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Leased Access: Crucial To First Amendment Rights

By Sidney Dean

The Cable Communications Policy Act of 1984 (the "Act"), the first and only legislated Federal policy for cable television systems (or better, "broadband communications facilities") is a travesty as national policy. It requires no national or interstate interconnections; it has no standards or incentives for adopting new, improved or lower cost technical facilities essential to public services; it ignores the needs of the poor and disadvantaged for lower priced services; it does not require systems to provide access for independent sources of local programs and content services. The terms of the Act deny its own declaration of legislative purposes: "assure that cable communications provide the widest possible diversity of ~~services to~~ ^{SOURCES} to the public."

The Act does fulsomely recognize the value of public, educational, and governmental (PEG) access, but it does not mandate the channel capacity and facilities to provide them. Instead, it permits local franchising authorities to set their own requirements in original or in renewed contracts. Further, local authorities are prohibited from securing payments in addition to franchise fees for support of the use of PEG facilities.

Leased Access

The only assurance of the widest possible diversity of *sources* is the dedication of a portion of channel capacity and facilities to independent producers and suppliers whose economic and social values and objectives are not de-limited by operators' constraints. The Act requires all cable operators with between 36 channels and 54 channels to set aside at least ten percent of their channels for leased access (not counting those channels whose use is mandated by federal law and regulation). Operators of systems with between 55 and 100 activated channels must set aside 15 percent of those channels; and operators with more than 100 channels must set aside 15 percent of all channels.

In view of the history and fact of intense operator opposition to decontrolled public use of their facilities, it is both remarkable and significant that the Act

unequivocally requires larger operators to allocate from ten to fifteen percent of capacity for leasing ("commercial use") to "persons unaffiliated with the operator, without editorial control."

The restrictions imposed on these allocations are rigorous but still leave important areas for development by independent producers and suppliers of content. There are no restrictions on leased access users other than independence from the operator; they may be non-commercial, non-profit institutions, civil or political groups as well as advertisers and propagandists.

The significance of this requirement for leased access is that a determined group in Congress has become convinced that a right of *access to speak* as well as to *look or listen* is essential to the public's First Amendment rights. Only a handful of cities and states with jurisdiction have mandated leased access; those who did have found it difficult to enforce against operator opposition.

Yet, independent policy studies and independent policy-makers have been consistent in their findings that broadband cable transmission is unique, essential, and a natural local monopoly. They have concluded that public rights of access at terms profitable to the operator are both a right and a necessity for the development of public communications services. This was the conclusion of, among others, the White House Task-Force on Cable Television, the Office of Telecommunications Policy, as well as the American Civil Liberties Union. Even the American Newspaper Publishers Association, with a high proportion of cable owners resolved in 1983:

"Recognizing that the growth and convergence of technologies for the delivery of information do not change the essential nature of communications in a free society, ANPA reaffirms that the public interest is best served where freedom from content regulation is maximized, regardless of the means by which information is disseminated."

The inclusion of an absolute public right of leased access, however condi-

tioned, is an inspiring victory for the embattled group in the House Telecommunications Subcommittee that prevailed over a conservative Senate and full-scale cable operator lobbying and PAC inducements. It decisively blocks operators' stepped-up claims for the status of "electronic publishers." Operators' goabare not the ability to supply their own programs and content . . . which they already have. Their real objective is to legalize a right to reject the programs and content of others which not only include leased access but also public, educational, and government programming. And down the road, it becomes a case for reducing or eliminating "must-carry" broadcast channels.

It should be a high priority for all who produce, package, supply and believe in independent video programming to make leased access work in every major system as well as regionally and nationally.

Electronic Media and The First Amendment

Not until radio advertising exploded in the mid 1940s, and television became a national system in the early 1950s, was it recognized that electronic broadcast media have effectively abolished public rights of access to their licensed monopoly facilities.

The long evolution of print communications established public policies that distinguished between *communications carriers* and *communications content*. The constitution mandated a national system of post offices and post roads; private turnpikes gave way to public highways; the telephone and telegraph systems were barred from content control by common carrier regulations. Printing and reproduction equipment, paper, ink were available to all.

The First Amendment was invoked to protect content integrity from abridgement by government as well as by private interests. Its jurisdiction was extended to the facilities of transportation and reproduction only when hardware interests were employed anti-competitively to control or monopolize content. For example, the Paramount consent decree broke up

the vertical controls between movie producers and theatrical exhibitors.

The right to freely seek, receive and transmit communications from any source to any destination is essential to the growth, health and self-fulfillment of every person. The right to equal opportunity to communicate with any other person by the use of any technical facility of communications transmission or processing available to the general public is essential to the free association and collaboration of individuals for common social, economic, cultural and political purposes.

Communications is a process to which almost all arts, sciences and industry contribute. There are two independent functional components of the communications process which are operationally and legally freestanding. These two elements, content (software) and facilities (hardware), are common to all communications processes including personal dialogue, public assembly, display, print and the electronic media. Public policies must be two-fold and clearly separate and distinguish between policies governing technical facilities (hardware) and content (software).

Content in all formats and modes is protected by constitutional rights to free expression and fair competition. Like all public speech, it is governed by legal sanctions against fraud, defamation, obscenity, etc. With these exceptions, government is constitutionally prohibited from regulating or abridging content. It follows that government is compelled to regulate technical facilities, especially those licensed by government or under monopoly anti-competitive controls, in order to protect and promote a free competitive market for speech, assembly, press, transactions and other content services.

These rights are implicit in the First Amendment of the U.S. Constitution:

"... the Congress shall make no law ... abridging the freedom of speech ... or of the press."

They are also explicit in the United Nations Declaration of Human Rights:

"every person shall have the right to communication with any other person in any medium ..."

In 1983, Doudou Diene, Director of UNESCO, said:

"The right to communicate means the right to be informed, but it also means the right to inform. . . . We have adopted . . . the Declaration of Mass Communication . . . to promote the right to communicate and access to communication infrastructures. This means not only receiving news, but also imparting news."

A business group, the International Chamber of Commerce, resolved in 1983:

"the boundary line between monopoly and competitive services should provide for monopoly protection where natural monopoly characteristics are evident. The boundary should therefore not be based on technology, since it is subject to dynamic change. It should not be based on the type of information handled by a service, since as ISDNs evolve, all types of information in digital form will be handled indiscriminantly. Universal and equal access to telecommunication services at cost-related prices will allow new companies providing enhanced services to compete in the marketplace."

Local leased access is a cost-effective means of both commercial and non-commercial program development. Some of its applications may include:

- multiple-sponsored half-hour to hour packages on central themes (home improvement, nutrition, investment, etc.)
- full-length "specials" for promotional events, fund-raising, membership drives, etc.
- Direct response, mail-order specials (department store type).
- "activist" events: meetings, fund-raising, recruitment.
- local test programming for intended regional or national programs.
- public relations series for larger local institutions.

Although the Act gives operators reasonable freedom to set terms, conditions and rates, there are basic conditions that are essential to the healthy development of leased access income to producers and

suppliers as well as to operators. Some are:

- Convenient segments of time (from 15 minutes to full-time).
- Definite times of commencement, continuation, termination.
- Bi-lateral rights (such as to amend on reasonable notice).
- A reasonable right to renew.
- The right to sub-lease for multiple sponsorship.
- Fair access opportunity to production, billing, promotion services available to others.

It is possible that leased access programming may be opened up on a national scale. One or more major independent suppliers of satellite-delivered syndicated service may calculate that direct cash purchase of time from affiliated cable systems could be more profitable and manageable than the usual percentage or barter arrangements. In any case, it is clear the Act presents to independent producers and suppliers of programming, an unprecedented opportunity for development of their professional careers and business.

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