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## Public Television Law Réduit

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## BOOK REVIEW

### **Public Television Law *Réduit***

*The Public Television Legal Survival Guide*, 2d ed., Association of Public Television Stations, 2001, 254 pages. The book can be ordered only through the Association of Public Television Stations.

Herbert A. Terry\*

With a great deal of work, a creative scriptwriter might turn this book into *Survivor VII: Inside the Beltway*. The more likely use—and, indeed, its intended use—is as a basic primer on what differentiates the law of public television from broadcasting law generally. According to its preface, the book is intended for “station personnel who do not have legal training” but who need to know some of the basics for their daily work and, through footnotes, for “in-house station counsel and outside legal consultants.”<sup>1</sup>

For the most part, this book fulfills that promise. It needs to be stressed, however, that it presumes substantial prior knowledge of all the other federal law that applies to the operation of broadcast stations in the United States. This is not the book to hand to your newly hired management assistant lacking prior experience in commercial broadcasting. But it certainly would be the ideal guide to hand to somebody recently “downsized” from a commercial station as a result of employment trends who lands in public broadcasting. Selected chapters could also be usefully given to unit managers, with instructions that they use them to conduct a “legal audit” of parts of the station under their supervision. This would at least highlight possible problem areas that could be subjected to more thorough review by management and/or counsel.

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1. ASSOCIATION OF PUBLIC TELEVISION STATIONS, *THE PUBLIC TELEVISION LEGAL SURVIVAL GUIDE* ix (2001).

Nor is this exactly the book to give to in-house counsel or outside consultants unless they, too, have basic familiarity with broadcasting law and regulation in general. Don't give it to libel lawyers and expect them to suddenly understand broadcast licensing issues. That said, the footnotes are extensive (they make up more than forty-three percent of the text), appropriate, and accurate. They could lead the modestly initiated lawyer to a lot of useful, if occasionally arcane, material. If your commercial-broadcast-experienced lawyer billed you fairly for becoming expert in some public television legal problem, buying this book for the lawyer could be cost-beneficial.

Privately published by the Association of Public Television Stations (APTS) in Washington, D.C., and overseen by Andrew D. Cotlar, their Senior Staff Attorney, *The Public Television Legal Survival Guide* quite effectively organizes and summarizes most federal law—statutory and regulatory—that is unique to public television. A third edition of the book is now being prepared by APTS and, given the high level of accuracy of the second edition as of its time of publication, the new edition should address well the few places where this book has become dated. It would be helpful, however, if the next edition included an index, and the footnote material would be much more useful to lawyers if it also included a table of authorities as some legal materials are cited and discussed at multiple points in the book.

*The Public Television Legal Guide* is divided into seven major sections with a thorough Table of Contents that to some extent makes up for the lack of an index. Most comprehensive, quite logically, are four chapters focused on federal statutes and Federal Communications Commission ("FCC") rules, regulations, and policies. The "Licensing and Management" section is an excellent overview of public TV-specific issues such as definitions of entities eligible for licenses, requirements pertaining to transparency and accountability through open records, meetings and advisory boards that have no parallel in commercial TV, and some of the federal and state requirements pertaining to fundraising. In "Programming," the book again addresses underwriting, fundraising, and contest and promotion problems peculiar to public TV, treats special public TV standards concerning political broadcasting, Federal Elections Commission ("FEC") rules, children's programming, captioning, censorship, and the perennially ruled to be nonenforceable "strict

adherence to objectivity and balance in all programs . . . of a controversial nature” language in the Communications Act.<sup>2</sup> The overview of FEC standards is probably especially welcome to typical public TV managers.

The book also does the best it possibly could of making sense of digital TV (“DTV”) conversion issues that are of importance to public TV licensees. In just nineteen pages (plus eighteen pages of notes), it whips through an overview of DTV history, a discussion of basic licensing and reallocation issues for public DTV stations, comments on the effect of DTV issues on low-power and translator stations, hits the highlights of how public broadcasters may use simulcasting and data transmission in the background of their required “at least one” standard definition digital signal, and does what it can (or at least could when published in December 2001) to tackle what’s known and not known about cable’s obligation to carry digital broadcast signals. Like the FCC, this book punts—for the present—on what the “public interest” obligations of DTV broadcasters will turn out to be. That’s an issue, of course, that everybody involved is leaving for sometime in the future.

In addition, there is a brief section titled “Auxiliary Services” which is largely an overview of the uses licensees can make of Instructional Television Fixed Services (“ITFS”). Since at least some public TV licensees derive revenues from leasing parts of their ITFS service, this is an important section for a few.

Another chapter in the book is somewhat less comprehensive, but for entirely understandable reasons. Chapter IV is devoted to “Non-Broadcast Delivery of Public Television Signals,” the question of how public TV signals are to get to people since most people don’t watch over-the-air TV through antennas anymore. The three major non-broadcast delivery systems are, of course, cable TV, direct-to-home satellite services, and, at least in theory, Open Video Systems (“OVS”) run by telcos. Given its failure in the marketplace, OVS gets its appropriate space and attention—a single paragraph. But the cable and satellite sections are adequate and, again, focused on the peculiarities of public TV which (to greatly shorten things) can often claim forms of “must carry,” but generally can’t negotiate for retransmission consent as commercial operations can. The limitation to these chapters, of course, is temporal. They are fine summaries for the analog TV era but ultimately the law that will really matter here is whatever develops for cable and satellite retransmission and delivery of digital signals. What exists now on that front is well-summarized, but there is clearly much to come. And there are likely to be some very thorny future

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2. 47 U.S.C. § 396(g)(1)(A) (2000).

issues for public television retransmission as it is anticipated that public TV stations may be doing a substantial amount of multicasting compared to commercial broadcasters, and using at least some of their digital capacity for commercial or commercial-like services. This is likely to be a much larger topic in some far future edition of this book when we are nearer to shutting down analog broadcasting.

Finally, there are a couple of sketchy but still useful sections that move the furthest afield from FCC-related issues. One section, "Copyright Exemptions and the Royalty Payment System," very briefly summarizes "fair use," but the reader should not rely on these pages as a survival guide to copyright law in general. It more thoroughly discusses special provisions in copyright law concerning the use of sound recordings in educational TV. There is a quick and dirty summary of how copyright royalties are collected and distributed in the public TV system. The book closes with a "guess what, there are also a lot of Internet issues and implications, too" section that is not very specific but, being honest, how could it be as of late 2001 or even today?

Given its current scope—a nuts-and-bolts overview of what makes public TV legally different from commercial TV—this is a useful volume. An updated third edition should catch up with developments in the areas where this book is already out of date, especially Equal Employment Opportunity ("EEO") and digital conversion. I suspect, however, that the current book is not quite the work public TV managers really want the most. We have been deregulating TV broadcasting for years—there is less day-to-day operational broadcast law-related trivia than there used to be and less concern by real public TV managers with such broadcast law than there was in the past. While it is true that broadcast TV is still a licensed medium and that there are still important broadcast-specific laws to comply with, I honestly suspect that the average manager's time these days is increasingly devoted to non-broadcast law issues related to labor and the workplace. If brief overviews that can never be comprehensive of things like copyright law and the Internet are appropriate in this edition, I would think the next edition should include brief treatment of things like the impact of the Americans with Disabilities Act, anti-discrimination and workplace harassment, and financial practices and policies emanating from the Department of Labor. Managers often say that these non-broadcast legal issues are as time-consuming, or perhaps more time-consuming, than is complying with broadcast law. While the situation is not exactly Donald Rumsfeld's "Old Europe/New Europe" distinction, if—in the past—management was largely concerned with media law ("Old Europe") then today, perhaps more attention is due to non-media law that increasingly impacts the management of public TV operations ("New Europe").

An academic cannot resist a substantive criticism of the book, but that criticism has to be offered in context. APTS is a membership advocacy group—the National Association of Broadcasters of the public TV world. This book is a kind of Jack Webb “just the facts, Ma’am,” overview for its members. It’s not a place for critical discussion of public TV law and so, in a review of the book, it probably is not fair to move too far in that direction.

But such a work does, perhaps, let down its readers slightly if it depicts something as settled law that is still in play. Perhaps that is the case here with regard to one area of public TV law. The work suggests, in several places, that the last word has been said on whether or not public TV stations are in any sense public forums and, related to that, that public TV operators have the same freedom to reject content from others as commercial operators do. Current law certainly leans in that direction; efforts to defend public First Amendment rights as different when applied to noncommercial than when applied to commercial operations have not fared well in courts. But, somehow, I suspect the last word is not yet in. Public broadcasters, like their commercial colleagues, still use what legally remains a public resource. *Red Lion Broadcasting Co. v. FCC* has not yet been overturned.<sup>3</sup> But, on top of that, nearly all public TV stations receive direct or indirect support from the U.S. government or the states that is unparalleled in the commercial world. The FCC has yet to define public interest obligations of digital broadcasters, including public broadcasters. While it is certainly the policy position of the APTS that public TV licensees should have the same First Amendment rights as commercial licensees, I am not sure—as an academic reviewer—that is so. Users of this book who relied upon its discussion of that topic into the future might turn out to be wrong. But, this is a minor—and academic (meaning in the real world, theoretical but not practical)—criticism of what is, by and large, a useful work for its intended audience of nonacademic managers and lawyers.

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3. *Red Lion Brdcast. Co. v. FCC*, 395 U.S. 367 (1969).

