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CHANGING CHANNELS IN BROADCAST REGULATION: LEAVING TELEVISION ADVERTISING TO CONTAINMENT BY MARKET FORCES

Despite its authority to regulate broadcast advertising, the Federal Communications Commission has long fostered industry self-regulation by the National Association of Broadcasters (NAB). Recently, however, the Justice Department challenged as a restraint of trade NAB guidelines restricting the timing and presentation of commercials. The NAB has since discarded its guidelines, leaving regulation of television advertising to natural forces at work in the marketplace. Opponents of deregulation have voiced concern that eliminating commercial guidelines will create overcommercialization. This Note examines the utility of "market discipline" as an effective regulator of television advertising. It contends that overcommercialization will be checked by competitive forces inherent in the marketplace. The Note identifies cable television and other new forms of video technology as a source of increased competition for conventional television. Observing that viewers are sensitive to excessive commercial interruptions, the Note concludes that the threat of an eroding audience share will deter broadcasters from overcommercialization.

INTRODUCTION

"THIS TUBE IS the most awesome godless force in this whole godless world." So spoke Howard Beale, veteran anchorman for UBS, the fictional fourth network in the 1976 academy award winning motion picture Network.1 Television is indeed a pervasive force in contemporary society. It is the sole means by which seven out of every ten Americans receive their information about the world.2 But television does more than communicate information—it shapes its vast audience's perceptions of people, places, and events.3 Television has become a powerful persuasive tool.4

The Communications Act of 19345 created the Federal Com-

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munications Commission (FCC), granting it broad authority to regulate broadcasting in the "public convenience, interest, and necessity." This broad language was intended to allow the FCC flexibility in an area which has proved dynamic since its inception. Recently, however, advances in video technology have opened the traditional broadcast industry to increased competition, casting doubt upon the vitality of the Communications Act and the role of regulation in broadcasting.

Despite its broad authority, the FCC has fostered self-regulation of television advertising. Even in its rare attempts to impose formal restrictions on the presentation and timing of commercials, the FCC has evinced continued deference to the guidelines imposed by the National Association of Broadcasters (NAB), a trade association of television broadcasters.

In June 1979, the Justice Department sued the NAB for alleged antitrust violations stemming from advertising standards in its Television Broadcast Code (NAB Code or the Code). The

7. Id. § 303. Sections 307, 309, and 310 refer to the Commission's licensing powers.
10. Advocates of modernizing the Act have indicated that cable television has raised issues which render the Act obsolete. Furthermore, the Act offers no guidance for treating computer-assisted communications. See, e.g., Robinson, The Federal Communications Commission, in COMMUNICATIONS FOR TOMORROW 353, 358-59 (G. Robinson ed. 1978); Berman, Computer Communications? Allocation of Functions and the Role of the Federal Communications Commission, 27 FED. COM. L.J. 161 (1974).
suit assailed those Code provisions which limited the amount of commercial material to be broadcast each hour, the number of commercial interruptions per program, the number of consecutive announcements per interruption, and the number of products to be advertised within a single commercial. District Judge Harold Greene granted summary judgment for the government, ruling that the multiple product standard was a per se violation of the Sherman Act. The court reserved determination on the Code's time and program interruption standards, however, finding issues of material fact which could only be resolved at trial. One week after the district court decision, the NAB suspended enforcement of all advertising provisions in its Code. By consent decree entered in November 1982, the NAB was enjoined from maintain-

NAB Code]. The petition alleged that three of the Code's advertising standards violated the Sherman Act by restricting the supply of advertising time. 536 F. Supp. at 153. See infra notes 112-48 and accompanying text.

15. The time standards mandated that network-affiliated stations not exceed 9½ minutes of commercial time per hour during "prime time" (plus an extra 30 seconds for promotional announcements), and 16 minutes per hour during the rest of the broadcast day. NAB Code, supra note 14, §§ 14.2.A(1), 14.2.B. Independent stations were allowed 7 minutes of commercial time per 30-minute period during prime time and 8 minutes during all other 30-minute periods. Id. § 15.2. The Code defined prime time as "three consecutive hours per broadcast day . . . between . . . 6:00 p.m. and midnight." Id. §§ 14.2.A(1), 15.2.

The FCC adopted guidelines resembling the Code's time standards. These guidelines prescribe 16 minutes of commercial time per hour as a maximum. 47 C.F.R. § 0.283(a)(6) (1982) (repealed 1984).

16. The Code's program interruption standards prohibited network affiliated stations from interrupting prime time programs more than four times per hour and all other programs more than four times per half-hour. NAB Code, supra note 14, §§ 14.4(B), 14.4(C).

17. The Code permitted no more than four consecutive announcements per station break. Id. § 14.5.

18. The multiple product standard proscribed the advertisement of "two or more products or services within . . . a single announcement" if the announcement was less than 60 seconds long. Id. § 9.5. The multiple product standard did not apply to commercials that were "integrated so as to appear to the viewer as a single message." 536 F. Supp. at 159 n.39.

19. 536 F. Supp. at 159–62. By requiring advertisers to purchase at least 60 seconds of time to promote more than one product, the multiple product standard could force advertisers to purchase more time than they might otherwise demand. Id. at 160. The net result is to increase demand for commercial time artificially, thereby raising the price of commercial time and enhancing the broadcasters' revenues. Id. at 160–61.

20. Id. at 159. The court noted that the broadcasting-industry possesses unique characteristics which make application of the per se rules inappropriate: spectrum scarcity, physical time limitations on its product, and government regulation. Id. at 156. But see Fowler & Brenner, A Marketplace Approach to Broadcast Regulation, 60 Tex. L. Rev. 207, 221–26 (1982) (discussing several flaws in scarcity argument, including its failure to account for "over-the-air" video substitutes such as cable television and direct broadcast satellites (DBS)).

ing, promulgating, publishing, distributing, enforcing, monitoring, or suggesting adherence to the disputed provisions.\textsuperscript{22} The NAB has subsequently discarded its entire Code.\textsuperscript{23}

With the Code's suspension, regulation of television advertising is essentially left to natural forces at work in the marketplace.\textsuperscript{24} The only remaining guidelines are those of individual television stations and station groups.\textsuperscript{25} Opponents of deregulation have voiced concern that eliminating commercial guidelines will create overcommercialization\textsuperscript{26} in contravention of the public interest.\textsuperscript{27} Advocates of deregulation, however, have insisted that competitive forces inherent in the marketplace will effectively check overcommercialization.\textsuperscript{28} "Market discipline," they contend, will better serve the public interest than government regulation.\textsuperscript{29}

*United States v. National Association of Broadcasters*\textsuperscript{30} appears to signal the demise of self-regulation in the television industry. At minimum, Judge Greene's opinion lends potent support to the campaign for broadcast deregulation.\textsuperscript{31} The result could hardly have been predicted. Prior to the decision, politicians, indus-

\begin{thebibliography}{31}
\bibitem{22} United States v. National Ass'n of Broadcasters, 1982-83 Trade Cas. (CCH) \| 65,049 (D.D.C. 1982). Individual stations should benefit from this settlement, since many could have been sued for adherence to Code standards. Interview with Erwin G. Krasnow, formerly General Counsel for the NAB, in Washington, D.C. (Nov. 19, 1982); see also Broadcasting, Mar. 15, 1982, at 46.
\bibitem{23} Broadcasting, Jan. 10, 1983, at 37.
\bibitem{24} See infra notes 158-62 and accompanying text.
\bibitem{25} Television/Radio Age, Feb. 14, 1983, at 54-55.
\bibitem{27} See National Ass'n of Broadcasters, 536 F. Supp. 149, 166 (D.D.C. 1982) (NAB argued that preventing overcommercialization is in public interest).
\bibitem{28} See Radio, 84 F.C.C.2d at 1004-08. In FCC v. WNCN Listeners Guild, 450 U.S. 582, 597-99, 601-03 (1981), the Supreme Court endorsed the FCC's discretion to rely on market forces as a means of ensuring that licensees satisfy the public interest. The WNCN Court upheld a 1976 FCC Policy Statement defining the FCC's role in reviewing format changes as consistent with the legislative history of the Communications Act. Id. at 597-604. The Statement had concluded that the public interest in diversity of broadcast formats is best promoted by reliance on market forces. See Changes in the Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858, 863-66 (1976), recon. denied, 66 F.C.C.2d 78 (1977).
\bibitem{29} See National Ass'n of Broadcasters, 536 F. Supp. at 166-68; Fowler & Brenner, supra note 20, at 210, 230-36.
\bibitem{30} 536 F. Supp. 149 (D.D.C. 1982).
\bibitem{31} A vocal supporter of deregulation is current FCC Chairman Mark Fowler. Broadcasting, Oct. 25, 1982, at 23; see Fowler & Brenner, supra note 20.
\end{thebibliography}
try officials, FCC regulators, and members of the public uniformly supported industry-imposed restrictions on television advertising.\(^{32}\)

Repeal of the NAB Code, together with the FCC's recent moves to deregulate commercial radio broadcasting\(^{33}\) and television,\(^{34}\) heralds a new era for the electronic mass media.\(^{35}\) Histori-

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In 1964, while declining to adopt the NAB Code's advertising standards, the FCC conceded that the "industry-formulated code of good practice in this field . . . does serve as one appropriate limitation . . . ." Commercial Advertising Standards, 36 F.C.C. 45, 50 (1964).

\(^{33}\) Deregulation of Radio, 46 Fed. Reg. 13,888, 13,900–06 (1981); see Radio, 84 F.C.C.2d 968. In effecting deregulation, the Commission abandoned its commercial time guidelines, and its rules requiring maintenance of comprehensive program logs, ascertainment of community needs, and conformance with nonentertainment programming guidelines. Id. at 971.

\(^{34}\) The FCC proposed deregulation of television. See Deregulation of Television, 48 Fed. Reg. 37,239 (1983) (to be codified at 47 C.F.R. pts. 0 and 73 (proposed Aug. 4, 1983) [hereinafter cited as Deregulation of Television]. The proposal contained two options for the elimination of commercial guidelines. Id. at 37,249–50. The first eliminates consideration of a broadcaster's commercial load in license renewal proceedings. This option is premised on the assumption that marketplace variables will serve as effective regulators of commercialization. Id. at 37,249; see infra notes 158–216 and accompanying text. The second option amends current guidelines to allow broadcasters more discretion in commercial loading and airing. The FCC has suggested that either option would allow licensees freedom to experiment with "new or unconventional commercial techniques." Deregulation of Television, supra, at 37,249. The proposal also considers the present and future television marketplace, and assesses the potential impact of "those technologies that may provide genuine substitutes in the viewer's mind for regular television broadcasting [and] the extent of competition within a narrowly defined over-the-air television submarket." Id. at 37,243 (emphasis added).

Effective September 24, 1984, the FCC eliminated its requirement that broadcasters schedule no more than 16 minutes of commercials per hour, thus choosing to implement the first option proposed in Deregulation of Television. See 49 Fed. Reg. 33,588, 33,598–99 (1984) (to be codified at 47 C.F.R. pts. 0 & 73) [hereinafter cited as Revision of Programming and Commercialization Policies]; see also Burnham, F.C.C. Relaxes Rules Covering Broadcast TV; N.Y. Times, June 28, 1984, at 24, col. 1 (the decision "removes an unnecessary layer of Government involvement in the television program decisions of the American people").

The Commission's decision has met with mixed reactions. Broadcasters generally have agreed that eliminating commercial guidelines is desirable. Broadcasting, Nov. 28, 1973, at 29. The consensus among broadcast executives is that the decision will have little practical effect on their operations. Berger, 2 Networks Doubt Ruling Will Spur Commercials, N.Y. Times, June 28, 1984, at 24, col. 2; Broadcasting, July 2, 1984, at 31 (group broadcast owners surveyed do not intend "to expand commercial inventories"). Advertising executives also believe that the FCC decision will not result in a flood of commercials as "stations are businessmen and they would recognize that when the number of commercials becomes so great, viewers are irritated or antagonized." Berger, supra. Television
cally, the broadcast licensee has occupied the role of public trustee, granted an exclusive privilege to use a limited re-

source. Although spectrum scarcity is no longer a realistic justi-

fication for regulation, television remains subject to an "absolute physical limitation on its product [since] there are . . . only sixty minutes to each hour."  

This Note explores how elimination of self-regulatory adver-
tising standards will affect commercial television. It considers the historical background of broadcast industry regulation and self-regulation under the NAB Code. With particular attention to the Code's advertising standards, and in light of the competitive nature of commercial television, the Note examines the utility of market discipline as an effective regulator of television advertising. It concludes that natural market variables such as audience, advertisers, and new technology should effectively contain the threat of overcommercialization.

executives have voiced their concern that overcommercialization could result in a decreased viewing audience. "It would be dangerous to expand commercial time. The viewer tolerance level for advertising per hour is at its highest, at a dangerous level, right now. To go higher would be extremely foolhardy." Id.; BROADCASTING, July 2, 1984, at 31 ("If there are too many commercials, people [will] stop watching television"); see also Revision of Programming and Commercialization Policies, 49 Fed. Reg. at 33,598-99 (citing viewing audiences' likely avoidance of stations which overcommercialize).

35. Congress is currently considering legislation to deregulate broadcasting. See S. 1609, 97th Cong., 2d Sess., 128 CONG. REC. 3158-64 (1982). The bill passed the Senate but died in the House, and was reintroduced by Senator Goldwater. See S. 55, 98th Cong., 1st Sess., 129 CONG. REC. 1289-93 (1983). It codifies many of the FCC's proposals for radio and television deregulation, including elimination of comparative renewal proceedings for licensees, id. at 1291, and limits on radio commercials. Id. at 1292. Other bills on broadcast deregulation are pending in the House of Representatives. See CONG. Q., Jan. 21, 1984, at 93.

36. See Fowler & Brenner, supra note 20, at 213-17.

37. Justice Frankfurter used this "scarcity" rationale to support his view of broadcasters as fiduciaries of the public. See NBC v. United States, 319 U.S. 190, 213 (1943). But the explosive growth of cable and other substitutes for over-the-air television broadcasting has prompted modern commentators to denounce the scarcity rationale as "flawed" and "antiquated." See, e.g., Fowler & Brenner, supra note 20, at 221-26; Robinson, supra note 10, at 358-59.

38. 536 F. Supp. at 156.

39. See infra notes 43-82 and accompanying text.

40. See infra notes 83-98 and accompanying text.

41. See infra notes 158-216 and accompanying text.

42. See infra notes 217-225 and accompanying text.
I. Historical Background and Developments in Television Broadcast Regulation

Television regulation has always generated controversy. In 1960, criticizing the medium as a "vast wasteland," Chairman Newton Minow urged the FCC to play a more active regulatory role. Recently, however, deregulation has been urged, partly on the assumption that increased competition will provide effective regulatory control. This section of the Note traces the history of broadcast regulation, with particular emphasis on the efforts of the FCC and NAB.

A. The Federal Communications Commission

1. Statutory History

Federal regulation of broadcasting originated in 1910 with the Wireless Ship Act. Two years later, Congress enacted the Radio Act of 1912, the first comprehensive regulatory scheme for radio. Hampered by insufficient guidelines and authority, the government failed to contain radio's unprecedented growth and the resulting frequency "free-for-all" of the 1920's. Finally, responding to fifteen years of inadequate regulation, Congress

43. See E. Krasnow, L. Longley & H. Terry, supra note 12, at 19-25.
46. Ch. 379, 36 Stat. 629 (repealed 1934). The Wireless Ship Act protected ships at sea by requiring two-way radio capability of any ship licensed to carry 50 or more persons before permission could be granted to leave an American port. Id. § 1, 36 Stat. at 629-30. Enforcement power vested in the Department of Commerce and Labor. Id. § 4, 36 Stat. at 630. The Act contained no specific provisions governing broadcasting and lacked any reference to licenses or wavelengths.

In 1922, Secretary of Commerce and Labor Herbert Hoover called the First National Radio Conference, which concluded unanimously that increased federal control over allocation and use of frequencies was essential to prevent chaos and interference. J. Bittner, supra note 47, at 7-8. Hoover's attempt to reduce interference by controlling the number of licensees was thwarted by the courts. See Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923) (authorizing Secretary to allocate frequencies but not to deny licenses); United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926) (denying Secretary power to impose restrictions on frequency, power, and hours of operation).
passed the Radio Act of 1927\textsuperscript{49} to save the industry from self-destruction.

The 1927 Act contained the first codification of the public interest standard\textsuperscript{50} which was to become the cornerstone of broadcast regulation. The newly created Federal Radio Commission addressed advertising abuse and excess in an early interpretation of the public interest standard.\textsuperscript{51} Returning to the subject in 1929, the Commission observed that advertising, as the primary source of revenue to the licensee, required close scrutiny to ensure protection of the public interest.\textsuperscript{52}

The growing public use of radio eventually demanded coordinated broadcast regulation by a single agency. Therefore, Congress passed the Communications Act of 1934,\textsuperscript{53} which created the Federal Communications Commission, an independent agency headed by seven commissioners. The 1934 Act delegated broad powers to the FCC to regulate broadcasting in the "public convenience, interest or necessity."\textsuperscript{54} Through its licensing authority, the FCC polices for compliance with the public interest standard.\textsuperscript{55} The Supreme Court has interpreted the Commission's ex-

\textsuperscript{49} Ch. 169, 44 Stat. 1162 (repealed 1934). The Act established the Federal Radio Commission to oversee broadcasting. \textit{id}. § 3, 44 Stat. at 1162. The Commission was empowered to assign wavelengths to licensees and to designate the power and location of transmitters. \textit{id}. § 4, 44 Stat. at 1163.

\textsuperscript{50} The Act gave the Commission power to grant licenses for three-year terms in the "public convenience, interest or necessity." \textit{id}. § 9, 44 Stat. at 1166; see R. NOLL, M. PECK & J. MCGOWAN, \textsc{Economic Aspects of Television Regulation} 98 (1973).


pansive jurisdiction to include cable as well as broadcast television.56

2. Public Interest in Diversity: The Trustee Approach

Courts have repeatedly affirmed that diverse broadcast programming is in the public interest.57 This view was reflected in the first edition of the Blue Book,58 the FCC’s definitive policy statement regarding factors relevant to the public interest.59 The Commission considered such factors upon review of both new and renewal license applicants.60 The Commission thus employed its licensing powers to promote balanced program formats—furthering its view of the licensee as public trustee.61


56. United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (FCC possesses regulatory authority over cable television as instrument of interstate communication under § 152(a) of Communications Act); see United States v. Midwest Video Corp., 406 U.S. 649, 662–70 (1972) (applying Southwestern to find that FCC may regulate cable television if exercise of authority is “reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting”). See generally Note, FCC Authority Over Cable Television, 1979 Wis. L. REV. 962, 964–72 (discussing implied jurisdiction over cable television based on ancillary jurisdiction under § 152(a)).


59. The public interest factors included noncommercial programming, local live programs, programs devoted to public issues, and the elimination of excess advertising. Blue Book, supra note 58, at 56. While acknowledging the importance of advertising as a means of disseminating information to consumers, the Commission recognized that the public interest requires a reasonable relation between advertising time and programming time.

60. Before considering the public interest factors, the FCC was required to balance the public interest in program diversity against the broadcaster’s first amendment rights. National Ass’n of Theatre Owners v. FCC, 420 F.2d 194, 207–08 (D.C. Cir. 1969).

61. Despite the Blue Book and the NAB Code, advertising regulation continued to pose major problems for the FCC. See generally Ramey, supra note 58, at 88–94 (describing problems and FCC responses). In 1957, the FCC established a formal liaison with the Federal Trade Commission to prevent deceptive advertising. Liaison Between FCC & FTC Relating to False Misleading Radio & Television Advertising, 22 F.C.C. 1572 (1957);
In 1960, the FCC reaffirmed this view.\textsuperscript{62} It repealed its \textit{Blue Book} requirement for noncommercial programming,\textsuperscript{63} while adding a requirement that licensees ascertain and serve diverse community programming needs.\textsuperscript{64} By placing programming responsibility on the licensee—including responsibility for quantity and frequency of advertising—the FCC encouraged industry self-regulation in accordance with its trustee philosophy.\textsuperscript{65}

3. \textit{Overcommercialization}

Since the inception of broadcast regulation, the FCC has maintained that excess commercialization contravenes the public interest.\textsuperscript{66} While advertising dollars may constitute the lifeblood of commercial broadcasting, the Commission nevertheless must "ensure that the 'public interest' does not become subordinate to financial and commercial interests."\textsuperscript{67} Yet it has imposed only the most limited restraints on quantitative aspects of broadcast advertising.\textsuperscript{68} Moreover, it has hesitated to regulate the content of commercials, due to first amendment considerations and fear of

\textsuperscript{see} Ramey, \textit{supra} note 58, at 92–93. \textit{See generally} Comment, \textit{FTC Deceptive Advertising Regulation: A Proposal for the Use of Consumer Behavior Research}, 76 Nw. U.L. Rev. 946 (1982) (discussing FTC responses to deceptive advertising). The FCC's general policy, however, has been to avoid content-based review of alleged deceptive advertising and to refer all such complaints to the FTC. \textit{See Adoption of Standards Designed to Eliminate Deceptive Advertising from Television}, 32 F.C.C.2d 360, 405 (1971).

63. \textit{Id.} at 2314–16.
64. \textit{Id.} at 2313–14. The Commissions made the licensee accountable "for all material broadcast through [its] facilities . . . . In the fulfillment of his obligation the broadcaster should consider the tastes, needs and desires of the public he is licensed to serve in developing his programming . . . . [and] carry them out as well as he reasonably can." \textit{Id.} The Inquiry enumerated 14 major elements of program material to guide the licensee in satisfying the "public interest, needs and desires of the community": (1) opportunity for local self-expression, (2) development and use of local talent, (3) children's programs, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorials by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, and (14) entertainment programs. \textit{Id.} at 2314.
68. The FCC has confined its action to modest regulation of commercial time. \textit{See} 47 C.F.R. \textsection 0.283(a)(6) (1982) (prescribing maximum of 16 minutes of commercial time per hour); \textit{supra} note 15.
violating the Communications Act's anticensorship provision.\textsuperscript{69} Thus, the Commission has left content-based decisionmaking to the courts, the networks, the NAB, and other government agencies.\textsuperscript{70}

Until 1981, the FCC limited the amount and frequency of commercial matter to be broadcast during an hour of radio.\textsuperscript{71} After extensive economic analysis and empirical research, and an exhaustive consideration of the history of advertising guidelines, the FCC chose to eliminate all restrictions on the amount of commercial time.\textsuperscript{72}

Proponents of deregulation contend that competition in an unbiased market will prevent overcommercialization.\textsuperscript{73} They argue that the intense competition in the radio market is a sufficient deterrent to overcommercialization, since "it is simply too easy for the public to turn the dial."\textsuperscript{74} In its comments supporting the FCC's deregulation proposal, the NAB observed that commercial clutter reduces the effectiveness of individual ads.\textsuperscript{75} Competition


\textsuperscript{71} \textit{See Radio}, 84 F.C.C.2d at 971.

\textsuperscript{72} Id. Responding to fundamental changes in the industry (a vast increase in the number of stations accompanied by a trend toward specialization), the Commission authorized a study of radio deregulation in October, 1978. \textit{Id.} at 969. The proposal to abolish restrictions on commercial time received strong support from broadcasters, many of whom indicated that they would comply voluntarily with the guidelines to ensure their ability to demonstrate satisfactory commercial service upon license renewal. \textit{Id.} at 1095 app. G.

Broadcasters have argued nonetheless that the regulatory burdens of the guidelines outweigh their effectiveness, and that lifting them would vest ultimate control over advertising levels with the listener-consumer. In addition, consumer judgments would more quickly be effected in the marketplace. \textit{Id.} at 1094-95. Moreover, deregulation might encourage experimental forms of advertising such as program-length commercials as opposed to traditional spots, which could prompt a desirable trend toward more information-oriented ads. \textit{Id.} at 1007.

\textsuperscript{73} \textit{Id.} at 1004.

\textsuperscript{74} \textit{Id.} at 1094 app. G.

\textsuperscript{75} \textit{Id.} Clutter is the overconcentration of messages (ads) in a continuous block of
thus provides a disincentive to overcommercialization: the listener may stop listening, causing reduced market exposure for the advertiser, who might then contract with another station, thus creating a smaller audience and fewer advertisers for the original station.\textsuperscript{76} This scenario has equal, if not greater, application to television.\textsuperscript{77} Although the FCC lacks express statutory authority to consider competition in its decisions,\textsuperscript{78} "practices which present realistic dangers of competitive restraint are a proper consideration for the Commission" in determining the public interest, convenience, and necessity.\textsuperscript{79}

The broad language of the Communications Act authorizes the FCC to promulgate commercial time limits in the public interest.\textsuperscript{80} The Commission has long acknowledged that excessive advertising poses a threat to the public interest, but nevertheless chose to encourage industry self-regulation through such policy statements as the Blue Book.\textsuperscript{81} Furthermore, the FCC deferred to the NAB Code as a means of ensuring that broadcasting is pursued in the public interest.\textsuperscript{82}

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\textsuperscript{76} Empirical research by the United States Department of Commerce, National Telecommunications and Information Administration (NTIA) found that "the overwhelming majority of broadcasters [remain] considerably below the guideline during every hour of operation." \textit{Radio}, 84 F.C.C.2d at 1101 app. G. Econometric analysis of this data suggested that stations limit their level of advertising to avoid clutter. \textit{Id.}

\textsuperscript{77} \textit{See} Abrams, "Zappers" \textit{Switch Off TV Ads and Scare Some Media Buyers}, Wall St. J., Oct. 6, 1983, at 33, col. 1 ("'Zapping' describes the switching of channels during commercials, typically by a remote-control device or a cable TV selector within a viewer's reach.").


\textsuperscript{79} General Tel. Co. v. United States, 449 F.2d 846, 857 (5th Cir. 1971). For a discussion of the applicability of antitrust law to the broadcast industry, see \textit{infra} notes 149–57 and accompanying text.

\textsuperscript{80} \textit{See supra} notes 53–55 and accompanying text.

\textsuperscript{81} \textit{See supra} notes 57–65 and accompanying text.

\textsuperscript{82} \textit{See supra} note 12 and accompanying text.
1. Historical Development

The NAB is a powerful lobbying force in broadcast regulation.\textsuperscript{83} According to its by-laws, the NAB was founded to "promote development of the arts of aural and visual broadcasting . . . ; to protect its members . . . from injustices . . . [and] to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public."\textsuperscript{84} Since its inception, it has grown to include over 690 member television stations and the three major networks.\textsuperscript{85} The NAB has worked closely with broadcasters and the FCC to develop a regulatory scheme which guards the public interest while avoiding cumbersome restrictions on broadcasters. This dual function was the goal of the NAB Code.

2. The NAB Television Code

In 1952, the NAB promulgated its first Television Code,\textsuperscript{86} consisting of guidelines to help broadcasters meet their statutory obligation to operate in the public interest. Essentially a self-regulatory version of the Blue Book,\textsuperscript{87} the NAB Code urged telecasters to scrutinize the quality of advertising aired by their stations.\textsuperscript{88} The NAB Code has undergone twenty-one revisions since

\textsuperscript{83} Broadcasters formed the NAB in 1923 to oppose charges by the American Society of Composers, Authors, and Publishers (ASCAP) that broadcasting music over the radio constituted a copyright infringement. J. Bittner, supra note 47, at 353; Mackey, The Development of the National Association of Broadcasters, 1 J. BROADCASTING 305 (1957); see Hearings on S. 2600 Before a Subcomm. of the Senate Comm. on Patents, 68th Cong., 1st Sess. 1-50 (1924).

\textsuperscript{84} NATIONAL ASS'N OF BROADCASTERS, BY-LAWS art. II, reprinted in J. Bittner, supra note 47, at 354-55.

\textsuperscript{85} NAB NEWS, Jan. 20, 1983, at 30. This group comprises 67% of American television stations, reaching roughly 85% of all viewers. NATIONAL ASS'N OF BROADCASTERS, LEGAL GUIDE TO FCC BROADCAST RULES, REGULATIONS, AND POLICIES ch. 4, at 2 (1977) [hereinafter cited as NAB LEGAL GUIDE].

\textsuperscript{86} The NAB approved its initial formulation of self-regulatory standards in 1928, with various revisions the following year. Pridergen & Engel, Advertising and Marketing on Cable Television: Whither the Public Interest?, 31 CATH. U.L. REV. 227, 247 (1982). The provisions of the NAB Radio Code were applied to television in its early years, but by 1950 the NAB had decided that a separate code was needed to accommodate the visual qualities of television. TV Standards: NAB to Set Up Code Unit, BROADCASTING, May 1, 1950, at 50. The first edition of the NAB Television Code, which took effect on March 1, 1952, utilized the basic language of the Radio Code, but contained more references to licensee responsibility. Note, supra note 12, at 1529 n.13.

\textsuperscript{87} See supra notes 58-61 and accompanying text.

\textsuperscript{88} Beatty, Stringent TV Code, BROADCASTING, Oct. 22, 1951, at 23, 32.
its enactment. Adverse antitrust litigation commenced in 1979, however, prompted the NAB to suspend its Code and dissolve its Code Boards.

Subscription to the Television Code was voluntary and open to all stations. By 1978, Code subscribers totaled nearly sixty-seven percent of all television stations in the United States. Each station was monitored semiannually for Code compliance, and subscribers who violated a Code provision were subject to suspension. Once suspended, a station could no longer display the NAB Television Seal of Good Practice. Administrative responsibility vested in a nine-member Television Code Board, representing the three major networks and management from individual subscriber stations.

While the Communications Act has for fifty years provided authority for FCC regulation of broadcasting, industry self-regulation by the NAB has long been the norm in television. With approval from broadcasters, advertisers, and the FCC, the NAB Code effectively protected the public interest while obviating government intrusion. The Justice Department's antitrust challenge, however, has cast doubt upon the future of self-regulation in the television industry.

89. See supra note 14.
91. See supra notes 21–23 and accompanying text.
92. NAB NEWS, Jan. 20, 1983, at 30. The NAB resolution cited the uncertain future of broadcast self-regulation in the wake of the antitrust suit, and the prior suspension of the NAB's Advertising Standards. Id. Nevertheless, the NAB has refused to accept these signals as the death of self-regulation and is considering lobbying Congress for an antitrust exemption to permit it to implement new codes. BROADCASTING, Jan. 10, 1983, at 37.
93. NAB CODE, supra note 14, § 3.1.
94. NAB LEGAL GUIDE, supra note 85, ch. 4, at 2.
95. NAB CODE, supra note 14, §§ 3.4, 7. A member could be suspended by a two-thirds vote of the NAB Television Board of Directors. Id. § 3.4.
96. Id. The standard for suspension was "continuing, willful or gross violation." Id. Commentators have labeled the penalty "trifling." See Levin, The Limits of Self-Regulation, 67 COLUM. L. REV. 603, 637 (1967); Note, supra note 12, at 1531. This view may have stemmed from the NAB's infrequent exercise of its suspension authority. Pridgen & Engel, supra note 86, at 250–51.
98. See supra notes 13–35 and accompanying text. Alberto-Culver Co. recently filed a class action against the NAB, station group owners, and the three major networks on behalf of purchasers of television advertising time. Alberto-Culver Co. v. National Ass'n of
II. ANTITRUST PROBLEMS IN TELEVISION ADVERTISING REGULATION

Advertising is a slanted process by nature. Its function is not merely to inform consumers about a product or service but to highlight the most appealing characteristics, often in a flamboyant or surreal manner, with the goal of persuading the public to purchase. Advertising has developed into a sophisticated art, utilizing advanced communication techniques and market re-

Broadcasters, No. 83–3427 (D.D.C. filed Nov. 17, 1983); see infra note 147 and accompanying text. On March 12, 1984, it dismissed the suit against most defendants, who dropped restrictions on split 30-second commercials. BROADCASTING, Mar. 19, 1984, at 42.

Advertising may function (1) as a reminder of a product, (2) as a source of information about a product, (3) as an argument on behalf of a product, (4) as a stimulus to create an emotional climate auspicious to a product, or (5) as a means of establishing an aura or image of a product.

L. BOGART, supra note 75, at 127.

Effective advertising consists of making the right promise to the right audience... All you have to do is find the desired benefit that your product is capable of delivering and then zero in on those who are most likely to gain the greatest advantage from this benefit.” D. MALICKSON & J. NASON, ADVERTISING—HOW TO WRITE THE KIND THAT WORKS 58 (2d ed. 1982). The classic formula for an effective ad is represented by the acronym “AIDA,” which translates: Attention, Interest, Desire, Action. Id. at 75–76; M. RAY, ADVERTISING AND COMMUNICATION MANAGEMENT 43–44 (1982); see also id. at 234–64 (advertising employs appeals to consumer goals and needs to enhance attractiveness of products); L. BOGART, supra note 75, at 13 (advertising aims to catalogue attributes of product and inform consumers of its virtues); Capitam, The Selling of the American Public, in ADVERTISING’S ROLE IN SOCIETY 143 (1974) (“Advertising involves the manipulation of symbols; its intention is to affect social perceptions and individual behavior.”).

Advertising often “moves away from the product and into pure gimmickry in order to break through the barrier of inattention.” L. BOGART, supra note 75, at 142.

When once we look at these appeals coldly and objectively, when once we question their meaning and value, many of them appear monstrous or ridiculous. But the fatuous, absurd, and exaggerated symbols through which some advertisers metaphorically proclaim the virtues of their products are rarely a subject of dispassionate examination by the average citizen of contemporary America. They are accepted as part of the landscape. Does anyone really believe that “Us Tareyton Smokers Would Rather Fight Than Switch”? Of course not; yet no one is indignant at this widely proclaimed statement, because no one assumes it is to be taken at face value.

Id. at 6.

The ultimate purpose of most advertising is to sell. Id. at 13. Advertising performs two significant functions for business: arousing in consumers the desire to buy a new product, and communicating logical and/or emotional reasons for choosing the advertised product over the competitor’s. Mortimer, Advertising: An Integral Function of Business, in ADVERTISING’S ROLE IN SOCIETY, supra note 100, at 167; see D. MALICKSON & J. NASON, supra note 100, at 58; see also M. RAY, supra note 100, at 250–64 (use of emotional, competitive, and credibility appeals to persuade consumers to buy); id. at 308–14 (using honesty, repetition, or fear as stimulus).

See M. RAY, supra note 100, at 46–47 (describing “marketing-communication research system”). These techniques include styling the tone of an ad to appeal to consumer needs. Id. at 234–64. Irritation, humor, distractions, and testimonials are all commonly
search\textsuperscript{104} to maximize the impact of a chosen message. Indeed, the multi-sensory approach of television advertising has prompted Judge Bazelon to express concern about its possible effects: "[A]\nordinary habitual television watcher can avoid these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the [subconscious] impact of this pervasive propaganda, which may be heard even if not listened to . . . ."\textsuperscript{105}

\textit{United States v. National Association of Broadcasters} reflects a conflict between the policies of the antitrust laws and the regulatory goals of the FCC. Both regulatory regimes share the broad purpose of protecting the public interest, yet their specific objectives are potentially incompatible. Antitrust seeks to promote competition;\textsuperscript{106} an important goal of the Communications Act is to prevent excessive commercialization.\textsuperscript{107} Commentators have suggested that these goals may become increasingly antagonistic in the future.\textsuperscript{108} This section of the Note addresses the problems such antagonism poses for broadcast regulation.

\section*{A. Code Advertising Standards Under Attack}

The most recent edition of the NAB Code contained two ma-

\begin{footnotesize}
\begin{enumerate}
\item[104] See D. Juggenheim & P. Turk, Advertising Media 33-44 (1980) (establishing market profiles based on geographic market and competitive product statistics); \textit{id.} at 45-56 (establishing consumer profiles by using demographics and audience characteristics); \textit{id.} at 59-71 (considerations in media planning). Advertising professionals compile various indexes of data to facilitate assessment and selection of advertising targets. J. Sissors & J. Surmanek, Advertising Media Planning 109-39 (2d ed. 1982). In targeting a specific type of consumer, advertisers compile data on personalities and buying habits, and utilize "psychographic analysis." \textit{Id.} at 110-24. To determine the geographic boundaries of the target market, advertisers utilize sales analyses of specific product brands and categories in conjunction with buying power indexes and geographic market data. \textit{Id.} at 124-36. 


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CHANGING CHANNELS IN BROADCAST REGULATION

1. **The Time Standards**

The Justice Department charged that the NAB Code time

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109. The Program Standards include guidelines for the presentation of news, politics, controversial public issues, community responsibilities, religion, and children's programming. The Advertising Standards contain guidelines pertaining to advertising claims, medical products advertising, contests, premiums, and other offers, as well as general rules regarding time standards and presentation. See J. BITTNER, supra note 47, at 360.

110. Banned products included distilled spirits (hard liquor), fortune-telling, tip sheets, and hypnosis. Restrictions included on-camera beer and wine drinking. Proscribed techniques included "bait and switch" (one product is advertised to attract customers but is unavailable upon a customer's request), program-length commercials, and subliminal advertising. R. ELLMORE, supra note 70, at 262-63; Pridgen & Engel, supra note 86, at 249-50.

111. See Pridgen & Engel, supra note 86, at 235-37.


113. Id. at 163. While mere membership in a trade association is insufficient to constitute an antitrust violation, an agreement to engage in or adhere to an unlawful practice may subject the individual members to antitrust liability. Egan, Trade Association Counseling: Exercises in Risk Management, 46 BROOKLYN L. REV. 183, 183-84 (1980); see Bembow, Brown, Burditt & Egan, Contracts with Trade Associations, 49 ANTITRUST L.J. 833, 835-38 (1981). The threat of private suits against NAB members was an influential factor in the NAB's decision to enter into a consent agreement in the government's suit. See supra note 22 and accompanying text.

Although a primary goal of self-regulation is protecting an industry from harming itself, such a scheme may cause "injury to competition which cannot be justified as furthering legitimate self-regulatory ends." Silver v. New York Stock Exch., 373 U.S. 341, 358 (1963). Despite previous deference from an administrative agency, a self-regulated industry can run afoul of the antitrust laws. See, e.g., National Soc'y of Professional Eng'r's v. United States, 435 U.S. 679 (1978) (society of engineers' canon of ethics prohibiting members from submitting competitive bids held to be unreasonable trade restraint); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (bar association rule prescribing minimum fees for legal services held to violate § 1 of Sherman Act); United States v. National Ass'n of Broadcasters, 536 F. Supp. 149 (D.D.C. 1982) (television industry trade association's self-imposed advertising standards alleged as unlawful restriction on supply of commercial time); National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965) (agreement fixing composition of wheat types in macaroni to depress demand for durum wheat constituted unlawful price fixing). Industry-promulgated codes of conduct are particularly suspect as potential restraints on competition. Blecher, Product Standards and Certification Programs, 46 BROOKLYN L. REV. 223, 230-31 (1980).
standards\textsuperscript{114} were an "artificial manipulation" of the supply of television advertising time.\textsuperscript{115} The government maintained that limiting the total amount of commercial time increased advertising prices.\textsuperscript{116} This proposition is based on the assumption that the traditional supply/price relationship\textsuperscript{117} exists in the television advertising context. But television possesses characteristics which interfere with the normal operation of market forces. These include scarcity of broadcast time and frequencies,\textsuperscript{118} and government regulation.\textsuperscript{119} Acknowledging these characteristics, the court concluded that the Code's time standards were not necessarily an unlawful limitation on the supply of advertising time.\textsuperscript{120} 

Empirical data collected by the Commission showed that a substantial number of radio stations were broadcasting less advertising than the maximum limits set by the FCC\textsuperscript{121}—suggesting that competition in the market actually sets the optimal amount of advertising time.\textsuperscript{122} This theory appears equally applicable to television.\textsuperscript{123} Slight increases in the amount of advertising time tend to reduce viewership and the attention devoted to commercials.\textsuperscript{124} 

Factors augmenting the scarcity concept are the high cost of television advertising, the existence of only three major networks, and the questionable cross-elasticity of advertiser demand for television. The cost of advertising on television is staggering,

\textsuperscript{114} See supra note 15.
\textsuperscript{115} 536 F. Supp. at 152.
\textsuperscript{116} Id.
\textsuperscript{117} For a discussion of this relationship and its bearing on antitrust law, see R. Posner & F. Easterbrook, Antitrust Cases, Economic Notes and Other Materials 4-10 (2d ed. 1981).
\textsuperscript{118} 536 F. Supp. at 156; see supra notes 37–38 and accompanying text. Scarcity of broadcast time is an absolute physical limitation, 536 F. Supp. at 156 & n.24, but frequency scarcity is no longer supportable due to technological developments such as cable television and satellite access. Even the spectrum limitations on UHF signals can be alleviated in part by bandwidth compression, although this might require consumers to purchase new receivers. Fowler & Brenner, supra note 20, at 222 n.70; cf. id. at 225 (some existing UHF channels have remained unclaimed for decades).
\textsuperscript{119} 536 F. Supp. at 156–57.
\textsuperscript{120} Id. at 157.
\textsuperscript{122} Id.
\textsuperscript{123} See Deregulation of Television, supra note 34, at 37,254–55 app. C (FCC staff study of 60 stations in Florida, Georgia, and Alabama); Broadcasting, Nov. 28, 1983, at 30 (NAB survey of 240 stations in 60 markets; results were based on FCC data compiled during license renewal process).
\textsuperscript{124} R. Noll, M. Peck & J. McGowan, supra note 50, at 34.
although it varies widely with the time of day and the specific program. For example, airing a thirty-second commercial during the 1984 Super Bowl cost an advertiser $450,000,\(^\text{125}\) while the average price for a thirty-second spot during prime time on ABC is $91,000.\(^\text{126}\) The existence of only three major television networks also restricts the amount of available advertising time. The cross-elasticity of demand for television advertising time has been a subject of debate,\(^\text{127}\) but it seems unlikely that any medium could adequately substitute for television. Marketing executives regard television as the most effective medium for mass marketing, citing "an unbeatable combination of 'sight, sound and motion.'"\(^\text{128}\)

Thus, the government may not have been justified in attacking the NAB Code's time standards as a significant restriction on the supply of advertising time.

2. Program Interruption Standards

The Justice Department assailed the Code's program interruption standards\(^\text{129}\) as a standardization agreement\(^\text{130}\) serving to eliminate "important forms of competition among networks and

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\(^{125}\) Broadcasting, Jan. 16, 1984, at 102. ABC has already reported that it will charge $525,000 for 30-second spots to be aired during the 1985 Super Bowl. Broadcasting, Nov. 28, 1983, at 7.

\(^{126}\) Wall St. J., Jan. 27, 1983, at 31, col. 1. Projected audience share is a major factor in setting prices for television ads. Thus, the major networks are able to charge significantly higher prices than their competitors. Compare the cost for a 30-second commercial aired on ESPN, an all-sports cable network, which ranges from $250 to $2000 depending on time and program. Friedman, Capsule Guide to Cable Networks, Madison Ave., Jan. 1983, at 123.

\(^{127}\) One commentator suggests that the demand for television advertising initially is highly elastic (very sensitive to changes in price), but only to a point where the advantages of substituting other media for television continue to have utility. R. Noll, M. Peck & J. McGowan, supra note 50, at 34. The only example of this substitution effect occurred when the government banned television advertising of cigarettes in 1971. Approximately 63% of the $211 million spent on television advertising in 1970 was shifted to other media in 1971. The remaining 37% was accounted for in reduced advertising expenses. Broadcasting, Jan. 24, 1972, at 40.

\(^{128}\) Wall St. J., Jan. 27, 1983, at 31, col. 1. Procter & Gamble, a diverse manufacturer of mass-market consumer products, spends over $400 million a year in advertising on network television. Id. In 1982, the five largest television advertisers were Procter & Gamble (spending $576.9 million), General Foods ($303.2 million), General Mills ($201.3 million), American Home Products ($197.5 million), and General Motors ($191.5 million). Wall St. J., Mar. 31, 1983, at 31, col. 1.

\(^{129}\) See supra note 17.

\(^{130}\) See supra note 17. Standardization agreements are agreements among horizontal competitors to standardize their products. See id. at 159. Such agreements are not permissible violations of the Sherman Act; their effect on competition is analyzed with respect to the structure of the industry involved and the degree of market development therein. L. Sullivan, Handbook of the Law of Antitrust 277-79 (1977).
stations both for advertisers and for viewers." 131 Together with the Code's time standards, the program interruption standards prevented a station from designating hours for commercial-free programming 132 or from staggering commercials in "odd-lot" sizes. 133

Given the reach and market penetration of the three major networks, 134 the Code's program interruption standards amount to an interfirm product agreement among the networks. 135 The concentrated nature of the television industry, 136 coupled with the interaction of Code program interruption and time standards, has served to maintain the high price of prime time network advertis-

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132. Id. at 159 n.37. This provision ultimately worked to the detriment of Code sub-
scribers by spurring viewer demand for commercial-free programming. Mink, Why the Networks Will Survive Cable, ATL. MONTHLY, Dec. 1983, at 63. Viewers were thus induced to subscribe to "pay cable" services such as Home Box Office and the Movie Channel. Id.
133. Members of the advertising community suggest, however, that the networks may object to odd-sized commercials, since they would disrupt the overall timing and sequenc-
ing of programs and complicate program editing. Friedman, supra note 108, at 38. Most commercials are currently produced and sold in 30- or 60-second blocks. O. Kleppner, supra note 75, at 142; Miller Interview, supra note 75. Even if a firm with a large advertis-
ing budget wished to produce a five-minute commercial, the networks would discourage such an ad for fear of disrupting program sequence. Sequencing is especially sensitive during prime time—which is precisely when the advertiser would most want its commercial aired. Such an expensive marketing ploy could only be justified if displayed during a pe-
riod of maximum exposure.

Advertisers are gradually beginning to experiment with odd-sized commercials. A 90-
second ad for British Airways was hailed as an artistic success and found to be substan-

134. In 1979, it was estimated that 99.9% of all homes wired for electricity had black and white television sets and that 89.8% had color sets. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 766 table 1384 (102d ed. 1981).
135. Levin, supra note 96, at 635.
136. Concentration of market share in the three major networks, coupled with their extensive reach, see supra note 134, makes the television industry a three-firm oligopoly at the national level. S. Long, THE DEVELOPMENT OF THE TELEVISION NETWORK OLIGOP-
OLY 61–69, 112–23 (1979). An industry can be structurally classified as an oligopoly if its biggest firms hold market shares large enough so "that they will recognize the interaction of their own behavior and their rivals' response in determining the values of the market variables." Id. at 61. One commentator has described the concentration of power in the three networks as a triopoly possessing all the characteristics of monopoly power. See B. Litman, THE VERTICAL STRUCTURE OF THE TELEVISION BROADCAST INDUSTRY: THE COALESCENCE OF POWER 24–28 (1979).

This high concentration of power, together with the coordinating nature of the NAB, prompted the Justice Department to examine the NAB Code for anticompetitive effects. Interview with Kenneth C. Anderson, former Chief of the Special Regulated Industries Section of the Antitrust Division of the Justice Department, in Washington, D.C. (Nov. 18, 1982) [hereinafter cited as Anderson Interview].
This has occurred through a continuing restriction on the supply of advertising time that has never been accompanied by a corresponding decrease in demand. Even if they do not constitute price fixing, the NAB Code’s Advertising Standards indirectly result in greater advertising revenues for the three major networks.

3. Multiple Product Standard

The Code’s multiple product standard, which barred advertisers from promoting two products within a single thirty-second spot, was deemed a per se violation of the Sherman Act. Under the multiple product standard, said the court, “if [an advertiser] wishes to promote more than one item, he must purchase at least sixty seconds of time—twice as much as he may actually want or need.” Thus, the standard artificially stimulated demand for commercial time, thereby increasing both the price of time and the revenues of broadcasters.

To any firm compelled by the nature of its product or by industry marketing practices to rely on television advertising, this standard imposed a formidable burden. But its impact was especially severe on smaller firms, which were precluded from using any portion of a thirty-second spot to launch or expose a second product whose sales did not justify a commercial of its own. Thus, the standard discriminated in favor of larger, “deep pocket” concerns capable of financing longer commercials to advertise several products per spot. Consequently, “[t]elevision advertising [reduced] competition by creating a cost barrier to firms in

137. Had the court concluded that the program interruption and time standards exerted more than a de minimis effect on the price of advertising time, the standards would have been deemed violative of the Sherman Act. 536 F. Supp. at 157-58. A finding of de minimis effect means that price is set essentially by other, neutral factors—type of programming, day of the week, time of day, audience size and demographics, or marketing strategy of the particular advertiser. Id. However, even if these factors were found to influence price, the Code would still have been held to violate the antitrust laws if its anticompetitive effect was more than de minimis. Id. at 158. Ultimately, the court held that the issue could not be resolved on summary judgment, and left the determination for the trial court. Id.

138. See supra note 18.
139. 536 F. Supp. at 163.
140. Id. at 160 (emphasis added).
141. Id.
143. 536 F. Supp. at 160.
144. Id.
industries that depend on advertising."145 In an unrestricted market, advertisers would be free to allocate their resources in a more cost-effective manner by promoting several complementary products in a single commercial spot.146 A fatal attribute of the multiple product standard was its coercive nature, giving the advertiser no option but to accede to its demand.147 But in the wake of the government's antitrust suit, and a settlement between the three major networks and Alberto-Culver Co.,148 advertisers now appear to enjoy a variety of options.

B. Antitrust Law and the Federal Communications Commission

While the FCC is not empowered to decide antitrust issues,149 the antitrust laws apply directly to the broadcasting industry.150 FCC regulation does not prevent federal courts from enforcing the antitrust laws, since they retain jurisdiction to decide antitrust issues regardless of conflicting Commission action.151 Several courts have suggested that the Commission consider possible anticompetitive factors in its decisions.152 Although the Commission may consider whether a competitive restraint violates the public interest standard, one commentator has noted:

In antitrust policy the relevant factors are so numerous, the policy choices so complex, and the impact so broad that the ulti-

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146. 536 F. Supp. at 161 n.46.
147. In the Alberto-Culver suit, see supra note 98, several multiproduct commercials submitted by plaintiff to each of the three networks had been rejected. Although the NAB Code had been discarded, the networks based their rejection on standards contained in their own codes. Complaint at 17, Alberto-Culver. Both ABC and NBC have stopped adhering to these provisions and have negotiated with Alberto-Culver to allow the purchase of multiproduct commercial spots. Id.; see BROADCASTING, Dec. 5, 1983, at 39. Alberto-Culver reached an out-of-court agreement with CBS on Feb. 3, 1984 whereby CBS agreed to accept Alberto-Culver's two-product, 30-second commercials, subject to their conformance with the network's qualitative standards. Settlement Agreement at 3, Alberto-Culver. Alberto-Culver dismissed the suit against all parties on Mar. 12, 1984 after the defendants dropped their restrictions against split 30-second commercials ("split-30's"). BROADCASTING, Mar. 19, 1984, at 42.
148. See supra note 147.
151. RCA, 358 U.S. at 346.
152. See, e.g., id. at 351-52; General Tel. Co. v. United States, 449 F.2d 846, 857 (5th Cir. 1971).
mate decision should rest with a decisionmaker who is without overt institutional bias and who is in a position to balance the multiplicity of competing interests. The courts [are] better suited for this task than . . . regulatory agencies, each of which is affected by the limited perspective of the industry under its protective jurisdiction.153

The public interest standard has become a "battleground for broadcasting's regulatory debate."154 Whereas the FCC has found the public interest to require diversity of programming155 and prevention of overcommercialization,156 Congress, through the antitrust laws, has identified a prominent public interest in free and fair competition.157 Unprecedented developments in television technology and the subsequent obsolescence of the scarcity rationale have raised questions about the effectiveness of industry self-regulation and its impact on potential competition in the video marketplace. The burgeoning new video media will compete increasingly with broadcast television for its audience and for the advertisers who finance its operation. With the advent of deregulation, competitive forces in the market offer the most promising means of checking overcommercialization. Thus, the goal of the antitrust laws can be viewed as complementing, rather than contradicting, the goals of the Communications Act: the public interest in preventing overcommercialization could conceivably be served by promoting the public interest in free competition.

III. MARKET DISCIPLINE AS THE NEW ALTERNATIVE

The demise of the NAB Code leaves television advertising time subject to containment by natural competitive forces in the

153. Shuman, supra note 78, at 42.
marketplace. Ideally, market discipline\(^{158}\) will determine the appropriate level of advertising through competition among broadcasters and substitute media for the greatest audience share.\(^{159}\) Advocates of market discipline assert that competition alone will make overcommercialization self-defeating for the broadcaster.\(^{160}\) As one proponent has aptly stated, "The viewer always retains ultimate control over what enters his home; he may choose to turn the channel."\(^{161}\) Thus, the threat of an eroding audience share should force broadcasters to resist overcommercialization.\(^{162}\) The market discipline approach is particularly attractive because market forces react more swiftly and efficiently to a change in viewer preferences.\(^{163}\)

### A. Obsolescence of the Previous Regulatory Scheme

The previous regulatory framework cast the licensee in the role of public trustee acting under government guidance, with the obligation to exercise "a diligent, positive and continuing effort . . . to discover and fulfill the tastes, needs and desires of his service area."\(^{164}\) The licensee's trustee role stemmed from the exclusivity of the government grant: a position on the limited broadcast spectrum. License assignment and renewal were based on the public interest standard.\(^{165}\) But this approach to regulation underestimated the influence of competition on the licensee's behavior.

In *NBC v. United States*, Justice Frankfurter used the spectrum scarcity rationale to support his endorsement of the FCC's broad authority to regulate in the "public interest."\(^{166}\) He noted, however, that "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regula-

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158. *See supra* notes 28–29 and accompanying text.
159. *See infra* notes 180–216 and accompanying text.
160. Anderson Interview, *supra* note 136; *see also Radio*, 84 F.C.C.2d at 1002–05 (discussing role of market forces in eliminating commercial guidelines for radio).
161. Fowler & Brenner, *supra* note 20, at 229 (emphasis added); *see Abrams*, *supra* note 77.
162. *See supra* note 76 and accompanying text.
166. 319 U.S. 190, 216 (1943). "The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest." *Id.* at 216.
tions, it must be assumed that the Commission will act in accordance with its statutory obligations." Time and changing circumstances have indeed raised doubts about the continued vitality of the scarcity rationale, which was formulated when broadcasting was in its infancy. Although television was a technological reality when the Communications Act was adopted, its drafters could never have predicted the revolutionary effect it would have on society. The growing size and complexity of the television industry have left the scarcity rationale outdated and the Act in urgent need of revision.

Cable television's increasing market penetration and popularity have helped render the scarcity rationale obsolete. Cable's rapid growth has made it an increasingly attractive medium for advertisers. Indeed, the advance of cable has been

167. Id. at 225.

168. No one in 1934 could have predicted that broadcast income for the total television industry in 1980 would be $1.65 billion. STANDARD & POOR'S CORP., INDUSTRY SURVEYS: COMMUNICATION CURRENT ANALYSIS 64 (1982) [hereinafter cited as INDUSTRY SURVEYS].

169. See supra note 10 and accompanying text. See generally E. KRASNOW, L. LONGLEY & H. TERRY, supra note 12, at 240-70 (summarizing congressional efforts to rewrite the Communications Act).

170. Cable currently reaches 39% of all American homes. Mink, supra note 132, at 64 (based on Nielsen figures). Industry analysts are predicting that cable will achieve market penetration of 50% to 60% by 1990. O & M Projects Cable Reaching 60% in '90, ADVERTISING AGE, Dec. 15, 1980, at 56, col. 4.

171. Spectrum scarcity is a principle that is technologically inapplicable to cable television. Cable distributes its signals by wire; it does not utilize the spectrum to transmit its signal. Fowler & Brenner, supra note 20, at 226; D. RICE, M. BOTEIN & E. SAMUELS, DEVELOPMENT AND REGULATION OF NEW COMMUNICATIONS TECHNOLOGIES 9 (1980).

The standard cable system uses a tower with antennas to receive broadcast television signals. Id. at 10. Some signals are relayed by microwave transmission. Id. at 10 n.42. These signals then are connected by coaxial cable from the antennas to the "headend" facility, which is the "master control station and nerve center" of the cable system." The headend processes these signals, often by translating them from a carrier signal (high frequency signal sent through the air and then modulated by a lower signal) to a standard television broadcast signal which corresponds to a channel. Once it is received by the microwave link, the desired television signal must first be demodulated (removed from the microwave transmission carrier). After filtering out unwanted signals, all signals are combined into one composite signal and then amplified prior to their distribution through the cable system. Id. at 10 n.43. The cable distribution network then carries these processed and amplified signals to the television sets of subscribers. Id. at 10 n.44. This is accomplished through a system of trunk cables which carry the signals from the headend, and feeder cables which carry the signals from the trunk cable to a drop cable connected to the subscriber's home. Id. at 10-11 nn.44-45.

172. INDUSTRY SURVEYS, supra note 168, at 62. Cable industry advertising revenues exceeded $382 million in 1983, a 58.4% increase over 1982 figures. The Cable Advertising Bureau projects revenues of $576 million for 1985. BROADCASTING, Jan. 30, 1984, at 64. But see Mink, supra note 132, at 65-66 (increase in advertising revenues for cable television
accompanied by a decline in the networks’ audience share.173

Another deficiency of television regulation is its failure to account for technological developments.174 The 1980’s are expected to bring further competition to over-the-air television from direct-broadcast satellites (DBS).175 Already the FCC is investigating the possibilities of low-power television,176 which can transmit signals in areas as small as ten percent of a typical service area, thus providing service in areas too small for profitable operation of a full-power station.177 Multipoint distribution service (MDS),178 another source of competition, transmits signals on microwave frequencies without utilizing the conventional broadcast spectrum. These new sources of programming have further contributed to the scarcity rationale’s obsolescence.

Competition in the video marketplace will acquire an entirely new meaning in the coming decade. With the wide array of available broadcasting services, the real scarcity in the near future may be a scarcity of programming and advertising dollars.179 Thus, the industry which Congress set out to regulate in 1934 has changed beyond recognition; fundamental principles upon which the Communications Act is based—such as the scarcity rationale—no longer reflect reality. The existing statutory system can no longer function as an effective regulatory model.

B. The Effect of Competition on Potential Overcommercialization

The elimination of commercial guidelines should not imply

has neither been as great nor as rapid as initially forecast, causing some cable channels to reduce programming).

173. INDUSTRY SURVEYS, supra note 168, at 65; Mink, supra note 132, at 63.


175. Ferris, supra note 174, at 174–76.


177. Ferris, supra note 174, at 172. Low-power television also can be used to broadcast to segmented audiences or special interest groups in urban areas without interfering with conventional stations’ broadcasts. Id.

178. Id. at 173. MDS was originally intended for use in hotels, apartments, and resort facilities, but has been used regularly in private homes as a substitute for cable. Id. See Deregulation of Television, supra note 34, at 37,244.

179. See Fowler & Brenner, supra note 20, at 223; Pridgen & Engel, supra note 86, at 233.
government approval of a disproportionate ratio of advertising to programming time. "A marketplace approach to broadcast regulation . . . emphasizes the role of new competitors, and new competition among existing firms, to ensure service in the public interest."  

There must be a reasonable balance, however, between the FCC's goal of preventing overcommercialization and the antitrust goal of promoting and preserving competition. By basing regulation on competition, market discipline seeks to achieve both goals simultaneously.

Protection of the public interest through reliance on competition in broadcasting received judicial endorsement as early as 1940. Distinguishing broadcasting from common carrier regulation, the Supreme Court in *FCC v. Sanders Brothers Radio Station* stated:

> The Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition. . . . Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public.

Reaction to new competition in the video marketplace from the viewing audience, advertisers, and individual licensees should provide adequate safeguards in maintaining acceptable levels of advertising.

1. **The New Competition**

As consumers of the products and services advertised on television, viewers are television's indirect financiers. Rapidly growing alternatives to over-the-air television have already begun to compete for viewers and advertising dollars. One favorable effect of eliminating commercial guidelines for television is the greater flexibility afforded broadcasters to compete with these new media.

a. **Cable Television.** Cable television stands as the leading rival of traditional television broadcasting. Cable's increased channel capacity has created the availability of diverse, segmented programming. Specialty channels now offer all-news, all-sports,
music videos, health news, and arts formats, along with programming specifically tailored to blacks, Hispanics, and children. The booming growth of cable proves that viewers are willing to pay for more diverse and commercial-free programming.

Cable television is attracting increasing advertiser support for its programming. The medium possesses qualities distinct from over-the-air television which may prove advantageous to certain advertisers. With its segmented, special interest programming, cable permits advertisers to target specific markets with a precision impossible on network television. This "narrowcasting" affords the advertiser a more efficient means of promoting products or services, an efficiency enhanced by reduced overhead cable advertising rates, which are substantially lower than those of broadcast television. Cable's lower rates in turn allow greater flexibility in the presentation and timing of commercials. Advertising on cable television also offers the opportunity for development of experimental formats and styles. Program-length commercials, formerly barred from broadcast television by the
FCC,193 may be uniquely suited to cable's segmented format and lower advertising costs.194

b. Subscription Television. Subscription television employs the facilities of a conventional television station to transmit a "coded" (scrambled) signal to individual dwellings.195 A device is then used to decode the scrambled signal to allow reception on television receivers.196 This commercial-free broadcast service is subsidized directly by subscribing viewers.197

Subscription television's primary appeal is to those whose communities have not yet been wired to receive cable television signals.198 Although the service currently reaches a limited market,199 subscription television companies expect to be operating ninety stations by 1985, serving three million subscribers and generating revenues of $720 million annually.200 While not nearly as formidable a competitor as cable, subscription television threatens an additional drain on the audience shares of advertiser-supported network television.201

c. Direct Broadcast Satellite System. Although still in development, DBS will transmit programming directly to viewers by a particularly valuable in educating consumers about functionally or technologically complex products such as computers and robots. Moreover, it would provide tremendous market exposure for an advertiser willing to invest in the time required to present its product in such a format. See Brown, Advertising and the New Media, CHANNELS, Mar./Apr. 1983, at 37; Pridgen & Engel, supra note 86, at 233; see also Beltramini, The Impact of Informercials: Perspectives of Advertisers and Advertising Agencies, J. ADVERTISING RESEARCH, Aug./Sept. 1983, at 25, 25–31 (research finding ad agency media directors and creative directors to favor informercials).

193. See R. ELLMORE, supra note 70, at 238–39.
194. The prohibitive cost of advertising on broadcast television negates any incentive for developing program-length commercials at the network level. Increased competition from cable, however, has prompted test marketing of new advertising formats. See, e.g., Koten, supra note 133, at 31, col. 1.
197. Id. at 474.
198. "[S]cattered populations in rural areas and the sheer cost of constructing some systems may keep 20 percent of American homes from ever having access to cable carrying video signals." Mink, supra note 132, at 64.
199. In 1980, subscription television was received by 400,000 homes in seven geographic markets. Krattenmaker & Metzger, supra note 196, at 474. In 1983, it was available to 20 American stations. Deregulation of Television, supra note 34, at 37,244.
201. Krattenmaker & Metzger, supra note 196, at 479.
system of communications satellites and home receiving units.\textsuperscript{202} The system employs technology similar to that used in conveying programs to cable systems via satellite.\textsuperscript{203} A dish-shaped antenna outside the home ("earth station") receives satellite signals; another device converts the signals to permit reception on a standard television set.\textsuperscript{204} One DBS service has proposed a three-channel system offering a wide array of programming choices.\textsuperscript{205}

The cost of DBS cannot be borne by subscribers alone and will require advertising support. The system’s broad geographic reach should make it an attractive medium for advertisers with mass-marketed national products. As with subscription television, the most promising markets for DBS initially will be rural and central city areas where cable is not yet available.\textsuperscript{206} Nevertheless, DBS is likely to tap audience shares and advertising revenues presently flowing to traditional broadcast television.

The video market has evolved to the point where close substitutes for conventional over-the-air television will soon be readily available in most geographic areas.\textsuperscript{207} The penetration of cable television and rapid development of competitive alternatives has increased the cross-elasticity of demand for advertising on traditional broadcast television. Demand should become even more elastic with the advent of a functional DBS system and the increased encroachment of cable television upon the three networks’ audience shares.

2. Additional Safeguards

In its proceedings on radio deregulation, the FCC identified three sources of market pressure that should inhibit commercial

\begin{itemize}
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id. at 479–80, 405 n.10.
\item \textsuperscript{205} This system, proposed by Satellite Television Corporation, envisions one channel featuring movies, concerts, and theater; a second channel offering public affairs, children’s programs, and fine arts programming; and a third featuring sports, adult education, and experimental theater. Note, \textit{Direct Broadcast Satellites: Ownership and Access to the New Technology}, 33 FED. COM. L.J. 245, 246 n.6 (1981); see also Landro, \textit{United Satellite Makes Progress in Talks With Movie Studios, Cable-TV Networks}, Wall St. J., Apr. 7, 1983, at 16, col. 1 (specific plans of United Satellite Communications, Inc. include five-channel system with sports, news, general interest, and two movie channels; proposed fees are $500 installation per home and $17.50 per month).
\item \textsuperscript{206} Ferris, \textit{supra} note 174, at 175.
\item \textsuperscript{207} See Deregulation of Television, \textit{supra} note 34, at 37,243–45 (assessing technologies which “may provide genuine substitutes in the viewer's mind for regular television broadcasting”).
\end{itemize}
abuse: audiences, advertisers, and individual licensees. The interaction of these groups should bear equally on enforcement of market discipline in the television industry. Both viewers and advertisers are sensitive to commercial clutter. Viewers react to clutter with an incapacity to differentiate among the various messages. They listen less attentively, retain less of the message, and become annoyed by the incessant appeals. Thus, clutter reduces return on investment for the advertiser, who must pay the high price of television time.

An advantage of market discipline is that it gives the audience ultimate control over optimum advertising levels. With an increasing number of video programming alternatives, viewers can select the channel that offers the most appealing ratio of programming to advertising. In an industry marked by fierce competition for audience share and ratings, fear of losing an audience is of paramount concern to the individual station. Thus, competition provides the most effective means of regulation. Commercial excess is likely to cause a decline in the viewing audience, resulting in lower ratings for the station and the particular program. This should force advertisers, who have a vested interest in reaching the maximum target audience, to shift their commercials to other stations. Thus, overcommercialization in a deregulated market is self-defeating for the licensee who depends on advertiser support.

Eliminating commercial guidelines and relying on market incentives also would allow advertisers to experiment with alternative forms of advertising presentation. Both the public and advertisers will benefit from development of more specialized advertisements and "informercials." More importantly, eliminating the guidelines will not reduce the FCC's licensing authority under

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209. See supra note 75.


211. O. Kleppner, supra note 75, at 127; cf. Abrams, supra note 77 (viewers "zap" commercials with remote control devices).

212. Regardless of audience size, advertisers have grown concerned about the impact of commercials aired during any show "clogged with pitches." Lazarus, supra note 210, at 8.

213. Anderson Interview, supra note 136; see BROADCASTING, June 18, 1979, at 27.

214. See Radio, 84 F.C.C.2d at 1007; cf. Koten, supra note 133 (90-second commercials).
the public interest standard.\textsuperscript{215} The Commission must still consider a totality of factors during the license issuance and renewal process to determine whether a particular station has met its public service obligations.\textsuperscript{216} Commercial excess may be one such factor.

Changes in the nature of the television product have compelled a reexamination of regulation in this dynamic industry. This, in turn, poses new challenges for controlling television advertising to safeguard against abuse. Reliance on market discipline to contain commercial excess will afford broadcast television the flexibility to compete with the new video media while providing a more accurate gauge of public preferences.

\section*{IV. Conclusion}

Eliminating television advertising standards is a positive step for the future of broadcasting. Previous regulation by the government and the NAB has tended to fabricate "artificial scarcity and inflated prices."\textsuperscript{217} The emergence of new alternatives to traditional broadcast television has reshaped the competitive nature of the industry. Furthermore, the judiciary has endorsed encouragement of competition in broadcasting and reliance on market forces to serve the public interest.\textsuperscript{218}

Self-regulation of advertising has always been promoted in the television industry.\textsuperscript{219} The increasing market penetration of cable television and the development of new forms of broadcasting technology have resulted in greater cross-elasticity of demand for television advertising time.\textsuperscript{220} Moreover, interaction among audi-

\textsuperscript{215} The consent decree only mandated elimination of the NAB Code's Advertising Standards, which were the subject of the government’s antitrust suit. See supra note 22 and accompanying text.

\textsuperscript{216} The FCC's decision to deregulate broadcast television eliminated ascertainment and logging requirements for commercial television licensees. See Revision of Programming and Commercialization Policies, supra note 34, at 33,588 & 33,596-97 & 33,599-601. Thus, citizens will find it more difficult to review a licensee's performance to assess whether their interests are being served. See Broadcasting, July 2, 1984, at 31-32. The elimination of logging requirements may increase the administrative difficulty and costs for the FCC to detect the occurrence of a market failure, or to intervene if overcommercialization ensues. But see Berger, supra note 34, at 24, cols. 2-3 (broadcasting and advertising executives do not expect increase in commercials broadcast per hour).

\textsuperscript{217} Ferris, supra note 174, at 170 n.3.


\textsuperscript{219} See Ramey, supra note 58, at 85.

\textsuperscript{220} See supra notes 185–207 and accompanying text.
ences, advertisers, and the price of advertising time would create a regulatory system capable of reacting swiftly and efficiently to correct commercial excess.\textsuperscript{221} Market discipline will better serve the public interest because the market directly reflects viewer preferences and tolerances regarding the appropriate level of television advertising.

Resort to market discipline as a regulatory scheme does not preclude the FCC from intervening in the event of market failure.\textsuperscript{222} Nor does it preclude the FCC from conducting hearings or issuing notices of inquiry or policy statements when it identifies a potential threat to the public interest.\textsuperscript{223} The FCC retains its licensing authority to review the practices of individual licensees to determine the level of their public service.\textsuperscript{224} In addition, networks and individual stations are free to implement their own guidelines.\textsuperscript{225}

The effects of the decision to abolish the NAB Code cannot be assessed until the industry has had time to adjust. But elimination of the Code may serve as a prod to expedite review and revision of the Communications Act so that it may be rendered more responsive to technological change in this volatile industry. Finally, the reliance on market forces may help to provide greater programming diversity on conventional over-the-air television.

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\begin{footnotes}
\item[221.] See supra notes 208–16 and accompanying text.
\item[222.] The FCC could act pursuant to its authority to “[m]ake such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this Act . . . .” 47 U.S.C. § 303(r) (1976 & Supp. V 1981).
\item[223.] Neither does it overturn judicial decisions on the issue of commercial excess. \textit{E.g.}, Action for Children’s Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977).
\item[224.] This may prove an empty process since stations are no longer required, as they had been under the NAB Code, to keep program logs or records to show compliance with specific standards.
\item[225.] These guidelines, however, must not contain provisions similar to the NAB Code’s Advertising Standards that prompted the government’s antitrust suit; otherwise, the individual stations could face similar litigation. \textit{See, e.g.}, Complaint at 11–13, Alberto-Culver Co. v. National Ass’n of Advertisers, No. 83–3427 (D.D.C. dismissed Mar. 12, 1984).
\end{footnotes}