

In Defense of the Public Interest

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The broadcasting scene of the United States has been dominated by large commercial networks whose powerful influence resulted in a regulatory regime that has been more marginal than substantive in impact in ensuring the public interest. The lessons to be learned are crucial for the development of European media and societies, especially in the new democracies of Central and Eastern Europe where political and commercial pressures on public service media are undermining its remit.

1. Foreword

The distinctiveness of the US broadcasting experience relies on scale and the resources made available through scale. The European observer is intimidated by the breathtaking dimensions and often put off by an astonishingly huge quantity of advertising and a desperate search for quality programming on television.

One way of coming to terms with this amazing system, and in particular the motives underlying it, is to examine the understandings of the notion of the public interest. Exploring the literature on the topic, however, is not sufficient in itself. One has to

spend a considerable amount of time in the United States interviewing scholars, regulators and media managers, talking to people, participating in social activities, watching TV to comprehend the role of the media in society. I was fortunate enough to find out through my Fulbright experience...

2. Background

Historically, spectrum scarcity had been evoked as a rationale for regulating the electronic media in the public interest both in the United States and in Europe, the argument being that only a certain number of broadcasters could transmit in any given region without interfering with each other's broadcasts. The reason for regulation that went beyond the mere distribution of frequencies, however, was the pervasiveness attributed to radio and later television. Due to the different perceptions of the role of the State in society, however, three different models of broadcasting developed.

Whereas in the US it was deemed that the public good was best served by private entrepreneurs who offered what the public wanted to hear on radio and later see on television, in Europe broadcasting had been reserved as a State monopoly. The public service model that originated in the United Kingdom is based on the idea that neither the market nor the State could meet the public interest objectives in broadcasting and therefore an arm's length relationship is necessary between the State and the public service

broadcaster. Under the third model, in which broadcasting was entrusted to direct government responsibility, the State was seen as the guarantor of the public interest as defined by itself.

None of the above models has been thoroughly convincing in representing the public interest. While in the market model the media tend to serve the interest of corporate profit, in the State owned models there is a continued attempt by governing authorities to exert control directly or indirectly through cutting funds.

3. Public Service Broadcasting

In Western Europe, the public interest in broadcasting has been epitomized by the notion and values of public service broadcasting. The Amsterdam Protocol¹ signed in October 1997 and annexed to the Treaty establishing the European Community recognizes that "the system of public broadcasting is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism."

In the US public broadcasting was established when three major networks controlled all programming with popular genres and a considerable part of the airtime devoted to advertising. In 1961, FCC Chairman Newton Minow condemned commercial television as a "vast wasteland"² and urged educational revival. In 1967 the Carnegie Commission recommended that America launch public

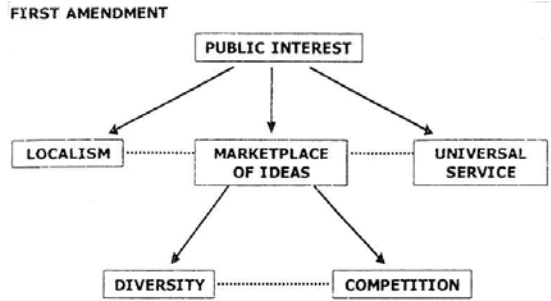
TV to serve as a “forum for debate and controversy” and to compensate for the limitations of advertising driven media.

The late introduction of public broadcasting as well as Congress’ reluctance to provide secure levels of funding have jeopardized the Public Broadcasting Service in playing the role that public service broadcasters have fulfilled in European countries. Consequently, from a European perspective, the US public broadcasting service is insignificant. Its audience share is around three percent (as opposed to an average of thirty percent for European public service broadcasters) and it is not required to offer a balanced diet of informational, educational and entertainment programming, but only to deliver the sort of programming that commercial broadcasters would fail to. As a result of insufficient levels of federal financing, however, the PBS has been pushed to rely more heavily on private and corporate sponsors, thereby exposing itself to accusations of political bias³ and to an increased trend towards commercialization.⁴

In the United States the marginal role played by public broadcasting is just one piece of evidence of the State’s reluctance to get involved in the media.

4. Democratic Rights

One of the most often cited texts in US media research is the First Amendment to the Constitution „Congress shall make no law... abridging the freedom of speech, or



of the press...” clearly meaning that the government will not interfere with either citizens’ right to free speech or with the press’ right to publish.

As the First Amendment could not refer to broadcasting, the situation here is far from being unequivocal. Whereas the State has maintained a hands-off attitude with the print media, some claim that it has meddled with the principle of free speech when it started to regulate the use of the public airwaves.

“In the United States the public interest standard [in the regulation of the electronic media] is an historical anomaly that is inconsistent with traditional understandings of the First Amendment. The FCC is seeking ways to perpetuate and expand a regulatory construct that permits it to exert unique control over the content of communications...”⁵

Ironically, First Amendment principles had been referred to by those who have sought to justify regulation in the public interest. In their view regulation, by preventing interference, encouraged rather than hampered free speech. Moreover, in the early days, broadcast regulation attempted to create an informed citizenry through advancing the needs of democracy and culture beyond what market forces could make available.

Indeed, the right of broadcasters and advertisers to free speech is just one aspect of democracy: the right of citizens to being informed in order to be able to exercise their democratic rights is equally important. A seminal case before the Supreme Court was *Red Lion*⁶ in 1969, in which the court ruled that it is “the right of viewers and listeners, not the right of broadcasters, which is paramount”.

The ruling in *Turner*⁷ was also a milestone as it exempted cable from rules on local programming obligations applying to broadcasters and thereby confirmed that cable would come under a different regulatory and constitutional regime than broadcasting.⁸

In August 2008, the major broadcast television networks filed briefs at the Supreme Court challenging *Red Lion*. They claim that today it is invalid to enforce broadcast indecency law as families subscribe to cable and satellite TV services and surf the Internet.

If the court rules in their favor, traditional understandings of the public interest will be lost forever.

5. The Public Interest Standard

Since 1934, the passage of the Communications Act, the Federal Communications Commission is required to regulate “in the public interest, convenience, and necessity”. Many blame the ineffectiveness of the public interest standard on the vagueness of its definition.

The term was borrowed from another industry, transportation in the 1920s. In his book on the foundation principles of communications policy, Napoli suggests that the confusion surrounding the public interest is largely due to blurring its conceptual, operational and applicational levels.⁹ He concludes that while the FCC has used a stable definition at the conceptual level, very little has been done to solidify it into a set of operational principles. For this reason, it can be and has actually been utilized on behalf of any policy action taken.

As already mentioned, the First Amendment can be seen as the boundary setting foundation principle in communications policy, the other principles being restricted by the confines of the First Amendment. The following figure is reproduced from Napoli’s book:

Entire studies have been devoted to how successfully the other principles emanating from the public interest have been enforced by the FCC.

The standard has been elaborated through numerous FCC regulations to enhance diversity of expression, political, discourse, children’s programming, localism and other functions. Under the public interest standard the government was supposed to favor licensees who seemed most inclined towards serving the public good and least inclined towards their own selfish interests. The only exception to these criteria was commercial advertising which could be conducted for selfish reasons.

Though many stations came to ignore public interest criteria over time as they succumbed to the drive to continually increase their profits, the FCC made numerous efforts at reinforcing the rules. With the rise of cable, however, it was argued that the contemporary, commercially supported environment could provide a multiplicity of voices, eradicating the previous justification for government regulation.

As a result, in the 1980s the FCC itself reinterpreted the public interest as a function of the market and replaced the previous trusteeship model. Under the new definition, a broadcaster's commercial success would be indicative of the public's satisfaction with it.¹⁰ Regulation came to be viewed as necessary only when the marketplace clearly failed to protect the public interest, but not when there was only potential for failure.

The marketplace model opened an era of relaxed public interest requirements. In 1981 broadcasters abandoned their voluntary code of conduct, which had defined programming and advertising standards through self-regulation. In the same year, the FCC introduced the "postcard renewal process", by which broadcasters, when applying for the continuation of their licenses, are not required to submit a detailed review of how they are meeting their public interest obligations. In 1984, the FCC eliminated the ascertainment requirements whereby broadcasters had to address local community needs in their programming.

In 1987 the FCC repealed provisions of the Fairness Doctrine, which required broadcasters to provide reasonable opportunities for contrasting and dissenting views on controversial topics. In 2003, the FCC eliminated a wide range of media concentration protections, allowing a single company to own eight radio stations, three TV stations, the only daily newspaper, the dominant cable TV provider and the largest Internet service provider in a single community.

Existing public service obligations include an unspecified amount of local programming, three hours per week of educational/informational shows for children, participation in V-chip ratings system, restrictions on indecent programming while children are likely to watch, limits on tobacco advertising and the amounts of ads during children's programs, special access and rates for appearances by political candidates, the right of citizens and groups to defend themselves if they had been attacked on air, and accessibility for the sight- and hearing-impaired.¹¹

Today, the only piece of content legislation is the Children's Television Act¹², but its efficiency is questionable. If we compare the shows delivered by commercial broadcasters, they are clearly inferior in quality to those offered on PBS channels. Also, what commercial broadcasters label as children's educational programs has been found misleading by the FCC.¹³

In her book on media diversity, Mara Einstein¹⁴ stated that structural regulation had little impact on the diversity of programming content. She argued that diversity should even be eliminated as a goal if, with reference to First Amendment principles, the government is only allowed to regulate structure and not content. She pointed at advertising as being at the heart of the problem as limits are placed on the type of programming that will be produced: it must fit into 22 minutes, it must be self-contained, and it must not be controversial within the current economic and social frame.

6. The Public Interest in the Digital Age

In the US the final date for analog switch-off has been postponed until 17 February 2009. By this date all full power stations will stop broadcasting in analog modulation.

The public is being educated about the advantages of digital television in the US and in Europe. DTV offers better picture quality, TV stations can broadcast several signals using the same bandwidth, and interactive content or additional information can be included. The main issue, however, from the public interest aspect, is whether DTV produces a greater diversity of high-quality programs.

The Telecommunications Act of 1996 amending the 1934 Communications Act gave broadcasters greater powers

of concentration and cross-ownership, greater security in holding their licenses, and more spectrum. It made a provision for the transition from analog broadcast television to “advanced television services”. Congress decided to effect the transition by limiting initial digital TV licenses to existing analog licenses. Broadcasters received for free an additional 6 MHz of spectrum to begin digital operation while they would phase out and then return to the government their 6 MHz of analog spectrum. This perceived giveaway, as well as the language of the Act that nothing therein should be construed as relieving broadcasters of their public service obligations, prompted a notion of increased public service obligations in the digital age.

In March 1997, an advisory committee (Gore Commission) was set up to recommend a set of obligations to be later implemented by the FCC. The main target of the work was the Administration’s desire to address the problem of skyrocketing costs of airtime for political candidates. In December 1998, the so called Gore Commission issued its final report recommending ten additional public interest obligations¹⁵ for digital broadcasters. As mandatory free airtime for political candidates created powerful controversy, it could not survive.

The last recommendation that seeks to explore alternative approaches to “allow for greater flexibility and efficiency while affirmatively serving public needs and interests” prompts the Administration,

Congress and the FCC to consider developing a new model of public service obligations. One of the promising approaches was the “pay-or-play” model under which broadcasters could choose between fulfilling certain non-statutory public interest obligations, or paying a share of their revenues to bypass those obligations and receive in return an expedited license renewal process. The so-called “pay or play” concept was perceived to be dangerous by several members of the Advisory Committee. While some worried that it would result in broadcasters dropping all public interest obligations and leave citizens with less exposure to information on public affairs or children’s programming, others assumed that commercial broadcasters would rather play and use their own definitions to meet certain programming requirements.

In October 1999, Vice President Al Gore urged the FCC to address four specific recommendations of the Advisory Committee. In response to the request, in December 1999 the FCC adopted a Notice of Inquiry, thereby creating a forum for public debate on how broadcasters could best serve the public interest during and after the transition to digital. After receiving comment on the proceeding, the FCC has never issued a report on this NOI.

In October 2000, the FCC held a hearing on the public interest obligations of TV broadcast licensees that consisted of three panels: serving children in the DTV world, protecting children from

the effects of sexually explicit or violent programming, and using DTV to better serve local communities. As a result, four years later FCC adopted a children’s programming obligations for Digital Television Broadcasters.¹⁶

Currently, public TV stations are not allowed to use any of their facilities for the broadcast of advertisements. In order to “help bring public television into the digital age”¹⁷, in 2001 the FCC decided to authorize advertising on the non-broadcast portion of the bit-stream. “The sort of convergence we don’t want to see is convergence of our public and commercial television services until they become indistinguishable one from another” said FCC Commissioner Michael J. Copps in his dissenting statement.¹⁸

Despite repeated calls from Senators¹⁹, FCC Commissioners²⁰ as well as public interest organizations to produce rules on public interest obligations of broadcasters in the digital age, no comprehensive action has been taken. The wording of a Report to Congress of the FCC is revelatory of FCC’s reluctance to impose further obligations on broadcasters.²¹ So far only some of the old rules have been confirmed, like in 2004 when the FCC unanimously extended children’s television rules to digital TV. Another field in which the FCC acted was the amendment of the Emergency Alert System (EAS) rules to extend them to providers of digital TV broadcasts by May 2007.²²

Since 1999 nine years have elapsed and switch-off date is only a few months ahead.

The need to impose increased obligations on broadcasters is being challenged not only by broadcasters, but also by certain media scholars.

7. Rethinking the Public Interest

The 1996 Act left no doubt that broadcasters would have continued public service obligations in the digital era, but notions of the public interest born in the era of centralized, one-to-many mass media seem to be old-fashioned in the context of the Internet and a wide array of digital appliances and competing content distribution platforms.

Why do broadcasters continue to be submitted to public interest obligations? It might be true that they benefit (financially) from the use of a public resource, the spectrum, but the vast majority of TV viewers makes no distinction between basic cable (and DBS) channels and broadcast channels. Although cable and direct broadcast satellite are subjected to access requirements, they do not have any public trustee content obligations like those imposed on broadcasting.

In the light of the shortcomings of the current regime and rapid technological changes, one is inclined to prefer an entirely new approach to the patching up of existing policy.

Winer suggested a return to first principles by abandoning public interest obligations altogether. As government regulation in the public interest is likely to produce even worse results than in the past, "we should rely on the journalistic integrity of broadcasters, appropriately

influenced by audience and marketplace forces, just as we do for the print media"²³

At a conference hosted by the Aspen Institute's Forum on Communications and Society (FOCAS) in 2001²⁴, there was general agreement that the marketplace is not adequately serving education and training, civic dialogue, arts and culture, healthcare and community life. "Increasing media concentration²⁵ and the policies that ignore public interest obligations threaten to exclude and silence voices and choices critical to an informed and participatory democracy."²⁶

Geller recommended that Congress should not proceed on an evolutionary basis, but should adopt a radically different regulatory scheme for television broadcasting. "It is time now to acknowledge that we no longer should care whether or not the commercial broadcaster plays in the public service field -...we want the commercial broadcaster to pay for its use of the public spectrum so that public broadcasting can be enabled to make a needed maximum contribution to educating and informing children and the electorate".²⁷

Similarly, the Citizens for Independent Public Broadcasting, an advocacy group have urged the creation of a public broadcasting trust that would be independently funded and publicly accountable in order to grant public broadcasting financial and editorial independence. One of the potential sources could be the money raised by the FCC in spectrum auctions.

Expanding the frontiers of the public media would also empower the public, but commercial networks obviously

oppose the creation of a strong public broadcasting network.

Another option would be to introduce quantitative limits on more genres (not just children's programs) and on advertising in particular. In Europe the minimum requirements to be observed by television broadcasters in each Member State have been around since the adoption of the Television without Frontiers Directive in 1989, although many rules have been relaxed by the new Audiovisual Media Services Directive.²⁸ The current hourly limit for spot advertising and teleshopping spots is twelve minutes, but Member States are free to impose stricter rules. If introduced in the US, such measure would doubtless represent significant improvement. It is, however, not likely to be initiated by policy makers for fear of First Amendment concerns to be raised immediately.

Whichever of the above solutions one prefers, one point is evident. The current regulatory regime based on the 1996 Telecommunications Act is outdated as it perpetuates an industry structure that has in the meantime undergone enormous changes. A comprehensive legal framework that applies to all audiovisual media services irrespective of distribution platform is needed, which could be modelled on the Audiovisual Media Services Directive of the EU. The AMS Directive covers all TV-like services including internet TV and on-demand, but adopts the principle of graduated regulation with stricter rules applying to television broadcasts in the fields of advertising and the protection of minors.

8. Conclusions

Rich Media, Poor Democracy. The title of Robert McChesney's book refers to the outcome of a trend to subject the public interest to corporate interest. "By defining the public interest as what is sufficiently popular (and profitable), the strict market model effectively dismisses the broader cultural and political significance of the media"²⁹

Whereas in Western European societies, public service broadcasters have succeeded in playing an essential role in preserving the democratic values of society by serving the public's informational and cultural needs, this has not been the case in the US. The freedom of speech principle enshrined in the First Amendment has too often been interpreted to over-respect commercial television's and advertisers' right to the detriment of the public's interest.

At the same time, the power of this same cornerstone value of democracy, freedom of speech has enabled hosts of scholars, Congressmen, FCC commissioners, and public interest organizations to repeatedly voice their concerns about inefficient policies. Public interest groups have been around since the 1930s and although they seem to be inefficient in comparison with more influential lobbyists, their efforts have brought some returns. By their sheer presence on the scene, they have managed to keep considerations of public interest on the agenda.

In order to avoid the pitfalls of the US system and to successfully defend the vulnerable values of European public service broadcasting, we should be looking at the activities and methods of the US public interest organizations.³⁰

Notes

1 Official Journal C340/109 10.11.97

2 Newton N. Minow, 1961: Television and the Public Interest.

Delivered on 9 May 1961 Washington, DC <http://www.americanrhetoric.com/speeches/newtonminow.htm>

3 PBS has been perceived as liberal by the Republicans who argued that there is a need for more conservative programming to restore the balance.

4 As programs are increasingly sponsored by companies, PBS's advertises toys, drugs and junk food to children.

5 Corn-Revere, R., 2001: The Public Interest, the First Amendment and a Horse's Ass. <http://www.law.msu.edu/lawrev/2001-1-Corn-Revere.htm>, pp 1-2

6 Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969)

7 Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994)

8 Public interest obligations of cable and DBS: Cable providers are required to set aside channel capacity for local public, educational, and governmental access programming, but the amount is not mandated. In contrast, DBS providers must reserve 4% of their channel capacity exclusively for noncommercial programming of an educational and informational nature.

9 Napoli, P.M., 2001: Foundations of Communications Policy. Hampton Press, Inc., Cresskill, New Jersey

10 Fowler, M., 1982: A Marketplace Approach to Broadcast Regulation, 60 Texas L. Rev., 2087

11 A Primer on the Public Service Obligations of Television Broadcasters. 1997. Prepared by United States Department of Commerce National Telecommunications and Information Administration for the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters (PIAC). <http://www.ntia.doc.gov/pubintadvcom/octmtg/PI-COVR2.htm>

12 Children's Television Act of 1990, 47 U.S.C.

13 Politics and Rules Concerning Children's Television Programming Revision, 8 F.C.C.R. 1841, 1842 (1993).

14 Einstein, M., 2004: Media Diversity, Economics, Ownership, and the FCC. Lawrence Erlbaum Associates, Publishers, Mahwah- New Jersey-London

15 These were: disclosure of public interest activities by broadcasters, voluntary standards of conduct, minimum public interest requirements, improving education through digital broadcasting, multiplexing and the public interest, improving the quality of political discourse,

disaster warning, disability access to digital programming, diversity in broadcasting and new approaches to the public interest

16 MM Docket 00-167

17 Included in FCC Chairman Michael Powell's statement. Report and Order in MM Docket No. 98-203 In the Matter of the Ancillary and Supplementary Use of Digital Television capacity by Noncommercial Licensees

18 Report and Order in MM Docket No. 98-203 In the Matter of the Ancillary and Supplementary Use of Digital Television capacity by Noncommercial Licensees.

19 In May 2000 Senators John McCain, Joe Lieberman, Robert Byrd and Sam Brownback wrote to the FCC expressing their concern about the declining standards of broadcast television, in particular the increasing amount of sexually-oriented and violent content.

20 Commissioner Copps and Adelstein called for action in February 2005 and in February 2007.

21 The report identified eleven major principles "on how broadcasters could fulfill their statutory duty to serve the public interest".

22 The dire state of the EAS can be best demonstrated by the fact that it hadn't been activated during the 9/11 attacks.

23 Winer, L.H., 1998: Public Interest Obligations and First Principles. The Media Institute http://www.mediainstitute.org/gore/03_03_98

24 In search of the public interest in the new media environment. A Report of the Aspen Institute Forum on Communication and Society. 2002, Washington DC

25 Today six companies own a controlling interest in the US media.

26 Citizen's Guide to the Public Interest Obligations of Digital Television Broadcasters. Benton Foundation www.benton.org

27 Geller H., 2003: Promoting the Public Interest in the Digital Era. Federal Communications Law Journal, Vol. 55. p. 520

28 Other types of content regulation prescribed by the Directive are a quota for European works and independent production

29 Cruteau D., Hoynes W., 2006: The Business of the Media. Corporate Media and the Public Interest. Pine Forge Press, Thousand Oaks-London-New Delhi, p.34

30 Their purpose is to represent before the FCC and other decision making bodies views that are otherwise underrepresented. These organizations are public law firms like the Media Access Project, institutions coordinating roundtable forums and projects like the Aspen Institute's Communications and Society Program, foundations (e.g., the Benton Foundation), national membership organizations (Citizens for Independent Public Broadcasting) and local organizations.