

important feature distinguishing broadcasting from public utilities, and common carriers — a distinction which was explicitly recognized by Congress when it drafted and adopted the Communications Act.²⁹

This single fact also sharply distinguishes pay television from other changes in broadcasting which have occurred over the years, such as color television, FM broadcasting, simplexing, multiplexing and functional music operations.³⁰ It also distinguishes pay television from CATV since in CATV there, again, is no direct financial relationship between a listener and a *broadcast licensee*. The relationship is between a listener and the CATV operator who is, in effect, charging the listener for the use of wire lines which he has constructed so as to bring the programming presented by the licensee to the public.³¹ On the other hand, a licensed pay television system permits the licensee to charge for the use of public facilities (the air waves) without any governmental regulation of those rates; the Supreme Court clearly indicated in the *Sanders* case³² that rate regulation of broadcasting is not encompassed within the present Act.

²⁹ See e.g., the remarks of Senator Broussard who, during the debates on the Communications Act of 1927, stated "radio makes no direct charges whereas the others (telephone and telegraph) are in the business of serving the public for direct pay." 67 Cong. Rec. 12504. See also *Pulitzer Publishing Co. v. FCC*, 68 U. S. App. D. C. 124, 126, 94 F.2d 249, 251.

³⁰ Although it is true that certain subscribers of functional music pay for the privilege of receiving material broadcast over the air, it is also clear that the general listening audience does not pay for this broadcasting. Stores, factories and buildings which desire such operations purchase them so as to provide the public in those stores and buildings with background music as an additional service. The public is not simultaneously deprived of the service.

³¹ It should be noted, of course, that, as was pointed out above, the CATV operator may, himself, originate programming, charging the public for it. Under these circumstances, CATV becomes quite similar to pay television. It is significant, however, that the Commission has specifically refused to hold that origination of programming by CATV systems on a permanent basis is in the public interest and has sought guidance from Congress on this matter. See Second Report in Docket No. 14895, at Par. 153(ii), 2 FCC at 787.

³² *FCC v. Sanders Bros. Radio Station*, 309 U. S. 470, 474.