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REGULATION OF TELEVISION PROGRAM CONTENT BY THE FEDERAL COMMUNICATIONS COMMISSION

*Walter H. Sweeney**

On Thursday, September 20, 1973, from 9:00 p.m. to 11:15 p.m., the Columbia Broadcasting System presented "Bonnie and Clyde," a film featuring extraordinary portrayals of violence, including close-ups of participants being shot in the face. This movie was scheduled by CBS to counteract the highly publicized tennis match between Bobby Riggs and Billie Jean King being shown by the American Broadcasting Company. The following Saturday, during prime time, ABC aired "Rosemary's Baby," a horror film involving the possession of a pregnant woman by Mephistopheles leading to the birth of a devil. This program followed the children-oriented "Patridge Family" show. While audience figures for these two programs have not been published at the time of this writing, there is no question that hundreds of thousands of children between the ages of two and eleven viewed them with or without parents present.

Many of these children most probably suffered irreparable damage to their mental health from witnessing the excessive violence and horror contained in these two films without their or their parents realizing it. Since the television industry is purportedly regulated by the Federal Communications Commission (hereinafter referred to as the FCC), the broadcast of programs such as "Bonnie and Clyde" and "Rosemary's Baby" during hours in which substantial numbers of children in their formative years are in the viewing audience raises the vital question of the extent, if any, to which the FCC is empowered to supervise the content of television programs. The FCC, under existing law, has broad regulatory powers over program content and may act to curtail programming containing excessive violence and horror which is not in the public interest.

The Nature of the Problem

By virtue of the Communications Act of 1934,¹ Congress preempted the regulation of broadcasting, and the FCC is responsible

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1. Act of June 19, 1934, ch. 652, §§ 1-5, 48 Stat. 1064.

for such regulation.² The guidelines for the FCC's administration are set forth in the Communications Act, the FCC's Rules and Regulations and policy statements, and relevant decisions of the FCC and the courts. Its regulatory powers are founded in the authority to grant applications for the construction of broadcast facilities, for licenses to operate the facilities, and for renewal of licenses, as well as other miscellaneous applications. A broadcast facility may be constructed only after the FCC determines that the applicant is legally, financially, and technically qualified to construct and operate the station. The applicant must propose an acceptable program service and show that the public interest will be served by the operation of the station.³ Because applicants are cognizant of the FCC's preferences, their applications for construction permits usually abound with good programming intentions. Unfortunately, the good intentions generally wane in light of the commercial reality that is gained after the station goes on the air. After all, broadcasters are in business to make a profit, and advertisers simply do not buy air-time unless they have some assurance that a reasonable number of viewers will see their message. According to most broadcasters, television viewers are not particularly enamoured by many of the programs which the FCC considers desirable. Nonetheless, a broadcast license expires three years after its granting unless renewed by an application to the FCC.

The license renewal application is basically the same as the original application for the facility, but the applicant is expected to show a "performance" in compliance with its "promise" in the previous application. The FCC has the power to deny an application for renewal of a license if the public interest has not been served by the applicant, but, unless the applicant has been guilty of serious misconduct, the grant of the application is usually a pro forma exercise in "brochuremanship." As a result of this attitude, broadcast licensees have become convinced that they hold a vested interest in their licenses, and any implication to the contrary is considered by many to be the equivalent of an attack upon motherhood. This attitude has led to program policies in which commercial value takes priority

2. *Allen B. Dumont Laboratories v. Carroll*, 184 F.2d 153 (3rd Cir. 1950).

3. An applicant is required to ascertain the community needs of its proposed service area and to design programming to meet those needs. The FCC looks with favor on certain types of programming, i.e., news, public affairs, instructional, agricultural and religious programs, and editorials. This is especially true if the programs are produced by the station.

over the public interest. The result of such policies is the broadcast of programs containing excessive portrayals of violence and horror such as "Bonnie and Clyde" and "Rosemary's Baby."

The FCC's Position

An application for renewal of a license does not require any details regarding the content of the applicant's past or proposed programming. Rather, the applicant need only recite the percentages of air-time devoted to certain types of programs and describe some of the programs which meet the needs of the service area. Thus, the FCC is basically unaware of the content of a licensee's programs unless complaints are filed. The FCC's lack of concern with this vital area of interest is professedly due to the first amendment, and Section 326 of the Communications Act of 1934. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press," and Section 326 of the Communications Act provides:

Nothing in this chapter [Act] shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.⁴

There is no question that the communication of ideas by means of radio and television is a form of expression entitled to protection by the first amendment from governmental abridgement.⁵ It is also readily apparent that the Communications Act prohibits "censorship" by the FCC. The FCC has held that complaints concerning offensive programming by a broadcast licensee are not an impediment to the grant of an application for renewal of a license.⁶ This holding is not surprising since the FCC has steadfastly maintained, in decisions and policy statements, that it does not have the legal power to supervise the program content of its licensees. It is submitted that the FCC has much broader powers than it cares to admit

4. Communications Act of 1934, 47 U.S.C. § 326 (1970).

5. *United States v. Paramount Pictures*, 334 U.S. 131 (1948).

6. *Pacifica Foundation*, 15 P & F RADIO REG. 2d 817 (1969).

and that the FCC may lawfully supervise certain types of program content.

To digress a moment, in 1960 the Attorney General of the United States released a report to the President entitled "Deceptive Practices in the Broadcasting Media."⁷ A portion of this report dealt with "rigged" television quiz shows, "payola," and the FCC's powers to curb abuses in these areas. The Report, noting the provisions of the first amendment and Section 326 of the Communications Act, stated that:

. . . [A] review of existing authority indicates that the Commission may, without running afoul of constitutional or statutory safeguards of freedom of speech, give considerable weight to advertising practices and programming in the context of licensing, rule making or investigative proceedings. *It is true that the statutory provision relating to censorship and the First Amendment delineate the outer limits of the Commission's powers. Yet, within those limits considerable scope is left for effective regulatory action.* (Emphasis added).⁸

Shortly after the Attorney General's Report, the FCC released a policy statement in which it proposed a number of rules and regulations to control quiz shows and "payola."⁹ In this policy statement, the FCC detailed the limitations imposed upon it by the first amendment and Section 326 of the Communications Act, and said:

Although the Commission must determine whether the total program service of broadcasters is reasonably responsive to the interests and needs of the public they serve, *it may not condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program.* To do so would "lay a forbidden burden upon the exercise of liberty protected by the Constitution." (Emphasis added).¹⁰

The FCC's view of its control over programming was reiterated later in the statement:

7. 19 P & F RADIO REG. 1901 (1960).

8. *Id.* at 1920.

9. Report and Statement of Policy *Re: Commission En Banc Programming Inquiry*, 20 P & F RADIO REG. 1901 (1960).

10. *Id.* at 1907, *citing* *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1941).

. . . [T]he Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that the fulfillment of the public interest requires the free exercise of his independent judgment. Accordingly, the Communications Act "does not essay to regulate the business of the licensee." *The Commission is given no supervisory control of the programs, of business management or of policy . . . Congress intended to leave competition in the business of broadcasting where it found it . . .* (Emphasis added).¹¹

An attempt was then made by the FCC to clarify its limited powers under the public interest standard:

In view of the fact that a broadcaster is required to program his station in the public interest, convenience and necessity, it follows despite the limitations of the First Amendment and Section 326 of the Act, that his freedom to program is not absolute. The Commission does not conceive that it is barred by the Constitution or by statute from exercising any responsibility with respect to programming. It does conceive that the manner or extent of the exercise of such responsibility can introduce constitutional or statutory questions. *It readily concedes that it is precluded from examining a program for taste or content, unless the recognized exceptions to censorship apply: for example, obscenity, profanity, indecency, programs inciting to riots, programs designed or inducing toward the commission of crime, lotteries, etc.* (Emphasis added).¹²

Thus, the FCC admitted that it does have certain "responsibilities" with respect to programming relevant to the determination of whether a licensee is operating in the public interest, convenience, and necessity, but it has used the specter of "censorship" to avoid its "responsibilities" except in certain unique situations where moral indignation appears to have entered the decisional process. For example, in 1931, the FCC's denial of a renewal of a radio license, in part due to the licensee's use of its facility to diagnose listener's ills and prescribe treatments, was upheld since the con-

11. *Id.* at 1908, citing *Federal Communications Comm'n v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940) (a case dealing with economic competition rather than whether or not a type of programming was in the public interest).

12. *Id.* at 1909.

duct was inimical to the public health and safety.¹³ In *Trinity Methodist Church, South v. Federal Radio Commission*,¹⁴ the court held that the FCC's denial of an application for renewal was not a violation of the first amendment where the licensee had allowed frequent defamatory attacks on various individuals. In 1955, the FCC held that it was not "censorship" to deny a license renewal application on the basis of the applicant's overall operation, which included the broadcast of programs in aid of an illegal activity (off-track betting on horse races).¹⁵ In another decision, the FCC held that consideration would be given to an applicant's past communications media activities which showed a pattern of unfair treatment of social and religious groups.¹⁶

An almost amusing decision is *Palmetto Broacasting Co.*,¹⁷ in which the FCC denied renewal due to the licensee's broadcast of coarse and vulgar material. The question of whether the broadcasts were obscene, which would have been a clear violation of the law, was never reached. Rather, the FCC determined that the material was "patently vulgar," and, in defense of its holding, stated:

Inasmuch as record-disc jockey type of entertainment is so popular and widespread on radio, the argument comes down to this: Radio could become predominantly a purveyor of smut and patent vulgarity—yet unless the matter broadcast reached the level of obscenity under 18 U.S.C. § 1464, the Commission even though charged to issue licenses only when it is in the public interest, would be powerless to prevent this perversion or misuse of a valuable national resource.¹⁸

Some Later Developments

A clear abdication by the FCC of responsibility for television violence occurred in 1968. In June of that year, the Chairman of the

13. *KFKB Broadcasting Ass'n v. Federal Radio Comm'n*, 47 F.2d 670 (D.C. Cir. 1931).

14. 62 F.2d 850 (D.C. Cir. 1932).

15. *Community Broadcasting Serv.*, 13 P & F RADIO REG. 179 (1955).

16. *WBNX Broadcasting Co., Inc.*, 4 P & F RADIO REG. 105 (1948). *Contra*, *National Anti-Vivisection Society*, 2 P & F RADIO REG. 2d 166 (1964) (which dealt with complaints against the telecasting of bull fights); *Station KTTM*, 4 F.C.C.2d 190, 7 P & F RADIO REG. 565 (1966) (which was concerned with the broadcast of anti-Semitic material). *See also*, *Appalachian Broadcasting Corp.*, 11 P & F RADIO REG. 1402 (1957).

17. 23 P & F RADIO REG. 483 (1962).

18. *Id.* at 485.

FCC wrote a letter to the Honorable Milton Eisenhower, Chairman of the National Commission on the Cause and Prevention of Violence, in which the Chairman expressed the FCC's concern with repeated charges that television violence "contributed to a popular acceptance of violence as a more or less normal part of our life," and said the FCC was reluctant to undertake research on the subject since it was "the licensing agency for the stations involved and . . . hesitant about encroaching on their freedom of program choice." The Chairman urged Mr. Eisenhower to study the problem.

The Violence Commission accepted the Chairman's offer of cooperation and submitted a series of questions concerning the subject to the FCC on October 3, 1968. On November 6, 1968, the FCC replied by letter to Mr. Robert K. Baker, Co-director of the Commission's Media Task Force. In that letter, the Violence Commission's questions and the FCC's responses thereto were set forth as follows:

* * * *

1. Does the Commission [FCC] have any evidence that the portrayal of violence in entertainment programming may increase the probability that viewers of such programs will engage in violent behavior? If so please identify the source of the evidence (hearings, academic studies, etc.) and a two or three sentence summary of the evidence.

The Commission [FCC] itself has conducted no research into this subject. See our letter to Chairman Milton Eisenhower, dated June 12, 1968, FCC 68-622. It is, of course, aware of studies which have been made in this area. We believe that these studies are inconclusive and that they have already been identified to your Commission.

2. What is the Commission's [FCC's] policy with regard to the portrayal of violence in entertainment programming, by what procedures is that policy implemented, and how effective are these procedures?

The Commission [FCC] has adopted no policy directed to this particular aspect of programming. As we stated in the above cited letter, we have been reluctant to undertake research in this area because we are the licensing agency for the stations involved and are hesitant about encroaching on their freedom of program choice; on the other hand, we believe that this is a matter warranting thorough study by your Commission and others. See also, response to A-3 below.

3. If there were evidence that the portrayal of violence on television or that certain modes of portraying violence increased the probability that some viewers would behave in an unlawful and violent manner, does the Commission [FCC] have *any* authority to impose *any* sanctions for the purpose of eliminating, reducing, or regulating portrayals of violence in entertainment programming? For example, would it be appropriate for the Commission [FCC] to consider the violent content of program material in a license renewal or rule making proceeding?

As you know, Section 326 of the Communications Act of 1934, as amended, prohibits consorship [*sic*] of broadcast matter by the Commission. On the other hand, the Act provides that the Commission shall grant or renew broadcast applications only if it finds that the public interest, convenience, or necessity will be served thereby. While these two provisions provide the framework for consideration of your question, it is, we believe, difficult to answer that question in an abstract context. Any sanction imposed by the Commission upon the basis that particular program content was likely to have harmful effects would raise, as a general matter (e.g., excluding matters such as obscenity, lotteries, etc.), serious questions under both Section 326 and the Constitution.

We stress that the licensee should be aware of the problem posed by his portrayal of violence and that he should take it into account in his programming judgments. Continuing study efforts in this area are clearly appropriate.¹⁹

It is readily apparent that the FCC did not want to answer the difficult questions raised by the Violence Commission and avoided doing so by weakly characterizing them as "abstract." The sheer hypocrisy of the FCC in this matter is revealed by the fact that, in 1968, the Court of Appeals for the District of Columbia Circuit, in *Banzhaf v. Federal Communications Commission and United States*,²⁰ held that the FCC's determination that anti-smoking messages were entitled to equal time with cigarette commercials under the "Fairness Doctrine" did not violate either the first amendment or Section 326 of the Communications Act. The court noted that:

19. Letter from the FCC to Mr. Robert K. Baker dated November 6, 1968.

20. 405 F.2d 1082 (D.C. Cir. 1968). In general the "Fairness Doctrine" requires licensees to provide equal time for opposing views concerning controversial public issues and personal attacks. Characteristically, the FCC refused to require licensees to provide the time and left it up to individual stations.

If agency power to designate programming "not in the public interest" is a slippery slope, the Commission and the courts started down it too long ago to go back to the top now unless Congress or the Constitution sends them. But Congress has apparently specifically endorsed this understanding of the public interest. *And whatever the limits imposed by the First Amendment, we do not think it requires eradicating every trace of a programming component from the public interest standard.*

The power to refuse a license on grounds of past or proposed programming necessarily entails some power to define the stations' public interest obligations with respect to programming. (Emphasis added).²¹

Banzhaf held that the "public health" is included within the "public interest" standard, that cigarette smoking is dangerous to the public health, and, that, therefore, the FCC's ruling was permissible. In dictum, the court stated that the FCC rarely used its power to specify material which the public interest forbids to be broadcast.²²

Thus, when the FCC replied to the Violence Commission's questions in 1968, it knew that it could curtail television programming which is injurious to the "public health" without running afoul of the first amendment and Section 326 of the Communications Act. Notwithstanding that knowledge, the FCC refused to state that it had the authority to impose sanctions designed to eliminate, reduce, or regulate television violence in its response to the Violence Commission's inquiry.

To make matters worse, the FCC completely disregarded the Violence Commission's findings in September, 1969, that, "a constant diet of violent behavior on television has an adverse effect on human character and attitudes," and that, "violence on television encourages violent forms of behavior, and fosters moral and social values about violence in daily life which are unacceptable in a civilized society."²³ The Commission also concluded that television is a "contributing factor" in the causation of violence in our society.

21. *Id.* at 1094-95.

22. *Id.*

23. Commission Statement on Violence in Television Entertainment Programs (released September 23, 1969). The Commission's conclusion is not surprising in view of the laboratory and clinical evidence to the same effect. See, e.g., LARSEN, VIOLENCE AND THE MASS MEDIA (1968); WERTHAM, A SIGN FOR CAIN—AN EXPLORATION OF HUMAN VIOLENCE (1966); Bandura,

Less than one month after the findings of the Violence Commission were made public, the Foundation to Improve Television filed a petition with the FCC, requesting amendment of the FCC's Rules and Regulations that would add sections designed to curb television violence and horror. Eleven months later, on September 23, 1970, the FCC sent a letter to the Foundation stating that the Surgeon General of the United States was studying the problem of television violence, and that the FCC was awaiting the results of that study. The Surgeon General's advisory committee had been appointed at the request of Senator John O. Pastore as a result of hearings he had chaired concerning television sex and violence. Those hearings' objectivity was questioned since the networks were allowed to censor committee members of whom they did not approve. Nonetheless, on January 19, 1972, the committee transmitted its report to the Surgeon General. The report concluded that viewing violence on television is conducive to an increase in aggressive behavior in children who are predisposed towards violence. Thus, even a committee screened by the networks concluded that television violence is detrimental to some children. In this regard, it should be stressed that, prior to the report, the networks claimed that television violence was good for children since it provided a harmless release for their aggression, or, alternatively, that there was no proof that it was bad for children.

It is clear that television violence and horror is inimical to the health and welfare of certain children who are predisposed toward violence at the very least, and, quite probably, adversely affects many more child viewers. Despite these well-known facts, the FCC has done nothing to curtail the broadcast industries' propensity to saturate television with violence and horror.²⁴ In contrast, the Chairman of the FCC was quoted as saying that the FCC must create guidelines to keep movies that deal openly with sexual topics off of

Imitation of Film-Mediated Aggressive Models, 66 J. OF ABNORMAL & SOCIAL PSYCHOLOGY 3-11 (1963); Bandura, *Transmission of Aggression Through Imitation of Aggression Models*, 63 J. OF ABNORMAL & SOCIAL PSYCHOLOGY 575-82 (1961); Berkowitz, *Film Violence and the Cue Properties of Available Targets*, 3 J. OF PERSONALITY SOCIAL PSYCHOLOGY 525-30 (1966); Lovacs, *Effect of Exposure to Symbolic Aggression on Aggressive Behavior*, CHILD DEVELOPMENT 32, 37-44 (1961); Mussen and Rutherford, *Effects of Aggressive Cartoons on Children's Aggressive Play*, 62 J. OF ABNORMAL & SOCIAL PSYCHOLOGY 461-64 (1964).

24. Even the Surgeon General's committee recognized that the rate of violent episodes on television remains fairly constant at about eight per hour and that Saturday morning cartoon programs are saturated with violence.

home television screens.²⁵ It appears that the FCC is more concerned with that old bogeyman "SEX" than with a proven instrument of harm—television violence.

Other Viewpoints

The FCC's lack of concern with television violence and horror is not shared by other countries. The Canadian Broadcasting Corporation has cancelled several programs produced in the United States since they were excessively violent. Similar concern has been expressed in Great Britain due to a report of a government investigating committee emphasizing that violence on television can be unhealthy and that the difficulties of a frustrated, maladjusted or isolated individual can be intensified. The Australian Broadcasting Control Board has cracked down on television violence, and the Board of Censors in Germany has exhibited greater concern with the depiction of brutality and horror on television than with the depiction of sexual conduct. The United States alone condones daily exposure to its children of television violence and horror.

An Opinion

We live in violent times. In the past decade, the United States has suffered unprecedented increases in acts of violence. The atrocious crime has become commonplace. Even the bestial acts of a Charles Manson or a Juan Corona have little shock value. It would be naive to claim that television violence has precipitated the domestic ills that plague the country, but there has been a steady stream of televised violence and horror for many, many years, and a significant body of knowledgeable people believe that the constant viewing of violence on television predisposes some individuals towards violence, and creates an immunity to real-life violence in others.²⁶ These are reasons enough for the FCC to act. "It is the right of the viewers and listeners, not the right of broadcasters, which is paramount," and, "difference in the characteristics of new media

25. Washington Post, Dec. 2, 1969 at 1A, col. 1. The author is unaware of any studies showing that the viewing of "blue" movies is harmful to anyone's mental health.

26. Recently a woman in Boston was forced to pour gasoline on her body and then was set on fire by her attackers. The press drew a comparison of this scene to the film "Fuzz" which contained a similar scene allegedly taking place in Boston, and which was televised in Boston shortly before the attack took place. In Florida, a man was recently strangled with an instrument similar to one featured in the ABC series "Kung Fu."

justify differences in the First Amendment standards applied to them."²⁷ Children need the protection of a responsible FCC.

As recognized by Congress, the Courts, and the Attorney General, the FCC possesses broad regulatory power over television program content, but has exercised it sparingly. Whatever the reason for its abstinence, the FCC should re-examine its policies and practices with the view of becoming a more effective instrumentality of the public interest. It is incumbent upon the FCC to make a determination that television programming featuring excessive violence and horror is not in the public interest, and to curtail the broadcast of such programming.

27. *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 386, 390 (1969).