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Federal Communications Law  
Journal

Volume 47 | Issue 2

Article 33

12-1994

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### Recommended Citation

Rosenbloom, Joel (1994) "On the Sixtieth Anniversary of the Communications Act of 1934," *Federal Communications Law Journal*: Vol. 47: Iss. 2, Article 33.

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# On the Sixtieth Anniversary of the Communications Act of 1934

Joel Rosenbloom\*

To celebrate an event's anniversary, as we do here, is to assert its continuing importance. One might well ask, however, what this celebration is about. It is quite arguable that the 1934 Act was an event of only passing importance in the history of communications law and regulation. The chief substantive provisions of the statute were taken, lightly adapted, from earlier statutes. Title II's scheme for the regulation of common carriers came from the Interstate Commerce Act of 1887 (by way of the Mann-Elkins Act of 1910); Title III's provisions for the regulation of broadcast and other users of the electromagnetic spectrum came from the Radio Act of 1927.<sup>1</sup>

The argument could be extended. Fundamental innovations in any field of human endeavor are few and far between. The "public trustee" concept of broadcasting created in 1927 is with us still, despite the deregulatory movement of the eighties and the demise of the Fairness Doctrine.<sup>2</sup> Moreover, basic innovations need not stem from legislation. The FCC substituted "price cap" for "rate base/rate of return" regulation of rates charged by major telecommunications carriers without any change in the 1934 Act.<sup>3</sup> The notion that maximum "diversification" in the ownership

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1. See Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 3, 3-5 (Max D. Paglin ed., 1989).

2. The "public trustee" obligations emphasized by the Federal Communications Commission (FCC or Commission) have varied markedly over time. The FCC no longer stresses programming and commercial promises or the ascertainment of community needs. It focuses instead on the commercial and programming requirements of the Children's Television Act, as well as equal employment and the avoidance of "actionable" indecency. But the basic concept remains. Indeed, the FCC's new Chairman recently proposed to "redefine, restate and renew the social compact between the public and the broadcasting industry." Kim McAvoy, *Hundt's New Deal*, BROADCASTING & CABLE, Aug. 1, 1994, at 6, 6.

3. See *In re Policy and Rules Concerning Rates for Dominant Carriers*, *Further Notice of Proposed Rulemaking*, 3 FCC Rcd. 3195 (1988), *Report and Order and Second Further*

and control of broadcasting and other mass media is an important public interest objective was invented by the FCC, not by Congress.<sup>4</sup>

There remains, nonetheless, reason for this anniversary celebration. The principal innovation of the 1934 Act was its creation of the FCC as the unitary regulator of both telecommunications common carriage and the use of the radio spectrum.<sup>5</sup> “[T]he two regulatory functions did not have that much in common, then or now,”<sup>6</sup> but the merger of functions itself has had significant consequences (or so I would argue).

One such effect is easily demonstrable. When Congress merged the two regulatory schemes, it inserted in its definition of the term “common carrier” the statement that “a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”<sup>7</sup> Whether other transmitters of interstate communications by wire or radio would be subject to regulation under Title II of the Act was left to depend on the uncertain application of traditional notions of what constitutes “common carriage.”<sup>8</sup> Broadcasters were given a blanket exemption.

In taking this step, Congress resolved a live controversy. Because broadcasters occupied what were then thought to be highly limited radio frequencies, there was major concern that they would deny access to their facilities altogether or discriminate unfairly among those who sought a

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*Notice of Proposed Rulemaking*, 4 FCC Rcd. 2873 (1989), *Second Report and Order*, 5 FCC Rcd. 6786 (1990), *Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd. 2637 (1991), *aff'd sub nom.* National Rural Telecomm. Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

4. The roots of the notion, of course, lie in antitrust thought (in its Brandeis/Jefferson version). But the “diversification” concept goes well beyond any requirements that might be imposed under antitrust statutes. It was clearly articulated, moreover, well before Justice Black’s dictum in *Associated Press v. United States* that the antitrust laws serve the First Amendment by promoting “the widest possible dissemination of information from diverse and antagonistic sources.” *Associated Press*, 326 U.S. 1, 20 (1945); see, e.g., *In re Radio Corp. of Am.*, 10 F.C.C. 212, 213 (1943) (“[T]he mechanism of free speech can operate freely only when the controls of public access to the means for the dissemination of news and issues are in as many responsible ownerships as possible and each exercises its own independent judgment.”).

5. See Robinson, *supra* note 1, at 3.

6. *Id.* at 4.

7. Communications Act of 1934, ch. 652, § 3, 48 Stat. 1064, 1065 (codified as amended at 47 U.S.C. § 153(h) (1988)).

8. See, e.g., *In re Amendment of § 64.702 of the Commission’s Rules and Regs.* (Second Computer Inquiry), *Final Decision*, 77 F.C.C.2d 384, paras. 121-22, *modified by Memorandum Opinion and Order*, 84 F.C.C.2d 50 (1980), *aff'd and clarified by Memorandum Opinion and Order on Further Reconsideration*, 88 F.C.C.2d 512 (1981), *aff'd sub nom.* Computer and Comm. Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, *Memorandum Opinion and Order*, 56 Rad. Reg. 2d (P & F) 301 (1984).

radio microphone.<sup>9</sup> The Senate committee on the 1927 radio legislation reported out a provision that would have classified as “a common carrier in interstate commerce” any broadcaster who sold time for any purpose or who allowed the use of his facilities either by political candidates or for the discussion of “any question affecting the public.”<sup>10</sup> Although that proposal was rejected on the floor of the Senate,<sup>11</sup> the statute as enacted authorized the new Radio Commission to revoke any station license if the Interstate Commerce Commission (ICC) (or “any other Federal body in the exercise of authority conferred upon it by law”) found that a licensee properly subject to traditional common carrier obligations (e.g., to “provide reasonable facilities” and avoid “discrimination”) had violated those obligations.<sup>12</sup>

As was predicted at the time, that provision turned out to be ineffective because the ICC disclaimed jurisdiction over radio.<sup>13</sup> But the notion that broadcasters should be regulated as common carriers was included in a bill, which would have created an agency exercising jurisdiction over both “wire and wireless” communication, on which there were extensive hearings in 1929 and 1930.<sup>14</sup> That idea, moreover, had the support of the Radio Commission’s Chairman.<sup>15</sup> The opponents of common carrier regulation for broadcasters (who included the majority of the Radio Commission and Senator Dill, one of the co-authors of the Radio Act) did not talk of broadcaster rights or editorial freedom. Instead, they emphasized the practical need that broadcasters retain editorial discretion over the use made of the limited broadcast time at their disposal.<sup>16</sup> Louis

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9. See, e.g., 69 CONG. REC. 5558 (1926) (“If the strong arm of the law does not prevent monopoly ownership and make discrimination by such stations illegal, American thought and American politics will be largely at the mercy of those who operate these stations.”).

10. S. REP. NO. 772, 69th Cong., 1st Sess. 4 (1926); see also 69 CONG. REC. 12,503 (1926).

11. See 69 CONG. REC. 12,501-02 (1926).

12. Radio Act of 1927, ch. 169, 44 Stat. 1162, 1168, *repealed by* Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064, 1102.

13. See 69 CONG. REC. 2567 (1927); see also *Sta-Shine Prod. Co. v. Station WGBB*, 188 I.C.C. 271 (1932).

14. *Commission on Communications: Hearings on S. 6 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 1st and 2d Sess. 1-2 (1929-30) [hereinafter *Hearings on S. 6*].

15. See *id.* at 189-95, 1614-17.

16. See *id.* at 75, 87-89, 104, 241, 1715, 1757. See also the remark of Senator Dill in the congressional debates on the 1927 Act concerning the undesirability of putting the broadcaster “under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid.” 69 CONG. REC. 12,502 (1926); and see his remark in 1929:

Caldwell, who had been the first General Counsel of the Federal Radio Commission, opposed common carrier status as follows:

If the broadcasting station which ordinarily has to rely on advertisers for its income has to receive every advertiser on an equal basis, it, and its listening public may be the prey to all sorts of quack advertising, and it is felt that it is safer to allow the station owner the same discretion which a newspaper or magazine has—that of rejecting or accepting advertising, and relying on his self-interest to see to it that no unfairness is done.<sup>17</sup>

Whatever their arguments, the supporters of broadcaster discretion prevailed. Their victory, sealed in Section 3(h) of the 1934 Act, cast a long shadow into the future. Almost four decades later, the country was torn by internal divisions concerning the war in Vietnam, as well as those of race, class, generation, and ideology. The impartiality and integrity of broadcast journalists was sharply questioned by avatars of both the right and the left. The Fairness Doctrine had been the FCC's traditional answer to fears on this score, but its requirement that broadcasters provide reasonable opportunity for the expression of conflicting views left broadcasters with broad editorial discretion—too much to satisfy the passions then abroad in the land. Moreover, in affirming the constitutionality of the Fairness Doctrine, *Red Lion Broadcasting Co. v. FCC*, had strongly hinted that more stringent intrusions could be justified.<sup>18</sup>

In this context, an activist court of appeals found in the First Amendment a requirement that broadcasters must accept paid advertisements in which the proponents of views on controversial issues could express those views, select the issues to be discussed, and control the manner of the overall presentation.<sup>19</sup> In *CBS, Inc. v. Democratic National*

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[I]n theory I have agreed for a long time with the idea that all broadcasting stations should be common carriers, but in practice I have never been able to convince myself that it could be worked out without seriously breaking down the radio service, and that is why I have never insisted upon it.

*Hearings on S. 6, supra* note 14, at 193.

17. *Hearings on S. 6, supra* note 14, at 87-88. Caldwell did not rely solely on the broadcaster's self-interest. He responded to a request for his opinion with respect to broadcast advertising of cigarettes and "the broad subject of going into the home with the creation of a habit which, if not deleterious, is at least not beneficial" by asserting that the Commission could take the broadcast of such advertising into account when passing on the broadcaster's license renewal. *Id.* at 88-89.

18. *Red Lion*, 395 U.S. 367 (1969). The Court said, "[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." *Id.* at 389. Further, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390.

19. *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 646 (D.C. Cir. 1971).

*Committee*, the Supreme Court rejected that holding.<sup>20</sup> In doing so, it relied on Section 3(h), which it read (in light of its history) as reflecting “Congress’ flat refusal to impose a ‘common carrier’ right of access for all persons wishing to speak out on public issues.”<sup>21</sup> The Court went well beyond the discussion of practicalities that had dominated the pre-1934 debate on this subject:

Nor can we accept the Court of Appeals’ view that every potential speaker is “the best judge” of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or for worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided.<sup>22</sup>

This passage represents, I believe, the first instance in which any court found the screening editorial function performed by mass media worthy of protection under the First Amendment.<sup>23</sup> To be sure, the Court’s recognition of broadcaster editorial rights was nowhere near as sweeping as the protection it soon thereafter gave to print editors.<sup>24</sup> It relied heavily on the constraints imposed on broadcasters by the Fairness Doctrine,<sup>25</sup> and left room for the creation of limited rights of access to the facilities of broadcasters.<sup>26</sup> But *CBS, Inc. v. Democratic National Committee* established the proposition that the constitutional need to preserve broadcasters’ editorial discretion imposes a limit on the scope and nature of any obligations that the government may impose.

This is not the only effect that Section 3(h) has had on media regulation. The belief that it is undesirable for media editors to stand as filters between would-be speakers and the public has had strong appeal in

20. *CBS, Inc. v. Democratic Nat’l Committee*, 412 U.S. 94 (1973).

21. *Id.* at 110; *see also id.* at 132, 137 (Stewart, J., concurring). While resolving a constitutional rather than statutory question, the Court gave “great weight to the decisions of Congress.” *Id.* at 102.

22. *Id.* at 124-25.

23. The right of an editor to reject proffered material is sometimes viewed as part of the broader right of any speaker to remain silent. Even on this view, *CBS, Inc. v. Democratic National Committee* antedated *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) and *Schnapper v. Foley*, 667 F.2d 102, 113-15 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). It was anticipated only by *Estate of Hemingway v. Random House*, 244 N.E.2d 250, 253 (1968) and, if read broadly, *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943).

24. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

25. *CBS, Inc. v. Democratic Nat’l Committee*, 412 U.S. at 130-32.

26. *See id.* at 131-32; *see also CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (upholding a statutory right of access to broadcaster facilities for candidates for federal office).

a variety of contexts. That appeal increases when there appears to be little constraint on a medium's capacity to deliver the messages of multiple speakers. When the FCC first recognized that cable television offered a potential "economy of abundance" in the channels of video service that the public might receive,<sup>27</sup> the agency toyed with the idea of imposing "common carrier" status, at least as to some channels.<sup>28</sup> In 1972, it imposed "access" requirements for the benefit of government, educational institutions, and would-be speakers via cable generally, both commercial and noncommercial.<sup>29</sup>

The agency's authority over cable, however, then rested on the holding in *United States v. Southwestern Cable Co.* that Section 2(a) of the 1934 Act granted jurisdiction over cable television "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."<sup>30</sup> In *FCC v. Midwest Video Corp.*, the Supreme Court struck down the Commission's cable access rules on the ground that: (i) "[Section] 3(h), consistently with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the Commission to impose access requirements amounting to common carrier obligations on broadcast systems,"<sup>31</sup> and (ii) Congress could not be deemed to have authorized the imposition on cable operators of restrictions that it had sternly forbidden in the case of broadcasters.<sup>32</sup>

The statutory ban on Commission attempts to constrain the programming discretion of cable operators was limited to intrusions which were so severe as to amount to the imposition of common carrier status.<sup>33</sup>

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27. *In re* Amendment of Subpart K of Part 74 of the Commission's Rules and Regs. with Respect to Tech'l Stds. for Community Antenna TV Sys., *Notice of Proposed Rule Making*, 25 F.C.C.2d 38, para. 6 (1970). The Commission had in fact perceived this possibility at least two years earlier. See generally *In re* Amendment of Part 74, Subpart K, of the Commission's Rules and Regs. Relative to Community Antenna TV Sys., *Notice of Proposed Rulemaking and Notice of Inquiry*, 15 F.C.C.2d 417, para. 4 (1968) [hereinafter *CATV Rulemaking*].

28. *CATV Rulemaking*, *supra* note 27, para. 26.

29. *Cable Television Report and Order*, 36 F.C.C.2d 143, paras. 122-25, 130-48, 240-42 app. (1972). Two years later, a committee of the President's cabinet proposed that cable operators be generally divorced from any control over the content they distributed, i.e., that they be subjected to full common carrier regulation. THE CABINET COMMITTEE ON CABLE COMMUNICATIONS, OFFICE OF TELECOMMUNICATIONS POLICY, REPORT TO THE PRESIDENT (1974).

30. *Southwestern Cable*, 392 U.S. 157, 178 (1968).

31. *Midwest Video*, 440 U.S. 689, 705 (1979).

32. *Id.* at 708.

33. *Id.* at 706-07 n.16 (distinguishing the Commission's then-existing rules requiring cable operators to carry the signals of local TV broadcasters, on the ground that they "did not compel cable operators to function as common carriers," were "limited to remedying a

Moreover, *Midwest Video* was far from the final word on the subject. The access requirements stricken by the Court in 1979 were substantially restored by the Cable Communications Policy Act of 1984.<sup>34</sup> But the idea that the programming discretion of cable operators is entitled to respect was given a powerful boost by *Midwest Video*. That discretion has since been given First Amendment protection, most recently and authoritatively in *Turner Broadcasting System, Inc. v. FCC*.<sup>35</sup>

We seem today on the cusp of an era marked by the convergence of technologies (and players) in telecommunications carriage, data processing, cable television, and broadcasting. In an era in which channels of communication to the public will be, as a practical matter, infinite, television viewing will become increasingly interactive, and "systems integrators" will play as large a role as the purveyors of content or the providers of transport services.<sup>36</sup> But there is no indication that fears of media power and fascination with its presumed ability to shape our society for good or ill will disappear. Nor is there much evidence that Congress or the courts will reject all rationales for the use of regulatory power to constrain the editorial choices of the electronic media. It is a matter of some moment, then, that any form of such regulation will have to leave electronic media editors with "abundant discretion over programming choices."<sup>37</sup> We owe that feature of our jurisprudence in no small part to one of the decisions made in 1934.

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specific perceived evil," and "involved a balance of considerations not addressed by § 3(h))."

34. Cable Communications Policy Act of 1984, § 2, 47 U.S.C. § 532 (1988). This section, dealing with commercial leased access, was significantly broadened by the Cable Consumer Protection and Competition Act of 1992, §§ 9, 10(a)-(b), 47 U.S.C. § 532 (Supp. IV 1992).

35. *Turner Brdcast.*, 114 S. Ct. 2445, *reh'g denied*, 115 S. Ct. 30 (1994). The protection afforded by *Turner* fell well short of the cable industry's hopes. But it remains unclear whether the broadcast signal carriage requirements imposed by the Cable Television Consumer Protection and Competition Act of 1992, which are plainly not threatened by anything in *Midwest Video*, will ultimately survive the further scrutiny that *Turner* mandates.

36. See, e.g., Eli Noam, *Beyond Liberalization: From the Network of Networks to the System of Systems*, 18 TELECOMMUNICATIONS POL'Y 286-94 (May/June, 1994).

37. *Turner Brdcast.*, 114 S. Ct. at 2464.



