

regulatory proposals, legislative reaction, public concern, and self-regulation. Of these the most important involved 1970s concerns about violence on television. The industry responded through the "family viewing policy," saying that inappropriate entertainment programming would not be shown between 7 p.m. and 9 p.m. eastern standard time. This was a distinctive form of self-regulation. But the Writers Guild of America challenged the policy on first amendment grounds (see below), arguing that the policy was not voluntary self-regulation but was in fact a product of government coercion.

In a controversial decision, the trial court accepted the challenge, and barred the NAB from enforcing the policy.⁵ The court of appeals overturned the decision on the ground that the district court was not the right forum to resolve these issues in the first instance.⁶ The Court of Appeals said that the issue should first be resolved by the FCC. Although the decision of the Court of Appeals was jurisdictional, that court suggested considerable doubt about the district court's judgment: "It simply is not true that the First Amendment bars all limitations of the power of the individual licensee to determine what he will transmit to the listening and viewing public."⁷

The FCC ruled in 1983 that there had been no Government coercion and that the NAB had adopted the family viewing policy voluntarily. In its key passage the FCC wrote, "voluntary industry action is often preferable to governmental solutions, and an industry frequently addresses a problem in order to forestall regulation by the Government; conversely, it is not unusual for a regulatory body to forego enacting rules when the regulated industry voluntarily adopts standards which deal with a perceived problem."⁸ In June 1979, however, the Justice Department filed the antitrust suit described in detail below, resulting in the demise of the television code.

In the 1980s, continuing congressional concern about televised violence led to a new law exempting from the antitrust law networks, broadcasters, cable operators and programmers, and trade association, in order to permit them to generate standards to reduce the amount of violence on television.⁹ But there was considerable doubt about whether an explicit exemption was necessary; a 1993 opinion from the Department of Justice said that the industry could cooperate to reduce television violence without offense to the law of antitrust.¹⁰

In June 1990 the NAB issued new "voluntary programming principles" to cover violence, indecency and obscenity, drugs and substance abuse, and violence. The new standards were reaffirmed in June 1991, and in 1992, ABC, NBC, and CBS issued and agreed to adhere to a set of new standards. Thus in the 1990s self-regulation can be found in various places: the advance parental advisory system, joint advisory guidelines issued by the four networks, NAB principles, and an annual public assessment, by the four networks, of television violence.

A Note on the First Amendment

It is possible to argue, as some have, that a code of the sort suggested here would create serious first amendment problems. But this is a mistake. The first amendment applies to government, not to private industries. By itself, a code is a private set of guidelines, and

private guidelines by themselves raise no first amendment issue. If a private group decides to impose restrictions on the speech of its members, and government is not involved, the first amendment is entirely irrelevant. We therefore believe that a voluntary form of self-regulation, of the kind suggested here, creates no first amendment problem.¹¹

For first amendment purposes, there is no difference between a system in which individual broadcasters decide what programming to offer, and a system in which the industry as a whole engages in self-regulation with the help of a code. In neither case is a government mandate involved, and hence the first amendment is irrelevant.

Of course the issue would have to be analyzed differently if a code were a product of government threat, and were effectively required by government. In that case, the first amendment would come into play.¹² There can be no question that a governmentally *mandated* code, not voluntary but taking the form that we have outlined, would raise legitimate constitutional problems. This does not necessarily mean that the first amendment would be *violated*; the question would be whether any content regulation in the code could survive constitutional scrutiny, and to answer that question, each code provision would have to be investigated separately. The key point is that if government mandated a code, or even used compliance or noncompliance with a code for its own regulatory purposes, any such governmental action would have to be tested for compliance with first amendment principles, including the serious constitutional limits on content regulation.

Hence, it is extremely important that we are arguing on behalf of a code as a simple recommendation to private organizations, above all the NAB, and *not* as a proposed mandate from the government, either the FCC or Congress. (The point is fortified by the fact that this Committee is a body consisting of private citizens appointed for advisory purposes, rather than as a coercive act from a governmental body.) Indeed, this Committee has no coercive powers. Thus our attitude to the code is very much in the spirit of the NAB's own report on community service—as a suggestion about non-governmental ways for the broadcasting industry to fulfill its public responsibilities.

Antitrust Law

In this section we offer a brief analysis of the antitrust issues raised by the proposed code. This is not an exhaustive discussion of an issue that is, in some of the details, quite complex. It is meant instead as a supplement to the analysis provided by the United States Department of Justice, which, we believe, is likely to be accepted by a court confronted with a challenge to any code. The discussion is necessarily a bit technical in parts.

A. Brief conclusion: The provisions that we are discussing are *not* likely to violate the antitrust laws. This is because (1) they would not have a significant anticompetitive effect, and without such an effect, there can be no violation of the antitrust laws; (2) it is unclear if any plaintiff could show an antitrust injury, and there is no violation of the antitrust laws without such an injury; and (3) the provisions would probably survive the “rule of reason,”

because any adverse effects on competition would be justified by the distinctive nature of the broadcasting media, which has been understood, historically, as an industry with a special obligation to the public interest.

There is considerable legal authority on behalf of our general conclusion. The United States Department of Justice has analyzed the issues in such a way as to give significant support to the legality of what we are discussing. (See Letter from Sheila Anthony, Assistant Attorney General for Legislative Affairs, attached as Exhibit A.) Notably, two district courts have upheld important aspects of prior codes. The leading district court ruling that might be thought to point the other way—often taken to be fatal to a code—was actually quite narrow. Thus there is no obvious legal authority against the kind of proposal that we are discussing here.

The best judgment is that courts would uphold a code that does not amount to price-fixing, or to a form of self-regulation designed in some way to increase broadcaster profits or to exclude new entrants. Of course the safest course would be for Congress to enact a law specifically authorizing codes of this kind, though we believe that this is not necessary.

- B. **Two favorable precedents.** In two important cases, aspects of the Code were upheld against private antitrust attack. A district court refused to issue an injunction against code standards forbidding cigarette advertising, despite a claim that these standards were inconsistent with the antitrust laws.¹³ The court concluded that the plaintiff was not likely to prevail on the merits. The court referred in particular to the dangers posed by cigarette smoking and claimed that the standards and guidelines in the code serve the “public interest.”¹⁴

A lower court also upheld the provisions involving standards for advertising for children.¹⁵ The rule at issue there said that children’s program hosts or primary cartoon characters “shall not be utilized to deliver commercial messages within or adjacent to the programs which feature such hosts or cartoon characters.” The provision applied as well “to lead-ins to commercials when such lead-ins contain sell copy or imply endorsement of the product by program host or primary cartoon character.” The plaintiff attacked the restrictions, claiming that it restricted the ability of hosts and actors to obtain free employment for delivery of commercials.

The court said, “There is not the slightest indication of any anti-competitive purpose in the creation of the rule,” especially since there was no evidence of a motive “to benefit one class of performers competitively over another class of performers.”¹⁶ The court found it relevant that the rule “resulted from a bona fide concern on the part of various groups, and the FCC, regarding fair and ethical methods to be used in television advertising directed to children.”¹⁷ This was “a reasonable rule of conduct regarding good practice by its members in the public interest and is not in violation of the antitrust laws.”¹⁸

In these cases, the court basically concluded that the restrictions were reasonable and in the public interest. This was a sufficient justification for the restriction.

- C. **An apparently unfavorable (but extremely narrow) precedent.** Ultimately the Code met its demise as a result of an antitrust action brought by the Justice Department in 1979,

based on an allegation that certain provisions of the Code violated the Sherman Act. We discuss this case in some detail, because it is often used as authority against the legality of any broadcasting code. This was actually a very narrow ruling that should not result in a successful legal challenge to a code of the kind that we are endorsing.

A narrow complaint. The Justice Department's complaint was quite narrow. It involved not the Code in general, but three specific kinds of advertising restrictions:

- Time standards, limiting the amount of commercial material that could be broadcast in an hour;
- Program interruption standards, which imposed a limit on the maximum number of commercial announcements per program as well as on the number of consecutive announcements per interruption;
- The multiple product standards, which prohibited the advertising of two or more products or services within a single commercial if the commercial was less than 60 seconds in length.

Note that each of these restrictions could be understood as a traditional form of collusion—as an effort by broadcasters to ensure high prices for advertisements. If, as is sometimes thought, broadcasters “deliver” viewers to advertisers in return for money, these parts of the code could be seen as illegitimate efforts to increase the return to broadcasters over the price that would prevail in an entirely competitive market. This is undoubtedly the concern that underlay the Justice Department's somewhat surprising decision to initiate the suit.

The ruling in brief. Basically, the court held that the multiple product standards were *per se* unlawful, but that the time standards and program interruption standards could not be tested without an inquiry into the facts.¹⁹ This was a narrow ruling because it dealt only with a small segment of the old Code, involving an apparent effort to increase profits at the expense of advertisers.

The ruling in a little detail. A little background: Antitrust law applies a “*per se* rule” of illegality to certain obviously anticompetitive agreements. (Price-fixing agreements are the most obvious case.) It applies a “rule of reason,” calling for a balancing test, to agreements that may or may not be anticompetitive. When the rule of reason is applied, it is necessary to find out a lot of facts.

On summary judgment in the case, the key issues were, first, whether the three agreements were so obviously anticompetitive that they were unlawful *per se*, and second whether, if they were not illegal *per se*, they were invalid under the “rule of reason,” which requires—to offer a bit more detail—an inquiry into the facts of the business, the nature of the restraint, and the justification offered on its behalf.

The district court held that the time and product interruption standards were *not* invalid *per se*. In the court's view, the distinctive characteristics of the broadcasting industry argued against a *per se* rule of invalidity. Because broadcast frequencies are scarce, because the whole area is subject to regulation, and because of the fact that there are only 60 minutes in an hour (!), no simple solution would be sensible.

On these two issues, the court also denied summary judgment for the government under the "rule of reason," concluding that there were material issues of fact. The legal question was whether the time standards would have the effect of raising or stabilizing the price of commercial time (this was the antitrust problem); it was possible, the court said, that any such effect would be trivial in light of the importance of other factors. If this was true, the code would not violate the Sherman Act. This is because there is no antitrust violation without a significant adverse effect on competition.²⁰

By contrast, the court held that the multiproduct standard was per se unlawful. In its view, this rule was akin to a standardization agreement by which food manufacturers set a standard for the ingredients that would be used in their products. This form of standardization was per se illegitimate. Thus, the court actually invalidated only one provision of the code, on the theory that it was analytically akin to a system for price-fixing. At the same time, the court denied summary judgment for the NAB.

The aftermath. After the court's ruling, the NAB suspended enforcement of all code provisions. In public it claimed that it would seek an appeal, but a consent judgment was issued, in which the NAB agreed, for 10 years, to cease monitoring and enforcement of the three disputed code provisions. The agreement also prohibited enforcing the standards for children's programming time. Thus, the district court's narrow decision—untested in any court of appeals—has loomed over the debate about codes.

An antitrust challenge to a new code? The best prediction is that a code of the sort that we are discussing would not violate the antitrust laws. In its most recent analysis of the problem, the Department of Justice reached this conclusion in suggesting that networks could agree to guidelines and principles to reduce unnecessary violence on television.²¹ The Department of Justice concluded that "the conduct that was at issue in the NAB case differs significantly from that covered by" an agreement on televised violence.²² In the NAB case, the problem was raising "the price of time," to "the detriment of both advertisers and the ultimate consumers of the products promoted on the air."²³ By contrast, an agreement covering violence should "be likened to traditional industry standard-setting efforts that do not necessarily restrain competition and may have significant procompetitive benefits."²⁴ In the view of the Department of Justice, "efforts to develop and disseminate voluntary guidelines to reduce the negative impact of television violence should fare well under the appropriate rule-of-reason antitrust analysis."²⁵

More particularly, a code of the sort we are discussing should probably be upheld for the following reasons.

- (a) This is not an ordinary form of collusion. It is not as if broadcasters are saying that advertisers must pay a minimum of \$X per advertisement. This is very far from the usual domain of price fixing. Hence no per se rule is likely to attach.
- (b) It is possible that the restrictions under discussion would have little or no adverse effect on competition; they may even have good effects on competition.²⁶ Without a significant adverse effect on competition, there is no antitrust violation. Even with a code, programmers would compete over a great many things, including the kinds of

programming regulated by a code. The code might in a sense be procompetitive, because it would ensure television coverage of materials in which there is a substantial public interest and which might otherwise not be provided. This is so especially in light of the fact that stations would compete for viewers with respect to the kinds of programming covered by the code.

- (c) It is not entirely clear that any plaintiff would have an antitrust injury. The self-regulation that we are discussing would allow a wide range of choices and options for consumers and producers. Perhaps some producer of some marginal programming could claim that he was unable to sell his product because of (for example) free air time for candidates; but this would be an extremely speculative injury. Perhaps viewers could argue that they were deprived of certain programming that they would like; but in view of the wide range of options available to viewers, this too is speculative. Perhaps some stations or programmers could contend that a code limited their freedom; but it is not clear that this would count as an antitrust injury, especially in light of the fact that the code is voluntary.
- (d) In light of the distinctive nature of the television market, a code of the sort under discussion would probably survive a "rule of reason" inquiry. The effect on competition would be quite limited, if indeed there would be any adverse effects at all. The restriction, such as it is, could be defended as a means of promoting competition,²⁷ and also various public interest goals, e.g., education of children, access for the handicapped, democratic and civic functions. This idea is bolstered by the line of cases analyzing restrictions by trade associations and similar entities.²⁸

Our most basic conclusion is that any antitrust challenge to a code of the sort we have endorsed would be most ill-advised, and extremely unlikely to succeed.

ENDNOTES

- ¹ See *Broadcasters Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service* (National Association of Broadcasters, Wash. D.C.), April 1998.
- ² *Id.* at 6 (noting that the typical television station runs an average of 137 public service announcements per week).
- ³ We draw here on a variety of sources, including Mark M. MacCarthy, *Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour, and Television Violence*, 13 *CARDOZO ARTS & ENT. L.J.* 667 (1995).
- ⁴ See Daniel L. Brenner, Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 *STAN. L. REV.* 1527, 1529 (1975).
- ⁵ *Writers Guild of Am. W. v. FCC*, 423 F. Supp. 1064 (C. D. Cal.1976), *vacated sub nom. Writers Guild of Am. W. v. ABC*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 US 824 (1980).
- ⁶ *Writers Guild of Am. W. v. ABC*, *supra*.
- ⁷ *Id.* at 364.

- ⁸ 95 FCC 2d at 710.
- ⁹ See 47 U.S.C. 303c.
- ¹⁰ See on next page, Letter from Sheila Anthony, Assistant Attorney General for Legislative Affairs, United States Department of Justice, to Senator Paul Simon (D-Ill) (Nov. 29, 1993).
- ¹¹ See *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (private contract raises no first amendment issue); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 482 U.S. 522 (1987); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).
- ¹² See *Writers Guild of Am. W. v. FCC*, 423 F. Supp. 1064 (C. D. Cal. 1976), *vacated sub nom. Writers Guild of Am. W. v. ABC*, 609 F.2d 355 (9th Cir. 1979), *cert. denied*, 449 US 824 (1980).
- ¹³ See *American Brands Inc v. NAB*, 308 F. Supp. 1166 (DDC 1969).
- ¹⁴ *Id.* at 1169.
- ¹⁵ See *American Fed'n of Television & Radio Artists v. NAB*, 407 F. Supp. 900 (SDNY 1976).
- ¹⁶ *Id.* at 902. An anticompetitive effect is also sufficient to trigger antitrust scrutiny, but it is not at all clear that restrictions of the kind we are discussing would have such an effect. See below.
- ¹⁷ *Id.*
- ¹⁸ *Id.* at 903.
- ¹⁹ *U.S. v. NAB*, 536 F. Supp. 149 (1982).
- ²⁰ See, e.g., *U.S. v. Arnold, Schwinn Co.*, 388 U.S. 365, 375 (1967), overruled on other grounds in *Continental TV v. GTE Sylvania*; *Neeld v. NHL*, 594 F.2d 1297, 1300 (9th Cir. 1979).
- ²¹ See Letter of Sheila Anthony, Assistant Attorney General, *supra* note 10.
- ²² *Id.* at 3.
- ²³ *Id.*
- ²⁴ *Id.*
- ²⁵ *Id.* at 4.
- ²⁶ Compare *Smith v. Pro Football*, 593 F.2d 1173, 1183 (D.C. Cir 1978).
- ²⁷ See Letter of Sheila Anthony, *supra* note 10, at 4.
- ²⁸ See, e.g., *NCAA v. Board of Regents*, 468 US 85 (1984); *Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

U.S. Department of Justice
Office of Legislative Affairs

Washington, D.C. 20530
November 29, 1993

Office of the Assistant Attorney General

The Honorable Paul Simon
United States Senate
Washington, D.C. 20510

Dear Senator Simon:

I am writing in response to your letter of November 17, 1993, also signed by Representative Dan Glickman, requesting the views of the Department of Justice on the antitrust implications of collective efforts by persons in the television industry to address the effects of violence on television.

Your letter notes the expiration on December 1, 1993, of the Television Program Improvement Act of 1990, which provided in part that "the antitrust laws shall not apply to any joint discussion, consideration, review, action, or agreement by or among persons in the television industry for the purpose of, and limited to, developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast materials." This legislation was intended to address uncertainty regarding the application of the antitrust laws to such activities, apparently based largely on United States v. National Association of Broadcasters, 536 F. Supp. 149 (D.D.C., 1982) ("NAB"), an antitrust case brought by the Department that challenged certain standards in the NAB's Television code that restricted the sale of commercial advertising time. You note that given the expiration of the 1990 Act, there may again be uncertainty about the application of the antitrust laws to continuing collective efforts to address television violence.

Your letter describes some of the collective activities undertaken in the industry to address television violence during the last three years. We understand that industry representatives have met to discuss television violence and have developed a set of general guidelines and an advisory message program. You request the Department's guidance on the antitrust risks to the industry of continuing to engage in cooperative activities with the goal of reducing gratuitous violence on television.

The Department of Justice does not believe that the antitrust laws should present any barrier to the activities described in the Television Program Improvement Act of 1990 notwithstanding the coming expiration of that statute. During the consideration of the bills that led to the exemption, the Department expressed the view that the legislation dealt with major issues largely unconnected to the proper functioning of an unregulated and competitive economy, see letter to Chairman Jack Brooks from Deputy Assistant Attorney General John Mackey on H.R. 1391, June 12, 1989 (copy enclosed). The conditions of the exemption—that any

guidelines be truly voluntary and that collective activity not result in the boycott of any person—let us to conclude that activities covered by the exemption were not likely to be anticompetitive. Indeed, as you letter suggests, the legislation was intended more to address antitrust uncertainty voiced by the industry than a belief that such activities in fact would violate antitrust law.

You request in particular the Department's interpretation of the NAB case, which apparently was the principal source of antitrust concern when the Television Program Improvement Act was under consideration. In the NAB case, the Department challenged under Section 1 of the Sherman Act certain television advertising standards in the NAB's Television Code. These provisions (1) limited the number of minutes of commercials per broadcast hour ("time standards"), (2) limited the number of commercial interruptions per program and the number of consecutive announcements per interruption ("program interruption standards"), and (3) prohibited the advertising of two or more products in a commercial shorter than sixty seconds, otherwise known as the "multiple product standard." The Code also contained a number of other television and programming standards that were not challenged.

In ruling on cross motions for summary judgment, the court held that item (3) above, the "multiple product standard," constituted a pre se violation of the antitrust laws and granted summary judgment as to the standard to the government. If found the multiple product standard to be an artificial device which required advertisers to purchase more commercial television time than they might wish and in excess of what they would be able to purchase if free market conditions prevailed.

The court declined to apply the per se rule to items (1) and (2) above—the time and program interruption standards—citing unusual characteristics of television broadcasting that may be disruptive of the "assumed link between supply and price that underlies the per se treatment of supply restrictions." The court noted the scarcity of broadcast frequencies, the inherent limit on the number of broadcast minutes, and the broadcasters' licensing obligation to operate in the public interest.

With respect to the rule of reason analysis required where a per se rule was inapplicable, the court found disputed issues of fact on whether the time standards actually affected the supply of commercial time and even if supply was affected, what effect that limitation would have on price. Likewise, the record was not sufficient to determine whether the program interruption standards fostered an anticompetitive standardization of station format or the likely economic effects of standardization in that instance. Therefore, summary judgment on items (1) and (2) above—the time and program interruption standards—was not granted.

After the court's decision on the summary judgment motions, the NAB case was settled by a consent decree that prohibited any code, rule, by-law, guideline or standard limiting or restricting (1) the quality, length, or placement of non-program material appearing on broadcast television; or (2) the number of products or services presented within a single non-program announcement on commercial television.

The conduct that was at issue in the NAB case differs significantly from that covered by the expiring antitrust exemption in the Television Program Improvement Act. The government's basic contention in NAB was that the challenged commercial advertising restrictions had as their actual purpose and effect the artificial manipulation of the supply of commercial television time, with the end that the price of time was raised, to the detriment of both advertisers and the ultimate consumers of the products promoted on the air. Indeed, without access to an important advertising forum, smaller, newer, competitors in some product areas could be at a significant disadvantage. At the same time, with fewer advertising slots and high demand, the broadcasters could charge anticompetitive prices for commercial time.

In our view, the NAB case should not be read as prohibiting the kind of activities that the Television Program Improvement Act was enacted to encourage. Such activities may be likened to traditional industry standard-setting efforts that do not necessarily restrict competition and may have significant procompetitive benefits. Absent unequivocal anticompetitive purpose or effect, as the multiple product standard was found to have in NAB, product standard setting is evaluated under an antitrust rule of reason that balances any potential anticompetitive effects against procompetitive benefits. The Supreme Court observed in Allied Tube and Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) ("Allied Tube"), that "(w)hen private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition ... those private standards can have significant procompetitive advantages. It is this potential that has led most lower courts to apply rule of reason analysis to product standard-setting by private associations." 486 U.S. at 500-01.

We believe that efforts to develop and disseminate voluntary guidelines to reduce the negative impact of television violence should fare well under the appropriate rule-of-reason antitrust analysis. The measures you describe the industry having taken since the passage of the Television Program Improvement Act and further comparable cooperative activities are in the Department's view unlikely to be found anticompetitive. They are not intended to, nor can we predict that they would have the effect of, significantly decreasing competition among broadcasters, cable operators or other advertisers. They entail voluntary guidelines, and the Supreme Court noted in Allied Tube that concerted efforts to enforce product standards face more rigorous antitrust scrutiny than efforts to agree upon such standards, 486 U.S. at 501, n. 6. We are aware of no indication that the measures already taken or those that may be taken in the future would be biased by any participants' economic interests in stifling product competition. The Television Program Improvement Act's protection did not extend to boycotts of any person, and we assume that further efforts by the industry to alleviate the negative impact of violence in telecast materials also would not entail such conduct.

Moreover, as the Supreme Court indicated in Allied Tube, potential procompetitive effects would be an important part of the antitrust analysis of voluntary television violence guidelines. Such guidelines could serve to disseminate valuable information on program content to both advertisers and television viewers. Accurate information can enhance the demand for,

and increase the output of, an industry's products or services. For example, viewers, including particularly parents, may react to uncertainty about the nature of violence in television programming by reducing television viewing in their homes. Violent television programming is seen by many as distasteful or harmful, and reasonable voluntary industry efforts to alleviate such negative effects can be likened to reasonable safety standards that improve the quality of, and thus the demand for, an industry's products.

In sum, the Department does not believe that continuance of the activities that have been exempted from the antitrust laws by the Television Program Improvement Act—including measures already taken or comparable cooperative measures that may be taken in the future—should present substantial antitrust risks. Certainly, such conduct would not raise the direct commercial competitive concerns that were presented by the commercial advertising restrictions that the Department challenged in the NAB case.

We appreciate very much your concerns with the negative effects of gratuitous television violence, and we hope our comments on the antitrust aspects of collective industry efforts to alleviate those effects will be helpful.

Sincerely,

Sheila F. Anthony (signed)
Assistant Attorney General

C.
**Statement of
 Principles of
 Radio and
 Television
 Broadcasting**

**STATEMENT OF PRINCIPLES OF RADIO AND TELEVISION
 BROADCASTING**

**Issued by the Board of Directors of the
 National Association of Broadcasters**

PREFACE

The following Statement of Principles of Radio and Television Broadcasting is being adopted by the Board of Directors of the National Association of Broadcasters on behalf of the Association and commercial radio and television stations it represents.

America's free over-the-air radio and television broadcasters have a long and proud tradition of universal, local broadcast service to the American people. These broadcasters, large and small, representing diverse localities and perspectives, have strived to present programming of the highest quality to their local communities pursuant to standards of excellence and responsibility. They have done so and continue to do so out of respect for their status as daily guests in the homes and lives of a majority of Americans and with a sense of pride in their profession, in their product and in their public service.

The Board issues this statement of principles to record and reflect what it believes to be the generally-accepted standards of America's radio and television broadcasters. The Board feels that such a statement will be particularly useful at this time, given public concern about certain serious societal problems, notably violence and drug abuse.

The Board believes that broadcasters will continue to earn public trust and confidence by following the same principles that have served them well for so long. Many broadcasters now have written standards of their own. All have their own programming policies. NAB would hope that all broadcasters would set down in writing their general programming principles and policies, as the Board hereby sets down the following principles.

PRINCIPLES CONCERNING PROGRAM CONTENT

Responsibly Exercised Artistic Freedom

The challenge to the broadcaster often is to determine how suitably to present the complexities of human behavior without compromising or reducing the range of subject matter, artistic expression or dramatic presentation desired by the broadcaster and its audiences. For television and for radio, this requires exceptional awareness of considerations peculiar to each medium and of the composition and preferences of particular communities and audiences.

Each broadcaster should exercise responsible and careful judgement in the selection of material for broadcast. At the same time each broadcast licensee must be vigilant in exercising and defending its rights to program according to its own judgements and to the programming

choices of its audiences. This often may include the presentation of sensitive or controversial material.

In selecting program subjects and themes of particular sensitivity, great care should be paid to treatment and presentation, so as to avoid presentations purely for the purpose of sensationalism or to appeal to prurient interest or morbid curiosity.

In scheduling programs of particular sensitivity, broadcasters should take account of the composition and the listening or viewing habits of their specific audiences. Scheduling generally should consider audience expectations and composition in various time periods.

Responsibility In Children's Programming

Programs designed primarily for children should take into account the range of interests and needs of children from informational material to wide variety of entertainment material. Children's programs should attempt to contribute to the sound, balanced development of children and to help them achieve a sense of the world at large.

SPECIAL PROGRAM PRINCIPLES

1. Violence.

Violence, physical or psychological, should only be portrayed in a responsible manner and should not be used exploitatively. Where consistent with the creative intent, programs involving violence should present the consequences of violence to its victims and perpetrators.

Presentation of the details of violence should avoid the excessive, the gratuitous and the instructional.

The use of violence for its own sake and the detailed dwelling upon brutality or physical agony, by sight or by sound, should be avoided.

Particular care should be exercised where children are involved in the depiction of violent behavior.

2. Drugs and Substance Abuse.

The use of illegal drugs or other substance abuse should not be encouraged or shown as socially desirable.

Portrayal of drug or substance abuse should be reasonably related to plot, theme or character development. Where consistent with the creative intent, the adverse consequences of drug or substance abuse should be depicted.

Glamorization of drug and substance abuse should be avoided.

3. Sexually Oriented Material.

In evaluating programming dealing with human sexuality, broadcasters should consider the composition and expectations of the audience likely to be viewing or listening to their stations and/or to a particular program, the context in which sensitive material is presented and its scheduling.

Creativity and diversity in programming that deals with human sexuality should be encouraged. Programming that purely panders to prurient or morbid interests should be avoided.

Where significant child audience can be expected, particular care should be exercised when addressing sexual themes.

Obscenity is not constitutionally-protected speech and is at all times unacceptable for broadcast.

All programming decisions should take into account current federal requirements limiting the broadcast of indecent matter.

ENDNOTE

This statement of principles is of necessity general and advisory rather than specific and restrictive. There will be no interpretation or enforcement of these principles by NAB or others. They are not intended to establish new criteria for programming decisions, but rather to reflect generally-accepted practices of America's radio and television programmers. They similarly are not in any way intended to inhibit creativity in or programming of controversial, diverse or sensitive subjects.

Specific standards and their applications and interpretations remain within the sole discretion of the individual television or radio licensee. Both NAB and the stations it represents respect and defend the individual broadcast's First Amendment rights to select and present programming according to its individual assessment of the desires and expectations of its audiences and of the public interests.

(Adopted October 1990; reaffirmed 1992).

D. Innovative Approaches to Public Interest Respon- sibilities: A Comparative Analysis

Innovative Approaches to Public Interest Responsibilities: A Comparative Analysis

The purpose of this appendix is to offer some discussion of various possible innovative approaches to public interest obligations, and to compare them to more conventional approaches.* Our shared ground is that broadcasters should attempt to contribute to the educational, civic, and democratic goals of a well-functioning democracy. The question is what methods are best suited to achieving those goals and whether it is possible to think of more creative means for doing so. Thus we discuss a wide range of proposals, from deregulation to spectrum auctions to a system of “digital drop-ins,” by which government would support a substantial amount of public interest programming.

Some of the most interesting proposals below attempt to promote public interest goals by allowing considerable flexibility for broadcasters, as, for example, by allowing them to provide public interest broadcasting or instead to pay for someone else to do it, or by paying a spectrum fee (from an auction or from a set price) that might be used to support public interest broadcasting.

We have been greatly assisted by a number of presentations and documents, including those by the Media Institute, a working group of the Aspen Institute, and Hugh Carter Donahue. The public through electronic mail submissions, faxes, and attendance at meetings has also made substantial contributions to the Committee. We are very grateful for the creative thinking and assistance provided by these organizations and individuals. These ideas were vigorously debated within the Committee. Given the innovative and new approach taken by many of these proposals, the Committee chose not to reach any final judgment and conclusions or make any specific recommendations.

I. TRADITIONAL REGULATION: THE PUBLIC TRUSTEE MODEL

The traditional approach to regulation of broadcasting has treated broadcasters as public trustees, obligated to meet a large set of public service responsibilities. Because broadcasters get exclusive use of a scarce public resource—the airwaves, it has been deemed appropriate to subject them to national commands designed to ensure promotion of the public interest. Perhaps the public trustee model should be “carried over” to the digital era, though there are complexities in deciding exactly how the model applies in a new setting. There are serious questions about the extent to which federal commands should be specific (so as to ensure compliance) or vague and general (so as to allow room for private adaptation).

* The Advisory Committee thanks Angela Campbell and the Aspen Institute’s Communications and Society Program directed by Charles M. Firestone and Amy Korzick Garmer for the submission, *Toward a New Approach to Public Interest Regulation of Digital Broadcasting: A Preliminary Report of the Aspen Institute Working Group on Digital Broadcasting and the Public Interest*, on which this Appendix is based.

Advantages: It is reasonable to think that direct mandates are the simplest way to ensure compliance with public interest responsibilities. If, for example, broadcasters are told to provide three hours of educational programming per week, or five hours of free air time for candidates per year, the public interest may be well-served simply by virtue of the mandate. Other approaches might be easier to evade and less effective.

Disadvantages: In general, this approach may be anachronistic in light of the new communications market, with so many more options. As historically understood, the public trustee model also has a degree of rigidity—a kind of “one size fits all” notion that is ill-suited to varying needs on the part of stations and viewers alike. Command-and-control approaches can also be counterproductive and have unintended bad side-effects.

II. ECONOMIC INCENTIVES: PAY OR PLAY, SPECTRUM CHECKOFF

In the environmental area, there have been many innovations designed to create efficient, or low-cost, ways of promoting regulatory goals. A creative illustration consists of “emissions trading,” by which polluters are given a right to pollute a set amount, and permitted to trade that right with others.¹ The basic idea is that pollution is a public bad, and therefore people should be able to save money from doing less of it (and in that way lose money from doing more of it). If the right to pollute can be traded, there will be strong incentives to come up with low-cost ways of reducing pollution, and the result should be a system in which we obtain pollution reductions most cheaply. Existing experience with emissions trading approaches have shown many advantages.²

This basic approach—using economic incentives—might be adapted to the area of public interest programming. Indeed, the Children’s Television Act now authorizes licensees to meet part of their obligation to children by demonstrating “special efforts . . . to produce or support [children’s educational] programming broadcast by another station in the licensee’s marketplace.”³ The idea might be generalized. Suppose, for example, that public interest programming is considered to be a “public good,” in the sense that the public is better off with more of it. Suppose too that some broadcasters are good at providing such programming, and can do so in a cost-effective manner, whereas others are not so good at it, and can do so only at great expense. Adapting the environmental law model, it might be provided that broadcasters should have a choice: provide public interest programming of a certain defined level; or pay a certain amount to someone else who will do so.

A mild variation on this approach would involve what has been called the “spectrum check-off” model. On this model, broadcasters are given a choice: adhere to public interest responsibilities as nationally determined; or pay a fee for the use of the spectrum. The payment would be used for public broadcasting of one kind or other. This approach is somewhat less fine-tuned, and somewhat simpler, than the “pay or play” model. Under “spectrum check-off,” there is only one “deal,” whereas under “pay or play,” there could be a number of trades every year.

Advantages: This approach might ensure a high level of public interest broadcasting, and do so in a way that ensures that such broadcasting will be provided by those most willing and able to do it. Thus the "pay or play" approach might combine the virtues of the public trustee model with the virtues of deregulation. Under this approach, people who do not want to provide public interest programming, or who can do so only at great expense, can make mutually beneficial deals with others who are willing to do so. This could serve both broadcasters and the public.

Disadvantages: In the environmental area, emissions trading does not work where it creates "hot spots," that is, areas that are highly polluted. A problem with "pay or play" is that it may result in the failure, on the part of some or many broadcasters, to do anything but "pay," with the consequence that many viewers do not see such programming—and with the further consequences that broadcasters who provide such programming may be hurt in the marketplace. In addition, there are symbolic and expressive values to uniform public interest obligations. Some people think that these obligations should apply to everyone and that no broadcaster should be allowed to buy its way out.

III. PAY PLUS ACCESS

Under this approach, broadcasters would pay a fee for a right to use the spectrum; the fee might be determined via auction or might be determined by government. At the same time, public interest obligations would be removed. In addition, broadcasters would be asked to allow a specified amount of programming in the public interest—in other words, to set aside an identified amount of time for political candidates, educational programming, or diverse viewpoints. It would be possible to imagine various combinations of the three ingredients of this approach: payment, relief from general public service obligations, and access.

Advantages: As compared with economic incentives, this approach would tend to ensure that some public interest programming was on every station. Many people think that this is important—that certain programming, for example candidate speech, should not be relegated to certain channels that are rarely watched. Thus this approach might do better in serving democratic goals. As compared with the public trustee model, this approach would better ensure that people will provide public interest programming who have the incentive to do so well.

Disadvantages: For those skeptical of "pay or play," this approach might create similar problems. It also would involve a degree of administrative complexity. It is possible that people would simply change the channel when the "access" material was on the station.

IV. DISCLOSURE OF PUBLIC INTEREST AND PUBLIC SERVICE ACTIVITIES

We have emphasized the importance of disclosure of public interest and public service activities. It would be possible to think that disclosure should be the exclusive governmental mandate, and that the market should be used for all specific decisions. Perhaps, then, government should restrict itself to a disclosure requirement.

Advantages: Disclosure might well trigger public-interested reactions on the part of broadcasters and diverse segments of the public. In the environmental context, disclosure has by itself done enormous good in terms of achieving low-cost pollution reductions.⁴ The same may well be true here. If broadcasters are required to disclose their public interest activities, there may well be a kind of competition to have more such activities, and to create a kind of "race" to do better. Moreover, disclosure is a minimal mandate, not by itself requiring anything. Perhaps what emerges from the market, influenced as it is by the pressures that come from disclosure, is best for society, especially in light of the increasing range of programming options.

Disadvantages: In advance, it is impossible to know how much good would be done by disclosure on its own. Perhaps the good results in the environmental area will not be replicated here. If disclosure by itself has few effects, there is insufficient reason to think that whatever results is necessarily "best." Disclosure may, in short, be too close to deregulation.

V. SPECTRUM AUCTION WITHOUT PUBLIC INTEREST OBLIGATIONS

The FCC has experimented with an auction approach to allocating scarce communications resources. It would be possible to suggest that instead of being required to pay a "fee" for spectrum, to be set by government, broadcasters should receive licenses via any auction, where the market would set the relevant prices. The proceeds from the auction could be used however the taxpayers see fit.

Advantages: It is usually better to have the market, rather than government, set the fees for goods and services. And if deregulation is an appropriate solution, a spectrum auction might well be part of a complete deregulatory package, in which broadcasters purchase "space" (at market prices) and then supply the relevant goods (also at market prices).

Disadvantages: Operation of so general an auction could be somewhat complicated. Some people believe that there would be serious questions of equity if digital "space" were put up for sale anew, especially in light of various investments that have already been made. Most important, this approach is unacceptable if the case for deregulation has not been made out. If, for example, there are various forms of market failure, it is reasonable to think that broadcasters should provide more public interest programming than the market guarantees (see below).

VI. COMPLETE OR NEAR-COMPLETE DEREGULATION

One possible approach, explicit in some of the suggestions that we have received, is to eliminate any public interest obligations. It might be thought, for example, that the market for communications is providing sufficient services for everyone, and that serious constitutional questions are raised by any governmental control of programming content. Even if the constitutional questions are not so serious, perhaps this form of government intrusion into the editorial discretion of broadcasting stations is no longer acceptable.

Advantages: Perhaps deregulation could do as well as any other approach at ensuring that viewers see what they want to see. It would certainly save money and reduce administrative burdens for broadcasters, a fact of general importance for the industry and of particular importance for many small and local stations. In light of the broad availability of options—including cable—it might be thought that there is no longer any reason for government control of content. On this view, any public interest programming should be funded by taxpayers, to the extent that they are willing to do so; broadcasters should not be required to pay for that programming on their own.

Disadvantages: There is good reason to believe that the communications market will not meet all social needs. Many people do not have cable television at all, and they rely instead on broadcasting. The market for broadcasting may well underproduce educational programming for children, and also programming relating to elections and other democratic concerns. There are large “external” benefits from such programming, and individual viewers may not adequately take account of those benefits in individual choices.⁵ The fact that advertisers are involved in determining program content suggests that the communications market is not an ordinary one; since broadcasters deliver viewers to advertisers—since viewers are in this sense commodities rather than consumers—it is not at all clear that the communications market will simply provide viewers what they “want.”⁶ In any case people are citizens as well as consumers, and they may well, in their capacity as citizens, want broadcasters to produce more public interest programming than the market produces on its own. And if broadcasters are receiving licenses for free, it makes sense to say that they should be required to provide something in return.

VII. DEREGULATION WITH LICENSING FEE, WITH PROCEEDS DEVOTED TO PUBLIC INTEREST BROADCASTING

Some people have suggested that government should deregulate the market, and allow broadcasters to show whatever they wish, but that it would be appropriate to impose a licensing fee, the proceeds to go to public interest broadcasting. Of course the licensing fee might be established via auction.

Advantages: Like the deregulation option, this one would eliminate any government control of the content of broadcasting. But it would impose a quid pro quo: broadcasters would have to pay a certain amount as a licensing fee, with the proceeds to go to public interest broadcasting on, for example, PBS.

Disadvantages: Like the deregulation option, this approach may well produce too little educational viewing for children and too little attention to democratic and civic affairs. It is risky to leave all public interest obligations with PBS; our tradition has sought to impose minimal duties on all stations who receive broadcasting licenses.

VIII. DIGITAL DROP-INS IN THE PUBLIC INTEREST AND THE QUESTION OF "RESERVING" PUBLIC INTEREST "SPACE"

It has been suggested that when the 1600 channel analog television system becomes obsolete, some part of the spectrum should be specifically reserved, by government, for civic discourse or local and public affairs programming. The networks that produce such programming might be funded by money received from auctioning off a portion of the analog stations. The basic idea would be to ensure "space" for public broadcast stations that would serve civic aspirations. These stations could in turn develop relevant expertise and obtain niche markets, as for example, C-Span has done.

Advantages: This approach would involve little control of commercial broadcasters. At the same time, it would ensure a large level of civic and democratic programming. The goal would be to use new technologies to expand on the PBS model, creating a number of "little," and private, public stations.

Disadvantages: If it is desirable to ensure a certain level of public interest programming on all stations, this approach will be inadequate. There are also questions about the extent to which it is appropriate for government to reserve "space" for programming of a specific content, and about how strong a role government might have in overseeing those stations.

ENDNOTES

¹ See Ackerman and Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).

² See *id.*; Robert Stavins, *What Can We Learn From the Grand Policy Experiment? Lessons from SO₂ Allowance Trading*, 12 J. ECON. PERSP. 69 (1998).

³ 47 USC 303b(b)(2).

⁴ See JAMES HAMILTON, *CHANNELING VIOLENCE* (1998).

⁵ See C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO STATE L.J. 311, 352-83 (1997); see also JAMES HAMILTON, *supra*.

⁶ See C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994).

E. History of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters

History of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters

President Clinton established the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters—or PIAC, for Public Interest Advisory Committee—on March 11, 1997.¹ The President charged the Advisory Committee with determining how the principles of public trusteeship that have governed broadcast television for more than 70 years should be applied in the new television environment created by the Telecommunications Act of 1996. Specifically, the President requested that the Advisory Committee advise Vice President Gore on the public interest obligations of digital television broadcasters as this new transmission technology replaces existing analog broadcasting techniques.

Under the mandate of the Telecommunications Act, Congress assigned existing television broadcasters an additional 6 megahertz of spectrum to facilitate the transition from analog to digital transmission technologies. New digital transmission protocols will enable broadcasters to offer high-definition television, additional channels, new programming formats and information services, and other innovations.

Because of its expected impact on broadcast programming, industry practices, and market-place competition, digital television is the most significant transformation in the history of broadcast television. Not surprisingly, it raises new questions about how public interest obligations that have historically applied to television broadcasters should evolve.

On June 28, 1997, President Clinton appointed Leslie Moonves, President of CBS Television, and Dr. Norman Ornstein, Resident Scholar at the American Enterprise Institute, to co-chair the Advisory Committee. Along with 19 prominent Americans appointed as members of the panel on October 22, 1997, the Advisory Committee was directed to explore the complex ramifications of digital television and to develop formal recommendations concerning the public interest obligations of digital broadcasters. (See Appendix G for biographies of Advisory Committee members.)

Members of the Advisory Committee were selected on the basis of their leadership in the commercial and noncommercial broadcasting industry, computer industries, film and video production, the artistic community, academic institutions, public interest organizations, and the advertising community. A twentieth member was appointed in December 1997, bringing total Advisory Committee membership to 22.

Initially, the President gave the Advisory Committee a June 1, 1998, deadline for submitting a report and recommendations to Vice President Gore. The President extended that deadline first to October 1, 1998, and then to December 31, 1998.

During its 15-month life—October 1997 to December 1998—the Advisory Committee met on eight occasions: six in Washington, DC, one in Los Angeles, California, and one in Minneapolis, Minnesota. At those meetings, the Advisory Committee heard from expert panels,

solicited the views of the public, and deliberated on the most appropriate policies for advancing the public interest in digital broadcasting.

EXPERT PANELS AND PUBLIC OUTREACH

The depth of the Advisory Committee's investigations is evidenced by the twelve presentations and discussions hosted by expert panels and individuals during the five fact-finding meetings held from October 1997 to April 1998. These presentations covered the following topics:

October 22-23, 1997: Washington, DC

1. **The Evolution of the Public Interest Standard in Broadcasting.** Broadcast attorney Erwin Krasnow of Verner, Lipfert, Bernhard, McPherson & Hand, described the complex historical changes in the public interest standard in broadcasting since its inception in 1927.
2. **Relevant Provisions of the Telecommunications Act of 1996 and the Federal Communications Commission's Implementation Efforts.** Karen Edwards, the Designated Federal Officer of the Advisory Committee and a telecommunications attorney with the National Telecommunications and Information Administration, explained the statutory and administrative framework that will guide the evolution of digital television and any public interest requirements.
3. **What Makes Digital Technology Different?** Richard E. Wiley, Senior Partner in the law firm of Wiley Rein & Fielding, Chair of the Advisory Committee on Advanced Television Service (ACATS), and the former Chairman of the FCC, offered an overview of the technical bases of digital television and the complex implications for the Advisory Committee's recommendations.
4. **HDTV Demonstration.** James Goodman, President and CEO of Capitol Broadcasting and Tom Beauchamp, Chief Engineer at *WRAL-TV* in Raleigh, North Carolina, discussed the superiority of digital transmission technology and demonstrated the difference in picture quality between a high definition digital signal and an analog signal.

December 5, 1997: Washington, DC

1. **Perspectives from the Public Interest Community.** Leaders of prominent public interest organizations—Andrew Jay Schwartzman, President and CEO, Media Access Project; Paul Taylor, Executive Director, Free TV for Straight Talk Coalition; and Mark Lloyd, Executive Director, Civil Rights Forum—explained their desire to secure free airtime for political candidates, ensure responsiveness to local communities, foster diversity of expression, among other concerns.
2. **Perspective from the Broadcast Industry.** Leading broadcasters—Robert Wright, CEO, NBC; W. Don Cornwell, CEO, Granite Broadcasting; and Robert T. Coonrod, President and CEO, Corporation for Public Broadcasting—discussed the industry's

commitment to public trusteeship and localism, and the complexities and risks of moving to digital television transmissions.

January 16, 1998: Washington, DC

1. **The Technology of Digital Broadcasting and the Implications for New Programming Services.** Robert D. Glaser, the Chairman and CEO of RealNetworks, Inc., and two industry analysts—Bruce M. Allan, Vice President for the Broadcast Division at Harris Corporation and Josh Bernoff, Principal Analyst for New Media Research at Forrester Research, Inc.—discussed innovative programming services that digital technologies will make possible and the complications this creates in fashioning public interest obligations.
2. **Closed Captioning and Video Description of Broadcast Programming.** Karen Peltz Strauss, Legal Counsel for Telecommunications Policy for the National Association of the Deaf, and three other experts on disability access explained how new digital transmission technology will facilitate versatile new types of closed captioning and video description that can make television more accessible to individuals who have hearing and vision disabilities.

The panel comprised James Tucker, Superintendent, Maryland School for the Deaf; Larry Goldberg, Director, CPB/WGBH National Center for Accessible Media; and Nolan Crabb, Editor, Braille Forum, American Council of the Blind.

3. **Natural Disaster Information Services.** Peter Ward, Chairman of the U.S. Geological Survey's Working Group on Natural Disaster Information Systems, discussed how digital television offers new and innovative ways to warn persons at risk of impending natural disasters, and explained that utilizing the technology to its fullest extent will require close coordination among broadcasters, television set manufacturers, and emergency communications specialists.
 4. **Educational Programming in the Digital Era.** Peggy Charren, Visiting Scholar at the Harvard University Graduate School of Education and founder of Action for Children's Television, hosted a panel of five experts who described the exciting new possibilities that digital television offers for improving educational programming.
- The panel comprised Gordan Ambach, Executive Director, Council of State School Officers; Janet Poley, President, American Distance Education Consortium; Marilyn Gell Mason, Director, Cleveland Public Library; Fred Esplin, General Manager, KUED-TV, Salt Lake City, Utah; and Gary Poon, Executive Director, Digital Television Strategic Planning Office, PBS.

March 2, 1998: Los Angeles, California

1. **Independent Programming and Access in the Digital Age.** At a meeting at the University of Southern California's Annenberg School for Communications, a panel of prominent independent producers and community leaders, moderated by James Yee, Executive Director, Independent Television Service, expressed concern about the challenges they face getting access to local and national television outlets.

The panel comprised Gerald I. Isenberg, Chairman, Caucus for Producers, Writers & Directors and Executive Director, Electronic Media Programs, USC School of Cinema-Television; Herbert Chao Gunther, President and Executive Director, Public Media Center; Kelley Carpenter, Director, Southern California Indian Center; and Marian Rees, Marian Rees Associates, Inc. and Co-Chair, National Council for Families and Television.

2. **Political Broadcasting.** University of Chicago Law School Professor Cass R. Sustein hosted a panel of three experts who explored the possibilities of providing additional airtime for political speeches by parties and candidates.

The panel comprised Tracy A. Westen, President, Center for Governmental Studies and Adjunct Professor, Annenberg School for Communication; P. Cameron DeVore, Senior Partner, Davis Wright Tremaine LLP; and Paul Taylor, Executive Director, The Free TV for Straight Talk Coalition.

April 14, 1998: Washington, DC

1. **Survey of Broadcasters' Public Service Activities.** Paul A. La Camera, President and General Manager of WCVB-TV in Boston, hosted a panel that reviewed the community services that many broadcasters currently provide—ranging from public service announcements to political debates to charity fundraising. The panel comprised William D. McInturff of Public Opinion Strategies and Jack Goodman of the NAB.

In addition to these panels, dozens of scholarly papers and special reports were submitted to the Advisory Committee from various parties, including major reports by the Aspen Institute's Communications and Society Program, the National Association of Broadcasters, the Benton Foundation, Media Access Project, the Media Institute, and numerous individual law review and news articles. Many Advisory Committee members also submitted significant testimony or reports on topics under review.

PUBLIC OUTREACH

To ensure that its deliberations could be followed by interested parties in the television industry, academia, the political area, and the general public, the Advisory Committee made a considerable outreach effort. The Advisory Committee established a website and listserv—www.ntia.doc.gov/pubintadvcom/pubint.htm—where meetings were announced and a wide variety of documents, including meeting transcripts, were posted. Dozens of additional documents were listed on the website and made available on request to the Secretariat of the Advisory Committee. In addition, audio recordings of Advisory Committee meetings were posted on the World Wide Web using RealAudio.

Public response to Advisory Committee deliberations was extensive. Several score of formal comments were sent to the Advisory Committee via e-mail, and dozens of members of the public appeared in person at Advisory Committee meetings.

SPECIAL PIAC SUBCOMMITTEES

Most of the efforts involved in framing the Advisory Committee's formal recommendations were undertaken by members of the following four subcommittees:

- **Broadcaster Code of Conduct Task Force.** After analyzing the former Television Code of the National Association of Broadcasters, this subcommittee, chaired by Cass Sunstein of the University of Chicago Law School, recommended principles and language for a new code of conduct for broadcasters.
- **Educational Programming Task Force.** This subcommittee reviewed the full Advisory Committee's discussion of educational programming in the digital age—especially two proposals involving public broadcasting—and developed recommendations on that basis. Lois Jean White, President of the National PTA, served as Chair.
- **Minimum Public Interest Standards Working Group.** Under the leadership of James Goodman, President and CEO of Capitol Broadcasting, this subcommittee drafted a set of mandatory minimum requirements for broadcasters.
- **Disclosure Requirements Working Group.** This subcommittee drafted recommendations concerning the types of information about public interest performance that the Advisory Committee believes broadcasters should disclose. Gigi Sohn, Executive Director of Media Access Project, chaired the subcommittee.
- **Datacasting Working Group.** After examining the new capabilities that datacasting will make possible, this subcommittee, headed by Robert D. Glaser, Chairman and CEO of RealNetworks, Inc., drafted recommendations on the public interest options available to broadcasters who choose to datacast.

Following its five fact-finding meetings, the Advisory Committee held three meetings to discuss issues and formulate recommendations. Those meetings were held in Minneapolis on June 8, 1998; Washington, DC, on September 9, 1998; and Washington, DC, on November 9, 1998.

As this record of investigation and deliberation suggests, the recommendations of the Advisory Committee represent one of the most sustained, thorough inquiries into the public interest obligations of television broadcasters ever conducted. (For a description of previous studies of this subject, see Section I.) The Advisory Committee has actively sought the views of the most diverse interests—including the general public—while attempting to reconcile divergent perspectives into a workable policy consensus. The Advisory Committee hopes that this report will serve as a valuable benchmark during future policymaking in the Administration, Congress, and Federal Communications Commission.

ENDNOTE

- ¹ Exec. Order No. 13038, 62 Fed. Reg. 12065 (1997).