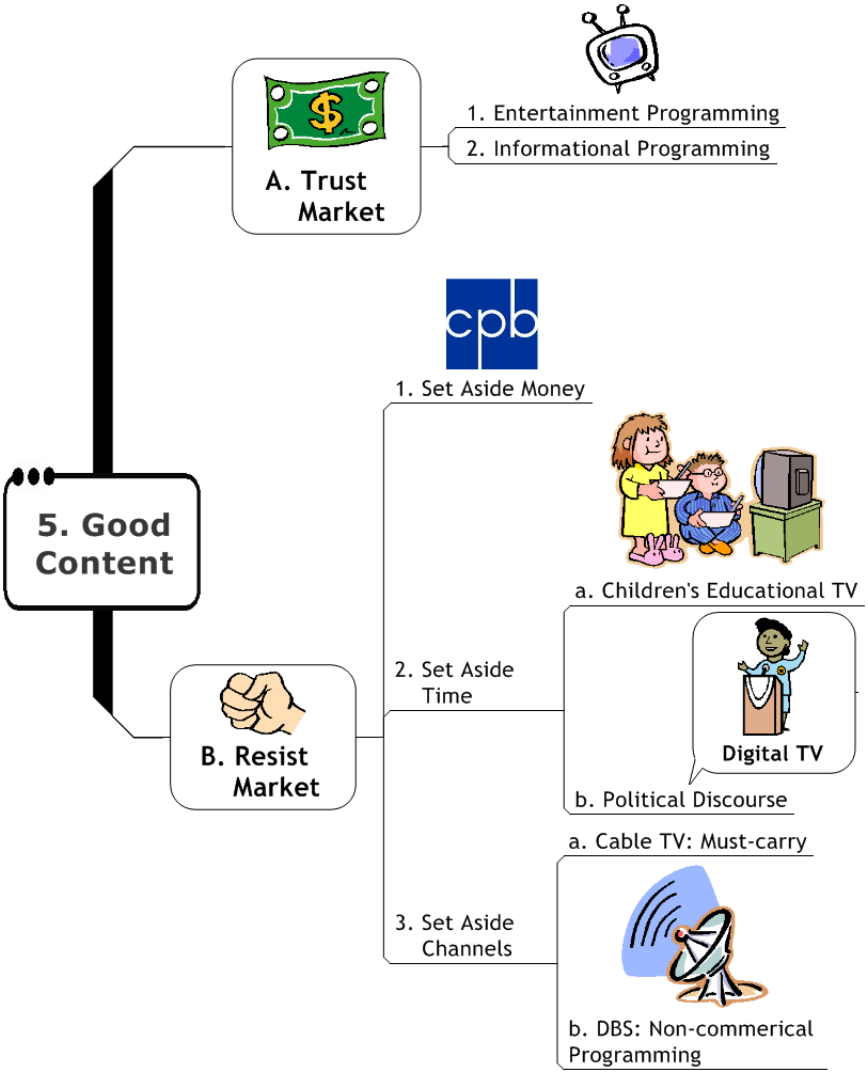
CHAPTER 5

Good Content



In the last chapter we struggled with a surfeit of "bad" content, such as indecency and defamation. In this chapter we struggle with a dearth of "good" content, such as diverse, informational, and educational broadcasting. Step back for a moment and consider how decisions are made about what content to produce and

distribute. In a market system, these decisions are made by private firms responding to consumer demand.

But what if the end result of market forces is content that society—upon reflection—is dissatisfied with? For instance, suppose that on the radio dial, all the stations play variations of the "Top 40" and no classical music. And on television all the channels offer little news programming of any substance and are instead littered with trashy talk shows riddled with commercials. What might society do in response when valuable spectrum is arguably wasted?

The first step is diagnosis. Society's dissatisfaction can arise from two separate sources. First, consumers may want a particular type of programming but because of market defects or failures, such programming remains unavailable (a problem of supply). Second, and more interesting, the public may simply not be interested in "high quality" programming (a problem of demand). Just as certain minors may avoid educational TV, adults may actively seek out "low quality" content and avoid what is supposedly good for them. For example, the majority of adult males in the United States may have their utility functions better satisfied by watching Ultimate Fighting Championship matches than Masterpiece Theatre—to the chagrin of the social and cultural elite, including those with law degrees. Should society accept such preferences as a given and not try to change them? Or does a well-functioning democracy strive to expose individuals to content that equips them for self-reflection and self-governance? (Of course, whether Victorian Age dramas do a better job than cage matches might be contested.)

Any attempt by the government (legal power) to intervene in the private sector's manufacturing and distribution of content (economic power) raises First Amendment concerns (legal power, but of a higher sort). The government cannot, for example, require the NATIONAL ENQUIRER to carry stories regularly seen in the NEW YORKER. Similarly, the government cannot require adult-oriented Web sites that peddle "bad" content to carry more "good" content, such as feminist and religious critiques of pornography. If any communications medium might tolerate such interventions, it would be broadcast radio and television, which has historically been subject to the most regulation. In this chapter, we also explore good content requirements on cable television and satellite.

An appropriate place to start is the "public interest" standard, which Congress has charged the FCC to pursue in broadcast. Recall that at the initial assignment of the license, at renewal,[*] and upon transfer of the license,[†] the FCC must—at each point—determine that the public interest is served. For broadcast, then, good content can be defined as that which furthers the public interest. But what does "public interest" really mean? This is no easy question.

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[*] Licenses are given out and renewed to further "public interest, convenience, and necessity." 47 U.S.C. § 309(a).

[†] Assignment or transfers must satisfy the same standard. *See* § 310(d).

Historically, the FCC has attempted to encourage certain types of "quality" programming as a requirement for discharging the public interest obligations of broadcast licensees. Back in 1946, the FCC released its PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES guide (known as the Blue Book by its cover's color), a staff report that provided informal guidance to programming in the public interest. It emphasized four requirements: unsponsored programs, local live programs, discussion of local public issues; and no excessive advertising.

Later, in 1960, the FCC issued a *Programming Policy Statement*, adopted as a formal rule.[*] This rule listed 14 major programming categories that licensees were encouraged to satisfy. These categories included, among others, local, children's, religious, educational, political, news, and "service to minority groups". In the policy statement, the FCC also instructed broadcasters to ascertain the tastes and needs of the local community through consultations with community leaders.

By the 1970s, however, the FCC entered a deregulatory mind-set, which put the FCC into conflict with the D.C. Circuit Court of Appeals in what is known as the "format cases," which we turn to now.

A. Trusting the Market

1. Entertainment Programming

We live in a pluralistic society, with various ethnicities, races, languages, classes, cultures, and subcultures. Perhaps in the ideal world, all the entertainment tastes of these various groups would be satisfied by the push and pull of the marketplace. However, this will not always be the case. For instance, a particular group may be numerically so small such that no broadcaster seeking profit through advertisement will rationally choose to satisfy that group's preferences. Does the public interest then require something different or in addition to what the marketplace commands?

To make our analysis more concrete, imagine that the last classical music radio station in your city is being sold. The new owners want to change formats to "urban." This planned entertainment format conversion creates an outcry among classical music enthusiasts, who no longer have any station tailored to their interests. They complain loudly that there are plenty of other stations that play "that kind" of music but only one that understands the true genius of Mozart. What, if anything, should the FCC do? Is the format change relevant to deciding whether the license transfer is in "the public interest"?

[*] *En Banc Programming Inquiry*, 44 F.C.C. 2303 (1960).

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MO&O, 60 F.C.C.2d 858 (1976)

2. This Inquiry grows out of . . . Citizens Committee to Save WEFM, Inc. v. FCC (D.C. Cir. 1974), the latest in a line of cases[1] which hold that when an application for the sale of a radio station license is before the Commission, and in connection with that sale the purchaser intends to discontinue the station's existing entertainment format, if there has been expressed a significant amount of public protest to the effect that this change of format, if completed, would deprive the public of an entertainment format not otherwise available in the market, then the Commission must hold a hearing pursuant to Section 309 of the Communications Act, to determine whether the public interest would be served by a grant of the application.

11. The practical problems [of holding such a hearing] are simple to comprehend. To determine, in the context of a prospective format change, whether the public interest would be served by allowing it, we must ascertain: (1) what the station's existing format is; (2) whether there are any reasonable substitutes for that format in the station's market; (3) if there are not, whether the benefits accruing to the public from the format change outweigh the public detriment. . . .

13. How is the Commission to define what constitutes a particular entertainment format, and what demarks it from neighboring formats? The Court of Appeals has made it clear that it, for one, will not be satisfied by any Commission attempt to define formats broadly. Hence, "popular music" is not a sufficiently diacritical category . . . nor even, we infer, would be "rock music" or "classical music." Instead, the Commission is required to distinguish progressive rock music from the other species of the rock genre, Citizens Committee to Keep Progressive Rock v. FCC (D.C. Cir. 1973); likewise, as the Court of Appeals suggests in the *WEFM* opinion, we may be obliged to distinguish between 19th Century and 20th Century classical music. . . .

16. The evidence on this record supports the conclusion that the marketplace is the best way to allocate entertainment formats in radio, whether the hoped for result is expressed in First Amendment terms (i.e., promoting the greatest diversity of listening choices for the public) or in economic terms (i.e., maximizing the welfare of consumers of radio programs). . . . [I]t is the best available means of producing the diversity to which the public is entitled. [A] filing of the National Association of Broadcasters, a description for the advertising trade of the radio stations in the New York and Washington, D.C. markets, shows that in large

[1] Citizens Committee to Keep Progressive Rock v. FCC (D.C. Cir. 1973); Lakewood Broadcasting Service, Inc. v. FCC (D.C. Cir. 1973); Hartford Communications Committee v. FCC (D.C. Cir. 1972); Citizens Committee to Preserve the Present Programming of WONO (FM) v. FCC (D.C. Cir.) (Order, May 13, 1971); Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-FM) v. FCC (D.C. Cir. 1970).