

MEMORANDUM

11 MAY 1995

FM: NOLAN BOWIE
TO: GEORGE GERBNER and ED BAKER

RE: FIRST AND FOURTEENTH AMENDMENT LEGAL CHALLENGES TO CURRENT
REGULATION OF BROADCASTING BY THE FEDERAL COMMUNICATIONS
COMMISSION

In relevant part, the First Amendment of the U.S. Constitution says that Congress shall make no law abridging the freedom of speech and of the press. Broadcasting regulation is one of the glaring exceptions to the official doctrine and ideology of the First Amendment, standing as it does as an effective shield against government intrusion into the content of what can be spoken, written, published and disseminated to an audience. The rationale given as to why broadcasting deserves special regulatory treatment under the First Amendment usually has something to do with the argument that the radiomagnetic frequency or spectrum is finite; that it is scarce and with limits as to its usability as a First Amendment forum if too many attempt to use it for broadcasting the airwaves would be full of noise or interference. Thus, so the argument goes, government must step in an act as a "traffic cop" and direct the flow of words and images in the public's interest by treating its licensees as public trustees with the burden of serving the "public interest, convenience and necessity. The problem with this story is that it is now, not that it ever was, not true. Currently, there is no public interest obligation burdening the holders of one of the most valuable government subsidy freely given away to business. Technically and in theory, the airwaves belong to *The People*. Under the 1934 Communications Act, as amended, there can be no proprietary ownership in a radio frequency used for broadcasting. A license to broadcast is revocable at any time the public interest demands it (due process, notwithstanding). The freedom to act as a radio or television licensee is limited to the current terms of the individual license; in the case of television, a full license term is five years, at which time the licensee must return to the FCC with a request for renewal of the license to operate for an additional term. Incidentally, the official license renewal application is no larger than a post-card, reflecting that no meaningful overview takes place with the great majority of renewals, thus assuring that the license is treated as private property. A complete license term for a radio station is seven years, at which time the post-card size renewal application must be deposited with a lap-dog agency charged with a watch-dog function. As for *The People*: ordinary tax-paying people, citizens and consumers, listeners and viewers, those who make up the numbers that are constantly counted in ratings that dictate programming content--simply do not have access to the airwaves. The only groups with access are broadcast licensees. The owners of radio and television stations. And, as in the case of any other publisher, the view points, the perspectives, the hiring decisions, the editorial content of all

programs reflect the bias of the owner. The second class or group that possesses a right to the airwaves are persons or victims who have been personally attacked over the air during the presentation of a broadcast program concerning a "controversial issue of public importance." The qualifying language, "controversial issue of public importance," was grafted from the so-called Fairness Doctrine that at one time required all broadcasters to provide reasonable amounts of programming, during various parts of the day, that dealt with a local community's problems and issues that were important, but controversial. In other words, the Fairness Doctrine attempted to promote issue access--more speech, rather than less speech; informed speech rather than mere propaganda, diverse speech, rather than mere repetition of popular belief, doctrine, entertainment. An lastly, the third group or class with a right of access to television and radio air are "legally qualified candidates for federal elective office," during a limited time period during an election. The so-call political broadcasting rules, under sections 315 and 312 of the Communications Act, provide for limited access for certain politicians, that is, if they can afford such access. Notwithstanding the claim that seekers of public elective office are seeking an effective and efficient means of reaching potential voters and supporters of them and their beliefs, they still have to pay for the privilege of appearing via the public owned but privately controlled airwaves. Often the amount of air time a candidate has on television will determine the outcome of an election. Campaign money spent on television is the primary expenditure in a city-wide, state-wide or national election. Expensive paid political television advertising abdicates the role of citizen to Political Action Committees, spin doctors, public relations specialists and to commercial advertisers. Its simply undemocratic. Moreover, ishould be pointed out that since 1980 for commercial radio and 1984 for commercial television, commercial broadcasters have had no obligation to air or otherwise carry any news or informational programming. No issue access, no news access, no information access, no public access via the public airwaves.

PROJECT GOALS:

It is my belief that the time is ripe to attack the broadcast provision of the 1934 Communications Act, as amended, on the grounds that current regulation is no longer supportable under First and Fourteenth Amendment grounds. That the assumption of spectrum scarcity is no longer a valid ground to justify government grant of free and exclusive use of the public's spectrum to limited numbers of corporate grantees, thus denying all other individual potential broadcasters with the right to engage in the electronic speech of broadcasting. Moreover, if some other less intrusive basis or rationale can be found that would multiply the number of voices (source diversity) and opinions (viewpoint diversity), it should be promoted as the better means of regulation toward achieving the First Amendment goals of a true "marketplace of ideas", open access to effective speech and publication, that is to an audience. For example, if, by use of digital compression

technology, the 6MHz of channel space currently used to carry a single television signal could be converted quadruple the number of television channels. According to Nicholas Negroponete in Being Digital: "You can pub four studio-quality digital TV signals into the same bandwidth that previously accommodated one noisy analog telegvision transmission." Negroponete goes on to conclude that being digital "creates the potential for new content to originate from a whole new combination of sources. Now is the time to test this teory of television of abudnance. Negroponete effectively offers a technology fix to apparent scarcity of airwave capacity. Four thousand television licensees clearly offers more opportunity for alternative and unheard voices and stories and perspectives and viewpoints than does broadcasting under the existing order.

WHY SUE?:

A law suit would focus public attention on the public interests in the public airwaves and on the on-going policy making concerning the so-called information highway, television content, the Cultural Environment Movement and on our current state of democracy and its institutions. While we may not win, we can't lose.

MATTHEW SPITZER WORTe AN INTERESTING ARTICLE DURING THE EARLY 1980S CONCERNING THE ILLEGALITY, ON OTHER GROUNDS, OF BROADCAST REQUATION. (UCLA Law Review, I believe.)

14th Amendment provides due process and equal protection grounds for arquing the misallocation of licenses based on race and class. Although minorities make up some twenty-five percent (25%) of the U.S. population, only 2.9% of all broadcast licenses are controlled or owned by minorities. Prictically all commercial television licenses are owned by members of the upper 4% of the population due to the political economy of the industry and the high cost of program production currently in use. Why should just some individuals or corporations, even non-American controlled firms get an exclusive government license to broadcast but not the ordinary citizen? A good rallying cry of nationalism for American Firsters in the trade war of global competition. No?...