

possessing special equipment will receive the broadcast. And, as the Court of Appeals stated in *Functional Music, Inc. v. FCC*, 274 F.2d 543, 548 (D.C. Cir.), cert. denied, 361 U.S. 813 (1958):

“Program specialization and/or control is not necessarily determinative of this requisite intent, and therefore dispositive of broadcasting status. . . . Broadcasting remains broadcasting even though a segment of those capable of receiving the broadcast signal are equipped to delete a portion of that signal,”

and vice versa.

If the “functional music” services involved in this last case are properly classifiable as “broadcasting” (as the Court of Appeals held), surely subscription services are broadcasts. The potential functional music audience is much smaller than that of subscription television. More importantly, functional music’s audience is inherently limited in type to “restaurants, stores, schools and comparable institutions.” *Id.* at 544. In contrast, in the Hartford trial no limit was placed upon the type or number of subscribers until the third year when RKO limited the number to 5,000 for the reasons previously explained. Otherwise, besides the geographic and atmospheric limitations on range of reception, the only considerations preventing an individual from participating in the subscription services were either his own economic dictates or his own free choice to abstain. Each one of these considerations is equally applicable to any other type of “broadcasting.”

It is likewise true that the inherent nature of the signal transmitted by a subscription operation demonstrates that it is a “broadcast” service. This signal is practically identical with that of any other broadcast station, the only difference being the specialized signal and equipment necessary to scramble and unscramble the transmission. A similar signal and similar equipment were involved in the *Functional Music* case.

Since most television broadcast stations derive their revenue from advertising and not from subscription charges, the argument has been made that Congress did not intend to authorize subscription stations to be classified under “broadcasting.” This argument finds no support either in the historical development of television or in the legislative history of the Communications Act. As the Commission recognized in its First Report:

“When Congress debated the legislation which emerged as the Radio Act of 1927, the practice of ‘free’ broadcasting had become