BROADCAST REGULATION IN TURMOIL: THE NORTH AMERICAN EXPERIENCE

I. "The Public Convenience, Interest, Necessity" (47 U.S.C. s309)

Broadcast regulation in the United States is in the advanced stages of a transition so major that, it would have been as unforeseeable in the 70s as putting a man on the moon would have been in the 50s. A combination of new technologies, different regulatory philosophies, and ideology have transformed not just the specifics, but the broad outlines, of broadcast regulation in the U.S.

Today, broadcasters are caught in the middle of a maelstrom produced by technological competition, politics, and the larger economics of the marketplace. This paper attempts to highlight some of the major shifts in broadcast policy and discusses some of the current "hot" issues being debated by policymakers and industry participants. By way of further illustration, the paper also touches briefly on the Canadian experience with broadcast regulation.

At present, U.S. policy on many questions remains unsettled. This paper will not, and cannot, canvass the questions, let alone the answers, exhaustively. Rather, it hopes to suggest the scope and centrality of the issues now being discussed.

II. Structure of U.S. Broadcast Regulation

At the outset, it might be instructive to outline the institutions and structure of broadcast regulation in the U.S. The principal (indeed only) relevant statute is the Communications Act of 1934 (1934 Act), which established the Federal Communications Commission (FCC) as the sole regulator of communications in the U.S. The FCC's jurisdiction is exclusive and pre-empts jurisdiction of the various states. In the U.S., the FCC is supreme, except that state public utility commissions can regulate intrastate common carrier services. The Act establishes a unified and comprehensive system for allocating and regulating radio spectrum in the U.S.

An Independent FCC

Unlike the system in other countries, the FCC is an "independent" regulatory commission free from control of the executive branch. Its five members are appointed by the President and confirmed by the Senate; they serve for seven years and cannot be removed by the President. The statue mandates bipartisanship, with no more than three of the five commissioners being from one political party.

The extraordinary political sensitivity in allocating and assigning spectrum for broadcasting and other uses underlies this attempt to guarantee independence. As well, however, Congress has historically recognized that an independent expert agency was needed to cope with the dynamism inherent in the evolution of the industry.

The historic insulation of the FCC is now being eroded, in some cases quite significantly. The Congress is certainly taking a far more active role in overseeing the FCC and making broadcast policy. Even the current President, with his ties to the motion picture industry, is rumoured to have had a hand in at least one FCC proceeding.

Title III of the Communications Act confers on the FCC plenary authority to allocate non-governmental radio spectrum to particular classes of uses and to assign licenses to individuals in accordance with the allocation scheme (47 U.S.C. ss303 & 309). The President and the executive branch have no authority over the licensing of radio transmitters for non-governmental purposes (47 U.S.C. s305). The rationale is to ensure the clearest possible separation between necessary government supervision and the free flow of ideas that is protected under the First Amendment of the Constitution.

One of the principal functions of the FCC is allocating spectrum to particular categories of use, and then to develop a regulatory framework for each "use" or technology. The three major categories are broadcast, common carrier and private services. Differ-

ent procedures and substantive standards of regulation are applicable to each one. The boundaries between the categories have never been defined with precision, either in the Communications Act or in regulation. The lines inevitably blur.

Spectrum Allocation

New technologies are increasing the demands on usable spectrum; obviously, the supply is not keeping up with those demands. The FCC is constantly besieged with proponents of more spectrum for "broadcasting", more for "private radio", "mobile satellite," and, most recently, "advanced television technologies". All comers cannot be accommodated.

It can take years, and in some cases up to a decade, to authorise new services. Historically, the FCC issues a rulemaking notice that suggests the allocation of spectrum that it is contemplating. It receives comments from the public and makes its final decision on the evidence presented. The decisions are reviewable by courts. All this is measured under the "public interest" standard.

Increasingly, a restive - and ideologically-driven - FCC is exploring alternative methods of allocating spectrum. The process of comparative hearings takes a long, long time to complete. In 1982, the FCC obtained authorisation from Congress to award some licences by lottery, in the cellular radio service and some microwave services, for example. These lotteries, too, have not greatly expedited the delivery of service to the public.

Consistent with the marketplace approach that has been adopted in recent years, the FCC has been exploring allocation alternatives that rely on the market and profit incentive. One example may suffice.

The Commission has been considering proposals that would re-allocate and affect existing broadcasting spectrum. First, in a still-pending proceeding, it has proposed to reallocate at least two UHF channels to land mobile services in eight major markets. Second, it has proposed that licensees for UHF channels 50 through 59 would have broad flexibility to use spectrum as they chose. A flexibile approach is desired, it is said, to increase licensee discretion and serve the market.

Broadcasters are, obviously, in favour of the latter and opposed to the former proposal. Flexibility in managing spectrum is, in the latter, delegated in some sense from the FCC to the licensee. It is anticipated that some of the channel 50 to 59 spectrum might be available for HDTV and broadcast auxiliary needs; for example, the FCC believes that a licensee might be able to join with a VHF licensee to provide one form of HDTV service.

There are not insignificant legal and policy ramifications by ceding authority to allocate spectrum to services from the government to licensees. As will be noted below, the FCC is moving from a "public trusteeship" concept of regulating broadcasting to a "marketplace approach". Although it may be prudent, even preferable, to have each licensee program in accordance with marketplace demands, it is not at all clear that it is wise to parcel off pieces of spectrum based on the marketplace - profit incentives - alone.

A Case Study: ATV

In the recently issued Advanced

The merger will not only result in broader range of activities and information available to members of both organisations but also in a "new-look" Communications Law Bulletin. Next year, the CLB will be published on a quarterly basis and it will have a new format (gone is that dreadful television transmitter). ACLA has already employed an editor to oversee the CLB's production and the first issue of Volume 8 will be available in March 1988.

With the greater range of information and material available the CLB will be able to provide its readers with an up-to-date and regular account of the rapid developments in communications law in Australia and overseas.

Television Systems proceeding, the Commission is taking a longer-range look at new advanced technologies that use different transmission and reception methods which cannot be displayed or decoded on existing receivers. Some of these will have a significant impact on existing broadcast technology - the NTSC standard in use in the U.S.

The Commission is charged with carefully weighing the improvements in television quality that are possible with the incident higher costs. When it secures information on what improvements are possible, the Commission will be in a position to decide whether adoption of some form of ATV is in the public interest. At this point, ATV is defined very broadly as anything that would improve audio or video broadcast quality: improvements in NTSC, new transmission technologies, with the same number of scan lines, and new technologies with a larger number of scan lines (i.e., HDTV).

Leaving aside the technical matters, the principal question facing the FCC is how to allocate spectrum. The issues at stake are typical of the FCC's spectrum allocation process. If it allocates more spectrum to ATV, and treats it as a separate service, there will be fewer incentives to improve existing technology. Over time, then, it is likely that the present broadcast standard could fall into some disuse; spectrum might be "wasted", because the FCC could not readily reassign broadcast spectrum to other services.

However, if it "conserves" spectrum and consolidates ATV with the existing broadcast service, exciting new technologies may be stalled - to the detriment of the public interest. For this reason, the FCC has already concluded on a tentative basis that allocating additional spectrum is warranted.

Where is there spectrum to be found? One possibility is the existing VHF and UHF spectrum under current or modified technical criteria; additional spectrum could be obtained from adjusting or eliminating the broadcast-to-broadcast interference standards, such as co-channel or adjacent channel protection. Another possibility is taking spectrum away from other, non-broadcast services or sharing with such services. Yet another, is "finding" or creating "new" spectrum capacity.

Beyond spectrum allocation issues alone, the FCC will have to address issues of standard-setting in ATV. It has some experience in this area, with AM stereo, FM stereo and stereo TV. Indeed, although the FCC prefers a marketplace approach, AM stereo is somewhat moribund in the U.S. precisely because there is no marketplace standard. For ATV, the FCC will need to determine whether new ATV technologies are compatible with NTSC, or whether the new technologies are compatible with one another.

At the same time, the FCC may use the ATV proceeding to begin relaxing the mandatory NTSC standards; if various systems are "compatible", the reasoning might go, then the consumer should be given the choice of which quality of service he might prefer (and pay for). In addition, there may be regional needs and demands that might reduce the requirement that the same standard be used nationwide. So long as the rules prevent interference, why not give licensees the discretion to deploy augmented spectrum as they choose?

Regulatory Classifications: Making Sense?

Once it allocates spectrum based on its "public interest" calculus, the FCC still has to decide the appropriate regulatory regime for ensuring that that spectrum is used in the "public interest" by the licensee. In one sense, these issues are governed by the Communications Act, which, as noted above, categorises services and then sets out a legal framework for them. (Title II of the Act governs common carriage; Title III governs broadcasting).

Beyond the skelatal outlines of the Act, the FCC must decide what is the appropriate regulatory regime for the services within the category.

More fundamentally, what is the FCC to do regarding new or hybrid services that do not fit neatly into a regulatory box?

The Communications Act defines "broadcasting" as the dissemination of radio (and, subsequently, television) communication "intended to be received by the public (47 U.S.C. s153(o)). Some commenters have noted that "broadcasting" had originally been described as the scattering of seeds in all directions. New services - DBS, STV, and MDS - do not, however, match in every particular the criteria of "broadcasting" as they are evolving under this statutory standard. It might be useful to examine how the FCC, and the courts, have treated these new technologies.

Direct Broadcast Satellite

The history of the classification and regulation of Direct Broadcast Satellite (DBS) amply illustrates some of the "fall-between-the-cracks" problems besetting the FCC. There is little debate that DBS, in most instances, is a broadcast service. Indeed, the FCC has conceded as much from the technology's name. Direct transmission from a satellite to an individual subscriber's antenna falls within the statutory definition.

The issue of how to regulate DBS illustrates the inflexibility and, perhaps, outmoded nature of that definition, however. If DBS is "broadcasting", then the plethora of broadcast regulations found in Title III (equal time, reasonable access,and Fairness Doctrine rules, for example) of the Act apply to a DBS programmer, regardless of whether it is the licensee of a DBS transmission facility. If regulated under Title III, potential DBS programmers might shy away from the service altogether - and the technology could be stillborn.

Of course, by contrast, programmers of over-the-air broadcast television are not licensed or subject to any regulation whatsoever. Nor, of course, are HBO or other programmers that use C-bands to transmit programming directly to large "backyard" dishes, although such programming is ostensibly aimed solely at cable operators and satellite master antenna television operators.

Tailoring its regulatory regime to the specifics of the technology, the FCC had set up a three-part scheme for DBS operations. First, a DBS licensee could choose to operate as a common carrier, offering capacity on a non-discriminatory basis to any programmer. This licensee would be regulated under Title II of the Act.

A DBS operator might also operate as a conventional broadcaster. It would control the transponder and would select the programming, just like a regular television licensee. Such an operator would be subject to Title III.

Third, the FCC developed a hybrid category of "customer-programmer"; this group would program all or part of a DBS service offered by a common carrier DBS operator. The FCC believed that Title III need not apply to this category, unless it found that such regulation was necessary to serve the public interest. In any event, the underlying carrier would be subject to regulation. By analogy, noted the FCC, customer-programmers of MDS have never been licensed as broadcasters; DBS programmers should be treated in the same way. Finally, because the Act speaks of "licensees", there was, believed the FCC, no intent to regulate "mere" programmers.

On review, the U.S. Court of Appeals for the District of Columbia Circuit gave a narrow reading to the definition of "broadcasting" in the Act to conclude that the technology must be subject to the full scope of Title III regulation (National Ass'n of Broadcasters v FCC, 740 F2d 1190 (D.C. Cir. 1984); U.S. Satellite Broadcasting Co., Inc. v FCC, 740 F2d 1177 (D.C. Cir. 1984)). The courts had already held, some 25 years earlier, that "background music" was a broadcast service because it was of interest to the "general" radio audience and that the touchstone of "broadcasting" is the "intent" of the broadcaster to disseminate to the public (Functional Music, Inc. v FCC, 274 F2d 543 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959)). The court was convinced that no matter how the technology is configured, if it

uses the airwaves to disseminate mass-appeal programming, it is "broadcasting". Thus, it imposed Title III regulation on programmers - those who have no stake in the underlying licensee or radio transmission facility.

The ramifications of the decision are significant. First, of course, DBS has never "gotten off the ground" in the U.S. Second, the court questioned the framework for regulating MDS; it held that no court had yet passed on the validity of the regulatory framework for that service, and thus the FCC's attempt to regulate by analogy was unpersuasive. Third, and most fundamentally, the decision seemed to tie the FCC into a regulatory straightjacket, removing much of the flexibility that is necessary to configure regulation to technological imperatives.

Subscription Television and MDS

Responding to the court's decision, the FCC initiated a proceeding to determine what criteria should be used to determine whether a communications service should be treated as "broadcasting" under the Act (In re Subscription Video, Gen. Docket No. 85-305, Report and Order (released Feb 17, 1987)). It opined that the definition of "broadcasting" is intended to differentiate between services intended to be received by an indiscriminate public and those intended only for specific receive points. Examination is had of the licensee's specific business practices.

Under this rubic, both subscription television and subscription DBS are classified as "non-broadcast". The consequences are significant. The equal employment opportunity rules will not apply and equal time and equal opportunity provisions will not apply.

What happened to the "customer-programmers" at issue before the Court of Appeals in the DBS case? The FCC has concluded that most of those will provide a fixed, subscription service; hence, they will be out from under Title III regulation. The FCC has sidestepped the question of what jurisdiction it can or will exercise over non-subscription customer programmers.

The FCC also has changed regulatory treatment of MDS to permit MDS operators to elect classification as either broadcasters or common carriers. Before this action, all MDS systems were regulated as common carriers. It was thought that because an MDS licensee was obligated to make non-discriminatory offerings of its service to the public, it was critical that MDS be designated as a common carrier service.

MDS was, however, a unique common carrier service in that it used broadcast technology to distribute multiple addressed broadband communications. The FCC's reclassification action corrected this somewhat anomalous situation and allowed subscription television services to be treated similarly, regardless of whether they are delivered by MDS, DBS, or traditional over-the-air broadcast technology.

Under the Commission's revised regulatory scheme, an MDS operator may select common carrier status and be treated as a non-dominant carrier, as to which the Commission will forbear from regulating. As such, MDS operators will not have to file tariffs for their services; they will, however, still be subject to Title II complaint procedures, which guard against unfair pricing practices. Those selecting non-common carrier status will be regulated under Title III of the Act.

III. The Fundamental Tension: First Amendment

The fundamental tension in U.S. broadcast policy is the relationship between the First Amendment and exercise of the regulatory function. This tension is played out in the factors taken into account in the assignment of licences, in renewal of licences, and in content-based regulation - the Fairness Doctrine, the equal time rule for political candidates, and the prohibition on "indecency". At a minimum, the FCC is empowered to act as a "referee", to prevent interference and chaos.

The FCC, in reality, does far more than serve as a mere traffic cop. It is charged with regulating "in the public interest, convenience, and necessity", a standard that is both vague and permissive of far-

reaching regulatory scope. And, to the extent that the FCC is perceived as having been unnecessarily intrusive, today's policymakers - both at the FCC and elsewhere - are strenuously trying to reduce its role.

The New Regulatory Approach: Relying on the Marketplace

The traditional philosophical approach toward broadcasters has been that they hold their licences as "public trustees". This perspective has been used to justify FCC regulation or, as some would say, intrusiveness that exceeds permissible First Amendment boundaries. Under the vague "public interest" standard guiding the Commission, the trusteeship role has been developed: broadcasters and programming obligations, including an emphasis on service to the community. Indeed, the application process itself required a fairly onerous exercise known as "ascertainment", which was used by the station to determine how best it could program to meet community needs.

Since then, the FCC had adopted percentage guidelines for news and public affairs programs. Non-specific content obligations had also been specified in the area of children's television and under the Fairness Doctrine.

The public trusteeship model was spawned in an age of spectrum scarcity. Now, however, the FCC - and many commenters - believe that the so-called "alphabet soup" of new technologies has alleviated whatever 'scarcity" had existed. Citations are made to MDS, DBS, low-power television, STV, cable, fixed-satellite services, videocassette recorders, and videodiscs. Of course, none of these alleviate actual spectrum scarcity with respect to broadcasting. Rather, they supply competitive alternatives. With these new technologies (some of which are yet to be seen), the view is that there is a "marketplace" of ideas that obviates the need to ensure that the broadcast service alone supplies the full range of programming to the public.

The alleged reduction in scarcity is justified somewhat illogically, by the fact that there are more broadcast outlets, by far, in the U.S. than there are print media. As of July 31, 1987, there were 4,888 AM stations, 3,970 FM radio stations, 459 UHF commercial television stations, and 543 VHF commercial television stations. In total, given educational, noncommercial, and low-power stations, there are 10,131 total radio stations and 1,623 total television stations currently licensed in the U.S. Thus, continues the argument, there is no greater justification for regulating broadcasters more strenuously or closely than there is for regulating the print media. Because the print media, however, are essentially unregulated, so, too, should be broadcasters.

Of course, the marketplace suggests that broadcast properties are anything but plentiful. Most communities have only three VHF outlets, for example, although some UHF channels in smaller markets do go wanting. Individual television stations in major markets are being sold for half a billion dollars. The highest price was just paid for an AM-FM combination in Dallas: $82 million. High prices do not necessarily mean scarcity. Nevertheless, it is fair to say that there is something special about broadcast outlets - despite the attractions of the new media. And, just because one can buy a station does not mean that the market itself is not limited by the laws of physics.

In any event, the former chairman of the FCC was convinced that scarcity analysis is misguided, if not constitutionally prohibited. There is some legal support for movement toward a "marketplace" approach. The courts have not made it impossible for the FCC to adopt such an approach, given their focus on the importance of competition. More importantly, the most important constitutional value in broadcasting is the "right of the viewers and listeners". Broadcasters are accorded somewhat lesser status but are also entitled to substantial rights as "speakers" and as the "press" under the First Amendment. A marketplace approach, which responds to what viewers and listeners actually want, rather than what the FCC thinks they should see and hear, and treats the electronic and print media alike,

may, therefore, pass constitutional muster.

Transition to a Marketplace Regime

The FCC has moved decisively toward a marketplace regime. In its first stages, the FCC has done away with regulation that it deems burdensome or unnecessary.

The FCC has now "deregulated" radio: no longer are non-entertainment and commercial level guidelines on the books. No longer is ascertainment required for television or radio. Some responsibility to the community is required, but its contours are unspecified. Radio station renewals can be filed on a postcard. In an ongoing series of "underbrush" proceedings, the FCC has done away with regulations as disparate as those dealing with licensee distortion of audience ratings, promotion of non-broadcast business of a station, sports announcer selections, and false and misleading commercials.

The FCC has greatly reduced the "character qualifications" that it applies to applicants for broadcast licences. It essentially no longer looks at non-FCC misconduct. Conduct more than ten years old is considered irrelevant.

The FCC's "deregulatory" process has had its full share of critics. They note the extraordinary churn in the broadcast market and the fact that broadcast licences are treated as if they were ordinary marketplace commodities. The FCC justifies its approach by focusing on consumer welfare and not on the policies that bureaucrats or Washington policymakers might like pursued. Calls for re-regulation are resisted: the marketplace appears robust, news programming is increased, and new technologies are entering the fray.

The long and the short of it seems to be that there is little turning back from the path on which the FCC has now embarked. Indeed, like much of the agenda on the plate of the current Administration, it seems that the policy debate has changed, if not inalterably, for the near and medium-term. The starting point is now not "how should broadcasters be regulated" but "can regulation improve on the marketplace".

Economics at Work: Auctioning Spectrum and the Spectrum Licence Fee

If broadcast licences are property, ask some in Washington, then why not charge for them? Deregulate the marketplace and sell off a frequency for a fee. Already broadcasters enjoy an expectation of renewal that comes close to a property right. In recent years, licences are almost always renewed, and the FCC has shown the greatest reluctance to revoke a station licence.

One proposal is to charge for spectrum usage via a fee. The fee could be charged on a percentage of a station's profits, or it could be a flat charge based on bandwidth. Given the general belief that the airwaves do belong to the public, perhaps a price should be put on broadcasting - the method of distribution.

For some time, there has been a proposal floating around to channel the proceeds from a spectrum fee into public broadcasting - which is often under fiscal, if not political, seige. The question of financing has long remained unsettled and politicians, responsible for authorising monies, have taken a hard look at a broadcasting service that has aired programming deemed offensive to those in power.

Another possible use for a spectrum fee could cover services rendered by the Commission in enforcement and licensing. The FCC has, however, recently adopted a proposal that charges fees for each application filed; the fees must be based on the "value to the recipient", not on the cost of services that inure to the public generally (National Cable Television Ass'n v United States, 415 U.S. 336 (1974)).

In general, the spectrum fee concept has not met with widespread acclaim. Broadcasters have opposed it, hoping to win deregulatory concessions at the FCC without having to pay for them. Frequency has always been "free", at least in a direct, monetary - though not necessarily in a conditional - sense. Furthermore, not all broadcast properties are profitable and would generate the revenues to pay such a fee. Congressional opponents of a spectrum fee proposal have gener-

ally charged that it would result in giving away an important public asset.

Another "marketplace" proposal is to use "auctions" to assign initial licences. Unlike the spectrum fee proposal, there would be no "quid pro quo" for auctioning off spectrum. Rather, given the high administrative expense and procedural hurdles posed by the comparative licensing process, it may make sense to assign vacant channels to the "highest bidder".

Auctions should not be used for existing licensees; the renewal expectation would be destroyed. An auction process also would make clear what is now understood by the communications bar: in reality, subsequent resale, private bargains between applicants, and private auctions after assignment all mean that the licence is, most often, going to the deepest pocket after all. And, of course, auctions save money, reduce delay, and compensate the public with funds from the private sector.

IV. A Structural Approach to Regulation

One way in which the FCC "regulates" the broadcast sector is structural - not content-based. That is, if the objective is to ensure diversity and competition in the marketplace, one way of doing so is to prevent concentration and to encourage the maximum number of outlets in a particular community.

Historically, the FCC had barred any entity from owning - or having interests in - more than seven AM stations, seven FM stations, and seven television stations. In 1984, however, it revised the ceiling to permit ownership of a maximum of twelve AM, twelve FM and twelve television stations (49 Fed. Reg. 31, 877 (Aug 9, 1984)). Congress reacted swiftly and negatively to this change; in response, the Commission modified its initial decision (49 Fed. Reg. 32 581 (Aug 15, 1984)).

Nevertheless, in December 1984, it decided to retain the twelve-station limit for the three broadcasting services and, for television, it adopted an additional ownership limit, which allows entities to acquire ownership interests in television stations reaching a maximum of 25% of the national audience (with some greater audience reach possible for UHF stations).

Also in 1984, the Commission eliminated the rules that had limited the number of AM, FM or television stations that an entity could own in a particular geographic region. The purpose of the rules had been to promote diversity of programming and economic competition on a regional basis. The FCC concluded, however, that those goals could be met by the marketplace because the increase in media outlets had reduced the potential influence of a single broadcaster.

More recently, the Commission has proposed relaxing its duopoly and one-to-a-market rules (Amendment of section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules, Notice of Proposed Rulemaking, MM Docket No. 87-7, 2 FCC Rcd 1139 (1987)). The duopoly rule prohibits common ownership of two or more commercial radio stations in the same broadcast service (AM or FM) that serve the same local area. The one-to-a-market rule restricts common ownership of service combinations in the same market; thus, a person or company can own just one commercial AM-FM combination, or one television station, or one daily newsaper in a local market. Under its proposal, the FCC would revise the duopoly rule to allow common ownership of multiple stations, except in situations where the stations have very powerful overlapping signals. The one-to-a-market rule would be changed to permit common ownership of AM-UHF, FM-UHF, and AM-FM-UHF stations serving the same local area. The Commission also would consider other local combinations on a case-by-case basis.

The FCC has now come to believe that large broadcast operations with substantial resources can produce programming that would otherwise never be made. The strong public interest in diversity is enhanced, it is said, by fostering an environment in which broadcast conglomerates can develop programming over "quasi-networks". Smaller, independent licensee station owners can do little more than channel network programming or buy prepackaged programming from syndicators.

As must be well-known to Australians, the easing of the structural rules has led to significant chain broadcasters: though the fate of the Fox Television Network is still uncertain, the FCC can point to the fact that that enterprise might not have been created unless the necessary economies of scale - made possible by the rule changes - permitted.

V. Current Policy Debates

A significant question in ongoing policy discussions is whether broad deregulation of the broadcast industry - as the FCC has carried out in recent years - is consistent with existing legislation and desirable as a matter of public policy. On the one hand, critics of recent Commission actions believe that the FCC has eroded the public trustee concept and has turned broadcasting into just a money-making business. Supporters of the FCC's actions contend that the Commission is upholding First Amendment principles by allowing broadcasters to operate relatively free of government oversight; such an approach, they argue, reflects the vigorous media marketplace that now exists.

Reform of the Licensing Process

Congress is considering comprehensive legislation that would dramatically alter the process by which broadcasters renew their station licences. However, what was once envisioned as deregulatory legislation has become entangled in a broader policy debate about whether the FCC has gone too far in its reliance on market forces to discipline broadcasters. As a result, Senate legislation seeks to balance marketplace ideology with public trustee concepts by providing broadcasters with a greater assurance of licence renewal if they conform to certain specific standards of conduct. The legislation, s1277, has been criticised broadly, and its chances of passage do not appear to be particularly good.

At present, applications for renewal of a broadcast licence are subject to potentially broad challenges for a wide range of conduct, including alleged violations of FCC rules and policies or other conduct not thought to be "in the public interest". A station also might find itself involved in a comparative hearing if there is a competing application filed for its frequency.

The Senate bill seeks to give incumbent broadcasters more protection from challenges at renewal time. The quid pro quo, however, is that licensees conform to a standard of conduct that Congress believes is consistent with the concept of a "public trustee". The bill would entitle broadcasters to renewal of their licences if they could prove that their service has been "meritorious". The bill also would require that licensees provide "meritorious" children's programming. In addition, it would codify rules regarding preferences for station applications by women and minorities and restrictions on multiple station ownership that are current prospects for repeal by the FCC.

Finally, the bill would protect an incumbent licensee from a comparative hearing unless the incumbent could not satisfy the "meritorious" service standard.

This tradeoff - stability in ownership in exchange for what many view as "renewed regulation" - has not won much support. In many respects, however, the legislation captures the heart of the current debate about the future of broadcasting: should it be a business infused with a strong public service obligation or governed by the demands of the market?

The industry and the FCC have criticised the "meritorious" service standard as being too vague and as requiring the FCC to return to the days when it closely scrutinised a licensee's programming in deciding whether the licensee was "fit" to continue operating a station.

In mid-August, the Justice Department announced its strong opposition to the bill, which is co-sponsored by Sen. Daniel Inouye (D. Hawaii), chairman of the Senate Communications Subcommittee, and Sen. Ernest Hollings (D.S.C.), chairman of the parent Commerce Committee. The Department said the bill was inconsistent with the First Amendment because of its "intrusive, content-based" provisions. The Department

also said that it would recommend to President Reagan that he veto the bill if it were to win passage in the House and the Senate.

House Legislation, H.R. 1140, involves fewer tradeoffs and has received broadcast industry support. Under that legislation, an incumbent licensee would be entitled to renewal if it could demonstrate compliance with FCC rules and policies. Despite industry support, the bill's future is in doubt because the powerful chairman of the House Energy and Commerce Committee, Rep. John Dingell (D. Mich.), opposes its deregulatory approach. Dingell has been a vocal critic of the FCC's efforts to deregulate broadly.

Regulating Trades in Broadcast Properties

A second major area of attention is the flood of broadcast station sales that has developed since 1985. Congress has proposed anti-trafficking legislation to combat the perception that broadcasting has become solely a profit-making venture.

Under an anti-trafficking rule that the FCC repealed in 1982, a licensee was not permitted to sell a broadcast licence for three years after acquiring that licence. Legislators are seeking to re-impose that holding period in the form of an amendment to the Communications Act.

The industry has not taken a unified position on the legislation. There appears to be significant support for the legislation in both the House and the Senate, however, where there is a feeling that licences have become a profitable trading commodity, rather than a commitment to serve the public interest. The House bill is H.R. 1187; the Senate has included an anti-trafficking provision in s1277, its general licence reform legislation.

Statistics suggest that station "flipping" - rapid buying and selling of broadcast stations to make a profit in the bullish broadcast market - has become relatively commonplace. According to one study done by Paul Kagan Associates, Inc., more than half of the 160 television stations sold in 1986 were held for less than three years; almost one-fourth were held for less than two years. In 1983, just five percent of the television stations sold were held less than three years, but that percentage has risen steadily in the last three years.

In addition to the large number of stations being bought and sold in the last two years, many of the major group owners of broadcast stations, including two of the three national networks (ABC and NBC) have changed hands. The third network, CBS, fought an expensive battle to thwart a takeover bid by Ted Turner, and many industry observers believe that CBS still has not recovered from the financial trauma of the experience. In fact, some observers believe that the defence that CBS adopted to fight off Turner's bid effectively has changed the control of CBS. To protect itself from Turner, CBS turned to a "white knight", businessman Larry Tisch, who purhcased 25% of the CBS stock and is now the company's chief executive officer and an influential board member. Periodically, there have been rumours that Tisch would end up acquiring outright voting control of CBS. A public interest group filed a request with the FCC seeking a ruling that Tisch had in fact assumed control of CBS. The FCC ruled, however, that CBS continued to be controlled by its diverse group of public stockholders.

In response to this active market, the FCC adopted new policies to accommodate the growing market in broadcast station mergers and acquisitions. This accommodation drew the anger of many congressmen and public interest groups, who saw it as strong evidence that the FCC seeks to foster a trading marketplace more than anything else. In the Commission's view, it was merely trying to bring its policies in line with the demands of the market and with other federal policies, such as the federal securities laws.

In 1985 and early 1986, a number of broadcast companies - including CBS - were the subjects of hostile tender offers and proxy contests. The FCC found itself in the middle of a difficult policy dilemma because these corporate maneuvers required speed and secrecy, whereas the Communications Act required broadcast transactions

receive prior Commission approval after completion of a time-consuming public notice and comment process. Where there is a substantial and material question of fact about an applicant's qualifications to assume control of a broadcast property, the FCC is required to hold a hearing to resolve the question. Such a hearing could take months or years - in any case far longer than a tender offer could be held open.

In response the FCC devised a "two-step" transfer procedure to permit tender offers and proxy contests to proceed quickly without violating the Communications Act (Tender Offers and Proxy Contests, 59 Rad. Reg. 2d (P&F) 1536 (1986)). Under this procedure, a potential buyer can form a trust into which tendered voting stock may be placed until the FCC has approved the buyer's application to assume control of the broadcasting company being acquired. Relying on s309(f) of the Communications Act, the Commission decided that - without requiring a minimum thirty-day wait for the completion of formal public notice and comment procedures - it could grant a Special Temporary Authority (STA) to an independent trustee appointed to administer the trust. This STA would permit the broadcast company to be controlled by the trustee for the period during which the FCC was reviewing the ultimate buyer's application.

If the application is approved, the trustee is permitted to transfer the stock to the buyer and the trust is dissolved. If the application is denied, the trustee is required to seek another qualified buyer for the stock held in trust.

Critics of this decision have argued that it circumvents the intent of the Communications Act by effectively allowing a hostile buyer to "get its arms" around a broadcasting company - albeit through an intervening trust. Nonetheless, they contend, the Commission is unlikely to "unwind" a transaction once it has gotten as far as the trust stage; thus, it is said, the Commission has created a fiction to accommodate the trading market for broadcast stations. According to critics, the Commission's "fiction" is saying that a transfer is not a transfer; they argue that the Commission is being disingenuous when it says that a transfer of ownership to a trust is something other than a transfer to which the Communications Act's prior approval and public notice and comment procedures apply.

A court challenge of this two-step transfer procedure recently was dismissed on the grounds that it was not ripe for judicial review (Office of Communication of the United Church of Christ v FCC, No. 86-1278 (D.C. Cir. Aug 14, 1987)). In the 2-1 decision, however, the dissenting judge said she would have over-turned the "two-step" policy on the ground that it "goes beyond [the FCC's] statutory power".

Minority Preferences

For many years, the FCC sought to encourage the diversity of broadcast programming by encouraging station ownership by minorities and women. Recently, however, the FCC reversed its position completely and proposed eliminating its various "minority preference" policies on the ground that they violate the Equal Protection Clause of the U.S. Constitution. In the FCC's view, the preference policies have not resulted in more diverse programming. The FCC's current view is that these policies have discriminated in favour of women and minorities without justification.

In 1985, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit held that a Commission decision awarding a licensing preference on the basis of gender "r[a]n counter to the fundamental constitutional principle that race, sex, and national origin are not valid factors upon which to base government policy" (Steele v FCC, 770 F2d 1192, 1199 (D.C. Cir. 1985)). After a motion for rehearing en banc was granted, the FCC submitted a request that the case be remanded to it before any further proceedings were held before the court. The Commission submitted a brief questioning the validity of its preference policies for women and minorities and said it would institute a proceeding to examine their continued constitutionality. Accordingly, the FCC released a Notice of Inquiry in December

1986 in which it proposed eliminating these preference policies for women and minorities.

These preference policies permit applicants to gain advantages in licence lotteries or in comparative hearings by demonstrating that they would involve women or minorities in the ownership and operation of the station. The FCC's policies also have allowed station sales to or purchase by women and minority owners to qualify for advantageous tax treatment.

In many cases, non-minority owners have abused these policies to gain station licences. In an effort to gain a licence or some other financial benefit, they have touted minority involvement that ends up being either token or fleeting. Shortly after a licence is awarded, the minority owners and managers quietly walk away from the station, usually with a significant amount of additional money in their pockets.

A number of Congressmen, together with a range of women's and minority groups, have expressed outrage at the FCC's action and have sought legislation to nullify expected FCC action. The Senate's comprehensive broadcast reform legislation, s1277, would adopt into law the FCC's current preferences for women and minorities. The House is considering similar legislation. Nevertheless, the FCC is expected to act this fall on the proceeding in which it has proposed to eliminate the various preferences.

Fairness Doctrine

For almost four decades, the Fairness Doctrine has been the cornerstone of "behavioural" regulation in the broadcasting industry. It has required broadcasters to present balanced coverage of controversial issues of public importance (see 47 C.F.R. s73.1910 (1986)). For critics of the policy, it has symbolised broadcasting's second class status under the First Amendment; the Fairness Doctrine, it is argued, unconstitutionally invades the editorial discretion of broadcasters. For supporters of the policy, it has been an essential element of the "public trustee" scheme of regulation.

On August 4, 1987, the FCC ended the lengthy debate of the Fairness Doctrine by repealing it (In re Complaint of Syracuse Peace Council, FCC No. 87-266 (released Aug 6, 1987)). The Commission decided that the policy was inconsistent with the public interest because it tended to chill broadcasters' speech, rather than enhance the vigorous discussion of public issues. In the FCC's view, the Fairness Doctrine caused broadcasters to avoid covering public issues for fear that their coverage would be deemed unbalanced. Such a finding would constitute a violation of the FCC's rules and could result in the imposition of penalties that, in theory, could be as severe as the revocation of broadcasters' station licence. (The FCC has erected significant procedural barriers in the way of Fairness Doctrine complaints; these place a very great burden on parties trying to prove a Fairness Doctrine violation. Most complaints fail to meet this burden and are dismissed).

Although the FCC's action was not unexpected, it still provoked an uproar in Congress and among public interest groups. Repeal of the Fairness Doctrine was characterised as the FCC's most brazen effort to eviscerate the "public trustee" concept embodied in the Communications Act. Broadcasters, of course, praised the FCC's action as vindicating their First Amendment rights.

At present, Congress is considering re-imposing the Fairness Doctrine through legislation. In June 1987, President Reagan vetoed a bill that would have amended the Communications Act to include the Fairness Doctrine. Congress is considering another codification effort, however; proponents of the legislation would seek to attach a new bill to other "must pass" legislation in order to avoid another presidential veto. The future of such legislation is uncertain, although there is substantial support for the Fairness Doctrine in Congress - particularly among influential committee chairmen.

The saga of the Fairness Doctrine's repeal - and its possible re-enactment - provides a vivid illustration of the dynamics of broadcast policymaking in the U.S. This debate has involved the legislative, judicial, and executive branches of the federal government in sparring with

the FCC, an "independent" administrative agency.

Although the FCC has long wanted to eliminate the Fairness Doctrine, it was uncertain as to whether it had the authority to do so. The FCC considered the Doctrine to be inconsistent with its deregulatory views and has avoided actually eliminating the Doctrine because of concerns that the Doctrine had been codified (and thus could not be repealed by the FCC) and due to a belief that significant support for the Fairness Doctrine in Congress would make an FCC action eliminating the Doctrine unwise. It was feared that if the FCC were to eliminate the Fairness Doctrine (assuming it had the power to do so), Congress might act quickly to punish the Commission - possibly through the appropriations process or through other legislation that would require the Commission to re-regulate broadcasters in a variety of ways.

There was disagreement as to whether Congress, when it amended the Communications Act in 1959, had actually included the Fairness Doctrine in the statute. The language in the statute and the legislative history were ambiguous. Thus, the FCC was unsure as to whether the Fairness Doctrine was a legislative mandate, which only Congress or the courts could change, or merely an FCC rule, which the FCC could repeal if it found the rule to be inconsistent with the public interest.

In September 1986, however, a federal court ruled that the Fairness Doctrine was only an FCC rule. According to the court, Congress had not codified the Fairness Doctrine in the 1959 amendments to the Communications Act (Telecommunications Research and Action Centre v FCC, 801 F.2d 501 (D.C. Cir.), pet. for rehearing en banc denied, 806 F.2d 111 (D.C. Cir. 1986), cert. denied, 55 U.S.L.W. 3821 (U.S. 1987)). Four months later, the same court remanded a Fairness Doctrine case to the FCC with directions that the agency consider the constitutional arguments being made by the broadcaster, which the FCC had found in 1984 to have violated the Fairness Doctrine (Meredith Corp v FCC, 809 F.2d 863 (D.C. Cir. 1987) (reviewing the decision in response to the Fairness Doctrine complaint of the Syracuse Peace Council)).

As a result, the FCC found itself in a difficult position. It had been ordered by a court to consider the constitutionality of the Fairness Doctrine. That same court, by finding that the Doctrine was only an FCC policy, had given the FCC an opening to act on its conclusion that the Doctrine should be repealed. At the same time, Congress had indicated its strong support for the Fairness Doctrine by passing legislation that would have codified it and by broadly criticising President Reagan's decision to veto that legislation. President Reagan, on the other hand, had expressed his Administration's clear opposition to the Fairness Doctrine.

When it repealed the Fairness Doctrine, the FCC claimed that court decisions left it no choice but to act decisively. It remains to be seen whether Congress, which believes that the FCC usurped a decision that it should have made, will respond. It is quite possible that the courts will have the final say on the issue. If Congress successfully codified the Fairness Doctrine, the court almost certainly will be asked to rule on the constitutionality of that legislation. At that point, there is likely to be some judicial clarification of the First Amendment status of broadcasting.

Children's Programming

Regulation of children's programming is an issue that the industry thought was dead, despite the continued efforts of one of the most outspoken leaders of a public interest group, Peggy Charren, president of Action for Children's Television (ACT). The issue was revived in June 1987 when a federal appeals court decided that the FCC had acted arbitrarily and capriciously in 1984 when it lifted its "commercialisation guidelines" for children's television The decision returned the children's television debate to the FCC - at least for one more round.

At issue in this dispute is ACT's assertion that many broadcasters are using children's programming as vehicles for disguising commercials,

rather than as an opportunity to provide educational programming. In ACT's view, many children's programs are nothing more than "program-length commercials". Advertisers have turned children's programming into a series of advertisements for products, according to ACT.

A major problem in the ongoing debate about children's programming is whether the FCC can constitutionally dictate the content of any programming, including programming for children. How can the government draw a line between something that is "commercial" and something that is "educational" without having to make editorial decisions? Nonetheless, there continues to be significant concern about the perceived "overcommercialisation" of children's programming. Senate legislation would require broadcasters to provide at least seven hours per week of educational children's programming. It also would require the FCC to launch an inquiry into program-length commercials.

The FCC originally regulated children's programming on the theory that the market did not adequately protect children from commercial exploitation. In 1984, however, the FCC decided that deregulating children's television would be consistent with its overall change in regulatory philosophy.

Although there is legislation in the Senate on the children's television issue, it does not appear to have a high priority. Things could change, however, for a number of reasons. House hearings on the topic are scheduled for this fall, and there is some feeling that children's television is one of the issues that Congress will pick up on in an effort to punish the FCC for eliminating the Fairness Doctrine. Children's television standards could be included in s1277. They also might be attached to other legislation, such as an appropriation bill, in an effort to force them into law.

Indecent Broadcasts

The recent rise of what is known in the U.S. as "blue" or "shock" radio has caused the FCC to involve itself in a controversial effort to regulate allegedly "indecent" broadcasting. In general, the courts have held that the First Amendment prevents the government from regulating speech unless the regulation will serve a compelling governmental interest. The FCC has argued that it can regulate indecent broadcast speech because of the government's strong interest in protecting children from indecency. The FCC also has pointed to the uniquely pervasive nature of broadcasting; because listeners may not be able to avoid hearing indecent broadcast speech as they tune in their radios and televisions, it is argued, the government should be able to protect them from an unwanted "verbal assault".

The FCC has proceeded under the authority of a federal statute that criminalises the broadcasting of "obscene, indecent, or profane language" (18 U.S.C. s1464). The Commission also has relied upon a 1978 Supreme Court decision that upheld an FCC decision finding that a broadcaster had aired "indecent" speech (Pacifica case). That case involved the broadcast of a monologue by comedian George Carlin in which he satirized the "Seven Dirty Words" that could not be said on radio or television programs.

Until recently, however, the Commission has tended to avoid getting involved in cases alleging the airing of obscene or indecent speech. It generally has viewed the Pacifica case as being limited to its facts - instances in which some or all of the seven words used in the Carlin monologue are repeated incessantly. Such "verbal shock treatment" was given a special, although not prominent, place in the FCC's regulatory lore.

In general, the FCC has left the task of prosecuting cases involving allegedly indecent or obscene speech to the Justice Department (under s1464 of the federal criminal code) or to local prosecutors (under state or local obscenity or indecency laws). The FCC would take account of any convictions for broadcasting obscene or indecent speech in considering a licensee's qualification to continue to hold a broadcast licence.

This policy of agency restraint, the FCC contended, was consistent with an important aspect of First Amendment

jurisprudence: namely, that courts are the proper fora in which to determine whether particular speech is obscene or indecent. In this way, the FCC avoided becoming enmeshed in trying to decide what speech was consitutionally protected. Such interpretation of the constitution was the province of the courts, not of an administrative agency.

In April, 1987, however, the Commission altered its position abruptly and announced that, in the future, it would vigorously enforce the federal prohibitions on obscene or indecent broadcasting (Public Notice No. 87-153 (released April 29, 1987)). The Commission decided that it would henceforth use the generic "definition" of indecent broadcast speech that had been used in the original Pacifica decision and that the Supreme Court did not overturn: "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience".

The FCC's decision has been the subject of broad criticism, requests for reconsideration by a large group of broadcasters, and an appeal to the federal courts. The future of the policy is far from clear; it has not yet been applied to another broadcaster.

Proponents of the FCC's action contend that it is long overdue and is a vital part of the FCC's statutory obligation to ensure that broadcasters operate in the "public interest".

Critics contend that the FCC's decision involves it in a very sensitive area of constitutional law and requires the FCC to make judgments that amount to unconstitutional censorship. They also assert that the Commission's legal rationale for regulating is very flimsy.

First, critics say, the Commission has neither provided a precise definition of what "patently offensive" offensive means nor established a mechanism to determine the "contemporary community standards" by which such patent offensiveness is to be measured. In its April 1987 decisions, the Commission simply asserted its conclusion that the broadcasts being complained of violated the enunciated definition; it was as if the community standard of patent offensiveness existed as an objective measure.

Moreover, the Commission has said that indecency need not be judged by local mores; it can be determined in light of some national standard (which is not defined). This approach conflicts with the Supreme Court's mandate in the obscenity area, which requires obscenity to be considered in light of local sensitivities. It is difficult to understand - without the benefit of an explanation from the FCC - why indecency is any less of a subjective issue.

Finally, the Commission has said that speech may be indecent even if it has "literary, artistic, political, or scientific value". In the obscenity area, the Supreme Court has held that speech must be totally without such value to be considered obscene. Once again, the basis for the Commission's reasoning is not apparent. The Commission has contended simply that indecent and obscene speech - particularly when the federally regulated airwaves are involved - are not to be judged by the same standards. Although this conclusion may have merit, there is little evidence being offered to support it.

It remains to be seen whether the FCC really will take an active role in deciding what speech can and cannot be carried by broadcasters. Such an activity is inconsistent with the FCC's general advocacy of deregulation: under such a marketplace approach, listeners would prevent broadcasters from carrying undesirable speech by tuning out and thereby expressing their economic disapproval of particular programs.

VI Broadcasting in Canada: Legal and Policy Issues

Despite its physical and apparent cultural proximity to the United States, Canada faces very different issues of law and policy in structuring its broadcasting market. U.S. developments affect these issues, because U.S. programming is popular in Canada and program delivery mechanisms make transborder transmissions relatively simple. However, Canadian broadcasting faces a national agenda

of issues that are related, although not parallel, to developments in the U.S.

The character of Canadian broadcasting has developed to a large degree in response to two geographical phenomena - Canada's large landmass and widely scattered population and its nearness to the U.S.

First, Canada has had to select a market system that it believed would reach its wide dispersed population. Canadian policymakers have adopted a European model of public broadcasting, rather than a U.S. model of commercial networks, to ensure that all Canadians receive adequate broadcasting services. Thus, Canada established a public broadcasting network, the Canadian Broadcasting Corporation (the CBC).

In addition, Canada has had to foster national programming - and its associated cultural and national values - in the face of stiff competition from readily accessible U.S. programs. From the early years of broadcasting, U.S. signals have been viewed throughout Canada's populous southern border. More recenlty, with the advent of satellite and cable technology, the competition between U.S. and Canadian programs has intensified and spread; U.S. programs are routinely retransmitted throughout Canada. Canadian programmers have been, and continue to be, at a competitive disadvantage due to the large broadcasting market in the U.S. that enables their U.S. counterparts to produce more expensive and - frequently - more popular programming. To assist Canadian programmers in competing with U.S. broadcasts, Canadian policymakers have required that all delivery media carry at least specified amounts of Canadian programming.

The twin policy concerns of a public national network and preservation of Canadian programming were incorporated into Canada's 1968 Broadcasting Act. However, the issues that these objectives raise are far from settled.

A. Regulatory Structure

Federal governmental entities, as well as the provincial governments, have authority to address broadcasting issues in Canada. The dominant actor is the Canadian Radio-television and Telecommunications Commission (the CRTC). Established as an independent regulatory body, the CRTC (originally the Candian Radio-Television Commission) is charged with imposing licensing requirements and regulating broadcasters. Since its inception, the CRTC's authority has been expanded to meet demands created by technological advancements. For example, in 1976, recognising the integrated nature of telecommunications and broadcasting, the government enlarged the CRTC's mandate to include telecommunications regulation (adding the word "telecommunications" to its title).

The CRTC is an independent agency; however, it is subject to oversight and other controls by the federal government, primarily through the actions of the Cabinet and the Minister of Communications, who acts through the Department of Communications (the DOC). CRTC members are government appointees, and the agency is subject to federal budgeting processes. In addition, the Cabinet has the power to set aside or refer back CRTC decisions - either on its own initiative or upon request. In proceedings before the Cabinet, the Minister of Communications advises the Cabinet. The DOC also plays a role in formulating national policies that, of course, affect the CRTC and in overseeing technical issues, such as spectrum allocation. Finally, the government can introduce legislation in the Parliament that will affect the CRTC and broadcast policies generally.

The Parliament also can affect national broadcasting policy by a method of "direction by inquiry". Parliamentary inquiries into specific broadcasting issues often act as catalysts for policy and regulatory changes. An example of "direction by inquiry" is the 1986 Report of the Task Force on Broadcasting Policy, co-chaired by Gerald L. Caplan and Florian Sauvageau, (the "Caplan-Sauvageau Report"); it recommended, inter alia, adoption of a new broadcasting act.

As provincial broadcasters grow in importance, the role of provincial governments in broadcast regulation also has expanded. Traditionally, education is within the jurisdiction of individual provincial governments. With the development of local broad-

cast stations, provincial governments increasingly have exercised their authority in this area. They have sought to pursue educational programming and other related objectives.

Not surprisingly, these various authorities often become entangled in jurisdictional conflicts. For example, the CRTC and provincial authorities disagree over the definition of "educational broadcasting" and whether provincial broadcasting should be within the sole jurisdiction of the federal agency. At the federal level alone, the DOC and the CRTC have clashed over new technologies. Given its statutory mandate to provide an essentially "Canadian" broadcasting system, the CRTC has given priority to Canadian broadcasters and programming. The DOC, by contrast, has advocated more rapid development of new technologies, such as satellite and electronic print services.

B. Current Issues in Broadcasting

Defining New Technologies

An issue of continuing importance in the Candian broadcasting industry is grappling with technologies that threaten to circumvent regulatory controls aimed at preventing an "Americanization" of the Canadian airwaves. If, for example, the CRTC had not stretched the Broadcasting Act to include authority over cable systems, satellite-delivered cable programming could have supplied Canadians with vast quantities of U.S. programming free of Canadian content restrictions. Because there typically is just one cable system in a community, this arrangement might have deprived many localities of cable-delivered Canadian programming.

Although the CRTC managed to bring cable systems within its jurisdiction, definitional issues continue to plague the CRTC and other regulatory entities seeking to determine their authority over newer delivery systems. With the advent of satellite and cable technology, Canada needs workable definitions for new services, so that future services can enter the market without disrupting Canada's long-standing policy goals.

As noted by the Caplan-Sauvageau Report, the Broadcasting Act and the Radio Act do not presently cover all available broadcasting technologies. Both acts define broadcasting as transmissions that are intended for "direct reception by the general public". This definition appears to exclude program services, such as STV.

The Caplan-Sauvageau Report, therefore, recommended amending the Broadcasting Act to bring all forms of transmission, distribution, and reception clearly within its scope.

Another fundamental definitional issue involves the ability of the Broadcasting Act to extend to new delivery systems. Although the Broadcasting Act has been interpreted to include cable systems in their capacity as "broadcast receiving undertakings", new systems such as satellite-delivered cable networks could stretch the Broadcasting Act well beyond its intended scope.

To date, Canada, like the U.S., has attempted to work within the confines of existing legislation, rather than adopt an entire new legislative scheme. New issues have been addressed through both aggressive interpretations of existing laws and new regulatory provisions. For example, the CRTC addressed a number of definitional issues in new cable television regulations that it issued in August 1986. The CRTC's definitional approach is evident in the agency's distinction between such new technologies as alphanumeric and other electronic text services and other types of video transmissions. The distinction enables the CRTC to apply different regulatory schemes to video and textual services, saving alphanumeric service providers from having to comply with cable regulations drafted to regulate video programming content.

Minority Broadcasting

Providing access to broadcasting media for native peoples has presented Canadian policymakers with problems. Originally they focused on ensuring that native peoples living in isolated rural areas received broadcast services. Satellite television helped solve this problem; however, it created another problem. Satellite television

brought with it easily delivered non-aboriginal culture - in the form of Canadian and U.S. programming. Without local native programming to balance the influence of these programs, aboriginal groups saw their language and culture gradually being eroded by satellite services.

In response, Canadian policy-makers have shifted their focus to providing native communities with a mechanism to participate in the program delivery system. The CRTC launched a program to create an aboriginal satellite television network (Inuit) and a satellite radio network for the Yukon and Dene Indian groups. Since its inception, this program has grown to the point where it now produces and transmits regular local television and radio programming in several native languages.

Despite this progress, unresolved issues remain. A number of small aboriginal groups still do not enjoy access to the program delivery system. Can CBC afford to provide access for even these small groups? And, what portion of CBC's programming should be allotted to native programs? Even in the Northern Territories, native groups are often in a distinct minority. Should they receive air time at the expense of other ethnic groups? Perhaps, the CBC could establish an aboriginal language service, just as it established English and French services.

Private Stations

Although it has relied primarily on the CBC to provide programming to its disparate population (through CBC-owned stations and affiliates), Canada has managed to encourage private broadcasters to provide significant amounts of service. Presently, privately owned television stations attract more than half of the country's English and French-language viewing. (Some of these private stations are CBC affiliates and carry both CBC and independently produced programming; others are not affiliated with the CBC).

The major policy issues raised by private stations derive from the conflict created by the stations' need to carry popular programming (typically U.S. programming) while also satisfying Canadian national content requirements. The CRTC has had to balance these commercial and cultural interests. However, the balancing process has itself created problems.

In its efforts to ensure that private broadcasters carry a minimum percentage of Canadian programming, the agency has been accused of failing to promote high quality, as opposed to mediocre, programming. Some critics assert that satisfying the carriage requirements by substituting poor quality Canadian programming for quality foreign programs is not beneficial overall. First, the total mix of programming is of a lower standard. Second, because poor quality Canadian programming can be used to satisfy the regulations, Canadian programmers can avoid having to develop higher quality programming to be competitive. If Canadian programs were not protected from having to compete with U.S. imports, it is argued, Canadian programmers might face a more urgent need to raise the level of their productions.

Copyright & Cable

At present, Canada's sixty-year-old Copyright Act does not deal effectively with modern broadcasting technologies. Consequently, in May 1987, the government introduced legislation to amend the Copyright Act. This legislation, as well as other proposed changes in Canadian copyright law, would affect both broadcasters and cable system operators.

One particularly significant proposed amendment would give program creators (or other copyright holders) the right to control the retransmission (such as via a cable system) of their copyrighted programs (House of Commons, Standing Committee on Communications and Culture, A Charter of Rights for Creators: Report of the Sub-Committee on the Revision of Copyright (1985)). This proposal also would extend to foreign works, consistent with Canada's obligations as a signatory to international copyright conventions.

A new retransmission right could have an adverse economic impact on cable television system operators.

Expanded copyright protections such as the right to control the retransmission of works could increase programming costs for cable operators. Presently, cable systems deliver foreign and domestic programming to their subscribers without paying royalties to the owners of the copyright in the programs being retransmitted. (Copyright holders receive payments in the first instance, when they sell the rights for the original transmission of their works - usually to broadcasters). If changes in the copyright law were to cause cable systems to pay a royalty for each program that they carried, the systems and, ultimately, their subscribers, would have to bear the additional expenses.

As it did in the U.S., the retransmission issue in Canada involves a complex mix of social and economic considerations. On the one hand, it is recognised that program creators have a right to be compensated for the commercial use of their works. On the other hand, there is concern about the effect on viewers and distribution media (such as cable systems) of imposing additional significant copyright fees. The problem is especially delicate in Canada because it involves a substantial foreign relations and trade component: U.S. program creators also want compensation for the retransmission of their works, and the popularity of U.S. programming in Canada would require Canadian cable operators to make substantial payments to U.S. programmers. The outflow would contribute to Canada's current status as a net importer of cultural products.

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Sydney, AUSTRALIA
27 August, 1987

TELECOMMUNICATIONS SEMINAR

Date : 7 December 1987 - 4:30 pm

Location : Allen, Allen & Hemsley
Level 47
19-29 Martin Place
SYDNEY

Speakers : John King "Procedures and Pitfalls of Privitisation: The British Experience".

Mr King is the Managing Director of British Telecom's Overseas Division and was actively involved in the Privitisation of British Telecom.

: Tony Hartnell "Liberalisation of Telecommunication in Australia".

Mr Hartnell is a partner in Allen, Allen & Hemsley and was legal adviser to the Davidson Committee.

Each paper will take approximately 45 minutes and there will be an opportunity for questions.

All ACLA members are invited and should ring (02) 229 8549 to confirm attendance.