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Gigi B. Sohn
Boston University

Andrew Jay Schwartzman
University of Pennsylvania

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Broadcast Licensees and Localism: At Home in the “Communications Revolution”

Gigi B. Sohn *

Andrew Jay Schwartzman **

“The Revolution is Coming! The Revolution is Coming!”

The sound you hear is not Paul Revere, on horseback, shouting about the impending arrival of the Redcoats. In 1995, the shouting is coming from the public, policymakers, and communications industry representatives (most likely riding sport utility vehicles and seven passenger vans), touting the coming of the “communications revolution.”

At best, this “revolution” promises the so-called “information superhighway”—a fully interactive global electronic marketplace of ideas, in which people speak to each other, receive and transmit video and text, renew driver’s and business licenses, vote, shop, and order dinner. At the very least, we could end up with 500 channels or less of old network reruns, multiplexed movies, music channels, and home shopping, fed passively through cable and/or some other wire to our television sets.¹

* Deputy Director, Media Access Project. B.A. (broadcasting and film) Boston University; J.D. University of Pennsylvania.

** Executive Director, Media Access Project. B.A., J.D. University of Pennsylvania.

Media Access Project is a twenty-one-year-old non-profit telecommunications law firm that represents the rights of the public to speak and to receive information over the electronic media before the Federal Communications Commission (FCC or Commission) and the courts.

1. No less a communications giant than Viacom International CEO Sumner Redstone expressed his skepticism about the future of the information superhighway in a recent speech at the National Press Club. He stated, “I am far from clear on what constitutes an information superhighway. And I have considerable doubt as to its emergence, at least in the near term. As I have said before, I will believe the 500-channel world only when I see it and when someone explains to me what’s going to be on it.” Sumner Redstone, *The Information Superhighway: False Mile Markers but Real Destinations*, Speech at the National Press Club Luncheon (Oct. 19, 1994), available in LEXIS, Nexis Library, Curnws File.

Whatever the changes, few dispute that they are of a magnitude far beyond the comprehension of the authors of the Communications Act of 1934.

The 103d Congress nearly enacted the most comprehensive telecommunications legislation of the last sixty years. This represented a recognition by many lawmakers that new rules were needed to facilitate the deployment of the telecommunications networks of the future. Both bills, H.R. 3636, which passed in the House, and S. 1822, which failed in the Senate, would have lifted prohibitions which keep the Regional Bell Operating Companies (BOCs) from providing video services in their service areas and permitted competition in local and long-distance telephone service, paving the way for the building of a seamless national telecommunications network. Similar legislation will be introduced early in the 104th Congress.

But even these monumental changes would have left much of the Communications Act of 1934 intact. The laws governing television, radio, and other wireless technologies under Title III of the Communications Act, remained largely unaltered. These telecommunications providers, unlike cable, telephone, or any others, are granted licenses by the FCC to serve "the public interest, convenience and necessity." This has required an FCC licensee to be of good character and, in the case of mass media services like broadcasting, generally ascertain and serve the needs of the local communities it is licensed to serve. This latter concept is commonly known as "localism."

What does the communications revolution hold for these broadcast licensees? Will they have a lane on the information superhighway, or will they simply be run over by the communications behemoths who will build this infrastructure and are making plans to program it as well?² Is there a need for localism in the global community of tomorrow?

We believe that broadcast licensees and localism can comfortably coexist within the global network of the future. The unique characteristics of broadcast services, including their universality and local focus, set them

2. As Congress found when it passed the 1992 Cable Act, the cable industry is highly vertically integrated, that is, many cable operators own all or part of many of the program networks on their systems. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(4)-(5), 106 Stat. 1460 (codified at 47 U.S.C. § 521 (Supp. IV 1992)). And, in the face of several court decisions invalidating restrictions on telephone companies' provision of video services, and, in anticipation of future regulatory relief, many local telephone companies have taken steps to develop video programming of their own. Three of these companies have recently hired Hollywood super agent Michael Ovitz to build relationships with video producers for entertainment, information, and interactive programming. *NYNEX, Bell Atlantic and Pacific Telesis Plunge into Video Programming*, COMM. DAILY, Nov. 1, 1994, at 1.

apart from the other prospective telecommunications providers on the information superhighway.

I. WHAT IT MEANS TO BE A BROADCAST LICENSEE

Section 309(a) of the Communications Act of 1934 instructs the FCC to determine whether the grant of a license to use broadcast spectrum is in "the public interest, convenience and necessity."³ When several applicants have applied for the same license, that determination includes a number of factors—whether an applicant is of good character, whether it owns other licenses, whether the applicant is financially qualified, and whether the applicant is a minority. Even when there is only one applicant for a license, the Commission must determine that the applicant is of good character and financially qualified, and whether grant of the license would transgress the Commission's ownership regulations.

For sixty years, the notion of the licensee as "trustee" for the public has survived, bringing with it certain duties that flowed from the licensee to the community it is licensed to serve. Over these past sixty years, in broadcasting, this duty has variously included ascertaining community needs, providing programming to meet community needs, providing programming to meet the needs of children, and providing fair and balanced overall programming on controversial issues of public importance.

Inevitably, over these sixty years, the FCC's interpretation of what a licensee is and what its responsibilities are has changed. For example, the Commission no longer enforces the duty of broadcasters to present overall balance in its programming on controversial issues of public importance, and no longer requires broadcasters to limit the amount of commercials in programming other than that intended for children.

But perhaps the most marked example of the FCC redefining the role of broadcast licensees is the increasingly common phenomenon of local marketing agreements (LMAs). LMAs permit a radio or television licensee to "lease" its station to others, often another licensee. The Commission has recently reaffirmed a series of staff rulings that held that the only responsibilities of the lessor licensees are to maintain the main studio and public files and insure adherence to the political programming law.⁴

3. 47 U.S.C.A. § 309(a) (West Supp. 1994).

4. *See In re Revision of Radio Rules and Policies*, in FCC 94-267, paras. 50-59 (Nov. 8, 1994). The FCC's "attribution" rules have similarly modified what it means to be a broadcast licensee. These rules now permit an entity to provide up to 100% of the financing for a license and not be deemed the licensee so long as it owns less than 50% of the voting stock where there is one single holder of more than 50% of the voting stock, or less than 5% of the voting stock where there is no single holder of more than 50% of the voting

Despite these modifications, however, there has been no fundamental change in the notion that there is a public benefit when an entity uses public spectrum for the good of the local community, and it remains, for the most part, not only in theory, but in practice as well.

II. THE LICENSEE CONCEPT CAN, AND WILL, THRIVE IN THE NETWORK OF THE FUTURE

What, then, will become of broadcast licensees and the notion of "localism" in the world of advanced telecommunications networks? Some, including broadcasters seeking regulatory relief,⁵ have questioned the continuing utility of these obligations. Others, including the current FCC Chairman Reed Hundt, believe that there is a lane on the "information superhighway" for broadcast licensees.⁶

There is good reason to believe that licensees will not only survive, but thrive, in the global network of tomorrow. This is in large part because they have inherent strengths not shared by those vying to build the information superhighway. Even though we cannot predict with specificity whether this highway will be a multimedia, switched broadband network that allows one to speak, write, receive, and send video, or a passive system of movies, national programming, and home shopping, or even something in between, we can comfortably compare broadcast licensees with those technologies vying to build the information superhighway.⁷

Broadcast licensees are distinctly different from other telecommunications providers in that they provide universally obtainable, real time services that are inherently locally based. And, even as our culture, and

stock. See 47 C.F.R. § 73.3555 n.2(a)-(b) (1993). Under those rules, then, the Commission considers the licensee to be the party with a majority of voting stock and "actual working control in whatever manner exercised." See 47 C.F.R. § 73.3555 n.1 (1993).

5. The National Association of Broadcasters and the Association of Independent Television Stations have argued that they will be unable to compete in multimedia markets unless they are permitted to provide data, wireless telephone, and other nonbroadcast services over the extra channel originally granted to them to provide High Definition Television services. See, e.g., *The Communications Act of 1994: Hearings on S.1822 Before the Senate Comm. on Commerce, Science and Transportation*, 103d Cong., 2d Sess. 304-15 (1994) (statement of Edward O. Fritts, President and CEO, National Association of Broadcasters).

6. In recent speeches and radio appearances, the Chairman has repeatedly spoken of a place for broadcasting as one of "the five lanes on the information superhighway: broadcast, cable, wire, wireless, and satellite." FCC Chairman Reed E. Hundt, Address Before the International Radio and Television Society (Oct. 19, 1994) (copy on file with Authors).

7. These technologies include cable, video dialtone, and direct broadcast satellite (DBS).

thus the nature of mass media, become more uniform throughout the nation, there will still be a need for such services in this country.

A. *Universality*

Unlike any other communications technology, broadcasting is universally available to 100 percent of American homes. Although over 80 percent of the American households are theoretically capable of subscribing to cable, only slightly more than 60 percent do.⁸ Direct broadcast satellite and other nascent wireless services reach only a fraction of that amount. And plans for video dialtone services that have been submitted to the FCC indicate that they will reach only a small portion of several metropolitan areas.⁹

Even though cable, satellite, and telephone video services may be more widely available in the future, none will likely ever reach the ubiquity of broadcasting. There are several reasons for this. Unlike satellite, cable, or other wired services, broadcasting is a mobile service; just about every car has a radio, and some even have television sets. One can bring a radio or television to the beach or to work. Other services are simply not that flexible.

In addition, broadcasting is a free, advertiser supported service, costing no more than the price of the receiver, which can cost as little as \$10 for a transistor radio. Although no one yet knows what the public will have to pay to become part of the future multimedia universe, the debate over the previously mentioned telecommunications legislation made it clear that access to, and services provided by, the network will generally not be free.¹⁰ Certainly, the current players in the communications game are not cheap: for example, cable can cost between \$20 and \$40 per month, plus installation and equipment charges; direct broadcast satellite has a similar monthly fee, and the receiving equipment costs approximately \$700.

8. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460, 1463 (codified as amended at 47 U.S.C. § 521 (Supp. IV 1992)).

9. In contrast to broadcasters, the FCC has not thus far required telecommunications providers to serve their communities on a nondiscriminatory basis. Indeed, the Authors served as co-counsel in filing a complaint that alleges that the plans for these video dialtone services are discriminatory because they would be made available mostly to wealthier, white neighborhoods. See *Petition for Relief* of Center for Media Education, RM 8491 (May 23, 1994).

10. There has been a consensus among most policymakers and industry leaders that hospitals and schools should have free or low-cost access to advanced telecommunications networks. However, questions remain as to whether such "free" service will include a mere hookup, or will include the provision of video and data services as well.

B. Local Service

Broadcasting also has a unique capability to serve local communities. Because the notion of localism is rooted in the licensee concept, broadcasting has developed as the only technology that provides a universal, real time programming service based on the specific needs and interests of all members of a community.

With few exceptions, the technologies most likely to form the infrastructure of the information superhighway have inherent economic and technological limitations that make them ill-suited to provide local service. Despite the welcome development of all-news cable channels in some of the largest cities, and public access channels, cable's 60 percent penetration (less in some communities) restrains its effectiveness as a provider of local programming. Video dialtone has similar penetration problems, and there has been little indication so far from local or long-distance telephone companies (entities which have no experience in programming at *any* level) that they are interested in providing locally based service. And direct broadcast satellite, by its nature, provides only national programming. Since locally based programming tends to be more expensive and labor intensive, it is a safe bet that none of these providers will be rushing to provide increased local service any time soon.

Still, there are those that believe that a truly "local" service is unnecessary in the global world of the future. They assert that nationally and internationally-based communications technologies will not ignore Americans' need to be part of a community, but that they will simply redefine the meaning of "community."

But such a claim ignores recent trends in local communities all over this country. Despite the growing push towards uniformity in our business, political, and mass media cultures, there has at the same time been a backlash against this trend. As the events leading up to the 1994 elections evidenced, many Americans are giving renewed attention to what happens in their local communities. They are battling over school curricula and library materials. They are taking greater stock in who runs for school and library boards. Involvement in local places of worship, political organizations, and other community based organizations has increased. Many Americans have rejected the "melting pot" idea of America and have opted instead to take pride in the individuality of their communities and cultures.

Underlying this resistance to uniformity are several very basic human needs. These needs have not been changed by communications revolutions of the past, and likely will not be changed by the coming communications revolution. People have a need to care and to have pride in the places they

have chosen to live in and become a part of. They have a need to not only know their neighbors, but to have some thread of commonality with them. And they have a need to insure that they do not become just another faceless name in a faceless society.

These are precisely the needs that broadcast licensees can, and will, meet. Broadcasters will report school closings on snow days, the result of the local marathon, the opening of a new church on Main Street, and the local race for city council. Broadcasters will ascertain what the community's needs are and will try to provide programming that meets those needs. And, as long as broadcasters continue to provide the universally available local services that the other telecommunications providers do not, they will likely have a long and comfortable ride on the information superhighway.

