

AMERICAN CIVIL LIBERTIES UNION
156 Fifth Avenue
New York, New York 10010

WORKING PAPER

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TO: Communications Media Committee

FROM: Sidney Dean

RE: CIVIL LIBERTY ASPECTS OF THE PETITION BY MIDWEST VIDEO CORPORATION
FOR REVIEW OF FCC ORDERS

A. Applicable Civil Liberties Principles and Precedents

I. ACLU considers that the right to transmit and receive communications on behalf of the individual as well as of society itself is essential to a free, just, and self-governing society and is explicitly guaranteed by the Constitution of the United States.

II. ACLU has defined the three civil liberties requisites of carrier systems for the media of public communications to be: (President's Task Force Statement)

1. The right of access to the carrier systems by any producer, distributor or consumer of content services for any legal purpose, whether for sponsored ("free") financial support or for optional direct purchase by the public.
2. The right of the general public to an unrestricted selection of content services whether "free" or "paid," "live" or recorded, without geographic, demographic, or civil discrimination.
3. The affirmative obligation of government to guarantee the establishment and maintenance of such communications carriers systems as they are technically feasible and economically viable by the use of public resources, public credit and public financing if prudent and necessary.

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The goal of public policy, in the plannable future, should be to establish with deliberate speed a fully-switched, two-way broadband carrier system analogous to the telephone carrier systems in principle but incorporating the potentials for diversity and open access of modern carrier and terminal systems and equipment.

III. ACLU is persuaded that broadband cable and microwave technology can now provide a carrier system with all of these capabilities and urges that all branches of government, at all levels, give the highest social and economic priorities to their development.

IV. Government Actions.

1. ACLU condemns the Congress for abandonment of its responsibilities to guide and regulate new technology toward the highest public interest giving due regard to proper incentives

for innovation and investment but without erosion of constitutional guarantees of the free marketplace of expression of expression, information, opinion and the multitude of communications content services which the new carrier technology should serve, but not exploit.

2. ACLU regards the central principles of the Radio Act of 1927 incorporated in the Communications Act of 1934 as obsolete and dangerous in their permissive sanctions to existing electronic carriers, including the broadcasting licensees, networks, and cable operators.
3. ACLU considers the effects of the FCC functioning without legislative direction as repressive of the benefits of broadband carrier technology to the public and improperly protective of the monopoly practises of the television and radio on-air licensees and the unlicensed networks.
4. ACLU, in this and other actions, must therefore look to the courts for relief against the irresponsibility of the Congress and the questionable and prejudiced exercises of regulatory authority by the FCC. In its application to cable carriage, the ACLU believes that the 1934 Act itself as well as its interpretations by the FCC are in violation of the First Amendment and of the clear intention of the Constitution to apply common carrier safeguards to the communications carrier systems.*

B. Statement of Issues and Possible ACLU Arguments

"DOES THE FEDERAL COMMUNICATIONS COMMISSION HAVE THE AUTHORITY TO ADOPT DETAILED RULES AND REGULATIONS RELATING TO THE OPERATIONS OF COMMUNITY ANTENNA TELEVISION SYSTEMS WHICH:

- "1. REQUIRE THAT ALL CATV SYSTEMS WITH 3,500 OR MORE SUBSCRIBERS PRODUCE AND TRANSMIT ORIGINAL PROGRAMS:

ACLU arguments for consideration:

a) Cable carriers should be prohibited from engaging in the production, distribution, control or in any form of revenue or profit-sharing in content since it unavoidably gives the carrier irresistible economic incentives (See Owen quotations: footnote)

...to delay and deny leasing capacity to others

...to employ their capital primarily for vertical integration into programming (program exploitation, talent, recordings, films, etc.) as opposed to expansion of carrier capacity and diversified services

...to defer investments in higher states of the carrier arts and services (local circuits, two-way, pay tv, etc.).

b) The fullest exercise of freedoms to communicate and to select from live and recorded communications content services will depend upon the prompt adoption by

*Article 1, Sec. 8 "...establish post offices and post-roads."

the monopoly carrier system of the highest state of the art in capacity, selectivity, two-way, optional payment facilities, terminal equipment compatability, localized circuits, etc. The best self-enforcing guarantee of this result is to require that the carrier system be exclusively dependent upon revenues from the leasing and usage of carrier facilities only, and wholly separated from revenue and profit participation in programming, content services, and equipment.

c) A requirement "to originate" in order to achieve "community self-expression" is unenforceable unless it specifies

...the geographic scope of the community, or

...the demographic scope of the community (or other definitions of communities of interest), and

...the number, location, and relevancy of the locations of origination.

d) Origination facilities are essentially terminal equipment. These were divorced by the Carterfone decision from control by carriers. The separation is beneficial and should not be breached.

e) Origination locations and equipment are freely available for lease to potential originating individuals or organizations from commercial suppliers, educational institutions, etc. Mandatory supply by the cable carrier will be restrictive in location, charges, and choice of types of equipment.

f) There is an implicit assumption that cable carriers, like broadcast stations, should be principally liable for their content. The FCC should exempt cable carriers from direct liability for content of leased channels.

g) Mandating the cable carriers systems to originate public payment programs (Pay-TV) carriers with it serious monopoly restraints in the direct marketing of a vast range of communications services which cannot be economically sponsored by advertisers. Etc.

"2. LIMIT THE TYPE OF PROGRAMS WHICH CATV SYSTEMS MAY TRANSMIT FOR WHICH A PER-PROGRAM OR PER-CHANNEL CHARGE IS MADE:

ACLU arguments:

Such abridgements of legal content services are:

- a) Unconstitutional, in violation of the First Amendment.
- b) Restraints of fair competition between competing economic services.
- c) Denials of access to markets by the creators and producers of literary and communications properties.

Etc.

"3. SET FORTH DETAILED CONDITIONS GOVERNING THE PROGRAM ORIENTATION OPERATIONS OF ALL CATV SYSTEMS:

- a) Advertising commercials only at natural breaks.

b) Application of equal time, fairness, section 215 to cable, without reference to availability of channel capacity or source of programming:

(1) Presumption that cable carriers, like broadcast carriers, are primarily liable for legality of content (as opposed to print and other carriers where the originator is primarily liable).

(2) Exemption of newspapers delivered in facsimile.

c) Prohibition of lotteries.

ACLU arguments: (not completed)

a) Undue restraint on revenues necessary for diversity, etc.

Etc.