PACs Americana: Reinventing Public Access Channel Cable Television Programming

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One source of diversity is often overlooked in the ongoing debate regarding concentration in the television industry—the American public. Ordinary citizens throughout the nation produce programs that are transmitted on cable television public access channels, which typically are managed by a cable television operator, a local government that issued the cable franchise, or a nonprofit organization affiliated with the franchising authority. Access channel managers determine the programs that are cablecast and increasingly, their programming decisions are being challenged in court.

From the perspective of access channel managers, the problem is obvious: some programs do not deserve to appear on a public access channel. Cablevision Systems Corporation evidently thought so when it rejected several shows from a producer that discussed pending personal lawsuits.[1] The State of Texas apparently did also when it prosecuted two producers for exhibiting a sexually explicit film during their live call-in program.[2] The City of Kansas City, Missouri, certainly held this sentiment when it chose to shut down its access channel rather than air the Ku Klux Klan's "Race and Reason."[3]

Solving the problem of unworthy public access programs requires knowledge of governing statutory and constitutional principles as well as a willingness to be proactive rather than reactive. Commentators,[4] access channel managers,[5] and a leading industry association[6] have championed "anything goes" as an operating paradigm. However, unless state legislation preempts programming regulation, that paradigm is not compulsory for local governments or nonprofit operators that operate a public access channel. This presents an opportunity for many access channel managers to circumscribe the parameters of acceptable program content by developing and enforcing appropriate program guidelines.

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Federal Statutory Scheme

Federal statutes allow local governments to determine whether cable television operators must provide public access channels as part of the consideration offered in exchange for a cable television franchise.[7] To paraphrase the D.C. Circuit, this authorization reflects deference to the origin of such channels more than congressional largesse.[8]

Equally significant, federal statutes vest local governments with primary responsibility for regulating program content. A cable television operator may refuse to transmit a public access program (or portion of one) if it contains obscenity, indecency or nudity; otherwise the operator cannot exercise any editorial control over public access channel programming.[9] By contrast, rather obtusely worded enabling legislation permits franchising authorities to "require rules and procedures" for the use of public access channel capacity.[10] Without this provision, federal law would preempt any effort by franchising authorities to impose requirements regarding the content of cable television services.[11]

State Preemption

State laws also affect the degree to which public access channel programming content may be regulated. Minnesota, for example, categorically precludes cable television operators from prohibiting or limiting a "program or class or type of program" presented over a public access channel.[12] New York imposes a similar ban, but its legislation also preempts any regulation by the New York State Public Service Commission and municipalities.[13] The New York statute even precludes the imposition of "discriminatory or preferential franchise fees" in an attempt to influence programming.[14]

Early Public Forum Cases

Congress all but assigned public forum status to public access channels in connection with the Cable Communications Policy Act of 1984,[15] the first federal legislation to address cable television. An oft-cited passage of the House Energy and Commerce Committee report for the 1984 Cable Act offers the following utopian assessment of the medium:

> Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas.[16]

The "public forum" concept is central to First Amendment jurisprudence, which generally classifies public property according to three categories. This taxonomy, first delineated by the Supreme Court in the 1983 landmark case *Perry Education Ass'n v. Perry Local Educators Ass'n*,[17] consists of:

1) traditional public forums—areas, such as streets and parks, that have been used for expressive activity;
2) designated public forums—areas that the government has set aside for either general or limited expressive activity; and
3) nonpublic forums.

Public forum status profoundly influences the degree to which a governmental entity may regulate private speech on public property. In both traditional and designated public forums, the government may enforce a content-based speech restriction only if it is necessary to serve a compelling state interest, and also is narrowly drawn to achieve that interest.[18] By contrast, a content-neutral restriction on speech in a traditional or designated public forum is permissible provided it is narrowly drawn to serve a significant state interest and leaves open ample alternative channels of communication.[19] Nonpublic forums afford the government the greatest regulatory latitude, and speech restriction in such forums is valid as long as it is reasonable and viewpoint neutral.[20]

Where to place public access channels in the public forum continuum has divided the courts for some time. In 1989, a federal district court in Missouri announced its intent to deem Kansas City's privately operated public access channel to be a public forum if the Ku Klux Klan could prove allegations that the public's use of the channel was guaranteed on a first-come, first-serve basis and that the city council held ultimate control over the channel.[21] A federal district court in Pennsylvania subsequently relied on this proclamation to support its conclusion that the City of Erie's publicly operated public access channel was a public forum.[22] Both cases arose from a municipality's plan to eliminate the public access channel rather than present controversial programs; each court allowed the plaintiff to proceed with the lawsuit. As a final example, after ruling that San Francisco's privately operated public access channel was meant to be a public forum,[23] a federal district court in California issued a preliminary injunction enjoining the cable television operator from banning or otherwise regulating indecent programs.

There are decisions at the opposite end of the spectrum as well. The D.C. Circuit, sitting en banc, ruled in 1995 that a public access channel is not a public forum because the channel belongs to the cable television operator and not the government.[24] The court also emphasized that the imposition of common carrier obligations on a cable television operator does not transmute the operator's facilities into a public forum. This ruling prompted the court to dismiss a constitutional challenge to provisions in the Cable Television Consumer Protection and Competition Act of 1992[25] that allowed cable television operators to prohibit sexually explicit programming on leased access and public access channels. Shortly thereafter, a federal district court in New York echoed the D.C. Circuit in an order denying dismissal of a lawsuit by a producer who objected to cancellation of her weekly public access series about her various pending suits.[26]

Denver Area Educational Telecommunications Consortium, Inc. and Its Aftermath

In 1996, the issue of whether a public access channel constitutes a public forum reached the U.S. Supreme Court in *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*.[27] The question arose in connection with the Court's review of the D.C. Circuit's en banc ruling regarding the sexually explicit programming restrictions of the 1992 Cable Act.

Although the Supreme Court invalidated the provisions affecting public access channels, there was no consensus on the public forum status of such facilities. Justices Breyer, Stevens, O'Connor, and Souter considered it premature to resolve the issue because of rapid changes in the law, technology, and infrastructure of the telecommunications industry.[28]

Justices Kennedy and Ginsburg, by contrast, unhesitatingly determined that a public access channel is indeed a public forum, reasoning that "[r]equired by the franchise authority as a condition of the franchise and open to all comers, [public access channels] are a designated public forum of unlimited character."[29]

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, reached the opposite conclusion. They considered the public forum doctrine applicable only to property owned by the government and to property in which the government holds a significant property interest, consistent with the communicative purpose of the forum to be established. In their estimation, public access channels satisfied neither criterion because the requirements for such facilities "are a regulatory restriction on the exercise of cable operators' editorial discretion, not a transfer of a sufficient property interest in the channels to support a designation of that property as a public forum."[30]

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Not surprisingly, the fractured decision has generated confusion among lower courts called upon to resolve public access channel litigation. Many of eschewed the public forum doctrine altogether in favor of some other analytical framework.[31] In one notable exception, however, a federal district court in Georgia split the baby by simultaneously declaring a public access channel's cablecasting facilities to be a designated public forum and its production facilities a nonpublic forum.[32]

PBS Analogy

Broadcast television does not offer an equivalent to cable television's public access channels, but a loose analogy can be drawn to noncommercial educational stations, which traditionally have enjoyed a reputation for embodying public television.[33] The federal government licenses these stations to nonprofit educational organizations, and to municipalities and other political subdivisions that do not have an independent educational organization, such as a board of education.[34] Generally, the licensees are allowed to transmit only educational, cultural, and entertainment programs.[35]

Noncommercial educational stations wield carte blanche authority, vis-à-vis the general public, as to programming selection. Most public broadcasters in the spring of 1980 aired "Death of a Princess," a controversial program about the execution of a Saudi Arabian princess and her adulterous lover. Two stations, the Alabama Educational Television Commission and the University of Houston's KUHT-TV, cancelled their previously scheduled broadcasts, ostensibly due to concern for the safety of American citizens in the Middle East and respect for objections by the Saudi government, and were sued by disappointed viewers. The Fifth Circuit ruled in an en banc decision that the plaintiffs had "no right of access to compel the broadcast of any particular program."[36]

A more recent example of programming discretion involves televised election debates. In 1992, the Arkansas Educational Television Commission refused to allow Ralph Forbes, an independent candidate for Congress, to participate in its debate on the grounds that neither the voters nor the press considered his campaign viable. The Supreme Court affirmed the exclusion, finding that the debate was a nonpublic forum and that AETC had acted reasonably in a viewpoint neutral manner.[37] Significantly, the Court emphasized that "in most cases, the

First Amendment of its own force does not compel public broadcasters to allow third parties access to their programming."[38]

A New Public Spirit

Public access channel litigation typically involves disputes over programming, which means that choosing an operating paradigm is one of the most important decisions that access channel managers must make. Many quite reasonably adopt a policy of cablecasting nearly all submissions, based on considerations such as ease of implementation, risk aversion, and an uncompromising devotion to the electronic soapbox principle. Yet public access need not be equated with "anything goes," and there is an alternative to such an operating paradigm.

The Fifth Circuit has recognized that public access channels "would enjoy virtually unfettered programming discretion" if courts applied a different legal standard.[39] It viewed this autonomy as being contingent upon either the pressing of the analogy to broadcast television's noncommercial educational stations or the rejection of the public forum doctrine in the public access channel context. Whether the former comes to pass, the *Denver Area Educational Telecommunications Consortium, Inc.* decision heralded the latter, precisely because of the Court's splintered public forum analysis.

Thus, a regulatory opportunity is available for many access channel managers who are frustrated by perceived abuses of their facilities. Unless subject to preemptive state statutes, local governments and nonprofit organizations can promulgate program guidelines to circumscribe the parameters of acceptable program content. Cable television operators that oversee public access channels lack this discretion because, as noted above, a federal statute strictly limits the grounds on which they can refuse transmission of a public access program. Notably, the Second Circuit has interpreted that statute as allowing cable television operators to bar programs that do not qualify for cablecasting on an access channel.[40]

Commercial Interruptions

Public access channel program guidelines usually prohibit commercial advertising. If an award were given for strictest enforcement of such a ban, one of the front-runners certainly would be the Mountain Valley Television Corporation (MVTC), which operates a public access channel in Ukiah Valley, California. MVTC somehow identified subliminal advertising inserted in videotapes submitted by an access program producer and successfully relied on that operating policy violation and the producer's false representations as grounds for suspension of access privileges.[41]

Determining whether an advertisement is commercial occasionally presents difficulties. Cablevision Systems Corporation refused to show a program on military issues called "America's Defense Monitor" until the producer deleted a twenty-five-second closing segment on how to purchase transcripts and copies of the videotape. The Second Circuit vacated a summary judgment in favor of the company and remanded the case for a determination of whether the primary purpose of the advertisement was dissemination of the program's message or profit for the producer.[42]

Real Sex (PAC Style)

Access program producers nationwide have sought to transmit pornography via public access channels. In Texas, for example, the producers of a live call-in program on Austin Community Television Cable exhibited a film depicting fellatio, analingus, and other sexual activity between male couples. They subsequently were convicted of promoting obscenity.[43] In Nebraska, a producer submitted a video containing a scene in which he masturbated for more than a minute while costumed as "Crotchy the Clown." He too was prosecuted successfully on obscenity charges.[44] As a final example, the producer of a live call-in program on Seattle's public access channel showed a video, entitled "Lactomania," that contained such "depths of bizarre depravity" that a federal district court was rendered speechless.[45] His access privileges were suspended, though he appears to have avoided prosecution.

Curiously, a plurality of the Supreme Court in *Denver Area Educational Telecommunications Consortium, Inc.* doubted the prevalence of sexually explicit programming on public access channels. Justices Breyer, Stevens, and Souter found no "significant nationwide pattern" in the "few examples" contained in the legislative history of the 1992 Cable Act and in the case record.[46]

Much more important than this skepticism, however, is their endorsement of public access channel programming control by governmental and nonprofit access channel managers. Justices Breyer, Stevens, and Souter stressed that such entities can enforce program guidelines by "requiring indemnification by programmers, certification of compliance with local standards, time segregation, adult content advisories, or even by prescreening individual programs."[47] The availability of these policing options contributed to their conclusion that the 1992 Cable Act unnecessarily afforded cable television operators the power to veto sexually explicit programming on public access channels.

Miscellaneous Controversial Programming

Commercial advertising and pornography do not exhaust the field of controversial public access channel programming. The best known hate speech example involves the "racialist" social and political commentary of the Ku Klux Klan's program "Race and Reason." Kansas City's futile attempt to avoid airing the program by shutting down its access channel has already been mentioned.

Defamatory and privacy-invading speech also has generated controversy. The Fairfield Public Access Television Committee in Iowa suspended the access privileges of a producer whose live program included audience telephone calls speculating about sexual activity at a particular residence. The Eighth Circuit reversed a summary judgment in favor of the Committee and the Fairfield City Council, which had upheld the suspension, and remanded the litigation for further fact-finding.[48]

Even political speech has run afoul of access channel managers. Cablevision Systems Corporation refused to cablecast a segment of the "Hippie Talk Show" that featured Marijuana Reform Party candidates running for office in New York. The company defended the exclusion on the basis that the program constituted a campaign advertisement and therefore was a prohibited commercial use of the channel. Not surprisingly, a federal district court rejected this argument and issued a preliminary injunction requiring that the program be aired before the election.[49]

Must the Show Go On?

Access channel managers who prescreen submissions presumably do so in

order to reject those in violation of their program guidelines, as illustrated by MVTC's refusal to cablecast the videotape containing subliminal advertising.

The notion that cablecasting of an access program involving constitutionally protected speech can be denied consistent with the First Amendment is counterintuitive. Nevertheless, in *Denver Area Educational Telecommunications Consortium, Inc.*, three members of the Supreme Court identified prescreening by governmental and nonprofit access channel managers as a legitimate option for policing program content. That ruling, although not dispositive, supports the viability of show exclusion as a program guideline enforcement technique.

Pulling the Plug

Several access channel managers have prevailed in federal district court in challenges to their revocation of access privileges of producers who violate program guidelines. As previously noted, MVTC suspended the producer who included subliminal advertising in his videotape.[50] TCI Cablevision of Washington similarly refused to cablecast new programs from two producers who aired obscene material during their live shows.[51] People TV in Atlanta even barred a producer from its production facilities on the basis of his disrespectful letters, telephone calls, and faxes to its employees.[52] Thus, producer exclusion should be considered as a program enforcement technique.

Conclusion

The promise of public access channels is that ordinary citizens can contribute to the marketplace of ideas on television. All too often, however, reality falls short of this ideal. Vendors hawk their wares, pornographers exhibit their smut, racists promote their bigotry, the litigious deride their adversaries, rumor mongers spread their gossip, and so it goes. Access channel managers, of course, may, and a number of them must, permit all of this. Many managers, however, can eliminate some of these activities by developing and enforcing appropriate program guidelines. Exercising that option is the key to public access channel programming reinvention.

Endnotes

1. Glendora v. Dolan, 871 F. Supp. 174 (S.D.N.Y. 1994).
2. Rees v. State, 909 S.W.2d 264 (Tex. App. 1995).
3. Mo. Knights of the Ku Klux Klan v. Kansas City, Mo., 723 F. Supp. 1347 (W.D. Mo. 1989).
4. *See* Jonathon H. Beemer, Comment, Denver Area Telecommunications Consortium, Inc. v. FCC and the Public Forum Status of Cable Access Channels, 63 BROOKLYN L. REV. 955 (1997); James N. Horwood, *Public, Educational, and Governmental Access on Cable Television: A Model to Assure Reasonable Access to the Information Superhighway for All People in Fulfillment of the First Amendment Guarantee of Free Speech*," 25 SETON HALL L. REV. 1413 (1995); Jason Roberts, Note, *Public Access: Fortifying the Electronic Soapbox*, 47 FED. COMMUNICATIONS L.J. 123 (1994).
5. *See* GLEN DARBY, HOW TO STAR IN YOUR OWN TV SHOW FOR $50 OR LESS! (1999); LAURA R. LINDER, PUBLIC ACCESS TELEVISION: AMERICA'S ELECTRONIC SOAPBOX (1999).
6. ALLIANCE FOR COMMUNITY MEDIA, CONTROVERSIAL PROGRAMMING: A GUIDE FOR PUBLIC, EDUCATIONAL, AND GOVERNMENTAL ACCESS TELEVISION ADVOCATES (1999).
7. 47 U.S.C. § 531(b). In addition to public access channels, this provision allows franchise authorities to require cable operators to provide channel capacity for educational and governmental use. Public, educational, and governmental cable television channels commonly are referred to collectively as "PEG channels."
8. *See* Time Warner Entertainment Co., L.P. v. Fed. Communications Comm'n, 93 F.3d 957, 972 (D.C. Cir. 1996) ("In passing the PEG provision, Congress thus merely recognized and endorsed the preexisting practice of local franchise authorities conditioning their cable franchises on the granting of PEG channel access.") (citation omitted). For a comprehensive history of public access channels, *see* LINDER, *supra* note 5, at 2–16.
9. 47 U.S.C. § 531(e).
10. 47 U.S.C. § 531(b).
11. 47 U.S.C. § 544(f)(1).
12. MINN. STAT. § 238.11.
13. N.Y. PUB. SERV. LAW § 229.
14. *Id.*
15. Pub. L. No. 98–549, 98 Stat. 2779 (1984) (1984 Cable Act).
16. H.R. REP. NO. 98–934, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667.
17. 460 U.S. 37 (1983).
18. *Id.* at 45–46.
19. *Id.*
20. *Id.* at 46.
21. Mo. Knights of the Ku Klux Klan v. Kansas City, Mo., 723 F. Supp. 1347, 1352 (W.D. Mo. 1989).
22. Britton v. City of Erie, 933 F. Supp. 1261, 1268 (W.D. Pa. 1995).
23. Altmann v. Television Signal Corp., 849 F. Supp. 1335, 1340 (N.D. Cal. 1994).
24. Alliance for Community Media v. Fed. Communications Comm'n, 56 F.3d 105, 122–23 (D.C. Cir. 1995).
25. Pub. L. No. 102–385, 106 Stat. 1460 (1992) (1992 Cable Act).
26. Glendora v. Cablevision Sys. Corp., 893 F. Supp. 264, 270 (S.D.N.Y. 1995).
27. 518 U.S. 727 (1996).
28. *Id.* at 742.
29. *Id.* at 791.
30. *Id.* at 831.
31. *E.g.*, Rhames v. City of Biddeford, 204 F. Supp. 2d 45, 51 (D. Me. 2002); Demarest v. Athol/Orange Community Television, 188 F. Supp. 2d 82, 93 (D. Mass. 2002); Horton v. City of Houston, 179 F.3d 188, 192–93 (5th Cir. 1999); Coplin v. Fairfield Public Access Television, 111 F.3d 1395, 1402 n.4 (8th Cir. 1997).
32. Jersawitz v. People TV, 71 F. Supp. 2d 1330, 1341–42 (N.D. Ga. 1999).
33. For a comprehensive history of noncommercial educational broadcast television stations, *see* RALPH ENGELMAN, PUBLIC RADIO AND TELEVISION IN AMERICA: A POLITICAL HISTORY (1996); JAMES DAY, THE VANISHING VISION: THE INSIDE STORY OF PUBLIC TELEVISION (1995); JAMES LEDBETTER, MADE POSSIBLE BY . . . THE DEATH OF PUBLIC BROADCASTING IN THE UNITED STATES (1998).
34. 47 C.F.R. § 73.621(a)-(b).
35. *Id.* § 73.621(c).
36. Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1042 (5th Cir. 1982). The history of the "Death of a Princess" litigation is dramatic in its own fashion. On March 12, 1980, the day the program had been scheduled to premiere, a three-judge panel of the Fifth Circuit vacated a district court order requiring the University of Houston's KUHT-TV to broadcast the show. The plaintiffs appealed to the Supreme Court that afternoon and, less than an hour before the original broadcast time, based on informal consultations with three colleagues, Justice Powell declined to overturn the Fifth Circuit's judgment. Barstone v. Univ. of Houston, 446 U.S. 1318 (1980).
37. Arkansas Educ. Television v. Forbes, 523 U.S. 666 (1998).
38. *Id.* at 675.
39. Horton v. City of Houston, 179 F.3d 188, 192 (5th Cir. 1999) ("If one were either to press the analogy between Access and a classic public television station or to reject the public forum doctrine for local access channels, then Access would enjoy virtually unfettered programming discretion.").
40. Time Warner Cable of NYC v. Bloomberg L.P., 118 F.3d 917, 928–29 (2d Cir. 1997).
41. Rickel v. Mountain Valley Television Corp., No. C-96-1033 DLJ, 1996 U.S. Dist. LEXIS 19961 (N.D. Cal.).
42. Goldberg v. Cablevision Systems

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Corp., 261 F.3d 318 (2d Cir. 2001).

43. Rees v. State, 909 S.W.2d 264 (Tex. App. 1995).

44. State v. Harrold, 593 N.W.2d 299 (Neb. 1999).

45. TCI Cablevision v. Aivaz, No. C98-665C, 1998 U.S. Dist. LEXIS 20570, at *8 (W.D. Wash. 1998).

46. 518 U.S. 727, 764 (1996) (citation omitted).

47. *Id.* at 762.

48. Coplin v. Fairfield Public Access Television, 111 F.3d 1395, 1402 n.4 (8th Cir. 1997).

49. Moss v. Cablevision Sys. Corp., 22 F. Supp. 2d 1 (E.D.N.Y. 1998).

50. Rickel v. Mountain Valley Television Corp., No. C-96-1033 DLJ, 1996 U.S. Dist. LEXIS 19961 (N.D. Cal.).

51. TCI Cablevision v. Aivaz, No. C98-665C, 1998 U.S. Dist. LEXIS 20570, at *8 (W.D. Wash. 1998).

52. Jersawitz v. People TV, 71 F. Supp. 2d 1330, 1341–42 (N.D. Ga. 1999).