standards applied to newspapers.

One final publication to acknowledge is Cable Television: A Comprehensive Bibliography,[39] compiled and written by Felix Chin. This bibliography covers books, articles, studies and reports on cable television

published between 1950 and 1977. Some of the vast array of topics include history, regulation and policy, finance and economics, education, community control and franchising. Chin also presents a chronology of major decisions and actions affecting cable television, a list of federal agencies and congressional committees dealing with cable television, and lists of the national, regional, and state cable television associations and the state regulatory agencies.

Summary

As indicated in the preceding discussion, literature on cable television focuses on several different aspects of its regulatory subjection. Although reports and publications dealing with cable television began to appear in the mid-1960s, especially with the FCC's moratorium on cable growth in 1966, First Amendment issues were seldom addressed in literature until the 1970s. In the early days of cable regulation, the major issue seems to have been whether the FCC had authority to regulate cable, not whether certain restraints imposed by the agency were in violation of First Amendment principles.

Although this variation of literature provides a strong background of knowledge on cable television regulation, it does not include a thorough presentation combining elements of history, regulation and First Amendment analysis. This researcher already has acknowledged those few publications that have examined cable regulation in view of the First Amendment; however, such literature is limited in its regulatory scope and/or lacks a comprehensive, historical ingredient. Thus, the literature available suggests that there has been no previous study to address these aspects of cable television regulation in this specific manner.

ENDNOTES

[1]Don R. Le Duc, Cable Television and the FCC: A Crisis in Media Control (Philadelphia, 1973), p. viii.

[2]Ibid.

[3]Ibid., p. 2.

[4]Ibid., p. 3.

[5]Mary Alice Mayer Phillips, CATV: A History of Community Antenna Television (Evanston, Ill., 1972), p. 74.

[6]Mary Louise Hollowell, Cable Handbook, 1975-1976: A Guide to Cable and New Communications Technologies (Washington, D.C., 1975), p. 17.

[7]Lynne Schafer Gross, The New Television Technologies (Dubuque, Iowa, 1983), p. 41.

[8]A majority of the journals, magazines, law reviews and books listed in the bibliography of this paper include information relating to the regulatory background of cable television.

[9]Steven R. Rivkin, Cable Television: A Guide to Federal Regulations (New York, 1974), p. 61.

[10]Ibid.

[11]U.S. Congress, Senate. "The Cable Communications Policy Act of 1984." S. 66, 98th Cong., 2nd Sess., 1984.

[12]Ibid.

[13]Rivkin, p. 8.

[14]Ibid.

[15]G. Kent Webb, The Economics of Cable Television (Lexington, Mass., 1983).

[16]Ibid., p. 39.

[17]Walter S. Baer et al., Cable Television: Franchising Considerations (New York, 1974).

[18]Kenneth S. Devol, Mass Media and the Supreme Court (New York, 1982), p. 254.

[19]Marc A. Franklin, The First Amendment and the Fourth Estate (New York, 1981), p. vi.

[20]Ibid.

[21]Frank J. Kahn, Documents of American Broadcasting (Englewood Cliffs, N.J., 1978).

[22]Richard E. Labunski, The First Amendment Under Seige (Westport, Conn., 1981).

[23]Ibid., p. 4.

[24]Kurland et al.

[25]Ibid., p. vii.

[26]George Shapiro, Current Developments in CATV 1981 (New York, 1981).

[27]Ibid., p. 13.

[28]Ibid., p. 23.

[29]Ibid., p. 29.

[30]NOTE, "Cable Television and the First Amendment," Columbia Law Review, Vol. LXXI (June 1971), p. 1008.

[31]Alan Beals and Nicholas P. Miller, "Regulating Cable Television," Washington Law Review, Vol. LVII (December 1981), p. 85.

[32]Michael I. Meyerson, "The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements," Journal of Communications and Entertainment Law, Vol. IV (Fall 1981), p. 3.

[33]Robert A. Kreiss, "Deregulation of Cable Television and the Problem of Access Under the First Amendment," Southern California Law Review, Vol. LIV (July 1981), p. 1001.

[34]Ibid., p. 1102.

[35]Ibid.

[36]Ibid., p. 1103.

[37]William Owen Knox, "Cable Franchising and the First Amendment: Does the Franchising Process Contravene First Amendment Rights?" Federal Communications Law Journal, Vol. XXXVI (December 1984), p. 318.

[38]Ibid.

[39]Felix Chin, Cable Television (New York, 1978).

CHAPTER III

CONTENT REGULATIONS

Introduction

Currently, cable television is subject to three content regulations that raise First Amendment questions: obscene or indecent programming is prohibited on channels subject to the exclusive control of a cable system; cable operators must carry the signals of local and significantly viewed television stations; and the commercial speech of cable operators is restricted. In the past, the courts have made decisions regarding cable television content by using the broadcast regulatory model and, at other times, the print model. This chapter will discuss various rulings of the judicial system relating to content regulations and their applicability to cable television. Moreover, the cable content regulations will be examined in view of the principles set forth by the First Amendment.

Obscenity and Indecency

The current standard used by the government to prohibit the distribution of obscene material was handed down by the United States Supreme Court on June 21, 1973. In the Miller v. California case,[1] the Court defined the essence of obscenity as "offensiveness" or "repulsiveness" and formulated standards by which the states could constitutionally regulate obscene material without infringing upon the freedoms set forth by

the First and Fourteenth Amendments.[2] In determining whether material is obscene, the Court specified that the basic guidelines for the trier of fact must be: (a) whether "the average person, applying the contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[3] In concluding its decision, the Court referred to the guidelines as "carefully limited" saying that "no one will be subject to prosecution for the sale or exposure of obscene material unless those materials depict or describe 'hard core' sexual conduct . . ."[4]

When the Communications Act of 1934[5] was enacted, it contained a passage forbidding the use of obscene or indecent speech in broadcasting. In 1948, that ban was placed in the United States Criminal Code as follows:

> Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than five years, or both.[6]

For many years this criminal statute has served as a guideline for policy in the broadcast area. Although the FCC has not established special rules and regulations implementing the statute, it has traditionally defined the limits of this statute based on "fact-specific" rulings of the Supreme Court.[7] In several early cases, the FCC attempted to distinguish between what constituted indecent, as opposed to obscene, speech.

In the FCC v. Pacifica Foundation case,[8] the FCC issued an order banning a George Carlin monologue from the airwaves because it contained

"indecent" words that depicted sexual and excretory activities in a "patently offensive" manner at a time when children were likely to be in the audience.[9] Justifying its departure from the concept of obscenity as defined in the Miller case, the FCC offered the following explanation:

> Indecent language is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest . . . and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value.[10]

The Supreme Court voted 5-4 to uphold the FCC sanction citing two "unique qualities" of the broadcast medium to support its decision--its pervasive presence in the home and its unique accessibility to children.[11]

Although the court contended in the Pacifica case that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," its decision to limit the First Amendment protection of broadcasting was based primarily on the concept of "intrusiveness."[12] In delivering the opinion of the Court, Justice John Paul Stevens stated that broadcasting "confronts the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[13] He further added that prior warnings to unexpected program content did not fully protect the broadcast audience from being momentarily offended while tuning in and out.

Dissenting with the majority, Justice Brennan criticized the intrusive nature ascribed to the broadcast media and claimed that the Court failed to recognize the ease with which individuals can turn off offensive programming. Although he agreed that an individual was entitled to

be left alone in the privacy of his home, Justice Brennan contended that a person who chooses to listen to or watch broadcast signals does not employ all of his privacy interests:

> . . . an individual's actions in switching on and listening to communications transmitted over the airwaves and directed to the public at large do not implicate fundamental privacy interests, even when engaged within the home.[14]

In concluding his opinion, Justice Brennan suggested that the limitations on individual privacy expectations were minimal when compared to the decrease in freedom of expression imposed by governmental restraints on nonobscene material that others may wish to hear or view.[15]

The second unique characteristic of broadcasting upon which the Court relied in Pacifica is broadcasting's unique accessibility to children. In the Ginsberg v. New York case,[16] the Court upheld a state statute that banned the distribution of material to minors which would not be judged obscene according to adult standards. Citing a legitimate governmental interest in the well-being of its youth, Justice Brennan delivered the Court's opinion which endorsed state efforts to aid parents in sheltering their children from harmful materials:

> Constitutional interpretation has consistently recognized that parent's claims to authority in their own households to direct the rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents and others who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.[17]

Applied to the Pacifica case, the Court's rationale in Ginsberg v. New York was to prohibit adults from receiving otherwise constitutionally protected communications solely because children might be in the audience.[18]

However, the Ginsberg case was based on a statutory prohibition that restricted (only) direct sales to minors of materials that were judged to be nonobscene to adults. As a result, the Court's ruling did not forbid the distribution of nonobscene material to willing adult recipients, nor did it absolutely prevent a minor from receiving the material if a parent or guardian thought no harm would result.[19]

After Ginsberg, the Court reviewed its earlier decisions relating to obscenity and concluded that restrictions on the general distribution of communicative material could not be justified based solely on the sensitivity of children.[20] In the Pinkus v. United States case,[21] the Court reversed an obscenity conviction on the grounds that the trial judge had erred in instructing the jury to include children in its determination of community standards. The Court held that the inclusion of children was a "reversible error" and concluded that the "average person standard" would be substantially diluted if the presence of children was considered in determining whether the material is obscene.[22] Later, in the Butler v. Michigan case,[23] the Court reaffirmed its previous decisions ruling that interest by the State in protecting children from nonobscene material did not justify "reducing the adult population . . . to reading only what is fit for children."[24]

As illustrated in the preceding cases, the government has traditionally taken an active role in regulating the content of various forms of expression. In Pacifica, the FCC applied its authority to regulate obscene and indecent material based on the Court's determination that broadcasting was intrusive and readily accessible to children. Although the Court identified these two characteristics as being unique to broadcasting, the FCC broadened its regulatory authority to include cable

television and now prohibits the transmission of obscene or indecent material on those channels which are subject to the system's exclusive control.

The federal restriction on obscene or indecent cable programming never has been tested in the various rulings of the FCC and never has been contested in the judicial system.[25] Several state and local governments, however, have sought to ban certain types of cable programming on grounds of indecency. In 1982, nine states introduced bills which prohibited the distribution of obscene or indecent material transmitted by wire or cable.[26] Recently, the Utah legislature passed a "Cable Television Programming Decency Act" over the governor's veto.[27] Although many state and local officials have attempted to regulate the communicative activities of cable television, operators claim that governmental intervention is unconstitutional because it violates their First Amendment rights to speak freely. Thus, the authority of state and local governments to regulate the content of cable television programming has become a debated issue in the courtroom.

In the Home Box Office v. Wilkinson case,[28] national and local cable distributors and franchisees petitioned the United States District Court in Utah for an injunctive relief from a state statute making it a crime to distribute pornographic material by wire or cable. Applying First Amendment analysis, the court invalidated the statute, citing that it was "unconstitutionally overbroad" and that it "reached protected forms of expression."[29] The district judge who delivered the court's opinion in this case also expressed his own belief that exposure to cable television programming is a matter of individual choice:

> There is no law that says you have to purchase a television set. There is no law that says you have to watch it. There is no law that says you have to subscribe to a cable television service. . . . The greatest virtue of our system is freedom to choose.[30]

In the subsequent Community Television of Utah v. Roy City case,[31] the same district court ruled that a municipal ordinance banning cable transmission of "indecent" programming was "facially defective, overly broad and unconstitutional."[32] Citing that the ordinance exceeded the First Amendment boundary set forth in the Miller v. California case, Judge J. Jenkins also concluded that the Supreme Court's reasoning for regulating broadcast content in the Pacifica case was not applicable to cable television. In the Roy City case, the court identified several critical differences between cable and broadcast television, but emphasized the "appreciably expanded spectrum" of choice and viewing control that cable subscribers have over off-the-air television viewers.[33] As noted in the previous cases, proponents of government regulation of "allegedly" indecent programming often rely on the Pacifica case to compare cable television and broadcasting. In Pacifica, intrusiveness into the home and availability to children were cited by the Court as reasons to regulate broadcasting content. Although the two characteristics may be applicable to broadcasting, the differences between cable and broadcast television clearly reveal that neither characteristic accurately describes cablecasting. First, cable television does not intrude into the privacy of the home. Subscribers voluntarily enter a private agreement to have their television receivers connected to the cable system and can, at any time, cancel or change service packages. In addition, cable television "isn't burdened by broadcasting's inability to protect the unwilling child or adult from unsuitable programming."[34]

Lock boxes and addressability allow subscribers to further control the programming that enters the home.

Another reason offered to justify local and state regulation of offensive cable programming is the "governmental interest in preserving local concepts of morality and indecency."[35] Although the Miller v. California case established contemporary community standards to be applied in defining obscenity, the Court later determined it unconstitutional for governments to suppress nonobscene expression in order to preserve morality. In the Stanley v. Georgia case,[36] the Supreme Court stated that "governmental control of the moral content of a person's thoughts is totally inconsistent with the philosophy of the First Amendment."[37] The district court judge in the Roy City case contended that cable indecency ordinances relinquish parental authority into the hands of the government and concluded that parents, not local government officials, are responsible to oversee the development of their children: "No police power or censorship can be a substitute for the moral function of the parent and the family."[38]

Aside from the strict limits established in the Miller v. California case, any governmental regulation of indecent material exceeds the bounds set for permissible action and is therefore unconstitutional. If content regulation is inevitable, however, the cable television industry could benefit if it received the same First Amendment protection that the print media enjoys; except for libel and obvious dangers to national security, the content of newspapers, magazines and books is completely protected. In a speech at the Western Cable Show in December 1983, Ralph Baruch, chairman of the board of Viacom International, Inc., compared cable systems to newspapers:

> Under the First Amendment, the newspaper editor decides--on a case-by-case basis--whether possible items for his pages are indeed obscene, and not fit for the community to see. On that premise, why is it not appropriate for the cable operator to judge what programs are deemed fit to offer to a system's subscribers, so long as he takes into account the Supreme Court's definition of obscenity?[39]

Must-Carry Rules

Despite its recent efforts toward deregulation, the FCC still requires cable systems to carry the signals of local and significantly viewed television stations. Specifically, cable operators must carry the signals of all licensed television stations within 35 miles of the community served by the cable system plus other local stations which, as shown by polls, are viewed frequently by people in the area. Television translator stations of 100 watts or more that serve the community also must be carried on request. The must-carry rules apply to all noncommercial educational stations, as well as those stations serving communities in small television markets, that can be viewed by at least 50 percent of the television households in the market area.

The must-carry requirement was one of the first restrictions imposed on cable television systems. The FCC initiated the requirement in the Carter Mountain case[40] when it refused to allow a microwave common carrier facility to transmit distant signals to a cable system unless that cable system agreed to carry the signal of the only local broadcast station. Mandatory carriage on microwave-served cable systems became official in 1965 and one year later, in 1966, was extended to include all cable systems.[41] The FCC's regulatory justification for imposing the must-carry rules was to assign cable television the role of a supplementary service and to "get cable moving so that the public may receive its

benefits, and to do so without jeopardizing the basic structure of over-the-air television."[42]

As indicated in the historical summary of cable television regulation, the Supreme Court in the Southwestern Cable case[43] upheld the signal carriage requirement, citing that such regulation was "reasonably ancillary" to the FCC's regulation of broadcasting. The must-carry rules were challenged again in the Black Hills Video Corp. v. FCC case[44] when cable operators claimed that such rules violated their First Amendment rights. The Eighth Circuit Court of Appeals, however, failed to recognize a First Amendment issue and concluded that cable's use of radio signals and its "unique impact upon the television broadcast service" necessitates regulatory jurisdiction on behalf of the public's interest.[45] In another case, Great Falls Community TV Cable Co. v. FCC,[46] the "public right to receive" standard was used to justify FCC rules implemented to protect local broadcast stations.[47]

One case in which First Amendment analysis was applied to cable television regulation was the Home Box Office, Inc. v. FCC case.[48] In response to the FCC's contention that cable was a secondary service to broadcasting, the District of Columbia Circuit Court held that:

> . . . the Commission has in no way justified its position that cable television must be a supplement to, rather than an equal of, broadcast television. Such an artificial narrowing of the scope of the regulatory problem is itself arbitrary and capricious and is ground for reversal.[49]

The court criticized the regulatory decisions of previous cases which upheld the FCC's must-carry and nonduplication rules. It claimed that the cases were "incorrectly decided," stating that "physical interference and scarcity requiring an umpiring role for government" is inappli-

cable to cable due to its abundance of channels and wire method.[50] In a later case, the FCC undermined its previous rationale for mandatory carriage by recognizing cable as a "separate technology" that was neither "secondary or inferior . . . in its public benefits."[51]

The most recent case to challenge the constitutionality of the must-carry rules involved Quincy Cable TV, Inc. in Washington, D.C., who filed a request with the FCC to delete three television broadcast signals from its cable system in order to carry alternative programming.[52] The chief of the Cable Television Bureau denied the request, citing that "the restrictions were necessary in order for the FCC to discharge its statutory responsibilities."[53] Quincy Cable then sought reconsideration of the decision, claiming that the must-carry rules "violated its First Amendment right to exercise discretion over the programming it offers to subscribers and its cable subscribers' rights to receive discretionary, nonmandatory signals."[54] By the time the case was appealed and reviewed by the District of Columbia Circuit Court, three years had elapsed and Quincy had considerably expanded its channel capacity. As a result, the court held that the facts of the case were substantively incorrect and reversed jurisdiction back to the FCC which upheld the mandatory carriage requirement without further protest.

Despite strong constitutional arguments against the must-carry rules, the FCC has taken no further action on the matter and the courts have yet to reexamine their validity. The rules, however, continue to "interfere with the editorial discretion of the cable operator and deprive the system of the use of a number of channels."[55] Although the previous FCC rationale for regulating cable--that it is subordinate to

broadcasting--has been rejected by the courts, three other justifications that have traditionally supported the rules also fail to withstand First Amendment scrutiny. They are: (1) Competition from cable systems will undermine the FCC's policy of fostering the needs of local broadcast stations; (2) Cable competition will harm UHF and noncommercial stations; and (3) Cable operators unfairly compete with broadcasters in the acquisition of programming.[56]

The FCC originated the must-carry rules for the dual purpose of preventing economic harm to local broadcasters and to subsequently ensure that programming "responsive to local needs" was provided to all communities.[57] However, the FCC has since abandoned its early rationale that local programming needs are only served by local stations:

> The premise that local needs can be met only through programming produced by a local station has not only been rejected by the Commission . . . but it lacks presumptive validity.[58]

The FCC further supported the above contention in 1979 when it reviewed a license renewal application for Community Television of Southern California. Although interest groups contested the license renewal application claiming the cable company was neglecting the needs of the community by spending a disproportionate amount of its income on nonlocal programming, the FCC upheld the license stating that "national programming can and does serve local programming needs and interests."[59] In 1983, the District of Columbia Circuit Court held that the FCC's responsibility in providing local programming extended only as far as its duty to grant licenses: ". . . as long as the Commission requires licenses to provide programming--whatever its source--that is responsive to local communities."[60]

In addition to reversing its contention that local needs and interests could be served only by local programming, the FCC has also recently begun to recognize that cable competition does not necessarily cause economic harm to local broadcasters. After conducting numerous economic analyses and case studies of approximately 160 broadcast stations, the FCC proposed the following conclusions:

> It is extremely unlikely that television broadcasters will experience any reduction in real income due to increased cable competition, audience diversion is likely to be low, and even if revenues actually declined there would be only a minor change in the quantity of public service programming from local broadcast stations.[61]

Thus, the FCC has determined that repeal of the must-carry rules would have little adverse impact on local stations and noncable viewers.

A second justification for the must-carry rules is that UHF and noncommercial stations would be harmed economically by cable competition. Although UHF broadcasting was viewed as "fragile" in the mid-1960s, it has since become competitive and no longer requires FCC protection.[62] In its Cable Deregulation Report and Order, the FCC noted that the impact on public broadcasting was difficult to ascertain due to a scarcity of financial figures; however, it maintained that a reduction in viewing hours of noncommercial stations did not necessarily indicate a reduction in viewer contributions or revenues for those stations.[63] A final justification for mandatory carriage is that cable systems unfairly compete with broadcast stations in the acquisition of programming. This rationale for intruding into cable editorial judgments is also invalid. The copyright law enacted by Congress, which went into effect in 1978, now requires cable systems to compensate program suppliers for the use of their copyrighted programs.[64]

Clearly, all justifications to support the must-carry rules do not withstand First Amendment scrutiny. The rules substantially infringe upon the right of cable operators to use their own editorial discretion to determine the programming to be carried on their systems. According to George Shapiro, attorney at law, the rules are overbroad and impose unnecessary costs on cable operators:

> The rules are overbroad because they require the cable operators to carry all local signals regardless of whether the local signal is or would be economically affected by carriage on the cable system. Moreover, the cable system must carry all local signals even if the signals are readily available off-the-air.[65]

Such content regulations cannot be justified by any substantial governmental interests or other compelling reasons and are, therefore, unconstitutional.

Commercial Speech

One final area of content regulation imposed on the cable television industry is commercial speech. When first confronted with the issue, the Supreme Court held in the Valentine v. Christensen case[66] that commercial speech was unworthy of protection. It rejected a First Amendment challenge to a city ordinance prohibiting the distribution of "commercial . . . (or) business advertising matter" in the streets.[67] The court stated that advertising, to be defined by looking at the motivation of the speaker, was "pursuance of gainful occupation" rather than speech.[68] This treatment of commercial speech was upheld years later in the Beard v. Alexander case,[69] when a magazine subscription organization challenged an ordinance prohibiting commercial door-to-door selling. Citing the question in the case as whether freedom of the press gave

magazines unique protection, the Court concluded that a seller of "gadgets or brushes" or "pots" could under no circumstances claim First Amendment protection.[70]

In the New York Times v. Sullivan case,[71] the Court retreated from its earlier position and considered the content of the speech as opposed to the motivation of the speaker. The case involved a libelous advertisement that was placed in the New York Times by a civil rights organization. Although the Court determined that the paper was motivated by purely commercial interests in running the advertisement, it said the publication "was not a 'commercial' advertisement in the sense in which the word was used in Christensen. It communicated information, expressed opinion, recited grievances, protected claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of highest public interest and concern."[72] This content test assumed prime importance in the Bigelow v. Virginia case,[73] when the Court held that where commercial speech contained "factual material of clear public interest," the state's ability to suppress it would be weighed by the First Amendment interests served by the speech against the interests advanced by the regulation.[74]

In 1976, the Court moved into a new era with the Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc. case,[75] and established protection for speech devoid of any content other than the proposal for a commercial transaction.[76] A Virginia statute that prohibited pharmacists from advertising prices for prescription drugs was challenged by customers who claimed a First Amendment right to receive drug price information. Ignoring the Bigelow balancing approach in its decision, the Court upheld the First Amendment right of the consumers and

concluded that a state could not suppress truthful and nonmisleading advertising of legal products on the ground that the information would harmfully effect the public or the advertisers.[77]

In the Central Hudson Gas & Electric Corp. v. Public Service Commission case,[78] the Court reapplied a balancing test to determine whether commercial speech was entitled to First Amendment Protection:

> . . . it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[79]

In a 1983 case, the Court identified a number of characteristics of commercial speech and stated that such speech "is entitled to qualified but nonetheless substantial protection . . ."[80] The Court also reemphasized that the government bears the burden of proving that a "substantial interest" exists when it seeks to restrict commercial speech.[81] Although the cases thus far have dealt with all categories of commercial speech, First Amendment issues regarding the commercial speech of cable operators have been limited to the areas of cigarette and liquor advertising.

In 1969, Congress enacted the Public Health Cigarette Smoking Act, making it unlawful to advertise cigarettes on any medium subject to jurisdiction of the FCC.[82] Two years later, in the Capital Broadcasting Co. v. Mitchell case,[83] broadcasters challenged the statute, claiming it was in violation of the First Amendment. The federal district court of the District of Columbia upheld the restriction, stating that it had "no substantial effect on the exercise of broadcasters' First Amendment rights "since they have lost no right to speak, but merely the ability to collect revenue from others for broadcasting their commercial

messages."[84] Moreover, the Court emphasized that the "unique characteristics of electronic communication make it especially subject to regulation."[85] Despite affirmation by the Supreme Court, the validity of the Court's decision in the Capital Broadcasting Co. case remains open to question since it was decided prior to Virginia Pharmacy and other cases that awarded First Amendment protection to commercial speech.[86]

Cases which have focused on state restrictions on liquor advertising have yet to establish how the First Amendment applies to such advertising. In the 1982 Queensgate Investment Co. v. Liquor Control Commission case,[87] a retail liquor permit holder challenged an Ohio regulation that prohibited permit holders from referring to price or price advantage in their offsite advertising. Ohio law permitted all other forms of advertising by permit holders and also permitted manufacturers and distributors of liquor to advertise. Citing the Twenty-first Amendment[88] and a substantial state interest in controlling and discouraging alcohol consumption, the Ohio Supreme Court rejected the permit holder's claim that the regulation violated its commercial speech rights. Later, the decision was appealed to the Supreme Court and dismissed for want of a substantial federal question.

In 1984, the Supreme Court in the Capital Cities Cable, Inc. v. Crisp Case[89] reversed the Tenth Circuit Court decision, which upheld a provision of the Oklahoma constitution and a related statute prohibiting off-site advertising of alcoholic beverages against a challenge by broadcasters and cable systems who were thus prevented from carrying liquor advertisements. The Court concluded that Oklahoma's prohibition against cable television firms retransmitting out-of-state commercials for alcoholic beverages conflicted with the FCC's preemptive jurisdiction which

requires cable companies to retransmit television signals. Upon review of the television case, the Court stated the following:

> . . . by requiring cable television operators to delete commercial advertising contained in signals carried pursuant to federal authority, the State has clearly exceeded that limited jurisdiction (allowed to the state by FCC policy) and interfered with a regulatory area that the (FCC) has explicitly preempted.[90]

Departing from the Queensgate and Crisp decisions, the Fifth Circuit Court advanced a different interpretation of the law concerning content regulation of liquor advertising.[91] A Mississippi statute prohibiting the origination of liquor advertisements in the state was challenged by an advertising agency on the ground that it violated the First Amendment. Although the state asserted a substantial interest in controlling the consumption of alcoholic beverages, the Court rejected the statute, claiming such legislation was "ineffective" and "remote" support for the state's purpose:

> . . . residents of Mississippi are exposed to so much liquor advertising from sources outside the state that the intrastate ban necessarily must have minimal effect on consumption and, hence, little effect on promotion of the state's asserted interest.[92]

As indicated by the conflicting decisions of the courts, content regulation of liquor advertising varies considerably, depending on the circumstances presented by each case. Thus, the current status of the law concerning the content regulation of liquor advertising on cable systems is unknown.

Summary

This chapter hopefully has demonstrated that content regulations

imposed on cable television exceed the bounds set by the First Amendment. As illustrated, suppressing programs solely because they are thought offensive, denying cable operators editorial discretion in the programming they present, and banning commercial speech on cable systems even though the same content is conveyed to the public through the print media are all governmental restraints that have serious constitutional weaknesses. Regulating the content of cable television based on the regulatory models of the broadcast or print media fails to take into account the unique characteristics of the cable medium. In the Kovacs v. Cooper case,[93] Justice Jackson stated that various media deserve individualized First Amendment standards rather than "oversimplified formulas."[94] Cable television should be no exception.

ENDNOTES

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[4]Philip B. Kurland, James P. Mercurio and George H. Shapiro, CableSpeech: The Case for First Amendment Protection (New York, 1983), p. 254.

[5]Communications Act of 1934 48 Stat. 1064 (1934), as amended, 47 U.S.C.A. § 151 et seq.

[6]Marc A. Franklin, The First Amendment and the Fourth Estate (New York, 1981), p. 610.

[7]Kurland et al., p. 32.

[8]438 U.S. 725 (1978).

[9]Daniel R. White, "Pacifica Foundation v. FCC: Filthy Words, 'The First Amendment and the Broadcast Media,'" Columbia Law Review, Vol. LXXVIII (January 1978), pp. 164-165.

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[11]Ibid.

[12]Richard E. Labunski, The First Amendment Under Siege (Westport, Conn., 1981), p. 84.

[13]Ibid.

[14]Franklin, p. 628.

[15]Ibid.

[16]383 U.S. 463 (1966).

[17]NOTE, "Cable Television and the First Amendment," Columbia Law Review, Vol. LXXI (June 1971), p. 1023.

[18]Kurland et al., p. 39.

[19]NOTE, "Cable Television and the First Amendment," Columbia Law Review, Vol. LXXI (June 1971), p. 1023.

[20]Kurland et al., p. 39.

[21]436 U.S. 293 (1978).

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[23]352 U.S. 380 (1957).

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[27]Ibid.

[28]531 F. Supp. 986 (1982).

[29]Ibid., p. 991.

[30]Ibid., p. 1001.

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[32]Ibid., p. 1165.

[33]Ibid., p. 1168.

[34]Brooke Gladstone, "Taking the First," Cablevision (May 7, 1984), p. 40.

[35]Kurland et al., p. 44.

[36]394 U.S. 557 (1970).

[37]Ibid., 565-56.

[38]Mary Frances Fuller, "The Decision, Please," SAT Guide (March 1984), p. 25.

[39]Stephen B. Borko, "The History of Cable Regulations," Public Management, Vol. LIV (July 1972), p. 15.

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[43]392 U.S. 157 (1968).

[44]399 F.2d 65 (8th Cir. 1969).

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[46]416 F.2d 238 (9th Cir. 1969).

[47]Kurland et al., p. 140.

[48]567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

[49]Ibid., p. 36.

[50]Ibid., p. 45.

[51]Kurland et al., p. 142.

[52]89 F.C.C.2d 1128 (1982), recon. denied, FCC 83-60 (Feb. 17, 1983).

[53]Ibid., p. 1134.

[54]Ibid.

[55]Kurland et al., pp. 142-143.

[56]Ibid., p. 143.

[57]Ibid.

[58]Ibid.

[59]72 F.C.C.2d 353 (1979).

[60]707 F.2d 1413 (1983).

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[62]Ibid., p. 146.

[63]Ibid., p. 147.

[64]Jules F. Simon, "The Collapse of Consensus: Effects of the Deregulation of Cable Television," Columbia Law Review, Vol. LXXXI (April 1981), pp. 618-619.

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[66]341 U.S. 622 (1951).

[67]Jonathan Weinburg, "Constitutional Protection of Commercial Speech," Columbia Law Review, Vol. LXXXIII (May 1982), pp. 722-723.

[68]Ibid., p. 723.

[69]341 U.S. 622 (1951).

[70]Weinburg, p. 723.

[71]376 U.S. 254 (1964).

[72]Franklin, pp. 261-262.

[73]421 U.S. 809 (1975).

[74]Weinburg, pp. 723-724.

[75]425 U.S. 748 (1976).

[76]Weinburg, p. 724.

[77]Ibid., 726.

[78]447 U.S. 557 (1980).

[79]Ibid., 566.

[80]Kurland et al., p. 26.

[81]Ibid.

[82]Alfred L. Scanlan, "The Federal Communications Commission and Cigarette Advertising," Catholic University Law Review, Vol. XIX (Winter 1969), p. 255.

[83]333 F. Supp. 582 (1971).

[84]Ibid., p. 583.

[85]Ibid., p. 582.

[86]Kurland et al., p. 27.

[87]103 S. Ct. 31, dismissing appeal from 69 Ohio St.2d 361, 433 N.E.2d 138 (1982) (per curiam).

[88]Amendment XXI, Sec. 2 reads "The transportation or importation into any State Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[89]52 U.S.L.W., pp. 4803-4810.

[90]Richard McKenna, "Preemption Under the Communications Act." Federal Communications Law Journal, Vol. XXXVII, No. 1 (January 1985), p. 31.

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[93]Ibid., p. 96.

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CHAPTER IV

ACCESS REGULATIONS

Introduction

The cornerstone of First Amendment law is the Supreme Court's ruling in the Associated Press v. United States case.[1] In expressing the opinion of the Court, Justice Black wrote that the First Amendment "rests on the assumption that the wisest possible dissemination for information from diverse and antagonistic sources is essential to the welfare of the public. . . ."[2] This view reflects the idea that there should be a marketplace of ideas, which, absent from governmental interference, would provide a diversity of expression in which all shades of opinion could compete for political or cultural acceptance.

The trend toward concentration and centralization of the communications media, however, has presented economic and organizational barriers to entry into the competitive marketplace.[3] As a result, commentators contend that some means of public access to these media should be developed in order to ensure a wide diversity of information and ideas. They argue that cable television provides a unique medium for the achievement of diversity and that mandatory access should, therefore, be required.

As mentioned in the historical background of cable television regulation, the FCC's original cable access rule required cable systems having 3500 or more subscribers to provide four access channels: one

channel for public use, one for educational purposes, one for government use and one for leased access. These rules provided the framework for a mandatory access program until 1979 when the Supreme Court invalidated the rules as beyond the Commission's statutory authority.[4] Although several states have attempted to mandate access requirements after the demise of the FCC rules, mandatory access is almost exclusively the domain of local governments. Municipalities typically require access channels in franchise agreements by specifying these and other requirements in "Requests for Proposals" when soliciting bids for cable franchises.

Today, one of the few access requirements imposed by the federal government was established by Congress in "The Cable Communications Policy Act of 1984."[5] The act requires cable systems with 36 or more activated channels to provide channel capacity for commercial use ("leased access") by unaffiliated third parties.[6] A final area of cable access regulation at the federal level includes the fairness doctrine and equal time requirements imposed by the FCC in 1969.

The imposition of these federal requirements or comparable requirements under state law or municipal franchises on cable systems raises serious First Amendment questions. Mandatory access not only affects the content of the cable system's communication, but also eliminates the editorial choice and discretion of the cable operator.[7] This chapter will focus on the constitutionality of imposing the fairness doctrine and equal time requirements on the cable television industry. Although the fairness doctrine relates more to content regulation than it does to access, it will be addressed in accordance with the equal time requirement due to the corollary relationship between these two provisions.

In addition, the editorial function performed by cable systems will be presented as an argument against mandatory access.

The Fairness Doctrine and Equal Time Requirements

In brief, the Fairness Doctrine has two parts: (1) All broadcast channels and cable systems with original programming must cover controversies of public interest; and (2) Opponents of the presented views must be allowed time to respond. Written in 1934, the doctrine was designed to reflect the public interest in receiving a variety of information and ensure that a balance of opinions was provided over the public airwaves. The equal time requirement, on the other hand, specifies that cable systems must allow political candidates equal opportunities to purchase advertising time.

The primary justification for upholding the fairness and equal time requirements for broadcasting is the spectrum scarcity rationale. In the 1934 case, National Broadcasting Co. v. United States,[8] Justice Frankfurter addressed the spectrum scarcity issue in view of the First Amendment:

> Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. . . . Denial of a station license . . . if valid under the Act, is not a denial of free speech.[9]

Justice Frankfurter's holding was based upon the premise that the spectrum of frequencies available for broadcasting had an absolute limit. Obviously, this opinion also relates to television (and, thus, to cable) spectrum space as well. Thirty-five years later, however, the

spectrum scarcity rationale was challenged after technology had permitted a more efficient use of available spectrum.

In the Red Lion Broadcasting Co. v. FCC case,[10] broadcasters argued that the increase in the availability of frequencies, compared to the declining number of daily newspapers, no longer justified FCC regulation. In expressing the opinion of the Court, Justice White stated the following:

> Scarcity is not entirely a thing of the past. Advances in technology . . . have lent to more efficient utilization of the frequency spectrum, but users of that spectrum have also grown apace.[11]

Justice White further maintained that as long as the number of potential broadcasters exceeded the number of available frequencies, the FCC had the power to grant and deny licenses:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[12]

The reasoning behind the scarcity rationale has been questioned on various grounds. First, the number of broadcast stations transmitted on "scarce" frequencies far outweighs the number of newspapers. Today, there are more than 9,000 radio stations and 1,000 television stations compared to less than 2,000 daily newspapers.[13] Less than 40 American cities are served by two or more competing daily newspapers.[14] According to the National Association of Broadcasters, 97 percent of 80 million TV households can receive four or more broadcast stations, 67 percent can

receive seven or more, and 38 percent can receive 10 or more stations.[15] There are currently 5,800 cable systems in the U.S., which serve some 15,665 communities.[16] Another 1,939 franchises are approved but not built.[17] Clearly, numerical scarcity is not a distinguishing characteristic of broadcasting or cable.

Another contention in support of the scarcity rationale is that broadcast frequencies are scarce in relation to those who wish to communicate over them.[18] George Shapiro disputes this claim:

> All economic resources, including resources used by print media such as paper and printing presses, are scarce in the sense that, absent some pricing mechanism, there would be a demand for a greater amount of the resource that exists. The government does not charge for broadcast licenses. Thus, prospective broadcasters are eager to brave the rigors of the FCC's allocation process, and it appears that there exists a great scarcity of frequencies compared to those who desire to use them. This same appearance would result if the government allocated, with no charge, printing presses and paper or any other economic resource.[19]

Thus, Shapiro concludes that the nature of the government's licensing scheme prevents a valid comparison between the actual demand and availability of broadcast frequencies.

Despite the alleged scarcity of the traditional broadcast outlets, technological developments in transmission and reception equipment has allowed for more use of the available spectrum. Some of the alternative forms of transmission include: cable, low power television, multichannel multipoint distribution systems, direct broadcast satellite and satellite master antenna systems.[20] Aside from economic considerations, these new technologies promise to further reduce scarcity, if indeed it exists at all.

Regardless of the validity of the scarcity rationale to broadcast regulation, its application to cable television is clearly unfounded. Cable operators do not communicate with their subscribers by means of the limited electromagnetic spectrum. The FCC, however, found authority to impose the fairness and equal time requirements on cable television, not by application of the spectrum scarcity rationale, but by invoking its jurisdiction over cable as "reasonably ancillary"[21] to its authority to regulate broadcasting.

To justify the imposition of the fairness doctrine on cable systems, the FCC stated in a 1969 report that "CATV operators have an obligation analogous to that of the broadcasters to give suitable time and attention to matters of great public concern."[22] The FCC further maintained that the intended principles set forth by the fairness doctrine:

> . . . would be grossly circumvented if the CATV subscriber receives both sides when he tunes his television set to a broadcast channel at a time when broadcast program material is being presented, but only one side when he switches to a CATV origination channel or stays tuned to the broadcast channel at a time when CATV origination has been substituted for deleted broadcast material.[23]

Specifically regarding the equal time obligations imposed on cable systems, the FCC stated that its responsibility for applying such a requirement on broadcasting "would be largely thwarted if unequal opportunities were afforded on CATV channels."[24]

After establishing that it had statutory authority to require cable systems to abide by the fairness doctrine and equal time rules, the FCC dismissed all claims that the requirements were in violation of cable operators' First Amendment rights:

> We could not, consistent with our statutory responsibilities, permit a CATV operator to place broadcast signals in a setting of inequality, unfairness, and hidden sponsorship which could destroy the signals' integrity and defeat the purpose of the obligations imposed on broadcasters in the public interest. . . . no one has a First Amendment right to provide broadcast signals to the public in a manner contrary to the public interest. Nor does the circumstance that CATV program origination may be economically dependent upon carriage of broadcast signals give rise to an indirect infringement of First Amendment rights. If the regulation is so related, it is not barred by the First Amendment.[25]

Although the fairness and equal time obligations were extended to include cable television in 1969, the FCC has yet to enforce the affirmative aspect of the fairness doctrine or the reasonable access requirement.[26] In a 1975 "Memorandum Opinion and Order," the FCC responded to a cablecaster's plea for reconsideration of the obligations saying that "We think it unwise to decide such a significant issue upon so sparse a record."[27] Six years later, the FCC's Cable Television Bureau reported that "there has been little detailed consideration of these laws, regulations, and policies as they have been applied to cable television."[28]

One of the many arguments raised by cable operators, as well as broadcasters, is that the affirmative obligations of the fairness and equal time rules are not requirements of the print media. In the Miami Herald Publishing Co. v. Tornillo case,[29] the Supreme Court held that right of reply doctrines cannot be constitutionally applied to newspapers. The Court held that the additional printing cost, the composing time and the use of scarce column space would hinder publishing. In a similar regard, Justice Tamm referred to the right of reply doctrines as "intolerable if applied to the print media."[30]

Although no compelling governmental interest has been supplied to justify the imposition of the fairness and equal time requirements on

cable, the impact of these obligations "is considerably more intrusive than their impact on broadcasting."[31] If they are applied to each separate channel, as originally determined by the FCC, cable operators could not meet the consumer demand for programming free of advertisements or editorializing.[32] The obligation under the fairness doctrine to provide balanced programming would severely limit cable's "narrowcasting" ability, in which it tailors its programming to specific audiences.[33]

Content obligations also would hinder the transmission of textual services, which may, in the future, provide home delivery of newspapers.[34] As mentioned previously, the Miami Herald[35] ruling prohibited government interference with newspaper content. It would seem likely that this ruling would apply equally to electronic print, making the fairness and equal time obligations unconstitutional as far as textual news channels are concerned.

A final criticism of the fairness and equal time obligations is the limitations they impose on the editorial autonomy of cable operators regarding political advertising, controversial issues and other programming decisions (the editorial function performed by cable systems will be further discussed in the next section of this chapter). In summary, the traditional justification for requiring broadcasters to abide by the fairness doctrine and the equal time provision should not be applicable to cable television. Although these rules have reportedly never been enforced against cable systems, they represent a serious intrusion into the First Amendment rights of cable operators.

The Editorial Function of Cable Systems

One of the strongest Constitutional arguments against mandatory

access is that it affects the content of cable communications. Mandatory access eliminates the cable operator's editorial discretion and control over programming transmitted on access channels. Shapiro addresses the constitutionality of governmental access requirements:

> As the Supreme Court has recognized in both the newspaper and broadcasting contexts, editorial judgment determines the content of a medium of expression. Ordering a communications medium to publish or distribute programming selected by others operates in much the same manner as telling what it can and cannot publish. Such intervention into editorial decision-making can be permitted only for the most compelling reasons.[36]

The editorial function performed by cable systems has been traditionally associated with the print media. Similar to newspapers, cable systems not only originate programming of their own, but also choose from a large number of available sources in order to offer a "package" of channels which will satisfy the interests and needs of cable subscribers. In the FCC v. Midwest Video Corp. case,[37] the Supreme Court recognized these functions as significant to the editorial choice and discretion of cable operators:

> Cable operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include . . . both in their signal carriage decisions and in connection with their origination function, cable television systems are afforded considerable control over the content of the programming they provide.[38]

The Court further identified mandatory access as a "comprehensive" threat to the journalistic freedom of cable operators:

> . . . we reject the contention that the Commission's access rules will not significantly compromise the editorial discretion actually exercised by cable operators. At least in certain instances, the access obligations will restrict expansion of other cable services. And even when not occasioning the displacement of alternative programming, compelling cable

> operators indiscriminately to accept access programming will interfere with their determination regarding the total service offering to be extended to subscribers.[39]

As the Court recognized in its holding, even one access requirement on a single channel can have a substantial impact on the cable operator's decisions regarding the content of other channels. Although a cable system's total service package may offer a broad range of information and entertainment, individual channels are essential in order to appeal to specific needs and interests of particular audiences. According to Shapiro:

> Each channel that is taken away from a cable operator because of an access requirement is one less channel available for programming the operator would select in order to best serve the demands of the community.[40]

Despite the Court's recognition of cable systems' editorial function, advocates of mandatory access contend that cable operators merely act as conduits for the communications of others and, thus, are not protected by the First Amendment.[41] Robert A. Kreiss explains the fundamental difference between an editor and a conduit:

> The difference between an editor and a conduit is fundamental, and the Constitutional significance of that difference cannot be neglected. The traditional model of the First Amendment envisions direct communications between speaker and listener. The mass media involves a more complex situation; the media may act either as speakers or as conduits for the speech of others. To the extent that the media communicate messages themselves, or act as editors in selecting messages to be communicated, they are entitled to full First Amendment rights. To the extent that they act as conduits for the communications of others, however, the First Amendment does not protect their activities.[42]

This characterization of cable as a conduit fails to consider that the lack of editorial control exercised by cable operators is

largely a result of deliberate governmental policies. Specifically, FCC regulations and some franchises require cable systems to carry certain broadcast signals without material degradation or editing (must-carry obligations). In addition, cable systems are forced to carry broadcast programs in their entirety based on provisions of the Copyright Act.[43] Cable systems also lack editorial control over access channels currently in operation because many of these channels are required as a result of franchising agreements or state laws. Thus, these restraints should not be used for justification of further governmental intervention.

Another contradiction of classifying cable systems as conduits is easily revealed upon examination of other media. Newspapers, for example, frequently print syndicated columns and features over which the editor exercises little editorial discretion.[44] Also, newspapers act primarily as conduits for others when they carry advertisements.[45] The government, however, does not take the liberty to control a proportionate number of newspaper columns in order to ensure a diversity of views. In a motion picture context, the fact that a theater owner may choose to present material produced by another without editing it does not reduce the First Amendment value of the editorial judgment involved in making the selection.[46]

Clearly, the editorial function performed by cable systems is vital to the achievement of diversity in the marketplace. It is the cable operator's own economic incentive to appeal to a large number of interests in order to attract the largest number of different audiences. This economic incentive encourages cable systems to provide channels for public access according to consumer demand. As one commentator observed:

> As more cable systems offer a greater number of channels, the probability of cable operators voluntarily providing public access channels increases. If access channels are not offered, it will more likely be due to the community's lack of interest in watching these programs than to the cable operator's refusal to offer such channels.[47]

Thus, cable systems must be allowed to perform their editorial function free of governmental intervention if they are to best serve the demands of the community. In the words of Shapiro:

> The editorial discretion of the cable television operator fosters diversity . . . it therefore plays a vital role in the system of free expression contemplated by the First Amendment.[48]

Summary

The most commonly cited rationale for mandating access is the broad claim that it protects the public interest. According to the National League of Cities, the foundation for this claim is that the public's interests outweigh the cable system's right of editorial control and free speech.[49] Access requirements, however, have yet to be supported by a compelling interest.

Cable operators should not be required, by any level of government, to communicate messages which the operator chooses not to communicate. Such requirements represent a serious threat to First Amendment principles. Mandatory access prevents cable systems from fully exercising editorial choice and discretion over the programming they offer to subscribers. The fairness doctrine and the equal time provision similarly intrude into the editorial decision making of cable operators.

Freedom of expression is vital to the marketplace of ideas. Cable operators should be allowed to operate in response to market forces rather than in accordance with "those who have no responsibility to

ensure the continued viability of the system and no accountability to subscribers." In the words of Gerald M. Levin, Vice President of Video Time, Inc.:

> . . . ideas take hold in this country through the marketplace of many media. And that's why cable can disseminate these ideas more widely and effectively than ever imagined.[50]

ENDNOTES

[1]326 U.S. 1 (1945).

[2]Ibid., p. 20.

[3]Benno C. Schmidt, Jr., Freedom of the Press Vs Public Access (New York, 1976), p. 37.

[4]440 U.S. 689 (1979).

[5]U.S. Congress, Senate, "The Cable Communications Policy Act of 1984," 98th Cong., 2nd Sess., 1984.

[6]Ibid., Sec. 612(A).

[7]Kurland et al., p. 80.

[8]319 U.S. 190 (1943).

[9]Ibid., pp. 226-227.

[10]395 U.S. 367 (1969).

[11]Howard Downs and Karen Karpen, "The Equal Time and Fairness Doctrines: Outdated or Crucial to American Politics in the 1980s" Journal of Communications and Entertainment Law, Vol. IV (Fall 1981), p. 85.

[12]Ibid., p. 84.

[13]Ford Rowan, Broadcast Fairness (New York, 1984), p. 11.

[14]Ibid.

[15]Ibid.

[16]Sol Talshoff, "A Short Course in Cable, 1984," Broadcasting Cablecasting Yearbook 1984, p. D-3.

[17]Ibid.

[18]Philip B. Kurland, James P. Mercurio, and George H. Shapiro, CableSpeech: The Case for First Amendment Protection (New York, 1983), pp. 57-58.

[19]Ibid., p. 58.

[20]Michael Pollan (ed.), "1984 Field Guide to the Electronic Media," Channels of Communications, Vol. III, No. 4 (Nov./Dec. 1983).

[21]392 U.S. 157 (1968).

[22]First Report and Order in Docket No. 18397, 20 F.C.C.2d 209 (1969).

[23]Ibid., p. 220.

[24]Ibid., p. 220.

[25]Ibid., p. 220-222.

[26]Mary Frances Fuller, "The Decision, Please," SAT Guide (March 1984), p. 25.

[27]Memorandum Opinion and the Order in Docket No. 19988, 53 F.C.C.2d 1105 (1975).

[28]Kurland et al., p. 70.

[29]418 U.S. 241 (1974).

[30]CBS, Inc. v. FCC, 629 F.2d 1, 30 (D.C. Cir. 1980).

[31]Kurland et al., p. 80.

[32]Ibid., pp. 70-71.

[33]Ibid., p. 70.

[34]Schmidt, Benno C. Jr., pp. 214-215.

[35]418 U.S. 241 (1974).

[36]Kurland et al., p. 80.

[37]440 U.S. 689 (1979).

[38]Ibid., p. 707.

[39]Ibid., pp. 707-708.

[40]Kurland et al., p. 82.

[41]Robert A. Kreiss, "Deregulation of Cable Television and the Problem of Access Under the First Amendment," Southern California Law Review, Vol. LIV (July 1981), p. 1024.

[42]Ibid.

[43]Copyright Act 17 U.S.C., 111 (1976 & Supp. V 1981).

[44]Kurland et al., p. 103.

[45]Kreiss, p. 1025.

[46]Kurland et al., p. 85.

[47]Ibid., p. 88.

[48]Ibid., p. 89.

[49]Ibid., p. 103

[50]Remarks by Gerald M. Levin, "Censorship: A Confrontation for Cable." Washington, D.C. (Sept. 22, 1981). (Speech presented at the Metropolitan Cable Club.)

CHAPTER V

FRANCHISING REGULATIONS

Introduction

In the majority of states, municipalities have supervisory control over local franchising. In several states, however, the same state agency which regulates public utilities serves as the franchising authority. In a few states, separate agencies have supervisory control over local franchising but require state approval of franchises and franchise agreements.[1]

The franchise agreement has been criticized on the ground that it intrudes on the First Amendment freedoms of cable systems. Cable operators typically are coerced by municipal authorities to make extensive promises for the authorized use of streets and public rights of way. According to Baldwin and McVoy, bidding for franchises has become so intense that "cable companies are promising services beyond tested technical capability at the time of application."[2] Another commentator notes that a successful franchise bidder has done "nothing more than agree to limit his constitutional rights."[3]

Although the negotiation of the cable franchise contract may itself be unconstitutional, other aspects of franchising such as rate-setting, franchise fees, services and other administrative controls have long been a First Amendment challenge to cable regulation. This chapter will

focus on the constitutionality of government officials charging franchise fees, regulating cable subscription rates, and limiting the number of cable systems that can use public rights of way.

Franchise Fees

Cable franchise authorities ordinarily charge a franchise fee to cable operators for the use of public rights of way and to reimburse cities for the cost of repairing torn-up streets, redirecting traffic, and other costs associated with laying and maintaining cable lines. In 1972, the FCC adopted rules limiting the amount of fees to three percent of the cable operator's gross subscriber revenues per year in order to prevent the assessment of unduly burdensome fees.[4] Prior to the FCC rules, some municipalities were collecting as much as 36 percent of the cable operator's gross revenues.[5] In 1977, the FCC amended the franchise fee rule by changing the revenue base from gross subscriber revenues to gross revenues of all cable services.[6] Recently, however, the provisions of "The Cable Communications Policy Act of 1984"[7] raised the federal ceiling on franchise fees to five percent, disassociated the fees from regulation costs and stripped the FCC of its power to grant waivers.

First Amendment analysis of the government charging franchise fees or other economic equivalents was set forth by the Supreme Court in the Grosjean v. American Press Co. case.[8] The Court ruled that the government could not single out a communications medium for special economic regulation. In the 1983 Minneapolis Star case,[9] Justice O'Connor delivered the most recent opinion of the Court concerning differential tax treatment of the press:

> Differential taxation places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.[10]

In the case of Murdock v. Pennsylvania,[11] the Court held that a fee imposed by municipalities upon persons soliciting orders or delivering goods (for example, books and pamphlets) could not be levied against persons engaged in the distribution of religious literature. In affirmation of its holding, the Court declared that:

> . . . the power to impose a license tax on the exercise of freedom is indeed as potent as the power of censorship which this Court has repeatedly struck down . . . a state may not impose a charge for the enjoyment of a right guaranteed by the federal Constitution.[12]

Subsequent to the Murdock case, the courts consistently have held that fees imposed by the government on those who communicate under the public forum doctrine are limited to "nominal fee(s) imposed as a regulation measure to defray the expenses of policing the activities in question."[13] Moreover, it is the government's burden to demonstrate that the fee is no greater than the actual cost of regulation.[14]

Despite the five percent ceiling on franchise fees, governmental authorities have been known to seek other forms of compensation from cable operators. In a 1974 "Report and Order," the FCC recognized no distinction between monetary fees and other forms of payment:

> Some franchises have required the cable operator, for instance, to wire each room in all the local public schools. This, in essence, requires the operator to internally wire the school system free of charge. Such an expense can be considerable, especially when several hundred rooms might be involved. The cost of equipment and materials alone could amount to more

> than the revenue derived from the franchise fee. It is this sort of indirect "payment-in-kind" that we are watching very closely and will not allow without justification. This type of expense is just as real and has just as much of an effect on the franchisee as a simple fee.[15]

Other forms of payment that have been demanded by franchising authorities include special cable networks linking various governmental or institutional offices, local studio facilities for programming and subsidies to nonprofit organizations that seek access to the cable operator's system.[16]

In whatever form or condition, the franchise fee imposed on cable operators is constitutionally limited to that amount in which the government can demonstrate is necessary to cover the actual cost of regulation.

Subscription Rates

In addition to franchise fees, the regulation of subscription rates also has been a topic of concern for First Amendment protection. In the past, one of the primary rationales for government regulation of cable television rested upon the assertion that cable television systems were natural monopolies and would, therefore, exact monopolistic prices from their subscribers if free of governmental restraint.[17] In 1981, local governments made the following argument in a report submitted by the National League of Cities:

> A cable operator, free of regulatory restraints, is likely to maximize profits by using his monopoly and monopsony powers. On the basis of his monopoly position, a cable operator can set the prices charged to subscribers for services largely free of all market constraints and limited only by the consumers' elasticity of demand.[18]

Despite the assertion that cable television is a natural monopoly, cable operators claim they always have faced competition from several sources, including the market, consumer demand and the potential competition from other operating cable systems. Considering the competitive alternatives to the communication services offered by a single cable operator and the continuing influx of new technologies, the cable industry contends that it is highly unlikely that "a cable operator could get the prices charged to subscribers for services largely free of all market constraints."[19] Moreover, another argument suggests that cable television is not an essential service and, thus, its pricing cannot exceed the level which consumers are willing to pay for the services it offers. In view of the facts stated above, rate regulation cannot be justified on the ground that it is necessary to prevent the abuses of monopolistic power.

Even in the absence of market competition, rate regulation of a communications medium violates the speech and press clause of the First Amendment. In the book, CableSpeech: The Case for First Amendment Protection,[20] Shapiro addresses the issue of regulating the subscription rates of cable television:

> Few would seriously contend that the government has constitutional power to set the prices at which newspapers and magazines are sold--even though many newspapers appear to have monopoly power in their circulation areas. Since communication by cable television cannot be distinguished from communication by newspaper on any basis that would suggest a difference in the constitutional principles by which regulation of their rates and prices should be tested, there is no reason to apply different rules to cable television.[21]

In addition, Shapiro identifies three reasons why governmental control of the rates and prices of a communications enterprise, even with monopoly power, is inconsistent with the First Amendment:

> First, rates and prices can be controlled only if the product or service sold is also controlled. For a communications enterprise this product or service is communication, which cannot be constitutionally subjected to control by government. Second, regulation of cable subscriber rates, by its nature, prevents the cable operator from selling at least some, and perhaps all, of his communications at rates subscribers are willing to pay. Regulation of only the cable basic service may result in lower rates for some subscribers. If the prescribed rates do not permit the cable operator to recover his cost for basic service, however, these low rates will require the cable operator to make up those costs by charging higher rates to subscribers who pay for the unregulated programming, thus interfering with the cable operator's freedom to communicate with these subscribers. Third, any scheme of rate regulation gives the government complete control over the economic well-being of the regulated enterprise and therefore makes the enterprise subservient to the wishes of the government. A system of total rate regulation, on the other hand, would curtail the ability of a cable operator to provide programming he wishes to provide, to expand his system in order to serve more viewers and increase the number of channels to enhance the diversity of programming available in the community.[22]

As evident in the preceding paragraph, the relationship between governmental regulation of subscription rates and the First Amendment has been heavily contemplated throughout the years. The recent enactment of "The Cable Communications Policy Act of 1984," however, made rate deregulation of all cable services an industry norm, after a transition period of two years in which some regulation will be permitted. Despite the strong regulatory nature of this provision, the new legislation instructed the FCC to promulgate rate regulation of basic cable service in markets where cable is not subject to effective competition. In addition, a five percent annual rate was granted to operators where basic

cable rates are regulated (i.e., during the two-year transition period or pursuant to FCC rules).

Limits on the Number of Cable Systems

Local governments in most states grant franchises that are nonexclusive in the sense that the city reserves the right to franchise more than one cable operator within the same geographic area. In a 1974 Rand Corporation report, the merit of granting only nonexclusive as opposed to exclusive, franchises was recognized:

> All in all, there is nothing to lose and perhaps something to gain by writing only nonexclusive franchises. If the operator is doing a good job, the threat of additional competition would be inconsequential, and the two types of franchises would have the same effect; but the potential threat of competition under a nonexclusive franchise would provide additional stimulus for the existing operator to perform well. If worst comes to worst and he does a poor job, then competition would serve as a safety valve to protect public interest.[23]

Despite the fact that the majority of franchises are awarded on a nonexclusive basis, over 99 percent of cable operators enjoy monopoly benefits.[24] In 1981, the New York Times reported that there were only five municipalities that had granted franchises to competing cable companies.[25] This exclusivity is typically created by a franchising process in which local governments select one cable company from among several and make no further attempt thereafter to encourage or allow competition.

Local government officials offer various justifications for allowing only one cable system to serve their communities. Cable television's use of public property is one ground that has been asserted as a constitutional basis for restricting the number of cable systems. Another

argument proposed by local governments is that they have the authority to deny permission to install a cable system in order to preserve the aesthetic quality desired in the locality. A final justification is based on the premise that cable television systems are natural monopolies and therefore government officials may select the one system which "best" serves the subscribers.

Cable operators' use of the public rights of way for communicative activity is subject to the government's power to impose reasonable regulations. The constitutional limit for such regulations was set forth by the Court in the Grayned v. City of Rockford case:[26]

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." . . . Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest.[27]

In view of the First Amendment, therefore, local governments may deny cable operators' use of public rights of way only if they can demonstrate that the cable system cannot be installed in any way that is compatible with the normal activities on the rights of way the cable operators wish to use. In the words of Shapiro:

> In almost any situation imaginable, there are means available to reduce to tolerable limits any interference with public usage that the wires or their installation and maintenance would threaten. The local government's interest in preserving public property for its normal use, therefore, ordinarily can justify nothing more than reasonable restrictions on the manner and time of installation and placement of the wires and reasonable regulations concerning their maintenance.[28]

Despite Shapiro's contention, commentators have claimed that at some point in the future the abundance of cable wire eventually could

make the streets and sidewalks unfit for normal use. This consideration, however, does not justify allowing only one cable system to be installed in a locality. According to the district judge in the City of Boulder case,[29] "While there are certainly finite limits to overbuilding (installing cable systems), those limits are something beyond two companies."[30]

The assertion that local governments may deny permission to install a cable system to preserve the aesthetic quality desired in the locality does not withstand First Amendment scrutiny. In the case of Metromedia Inc. v. San Diego,[31] a majority of justices acknowledged the subjective nature of aesthetic evaluation and concluded that any restrictions on communicative activity by employing aesthetic considerations must be "carefully scrutinized."[32] In the words of another commentator:

> Aesthetic judgments are the quintessence of subjectivity. Because of this fact, reliance of a governmental body upon aesthetics to support decisions to limit the number of cable television operators can be accepted only with considerable caution.[33]

Aesthetic considerations should rarely suffice for justification to limit the number of cable systems in a community. Cable television wires can be run either underground or installed overhead where wire systems for telephone and electrical connections already exist. Cable wires would have little effect, if any at all, on the aesthetic quality of a community.

The final justification for limiting the number of cable systems is based on the theory that only one system can operate in a given area and is therefore considered a natural monopoly. One reason proposed for a

single cable television operation is that one system can usually service a designated area at a lower cost to subscribers than could two or more systems: this condition is a result of the high fixed costs associated with installing a cable system in comparison to the variable cost of serving individual subscribers.[34] Physical limitations, such as the amount of space available on the poles or underground conduits, are also cited in favor of having only one cable system per community or sub-area of major cities.

Evidence in support of these economic and physical limitations has not been substantiated. Moreover, the number of communities in which more than one cable system is operating has increased, indicating that cable television may not be an economic monopoly in many markets.[35] In addition, physical limitations are no longer a valid argument for permitting only one cable system in a locality. The technology of fiber optics represents an untapped market for distributing the programming and other services offered by cable.[36]

Recently, the Ninth Circuit Court of Appeals declared that constitutional rights are violated when a city allows only one cable system in an area that is able to accommodate more.[37] This appelate ruling was reportedly the first in the nation to allow a First Amendment challenge to exclusive city licensing systems. In the words of attorney Harold Farrow, the case was "The first clear and direct attack by the Courts on the use of the franchising process by municipalities to displace competition and probably the most definitive decision in the country now affecting cable licensing."[38]

Summary

In light of First Amendment principles, various franchise regulations imposed on cable operators should not be allowed. Beyond cable's use of public rights of way, there are few, if any, valid justifications for the government charging franchise fees, regulating subscription rates and limiting the number of cable systems that can operate in a given area.

The constitutionality of the franchising process also raises serious First Amendment questions. Cable franchise authorities too often encourage or demand cable operators to surrender their First Amendment rights. Cable operators are subsequently in the "no win" situation of allowing franchise authorities to limit their constitutional rights in exchange for the privilege of a franchise. Although regulations are often negotiated and agreed upon by cable operators, they clearly represent an unconstitutional barrier to freedom of speech and the press.

Endnotes

[1]Philip B. Kurland, James P. Mercurio and George H. Shapiro, CableSpeech: The Case for First Amendment Protection (New York, 1983), p. 14.

[2]Thomas F. Baldwin and D. Stevens McVoy, Cable Communication (Englewood Cliffs, N.J., 1983), p. 4.

[3]William Owen Knox, "Cable Franchising and the First Amendment: Does the Franchising Process Contravene First Amendment Rights?" Federal Communications Law Journal, Vol. XXVI, No. 3 (December 1984), p. 333.

[4]Don Levin, "CATV Franchise Fee: Incentive for Regulation, Disincentive for Innovation," Syracuse Law Review, Vol. XXX (Spring 1979), p. 743.

[5]Ibid., p. 753.

[6]Ibid., p. 755.

[7]U.S. Congress. Senate. "The Cable Communications Policy Act of 1984" S.66, 98th Cong., 2nd Sess., 1984.

[8]297 U.S. 233 (1936).

[9]103 S. Ct. 1365 (1983).

[10]Ibid., p. 1372.

[11]319 U.S. 105 (1943).

[12]Ibid., pp. 112-113.

[13]Ibid., pp. 113-114.

[14]Kurland et al., p. 204.

[15]Clarification of Cable Television Rules and Notice of Proposed Rulemaking and Inquiry in Docket Nos. 20018 et al., 46 F.C.C.2d 202-204 (1974).

[16]Kurland et al., p. 202.

[17]Geoffrey A. Berkin, "Hit or Myth? The Cable TV Marketplace, Diversity and Regulation," Federal Communications Law Journal, Vol. XXXV, No. 1 (Winter 1983), pp. 61-66.

[18]Kurland et al., p. 154.

[19]Ibid.

[20]Ibid.

[21]Ibid., p. 154-155.

[22]Ibid., p. 157.

[23]Walter S. Baer et al., Cable Television: Franchising Considerations (New York, 1974), p. 100.

[24]Robert A. Kreiss, "Deregulation of Cable Television and the Problem of Access Under the First Amendment," Southern California Law Review, Vol. LIV (July 1981), p. 1005.

[25]Ibid.

[26]408 U.S. 104 (1972).

[27]Ibid., p. 116.

[28]Kurland et al., p. 183.

[29]F. Supp. 1035 (D. Colo. 1980).

[30]Ibid., p. 1038.

[31]453 U.S. 490 (1981).

[32]Ibid., pp. 510, 530.

[33]Kurland et al., p. 187.

[34]Michael I. Meyerson, "The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements," Journal of Communications and Entertainment Law, Vol. IV (Fall 1980), p. 7.

[35]Kurland et al., p. 189.

[36]Michael Pollan (ed.) "1984 Field Guide to the Electronic Media," Channels of Communications, Vol. III, No. 4 (Nov./Dec. 1983), p. 60.

[37]Associated Press, "Cable TV Gets Victory," Stillwater NewsPress, March 3, 1985, p. 6D.

[38]Ibid.

CHAPTER VI

SUMMARY AND CONCLUSIONS

Summary

Today, cable systems are serving more than 33 million homes in the United States.[1] As a result of rapid technological developments, the cable industry now offers even greater service flexibility and transmission capacity. In the words of Channels of Communications editor Les Brown:

> Cable is a video cornucopia whose gifts include: a multitude of channels (upwards of a hundred in the most up-to-date systems); an abundance of national program networks; a potential for local public access; a range of interactive services from video games to home security; a method of information retrieval from data banks; an electronic equivalent of the department store, and an ability to narrowcast to specific audiences as physicians and investment brokers.[2]

Beyond being a television medium, cable also has the capability to serve as a communications network for an entire community. Cable systems can now link schools, libraries, hospitals, and police and fire departments.

This significant growth of cable television makes it all the more important to reconcile government regulation with the principles set forth by the First Amendment. Despite its long-time comparison with the other media, cable television is a unique communications medium and should be treated as such for regulatory and constitutional purposes. As Justice Jackson stated in the Kovacs v. Cooper case:[3] The moving picture

screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses, and dangers. Each, in my view, is a law unto itself . . ."[4] Supreme Court Justice Frankfurter further criticized the use of "over-simplified" formulas to determine the constitutional protection of the various media:

> Some of the arguments made in this case strikingly illustrate how easy it is to fall into the ways of mechanical jurisprudence through the use of oversimplified formulas. It is argued that the Constitution protects freedom of speech: Freedom of speech means the right to communicate, whatever the physical means of doing so; sound trucks are one form of communication, whether by tongue or pen. Such sterile argumentation treats society as though it consisted of bloodless categories. The various forms of modern so-called "mass communications" raise issues that were not implied by Franklin and Jefferson and Madison. . . . Movies have created problems not presented by the circulation of books, pamphlets, or newspapers. . . . Broadcasting, in turn, has produced its brood of complicated problems hardly to be solved by an easy formula about the preferred position of free speech.[5]

Indeed, cable television offers its own array of regulatory and First Amendment issues. It should not be subject to the precise rules which govern other methods of expression.

Conclusions

This thesis has attempted to illustrate that various regulations placed on the cable television industry exceed the bounds set by the First Amendment for permissible government action. The government has taken the liberty to impose negative restraints on cable systems which affect the content of their communications, and subsequently eliminate their journalistic freedom to exercise editorial judgment. Such restraints include indecency standards, must-carry rules and prohibitions

against commercial speech. Affirmative restraints in the form of access requirements and franchising demands also represent serious First Amendment violations relating to the constitutional rights of cable operators.

Although numerous rationales have been offered to justify these governmental restraints, few, if any at all, can withstand First Amendment scrutiny. Almost no one argues that cable television should be left totally unregulated. Much debate does, however, focus on whether the local government should involve itself in matters beyond its responsibility of controlling the public rights of way, and whether the federal government should restrict the level of control it exerts over local cable operations. This researcher contends that most of the regulations imposed on cable systems would best serve First Amendment principles if they were determined by the marketplace rather than by the subjective views of governmental officials. In the words of one commentator:

> Allowing the demands of the marketplace to be satisfied by suppliers who operate free from government interference is the best mechanism known for assuring the supply of the goods and services a community desires. Time and again this fundamental law of human society has proved itself.[6]

Clearly, cable operators must be allowed to speak and communicate freely in the marketplace of ideas if the democratic principles of the First Amendment are to prevail.

ENDNOTES

[1]Les Brown, "Cable TV: Wiring for Abundance," Channels of Communications, Vol. III, No. 4 (Nov./Dec. 1983), p. 25.

[2]Ibid.

[3]336 U.S. 77 (1949).

[4]Ibid., p. 97.

[5]Ibid., p. 96.

[6]Philip B. Kurland, James P. Mercurio and George H. Shapiro, CableSpeech: The Case for First Amendment Protection (New York, 1983), p. 88.

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