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## PROGRAM CONTROL

LOUIS L. JAFFE†

**C**RITICS of commercial broadcasting and of the Federal Communications Commission (FCC) should face the hard truth that regulation of programming by the FCC can never be more than marginal. With the possible exception of certain negative controls, in particular the so-called fairness doctrine, governmental machinery is not adapted to the evaluation and improvement of programs. The statute under which the FCC operates was not designed for such a purpose. It was a response primarily to a crisis created by electrical interference among stations with a consequent deterioration of service. It is true that the act requires that licensing and the performance of licensees be in "the public interest" and that there was an intention, though nowhere formulated with any precision, to allow the FCC to pursue purposes beyond the mere mechanical. But nevertheless there is little or nothing to suggest that the FCC was to evaluate programs or, in the most general sense, determine their character. It is not simply that Congress did not then formulate nor has ever yet formulated standards for such an enterprise. It is the more radical fact that long years of administration have failed to produce any workable standards or at least any standards commanding the assent of the interested publics.

The FCC has never attempted to evaluate the quality of programs, though it has from time to time condemned certain extreme forms of exploitation of broadcasting facilities. It has, however, in the past at least, both in the original and renewal licensing process, approached the regulation of program content through percentage categories. This took the form of requiring applicants to make program proposals in terms of percentages of program categories. The crucial categories were so-called local programs, news, and public affairs; and somewhat less crucial, agriculture and religion. These proposals were not treated as strict promises. It was understood that experience and changing circumstances would justify deviation. But in a few cases, at least, extreme and unexplained failure to perform according to the proposals was penalized by a short-term renewal (one year rather than the usual three).<sup>1</sup> In the last few years, however, the Commission seems to have given up any control whatsoever. This was manifested by a recent batch of renewal of Texas stations which had had

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1. See, e.g., Pasco, 21 R.R. 782 (1961).

very poor showings in the news and public affairs categories. Commissioners Cox and Johnson protested these renewals vehemently,<sup>2</sup> but the majority of the Commission was completely silent in the face of this protest and, as far as I can discover, has made no attempt to explain its actions. Thus, one can only hazard a guess as to their reasons.

I suspect that the majority believes that there are certain intractable difficulties which would make the effort at control too marginal to be worthwhile. There is first, as I have already suggested, the problem of standards. How much news? How much public affairs? How valid is a control in terms of amounts where quality cannot be controlled. Would not a few good programs be better than a greater amount of mediocre ones? Nevertheless, I do not regard this objection as insuperable. It would be possible to experiment with arbitrary percentages, let us say in the order of 5 to 10% of news and of public service programs. It is the latter category, particularly, which needs emphasis because, at least in terms of amounts, news seems now to be taking care of itself. Much of the news programs, it is true, is superficial and repetitious; but we have already come to the conclusion that there is no way of evaluating the quality of news programs.

A second problem in percentage regulation of categories is that with the increase of the number of stations, particularly radio, there is increasing and useful specialization. In a large metropolitan area with many outlets, it is somewhat arbitrary to require each and every licensee to perform services of the same type. It is indeed a defect in the thinking of some who would control programming that they treat each station as if it must be a communication world in itself. I have said that their image of appropriate programming of a station can be likened to a mother's milk which provides all the nourishment that the child needs. It assumes a listener who is cut off from all other sources of communication and must learn everything from what Commissioner Cox calls "the listener's favorite station." I find this notion of the passive, unadventurous listener peculiarly repellant, and I am sufficiently confident that it is unfair even to those who do a great deal of listening. As more and more outlets become operational — technical innovations such as CATV will increase their number — it should become less and less necessary to look upon any one station as an all-purpose communications medium. However, I suppose it is still the case that there are many small communities with very few outlets

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2. See *Renewal of Standard Broadcasting Television Licenses [Broadcasting in America and the FCC's Licensing Process: An Oklahoma Case Study]*, 14 F.C.C.2d 1 (1968) (Dissenting Statement of Commissioners Cox and Johnson).

and no newspapers. Were I a Commissioner and were I able to proceed on a case by case basis which would take account of such situations, I would be prepared to go along with Commissioners Cox and Johnson in requiring some satisfactory showing in the news and public affairs categories.<sup>3</sup>

Commercial broadcasting has been criticized for its failure to present standard repertory and original drama. This is, I think, a valid criticism of its performance though in the last year or two there has been a considerable increase in original drama. It is my observation that, by and large, critics of the system do not avail themselves of the opportunity to watch even these performances. There are occasionally very distinguished repertory performances, such as the recent "Midsummer Night's Dream." Many persons who might be expected to watch this did not do so. But even if it be granted that the number of good dramatic programs is fewer than it should be, it is difficult to devise any method for compelling and maintaining a better showing. Continuing criticism by the Commissioners and by viewer-interested organizations is nevertheless useful. The networks particularly, are sensitive to their "image." They are aware that they represent an industry which makes a large monopoly profit and is therefore vulnerable. Because of this they are prepared to make some concessions to criticism from the progressive elements of the "Establishment." Consequently the "heat" should be kept on.

Certain criteria used in original and, it is now suggested, in renewal licensing<sup>4</sup> might be thought to have some bearing on program character and quality, though in my opinion it would be difficult to demonstrate that they in fact do have such a bearing. The FCC is now emphasizing two criteria for licensing: integration and diversification. The integration criterion requires ownership of substantial shares of stock in the enterprise by the local managers of the station. It is thought that they will be in closer contact with community interests and needs as contrasted with managers who do not own shares and whose principals may reside outside of the area. The Commission has done almost nothing by way of research to demonstrate that integration has a significant effect on programming. Of course, it would be, as

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3. One must, however, concede that there are political risks to such a policy. The cry would go up that the FCC had saddled the "little fellow" — arguably the least able to bear added costs — with responsibilities from which his city cousin was free. Of course, one of the supposed virtues of administrative agencies is just this capacity to particularize, but one cannot be blind to the hazards, political and otherwise, of such a policy.

4. See *WHDH, Inc.*, 16 F.C.C.2d 1, 15 R.R.2d 411 (1969). For a critical treatment of this decision, see, Jaffe, *The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969).

a matter of fact, rather difficult if not impossible to make comparisons between integrated and non-integrated stations. We would be back once more to the problem of criteria for evaluation. But if one were to rely on impression, I for one would be very skeptical that programming of any one integrated management willy-nilly was better than, let us say, the programming of Westinghouse, NBC, CBS. Arguably, programming is a function of resources and the commercial potentialities of particular stations, and these hardly depend on integration.

Diversification, that is to say ownership by persons who do not have other communication interests, is a valid objective. It increases the number of voices in the community and for that reason it is a purpose worth pursuing. But that it bears significantly on program quality and make-up is, I think, as doubtful as is the impact of integration. It may, however, mean that certain restraints on programming will be removed. Commissioner Johnson has on numerous occasions pointed out that conglomerate owners may suppress programs contrary to their conglomerate interests.<sup>5</sup>

In the posture of our broadcasting operation, an important supplement to our programming may be provided by private and public support of non-commercial television. This is not the place to explore in detail these potentialities. The Ford Foundation and the federal government have already made commitments in this direction. The existing system of educational broadcasting provides a base which may be expanded and which may serve as a trunk for grafting of one sort or another type of non-commercial programming. The future of such broadcasting depends on whether the critics of commercial broadcasting really represent a widespread demand for types of services not supplied by commercial broadcasting or supplied to an insufficient degree.<sup>6</sup>

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5. See, e.g., *Westinghouse Broadcast*, 15 R.R.2d 1038 (1969).

6. I do not here discuss the fairness doctrine. I have considered the function of that doctrine in Jaffe, *Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation: Implications of Technological Change*, 37 CINN. L. REV. 550 (1968).