Chapter 3

New Technologies for Publishing and Disseminating News and Information

THE CONVERGENCE OF THE MEDIA

Of all the First Amendment issues concerning the press and new technology, none is more contentious than Federal regulation of the means of publishing and disseminating news through electronic media. The seemingly absolute prohibition on abridgments of press freedom enunciated in the First Amendment ("Congress shall make no law. . .") has nevertheless been found compatible with a three-tiered system of communications freedom: print media, broadcast media, and common carrier. This separation was at first a product of market economics and agreements between key players in the communications industry,[1] rather than being mandated by technology.[2] It was nevertheless embodied in the regulations of the Federal Communications Commission (FCC).[3] Today, technology is ushering in a convergence of forms of press publishing that were once partitioned by technology: print publishing, mail, broadcasting, and telephone.

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Print media[4] occupy the first tier of constitutionally protected communication, and are subject only to laws concerning injurious speech (like defamation and negligence), constitutionally unprotected speech (obscenity and "fighting words"), and those laws regulating the press as a business, without regard to the press' communicative functions (e.g., corporate, labor, and antitrust laws).[5]

The broadcasting media occupy the second tier. Under the Communications Act of 1934, the FCC has the task of:

> . . . regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication.[6]

[1] In 1926 AT&T abandoned broadcasting in return for RCA'S commitment to use AT&T's lines rather than Western Union's for networking. The agreement provided for exchange of patent licenses, and WEAF was sold to RCA, where it became WNBC, the flagship station for the National Broadcasting Co." Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge, MA: Belknap Press, 1983), p. 35. See also Lynn Becker, "Electronic Publishing: First Amendment Issues in the Twenty-First Century," 13 *Fordham Urban Law Journal 801, 818-820 (1984).*

[2] "Other approaches were proposed and tried. For a quarter of a century from 1893 phones carried music and news bulletins to homes in Budapest, Hungary. Thomas Edison thought that the main use for the phonograph he had invented would be for mailing records as letters. ". . . The fact that different technologies were consecrated to different uses protected media enterprises from competition from firms using other technologies." Pool, *Technologies of Freedom,* op. cit., p. 27.

[3] Congress provided for three distinct regulatory schemes: for *broadcasters (47* U.S.C.§§ 301-332), *common carriers (47* U.S.C. §§201-224), and for *non-broadcast* users (47 U.S.C.§§ 351-362). *Print media,* which do not travel by "wire or radio, are beyond the jurisdiction of the FCC to regulate, 47 U.S.C.§151.

[4] "Print media" refers not only to all paper and ink publications; it is coextensive with any "work fixed in a tangible medium of expression," as defined under the Copyright Act, 17 (J, S. C'. § 102(a), and thus includes motion pictures, paintings, sculpture, photographs, computer-processible information (including programs and databases), and sound recordings.

[5] *Miami Herald Co. v. Tornillo, 418* U.S. 241 (1974), has reaffirmed the premier position occupied by the print media, so far as freedom from government interference in editorial control is concerned.

[6] 47 U.S.C. §151.

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In carrying out this responsibility, the FCC must conform its actions to those 'consistent with the public interest, convenience [and] necessity."[7] Under this authority, and based on a rationale that "the electromagnetic spectrum is simply not large enough to accommodate everybody, the FCC licenses broadcasters and conditions the grant and renewal of licenses on compliance with a variety of content and structural regulations. These regulations include:

- *Cross-Ownership Restrictions:* In the interest of promoting diversity, the FCC imposes three general types of restrictions on multiple ownership of broadcasting facilities: those limiting ownership in a single community,[9] those limiting ownership of broadcast facilities by single entities nationwide,[10] and those forbidding newspapers from owning television stations in the same community in which they publish.[11]
- *The Fairness Doctrine:* Under FCC decisions construing a 1959 amendment to the Communications Act of 1934, broadcasters were obligated to "operate in the public interest and to afford reasonable opportunist y for the discussion of conflicting views on issues of public importance."[12] The FCC added a further gloss to this statutory language in the Report Concerning General Fairness Doctrine Obligations of Broadcast Licencees, 102 F.C.C. 2d 143, 146 (1985): licensees must "provide coverage of vitally important controversial issues of interest in the community served by licensees . . . [and] provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues. " The codification of the Fairness Doctrine in the Communications Act (H.R. 1934) was recently vetoed by the President, and the FCC voted to repeal its fairness regulations on the ground that they offended the First Amendment.*
- *The Equal Time Doctrine:* "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."[13]
- *Reasonable Access:* Broadcasters must allow "reasonable access . . . for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy."[14]
- *Indecency:* Under criminal law and FCC regulations, broadcasters are held to a higher standard than other publishers, insofar as they are prohibited from broadcasting not only "obscene, but also "indecent" programming.[15] The rationale for this higher standard is that the broadcast audience, and particularly children, are "captive."[16]

FCC regulations, and indeed, much of the rationale under which the FCC regulates, have come under attack in recent years, largely as a result of technological challenges to the notion of scarcity .[17]

[7] 47 U.S.C. §307.

[8] *National Broadcasting Co. v. United States,* 319 U.S. 190, 213 (1943). The scarcity rationale was reaffirmed as the basis for broad FCC authority to regulate in *Red Lion Broadcasting v. FCC,* 395 U.S. 367 (1969).

[9] 47 CFR §§73.35 (AM), 73.240 (FM), and 73.636 (TV).

[10] Ibid.

[11] See Second Report and Order, Docket No. 18110, 50 F.C.C. 2d 1046 (1975).

[12] 47 U.S.C. $315(a).

*56 U.S.L.W. 2112 (Aug. 25, 1987).

[13] 47 U.S.C. 5315.

[14] 47 U.S.C. §312(a)(7).

[15] Broadcast of "obscene, indecent, Or profane" language " images is a criminal violation, 18 U.S.C. $1464, for which the FCC may revoke a license, 47 U.S.C. 312(a)(6). This power was upheld in *FCC v. Pacifica Foundation, 438* U.S. 726 (1978). The FCC recently recommended expanding the operative definition of "indecency" beyond seven particular words to include the generic definition of broadcast indecency advanced in *Pacifica*, which is: "language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. " The Commission added that "in certain circumstances, innuendo or double entendre may give rise to actionable indecency. " 52 *Federal Register* 16386-01 (Tuesday, May 5, 1987).

[16] See, e.g., *Cohen v. California,* 403 U.S. 15 (1971)

[17] For example, see U.S. Congress, 98th Cong., 1st sess., senate Committee on Commerce, Science, and Transportation, *Print and Electronic Media: The Case for First Amendment Parity,* printed at the direction of Hon. Bob Packwood, Chairman, for the use of the Committee on Commerce, Science, and Transportation, Senate (Washington, DC: U.S. Government Printing Office, 1983).

Whether broadcasting is a scarce resource depends to a great degree on how "scarcity" is defined. Absolute numerical comparisons of te number of media outlets maybe misleading measures of scarcity. If scarcity is measured by the number of organizations or individuals wishing to broadcast as compared with the number of available frequencies, then scarcity is still the rule for broadcasting. There are, for example, no open broadcast television channels in the top 50 markets in the United States. If, as one First Amendment scholar suggests, scarcity occurs in situations where 'one utterance will necessarily displace another, " then scarcity takes on yet another meaning:

> . [the] opportunities for speech tend to be limited, either by the time or space available for communicating or by our capacity to digest or process information. . . . The decision to fill a prime hour of television with Love Boat necessarily entails a decision not to broadcast a critique of Reagan's foreign policy . . . during the same hour.[18]

The development of cable television (which typically carries anywhere from 34 to 120 stations), the direct broadcast satellite, other microwave communications systems, low power television, and other new technologies cast doubt on scarcity as the premise for government regulation. The broadcast medium far exceeds the print medium in sheer number of outlets.[19] Broadcasting has become more ubiquitous and far more diverse than newspapers in many metropolitan areas. Multiplexing and compression techniques may further overcome physical limitations of the electromagnetic spectrum, the limitations on time and space inherent to the broadcasting medium.

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In this context, the FCC has now rejected the scarcity rationale-at least as the basis for the fairness doctrine.[20] Many in Congress are seeking to legislate the fairness doctrine out of concern over the scarcity and high cost of broadcast outlets. The FCC has in other instances suggested an alternative rationale having to do with the broadcasting industry's "power to communicate ideas through sound and visual images in a manner that is significantly different from traditional avenues of communication because of the immediacy of the medium."[21]

Yet even these constraints on the broadcasting media are being overcome by technologies, the videocassette recorder, for instance, that permit an audience to select among and store programs of its choosing. The element of viewer selection and timing was a principal reason for the Supreme Court's finding that "time-shifting' television programs constituted 'fair use' and is not a violation of copyright law.[22]

Common carriers, finally, are subject to yet different treatment under Federal law and the First Amendment. Under Title II of the Communications Act, communications common carriers are subject to franchise, rate, service, and reporting requirements, and "must hold themselves out to all comers" on a nondiscriminatory basis.[23] Thus common carriers are not

[18] Owen Fiss, "Free Speech and Social Structure, " 71 *Iowa Law* Review 1405, 1412 (July 1986).

[19] At the end of 1985, there were 9,871 radio and 1,220 television stations operating in the United States, compared to 1,676 daily and 6,600 weekly newspapers, and more than 10,000 magazines. *Broadcasting Yearbook 1986,* and *Editor and Publisher Yearbook 1986,* as cited in Christopher Bums, *Freedom of the Press in the Information Age,* OTA contract report, Apr. 21, 1987, p. 20. In 1986, A.C. Nielsen counted 86 million television homes and a total of 157 million television sets in use, compated to 63 million daily newspaper subscribers. Television Bureau of Advertising, "Trends in Television, 1986, " as cited in Bums, op. cit. In 1985, the average home had the television on 7 hours and 10 minutes per day, compared to an average of 34 minutes per day spent reading the newspaper (of course, the time spent watching television was probably for entertainment, rather than news; the comparison may thus be misleading). National Readership Study conducted in 1971 by Audits & Surveys, Inc., for the Newspaper Advertiser Bureau, as cited in Burns, op. cit.

[20] Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143 (1985); see also *Meredith Corp. v. FCC, 55* U. S.L.W. 2391 (1987).

[21] *Report and Order,* 53 Rad. Reg. 2d (P&F) 1309 at 1324 (1983), as quoted in *Telecommunications Research and Action Center v. FCC,* 13 Med. L. Rptr. 1881, 1883 (D.C. Cir. 1986).

[22] *Sony v. Universal Studios, Inc.* 464 U.S. 417 (1984). Electronic publishing, also illustrates the way in which technology is overcoming time and space scarcity.

[23] 47 U.S.C. 201-224 (1982).

generally liable for the content of the messages they transmit.

Drawing on the precedent of the postal system, the telegraph, and the railroads, the FCC defined communications common carriers as "any person engaged as a common carrier for hire. "[24] This circularity causes a number of conceptual problems, particularly in questions of whether and how to regulate new media. The Supreme Court has defined common carrier in a less circular fashion, as "one who makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . . "[25] but this does not solve the problem of when common carrier status may be mandated and imposed by the government.[26] The decision that a communication system is or is not a "common carrier' is a political rather than a technical decision. Legislatures tend to decide to regulate a system as a common carrier if it appears to have at least some of the characteristics of a natural monopoly .27 Until recently, there has been no interaction between common carrier status and First Amendment concerns.[28] However, since the 1982 consent decree between AT&T and the Justice Department, AT&T has been denied the right to disseminate its own messages over its lines until 1989 because of the potential for anti-competitive behavior.[29] The

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First Amendment issues concerning the relationship between media ownership and control over the *content* that flows through that medium have been joined. Among these issues are whether common carriers can also be publishers, who–as publishers-have the right to exclude other publishers from their fora; whether a monopoly common carrier can also do some publishing; and whether the government can compel some access over monopoly controlled facilities. The controversies over cable television and information services that might be available over telephone wires are illustrative of this issue, which promises to be the focal point of much First Amendment litigation for years to come.

[24] 47 U.S.C. 153(h).

[25] *FCC v. Midwest Video Corp.,* 440 U.S. 689, 701 (1979).

[26] Broadcasters may not be treated as common carriers. 47 U.S.C. $153(h). Notwithstanding this, Direct Broadcast Satellite owners are permitted to choose between broadcast and common carrier type regulation. *National Association of Broadcasters v. FCC 740* F.2d 1190 (D.C. Cir. 1984).

[27] "When 'natural' monopolies are recognized and entry is prohibited to all but the designated monopolist, the monopolist is normally required to provide universal service as a common carrier, " Mark Nadel, "A Unified Theory of the First Amendment: Divorcing the Medium From the Message, " *11 Fordham Urban Law Journal 163, 193,* n. 109 (1982). "The rate and service requirements imposed on these carriers under the Communications Act reflect the view that their natural monopoly status justifies government control of their business activities. " Lynn Becker, "Electronic Publishing, " op. cit., p. 855. See also *United States v. RCA,* 358 U.S. 334 (1959). Cable television was initially proposed as a candidate for common carrier regulation by the FCC, but the plan was abandoned.

[28] In the case of the telegraph, for example, the reason for the "dim perception [of First Amendment concerns] was that the early telegraph carried so few words at such a high cost that people thought of it not as a medium of expression but rather as a business machine. The computer suffered the same misperception a century later. Pool, *Technologies of Freedom,* op. cit., p. 91.

[29] Consent decree in U.S. v. *Western Electric,* 552 F. Supp. 131, 180-86 (D.C. Cir. 1982).

CABLE TELEVISION

When cable television entered the scene in the 1940s it was called Community Antenna Television (CATV), carried only existing broadcast channels, and was intended merely to provide better signals to homes in a bad reception area. Since that time, however, cable television has multiplied channel capacity many fold. Systems that run two coaxial cables into the home can now provide up to 120 different channels. Initially, the FCC declined

jurisdiction over cable TV, but throughout the 1960s and 1970s, the Commission imposed a variety of access, content, and distant signal importation requirements. The Commission's authority to do so was based on the rationale that its regulations were "reasonably ancillary to . . . the Commission's various responsibilities for the regulation of television broadcasting, "[30] and broadcast television was "placed in jeopardy by the unregulated growth of CATV."[31]

Then, in the late 1970s and early 1980s, a series of Federal appeals court rulings struck down a variety of programming content regulations, based on either the First Amendment or statutory grounds.[32] Finding first that the FCC had failed to show that cable systems are "public forums' (i.e., common carriers), the language of one appeals court decision went on to frame the issue thus:

> The First Amendment rights of cable operators rise from the Constitution; the public's "right' to "get on television' stems from the Commission's desire to create that "right."[33]

In the Cable Communications Policy Act of 1984;[34] Congress created such a right, albeit in limited fashion. It requires cable operators to provide "leased access channels" for commercial use "by persons unaffiliated with the [cable] operator,"[35] and it permits local franchising authorities to reserve public, educational, and government channels.[36] But cable operators take the position that because they do not suffer the physical limitations inherent in broadcasting, they are in the position of other publishers, and ought to have absolute editorial discretion. It seems likely, therefore, that even the limited content regulations set forth in the Cable Act will be challenged on First Amendment grounds.

But, as Ithiel de Sola Pool pointed out, "[the problem of access] may become the Achilles heel of what could otherwise be a medium of communication every bit as free as print."[37] Though many have argued that cable television is not a "natural monopoly, one cable franchise per municipality is nevertheless the rule and not the exception. " This suggests to some that cable operators ought to be treated in the same way as any other essential facility with substantial power to exclude others. Several commissions have come to this conclusion, but have still accepted the argument that treating cable as a common carrier would not provide adequate economic incentives for operators to build cable systems.[39] Even if cable systems are not treated as total common carriers, the question remains whether the government, to promote diversity, can require access to a certain portion of the available channels.

The delicate equilibrium that exists today between cable operators and television publishers will likely be disturbed as technology

[30] *U.S. v. Southwestern Cable Co., 392* U.S. 157 (1968)

[31] Ibid.

[32] For example, in Home *Box* Office, *Inc. v. FCC,* 567 F.2d 9 (D.C. Cir. 1977), overturned, on First Amendment grounds, rules restricting movies that could be shown over subscription television. In Midwest *Video Corp. v. FCC, 440* U.S. *689 (1979)* (Midwest Video II), the Supreme Court struck down Federal (though not necessarily state) cable access requirements as beyond FCC jurisdiction; if access rules could not be imposed on broadcasters, they could not be imposed on cable operators on an "ancillary to broadcasting' rationale. In *1985,* the Court of Appeals for the D.C. Circuit decided that "must carry" rules, which required cable systems to carry local broadcast signals, were unconstitutional under the First Amendment. *Quincy Cable TV v. FCC, 768* F.2d 1434 (D.C. Cir. 1985), cert denied, 106 S. Ct. *2889 (1986).* The court suggested, moreover, that even if the "must carry" rules had furthered a significant governmental interest, they might nevertheless be contrary to the principle announced in *Miami Herald Co. v. Tornillo, dicta* of some portent for categorization of cable for First Amendment purposes.

"The language is from the appeals court ruling in Midwest Video II, *Midwest Video Corp. v. FCC,* 571 F.2d 1025, 1054 (D.C. Cir. 1978).

[34] 47 U.S.C. §§ 601-639, Public 1,. No. 98-549, 98th Cong. 2d sess., 98 Stat. 2779-2806, 1984.

[35] 47 U.S.C. §612

[36] 47 U.S.C. §611

[37] Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge, MA: Belknap Press, 1983), p. 166,

[38] Cable is often called a "natural monopoly" because, as a practical matter, only one operator may use rights of way over poles or through conduits to connect with subscribers' houses. Where these physical limitations are not present, or where there is sufficient excess physical capacity, a cable operator may raise First Amendment objections. Los *Angeles v. Preferred Communications, Inc.,* 106 S. Ct. 2034, 54 U. S.L. W. 4542 (1986).

[39] Two early studies of the cable industry, the Sloan Foundation (On the Cable (New York: McGraw-Hill, 197 1) and the Whitehead Report (Cabinet Committee on Cable Communications, *Cable–Report to the President* (Washington, DC: U.S. Government Printing Office, 1974). The Whitehead report reached the conclusion that when cable reached 50 percent penetration, it should change to carrier status.

again brings new interests into play. Although cable is today primarily an entertainment medium, it may not necessarily remain so. Because it is a "broadband" medium (meaning that it has capacity for handling high volumes of all sorts of electronic traffic), cable is a suitable carrier for computer data, electronic mail, videotex, databases, security monitoring, home banking and shopping, teleconferencing, and other interactive services. If cable systems are publishers under the First Amendment, and allowed to choose the content of what goes through their lines, they may well discriminate against content that is competitive to their own, or which do not yield as large a profit as entertainment products, such as Home Box Office (HBO) and other movie channels. In the future (perhaps the mid-1990 s), fiber optic telephone connection to the home may make the telephone company a broadband highway for all information (with cable operators perhaps becoming customers of the telephone company), but for now, the tension between cable operators as First Amendment speakers and as forums for other would-be speakers will heighten.

The delicate equilibrium that exists today between cable operators and television publishers will likely be disturbed as technology again brings new interests into play.

INFORMATION SERVICES DELIVERED OVER TELEPHONE LINES

Technology has also blurred distinctions between computers and communications, between those who create a message (or data) and those who transmit it. This confounding of roles has raised First Amendment issues similar in kind to those raised by cable television; that is, how to reconcile the First Amendment interests of communications companies as speakers with the First Amendment interests of those who seek *access* to these companies' communications facilities. While the tension in the cable industry concerns whether cable operators will be required to grant a limited form of access to other would-be program providers, the issue here is whether telephone companies will be permitted to provide information services, using their own facilities, in competition with independent providers of the same or similar services.

Companies offering stock quotations, sports scores, airline schedules, and news retrieval services, among others, are concerned that the telephone companies could offer these same services themselves. Even more significant is the fear of the American Newspaper Publishers Association that telephone companies would provide electronic yellow pages and draw away a substantial chunk of newspapers' classified ads. Given the evidence of past discriminatory actions by AT&T against competitors, the modified final judgment (MFJ) settling the AT&T lawsuit barred the telephone company from entering the electronic publishing business.

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It is unclear whether the First Amendment permits such an absolute prohibition. Cable operators have been charged with discriminating by favoring their own affiliated pay networks over those of their competitors, yet they are not barred from carrying any of their own

services. One could argue that cable television systems are different from telephone companies because the former are not natural monopolies, but in *The Geodesic Network*,[40] a consulting report prepared for the Department of Justice, Peter Huber argued that local telephone companies are not natural monopolies either. He concluded that technology has changed the nature of communications from that of a hierarchical pyramid to that of a geodesic ring, so that the threat of dominance by one or a few industries is no longer possible.

Meanwhile, the FCC appears to believe that information services will not become widely available until the telephone companies offer information services. The agency, in its *Computer III* decision, argues that requiring all competitors to grant comparable efficient interconnection would be sufficient to ensure nondiscriminatory treatment.

[40][J. S. Department of Justice, Antitrust Division, *The Geodesic Network*, 1987 Report on Competition in the Telephone Industry, , January 1987.