

Improving Educational and Informational Television For Children: When the Marketplace Fails

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American children view an average of four hours of television per day,¹ a total of approximately 15,000 hours by the time they reach age 18. No single activity except sleep occupies as much of their time.² For children, television content is entertaining *and* educational; the medium imparts many messages to children about society, its values, and its expectations. Indeed, it has been argued that for children, all television is educational, and the question is simply, "What is it teaching?"

In the past, there has been considerable concern about the learning of antisocial behavior from television, especially aggressive behavior modeled on violent program content. Certainly such concern with the impact of mass media on children and youth predates television. Books have been written on the effects of comics,³ and 13 volumes resulted from a series of studies in the early 1930s on the impact of motion pictures.⁴ Such concerns almost always have focused on the negative impacts of media, and the major study on television's effects conducted by the U.S. Surgeon General in 1972 was no exception.⁵ In general, however, policy action based on negative-effects research has been stymied by first amendment concerns, since most reform proposals involved elements of content

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1. 1986 A.C. Nielsen Report on Television.
2. See generally Nat'l Inst. of Mental Health, *1 Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties* (1982).
3. See, e.g., F. Wertham, *Seduction of the Innocent* (1954).
4. The results of these studies are collected in W. Charters, *Motion Pictures and Youth: A Summary* (1933).
5. U.S. Surgeon General's Scientific Advisory Comm. on Television & Social Behavior, Nat'l Inst. of Mental Health, U.S. Dep't of Health, Education and Welfare, *Television and Growing Up: The Impact of Televised Violence* (1972) [hereinafter Surgeon General's Report].

control or content prohibition. Regulation of content, even content that portrays undesirable behaviors, is generally prohibited.⁶ As a result of such constitutional concerns, as well as changing philosophies of communication regulation, policy bodies responsible for regulation increasingly have removed themselves from content decisions.⁷

There are several intertwined issues in a policy-oriented approach to children and television. The first concerns the currently available fare of broadcast programming produced for a child audience. While children view several hours of television a day, only a small percentage of their total viewing, perhaps as low as 12-15%, mostly clustered on Saturday mornings and after school, is of programming produced specifically for them.⁸ Children view a considerable amount of programming that is intended to be viewed, understood, and reacted to by adults. Thus the second concern—the impact of television content—is important *because* children lack access to diverse content aimed at appropriate social and cognitive levels. Were there more child-oriented fare from which to choose, children probably would be less exposed to inappropriate program content and consequently less likely to be affected in a negative manner.

Some have argued that television content is more diverse today than it ever has been.⁹ Cited are advances in cable services, satellite transmissions, low power television in urban settings, educational and cultural content on public broadcasting stations, and the popularity and potential of video cassette recorders (VCRs). Several recent policy decisions on the responsibilities of commercial broadcasters have been based on the increasing availability of alternative video fare. Unfortunately, while this situation of abundance may be true for adult-oriented fare, the amount and quality of commercially broadcast informational or educational television¹⁰ for

6. Exceptions include obscene, indecent, or profane content, 18 U.S.C. § 1464 (1982), *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), or content that incites or endangers the public, *Schenck vs. United States*, 249 U.S. 47 (1919).

7. The Federal Communications Commission (FCC) indicated its difficulty with decision-making on any other than a content-neutral basis in *In re Children's Television Programming and Advertising Practices*, 96 FCC 2d 634 (1984) [hereinafter 1984 Order]. This decision was upheld by a U.S. Court of Appeals in *Action for Children's Television vs. FCC*, 756 F.2d 899 (D.C. Cir. 1985).

8. 1985 A.C. Nielsen Report on Television.

9. Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *Tex. L. Rev.* 207-57 (1982).

10. It is difficult precisely to define *educational* or *informational* programming, since such definitions involve considerable subjective evaluations. However, it is possible to provide examples of programming that could be considered educational or informative, which is precisely what the FCC did in a 1974 policy statement: "There are many imagi-

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children have not improved, and may be at one of their lowest points since the introduction of the medium.¹¹ Indeed, for every gain in alternative video content, it seems as if there has been a loss in commercially broadcast content for children. A few citizens' groups, such as the Center for Science in the Public Interest (CSPI), the National Congress of Parents and Teachers (PTA), the National Education Association (NEA), and most notably Action for Children's Television (ACT), have lobbied for, filed lawsuits on behalf of, and otherwise attempted to represent the interests and needs of children against those of commercial broadcasting corporations. Their successes, however, have been both hard-fought and infrequent. Similarly, a few individuals in Congress have been willing to legislate on behalf of children in this area, but the legislative process has yet to achieve and implement significant solutions.

This article briefly analyzes the state of television for children, explores the history of the policy initiatives that have sought to improve television for children, and suggests options that are likely to be most effective in the present climate of broadcast regulation.

I. History of Broadcaster Programming Responsibilities

Commercial broadcasting is regulated by the Communications Act of 1934,¹² which represented an effort to guarantee universal telephone service and radio reception to citizens by establishing standards for broadcasting frequencies and regulating the use of local frequencies to eliminate interference. Section 309(a) of the Communications Act provides that broadcast airwaves belong to the American public; broadcasters can have "free and exclusive use" of such airwaves for a fixed period of time, but in return they are required to serve in the "public interest, convenience, and necessity." As the technology of television advanced, the industry divided on the issue of whether it was ready to enter the world of commercial broadcasting. Much of the indecision was tied to the lack of agreed-on standards for broadcasting and receiving. Media historian Erik Barnouw has noted that RCA president David Sarnoff almost imme-

native and exciting ways in which the medium can be used to further a child's understanding of a wide range of areas: history, science, literature, the environment, drama, music, fine arts, human relations, other cultures and languages, and basic skills such as reading and mathematics which are crucial to a child's development." Children's Television Report and Policy Statement, 50 FCC 2d 1 (1974), *aff'd sub nom.*, Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) [hereinafter 1974 Policy Statement].

11. See Hechinger, TV's Pitch to Children, N.Y. Times, Mar. 17, 1987, at A19, col. 3.

12. 47 U.S.C. §§ 151-610 (1982).

diately sought the cooperation of the Federal Communications Commission (FCC or the Commission), the regulatory body created by the Act, in setting technical standards for television as well as allocating spectrum space.¹³ Apparently governmental oversight, if not welcomed, certainly was not resisted.¹⁴

Because of fear that the government might intrude in the area of media content control, the FCC initially avoided specific rules on how broadcasters might fulfill their public interest obligations. This avoidance resulted in considerable confusion and wide variations in services and programming offered by individual broadcasters. With the impending mass availability of television, the FCC set about to provide more specific requirements for serving in the public interest, and in 1946 it released a set of standards, entitled *Public Service Responsibility of Broadcast Licensees*. Among other suggestions, the FCC encouraged broadcasters to provide adequate noncommercial programming (local and network), live local programs, and programs devoted to discussion of public issues.¹⁵ However, broadcasters as well as influential members of Congress charged that by specifying content, the FCC was placing itself in the role of censor. As a result, the standards were never systematically enforced.¹⁶

In 1960, after more than two decades of television broadcasting, the FCC declared that broadcasters were not adequately fulfilling their public interest responsibilities. It issued a policy statement¹⁷ that affirmed broadcasters' responsibilities to ascertain the needs and interests of the viewers whom they served, and to provide programming to meet those needs and interests. The FCC set out 14 categories of programming that were necessary to meet the public

13. E. Barnouw, *Tube of Plenty: The Evolution of American Television* 74-77 (1977). Broadcasters had increased their public service radio programming considerably prior to passage of the Act. Barnouw implies that this was done in response to growing concerns over the commercialization of radio. The increase in public service programming was a way to defeat a proposed amendment to the Act that would have canceled all existing commercial broadcasting licenses and awarded a minimum of 25% of all newly awarded licenses to nonprofit organizations. The amendment, which at one point appeared "within reach of success," *id.* at 74, was defeated, in no small part due to congressional perceptions about the increase in public interest programming.

14. See generally R. Barrow, *Development of Television: FCC Allocations and Standards*, in *American Broadcasting: A Sourcebook on the History of Radio and Television* 602 (L. Lichty & M. Topping eds. 1975).

15. Fowler & Brenner, *supra* note 9.

16. L. Brown, *Les Brown's Encyclopedia of Television* 151-52 (1982).

17. *Network Programming Inquiry: Report and Statement of Policy*, 25 Fed. Reg. 7291-96 (1960).

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interest obligation; among these was programming specifically designed for children.¹⁸

The public interest in children's programming had increasingly become evident. As more American families bought television sets, an increasing proportion of children's leisure time was devoted to viewing television.¹⁹ Policymakers began to express interest in the content of television programming. Early hearings focusing on violence and antisocial content were conducted by congressional subcommittees in 1952, 1954, and 1955.²⁰ Informal pressures were brought to bear on broadcasters to reduce the amount of crime and aggression in programs that were viewed by children and, especially, adolescents. Broadcasters, on the other hand, argued that there was insufficient evidence demonstrating that juvenile delinquency or aggressive behavior resulted from exposure to television. However, by the early 1960s, researchers produced the first experimental evidence on the negative impact of televised content on behavior.²¹

Public concerns mounted and eventually led the government to fund an investigation of television's impact on aggressive and antisocial behavior. The research, consisting of several dozen individual studies, was conducted under the auspices of the U.S. Surgeon General, and was funded by the federal government at a cost of close to \$1,500,000.²² The final report, carefully worded to satisfy both the social scientists and industry representatives serving on the 12-member advisory panel appointed by the Surgeon General, indicated that there was evidence of a causal relation between viewing violence on television and children's learning and performing aggressive behaviors.²³ This relationship was primarily evident in

18. *Id.* at 7295.

19. See generally W. Schramm, J. Lyle & E. Parker, *Television in the Lives of Our Children* (1961).

20. Investigation of Radio and Television Programming: Hearings before the FCC Subcomm. of the House Comm. on Interstate and Foreign Commerce, 82nd Cong., 2nd Sess. (1952); Juvenile Delinquency (Television Programs): Hearings before the Subcomm. to Investigate Juvenile Delinquency, Senate Comm. on the Judiciary, 83rd Cong., 2nd Sess. (1954) & 84th Cong., 1st Sess. (1955); Juvenile Delinquency (Motion Pictures): Hearings before the Subcomm. to Investigate Juvenile Delinquency, Senate Comm. on the Judiciary, 84th Cong., 1st Sess. (1955).

21. See A. Bandura, D. Ross, & S. Ross, Transmission of Aggression Through Imitation of Aggressive Models, 63 *J. Abnormal and Soc. Psych.* 575 (1961); and A. Bandura, D. Ross & S. Ross, Imitation of Film-Mediated Aggressive Models, 66 *J. Abnormal and Soc. Psych.* 3 (1963).

22. Surgeon General's Report, *supra* note 6, at 147-63. The results, presented in five individual volumes of research reports, were "briefly" presented in this summary volume of 169 pages.

23. *Id.* at 11.

those children who were "predisposed" to aggressive behavior. Further, only some television violence occasioned aggressive behavior, and then only when the children's environment supported aggressive behavior. The report concluded that while such evidence was convincing, further research was warranted. It carefully recommended policy options that would originate from the programming community rather than the legal or regulatory process, urging broadcasters to show more consequences of violent actions, help viewers identify with victims, produce more "high quality" drama, and increase their investment in the positive educational potential of television.²⁴

Despite the report's conclusion, and despite at least 10 Congressional hearings focusing almost exclusively on the issue of violence, no *formal* policy action resulted. While sensitized broadcasters did make certain changes in broadcast content,²⁵ violence has continued to be a part of "prime time" television drama, and children, as viewers of a significant amount of prime time television, continue to be exposed to violent and aggressive portrayals.

More recently, research on the impact of pornography on sexual violence has renewed the concern that media portrayals of violence have the potential to result in serious antisocial behavior.²⁶ The most recent evidence, however, is based primarily on research with adults, and the film content used in the research is not typical of that provided by commercially broadcast television. As such, it is not representative of content that children and adolescents—and indeed most adults—would be likely to view. Thus, at least from a research and policy perspective, the issue of televised violence and subsequent aggressive behavior among youth has not maintained the high level of activity that characterized the preceding decade.

The Surgeon General's report did succeed, however, in spurring research in the general area of children and the media, resulting in works investigating the medium's impact on sex role and ethnic attitudes, consumer attitudes and behavior, and on cognitive processes such as attention, comprehension, imagination, and affective devel-

24. *Id.* at 126-27.

25. Especially in the area of children's programming, guidelines were instituted to eliminate unnecessary aggression. See Rushnell, *Nonprimetime Programming*, in *Broadcast Programming 198* (S. Eastman, S. Head & L. Klein eds. 1981).

26. Much, but not all, of the current laboratory research indicates that exposure to media portrayals of sexual violence and rape, especially when the victim's response is positive, results in generally undesirable effects on male viewers of the presentations. For a thorough review of the theory and the research, see *Pornography and Sexual Aggression* (N. Malamuth & E. Donnerstein eds. 1984).

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opment. Much of the socialization research has been based on the assumption that television "cultivates" values and behaviors similar to those it presents in its symbolic drama and selective news and informational programs. This cultivation is thought to have the greatest effect on persons who watch a higher than average amount of television.

In 1982, a 10-year update to the Surgeon General's report was published by the National Institute for Mental Health.²⁷ The update included reports on many of the cultivation studies, and provided some support for the contention that the medium has a significant impact on reinforcing the attitudes and beliefs of children, youth, and in some cases, adults. However, experts have criticized this report, and cultivation work in general, on a number of grounds, ranging from questions about careless or incorrect methodology to criticisms of its narrow scope.²⁸ Selected studies in this regard, though, have provided evidence that television use is highly correlated to children's learning about their world. This relationship is especially strong for those children who have fewer alternative sources of information—the ones who watch the most television.

Television's potential as a positive, as well as a negative, educational medium was also recognized early on, and generated considerable research on the use of the medium compared with standard educational methods.²⁹ By the mid-1960s an evaluation of the existing system of educational broadcasting in the United States led to a report by the prestigious Carnegie Commission on Educational Television. The Commission explored alternatives to commercially broadcast television and ways to improve on the existing system of educational television to provide even greater diversity of broadcast fare. Based heavily on the recommendations of this January 1967 report, the Public Broadcasting Act was passed that year, creating a system of nonprofit stations to provide diverse cultural and educational programming. It was understood that one intent of the new system was to provide imaginative instructional programming for

27. *2 Television and Behavior: Ten Years of Scientific Progress and Implications for the Eighties* (D. Pearl, L. Bouthilet & J. Lazar eds. 1982).

28. Cook, Kendzierski & Thomas, *The Implicit Assumptions of Television Research: An Analysis of the 1982 NIMH Report on Television and Behavior*, 47 *Pub. Opinion Q.* 161-201 (1983); Hirsch, *The "Scary World" of the Nonviewer and Other Anomalies: A Reanalysis of Gerbner et al.'s Findings on Cultivation Analysis* (pt. I), 7 *Comm. Res.* 403-56 (1980).

29. *See generally* 10 *Am. Psychologist* 587 (1955).

children.³⁰ Several of the early successes on the new public television stations were programs produced for children: *Sesame Street*, *Mister Roger's Neighborhood*, and *Electric Company*. By the time the original Surgeon General's Report was released, research using some of these programs had demonstrated the medium's positive, prosocial potential. In contrast to violent programs, which tended to affect only children who already demonstrated aggressive tendencies, prosocial programs such as *Mister Roger's Neighborhood* and *Sesame Street* were shown to teach positive behaviors, such as cooperation, empathy, and patience to children regardless of their initial propensity to these behaviors.³¹

These programs, and a few others that aired on public television, made it clear that the entertainment quality of children's programming need not be sacrificed for educational outcomes.³² Most commercially broadcast programming for children seemed insipid and without significant educational value when compared with these programs. In 1970, inspired by such programming success and disappointed by the poor informational quality of commercial programming, Action for Children's Television (ACT), a children's media advocacy group formed in 1968, petitioned the FCC to require commercial broadcasters to air specific amounts of informational children's programming.³³ The Commission consequently initiated a notice of inquiry (NOI) and a notice of proposed rulemaking (NPRM) in 1971, and solicited comments from a wide variety of sources. Contributors were to identify the problems as well as suggest industry-based and regulatory methods to solve the problems.³⁴ After sorting through considerable public commentary, the Commission released its results and recommendations in a

30. Carnegie Comm'n on Educational Television, *Public Television: A Program for Action* (1967).

31. See Stein & Friedrich, *The Impact of Television on Children and Youth*, in *Review of Child Development Research* (E.M. Hetherington ed. 1975).

32. The combination of entertainment and educational quality did not come easily. For an account of the difficulty of achieving this success, see G. Lesser, *Children and Television: Lessons from Sesame Street* (1974).

33. ACT asked the FCC to require commercial stations to air a minimum of 14 hours per week of age-specific programming for children; the petition also requested that all commercial sponsorship on television for children be prohibited. See 1974 Policy Statement, *supra* note 10, at 1-2.

34. By issuing such an inquiry, the FCC formally opened its examination of the issue, and assigned it a docket number (19142). See *Children's Television Programs: Notice of Inquiry and Notice of Proposed Rulemaking*, 36 Fed. Reg. 1429 (1971) (codified at 47 C.F.R. § 73.4050). For a detailed explanation of the process by which the FCC issues NOIs and NPRMs, see Kunkel & Watkins, *Evolution of Children's Television Regulatory Policy*, J. Broadcasting and Electronic Media (in press) (on file with the Yale Law & Policy Review).

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1974 policy statement.³⁵ The Commission found that some broadcasters aired no programming for children, and it denounced such a practice as "not acceptable." It noted that all broadcasters must make a "meaningful effort" to provide programming for "both preschool and school-aged children," that such programs must be scheduled for periods when children are likely viewers, and that these programs could not be relegated to weekends only. Finally, recognizing that this report provided the first detailed suggestions for broadcasters to follow regarding children's programming, and acknowledging that the policy statement was not an order in the usual sense, the FCC indicated that systematic enforcement would not begin before January 1976. Docket 19142 was left open in order to monitor compliance; since most dockets are closed upon issuance of an order, this was intended as a signal to broadcasters that compliance was expected and would be assessed.

Formal monitoring did not begin until 1978 at the direction of newly installed FCC Chairman Charles Ferris, an appointee of the Carter Administration. Under Ferris, the FCC issued a second NOI and commissioned several studies to compare programming available at that time with programming prior to the 1974 Policy Statement.³⁶ Results of these studies, published in a 1979 Commission report, suggested that there had been no significant increase in educational and informational programming for children.³⁷ The Commission subsequently generated several possible strategies to increase children's programming, and in 1980 released its NPRM, which suggested five options, two of which involved setting specific percentage amounts of children's programming.³⁸ Comment was solicited on these options prior to what appeared to be certain im-

35. 1974 Policy Statement, *supra* note 10. While neither ACT proposal was specifically implemented by the 1974 Policy Statement, that statement did represent the most detailed position taken by a regulatory body on the issue of children's television.

36. Children's Programming and Advertising Practices: Second Notice of Inquiry, 43 Fed. Reg. 37136 (1978) (to be codified at 47 C.F.R. § 73).

37. Television Programming for Children: A Report of the Children's Television Task Force (1979) (on file with author). For a complete description of the task force report and the FCC's response, see M. McGregor, *Assessing FCC Response to Report of Children's Television Task Force*, 63 *Journalism Q.* 481-87, 502 (1986).

38. Children's Television Programming and Advertising Practices: Notice of Proposed Rulemaking, 45 Fed. Reg. 1976 (1980) (to be codified at 47 C.F.R. § 73). The options were to rescind the 1974 Policy Statement, maintain or modify it, set uniform national mandatory program rules of five hours per week for preschoolers and two-and-a-half hours for elementary-aged children, set program guidelines, and rather than have uniform rules, evaluate performance of individual broadcasters at license renewal time, or increase the number of broadcast outlets in each market to encourage programming specialization.

plementation of specific requirements, either by programming quotas or programming guidelines.³⁹

The FCC's attitude toward programming regulation, however, underwent a major change in the next several years.⁴⁰ Under Ferris, the Commission began to remove many rules for radio broadcasters that it deemed unnecessary and acted to ease regulations governing satellite broadcasting, cablecasting, and media ownership. With the election of Ronald Reagan in 1980, the process of deregulating private industries accelerated. President Reagan replaced Chairman Ferris with Mark Fowler, a staunch advocate of telecommunications deregulation who would forcefully and "personally . . . put the 'mark' in 'marketplace.'" ⁴¹ The Fowler-led FCC committed itself to television deregulation, arguing that marketplace competition rather than regulation should be the basis for broadcast decisions. It proceeded to remove regulations that it felt were unnecessary and halted the creation of new regulations in areas where it felt the marketplace should determine programming. By late 1981 the proposed children's television rule-making had disappeared from the Commission's agenda.⁴² When Docket 19142 was finally closed in December 1983—and then only in the face of a lawsuit filed by ACT—both the overall amount and creative quality of regularly scheduled children's programming were at one of the lowest levels in the history of television programming.

In closing one of its longest-running dockets, the FCC declared that while it still expected the child audience to be served by broad-

39. National program rules would set a fixed amount of programming that each broadcaster would be required to air. Any station not airing such amounts would be in violation of the appropriate FCC regulation. Program guidelines would be suggested amounts for broadcasters; performance would only be assessed at license renewal time, and generally only if there were some reason to believe that a broadcaster was not following the broad guidelines.

40. See Kunkel & Watkins, *supra* note 34; Heffron, The Federal Communications Commission and Broadcast Deregulation, in *Communications Policy and the Political Process* 39-70 (J. Havlick ed. 1983).

41. Halonen, A Chairman Who Marched to His Own Drummer, 112 *Broadcasting*, Mar. 23, 1987 at 51.

42. Radio deregulation had occurred first. See *Deregulation of Radio: Final Rule*, 46 Fed. Reg. 13888 (1981) (to be codified at 47 C.F.R. § 915) (effective Apr. 3, 1981). Television followed in 1984. See *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Programming Log Requirements for Commercial Television Stations: Final Rule*, 49 Fed. Reg. 33588 (1984) (to be codified at 47 C.F.R. § 73) (effective Sept. 24, 1984) [hereinafter *Television Deregulation*]. The Ferris Commission held that television for children was an area in which deregulation was not appropriate, but the Fowler-led FCC, with only Commissioner Henry Rivera consistently dissenting, did not agree with this assessment. See Rubinstein & Brown, *Television and Children: A Public Policy Dilemma*, in *The Media, Social Science, and Social Policy for Children* 101 (E. Rubinstein & J. Brown eds. 1985).

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casters, individual stations might take into account services offered by alternative technologies, such as basic and premium cable, programs aired by public television stations, and content for children adapted to videodisc and VCRs. Programs provided by other commercial broadcasters in the particular marketplace also could be considered.

Child advocates did not greet this decision warmly. There was and continues to be considerable fear that this decision will ultimately benefit only children from middle- and upper-income families, whose parents are able to afford the luxury of newer technologies. This possibility is particularly disconcerting since viewership data consistently show that disadvantaged and lower-income children watch more commercial television than do children from middle- and upper-income households, and are more likely to believe the presentations they see there.⁴³ Recent Nielsen data indicate that lower-income children aged two to eleven watch an average of 33 hours per week; those from upper-income families watch only about half this amount (19 hours), and middle-income children fall between the two groups (22 hours). For adolescents, the comparable weekly averages are 27 hours, 19 hours, and 21 hours, respectively.⁴⁴ For lower-income households, the majority of youth viewing is of commercially broadcast fare, while for other households, cable viewing accounts for increasing percentages. Advocates are concerned that for those children who need alternatives the most, fewer and fewer will be available. Responding to the late-December dismissal of the children's television issue, ACT denounced the FCC for leaving a lump of coal in the stocking of every American child, while providing a "great Christmas present" for the television industry.⁴⁵ Congressional detractors, who had continually battled the Fowler Commission on other public responsibility issues, such as minority hiring, license preferences, and enforcement of the Fairness Doctrine, also criticized the FCC's decision. Nonetheless, the decision was subsequently upheld by a federal appeals court in 1985.⁴⁶

43. See generally G. Comstock, S. Chaffee, N. Katzman, M. McCombs & D. Roberts, *Television and Human Behavior* (1978); B. Greenberg & B. Dervin, *Use of the Mass Media by the Urban Poor* (1970).

44. These figures are from the A.C. Nielsen Media Research office, Northbrook, Ill. and are based on data gathered in December, 1986.

45. FCC Strikes the Flag on Children's TV, 106 *Broadcasting*, Jan. 2, 1984, at 35.

46. *Action for Children's Television v. FCC*, 756 F.2d 899 (D.C. Cir. 1985).

In response to the alternative technologies concerns, the district court's decision stated, in part:

As to cable . . . it has a sufficiently broad and increasing presence that the Commission may appropriately consider its offerings in determining the necessity for such nationwide rules as petitioners favored. This does not mean . . . that in a particular service area where cable penetration is insubstantial or nonexistent that medium can have any effect upon the broadcaster's assessment of the most significant needs of his community; or that the broadcaster in any community can disregard the needs of those not served by cable. We also see no need for the Commission to blind itself to the contribution of noncommercial television. . . . Congress did not intend noncommercial broadcasting to 'relieve commercial broadcasters of their responsibilities to present public affairs and public service programs, and in general to program their stations in the public interest.' But that does not mean that the Commission must require commercial broadcasters to pursue those responsibilities in disregard of the fact that some gaps in the public interest may have been filled by that source while other needs remain entirely unmet.⁴⁷

II. *Obstacles to Policy Action*

In the past, children's programming rarely has been profitable for broadcasters. Ultimately, any requirement to carry a fixed amount of child-oriented television will reduce profits to the extent that more lucrative programming is replaced. Thus, commercial broadcasters have been united in opposition to any pressure to provide more than minimal levels of children's content. Their major public argument has been that *any* attempt to proscribe content runs directly counter to the first amendment, and attempts to prescribe content by organizations such as the FCC fall outside of their constitutional authority, constituting a direct intrusion into the free enterprise of commercial broadcasting. Finally, they point out that since the product of broadcasting is a service to the consumer, the marketplace is the preferred setting for making programming decisions. Viewers would not watch programs if they disliked them, and alternatively, if certain kinds of programs were strongly desired, viewers would make such needs known. Thus regulation is unnecessary, or at least less desirable than marketplace forces.

47. *Id.* at 901 (citations omitted).

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A. *The First Amendment Argument*

Although the last few years have seen the broadcast media come under increased first amendment protection, radio and television have still generally been treated as different from print due to the inherent limitations on the medium's availability. Whereas anyone might write or print material, access to the broadcast spectrum is restricted; there is a much larger demand for broadcast licenses than there is spectrum space. Broadcasters must apply for a license to broadcast on a particular frequency; once this license is awarded, no one else in that area may legally broadcast on the same frequency.⁴⁸ Thus, the courts have adopted different protection standards,⁴⁹ and have made clear that neither the 1934 Communications Act nor the first amendment prohibits the government from requiring content-specific programming.⁵⁰ In an analysis prepared for Congress, Library of Congress Legislative Attorney David Siddall⁵¹ pointed out that a number of areas exist in which courts have upheld restrictions on broadcasters: prohibitions against obscenity and indecent programming,⁵² lottery announcements,⁵³ and cigarette advertisements.⁵⁴ Similarly, the *Red Lion* decision upheld the Fairness

48. Currently television licenses are awarded for five years, at which point the holders must apply for renewal. If others apply for the same license, a comparative renewal process ensues, at which point the applicants are matched on a number of dimensions related to their abilities to serve in the public interest. In almost all cases, the advantage is to the incumbent. Even if there are no competing applicants, local groups may file a "petition to deny" if there is sentiment that the incumbent broadcaster is not serving the public. In such cases the FCC determines whether adequate evidence exists to hold a hearing; if no hearing is held the license application proceeds as usual. Since early 1981 the broadcast license renewal application has consisted of a postcard with five questions, none of which assess the amount of children's programming. See Radio Broadcast Services; Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees: Final Rule, 46 Fed. Reg. 26236 (1981) (to be codified at 47 C.F.R. § 73). Each renewal period, 5% of the applicants are randomly selected to fill out a comprehensive form, similar to that used prior to 1981; this form includes questions about children's programming and advertising practices.

49. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

50. See Siddall, *Constitutionality of Proposals to Require Broadcast Television Programs for Children*, Cong. Research Service (Apr. 3, 1984). See also *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46-48 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

51. Siddall, *supra* note 50.

52. 18 U.S.C. § 1464 (1982); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

53. 18 U.S.C. § 1304, 1307(a)(2) (1976); *American Broadcasting Co. v. United States*, 110 F. Supp. 374 (S.D.N.Y. 1953), *aff'd, sub nom. FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954).

54. 15 U.S.C. § 1335 (1976); *Capitol Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.C. 1971), *aff'd sub nom. Capitol Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000 (1972).

Doctrine, which in some instances requires broadcasters to carry certain content.⁵⁵

For a long time FCC processing guidelines used in evaluating applications for license renewals contained recommended percentages of specific content that broadcasters must carry: news, informational, and other noncommercial material. For example, after the 1960 policy statement detailing 14 important content obligations, the FCC directed its staff to refuse to act on applications that proposed *any* of the following: less than 15% noncommercial programming, less than 5% local live programming, more than 90% network programming, or more than 12 commercial announcements per hour. Broadcasters were again reminded that, absent a good explanation, each must provide some combination of religious, agricultural, educational, news, and discussion programming.⁵⁶ Thus, the

55. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969). *See also*, *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367 (1981). The Fairness Doctrine requires broadcasters to devote time to the coverage of public issues and to ensure that reasonable opportunity is afforded for the presentation of views on controversial issues of public importance. In the *Red Lion* case, a radio station challenged the FCC requirement that it provide free air time to an author wishing to respond to an evangelist's attack. A U.S. Court of Appeals ruling upheld both the Fairness Doctrine and the FCC personal attack rules. *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908 (D.C.Cir. 1967). During the same period, another U.S. Court of Appeals ruling on the constitutionality of the Fairness Doctrine found it to be in violation of the first amendment. *Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002 (7th Cir. 1968). The Supreme Court, in deciding between the two rulings, noted that the issue was one of ensuring public service, and that the public is served only when it is guaranteed exposure to all sides of controversial issues of public importance; the Court therefore upheld the Fairness Doctrine. *Red Lion*, 395 U.S. 367 (1969).

The FCC recently ruled that enforcement of the Fairness Doctrine has a "chilling" impact on broadcasters' willingness to air issues that are in any way controversial. The Commission therefore vacated a 1984 order in which it had determined that a broadcaster had violated the doctrine. The FCC specifically noted that the ruling did not apply to "equal access" and "equal time" requirements. It also found that nothing in the decision will limit its ability to license and regulate broadcasters in the public interest. *See* N.Y. Times, August 5, 1987, at A1, col. 6.

Nonetheless, Doctrine advocates in both the House and Senate maintain that the Commission lacks the authority to end enforcement; they argue that the Doctrine is not comprised solely of FCC policies and rulings, but is taken from the first amendment, as well as being codified in Section 315 of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (1982), and is therefore out of the Commission's jurisdiction.

The FCC's position is supported by a recent U.S. Court of Appeals decision which ruled that the entire Doctrine resides under the jurisdiction of the Commission. *See* Telecommunications Research and Action Center and Media Access Project v. FCC, 801 F.2d 501 (D.C. Cir. 1986). Thus legislation has been introduced to formally codify the provisions of the Doctrine. S. 742, 100th Cong., 1st Sess., 133 Cong. Rec. 3130 (1987); H.R. 1934, 100th Cong., 1st Sess., 133 Cong. Rec. 1790 (1987). *See* Telecommunications Research and Action Center, A Citizens Primer on the Fairness Doctrine (1984) and D.Pember, Mass Media Law (1984) for thorough discussions of the Doctrine.

56. Notations of General Agenda, June 28, 1961, as recalled in Television Deregulation, *supra* note 42, at 33589. In 1976 these were superseded by guidelines calling for no less than 5% local programming, 5% informational (news plus public affairs) pro-

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FCC has required, in the recent past, certain amounts of specific program content, especially the kind perceived as in the public interest, such as news and public affairs.

The FCC's broad program of deregulation has eliminated such guidelines, which had existed in some form or another since 1946.⁵⁷ In the current deregulatory environment the FCC generally prefers to avoid decisions in which content must be evaluated (although it has made a major exception where obscene or indecent content is concerned). The role of the Commission, in this view, is simply to serve as a "traffic cop," setting technical standards and processing smoothly such things as license renewal applications. However, this recent FCC interpretation has not received complete support in several court rulings, which have found the FCC to be not simply a traffic agent, but a rule-making body empowered to "determin[e] the composition of that traffic."⁵⁸ In the *Red Lion* case the Supreme Court clearly stated that the FCC does not violate the law by becoming involved in determining "the kinds of programs broadcast by licensees."⁵⁹ The courts have tended to perceive the first amendment as a way to guarantee access by the public to information and ideas rather than as a protection for broadcasters. The crucial issue, the Court observed in *Red Lion*, is the right of the public to "receive suitable access to social, political, esthetic (sic), moral, and other ideas," and the purpose of the first amendment is to "preserve an uninhibited marketplace of ideas" rather than "to countenance monopolization of that market."⁶⁰

The intent behind specifying requirements for children's programs, as ACT had asked the FCC to do in 1970, was to guarantee access to information for one part of the audience—children. Henry

gramming, and a minimum of 10% total nonentertainment programming. 59 FCC 2d 491, 493 (1976).

57. Television Deregulation, *supra* note 42, removed: (1) the program guideline percentages; (2) obligations that commercial broadcasters formally ascertain important needs and problems affecting their local communities; (3) all guidelines limiting the amount of allowable advertising; (4) the obligation that stations keep comprehensive program logs, and that those logs be available for public inspection; and (5) the long-form audit requirement used for license renewal. With the elimination of Form 303-C licensees will no longer be required to present a separate list of programs designated for children 12 years or under. A footnote indicated that it remains "part of the licensee's general public interest obligation to examine the program needs of children and to be ready to demonstrate its attention to those needs." *Id.* at 33601.

58. *National Broadcasting Co. v. United States*, 319 U.S. 190, 215 (1943).

59. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). A similar decision was reached in *FCC v. Nat'l Citizens Committee for Broadcasting*, 436 U.S. 775, 799-800 (1978) (holding that FCC's prospective ban on common ownership of newspapers and broadcast stations was valid exercise of Commission's statutory rulemaking authority).

60. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390 (1969).

Geller, former head of the Carter Administration's National Telecommunication Information Agency, has argued that since broadcast licensees are constitutionally required to be public trustees and since as part of the public interest obligation both Congress and the FCC can properly be concerned that "children receive a reasonable amount of informational/instructional programming," it follows that both "can specify the amount of the informational/instructional programming to be provided by the broadcast licensee."⁶¹ He has posited that in the past the FCC has made decisions that involved evaluating whether broadcasters made substantial efforts to provide certain program content,⁶² and if the FCC could make such ad hoc decisions, it could also "proceed by a regulation that delineates the public interest in this respect."⁶³ In summary, clear precedent exists for requiring certain types of content from commercial broadcasters, and these requirements have not been found to be in violation of the first amendment.

Historically, the rationale for removing requirements for programming has been the belief that they were unnecessary. Thus the logic behind recent deregulatory moves by the FCC has been its belief that broadcasters already provide such services as news and local programming not because of regulatory requirements, but because the marketplace demands them. Additionally, Fowler's consistent position has been that content specifications are in violation of the spirit of the first amendment, which has also made him eager to lift such requirements.

B. *The Marketplace Argument*

This argument posits that broadcasters operate not in isolation, but in a marketplace of competing services. Broadcasters must make decisions by taking all services into account, and by attending both to the audience and to the competition. The most significant aspect of the marketplace argument is that responsibility for public

61. Geller argued this point in a letter, dated March 6, 1984, to then-Rep. Timothy Wirth. (Letter is on file with author.) Wirth was elected to the Senate in 1986.

62. In support Geller cited, among other decisions, *Broadcasting Renewal Applicants*, 66 FCC 2d 419, 430 (1977), *aff'd*, *Black Media Coalition v. FCC*, 589 F.2d 578 (D.C. Cir. 1978) (FCC's decision to decline to adopt quantitative program standards for television broadcasters involved in comparative renewal proceedings held to be reasonable and within its statutory and constitutional authority).

63. Geller cited *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (holding that rules adopted by FCC to avoid overconcentration of control of broadcasting facilities were reconcilable with the powers of the Commission granted by the Communications Act), and *FCC v. American Broadcasting Co.*, 347 U.S. 284, 289 n.7 (1954). He also posited that if the FCC can require content, Congress can do so *a fortiori*.

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interest service shifts from the individual commercial broadcaster to the collective *marketplace*. Individual broadcasters no longer must provide all needed public services, and to the extent that public interest services are provided within a particular broadcast market, individual broadcasters may so adjust their offerings.⁶⁴ If several all-news stations broadcast in a single market, the responsibilities of other broadcasters to provide news is diminished. Similarly, broadcasters may now take into account the offerings of other outlets that reach children when determining the extent of children's programming that they must provide. The FCC has even argued that requiring specific types of programs runs contrary to efforts at specialization:

On weekends, when network stations target the child audience, the independent (and the public) stations do not. As predicted, market segmentation leads to station specialization better serving the needs of the entire viewing public. Program quotas . . . would work fundamentally against efforts to align commercial incentives with quality service to the child audience.⁶⁵

The major and essentially unsubstantiated premise behind the marketplace argument is that all broadcast audiences are capable of determining whether broadcasters are serving their interests, and if they are not, the audiences will communicate this to them, either by contacting the broadcasters directly, or by turning to their competitors. There are no reliable and valid methods to measure such feedback to broadcasters, however, leaving program ratings as the only real measure of audience attitudes and behavior. Thus, when ratings demonstrate that broadcasters are losing viewers, broadcasters respond quickly, since their advertisers might cancel in favor of the competition or at least demand significantly lower ad rates. Note that audiences are not consulted directly in this process.

In addition, since broadcasters wish to charge the maximum rate to program sponsors, they attempt to reach the largest possible share of the audience most desired by advertisers. Thus the concern is not for maximum audience, but for the *maximum audience desired by advertisers*. Given the choice of reaching equal numbers of preschoolers or adults between 25 and 34, a broadcaster will program for the adults, since they represent a large group of purchasing consumers, attracting sponsors willing to pay the highest rates. It is in the economic interest of the broadcaster to "please" the public and the advertising accounts, so each attempts to provide as

64. Television Deregulation, *supra* note 42, at 33589.

65. 1984 Order, *supra* note 7, at 654.

much mass appeal, revenue-generating programming as possible.⁶⁶ The danger comes, of course, when an emphasis on making money overrides the commitment to provide programming in the public interest, even if such programming does not garner the highest ratings or make the largest profits.

While in the infant days of television much of the children's programming was aired in prime time, it was soon shifted to "ghetto" hours, either after school or Saturday mornings, times identified as attracting the smallest adult audiences.⁶⁷ Prime time was seen as simply too valuable to fill with content aimed at a group with low purchasing power. This belief has not changed. Presently, even mid-morning and early afternoons, when advertisers might target the at-home, primarily female audience, are seen as too valuable for children's content. This leaves a fairly fixed amount of time in which children's programs might be broadcast. Two hours in the morning (7 a.m. - 9 a.m.), three in the afternoon (3 p.m. - 6 p.m.), for five weekdays, plus five hours on Saturday morning (7 a.m. - 12 noon), total 30 available hours for children.

In practice, though, many of the programs currently broadcast in these time slots are not programs initially produced for children, but rather syndicated reruns of adult and family situation comedy, variety, or dramatic programs, since the costs to the broadcaster for these syndicated offerings are generally lower than for first-run children's fare.⁶⁸ The final afternoon hour is almost always devoted to

66. The emphasis on revenue-generating programming can be seen in recent mergers and takeovers of networks by other companies such as General Electric and Capital Cities Communications. In the case of network takeovers (e.g., NBC, ABC), the initial concern has been for "streamlining" operations. Individuals, units, and emphases seen as unnecessary are eventually eliminated or de-emphasized, with many or even most of these decisions based on financial grounds, since ultimately such takeovers are done for business rather than public interests. Similarly, a network that seeks to avoid a takeover may also find itself in a financially tenuous position, since avoidance may mean taking out a short-term, high interest loan or selling subsidiary properties, actions that may be almost as expensive as accepting new ownership. While CBS, for example, recently was able to repurchase its stock and successfully avoid a takeover, such a move left the corporation with considerably less cash than formerly and with a debt that rose from \$386 million to \$1.3 billion. *See Upping the Ante: CBS Tops the Turner Offer*, *Time*, July 15, 1985, at 49. These financial considerations will guarantee that, for the present, high-revenue-generating programming will be a top priority at CBS in order to replenish these funds and reduce the debt. *See Days of Turbulences, Days of Change*, *Time*, Mar. 16, 1987, at 62-4 (network news departments pressed to reduce staff and become financially profitable). News and non-entertainment programming such as public interest fare is simply a luxury, and accorded much lower priority, as is other programming that is not high in revenue generation, such as children's fare.

67. W. Melody, *Children's Television: The Economics of Exploitation* (1973).

68. Program creators generally enter into an initial contract with a network that allows the network a fixed number of airings of a program; the rights to the program then revert back to the creator, who has the option of syndicating the program or contracting

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such reruns, in order to catch adolescents after school and adults returning from work. Only eight possible program slots remain for children's programming during weekdays, further reducing the possible weekly total to 18 half-hour slots.

Most broadcasters owned by or affiliated with one of the major networks⁶⁹ currently devote the morning times to their nationally broadcast news and variety programs, and the afternoon hours to adult-oriented programs such as soap operas and talk shows, rather than to shows aimed at a child or youth audience. For example, in the current Detroit market, each network affiliate devotes one-half hour a day to the child/youth audience, offering reruns of *Taxi* (ABC), *Benson* (CBS), and *The Jeffersons* (NBC) during late afternoon. One day each month, on the average, a one-hour special may be offered to the child audience by each of the three major networks.⁷⁰

Therefore, in practice, network-affiliated broadcasters presently offer a maximum of 10 children's programs, concentrated during Saturday morning.⁷¹ Only the independent broadcasters provide regularly scheduled weekday programs for children. Most of these, though, are not produced for informational purposes, but rather are predominantly product-oriented programs, or what have come to be known as "30-minute commercials." Such cartoons, created in conjunction with a line of toys, are often produced by the advertiser/manufacturer, aim to popularize the characters, and therefore to increase toy sales. Some of the more popular product programs currently syndicated include *Ghostbusters*, *Rambo*, *He-Man and the Masters of the Universe*, *She-Ra: Princess of Power*, *Transformers*, *Care Bears*, and *Laser Tag Academy*. The cost to the broadcaster for such direct-

with individual stations, which purchase rights to air the subsequent reruns of the program.

69. Stations owned and operated by one of the commercial networks, and each of their affiliates, receive much of their programming from that network, usually by direct feed at broadcast time. Independents are not affiliated with the major commercial networks and therefore seek other methods of obtaining programming. This usually means paying for the rights to air syndicated programs, which often are programs formerly broadcast on commercial television.

70. *ABC Afterschool Special*, *CBS Schoolbreak Special*, and NBC's *Main Street* are offered approximately once a month during the school year (Sept.-May); intended audience for the ABC and CBS programs vary, while the NBC program is intended for adolescents. In addition, CBS offers its *Festival of the Lively Arts* for a child audience on a "very irregular" basis, according to the CBS Programming division.

71. Some evidence suggests that at least one of the major networks is considering replacing its Saturday morning children's programming with programming geared toward adults; early in 1987, NBC Entertainment President Brandon Tartikoff suggested the Saturday morning time slot as appropriate for a weekend version of the *Today* show, for example. Network Children's Programming Regains Ads from Syndication, 108 Broadcasting, Apr. 13, 1987, at 85.

to-syndication product programs is less than for those not produced by toy manufacturers,⁷² and therefore "30-minute commercials" often make up a considerable percentage of independent offerings before and after school.

As a result of this economic reality there is generally no standard weekday fare for children on stations owned by or affiliated with the major networks (comprising about 70% of all commercial television broadcasters),⁷³ and programming on independents is primarily provided by advertisers as a message to promote products. Tables 1 and 2 represent the typical weekly schedule of children's programs from the Detroit market, which is fairly representative. Note in particular how the network affiliates and the independents "work together" (i.e., the absence of children's programs on the network affiliates during all times except Saturday mornings, and the comparable absence of such programs on the independents during Satur-

72. A forthcoming book by a long-time children's marketing executive (Schneider, *Children's TV Marketing*, 1987) indicates that there are currently 42 such syndicated features from which broadcasters might choose. *See also* Licensing escalates from '50s and '60s "child's play," 6 *Electronic Media*, January 19, 1987, at 186-214. ACT President Peggy Charren, in a speech to a child development conference on April 23, 1987, indicated that at least 65 30-minute commercials were presently available. The recent practice of "barter syndication" has made this situation possible. Under barter syndication, a program distributor/manufacturer/advertiser provides programming to a station at a significantly reduced price (sometimes at no cost) in exchange for the advertising slots during the program. These slots are then used by the distributor/advertiser to promote other similar products (for example, advertising He-Man products on *She-Ra: Princess of Power*) or sold to other advertisers.

Prior to the current emphasis on deregulation, the FCC forcefully had gone on record against such programming. In 1969, Topper Corporation complained that its competitor, Mattel Incorporated, was violating an FCC guideline on maximum commercial minutes during children's programming—at that time limited to 16 minutes per hour—by airing a 30-minute program based on its "Hot Wheels" toys. Topper contended that since the toys were used in the program, and the name "Hot Wheels" was included in the title, the situation essentially amounted to Mattel receiving commercial promotion during much of the show. In a preliminary opinion, the Commission agreed, and found the matter "disturbing." *See In re Complaint of Topper Corp. Concerning American Broadcasting Co. and Mattel Inc.*, 21 FCC 2d 148 (1970). The FCC chastized Mattel and ABC, the network airing the Saturday morning program, for subordinating programming in the public interest to programming in the interest of profit. Before the FCC could issue a final order, the network stopped showing the program. However, the Commission felt the issue was important enough to reiterate its position in its subsequent 1974 Policy Statement: "the Commission wishes to caution licensees against engaging in practices in the body of the program itself which promote products in such a way that they may constitute advertising." 1974 Policy Statement, *supra* note 10, at 17 (citing *Hot Wheels* as an example of such a program). To their credit, the three major networks resisted airing 30-minute commercials for several years, until such resistance presented clear financial difficulties for their affiliates.

73. Figures indicate that at the end of 1985, 632 of the 922 commercial stations in operation were owned by or affiliated with one of the three networks. *See Broadcasting Cablecasting Yearbook 1986 A2* (1986).

Table 1
 Child-oriented program offerings during "children's times" on commercial and independent stations in Detroit¹

Weekday time slot	Broadcast station type			
	Commercial		Independent	
	ABC (7)	CBS (2)	NBC (4)	A (20) B (56)
Morning				CHILD SHOW PRODUCT SHOW PRODUCT SHOW
7-7:30 a.m.				CHILD SHOW PRODUCT SHOW CHILD SHOW CHILD SHOW
7:30-8 a.m.				CHILD SHOW PRODUCT SHOW CHILD SHOW PRODUCT SHOW
8-8:30 a.m.				CHILD SHOW PRODUCT SHOW CHILD SHOW PRODUCT SHOW
8:30-9 a.m.				CHILD SHOW PRODUCT SHOW CHILD SHOW PRODUCT SHOW
Afternoon				CHILD SHOW PRODUCT SHOW CHILD SHOW PRODUCT SHOW
3-3:30 p.m.				CHILD SHOW PRODUCT SHOW CHILD SHOW PRODUCT SHOW
3:30-4 p.m.				CHILD SHOW PRODUCT SHOW CHILD SHOW PRODUCT SHOW
4-4:30 p.m.	CHILD SHOW ²	CHILD SHOW ²	CHILD SHOW ² adult rerun (sc)	CHILD SHOW PRODUCT SHOW CHILD SHOW PRODUCT SHOW
4:30-5 p.m.				CHILD SHOW PRODUCT SHOW CHILD SHOW PRODUCT SHOW
Early Evening				CHILD SHOW PRODUCT SHOW CHILD SHOW PRODUCT SHOW
5-5:30 p.m.				CHILD SHOW PRODUCT SHOW CHILD SHOW PRODUCT SHOW
5:30-6 p.m.	adult rerun (sc)	adult rerun (sc)		adult rerun (sc) adult rerun (sc)

¹ Empty cells indicate adult-oriented programming, such as news, game or talk show programs. Based on offerings during the week of January 12-16, 1987; Codes indicate cartoon, puppets, or live programs aimed at a child audience (CHILD SHOW), 30-minute commercial fare (PRODUCT SHOW), or reruns of programs initially produced for an adult audience (adult rerun: sc=situation comedy).

² Program specials offered once or twice a month.

Table 2
Child-oriented program offerings during Saturday morning on commercial and independent stations in Detroit¹

Saturday morning time slot	Broadcast station type					
	Commercial			Independent		
	ABC (7)	CBS (2)	NBC (4)	A (20)	B (56)	
7-7:30 a.m.	CHILD SHOW	PRODUCT SHOW	CHILD SHOW	adult rerun (d)		
7:30-8 a.m.	CHILD SHOW	PRODUCT SHOW	PRODUCT SHOW	adult rerun (d)		
8-8:30 a.m.	PRODUCT SHOW	CHILD SHOW	CHILD SHOW	adult rerun (m)		
8:30-9 a.m.	PRODUCT SHOW	CHILD SHOW	CHILD SHOW	adult rerun (m)		
9-9:30 a.m.	CHILD SHOW	CHILD SHOW	PRODUCT SHOW	adult rerun (m)		
9:30-10 a.m.	CHILD SHOW	CHILD SHOW	PRODUCT SHOW	adult rerun (m)		
10-10:30 a.m.	PRODUCT SHOW	CHILD SHOW	PRODUCT SHOW	adult rerun (m)		
10:30-11 a.m.	PRODUCT SHOW	CHILD SHOW	CHILD SHOW	adult rerun (m)		
11-11:30 a.m.	CHILD SHOW	PRODUCT SHOW	CHILD SHOW	adult rerun (m)		
11:30-noon	PRODUCT SHOW	PRODUCT SHOW	CHILD SHOW	adult rerun (m)		

¹ Empty cells indicate adult-oriented programming, such as news, game or talk show programs. Based on offerings during the week of January 12-16, 1987; Codes indicate cartoon, puppets, or live programs aimed at a child audience (CHILD SHOW), 30-minute commercial fare (PRODUCT SHOW), or reruns of programs initially produced for an adult audience (adult rerun: d=drama; m=movie).

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day morning). Note also the preponderance of 30-minute commercials on the independent stations.

This analysis of representative offerings for children suggests that commercial broadcasters are not providing significant educational and informational content for children. The needs of children are not necessarily served simply because more signals are received in a market.⁷⁴ Commercial broadcasting represents the major delivery system for many children who live in large cities, and particularly those living in the inner city. These children generally have no access to alternative technologies, such as basic or premium cable service. Because of prohibitive costs as well as lower-than-average subscription success, large cities—and particularly inner cities—are usually the last to be wired for cable. Additionally, in many markets, network affiliates control the “best” broadcast frequencies, the VHF (very-high frequency) channels. Public broadcasting and independent stations are relegated to UHF (ultra-high frequency) channels, on which signal quality is poorer than that on VHF stations.⁷⁵ Therefore viewing public broadcasting fare is more difficult and less satisfying than commercial programming. And obviously, “signals” on VCRs and videodiscs are received only in households that are able to purchase the necessary equipment. Thus, commercial broadcast signals remain the major delivery vehicle for a significant percentage of American children.

At the same time that the FCC has been following its marketplace philosophy, others more familiar with children's television have warned of problems. In testimony before the FCC in April of 1983, Robert Keeshan, for many years “Captain Kangaroo” on CBS, pointed out that networks were having considerable difficulty getting their affiliates to run children's programming.⁷⁶ Thus it was

74. A recent federal appeals court found that the FCC's general deregulation of television commercialization did not justify its termination of commercialization guidelines in the “special realm” of children's television. *Action for Children's Television v. F.C.C.*, 821 F.2d 741, 745 (D.C.Cir. 1987). The Court held that the Commission had failed to explain adequately the elimination of its long-standing children's television commercialization guidelines and therefore remanded the case to the Commission for further explanation of its decision. ACT has asked that the guidelines be enforced while the FCC reconsiders its decision.

75. According to *Broadcasting Cablecasting Yearbook 1986*, *supra* note 73, at A2, 62 percent of all public television stations were broadcasting on UHF at the beginning of 1986, compared with 41 percent of commercial broadcasts.

76. Robert Keeshan, Oral Testimony, FCC En Banc Meeting In re Children's Television Programming (April 28, 1983) (author's notes). Keeshan's *Captain Kangaroo* was eventually taken off the air by the network, which cited as a reason the failure of affiliates to carry it. While affiliates have the option not to carry the programming provided by their networks, in practice this option is very cautiously exercised.

not in the best interests of networks to expend considerable effort and funding for new high quality informational television if affiliates would rather choose lower-cost syndicated programs. To the extent that such syndicated programs were less expensive to acquire, and resulted in higher ratings per dollar spent, Keeshan argued, the decision was simply an economic one. Lou Scheimer, president of Filmation Studios, which produced the highly successful *Fat Albert and the Cosby Kids*, indicated at a 1983 conference in celebration of National Children and Television Week⁷⁷ that his production house had proposed a number of similar educational-yet-entertaining programs for children of various ages. The commercial broadcast community, however, has shown no interest, so there was no incentive to invest either creative effort or funding.

This analysis of the commercially broadcast educational and informational content available for children indicates that the marketplace alone cannot produce adequate television programming for children. While the FCC has argued the opposite view, it has not documented its position with a systematic investigation of the impact of the deregulation decisions on the quantity of children's television. In late 1983, however, a congressional study of available children's educational television revealed an average of 61 minutes *a week* of such content, out of a total of 4.5 hours of children's content. This is contrasted with an average of four hours *a day* of child viewing.⁷⁸ The marketplace for creative endeavors in children's programming is restricted, whereas the marketplace for adult programming is diverse. The diversity sought by the FCC in its deregu-

77. The March 13, 1983 conference, sponsored by the UCLA Bush Foundation Training Program in Child Development and Social Policy, brought together researchers, policymakers, and individuals in television's creative community to recognize the medium's positive contributions and explore ways to encourage and support such programming. Of the seven network-aired programs honored at that time, four are no longer regularly broadcast on network affiliates: *Captain Kangaroo*, *Fat Albert and the Cosby Kids*, *CBS Festival of Lively Arts for Young People*, and *The CBS Library*; two remain on the Saturday morning schedule: *Smurfs*, *ABC Weekend Special*; the remaining program, *CBS Afternoon Playhouse*, now called *CBS Schoolbreak Special*, appears on the average of once a month. In contrast, many of the honored programs appearing on cable (*Against the Odds*, *Fraggle Rock*, *Pinwheel*) and public broadcasting (*The Electric Company*, *Mister Rogers' Neighborhood*, *Sesame Street*, *3-2-1 Contact*) are still aired on a daily basis, and of the public broadcasting programming, all but *Electric Company* continues to produce new episodes.

78. The analysis was carried out by subcommittee staff and presented during testimony at Potential of Television in Educating Children: Joint Hearings before the Subcomm. on Telecommunication, Consumer Protection and Finance of the Comm. on Energy and Commerce and the Subcomm. on Elementary, Secondary, and Vocational Education of the Comm. on Education and Labor, 98th Cong., 1st Sess. 3 (1983). For several caveats regarding interpretation of the findings, see Kunkel & Watkins, *supra* note 34.

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lation of broadcasting has failed to materialize in the area of programming for children.

III. Policy Options

Despite these institutional and policy constraints, there have been some attempts to improve the quantity and quality of programs directed at children and adolescents. Public interest groups such as ACT have worked to keep the issue in the forefront of public attention, and to hold policy makers, especially the FCC, accountable for communication policy decisions that have an impact on children. Legislative solutions have generally sought to create an artificial marketplace for children's television by requiring broadcasters to carry a certain amount or percentage of children's programming. Others have sought to create or improve the market by offering monetary incentives. Proposed tax incentives have been aimed at individual broadcasters who air informational children's programming and at corporations for sponsoring the creation or airing of such programming.⁷⁹ Others have not sought legal solutions, but have attempted to work within the industry. These groups have suggested a national center for children's television,⁸⁰ workshops to educate creators and producers of children's programming, fundraising for children's television by the broadcast community,

79. A related method involved the imposition of a tax on new television sets, with the proceeds to be directed toward funding of creative programming aimed at child audiences. This type of tax was first suggested in 1967 by the Carnegie Commission on Educational Television, *supra* note 30, which proposed it as a method to partially fund the nation's "new" public broadcasting network. The television set tax recommendation was not implemented; Congress preferred that public broadcasting be funded by a combination of existing governmental money and other public and private support.

80. Probably one of the most complete analyses of options for children's television was prepared by Eli Rubinstein, one of the editors of the 1972 Surgeon General's Report, *supra* note 6. His options paper (dated Aug. 13, 1982, on file with author) was prepared for a 1982 meeting to explore policy implications of the 10-year update to the Report (D. Pearl, L. Bouthilet & J. Lazar, *supra* note 27). Major options discussed by Rubinstein included: creating a national center for children's television; establishing a television research facility within the industry to focus on action-oriented research; formation of a high-level public commission on the future of television and children; greater involvement by governmental and corporate entities; and a tax on the sales of new television sets. After exploring the arguments for and against each of 15 options, Rubinstein avoided indicating one or more as preferable, injecting a note of caution: "The new technologies and the changing structure of the television industry may produce such a rapidly moving target that no presently conceived option can appropriately anticipate these changes. Such a contingency only further complicates an already complex policy issue."

and the provision of incentives and awards for high-quality children's programming.⁸¹

Most of the options suggested have not generated adequate support within the broadcasting industry, the government, or at the grass roots level. Solutions that involve expenditures of governmental funds have been perceived as unnecessary and undesirable. The broadcast industry is already seen as lucrative, and funneling tax money to members of this community seems excessive. While the idea of a center for television has gathered a number of proponents, inadequate commitment by federal agencies, disinterest by the broadcast industry, and a general lack of specific focus and direction for such a center, have kept it at the idea rather than the implementation stage. And, while the broadcasting industry contains many committed individuals, their commitment amounts to very little in an industry ruled by the "bottom-line" process of decision-making. Thus, educating producers and other industry personnel, and providing awards for high-quality programming, have not achieved the desired result of improved and increased television content for children. The approaches that have gathered the most support, if not resulted in the most progress, have been the move to create an artificial market for children's programming and the search for methods to fund and otherwise stimulate the production of such programming.

A. Creation of an Artificial Marketplace

The Children's Television Education Act of 1983,⁸² introduced by Representative Timothy Wirth, at that time Chairman of the House Subcommittee on Telecommunications, Consumer Protection and Finance, would have required broadcasters to provide a minimum of one hour of educational/information programming for children a day. More recently, another Wirth-sponsored bill, the Children's

81. While not directly aimed at improving the quality of children's television, several attempts have been made to boycott the sponsors of programs deemed offensive by particular groups. These boycotts have not been supported by the major groups interested in improving children's programming. ACT, for example, has not countenanced any attempts at censorship and has worked instead at increasing diversity of available content. The major boycott efforts have been led as part of a religious crusade by the Rev. Donald Wildmon, Chairman of the Tupelo, Mississippi-based Coalition for Better TV; by all accounts but his own, the attempts have not been successful. *See* Crusade Sets Out to Clean Up TV, 100 Broadcasting, Feb. 9, 1981, at 27.

82. H.R. 4097, 98th Cong., 1st Sess., 129 Cong. Rec. H8080 (1983).

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Television Education Act of 1985,⁸³ would have introduced guidelines suggesting that each commercial broadcaster air a minimum of seven hours a week of educational/informational fare, five of which must be during weekdays. Such an approach was intended to accomplish two objectives. First, it would guarantee an available marketplace for new, innovative programming aimed at educating, informing, and entertaining children and youth. Second, it would bring the networks back into the business of providing programs for children to their broadcast affiliates. With their affiliates' license-renewal decisions based in part on the amount of children's programming provided, the networks therefore could resume production and support of such fare, which is now provided infrequently as monthly "specials."⁸⁴

The major obstacle to the creation of a federally-mandated marketplace for children's television has been the broadcasters themselves, who are adamantly opposed to such interference. To this point, the broadcast lobby has been able to muster legislative support to counter proposals mandating children's programming.⁸⁵ While their major argument has been of the censorship/first amendment variety, the National Association of Broadcasters (NAB) also has questioned the role television should be assuming in the education of American children:

Indeed one can question the advisability of creating more programming to attract young viewers from other pursuits (e.g. reading, athletics, etc.) critical to their development. Determining a certain number of children's programming hours also presupposes that children, in fact, should be watching a specific number of hours of television.

83. H.R. 3216, 99th Cong., 1st Sess., 131 Cong. Rec. E3763 (1985). Identical legislation also was introduced in the Senate by Sen. Frank Lautenberg as S. 1594, 99th Cong., 1st Sess., 131 Cong. Rec. S10914 (1985).

84. One criticism of the early Wirth bill, H.R. 4097, *supra* note 82, was that it would somehow mandate a national curriculum, or place the government in the position of a "national nanny." The 1985 Wirth/Lautenberg legislation attempted to move the enforcement and monitoring back to the local level; rather than set a requisite amount of hours, the bill simply required that the FCC immediately schedule a hearing on any local "petition to deny" a license application or renewal that alleged that the applicant had failed to broadcast seven hours a week of children's programming, with five of those hours aired Monday through Friday. Thus the numbers were stated as content guidelines, and active monitoring and interest at the local level would replace federal oversight and monitoring.

85. Broadcasters have developed into a very powerful lobbying force, one that few legislators can ignore without consequences. This is especially true for Representatives, who must seek election every other year. Local broadcasters represent a major communications medium by which elected officials communicate to constituencies, and by which others publicly evaluate the performance of their elected officials.

These decisions should be left to families and educators, not to our legislators, regulatory commissions or broadcasters.⁸⁶

Of course the goal of children's programming advocates is not to see broadcasters flood all children's free time with video content that would prevent them from enjoying alternatives to viewing. Rather, they have suggested simply that of the time that broadcasters do program for children, some small part be devoted to educational and informational programming. The concerns raised by the NAB never prevented broadcasters from promising the delivery of a child audience to advertisers of toys, candy, cereals, and snack foods. Nor have these concerns prompted them to ensure that a major portion of their offerings to the child audience educate children in these valued areas by, for example, bringing literature and the classics alive, or providing real cultural and arts entertainment for a small part of the broadcast day.

While Wirth's proposed legislation gained support from various public interest and advocacy groups, such as ACT, PTA, and NEA, the bills never received adequate congressional support, due in no small part to broadcast industry opposition. Neither bill ever reached a vote, even at the subcommittee level. Yet broadcasters are unlikely to abandon their opposition to program mandates in the near future. Congress is also unlikely to abandon its pressure, especially given the FCC's failure to enforce, even minimally, its 1974 Policy Statement. Such legislation does serve to inform broadcasters that programming for children remains an issue at the national level and to let the FCC know that Congress feels the Commission must continue to enforce the public interest standard where children are concerned.

B. Content For the Marketplace

A related policy approach is aimed at providing funds for creative endeavors. It is important that the creative community perceive a need and available market for the service and product it provides. Indeed, the number of production companies that provide content for commercial television is actually quite limited. New production companies find it relatively difficult to compete with those that have

86. Written response to the FCC's 1983 Report and Order by the National Association of Broadcasters (NAB), Feb. 24, 1984, at 9 (on file with the Yale Law & Policy Review). In the same paper in which they questioned whether children should be watching television at all, the NAB affirmed that its members would "continue to serve the needs of children without policy statements, regulatory or legislative activity." *Id.* at 1.

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already established network ties.⁸⁷ While some children's program series, especially cartoons, are "picked up" after a storyboard presentation by an established production studio, newcomers are often required to present at least one complete animated program. The expense involved tends to be prohibitive, keeping many production companies out of the competitive setting. In 1977, and again in 1979, Senator John Heinz introduced bills designed to address this situation. The legislation⁸⁸ would have established a National Endowment for Children's Television, with its primary function to raise and disburse money to stimulate the creation and production of television programming for children. Included were recommendations to fund "projects and productions which have substantial artistic or educational significance and which meet high standards of merit," and those "projects and productions of an experimental nature which may reasonably be expected to contribute to the quality of television programming for children." The bill was also intended to stimulate alternatives by organizing or funding "workshops, institutes, and training programs in the field of television programming for children" as well as research and other relevant projects. Thus it was aimed at bypassing the usual institutional constraints and barriers to entry that have plagued creative production organizations in the past.

The Heinz approach was not successful. Neither bill ever was voted on at committee level, nor were companion measures introduced in the House. A need for an endowment and center was not recognized by all the groups whose commitment was necessary: academics, governmental organizations, and industry representatives. The approach also suffered from the negative connotations involved with spending federal money for creative endeavors in a

87. See generally Melody, *supra* note 67.

88. The 1977 (S. 1960, 95th Cong., 1st Sess., 123 Cong. Rec. 25398-25400) and 1979 (S. 1823, 96th Cong., 1st Sess., 124 Cong. Rec. 26286) bills were the outcome of discussions and recommendations of participants in an earlier conference that explored the problems and strengths of a nationwide endowment for children's broadcasting. The conference, held in Princeton and funded by the John and Mary R. Markle Foundation, made its recommendations in a final report entitled *Toward a National Endowment for Children's Broadcasting* (1977). The author and project director, Nicholas B. Van Dyck, participated in the creation of the National Council for Children and Television (now National Council for Families and Television), a policy-oriented group that attempts to encourage communication and activities among members of the television broadcast and production community, those from the academic research world, and individuals with policy goals. Several years later, the Aspen Institute for Humanistic Studies hosted a related conference on proposals for an even more comprehensive center for the study of television. See W.R. Neuman, *The Social Impact of Television: A Research Agenda for the 1980's* (1981).

high-profit industry like commercial broadcasting. Eli Rubinstein⁸⁹ also suggested that a centralized endowment was perceived as detrimental to existing support by other federal agencies that sponsor research and programming endeavors for children's television. Thus there was some fear that such a center might actually produce a decrease in federal efforts for children and television. Rubenstein also noted that commercial broadcasters raised considerable concerns about federal intrusion, arguing that a federally funded operation would introduce the undesirable specter of governmental control of children's programming.

C. *Industry Initiatives*

Broadcasters continue to resist attempts by legislators to improve television for children. Indeed, they have come to recognize that it is in their best interests not simply to oppose such efforts once underway, but actively to prevent them. Although the NAB, the most powerful lobbying organization for the industry, has recently indicated that members might be interested in raising funds to enhance the production of children's and other alternative television programs, the seriousness of their concern is questionable. Reasoning that if children's fare were adequate, regulators would be less likely to seek legislative solutions, they have formed a committee to work with government and industry representatives to seek methods by which the NAB might contribute to a stronger public broadcasting presence, and particularly to an improvement in programming for specialized audiences, such as children.⁹⁰

While it would seem illogical for commercial broadcasters to encourage and support public broadcasting, ostensibly a competitor, the current era of deregulation has made for strange bedfellows. To the extent that the FCC bases its requirements of commercial broadcasters on the offerings of the marketplace, a strong public broadcasting system, offering adequate educational, cultural, informational, and children's programming, would relieve broadcasters of similar programming requirements. Therefore, an even larger percentage of their programming might be devoted to higher-profit enterprises. The NAB has made a preliminary suggestion to hold a yearly telethon, with money then earmarked for creative endeavors. No concrete recommendations have emerged in the

89. See Neuman, *supra* note 88, at 39.

90. See 108 Broadcasting, Apr. 8, 1985, at 7 and 108 Broadcasting, May 13, 1985, at 7.

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almost-two-year period since the original suggestion, however. None are likely to emerge, unless the broadcasters are faced with particularly threatening legislation. Indeed, much of their willingness to begin discussions on the provision of alternative programming probably stemmed from Congress' continual threat to mandate specified program amounts.⁹¹ Thus it is unlikely that any concrete proposals regarding commercial broadcaster efforts for supporting alternative programming will emerge unless they are once again faced with "unfriendly" legislation, at which time the suggestion may suddenly re-emerge in the context of compromise.⁹²

D. Alternatives to Commercially Broadcast Content

Since a major argument for eased broadcaster requirements has focused on the alternative technologies and content available in the marketplace, an option to guarantee adequate informational and educational programming for children must both strengthen alternative programming sources and guarantee adequate access to such content by all children, regardless of income level.

1. *Public television.* Public broadcasting in particular has been cited often as being primarily responsible for providing programming for children. Since the FCC has placed much of the responsi-

91. During the 98th Congress, broadcasters reacted in a like manner to the threat of restrictions on alcohol advertising. A public interest group had amassed over 1,000,000 signatures on a national petition to ban or otherwise restrict alcohol advertisements on electronic media, and legislation had been introduced in Congress that would have required broadcasters to air anti-alcohol messages in proportion to the number of alcohol advertisements broadcast. See H.R. 2526, 98th Cong., 2nd Sess., 131 Cong. Rec. H3264 (1985). Faced with the loss of considerable revenue, the broadcasters set about to prove their concern for the issue of alcohol abuse. At the local level, they increased the number of public service ads dealing with drinking and driving. At the national level, they lobbied hard to prevent any votes on the alcohol advertising legislation. They convinced key legislators that broadcasters act responsibly without governmental mandates, but the threat of such legislation kept the broadcast lobby "well-behaved" through the 99th Congress.

92. Using such leverage in the legislative context is not uncommon. For example, during the 98th Congress, legislation was introduced to codify the FCC's deregulation orders, thus changing them from simply FCC policies to federal law. See H.R. 2382, 98th Cong., 1st Sess., 129 Cong. Rec. H1809 (1983). In addition, this legislation would have eliminated the comparative renewal process, essentially guaranteeing broadcasters licenses for perpetuity, and further removing broadcasters from public pressures and demands. While the legislation had over half of the total membership of the House as co-sponsors (235 on Mar. 28, 1984), Wirth indicated that he would not schedule it for a subcommittee vote unless broadcasters who supported the legislation were willing to compromise. Terms of compromise listed by Wirth included acceptance of mandatory children's programming requirements of up to five hours a week and a formal review of the impact of the FCC's radio deregulation after five years. See 106 Broadcasting, Feb. 6, 1984, at 50 and 106 Broadcasting, May 7, 1984, at 85. The compromise ultimately failed, and the legislation died at the end of the congressional session.

bility for programming for children on the national public broadcast system, public broadcasting must be supported and strengthened. Since their inception, the nation's public broadcasting stations have more than fulfilled their obligations to children by providing a *daily* diet of programming, aimed at both at-home and in-school audiences, and addressing the interests and needs of specific age groups. Indeed, some of the best and most creative public broadcast programming has been its children's fare: *Sesame Street*, *3-2-1 Contact*, *Reading Rainbow*, and recently the new mathematics series, *Square One*.

Under the Public Broadcasting Act of 1967, public funds are appropriated for the Corporation for Public Broadcasting (CPB), which is an independent nongovernmental body created to disburse federal support and to insulate public broadcasters from the political pressure usually associated with governmental financing.⁹³ CPB then distributes the funds to individual stations, to the Public Broadcasting Service (PBS), which is an organization responsible for creating, producing, or otherwise distributing public broadcast programming, to other production companies—such as Children's Television Workshop (CTW)—and to other associated ventures, such as research. Production companies are responsible for raising adequate money for the creation and support of its programming efforts, including but not limited to children's programs. Thus PBS and other production companies use CPB money, contributions from individual stations, and money from other public and private corporate sponsors to underwrite production costs.⁹⁴

Indeed, the majority of funds for public broadcasting, money used both to create programming and to support the stations airing the programs, comes not from the government but from corporate sponsors, individual contributors, affiliated universities, and individual states. By 1977, for example, federal funds accounted for only 28% of public broadcasting's income. State and local governments accounted for 29%, university, business, and individual contributions accounted for 32%, and private and public foundation support accounted for 11%. The percentage of support supplied by the federal government has continued to shrink; a recent estimate, by the general manager of Chicago's public television affiliate WTTW, is

93. Separate funds also are allocated for the Public Telecommunications Facilities Program, and go toward repairing, maintaining, and replacing necessary equipment for individual public broadcasting stations.

94. For example, *Square One* was created by CTW on a \$16 million budget, combining funds from CPB, DOE, NSF, the Andrew W. Mellon Foundation, the Carnegie Corporation of New York, and the International Business Machines Corporation. See N.Y. Times, Jan. 25, 1987, at H25, col. 1.

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that only 15% of public television's income is from federal funds.⁹⁵ Approximately 80% of this money is from CPB, and 20% is from agencies such as the Department of Education (DOE), the National Science Foundation (NSF), the National Endowment for the Arts (NEA), and the National Endowment for the Humanities (NEH).

For the responsibilities it is given, public broadcasting is significantly underfunded. The \$200 million it received this past year must be divided between public television and radio. Both have been at considerable risk since 1981, about the same time that the FCC began to place increasing responsibility on it to serve the specialized interests of the public. The level of federal support necessary for public broadcasting to provide meaningful alternative content would be at least two to three times what it presently receives. Indeed former FCC Commissioner Nicholas Johnson, testifying at a 1972 hearing, recommended that a minimum of \$500 million per year be allocated to CPB to allow it truly to function as an alternative to commercial broadcasting.⁹⁶ Johnson also noted that while the U.S. "need[ed] a strong public broadcasting service more than any other nation . . . to counteract commercial broadcasting, . . . we fund our modest efforts at a lower proportion of our gross national product than virtually any other civilized nation."⁹⁷ Years later, in its 1979 evaluation of the success of public broadcasting, the Carnegie Commission recommended that the minimum yearly federal contribution to the system be \$590 million—in 1979 dollars.⁹⁸ Despite these recommendations, funding never has reached this level, and the current level of appropriation, \$200 million, represents only slightly more than contributions during the late 1970s, adjusting for inflation.⁹⁹

Besides its difficulties with strictly economic considerations, funding for public broadcasting has often been the center of political battles. During the Nixon Administration, for example, it was recommended that funds be denied because the programming was perceived as philosophically liberal and representative of the politics and values of the "Eastern-intellectual" establishment.¹⁰⁰ Follow-

95. 112 Broadcasting, Jan. 26, 1987, at 22. These figures were confirmed by Peggy Hubble, Director of Press Relations for PBS, in a telephone interview.

96. Surgeon General's Report by the Scientific Advisory Committee on Television and Social Behavior: Hearings before the Subcomm. on Communications of the Sen. Comm. on Commerce, 92nd Cong., 2nd Sess. 118 (1972).

97. *Id.*

98. Carnegie Comm'n on the Future of Public Broadcasting: A Public Trust 118 (1979) [hereinafter Carnegie Commission].

99. \$135.3 million in 1977; \$138.2 million in 1978. See Carnegie Commission, *supra* note 98, at 42, 52.

100. *Id.* at 41-42.

ing these threats, Congress changed the process by which money was authorized, incorporating a process of forward funding for a period of years in order to decrease the likelihood of political pressures affecting public broadcasting content.

Yet funding and support continues to be tied to political and philosophical evaluations. Indeed, the present Administration has not been supportive of either the concept or the funding of public broadcasting. During the 98th Congress, President Reagan vetoed two public broadcasting funding bills, which had received significant bipartisan support in both the House and Senate.¹⁰¹ In addition, the administration requested from Congress a rescision of \$14 million from the already approved budget for public broadcasting, a request that Congress refused. Current administration budget requests ask for rescisions of \$44 million from \$214 million already authorized for 1988, and \$88 million from the \$228 million authorized for 1989. The "savings" of \$132 million is what the Administration recommends for public broadcasting during 1990.

While in the past, public broadcasting stations as well as PBS and various production organizations have attempted to supplement, and in some instances replace, inadequate federal support with corporate sponsorship and program underwriting, such an approach seems increasingly problematic. For example, several large underwriters (e.g., Exxon for *Great Performances*, United Technologies for *3-2-1 Contact*) have withdrawn or significantly reduced their support, and changes in the new tax law regarding contributions may result in further erosion of corporate sponsorship. Tight federal money at agencies such as NSF, DOE, NEA, and NEH also means diminished support for public programming. Since 20% of all federal funds received by public television during the past year represent money from agencies other than CPB, additional loss would leave a very serious gap in the nation's public broadcasting potential for children. Due to recent budget restrictions, and the resultant cutback in the amount of money available for new program production, creators of popular PBS children's programs find that they are unable to create and produce as many new episodes of ongoing series as they had formerly; increasingly, children's programming on public broadcasting affiliates consists of rerun episodes.

2. *Alternative technologies.* A growing reliance on service by alternative technologies also means that children not served by cable,

101. Both S. 607, 98th Cong., 1st Sess., 129 Cong. Rec. S1725 (1983) and S. 2436 98th Cong., 2nd Sess., 130 Cong. Rec. S2854 (1984) were vetoed; President Reagan characterized them as excessively expensive and not within budget limits.

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satellite broadcasting, or low-power television, and without access to VCRs, are least likely to benefit from the current state of "diversity." The irony of this situation already has been mentioned: lower-income children, with fewer alternative sources for experiencing the world in general than children of other income levels, rely on television considerably more for information. With many of the positive children's offerings moving to cable and VCRs, these children will be denied the benefits that creative video offers to children. Low-income children will increasingly be at the mercy of commercial broadcasters who see them not as a future generation to be taught and nurtured but simply as potential consumers. It is not meaningful to children from families without VCR equipment that new and creative alternatives exist on cassettes. Indeed, while production efforts from several creative organizations are bypassing commercial television and focusing on first-run educational and informational content for VCRs, it is unlikely that those children most in need of educational fare will have access to this programming. Therefore, policy efforts must center on methods to provide economically disadvantaged children with access to these alternative technologies.¹⁰² Libraries must be adequately equipped with facilities for receiving, recording, and showing cable programming for children. The national education budget must contain adequate money to support VCR technology in public schools. Such support must be not only for the equipment and hardware but also for compensating staff so that the equipment, as well as the educational content for the equipment, is available to children, during and after school times.

The issue faced here is quite similar to that faced by policymakers who seek to guarantee all schoolchildren equal access to microcomputer technology. Early policy efforts in this regard proposed essentially indiscriminate use of federal funds to purchase hardware for all school systems. It soon became clear, however, that there was a differential need, and that school districts in well-to-do areas already owned adequate numbers of microcomputers. These districts needed, more than anything, adequate creative software to use on the microcomputers. Many school districts had no microcomputers, though, and therefore, for them, concerns about software were one step removed. More recent policy approaches have targeted federal support for hardware for these specific schools, and have devoted the bulk of recommended spending to creative content for the systems. A similar two-pronged approach might be

102. Many thanks to Peggy Charren for this insight.

used to guarantee that in low-income school districts children have access to all means of video technology; remaining federal efforts could then be concentrated on the content of the technology.¹⁰³

Conclusion

The point must be made, and made again, that television serves as a major part of the educational curriculum of American children. Teaching and learning, intended or unintended, take place whenever children watch television. The government should recognize rather than ignore this phenomenon and support positive educational programming for children. Since the alternative technologies argument is not likely to be abandoned, no alternative exists to a strong and consistent federal commitment to public broadcasting.

Governmental organizations such as NSF, NEH, NEA, and DOE must have the budget and the vision—as in the case of *Square One*—to help underwrite the creation of educational video, be it broadcast or produced for VCR. Educational production is expensive, in terms of both effort and money. VCR material produced with an educational intent must be accessible at a modest price to all families and schools. Certainly the price should be comparable to video content produced or underwritten by advertisers and toy manufacturers. To the extent that toy companies begin to underwrite the creation of VCR materials, much as they do with broadcast programming, the costs of such material will be artificially lower than that of equally entertaining but more educational materials. Government agencies should work to ensure that educational programming is not squeezed out of the market.

Public interest groups supportive of television for children, such as ACT, must continue to receive support—financial, moral, and political. At a time when the relatively disadvantaged and powerless have little access to lobbying representatives, ACT has continued to press broadcasters to fulfill their legal responsibilities, and they have done so in the face of continued setbacks and failures. ACT has filed countless lawsuits to protect children from commercial exploitation and to work towards real diversity in the children's video

103. Some will argue that these are responsibilities of the private sector, and in most cases they are correct. However, performance of the private sector in this case has been dismal, as has federal oversight by the FCC, which is charged with ensuring that the private sector has adequate motivation to perform properly. In the absence of an FCC reversal of its "hands off" position in the case of television for children, other measures must be taken. Of course, if the FCC were more diligent, there would be no need to recommend that other federal agencies be responsible for funding these materials.

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marketplace.¹⁰⁴ While it may sometimes seem that the quantity and quality of fare for children may not be appreciably better than when the organization began in 1968, it is likely that without ACT, there would be no commercially broadcast fare for children at all. Whatever positive there is in television for children, most of it can be attributed to efforts of groups such as Action for Children's Television.

But, by themselves, such efforts are not enough. Those in government should exercise their legal authority to ensure that broadcasters offer adequate programming for children as an integral part of their obligation to serve in the public interest. To ensure equal access to informational television for all children, government should renew and increase its commitment to public television as well as to bringing alternative technologies to lower-income children. And public interest groups must be given the resources necessary to continue their striving for excellence in children's television. It will take the combined efforts of government agencies, industry leaders, and public interest advocates to overcome the failure of the marketplace to protect the interests of our children.

104. For a partial listing, see C. Alperowicz & R. Krock, *Rocking the Boat: Celebrating Fifteen Years of Action for Children's Television* (1983).