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Regulating Media Content in an Age of Abundance

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Testifying at a Senate Commerce Committee hearing entitled "Rethinking the Children's Television Act for a Digital Media Age" less than a month after taking the helm at the Federal Communications Commission (FCC), Chairman Julius Genachowski agreed with the committee that the Children's Television Act should be reexamined "in light of the current marketplace and technologies." He told the committee that since the act was passed in 1990, "an array of new choices—direct broadcast satellite, Internet-based video, mobile services, video offerings from telephone companies, and video games—have joined broadcast and cable television as a daily reality for millions of American families. Cable has grown substantially since 1990, and of course broadcasting has now gone digital." Genachowski pledged to work closely with the committee "as it proceeds on its work in this area."[1]

Committee staff members already were researching legal bases for extending FCC authority over children's programming beyond broadcast TV to subscription television, Internet, and/or mobile video.[2] Although the chairman did not endorse such an expansion of FCC jurisdiction at the hearing, he promised to launch an inquiry to "refresh the agency's record and gather the necessary facts" to determine "how best to promote, in a digital media world, the critical goals that animate the Children's Television Act."[3]

Three months later, the FCC opened a major proceeding, *Empowering Parents and Protecting Children in an Evolving Media Landscape* (*Children's Media Inquiry*).[4] Drawing on the commission's August 2009 report to Congress pursuant to the Child Safe Viewing Act, which concluded that the media landscape had been transformed, the *Children's Media Inquiry* began with the understanding that "media platforms are abundant, content is diverse, and numerous tools exist that enable individualized control over exposure [to media] in the household."[5] The FCC observed that "[f]rom television to mobile devices to the Internet, electronic media offer children today avenues . . . their parents could never have envisioned."[6]

Nevertheless, it urged commenters to suggest "new actions that the Commission or industry can take to address the issues" and, necessarily, asked "whether the Commission has the statutory authority to take any proposed actions and whether those actions would be consistent with the First Amendment." The commission did not stop with broadcasting but invited those weighing in "to consider the full range of electronic media platforms," including broadcast television and radio and multichannel video programming distributors such as cable and satellite television, as well as "audio devices, video games, wireless devices, nonnetworked devices, and the Internet."[7]

The FCC's *Future of Media Inquiry* took a similarly broad approach. It sought comment on all media, from newspapers to the Internet, and asked a large number of questions for a report that will make policy recommendations to the commission and other government

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entities. Among other things, it asked whether public interest obligations should be "strengthened, relaxed, or otherwise re-conceptualized" and whether they "should be applied to a broader range of media or technology companies, or be limited in scope."[8]

Such questions are nothing short of revolutionary. Media regulation at the FCC primarily has been based on scarcity, either of spectrum, of sufficient "public interest" programming, or of technologies to give consumers control over viewing and listening. This rationale has been used to justify technology-specific rules, imposed primarily on broadcasting, that are constitutionally impermissible for other media. In short, the previous limitations of the medium had been used to craft a limited exception to prevailing First Amendment doctrine.

In recent years, however, and most notably in the FCC's latest studies, the agency has thoroughly documented the fact that scarcity is a vestige of the past. Yet this has not led the agency to question the propriety of its existing content controls, at least not of late. Far from it. In its current proceedings, the commission bypasses the part of the analysis that asks whether existing regulations may still be justified in the current media environment and proceeds to ask whether new requirements may be imposed, not just on broadcasting but on all media.

Scarcity, it appears, is no longer the important factor it once was. To be sure, it admirably served its purpose as a doctrinal rationalization for broadcast regulation. But now that it is all used up, the rationale is being discarded without so much as a by-your-leave. In its place, the FCC is asking whether it may expand its authority over both broadcasting and newer media platforms based on concerns about the problems of abundance, i.e., too many content options to manage, multiple platforms on which to receive them, and myriad technologies to exercise dominion over what media enters the home. Ah, the irony.

Scarcity and Its Discontents

To fully appreciate this radical change in direction, it helps to briefly review what policy makers and reviewing courts have said about scarcity as the raison d'être of media regulation. The Supreme Court explained in *Red Lion Broadcasting Co. v. FCC* that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them" and that "[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium."[9] Particular programming regulations, such as those promulgated pursuant to the Children's Television Act, were expressly predicated on this notion of spectrum scarcity[10] and on the belief that the market failed to provide a sufficient amount of quality children's programming.[11]

Similarly, regulation of "negative" speech, i.e., indecency or other types of content that the commission considers inappropriate for children, is based on a different kind of scarcity: a perceived lack of parental empowerment technology. The commission historically sought to justify regulation to discourage "indecent" content because it believed that parents had no ability to prevent access to such broadcasts by children. In *FCC v. Pacifica Foundation, Inc*., the Supreme Court agreed that the broadcast medium was a "uniquely pervasive presence" and was "uniquely accessible to children."[12] Such content regulations presumed that "parents lack the ability, not the will, to monitor what their children see."[13]

These characteristics were cited to create a limited constitutional exception, not to establish First Amendment rules for media generally. As a consequence, reviewing courts consistently invalidated FCC-type regulations for media that are neither scarce in the *Red Lion* sense nor uniquely accessible as understood in *Pacifica*. For example, the Supreme Court struck down attempts to impose restrictions similar to the Fairness Doctrine[14] on newspapers, as well as indecency regulations on cable television.[15] It also invalidated an attempt to impose indecency regulation on the Internet, contrasting the new global medium with broadcasting and finding that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."[16]

It also was widely assumed that as technological conditions changed, FCC broadcast content regulation would wither away, much like Friedrich Engels's predicted state power would atrophy after the transition to Communism. Reviewing courts pointed out that "the rationale of *Red Lion* is not immutable"[17] in that the decision was based on "'the present state of commercially acceptable technology' as of 1969."[18] They presumed "some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets."[19]

To a certain degree this happened. In the mid-1980s, the commission "found that the 'scarcity rationale,' which historically justified content regulation of broadcasting . . . is no longer valid," and it eliminated most vestiges of the Fairness Doctrine.[20] Other Fairness Doctrine corollaries were eliminated later as well, although the commission began to show a growing reluctance to relinquish power. Thus, in 2000, the D.C. Circuit directed the FCC to eliminate the political editorial rules because the agency was relying on "a thirty-year-old conclusion that the challenged rules survive First Amendment scrutiny."[21] But the more recent trend at the commission has been to explore ways to retain its authority for regulating broadcast content and to look for new theories to expand its regulatory mission as to both broadcasting and other media.

The commission has taken this position in the face of cumulative findings, both by Congress and by the agency itself, that scarcity is a thing of the past. For example, the Senate Report for the Telecommunications Act of 1996 noted that "[c]hanges in technology and consumer preferences have made the 1934 [Communications] Act a historical anachronism." It explained that "the [Communications] Act was not prepared to handle the growth of cable television" and that "[t]he growth of cable programming has raised questions about the rules that govern broadcasters," among others.[22] The findings of the House of Representatives were equally direct. The House Commerce Committee pointed out that the audio and video marketplace has undergone significant changes over the past fifty years "and [that] the scarcity rationale for government regulation no longer applies."[23]

Then-President Bill Clinton summarized the situation succinctly: "As you know, the distinction between broadcasting and publishing in terms of the First

Amendment is based on the scarcity principle. . . . When that changes, the distinction between broadcasting and print will change too."[24]

A New World

In the intervening years, the commission has borne witness to more than just the end of spectrum scarcity. Numerous proceedings on various issues have documented the birth of an age of true media abundance. Seven years ago, the FCC found in its periodic review of broadcast ownership rules that "the modern media marketplace is far different than just a decade ago." It concluded that traditional media "have greatly evolved" and that "new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history."[25]

The commission has tracked these changes over the past two decades in annual reports required under the 1992 Cable Act. In its most recent video competition report, it found that almost 90 percent of television households subscribe to a multichannel programming service such as a cable, satellite, or telco-provided service. These services bring hundreds upon hundreds of channels of video programming into the home alongside traditional broadcast channels.[26] Such findings were reconfirmed and bolstered by the FCC's 2009 *CSVA Report*, in which it found that "[t]he number of suppliers of online video and audio is almost limitless."[27] Internet-based video continues to increase significantly each year as the overall number of homes having access to the Internet continues to grow, with nearly 70 percent of U.S. households subscribing to Internet service.[28] Approximately 60 percent of Internet users view and/or download videos online, with major Internet portals increasingly licensing both preexisting and original content from traditional video providers.

Meanwhile, traditional video providers, including broadcast networks, continue to experiment with alternate programming options on alternate, out-of-the-home platforms.[29] The commission found that "77 percent of teens in the U.S. have their own mobile phone[s]," which increasingly are used to access video content from the Internet and other sources.[30] Consistent with this trend, mobile services now offer a range of video offerings for cell phones and other mobile devices, including from networks such as CNN, ESPN, MTV, Comedy Central, Discovery, and Fox News.[31]

The FCC likewise has found that a growing variety of parental controls and strategies are available now in the vast majority of television households. The commission reported to Congress that the V-chip, which allows users to block the display of television programs based on their ratings category, provides a "baseline tool" for all over-the-air viewers that own a V-chip-equipped television set or converter box.[32] Additionally, many "broadcast only" households have V-chip capability through digital converter boxes.[33] In any event, nearly 90 percent of TV households subscribe to multichannel video services that provide additional parental control tools.[34] Plus, the FCC identified "a wide array of parental control technologies for television," including "VCRs, DVD players, and digital video recorders ('DVRs'), that permit parents to accumulate a library of preferred programming for their children to watch."[35]

The availability of such technological alternatives for parental control of material entering the home explains why the Supreme Court struck down attempts to regulate content for nonbroadcast media in every case decided since *Pacifica*.[36] With respect to the Internet, "the mere possibility that user-based Internet screening software would 'soon be widely available'" was relevant to the Court's "rejection of an overbroad restriction of indecent cyberspeech."[37]

Now, the same logic suggests that broadcast regulations lack a constitutionally sound factual basis. The U.S. Court of Appeals for the Second Circuit recently observed in *Fox Television Stations, Inc. v. FCC* that "technological changes have given parents the ability to decide which programs they will permit their children to watch," and "there now exists a way to block programs that contain indecent speech in a way that was not possible in 1978."[38] The court pointed to the Supreme Court's invalidation of indecency restrictions in *United States v. Playboy Entertainment Group*[39] and, citing the *CSVA Report*, said, "We can think of no reason why this rationale for applying strict scrutiny in the case of cable television would not apply with equal force to broadcast television in light of the V-chip technology that is now available."[40]

The court in *Fox Television* declined to base its holding on these changes in the media environment, leaving that issue for the Supreme Court to decide. It found instead that the FCC's indecency enforcement regime is unconstitutionally vague. But the court's discussion of the issue should signal the FCC that its traditional justifications for regulating media have seen their day.

You Can Check Out Any Time You Like, but You Can Never Leave. . . .

It seems that the FCC no longer contemplates the possibility that it may have to relinquish some constitutional authority for media regulation as technological conditions change. To the extent that the issue may have cropped up in discussions within the agency, the prospect of diminished constitutional power is not reflected in the current inquiries about the future of media regulation. In the *Children's Media Inquiry*, for example, the commission sought comment on a very broad range of issues ranging from the availability of educational programming to advertising exposure and cyberbullying. The notice asked what individuals and industry may do to solve perceived problems, but a predominant focus is on potential actions that the government might take to address the issues raised.

Thus, the FCC asked if "enough educational content for children" is available "across electronic media platforms" and whether "governmental or industry action [is] needed to increase incentives" for such programming. It noted that the Children's Television Act is "one example of government action to promote the availability of educational content on one type of medium" and asked for comment on whether it should be strengthened.[41] The commission also cited the act as "an example of a governmental action to ensure that one type of medium—television—limits the amount of advertising viewed by children." It asked about the extent to which children are exposed "to excessive and exploitative advertisements on media other than television" and asked, "What actions, if any, should government take to create incentives to limit the exposure of children to advertisements and to promote associated policies, such as the separations policy, on these other media?"[42] The FCC urged commenters "to

consider the full range of electronic media platforms," including nonnetworked devices and the Internet.[43]

Interestingly, the word *scarcity* does not appear in the twenty-five pages and 111 footnotes of the *Children's Media Inquiry*. It does mention "the pervasive presence of media in the lives of children" once, but not in the sense the Supreme Court used that term in *Pacifica* to support regulating broadcast indecency.[44] Rather, the thrust of the commission's inquiry was that regulation might be necessary because the new media are *too* abundant and provide the public with *too* many choices, not that they lack technical means to control the programming choices available to them or to their kids. With respect to parental controls, the FCC described the many options available and asked what steps might be undertaken to increase public awareness and use of the various methods. It also asked whether the creation of "a uniform rating system that would apply to various platforms [would] be an appropriate objective."[45]

Admittedly, the commission at this point is just asking questions. What is the harm in that? After all, the *Children's Media Inquiry* invited those submitting comments to discuss "the source and extent of the Commission's authority to take the action, or whether new legislation would be needed to authorize such action." It also sought input on "the compatibility of any proposed action with the First Amendment."[46]

Perhaps it is the yawning chasm between the collapse of the commission's six-decade rationale for regulating broadcasting and its possible new regulatory mission to reform all other media that creates such dissonance. Extracting just the questions from the *Children's Media Inquiry*, the text runs over six single-spaced pages. Yet the question about the FCC's constitutional authority is appended at the end, almost as an afterthought. One might think that a complete revolution in the First Amendment rationale for media regulation merits a discussion at least as thorough as the eight paragraphs the inquiry devotes to media literacy, but there is no analysis of this point at all.

To the commission's credit, part of one of the forty-two questions in its *Future of Media Inquiry* asks whether public interest obligations should be "relaxed, or otherwise re-conceptualized in this digital era" and whether they should be "more limited in scope."[47] But that proceeding also lacks any discussion of the continuing validity of past rationales for regulation. And the prospect that the commission actually may reconsider the limits of its constitutional authority would be more plausible if the *Future of Media Inquiry* had not been linked directly to other ongoing FCC proceedings in which the commission has proposed or adopted new regulations, including rule makings on the public interest obligations of broadcast licensees, localism requirements, enhanced disclosure rules, and network neutrality.[48]

Redefining the First Amendment

The commission may well believe it may simply assert jurisdiction without laying the necessary groundwork. It would not be the first time. Congress extended certain broadcast regulations to cable television operators by merely altering the definition of the entities subject to regulation. For example, in 1971, it amended the Communications Act to apply "equal opportunities" requirements for political candidates to cable television simply by decreeing that "the term 'broadcasting station' includes a community antenna television system."[49] Likewise, Congress extended the commercial time limits in the Children's Television Act to cable merely by defining the term *commercial television broadcast licensee* to include "a cable operator."[50]

Such anomalies in the law persist only because they have never been challenged in court. After these elastic definitions were promulgated, the Supreme Court found in a case challenging other rules that the Constitution limits the ability of Congress and the FCC to blur the jurisdictional lines between the various media platforms. Thus, in *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court pointed out that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable television."[51] Similarly, the Court invalidated indecency restrictions on cable because of what formerly was "a key difference between cable television and the broadcasting media," i.e., "the capacity to block unwanted channels on a household-by-household basis."[52]

Looking forward, it is quite doubtful that the Court would permit the FCC to expand its jurisdiction to regulate media content simply by rearranging regulatory labels. Most recently, in *Citizens United v. FEC*, the majority opinion signaled a growing discomfort with different levels of constitutional protection for various media.[53] Justice Kennedy stressed:

> The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.[54]

He added that "[w]e must decline to draw, and then redraw, constitutional lines based on the particular media or technology used" to disseminate speech. Doing so is necessarily suspect because "those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux."[55]

Whether this issue ripens into a real controversy will depend on what concrete proposals to regulate media content emerge from Congress, the *Children's Media Inquiry*, or other commission proceedings. But one point is clear: If the government seeks to extend such regulation to new media platforms, or to strengthen (or even maintain) the rules governing broadcasting, it must devise new rationales that can survive constitutional scrutiny. Manipulation of regulatory classifications no longer will suffice.

Endnotes

1. Statement of Julius Genachowski, Chairman, Fed. Commc'ns Comm'n, Before the United States Senate Committee on Commerce, Science, and Transportation on *Rethinking the Children's Television Act for a Digital Media Age*, *in* 2009 WL 2194549 (July 22, 2009) [hereinafter Chairman's Statement].

2. Anne Veigle, *Rockefeller Calls for Review of Children's TV Act*, Comm. Daily, July 23, 2009, at 2.

3. Chairman's Statement, *supra* note 1.

4. 24 F.C.C.R. 13,171 (2009) [hereinafter Children's Media Inquiry].

5. Empowering Parents and Protecting Children in an Evolving Media Landscape: Reply Comments of the National Media and Advertisers Before the Fed. Communications

Commission, MB Docket No. 09-194, at 2 (Mar. 26, 2010) (prepared by Robert Corn-Revere et al., Counsel).

6. Children's Media Inquiry, *supra* note 4, at 13,172, 13,174–75, 13,187–88; *see Implementation of the Child Safe Viewing Act: Examination of Parental Control Technologies for Video or Audio Programming*, 24 F.C.C.R. 11,413 (2009) [hereinafter *CSVA Report*]; *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 24 F.C.C.R. 542, 544–45 (2009) [hereinafter *Thirteenth Annual Report*].

7. Children's Media Inquiry, *supra* note 4, at 13,173.

8. FCC Launches Examination of the Future of Media and Information Needs of Communities in a Digital Age, DA 10-100, released Jan. 21, 2010, at 1, 6 [hereinafter Future of Media Inquiry].

9. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386, 390 (1969).

10. H.R. Rep. No. 101-437, at 8 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1605, 1612–13 (citing *Red Lion*, 395 U.S. at 388–89); *see also* Policies and Rules Concerning Children's Television Programming, 11 F.C.C.R. 10,660, 10,729 (1996) [hereinafter Children's Television Programming].

11. Children's Television Programming, *supra* note 10, at 10,671 (quoting S. Rep. No. 227, at 1 (1989)); *see also* Chairman's Statement, *supra* note 1; John Eggerton, *Genachowski Speaks of Dangers Posed By Youths' Increased Screen Time*, Broadcasting & Cable (Jan. 20, 2010), www.broadcastingcable.com/article/445024-Genachowski_Speaks_of_Dangers_Posed_By_ Youths_Increased_Screen_Time.php?nid=2228&source=link&rid=6416594.

12. FCC v. Pacifica Found. Inc., 438 U.S. 726, 750 (1978). *Pacifica* did not rely on "spectrum scarcity," and the commission has confirmed that "it is the physical attributes of the broadcast medium, not any purported diminished First Amendment rights . . . based on spectrum scarcity or licensing, that justify [regulating] indecent material." Pacifica Radio, 2 F.C.C.R. 2698, 2699 (1987).

13. Ashcroft v. ACLU, 542 U.S. 656, 669 (2004); *see* Action for Children's Television v. FCC, 852 F.2d 1332, 1340 n.12 (D.C. Cir. 1988) ("Broadcasting is a unique medium [because] it is not possible simply to segregate material inappropriate for children, as one may do, e.g., in an adults-only section of a bookstore.").

14. The Fairness Doctrine was an FCC policy, first introduced in 1949, that required the holders of broadcast licenses both to present issues of public importance and to do so in a manner that was, in the commission's view, honest, balanced, equitable, and fair. The commission abolished the Fairness Doctrine in 1987 in *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987).

15. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (right of reply law for newspapers violates the First Amendment); United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (indecency regulation for "signal bleed" on cable television violates the First Amendment); Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 756–57 (1996) (regulation of indecency on cable-leased and public-access channels is invalid where less restrictive means of control are available).

16. Reno v. ACLU, 521 U.S. 844, 870 (1997).

17. Meredith Corp. v. FCC, 809 F.2d 863, 867 (D.C. Cir. 1987).

18. News America Publ'g, Inc. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 388 (1969)).

19. Banzhaf v. FCC, 405 F.2d 1082, 1100 (D.C. Cir.1968), *cert. denied sub. nom.*, Tobacco Inst., Inc. v. FCC, 396 U.S. 342 (1969).

20. *Meredith Corp.*, 809 F.2d at 867 (citing *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143 (1985) [hereinafter *1985 Fairness Doctrine Report*]; *see* Syracuse Peace Council v. FCC, 867 F.2d 654, 660–66 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990) (discussing *1985 Fairness Doctrine Report* and upholding the FCC's decision to repeal the Fairness Doctrine).

21. Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872, 882 (D.C. Cir. 1999); *see* Radio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000) (vacating rule).

22. Telecommunications Competition and Deregulation Act of 1995, S. Rep. No. 104-23, at 2-3 (Mar. 30, 1995).

23. Communications Act of 1995, H. Rep. No. 104-204, at 54 (July 24, 1995).

24. *Clinton on Communications*, Broadcasting & Cable, Sept. 23, 1996, at 22.

25. 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, 18 F.C.C.R. 13,620, 13,623, 13,647–48 (2003).

26. *Thirteenth Annual Report*, *supra* note 6, at 546.

27. *See CSVA Report*, *supra* note 6, at 11,468.

28. *Thirteenth Annual Report*, *supra* note 6, at 549–50.

29. *Id*. at 613–20.

30. *CSVA Report*, *supra* note 6, at 11,414 & n.5.

31. *Thirteenth Annual Report*, *supra* note 6, at 549, 610–12.

32. *CSVA Report*, *supra* note 6, at 11,417.

33. *Id*. at 11,418.

34. *Id*. at 11,438.

35. *Id.* at 11,418.

36. *See*, *e.g.*, Sable Commc'ns v. FCC, 492 U.S. 115, 130–31 (1989) (technological approach to controlling minors' access to "dial-a-porn" messages required invalidation of indecency restrictions); Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 754–57 (1996); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 815–16 (2000) (existing and potential technical solutions led the Court to strike down indecency restrictions on cable television).

37. *Playboy Entm't*, 529 U.S. at 814 (quoting Reno v. ACLU, 521 U.S. 844, 876–77 (1997)).

38. Fox Television Stations, Inc. v. FCC, ___ F.3d ___, 2010 WL 2736937, at *7–8 (2d Cir. July 13, 2010).

39. *Playboy Entm't*, 529 U.S. 803.

40. *Fox Television*, 2010 WL 2736937, at *7–8.

41. Children's Media Inquiry, *supra* note 4, at 13,179–80.

42. *Id*. at 13,184–85.

43. *Id*. at 13,173.

44. *Id*. at 13,174–75, ¶ 12.

45. *Id*. at 13,187–91.

46. *Id*. at 13,193.

47. Future of Media Inquiry, *supra* note 8, at 6.

48. *Id.* at 9–10.

49. 47 U.S.C. § 315(c); *see* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (amending § 315 to cover community antenna television systems).

50. 47 U.S.C. § 303a(d).

51. 512 U.S. 622, 637 (1994).

52. United States v. Playboy Entm't Group, 529 U.S. 803, 815 (2000).

53. 130 S. Ct. 876 (2010).

54. *Id*. at 906.

55. *Id*. at 890–91.