1984

Introduction [comments]: From First Amendment rights and the Cable Television Industry

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Recommended Citation
6 Comm. & L. 45 (1984)

From **First Amendment Rights and the Cable Television Industry**

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Introduction*

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In a strictly technological sense, cable television is not an engineering innovation, but rather the oldest new technology in town. Although the origins of cable date back to the 1950's, the industry saw little economic development until the mid-1970s.[1] As a result, a substantial body of legal doctrine did not begin to develop until then.

Moreover, until the end of the last decade, the Federal Communications Commission (FCC) provided virtually the entire day-to-day legal environment in which the cable industry lived.[2] Most of the initial legal issues concerning cable focused on the scope of the Commission's jurisdiction and the validity of its regulations. Having recognized the sin of regulation during the last few years, however, the FCC has engaged in successive orgies of "reregulation" under Chairman Richard E. Wiley, "deregulation" under Chairman Charles D. Ferris, and now "unregulation" under Chairman Mark Fowler. The Commission apparently has found cable far easier than broadcasting to deregulate, partially because no statutory scheme governs cable and partially because cable creates no electrical interference – and thus no need for some type of private or governmental frequency allocation functions.[3]

*Special thanks are due Leonore Larraquente, Glen Richards, and Louise Zito for their assistance in editing and cite-checking the papers for this symposium.

1. Cable Television Report and Order, 36 F.C.C. 2d 141 (1972).
2. For an excellent and concise history of the F.C.C.'s early regulation policy, *see* C. D. FERRIS, F. W. LLOYD AND T. J. CASEY, CABLE TELEVISION LAW: A VIDEO COMMUNICATIONS PRACTICE GUIDE 5-4 *et seq.* (1983).
3. *See, e.g.*, Ashbacker Radio Corp. v. F.C.C. 326 U.S. 327 (1945).

The main focus of the law today is on the relationships between cable operators, state or local governments, and programmers. The tensions in this tripartite relationship implicate the first amendment in several ways. Operators seek immunity from obligations to either governmental bodies or programmers. Cities want to impose program content control on both operators and programmers. And programmers want to reach cable viewers, despite operators' or cities' objections to the content of their programming.

In order to explore these emerging first amendment issues, the Communications Media Center at New York Law School, with the generous support of Meckler Publishing Company and the Playboy Foundation, convened an intensive conference on October 21–22, 1983. Special thanks are due to Burton Joseph, Kenneth Norwick, Janel M. Radtke, David M. Rice, R. Bruce Rich, and Eudry Sell for their assistance in organizing the conference. The conference focused on the three major papers published in this issue of *Communications and the Law,* by Glen Robinson, Thomas Krattenmaker, and Douglas Ginsburg. For reasons of space, it unfortunately is impossible also to print the comments from the conference's fifteen distinguished panelists;[4] suffice to say, however, that their participation added immeasurably to the proceedings' breadth and depth.

These papers discuss the comparative rights and obligations of operators, cities, and programmers. Robinson begins by reviewing the general history and first amendment status of the electronic media, pointing up the ambiguities in the law and suggesting that we ought to "be ready for almost anything."[5] Krattenmaker then discusses probable types of content regulation and their validity, arguing that distinctions exist between the first amendment status of broadcasting and cable under the *Pacifica* decision.[6] Finally, Ginsburg points out the social and economic implications inherent in the existence of access channels and concludes that in first amendment terms the best approach is to leave content control to cable operators' commercial and non-ideological incentives.

These articles do not purport to resolve or even fully identify a host of still evolving questions as to cable's first amendment status. They are suggestive rather than definitive. Nevertheless, they give a preliminary look at an increasingly important area of first amendment jurisprudence. We hope they will spark further thought on these issues.

4. The panelists were: Daniel Brenner, Les Brown, Joseph Ferris, Heather Florence, Brenda Fox, James Goodale, Paul Klein, Alan Meckler, James Mercurio, Michael Meyerson, Mark Nadel, Dean Ringal, Frederick F. Schauer, Sam Simon, and Morris Tarshis.
5. Robinson, *Cable Television and the First Amendment* 6, no. 5 COMMUNICATIONS & L. 47–61 (October 1984).
6. F.C.C. v. Pacifica Foundation, 430 U.S. 726 (1978).