

Nicholas Johnson on television

Beyond The Fairness Doctrine

Whatever the First Amendment may require of the mass media, it is not satisfied by the opportunity of every citizen to start his own television network. Nor do its rights extend only to the lucky trustees of the few stations that do exist. As the Supreme Court said in the *Red Lion* case, "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all."

The *Red Lion* case was the Supreme Court's unanimous rejection of the broadcasting industry's argument that the "Fairness Doctrine" was unconstitutional. In finding the Fairness Doctrine constitutional, the court went beyond it to lay the groundwork for the newly emerging doctrine of "access" — allowing individual citizens to get on the air and express themselves.

The Fairness Doctrine is extremely limited as an extension of the First Amendment. All it achieves is avoidance of the grossest abuses: the use of a station as an instrument of propaganda for one point of view. It does not — so far — guarantee any individual a right to put on his own program or commercial. The only areas of personal access presently are the "Equal Opportunity" doctrine (during campaigns if one candidate gets non-news time his opponents can demand an "equal opportunity"), and the "Personal Attack Doctrine" (anyone personally attacked has a right of reply). The Fairness Doctrine merely provides that a station must cover "controversial issues of public importance," and that when it does so, it must present all points of view. It is enforced in random fashion by citizen complaints (often inadequately supported); the FCC generally gives the broadcaster the benefit of the doubt as to the balance in his programming if he has made any effort at all; there is no sanction except that the broadcaster present the omitted point of view; and —

the most severe limitation — the broadcaster has almost sole discretion as to by whom, and how, the views will be presented.

The doctrine of access got its first boost in a case involving WTOP in Washington, and a group of antiwar businessmen (BEM). The businessmen wanted to buy time for antiwar "commercials." WTOP refused. The FCC sustained the station (over my dissent). The Court of Appeals reversed. The Court did not go so far as to say the station had to sell the time to BEM; but it did say that it couldn't refuse to sell the time to any and all such groups just because they are selling ideas rather than products. This is a tremendous step forward, but is still a long way from "participatory television."

A more direct application of "access" may come to life on cable television. In the FCC's historic August 5, 1971 Statement of Policy to Chairmen Pastore and MacDonald, it provides for the right of all comers to buy time on cable systems. If the rates are kept low, creative evasions of the spirit of the rule don't evolve, an adequate quantity of half-inch video taping equipment is made available, and the number of channels is in fact expanded to handle demand (as the rules contemplate), America could emerge as the first nation to brave the experiment of turning the mass media over to the masses.

The problem with the reactionary wing of the broadcasting industry is that it not only opposes the Fairness Doctrine, it also opposes access, and cable television as well. It is hard for one to draw any other conclusions from such a position than that the industry is mindful of the power it has and doesn't want to relinquish it.

President Nixon's Director of Telecommunications Policy, Dr. Clay ("Tom") Whitehead, has proposed abolishing the case-by-case fairness doctrine, creating paid access to television, and deregulating radio. Paid access gives me no trouble (he means access to the commercial time, as available), but I've never learned what "deregulation" of radio (long an industry rallying cry) really means. Certainly all would benefit by requiring a little less bureaucratic paper-shuffling for "Mom and Pop" daytime-only radio stations in the mountain states than for network-owned television stations in New York City. But everytime I've proposed substituting competition for regulation, I've encountered little but anguished cries from

industry (foreign-built ships for our merchant marine; more equipment suppliers for telephones; cable television for broadcasting). If all I'm offered is a choice between monopolistic privilege with regulation and monopolistic privilege without regulation, I'm afraid I have to opt for the former.

My own enthusiasm for the Fairness Doctrine has never been unqualified. I don't like the government being involved in that level of programming detail; the rationale for individual decisions can become convoluted and cumbersome; the public doesn't get that much from it anyway. But before I'll vote to abolish it, somebody's going to have to tell me what's in the grab bag I get in exchange.

Where are we headed? Total access in cable can mean a lot ten to twenty years from now. Limited access to commercial-over-the-air stations is a step forward. Limitations on stations' censorship practice are called for (at least to the extent of prohibiting the censoring of nonlibelous statements of guests speaking on the subjects for which invited).

I've long proposed the "one-third prime time rule." (Each network would be required to program one-third of its prime time with material other than the current lowest-common-denominator sponsored fare. Properly staggered, viewers would always have the alternative programming of one commercial network to choose from.) The FCC's three-hour prime-time rule (network affiliates can accept only three hours of network programming per night) is a small step consistent with this proposal.

Regularly scheduled, free letters-to-the-editor can be effective. CBS used them on "60 Minutes" to good effect. Mike Shapiro, station manager of WFAA-TV in Dallas, has for eleven years been reading critical letters from viewers over the air and answering them. This feature gets great ratings, and WFAA-TV plans syndication of the feature in other areas of the country.

More and more stations are experimenting with real access time, although most are educational. WGBX-TV in Boston, and John Montgomery's Iowa network, offer open time to all comers. New York City's Channel 13 has a program called "Free Time." Several commercial TV stations in California have, as the result of effective citizen pressure, begun offering time for "Free Speech Messages" to ordinary citizens with something they want to say. The

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they're now silent (say, midnight to 6:00 a.m.)? Why not require managers to share time so long as there are more qualified individuals or groups in any community than there are available stations?

No matter what the ease of "access," no democratic system will work unless we begin to provide ourselves – and our children – as much training and equipment for making radio and television programs as for writing.

The mass media can be made to work in ways that bridge the purposes of the First Amendment and the technological and economic requirements of modern day television. We needn't – necessarily – abolish commercial television to get there. But it's going to require a lot of imagination, action by public interest law firms, at least a little bit of cooperation from the industry, understanding by the public and good luck.

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Avco Corporation filmed one-minute messages by selected citizens for its commercials on a golf tournament it sponsored. In some cases, programming by and for minorities has allowed relative autonomy for the participants.

Given the lack of direct access, who owns the stations is extremely important. Radio and television station ownership – especially in the larger markets – is virtually locked up. Far less than 1 percent of the nation's stations are owned by members of minority groups. This makes the effort for minority, community and cooperative, non-profit ownership of cable systems especially important.

Of course there is no reason why a station need always be run by the same manager or group. England's most profitable station (in London) is run during the week by Thames Television and on weekends by London Weekend. There are stations that share time here, too. Why not encourage such arrangements – especially for anyone inclined to keep stations on the air during hours