

THE CONSTITUTIONAL ISSUES OF PUBLIC POLICY FOR
TELEVISION and other ELECTRONIC MASS COMMUNICATIONS

Under the First Amendment

The First Amendment was an organic part of the U.S. Constitution when it was ratified by the States in 1791.

"Congress shall make no law abridging the freedom of speech or of the press; or the right of the people peaceably to assemble."

The meaning and intent of these basic rights need to be related to the universe of 1791, when speech, assembly, and the press (i.e., all products of the printing press) comprised the entirety of the U.S. media of public and mass communications. The printing press produced books, handbills, posters, pamphlets, and magazines, as well as newspapers. Word-of-mouth was the principal medium of popular communications.

Printing press products, speech, and assembly remained the sole media of public communications until radio broadcasting commenced in the early 1920's. Film* became popular in the early 1900's but was restricted in audience and content by the limitations of theatrical distribution.

During these 150 years, by court decision and precedent, the First Amendment has been interpreted to guarantee a comprehensive list of specific freedoms and safeguards of free speech, many of which were inherent in the nature of print communications, such as:

- ... free access to the essentials of production (paper, presses, etc.)
- ... free access to carriers and channels of distribution
 - the post office and mails
 - express and private carriers
 - stores and retail outlets
 - canvassing and places of meeting and assembly
- ... free choice of sources of revenue, whether from direct sale to users, or indirect sponsorship by advertisers, patrons, etc.

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*The film medium has been progressively unshackled by court interpretations of speech freedoms as well as anti-trust actions. Production and distribution organizations were divested; distributor and exhibitor monopolies were broken up; restrictive block bookings were forbidden; tie-ins between artists, producers, and distributors controlling recordings and broadcasting as well as films were outlawed. Each of these practices persists in broadcasting, to a greater or lesser extent.

- ... freedom to act as an entrepreneur, whether as publisher, distributor, or self-employed writer or artist, counter-balancing the risks with the satisfactions of self-expression and exclusive right to the profits from the work and risk.
- ... Opportunities to compete freely, free from censorship, licensing, and restraints on competition from horizontal and vertical combinations. Print media with nearly unlimited choices of format, sources of income, and carriers, have been almost wholly free of monopoly restrictions.

These and other freedoms achieved in the print media have molded our society - politically, culturally, and economically. In fact, the history of print technologies and press freedoms coincides with the growth of popular democracy.

From the inception, it is not surprising that the Federal government and its regulatory agencies were not aware that radio and its giant offspring, television, were to become the dominant mass media, surpassing print in total hours of audience time.

A series of false assumptions were made. Herbert Hoover, who had jurisdiction as Secretary of Commerce, predicted in 1926 that radio would be supported by direct public payment. The drafters of the Federal Communications Act made the error of identifying the station licensee as the equivalent of the newspaper publisher, rather than as a common carrier or channel. An early pre-meditated court test made the networks - the interconnecting carriers - immune from licensing and direct regulation. The self-asserted privilege of the carriers to control, select, and reject programs has not been challenged. The right of a newspaper, for example, to buy time or seek public payment for an "electronic edition" has not been asserted. In fact, major networks and stations, as a matter of policy, reject all outside originated news and public affairs programs.

As the F.C.C. notice states (p. 11, par. 25), "... the reliance of the broadcasting industry upon advertising revenue, rather than upon direct charge to the public as its principal source of revenue, has not been the result of any action by either Congress or the Commission, but rather the result of natural development of the industry."

So long as the number of broadcast channels available for television was not adequate to serve all potential users, many of the freedoms of speech and press gained in the print media had to accept abridgment by station licensees and the "networks," quite naturally acting in their exclusive self-interest. It is significant that the few countries outside the U.S. which have established systems of privately owned broadcasting have either done so after a governmental system had been established (c.f. Canada) or have required that the carrier systems (i.e., the stations and inter-connecting networks) either be operated as independent common carrier public utilities or be prohibited from engaging in programming.

But new technologies are about to eliminate channel shortages, with UHF, cable, micro-wave, laser, and satellites. The vital incentive of direct public payment, which confers independence on the producer and makes the service directly

responsive to the needs of all segments of the public, can now be achieved by a variety of proven techniques.

The public interest is deeply involved in rule-making for subscription television, since it will establish guide-lines for the structure and controls of the entirety of high capacity electronic communications, which is destined to become the predominant system of U.S. public communications. Such a system, including cable and over-the-air transmission, will allow the public to select and pay for almost all of the present print as well as broadcast media - for news and information, entertainment, and education. But it will also make possible new and unprecedented services such as in-home retail shopping and banking and unlimited "library" access to books, films, drama, music, education, and business information.

The U.S. now has the capability to establish a public electronic communications system with the universal coverage and flexibility of the present telephone system, but with the capacity to provide almost the entirety of our present and future communications needs on a practical, profitable basis.

Such a system is predicted as "inevitable" by Dr. Charyk, electronic scientist and president of COMSAT. It would be identical in both its technical and regulatory aspects with the present telephone system, except for the high capacity of its circuits. Employing the "telephone exchange" principle, it would provide the producers of programs and services with potentially unlimited channels of access to national audiences and markets, for both paid and free (sponsored) distribution direct to the public. It would provide the public, on the "telephone dial" principle, with a choice of all available systems and services, whether paid or sponsored. It can incorporate, without curtailment, the entire present system of commercial and educational on-the-air broadcasting as well as CATV systems. It can provide both "one-way" ("broadcast") services, and "two-way" ("point-to-point") services within a single public system of circuits and exchanges.

The character of our society is molded by our communications systems. Free and competitive private enterprise is possible only when all producers and distributors have equal access to all public carriers of goods, services, and tape communications. Self-government itself depends on the unbridged distribution of information and diverse viewpoints on public policy and electoral contests.

The people of the U.S., as a matter of right, are entitled to a system of public electronic communications which will assure the maximum degree, and the least abridgment, of press freedoms, with safeguards against monopoly abuse. The communications utility system described by Dr. Charyk meets these standards, and is now technically feasible.

The Federal government has the positive obligation to so direct the future growth and regulation of television and the myriad of emerging electronic communications to regain the freedoms of speech and "press" that are required by the Constitution, and which generally characterize the print media. The free speech abridgments that have almost fortuitously been accepted in the evolution of radio and television are false precedents for public policies for the new scope and magnitude of the electronic media of the future.

The rules and regulations now proposed by the Federal Communications Commission would impose the present inadequate and stultifying structure of over-the-air broadcasting upon this new and limitlessly promising communications system of the future.

Both the Federal and State governments have adopted the public policy that comprehensive and free systems for the distribution of goods, services, and information are essential to our society. They have both supported and operated marine, highway, canal, rail, mail, and express systems. They have subsidized informational and educational postal services. It is completely consistent with these policies that the Federal government provide the services and financial assistance to establish a free public system of mass electronic communications, at the earliest possible moment in this hour of decision.

The Constitutional rights of the people can be denied by the non-actions of the Government.