

19. Regulation of Electronic Speech

Congress should

- phase out compulsory licensing for all communications content industries,
- repeal must-carry rules for cable television and satellite networks, and
- eliminate the Federal Communications Commission's power to control broadcast content in the name of the "public interest."

In the United States, freedom of speech is secured by the First Amendment, which declares that Congress "shall make no law . . . abridging the freedom of speech, or of the press." The language of the First Amendment does not distinguish one medium of speech from another. Electronic free speech should be no less protected than speech on paper, as the Supreme Court has affirmed in the case of the Internet.

The Must-Carry Mess: Cable TV, Satellites, and Freedom

The regulations governing carriage of broadcast programs on cable television and satellite networks are an appalling mess. One key feature of those regulations is compulsory licensing of broadcast programming to satellite networks and cable television stations (intended to help the satellite networks and cable television stations). A second key feature is the must-carry rules (intended to help broadcasters) that require cable television stations and satellite networks to carry certain local stations. Compulsory licensing and must-carry should be phased out together, furthering both equality under the law and freedom. The benefits for broadcasters of repealing compulsory licensing would balance the benefits for cable and satellite networks of repealing must-carry.

Compulsory licensing was adopted to give cable television and satellite networks access to broadcast programming without having to negotiate

for it; the beneficiaries of compulsory licensing pay rates set by arbitrators or bureaucrats, not by the market.

That socialization of broadcasting programming is wrong in principle and painfully inefficient in practice. In their first incarnation, compulsory license rates gave rise to disputes that led to endless litigation. Compulsory licensing was then reformed to refer the disputes to arbitration. The rates have now become politicized, with Congress voting on whether or not satellite networks should pay a royalty fee increase. Clearly, this is not a proper role for the federal government.

For years the Copyright Office urged that compulsory licensing be abolished, but the office has recently backed off, arguing that no viable free-market alternative exists. Certainly, compulsory licensing has become enmeshed in the fabric of the industry, and any plan for eliminating it must recognize that. But it is absurd to argue that the private sector, which coordinates extraordinarily complex transactions such as those of the stock market, cannot evolve a mechanism for trading the rights to retransmit broadcast programming. Ending the compulsory license scheme for all industries is essential—before the contagion infects Internet content and new digital programming.

The second major issue is must-carry. The Supreme Court stretched to uphold the must-carry rules against cable television's First Amendment challenge in a five-to-four decision in *Turner Broadcasting Co., Inc., v. FCC*. Given that the First Amendment denies federal lawmakers any role in regulating the content of speech, the decision was both bad law and bad policy. The purpose of the must-carry rules is to insulate broadcasters from competition—a move guaranteed to cause broadcasting to stagnate. Repealing any remaining regulations such as cross-ownership rules that stop broadcast networks from entering the satellite or cable business would be far more useful.

It was a mistake to extent must-carry rules to satellite services in the Satellite Home Improvement Act. The must-carry rules in effect penalize satellite networks, such as DBS, for entering new local markets: upon entering new local markets, a satellite provider must suffer a loss of capacity when channels are occupied by government fiat. *The First Amendment demands deregulation across the board for cable and satellite—not regulation for both.* That is good policy as well as good constitutional law. The model for a thriving, innovative industry is the unregulated computer industry, free of public interest requirements, must-carry, and compulsory licensing.

Broadcasting and the “Public Interest”

Broadcasters, like the print media under Henry VIII, are licensed. The federal government’s control over broadcasters’ economic fortunes is easily leveraged into content controls. It is time to end this state of affairs.

Several unpersuasive arguments for denying broadcasters full free speech rights have been presented. First, it is argued that broadcasters use public property. But so do speakers in public parks, and so do newspapers, which are delivered through the public streets and printed on paper made from trees cut on federal lands. As is argued in Chapter 42, the spectrum should be auctioned to private owners. If declaring the spectrum public property means that broadcasters cannot enjoy free speech rights, that is itself an excellent reason to privatize the spectrum.

Recognizing the full First Amendment rights of broadcasters would entail the following:

Repealing the Children’s Television Act of 1990

The Children’s Television Act of 1990 requires the FCC to consider whether a broadcast licensee has served the educational needs of children in license renewal proceedings. The First Amendment to the U.S. Constitution contains no special exceptions that permit controls on speech to children.

Repealing V-Chip Requirements

Clearly, it would be unconstitutional for Congress to direct the FCC to rate violent programming and refuse to renew the licenses of broadcasters who broadcast too much violence. The V-chip regime uses subterfuge and threats to indirectly accomplish the same illegal objective. Imagine a law that required printers to place on the spines of books a bar code that could be used to record ratings of violent content. If, within a year, publishers and authors had not come up with a rating system for book violence, a federal agency would be empowered to craft guidelines on their behalf. Publishers would be required to attach a rating to all the books they published. No one would pretend for a moment that such a system was voluntary, and neither is the V-chip.

Remove the FCC’s Power to Regulate Content in the Public Interest

The Communications Act of 1934 gives the FCC power to regulate broadcast licensees in the “public interest.” The FCC has employed that broad power to enact an extraordinary series of content controls. In 1998 the presidential Advisory Committee on Public Interest Obligations of

Digital Television Broadcasters (also known as the Gore commission) threatened to extend this regime to high-definition television.

Early in the 1940s the FCC actually forbade broadcasters to editorialize. From 1949 until 1987 the agency imposed the Fairness Doctrine on radio and television stations. Broadcasters covering controversial issues of public importance were required to offer their facilities to those with opposing views. So broadcasters stayed away from controversy. The FCC repealed the Fairness Doctrine in 1987. Since then, there has been a stunning increase in the amount of informational programming on radio and television.

The FCC also controls “indecent” on radio and television. Indecent material is defined as that which is “patently offensive.” No one knows what that means. D.C. Circuit Court of Appeals Judge Patricia Wald found that the definition could include programs on childbirth, AIDS, abortion, or almost any aspect of human sexuality. The FCC has admitted that it cannot describe exactly what material is “indecent,” explaining that indecency rulings must be made on a “a case-by-case basis.” In other words, something is indecent if it offends a majority of FCC commissioners.

It would be unthinkable for any agency to impose either the Fairness Doctrine or the vague, arbitrary indecency regime on newspapers. And newspapers, of course, would fight back with court challenges. But broadcasters are reluctant to protest, for they are economic hostages of the FCC. When the FCC suggests new content controls, broadcasters hesitate to assert their First Amendment rights for fear of reprisals at license renewal time or in spectrum allocation proceedings.

The extension of “public interest” content control to advanced and high-definition television is rationalized by the argument that broadcasters must pay for getting the advanced television spectrum for free. That argument is dead wrong, threatening broadcasters with an unconstitutional condition; lawmakers could not constitutionally demand that HDTV broadcasters refrain from transmitting news about Monica Lewinsky just because they had received free spectrum. The spectrum giveaway cannot justify unconstitutional demands. Also, the spectrum giveaway was not good policy to begin with, because it favors incumbent broadcasters and advanced television technology over new entrants and other uses for the spectrum; leveraging the giveaway into government control over the airwaves simply betrays the American public a second time.

Congress should remove the FCC’s power to review any aspect of broadcast content.

“Harmful-to-Minors” on the Internet

In June 2000, the Third Circuit Court of Appeals ruled that the Child Online Protection Act violated the First Amendment rights of Web publishers. The Court ruled that the “harmful-to-minors” material banned by the act had no coherent national definition. Traditionally, “harmful-to-minors” laws have been interpreted with reference to local geographic community standards. But Web publishers currently cannot tailor their offerings to different geographic locations. The Third Circuit’s decision was correct.

Harmful-to-minors, like obscenity, is defined according to community standards. The Supreme Court decided that “community standards” were better than trying to decide on a national standard for regulating offensive material—something the Court had struggled with for decades. But community standards are not philosophically sound. Why should the Constitution mean different things in Peoria and New York City? The whole purpose of the First Amendment is to protect dissenters from the majority, but “community standards” rules undermine that by deferring to the majority. So no law that relies on community standards should be upheld as applied to either print or the Internet. But such laws will cause particular problems on the Internet.

Arguably, harmful-to-minors laws do not cover as large a category as “indecentcy” laws, but they are still quite broad. Even a work with artistic or scientific merit for adults could be considered harmful to minors.

Furthermore, a community standard cannot fairly be applied to the Internet. If “community” is defined as the national community of Internet users, no jury could predictably calculate the average tastes of that diverse group. As is the case with the print media, “community” could be defined more narrowly (say, as the town within which a document is downloaded). But it’s hard to see why the tastes of any given town should be elevated to constitutional significance on the Net, where geography doesn’t matter to the content provider.

Because harmful-to-minors is broad and unclear, the amended law would require anyone who posts material about sex to keep children out. Commercial pornographers restrict access by requiring a credit card number or a PIN. But that costs money and slows down Net surfers. Adult verification services are unpopular with users, because those services charge a fee and require advance registration. Even if the harmful-to-minors law applies only to commercial sites, it might cause devastating problems for online libraries and bookstores.

Suggested Readings

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