New Video Technologies in the United States: Regulatory and Intellectual Property Considerations

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by Michael BOTEIN *

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INTRODUCTION

During the last few years, an increasingly shrill litany of "deregulation" has been heard in both Europe and the United States. Unfortunately, however, the phrase loses something in translation from one legal system to another. In the European context, deregulation generally means breaking up a governmental monopoly; it contemplates entry from the private sector, not abdication of public control. In the United States, however, deregulation has come to mean terminating all government control (except where natural monopolies exist), and allowing the private economic "marketplace" to govern. The results of marketplace control — whether death, famine or shoddy children's television programming — are irrelevant in the great Adam Smithian scheme of things.

The Federal Communications Commission (FCC) has been one of the most active U.S. administrative agencies in embracing deregulatory goals. Its basic assumption is that effective competition makes regulation of telecommunications unnecessary. Instead, it believes competition among rational profit-maximizing entrepreneurs will produce consumer satisfaction. This conclusion in turn leads to the regulatory imperative

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of creating — or at least encouraging — maximum feasible competition within the various telecommunications industries. The role of governmental intervention thus is seen to be creating a "level playing field" on which firms can compete.

Whether regulation can produce these market conditions is far from clear. As Representative Tim Wirth, Chairman of the House Subcommittee on Telecommunications, once quipped, "there's no such thing as a level playing field or airline food" (1). Part of the problem, of course, is that the U.S. government traditionally has had two distinct — and basically inconsistent — ways of promoting competition.

The first approach is simply to impose identical restrictions upon all potential players. This rationale is eminently fair, if all potential players have reasonably comparable abilities. If they do not, however, this approach runs into both political and moral problems. After all, the public and its representatives get a bit upset at the sight of a 240 pound professional football player tackling a 140 pound high school athlete. It thus is tempting to adjust any game's rules so that everyone can play.

Precisely because of this very human tendency, a 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

(1) Remarks of Representative Timothy E. Wirth, in New York City, January 10, 1983.

for jockeys, and separation of professional from amateur athletes. Indeed, much of the New Deal's sometimes murky philosophy derived from this principle. This approach naturally is heresy to any ideologically pure deregulator in the U.S., since it injects government into the marketplace. Nevertheless, it routinely creeps into administrative decisionmaking, because of demands for equity. Classic examples in U.S. telecommunications policy include the now declasse anti-siphoning rules (which prevented cable or subscription television from competing with broadcast television to buy motion pictures or sporting events) (2) and the still operational multipoint distribution service (MDS) rules (which prohibit an MDS operator from controlling more than half of its programming) (3).

The current FCC purports to have used only the first approach in bulldozing 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 and the Congress' premises, by analyzing the consistency of their current regulatory and legislative schemes.

This piece thus begins by reviewing the FCC's policies as to the new video technologies in several different areas: ease of entry; ownership restrictions; jurisdictional bases; degree of federal preemption; and

(2) E.g., Home Box Office, Inc. v. FCC, 567 F2d 9 (D.C. Cir.), cert., denied 434 U.S. 829 (1977).
(3) 47 C.F.R. § 21.900 (1984).

content regulation. These areas merit consideration because they impact heavily upon each medium's ability to compete effectively. This classification scheme is suggestive rather than scientific, however, since no data 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 article also considers differences among the media in protection of intellectual property rights, through the copyright and "anti-signal-piracy" statutes. (In this respect, the anti-piracy laws are duplicative of and perhaps redundant to the copyright statutes. As noted in Section III, however, the anti-piracy laws often provide more severe remedies than the Copyright Act.). Because of these laws' disparate statutory bases, they affect the new media in haphazard ways. 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).

By way of brief description, MMDS uses high-frequency microwave signals to provide a dozen or more channels of programming to subscribers — hence its nickname of "wireless cable". Both STV and LPTV operate on conventional broadcast frequencies, usually in the UHF band;

STV stations scramble their signals to offer "pay" programming, while LPTV stations broadcast either pay or advertiser-supported programming. DBS apparently will use high-powered transmitters on geosynchronous satellites to provide a mix of pay and advertiser-supported service.

The focus on these media obviously excludes several other electronic distribution systems. Videocassette recorders (VCRs) and videodisc (VDP) players offer programming similar or even identical to that available from the other new video media — particularly in terms of pay programming. The FCC cannot — and the Congress has chosen not to — regulate VCRs or VDPs except to prevent electrical interference with broadcast stations; and these media do not receive any special legal treatment, except for the courts' limited immunization of VCRs from the copyright laws. There thus is little basis for comparing them to the other media. Nevertheless, it is increasingly apparent — particularly in nations with high VCR penetration, such as England — that VCRs compete for audiences with both new and conventional media.

Similarly, this analysis does not consider distribution of 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 most probably will do so in the near future, thus complicating any comparison. 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 — have some competitive impact on each other.

Finally, some delivery systems simply are too new to evaluate. For example, the Operational Fixed Service (OFS) might evolve into either a private or a mass medium, and its development might affect its copyright status; the FCC seems quite unclear about the ways in which OFS will develop (4).

With these considerations in mind, it may be useful to analyze the FCC's regulatory approaches to — and the Congress' legislative treatment of the intellectual property rights of — the new video media. On many points, the most relevant observations focus not on what the FCC and the Congress have stated, but rather on what they have failed to say.

II

THE FCC'S REGULATORY POLICIES

Although perhaps desirable from a logical point of view, completely uniform regulation often is either politically or pragmatically infeasible. After all, most potential competitors are not comparable in terms of market performance. A realistic regulatory goal in many cases is to

(4) *First Report and Order*, 86 FCC 2d 299, 308 (1981).

equalize the effects of regulation on competitors. It thus is less than surprising that the FCC's deregulatory treatment of the new video technologies shows inconsistencies.

A. — PROCEDURAL INHIBITIONS ON ENTRY

Since most of the new video technologies are infant industries, there are few absolute barriers to entry. In all of the over-the-air services considered here, a substantial amount of spectrum is available for initial FCC licensing, even if there is not enough for every potential user. Moreover, only a few absolute legal bans — such as prohibitions on alien ownership or cross-ownership — currently exist, and the Commission is attempting to abolish most of these.

But a variety of procedural requirements may inhibit or delay entry. And these procedural snares vary significantly from one medium to another. To a certain extent, of course, this situation results from differences in the underlying statutory and case law. For example, conventional broadcast television, LPTV, STV and any other broadcast uses are subject to a wide variety of statutory and judicial doctrines which evolved during the 1950's and 1960's, when the FCC was focusing most of its regulatory attention on broadcasting. Moreover, the effect of this historical accident may be exaggerated somewhat by the vagaries of the Commission's current regulatory program. Because of both political and judicial opposition, the Commission has found it harder to repeal existing rules than to limit new ones.

Three procedural rules seem particularly noteworthy.

First, the Commission's current license application processes require applicants for some services to undergo substantially more steps than applicants for other services. For example, the Commission has proposed eliminating the traditional requirement of a "construction permit" — i.e., a preliminary authorization to build a station — in processing applications for MMDS stations (5). Applicants for conventional broadcast, STV facilities or LPTV stations, however, apparently still must secure a construction permit before applying for a license. Applicants for DBS facilities must obtain a construction permit, launch authority, and a license.

To be sure, legal and historical reasons explain many of these procedural differences. The Communications Act requires broadcasters to secure a construction permit before applying for a license (6), and the Commission has operated this way for fifty years. Moreover, implementation of DBS service requires coordination with other government authorities, which control the U.S.'s satellite launch facilities. Alternatively, the Commission's action might flow from an assumption that MMDS' impact on a national scale will be minimal, while DBS's might be substantial. Given the failure of all U.S. DBS entrepreneurs to date, this assemption would be highly questionable. Nevertheless, the requirement of construction permits for DBS but not for MMDS arguably

(5) *Notice of Proposed Rule Making*, 54 RR2d 881, 889 (1983).
(6) 47 U.S.C. § 319 (1976).

To begin with, it may be useful to review briefly the prerequisites to copyright protection for any type of programming material. In order for works to be copyrightable under the 1976 Copyright Revision Act, they mut be "fixed in any tangible medium of expression... from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (68). If sufficiently fixed, programs would be classified as "motion pictures and other audio-visual works...", the latter of which are defined as:

> *works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, such as films or tapes, in which the works are embodied* (69).

Realistically, of course, this usually means just that a film or tape of a program must exist. The Act specifically provides that a "live" event is sufficiently "fixed" to acquire copyright protection if a tape or other copy of it is made at the same time that it is transmitted (70). Most U.S. broadcast and other stations thus make an audio or video tape of all live programming. Beyond these general requirements, however, the extent of copyright and other protection varies dramatically from one medium to another.

(68) 17 U.S.C. § 102 (1982).
(69) 17 U.S.C. § 101 (1982).
(70) 17 U.S.C. § 101 (1982).

Questions may exist as to the Commission's power to license cable systems, however, since Title III's licensing requirements extend only to over-the-air transmissions — which cable does not use — and the Cable Act apparently creates no new FCC jurisdiction. The Commission thus would need to seek legislation, in order to impose a licensing requirement on all of the new video media.

E. — PROGRAM CONTENT CONTROL

Even aside from First Amendment considerations, regulation of any medium's programming has a number of practical consequences. On a purely non-economic level, the existence of content control affects managers' self-perceptions and behaviour. Newspaper editors place more emphasis upon the message than the medium, while telephone operating company executives reverse these priorities. On an economic level, restraints on speech affect decisions as to whether or not to take a particular risk. For example, the Playboy Channel presumably never would have come into existence had the FCC prohibited frontal nudity on cable.

The Commission traditionally has regulated programming only on broadcast services, since by definition a common carrier cannot control — and thus be responsible for — the content of the messages which it transmits. In turn, regulation of broadcast program content has taken two primary forms: first, prohibitions on certain types of

of broadcast stations which a single entity may own (24). Yet the Commission has disavowed multiple ownership restrictions for MMDS, LPTV, DBS or cable (25). In theory, one entity thus could own all MMDS, DBS and cable systems in the United States. Although this may not occur, oligopoly may characterize ownership of the new video media. The Commission's laissez-faire postures on both common and cross-ownership may have significant implications for the future, depending upon how the new video technologies develop.

The sharp contrast between the FCC's strict restrictions on conventional radio or television stations and its relaxed attitude towards the new video media seems to be largely a result of history. After all, the Commission has liberalized its multiple ownership restrictions for radio and television, partially in response to arguments that the new video media make strict multiple ownership rules unnecessary (26).

In terms of alien ownership, the Commission faces a somewhat more complicated legal problem. Section 310 (a) of the Act prohibits a foreign firm from owning more than twenty-five percent of the stock in a U.S. broadcast station or common carrier (27). By its terms, the

(24) 47 C.F.R. § 73.636 (1983).
(25) E.g., *Report and Order*, 52 RR2d 257 (1982).
(26) *Notice of Proposed Rulemaking*, RR2d (1983).
(27) 47 U.S.C. § 310 (a) (1976).

might allow an MMDS station to go on the air substantially before a competing DBS operation.

A similar phenomenon may exist as to petitions to deny an existing license or competing applications for the same frequency. (Petitions to deny represent situations in which one party claims that another is unqualified to operate an over-the-air facility; competing applications involve situations in which two or more applicants claim the right to operate the same broadcast facility.)

Under the *Carroll* doctrine (7), the Commission must allow an existing broadcaster to oppose a new license application by showing that grant of another license would make operation of both stations unprofitable. The *Carroll* rule may be unwise, since it relies solely upon economic projections. But until the courts disavow the doctrine, it presumably would apply to conventional broadcast television applications. At the same time, the Commission has indicated that it will not apply *Carroll* to LPTV (8) and DBS (9) applications. The Commission's reasoning may be that neither LPTV nor DBS is likely to have a significant impact upon conventional television broadcasting. But it may be questionable whether the Commission may use a general policy statement to avoid case-by-case adjudication (10). The District of

(7) *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).
(8) *Report and Order*, 51 RR2d 476, 507 (1982).
(9) *Report and Order*, 51 RR2d 1341, 1352-53 (1982).
(10) E.g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); FPC v. Texaco, Inc., 377 U.S. 33 (1964).

Columbia Court of Appeals upheld the FCC's refusal to apply *Carroll* to competition between DBS and conventional broadcasting (11). Whether the same result would hold as to two competing DBS systems, though, is not clear.

The Commission may have good reasons for not applying *Carroll* to the new video technologies. But the Commission has cautioned LPTV operators against causing electrical interference to either MDS or cable operations (12). After all, *Carroll* never may have made much sense because of its clearly anti-competitive consequences, and it presumably makes even less sense when many program sources are available. The continued applicability of *Carroll* to broadcasting but not to the new video technologies seems a bit anomalous, however, unless the Commission implicitly is stating that it will not enforce the doctrine as to broadcasting either — a position also with questionable legal validity.

A third procedural difference arises from the Commission's procedure for resolving competing applications for the same frequency. Traditional case law required the Commission to hold "comparative hearings" (13), which are infamous for their Dickensian length and cost, to pick the best qualified applicant. Under a recent amendment to the Communications Act, however, the Commission can resolve comparative

(11) *National Ass'n of Broadcasters v. FCC*, F2d (D.C. Cir. 1984).
(12) *Report and Order*, 51 RR2d 478, 497-499 (1982).
(13) *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

proceedings by holding lotteries to pick a licensee by chance. Although the Commission has proposed a lottery procedure for conventional broadcast television licenses, it has not implemented it (14). But it has applied the lottery procedure to applications for LPTV and MMDS (15). As a result, an applicant for a conventional broadcast television station must wade through years of litigation and thousands of dollars in legal expenses, while an LPTV or MMDS operator would receive comparatively speedy and certainly inexpensive processing.

Once again, there may be sound reasons for this situation. Regardless of its deregulatory philosophy, the Commission may find it difficult to depart from almost forty years of experience — albeit rather unsatisfactory experience — with comparative hearings for broadcast stations. Moreover, there simply may be less need for concern about picking the "right" licensee for LPTV and MMDS, because of the public's initially limited use of these services. In addition, the Commission may be the victim of a regulatory lag inherent in disposing of old rules rather than in fashioning new ones.

As is obvious, this analysis omits any consideration of cable television, since cable systems need not obtain a license from the FCC. Instead, a cable operator must file only a "registration statement" when it actually begins operations (16). (Cable operators must obtain licenses

(14) *Memorandum Opinion & Order*, 53 RR2d 1270 (1983).
(15) *Report and Order*, 54 RR2d 107, 145 (1983).
(16) 47 C.F.R. § 76.12 (1983).

to operate microwave relay stations (17), however, which are essential for any large system). At least in theory, a cable operator can begin operations considerably more expeditiously than any of the over-the-air new video media. In reality, of course, most large cable operators have had to wage costly "franchise wars" in order to obtain desirable franchises. For example, New York City granted franchises for Manhattan in 1970, but not for the City's other four boroughs until 1983 — and construction will not be completed until the 1990's. Depending upon the speed of a local franchising procedures, a cable operator thus may face delays as great as, or even greater than those applicable to the other new video technologies.

The new video media thus are subject to different procedural translate into time and money. For example, if an STV operator must go through a lengthy comparative hearing while an LPTV operator need not, the latter will incur fewer expenses than — and be operational before — the former. If a market can support only one over-the-air pay television operation, a group of LPTV operators might foreclose future entry by a potential STV or MMDS operator.

B. — STRUCTURAL AND OWNERSHIP LIMITATIONS

An ownership restriction not only may bar a firm from a market, but also may complicate capital formation through joint ventures and the like. For example, the Congress's abolition of prohibitions on alien

(17) 47 C.F.R. § 78.11 (1983).

ownership of cable television systems in 1974 (18)., brought a significant amount of Canadian capital into the U.S. cable industry. (Ownership limitations have comparatively little impact on acquisition of programming, however, which essentially is a separate transaction. Even though they may not own more than twenty-five percent of a U.S. broadcast station, British programmers have done a brisk trade in the United States.)

The Commission has imposed no new ownership restrictions on the new video technologies and has attempted to avoid most existing ones. Perhaps because of the inherent problems of regulatory lag, however, the Commission's present ownership policies are less than consistent.

The FCC has retained its traditional ban on cross-ownership of a radio station, newspaper, or cable system by a broadcast television station in the same market (19). But it has not imposed similar cross-ownership requirements upon MMDS, DBS, or LPTV. Instead, the FCC merely has reiterated that cross-ownership prohibitions are unnecessary where multiple video sources exist (20). This approach contrasts sharply with traditional cross-ownership prohibitions. On the one hand, a conventional television station may not acquire a radio station in its

(18) *Notice of Proposed Rule Making*, 56 FCC 2d 159, 160 n. 7 (1975).
(19) 47 C.F.R. § 73.636 (1983).
(20) E.g., *Report and Order*, 51 RR2d 476, 486 (1982).

market without an FCC waiver (21). On the other hand, it is perfectly free to own one or more MMDS, DBS and LPTV operations in the same area — even though the latter three operations ultimately may attract a larger share of the audience than one radio station.

There may be an argument in favor of allowing local cross-ownership of MMDS, DBS, LPTV and cable operations in the short run; aggregation of these media arguably may create countervailing power to local broadcast television stations and newspapers. But the FCC apparently has not taken this approach, because it allows conventional television stations to own MMDS and DBS — but not cable (22) — operations in their markets. Similar arguments exist for allowing cable/telephone cross-ownership (23).

Conversely, the Commission's policies do not anticipate future growth by the new video technologies. For example, cable and MMDS eventually may supply the vast majority of pay programming. By permitting cross-ownership of MMDS, DBS, LPTV and cable operations, the Commission may be creating the risk that it will need to unscramble this omelet at some point in the future — a job which it has found singularly distasteful with local newspaper cross-ownership of broadcast or cable operations.

Along similar lines, the FCC traditionally has limited the number

(21) *Report and Order* 52 RR2d 401 (1982).
(22) 47 C.F.R. § 76.501 (1983).
(23) See *Notice of Proposed Rulemaking*, 84 FCC 2d 335 (1981).

statute thus does not govern MMDS, DBS, or cable. (If these media elected to operate as broadcasters or carriers, of course, Section 310 (a) would apply.)

If Section 310 (a)'s goal is to restrict foreign control of the U.S. mass media, the current exemption of cable, MMDS, and DBS creates some strange situations. For example, a foreign entity could own an MMDS operation with leased educational microwave channels, because these facilities are neither broadcasters nor carriers. On the other hand, the same company could not acquire more than twenty-five percent of a traditional single-channel MDS operation — which might be folded into an MMDS operation — because the single-channel MDS operation is a common carrier. Since most MMDS systems probably will combine leased educational channels with existing single-channel MDS stations, the present situation has the potential for endless mischief. The Commission could resolve these anamolies by adopting alien ownership restrictions as a matter of discretion — which it once proposed to do for cable television (28) — but has shown no inclination to act.

Finally, the Commission traditionally has reserved both radio and television frequencies for educational and non-commercial uses (29). It has declined to do so, however, for DBS (30) or cable (31). (MMDS

(28) *Notice of Proposed Rule Making*, 56 FCC 2d 159 (1975).
(29) 47 C.F.R. § 73.606 (1983).
(30) *Report and Order*, 51 RR2d 1341, 1347-1348 (1982).
(31) *Memorandum Opinion & Order*, 49 RR2d 1696 (1981).

operations presumably will lease educational microwave channels, thus building in an educational component; and since a number of television broadcast channels already are assigned to non-commercial uses, the present reservation of non-commercial frequencies is inherent in LPTV (32).

The Commission's reasoning seems to be that existing public television stations provide enough educational programming. Although this rationale does not consider the fact that many public stations have poor transmission facilities and small coverage areas, it has some abstract validity. Unfortunately, however, it ignores the fact that public television funding is declining steadily. The Commission's only response to this problem seems to be that MMDS will provide funding for educational microwave stations, by leasing channels from them (33). The amount of such funds is likely to be quite insubstantial, however, unless the MMDS industry grows significantly.

Moreover, the Commission's refusal to reserve non-commercial allocations distributes unequally the burden of providing non-commercial television channels. The Commission's policy reduces the number of commercial channels available to conventional, LPTV or STV broadcasters, and increases the number available to DBS and cable operators. Since this does not reduce the present number of public stations, there may be no advantages or disadvantages in relieving DBS and cable operators from offering non-commercial channels. But some potential commercial broadcasters might suffer by not being able to use conventional, STV or LPTV channels for advertiser-supported and pay programming. The FCC thus has not been consistent in its ownership-

(32) *Report and Order* 51 RR2d 478, 490 (1982).
(33) *Notice of Proposed Rule Making*, 54 RR2d 381, 383 (1983).

policies for the new video technologies. The reasons lie partially with statutory problems and partially with history. If the Commission were to make at least some major changes — e.g., as to alien ownership — it would need to seek amendments to the Act.

C. — JURISDICTIONAL BASES

Under the Communications Act, the FCC has at least five different types of regulatory jurisdiction. First, Title II of the Act gives the Commission power over any "common carrier" — a term which is defined rather circularly as "a common carrier for hire in interstate or foreign communication..." (34). The basic notion of common carriage is comparatively simple, focusing on whether a firm either holds itself out by its business practices or is required by law to provide transmission services to any properly qualified customer. The most common types of communications common carriers are telephone companies.

Second, the Commission also has jurisdiction under Title III of the Act over the use of "any apparatus for the transmission of energy or communications or signals by radio..." (35). This jurisdiction in turn breaks down into three distinct subcategories. The most well-known is regulation of broadcast stations, of course, and some Title III provisions apply only to broadcasters — such as the fairness doctrine's requirement

(34) 47 U.S.C. § 153 (h) (1976).
(35) 47 U.S.C. § 301 (1976).

of reply time to personal attacks or opposing points or view on controversial issues. In addition, a license is necessary under Title III for any Title II common carrier spectrum use. Moreover, Title III gives the Commission jurisdiction over spectrum uses which are neither broadcasting nor common carriage — e.g., mobile telephones, institutional microwave circuits — under the general label of "private radio".

Finally, the FCC has a very vague type of implied or residual power over activities which are not squarely within either Title II or Title III. The most significant example of this type of jurisdiction is the Commission's "reasonably ancillary" jurisdiction over cable television. Although the extent of this authority is unclear, it appears to be totally separate from — albeit implied by — the Commission's other jurisdiction (36). (As discussed later (37), the impact of the new cable television legislation on the FCC's residual juridiction is subject to question.)

The FCC's choice of a jurisdictional basis has a significant impact on a medium's legal status. If a medium is classified as broadcasting, it becomes subject to a wide variety of statutory requirements, ranging from reply time under the fairness doctrine to sponsorship identification (38). On the other hand, classification as a common carrier requires an operator to file tariffs, and at least potentially subjects it to rate-of-return regulation (39).

(36) *United States v. Southwestern Cable Co.*, 392 U.S. 167 (1968).
(37) See discussion in text at n. 60, *infra*.
(38) 47 U.S.C. §§ 315, 317 (1976).
(39) 47 U.S.C. § 214 (1976).

Private radio status therefore is attractive, since it insulates a medium from both common carriage and broadcasting requirements.

The distinctions between common carriers, broadcasters, and private radio services traditionally were clear. After all, both broadcasting (in the form of AM radio) and common carriage (in the form of telephone and telegraph) had existed for between one and five decades when the Act was passed. When the Commission embarked upon regulation of cable television in the mid-1960s, it faced a somewhat more complicated problem. Cable obviously did not fit into either Title II and III, since it neither held itself out to the public nor used the electromagnetic spectrum. Nevertheless, the Commission dodged the question by treating cable as a "hydrid" (40).

The District of Columbia Circuit Court of Appeals recently seemed to limit the FCC's discretion in choosing jurisdictional bases for the new video media. In *National Association of Broadcasters* v. *FCC* (41), the D.C. Circuit held that the Commission could not refuse to regulate either DBS operators or their customers as broadcasters — thus subjecting them to the full panoply of fairness, equal time, and other traditional broadcast regulations. The court reasoned that since "DBS systems transmit signals directly to homes with the intent that those signals be received by the public such transmissions rather clearly fit the definition of broadcasting..." (42). Moreover, it went on to note that "DBS does

(40) *Cable Television Report and Order*, 36 FCC 2d 143 (1972).
(41) 740 F2d 1190 (D.C. Cir. 1984).
(42) *Id.*

not give the Commission a blank check to regulate DBS in any way it deems fit" (43). At the same time, the court rejected analogies to regulation of MDS as a common carrier, suggesting that the Commission's initial classification of MDS may have been misconceived (44). As a result, the *NAB* decision casts considerable doubt on the FCC's treatment not only of DBS, but also of MMDS and the other new video media.

Before the *NAB* decision, the Commission had taken a hands-off position with the new video media other than cable, treating most of them as private radio services. To a very great extent, the Commission may have reacted to the problems which it created for itself in the past by hastily selecting regulatory classifications for MDS and STV before their development was clear (45).

Precisely because of its past decisions, however, the Commission faces a mixture of regulatory modes for the new video media. Since the Supreme Court has held cable not to be a common carrier, it retains its hybrid status. On the other hand, single-channel MDS is a loosely regulated common carrier; although it must file tariffs, it is not subject to rate of return regulation (46). The rationale behind MDS' classification as a common carrier is a bit murky, but it seems to be based solely upon the fact that MDS frequencies previously had been designated

(43) 740 F2d 1190 (D.C. Cir. 1984).
(44) *Id.*
(45) *National Association of Regulatory Utility Commissioners* v. *FCC*, 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976).
(46) 47 C.F.R. § 21.900 (1983).

for common carrier purposes (47). On the other hand, STV and LPTV are broadcasters; but LPTV is subject to few conventional broadcasting rules, need not provide community service, and may be exempt from the fairness and equal opportunities doctrines (48). Since all STV stations and many LPTV stations provide the same pay programming as — and often from the same national networks as — MMDS, the basis for the distinction seems questionable. As with MMDS, the FCC's decision as to regulatory classification may have been based primarily upon the fact that STV and LPTV use frequencies previously allocated to conventional television broadcast stations.

With new services such as DBS and MMDS, however, the Commission was not constrained to follow its own prior decisions, and has refrained from imposing any regulatory classifications. Depending upon the nature of their activities, DBS operators thus may be broadcasters, common carriers, or private radio services (49). Similarly, MMDS operators would be classified as private radio sevices, although they might be regulated as either broadcasters or carriers if they operated as such — for example, by providing data transmission capability (50). Although private radio status may be appropriate for MMDS in

(47) *Report and Order*, 29 R.R2d 382 (1974).
(48) *Report and Order*, 51 RR2d 476, 518-510 (1982).
(49) *Report and Order*, 51 RR2d 1341, 1366-1367 (1982).
(50) *Report and Order*, 64 RR2d 107, 140 (1983).

its formative years, it might subject MMDS operators to both private radio and common carrier regulation. Single-channel MDS retains its traditional common carrier status, and most MMDS operators are likely to combine existing single-channel MDS stations, newly authorized MMDS facilities, and leased educational channels.

Finally, recent amendments to the Communications Act may impose common carrier status on at least some of the new video technologies' activities. Section 331 (c) (1) of the Act classifies as land mobile radio any "service provided by specialized mobile radio, multiple licensed radio dispatch systems and all other radio dispatch systems" (51). A new statutory definition of "mobile service" includes any "radio communications services carried on between mobile stations or receivers and land stations... and... both one-way and two-way radio services" (52). As the Commission recognizes (53), the statutory language would include a paging or other service offered on a subcarrier by a television, DBS, MMDS, LPTV or STV station. (The new provision presumably is irrelevant to cable television, which is technologically incapable of offering the services).

(51) 47 U.S.C. § 331 (c) (1) (Supp. 1984).
(52) 47 U.S.C. § 153 (n) (Supp. 1984).
(53) *Report and Order*, 54 RR2d 107, 141-142 (1983).

The Commission's wait-and-see approach seems to make sense, but not consistency. Some of the disparities may not be terribly significant in terms of their real world impacts. For example, the Commission is quite unlikely ever to apply the fairness doctrine to LPTV stations, even though they technically are broadcasters (54). Other factors may have far greater impacts, however, in terms of investment decisions. For example, the potential threat of rate-of-return regulation might deter entry into a common carrier service.

The basic problems are historical and statutory. If the Commission is to leave STV and LPTV as broadcasters and yet give them regulatory parity with DBS and MMDS, it presumably should seek repeal of several provisions in the Act — including the fairness and equal time doctrines. Indeed, the Commission already has proposed eliminating the fairness doctrine, but has encountered a chilly reception in Congress (55). Neither the fairness doctrine nor the equal opportunities doctrine seems vulnerable at present, because of their substantial backing from both public interest groups and elected officials — the latter of whom naturally have a strong incentive to preserve their right to free or inexpensive air time.

Moreover, repeal of Section 331 (c) of the Act presumably would be necessary in order to keep the new video media free from common

(54) *Report and Order*, 51 RR2d 476, 519 (1982).
(55) E.g., J. Stern & E.G. Krasnow, *The New Video Marketplace and the Impending Identity Crisis* (1985).

carrier regulation of paging and similar services, but would meet stiff opposition from land mobile radio operators. As a result, the Commission probably will be unable to reclassify existing media in the near future.

As its limited application of the fairness doctrine to LPTV indicates, the Commission may not apply these statutory provisions very stringently. Whether this type of administrative law-making is within the Commission's discretion, of course, remains to be seen in the *NAB* case's wake.

D. — DEGREE OF FEDERAL PREEMPTION

A related issue is which level of government — i.e. federal, state, or local — should administer any regulatory scheme. The level of governmental regulation has a very substantial impact upon a firm in terms of inconsistent regulatory schemes and intensity of regulation. After all, six thousand cities and fifty states are considerably more likely to experiment with regulatory policies — and are much more difficult to control — than a single federal agency (56). In a deregulatory federal environment, the absence of state or local regulation effectively translates into no regulation at all — a fact which hardly has escaped the attention of the cable industry.

56) Noam, "The Interaction of Federal Deregulation and State Regulation, 9 *Hofstra L. Rev.* 199 (1980). 57 *Id.* at 199-206.

With the exception of cable television, the new video media are subject to virtually exclusive federal regulation. Since STV, MMDS, LPTV and DBS use interstate, over-the-air transmissions, the Commission has ample statutory authority to preempt any state and local regulation. To be sure, the Commission presumably could delegate power to local and state authorities. But it has not considered this approach, which is hardly surprising in light of these industries' inherent preferences for federal regulation.

The major exception to this trend has been cable television. Local governments traditionally have used both their police powers and their ownership of the streets to require cable operators to secure franchises or other local authorizations before constructing systems (57). Roughly a dozen states have used their general police powers to regulate cable, sometimes by cooperating with cities and sometimes by preempting them (58).

The cable industry did not actively oppose state or local regulation until recently, apparently because it feared intensive federal regulation more than haphazard local jurisdiction. But massive federal deregulation naturally has provided an incentive for the industry to seek federal preemption — and thus effectively no regulation at all.

(57) E.G., New York, N.Y. Charter § 362 (1977).
(58) Cable Television Bureau, FCC, Cable Television Legislation (1982).

In October, 1984, the Congress passed the Cable Communications Policy Act of 1984, which reflected a compromise between the National Cable Television Association and the National League of Cities. The statute limits franchise fees to five percent of a system's gross revenues, prohibits rate regulation except in areas with virtually no over-the-air television reception, largely guarantees renewal of franchises, restricts the number of access channels required by local governments, and allows cable operators unilaterally to abrogate burdensome franchise terms (59).

As the Cable Act indicates, the inevitable trend in cable regulation is towards exclusive federal regulation. Regardless of whether federal, state, or local regulation intrinsically is most effective, cable operators need uniformity as much as any other national medium. Although preemption of state and local regulation puts cable in parity with the other new video media, it leaves one important difference: namely, all media except cable would be federally licensed. Even in a deregulatory environment, licensing serves an important function by allowing an agency to monitor an industry's performance and to police abuses. The FCC perhaps should consider re-instituting its certificating process for cable, in order to insure its parity with the other new video media.

(59) 47 U.S.C. § 601 et. seq. (Supp. 1985).

offensive material (such as obscenity, indecency, payola, plugola, and lotteries), and, second, affirmative reply time requirements under the fairness and equal time doctrines.

The Commission has indicated that it will impose both negative and affirmative programming requirements upon the new video technologies only to the extent that they function as broadcasters. Indeed, the FCC seems somewhat reluctant to regulate program content except as mandated by statute. As noted before, the Commission has indicated that it does not plan to enforce rigorously even statutory provisions such as the fairness doctrine (60). Finally, in addition to the Communications Act's provisions, federal law provides criminal penalties for transmitting some types of material — most notably obscenity, indecency, plugola, payola and lotteries (61). These provisions would apply to all of the new video media except cable, since it does not use over-the-air transmissions. (The statute applies to any "means of radio communication" (62), rather than just to broadcasting.) The only means for direct enforcement of the Criminal Code is by prosecutions, which lie in the discretion of regional United States attorneys. Although the Commission

(60) *Notice of Proposed Rule Making*, 82 FCC 2d 47, 65 (1980); Report and Order, 51 RR2d 476, 519 (1982).
(61) 18 U.S.C. § 1464 (1976).
(62) *Id.*

has the authority to enforce the Criminal Code's policies through appropriate rules, it is not reuired to do so (63).

Each new medium's regulatory scheme therefore depends largely upon its classification as private radio or as broadcasting. Although cable television is neither, the Commission long ago imposed the traditional array of negative and positive broadcast regulations on "origination" material (64). While this term's meaning is less than clear, it may refer only to programming produced by a cable operator, rather than programming received from satellite networks. In any event, the question is probably moot; the Commission never has enforced the rules.

On the other hand, STV and LPTV presumably are subject to all of the Commission's broadcast regulations, since both are broadcast uses. But, the Commission already has indicated that it will not enforce the fairness doctrine — and presumably other regulations also — against LPTV stations as rigorously as against conventional broadcast stations (65). DBS and MMDS apparently would be subject to no regulation beyond the Criminal Code's provisions, however, unless the *NAB* case vitiates their status as private radio services.

Finally, the FCC apparently would subject none of the new video media to access requirements. A DBS operator would be subject to

(63) *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (1975).
(64) 47 C.F.R. §§ 76.221 (1988).
(65) See authorities cited in note 60, *supra*.

common carriage requirements if it operated as a common carrier, of course, but Title II contemplates only commercial access. Along similar lines, single-channel MDS operators theoretically are common carriers, but realistically take the bulk of their programming from established pay television networks. And although the FCC clearly lacks jurisdiction to impose access channel requirements on cable television systems (66), state and local governments do so routinely. Moreover, the Cable Act creates a limited right of commercial or "leased" access (67).

Except on the access front, the Commission's content regulations are less than consistent. The problems appear to arise from the same factors already considered in the context of regulatory status: historical and statutory inhibitions. Rationalizing questions of regulatory status thus would solve a number of problems simultaneously.

III

THE CONGRESS' INTELLECTUAL PROPERTY CONCERNS

Like the FCC's regulatory treatment of the new video technologies, the Congress' action on a variety of intellectual property fronts — including copyright and "anti-signal-piracy" measures — has been less than consistent. The result of the current legislative hodge-podge is that the extent of a copyrighted work's legal protection varies substantially, depending upon the medium on which it is presented.

(66) *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).
(67) 47 U.S.C. § 612 (Supp. 1985).

The copyright history of cable television began in the courts. The Supreme Court consistently held in the *Fortnightly* (71) and the *Teleprompter* (72) cases that transmission of "distant" signals — i.e., programming from otherwise unreceivable stations — by cable systems had no copyright significance. The Court viewed a cable system as a passive intermediary that "simply carr[ies], without editing whatever programs [it] receive[s]" (73). Cable systems thus could carry broadcast programming without incurring copyright liability. During the late 1960s and early 1970s, the FCC had considered adopting rules to give copyright-like protection to broadcast programming, but had deferred to Congress (74). To resolve the conflict between traditional copyright law principles and the emergence of a viable cable industry, the 1976 Copyright Act created a "compulsory license" scheme, under which cable television systems may retransmit broadcast programs in return for fixed royalty fees. Although fiendishly complex to compute, these fees are based upon the number of distant television broadcast signals transmitted (75). The 1976 Act also created a new agency, the Copyright Royalty Tribunal, to adjust the rates cable systems would pay, and to determine how the royalty fees should be distributed (76).

(71) *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), *RIDA* LVIII, October 1968, p. 236.
(72) *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974).
(73) 392 U.S. at 400.
(74) *Report and Order* (Docket Nos. 20988 and 21284), 74 FCC 2d 663 (1980), *aff'd Midrite TV of N.Y. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).
(75) 17 U.S.C. § 111 (1982).
(76) 17 U.S.C. § 801 (1982).

How well the Tribunal has worked out may be open to question, since it is one of the few authorities in U.S. history to recommend its own abolition.

Moreover, the Congress recently came to the aid of the cable industry yet again in the Cable Communications Policy Act of 1984, by enacting tough new "anti-signal piracy" provisions (77). (A number of state and local governments had passed similar "theft of services" measures previously, but they did not create the uniformity of federal legislation, which most large cable operators believe to be essential.) The new law creates civil and criminal penalties not only for intercepting cable programs, but also for manufacturing or distributing any receiving equipment — such as converters and the like. The Act provides criminal penalties of up to two years imprisonment or $ 50,000 in fines for any piracy activities undertaken for "commercial advantage or private financial gain" (78). Moreover, cable operators and other private parties may sue for injunctions as well as for substantial money damages — including automatic "statutory" damages of up to $ 10,000, lost profits and attorneys' fees. In short, the new law gives cable operators a set of substantial threats to use against unauthorized viewers, going far beyond the scope of the traditional copyright laws.

Reflecting a narrow construction of the Copyright Act, the Second Circuit Court of Appeals held that retransmision of baseball games by

(77) 47 U.S.C. § 633 (Supp. 1985).
(78) 47 U.S.C. § 644 (b) (2) (Supp. 1985).

a common carrier, which distributes a New York television station to more than 600 cable systems, was exempt from the copyright laws under the "passive carrier" exemption (79). That exemption applies ot carriers with "no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables ,or other communications channels for the use of other" (80).

On the other hand, the Seventh Circuit Court of Appeals has shown a reluctance to apply the passive carrier exemption to inhibit the growth of a new technology. In the *WGN* case, it held that teletext services transmitted over the television vertical blanking interval had copyright protection as part of the station's main signal (81). In that case, a Chicago station, which was distributed by satellite to many cable systems, brought a suit against a telecoccunications common carrier, because of the carrier's deletion of the station's teletext service and substitution of the Dow Jones teletext service in its place. The court held that the carrier was not exempt from copyright liability as a passive carrier, since it had altered the copyrighted work by deleting the teletext service. Although the court stated that the station's copyright for its news program included the teletext transmission, it suggested that it might rule

(79) *Eastern Microwave, Inc. v. Doubleday Sports, Inc.* 691 F.2d 125 (2d Cir. 1982).
(80) 17 U.S.C. § 111 (a) (3).
(81) *WGN Continental Broadcasting Co. v. United Video,* 693 F.2d 622 (7th Cir. 1982).

differently if the teletext were not related to the main program, not intended to be viewed with it, and not an integral part of that program.

And in the much-renowned "Betamax" case (82), the Supreme Court of the United States held that use of VCRs to tape broadcast television shows at home for private and noncommercial use purposes was not a copyright infringement, and thus that sale of VCRs to the general public was legal (83). Emphasizing that "sound policy, as well as history, supports our consistent deference to Congress", and that "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology" (84), the Court clearly was reluctant to expand copyright protection without explicit legislative guidance.

In reversing the Ninth Circuit and affirming the trial court, the Supreme Court held that home "time-shifting" (i.e., recording a broadcast for later home playback) was a fair use under the Copyright Act. It concluded that time-shifting for private home use was a noncommercial activity (84), and that time-shifting merely enabled viewers to see a program which they had been invited to watch free of charge (85). The Court also noted that many copyright holders licensed their works for

(82) *Sony Corporation of America v. Universal City Studios, Inc.*, 104 S. Ct. 774 (1984).
(83) *Id.* at. 783.
(84) *Id.* at 788.
(85) *Id.* at 792-93.

free and did not object to having their broadcasts time-shifted by private viewers. In the Court's view, the plaintiffs had failed to demonstrate that time-shifting would cause any real harm to the potential market for, or the value of their copyrighted works.

Finally, as perhaps another piece of special interest legislation, the new Cable Act also provides anti-piracy protection for satellite distribution of programming. Although these programs naturally have the benefit of the copyright laws, the Act added new and severe penalties to the existing anti-piracy laws. As under the cable piracy provisions discussed above, criminal penalties may be as great as two years in prison or a $ 50,000 fine, and potential civil money damages may be subtantial (86). As a concession to the growing use of backyard satellite earthstations, however, the Act also established an affirmative defense. A satellite viewer is not liable if a programmer does not provide an alternative to piracy, by selling a copyright-style license for its programming (87). Essentially, this provision is designed to prevent major "pay" programmers from refusing to sell their programs to satellite viewers, in order to force them into taking more expensive — and often unavailable — cable, STV or MMDS service.

(86) 47 U.S.C. § 553 (Supp. 1985).
(87) 47 U.S.C. § 605 (b) (Supp. 1985).

On the legislative as well as regulatory side, the U.S. legal regime seems to have been less than successful in creating anything resembling a level playing field. For example, cable operators have compulsory licenses for broadcast programming, while also enjoying the Cable Act's stiff new anti-piracy provisions. Conversely, MMDS or "wireless cable" must negotiate for all of its programming, and is not protected by strict anti-piracy provisions. As always, there may be some arguable policy reasons for these distinctions; historically, the threat of copyright infringement was used as an attempt to destroy the cable industry, while efforts to collect from cable pirates were difficult. It is at least possible that these problems do not plague MMDS. Since there is no indication that Congress reached this conclusion or even had any supporting data before it, however, its action is questionable.

IV

CONCLUSION

Although the Commission and Congress are committed to creating a level playing field for the new video technologies, they have left a number of potholes behind. On virtually all of the fronts examined above, significant disparities and inconsistencies exist among the new video media. Equally important, the FCC and the Congress have failed to consider a host of questions — e.g., MMDS's fairness obligations or copyright liabilities.

At the present, it is difficult, if not impossible to estimate these problems' impact on the new video media. Measuring the cost of a particular type of regulation is speculative at best and foolhardy at worst, when two of the industries in question — DBS and MMDS — do not even exist. Nevertheless, these inconsistencies may change the ways in which the new video media evolve.

The problem is not that the U.S. legal regime has created this lack of consistency deliberately. In almost every instance, the Commission and the Congress have been hampered by historical accidents, legislative lacunae, and inherent regulatory lag. Nevertheless, it seems fair to criticize the FCC and Congress for not considering these problems in advance.