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# To Be Or Not To Be: FCC Regulation of Video Subscription Technologies

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# TO BE OR NOT TO BE: FCC REGULATION OF VIDEO SUBSCRIPTION TECHNOLOGIES\*

*Allen S. Hammond, IV\*\**

Recent innovations in microwave and satellite technology are creating a new video marketplace.<sup>1</sup> Liberalized Federal Communications Commission (FCC) market entry policies have stimulated an increase in the number and type of video program distribution facilities available to serve the public. These services compete with television for the delivery of information and entertainment to the private home and include cable television, direct broadcast satellites (DBS),<sup>2</sup> multichannel, multipoint distribution service (MMDS) and its predecessor multipoint distribution service (MDS),<sup>3</sup> instructional television fixed service (ITFS),<sup>4</sup> operational fixed service (OFS),<sup>5</sup> and subscription television (STV).

Presumably, this new video marketplace will be characterized by increasing competition between the new and established distribution services and driven by consumer preference for a variety of information services.<sup>6</sup> As a consequence, the entry of the new services has been hailed as an opportunity

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This article is dedicated to former Commissioner Henry M. Rivera, who first raised the issue that is the subject of this article.

1. See generally 1986 *Field Guide to the Electronic Media*, CHANNELS, Nov.-Dec. 1985 [hereinafter cited as *Channels Field Guide*]; Stern, Krasnow & Senkowski, *The New Video Marketplace and The Search for a Coherent Regulatory Philosophy*, 32 CATH. U.L. REV. 529 (1983); MAJORITY STAFF OF THE HOUSE SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION AND FINANCE OF THE COMM. ON ENERGY AND COMMERCE, 97TH CONG., 2D SESS., TELECOMMUNICATIONS IN TRANSITION: THE STATUS OF COMPETITIONS IN THE TELECOMMUNICATIONS INDUSTRY (Comm. Print 1981) [hereinafter cited as HOUSE REPORT].

2. See *infra* notes 22-35 and accompanying text.

3. See *infra* notes 36-50 and accompanying text; see also *Author's Note* last page.

4. See *infra* notes 51-62 and accompanying text.

5. See *infra* notes 63-73 and accompanying text.

6. See Stern, Krasnow & Senkowski, *supra* note 1, at 531; see also Hammond, *Now You*

to enhance the American public's first amendment rights to know and to speak.<sup>7</sup> Paradoxically it has also been viewed as a new and perturbing opportunity for fractionalism by fragmenting audiences through market segmentation and consumer preference, as well as for eviscerating democracy through increased concentration of media ownership.<sup>8</sup>

Currently, the FCC is considering the ultimate manner in which the new services will affect the public's first amendment rights.<sup>9</sup> Although each of the microwave- and satellite-based distribution services share common characteristics of transmission and information capacity with traditional broadcast service, and compete against conventional broadcast service for significant portions of the general audience, the Commission has refrained from regulating these services as broadcasting under title III of the Communications Act of 1934.<sup>10</sup> Instead, the Commission has argued that the new subscription services are nonbroadcast and has declined to apply the political access and fairness provisions of title III to the services.

Because the Communications Act does not specify how these new services are to be characterized, the Commission has applied different regulatory schemes to each. Thus, it has regulated MDS licensees as common carriers under title II of the Communications Act of 1934.<sup>11</sup> On the other hand, it has found DBS and OFS to be hybrid services having characteristics of

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*See It, Now You Don't: Minority Ownership in an "Unregulated" Video Marketplace*, 32 CATH. U.L. REV. 633, 635 (1983).

7. The information revolution offers great promise of enhancing . . . [the right to speak, the right to know, and the right to privacy] and their underlying democratic values. Bazelon, *The First Amendment's Second Chance*, CHANNELS, Feb.-Mar. 1982, at 16-17.

8. Barber, *The Second American Revolution*, CHANNELS, Feb.-Mar. 1982, at 21-25, 62; see also Bazelon, *supra* note 7, at 16-17.

9. Notice of Proposed Rulemaking *In re* Subscription Video Serv., FCC Gen. Docket No. 85-305, released Jan. 8, 1986 [hereinafter cited as Subscription Video Serv.].

10. Title III of the Communications Act of 1934, 47 U.S.C. § 301 (1982), requires broadcast licensees to maintain editorial control over the content of their transmissions. See *National Ass'n of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

11. Title II of the Communications Act of 1934, 47 U.S.C. § 201 (1982), requires all common carriers to serve all members of the same class of consumers indifferently. The licensee must allow its customers to have control over the content of the information transmitted. See *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976).

MDS operators have been deemed common carriers. As such, they must provide transmission capacity to the public under tariff on a first-come, first-served nondiscriminatory basis and are prohibited from exercising editorial control over the content of the transmissions. *Microband Corp. of America*, 70 F.C.C.2d 231 (1979). By contrast, broadcasters may not allow the public indiscriminate access to their transmission capacity and are held accountable for the content of their programming. The Commission has relied on the statutory distinction between common carriers and broadcasters to justify its refusal to apply title III regulation to MDS. See *Multipoint Distribution Serv.*, 45 F.C.C.2d 616, 618-19 (1974).

broadcasting and common carrier, or broadcasting and point-to-point transmission.<sup>12</sup> The Commission, in its administrative discretion, has exempted these services from traditional broadcast regulation. Finally, ITFS licensees have been seen as a special class of videocasters deemed to fall outside existing regulatory classifications. They have been exempted from broadcast regulation because ITFS is intended primarily to operate as an educational service and only secondarily as a carrier or videocaster of subscription programming.<sup>13</sup>

Recent actions of the Congress and the United States Court of Appeals for the District of Columbia Circuit have called into question much of the policy the Commission has used to keep from extending title III regulation to the subscription services. In 1982, Congress amended section 309(i) of the Communications Act of 1934.<sup>14</sup> The amendment statutorily recognized the similarities between hybrid subscription services and broadcasting by classifying these services as "media of mass communication."<sup>15</sup> In addition, the legislative history of Congress' recent amendment to the signal piracy statute, sec-

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12. Direct Broadcast Satellites, 90 F.C.C.2d 676, 708-09 (1982); Operational Fixed Serv., 99 F.C.C.2d 715, 727 n.29 (1983).

13. *In re Instructional Television Fixed Serv.*, MM Docket. No. 83-523, released June 20, 1985, at 20-21, 29, 37.

14. Section 309(i) of the Communications Act of 1934, 47 U.S.C. § 309(i) (1982), authorizes the Commission to conduct lotteries to award licenses for media of mass communication where the number of applicants is too great to use the comparative licensing procedure.

15. 47 U.S.C. § 309(i)(3)(C) (1982). Congress has directed the Commission to apply significant preferences in lotteries conducted by the Commission to award licenses for services that

may be neither clearly common carrier nor broadcast entities (such as multipoint distribution service), or services in which the applicant may be able to self-select either common carrier or broadcast status (such as . . . direct broadcast satellite service) . . . to the extent that the licensees have the ability to provide under their direct editorial control a substantial proportion of the programming or other information services over the licensed facilities.

H.R. CONF. REP. NO. 765, 97th Cong., 2d Sess. 17, 41, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2261, 2285, in which Congress required the FCC to establish ownership and diversity preferences where licenses for mass media services are awarded via random selection. *Id.* at 37-41, 1982 U.S. CODE CONG. & AD. NEWS at 2281-85. It might be argued that congressional designation of MDS and other hybrid communications services as media of mass communications for the purposes of the establishment of ownership and diversity preferences in a lottery scheme has no relevance to whether or not the new services are broadcasting as defined in § 153(o) of the Act. However, inherent in Congress' designation of a service as a medium of mass communication is the recognition that the licensees of the service have the ability to exercise editorial control over programming that is transmitted and of interest to the general public and that may entertain, inform, and persuade regardless of its subscription nature. Hence, Congress saw a need to assure greater diversity of ownership and diversification of program content. *See id.* at 40, 1982 U.S. CODE CONG. & AD. NEWS at 2284. Perhaps even more compelling is Congress' placement of the lottery provision with its application to subscription services in title III.

tion 605 (now 705) of the Communications Act of 1934, indicates that section 605 provides protection against unauthorized reception of STV, MDS, and DBS signals.<sup>16</sup> When viewed in concert, the recent amendments suggest that Congress deems hybrid services to constitute broadcast-like subscription services whose signals are protected from unauthorized reception.

Finally, but perhaps more importantly, the United States Court of Appeals for the District of Columbia Circuit in *National Association of Broadcasters v. FCC*<sup>17</sup> held that at least one subscription service, DBS, constitutes broadcasting as defined in section 153(o) of the Communications Act of 1934.<sup>18</sup> On January 8, 1986, in response to the *NAB* decision, the FCC initiated a Notice of Proposed Rulemaking (NPRM) to harmonize the regulation of microwave- and satellite-based subscription services.<sup>19</sup>

The Commission's decision and the responses of Congress and the courts will have a profound impact upon the manner and the extent to which electronic speech is to be regulated in the future. A decision to eschew the principles of diversity and licensee responsibility to the public embodied in title III and to rely instead upon competition in the marketplace would result in the beginning of a fundamental rebalancing of the public's "right to know" and the videocaster's "right to speak." This article explores the Commis-

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16. In the legislative history accompanying the amendment of § 605, Congress stated: H.R. 4103 as reported by Committee recodifies without modification section 605 to the Communications Act of 1934 as new section 705(a). In amending existing section 605, it is intended to leave undisturbed the case law that has developed confirming the broad reach of section 605 as a deterrent against piracy of protected communications. Over the years federal courts, consistent with congressional intent, have recognized that section 605 provided broad protection against the unauthorized interception of various forms of radio communications. It is the Committee's intention that the amendment preserve these broad protections; that all acts which presently constitute a violation of present section 605 shall continue to be unlawful under that section as amended and redesignated by H.R. 4103.

Section 605 not only prohibits unauthorized interception of traditional radio communications, but also communications transmitted by means of new technologies. For example, existing section 605 provided protection against the unauthorized reception of subscription television (STV), multipoint distribution services (MDS), and satellite communications. This amendment made by section 5 of the bill is intended to preserve this broad reach of existing section 605 and to make clear that all communications covered under section 605 will continue to be protected under new section 705(a).

130 CONG. REC. S14,287 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS at 4746.

17. 740 F.2d 1190 (D.C. Cir. 1984).

18. *Id.* at 1201. Section 153(o) of the Communications Act of 1934, 47 U.S.C. § 153(o) (1982) defines broadcasting as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."

19. Subscription Video Serv., *supra* note 9, at 3-4, 17-21.

sion's rationales for its proposed action in light of the current law and offers observations on the advisability of the Commission's proposal.

## I. THE FCC'S CLASSIFICATION OF THE NEW VIDEO DISTRIBUTION SERVICES

In the name of spectrum efficiency and economic pragmatism, the FCC has created myriad opportunities for the distribution of video programming to the home. These services are identical in all practical functional aspects to broadcast service and are only slightly different in terms of ownership restrictions and constraints upon the licensee's exercise of editorial control. Each service relies on a technology that produces omnidirectional, point-to-multipoint transmission patterns.<sup>20</sup> Each service can carry the same amount and types of information over its six-megahertz-wide channels.<sup>21</sup> Moreover, as they have presently evolved, each of the services is expected by the Commission to be used in large measure, if not chiefly, for the distribution of video programming of interest to the general public.

Although the services are functionally similar to broadcasting, the Commission has argued that the existence of their other nonbroadcast characteristics precludes a determination that the services constitute broadcasting and are subject to title III. In the process, the Commission has rendered the regulatory distinctions between the services and broadcasting suspect if not illusory.

### A. Direct Broadcast Satellites

Direct broadcast satellite (DBS) systems are composed of high-powered, multichanneled satellites transmitting programming over wide geographic areas to single and multidwelling homes and cable systems. Earth stations transmit signals to a satellite that receives, amplifies, and retransmits the signals to receivers.<sup>22</sup> The Commission authorized DBS services in 1982.<sup>23</sup>

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20. See Instructional Television Fixed Serv., 101 F.C.C.2d 50 (1985); Instructional Television Fixed Serv., 94 F.C.C.2d 1203, 1205-16 (1983); Operational Fixed Serv., 99 F.C.C.2d 715, 716 (1983); Direct Broadcast Satellites, 90 F.C.C.2d 676 (1982); Use of Private Microwave Frequencies, 86 F.C.C.2d 299, 306, 311 (1981); Multipoint Distribution Serv., 45 F.C.C.2d 616, 617 (1974).

21. See Instructional Television Fixed Serv., 101 F.C.C.2d 50 (1985); Instructional Television Fixed Serv., 94 F.C.C.2d 1203, 1205-16 (1983); Operational Fixed Serv., 99 F.C.C.2d 715, 716 (1983); Direct Broadcast Satellites, 90 F.C.C.2d 676 (1982); Use of Private Microwave Frequencies, 86 F.C.C.2d 299, 306, 311 (1981); Multipoint Distribution Serv., 45 F.C.C.2d 616, 617 (1974).

22. *Channels Field Guide*, *supra* note 1, at 52; NATIONAL ASSOCIATION OF BROADCASTERS, NEW TECHNOLOGIES AFFECTING RADIO AND TELEVISION BROADCASTING 17 (1981) [hereinafter cited as NEW TECHNOLOGIES].

The new service was expected to provide as many as thirty to sixty additional channels of video programming.<sup>24</sup> Each channel possesses an omnidirectional point-to-multipoint transmission pattern and possesses the same capacity and ability to carry programming that broadcast services possess. As of 1984, eight companies have been authorized to construct systems and provide service.<sup>25</sup> The proposed system configurations range from two to four satellites each using from two to as many as ten channels or transponders. Of the original eight permittees, only three appear to be making actual progress toward constructing a system.<sup>26</sup> At least one DBS service is presently in operation and a second service is planned for 1988.<sup>27</sup>

DBS operators may elect merely to provide transmission capacity to programmer-customers who in turn transmit programming to the public or to cable operators. Alternatively, DBS operators may broadcast video programming directly to the public or to cable operators over their satellite transmission facilities. Because of these two different functions, when the Commission authorized DBS service in 1982, it declined to require DBS systems to operate under a particular service classification, preferring to allow "the developmental and experimental period [of DBS] . . . to run its course."<sup>28</sup> The choice of service classification was left to the DBS system operator. If the DBS operator merely provided transmission capacity, it would be deemed a common carrier serving the public indiscriminately under tariff, and thus subject to regulation under title II of the Communications Act.<sup>29</sup> On the other hand, if the DBS operator broadcasted directly, it would be deemed a broadcaster with editorial control over the content of its programming, and thus subject to regulation under title III.<sup>30</sup> In those instances in which a DBS operator provided both services, it would be considered a hybrid service, subject to both title II and title III.<sup>31</sup>

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23. Direct Broadcast Satellites, 90 F.C.C.2d 676 (1982).

24. Pitsch, *Home Video Competition: What Should Regulators Do?*, TVC, Oct. 1, 1982, at 78, 80.

25. *The New Order Passeth*, BROADCASTING, Dec. 10, 1984, at 43, 46, 50, 54.

26. *Id.*; see also *Cable Programmers Use Satellites To Expand Consumer TV Market*, AVIATION WEEK & SPACE TECH., Jan. 20, 1986, at 111; *After 10 Years of Satellites, The Sky's No Limit*, BROADCASTING, Apr. 9, 1984, at 42, 60-61.

27. *The New Order Passeth*, *supra* note 25, at 50.

28. Direct Broadcast Satellites, 90 F.C.C.2d at 708.

29. *Id.* at 709.

30. *Id.*

31. Report and Order *In re* Direct Broadcast Satellites, FCC Gen. Docket No. 80-603, released July 14, 1982; Notice of Proposed Policy Statement and Rulemaking Regarding DBS, 46 Fed. Reg. 30,124 (1981); Notice of Inquiry Regarding DBS, 45 Fed. Reg. 72,719 (1980). For a detailed discussion of the jurisdictional and regulatory considerations, see Ferris, *Direct Broadcast Satellites: A Piece of the Video Puzzle*, 33 FED. COMM. L.J. 169 (1981); Botein,

The Commission also considered whether to apply title III regulatory constraints on programmer-customers of common carrier DBS operators.<sup>32</sup> It concluded that nothing in the Communications Act or its legislative history required that title III be applied to programmer-customers. The Commission also noted that imposing upon a common carrier's customers the limited access requirements now imposed upon broadcasters—the fairness doctrine, equal opportunities for political candidates, and reasonable access for federal candidates<sup>33</sup>—merely would duplicate the more pervasive access obligation already imposed upon the carrier itself.<sup>34</sup> The fact that the Commission did not license or regulate the programmer-customers of common carrier MDS operators was cited as support for the Commission's decision not to regulate common carrier DBS programmer-customers.<sup>35</sup>

*B. Multipoint Distribution Service and Multichannel Multipoint Distribution Service*

Multipoint distribution service (MDS) uses omnidirectional, microwave signals in the super-high frequency broadcast band to deliver video, data, text, and other information to single and multidwelling units and businesses. MDS operators have traditionally leased a significant portion of their program time to subscription services that receive their programming from pay program suppliers. Subscribers of MDS must purchase a special antenna and a down converter that changes the MDS signal to a standard VHF television frequency and sends the signal down a cable to the subscriber's television set.<sup>36</sup>

MDS was originally created as an omnidirectional, narrow-band, point-to-point microwave service.<sup>37</sup> Because common carriers and private radio operators made little use of the allocated frequencies, in 1970 the FCC removed the 3.5 megahertz (MHz) bandwidth limitation from the two MDS channels.<sup>38</sup> Within two years, the FCC had received numerous applications proposing to provide nonbroadcast, omnidirectional, point-to-multipoint, closed circuit television relay service to customers on a common carrier ba-

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*Jurisdictional and Antitrust Considerations in the Regulation of the New Communications Technologies*, 25 N.Y.L. SCH. L. REV. 789, 873 (1980).

32. 90 F.C.C.2d at 709-11.

33. *Id.*

34. *Id.*

35. *Id.*

36. See generally *Channels Field Guide*, *supra* note 1, at 34; NEW TECHNOLOGIES, *supra* note 22, at 6-8.

37. Instructional Television Fixed Serv., 94 F.C.C.2d 1203, 1207 (1983).

38. *Id.*



sis. In response to the applicants, the Commission created MDS.<sup>39</sup> Although the initial MDS license applications addressed the need for private intragroup communications among schools, businesses, and municipal governments, by 1978, sixty-eight percent of MDS service time was devoted to transmitting subscription entertainment programming provided by programmer-customers.

By 1980, the demand for MDS frequencies had grown astronomically. As a result, in July 1983, the Commission created multichannel, multipoint distribution service (MMDS) out of eight of the channels previously allocated to ITFS.<sup>40</sup> Less than two months later, the Commission received approximately 16,500 MMDS applications for 413 markets.<sup>41</sup> The eight MMDS channels are being licensed in two groups of four channels each.

Until recently, the FCC has regulated MDS and MMDS operators as common carriers with no editorial control over the content of the programming they transmit.<sup>42</sup> Instead, MDS operators merely provided the "pipeline or the transmission medium and the customer determine[d] the content of the communication and the points of communication."<sup>43</sup> They were obligated to transmit the customer's message consistent with the customer's desire.<sup>44</sup>

This line of reasoning has proved unpersuasive, however, because MDS licensees may in fact exercise substantial control over the information transmitted over their facilities. First, the MDS licensee can control the transmission of information indirectly via its tariff structure and service philosophy.<sup>45</sup> As a practical matter, most MDS licensees have but one customer with a long-term contract and thus have the option to engage in a significant selection process when choosing among potential customers. Second, MDS licensees may and sometimes do exercise substantial control over

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39. *Id.* at 1214-16, 1220-22.

40. *See infra* notes 55-56 and accompanying text.

41. Second Report and Order, FCC Gen. Docket No. 80-112, released Feb. 1, 1985, at ¶¶ 1-2.

42. The rules governing MDS operations may be found in Multipoint Distribution Service, 45 F.C.C.2d 616 (1974). For further discussion of the regulatory policy aspects of MDS, see Botein, *supra* note 31, at 801-06; HOUSE REPORT, *supra* note 1.

43. Microband Corp. of Am., 80 F.C.C.2d 211, 215 (1979).

44. *Id.* The Commission has been criticized for its continued regulation of MDS as a common carrier after MDS' entry into the video marketplace. It is argued that such regulation renders MDS less competitive with other video distribution services in which the video caster maintains editorial control over content. *See* Brotman, *Video Competition Suffers from Regulatory Lag*, LEGAL TIMES, Dec. 23-30, 1985, at 9.

45. Lipper & Int'l Television Corp., 69 F.C.C.2d 2158 (1978). Indeed, MDS' leasing arrangements are much more akin to those anticipated to be used by ITFS and may preclude the common carrier status the Commission imposes on MDS. *See* Instructional Television Fixed Serv., 94 F.C.C.2d at 1251-52.

the transmission of information over their facilities through an "affiliated or related" entity.<sup>46</sup> The definition of an "affiliated or related entity" is extremely broad: "any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier (MDS operator) and the subscriber (programmer)."<sup>47</sup>

The relationship of MDS licensees with "affiliated or related" entities recently led the Commission, in response to substantial congressional pressure, to conclude that "it has become apparent that Congress labeled MDS a '[medium] of mass communication' . . . because it felt that, as presently constituted, MDS operators do have the ability to exercise editorial control over a substantial portion of the service."<sup>48</sup> Pursuant to the Commission's "fifty-percent rule," an MDS operator may provide service to its affiliate for up to fifty percent of its total programming time.<sup>49</sup> An MDS operator's ability to control the program content of fifty percent of its transmissions is closely akin to the broadcaster's ability to exercise editorial control over the content of its transmissions. Although the broadcaster theoretically maintains control over one-hundred percent of its transmissions, in actuality many broadcasters have even less editorial control than an MDS operator.<sup>50</sup> The MDS operator's ability to exercise control over the information transmitted over its frequencies is contrary to the service's common carrier classification.

Given the technical and product similarities between broadcast and MDS, as well as the ability of licensees of both services to exercise significant control over transmission content, the services are far more alike than they are different.

### C. *Instructional Television Fixed Service*

Instructional television fixed service (ITFS) was created in 1963 in response to the educational community's demand for television service that could simultaneously transmit multiple channels of instructional programming to a relatively small number of receiver sites.<sup>51</sup> ITFS is a special microwave service primarily intended to deliver programming for credit to

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46. 47 C.F.R. § 21.903(b)(2) (1985).

47. *Multipoint Distribution Serv.*, 45 F.C.C.2d 616, 618 (1974).

48. Second Report and Order, FCC Gen. Docket No. 80-112, released Feb. 1, 1985, at ¶ 16.

49. *Id.*; see 47 C.F.R. § 21.903(b)(2) (1985) (the "fifty-percent rule").

50. The Commission has sought to assure that broadcast television network affiliates maintain control over their broadcast time via restrictions on the terms and length of affiliate agreements and restrictions on the presentation of network-produced programming during certain day periods. See 47 C.F.R. § 73.658 (1982).

51. *Educational Television*, 39 F.C.C. 846 (1963), *reconsideration denied*, 39 F.C.C. 873 (1964).

students enrolled in accredited schools. ITFS stations may also be used to transmit other educational, instructional, or cultural programming, including in-service training and extension of professional training, to schools, businesses, homes, or any other sites having the appropriate receiving and conversion equipment. ITFS licensees<sup>52</sup> are allowed to use excess capacity on each of their channels to transmit non-ITFS programming, including subscription programming, provided the licensees preserve at least forty hours per channel, per week for ITFS purposes and at least twenty hours per channel, per week are actually used for ITFS programming.<sup>53</sup>

In 1970, after a reassessment of ITFS usage, the Commission allocated twenty-eight channels to ITFS on an exclusive basis.<sup>54</sup> However, in 1983 the Commission reallocated eight of ITFS's twenty-eight channels to create the multichannel, multipoint distribution service (MMDS).<sup>55</sup> The action was taken because the ITFS channels remained underutilized, apparently because of the specialized nature of the service and the limited availability of funding, while the demand for MMDS had increased dramatically over the same period of time.<sup>56</sup> To facilitate efficient use of the remaining ITFS channels, the Commission now allows ITFS licensees to use or lease their excess channel capacity for non-ITFS purposes as long as the ITFS licensees transmit a minimum of twenty hours per channel, per week of traditional educational or instructional programming.<sup>57</sup> Chief among the non-ITFS purposes is the leasing of excess capacity to MDS operators who distribute subscription programming to the public. To increase the usage of ITFS excess channel capacity further, the Commission also allows licensees who lease their excess channel capacity to maintain editorial control over the content of the programming transmitted over their facilities. Licensees are also afforded great flexibility in contracting with others for the leasing of the excess capacity.<sup>58</sup>

As the Commission has recognized, there are great similarities between MDS and the service to be provided by leasing "excess capacity" in the ITFS

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52. Accredited educational institutions, governmental organizations engaged in the formal education of enrolled students, and nonprofit organizations whose purposes are educational are all eligible to become ITFS licensees. Educational Television, 30 F.C.C.2d at 853-54.

53. Instructional Television Fixed Serv., MM Docket No. 83-523, released June 20, 1985; 47 C.F.R. § 74.931(e) (1985).

54. Instructional Television, 30 F.C.C.2d 197 (1971).

55. Instructional Television Fixed Serv., 94 F.C.C.2d 1203 (1983).

56. *Id.* at 1216-24.

57. Second Report and Order *In re* Instructional Television Fixed Serv., MM Docket No. 83-523, released June 20, 1985, at ¶¶ 95-96; 47 C.F.R. § 74.931(e) (1985).

58. Second Report and Order *In re* Instructional Television Fixed Serv., MM Docket No. 83-523, released June 20, 1985, at ¶¶ 101-06.

service.<sup>59</sup> The similarities between proposed DBS systems and the newly proposed ITFS systems are also substantial. Both systems propose to use a substantial portion of their main channel capacity for public distribution of programming, that is, the programming will be directed towards "as many people as can be interested in the particular program [or program service] as distinguished from a point-to-point message service to specified individuals."<sup>60</sup> Both systems propose to transmit programs of general interest, as opposed to business data, proprietary information, or other matter intended for limited or exclusive use. They both transmit directly to homes and both make provision for the lease of substantial portions of their main channel capacity to programmer-customers.

In contrast to both MDS and DBS, the Commission has refrained from regulating ITFS as either a broadcaster or a common carrier. Yet ITFS has characteristics of both. The Commission has not reached the question of whether ITFS should be regulated as broadcasting because until recently ITFS, like MDS, was considered, and was in fact, a point-to-point service transmitting information of nongeneral interest to a limited segment of the public.<sup>61</sup> However, the Commission's recent decisions allow ITFS frequencies to be used to disseminate commercial programming to as many people as are interested in the particular program, or program service, wherever they are situated. Thus, the new commercial use of ITFS is no less a form of broadcasting than DBS or MDS. If ITFS were defined to include the transmission of noncommercial educational and instructional information of general interest to individual homes, arguably it would constitute broadcasting.<sup>62</sup>

#### D. *Private Operational Fixed Service*

In 1975, the Commission created what is now known as private operational fixed service (OFS).<sup>63</sup> OFS consists of private, fixed radio stations not open to public correspondence but operated solely for the use of persons or agencies operating their own radio communication facilities.<sup>64</sup> When it was

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59. *Id.* at ¶ 80.

60. *NAB*, 740 F.2d at 1201 (citing *Subscription Television Serv.*, 3 F.C.C.2d 1, 9-10 (1966)).

61. *Instructional Television Fixed Serv.*, MM Docket No. 83-523, at ¶¶ 119-21.

62. *See supra* note 18.

63. Report and Order, 52 F.C.C.2d 894 (1975).

64. 47 C.F.R. § 94.3 (1985). Only "persons" qualified for licensing in a radio service under either 47 C.F.R. pt. 81 (stations on land in the maritime service and Alaska public fixed stations); 47 C.F.R. pt. 87 (aviation services); or 47 C.F.R. pt. 90 (private land mobile radio services), may be licensees of OFS facilities. 47 C.F.R. § 94.5 (1985). Until recently, OFS licensees were limited to transmitting their own communications to their own subsidiaries or

created, OFS was allocated three channels because the Commission recognized that a small but significant number of private radio licensees desired to use frequencies to address their growing television transmission needs.<sup>65</sup> On May 7, 1981, the FCC allowed OFS licensees to distribute video programming to hotels and other commercial facilities on three channels in the 2.5 gigahertz (GHz) band. Sixty entities seeking to distribute video programming to hotels and other locations filed over 1,400 applications in response to the Commission's action. Finally, in 1983, the FCC allowed OFS licensees to distribute their own video programming products and services to "any receiving location including hotels, apartment house MATV systems, and private residences,"<sup>66</sup> and expanded the number of OFS frequencies available for point-to-multipoint distribution of video programming.<sup>67</sup> OFS licensees must still maintain an ownership or contractual interest in the video programming they distribute.<sup>68</sup> In addition, they are prohibited from leasing time to other commercial entities.<sup>69</sup>

Although it has recognized that "the programming content of OFS entertainment service offerings may be very similar to the content of conventional free broadcast services,"<sup>70</sup> and that OFS service signals are point-to-multipoint in nature, the Commission has held that OFS entertainment services are not broadcasting.<sup>71</sup> According to the Commission, "OFS services are 'addressed' communication intended for, and directed to, specific points of reception—the licensee's paying customers."<sup>72</sup> Consequently, reasoned the Commission, OFS entertainment transmissions are "hybrid" in nature, that is, having the characteristics of both broadcasting and point-to-point services, in much the same manner as subscription FM radio service transmissions are hybrid.<sup>73</sup> And, as such, OFS services are not subject to regulation under title III. However, as OFS possesses *all* the relevant characteristics of broadcasting including editorial control, OFS, like the other subscription services, could be classified as broadcasting under sections 153(o) and 309(i) of the Communications Act.

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customers only in the course of conducting their businesses. Use of Private Microwave Frequencies, 86 F.C.C.2d 299, 300-01 (1981); Operational Fixed Serv., 99 F.C.C.2d 715 (1983).

65. Use of Private Microwave Frequencies, 86 F.C.C.2d at 307-11.

66. *Id.*

67. Operational Fixed Serv., 99 F.C.C.2d at 727.

68. *Id.*

69. 47 C.F.R. § 94.9(a)(1) (1985); Use of Private Microwave Facilities, 86 F.C.C.2d at 304, 309.

70. Operational Fixed Serv., 99 F.C.C.2d at 737 n.29.

71. *Id.*

72. *Id.*

73. *Id.*

## II. THE DISTRICT OF COLUMBIA CIRCUIT'S INTERPRETATION OF SECTION 153(O) OF THE COMMUNICATIONS ACT AND THE COMMISSION'S RESPONSE

In the process of authorizing each of the new subscription services, the Commission has argued that although a subscription service may possess some of the characteristics of broadcasting, the existence of other nonbroadcast characteristics precludes a determination that the service is broadcasting and subject to title III. Thus, the Commission has determined that OFS and ITFS are "hybrid" services, while DBS has been classified as experimental, and MDS and MMDS have been classified as common carriers. These regulatory classifications recently were challenged in *National Association of Broadcasters v. FCC*.<sup>74</sup> In *NAB*, the United States Court of Appeals for the District of Columbia Circuit held that a service that transmits signals directly to homes, intending those signals to be received by the public, clearly fits the definition of a broadcaster under the Communications Act.<sup>75</sup>

The court considered DBS service to be broadcasting even when satellite operators lease their channels to programmer-customers, and without regard to whether the programming is provided to consumers on a "free" or subscription basis.<sup>76</sup> By contrast, the court held that DBS activities that provide "non-general interest, point-to-point service, where the format is of interest to only a narrow class of subscribers and does not implicate the broadcasting [objective] of the Act, need not be regulated as broadcasting."<sup>77</sup>

In determining that broadcast regulation should apply to DBS programmers seeking general audiences, the court dismissed Commission arguments justifying the exemption of DBS programmer-customers and common carrier licensees from broadcast regulation under title III. The court rejected the notion that congressional failure to anticipate the development of DBS and classify it as broadcasting or common carrier justified the Commission's decision to exempt programmer-customers from title III regulation.<sup>78</sup> It emphasized that regulation was compelled by the plain language of section 153(o) of the Communications Act, stating:

[T]he test for whether a particular activity constitutes broadcasting is whether there is "an intent for *public* distribution," and whether the programming is "of interest to the *general* . . . audience." . . . When DBS systems transmit signals directly to homes with the in-

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74. 740 F.2d 1190 (D.C. Cir. 1984).

75. *Id.* at 1201.

76. *Id.* at 1204.

77. *Id.* at 1205.

78. *Id.* at 1203.

tent that those signals be received by the public, such transmissions rather clearly fit the definition of broadcasting. . . . That remains true even if a common carrier satellite leases its channels to a customer programmer who does not own any transmission facilities; in such an arrangement, someone—either the lessee or the satellite owner—is broadcasting. . . . [This] also remains true regardless of whether a DBS system is advertiser or subscriber funded.<sup>79</sup>

The Commission acknowledges the significance of the *NAB* decision to its current regulatory policies regarding subscription services when it states in its January 8, 1986, Notice of Proposed Rulemaking (NPRM) that:

The *NAB v. FCC* decision has a considerable impact on our regulatory policies. It affects not only common carrier DBS and domestic fixed satellite services but other subscription services that previously had not been classified as broadcasting. These services include FM/SCA's, teletext and private OFS offerings, as well as common carrier MDS (multi-point distribution services) that are primarily subscription in nature. Unless the Commission establishes the non-broadcast status of these subscription offerings, it may be required to apply to these previously unregulated services the broadcast statutory provisions.<sup>80</sup>

Recognizing that the *NAB* court rejected the proposed exemption of subscription services from broadcast regulation in part because of the Commission's holding that subscription television services were broadcasting, the Commission seeks to nullify the *NAB* case by reclassifying STV and DBS as nonbroadcast.<sup>81</sup> In its January 8, 1986, NPRM, the Commission suggests that although some similarities exist between the subscription services and broadcasting, it would be prudent to classify all subscription services as point-to-multipoint nonbroadcast services not subject to title III regulation. The Commission argues that nothing in the Communications Act requires that subscription services be classified as broadcast services or that the fairness and political broadcast access provisions of title III apply to the services.<sup>82</sup> It suggests that the services are nonbroadcast in nature because their transmissions are "addressed" to specific subscribers who are the services' intended recipients and who enjoy a private contractual relationship with the videocaster.<sup>83</sup> The Commission sees the subscription characteristic of the

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79. *Id.* at 1201 (citation omitted).

80. Subscription Video Serv., *supra* note 9, at ¶ 7.

81. *Id.* at ¶¶ 7, 36.

82. *Id.* at ¶¶ 31-36.

83. Addressable communications have been defined as those that are intended for, and directed to, specific points of reception. In point-to-point microwave services, the specific points of reception can be easily ascertained because they are located along a linear path. By contrast, point-to-multipoint transmissions are omnidirectional, i.e., flow along multiple paths

services as dispositive of the issue of addressability regardless of whether the programming is of interest to the general public. According to the Commission, equating subscription with addressability comports more faithfully with the distinction between broadcasting and point-to-point transmissions embodied in the Communications Act, provides a more objective test that is easier to administer, and is more cognizant of the financial reality in which subscription services operate.<sup>84</sup> The Commission further posits that the contractual relationship between the subscription service and its audience obviates the need for the viewer protections afforded by broadcast regulations because subscription programming is transmitted to discrete audiences that exercise direct economic choice over which services and programs to receive.<sup>85</sup>

### III. THE LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT

In supporting its proposed policy, the Commission argues that nothing in section 153(o) of the Communications Act requires that subscription services be classified as broadcasting, and that section 153(o) was clearly intended to exclude from broadcasting all point-to-point transmission services.<sup>86</sup> However, a careful review of the legislative history of the Act does not support the Commission's assertion. Although Congress recognized the difference between the unaddressed transmission nature of broadcasting and the addressed transmission nature of point-to-point communications, it may nevertheless have intended that subscription broadcast services be deemed broadcasting.

During the congressional hearings on the Radio Act of 1927, the possibility that broadcasters might seek to implement pay services was debated in the Senate by the principal authors of the Communications Act of 1934.<sup>87</sup> Even though members of the Senate were skeptical of the prospect that broadcasters would elect to provide pay rather than "free" services, they nonetheless felt that a broadcaster should be allowed to provide pay serv-

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to any point of reception within the reach of the signal. The Commission now argues that point-to-multipoint transmissions are akin to point-to-point transmissions, and hence addressable, when the subscription service licensee's transmissions are intended for its subscribers. *Operational Fixed Serv.*, 99 F.C.C.2d at 727 n.29.

84. *Id.*

85. *Id.*

86. *Subscription Video Serv.*, *supra* note 9, at ¶ 9.

87. 68 CONG. REC. 2580, 2880-81, 3033 (1927); *see also* Lyons & Hammer, *Deregulatory Options for a Direct Broadcast Satellite System*, 33 FED. COM. L.J. 185, 191-93 (1981). The Commission disagrees with this reading of the relevance of the legislative history. *See Subscription Video Serv.*, *supra* note 9, at ¶ 24 n.23.



ices.<sup>88</sup> Thus, the Congress believed that if pay operations developed, they would be broadcasting.<sup>89</sup> Indeed, the court in *National Association of Theatre Owners v. FCC*,<sup>90</sup> found support for the Commission's decision to authorize subscription television services in the aforementioned debates.<sup>91</sup> Despite the obvious importance which the *NATO* court attached to the 1927 debates, in its January 8, 1986, NPRM, the Commission apparently argues that Congress' decision not to prohibit broadcasters from providing subscription services is of "questionable value" in establishing Congress' intent that subscription services provided over broadcast channels be deemed broadcasting as defined in section 153(o).<sup>92</sup> In so doing the Commission could certainly be viewed as questioning its authority to permit the establishment of broadcast subscription services—a result it certainly does not seek.

#### IV. CASE HISTORY OF REGULATION OF SUBSCRIPTION SERVICES

According to the Commission, its proposal to equate subscription with addressability is amply supported by legal precedent. In its January 8, 1986, NPRM, the Commission seeks support in the early cases in which multiplexed radio subscription services were found to be akin to point-to-point services and hence nonbroadcast in nature. Reliance is also placed on signal piracy cases in which MDS and STV subscription services have been found not to be broadcast services within the meaning of section 153(o) in order to extend the protection of the signal piracy provision of section 705 to the services' signals. Finally, the classifications of ITFS and OFS are cited by the Commission as precedent for its proposal to reclassify STV and DBS as nonbroadcast.

##### A. *Frequency Modulation/Subsidiary Communications Authorization Cases*

In the frequency modulation/subsidiary communications authorization (FM/SCA) cases,<sup>93</sup> exemption from broadcast regulation was upheld for radio subscription services providing programming of interest to a limited audience where the programming was transmitted over a small portion of the licensee's main channel. The transmissions in question were not of general

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88. 68 CONG. REC. 2580, 2880-81 (1927).

89. *Id.* at 2880-81, 3033.

90. 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

91. *Id.* at 201-02.

92. Subscription Video Serv., *supra* note 9, at ¶ 24 n.23.

93. See, e.g., Greater Washington Educ. Telecommunications Ass'n, 49 F.C.C.2d 948 (1974); Functional Music, Inc. v. United States, 274 F.2d 545 (D.C. Cir. 1958); Muzak Corp., 8 F.C.C. 581 (1941).

interest to the public and were made to a distinct audience easily distinguished from the general public.

By contrast, the Commission seeks to foster a more narrow reading of the cases in this area. In its January 8, 1986, NPRM, the Commission cites *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*,<sup>94</sup> for the proposition that subscription service programming received by subscribers alone was not broadcasting within the meaning of section 153(o) but was akin to point-to-point service<sup>95</sup> and that the controlling factor was the licensee's intent to transmit only to subscribers. The Commission's recitation of the case is incomplete, however. First, in *KMLA*, the court indeed ascertained the licensee's intent from the fact that programming was multiplexed over the licensee's subcarrier authorization to subscribers who received the service via special equipment. However, the case was decided after Commission and judicial decisions that specifically required subscription services to be transmitted via the licensee's multiplexed SCA in order for the services to be deemed nonbroadcast and not subject to title III.<sup>96</sup> Further, in a later case, even the transmission of programming via multiplexed SCA was deemed an insufficient indication of licensee intent not to broadcast to the public if in fact the service was later found to be provided to a general audience.<sup>97</sup> Second, *KMLA* was not the first instance in which broadcast subscription transmissions were to be received by subscribers alone. In *In re Muzak Corporation*,<sup>98</sup> a broadcast applicant sought authority to provide high-quality programming financed by direct payment from subscribers. The Commission granted the application and classified the service as broadcasting, stating:

The service which this applicant proposes will be available to the general public; any member of the public, without discrimination, may lease the equipment to receive the service. The distinguishing feature will be that those receiving the programs will pay directly rather than indirectly therefor. *Operation of a station in this manner is within the definition of broadcasting.*<sup>99</sup>

### B. The Signal Piracy Cases

In its January 8, 1986, NRPM, the signal piracy cases consist of instances in which the Commission and the courts have considered whether a sub-

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94. 264 F. Supp. 35 (C.D. Cal. 1967).

95. Subscription Video Serv., *supra* note 9, at ¶ 12.

96. See Greater Washington Educ. Telecommunications Ass'n, 49 F.C.C.2d 948 (1974).

97. *Id.* at 948-49.

98. 8 F.C.C. 581 (1941).

99. *Id.* at 582 (emphasis added).

scription service is nonbroadcast for the purposes of section 705 of the Communications Act (previously section 605).<sup>100</sup> In most cases, the Commission and the courts have sought to protect the economic viability of the subscription services by prohibiting unauthorized reception of the signal carrying the subscription programming.<sup>101</sup>

The Commission cites several of the signal piracy cases to support its argument that transmission of subscription services are analogous to point-to-point transmissions and nonbroadcast in nature because they are not intended for the general public.<sup>102</sup> For, in order for a service to be entitled to protection under section 705, it was necessary to determine that it was private communications not intended for the general public and hence not a broadcast service either as defined in section 153(o) (concerning MDS) or as interpreted in section 705 (concerning STV). However, the Commission again presents only part of the holdings without granting proper deference to the particular circumstances before the courts. First, a determination that the services were broadcasting within the meaning of section 153(o) and section 705 would have dealt a death blow to the subscription services because they would have been unable to generate fees. Second, aside from being faced with deciding the economic viability of the MDS and STV subscription services, the courts were faced with ruling on the classification of at least one technology (MDS) whose evolution, unbeknownst to the court, had outgrown its preexisting regulatory classification.

The courts addressing the regulatory classification of MDS decided it was common carrier, and hence nonbroadcast. However, the courts did not have the benefit of Congress' statutory redefinition of MDS as a medium of mass communication.<sup>103</sup> If the court in *Home Box Office Inc. v. Advanced Consumer Technology*<sup>104</sup> had been required to consider Congress' reclassification of MDS, it would not have been able to distinguish the STV precedents and conclude that MDS was not broadcasting because of its alleged common

100. See, e.g., *National Subscription Television v. S & H TV*, 644 F.2d 820 (9th Cir. 1981); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459 (6th Cir. 1980); *Home Box Office, Inc. v. Pay TV, Inc.*, 467 F. Supp. 525 (E.D.N.Y. 1979); *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp.*, 264 F. Supp. 35 (C.D. Cal. 1967). See generally Comment, *Pay Television Piracy: Does Section 605 of the Federal Communications Act of 1934 Prohibit Signal Piracy—And Should It?*, 10 WM. MITCHELL L. REV. 531 (1984); Casenote, *Movie Systems Inc. v. Heller: The Unauthorized Interception of Subscription Television*, 17 CREIGHTON L. REV. 1267 (1983-84); Note, *Pirates Walk the Plank: Unauthorized Interception of Pay TV Signals*, 4 COMM/ENT. L.J. 141 (1981); see also Lyons & Hammer, *supra* note 87, at 193-201.

101. *Orth-O-Vision, Inc. v. Home Box Office, Inc.*, 474 F. Supp. 672 (S.D.N.Y. 1979).

102. *Subscription Video Serv.*, *supra* note 9, at ¶¶ 11-23.

103. 47 U.S.C. § 309(i)(c)(i) (1982).

104. 549 F. Supp. 14 (S.D.N.Y. 1981).

carrier classification.<sup>105</sup>

In the STV piracy cases the courts found a way to extend section 705 protection to STV transmissions without invalidating STV's classification as broadcasting under section 153(o). The courts ruled that the Commission had not determined whether STV was to be considered broadcasting for the purposes of section 605. Hence a decision by the courts that section 605 applied to STV was not precluded.<sup>106</sup> STV transmissions could then be declared private by virtue of the subscriber's need for special reception equipment, a fact which tended to establish in the court's view that the program service was not intended for the general public.<sup>107</sup>

The STV piracy cases arguably solve the apparent conflict between sections 153(o) and 705 and preserve the economic existence of the subscription service alternative. These cases do not hold that a subscription service transmitted over a broadcast channel is not broadcasting as defined by section 153(o)—a point which the Commission concedes.<sup>108</sup> Thus, the Commission must look elsewhere for precedent to support its assertion that STV subscription services are nonbroadcast within the meaning of section 153(o). Nevertheless, the Commission does argue that "[i]f subscription television involves private communications for section 705 purposes, we believe these cases raise a significant question whether the service should then be classified as 'intended to be received by the public' under section 3(o) and other provisions of the Act."<sup>109</sup>

The Commission also cites its Teletext and OFS rulings as precedent for its decision to forgo broadcast regulation of subscription services. In its Teletext ruling, the Commission decided that because Teletext program services are transmitted via a small portion of a television licensee's main channel, they are nonbroadcast regardless of whether the programming transmitted is of interest to the general public.<sup>110</sup> The Commission has also deemed OFS to be nonbroadcast by arguing that OFS services are "addressed" communications intended for and directed to specific points of re-

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105. See *infra* note 106-09 and accompanying text.

106. See *Movie Systems, Inc. v. Heller*, 710 F.2d 492 (8th Cir. 1983); *National Subscription Television v. S & H TV*, 644 F.2d 820 (9th Cir. 1981); *Chartwell Communications Group v. Westbrook*, 637 F.2d 459 (6th Cir. 1980).

107. *Chartwell*, 637 F.2d at 464.

108. *Subscription Video Serv.*, *supra* note 9, at ¶¶ 19-23.

109. *Id.* at ¶ 23.

110. Amendment of the Commission's Rules to Authorize the Transmission of Teletext by TV Stations, Report and Order, 48 Fed. Reg. 27,054 (1983) [hereinafter cited as *Teletext Report and Order*], *appeal pending*, *T.R.A.C. v. FCC*, No. 85-1160 (D.C. Cir. filed Mar. 14, 1985); Amendment of the Commission's Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations, 50 Fed. Reg. 4658 (1985).

ception—the licensee's paying subscribers.<sup>111</sup> With regard to Teletext, a subscription service transmitted via a licensee's vertical blanking interval (VBI), the Commission's current ruling constitutes a departure from the section 153(o) exemption cases. In each of the previous cases, the exemption of the subscription service was justified because of the limited nature of the transmission vehicle (SCAs) and the limited nongeneral interest nature of the service to be provided.<sup>112</sup> In its Teletext ruling and in the January 8, 1986, NPRM, the Commission seeks to rely on the limited nature of the transmission vehicle alone as sufficient justification for the exemption.<sup>113</sup> Therefore, the Commission's reliance on the section 153(o) exemption cases to establish its Teletext precedent is misplaced. Reliance on the exemption of OFS from broadcasting regulation is misplaced also because OFS does in fact have all of the relevant characteristics of broadcasting.<sup>114</sup>

In its January 8, 1986, NPRM, the Commission presents what it believes to be the legal precedent for its proposed decision to exempt all subscription services from broadcast regulation. In essence, the Commission argues that the section 153(o) exemption cases, the signal piracy cases and its Teletext and OFS rulings support a determination that subscription services are non-broadcast in nature irrespective of the content of the programming. On closer analysis, the cases in question do not provide the necessary support for the Commission's assertion, and, in many instances, contradict the assertion.

## V. CONCLUSION

"It looks like broadcasting, smells like broadcasting, tastes like broadcasting, has all the benefits of broadcasting, but it's not regulated like broadcasting because it didn't exist when the Communications Act was adopted?"<sup>115</sup>

Contrary to the Commission's assertions, there is significant statutory, regulatory, and judicial support for classifying subscription services as broadcasting and therefore subject to limited content regulation under title III. Although the services may enjoy a private contractual relationship with their subscribers that incorporates some elements of addressable communications, the audiences are neither small enough nor distinct enough to suffi-

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111. Subscription Video Serv., *supra* note 9, at ¶ 8.

112. See *supra* note 93 and accompanying text.

113. Subscription Video Serv., *supra* note 9, at ¶ 8; Teletext Report and Order, *supra* note 110, at 27,062-64.

114. See *supra* notes 63-74 and accompanying text.

115. Remarks of Henry M. Rivera, Commissioner, Federal Communications Commission, before the American Law Institute—American Bar Association 8 (Mar. 29, 1984).

ciently differentiate them legally or factually from the broadcast audience.<sup>116</sup> Despite Commission arguments to the contrary, the definition of broadcasting under section 153(o) still incorporates both a finding of intent for public distribution *and* determination of whether the programming is of interest to the general public.

While the subscription/addressability dichotomy espoused by the Commission may arguably be easier to administer, it is no more objective than the current standard. It simply ignores the competitive nature of the relationship between subscription services and "conventional" broadcasting services. All of them compete for audiences having similar if not identical demographic and socioeconomic characteristics.<sup>117</sup> All of them compete for these audiences by providing programming virtually identical to that provided by conventional broadcast services.

Moreover, as the courts have shown in recent piracy cases regarding STV transmissions, a finding that a subscription service is broadcasting for purposes of section 153(o) need not preclude section 705 protection. Thus, no change in policy is necessary to protect the longevity of subscription services. Indeed, given Congress' recent amendment to section 705,<sup>118</sup> there is no longer a need to view the courts' interpretation of section 705, which extends signal piracy protection to STV, as strained. Congress has sanctioned this interpretation as properly capturing its intent. Finally, the exercise of choice enjoyed by subscribers of subscription services does not sufficiently distinguish the viewing of subscription services from the viewing of broadcast services, nor does it diminish the need for viewer protections afforded by broadcast regulation. Whether one views conventional broadcasting or subscription services, one must take an affirmative action to acquire the equipment, turn it on, and view the programming. The invitation to enter the home is not implied in either case. The difference is that one option costs more than the other.

Viewer selection of programming under either the subscription regime or the "free" broadcasting regime results in viewers receiving programming from producers over which viewers have some control, whether it be via pocketbook or boycott of advertiser or program. However, in neither case is the control so complete as to assure exposure to new and or controversial contrasting viewpoints and sufficient knowledge of public officials so that

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116. "The business realities of electronic video media require that videocasters seek to attract and hold the segments of the viewing audience controlling the largest portion of disposable income. These audience segments are typically white females and males eighteen to forty-nine years of age." Hammond, *supra* note 6, at 643.

117. *Id.*

118. See *supra* note 16 and accompanying text.

viewers may exercise the responsibilities as citizens in a democracy.<sup>119</sup> Moreover, the fragmentation of audiences may very well result in a loss of democracy and national unity if not accompanied by some assurance that everyone may receive information critical to the exercise of citizenship.<sup>120</sup> For these reasons, as well as the fact that Congress has required that broadcasters be regulated under the fairness and political broadcast provisions, title III should be extended to the new subscription technologies—at least to the extent that the provisions apply to subscription television and cable.

When addressing a gathering of lawyers, former Commissioner Henry M. Rivera was moved to ask:

Can it be possible . . . that the applicability of Congressional and FCC generated broadcasting policies can be allowed to depend on what part of the radio spectrum is used to deliver . . . [the programming service]? On the mechanics of how the service is provided? On whether it is delivered by satellite or terrestrial facility? Or on whether the service is subscription, advertiser-supported or free?<sup>121</sup>

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119. As Benjamin Barber states:

A political price is paid for this new activism among viewers and the apparent decentralization of television: Where television once united the nation, it will now fragment it. Those it once brought together it will now keep apart. In place of broadcasting comes the new ideal of "narrowcasting," in which each special audience is systematically typed, located, and supplied with its own special programming. Each group, each class, each race, and each religious sect can have its own programs, and even its own mini-network, specially tailored to its distinct characteristics, views, and needs. The critical communication *between* groups that is essential to the forging of a national culture and public vision will vanish; in its place will come a new form of communication *within* groups, where people need talk only to themselves and their clones. . . . Faction—the scourge of democracy feared by its critics from James Madison to Walter Lippmann—is given the support of technology; compromise, mutualism, and empathy—indispensable to effective democratic consensus—are robbed of their national medium. Every parochial voice gets a hearing (though only before the already converted), and the public as a whole is left with no voice. No global village, but a Tower of Babel: a hundred chattering mouths bereft of any common language.

Barber, *supra* note 8, at 23-24.

120. *Id.* The fairness and political broadcast provisions would provide a safeguard against both licensee bias and uninformed or unenlightened viewer selection.

121. Rivera, *supra* note 115, at 8.

*Author's Note.* On May 2, 1986, as this article was being prepared for printing, the FCC issued a news release announcing its decision to issue a Notice of Proposed Rulemaking (NPRM) regarding the regulatory classification of multipoint distribution service (MDS and MMDS). See FCC, *FCC Adopts Three Proposals Relevant to Regulatory Classification of Multipoint Distribution Service*, REP. NO. DC-485 (May 2, 1986) (announcing NPRM, FCC 86-266). In the news release, the Commission briefly outlined its proposals:

This author, and apparently the United States Court of Appeals for the District of Columbia Circuit, must respectfully answer—no.

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(1) to permit all NDS applicants to elect to provide their services on a common carrier or noncommon carrier basis;

(2) to subject all MDS applicants which elect to act as common carriers to limited regulation under title II, *see* MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (regarding forbore regulation of nondominant common carriers);

(3) eliminate its rules prohibiting MDS operators acting as common carriers from influencing the content of the information they transmit, 47 C.F.R. § 21.903(b)(1) (1985), or failing to reserve space for use by others seeking access to the MDS operators' transmission capacity. *Id.* § 21.903(b)(2).

If the Commission's proposals are adopted subsequent to public deliberation, MDS operators would find themselves with the same regulatory flexibility to compete across markets presently available to other video distribution services such as DBS. The advent of such flexibility will not diminish the importance of title III regulation to those MDS operators. *See supra* notes 74-79 and accompanying text.



