



Television

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- [Background](#)
- [Federal Regulation of Licenses, Content, and Advertising](#)
- [Additional Resources](#)
- [Organizations](#)

Background

American businesses pour billions of dollars each year into marketing their services and products on television. Transmitted to viewers through electro-magnetic airwaves, satellite feeds, optical fibers, and cable lines, television programming often transcends state lines. The interstate character of this commercial activity brings regulation of television within the purview of the Commerce Clause of the U. S. Constitution. U.S.C.A. Const. Art. I, section 8, cl. 3. Under the Commerce Clause, federal courts have ruled that Congress has the power to regulate "radio communications," including the power to control the number, location, and activities of broadcasting stations around the country. *Technical Radio Laboratory v. Federal Radio Commission*, 36 F.2d 111 (App. D.C. 1929).

Pursuant to this power Congress passed the Communications Act of 1934, which expanded the definition of "radio communication" to include "signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission." 47 U.S.C.A. sections 151 et seq. With the advent of television in the late 1930s and its growth in popularity during the 1940s and 1950s, "radio communication" was eventually interpreted to encompass television broadcasts as well. *Connecticut Committee Against Pay TV v. Federal Communications Commission*, 301 F.2d 835 (D.C. Cir. 1962).

The rapid growth of telecommunications also prompted Congress to create the Federal Communications Commission (FCC), an [EXECUTIVE BRANCH](#) agency charged with overseeing the telecommunications industry in the United States. The FCC has exclusive [JURISDICTION](#) over granting, denying, reviewing, and terminating television broadcast licenses. The FCC is also responsible for establishing guidelines, promulgating regulations, and resolving disputes involving various broadcast media. In 1978 Congress established the National Telecommunications and Information Administration (NTIA) to serve as the policy arm for federal regulation of telecommunications. Together with the FCC, the NTIA formulates and presents official White House positions on a variety of domestic and international telecommunication-related issues.

Fueled in part by growing public sentiment against the increasingly violent nature of television programming, NTIA and FCC officials recommended that federal law give parents greater control over the programming viewed by their children. Congress responded by enacting the Telecommunications Act of 1996, which introduced a ratings system that requires television shows to be rated for violence and sexual content. **PUBLIC LAW 104-104**, February 8, 1996, 110 Stat 56. The act also created the so-called V-chip, a receptor inside television sets that gives parents the ability to block programs they find unsuitable for their children. Under the act, authority to establish TV ratings is given to a committee comprised of parents, television broadcasters, television producers, cable operators, [PUBLIC INTEREST](#) groups, and other interested individuals from the private sector.

Federal regulation of television broadcasting preempts any conflicting state or local regulation. However, the federal government's power to regulate television is not absolute. In regulating television, both Congress and the FCC must do so to advance the public interest. Congress and the FCC also must be sensitive to First Amendment concerns. Television broadcast companies are entitled to exercise robust journalistic freedom that is consistent with the right of the public to participate in a diverse marketplace of ideas, a marketplace that itself is tempered by appropriate social, political, esthetic, moral, and cultural values. *CBS, Inc. v. F. C. C.*, 453 U.S. 367, 101 S. Ct. 2813, 69 L. Ed. 2d 706 (1981).

Federal Regulation of Licenses, Content, and Advertising

Regulation of Television Broadcast Licenses

The Communications Act of 1934 confers upon the FCC the sole authority to examine applications for television broadcast licenses and to grant, refuse, or revoke them as the public interest, convenience, or necessity requires. Each license granted for the operation of a television station lasts for a term of not to exceed eight years and may be renewed for a term of not to exceed eight years, measured from the expiration date of the preceding license.

The FCC has broad discretion to establish the qualifications for applicants seeking a television broadcast license and for licensees seeking renewal. The FCC has exercised this discretion to prescribe an assortment of qualifications relating citizenship, financial [SOLVENCY](#), technical prowess, and moral character, among other criteria the commission has deemed relevant in determining the fitness of particular applicants to run a television station. The FCC will also compare the programming content proposed by an applicant to the content of existing programming. The FCC favors applicants who will make television entertainment more diverse and competitive.

To limit the concentration of power in television broadcast rights, the FCC has promulgated rules restricting the number of television stations that a licensee may operate. An applicant who has reached the limit may seek an amendment, [WAIVER](#), or exception to the rule, and no licensee may be denied an additional license until he or she has been afforded a full [HEARING](#) on the competing public interests at stake. Applicants or licensees who are dissatisfied with a decision issued by the FCC may seek review from the U. S. Court of Appeals for the District of Columbia Circuit, which has exclusive jurisdiction over appeals concerning FCC decisions granting, denying, modifying, or revoking television broadcast licenses. 47 U.S.C.A. section 402(b). Decisions rendered by the D. C. Circuit are appealable to the U. S. Supreme Court.

The FCC is authorized to assess and collect a schedule of license fees, application fees, equipment approval fees, and miscellaneous regulatory assessments and penalties to cover the costs of its enforcement proceedings, policy and rulemaking activities, and user information services. The commission may establish these charges and review and adjust them every two years to reflect changes in the [CONSUMER PRICE INDEX](#). Failure to timely pay a fee, [ASSESSMENT](#), or [PENALTY](#) is grounds for dismissing an application or revoking an existing license.

Content Regulation: The Fairness Doctrine

The original rationale for federal regulation of telecommunications was grounded in the finite number of frequencies on which to broadcast. Many Americans worried that if Congress did not exercise its power over interstate commerce to fairly allocate the available frequencies to licensees who would serve the public interest, then only the richest members of society would own television broadcast rights and television programming would become onedimensional, biased, or slanted. Only by guaranteeing a place on television

Encyclopedia of Everyday Law: Television

for differing opinions, some Americans contended, would the truth emerge in the marketplace of ideas. These concerns manifested themselves in the **FAIRNESS DOCTRINE**.

First fully articulated in 1949, the Fairness Doctrine had two parts: it required broadcasters to (1) cover vital controversial issues in the community; and (2) provide a reasonable opportunity for the presentation of contrasting points of view. Violation of the doctrine could result in a broadcaster losing its license. Not surprisingly, licensees grew reluctant to cover controversial stories out of fear of being punished for not adequately presenting opposing views. First Amendment advocates decried the Fairness Doctrine as chilling legitimate speech. The doctrine came under further scrutiny in the 1980s when the explosion of cable television stations dramatically expanded the number of media outlets available.

In 1987 the FCC abolished the Fairness Doctrine by a 4-0 vote, concluding that the free market and not the federal government is the best regulator of news content on television. Individual media outlets compete with each other for viewers, the FCC said, and this competition necessarily involves establishing the accuracy, [CREDIBILITY](#), reliability, and thoroughness of each story that is broadcast. Over time the public weeds out news providers that prove to be inaccurate, unreliable, one-sided, or incredible.

Content Regulation: Rules Underlying the Fairness Doctrine

Despite the death of the Fairness Doctrine in 1987, two underlying rules that were developed during its existence remained in effect for another 13 years: the personal attack rule and the political editorial rule. The personal attack rule required broadcast licensees to notify persons who were maligned or criticized during their station's coverage of a controversial public issue and allow the attacked persons to respond over the licensees' air waves. If the attack was made upon the honesty, character, or integrity of another person, the licensee was required to provide a script or tape of the attack to the person identified before giving that person a reasonable opportunity to respond. The political editorial rule afforded political candidates notice of and opportunity to respond to editorials opposing them or endorsing another candidate.

These rules were called into question by a federal court that ordered the FCC to either provide a detailed justification for their continued application or abandon them. *Radio-Television News Dirs. Ass'n v. FCC*, 229 F.3d 269 (D.C. Cir. 2000). Initially, the FCC suspended the rules on a temporary basis, while it discussed the rules' usefulness. Based on these preliminary discussions, the commission formally repealed both rules on October 26, 2000. Notwithstanding the [REPEAL](#), the FCC has since scheduled hearings to revisit whether these rules might still serve the public interest.

Although the demise of the Fairness Doctrine and its underlying rules have given broadcasters greater control over the content of their programming, broadcasters still may not discriminate among candidates for public office. Once a broadcaster permits one candidate for public office to use its facilities, it must afford equal opportunities to all other candidates for the same office. Broadcast stations that willfully or repeatedly fail to provide a legally qualified candidate for elective office reasonable access to their airwaves may subject themselves to sanctions, including revocation of their licenses. The FCC "equal time" provisions apply only to the candidates themselves and not to appearances made by campaign managers or other supporters. The determination of what constitutes a legally qualified candidacy is made by reference to state law.

Content Regulation: Indecency

Within the universe of First Amendment protection, broadcast radio and television stations have been subjected to greater regulation than any other verbal, visual, or printed medium of expression. The licensing process by itself gives the federal government more power over the content of television and radio broadcasts than it has over any print medium. Radio and television stations have been required to carry public service messages that they might not otherwise have chosen to carry, and they have been subjected to censure for

Encyclopedia of Everyday Law: Television

broadcasting materials that would not have been punishable if they had been published in another medium.

The United States Code prohibits the broadcast of any material that is "obscene, indecent, r profane," but offers no definition for those terms. 18 U.S.C.A. section 1464. Instead, that task is left to the FCC through its rulemaking and adjudicatory functions. In 1978 the U. S. Supreme Court upheld an FCC order finding that a pre-recorded satirical monologue violated this prohibition by making repeated use of seven "dirty words" during an afternoon broadcast. *F. C. C. v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026 57 L.Ed.2d 1073 (1978). The Supreme Court acknowledged that the monologue was not obscene and thus could not have been regulated had it been published in print. But the Court distinguished broadcast media from print media, pointing out that radio and television stations are uniquely pervasive in Americans' lives, and are easily accessible by impressionable children who can be inadvertently exposed to offensive materials without adult supervision. Print media, the Court said, do not intrude upon Americans' privacy to the same extent or in the same manner. Thus, the Court concluded that the FCC could regulate indecent speech on radio and television but cautioned that the commission must do so in a manner that does not completely extinguish such speech.

The FCC order had defined indecent speech as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience." In the *Matter of a Citizen's Complaint against the Pacifica Foundation*, 56 F. C.C.2d 94 (1975). As cable television gained prominence during the 1980s, it became unclear whether the FCC's prohibition applied to this burgeoning medium. Cable operators do not use broadcast spectrum frequencies, but they are licensed by local communities in the same way broadcast television station operators are licensed by the FCC. Moreover, cable operators partake in the same kind of First Amendment activities as do their broadcast television counterparts.

Congress tried to clarify the responsibilities of cable operators when it passed the Cable Television **CONSUMER PROTECTION** and Competition Act of 1992 (CTCPCA). 47 U.S.C.A. section 521 et seq. CTCPCA authorized cable channel operators to restrict or block indecent programming. The authorization applied to leased access channels, which federal law requires cable systems to reserve for [LEASE](#) by unaffiliated parties, and public access channels, which include educational, governmental, or local channels that federal law requires cable operators to carry. Cable operators claimed that the [STATUTE](#) was fully consistent with the First Amendment because it left judgments about the suitability of programming to the editorial discretion of the operators themselves. But cable television viewers filed a lawsuit arguing that the statute violated the First Amendment by giving cable operators absolute power to determine programming content.

In 1996 the case was appealed to the U. S. Supreme Court, which issued an opinion that was as badly divided as the litigants. *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (U.S. 1996). In handing down its 5-4 decision, the Court first noted that cable television shares the same characteristics of broadcast television that were discussed in the *Pacifica* case, namely that it is uniquely pervasive, is capable of invading the privacy of viewers' homes, and is easily accessible by children. Despite the similarities, the Court held that CTCPCA had violated the First Amendment by giving cable operators the power to prohibit patently offensive or indecent programming transmitted over public access channels. The court reasoned that locally accountable bodies comprised of community members are better capable of addressing programming concerns, and thus creating a "cable operator's veto" was not the least restrictive means of addressing the appropriateness and suitability of cable television programming.

With respect to leased access channels, the Court ruled that CTCPCA also violated the First Amendment by requiring cable system operators to segregate patently offensive programming on separate channels and then requiring the operators to block those channels from viewer access until individual cable subscribers requested access in writing. The Court said that these requirements had an obvious speech-restrictive effect on viewers and were not narrowly or reasonably tailored to protect children from exposure to indecent materials. The

Encyclopedia of Everyday Law: Television

Court cited the V-chip, discussed above, as one less restrictive means of accomplishing the same objective.

The Court's divisive opinion in Denver Area Educational Telecommunications Consortium answered only the questions presented about the constitutionality of CTCPCA. Congress and the FCC continue to hold hearings and investigate alternative ways to effectively regulate cable and broadcast television content without running afoul of the First Amendment. At the same time, the telecommunications industry continues to develop new ways to transmit programming into would-be viewers' homes. Accordingly, the law in this area of telecommunications remains in flux.

Regulation of Advertising

The law governing television advertising is more settled. The First Amendment permits governmental regulation of television advertising and other forms of commercial speech so long as the government's interest in doing so is substantial, the regulations directly advance the government's asserted interest, and the regulations are no more extensive than necessary to serve that interest. This test affords advertisers more First Amendment protection than does the public-interest test under which federal courts review most FCC content-related regulations. In a free enterprise system the law recognizes that consumers depend on unfettered access to accurate and timely information regarding the quality, quantity, and price of various goods and services.

Conversely, society is not served by false, deceptive, or harmful advertisements, and thus regulations aimed at curbing such advertising are typically found to serve a substantial governmental interest. The best example involves the federal ban on cigarette advertising. In 1967 the FCC acted upon citizen complaints against the misleading nature of tobacco advertisements by implementing a rule that required any television station carrying cigarette advertisements to also air public service announcements addressing the health risks posed by tobacco. This rule was upheld in *Banzahf v. FCC*, 405 F.2d 1082 (D.C. Cir 1968). Two years later Congress intervened by passing the Public Health and Cigarette Smoking Act of 1969, which banned all electronic advertising of cigarettes as inherently misleading and harmful. Pub. L. No. 91-222, 84 Stat. 87. The act took effect in 1971 and survived a court challenge that same year. *Capital Broadcast. Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), *aff'd mem.*, 405 U.S. 1000, 92 S.Ct. 1289, 321 L. Ed.2d 472 (1982). The law remains in effect today.

Unlike other areas of telecommunications law, Congress has allowed states to adopt their own regulations governing false and deceptive advertising. Many states have responded by adopting the Uniform Deceptive Trade Practices Act (UDTPA), which prohibits three specific types of representations: (1) false representations that goods or services have certain characteristics, ingredients, uses, benefits, or quantities; (2) false representations that goods or services are new or original; and (3) false representations that goods or services are of a particular grade, standard, or quality. Under the UDTPA, liability may arise for advertisements that are only partially accurate, if the inaccuracies are likely to confuse prospective consumers. Ambiguous representations may require clarification to prevent the imposition of liability. For example, a business that accuses a competitor of being "untrustworthy" may be required to clarify that description with additional information if consumer confusion is likely to result.

Additional Resources

American Jurisprudence. West Group, 1998.

<http://caselaw.lp.findlaw.com/data/constitution/amendment01> U.S. Constitution: First Amendment.

West's Encyclopedia of American Law. West Group, 1998.

Organizations

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