FIRST AMENDMENT AND ELECTRONIC MEDIA: RAISING THE ISSUES

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INTRODUCTION

The purpose of this article is to give an overview of some of the important First Amendment issues in the area of electronic media. No attempt has been made to delve deeply into the issues or to supply answers to the problems raised. Rather, it is hoped that delineation of the issues will serve the useful purposes of spurring further study and making clear the pervasive and serious nature of the First Amendment problems — a factor that militates strongly for radical alternatives to the present scheme.

I. BROADCASTING

The First Amendment problems stem largely from the public trustee licensing scheme adopted by the Congress in this area. There was engineering chaos in the 1920's, resulting in the necessity for Government to license one party to use a frequency in an area and to enjoin the use by all others.[1] While economists argue that a market scheme where rights to frequencies are freely sold is feasible, the Congress chose a short-term licensing system where the party licensed does not pay for the use of the frequency but rather volunteers to serve the public interest. The licensee can only obtain renewal of the license upon a showing to a Governmental agency (Federal Communications Commission, [hereinafter FCC or the Commission]) that the public interest has in fact been served.

A. *General Licensing and Renewal Problems*

1. *Programming Generally*

At initial or renewal licensing, programming is the essence of service to the public.[2] Thus, the FCC states that it could deny a license on the ground that the applicant proposed only to present one record all the broadcast day or only wrestling on TV. Further, the Commission allocates frequencies among all users, and has stated that its allocation of so much spectrum space to broadcasting as compared with others stems from the judgment (i) to have local broadcast outlets and (ii) to enable broadcasting to make its vital contributions to an informed electorate.[3] Clearly, it can deny a license to an applicant proposing no *local*

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1. *See* NBC v. United States, 319 U.S. 190 (1943).

2. Johnston Broadcasting Co. v. F.C.C., 175 F2d 351, 359 (D.C. Cir. 1949).

3. *See* Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1248-49 (1949); Notice of Inquiry, Formulation of Policies Relating to the Broadcast Renewal Applicant, 27 F.C.C.2d 580, 581 (1970).

programming.[4] But these are clear-cut, easy situations. When the FCC is called upon to judge whether an applicant's overall programming operation has served the public interest, it can face very difficult borderline cases: And then the propriety of the *Government* evaluating programming operations, even on an overall basis, raises difficult First Amendment issues. The Commission has struggled unsuccessfully with this problem for decades. From the 1960 Programming Statement[5] to the present Ascertainment and Renewal efforts,[6] the Commission has sought to bring some certainty to this murky process. Both critics and the Commission itself have acknowledged that it has failed in this area. Thus, after close to a half-century of regulation, Chairman Burch in 1973 stated:

> If I were to pose the question, what *are* the FCC's renewal policies and what are the controlling quidelines, everyone in this room would be on equal footing. You couldn't tell me. I couldn't tell you—and no one else at the Commission could do any better (least of all the long-suffering renewals staff).[7]

This failure may not be one solely of will. With every delineation comes the most serious First Amendment problems. Thus, the FCC seems to prefer to have vague, general policies rather than ones with definiteness.[8] However, at renewal these vague policies come home to roost, and a Government agency must determine whether programming efforts to meet these policies do or do not serve the public interest.[9] To give but one example, the renewal applicant must show that he has sought equitably and in good faith to meet the needs of his public, including significant minorities. But this can raise the most difficult problems in judging whether the applicant has acted reasonably and in good faith, and can lead to much controversy.[10] While the Courts have sustained generally the FCC's right to examine programming on an overall basis,[11] a study should be made on whether or not the First Amendment problems in this respect are insurmountable.

2. *Entertainment Formats*

The FCC has sought to exclude entertainment formats from its public interest perusal, leaving such choice of formats solely to the licensee's judgment and thus to the marketplace. The courts, in a series of cases, have required the Commission to examine this issue, either on assignment or at renewal, stating that the public has an interest in diversity of entertainment formats.[12] But this, in turn, raises

4. Simmons v. F.C.C., 169 F.2d 670 (D.C. Cir. 1948), *cert. denied*, 335 U.S. 856 (1948).

5. Report and Statement of Policy Re: Commission's En Banc Programming Inquiry, 20 P. & F. RADIO REG. 1901 (1960).

6. Renewal of Broadcast Licenses, 38 Fed. Reg. 35398 (1973).

7. Address to the International Radio and Television Society, September 14, 1973, at 3.

8. *See, e.g.*, Children's Television Report, 39 Fed. Reg. 39396, 39397 (1974) ("[W]e are involved in a sensitive First Amendment area, and we feel that it is wise to avoid detailed governmental supervision of programming whenever possible."). But see NAACP v. Button, 371 U.S. 415, 432-33 (1963): "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

9. *See, e.g.*: Lee Roy McCourry, 2 P & F RADIO REG. 2d 895 (1964), discussed, Robinson, *The F.C.C. and the First Amendment*, 52 MINN. L. REV. 67, 115, 122-24 (1967).

10. *Compare* Alabama Educational Television Commission, 50 F.C.C.2d 461 (1974), with Puerto Rican Media Action, 51 F.C.C.2d 1178 (1975).

11. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 395 (1969); NAITPD v. F.C.C., 50 F.2d 249 (2d Cir., 1975).

12. *E.g.*, Citizens Committee to Preserve Choice of the Arts in Atlanta v. F.C.C., 436 F.2d 263, 263-72 (D.C. Cir. 1970); Citizens Comm. to Save WEFM v. F.C.C., 506 F.2d 246, 250-52 (D.C. Cir. 1974). Thus, whether abandonment of a "progressive rock format" for "middle of the road music" is

serious First Amendment issues. Is this format unique, or is it largely matched by some existing station—a difficult and sensitive issue, as shown in the WEFM case?[13] Does this holding discourage experimentation on the part of licensees, because they will fear that once they try a unique format, they will not be allowed to abandon that format, short of a showing of economic necessity to do so? How does the Government decide that the community should retain its only classical music station (desired by 8% of the population) as compared with the licensee bringing the second or third Black-oriented station in a community with 45% Black population? And if the Government can and must be concerned with this need for diversity in entertainment format, why is it not required to assign frequencies in a community upon this basis? Yet how could this be accomplished by the Government?[14]

3. *Comparative Renewals*

The incumbent can be challenged at renewal by a newcomer. Under the statutory scheme, the critical issue is then the incumbent's record, and programming is again the essence of that record. The Commission, however, has never set out any guidelines or standards—even in the most basic allocations area such as local or informational programming—as to the level of service reasonably assuring renewal in the face of a comparative challenge. This lack of any "standard" or "guidance" is, the FCC has recently stated to Congress, "an invitation to the exercise of unbridled administrative discretion, applied unpredictably from one case to the next . . ."[15]; "the public interest requires some degree of certainty and predictability in the outcome of renewal proceedings, and some measure of consistency in the applicable criteria."[16] So the question is whether in this sensitive area involving an important press medium, the First Amendment is served by examination of an incumbent's programming without any objective standards which the licensee has the opportunity to meet.[17]

B. *Specific Requirements Raising First Amendment Issues*

1. *Section 315—Equal Opportunities*

Section 315 of the Communications Act of 1934, as amended,[18] requires a broadcast licensee to afford equal opportunities to all legally qualified candidates

in the public interest requires a hearing in a proceeding to transfer a station license. Citizen Committee to Preserve Choice of the Arts in Atlanta, *supra*.

13. WEFM v. F.C.C., 506 F.2d 246 (D.C. Cir. 1974).

14. The FCC has an outstanding "notice of inquiry" considering those issues. *See* The Development of Policy Re: Changes in the Entertainment Format of Broadcast Stations, 57 F.C.C.2d 580 (1975).

15. *Hearings before the House Subcommittee on Communications and Power*, 94th Cong., 2d Sess., 1119 (March 14, 1973).

16. *Id.* at 1120-21.

17. To the same effect, *see* Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 854 (D.C. Cir. 1970), *cert. denied* 402 U.S. 1007 (1970), 403 U.S. 923 (1971) ("[A] question would arise whether administrative discretion to deny renewal expectancies, which must exist under any standard, must not be reasonably confined by ground rules and standards . . ."). This is a significant First Amendment issue, despite the obvious reluctance of the Commission presently to deny renewal of incumbent reluctance of the Commission presently to deny renewal of an incumbent licensee. *See, e.g.*, Moline Television Corp. 31 F.C.C.2d 263 (1971); RKO General, Inc. (KHJ-TV), 44 F.C.C.2d 123 (1973), *aff'd sub. nom.* Fidelity Television, Inc. v. F.C.C., 515 F.2d 684 (D.C. Cir. 1975), *cert. denied* 423 U.S. 926 (1975), Cowles Florida Broadcasting, Inc. (WESH-TV), F.C.C. 76-642 (1976).

18. 47 U.S.C. § 315(a) (1970). Section 315 of the Communications Act of 1934, as amended requires a broadcast licensee to afford equal opportunities to all legally qualified candidates for the

for the same office. This provision works reasonably well in the case of paid political broadcasts, but it inhibits the affording of free time to major candidates when there are fringe party candidates, like those of the Prohibition or Vegetarian Parties.

The provision thus inhibits robust, wide-open debate, as the FCC, the expert agency in the field, has stressed:

> In short, section 315 in its present form would appear, as is claimed, to inhibit broadcasters from affording free time to major presidential candidates — and does so, we urge, without any significant practical compensating benefits. The effect of section 315 is not that the Socialist Labor or Vegetarian candidate gets free time for political broadcasts. Further, and most important, there would appear to be little, if any, public benefit from insuring equal treatment for candidates whose public support is insignificant . . . .[19]

While there has been some improvement in this area, with the recent *Aspen Institute*[20] ruling affording a more liberal construction to news-type programs exempt from the equal opportunities requirement, a serious problem remains.

2. *Section 315—Fairness*

First amendment issues can arise under the first requirement of the fairness doctrine — that the broadcaster must cover matters of "great public concern."[21] Suppose the broadcaster does not cover a matter like integration in the South or Boston, or an issue important to his own operation (e.g., renewal bills or pay)? Is this a matter really reviewable by the Government? The Commission has held that "some issues are so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely . . .," but that any FCC action in this respect would be "the rare exception . . ."[22] In a recent ruling, *WHAR*,[23] the FCC found that a station in Clarksburg, West Virginia had failed to meet its responsibilities under the first duty in the fairness doctrine because it had failed to cover locally the "burning issue" of strip mining. Is this just a rare exception or does it portend an ever-widening role for the FCC in setting the agenda for public issues, as Commissioner Robinson in his concurring opinion fears?

The second duty set out in the doctrine—that the broadcaster cover issues fairly—also raises difficult First Amendment issues. On the one hand, there is the argument advanced by Chief Judge Bazelon that the Government (FCC) cannot insure fairness. And the *Miami Herald* case is cited in support:

> . . . The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treat-

same office. This provision works reasonably well in the case of paid political broadcasts, but it inhibits the affording of free time to major candidates when there are fringe party candidates like those of the Prohibition or Vegetarian Parties.

19. Statement of Chairman Burch on H.R. 13721, before House Subcommittee on Communications and Power, 91st Cong. 2d Sess., June 2, 1970, at 5.

20. While there has been some improvement in this area with the recent Commission ruling *Aspen Institute*, 55 F.C.C.2d 697 (1975), *affirmed*, Chisholm v. F.C.C., — F.2d — (1976), petition *for cert. pending* affording a more liberal construction to news-type programs exempt from the equal opportunities requirement, a serious problem remains.

21. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. at 394.

22. Fairness Doctrine and Public Interest Standards, 39 Fed. Reg. 26371, 26375 (1974).

23. WHAR, F.C.C. 76-529.

> ment of public issues and public officials — whether fair or unfair — constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.[24]

It is argued, however, that there is a distinguishing feature in broadcasting: The Government licenses one party to use Channel 3 in Jackson, Mississippi, and enjoins all others from using that frequency. Suppose the Government were to license the use of the main park in Jackson to one party, the White Citizens Council, for three years, and allow no one else to use that park for parades, rallies, etc.; and suppose Black groups sought the right to present their parades or rallies. Clearly, they would succeed in striking down the above governmental action as unconstitutional. But the Government has done the equivalent in regard to Channel 3 in Jackson. There are thus indications in *Red Lion* that some form of access by the public is constitutionally required.[25] The Government has determined upon fairness to afford that access.[26] Perhaps it would have been wiser policy under the First Amendment to have simply afforded a specified portion of time for use by the public, on a first come, first served basis. But as the court in *Red Lion and CBS v. DNC*[27] found, fairness is also a permissible option to meet this First Amendment purpose and possible requirement.

But if fairness is generally appropriate, its implementation can raise substantial First Amendment problems. Thus, former CBS President Fred Friendly has shown in two articles how both Republican and Democratic Administrations sought to use the fairness doctrine to chill anti-Administration viewpoints.[28] A 1973 Rand study by the author[29] urges that the Commission's practice of *ad hoc* fairness rulings has led it ever deeper into the journalistic process, and has raised most serious problems. What is a reasonable balance (2 to 1, 3 to 1, etc.)? Further, how does the frequency of presentations or choice of time (e.g., prime or nonprime time) affect this evaluation?

In order to ascertain whether there has been reasonable balance, the FCC literally has used a stop-watch to time the presentations that have been made by the various sides on an issue.[30] Even more difficult can be the problem of judging

24. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

25. *See* Red Lion Broadcasting Co. v. F.C.C., 395 U.S. at 389, 390: "[B]ecause 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 [cases omitted] . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the F.C.C."

26. *See* CBS v. DNC, 412 U.S. 94 (1973). Significantly, in their arguments in that case, broadcasters relied heavily upon the existence of the fairness doctrine to fend off any right of access. Similarly, in the multiple ownership field, broadcasters have pointed to the fairness doctrine in support of their position for liberalized standards. Thus, if the doctrine were eliminated without any access substitution, it would be necessary to re-examine policy in several areas (e.g., duopoly; the 7 or 5 VHF TV station limitation).

27. CBS v. DNC, 412 U.S. 94 (1973).

28. *See* F. Friendly, "*Poliiticalizing TV*",—COLUM. J. REV., March- April 1973, p. 9; N.Y.Times Magazine Section, Mar.30, 1975 (Magazine), at 8.

29. *See* H. Geller, The Fairness Doctrine in Broadcasting: *Problems and Suggested Courses of Action*, The Rand Corporation, R-1412-FF, December 1973 [hereinafter cited as *Rand Study*].

30. *See* Concurring Statement of Chairman Burch in Complaint of the Wilderness Society Against NBC (ESSO), 31 F.C.C.2d 729, 734-39 (1971).

whether a program segment is for, against, or neutral to a particular issue. In the gray areas that are bound to arise in this respect, is it appropriate for a governmental agency to make such sensitive programming judgments? Indeed, there can be considerable controversy over whether a controversial issue of public importance was covered. The argument is thus made, based on cases like *Sherwyn Heckt*,[31] that there is a chilling effect on robust, wide-open debate as a result of the Commission's case-by-case implementation of the fairness doctrine; and that the Commission should return to the pre-1962 practice of applying the fairness doctrine only at time of license renewal, and determine then whether a flagrant pattern of violation of the doctrine is indicated.

3. *The FCC's Policies on Rigged or Slanted News*

The Commission's present policy is to investigate every "extrinsic evidence" case of abuse by some newsman within the extensive news organization maintained by broadcasters.[32] It is argued that the Commission is intervening here in the most sensitive journalistic area, and that no really hard-hitting journalistic enterprise can flourish in an atmosphere where there is, in effect, a deep intrusion by the government into the journalistic processes, either by direct FCC investigation, or by the FCC's review of the licensee's investigation.

The FCC investigation of the WBBM-TV Pot Party newscasts illustrates these difficulties.[33] In that case, WBBM-TV telecast a pot party at the Northwestern University campus to show the pervasiveness of this kind of drug violation. The party depicted was authentic in that it did involve pot smoking by students at a campus rooming house; further, the public obviously knew that "this was a televised pot party—an inherently different event from a private, non-televised pot-smoking gathering.[34] But the FCC found that the public was incorrectly "given the impression that WBBM-TV had been invited to film a student pot gathering that was in any event being held, whereas, in fact, its agent [a young newsman] had induced the holding of the party."[35] Since this newsman had encouraged the Commission of a crime, the FCC called for stricter policy guidelines to the licensee's staff in this respect. It is argued that this exhaustive hearing, during which WBBM-TV's renewal was in jeopardy, did not serve any overridling policy need, but could have a chilling effect on other broadcasters who might have been interested in breaking new ground in TV investigative journalism. The Commission, it is claimed, has forgotten the Court's admonition in the *CBS* case that "calculated risks of abuse are taken in order to preserve higher values.[36] Here again, the FCC is urged to revise its policies, so as to intervene *only* to ensure that the licensee is acting consistently with the public trustee concept.[37]

31. Complaint of Sherwyn H. Heckt, 40 F.C.C.2d 1150 (1973), analyzed in Rand Study, supra note 29, at 40-43.

32. *See* Letter to CBS, F.C.C. 72-871; Letter to ABC, F.C.C. 72-870.

33. 18 F.C.C.2d 124 (1969).

34. *Id.* at 133.

35. *Id.* at 134.

36. CBS v. DNC, 412 U.S. at 125.

37. Thus, if there is evidence of slanting or staging by the licensee or its top management (e.g., statements by news employees that they were instructed to slant or stage news), the F.C.C. should investigate fully, since this involves the basic public trustee qualifications. But in all other instances, and in today's extensive broadcast news operations there are bound to be faults by employees, the FCC should simply refer appropriate complaints to the licensees and not intervene further.

4. *Section 399*

Section 399 of the Federal Communications Act, banning editorializing by noncommercial broadcasting stations, is of dubious constitutionality.[38] This type of provision is encountered also at the State level.[39]

5. *Prime Time Access*

In the Prime Time Access Report III,[40] the Commission exempted for the first time public affairs programs, programs designed for children, and documentary programs. The first category was not defined, and the Commission was prodded by the Court to delineate more precisely the scope of the exception.[41] The second category means programs primarily designed for children aged 2 through 12. The Court sustained the constitutionality of the later definition against the claim of vagueness, saying that "a precise definition is probably unattainable and, indeed, undesirable";[42] and it ruled out any prior declaratory rulings by the Commission because such *ad hoc* decisions. . . "suggest a system of censorship, and because the very absence of precise guidelines makes competitors suspicious that the Commission reaches its *ad hoc* decisions entirely at large."[43] But there is clearly a serious First Amendment issue here. For unlike the usual situation where it is only a matter of proper program classification at renewal, here a program can be exhibited at a particular hour only if it is, for example, primarily designed for children. Thus, the Commission's statement that only one network program presently comes within that definition — NBC's *Disney* — was labelled by the Court as "unfortunate,"[44] and indeed, there was great controversy as to whether *Disney* does in fact meet the definition or constitute the only program to do so. Further, the Court may be wrong in believing that *ad hoc* ruling will be avoided; competitors for the cleared block of time could file complaints with the Commission, urging that the rule has been violated and requesting the issuance of a cease and desist order under Section 312(b). There thus remains a serious First Amendment issue to be explored.

6. *Children's TV Report*

In its 1974 Children's TV Report,[45] the Commission held that licensees must make "a meaningful effort" to program for children; that "a reasonable amount of programming [must be] designed to educate and inform . . ."; that all licensees must "make a meaningful effort" to present age-specific children's programming (i.e., pre-school; primary school; elementary school); and as to scheduling stated:

> [W]e do not believe that it is a reasonable scheduling practice to relegate all of the programming for this important audience to one or two days.

38. *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) ("any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutionality."); Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

39. *See* State of Maine v. University of Maine, 266 A.2d 863 (1970).

40. Second Report and Order, 50 F.C.C.2d 829 (1975). NAITPD v. F.C.C., 516 F.2d 526 (2d Cir. 1975).

41. *Id.* at 540.

42. *Id.* at 541.

43. *Id.*

44. *Id.* at 540; Second Report, supra, at note 40.

45. 50 F.C.C.2d 1 (1974).

> Although we are not prepared to adopt a specific scheduling rule, we do expect to see considerable improvement in scheduling practices in the future.[46]

Wholly aside from any definitional problems, there is the serious issue of vagueness in this statement of the licensee's responsibility. As noted, the Commission deliberately chose this "flexible" approach because of the "sensitive First Amendment" nature of the area (par. 19). But listener groups such as Action for Children's Television (ACT) have made clear that they will petition to deny renewals in 1977 when the policies are applicable, on the ground they have not been met. The FCC will then have to say whether some particular effort is "reasonable" or "meaningful." Neither the public nor the broadcaster has been given any "meaningful" notion (to use the FCC's favorite word) of what is called for. Again, therefore, the area is one of "unbridled administrative discretion" — of the subjective judgment of the current majority of the Commission. The issue is thus raised whether more definitive guidelines are not desirable or required to serve First Amendment policies.[47]

C. *Specific Proscriptions Raising First Amendment Issues*

1. *The Commission's Construction of Obscene and Indecent*

Section 1464 of Title 18 proscribes "obscene, indecent, or profane language." The Commission has construed "obscene" and "indecent" in recent cases in a fashion raising serious First Amendment issues. Thus, in *Sonderling*,[48] the Commission found obscene a so-called "topless radio" show which, during hours when the audience could include children, had broadcast explicit discussion of sexual acts in an allegedly titillating context (e.g., the peanut butter episode during the discussion of oral sex). While the Court affirmed, relying greatly on the pandering or titillating aspect,[49] the decision is a close one that can be seriously questioned on First Amendment grounds. Sex and obscenity are not the same; sex, including aspects like oral sex or masturbation, is an important human function that can be discussed over broadcast media. Here the discussion in *Sonderling* was carried on not by boring clinicians but in simplistic terms by wives or women who were describing their experiences; and while ratings were undoubtedly the largest factor in scheduling such programs, that is true of the great majority of broadcaster programming decisions and does not automatically make "titillating" an informative program on sex. Stated differently, what program involving discussion of sex by ordinary people *is* permissible on radio? None, because of the presence of the children? What then of *Butler v. Michigan*[50] that children cannot be the criterion controlling what adults may see or read?

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46. *Id.* at 8.

47. The Commission's construction of the lottery law (18 U.S.C. 1302) also has raised substantial First Amendment problems in the news area. *Compare* N.Y. State Broadcasters Assn. v. —, 414 F.2d 990 (2d Cir. 1969) *cert. denied* 396 U.S. 1061 (1970) *with* New Jersey State Lottery Com. v. United States, 491 F.2d 219 (3d Cir. 1974). However, recent legislation (Public Law 93-583 (1975)) may have obviated the need to explore this area.

48. Sonderling Corp., Illinois Citizens Comm. for Broadcastingv. F.C.C., 515 F.2d 397 (D.C. Cir. 1975).

49. *See* Ginsberg v. New York, 390 U.S. 629 (1968).

50. 352 U.S. 380, 383-84 (1957). Further, the law requires that the work be viewed "as a whole." Miller v. California, 413 U.S. 15, 24 (1973). The Commission, however, took isolated passages.

The Commission's construction of "indecent" in *Citizen's Complaint Against Pacifica Foundation (WBAI)*,[51] raises even more serious First Amendment issues. The Commission found "indecent" a radio program presented by WBAI at 2 p.m., in which the host played a record by George Carlin, a social satirist on American language and manners and then discussed it on the call-in show. The audience was warned just prior to the playing of the 15-minute Carlin segment that it contained language offensive to some (e.g., the typical four-letter words). On the basis of a single complaint (the only one received by the Commission or the station), the Commission found the presentation to be indecent, largely because of the possible presence of children in the audience. The Commission's decision raises the following issues: (1) The Commission first held that "indecent" has a different meaning from "obscene."[52] Perhaps so, but the question then becomes, what is left of "obscene"—why should the Commission or Justice ever prosecute on "obscene" when they could use the lesser standard of "indecent"; (2) assuming that "indecent" is different from "obscene,: the Commission, in a departure from *WUHY-FM*,[53] dropped *two* of the definitions in *Miller*[54]—the "prurient interest" test *and* whether the material, taken as a whole, has serious literary, artistic, political or scientific value. The FCC stated that when "the number of children in the audience is reduced to a minimum, for example during the late evening hours, [the latter] standard might conceivably be used.[55] The opinion, citing *Williams v. D.C.*,[56] thus relies greatly upon nuisance law which "generally speaks to *channeling* behavior more than actually prohibiting it."[57] But nowhere does the opinion cite *Butler v. Michigan;* nowhere does it acknowledge that because of children, it is ruling out any possibility that the 2235 daytime-only stations can present, or the millions who retire before 10 p.m. can hear, a serious literary, etc., work which happens to contain any of the proscribed language. Indeed, since the Commission twice mentions only that the language "conceivably might be broadcast" during the late evening hours,[58] it may well be that the Commission has inhibited *all* broadcasts of serious works with these words—in the cause of allegedly channelling programs to protect children.

2. *Specific Inhibitions*

In several instances the Commission has proceeded on programming matters in a way raising serious First Amendment issues. Thus, in *Palmetto Broadcasting Co.*,[59] the Commission denied renewal of license, not on the grounds that a substantial pattern of programming was obscene or indecent, but rather that it was simply patently offensive by any standard. And to give one other example, in the *KRAB-FM* case,[60] the station auditioned several tapes from a series by Reverend

51. 52 F.C.C.2d 433 (1975), *appeal pending* D.C. Cir. Case No. 75-1391.

52. The broadcast clearly could not be called "obscene," as it did not meet all three elements in Miller v. California; in particular, it did not appeal to "purient interest." 413 U.S. at 24.

53. WUHY FM, 24 F.C.C.2d 408 (1970).

54. Miller v. California, 413 U.S. 15 (1973).

55. WBAI, 52 F.C.C.2d at 433. Two concurring members would not allow the language to be broadcast at any time.

56. Williams v. D.C., 419 F.2d 638 (D.C. Cir. 1969).

57. WBAI, 52 F.C.C.2d at 433.

58. *Id.* at 433-34.

59. 33 F.C.C. 250, *aff'd on other grounds sub nom*; Robinson v. F.C.C., 334 F.2d 534 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 843 (1964).

60. 21 F.C.C.2d 833, 21 F.C.C.2d 266 (1970).

Sawyer and found them suitable for broadcast. When actually presented, however, some (which had not been auditioned) contained offensive language and were immediately cut off the air when the licensee heard the offensive material. Nevertheless, the Commission gave the licensee only a short-term, rather than a three-year, renewal, on the ground that it failed to exercise proper supervision to prevent this objectionable matter from being broadcast. After the licensee demanded a hearing, contending that it had exercised reasonable supervision in the circumstances (and indeed it had done as much or more than many users of network or syndicated programming), the FCC put the station through an evidentiary hearing. KRAB won a complete victory,[61] but the issue is raised as to why it was treated in this manner.[62] Certainly the Commission's action did little to serve the First Amendment's basic goal of promoting "unihibited, robust and wide-open" debate.[63]

3. *Lifted Eyebrow*

In a recent speech,[64] Chief Judge Bazelon has detailed the "lifted eyebrow" method used by the Commission as to drug lyrics,[65] topless radio, and recently "family viewing." On topless radio, Senator Pastore, chairman of the Subcommittee on Communications of the Senate Committee on Commerce, spoke out; and then FCC Chairman Burch at the National Association of Broadcasters (NAB) Convention similarly called upon the broadcasters to act responsibly, if they wanted in turn to be treated responsibly as to renewals, etc.[66] The NAB got the "message." Indeed, Storer Broadcasting Company, the originator of the topless pattern, ended its talk show in this field, stating that "rather than add to the problems of an industry which already has enough major difficulties in the area of governmental relations, we prefer to be responsive."[67] In "family viewing," the pressure again came from Congress to the FCC to the broadcasters, with Congress threatening legislation, the FCC talking about the need for industry-wide self-regulation, and the broadcasters eventually providing such self-regulation.[68] Chairman Wiloy participated extensively in the negotiations leading to the industry-wide NAB rule, both as a catalyst and a pressure point'particularly to get the independent and noncommercial broadcasters to join in the policy. But the Chairman and the Commission have conceded that the FCC lacks the power to

61. F.C.C. 71D-13, 29 F.C.C.2d 334 (1971).

62. *See* dissenting opinions of Comm'rs. Cox and Johnson, 21 F.C.C.2d at 834-42.

63. The New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

64. 1975 Brained Currie Lecture, Duke Univ. School of Law, April 3, 1975.

65. *See* Yale Broadcasting Co. v. F.C.C., 478 F.2d 594, 603 (D.C. Cir. 1973) (dissenting opinion of C. J. Bazelon), *cert. denied*, 414 U.S. 914 (1973).

66. *See* Illinois Citizens Comm. for Broadcasting v. F.C.C., 515 F.2d 397 408 (D.C. Cir. 1975), dissenting opinion of C. J. Bazelon, quoting the following excerpt from speech by Dean Burch, NAB Chairman:

> "And the price [of topless radio] may be high. Because this comes at a time when broadcasters are seeking greater stability in the renewal process, longer license terms, selective deregulation, and less detailed intrusion into journalistic discretion . . .
>
> All these matters are now pending before the Congress or the Commission. All are dependent on the notion of the responsible public trustee. . . ."

67. *Id.* at 409. Metromedia took similar action, stating: "We didn't feel it was a big enough part of our format to be worth the hassle, or worth looking over our shoulder and wondering what Big Brother thought of our topic yesterday." *Id.*

68. *See* Report on the Broadcast of Violent, Indecent and Obscene Material, 52 F.C.C.2d 418, 420-21 (1975) (discusses efforts of Chairman Wiley to restrict viewing of "adult" programming to time periods after 9 p.m.).

adopt a rule or policy in this area—that to do so would violate the no-censorship provision of the Communications Act.[69] What then is the Chairman's authority under the Act to engage in the family viewing negotiations? Is he not clearly acting *ultra vires* in this sensitive First Amendment area, and thus subject to being enjoined?[70]

D. *Specific Political Pressures Using the Public Interest Licensing Scheme*

1. *The Nixon Administration Effort to Use Fairness Doctrine*

In 1972, the broadcasters were attempting to obtain renewal relief. The Nixon Administration seized upon this occasion to make a "carrot and stick" proposal: If the broadcasters would take action against "biased" network news (i.e., anti-Administration), the Administration would support their efforts for renewal relief; but the price was strict application of the fairness doctrine at renewal against the local broadcaster who failed "to act to correct imbalance or consistent bias from the network. . ."[71] The effort failed, largely because of the Democratic Congressional outcry, but it does raise a serious problem: What if Congress had been of the same party as the President?

2. *The Colson Visits and Pressure*

A high Administrative official, Charles Colson, also was active in pressuring the networks. Thus, during the 1972 campaign, Colson called CBS Chairman Paley to protest a scheduled 15-minute report on Watergate on the CBS Evening News (CBS denies that the Colson call influenced the decision to cut the report to eight minutes).[72] And the Watergate hearings revealed that Colson visited the networks in 1969 in an effort to soften any anti-Administration news position.[73] Perhaps he exaggerated the impact of these visits. But what if an Administration bent on improperly influencing the networks also had the cooperation of the FCC in this undertaking—and that agency issued a new notice proposing some action adverse to the networks in prime time access or in the multiple ownership area (e.g., that no person or no network could own more than two (or three) stations in the top 15 markets)? And what if the Charles Colson of a future Administration then visited the networks to discuss "problems of mutual concern"?

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69. 47 U.S.C. § 326 (1970). See KCOP, Inc., FCC 76-526, par. 15 (1976).

70. *See* Writers Guild of America West, Inc. v. F.C. C., Civ. Act. No. CV75-3641-F, D.C. Cent. Dist. Calif.

71. *See* Speech of Clay T. Whitehead, OTP Director, the Indianapolis Sigma Delta Chi Chapter, December 18, 1972. Dr. Whitehead further stated that broadcasters must be "responsible," and that a vital part of this "local responsibility" under the fairness doctrine involves licensee action against "ideological plugola" in the news and the correction of the situation where "so-called professionals can dispense elitist gossip in the guise of news analysis," (Rand Study, ch. 76 n. 1). There is no FCC precedential support for these statements: they represent blatant pressure. And as to OTP's complete switch in fairness, see F. Friendly, Politicalizing TV, supra, at 9.

72. VARIETY, June 27, 1973, at 42.

73. *See* Memorandum from Charles Colson to H. R. Haldeman, Sept. 25, 1970 (discussing a meeting between Colson and various television network officials), reprinted in SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, FINAL REPORT, S. Rep. No. 981, 93d Cong., 2d Sess. 281-83 (1974).

3. *The Nixon Administration's Efforts to Influence the Content of Controversial Issue Programming in the Noncommercial Area*

The Nixon Administration also mounted a strong attack against public affairs programming by the noncommercial network because it was regarded as anti-Administration.[74] Mr. Patrick J. Buchanan, a White House aide, acknowledged this in a 1973 television appearance:

> "I had a hand in drafting the [President's] veto message," [of a 1972 bill on financing public broadcasting] Mr. Buchanan had said. He described how the White House compared the bill with what it saw on public television, where it found such presences as: Sander Vanocur, whom Mr. Buchanan described as "a notorious Kennedy sycophant in my judgment"; Robert MacNeil, "who is anti-Administration"; Elizabeth Drew, who "is definitely not pro-Administration, I would say anti-Administration." "Washington Week in Review' is unbalanced against us," Mr. Buchanan said. "You have 'Black Journal', which is unbalanced against us. You have Bill Moyer's, which is unbalanced against the Administration, and then for a fig-leaf they throw in William F. Buckley's program." The Senate voted the big financing bill out by 82 to 1, thinking, Mr. Buchanan said, that Mr. Nixon "couldn't possibly have the courage to veto something like that." He continued: "And Mr. Nixon, I'm delighted to say, hit that ball about 450 feet down the rightfield foul line, right into the stands; and now you've got a different situation in public television.[75]

E. *Multiple Ownership*

The heart of the First Amendment, the Courts and the Commission have stressed, lies in information coming to the American people from diverse, antagonistic sources.[76] The Commission has sought to promote this First Amendment goal by proscribing cross-ownership of newspaper and TV in the same market prospectively and in certain monopoly situations. It has, however, "grandfathered" other situations (72) in which, say, the one newspaper owns one of two TV stations. Interested local parties have, at times, petitioned to deny renewal in cross-ownership situations because of alleged abuses.[77] But this can raise the most difficult First Amendment problems. The Government FCC is then investigating to determine why a newspaper or station presented or failed to cover a particular news story.[78] This in turn raises the issue whether the structural rather than behavioral approach is not called for under the First Amendment.

F. *Alternatives*

The foregoing issues have led critics of the public trustee/fairness scheme to urge its abandonment. Thus, Judge Bazelon argues that there is no longer any scarcity basis for the scheme: "As of December 31, 1974, there were 7,785 radio stations on the air and 952 TV stations, serving nearly every part of the country. As of January 1, 1971, daily newspapers totaled only 1,749. And the broadcast

74. *See* BROADCASTING MAGAZINE, Mar. 6, 1972, at 45-47; TV DIGEST, AUG. 14, 1972, at 5; TV DIGEST, Sept. 25, 1972, at 5; TV DIGEST, Oct. 30, 1972,at 1-2.

75. N.Y. TIMES, May 28, 1973, at 31.

76. *See* AP v. U.S., 326 U.S. 1, 20 (1944); 50 F.C.C.2d 1046, 1079-80 (1975).

77. *See* Chronicle Broadcasting Co., 40 F.C.C.2d 775 (1973).

78. Id. at 789, 792-94, 797-99; Barnett, Cross-Ownership of Mass Media in the Same City: A Report to the John and Mary R. Markle Foundation. (Mimeo, 1974).

spectrum is still not completely filled."[79] Opponents argue that it is not a question of the scarcity of broadcast facilities as compared to daily newspapers. Whatever the economics of the daily newspaper field, it is technologically open to all. Radio is inherently not so open. The government must license or there will be a pattern of frequency interference. It chooses one licensee for a frequency and forecloses all others—a crucial difference from the print media. And choose it must, because there are many more applicants than frequencies available. As the Court pointed out in the *Red Lion* case,[80] in the large markets with the great majority of the U.S. population, there is not one AM, FM, or VHF broadcast frequency available, and most of the allocated UHF assignments are being used; indeed, others cover the broadcast band for nonbroadcast use.

Whatever the merits of the argument, as shown, serious First Amendment problems do exist. There should thus be studies to consider whether alternative approaches might alleviate those problems. For example, suppose an access system were substituted, with the broadcaster no longer required to be a public trustee (and thus to comply with the fairness doctrine). Or, could the following system be substituted for the public trustee scheme: The broadcast would pay in recompense a specified and reasonably low percentage of its gross revenues into a special local fund. This fund might be used for public broadcasting and for access purposes in the community, including the training and presentation of programming by significant minority groups. Other alternatives might be examined, not from an economic but from a First Amendment standpoint.

II. CABLE

A. *Obscene or Indecent Material*

Here again there are prohibitions against the cablecast origination of obscene or indecent material[81] and of its presentation over the access channel.[82] Thus, the same First Amendment issues are presented. And while the Court in *Burstyn v. Wilson*,[83] has pointed out that "each method [of expression] tends to present its own peculiar problems," the Commission tends to regard access television programming on cable as on the same footing as TV broadcast programming: "It is by no means clear that the viewing public will be able to distinguish between a broadcast program and an access program; rather, the subscriber will simply turn the dial from broadcast to access programming, much as he now selects television fare . . ."[84]

The Commission has precluded review by local/state entities of access or cablecasting.[85] This means that the cable operator must first reach a judgment whether the proffered access material is obscene or indecent; that that judgment is reviewable by the Commission; and that the matter can be reviewed by the Courts. The procedure, however, remains to be worked out, and could be of crucial importance in this sensitive area.

79. *Duke Law School Lecture, Supra* note 64, at 9.
80. 395 U.S. at 396-400.
81. 47 C.F.R. § 76.213 (—).
82. 47 C.F.R. § 76.251(a)(—)(i)(—). 47 C.F.R. § 76.251(a)(11)(i).
83. 343 U.S. 495, 502-03 (1952).
84. 1972 Cable Television Report, 36 F.C.C.2d 143, 193. On the other hand, pay may well call for a different, more liberal approach, if it is on per program basis *and* requires a deliberate action to unlock or unscramble the channel. In such circumstances, it is difficult to make arguments based on nuisance or the presence of children in the general TV audience.
85. *Id.*

B. *The Question of Liability of the System for Libel*

Because the Commission has forbidden the cable system from censoring access programming, except for obscene or indecent material, lotteries, or advertising, it has also sought to relieve the operator from any liability under state libel laws:

> In the event that some material presented on these nonbroadcast channels were to fall outside the broad scope of the Court's recent decisions such as *Rosenbloom*, this would not necessarily mean that the system is liable. In this situation, recourse against the programmer would be available.) We have adopted the non-censorship requirement in order to promote free discourse; this is, we believe, valid regulation having "the force of law." While the matter is of course one for resolution by the courts, state law imposing liability on a system that has no con-trol over these channels may unconstitutionally frustrate federal purposes . . .[86]

The Commission is understandably not sure of this sweeping declaration, and has stated that it "would welcome clarifying legislation."[87] This is again an interesting First Amendment issue: Can the agency, by rule, insulate the entrepreneur from libel suits, as Congress did the broadcaster,[88] in order to promote robust, wide-open debate?

C. *Fairness*

The Commission made the equal time and fairness doctrine requirements applicable to origination cablecasting.[89] This raises the issue as to why such requirements are necessary in situations where there are access channels available to present contrasting viewpoints of other candidates. Why should the Congress or the Commission graft on cable unnecessary provisions stemming from broadcast where there is but one channel?[90]

III. PAY TELEVISION

A. *Overbreadth*

The Commission believes that the First Amendment issues raised by its anti-siphoning rules were settled by *Nato v. FCC*.[91] But that case settled that the Commission could, consistently with the First Amendment, adopt anti-siphoning regulations in the area of feature films, sports, series, etc. It did not settle the issue whether specific rules go beyond their legislative purpose, and thus suppress speech for no legitimate purpose.[92] Presentation of programming such as feature

86. *Id.* at 195-96.

87. *Id* at 196.

88. Farmers Union v. WDAY, Inc., 360 U.S. 525 (1959).

89. 47 C.F.R. § 76.209.

90. There is also the same possibility of First Amendment problems in the agency ferreting out abuses in cable-TV or cable-newspaper cross-ownership situations. *See* text accompanying note 76 *supra*.

91. 420 F.2d 194 (D.C. Cir. 1969), *cert. denied* 397 U.S. 92 (1970). To the argument that this involves over-the-air subscription TV, the Commission cites United States v. Midwest Video Corp., 406 U.S. 649 (1968). *See* first report in Docket No. 19554, 40 Fed. Reg. 15546, 15562 (1975).

92. The matter of overbreadth was not briefed by NATO or the Commission, and therefore could not have been settled by the Court. That this is so is borne out by the nature of the appeal: NATO, an all-out opponent of pay-television, was certainly not arguing to the Court that the FCC could adopt some anti-siphoning rules but these particular rules were too restrictive and therefore the case should

films is plainly entitled to First Amendment protection.[93] The Commission cannot prohibit such presentations unless clearly required by the public interest.[94] If the Commission's regulation goes beyond necessary anti-siphoning requirements, it thus violates the First Amendment as being overbroad for the accomplishment of its stated purpose.[95]

The First Amendment issue presented thus is whether the rule adopted by the Commission in its First Report goes beyond the Commission's stated purpose of preventing siphoning. It would appear that there are serious issues in this respect. To give but a few examples:

(1.) The rule provides that when a film is available for conventional television, it may also be used on pay television (if there is no exclusivity bar). But it states that a "film under contract, but which is not available for exhibition until some future date, will not be considered as available for telecast."[96] This is arbitrary and clearly goes beyond any legitimate anti-siphoning (or even delay) purpose. Suppose a film is sold for network exhibition after three years in theatres or pay cable, such exhibition to begin in the fifth year; this means that even though the film has not been siphoned or unreasonably delayed (assuming *arguendo* that the Commission has stated a basis for this delay concern), it nevertheless must be removed from pay television in its fourth year after general release. This overbreadth, which is not insignificant, raises the First Amendment issue discussed above.

(2.) A film that is not sold to conventional television can be shown on pay if it is more than ten years old and has not been shown in the market in the last three years.[97] But this could mean that films could be delayed seven years before they can be shown on pay, even though they never will be shown on conventional TV. To meet this problem, the Commission allows for the waiver "upon a convincing showing . . . that [the films] are not desired for exhibition over conventional television in the market or that the owners of the broadcast rights to the films, even absent the existence of subscription television, would not make the films available to conventional television."[98] This in turn can raise the most serious problems—namely, that the film is desired for showing but only with editing that the owner will not permit—or at a price that the broadcaster will not meet. While there have been no problems here in the past because the pay industry was so embryonic, as pay grows, the Commission will find itself in a First Amendment quagmire. Some have argued that a reasonable number of "wildcard" exemptions is the only way to handle this mess.

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be remanded to revise them, so as to allow pay-television to compete more effectively. NATO's position was simple: no anti-siphoning rules are permissible under the First Amendment, and since the Commission would not authorize pay-television without such rules, it follows that there should be no pay-television authorization.

93. *See* Burstyn v. Wilson, 343 U.S. 495 (1952)

94. NBC v. U.S. 319 U.S. 190, 226-27 (1943).

95. *See* Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960). In the latter case the Court, after noting that considerable leeway is afforded the legislative judgment in the economic regulatory area, stated as to the sensitive First Amendment field:

> ". . . [e]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved [footnote omitted]. The breadth of legislative abridgment must be conceived in light of less drastic means for achieving the same basic purpose . . ."

96. First Report in Docket No. 19554, 40 Fed. Reg. at 15565.

97. Id.

98. 47 C.F.R. § 76.225(a)(2) ( ).

(3.) The Commission retained the restriction that not more than 90% of the total cablecast programming hours shall consist of feature films and sports events combined.[99] This provision appears to have been carried over from the broadcast television rules without taking into account the entirely different nature of the cable operation. The over-the-air pay television operator is a public trustee with one channel. The cable operator has many leased channels, and at some future point ought to be divorced from programming, and become strictly a provider of channel capacity.[100] There is thus a serious issue whether this regulation is permissible.

CONCLUSION

The above list could of course be lengthened. But it suffices to show the number and seriousness of First Amendment issues presented, and the need for thorough study, not just of these issues but of broad-ranging alternative approaches that will obviate the need for Governmental intrusion and supervision and at the same time promote the larger and more effective use of those important electronic media in the public interest. To continue along the present path of deep Government intervention is to ignore the warning of Lord Dovlin:

> If freedom of the press . . . perishes, it will not be by sudden death . . . . It will be a long time dying from a debilitating disease caused by a series of erosive measures, each of which, if examined singly, would have a good deal to be said for it.[101]

99. 47 C.F.R. § 76.225(c) ( ).

100. REPORT OF THE CABINET COMMITTEE TO THE PRESIDENT ON CABLE COMMUNICATIONS 29-30 (1974).

101. As cited in Yale Broadcasting Co. v. F.C.C., 478 F.2d at 606.