

# FREEDOM TO CREATE: The Implications of Anti Trust Policy for Television Programming Content

NICHOLAS JOHNSON\*

*Commissioner Johnson's main thesis is that there are inhibitions to a development of creativity and diversity in television programming and that this is unfortunate for a variety of reasons. It is his contention that these inhibitions are related to the structure of the industry and that governmental regulation has therefore failed.*

*In an exhaustive analysis the Commissioner relates the structure of the industry and the "Who", "How" and "Why" of content control which has been fostered under present regulatory schemes. He then proposes solutions in terms of existing potential that may promote the values that a media structure should reflect.*

The article which follows by FCC Commissioner Johnson reiterates with notable organization and effect his concern that the present structure of the media, both in ownership and in the practical exercise of content control, has severely inhibited freedom and creativity in television programming. Because many of the controls over content have tended to be indirect, inarticulated and based on social structure rather than overt direction, much of Commissioner Johnson's material is anecdotal in nature. This is also true of comparable Canadian materials which have tended to focus on ownership anomalies in a few specific communities rather than on the indirect biases inherent in the structure of the media as a whole. The following references to decisions of the Canadian Radio-Television Commission and to other materials must be taken in this light. See also the citations referred to in the commentaries on the related articles, *infra*.

1. Multiple ownership in the broadcast media in Canada (i.e. the ownership of stations in more than one community) is treated at present on a case-by-case basis by the CRTC, with some discouragement inherent in its preference for local ownership, but a number of decisions indicating a recognition of financing difficulties in smaller communities. For some of the recent decisions, see *Trois Rivieres—CKTR* [1968] CRTC Decisions

---

\*The author is a commissioner of the Federal Communications Commission (F.C.C.) in the United States and formerly was Acting Associate Professor of Law, University of California Law School (Berkeley). This paper was prepared for presentation to the Trade Regulation Roundtable, Association of American Law Schools' Annual Convention, San Francisco, California, held on December 29th, 1969 (referred to subsequently as *Trade Regulation Roundtable* (1969)).

30 (Aug. 27), *CRTC Transcript of Hearing*, Ottawa, April 23, 1968, pp. 434-443; *Montreal—CFMB* [1968] CRTC Decisions 139 (Dec. 24) *CRTC Transcript of Hearing*, Ottawa, Nov. 19, 1968, pp. 793-801; *Calgary—CFCN-TV* [1969] CRTC Decisions 88 (March 21), *CRTC Transcript of Hearing*, Ottawa, Feb. 4, 1969, pp. 272-289; *Montreal—CKGM, CKGM-FM* [1969] CRTC Decisions 394 (Dec. 11), *CRTC Transcript of Hearing*, Montreal, June 10, 1969, pp. 622-653; and *Halifax—CJCH*, [1969] CRTC Decisions 396 (Dec. 11) *CRTC Transcript of Hearing*, Ottawa, Nov. 1969, Volume 1, pp. 542-607. In a few decisions, the Commission has indicated its willingness to ignore the local ownership criterion where a valid overall national or regional benefit is involved [e.g. *Quebec City—CJLR*, [1968] CRTC Decisions 141 (Dec. 24), *CRTC Transcript of Hearing*, Ottawa, Nov. 19, 1968, pp. 731-760; *Moose Jaw—CHAB-TV, CHRE-TV* [1969] CRTC Decisions 253 (July 18) *CRTC Transcript of Hearing*, Montreal, June 10, 1969, pp. 706-834] but where an "overall plan" is not presented, the *Famous Players-Teltron Communications* decision, [1969] CRTC Decisions 145 (April 17) *CRTC Transcript of Hearing*, Ottawa, Nov. 19, 1968, pp. 1-71; April 15, 1969, pp. 19-224 represents the opposite side of the coin.

2. The Canadian equivalent to the FCC duopoly rule was first enunciated by the BBG in *Montreal—CFCF, CFCF-FM* [1963] BBG Decisions (Apr. 5) *BBG Transcript of Hearing*, Ottawa, March 26, 1963, pp. 96-147 with an exception provided where a minority language service was involved. Then as now, the only examples falling within the exception are in Sudbury, Sherbrooke and Quebec City. Since that time, the Commission has tightened the rule in regard to AM stations to include minority overlap (see *Thunder Bay—CKPR*, [1969] CRTC Decisions 76 (March 21), *CRTC Transcript of Hearing*, Ottawa, Feb. 4, 1969, pp. 160-185; *Quebec City—CKCV*, [1970] CRTC Decisions 74 (March 25)) but relaxed it in areas where alternative television has been sought (see, e.g. the combined effect of *Kelowna—CHBC-TV* [1968] CRTC Decisions 39 (Aug. 27) *CRTC Transcript of Hearing* Ottawa, April 23, 1968, pp. 412-3 (share transfer) and *Kelowna—British Columbia Television* [1969] CRTC Decisions 398 (Dec. 23), *CRTC Transcript of Hearing*, Vancouver, Oct. 14, 1969, pp. 307-345 (rebroadcaster)).

3. Concentration of media ownership within a particular market in Canada has received most of its attention where cross-ownership has also been involved (e.g. where one person controls both print and broadcast media, or both broadcast and cable media). Common ownership of radio and television stations is so prevalent in Canada (over 85% of Canadian private television stations are owned by radio owners) that any application of a broad one-to-a-market rule such as that promulgated by the FCC this year would be unthinkable. On the other hand, newspaper-broadcast cross-ownership has been viewed very stiffly by the Commission and appears to be hardening into a licensing rule. See, e.g. *Saint John—Saint John Cablevision* [1968] CRTC Decisions 73 (Oct. 18), *CRTC Transcript of Hearing*, Moncton, Sept. 25, 1968; *Vancouver—CHAN-TV*, [1968] CRTC Decisions 38, (June 13), *CRTC Transcript of Hearing*, Ottawa, April 23, 1968, pp. 394-411; and *Toronto—Rogers Cable T.V.*, [1969] CRTC Decisions 197 (July 10), *CRTC Transcript of Hearing*, Ottawa, Feb. 4, 1969, pp. 407-521. Two pending share transfers, *Hamilton—CHCH-TV* and *Toronto—York Cablevision*, will also have considerable impact on this observation. Cross-ownership between the newspaper and the broadcast media in Saint John, London, and certain other markets was prominently highlighted as well in the hearings of the Special Senate Committee on the Mass Media.

4. Mr. Johnson's references to the effects of conglomerates and non-media interests on program content have been considered in Canada

only in regard to isolated situations, no overall policy having evolved so far. For relevant statements of the CRTC, see *St. John's—Wesley United Church Board*, [1968] CRTC Decisions 60 (Oct. 18) [policy against church ownership]; *London—Maclean-Hunter* [1969] CRTC Decisions 320 (July 23) [policy against chartered banks taking equity positions in broadcasting], and *Licensing Policy in relation to Common Carriers*, CRTC Announcement, December 3, 1969 [general policy against licensing utilities as CATV operators].

5. Antitrust policy in regard to the media in Canada is ill-defined and inconsistent. The *Combines Investigation Act* applies to newspapers, books, magazines, tapes, records and the film industry but not to the broadcast media save in regard to misleading advertising. Although a number of inquiries have been instituted into the print media, the Act does not at present extend to concentration of ownership or anticompetitive practices in radio or television except where goods (e.g. film exclusivity contracts) are involved. See, generally, the testimony of D. H. W. Henry, Q.C. (Director of Investigation and Research), before the Special Senate Committee on Mass Media, January 20, 1970, and his brief to the Committee reproduced later in this issue. In regard to anticompetitive allegations made before the CRTC (both somewhat insubstantial) see *CRTC Transcript of Hearing*, Ottawa, Feb. 4-6, 1969, pp. 242-271 (CKTB renewal) and *CRTC Transcript of Hearing*, Moncton, Sept. 25, 1968, pp. 271-280 (KCCW-TV representation).\*\*

PETER GRANT

---

“I believe what Cocteau said: ‘Ninety-eight percent of all creation is accident, one percent intellect, and one percent logic.’ I believe that: you must keep *free* for things to happen, for the accident — and then learn how to use the accident.”

—Dennis Hopper, co-author, director and co-star of “Easy Rider,” a Columbia Motion Picture.<sup>1</sup>

---

\*\*The brief commentaries referring the reader to Canadian materials dealing with similar problems were prepared by Peter S. Grant, a barrister with the Toronto law firm of McCarthy & McCarthy. A major source-book of communications materials will become available this fall when Mr. Grant's textbook, *Canadian Broadcasting Law & Administration* (Toronto, CCH Canadian 1970), is published with the joint support of the Canadian Radio-Television Commission, the Canadian Association of Broadcasters, and the University of Toronto Faculty of Law. The textbook, which is the first thorough study of the law and administrative practices relating to broadcasting and cable television in Canada, includes commentaries on all BBG and CRTC licensing decisions, circulars, regulations and policy statements from January, 1959, to August 1970, as well as chapters on a number of related areas such as CRTC procedure, international and domestic jurisdiction, CATV pole agreements, copyright, the Telesat Canada Act, and the myriad of provincial and federal regulations affecting advertising and program content.

<sup>1</sup> L. Carson, “Easy Rider: A Very American Thing,” *Evergreen Review*, Nov. 1969, pp. 24, 26.

The "creative accident", that sparking of genius to conception and creation, is perhaps man's greatest gift. There is considerable question whether the present structure of the television industry provides enough *freedom* for creativity and diversity to flourish in television news and entertainment programming.

The issue assumes a special significance in view of television's pre-eminence as our nation's most influential means of mass communication — the American people's principal source of information, opinion, aesthetic taste, moral values, political participation, education, and national priorities.

To the extent that scholars and lawyers have dealt with this problem at all, they have viewed it in the traditional antitrust terms of the economic marketplace. And yet the most significant issues are not those at all. The purpose of this paper is to argue that our antitrust orientation has been excessively narrow, that the antitrust laws are inadequate to deal with monopolization of thought in our society, and that newer approaches and standards are required. As such, it may be merely illustrative of a broad range of social, economic and political implications of antitrust administration. But it is an illustration of uncommon consequence on its own terms.

The first section will consider the characteristics we might wish to encourage in the operation of a television industry designed to stimulate creativity. The second section will analyze the mechanisms of content control—who exercises it, how, and with what motivations. The third section will discuss the FCC's role in shaping media structure, and will present some possible solutions and prospects for research and investigation.

#### *Note on Evidentiary Sources*

For many reasons, any conclusions in the area of media structure and programming content must remain tentative. There are no thorough contemporary case studies on the television industry even comparable to William H. Whyte, Jr.'s landmark book, *The Organization Man*.<sup>2</sup> We are principally dependent upon first-hand published accounts of personal experiences,

---

<sup>2</sup> W. Whyte, Jr., *The Organization Man* (1956).

testimony at Congressional and FCC hearings, a few published intra-corporate memoranda, and a great deal of unreported (often confidential) anecdotal material.<sup>3</sup>

Lack of data is complicated by the fact that the mechanisms of content control are largely secretive. We really don't know what impact "faceless individuals" — the "Under-Assistant West Coast Promotion Man" immortalized by the Rolling Stones, network affiliates' spokesmen, sponsors, advertising agency executives, network censors, independent producers, New York and

---

<sup>3</sup>The following is an illustrative, but not exhaustive, listing of the types of materials available.

The FCC has held hearings on the problems involved in the creation of television programming. See, e.g., FCC, Second Interim Report by the Office of Network Study, *Television Network Program Procurement* (Part II, 1965).

I have written of corporate control and footnoted numerous examples of abuse in opinions. See, e.g., *In re Complaint Against National Broadcasting Co.* (Chet Huntley), 14 F. C. C. 2d 714, 718 (1968); *In the Matter of Applications by American Broadcasting Co. for Assignment of Licenses* (ABC-ITT Merger), 7 F. C. C. 2d 245, 278, 296-304 (1966). In the former opinion I wrote of intra-office memoranda that candidly spoke of the operation of broadcast properties to benefit other corporate interests. For example, there is the CBS memorandum which advised newsmen that since CBS owned the New York Yankees they were to be given priority in reporting scores. *Variety*, May 28, 1968, at 25 (quoted in 14 F. C. C. 2d at 722, n. 10). Another example is the ABC memorandum proposing special treatment of a topic suggested by an ITT executive at the time the two companies were negotiating a merger. *ABC-ITT Merger*, Docket No. 16828, Exhibit No. J323 (quoted in 14 F. C. C. 2d at 731, n. 38). *Variety*, the entertainment trade newspaper, is an excellent source of examples of corporate interference in broadcasting decisions. See, e.g. *Variety*, Sept. 3, 1969, at 33 (reporting the self-censorship by ABC in preparing documentary topics for Minnesota Mining & Manufacturing). Virtually all issues of the *Columbia Journalism Review* contain useful material.

Many authors of books and articles — both academic and popular — have written of the corporate control exerted by advertisers and broadcasters over program content. People in the industry have written of their frustration in dealing with business interests interfering with a creative medium. See, e.g., A. Kendrick, *Prime Time: The Life of Edward R. Murrow* (1969); F. Friendly, *Due to Circumstances Beyond Our Control* (1966); Hubert, "Television Journalism: Its Progress and Problems," *Amherst Alumni News*, Fall 1968, at 8; Murrow, Address to the Radio and Television News Directors Association Convention, October 15, 1958 (reprinted in H. Skornia, *Television and Society* 227 (1965)). A newspaperman has reported to us about the corporate influence in broadcasting, S. Optowsky, *TV: The Big Picture* 69-80 (1962); and we have been shown how politicians use the media to sell themselves like bars of soap or bottles of mouthwash, J. McGinniss, *The Selling of the President 1968* (1969). We should not have been surprised at what Joe McGinniss described as Robert MacNeil, a former television newsmen, had warned of the dangers in mixing television advertising and politics in his excellent book, *The People Machine* (1968).

A recent book by a former advertising executive gives insights into the pressures brought to bear by large corporations, most of which are only interested in larger audiences. F. Cone, *With All Its Faults* (1969). And see S. Baker, *The Permissible Lie* (1968). One excellent series reports the history of broadcasting. E. Barnouw, *Tower of Babel* (1966), *The Golden Web* (1968). One author has traced the frustrations of producing a television show from inception to showing. M. Miller, *Only You, Dick Da ing* (1964). Academicians have also written of the corporate influence on broadcasting and creativity. See, e.g., H. Skornia, *Television and the News* (1969); H. Skornia, *Television and Society* (1965); B. Rucker, *The First Freedom* 105-07, 217-23 (1968).

For each of these books and articles there are dozens more. My most current and fertile source of information on what is going on in the industry are the almost daily written and oral communiques I receive from men in the industry who are sickened by what they are made to do in the interests of big business.

West Coast network executives — have on a television program as it flows from writer's conception to corporate realization. Do the Presidents of the three networks involve themselves directly in program control, letting their own programming preferences be known, or censoring out words, characters or ideas that they find offensive? One leading television producer remarked to me: "If [William S.] Paley [Chairman of CBS] likes a show, that doesn't guarantee it will get on; but it makes it a damn sight harder to knock it off."<sup>4</sup> Allegations, and the inevitable self-serving denials, are not the best of building materials for a scientific inquiry. But in some cases that's about all we have.

Consider, for example, the controversy over television news. Richard S. Salant, President of CBS News, has remarked:

In the 11 years I was a CBS corporate officer and in the six years that I have been president of CBS News, to my knowledge there is no issue, no topic, no story which CBS News has ever been forbidden, or instructed, directly or indirectly, to cover or not to cover, by corporate management. [T]here has been no self-censorship; I — and to the best of my knowledge, my associates at CBS News — have never avoided a topic or altered treatment to protect, or to avoid displeasing, corporate management or any advertiser.<sup>5</sup>

Yet many television newsmen have come to the opposite conclusion. Edward R. Murrow said: "[Corporate managements] make the final and crucial decisions having to do with news and public affairs."<sup>6</sup> Walter Cronkite has said, "We have barely dipped our toe into investigative reporting."<sup>7</sup> Mr. Salant's predecessor, Fred Friendly, reports that an Edward R. Murrow *See It Now* expose of the television quiz show scandals was never scheduled because CBS' lawyers "said it would have been in bad taste," and that the entire show was cancelled by CBS because Murrow's "fortitude and independence, . . . [the] same virtues which gave CBS distinction, also brought it controversy, enemies and 'stomach aches'."<sup>8</sup> H. V. Kaltenborn remarked: "Each time I criticized a Federal Judge . . . a labor leader (who supervised the company's labor contracts), or a Washington official (whose influence counted in the issue of a broadcasting license), one of the vice-presidents became frightened and protested."<sup>9</sup> Professor Harry Skornia reports that "in late 1963 the American Civil Liberties Union noted that CBS excluded a song satirizing the John Birch Society from the Ed Sullivan program because it would have been 'too controversial'."<sup>10</sup> An executive in another network

---

<sup>4</sup> This statement was made to me, in confidence, by a leading Hollywood television producer during a series of conferences which I conducted with many television writers, directors and producers on July 30 through August 2, 1969, Los Angeles, California. Because these statements were made in confidence and identification might prejudice those involved, I will leave them unidentified. Hereinafter, these conferences will be cited, "*Los Angeles Television Conferences, Summer 1969.*"

<sup>5</sup> R. Salant, "He Has Exercised His Right to Be Wrong," *TV Guide*, Sept. 20, 1969, pp. 10, 11.

<sup>6</sup> E. Murrow, "Address to the Radio and Television News Directors' Association Conference," Chicago, Illinois, October 15, 1958, reprinted in H. Skornia, *Television and Society* 231-32 (1965) (paper ed.)

<sup>7</sup> *Time*, Oct. 14, 1966, p. 57.

<sup>8</sup> F. Friendly, *Due to Circumstances Beyond Our Control* 97, 95 (1967).

<sup>9</sup> H. Skornia, *Television and the News* 94-95 (1967).

<sup>10</sup> H. Skornia, *id.* at 98-99.

recently said, "There are many vital issues that we won't go near. We censor ourselves."<sup>11</sup> The full exchange between Mr. Salant and myself — two articles, a letter to the editor, and a speech — is reprinted in the Congressional Record.<sup>12</sup>

Confronted with this conflict, I simply have had to rely on the best information available to me. Some in the communications industry have given me information in confidence. Others have left the business and written books about their own experiences which we can all read.<sup>12(a)</sup> There are some Congressional and FCC hearings that contain useful material. We simply have to make do with these — and extrapolate when necessary.<sup>13</sup>

## I. CHARACTERISTICS OF CONSTRUCTIVE PROGRAMMING

If we are to evaluate the success of the existing media structure, we should first formulate some idea of the content-neutral values we want that structure to reflect. I will list six. These are by no means exhaustive, and no doubt some will be questioned. But let us try.

*A. Creativity.* The role of the creative artist, today as in the time of Aristotle, is to increase man's understanding of himself and his world. According to Robert Doty, a leading contemporary painter, the artist "desperately seeks to engage the mind and spirit of the spectator to bring him to a state of awareness that will permit no evasion."<sup>14</sup> The creative artist, in Ezra Pound's phrase, is the "antennae of the race."<sup>15</sup> He uses his sensitized conscious to absorb the subconscious and unconscious tendencies in the culture and then to express them in his art. Dr. Rollo May, the well-known psychotherapist, argues that art's function is essentially "predictive":

[I]n a given period of history, art expresses the meanings and trends which are as yet unconscious, but which will later be formulated by the philosophers, religious leaders, and scientists of the society. The arts anticipate the future social and technological development by a generation when the change is more superficial, or by centuries when the change, as the discovery of mathematics, is profound.<sup>16</sup>

<sup>11</sup> *TV Guide*, March 22, 1969.

<sup>12</sup> Congressional Record, E 10174 (daily ed. Dec. 1, 1969; remarks of Hon. William D. Hathaway).

<sup>12(a)</sup> The most revealing volume about the operations of CBS is that of Mr. Salant's predecessor: Fred W. Friendly, *Due to Circumstances Beyond Our Control* (1967).

<sup>13</sup> See note 3 above.

<sup>14</sup> *Newsweek*, Nov. 3, 1969, p. 107.

<sup>15</sup> Quoted in R. May, *Love and Will* 22 (1969).

<sup>16</sup> R. May, *supra* note 15 at 21. Dr. May continues:

Since art is communication springing from unconscious levels, it presents to us an image of man which is as yet present only in those members of the society who, by virtue of their own sensitized consciousness, live on the frontier of their society — live, as it were, with one foot in the future. Sir Herbert Read has made the case that the artist anticipates the later scientific and intellectual experience of the race. The water reeds and ibis legs painted in triangular designs on neolithic vases in ancient Egypt were the prediction of the later development of geometry and mathematics by which the Egyptian read the stars and measured the Nile. (*Ibid.*)

Especially because the tempo of change accelerates in our society, art must be allowed to play its "predictive" role. We already know that most people obtain their information about the world from television, and consider it to be a more "believable" medium by a two-to-one margin over print. We should seek, therefore, to structure television in ways that will encourage its use as a medium for creative expression — in all its current formats (soap operas, situation comedies, westerns, news, investigative documentaries, advertising) — and in new, and more innovative forms. If our society's creative people, the "antennae of the race", can indeed help us to understand our future, then the structure of television must not keep them from us, or blind us to what they have to say.

*B. Diversity.* The structure of television must permit the expression of diverse views and forms of entertainment for several important reasons. The first is the rationale behind the doctrine, embodied in the First Amendment to the Constitution, that society can best gain access to the "truth" when differing ideas are allowed to compete in the crucible of open, public discussion. The opinions or views of some may startle, shock, or offend. But no man has a monopoly on truth, and America's history is replete with examples of the proposition that the ideas our society rejects today often become its mainstays tomorrow.

Diversity is also important on an individual level. The quality of each individual's life, and his capacity for attaining the greatest growth of which he is capable, are markedly enhanced if a medium of communication has been structured to permit the expression of all points of view; to offer every individual the intensely personal freedom of selection, and of self-expression, without restraint; and to permit each person to participate in the decision-making processes of government and culture that affect his life.

Finally, diversity of needs and interests demands diversity in entertainment and news if television is to serve the "public interest" in any sense — even within the terms of that stale industry bromide that "the public interest is what interests the public." Programming can be devised that large numbers of people will not turn off. But programming that is intensely compelling, and related to personal experiences and interests, must be more precisely tailored. If television is truly to become a public medium, then it must be allowed to cater to *all* those minorities that, taken together, comprise the abstraction we call the "mass audience."

*C. Flexibility.* Responsiveness to change, to innovation, to new forms of thought, should also be part of the structure of television. Some means of public communications, such as book publishing, magazines, records, films and the theater, have seemingly acquired a relatively high degree of adaptability.

It was only a few years ago, for example, that the Beatles and Rolling Stones brought rock music to the United States. Yet there are now over a half-dozen books on rock music (including several "encyclopaedias" of rock), at least two full-time rock music magazines (*Crawdaddy* and *Rolling Stone*),



literally thousands of recording companies and rock bands that have sold millions of records, numerous films (of which *Monterey Pop* was only the first), and the stage musical "Hair." Why then is it that, apart from a few abortive attempts, there has been no serious effort to present rock music on television?

"Television, to be blunt about it," says Jack Gould of the *New York Times*, "is basically a medium with a mind closed to the swiftly moving currents of tomorrow. The networks and stations have erected an electronic wall around the status quo."<sup>17</sup> If television is to be our nation's most influential medium of communication, we cannot afford to have it lag twenty years behind contemporary issues.

Flexibility in television depends on *access* — the extent to which the structure of the industry permits the entry of new ideas, new creative people, and new ownership. The FCC's fairness doctrine, which requires stations to inform their communities of all points of view on issues of controversy and public importance, has helped to some extent. Yet the three networks still exert a stranglehold over virtually all television programming production, and Congress is moving to *prevent*, rather than to encourage, citizen's groups from filing competing applications for existing television stations.<sup>18</sup>

*D. Competition.* The talent of the writers, producers, actors, and others that create and distribute the nation's broadcast news and entertainment is a valuable national resource. Yet when competition between program producers is low, there are no incentives to spur them on to superior efforts. A viable television industry must contain sufficient competitive stimuli to force a response to fresh new talent when older ways have lost their vitality.

*E. Individual participation.* Individuals need to express themselves — to communicate with others, to share thoughts and ideas, to build a sense of community, to overcome the alienation caused by a highly urbanized, industrialized, mechanized life. Yet speech depends on access to a medium of communication. A soap box in the town square is no longer sufficient. Ideas must be communicated to society as a whole. They cannot be unless the structure of television permits and encourages the participation by individuals with something to say.

*F. Prevention of excessive power.* To place control of the broadcast media in the hands of a few gives them an inordinate amount of political, economic and social power. Because politicians depend on television coverage for election to political office, they cannot risk offending those who own and control the major broadcasting media that serve their constituents. To do so is to court a "media blackout" — the swiftest form of modern

---

<sup>17</sup> N.Y. Times, March 30, 1969, p. D-21.

<sup>18</sup> Senate Bill 2004, "The Pastore Bill." For two of many versions of the pros and cons of this proposed legislation, see L. Jaffe, "We Need the Pastore Bill," and N. Johnson, "No, We Don't," *The New Republic*, Dec. 6, 1969, pp. 14, 16.

political death. Further, a media chain wields enormous national political power — even though its pattern of media ownership may not violate the narrow scope of the antitrust laws. Democracies can only function with an informed and responsible electorate. But if the flow of information to that electorate is distorted or inhibited by private concentrations of control, then the democratic decision-making process will cease to function.

## II. THE PROBLEMS OF MEDIA STRUCTURE

As Professor Jerome Barron has observed, “diversity of ideas, not multiplicity of forums, is the primary objective of the first amendment.”<sup>19</sup> Yet the major thrust of FCC decisions, as well as that of the antitrust laws, has been to promote multiplicity of forums. The reason for this is fairly obvious. Feeling the constraints of the First Amendment, the Commission has sought in its actions to create a true broadcast “marketplace of ideas” open to all views, and yet to remain “content neutral” at the same time. The FCC’s fairness doctrine, for example, creates a partial structural remedy for the uniformity and blandness in broadcasting by permitting greater *access* to the system by those with contrasting views on controversial issues.

The Commission has also sought, through its diversification of ownership policies, to increase the number of media voices in the country, hoping that diversity of ideas would ensue. Yet even these indirect efforts have generally failed. In the nation’s 11 largest cities there is not a single network-affiliated VHF television station that is independently and locally owned. All are owned by the networks, multiple station owners, or major local newspapers — and many of these owners are large conglomerate corporations as well.<sup>20</sup> Compounding this problem, most national news comes from the two wire services, AP and UPI, each serving approximately 1,200 newspapers and 3,000 radio and television stations. Newspaper cross-ownership figures are also depressing. Of the 1,500 communities with daily newspapers, for example, 96% are served by single-owner monopolies, and approximately 28% of all television stations are owned by newspapers.<sup>21</sup> In 1945 there were 177 cities with separately owned dailies; by 1966 there were only 43 — one-third as many.<sup>22</sup>

### A. Patterns of Media Concentration

Despite the many possible permutations and combinations, the following breakdowns usefully categorize the various types of media concentration.<sup>23</sup>

---

<sup>19</sup> J. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 *Geo. Wash. L. Rev.* 487, 498 (1969).

<sup>20</sup> See generally, *Television Factbook, Stations Volume* (1969-1970 ed.).

<sup>21</sup> See generally, *Hearings Before the Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary on S. 1312, “The Failing Newspaper Act*, Part 7 (1969).

<sup>22</sup> *Ibid.*

<sup>23</sup> See generally, N. Johnson, “The Media Barons and the Public Interest,” *The Atlantic*, June 1968, p. 43; The Editors, “The American Media Baronies: A Modest *Atlantic Atlas*,” *The Atlantic*, July 1969, p. 82.

1. *The Local Monopoly.* One person or corporation may dominate the various media in one community. There are communities, for example, where two newspapers and a single television station are owned by one person. Or one corporation may own both newspapers, the only television, one each of the two AM's and FM's, and the only cable television (CATV) system. The Senate Antitrust and Monopoly Subcommittee reported that, as of late 1967, there were 73 communities where one person or organization owned or controlled *all* the local newspaper and broadcast outlets.<sup>24</sup>

2. *The Regional Concentration.* In many areas of the country, one person, corporation or family exercises substantial control over the most influential media throughout a state, or perhaps a multi-state region. The Mormon Church in Salt Lake City, for example, owns KSL-TV-AM-FM and the *Desert News*, one of two daily newspapers. It is also the licensee of the educational TV-FM complex at the Brigham Young University, and its KSL-TV signal is carried on 71 translators throughout virtually every community in the State. The Church also owns a TV-AM-FM in Idaho Falls, Idaho, and a TV-AM-FM in Seattle, Washington. It has a joint-operating agreement with Salt Lake City's other daily newspaper, the *Tribune*, which in turn has substantial interests in the second of three commercial VHF stations in Salt Lake City. Whether for good or ill, the Mormon Church could be in a position to exercise considerable influence over opinion in Utah and neighbouring states.<sup>25</sup>

3. *Multiple Ownership.* A multiple owner is a person or entity that owns more than one of any particular broadcast medium. Among the biggest are ABC, NBC, CBS, RKO, Westinghouse and Metromedia. The three networks, between them, *own* 15 television and 40 radio stations— and are affiliated, of course, with more than 1,000 additional stations. RKO owns 6 television and 13 radio stations. Westinghouse owns 5 television and 9 radio stations and Metromedia owns 5 television and 12 radio stations. Such owners generally control stations in the largest, most politically influential — and most profitable — markets. The implications of this degree of multiple ownership are clear: it necessarily results in absentee ownership, substantial national political power (particularly when the stations are located in major population centers which dominate the largest States), competitive advantages in bargaining for programming, advertisers and other talent, and a probable diminution of views.

4. *Multimedia Ownership.* Often one person or company has accumulated ownership or control of media properties in ways that cut across the categories listed above. RCA, for example, owns radio and television stations, the NBC network, a book-publishing firm (Random House), a record company, and is a major manufacturer of television sets. Time, Inc., the Washington Post-Newsweek complex, Cowles Communications, and CBS are

---

<sup>24</sup> *Newspaper-Broadcast Joint Interests as of November 1968*, Table 1 (informal FCC compilation).

<sup>25</sup> See *KSL, Inc.*, 16 F. C. C. 2d 340, 346, 15 P & F Radio Reg. 2d 458, 465 (1969) (dissenting opinion).

also multimedia owners — the latter, for example, owning a television network, television stations in five major cities, a record company, musical-instrument manufacturing companies, a book-publishing company (Holt, Rinehart and Winston), educational film producers, CATV systems, Creative Playthings toys, and the New York Yankees. Significantly, media owners are increasingly involving themselves in CATV ownership. More and more, multiple-station owners, equipment manufacturers, telephone companies, newspapers, broadcasters (often serving the same area as the cable system), and large conglomerate industrial concerns are picking off valuable CATV franchises. Cable television now includes in its ranks CBS, GE, General Telephone, Kaiser Industries, Newhouse interests, RCA, Time, Inc., Westinghouse and more than fifty independent telephone companies. Broadcasters alone accounted for almost 50% of the franchise applications filed in 1967, and now have ownership interests in 32% of all operating systems.<sup>26</sup>

5. *Conglomerates.* As indicated above, CBS and RCA are also conglomerates, in that they own, in addition to their media properties, substantial non-broadcasting interests. Had ITT succeeded in its takeover of ABC, each of the networks would have been subsidiaries of conglomerates.<sup>27</sup> A lesser known example is the Mormon Church — whose media holdings were just detailed. Some of its other interests include a 50% interest in the Utah Idaho Sugar Co., a \$20 million investment in the Los Angeles Times, a 25% interest in Zion's Cooperative Mercantile Institution (a Salt Lake City department store), Beneficial Life Insurance Co., a trucking company, a pineapple plantation, a total of 600 farms, 40 mills, factories and salvage stores, and a 6,500 acre sugar plantation in Hawaii.<sup>28</sup> The problem is the danger that conglomerates are in a position to use their broadcast properties to advance their non-broadcast interests.

6. *Network Programming Production.* Equally important is the already-dominant network monopolization over the production and purchase of television programming. For all practical purposes, any writer, director or producer of television programming has only three buyers for his product: ABC, CBS and NBC. The networks customarily purchase both the first-run and the syndication rights — the entire package of ownership and control rights. For the reasons discussed below, the networks are involved in every aspect of programming production: the choice of a theme, the designation of the writer, the re-writing of the script, the choice of actors, director and producer, and the day-to-day shooting of the series. It is no accident that the three networks and their 15 wholly owned and operated television stations earn more than 50% of all television revenues (in an industry of 642 television stations), and more than one-third of all profits<sup>29</sup>

---

<sup>26</sup> See S. Schildhouse, Chief, CATV Task Force, Federal Communications Commission, Washington, D.C.

<sup>27</sup> See generally, *ABC-ITT Merger*, 7 F. C. C. 2d 245, 278 (1967) (dissenting opinion).

<sup>28</sup> See *KSL, Inc.*, 16 F. C. C. 2d 340, 346, 15 P & F Radio Reg. 2d 458, 465 (1969) (dissenting opinion).

<sup>29</sup> *TV Broadcast Financial Data — 1968*, FCC Doc. No. 35922, released August 6, 1969.

### B. Who Exercises Content Control?

Who exercises content control over television entertainment programming? The *network's* development of programming will serve as the most useful model — both because the networks are the source of the television programming watched by most people today, and because information on locally-originated programming production is scanty.

The persons who influence programming content fall into roughly three groups: the “creative” people who actually create the programming — writers, on-camera talent, producers, directors, and technicians (cameramen, lighting specialists, makeup artists, etc.); the “management” personnel who supervise the operation of a station or network as a business — program directors, financial directors, censors, managers, and owners; and “outsiders” who directly or indirectly involve themselves in the programming and daily affairs of the station or network — advertisers, industry lawyers, lobbyists, trade magazines, politicians, and viewers.

The interaction between the first two groups, “creative” and “management,” is perhaps best illustrated by the members’ own words.

For example, the *Second Interim Report on Television Network Program Procurement*, produced by the FCC’s Office of Network Study in 1965,<sup>30</sup> contains the statements of James Aubrey, then president of CBS. Here is his nutshell summary of the process by which his network acquired its entertainment programming:

The main functions of the program department are the evaluation and preparation of new entertainment program product to be considered for scheduling by the network, and continuing supervision to maintain the quality of existing programs. These programs may be produced either completely within the program department or by outside production organizations in association with CBS.

\* \* \*

Starting in about April or May of each year, [the program department]. . . begins preparation of pilots and auditions for the season which will start approximately 18 months away. . . .

In all, 100 or more ideas are considered for more detailed discussion. Based on this discussion, these possible projects are then cut to about 40 . . .

During the ensuing months, the 40 program projects are progressed. We try to advance these on a step-by-step basis in which we finance various stages of development, reserving decision whether to go on to the next stage. An ideal situation would be first to finance a detailed outline, let us say for \$2,000 or \$3,000. This permits us again to evaluate the projects at a more developed stage and, if we wish to proceed, to finance a script which might cost us from \$5,000 to \$10,000. Should our evaluation be favourable at the script stage, we would then finance an actual pilot episode, which might cost anywhere from \$80,000 to \$200,000 or more. . . .

During the summer and fall, these program projects are moved along, as I have indicated. Along the way, some drop out for reasons of creative reevaluation and some because the necessary business arrangements cannot be made; . . .

By late fall, the new projects have been whittled down to some twenty or twenty-five. . . .

---

<sup>30</sup> “Television Network Program Procurement, Part II,” *Second Interim Report by the Office of Network Study in Docket No. 12782* (FCC 1965) (hereinafter, “*Second Interim Report*”).

Our first aim in program arrangements is to furnish the tools to our program staff to insure the highest quality in creative programming. *This may involve control by the network program department of all creative decisions*, or it may provide only the right to approve scripts. (Emphasis added.)<sup>31</sup>

Aubrey's candid overview of CBS's program selection process is notable for illustrating the network's total involvement ("continuing supervision") in all aspects of creation — from formulation of the plot ideas ("completely within the program department" or "in association" with outside groups) to financing outlines, scripts and pilots, to the elimination ("creative reevaluation") of finished pilots. In short, the network involves itself in "all creative decisions."

Here is a sampling of comments recently made to me in confidence by a number of writers, directors and producers directly involved in the creation of network television programming. The sources will not be identified.<sup>32</sup>

The headwriter for one of this year's successful network shows remarked: "I was told there were to be no unorthodox opinions on TV."<sup>33</sup>

Another experienced television writer, with dozens of successful programs under his belt stated: "The system seems designed to create lousy television — the blandest, most mediocre. All writers want to get out of television. The best do; it's a levelling process."<sup>34</sup>

One said that:

Writers often use pseudonyms to avoid others knowing who wrote the show. Somebody's got to take the rap.<sup>35</sup>

---

<sup>31</sup> *Second Interim Report, supra* note 30 at 217-18.

<sup>32</sup> See note 4 *supra*.

<sup>33</sup> He went on to say:

Most writers feel their best work has never been on the networks.

Art anticipates history, but not in the U.S. I did a play in [the 1950's] about a Negro trying to register to vote in the South. It was dropped in rehearsal. . . . The network also turned down a play of mine on a woman sending her child to an integrated school.

<sup>34</sup> He said further:

The networks are involved in the creative process from the very inception. The writer may want a guarantee of air time before he starts to work. Thus, the networks get into the act during the initial 12-page presentation. There's no script then; it's creation by committee.

We make story lines simplistic to get by the network officials. They're a deadening influence from start to finish. The nets all think alike. Everybody's running scared.

The real money comes from syndication, and you have to give these rights away.

<sup>35</sup> He also noted:

Broadcasting is using its money from the public trust to contract the number of points of view — buying syndication rights, producers, writers, distributors, exhibitors, motion pictures, record companies, books, Broadway plays. A program goes from book, to play, to movie, to TV — all within the networks.

Television is sales. But you don't have to put a bad Indian on the back of a mediocre wagon.

It's impossible to write drama without controversy, but the networks have a cultural lag. What the man on the street talks about every day shouldn't be thought of as "controversial."

No production studio *needs* network money. But all take it to get on the air. CBS had to accept . . . [a major show I'd worked on] before production would begin.

And another remarked:

There are many "untouchable subjects" on TV: Southern racial problems, cops played straight (dumb, brutal), medical shows played straight (doctors who don't care if you live or die, just so they get their fee), venereal disease, drugs (often mentioned, never probed), the politics and profits of space exploration, the woman who's period is late and she's afraid she's pregnant, problems of menopause, teenagers' alienation from society, interracial couples and the miscegenation laws, the little man's fear of government and bureaucracy, the overbearing mother (not as a comedy figure, but as a serious problem), sexual problems in the first year of marriage, and so forth.<sup>36</sup>

The producer of a television series works with the writers, actors, and network program department to produce a program. Here's what one major documentaries producer for an independent studio told me about the networks:

There are a number of companies that are interested in controversy — Xerox, GE, Monsanto, ATT, Westinghouse, 3 M, North American Rockwell, and Union Carbide. But you just can't sell a news-type documentary (Vietnam, elections) to the networks.<sup>37</sup>

Two directors for another major network show told me: "Network officials really love to get involved in the content of shows. Everybody loves 'show biz.' Most managers get into it as a means to production control."<sup>38</sup>

---

<sup>36</sup> This writer described his experience with one show:

I took one show to Fox. They never try to sell anything to the networks; they just wait until the nets tell you what they want. [One network] wanted a "cop show" — you know, a Peyton Place on the police. I did a project for 26 episodes, and put in a colored cop. The network wouldn't accept it. When "I Spy" became a hit, they put him back in. The networks put up the production money and then sit around while you produce it — looking at the rushes and watching for "technical mistakes."

Censorship begins long before something gets snipped from a show. Because the writers and producers don't want to invest in trouble and spend their time creating something the networks won't buy, they develop an instinct of "internalized caution." They censor themselves. It never gets to Standards and Practices. Writers and producers aren't trying to fight the networks; they want to sell their products. The community of interest is worse than a conspiracy. They all share the same values.

<sup>37</sup> He also commented:

It's not a free market. The market is the networks. Not only won't they buy documentaries; they hire up all the good documentary directors and producers, and keep them idle. They only broadcast documentaries they've produced.

I had an idea for a documentary: what college kids do to beat the draft. But I wouldn't even *submit* the idea. The networks wouldn't accept it.

[A network] told [one company] . . . that they would have to buy *two* [network] produced documentaries before [it] would give them air time for one of their independently produced programs. [Another network] did the same thing to . . . [another company] — said they had to buy one [network] documentary for every three of their own.

<sup>38</sup> They also observed:

Television is a sales medium.

The stations and networks use the FCC as a fall guy for sponsor pressure.

Six years ago [a network] wouldn't let us use the word "pregnancy" on a show — much less do a program about it.

We're often bound by 'tie-in' agreements for talent: to get one talented person we're forced to take others in the network's stable.

Finally, here are the comments of one of Hollywood's most successful young television producers:

The chain of control goes: writer, producer, director, network, sponsor, affiliates, censor, and finally audience. By the time a program gets to the audience, there's scarcely anything left.

\* \* \*

What you've got is one long shill for snake oil. I'm supposed to keep them there for the commercial message.<sup>39</sup>

Mr. Gene Roddenberry, creator and executive producer of *Star Trek*, said in his recent book of the same name:

The television writer-producer faces an almost impossible task when he attempts to create and produce a quality TV series. Assuming he conceived a program of such meaning and importance that it could ultimately change the face of America, he probably could not get it on the air or keep it there.<sup>40</sup>

Thus, the published reports, and the earlier record testimony before the FCC, tend to corroborate my own more current and confidential data.<sup>41</sup>

These, then, are the themes that run through this body of comment: *frustration* — the best, most creative work never gets on television, scripts are made childishly simple; *excessive orthodoxy* — opinions are kept bland, networks won't buy controversial subjects; *cultural lag* — television isn't contemporary, doesn't deal with current problems; *excessive control* — network businessmen are involved in every step of the creative process; *lack of diversity* — the range of views expressed on television is extremely narrow; *self-censorship* — many give the networks what they want just to make their products marketable; *excessive commercialism* — resentment at the mutilation of their creative product to sell soap; and *monetary controls* — exercised by the networks over production funds and syndication rights.

The interaction between the "management" and "outsider" groups is more difficult to document. Essentially the "outsiders" also fall into three sub-groups: advertisers; politically-oriented groups (lawyers, lobbyists, trade magazines, politicians); and viewers.

Stanley Cohen has admirably discussed advertiser control over programming in his paper, and I will not attempt to add to it.<sup>42</sup> The point bears reiteration, however, that as Professor J. K. Galbraith has said, radio and

---

<sup>39</sup> Here are other blunt views:

The supposed existence of the "Bible Belt" means that all profanity is out. The networks ask, "Will *anyone, anywhere*, be offended or disturbed?" If so, it's out. It's simply impossible to do realism without the slightest bit of profanity.

[Speaking of a particular new television series:] People will be lied to for three years. That's not what a motion picture studio is really about.

Anyone with anything to say runs from the medium.

TV makes people unwilling to face truths when they do encounter them.

<sup>40</sup> S. Whitfield & G. Roddenberry, *The Making of Star Trek* 21 (1968) (paper ed.).

<sup>41</sup> See materials cited at note 3 *supra*.

<sup>42</sup> S. Cohen, "The Advertiser's Influence in TV Programming." (1969-70), 8 Osgoode Hall Law Journal 91.



television are "the prime instruments for the management of consumer demand."<sup>43</sup> The real threat of advertising censorship, therefore, comes not from direct advertiser control, but from the advertiser's need for bland "Musak" programming against which its more dramatic commercials will stand out. One cannot overemphasize the importance of this in an industry that has watched its advertising revenues soar from \$300 million in 1952 to over \$2.5 billion in 1968.<sup>44</sup> Walter Lippman's remark puts it bluntly: "by constantly pandering to the largest possible audience in search of the most profitable advertising, television has become . . . the creature, the servant, and indeed the prostitute of merchandising. . . ."<sup>45</sup> The real threat from advertising censorship comes from the obeisance that creative people and management pay to the demands of such a system.

The impact of "political questions" on television programming is equally difficult to document, for the primary sins are those of omission. Tokenism there may be. But consider, for example, how many documentaries or how much news coverage you've seen on the impact of television itself on our society — on the Pastore Bill (to eliminate competing applications for radio and television stations), news "staging" problems, information on the process of assembling a network news program, critics talking about the quality of the networks' new fall programs, the impact of television on children, the impact of televised violence on society, the extent of deceptive television advertising, and the growing resentment at incessant commercial interruptions. How many documentaries have you seen on the subject matter in Joe McGinniss's best seller, *The Selling of the President 1968*, or the radiation and fire hazards from television sets?

My point is simply that all these questions involve potential criticism of television itself, and might result in "corrective legislation" from Congress. It is therefore in the interests of a whole gaggle of parties — lawyers, Washington vice-presidents, trade press, trade associations — to warn networks and stations to avoid such "controversial" self-criticism like the plague.

Finally, there is that vast, vague, undefined mass of viewers called "The Audience" — in whose name the television industry supposedly justifies its programming fare. The audience's leverage over television programming is potentially great. As one Hollywood writer remarked, "People don't realize that a nationwide product boycott for three days would get any show off the air."<sup>46</sup> Of course, this power is seldom, if ever, used.

### C. *How Control is Exercised*

Content control may be exercised in different ways — from the blunt telephone call or intra-corporate memo to anticipatory self-censorship by

---

<sup>43</sup> J. K. Galbraith, *The New Industrial State* 218 (1967) (paper ed.).

<sup>44</sup> Compare the FCC's yearly publication, *TV Broadcast Financial Data*, for 1952 and 1968.

<sup>45</sup> Quoted in F. Friendly, *Due to Circumstances Beyond Our Control* 116 (1966).

<sup>46</sup> See note 4 *supra*.

writers and producers trying to guess management's desires. This control is best seen in five areas: direct content specification; personnel policies; financial policies; anticipatory self-censorship; and outside pressures on management.

1. *Direct content specification.* The most obvious examples of content control are the explicit instructions to program creators. In the 1948 *Richards* case, for example, the management of KMPC in Los Angeles sent reporter Clete Roberts to Japan to do a favorable radio program about General Douglas MacArthur, hoping it would boost his chances for a Presidential candidacy. Among other things, Roberts was instructed to delete any references to MacArthur's age. He was fired when he mentioned a tremor in MacArthur's hand.<sup>47</sup> In the mid-1940's, newscaster Norman Corwin was told by memorandum from the management of station WLW that "[n]o reference to strikes is to be made on any news bulletin broadcast over our station."<sup>48</sup> When Corwin mildly objected, he was fired. And the FCC has only recently begun to investigate allegations (not yet tested or proven by hearing) that the management of KRON-TV in San Francisco instructed employees to slant documentaries, and to present favorable coverage of mayors who one day might be in a position to grant the licensee's parent a CATV franchise.<sup>49</sup>

Direct programming specifications seem infrequent in entertainment — no doubt because the program purchasers (the networks or individual stations) directly involve themselves in programming from its very conception, and because "pre-censorship" by writers and producers is so widespread. Yet Senator Dodd's investigation into televised violence in the early 1960's hints at the widespread nature of even this practice.<sup>50</sup> One independent producer, for example, over a sponsor's objections to excessive violence, was asked by memo to "inject an 'adequate' diet of violence into scripts."<sup>51</sup> Another executive demanded: "Give me sex and action."<sup>52</sup> Other shows were criticized as being "a far cry" from top management's orders to deliver "broads, bosoms, and fun."<sup>53</sup> And one producer testified, "I was told to put sex and violence in my show."<sup>54</sup>

Far more pervasive and insidious than the "executive memorandum" is the refusal of a station or network to purchase programming which falls out-

---

<sup>47</sup> E. Barnouw, *The Golden Web* 258 (1968).

<sup>48</sup> E. Barnouw, *supra* note 47 at 118-19.

<sup>49</sup> *Chronicle Broadcasting Co.* [Specification Order], 17 F. C. C. 2d 245, 250-55, FCC 69-376 (Docket No. 18500, Adopted April 16, 1969).

<sup>50</sup> "Television and Juvenile Delinquency," *Interim Report of the Subcommittee to Investigate Juvenile Delinquency*, pursuant to S. Res. 274, (88th Cong. 2d Sess. (1965) (hereinafter "*Dodd Committee Report*").

<sup>51</sup> *Dodd Committee Report*, *supra* note 50 at 24.

<sup>52</sup> *Dodd Committee Report*, *supra* note 50 at 30 (attributed to Mr. James Aubrey, then President of CBS).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Dodd Committee Report*, *supra* note 50 at 34.

side certain stated implied "guidelines" of "controversiality"—often described as the "limits of good taste." In his book, *Due to Circumstances Beyond Our Control*, Fred Friendly reports a conversation between Edward R. Murrow and William S. Paley, President of CBS:

"Bill," Murrow pleaded at one point, "are you going to destroy all this? Don't you want an instrument like the *See It Now* organization which you have poured so much into for so long, to continue?"  
 "Yes," said Paley, "but I don't want this constant stomach ache every time you do a controversial subject."<sup>55</sup>

Perhaps of greater importance is that such conversations seldom if ever occur. They are unnecessary.

The newsmen or writers, as one network executive put it, "don't want to commit money to a property that might get into trouble, so they don't even bother with something different."<sup>56</sup> Controversy is therefore removed by self-censorship long before it reaches the corporate board rooms. To verify this, ask yourself how many "controversial" programs ever reach the roughly 100 hours a week of network prime-time programming. How many programs have you seen that seriously dealt with abortion, brutal military weaponry, sympathetic attempts to understand the Black Panthers' world, police brutality toward minority groups (blacks, the poor, the young, the immigrant), oppression in draft boards and high schools, the Justice Department's attitudes toward dissent, the slowdown in the administration's protection of civil rights, conflicts of interest by Congressmen, anti-consumer lobbying by large corporations, racism, venereal disease, sexual problems of the young married, and so on?

Another obvious form of direct content specification is censorship during the production of programming. The Smothers Brothers reported, for example, that network censors made cuts in 75% of their programs.<sup>57</sup> Some examples of production censorship are just plain silly. For example, Stan Opotowsky reports in his book, *TV — The Big Picture*, that "Ford deleted a shot of the New York skyline because it showed the Chrysler Building."<sup>58</sup> And "a breakfast-food sponsor deleted the line 'She eats too much' from a play because, as far as the breakfast-food company was concerned, nobody could ever eat that much."<sup>59</sup> Other examples are less amusing — such as the silencing of Joan Baez by CBS when she wished to express her views about the Selective Service system on the Smothers Brothers show; the censoring of a visually creative piece of entertainment by Harry Belafonte involving film from the Democratic Convention or the network's refusal to let Benjamin Spock appear on the program (on grounds he was a convicted felon).

---

<sup>55</sup> F. Friendly, *Due to Circumstances Beyond Our Control* 92 (1966).

<sup>56</sup> S. Roberts, "Playing It (Very) Safe," *N.Y. Times*, July 27, 1969, p. D-15.

<sup>57</sup> W. Kloman, "The Transmogrification of the Smothers Brothers," *Esquire*, October 1969, p. 148.

<sup>58</sup> S. Opotowsky, *TV — The Big Picture* 83 (1961).

<sup>59</sup> *Ibid.*

The culmination of this humorless approach to comedy was CBS' ultimate censorship: the eventual cancellation of the whole show.<sup>60</sup>

A final instance of direct content specification involves the "post-broadcast review," in which management assesses the audience ratings, feedback from viewers on the program's quality, and advertisers' comments, and makes programming adjustments. The audience ratings are, of course, given great respect. Advertisers want networks and stations to deliver audience — and the more delivered, the more they are willing to pay. As James Aubrey, former President of CBS, testified before the FCC in 1965, ratings

. . . tell how a program fares competitively, how the size of a program's audience compares to the programs in the preceding and following time periods and, over a period of time, whether the audience of the program increases or diminishes in size. . . The interests of our advertisers, our affiliated stations and our viewers all are influenced to varying degrees by ratings.<sup>61</sup>

Unfortunately, a station or network may often cancel a particular program merely because it receives a higher proportion of complaints than other shows. Yet is it not possible, or even likely, that the level of complaints received is a pretty good measure of a program's *success* — at least in stimulating controversy and provoking thought? The audience feedback effect, therefore, may eliminate the worthy just to enshrine the mediocre. The question we must eventually address, therefore, is how we can change this pervasive system of self-censorship by *structural* modifications in the broadcasting industry.

2. *Personnel policies.* I believe there may be a direct correlation between concentration of control over the broadcast media and the type of person hired to make programming decisions. There are no sociological studies of the broadcasting industry that directly confirm my belief. But the studies in related fields provide substantial support. It's time we asked whether there are institutional factors in large bureaucracies, including the oligopolistic networks, that determine what kinds of persons are hired and retained, promoted, given access to top management, or excluded because of membership in minority groups.

In 1956, William H. Whyte, Jr., published his landmark work, *The Organizational Man*, a study of corporate bureaucracies. In a chapter entitled, "The Fight Against Genius," Whyte asked why only four of the top 225 scientists in the country held jobs in industry. His conclusions were revealing. "By its very nature," he wrote, "discovery has an accidental quality." Curiosity must be allowed to follow almost a random course, to meander into areas whose practical value is not immediately apparent. "Rationalize curiosity too early, however, and you kill it." Yet he found that corporate management consistently view the desire to do "free" research as "a downright defect — a symptom of maladjustment that demands cure, not

---

<sup>60</sup> For general treatment of these and other incidents, see W. Kloman, *supra* note 57; N. Hentoff, "Who Controls TV,? *Look*, June 24, 1969, p. 27.

<sup>61</sup> *Second Interim Report*, *supra* note 30 at 231.

coddling. When a man wants to follow his own hunch, they believe this is a warning that he is not 'company-oriented.' The solution? Indoctrination."<sup>62</sup>

Anne Roe, writing in the *Scientific American*, supplies confirmation for Whyte's thesis. The most important single factor in the making of a scientist, she concludes, "is the need and ability to develop personal independence to a high degree."<sup>63</sup> Yet corporations have gained notoriety for refusing to hire brilliant scientists because they might disrupt the "organization." Socony-Vacuum Oil Company's booklet on company policy expresses this fear admirably: "There is little room for virtuoso performances."<sup>64</sup> And a Monsanto Chemical Company promotional film announces: "No geniuses here; just a bunch of average Americans working together."<sup>65</sup> Thus mediocrity and harmony appear to be corporate values that prevail over an individual's brilliance.

Our question is: do these same pressures toward mediocracy operate inside the huge bureaucracies of the three networks? Consider this statement made by CBS in its 1963 Annual Stockholders' Report:

[O]ur ability to produce a program schedule which year after year commands the largest audiences in broadcasting is founded [in part] on . . . *the continuing participation of the Network's programming officials at every stage of the creative process from the initial script to the final broadcast.* This applies not only to the occasional special program, but to the day-to-day production of continuing program series.<sup>66</sup>

(Emphasis added.) The television industry, dominated by the three networks, weighs in heavily at every stage of programming production.

The social philosopher Paul Goodman believes it is "the nature of our institutions that the wise and the benevolent do not rise to the top; the safe rise to the top. . . ."<sup>67</sup> Yet those network programming officials who do rise to the top are apparently the ones who openly participate in "every stage of the creative process from the initial script to the final broadcast." It is difficult to imagine how the writer, producer or director can keep *free* "for things to happen, for the [creative] accident," as Dennis Hopper puts it, under these circumstances.

The point is amply illustrated by the media's treatment of racial problems in the 1960's. "[T]he communications media," reported the Kerner Commission last year, "ironically, have failed to communicate."<sup>68</sup> That

---

<sup>62</sup> W. Whyte, Jr., *The Organization Man* 229, 231 (1956).

<sup>63</sup> *Scientific American*, Nov. 1962, quoted in W. Whyte, Jr., *supra* note 62 at 232.

<sup>64</sup> W. Whyte, Jr., *supra* note 62 at 235.

<sup>65</sup> W. Whyte, Jr., *supra* note 62 at 235.

<sup>66</sup> *Second Interim Report*, *supra* note 30 at 730.

<sup>67</sup> P. Goodman, "The Social Perspective," reprinted in S. Donner (ed.) *The Meaning of Commercial Television* 71 (1967).

<sup>68</sup> *Report of the National Advisory Commission on Civil Disorders* 383 (Bantam ed. 1968).

failure has cut the average American off from the degradation, alienation and helplessness of the Negro ghetto resident. Obviously, there is no one better suited to portray the Negro against the backdrop of American society than the black citizen himself. Yet, too often, Negroes and other minority groups are excluded from participation in the creation of television programming. This problem has become so serious that the United States Justice Department is currently investigating the three networks for discriminatory hiring practices.<sup>69</sup>

Finally, there is some evidence that the networks have been successful in hiring most of the creative talent in certain fields — documentaries, for example — and keeping them idle or occupied with non-controversial tasks.<sup>70</sup> To the extent that creativity and unrestrained individual expression are programmed out of the industry's personnel policies, we may have to turn to structural solutions.

3. *Financial Management.* In important ways, the television industry's financial policies directly bear on the content of its programs. A station or a network may pride itself on an absolute "hands off" policy toward the content of its news programs. Yet that management may censor just as effectively by restricting news broadcasts to a few minutes a day, or giving news staffs crippling budgets with which to operate. No newsman can discuss major issues adequately during minute-and-a-half clips on the evening news. His predicament is a direct, yet less obvious, form of content control.

Several questions must be asked. What production units in any television operation are given resources and financial backing — news and documentary production units, or entertainment and comedy serial "teams"? When new financing becomes available, what new units are established? When programs are eliminated to improve profit-and-loss statements, which programs are the first to be axed — public affairs programming, or mass appeal lowest-common-denominator programming? Most importantly, do policies of "profit maximization" and "mass merchandising" eliminate special appeal or minority-oriented programming?

Based on testimony from many performers, writers, directors, and producers before the FCC, the Commission's Office of Network Study concluded that,

. . . the policies and practices of network managers . . . tended to substitute purely commercial considerations based on circulation and "cost per thousand" for considerations of overall service to all advertisers and to the various publics, as the dominant motives in the plan and design of network schedules. In other

---

<sup>69</sup> See e.g., *Variety*, October 31, 1969, p. 1 (daily ed.).

<sup>70</sup> One leading Hollywood producer of documentaries told me:

It's not a free market. The market is the networks. Not only won't they buy documentaries; they hire up all the good documentary directors and producers, and keep them idle. They only broadcast documentaries they've produced.

See note 4 *supra*.

words network television became largely a 'slide rule' advertising medium principally motivated by a commercial concept. . . .<sup>71</sup>

Obviously there are exceptions. Stations and networks do, on occasion, promote some token "higher quality" programming (even at lower profits) for the benefit of their "public image" and the FCC — not surprisingly, just before license renewal time, and accompanied by full-page promotional newspaper advertisements in case those they wish to impress are numbered in that growing class of Americans who are watching less and less television and would otherwise have totally overlooked the program. In larger markets, particularly in radio, there is some attempt to carve out particular audience segments and cater to their tastes and preferences. Pacifica radio, for example, has been successful in fulfilling certain minority needs and interests.

But the generalization seems safe: the television industry seeks to maximize audience (and thus profits) in virtually every time segment available to it. It is as if every major book publisher bid only for the "Peyton Place" market.

4. *Anticipatory self-censorship.* Television writers, producers and directors, like the rest of us, do not eagerly engage in futile acts. In the television industry, "futility" may be the submission of work that does not conform to pre-conceived corporate standards of saleability. One network executive concerned with program standards remarked to Steven Roberts of the *New York Times*:

Most of the stuff never even reaches us. There's a tremendous amount of self-censorship, not only by network executives, but by writers and producers as well. They don't want to commit money to a property that might get into trouble, so they don't even bother with something different.<sup>72</sup>

A successful television writer remarked to me, "We make story lines simplistic to get by the network officials."<sup>73</sup> Another said, "Writers and producers don't want to invest in trouble and spend their time creating something the networks won't buy." They develop an instinct of "internalized caution."<sup>74</sup>

George Schaefer, one of the few independent television producers, argues that the great advantage of being "small and comparatively independent is that we can afford to take considerably greater artistic risks than can any network or corporate structure which is controlled by a board of directors and answerable to stockholders."<sup>75</sup> Yet those who do produce an independent product often find themselves turned away from the stations' and networks' door. Even those outside the corporate hierarchies must either conform or forego the sale of their product.

---

<sup>71</sup> *Second Interim Report, supra* note 30 at 535.

<sup>72</sup> S. Roberts, "Playing It (Very) Safe," *N.Y. Times*, July 27, 1969, p. D-15.

<sup>73</sup> See note 34 *supra*.

<sup>74</sup> See note 36 *supra*.

<sup>75</sup> G. Schaefer, "The Independent Producer," reprinted in S. Donner, *The Meaning of Commercial Television* 23 (1967).

5. *Outside pressures on management.* Pressures for content control also come from outside the "creative" or "management" areas. Perhaps the most obvious source is commercial sponsors. Yet the nature of advertising pressure appears to have changed over the past two decades.

In the 1950's, the so-called "Golden Age of Television," over one-half of network evening schedules were filled with independently produced programs licensed and sold to advertisers.<sup>76</sup> Many corporations sought to associate "high quality" programming with their corporate image—apparently feeling the quality of the presentation was more important than the size of the audience.

All this changed, in large part from the challenge of ABC's "counter-programming" in the 1950's. It also resulted from the policy of first acquiring programming directly from independent producers (eventually buying up even the independent producers to bring them into the corporate fold) and then selling advertisers compartmentalized one-minute slots.<sup>77</sup>

Today, the volume of independently produced programming shown by the networks has shrunk from 50 to less than 10 percent.<sup>78</sup> More than 93% of all evening network fare is under direct network supervision from start to finish.<sup>79</sup> The networks now promote the "magazine concept" whereby all programming is prepared under the auspices of the networks and time is offered to the sponsors. This procedure spreads the "risk" of buying a bad show among a collection of sponsors. Sponsors can also obtain variety in their spots by distributing them throughout the evening's schedule. On the other hand, the magazine concept pretty clearly promotes programming homogeneity. Each time slot must be filled with programming which is sufficiently standardized to appeal to any sponsor—whether cigarettes, automobiles, mouth wash, or deodorant. Every "media meal" is prepared for the "average" diner.

Another "outside pressure" for content control comes from management's reaction to the presumed desire of stockholders to have their investments reflect a "cheerful market picture." The equation is simple: viewer ratings determine advertising rates, which in turn determine corporate profits, which in turn determine stock dividends and stock market prices. Deviations from the audience maximization goal, therefore, are interpreted as corporate mismanagement or disloyalty.

Two "outside pressures" occasionally serve to counteract this audience maximization tendency. The first is the critic, whose vitriolic sarcasm over

---

<sup>76</sup> *Second Interim Report*, *supra* note 30 at 209.

<sup>77</sup> *Second Interim Report*, *supra* note 30 at 182.

<sup>78</sup> *Competition and Responsibility in Network Television Broadcasting*, 30 Fed. Reg. 4068-69 (1965).

<sup>79</sup> *Remarks of Ashbrook P. Bryant*, Before the Annual Radio-TV Conference and Clinic, Norman, Oklahoma, March 4, 1967.



network mediocrity may occasionally bring forth a superior production. The Alfred I. duPont-Columbia University Television Awards, for example, may fulfill this "carrot-and-stick" function.<sup>80</sup> The second pressure is the politician. Thus, early this year Senator Pastore denounced excessive "sex and violence" on television. And in the view of one network executive, Senator Pastore's hearings "had an inhibiting effect throughout the industry."<sup>81</sup> There was, however, an additional political tidbit to tempt the broadcasters into compliance with "Pastore's Complaint." That was his proposed bill, S. 2004, which would substantially secure television licenses from the threat of competing license challenges. As *Variety* magazine remarked, "At gunpoint, and given the choice of 'your money or your life,' the ordinary citizen promptly yields up his money. Not so the broadcaster."<sup>82</sup> Sacrificing programming content in return for economic security is but one example of obeisance to political pressure.

#### D. Motivations for Content Censorship and Control

These, then, are the more prominent motivations which cause the "creative," the "management," and "outside" elements of the broadcasting industry to control program content:

1. *Profit maximization.* During the legislative debates in 1934 over the proposed Communications Act, Secretary of Commerce [later President] Herbert Hoover warned that there must be "something more than naked commercial selfishness" in broadcasting,<sup>83</sup> and Congressman White of Maine announced that "the right to broadcast is to be based . . . not upon the selfish desire of the individual."<sup>84</sup> Their fears have today come to haunt us. The supreme goal has become ratings, cost per thousand, and advertising revenue. This single-minded drive for profits has quite naturally produced many of the motivations for content control that follow.

2. *Uniformity and blandness.* Centralized network control over programming produces uniformity and blandness just as certainly as all meat, run through the same grinder, inevitably emerges hamburger. William H. Whyte, Jr. found little room for non-conformity, initiative, experimentation or daring in centralized bureaucracies—which operate by the research team, the planning committee, the writers' co-ordinator, and the production unit.

---

<sup>80</sup> See M. Barrett (ed.), Alfred I. duPont-Columbia University *Survey of Broadcast Journalism 1968-69*.

<sup>81</sup> S. Roberts, "Playing It (Very) Safe," N.Y. Times July 27, 1969, p. D-15.

<sup>82</sup> *Variety*, March 26, 1969, p. 74 (daily ed.)

<sup>83</sup> *Fourth National Radio Conference 7-8* (Nov. 9, 1925), quoted in Rosenbloom, "Authority of the Federal Communications Commission with Respect to the Programming of Radio and Television Broadcasting Stations," in J. Coons (ed.), *Freedom and Responsibility in Broadcasting 96* (1961).

<sup>84</sup> 68 Cong. Rec. 2579 (1934).

In the world of science, for example, during the last thirty years, the great advances, with few exceptions, did not come from corporate laboratories. Thus, Kodachrome was invented by two musicians in a bathroom, not Eastman Kodak.<sup>86</sup> None of the first important jet engine developments came from the established German, American or British aircraft firms.<sup>86</sup> Similarly in films, the truly creative works have most often come from small innovative groups operating on the fringes of the larger studios. Television during the 1950's developed programming for minority as well as majority tastes, in part because much of the creative talent that came from "outside" the established network bureaucracies—from the theater, from the movies, from the print media—had catered to these tastes.<sup>87</sup> By the early 1960's, however, the networks had successfully drawn the most creative talent into their corporate folds (or driven it out of television entirely), and the pressures for uniformity inevitably began to operate.

Blandness and uniformity seem to increase in direct proportion to the numbers of decision-makers involved. When programming decision-makers are grouped into three networks, with identical competitive goals of profit-maximization through mass appeal programming, then the pressures for uniformity are intensified.

3. *Fear of controversy.* There is an old maxim in politics that warns, "The more you say, the more you'll antagonize *someone*." The same appears true of television. Much television programming appears motivated primarily by the nervous desire to offend *no one*. The ideal program is presumably one that receives *no* letters of comment, not one that produces 500 thoughtful letters of approval and 500 letters of outraged complaint. Although network and sponsor no doubt appreciate 500 approving letters, the 500 negative ones make their blood run cold. The stimulation of discussion and controversy, in First Amendment terms, is a prime political and social good. For modern television, however, it is the primary evil.

In many ways the fear of controversy is peculiar to bureaucracies. The operative motivation in most bureaucracies is to avoid mistakes, not to attempt innovation or creativity. The First Bureaucratic Commandment is always: Act so that no one can hold you responsible if something later goes wrong. The same motivations operate within television bureaucracies. For a "Programming Committee" to pass approval on a 12-page program series outline is a little like the Department of Defense passing on a 12-page outline for the book *War and Peace*. Too many minds, like too many cooks, consistently spoil the broth. As Paul Goodman remarks, "[m]y theme is

---

<sup>86</sup> W. Whyte, Jr., *The Organization Man* 238 (1956).

<sup>86</sup> *Ibid.*

<sup>87</sup> *Second Interim Report*, *supra* note 30 at 535.

not . . . the bad taste of the masses, but the theme that too few minds are in control, and they pander to this bad taste."<sup>88</sup>

Bureaucracies even operate before creative people have injected their product into the system. Clyde North, for example, recently wrote this letter to *Variety* magazine:

Am developing a slow burn over the treatment accorded me by two of our top ranking TV stars who have their own programs. They employ an office staff and a legal department whose solemn duty is to see that nothing new, fresh or original ever reaches the eye or ear of The Presence! I believe this has a profound bearing on the problems confronting a writer, even an experienced one, who finds that he can't even get a hearing for his material. It might also account for the largely stagnant condition of TV and account for the criticism that it is "a vast wasteland."<sup>89</sup>

4. *No product distraction.* Abbie Hoffman has perceptively observed that most one-hour discussion programs contain about fifty minutes of "dry debate" and ten minutes of previews, station identification, and commercials. (In fact, he gives the industry too much credit. It's a rare hour that devotes as little as 10 minutes to such matter.) He says, in *Revolution for the Hell of It*,

Notice the way this ten minutes is treated as compared to the other fifty minutes. Notice the camera angles, cuts, flashes, zooms. Notice the play to the viewers' needs. Notice the appeal to "do what you've always wanted." *The commercial is information. The program is rhetoric.* <sup>90</sup> (Emphasis added.)

Others have noticed this too. Paul Goodman believes "the only part of television which has fulfilled its promise at all is the commercials . . . the only part that has any aesthetic validity, . . . that uses montage [and] . . . animated cartoons. . . ."<sup>91</sup>

Is this just accident? I don't think so.

Many sponsors spend \$50,000 to \$100,000 just producing a major one-minute commercial (each exposure on the network may cost almost as much!) — an amount that exceeds the production costs for some half-hour "programs." But there is more to it than this.

It is my suspicion that a commercial's effectiveness depends in substantial part upon the lack of quality of the program in which it is placed. For the same reason that raisins are more distinctive in cereal than in fruit

---

<sup>88</sup> P. Goodman, "The Social Perspective," in S. Donner (ed.), *The Meaning of Commercial Television* 69-70 (1967). Mr. Goodman also observed:

[O]ne disadvantage of over-centralization of control is that it determines the kind of bad taste; it interferes with the people's natural bad taste. . . I . . . think there is a large number of people who would prefer much stupider entertainment than even NBC, ABC or CBS dare allow. I wish those people would get the stupider entertainment that they really want. You see I am not an elitist . . . I believe people should get what they want in a free market.

*Id.* at 70.

<sup>89</sup> Letter to *Variety*, Oct. 22, 1969, p. 51 (daily ed.)

<sup>90</sup> A. Hoffman, *Revolution for the Hell of It* 133 (1968) (paper ed.).

<sup>91</sup> P. Goodman, *supra* note 88 at 71.

cake, the message and impact of commercials is more effective in mediocre programming than in moving drama, stinging satire, or realistic documentary. Can the television viewer be truly responsive to the blandishments of under-arm deodorant or mouthwash following the video death of an Oedipus, a Hamlet, or a Willey Loman? Did the Smothers Brothers' satire of the Vietnam war soothe the average American businessman into the tranquility apparently demanded to sell him airline trips to the Orient? Do documentaries on lung cancer, automobile safety, or contaminated foods provide the necessary atmosphere for sales of cigarettes, automobiles, and processed meat? Surely not.

Television's solution, I think, has been "cotton candy" programming: all form, no substance. A friend told me of watching a leading television western the other day. It was literally stuffed with "action" techniques: dramatic music, quick camera cuts from face to face, long pregnant pauses between antagonists, innumerable full-face close-ups to build "tension" between characters, and long, 10 or 12-minute crescendos from static dialogue to tantalizing promises of violent action. It held his attention, it made him wait through the commercials, yet after a full *hour and a half*, what had happened? Someone falsely arrested had been released when the true culprit was discovered. Nothing more. No character development, no psychological insight, no study of fear, cowardice, or greed — simply a plot resolution. He had "eaten" cotton candy entertainment for an hour and a half. And after all that time, his stomach was empty and an unpleasant taste lingered in his mouth. He had been "captured" by content-less technique, then "set up" for the real message — the short bursts of drama, action and information we call "the commercial."

5. *Fantasy and escapism.* During the 1950's television was a focus for original theater, "live" productions, experimental camera techniques, and serious drama. The networks soon found, however, that they could capture larger and larger audiences through "action-adventure" programming (westerns or detective series) and situation comedies. These newer forms provided enough excitement to hold the viewer's attention, yet did not distract him with any *substance* from the commercial message. Further, escapist fare (the romantic "Old West," the futuristic "Space Operas," etc.) provided perfect backgrounds for "escapist" commercials — Marlboro men, the sexual fantasies brought on by deodorants and hair sprays, romantic airline vacations to Hawaii, and futuristic rides in "stylish" (if unsafe) automobiles. Fantasy and escapism may stem from a need to forget the pressures of contemporary life. But it seems more than coincidental that escapist programming meshes so effectively with commercialism.

6. *Selective or inflammatory news.* There's nothing more popular than an accident or a fire. And too often accidents, fires and similar excitement provide the content for "20-20 Bannerline Top-40 News" programs. Indeed, network television news shows have acquired all the trappings of the leading entertainment series: drama, music, familiar actors, adventure, color and action. The hard fact is that these techniques pay off in high ratings.

Over-emphasis on the sensational and the bad, however, is often recognized by newsmen themselves. Thus, Edward R. Murrow said in 1958 that "[t]he top management of the networks . . . has been trained in advertising, research, sales or show business. But by the nature of the corporate structure, they also make the final and crucial decisions having to do with news and public affairs. Frequently they have neither the time nor the competence to do this."<sup>92</sup> This mixture of news and commercialism may also explain Milton Eisenhower's criticism of the news medium: "for a long, long time it has given greater news value to conflict than it has to the fundamental knowledge that the people need in order to make wise, democratic decisions."<sup>93</sup> Nicholas Von Hoffman — who is now writing some of the most insightful radio and television criticism — wrote a column on "Radio Newscasts" worth quoting. Fresh from the recent Radio Program Conference in Atlanta, Georgia, von Hoffman observed:

With certain admirable exceptions radio news is a bad, venal service performed by ignorant, incompetent men who lack every qualification to gather, edit, arrange and disseminate important information. More often than not, your radio newsmen is the loudmouth on the bar stool next to you in the neighbourhood tavern. . . .

In response to a question from a radio newsmen who had had to cover a series of racially motivated fire bombings in his city, Dobbon [news director of station KIKK, Houston, Texas] said that, "In Houston, if that was going on, . . . I'd go down to the major sporting goods store and sell them a spot for a firearms sale. . . My main point is sensationalism; death can be fun; you can sell it. And just wait 'til we get our television station on the air (Channel 26) in June. When our six o'clock news features the in color showing of the autopsy, they'll all be tuned in to us."<sup>94</sup>

Little more need be said. In such extremes, the marriage of sensationalism and commercialism is complete.

7. *Promotion of related business interests.* During the 1967 FCC hearings on the proposed merger of ITT and ABC, an AP, a UPI, and other reporters testified to receiving several phone calls to their homes by ITT public relations men asking them to change stories. ITT apparently felt the reporters newspaper coverage of the proceedings was unfavorable to the corporate cause. In one instance, an ITT senior vice-president went to a reporter's office, criticized the tone of her articles in the *New York Times*, and reminded her of her "responsibility to the shareholders [of ITT] who might lose money as a result of what" she wrote.<sup>95</sup> Imagine the result if the ITT-ABC merger had been approved! ITT has many sensitive business relations at highest levels of government and in foreign countries. ABC newsmen would have had that thought constantly in their minds, and any lapses of memory could have easily been remedied by a thoughtful call from the ITT public relations department.

---

<sup>92</sup> E. Murrow, "Address to the Radio and Television News Directors Association Convention," Chicago, Illinois, Oct. 15, 1958, reprinted in H. Skornia, *Television and Society* 231-32 (1965) (paper ed.).

<sup>93</sup> N.Y. Times, Dec. 16, 1969, p. 24 (daily ed.)

<sup>94</sup> Washington Post, Dec. 10, 1969, p. C-1.

<sup>95</sup> See *ABC-ITT Merger*, 9 F. C. C. 2d 546, 593-97 (1967).

Communications properties are currently very attractive conglomerate acquisitions. Broadcast properties frequently offer handsome profits to the owners (the television industry *averages* a 100 percent return on depreciated tangible investment *annually*), and provide conglomerate corporations with funds to drain off and pump into other projects. (After ITT had argued to the FCC that it would strengthen ABC's financial resources, an intra-corporate ITT memorandum came to light revealing ITT's intention to drain \$100 million *from* ABC during the next five years to assist in other conglomerate corporate acquisitions.)<sup>96</sup> But there is a more serious problem. And that is the extent to which conglomerates use their broadcast properties to promote other business interests — through advertising or pap and propaganda. The ITT-ABC episode illustrates the dangerous potential for such abuse. The FCC has, at long last, begun an inquiry into such problems.

8. *Psychological controls.* One motivation for content control in the television industry might be described as "consciousness of others." Such self-censorship may be inoffensive — or even highly commendable in certain situations. Yet it can operate as a serious danger when "programming executives" censor out ideas, concepts and forms of entertainment which they consider to be excessively "controversial," "too political," or "not suitable for the Kansas audience." The United States Supreme Court has recently stated it to be "well established that the Constitution protects the right to *receive information and ideas* . . . regardless of their worth . . . as fundamental to our free society."<sup>96(a)</sup> And many believe that the value of an idea is directly related to its ability to disturb, to shake the complacent out of more comfortable views, to force the consideration of new alternatives. If the network bureaucracies operate on the principle that people must be spared any unsettling idea or concept, then we had best reconsider our views of existing media structure.

9. *Politics.* There is little doubt that the broadcasting industry comprises the most powerful political lobby this country has ever known. Never in history has any handful of men had more power than the men who control Big Broadcasting. When Bill Henry, former Chairman of the FCC, rather innocently proposed to adopt the industry's *own standards* for limiting the number of commercials during an hour, the industry reacted in shock and hastily got a law through the House forbidding such a radical move.<sup>97</sup>

---

<sup>96</sup> See *Letter from Donald F. Turner, Assistant Attorney General, Antitrust Division, United States Department of Justice, to Rosel H. Hyde, Chairman, Federal Communications, Dec 20, 1966, reprinted in ABC-ITT Merger, 7 F. C. C. 2d 245, 331, 332 (1967):*

ITT's estimates indicate that ABC's earnings growth rate over the next 5 years would be 16 percent. More importantly, it was anticipated that after capital expenditures and debt repayment, and assuming ABC continues in third place, *it would yield a cash flow approaching \$100 million between 1966 and 1970, almost all of which was thought by ITT to be available for reinvestment outside the television business.* (Emphasis added.)

<sup>96(a)</sup> *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

<sup>97</sup> House Resolution No. 8316 (1961).

When the FCC took away the license of Boston television station WHDH, an action virtually unheard of in the history of Commission indecision, the industry promptly secured the introduction of S. 2004 by 27 Senators and over 100 Congressmen to eliminate the threat of future competing applications.<sup>98</sup>

Yet there is another side to this coin. Although broadcasters can exert tremendous pressure on elected public officials dependent upon the mass media for reelection, they must often go to Congress and other public bodies for favors. And those favors may be forthcoming only upon favorable television treatment of the "donor." Joe McGinniss, in *The Selling of the President 1968*, reports the following remarks from Frank Shakespeare, a leading member of Richard Nixon's campaign organization during the 1968 election:

"Now listen to this. Here's what I thought I'd do. I thought I'd go to Walter Scott, the NBC Board Chairman — this would be in private of course, just the two of us in his office — and say, 'Here are the instances. Here are the instances where we feel you've been guilty of bias in your coverage of Nixon. We are going to monitor every minute of your broadcast news, and if this kind of bias continues, and if we are elected, then you might find yourself in Washington next year answering a few questions. And you just might find yourself having a little trouble getting some of your licenses renewed.'"

Shakespeare paused and smiled. "I'm not going to do it because I'm afraid of the reaction. . . . But goddammit, I'd love to."<sup>99</sup>

No clearer statement of the potential for political pressure to obtain changes in programming content can be found. The Administration-wide involvement in Vice President Agnew's Des Moines and Birmingham speeches only reinforces one's suspicions that such desires do not fade when the responsibilities of office replace the enthusiasm of the campaign.<sup>100</sup> Given *Variety's* characterization of the industry's reaction to the violence issue, it is a little disquieting to wonder how many radio and television stations have succumbed, and will yet succumb, to such pressure.

There is also a more subtle and insidious variation of this point. Professor John Silber has estimated that television's importance to any successful political campaign, combined with its high costs (he estimates 30 minutes on state-wide Texas television would cost more than \$25,000), mean that "no man without private wealth can hope to compete for state-wide office in Texas unless he is prepared to sell his office to someone or some group."<sup>101</sup> Silber describes the process in this way:

---

<sup>98</sup> For the pros and cons of this proposed legislation, see articles by L. Jaffe and N. Johnson, *The New Republic*, Dec. 6, 1969, pp. 14, 16.

<sup>99</sup> J. McGinniss, *The Selling of the President 1968*, 60 (1969).

<sup>100</sup> See *Address by the Vice President*, Mid-West Regional Republican Committee Meeting, Des Moines, Iowa, Nov. 13, 1969, reprinted in *Washington Post*, Nov. 14, 1969, p. A-23; see generally, W. Green, "Broadcasters Uneasy After Agnew Attack and Praise for It by FCC's New Chairman," *The Wall Street Journal*, Nov. 17, 1969, p. 6.

<sup>101</sup> J. Silber, "Television: A Personal View," reprinted in S. Donner (ed.), *The Meaning of Commercial Television* 113, 136 (1967).

The high costs of television campaigns are forcing all candidates toward the dull middle of the road, because major financial support comes from essentially middle-of-the-road groups.<sup>102</sup>

In such cases the television industry influences, not just the content of the industry's own programs, but the content and thought of politicians as well.

10. *Mass news gathering.* A small, independent journal or local television station can afford to pick and choose stories depending on the readiness of local officials to give them information. The networks, on the other hand, feel the need to establish channels of communication into Governmental agencies to obtain current information on an hourly basis. Unfortunately, this need for a mass news gathering capacity seriously influences the content of the news. I. F. Stone describes the phenomenon:

The reporter assigned to specific beats like the State Department or the Pentagon for a wire service or a big daily newspaper soon finds himself a captive. State and Pentagon have large press relations forces whose job it is to herd the press and shape the news. There are many ways to punish a reporter who gets out of line; if a big story breaks at 3 a.m., the press office may neglect to notify him while his rivals get the story.<sup>103</sup>

The point is that news manipulation flows from the networks' need for continual access to news. Distortion of news, however, may be a high price to pay for the "on-the-spot" news coverage the public seems to demand.

*E. Summary.* If we evaluate the performance of the television industry against our postulated media "values" of creativity, diversity, flexibility, competition, individual participation, and prevention of excessive power, the conclusion seems inescapable: these values are too often incompatible with the existing structure of the medium. The concentration of television ownership in the hands of a few persons, corporations or networks; the power exercised by the networks over every step of programming production; the bureaucratic desires for orthodoxy, uniformity and mediocrity; the self-censoring conformism of talented creators who have been drawn inside

---

<sup>102</sup> *Ibid.* Silber explained further:

[T]he aspiring politician goes to see the contractors to talk about what he will give them and what he will get in return. Then he goes to the labor unions to find out what kind of deal can be made with them. And he discovers that he can be bought by both sides. If his major support is from liberal groups, he may expect contributions from conservative groups that want to take out insurance in case he wins. . . . And before long he discovers that he and his opponents are talking very much alike on every issue because they have made essentially the same deals with the same people to finance their campaigns.

*Supra* note 101 at 136.

<sup>103</sup> I. F. Stone, *The Haunted Fifties* at xix (1969) (paper ed.). Mr. Stone observed further:

There are . . . many ways to flatter and take a reporter into your camp — private off-the-record dinners with high officials, entertainment at the service clubs. Reporters tend to be absorbed by the bureaucracies they cover; they take on the habits, attitudes and even accents of the military or the diplomatic corps. Should a reporter resist the pressure, there are many ways to get rid of him. If his publisher is not particularly astute or independent, a little private talk, a hint that the reporter seems irresponsible — even a bit radical . . . will do the job of getting him replaced with a more malleable man.

*Ibid.*



these monolithic structures; and the constant strivings for profit, high audience ratings and commercial acceptability — all tend to shrink the latitude of freedom necessary for true creativity. Albert Einstein once commented, "Never let the container be more valuable than the contents."<sup>104</sup> In the television industry's scramble for ever-escalating profits, this important lesson has been forgotten.

### III. ALTERNATIVE SOLUTIONS

A truly creative television product cannot be manufactured and processed like plastic Christmas trees on an assembly line. Creativity has almost always come from small groups of relatively independent writers and producers who have the freedom for innovative work. Stated another way, the problem with present media structure is *access*.

Consider, for example, the magazine and book publishing industries. They have always had their faults, and the current trend to conglomerate take-over is alarming, but their historic diversity and responsiveness to change make the television industry pale by comparison. Ernest Hemingway and Norman Mailer had no committees of "continuity directors" to assist them with their writing. Yet precisely this is the norm in the television industry. Creative people in television must be given the freedom in which to *complete* their product — before turning it over to the networks and stations for distribution.

This goal can be accomplished in three ways: by diversifying the ownership of media outlets, and divorcing them from ownership of non-media business interests; by increasing the access to television of individuals and groups with new or distinctive programming concepts; and by increasing the number of available channels through technical innovation.

#### A. Diversification of Ownership

Although diversity of ideas rather than multiplicity of forums has been the goal of the First Amendment, multiplicity of forums has seemed a useful means to that end. It stands to reason that a market with 25 broadcast media outlets will produce more diversity of ideas with 25 owners than with 10 owners.

There are two principal legal avenues to approach media concentration: the federal antitrust laws, and the FCC's concentration of control guidelines. Although the latter are theoretically broader in scope, an indecisive Commission over the past decades has refused or failed to flesh them out. Accordingly, the substantially narrower antitrust laws rest on a vast body of legal precedent, while the broader FCC guidelines are relatively lacking in content.

---

<sup>104</sup> Quoted in R. Field, "Here Comes the Tuned-In, Wired-Up, Plugged-In, Hyper-articulate Speed-of-Light Society," *Electronics*, Nov. 24, 1969, p. 104.

### I. Antitrust

The FCC is empowered by Section 309 (e) of the Communications Act of 1934 to renew broadcast licenses *unless* "substantial and material question[s] of fact" are presented to the Commission which would constitute a violation of law or of the policies supporting license renewal. In such a case, the Act requires the Commission to "formally designate the [renewal] application for hearing. . ."<sup>105</sup> Although the FCC does not, and could not, actually administer the antitrust laws, obviously it must take those laws into consideration. The Commission "should administer its regulatory powers with respect to broadcasting in the light of the purposes which the [antitrust laws were] . . . designed to achieve."<sup>106</sup> "[O]nce an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is 'contrary to the public interest', unless other evidence in the record fairly detracts from the weight of this factor."<sup>107</sup>

There are two provisions of the antitrust laws directly applicable in the area of concentration of media control. The first is Section 2 of the Sherman Act:

Every person who shall monopolize, or attempt to monopolize, or combine . . . with any other person or persons, to monopolize any part of the trade or commerce among the several States . . ., shall be deemed guilty of a misdemeanor.<sup>108</sup>

The offense of monopolization under Section 2 consists of two elements: (1) the mere existence of monopoly *power* — that is, the power to fix prices or exclude competition; and (2) the existence of some *purpose* or *intent* to use or preserve that power.<sup>109</sup>

The second provision of the antitrust law relevant to broadcasting is Section 7 of the Clayton Act:

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country the effect of such acquisition, of such stocks or assets, or the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.<sup>110</sup>

---

<sup>105</sup> 47 U.S.C. S. 309 (e).

<sup>106</sup> *National Broadcasting Co. v. United States*, 319 U.S. 190, 223 (1943).

<sup>107</sup> *Federal Maritime Commission v. Akliebolaget Svenska Amerika Linien*, 390 U.S. 238, 245-46 (1968).

<sup>108</sup> 15 U.S.C. S. 2.

<sup>109</sup> See *United States v. Griffith*, 334 U.S. 100 (1948); *Standard Oil of New Jersey v. United States*, 221 U.S. 1 (1911).

<sup>110</sup> 15 U.S.C. 818.

Section 2 of the Sherman Act is generally designed to prohibit actions which constitute monopolization; Section 7 of the Clayton Act is more specifically designed to prohibit corporate mergers or stock acquisitions which tend to create a monopoly. In order to make out a *prima facie* violation of these two sections, many of the same elements must be considered: (1) the essential product market must be defined; (2) the essential geographic market must be defined; (3) the existence and extent of competition in the market must be determined and weighed; (4) the percentage market share of the monopolist must be determined; and (5) the existence of illegality must be determined with reference to judicial standards.

There are important differences between the two, however. Section 2 of the Sherman Act requires proof of some purpose or intent to use or preserve monopoly power; Section 7 of the Clayton Act does not. Further, the extent of the permissible monopolization under the two Acts may differ. In *United States v. Aluminum Co. of America*,<sup>111</sup> a Sherman Act case, the court observed as a rough rule of thumb that control of more than 90% of the supply of goods and services might constitute a monopoly. In one Clayton Act case, however, the Supreme Court proscribed a merger which would have resulted in one competitor in a market controlling only 7.5% of its market.<sup>112</sup>

Numerous problems arise when these antitrust standards are applied to media concentration. *First*, because most current media concentrations already exist and do not involve mergers or acquisitions, the Clayton Act's stricter standards of proof and percentage concentration seem inapplicable. To be sure, every station must have its license renewed every three years, and this renewal might be analogized to a periodic "re-acquisition" of a public resource. But as yet there are apparently no judicial precedents on this point. Thus the less-used Sherman Act appears more appropriate. Yet it may be difficult to find an "intent" to use monopoly power on the part of media barons (other than that inherent in their normal day-to-day operations); and it may be difficult to find media concentrations involving more than 90 percent market domination.

A *second* difficulty lies in defining the relevant "product market." In one sense, the relevant product market is advertising — for stations and networks sell time in their programming formats for insertion of commercial announcements. Yet this standard seems inadequate. Sufficient competition may exist within the media market (or even within specific media such as newsprint or television) to provide advertisers with a choice of outlets and competitive rates. But total diversification of media ownership might double or even triple the number of independently owned radio and television outlets in the community — certainly a desirable improvement. Competition sufficient for advertising dollars may not suffice for a true "marketplace of ideas." Ten TV-AM-FM combinations, owned by ten corporations, may

---

<sup>111</sup> 148 F. 2d 416, 424 (2d Cir. 1945).

<sup>112</sup> *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

create advertising competition among 30 stations in a city; but are there not substantial benefits from 30 separately-owned, and programmed, TV, AM and FM outlets?

In sum, it does not seem desirable to limit the level of permissible First Amendment diversity of thought and expression to the standards of the advertising market. Accordingly, we need newer and different high-water marks for the broadcast media — standards which might be phrased in terms of our six postulated values: creativity, diversity, flexibility, competition, individual participation, and prevention of excessive power. Notice that all of these might not require *greater* diversity of ownership. For example, competition in some markets may require financial power which only multiple ownership (*e.g.*, AM-FM combinations) can provide. And the deep pocket that joint ownership creates may, under some conditions, provide the resources for greater experimentation, innovation, and artistic creativity. We may have to redefine the “product market” in terms of “access to creative persons,” or as “programming production” (versus “programming distribution”), or even in terms of sub-groups such as “writing,” “producing,” and “directing.” The point, simply, is that diversity of ideas and expression may require far lower concentrations of control than we presently tolerate in the commercial world.

A *third* difficulty with traditional antitrust concepts is defining the relevant “geographic market.” In *United States v. Philadelphia National Bank*,<sup>113</sup> the Supreme Court defined this market as the “area in which the seller operates, and to which the purchaser can practicably turn for supplies.” This standard might be used to handle the three networks, for they sell their wares (time) to advertisers all over the country and distribute their product to affiliates on a nation-wide scale. But what about multiple station owners who, say, control seven powerful television stations in seven large cities? Each station might draw substantially on purely *local* advertising, yet program sharing might substantially decrease the diversity of ideas and expression across the country, and constitute an undesirable concentration of national political power as well. We may need newer standards to limit multiple ownership in terms of national political power or outlets for diversity of expression.

## 2. FCC: “Undue Concentration of Control”

Broadcast licenses are first granted and then renewed for three year periods, but only pursuant to a Commission finding that renewal serves the “public interest, convenience, and necessity.”<sup>114</sup> The Commission and the courts have always read into the “public interest, convenience, and necessity” standard the need to preserve competition between various

---

<sup>113</sup> 374 U.S. 321, 357-62 (1963).

<sup>114</sup> 47 U.S.C. §307.

sources of news and advertising.<sup>115</sup> This policy is specifically involved in Commission renewal proceedings:

In any proceeding, comparative or not, the Commission has an obligation to determine whether a potential grant will result in a concentration of control of communications media inconsistent with the public interest.<sup>116</sup>

Further, Commission Rule 73.636 (a) provides that:

No license for a television broadcast station shall be granted to any party . . . if the grant of such license would result in a concentration of control of television broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of area served, the number of people served, and the extent of other competitive service to areas in question.

Indeed, the courts have seen this as an *affirmative* duty placed upon the Commission: "The public welfare *requires* the Commission to provide the 'widest possible dissemination of information from diverse and antagonistic sources' . . ."<sup>117</sup>

Yet the Commission majority has never attempted seriously to pour specific content into this broad and potentially far-reaching "undue concentration of control" standard. I have made some suggestions, drawn by analogy from the antitrust laws, as to how this might be done. Yet the task is sufficiently difficult to occupy profitably the full efforts of universities and law schools across the country — certainly something more than the part-time efforts of one harried Federal Communications Commissioner are required. Your thoughts and suggestions in this are urgently needed.

### 3. Pending FCC Rulemaking

As partial steps toward greater diversification of media ownership, the FCC is considering several proposed rules. The first is the so-called "one-to-a-market" rule,<sup>118</sup> which, if enacted, would prohibit ownership of more than one full-time AM or FM or TV station in any one market. The rule as proposed, however, would operate only prospectively and would not require divestiture of non-complying AM-FM-TV combinations. In addition, it would not encompass newspaper ownership — thereby permitting an owner also to own an AM, or an FM, or a TV in the same market. The Justice Department has suggested that the Commission expand its proposed rule to contemplate divestiture and newspaper ownership.<sup>119</sup>

---

<sup>115</sup> See, e.g., *McClatchey Broadcasting Co. v. F.C.C.*, 239 F. 2d 15 (D.C.C. in 1956), cert. denied, 353 U.S. 918 (1957).

<sup>116</sup> *Miami Broadcasting Co.*, 1 P & F Radio Reg. 2d 43, 48 (1961).

<sup>117</sup> *Joseph v. F.C.C.*, 404 F. 2d 207, 211 (D.C. Cir. 1968) (emphasis added).

<sup>118</sup> 33 Fed. Reg. 9075 (1968), 12 F.C.C. 2d 912 (1968).

<sup>119</sup> Comments filed by the United States Department of Justice in FCC Docket No. 18110.

The FCC also has under consideration the problems of "conglomerate" ownership of broadcast properties — that is, ownership of broadcast properties by corporations with substantial non-broadcast properties.<sup>120</sup> Again, as yet no rules have been proposed.

Finally, the FCC is currently considering proposals to limit cross-ownership of CATV systems by persons or interests with other media properties — including AM's, FM's, TV's and newspapers.<sup>121</sup>

Arguably, these various diversification rules would permit greater numbers of persons and viewpoints to gain access to the broadcast spectrum, would lower existing concentrations of economic and political power, would increase competition in programming and advertising, and would open the market up to independent produced programming. Limits on conglomerate ownership might, if evolved, eliminate business interests that might distort the accuracy of news and information. At present, however, nothing has been done by the Commission to adopt any of these proposals.

### B. "Programming Access"

Access to ownership is not the only way to open television up to greater diversity. One does not have to own a station to get views out, any more than one has to own a taxi-cab company to take a ride across town. All you need is access to the station's or network's transmission facilities. There are a number of devices, present and proposed, that might accomplish this.

First, there are the "fairness" and related doctrines.<sup>122</sup> Essentially, the FCC's fairness doctrine provides that on controversial issues of public importance a station must present all points of view. It doesn't mean it has to put on any particular person — only that it must put on someone who represents the contesting points of view.

The difficulty with this doctrine is that stations (and too often the FCC) have thought the fairness doctrine was invoked only if a station first presented one side of an issue of public importance and controversy.

The Supreme Court has conclusively laid this misinterpretation to rest in *Red Lion Broadcasting Co., Inc. v. FCC*.<sup>123</sup> In upholding the constitutionality of the fairness doctrine, the Court described it as an affirmative doctrine,

. . . the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. . . .

---

<sup>120</sup> See Docket No. 18449, FCC 69-17.

<sup>121</sup> See Docket No. 18397, FCC 68-1176.

<sup>122</sup> The fairness doctrine is contained in 47 U. S. C. § 315(a); the "personal attack" doctrine is in 47 C. F. R. §§ 73. 123, 73. 300, 73. 598, and 73. 679; and the "equal time" doctrine is contained in 47 U. S. C. § 315(a).

<sup>123</sup> 395 U.S. 367 (1969).

. . . This must be done at the broadcaster's own expense if sponsorship is unavailable. . . Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source.<sup>124</sup>

What is more, should broadcasters tend to reduce the quality and volume of coverage, the Court plainly warned that "the Commission is not powerless to insist that they give adequate and fair attention to public issues."<sup>125</sup>

One difficulty with the fairness doctrine, as Paul Goodman wryly notes, is that "the bland is [also] an ideology."<sup>126</sup>

When television runs soap operas and so forth that have the sex mores of, let us say, the old *Saturday Evening Post*, television is selling an ideology . . . Many . . . think that the present over-proliferation of motor cars is one of the greatest menaces to urban America. Yet television programs continually throw the cars and the oil and the highways and the freeways at people. Unfortunately, we on the other side can't afford the advertising, but we really should have a half an hour a week at least in which to say [that] these things . . . pollute the atmosphere, they congest the streets, they destroy urban patterns, they destroy the countryside. Obviously the accepted, the bland, is not controversial.<sup>127</sup>

A further problem is the recalcitrance of most television networks and stations at presenting controversial views. It may take years of litigation before the FCC and the courts will enforce one fairness doctrine ruling — as it took John Banzhaf to fight the appeals by the tobacco companies protesting the Commission's fairness doctrine cigarette ruling.<sup>128</sup> What is needed are easier access routes.

Change is being suggested from many directions. Law professor Jerome Barron has argued that the First Amendment requires a "public right of access to the mass media."<sup>129</sup> In his view, in order for free speech to be effective, it cannot be confined to a closet. Truly free and effective speech requires that people with something to say be given the chance to say it over radio and television. There are already cases which hold that anti-Vietnamese war posters and advertisements, for example, cannot be barred from such public places as municipal busses and railway stations.<sup>130</sup> It may be only a matter of time before television stations and networks, as trustees for analogous public places (broadcast frequencies), will be barred from censoring off the air opinions with which they disagree. The Supreme Court has already warned in its *Red Lion* decision:

There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. Freedom of the press from governmental

<sup>124</sup> 395 U.S. at 369, 377-8.

<sup>125</sup> *Ibid.* at 393.

<sup>126</sup> P. Goodman, "The Social Perspective," reprinted in S. Donner (ed.), *The Meaning of Commercial Television* 69, 72 (1967).

<sup>127</sup> *Id.* at 72-73.

<sup>128</sup> For a general account of Mr. Banzhaf's case, see N. Johnson, "What You Can Do To Improve TV," *Harper's Magazine*, Feb. 1969, p. 14.

<sup>129</sup> See Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 *Geo. Wash. L. Rev.* 487 (1969); Barron, *Access to the Press — A New First Amendment Right*, 80 *Harv. L. Rev.* 1641 (1968).

<sup>130</sup> e.g., *Kissinger v. New York City Transit Authority*, 274 F. Supp. 438 (S. D. N. Y. 1967); *Wolin v. Port of New York Authority*, 268 F. Supp. 855 (S. D. N. Y. 1967), *aff'd*, 392 F. 2d 83 (2d Cir. 1968).

interference under the First Amendment does not sanction repression of that freedom by private interests.<sup>131</sup>

Other countries have developed structural reforms that far exceed our already antiquated fairness doctrine. In Holland, for example, any group that can round up 15,000 persons to support its list of proposed programs is given free television time. In democratic Dutch fashion, an organization has even been created to "pool" the time allotted to tiny and eccentric splinter groups without 15,000 supporters — so even small minorities have "programming access" to nation-wide television.<sup>132</sup>

In England, the Independent Television Authority (ITA), a quasi-governmental agency, *leases* time on government-owned television facilities in the major population centers to various independent program production units — a perfect example of divorcing control over distribution facilities from control over programming. The incumbent lessee must "compete" for its right to win another term against the promises of other groups asking for a chance. This year, for example, one major production group in London lost its franchise to a challenger promising more innovative programming. Variations of both the Dutch and the English systems are certainly feasible in this country.

We might also consider a proposal whereby each national network would devote a full one-third of its prime time evening programming to something other than conventional entertainment programming. If the networks were required to stagger this fare, then at all times during the evening the audience would have an alternative to the customary lowest-common-denominator, commercial-laden diet of situation comedies, Westerns, quiz shows, and old movies.

Pete Seeger also has a proposal — and an imaginative one at that.<sup>133</sup> Under his system, every citizen (from 5 years old on up) would have a vote in a national television convention. Representatives would be elected, would swap votes at regional or national caucuses, and thereby "bid" for the right to broadcast programs of their own choosing in pre-allocated time-slots. A system of proportional representation would ensure minority representation for special interests.

The FCC currently has before it two important rulemaking proposals — each of which might alleviate the current network monopoly over programming. The "50-50" rule would prohibit networks from owning more than 50 percent of all prime time programming and would bar networks

---

<sup>131</sup> 395 U.S. at 392.

<sup>132</sup> K. Meyer, "Feeble Outrage and Liberality," *Washington Post*, Ap. 18, 1969, pp. D-1, D-3.

<sup>133</sup> P. Seeger, "The Air Belongs to Everyone," *The Arts*, Ap. 28, 1969, p. 53.



from the syndication business entirely.<sup>134</sup> This rule might permit corporations and advertising agencies to contract for and produce their own programming and submit the finished product to the networks. Although it has drawbacks, this proposal would at least remove the networks from their otherwise total involvement in every aspect of the creative process for at least 50 percent of prime-time programming.

Westinghouse has submitted an intriguing counter-proposal.<sup>135</sup> Under its version, no station in the top 50 television markets could carry more than three hours of network programming during prime-time. The remaining hour or hour-and-a-half would have to be filled from other sources. The expectation would be to open up a new market for independent program producers, possibly injecting fresh streams of creativity into the daily flood of mass-appeal programming.

### *C. Increased Media Channels*

There are now nearly ten times as many radio and television stations as there were 35 years ago. But further innovations in cable television (CATV) offer a potentially unlimited number of channels into the home. Twelve channel CATV systems are now common, twenty channel systems are being installed, forty channel systems are in preparation, and more seem feasible. After all, the common telephone is a "100 million channel system" that can call, or be called by, any one of the 100 million other instruments in the country. There is no reason why CATV could not develop toward that goal. Indeed, a two-way CATV cable into the home would permit the viewer to "access" computers or tape libraries containing thousands or millions of video recordings. If there were adequate market demand, the time need not be far off when a viewer can look through a video tape library catalogue, select the program he desires, dial the proper code number over his telephone, and receive his selection over his cable-connected television set — literally a twentieth century video juke box.

Cable television can offer one great advantage: public access. The FCC has indicated that cable systems with more than 3,500 viewers should be required to originate programming on one channel.<sup>136</sup> Ultimately, CATV systems might be required to hold channels open to any who will pay the going rates — on a common carrier basis. Anyone with something to broadcast and the money for the current rates would have his chance. And for those who lack the money for even common carrier rates, and who do not

---

<sup>134</sup> *Competition and Responsibility in Network Television Broadcasting*, 30 Fed. Reg. 4065 (1965).

<sup>135</sup> For a general description of the Westinghouse proposal and an endorsement from Assistant Attorney General (Antitrust) Richard B. McLaren, see *Broadcasting*, May 5, 1969, p. 68.

<sup>136</sup> See *First Report and Order*, 20 F.C.C. 2d 201, FCC 69-1170, Docket No. 18397 (released Oct. 27, 1969).

intend to advertise or profit from their programming, cable systems might be required to reserve some *free* channels for their use. City councils across the country (including New York City) are already incorporating such concepts into their CATV ordinances and franchises.

#### IV. SUMMARY AND CONCLUSION

The subject of trade regulation is generally addressed to the performance of firms in the marketplace. Its raw material comes from case studies involving manufacturing, distribution, advertising, and so forth. The philosophy underlying our antitrust laws is that free and open economic competition will promote innovation, cost-cutting, lower prices, higher quality and better service. The laws are designed to make that competition possible, by inhibiting monopoly power and anticompetitive trade practices.

But these conventional antitrust concepts are beginning to show the strain of adjustment to changing times and problems. The beneficial (or undesirable) consequences of trade regulation may extend well beyond the lawyer's or economist's usual interests. Environmental pollution, employment levels and practices, inflation, urban sprawl, race relations, or the growth of militarism are but a few of the other facets of life that may be affected by the size and behavior of firms. And the time has long since passed when the student or practitioner can afford to ignore such implications of his activities.

Not only are there wide-ranging effects of our present antitrust policies, but there is increasing interest in addressing some of these effects directly with laws more precisely designed to deal with them.

Creativity in television programming is one such example, and the one chosen for this paper. Our antitrust and trade regulation policies may or may not be adequate to deal with the economics of the industry. Monopolies can exist in this industry as elsewhere. Anti-competitive business practices may occur. There may be conspiracies in restraint of trade. Present laws are helpful in improving the level of economic competition in the television industry.

But the consequences of these policies are also felt in the marketplace of ideas — the content of the television programs. And lawyers must learn to understand this relationship.

This paper has been an effort to address directly the inhibitions to creativity in television programming which flow from the industry's present structure, and the possible ways in which trade regulation might improve the situation.

A number of optimal characteristics of a fully functioning television programming production process have been postulated: creativity, diversity, flexibility, competition, individual participation, and prevention of excessive

power. The present patterns of media concentration have been described, who controls program content, how and why. The picture that unfolds is one of individuals, institutional structures, and practices that tend to stifle creativity at every turn.

The alternative solutions considered have included diversification of ownership under antitrust standards or the FCC's "undue concentration of control" rule. Although enforcement by the FCC has been less than enthusiastic, there also appear to be basic limitations in the standards as well. A number of proposals for citizen "access" to distribute programming over the present stations and networks have gained in support with the Supreme Court's decision in *Red Lion Broadcasting Co., Inc. v. FCC*.<sup>137</sup> Finally, there are the possibilities offered by cable, and possibly other technologies, to open up creativity and diversity in the television industry well beyond its current potential.

There are undoubtedly other case studies of this kind that could be done in the broadcasting, or other industries. But this paper is illustrative of the general propositions that trade regulation has an impact well beyond the economic marketplace, and that other regulatory tools may be needed to fully implement social policies now effectuated almost entirely by anti-trust regulation.

Television is probably the single most powerful force — for good or ill — man has ever unleashed upon himself. Virtually all students of the industry (even those who work for it) acknowledge that its programming is not contributing all it might to the quality of life in America. One of the principal forces shaping the present character of television programming is the restraint on creative freedom. The traditional application of trade regulation principles can help remove those restraints. But the problem will only be solved when it is addressed directly, with all the instruments of reform that are available.

#### POSTSCRIPT\*

PROFESSOR JAFFE\*: There is a marvelous contradiction in Commissioner Johnson's paper: I spend a good deal of my time picking out contradictions in Commissioner Johnson's utterances! It is the role that I have cast myself in! (Laughter)

---

<sup>137</sup> 395 U.S. 367 (1969).

\*This postscript represents relevant excerpts from the transcript of the *Trade Regulation Roundtable*, (1969). The editors have appended to the papers, in this form, comments and discussions made during the meeting which are relevant to and arising out of the issues presented by the authors.

\*Professor Louis Jaffe, The University of Harvard Law School.

He says that broadcasting is this tremendous creative force, and then he goes on to say that we have this great development of rock music — it has been a tremendous development, one of the biggest developments, culturally, I guess, in the last ten years — and he goes on to say that television and broadcasting haven't played any part in it at all. Why don't they do something about it?

Well, one thing it suggests to me is that television isn't all that creative. I think we have got all kinds of stereotypes about television, and about broadcasting, and about communication.

One thing we have done is accept the value that the commercial broadcaster has put on the media. I mean, we have all been marvelously taken in about this, about how incredibly important it is.

Now I dare say it is very important, but I think that one of the things that we have got to do now in the immediate future is to think a good deal more concretely, and in a good deal more complicated fashion, about what broadcasting, and these various forms of electronic communication, what they are doing.

We may, for example, come up with a conclusion that was suggested [by Mr. Cohen]: That possibly the chief function of a large broadcaster is a very popular function. It is not possibly a great creative role. It may turn out, for example, that great creation does not come about in this type of broadcasting to large numbers of people. There may be a whole lot of conditions.

For example, maybe rock music comes out of groups that get together. Maybe it comes out of traveling long distances to remote parts of the world, and acting for three days like all get-out. Maybe it comes in people's chambers. Maybe in a whole variety of ways that, possibly, broadcasting is quite inimicable to.

And it may be, thus, that we do have to think, in thinking about — and also, the interesting thing about the Canadian experiences is that it may be the cultural meaning of broadcasting is very different in Canada from its meaning in this country, or from its meaning in France, or Russia, or Britain, or Italy.

These stereotypes that we have, seem to me very much unexamined, and in determining, I think, our program, our attitude toward regulation in the future, and what we are going to do about it, and how we have to do it, I think we have to break the thing down a great deal more than we have done, into the news function, the drama function, the public affairs function, the weather function, the great events function, the local functions, the national functions, the regional functions, the people who like to buy things and store them up, the people who don't like to buy them but like to turn the knob.

If we adopt, I think, this much more articulated approach toward the whole problem, I think that we will get a little further than in simply making these great statements about the wasteland, or these great statements about concentration, and then somehow thinking that when you make these great statements you have done something, and something is going to happen when you do it.

COMMISSIONER JOHNSON: Well, it would be impossible, I suppose, to really request equal time with Professor Jaffe, but I will, at least, request an equal opportunity as we go along with the FCC to address several points that he has raised.

I appreciate the attention he gives to what I write, and certainly the plucking out of contradictions is a pastime to be encouraged. There is even a story, I am sure, of the day a very small contradiction crept in under the door of the Harvard Law School, but nobody has ever been able to prove that, one way or the other! (Laughter.)

In fact, however, I do not doubt that in the mentioned paper a great many faults have crept in, in addition to the one he mentions. I am not sure he has found one in this particular instance.

My point was not that television is a great creative force. Indeed, the entire thrust of the paper is quite the contrary, that television has not produced a great creative impact.

The point about rock music was simply that there are a great many things in our society that are terribly important that did not find their way onto television.

In programming, a point which Commissioner Jones has made with regard to advertising — it is difficult, of course, for one who does not watch television to assess its impact, Professor Jaffe. Recently he has been attracted by a program called "The Forsythe Saga", and he thereby is increasing his experience with the media, and that is to be encouraged. (Laughter.)

The fact is, however, that the television watching experience of the particular group here today — those of you there and those of us here at the Panel — is really almost statistically insignificant in terms of the viewing patterns of the nation.

And whatever Louis may say, about our over-generalizations, I think it is useful for this group of both writers and readers to, at least, be exposed briefly to a few facts about the impact that television does have on our society:

You should know, for example, that there are more homes in the United States that have television sets than have bathtubs — and clearly they are in use for a larger proportion of the day! (Laughter.)

The average American home has the television set running six hours a day.

The average child, by the time he enters kindergarten, has received more hours of instruction from his television set than the number of hours he will spend in a college classroom or intermediate degree.

By the time the average man reaches sixty-five, he will have spent nine full years of his life, twenty-four hour days, 365 days a year — nine full years of his life watching television.

Now whatever impact this experience may be having on our society, it is clear that it is having some impact. The industry would like to have you believe that nothing really flows from this experience at all. But at the same time, if I may be permitted to find a contradiction, the industry would also argue that it possesses the most effective selling tool ever known to man, and they back this up with rather impressive case studies:

The manufacturer of Lestoil, for example, who started out making 100,000 bottles a year in his garage, was told about the benefits of television advertising, and in three years his sales climbed to 100,000,000 bottles of Lestoil a year — a product that some of you may know of through your wives or housekeepers.

Alberto VO5 hair spray came into the market at a time when there were 35 brands fighting for the overall consumption of hair spray, and within five to eight weeks it captured about 30 per cent of the market.

And the assets of the Dreyfus Fund in three years went from 95 million to 1.1 billion dollars.

These stories can be repeated over and over and over again.

The point is that the impact is not limited to the commercial in its initial purpose; it also includes the commercial side effect and the program's side effect. The mere fact of television watching only, apart from the content, has an impact on our society.

A couple of weeks ago, when Tiny Tim was married on television, the nation's electric power companies reported a 2.5 million kilowatt drop in the power levels across the country as television sets were turned on in homes all across our land. Water systems in cities have to be designed to accommodate the great pressure on the system at the hour and half hour when the toilets are flushed and the water is run in the kitchen.

Sociologists report that sixty per cent of the families have changed their eating habits, sixty-five per cent have changed their sleeping habits, and about eighty per cent use the television set for an electronic baby sitter. This is before you reach the matter of programming content. Taking the programming content, when the westerns first came out, and we watched the heroes with their quick draw artists out in the west, the

doctors were suddenly inundated with men with gunshot wounds in the leg, who had gone out and purchased their own revolver and tried the same stuff at home.

We are all experienced with the phenomenon of the young kids thinking they are "batman" or Daniel Boone with capes or coonskin caps.

Walter Cronkite, the other evening mentioned a new book in the course of a news report, a very brief mention, and the next morning nine thousand copies were sold.

Rowan and Martin, in "Laugh In", the first time they mentioned, "Look that up in your Funk and Wagnall's", they found that the dictionary sales had gone up twenty per cent the next morning.

That television does have an impact on our society, I think, can be documented. It comes through the commercials, it comes through the programs, it comes through everything that is televised.

I think it is true that television affects every rung of our society one way or another. The Kerner Commission\* addressed a question to race relations in the United States and discovered they had to devote a whole chapter to the mass media—including that the communications media, ironically, have failed to communicate.

The Eisenhower Commission on Violence† found that it had to spend a great deal of its time addressing violence on television, entertainment violence on television, and its relationship to violence in our society.

Earlier a Senate Committee addressing the question of juvenile delinquency found it had to spend a great deal of time addressing the impact of television programming on juvenile delinquency.

And I think the time is past when in this nation we are willing to take up every social problem before us — alcoholism, rising rates of divorce, the drug problem, school dropouts, education, environmental pollution, et cetera — set up a National Commission on it only to discover that television is somehow related to it, and I think the time has come when we are beginning to realize that television is implicated in virtually everything we like and don't like that is going on in our country, and that it is time that we addressed the problem frontally, and that is what we are trying to do here this morning.

PROFESSOR ANDREW S. WATSON: I am Dr. Andrew Watson, University of Michigan Law School, and I might say I am also a member of the Surgeon General's Committee on Television.

---

\**Report of the National Advisory Commission on Civil Disorder (1968).*

† *The National Commission on the Causes and Prevention of Violence (December 1969)*

I would just like to comment about the colloquy between Professor Jaffe and Commissioner Johnson, in relation to the business of impact.

I would join with Professor Jaffe in his comment that there are a whole lot of open questions about what the impact of television is, and Commissioner Johnson's comment about impact related to how many people buy Lestoil, and things like that—and I don't doubt that that is true, but values like the ones alluded to by Commissioner Jones, that it is more important how you run the race than it is whether you win—this kind of value and all of the other myriad values about the style of life and value systems about society and so forth, I would suggest that we know almost nothing about the impact of television and myriad other things.

So that when it comes to regulating television in the light of those kinds of values, I would certainly hope that we would not apply the same principles as relate to the purchase of material objects. That is a very, very different and relatively simple kind of cause-effect relationship than these other more complex values that tie into such things as who listens when the set is on, what is the family matrix behind this, and a thousand and one other complicated things about which we literally know nothing.

COMMISSIONER JOHNSON: I would like to say a word with regard to the prior question [Professor Watson's Comment], if I may, just to straighten out what I believe would be my own position on this.

I gave no examples other than advertising, and I deliberately referred to two National Commissions that preceded yours—the Kerner Commission, which found that there was a correlation between race relations and television, and the Eisenhower Commission, which found that there was a correlation between television programming and violence in our society.

I would, however, not disagree with you or Professor Jaffe that we know far too little about this. I think you are perhaps right. I think that we don't really know the full range of impact. But I think that there is an impact, we can conclude.

And as Wilbur Schramm has said, we do know enough to know that when we subject our children to this programming, we are subjecting them to an unnecessary risk, and like the risk of subjecting them to the bacteria in unpasteurized milk, it is a risk that we need not subject them to. That much, I think we can say.

There are, of course, those who argue, and those who still argue, that the health hazards of cigarette smoking have not been conclusively demonstrated. On the other hand, most of us conclude that those hazards have been demonstrated sufficiently to satisfy us that we don't want to smoke cigarettes.

And I think we ought to do the best we can. What your particular Commission will come up with, I don't know, and I am sure at this point



you don't know either, but I wanted to register my agreement that we need to know more about what we do [know], but also make the point that we may have considerably more evidence at this point than you give us credit for.

*The following dialogue revolves around the issue of pay television. Pay television, in a technologically advanced form, has been proposed as a panacea for the ills of advertiser and network control, described in the papers. Commissioner Johnson's and Professor Jaffe's reply outline the evolution required in such an approach and suggest the method is much more complex than one might initially assume.*

PROFESSOR WALLACE M. RUDOLPH: Wallace Rudolph, University of Nebraska.

We haven't mentioned pay TV, but it certainly seems to arise in the situation where you can have as many channels as you want. And the FCC originally was started as an engineering program to stop — in 1927 — interference. Now if you have as many channels as you want, why do we have to use advertising as a method of distribution of programs at all?

[And why can't you,] why wouldn't you get a greater diversity and a greater choice through normal market processes since the government doesn't know what it is doing anyhow, in relationship to programming?

I thought the Supreme Court in their last opinion was pretty short-sighted in supporting FCC's claim over CATV [cable].

COMMISSIONER JOHNSON: Well, these things tend to be evolutionary. I think it is probably a mistake to suggest that it is now possible to have an unlimited number of channels come into all homes. It is technologically possible, but then the airplane was technologically possible a long time before transcontinental jet service of the kind we have today.

I would tend to agree with your basic proposition, however, that if we had virtually an unlimited number of channels coming into the home, and if we had the logical extension of that, which is viewer selection of programs at the time the viewer wants them by remote control device access, tapes in the libraries, you know, somewhere, then there would be very much less need for the kind of functions that the FCC now proposes.

Now as far as pay television is concerned, once again I think it is unlikely that something like that is simply going to come along some Monday morning. I think it will evolve.

But I think it is evolving with the FCC's recent ruling for any pay television, first, under the following set of circumstances:

That pay television can be introduced into any community that has five or more television stations. It can be provided by one of those stations

part of the time providing a service to viewers for those who wish to pay. additionally for this service, and it must provide a programming that has not formerly been available in that community.

We also have out for rule making the issue of pay alongside of advertiser-supported television on cable systems. In other words, the expression "pay television" or "subscription television" is simply a way of talking about how the programming is to be funded, not how the programming is to be distributed.

You can distribute programming which can be paid for on a program-by-program basis either over the air on a television station, or by means of a cable into the home. But the FCC now is moving in the direction of clearly anticipating both, and is basically sympathetic to what it is you are suggesting, with a difference only perhaps in terms of the speed with which this is to be brought about.

PROFESSOR JAFFE: I don't think that is a very adequate answer to the point.

The question floats on top of an enormous amount of unknown economics. The question is not essentially simply a technological question, as indeed very few questions today are just technological questions. It has to do with the distribution of purchasing power, the distribution of wealth. The question that we don't know anything about is what viewers are paying for what.

Now it is an arguable proposition that under the present system a different class is paying than those who use it most.

It is, for example, perfectly possible that the poorest people in a community pay less in advertising—I don't know that is the case, but we just don't know—pay less in advertising, for the advertising, than other classes, other heavier purchasers.

This thing has to be paid for somehow, you know. I mean, just talking about a technology doesn't pay for something.

And the question of whether, for example, a great number of television viewers, who have free access to a very large entertainment medium at the moment, if they had to put a nickel in the slot or a dime in the slot, or if they had to make all of those arrangements, would be doing it—the result is that you can't answer the thing simply in terms of why don't we do this or why don't we do that; it has got to be—as Nick Johnson says—it has got to evolve.

It may turn out, for example, that all kinds of people, including very poor people, are prepared to pay for capabilities—but it may be that they are not.

*In a continuation of this same dialogue Dean Daniel Soberman stresses the importance technology in the form of any modification of the traditional television programming structure with a concomitant impact on the values we are seeking to promote.*

DEAN DANIEL SOBERMAN:\* I find this discussion very disturbing. I think we are ignoring a critical thing. We are talking about a market, an unlimited market. The only unlimited marketable items are the advertising, the products of the advertisers.

The creative element hasn't been mentioned at all. Five channels, ten channels, fifty channels, a hundred channels won't do us any good if we are not somehow encouraging creative work on any kind of mass media.

And here there is a very serious technical problem. Perhaps you will solve it for me — namely, that television is a sequential way of giving information, as opposed to a library or a magazine, where there is a time lag between the creation of the item and the time it is used by the consumer or the viewer.

Now this, I think, is a very important thing, because television has this stricture, that it is on for a certain number of hours a day under its present development, its present state of development, and somebody has only that limited choice and can only watch things in the sequences in which they come out.

And in order to fill that market up with the qualities of creativity behind it is the constant flow that carries television on, on a day-to-day basis, unlike literature in a written form, which can be intermittent in its creation, and read intermittently at a different time, the two aren't as closely related as they are to television, and nothing has been said about this.

We have run to the position now where we are coming to, perhaps, a period when technology has so outstripped human creativity that what we are really doing is simply diluting what we do have to such an extent that none of those people are watching, or virtually none of them.

And I think that it is important to think that this large minority of twenty per cent or whatever it is will put up indefinitely with the same kind of material over a long period. I don't know; I am not a market researcher, and I don't particularly suggest that I have any expertise in this.

But it seems to me that much more important is what we do to create and protect creativity and get it to the right market — and it may be a library system whereby the receiver can pick the program they want at any time sequence they want, will be the answer.

---

\* Queen's University Law School, Kingston, Ontario.

So the technology is very important, in the sense that it may enable television to suddenly get free from this very strict sequential system that we are now in, and until we reach that, we may have virtually an insoluble problem.

*Maintaining his emphasis on technology, Dean Soberman raises a specific problem of present technology on creativity and productivity.*

DEAN SOBERMAN: And that is that what we are confronted with here is not just the mass media problem, but we are getting into the whole question of copyright, and the whole question of parasitic marginal costs of taking other people's works; this is the problem in cable television. It is the same problem in using a Xerox machine to run off copies of a book, or to use a computer to store somebody else's work, and then use it at a much lower cost than the original producer can use it for. Whether it is in Canada or the United States, whether it is in Wyoming or in England, it doesn't matter much; the problem is that we have to try to devise a system or a policy which will encourage productivity.

We have no problem really with marketing technologically, but as far as I can see, there has been no steady increase on the human creative level to advance the technology in that sphere.

*Professor Paul M. Bator then adds two related questions to the discussion of advanced technology.*

One is whether the government should have the technology — expand the number of channels available, or should the government continue to have some say over who gets in, or should the market somehow control that — which is one question.

The second question is whether a government can tell its businesses, as well as restricting access, that the advertiser form of financing necessarily should be excluded. I don't see that that follows.

That is, even if there is enormous access, or the FCC licensing system is thrown out, and an enormous number of channels become available, it may still be the case that certain types of programs, very effectively and efficiently financed—by advertising rather than by pay TV will require this backing.

*Professor Michael R. Asimow of U.C.L.A. directed a question to Commissioner Johnson and prompted a response which amplified his position on the relationship between concentration and adequate financing.*

PROFESSOR MICHAEL R. ASIMOW: I am Mike Asimow from U.C.L.A.

I thought the Panel was going to be about problems of concentration of control this morning, but it wasn't about that. But I would like to ask a question in that area particularly of Nick Johnson.

I have noted the concern that he has expressed in many opinions about ownership by conglomerates of the local stations. And I have not fully understood that, and it seems to me to reflect a somewhat romantic view of the industry, perhaps.

It does seem to me — and I am thinking now of the Channel 9 case in Los Angeles, for example — in which the Hearing Examiner suggested that a license should be taken away from a conglomerate and given to a highly — to a very under-financed local group. It does seem to me that the financial resources of conglomerates might have a lot to do with the kinds of comments that this gentleman [Mr. Templeton] made about the impending under-financing of television.

COMMISSONER JOHNSON: I just think something must be said about if we don't permit the large industrial conglomerates, you know, to take over our mass media, like everything else, that we will never be able to have these marvelous programs, and it is rather like arguing that unless we permit large, racist, conglomerate corporations to continue to exist with their token programs for the employment of Negroes, we are told that there won't be as many jobs for the blacks, and that therefore that is an argument for keeping them on. The fact that the large conglomerate broadcasters engage in some tokenism of public affairs programming for purposes of public relations in relation to the FCC and so forth is not an argument, it seems to me, for suggesting that conglomerates ought to be permitted to continue.

As for the financial resources question, I would simply refer briefly again to the write-up. The argument for the ITT's merger made by ABC was "We need the financial resources of ITT. If we had the financial resources of ITT, we could put on more public affairs programming and do a better job of competing with NBC and CBS."

And their argument had some validity until Don Turner, then Assistant Attorney General of Antitrust, uncovered the internal I.T.T. memorandum, which made it very clear that the entire purpose of the purchase, as far as ITT was concerned, was not that they were going to put money into ABC. Quite the contrary. It was that they intended to remove from ABC 100 million dollars over the course of the next five years, which would be used for the acquisition of other subsidiaries in its growing conglomerate move.

So this argument about the need for financial resources is something that I think we need to examine very compulsively, to give to it, as Professor Jaffe says, some complicated thinking.

