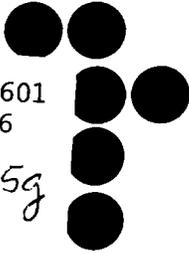


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COMMUNICATIONS FORUM

ELECTRONIC MEDIA AND THE FIRST AMENDMENT

Harold Farrow (Farrow, Schilhouse & Wilson)
Bruce Solker (Mintz, Levin, Cohn, Ferris,
Glovsky & Popeo)
Jim Hedlund (Association of Independent TV
Stations)

November 7, 1985

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Electronic Media and the First Amendment

Harold Farrow - Farrow, Schilhouse, & Wilson

Farrow began by tracing the history of mass media communication and its control/manipulation by those in authority. He described how the printing press was initially treated like a toy till its potential was discovered and then it was strictly controlled by the King (Henry VIIIth). It took 400 years to free the press. He commented on the similarity in the case of the Cable, where the government asserted jurisdiction in 1966. Since 1966 it has taken a lot of years to undo that process. Just about the time the cable begins to be threatened by new technologies, such as satellite dishes, it seems to be winning the warfare relating to restriction. He said there were others like him who believed that the Cable was good enough, and that it could survive if it did not repeat the mistakes of others in the past.

He claimed that the cable industry had made many mistakes in the past, resulting in damage to itself and to the First Amendment. He said that after the hundreds of years that it took to develop the common law that came out to be the First Amendment, no one really questioned the concept of 'freedom of the press', until broadcasting came along. The restriction on broadcasting was actually brought about under the concept of physical scarcity and not restriction of freedom. This was followed by 30 years of regulation and according to Farrow the franchise process that went with it was a very corrupt and corrupting process, encouraging bribery and almost mandating extortion. He further went on to say that this franchising process does not work, it hadn't worked, and it won't work. He said that the franchise agreement was so unwieldy and long, that by the time you get through it nobody knows what the agreement is. He said that it is not law, not a statute, nor an ordinance, in short it was unconstitutional.

Farrow said that in this respect City Halls were guilty of stealing since they were taking people's property against their will. i.e. their demand for free channels, studios, etc. in return for franchises. This he said was extortion. Ransom is ransom no matter who demands it. He inquired as to what right City Halls had to demand the right to examine a Cable Operator's books. Due to all these burdens and impediments affecting the broadcaster, marks will be left in the history of the freedom of the press/speech, which is the most basic of all constitutional rights. Without it the right to vote and/or pursue an occupation means little. He said that if this right can be protected there will be hope.

Bruce Solker - Partner

Mintz, Levin, Cohn, Ferris, Glovsky, & Popeo

Solker began by describing the story of the 'must carry' law. Must carry rules were originally adopted in 1965 and applied the next year by the FCC to every cable system in the US. It was originally justified by the FCC on two basic grounds. Firstly, back in the '60s, cable TV was viewed not as a publisher or as a speaker according to the First Amendment, but merely a supplementary service to basic over the air TV. According to FCC at that time, Cable was nothing more than an alternative way of making broadcast programs available to the public. Therefore they felt that every local broadcaster was entitled to the protective treatment of the 'must carry' rules. Secondly, the rules were imposed to prevent what they felt to be unfair competition between cable TV and local broadcast stations. FCC believed at that time, that viewers would lose access to free TV programming since the market would be fractionalized by cable competition, and would lead to a loss of viewers resulting in lost advertising and hence death to some over the air broadcasters. These rules were on the books for 20 years and never really re-examined until the late 1970s.

The three year economic inquiry conducted by the FCC revealed that cable regulation had been premised on an intuitive model which was most inaccurate having neither legal nor economic support. Following the re-examination, the FCC in 1979/1980 eliminated a lot of the federal regulation of Cable. However no change was made at that time to the 'must carry' rules. This was followed soon after by pressure from national cable programmers (about 50 nation wide). In 1976 the FCC deregulated earth stations receiving such signals. The 1978 copyright act included compulsory license for Cable to retransmit the programming on those signals it was legally entitled to carry. In 1980 Ted Turner (a cable operator) requested the FCC get rid of the 'must carry' rules on the basis that they were unconstitutional. At that time the broadcasters overplayed their hand indicating that the government should not touch it. In the fall of 1983 Turner via the Court forced FCC to take another look. At this time a second case - 'Quincy Cable Case' was percolating up through the federal regulatory system. Quincy took FCC to Court challenging the 'must carry' rules under the first amendment.

With all this as background when Solker and others got to Court earlier this year, the FCC had already begun dismantling a fair amount of broadcast regulations, as it agreed that the scarcity problem (unlike in broadcast stations) doesn't affect Cable. The FCC effectively lost the case, probably because the rules were far too broad, and as such worked whether the cable system had 12 or 200 available channels. The Court could not find any justification for the first amendment however they decided only to be lenient. Consequently storm broke out in the broadcast and cable industries. Broadcasters were now pressing FCC to take the Court up on its invitation and try to draft more rules. In closing Solker said that he could not yet declare victory, and when it is all done he expected a final law to apply - 'law of unintended consequences'!

Jim Hedlund - Association of Independent TV Stations

Hedlund expected the development in Washington to go on for a couple of years. He discussed the issues from the perspective of the independent TV broadcaster, and began tracing some of the history and relationship between over the air broadcasters and the cable industry. He said that there were over 1000 federally licensed local TV stations in the US of which about 250 were independent stations. The independent station has to produce or buy programming to fill every single minute of broadcast. The market for purchasing programming is competitive and the 'right fees' are astounding. To this he compared the cable industry which started in the late '40s primarily as an antenna service and continued in that form for approximately 20 years. This service was to allow the cable industry to serve people who for purely physical reasons could not obtain over the air broadcasts (e.g. people living in a valley).

Hedlund said that now it had come to a point where broadcasters have to buy TV programming from its owners, but the cable industry takes these programs and sells it to subscribers who are within the access of the over the air broadcast. In the '60s he said there were a few landmark Court decisions relating to the copyright act of 1909, ruling Cable as a "passive antenna" no different from TV receivers. However since then Cable has become much more "active". In 1976 there was copyright compromise when Congress first recognized that Cable did have copyright liability for carrying copyright programs. This was dealt with by creating a compulsory license supplemented by compulsory licenses at lower market rates for the importation of distant signals.

Hedlund said that 1976 also brought about the possibility of Cable having its own programming. This was the result of the launch of the first domestic Commercial Communication Satellite which would free the cable industry from total reliance on broadcasters. Consequently today the cable industry now provides video and pay movie services. This is actually their "bread and butter". However, he claimed that this business was now going down because of the growth of VCR's in the rental market. The resultant desperation is pushing the cable industry to now want scrambling, which if it materialises will be the salvation of the cable industry. It will enable them to make money by discriminating between stations, they will distort the advertising market, and carry only programs that they want people to watch.

Hedlund said that it was fine by him if the cable industry wanted to operate a free of charge system, but they should decide as to whether Cable was to be defined as a "passive antenna", or "a publisher under the first amendment", and stick by the rules relating to either choice.

Speakers' Comments and Responses to Questions

The question was asked as to whether broadcasters had a right to sell programs, to which Hedlund replied, no. But he said it was not really clear because one could have a TV station in Boston consenting to the carriage of a movie by a cable system in California. He expected that in a free market without the compulsory 'must carry' license a TV operator would give retransmission rights to its own programming and news to the cable operator. But he said that Hollywood producers would probably not allow retransmission by cable operators without their buying the rights from the producers. But since TV stations would probably want the right to give consent themselves, this issue will have to be resolved in the market place.

The case regarding the State of Oklahoma prohibiting the advertising of liquor was brought up for discussion. This was the Supreme Court case where the cable operator was sued by the State for violation of the law. In commenting on this issue Solker stated that the case was argued on both constitutional and regulatory grounds. The Supreme Court explicitly said that it did not reach any constitutional issue. In an unanimous decision the Supreme Court found that there were four or five ways in which the Federal Government had pre-empted the State's right to regulate in this instance. One of the issues was the FCC's regulation relating to signal carriage and including the 'must carry' rules. However, Solker mentioned that there is a constitutional doctrine that allows regulation at administrative level where there is insufficient justification to use a constitutional rule. This he said was used in the Quincy-Turner case. But in both instances pre-emption as a result of the FCC rules could not be reversed.

Referring to Farrow's claim that cable should have the same rights as newspaper publishers, the inquirer asked whether cable operators do have the same rights, and whether they could use the streets as they see fit without any quid pro quo, and whether municipalities had equal right to breach those contracts and enter into negotiations with other service providers. In reply Farrow said that another cable company has the right to be on the same street. In effect he said the company that is already there has the right to stay there, and the new company coming in could enter and compete using the same or different technology. Speaking of quid pro quo, he said that the franchising fee is the return received by the municipality. He also said that the fees were astoundingly high, and at one time as much as 1/3rd of the gross receipts. No other industry pays that kind of price to be in business. Therefore if franchising does not give you a monopoly right, then there is actually no quid pro quo from the municipality to the cable company.

With reference to the Savannah case, Farrow stated that cable operators were capable of breaking laws like anyone else but that should not prevent them from enjoying the freedom that goes with the first amendment. The basic rule of freedom to publish

and speak should not be curtailed. He said that once given the rights of the first amendment, technologies should be allowed to compete. He referred to independent broadcasters as parasites who stand in between the program producer and the public collecting revenue. Hedlund in response to this comment stated that all independent broadcasters produce their own programs as well. He said that it was cable companies that were parasitic since they were incapable of managing without independent broadcasters and/or other producers.
