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SYMPOSIUM: ARE NEW MEDIA REALLY REPLACING OLD MEDIA? BROADCAST MEDIA DEREGULATION AND THE INTERNET

FOREWORD

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On Friday, March 22, 2002, St. John's University School of Law held a day-long communications law conference entitled "Are New Media Really Replacing Old Media? Broadcast Media Deregulation and the Internet." The conference consisted of two panels. In the first panel, the presenters analyzed broadcast deregulation and market concentration issues. In the second panel, the presenters analyzed those issues that affected access to the Internet. Columbia Law School Professor Lance Liebman was the luncheon keynote speaker. The conference examined the technological changes and recent court decisions that have furthered the deregulation and concentration of traditional media such as broadcast television and radio. The conference and this related symposium raise the question whether this media concentration is problematic from a federal and state regulatory standpoint in a now-new media market, which includes the Internet.

Traditionally the Federal Communications Commission has regulated the broadcasters with a variety of rules that required them to place opposing views on the air,² to provide air-time for someone who was attacked as to her honesty, character, and integrity,³ to provide equal time for political candidates,⁴ to provide for children's television,⁵ to time-channel indecent

Telecommunications Law Committee of the Bar Association of the City of New York for their support for the conference. Finally, I would like to thank the *St. John's Journal of Legal Commentary*, especially 2002-2003 Editor-in-Chief, Rebecca Valk, for help with this symposium edition.

² See *Report on Editorializing by Broadcast Licenses*, 13 F.C.C. 1246, 1249-1252 (1949) which notes that the rule required that the broadcaster must give adequate coverage to controversial issues and must accurately reflect the opposing view, irrespective of whether the licensee receives sponsorship for it. In addition, Congress had amended Section 315 of the Communications Act, which accorded equal time to each political candidate, to exempt certain appearances on news programs, but Congress added an exception to this exemption that provided the exemption did not relieve the broadcasters "from the obligation imposed upon them under this Act to operate in the public interest and to afford a reasonable opportunity for the discussion of conflicting views on issues of public importance." Act of September 14, 1959, § 1, 73 Stat. 557, (amending 47 U.S.C. § 315(a)).

³ See generally *Times-Mirror Broadcasting Co.*, 40 F.C.C. 538 (1962) (asserting that the licensee is obligated to send a tape, transcript, or summary of the "attack" broadcast to the individual attacked and offer that individual reply time, irrespective of sponsorship).

⁴ 47 U.S.C. § 315(a) (providing that if a broadcaster allows one candidate for elective office to have air time, the broadcaster must give a like opportunity to the candidate's opponents, except if the airing is a bona fide newscast, bona fide news interview, bona fide news documentary, or on-the-spot coverage of a bona fide news event).

⁵ Children's Television Act of 1990, Pub.L.No. 101-437, 104 Stat. 996-1000 (codified at 47 U.S.C. §§ 303(a), 303(b), & 394) (requiring that, in reviewing television license renewal

broadcasts to the late-night hours,⁶ to ascertain the needs of the relevant community.⁷ In addition, the broadcasters were limited in the number of stations that they could own in the same market⁸ and the number of stations that they could own nationally. They also were prohibited from cross owning newspaper properties in the same geographic area.⁹ Finally, the broadcasters also had to undergo a rigorous comparative hearing¹⁰ as to their qualifications for their initial acquisition of their licenses and for renewal of the licenses.¹¹ Moreover, during the comparative hearing, the FCC would take into account the race and gender of the applicants in making its decision.¹²

applications, the FCC must consider whether the licensee has served “the educational and informational needs of children through the licensee’s overall programming, including programming specifically designed to serve such needs.”; see also *Policies and Rules Concerning Children’s Television Programming*, 11 F.C.C.R. 10660 (1996) (adopting a processing guideline that provides certainty for broadcaster’s renewal if they air at least three hours per week of programming “specifically designed” to educate and inform children).

⁶ *FCC v. Pacifica Found.*, 438 U.S. 726, 748-50 (1978) (noting that broadcasting has received the most limited First Amendment protection because the broadcast media have “a uniquely pervasive presence in the lives of all Americans” and are “uniquely accessible to children”); *Action for Children’s Television v. FCC [ACTIII]*, 58 F.3d 654, 669-670 (D.C. Cir. 1995) (en banc), cert denied 516 U.S. 1043 (1996) (allowing the Commission to time-channel the broadcast of indecent material between 10:00PM and 6AM).

⁷ See *In the Matter of Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650 (1971); *In the Matter of Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418 (1978) (finding broadcasters were obligated to determine the composition of the area served, consult with community leaders, and the general public to determine the community problems and needs in order to propose programming to meet those needs).

⁸ *Rule Relating to Multiple Ownership*, 22 F.C.C.2d 306 (1970) (holding licensees were limited to one broadcast station in any one market); *Multiple Ownership of Standard FM and TV Broadcast Stations*, 28 F.C.C.2d 662 (1971) (allowing AM-FM combination, and only banning VHF-radio combinations); *Radio Multiple Ownership Rules*, 7 F.C.C.R. 6387, 6388 (1992) (asserting licensee’s local ownership caps depended on the number of stations in the market and the FCC imposed an audience share cap of 25 percent); 47 C.F.R. § 73.3555 (2002) (stating ownership caps were increased depending on the size of the market and the number of stations existing therein).

⁹ *Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, 50 F.C.C.2d 1046 (1975) (“Second Report and Order”), recon., 53 F.C.C.2d 589 (1975) (“Recon. Order”), *aff’d sub nom.*, *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775 (1978).

¹⁰ See *FCC Policy Statement on Comparative Hearings*, 1 F.C.C.2d 393, 394-99 (1965) which highlighted there were two primary objectives of the comparison: (1) the best practical service to the public, and (2) maximum diffusion of control of the media of mass communications. In addressing these factors, the FCC would consider the following factors: (1) diversification of control of the media of mass communications; (2) full-time participation in station operation by owners; (3) proposed program service; (4) past broadcast record; (5) efficient use of frequency; (6) character; and (7) other factors.

¹¹ See, e.g., *Central Florida Enter. v. FCC*, 683 F. 2d 503, 507 (D.C. Cir. 1982) cert. denied, 468 U.S. 1084 (1983) (noting that the FCC established and justified its “renewal expectancy” for incumbent broadcasters).

¹² *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d

Because the number of broadcast frequencies was considered scarce, these regulations and rules were designed to ensure that there were diverse voices on the air. As Justice White said:

It was the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market. . . .by. . . a private licensee.¹³

It was believed that, by having many owners, there would be diverse voices. In addition, the broadcasters had a fiduciary duty to the listeners to make sure that a variety of perspectives were aired.

Most of these rules and regulations have fallen by the wayside either by FCC action or court invalidation. The comparative hearings have been replaced by auctions in which bidders with the most money and resources win licenses.¹⁴ In addition, the statute was amended to virtually eliminate comparative hearings for license renewals. Section 309(k) specially states that “the Commission shall not consider whether the public interest, convenience, and necessity might be served by the grant of a license to a person other than the renewal applicant.”¹⁵ Moreover, *Adarand Contractors, Inc. v. Peña*¹⁶ held that all race-based federal government programs had to be analyzed under strict scrutiny¹⁷; as a consequence of this decision, the FCC eliminated all its affirmative action programs.¹⁸ The broadcasters no longer have to ascertain the needs of its community by polling

979, 983-84 (1978).

¹³ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

¹⁴ 47 U.S.C. §309(j) (2000); see also *In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission’s Comparative Hearing Process to Expedite the Resolution of Cases*, 13 F.C.C.R. 15920 (1998) (providing a bidding credit for new entrants)

¹⁵ 47 U.S.C. § 309(k) (2000) (proposing the FCC has to grant the renewal except where the licensee violated the Communications Act, the FCC rules, or any other violations “which taken together would constitute a pattern of abuse.”)

¹⁶ 515 U.S. 200 (1995).

¹⁷ *Id.* at 227.

¹⁸ Leonard M. Baynes, *Life After Adarand: What Happened to the MetroBroadcasting Diversity Rationale for Affirmative Action in Telecommunications Ownership?*, 33 U. MICH. J.L. REFORM 87, 98-100 (2000).

different community groups.¹⁹ The Supreme Court and the FCC have both held that the market is the “best way to allocate entertainment formats.”²⁰ In the *1985 Fairness Report*, the FCC determined that the broadcasters were no longer required to cover both sides of controversial issues.²¹ The FCC based its decision on the increase in broadcast outlets since the last fairness report and since the Supreme Court decision in *Red Lion*, which validated the Fairness Doctrine.²² The FCC noted that there was a 280 percent increase in the number of radio stations since the *1949 Fairness Report* and a 30% increase since the *1974 Fairness Report*.²³ The FCC also noted that the overall network audience share dropped to 76% in 1984 and the national cable penetration rate increased to 43.3% for all television households.²⁴ Lastly, the FCC noted that there was an increase in periodicals from 6,920 in 1950 to 10,688 in 1982.²⁵

In its *1985 Fairness Report*, the FCC analyzed the issue of scarcity in a different manner than the Supreme Court in *Red Lion*.²⁶ In that case, the court evaluated spectrum scarcity from the standpoint of the number applicants vying for each broadcast license.²⁷ With such a definition, spectrum scarcity might always exist because presumably more individuals would always be interested in acquiring a broadcast license than are available. However, in its *1985 Fairness Report*, the FCC considered only the fact that there are more media outlets available than when it first promulgated the fairness doctrine. However, in 2000, the FCC seemed to repudiate the *1985 Fairness Report*, when it stated that

[t]he proliferation of television stations and the development of cable television reasonably led the Commission to reevaluate the need for the fairness doctrine. The standard

¹⁹ *In Deregulation of Commercial Television, Report and Order*, 98 F.C.C.2d 1076 (1984).

²⁰ *See Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858, 863 (1976) *rev'd*, 610 F.2d 838 (D.C. Cir 1979), *aff'd* 450 U.S. 582 (1981).

²¹ *Fairness Report*, 102 F.C.C.2d 145,147-156 (1985); *see also* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C.Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

²² *Fairness Report*, 102 F.C.C.2d at 148, 156.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Red Lion Broad.*, 395 U.S. at 396-400.

²⁷ *Id.*

of *Red Lion*, however, was not based on the absolute number of media outlets, but on the fact that the spectrum is a public resource and 'there are substantially more individuals who want to broadcast than there are frequencies to allocate.'²⁸

Then-FCC Chairman William E. Kennard said that "spectrum scarcity has emerged as a major 'gating factor' in the New Economy."²⁹ The D.C. Circuit ordered that the FCC repeal the personal attack and political editorial rules because the FCC failed to determine the rules should be retained.³⁰ However, current FCC Chairman Michael Powell has announced that "[t]he time has come to reexamine First Amendment jurisprudence as it has been applied to the broadcast media and bring it into line with the realities of today's communications marketplace. . . ."³¹ As a consequence, the FCC is likely to do more deregulation.

In *Time Warner Entertainment Co. v. FCC*,³² the D.C. Circuit struck down the thirty percent ownership cap on cable systems.³³ The FCC also is examining and reviewing whether the ban on cross ownership of newspapers and broadcasters in the same market should be repealed.³⁴ On the eve of the conference, the D.C. Circuit in *Fox Television v. FCC*,³⁵ found that the FCC failed to establish that the 35% broadcast audience reach was in the public interest, convenience or necessity.³⁶ The court refused to vacate the rules and remanded the case back to provide

²⁸ *In the Matter of Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 F.C.C.R. 19973 (2000) (attempting to suspend the personal attack and political editorial rules) *overturned by* *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (overturning FCC order solely on FCC's lack of response to the court's order, not on any ground related to the validity or constitutionality of the rules).

²⁹ *Chairman Kennard Tells Private Wireless Industry Group Spectrum Scarcity Will Be Greatest Challenge; Chairman Receives Group's Award for Outstanding Contribution to Industry*, FCC NEWS RELEASE, Oct. 5, 2000, available at 2000 Lexis 5301.

³⁰ *Radio-Television News Directors Ass'n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000) (noting that the FCC could start proceedings "to determine whether, consistent with constitutional constraints, the public interest requires the public attack and political editorial rules").

³¹ See Doug Halomen, *FCC's Powell Hits 'Scarcity' Rationale*, ELECTRONIC MEDIA, April 27, 1998, at 34.

³² 240 F.3d 1126 (2001).

³³ *Id.* at 1136.

³⁴ See 13 F.C.C.R. 11276, 11300 (1998).

³⁵ 280 F.3d 1027 (D.C. Cir. 2002).

³⁶ *Id.* at 1042-43.

justification for the rules.³⁷ In addition, in *Sinclair Broadcast Group, Inc. v. FCC*,³⁸ the D.C. Circuit also invalidated the FCC's duopoly rules that allowed for the creation of television duopolies but just in certain markets.³⁹

This deregulation has led to extreme consolidation in the radio market. Senators Ernest Hollings and Byron Dorgan have written that “[p]rior to the 1996 Telecommunications Act, the top radio station group owned 39 stations and generated annual revenues of \$495 million. Today the top group owns more than 1,100 stations and generates annual revenues of almost \$3.2 billion.”⁴⁰ They have further noted that “the radio industry has consolidated into four companies that control 90 percent of radio advertising revenue.”⁴¹

Much of the FCC prior regulatory regime has changed and been eliminated. The FCC regulations in the broadcast sector basically deal with the auctioning of spectrum, the time channeling of indecent broadcasts, and ensuring that the requisite percentage of children's television is broadcast. Broadcast regulation is now quite limited especially in comparison to regulation in the past.

The purpose of this symposium is to analyze and examine whether this major regulatory change is appropriate and justified because now there are many other sources of information like cable television and the Internet.

Four articles have been submitted for the symposium and they provide voice across the board on these issues. My colleague Professor Edward Cavanagh, in his article, entitled *Deregulation of the Airwaves: Is Antitrust Enough?*, analyzes the issue from the standpoint of antitrust theory.⁴² He concludes that antitrust as a solution to media concentration “is similarly short term and *ad hoc*.”⁴³ He advocates that Congress restructure the patchwork of current regulation involving media concentration.⁴⁴

³⁷ *Id.* at 1047-49.

³⁸ 284 F. 3d 148 (D.C. Cir. 2002).

³⁹ *Id.* at 162-65.

⁴⁰ Ernest F. Hollings & Byron Dorgan, *Your Local Station, Signing Off*, WASH. POST, June 20, 2001, at A27.

⁴¹ *Id.*

⁴² Edward D. Cavanagh, *Deregulation of the Airwaves: Is Antitrust Enough?*, 17 ST. JOHN'S J. LEGAL COMMENT. 67, 74-80 (2003)

⁴³ *Id.* at 80.

⁴⁴ *Id.*

In their article entitled *Defining the Public Interest in Terms of Regulatory Necessity*,⁴⁵ attorney Stuart Schorenstein and Professor Lorna Veraldi analyze the evolving notion and interpretation of the FCC's "public interest, convenience and necessity"⁴⁶ standard through the lens of two recent D.C. Circuit cases—*Fox Television Stations v. FCC*⁴⁷ and *Sinclair Broadcast Group, Inc. v. FCC*.⁴⁸ They conclude that "necessity," rather than "public interest" may be the new standard by which FCC rules may be judged.⁴⁹

Attorney Jonathan Lubell, in his article entitled *The Constitutional Challenge to Democracy and the First Amendment Posed by the Present Structure and Operation of the Media Industry Under the Telecommunications Act*,⁵⁰ also analyzes the *Fox Television Stations v. FCC*.⁵¹ Attorney Lubell notes the ironies of the *Fox* decision and asks to whom the First Amendment belongs.⁵² He then notes the many historical examples in which the media has influenced public policy.⁵³

In *Perspectives on How Internet Affects the Broadcast Market*,⁵⁴ Commissioner Thomas J. Dunleavy and Administrative Law Judge Eleanor Stein of the New York Public Service Commission note that access to and by the end user to new technology is crucial.⁵⁵ They also note that Internet technology is not yet available over the broadcast network.⁵⁶ In their article, they provide specific commentary on each member of the Internet panel.⁵⁷

I encourage all readers to read the different perspectives and voices of all those who have participated in the symposium on

⁴⁵ Stuart A. Shorenstein & Lorna Veraldi, *Defining the Public Interest in Terms of Regulatory Necessity*, 17 ST. JOHN'S J. LEGAL COMMENT. 45 (2003).

⁴⁶ Communications Act of 1934, ch. 655, 48 Stat. 1064 (1934).

⁴⁷ 280 F.3d 1027 (D.C. Cir. 2002).

⁴⁸ 284 F.3d 148 (D.C. Cir. 2002).

⁴⁹ Shorenstein & Veraldi, *supra* note 45, at 64.

⁵⁰ Jonathan Lubell, *The Constitutional Challenge to Democracy and the First Amendment Posed by the Present Structure and Operation of the Media Industry Under the Telecommunications Acts*, 17 ST. JOHN'S J. LEGAL COMMENT. 11 (2003).

⁵¹ 280 F.3d 1027.

⁵² Lubell, *supra* note 50, at 25-26.

⁵³ *Id.* at 27-43.

⁵⁴ Thomas J. Dunleavy & Eleanor Stein, *Perspectives on How the Internet Access Affects the Broadcast Market*, 17 ST. JOHN'S J. LEGAL COMMENT. 81(2003)

⁵⁵ *Id.* at 82.

⁵⁶ *Id.* at 84.

⁵⁷ *Id.* at 84-85.

these very vital issues. In addition, I would like to thank each of the authors who have worked hard to make this symposium a success.

