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# The Pursuit of Pluralism: The Lessons from the New French Audiovisual Communications Law

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# The Pursuit of Pluralism: Lessons from the New French Audiovisual Communications Law

by MICHAEL MEYERSON\*

*Electronic mass communications, which have become increasingly influential over the past quarter century, have also undergone rapid and profound technological change. Constitutional governments around the world have struggled to apply their fundamental legal principles to the electronic media through sensible and balanced regulation. Perhaps the central problem in such regulation is to protect truth in the media, mainly by encouraging diversity, without allowing the regulators themselves to exert undue influence over what is disseminated over the airwaves and cables of a country's communications infrastructure. The following article traces the history of France's attempts to solve this problem in its electronic media law, analyzes the most recent reform of French law and suggests some possibilities for applying the lessons of the French experience to U.S. regulation of electronic media.*

The relationship between government and electronic mass communications is inevitably difficult and complex. Government must carefully balance its goal of maximizing the social benefits from scarce public resources, whether they are the airwaves which carry broadcast signals or the city streets where cable

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television lines are laid, against the continual threat of government influence, or even control, of an important means of communication.<sup>1</sup>

France has long struggled with this dilemma. On July 29, 1982, France enacted a major reform of its communication law for the fifth time in less than a quarter century.<sup>2</sup> The goal of the 1982 reform was to "reinvent" the law of communications and replace the historical government monopoly of radio and television with pluralism and private access to the electronic media.<sup>3</sup>

The new law has proved only partly successful. Diverse private communications have flourished in radio, but other electronic media remain under government domination.<sup>4</sup> The announced state plans for cable television do not remove the risk of undue influence by both the national and local governments.<sup>5</sup>

It is especially important that Americans understand both the problems and potential of the new French law, as well as the alternative proposals which ultimately were rejected by the French Parliament. Of course, there are many important historical and cultural differences between the U.S. and France and their regulation of communications. The French began their reform from a position of government dominance over the electronic media, while the United States' tradition of the private journalist permeates its broadcasting: "We must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust."<sup>6</sup>

Nevertheless, because of its government's involvement in electronic mass communications, the U.S. faces issues similar to those confronted by the French. Federal licensing and regulation of broadcasters and state and local franchising of cable television operators are intended to foster diversity and the public

<sup>1</sup> See, e.g., *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969); *CBS v. Democratic National Committee*, 412 U.S. 94 (1973); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982).

<sup>2</sup> Law No. 82-562 of July 29, 1982, 1982 *Journal Officiel de la Republique Francaise* [J.O.] 2431, 1982 *Juris-classeur periodique* [J.C.P.] III No. 53048. See also Law No. 74-696 of August 7, 1974, 1974 J.O. 8355, 1974 *Dalloz-Sirey, Legislation* [D.S.L.] 270; Law No. 72-553 of July 3, 1972, 1972 J.O. 6851, 1972 *D.S.L.* 329; Law No. 64-621 of June 27, 1964, 1964 J.O. 5636; Decree No. 59-273 of February 4, 1959, 1959 J.O. 1859.

<sup>3</sup> *Institut National de la Communication Audiovisuelle et Correspondence Municipale, La Bataille du Cable* (1983) (hereinafter cited as *La Bataille du Cable*). See *infra* text accompanying notes 192-202.

<sup>4</sup> See *infra* text accompanying notes 310-327.

<sup>5</sup> See *infra* text accompanying notes 328-346.

<sup>6</sup> *F.C.C. v. League of Women Voters of California*, 104 S.Ct. 3106, 3117 (1984). See also *CBS v. Democratic National Committee*, 412 U.S. 94, 124-27.

interest.<sup>7</sup> Government regulators are limited, though, by the fundamental principle that “the First Amendment forbids the government from regulating speech in ways that favor some viewpoints at the expense of others.”<sup>8</sup>

The purpose of this article is to analyze the French law of communications in order to understand more fully the need for, and dangers of, government regulation of the electronic mass media. First, an examination of the history of French communications law, from the first broadcasting law in 1923 through the most recent reforms of 1982, builds a framework for evaluating current law by exploring the development of the government monopoly. Next, the most recent law is analyzed. This study of the proposed reforms, the actual language as enacted and the practical results of the law, reveals those ideas which work, the innovative proposals which were lost in the political process and the false “reforms” which simply maintained the status quo. Finally, some of the “lessons” of the 1982 law are applied to American communications law. The dual, and occasionally conflicting, First Amendment interests of ensuring the widest diversity of speakers while preventing governmental influence in the marketplace of ideas are reexamined in light of the French experience.

## I. INTRODUCTION

### A. *Freedom of the Press in France*

The history of government control of radio and television in France mirrors to some extent the longer history of French government involvement with the press in general. The Declaration of the Rights of Man,<sup>9</sup> written in 1789, established freedom of opinion<sup>10</sup> and of communications,<sup>11</sup> but placed limitations on

<sup>7</sup> E.g., *National Broadcasting Company v. United States*, 319 U.S. 190, 227 (1943); *Berkshire Cablevision of Rhode Island v. Burke*, 571 F. Supp. 976, 986 (D.R.I. 1983), *appeal filed*, no. 83-1800 (1st Cir. 1983).

<sup>8</sup> *F.C.C. v. League of Women Voters of California*, 104 S. Ct. 3106, 3135 n.6 (Stevens, J., dissenting). See also *Police Department v. Mosley*, 408 U.S. 92, 95 (1972) (“[T]he First Amendment means as a general matter that government has no power to restrict expression because of its message, its idea, its subject matter or its content.”)

<sup>9</sup> DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN OF AUGUST 26, 1789 (Translated by *H. deVries, N. Galston & R. Loening, French Law* 2-3 (1982) [hereinafter cited as “*French Law*”]). The Preamble to the Constitution of October 4, 1958 specifically refers to the Declaration of the Rights of Man: “The French people hereby solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789. . . .” (translated in *French Law* at 2-9). It is, therefore, still binding on the French government. See Neuborne, *Judicial Review and Separation of Power in France and the United States*, 57 N.Y.U. L. Rev. 363, 380 n.60 (1982).

<sup>10</sup> DECLARATION OF THE RIGHTS OF MAN art. X.

both. Article 10 prohibited punishment for opinions "provided their expression [did] not disturb the public order."<sup>12</sup> The right to "speak, write and publish freely," granted by article 11, was constrained by the proviso that every citizen "shall be liable for the abuse of this freedom in such cases as are determined by law."<sup>13</sup>

Government censorship and control of the press continued, with occasional periods of relative freedom, throughout most of the nineteenth century.<sup>14</sup> Finally, in 1881, a major law on the rights of the press was enacted.<sup>15</sup> Article 1 of the law declared: "Press and publishing are free."<sup>16</sup> Newspapers no longer needed government authorization to print, and direct control of the press was restricted.<sup>17</sup> The press, however, was far from free of government interference. Seizure of newspapers by the government "in order to maintain or reestablish the public order" remained legal.<sup>18</sup>

The relationship of the government to the press remains uneasy. Legislation to limit the number of newspapers controlled by one person,<sup>19</sup> proposed in 1983 by the socialist Mitterand government, appears to be aimed more at limiting the influence

<sup>11</sup> *Id.* at art. XI.

<sup>12</sup> "No one may be harassed because of his opinions, even his religious opinions, provided their expression does not disturb the public order established by law." *Id.* at art. X.

<sup>13</sup> "The free communication of thoughts and opinions is one of the most precious rights of man; every citizen may therefore speak, write, and publish freely, provided he shall be liable for the abuse of this freedom in such cases as are determined by law." *Id.* at Art. XI. The government remained free to punish expression which it disapproved. Thus, the Constitution of 1791 outlawed the defamation of the "integrity" of public officers, and a law enacted in 1796 authorized the death penalty for those promoting a form of government other than that established by the Constitution. F. CASTBERG, *FREEDOM OF SPEECH IN THE WEST* 14-15 (1960).

<sup>14</sup> CASTBERG, *supra* note 13, at 16-21.

<sup>15</sup> Law of July 29, 1881, Bull. off. 637, No. 10,850, 1882 Recueil Sirey, *Lois Annotees* 1.

<sup>16</sup> *Id.*

<sup>17</sup> See C. COLLIARD, *LIBERTES PUBLIQUES* 455 (5th ed. 1975).

<sup>18</sup> Art. 24 of the Law of July 29, 1881. See C. COLLIARD, *supra* note 17, at 459; F. CASTBERG, *supra* note 13, at 22. Newspapers which attacked the President of the Republic were seized in 1909, and those which threatened national security were seized before the start of the Second World War. C. COLLIARD, *supra* note 17, at 460. As recently as 1956-57, there were widespread seizures of books, periodicals and newspapers reporting on the Algerian crisis. *Id.* See also F. CASTBERG, *supra* note 13, at 79 ("Most frequently the seizures are carried out because the newspapers involved give information about the actions and repressive measures taken by the French armed forces in Algeria, in a way which the authorities find defamatory and detrimental to the armed forces of the country.")

<sup>19</sup> *Nothing to Lose but its Chains*, *The Economist*, Dec. 24, 1983, at 43-44; *France Unveils Plan to Limit Ownership of Newspapers*, *N.Y. Times*, Nov. 20, 1983, at A22, col. 3.

of a particular conservative publisher<sup>20</sup> than at promoting the stated objective of protecting pluralism in the press.<sup>21</sup>

### B. *Broadcasting and the State*

Regardless of the ties between the French government and the print media, the integration of government and broadcasting has increased immeasurably. At the center of this link is the doctrine that radio and television constitute a "public service."<sup>22</sup> The public service concept governs activities of such importance to the general welfare that they must either be undertaken by the government itself or by private parties subject to vigorous government oversight.<sup>23</sup> Broadcast communications in particular are seen as having the power to turn viewers and listeners into either "educated citizens of the world" or "conditioned subjects."<sup>24</sup> As President Georges Pompidou declared in 1972: "Whether one likes it or not, television is regarded as the Voice of France both by the people of France and abroad."<sup>25</sup> Accordingly, the government supervises "all information in the name of the collective interest."<sup>26</sup>

Public services traditionally are performed by a state monopoly.<sup>27</sup> Such a monopoly is considered especially appropriate for broadcasting because of the physical limitations of the radio

Under the proposed law, no person could own either two national newspapers or one regional and one national newspaper.

<sup>20</sup> *Nothing to Lose but its Chains*, *supra* note 19, at 44.

<sup>21</sup> *France Unveils Plan to Limit Ownership of Newspapers*, *supra* note 19.

<sup>22</sup> See e.g., Kerever, *French Broadcasting Law*, in INTERNATIONAL LITERARY AND ARTISTIC ASSOCIATION, CABLE TELEVISION-MEDIA AND COPYRIGHT LAW ASPECTS 66 (1983).

<sup>23</sup> *Id.* at 66.

<sup>24</sup> Bouissou, *Le State de L'Office de Radiodiffusion-Television Francaise (ORTF)*, 80 R.D.P. 1169, 1173 (1964). See also, Missika & Wolton, *Ou Va La Television*, *Le Monde*, Feb. 26, 1982, at 1 (French television is "an important instrument of cultural promotion."). Radio and television are perceived as being far more powerful than the written press because of the size of the audience, make-up of the audience (particularly the large percentage of children), the speed of transmission (which inhibits "reflection") and in the case of television, the emotive power of pictures.

<sup>25</sup> *Tarlé, France: The Monopoly That Won't Divide* in TELEVISION AND POLITICAL LIFE 23 (A. Smith ed. 1979). Traditionally, most Frenchmen agreed that radio and television were a "government affair." Morand & Valter, *Efficacite de Gestion et Liberte d'Expression A La Radiodiffusion-Television Francaise*, 92 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ÉTRANGER [R.D.P.] 5, 60 (1976).

<sup>26</sup> Chevalier, *Le Statut de la Communication Audiovisuelle*, 10 ACTUALITES JURIDIQUES DROIT ADMINISTRATIF (A.J.D.A.) 555 (Oct. 20, 1982). See Bouissou, *supra* note 24, at 1194-95 (The Minister of Information announced in 1963 that the consequences of the "audiovisual revolution . . . are too large for the State to lose interest.").

<sup>27</sup> See Kerever, *supra* note 22, at 66.

spectrum.<sup>28</sup> While the state can "share" its monopoly of a public service with private parties,<sup>29</sup> such sharing has begun only recently in radio,<sup>30</sup> and is virtually non-existent in television.<sup>31</sup> Many believe that the government's control over broadcasting is essential to its retention of political control.<sup>32</sup> Some have feared that private control of the limited resource of the airwaves would lead to a private monopoly.<sup>33</sup> This would create undesirable corporate power,<sup>34</sup> and economic pressure to "please at any price" would lead to "simplicity and sensationalism, if not vulgarity."<sup>35</sup>

A related justification for treating radio and television as public services is to ensure pluralistic expression. Beginning in the 1960s, France recognized, at least in theory, the need for all segments of society to have the ability to communicate electronically.<sup>36</sup> Many believe, however, that free expression and pluralism cannot thrive under a state monopoly.<sup>37</sup> Government

<sup>28</sup> See Bouissou, *supra* note 24, at 1183-84 (Because radio frequencies are divided by international agreement, they constitute a "national good which must be preserved by monopoly or, at the least, strict control."). See also Chevalier, *supra* note 26, at 556.

<sup>29</sup> See Kerever, *supra* note 22, at 66. See also *infra* notes 101, 243-44 and accompanying text.

<sup>30</sup> See *infra* text accompanying notes 146-190.

<sup>31</sup> See *infra* text accompanying notes 243-44.

<sup>32</sup> Andre Malraux is reported to have said to United States President John F. Kennedy, "I do not understand how you are able to govern your immense country without controlling its television." Todd, *Pourquoi La Tele Est Malade*, PARIS MATCH, Apr. 1, 1983, at 3,4. MISSIKA & WOLTON, *supra* note 24, at 20, col. 2, point out that the government imposed its strictest regulations during the unsettled times of 1968: "The political power-holders of the time, like almost all power-holders who overestimate television's direct influence, thought, wrongly, that a liberalization of [television] would be fatal to [the government]." See also Bouissou, *supra* note 24, at 1188 n.214 (The President of the Administrative Council said, in 1963, "It is natural for the majority of a nation to govern the use of television as it is a public service to inform the nation of its actions in all areas of public life.").

<sup>33</sup> Morand & Valter, *supra* note 25, at 53.

<sup>34</sup> Chevalier, *supra* note 26, at 555.

<sup>35</sup> Morand & Valter, *supra* note 25, at 57.

<sup>36</sup> Chevalier, *supra* note 26, at 555. See *infra* text accompanying note 198. According to one commentator, France has gone through different phases. First was a nationalistic phase, attempting to unify the country under a single identity. Next came the internationalist phase, where the ideals of France were felt to be common to all humanity. "Third was the pluralist phase, because it became obvious that uniformity represses minority interests, which clamor for recognition and freedom of expression. Pluralism is what the politicians are now trying to institutionalize. . . . The age of the minority asserting its right to be different has arrived." T. ZELDIN, THE FRENCH 506-07 (1980). See also Tarlé, *France: The End of the Monopoly*, INTERMEDIA, May, 1982, at 23 (One reason for the Government monopoly over broadcasting "was the widely held conviction that only the government could operate the public service in an impartial and equitable way.").

<sup>37</sup> E.g., Chevalier, *supra* note 26, at 559 ("For some public service is the condition for free communication, for others, its negation.") See also Tarlé, *supra* note 25, at 44-46; Bouissou, *supra* note 24 at 1168 ("The right to speak without the right to use airwaves is like the right of all citizens to build a castle.")

control limits the number of speakers on the airwaves, and the political party in control is invariably accused of dominating the news. French broadcast news has been widely perceived as slanted in favor of the government.<sup>38</sup> Finally, there is the prevalent view that programming on French television is simply not very interesting.<sup>39</sup>

## II. THE HISTORY OF BROADCAST REGULATION

The history of broadcast regulation in France has been described as "incoherent and paradoxical."<sup>40</sup> A review of that history reveals a country struggling to come to grips with both a powerful technology and a highly uncertain view of freedom of expression.

### A. Before World War II

The first law covering radio broadcasting was enacted on June 30, 1923.<sup>41</sup> The government's telegraph monopoly, created in 1837,<sup>42</sup> was extended to include "the emission of radio-electric signals."<sup>43</sup> While the government thus assumed absolute authority over the technical operation of broadcasting,<sup>44</sup> the law was not intended to give the government exclusive use of the airwaves.<sup>45</sup> Private radio operators were permitted to broadcast under licenses granted by the Administration of Posts and Telegraphs,

<sup>38</sup> See Morand & Valter, *supra* note 25, at 57; Chevalier, *supra* note 26, at 555; Tarlé, *supra* note 25, at 47-49. "Television in France has long been open to political manipulation." D. GRAY & C. GRANT, *CABLE TELEVISION IN WESTERN EUROPE: A LICENSE TO PRINT MONEY?* 97 (1983).

<sup>39</sup> "[T]he fare served up by the domestic channels . . . [is] almost universally acknowledged as being dull and unappetizing, with the commercials frequently being more entertaining than the programmes." D. GRAY & C. GRANT, *supra* note 38, at 97.

<sup>40</sup> Bouissou, *supra* note 24, at 1110. Despite repeated changes in the law of communication, see *supra* note 2, one commentator states that "[t]he basic French system has resisted all reforms." Chevalier, *supra* note 26, at 50.

<sup>41</sup> Law of June 30, 1923, art. 85, 1924 Recueil Periodique et Critique [D.P.] IV 81, 103. The first radio emissions from the Eiffel Tower had occurred in 1921. See Bouissou, *supra* note 24, at 1113.

<sup>42</sup> Law of May 2, 1837, 1837 D.P. III 156, cited in W. EMERY, *NATIONAL AND INTERNATIONAL SYSTEMS OF BROADCASTING* 238 (1969). See also Kerever, *supra* note 22, at 61.

<sup>43</sup> See generally C. DEBBASCH, *TRAITE DU DROIT DE LA RADIODIFFUSION (RADIO ET TELEVISION)* 54 (1967); C. COLLIARD, *supra* note 17, at 573-75.

<sup>44</sup> Kerever, *supra* note 22, at 62 ("This monopoly was justified on purely technical grounds, for freedom of the air would have spelled anarchy in the allocation of wavelengths and led to an impossible situation.")

<sup>45</sup> The state monopoly was "not one of use but of regulation." Debbasch, *Les Radios Libres: Un Regime de Liberte Sous Surveillance Etatique*, Recueil Dalloz Sirey, Chronique XX, 123, 124 (May 19, 1982) [hereinafter cited as *Les Radios Libres*]. See also *Audiovisuel: la nouvelle donne*, REGARDS SUR L'ACTUALITE, Sept.-Oct. 1982, at 25, 27.



as long as they complied with state regulations and did not interfere with public service broadcasts or pose any danger to national security.<sup>46</sup>

Private radio flourished for a time. In 1933, there were 10 private stations throughout France, competing with 14 government-owned stations.<sup>47</sup> One association of radio listeners, which helped plan programming, had as many as 75,000 members.<sup>48</sup> This private participation, however, was short-lived. Controversy arose over the fact that private broadcasters, who had been established as not-for-profit organizations, were receiving substantial under-the-table income from the sale of advertising.<sup>49</sup> Also, as the international situation worsened, pressure for centralized control over broadcasting intensified. Restrictions on private stations were gradually increased until the government was effectively in control.<sup>50</sup> Private stations continued to broadcast until 1941, when the Vichy government banned their operation.<sup>51</sup> Ironically, though, it was the post-liberation government which, in 1945, formally revoked all private radio licenses.<sup>52</sup> Broadcasting was placed under the control of a government organization, Radiodiffusion-Télévision Française (RTF). The RTF, which had been organized in 1941 under General Charles de Gaulle, was charged with running all broadcasting in France.<sup>53</sup>

<sup>46</sup> Decree of Nov. 24, 1923, 1924 D.P. IV 120 (especially arts. 8, 21-22), cited in ASSEMBLE NATIONALE, PROJET DE LOI No. 754, 7eme Legis., 2eme Sess. 10 (1982) [hereinafter cited as PROJET DE LOI]. See also W. EMERY, *supra* note 42, at 239.

<sup>47</sup> See W. EMERY, *supra* note 42, at 241; Bouissou, *supra* note 24, at 1111 n.5. Because of the flexible approach of the law, French radio in the 1930's has been described as operating under a "regime of improvisation." Morand & Valter (quoting Debbasch, *supra* note 25, at 53).

<sup>48</sup> Morand & Valter, *supra* note 25, at 75.

<sup>49</sup> W. EMERY, *supra* note 42, at 243. Not-for-profit associations were established pursuant to the Law of July 1, 1901.

<sup>50</sup> E.g., *Les Radios Libres*, *supra* note 45, at 124. Thus, in 1933, the State supplanted the local, private associations with two organizations designed to centralize control over broadcasting. Morand & Valter, *supra* note 25, at 75. Then, in 1936, the State prohibited all local news on private stations. Instead, all news was to emanate only from Government programming. W. EMERY, *supra* note 42, at 242. State control over broadcasting continued to increase during the decade. The decree of Oct. 13, 1938, imposed rigorous new supervision over every broadcast with an "economic, political or financial character." Morand & Valter, *supra* note 25, at 54.

<sup>51</sup> W. EMERY, *supra* note 42, at 243.

<sup>52</sup> Ordinance of Mar. 23, 1945, No. 45-472, 1945 Recueil Dalloz Legislation [D.L.]. See, e.g., *Les Radios Libres*, *supra* note 45, at 124; Bouissou, *supra* note 24, at 1115. Some private station owners were compensated for the loss of their property. Those suspected of collaborating with the Germans, however, were denied compensation and, in some cases, received prison sentences. W. EMERY, *supra* note 42, at 243.

<sup>53</sup> See W. EMERY, *supra* note 42, at 243. After the war, it was generally considered the role of the State to further the "common interest," especially in the important area

## B. *The Fourth Republic*

During the twelve years of the Fourth Republic, from 1946 to 1958,<sup>54</sup> the state monopoly over broadcasting remained essentially unchanged.<sup>55</sup> When regular television broadcasts began in 1948, they were simply treated like radio and run by the RTF.<sup>56</sup> Both media were subject to strict political control.<sup>57</sup> The head of broadcast news, for example, met daily with representatives of the Ministers of Information, Industry and the Interior, where he “received his instructions” on the content of that evening’s broadcast.<sup>58</sup> Critics charged that radio was merely a “political organ in the service of the government.”<sup>59</sup> A 1958 statement by the private Commission de la Presse deplored what it termed “the aggravation of the tendency for unilateral and partial news service in [radio] broadcasting and television.”<sup>60</sup> Throughout this period there were proposals for reform, but none was ever brought to debate in Parliament.<sup>61</sup> One reason for this failure was that the frequent changes in government during the Fourth Republic prevented RTF from falling under the complete control of any one party,<sup>62</sup> which meant that different political views actually were broadcast depending on which party was in power at the time.<sup>63</sup>

## C. *1959: The First Reform*

Several factors combined to spur the first major revision of

of communications. “For the leaders who had grown out of the resistance, it was essential to put an end to the power of wealth and private interests in the information sector.” Tarlé, *supra* note 25, at 47.

<sup>54</sup> The Fourth Republic is traditionally viewed as lasting from Oct. 27, 1946, to Oct. 4, 1958. *E.g.* Neuborne, *supra* note 9, at 378 n.54.

<sup>55</sup> See Morand & Valter, *supra* note 25, at 55.

<sup>56</sup> The first regular television broadcasts were in 1948. Tarlé, *supra* note 25, at 47.

<sup>57</sup> The Algerian crisis, which began in 1954, only heightened the problem of government manipulation of broadcasting. For example, when General de Bollardiere resigned his command in Algeria on March 28, 1957, news of the resignation was kept off the broadcast news of the day. F. CASTBERG, *supra* note 13, at 105 n.5.

<sup>58</sup> Tarlé, *supra* note 25, at 47 (*quoting* F.O. GIESBERT, FRANCOIS MITTERAND 103 (1977)).

<sup>59</sup> F. CASTBERG, *supra* note 13, at 106.

<sup>60</sup> *Id.* George Hourdin, director of La Vie Catholique, warned in 1958 that “[n]ews broadcasts are being infected by a form of censorship which is unacceptable because it is unacknowledged.” Quoted in Tarlé, *supra* note 25, at 48.

<sup>61</sup> There were sixteen major laws proposed to alter the operation of RTF, most of which would have given the organization at least a minimum of autonomy. See Bouissou, *supra* note 24, at 1116; Morand & Valter, *supra* note 25, at 12.

<sup>62</sup> See Tarlé, *supra* note 25, at 47-48.

<sup>63</sup> Morand & Walter, *supra* note 25, at 60.

broadcasting law, which occurred in 1959. First, RTF, operating without a written charter, was unable to cope with the administrative and technological demands of a changing medium.<sup>64</sup> Radio had evolved into the premier vehicle for entertainment and news,<sup>65</sup> and television was finally available to the entire country.<sup>66</sup> Most important, the Fifth Republic, beginning in 1956, established a strong government, with President de Gaulle firmly in command.<sup>67</sup> Many in the RTF called for a new arrangement to provide the organization both administrative and budgetary autonomy from this new and powerful regime.<sup>68</sup>

The Ordinance of February 4, 1959, established RTF as an "établissement public," a separate public institution.<sup>69</sup> Very little changed, however, in terms of government control over broadcasting. The RTF monopoly continued, but the ordinance did not provide any real financial, administrative or political autonomy for the RTF.<sup>70</sup> For example, the ordinance allowed the government to dismiss the Director General of RTF at any time.<sup>71</sup>

Thus, government domination of the content of information conveyed by radio and television continued throughout the Fifth Republic. The crucial difference in this period was that, unlike the revolving door era of the Fourth Republic, the same government stayed in power, and those in power were able to make effective use of the electronic media.<sup>72</sup> As one commentator described the political success of the de Gaulle government:

<sup>64</sup> See Tarlé, *supra* note 25, at 48; W. EMERY, *supra* note 42, at 246.

<sup>65</sup> Bouissou, *supra* note 24, at 1116.

<sup>66</sup> See Tarlé, *supra* note 25, at 49; Bouissou, *supra* note 24, at 1115 (crediting the improved broadcast quality and "miniaturization" of television receivers for the growth in popularity of television).

<sup>67</sup> *E.g.*, Bouissou, *supra* note 24, at 1115.

<sup>68</sup> See W. EMERY, *supra* note 42, at 246.

<sup>69</sup> Ordinance of Feb. 4, 1959, No. 59-273, 1959 J.O. 1859, 1959 D.L. 316. There are two types of public establishments in France: one which is totally under the power of the government, and the other of an "industrial and commercial" character, which traditionally has greater independence. PROJET DE LOI, *supra* note 46, at 65. Even though under the 1959 decree RTF was deemed an establishment of an industrial and commercial character, it nonetheless lacked "administrative and financial autonomy." Bouissou, *supra* note 24, at 1112.

<sup>70</sup> *E.g.*, Bouissou, *supra* note 24, at 1116-17. In addition to the monopoly on broadcasting, the government also had a monopoly on the retransmission of its programs. Ordinance of Feb. 4, 1959, *supra* note 69, at art. 4. See Kerever, *supra* note 22, at 66-67 (quoting article 4 of the Ordinance of Feb. 4, 1959).

<sup>71</sup> Ordinance of Feb. 4, 1959, *supra* note 69, at art. 5. See also F. CASTBERG, *supra* note 13, at 106.

<sup>72</sup> "The new majority could not avoid the temptation of employing this rapidly expanding medium for its own ends. . . ." Tarlé, *supra* note 25, at 49.

“Gaullism is personal power plus the monopoly of television.”<sup>73</sup>

#### D. 1964: The Creation of the ORTF

Five years after the promulgation of the 1959 ordinance, Parliament passed a statute for radio and television.<sup>74</sup> The rationale for the Law of June 27, 1964 was remarkably similar to that given for the ordinance. Among the aims of the new statute, according to the Minister of Information, were “to overcome the inefficiency of an organization imprisoned by its old structure” and “to protect [the organization] from . . . abuses of power.”<sup>75</sup> It was felt that a law, which could only be amended by an act of Parliament, would provide more stability than an ordinance, which could be altered at will by the ruling party.<sup>76</sup>

The 1964 law created two organizations. One, the Office de Radio-Télévision Française (ORTF), took over all the functions of the RTF.<sup>77</sup> The other, the Conseil d’Administration (Administrative Council), was charged with overseeing the ORTF, to protect “public liberties” such as freedom of expression,<sup>78</sup> and to prevent radio and television from becoming instruments to “condition” the French people.<sup>79</sup>

Still, while there was a separation of power between the ORTF and the watchdog Administrative Council, neither was

<sup>73</sup> Bouissou, *supra* note 24, at 1168 (quoting J.J. Servan-Schreiber). See also Tarlé, *supra* note 25, at 43; F. CASTBERG, *supra* note 13, at 106.

<sup>74</sup> Law of June 27, 1964, *supra* note 2.

<sup>75</sup> Tarlé, *supra* note 25, at 49-50. See also Bouissou, *supra* note 24, at 1117. Just as the inability of RTF to perform its duties competently and free from political pressure remained unchanged, so did its need to adapt to the growth of the range and influence of the electronic media. A second French national television channel began operating on April 18, 1964, see W. EMERY, *supra* note 42, at 256, and the rapid increase in the number of television sets in the country continued. There were 400,000 television sets in France in 1957, one million in 1958 and four million in 1963. Missika & Wolton, *supra* note 24, at 20, col. 1; Tarlé, *supra* note 25, at 49.

<sup>76</sup> See W. EMERY, *supra* note 42, at 250. It was hoped that the new law would give broadcasting freedom “permanent, statutory sanction.” *Id.*

<sup>77</sup> The Constitutional Council (Conseil Constitutionnel), in upholding the constitutionality of the law, stated that because of the importance of its mission, “notably the communication of ideas and information,” the ORTF was a public establishment “without equivalent.” Decision of Con. const. of March 19, 1964. The Constitutional Council rules on the constitutionality of laws, before they are promulgated, upon the request of the President of France, the Prime Minister, the President of either the Senate or the National Assembly, or 60 Deputies (members of the Assembly) or Senators. Const. art. 61. There is no procedure for challenging the constitutionality of a law once it has been enacted. See generally Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431 (1972).

<sup>78</sup> Law of June 27, 1965, *supra* note 2. See Bouissou, *supra* note 24, at 1170.

<sup>79</sup> Bouissou, *supra* note 24, at 1182.

well-insulated from government influence.<sup>80</sup> The majority of the members of the board of directors of the ORTF and all the members of the Administrative Council were appointed by the government.<sup>81</sup> Also, the government was able to control the financing of the ORTF and fix the rules for the operation of the Administrative Council.<sup>82</sup> Thus, the content of television news continued to be controlled by the government (this time by the Minister of Information);<sup>83</sup> the Administrative Council, dominated by political appointees and with weak enforcement powers, proved completely ineffective in policing the ORTF.<sup>84</sup>

One of the few breakthroughs of the 1964 law was that it contained the first direct statement that pluralism was a specific goal of the state broadcast monopoly. One of the ORTF's duties was to ensure that "the principal tendencies of thought and grand currents of opinion" were expressed.<sup>85</sup> This was not the fully equal access to the airwaves sought by the opposition parties,<sup>86</sup> but it marked the beginning of official recognition that "public service" broadcasting needed to do more to serve the public interest than simply spout the government's point of view.

The 1965 presidential elections brought the first evidence of this change. All candidates were granted equal time on radio and television, and many attributed the gains made by the opposition parties in the election to this new exposure.<sup>87</sup> Still, the vast majority of radio and television programming, at least that which was controlled by the government, suffered from one of two flaws. Either the news blatantly espoused the government's point of view,<sup>88</sup> or it was bland and nondescript.<sup>89</sup>

<sup>80</sup> *Id.* at 1166.

<sup>81</sup> Law of June 27, 1964, *supra* note 2, art. 4; Decree of July 22, 1964, No. 64-737, 1964 J.O. 6552, 1964 D.L. 260. *See also* Tarlé, *supra* note 25, at 50; W. EMERY, *supra* note 42, at 251.

<sup>82</sup> *See* Bouissou, *supra* note 24, at 1136-37.

<sup>83</sup> One government employee described the decision-making process: "Each morning, at about 11:00 a.m., ten or so civil servants would meet to determine: (1) What television should not deal with; (2) The official inaugurations and ceremonies which had to be given maximum coverage." Tarlé, *supra* note 25, at 51.

<sup>84</sup> As one commentator noted, the Administrative Council seemed to prefer the "politics of the ostrich." Morand & Valter, *supra* note 25, at 61. *See also* Bouissou, *supra* note 24, at 1196. The power of the Administrative Council is "more theoretical than real." Bouissou, *supra* note 24, at 1196.

<sup>85</sup> Law of June 27, 1964, *supra* note 2, art. 4.

<sup>86</sup> *See* Bouissou, *supra* note 24, at 1196.

<sup>87</sup> *See* Tarlé, *supra* note 25, at 51.

<sup>88</sup> The complaints of government interference with broadcast news were legion: "It would be tedious to list all the cases of journalists silenced or sacked for their lack of submissiveness or of those dismissed for not conforming to the wishes of the govern-

A major crisis for the ORTF arose in May, 1968. During the riots and political upheaval of that month, television news, pursuant to government instructions, played down the critical nature of the events. Riots went unreported.<sup>90</sup> The written press, as well as broadcasters from outside the country, covered the stories fully. The resulting gap between what viewers and listeners knew to be news and what was reported on French radio and television destroyed both the credibility of public broadcasting and the morale of the ORTF.<sup>91</sup> Embittered television journalists went on strike through the end of June.<sup>92</sup>

One result of this turmoil was a reexamination of the relationship between broadcasting and the government. A government commission (the Paye Commission) concluded that radio and television should be "complete, correct, balanced, impartial and free."<sup>93</sup> The commission also recommended that the grant of authority to the ORTF be defined more precisely to clarify the ORTF's relationship to the government. Not only were these proposals never enacted into law, the commission's report was never even discussed in Parliament.<sup>94</sup>

Instead, a new law was enacted in 1972, a law which made few significant changes from the 1964 statute.<sup>95</sup> The composition of the ORTF board remained the same, though the term of the Director General was set at three years.<sup>96</sup> The theory was that the three-year term would insulate the Director General from political pressure and increase the autonomy of the ORTF.<sup>97</sup> The first Director General under this law was removed, however, after serving only one year.<sup>98</sup>

ment." *Tarlé, supra* note 25, at 50. *See also* Missika & Wolton, *supra* note 24, at 20; Bouissou, *supra* note 24, at 1182-83.

<sup>89</sup> One critic stated that in the name of "objectivity and neutrality," television programming often only reflected an "undifferentiated and homogeneous mass." Chevalier, *supra* note 26, at 564.

<sup>90</sup> *Tarlé, supra* note 25, at 52.

<sup>91</sup> *Id.* at 52-53.

<sup>92</sup> *Id.* Many of those who went on strike "have never been readmitted to television." Smith, *Some Conclusions*, in TELEVISION AND POLITICAL LIFE 232-34 (A. Smith ed. 1979).

<sup>93</sup> COMMISSION D'ETUDE DU STATUT DE L'ORTF, RAPPORT (1970), *quoted in* *Tarlé, supra* note 25, at 54-55.

<sup>94</sup> *Tarlé, supra* note 25, at 55.

<sup>95</sup> Law of July 3, 1972, *supra* note 2.

<sup>96</sup> *Id.*, art. 9.

<sup>97</sup> *See* Morand & Valter, *supra* note 25, at 62; *Tarlé, supra* note 25, at 55.

<sup>98</sup> Morand & Valter, *supra* note 25, at 62. The 1972 Law also reaffirmed and expanded the monopoly over broadcasting. The ORTF monopoly was described as covering, "any telecommunications process." Law of July 3, 1972, *supra* note 2, art. 2. This

Perhaps the most important innovation of the 1972 law was the extension of the "right of response" to radio and television for the first time.<sup>99</sup> The right of response had been available since 1881 for persons who believed their reputations to have been injured in the written press.<sup>100</sup> Any person so injured could require a newspaper to print a response, drafted by the injured party, to the defamatory statement. This right has been widely viewed in France as a necessary protection both for individual rights and for free public debate.<sup>101</sup>

The government had justified its previous reluctance to permit a right of response to broadcasting primarily because of the difficulty of proving the content of speech which had been broadcast but not taped.<sup>102</sup> Still, many believed that the government simply did not want to encourage replies by people allegedly injured by government produced programming.<sup>103</sup>

The right of response finally created for broadcasting was more limited than that for the written press. While the 1881 press law applied to any injured party, including individuals, political parties and labor unions, only natural persons could respond to a broadcast.<sup>104</sup> Also, the type of statement triggering the right was narrower for broadcast. Not only did a person have to assert that his or her reputation had been called into question, which satisfied the burden of the old law,<sup>105</sup> but the person had to prove defamation by an erroneous statement.<sup>106</sup>

definition included not only traditional radio and television, but also programming distributed by satellite or carried over cable television. See Kerever, *supra* note 22, at 68. The law did provide for very limited exceptions to the monopoly, called "derogations." Law of July 3, 1972, *supra* note 2, art. 3. The Government was directed by decree also to grant derogations to those distributing programs either to specified, limited audiences (such as the hard-of-hearing) or within private property via closed circuit television. Decree of March 20, 1978, No. 78-379, 1978 J.O. 1259, 1978 D.S.L. 203. See, e.g., Kerever, *supra* note 22, at 63; Morand & Valter, *supra* note 25, at 87; Chevalier, *supra* note 26, at 561; *Les Radios Libres*, *supra* note 45, at 124.

<sup>99</sup> Law of July 3, 1972, *supra* note 2, art. 8. The ground rules for the right of response for radio and television were laid out in the Decree of May 13, 1975, No. 75-341, 1975 J.O. 4867, 1975 D.S.L. 148.

<sup>100</sup> Law of July 29, 1881, Bull. Off. 637, No. 10,850, art. 13, 1882 RECUEIL SIREY, *Lois Anotees* 1, 6. A person mentioned in a news article is the sole judge of whether he or she has been injured. Toulemon, *Le Droit de Reponse et la Television*, LA GAZETTE DU PAIS, DOCTRINE 393, 394 (1975).

<sup>101</sup> Bouissou, *supra* note 24, at 1196.

<sup>102</sup> *Id.* at 1178-79.

<sup>103</sup> *Id.* at 1186-87.

<sup>104</sup> Law of July 3, 1972, *supra* note 2, art. 8; Decree of May 13, 1975, *supra* note 99, art. 1. See also Morand & Valter, *supra* note 25, at 91.

<sup>105</sup> See Toulemon, *supra* note 100, at 394; Morand & Valter, *supra* note 25, at 91.

<sup>106</sup> See Morand & Valter, *supra* note 25, at 91.

## E. 1974: Dissolution of the ORTF

The next major broadcasting reform occurred in 1974.<sup>107</sup> As in the past, the drafters in justifying the new law cited the growth of television<sup>108</sup> and the need to put an end to the subjugation of broadcasting to politics.<sup>109</sup> This time, though, there were other perceived problems. ORTF had grown tremendously during the preceding decade, and many felt that the “monolithism and gigantism” of the organization had led to gross inefficiency and incompetence.<sup>110</sup> Also, many in government saw ORTF as a “bureaucracy dominated by unions,”<sup>111</sup> which had undue influence over programming.

Accordingly, the 1974 law split the ORTF into seven smaller organizations. The new division created organizations which reflected the distinction between programming and “diffusion,” the technical aspect of broadcasting.<sup>112</sup> Thus, four programming societies were established, one for each of the three television channels,<sup>113</sup> and one for Radio France. One society was set up to supervise programming,<sup>114</sup> and a national institute was created to supervise production research, archives and training.<sup>115</sup> The seventh organization, Télédiffusion de France (TDF), was placed in charge of diffusion.<sup>116</sup>

The 1974 law was the most successful of all the attempts to reform broadcasting law in that it was able to accomplish fully at least one of its goals, namely the undermining of the strength of the unions. With their old structure destroyed, their members scrambling for jobs in the new organizations, and their member-

<sup>107</sup> Law of August 7, 1974, *supra* note 2.

<sup>108</sup> The number of television sets in France rose from four million in 1963 to 13 million in 1973. Missika & Wolton, *supra* note 24, at 20. Also, in 1971, a third television channel, FR3, began broadcasting. *Id.* See also *infra* text accompanying notes 65-66, 75.

<sup>109</sup> See Morand & Valter, *supra* note 25, at 7; Chevalier, *supra* note 26, at 556. See also *infra* text accompanying notes 67-69, 75.

<sup>110</sup> *Audiovisuel: la nouvelle donne*, *supra* note 45, at 25. See also Morand & Valter, *supra* note 25, at 7.

<sup>111</sup> Missika & Wolton, *supra* note 24, at 20.

<sup>112</sup> See Kerever, *supra* note 22, at 67; Chevalier, *supra* note 26, at 571. The framework of seven public service organizations out of one was termed a communications structure, “in the nature of archipelagos.” Morand & Valter, *supra* note 25, at 7.

<sup>113</sup> Law of Aug. 7, 1974, *supra* note 2, art. 8. The three television stations were TF1, A2, and FR3.

<sup>114</sup> Law of Aug. 7, 1974, *supra* note 2, art. 13.

<sup>115</sup> *Id.* art. 3.

<sup>116</sup> *Id.* art. 5. TDF was “assigned the task of seeing to the diffusion of radio and television programs in France and abroad, and of organizing, developing, operating and maintaining the diffusion networks and installations.” *Id.* (translated in Kerever, *supra* note 22, at 64).



ship depleted and dispersed, the influence of the unions was substantially diluted.<sup>117</sup>

In most other respects, however, the 1974 reform suffered a fate similar to its predecessors. The state monopoly over broadcasting continued, and government control over the personnel and financing of the organizations charged with running that monopoly went on unabated.<sup>118</sup>

The major chink in the state monopoly came in Article 1 of the law, which guaranteed "equal access to the principal tendencies of thought and important currents of opinion."<sup>119</sup> There were several restrictions to this access, however, which prevented equitable presentation of opposing viewpoints. The actual right of access was limited to the major political parties,<sup>120</sup> reducing the number of potential speakers and the range of topics covered. Also, speakers were not guaranteed equal time, but rather a minimum amount of time.<sup>121</sup> This allowed the government, which controlled the broadcasting organizations, to dominate the airwaves.<sup>122</sup>

This control was exercised by three means. While the government did not have the power to select a majority of the directors of each organization, it did appoint the chairmen.<sup>123</sup> Second, both the government and Parliament were able to decide how much money each of the organizations received.<sup>124</sup> The fi-

<sup>117</sup> See Kerever, *supra* note 22, at 64; Tarlé, *supra* note 25, at 59.

<sup>118</sup> Law of Aug. 7, 1974, *supra* note 2, arts. 2, 5, 11, 18. See *Audiovisuel: la nouvelle donne*, *supra* note 45, at 25 (stating that the 1974 law was in "strict conformity" with those of 1959, 1964, and 1972); Chevalier, *supra* note 26, at 556 (saying that the 1974 law represented the "last chance" for the state monopoly).

<sup>119</sup> Law of Aug. 7, 1974, *supra* note 2, art. 1. This marked the first time that "equal access" was affirmed as a public service obligation. This "innovation," according to one commentator, marked a recognition by the legislature that equal access was "a necessary counterweight to monopoly." Morand & Valter, *supra* note 25, at 96.

<sup>120</sup> Morand & Valter, *supra* note 25, at 96.

<sup>121</sup> Law of Aug. 7, 1974, *supra* note 2, art. 15. The opposition party, the Socialists, led by Francois Mitterand, had unsuccessfully tried to include a right of "political response" to press conferences and speeches made by the Prime Minister. Morand & Valter, *supra* note 25, at 94.

<sup>122</sup> See Morand & Valter, *supra* note 25, at 97.

<sup>123</sup> Law of Aug. 7, 1974, *supra* note 2, arts. 5, 11. See also Tarlé, *supra* note 25, at 58. "The government retained the power of appointing and dismissing all of the seven Directors General within an internally competitive system, so deep-seated is the belief that without an umbilical cord to government, broadcasting will inevitably construct links of a political kind with the opposition." Smith, *supra* note 92, at 235. In addition, many important lower level workers were hired only after meeting Government approval. See Tarlé, *supra* note 25, at 58-59, 74.

<sup>124</sup> See Morand & Valter, *supra* note 25, at 80-81; Tarlé, *supra* note 25, at 58-59, 74. Parliament did indeed attempt to use its financing power to influence public broadcasters: "The National Assembly, which was unhappy with television, almost unanimously

nal element of government involvement was the *cahiers des charges*,<sup>125</sup> programming requirements imposed on the various channels by government order. Each station was required to meet numerous, specific programming obligations such as the broadcast of a certain number of French films, minimum number of concerts, weekly religious programming and various other mandated categories.<sup>126</sup>

The results of the 1974 reform, if not surprising, were disappointing. Government influence over broadcasting, though perhaps more subtle, nonetheless remained substantial.<sup>127</sup> While for the first time opposition politicians made regular appearances on current affairs programs,<sup>128</sup> access for small parties and individuals was, at best, "mediocre."<sup>129</sup> Complaints abounded that the government monopolized and censored broadcast news for its own benefit.<sup>130</sup> Finally, and unexpectedly, channels competing for higher ratings, which would increase their allotment of government financing, began reaching for the "lowest common denominator,"<sup>131</sup> and observers agreed that the quality of programming suffered.<sup>132</sup>

### III. 1981: THE FIRST STEPS TOWARDS REFORM

In 1981, three major events in France sparked hope that French communications law would finally be changed to produce a pluralistic and impartial system. The first of these was the election of François Mitterand as the President of France.<sup>133</sup> Presi-

rejected the authorisations of payment of revenues in November 1975, and it only went back on its decision after difficult negotiations with the government." *Id.* at 60.

<sup>125</sup> The "cahiers des charges" is basically a "schedule of obligations" imposed on public service companies by the government. Law of Aug. 7, 1974, *supra* note 2, art. 15. Because of this power to impose obligations, "the risks of this new independence are lessened. . . ." Morand & Valter, *supra* note 25, at 52.

<sup>126</sup> See generally Morand & Valter, *supra* note 25, at 66-71.

<sup>127</sup> See, e.g., Missika & Wolton, *supra* note 24, at 20 (After 1974, "the influence of political power, even if less strong than before, remained by habit, indirect pressure and self-censorship more than the European average.").

<sup>128</sup> See Tarlé, *supra* note 25, at 62, 67-68.

<sup>129</sup> Morand & Valter, *supra* note 25, at 73. Political groups too small to have representatives in Parliament were excluded from radio and television. See Tarlé, *supra* note 25, at 60-61.

<sup>130</sup> See, e.g., Morand & Valter, *supra* note 25, at 98; Tarlé, *supra* note 25, at 46, 73-75.

<sup>131</sup> *Audiovisuel: la nouvelle donne*, *supra* note 45, at 28; Missika & Wolton, *supra* note 24, at 20 (One of the major criticisms of the 1974 law was that it resulted in a "timid taking into account" of the television audience.).

<sup>132</sup> See Tarlé, *supra* note 25, at 75 ("The 1974 reform helped to speed up the process of debasement which was already noticeable before.").

<sup>133</sup> *Les Radio Libres*, *supra* note 45, at 123.

dent Mitterand had a long history of criticizing the pro-government bias of the state broadcast monopoly and had frequently called for greater access for those not in power.<sup>134</sup>

The second was the release of the Moinot Commission report.<sup>135</sup> At the behest of the new Minister of Communications, a commission, headed by Pierre Moinot, had been established to propose a new audiovisual law.<sup>136</sup> On October 6, 1981, the commission released a report which called for a total revamping of the communications law and a strict division between government and the media.<sup>137</sup> The report called for the creation of a High Authority (H.A.) to oversee telecommunications regulation.<sup>138</sup> Two central provisions were to ensure the independence of the H.A.: only three of the nine members of the H.A. were to be appointed by the government,<sup>139</sup> and the budget was to be largely autonomous.<sup>140</sup> The public service was also to be independent of the government. None of the members of the boards of directors of the public service companies was to be appointed by the government, and the companies were to have diverse sources of funding.<sup>141</sup> Finally, the report called for private access to electronic mass communications. Private radio operators and private cable television programmers were to be author-

<sup>134</sup> See, e.g., *supra* note 121.

<sup>135</sup> LA COMMISSION DE RÉFLEXION ET D'ORIENTATION, POUR UNE RÉFORME DE L'AUDIOVISUEL (1981) [hereinafter cited as MOINOT COMMISSION].

<sup>136</sup> See Chevalier, *supra* note 26, at 557. (Communications Minister Georges Fillioud announced the formation of the Commission on May 26, 1981.)

<sup>137</sup> See *infra* text accompanying notes 138-42. See also Chevalier, *supra* note 26, at 558.

<sup>138</sup> MOINOT COMMISSION, *supra* note 135, at 20.

<sup>139</sup> Three other members were to be appointed by judges serving on the highest courts, one nominated each by the First President of the Supreme Court of Appeals, the First President of the Tax Court, and the Vice-President of the Conseil d'Etat (the highest administrative tribunal). These six members would then name the final three members from a list compiled by the National Audiovisual Council. (The Council was to be composed of 60 members, representing elected national and local officials, unions, industry, program producers and the public.) The nine members would then designate a President of the H.A. *Id.* at 32.

<sup>140</sup> *Id.* at 29.

<sup>141</sup> Three members of the nine-member Boards of Directors of the public service companies were to be selected by the H.A., another three by the National Audiovisual Council, and the final three by employees of the broadcasting organizations. These nine would choose from among themselves the president of the Board, who would be responsible for appointing heads of the various channels. *Id.* at 40. The Commission also said that without the guarantee of adequate and independent financial means for the public service companies, the other proposed reforms "will only have an abstract value." See also *id.* at 105. Nonetheless, the government was still to be involved in financing public service to the extent that it would give direct grants and loans to the public service companies. *Id.* at 104.

ized by the H.A.<sup>142</sup>

The third major groundbreaking event of 1981 was the passage of the "Waivers of the State Broadcasting Monopoly" law on November 9.<sup>143</sup> This statute legalized private control of radio stations for the first time in almost half a century.

Beginning in 1977, illegal private stations, generally known as "free radio," had multiplied throughout France.<sup>144</sup> Two factors were cited for this growth. One was the poor programming of the centralized national public radio station, which proved unresponsive to local community needs.<sup>145</sup> The second was the improvements made in radio technology, which permitted the use of a wider range of radio frequencies at low cost.<sup>146</sup>

The initial government response to this assault on its monopoly by so-called "savage" local radio stations<sup>147</sup> was the enactment of a strict penal law in 1978.<sup>148</sup> The law criminalized radio and television broadcasting in violation of the state monopoly, with punishments including imprisonment of one month to a year and fines of between 10,000 and 100,000 francs.<sup>149</sup>

The 1981 law did not do away with the concept of a state monopoly over radio<sup>150</sup> but did create ground rules for waivers of the monopoly. The bill was thus characterized less as a true reform than as a return to the regulatory regime which existed prior to World War II.<sup>151</sup>

As was proposed by the Moinot Commission, private broadcasters could only operate after receiving a preliminary authori-

<sup>142</sup> *Id.* at 53, 61-62. This division is analogous to the one established by the 1974 Law, between "diffusion" and radio programming. See *supra* text accompanying notes 115-19.

<sup>143</sup> Law of Nov. 9, 1981, No. 81-994, 1981 J.O. 3070, 1981 D.S.L. 367.

<sup>144</sup> *Les Radio Libres*, *supra* note 45, at 123. A 1978 survey by TDF, which was charged with policing the airwaves for just such violations of the government monopoly, found 58 illegal private stations, 27 in the Paris area. *Id.*

<sup>145</sup> *Id.* See also Chevalier, *supra* note 26, at 557 (Private stations gave viewers the chance to "break free of the constraints of State programming and affirm their own tastes.").

<sup>146</sup> *Les Radio Libres*, *supra* note 45, at 123.

<sup>147</sup> *Audiovisuel: la nouvelle donne*, *supra* note 45, at 214.

<sup>148</sup> Law of July 28, 1978, No. 78-787, 1978 J.O. 2935, 1978 D.S.L. 345. One commentator said that this law, in attempting to protect the state monopoly, "ignored the impossibility of holding a defensive position for too long." *Audiovisuel: la nouvelle donne*, *supra* note 45, at 28. See also *Les Radio Libres*, *supra* note 45, at 123 (terming the penal law "repressive").

<sup>149</sup> Law of July 28, 1978, *supra* note 148, art. 1.

<sup>150</sup> Law of Nov. 9, 1981, *supra* note 143, art. 3-1. The continuance of the State monopoly was termed "a political imperative." Debbasch, *supra* note 45, at 124.

<sup>151</sup> See Debbasch, *supra* note 45 at 124. See also *supra* text accompanying notes 41-48.

zation.<sup>152</sup> The authorizations, however, were to come not from an independent body but from the office of the Prime Minister.<sup>153</sup> A 21-member commission representing a broad range of interests (including broadcasters) was also created, with the mission of advising the Prime Minister as to which parties should be awarded authorizations.<sup>154</sup> The policing ability of this commission was limited by two factors. First, the commission had only consultative power, since the government was not required to follow its suggestions.<sup>155</sup> Second, while eight different groups were represented in the commission, the law provided that eleven members, enough for a majority, were to be selected either by the state or by state appointees.<sup>156</sup> Supporters of the law, however, were quick to point out that the power of the government to dispense authorizations was not unfettered.<sup>157</sup> Indeed, the Constitutional Council ruled that the power was not "discretionary" as the government was obligated to "ensure the free and pluralistic expression of ideas and views," in keeping with "the constitutional principles of freedom and equality."<sup>158</sup> Thus, the government's actions in dispensing authorizations were subject to judicial review.<sup>159</sup>

The authorizations, once awarded, were not regarded as permanent property rights.<sup>160</sup> The authorizations were revocable under two circumstances.<sup>161</sup> The first was when revocation was necessary for the general welfare, if, for example, the authorized frequencies were needed for a new airport.<sup>162</sup> The second ground for revocation of an authorization was the failure of the broadcaster to live up to its legal obligations.<sup>163</sup>

<sup>152</sup> Law of Nov. 9, 1981, *supra* note 143, art. 3-1.

<sup>153</sup> *Id.*, art. 3-3.

<sup>154</sup> *Id.*

<sup>155</sup> See *Les Radio Libres*, *supra* note 45, at 125.

<sup>156</sup> The 11 members of the commission appointed by the Government were: three chosen specifically as representatives of the State, two members of the Assembly (from the President's party), one representative each from the public service radio and diffusion company, three representatives of cultural and educational societies, and the chair of the commission, chosen from the Conseil d'Etat. Law of Nov. 9, 1981, *supra* note 143, art. 3-3. In the words of one commentator, "It is a very wide power that the government has kept for itself in composing the commission." *Les Radio Libres*, *supra* note 45, at 125.

<sup>157</sup> See *Les Radio Libres*, *supra* note 45, at 125.

<sup>158</sup> Decision of Con. const. of Oct. 30, 1981.

<sup>159</sup> See *Les Radio Libres*, *supra* note 45, at 125.

<sup>160</sup> The Law of Nov. 9, 1981, *supra* note 143, states in art. 3-1: "The waivers [of the government's broadcast monopoly] are precarious and revocable."

<sup>161</sup> See *Les Radio Libres*, *supra* note 45, at 125.

<sup>162</sup> See SCHREINER, LA LOI SUR LA COMMUNICATION AUDIOVISUEL 5 (1982).

<sup>163</sup> *Les Radio Libres*, *supra* note 45, at 125-27.

These obligations included the declaration of a “principal object.”<sup>164</sup> In order to ensure pluralism and preserve each station’s distinct identity, holders of authorizations had to announce the principal goal of the station, such as news or culture.<sup>165</sup> While a station could occasionally broadcast programs on other themes, the holder of the authorization was barred from diverting the station to a different purpose. Though such declarations could in theory help the government maintain diverse programming, some feared that they would prove excessively rigid, barring all possibility of innovation.<sup>166</sup>

A major concern of the drafters of the 1981 law was to preserve the local character of private radio.<sup>167</sup> Thus, as had been proposed by the Moinot Commission, a strict geographic limit on the signal range of private stations was included in the law.<sup>168</sup> The law was somewhat more generous than the Commission, however, permitting transmission in a thirty, rather than twenty, kilometer radius. A second requirement, which was also designed to avoid creating private radio networks, was that each station was required to produce at least 80% of its own programming.<sup>169</sup> Finally, holders of one authorization were barred from having any interest, however indirect, in any other station.<sup>170</sup>

An additional legislative concern was to prevent free radio from falling under the domination of large commercial interests.<sup>171</sup> Toward this goal, another recommendation of the Moinot Commission was adopted. Only non-profit associations were permitted to obtain authorizations.<sup>172</sup>

One major commission proposal was pointedly rejected by

<sup>164</sup> *Id.* at 127.

<sup>165</sup> *Id.*

<sup>166</sup> See Chevalier, *supra* note 26, at 562.

<sup>167</sup> *Les Radio Libres*, *supra* note 45, at 126.

<sup>168</sup> In addition to the geographic limit, private operators were limited to the FM band and the maximum broadcast power was fixed at 500 watts. See Kerever, *supra* note 22, at 68; *Les Radio Libres*, *supra* note 45, at 124-26.

<sup>169</sup> See *Les Radio Libres*, *supra* note 45, at 127. Additionally, the stations had to carry at least 84 hours of programming a week. The goal of this requirement was “to incite the stations to creativity.” *Id.*

<sup>170</sup> *Id.* at 127-28. Another aim of this limitation was to prevent the creation of large private networks. See Chevalier, *supra* note 26, at 562. See also *infra* text accompanying notes 171-72.

<sup>171</sup> See *Les Radio Libres*, *supra* note 45, at 128.

<sup>172</sup> Law of Nov. 9, 1981, *supra* note 143, art. 3-1. This rule was termed “indispensable for preserving the essential local and community character” of radio. Chevalier, *supra* note 26, at 562. The constitutionality of this restriction was upheld by the Constitutional Council, which ruled that “eliminating all profit motive” from broadcasting was a legitimate state aim. Decision of Con. const. of Oct. 30, 1981.

the drafters of the law: private parties were precluded from financing through advertisements.<sup>173</sup> Various reasons were given for the ban, including the need to avoid creating private monopolies<sup>174</sup> and the difficulty of enforcing laws against false advertising.<sup>175</sup> Perhaps the primary reason for the ban, however, as was the case for advertising restrictions on public broadcasting,<sup>176</sup> was to protect the advertising revenue of the print media.<sup>177</sup> A second objective was apparently more ideological and focused on keeping speech over radio out of the "capitalist field," generally removed from the influence of money.<sup>178</sup>

There was opposition to the advertising ban.<sup>179</sup> Some suggested that, without advertising, private broadcasters would be placed under a different form of dependency.<sup>180</sup> They would be forced to turn to more "insidious" sources of financing, such as local governments or under-the-counter, indirect advertising.<sup>181</sup>

Additionally, some felt it unfair that public radio, which competed directly with private stations, was able to finance through advertising while this source was denied to private broadcasters.<sup>182</sup> This contention was rejected by the Constitutional Council, which held that the distinction was justified in light of the "particular responsibilities" of the public service,<sup>183</sup> including the responsibility of providing equal access to the major schools of thought and opinion.<sup>184</sup> This was so even though the principle of equality was to apply to private stations only in the division of the radio spectrum,<sup>185</sup> with individual stations expected to be

<sup>173</sup> Law of Nov. 9, 1981, *supra* note 143, art. 3-6.

<sup>174</sup> See *Les Radios Libres*, *supra* note 45, at 127.

<sup>175</sup> *Id.* (quoting the discussion in the National Assembly on the "difficulty for the state actually to set up a very heavy bureaucratic system to control at the local level the volume as well as the nature and truth of advertising messages.").

<sup>176</sup> See *infra* note 218.

<sup>177</sup> See *Audiovisuel: la nouvelle donne*, *supra* note 45, at 32; *Les Radios Libres*, *supra* note 45, at 127. Many felt that none of the other reasons offered to support the advertising ban was "convincing." *Id.*

<sup>178</sup> *Les Radios Libres*, *supra* note 45, at 127.

<sup>179</sup> *Id.* ("But is it legitimate to condemn advertising financing of a new means of expression in the name of defending another means of expression?").

<sup>180</sup> *Id.*

<sup>181</sup> In the words of one commentator, "In holding one's nose in front of direct advertising, one gives birth to the opening of the cesspool of indirect advertising." *Id.* at 128.

<sup>182</sup> *Id.* at 127.

<sup>183</sup> Decision of Con. const. of Oct. 30, 1981.

<sup>184</sup> *Id.* See *Les Radios Libres*, *supra* note 45, at 126.

<sup>185</sup> The Law of Nov. 9, 1981, *supra* note 143, requires, inter alia: "In each given area, waivers of the monopoly and the resulting frequency sharing must secure the free and pluralistic expression of ideas and trends of opinions."

narrowly partisan.<sup>186</sup>

In sum, the law did bring about a major change in French electronic communications. The airwaves were finally legally open to private broadcasters, and listeners were finally able to receive diverse and divergent viewpoints. Nonetheless, the ability of the government to influence, if not control, these broadcasters was not eliminated. As one commentator observed: "The window of freedom, half-opened by the legislator, depends on the governmental authority who has the power to grant the authorization."<sup>187</sup>

#### IV. 1982: THE MOST AMBITIOUS REFORM<sup>188</sup>

The 1981 radio law was only a first step toward actual reform of France's communications law. Both the government and the Moinot Commission had called for reform of the entire system of electronic communications.<sup>189</sup> This reform was completed, and a comprehensive statute went into effect on July 29, 1982.<sup>190</sup>

This law covers far more than just radio and television broadcasting. Rather, for the first time, the term "audiovisual communications" is used.<sup>191</sup> The term includes all means of transmitting messages to the public over a distance, whether by broadcast or cable.<sup>192</sup> Also covered by the law are all forms of messages, including teletext and videotext, as well as traditional radio and television programs.<sup>193</sup>

The law maintains the government monopoly on "diffusion,"

<sup>186</sup> See *Les Radios Libres*, *supra* note 45, at 126.

<sup>187</sup> *Id.* at 125.

<sup>188</sup> Chevalier, *supra* note 26, at 559.

<sup>189</sup> See letter of Prime Minister Pierre Mauroy to President Francois Mitterand, reprinted in MOINOT COMMISSION, *supra* note 135, at 3. See also *id.* at 11-17.

<sup>190</sup> Law of July 29, 1982, *supra* note 2 (unofficial translation of the French Embassy in London).

<sup>191</sup> *Id.* art. 1. *But cf.* *supra* note 98 (The 1972 law referred to "any telecommunications process.") Law of July 3, 1972, *supra* note 2. Unlike the 1972 Law, the 1982 Law was specifically intended to cover services such as videotext as well as radio and television programming. See *infra* text accompanying note 193.

<sup>192</sup> The Law of July 29, 1982, *supra* note 2, provides, *inter alia*: "For the purposes of the present Act, audio-visual communications comprises the provision to the public, by direct radio wave or cable, of sounds, pictures, documents, information or messages of any nature." This definition excludes private telephone and telegraph communications. PROJET DE LOI, *supra* note 46, at 14.

<sup>193</sup> See Chevalier, *supra* note 26, at 566 (saying that the 1982 Law recognizes that communication is no longer "linear and unilateral" but is instead, "global, interactive, abundant, multidimensional.").



the technical means of transmission.<sup>194</sup> Also continued is the concept of "public service."<sup>195</sup> The public service organizations, running the state radio stations and television channels, are charged with "serving the general interest" and respecting the principles of "pluralism and neutrality."<sup>196</sup>

Two major goals of the law would, if realized, revolutionize French communications. One is to "safeguard" the independence of the public service.<sup>197</sup> The other, termed the "cornerstone of the law," is the termination of the government's monopoly on audiovisual communications.<sup>198</sup> Expanding on the 1981 law, this statute attempts to create a "space of liberty" for those who want to communicate electronically with the public.<sup>199</sup>

Article 1 of the law declares: "Audio-visual communication is free."<sup>200</sup> This deliberately mirrors the language of the century-old law on the rights of the written press, which begins: "Press and publishing are free."<sup>201</sup>

In addition to the freedom to communicate, the law guarantees the corollary right to receive information electronically. Article 2 states: "Citizens are entitled to free and pluralistic audio-visual communication."<sup>202</sup> The law was intended to create a

<sup>194</sup> The public service establishment, Telediffusion de France (TDF), supervises the monopoly over diffusion. Law of July 29, 1982, *supra* note 2, art. 34.

<sup>195</sup> Law of July 29, 1982, *supra* note 2, art. 5. *See, e.g.*, Kerever, *supra* note 22, at 288.

<sup>196</sup> Law of July 29, 1982, *supra* note 2, art. 5. *See also* PROJET DE LOI, *supra* note 46, at 13 ("For it is the public service which alone is able to play an essential role in permitting the exercise of the right of citizens to free and pluralistic audiovisual communications."). In addition to the TDF, the 1982 Law provides for several other public service organizations, including Radio France, which operates national public radio (art. 35); TF1 and A2, which operate the two national television channels (art. 36); FR3, which operates the regional television channel (art. 49); and the National Programming Society (art. 49). *See infra* text accompanying notes 238-43. *See also* France: *New Broadcasting Law*, INTERMEDIA, May 1982, at 7-8 [hereinafter cited as *New Broadcasting Law*].

<sup>197</sup> *See* PROJET DE LOI, *supra* note 46, at 27.

<sup>198</sup> Durieux & Cojean, *An II de la Communication Audiovisuelle*, Le Monde, July 30, 1983, at 1.

<sup>199</sup> PROJET DE LOI, *supra* note 46, at 13. Broadcast television, however, is to remain under the complete control of the government monopoly. *See infra* text accompanying notes 242-43.

<sup>200</sup> Law of July 29, 1982, *supra* note 2, art. 1.

<sup>201</sup> Law of July 29, 1881, *supra* note 18. *See supra* text accompanying notes 15-16. *See also* *An II*, *supra* note 198, at 1. One reason this language was chosen was to demonstrate the link between this new freedom and that which preceded it: "Freedom of opinion; freedom of expression; freedom of the press; freedom to communicate. This [marks an] ascending progression of liberties gained by a people in the course of its national history. . . . The ambition here is not to substitute one freedom for another. . . . but rather to crown the whole fabric of 'intellectual' freedoms with a new one that encompasses all the others." D'Arcy, *The 'Right to Communicate' and the Meaning of Words*, INTERMEDIA, Mar. 1983, at 9-10.

<sup>202</sup> Law of July 29, 1982, *supra* note 2, art. 1.

“multiplicity of choice” in the audiovisual field comparable to that available from the written press.<sup>203</sup>

In the version of the law originally passed by the National Assembly, the freedom of audiovisual communication was to be protected “in particular” by the public service and the ability of private persons to have access to the electronic media.<sup>204</sup> The Senate amended the law to specify a third element protecting this freedom: the High Authority.<sup>205</sup>

#### A. *The Protective Screen of the High Authority*<sup>206</sup>

In what was termed the law’s “most spectacular innovation,” the High Authority for Audiovisual Communication (H.A.) was created.<sup>207</sup> The H.A. was instituted to “cut the umbilical cord” between the various electronic media and the executive branch of government.<sup>208</sup>

The H.A. was thus charged with the formidable mission of removing audiovisual communications from the extensive reach of the government.<sup>209</sup> When the H.A. was officially installed, President Mitterand echoed the words of the Moinot Commission and called the H.A. “the key to the vault of the new audiovisual structure.”<sup>210</sup>

Not all of the recommendations of the Moinot Commission were, however, ultimately carried out. Key provisions intended to ensure the complete autonomy of the H.A. were altered. The result was that the entity created to prevent undue government influence over communications was itself granted only “limited independence” from the government.<sup>211</sup>

<sup>203</sup> PROJET DE LOI, *supra* note 46, at 16.

<sup>204</sup> *Id.* at 17-18.

<sup>205</sup> Law of July 29, 1982, *supra* note 2, art. 4. See also PROJET DE LOI, *supra* note 46, at 18. The Senate had attempted to add an additional safeguard, a requirement that the government exert no control over news on radio and television. This proposal was rejected by the National Assembly because of its “polemic character” and because the High Authority would “guarantee the independence of the public service.” *Id.*, quoting socialist deputy M.B. Schreiner.

<sup>206</sup> Chevalier, *supra* note 26, at 566.

<sup>207</sup> Tarlé, *supra* note 25, at 21.

<sup>208</sup> PROJET DE LOI, *supra* note 46, at 31.

<sup>209</sup> Art. 12 of the Law of July 29, 1982, *supra* note 2, provides that the H.A. is “charged in particular with safeguarding the independence of the public sound and television broadcasting service.” One commentator stated that, as a result of the creation of the H.A., “the government, at least in theory, is freed from the responsibilities that, until now, it shouldered under difficult conditions. . . .” Tarlé, *supra* note 25, at 21-22.

<sup>210</sup> Chevalier, *supra* note 26, at 566.

<sup>211</sup> *Id.* at 570.

One of the most important departures from the Commission's proposal came in the method of selecting H.A. members. The Commission had proposed that the President select only three members, with three selected by the judiciary and the final three selected by the first six. This method "would have ensured a substantial degree of independence from direct political control."<sup>212</sup> The law provides instead that all nine members are appointed by elected officials: three by the President, three each by the leaders of the National Assembly and Senate.<sup>213</sup> This means that the political party in power will always be able to appoint at least a majority of six members of the H.A.<sup>214</sup>

The ability of the H.A. to resist political influence is further eroded by the mechanism created to finance it. Rejecting the Moinot Commission's call for an autonomous budget,<sup>215</sup> the law states that the operating expense of the H.A. will be paid directly out of the Prime Minister's budget.<sup>216</sup> As this financing arrangement was selected to ensure "interministerial responsibility," all interested government ministers, including, for example, those responsible for communication and culture, will have some input in determining the annual budget for the H.A.<sup>217</sup>

## B. *Public Service*

As with the Moinot Commission's proposals on the structure and finance of the H.A., many of the Commission's recommendations on the division of responsibility for public service were

<sup>212</sup> *New Broadcasting Law*, *supra* note 196, at 7. See *supra* text accompanying note 140.

<sup>213</sup> Law of July 29, 1982, *supra* note 2, art. 23.

<sup>214</sup> For the entire history of the Fifth Republic, "every President has governed with a majority for his coalition in the National Assembly." *Presidency Isn't Affected*, N.Y. Times, July 17, 1984, at A4, col. 1. See also Chevalier, *supra* note 26, at 567. The primary justification given for the change in the selection process was that the process chosen was the same as that provided in the Constitution for the selection of the Constitutional Council, and, thus, "the most difficult to contest." Chevalier, *supra* note 26, at 567. It was also argued that it would be virtually undemocratic to mistrust those officials who had been selected by "universal suffrage." PROJET DE LOI, *supra* note 46, at 44. Additionally, it was hoped that, once appointed, the members of the H.A. would be able to act independently of the Government which appointed them. *Id.* For example, the irrevocable nine-year term, Law of July 29, 1982, *supra* note 2, art. 2, is supposed to insulate the H.A. from political pressure. It was said that the fact that the term was not revocable would enable the H.A. "to resist all pressure." PROJET DE LOI, *supra* note 46, at 44.

<sup>215</sup> See *supra* text accompanying note 135.

<sup>216</sup> Law of July 29, 1982, *supra* note 2, art. 25. See also Chevalier, *supra* note 26, at 558, 568.

<sup>217</sup> PROJET DE LOI, *supra* note 46, at 46. Even though the Ministries of Communication and Culture have since been lowered in rank, see *France: Government Changes*, INTERMEDIA, May 1983, at 3, numerous interested government officials can still help determine the budget for the H.A.

changed to give the government more influence. For example, the Prime Minister, not the H.A., will control the financing of the public service organizations.<sup>218</sup> Many feared that this power, which included the power to distribute revenues raised from advertising and taxes, renewed the risk of subordination of broadcasting, but the Minister of Communication argued that the disbursement of public funds was a non-delegable governmental duty.<sup>219</sup>

An additional power given to the government instead of the H.A. is the fixing of the "schedule of obligations" of the public service organizations.<sup>220</sup> These obligations include the general mission of each group, such as choosing between national and regional programming; general principles, such as pluralism and objectivity; and specific rules in areas such as films and religious programming.<sup>221</sup> While the fact that the schedule of obligations is fixed in advance may help protect the autonomy of the organizations, critics have contended that because the obligations can be changed unilaterally at any time, the government will still be

<sup>218</sup> Law of July 29, 1982, *supra* note 2, art. 61. *See supra* text accompanying note 139.

<sup>219</sup> PROJET DE LOI, *supra*, note 46 at 108. *See also* Chevalier, *supra* note 26, at 569. The H.A. can regulate advertising to ensure that it is truthful, *see* the Law of July 29, 1982, *supra* note 2, art. 19, and along with another agency, the Regie Francaise de Publicite, polices advertisements to ensure that they fulfill all requirements laid out in the schedule of obligations. *Id.*, art. 66. The ceiling on advertising revenue was raised from 25% of a station's funding to 80%. *Id.*, art. 84. The 25% ceiling had replaced a total ban on broadcasting advertising which had existed until 1968. (A 1961 Budget Appropriations Act had prohibited advertising without legislative approval.) W. EMERY, *supra* note 42, at 257. This requirement was not included in the 1964 law, and advertising began in 1968. *Id.* Both the ban and the ceiling reflected a historical antagonism toward the use of commercials on the airwaves. One source of this hostility was the feared two-fold impact on viewers: first, because advertising aroused artificial needs, Bouissou, *supra* note 24, at 1191; and second, because advertising would reduce the quality of programming by forcing programmers to vie for the largest audiences by striving for the lowest common denominator. *Id.*

The primary reason, though, for the restriction on advertising was to protect the revenue base of the written press. *See, e.g.*, MOINOT COMMISSION, *supra* note 135, at 107. The French newspapers, concerned that they could not compete as a selling medium with radio and television, continually fought against the introduction of broadcast advertising. In 1968, however, the television stations ran short of funds and the Government opposed raising taxes and advertising was seen as the easiest way to make up the economic shortfall. *See, e.g.*, Bouissou, *supra* note 24, at 1194 ("How do you resist such a generous offer of revenue in exchange for such an insignificant service.") To appease the press, a compromise was reached. Advertising would be permitted on the public service channels, but only for four minutes a day and subject to the 25%-of-the-total-funding ceiling. *See* Missika & Wolton, *supra* note 24, at 20, MOINOT COMMISSION, *supra* note 135, at 107.

<sup>220</sup> Law of July 29, 1982, *supra* note 2, art. 32.

<sup>221</sup> *See* PROJET DE LOI, *supra* note 46, at 61. The schedule of obligations was termed the government's "most direct involvement" with the public service organizations. Chevalier, *supra* note 26, at 569.

too directly involved in both programming and management decisions.<sup>222</sup>

The H.A.'s role in drawing up the schedule of obligations is again purely consultative.<sup>223</sup> The H.A. can make recommendations, but the government is not bound. As with the issue of financing, the Minister of Communications stated: "It is out of the question for the government to delegate its regulatory power to the H.A."<sup>224</sup>

The law did give the H.A. limited rule-making authority. In particular, the H.A. can fix rules concerning political campaigns, access to broadcast facilities by political parties and the right of reply to government programming.<sup>225</sup> Supporters of the law say that these transfers of power were especially important, as they covered the areas where the government was most likely to be accused of "partiality."<sup>226</sup>

The law's guarantee of equal time for candidates during political campaigns and access for political parties between elections basically carried over a requirement of the 1974 law.<sup>227</sup> Under the new law, any group of 30 deputies in the National Assembly or 15 members of the Senate can demand broadcast time.<sup>228</sup> Smaller parties with fewer representatives can combine forces to qualify for access to the airwaves.<sup>229</sup> Unions and national professional organizations were also given air time.<sup>230</sup> The H.A.'s responsibility includes setting the rules for this access and policing the public service organizations to make sure that each group receives sufficient time.<sup>231</sup>

There is no individual right of access to the public service broadcasting system except for the "right to respond" to government programming, which was essentially carried over from the

<sup>222</sup> PROJET DE LOI, *supra* note 46, at 61.

<sup>223</sup> Law of July 29, 1982, *supra* note 2, art. 15. See also PROJET DE LOI, *supra* note 46, at 61.

<sup>224</sup> PROJET DE LOI, *supra* note 46, at 34.

<sup>225</sup> Law of July 29, 1982, *supra* note 2, art. 14. Art. 13 of the Law states: "The High Authority enforces the proper performance by those bodies responsible for them of the public service duties referred to in this Act." This article, however, is merely a declaration in "l'esprit du législateur," and does not add to the power given to the H.A. in art. 14. PROJET DE LOI, *supra* note 46, at 31.

<sup>226</sup> PROJET DE LOI, *supra* note 46, at 33.

<sup>227</sup> See *supra* text accompanying notes 120-22.

<sup>228</sup> Law of July 29, 1982, *supra* note 2, art. 33.

<sup>229</sup> The leaders of these parties then decide when each coalition member receives air time. See PROJET DE LOI, *supra* note 46, at 63.

<sup>230</sup> See Chevalier, *supra* note 26, at 564.

<sup>231</sup> Law of July 29, 1982, *supra* note 2, art. 14.

1972 law.<sup>232</sup> Responsibility for policing the right of response is divided. The H.A. is in charge of both rule-making and enforcement for public service organizations.<sup>233</sup> For all other broadcasters, the Conseil d'Etat (Council of State) lays down the rules, which the H.A. can "clarify and complete," and the courts must enforce.<sup>234</sup>

The other area where the H.A. is given important authority, previously reserved for the government, is the power of appointment. The H.A. selects the chairmen, along with three other members, of the 12-person board of directors of each of the public companies running the three public service television channels and the national radio system.<sup>235</sup>

As for the creation of programming for the public service, however, the government retains much control. While the law permits the public service companies to use private sources of programming, most programming will continue to come from the National Programming Society (SNP),<sup>236</sup> and the law provides many ways for the government to exert influence over the SNP. First, the government is the majority shareholder in the SNP.<sup>237</sup> Second, although the president of the SNP's 12-member

<sup>232</sup> *Id.* art. 6. See *supra* text accompanying notes 99–106. A person has the right to respond to any broadcast statement susceptible of being construed as an attack on his or her honor or reputation. The response must be broadcast under "equivalent technical conditions" and in "such a way as to ensure an equivalent audience" to the original broadcast. Law of July 29, *supra* note 2, art. 6. As with the 1972 law, this right of response to broadcasts is far narrower than the right to respond to the written press, which requires no proof of possible negative interpretations or consequences. See Toulemon, *supra* note 100, at 394.

<sup>233</sup> Law of July 29, 1982, *supra* note 2, art. 14.

<sup>234</sup> *Id.*, art. 6. It is unclear what role the H.A. will play in policing the right of response to non-public service broadcasts. PROJET DE LOI, *supra* note 46, at 34. The responsibility for resolving disputes over the right to respond to non-public service broadcasts, though, rests with the Tribunal de Grande Instance. Law of July 29, 1982, *supra* note 2, art. 6.

<sup>235</sup> Law of July 29, 1982, *supra* note 2, arts. 39, 41. For each of the two national television companies and the national radio station, a total of four of the twelve directors are appointed by the H.A., two are appointed by the Senate, two by employees of the company, and two by the National Audiovisual Communications Council (NACC) (an advisory body of 56 representatives of journalists, workers, the "cultural and scientific worlds," and "major spiritual and philosophical movements"). *Id.* art. 28. The regional television company's board consists of one member appointed by the H.A., two by employees, one by the NACC and three by regional public service television companies. The power of the executive branch to appoint members of the boards of radio and television companies is, notably, relatively weak. By contrast, the state appoints six of sixteen members of the board which controls the monopoly on diffusion, TDF. *Id.*, art. 35. See generally Chevalier, *supra* note 26, at 559; PROJET DE LOI, *supra* note 46, at 66–75.

<sup>236</sup> Law of July 29, 1982, *supra* note 2, art. 45.

<sup>237</sup> *Id.* Other shareholders include the public service television companies and may

council of administrators is appointed by the H.A., eight are chosen by the "shareholders."<sup>238</sup> As the state is the majority shareholder, it can appoint a majority of the SNP's ruling council. Finally, the law provides that the public service companies in charge of the television channels participate, along with the government, in the funding of the SNP.<sup>239</sup> This entails a symbiotic relationship between the public channels and the public programmers, to the detriment of private production societies.<sup>240</sup>

In addition, a private party can receive a "concessionary contract" to assume the responsibilities of a public service organization.<sup>241</sup> A public service concessionaire must uphold all of the obligations of the public service company as well as be subject to strict governmental control. The Moinot Commission had recommended that concessions be the major instrument for fulfilling public service obligations, but the law limits the use of concessions to channels which supplement the three public service channels.<sup>242</sup> Thus, the only access by private concessionaires to the public service will either be a fourth channel to be used for teletext or a fifth channel available after the launch of a new broadcast satellite.<sup>243</sup> The law makes clear that the three existing broadcast television channels are to remain under the complete control of the public service companies.

### C. *Private Audiovisual Communications*

For those who desire to communicate outside the public service, the 1982 law carries over much of the substance of the 1981 radio law.<sup>244</sup> Only non-profit associations can obtain authorizations to operate a radio station, and stations can only broadcast

include "mixed economy companies," that is, companies which are part governmental and part private. See PROJET DE LOI, *supra* note 46, at 81.

<sup>238</sup> Law of July 29, 1982, *supra* note 2, art. 46. Of the other four members, the president is appointed by the H.A., one member is appointed by the National Audiovisual Communications Council, and two are appointed by employees of the S.N.P.

<sup>239</sup> Law of July 29, 1982, *supra* note 2, art. 45.

<sup>240</sup> Cousin, *Droit des Nouveaux Medias: Le Secteur Public Garde La "Part du Lion," Com'7*, Nov.-Dec. 1982, at 9. See also PROJET DE LOI, *supra* note 46, at 82.

<sup>241</sup> Law of July 29, 1982, *supra* note 2, art. 79. A concession is a contract between a private party and a government agency under which the private party assumes a governmental responsibility in return for the ability to benefit from the activity. See PROJET DE LOI, *supra* note 46, at 130.

<sup>242</sup> MOINOT COMMISSION, *supra* note 135, at 13. See also Chevalier, *supra* note 26, at 563.

<sup>243</sup> See Chevalier, *supra* note 26, at 563; PROJET DE LOI, *supra* note 46, at 129.

<sup>244</sup> See *supra* text accompanying notes 152-80. See also Kerever, *supra* note 22, at 72.

within a radius of thirty kilometers.<sup>245</sup> Similarly, the ban on advertising on private radio continues.<sup>246</sup> Certain provisions were changed, however, to accommodate the new organizations set up by the law, in particular the H.A., and to permit a unified approach to the entire field of audiovisual communications.

Contrary to the recommendations of the Moinot Commission, the H.A. was not given complete authority to regulate private audiovisual communication.<sup>247</sup> The Senate tried to give the H.A. broad power in this area, including the the power to prepare the schedule of obligations for private broadcasters and to divide radio frequencies.<sup>248</sup> The Minister of Communications labelled this attempt “extremely dangerous” and “contrary to democratic, republican and parliamentary institutions.”<sup>249</sup>

The final version of the law creates a shared responsibility between the H.A. and the government. This sharing reflects the division, recognized in the law, between the “container”—the telecommunications infrastructure—and the “contents”—the programs and services to be offered.<sup>250</sup> The government retains control over the infrastructure while, with some exceptions, the H.A. issues authorizations to programmers.<sup>251</sup>

There are two major elements to the infrastructure. The first is the radio airwaves. They must be under some control, according to the Minister of Communication, because they constitute a scarce resource which requires regulation if it is to be put to the best possible use.<sup>252</sup> The Minister has asserted that control must be state control, because the airwaves are a public good for which

<sup>245</sup> Law of July 29, 1982, *supra* note 2, art. 81.

<sup>246</sup> *Id.* The advertising ban was considered a temporary means of preserving the “equilibrium” between the written press and the audiovisual media. The written press had shown an interest in operating radio stations on its own, and the government felt that an “evolution” would occur as the written press became more involved with audiovisual communications. This evolution would lead to an eventual sharing of advertising revenue among the media. For the present, though, “the actual balance is fragile. We want to continue to protect it, all in preparation for a necessary evolution.” PROJET DE LOI, *supra* note 46, at 134.

<sup>247</sup> See Chevalier, *supra* note 26, at 567.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> See *La Bataille du Cable*, *supra* note 3, at 5.

<sup>251</sup> Law of July 29, 1982, *supra* note 2. Thus, for example, a private radio broadcaster needs three separate authorizations before operation can begin. From the government, the broadcaster must get permission both to use a specific frequency, and to install a transmitter. *Id.* arts. 7-8. From the H.A., the broadcaster must receive the right to program. *Id.* art. 9. See also PROJET DE LOI, *supra* note 46, at 13.

<sup>252</sup> PROJET DE LOI, *supra* note 46, at 24.



the state must assume responsibility.<sup>253</sup>

The second part of the infrastructure is the physical plant. For radio, that includes broadcasting equipment such as receivers and transmitters.<sup>254</sup> For cable television, all equipment and facilities, which either cross the public domain or are situated on private property but are collectively owned, require state approval.<sup>255</sup> This encompasses all of the cable hardware, from the head-end antennas to the cables which run down the street and into individual homes.<sup>256</sup>

Access to both the cable and radio infrastructure by programmers and other service providers (those who offer the "contents" of the audiovisual system) is governed by an entirely different framework.<sup>257</sup> To bring about the "abolition of the programming monopoly of the public service,"<sup>258</sup> the law provides two basic ways to obtain access to the infrastructure: declaration and authorization.<sup>259</sup>

The declaration is basically a formality, not requiring government approval. Even the French written press is subject to this process, which consists of filling out some forms to "declare" one's existence.<sup>260</sup> There are several limitations to access by declaration. Only the providers of services such as videotext and teletext, and not video programmers, are able to use the declara-

<sup>253</sup> *Id.* The public service organization, TDF, devises the plan for dividing the airwaves into frequencies, Law of July 29, 1982, *supra* note 2, art. 34, but the government ministers in charge of communications and the Post, Telephone, and Telegraph (PTT) give the authorizations to use a specific frequency. *Id.* art. 7.

<sup>254</sup> *Id.* art. 8. See PROJET DE LOI, *supra* note 46, at 25.

<sup>255</sup> Law of July 29, 1982, *supra* note 2, art. 8. See PROJET DE LOI, *supra* note 46, at 25. Reception of satellite programming by individually-owned antennas or satellite dishes cannot be controlled by the government. Law of July 29, 1982, *supra* note 2, art. 8. The PTT minister declared that the freedom to receive broadcasts is a "public liberty" even if it conflicts with a government policy favoring cable television: "The choice one is able to make as to which technology is chosen does not absolutely require that one be so partisan as to outlaw the others." PROJET DE LOI, *supra* note 46, at 17.

<sup>256</sup> There were several justifications given for placing the physical infrastructure under state control. For both radio and cable government intervention would purportedly ensure quality and uniformity: "Too many promoters are content today to install a network which is unreliable and inefficient." PROJET DE LOI, *supra* note 46, at 25-26. For cable, an additional reason given for government involvement was the great expense of building a national cable system. See *La Bataille du Cable*, *supra* note 3, at 5. One government minister argued that because there was insufficient private capital available in France to wire the country, it fell to the government to finance the system. *Id.*

<sup>257</sup> Law of July 29, 1982, *supra* note 2, art. 9.

<sup>258</sup> PROJET DE LOI, *supra* note 46, at 26.

<sup>259</sup> Law of July 29, 1982, *supra* note 2, arts. 77-78.

<sup>260</sup> *Id.* art. 77. See C. COLLIARD, *supra* note 17, at 484; PROJET DE LOI, *supra* note 46, at 126.

tion.<sup>261</sup> Additionally, the service must be “interactive,” or provide only information specifically requested by the consumer.<sup>262</sup> The other limitation on use of the declaration is that it is not available to anyone until January 1, 1986.<sup>263</sup> Several reasons were given for this delay. First was the desire to provide sufficient “start-up” time to avoid monopolization by a few existing service providers.<sup>264</sup> Second, because the existing law does not adequately set out the ground rules for this new type of enterprise, a transition period was implemented to allow the legislature time to draft a more comprehensive law governing the legal and financial structure of audiovisual communications businesses.<sup>265</sup> Until the legislature completes its job, all service providers labor under the same requirements as programmers and must receive authorizations before they can secure access to the communications infrastructure.<sup>266</sup>

The H.A. issues some, but not all, authorizations. Specifically, the H.A. grants authorizations for local broadcast radio and local radio and television delivered by cable.<sup>267</sup> The government issues authorizations for broadcast radio stations and cable programming which are not “local.”<sup>268</sup>

The law is unclear as to who issues authorizations for those services which will eventually need only a declaration.<sup>269</sup> Presumably, the H.A. will give an authorization if the services will be

<sup>261</sup> See Chevalier, *supra* note 26, at 561. The aim was to have a “liberal” law to encourage development of these new services. *But see infra* text accompanying notes 263-66.

<sup>262</sup> PROJET DE LOI, *supra* note 46, at 127. The precise services which will qualify were left unspecified in the law since “the technology evolves very quickly,” and it is “impossible to foresee all the devices which will be put at our disposal.” *Id.* at 126.

<sup>263</sup> Law of July 29, 1982, *supra* note 2, art. 77.

<sup>264</sup> See *Audiovisuel: la nouvelle donne*, *supra* note 45, at 29. See also *La Bataille du Cable*, *supra* note 3, at 7-8.

<sup>265</sup> PROJET DE LOI, *supra* note 46, at 127.

<sup>266</sup> Law of July 29, 1982, *supra* note 2, art. 78. Art. 78 governs “every audio-visual service not covered by” art. 77.

<sup>267</sup> Law of July 29, 1982, *supra* note 2, art. 77.

<sup>268</sup> According to art. 78, “The government issues all such permits other than those granted by the High Authority. . . .” There is one major difference in the way in which the H.A. and the government issue authorizations. Prior to granting an authorization, the H.A. must consult with a 22-member advisory body, consisting of representatives of the government, National Assembly, the written press, authorization holders and applicants, and the public service companies. Law of July 29, 1982, *supra* note 2, art. 87. The law does not require consultation by the government before it approves or denies an authorization. See PROJET DE LOI, *supra* note 46, at 127-28. In the words of one commentator: “This shows that the government intended to maintain complete control of broadcasting and the freedom to take advantage of the opportunity to open the national antennas to private initiative.” Chevalier, *supra* note 26, at 569.

<sup>269</sup> See PROJET DE LOI, *supra* note 46, at 128.

offered locally through a cable system. If a service is national, the government will handle authorization.<sup>270</sup>

As with the 1981 radio law, the decision to grant an authorization is not entirely within the discretion of either the H.A. or the government.<sup>271</sup> The new law requires the issuing authority to take into account "geographical and sociocultural factors," as well as "the need to secure the free and pluralistic expression of ideas and trends of opinions."<sup>272</sup> Also, any denial of an authorization can be appealed to an administrative judge.<sup>273</sup>

The authorizations, once granted, are for ten-year terms.<sup>274</sup> A three-year term had been proposed by the Assembly, but the longer period was chosen to ensure authorization holders a greater chance of profit.<sup>275</sup> The law does provide, however, for revocation of authorizations in mid-term either for the "public interest" or if the holder fails to uphold the various obligations.<sup>276</sup> Although the "public interest" provision could conceivably be used to make arbitrary withdrawals of authorizations, withdrawals can also be appealed to an administrative judge, who must determine the validity of the reasons for such a withdrawal.<sup>277</sup>

The responsibilities of authorization holders, detailed in a schedule of obligations, are similar to those imposed by the 1981 law. Like the 1981 law, the 1982 law requires a statement of a holder's "main purpose" and the broadcast of a weekly minimum amount of programming.<sup>278</sup> There was much concern that any

<sup>270</sup> According to the Minister of Communication "the system of authorizations should be reserved for those situations where, due to scarcity, it is necessary to mediate between requests. The aim is, in effect, to institute a regime of liberty which will find full expression when everyone will be able to have access to cable and when editorial rights common to all communications businesses will put each in a situation equal to the others. For the moment, authorizations are the general rule, given the necessity of protecting the fragile balance between the different means of communication." *Id.* at 125.

<sup>271</sup> Law of July 29, 1982, *supra* note 2, art. 87.

<sup>272</sup> *Id.* Of course, such language is "susceptible to many interpretations." Chevalier, *supra* note 26, at 562 n.38.

<sup>273</sup> See PROJET DE LOI, *supra* note 46, at 135.

<sup>274</sup> Law of July 29, 1982, *supra* note 2, art. 86.

<sup>275</sup> PROJET DE LOI, *supra* note 46, at 138.

<sup>276</sup> Law of July 29, 1982, *supra* note 2, art. 86. The obligations imposed on private radio operators include the ban on advertising, see *supra* note 246 and accompanying text, and the requirement that no individual finance more than 25% of a station's budget. See PROJET DE LOI, *supra* note 46, at 138, and *infra* text accompanying notes 288-92.

<sup>277</sup> PROJET DE LOI, *supra* note 46, at 138.

<sup>278</sup> Law of July 29, 1982, *supra* note 2, at 83. See also *supra* text accompanying notes 166-67, 170. A weekly rather than a daily minimum was chosen to permit private radio stations greater "flexibility." See PROJET DE LOI, *supra* note 46, at 135.

schedule of obligations would place private programmers in a regime similar to that for public service companies, which would lead to direct government control.<sup>279</sup> While the law does not specify that the two types of schedules are different, proponents of the law have argued that there is a “very real legal distinction” between the technical requirements for authorization holders and the full requirements of public service.<sup>280</sup> For example, a public service must respect general obligations of neutrality and even-handedness. Authorization holders are under no such duty.

Another important distinction between private and government programmers arises from the provisions of the law concerning concentration of power. Article 80 of the law prohibits anyone from holding more than one authorization “of the same type.”<sup>281</sup> In other words, an association may have one authorization for access to a cable television system and one for a local radio station, but not two of either.<sup>282</sup> The rationale for this rule is “to stop the establishment of monopolies,” especially by the regional press.<sup>283</sup>

There is one major exception to this limitation. Public service companies and companies in which the state is the majority shareholder may receive an unlimited number of authorizations.<sup>284</sup> While supporters have said that this is necessary to permit these companies to “fulfill their missions,” others have feared that this opens the door to reinstatement of the state monopoly, especially over the programs offered on the new cable networks.<sup>285</sup>

<sup>279</sup> *E.g.*, Cousin, *supra* note 240, at 7-8 (The end of the government monopoly will not be an improvement if “almost all activity falls under public service.”).

<sup>280</sup> See PROJET DE LOI, *supra* note 46, at 130. See also Chevalier, *supra* note 26, at 561.

<sup>281</sup> Law of July 29, 1982, *supra* note 2, at 80. There is no limit on the number of declarations for services which an individual may obtain under art. 77.

<sup>282</sup> PROJET DE LOI, *supra* note 46, at 131.

<sup>283</sup> One supporter of the law explained: “Clearly, we do not want a press group which is able . . . to have a monopoly position in a region . . . to control at the same time in the same region . . . many cable television networks and a radio chain.” PROJET DE LOI, *supra* note 46, at 131, quoting M. G. Fillard. By contrast, there is no limitation placed on those who distribute programs to, and produce programs for, many cable networks. See *Bataille du Cable*, *supra* note 3, at 24.

<sup>284</sup> Law of July 29, 1982, *supra* note 2, art. 80. An example of a company in which the state is the majority shareholder is SOFIRAD, a “mixed economy company,” see *supra* note 237, which manages radio stations that broadcast into France but from outside the country. See PROJET DE LOI, *supra* note 46, at 132.

<sup>285</sup> *Id.* at 131-132.

#### D. *The Constitutional Council*

The constitutionality of the new law on audiovisual communications was challenged before the Constitutional Council.<sup>286</sup> The first contention was that the law violated the right to “speak, write and publish freely” as guaranteed by article 11 of the Declaration of the Rights of Man.<sup>287</sup> The major provisions of the law attacked were: the “excessive limitation” placed on the right to use a declaration instead of an authorization;<sup>288</sup> the imposition of public service responsibilities on private concessionaires who obtain access to the broadcast television system;<sup>289</sup> the schedule of obligations imposed on authorization holders;<sup>290</sup> and the requirement that cable systems built entirely on private property must obtain an authorization if they are “collectively owned.”<sup>291</sup>

The Constitutional Council ruled that these provisions did not violate the Constitution but rather represented a necessary balance, struck by Parliament, between free expression and the limits of technology. The law, according to the Council, furthered the constitutional values of safeguarding the public order, respect for others, and the preservation of pluralistic expression, which the various means of audiovisual communications, “by their considerable influence,” are capable of undermining.<sup>292</sup>

The prohibition on advertising on private radio was also challenged.<sup>293</sup> First, the Council rejected the argument that the ban violated the “freedom of business,” stating that this freedom is not absolute and requires rules such as this one in order to exist.<sup>294</sup> A second argument was that, because public service radio stations were permitted to accept advertising, the ban on private stations violated the principle of equality before the law. The Council ruled that, because the same prohibition applied to all who held authorizations “of the same type,” there was no unconstitutional inequality.<sup>295</sup>

The Constitutional Council did find that one part of the law

<sup>286</sup> Decision of Con. const. of July 27, 1982, No. 82-141, Dalloz-Sirey, *Jurisprudence* [D.S. Jur.]. For a discussion of the Constitutional Council, see *supra* note 106.

<sup>287</sup> See *supra* text accompanying note 11.

<sup>288</sup> See *supra* text accompanying notes 264-65.

<sup>289</sup> See *supra* text accompanying notes 282-83.

<sup>290</sup> See *supra* text accompanying note 278.

<sup>291</sup> See *supra* text accompanying note 255.

<sup>292</sup> Decision of Con. const. of July 27, 1982, *supra* note 286.

<sup>293</sup> See *supra* text accompanying note 246.

<sup>294</sup> Decision of Con. const. of July 27, 1982, *supra* note 286.

<sup>295</sup> *Id.* See *supra* text accompanying notes 218-19.

violated the principle of equality. The version of the law originally passed by Parliament gave the right of response only to natural persons and non-profit corporations.<sup>296</sup> The Council held that “for profit” corporations were being discriminated against and ordered that all legal persons, individual and corporate, be accorded the right of response.<sup>297</sup>

### E. Evaluation of the Law

The 1982 law on audiovisual communications was intended to “reinvent” the French communications law.<sup>298</sup> It was designed to end the government’s monopoly on programming and affirm the freedom of audiovisual communications.<sup>299</sup> Furthermore, the law was intended to institute a “clear separation” between political powers and communications.<sup>300</sup>

Opponents of the law charged that the government remained firmly in control of all electronic communications. They argued that the “tentacular” public service, the governmental monopoly over the infrastructure and the “privileged situation” of the public service companies over private broadcasters gave the state “all the means and all the power.”<sup>301</sup> As one critic stated: “The law has 110 articles—two are for liberty, 108 are for regulating it.”<sup>302</sup>

Actually, the law, like all legislative compromises, contains both positive and negative elements. The few years since the passage of the law on audiovisual communications have revealed some of its strengths and weaknesses.

<sup>296</sup> See PROJET DE LOI, *supra* note 46, at 22.

<sup>297</sup> Decision of Con. const. of July 27, 1982, *supra* note 286. See also Law of July 29, 1982, *supra* note 2, art. 6.

<sup>298</sup> *La Bataille du Cable*, *supra* note 3, at 1. The Minister of Communication said that this reform “seeks to adapt our law to reality.” PROJET DE LOI, *supra* note 46, at 13.

<sup>299</sup> PROJET DE LOI, *supra* note 46, at 13. See also *La Bataille du Cable*, *supra* note 3, at 5 (the 1982 law transforms “administrative logic” into a regimen able to take “diverse forms”); Chevalier, *supra* note 26, at 561 (the law raises “new possibilities for free expression”).

<sup>300</sup> *La Bataille du Cable*, *supra* note 3, at 32. See also PROJET DE LOI, *supra* note 46, at 27 (legislative intent was to “ensure the independence of the radio-television public service from political power.”)

<sup>301</sup> Chevalier, *supra* note 26, at 558. See Cousin, *supra* note 240, at 7 (“Liberties are at stake in France where the excessive domination by the public sector of communications constitutes a menace. . .”).

<sup>302</sup> Berger, *Michael D’Ornano: Rapport sur la Television Socialiste*, *Le Figaro*, Apr. 9, 1983, at 69; Durieux & Cojean, *supra* note 198, at 15 (the “potentialities” of the law are “largely erased by the laborious setting up of liberties”); Chevalier, *supra* note 26, at 561 (the contradiction between Article I’s freedom of communication and the regimes of public service and authorizations, creates more a “right of expression” than a “true freedom of audiovisual communication.”).

For example, the H.A. began quite inauspiciously, with the Socialists in power, appointing six of the nine members.<sup>303</sup> Of greater concern was the fact that several of the appointees had close personal ties with the Administration.<sup>304</sup>

As a "protective screen" between the government and audio-visual communications, though, the H.A. has received mixed reviews.<sup>305</sup> It is generally conceded that the H.A. was able to ensure equal time for all candidates during the municipal elections.<sup>306</sup> Additionally, the H.A. has opposed the government on the sensitive issue of the right to respond to general government statements on political issues and argued that an open debate between representatives of majority and opposition parties should follow such pronouncements.<sup>307</sup>

The primary complaint about the H.A. involves its apparent inability to sever the "umbilical cord" between government and communications and ensure objectivity and impartiality.<sup>308</sup> There is near universal agreement that the pro-government bias of the public service continued unabated even after the passage of law. "[T]he cold hand of the state, although gloved in the H.A. and the nominal independence of the TDF, shows no sign of loosening its grip on French telecommunications. . . ."<sup>309</sup>

There are frequent complaints that the news carried on the public service stations favors the government's perspective; stories harmful to the government's interests are not covered and critics of the government are kept off the public channels.<sup>310</sup> Ad-

<sup>303</sup> The members were quickly termed "political appointees." D. GRAY & C. GRANT, *supra* note 38, at 47.

<sup>304</sup> For example, one appointee was an "intimate friend" of President Mitterrand, another worked on his election campaign. See Berger, *supra* note 302, at 70.

<sup>305</sup> Chevalier, *supra* note 26, at 566.

<sup>306</sup> See Durieux & Cojean, *supra* note 198, at 15.

<sup>307</sup> See *Le Premier Rapport Annuel de la Haute Autorite*, Le Monde, Oct. 26, 1983, at 15. Because the H.A. seems occasionally willing to stand up to the government, one Senator from the opposition proposed giving H.A. control over all public service societies. *Id.*

<sup>308</sup> See Todd, *supra* note 32, at 4; Berger, *supra* note 302, at 70. There have also been charges that the government has received more air time than opposition political parties. See *Le Premier Rapport Annuel de la Haute Autorite*, *supra* note 307.

<sup>309</sup> D. GRAY & C. GRANT, *supra* note 38, at 77. For a discussion of the TDF, see *supra* notes 296-98 and accompanying text. A Canadian journalist, Denise Bombadier, had predicted in 1975 that if the left took power in France, it would find it difficult to resist the temptation to make the public service monopoly "sing its song." Morand & Valter, *supra* note 25, at 60.

<sup>310</sup> See Berger, *supra* note 302, at 69 (the majority parties take five to seven times more television air time than the opposition); Todd, *supra* note 32, at 6 (news is not "objective"); *Television: Pour "FR3", Cette Femme est Dangereuse*, Le Figaro, Mar. 17-23,

ditionally, some charge that public service employees who do not agree politically with the state are either fired or removed from positions of responsibility.<sup>311</sup>

Nonetheless, the H.A. has served an important purpose. Despite the continued involvement of the government in communications, the H.A. has been able to limit some of the government's power.<sup>312</sup> This has resulted in general fairness to all political parties during election campaigns and remarkably few complaints over the awarding of authorizations to private broadcasters.<sup>313</sup> Even if the H.A. cannot guarantee complete freedom for all audiovisual communications, it is of great symbolic importance to have the H.A. as a "necessary dike" keeping, to some extent, the power of the government from washing over all communications.<sup>314</sup>

As for the programming offered by the public service itself, there has been no decrease in the widespread condemnation of its poor quality. Surveys reveal that over two-thirds of the population is dissatisfied with French television,<sup>315</sup> which offers what has been termed "a menu almost universally acknowledged as being dull and unappetizing."<sup>316</sup>

A quite different reaction has greeted the programs offered on private radio stations. It was generally reported that listeners are "enthusiastic" about the wide variety of new and specialized programming.<sup>317</sup> Groups as diverse as the Boy Scouts, the Portuguese-French community, the environmentalists and the anar-

1982, at 124 (int'l ed.) (popular television star kept off FR3 because of her political views).

<sup>311</sup> See Berger, *supra* note 302, at 69; Todd, *supra* note 32, at 6.

<sup>312</sup> See Chevalier, *supra* note 26, at 568.

<sup>313</sup> There were some complaints over the sharing of frequencies. In particular, *Frequence Gaie*, the homosexual station, interrupted its programming for 48 hours to protest the H.A.'s order requiring it to share a frequency with *Radio-Libertaire*, the station for anarchists, and *Radio-Verte*, the ecologists' station. *Frequence Gaie*, *Le Monde*, July 22, 1983, at 24, col. 2.

<sup>314</sup> Durieux & Cojean, *supra* note 198, at 15.

<sup>315</sup> See *La Bataille du Cable*, *supra* note 3, at 29.

<sup>316</sup> D. GRAY & C. GRANT, *supra* note 39, at 97. See also Todd, *supra* note 32, at 4 (French television is often "mediocre"); Bercoff, *Un Service qui N'Existe Pas*, *Le Monde*, May 4, 1984, 1, col. 3 (television suffers because it only searches for the lowest common denominator); Berger, *supra* note 302, at 72 (American television "pleases" more than French television "to judge by *Dallas*").

<sup>317</sup> While many listeners prefer the programming on private radio stations to that offered on the public service stations, a survey conducted in July, 1983, found that 61% of radio listeners preferred the public service stations for news. Guigon, *Radios Libres: l'Onde de Choc*, *Le Point*, July 4, 1983, at 66.



chists have obtained air time.<sup>318</sup> Over 800 stations have been authorized by the H.A.<sup>319</sup> In Paris, in fact, the number of broadcasters so exceeded the number of allotted frequencies that each frequency is shared by several different groups.<sup>320</sup> Thus, the pluralism promised by the law has come not from the public service, which is charged with guaranteeing pluralism, but from the 800 private parties with access to the airwaves.<sup>321</sup>

The prohibition on advertising, however, has caused widespread difficulty. Some stations have been able to deal with the problem of funding through creative means. For example, one station which specializes in accordion dance music staged fundraising balls, while "Frequence Gaie," the homosexual station, has been paid for by listener contributions.<sup>322</sup> Other stations have not been so fortunate. Some have turned to illegal "hidden advertising," while others have been unable to raise sufficient capital to survive.<sup>323</sup> Accordingly, on April 4, 1984, the government announced that it would seek a new statute permitting advertising on private radio stations.<sup>324</sup> While many endorsed this plan, others feared the loss of the "non-profit spirit," and the possible replacement of local stations by national networks.<sup>325</sup>

The 1982 law also did not resolve all of the questions concerning the regulation of cable television. The development of the French cable television system was impeded by the inability of the government to devise a plan, consistent with the law, for sharing responsibility. The major reasons cited for the almost two-year delay were the need to develop adequate financial resources for the project, the concern for the effect of cable on other media, and cable's "political consequences."<sup>326</sup>

<sup>318</sup> See *Freedom Without Commercials*, *The Economist*, Sept. 3, 1983, at 41; *Frequence Gaie*, *supra* note 313, at 24.

<sup>319</sup> See Guignon, *supra* note 317, at 66. In August, 1982, more than a year after the 1982 Law was enacted, the Government began closing down unlicensed radio operators. Opposition party leaders called the police raids on these stations, "the Saint Batholomew's Day massacre of the airwaves." See Durieux & Cojean, *supra* note 201, at 15; *Freedom Without Commercials*, *supra* note 318, at 41.

<sup>320</sup> See *Freedom Without Commercials*, *supra* note 318, at 41. See also *supra* note 313.

<sup>321</sup> See *supra* notes 320-22 and accompanying text.

<sup>322</sup> See *Freedom Without Commercials*, *supra* note 318, at 42.

<sup>323</sup> *Id.*

<sup>324</sup> See Graret, *La Bataille de la Publicite est Commencee*, *Le Nouvel Economiste*, Apr. 16, 1983, at 50; Mitterand *Sur la Defensive*, *Le Figaro*, Apr. 5, 1982, at 1.

<sup>325</sup> E.g., Graret, *supra* note 324, at 50. There was also some concern since 43% of the audience of the private stations, according to one survey, said they were attracted by the lack of advertisements. Guignon, *supra* note 317, at 65.

<sup>326</sup> Lacon, *Le Plan de Cablage*, *Le Monde*, Mar. 2, 1984, at 24. These "political consequences" of cable television included the fact that each cable system would offer viewers

Finally, on May 3, 1984, the cabinet ratified a plan for the creation of local cable networks.<sup>327</sup> While the framework of the plan recognizes the split between infrastructure and services, there is governmental involvement (either national or local) in the operation of both. The government-run PTT<sup>328</sup> (the national postal, telephone and telegraph company) will control most of the infrastructure.<sup>329</sup> The PTT will plan, construct and own the entire cable network except for the "head-end".<sup>330</sup> The TDF,<sup>331</sup> the public service organization which is responsible for the technical transmission of broadcasting, will be in charge of the head-end equipment and facilities.<sup>332</sup> Thus, the TDF "controls the reception of programmes from terrestrial or satellite transmitters, allocates frequency bands, and is responsible for the transmission of all programming."<sup>333</sup>

The party that decides which services and programs will be carried on each cable system will not be a private entity. Rather, each "cable operator" will be a company whose shareholders constitute a "subtle melange" of state, municipal and private interests,<sup>334</sup> known as an SLEC (Societe locale d'exploitation commerciale).<sup>335</sup>

The plan allows each SLEC to determine its own member-

a wide range of programs and services, "not controlled by the state." *Id.* Also delayed was the planned start of the fourth television channel, Canal Plus. This channel, conceived as a "pay channel" requiring subscribers to purchase a decoder as well as pay a monthly subscription fee, was scheduled to begin operation on Christmas Day, 1984. See *Trois Nouveaux Programmes de Television*, *Le Monde*, Oct. 27, 1983, at 32; Billiard, *TV: le Marecage*, *Le Point*, July 18, 1983, at 67.

<sup>327</sup> See *French Government Opts for Fiberoptic Systems*, MULTICHANNEL NEWS, May 14, 1984, at 36.

<sup>328</sup> Le Ministere du Poste, Telephones et Telegraphes.

<sup>329</sup> See *supra* text accompanying notes 255-56. See also *French Government Opts for Fiberoptic Systems*, *supra* note 330, at 36; *Cable and Electronics have a Bright Future*, INTERMEDIA, May, 1984, at 3-4.

<sup>330</sup> "Head-end" is defined as the "general term for the array of equipment controlling the central reception and transmission of signals in a [cable] network. [It] consists of electronics for receiving, converting, decoding, amplifying, filtering and transmitting signals as necessary." D. GRAY & C. GRANT, *supra* note 38, at 9.

<sup>331</sup> Telediffusion de France. See *supra* notes 194, 235 and accompanying text.

<sup>332</sup> See *La Bataille du Cable*, *supra* note 3, at 9; D. GRAY & C. GRANT, *supra* note 38, at 102.

<sup>333</sup> D. GRAY & C. GRANT, *supra* note 38, at 102.

<sup>334</sup> Le Boucher, *Television Cable: le Plan est Pret*, *Le Monde*, Apr. 28, 1984, at 1, col. 3.

<sup>335</sup> See *La Bataille du Cable*, *supra* note 3, at 6; D. GRAY & C. GRANT, *supra* note 38, at 102. The 1982 Law does not provide for, or even mention, SLEC's. Most observers believe, however, that the law is "flexible" enough to permit their functioning. See Lacon, *Les Debuts de la Teledistribution*, *Le Monde*, May 20, 1984, at 32; *La Bataille du Cable*, *supra* note 3, at 9.

ship, subject to certain ground rules.<sup>336</sup> For example, while governmental and private interests will be represented in each SLEC, no single interest may constitute a majority.<sup>337</sup> The municipal government where the cable system is located, however, will have veto power over actions taken by the SLEC.<sup>338</sup> The fact that the president of each SLEC must be a local elected official, either a mayor or a member of the regional governing council, adds another element of local governmental control.<sup>339</sup> The principal goals of the SLEC structure are "to keep the company local and to prevent industrialists from building empires."<sup>340</sup> To further ensure localism, cable networks will be limited to serving areas smaller than 36 miles.<sup>341</sup> The aim of avoiding private monopolies will also be supported by the restriction on private involvement in SLEC's: no private party may participate in more than one SLEC.<sup>342</sup>

Under the plan, the SLEC must be closely involved with numerous national governmental entities. The SLEC rents the right to use the infrastructure from the PTT, contracts with the TDF to operate the head-end facilities, and receives an authorization to operate from the H.A.<sup>343</sup>

Ultimately, though, it will be the SLEC who decides which programmers are allowed onto the cable network. This means that, as the president of the H.A. noted, "it is local officials who . . . are entrusted with managing the new cable systems, it is up to them to assure the new liberty."<sup>344</sup>

<sup>336</sup> See *Cable and Electronics Have a Bright Future*, *supra* note 329, at 4.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.* See also Le Boucher, *supra* note 334, at 12.

<sup>340</sup> See *Cable and Electronics Have a Bright Future*, *supra* note 329, at 4.

<sup>341</sup> See *French Government Opts for Fiberoptics Systems*, *supra* note 327, at 36. The 1982 Law did not specify exactly how large an area could be served by cable and still be considered "local" (unlike the 30 kilometer limit for local private radio specified in art. 81). See *PROJET DE LOI*, *supra* note 46, at 36.

<sup>342</sup> Law of July 29, 1982, *supra* note 2, art. 80. The public service societies will be able to participate in more than one SLEC. Thus, they could play a major role in the programming on cable as well as on broadcast television. See *Le Nouveau "Monsieur Cables" Devra Faire Dialoguer l'Etat et les Collectives Locales*, *Le Monde*, Jan. 22, 1983, at 24.

<sup>343</sup> Law of July 29, 1982, *supra* note 2, art. 78. See *La Bataille du Cable*, *supra* note 3, at 8-9. The H.A. will also impose various obligations on each SLEC, such as respect for pluralism. *But cf.* *supra* text accompanying notes 282-83 (supporters of the law suggest that authorization holders will not be subject to public service obligations, only technical requirements). By the time the government unveiled its final plans for the cable in May, 1984, over 130 groups had applied for authorizations. See *Cable and Electronics Have a Bright Future*, *supra* note 329, at 4.

<sup>344</sup> *La Bataille du Cable*, *supra* note 3, at 3. See also *Le Nouveau "Monsieur Cables" Devra Faire Dialoguer l'Etat et les Collectives Locales*, *supra* note 342, at 24 (because of the involve-

Thus, the national government has kept complete control over the cable infrastructure and has granted local governments great power over the programming.<sup>345</sup> While this does bring about some much needed decentralization of power,<sup>346</sup> it also means that pressure can be exerted by some governmental entity at every section of the cable network.

In sum, the audiovisual law created what has been aptly called a "conditional liberty."<sup>347</sup> Private parties finally have access to certain forms of electronic communication, but always under the watchful eye of the state. The law has modified the ways in which government can exercise its power, but the freedom to communicate remains a "faucet," which the government is able to open and close.<sup>348</sup>

The new law neither guarantees total freedom of communication nor condemns the French citizenry to a despotically controlled communications network. Rather, it creates the possibility, but not the guarantee, that democratic pressures and the competition created by private programmers in the marketplace of entertainment and ideas will lead to true pluralism for French electronic mass communications.<sup>349</sup>

## V. BETWEEN SCYLLA AND CHARYBDIS: PRIVATE MONOPOLY VS. GOVERNMENT DOMINATION

Americans have much to learn from the history of French telecommunications law. Certainly there are similarities between the two democracies, each with a dedication to freedom of speech spanning almost two centuries.<sup>350</sup> Differences in history,

ment of local officials, "there will not be a lack of delicate problems of political pluralism.").

<sup>345</sup> See *supra* text accompanying notes 338-39.

<sup>346</sup> E.g., PROJET DE LOI, *supra* note 46, at 59; Chevalier, *supra* note 26, at 574.

<sup>347</sup> An 11, *supra* note 198, at 1.

<sup>348</sup> Cousin, *supra* note 240, at 10. See Chevalier, *supra* note 26, at 565 (While the state can still intervene in communications, the law "modifies the context in which this supervisory power can be exercised."); *Audiovisuelle: la nouvelle donne*, *supra* note 45, at 35 (The law will require the government to engage in "delicate balancing.").

<sup>349</sup> In the words of one commentator, "France in the 1980's will have the radio and television it deserves and its political and social system is ready to accept." Tarlé, *supra* note 25, at 23. One hopeful sign appeared at the end of January, 1985, when President Mitterand announced a plan for the creation of 80 private local television stations. See *Channel 80*, *The Economist*, Jan. 26, 1985, at 40.

<sup>350</sup> Compare U.S. Const. amend.I ("Congress shall make no law. . .abridging the freedom of speech, or of the press. . .") with art. XI of the Declaration of the Rights of Man and of the Citizen of Aug. 26, 1789 ("The free communication of thoughts and opinions is one of the most precious rights of man; every citizen may therefore speak,

culture and legal structure have, however, created vastly different frameworks for the law of communications in each country. Through the study of the French experience, both by examining proposals which have yet to be tried in the United States and by considering the basic principles and assumptions of a foreign country, one can gain fresh insight into U.S. telecommunications law.<sup>351</sup>

Perhaps the most important cultural difference between France and the United States, in terms of communications law, is the different national perspectives on the role of elected officials and the judiciary. The French view, evolving from the French Revolution, places primary faith in majority rule, while distrusting the power of appointed judges to thwart the popular will.<sup>352</sup> By contrast, the American system is one of checks and balances, whereby the courts in their application of the Constitution are expected to protect the people from majoritarian abuse.<sup>353</sup>

One result of this difference is that, for better or worse, the French President and Parliament have been relatively involved in the regulation of electronic mass communications. In some areas, this intervention has prevented domination of the airwaves by small groups of private individuals. Unfortunately, however, rather than creating a free marketplace of ideas with numerous vendors, the French government has reserved the largest stand in the market for itself.

Americans must proceed with caution, therefore, in considering the French system of communications regulation. There are some concepts which cannot cross the Atlantic, while others reflect a shared belief in pluralism and freedom.

Traditionally, both American and French theorists have agreed on the desirability of fostering diversity in mass communications. Throughout the history of French telecommunications regulation runs the theme that government must intervene in order to prevent the development of private communications mo-

write and publish freely, provided he shall be liable for the abuse of this freedom in such cases as are determined by law" (translated in FRENCH LAW, *supra* note 9, at 3).

<sup>351</sup> See Tunc, Preface to O.KAHN, C. LEVY & B. RUDDEN, A SOURCE-BOOK ON FRENCH LAW, xi (1979) ("By a well-known phenomenon, consideration of a foreign system fosters 'reflection' on one's own.").

<sup>352</sup> PRESS LAWS IN MODERN DEMOCRACIES 342 (P. Lahav ed. 1985).

<sup>353</sup> *Id.* See also L. TRIBE, THE CONSTITUTIONAL PROTECTION OF INDIVIDUAL RIGHTS 583 (1978) (In the arena of free expression, the role of "the judicial branch is to protect dissenters from a majority's tyranny. . . .").

nopolies. The fear is that, without regulation, communications empires would rise up and dominate public opinion, squelching pluralistic expression. To prevent this from occurring, numerous barriers have been erected.<sup>354</sup>

The United States has applied the First Amendment theory that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."<sup>355</sup> The Supreme Court has recognized that "the greater the number of owners in a market, the greater the possibility of achieving diversity of program and service viewpoints."<sup>356</sup>

In pursuit of diversity, the U.S. has established a wide variety of structural regulations to ensure the greatest number of owners within the mass media. For example, newspapers are barred from owning a television station within their area of circulation; broadcasters cannot own cable television systems which serve their area of broadcast.<sup>357</sup> Similarly, the F.C.C. has prohibited "duopolies," that is, two television, two FM or two AM stations which serve the same area and are owned by the same person.<sup>358</sup>

In recent years, however, the presumption that diversity of ownership should be preferred over concentrated ownership has been attacked as an unnecessary inhibition of the "normal mechanisms of the marketplace."<sup>359</sup> In fact, Federal Communications Commission Chairman Mark Fowler has stated that those arguing for restrictions on concentration "should have to demonstrate that a limit on ownership bears a close relationship to an identifiable harm."<sup>360</sup>

As the Supreme Court has noted, however, "the possible benefits of competition do not lend themselves to detailed fore-

<sup>354</sup> Law of July 29, 1982, *supra* note 2, art. 80. See also *supra* text accompanying notes 343-45.

<sup>355</sup> *Associated Press v. United States*, 326 U.S. 1, 20 (1945). See also *Terminello v. Chicago*, 337 U.S. 1, 4 (1949) ("The right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from the totalitarian regimes.").

<sup>356</sup> *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978).

<sup>357</sup> 47 C.F.R. §§ 76.501(a), 76.636(c) (1983). The constitutionality of the ban on newspapers owning television stations which operate in the same market was upheld in *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. at 802. ("The regulations are a reasonable means of promoting the public interest in diversified mass communications. . . .").

<sup>358</sup> 47 C.F.R. § 73.636(a) (1983).

<sup>359</sup> Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 210 (1982).

<sup>360</sup> *Id.* at 246.

cast.”<sup>361</sup> Applying the Supreme Court’s reasoning, the F.C.C. somewhat cursorily determined in a recent decision that even though the total number of speakers may decline, there are “public interest benefits from the multiple ownership of stations” on a regional and national level.<sup>362</sup> Accordingly, the F.C.C. has eliminated rules which previously prevented common ownership of three television, AM or FM stations where two were located within 100 miles of each other and which discouraged ownership of three television stations or two VHF stations in the 50 largest television markets.<sup>363</sup>

The problem with this momentum towards industry concentration can be seen in the rationale given for the F.C.C.’s aborted attempt to repeal its primary limitation on multiple ownership of broadcast stations, the 7-7-7 rule.<sup>364</sup> The F.C.C. argued that limiting the number of different viewpoints expressed on television news would not limit “viewpoint diversity” because viewers “could turn to an alternative medium if they became dissatisfied with their current one.”<sup>365</sup> The alternatives, according to the F.C.C., include not only electronic communications such as radio and cable television, but newspapers, magazines and books.<sup>366</sup> However, the F.C.C. fails to recognize that a “satisfied” viewer is not necessarily a “well-informed” viewer. A person may well enjoy a news program, yet be unaware that important issues are being ignored. While “letting the market do it” may permit slanted appeals to majoritarian opinions and prejudices, “the ‘public interest’ in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public.”<sup>367</sup>

The F.C.C. is also misguided in its broad description of a

<sup>361</sup> F.C.C. v. RCA Communications, 346 U.S. 86, 96 (1953)

<sup>362</sup> Repeal of the “Regional Concentration of Control” Provisions of the Commission’s Multiple Ownership Rules, 55 R.R. 2d 1389, 1398 (1984). See also Amendment of § 73.3555 of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 56 R.R. 859, 879-89 (1984) [hereinafter *Amendment of 7-7-7 Rule*]. These benefits were said to include economies of scale and permitted successful station owners to own more stations.

<sup>363</sup> *Amendment of 7-7-7 Rule*, supra note 362, at 882-83.

<sup>364</sup> *Id.* at 865. This proposal was rescinded in Amendment § 73.3555 of the Commission’s Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, 56 R.R. at 887 (1984), in response to heavy Congressional opposition. E.g., Wirth, *Why the “Rule of 12” Hurts Competition*, N.Y. Times, Aug. 26, 1984, Sec. 3, at 2, col. 3.

<sup>365</sup> *Amendment of 7-7-7 Rule*, supra note 362, at 865.

<sup>366</sup> *Id.*

<sup>367</sup> *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 385 (1969).

competitive “market” for news and information. Television today has no real competition. The Supreme Court has recognized that “the broadcast media have established a uniquely pervasive presence in the lives of all Americans.”<sup>368</sup> In fact, a study cited by the F.C.C. itself showed that 64% of Americans list television as their primary source of news.<sup>369</sup>

A final error in the F.C.C.’s analysis is that it undervalues “the ‘public interest’ in diversification of the mass communications media.”<sup>370</sup> We must return to the fundamental principle that, in the words of the French law, citizens “are entitled to free and pluralistic audio-visual communication.”<sup>371</sup> This right is premised on the belief, central as well to the First Amendment, that the truth is more likely to come from several speakers than from one.<sup>372</sup> As the F.C.C. stated itself in 1970:

We are of the view that 60 different licensees are more desirable than 50, and even 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be the 51st licensee that would become the communication channel for a solution to a severe local social crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated.<sup>373</sup>

One aspect of French regulation of telecommunications which has particular relevance to the U.S. is the mandated division between the infrastructure of a communications network and the programs and services carried on that network.<sup>374</sup> This is

<sup>368</sup> F.C.C. v. Pacifica Foundation, 438 U.S. 726, 748 (1978).

<sup>369</sup> The Commission, in describing why the survey results totaled over 100% (in addition to the 64% who listed television, 18% listed radio as their primary news source and 44% listed newspapers), stated that it “implies that many people actually use more than one medium as a news source.” *Id.* However, it does not imply that they use more than one medium as a news source for news on the same topic. For example, a local newspaper may be the source of local news, while network television is the source for national and world news. Thus, there is not necessarily “competition” between these news sources.

<sup>370</sup> F.C.C. v. National Citizens Committee for Broadcasting, 436 U.S. 775, 799 (1978).

<sup>371</sup> Law of July 29, 1982, *supra* note 2, art. 2.

<sup>372</sup> The First Amendment “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.” *Associated Press v. United States*, 52 F. Supp. 366, 372 (S.D.N.Y. 1943), *aff’d*, 326 U.S. 1 (1945).

<sup>373</sup> Matter of Rules Relating to Multiple Ownership, 22 F.C.C.2d 306, 311 (1970).

<sup>374</sup> See *supra* text accompanying notes 369-70, 447-70.



especially applicable to cable television. Recognizing both the inherent differences between the "container" and its "contents" and the need to divide responsibility for this important means of communication, the French have established a system in which different groups have responsibility for laying the wires and selecting the programming.

In the U.S., by contrast, the cable television operator controls both the infrastructure and the programming.<sup>375</sup> Thus, the cable operator, who is given a license by the city or state government to build what will be the only cable system in a particular area, also has the freedom to decide, unilaterally, which programs will and will not be carried over each of the 36, 54 or 70 channels on the system.<sup>376</sup> As one commentator has observed:

A cable system is a mixture of pluralism and monopoly. It has elements of each. It has numerous channels that can be programmed by many separate producers. Video production is an intensely competitive business. However, one element of the cable system is a bottleneck monopoly, namely the physical cable. . . . From a social point of view, the promise of cable lies in the pluralism made possible by its unlimited number of channels. From the programmer-cablecaster's point of view, this may be its horror. A program producer gains from the limitations on competition that compel vast audiences, because of the lack of alternatives, to watch programs of moderate interest. But for the society, the advantage of cable is that it can create for video that kind of diversity that exists in print.<sup>377</sup>

When the cable operator in control of the bottleneck facility is also the programmer, the conflict between the societal interest in diversity and the programmer's interest in maximizing the share of the viewing audience intensifies. For example, the four largest services offering pay programming to cable operators serve 90% of pay subscribers and are owned by the three largest cable operators.<sup>378</sup> These operators have a particular economic interest in

<sup>375</sup> See, e.g., Nadel, *COMCAR: A Marketplace Cable Television Franchise Structure*, 20 HARV. J. ON LEGIS. 541, 547-49 (1983).

<sup>376</sup> Of the more than 4,200 cable television systems in operation, fewer than ten compete with another cable system for subscribers. Dawson, *How Safe Is Cable's Natural Monopoly?*, CABLEVISION, June 1, 1981, at 340. Cable television has been alternately termed a "natural monopoly," *Community Communications Co. v. City of Boulder*, 660 F.2d at 1379, and a "natural oligopoly," Meyerson, *The First Amendment and the Cable Television Operator: An Unprotective Shield Against Public Access Requirements*, 4 COMM/ENT L.J. 1, 10 (1981).

<sup>377</sup> I. POOL, *TECHNOLOGIES OF FREEDOM* 168-72 (1983).

<sup>378</sup> Home Box Office (the largest pay movie service, with 13,500,000 subscribers)

limiting competition to their programs, and hence in limiting the diversity of programs available on their systems.

The Supreme Court has noted that "evidence of specific abuses by common owners is difficult to compile."<sup>379</sup> In the relatively short history of cable television, however, there have been numerous examples of just such abuses. For example, when cable companies have instituted pay movie services, they have frequently first removed competing movie services from their systems.<sup>380</sup> Similarly, one cable operator refused to carry a channel offering 24-hour news, not because of a lack of subscriber interest, but so that it could offer its own news channel instead.<sup>381</sup> These anti-competitive impulses would not exist if there were a clear division between the cable network and the cable network's programming. If the cable operator did not control programming, it would have a strong economic incentive to offer the most diversified programming possible in order to best compete.<sup>382</sup>

In 1984, Congress created a modest division. The Cable Communications Policy Act of 1984 permits the cable operator to control most of the channels on the system, but reserves some channels for those not affiliated with the operator.<sup>383</sup> Any cable system with 36 or more channels must lease a set percentage of those channels to non-affiliated programmers.<sup>384</sup> Additionally,

and Cinemax (the fourth largest service, with 2,700,000 subscribers) are owned by American Television and Communications Corp. (the country's second largest cable television operator). The second and third largest pay services, Showtime and The Movie Channel (with 5,000,000 and 3,100,000 subscribers respectively), are owned jointly by the sixth and tenth largest cable television operators, Warner Amex Cable Communications, Inc. and Viacom Cablevision. See *Cable Service Subscriber Count*, CABLEVISION, July 16, 1984, at 62; *Top 100 Cable MSO's*, CABLEVISION, June 11, 1984, at 222.

<sup>379</sup> National Citizens Committee for Broadcasting, 436 U.S. at 797 (quoting *FCC v. RCA Communications*, 346 U.S. 86, 96 (1953)).

<sup>380</sup> When the Times Mirror Cable TV, Inc., the sixth largest cable television operator, started its own movie service, Spotlight, it removed Home Box Office and Showtime from its systems. See *In the Matter of Cable Leased Channel Access on the New, Large Capacity Systems*, Petition of Henry Geller & Ira Baron before the Federal Communications System, 10 (Oct. 9, 1981) [hereinafter cited as *Petition of Geller & Baron*].

<sup>381</sup> See Nadel, *supra* note 375, at 548, n. 40. Similarly, when Cable News Network (CNN), in an attempt to get cable subscribers to ask their cable systems to carry CNN, offered a day of programming on another channel, more than a dozen cable systems blocked out that channel for the day. See *Petition of Geller & Baron*, *supra* note 381, at 11.

<sup>382</sup> See I. POOL, *supra* note 377, at 175-76.

<sup>383</sup> 47 U.S.C. §§ 601-12 (1982).

<sup>384</sup> If a system has between 36 and 54 activated channels, the cable operator must set aside 10% of those channels (channels whose use is mandated by federal law for carriage of broadcast signals are subtracted from the base number of channels). Operators of systems with more than 55 activated channels must set aside 15% of such chan-

the cities which grant cable franchises are permitted to require that other channels be set aside for the public on a "first come, first serve" basis (so-called "public access").<sup>385</sup> The cable operator is not permitted to exercise any editorial control over any programming on either type of channel.<sup>386</sup>

The cable access requirements supplant the power of the single entity who manages the infrastructure to control all of the system's programming and create instead a right for many programmers to offer their services. The Cable Act creates a content-neutral, structural regulatory scheme designed to increase diversity in programming.<sup>387</sup> Accordingly, the Act furthers the interests of the First Amendment by presupposing that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."<sup>388</sup>

This type of structural regulation which increases the number of speakers without silencing any speaker or regulating content, should be encouraged.<sup>389</sup> As the Supreme Court has held: "It is the purpose of the First Amendment to preserve the uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee."<sup>390</sup>

Without denigrating the need to prevent private monopolies, however, it is fair to say that the French experience underscores the wisdom of the U.S. Supreme Court's dualistic warning. The history of French telecommunications law demonstrates unmistakably that government, however well-intentioned, simply cannot resist the temptation to control communications if given the opportunity.<sup>391</sup> One obvious remedy for government interference with communications is to establish a watchdog agency.

nels, and systems with more than 100 channels must include the must-carry channels in their base number. *Id.* § 612.

<sup>385</sup> *Id.* § 611.

<sup>386</sup> *Id.* §§ 611(e), 612(c)(2). According to the legislative history of the Act, "[w]ith regard to the access requirement, cable operators act as a conduit." H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 35 (1984).

<sup>387</sup> See National Citizens Comm. for Broadcasting, 436 U.S. at 801-02.

<sup>388</sup> *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945).

<sup>389</sup> See Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation*, 31 FED. COM. L. J. 215, 222 (1979) ("[A] structural approach is preferable to an approach to diversity which involves content regulation.")

<sup>390</sup> *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S. 367, 390.

<sup>391</sup> See *supra* text accompanying notes 311-14. See also D. GRAY & C. GRANT, *supra* note 38, at 97.

The Federal Communications Commission in the United States and the High Authority in France both serve this function.<sup>392</sup> They both police the airwaves to ensure that broadcasters operate in a manner which serves the public interest. Both the Commissioners and the “nine sages” of the H.A. are, however, appointed by those holding political power.<sup>393</sup> This selection process, therefore, raises the continuing specter of political interference with the operations of private radio and television stations. As Professor Mark Yudof asked: “Can the ‘referee’ be fair-minded when it has such an interest in the outcome of the process?”<sup>394</sup>

The relationship between the President of the United States and the F.C.C. ensures a unity of interests between the “referee” and the executive branch. The F.C.C. commissioners are appointed for seven-year terms by the President, who also selects the chairman.<sup>395</sup> Appointees are not only likely to share the views of the person who appointed them, “they may also feel a sense of loyalty to the President.”<sup>396</sup> Moreover, those selected by a former President but who wish to continue and serve another term “must remember that they are also reappointed by the President.”<sup>397</sup>

Once the F.C.C. has been “influenced” by those in political power, it is quite easy for the F.C.C. to “influence” the decisions of broadcasters. The F.C.C. has the power to either deny a renewal or revoke any license.<sup>398</sup> In the words of one broadcaster: “We live or die . . . by the F.C.C. gun.”<sup>399</sup>

<sup>392</sup> For example, both the F.C.C. and H.A. license private broadcasters. Compare 47 U.S.C. § 301 with Art. 17 of the Law of July 29, 1982, *supra* note 2. Both can revoke licenses if the station operator fails to comply with the agency’s requirements. Compare 47 U.S.C. § 312 with Art. 83 of the Law of July 29, 1982, *supra* note 2. While the F.C.C. regulates “as public convenience, interest, or necessity requires,” 47 U.S.C. § 303, the H.A. is charged with “safeguarding the independence” of the public service and securing “the free and pluralistic expression of ideas,” Law of July 29, 1982, *supra* note 2, arts. 12, 82.

<sup>393</sup> See 47 U.S.C. § 154(a); Art. 23 of the Law of July 29, 1982 *supra* note 2. See also *An II*, *supra* note 198, at 15 (describing H.A. members as “nine sages”).

<sup>394</sup> M. YUDOF, WHEN GOVERNMENT SPEAKS 93 (1983).

<sup>395</sup> 47 U.S.C. § 154(a). The current chair of the Corporation for Public Broadcasting was “a leading campaign organizer” for the President. *Reagan Aide Heads Public Broadcasting*, N.Y. Times, Sept. 22, 1984, at A1, col. 3.

<sup>396</sup> R. ELLMORE, BROADCASTING LAW AND REGULATION 26 (1982).

<sup>397</sup> *Id.* An additional source of potential influence is the power held by the White House over the F.C.C.’s budget. Thus, in 1971, the F.C.C. was forced to negotiate with the White House for its funding after the Office of Management and Budget “temporarily withheld more than a million dollars of the F.C.C.’s budget. . . .” *Id.* at 27.

<sup>398</sup> 47 U.S.C. §§ 3.07(d), 312(a).

<sup>399</sup> Bazelon, *The First Amendment and the “New Media”: New Directions in Regulating Tele-*

This power is not merely theoretical. Not only did the Nixon Administration threaten the licenses of stations which did not represent the Administration's views, but there was actually discussion of attacking the broadcast licenses held by the Washington Post in retaliation for the newspaper's Watergate investigation.<sup>400</sup>

Even in the absence of such obvious abuse of power, there is something unseemly about a commission, appointed by or beholden to a President, sitting in judgment of the fairness of the coverage of that President's re-election campaign. For example, in 1964 the F.C.C. ruled that candidate Barry Goldwater did not have the right to respond to an address by President Johnson on international affairs which was broadcast less than a month before the presidential election.<sup>401</sup> The Supreme Court declined to review this decision over the dissent of Justices Goldberg and Black, who said that the limited statutory exceptions to the equal time rule "do not appear to apply to the address."<sup>402</sup>

In 1979, the F.C.C. was again forced to rule on an incumbent President's campaign.<sup>403</sup> President Carter's campaign committee had sought to purchase time on the three commercial networks during December 1979. The networks refused, saying that they would sell time to candidates only in the actual year of the election. The F.C.C. ruled 4-3 in favor of the President and ordered that time be made available to his campaign. One of the dissenting commissioners stated that the ruling "substitutes the Commission's judgment for the broadcaster's own good faith interpretation of candidate requests and his response thereto. Such governmental intrusion is unwarranted, is illegal and, I fear, will come back to haunt the Commission and the public again and again."<sup>404</sup>

*communications*, 31 FED.COM.L.J. 201, 206 (1979). With some notable exceptions, *see infra* text accompanying notes 406-10, the F.C.C. has generally refrained from even moderate oversight of programming decisions. *See* Fowler & Brenner, *supra* note 359, at 231 ("[T]he Commission's regulation has rarely been overbearing.").

<sup>400</sup> *See* Price, *supra* note 389, at 225, n.47.

<sup>401</sup> *Republican National Committee* (letter from the F.C.C. to Chairman Dean Burch), 3 R.R.2d 647 (1964).

<sup>402</sup> *Goldwater v. F.C.C.* 379 U.S. 893, 895 (1964) (Goldberg, J. dissenting).

<sup>403</sup> In re Complaint of Carter-Mondale Presidential Committee, Inc. against the American Broadcasting Company, Columbia Broadcasting System and National Broadcasting Company Television Networks, 74 F.C.C. 2d 631 (1979), *aff'd sub.nom.* *Columbia Broadcasting System v. F.C.C.*, 453 U.S. 367 (1981). This case involved the interpretation of the requirement that stations allow "reasonable access" for federal candidates. 47 U.S.C. § 312(a)(7).

<sup>404</sup> 74 F.C.C. 2d at 682 (dissenting statement of Commissioner Washburn).

Another potential government intrusion in the arena of political speech is the Fairness Doctrine, which requires broadcasters to provide adequate time for discussion of public issues and to afford a “reasonable opportunity” for contrasting viewpoints.<sup>405</sup> A related rule, the personal attack rule, requires broadcasters to afford individuals a “reasonable opportunity” to respond to broadcast attacks on their honesty, character or integrity.<sup>406</sup> The F.C.C. has called for the repeal of these rules, arguing that they offend First Amendment values because under them broadcasters can be forced to relinquish valuable air time as a result of the content of their programming.<sup>407</sup> Conversely, others have contended that these rules should be retained because they protect the viewer’s First Amendment interest in maintaining a marketplace of ideas and in receiving diverse viewpoints.<sup>408</sup>

Again, the U.S. could learn from the French experience. In France, the concept of a right to respond to personal attacks in broadcasts is considered “necessary for the protection of public and private liberty.”<sup>409</sup> The French right to respond to broadcasts is basically an extension of the right to respond to the written press which was codified in 1881.<sup>410</sup> This right, which did not require that the government or judiciary rule on the content of the newspaper publication before the individual could respond, has been hailed in France as “an excellent law which established a reasonable balance between the freedom of thought and the rights of others.”<sup>411</sup>

In contrast, the Fairness Doctrine goes against the grain of American regulatory tradition, which holds that “liberty of the press is in peril as soon as the government tries to compel what is

<sup>405</sup> *Broadcast Procedural Manual*, 49 F.C.C.2d 1, 9-13 (1974). The Fairness Doctrine was ratified by Congress in 1959. *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S. 367, 385 (discussing 47 U.S.C. § 3.15(a)).

<sup>406</sup> 47 C.F.R. § 73.1920 (1984). The personal attack rule does not apply to most statements made about candidates during election campaigns and bona fide news programs. 47 C.F.R. § 73.1920(b).

<sup>407</sup> *Notice of Proposed Rulemaking In Re Repeal or Modification of the Personal Attack and Political Editorial Rules*, 48 Fed. Reg. 28295, 28301 (June 21, 1983).

<sup>408</sup> See e.g. F. ROWAN, *BROADCAST FAIRNESS* 153 (1984). *Accord* *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S. 367, 390. (“It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.”).

<sup>409</sup> Bouissou, *supra* note 24, at 1196. In France, this right is contained in Art. 6 of the Law of July 29, 1982. *Supra* note 2.

<sup>410</sup> See *supra* text accompanying notes 137-44.

<sup>411</sup> Toulemon, *supra* note 100, at 393. Despite the existence of a right to respond to newspaper criticism, “[p]eople exercise this right surprisingly rarely. . . .” I. POOL, *supra* note 377, at 133.

to go into the newspaper."<sup>412</sup> Thus, the Supreme Court struck down a Florida statute requiring a newspaper to give a political candidate equal space to respond to criticism by the paper.<sup>413</sup> The Court ruled that the law unconstitutionally permitted the government to intrude into the editorial process of the newspaper: "It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time."<sup>414</sup>

The Fairness Doctrine does permit government regulation of broadcasters' editorial processes. Justice Douglas argued that it "puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends."<sup>415</sup>

There is now a new danger of government intrusion into the editorial process: the FCC has ruled for the first time that other government agencies are to be permitted to file Fairness Doctrine complaints alleging that a broadcaster has been unfair to them.<sup>416</sup> This decision arose out of an F.C.C. ruling on a complaint by the Central Intelligence Agency against a news broadcast alleging CIA participation in plots to assassinate American citizens.<sup>417</sup> Although the CIA's complaint was rejected, it presented the unsettling spectacle of a government agency sitting in judgment of the truthfulness and fairness of news reporting about a sister agency. As the Supreme Court has warned, any governmental action which raises "the possibility that a good-faith critic of government will be penalized . . . strikes at the very center of the constitutionally protected area of free expression."<sup>418</sup> The F.C.C. should refuse to hear any complaint by government agencies about reporting on government operations. The ability of the government to use its own agency to silence

<sup>412</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 261 (1974) (White, J. concurring) (quoting Z. CHAFFEE, 2 *GOVERNMENT AND MASS COMMUNICATIONS* 633 (1947)).

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*

<sup>415</sup> *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 154 (1973) (Douglas, J. concurring).

<sup>416</sup> *Complaint of Central Intelligence Agency against American Broadcasting Companies, Inc.*, Staff Ruling, F.C.C.2d 1 (Jan. 1985).

<sup>417</sup> *Id.*

<sup>418</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964) (holding that an "impersonal attack on governmental operations" cannot be the basis for a libel judgment in favor of the government official responsible for the operations.).

critics, "because of the restraint it impose[s] upon criticism of government and public officials, [is] inconsistent with the First Amendment."<sup>419</sup>

It should not be necessary, however, to scrap all regulation of broadcasting in order to protect the Commission from political influence. One possible solution is suggested by the plan proposed by the Moinot Commission for the H.A.: have the independent judiciary appoint those who oversee broadcasting.<sup>420</sup> Although this recommendation was not adopted in France, the U.S. might consider such an approach.

Congress does have the constitutional authority to give the power of appointment to "the Courts of Law."<sup>421</sup> The commissioners could be selected either by the Chief Justice or by a lower court, such as the D.C. Circuit Court of Appeals, which already has appellate jurisdiction over the F.C.C.<sup>422</sup> Those selected as commissioners could either be federal judges, protected by lifetime tenure, or others who could be granted that protection.

Such an appointment system would help insulate the F.C.C. from the influence of politicians who are subject both to the F.C.C.'s regulation and its desire to affect the way their opponents are regulated. Judicial appointment of F.C.C. commissioners would not be a panacea but, as one French proponent of the plan stated, it would ensure "a substantial degree of independence from direct political control."<sup>423</sup>

The need for this independence has sometimes been underestimated by Americans. For example, Judge David Bazelon has observed that this country "has never examined closely the problem of governmental propaganda. We tend to think that propaganda is confined to communist or fascist dictatorships."<sup>424</sup>

<sup>419</sup> *Id.* at 276. See also *City of Chicago v. Tribune Co.*, 307 Ill. 595, 610, 139 N.E. 86, 91 (1923): "[I]t is better that an occasional individual or newspaper that is so perverted in judgment and misguided in his or its civic duty should go free than that all . . . citizens should be put in jeopardy of imprisonment or economic subjugation if they venture to criticize an inefficient or corrupt government."

<sup>420</sup> See *supra* text accompanying notes 187-88.

<sup>421</sup> U.S. CONST. art. II, § 2, cl. 2 ("[T]he Congress may by Law vest the Appointment of such . . . Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.) See also *Rice v. Ames*, 180 U.S. 371 (1901) (upholding power of Congress to confer on district judges the power to appoint extradition commissioners).

<sup>422</sup> 47 U.S.C. § 402(b).

<sup>423</sup> *New Broadcasting Law*, *supra* note 196, at 7. See also R. ELLMORE, *supra* note 396, at 26 ("Perhaps extending the term of office for commissioners or giving them the status of federal judges would lessen the outside pressures on them.")

<sup>424</sup> Bazelon, *supra* note 399, at 211.



Since the end of World War II, however, the democratically elected French government has supervised, influenced and dominated the news and information broadcast over the public service channels under its controls.

The American belief that "it can't happen here" is amply illustrated by the recent Supreme Court decision in *F.C.C. v. League of Women Voters of California*.<sup>425</sup> In that case, the Court struck down as unconstitutional a law prohibiting noncommercial educational broadcasting stations from editorializing if they receive any funds from the Corporation for Public Broadcasting (CPB).<sup>426</sup> Despite the fact that the CPB board is appointed by the President and that the board disperses federal funds to non-commercial stations, the Court found adequate legal safeguards in the CPB statute which "substantially reduce" the risk of governmental interference with the editorial judgment of local stations.<sup>427</sup> Thus, the offending part of the law was an unnecessary and superfluous restriction of First Amendment guarantees. In examining the legislative history, the Court pointed out that "as the House Committee Report frankly admits, [the ban on editorializing] was added not because Congress thought it was essential to preserve the autonomy of local stations, but rather 'out of an abundance of caution.'" <sup>428</sup>

Many of the protections against government interference cited by the Court, however, have already been implemented in France and have proved incapable of preventing government interference. For example, the first safeguard described by the Court is the "bipartisan" nature of the CPB's board of directors.<sup>429</sup> Although the President selects the entire board, there is a limit to how many members can come from one party.<sup>430</sup> The French public service companies, however, are guaranteed even greater bipartisan character, as members of both houses of Parliament, as well as several other groups, select the boards of

<sup>425</sup> 104 S.Ct. 3106 (1984).

<sup>426</sup> The CPB is authorized to "make grants to public telecommunications entities, national, regional, and other systems of public telecommunications entities, and independent producer and production entities, for the production or acquisition of public telecommunications services to be made available for use by public telecommunications entities. . . ." 47 U.S.C. § 396(g)(2)(B).

<sup>427</sup> *F.C.C. v. League of Women Voters of California*, 104 S.Ct. 3106, 3123.

<sup>428</sup> *Id.* at 3121 (quoting H.R.Rep. No.572, 90th Cong., 1st Sess. 20 (1967)).

<sup>429</sup> *Id.* at 3122.

<sup>430</sup> 47 U.S.C. § 396(c)(1). There are ten members of the Board of Directors, but no more than six can come from the same political party.

directors.<sup>431</sup>

A second safeguard, according to the Court, is the “defined objective criteria” for the distribution of funds to local stations.<sup>432</sup> The Prime Minister of France is required to follow equally “objective” criteria in allocating funds to the public service channels.<sup>433</sup> An additional protection cited by the Supreme Court is that, according to statute, the CPB is “required to adhere strictly to a standard of ‘objectivity and balance’ in disbursing federal funds to local stations.<sup>434</sup> The French public service organizations are also required by statute to ensure the “honesty, independence and pluralism of information,” and to do so “in a context of respect for the principles of pluralism and equality between cultures, beliefs and schools of thought and opinion.”<sup>435</sup>

One conclusion that can be drawn from the French experience is that the enumerated safeguards are incapable of guaranteeing that a government can not intervene in communications. There are no French counterparts to many of the safeguards found in the American public broadcasting system, namely the large number of public radio and television stations in America and the fact that CPB funds amount to less than one-quarter of the total income for these stations.<sup>436</sup> These protections do indeed help insulate local public broadcasters from undue influence by the Federal Government. Nonetheless, as Justice Stevens noted in his dissent in *League of Women Voters*: “Congress enacted many safeguards because the evil to be avoided was so grave.”<sup>437</sup> The “abundance of caution” described in the House

<sup>431</sup> See *supra* note 235. The H.A. is also “bipartisan,” since three of its members are appointed by the President of the Senate, three by the President of the National Assembly, and three by the President of France. See *supra* text accompanying note 214. Just as a majority of the members of the H.A. can come from the political party in power, see *supra* text accompanying notes 303-04, so can a majority of the CPB’s Board of Directors belong to the same political party as the President who appoints them.

<sup>432</sup> *League of Women Voters of California*, 104 S.Ct. 3106, 3123. The criteria cited by the Court leave room for the exercise of discretion by the CPB. For example, the CPB’s formula for disbursing funds to local public television stations must be designed to “provide for the financial needs and requirements of stations in relation to the communities and audiences such stations undertake to serve. . . .” 47 U.S.C. § 396(k)(6)(B)(i).

<sup>433</sup> The Prime Minister must consider the budget, needs and resources of each public service organization. Law of July 29, 1982 *supra* note 2, art. 63. See also *supra* notes 218-19 and accompanying text.

<sup>434</sup> *League of Women Voters of California*, 104 S.Ct. 3106, 3122 (quoting 47 U.S.C. § 3.96(g)(1)(A)).

<sup>435</sup> Law of July 29, 1982, *supra* note 2, art. 5. See *supra* text accompanying notes 194-95.

<sup>436</sup> *League of Women Voters of California*, 104 S.Ct. 3106, 3123, n.19.

<sup>437</sup> *Id.* at 3136 (Stevens, J., dissenting).

Report accurately reflects "[t]he quality of the interest in maintaining government neutrality in the free market of ideas."<sup>438</sup>

The current system of public broadcasting creates a danger beyond attempts by the Federal government to interfere with a free market of ideas. In its present condition, public broadcasting faces the possibility of abuse by state authorities. At least two-thirds of the public broadcasting licensees are directly tied to state and local government, either through state public broadcasting authorities appointed by the governor, state universities and educational commissions, local school boards or municipal authorities.<sup>439</sup> These stations, controlled by local government, also have the power to slant news coverage. For example, in 1981, a New Jersey programming authority, funded in large part by the State Legislature, decided to present a debate among the leading gubernatorial candidates running in the primary election.<sup>440</sup> Because 21 candidates were running, the authority decided to limit the debate to only those ten with the best chance of winning. While the New Jersey Supreme Court eventually upheld the New Jersey programming authority's action as a legitimate exercise of editorial discretion,<sup>441</sup> the incident shows how easily a state programming agency can become involved in a state election in which the government appointees running the agency may well have had more than a passive interest.

The Supreme Court has not yet promulgated a standard for evaluating the constitutionality of editorial decisions made by governmental station operators. In one of its last *en banc* decisions before being divided into two circuits,<sup>442</sup> the Fifth Circuit Court of Appeals offered such a standard whereby the govern-

<sup>438</sup> *Id.* at 3133 (Stevens, J., dissenting). A recent decision of the Supreme Court reflecting this "quality of interest" is *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 103 S.Ct. 1365 (1983). In that case, the Court struck down a special tax on newspapers without a showing of an improper legislative motive or even that newspapers would be forced to pay a higher tax than other businesses. The Court warned that "the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent, *differentially more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects. . . ." 103 S.Ct. 1365, 1374 (emphasis in original).

<sup>439</sup> *League of Women Voters of California*, 104 S.Ct. 3106, 3125, n.22.

<sup>440</sup> *McGlynn v. New Jersey Public Broadcasting Authority*, 88 N.J. 112, 439 A.2d 54 (1981).

<sup>441</sup> *Id.*

<sup>442</sup> The Fifth Circuit was divided into the Fifth and Eleventh Circuits as of October 1, 1981. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub.L.No.96-452, 94 Stat.1994 (1980). The judges of the circuits, though, were to treat all cases under consideration at that time as if the circuit had not been divided.

ment television operators had the “same rights and obligations to make free programming decisions as their private counterparts.”<sup>443</sup>

The Fifth Circuit decision upheld the actions of two state agencies in reversing initial staff decisions to show a program entitled “Death of a Princess.” The show, which dealt with the “execution for adultery of a Saudi Arabian princess and her commoner lover,” was rejected by the two stations out of fear of the reaction of the Saudi government.<sup>444</sup> The court denied that this rejection was censorship in violation of the First Amendment: “A general proscription against political programming decisions would clearly be contrary to the licensee’s statutory obligations, and would render virtually every programming decision subject to judicial challenge.”<sup>445</sup> The court concluded that the proper remedy was to be found with the F.C.C., which was empowered to decide whether the programs of all broadcasters, private or governmental, met the minimum standards of fairness required by the Communications Act.<sup>446</sup>

As one of the dissenting opinions points out, however, the F.C.C. will defer to the discretion of its licensees in all but extreme cases: “Because the FCC does not distinguish between private and public broadcasters in its regulation of the airwaves, it provides no protection from the kind of state censorship alleged in these cases.”<sup>447</sup> Another dissenting judge proposed a reasonable test for evaluating editorial decisions of public broadcasters. Under this test, a government programmer who decided whether to present a program based not on its content and “value” but on the agreement or disagreement of the government with its viewpoint, would be held to violate “the First Amendment requirement of neutrality.”<sup>448</sup>

Absent this neutrality, the “intrusive editorial thumb of Gov-

<sup>443</sup> *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033, 1041 (1982), *cert. denied*, 460 U.S. 1023 (1983). One station, run by the Alabama Educational Television Commission, was largely funded through state legislative appropriations. The other station was run by a public university, the University of Houston.

<sup>444</sup> *Id.*, 688 F.2d at 1036. The University of Houston official who decided not to run the program issued a press release explaining that the program was canceled because of “strong and understandable objections by the government of Saudi Arabia at a time when the mounting crisis in the Middle East, our long friendship with the Saudi government and the U.S. national interests all point to the need to avoid exacerbating the situation.” *Id.* at 1037.

<sup>445</sup> *Id.* at 1044.

<sup>446</sup> *Id.* at 1047.

<sup>447</sup> *Id.* at 1056-57 (Johnson, J., dissenting)(citations omitted).

<sup>448</sup> *Id.* at 1060 (Reavely, J., dissenting).

ernment," at both the federal and local levels, could be felt in the United States as it has been in France.<sup>449</sup> There would be an ever-present danger that "pro-government views that are not actually shared by [the broadcaster] will be parroted to curry favor with its benefactor," the government.<sup>450</sup> The possibility would exist that all news coverage would be slanted by "the insidious evils of government propaganda favoring particular points of view."<sup>451</sup>

Thus, the ultimate lesson for Americans to learn from France may be that, while government needs to play a critical role in establishing a diversified and pluralistic system of communications, every precaution must be taken to ensure that government is never given the chance to reward and punish speakers for statements which please or annoy those in power. We must always protect what Justice Stevens terms "the overriding interest in forestalling the creation of propaganda organs for the Government."<sup>452</sup>

## VI. CONCLUSION

The regulation of mass communications poses unique risks and dangers. What is being regulated is not the simple sale of goods and services but the dissemination of information to the public.<sup>453</sup> With too little government supervision, small groups may come to monopolize the primary means of communication

<sup>449</sup> *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. at 145 (Stewart, J., concurring). The majority in *League of Women Voters of California* noted that another area where the Government potentially can intrude in public broadcasting is the programs funded directly by the CPB: "Such programs truly have the potential to reach a large audience and, because of the critical commentary they contain, to have the kind of genuine national impact that might trigger a congressional response or kindle governmental resentment." 104 S.Ct. 3106, 3124. The Court noted that when President Nixon vetoed a bill involving CPB funding, "the Administration was critical of certain of the best-known nationally distributed public affairs programs, such as 'Bill Moyer's Journal' and 'Washington Week in Review,' which were regarded as too controversial." *Id.* n.21.

<sup>450</sup> *League of Women Voters of California*, 104 S.Ct. 3106, 3137, n.11 (Stevens, J., dissenting).

<sup>451</sup> *Id.* at 3133 (Stevens, J., dissenting).

<sup>452</sup> *Id.* at 3138 (Stevens, J., dissenting).

<sup>453</sup> As Justice Frankfurter wrote, the press "has a relation to the public interest unlike that of any other enterprise pursued for profit. A free press is indispensable to the workings of our democratic society. The business of the press . . . is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts or potatoes. . . . The interest of the public is to have the flow of news not trammled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. A public interest so essential to the vitality of our democratic

and, thus, the agenda and substance of the discussion of issues of public importance. Without adequate safeguards, however, the government itself may be able to influence or control the content of public debate.

The history of France's audiovisual communications law may guide those in the United State to possible solutions to this quandary. Most important, understanding the French experience gives new appreciation to not only the difficulty, but also the necessity, of properly defining, structuring and limiting the role of government in regulating the electronic media.