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### **Access Cable TV as Electronic Public Space**

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*This article started out as a briefing paper for friends in the public interest community working on the bill that eventually became the 1992 cable act (and was then folded into the Communications Act of 1934). Our question then, as it has been since, is what would be a useful way to define the public interest as communications systems grow and change. As the 1992 act was being shaped, conservatives pressed hard the argument that less regulation meant more benefits to the public. Consumer advocates pushed for price regulation, supporting a broad public outrage at deregulated prices and poor quality. I argued the need to consider as well the need for public spaces and public behaviors. This version of the article was published in the *Journal of Communication*, and was used in a lawsuit ensuing from the act (See the following chapter, "Access Cable in Action"). The issues endure, since cable has continue to operate with monopoly power, and since public cultures continue to need nourishment.*

As a regulated telecommunications service, cable TV has been under scrutiny for its service to the public interest--a central term in U.S. communications policy (Aufderheide, 1998). Perhaps the most high-profile public interest issue in cable service has been rates, an issue that reflects both consumer concern and its monopoly clout. I would like to propose that the public interest can be served, not only by regulatory mechanisms that check market power and enhance diversity in the commercial marketplace, but also by mechanisms that guarantee and protect electronic spaces--channels, centers, services--exclusively for public activity. This is because the public interest is broader than that of consumers, or even protection of the individual speaker; the public has its own interests, separate from those of government or business.

### Cable TV Today

Cable is now the primary delivery medium for television in a majority of American homes. Currently almost all American television homes can receive cable, and more than 66 percent of those homes do receive it (U.S., FCC, 1998). Cable has become an essential information service for the majority of Americans, and for many has always been so. The cable industry argues that cable is not nearly as important as it appears, because consumers have alternatives (newspapers, videocassettes, broadcast, theaters) to the various elements of its communications package. But this ignores questions of accessibility, comparative cost, and consumer habits. In rural Madelia, Minnesota, cable brings in the only clear signals. Cable is also a virtual necessity in Manhattan, where dense building means poor reception. And in Laredo, Texas, where 94 percent of the population speaks Spanish as the language of the home and one in four speaks no English, Spanish-language programming appears only on cable (U.S. Senate 1990b: 52).

Historically, cable policy has been hammered out among a handful of special interests, all of whom have invoked the public interest. The Cable Communications Policy Act of 1984 was passed with a minimum of public participation. This law, a hasty resolution to a three-year argument between the largest cable operators and the municipalities that control franchises,

created a national cable policy for the first time. The law attempted to encourage the growth of cable, partly "to assure that cable communications provide, and are encouraged to provide, the widest possible diversity of information sources and services to the public" (Cable Communications Policy Act of 1984, Section 601[4]. 47 U.S.C. Sec. 532 [4]). It also attempted to balance the concerns of the major parties, e.g. the cablers' desire for minimal regulation and the cities' desire for accountability (Meyerson, 1985).

The cable industry did grow dramatically once the law went into effect. Viewership grew rapidly, and prices skyrocketed. Even the law's modest public interest provisions--e.g. leased access and public access--were poorly enforced, sometimes leaving those who wished to gain access to the cable systems worse off than before (Lampert, Cate, & Lloyd, 1991; U.S. Senate, 1990b). Consumers outrage over prices and services, and municipalities' indignation over contracts violated, triggered passage of the 1992 Cable Act, which among other things required cable rates to be more closely regulated and required cable operators to carry broadcast signals on a third of their capacity. The cable industry conducted a high-visibility public relations campaign to blame industry problems on government regulators, while also lobbying Congress on the rewrite of the Communications Act, what eventually became the Telecommunications Act of 1996. In that process, cable industry leaders represented themselves as the nation's only business ready to compete with the telephone companies, if properly favored. Once so favored, with (among other things) deregulation of most cable rates, cable and phone companies regrouped and opted not to compete, at least in the short term. (Aufderheide, 1998)

The virtual absence of a public voice on cable policy, if typical, may be related to the fact that policy has not encouraged the use of mass communication, including cable, for explicitly civic activity. One important, and neglected vehicle for such stimulation is access cable.

### The Public Sphere and the First Amendment

The public sphere, a social realm distinct both from representative government and from economic interest (See earlier chapter, "Public Television and the Public Sphere"), is barely recognized as such in common parlance in the U.S. "Public" is commonly a simple synonym for "consumers" or "demographic set." While public spaces are regularly carved out with ingenuity and against the odds by citizens across the nation, they are rarely noticed in national media. Even more rarely are they identified as examples of activity in the public interest, as well as of their particular issue (e.g. school reform, toxic waste dumps). Typically such groups and movements lack access to media, particularly on their own terms.

Communication is central to political life in a democratic nation, as John Dewey made clear long ago. When members of the public have resources to raise issues of public concern, debate them among themselves and develop ways to act on them, telecommunications becomes one tool in the public's organizing of itself. The First Amendment is important, not merely because it guarantees free speech to individuals, but precisely because by doing so it is a tool in defense of the public sphere, protecting the right of the citizenry to "understand the issues which bear upon our common life" (Meiklejohn 1948, 89). Ruling in the context of broadcasting, the Supreme Court has said that the ultimate objective of the First Amendment is to create a well-informed electorate, and that the public's rights are paramount over all (Red Lion Broadcasting Co. v. FCC, 395 US, 367 [1969]; reinforced in *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 [1990]).

Concern for the quality of public life has marked other judicial decisions, such as the

Supreme Court's ruling supporting free and open airing of contemporary issues so that "government may be responsive to the will of the people and that changes may be obtained by lawful means..." (Stromberg v. California, 283 U.S. 359, 369 [1931]). It is the basis for Judge Learned Hand's celebrated statement that the First Amendment

presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all. (U.S. v. Associated Press, 52 F. Supp. 362, 372 [S.D.N.Y. 1943]).

"A multitude of tongues" has a social utility; it is not a good in itself. What is involved is not mere data delivery, but a process in which many are involved as producers and presenters as well as receivers.

This concept has been given a shorthand definition as diversity of sources, a longstanding measure of the First Amendment in communications policy (Melody 1990a,b). Diversity's primary value is to offer ranges of viewpoints and sources on problems affecting the public sphere. In recent years, the notion that the marketplace of ideas is well-served in the commercial marketplace without regulatory protection for such diversity has become popular. However, a public without a thriving marketplace of ideas may not be educated to demand it either (Entman and Wildman, 1990, 36-37).

### Advertisers and Eyeballs

Cable is hardly a thriving marketplace of ideas. There have been, historically, harsh limitations on the current cable industry's ability to provide diversity of sources and viewpoints on issues of public concern, much less to be a service that fortifies civic activism. Those limitations lie in the conditions of commercial television programming, whatever the delivery vehicle, as well as the current structure of the cable industry.

Cable was once trumpeted as the "technology of abundance," a medium so expansive that no social engineering would be needed for a multitude of tongues to flourish. But this turned out to be another instance in a longstanding tradition of blind optimism in technologies to bring about social change (Streeter, 1987; Winston, 1986; LeDuc, 1987; Sinel, 1990). Although cable has ushered in new formats, from CNN to Nickelodeon to Court TV, the unforgiving logic of commercial production has shaped them all, and ownership has increasingly centralized in a few hands. C-SPAN, funded by voluntary contributions of the cable industry as a non-commercial project (and as a kind of insurance policy with legislators), says nothing about the capacity of the television marketplace to function in the public interest.

Most television programming, including cable programming, is supported by advertising. Programming is designed to attract the audience for the advertising; the public interest may lie in the opposite direction, and the public as a concept is virtually erased in favor of the consumer--who is often referred to as "the public" nonetheless. The most vulnerable members of the public--the young--have been long slighted. Even with the stimulus of legislation mandating children's programming, educational programming for children is still mostly dependent on the slim resources of public television. An issue of great public importance that commercial television never frankly addresses is its own social effect. Bill Moyers' TV series The Public Mind, which did address this issue, was on public television, and was not even carried by all public stations.

Cable's increased channel capacity does not miraculously create new opportunities for public participation in this technology, nor even for greater diversity of sources (LeDuc, 1987;

Winston, 1990). Eyeballs and dollars set a low ceiling even on experimentation within commercial priorities. Television viewing overall has increased only by minutes a day since the wide distribution of cable, and this fact affects the available universe of advertising. While the high costs of production are lowering, as the networks brainstorm cost-cutting measures including "reality" programming, this merely reflects that the total amount of production dollars is being spread ever more thinly. Compression technologies, multiplying the possible channels, and digital set-top boxes that promise vastly expanded options, threaten to spread the viewers out even further, to many programmers' dismay.

Producers know that new technologies do not bring new creative options, new voices, new viewpoints. One study surveying 150 television producers on the options for creativity in the "new television marketplace" found several biases pushing programming away from creativity, including bottom-line strategies and horizontal and vertical integration (Blumler & Spicer, 1990).

### Cable's Control

Cable's industry structure has historically discouraged diversity of sources and perspectives, and leaves virtually no opening for use of the system as a public space.

The simple fact that one operator controls all the channels--a practice that cable industry leaders have zealously guarded, whatever the technical possibilities--concentrates decisionmaking. That tendency has been greatly increased by waves of centralization and vertical integration (U.S. House of Representatives 1990b; U.S. FCC, 1998). As the Supreme Court has recognized, concentration of ownership militates against diversity in principle: "[T]he greater the number of owners in a market, the greater the possibility of achieving diversity of program and service viewpoints" (FCC v. National Citizens Committee for Broadcasting, 436 US 775, 795 [1978]). In 1984, the top four companies controlled 28-29 percent of the national market (U.S. FCC, 1990a, Appendix G, 3; U.S. NTIA, 1988, 555). As the cable law went into effect, mergers and takeovers flourished; the selling price of cable systems tripled in the 1980s (U.S. Senate 1990c, p. 10). By 1991, four companies controlled, at a conservative estimate, 47 percent of all cable subscribers--a national figure that grossly underestimates often-total regional control (U.S. FCC 1990a, Appendix G: 1; U.S. FCC 1990b, Association of Independent Television Stations Comments, April 6, 15-16). By 1998, the top four controlled 62 percent of subscribers (U.S. FCC 1998, E-5). A single MSO, by a decision to carry or not to carry a service, can decide its fate. To add to the problem, the large MSOs have steadily bought equity in program services (U.S. FCC 1990a, Appendix G, 4, 6-9; (Davis, 1990, 38; U.S. FCC 1998, 89f), with Tele-Communications Inc. (TCI) and Time Warner leading the industry with a combined investment in 45 percent of all national cable programming services and similar holdings in cable programming networks. The industry practice has become general, with the eight largest multiple system operators holding interests in all the 68 vertically-integrated services. Moreover, throughout most of the 1990s, most of the largest cable interests developed joint strategies, for instance through participation as board members of Ted Turner's cable operations and through complex programming partnerships.

The result is impressive market power, as the FCC, the General Accounting Office, local officials and Congress have all admitted (U.S. FCC, 1990a, para. 13.4f & par. 69; U.S. GAO, 1990; U.S. Senate, 1990c, 9; The City of New York, National League of Cities, et al., Reply Comments, 2f; "Why viewers," 1990, B1; U.S. FCC 1998). It is evident from pricing to

quality of service to availability of C-SPAN and other programming to availability of new services.

Historically, cable MSOs have militated against programming diversity, even within the limits of what advertisers want and what viewers find entertaining. Cable companies favor programs they own, and they also discourage new, competing programming. They required legislation to force them to carry all local broadcast signals, on up to a third of their capacity, to permit programmers to sell programming on the open market, and to permit programmers to lease available space on their systems at reasonable rates. New technologies and a changed policy platform, in the Telecommunications Act of 1996, did not create a friendlier, more accessible market for independent programmers, and prices of cable service continued to rise.

Cable television service offers a highly constrained range of programming to American viewers. Even if it were a more vigorous programming marketplace, however, the available programming would still be subject to the eyeballs-and-advertisers limitations. People would be able to see what would attract a demographic slice of American consumers interesting to advertisers.

### Electronic Public Spaces

If electronic media policy is to fortify the public sphere, members of the public must be able to use this resource as a public space and in support of other public spaces. The success of this use of the medium would not be measured in commercial criteria, but on its ability to promote relationships within its communities of reference, on issues of public concern. Numbers would be less important than contributing to the perpetual process of constructing a public.

One of many potential resources already exists--public, educational and governmental access channels. They exist thanks largely to grassroots activism resulting in local regulation, and a since-revoked 1972 FCC rule requiring access channels (Engelman, 1990, 1996). Such channels--especially public access--have long been portrayed as electronic soapboxes, where the goal is simple provision of a space in which to speak. The 1984 Act continued this tradition, describing public access as

the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the marketplace of ideas. (House report, cited in Meyerson, 1985, 569)

But what if everybody can speak but nobody cares? The real value of such services has been and must be in helping to build social relationships within which such speech would be meaningful--constructing that "marketplace of ideas." Such a service needs to be seen and used not as a pathetic, homemade version of entertainment, but as an arm of community self-structuring.

Access programs often have been, in the words of one tired access director, "programmed to fail." This is less remarkable than the fact that they exist at all. Only canny, ceaseless, locality-by-locality citizen activism wrested access centers and channels in the franchise process in the first place, and all such victories are temporary. The 1984 Act sabotaged some of those victories. It had capped localities' franchise fees and required them to be unrestricted. It did not require access channels. Points of confusion in the law--particularly the definition of "service"--as well as restrictions on renewal procedures among others made it easy for cable operators to pay more attention to their bottom line and for franchisers to pay more attention to road paving than to cable access. (Meyerson, 1990; U.S. Senate, 1990a, Lila Cockrell, Mayor, San Antonio,

Texas, 453-490; Ingraham, 1990; Brenner, Price and Meyerson, 1990, sec. 6.04[3][c], 6.04[4]). The 1992 Act not only did nothing to remedy these weaknesses, but further crippled the service by permitting operators to censor controversial programming (see *Access Cable in Action*). Reversing that decision required extended legal action. In the 1996 Act, access cable was given a curt nod, by requiring competitors to cable systems in any community to carry the equivalent of the cable operator's access obligations, but no other provisions for access cable were made. In fact, proposals in earlier drafts of the legislation for nonprofit set-asides were struck (Aufderheide, 1998).

Even under starvation conditions, access has carved out a significant role in the minority of communities where it exists. Currently only 18 percent of systems have public access; 15 percent have educational access, and 13 percent have governmental access (TV and Cable Factbook 1998, F1). An abundance of local programming is produced in some 2,000 centers--about 10,000 hours a week (Ingraham, 1990), far outstripping commercial production. The Hometown USA Video Festival, showcasing local origination and PEG channel production annually attracts thousands of entries from dozens of states.

These channels are often perceived to be valued community resources, using traditional measures. One multi-site study shows that 47 percent of viewers watch community channels, a quarter of them at least three times in two weeks; 46 percent say it was "somewhat" to "very" important in deciding to subscribe to or remain with cable (Jamison, 1990). Another study, commissioned by Access Sacramento, showed that two-thirds of cable subscribers who knew about the channel watched it (Access Sacramento, 1991). Access centers provide resources and services typically valued at many times what they cost. Access Sacramento, for instance, estimates a community value of its equipment, training and consultation at \$4.5 million, ten times its budget (Access Sacramento Annual Report, 1990), an estimate corroborated by the experience of access cable in Nashville and Tucson.

But the most useful measure is not, and should not be, numbers of viewers or positive poll results, but the ability of access to make a difference in community life. Access cable should not function like American public television does. Public television offers a more substantial, thoughtful, challenging or uplifting individual viewing experience than a commercial channel. Access needs to be a site for communication among and between members of the public as the public, about issues of public importance.

Beyond a basic technical level of quality, the entertainment value of such programming comes far secondary to its value as a piece of a larger civic project, whether it is citizen input into actions the local city council is making, or discussions of school reform, or a labor union's donation of services to low-income residents, or the viewpoints of physically challenged people on issues affecting them, or the showcasing of minority culture, such as youth music. This is because viewers are not watching it as individual consumers, but as citizens who are formulating a response. In each case, the program--unlike a commercial broadcast or cable service--is not the end point, but only one of the means toward the continuing process of building community ties.

In small and incremental ways, the access cable channel acts as a public space, strengthening the public sphere. In Tampa, Florida, for instance, public access cable provided the primary informational vehicle for citizens concerned about a county tax that was inadequately justified; major local media, whose directors shared the interests of politicians, had failed to raise accountability issues. The tax was defeated in a record voter turnout. In the area's educational cable access system, airing school board meetings has resulted in vastly increased public contact with school board members. And a children's summer reading program in which

libraries, schools and the access center worked together resulted in the committee members, officers of 13 different institutions, finding other common interests.<sup>1</sup>

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<sup>1</sup>. Interviews with the following people between September 1990 and August 1991 informed the analysis of access cable: Andrew Blau, then-communications policy analyst, United Church of Christ Office of Communication, New York; Alan Bushong, Executive Director, Capital Community TV, Salem, Oregon; Gerry Field, executive director, Somerville Community Access Television; Ann Flynn, Tampa Educational Cable Consortium; Nicholas Miller, lawyer, Miller and Holbrooke, Washington, D.C.; Elliott Mitchell, ex-executive director, Nashville Community Access TV; Randy Van Dalsen, Access Sacramento.

Access does not need to win popularity contests to play a useful role in the community. It is not surprising if people do not watch most of the time. (Indeed, given the treatment access gets by cable operators, it is a kind of miracle that viewers find the channel at all.) It is indicative of its peculiar function that people find the channel of unique value when they do use it.

Different kinds of access are used for very different purposes. Government and educational channels may feature such programming as the city council meeting, the school board meeting, the local high school's basketball game, religious programming or rummage-sale announcements on a community billboard. Some colleges have sponsored oral history sessions that illuminate immigrant history (Agosta, 1990; Nicholson, 1990).

Public access channels, run on a first-come, first-serve basis, are responsible for much of access cable's negative image, and some of its most improbable successes. There is often a strong element of the personalist and quixotic in the programming, and public access channels have sometimes been a source of scandal and legal controversy, for instance when the Ku Klux Klan started circulating national programs for local viewing (Shapiro, 1990, 409f; Brenner, Price and Meyerson, 1990, sec. 604[7]). Less reported is that often the Klan issue spurred civil liberties and ethnic minorities organizations to use the service for their own local needs; and these groups have continued to use the service. Voluntary associations, for instance the Humane Society's adopt-a-pet program in Fayetteville, Arkansas and a musical education series sponsored by the Los Angeles Jazz Society (Nicholson, 1990), also use public access. In some places--for instance New York City, where Paper Tiger television regularly produces sharply critical programs on the media; or Austin, Texas, home of one of access cable's oldest talk shows--public access has become an established alternative voice in public affairs. Public access is host to viewpoints as diverse as those of leftist critics of the Gulf War (in Deep Dish TV's national series) and those of conservative Rep. Newt Gingrich (R-GA), who hosts half-hour shows produced by the Washington, D.C.-based American Citizens' Television (ACTV).

Thus access has a history of fulfilling a role of community service, and has been recognized in law as performing a useful First Amendment function. Access cable could, in every locality, provide an unduplicated, local public forum for public issues.

Cable operators and municipalities alike have found access cable to be a thorn in their sides (Ingraham, 1990). In municipalities such as Pittsburgh, Milwaukee, and Portland (Oregon), cable companies immediately rescinded or renegotiated franchise terms regarding cable access, once the Act went into effect. Even when access was established or re-established, the cost was often significant. For instance, in Austin, Texas, the Time-owned company only two weeks after deregulation went into effect announced that it could not afford to meet its franchise obligations--especially its \$400,000-a-year funds for access television and the provision of eight channels. It took 11 months of civic organizing and city council pressure, and some \$800,000, to restore the provisions.

In localities beset with fiscal crisis--a widespread problem, since in the 1980s many costs of government were shifted downward--revenues once designated to access have gone into general revenues. For instance, when Nashville found itself in a budget crisis in 1988, a program by a gay and lesbian alliance on public access triggered a city council debate. The cable company, a Viacom operator, supported city council members trying to rechannel access funds into general operating funds. The upshot was near-total defunding of the access center. In Eugene, Ore., and Wyoming, Mich., among others, municipalities have drastically cut or eliminated access budgets in favor of other city projects.

## What It Would Take

Local citizen activism has kept access cable alive, but its limits, in a situation where national cable policy shapes the economic environment, are clear. Consistent, federal-level reservation and subsidy would be needed to create the opportunity for creative experiments in public spaces on cable TV. Reservation of channel capacity would need to be accompanied by adequate funding--for facilities, professional production assistance, a local public production fund, and promotion-- through the franchise and through annual franchise fees.

Centers should universally have funding for professional staff, which would not mitigate access' value as a public space. There is no need to fetishize the amateur and the homemade; professional craftsmanship can improve the functioning of a public forum and enliven the public sphere as much as it can the realm of commerce. Professionals' tasks, however, would be as facilitators of communication rather than promoters of expression for its own sake.

National public cable channel capacity, with protected funds to avoid both censorship and the distortions of corporate underwriting, could further broaden the public forum. C-SPAN's admirable record, and that of a foundation-funded regional public affairs channel focusing on the state legislature, CAL-SPAN: The California Channel (Westen, 1989), might serve as prototypes for such an effort. The service would not, however, have to be limited to legislative or judicial issues. Nor would it be beholden to the whims of the cable industry as C-SPAN is. This service would differ from public television--another valuable service--not only in its subject matter but in its primary mandate to respond to the moment, a flexibility public television does not exercise except in extremity.

Such national channel capacity would boldly raise the perennial problem of who should broker information and how, a problem that in itself could become another opportunity for civic organizing and creative rethinking of how television is and can be used. It too would without doubt require professional staff, with rules and structures guiding their work. For instance, users might have to meet a minimum standard of organization; public interests least likely to be served in the commercial marketplace might be prioritized. Arenas of concern such as educational and health policy, multicultural questions, environmental and workplace issues, and the arenas of public discourse themselves (e.g. events of public interest groups) could be the basis for ongoing electronic workshops.

Another resource for such a reinvigorated public interest could be a national video production fund, with its products available for distribution through all televisual vehicles, including cable, broadcast television and videocassette. Such a fund could be paid for in a variety of ways, such as spectrum fees, revenues from profits from sales of broadcast stations and cable systems, and charges on videocassettes, VCRs and satellite dishes. Its goal too would be to promote citizen organizing; some of the early projects of Britain's Channel 4, particularly its workshops and special programming sections, could provide useful models. The funds could be allocated to community organizations of all kinds, rather than to media organizations.

## That's All Very Well, But...

Would protection for access channels and other public spaces even survive the cable companies' claim to First Amendment priority? Operators have made vigorous, and largely but not wholly successful, arguments for the primacy of their First Amendment rights over cable

access (Shapiro, 1990). And commercial media lay a legitimate claim to First Amendment rights, one recognized extensively in law since the mid-1970s (Robinowitz 1990: 313, fn.29). However, First Amendment rights are not absolute, nor the special preserve of economic as opposed to public interests; and there is powerful precedent for the democratic state structurally promoting the public's right to speak (Holmes, 1990, 55). In many of their aspects cable operators are not speakers or even editors (Brenner, 1988, 329f). Policy mandating access centers certainly would not abridge "expression that the First Amendment was meant to protect" (First National Bank of Boston v. Bellotti, 435 US 765, 776 [1978]), but rather the opposite, and furthermore withstand constitutional scrutiny (Meyerson, 1981, 33-59). Congress has also found that leased and PEG access regulation meet First Amendment and constitutional standards (U.S. Senate 1990c, 46; U.S. House of Representatives 1990, 35).

Is it reasonable to assume, though, that people want to "make their own media," when the record shows so decisively that people prefer to pay someone to make it for them? No, and that argument is not made here. For entertainment, most people do and will choose high-quality product paid for mostly by their purchase of advertisers' products. Parents of junior high school football stars will find school sports carried on educational access channel more interesting than the top-rated sitcom or even the NBA, of course, but most people will select commercial alternatives. Indeed, that is why it is important not to abandon that arena to the iron grip of a few MSOs.

But people using cable as a public space are using it to communicate with others about particular issues and projects of public interest. Whatever the level of their involvement, they perceive it and use it--as producers, viewers, or organizers of viewers--not as a consumer experience but as a participatory step in a relationship that is not, typically, either electronic or commercial.

Is access cable part of a dinosaur technological model, in a world in which consumers increasingly can obtain audiovisual services from satellite providers or even from phone companies? Is it unfair to cable operators to saddle them with electronic public spaces that others either do not have to or cannot provide? These are issues, in fact, not of technology but of political and social will. It is perfectly possible to level the policy playing fields, once committed to public spaces. DBS providers do, in theory, have public set-aside obligations (see *The Missing Space on Satellite TV*), and it is possible to imagine comparable obligations in other technologies.

If the public needs such spaces, why not simply pay for access on an open market, and fund the program through general tax revenues? This is indeed one plausible approach to the project of reserving public spaces, but it would confront immediately the fact that the markets for electronic space in telecommunications policy are profoundly distorted, both because of existing policy and because of market dominance.

Why should we assume a demand for something that's been around so long to so little effect? This question builds on the negative image of access cable, which like all stereotypes has an origin in some kind of truth. A variety of answers, substantiated above, address different facets of that negative image. One is that some programming, primarily in public access, has indeed been trivial, self-indulgent and derivative, and that those uses often reflect an interpretation of access that sees the First Amendment as an end rather than a means to democratic vitality. More important is access' gross underfunding, its abandonment by legislators and regulators, and the unrelenting attacks by cabling and cities on centers; in that light, much more shocking is that access centers survive anywhere. It is particularly impressive

that access channels have been able to do as much as they have with so little professional staff. Finally, access, lacking as public television did until 1967 a national substructure, is still in its pre-history.

But can we afford to have such ambitious programs? One answer is to ask, Can we afford not to? Less rhetorically, this is a question that needs as yet ungathered data. Cable and other mass media interests would probably make a substantial contribution to the costs. Operators have powerful arguments against any of these proposals, and they all hinge on inability to afford them--an argument unprovable without accounting evidence. So telecommunications media, especially cable MSOs and broadcast stations, should open their books for the public record.

Finally, are access and other mechanisms to promote the use of the medium as a public space cost-effective? This is a wildly speculative area of economics, because it deals with externalities such as the health of a democratic polity. In the absence of social cost-benefit studies--an area begging for more economic research--one can make some basic points. The technological level of equipment and expertise needed to do so is comparatively low; the price of even lavish subsidy cannot compare to even a small road paving job; and the benefits are widespread and incremental. Civic life is a cultural process that must be nurtured. Television, and increasingly cable television, has a central role in American consumer habits, and has unique capacities to transmit complex, multisensory messages. Why should that capacity be used exclusively to sell things and not to develop civic projects?

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## References

- Access Sacramento (1990). Access Sacramento Annual Report: 1990, The Year in Review. Sacramento: Coloma Community Center.
- Access Sacramento (1991). 1991 Audience Survey Findings Report. Sacramento: Coloma Community Center.
- Agosta, D., with Rogoff, C., & Norman, A. (1990). The PARTICIPATE study: A case study of public access cable television in New York state. New York: Alternative Media Information Center, 121 Fulton St., 5th flr, NY NY 10038.
- Aufderheide, P. (1998). Communications policy and the public interest. New York: Guilford Press.
- Blumler, J. G. & Spicer, C. (1990). Prospects for creativity in the new television marketplace: Evidence from program-makers. Journal of Communication, 40, 78-101.
- Boyte, H. C. and Evans, S. M. (1986). Free spaces: The sources of democratic change in America. New York: Harper and Row.
- Brenner, D. (1988). Cable Television and the freedom of expression. Duke Law Journal, 1988, 329-388.
- Brenner, D., Price, M. & Meyerson, M. (1990). Cable television and other nonbroadcast video: law and policy. New York: Clark Boardman.
- Davis, L. J. (1990, December 2). Television's real-life cable baron. New York Times Magazine, Part 2 The Business World, 16f.
- Engelman, R. (1990, October). The origins of public access cable television. Journalism Monographs, Association for Education in Journalism and Mass Communication (1621 College St., University of South Carolina, Columbia, SC 29208-0251), No. 123.
- Engelman, R. (1996). Public radio and television in America. Thousand Oaks, CA: Sage.
- Entman, R. M. & Wildman, S. (1990). Toward a new analytical framework for media policy: Reconciling economic and non-economic perspectives on the marketplace for ideas. Paper presented at the Annual Telecommunications Policy Research Conference, Airlie, Virginia, October 1-2.
- Hauser, G. A. (1987). Features of the public sphere. Critical Studies in Mass Communication, 4, 437-441.
- Holmes, S. (1990). Liberalism and free speech. In Lichtenberg, J. (Ed.), Democracy and the

mass media. New York: Cambridge University Press.

Ingraham, S. B., on behalf of The National Federation of Local Cable Programmers (1990, May 16). Testimony before the U.S. House of Representatives Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce.

Jamison, F. R. (1990). Community programming viewership study composite profile. Kalamazoo, Mich.: Western Michigan University Media Services Department.

Lampert, D., Cate, F. H., & Lloyd, F.W. (1991). Cable television leased access. Washington, D.C.: Annenberg Washington Program.

Le Duc, D. (1987). Beyond broadcasting: Patterns in policy and law. New York: Longman.

Meiklejohn, A. (1948). Free speech and its relation to self-government. New York: Harper & Bros.

Melody, W.H. (1990a, June-July). The information in I.T.: Where lies the public interest? Intermedia (London), 18, 10-18.

Melody, W.H. (1990b). Communication policy in the global information economy: Whither the public interest? In Ferguson, M. (Ed.), Public communication: The new imperatives. London: Sage Publications.

Meyerson, M.I. (1981). The First Amendment and the cable operator: An unprotective shield against public access requirements. Comm/Ent, 4, 1-66.

Meyerson, M.I. (1985). The Cable Communications Policy Act of 1984: A balancing act on the coaxial wires. Georgia Law Review, 19, 543-622.

Meyerson, M.I. (1990). Amending the oversight: Legislative drafting and the Cable Act. Cardozo Arts and Entertainment Law Journal, 8, 233-255.

Nicholson, M. (1990). Cable access: A community communications resource for nonprofits. Benton Foundation Bulletin 3, Washington, D.C.: Benton Foundation, 1710 Rhode Island Av. NW, 4th flr, Washington, D.C. 20036.

Parsons, P. (1987). Cable television and the First Amendment. Lexington, Mass: Lexington Books.

Robinowitz, S. (1990). Cable television: Proposals for reregulation and the First Amendment. Cardozo Arts and Entertainment Law Journal, 8, 309-335.

Shapiro, G.H. (1990). Litigation concerning challenges to the franchise process, programming and access channel requirements, and franchise fees. In Lloyd, F. (Ed.), Cable Television Law 1990: Revisiting the Cable Act, Volume 1. Washington, D.C.: Practising Law Institute.

Sinel, N. M., et al. (1990). Current issues in cable television: A re-balancing to protect the consumer. Cardozo Arts & Entertainment, 8, 387-432.

Streeter, T. (1987). The cable fable revisited: Discourse, policy and the making of cable television. Critical Studies in Mass Communication, 4, 174-200.

Television and cable factbook. (1998). Washington, D.C.: Warren.

U.S. Federal Communications Commission. (1990a, July 31). In the matter of competition, rate deregulation, and the Commission's policies relating to the provision of cable television service, MM Docket No. 89-600, FCC 90-276.

U.S. Federal Communications Commission. (1990b, December 31). Reexamination of the effective competition standard for the regulation of cable television basic service rates, MM Docket No. 90-4, FCC 90-412, Further Notice of Proposed Rule Making.

U.S. Federal Communications Commission. (1991, June 13). Reexamination of the effective competition standard for the regulation of cable television basic service rates, MM Docket No. 90-4, FCC 90-412, Report and Order and Second Further Notice of Proposed Rule Making.

U.S. Federal Communications Commission. (1998, Jan. 13, 1998). Fourth annual report. In the matter of annual assessment of the status of competition in markets for the delivery of video programming. CS Docket No. 97-141.

U.S. House of Representatives. (1990). Cable Television Consumer Protection and Competition Act of 1990. House Report, H.R. 5267. Report 101-682, 101st Congress, 2d Session.

U.S. General Accounting Office. (1990, June 13). Telecommunications: Follow-up national survey of cable television rates and services. GAO/RCED-90-199. Report to the Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives.

U.S. National Telecommunications Information Administration. (1988). NTIA Telecom 2000. Washington, D.C.: GPO.

U.S. Senate. (1989). Media ownership: Diversity and concentration, hearings before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation. 101st Cong., 1st Sess., June 14, 21, and 22. Washington: GPO.

U.S. Senate (1990a). Cable TV Consumer Protection Act of 1989: Hearings before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, U.S. Senate. 101st Cong., 2d session, on S. 1880, March 29 and April 4. Washington: GPO.

U.S. Senate. (1990b). Competitive problems in the cable television industry: Hearing before the Subcommittee on Antitrust, Monopolies and Business Rights of the Committee on the Judiciary. United States Senate, 101st Cong., 1st Session, April 12. Washington, D.C.: GPO.

U.S. Senate (1990c). Cable Television Consumer Protection Act of 1990: Report on S. 1880. Report 101-381, 101st Congress, 2d Session.

Why viewers would like to zap their cable firms. (1990, March 19). Wall Street Journal, B1.

Westen, T. & Givens, B. (1989). A new public affairs television network for the state: The California Channel. Los Angeles: Center for Responsive Government.

Winer, L.H. (1990). Telephone companies have First Amendment rights too: The constitutional case for entry into cable. Cardozo Arts and Entertainment Law Journal, 8, 257-307.

Winston, B. (1986). Misunderstanding media. Cambridge: Harvard University Press.

Winston, B. (1990, November-December). Rejecting the Jehovah's Witness gambit. Intermedia, 18, 21-25.

## Access Cable in Action

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*Access cable is easy to make fun of, and even easier to ignore. So when access cable centers across the country were threatened with extinction, because of a clause in the 1992 Cable Act, no one knew exactly what was at stake in this decentralized and slighted medium. I did a survey to collect some information that lawyers fighting the clause could use; the Supreme Court finally decided the clause was unconstitutional. I reworked the original affidavit for publication, to expand the audience for the argument.*

What difference does it make in a community to have access cable programming? A national survey of controversial programming on access cable in 1992 suggests that such programming provides a valuable service for immediate communities of reference, but also expands the public sphere by increasing public discussion, debate and awareness of community issues and cultural realities.

### Access cable as a public space

Access cable--the channels variously known as public, educational and governmental (or PEG) and offered as part of basic cable wherever they have been called for in franchises--is that rare site on cable where public interest comes before profit. It is also fiercely embattled, and widely disrespected.

Cable companies and local governments have often found access cable, especially public access, exasperating and even infuriating. On such channels appear usually inoffensive items such as community news bulletin boards, junior high school sports, city council and board of education meetings and senior citizens' workshops. As well, because of public access' wide open, first-come-first-serve policies and its uniqueness as a free and profitless entry point to television, what also sometimes appears there is the dissenting opinion, the deliberately outrageous youthful statement, the talk show that escalates into a free-for-all, nagging critiques of public officials--programming virtually guaranteed to irritate someone. And yet the programming that authorities and some consumers find most obnoxious might turn out, at least at times, to be a unique service to the public sphere.

Public access television, imagined by Congress as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet" (U.S. House of Representatives, 1984, 21-22), has a unique function on television, which usually is one of the most tightly guarded gates in mass media. It has been celebrated as a First Amendment victory because of its accessibility alone. But to become socially significant, its open access needs to result not merely in the service being a catch-all, a kind of garbage can, for leftover opinions and rejected behaviors in the society.

"Public access brings private citizens into public life," one scholar involved with the service argues (Devine, 1992, 9). At its best, public access can create new and expand existing venues for public discussion uncontrolled by government and not conditioned by commercial messages. It can act as an electronic public space, contributing to the elaboration of the public sphere, an arena outside economic and governmental institutions and structures where a polity can form and establish priorities and procedures for managing public resources and problems.

No one, including access' strongest supporters, believes that public access universally

exemplifies that ideal, and some argue that access center directors need to re-envision themselves explicitly as providers of public space rather than as brokers, facilitators, or retailers of individual opinion (Blau, 1992). Access' occasional flurries of publicity--whether publicizing a Wayne's World image of the service or that offered by Ku Klux Klan programming occasionally carried on public access--seem inevitably to embarrass its advocates. Cable access, in short, lives out the tensions between individual and community that infuse discussion of free expression.

One place to assess the utility of public access cable is therefore at what some might consider its most embarrassing, the programming most likely to trigger concern or complaint on the part of the cable operator. This is programming likely to trigger an operator's interference, under the new legislation.

### Method

This study explores the social function of public access, as seen in programming could be seen as controversial. Such programming provides an indication, among other things, of how public access works as an electronic public space.

Eighty-one access centers were surveyed in November and December 1992, in conjunction with research conducted for the Alliance for Community Media's intervention in a Federal Communications Commission rulemaking interpreting operator control over programming (U.S. Federal Communications Commission, 1992, 1992b, 1992c) (See appendix for details of the lawsuit and specifics of the survey). Access directors were asked to identify programming that was or might be construed to be controversial, and also to describe current gatekeeping arrangements and relationships with the cable company. They were also asked to speculate on the effect of operators' having more control over programming.

Some 31 access directors--chosen through their participation in the Alliance for Community Media, which represents the interests of cable access--were interviewed by telephone. Most (20) headed independent nonprofit entities; the rest were functionaries of local government (9) or the cable company (2). The majority (21) came from smaller communities, while 10 worked in major cities or state capitals. The sample was regionally diverse, with 13 from the East, seven from the Midwest, three from the South, and eight from the West.

A mail survey, sent to some 200 access directors on the mailing list of the Alliance for Community Media, then asked the same questions. Among the 50 respondents, 34 headed nonprofit entities. Seven centers were run by the city, and four by the cable company (six were some combination, usually city-run non-profits). Thirty-nine were from smaller communities; 11 were from major cities or state capitals. Twenty-two came from the East, 15 from the Midwest, three from the South, and 10 from the West.

### Programming that tests the limits

Access directors argue that successfully executed programming, particularly programming that wins a regular time slot, is evidence of more than an individual opinion, and reflects a concern somewhere in that community. They gauge this concern in part through enthusiasm for program production and in part through responses to programming. "If it has an audience," said director Deb Vinsel in Olympia, WA, "it's part of your community, even if you wish it were not."

Such programming is here analyzed in two categories, taped and live programming, because each type creates different opportunities for raising issues, discussion and debate, and so fostering the public sphere.

### Taped programming

Taped programming, which often includes some "imported" shows (made elsewhere but sponsored locally), demonstrates a conscientious investment of time and energy on the part of people eager to communicate their views, either with peers or beyond their immediate circle. Access' airing of them provides an otherwise inaccessible platform for sometimes unpopular views.

The examples that access directors offered, when asked to consider pre-recorded programming that a cautious programmer might reject for fear of being interpreted as containing "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct," provide a sample of expression that goes past the idiosyncratic into the social. The most importance categories include sex education, public affairs, and cultural minorities.

Sex education, and particularly AIDS education, was a frequent item mentioned by access directors; it was both popular and controversial. Such programming was often, though not necessarily, an indication of the self-awareness and public self-identification of a gay and lesbian community. Furthermore, it was an instance of introducing a hitherto unknown or forbidden item of knowledge--transmission of AIDS--into public discourse. Series such as Fairfax (VA) Cable Access Corporation's Gay Fairfax, Grand Rapids (MI) Community Media Center's The Lambda Report, Tucson (AZ) Community Cable Corporation's Empty Closet all touch on AIDS education. Single programs such as Cambridge (MA) Community TV's Truth or Consequences: A Guide to Safe Sex at MIT; AIDS, a documentary cablecast at Spring Point Community television Center in South Portland, ME; and an AIDS prevention special involving role playing at Kalamazoo (MI) Community Access Center frankly confront an emerging health menace with approaches that may offend some.

Imported public affairs programs trigger complaints but also enhance the range of debate, according to center directors. Several centers reported that the talk show Alternative Views, produced through the Austin, TX access center but distributed where the program finds a local sponsor, often draws criticism for its leftist perspective. It offers a clear example of the longstanding goal of "diverse and antagonistic sources" (Associated Press v. U.S., 326 U.S. 1, 20 [1945]) in a democratic society's media, however, and furthermore demonstrates resonance cross-regionally by its acceptance in very different localities. Similarly the regular programming of Deep Dish TV, which anthologizes local access programming and packages it around themes ranging from agriculture to AIDS to border cultures, has been a source of contention in some communities, where access center directors nonetheless see it as offering an important alternative perspective and furthermore an opportunity to perceive what other localities are producing.

The left has no special purchase on unpopular but vocal minority opinion. Several access centers (Forest Park, OH; Fort Wayne, IN; Sacramento, CA; Kalamazoo, MI; Portland, OR; Dayton, OH; South Portland, ME; Portland, ME) reported either local or imported programs opposing abortion, some by Operation Rescue. These tapes typically encourage blocking of access to abortion clinics and/or include graphic, possibly offensive images.

Access cable is sometimes a major site of electoral controversy, which otherwise, in an era in which the Fairness Doctrine has been suspended, can be left without a televisual

battlefield. In Oregon during election season 1992, ballot measure 9, which would have criminalized some homosexual behavior, was hotly debated on access cable. Oregon access center directors in Portland and Salem both reported extensive use, both in live and taped programs, of access by opposing sides. Both sides incorporated material that might have been perceived as sexually explicit.

Another topical instance was the Gulf War, where access cable was a rare site of dissent, including a series of programs by Deep Dish TV. This programming was typically controversial. For instance, in Winsted, CT, the Mad River TV access service weathered demands to remove anti-Gulf War programming while it was being cablecast. A production group in Portland, OR, The Flying Focus Video Collective, has taken controversial stands on issues ranging from the Gulf War to local environmental issues.

Thus, on electoral and topical political issues, access cable seems to serve as a kind of televisual op-ed page, where clashing opinions can be aired and where a public forum can be created--registered not least in the hot contest over the right of dissenting groups to cablecast their views, and the eager pursuit of reply time by opposing sides.

Cultural minorities create a communications space for themselves on cable access, by producing and cablecasting programs of primary interest to their constituencies--otherwise neglected in mass media. For instance, young people are catered to as individual consumers of media and the products it touts, but are rarely given their own forum in the media. Young people eagerly use access cable both to speak to their own peers and to speak about an experience underrepresented in mainstream media.

A program wildly popular with teenagers, Silly Goose, was for a season a weekly comedy program in at least arguable and certainly adolescent taste in Defiance, OH. (Director Norm Compton recalled one episode that featured the theme of running with scissors.) Other regular local programs in that area that promoted youth culture on access were Musical Mayhem, featuring music videos, and Hard Hits, a rap show produced by a young African-American man. Similarly, in Olympia, WA, a youth-oriented music video program, Mosher's Mayhem, accounts for both a passionate teen audience and also the bulk of the occasional complaints to the service. In Grand Rapids, MI, Blackwatch focuses on the language and images of inner city youth. Malden, MA's public access has weathered controversy over youthful productions marked by vulgar language.

In each case, the programs were supported by young people and denounced by others, usually for bad taste. In these cases, public access provided a venue for a self-described cultural minority to assert the existence of its reality and values to itself and the wider community, to challenge and be challenged.

### Live programming

Live programming makes cable an interactive experience, cultivating on-air discussion and debate, and most centers surveyed offer it. It also defines and shapes audiences. In interviews, access directors often singled out live programming as of particular interest to their communities. They highlighted several kinds of programming, demonstrating the role of access cable as a public space: sexual and health education; topical call-in; and minority cultures.

Sexual and health education is an area where live programming draws an engaged, often young audience, for whom this may be the first opportunity to perceive these issues as legitimate objects of public discussion. In Chicago, AIDS Call-In Live is the only regularly scheduled TV

program offering AIDS education, according to director Barbara Popovic (Popovic, personal correspondence, October 26, 1992). Various area organizations are showcased, each focusing on its own agenda and issues.

Two such groups, the Westside Association for Community Action and the Howard Brown Memorial Clinic, aspire to reach minority youth and find that four-fifths of their phone calls are from African Americans, most of them teenagers. Typical of the kind of interchange was the phone call of one 17-year-old girl who wanted to know how to respond to a boyfriend who assured her they need not use condoms because he was "loyal" to her. The conversation was frank and colloquial on both sides, while also giving the girl much-needed information. As well, on air, speakers hold up items such as condoms and dental dams, and explain their use. Organizations also achieve other goals with such participation. For instance, Chicago House wanted more volunteers, and found that their volunteer base grew 10 to 15 percent, with a marked increase in minority volunteers, after participating in Aids Call-in Live. The Portland, OR AIDS Forum Live has a similar format.

Other health programs similarly frame sexual and health issues as ones of public information and discussion, sometimes quixotically. On public access cable in Austin, TX, a program called Midnight Whispers frankly encourages viewers to call in to share their sexual fantasies, so that an on-air nurse can respond to them and discuss safe sex practices. Some programming uses demonstrations or images that may offend. A Tucson program, Bridges, by and for the disabled, has featured AIDS education involving anatomical models. In Sacramento, the monthly Health in America program on alternative and holistic health options, has featured graphic images of women with mastectomies and damaged breast implants.

Topical call-in more traditionally--and sometimes in a more volatile way--raise public issues for community debate. In Sacramento within hours of the Rodney King verdict a special edition of the weekly Live Wire community call-in program was airing, with scores of viewers, most apparently African-American, responding to a host known in the community for his success in working with alienated youth. The staff found that the discussion was less raw than expected.

Programs such as Fort Wayne, IN's program Speak Out and Tucson's You're the Expert touch on controversial local issues ranging from street signs to police behavior, without any way of predicting how callers might behave. NDC Community TV in West St. Paul aired a series Facts not Friends around 1992 electoral politics, which the access director saw as expanding the debate. In South Portland, ME, a call-in show debated U.S. policy during the Gulf War; some callers suggested illegal actions as protest.

Minority cultures have an opportunity on cable both to build community and to reach out beyond what may be a misunderstood community to a wider public. The Fort Wayne, IN program Coalition for Unlearning Racism, a live twice-a-month program, deals with topics on which, as access manager Rick Hayes puts it, "people are already irate," and has been the site of heated, wide-ranging discussion about racism. Also on the same system is a program Message to the Black Man, a black nationalist program that purveys a distinctly minoritarian view in Fort Wayne and is, apparently, a unique resource for those who support its perspective.

As with recorded programming, teenagers make extensive use of this rare public forum for them. In Tucson, they produce a live program called The Forbidden Zone, in which they talk in the slang and curse-laden jargon of their peers, involving sexually explicit language and sometimes addressing illegal activities such as drug use. White Bear Lake, MN's Cable TV North Central hosts a teen talk show with the "racy language" typical of that subculture. This kind of programming easily raises eyebrows. For instance, the live teen show Active

Butch/Pensive Willy in Newton Highlands, MA, has with its raw language in call-ins roused the ire of a board member. Nonetheless it also evidences the importance of that venue for the young people themselves.

### Prescreening and banning programming

How do access centers handle conflicts over programming? Until now, most public access centers have functioned primarily as sites of technical assistance for whoever wants to use the service, on a first-come-first-serve basis; this is the strict construction of access in the 1984 Act. Thus, many access centers surveyed do not prescreen at all; in a minority of centers surveyed, 10-18 hours a week of prescreening is built into the work schedule (e.g., Prince George's Community Television, Landover, MD; Pittsburgh Community Television, Pittsburgh, PA). Many access centers have guidelines prohibiting obscene and commercial material, and require producers to read guidelines and certify that they abide by them.

Public access directors do become adepts at dealing with complaints from viewers, and from city and cable officials. But rarely, in these interviews, had complaints resulted in prohibition of programming, and then only after it had already run at least once.

Several reported incidents of attempted programming intervention point up the importance of an independent public forum on controversial political issues. A Cincinnati channel accepted a tape from one political party in 1991 local elections; the other party promptly obtained a restraining order, although it had the right to air a program, and furthermore center staff had volunteered to help produce one. Ultimately, the complaining party lost in court, and the tape was aired. In the small town of Defiance, OH, several years ago town officials attempted--again, unsuccessfully--to block a program criticizing the town's plan to privatize emergency medical services. In Marshall, MN, the city council tried to block a tape of a demonstration against ordinances and owners of a mobile home park, but was eventually dissuaded by the access director's first amendment arguments.

Other reported cases usually involve questions of taste and decency. For instance, in Columbus, Ohio, in September 1992 the city, which controls transmission from the independent nonprofit center, responded to complaints about frontal nudity in a program on gays and AIDS by dropping the program after it had run. Upon legal consultation, however, the city reversed its decision because the program could not be considered pornography.

In Sacramento, the incident appears part of a larger struggle between the center, the city, and the cable company. The cable company representative seized upon a viewer complaint about a videoplay, Dinosaurs, and eagerly argued for shutting down the independently-run center to the city, which allocates its funds. Written and produced by a young local man, the play involved scenes of nudity and sexual aggression as part of the author's social critique. (The center's attorney advised the center the piece was not obscene.) Center director Ron Cooper recalls that the local cable operator, long a grudging supporter of the service, recently warned him that he would "shut you down" and that he had the approval of the multi-system owner to take the case to court.

### Expanding speech

Access center directors confront controversy by encouraging more speech, not only by allowing all voices a hearing but also by encouraging complainants to make use of training and

production assistance, and by explaining the philosophy of the access center. This process appears to expand the opportunity for speech, not only for producers but for viewers, who may call in.

Officials' calls for banning sometimes result in reasoned accommodation such as guidelines devised by aldermanic and cable boards, given directly to producers. Sometimes, attempts to ban programming can act as a powerful threat. When a program by and for teenagers, Streetwatch, ran on Columbus Community Cable Access several years ago and frank sexual language offended city officials enough to pull the program from rotation briefly, the board was badly shaken. "When government taps you on the shoulder and tries to crush it at the same time, you take notice," recalled center director Carl Kucharski. He notes that several board members, whose corporations did business with the city, felt particularly vulnerable to official discontent. The board contemplated over a period of months ways to prescreen programming, but could not find a workable arrangement. It returned eventually to its open access policy.

But often the solution to a piece of unpopular speech is bringing the offended parties into the debate, thus carving out new public ground. At Malden (MA) Access TV, director Rika Welsh recalled a program made by local youths in summer 1992 with "what was to my taste and probably yours an excessive amount of profanity." After the program, the center scheduled a two hour call-in, which was vigorously used. For Welsh, "That's what public access is all about--creating that public space. It allows the community to speak to issues; it's not just about the programming itself."

At Waycross Community TV in Forest Park, Ohio, director Greg Vawter pointed to response to a racial hate text message posted on a nearby suburban system. Several of his access center's board members composed and aired passionate arguments against intolerance, part of a community-wide electronic conversation. Director Rick Hayes of the Fort Wayne, IN library system's public access channel noted that a well-established twice-weekly program, Coalition for Unlearning Racism, supported by the local NAACP and Urban League among others, began as a response to the possibility of carrying the Ku Klux Klan's Race and Reason (which never did run). Making the program also brought together nine groups that hitherto had not worked jointly.

But what about people who do not choose to enter into that public space? The 1984 Cable Act requires the operator to provide lock boxes, or the consumer option of blocking the channel entirely. This option would appear, from this survey, to be widely available. In the 31 interviews conducted, all but one person, who did not know, said the system had the capacity. In two cases, directors interviewed said that the company either appeared unwilling to block the channel or simply did not make public the ability to do so. In the 50 written surveys, 38 reported lockboxes available, although one said that they were not available for public access (a violation of the law), and two said they did not know.

Access directors have evolved a variety of mechanisms to deal with first-amendment rights conflicts, which appear to have worked fairly well. The process has renewed their commitment to public access as a public space, open even to repugnant speech but using it as an indication of unrepresented opinion and an opportunity to spur discussion.

## Conclusion

Public access cable, seen through the atypical angle of its most controversial programming, demonstrates its unique role in electronic media, as a local community television

service open to all. The programming produced by various community interests with minimal access to mainstream media showcases concerns of a subculture to itself in the language of that subculture, whether through public affairs or dramatic work or music video. This is apparent in programs by, for instance, African Americans, gays and lesbians, and young people.

As well, public access acts as a place where citizens can and do not only hear about issues of public concern but participate in the creation of that debate, whether through making programming or through the debates both on and off the cable service precipitated by the expanding of the arena for speech.

Note: The Freedom Forum and the School of Communication at American University both provided resources to conduct this research. The author gratefully acknowledges the assistance of Tamar Rotem in administering the written survey.

## Appendix

The 1992 Cable Act included a clause that would let cable operators--who must by law otherwise stay out of access program decisions--ban indecent or obscene material, or "material soliciting or promoting unlawful conduct." Most access providers felt that cabling, who have often found access a thorn in the side, would use this clause to meddle with and possibly even shut down access centers. Petitioners led by the Alliance for Community Media's impressive, dedicated pro bono lawyers asked for a suspension, or stay, of the rules, and won that stay, while a lawsuit against the Federal Communications Commission went forward. The firm of Shea and Gardner, where Michael Greenberger, David Bono and Michael Isenman led the legal team, could undertake the work specifically because they had no conflicting interests in the area. As a result, they also lacked basic information on the nature of access cable. James Horwood of the firm of Spiegel and McDermott and an ACM board member, aided by Joseph Van Eaton of Miller and Holbrooke, who have guided ACM's legal work over the years, consulted with the Shea and Gardner team. I volunteered to conduct this survey, in which I asked access center directors specifically what kinds of programming, and by implication what kinds of public service and public debate, was actually in practice and at stake. My original report, from which this is derived, was filed as an affidavit in the access centers' brief.

On November 23, 1993, a panel of the only three Democratic judges in what was then an appeals court of ten decided the case (*Alliance for Community Media, et al, v. FCC, D.C. Circuit, 93-1169, etc.*) in favor of access centers. The court found that the clause effectively makes the government a censor, because the government strongly encourages a private actor to do so, and so is unconstitutional. Because of appeals claims by the FCC and the Department of Justice, the case eventually went to the Supreme Court, where two cases were considered jointly (*Denver Area Educational Tele-Communications Consortium, Inc., et al. V. FCC, 95-124; Alliance for Community Media, et al., v. FCC, 95-227*). The Justices concurred with the lower court that the clause was unconstitutional, because it was not appropriately tailored to achieve the basic, legitimate objective of protecting children from exposure to >patently offensive=  
material.=

The following access directors, in alphabetical order, were interviewed by telephone: Sam Behrend, Tucson (AZ) Community Cable Corporation (November 13, 1992); Rick Bell, Tampa (FL) Cable TV (November 13, 1992); Joan Burke, Community Access Center (Kalamazoo, MI) (November 13, 1992); Alan Bushong, Capital Community TV (Salem, OR) (November 13, 1992); Mary Bennin Cardona, Glenview (IL) Television (November 13, 1992); Norm Compton, Defiance (OH) Community TV (November 17, 1992); Paul Congo, Austin (TX) Community TV (October 27, 1992); Ron Cooper, Access Sacramento (CA) (November 13, 1992); Neal Gosman, Cable Access St. Paul (October 23, 1992); Patricia Havlik, Intercommunity Cable Regulatory Commission (Cincinnati, OH) (November 13, 1992); Rick Hayes, All County Public Library Public Access (Fort Wayne, IN) (November 13, 1992); Irwin Hipsman, Cambridge (MA) Community TV (October 28, 1992); Dirk Koning, Grand Rapids (MI) Community Media Center (October 27, 1992); Carl Kucharski, Columbus (OH) Community Cable Access (October 22, 1992); Myra Lenburg, Amherst (MA) Community TV (November 20, 1992); Deb Luppold, Portland (OR) Cable Access TV (November 16, 1992); John Madding, Wadsworth (OH) Community TV (November 17, 1992); Paula Manley, Taulatin Valley (OR) Community Access (October 27, 1992); Fernando Moreno, City County Access TV (Albuquerque, NM) (October 27, 1992); Jeff Neidert, City of Brunswick, OH (November 18,

1992); Abigail Norman, Somerville (MA) Community Access TV (October 23, 1992); Barbara Popovic, Chicago Access Corporation (October 23, 1992); Tony Riddle, Minneapolis TV Network (October 23, 1992); Alex Quinn, Manhattan Neighborhood Network (October 23, 1992); Nantz Rickard, DC Public Access Corporation (Washington, DC)(October 28, 1992); Suzanne Silverthorn, Vail (CO) Valley Community TV (November 13, 1992); Fred Thomas, Fairfax (VA) Cable Access Corporation (October 27, 1992); Greg Vawter, Waycross community TV (Forest Park, OH) (November 13, 1992); Deb Vinsel, Thurston Community TV (Olympia, WA) (November 20, 1992); David Vogel, Community TV of Knoxville (TN) (October 27, 1992); Rika Welsh, Malden (MA) Access TV (October 28, 1992).

Surveys were sent out November 16, 1992. Those received by December 23 are alphabetized by town, township or county of origin: AACAT, Ann Arbor, MI; Arlington Community TV, Arlington, VA; Baltimore Cable Access Corp., Baltimore, MD; Bellevue Community Television, Bellevue, Neb; Bethel Park Public Access TV, Bethel Park, PA; Cincinnati Community Video, Cincinnati, OH; Anderson Community Television (Anderson Township), Cincinnati, OH; Davis Community TV, Davis CA; DATV, Dayton, OH; Denver Community TV, Denver, CO; Access 4, Fayetteville, AK; WFRN, Ferndale, MI; Fitchburg Access TV, Fitchburg, MA; College Cable Access Center, Fort Wayne, IN; Public Access Corp., Great Neck, NY; MCTV Gresham, Gresham, OR; HCTV, Holland, MI; Public Access TV, Vision 26, Iowa City, IA; Prince George's Community Television, Landover, MD; CTV 20, Londonderry, NH; PAC 8, Los Alamos, NM; Suburban Community Channels, Maplewood, MN; Studio 8, Community Access TV, Marshall, MN; Nashoba Cable Community TV, Nashoba, MA; Medfield Cable 8, Medfield, MA; Medway Cable Access Corporation, Medway, MA; Mountain View Community TV, Mountain View, CA; Middlebury Community TV; Middlebury, VT; Monrovia City Hall (KGEM), Monrovia, CA; Newton Cable, Newton Highland, MA; Mid-Peninsula Access Corp, Palo Alto, CA; Pittsburgh Community Television, Pittsburgh, PA; Portland Community Access Center, Portland, ME; Sierra Nevada Community Access TV, Reno, NV; Montgomery Community TV, Rockville, MD; RCTV, Rye, NY; Community Access TV of Salina, Salina, KS; Saratoga Community Access TV, Saratoga, CA; Viacom Community TV, Seattle, WA; NDC-TV, St. Paul, MN; SPTV, South Portland, ME; Montague Community TV, Turners Falls, MA; Wakefield Community Access TV, Wakefield, MA; Westbrook Cable Channel, Westbrook, ME; Cable TV North Central, White Bear Lake, MN; Windsor, CT; Wilmington Community TV, Wilmington, MA; Mad River TV, Winsted, CT; Winthrop Community Access TV, Winthrop, MA; Yakima Community TV, Yakima, WA

Access directors were asked these questions:

- 1) Do you or anyone else prescreen programming on public access for content or for technical reasons? If so, how does this affect programming, especially live programming? How much staff time does it take?
- 2) Does your system have the capacity to block channels or programs, or provide lockboxes?
- 3) Has anyone ever prohibited--or attempted to prohibit--someone from running a program on public access? What happened?
- 4) How much staff time do you think would it take to prescreen programming on public access? What impact would it have on the budget? Would programming be delayed?
- 5) Do you have live programming now on public access? (Please give an example.) How do you think it would be affected if you were legally responsible for the programming, as you might become under some interpretations of the 1992 cable act?
- 6) If up till now you had been legally responsible for the programming on public access, is there

a program(s) you might have considered not carrying, whether because of your own or board or city or cable company concern? Issues include sexual content, nudity, language or because it promotes unlawful conduct--for instance, gambling, civil disobedience, anti-abortion actions. (Could you include the title, a brief description, if possible when it was carried, and tell us briefly why you might not carry it...)

7) Has the cable operator issued any new rules or procedures as a result of the 1992 Act?

## References

Blau, A. (1992, April). The promise of public access. The Independent, pp. 22-26.

Devine, R. H. (1992, November-December). The future of a public. Community television review, 15:6, 8-9.

Meyerson, M. (1987-88). The right to speak, the right to hear, and the right not to hear: The technological resolution to the cable/pornography debate. University of Michigan journal of law reform 21: 1 & 2.

U.S. House of Representatives. (1992). Cable Television Consumer Protection and Competition Act of 1992. Report 102-862.

U.S. House of Representatives. (1984). The Cable Communications Policy Act of 1984. Report 98-934.

U.S. Federal Communications Commission. (1992, November 5). In the matter of implementation of section 10 of the Cable Consumer Protection and Competition Act of 1992, MM Docket No. 92-258, Notice of proposed rulemaking.

U.S. Federal Communications Commission. (1992b, December 7). In the matter of implementation of section 10 of the Cable Consumer Protection and Competition Act of 1992, MM Docket No. 92-258, Joint Comments of the Alliance for Community Media, The Alliance for Communications Democracy, The American Civil Liberties Union and People for the American Way.

U.S. Federal Communications Commission. (1992c, December 21). In the matter of implementation of section 10 of the Cable Consumer Protection and Competition Act of 1992, MM Docket No. 92-258, Joint Reply Comments of the Alliance for Community Media, The Alliance for Communications Democracy, The American Civil Liberties Union and People for the American Way.

## The Missing Space on Satellite TV

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*When the FCC opened up a public discussion in 1997 of how to use reserved space on satellite TV, I wanted to find out who wanted to come to the party. It shouldn't have been a surprise. I also wanted to find out why, even after the pro-competitive Telecommunications Act of 1996, "scarcity" was still a living concept in communications policy. That shouldn't have been a surprise either.*

The multichannelling of television has been marked by utopian and dystopian rhetoric and battles over public interest obligations, competing First amendment rights and ownership. Channels have multiplied, in fact, without much changing the nature or weight of public interest obligations of providers. A certain kind of abundance has flourished, without affecting another kind of scarcity.

Direct broadcast satellite (DBS) again expands the number of channels available in American homes, and again raises basic questions of how such abundance can benefit the democratic society into which it beams its offerings. The debate that occurred in 1997 over how to define DBS's public interest obligations put into sharp relief the weaknesses of existing policy defining the public interest in mass media, and also revealed the weaknesses of existing stakeholder organizations.

### The public interest in mass media

Since the prototype of telecommunications legislation was passed in 1927, the public interest in U.S. mass media has been a term of art, anchored to an acceptance of monopoly power and its consequences. The public interest in electronic media developed as a corollary of the creation of monopoly spectrum holders. The 1934 Communications Act (47 U.S.C.) was part of a larger process of institutionalizing Acorporate liberalism.≡ The creation of monopolies, cartels, and sectors typified by substantial market power was seen as having powerful benefits, most especially a stable marketplace, properly regulated by government. (Douglas, 1987; Horwitz, 1988; Streeter, 1996) Spectrum licensees exclusively controlled a communications resource, and operated oligopolistically at best. As programming networks and syndication services developed, these also operated oligopolistically. Their market strength also brought economic power to the sector.

The term "the public interest" originally linked broad commercial appeal and the public good. In 1925, then Secretary of Commerce Herbert Hoover argued that commercial owners of radio channels should provide a "public benefit," meaning services available to "the great body of the listening public," with regulation to be designed as the activity evolved, to protect "the public interest" (Robinson, 1989, 9; Rowland, 1997, 367, 371-9). The FCC contrasted broadly entertaining programming with special-interest money-making schemes, for instance the on-air broadcasts of a doctor who prescribed over the air, with prescriptions filled only by participating pharmacies, and also against highly partisan or propagandistic owner/operators (Wollenberg, 1989). Guiding the evolution of the public interest concept in mass media was the notion of scarcity--that broadcasters were monopoly editors over spectrum that was both owned by the American people and was also not sufficient for all the potential and desiring voices to be heard.

Partly in response to the powerful centralization of electronic media around national

networks and partly in response to consumer and social issue organizations (Montgomery, 1988), public interest regulations were designed to tailor and shape the marketplace designed and now maintained by regulation. Some were structural, e.g. cross-ownership and concentration of ownership limitations. Some were explicitly editorial, especially in the 1960s and early 1970s as television's cultural power grew, e.g. electoral rules and guidelines encouraging some public affairs programming. As well, electronic spaces protected from commercial entertainment priorities--public radio and TV--were established, implicitly acknowledging the limitations of the commercial model but operating within its terms. These three approaches to the public interest all operated within an architecture created in the 1920s. The government, by allocating spectrum for specific uses, by opting to lease uses rather than to issue specific property rights, and by defining the public as a commercial consuming audience, created the conditions for a booming national economic sector, and for a powerful cultural force. The public interest became contested terrain by virtue of the success and the power of electronic media.

### Deregulation and the television of abundance

From 1970 forward, as Horwitz elegantly charts (1988), there was a dramatic, society-wide shift in the notion of what role regulation, and even government, should play. Nurturing and regulating key industries was superseded by the goal of encouraging competition to meet emerging consumer needs. The FCC and its policies came to look old-fashioned.

Electronic media regulation was challenged by regulators, government lawyers, ideologues and politicians. The scarcity doctrine, the pinion of public interest regulation, came under attack, because roughly comparable alternatives (cable, videocassette, a greater number of independent stations) now existed. Critics attacked the notion of spectrum monopoly as an artifact of a mutually convenient and rewarding relationship between big broadcasters who wanted a protected environment and politicians who wanted control over spectrum (Krattenmaker and Powe, 1994). From the late 1970s forward, the FCC began weakening the public trusteeship obligations of broadcasters. Mark Fowler, head of the Reagan-era FCC, with his chief aide Daniel Brenner, boldly asserted, ACommunications policy should be directed toward maximizing the services the public desires...The public=s interest, then, defines the public interest.≡ (Fowler and Brenner, 1982, 207) Meanwhile, a private satellite business emerged from the shadow of government, in the process making cable television a national business, by providing relatively cheap interconnection. By 1984 cable was no longer a booster service for broadcasting. It had become a lightly regulated, booming business.

In 1996, an omnibus overhaul of the 1934 Act (Aufderheide, 1998) codified the equation of the public interest with a competitive environment for telecommunications, in its crisp Title IV. This title asserted that the public interest could be neatly associated with a competitive environment. It still, however, was not extended to mass media, where monopoly licenses were still given.

### DBS and the return to scarcity

The DBS proceeding began in a consumer backlash to media deregulation. Rising prices and poor service after the 1984 Cable Act had provoked consumers and consumer organizations such as Consumer Federation of America to pressure for a return to more traditional regulation. The 1992 Cable Television Consumer Protection Act, incorporated into the Communications

Act, contained a clause (47 U.S.C. 335) intended to impose traditional public interest obligations and to reserve space for noncommercial programming and programmers on incipient new competing multichannel video services: direct broadcast satellite. In 1992 there was only one DBS provider, and spectrum allocations had just begun. Public television entities; consumer groups such as Consumer Federation of America; and advocacy and nonprofit organizations, including the policy advocacy group Center for Media Education and public interest law firms Media Access Project and Institute for Public Representation, pushed to insert specific public interest obligations.

The law held DBS providers to two specific kinds of public interest obligations. Section 25(a) of the act required the FCC to design rules for public interest requirements on DBS providers. At a minimum, Congress demanded that DBS providers, like broadcasters, be forced to make time available cheaply to federal-level electoral candidates. It also required the FCC to consider how the Congressional goal of localism in mass media could be promoted in this medium (quite a challenge, since by definition, DBS is not a local service and the signal often may even be national in reach). These rules affect programming decisions of DBS providers and of the programmers to which they rent space. Section 25(b) requires a DBS provider to “reserve a portion of its channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial programming of an educational or informational nature.” A DBS provider was to meet these requirements “by making channel capacity available to national educational programming suppliers” at special low rates to be determined by the FCC.

Time Warner and other media companies immediately challenged the public interest provisions in court, in a complex, omnibus suit that broadly attacked the 1992 Cable Act. The lawsuit charged, among other things, that the provisions were unconstitutional because they violated the First Amendment rights of DBS providers. In March 1993, The FCC, observing the timetable established in the law, initiated a proceeding to implement the provisions, opening a docket that became MM Docket No. 93-25 (U.S. FCC, 1993). But on September 16, 1993, the U.S. District Court for the District of Columbia ruled that the provision was unconstitutional (*Daniels Cablevision, Inc. v. U.S.*, 835 F. Suppl. 1 [D.D.C. 1993]). Action stopped.

The lawsuit on appeal became an urgent issue for a variety of public interest organizations; it was seen as a watershed moment for public interest obligations of electronic media. The amicus brief filed by Center for Media Education and Consumer Federation of America, for instance, argued that DBS= public interest obligation Aclearly enhances rather than abridges freedom of speech protected by the First Amendment, and should be upheld= (Time Warner et al. v. F.C.C., No. 93-5349 and consolidated cases, Brief for Amicus Curiae CME/CFA, 9).

The provision was reinstated by an appeals court decision of the Time Warner suit that reversed the first court’s decision (*Time Warner Entertainment Co., L.P. v. FCC*, 93 F. 3d 957 [D.C. Cir. 1996]). Responding to the FCC’s appeal of the earlier decision, the court made a decisive, clear, and articulate ruling. It endorsed the notion that scarcity continues to exist, despite new multichannel technologies, and despite new competition. Citing to the critical cases on the issue, all footballs in the ideological debate over scarcity--Red Lion (*Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 S. Ct. 1794, 23 L. Ed. 2d. 371 [1969]), DNC (*Columbia Broadcasting Sys., Inc. v. Democratic Nat=1 Comm*, 412 U.S. 94, S. Ct. 2080, 36 L. Ed. 2d 772 [1973]), NCCB (*FCC v. National Citizens Comm. For Broadcasting*, 436 U.S. 775, S. Ct. 2096, 56 L. Ed. 2d. 697 [1978])--it reiterated their validity for the current day.

It said that, just as Red Lion had said that broadcast spectrum was scarce in a way print

was not, so was the spectrum DBS uses. Just as DNC held that listener and viewer rights were paramount, so were they in the DBS medium. This was because, as NCCB had itself reiterated from an earlier case, the First Amendment's goal is not merely the right of anyone to say anything, but the widest possible dissemination of information from diverse and antagonistic sources.≡ That is, the point of regulation that limits the First Amendment rights of media corporations is to foster democratic discourse and decision-making. The decision asserts that because electronic mass media continue to exert monopoly control of spectrum space that many more people want than can use, traditional public interest regulation continues to be a legitimate use of the power of government.

The decision specifically recognized the history of legal decisions affirming that, as legislative language for the 1967 Public Broadcasting Act said, the economic realities of commercial broadcasting do not permit widespread commercial production and distribution of educational and cultural programs which do not have a mass audience appeal≡ (H.R. Rep. No. 572, 90th Cong., 1st Sess. 10-11 [1967], quoted in 93 F. 3d 957, 976 [D.C. Cir. 1996]). The public interest provisions for DBS, the decision said, was simply a new application of a well-settled government policy of ensuring public access to noncommercial programming≡ (976). Finally, the decision noted that the law does not specify exactly what kind of programming should be reserved, and that its function is to increase, not limit, speech.

This decision powerfully challenged the notion that the basic structure of mass media, affecting its social role, had changed or would change soon with a multichannel environment and with competition. It portrayed DBS as just more television, still charged with public obligations because it continued to operate under the old, top-down, mass media paradigm. It also reinforced the notion that such obligations continued to express appropriately the public interest. Under this logic, to fulfill its obligations, DBS providers should create an environment where the widest possible dissemination of information from diverse and antagonistic sources≡ could take place.

Thus, the law still asserts that scarcity continues to exist. It is, however, a fragile conclusion. After the appeals court ruling, Time Warner asked the full court to reconsider its decision. The ensuing vote to rehear the case was 5-4, not enough to win rehearing but enough to signal continuing contention about the issue. The majority of judges would have liked to revisit the Red Lion rationale.

### The challenge of occupying new spaces

The rulemaking that was triggered by the appeals court ruling offered the first major platform for discussion of the public interest in mass media after the passage of the Telecommunications Act of 1996. In a Notice of Proposed Rule Making initiated Jan. 31, 1997, the Federal Communications Commission reopened its process of taking comments before decision-making. In this round, the pool of participants was the same kind and size as previously. On the commercial side, there were:

- ∃ DBS providers and trade association (nine comments, five reply comments);
- ∃ cable operators, programmers and trade associations (five comments, five reply comments); and
- ∃ commercial programmers (three comments, three reply comments).

On the noncommercial side were:

- ∃ universities and public television entities (both were included in legislative language in the designation National educational programming suppliers≡) (four comments, two reply

comments);

∃noncommercial programmers, including a consortium of universities planning distance learning (three comments, two reply comments);

∃the national cable access association, Alliance for Community Media (one comment, one reply comment); and

∃public interest, issue-based and minority organizations, including two loose and overlapping coalitions of public interest, nonprofit, and minority interest ranging from the National Association of Elementary School Principals to the American Psychological Association to the Association of Independent Video and Filmmakers (three comments, four reply comments).

Several other commenters submitted short comments or letters addressing specific concerns, e.g. Morality in Media's concern that indecency provisions be applied to DBS programming.<sup>2</sup> These organizations generally took the same positions they had taken four years earlier. Positions clearly reflected, as the process is designed to do, stakeholder self interest.

The DBS providers vigorously attempted to diminish their obligations in both 25(a) and 25(b). They argued that a new business (despite the fact that four commercial services were now in business) should not be burdened with obligations. Regarding 25(a), they argued that DBS providers should only have to make room for presidential campaign ads, since Senate and House campaigns were not of national interest. They should not have to offer other public interest programming, such as children=s, civic or educational programming.

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<sup>2</sup>. The Federal Communications Commission maintains an electronic database listing all filers in a docket at its Washington, D.C. offices, where hard copy comments are on file. Increasingly, commenters are filing electronically, but at the time this docket was active, most still filed hard copy, and access to these was either slow or expensive. Although I consulted these records, in most cases I used private resources. Andrew Jay Schwartzman, Gigi Sohn and Joseph Paykel of The Media Access Project, one of the public interest filers, were kind enough to share their own copies of many of the comments, which facilitated the research considerably. Several other filers also graciously sent me their copies. At the FCC, Rosalie Chiara was gracious and helpful in providing updates and clarifications. In referring to this docket, I refer to the filer, to either the Comments or the Reply Comments ("Reply"), and the page number.

Regarding 25(b), most providers did not want to establish separate space. They should, they argued, be permitted to aggregate all the minutes of qualifying programming from all video services to make up the set-aside, which should be 4 percent, not 7. They should be able to count toward their obligations any good deeds they were now doing, and they should be able to use commercial services whose content might not be frivolous, such as Discovery, WAM!, or, in the case of a rural cooperative using DBS transmission, Channel Earth. Channel Earth is a commercial channel that provides “live and late-breaking agricultural news, weather and livestock and commodity market information” (National Rural Telecommunications Cooperative, Reply Comments, 6. The cooperative argued that the commercial channel should qualify for the noncommercial set-aside because it “mixes information, educational and entertainment programming of particular interest to rural America” (7).

DBS providers were centrally concerned about editorial control. They suggested the creation of an organization to be dominated by DBS interests that would certify appropriate programming. They were also concerned about cost of access to any set-aside channel space. They wanted to calculate the discount rate stipulated by Congress to include many basic and infrastructure costs.

Cable operators and associations, competitors with DBS (at least for now), generally demanded that the FCC apply any public interest obligations they had (e.g., must-carry, leased access, rate regulation) to DBS. Commercial programmers argued that commercial programming should both fill the public interest obligations and be permitted on the set-aside, if such programming was truly educational and informational. They pointed out, among other things, that public television regularly worked with commercial entities, including many of the program producers for the service.

Noncommercial interests shared certain positions: DBS was now a viable competitive business, not a nascent one; it should be expected to devote 7 percent of the space to a set-aside; it should not have editorial control or create an accrediting board; capacity should be calculated in terms of megabits or total capacity, not merely the part devoted to video; the price for set-aside rates should be an incremental rate, not one that builds in infrastructure or promotion or other costs. Those who addressed the responsibility of DBS operators on electoral issues under 25(a) declared that operators had a legal obligation to carry any federal candidates who demanded space. Only the Association for Community Media addressed the issue of localism, projecting the possibility in the future of spot beams to target localities and regions.

Public television, universities, and public access organizations--institutions that already developed educational or informational programming--argued that the best interpretation of the obligations would be to extend the model that each worked on. Public television argued that the set-aside pertained only to the entities mentioned in the legislative language: public television stations; national public telecommunications entities (including, for them, public television-related organizations such as Public Broadcasting Service, which is actually a member organization of stations that provides core programming to its members); and institutions of higher learning. One entity such as PBS, public TV argued, ought to be able to occupy the entire set-aside, while public TV still ought to be able to enter into business ventures with commercial entities and even rent commercial space on DBS.

Universities, most visibly through a consortium-in-formation calling itself Research TV composed of large public and prestigious private universities, proposed that the full 7 percent should be divided equally among the three kinds of entities designated in the law. A third would then go to accredited educational institutions; they proposed K-12 schools, research universities,

and post-secondary institutions should all have equal access. An educationally based, cable access-style body could adjudicate use if there were conflicts. The hastily assembled consortium did not claim to have programming but suggested the service could be used to release research information, and also to showcase events such as examples drawn from recent university efforts: a seminar on teens, drugs and pregnancy; a symposium on space technology; a seminar on biotechnology business opportunities (Research TV, Comments, 5). The consortium's filing identified two uses: "information access for professionals," and "public first-hand access to the most up-to-date information" (6). "Public" in this case simply meant audience members with particular needs, e.g. diabetes patients.

Children's Television Workshop, the leading producer of quality children's educational programming, had long sought a larger window on television. It was frustrated by public television's small demographics, and equally by network TV's low tolerance for research budgets and for educational content (ABC's casual treatment of CTW's short-lived network series Cro had been chastening). Several attempts to launch an educational children's cable channel, under various models, had failed for lack of capitalization; it was then in discussion with Fox about trading equity investment for programming on Fox's newly acquired Family Channel (Ross, 1997). The DBS set-aside, if CTW could qualify, would solve the problem of access, but only if CTW, a small, lucrative but expensive operation--could make it pay. As CTW said in its comments, "while qualifying to supply programming for the reserved DBS capacity, [CTW] would find it difficult to do so given DBS' currently limited nationwide subscriber volume, absent the ability to include commercial matter within the setaside programming" (CTW, Comments, 6). So it proposed that in 25(a), DBS providers be required to make 3 percent of its capacity educational and informational children's programming. Whatever part of this programming was produced by noncommercial entities could count toward the set-aside (from 4-7 percent). The CTW proposal also suggested that the noncommercial set-aside providers be permitted joint ventures with commercial partners, and that on a section of the set-aside, qualifying users be permitted limited commercial matter. This would address, CTW said, the widespread concern of DBS providers that low-quality material would be used to fill the noncommercial space.

The Center for Media Education and some 21 other organizations (nine of which participated because of an interest in children or to safeguard specific media agendas, e.g. the hearing-impaired) developed an argument focused on children, through the law clinic Institute for Public Representation. Concerning itself only with 25(a) and not the set-aside, and building narrowly on success, it demanded that DBS providers be held to the same standard as broadcasters were in the 1990 Children's Television Act.

The Alliance for Community Media, a membership organization of cable access organizations, focused on 25(b), filing in combination with the National Association of Telecommunications Officers and Advisors. Alliance/NATOA claimed to represent "the interests of religious, community, educational, charitable, and other non-commercial, non-profit institutions who utilize PEG access centers and facilities....and participate in an ever-growing 'electronic town hall,'" as well as those who believe "that the tremendous resources of the Information Age should be made available to 'at-risk' communities..." (Alliance/NATOA, Comments, 2). The filers saw the potential of the noncommercial set-aside as a chance for DBS subscribers

to see varieties of programming that encompass the range of human experience, but which generally are not seen because they lack commercial viability. Such programming

includes not only distance-learning and public affairs programming, but also the performing arts, regional affairs, programming by and about minority and at-risk populations (programming by and about ethnic groups, religious organizations, women, the disabled, social service agencies, etc.) (10)

The filers proposed to use the cable public access model, with a programming body administered by a national board of directors largely drawn from the nonprofit world. This body would be run, and promote and fund programming with monies generated by an up-to-5 percent cut of DBS profits. Tacitly addressing widespread doubt that local PEG access programming was a model for national-level programming, the filers stressed the importance of distance learning as a core programming activity, along with event programming and a special role for public television programming, which in their scheme would be permitted a larger-than-10-percent share of time on the reserved space.

The group of clients assembled by the public interest legal firm Media Access Project, led by the Denver Area Educational Telecommunications Consortium (a nonprofit producer and distributor of independent video), dealt with both parts of the requirement. Besides DAETC, potential producers also included the independent video and film producers= association, a public access cable center, a consortium of land grant colleges with distance learning programs, and the National Federation of Community Broadcasters, a public radio organization.

The DAETC filing called under 25(a) for DBS providers to be required to provide civic, children's educational and informational, and/or fine arts programming. To fill the 4-7 percent of capacity set aside for noncommercial use, DAETC strongly resisted the notion that commercial programmers could be used, and suggested that any noncommercial programmer (such as PBS) should only have one channel.

DAETC's vision was similar to that of Alliance/NATOA. Nonprofit institutions could use the set-aside

for distance learning, low cost internet access, community radio, and video programming that otherwise would only be viewed on PEG access channels in a handful of communities...[while section 25a, under DBS= public interest responsibilities, could provide a] secure home for C-SPAN, which has become the mistreated stepchild of the cable industry, or by providing several channels of children=s educational and informational programming. Candidates for President could receive cross country access for their messages in one shot (DAETC, Comments, 3).

Confronting the question of resources for production, DAETC suggested that DBS providers should subsidize production for the set-aside space. If they do not, it said, then the space between 4 and 7 percent could be used for material that was "80 percent noncommercial" (a figure borrowed from the amount of advertising permitted on broadcast children's programs), with some of the profits from that sector returning to the noncommercial programming carried on the reserved spectrum up to 4 percent. Monies would be paid directly to a nonprofit programming consortium, free from DBS editorial control (DAETC, Comments, 15, 19).

### Implications

The challenges of interpretation posed by the two aspects of Section 25 were different in kind. Debate over the meaning of 25(a) operated within a well-established set of regulatory expectations for commercial television. It called upon DBS operators or their renters to make space for political candidates and to address the weaknesses of the marketplace for vulnerable

constituencies, especially children. Noncommercial stakeholders wanted DBS providers to assume more editorial responsibility for civic, educational and children's programming, and DBS operators wanted to minimize it.

The question of 25(b) posed a far greater challenge, inviting commenters to imagine electronic space that does not now exist and propose uses for it. The set-aside discussion was a greater test of the vigor of the public interest concept today.

One of the salient features of the DBS set-aside discussion was its narrowness. It did not generate much enthusiasm, either in the general public, or in more immediately affected constituencies. In spite of the fact that this was new televisual space opened up for public life, national newspapers merely mentioned it in passing and it was nearly invisible on electronic media. Several newspaper and magazine editors contacted by this author simply found the story lackluster. The narrow stakeholder participation would seem to prove them right.

The proceeding did not take place in obscurity or without warning. Individuals and organizations had months and even years to work out their interest in the proceedings, and were given ample warning by the FCC through familiar channels. Once the proceeding became a reality, Media Access Project's Gigi Sohn prepared an action alert distributed via the Internet. Meetings among stakeholders were held, some to brainstorm potential entities that might be able to contribute to diversity of expression and representation through the set-aside. The MAP press release, aimed at the community of independent film and video producers, said in part,

Without the active participation of independent producers and the education community, the FCC will be far less disposed toward creating a substantive access policy that, from the outset, will guarantee low-cost access to DBS service as it becomes a competitive means of program distribution to cable and broadcast television. Activism is particularly important given the skepticism of some policy-makers that the public interest programming set-aside will be no more than simply another outlet for...the Public Broadcasting Service. This misperception must be strenuously rebutted by the independent creative community and educators. (Media Access Project, n.d. [1997])

But aside from public television and universities involved in distance learning, there were no viable institutional volunteers for that space. Major unions and religious organizations, among others, made no direct claims on the space. The only substantial nonprofit producer, Children's Television Workshop, explicitly charged that a set-aside without a profit-making mechanism or subsidy was unviable. Public television interests argued strenuously that corporate alliances should not affect its status as a noncommercial provider. A few months later, PBS and four of the largest (and program producing) public TV stations formed the PBS Sponsorship Group to solicit corporate sponsorship in a coordinated way, marking increased commercialization (Farhi, 1997).

Other production-related organizations may become important players in the future, but are not in a position to use the space immediately. The Association of Independent Film and Video, a member organization of producers, does not have distribution or programming mechanisms, nor does the National Federation of Community Broadcasters, representing small community public radio stations. The Alliance for Community Media, now a small membership organization of embattled local production centers, would require an infusion of resources. Research TV is still an organization in formation.

The entities that even in theory could use that space had, significantly, decades of public subsidy behind them. Public television's core structure of stations depend on local, state and federal tax money for nearly half of their revenues and pass them on to services such as PBS. Universities both private and public depend on a variety of public subsidies; the lead participants

in this discussion were land-grant and state universities whose primary revenues come from public funding. Nonprofit programmers such as CTW directly and indirectly benefit from both structures.

Entities that could not themselves use the space but which supported a vigorous interpretation of the public interest divided into two camps. One, through CME, chose not to address the set-aside at all. The DAETC coalition and Alliance/NATOA both assumed the further challenge of imagining the reserve space. These proposals did not restrict suggestions to programming but extended to services and practices occurring in a protected space, where noncommercial behaviors and relationships might be nurtured. Both grounded their proposals in the potential of distance learning, a service for which there are today both providers and audiences.

That imaginative stretch toward public space was the exception rather than the rule. The discussion largely focused on the availability and quality of consumer programming, a point that loomed large in the FCC's informal discussions with interested parties (Personal communication, FCC Mass Media bureau lawyer Rosalie Chiara, Sep. 26, 1997). Programming was largely discussed within a commercial, entertainment-oriented context, which made it easy for DBS providers and commercial programmers to argue that high-quality commercial programs should count toward the obligation. Noncommercial commenters with the exception of DAETC and Alliance/NATOA did not, by and large, challenge this vision.

Nonprofit organizations by and large supported major parts of each other's proposals, with the exception of public television (which resisted any limitation on a single user of the reserved space). But one of the more visible potential occupiers of noncommercial space--one invoked in many comments--was silent on the issue: C-SPAN, after public TV perhaps the most well-known example of public space on television. C-SPAN carries activities on the floor of Congress, and covers policy issues broadly in the off-hours. A creature of the cable industry, C-SPAN is supported by voluntary industry contributions and carried as an act of good will by operators (Aufderheide, 1997). Since the 1992 cable legislation, C-SPAN carriage has suffered gravely. Both from pragmatism and principle, in this case the organization chose caution. Its counsel, Bruce Collins, explained that since its patrons' interests were multiple--some of the cable owners, particularly the behemoth TCI, had DBS holdings, and most DBS operators are contributing to C-SPAN and using its programs--it chose to keep a low profile (Collins, May 8, 1997, personal communication). In a two paragraph filing, C-SPAN notified the FCC it was entering the discussion only because it had been mentioned by so many others:

...[W]e have never sought a governmental preference or advantage of any kind, preferring instead to succeed or fail in a fair and competitive programming marketplace....[W]e urge the Commission as it grapples with these issues to exercise its authority in a competitively neutral manner such that regulatory parity is the result for similarly-situated multi-channel video providers. (National Cable Satellite Corporation, d/b/a C-SPAN, Reply Comments, 2)

C-SPAN, thus, actively rejected a reserved-space model, although it was one of the most well-developed examples of noncommercial, national public service. C-SPAN head Brian Lamb has often recognized the importance of separate spaces. As he told an interviewer from Broadcasting and Cable, explaining the distinctiveness of C-SPAN, "When you get up every day and you don't have to make a profit, and you just have to meet your mission statement, you react differently than if you have to deliver eyeballs to advertisers" (West & Brown, 1997, 71-2). But C-SPAN remains a private service, subject to the vagaries of private indulgence.

Although the appeals court decision eloquently argued the need for a noncommercial space that could operate as a marketplace not of products but ideas, not under the mandate of profit but of public deliberation, the DBS set-aside discussion demonstrated that this space, at least electronically, is thinly populated and impoverished both financially and imaginatively. Where there are oases, they are fed with public and private subsidies--although the subsidies have usually been doled out without a commitment to a vigorous noncommercial space or set of relationships. Excepting children, commenters had difficulty invoking noncommercial constituencies--either producers or audiences--and to articulate what was at stake in the inhabiting of reserved space. The most immediate and largest available institution to use this space, public television, has demonstrated with painful consistency over the last few years a complacency with the vision of programming within a commercial context (Hoynes, 1994; Engelman, 1996). The courts seem more eager to refer to a marketplace of ideas than policymakers or cable operators seem eager to build one.

### The FCC Finally Rules

In November, 1998, more than six years after congress had established public interest obligations for DBS providers, the FCC finally issued its ruling (U.S. FCC, 1998). The ruling struck a middle ground between demands of DBS operators and public interest commenters. On 25(a), the FCC simply required DBS operators to allow all candidates for federal office access to their systems, whether on a designated channel or elsewhere throughout the program offerings. It declined to require a minimum of children's programming, as it did the cable industry's request to saddle DBS with its own public interest requirements.

On 25(b), the FCC required the minimum channel space, 4 percent, but included all video channels, including barker channels, in the count. It required DBS operators to use distinct and consistent channels, rather than sprinkling noncommercial programming throughout the day. (It thus rejected CTW's proposal to count programming on the commercial side toward the noncommercial 4 percent.) It did permit DBS operators to select the channels, although not without vigorous discussion and, ultimately, dissent, among the commissioners. The FCC report and order also limited each program provider to one channel, relieving other program providers of the fear that public television would take the entire space. It permitted joint projects between noncommercial and commercial entities on the reserved space, so long as the project stayed educational and noncommercial, with no advertising.

Within the limits of the law it had been given to interpret, and the precedents already set, the FCC created some new spaces for noncommercial use. They would be hedged about by a DBS operator's decision to carry or not to carry, but by the end of the report and order, there existed a new window for a variety of noncommercial programmers and programs to reach national television audiences. There was, of course, no provision to support such programs financially, and could not have been, since it was not stipulated in law.

### Challenges

Current policy is extremely mild-mannered encouragement to the project of fomenting a marketplace of ideas. The challenge facing civic activists with DBS will be to stake a claim to the putatively public elements of the service, and to design and distinguish such use, not merely as good-for-you programming but as television that not merely speaks to individuals as

consumers but to members of a a multifaceted public. But it is not clear from the commenting process that there is a producing and distributing community beyond the limited world of public TV with such a vision for its use, or a set of organized interests in civil society that will commit to such a vision. It also seems patently clear from related policy skirmishes, for instance over federal funding for the National Endowment for the Arts, for the Department of Commerce's grants for demonstration projects in public networking, and for public television, that federal government has little enthusiasm for fueling experiment in public electronic spaces.

The DBS set-aside debate thus demonstrates the consequences of an extended impoverishment of the concept of the public interest in electronic media. The conduct of commercial media demonstrates vividly, at least to appeals court judges, the need for noncommercial spaces, programs, habits and expectations. At the same time the culture constructed around commercial television, marginalizes, even shrivels, alternatives. A strong governmental role to reallocate resources, of the kind occasionally played throughout the nation's history--in postal subsidies, in the creation of public broadcasting, in the creation of the Internet--appears essential to any viable project. Otherwise, the noncommercial set-aside is likely to confirm smug expectations that any alternative to commercial television is indeed not "what the public is interested in."

## References

- Aufderheide, P. (1997, July-August). Cable: C-SPAN=s fight for respect, Columbia Journalism Review, pp. 13-14.
- Aufderheide, P. (1998). Communications policy and the public interest: The Telecommunications Act of 1996. New York: Guilford Press.
- Douglas, S. (1987). Inventing American broadcasting, 1899-1922. Baltimore: Johns Hopkins University Press.
- Engelman, R. (1996). Public radio and television in America: a political history. Thousand Oaks, LA: Sage.
- Farhi, P. (1997, August 11). Seeking a word from their sponsors. WashTech, Washington Post, p. 17f.
- Fowler, M. & Brenner, D. (1982). A marketplace approach to broadcast regulation. Texas law review 60, 207-57.
- Horwitz, R. (1988). The irony of regulatory reform. New York: Oxford.
- Hoynes, W. (1994). Public television for sale: media, the market, and the public sphere. Boulder: Westview.
- Krattenmaker, T. & Powe, Jr., L. (1994). Regulating broadcast programming. London and Washington, D.C.: MIT Press and American Enterprise Institute Press.
- Media Access Project (n.d. [1997]). Availability of guaranteed, low-cost programming distribution for independent producers & educators via Direct Broadcast Satellite at risk. Ms. Washington, D.C.: Media Access Project.
- Montgomery, K. (1989). Target: primetime. New York: Oxford.
- Robinson, G. (1989). The Federal Communications Act: An essay on origins and regulatory purpose, pp. 3-24 in M.D. Paglin, ed., A legislative history of the Communications Act of 1934. New York: Oxford University Press.
- Ross, C. (1997, August 11). Fox eyes linkup with CTW to boost its kids offerings. Advertising age, 2.
- Rowland, W. (1997, Autumn). The meaning of Athe public interest≡ in communications policy, part II: its implementation in early broadcast law and regulation. Communication law and policy 2:4, 363-396.

Streeter, T. (1996). Selling the air. Chicago: University of Chicago Press.

Tunstall, J. (1986). Communications deregulation: the unleashing of America=s communications industry. New York: Basil Blackwell.

U.S. Federal Communications Commission. (1993). MM Docket no. 93-25. In the matter of implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Service Obligations. Notice of Proposed Rule Making. Federal Communications Commission record. 8:5, 1589-1599.

U.S. FCC. (1998, November 25). In the matter of implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992: Direct Broadcast Satellite Public Service Obligations. Report and Order.  
[Http://www/fcc/gov/Bureaus/Mass Media/Orders/1998/fcc98307.text](http://www/fcc/gov/Bureaus/Mass_Media/Orders/1998/fcc98307.text) (accessed February 16, 1999).

West, D. & Brown, S. (1997, July 21). America=s town crier. Broadcasting & Cable, 70-74.

Wollenberg, J.R. The FCC as arbiter of Athe public interest, convenience and necessity,= pp. 61-78 in M.D. Paglin, ed., A legislative history of the Communications Act of 1934. New York: Oxford University Press.