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THE FEDERAL COMMUNICATIONS COMMISSION AND THE “MUST CARRY” PROVISIONS

WHAT ARE THE
“MUST CARRY” PROVISIONS,
AND HOW DO THEY AFFECT
THE INTERESTS OF THE
CABLE INDUSTRY
AND
THEIR CONSUMERS?

HOW IT RELATES TO THE HISTORY OF INFORMATION

- ◉ The FCC is a substantial contributor as what information reaches the public, especially via television.
 - More specifically, they regulate the “must carry” provisions which “promotes the wide spread dissemination of information from many sources”
 - These regulations provide more well rounded sources’ of information (i.e. PBS, public service announcements, public access channels) rather than sources that are overwhelming profit driven and/or dictated by governmental interests.

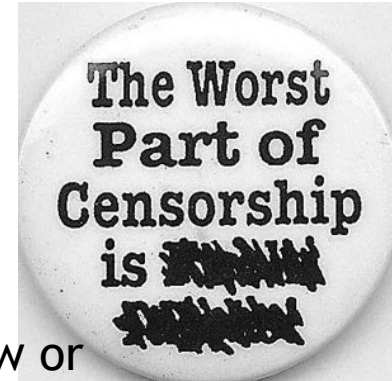
WHAT IS THE FCC?



The Federal Communications Commission (FCC) is an agency of the United States charged with regulating essentially all communications in or originating in the United States.

television and radio airwaves, [satellite](#) and cable transmissions, and [telegraph](#) communications. The FCC was created as a direct successor to the Federal Radio Commission, the federal body in charge of radio communications within the United States. With the advent of television, it was apparent that a body with a broader mission would be necessary, and it made sense to group a number of similar duties together under one umbrella. The Congress created the FCC with the Communications Act of 1934.

WHAT IS THE FCC CONT.



- ◉ The FCC's primary power comes from its ability to renew or decline to renew licenses to broadcasting stations. In an earlier era of television, this allowed the FCC to dictate rather strongly what content was and was not appropriate for broadcast.
 - However, since the advent of cable and satellite television - two areas the FCC does not have the same powers over - this has become less important. While the FCC still occasionally fines affiliate networks for violating its content guidelines -
 - ex. the infamous Janet Jackson indecency fine during Superbowl XXXVIII - they seem less inclined to exercise this power than they have in the past.
- ◉ Prior to the 1980s, the FCC also set out a number of guidelines meant to keep the public stations as vessels primarily for the public good. A certain amount of hours of each broadcast day were required to be devoted to non-entertainment programming, such as educational or news shows.



BROADCAST VS. CABLE



○ Broadcast (terrestrial television) 1926:

- “The US has long been dominated by the Big Three television networks, ABC(1943), CBS(1927) and NBC(1926), and now Fox, which launched in 1986 and is now considered as part of the "Big Four". The Big Three provide a significant amount of programming to each of its affiliates, including news, prime-time, daytime and sports programming, but still have periods each day when each affiliate can air local programming, such as local news or syndicated programs. Other networks are dedicated to specialist programs, such as religious programming or services in languages other than English, especially in Spanish.
- The largest television network in the United States, however, is the Public Broadcasting Service, a non-for profit, publicly owned service. In comparison to the commercial networks, there is no central programming arm or unified schedule, meaning that each PBS affiliate has a significant amount of freedom to schedule programs as it sees fit.

○ Cable (Basic/Premium)~1949:

- common form of television delivery, generally by subscription. Cable television first became available in the United States in 1948, with subscription services in 1949. However Cable as we know it (Basic Cable [MTV] and Priemum Cable [HBO]) began in 1972.

WHAT ARE “MUST CARRY” PROVISIONS?



- ◉ What is it?
 - Mandates that cable companies carry various local and public television stations within a cable provider's service area
- ◉ Why?
 - "Designed to insure that local television stations did not lose market share with increased competition from cable networks competing for a limited number of cable channels"
- ◉ Importance?
 - valuable for broadcasters and important for determining the value of a broadcaster's FCC license
- ◉ **1972 Must-carry rule mandate the cable companies to provide channels for all local broadcasters within a 60-mile area.**
 - If a broadcaster chooses must carry they receive no compensation for use of their signal, but are assured carriage and channel position.
 - -This is apposed to retransmission consent which gives up any assurance of carriage or of a desirable channel position. All terms and conditions of carriage are subject to negotiation to decide such things as their channel position and tier placement, DTV channel carriage, distribution and construction costs, studio/personnel/equipment sharing deals and or compensation, to name a few.
- Rules applied to: franchise standards, signal carriage, network program nonduplication and syndicated program exclusivity, non-broadcast or cablecasting services, cross-ownership, equal employment opportunity, and technical standards.

WHAT HAS CHANGED SINCE 1974?

- ◉ **1984 Cable Communications Policy Act:**
 - Must specify:
 - The nature of the info that may be collected
 - The “nature, frequency, and purpose” that the info will be used for
 - How long the info will be held by the cable service provider
 - Where/how the subscriber may have accessed this info
 - Subscribers right to involve legal action
- ◉ **1992 Cable Television Consumer Protection and Competition Act:**
 - The cable companies were allowed to drop redundant carriage of signals to promote the availability of diverse views and information.
- ◉ **1996 Telecommunications Act: Amending the Communication Act of 1934:**
 - “In adopting the Telecommunications Act of 1996, Congress noted that it wanted to provide a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. The Commission has adopted regulations to implement the requirements of the 1996 Act and the intent of Congress.” (General Cable Television Industry and Regulation Information Fact Sheet." Federal Communications Commission (FCC) Home Page. Web.)



COURT CASES LATE 1980'S



- ◉ **Quincy Cable Tv Inc v. Federal Communications Commission**

- Argued April 16, 1985. Decided July 19, 1985.

- When the Commission strikes this balance in favor of regulations that impinge on rights protected by the First Amendment, it assumes a heavy burden of justification... After extensive examination of the purposes and effects of the must-carry rules, we have concluded that the Commission has failed to carry this heavy burden. After the passage of nearly two decades, and despite its demonstrated capacity to do so, the Commission has failed entirely to determine whether the evil the rules seek to correct "is a real or merely a fanciful threat." *Home Box Office, Inc. v. FCC*, supra, 567 F.2d at 50. Moreover, because the must-carry rules indiscriminately sweep into their protective ambit each and every broadcaster, whether or not that protection in fact serves the asserted interest of assuring an adequate amount of local broadcasting in the community, the rules are insufficiently tailored to justify their substantial interference with First Amendment rights. We stress that we have not found it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment. We hold only that in their current form they can no longer stand

- ◉ **835 F2d 292 Century Communications Corporation v. Federal Communications Commission**

- Argued Oct. 22, 1987. Decided Dec. 11, 1987.

- in the absence of record evidence in support of its policy, the FCC's reimposition of must-carry rules on a five-year basis neither clearly furthers a substantial governmental interest nor is of brief enough duration to be considered narrowly tailored so as to satisfy the O'Brien test for incidental restrictions on speech. We do not suggest that must-carry rules are per se unconstitutional, and we certainly do not mean to intimate that the FCC may not regulate the cable industry so as to advance substantial governmental interests. But when trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures. As in *Quincy Cable TV*, we reluctantly conclude that the FCC has not done so in this case, but instead has failed to "put itself in a position to know" whether the problem that its regulations seek to solve "is a real or fanciful threat." *Quincy Cable TV*, 768 F.2d at 1457-59 (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C.Cir.), cert. denied, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977)). Accordingly, we have no choice but to strike down this latest embodiment of must-carry.



COURT CASES INTERESTS ENTANGLED IN THE NEW INFORMATION INDUSTRY:



- ◉ First Amendment vs. Antitrust Enforcement (for fair competition; common-carrier regulations) vs. commercial interests and longevity of cable operators.
- ◉ Congress passed the Cable Television Consumer Protection and Competition act of 1992 to deal with concerns that a competitive imbalance between cable television and over the air broadcasters was jeopardizing the broadcasters' ability to vie for a viewing audience and, consequently, operating revenues.
- ◉ Cable companies challenged this act and the constitutionality of the must carry provisions in the court case, *Turner Broadcasting System, Inc. v. the FCC* in 1994.
 - But the case was remanded and revisited in 1997.



COURT CASES

The Turner Broadcasting System, Inc. v. the FCC (1997)



- ◉ Leading cable operator Turner Broadcasting System alleged that the must carry provisions were in clear violation of the First Amendment, given the laws not only burdened but also suppressed free speech.
- ◉ The Court dealt with questions as to the scope of what was considered “permissible regulation of information production and distribution industries”, in relation to several competing interests.
- ◉ In a 5-4 vote, the Supreme Court rejected the allegations made by Turner Broadcasting System.
- ◉ The court argued that Congress possessed substantial evidence in justification of the necessity of the must carry provisions, especially in promoting crucial governmental interests that neither suppressed or burdened free speech.



THE SUPREME COURT RULED THAT THE MUST CARRY LAWS HELPED:



- ◉ Preserve the benefits of free, over-the-air local broadcast television
- ◉ Promote the widespread dissemination of information from many sources
- ◉ Advance fair competition in the television programming market.



THE TURNER DECISION UPHOLDS:



- ◉ Traditional First Amendment interests of speakers
- ◉ The related interests in preventing market power abuses from limiting speaking opportunities
- ◉ Government interests in traditional economic regulation



HOW THIS RULING IS RELEVANT TO THE HISTORY OF INFORMATION:



- According to *The New Information Industry: Regulatory Challenges and the First Amendment*-Richard Klinger:
 - “The cable system operators and cable programmers sought a rule that would have exempted them (and other entities that deliver and produce information) from regulations directed at them and designed to further precompetitive objectives unrelated to speech or the messages communicated.” (145)

AFFECTS TO CABLE INDUSTRY AND CONSUMERS

◉ Cable industries:

- Losing out on channels
 - Losing out on “operating revenues”
- It curbs the ability of cable systems to engage in anti-competitive behavior.

◉ Consumers

- it promotes the continued availability of free television programming not dictated by the cable or satellite operator - especially for viewers who are unable to afford other means of receiving programming.
- They are assured access and channel placement with respect to local broadcast signals available in their community including locally originated programming
- they are assured access to the diversity of broadcast signals available in their community.

FURTHER RESEARCH

- ◉ retransmission consent
 - Get a greater understanding of the alternative to must carry.
- ◉ Must carry in other countries
 - How do must carry provisions play out in other countries, such as, Ireland, Australia, India, ect.
- ◉ More in depth about FCC
 - Find out more about the bureaus and offices of the Federal Communications Commission

