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Advertising and Marketing on Cable Television: Whither the Public Interest?

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ADVERTISING AND MARKETING ON CABLE TELEVISION: WHITHER THE PUBLIC INTEREST?

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The 1980's may be remembered as the decade of cable television. From humble beginnings as a method for improving the broadcast television reception for people in rural or mountainous areas,1 cable television now brings multiple channels of original programming into over fourteen million homes across the country. With the current penetration level approaching 25% of homes with television, industry analysts are predicting that 50-60% of the homes in the United States will be wired for cable television by the end of the decade.2 As the coverage of cable spreads, with a corresponding decline in broadcast network television's share of the audience,3 the advertising community is becoming increasingly interested in exploring the potential of cable television as a distinct marketing medium.

Government agencies traditionally concerned with communications and advertising, such as the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC), are taking a "hands-off" approach to this new medium. Moreover, no federal intervention is likely, absent an

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1. Indeed, cable television was originally referred to generically as community antenna television, or CATV, because the cable system would set up a large antenna on a hilltop or other location having good reception in order to pick up signals from broadcast stations and redistribute them over cable wires to paying subscribers. See FCC INFORMATION BULL. No. 18, Cable Television 1 (Oct. 1980).


3. J. Walter Thompson's Projections For The Future Of Cable & Commercial TV, MEDIA INDUSTRY NEWS, Nov. 5, 1980, at 4, predicting a decline in share in prime time network television audience levels from the current 90% to 85% in 1984-85, and 75% in 1989-90.
established record of actual injury to the public interest. Yet must a scandal arise for the creaky wheels of the federal bureaucracy to fashion a response to assure that the "wired nation" will flourish as an honest and open marketplace? By learning from history and planning ahead for coming technological developments, industry, government, and the public can work together to assist the cable medium in becoming an avenue for accurate consumer information without the necessity for heavy-handed regulation.

In Part I of this article, the reality of cable television as an advertising and marketing medium is explored. Advertiser-supported, satellite-distributed cable programming networks already are offering their wares nationwide. Commercials in new formats, such as talk shows or feature films and electronic push-button purchasing from two-way cable television video catalogues, may be introduced soon.

Part II contains an overview of the federal framework for advertising and marketing in the traditional media. In a series of rulings, the FCC has established that broadcasters are responsible for the accuracy of the commercials they disseminate. This background has assisted the FTC in carrying out its mandate to police deceptive advertising. By contrast, the FCC has not imposed similar duties on cablecasters for jurisdictional as well as other reasons. The FTC has also placed some consumer safeguards on direct marketing by conventional means, such as door-to-door and mail-order sales, but has not extended them to newer forms of electronic selling.

In Part III, the industry's efforts to provide a private security force to scrutinize advertising are examined, with a particular emphasis on self-regulation in the broadcasting industry. These private efforts appear to have had a positive effect on the integrity of broadcast television commercials. The initial efforts of the cable industry in this direction appear promising but need more development.

Finally, in Part IV, the possibility of raising, during the local franchising

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4. While there is no explicit statutory requirement that consumer injury be shown before the FTC will act, as a matter of policy, the agency generally awaits evidence of harm before intervening in the marketplace. See FTC, Trade Regulation Rule for the Prevention of Unfair or Deceptive Acts or Practices in the Sale of Cigarettes, 29 Fed. Reg. 8324, 8354-55 (1964), where the Commission specified that "substantive injury to consumers" is one of three factors determining whether a practice could be considered "unfair" under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1958).

5. See infra notes 46-73 and accompanying text.

6. See infra note 45.

7. See infra notes 74-83 and accompanying text.

8. See infra notes 84-110 and accompanying text.
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(or licensing) process, the issue of the cablecaster's responsibility for the commercials it disseminates is discussed. Unlike broadcast television stations, which are licensed by the FCC, cable television systems receive franchises from local governments. The effect of the first amendment's free press guarantee on a franchise provision concerning advertising and marketing is analyzed. While not diminishing the importance of this consideration, the authors conclude that it would be constitutional for a cable franchisee to be required to assume responsibility for advertising, based both on the cable operator's position as a locally-licensed business and the constitutionally unprotected status of deceptive commercial speech.

In the final analysis, however, it is likely that pressures from local franchising authorities will lead to the development of better self-policing mechanisms for cable television, to the benefit of both the public and the cable industry. Given the sheer number and diversity of local franchising agreements and the rapid pace with which the available franchises are being awarded, it is doubtful that local regulation by itself will be effective. By raising these consumer protection issues during the franchise negotiation process, local citizens can work with the cable industry to create a responsible, yet flexible, mechanism to protect cable viewers from deceptive advertising and abusive marketing schemes.

I. ADVERTISING AND MARKETING ON CABLE TELEVISION: CURRENT STATE OF THE ART AND FUTURE PROJECTIONS

As is rapidly becoming common knowledge, the principal advantage of cable over broadcast television is channel capacity. While only seven VHF broadcast channels can coexist in any one community, a single coaxial cable (about a finger's thickness) currently can deliver up to fifty-two discrete channels. Furthermore, any number of cables can be installed at once, and major “builds” (cable installations) now typically employ at least two cables. Another advantage is cable's unique interactive capacity which allows the viewer to “talk back” to his or her television set.

Considering the competitive positions of cable and broadcast television, it is ironic that cable began as an ally of the broadcast industry. Cable

10. J. STEARNS, A SHORT COURSE IN CABLE 8 (6th ed. 1981). The number of channels that can be squeezed onto a single cable is expanding almost as rapidly as cable itself. While engineers widely debated the feasibility of 400 mhz technology (capable of delivering 50 to 54 channels) in 1980, 400 mhz technology is now considered commonplace and Magnavox has introduced 440 mhz equipment which it claims can deliver 64 channels on a single cable. NCTA '81: Hottest Ticket in Medieville, BROADCASTING, June 8, 1981, at 44.
television originated in the late 1940's and early 1950's in the hills of rural America as a device to improve reception of over-the-air signals from broadcast television stations.\(^\text{12}\) A fee was charged for this retransmission service, but the programming and commercial advertising was the same as that on "free" television. Cable television emerged as a separate medium in the mid-1970's when satellite transmission spurred the development of premium, commercial-free "pay cable" services, such as Time, Inc.'s "Home Box Office."\(^\text{13}\) Viewers proved willing to pay a subscription fee to see recent and uninterrupted movies at home, a distinct advantage of cable over broadcast television.

In the past few years, however, cable networks have begun to offer special interest programming, partially supported by advertisements. Ted Turner's Cable News Network, for instance, delivers a twenty-four-hour news service as part of the basic cable package offered by many cable operators around the country.\(^\text{14}\) This service is not available on broadcast television, but like broadcast programs, it is intended to be advertiser-supported. Similarly, cable programmers appealing to special interest viewers, such as sports fans,\(^\text{15}\) women,\(^\text{16}\) children,\(^\text{17}\) Blacks,\(^\text{18}\) Hispanics,\(^\text{19}\)

\(^\text{12}\) Id.


\(^\text{15}\) The Entertainment & Sports Programming Network (ESPN), which delivers sports programs to six million cable homes, recently announced a $25 million, five-year advertising contract with Anheuser-Busch, the well-known beer manufacturer. AB Pours $25 Million into ESPN Contract, Advertising Age, Nov. 3, 1980, at 4, col. 1. ESPN's president estimated that 70 advertisers would purchase approximately $7 million worth of commercial time from this sports-oriented network in 1980. Id.

\(^\text{16}\) USA Network announced that Bristol-Myers, maker of health and beauty aids, will sponsor a two-hour daily women's show called "Alive and Well." USA Network, Press Release, Bristol-Myers, USA Network Sign Historic Cable Agreement (Feb. 18, 1981).

\(^\text{17}\) USA Network's children's show, "Calliope," has been opened up for commercials deemed "compatible with the entertainment." Christopher, Alter to Fill the First CTVB Presidency, Advertising Age, Mar. 2, 1981, at 58, col. 1.


\(^\text{19}\) Hispanic TV is Beaming in on the Big Time, Bus. Wk., Mar. 23, 1981, at 122. The SIN Spanish Television Network, distributed by satellite to 79 cable systems, expected to earn $30 million in advertising in 1981. Id.
theater buffs, and rock music fans have announced plans to accept commercials. In fact, of the thirty satellite-distributed cable programming networks announced to date, fully one-half accept advertising. In addition to the satellite services, many cable systems sell advertising on their own channels, using regional “interconnects” to reach larger audiences. The National Cable Television Association, the industry’s trade association, is optimistic about the future of commercial support for cable, predicting a tenfold increase in cable advertising revenues, to $350 million, by 1985.

A few cable systems can also boast of “shop-at-home,” or direct marketing video services. Modern Satellite Network’s “Home Shopping Show” reaches 3.8 million households in forty-seven states. Advertisers can buy nine-minute segments in the half-hour show to demonstrate their wares and to tell viewers how to order. Times-Mirror Satellite Programming Company has joined with Comp-U-Card of America, Inc. to offer a video information and discount buying service to cable viewers, in which the cable system would receive a percentage of the sales originating from its subscribers. The giant of mail-order catalogues, Sears, Roebuck, and Company, is experimenting with the concept of a Video Catalogue Channel to be distributed by cable television.

While cable television seems to be developing into an advertising-sup-


27. The Computer as Retailer, N.Y. Times, Jan. 9, 1981, at D1, col. 3.


ported medium like its broadcasting counterpart, there appear to be important differences in form and substance looming on the horizon. First, cable’s multiple channel capacity has provided a vehicle for special interest programming, offering advertisers a unique opportunity to “narrowcast,” or carefully target recipients of their video messages. This fragmentation of the viewing audience may result in an increase in the total number of television advertisements disseminated because different segments will be watching different commercials, rather than a mass audience watching the same advertisement. While the individual viewer may not be seeing a greater number of commercials, the total number of commercials may increase. This trend could have a substantial impact on the workload of a centralized law enforcement agency like the FTC, charged with monitoring deceptive advertising.

Second, cable television’s advertising rates are, and probably will continue to be, considerably lower than those of broadcast television. Companies that cannot afford to pay for national broadcast commercial minutes may be enthusiastic purchasers of cable television advertising. Thus, new national television advertisers could emerge, but these new, smaller advertisers may not be familiar with the general requirements that their claims be truthful, nondeceptive, and have a reasonable basis in fact.

30. At the Cable Television Administration and Marketing Society’s First National Conference on Cable Advertising, Robert Alter, first president of the Cable Television Advertising Bureau, stressed the uniqueness of the medium. Alter said that “[c]able is different. It cannot be forced to fit any existing media mold,” and that “[t]he possibilities for developing cable as an advertising medium are probably only limited by our imaginations.” CTVB’s Alter Puts “Vive la Difference” Proposition before CTAM Ad Conference, BROADCASTING, Mar. 9, 1981, at 33.


33. Kathryn Creech, Senior Vice President of the National Cable Television Association, has pointed out that the relatively expensive rates of other media is the most important reason for the rise of cable advertising. Rosenthal, supra note 18, at 40.

34. See Burgeoning Role for Cable Sponsors, Advertising Age, Mar. 2, 1981, at 1, col. 4. Cable “superstation” WTBS Atlanta sells prime-time 30-second spots for $1,100 to $1,800 each, while CBS, ABC, and NBC ask $50,000 to $150,000 for similar time slots. Cable TV Pitching Big-Spending Advertisers, Advertising Age, May 5, 1980, at 72, col. 1.

35. A series of FTC cases has held that it is unfair and deceptive for advertisers to make a claim without having substantiation or a reasonable basis in fact before they disseminate the claim. National Dynamics Corp., 82 F.T.C. 488, 543-44 (1973), modified, 85 F.T.C. 391
Third, unlike broadcast television, which is governed by an industry code restricting the number of commercial minutes per hour of programming, cable television can offer advertisers more flexible time frames for delivering their messages. In contrast to the thirty-second standard that has evolved in broadcast television, at least one of the new cultural cable programming networks has announced its intention to make time available for two-minute, institutional messages. The possibilities of program-length commercials (referred to as “informercials”) and advertiser-produced programming for cable have also been raised. An example of the former occurred on Warner-Amex’s QUBE cable system in Columbus, Ohio, when a representative of a local bookstore appeared on “Columbus Alive,” a public affairs talk show, to discuss the relative merits of hardcover and paperback books. Four books mentioned during the segment were offered for sale to viewers by the sponsoring bookstore, but at no time was the eight-minute interview identified for what it was—a paid commercial.

Cable systems seem to be suffering from a shortage of programming at present, and it may be that the advertisers themselves will fill that gap with sponsor-produced programs. In this respect, cable resembles the early stages of program development in broadcast television, when advertisers themselves produced the shows that were to be the vehicles for their commercial messages. While there is nothing inherently deceptive about ad-


36. The National Association of Broadcasters’ Television Code limits the amount of nonprogram material to 9 minutes and 30 seconds per hour during prime time and children’s programming and to 16 minutes per hour at all other times. NATIONAL ASS’N OF BROADCASTERS, THE TELEVISION CODE 19-20 (21st ed. Jan. 1980) [hereinafter cited as NAB TELEVISION CODE]. Nonprogram material includes billboards, commercials, and promotional announcements. Id. § XIV, para. 1, at 18 (Advertising Standards).

37. Herb Granath, head of ABC Video Enterprises, has stated that two-minute commercials may be introduced on ABC’s Alpha culture network. RCTV Joins Cable Derby, Advertising Age, Dec. 15, 1980, at 1, col. 1. Irving Kahn, Chairman and President of Broadband Communications, has noted that the future of the cable industry “lies not in the 30-second spot but in our extraordinary capacity to develop new means of selling.” Kahn Flies a Red Flag, Donnelly a Green One, BROADCASTING, Mar. 9, 1981, at 35.

38. The segment cost the Readmor Bookstores about $75. Wicklein, Wired City, U.S.A., THE ATLANTIC, Feb. 1979, at 35, 37. In New York City, a travel agency regularly leases a half-hour slot from Manhattan Cable to air “The First Cable Club Travel Segment,” a travelogue promoting the agency’s package tours. FTC STAFF, MEDIA POLICY SESSION: TECHNOLOGY AND LEGAL CHANGE (Dec. 31, 1979), at 31 [hereinafter cited as FTC MEDIA POLICY BOOK].

39. For example, Bristol-Myers sponsored and produced the program “Alive and Well.” See supra note 16.

40. See E. BARNOUW, THE SPONSOR 46-58 (1978). Herbert Granath, Vice President of
advertiser-produced programs, or even program-length advertisements, both may raise a consumer protection pitfall because viewers may not be sufficiently aware of the sponsored nature of the programming.

One of the more intriguing marketing opportunities that will distinguish cable from broadcast television is the use of interactive, or "two-way," cable systems to provide instant "push-button" ordering of items offered for sale by means of video catalogues. The most famous of the two-way systems is QUBE, and most of the recent cable franchises awarded around the country include a promise to offer a similar capability. Using the system's interactive capacity, QUBE viewers of a bookstore infomercial were invited at the end of the segment to purchase one of the four books offered by pressing an appropriate button on their home consoles. This raises the issue whether consumers could be pressured by this new medium into purchasing products that they would not have bought had they had sufficient time for reflection. On the other hand, the marriage of computer-ized data bases with interactive cable could turn the television set into a product information library. Comparative price, quality, and warranty information could enrich the purchase decision at minimal cost to the consumer. But who would compile these listings and bear responsibility for their accuracy remains to be seen.

Cable as a distinct advertising medium is beginning to come into its own. The cable networks carry some commercials today and more are expected in the future. Yet cable advertising may differ from conventional television advertising by offering longer formats, narrower audiences, the presence of many new television advertisers, and two-way communication. Given these distinctions, how will the traditional regulatory framework, designed to protect consumers from deceptive advertising and abusive marketing practices, apply? This subject is explored in the next section.

ABC Video Enterprises, has said, "We would like to see advertising agencies and their clients come into this together and possibly produce programs they would sponsor, much like in the early days of television." Poe, supra note 31, at 10.

42. Wicklein, *supra* note 38, at 37.
II. THE FEDERAL FRAMEWORK FOR ADVERTISING AND MARKETING REGULATION—WHERE DOES CABLE FIT?

The Federal Trade Commission is the major federal agency monitoring advertisements for deceptive practices. Any advertiser disseminating a deceptive commercial over broadcast or cable television is subject to FTC action. However, fulfillment of the FTC’s mandate with regard to advertising in the broadcast media has been aided substantially by a series of FCC rulings that hold broadcasters responsible for the accuracy of the commercials they air. Although it is apparent that cable television will also be an advertising medium, the FCC has not applied similar consumer protection measures to cable.

A. FCC Rulings Establishing Broadcaster Responsibility for Advertising

The Communications Act of 1934 gives the FCC authority to license broadcasters to serve the “public convenience, interest, or necessity.” Television licenses may be granted for a maximum of five years, with renewal at the discretion of the FCC. Under this statutory scheme, the FCC has issued a series of regulations, decisions, and rulings interpreting broadcasters’ duty to act in the public interest.

As a general policy, the FCC has avoided content review of allegedly deceptive advertising by referring complaints to the FTC. Indeed, the two agencies have entered into an agreement which provides that the FTC will exercise “primary jurisdiction over all matters regulating unfair or decep-


tive advertising in all media, including the broadcast media."

The agreement goes on to stress, however, that the FCC "will continue to take into account pertinent considerations in this area [false and misleading advertising] in determining whether broadcast applications for license or renewal of license shall be granted or denied . . . ."

This division of authority does not negate the foundation of FCC directives to broadcasters to the effect that they must:

assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter . . . . This duty is personal to the licensee and may not be delegated.

The FCC has also charged the broadcast licensee with a continuing obligation "to take reasonable steps to satisfy himself as to the reliability and reputation of prospective advertisers." While "every station must have a program to protect the public in this area," the FCC has conceded that stations may turn to the National Association of Broadcasters' Code Authority for advice and may also rely on the national broadcast networks' own clearance procedures. The extent of the individual station's clearance program for advertising also "depend[s] upon the size and resources of the station." These FCC rulings demonstrate the Commission's recognition that local stations must be allowed to rely on the self-regulatory


50. Id.


53. Consumer's Ass'n of D.C., 32 F.C.C.2d 400, 407 (1971). The significance of the network clearance procedure will be discussed in greater detail at infra notes 153-57 and accompanying text.

54. Id.

55. Id. In 1971, the FCC rejected a petition to adopt as part of its rules a "Code of Standards" for television advertising, reasoning that self-regulatory efforts by the broadcasting and advertising industries, as well as the apparent renewed vigor of the FTC, precluded the need for such a code. Adoption of Standards Designed to Eliminate Deceptive Advertising from Television (Petition of TUBE (Termination of Unfair Broadcasting Excesses)), 32 F.C.C.2d 360, 373 (1971).
mechanisms of their network or their trade association to fulfill their re-
sponsibility to eliminate deceptive commercials.

FCC licensees are required to take into account FTC rulings on particu-
lar commercial messages. If the FTC has issued a final judgment that a
particular advertisement is deceptive, the FCC has held that its continued
broadcast "would raise serious questions as to whether such stations are
operating in the public interest." The FCC has cautioned, however, that:

licensees should not rely solely on the action or inaction of the
Federal Trade Commission, nor should they suspend their own
continuing efforts in determining the suitability of advertising
material to be broadcast over their facilities. Thus, advertising
similar to that found to have been deceptive should raise ques-
tions on the part of broadcast stations as to the propriety of such
material.

To assist broadcasters in screening for deceptive commercial material,
the FTC, in cooperation with the FCC, began sending broadcasters a pub-
lication called "Advertising Alert." This bulletin provided notice of the
advertisements subject to corrective action by the FTC and also discussed
particular problem areas to "familiarize licensees with various deceptive
practices so that they will be able to recognize them and take appropriate
steps to protect the public against them." Thus, while the FCC has never
revakd a broadcast license because the station disseminated misleading
advertisements, a series of FCC directives has established that both adver-
sisers and broadcasters have a legal duty to prevent the dissemination of
false or misleading commercial messages.

56. FCC, Public Notice 41503, [Current Service] RAD. REG. (P & F) ¶ 11:401 (Feb. 21,
1957). The FCC later elaborated this point when it stated:

Should it come to [the FCC's] attention that a licensee has broadcast advertising
which is known to have been the subject of a final Order by the FTC, serious
question would be raised as to the adequacy of the measures instituted and carried
out by the licensee in the fulfillment of his responsibility, and as to his operation in
the public interest.

57. FCC, Public Notice 41503, [Current Service] RAD. REG. (P & F) ¶ 11:401 (Feb. 21,
1957).
58. FCC, Public Notice 11836, [Current Service] RAD. REG. (P & F) ¶ 11:402 (Nov. 7,
1961) (announcing first issue of the FTC's "Advertising Alert").
59. Id.
60. There are no legal impediments to carrying out this obligation. The courts have
clearly ruled that a broadcaster may refuse to sell time for advertisements it finds objectiona-
ble for any reason (with limited exceptions necessary to effectuate the fairness doctrine and
to prevent antitrust violations). See Mcintire v. William Penn Broadcasting Co., 151 F.2d
597, 601 (3d Cir. 1945). See also Columbia Broadcasting Sys. v. Democratic Nat'l Comm.,
The Communications Act itself specifically requires that the sponsors of all paid broadcast material be clearly disclosed. An FCC regulation provides that a single announcement of the sponsor’s corporate or trade name, or the name of the sponsor’s product, is sufficient provided the product name clearly indicates sponsorship of the message. However, the issue of repeated sponsor identification for longer advertisements has not come up in the broadcast context because the FCC effectively prohibits program-length commercials. “Teaser” broadcasts (short announcements not identifying the advertiser or product, which are to be revealed in subsequent advertisements) are also prohibited under the sponsor identification rule. “Subliminal” advertisements, in which a message is transmitted at levels below the viewing audience’s threshold of sensation or awareness, would by definition constitute an evasion of the sponsor identification requirement. The FCC has specifically prohibited this technique for all broadcast material, whether commercial or not.

The FCC has also required broadcasters to take special precautions to assure the adequate separation of program content and commercial messages on children’s programs. For instance, a program host or other personality appearing in the program may not promote products on the same children’s show on which he or she appears. The FCC has emphasized that, in addition to strictly enforcing sponsor identification of commercial material broadcast during children’s programs, it also expects licensees to exercise a higher than average level of care in preventing the broadcast of false, misleading, or deceptive commercials on children’s

62. 47 C.F.R. § 73.1212(f) (1980).
63. Public Notice Concerning the Applicability of Commission Policies on Program-Length Commercials, 44 F.C.C.2d 985 (1974). The FCC is apparently more concerned with logging commercials as programs than with the potential for deception and has stated that “[t]he primary test is whether the purportedly non-commercial segment is so interwoven with, and in essence auxiliary to, the sponsor’s advertising (if in fact there is any formal advertising) to the point that the entire program constitutes a single commercial promotion for the sponsor’s products or services.” Id. at 986 (footnote omitted). See also KCOP-TV, Inc., 24 F.C.C.2d 149 (1970).
67. Id. at 16.
The only other major FCC initiative regarding broadcast advertising concerned the question whether commercial announcements could be subject to the fairness doctrine, which would require broadcasters to provide a reasonable amount of air time to persons holding views opposed to those expressed implicitly or explicitly in the advertisement. In 1967, the FCC found that cigarette advertisements were inherently statements of a point of view in the public controversy over the safety of smoking, and, therefore, broadcasters of cigarette commercials had to make time available to opponents of smoking. The FCC ruling led to an inundation of demands by environmentalists and others for broadcast time to respond to automobile, public utility, and similar ads. The ill-fated experiment ended when the FCC announced that its “cigarette rule” was erroneously based. Currently, the rule is that commercial advertising is not a statement on a controversial issue triggering fairness doctrine obligations as long as the advertisement is restricted to extolling the virtues of the product and takes no explicit position on matters of public controversy.

B. FCC Regulation of Cable Television

In contrast to the precedent of broadcaster responsibility for advertising, the FCC has not placed any obligations on cable systems for the commercials they disseminate, with the single exception of the sponsor identification requirement. FCC regulation of cable television has waxed and waned because the FCC's jurisdiction is indirect. The Communications Act gives the FCC authority over broadcasters and common carriers but...
does not mention the cable medium. FCC regulation of cable television has been approved only to the extent that such regulation is reasonably ancillary to the effective enforcement of broadcast television regulation. In addition, the FCC does not license cable systems, as it does broadcast stations. Generally, states or municipalities grant cable franchises, and the franchise applicant need only file a pro forma technical document ("signal registration") with the FCC.

Under the "reasonably ancillary" rubric, the FCC issued a series of regulations that, among other things, required larger cable systems to maintain a minimum potential capacity of twenty channels and to designate one or more channels for access by the public and leasing programmers, on a first-come, nondiscriminatory basis, and by local educational and governmental authorities. The Supreme Court refused to sustain these regulations, however, because "[t]he access rules plainly impose common-carrier obligations on cable operators," in violation of the Communications Act.

75. The FCC determined early on that cable television operators were not broadcasters under subchapter III of the Communications Act because they did not use the airwaves to transmit signals. Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958).

76. In the 1960's, the FCC sought to restrict the operation of cable television systems on the theory that their importation of distant signals into a local broadcast television market would harm the local broadcast licensee and would not be in the public interest. Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962); Amendment of Subpart L, Part 91, To Adopt Rules and Regulations To Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems, 2 F.C.C.2d 725 (1966). The Supreme Court later affirmed the FCC's limited authority over cable, stating that "the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968). Under the same theory, the Court later upheld FCC regulations requiring cable systems with 3,500 or more subscribers to originate programming (as opposed to simply retransmitting broadcast signals) and to make facilities available for local production. United States v. Midwest Video Corp. (Midwest Video I), 406 U.S. 649 (1972) (upholding Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, codified at 47 C.F.R. § 74.1111(a) (1971)). The regulation was first proposed in Inquiry Into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, 20 F.C.C.2d 201 (1969).

77. 47 C.F.R. § 76.12 (1980).

78. 47 C.F.R. § 76.251 (1972) (systems with 3,500 or more subscribers had to build facilities capable of handling at least 20 channels).

79. Id. (governmental and educational users were not to be charged for the use of the facilities; subject to an exception for production costs for live studio presentations exceeding five minutes, public users were not to be charged for use of the facilities).

tems originate some programming (as opposed to simply retransmitting broadcast signals), but still applies the fairness doctrine and certain other restrictions to any programming that is originated voluntarily by a cable system. The only advertising restriction the FCC currently applies to such “origination cablecasting” (including cable network programming distributed by satellite) is sponsor identification, as mentioned above. The issue of how to comply with this mandate in the context of longer-format “infomercials” has not yet been addressed.

The FCC’s relationship with cable television has come full circle in the past two decades. Its original approach was to restrict the expansion of cable in order to maintain the viability of broadcast television, a free service to the public. Subsequently, the FCC saw the cable medium as an opportunity to provide access to television for previously excluded groups such as local community groups and educational interests. With the reversal of the access rules, however, the FCC has taken a pronounced deregulatory approach to the cable industry.

C. FTC Regulations and Federal Statutes Affecting Direct Marketing

Cable television, due to its many channels, special interest programming, and interactive (two-way) capability, is a promising medium, not only for conventional types of advertising, but also for direct marketing efforts. Direct marketing, or (from the consumer’s perspective) in-home shopping, encompasses any promotional plan through which a marketer

1066 (codified at 47 U.S.C. § 153(h) (1976)), and the Court held this prohibition applicable to cable operators as well. 440 U.S. at 705. The “first-come, first-served” aspect of the access program led to the common carrier characterization by the Court. Id. at 701-02. For an excellent analysis of Midwest Video II, as well as a good overview of the history of cable regulation, see Note, Administrative Law—Communications Law—FCC Authority Over Cable Television—FCC v. Midwest Video Corp., 1979 Wis. L. Rev. 962.

81. Although the Supreme Court approved the origination requirements in Midwest Video I, 406 U.S. 649 (1972), the FCC later deleted the requirement, leaving the decision whether to provide original programming to the local system operator. Amendment of Part 76, Subpart G, of the Commission’s Rules and Regulations Relative To Program Origination by Cable Television Systems; and Inquiry Into the Development of Cablecasting Services To Formulate Regulatory Policy and Rulemaking, 49 F.C.C.2d 1090 (1974).


83. 47 C.F.R. § 76.221 (1980). The sponsor identification requirement has been waived with respect to classified ads sponsored by individuals, provided that the cable system maintains a publicly-available list of the name, address, and phone number of each advertiser. 47 C.F.R. § 76.221(f) (1980).
sells directly to the customer, without the intervention of a retail outlet. It includes door-to-door sales, telephone solicitations, mail-order catalogues, and television advertisements giving an address or telephone number through which interested persons can place orders. With an interactive cable system, consumers could order directly through the television set by pressing in their credit card or debit card numbers, thus bypassing the extra step of calling or mailing in the order. While direct ordering by means of cable television is farther down the road than cable as a conventional advertising medium, it is nonetheless instructive to examine the current regulatory framework for direct marketing in non-cable media, and to analyze its applicability to cable direct marketing.

In 1972, the FTC promulgated a "cooling-off" rule for door-to-door sales. In essence, the rule provides that any consumer who purchases an item for twenty-five dollars or more from a sales representative at a place other than the normal place of business of the seller has the right to cancel the transaction within three business days of the sale. The Commission based its rule on a finding that personal selling had a record of consumer abuses, such as deceptive door-openers and misrepresentations of price and quality, and that it entailed the nuisance of a visit to the home by an uninvited salesperson. While several states and some FTC cases have

84. See generally B. Stone, Successful Direct-Marketing Methods (1979).

85. A "debit" card would allow the holder to initiate an "electronic fund transfer," defined as "any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account." 15 U.S.C. § 1693a(6) (Supp. IV 1980). Such a transaction would be the rough equivalent of paying cash or writing a check, as opposed to a credit transaction, which authorizes the debtor to defer payment. 15 U.S.C. § 1602(e) (1976). See also infra notes 103-06 and accompanying text.


87. Id. Similar cooling-off provisions had been adopted by a significant number of states. See FTC, Cooling-Off Period for Door-to-Door Sales, Trade Regulations Rule and Statement of Basis and Purpose, 37 Fed. Reg. 22,933, 22,935 n.6 (1972). Many states still have such laws on the books. See, e.g., CAL. CIV. CODE §§ 1689.5-13 (Deering Supp. 1979) (three-day cooling-off, $25 minimum purchase, oral and written notice of right to cancel must be given in the same language used in the sales presentation, seller has 10 days to return down payment and 20 days to pick up cancelled goods); FLA. STAT. ANN. §§ 501.021.-035 (West Supp. 1981) (three-day cooling-off, $25 minimum purchase, seller may keep part of down payment as cancellation fee); GA. CODE ANN. §§ 96-902 to -906 (Supp. 1979) (three-day cooling-off, credit sales only, seller may assess a cancellation fee and pick up fee for cancelled goods even if buyer made no down payment); MISS. CODE ANN. §§ 75-66-1 to -11 (Supp. 1980) (three-day cooling-off, credit sales only, cancellation fee, 40 days to pick up goods, excludes sales on buyer's initiative); N.Y. PERS. PROP. LAW §§ 425-431 (McKinney Supp. 1980-81) (same provisions as California Civil Code).

88. See FTC, Cooling-Off Period, supra note 87, at 22,937-40 for a summary of the FTC rulemaking record on these points.
applied cooling-off periods to telephone sales, for the most part, this concept has been limited to in-person sales. Sales through television, either broadcast or cable, are not covered.

In the field of unsolicited telephone selling, the abuses of misrepresenting the purpose of the call (e.g., a research survey) and misrepresenting the total price of the contract have been surfacing. The nuisance factor of telephone solicitation has been widely discussed, resulting in several legislative proposals to give telephone subscribers the option of being taken off telephone marketing lists. Computerized, automated dialing systems that deliver prerecorded sales messages have been banned or restricted in several states.

The possibilities for computerized sales interactions via two-way cable television are virtually limitless. A subscriber may respond to a "survey" through his electronic mail system, only to be subjected to a personalized sales pitch delivered from a computer bank of messages based on his an-


93. See discussion of 1978 California legislative proposal in Comment, Unsolicited Commercial Telephone Calls, supra note 92, at 159-60.

swers to the survey. Overreaching sales techniques and potential invasions of privacy could provoke a call for extension of consumer protection measures to interactive cable television. In addition to the constitutional issues associated with attempts to restrict nondeceptive commercial speech, it is unclear whether electronic sales would give rise to the same level of consumer injury as door-to-door, in-person sales. Measures such as cooling-off periods, subscriber option to be taken off call lists, and clear identification of the purpose of the communication at its outset may have to be considered in the future but should be approached cautiously so as not to stifle innovation in this new medium, which has the potential to provide a wealth of valuable information to consumers.

Another issue in direct marketing, whether conventional or electronic, is the amount of time the seller should take to send the ordered merchandise. In 1975, the FTC issued a regulation (the Mail-Order Rule) which in essence provided that sellers should ship merchandise ordered by mail to buyers within the promised time period or within thirty days if no time had been specified.\(^{95}\) If the seller is unable to send the goods within the applicable time period, the buyer must be given the option to consent to a delay for a specified time or to cancel the order and receive a prompt refund.\(^{96}\) The FTC rulemaking record contains over 20,000 pages of consumer complaints regarding mail order sales, with failure to ship prepaid merchandise by far the most frequent complaint.\(^{97}\) Despite the enforcement efforts of the FTC, the United States Postal Service\(^{98}\) and the industry trade association,\(^{99}\) late delivery and nondelivery remains a significant consumer problem.\(^{100}\)

Despite an expected upsurge in direct sales by telephone\(^{101}\) and other electronic media, including cable television, neither the FTC’s Mail-Order Rule nor the Postal Service statutes apply to transactions other than those

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96. Id. at § 435.1(b)(1).
99. The Direct Mail/Marketing Association is a 3,400-member industry group that helps resolve consumer mail-order problems. It currently receives 20,000 to 30,000 mail-order complaints a year, most involving nondelivery. See U.S. General Accounting Office, The Federal Trade Commission’s Mail Order Rule Needs Improved Monitoring and Enforcement 3 (Jan. 19, 1981).
100. Id. at 2. See also Federal Study Advising Mail-Order Rule Reform, N.Y. Times, Jan. 26, 1981, § A, at 24, col. 5.
where the consumer orders by mail. Thus, they would not apply to cable television marketing efforts, unless the buyer uses the mails to order rather than the telephone or the interactive feature of a cable system. Whether late shipment protection should be extended to the electronic media remains an unanswered question.

To the extent that consumers use electronic fund transfer (EFT) rather than credit to purchase items marketed on cable, some significant consumer rights would be lost. The Fair Credit Billing Act allows credit card customers to use the creditor's dispute resolution procedure. In turn, it requires the creditor to withhold charges for goods or services which the consumer did not accept or which were not shipped as agreed. Furthermore, under certain circumstances, the consumer can withhold payment from the credit card issuer by asserting a claim or defense against the merchant regarding the quality of the goods purchased. The Electronic Fund Transfer Act, by contrast, was apparently aimed primarily at the bank-depositor relationship and does not contain these marketing-oriented, consumer protection measures. An EFT purchase would operate in essentially the same way a cash purchase does, since payment could not be withheld if the goods were not sent or were defective.

Finally, it is unclear how consumers will obtain presale warranty information for goods marketed directly on cable television. Congress passed the Magnuson-Moss Warranty Act in 1975 with the stated goal of improving the adequacy of warranty information available to consumers, thereby improving competition in the marketing of consumer goods. Under an

102. 16 C.F.R. § 435.1(a)(1) (1981) states that the FTC Mail-Order Rule is applicable to "any order for the sale of merchandise to be ordered by the buyer through the mails." (emphasis added). The Postal Service Statute dealing with false representations (as opposed to mail or wire fraud) requires that there be "a scheme or device for obtaining money or property through the mails by means of false representations" in order to constitute a violation. 39 U.S.C. § 3005(a) (1976) (emphasis added).

103. Most development of EFT systems thus far has been in banking rather than in marketing. If "home banking" and "home shopping" services develop simultaneously, it is likely that the cable medium could become a major stimulus for the use of EFT. There may be a regulatory stumbling block to this development, however, because paper receipts currently must be made available at all EFT terminals. Electronic Fund Transfer Act of 1978, 15 U.S.C. §§ 1693a(7), 1693d(a) (Supp. II 1978). See generally Broadman, Electronic Fund Transfer Act: Is the Consumer Protected?, 13 U. OF S.F.L. REV. 245 (1979).


105. Id. § 1666i (transaction must exceed $50 and occur in the same state or within 100 miles of the cardholder's address).


FTC regulation implementing the Act, a written copy of the warranty (if any is offered) on all consumer products priced over fifteen dollars must be available in retail stores prior to any sale.\footnote{108} As for mail-order catalogues, either the full text of the warranty must be reported, or the catalogue must disclose that a free copy of the written warranty can be obtained on request.\footnote{109} Due to a rather broad definition of "mail-order,\"\footnote{110} it appears that telephone and interactive cable sales would be included. The capability of interactive cable television to provide instant access to a central data base would clearly benefit consumers in obtaining the warranty information through the cable medium itself, rather than through the more cumbersome procedure of requesting the warranty by mail.

In marketing, as in advertising, a regulatory structure has been erected to curb abuses in the traditional media; these safeguards, for the most part, are not applicable to cable marketing. Yet federal regulation is unlikely unless a record of consumer injury develops. If abuses in this new use of cable television are to be prevented, the most likely stimulus at this time would be either industry self-regulation or local franchising agreements. Each of these possibilities is discussed in turn in the next two sections.

III. Industry Self-Regulation of Advertising and Marketing—Precedents from Broadcasting and the Prospects for Cable

Advertising and marketing in the broadcast media, particularly television, is filtered through a series of self-regulatory standards and procedures to assure its accuracy. The National Association of Broadcasters (NAB) has developed a fairly detailed Television Code\footnote{111} and issues detailed guidelines and Code interpretations as needed.\footnote{112} The NAB also prescreens commercials in a few sensitive categories.\footnote{113} The three major

\footnote{108}{16 C.F.R. § 702.3 (1981).}
\footnote{109}{16 C.F.R. § 702.3(c)(2)(i) (1980).}
\footnote{110}{The regulation defines "catalogue or mail-order sales" to include "any solicitation for an order for a consumer product with a written warranty, which includes instructions for ordering the product which does not require a personal visit to the seller's establishment." \textit{Id.}}
\footnote{111}{\textit{NAB Television Code, supra} note 36. Sections I through VIII are concerned with program standards. Sections IX through XV deal with advertising standards.}
\footnote{112}{\textit{See, e.g., NAB Code Authority, Children's TV Advertising Guidelines} (2d ed. Apr. 1977).}
\footnote{113}{The NAB Code Authority prescreens all broadcast commercials in the following four areas: (1) children's toys, (2) children's premiums, (3) personal care products, and (4) margarine and vegetable oil products involving health claims. LaBarbera, \textit{Analyzing and Advancing the State of the Art of Advertising Self-Regulation}, 9 J. of Advertising 27, 30 (1980).}
broadcast networks preview all commercials aired, subjecting them to an internal audit under standards for accuracy and "taste."\textsuperscript{114} The Association of National Advertisers (ANA), the trade association of major national advertisers, and the American Association of Advertising Agencies (4A's) created the National Advertising Division (NAD) of the Council of Better Business Bureaus to review advertisements of questionable veracity.\textsuperscript{115} This rather tightknit web appears to have helped prevent, at least on national television, the dissemination of blatantly fraudulent advertising. The cable industry, by contrast, is just beginning to explore the need for self-regulation in this burgeoning new medium. The development of internal regulation in broadcast television and its potential applicability to cable is examined next.

\textbf{A. The NAB and the Television Code}

The NAB had its origins in the radio industry, having had its first organizational meeting in 1923.\textsuperscript{116} After the creation of the Federal Radio Commission (precursor to the FCC) in 1927,\textsuperscript{117} criticism of certain radio industry practices, such as the playing of unidentified phonograph records and, curiously, direct advertising (today called commercials), began to mount.\textsuperscript{118} In an attempt to forestall further government regulation, the NAB Board of Directors approved the organization's first Code of Ethics in 1928.\textsuperscript{119} This first effort was rather general,\textsuperscript{120} but the following year, the NAB revised the Code, with six out of the seven principles of conduct addressing consumer deception and safety issues.\textsuperscript{121}

The Code provisions were more honored in the breach than otherwise by most radio stations, however, leading the Federal Radio Commission to threaten "proper legislation" (including the possibility of nationalizing the industry) if the broadcasters did not eliminate "false, deceptive or exagger-
ated” advertising statements. The FTC, on the other hand, proposed a conference with the industry “for the purpose of cooperatively drafting rules by which the industry could regulate itself and thus avoid the pitfalls of fraudulent or misleading advertising.” While the Radio Commission ultimately concluded that government ownership was impractical and that regulation of commercial advertising would impair the quality of programming, the Association of National Advertisers three years later proposed a plan to eliminate undesirable advertising by “voluntary internal censorship” with “the hope of substituting ‘self-regulation’ of advertising for projected government regulation . . .”

From the beginning of commercial television, the radio Code of Ethics was considered applicable to television broadcasters, but in 1950 the NAB announced plans to develop a separate television code to deal with television’s visual aspects. As was the case in the development of the radio code, one of the likely motivations was to fend off government regulation, a threat apparently believed to be possible but not imminent. When Senator William Benton introduced a Senate resolution calling for the cre-

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122. Warning Issued on Blatant Advertising: Commission Proposes Self-Regulation to Stave Off Congressional Action, Upholds American System, Broadcasting, Jan. 1, 1932, at 12. The Commission expressed concern about offensive programming as well as questionable commercial material. Id.
124. Radio Board Cold to Advertising Cut, N.Y. Times, June 10, 1932, at 12, col. 3.
126. T.V. Standards; NAB to Set Up Code Unit, Broadcasting, May 1, 1950, at 50.
127. An editorial in Telecasting (a subsection of Broadcasting) noted:
It was probably inevitable at this stage of television development that there would have occurred enough lapses in common sense and good taste in programming to arouse a fear within the industry that unless formal corrective action were taken at once, censorship was just around the corner.
ation of an eleven-member National Citizens Advisory Board for Radio and Television in 1951, however, a trade press editorial condemned the proposal as an attempt at "regulation by lifted eyebrow." Suddenly, the promulgation of a television code became a high priority for the National Association of Radio and Television Broadcasters. Before the end of 1951, the first television code was adopted. Broadcasting magazine noted that the "stringent code" was approved by the industry "with the eyes of Congress upon them." As passed, the Code sought to remind telecasters that "they must be choosy in admitting advertisers to their facilities as well as careful to require truth and consideration in commercial messages . . . ."

The Television Code has undergone twenty revisions since its first adoption, but the basic principles have remained constant. It acknowledges that broadcasters are ultimately responsible for all material broadcast by their stations, including advertising. Broadcasters are advised to "refuse the facilities of their stations to an advertiser where they have good reason to doubt . . . the truth of the advertising representations." As a general rule with regard to advertising, the Code states:

> great care [should] be exercised by the broadcaster to prevent the presentation of false, misleading or deceptive advertising. While it is entirely appropriate to present a product in a favorable light and atmosphere, the presentation must not, by copy or demonstration, involve a material deception as to the characteristics, performance or appearance of the product.

More specific guidance on particular types of advertising is provided. For instance, commercials directed primarily toward children must be clearly separated from the program and must not feature personalities

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130. In 1951, the NAB merged with the Television Broadcasters Association and changed its name to the National Association of Radio and Television Broadcasters (NARTB). The NARTB said that the Television Code would show the public that the industry "means business." T.V. Code Takes Shape, Broadcasting, Oct. 8, 1951, at 71. The organization reverted to the name NAB in 1958.
132. Id.
133. NAB TELEVISION CODE, supra note 36, at 1 (Preamble). The preamble goes on to state that the responsibility is shared with television advertisers. Id.
134. Id. § IX, para. 1(B), at 11 (Advertising Standards).
135. Id. § X, para. 1, at 15.
136. Id. § IX, para. 6(B), at 13.
or cartoon characters regularly appearing in the sponsored program.  

"Bait and switch" advertising is specifically prohibited, as are program-length commercials. Personal endorsements must be genuine and based on personal experience. References to research, surveys, or tests must not "create an impression of fact beyond that established by the work that has been conducted." The use of an actor in a white coat (i.e., simulating a medical professional) to recommend a health product is not permitted. Contests and premium offers should spell out all details and not exaggerate the prizes to be won.

The NAB Television Code, to which 67% of United States television stations and the three national networks subscribe, is administered by the Television Code Authority. This group issues a continual series of "interpretations" of the Code for the guidance of subscribers. For instance, although mail order merchandising is nowhere specifically mentioned in the Television Code, the Code Authority has interpreted the general provisions regarding the integrity and truthfulness of advertisers to advise that "mail order advertising, because it exhorts the viewer to invest his money in a product sight unseen, requires greater vigilance by the broadcaster than is normally required."

The Code is enforced formally by control over the use of the "NAB Television Seal of Good Practice," and by the Code Authority's biyearly monitoring of each television station. The NAB has rarely sus-

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137. Id. § IX, para. 6(E), at 13.
138. Id. § IX, para. 14, at 14. Bait and switch involves "goods or services which the advertiser has no intention of selling . . . offered merely to lure the customer into purchasing higher-priced substitutes." Id.
139. Id. § IX, para. 15, at 15.
140. Id. § IX, para. 6, at 15.
141. Id. § X, para. 2, at 15.
142. Id. § XI, para. 4(A), at 17.
143. Id. §§ XII & XIII, at 17-18.
144. NAB, LEGAL GUIDE TO FCC BROADCAST RULES, REGULATIONS AND POLICIES, ch. IV, at 2 (May 1977).
145. The NAB Code Authority employs a full time staff of 34 and has offices in New York City, the District of Columbia, and Los Angeles. This group preclears about 3,000 advertisements per year. The Code Authority also has a medical and scientific panel which provides free advisory service to NAB staff. Interview with Jerry Lansner and William Schulte, NAB Code Authority Staff, New York, N.Y. (Feb. 23, 1981) [hereinafter cited as Lansner Interview].
146. Mail Order Advertising Requires Special Care in Evaluating Offer Before It is Aired, NAB TV CODE NEWS, Dec. 1966, at 3.
147. See NAB TELEVISION CODE, supra note 36, § III(4), at 25 ((Regulations and Procedures). Section III(4) states that authority to use the Seal may be revoked or suspended by a vote of two-thirds of the Television Board of Directors.
148. NAB CODE AUTH., BROADCAST SELF-REGULATION: WORKING MANUAL (1976 in-
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pended a station's authority to use the Seal;\textsuperscript{149} however, there may be enough public awareness to make the threat of withdrawal a fairly effective deterrent.\textsuperscript{150} Most of the policing appears to be accomplished through advice and comment behind the scenes. Member stations can and frequently do call the Code Authority for advice.\textsuperscript{151} Advertising agencies may also come in with questions in the course of preparing a campaign. After a commercial is aired, advertisers may file complaints with the NAB regarding the claims of their competitors. These questions can be negotiated with the member stations who broadcast the commercials in question.\textsuperscript{152} Another major influence on compliance is the clearance procedure for commercials employed by the broadcast networks; this procedure will be discussed in the next section.

\textbf{B. Broadcast Television Network Internal Review Procedure}

While little has been formally documented about the rules and procedures for network clearance of commercials, there can be no doubt that it plays a pivotal role in maintaining the honesty of advertising shown on national network television. The networks review every commercial before it is aired, a total of approximately 50,000 per year.\textsuperscript{153} The networks are prominent members of the NAB, each having a permanent seat on the Board of Directors. The broadcast networks consider applicable NAB Code standards when they preview advertisements.\textsuperscript{154} Thus, many com-

\textsuperscript{149} One incident occurred in the early 1960's when 65 subscribers withdrew or were ejected from subscription to the Code because of a dispute over advertising for a hemorrhoid medicine. Nearly all subsequently rejoined the fold. \textit{Broadcast Self-Regulation, supra note 148, Commercial Clearance (1972 insert).}

\textsuperscript{150} The NAB has pledged to publicize the Seal and its significance. \textit{NAB Television Code, supra note 36, § III(2), at 25 (Regulations and Procedures).} In 1967, the NAB commissioned a Roper survey of the public's awareness of the Seal and found that 54% of those asked had seen the Seal before, and that most of those who had seen it were aware of the basic provisions of the Code. \textit{Special Report: Research Shows Public Prefers Self-Regulation, NAB TV Code News, April 1967, at 1.} Only one-third believed the industry had imposed the rules on itself, with most crediting the FCC or some other government agency. \textit{Id.}

\textsuperscript{151} Lansner interview, \textit{supra} note 145.

\textsuperscript{152} \textit{Id.}

\textsuperscript{153} \textit{Id.} In 1971, the CBS Television Network Program Practices Department alone had a staff of 34 in New York and Los Angeles. Advertisements are usually submitted in script or storyboard form. All product claims must be substantiated, and the network staff, the advertiser, and/or the advertising agency commonly discuss the substantiation or presentation of a claim before it is accepted by the network. \textit{Consumers Ass’n of D.C., 32 F.C.C.2d 400, 401 (1971).}

\textsuperscript{154} Lansner Interview, \textit{supra} note 145.
merginals containing potential Code violations are never broadcast, but are modified or rejected at the network level. Indeed, other self-regulatory bodies that deal with television advertising have been greatly assisted by the network procedures.°

Network clearance, which grew partially out of a desire to preserve the licenses of affiliated stations, was formalized during the early 1970's.° During this time, the three networks also began a practice, still continued today, of forwarding the scripts or storyboards of all commercials aired to the FTC's Advertising Monitoring Unit.° Thus, the FTC is assisted in its consumer protection mission by the network clearance procedures and by having scripts of commercials made available for review.

C. The National Advertising Division of the Council of Better Business Bureaus

The National Advertising Division (NAD) and its appellate body, the National Advertising Review Board (NARB), were sponsored in 1971 by the major advertising associations (the ANA and the 4A's) under the aegis of the Council of Better Business Bureaus.° The NAD does not administer a code as such, but its stated goal is "to achieve and sustain high standards of truth and accuracy in national advertising."°

The NAD does not preview commercials but resolves complaints from competitors and consumers. It also initiates almost half of its cases by monitoring advertisements on radio and television and in magazines and newspapers.° Cases that cannot be resolved by the NAD are reviewed by the NARB, a court of appeals composed of ten five-member panels of rep-

155. NAB Code Authority staff confirmed that they would have to expand their operations greatly if the networks stopped clearing commercials. Id. Similarly, Lorraine Reed, Senior Vice President of the Council of Better Business Bureaus' National Advertising Division (NAD), has said that while 53% of their cases are from the print media, only 32% are from television. The network prescreening procedures, therefore, probably help keep misleading advertisements from being aired. Interview with Lorraine Reed, New York, N.Y. (Feb. 23, 1981) [hereinafter cited as Reed Interview].

156. Interview with Alfred Schneider, Vice President of Incorporation, American Broadcasting Company, New York, N.Y. (Feb. 23, 1981).


158. LaBarbera, The Shame of Magazine Advertising, supra note 115, at 36.


160. Reed Interview, supra note 155.
representatives from advertisers, advertising agencies, and the public.\footnote{161} While this system has been in existence for over eight years, only thirty-five panel decisions regarding truth and accuracy in national advertising have been rendered to date.\footnote{162} Referral to the FTC is considered the ultimate sanction, but thus far this has not proven necessary.\footnote{163}

The work of the NAD/NARB apparently has been very effective. Former FTC Chairman (now Commissioner) Michael Pertschuk has praised the group for having "skimmed the cream of deceptive ads, outrageous frauds and misrepresentations. Thanks to you, the latter-day ancestor of the silver tongue snake oil purveyor has been tongue-tied."\footnote{164} Former FTC Commissioner Robert Pitofsky, who was Director of the Bureau of Consumer Protection at the time the NARB was created, has stated:

\begin{quote}
[T]he NARB is as successful an effort at self regulation as any we have witnessed in the country. Many of the cases that might otherwise vex federal enforcers are nipped through the self regulation process, and policing now occurs inside advertising's house and therefore without the inevitable friction of government regulation of private activities.\footnote{165}
\end{quote}

\section*{D. Cable Advertising and the Future of Self-Regulation}

The cable industry begins its emergence as an advertising vehicle at a time when deregulation has become fashionable. Yet, self-regulation can have a positive, prophylactic effect. Will this relatively young medium act responsibly to ensure that cable television is not handicapped from the start by unsubstantiated or misleading advertising banned by the more established media? The signs thus far are encouraging, although more could be done to bring cable up to the level of broadcast television in terms of advertising self-regulation.

The National Cable Television Association (NCTA), the cable counterpart to the NAB, has formed a committee to study advertising self-regulation.\footnote{166} The NAB Code appears to be the primary model, although the

\begin{footnotes}
\item[162] Id.
\item[163] Id.\footnote{LaBarbera, \textit{Advertising Self-Regulation}, \textit{supra} note 113, at 31.}
\item[164] Address by Chairman Michael Pertschuk, FTC, Annual Meeting of the National Advertising Review Board, New York, N.Y. (Nov. 8, 1978).
\end{footnotes}
NCTA is taking a cautious approach. Some aspects of the NAB Code, such as the limits on commercial minutes per hour, may not be deemed appropriate for cable, which can offer advertisers greater flexibility due to the large number of channels available. In addition, absolute bans on commercials for certain types of products (e.g., liquor and contraceptives) may not be needed in the cable medium, which has the technical capacity to allow parents to prevent their children from having access to “adult” channels. Indeed, any attempt to restrain the free flow of truthful commercial speech on cable could be viewed as anticompetitive.

NCTA is not only looking back to the NAB Code, but is also reportedly studying the self-regulatory code of a more futuristic and experimental medium, the computerized information retrieval system called Prestel, now operating in the United Kingdom. Prestel is a “viewdata” or “videotex” system, which in essence links the user’s television set to a central data bank via telephone lines (although the same effect could be achieved directly through the coaxial cable used in cable television). Prestel gives the user access to over 160 information providers, including Reuters, British Rail, FINTAL (a commercial publisher of financial information) and American Express. The system, developed by the British Postal System, is operated as a common carrier. The information providers (not Prestel) are solely responsible for the content they disseminate, which includes

167. Telephone interview with Char Beales, Vice-President for Media Services and Research, National Council of Television Advertisers (Feb. 12, 1981).
169. See generally NAB TELEVISION CODE, supra note 36, § IX (Advertising Standards).
170. Cf. American Medical Ass’n, 94 F.T.C. 701 (1979), enforced as modified, 1980-2 Trade Cas. (CCH) ¶ 63,569 (2d Cir. Oct. 7, 1980), in which the FTC struck down the AMA’s near-total prohibition of advertising by physicians. Because self-regulation is permissible under the rule of reason if it promotes competition, the FTC’s decision in the AMA case allowed that group to issue and enforce “reasonable ethical guidelines” to weed out false or deceptive advertising by member physicians. 94 F.T.C. at 1037. See also Address by E. Perry Johnson, Director of the FTC Bureau of Competition, 17th Annual Symposium on Trade Association Law and Practice of the Antitrust Law Committee, Bar Association of the District of Columbia, Washington, D.C. (Feb. 25, 1981).
171. Beales Interview, supra note 167.
173. FTC MEDIA POLICY BOOK, supra note 38, at 52.
some advertisements.174

While advertising is not regulated on Prestel, all information providers are asked to sign a voluntary code of conduct, most of which is concerned with advertising.175 The basic principle, not surprisingly, is that the advertising “must be legal, decent, honest and truthful.”176 An advertisement must be clearly distinguishable from adjacent data, and viewers must be warned if they are to be charged for a “frame” (video page) of advertising.177 As to the direct sale of merchandise via Prestel, the Code requires not only delivery within twenty-eight days (or the customer must be given a written notice of a right to cancel the order and obtain a refund), but also a minimum fourteen day customer approval period.178 If the goods do not correspond to the description or if they are defective, the seller must provide a complete refund.179

Some of the more advanced cable systems, which offer interactive capacity and opportunities for direct selling, have much in common with Prestel. Because it is a common carrier medium, however, Prestel’s code applies to the information providers, not to the medium of distribution. In its present state, cable appears to be a hybrid between a common carrier (with no control over content) and a publisher (exercising total control over content). If a self-regulatory code were developed for cable, should only the program suppliers (e.g., the cable satellite networks such as CNN and ESPN) be bound? Only the advertisers? Or should the local system operators themselves be responsible for advertising? The cable operators do not act as common carriers, but seek to control the mix of programs offered to subscribers in order to maximize their revenues, thus providing a basis for a share of responsibility for the commercial messages they choose to carry.180

As for the national cable programming networks, they are members of NCTA and have representatives on the advertising committee. However, no clearance procedure comparable to the broadcast network practice has yet been established, on the theory that the commercials seen on cable are

175. See ASSOCIATION OF VIEWDATA INFORMATION PROVIDERS, LTD., VIEWDATA CODE OF PRACTICE (1980).
176. Id. § 2, para. 2 (Advertising).
177. Id. § 2, para. 3 (Advertising).
178. Id. § 3, paras. 3.1 to 3.4 (Direct Sale of Goods and Services).
179. Id. § 3, para. 3.7 (Direct Sale of Goods and Services).
180. At least one cable system, Gill Cable of San Jose, California, has a continuity acceptance department and uses the standards set forth in the NAB Code to screen commercials. Statement of Robert Hosfeldt of Gill Cable, The Consumer and Cable Television: A National Conference, Washington, D.C. (Feb. 27, 1981).
no different from those on broadcast television which have already under-
gone network clearance.\textsuperscript{181} If and when the advertising community starts
developing campaigns specifically for cable distribution, however, the role
of the cable networks in screening commercials could become as crucial as
broadcast network clearance is today. If the cable networks do not assume
this function, the work of self-regulatory bodies such as the NAD/NARB
will certainly be much more difficult.

As may be inferred from the preceding discussion, self-regulation of tel-
elevision advertising has ebbed and flowed over the years, depending on the
political climate. Nevertheless, this process has produced benefits to the
public in the form of more accurate advertising,\textsuperscript{182} which in turn can spur
competition in the marketplace. The cable industry has the opportunity to
prevent problems from arising that might otherwise require government
regulation. In the words of an \textit{Advertising Age} editorial, "it would be fool-

\textsuperscript{183}hardy for business leaders to declare victory and go back to the old
ways."\textsuperscript{183}

IV. LOCAL CABLE FRANCHISING PROCESS—OPPORTUNITY FOR
CITIZENS TO WORK WITH INDUSTRY ON ADVERTISING AND
MARKETING ISSUES

A. Local Cable Franchising

Unlike broadcasters, cable operators are not granted licenses by the fed-
eral government but rather are franchised at the local level. At one time,
however, a cable system could not legally begin providing service without
first obtaining a certificate of compliance from the FCC. The prerequisite
for obtaining such a certificate was a local franchise granted to the appli-
cant in accordance with a set of procedures and guidelines imposed by the
FCC.\textsuperscript{184} In the wake of the Supreme Court case overturning some of its
major cable television regulations,\textsuperscript{185} the FCC deleted the certificate of
compliance requirement in favor of the more permissive "signal registra-
tion," which need state little more than the applicant's name, address and

\textsuperscript{181} Telephone interview with Kay Koplovitz, President, USA Network (Feb. 13, 1981).
\textsuperscript{182} Cf. Dowling, \textit{Information Content in U.S. and Australian Television Advertising}, \textit{44 J. of Marketing} 34 (1980), in which the author concluded that Australian television com-
mmercials were more informative than their United States counterparts, due in part to the
stronger enforcement procedures of Australian self-regulatory authorities. \textit{Id.} at 36-37.
\textsuperscript{183} Self Regulation and FTC's New Course, \textit{Advertising Age}, Feb. 9, 1981, at 18.
\textsuperscript{184} 47 C.F.R. \textsection{} 76.11 (1972).
a skeletal outline of the proposed cable service.\textsuperscript{186} Previously mandatory FCC guidelines have been changed to recommendations (e.g., that a full public hearing affording due process precede the grant of a franchise, a fifteen year maximum term for franchise awards, and a requirement that the franchise recipient establish procedures for investigating and resolving subscriber complaints).\textsuperscript{187}

The states have also exerted a limited amount of regulatory power over cable television. The Supreme Court has upheld state regulation of cable as a public utility because cable television is local in nature and does not demand national uniformity. The Court further found that the FCC has not preempted the field by regulating in the same subject areas as the states (e.g., rates and quality of signal).\textsuperscript{188} Although forty-one states have enacted at least one statute applicable specifically to cable television, only eleven states have adopted any form of cable regulation.\textsuperscript{189} Massachusetts,\textsuperscript{190} Minnesota,\textsuperscript{191} and New York\textsuperscript{192} have set up independent cable television commissions, but the actual franchising authority remains with the local governments. Indeed, one of the major functions of the New York State Commission on Cable Television is to advise municipalities on the franchising process.\textsuperscript{193} Only in Alaska,\textsuperscript{194} Connecticut,\textsuperscript{195} Hawaii,\textsuperscript{196} Delaware,\textsuperscript{197} Rhode Island,\textsuperscript{198} and Vermont\textsuperscript{199} does the state itself grant

\textsuperscript{186} 47 C.F.R. § 76.12 (1980).
\textsuperscript{187} 47 C.F.R. § 76.31 (1980). Only the limits on the franchise fee have been retained as mandatory.
\textsuperscript{188} TV Pix, Inc. v. Taylor, 304 F. Supp. 459 (D. Nev. 1968), aff'd per curiam, 396 U.S. 556 (1970) (upholding the constitutionality of a Nevada statute granting regulatory authority over cable television to the Nevada Public Service Commission). More recently, the Court held that municipalities would not be exempt from antitrust actions if local restrictions on competition in the cable area were not specifically authorized by the states. See Community Communications Co. v. City of Boulder, 50 U.S.L.W. 4144 (Jan. 13, 1982). But see Id. at 4149 (Rehnquist, J., dissenting) (discussing whether federal antitrust laws should preempt local ordinances).
\textsuperscript{191} MINN. STAT. ANN. §§ 238.06 & 238.08 (West Supp. 1981).
\textsuperscript{192} N.Y. EXEC. LAW §§ 814 & 819 (McKinney Supp. 1980).
\textsuperscript{193} See N.Y. STATE COMMISSION ON CABLE TELEVISION, CABLE TELEVISION FRANCHISING WORKBOOK (1980).
\textsuperscript{194} ALASKA STAT. §§ 42.05.141 & 42.05.701 (1976).
\textsuperscript{196} HAWAII REV. STAT. §§ 440G-2 to -5 (1976).
\textsuperscript{197} DEL. CODE ANN. tit. 26, § 201 (Supp. 1980). The Delaware Public Service Commission grants franchises only in unincorporated areas of the state.
\textsuperscript{198} R.I. GEN. LAWS §§ 391-93 & 391-96 (Supp. 1980).
cable television franchises through the public utility or public service commission.

In most cases, the municipality plays the leading role in regulating cable television. The cable operator generally enters into a franchising agreement with the local government. It is important to realize that a local cable franchise is, above all else, a public franchise, i.e., a legal entity with a long history of judicial interpretation. A cable franchise, like any public franchise, is a privilege conferred by government on an individual or corporation to do for the public benefit that which is not a common right of citizens generally. 200 The laying of cable in, on, and over public streets is a privilege which, but for the grant of a franchise, would be a trespass. 201

In essence, a cable franchise is a contract between the grantor sovereign, the local government, and the grantee, the cable operator. 202 A franchise offer, even when contained in a statute or ordinance, must be accepted and acted upon to become effective. 203 Once accepted, the franchise is generally treated as any other contract, binding both parties to its terms and tenor. 204 A grantor sovereign can attach to a franchise any terms it sees fit, and may attach any lawful conditions (which then become part of the contract) to its exercise. 205 The only limitations on terms that may be attached to a franchise are that the terms must be legal and not against public policy. 206 A cable franchise may thus include stipulations as to standards of service to the community. 207

Indeed, a grantor sovereign can, by means of a voluntarily accepted franchise, impose obligations upon a grantee which would be beyond the

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204. Grand Trunk W. Ry. v. South Bend, 227 U.S. 544 (1913); Louisville v. Cumberland Tel. & Tel. Co., 224 U.S. 649 (1912). As a wise precaution, some franchise ordinances specifically state that they are to be treated as contracts. See, e.g., 8 AM. JUR. LEGAL FORMS 2D Franchises from Public Entities § 124:71 (1972).
207. For sample language stipulating some standards of service for a cable television franchise, see 8 AM. JUR. LEGAL FORMS 2D Franchises from Public Entities § 124:26 (1972) (secs. 1 & 2).
authority of the grantor, but for the grantee's voluntary acceptance.\textsuperscript{208} Such obligations attached to a cable television franchise were upheld in \textit{Illinois Broadcasting Co. v. Decatur}.:\textsuperscript{209}

Decatur has the right to attach—but not impose or exact—conditions to such use, though unrelated to it, leaving it up to the person seeking the grant to either accept or reject them. Cast in this mold the ordinance becomes effective only upon acceptance. Rejection, and the ordinance is a dead letter. We see nothing wrong in the city saying in effect: You may use our streets for such and such a purpose as such purpose is reasonable and in the public interest yet before we will grant you this, you must in turn agree to certain conditions collateral to the specific use you desire.

\ldots\ldots

\ldots\ldots \{T\}hese conditions are self-imposed. They are not imposed by Decatur. If General [the cable franchisee] agrees to be so regulated who can complain. If General accepts a condition to pay a given sum who cares, and if General pays, as we assume it will, who is hurt. If General discovers later on that some of the conditions it agreed to are onerous, it can assuage itself with the thought that surcease is but fifteen years away—a condition, too, it agreed to.\textsuperscript{210}

Thus, a municipality can place conditions in the franchise agreement, such as provisions for public access and privacy protections for consumers, that, if accepted by the franchisee, would appear to be perfectly legal.

The public franchise differs from ordinary contracts in that the grantor sovereign is not precluded from subsequently enacting legislation under its police power that regulates the exercise of the franchise so long as it does not interfere substantially with the main object of the franchise.\textsuperscript{211} A municipality (grantor sovereign) can also specifically reserve the power to alter the franchise by subsequent enactment.\textsuperscript{212} Thus, if all the ramifications of the public interest concerning cable television are not apparent at the time the initial franchise is granted, the municipality can retain some degree of flexibility under public franchise law.

\textsuperscript{208} Southern Pac. Co. v. Portland, 227 U.S. 559 (1913).
\textsuperscript{209} 96 Ill. App. 2d 454, 238 N.E.2d 261 (1968).
\textsuperscript{210} \textit{Id.} at 461, 238 N.E.2d at 265.
\textsuperscript{211} Pearsall v. Great N. Ry., 161 U.S. 646 (1896); New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885). The grantor cannot, however, effectively annul the franchise under the rubric of police power. Dobbins v. Los Angeles, 195 U.S. 223, 236 (1904).
\textsuperscript{212} Cf. Fort Smith Light & Traction Co. v. Board of Improvement of Paving, 274 U.S. 387, 390 (1927). For sample language specifically reserving the right to alter the terms of a cable television franchise, see 8 AM. JUR. LEGAL FORMS 2D Franchises from Public Entities § 124:41 (1972).
B. Consumer Protection Franchise Provisions

Although it is probably within the authority of every municipality that has granted a cable franchise, there is currently no state law or local regulatory action directed at the responsibility of cable franchisees for advertising or marketing originating on cable channels. A few simple paragraphs in the franchise agreement could establish this responsibility, while retaining sufficient flexibility to account for future developments in the form of advertising and marketing on cable, as well as developments in self-regulation by the industry.

Just as the FCC’s rather general requirements that local broadcast stations assume responsibility for screening out deceptive advertisements may in part have led to the protective net of self-regulation of advertising that exists in the broadcast community, so too the presence of local provisions of this type could spur the development of clearance procedures by the satellite-distributed cable networks. A local cable system that risks possible litigation for deceptive commercials would no doubt refuse to distribute advertiser-supported cable programs that did not feature some sort of screening process for the featured commercials. Thus, a few well-placed local restrictions could lead to a healthy level of self-regulation on a national scale by cable program suppliers. Such measures could benefit the industry by increasing the credibility of cable television as an advertising medium.

Many franchise agreements already require the operator to establish a local office to handle complaints about reception, installation, or billing. Should the cable company also be asked to use its local office to resolve consumer complaints about late shipment, defective products, or improper billing of products directly marketed on cable? Should a complaint handling service for advertised items be required only if the cable company does the billing for the marketer or receives a share of the revenue of items sold? Could complaint handling be done more efficiently by pooling the resources of cable systems at the regional level? Given that consumers are being asked to purchase items sight unseen, should the cable system require marketers who use their facilities to offer “satisfaction guaranteed”


or at least provide a warranty against defects? At the very least, should the cable system agree to keep records of the addresses and telephone numbers of companies engaging in direct marketing, so that subscribers will have a place to go with their complaints?

Given the somewhat uncertain aspects of the details of advertising and marketing on cable television, the franchise agreement itself could contain only a general provision regarding the cable operator's duties, with the details to be developed over time by a citizens' advisory committee or the local office of telecommunications. In this way, if self-regulation is working, there may be no need for more specific provisions. But it is important at least to establish the basic principle of operator responsibility in the franchise agreement because there may not be an equivalent opportunity to raise the issue until the franchise is renewed some ten or fifteen years later. Once the franchise has been granted, the local community may not have the same bargaining power to win concessions from the cable company. Other issues could also be discussed with franchise applicants. In the interest of assuring the free flow of nondeceptive commercial speech, cable systems could be advised by the local government not to place any unnecessary categorical restrictions on comparative, professional, or price advertisements. The Supreme Court has struck down such advertising restrictions when imposed by the state itself or by professional associations.

Freely-negotiated prophylactic measures could prevent the use of cable television for fraud or deception by inspiring the development of a self-regulatory framework, with the least amount of government involvement. The following language, while by no means foolproof, might be considered to achieve this end:

FRANCHISEE assumes ultimate responsibility for eliminating any false, deceptive or misleading commercial material from all origination cablecasting material carried on the CABLE SYSTEM.

215. Marketers who use the British Prestel system have agreed to sell items "on approval" only. See supra note 178 and accompanying text.
217. FCC defines origination cablecasting as: "Programming (exclusive of broadcast signals) carried on a cable television system over one or more channels and subject to the exclusive control of the cable operator." 47 C.F.R. § 76.5(w) (1980). Presumably, the franchise agreement would define it similarly. This definition would not include leased or public access channels.
FRANCHISEE’S responsibility is personal and may not be delegated, but FRANCHISEE may rely on prior determinations regarding false, misleading or deceptive content made by responsible cable television industry networks or organizations, responsible federal regulatory agencies or [state and/or local equivalent agencies].

FRANCHISEE shall provide facilities and personnel for receiving complaints from SUBSCRIBERS regarding products and services advertised over the CABLE SYSTEM. FRANCHISEE shall provide a complaining SUBSCRIBER with the true business name, address and telephone number of the product or service provider and, if requested by the SUBSCRIBER, refer the complaint to an appropriate consumer aid organization. In addition, FRANCHISEE shall compile and retain for three years a log of all such SUBSCRIBER complaints and shall consider any such complaints in determining the acceptability of specific advertisements.

Clearly, each locality would have to tailor the franchise language to suit its needs. One would not want to ask the cable company to produce more consumer protection than is realistic. After all, some systems envision over 100 channels of programming. Broadcast licensees must keep track of the commercials on only one channel. Lack of cable operator control over leased channels and public access channels suggests that these should be excluded from the cable operator’s responsibility. Yet, cable systems can be selective about the programs they choose to fill their origination channels. They could demand that national cable networks screen their commercials for possible deception. They could refuse to accept direct marketers for local spots if they do not offer suitable warranties, or if they have been subject to a high level of complaints concerning late shipment. While cable companies may take on this task voluntarily, given the economic realities of the marketplace, it is unlikely that they would do so unless it proved necessary to secure the franchise. In the long run, however, responsible business practices may lead to a greater consumer acceptance of marketing via cable television as well as greater profits for the industry.

C. First Amendment Issues

Some local governments may hesitate to seek consumer protection provisions because they might be challenged on constitutional grounds.218

218. See Cable More Akin to Newspapers than Broadcasters, NCTA Tells Senate, BROADCASTING, May 4, 1981, at 71, which quotes the NCTA: “Like newspaper publishers, cable
Such fears are largely unfounded, however, due to the unique nature of the cable medium and the quasi-contractual nature of the franchising process. The first amendment protection of the press varies with the medium being used. The Supreme Court has stated that while "the basic principles of freedom of speech and the press ... do not vary," any one medium is not "necessarily subject to the precise rules governing any other particular method of expression. Each method tends to present its own peculiar problems."219 The Court has also asserted that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."220

The print medium enjoys the highest level of free press protection. The constitutional doctrine prohibiting prior restraints originated with the written press221 and is still most forceful in that medium.222 While licensing is commonly accepted for broadcasting, the licensing of a newspaper would be a classic example of an impermissible prior restraint.223 A newspaper may need certain licenses as adjuncts to its commercial operation (e.g., building permits and vendors' licenses) but cannot be saddled with a license requirement simply to publish, as a cable or broadcast system is to transmit. Even adjunct licenses, if used to inhibit newspapers, may be impermissible restraints.224 In fact, the only major restriction on the free exercise of expression placed on the print media is a limited liability for defamation.225

With regard to commercial advertising, some limited government restrictions have been permitted. For instance, a paper may be required to remove sex designations from its "help wanted" classified advertisements.226 In addition, many states have statutes (albeit, unenforced) which hold the publisher responsible for knowingly disseminating false or fraud-

operators should be free of government attempts to tell them what must be said on, or who must have access to, their medium of expression."

ulent advertising.\textsuperscript{227}

By contrast, a significant amount of regulation is permitted for the broadcast media. While anyone is free to print and distribute written materials, only a small fraction of those who would like to use broadcast frequencies are able to do so without unduly interfering with the broadcasts of others. To deal with this problem of electronic cacophony, Congress established the Federal Radio Commission in 1927.\textsuperscript{228} The Communications Act of 1934 created the Federal Communications Commission, giving it the power to allocate frequencies to applicants to serve "the public interest, convenience, or necessity."\textsuperscript{229} The scarcity of broadcast frequencies was identified by the Supreme Court as the basis for requiring access for competing viewpoints (i.e., the "fairness doctrine"),\textsuperscript{230} a restriction on the free expression of broadcasters that would be impermissible if applied to print publishers.\textsuperscript{231}

The Supreme Court has also cited the intrusiveness of the electronic media as a relevant distinction between print publishing and broadcasting for first amendment analysis. Noting that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans" and are "uniquely accessible to children, even those too young to read," the Court upheld an FCC restriction against the broadcast of "indecent" material.\textsuperscript{232} In another case, the Court quoted Herbert Hoover's statement from his days as Commerce Secretary that "the radio listener does not have the same option that the reader of publications has—to ignore advertising in which he is not interested . . . ."\textsuperscript{233}

Cable television is not identical to print publishing for first amendment purposes but instead has much in common with broadcasting. Anyone can hand out leaflets or establish a newspaper or magazine without interfering with the rights of others. On the other hand, before one can become a cablecaster, a franchise to use the local rights-of-way must be obtained.

Cable television is a video medium equally as intrusive as broadcast television. Both provide sound and moving pictures and have an identical impact on the viewer. Indeed, when a cable system is hooked up to a tele-

\textsuperscript{227} See Developments in the Law—Deceptive Advertising, 80 Harv. L. Rev. 1122-23, 1152 (1967).
\textsuperscript{228} Radio Act of 1927, ch. 169, 44 Stat. 1162 (1927) (repealed 1934).
\textsuperscript{233} Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 128 (1973) (upholding the right of broadcasters to refuse to accept paid editorial advertising).
vision set, the typical subscriber foregoes all broadcast television and uses the cable for both cable-originated programming and retransmission of broadcast-originated programming. As far as the impact on the viewer is concerned, the only significant difference between broadcast and cable television is that the former is free, while the latter is only available through paid subscription.

On the other hand, cable television lacks the same scarcity of available frequencies as broadcasting. Current technology allows over fifty channels to be transmitted over a single coaxial cable and, theoretically, any number of cables can be installed at the same time. It is precisely this lack of scarcity of outlets that is most commonly cited for the proposition that first amendment principles applicable to cable television should be those now applied to newspapers, which also lack scarcity, rather than those principles applied to the broadcast media.234

While cable does not suffer from the same scarcity of frequencies problem that over-the-air broadcasting does, it is a limited access medium in other ways. Many cable systems derive the bulk of their programming from satellite-distributed networks. The satellites themselves have limited available space, and the launching of communication satellites must be authorized by the FCC.235 Thus, the distribution of cable programs is limited by the availability of satellite space.

In addition, the capital expenditures necessary to wire a city or town are such that only one cable system is likely to be available in any given locality.236 While exclusive franchises are rare and have been challenged legally,237 in effect most cable franchise holders have a regional monopoly. Although the Supreme Court has never ruled expressly on “economic scarcity” (when the relevant market will not support more commercial users, although the medium could physically withstand more), at least one court has inferred from Supreme Court opinions that economic scarcity is not sufficient to justify government regulation of the press.238 In this sense, the

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236. An attorney with the National Cable Television Association has stated: “In reality, if one operator has ‘built’ a city, another cable operator isn’t going to build another system.” Andrew, Courts Ponder Status of Cable TV to Rule on Legality of Regulation, Wall St. J., Dec. 29, 1980, at 11, col. 3 (quoting James Ewalt).
237. See California Judge Says Exclusive Franchises Are Unconstitutional, Broadcasting, Jan. 12, 1981, at 69. Governor Carey of New York has also proposed legislation aimed at encouraging new cable companies to compete in areas where only one company is now providing service. Carey Moves to Ease Controls on Cable TV, N.Y. Times, Apr. 13, 1981, at 81.
one-cable town is the same as the one-newspaper town.

Any first amendment analysis of the permissible limits of government regulation must account not only for the nature of the medium but also for the nature of the proposed restriction itself. The concept of cablecaster responsibility for false or misleading advertising on the channels it controls is far less of an intrusion on editorial prerogatives than are requirements to set aside leased channels or to provide access to any and all speakers on a first come—first served basis. The proposal discussed in this article would affect only commercial speech, which is entitled to a lesser degree of protection than other forms of speech. Furthermore, the only type of speech that might be suppressed, namely false or misleading advertising, is wholly outside the first amendment’s protection.

The constitutional status of commercial speech has undergone dramatic change in recent years. The issue had remained dormant since the 1940s, when Valentine v. Chrestensen suggested to nearly all courts and commentators that “purely commercial advertising,” whether deceptive or not, was wholly without first amendment protection and could, therefore, be freely regulated by the government.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-56 (1974), as indicating that economic scarcity is “insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press . . . and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point.” 567 F.2d at 46.

239. Cf. Home Box Office, Inc. v. FCC, 567 F.2d at 46. (“The absence in cable television of the physical restraints of the electromagnetic spectrum does not, however, automatically lead to the conclusion that no regulation of cable television is valid . . . . [R]ules restricting speech do not necessarily abridge freedom of speech.”).


241. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. at 566 (“At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.”).

Advertising on Cable Television

The Supreme Court, in the landmark case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, first held unequivocally that speech that “does no more than propose a commercial transaction” is entitled to some degree of first amendment free speech protection. Recognizing the interests of sellers, consumers, and society, the Court emphasized that the “free flow of commercial information . . . is indispensable to the proper allocation of resources in a free enterprise system . . . .” Yet, from the outset, the Court recognized that there were limits to the first amendment shield in the commercial area. The Court alluded to the “commonsense differences” between commercial speech and other varieties, namely, that its truth is more readily verified by the speaker than other forms of speech, and that it is more durable and less likely to be chilled by regulation because “advertising is the sine qua non of commercial profits . . . .” Acknowledging the legitimate government interest in regulating false, deceptive, or misleading advertising, the Court stated that “[t]he First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”

Given the Court’s characterization of commercial speech, it is not surprising that the permissible scope of regulation goes beyond the restriction of misleading or deceptive speech to include broad, prophylactic measures designed to prevent deception. Thus, the Court upheld a disciplinary action against an Ohio lawyer for violating a rule against in-person solicitation, even though it was not alleged specifically that his conduct was deceptive, because “the State has a legitimate and indeed ‘compelling’ interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of ‘vexatious conduct.’” Similarly, the Court upheld a complete ban on the use of trade names by optometrists because it concluded there was “a significant possibility that trade names will be used to mislead the public.”

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244. *Id.* at 765. For a discussion of the relationship of commercial speech to the marketplace of ideas theory of free speech, see Westen, *The First Amendment: Barrier or Impetus to FTC Advertising Remedies?,* 46 BROOKLYN L. REV. 487 (1980).
246. *Id.* at 771-72.
247. For an economic and legal analysis of the appropriate scope of government regulation to prevent deception in commercial speech, see Reich, *Preventing Deception in Commercial Speech,* 54 N.Y.U.L. REV. 775 (1979).
249. Friedman v. Rogers, 440 U.S. 1, 13 (1979). Some authors have characterized the Friedman opinion as a dramatic shift away from the more demanding balancing test applied to strike down state laws in *Virginia Pharmacy* and Bates. E.g., Comment, *First Amendment
words, the “government may ban forms of communication more likely to deceive the public than to inform it . . .”

The Court has recently clarified the test for government regulation of commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, a case involving a state regulation prohibiting a utility from advertising to promote the use of electricity. The majority opinion stated that a “four-part analysis” has developed for commercial speech cases. First, a court must determine whether the expression comes within the first amendment’s purview at all. For commercial speech, that means commercial speech “at least must concern lawful activity and not be misleading.” Second, the government must assert a “substantial interest” to be accomplished by the regulation. Third, the restriction must “directly advance” the substantial state interest. Fourth, the reviewing court must determine whether the restriction “is not more extensive than is necessary.” For the purpose of local regulation of false or misleading commercial speech on cable television, stopping at the first inquiry is appropriate. Such commercial speech is utterly without first amendment protection and may be prohibited by government regulation.

The Supreme Court has not yet dealt with the issue of the legal responsibility of the publisher of deceptive advertising, as opposed to the responsibility of the advertiser himself. By analogy, however, cases holding publishers liable for defamation do not distinguish between liability for material originating with the publisher and material submitted by others, including advertisements. Clearly publishers, and even broadcasters,


252. *Id* at 566.
253. *Id* at 564.
254. *Id* at 566.
255. *Id*. The New York regulation banning all promotional advertising by electric utilities was held invalid because the Public Service Commission failed to show that less restrictive methods would not achieve its admittedly substantial interest in energy conservation. It is not clear that this “least restrictive means” test would apply to restrictions aimed at misleading or deceptive speech because such expression is apparently considered by the Court to be outside the scope of the first amendment. Also, in an earlier case in which a state banned all trade names for optometrists because they were potentially deceptive, the Court said that “there is no First Amendment rule . . . requiring a State to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication.” *Friedman v. Rogers*, 440 U.S. 1, 12 n.11 (1978).
256. *See* Louisville Times Co. v. Lyttle, 257 Ky. 132, 77 S.W.2d 432 (1934); Kulesza v. Alliance Printers & Publishers Inc., 318 Ill. App. 231, 47 N.E.2d 547 (1943); Fitch v. Daily
have the freedom to accept or reject paid commercial messages,\textsuperscript{257} so that some reasonable duty of care with regard to false or deceptive advertisements is well within the accepted scope of editorial control. This responsibility should not have a chilling effect on the dissemination of truthful commercial speech on cable television, nor should it unduly burden the protected journalistic functions of disseminating news, information and entertainment, because the cablecaster as well as the advertiser stands to gain revenues through the distribution of advertising.

The conclusion that cablecaster responsibility for false or misleading advertising would be constitutional becomes even more forceful when it is recalled that the municipality would not be simply regulating the local cable system, but would in effect be conditioning a privilege on the acceptance of some degree of responsibility for its use. It is beyond question that a municipality could prohibit altogether a private company from wiring its streets unless state law dictated otherwise. Since such wiring is not a right, a municipality could reasonably condition the grant of the privilege on the acceptance of certain conditions. The conditions which may be imposed, however, are not without limit. The Supreme Court has stated:

\begin{quote}
As a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.\textsuperscript{258}
\end{quote}

Since it is difficult to argue that the dissemination of deceptive commercial speech is a constitutional right, however, this doctrine should not pose a significant problem.

The Supreme Court has held that surrender of substantial first amendment rights (indeed, the imposition of a clear prior restraint) is not a violation of public policy when such a surrender is part of a voluntary agreement. This would be the case in a cable franchise agreement. In the

\begin{footnotesize}

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recent case of *Snepp v. United States*,259 the Court concluded that the CIA may require, in an employment contract, the submission of any writings (even if conceded to contain no classified material) for prepublication review. Just as a cable applicant can refuse conditions, the prospective employee in the *Snepp* case could have refused to agree to the condition and thus sacrificed government employment.260 If a voluntary agreement to a prior restraint on free expression is not against public policy, it seems safe to conclude that a voluntary agreement to avoid the dissemination of false or misleading advertising (not protected by the first amendment) would not be proscribed.

In summary, the local franchising process provides an opportunity to negotiate with prospective cable operators regarding the public's interest in preventing the dissemination of deceptive advertisements or abusive marketing schemes on cable television. First amendment considerations, while not to be taken lightly, should not preclude a cable company from agreeing to accept responsibility for commercial messages in return for the grant of the franchise. Only unprotected speech, i.e., false or misleading advertising, would be affected. Further, because commercial speech is readily verifiable and peculiarly hardy, reasonable measures to preclude the use of cable for deceptive advertisements should neither chill the flow of truthful commercials nor reduce the cablecaster's economic base.

V. CONCLUSION

Cable television is on the verge of maturing as a conduit for commercial messages and original program services. Thus far, no blemish has been discovered to mar cable's image as a bonanza of information and entertainment. Yet some instruction can be gleaned from examining typical consumer problems, such as deceptive advertising and unfair marketing practices, along with the government and industry regulatory framework that has kept such practices in check in the traditional media.

The pressure of FCC regulation and threats of greater government involvement appear to have played a role in the development of self-regulation of advertising in broadcasting. Yet the FCC's jurisdiction to extend similar restrictions to cable television is uncertain. Furthermore, it would be inappropriate to apply industry-wide federal requirements for cable television advertising unless a record of widespread consumer injury had developed. Similarly, the extension of FTC provisions regarding cooling-off

periods and late shipment for home sales should be approached with cau-
tion lest a promising new medium for commerce be strangled by the pre-
mature imposition of unnecessary restrictions.

Responsible self-regulation, with input from citizens and government, could be the most cost-effective means of preventing consumer injury as well as maintaining cable television's credibility with its viewers. The local franchising process offers an opportunity for citizens and industry to negotiate acceptable measures to deal with consumer protection issues in a co-
operative, rather than an adversarial, setting. This type of low-key, flexible experimentation at the local level could serve to bolster the resolve of the industry to police itself. By acting now, consumer injury could be avoided and the necessity for burdensome litigation and unwieldy administrative procedures foregone. As the decade of cable television unfolds, let us hope that a spirit of fair play will prevail.