

1995

# The FCC's Regulation of the New Video Media : Backing and Filling on the Level Playing Field

Michael Botein  
*New York Law School*

Follow this and additional works at: [http://digitalcommons.nyls.edu/fac\\_books](http://digitalcommons.nyls.edu/fac_books)

 Part of the [Antitrust and Trade Regulation Commons](#), and the [Communications Law Commons](#)

---

## Recommended Citation

Botein, Michael, "The FCC's Regulation of the New Video Media : Backing and Filling on the Level Playing Field" (1995). *Books*. 37.  
[http://digitalcommons.nyls.edu/fac\\_books/37](http://digitalcommons.nyls.edu/fac_books/37)

This Book is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Books by an authorized administrator of DigitalCommons@NYLS.

THE FCC'S REGULATION OF THE NEW VIDEO MEDIA:  
BACKING AND FILLING ON THE LEVEL PLAYING FIELD

Michael Botien\*

THE FCC'S REGULATION OF THE NEW VIDEO MEDIA:

BACKING AND FILLING ON THE LEVEL PLAYING FIELD

By

Michael Botien

KF  
2765  
.1  
B67



## THE FCC'S REGULATION OF THE NEW VIDEO MEDIA: BACKING AND FILLING ON THE LEVEL PLAYING FIELD

Michael Botein\*

### I

### INTRODUCTION

Like many other federal agencies, during the past few years the Federal Communications Commission (FCC) has engaged in an orgy of reregulation, deregulation, and now unregulation. The basic assumption behind this exercise, of course, is that effective competition makes regulation unnecessary. Instead, competition among rational profit-maximizing entrepreneurs inevitably will produce consumer satisfaction.<sup>1</sup> This tenet in turn leads to a regulatory imperative of creating — or at least encouraging — as much competition as possible within any industry. The role of governmental intervention is solely to create a "level playing field" on which firms can compete.

Whether or not regulation can produce these market conditions is far from clear. As Representative Tim Wirth has quipped, "there's no such thing as a level playing field or airline food."<sup>2</sup> Part of the problem, of course, is that government traditionally has two distinct — and basically inconsistent — ways of promoting competition.

The first, and temptingly logical approach is simply to impose identical restrictions upon all potential players. This rationale is eminently fair, assuming that all potential players have reasonably comparable abilities. If they do not, however, this approach runs into both political and equitable problems. After all, the public and its representatives traditionally get a bit queasy at the sight



of a 240 pound professional football player landing on the back of a 140 pound high school athlete. As a result, it is tempting to adjust any game's rules in order to allow everyone to play.

Precisely because of this very human — and very inefficient — tendency, the second and time-honored method of creating a level playing field is to rein in the most effective players. Common examples are handicaps for golfers, weights for jockeys, separation of professional from amateur athletes, and the like. Indeed, much of the New Deal's sometimes murky philosophy derived from this principle. This approach naturally is heresy to any ideologically pure deregulator, since it injects government into the marketplace. Nevertheless, it routinely creeps into administrative decisionmaking, because of demands for equity. Classic examples in telecommunications policy include the now declassified anti-siphoning rules (which prevented cable or subscription television from competing with broadcast television to buy motion pictures as well as sporting events)<sup>3</sup> and the still operational multipoint distribution service (MDS) rules (which prohibit an MDS operator from controlling more than half of its programming).<sup>4</sup>

The current, ideologically pure Commission purports to have used only the first approach in constructing a level playing field for the new video technologies. In most respects, this probably has been the case. Nevertheless, it may be useful to test the Commission's premises, by analyzing the consistency of its current regulatory scheme. This paper thus reviews the FCC's policies as to the new video technologies in several different areas, including: ease of entry; ownership restrictions; jurisdictional bases; degree of federal preemption; and content regulation. These areas seem to merit consideration because they all



impact heavily upon each medium's ability to compete effectively with others. This classification scheme is suggestive rather than scientific, however, since no data currently are available as to the cost of different regulatory burdens for these media. Indeed, some of these media do not even exist, and the Commission's abolition of most reporting requirements will make it difficult to create accurate data bases in the future.

This review considers only conventional broadcast television, cable television, multi-channel MDS (MMDS), subscription television (STV), low power television (LPTV), and direct broadcast satellites (DBS). The choice of these media obviously excludes several other electronic distribution systems. Videocassette recorders (VCRs) and videodisc players offer programming similar or even identical to that available over the other new video media — particularly in terms of pay programming. Since the Commission does not and can not regulate VCRs or disc players (except to prevent spurious radio frequency interference), however, there is little basis for comparing them to the other media in regulatory terms. Nevertheless, it is becoming increasingly apparent — particularly in nations with high VCR penetration, such as England — that VCRs and discs compete with these other media for audiences.

Similarly, the analysis does not consider services for distributing text or graphics — such as videotex and electronic games — rather than traditional video images. Although no data seem to exist, these services also probably draw some viewers away from traditional video programming. After all, if a viewer plays a videogame or accesses a data base, he or she presumably is lost to conventional video programming. Moreover, all of the new video media can offer data or graphics services, and apparently at least some plan to do so in the



comparatively near future. Nevertheless, at least the present experience indicates that these services will not compete substantially with any of the new video media. After all, at the extremes all forms of communication — including print or audio media — presumably have some competitive impact on each other.

Finally, some delivery systems simply are too new to evaluate in any significant fashion. For example, the Operational Fixed Service (OFS) might evolve into either a private or a mass medium. The Commission seems quite unclear about the ways in which OFS will develop.<sup>5</sup>

With these considerations in mind, it is appropriate to begin a perhaps pedestrian analysis of the Commission's regulatory approaches to the new video media. On many points, the most relevant observations involve not what the FCC has stated, but rather what it has failed to say. In these situations, of course, a certain amount of speculation as to the Commission's intent presumably is necessary.