

After recognizing this as a threat to the public interest, the report proposed a detailed regulation of pay television programs to prevent "selective program siphoning."

Basically, these proposed regulations would prohibit entertainment "series programming on pay television and would control the kinds and amounts of movies and sports programs pay television could show. This includes a stipulation that movies and sports may not exceed 90 percent of pay television programming annually, or 95 percent in any month. Of course, this concedes that the concept of program diversity—which was supposed to be pay television's special contribution—has been abandoned.

Instead, the dangerous principle of program regulation is adopted to legislate a far lower standard of diversity than is now typical on free television.

We believe that these detailed program controls raise the most serious questions of constitutional validity and FCC authority. We oppose such regulatory control of programming whether it is directed to pay or free television. We also feel the program regulations would be ineffective, because they could easily be manipulated to permit large-scale diversion of programming from free to pay television.

Before discussing these points, we believe that some additional public policy questions should be considered.

One of these centers on the claim that pay television should be given the chance to rise or fall on the basis of public choice. This concept of public choice is a camouflage. To take a specific example, if the world's series should move from free to pay television, the public's only choice would be either paying or not seeing the games.

It is also claimed that the market is broad enough to permit the coexistence of free and pay television, since the pay service is likely to attract only a minority of the public. This disregards the enormous economic leverage pay television could exert, with relatively few subscribers. For example, if pay television could achieve a 20-percent penetration rate, as assumed in the fourth report, and operated under the limitations outlined in that report, it could accumulate annual revenues approaching \$1 billion, enabling it to outbid free television for key program attractions. As a result, by having to pay for programs, 20 percent of the public could foreclose free television from making those programs available to all of the public.

Thus, the advertiser-supported medium would lose the economic base for its own costly and less popular—but extremely important—news and public affairs programming. There is nothing to indicate that the loss or reduction of this type of programming would be made up by pay television. Currently such programming represents approximately 25 percent of the NBC television network schedule. By comparison, the "educational and instructional" features offered during the first 2 years of the Hartford test represented about 3.2 percent of the total.

The fourth report mistakenly assumes that free television cannot grow beyond the types of movies and sports it offered in its earlier years. When the Hartford test started, there were no movies on television that had been released within 2 years. But during the last broadcast season, over 10 percent of the network movies were less than 2 years old, and we estimate that the proportion will more than double during the current season. Similarly, free television now presents on