IT'S ALL IN THE FAMILY: FAMILY VIEWING AND THE FIRST AMENDMENT

I
INTRODUCTION

In 1975, the television networks opened the fall season with an unusual première: the family viewing hour. This short-lived policy, which restricted the programming content of television during the early evening hours, was adopted, in part, as a response to increasing public concern about the effects of televised violence on children. A more important influence, however, was the interest of another audience—the federal government.

The family viewing policy,[1] established by an amendment to the National Association of Broadcasters Television Code, provided for the regulation of television programming according to the following standard:

> Entertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour. In the occasional case when an entertainment program in this time period is deemed to be inappropriate for such an audience, advisories should be used to alert viewers. Advisories should also be used when programs in later time periods contain material that might be disturbing to significant segments of the audience.[2]

The validity of the adoption of the family viewing policy was immediately challenged in *Writers Guild of America, West, Inc. v. Federal Communications Commission*,[3] a consolidation of two actions against the Federal Communications Commission (FCC),[4] the networks, and the National Association of Broadcasters (NAB).[5] The first action, brought by the Writers Guild of Amer-

1. The family viewing policy has also been called the "family hour," the "9:00 rule," and the "prime time censorship rule." Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1072 (C.D. Cal. 1976).

2. NATIONAL ASS'N OF BROADCASTERS, THE TELEVISION CODE 2-3 (18th ed. 1975), *quoted in* Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1072 (C.D. Cal. 1976).

3. 423 F. Supp. 1064 (C.D. Cal. 1976).

4. In addition to the FCC, the government defendants included the individual Commissioners: Wiley, Hookes, Lee, Quello, Reid, Robinson, and Washburn. *Id.*

5. The so-called "private defendants" consisted of the American Broadcasting Companies, Inc. (ABC); Columbia Broadcasting System, Inc. (CBS); the National Broadcasting Company, Inc. (NBC); and the National Association of Broadcasters (NAB). *Id.*

ica, West, Inc. and other television writers, creators, and producers,[6] challenged the family viewing policy on the grounds that it violated the first amendment, the Federal Communications Act of 1934, the Administrative Procedure Act, and the Sherman Antitrust Act.[7] The second suit, brought by Tandem Productions, Inc.[8] differed in that it did not include an Administrative Procedure allegation and it sought to recover damages.[9]

Judicial review of the implementation of this new policy was quick and sharply critical. In *Writers Guild*, the adoption of the family viewing policy was held to be an unlawful restraint on free speech in violation of the first amendment because it was implemented as a result of government pressure exerted through the FCC and not as an independent decision reached by individual licensees.[10]

This Note will examine the factors which created the need for such programming regulation, evaluate the constitutional impediments to such regulation, and propose a model for the future.

II
IMPACT OF TELEVISION

A. Pervasiveness of Television

The family viewing policy was the culmination of years of mounting concern about the potential harmful effects which the viewing of violent programs may have on children.[11] The dimensions of the problem came into clear focus in the 1960s with the proliferation of studies on the impact of television and

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6. The plaintiffs in this action also included Writers Guild of America, East, Inc.; Directors Guild of America, Inc.; Screen Actors Guild, Inc.; Concept Plus II Productions; Four D Productions; Danny Arnold; Allan Burns; Samuel Denoff; Larry Gelbart; Susan Harris; Norman Lear; William Persby; Paul Witt; and Edwin Weinberger. The shows with which they were affiliated include "All in the Family," "Phyllis," "The Mary Tyler Moore Show," "Barney Miller," "M*A*S*H," and "Fay." *Id.*

7. For a discussion of the first amendment and Communications Act implications of the decision, *see* text accompanying notes 99-156, *infra*. For a discussion of the Administrative Procedure Act and antitrust implications of the decision, *see* Note, Writers Guild v. FCC: *Duty of the Networks to Resist Governmental Regulation*, 28 SYRACUSE L. REV. 583, 591 (1977) [hereinafter cited as *Duty of Networks*].

8. Tandem Productions, Inc. v. Columbia Broadcasting System, Inc., 423 F. Supp. 1064, 1072 (C.D. Cal. 1976). Tandem Productions is the producer of "All in the Family."

9. For a discussion of the question of damages in *Tandem* and *Writers Guild*, *see* text accompanying notes 93-96, *infra*.

10. 423 F. Supp. at 1134, 1140. *See* § IV, *infra*.

11. Material which is thought to be inappropriate for and potentially harmful to young viewers includes violent and obscene programming. Although this Note is primarily concerned with violent television content, it should be noted that the family viewing policy was also aimed at regulating obscenity and sex-related programming. Report on the Broadcast of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418 (1975). For a general history regarding the growth of concern about violence in children's programming, see D. CATER & S. STRICKLAND, TV VIOLENCE AND THE CHILD: THE EVOLUTION AND FATE OF THE SURGEON GENERAL'S REPORT 9-17 (1975) [hereinafter cited as CATER & STRICKLAND].

television programming on children.[12] Although experts disagree as to the precise nature of the way in which the content of television programs might affect young people at various stages in their development,[13] there is, nevertheless, a consensus that viewing does have a very significant impact.

Television, along with the home and the school, has become a major force in socializing children and may be their greatest common experience.[14] The pervasiveness of television viewing is evidenced by the fact that over 96 percent of American homes have one or more television sets[15] and that television viewing has reached an average of seven hours and sixteen minutes each day per household.[16] Not only do more people own and watch television than make use of any other form of mass communications,[17] but they also watch it more frequently and for longer periods of time.[18]

Children, in particular, have become avid television viewers. Estimates of the time spent by pre-school children watching television range from twenty-two to twenty-five hours per week[19] to more than one-third of their waking hours.[20] Children generally have their first experience watching television at age two, and by three years of age they are using television on a regular basis.[21] Thus, by the time of high school graduation, they will have spent an estimated 15,000 hours in front of a television as compared to 11,000 hours in school.[22]

The amount of time children spend watching television justifies close analysis of programming content.[23] Inquiry into the content of television programming has focused on the pervasiveness of violence in television. Recent studies have concluded that the level of violence on television is increasing.[24]

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12. *See, e.g.*, W. SCHRAMM, J. LYLE, & E.B. PARKER, TELEVISION IN THE LIVES OF OUR CHILDREN (1961) [hereinafter cited as SCHRAMM].

13. TELEVISION AND GROWING UP: THE IMPACT OF TELEVISED VIOLENCE, REPORT TO THE SURGEON GENERAL FROM THE SURGEON GENERAL'S SCIENTIFIC ADVISORY COMM. ON TELEVISION AND VIOLENCE 24 (1972) [hereinafter cited as SURGEON GENERAL'S REPORT].

14. SCHRAMM, *supra* note 12, at 12.

15. SURGEON GENERAL'S REPORT, *supra* note 13, at 1-2.

16. This figure is as of 1977. BROADCASTING, March 7, 1977, at 52.

17. SURGEON GENERAL'S REPORT, *supra* note 13, at vii.

18. In a study released in September, 1975, a comparison of television and newspaper consumption patterns revealed that the number of people who said they watched television "yesterday" increased from 81% in 1970 to 85% in 1975, while the number of people who read newspapers "yesterday" declined from 77% in 1970 to 73% in 1975. In addition, the number of minutes per day an individual spent watching television increased while the amount of time spent reading newspapers declined. BROADCASTING, Sept. 15, 1975, at 53.

19. E. KAYE, THE FAMILY GUIDE TO CHILDREN'S TELEVISION: WHAT TO WATCH, WHAT TO MISS, WHAT TO CHANGE AND HOW TO DO IT 7 (1974).

20. M. WINN, THE PLUG-IN DRUG 4 (1977).

21. *Compare* SCHRAMM, *supra* note 12, at 24-25 *with* SURGEON GENERAL'S REPORT, *supra* note 13, at 36.

22. E. KAYE, *supra* note 19, at 7.

23. *See* SURGEON GENERAL'S REPORT, *supra* note 13, at 4-5, 43-60.

24. This is not, however, a universal perception. The National Citizens Committee for Broadcasting (NCCB) found 9% fewer incidents of "murder and mayhem" in the fall, 1977 season as compared with the previous year. This represents a decline from 190 violent episodes per week in

Dr. George Gerbner and Dr. Larry Gross of the University of Pennsylvania's Annenberg School of Communications have devised a "violence index" which measures the incidence of violence[25] on television. This index shows the steady progression in the incidence of violence since 1967, with the 1976 television season setting a new record for the number of violent episodes.[26] Their findings showed that three-fourths of all television characters and nine out of ten programs sampled were found to exhibit some violence.[27]

1976 to an average of 173 incidents per week in 1977. N.Y. Times, Feb. 2, 1978, § C, at 19, col. 1. Although this is an encouraging development, it does not necessarily signal an overall reduction in violence. This is because "violence" is not clearly defined, and, as a result, the persuasiveness and relevance of each study is necessarily limited by definitional constraints. Thus, studies on violence in television are capable of comparison only insofar as their definitions of violence are compatible. To the extent that definitions diverge, the statistical findings as well as the conclusions of various studies will differ. The definition of violence used in the NCCB study included "the realistic portrayal of a gunfight, threat to use a gun, shooting at a person, threat of beating, strangling, manhandling, fist fight, inflicting wounds, stabbing, attempted drowning, attempted suicide, killing, kidnapping, or suicide." *Id.* While that definition lists many violent acts, it is narrowly circumscribed in that it does not include comedic incidents (*e.g.*, pratfalls and other slapstick) or situations in which the initiator is not a person (*e.g.*, natural catastrophes and accidents) which other definitions of violence include. *Compare* this definition *with* note 25, *infra*, *and* text accompanying notes 28-30 *infra*.

Compounding this definitional problem is a perceptual problem: whether an act is viewed as violent depends upon one's perspective as well as on the context. SURGEON GENERAL'S REPORT, *supra* note 13, at 30; *see* text accompanying notes 37-39 *infra*. Thus, the same act may or may not be considered violent depending upon the circumstances, the person judging it, the person committing the act, or the age of the viewer. Subjective factors such as whether the act was committed in self-defense or whether it was a verbal or physical attack may also be influential. SURGEON GENERAL'S REPORT, *supra* note 13, at 30. The obstacles imposed by the evaluation of these subjective considerations in identifying violence are nearly insurmountable when attempting to draft regulations to control violent programming on television. FCC Chairman Richard E. Wiley recognized this problem in a speech to the National Association of Television Producers at Atlanta, Georgia on February 10, 1975:

> Short of an absolute ban on all forms of "violence"—including even slapstick comedy—the question of what is appropriate for family viewing necessarily must be judged in highly subjective terms. Under a rigid objective test, I suppose that it would be argued that many traditional children's films would be banned because they include some element of violence—for example, episodes in *Peter Pan* when Captain Hook is eaten by a crocodile or in *Snow White* where the young heroine is poisoned by the witch. Such an extreme result simply does not make sense and would not be acceptable to the American people. Indeed, the lack of an acceptable objective standard is one of the best reasons why—the Constitution aside—I feel that self-regulation is to be preferred over the adoption of inflexible governmental rules.

Report on the Broadcast of Violent, Indecent, and Obscene Material, *supra* note 11, at 419 n.5.

25. For the purposes of this study, the term "violence" was defined as "the overt expression of physical force against others or self, or the compelling of actions against one's will on pain of being hurt or killed." *See* Liebert, Davidson & Neale, *Aggression in Childhood: The Impact of Television*, in WHERE DO YOU DRAW THE LINE 115 (V. Cline ed. 1974).

26. BROADCASTING, Feb. 28, 1977, at 20. The violence index for the 1976 season was 203.6 as compared with the 1967 figure of 198.7. The results of the study of the 1977 season may indicate a reversal of this trend. The percentage of programs containing violence decreased to 75.5% in 1977 as compared to a range of 80-90 percent in 1975 and 1976. An exception to this overall reversal was the increase in violence during the "family viewing hour." N.Y. Times, Apr. 3, 1978 § C, at 22, col. 1.

27. *Id.*

Another study, which defined "violence" to include the infliction of harm, injury, or discomfort to people, or the damaging of property,[28] found that "approximately three out of ten dramatic segments were 'saturated' with violence" and that 71 percent of all shows in a typical Saturday morning line-up (including both cartoons and adult material) portrayed a violent episode.[29] Moreover, cartoons, the perennial children's favorite, were shown to be the most violent type of program.[30]

B. Psychological Impact of Television

The 1600 percent increase in arrests for violent crimes committed by juveniles between the years 1952 and 1972[31] coupled with the increase in viewing of televised violence has prompted experts to seek a causal connection between televised violence and aggressive behavior.[32] So far that link has eluded them.[33]

After intensive consideration of empirical studies, the Surgeon General's Panel concluded in its *Report* that there is only a "modest asociation" between exposure to televised violence and aggressive tendencies.[34] In considering the extent to which children imitate or instigate violent action as a result of televised violence,[35] the *Report* concluded that although a certain amount of aggressive behavior is to be expected, the evidence does not prove "that televised violence has a uniformly adverse effect . . . on the majority of children."[36]

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28. SURGEON GENERAL'S REPORT, *supra* note 13, at 5.

29. *Id.* at 3. These statistics were based on findings in 1971.

30. *Id.* Cartoons were found to be the most violent during 1967-1969.

31. M. WINN, *supra* note 20, at 65, *citing Skyrocketing Juvenile Crime*, N.Y. Times, Feb. 21, 1975, at 37, col. 1.

32. M. WINN, *supra* note 20, at 65. The National Commission on the Causes and Prevention of Violence stated that:

> It is reasonable to conclude that a constant diet of violent behavior on television has an adverse effect on human character and attitudes. Violence on television encourages violent forms of behavior, and fosters moral and social values about violence in daily life which are unacceptable in a civilized society.

Quoted in Report on the Broadcast of Violent, Indecent, and Obscene and Material, *supra* note 11, at 418.

33. M. WINN, *supra* note 20, at 65.

34. SURGEON GENERAL'S REPORT, *supra* note 13, at 4.

35. Imitation and instigation were distinguished in the study on the basis that imitation involves mimicking or copying while instigation occurs "when what is seen is followed by increased aggressiveness." SURGEON GENERAL'S REPORT, *supra* note 13, at 6.

36. *Id.* at 7. In a departure from this conclusion, Jesse L. Steinfeld, the Surgeon General, stated:

> While the Committee Report is carefully phrased and qualified in language acceptable to social scientists, it is clear to me that the causal relationship between televised violence and antisocial behavior is sufficient to warrant appropriate and remedial action. The data on social phenomena such as television and violence and/or aggressive behavior will never be clear enough for all social scientists to agree on the formulation of a succinct statement of causality. But there comes a time when the data are sufficient to justify action. That time has come.

The *Report* indicated, however, that the amount of violence viewed may not be as important as the manner in which the violence is presented. Whether it is condoned or frowned upon, whether it is committed by sympathetic or unsympathetic characters, whether it is successful or unsuccessful, and whether it is punished or not may affect the way in which the televised violence affects each child.[37] Depending on how these factors combine, violence on television may actually be "cathartic" and "reduce the propensity to violence" by allowing children to vicariously act out fantasized aggression in a harmless way.[38] This view of violence suggests the danger that young children (four to six years old), who lack the ability to understand the context in which the violent act occurs and who cannot distinguish the "make-believe" character of violence in fictionalized programs from the "real thing," will transfer their fantasies into reality.[39] Inasmuch as confusion between the real and fantasy worlds is characteristic of small children,[40] there is always the danger that violence on television will be transferred to the real world.[41] The greatest risk of transference is with children who already exhibit aggressive behavior.[42]

This inability to distinguish between reality and fantasy may also encourage violence in children by dulling the individual's sensitivity to real events.[43] There is concern that television conditions its viewers to deal with real people as if they were on a television screen. Thus, children may become able to " 'turn [people] off' . . . with a knife or a gun or a chain, with as little remorse as if they were turning off a television set."[44]

Steinfeld, *Statement of the Surgeon General Concerning Television and Violence*, in WHERE DO YOU DRAW THE LINE 177-78 (V. Cline ed. 1974). For a compilation of the deleterious effects of televised content, *see* Wertham, *School for Violence, Mayhem in the Mass Media*, in WHERE DO YOU DRAW THE LINE 157, 169-75 (V. Cline ed. 1974).

37. SURGEON GENERAL'S REPORT, *supra* note 13, at 4.

38. *See, e.g.*, SURGEON GENERAL'S REPORT, *supra* note 13, at 4-5, 66; Lopiparo, *Aggression on TV Could Be Helping Our Children*, 105 INTELLECT 345, 346 (1977).

39. SURGEON GENERAL'S REPORT, *supra* note 13, at 7. *See generally* SCHRAMM, *supra* note 12, at 162-63. Especially troubling is the association of violent behavior with the hero as a tool of justice in solving problems. *See* Wertham, *supra* note 36, at 164.

40. SCHRAMM, *supra* note 12, at 162.

41. *Id.* at 162-63.

42. *Id.* at 163. Because television can distort reality more for aggression-prone children than for normal children, it is they who are more likely to remember the violent episode and to apply it. M. WINN, *supra* note 20, at 72-73.

43. M. WINN, *supra* note 20, at 71. *See also* Cline, Croft & Courrier, *The Desensitization of Children to TV Violence*, in WHERE DO YOU DRAW THE LINE 147-55 (V. Cline ed. 1974). This phenomenon was best described in the SURGEON GENERAL'S REPORT:

> The viewer may identify with the aggressor, but he himself does not deliver any blows or fire any weapons. He may identify with the victim, but he does not himself experience any pain, sustain any wounds, or shed any blood. There is no way he can intervene to prevent or terminate the aggressive exchange, no way he can retaliate against the aggressor, bring the criminal to justice, succor the victim, or comfort the bereaved. His involvement is remote, detached, vicarious, and thus only partial.

SURGEON GENERAL'S REPORT, *supra* note 13, at 20. For an interesting theory that it is the *experience* itself, regardless of content, which affects a child's perception of reality, *see* M. WINN, *supra* note 20, at 67, 74.

44. M. WINN, *supra* note 20, at 74. The defense of television-induced insanity was unsuccess-

Perhaps the most succinct and accurate summary of this complex and often contradictory area is that, "[f]or *some* children, under *some* conditions, *some* television is harmful. For *other* children under the same conditions, or for the same children under *other* conditions, it may be beneficial. For *most* children, under *most* conditions, *most* television is probably neither particularly harmful nor particularly beneficial."[45] For the present, that is the extent of the knowledge regarding the effect of television viewing on aggressive behavior in children. Researchers have yet to correlate specific portrayals of violence with their "net result on society."[46]

Although parents berate the excessive violence of television shows, they often fail to realize that violence is a prime component of all forms of mass media in the United States.[47] Parental sensitivity to the abundance of violence on television is heightened by the fact that their exposure to television is greater than their contact with other media forms.[48]

In 1968, a group of Boston mothers expressed this parental concern by forming Action for Children's Television (ACT) for the expressed purpose of achieving advertising and programming reforms to cater to the specific needs of children.[49] Toward that end, ACT petitioned the Federal Communications Commission in late 1969 to adopt three proposed guidelines, including one which would have required each station to set aside at least fourteen hours each week for children's programming as part of its public service requirement.[50] The public's response to this petition for rulemaking was overwhelming; over 100,000 letters were received.[51] Despite this outpouring, the FCC did not respond until 1974, when it finally issued its Children's Television Report and Policy Statement.[52] In the Policy Statement, the FCC concluded that broadcasters have a "special obligation" to serve the "unique needs" of children and that this obligation "bears a direct relationship to the licensee's obligation . . . to operate in the 'public interest.' "[53] The Policy Statement decided, however, that the Commission should not require broadcasters to devote a specified number of hours per week to children's programming.[54] In so rul-

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fully asserted on behalf of a child convicted of homicide in People v. Zamora, ___ S.2d ___ (Fla. 1977). *See also* Olivia N. v. National Broadcasting Company, ___ Cal. App. 3d Supp. ___, 141 Cal. Rptr. 511 (1977) (reversed dismissal of action brought by minor against television network for injuries inflicted by an "artificial rape" with a bottle by children allegedly incited to do so by viewing an "artificial rape" scene in a television drama).

45. SCHRAMM, *supra* note 12, at 1.

46. SURGEON GENERAL'S REPORT, *supra* note 13, at 5.

47. *Id.* at 3. For the view that sex-related television shows will supplant violence as the primary cause of programming concern beginning with the 1978 television season, see White, *Mom, Why's the TV Set Sweating?* N.Y. Times, Mar. 29, 1978, § A, at 27, col. 2. *See also*, N.Y. Times, Mar. 20, 1978, § C, at 15, col. 1.

48. *Id.*

49. For a critical view of ACT's goals, *see* M. WINN, *supra* note 20, at 5.

50. Children's Television Report and Policy Statement, 50 F.C.C.2d 1 (1974).

51. *Id.* at 2.

52. 50 F.C.C.2d 1 (1974).

53. *Id.* at 5.

54. *Id.* at 6.

ing, the Commission recognized that governmental supervision of programming is incompatible with the dictates of the first amendment.[55]

III
THE SCRIPT FOR *WRITERS GUILD*

Even before this Policy Statement was released, concern over violence in television spurred the House of Representatives and the Senate to add to the FCC appropriations bills a directive to report on the Commission's efforts to protect young viewers from excessive television violence.[56] This request set in motion the chain of events which culminated in *Writers Guild*. In response to the House's request, FCC Chairman Richard E. Wiley,[57] acting through an aide, asked the National Association of Broadcasters (NAB)[58] to strengthen its stand on televised violence.[59] Although the request was rejected, it marked the first attempt by the FCC to interfere with the networks and the NAB in order to promote a family viewing policy. On October 4, 1974, the FCC staff presented Chairman Wiley with a series of proposals to submit to Congress. These included notices of inquiry, notices of proposed rulemaking, and policy statements.[60] The emphasis was to be on "jawboning"[61] and industry self-regulation under color of the public interest standard.[62]

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55. In first amendment areas, "it is wise to avoid detailed governmental supervision of programming wherever possible." *Id.* at 6. *See* text accompaning notes 106-27, 140-44, *infra*.

56. 423 F. Supp. at 1095-96, *citing* H.R. REP. No. 1139, 93d Cong., 2d Sess. 15 (1974); S. REP. No. 1056, 93d Cong., 2d Sess. 10 (1974). *See generally* Hamburg, *"Jawboning"—or Regulation by the FCC*, N.Y.L.J., Dec. 31, 1976, at 2, col. 1.

57. Richard Wiley ended his tenure as FCC Chairman in September, 1977. He was succeeded by Charles D. Ferris. Mr. Wiley subsequently agreed to serve as trustee of the Television and Radio Political Action Committee, the political arm of the NAB. N.Y. Times, Feb. 12, 1978, § A, at 29, col. 1. For an analysis of the interrelationship of the FCC and the NAB, see Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STAN. L. REV. 1527 (1975), *reprinted with revisions in* 28 FED. COM. B.J. 1 (1975).

58. The National Association of Broadcasters originated in 1923 and issued its first broadcast standards in 1929. Its membership is comprised of individual or corporate operators of television stations or networks. As of January 1, 1975, 413 stations subscribed, a number equal to 60% of all television stations. For background on the NAB, *see generally* Brenner, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 28 FED. COM. B.J. 1, 3-7 & n.17 (1975).

59. 423 F. Supp. at 1096.

60. *Id.*

61. "Jawboning" is a form of moral suasion. It is frequently used in the context of fiscal and monetary policy to describe a method whereby the Federal Reserve Board may convey its displeasure over specific practices to bankers in private talks. Jawboning usually involves an appeal to community (or industry) spirit and may include vague threats. P. SAMUELSON, ECONOMICS 324 (10th ed. 1976). The analogy in this case is to the persuasive power of the FCC over the individual licensees.

62. 423 F. Supp. at 1097. The FCC's licensing and renewal powers are limited by the "public interest, convenience and necessity" standard. *See* 47 U.S.C. §§ 303, 307(a), 309(a) (1970). The public interest standard is the basis of the FCC's regulatory power and has been described by the Supreme Court as, "a broad one, a power 'not niggardly but expansive,' . . . whose validity we have long upheld." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380 (1969). The expansive reading given the public interest standard was one reason the FCC staff recommended reliance on

Chairman Wiley was opposed to formal proceedings because he believed that formal FCC action would run afoul of the first amendment[63] and of the anti-censorship dictates of section 326 of the Federal Communications Act.[64] He therefore chose to conduct a personal campaign to confront broadcasters with the issue of violence and obscenity on children's television. Pursuant to this strategy, Chairman Wiley delivered a speech to the Illinois Broadcasters Association on October 10 which raised the specter of government regulation by declaring, "[i]f self-regulation does not work, governmental action to protect the public may be required—whether you like it or whether I like it."[65] This speech also presented the Chairman's initial conception of children's programming, which included the use of appropriate warnings and a rating scale to create a system of informed programming and viewing.[66]

Following this speech, Chairman Wiley's "personal lobbying" intensified.[67] A November meeting with the Washington vice-presidents of ABC, NBC, and CBS was arranged for the primary purpose of convincing each network to issue a policy statement on televised violence and to take steps to deal with violence and sex-related material on television.[68] This was followed by a meeting with the network presidents at which Chairman Wiley, striving for industry-wide acceptance, proposed a joint network policy statement on the subject of sex and violence and suggested that the NAB Code might want to express a new position on these subjects.[69] The Chairman then threatened action, including the issuance of a general policy statement regarding the programming of violence and sex and the manipulation of license renewal forms, which he personally believed to be an unconstitutional interference with programming content.[70] It is significant to note that while the FCC and the net-

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the standard "to provide a color of legal authority for its views." 423 F. Supp. at 1097. Because the FCC determined license renewals in terms of the public interest, it could therefore identify those issues it felt were not in the public interest, thereby indirectly regulating programming. *See generally* Banzhaf v. FCC, 405 F.2d 1082, 1094-95 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). It was hoped that this theory would be sufficient to justify the proposed FCC action while avoiding a direct confrontation between either the first amendment or § 326 of the Federal Communications Act.

63. 423 F. Supp. at 1097.

64. Section 326 of the Federal Communications Act forbids the infringement of first amendment freedoms by the FCC and provides in part:

> Nothing in this [Act] shall be understood or construed to give the Commission the power of censorship . . . and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech. . . .

47 U.S.C. § 326 (1970).

65. 423 F. Supp. at 1098. Chairman Wiley continued, " 'I am frankly optimistic that the combined effect of government encouragement and enlightened self-regulation will bring about constructive change in this very important aspect of public service.' " *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1098-99.

69. *Id.* at 1099. " 'The Commission was reluctant, for legal and policy reasons, to try to lay down specific program rules, but *something had to be done*.' " (emphasis added by the court). *Id.*

70. *Id.* at 1100-01.

works were required to act under the "public interest" standard, citizen's groups and the public-at-large were never included in the negotiating process.[71]

At this delicate point in the negotiations the networks became indignant when Chairman Wiley indicated that public hearings might be used as leverage against the networks.[72] Although Chairman Wiley disclaimed an intent to threaten, he apparently meant to indicate that the FCC might be forced to take official action if the networks did not move toward self-regulation. The court in *Writers Guild* relied on this episode as another example of Chairman Wiley's pressuring the networks.[73]

As of December 30, 1974, the major networks had agreed, with reservations, to the family viewing policy. NBC accepted the family viewing policy, but not for the first hour of prime time;[74] CBS also agreed to a family viewing period, but only if the NAB adopted an amendment codifying the family viewing policy;[75] and ABC finally endorsed the policy on January 8, qualifying its approval in a carefully composed announcement which stated its concerns about government action:

> *We wish to emphasize the necessity to preserve* the basic rights of freedom of expression under the Constitution and under the Communications Act. Government action in the area of program content must be both cautious and carefully limited lest we do permanent damage to the principles of free expression which are so fundamental in our society. All Americans recog-

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71. Former FCC Commissioner Nicholas Johnson, the Chairman of the National Citizens Committee for Broadcasting, was rebuffed in his attempts to represent the public at the negotiations. "The Chairman preferred closed door negotiating sessions with selected industry leaders, sessions which excluded the creative community, the independent television stations, representatives of public interest groups, and the public at large." *Id.* at 1101. This lack of public input was the basis of the alleged violation of the Administrative Procedure Act. *See* text accompanying note 92, *infra*; BROADCASTING, Dec. 9, 1974, at 8.

72. 423 F. Supp. at 1105.

73. *Id.* at 1106. Chairman Wiley's reliance on the renewal process (through changes in the forms and policy statements) as tools to secure compliance interfered with independent licensee decisionmaking. The court held that the FCC had "no right to launch orchestrated campaigns to pressure broadcasters to do what they do not wish to do." *Id.* at 1150. It was especially crucial to avoid even the appearance of pressure when, as here, the FCC was making recommendations in areas in which formal regulation would be questionable. *Id.*

74. Prime time refers to the hours between 7:00 and 11:00 p.m. Eastern Time and Pacific Time and 6:00 and 10:00 p.m. Central and Mountain Time. In practice, however, prime time is affected by the requirements of the Prime Time Access Rule which frees one hour during prime time from network control. *See* 47 C.F.R. § 73.658(k) (1975). This "access time" is between 7:00 and 8:00 p.m. Eastern and Pacific Time. *See* Note, *Federal Regulation of Television Broadcasting—Are the Prime Time Access Rule and Family Viewing Hour in the Public Interest*, 29 RUTGERS L. REV. 902, 903 n.6 (1976) [hereinafter cited as *Television Broadcasting*]. It is unclear from the opinion whether NBC was referring to the hour from 7:00 to 8:00 or 8:00 to 9:00 p.m., although it seems probable that NBC was unwilling to follow family viewing during 8:00 to 9:00 p.m., which is the first hour of prime time network scheduling. 423 F. Supp. at 1110. NBC later revised its position to include the first hour of prime time network scheduling. *Id.*

75. 423 F. Supp. at 1110 n.72. CBS later decided to support family viewing with or without NAB adoption. *Id.*

nize, we are sure, that these are sensitive and fragile concepts. *Accordingly, ABC strongly supports the concept of industry self-regulation.*[76]

The NAB met on January 15 and agreed, in deference to Chairman Wiley, to accelerate its consideration of a family viewing policy so that amendments could be adopted in time for their inclusion in the FCC report to Congress.[77] Accordingly, on February 4, the NAB Television Code Review Board approved the amendments embodying the family viewing policy and on February 19, the FCC submitted its report, including the NAB amendments, to Congress.[78]

The FCC Report on the Broadcast of Violent, Indecent, and Obscene Material[79] was a report as notable for what it did not say as for what it did say. Although the report unveiled the family viewing provisions of the NAB Code, the Commission carefully avoided any discussion either of the applicability of the first amendment restrictions against regulation of television programming, or, assuming the first amendment did not bar regulation, of the powers the Commission felt it had in this area.[80] Instead of dealing with this issue, the Report lauded the proposed family viewing amendments to the NAB Code as "commendable" and stated they would "go a long way toward establishing appropriate protections for children."[81] By endorsing the NAB amendments, the FCC was able to sidestep the first amendment issue entirely: "Regulatory action to limit violent and sexually-oriented programming which is neither obscene nor indecent is less desirable than effective self-regulation, since government-imposed limitations raise sensitive First Amendment problems."[82] At no point did the FCC discuss whether these issues were best resolved in the courts or whether it felt the first amendment was a bar to regulation.[83] The court characterized this omission as a means for the FCC to maintain its leverage over licensees by preserving its "option to threaten governmental action while simultaneously recognizing that any action it might take would involve First Amendment difficulties."[84]

Until April 8, when the TV Board of the NAB formally approved the Television Code amendments containing the family viewing policy,[85] Chairman Wiley made speeches, held meetings with network officials, and issued press releases to maintain the momentum to resolve the issue. Chairman Wiley sought to characterize this activity as well as the rest of his activity since 1974 as personal in nature. The court in *Writers Guild*, however, characterized it as "official, not personal; and the circumstantial evidence is persuasive that the

76. *Id.* at 1112 (emphasis in original).
77. *Id.* at 1114.
78. *Id.* at 1116.
79. 51 F.C.C.2d 418 (1975).
80. 423 F. Supp. at 1117.
81. Report on the Broadcast of Violent, Indecent, and Obscene Material, *supra* note 11, at 422.
82. *Id.* at 420.
83. 423 F. Supp. at 1117.
84. *Id.*
85. *Id.* at 1119.

Chairman was acting on behalf of, and with the approval of, the Commission."[86]

The family viewing provisions that went into operation with the fall, 1975 season were designed to ensure that "material inappropriate for children will not be broadcast" during the early prime time hours.[87] The family viewing policy, as codified, consisted of: (1) the establishment of the family viewing period as the first hour of network programming in prime time and the hour immediately preceding it; (2) audio/visual warnings in the rare cases where a program sought to be broadcast in these time slots is deemed unsuitable for such a family audience; (3) viewer advisories in later hours where programs contain questionable material for large segments of the audience.[88]

Following the enactment of the amendment, two separate lawsuits were filed claiming that the family viewing policy was not only ill-conceived, but that the means by which it was promoted by the FCC and ultimately adopted by the NAB and the networks was unconstitutional.[89]

In the first action,[90] the Writers Guild of America and other creators, writers, and producers claimed that the promulgation of the family viewing rules by the government defendants (the FCC and the individual commissioners) and the individual defendants (ABC, NBC, CBS, and the NAB) violated the first amendment, section 326 of the Federal Communications Act,[91] and the Administrative Procedure Act.[92] In the second suit,[93] Tandem Productions sought restoration of its show "All in the Family" to the family viewing period and claimed damages for the reduced earning potential which occurred both from its exclusion from prime time and from reduced value in the syndication market.[94] The court held in *Writers Guild* that it was a violation of the first amendment for the FCC to pressure the networks to adopt the family viewing

86. *Id.* at 1120. The significance of personal as opposed to official action has ramifications for a finding of state action. *See* text accompanying notes 28-44 *infra*.

87. *Id.* at 113 n.76.

88. NATIONAL ASSOCIATION OF BROADCASTERS, THE TELEVISION CODE 2-3 (18th ed. 1975). *See* text accompanying note 2 *supra*.

89. *See* text accompanying notes 3-10 *supra*.

90. Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976).

91. 47 U.S.C. § 326 (1970).

92. 5 U.S.C. §§ 551-59 (1970). Section 553 of the Administrative Procedure Act sets forth the regulations for public notice and provides for an opportunity for interested parties to be heard. For a discussion of the procedural requirements of FCC rulemaking see Note, *Duty of Networks*, *supra* note 6, at 591-94.

93. Tandem Productions, Inc. v. Columbia Broadcasting System, Inc., 423 F. Supp. 1064 (C.D. Cal. 1976).

94. *Id.* at 1157-58. Damages may be awarded against the private defendants, but not against the government defendants because of sovereign immunity. *Id.* at 1158-59. It is not clear whether Tandem also seeks compensatory damages for "intangible losses associated with the deprivation of first amendment rights." *Id.* at 1157 n.146. Syndication is that process by which shows are sold to independent stations after their run on a network. The most lucrative air time for syndicated shows is during the first hour of prime time. Thus, if "All in the Family" could not be shown then because of the family viewing hour, its value would diminish significantly and the court estimated the damages as "potentially large." *Id.* at 1128.

policy[95] and that the NAB and all three networks were liable for financial damages to Tandem Productions.[96] The three networks and the government defendants have decided to appeal the imposition of damages in this case[97] and the NAB will appeal those parts of the decision which appear to cast doubt on broadcasters' rights of self-regulation through the NAB Code.[98] That part of the decision which affirms the first amendment prohibition on government interference with broadcasting may emerge unscathed.

IV
ANALYSIS OF THE FIRST AMENDMENT ARGUMENT

In its discussion of the first amendment issues, the *Writers Guild* court reached four main conclusions with respect to the liability of the private defendants: (1) adoption of a family viewing policy by a broadcaster would not have been a first amendment violation in the absence of government pressure;[99] (2) something more than the mere presence of government in this area is necessary to precipitate a violation of the free speech guarantee;[100] (3) the adoption of a family viewing policy to avoid the threat of government regulation is unconstitutional;[101] and (4) the undermining of independent decision-making constitutes a first amendment violation.[102] The liability of the government defendants turned on the attribution of Chairman Wiley's actions to the Federal Communications Commission as government conduct.[103]

These conclusions are synthesized in the court's statement:

> Broadcasters are free to adopt the family viewing policy even if the source of the idea is governmental, and even if government officials have encouraged the policy, provided that their adoption of the policy is based on their independent judgment that the particular programming policy is best suited to promote the public interest.[104]

Broadcasters may not program "on any basis other than their own independent judgment;" nor may they interfere with the similarly independent judgment of other broadcasters.[105]

A. Independent Adoption

The statutory authority for broadcast regulation derives from the provisions of the Federal Communications Act of 1934 which established a

95. *Id.* at 1150-51.
96. *Id.* at 1158. The court denied Tandem's request to order CBS to return "All in the Family" to the family viewing time period. *Id.* at 1154.
97. BROADCASTING, Nov. 15, 1976, at 22, 29.
98. BROADCASTING, Nov. 29, 1976, at 20.
99. 423 F. Supp. at 1134-35, 1140.
100. *Id.* at 1135.
101. *Id.* at 1140-43.
102. *Id.* at 1143.
103. *Id.* at 1130.
104. *Id.*
105. *Id.* at 1130-31.

framework for the operation of the broadcast media and created the Federal Communications Commission to enforce the provisions of the Act.[106] The FCC's regulatory powers are far-reaching in the areas of licensing and renewal, limited only by the "public interest, convenience, and necessity" standard.[107] By making the right to broadcast contingent on public interest considerations, the scheme effectively casts licensees in the role of the public's trustees of the airwaves.[108] In policing these public trustees, the FCC is charged with safeguarding the rights guaranteed by the first amendment.[109] The Federal Communications Commission is explicitly denied the power to act as a public censor.[110]

The first amendment to the Constitution which states that, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[111] is not an absolute freedom. It is subject to reasonable time, place, and manner restrictions.[112] In the context of the communications media, broadcast expression has been subject to even greater regulation, usually designed to ensure that the public receives maximum benefits from the media.[113] Thus, while regulation is usually regarded as a device which limits diversity by requiring adherence to a single norm, regulation has paradoxically been perpetrated in the broadcast industry in the name of ensuring diversity in programming.[114] As a public trustee, one of the licensee's primary responsibilities is the presentation of diverse programming.[115] In *Red Lion Broadcasting Co. v. FCC,* the Court indicated that the public has a right to have broadcasters operate "consistently with . . . the First Amendment" and that, "[i]t is the right of the public to

106. 47 U.S.C. §§ 154-55 (1970).

107. The public interest standard is a broad standard which has never been adequately defined. *See* note 62 *supra*. It is, however, the basic standard on which the entire regulatory scheme rests. The FCC's power to issue and renew is based on the condition that the "public . . . interest . . . will be served thereby." 47 U.S.C. §§ 307(a), 307(d) (1970). In considering license renewals, the FCC's inquiry into the public interest may extend into program content. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 394 (1969).

108. Note, *Television Broadcasting, supra* note 74, at 904.

109. "But, while the Commission's statutory authority is indeed broad, it is certainly not unlimited. Broadcasting is plainly a medium which is entitled to First Amendment protection." Children's Television Report and Policy Statement, *supra* note 50, at 3.

110. 47 U.S.C. § 326 (1970). *See* text accompanying note 63 *supra*.

111. U.S. CONST. amend. I.

112. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77 (1940) (loudspeaker on sound truck in public streets).

113. "[D]ifferences in the characteristics of new media justify differences in the First Amendment standards applied to them." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969). *Accord*, National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943). The theory for regulation of the broadcast media originated in the scarcity of frequencies of the electromagnetic spectrum as compared with the number of potential users. Regulations which dictate how the spectrum is to be allocated were held to be constitutional in *Red Lion*, 395 U.S. at 396-400. *See also* Schiro, *Diversity in Television's Speech: Balancing Programs in the Eyes of the Viewer*, 27 CASE W. RES. L. REV. 336 (1976).

114. Schiro, *supra* note 113, at 338-39.

115. "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . . ."[116] The public's right to diverse programming is reinforced by the statement that, "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[117] Family viewing may thus be invalidated as unconstitutionally restricting the content of programming during the early evening hours, although the court never expressly reaches this conclusion.[118]

In order to assure diversity, the Court maintained that decisions about program content must be made independently.[119] Independent decisionmaking was thus seen "not only [as] the basis of the Federal Communications Act, but also [as] the constitutional foundation for the broadcasting system."[120]

The danger, as the Court saw it, was that the enforcement of specific programming criteria by the FCC, NAB, or any outside organization would undermine the licensee's independent base and thus abrogate the licensee's duty to make programming decisions under the public interest standard. In so reasoning, the *Writers Guild* case introduced the idea that a broadcast licensee owes a duty to the public to resist government regulation:[121]

> The question of what the needs of the community are at particular times is peculiarly the province of the licensee. If the licensee should determine that an audience is likely to be composed of children and adults at particu-

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116. *Id.* The *Red Lion* case upheld the personal attack rule of the fairness doctrine. The fairness doctrine imposed certain requirements on broadcasters pertaining to discussion of public issues on broadcast stations. In order to ensure that each side of an issue be presented to the community, the FCC developed rules relating to the right of reply to personal attacks and political editorials. These requirements are distinct from the statutory provision for equal time for political candidates. 47 U.S.C. § 315 (1970).

117. 395 U.S. at 390. *Compare Red Lion with* Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) (broadcaster's refusal to accept editorial advertisements does not constitute a first amendment violation). For the view that the *Red Lion* decision was on the broadcaster's obligation under the public interest standard rather than on the first amendment and that this would have provided a sounder rationale for the *Writers Guild* court, *see* Note, *Duty of Networks, supra* note 7, at 595-96.

118. The constitutionality of family viewing on the merits has expressly been left open. "The desirability or undesirability of the family viewing policy is not the issue . . . . This court will not evaluate the family viewing policy except to say that individual broadcast licensees have the right and the duty to exercise independent judgment in deciding whether or not to follow that policy." 423 F. Supp. at 1072. Although the court disclaimed any authority to declare an end to family viewing, this is not central to the court's holding. *Id.* Since the constitutionality of family viewing is not squarely presented in this case, the validity of family viewing, itself, may yet be litigated. *See* text accompanying notes 157-73 *infra*.

119. *See* text accompanying notes 145-56 *infra*. "[A] licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programming on any basis other than his own reasonable decision that the programs are satisfactory." National Broadcasting Co. v. United States, 319 U.S. 190, 206 (1942), *quoting* FCC, REPORT ON CHAIN BROADCASTING 39, 66 (1941). The *NBC* case upheld the chain broadcasting rules which were designed to prevent network control over licensees' programming decisions. *Id.* at 204-05, 226-27.

120. 423 F. Supp. at 1133.

121. Note, *Duty of Networks, supra* note 7, at 584.

lar hours, nothing in the First Amendment prohibits it from programming accordingly.[122]

In striking down the family viewing regulations of the broadcasting industry, *Writers Guild* leaves several questions unresolved. From the court's opinion, it is unclear whether any outside concerted action in the area of programming is ever permissible. Thus, there is no indication whether there are any circumstances in which one or more stations may jointly decide to follow any coherent policy based on specific programming considerations. By extension, this casts doubt on the viability of other provisions of the NAB's Television Code relating to programming quality.[123] Finally, the court suggests no standards by which the existence of the requisite degree of independence of a given programming decision can be judged and it broadens the licensee's potential for liability for breach of other, as yet unspecified, duties which may arise.[124]

The court's opinion also obscures the basic issue of programming control by combining it with its interpretation of *Columbia Broadcasting System v. Democratic National Committee,*[125] a case which more properly involved access by various groups to the medium itself for advertising purposes. The *Writers Guild* court reasoned that, "[i]f the decision to refuse editorial advertisements is within the range of editorial discretion afforded to broadcasters, then an individual decision to adopt a policy such as family viewing must be similarly safeguarded."[126] Family viewing and access to the media for advertising are not, however, comparable aspects of first amendment doctrine and the *CBS* ruling is sorely strained by its application to the instant case.[127]

Thus, although the court appears to have reached a satisfying decision regarding an independent broadcaster's prerogative to adopt a family viewing policy, it has apparently used a faulty road in getting there.

B. Government Influence

The mere influence of government in programming decisions does not necessarily indicate a sufficient level of state action to constitute a first

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122. 423 F. Supp. at 1134. The responsibility for programming decisions may not be delegated to a network or any other person or group and thus is inconsistent with the concept of government regulation of programming. *Id.*, *citing* Report on Editorializing, 13 F.C.C. 1246, 1248 (1949).

123. If broadcasters are required to make all programming decisions independently, then the validity of the NAB Code is jeopardized insofar as it centralizes programming decisions into one board. *See* text accompanying notes 145-56 *infra*. The NAB is appealing those aspects of the decision which treaten the NAB Code and preclude the broadcasters' right to engage in "meaningful voluntary industry self-regulation." The NAB believes "the public and the broadcasting industry support the concept of self-regulation as an essential means of assuring that the nation's broadcasting stations serve the public interest." BROADCASTING, Nov. 29, 1976, at 20.

124. Note, *Duty of Networks, supra* note 7, at 584.

125. 412 U.S. 94 (1972). The *CBS* case dealt with the question of access to television through paid editorial advertisements and held that broadcasters have the right to refuse such ads under the first amendment.

126. 423 F. Supp. at 1134.

127. The obligation to provide viewers with diverse programming is confused with the "supposed obligations of licensees to afford various groups access to the airwaves." *See* Hamburg, *supra* note 56, at 2.

amendment violation.[128] According to the court, the plaintiff's argument that there is a first amendment violation if the source of the idea for a family viewing policy is the government or if the broadcaster's decisions are influenced by government proves too much. "If the plaintiffs' position were correct, a licensee which heard a good idea from a governmental source could not adopt it even if, in its independent judgment, the programming suggestion was worthwhile."[129] To require licensees to ignore constructive suggestions is patently undesirable when the objective should be to achieve quality programming to serve the varied needs of viewing audiences.

By characterizing the duty of licensees as a first amendment duty,[130] the court was hamstrung by the constitutional requirement of showing that the first amendment violation resulted from governmental rather than private interference.[131] The court was cognizant of the fact that the state action doctrine may apply to government action through private individuals when one can show there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[132] The court applied this standard in arriving at its finding that government influence was a form of coercive pressure on the networks to the extent that "the networks served in a surrogate role in achieving the implementation of government policy."[133]

In discussing state action, the court noted that while many of the cases in which there has been a finding of action involve racial discrimination, this was by no means the exclusive area in which such a finding has been made.[134] The court cited favorably a line of cases involving "offensive conduct" which caution the government against supporting private practices which conflict with national policy.[135] The court distinguished these cases, however, on the basis of the interests involved, and found here that direct government involvement was not extensive enough to satisfy the state action requirement.[136]

In rejecting plaintiff's position that mere government influence would be a first amendment violation, the court indicated that insofar as such a result

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128. 423 F. Supp. at 1135. The court is referring to government input in the form of new ideas or suggested policy short of coercion.

129. *Id.* The court was apprehensive of plaintiffs' position because it would mean that licensee discretion in programming development would be sharply curtailed whenever it could be shown that government sources had any input whatsoever in a given programming decision.

130. *Id.* at 1133, 1140.

131. Note, *Duty of Networks*, *supra* note 7, at 596, *citing* Hudgeons v. NLRB, 424 U.S. 507, 519 (1976); Corrigan v. Buckley, 271 U.S. 323, 330 (1926).

132. 423 F. Supp. at 1135, *quoting* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). For an in depth discussion of the state action finding as well as a critical view of its application to the finding of private network liability, *see* Note, *Duty of Networks*, *supra* note 7 at 596-601.

133. In so reasoning, the court concluded that while government pressure was sufficient to rise to the level of a first amendment violation, government influence did not. 423 F. Supp. at 1140. *See* § text accompanying notes 140-44 *infra*.

134. 423 F. Supp. at 1136-40.

135. *Id. See also* Brenner, *supra* note 58, at 41-44.

136. 423 F. Supp. at 1135.

would restrict licensees' latitude in programming, it was also incompatible with the overriding goal of maximum diversity. The court also reversed prior interpretations of section 326 by noting that it would be an unusual result if the government could achieve its ends by endorsing rather than prohibiting programming ideas.[137]

The court reiterated that the prime concern of the first amendment analysis is not the actual content of the broadcasters' programming decisions, but the independence with which these decisions are made.[138] Thus, mere government presence may not rise to the level of a first amendment violation:

> If the licensee has in good faith adopted a policy which it reasonably believes to conform with the public interest and applicable regulations and if it has adopted it not because of government pressure, but because it believes it to be wise policy, the First Amendment not only permits the decision, but secures it from judicial restraint.[139]

C. *Government Pressure*

Although mere government presence does not constitute state action, the court found that adoption of a family viewing policy to avoid threatened government regulation was such a violation.[140] The totality of the evidence indicated that Chairman Wiley, acting on behalf of the FCC, had conducted a campaign designed to pressure the networks into radically changing the content of early evening programming and, in the course of the campaign, had "threatened the industry with regulatory action if it did not adopt the essence of his scheduling proposals."[141]

The unconstitutional pressure exerted by Wiley included the possibility of severe economic burdens and the implied threat of full-fledged administrative proceedings.[142] The bottom line of the court's findings—that but for the government's threats no family viewing policy would have materialized—indicates the degree to which independent decision-making by licensees was restricted by government pressure. Stated this way, it is apparent that this is hardly a milieu conducive to the requisite degree of independent decision-making by licensees.

The court charged broadcasters, in their role as public trustees and fiduciaries, with the duty to resist such government intrusions into programming.[143] The opinion pointed out, in the context of another fiduciary relationship, that when corporate profits have been at stake, the networks have

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137. *Id.*
138. *Id.* at 1140.
139. *Id.*
140. *Id.*
141. *Id.* at 1094. *See* text accompanying notes 56-98, *supra*.
142. *Id.* at 1142. The implication is that such proceedings would be expensive and time consuming.
143. *Id.* at 1143. This concept of a fiduciary duty under the public interest standard derives from *Red Lion*: "It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern." 395 U.S. at 394.

staunchly resisted FCC action, and concluded that the networks' responsibility in this area is no less compelling.[144] The finding of government pressure regarding family viewing tantamount to censorship clearly indicated a first amendment violation.

D. Independent Decision-Making

The use of the NAB Code to undermine independent decision-making and to give the Board the unparalleled power to control early evening programming[145] across the country constituted a first amendment violation.[146] The court stated that this plan would have destroyed the "decentralized character of the system of broadcasting, achieved monopolistic control over American television, and thus imperiled the 'paramount' right of viewers and listeners."[147]

In exploring the role of the NAB, the court found that the Board had no constitutional right to regulate programming by acting as a censor.[148] The FCC and NAB policy, in effect, prevented broadcasters from programming on an independent basis and compelled them to consider what would be acceptable to the NAB Review Board.[149] The result, shown by factual evidence,[150] was ample proof of the palpable "chill" on first amendment expression of producers and writers in striving to present unobjectionable material:

> Significant self-censorship was evident. Characters were not developed, themes were not explored, language was deleted—all in response to network adherence to family viewing principles. To denigrate this phenomenon as mere "irritation" or "subjective chill" bespeaks a reckless indifference to the fact that the family viewing policy significantly changed the process of television editing. It transformed network editors from independent decisionmakers into conduits of FCC and NAB policy. Instead of deciding what should and should not be broadcast, they decided what material would evoke criticism from other networks and NAB functionaries.[151]

The court demonstrated the degree to which independent action was inhibited by noting that at one time the suggested regulation would have limited

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144. 423 F. Supp. at 1143. Although the court injects statutory language from the Federal Communications Act, it does not expressly rely on it as a basis for liability. For a discussion of the appropriateness of a statutory basis for liability, see Note, *Duty of Networks*, *supra* note 7, at 601-03.

145. The ultimate sanction available to the NAB is to delete the station from its roster and to withdraw the right to display the "Seal of Good Practice." For an analysis of the advantages and disadvantages of NAB subscription, *see* Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, *supra* note 57, at 1530-31.

146. 423 F. Supp. at 1143.

147. *Id.* at 1143-44. text accompanying note 117 *supra*.

148. *Id.* The relationship between the FCC and the NAB is analyzed in Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, *supra* note 57.

149. 423 F. Supp. at 1126. *See generally* BROADCASTING, Sept. 15, 1975, at 30.

150. 423 F. Supp. at 1126.

151. *Id.*

networks to material which would mollify even the "most uptight parent that could be imagined."[152] A policy which established such dominance by the NAB or any other screening panel would clearly violate the doctrine that regulation of program content is permitted only insofar as it promotes greater, not lesser, diversity.[153]

The court did not view as dispositive the fact that the FCC had not overtly adopted the family viewing policy or tied it to its licensing procedure in any way. It was enough that the FCC conspired to "usurp licensee independence through the vehicle of the NAB."[154] The court also emphasized the point that the family viewing policy was so vague that it was incapable of definition or consistent administration.[155]

In summary, the court stated:

> If the First Amendment means anything, however, the Commission has no right to accompany its suggestions with vague or explicit threats of regulatory action should broadcasters consider and reject them. The Commission has no right whatsoever to demand or to secure commitments from broadcasters that its suggestions be accepted. It has no right to launch orchestrated campaigns to pressure broadcasters to do what they do not wish to do. Particularly when Commissioners make recommendations in areas where formal regulation would be questionable, it is vital that any suggestion of pressure or the appearance of pressure by scrupulously avoided. Plaintiffs contend that "suggestions" emanating from the Commission automatically exert improper pressure because of the delicacy of the regulatory system. The answer to this problem is not to outlaw suggestions but to relieve the ambiguities of the system—to make it clear not only that the Commission cannot use the licensing system to combat material it believes to be offensive but also that government threats to use regulatory tools if programming suggestions are not adopted violate the First Amendment.[156]

Thus, finding that the interference with independent decision-making compromised viewers' rights to diversity, the court held that such interference constituted a violation of the first amendment.

V
IMPLICATIONS OF THE DECISION

The court's first amendment analysis relies heavily on the factor of government intervention in the programming decision to adopt the family viewing

152. *Id.*
153. *Id.* at 1147.
154. *Id.* at 1151.
155. "[U]nless the Commission enacts valid regulations giving fair notice to licensees . . . the Commission has no authority to use the licensing process to control the depiction of violence or the presentation of adult material on television." *Id.* at 1149.
156. *Id.* at 1150.

policy and does not discuss the constitutionality of family viewing *per se*. As a result, it fails to treat adequately the public's interests in first amendment rights and in diverse programming.

The public's first amendment rights in broadcasting were initially explored in the seminal cases of *National Broadcasting Co., Inc. v. United States*[157] and *Red Lion Broadcasting Co. v. FCC*.[158] Those cases stand for the proposition that the rights of viewers are paramount in broadcasting.[159] The family viewing policy posed a grave threat to those rights insofar as it determined the content and broadcasting time of programs depending on the characteristics of the projected audience.[160] As Action for Children's Television put it, family viewing hour had deteriorated into "family blandness hour" because the phrase "unsuitable for family viewing" is usually a catch-all to exclude not only violence or obscenity, but also controversy in the form of social issues or mature themes.[161] Not only did family viewing tend to prevent the viewing of more complex issues by both adults and children, but it also deprived both groups of the opportunity to mutually explore difficult and topical issues during a time period when families would be most likely to be together and to engage in such discussions.[162] The court in *Writers Guild* failed to deal with these aspects of first amendment doctrine except as it tangentially related to government intervention.[163] If diverse programming is the cornerstone of first amendment rights of viewers,[164] insofar as the family viewing policy decreases that diversity during the early evening hours, it may violate the public's right to diversity in broadcasting.[165]

In addition to the failure to discuss the effects which family viewing has on diversity, the opinion also failed to analyze the issue of family viewing on the merits.[166] Instead, it sidestepped the issue by observing, "the networks are free to continue or to discontinue the family viewing policy . . . based on their independent conception of the public interest."[167] This does not address the more basic issue of whether or in what manner the family viewing policy protects or serves young viewers—the ostensible main purpose of the policy. The charge by ACT that a family viewing policy is a "public relations gimmick allowing networks to *appear* concerned and sensitive to children's needs, and lulling the public into the belief that by virtue of the policy, children's needs

157. 319 U.S. 190 (1943).
158. 395 U.S. 367 (1969).
159. *Id.* at 390.
160. Pre-Trial Memorandum of National Citizens Committee for Broadcasting and Action for Children's Television as Amici Curiae at 5, Writers Guild of America, West, Inc. v. Federal Communications Commission, 423 F. Supp. 1064 (C.D. Cal. 1976) [hereinafter cited as NCCB & ACT Brief].
161. *Id.* at 37.
162. *Id.* at 6.
163. *See* text accompanying notes 99-156 *supra*.
164. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).
165. NCCB & ACT Brief, *supra* note 160, at 31.
166. "[T]his is not the family hour case." 423 F. Supp. at 1072. *See* text accompanying note 120 *supra*.
167. 423 F. Supp. at 1153.

are adequately served"[168] is worthy of serious consideration. If the purpose of family viewing is to insulate children from sex and violence, it is bound to fail, because such fare is readily available in the afternoons and after the arbitrary 9:00 p.m. cut-off point when millions of children are watching.[169] If, on the other hand, the purpose of the policy is to cater to the unique needs of children by providing stimulating shows for young viewers, it still fails.[170] As a group, children are the most neglected audience and are offered the least amount of programming for their age or interest.[171] Moreover, the family viewing policy deprives children of diversity by denying them the opportunity to deal with significant issues and mature themes during a time when they are likely to be watching.[172] Thus, the policy conflicts with the FCC's own policy statement which calls for programming designed especially for children.[173]

In failing to deal with these problems, the court is issuing an open invitation to the relitigation of family viewing on the merits should a broadcaster comply with the opinion in *Writers Guild* and independently adopt this policy.

VI
FUTURE OF FAMILY VIEWING

It is unlikely that a designated family viewing time will be adopted in the future. The rule established by *Writers Guild* is that a family viewing policy is permissible only if it is independently adopted by individual broadcasters in the exercise of their license in the public interest. It is doubtful, given market pres-

168. NCCB & ACT Brief, *supra* note 160, at 40-41.

169. *Id.* at 41, *citing* T.V. GUIDE, Apr. 26, 1975, at 6. Nielsen demographics for the fall, 1975 schedule showed that family viewing had minimal impact. For the first two weeks of the fall season, the total adult viewing in the 8:00 to 9:00 p.m. time slot was down 6% from the previous year, while the size of the children's share of the viewing audience increased 4%. Significantly, the number of teenagers watching television in the post-family hours of 9:00 to 11:00 p.m. was up 14% from the previous year. BROADCASTING, Oct. 6, 1975, at 24.

170. 423 F. Supp. at 1149 n.138. The lack of appropriate programming for young children has long been recognized by the FCC: "[B]ecause of their immaturity and their special needs, children require programming designed specifically for them. Accordingly, we expect television broadcasters, as trustees of a valuable public resource, to develop and present programs which will serve the unique needs of the child audience." Children's Television Report and Policy Statement, *supra* note 50, at 5.

171. NCCB & ACT Brief, *supra* note 160, at 41. The poor, the elderly, and rural segments of the population are similarly neglected. *See* Brenner, *supra* note 58, at 35. "To preclude the broadcasting of thematic expression fully protected in other media is to make totally unavailable to a sizeable audience that access to esthetic and moral ideas considered 'crucial' to the function of broadcasting." *Id.* at 36.

172. NCCB & ACT Brief, *supra* note 160, at 44. Broadcasters have an obligation to provide "diversified programming designed to meet the varied needs and interests of the child audience." Children's Television Report and Policy Statement, *supra* note 50, at 5.

173. Children's Television Report and Policy Statement, *supra* note 50, 5. The court noted that children's rights to diverse programming may have been so severely ignored that "affirmative requirements that broadcasters meet their needs in the times when children most frequently watch television could be constitutionally supported in a properly prepared administrative record." 423 F. Supp. at 1149.

sures, that independent broadcasters will unilaterally adopt family viewing as a programming policy. A family viewing policy is not likely to be adopted unless it would ensure commercial success in the form of high ratings.[174] Moreover, even if such action is taken, it is entirely likely that family viewing would be invalidated by the courts as violative of children's first amendment rights to diversity in programming.[175]

One alternative to the family viewing policy would be to include pre-broadcast advisories or warnings for violent shows through television guides. There is no assurance, however, that the warnings or advisories would ever be read or seen by the viewer. A more appealing idea is the use of a white dot in the corner of the television screen which is displayed during the broadcast of a show containing potentially objectionable material to young viewers based on the independent judgment of licensees. This method has the advantage of being conspicuous during the course of the program as a constant alert.[176] This mechanism, as all the others, must be measured against first amendment requirements of independent adoption. Should stations adopt this device on their own initiative, as they could have done with family viewing, constitutional issues will probably not arise. If the government pressures or coerces the networks into adopting this new technique, however, the courts may feel compelled to broaden the application of the first amendment beyond government attempts to regulate programming to procedures which influence only the technique and method of braodcasting (*i.e.*, where content is not being controlled).

In the meantime, the use of the white dot is at least a partial solution to the dilemma posed by the dangers of showing excessive violence and other objectionable programming on television and the protection of rights guaranteed under the first amendment.

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174. There is ample evidence that the family viewing policy was adopted by the networks because of economic exigencies. One of the main goals of the high pressure campaign was to obtain a commitment to the policy by all of the networks so that no one network would be put at a competitive disadvantage. 423 F. Supp. at 1099-1100. Another indication of the importance of economics in the adoption of the policy was the delineation of the relevant time spans. On the coasts, the family viewing hour was from 7:00 until 9:00 p.m., while in the Central and Rocky Mountain Time Zones it was from 6:00 until 8:00 p.m. This disparity existed because an arbitrary standard of 9:00 p.m. at *local* time would have required prohibitively expensive transmission to each time zone. NCCB & ACT Brief, *supra* note 160, at 42.

175. *See generally* Children's Television Report and Policy Statement, *supra* note 50, at 5-6.

176. This mechanism has been used by European television. Brenner, *supra* note 58, at 37. FCC Chairman Wiley mentioned the use of the white dot during November, 1974 but it was not pursued. 423 F. Supp. at 1099 n.44.