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Promoting the Public Interest in the Digital Era

Henry Geller*

The issue posed is whether in today's media environment, the public interest is better served than at the time of the "Vast Wasteland" speech.¹ Clearly, it is in some important respects. For example, with cable's increasing importance, there are more national news outlets and the terrific addition of the C-SPAN channels. However, I do not plan to explore this issue further. In my opinion, the more important question today is whether we should continue the present regulatory scheme for television broadcasting or adopt a radically different approach.

Under the Communications Act of 1934² (the 1934 Act) and the Telecommunications Act of 1996³ (the 1996 Act), the broadcaster is a short-term licensee obligated to operate in the public interest. Broadcasters, led by the National Association of Broadcasters ("NAB"), have stated that they accept this social compact, that is, a commitment to serve the public interest in exchange for free use of the spectrum.⁴ But this public trustee content scheme raises serious policy considerations, especially in light of

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1. Newton N. Minow, *Television and the Public Interest*, Speech Before the National Association of Broadcasters (May 9, 1961).

2. Communications Act of 1934, ch. 652, Title III, 48 Stat. 1064, 1081.

3. Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 336(d), 110 Stat. 56, 107.

4. See Doug Halonen, *Spectrum Fees in 'Rigor Mortis'*, ELEC. MEDIA, Feb. 14, 2000 (quoting NAB President Eddie Fritts: "The deal is this: that broadcasters provide community interest and public service programming in exchange for a small slice of the spectrum"), available at <http://www.craini2i.com/em/archive.mv?count=3&story=em42818878415697889>; see also Kim McAvoy, *Broadcast, Cable Unite Behind Senate Bill*, BRDCST. & CABLE, June 13, 1994, at 42-43.

changed circumstances in the video distribution field. These considerations include the following:

(1) The heart of the regulatory scheme is the presentation of public service programming. But this necessarily involves behavioral content regulation and thus First Amendment strains. Whatever public service program categories are used, for example, local, informational, nonentertainment, community issue oriented, or “specifically designed” to educate or inform children,⁵ definitional problems arise, particularly at the margins. Take the latter category, called core educational programming.⁶ Educational or informational programming for children contains a strong entertainment component, and trying to separate the two components is neither possible nor appropriate; further, it can have a social purpose instead of being cognitively directed, and indeed, studies by the Annenberg Public Policy Center establish that almost all of the core programming on the commercial networks is of the social purpose nature.⁷ This can result in the claim that *The Little Mermaid* meets the definition of core educational programming because it shows little girls how to be leaders or be assertive. Controversy can and has arisen over programs like NBC’s *N.B.A. Inside Stuff*, with the network disputing the criticism that this was not core educational material by citing the support of two educational consultants who assisted in its preparation.⁸ This is but one example of the difficult First Amendment problems that can arise in this field.⁹

(2) The objective is to obtain high-quality public-service programming. But the government cannot review for quality; that would be much too subjective. So we are dependent on the broadcaster to produce such high-quality programs. The noncommercial system has demonstrated

5. Children’s Television Act of 1990, § 303b(a), Pub. L. No. 101-437, 104 Stat. 996, 47 U.S.C. § 303b(a)(2) (2000).

6. See Policy and Rules Concerning Children’s TV Programming, *Report and Order*, 11 F.C.C.R. 10660, para. 4, 3 Comm. Reg. (P & F) 1385 (1996).

7. See AMY B. JORDAN & EMORY H. WOODARD, IV, 1997 STATE OF CHILDREN’S TELEVISION REPORT: PROGRAMMING FOR CHILDREN OVER BROADCAST AND CABLE TELEVISION 20-21 (Annenberg Public Policy Ctr. of the Univ. of Pa., Report Series No. 14, 1997). This same report concluded that one-quarter of the programs cited by the commercial broadcasters “could not be considered educational by any reasonable benchmark.” *Id.* at 4.

8. See Policies and Rules Concerning Children’s TV Programming, Comments of NBC, Inc., MM Dkt. No. 93-48, at 6-7 (Oct. 16, 1995), at <http://www.fcc.gov/cgb/ecfs/>.

9. Thus, Federal Communications Commission Chairman Reed Hundt acknowledged that “[t]his definitional issue is . . . the crux of our rules and by far the most difficult.” Significantly, the Chairman stated that there was no problem as to the children’s programming of PBS. *Reject Commercials on PBS—Hundt*, TV DIG., June 16, 1997, at 7.

that it will strive to do that, even though it is expensive. The commercial system, under fierce and growing competition, has no such history or incentive.¹⁰

(3) It is anomalous to be still applying the seventy-five-year-old public trustee content scheme to this one medium of video distribution, broadcasting, while powerful new media are soundly not under such content regulation. Thus, multi-channel video program distributors (chiefly cable and direct broadcast satellite (“DBS”)) serve 85.3% of U.S. television households.¹¹ The vast majority of the public makes no distinction between basic cable (and DBS) channels and broadcast channels, with cable and DBS coming close to TV broadcasting in audience reception figures. Cable and DBS have hundreds of channels, with more in the offing in the digital era. Still to come is video streaming over the Internet. There are access requirements applicable to some of these new media, but none have public trustee content obligations of the nature imposed on broadcasting.¹²

(4) The Federal Communications Commission (“FCC”) has largely deregulated radio and television broadcasting.¹³ Thus, with the exception of core children’s television programming, the broadcast licensee sends only a postcard to the FCC at renewal time. This means that with the exception noted, eliminating the public-interest content requirement would not result in any change apparent to the viewing public. The broadcaster is supposed to present community issue-oriented programming, but this is a very mushy concept. The commercial television operator does present much local news, but this is done for solid business reasons—not to meet FCC regulations. There is also the presentation of public service announcements (but rarely in prime time), but again there is no FCC rule.

In view of the above considerations, it makes excellent policy sense to adopt a new regulatory scheme for broadcasting as we enter the new century. There is still a strong need for the provision of public service programming—high-quality educational material, cultural programming, in-depth informational fare, etc. We should look to the noncommercial

10. JORDAN & WOODARD, *supra* note 7.

11. See *Satellite Nipping at Cable Industry’s Heels*, *FCC Report Shows*, COMM. DAILY (Warren Publ’g, Inc., Washington, D.C.), Jan. 2, 2003, at 2-3.

12. See, e.g., Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. §§ 611-612 (2000)).

13. Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial TV Stations, *Report and Order*, 98 F.C.C.2d 1076, 56 Rad. Reg.2d (P & F) 1005 (1984); *Memorandum Opinion and Order*, 104 F.C.C.2d 358, 60 Rad. Reg.2d (P & F) 526 (1986). For a full discussion of the FCC’s long pattern of regulatory failure in the broadcast era, see Henry Geller, *Public Interest Regulation in the Digital TV Era*, 16 CARDOZO ARTS & ENT. L.J. 341, 343-45 (1998), and the cases and articles contained therein.

sector to provide this high-quality public service—not to behavioral content regulation of the commercial system, which has been and will continue to be a failure in this respect. It follows that the noncommercial system should be more adequately funded to meet its heightened responsibility in the digital era;¹⁴ the commercial broadcasters should be relieved of their obligation to present public-interest content programming, and in lieu thereof, should pay a modest spectrum usage fee, which would go to supplement the current inadequate funds for public telecommunications. This would result in a policy structure that promotes the creation and distribution of high-quality public service, as against the present one that tries to overcome through content regulation the driving commercial force. First Amendment strains would be markedly reduced, and broadcasting would be treated like the other video distribution media. In particular, it is sound policy to bring broadcasting in this century within the same First Amendment jurisprudence as cable or print.¹⁵

Because it makes use of the public streets, cable pays to the franchising community a fee of up to 5% of its gross revenues from cable service operations.¹⁶ With the ending of the social compact—with no obligation now to put profits second and public service first—broadcasters would pay the same modest fee, 5%, for their use of the public radio spectrum. Since the advertising revenues (national and local spot) of commercial TV stations was about \$25 billion in 2000,¹⁷ this would garner the sum of \$1.25 billion for public television.

Just as Congress acted to change the regulatory paradigm for common carrier and related telecommunications in the Telecommunications Act of 1996, it is time now to change the public trustee content scheme for broadcasting. If, contrary to this recommendation, Congress decides to proceed on an evolutionary basis, at the least it should act in the radio broadcast field and in the area of children's TV programming. The case for the above new policy is overwhelming in radio. There are more than

14. See TWENTIETH CENTURY FUND TASK FORCE ON PUBLIC TELEVISION, *QUALITY TIME?* 152 (1993) (showing the amounts spent per capita on public broadcasting in 1992: U.S., \$1.06; Japan, \$17.71; Canada, \$32.15; U.K., \$38.56). It is because of this inadequate funding that so many public TV stations are going down the "commercial slope" with their so-called "enhanced underwriting." With adequate funding, this pattern should be proscribed.

15. Cf. *Turner Brdcast. Sys., Inc. v. FCC*, 512 U.S. 622, 636-41 (1994).

16. Five percent is also the fee decided upon by the FCC to determine what sums are to be paid the Treasury by the digital broadcasters for engaging in ancillary services. Fees for Ancillary or Supplementary Use of Digital TV Spectrum Pursuant to Section 336(e)(1) of the Telecomms. Act of 1996, 14 F.C.C.R. 3259, 14 Comm. Reg. (P & F) 126 (1998).

17. Universal-McCann U.S. Advertising Revenues, 2000.

13,000 radio broadcast stations.¹⁸ Satellite digital radio is coming on stream. The Internet is a significant factor in radio already. Radio broadcast stations simply send a postcard at renewal.¹⁹ It is public radio that delivers in-depth informational programming, cultural fare, programming for the blind, etc. In these circumstances, it is clearly time for Congress to confront the issue of why there is a continuing behavioral content requirement as if radio were back in the early or mid-twentieth century—why it would not make much better policy sense to eliminate the public trustee obligation and to substitute some very modest spectrum fee, for example, 1% or 2%, to go to public radio, which is so inadequately funded. Commercial radio national and local spot revenues come to roughly \$18 billion.²⁰

In the case of children's TV programming, the present reliance on the commercial system is both inadequate and troublesome.²¹ Public television needs additional funding to fully and effectively implement its expansive and much-needed educational plans in the digital era (preparation, production, distribution, and publicizing). In the multi-channel digital era, it is greatly desirable to have a preschool (ready to learn) program, one for the school-aged child (6-11), another for adults, literacy, and for training, especially for teachers in the use of high technology. It would thus greatly benefit the national interest by making mandatory the voluntary policy of Section 303b(b)(2) of the Children's Television Act.²² Doing so would relieve the commercial broadcasters of their obligation to present core children's educational fare, and in lieu thereof, impose a very modest spectrum usage fee of, for example, 1%, which would garner roughly \$250 million to be used solely to assist in the implementation of the above multi-channel educational activities.

If the above evolutionary steps proved successful, Congress could then move to implement the policy on a comprehensive basis as to

18. News Release, FCC, Broadcast Station Totals as of Sept. 30, 2002 (Nov. 6, 2002), available at http://www.fcc.gov/mb/bureau_chief/fy2002st.doc.

19. Deregulation of Radio, *Report and Order*, 84 F.C.C.2d 968, 49 Rad. Reg.2d (P & F) 3 (1981); *Memorandum Opinion and Order*, 87 F.C.C.2d 797, 50 Rad. Reg.2d (P & F) 93 (1981); Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial TV Stations, *Report and Order*, 98 F.C.C.2d 1076, 56 Rad. Reg.2d (P & F) 1005 (1984); *Memorandum Opinion and Order*, 104 F.C.C.2d 358, 60 Rad. Reg.2d (P & F) 526 (1986).

20. See Universal-McCann U.S. Advertising Revenues, *supra* note 17.

21. See (1), (2), *supra*.

22. See Children's Television Act of 1990, 47 U.S.C. § 303b(b)(2) (2000). This subsection provides that broadcasters who enable another broadcaster to present educational programming are to be given credit for this action at the time of filing for renewal. The provision has been little used. Unlike cable which has commendably supported the C-SPAN channels, broadcasters have no similar move to support the PBS ready-to-learn channel or other multi-channel educational activity.

television broadcasting. The above sets out the concept. There would clearly be much work as to the details. For example, the license term might be doubled or more, and Congress would have to decide upon multiple ownership provisions and the retention of content-neutral requirements such as equal opportunities or lowest unit rate.

Forty years ago Newton Minow sounded a clarion call for commercial broadcasters to meet their public-interest responsibilities. At the same time, he wisely sought to promote public television, especially by fostering flagship stations in New York and Los Angeles. He has continued to push strongly for excellent public service to children because they represent the future of the nation.²³ In my view, it is time now to acknowledge that we no longer should care whether or not the commercial broadcaster plays in the public service field—that instead we want the commercial broadcaster to pay for its use of the public spectrum so that public broadcasting can be enabled to make a needed maximum contribution to educating and informing children and the electorate. The motto should be: Play if you want, but pay you must.

23. See NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* (1995).