

5-2003

Avast Ye Wasteland: Reflections on America's Most Famous Exercise in "Public Interest" Piracy

Robert Corn-Revere
Davis Wright Tremaine LLP

Follow this and additional works at: <https://www.repository.law.indiana.edu/fclj>



Part of the [Administrative Law Commons](#), [Antitrust and Trade Regulation Commons](#), and the [Communications Law Commons](#)

Recommended Citation

Corn-Revere, Robert (2003) "Avast Ye Wasteland: Reflections on America's Most Famous Exercise in "Public Interest" Piracy," *Federal Communications Law Journal*: Vol. 55 : Iss. 3 , Article 12.

Available at: <https://www.repository.law.indiana.edu/fclj/vol55/iss3/12>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Federal Communications Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Avast Ye Wasteland: Reflections on America’s Most Famous Exercise in “Public Interest” Piracy

Robert Corn-Revere*

You have to admire Newton Minow. You really do. On May 9, 1961, JFK’s youthful FCC Chairman strode confidently to the podium at the National Association of Broadcasters Convention and delivered a stinging rebuke of his hosts’ business. Right there, in the very Belly of the Beast, Minow branded television with a label that still resonates after the passage of four decades: TV, he said, is a “vast wasteland” of “game shows, violence, audience participation shows, formula comedies about totally unbelievable families, blood and thunder, mayhem, violence, sadism, murder, Western badmen, Western good men, private eyes, gangsters, more violence and cartoons.”¹

The move was bold, the speech pithy, and in every important respect, wrong. The television marketplace at the time was neither vast nor as much of a wasteland as the Chairman claimed. More importantly, the speech itself was an exercise in public interest piracy—a naked effort to coerce broadcasters indirectly into doing what the government could not compel directly. It is the kind of speech that puts the bully in the bully pulpit.

The message itself was pretty unremarkable if you don’t think about who delivered it, and where. After all, you don’t have to be too smart to

* Robert Corn-Revere is a partner at Davis Wright Tremaine LLP in Washington, D.C. He previously served as Chief Counsel to interim Chairman James H. Quello at the Federal Communications Commission.

1. Newton N. Minow, Television and the Public Interest, Speech Before the National Association of Broadcasters (May 9, 1961) [hereinafter Vast Wasteland Speech].

know that TV can be dumb. As the popular euphemisms of the time made clear—like “idiot box” and “boob tube”—the ideas in the speech were not exactly original. Noted personages of the day also had made the same point: Frank Lloyd Wright called TV “chewing gum for the eyes”;² Ernie Kovacs said that television is called a medium “because it is neither rare nor well done”;³ and David Frost said that television is an invention “that permits you to be entertained in your living room by people you wouldn’t have in your home.”⁴

But the message carries far more weight when delivered not by an architect, a comic, or a journalist, but by the Chairman of the agency that grants, and, more to the point, denies broadcast licenses. The expression itself—“vast wasteland”—is positively Churchillian. Like “Iron Curtain” it is rich with imagery and can fit on a bumper sticker. And it is absolutely breathtaking to combine this memorable turn of phrase with the masterful stroke of delivering such an unwelcome message at the annual celebration of commercial broadcasting.

The “Vast Wasteland” speech, as it has come to be known, is nothing less than the regulator’s manifesto. For those who think the government should have a greater role in controlling what we see on TV and hear on the radio, the speech was the background theme for the journey to *Red Lion Broadcasting Co. v. FCC*.⁵ Of course, Minow disclaimed any intent to engage in censorship: “I am in Washington to help broadcasting, not to harm it; to strengthen it, not to weaken it; to reward it, not punish it; to encourage it, not threaten it; to stimulate it, not censor it.”⁶ In this respect, perhaps the speech should be considered Shakespearian (“I come to bury Caesar, not to praise him.”).⁷

But this was hardly a subtle exercise of regulation by raised eyebrow, either. The Chairman told the broadcasters that their obligation to serve the public trust was imposed by law, and that they should not expect automatic renewal of their licenses if their programming failed to improve. “I say to you now: renewal will not be *pro forma* in the future. There is nothing

2. THE PORTABLE CURMUDGEON 267 (Jon Winokur ed., 1987).

3. *Id.* at 268.

4. *Id.* at 269.

5. 395 U.S. 367 (1969). It is well beyond the limited scope of this Essay to critique the “public trustee” doctrine of broadcast regulation. For a more thorough treatment of the subject, see MEDIA INSTITUTE, RATIONALES & RATIONALIZATIONS: REGULATING THE ELECTRONIC MEDIA (Robert Corn-Revere ed., 1997).

6. Vast Wasteland Speech, *supra* note 1.

7. WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF JULIUS CAESAR, act 3, sc. 2 (Marc Antony’s funeral oration).

permanent or sacred about a broadcast license.”⁸ He also scoffed at those who asked the Federal Communications Commission (“FCC” or “Commission”) to establish clear standards to qualify for license renewal. “My answer is: Why should you want to know how close you can come to the edge of the cliff?”⁹

In this regard, Minow was not suggesting that he wanted to impose his personal programming preferences on broadcasters. Heavens, no. That would be censorship, which, he said, “strikes at the tap root of our free society.”¹⁰ Rather, the Chairman said he wanted to hold public hearings on license renewals to determine “whether the community which each broadcaster serves believes he has been serving the public interest.”¹¹ In such hearings, Minow said he wanted “the people who own the air and the homes that television enters to tell you and the FCC what’s been going on”; that it would be up to the people “to make notes, document cases, tell us the facts.”¹²

What could be more democratic than that? Well, people’s actual viewing preferences, for one thing. However, what interests the public has never been of much interest to “public interest” regulators. As the Chairman told the assembled broadcasters, “[y]ou will get no argument from me if you say that, given a choice between a Western and a symphony, more people will watch the Western.” “But,” he added, “your obligations are not satisfied if you look only to popularity as a test of what to broadcast.” Accordingly, he warned, “[i]t is not enough to cater to the nation’s whims—you must also serve the nation’s needs.”¹³

This is the enduring dilemma that confronts the “public interest” regulator. In order to avoid the well-founded charge that governmental mandates about programming quality would violate basic First Amendment principles, he must claim that he is not imposing his own tastes, but is merely regulating on behalf of “the people.” The problem with this argument is that the facts refuse to cooperate. In reality, people’s choices are so, well, *disappointing* to the refined mind of the regulator. As theatre critic Clive Barnes put it, “[t]elevision is the first truly democratic culture—the first culture available to everybody and entirely governed by what the people want. The most terrifying thing is what the people want.”¹⁴

8. Vast Wasteland Speech, *supra* note 1.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. THE PORTABLE CURMUDGEON, *supra* note 2, at 269.

Writer Paddy Chayefsky was even more blunt: "Television is democracy at its ugliest."¹⁵ Accordingly, the theory goes, it is the regulator's job to ensure that broadcasters rise above mere public "whims" and offer programs that meet the people's "needs."

So, rather than determining the public interest by asking what shows people actually want to watch, the determined regulator seeks to divine what the public *should* see through administrative hearings in which the loudest pressure groups set the agenda. This may not represent the direct imposition of "bureaucratic tastes," which Minow eschewed, but it is awfully far removed from people's actual preferences. In such a scheme, the public interest is determined by governmental selection from among the various views presented at public hearings and in written comments. While it is true that most license renewals have never lead to hearings, the FCC's public interest determinations nevertheless are institutionalized in the form of administrative decisions and rules that apply to all broadcasters.

Come to think of it, this pretty much *is* the imposition of "bureaucratic tastes." To the bureaucratic mind, the public interest should not be gauged by the desires of those rubes who watch TV, but by the views of an enlightened "public" that cares about television, but would not be caught dead watching it. Or, at least, wouldn't want to admit watching, much less liking it. No FCC commissioner would be so rude as to say these things, but the true "public interest" regulator certainly believes them. One giveaway is the lack of any discernable difference between the personal tastes of the typical reform-minded FCC commissioner and those of the idealized viewers he or she claims to represent.

THAT WAS THEN, THIS IS NOW?

It is tempting to think of the "Vast Wasteland" speech as simply a period piece that belongs to an era when there were only three television networks and the broadcast day began at 6 A.M. and ended at midnight. But as this collection of Essays proves, the continuing appeal of Minow's words transcends the limited media landscape of the early 1960s. Indeed, the main attraction of the speech has very little to do with facts and everything to do with mindset. Its attitude is, if television is bad, it is the government's job to make it better. Or, as Chairman Minow suggested, licensees have an obligation to make it better . . . or else.

Given this premise, perhaps a look at the facts might be instructive. A network executive who accepted Minow's challenge to "sit down in front of your television set when your station goes on the air . . . and keep your

15. *Id.* at 270.

eyes glued to that set until the station signs off”¹⁶ would find a quite different picture than the one sketched in the “Vast Wasteland” speech. On May 14, 1961, five days after the speech, the viewer would have to choose between *Washington Conversation* on WCBS-TV, featuring none other than FCC Chairman Newton Minow, and *Meet the Professor* on WABC-TV, in which the former President of Sarah Lawrence College discussed American education. The third (and only other choice) for that time period was *Oral Roberts* on WOR-TV.¹⁷

Just on that May 14 alone, the television viewer in New York would have had the following programming choices during the rest of the day in addition to the three just mentioned: *Let's Look at Congress*, with Senator Kenneth B. Keating and guest (WOR-TV); *Camera Three*, featuring Mozart's comic opera *The Impresario* (WCBS-TV); *Accent*, with a discussion among architects (WCBS-TV); *Dorothy Gordon's Youth Forums*, discussing whether the Peace Corps will serve a purpose (WNBC-TV); *UN International Zone*, a tour of the United Nations headquarters with Alistair Cooke (WNBC-TV); *Directions '61*, discussing rare books and manuscripts from the vaults of the Jewish Theological Seminary of America (WABC-TV); *Catholic Hour*, exploring man's dignity in the face of death as described in modern dramas (WNBC-TV); *Direct Line*, a discussion with the New York State Housing Commissioner (WNBC-TV); *Congressional Conference*, with Representative John V. Lindsay (WOR-TV); *Youth Wants to Know*, with Senator Henry Jackson of Washington (WABC-TV); *WCBS-TV Views the Press*, with Charles Collingwood (WCBS-TV); *Open Mind*, with reflections on the social, political, and economic changes of the past fifty years by theologian Dr. Reinhold Niebuhr, Socialist Party leader Norman Thomas, NAACP counsel Thurgood Marshall and Professor Eric F. Goldman (WNBC-TV); *Eichmann on Trial*, featuring highlights of the week's war crimes tribunal sessions (WABC-TV); *American Musical Theatre*, with Alan J. Lerner discussing his career (WCBS-TV); *Issues and Answers*, with Treasury Secretary Douglas Dillon (WABC-TV); *College Bowl*, pitting Johns Hopkins University against Montana State University (WCBS-TV); *Chet Huntley Reporting*, showing a Cuban propaganda newsreel about the Bay of Pigs invasion (WNBC-TV); *Meet the Press*, an interview with Dr. Jonas Salk, inventor of the polio vaccine (WNBC-TV); *Recital Hall*, featuring baritone Theodor Uppman (WNBC-TV); *On Call to a Nation*, reporting on socialized medicine in Great Britain (WNTA); *A Way of Thinking*, with Dr.

16. Vast Wasteland Speech, *supra* note 1.

17. *Television Programs: Sunday, Monday, Tuesday*, N.Y. TIMES, May 14, 1961, at X14-X16.

Albert Burke (WNEW-TV); *Between the Lines*, discussing the “parochial school question” (WNTA); *Open End*, exploring the “Pro and Con of the New Frontier” (WNTA); and *Winston Churchill* (WABC-TV).¹⁸

Admittedly, these programming choices were on a Sunday, the day of the week when most issues-oriented and educational programming was clustered. Yet during the week, when entertainment predominated, the commercial networks also presented news reports and commentary, as well as special reports. WABC, for example, broadcast a report on the Adolph Eichmann war-crimes trial each evening just before the 7 P.M. newscast. While some well-meaning FCC commissioners no doubt would have preferred that every day’s programming schedule be more like the one on Sunday, this was no “wasteland.” Nor was it vast. In 1961, the largest media marketplace in the world—New York—had seven television stations, only five of which were full time (which means they signed off at 1 or 2 A.M. with the national anthem before beginning the next broadcast day at 6 A.M.).¹⁹ At that time, all of New York City’s television stations combined presented fewer *programs* in a given week than there are different *channels* in 2003.

Today, the television marketplace is indeed vast, and it is no longer possible to complain about a lack of high-quality alternatives. In a study that encompassed both broadcast and multi-channel television sources, Professor Eli Noam of Columbia University found that “public interest” programming on commercial television is both abundant and growing.²⁰ Defining such programs as those that “go beyond pure entertainment and provide a cultural, civic, informational or educational function,”²¹ he found that the share of public interest programming hours compared to total program hours grew from 28.2% to 43% between 1969 and 1997.²²

Professor Noam identified a significant number of cable television networks that provide what he considered to be public interest programming, including A&E Television, Bravo, C-SPAN, CNN, CNBC, Court TV, Disney Channel, Discovery Channel, The History Channel, the FOX News Channel, The Learning Channel, The Weather Channel, Mind

18. *Id.*

19. *Id.*

20. Eli M. Noam, *Public-Interest Programming by American Commercial Television*, in *PUBLIC TELEVISION IN AMERICA* 145-176 (Eli M. Noam & Jens Waltermann eds., 1998). The study examined the growth of public-interest programming available on cable television systems in New York City between 1969 and 1997. See *Role of Commercial TV in Public Interest Programming Hotly Debated*, COMM. DAILY (Warren Publ’g, Washington, D.C.), Mar. 9, 1998, at 6.

21. Noam, *supra* note 20, at 146.

22. *Id.* at 169.

Extension University and others, including regional news channels. He also identified several channels, such as Black Entertainment Television, that address the interests of ethnic minorities. In total, the number of channels found to provide “primarily public-interest programming” was considered to be quite large, representing almost half of the available cable channels.²³ Since that study, even more such channels have been launched, including National Geographic Channel, History Channel International, Discovery Civilization Channel, The Science Channel, Discovery Kids, Biography Channel, and others.

Professor Noam also attempted to quantify the growth rate of “public interest” programming availability, and found that the annual growth rates for various programming categories were “extraordinarily high,” such as 12.86% for news programs, 13% for documentary/magazine programs, 12.4% for health/medical programs, 12.7% for programs on science/nature, 8.8% for cultural programs, 7.62% for quality children’s programming, 9.41% for programs devoted to education, 8.8% for religious programming, and 9.48% for foreign language programming.²⁴

The market for public-interest programming is not limited to cable television. Professor Noam also found that the news coverage of traditional local broadcasters “has expanded considerably in terms of hours,” and that serious news magazine programs have proliferated on the broadcast networks.²⁵ A study by Belo Corp., which in 2000 owned eighteen full-service television stations, found that the amount of time devoted by the four major broadcast network affiliates to news, public affairs, and educational programming in a sample of its markets ranged from 24.5% to 31.2% of the total broadcast schedule (excluding commercial time during those programs).²⁶

23. *Id.* at 169-70.

24. *Id.* at 168-69.

25. *Id.* at 170-71. He acknowledged that increased competition had led some news magazines to focus on more sensationalist subjects, particularly among syndicated “tabloid” shows, but found that this “pales in comparison” to the growth of serious news magazine programs on the networks. *Id.* at 171.

26. *See* Public Interest Obligations of TV Brdcast. Licensees, MM Dkt. No. 99-360 (Comments of A.H. Belo Corp., Mar. 27, 2002), *available at* <http://www.fcc.gov/cgb/ecfs>. The study measured broadcast time, discounted for commercials, devoted to newscasts, informational programs (exclusive of tabloid and talk shows), public affairs, educational, and religious programs in various markets during selected weeks in the period from November 1997 through January 1998. Belo calculated the time allocated to such programming for all network affiliates as a percentage of total programming; first including, then excluding, commercial time in the total. Those numbers follow: Dallas-Ft. Worth (41.0%, 31.2%); Houston (34.7%, 26.4%); Seattle-Tacoma (34.5%, 26.2%); Hampton-Norfolk, VA (32.7%, 24.8%); Boise (32.2%, 24.5%); and Phoenix (34.4%, 26.1%). *Id.* at app. A.

None of this makes a difference to the determined “public interest” regulator, however, for no amount of improvement will ever be enough to free the medium from the need for regulation. This point was made most forcefully by Newton Minow himself in a 1991 speech commemorating the thirtieth anniversary of the “Vast Wasteland” speech. Noting the advent of new programming services and VCRs, Minow said:

[Y]ou can watch a program when you want to see it, not just when the broadcaster puts it on the schedule. If you are a sports fan, a news junkie, a stock market follower, a rock music devotee, a person who speaks Spanish, a nostalgic old-movie buff, a congressional-hearing observer, a weather watcher—you now have your own choice.²⁷

Indeed, he noted that “[t]he FCC objective in the early ’60s to expand choice has been fulfilled—beyond all expectations.”²⁸

Not that the FCC actually had anything to do with this. The current transition to digital television notwithstanding, the Commission has very little role in the world of consumer electronics, and deserves no credit whatsoever for the VCR’s development and popularity. Nor can the government claim that “its goals” were met by the proliferation of hundreds of cable channels. The cable industry grew and succeeded not because, but in spite, of FCC intervention. And this medium made possible all these choices in the total absence of the type of “public interest” regulation over programming that Minow advocates.

But no amount of improvement will ever be sufficient to blunt the zeal of the determined regulator. As Minow noted in his 1991 speech, “to many of us, this enlarged choice is not enough to satisfy the public interest.”²⁹ He rejected the “ideological view that the marketplace will regulate itself and that the television marketplace will give us perfection.”³⁰ He challenged “the men and women in television . . . to make it a leading institution in American life rather than merely a reactive mirror of the lowest common denominator in the marketplace.”³¹ In this view of the world, the developments of the past decade, including satellite television, DVDs, the Internet, and personal video recorders will have made no difference, either. In the mind of the regulator, there will always be a reason to regulate.

27. Newton N. Minow, *How Vast the Wasteland Now?*, Address at the Gannett Foundation Media Center, Columbia University (May 9, 1991).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

WHOSE WASTELAND?

What we are left with is an “eye of the beholder” problem. It appears that television will always be a wasteland from someone’s perspective. In 1961, Newton Minow called it a wasteland because the choices were few and, in his view, of insufficient quality. In 2003, the choices are plentiful—too plentiful, according to some, because they include so many “unwholesome” programs. Michael J. Copps, the latest FCC Commissioner to make stamping out broadcast “indecent” a principal priority, has argued that the public interest and responsible broadcasting require broadcasters to offer “programming that appeals to something other than the lowest common denominator that some advertiser can find to exploit.”³²

In other words, the problem with television in 2003 is precisely the same as in 1961—broadcasters are giving the people what they want. Or, as Professors Thomas Krattenmaker and Lucas A. Powe put it, “viewers . . . watch or read what critics and regulators like with insufficient frequency and . . . enjoy too often what commissioners and columnists abhor.”³³ The issue is not, and has never been, whether there is too little “good” programming on TV or too much “bad” programming. The essential question is: Who should decide?

From the regulator’s perspective, whether or not an unregulated marketplace produces “enough” valuable speech, or conversely, “too much” worthless or harmful speech, assumes an ability to determine the optimal amount separate from the voluntary choices of speakers and listeners.³⁴ It presumes that the “public interest,” however it may be defined, should outweigh basic First Amendment concepts of speaker and listener autonomy. But this presumption is difficult to justify either in theory or in practice.

Traditional First Amendment doctrine considers it a “fixed star in our constitutional constellation” that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”³⁵ The same is true in matters of taste and entertainment choices.

32. Press Release, FCC, Commissioner Michael J. Copps Calls for Re-Examination of FCC’s Indecency Definition, Analysis of Link Between Media Consolidation and “Race to the Bottom” (Nov. 21, 2002), available at <http://www.fcc.gov>.

33. Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1725-26 (1995).

34. See Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1538 (1997) (“To cast the state as a teacher is to permit the state to define the agenda and parameters of public debate; it is to presuppose an Archimedean point that stands outside of the processes of self-determination.”).

35. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The Supreme Court has stressed that:

[t]he Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.³⁶

Freedom of speech and of the press “may not be submitted to vote; they depend on the outcome of no elections.”³⁷ No matter how well-intentioned proposals to improve the quality of television may be, to the extent they conflict with the choices of speakers and viewers, they are inconsistent with a concept of freedom in which “no one has a right to press even ‘good’ ideas on an unwilling recipient.”³⁸

Using the amorphous notion of the “public interest” as a fig leaf to cover regulators’ personal programming preferences does not fare well when measured by such well-established constitutional principles. Nor are such matters of taste easy to enforce, as illustrated by the classic television series *The Twilight Zone*. In 1961, Newton Minow praised it as one of a few programs he considered “dramatic and moving,” adding that “[w]hen television is good, nothing—not the theater, not the magazines or newspapers—nothing is better.”³⁹ But how does this judgment apply today?

As it happens, UPN reintroduced *The Twilight Zone* in 2002. Although it lacks the quality of the original series (How could it be otherwise since Rod Serling is no longer with us?), *The Washington Post* television critic Tom Shales wrote that the program “is not devoid of respectable qualities and nifty touches.”⁴⁰ For a critic like Shales, this is high praise indeed for a TV show in an otherwise mediocre review, but another point in his article raised an important issue that is relevant here. He described a story in the premiere episode involving the moral question of whether “virtual sex” with a computer-generated woman is consistent with a prenuptial vow of celibacy. Shales quite rightly pointed out that the original *Twilight Zone* could not have told this story: “There would have been no way of dealing with that setup in the original show because on television of that era, nobody talked about having sex before, during or

36. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 818 (2000).

37. *Barnette*, 319 U.S. at 638.

38. *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 738 (1970).

39. *Vast Wasteland Speech*, *supra* note 1.

40. Tom Shales, *‘Twilight Zone’: A Dim Shadow of its Former Self*, WASH. POST, Nov. 13, 2002, at C1, C8.

after marriage—or at any other time, either. Television characters, like Barbie dolls, were not equipped with genitalia.”⁴¹

So, which is the wasteland? Is it a medium that can tell powerful stories but is strictly limited in the range of subjects it may address, or is it one in which it is up to the viewers to set the boundaries? To the avid regulator, of course, the answer in both cases is an emphatic “yes”; television desperately needs the government’s seal of approval. In this view, Chairman Minow’s speech is as relevant today as it was in 1961.

But this vision of perpetual government oversight of television content itself plays like a *Twilight Zone* episode. In fact, on May 5, 1961, the week of the “Vast Wasteland” speech, the show presented an episode entitled “Shadow Play” in which a condemned prisoner claims his life is a dream—a recurring nightmare that finds him unable to wake up. Each time he is executed, the nightmare begins again.⁴²

And so it is with “public interest” regulation. No matter how much the television medium changes, or fulfills the FCC’s dream of expanded choice, or provides high-quality programming, it will wake up to find a new regulator determined to pull the switch of government control.

Perhaps instead, it is finally time to put the concept of the “vast wasteland” to sleep.

41. *Id.* at C8.

42. The *Twilight Zone*, *Shadow Play*, available at <http://www.tvtome.com/TwilightZone/guide.html> (last visited Mar. 4, 2003).

