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P. D. CUE Article
By FCC Commissioner James H. Quello

> ...our liberty depends on the freedom of the press, and that cannot be limited without being lost.
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> Thomas Jefferson, letter
> to Dr. J. Currie, 1786

Unlimited freedom of the press has long been an ideal, of course, but rarely, if ever, a fact. Even Jefferson recognized, his letter to Dr. Currie notwithstanding, that some limitations were necessary. Some eight years after writing his letter to Dr. Currie, in 1794, Jefferson conceded that press freedom was not absolute:

> Printing presses shall be free except as to false facts published maliciously, either to injure the reputation of another, whether followed by pecuniary damages or not, or to expose him to the punishment of the law.

Thus, even Jefferson--that passionate defender of press freedom--concluded that freedom stopped short of being license to use "false facts published maliciously." With that minor concession, however, he believed that freedom of the press should be otherwise absolute and should be guaranteed in the U. S. Constitution.

A different view was held by one of Jefferson's prominent contemporaries, Alexander Hamilton, writing in "The Federalist", noted:

> "What signifies a declaration, that 'the liberty of the press shall be inviolably preserved?' What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declaration may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and the government. Here, after all, must we seek the only solid basis of our rights."

It would appear that both were correct; Jefferson in insisting that press freedom should be constitutionally guaranteed and Hamilton in recognizing the elusiveness of precise definition.

Various court interpretations over the years have placed limitations upon press freedom. The courts have generally held that "gag rules" were a proper limitation, for example, to protect the rights of the accused

in a trial. False advertising claims are generally not protected by the press freedom guarantees of the Constitution. And, there are numerous other limitations which have been imposed as a result of balancing press freedom against other rights.

Granting, at least for the sake of argument, that press freedom is not absolute, it might be useful to attempt to determine whether it is divisible. That is, can or should there be different degrees of freedom allotted to one kind of journalism over another? In this instance, we might ask whether there is something inherent in broadcasting which is not present in newspapers, for example, which might logically accord one or the other greater freedom.

Attempts have been made to distinguish the two media on the basis that newspapers must be deliberately brought into the home and, thus, are subject to acceptance or rejection by the reader. It is further argued that newspapers and other print media are not necessarily consumed serially and, therefore, it is relatively easy to read what is of interest and what is nonoffensive and skip over the remainder. Broadcasting, it is explained, is consumed serially--in the order in which it is presented--and the consumer does not have the option of weeding out uninteresting or offensive material. There is the argument, also, that broadcasting is so pervasive that it is virtually impossible to prevent access to it by the young and innocent. This argument appears to presume that printed material has significantly less appeal to the young and, therefore, less restraint is necessary in printed material.

In a concurring statement in the WBAI case early in 1975, I advanced a "pervasion" argument in attempting to set some kind of standard for permissible broadcasting language. The Commission, at that time, concluded that certain words were "...words which depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly 'indecent' when broadcast on radio or television." The Appeals Court subsequently overturned that Commission action on First Amendment grounds and the Commission has successfully sought review of that decision by the U. S. Supreme Court.

There is another, more traditional argument which attempts to distinguish broadcasting from the print media in terms of the limited spectrum occupied by broadcasting. Because there are certain technical or technological limitations upon the number of broadcasting facilities which may be licensed in any given location, it is argued, the government must prescribe

certain programming practices to assure public benefits. Among these prescriptions, of course, are requirements that equal access be provided for political candidates and that all significant views of controversial issues of public importance must be presented. The scarcity argument has been accepted by the courts as valid. However valid the principle of scarcity might be, its practical validity is belied by the fact that virtually every community in the nation is served by more local broadcasting stations than local newspapers.

A permutation of the scarcity argument is the "public airwaves" assertion. The "airwaves" (electromagnetic spectrum) are not privately owned, therefore they must be considered a publicly-owned natural resource. Thus, in managing this public resource, the government is obliged to see to it that those who own and operate broadcasting stations perform in the best interests of the public. This argument has been stretched to accommodate those favoring use of broadcasting facilities by members of the public at no cost to themselves. Since there are costs associated with the use of such facilities, of course, they are presumably to be borne by the owners of the facilities as a form of hidden taxation.

The primary distinction of significance between broadcasting and print journalism is, so far as I'm concerned, the fact that a regulatory framework has grown up around broadcasting and no such framework has been constructed around the print media. With the means of control in place, it has simply been too much temptation for government to resist.

I supported the FCC's reinterpretation of the Fairness Doctrine in 1974 pointing out that, as a former broadcaster, I had lived comfortably under its minimal strictures. Good journalism, in my mind, requires that all significant sides of a controversial issue of public importance be presented if journalism is to perform its intended function to objectively inform. I continue to support the principle of the Fairness Doctrine but I no longer believe that principle should be enforced by governmental edict. Over all, I'm convinced that the principle will survive and even prosper in broadcasting without the interference of government.

The most onerous of the government-imposed burdens placed upon broadcast journalism is Section 315 of the Communications Act of 1934, as amended. Congressional intent in the passage of Section 315 and subsequent amendments was laudable but misplaced. The concept of equal access to the electorate for each candidate for public office does have some appeal. In practice, of course, it has all too often resulted in an equal lack of access in those instances where Section 315 would require equal time for

a multitude of candidates--in some cases candidates who have not been able to generate support from even 1% of the electorate.

As the law is written, the equal access provision does not apply in the case of newscasts, news interviews, news documentaries and on-the-spot coverage of bona fide news events. Until 1975, news documentaries and on-the-spot coverage were so narrowly defined by the FCC that prudent broadcasters avoided using them for coverage of political campaigns. I enthusiastically participated in the Commission decision to broaden the interpretation of those exemptions to include coverage of political debates. I would be equally enthusiastic in supporting complete repeal of Section 315. Repeal, of course, is not the perogative of the FCC and requires action by the Congress. I intend to urge repeal when I submit a list of recommendations to the House Subcommittee on Communications for its consideration during the review of the Communications Act.

With or without governmental control of equal access and fairness there will always be some human errors in judgment and discretion by some broadcasters. The First Amendment even confers the right to be wrong. However, it is the responsibility of management to make certain their particular media or reporters aren't wrong too often to gain public acceptance and to maintain sound social and business practices.

It was the obvious intent and wisdom of our forefathers in guaranteeing "freedom of the press" to guarantee freedom to disseminate information and opinion in their quest for liberty and justice for all. Because the means of disseminating information are no longer limited to the printing press, it would seem to follow, logically, that neither should the guarantees be limited to the printing press. The principle which Jefferson fought so hard to advance had nothing whatever to do with the means of delivery. He wanted the means to be available--whatever form it might take--to ensure that the people who bore the heavy burden of electing their representatives to govern could avail themselves of the widest possible range of information and ideas.

While both the Congress and the FCC acted affirmatively to support press liberty through adoption of Section 315 and the Fairness Doctrine, those actions only served to demonstrate the futility of attempting to guarantee liberty through repression. It simply doesn't work. The principle of liberty is far stronger than any government. The time has come--again--to give that principle a chance to work.