

HISTORICAL AND SOCIAL ASPECTS OF CONCENTRATION OF PROGRAM CONTROL IN TELEVISION*

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I

INTRODUCTION

The maximum possible number of independent diversified sources of ideas to foster the development and continuity of our open competitive society and the evolution of its free institutions has been established as the conceptual base for the operation of our broadcast structure.¹ However, inherent in our commercial system of television broadcasting is danger that these high aspirations may be progressively eroded by the practicalities of attracting economic support for television program service through advertising. To permit such a result would be to subordinate the paramount interests of the public in a free market for ideas to commercial interest in a market for goods and services. This paper will deal with an important phase of the conflict between the public interest and the needs of commercial broadcasting—the growth of concentration of control of the television program procurement process.

Thomas Jefferson, to whose words and ideas we may safely return in evaluating the needs and usages of a democratic society, could not have imagined a system of instantaneous and pervasive communications such as we are provided by television today. But he understood the requirements of a free people and spoke in terms which are valid for the governance of television as a social implement. His faith in common men assumed their wish to be provided sources of information and ideas to fulfill their need to make informed decisions affecting their common welfare. He foresaw quite prophetically that the future of a democratic society could not be secured by the “state of science, no matter how exalted it may be, in the minds of a select band of enlightened men . . .” Progress in the general welfare depends on

* Opinions and conclusions expressed in this paper are those of the author and not those of the Federal Communications Commission or any Commissioner. Much of the material contained herein is found in greater detail in three reports by the author: (1) INTERIM REPORT BY THE OFFICE OF NETWORK STUDY, RESPONSIBILITY FOR BROADCAST MATTER (F.C.C., 1960), reprinted in TELEVISION NETWORK PROGRAM PROCUREMENT, H.R. REP. NO. 281, 88th Cong., 1st Sess. 197 (1963) [hereinafter cited as INTERIM REPORT]; (2) SECOND INTERIM REPORT BY THE OFFICE OF NETWORK STUDY, TELEVISION NETWORK PROGRAM PROCUREMENT pt. I, H.R. REP. NO. 281, 88th Cong., 1st Sess. 13 (1963); and (3) SECOND INTERIM REPORT BY THE OFFICE OF NETWORK STUDY, TELEVISION NETWORK PROGRAM PROCUREMENT pt. II (F.C.C., 1965) [hereinafter cited as PART II, SECOND INTERIM REPORT].

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¹ See *Associated Press v. United States*, 326 U.S. 1 (1945); FCC Report on Editorializing, 13 F.C.C. 1246 (1949).

the "condition of the general mind."² This reliance upon the "general mind" as the ultimate arbiter of social, cultural, and political choices remains the only feasible basis for development of our society in the vital and dangerous age in which we live. But such reliance must be bottomed on the availability to the public through our mass media—particularly television, the most powerful instrument thus far devised—of the ideas, information, and stimuli necessary to the enlightened choices and fateful decisions it will be called upon to make. Television is unique among the mass media in that it provides a social mechanism capable of uniting individuals in concerted response to common stimuli on a scale and at a speed undreamed of until recent times. Quite apparently, whether this vast and potent implement is useful for good or for evil will depend on the images which it imposes on the general mind.³

The importance of free discussion and open access to ideas was well stated by John Stuart Mill in the last century:⁴

Where there is a tacit convention that principles are not to be disputed; where the discussion of the greatest questions which can occupy humanity is considered to be closed, we cannot hope to find that generally high scale of mental activity which has made some periods of history so remarkable. Never when controversy avoided the subjects which are large and important enough to kindle enthusiasm, was the mind of a people stirred up from its foundations, and the impulse given which raised even persons of the most ordinary intellect to something of the dignity of thinking beings.

There seems little doubt that network television properly used is an instrument capable of "stirring up" the foundations of thought and raising our people to the level of "thinking beings." Indeed, a communications system fraught with greater possibilities for good or harm to ourselves and our free institutions has never before existed on so large a scale.

The courts and the Federal Communications Commission have developed a conceptual framework within which our communications system—despite its

² As cited in H.R. REP. No. 281, 88th Cong., 1st Sess. 29 (1963).

³ As William Ernest Hocking has said with respect to the effect of television on the public mind: "The motive of the consumer is described in terms of 'entertainment' and 'information'; it is seldom that he deliberately seeks 'education' there. [But] *an unintended education takes place*, perhaps the more effective because unintended. . . .

". . . Without intention, the radio-TV pabulum becomes weighted in favor of the animal end of the emotional scale; and the incidental education moves not from the primitive to the advanced but *from the advanced to the primitive*

". . . [T]he question cannot be evaded whether this type of *entertainment by de-civilizing-at-the-source*, at work on a hundred million people day by day, can fail to affect and be affected by a *public interest in maintaining civilization*. If so, this unintended education-in-reverse demands a type of public attention which the media themselves [because of their necessary pre-occupation with the commercial aspects of the medium] are not in a position to furnish."

Official Report at 1229-30, Study of Radio and Television Network Broadcasting Before the Federal Communications Commission, No. 12782 (1959).

⁴ ON LIBERTY 32 (E. Halderman-Julius ed. 1925).

clearly centripetal urge—may operate to preserve and promote a healthy diversity of thought and expression in our society. In essence this framework relies for preservation of the public interest upon the fostering and development of diverse and competitive creative sources for the content of our broadcast service.⁵

No matter how disinterested may be their motives in providing the stuff for the American "market for ideas," the effort of a small commercial elite cannot adequately serve the needs of a free and dynamic people. In our open competitive society implementation of the basic leaven to human intellect protected by the first amendment of the Constitution "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."⁶ Broadcasting is a form of expression entitled to the protection of the first amendment,⁷ but its technological and operational differences from other media justify differences in the way first amendment standards are applied to it.⁸ The right of free speech may not be used by broadcasters to "snuff out" the free speech of others.⁹ It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.¹⁰ These principles, clearly enunciated over the years in the Supreme Court but sometimes watered down in practice, have recently been reaffirmed by the Court in a forceful and unequivocal opinion by Mr. Justice White. Among other things, he restated that under the first amendment it is the principal responsibility of licensed broadcasters "to preserve an uninhibited market-place of ideas in which truth will ultimately prevail . . . [through] suitable access [for the public] to social, political, esthetic, moral, and other ideas and experiences."¹¹ This is not a matter of discretion or grace on the part of broadcasters. These are rights inhering in the public which must be validated and which "may not constitutionally be abridged."

The practicalities of commerce frequently run counter to an idealistic interpretation of the public interest in the advancement of art, culture, and public wisdom through mass communications means. This seems inevitable in a commercial system. However, it should be kept in mind that electronic mass communications are still in their beginning stages and the end of their development is, of course, not in sight. It seems important that their future use and development be governed

⁵ See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1942), for a detailed discussion of the broad and comprehensive nature of the Commission's authority. See also *American Bond & Mortgage Co. v. United States*, 52 F.2d 318 (7th Cir. 1931); *Trinity Methodist Church v. Federal Radio Commission*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933).

⁶ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

⁷ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1947). See generally Loevinger, *Free Speech, Fairness, and Fiduciary Duty in Broadcasting*, in part I of this symposium, p. 278.

⁸ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

⁹ *Associated Press v. United States*, 326 U.S. 1 (1945).

¹⁰ *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940).

¹¹ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Justice Holmes' phraseology in his famous dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919), casts its luminous image fifty years later.

by democratic principles of equality and fairness. High on the list of values which must be preserved is that of enlightened public service based on a diversity of uninhibited tongues. This can best be accomplished by preservation of competitive opportunity in both the economic and creative aspects of the medium.¹² Above all, the public interest requires that avenues be kept open within the network television structure to insure the continuing availability of numerous and diverse program sources. Recent as well as long-standing trends suggest that there is cause for concern on this score.

II

EARLY HISTORY

Problems of concentration which presently confront the broadcasting industry began early. At the outset of broadcasting, considerable difference of opinion existed as to how its development and operation should be financed. It was obvious that some stable and continuing source of economic support was essential. Some believed that the government should undertake subsidy of broadcasting activities as a public service. A larger group thought that the industry itself—the manufacturers and distributors of radio sets and parts—should contribute to the support of broadcast stations as a means of stimulating sales. There were a number of other suggestions made and a lively debate was under way throughout the country.¹³ But, as is frequently the case, commerce superseded dialogue, and a stable source of economic support for radio through advertising revenues was discovered almost by accident.¹⁴ From then on there was little doubt as to how radio would ultimately be supported. Indeed, advertising has been described as the “Fairy Godmother” of broadcasting.¹⁵ Although it was many years before the role of advertising in our broadcast structures was developed and defined—in some aspects the role is still undefined—the use of radio as a powerful and popular advertising medium solved the problem as to whence economic support would be supplied.

¹² Competition for mass audience is not the whole of the public interest in television. The needs and tastes of significant minority audiences must be served in due proportion. However, particularly in entertainment, the diverse interests of advertisers—institutional and otherwise—if permitted full expression on networks will go a long way toward support of a sufficient diversity in programming to satisfy many of these minority needs.

¹³ For instance, on June 17, 1922, in a letter to Mr. E. W. Rice, then honorary chairman of the board of the General Electric Company, David Sarnoff, a leading figure in the subsequent development of radio as a mass medium, wrote:

“[T]he cost of broadcasting must be borne by those who derive profits directly or indirectly from the business resulting from radio broadcasting. This means the manufacturer, the national distributor, the Radio Corp. of America, the wholesale distributor, the retail dealer, the licensee and others associated in one way or another with the business.”

PART II, SECOND INTERIM REPORT 62.

¹⁴ “So rapid was the evolution that before noncommercial alternatives had reached the stage of public formulation and discussion, the Nation was committed to a policy of broadcasting support by commercial advertisers.” M. WILLEY & S. RICE, COMMUNICATIONS AGENCIES AND SOCIAL LIFE 197 (Recent Social Trends Monographs, 1933).

¹⁵ T. ROBINSON, RADIO NETWORKS AND THE FEDERAL GOVERNMENT 23-24 (1943).

Commercial advertising was not universally approved as the best means of assuring the optimum use of radio as a mass communications service. Indeed, a number of those who fostered its growth and pioneered its development as an implement for public service "feared" that commercial advertising would soon dominate radio and derogate from its social utility.¹⁶ However, the evolution of radio as a medium first of local and then of national advertising proceeded so rapidly and was so readily accepted by the public that advertising revenues quickly became—and have remained—the sole support of the American system of broadcasting.

As a result of this newly discovered commercial value of radio, a very rapid

¹⁶ In 1924, Herbert Hoover said:

"I believe the quickest way to kill broadcasting would be to use it for direct advertising. . . . [I]f a speech by the President is to be used as the meat in a sandwich of two patent medicine advertisements, there will be no radio left. To what extent it may be employed for what we now call indirect advertising I do not know, and only experience with the reaction of listeners can tell. The listeners will finally decide in any event."

Opening address at the Third Annual National Radio Conference, Oct. 6, 1924, in RECOMMENDATIONS FOR REGULATION OF RADIO 4 (1924). See PART II, SECOND INTERIM REPORT III.

[Interestingly enough, *Broadcasting*, in its issue of August 11, 1969, at 15, includes a letter from Frank Miller, formerly a Vice President of RCA and NBC, who participated in the 1924 Radio Conference. He writes that the Committee on Advertising of the Conference (of which he was a member) was responsive to the suggestions of Herbert Hoover, then Secretary of Commerce, in its position on advertising: "As I recall, we labored all week drafting a resolution calling for nothing but indirect advertising on radio, and banning the direct sales pitch. It was passed unanimously."

Likewise, it is interesting to speculate what our broadcast service would be like today if industry had continued to present only "indirect" advertising. However, by 1930 "indirect" advertising had gone by the board and the "sales pitch" had taken over. By 1932 the situation had gotten so bad that Congress seriously proposed the possibility that the advertiser-supported system be abandoned and a new method of broadcast operation be sought. For a brief description of this very interesting phase of the history of broadcasting, see INTERIM REPORT 301.]

In its report of 1929, the Federal Radio Commission, predecessor of the FCC, quoted from the Commission's opinion in *Matter of Great Lakes Broadcasting Co.*:

"The Commission must, however, recognize that, without advertising, broadcasting would not exist, and must confine itself to limiting this advertising in amount and in character so as to preserve the largest possible amount of service for the public. . . . *Advertising must be accepted* for the present as the sole means of support for broadcasting, and regulation must be relied upon to prevent abuse and overuse of the privilege."

3 FRC ANN. REP. 35 (1929) (emphasis added).

Previously, in its Annual Report for 1928, as part of an over-all statement relevant to the "public interest, convenience, or necessity," the Commission said:

"While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasting stations are not given these great privileges by the United States Government for the primary benefit of advertisers. Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public."

2 FRC ANN. REP. 168 (1928).

On December 21, 1931, the Commission, in a formal statement (*The Use of Broadcasting for Advertising Purposes*) calling attention to the Code of Ethics which had recently been adopted by the National Association of Broadcasters said:

"The principal objection to programs under our system arise [*sic*] out of the kind of advertising that is allowed to be made a part of them.

". . . There is not a single station that can escape responsibility. A heavy responsibility rests upon all chain companies. . . ."

FRC Release No. 5950, cited in INTERIM REPORT 306.

proliferation of stations followed within a very short period of time. The spectrum was soon found to be inadequate to accommodate within the preferred wave lengths all those who sought to use the medium. Stations overlapped each other and raised their power in attempts to pre-empt the air. Herbert Hoover, then Secretary of Commerce, sought to govern the storm by issuing licenses under the Radio Act of 1912,¹⁷ which was not designed for and was ill-suited to regulation of broadcast stations. His efforts were partially successful until the courts held in effect that the Secretary had no authority under the act to allocate frequencies and require adherence to his orders.¹⁸ Hoover then abandoned his efforts to regulate radio and urged that the stations seek to solve the problem through self-regulation. But, as has frequently occurred, industry rendered lip service but little else to the self-regulatory theory.

From July 1926, when regulation collapsed, to February 1927, when Congress enacted the Radio Act of 1927,¹⁹ almost 200 new radio stations went on the air. They broadcasted on any frequency they wished, raised their power to blot each other out, and operated at will. The result was confusion and chaos. With everybody on the air, virtually no one could be heard. This series of events and the ensuing chaos on the air waves led directly to the enactment of the Radio Act of 1927.²⁰

This bit of history may help in the evaluation of the industry's often repeated claim that many of its serious problems can and should be solved by voluntary self-regulation. The original regulation of broadcasting—at least its form and content—was greatly accelerated, if not made necessary, by the failure of industry members to respond to Secretary Hoover's plea that they take steps to regulate themselves in the interest of avoiding chaos.

III

DEVELOPMENT OF THE REGULATORY STANDARD—THE PUBLIC INTEREST, CONVENIENCE, OR NECESSITY

At first, Hoover had thought adequate regulation could be achieved simply through allocation of physical facilities, regulation of frequencies and power, and so forth. However, in 1925, he informed the national radio conference that, because of

¹⁷ Radio Act of 1912, ch. 287, 37 Stat. 302.

¹⁸ *Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923), *writ of error dismissed as moot*, 266 U.S. 634 (1924); *United States v. Zenith Radio Corp.*, 12 F.2d 614 (1926).

¹⁹ Radio Act of 1927, ch. 169, 44 Stat. 1162.

²⁰ On December 27, 1926, President Coolidge recommended that Congress act "to prevent chaos." Among other things he said:

"Due to the decisions of the courts, the authority under the law of 1912 has broken down; many more stations have been operating than can be accommodated within the limited number of wave lengths available; further stations are in course of construction; many stations have departed from the scheme of allocation set down by the department, and the whole service of this most important public function has drifted into such chaos as seems likely, if not remedied, to destroy its great value . . ."

MESSAGE OF THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 483, 69th Cong., 2d Sess. 10 (1926). For a description in some detail of the history of this period, see PART II, SECOND INTERIM REPORT 59-86.

the scarcity of facilities, it had become clear that permission to use broadcast facilities must be based on public service, as there would not be enough channels for everyone to operate as he pleased.²¹ In these circumstances some principle of selection among competing applicants for broadcast stations had become an urgent national need.²² Although reluctant to do so, Congress and the industry accepted the inevitable logic of the situation as presented by Mr. Hoover—that a standard of selection based on the public interest (the “public interest, convenience, or necessity” familiar in public utility law) would necessarily be required.

Under the spur of the “breakdown of regulation,” Congress acted almost immediately to stave off collapse of the broadcast system. The result was the Radio Act of 1927 and the introduction into broadcast regulation of several basic principles which continue to guide our broadcast system. It might be well to keep these in mind. They include the following: (1) Neither prior appropriation nor use confers any prescriptive right to a broadcast channel. These are public property and may be used only under license on terms provided by Congress. (2) One who accepts use of a publicly owned broadcast channel does so as a “trustee” for the public, and, in case of conflict, the interests of the public must take precedence over his own commercial interests.²³ (3) A licensee gains no *right* to the renewal of his license,²⁴ and he may be required to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present “views and voices” representative of his community. Indeed he must act as the “mouth of the community” on the air.²⁵ His continuance as a licensee depends upon evaluation by the Commission of the discharge of his responsibility and the forecast of his service to the public in his community.

The provisions of the Radio Act of 1927, and particularly its standard of the public interest, convenience, and necessity, were broad and sweeping in scope. They

²¹ “Scarcity” is still a pressing problem in broadcasting and requires “sharing” of the use of facilities. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

²² See PART II, SECOND INTERIM REPORT. See also PROCEEDINGS OF FOURTH NATIONAL RADIO CONFERENCE (1925).

²³ “It is plain . . . that a radio broadcasting station must operate in the public interest and must be deemed to be a ‘trustee’ for the public.” *McIntire v. Wm. Penn Broadcasting Co.*, 151 F.2d 597, 599 (1945), *cert. denied*, 327 U.S. 779 (1945).

²⁴ See *WHDH, Inc.*, 16 F.C.C.2d 1 (1969), for an example of how tenuous a renewal applicant’s position may prove to be. Among the responses to this decision was the introduction of a bill, S. 2004, which provided for a limited property right for existing licensees by immunizing them from competing applications while the FCC made its renewal decision. See S. 2004, 91st Cong., 1st Sess. (1969).

In response to the post-*WHDH* confusion and public outcry, the FCC has recently issued a new position statement to the effect that “if the applicant for renewal of license shows in a hearing with a competing applicant that its program service during the preceding license term has been substantially attuned to meeting the needs and interests of its area, and that the operation of the station has not otherwise been characterized by serious deficiencies, he will be preferred over the newcomer” Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 18 P & F RADIO REG. 2d 1901, 1904 (1970).

²⁵ See *Great Lakes Broadcasting Co.*, 3 FRC ANN. REP. (1929), *modified*, 37 F.2d 993 (D.C. Cir. 1930), *cert. denied*, 281 U.S. 706 (1930). See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

established machinery for the regulation of radio in a manner as drastic as any ever imposed on an industry.

Rarely have the problems which later developed in an industry been so accurately foreseen. Rarely has such ample provision been made in an initial statute to cope with those problems. The fact that the role of broadcasters as trustees for the public interest has often been obscured by commercial interest does not make that basic regulatory principle any less valid and potentially effective. From time to time, the courts have jogged the memory of the industry, and sometimes of the Commission, to recall the extent to which acceptance of a broadcast license involves dedication of property and motivation to the public interest.²⁶

IV

THE CONCENTRATION PROBLEM

Congress was fully aware when it enacted the Radio Act of 1927 that the right to license broadcasters and limit the number of stations would necessarily deny to many individual Americans their "basic right" to express themselves and communicate their ideas, thoughts, and impressions through the new medium. The act also would necessitate choice and censoring of broadcast matter either by the government or broadcasters. After much deliberation, the full program responsibility was placed at the community level in the hands of local licensees. Thus, Congress

²⁶ See Judge Learned Hand's opinion in *National Broadcasting Co. v. United States*, 47 F. Supp. 940, 945-46 (S.D.N.Y. 1942):

"[the public, convenience, interest, or necessity] . . . demands the widest practicable variety in the choice of programs available for broadcasting; that system which will most stimulate and liberate the ingenuity of those who purvey them to the public."

See also Justice Frankfurter's remarks in *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943):

"In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers."

See also *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969):

". . . the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."

In *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966), vindicating the right of a public group to intervene in a licensing proceeding, the Court, through Judge (now Chief Justice) Burger, forcefully reminded the industry and the FCC of the public nature of the broadcast calling:

"The argument that a broadcaster is not a public utility is beside the point. True it is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or an automobile agency. A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the fact that a broadcast license is a public trust subject to termination for breach of duty."

sought to avoid centralization of program control by demographic and geographic dispersal, at the grass roots level, of the right to choose and censor programs. Despite the vast growth of the industry and the present "practical reliance" of affiliates on networks for programming, the ultimate responsibility to program as "trustee" or "proxy" for the public remains that of the local station. This is as true in television as in radio and applies to network affiliates as well as independents.

Economic power and its effect upon control of the production, selection, and distribution of broadcast programs have caused recurring problems virtually since radio came into being. At an early stage, it was decided that radio would be most useful if it were operated as a locally controlled medium supplemented by national service.²⁷ The latter could be provided only through interconnection, which carried with it the risk that trivia would take over in radio service, and the need to see to it that the "worthwhile" be retained as the basis of broadcast service was early recognized.²⁸

The network concentration problem arises because of the inherent characteristics

²⁷ The First Radio Conference was convened in 1922 to consider problems of regulation of radio. It was presided over by Herbert Hoover and consisted of representatives of the executive and legislative branches of the federal government as well as representatives of all segments of the then rapidly developing broadcast industry. The conference took seriously its mission to define and develop a useful social rule for radio and concluded among other things that "radio communication is a public utility and as such should be regulated and controlled by the Federal Government . . ." G. ARCHER, HISTORY OF RADIO TO 1926, at 250 (1938). For the history of the development of the regulatory concept underlying radio regulation, see PART II, SECOND INTERIM REPORT.

²⁸ At the Third National Radio Conference in 1924, when networks as such had not yet developed, Hoover foresaw the need for and value of *national* program service.

"[Radio] must bring instantly to our people a hundred and one matters of national interest. . . .

This can be accomplished by regularly organized interconnection on a national basis with nationally organized and directed programs for some part of the day in supplement to local material."

But he also foresaw the dangers of concentration of control of broadcast programs.

". . . It would be unfortunate, indeed, if such an important function as the distribution of information should ever fall into the hands of the Government. It would be still more unfortunate if its control should come under the arbitrary power of any person or group of persons. It is inconceivable that such a situation could be allowed to exist. . . ."

And he recognized the need for assumption of responsibility for broadcast content.

". . . It is not the ability to transmit but the character of what is transmitted that really counts. . . .

For the first time in history we have available to us the ability to communicate simultaneously with millions of our fellowmen, to furnish entertainment, instruction, widening vision of national problems, and national events. An obligation rests upon us to see that it is devoted to real service and to develop the material that is transmitted into that which is really worthwhile. For it is only by this that the mission of this latest blessing of science to humanity may be right-fully fulfilled."

RECOMMENDATIONS FOR REGULATION OF RADIO, *supra* note 16, at 3-4.

One hears the echo of Mr. Hoover's philosophy forty-five years later in the words of Mr. Justice White.

"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."

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (emphasis added). This sentence can be far reaching in its effect. Does this constitutional right of the public require the Commission to devise and enforce standards as to the social, esthetic, and moral "ideas and experience" to be provided by broadcasting?

of television as both an advertising medium and a social instrument. Its solution, therefore, must be found in terms of balance between the commercial need for efficiency and convenience in national advertising, on the one hand, and the national need for conscious promotion of social and cultural goals through a "multitude of tongues," speaking from the vantage of the feasible maximum of "diverse and antagonistic" creative sources, on the other.²⁹ A blend of these characteristics is necessary to an economically viable commercial system which, at the same time, serves the total public interest in television service. The national network has become an integral and essential part of that service.

In chain broadcasting³⁰ individual licensees had originated the programs and shared them with other licensees by means of direct wire connection. This arrangement did not involve a major deviation from the pattern of broadcast responsibility at the community level written into the Radio Act. Shortly after the high degree of utility and profitability of radio as a national advertising medium had become apparent, means of providing programming, commercials, and interconnection for the convenience of advertisers on a one-transaction basis became commercially desirable. The network was the result. Stations readily fell into line as this arrangement relieved them of a large part of the effort and expense of programming.

The network, of course, is the more sophisticated commercial concept. It uses chain broadcasting methods of interconnection but involves a much higher degree of program selection and control. During the course of consideration of the Radio Act of 1927, Congress concluded that networks, even in their then somewhat primitive state, threatened eventual centralization of broadcasting. It was realized that if "chain broadcasting" companies, which by then were rapidly evolving into networks, were not subject to regulation, large companies would "be able by chain-broadcasting methods practically to obliterate the independent small stations."³¹

The Radio Act contained authority, later incorporated into the Communications Act of 1934, empowering the Radio Commission and later the Federal Communications Commission to make special "regulations" with regard to "stations engaged in chain broadcasting."³² Such authority is supplemental to the Commission's licensing function and was intended to enable the Commission to deal with the "concentration" problems which Congress believed would arise in the rapidly expanding field of broadcasting.³³ Although the regulatory potential of this authority is great, it has been used only sparingly.

²⁹ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

³⁰ The terms "chain broadcasting" and "network" have often been used as synonyms. The resultant confusion of identity has tended to obscure their essential differences. Chain broadcasting envisions a program originated by one station and carried by other stations—usually on an occasional basis. A network envisions a regularly organized system of interconnected stations who "clear" programs provided by a central source, the network organization.

³¹ FCC, REPORT ON CHAIN BROADCASTING 86-87 (1941).

³² Communications Act of 1934, 47 U.S.C. § 303(i) (1964).

³³ Later the Supreme Court of the United States took note of the purpose of Congress to avoid monopolistic control in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940):

Networks, as had been anticipated, rapidly became the principal source of station programming and greatly affected the ability of individual licensees to manage their own affairs in the way Congress had intended they should. Radio networks, through various devices but principally through the optioning of time, directly controlled the allocation of the greatest part of desirable time on stations across the country. In large measure they controlled station operations. Indeed, by 1939, networks had become so dominant in broadcast operations that a minority of the Federal Communications Commission concluded, "There is no open market in the business of broadcasting as in other businesses. . . . [It is] licensed by the Government to operate as a form of monopoly in the public domain."³⁴ However, at the same time, the majority of the Commission concluded that the American system of broadcasting could be operated as a community-oriented competitive enterprise served by national networks. It felt that the Commission should assert its full authority under the Communications Act to foster a climate in which radio would not only retain and expand advantages and benefits of network broadcasting to the public but would also preserve an adequate degree of program choice to the licensee at the community level. To accomplish this dual purpose, the Commission enacted its Chain Broadcasting Rules. The purpose, and to some degree the effect, of these rules was to preserve the opportunity for network broadcasting while giving fuller sway to licensee initiative at the local level.³⁵

Hence, we see that the fears of monopoly and centralization of the subject matter control in interconnected broadcasting expressed by Mr. Hoover in 1924 were prophetic of the future. As he had warned, the great benefits to the public from the program service supplied by national "interconnection" were accompanied by a strong tendency toward centralization of control of broadcast matter in a few hands. As he had feared, "a small group" of network executives acquired a substantial portion of "the right to determine what communication may be made to the American people." Television, of course, has supplanted radio as the principal network medium. The tendency toward centralization still persists; indeed, it appears to have accelerated.

To operate a television network effectively as a medium of national advertising necessarily involves a high degree of centralized control of program selection. Net-

"Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcast field."

³⁴ FCC, REPORT ON CHAIN BROADCASTING, *supra* note 31, at 116-17. For a fuller statement of the reasoning of the minority, see PART II, SECOND INTERIM REPORT.

³⁵ The Commission said:

"If radio broadcasting is to serve its full function in disseminating information, opinion, and entertainment, it must bring to the people of the nation a diversified program service.

". . . Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin."

REPORT ON CHAIN BROADCASTING, *supra* note 31, at 4.

work managers "offer" a regular program service together with commercials for simultaneous transmission by large numbers of affiliated stations. Such schedules occupy a substantial part of the broadcast day. Most affiliates "clear" a very high percentage—ninety per cent or more—of the programs offered by their networks.

The "practical alteration" in the statutory pattern of program responsibility to conform more nearly to commercial considerations was justified by networks and advertisers and acquiesced in by stations as necessary to continued commercial support for radio.³⁶ It was assumed to be "dictated" by the realities of "competition" among broadcasters and advertisers for public attention and approval. Advertisers had "learned" through experience and research that it was they and not the networks and stations who bore the brunt of public apathy or displeasure from unpopular or controversial subject matter. To displease or annoy even a small part of the listening audience became—and remains—in large measure a matter of grave concern to advertising experts and their clients, since such displeasure was and is thought to have an adverse effect on the impact of advertising and marketing. This attitude led to the demand—soon conceded by networks—that advertising agencies, in the interests of efficient and effective marketing, be accorded the "right" to a decisive voice in program production and selection. This same custom has carried over into network television.

Contrary to what has generally been thought, advertiser involvement in programming has not always been detrimental to its quality. Indeed, many of the best programs—those which, over the years, have been accorded critical acclaim—have been advertiser-supplied.³⁷ Instances of censorship of programming on behalf of supposed commercial interests disclosed in the Commission's Program Inquiry³⁸ were at least as prevalent in programs entirely controlled by networks as they were in advertiser-controlled programs. Indeed, by and large, the average network program which is planned, produced, and slotted into prime time before it is sold must necessarily take account of the views of the most conservative advertisers as to subject matter.

In the main, network program choice became a function of advertising and only incidentally a means of community service. In this process, the local station licensee became merely an adjunct of the network programming process. The "interest, convenience, and necessity" of the "national public" for programs as determined by advertising considerations rather than program judgments of licensees became the criterion of broadcast service. As stated above, in television as in radio, licensees bear the sole legal responsibility to supply programs designed to serve the needs and interests of their communities.³⁹ But, under present practices in network tele-

³⁶ Virtually the same argument is presently made to justify network program control in television.

³⁷ These are such programs as *U.S. Steel Hour*, *DuPont Shows of the Month*, *Armstrong Circle Theater*, *Robert Montgomery Presents*, and *Voice of Firestone*.

³⁸ See INTERIM REPORT.

³⁹ For a full discussion of licensee program responsibility, see Report and Statement of Policy re *en banc* Programming Inquiry, 25 Fed. Reg. 7291 (1960).

vision, licensees have little or no opportunity to perform these essential parts of their duty as trustees for the public, since their ability to obtain programs necessary to serve these needs and interests depends in large measure on the schedules offered them by network corporations.⁴⁰

The bulk of television station programming comes from three sources: (a) the three network corporations via some form of interconnection; (b) "syndication," which can be defined for present purposes as the distribution of programs produced for television and sold on a station-to-station basis as programming for nonnetwork use; and (c) theatrical film usually produced for and originally distributed in motion picture theaters. Old and not so old theatrical motion pictures have, during the past several years, become a staple of network programming where formerly they were largely confined to local station broadcasting.

Each of the three network corporations has gradually increased its schedule so that in the fall of 1969 each was offering an evening schedule which extended pretty much from 6:30 or 7:00 p.m. until well after midnight. All three networks were offering a late night "talk" show from 11:30 p.m. to 1 a.m.; these shows for the most part take the place of feature films, which are becoming both scarce and expensive. The largest part of these schedules consists of television films, although an increasing share is composed of theatrical motion pictures.⁴¹ In truth the networks have become arbiters of what the American people may see and hear on television.

V

NETWORK PROGRAM PRODUCTION AND PROCUREMENT

As network television became the principal national advertising medium and large national concerns shifted their main advertising from radio to television, a considerable number of independent television program companies came into the field and dealt directly with sponsors. By the 1955-56 season, approximately half of the entertainment programs comprising the combined schedules of NBC and CBS in prime time were conceived, designed, and produced by independent television

⁴⁰ In its Policy Statement the Commission concluded:

"Although the individual station licensee continues to bear legal responsibility for all matter broadcast over his facilities, a structure of broadcasting, as developed in practical operation, is such—especially in television—that, in reality, the station licensee has little part in the creation, production, selection and control of network program offerings. Licensees place "practical reliance" on networks for the selection and supervision of network programs which, of course, are the principal broadcast fare of the vast majority of television stations throughout the country."

Id. at 7295.

⁴¹ At present fourteen hours per week of network evening programming is feature film. Indeed such is the pressure of demand on supply that two networks (CBS and ABC) have gone into production of features to be shown first in theaters and then on television—presumably first as network programs and then released in "syndication" for station use. NBC has entered into joint arrangement with a major film company for the same purpose.

producing firms who retained the copyrights but sold exhibition rights directly to advertisers.⁴² In these cases, the network manager simply approved the original series pro forma and continued to evaluate the subject matter simply to assure that basic network policies as to taste, decency, and so forth were being followed. In such cases, the network had no direct relationship with the independent producing firm and acquired no financial or proprietary interest in the program.⁴³

Since the network method of television program distribution relies on the custom of national advertisers, a high degree of centralization of the network programming process in the hands of network managers seems inevitable. However, if economic policies and practices which tend unduly to accelerate the natural trend toward centralization of control are pursued by network managers, a situation may well develop where television network managers can and do exercise not only the power of economic life and death over independent producers of television programs but also dominate the choice of the impressions and ideas which the American public are permitted to "see and hear" through television.

To understand, however, how and why the concentration problem has arisen, it is necessary to understand how programs are produced and procured for network exhibition. Each television network is composed of approximately 200 affiliated television stations connected by facilities provided by the American Telephone and Telegraph Company. The network acquires a conditional right to sell time on the station and to supply programs and commercial announcements which the affiliate may broadcast or not as he sees fit.⁴⁴ The affiliate is compensated by the network for carrying the program if a network advertiser sponsoring the program orders the affiliated station and the station chooses to exhibit the program. The cost of quality, mass appeal television programming is so great that no individual licensee (nor, for the most part, even multiple owners) can afford to produce it for himself. Thus individual affiliates are dependent, in large measure, on the network for the programs which attract their principal nighttime audiences and, hence, provide them with economic "goods" of high profitability.

A network is an organization—in a sense an agent—which sells to advertisers the right to sponsor programs throughout the country on the large number of stations which compose the network.⁴⁵ The amount paid by the advertiser depends

⁴² For the week of April 17-24, 1955, between the hours of 6 and 11 p.m. on NBC twenty-eight out of forty-three programs were supplied by advertisers; during the same week eighteen out of forty-seven programs on CBS were supplied by advertisers. See Exhibit No. 83, Public Proceedings of the FCC Network Program Inquiry (Before James D. Cunningham, Chief Hearing Examiner), No. 12782 (F.C.C., 1959).

⁴³ In radio many programs were produced by advertising agencies; in television this has rarely been the case.

⁴⁴ "Clearance" of network programs, however, is high—90% or more in evening time slots.

⁴⁵ Most stations are owned by persons other than networks. Each of the three national television networks (ABC, NBC, and CBS) is licensee of five VHF television stations—the limit allowed to one owner by the FCC. The balance of each network is licensed to others who enter into affiliation contracts with the network.

on whether the network furnishes the program or whether the advertiser does so.⁴⁶ Where the advertiser brings in the program, he pays only a charge for the time period and use of the network's facilities. Each network publishes a rate card setting forth these time charges. However, at present, eighty-five to ninety per cent of all evening time is sold in the form of "minutes" on network controlled programs. The price of minutes differs from program to program and depends on various factors related to advertising impact, circulation, and so forth. Network-supplied programs can be either of two types. When a program is network-produced, all rights in the program are owned by the network, and the network company employs creative talent, a producer, and a director in addition to using its own production facilities.⁴⁷ When the program is "packager-licensed" the network acquires from a producer or a "packager" the exclusive first-run right to broadcast the series on the network. By contract, custom, or informal acquiescence the network gets a large say as to the creative aspects of the program.

A network acquires the initial network broadcast license—"commits to a series"—through a contractual arrangement with the producer of the production company. This is usually negotiated by a so-called talent agent who represents the packager and receives a fee for his effort—usually ten per cent of the over-all price for the program. The network agrees with the producer that he will film a certain number of episodes for a series and give the exclusive first-run license for such episodes to the network. The contract may be for any duration but usually covers a period of years, with the network having the right to cancel at stated intervals.

Networks invariably finance their own program development costs, but packagers often rely on outside financing. In such cases, the packager often obtains the financing from a network in exchange for a share in subsidiary revenues. When the program is packager-produced, the network usually "commits to a series" with the packager and schedules the program for broadcast, selling sponsorship to one or more advertisers. If the network has not previously financed development costs, it often acquires a share in subsidiary revenues, which will be discussed later, for the "risk" it takes in committing to the series before it has been sold to sponsors. In exchange for network broadcast rights and such of the subsidiary rights and interests as the parties agree to include, they usually bargain and agree on a single price per episode. The price per episode varies from one program series to another depending on the anticipated value of the series, its cost, and the extent of the rights and interests acquired by the network.

Occasionally a network or an advertiser will commit itself to a program series

⁴⁶ Only a very small fraction—about 4%—of evening programming is advertiser supplied at present. Approximately 96% is either produced by or licensed directly to the network. Where the program or series is so licensed, the network exerts very considerable, if not total, creative control of program content.

⁴⁷ Only 4.8% of network evening entertainment programs were network-produced in 1968. See page 622 *supra*. Networks, however, produce almost all their news and public affairs offerings.

on the basis of a story line or a program script.⁴⁸ The more common practice, however, is to defer commitment until after the production of an entire "pilot" program. A pilot may be defined as a sample film (or tape) episode for a proposed series that can be shown to prospective sponsors and which can later be used as one of the series episodes as the series is produced. Also, in some instances, the scripts for episodes are developed before the series is committed and produced.⁴⁹ Preparation of a story outline, script, or pilot costs the producer a substantial sum (as much as \$400,000 or more for a one-hour pilot), which cannot usually be recovered if the series is not produced. Producers therefore often seek or even require someone—frequently a network—to undertake or share this financial risk.⁵⁰

There are a variety of financing arrangements between networks and producers. The most common type is the step-by-step arrangement through which the network finances each stage of production of a pilot and has the right to discontinue at any stage; for example, it can terminate the arrangement after preparation of the script. Small packagers sometimes receive development financing from larger packagers as part of joint venture arrangements or where the large packager has received financing from a network. In addition to development financing, a packager often needs financing for the production of a continuing program series. Indeed, it is rare for a packager to finance the entire cost of a series production. Banks and other conventional lending sources often play a role in financing series with the security of a network contract, but these conventional sources are rarely involved in development financing. Networks often undertake the risk of program development, which is substantial. Except in rare cases, the cost of program development can only be recovered if the program becomes a series, and a significant number of programs do not become series.

Another functional difference between commercial exploitation of radio programming and television programming substantially affects the economics of production and distribution. Most radio programs were "live." In television, from an early stage, much of the programming was produced on film. Many filmed programs and program series were made specifically for television. A substantial number of such "filmed series" were distributed from station to station in what came to be known as "syndication." Soon the subsidiary rights—largely but not exclusively the right to exhibit a network series after its network run—began to acquire substantial values. The right to exhibit a network series after its network

⁴⁸ A story line is a very simple outline of the characters and action in a proposed program or series. A "script," as the name implies, is a developed play with dialogue, stage directions, and so forth.

⁴⁹ In a live program series, of which there are a few in network television, no pilot, of course, in this sense is made. Often, however, a simple program is filmed or taped for viewing by networks and advertisers.

⁵⁰ The network is frequently not the source of financing. For instance, between 1960 and 1965, approximately 50% of all new network series were so-called "free balls," that is, programs which were financed independently.

run is the right to act as syndicating agent—that is, the right to act as agent in selling the program to stations for nonnetwork exhibition in the United States (the “domestic syndication right”) or in other countries (the “foreign syndication right”). Less important subsidiary revenue sources are as follows: (a) the right to share in the receipts from syndication (after distributing agents’ commissions and other deductions); (b) the right, known as the merchandising right, to exploit, as agent, the license to manufacture such things as wearing apparel, toys, games, jewelry, novelty items, and so forth, related to a program; and (c) the right to share in the receipts of the exploitation by the merchandising licensee (the merchandising interest). Also, there are other nonbroadcast interests in the program, such as the right to make the program into a motion picture or play or the right to publish books, magazines, or music based on the program. While sometimes of considerable value, these rights are normally not as profitable as syndication and merchandising rights.

In network-produced programs, subsidiary rights are usually retained by the network. In other programs these rights are sometimes retained by the packager, who may have his own distribution organization, but they are often turned over to a network or to some other syndicator or merchandiser engaged in such activities. (Each of the three national television networks operates extensive domestic and foreign syndication divisions.) When a packager is the producer and licenses directly to the network, as is the case with a large part of entertainment programming, the networks usually acquire either the syndication distribution right, or profit shares, or both.⁵¹ In addition, these arrangements usually accord network corporations the right to participate in the creative process to the extent necessary to assure themselves and mass advertisers that the program or series will initially be designed to attract large circulation and that subsequent episodes of a series will adhere to the “formula” originally designed.⁵²

⁵¹ From 1960 to 1964, 114¼ hours of *packager-licensed* programming were accepted for evening offering by the three networks. Networks financed the “pilot” in about 50% of these cases. However, for forty-three hours (37.6%) they obtained domestic and/or foreign syndication distribution rights, and for ninety-three hours they received profit shares. As the total of 136 hours exceeds 114¼ by a substantial margin, it seems clear that in a number of instances the networks obtained both distribution rights and profit shares.

⁵² As CBS has stated in its ANNUAL REPORT TO STOCKHOLDERS, at 12 (1963):

“The ability to produce a program schedule which year after year commands the largest audiences in broadcasting is founded on a steadfast commitment to two fundamental programming principles. The first is to obtain the talents of those writers, producers, directors and performers whose outstanding abilities and dedication permit no compromise with anything less than their best efforts at all times. The second is the continuing participation of the Network’s programming officials at every stage of the creative process from the initial script to the final broadcast. This applies not only to the occasional special program, but to the day-to-day production of continuing program series.

“By adhering to these principles the CBS Television Network commanded the largest nighttime audiences in network television throughout the year, averaging eight of the top ten programs and 23 of the top 40.” (Emphasis added.)

VI

PRESENT SITUATION IN NETWORK CONTROL

Formerly, many network television programs were developed and brought to the market in "pilot" form by independent producers at their own account and risk. A reasonably broad market was then available to such producers.⁵³ It was composed of a large number of sponsors and potential sponsors of network programming in addition to the three network corporations. The first-run exhibition rights to many such programs were sold by independent producers directly to sponsors and, subject to network approval as to scheduling, suitability, good taste, decency, and other factors, were exhibited as network offerings. Sponsors chose programs in accordance with their diverse needs from a program market provided by independent producers.

In recent years (since 1957 or 1958) the market in which an independent producer of television can sell his product has progressively contracted. The percentage of independently provided programs in the schedules of all three national television networks has declined sharply. Such programs, in effect, have been supplanted in network schedules by programs—in many cases hour-length film series and, more recently, feature films—supplied by outside producers but procured and controlled (both creatively and economically) by network corporations. In procuring these programs, network corporations almost invariably acquire the exclusive right to first-run network exhibition directly from the producer and schedule the program series in choice evening time. Often the network corporations "buy" a program series and "slot" it in the schedule before sponsorship has been obtained and thereby assume the economic risk of selling advertising positions in the program—usually to several different sponsors.⁵⁴

The figures show a big increase in network controlled, packager-licensed programs. Such programs may be produced with or without network financial assistance. Invariably where network financing is provided, and frequently where it is not, the network corporations acquire, in addition to the first-run right, the right to share in the profits from the network run, the right to distribute and/or share in the profits from domestic syndication and overseas sales, and other valuable subsidiary rights. Coincidentally, there has been a very sharp decline on all three

⁵³ For example, for the week of April 15-21, 1956, between the hours of 6-11 p.m., on CBS twenty-three out of forty-nine programs (or 46.9%) were programs in which the network had no financial or proprietary interest, and on NBC for the same period twenty-three out of forty-one programs (or 56.1%) were programs in which the network had no financial or proprietary interest.

⁵⁴ In many cases the quid pro quo to justify the grant to network corporations of distribution and profit sharing rights is simply the assumption of the risk of sale to advertisers. Because of a continuing seller's market in network advertising, the network "risk" can perhaps be inferred from a statement by Dr. Frank Stanton, president of CBS, Inc., as quoted in the trade press. "If the Surgeon General's report on smoking leads to decline in cigarette advertising, CBS will be able to more than offset such losses by acquisition of new advertising business." *BROADCASTING*, Jan. 20, 1964, at 9.

networks in the number of programs independently produced and licensed to advertisers.

Table 1 summarizes in percentages the sources of all evening (6-11 p.m.) programs and all evening entertainment programs carried on the three networks during a representative week in 1957 and 1968. Where in 1957 independents provided approximately one-third of the evening network schedules, their share in 1968 had declined to less than five per cent. Conversely, programs produced by or in conjunction with network corporations now occupy more than ninety-five per cent of the weekly evening hours on the three network corporations combined.

The inability of independent entrepreneurs successfully to compete in the so-called network television program market except upon terms dictated by network corporations seems obvious from the above figures. The ability of network corporations to dictate the terms of entry to the network television program market is a function of their control of broadcast time on large combinations of local television facilities, permitted by the commercial convenience and willing acquiescence of television licensees.

TABLE 1
SOURCES OF EVENING NETWORK PROGRAMS, IN PERCENTAGES, 1957 AND 1968

	All Evening Programs		Entertainment Programs	
	1957	1968	1957	1968
(1) Network-produced	29.5%	15.7%	23.9%	4.8%
(2) Network participation (produced by others and licensed to network corporations)	<u>29.5</u>	<u>80.7</u>	<u>39.3</u>	<u>91.2</u>
(1) and (2) combined	59.0	96.4	63.2	96.0
(3) Independently provided	33.4	3.0	36.1	3.4

It appears that the increase in financial and proprietary control of the production, procurement, and scheduling process by network corporations has been accompanied by an increase in bulk circulation programs attractive to mass advertisers and a progressive increase in their evening rates.

The results of the evolution of program practices above described as they affect procurement of *network* programs have been (a) to concentrate economic, proprietary, and creative control of program production and procurement in network corporations; (b) to concentrate residual rights to television programs in network corporations; and (c) progressively to limit the market available to independent producers of network programs for all practical purposes to the three network corporations and, hence, to restrict the profitability of the operations of independent program producers. The total effect of this condition has been a marked tendency to centralize control of what the American public may see and hear through television in network corporations and thus to hamper the competitive development

of "diverse and antagonistic" sources for television program service. This is almost the exact reverse of that "condition of competition" within the framework of service in the public interest intended as the principal criterion of choice of program fare under the American system of broadcasting.

VII

THE DOMESTIC SYNDICATION AND FOREIGN TELEVISION PROGRAM MARKETS

In addition to offering network schedules to affiliates, the three television network corporations engage in domestic syndication (both to their own affiliates and to other stations) and in foreign sales of television programs as regular parts of their business. During approximately the same span of time when network corporations devised and perfected program production and procurement practices, through which they progressively acquired economic and creative control of all but a small portion of their evening schedules, they expanded their activities in the sale of filmed programs and series in the domestic syndication and foreign markets. Formerly, the domestic syndication market was regarded by television station licensees as their principal alternate source of television programs. Under modern program procurement practices, production and procurement of programs for network exhibition and for syndication have become directly related activities. In large measure they involve the same persons and the same programs. Syndication of programs produced for television which are reasonably competitive in quality with current network offerings, has become a by-product of network program production and procurement.

As stated earlier, in the initial process of program procurement for network exhibition, network corporations often acquire the right to distribute the program or program series in syndication after the network run. This right is then assigned to the syndication division or arm of the network and is commercially exploited in station-by-station sales for nonnetwork exhibition. The result is that a large part of the programs ultimately available for syndication stems from the same transaction as do network programs and simply involves a subsequent use of a program which is designed for network broadcast. Syndication as a truly alternate source of prime-time station program service has thereby been substantially constricted. The importance of this development, which came about through normal commercial motives, may be realized when one considers that the health of our television system depends on a supply of programs chosen in the public interest from the feasible maximum of "diverse and antagonistic" sources. As a result of the massive shift to film and the procurement and production practices of network corporations, the great bulk of the programming available for syndication, not only from network syndication divisions but from all other distributors, at present consists of "off-network" product. A first-run syndication market composed of quality mass appeal syndicated

programs available to compete with network offerings in prime time has virtually disappeared.

About 1955, questions arose and complaints were made to the Federal Communications Commission and to committees of Congress that network managers would not allow the exhibition of filmed series without network acquisition of subsidiary rights. It was asserted that, with increased frequency, networks would not accept independently produced, advertiser-supplied programs for network exhibition unless producers and/or advertisers granted the network involved financial and proprietary interests in the form of syndication and other rights in the program or television stations no matter who bears the licensee responsibility small part of the revenues and profits of network corporations. Network corporations claim that the acquisition of rights to subsequent distribution of programs is merely an ancillary economic activity to minimize the "enormous risks" they run in procurement and financing of programs for their schedules. However, it also appears that the potential expansion of both domestic and foreign markets for American television programs is great. The overseas market especially may expand rapidly. With the expected increase in the number of American television stations in the UHF band, there will in all probability be a large increase in the domestic market for television programs. Under present program practices of network corporations, the available staple to compete with network evening offerings in these markets will continue to be "off-network" film series. Unless more competitive opportunity is provided for independent television program producers, it seems inevitable that network corporations will expand their control of these markets. In other words, for all practical purposes the networks will, in large measure, program our television stations no matter who bears the licensee responsibility and whether or not the station is affiliated with a network.

VIII

STEPS TOWARD A SOLUTION OF THE CONCENTRATION PROBLEM

On March 22, 1965, the FCC issued its Notice of Proposed Rule Making in Docket 12782, which proposed to deal with concentration of control of television programming. The Notice was the result of a long public inquiry in which upwards of 200 witnesses had been heard over a three-year period, and many hundreds of documents had been examined. Staff reports submitted to the Commission as a result of this inquiry concluded, among other things, that policies and practices pursued by network corporations tend unduly to restrict competition—both economic and creative—in the production and procurement of programs for television exhibition; that entry into network television program markets for independent program producers is substantially impeded; and that network corporations control the source of supply of television programs and dominate competition in both the network and syndication program markets. The staff suggested that the Commission, through

the exercise of its rule-making authority, seek to reduce these existing competitive imbalances and to encourage and maintain increased competition in television program production and procurement.

The rule as proposed would (1) eliminate network corporations from the syndication business within the United States and from the sale, licensing, and distribution of independently produced television programs in foreign markets; (2) prohibit network corporations from acquiring distribution or profit-sharing rights in syndication and foreign sales of independently produced television programs; and (3) limit economic and proprietary control by network corporations of the programs included in their schedules in desirable evening network time. However, it would preserve the right of network corporations to sell or otherwise dispose of syndication, overseas, and other subsidiary rights in programs produced by them or by persons controlling, controlled by, or under common control with them, and to distribute programs of which they are the sole producers in foreign markets.

Finally, on May 4, 1970, the Commission adopted rules⁵⁵ along these lines to provide a "healthy impetus" to the development of the feasible maximum of diverse sources for network programming. These rules were designed to alleviate the concentration of control described in this paper and to encourage production of the widest practicable variety of programs available for television broadcasting and provide network affiliates with something more than nominal choice in the exercise of their responsibility as "trustees" to serve the diverse needs and interests of their communities in providing television program service.

The rules will restrict the broadcast by commercial stations in the top fifty markets in which there are three or more operating commercial television stations to no more than three hours of network programs between the hours of 7:00 and 11:00 p.m. (6:00 and 10:00 p.m. Central time), thereby opening up evening time to competition among present and potential alternate program sources. Special programs concerning fast-breaking news events, on-the-spot coverage of news events, and political broadcasts were excepted from the definition of "network program." Also, the rules prohibit networks from engaging in the business of distributing nonnetwork programs in domestic syndication or otherwise. Networks may not acquire rights to the subsequent commercial use of programs and series which compose network programs. No longer will networks be permitted to "compete" in the domestic syndication and nonnetwork program market; no longer will the networks be permitted to acquire, as part of the bargaining process for network exhibition, distribution and profit-sharing rights in domestic syndication and foreign distribution. They may engage in foreign distribution of programs of which they are the sole producers, but must not distribute such programs nor share in the profits from such distribution.

⁵⁵ Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting (Report and Order), No. 12782 (F.C.C., May 4, 1970).

Networks will be permitted to sell the distribution rights to their own program products to other domestic distributors.

The Commission said that an "unhealthy situation" presently exists in television service. It emphasized that "[o]nly three organizations [the three national television networks] control access to the crucial prime time evening schedule."⁵⁶ The Commission recognized that access to the top fifty markets, or a substantial share of them, is essential to the economic viability of a nonnetwork producer who proposes to compete for station time with network prime-time quality programming. It decided that the public interest would be served by curbing network occupancy of high-rated evening time and thereby giving other program sources competitive opportunity to contest for market entry by seeking the custom and favor of affiliate licensees. Independent nonnetwork producers are presently at such a competitive disadvantage that prime-time, first-run syndicated programming has virtually disappeared. "Such programming is the key to a healthy syndication industry because it is designed for a time of day when the available audience is by far the greatest."⁵⁷

The Commission also found that close network supervision of so much of the nation's programming centralizes creative control. It tends to work against the diversity of approach which would result from more independent producers developing programs in both network and syndication markets.

The Commission found that network participation in syndication, either through distribution or profit sharing, involves at least a potential conflict of interest. "Certainly," said the Commission, there is a "close correlation" between the acquisition by networks of syndication and other subsidiary rights and interests and the choice of a program or series for inclusion in the networks' schedule.⁵⁸

The Commission said that under present conditions independent producers who desire to exhibit their product initially on a network and then offer it in domestic syndication and foreign markets must first bargain with the networks, who are their principal competitors in syndication and foreign sales, for the network exposure necessary to establish the subsequent value of their programs as valuable commercial assets in domestic syndication and foreign sales. They are usually required to grant to the networks either the distribution rights or large shares in the profits from domestic syndication and foreign distribution, or both, for the program. Similarly, a producer who seeks to distribute his programs in foreign countries must compete with the networks, who, through bargaining with the same and other independent producers, control the source of supply of the programs which constitute the staples of his market and/or share in the profits from such distribution by others. Networks do not normally accept new, untried packager-licensed programs for network exhibi-

⁵⁶ *Id.* para. 21.

⁵⁷ *Id.*

⁵⁸ *Id.*

tion unless the producer/packager is willing to cede a large part of the valuable rights and interests in subsidiary rights to the program to the network.

The Commission said:

If networks are prevented from operating as syndicators or from sharing in the profits from distribution by others in the domestic syndication market, there will no longer be any inducement to choose for network exhibition only those packager-licensed programs in which they have acquired other rights. Furthermore, producers and packagers will be enabled to fully benefit from their own initiative and presumably become more competitive and independent sources of programming since in many instances a packager cannot recoup his outlay from the first network run of a series or program and must look to the commercial uses of the program subsequent to the network run for commercial success. Relieved of the need to grant a network a large portion of his potential profit the producer's ability profitably to operate in network television will be greatly enhanced. With the expanded syndication market as a feasible alternate to network exhibition his bargaining position will be improved and he can be expected to develop into a stable and continuing alternate source of programs and ultimately to compete for network time.⁵⁹

The Commission pointed out that its objective was not to create "reverse option time" for any program source, but to permit independent producers to vie with each other and with the networks for the custom and favor of stations on something approaching an even basis.

The Commission was not persuaded that the so-called 50/50 rule would have the adverse consequences which its opponents predicted. On the contrary, the Commission concluded that that proposal would accomplish "its intended purpose without undesirable side effects."⁶⁰ It decided for several reasons—among them the possibility of unfavorable effects on internetwork competition—to adopt the Prime Time Access rule. The Commission will continue to observe and study the results of its present action to determine whether the rules adopted are sufficient for the purpose of adequately diversifying and multiplying sources of television programming. It published its findings regarding the 50/50 rule as an appendix to its opinion. In this regard the Commission said:

Diversity of programs and development of diverse and antagonistic sources of program service are essential to the broadcast licensee's discharge of his duty as "trustee" for the public in the operation of his channel. We note that the degree of network control of their evening schedules has been steadily increasing; indeed there has been a substantial increase since we issued our Notice in 1965. This tendency should be reversed and the networks should take the lead in encouraging the inclusion of the feasible maximum of independently controlled and independently provided programs in their schedules. In this way we may more nearly achieve the goal described by Judge Learned Hand in 1942, and echoed by Justice White in 1969, of a television broadcast structure which is served "by the widest practicable

⁵⁹ *Id.* para. 29.

⁶⁰ *Id.* para. 4.

variety" of choice of programs available for broadcasting; that system which will most stimulate and liberate those who create and produce television programs and those who purvey them to the public.⁶¹

The Commission's action is a landmark in regulation of television networks and their effect on the public interest in program service. A principal part of the rules—that affecting syndication and other program rights—operates directly on network organizations rather than on affiliate licensees as do the Chain Broadcasting Rules. The Commission's action is in this respect largely one of first impression, and it is controversial in many other respects as well.⁶² It will certainly be the subject of further legal action, perhaps including reconsideration by the Commission and appeals to the Supreme Court.

IX

CONCLUSION

Diversity of television program sources is a matter of first importance, both to the public and the industry. It involves the future course and social worth of broadcasting as an implement of our society and democracy.

The conception of a broadcast system based on a union of commercial interest and social responsibility which draws its service from a maximum of diverse and antagonistic sources basically suits the genius of the American people.⁶³ That execution of that ideal will at times doubtless falter does not detract from its utility as a practical inspiration for the future.

Our system of broadcasting based on commercial enterprise is bound to be the product of give and take among contending individuals. This is both a great strength and a safety valve in our system. It is in the very nature of an advertising-supported mass medium that it must serve the masses of our people. It must be governed in large measure by commercial considerations which place some subject matter limitations on its capacity to provide all kinds of programs, whether or not they are attractive to substantial audiences. Advertisers and broadcasters cannot be expected to permit programming to dominate prime hours if it appeals to and attracts only a small fraction of the public. Nor ought a mass medium committed to serve all the people be programmed for the few. But, equally, television should provide programs in the evening hours to serve, in fair proportion, the tastes and needs of all substantial groups in the viewing audience.

We must, in our evaluation of television service, accept the inevitable subject matter restrictions imposed by the essential nature of our commercial system. But we

⁶¹ *Id.* para. 37 (footnotes omitted).

⁶² *See, e.g.*, Dissenting Statement of Chairman Dean Burch, *id.*; N.Y. Times, May 8, 1970, at 1, 63; Wall Street Journal, May 8, 1970, at 5.

⁶³ The expansion of *public broadcasting* under the Corporation for Public Broadcasting will, of

also must be certain that unnecessary further restriction of the sources and subject of programs are not imposed purely to maximize profits. At the peril of our social, political, and cultural growth, we must see to it that television remains free to develop and transmit the maximum of diverse ideas, concepts, and impressions which our creative community with the willing support of the broad range of commercial interests can provide.

Our fellow citizens who have undertaken to act as our "trustees" must temper commercial interest with social responsibility and provide opportunity for the maximum feasible development of sources for television service. Such an admixture of practicality and idealism in the operation of this important implement of democracy stands as a constant challenge to those who would have the world believe that our society based on willing cooperation of responsible individuals is archaic. To the totalitarian such a way of handling so vital a matter is incomprehensible nonsense. To us it is a way of life.

Judge Learned Hand remarked many years ago that the dissemination of ideas by private enterprise through mass media is "one of the most vital of all general interests." To meet the free speech and free press requirements of the first amendment to the Constitution, such information and ideas should derive

from as many different sources, and with as many different facets and colors as is possible. . . . [Our American system] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.

To this he added his credo of faith in our democracy, "To many this is, and always will be, folly: but we have staked upon it our all."⁶⁴ We assert to the world that "democracy" and "America" still are convertible terms and that we will continue to aspire to the ideal set by Walt Whitman and to assume "the task to put in forms of lasting power and practicality . . . the moral political speculations of ages, long, long deferred: the democratic republican principle, and the theory of development and perfection by voluntary standards, and self reliance" in the "civilized rivalry" of free competitive contest.⁶⁵

course, add to over-all diversity, but, relatively speaking, noncommercial audiences are a mere drop in a bucket. Television's principal impact will continue to derive from commercial stations and networks.

⁶⁴ *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

⁶⁵ W. WHITMAN, *DEMOCRATIC VISTAS* 1-2 (1871).