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Heidi R. Young

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THE DEREGULATION OF COMMERCIAL TELEVISION

I. Introduction

In August 1984, the Federal Communications Commission (FCC or Commission) released the Report and Order in the Matter of the Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations (Deregulation Report and Order).¹ The Deregulation Report and Order affects the FCC regulations concerning programming policies,² ascertainment requirements,³ program

1. *In re* The Revision of Programming and Commercialization, Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, MM Docket No. 83-670 (Aug. 21, 1984) [hereinafter cited as Deregulation Report and Order]; *see also In re* The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Logging Requirements for Commercial Television Stations, Notice of Proposed Rulemaking, 94 F.C.C.2d 678 (1983) [hereinafter cited as Deregulation Notice].

In 1981, the Commission deregulated radio, eliminating or modifying the same regulations that are affected by the TV Deregulation Report and Order:

Action taken herein resolves the issues raised in the Commission's Notice of Inquiry and Notice of Proposed Rulemaking, released September 27, 1979, In the Matter of the Deregulation of Radio. The Commission is eliminating its current processing guidelines which commercial radio stations should provide and the number of commercial minutes per hour which they should not exceed. Additionally, the Commission is eliminating its community ascertainment requirement and its program log keeping requirements for commercial radio stations. The action is being taken to reduce the paperwork and other burdens on commercial radio stations without having a substantial adverse impact upon the public interest.

49 PIKE AND FISCHER, RADIO REGULATIONS 2D SERIES 3 (1981). *See* 84 F.C.C.2d 968, *recon. denied*, 87 F.C.C.2d 797 (1981); Office of Communication of United Christ Church v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) [hereinafter cited as *UCC v. FCC*], upholding the actions taken by the FCC, but remanding on the issue of eliminating the program logging requirement and directing the FCC to "reconsider its decision, this time giving adequate attention to the usefulness of programming logs in the newly revised, overall scheme of broadcast regulation." *Id.* at 1418.

2. 47 C.F.R. § 0.283(a)(6)-(8) (1983); *see* Report and Statement of Policy Res: Commission En Banc Programming Inquiry, 44 F.C.C. 2303 (1960). "Programming policies" refer to the Federal Communications Commission's [hereinafter cited as FCC] notion of balanced programming which the FCC has considered necessary to fulfill the requirement under the Communications Act of 1934 that broadcasters serve the public interest. *See infra* notes 41-48 and accompanying text for a historical discussion of programming policies.

3. The "ascertainment of community needs" requirements are to insure that broadcasters survey the public and the leaders in the communities they serve as to what they perceive their own needs to be and what issues are important to

logging rules⁴ and commercialization policies.⁵ This action is part of the FCC's continuing trend toward total deregulation of the broadcast media.⁶

The Television Deregulation Notice, which preceded the Deregulation Report and Order by one year, had proposed several options for each of the above-mentioned areas, ranging from complete deletion of the particular regulation to slight modification of the existing stringent rules and policies.⁷ The Deregulation Report and Order eliminated all formal ascertainment requirements⁸ and programming

them. For the specific requirements, see *In re* Primer on Ascertainment of Community Problems by Broadcast Applicants Part I, Sections IV-A and IV-B of FCC Forms, 27 F.C.C.2d 650 (1971) [hereinafter cited as Ascertainment Primer]. See also *infra* notes 56-67 and accompanying text for a discussion of ascertainment requirements. The term "ascertainment" refers to "the determination of community needs through a set of special procedures." Comment, *FCC Broadcast Standards for Ascertaining Community Needs*, 5 FORDHAM URB. L.J. 55, 56 n.10 (1976).

4. 47 C.F.R. §§ 73.1800-1840 (1983). The program logs required by the FCC consisted of a detailed listing of virtually everything that the station has broadcast during the day. The log had to be entered contemporaneously with the actual broadcast. The log included the name of the program, a description of the category (e.g., entertainment, public affairs, news) and the time of day that the program begins and ends. Logs also were required for all program interruptions such as advertisements, public service announcements and station identification. See also *infra* notes 69-77 and accompanying text for a historical perspective of program logging requirements.

5. Under the former FCC regulations, there was no specific limit on the number of commercials a licensee could broadcast, but under 47 C.F.R. § 0.283(a)(7) (1983), the Broadcast Bureau was required to refer renewal license applicants to the full Commission for approval where the applicant proposes more than "16 minutes of commercial matter per hour, or, during periods of high demand for political advertising, providing for exceptions permitting in excess of 20 minutes of commercial matter per hour during 10 per cent or more of the station's total weekly hours of operation." *Id.* There also was a prohibition on program length commercials.

The Deregulation Notice proposed the elimination of the consideration of commercial time for license applicants or renewal applicants, or, as an alternative, increasing the maximums set forth in the 1973 Delegation of Authority. Deregulation Notice, *supra* note 1, at 704. This Note will not consider this portion of the deregulation. See Amendment of Part O of the Commission's Rules — Commission Organization — with Respect to Delegations of Authority to the Chief, Broadcast Bureau, 43 F.C.C.2d 638 (1973) [hereinafter cited as 1973 Delegations of Authority]. For discussions of commercialization, see BOTEIN & RICE, NETWORK TELEVISION AND THE PUBLIC INTEREST (1980); KRASNOW, LONGLEY & TERRY, THE POLITICS OF BROADCAST REGULATION 192-205 (1982).

6. See, e.g., *In re* Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Notice of Inquiry, No. 84-282 (May 8, 1984); *In re* Repeal of the "Regional Concentration of Control" Provisions of the Commission's Multiple Ownership Rules, 96 F.C.C.2d 578 (1984); *In re* Deregulation of Radio, Report and Order 84 F.C.C.2d 968 (1981).

7. Deregulation Notice, *supra* note 1, at 700-07.

8. See Deregulation Report and Order, *supra* note 1, at 23-25.

guidelines.⁹ It also eliminated commercialization policy guidelines and the prohibition against program length commercials.¹⁰ Finally, it significantly reduced program logging requirements which now will be satisfied by quarterly filing of an issues/programs list by the broadcaster.¹¹

This Note analyzes these regulatory changes according the following structure: first, a historical exposition of radio and television regulation in general¹² and of the areas affected by the deregulation in particular;¹³ second, an assessment of the changes in the context of the modern television marketplace;¹⁴ and third, a discussion of television content regulation and the first amendment.¹⁵ This Note concludes that, although the deregulation is a major step forward in accommodating the changing broadcasting marketplace, the FCC has not made any real progress on the crucial issue of full first amendment protection in broadcasting.

II. Regulation: Past to Present

A. Early History

In the early 1920's, the number of radio broadcast stations licensed by the Secretary of State of the Department of Commerce and Labor under the Radio Act of 1912¹⁶ began to increase rapidly. The competition for airtime resulted in interference on the airwaves, and broadcasters attempted to make their programs heard by broadcasting at higher volumes than did their competitors.¹⁷ This only exacerbated

9. *Id.* at 4-5. However, the Commission noted that they "do not imply that the programming obligations of broadcast licensees, as we have historically viewed them, are not properly subject to review and revision in appropriate proceedings." *Id.* at 2 n.2.

10. *Id.* at 29. "Program length commercials" are "programs into which so much commercial consideration is interwoven that the entire program becomes a commercial." BITTNER, *BROADCAST LAW AND REGULATION* 239 (1982).

11. Deregulation Report and Order, *supra* note 1, at 34-35. The decision to require a quarterly programs list was influenced by the District of Columbia Circuit Court of Appeals decision in *UCC v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983), where the court questioned whether an annual list, limited to 10 issues, "could provide a significant gauge of a station's overall public service performance." Deregulation Report and Order, *supra* note 1, at 33.

12. *See infra* notes 16-40 and accompanying text.

13. *See infra* notes 41-82 and accompanying text.

14. *See infra* notes 83-115 and accompanying text.

15. *See infra* notes 116-47 and accompanying text.

16. Radio Act of 1912, Pub. L. No. 264, § 1, 37 Stat. 302 (1912).

17. *See* EMERY, *BROADCASTING AND GOVERNMENT* 23-24 (1961) [hereinafter cited as EMERY].

the problem, and both the public and the broadcasters appealed to the government to remedy the situation.¹⁸

Gradually, it became clear that the Secretary had no power, under the 1912 Act, to control the problems that were arising in the broadcast industry.¹⁹ The Secretary had no authority to refuse a license merely because it would cause interference with other licensed broadcasters²⁰ nor could he assign hours of operation²¹ or even require licensees to use only their assigned frequencies.²²

In response to the critical need for further legislation, Congress passed the Radio Act of 1927,²³ which was

intended to regulate all forms of interstate and foreign radio transmissions and communications . . . to maintain the control of the United States over all the channels of interstate and foreign radio transmission and to provide for the use of such channels, but not the ownership thereof,^[24] by individuals, firms, or corporations, for limited periods of time under licenses granted by Federal authority. . . .²⁵

The Radio Act of 1927 established the Federal Radio Commission (FRC) as the licensing authority.²⁶ The FRC, which was given broad rule-making powers, assigned frequencies or wavelengths as the "public convenience, interest, or necessity require[d]."²⁷ The FRC expressed its licensing and regulatory policies and its interpretation of the standard of public convenience, interest or necessity in *In re*

18. *Id.* at 24-26.

19. The 1912 Act "gave the Secretary no discretionary power. There were no general standards by which he could choose among applicants for stations." EMERY, *supra* note 17, at 17. The Secretary was merely to grant licenses and enforce the minimal regulations set forth in the 1912 Act. *Id.*

20. *Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. App. 1923), *appeal dismissed*, 266 U.S. 636 (1924).

21. *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926); *see also* 35 Op. Att'y Gen. 126 (1926). Attorney General William Donovan's response to Secretary of Commerce and Labor Hoover's request for a definition of duties and powers under the Radio Act of 1912, stated that Donovan agreed with the *Zenith* holding that Hoover had no express power under the act to establish regulations. *Id.*

22. 35 Op. Att'y Gen. 126.

23. Radio Act of 1927, 44 Stat. 1162-74 (1927).

24. This specific emphasis on the fact that licensees are not owners of the frequencies which they are licensed by the government to use is frequently cited by those who use the public trustee theory to support a denial of equal first amendment privileges for the broadcast media and the print media. *See infra* notes 124-26 and accompanying text for a discussion of the "public trustee" theory of broadcast licensing.

25. Radio Act of 1927, Pub. L. No. 632, § 1, 44 Stat. 1162 (1927).

26. *Id.* at 1163-64.

27. *Id.* at 1163.

Great Lakes Broadcasting Company.²⁸ The FRC asserted its authority to inquire into the programming content of broadcast stations by indicating that the broadcasters had a duty to "serve the entire listening public within the service area of a station."²⁹ This duty included the requirement that

the tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program in which entertainment consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports and news and matters of interest to all members of the family find a place.³⁰

The FRC noted that there existed two safeguards to insure that a broadcaster would meet the public needs: first, the listener could "exercis[e] his complete power of censorship by turning his dial away,"³¹ and second, the FRC could review past performance when applications were made for renewal of licences or when others applied to take over a particular broadcaster's license.³²

The Communications Act of 1934 (Act),³³ which adopted many of the provisions of the Radio Act of 1927 in its section pertaining to broadcast regulation, also established the FCC.³⁴ Originally, the

28. *In re Application of Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32 (1929), *rev'd in part on other grounds*, 37 F.2d 993 (D.C. Cir. 1930), *cert. dismissed*, 281 U.S. 706 (1930).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Communications Act 1934, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-757 (1982)).

34. 47 U.S.C. § 151 (1982).

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide and radio communication service with adequate facilities at reasonable charges, for the purpose of the rational defense, for the purpose of promoting the safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

Id.

FCC's programming requirements,³⁵ ascertainment requirements,³⁶ logging rules³⁷ and limits on commercialization³⁸ stemmed from the notion that the "public interest"³⁹ required the type of balanced programming that was described in *In the Matter of the Application of Great Lakes Broadcasting Company*.⁴⁰

B. Programming Policies

In 1946, the FCC issued a Report on Public Service Responsibility of Broadcast Licensees (the Blue Book),⁴¹ in which the commission set forth its policies concerning a "well-balanced program structure."⁴² The Blue Book indicated that local talent programs, discussions of public issues, programs covering religious, educational and civic matters, local news and market reports had to be included in a licensee's programming.⁴³

Although the Commission did not require a specific quantity of time to be devoted to each type of programming, it indicated that an "adequate amount of time" during "the good listening hours" would be required.⁴⁴ In 1960, the FCC issued a report which reiterated the policies set forth in the Blue Book but which listed the "major elements usually necessary to meet the public interest, needs, and desires of the community in which the station is located as developed by the industry, and recognized by the commission."⁴⁵

35. See *supra* note 2.

36. See *supra* note 3.

37. See *supra* note 4.

38. See *supra* note 5.

39. Section 309(a) of the Communications Act states that the F.C.C. will only grant a license if it finds that the "public interest, convenience and necessity would be served by the granting thereof." 47 U.S.C. § 309(a) (1982). The Commission from its inception has taken the position that programming in the public interest means diversity in programming, balanced programming and responsiveness to local community concerns. The need for public affairs programs, news, educational and religious programs in addition to entertainment has been emphasized throughout the Commission's existence. See *infra* notes 41-68 and accompanying text.

40. See *supra* notes 28-32 and accompanying text.

41. FCC internal document (available at the FCC library, Washington, D.C.).

42. *Id.*

43. *Id.* This stance taken by the Commission is an outgrowth of the early view of the "public interest" standard set forth in section 309(a) of the Communications Act of 1934. See *In re Application of Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. at 32.

44. *Id.*

45. Report and Statement of Policy Res: Commission En Banc Programming Inquiry, 44 F.C.C. 2303, 2314 (1960) [hereinafter cited as 1960 Programming

The Commission noted in the 1960 Programming Statement that it "d[id] not intend to guide the licensee along the path of programming,"⁴⁶ that it would "steer clear of the bans of censorship"⁴⁷ and that it would not establish specific quantitative programming requirements.⁴⁸

Through the Deregulation Report and Order,⁴⁹ the FCC eliminated the application of the "promise versus performance" standard in the case of uncontested license renewals.⁵⁰ The Commission states that this decision was based upon the following "fundamental considerations:"⁵¹ the belief that licensees would continue to broadcast the type of programming required by the guidelines, even in their absence, in response to marketplace incentives⁵² and the FCC's conclusion that the guidelines may have conflicted with the policies underlying the Regulatory Flexibility Act⁵³ and the Paperwork Re-

Statement]. These elements are:

(1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs[,] (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs[,] (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, [and] (14) entertainment programs.

Id.

46. *Id.* at 2316.

47. *Id.* This statement on the part of the FCC is rather superfluous given that Section 326 of the Communications Act of 1934 specifically prohibits censorship.

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

47 U.S.C. § 326 (1982).

48. 1960 Programming Statement, *supra* note 45, at 2314. But see 1973 *Delegations of Authority*, *supra* note 5, which requires that the Broadcast Bureau refer license applications proposing less than 10% non-entertainment programming to the full Commission for approval. *Id.* at 640. See also *In re Amendment to Section 0.281 of the Commission's Rules: Delegations of Authority to the Chief, Broadcast Bureau*, 59 F.C.C.2d 491, 493 (1976), which further specifies the guidelines to be a minimum 5% "local" and 5% "informational" programming. 47 C.F.R. § 0.283(a)(7)(ii)(A) (1983) sets forth the current standard.

49. Deregulation Report and Order, *supra* note 1, at 4.

50. *Id.* The promise versus performance standard consisted of a comparison of the type of programming a licensee proposed in the license application to the programs actually broadcast by the licensee. This standard was applied by the Commission where the renewal was not contested.

51. *Id.*

52. *Id.* In fact, the FCC states that "the guidelines appear to have no impact on the levels of informational (news and public affairs) programming." *Id.* at 10.

53. 5 U.S.C. § 601 (1980).

duction Act.⁵⁴ Furthermore, the FCC considered the costs of compliance and the "possibly unnecessary infringement on the editorial discretion of broadcasters"⁵⁵ as important factors in favor of eliminating the programming guidelines.

C. Ascertainment

The 1960 Programming Statement also contained the new FCC policies with regard to the ascertainment of community needs and interests.⁵⁶ The FCC emphasized that it would not accept program proposals or letters of praise from the public in satisfaction of its requirements but that a specific ascertainment procedure would have to be followed by license applicants.⁵⁷

The confusion arising from differing interpretations given by license applicants to the ascertainment portion of application forms caused the Federal Communications Bar Association (FCBA) to request a clarification of the FCC ascertainment standards.⁵⁸ As a result, in 1971, the FCC published a list of guidelines known as the "Ascertainment Primer."⁵⁹

The Ascertainment Primer details appropriate ascertainment procedures for license applicants.⁶⁰ A separate "Renewal Primer" was

54. Deregulation Report and Order, *supra* note 1, at 4-5; see Paperwork Reduction Act, 44 U.S.C. § 3501 (1980).

55. Deregulation Report and Order, *supra* note 1, at 5.

56. 1960 Programming Statement, *supra* note 45, at 2314-18.

57. *Id.* at 2316.

What we propose will not be served by preplanned program format submissions accompanied by complementary references from local citizens.

What we propose is documented program submissions prepared as a result of assiduous planning and consultation covering two main areas: first, a canvas of the listening public who will receive the signal and who constitute a definite public interest figure; second, consultation with leaders in community life

Id.

58. Deregulation Notice, *supra* note 1, at 719 n.10 (Separate Statement of Commissioner Mimi Weyforth Dawson).

59. *In re* Primer of Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971).

60. The Ascertainment Primer is a detailed guide for license applicants to follow. It explains the purpose of each question pertaining to ascertainment on application forms and what is needed to constitute satisfactory compliance.

[T]he Primer require[d] the license applicant to: (1) draw up a detailed demographic outline of the community; (2) determine significant community groups from the outline; (3) conduct interviews with leaders of each "significant group" to discuss community needs; (4) undertake a survey of the general public to discuss community needs; and (5) propose

adopted in 1975 for renewal license applicants.⁶¹ The FCC required that ascertainment be conducted on an annual basis.⁶² The results of ascertainment and programming proposals to conform with community needs were to be filed with license and renewal applications.⁶³

The Deregulation Report and Order eliminated formal ascertainment obligations completely⁶⁴ and abolished the Ascertainment Primers.⁶⁵ The FCC has concluded that these regulations are unnecessary because licensees will become aware of community interests even in the absence of formal requirements.⁶⁶ Furthermore, the then-existing procedures for ascertainment imposed significant costs on the licensees where less costly methods of the licensees own choosing might have been equally effective.⁶⁷ Finally, the FCC seems to believe that competition in the marketplace is continually increasing, so that "commercial necessity dictates that broadcasters must remain aware of the issues of the community."⁶⁸

D. Program Logging Rules

Although program logging requirements have existed in some form since regulation under the FRC,⁶⁹ they have increased steadily over the years.⁷⁰ Under the FRC rules,⁷¹ broadcasters were required to

programming to meet the needs and problems of the community as ascertained from the prescribed studies

Comment, *FCC Broadcast Standards for Ascertaining Community Needs*, 5 FORDHAM URB. L.J. 55 (1976) (footnotes omitted).

61. *In re* Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1976), *recon. granted in part*, 61 F.C.C.2d 1 (1976) [hereinafter cited as *Renewal Primer*]; see *Bamford v. FCC*, 535 F.2d 78 (D.C. Cir. 1976) (court upheld denial of new license by FCC for failure to conduct ascertainment under primer guidance), *cert. denied*, 429 U.S. 895 (1976).

62. Ascertainment Primer, *supra* note 59.

63. Deregulation Notice, *supra* note 1, at 685-87. However, *In re* Ascertainment of Community Problems by Broadcast Applicants: Small Market Ascertainment Exemption, 86 F.C.C.2d 798 (1981), exempts renewal applicants serving communities of 10,000 or less from the ascertainment requirements on the theory that these broadcasters are "sufficiently familiar with their communities to enable them to develop responsive programming without the substantive administrative burdens associated with formal ascertainment procedures." Deregulation Notice, *supra* note 1, at 687.

64. Deregulation Report and Order, *supra* note 1, at 23.

65. See *supra* notes 59, 61.

66. Deregulation Report and Order, *supra* note 1, at 23-24.

67. *Id.*

68. *Id.* at 24.

69. Deregulation Notice, *supra* note 1, at 687.

70. *Id.* at 688.

71. 5 F.R.C. Ann. Rep. 96 (1931).

log all station and call announcements and the time of their broadcast and also to enter a description of all programs.⁷²

In 1934, the FRC established requirements that broadcasters log all programs by category⁷³ and log all political speeches along with the name and party of the politician represented by the speech.⁷⁴ The FCC revised the logging rules in 1966⁷⁵ "to require the contemporaneous maintenance of a comprehensive record of programs by specific categories."⁷⁶ The logging rules required not only a precise record of what had been shown throughout the broadcast day but also specified the manner in which these logs were to be entered and kept and the length of time they were to be retained for public inspection.⁷⁷

In determining its latest action with regard to logging requirements, the Commission was careful to consider the court of appeals' decision

72. *Id.*

73. F.R.C. Rules and Regulations § 172(A) (1934).

74. *Id.*; see Deregulation Notice, *supra* note 1, at 688.

75. *In re* Amendment of § 3.663(a) (now § 73.670). The Program Logging Rules for Television Broadcast Stations, 5 F.C.C.2d 185 (1966).

76. Deregulation Notice, *supra* note 1, at 688.

77. 47 C.F.R. §§ 73.1800-1840. See also ELLMORE, BROADCASTING LAW & REGULATION 166 (1982), which summarizes the extensive former program logging requirements as follows:

The employee keeping the log must sign it when starting duty and again when going off duty. Logs must be kept in an orderly and legible manner. Key letters or abbreviations may be used if proper meaning or explanation is contained elsewhere in the log. Each sheet must be numbered and dated. Time entries must be made in local time and must indicate whether it is advanced (daylight savings) or nonadvanced time. Any necessary corrections of a manually kept log may be made only by striking out the erroneous portion and making a corrective explanation on the log or attachment to it. The corrections must be dated and signed by the person who kept the log, the program director, the station manager, or an officer of the licensee. No program log may be erased, willfully destroyed during the two years logs are required to be retained. . . .

Program logs must contain (1) [a]n entry identifying the program by name or title, (2) [e]ntries that indicate the time each program begins and ends, (3) [a]n entry classifying each program as to type.

Id.

For commercial stations the FCC lists eight types of programs and three subcategories of programs.

For noncommercial educational stations the FCC lists seven types of programs.

An entry classifying each program as to source. For commercial stations the FCC lists three sources of programs: local programs (L), network programs (NET), and recorded programs (REC). . . . An entry for each

in *Office of Communication of United Church of Christ v. FCC*.⁷⁸ In that case, which concerned the deregulation of radio, the court questioned the Commission's decision to eliminate program logs and to require only an annual issues/programs list.⁷⁹

The Deregulation Report and Order concluded that "the best method of documentation suitable and adequate to our new regulatory scheme for television broadcasting is a quarterly issues/programs list requirement."⁸⁰ As in the decisions regarding ascertainment and programming guidelines,⁸¹ the cost and burden to the licensee of the comprehensive log requirement and the questionable need for it under the new regulatory scheme were among the primary considerations in minimizing the logging requirements.⁸²

III. The Deregulation: An Assessment

A. The Sources of Regulation

The rules concerning programming policy, ascertainment and program logging are all FCC-made regulations.⁸³ The Supreme Court

program representing a political candidate, showing the name and political affiliation of such candidate. For commercial matter: 1. An entry identifying the sponsor(s), the person(s) who paid for the announcement or the person(s) who furnished materials or services.

Id. at 166-67 (requirements pertaining to public service announcements, other announcements, and emergency broadcast systems operations are omitted) (footnotes omitted).

78. *UCC v. FCC*, *supra* note 1.

79. *Id.* at 1438-42.

80. Deregulation Report and Order, *supra* note 1, at 33-34.

This list is to be placed in a station's public inspection file and it should contain, in narrative form, a brief description of at least five to ten issues to which the licensee gave particular attention with programming in the past three months with a statement of how each issue was treated.

The list also is to include information pertaining to the date and time of broadcast and the duration of listed programming.

Id. at 34 (footnotes omitted).

81. See *supra* notes 52-55, 66-68 and accompanying text.

82. Deregulation Report and Order, *supra* note 1, at 34. For a thorough discussion of the Commission's reasoning, see *id.* at 33-36.

83. Programming Content, 47 C.F.R. § 0.283 (a)(7) (1983); Logging Rules, 47 C.F.R. §§ 73.1800-1840 (1983); *In re* Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C.2d 418 (1976) [Renewal Primer], *recon. granted in part*, 61 F.C.C.2d 1 (1976); *In re* Primer on Ascertainment of Community Problems by Broadcast Applicants, Part 1, Sections IV-A and IV-B of FCC Forms, 27 F.C.C.2d 650 (1971) [Ascertainment Primer].

The only specific statutory requirements related to broadcast content are the equal opportunity requirement, the reasonable access rule, the sponsorship an-

has held that instituting such regulations is within the jurisdiction of the FCC and that such regulations are an appropriate means for carrying out its responsibility to insure that broadcasters serve the "public convenience, interest and necessity" as required by the Communications Act of 1934.⁸⁴ Therefore, it is equally within the discretion of the FCC to determine that such rules should be eliminated or modified as has been done in the Deregulation Report and Order.

nouncement rules and possibly the fairness doctrine.

The "equal opportunity rule" requires that licensees afford equal opportunities to all legally qualified candidates for a public office, once one such candidate has been permitted to use the broadcast station. 47 U.S.C. § 315 (1982).

The "reasonable access rule" states:

The Commission may revoke any station license or construction permit . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

47 U.S.C. § 312(a)(7) (1982).

The "sponsorship announcement rule" states:

All matter broadcast for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person

47 U.S.C. § 317(a)(1) (1982). This section goes on to define specific situations where sponsorship announcement will be required and it also gives the FCC power to "prescribe appropriate rules and regulations to carry out the provisions of this section." 47 U.S.C. § 317(b), (d), (e) (1982).

The Fairness Doctrine imposes two duties upon broadcast licensees: 1) the duty to devote broadcast time to controversial issues of public importance and 2) the duty, when such programming is presented, to insure that it is balanced overall; that is, to provide a reasonable opportunity for the presentation of contrasting views. 47 U.S.C. § 315 (1982); *see also* NBC v. FCC, 516 F.2d 1101 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976). The FCC is currently considering the elimination of the Fairness Doctrine. *See In re* Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Gen. Docket No. 84-282 (May 8, 1984) [hereinafter cited as *Fairness Inquiry*]. The Commission points out in the *Fairness Inquiry* that one of the primary questions to be explored is whether or not Congress has vested the Commission "under the Communications Act of 1934, as amended, and, in particular, under the 1959 legislative amendments to Section 315 of the Act [with] the Agency discretion to significantly modify or even repeal the fairness doctrine." *Id.* at 4; *see* 47 U.S.C. § 315 (1982) (footnotes omitted).

84. An early interpretation of this standard by the court can be found in *In re* Application of Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32 (1929), *modified*, 37 F.2d 993 (D.C. Cir. 1930), *cert. dismissed*, 281 U.S. 706 (1930); *see also* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); FRC v. Nelson Bros. Co., 289 U.S. 266 (1933).

B. The Arguments for and against Deregulation

The FCC and proponents of the deregulation base their support on two specific considerations.⁸⁵ First, they claim that today's television marketplace is substantially different from that of ten to twenty-five years ago when these regulations were made and that this new, highly competitive marketplace will ensure the results that these regulations were intended to achieve.⁸⁶ Secondly, supporters of deregulation claim that the costs of complying with the regulations outweigh the benefits derived from them,⁸⁷ indicating that relying on marketplace competition would be a more cost efficient method of achieving the same result.

Another argument in favor of the deregulation, touched upon only briefly by the FCC in the TV Deregulation Notice⁸⁸ and by the other proponents of the deregulation,⁸⁹ is the continuing question of whether such content regulations constitute a violation of the first amendment rights of broadcasters.⁹⁰

Those who oppose the deregulation base their argument primarily on the public interest standard of the Act and on the concept of broadcasters as public trustees of the airwaves.⁹¹ In addition, opponents claim that there is a lack of reliable statistical support for

85. See, e.g., Deregulation Notice, *supra* note 1; *Comments of the National Association of Broadcasters* [hereinafter cited as *NAB Comments*]; *Comments of American Broadcasting Companies, Inc.* [hereinafter cited as *ABC Comments*] (Nov. 21, 1983) (on file at F.C.C., Washington, D.C.).

86. See Deregulation Notice, *supra* note 1, at 680; *NAB Comments, supra* note 85, at 7-10.

87. See Deregulation Notice, *supra* note 1, at 695; *NAB Comments, supra* note 85, at 10-12, Appendix A. The NAB had an independent communications research firm conduct a cost/benefit analysis of the FCC's pre-deregulation ascertainment and program logging requirements. It concludes that the costs to the licensee of complying with these regulations outweigh the benefits that result from maintaining the regulations (i.e., the degree to which these regulations insure that the licensee's programming is in the "public interest"). *Id.*; see also Deregulation Report and Order, *supra* note 1, at 56.

88. Deregulation Notice, *supra* note 1, at 695.

89. See *NAB Comments* and *ABC Comments, supra* note 85.

90. Although this argument has been made unsuccessfully in the past with regard to content regulation of broadcast television, the question still exists and broadcasters continue to fight for full first amendment rights. See *infra* notes 92-116 and accompanying text.

91. See, e.g., *Comments of the Office of Communications of United Christ Churches* (Nov. 21, 1983) (on file at the F.C.C., Washington, D.C.); *Reply Comments of the Office of Communications of United Christ Churches (U.C.C.)* (Jan. 5, 1984) (on file at the F.C.C., Washington, D.C.). See also *infra* notes 135-46 and accompanying text on the public trustee concept.

the economic and free marketplace competition arguments of the deregulation proponents.⁹²

C. Analysis of the Argument for Deregulation

1. *The Competitive Marketplace*

A common justification for the deregulation of the television broadcast industry is the theory that it is preferable to allow an industry to regulate itself through free marketplace competition rather than through government-imposed regulation.⁹³ Proponents of deregulation point out that, although self-regulation may not have been a viable alternative in the early years of television, the industry has grown to such an extent that it is, indeed, not only possible but that it is already occurring.⁹⁴

Self-regulation through competition is preferable to government regulation, according to its supporters, for several reasons. First, effective self-regulation by definition requires less government supervision.⁹⁵ Secondly, marketplace competition by its nature would better serve the public interest; the public indicates its preference by choosing one broadcast station over another.⁹⁵ Under the current method, broadcasters present the FCC with documentary evidence of phone interviews, surveys and conversations with community leaders; the mere quantity of such documents might be used to indicate the degree of effort on the part of the licensee to serve the public.⁹⁶ Thus, as FCC Chairman, Mark S. Fowler, has noted,

92. *Reply Comments of U.C.C.*, *supra* note 91, at 4-6.

93. See Regulatory Flexibility Act, 5 U.S.C. § 601 (1980).

(a) agencies should achieve stated goals as effectively and efficiently as possible without imposing unnecessary burdens on the public; (b) uniform regulations and reporting requirements have, in numerous instances, imposed unnecessary and disproportionately burdensome demands upon small businesses with limited resources; (c) regulations have adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity; (d) pervasive regulations have created barriers to entry; and, (e) unnecessary regulations may lead to inefficient use of regulatory agency resources.

Id. (quoted in Deregulation Notice, *supra* note 1, at 694).

For a detailed discussion in support of this theory, see Fowler and Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982) [hereinafter cited as Fowler and Brenner].

94. See Deregulation Notice, *supra* note 1, at 692-93, Appendix A; *NAB Comments*, *supra* note 85, at 7-10. See generally Fowler and Brenner, *supra* note 93.

95. See Fowler, *The Public's Interest*, 4 COM. AND THE LAW Q. REV. 51 (1982) [hereinafter cited as *The Public's Interest*].

96. See Deregulation Notice, *supra* note 1, at 696-98, Appendix A.

“[b]roadcasting in the United States conforms little to the model contemplated in the Commission’s licensing philosophy.”⁹⁷

Further, although in the past free competition may not have been a viable alternative to FCC regulation because of the scarcity of television stations,⁹⁸ it is clear that this is no longer the case.⁹⁹ The number of television stations has increased steadily over the last forty years.¹⁰⁰ Additionally, improvements in ultra-high frequency (UHF) television,¹⁰¹ the introduction of new systems¹⁰² such as low power television,¹⁰³ multipoint distribution systems,¹⁰⁴ direct broadcast satellite,¹⁰⁵ and the advent of other alternatives such as video cassette recorders, are contributing to the dramatic increase in competition for the home-viewing audience.¹⁰⁶ Perhaps the most important factor

97. Fowler and Brenner, *supra* note 93, at 208.

98. See *infra* notes 36-59 and accompanying text.

99. “Competition to over-the-air broadcasting from new media has led to an awareness that traditional broadcasting is just one of many information delivery systems. Technological plenty is forcing a widespread reconsideration of the role competition can play in broadcast regulation.” Fowler and Brenner, *supra* note 93, at 209.

100. Deregulation Notice, *supra* note 1, at Appendix A. The numbered television stations has increased from six stations in 1945 to 756 in 1981 (UHF and VHF Commercial stations).

101. Ultra-high frequency television (300-300MHz) (Channels 14-83). The first frequency assignment plan was based only on VHF channels (7-13) and it was not until 1952 that UHF channels were assigned. UHF lagged behind VHF in technological development, however, improvements in reception of UHF signals continue to be made and it is anticipated that the number of successful UHF stations will increase. Geller, *Television and Legal Problems in the Decade of the 80’s* in LAW AND THE TELEVISION OF THE 80’s 3 (1983) [hereinafter cited as Geller].

102. For a description of the new video services and their regulations, see Stern, Krasnow & Senkowski, *The New Video Marketplace and the Search for a Coherent Regulatory Philosophy*, 32 CATH. U.L. REV. 529 (1983).

103. Low Power Television (LPTV) is a new class of television operating at low wattage. These stations have less coverage distance than regular UHF and VHF and have only recently been approved for operation. See Low Power Television Service, 51 R.R.2d 476 (1982).

104. Multi-point Distribution System (MDS) “is an omni-directional microwave common carrier service that now brings pay-tv services like Home Box Office (HBO) to homes, mostly in the large communities. It is also flourishing and will soon obtain additional channels from the FCC, so that it can bring a number of pay services.” Geller, *supra* note 101, at 4.

105. Direct Broadcast Satellites (DBS) could bring additional channels directly into the home from an orbiting satellite. Eight companies have received conditional authorization to construct high power DBS systems, which could begin service as early as 1986. Deregulation Notice, *supra* note 1, at 691-92; see also *The Public Interest*, *supra* note 95.

106. Deregulation Notice, *supra* note 1, at 691-92; see also Fowler and Brenner, *supra* note 93; *The Public’s Interest*, *supra* note 95.

has been the rapid growth of cable television over the last thirty years.¹⁰⁷

The FCC and the A.C. Nielsen Company, in separate studies, report that almost all television households receive four or more television signals,¹⁰⁸ and the Nielsen report further states that over sixty-five percent receive seven or more signals.¹⁰⁹ Thus, despite the natural limitations of the broadcast spectrum, marketplace competition continues to increase.¹¹⁰

The significance of these statistics to the public interest standard in television broadcasting is clear. Increased competition for the viewing public requires a greater knowledge of the public needs and interests¹¹¹ and an increased ability to serve those needs and interests.¹¹² Furthermore, since many of the cable competitors provide specialized programming such as the all-movie stations, all-music-video and all-sports stations, commercial television stations may have to offer alternative programming such as increased local news and public-issue oriented programming in order to compete successfully.

Finally, it is important to note that broadcast television's competition with other media such as cable, that have been subject to little or no regulation,¹¹³ places commercial television at a great competitive disadvantage. Since commercial television is free to the public, this disadvantage may not be in the public interest at all.

107. Deregulation Notice, *supra* note 1, at 711, Appendix A, Table III. Cable has increased from 20 operating systems with 14,000 subscribers in 1952 to 4,825 operating systems with 21 million subscribers in 1982. *Id.*

108. Deregulation Notice, *supra* note 1, at 689-90.

109. *Id.*

110. Proponents of the deregulation point out that television is not much different in this respect from radio, which was "deregulated" in 1981. *See supra* note 1. Indeed, if cable figures are taken into consideration, there were a total of 5,313 VHF-UHF stations and cable systems in 1981. By way of comparison, there were 8,451 authorized AM and FM radio stations in 1981. The difference has been steadily decreasing. In 1970 the radio figures were 7,097 and the TV/cable figures were only 3,362. *See* Deregulation Notice, *supra* note 1, at 710-11 (Appendix A).

111. Deregulation Report and Order, *supra* note 1. The FCC points out that its action "reflects the importance and viability of market incentives as a means of achieving [their] regulatory objectives and will provide television broadcasters with increased freedom and flexibility in meeting [those needs]." *Id.* at 2.

112. In fact, broadcast television stations already almost uniformly present a higher percentage of the type of programming than is required under policy guidelines. *See NAB Television Programming Study, Final Report on Local Commercial Stations* (1983) in *NAB Comments, supra* note 78, at Appendix B (NAB Television Programming Study); *see also* Deregulation Report and Order, *supra* note 1, at 5-10.

113. *See* DAVIS, REGULATION OF CABLE TELEVISION BY THE FEDERAL COMMUNICATIONS COMMISSION, CABLE TELEVISION IN A NEW ERA (1983).

The economic burden of compliance with the regulations, particularly the ascertainment requirements and logging rules, has increased the disadvantage of commercial television licensees according to proponents of the deregulation.¹¹⁴ In fact, they maintain that the costs of compliance far outweighed whatever benefits arose from regulation.¹¹⁵

B. The First Amendment and the Public Interest Standard

Although the Television Deregulation Notice and many of the comments to it make slight mention of the first amendment aspect of television content regulation,¹¹⁶ it is an important and ongoing question relating to government regulation of the media. In the Deregulation Report and Order,¹¹⁷ while the FCC adopts a somewhat more favorable position on the issue of first amendment rights, it still fails to provide full first amendment protection for broadcasters.¹¹⁸

The Supreme Court has held that even the former degree of content regulation did not violate the first amendment rights of

114. "The Commission estimates that the elimination of the ascertainment requirements will result in an annual savings of 66,956 work hours to the industry." Deregulation Report and Order, *supra* note 1, at 25. Furthermore, the Commission staff has estimated that the logging requirements impose a burden on commercial television licensees which exceeds 2,468,000 work hours annually. *Id.* at 32.

115. See *NAB Comments*, *supra* note 85, at 10-11, 26, 44 & Appendix A (Appendix A entitled *A Cost/Benefit Analysis of the FCC's Ascertainment and Program Log Requirements*); see also Deregulation Notice, *supra* note 1, at 695-96.

116. Moreover, the case for revising and perhaps modifying our programming policies becomes even more compelling when we remember that we are dealing with rules and regulations that relate to the sensitive area of program content. It is at least arguable that our programming guidelines and commercialization policies impinge on a broadcaster's editorial discretion even though these guidelines have no substantive effect. If the Commission's policies have limited continuing utility or if their viable purposes may be achieved by less intrusive means, then the public interest would seem better served by the elimination or modification of such policies.

Deregulation Notice, *supra* note 1, at 695; see also *NAB Comments*, *supra* note 85, at 3; *ABC Comments*, *supra* note 85, at 15.

117. See *supra* note 1.

118. [W]e find that the present regulatory structure raises potential First Amendment concerns. Congress intended private broadcasting to develop with its public interest obligation. Moreover, the public interest standard necessarily invited reference to First Amendment principles. These concerns with the First Amendment are exacerbated by the lack of a direct nexus between a quantitative approach [to programming guidelines] and licensee performance.

broadcasters;¹¹⁹ although the deregulation may slightly reduce the amount of content regulation, broadcasters still are not entitled to full first amendment rights.

There are several theories on which the Court's conclusion regarding the first amendment issue has been based. First, there is the "scarcity doctrine."¹²⁰ This argument is used to differentiate between the treatment of broadcasting and other media, such as the print media, with regard to the first amendment.¹²¹ Since the number of frequencies is limited and access is costly, the number of people who have the opportunity to express themselves through the television medium is very limited.¹²² Therefore, the FCC can require licensees to conform to these content regulations in exchange for the privilege of using broadcast frequencies.¹²³

A second theory, partially based on the notion of scarcity, is the "public trustee" concept of broadcasting which provides that since licensees do not own the frequencies but only are given the privilege through licensing to use them for a limited time, they hold the airwaves "in trust" for the public.¹²⁴ As trustees, the licensees have a fiduciary-type duty to provide certain kinds of programming; as non-owners of the medium, they do not have the right to use it

To the extent that existing levels of programming are market-dictated, then it may be argued that the overall intrusive nature of the guidelines is not pervasive. This does not mean, however, that there is no current infringement on the editorial discretion of individual broadcasters. For example, each licensee must still monitor its performance in light of this government-imposed standard. Further, the continued existence of the programming guidelines in the context of an evolving video services marketplace could conceivably constitute an unacceptable general level of infringement at some future time. In this regard, our action today provides a less intrusive means of meeting our regulatory objectives. Accordingly, we believe that our new regulatory approach is more consistent with underlying First Amendment values.

Deregulation Report and Order, *supra* note 1, at 14-15 (footnotes omitted).

119. *NBC v. United States*, 319 U.S. 190 (1943) (Court upheld FCC Chain Broadcasting Regulations which provide that no license shall be granted to station having specified relationship with a network); *Bamford v. FCC*, 535 F.2d 78 (D.C. Cir.), *cert. denied*, 429 U.S. 895 (1976) (upheld ascertainment requirements).

120. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 383 (1969) (upholding Fairness Doctrine, *supra* note 76); *NBC v. United States*, 319 U.S. at 226-27 (upholding Chain Broadcasting Regulations).

121. *Compare Red Lion*, 395 U.S. 367 (1969) with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (holding unconstitutional Florida "personal attack" reply statute for newspapers).

122. *Red Lion*, 395 U.S. at 386-92; *NBC v. United States*, 319 U.S. at 226-27.

123. *Id.* See Note, *The Future of Content Regulation in Broadcasting*, 69 CALIF. L. REV. 555, 576 (1981) [hereinafter cited as *Content Regulation*].

124. See *Content Regulation*, *supra* note 123, at 582-83.

for a completely free expression of their own views¹²⁵ and ideas.¹²⁶

Both the scarcity argument and the public trustee argument are used to support the legitimacy of content regulation in broadcasting.¹²⁷ In turn, content regulation, theoretically, insures diversity in broadcasting which is viewed as the primary goal.¹²⁸ Diverse programming is in the public interest.¹²⁹ Recent articles on the subject of broadcast regulation point out that the scarcity doctrine alone is no longer an adequate or even logical explanation for treating the broadcast medium differently from the print media in terms of first amendment rights, particularly in view of the new technologies.¹³⁰ Although broadcast frequencies may be scarce in the sense that they are limited by the finite nature of the spectrum and that it is expensive to start a broadcast station, they are, in effect, no more scarce than newspapers and probably not much more expensive.¹³¹ Yet, the

125. *Id.*; see also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

126. Furthermore, the trusteeship models bring adverse economic implications. In Fowler and Brenner, *supra* note 93, Commission Chairman Fowler and his legal assistant point out:

[t]he responsibilities imposed under the trusteeship model turn an operator into a super-citizen, with obligations that go beyond providing goods and services that the public wants. . . . The incidental costs of licensure would vanish if there were no program-tied licensing criteria. Furthermore, because the licenses have become imbued with a "community service" character, they have lost some of their marketplace attributes. Consequently, broadcast licensees have been subjected to restrictions that bear no relation to the marketplace.

Id. at 220.

127. *Id.*; see also *Content Regulation*, *supra* note 123.

128. *Content Regulation*, *supra* note 115; *FCC v. Nat'l Comm. for Broadcasting*, 436 U.S. 775 (1978).

129. *FCC v. Nat'l Comm. for Broadcasting*, 436 U.S. at 793-97 (1983); see also *FCC v. WNCN Listener's Guild*, 450 U.S. 582 (1981) (holding that Commission's decision to ease regulations concerning radio station's format was not contrary to public interest standard mandated by Communications Act because FCC provided rational basis for its conclusion that reliance on market forces would promote diversity and that diversity was in public interest).

130. See, e.g., Alienkoff, *Some Unanswered Questions about the First Amendment* in *NETWORK TELEVISION AND THE PUBLIC INTEREST* (Botein and Rice, eds. 1980) [hereinafter cited as *Some Unanswered Questions*]; Diefenderfer, *Proposed Federal Legislation and the Next Decade of Television* in *LAW AND TELEVISION OF THE 80'S* (1983) [hereinafter cited as *Proposed Federal Legislation*]; Fowler and Brenner, *supra* note 93, at 221-26.

131.

Why is there a difference between television and newspapers — between electronic and print media? Scarcity of frequencies has been cited again and again and has always been disproved. There are more television channels in most cities than there are newspapers, and there certainly are more radio frequencies almost everywhere. It is no more expensive to start a radio station than it is to start a newspaper in this country.

Some Unanswered Questions, *supra* note 130, at 157-58.

scarcity doctrine still is espoused by the courts¹³² and by those who favor strong government regulation of broadcasting.¹³³

The public trustee doctrine is the second argument for affording broadcasters more restricted first amendment rights.¹³⁴ The Communications Act specifically states that broadcast licensees shall have the right to use but not to own channels of transmission.¹³⁵ Licensees do not acquire a specific "property right" as a result of obtaining a license, which is limited in duration and may be revoked or not renewed if continuation or renewal is not in the public interest.¹³⁶ Under the public trustee theory, licensees hold the frequencies "in trust for the public;" they are required to serve the public interest. This reasoning justifies the statutory fairness doctrine and the stringent FCC regulations which are meant to insure compliance therewith.¹³⁷ It is, therefore, the public's first amendment interest, not the broadcast media's, which is paramount.¹³⁸

The public trustee theory is, however, difficult to reconcile with other theories and judicial holdings. For example, broadcasters, undoubtedly, are afforded some first amendment protection since the Communications Act specifically prohibits censorship of broadcasters.¹³⁹ Yet, this prohibition has not been interpreted as the same

When examining the scarcity concept, it is interesting to observe that at the time the Constitution and the Bill of Rights were written, there were only 32 newspapers in the entire nation of three million people. Total circulation was no more than 40,000 a week. Today our nation has grown to over 225 million people and there is a total of 9,676 newspaper offerings (1,747 dailies and 7,929 weeklies or less than weeklies) and 10,873 periodicals. . . [I]n 1980 there were 8,933 radio stations and 1,020 television stations in the United States.

Proposed Federal Legislation, supra note 130, at 259 (footnotes omitted). In addition, in 1980, there were 4,285 cable systems operating, with 16 million subscribers. Deregulation Notice, *supra* note 1, at 711, Appendix A, Table III.

132. See *supra* note 122.

133. See *Comments of United Church of Christ, supra* note 91; *Reply Comments of United Church of Christ, supra* note 91.

134. See *supra* notes 125-26 and accompanying text.

135. 47 U.S.C. § 301 (1982).

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal Authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.

Id.

136. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 473-75 (1940).

137. *Red Lion*, 395 U.S. at 389.

138. *Id.*

139. See *supra* note 124 and accompanying text.

kind of proscription on censorship that the print media enjoys.¹⁴⁰

In *Columbia Broadcasting System, Inc. v. Democratic National Committee*,¹⁴¹ the Supreme Court addressed the issue of whether a broadcaster's refusal to accept editorial advertising constituted governmental action violative of the first amendment.¹⁴² The Court stated that "the concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as governmental action."¹⁴³ It then addressed the issue of "whether the various interests in free expression of the public, the broadcaster, and the individuals require broadcasters to sell commercial time to persons wishing to discuss controversial issues."¹⁴⁴ The Court held that such a right-of-access would infringe on the editorial discretion of broadcasters and enlarge "[g]overnment control over the content of broadcast discussion of public issues,"¹⁴⁵ thus sacrificing first amendment protections.¹⁴⁶ It is clear from the Court's language in the broadcast cases that, although broadcasters do have first amendment rights with regard to their broadcasts and although they must have some editorial and journalistic discretion, the extent of these rights is somewhat less than that of other media.¹⁴⁷

IV. Conclusion

The deregulation of television by the FCC is likely to be beneficial to both broadcasters and the public. The FCC's regulatory changes should give broadcasters greater programming flexibility and encourage them to provide more innovative programming, thereby providing program diversity without the burdens of government-imposed regulations. Marketplace competition for viewers is likely to insure that broadcasters make themselves aware of the public interest and needs. The elimination of ascertainment requirements and program logs also will reduce unnecessary economic burdens on broadcasters as well as on the FCC.

However, since broadcasters still will be subject to the comparative

140. See *supra* note 121 and accompanying text.

141. 412 U.S. 94 (1973).

142. *Id.*

143. *Id.* at 121.

144. *Id.* at 122.

145. *Id.* at 126.

146. *Id.*

147. See, e.g., Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium from the Message*, 11 *FORDHAM URB. L.J.* 163 (1982); Powe, "OR" of the [Broadcast] Press, 55 *TEX. L. REV.* 39 (1976); Comment, *The Future of Content Regulation in Broadcasting*, 69 *CALIF. L. REV.* 555 (1981).

system¹⁴⁸ and, at least for now, still will be required to abide by statutory rules,¹⁴⁹ it is equally conceivable that very little will change in terms of programming. The FCC still will employ the same criteria in granting licenses and renewals since the deregulation merely eliminates formal programming guidelines. Until program content is eliminated completely as a measure for the granting of licenses, broadcasters will never really have the full first amendment rights enjoyed by other media. The deregulation is a step in the right direction, but, in the end, it is only a small one.

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148. Under the current FCC administration, efforts are being made to reduce regulation as much as possible and allow competition in the marketplace to govern. See Middleton, *A Clear Signal from the FCC*, Nat'l L.J., Jan. 21, 1985, at 1, col. 2.

149. See *supra* note 83.