Communications Law - Television - Antisiphoning Rules Governing Movie and Sports Content of Pay Cable Television Exceeded Jurisdiction of FCC under Federal Communications Act

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COMMUNICATIONS LAW — TELEVISION — ANTISIPHONING RULES GOVERNING MOVIE AND SPORTS CONTENT OF PAY CABLE TELEVISION EXCEEDED JURISDICTION OF FCC UNDER FEDERAL COMMUNICATIONS ACT.

Home Box Office, Inc. v. FCC (D.C. Cir. 1977)

In fifteen consolidated cases, petitioners1 challenged four regulations2 of the Federal Communications Commission (FCC) which limited the program fare that cablecasters3 could offer to the public for a fee set on a per program or per channel basis.4 The rules, issued by the FCC in 1975,5 greatly curtailed the ability of cablecasters6 to show feature films or sports events if a separate program or channel charge was levied.7 The rules also prohibited

1. Home Box Office, Inc. v. FCC, 567 F.2d 9, 9 (D.C. Cir. 1977) (per curiam). Petitioners were Home Box Office, Inc.; Metromedia, Inc.; Columbia Pictures Industries, Inc.; United Artists Corp. and Metro-Goldwyn-Mayer, Inc.; Motion Picture Ass’n of America, Inc.; National Ass’n of Broadcasters; American Broadcasting Co.; CBS, Inc.; and National Broadcasting, Inc. Id. Intervenors were Professional Baseball; American Broadcasting Co.; CBS, Inc.; and National Citizens Comm. for Broadcasting. Id.

2. Id. at 17. See 47 C.F.R. § 76.225 (1976).

3. “Cablecasting” refers to the exhibition on a cable television system of original programming developed by the cable television operator or another entity. First Report and Order, 20 F.C.C.2d 201, 223 (1969). In contradistinction to the usual function of cable television systems — the retransmission of signals that have been received over the air from conventional broadcast stations — cablecasting does not involve use of the broadcast spectrum, i.e., the range of frequencies of electromagnetic waves assigned to broadcasting stations. Id. at 223.

4. 567 F.2d at 17. The petitioners also challenged similar restrictions applied to subscription broadcast television stations. Id. See 47 C.F.R. §73.643 (1976). Subscription television uses the broadcast spectrum to transmit programs “intended to be received in intelligible form by members of the public only for a fee or charge.” Id. § 73.641(b).


That group of petitioners composed of the major broadcast networks and the National Association of Broadcasters challenged only the amendments to the rules as a major and arbitrary shift in FCC policy. 567 F.2d at 18 n.6. The petitioners representing cable television, the Justice Department, and producers of programs suitable for showing on either cable or broadcast television took the position that “any regulation [of pay cablecasting] exceeds the authority” of the FCC. Id. at 18 n.7.

6. 567 F.2d at 17 n.2. The regulations at issue applied to both “origination” cablecasters and “access” cablecasters. 47 C.F.R. § 76.225 (1976). The former operate cable systems, id. § 76.5(w), while the latter lease channel time from system operators, id. §76.5(x). However, they applied only to cablecasting on systems that also retransmit broadcast signals. See, id. §76.5(a), 225.

7. 567 F.2d at 18-19. Specifically, the rules prohibited the pay cablecasting of a feature film by a cable television system with the following exceptions: 1) the film had been in general release for three years or less; 2) a conventional television station in the same market had a contract to show the film; 3) the film had been in general release for more than 10 years and had not been shown in the same market by conventional television for three years; and 4) the film was in a foreign language. 47 C.F.R. § 76.225(a) (1976).

The live cablecasting of sports events for a per program or per channel charge was prohibited with the following exceptions: 1) a “specific event” could be exhibited if it had not been broadcast live by a conventional television station in the same
cablecasters from devoting more than ninety percent of their cablecast hours to movie and sports programs and from showing commercial advertising on cable channels on which programs were presented for a direct charge to the viewer. The purpose of these regulations was to prevent the "siphoning" of feature film and sports material from conventional broadcast television by pay cable television (CTV). The Court of Appeals for the District of Columbia Circuit vacated the regulations as applied to pay CTV, holding that, while the FCC may exercise authority over CTV to the extent "reasonably ancillary" to its

market for five seasons; 2) a "regularly recurring event" which occurred at intervals of more than one year could be shown if it had not been broadcast live by a conventional television station in the same market for more than 10 years; and 3) new types of specific sports events could not be shown over cable for five years. In addition, the number of "non-specific events" which could be shown over cable in any given season was limited by a mathematical formula. Id.

To illustrate how siphoning would work, the American Broadcasting Co. posited the following situation in a reply comment to the FCC:

[S]lightly more than 1.5 million homes would pay $2.25 each for a particular program making available [after payment to program producer and other costs] slightly more than $1.2 million dollars to the pay cable industry for the purchase of the program in question. This . . . compares with the $1.5 million dollars a network might pay for two showings of a "blockbuster" feature film like Love Story during a five-year period, and the $1 million dollars that might be paid for a movie of somewhat less appeal.

Id. at 10.

The antisiphoning objective of the regulations is also clearly expressed in the FCC's standard for waiving the film restrictions:

Feature films otherwise excluded by this paragraph may be cablecast upon a convincing showing to the Commission that they are not desired for exhibition over conventional television in the market of the cable television system, or that the owners of the broadcast rights to the films, even absent the existence of subscription television, would not make the films available to conventional television.


For a discussion of the term "CTV," see note 19 and accompanying text infra.

12. For a discussion of the term "CTV," see note 19 and accompanying text infra.

13. 567 F.2d at 60. The D.C. Circuit affirmed the subscription broadcast rules (see note 4 supra) on the basis of its decision in National Ass'n of Theatre Owners (NATO) v. FCC, 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970). In NATO, the court had affirmed substantially similar subscription broadcast television rules promulgated in the FCC's Fourth Report and Order, 15 F.C.C.2d 466 (1968). 420 F.2d at 208. The court observed that few, if any, subscription broadcast stations had begun operation since 1969 and, as a result, the best information available was that reviewed in NATO. 567 F.2d at 59-60.

In addition, the Home Box Office court remanded the record to the FCC for supplementation with instructions to hold an evidentiary hearing to determine the nature and source of all ex parte communications made during the rulemaking proceeding. Id. at 58-59. Of concern to the court were informal discussions, not part of
jurisdiction over broadcast television,\textsuperscript{14} it had not established its jurisdiction in the instant case.\textsuperscript{15} The case was remanded to the FCC with instructions 1) to demonstrate that the objectives to be achieved by regulating CTV were also ones for which it could regulate the broadcast media; and 2) to state clearly the harm that its regulations sought to remedy as well as its reasons the public record, between FCC personnel and interested parties, such as representatives of the broadcast, cable, motion picture and sports industries. \textit{Id.} at 53.

According to the court, the acknowledged presence of \textit{ex parte} contacts threw the validity of the proceeding into doubt because of the possibility of "undue industry influence." \textit{Id.} The court suspected that the rules may have been shaped "by compromise among the contending industry forces, rather than by exercise of the independent discretion in the public interest the Communications Act vests in individual commissioners." \textit{Id.}

The court stressed that, in general, agency officials involved in a rulemaking must avoid \textit{ex parte} communications on matters relating to the proceeding. \textit{Id.} at 57. If \textit{ex parte} contacts do occur, their substance must be recorded in a public file. \textit{Id.}

Judge MacKinnon filed a special concurrence in which he stated that the rule set down by the court should be limited to rulemaking proceedings involving "competing private claims to a valuable privilege or selective treatment of competing business interests of great monetary value." \textit{Id.} at 61-64.

It should be noted that the \textit{Home Box Office} court's proposition was later rejected by another panel of the D.C. Circuit in Action for Children's Television (ACT) v. FCC, 564 F.2d 458 (D.C. Cir. 1977). In that case, the court stated that a rule requiring disclosure of all \textit{ex parte} communications should not apply to every case of informal rulemaking, as the \textit{Home Box Office} opinion suggested, but only when the proceeding involves 'competing claims to a valuable privilege.' \textit{Id.} at 474-77. However, the \textit{ACT} court held only that the \textit{Home Box Office} rule would not be applied retroactively to the case under consideration since it constituted "a clear departure from established law when applied to informal rulemaking proceedings. . . ." \textit{Id.} at 474.


15. 567 F.2d at 34. Furthermore, the court determined, even if the \textit{antisiphoning} rules were within the FCC's jurisdiction, they would have to be vacated for lack of evidence as to the need for regulation. \textit{Id.} at 40. The D.C. Circuit stated that the FCC failed to adequately document its two basic assumptions: 1) that siphoning would in fact occur and 2) that it would be injurious to the public interest since it would lead to the loss of sports and movie programming for audiences not served by CTV systems or too poor to subscribe to pay cable. \textit{Id.} at 36-40.

In response to petitioners' contention that the FCC had failed to consider the anticompetitive effects of the challenged rules, the court concluded that the FCC had not met its obligation to make a record for the court containing the rationale for its conclusion that regulation was appropriate in the instant case. \textit{Id.} at 40-41. The FCC had analogized the regulatory problem presented in the case \textit{sub judice} to that considered in United States v. Southwestern Cable Co., 392 U.S. 157 (1968). 567 F.2d at 41. The D.C. Circuit rejected this analogy for two reasons. Initially, the court stated that \textit{Southwestern} did not stand for the "proposition that 'unfair competition' requires the general protection of broadcast television." \textit{Id.} at 41. See note 31 infra. Secondly, the \textit{Home Box Office} court observed that, even if it had, the "unfairness" recognized in \textit{Southwestern} was not present in the instant case. 567 F.2d at 41-42. Moreover, according to the D.C. Circuit, the balance to be struck between regulation and competition should be based, not on legal precedent, but on the factual material contained in the rulemaking record. \textit{Id.} at 42.

The earliest cable television systems were known as Community Antenna TeleVision (CATV). These systems functioned simply as master antennae, picking up and amplifying local broadcast signals and relaying them to homes via a single cable. In contrast, contemporary cable television systems (CTV) not only retransmit broadcast signals but also engage in cablecasting — the creation and carriage of original programming.

The FCC's ever increasing regulation of CTV has reflected CTV's technological development and the resulting threat it has posed to

16. 567 F.2d at 34. The D.C. Circuit also found the antisiphoning rules inconsistent with the first amendment. Id. at 49-50. The court noted initially that it had upheld similar subscription television rules in National Ass'n of Theatre Owners (NATO) v. FCC, 420 F.2d 194 (1969), cert. denied, 397 U.S. 922 (1970). 567 F.2d at 43. See note 13 supra. The court then concluded that NATO was not controlling since “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.” 567 F.2d at 43, quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969).

Secondly, the court determined that the conventional justification for FCC regulation of the broadcast media — physical interference and scarcity requiring an umpiring role for the government — was not applicable to the regulation of CTV. 567 F.2d at 44-45.

However, the court did state that the absence in CTV of the physical limitations of the electromagnetic spectrum did not mean that it cannot be regulated without offending the principles of the first amendment. Id. at 46. The government, according to the court, “may adopt reasonable regulations separating speakers competing and interfering with each other for the same audience.” Id. at 47.

The D.C. Circuit then considered the test enunciated by the Supreme Court in United States v. O'Brien, 391 U.S. 367 (1968), to determine if the challenged regulations comport with the first amendment. 567 F.2d at 48-49. The three-tiered approach of O'Brien requires: 1) that the purpose of the regulation be unrelated to the suppression of expression; 2) that the regulation further an important or substantial governmental interest; and 3) that the incidental restriction on first amendment freedoms be no greater than necessary to further that interest. United States v. O'Brien, 391 U.S. at 377. In applying this standard to the facts of the instant case, the court stated that the first requirement was met since the purpose of the antisiphoning regulations, “protecting the viewing rights of those not served by cable or too poor to pay for cable,” was neutral. 567 F.2d at 48-49. However, the D.C. Circuit concluded that the rules failed to satisfy the remainder of the O'Brien test. Id. at 49-50. The court stated that, since the record did not support a conclusion that a problem exists, the regulations did not further an important governmental interest. Id. at 50. Moreover, the court found that the rules were overbroad in light of the purposes sought to be achieved by the FCC. Id. at 51.


19. The FCC has recommended that the acronym “CTV” be used when referring to contemporary cable television systems. Cable Television Report and Order, 36 F.C.C.2d 143, 144 n.9 (1972). Throughout this note, “CTV” will be used to refer to cable television in general. Where it is necessary to distinguish between the retransmission of broadcast signals and the origination of programming, the terms “CATV” and “cablecasting” will be substituted. For an explanation of cablecasting, see note 3 supra. For a definition of CATV, see text accompanying note 18 supra.

20. For a further explanation of “cablecasting,” see note 3 supra.

21. A CTV system, unlike conventional over-the-air broadcasting, transmits television signals directly by wire to home receivers — television sets. LaPierre, supra note 18, at 26. For a simplified description of the technology of CTV, see id. at 26-27.
conventional broadcasting. 22 When CATV was introduced in the 1950's as a means of providing improved service for rural areas where direct over-the-air reception was poor, the FCC declined regulation on the grounds that it lacked jurisdiction. 23 At that time, CATV was viewed as a hybrid form of communication outside the scope of the specific grants of power given the FCC 24 under the Communications Act of 1934 (Act). 25

As CATV gradually expanded its function as a "master antenna" for local broadcast stations to include the importation of more remote television signals over its multiple channels, 26 the FCC asserted jurisdiction over its operations to protect the revenues and audiences of competing local broadcasters. 27 In 1965, rules requiring the carriage of local broadcasters' signals and prohibiting the duplication of local programming 28 were applied.

23. Frontier Broadcasting Co. v. Collier, 24 F.C.C. at 251 (1958); Report and Order, 26 F.C.C. 403 (1959), modified, In re Application of Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), aff'd, Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963). In Frontier, a group of 13 broadcasters filed a complaint against 288 CATV system operators located in 36 states, asking the FCC to exercise jurisdiction over such systems as common carriers of communications under the Communications Act of 1934, 47 U.S.C. §§151-609 (1970). Frontier Broadcasting Co. v. Collier, 24 F.C.C. at 251. The FCC refused this request, finding that CATV systems were not "common carriers in the ordinary sense of the term" since the operator, not the subscriber, chose which television signals were to be picked up and transmitted to the viewer. Id. at 254; Report and Order, 26 F.C.C. at 441 (emphasis in original).
25. 47 U.S.C. §§151-609 (1970). Title I of the Act created the FCC "for the purpose of regulating interstate and foreign commerce in communication by wire or radio," id. §151, and provided that "[t]he provisions of this chapter shall apply to all interstate and foreign communication by wire or radio." Id. §152. Title II granted the FCC regulatory authority over interstate common carriers. Id. §§201-221. Title III provided for authority over interstate and foreign radio, id. §§301-329, and, by later interpretation, television. Norman v. Century Athletic Club, 193 Md. 584, 593, 69 A.2d 466, 470 (1949).
27. Indirect regulation began in 1962 by virtue of the FCC's authority over the common carrier microwave facilities that served CATV systems. In re Application of Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), aff'd, Carter Mountain Transmission Corp. v. FCC, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963). In Carter Mountain, the FCC denied the application of a common carrier by radio for permission to install a microwave radio relay to pick up television signals from distant cities and to transmit them to CATV systems. 32 F.C.C. at 465. The FCC refused permission pending a showing that the CATV systems would not duplicate local programming and would carry the signals of local television outlets. Id.
28. First Report and Order, 38 F.C.C. 683 (1965). The rules promulgated by the FCC required that, upon request, a microwave-serviced CATV system carry the signals of all local television stations. Id. at 741-43. Additionally, the regulations mandated that a CATV system refrain from duplicating the programs of local
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commercial stations, either simultaneously or within 15 days before or after local broadcast. Id.
The FCC justified the imposition of these requirements on two grounds. Id. at 713. First, the failure to carry local stations and the duplication of their programs constituted unfair competitive practices, which are inconsistent with the supplementary role of CATV. Id. at 701–06, 713. Second, these regulations were necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service. Id. at 706–14.
29. Id. at 741. Microwave facilities relay television broadcast signals, normally picked up off the air from the transmitting broadcast antenna, through a series of radio repeaters to a terminal point near the community served by CATV. Id. at 684 n.1. Use of microwave connections enables the importation of more distant signals that cannot be received by means of the usual off-the-air antenna. Id.
30. Second Report and Order, 2 F.C.C.2d 725 (1966). The FCC concluded that the distinction between microwave and nonmicrowave systems was unwarranted and applied the local carriage and nonduplication requirements to both. Id. at 745. For an explanation of these requirements, see note 28 supra. In addition, the FCC prohibited the importation by CATV of distant signals into the 100 largest television markets. 2 F.C.C.2d at 782.
The FCC, in justifying its exercise of jurisdiction over CATV, asserted:

there would seem to be no question that CATV systems are engaged in interstate communications by wire or radio. They transmit "pictures, and sounds . . . by aid of wire" and are "instrumentalities . . . used for . . . the receipt, forwarding, and delivery of communications . . . incidental to such transmission," and hence fall within the definition of wire communication under section 3(a). Moreover, CATV systems constitute interstate communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber) — a chain which "is now well established . . . as interstate communication". . . . CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry, . . . and hence constitute "interstate communication by wire" to which the provisions of the act are applicable. Id. at 793–94. (citations omitted) (emphasis in original).
31. 392 U.S. 157, 178 (1968). Midwest Television, a licensee of a San Diego broadcast station, claimed that the transmission by Southwestern Cable Co.'s CATV systems of signals of Los Angeles broadcasting stations into the San Diego area fragmented the San Diego audience. Id. at 160 n.4. The result, Midwest Television asserted, would be the loss of advertising revenues and, ultimately, the demise of local broadcast stations. Id.
32. Id. at 181. See note 30 supra.
33. 47 U.S.C. § 152(a) (1970). This section provides in pertinent part:
The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States, in such communication or
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directly confers jurisdiction over CATV systems on the FCC. However, the Court ultimately decided the case under the concept of ancillary jurisdiction, holding that the FCC may exercise jurisdiction over CATV to the extent "reasonably ancillary" to the effective performance of the FCC's various responsibilities for the regulation of television broadcasting. Under this standard, the rule contested in Southwestern was sustained as furthering the FCC's long-standing and congressionally approved policy of attempting to provide locally controlled broadcast television service. The Court accepted the FCC's assertion that local broadcast stations were threatened by competition from cable operators.

The next step on the path toward full regulation was an FCC inquiry into the role of CTV in national communications policy. Noting the trend toward origination of programming by CTV and recognizing that it was in

such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided.

Id. 34. 392 U.S. at 172. In response to the argument that this section does not independently confer regulatory authority but merely establishes the media to which the other provisions of the Act may be made applicable, the Supreme Court in Southwestern stated:

We cannot construe the Act so restrictively. Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions . . . . Congress in 1934 acted in a field that was demonstrably "both new and dynamic," and it therefore gave the Commission "a comprehensive mandate," with "not niggardly but expansive powers."

Id. (citations omitted).

35. See notes 36-38 and accompanying text infra.

36. 392 U.S. at 178. The Court, in stressing the limits of its holding, stated:

There is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law," as "public convenience, interest, or necessity requires." We express no views as to the Commission's authority, if any, to regulate CATV under any circumstances and for any other purposes.


37. 392 U.S. at 174.

38. Id. at 175. The Court determined that the FCC had "reasonably found" that the importation of distant signals into the markets of local broadcasting stations may "destroy or seriously degrade the service offered by a television broadcaster," and thus adversely affect the public interest. Id., quoting First Report and Order, 38 F.C.C. 683, 700 (1965). Although these claims were speculative, the Court concluded that the FCC must have authority over CATV systems in order to effectively carry out its responsibilities under the Act. 392 U.S. at 176-77.

the public interest,\textsuperscript{40} the FCC promulgated a rule permitting CTV systems to carry broadcast signals only if they also engaged in cablecasting.\textsuperscript{41}

The program origination rule prompted the second serious challenge to the FCC regulation of CTV in United States v. Midwest Video Corp.\textsuperscript{42} In Midwest, a four-judge plurality again applied the "reasonably ancillary" standard\textsuperscript{43} in determining the validity of the FCC's exercise of jurisdiction. The FCC was found to be authorized to require program origination\textsuperscript{44} since such a rule\textsuperscript{45} furthered long-standing regulatory goals in the field of television broadcasting "by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services."\textsuperscript{46} Since the Court's affirmance of the rule liberalized the nature of

\textsuperscript{40} Id. at 418-19. This recognition was based on findings of the FCC that CTV origination: 1) had the potential to increase the number of outlets for community self-expression and the variety of programs without using the broadcast spectrum; 2) did not involve unfair competition, unlike the importation of distant signals into a local market; and 3) would be unlikely to duplicate local programming. \textit{Id.}, quoting Midwest Television, Inc., 13 F.C.C.2d 478, 505-06 (1968).

\textsuperscript{41} First Report and Order, 20 F.C.C.2d 201, rev'd, Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971), aff'd, 406 U.S. 649 (1972). The program origination rule provided:

Effective on or after January 1, 1971, no CATV system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services.

First Report and Order, 20 F.C.C.2d at 223. In this order the FCC also extended the equal time, sponsorship identity, and fairness doctrines to cablecasting systems. \textit{Id.} at 223-25. For a discussion of these doctrines, see generally Barrow, \textit{Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience}, 61 VA. L. REV. 515 (1975); Hagelin, \textit{The First Amendment Stake in New Technology: The Broadcast — Cable Controversy}, 44 U. CIN. L. REV. 427 (1975); Simmons, \textit{The Fairness Doctrine and Cable TV}, 11 HARV. J. LEGIS. 629 (1974). For the subsequent history of the program origination rule, see notes 42-48 and accompanying text infra.

\textsuperscript{42} 406 U.S. 649 (1972), rehearing den., 409 U.S. 1014 (1972). Midwest Video Corp., an operator of CTV systems subject to the new cablecasting rules, contended that Congress had not authorized the FCC to impose program origination requirements. Midwest Video Corp. v. United States, 441 F.2d 1322, 1323 (8th Cir. 1971).

\textsuperscript{43} 406 U.S. at 663. The issue addressed in Midwest was whether or not the FCC's program origination rule was "reasonably ancillary" to the FCC's jurisdiction over broadcast television. \textit{Id.} The question of the FCC's direct jurisdiction over CTV under §152(a) of the Act (see notes 33-36 and accompanying text supra), left open by the Court in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), was not litigated. It was, however, addressed in a footnote to the plurality opinion which stated that, by carrying broadcast signals, CTV systems have "necessarily subjected themselves to the Commission's comprehensive jurisdiction." 406 U.S. at 663 n.21. The factors of the interdependency between CATV carriage of broadcast signals and cablecasting, as well as the need for unified regulation, were said to reinforce this conclusion. \textit{Id.} See Berman, \textit{CATV Leased-Access Channels and the FCC: The Intractable Jurisdiction Question}, 51 NOTRE DAME LAW. 145, 156-57 (1975).

\textsuperscript{44} 406 U.S. at 670.

\textsuperscript{45} The FCC eventually repealed the mandatory origination requirement, having concluded that "imposing mandatory origination rules is unlikely to best serve our cablecasting goal. Quality, effective, local programming demands creativity and interest. These factors cannot be mandated by law or contract." Report and Order, 49 F.C.C.2d 1090, 1105 (1974).

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the "ancillariness" required under the standard set out in Southwestern, it was seen as a significant expansion of the FCC's authority over CTV.

At the time the program origination rule was issued, the FCC specifically declined to issue rules for CTV governing the showing of feature films and sports programs similar to those it had promulgated for subscription television. Nine months later, in an apparent about-face, the

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47. See notes 35 & 36 and accompanying text supra. The Court of Appeals for the Eighth Circuit had set aside the FCC's program origination order, finding that it was not reasonably ancillary to the FCC's responsibilities in the broadcasting field. Midwest Video Corp. v. United States, 441 F.2d 1322 (8th Cir. 1971). The court noted the distinction between the function of broadcasters and CATV systems drawn by the Supreme Court in Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 399-401 (1968). 441 F.2d at 1325-26. The Eighth Circuit relied on this distinction to support its determination that cablecasting, which does not exploit the broadcast spectrum, is an entirely separate business from retransmitting broadcast signals. Id. at 1326-27.

The plurality opinion of the Supreme Court, authored by Justice Brennan, did not address the distinction drawn by the Eighth Circuit. Justice Brennan also rejected the contention that Fortnightly was relevant since it involved the validity of a copyright. United States v. Midwest Video Corp., 406 U.S. 649, 663-64 & n.22 (1972). Instead, the Court suggested that the FCC's authority might exist even if cable systems did not retransmit broadcast signals:

Equally plainly the broadcasting policies the Commission has specified are served by the program-origination rule under review. To be sure, the cablecasts required may be transmitted without use of the broadcast spectrum. But the regulation is not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services. Id. at 669.

Chief Justice Burger, concurring in the plurality opinion, observed that the FCC's position "strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." Id. at 676 (Burger, C.J., concurring). The Chief Justice stated that the matter was one for Congress but concurred on the ground that, until Congress acts, the FCC should be allowed wide latitude. Id.

Justice Douglas' dissent quoted extensively from the Fortnightly opinion and concluded that "the upshot of today's decision was to make the Commission's authority over activities 'ancillary' to its responsibilities greater than its authority over any broadcast licensee." Id. at 677-81 (Douglas, J., dissenting).


49. First Report and Order, 20 F.C.C.2d 201, 204-05 (1969). The FCC reasoned: In short, it appears to us that wire origination operations in the larger markets may face different, and perhaps more difficult, problems than over-the-air pay-TV; that we lack any present substantial experience in this respect in the wire area; and that, therefore, the public interest would be best served for the present by encouraging CATV to experiment and develop its originations free from restriction as to interconnection or limitations as to types of programming, in the expectation that the end result will be significant added diversity for the public. Id. at 205.


51. Memorandum Opinion and Order, 23 F.C.C.2d 825 (1970). Asserting that pay CTV is similar to subscription television and has the same "siphoning" potential, the
FCC applied antisiphoning rules restricting the showing of movies and sports to pay CTV.\textsuperscript{52} In 1975, after an inquiry, the FCC readopted a slightly revised version of the antisiphoning rules.\textsuperscript{53}

The court in \textit{Home Box Office}\textsuperscript{54} began its analysis by adopting as the standard for determining the FCC's statutory authority the "reasonably ancillary" test\textsuperscript{55} first enunciated by the Supreme Court in \textit{Southwestern}\textsuperscript{56} and later applied in \textit{Midwest}.\textsuperscript{57} The D.C. Circuit observed that these Supreme Court opinions both expanded and restricted the jurisdiction of the FCC to regulate CTV.\textsuperscript{58} On the one hand, they recognized "an expansive jurisdiction for the Commission based on Section 2(a)\textsuperscript{59} of the Communicat-
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567 F.2d at 27.
61. Id. at 28.
62. Id.
63. Id.
64. Id. See notes 10 & 11 supra.
65. 567 F.2d at 28 (emphasis in original).
66. Id.
67. Id. at 29. The court disposed of a closely related argument that, because § 1 of the Act requires the FCC to promote a nationwide communications service, the FCC must impose antisiphoning rules since siphoning would destroy nationwide service. Id. at 33–34. See 47 U.S.C. § 151 (1970).

Section 1 provides in pertinent part:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . there is created a commission to be known as the "Federal Communications Commission . . . ."


In dismissing this argument, the court stated: "We need not consider whether Section 1 can be so construed since counsel's argument is nothing more than a naked allegation, unsupported in the record." 567 F.2d at 33.

68. 567 F.2d at 29–32. The programming policy of the FCC has been 

"that the station's [entertainment] program format is a matter best left to the discretion of the licensee or applicants, since as a matter of public acceptance and of economic necessity he will tend to program to meet the preferences of his area and fill whatever void is left by the programming of other stations."


The FCC has stated in other contexts that the first amendment and the anticensorship provision of the Act, 47 U.S.C. § 326 (1970), prevent it from requiring or
The court next considered its own decision in *Citizens Committee to Save WEFM v. FCC*, in which the D.C. Circuit had taken a position that might be thought to lend support to the contention of the FCC in the instant case. In *WEFM*, the court held that, when confronted with a proposed radio station license assignment encompassing a change in entertainment format, the FCC was required to consider the public interest and to regulate the format that radio stations can present “whenever a significant segment of the public is threatened with loss of a preferred broadcast format.” Nevertheless, since the FCC had not acquiesced in *WEFM*, the court concluded that it should not affirm the challenged regulations on the basis of that decision.

Furthermore, the court found that the ninety-percent and no-advertising rules as applied to pay CTV could not be sustained. The court observed that these rules were framed in the dissimilar context of subscription broadcast television in order to ensure a purely supplemental role for that medium, which shares the scarce spectrum resources relied on by commercial television. The court stated that it saw no comparable need for the rules in the pay CTV context, given the abundance of channels CTV systems can carry as well as the orders already in effect requiring governmental, educational, and public access to channels of every CTV system carrying broadcast signals.


69. 506 F.2d 246 (D.C. Cir. 1974) (en banc). In *WEFM*, a citizens group appealed from FCC orders approving the assignment of a radio station license and the assignee’s proposal to change the entertainment format from classical to contemporary music. *Id.* at 249.

70. *Id.* at 262.

71. See Memorandum Opinion and Order, 60 F.C.C.2d 858 (1976); Notice of Inquiry, 57 F.C.C.2d 580 (1976).

72. 567 F.2d at 32. The court stressed that it was not reconsidering its decision in *WEFM*. *Id.* As stated by the Home Box Office court: “The sole purpose of undertaking this analysis is to demonstrate that the Commission has, in this proceeding, seemingly backed into an area of regulation in which it would not assert jurisdiction were it to face the issues directly.” *Id.*

In addition, assuming the FCC did have the authority to promote the objective of maintaining present levels of public enjoyment by protecting conventional television structure, the court questioned the FCC’s definition of “the current level of programming as a baseline for adequate service.” *Id.* at 31–32. The court noted also the failure of the record to refer to the preferences of the public or to speculate as to what kind of programming would replace that which was siphoned. *Id.*

73. *Id.* at 34. See notes 8 & 9 and accompanying text supra.

74. *Id.* See notes 3, 4 & 13 supra.

75. 567 F.2d at 34. Coaxial cable has the capacity to carry 40 television channels; however, the number that can actually be carried depends upon the sophistication of the distribution system. LaPierre, supra note 18, at 27–28. With current technology, the capacity of one channel could be increased to over 80 channels. See, e.g., Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. Rev. 133, 135 (1976). Predictions are that foreseeable developments will make CTV’s channel capacity virtually unlimited. *Id.* at 135.

76. 567 F.2d at 34. See 47 C.F.R. §§ 76.251, .253 (1976).
RECENT DEVELOPMENTS

In conclusion, the court found that the regulations went beyond the statutory authority of the FCC. With the caveat that it was not directing the FCC to find express statutory authority for its CTV regulations, the court set forth a refined "reasonably ancillary" standard to be applied in determining the validity of the FCC's regulation of CTV. Under this test, the FCC must: 1) "demonstrate that the objectives to be achieved by regulating cable television are also objectives for which the Commission could legitimately regulate the broadcast media," and 2) "state clearly the harm which its regulations seek to remedy and its reasons for supposing that this harm exists."

In a concurring opinion, Judge Weigel emphasized his view that the FCC lacks any power to control the content of cablecasting since such programming does not involve use of the broadcast spectrum. Judge Weigel found that Southwestern and Midwest, when read in light of their particular facts, supported his position. It is submitted that the Home Box Office court sidestepped some of the more difficult issues presented by the case by failing to confront the jurisdictional questions that have perplexed courts and commentators since the inception of CTV. As a result, the court did nothing to alleviate the persisting confusion, engendered by the dicta in Southwestern and Midwest, as to whether or not the Act directly confers jurisdiction over CTV on the FCC. Moreover, in adopting the "ancillary to broadcasting" standard.

77. 567 F.2d at 34.
78. Id.
79. Id.
80. Id.
81. Id.
82. Id. at 61.
83. Id. Specifically, Judge Weigel stated that the Act did not grant the FCC the asserted authority:
   It seems to me that if there could be any governmental interest justifying this species of censorship, it is an interest which Congress has not empowered the Commission to assert. In relation to cablecasting, the power is so fraught with the potential for impingement upon First Amendment rights that it should not be sanctioned by implication.

Id.

For an explanation of cablecasting, see note 3 supra. For a discussion of the FCC's authority to regulate cablecasting, see notes 85-90 and accompanying text infra.

84. 567 F.2d at 61. For the facts of Southwestern and Midwest, see notes 32-38 & 42-48 and accompanying text supra. For a discussion of the limitations of Southwestern and Midwest as precedents conferring authority on the FCC to regulate pay cablecasting, see notes 91-94 and accompanying text infra.

85. Some of the petitioners had contended that any regulation over pay CTV exceeded the authority of the FCC. See note 5 supra.

86. For in-depth accounts of the jurisdictional history of the FCC and CTV, see, e.g., Berman, supra note 43; Hagelin, supra note 41; LaPierre, supra note 18.

87. See notes 33 & 43 and accompanying text supra.
88. See Hoffer, supra note 52, at 482-86. This commentator examined the text of the Act, the concept of ancillary jurisdiction and the plenary rulemaking powers granted the FCC in the Act and concluded that the FCC lacks any power over pay
approach without question, the court perpetuated a standard which has been widely criticized because it raises serious jurisdictional issues and regulates CTV as an appendage to broadcasting rather than in its own right.

Specifically, it is submitted that the court's treatment of the jurisdictional issues was deficient because it overlooked the inadequacies of Southwestern and Midwest as precedents conferring authority on the FCC to regulate pay cablecasting. The jurisdiction upheld in Southwestern applied only to CATV systems that carried signals of television broadcast stations exclusively. In addition, jurisdiction was extended over cablecast operations in Midwest only with the reluctant concurrence of Chief Justice Burger and over a strong dissent. Moreover, in assuming that ancillary jurisdiction over cablecast operations unquestionably exists, the D.C. Circuit failed to address the jurisdictional issue in light of the apparent difference between the business of retransmitting signals originally sent over the broadcast spectrum and that of cablecasting, which makes no use of the broadcast spectrum.

In contrast to its treatment of the jurisdictional issues, the D.C. Circuit did not neglect to address the second criticism of the "reasonably ancillary" approach. At several points in the opinion, the court questioned the underlying assumption of the FCC's arguments that CTV should be cablecasting. Id. at 486, 488-89. In his discussion of Southwestern and Midwest, the author summarized:

Thus, despite the assertions found in these cases, it cannot be said that the Supreme Court has squarely held section 2(a) of the Act to be a grant of power broad enough to include jurisdiction over cable pay-TV. Indeed, if the power of the FCC were as great as is suggested in dictum, the theory of "ancillary jurisdiction," on which the Court actually relied in Southwestern Cable and Midwest Video, would be unnecessary.

Id. at 486.

89. See 567 F.2d at 25-28.
90. See STAFF OF SUBCOMM. ON COMMUNICATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, CABLE TELEVISION: PROMISE VERSUS REGULATORY PERFORMANCE, 94th Cong., 2d Sess. 28-29 (Subcomm. Print 1976) [hereinafter cited as CABLE TELEVISION REPORT]. See generally Comment, Regulation of Pay-Cable and Closed Circuit Movies: No Room in the Wasteland, 40 U. Chi. L. Rev. 600 (1973); Note, supra note 75, at 133.
91. The Supreme Court, in Southwestern, made this limitation clear in its description of the functions of CATV:

CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which reception would not otherwise be possible; and second, they may transmit to subscribers the signals of distant stations entirely beyond the range of local antennae.

92. For an overview of the plurality, concurring and dissenting opinions in Midwest, see note 47 supra.
93. 567 F.2d at 25-28.
94. Even though the Eighth Circuit stressed this distinction in Midwest, Justice Brennan did not treat it in his plurality opinion. For a discussion of the Midwest opinions, see note 47 supra. See also Note, supra note 48, at 818. For an explanation of cablecasting, see note 3 supra.
95. In reconsidering the antisiphoning rules imposed in 1970, the FCC framed the problem as "how pay-cablecasting can best be regulated to provide a beneficial
merely supplementary to conventional broadcasting.\textsuperscript{96} Furthermore, in applying the "reasonably ancillary" standard, the court's appraisal of the objectives to be advanced by the regulations in issue indicated a refusal, novel on the part of a reviewing court in the context of CTV regulation, to take the assertions of the FCC at face value.\textsuperscript{97}

It is submitted, however, that the court's suggestion that its decision in \textit{WEFM} lent some support to the FCC's contention that it had authority to regulate the content of pay CTV\textsuperscript{98} is misleading. \textit{WEFM} is not on point since it arose in the context of the FCC's authority to review changes in entertainment format at the time of approving assignment of a radio station license.\textsuperscript{99} More importantly, the differences between the two media are so significant that any comparison as justification for regulation of content is inappropriate.\textsuperscript{100} Radio, like conventional television, depends upon the limited broadcast spectrum so that the loss of a unique entertainment format would be felt by its listeners.\textsuperscript{101} In contrast, since CTV has an

supplement to over-the-air broadcasting without at the same time undermining the continued operation of that "free" television service." Notice of Proposed Rulemaking and Memorandum Opinion and Order, 35 F.C.C.2d 893, 898 (1972).

At the time of readopting the pay cablecasting rules, the FCC elaborated upon this supplemental role:

\begin{quote}
[Pay] television's potential to expand the public's program choices, to supplement the programming now provided by conventional television, gives it an important role to play in our national communications structure. It is this supplemental role that our [pay] programming rules are designed to promote, while at the same time insuring that the public's reliance on conventional television is not unreasonably impaired.
\end{quote}

First Report and Order, 52 F.C.C.2d 1, 43 (1975).

\textsuperscript{96} 567 F.2d at 31-32, 34, 36. \textit{See} text accompanying notes 74-76 \textit{supra}.

\textsuperscript{97} The Supreme Court in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), upheld the FCC's jurisdiction even though the harm was admittedly speculative. \textit{Id.} at 176-77. \textit{See} note 38 \textit{supra}.

Similarly, in United States v. Midwest Video Corp., 406 U.S. 649 (1972), the Court accepted the FCC's assertions that the cablecasting requirement would promote the public interest. \textit{Id.} at 673-75. However, the rule was repealed two years later because it was ineffective. Report and Order, 49 F.C.C.2d 1090, 1105 (1974). \textit{See} note 45 \textit{supra}.

The \textit{Home Box Office} court, on the other hand, not only examined the objective of maintaining present levels of public enjoyment in light of the FCC's authority to promote it, but also questioned the FCC's assumption that the current level of programming on conventional television was optimum. 567 F.2d at 31-32. \textit{See} notes 67-72 and accompanying text \textit{supra}.

In addition, the court rejected as inadequate the evidence offered by the FCC that siphoning actually occurred. \textit{See} note 15 \textit{supra}. Several commentators have expressed similar doubts as to the potential impact of CTV on broadcast television. \textit{See}, e.g., Hagelin, \textit{supra} note 41, at 516-22; LaPierre, \textit{supra} note 18, at 115-16; Comment, \textit{supra} note 90, at 609-11; Note, \textit{supra} note 75, at 140-42.

\textsuperscript{98} \textit{See} text accompanying notes 69-72 \textit{supra}.

\textsuperscript{99} Citizens Committee to Save WEFM v. FCC, 506 F.2d 246, 249, 262 (1974). The \textit{Home Box Office} court did acknowledge in a footnote that application of \textit{WEFM} to CTV would require additional thought. 567 F.2d at 30-31 n.49. \textit{See} notes 69-72 and accompanying text \textit{supra}.

\textsuperscript{100} \textit{See generally} Note, \textit{supra} note 75, at 135 n.18, 144-45; Hoffer, \textit{supra} note 52, at 480-81, n.17.

\textsuperscript{101} \textit{See generally} Note, \textit{supra} note 75, at 135 n.18, 144-45; Hoffer, \textit{supra} note 52, at 480-81 n.17.
apparently unlimited channel capacity,\textsuperscript{102} arguments justifying regulation of its content to promote diversity of programming have little force.

Although the court stressed the narrow confines of its holding and suggested that the FCC may be able to satisfy the jurisdictional prerequisites after remand, the \textit{Home Box Office} decision will probably have greater permanence. Even if the jurisdictional defects are corrected, the FCC faces other formidable obstacles to achieving approval of the challenged regulations.\textsuperscript{103}

The major impact of the decision will undoubtedly be an increased rate of development for pay cablecasting operations.\textsuperscript{104} Removing the restrictions may also have an ancillary effect on CTV's development in major markets where broadcast reception is good since the attractive pay cablecasting service will draw subscribers.\textsuperscript{105}

The FCC's restrictive policies have been blamed for retarding the development of pay cablecasting.\textsuperscript{106} Paradoxically, although the rules were justified as necessary to promote the established goal of program diversity,\textsuperscript{107} the unrestricted use of popular movie and sports fare may be the most effective way to achieve the FCC's objective. While pay CTV offers the potential for programs that serve small, specialized audiences,\textsuperscript{108} it must first establish a market for itself with programming of wider appeal.\textsuperscript{109} With a large subscriber base providing financial viability, it is submitted that the industry will be sooner able to offer the cultural and minority programming to which it is better suited than conventional television.\textsuperscript{110}

In addition, the court's invalidation of the antisiphoning rules may signify an end to the unquestioning acceptance by the courts over the past twenty years of the FCC's position that CTV should be purely supplemental to conventional television.\textsuperscript{111}

In creating the FCC in 1934, Congress directed it "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide . . . communication service"\textsuperscript{112} and to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public

\textsuperscript{102} See note 75 \textit{supra}.

\textsuperscript{103} See notes 13, 15 & 16 \textit{supra}.

\textsuperscript{104} See LaPierre, \textit{supra} note 18, at 118. Two commentators have suggested that pay cablecasting could grow to a billion dollar industry by 1980 if the antisiphoning programming restrictions were lifted. W. Baer & C. Pilnick, \textit{supra} note 52, at 13.

\textsuperscript{105} See W. Baer & C. Pilnick, \textit{supra} note 52, at 6. See also \textit{Cable Television Report, supra} note 90, at 62.

\textsuperscript{106} LaPierre, \textit{supra} note 18, at 117.

\textsuperscript{107} See notes 64-67 and accompanying text \textit{supra}.

\textsuperscript{108} See note 52 \textit{supra}.

\textsuperscript{109} W. Baer & C. Pilnick, \textit{supra} note 52, at 2. Most pay cablecasting operations have relied extensively on sports and movies. \textit{Id.} at 9. See LaPierre, \textit{supra} note 18, at 118.

\textsuperscript{110} See W. Baer & C. Pilnick, \textit{supra} note 52, at 9, 11; LaPierre, \textit{supra} note 18, at 118-19; Note, \textit{supra} note 75, at 136-38.

\textsuperscript{111} See notes 95-96 and accompanying text \textit{supra}.