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**Hidden Hands That Shaped the Marketplace of Ideas: Television's Early Transformation from Medium to Genre**

## HIDDEN HANDS THAT SHAPED THE MARKETPLACE OF IDEAS: TELEVISION'S EARLY TRANSFORMATION FROM MEDIUM TO GENRE

Jon M. Garon\*

### ABSTRACT

In a few decades from the beginning of national radio broadcasts to the Post-War cultural explosion, artists, politicians, lawyers, and spies forged the Golden Age of Television. Conflicting pressures of media censorship, modernist design, American hegemony, expressionist art, anti-communist legislation, and TV ownership limitations clashed and reshaped the cultural identity of the American viewer. These forces competed for dominance, shaping the content, empowering new producers, and setting new standards for artist and viewer alike.

Studies on the broadcast industry marketplace assessed the efficiency of broadcast licensing but failed to identify either the influences or goals of the emerging television market. This article develops the origins of television from its beginning in radio and film innovations. It then chronicles the surprising influences of modern art as part of the government's strategy to address Cold War concerns. Cold War politics, nascent marketing strategies, and cutthroat business practices combined to shape the Golden Age of Television. This article adds a legal and business commentary to television's early engagement with expressionist art and the risk-taking in the dynamic new medium.

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The hand that rules the press, the radio, the screen and the far-spread magazine, rules the country.

– Learned Hand<sup>1</sup>

## INTRODUCTION

The early years of commercial television triggered a transformation in art, culture, law, and politics which redefined both domestic and international culture. These changes were not inevitable, but they were inexorable; each domino toppling the next in line as the technology opened our eyes to the world. It is generally accepted that television has shaped American culture more than any invention,<sup>2</sup> so it is critical to understand that the shape of television was not itself pre-ordained. Rather, the political, regulatory, and creative influences on television combined to make a new medium, unlike that of the theatre, film, or radio that had earlier mediated U.S. culture. These influences defined television, which in turn reshaped civilization. As such, these influence and choices must be clearly understood because we stand again at a precipice regarding transformative new media.

If we wish to have any clear notion about the machine, we must think about its psychological as well as its practical origins; and similarly, we must appraise its esthetic and ethical results. . . . The vast material displacements the machine has made in our physical environment are perhaps in the long run

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<sup>1</sup> Judge Learned Hand, Memorial Service for Justice Brandeis (Dec. 21, 1942).

<sup>2</sup> See, e.g., U.S. HISTORY ONLINE TEXTBOOK, LAND OF TELEVISION, <http://www.ushistory.org/us/53c.asp>, (last visited Jan. 30, 2016).

Perhaps no phenomenon shaped American life in the 1950s more than television. At the end of World War II, the television was a toy for only a few thousand wealthy Americans. Just 10 years later, nearly two-thirds of American households had a television. . . . Television forever changed politics. The first president to be televised was Harry Truman. When Estes Kefauver prosecuted mob boss Frank Costello on television, the Tennessee senator became a national hero and a vice presidential candidate.

less important than its spiritual contributions to our culture.<sup>3</sup>

Television is at once a machine and yet something much greater. It transmitted sporting events, news, entertainment, and political campaigns while at the same time, it quickly emerged as its own medium. Pioneering eighteenth century economist, Adam Smith tried to explain the origins of such markets in an earlier age, but even as Smith described the self-interest that motivated economic actors, he did so without taking into account the redefinition of the marketplaces they would engender.<sup>4</sup>

If television has had as great an influence on culture as industrialization, then the call to understand its structural implications should be met. The role of the government, through Congressional hearings, regulatory licensing, and covert operations must all be taken into account. In the current market, broadcast television is in significant decline while non-broadcast media is becoming the dominant cultural ethos. Therefore, it becomes critical to understand the pressures shaping these new media and learn lessons from television's earlier rise and fall.

This article highlights the salient factors that shaped the Golden Age of Broadcast Television and offers comparisons for its burgeoning replacement. Each of the factors – business, technology, war, regulation, politics, art, and culture – combined at a unique moment following World War II to awaken an America that itself was moving to the center of the world stage. Perhaps surprisingly, the role of the Hollywood Blacklist and the Central Intelligence Agency's ("CIA") response to the Cold War were among the most critical of factors that intersected with more traditional battles over technology and finance to shape the most transformative invention in media history. Taken together, these influences capture American culture and hold the keys to its future.

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<sup>3</sup> LEWIS MUMFORD, *TECHNICS AND CIVILIZATION*, at xv (1964).

<sup>4</sup> *See generally* ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (EDWIN BULLOCK ED. 1909).

## I. Business and Technology

“It is naturally given to all men to esteem their own inventions best.”

— Thomas More

The battle to control the television industry was fought through a series of interdependent battles; fights over technology; competition for content; influence over the artists; and finally a race to win over the public. Each of these battles established the framework for the next competition, as the players shifted in their influence and power. In each battle, there was an “invisible hand” of self-interest<sup>5</sup> motivating the participants to challenge the status quo in order to corner the market for the new medium, both to reap its financial benefits and to dominate the competitors.

At its origins, the battle to control television was understood merely as a race to establish and patent a new technology.<sup>6</sup> But even this introductory step combined technology with finance and management. RCA,<sup>7</sup> led by David Sarnoff, won the competition because RCA combined these elements at a time when no other competitor had mastery of all three.<sup>8</sup> It was the combination of all

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<sup>5</sup> See SMITH, *supra* note 4, at 351 (“By ... directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.”).

<sup>6</sup> See ROBERT CAMPBELL, *THE GOLDEN YEARS OF BROADCASTING: A CELEBRATION OF THE FIRST 50 YEARS OF RADIO AND TV ON NBC 50* (1976).

<sup>7</sup> *History of RCA*, RCA, <http://rca4tv.com/company/history.asp> (last visited Jan. 30, 2016). RCA originally stood for the Radio Corporation of America, which was formed in 1919. Conceived as a *marriage of convenience* between private corporations and the U.S. government for the development of wireless communication, the RCA company soon grew in a different direction, becoming an innovative leader in broadcasting and entertainment products. *Id.*

<sup>8</sup> CAMPBELL, *supra* note 6, at 56 (in the spring of 1941, the Federal Communications Commission granted NBC the first commercial television license).

these elements rather than innovation in just the patentable elements of television that gave RCA its dominance.<sup>9</sup>

Sarnoff began as an employee at the predecessor of RCA, working as a telegraph operator and manager. He moved quickly through the ranks of the company as he developed the models for creating a national broadcasting company with original programming.<sup>10</sup> By 1915 he had conceived radio as a “household utility” utilizing “Radio Music Box” and arranged for several different wavelengths, which would be changeable with the throwing of a single switch or pressing of a single button.”<sup>11</sup> Sarnoff went beyond the standard radio, describing in a business memo to his superiors the outline of what eventually developed as the national broadcast network system.

[Sarnoff] invented the system of providing programs for [radios] by calling for “... a chain of national broadcasting stations . . . simultaneously radiating the same program, what it may be, to reach every city, every town, every village, every hamlet, every home in the United States and with an organization capable of measuring up to the responsibilities of that character of a national service.”<sup>12</sup>

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<sup>9</sup> See David Halberstam, *CBS: The Power and the Profits*, THE ATLANTIC (Jan. 1976), <http://www.theatlantic.com/magazine/archive/1976/01/cbs-the-power-and-the-profits/305304/>. David Sarnoff had been a poet of technology, the protégé of Marconi, a visionary in a new and revolutionary field. In the early twenties he had dreamed of installing something called the Radio Music Box in every American home, and by the thirties, when radios were finally arriving in people's homes, he was already pushing for something called television. *Id.*

<sup>10</sup> CAMPBELL, *supra* note 6, at 22.

<sup>11</sup> Jerome B. Wiesner, *Forward*, in DAVID SARNOFF, LOOKING AHEAD, at vii (1968) (quoting letters of David Sarnoff). See also CAMPBELL, *supra* note 6 at 22 (Sarnoff proposed “a radio music box” and outlin[ed] a plan of development that he believed “would make radio a household utility.” He suggested that such a device could carry lectures, music, major national events, baseball scores, and other matters of interest . . .”).

<sup>12</sup> Wiesner, *supra* note 11, at viii; see also CAMPBELL, *supra* note 6, at 29.

In 1922, Sarnoff was general manager of RCA, then owned in part by General Electric (“GE”). He wrote to the GE ownership that a “specialized organization would be needed” to maintain a national broadcast supporting news, events, and entertainment.<sup>13</sup> In June 1922, he also wrote to GE that the “solution to the broadcasting problem” required a national broadcasting system in which “broadcasting represents a job of entertaining, informing, and educating the nation and should, therefore, be distinctly regarded as a public service.”<sup>14</sup> In shaping what would become the business plan for national radio and television broadcasting, Sarnoff also framed his business as the distribution of a public good as well as a private enterprise.

RCA established a national broadcast model in 1921 by nationally broadcasting a boxing prizefight, dubbed “the “battle of the century” by boxing enthusiasts, the fight between Jack Dempsey and Frenchman Georges Carpentier.”<sup>15</sup> The fight established the national broadcasting model and the leadership of RCA. Nonetheless, AT&T was the leading corporation in broadcasting until 1925 because it had the transmission lines to relay broadcast signals from station to station, but it was not focused on the business of entertainment, so it sold its broadcast station—WEAF to RCA—which later became RCA’s NBC station.<sup>16</sup> Sarnoff understood that

<sup>13</sup> CAMPBELL, *supra* note 6, at 29.

<sup>14</sup> DAVID SARNOFF, LOOKING AHEAD 41 (1968) (Letter to E. W. Rice, Jr., Honorary Chairman of the Board, General Electric Company, June 17, 1922).

<sup>15</sup> Carmela Karnoutsos, *Dempsey Carpentier Fight*, NEW JERSEY CITY UNIVERSITY, [https://www.njcu.edu/programs/jchistory/Pages/D\\_Pages/Dempsey\\_Carpentier\\_Fight.htm](https://www.njcu.edu/programs/jchistory/Pages/D_Pages/Dempsey_Carpentier_Fight.htm) (last visited Jan. 31, 2016) (“The “battle of the century” is also celebrated as the first sports event broadcast on the radio, the new mass communications medium of the decade. . . . Telephone lines and a temporary radio transmitter, sponsored by the Radio Corporation of America, were installed . . .”). SARNOFF, *supra* note 14, at 34.

<sup>16</sup> CAMPBELL, *supra* note 6, at 29. *See also* John McDonough, *First Radio Commercial Hit Airwaves 90 Years Ago*, NPR (Aug. 29, 2012), <http://www.npr.org/2012/08/29/160265990/first-radio-commercial-hit-airwaves-90-years-ago> (“. . . AT&T sold WEAF to the National Broadcasting Company and left radio for good. But it left behind the financial structure on which American commercial broadcasting would grow rich through advertising. WEAF



the model he developed for radio would apply equally well to the emerging technology of television and sought to develop the technology essential for television from its earliest beginnings.<sup>17</sup>

RCA based its technology on patents by Vladimir K. Zworykin, a Russian engineer who was hired by Sarnoff to develop RCA's television system for its NBC broadcast system.<sup>18</sup> Zworykin was a very early pioneer in electronic television. He earned his electrical engineering degree in 1912 and studied the potential of cathode ray tube technology from one of the pioneers in the field.<sup>19</sup> Zworykin's initial iconoscope patent was filed in 1923, giving Zworykin and RCA the legal priority for television.<sup>20</sup>

Modern technology historians often point to Philo Farnsworth as the true inventor of television,<sup>21</sup> but this approach takes too nar-

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would become the flagship station of the NBC network. It became WNBC in 1946 and disappeared in 1988.”).

<sup>17</sup> SARNOFF, *supra* note 14, at 88 (quoting Memorandum, “Radio Broadcasting Activities,” to RCA Board of Directors, “I believe that television, which is the technical name for seeing instead of hearing radio, will come to pass in due course”).

<sup>18</sup> CAMPBELL, *supra* note 6, at 55.

<sup>19</sup> Robert McG. Thomas Jr., *Vladimir Zworykin, Television Pioneer, Dies At 92*, N.Y. TIMES (Aug. 1, 1982),

<http://www.nytimes.com/1982/08/01/obituaries/vladimir-zworykin-television-pioneer-dies-at-92.html> (“In 1912 he earned a degree in electrical engineering from the St. Petersburg Institute of Technology, where he studied under Prof. Boris Rosing, whose belief that the future of television lay in the direction of the cathode ray tube and not mechanical systems . . .”).

<sup>20</sup> See *McCreary v. Zworykin*, 55 F.2d 445, 446 (C.C.P.A. 1932) (“[Zworykin] filed on Dec. 29, 1923. [Zworykin] therefore is the senior party. The principal questions before us relate to the transmitter cathode ray tube disclosed by Zworykin . . .”).

<sup>21</sup> See *Philo Farnsworth*, NNDB, <http://www.nndb.com/people/662/000024590/> (last visited Jan. 30, 2016) (“Farnsworth built his first television camera and receiving apparatus, and on 7 September 1927 he made the first electronic transmission of television, using a carbon arc projector to send a single smoky line to a receiver in the next room of his apartment.”) *but see* ALBERT ABRAMSON, *ZWORYKIN, PIONEER OF TELEVISION* 210 (1995) (discussing the foundational patents by Zworykin on the iconoscope and picture tube whereas Farnsworth's contributions included “his many basic patents covering low-

row an understanding of television. In 1922, at the age of fifteen, Farnsworth explained his theory for how a combination of photoelectric cell and cathode ray tube would allow the transmission of electronic signals that could reproduce live, moving images.<sup>22</sup> By 1927, the young Farnsworth had begun to test his electronic system.<sup>23</sup>

Brilliant though it was, and perhaps developed without the aid of reference to prior research, Farnsworth was not the first to conceive the innovation of television. “As early as 1897, German scientist Karl Ferdinand Braun developed the first cathode ray tube scanning device, otherwise known as an oscilloscope.”<sup>24</sup> An American inventor, Charles Francis Jenkins also pioneered the television. He published an article on "Motion Pictures by Wireless" in 1913 and by 1923 he transmitted moving silhouette images for witnesses.<sup>25</sup>

In contrast, Sarnoff's RCA began broadcasting from the top of the Empire State Building in 1931, despite the limitations of operating a mechanical system rather than an electronic one.<sup>26</sup> The RCA broadcasts from the Empire State Building switched to electronic two years later, in 1933.<sup>27</sup> As a result, during the late 1920's and early 1930's, Farnsworth had the technological edge, but neither company had anything near a commercial product.

Farnsworth's many patents and innovations eventually led to successful patent claims of his own and he eventually negotiated a successful patent royalty agreement with RCA.<sup>28</sup> Farnsworth was a

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velocity beam scanning, synchronizing, generating the high voltage from the horizontal scan frequency, and maintaining a constant black level . . .”).

<sup>22</sup> GEORGE EVERSON, *THE STORY OF TELEVISION: THE LIFE OF PHILO T. FARNSWORTH* 22–24 (1949).

<sup>23</sup> *Philo Farnsworth*, *supra* note 21.

<sup>24</sup> JON PEDDIE, *THE HISTORY OF VISUAL MAGIC IN COMPUTERS* 137 (2013).

<sup>25</sup> *See Charles F. Jenkins*, OHIO HISTORY CENTRAL, [http://www.ohiohistorycentral.org/w/Charles\\_F.\\_Jenkins](http://www.ohiohistorycentral.org/w/Charles_F._Jenkins) (last visited Jan. 30, 2016).

<sup>26</sup> CAMPBELL, *supra* note 6, at 55.

<sup>27</sup> *Id.* at 55.

<sup>28</sup> EVERSON, *supra* note 22, at 249.

successful patent owner and used the patent system to develop his company's own business structure.<sup>29</sup> At the same time, Farnsworth's success as an inventor did not extend to console manufacturer or broadcaster, however, so while Farnsworth's contributions were essential to the technological development of early television prior to World War II, he was not part of television's emergence after the war.

In the race for supremacy between David Sarnoff and Philo Farnsworth, there is an explanation other than Sarnoff's thievery or Farnsworth's self-delusion. "The pages of the history of science record thousands of instances of similar discoveries having been made by scientists working independently of one another."<sup>30</sup> This may be triggered by competition or by the prerequisite conditions of invention becoming available to the scientific community.<sup>31</sup> The potential for television had been popularized throughout the 1920's so there was undoubtedly a great many inventors who attempted to be part of its development.<sup>32</sup> The creative convergence and rush to

<sup>29</sup> *Id.* at 245 ("After spending thirteen years in building a patent structure, [Farnsworth] faced the all-important question of whether [RCA] the leader among the possible customers, who would set the pattern for all the rest, would agree to pay for it.")

<sup>30</sup> Robert K. Merton, *Multiple Discoveries as Strategic Research Site*, (1963), in ROBERT K. MERTON, *THE SOCIOLOGY OF SCIENCE: THEORETICAL AND EMPIRICAL INVESTIGATIONS* 371 (1973).

<sup>31</sup> *Id.* ("Such occurrences suggest that discoveries become virtually inevitable when prerequisite kinds of knowledge and tools accumulate in man's cultural store and when the attention of an appreciable number of investigators becomes focused on a problem, by emerging social needs, by developments internal to the science, or by both.")

<sup>32</sup> See, e.g., John Logie Baird, who first broadcast British television in 1925 using a mechanical system and U.S. inventor, Charles Francis Jenkins who published an article on "Motion Pictures by Wireless" in 1913 and transmitted moving silhouette images in 1923; Bell Telephone Laboratories inventors Herbert E. Ives and Frank Gray demonstrated another system in 1927. J. Fred MacDonald, *The Race for Television in One Nation Under Television: The Rise and Decline of Network TV*, J FRED MACDONALD, <http://jfredmacdonald.com/onutv/race.htm> (last visited Jan. 30, 2016) (noting Ernst F. W. Alexanderson, Lee de Forest, U. A. Sanabria, C. F. Jenkins, and Allen B. DuMont).

a market is perhaps another aspect of the invisible hand of the market.

Farnsworth naively believed that being unencumbered by relationships in radio or motion pictures was an advantage,<sup>33</sup> but history proved this theory wrong. Success hinged on much more than just effective technology.

To win in the marketplace for television, the victor had to first establish that marketplace. Economist Adam Smith was no stranger to markets and monopolies, explaining that the “monopoly of the home-market frequently gives great encouragement to that particular species of industry which enjoys it, and frequently turns towards that employment a greater share of both the labour and stock of society than would otherwise have gone to it . . . .”<sup>34</sup>

Farnsworth also naively believed that being excellent at technology would enhance his position in the market, but did not take into account the limited nature of the marketplace and the other elements essential to succeed.<sup>35</sup> “Farnsworth and his backers were practically the only ones doing television experimental work who did not have conflicting interests in radio and whose whole heart and interest were in the commercial exploitation of the new art.”<sup>36</sup> Farnsworth could place only his technological acumen into the new market; nothing more.

RCA, in contrast, was in a position to invest not only the research needed to perfect and continually improve the broadcast of television but also the manufacture of the home television consoles and the content development in performers, scripts, and events to make the market essential to the new viewers.<sup>37</sup>

Sarnoff succeeded where Farnsworth and others failed because he brought more than just technical expertise. Sarnoff built RCA

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<sup>33</sup> EVERSON, *supra* note 22, at 249.

<sup>34</sup> SMITH, *supra* note 4, at 348.

<sup>35</sup> EVERSON, *supra* note 22, at 249.

<sup>36</sup> *Id.*

<sup>37</sup> See, e.g., U. S. FEDERAL COMMUNICATIONS COMMISSION, No. 5060, REPORT ON CHAIN BROADCASTING (1941) [hereinafter CHAIN BROADCASTING REPORT].

into the dominant leader in radio. Writing in 1938, the Federal Communications Commission explained that “[t]he largest and oldest national organization is the National Broadcasting Company, Inc., founded in 1926, a subsidiary of the Radio Corporation of America. NBC operates two network systems, known as the “Red” and “Blue” networks.”<sup>38</sup> The FCC ultimately passed regulations forcing NBC to divest itself of two networks, resulting in the sale of the Blue network, which was renamed and grew into ABC.<sup>39</sup>

The seminal market study by Ronald Coase provided great insights into the market of broadcast spectrum sales.<sup>40</sup> The theoretical start of the broadcast market analysis was the simple assumption that “radio, by virtue of the interferences, is a natural monopoly; either the government must exercise that monopoly by owning the stations, or it must place the ownership of these stations in the hands of one concern and let the government keep out of it.”<sup>41</sup> The assumption of a natural monopoly created by radio spectrum limits drove much of the regulatory model until near the end of the twentieth century.<sup>42</sup>

Over the ensuing decades this resource has only grown in national importance. “The Commission has been charged with broad

<sup>38</sup> CHAIN BROADCASTING REPORT, *supra* note 37. *See also* Nat’l Broad. Co. v. U.S., 319 U.S. 190, 190 (1943).

<sup>39</sup> 47 C.F.R. § 3.101–108. *See Radio Program Controls: A Network of Inadequacy*, 57 YALE L.J. 275, 296 (1947).

<sup>40</sup> *See* R. H. Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. (1959); Glen O. Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967–68).

<sup>41</sup> *Id.* at 4 (quoting Commander Hooper before House Committee on the Merchant Marine and Fisheries, H.R. 13159, 65<sup>th</sup> Cong. (3d Sess. 1918)).

<sup>42</sup> *See, e.g.*, Nat’l Broad. Co. v. U.S., 219 U.S. 190, 213 (1943) (requiring control of spectrum use); *Red Lion v. F.C.C.*, 395 U.S. 367, 376 (1969) (upholding scarcity doctrine as basis for regulating broadcast despite role of First Amendment concerns); *Turner Broad. System, Inc. v. F.C.C.*, 512 U.S. 622 (1994) (recognizing continued television distribution through over-the-air broadcast to meet the compelling government interest standard); *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180 (1997) (upholding must-carry rules to compel cable operators to include broadcast television).

responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population."<sup>43</sup> In the early days of radio, however, these assumptions were hardly tested.

## II. The Invention of the Public Interest

Neither the importance nor the news and entertainment nature of broadcast radio and television were preordained. Failures to update the Radio Act and court decisions limiting the Secretary of Commerce's power to refuse the issuance of a license led to chaos among earlier broadcasts.<sup>44</sup> After Zenith won a court decision determining the Secretary of Commerce could not even control the allocation of spectrum, Congress stepped in with a ninety day moratorium on the issuance of new licenses, giving itself the opportunity to finally enact new, comprehensive legislation.<sup>45</sup>

The updated law effective in February 1927 created the Federal Radio Commission (later transferred to the Federal Communications Commission ("the FCC or Commission")).<sup>46</sup> The law provided broad regulatory authority to control the licensing of broadcast stations – though not networks – and establish the basis for ownership of the broadcasters. "The Commission was authorized to issue a license if the "public interest, necessity or convenience would be served" by doing so.<sup>47</sup> The Radio Act of 1927 was incorporated as one of the titles into the Communications Act of 1934.<sup>48</sup> The 1934 law was not a further revision of radio regulation. Instead "its main purpose was "to extend the jurisdiction of the existing Radio Commission to embrace telegraph and telephone communications

<sup>43</sup> U.S. v. Sw. Cable Co., 392 U.S. 157, 177 (1968).

<sup>44</sup> See Hoover v. Intercity Radio Co., 286 Fed. 1003 (App. D.C. 1923); U.S. v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926). See also Coase, *supra* note 40, at 4–5.

<sup>45</sup> See *Zenith Radio Corp.*, 12 F.2d at 617–618. Coase, *supra* note 40, at 5–6.

<sup>46</sup> Coase, *supra*, note 40, at 6.

<sup>47</sup> *Id.* (quoting the Radio Act of 1927).

<sup>48</sup> 47 U.S.C. §§ 151 *et. seq.*

as well as those by radio.”<sup>49</sup> Professor Coase noted that little changed either at the time of the 1934 enactment or at the time of his analysis in 1959.

The goal of Congress was to give the government control of the broadcasters, not merely to create a more efficient marketplace for broadcasters to complete. Professor Coase correctly notes that by 1959, television and motion pictures were both considered media protected by the First Amendment.<sup>50</sup> He elides past the actual jurisprudential history in which the First Amendment had not been extended to broadcast or film in 1934.<sup>51</sup> At the time, entertainment such as theatre, circuses, and broadcasts were highly regulated and heavily censored amid government concerns of their insidious, corrupting influences rather than protected as exemplars of civic discourse.<sup>52</sup> While this situation changed in the decades following World War II, at the time of the enactment of the Radio Act or the Communications Act, there was little concern that broadcast regulations were subject to limitations by the First Amendment. During America’s involvement in World War I, for example, the U.S. Na-

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<sup>49</sup> *People v. Broady*, 5 N.Y.2d 500, 507–508 (1959).

<sup>50</sup> Coase, *supra*, note 40, at 8.

<sup>51</sup> *See* *Gitlow v. People of State of N.Y.*, 268 U.S. 652 (1925) (first recognizing the First Amendment as applying to the states); *Winters v. People of State of N.Y.*, 333 U.S. 507, 510 (1948) (“What is one man's amusement, teaches another's doctrine.”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (extending First Amendment protection to film).

<sup>52</sup> *See, e.g., Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 242 (1915).

[Motion pictures] may be used for evil, and against that possibility the [censorship] statute was enacted. Their power of amusement, and, it may be, education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose. Indeed, we may go beyond that possibility. They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to.

vy took control of all amateur and commercial radio broadcast from April 7, 1917 until the end of the war on November 11, 1918.<sup>53</sup>

Secretary of Commerce, Herbert Hoover (later to become U.S. President) had this to say about the scope of the Radio Act regulation: “[T]he ideal situation, as I view it, would be traffic regulation by the Federal Government to the extent of the allotment of wave lengths and control of power and the policing of interference, leaving to each community a large voice in determining who are to occupy the wave lengths assigned to that community.”<sup>54</sup> In this statement, Hoover outlines what became the governing model, namely government control over the policing of the marketplace and public input regarding the distribution of licenses. The “large voice” of public input was likely not intended to grant any actual authority to localities, despite later statutory reference to localism as a goal under the statute.<sup>55</sup> Instead, the public input outlined by

<sup>53</sup> NORMAN J. MEDOFF & BARBARA K. KAYE, *ELECTRONIC MEDIA: THEN, NOW, AND LATER* 231 (2d Ed. 2011) (“After the war, the federal government was in the position to keep control of radio. Many people believed the government should do just that, considering the vicious competition between telephone and telegraph companies, the monopolistic leanings of radio companies, and examples in Europe of government control.”). The United States declared war on April 6, 1917 which lasted until November 11, 1918.

<sup>54</sup> Coase, *supra* note 40, at 8.

<sup>55</sup> See U. S. FEDERAL COMMUNICATIONS COMMISSION, No. 07-218, *REPORT ON BROADCAST LOCALISM AND NOTICE OF PROPOSED RULEMAKING* (2008). See also Jon M. Garon, *Localism as a Production Imperative*, in SEAN A. PAGER & ADAM CANDEUB, *TRANSNATIONAL CULTURE IN THE INTERNET AGE* 356 (2012) (“Localism became one of the fundamental regulatory assumptions of Congressional and FCC policy during the development of terrestrial radio and television.”). Cheryl A. Leanza, *Essay: Monolith or Mosaic: Can the Federal Communications Commission Legitimately Pursue a Repetition of Local Content at the Expense of Local Diversity?*, 53 AM. U. L. REV. 597, 598 (2004) (“Historically, the FCC has interpreted its animating legislation, the Communications Act, to embrace two fundamental goals – that the American media should be comprised of many competing owners (called ‘diversity’) and that media should serve local interests (‘localism’).”).



Hoover was incorporated into the act through the public comment process in license renewal.<sup>56</sup>

From the earliest enactment of the law, government gave itself additional access to the airwaves. "If a licensee permitted a legally qualified candidate for public office to broadcast, equal opportunities had to be offered to all other candidates."<sup>57</sup> Congress understood the potential for the new medium to affect the electoral process; something they would not open to the highest bidder.

Television developed during a tumultuous time in U.S. history. Key technological work occurred during the 1930's. Although the Great Depression was fading, unemployment and economic distress remained very high. By 1939, NBC was broadcasting from the Empire State Building and CBS had just acquired access to broadcast from the Chrysler Tower.<sup>58</sup> Sarnoff again stepped in.

David Sarnoff, taking the leadership for the industry, reported to the F.C.C. that his company had spent \$10,000,000 on television development and others had also spent large sums for the same purpose, and he urged the Commission to take some action. Sarnoff felt that he could not justify such vast expenditures with his stockholders unless something concrete in the way of commercial returns were forthcoming in the near future. The Farnsworth Company took the same position.<sup>59</sup>

Even in the short time between the Radio Act of 1927 and the Communications Act of 1934, the importance of improving the broadcast quality of the licensees. With the advent of the FCC, the Commission "set about tackling the problem of substandard programming in radio, which ranged from fortune-telling, huckerster-

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<sup>56</sup> See 47 U.S.C. § 309(e).

<sup>57</sup> Coase, *supra* note 40, at 6. 47 U.S.C. § 315.

<sup>58</sup> REPORT ON CHAIN BROADCASTING, *supra* note 37.

<sup>59</sup> EVERSON, *supra* note 22, at 253.

ing medicinal cure-alls, and excessive advertising to issues of obscenity and religious intolerance.<sup>60</sup>

The government continued to make efforts to make the license renewals competitive, forcing all licensees to remain operating in the best interests of the public.<sup>61</sup> As a result, the Sarnoff model of creating a broadcast license as a resource to be held in public trust became the governing model. He acquired the talent, identified the public interest, and funded the technology essential to dominate the market he created.<sup>62</sup>

The stakes for radio and the potential for television were well known. “Some analysts even argued that radio was the ‘paramount

<sup>60</sup> MEDOFF & KAYE, *supra* note 53, at 232 (“Between 1934 and 1941, the FCC examined many stations, but only two licenses were revoked and only eight others were not renewed.”).

<sup>61</sup> See *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945). See also U.S. Federal Communications Commission, *In the Matter of Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996*, No. 96-172, Broadcast License Renewal Procedures, available at [https://transition.fcc.gov/Bureaus/Mass\\_Media/Orders/1996/fcc96172.txt](https://transition.fcc.gov/Bureaus/Mass_Media/Orders/1996/fcc96172.txt).

Under comparative renewal procedures, if one or more such competing applications were filed, the Commission was required to consider the applications comparatively to determine which applicant would best serve the public interest, convenience and necessity. The Commission is required to afford renewal applicants and competing mutually exclusive applicants a full comparative hearing under Section 309(e) of the Communications Act, 47 U.S.C. §309(e) and *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

<sup>62</sup> See KEVIN HILLSTROM & LAURIE COLLIER HILLSTROM, *THE INDUSTRIAL REVOLUTION IN AMERICA - OVERVIEW/COMPARISON* 171–72 (2007) (“Zworykin convinced Sarnoff that he would be able to develop a television system for RCA in just two years. Sarnoff granted him \$200,000 for the two-year project, but by the time Zworykin had completed his work, RCA has spent almost \$50 million to fund his efforts.”). CAMPBELL, *supra* note 6, at 58 (“By the close of 1950, NBC-TV had accumulated some staggering operating losses, an estimated \$18 million. It was not until 1952, the twenty-fifth anniversary of the National Broadcasting Company that the time turned and the first profit was generated.”).

information medium of the war, both domestically and internationally.”<sup>63</sup>

Adam Smith famously explained that the collective effect of the self-interest of business owners in a marketplace, investing only for their own gain, will be “led by an invisible hand to promote an end which was no part of his intention.”<sup>64</sup> The invisible hand explains the efficiency that comes when each individual’s self-interest allows the marketplace to operate in an efficient and self-regulated manner.<sup>65</sup> Sarnoff’s model, in contrast, assumed that the self-interest of broadcasters would lead away from news and education and towards direct government control of radio.<sup>66</sup> Sarnoff objected to radio receiver taxes or other devices to further control the broadcaster from government.<sup>67</sup>

The hand steering television was not invisible. The ability of the FCC to break up RCA even before the first television station licenses were issued highlighted the close regulation that would be upon the industry. As further described below, both the Congress and the courts were actively pursuing complaints against the motion picture industry<sup>68</sup> and these heightened concerns about abuses among the motion picture producers may have had a great influence on the growing partnership between early television producers and the federal government.

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<sup>63</sup> DAVID S. ALBERTS & DANIEL S. PAPP, *THE INFORMATION AGE: AN ANTHOLOGY ON ITS IMPACT AND CONSEQUENCES* 20 (1997) (quoting JOSEPH STRAUBHAAR & ROBERT LAROSE, *COMMUNICATIONS MEDIA IN THE INFORMATION SOCIETY* 179 (1996)) (“[G]overnments used radio to inform—and sometimes misinform—their citizens about the progress of the war, to promote nationalism, and to spread propaganda.”).

<sup>64</sup> SMITH, *supra* note 4, at 351.

<sup>65</sup> See Heinz Lubasz, *Adam Smith and the ‘Free Market,’* 62, in *ADAM SMITH’S WEALTH OF NATIONS NEW INTERDISCIPLINARY ESSAYS*, STEPHEN COPLEY & KATHRYN SUTHERLAND, ED. (1995) (describing the invisible hand of nature as distinct from laissez-faire economics or free markets, but rather a power of natural law).

<sup>66</sup> See SARNOFF, *supra* note 4, at 52–54.

<sup>67</sup> *Id.* at 54.

<sup>68</sup> See *infra*, note 14 and accompanying text.

As one brief illustration of the FCC influence, despite strong industry support amongst all competitors, the regulations to issue television station licenses were not approved to go into effect until July 1941.<sup>69</sup> By this time the demands of defense manufacture shifted the innovations of television technology to the war effort. The race for television was shelved as all the participants shifted to defense efforts.<sup>70</sup>

Following the war, the competition for ownership of commercial television began again. Farnsworth, perhaps the leading independent, shifted his own focus toward nuclear energy based on his innovations during the war effort.<sup>71</sup> Although the company continued for some time, the lack of funding and other resources limited its growth. Financial demands also largely sidelined other competitors.

By the end of World War II, a different television race had formed. The once invisible hand of the market was now the open hand of Congress. Farnsworth had little content and no ownership in equipment manufacturer, so his company's role diminished. Instead, the focus shifted to the three dominant national radio networks: NBC, CBS, and fledgling ABC. They were joined by a fourth competitor, DuMont Laboratories (later the DuMont Television Network), which broadcast original content, licensed television stations, and manufactured high quality television consoles.<sup>72</sup>

<sup>69</sup> EVERSON, *supra* note 22, at 253–55.

<sup>70</sup> *Id.* at 255 (despite a lack of preexisting government military contracts, the Farnsworth Company assembly lines were “running at full capacity on government work” as a result of subcontracts and eventually direct contract, which refocused efforts away from television).

<sup>71</sup> See PAUL SCHATZKIN, *THE BOY WHO INVENTED TELEVISION* 3 (2002) (“[I]n 1965, Philo Farnsworth had made more progress toward controlling nuclear fusion than anybody before or since.”).

<sup>72</sup> J. Fred MacDonald, *One Nation under Television: The Rise and Decline of Network TV*, J FRED MACDONALD, <http://jfredmacdonald.com/onutv/programming.htm> (last visited Jan. 31, 2016).

Of the two smaller networks, ABC and DuMont, only the former had any lasting impact. The DuMont network was programmatically underdeveloped, poorly positioned in terms

DuMont began broadcasting in 1946 and featured content including comedian Ernie Kovacs and Jackie Gleason in the *Cavalcade of Stars*. Within a decade, the golden age of television would be nearly over.

### III. How Politics Sidelined the Motion Picture Industry

The battle for control of the television industry should have been a story of technologies clashing over transformation. Instead it became the model of government control of a new marketplace. And while the government may have been a reluctant supporter of the emerging broadcast industry, the government had very definite opinions about the leading entertainment of the day, namely the morally corrupt motion picture industry.<sup>73</sup>

The motion picture industry recognized the broadcasters as a threat. For example, to promote commercial television, NBC signed a five year contract with Bob Hope, based on his longstanding relationship with the radio network.<sup>74</sup> As Hope explained, “I defected from motion pictures. In those days, television and pictures were mortal enemies.”<sup>75</sup> A defection by a popular film star like Bob Hope signaled a shift in the tension between these two industries.<sup>76</sup>

While the motion picture studios could have competed for dominance on television, they instead tried to shut it down.

[T]he [m]otion-picture industry at one time seriously considered taking effective steps to boycott

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of its affiliates, and insufficiently supported by advertisers. With no radio network to build on, DuMont lacked the entertainers and the affiliated stations needed to compete against CBS and NBC. When DuMont did develop a talent of any consequences, such as Jackie Gleason, CBS and NBC had little trouble outbidding DuMont for his services.

<sup>73</sup> See *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 242 (1915).

<sup>74</sup> CAMPBELL, *supra* note 6, at 14.

<sup>75</sup> *Id.*

<sup>76</sup> EVERSON, *supra* note 22, at 246–47.

television. A meeting was called by the motion-picture moguls in New York to devise ways and means to accomplish it. Legend has it that Walt Disney's company refused to go along with any such strangling tactics, and the plan fell through.<sup>77</sup>

The approach to stop the competition and control the marketplace was nothing new. The motion picture industry was founded on the aggressive exploitation of monopoly power.<sup>78</sup> By acknowledging the patents owned by Thomas Alva Edison and cross-licensing a number of patents held by other companies, the Motion Picture Patents Company members<sup>79</sup> were able to control a significant amount of the motion picture production.<sup>80</sup> Known as "the Trust," the goal was control.<sup>81</sup> The Motion Picture Patents Company arranged horizontal and vertical arrangements to approve production and distribution among the Trust's members.<sup>82</sup> To enforce this power over non-members, the Trust also sought to control the manufacture of movie projectors and stock film.<sup>83</sup> The controls

<sup>77</sup> *Id.*

<sup>78</sup> MICHAEL CONAN, ANTITRUST IN THE MOTION PICTURE INDUSTRY 18–20 (1960) ("The Motion Picture Patents Company was organized in 1908 and the next year began to control production and marketing in the entire industry. . . . Eastman Kodak Company, the largest producer of raw film stock, contracted to sell raw film only to the licensee of the Patents Company.").

<sup>79</sup> *Id.* at 18 ("Members were the seven largest American producers, two French producers, and George Kleine—the leading importer-distributor . . .").

<sup>80</sup> See RICHARD CAMPBELL, CHRISTOPHER R. MARTIN & BETTINA FABOS, MEDIA AND CULTURE: AN INTRODUCTION TO MASS COMMUNICATION 192 (2011).

<sup>81</sup> *Id.*

<sup>82</sup> NEAL GABLER, AN EMPIRE OF THEIR OWN 55-58 (1989) ("Under the proposed arrangement, the companies would drop all litigation and pool their patents in a single holding company . . . . Film distributors and exhibitors who rented out or showed movies photographed with patented equipment would also be licensed and forced to pay a royalty based on footage of film.").

<sup>83</sup> CONAN, *supra* note 78, at 20. ("The Motion Picture Patents Company was organized in 1908 and the next year began to control production and marketing in the entire industry. . . . Eastman Kodak Company, the largest producer of raw film stock, contracted to sell raw film only to the licensee of the Patents Company.").

went well beyond the technology of the motion picture production and distribution in an attempt to control all filmed content being distributed so “that no play would be written, or dramatically enacted, except by authors and artists favored by the [Trust].”<sup>84</sup>

The attempt by Edison to control U.S. motion pictures was cultural as well as financial.

[The Trust members] never seemed to understand that they were engaged in much more than an economic battle to determine who would control the profits of the nascent film industry; their battle was also generational, cultural, philosophical, even, in some ways, religious. The Trust’s members were primarily older white Anglo-Saxon Protestants who had entered the film industry in its infancy by inventing projectors. . . . The Independents, on the other hand, were largely ethnics, Jews and Catholics, who had entered the industry by opening and operating theaters. For them . . . movies would always be much more than novelties; they would be the only means available of demanding recognition and exorcising failure.<sup>85</sup>

The cultural aspect of the fight to control Hollywood was a theme that did not disappear in the battle between Edison’s Protestant

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<sup>84</sup> U.S. v. Motion Picture Patents Co., 225 F. 800, 811 (E.D. Pa. 1915).

[T]he defendants did, in furtherance of the scheme of the combination so to do, directly impose upon the trade undue and unreasonable restraint, and that such restraint was the end proposed to be directly reached, and was not merely incidental to efforts to protect the rights granted by the patents, but went far beyond the fair and normal possible scope of any efforts to protect such rights, and that as a direct and intended result of such undue and unreasonable restrictions the defendants have monopolized a large part of the interstate trade and commerce in films, cameras, projecting machines, and other articles of commerce accessory to the motion picture business.

<sup>85</sup> GABLER, *supra* note 82, at 59.

conservatism and the ethnic diversity of Hollywood. That cultural war would return to shape both motion pictures and television.

The efforts to control the growing motion picture industry did not go unnoticed. In 1917, the Supreme Court stopped the illegal tying of the Motion Picture Company Patents to the exhibited films.<sup>86</sup> As the Court explained:

A restriction which would give to the plaintiff such a potential power for evil over an industry which must be recognized as an important element in the amusement life of the nation, under the conclusions we have stated in this opinion, is plainly void because wholly without the scope and purpose of our patent laws, and because, if sustained, it would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortunes.<sup>87</sup>

The loss of the illegal tying by the Motion Picture Patents Company was a tremendous blow to the early, New York based motion picture industry.<sup>88</sup> But the antitrust actions were not the only pressure on the Trust. “There was too much demand for films, too much money to be made, and too many ways to avoid the Trust’s scrutiny.”<sup>89</sup> The new competitors geographically separated themselves from Edison’s New York base, shooting in Cuba and Florida before discovering Hollywood, California as the new home of the industry.<sup>90</sup> “In 1908 the Trust had a virtual monopoly on the

<sup>86</sup> *Motion Picture Patents Co. v. Universal Film Co.*, 243 U.S. 502, 517–519 (1917).

<sup>87</sup> *Id.* at 519.

<sup>88</sup> See William F. Whitman, *Anti-Trust Cases Affecting the Distribution of Motion Pictures*, 7 *FORDHAM L. REV.* 189 (1938), available at <http://ir.lawnet.fordham.edu/flr/vol7/iss2/3>.

<sup>89</sup> CAMPBELL, MARTIN, & FABOS, *supra* note 80, at 192.

<sup>90</sup> *Id.* (“Wanting to free their movie operations from the Trust’s tyrannical grasp, two Hungarian immigrants – Adolph Zuckor, who would eventually run Paramount Pictures, and William Fox who would found the Fox Film Corporation . . . played a role in the collapse of Edison’s Trust.”)



movies. By 1912 the Independents had gobbled half the market and were closing in on a monopoly of their own.”<sup>91</sup>

Whether as a reaction to Edison’s early control or simply to extend their own power, Adolph Zukor of Paramount Pictures, William Fox, Carle Laemmle who founded Universal, and the other studio leaders began to control the first-run theatres, the venues where major productions premiered. “The major studios (which would eventually include MGM, RKO, Warner Brothers, Twentieth Century Fox, and Paramount only needed to own the first-run theaters (about 15 percent of the nation’s theaters), which ... generated 85 to 95 percent of all film revenue.”<sup>92</sup> Each studio had its own production and distribution. Each studio also controlled most of the movie stars through long-term employment agreements and a practice of allowing actors to appear in films of other studios through loan-out agreements, provided these loan-outs were approved by the studios.<sup>93</sup> Finally, the studios standardized and controlled the distribution through an industry trade association which established a standard form agreement which controlled the non-studio distributors.<sup>94</sup>

The new studio system of the 1930’s was an oligopoly rather than a monopoly because there was fierce competition among the major studios to control stars and make motion pictures.<sup>95</sup> This competition, however, did not extend to the distribution or exhibition of the films.<sup>96</sup> The rise of the Hollywood studio system and the dominance of Jewish ownership also gave rise to strong anti-Semitic rhetoric and calls for its destruction or control.<sup>97</sup>

<sup>91</sup> GABLER, *supra* note 59, at 59.

<sup>92</sup> CAMPBELL, MARTIN, & FABOS, *supra* note 82, at 195.

<sup>93</sup> *Id.* at 194–195.

<sup>94</sup> See Whitman, *supra* note 88, at 192–194.

<sup>95</sup> See *U.S. v. Paramount Pictures*, 66 F. Supp. 323, 330 (S.D.N.Y. 1946).

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., ALEXANDER MCGREGOR, *THE CATHOLIC CHURCH AND HOLLYWOOD: CENSORSHIP AND MORALITY IN 1930S CINEMA* (150–52) (suggesting that the relentless anti-Semitic attacks from Christian and Catholic sources shifted the Jewish-owned film studios to acquiesce to more Catholic-based censorship. “[O]f all the religious groups in the United States, the American Catho-

“Protestant reformers advocating federal censorship of the movies had begun to enunciate the charge shortly after World War I. Throughout the 1930s, the charge electrified the formation of such pressure groups as the Catholic Legion of Decency and, in the early 1940s, the isolationist American First.”<sup>98</sup>

Congress regularly held hearing during the 1920’s and 1930’s about antitrust issues in Hollywood and the Jewish influence of these collaborations.<sup>99</sup> Attempts to create the Federal Motion Picture Commission did not result in a federal film board, but did push the industry to create a self-regulatory body, the Motion Picture Producers and Distributors of America (“MPPDA”), headed by ex-Postmaster General Will Hays.<sup>100</sup> Pressure continued to mount. “In February 1929, as religious organizations issued demands for control, Hays learned that press baron William Randolph Hearst would throw his considerable influence behind the movement for federal censorship.”<sup>101</sup>

The Production Code was launched by the MPPDA in 1929 but took some time before it became the dominant form of motion picture censorship.<sup>102</sup> The MPPDA was initially slow to actually censor its members’ films, but a threatened boycott by the Catholic Legion of Decency in 1934 and growing complaints of association with communism by some and anti-Nationalism by others resulted in the creation of the heavily enforced Production Code.<sup>103</sup>

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lic Church was the most anti-Semitic, and . . . the most organized and militant. . . . As a corollary, it was the American Catholic Church that most passionately argued for power to be removed from these cultural producers.”)

<sup>98</sup> STEVEN ALAN CARR, *HOLLYWOOD AND ANTI-SEMITISM: A CULTURAL HISTORY UP TO WORLD WAR II* 5 (2001).

<sup>99</sup> *Id.* at 72–73.

<sup>100</sup> JILL NELMES, *AN INTRODUCTION TO FILM STUDIES* 42 (3d Ed. 2003).

<sup>101</sup> LEONARD J. LEFF & JEROLD L. SIMMONS, *THE DAME IN THE KIMONO: HOLLYWOOD, CENSORSHIP, AND THE PRODUCTION CODE* 8 (2001).

<sup>102</sup> *Id.* at 13–15.

<sup>103</sup> See NELMES, *supra* note 100 at 42–43 (discussing establishment of Production Code); McGregor, *supra* note 97 at 151–53 (Joseph Kennedy “encouraged the studio heads to “stop making anti-Nazi pictures or using the film medium to

By 1938, the major Hollywood studios<sup>104</sup> also had significant antitrust issues with which to contend.<sup>105</sup> The studios have been accused of concerted action to monopolize the production of motion pictures, the distribution of those films, and the eventual exhibition of those films. “By March 1939, over thirty antitrust lawsuits had been filed against the majors in federal, state, and local courts, and the Senate’s Interstate Commerce Committee had resumed hearings on legislation to stop the film industry practices.”<sup>106</sup>

At trial, the evidence established that the studios competed for the production of films, so that aspect of the case was dropped.<sup>107</sup> The remaining claims of vertical and horizontal restraints of trade were established through two cases, one of which was decided by the Supreme Court a decade after the litigation began.<sup>108</sup>

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promote or show sympathy to the cause of the ‘democracies’ versus the ‘dictators’.”).

<sup>104</sup> *Id.* (“Paramount Pictures, Inc., Loew’s, Incorporated, Radio-Keith-Orpheum Corporation, Warner Bros. Pictures, Inc., [and] Twentieth Century-Fox Film Corporation, which produce motion pictures, and their respective subsidiaries or affiliates which distribute and exhibit films. These are known as the five major defendants or exhibitor-defendants.”).

<sup>105</sup> *U.S. v. Paramount Pictures*, 334 U.S. 131, 140 (1948) (Sherman Act violations against the major motion picture studios and other distributors.).

<sup>106</sup> *The Motion Picture Industry in 1940–1941 - Prologue: January 1940, The 1940 Consent Decree, Labor Pains*, ENCYCLOPEDIA, <http://encyclopedia.jrank.org/articles/pages/2905/The-Motion-Picture-Industry-in-1940-1941.html> (last visited Jan. 31, 2016) [hereinafter *The Motion Picture Industry in 1940–41*].

<sup>107</sup> *Paramount Pictures*, 66 F. Supp. at 330 (it “appeared upon the trial that there was no violation of the Sherman Act in respect to production of motion pictures and that there was on the contrary active competition in production, the charge in respect to production was formally abandoned by the plaintiff.”).

<sup>108</sup> *See The Independent Producers and the Paramount Case, 1938-1949, Part 6: The Supreme Court Verdict That Brought an End to the Hollywood Studio System, 1948*, COBBLESTONE ENTERTAINMENT, [http://www.cobbles.com/simpp\\_archive/paramountcase\\_6supreme1948.htm](http://www.cobbles.com/simpp_archive/paramountcase_6supreme1948.htm) (last visited Jan. 31, 2016.)

The oligopoly scheme developed by Hollywood was even more comprehensive than that of Edison's Trust.<sup>109</sup> The majors and other distributors fixed the ticket prices to consumers, so all theaters charged approximately the same amount.<sup>110</sup> The conspirators extended the exclusive windows in which movies were made available to theaters to control the exhibition of the films, maximize profits, and preclude competitors from access to those theaters.<sup>111</sup>

The vertical ownership of the first-run movie halls guaranteed exhibition of all the important studio films, eliminating a significant financial risk of the independents film companies. Access to these film exhibitors made the independent film producers and distributors beholden to the major studios. As the Court described the cabal, "[t]he practices were bald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor-defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine."<sup>112</sup>

The most significant of the Supreme Court findings of restraint of trade focused on the ownership by the major studios of the first-run motion picture exhibition chains. The Court remanded the case to the district court to complete what ultimately became a divestiture of many theatrical exhibition holdings by the motion picture studios.<sup>113</sup> RKO and Paramount entered into consent decrees with the justice department to divest their theater chains while MGM,

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<sup>109</sup> Among the many restraints of trade was the use of copyright monopolies to extend beyond a single copyright, much like the Motion Picture Patent Company used its patents. *Paramount Pictures*, 334 U.S. at 157–158 (“The court enjoined defendants from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee's taking one or more other features.”).

<sup>110</sup> *Id.* at 141 (“defendants in the licenses they issued fixed minimum admission prices which the exhibitors agreed to charge . . . . The District Court found that two price-fixing conspiracies existed—a horizontal one between all the defendants, a vertical one between each distributor-defendant and its licensees.”).

<sup>111</sup> *Id.* at 146–147 (“many clearances had no relation to the competitive factors which alone could justify them”).

<sup>112</sup> *Id.* at 149.

<sup>113</sup> *Id.* at 177.

20<sup>th</sup> Century Fox, and Warner Bros continued to fight through additional litigation before ultimately agreeing to divestiture.<sup>114</sup>

The consequences were far reaching for Hollywood. The scale of the antitrust actions gained these companies many enemies in Washington.<sup>115</sup> Some in Congress were angry with the anticompetitive practices of the industry.<sup>116</sup>

A third wave of criticism rocked Hollywood in the wake of World War II. This began with investigations of the U.S. Senate's Special Committee Investigating the National Defense Program, chaired by Harry S. Truman.<sup>117</sup> "The committee wanted to know, among other things, how some of the [Hollywood] moguls and their staff had wangled officers' commissions, how much other movie industry was profiting from the production of military training films, and whether the major studios exercised monopolistic control over government-contract filmmaking."<sup>118</sup> Other questions

<sup>114</sup> See George Hodak, *May 3, 1948: Court Rules on Hollywood Antitrust Case*, AMERICAN BAR ASSOCIATION JOURNAL (May 1, 2012 05:20 AM CDT), [http://www.abajournal.com/magazine/article/may\\_3\\_1948\\_court\\_rules\\_on\\_hollywood\\_antitrust\\_case/](http://www.abajournal.com/magazine/article/may_3_1948_court_rules_on_hollywood_antitrust_case/). Brian J. Wolf, *The Prohibitions Against Studio Ownership of Theatres: Are They an Anachronism?*, 13 LOY. L.A. ENT. L. REV. 413 (1993).

<sup>115</sup> See *The Motion Picture Industry in 1940-41*, *supra* note 106.

<sup>116</sup> *Id.*

Senator Matthew Neely of West Virginia [was] an outspoken critic of motion picture trade practices. In past years, Neely had sponsored bills against the block booking of pictures, a practice by which the studios forced exhibitors to take a studio's entire annual output, sight unseen, in order to get the more desirable A-class pictures. Neely's anti-block-booking bills had passed the Senate in 1938 and again in 1939, only to fail in the House. Neely vowed in January 1940 to reintroduce that legislation and to sponsor additional bills outlawing double features and, on a more serious note, prohibiting studios from owning theater chains.

<sup>117</sup> See ROBERT SKLAR, *MOVIE-MADE AMERICA: A CULTURAL HISTORY OF AMERICAN MOVIES* 249-250 (citing U.S. Cong., Senate Special Committee Investigative Committee Investigating the National Defense Program, *Investigation of the National Defense Program*, 6896-97 (1943)).

<sup>118</sup> *Id.* at 249.

focused on the “recent citizen” status of the Hollywood filmmakers.<sup>119</sup>

At the same time, the House Un-American Committee of the House of Representatives (“HUAC”) turned its attention to the films and filmmakers of Hollywood. In 1942, the Federal Bureau of Investigation (“FBI”) began its own report on “Communist Infiltration of the Motion Picture Industry.”<sup>120</sup> The FBI fed the information to the HUAC.

HUAC began in 1938 under the chairmanship of Martin Dies.<sup>121</sup> The HUAC had broad authority to investigate:

(1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.<sup>122</sup>

<sup>119</sup> *Id.* (quoting Senator Ralph O. Brewster).

<sup>120</sup> Daniel J. Leab, *Introduction*, in *A GUIDE TO THE MICROFILM EDITION OF FEDERAL BUREAU OF INVESTIGATION, CONFIDENTIAL FILES, COMMUNIST ACTIVITY IN THE ENTERTAINMENT INDUSTRY, FBI SURVEILLANCE FILES ON HOLLYWOOD, 1942–1958* (1991), available at [http://cisupa.proquest.com/ksc\\_assets/catalog/1708\\_FBIFilesCommActsEntertainment.pdf](http://cisupa.proquest.com/ksc_assets/catalog/1708_FBIFilesCommActsEntertainment.pdf).

<sup>121</sup> Erica Bose, Comment, *Three Brave Men: An Examination of Three Attorneys Who Represented the Hollywood Nineteen in the House Un-American Activities Committee Hearings in 1947 and the Consequences They Faced*, 6 *UCLA ENT. L. REV.* 321, 323 (1999) (“H.U.A.C. first appeared as a special committee in 1938. . . . [I]t spent much of its first six years trying to prove that Communists dominated such New Deal organizations as the Federal Theatre Project, the C.I.O., and the Tennessee Valley Authority.”).

<sup>122</sup> H.R. Res. 282, 75th Cong., 83 *Cong. Rec.* 7568 (1938). See also Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 *MINN. L. REV.* 1669, 1678 (2001).

The focus of the investigations were predominately focused on communist influences and heavily influenced by J. Edgar Hoover's FBI investigations. Hollywood had been an HUAC target a number of times, but the focus grew with the FBI reports, culminating in particularly explosive hearings in 1947 and again in 1951–52.<sup>123</sup>

The 1947 investigation was triggered by FBI and HUAC investigations that identified Gerhart Eilser, a Hollywood composer, as a spy for the Communist International Party.<sup>124</sup> As a Hollywood composer, Eilser opened the door to more Hollywood investigations and accusations.

Given the tension between Hollywood and the broadcasters, the Hollywood investigation also served as another victory for radio and television. "Eisler's hearings precipitated HUAC's subsequent, broader investigation of Hollywood. . . . [T]he hearings attracted the widespread attention of the media, especially the fledgling television broadcasters."<sup>125</sup> Hollywood's misery served to fuel the political agenda of the HUAC members and economic

<sup>123</sup> Leab, *supra* note 120, at vi.

[T]he FBI throughout much of the 1940s and 1950s "was selling its own brand of anti-Communism"—and one of its most important clients was HUAC, through which material from the bureau's confidential files became "public information" that could spread fears about radicalism "without compromising the FBI's image of a disinterested, nonpartisan, investigative agency." It is therefore not surprising that the 1947 HUAC hearings dealing with the movies and obviously based on FBI information was called by the committee "[h]earings dealing with Communist infiltration of the movie industry." Related hearings held in 1951-52 dealt with "Communist infiltration of [the] Hollywood motion picture industry." (internal footnotes omitted).

<sup>124</sup> ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 359-415 (1998) ("By the end of the war, the FBI believed it had a big fish on the line. Eilser's apparently furtive behavior . . . gave plausibility to that characterization. . . ."). See also Redish & McFadden, *supra* note 122 at 1680. Eilser v. U.S., 170 F.2d 273, 276 (D.C. Cir. 1948).

<sup>125</sup> Redish & McFadden, *supra* note 122, at 1680.

agendas of the radio and television stations broadcasting the political tragedy.

The human toll throughout Hollywood was significant. The HUAC initially subpoenaed 41 individuals.<sup>126</sup> “Over the course of five days, a total of twenty-two witnesses eventually denounced over one-hundred men and women as members of the Hollywood branch of the Communist Party.”<sup>127</sup> Studio heads, including Louis B. Mayer, Walt Disney, and Jack Warner all vowed to expunge the communist influence from the motion picture industry and each named individuals thought to be associated with the Communist Party.<sup>128</sup>

The Screen Actors Guild, represented by Robert Montgomery, read a statement into the record that it will “rigorously oppose by every power which is within its legal rights, any real Fascist or Communist influence in the motion-picture industry or in the ranks of labor.”<sup>129</sup> The anti-communist beliefs of many studio heads were quite genuine. Hollywood was undergoing tremendous labor disputes in the post-war era and many of those involved political as well as economic dimensions.<sup>130</sup> The studios may have welcomed the opportunity to show their patriotism in general and support for Congress in particular.

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* (quoting ROBERT VAUGHN, *ONLY VICTIMS* 72 (1972)).

<sup>128</sup> VAUGHN, *supra* note 127, at 76–80.

<sup>129</sup> *Id.* at 84. Ronald Reagan, later to become president of the Screen Actors Guild, and later still president of the United States concluded his testimony before the questions of Richard Nixon, he offered a statement that “I abhor their philosophy . . . but at the same time I never as a citizen want to see our country come urged, by either fear or resentment of this group, that we ever compromise with any of our democratic principles through that fear or resentment.” *Id.* at 88.

<sup>130</sup> See Redish & McFadden, *supra* note 122, at 1678 (“the Conference of Studio Unions (CSU), a Communist-dominated union of screenwriters, technicians, studio painters, and machinists, had fought two successful strikes against Walt Disney Studios and Warner Brothers Studios. The CSU also was involved in a bitter jurisdictional dispute against the competing International Alliance of Theatrical Stage Employees (IATSE) . . .”).



But the hearings were not a showcase of Hollywood's embrace of congressional policies. The creative community was deeply split over the HUAC investigations. Many believed the hearings were political propaganda, witch-hunts, and grandstanding all offered at the cost of real people's livelihoods and freedom.

Against this backdrop, John Howard Lawson, founder and president of the Screen Writers Guild was interrogated by HUAC counsel Robert Stripling. Lawson offered a prepared statement which began "[f]or a week, this committee has conducted an illegal and indecent trial of American citizens, whom the committee has selected to be publicly pilloried and smeared."<sup>131</sup> Unlike Warner and Mayer, Lawson's statement would not be read.<sup>132</sup> Asked whether he was a member of the Screen Writers Guild or a member of the Communist Party, Lawson shouted that "the raising of any question here in regard to membership, political beliefs, or affiliation is absolutely beyond the powers of this committee."<sup>133</sup>

The shouting match grew between Lawson members of the HUAC. Lawson "I am not on trial here, Mr. Chairman. This Committee is on trial here before the American people. Let us get that straight."<sup>134</sup> Lawson analogized to Hitler, adding, "[y]ou are using the old technique, which was used in Hitler's Germany, in order to create a scare here in order that you can smear the motion-picture industry, and you can proceed to the press, to any form of communication in this country."<sup>135</sup>

James Dalton Trumbo was next to testify. He attempted to introduce twenty screenplays into evidence, challenging the HUAC to identify the introduction of the insidious and communistic propaganda of which he and the other communist sympathizers stood accused. The chairman of the hearing refused, complaining that it

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<sup>131</sup> MARC NORMAN, *WHAT HAPPENS NEXT: A HISTORY OF AMERICAN SCREENWRITING* 272 (2008).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 272–73.

<sup>134</sup> *Id.* at 373. Redish & McFadden, *supra* note 122, at 1680.

<sup>135</sup> MEDOFF & KAYE, *supra* note 53, at 273.

was “too many pages.”<sup>136</sup> Trumbo was asked of his Screen Writers Guild membership and Communist Party membership. Not getting a direct answer, he was also dismissed. Very shortly thereafter, both men were cited for Contempt of Congress for refusing to answer the questions in response to the subpoena.<sup>137</sup>

Contempt citations were also served on Albert Maltz, Alvah Bessie, Samuel Ornitz, Herbert Biberman, Edward Dmytryk, Adrian Scott, Ring Lardner, Jr., and Lester Cole. Eight of these individuals were writers.<sup>138</sup> Together, these Hollywood creative leaders became known as the Hollywood Ten.

The stand for free speech and association of the Hollywood Ten did not bode well for either them or the industry. The early and aggressive question regarding membership in the Communist Party suggested the HUAC was hoping to end these hearings with criminal contempt citations and the members neatly walked into that trap.<sup>139</sup> The studio owners and management had a public relations nightmare on their hands and responded with a blacklist designed to distance themselves and root out Communism.<sup>140</sup>

The turmoil within Hollywood did little to mollify those in Congress who believed the motion-picture industry was infiltrated by Jews and Communists and the blacklist ruined lives without changing the public perception.<sup>141</sup> “The heads of the major studios – including Louis B. Mayer, Samuel Goldwyn, Harry Cohn, Bar-

<sup>136</sup> *Id.* at 275.

<sup>137</sup> *Id.* at 375; Redish & McFadden, *supra* note 53, at 1680.

<sup>138</sup> VAUGHN, *supra* note 127, at 112.

<sup>139</sup> *See id.*

<sup>140</sup> *See id.* at 170 (“The blacklist was a public relations gimmick in motion pictures and television. . . .”). *See also* MEDOFF & KAYE, *supra* note 53, at 278–279 (using the morals clauses in studio contracts enabled the studios to enforce the blacklist without violating laws).

<sup>141</sup> MEDOFF & KAYE, *supra* note 53, at 278–279 (“The threat of boycotts from customers who were offended by the notion of paying money to support Communist sympathizers soon led to the ‘Waldorf Statement,’ in which every major studio announced they were firing the Hollywood Ten and pledged not to ‘knowingly employ a Communist or a member of any party or group which advocated the overthrow of the Government of the United States.’”)

ney Balaban and Albert Warner – signed the declaration in part simply to look like they, the leaders of the industry, were getting out in front of the supposed problem by taking what they termed ‘positive action.’”<sup>142</sup> The Waldorf Statement and the blacklist were designed to regain the support of the public and Congress. Their efforts failed—creating a lasting legacy of distrust for the motion picture industry as an industry of free speech or of government support.<sup>143</sup>

The motion picture studios were not going to be provided the public trust of the broadcast airwaves for the new medium of television. Although both the Hollywood studios and the broadcast networks established loyalty oaths and screening systems, there was little opportunity for Hollywood in the post-war political environment.<sup>144</sup> An open license marketplace was the last thing Congress wanted.<sup>145</sup>

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<sup>142</sup> Gary Baum & Daniel Miller, *The Hollywood Brass Who Endorsed the Blacklist*, HOLLYWOOD REPORTER (Nov. 19, 2012), <http://www.hollywoodreporter.com/news/blacklist-hollywood-brass-who-endorsed-391979>.

The so-called Waldorf Statement -- named for the New York hotel where it was drafted on Nov. 24-25, 1947, by MPAA president Eric Johnston on behalf of 48 movie executives -- decreed that the 10 Hollywood men who had just been cited for refusing to testify before the House Committee on Un-American Activities would not be allowed to work in the business until each had "purged himself of contempt and declares under oath that he is not a communist.

<sup>143</sup> See MEDOFF & KAYE, *supra* note 53, at 273; Reddish & McFadden, *supra* note 122 at 1680.

<sup>144</sup> See, e.g., LYNNE OLSON & STANLEY W. CLOUD, *THE MURROW BOYS: PIONEERS ON THE FRONT LINES OF BROADCAST JOURNALISM* 302-03 (1997) (describing the process of requiring news reporters such as Edward R. Murrow to sign loyalty oaths and a “screening procedure intended to root out employees with suspected Communist leanings. . .”).

<sup>145</sup> See Coase, *supra* note 40, at 18–19 (“The ‘novel theory’ (novel with Adam Smith) is, of course, that the allocation of resources should be determined by the forces of the market rather than as a result of government decisions.”)

In stark contrast to the preferred, economically driven market outlined by Professor Coase, the government's focus on the entertainment industry was over its content, its concentration, and its influence.<sup>146</sup> Coase acknowledges that “[c]ontrol of monopoly is a separate problem,” and concedes that “[t]o increase the competitiveness of the system, it may be that certain firms should not be allowed to operate broadcasting stations.”<sup>147</sup>

As Coase notes of the FCC, the governmental position remained that “[i]t is, however, a necessary and constitutional abridgment [of free speech] in order to prevent chaotic interference from destroying the great potential of this medium for public enlightenment [*sic*] and entertainment.”<sup>148</sup> Coase challenges the comment, stating “[i]t is not clear to me what the Commission meant by this. It could hardly have been the intention of the Commission to pay a tribute to the “invisible hand.”<sup>149</sup> Indeed, in this regard the hands of Congress and the FCC are anything but invisible. They are carving the broadcast industry into their preferred shape by chipping away those producers and broadcasters the government believes are un-American or excessively liberal-leaning.<sup>150</sup>

If there was any question whether the FCC was in the thrall of the HUAC, then the FCC's own battle with the committee should help illustrate the Commission's difficulty. From 1940 through 1943, a series of actions by the HUAC and other Senate and House committees held hearings, withheld appropriations, and sought the ouster of FCC staff under the banner of eliminating pro-communist

<sup>146</sup> See *id.* at 9–11 (discussing “the clash with the doctrine of freedom of the press” with numerous examples of FCC actions enforced without regard to potential free speech limitations).

<sup>147</sup> *Id.* at 16–17.

<sup>148</sup> *Id.* at 10 quoting *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1257 (1949) (notation of error in quotation).

<sup>149</sup> *Id.*

<sup>150</sup> See SUSAN L. BRINSON, *THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION 2–4 1941–1960* (2004) (describing the post-war Communist scare as largely motivated by a conservative backlash against the progressive social landscape of President Roosevelt's New Deal.)

leanings in government.<sup>151</sup> “[T]he FCC played a pivotal role in the political and social crisis that enveloped the United States regarding the Red Scare.”<sup>152</sup> The battles between the FCC and Congress took their toll on the staff members and political will of the FCC, so that eventually, the individuals targeted withdrew from the agency and the political stance reversed itself, supporting a more politically conservative agenda sought by those involved with the fight. “[A]s early as 1945 [the FCC] began the slow transformation toward more conservative, pro-business regulations ... an agency that increasingly acquiesced to industry wishes in its decisions and policy making.”<sup>153</sup> As World War II ended and the FCC shifted towards a more pro-industry stance, the industries that helped win the war were well-positioned to take advantage of the new environment. Unlike in Hollywood, where the political fights continued, the industry of radio and television was well-positioned to take advantage of the emerging new marketplace.

#### **IV. Television Technology as an Essential Service to WWII**

In contrast to the motion picture industry, the radio and emerging television industry had a very different relationship with the U.S. government.<sup>154</sup> Unlike the relatively modest role motion picture propaganda had on the Second World War, the technology of radio and television was foundational to developing the technolo-

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<sup>151</sup> See BRINSON, *supra* note 150, at 85–89.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 89.

<sup>154</sup> *Cf. id.* at 4.

Thus, the reality of anti-Communism was that it was a public mask for a political backlash. As the 1940s progressed and the Red Scare escalated, it was increasingly clear that those who supported the New Deal and advocated significant social and political change during the Depression were particularly at risk for being accused of Communist sympathies. Several people at the FCC fit his bill. . . .

gies necessary to winning the war.<sup>155</sup> The U.S. Navy had long understood the foundational role that radio communications played in maritime navigation.<sup>156</sup> Throughout the 1930's, RCA and AT&T were working with the U.S. military to begin developing systems for radar and sonar to better track the movement of ships, planes, and bombs.<sup>157</sup> In a 1931 report, engineers working on RCA's television broadcast from the top of the Empire State Building had recognized that they could measure signal strength of the broadcast and use it to "monitor the motion of the elevator in their building and the automobile traffic in the street below, stop and go conditions being clearly discernable."<sup>158</sup>

Following the attack on Pearl Harbor, the "American electrical industry slowly converted to total war production."<sup>159</sup>

David Sarnoff of RCA had immediately telegraphed President Franklin Roosevelt: "All our facilities and personnel are ready and at your instant service. We await your commands." RCA's scientists and engineers would play a major role in the development of radar and sonar and of the electronic navigation systems known as LORAN and SHORAN. . . . In fact, most of the wartime advances in television weaponry were spearheaded by RCA in collaboration with the Office of Scientific

<sup>155</sup> See generally LOUIS BROWN, TECHNICAL AND MILITARY IMPERATIVES: A RADAR HISTORY OF WORLD WAR 2 (1987); ALBERT ABRAMSON, THE HISTORY OF TELEVISION, 1942 TO 2000 3-5 (1999).

<sup>156</sup> See MEDOFF & KAYE, *supra* note 53 at 231 (discussing the naval seizure of all U.S. radio in World War I).

<sup>157</sup> See BROWN, *supra* note 155, at 65-68 ("RCA had had an interest in radar . . . but for the men from Bell Telephone Laboratory, representing AT&T, it was all new and quite astounding."); ABRAMSON, *supra* note 155, at 3 (in 1935, RCA began work on guided missiles "based on a design of a flying torpedo by Dr. Vladimir Kosma Zworykin in 1934.").

<sup>158</sup> BROWN, *supra* note 155, at 43.

<sup>159</sup> ABRAMSON, THE HISTORY OF TELEVISION, 1942 TO 2000 3 (1987).

Research and Development (OSRD) of the armed forces.<sup>160</sup>

In addition to improvements in missile navigation, sonar, and radar, RCA's television systems were used as closed-circuit television, remote viewing systems to enable nuclear scientists to conduct research from more safe distances. The equipment was installed in the facilities of the Manhattan Project, helping speed the development of the atomic bomb.<sup>161</sup>

RCA, like the rest of the electronics industry, was fully committed to the war effort. The role of the developing television was transformed from entertainment to essential industry. And the NBC radio network, like its chief competitor at the Columbia Broadcast Network ("CBS") were both developing news networks throughout the 1930's.<sup>162</sup> Both NBC and CBS expanded their news programming and with the expansion of German aggressions in 1938, NBC and CBS developed expansive foreign news coverage.<sup>163</sup> Led by the journalistic and on-air efforts of Edward R. Murrow, the development of top talent, helped CBS eclipse NBC in news programming.<sup>164</sup>

CBS Radio was created in 1928 by William S. Paley after the purchase of Philadelphia radio station WCAU.<sup>165</sup> Paley had earned his experience and financing at the Congress Cigar Company, owned by his family. Paley helped develop its aggressive market-

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<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 9–10.

<sup>162</sup> See GERD HORTEN, *RADIO GOES TO WAR* 28 (2003).

<sup>163</sup> *Id.* at 30–31.

<sup>164</sup> *Id.* at 29–30 ("most European countries were only familiar with state-owned broadcasting, and officials generally assumed that NBC was the official national broadcasting station of the United States. . . . Murrow and the CBS staff would soon outshine the NBC news team, establishing themselves as the premier news network . . . by the early 1940s.").

<sup>165</sup> See, e.g., MICHAEL D. MURRAY, *ENCYCLOPEDIA OF TELEVISION NEWS* 28 (1998); SALLY BEDELL SMITH, *IN ALL HIS GLORY: THE LIFE AND TIMES OF WILLIAM S. PALEY* (1990); *BROADCAST PIONEERS OF PHILADELPHIA*, <http://www.broadcastpioneers.com/wcauhistory.html> (last visited Dec. 31, 2015); CHAIN BROADCASTING REPORT, *supra* note 37, at 21–25.

ing strategies, first in print and later on radio. His familiarity with the fledgling commercial medium drew him to enter the business.<sup>166</sup> The station was part of the Columbia Phonograph and Records Company which changed its name to the Columbia Phonograph Broadcasting Company, which Paley then changed to the Columbia Broadcasting System after the purchase.<sup>167</sup>

As CBS grew, it challenged NBC in both the news and the entertainment divisions. “Paley’s fledgling radio network was profitable by 1932 and he later successfully challenged NBC for leadership in the medium by stealing many stars from the network in what became known as “Paley Raids.”<sup>168</sup>

“Mr. Paley . . . soon proved to be a vigorous challenger to David Sarnoff of dominant NBC, hiring away from him, at then-astronomical salaries, every major star in the radio galaxy: Jack Benny, Kate Smith, Red Skelton, Bing Crosby, Lucille Ball and a host of others.”<sup>169</sup> Paley brought a focus on advertising and market to radio that was fundamentally different than the technological and industrial focus brought by Sarnoff. In their rivalry, each pushed the other to shape and expand first radio and then television.

Just as Sarnoff jumped into the war effort personally and on behalf of RCA and NBC, Paley did the same for himself and for CBS. Paley was given the honorary rank of colonel in the Psychological Warfare Branch of the Office of War Information. “He helped prepare the information campaign for the Normandy invasion, gained executive broadcasting experience, and supervised the

<sup>166</sup> See BERNARD F. DICK, *ENGULFED: THE DEATH OF PARAMOUNT PICTURES AND THE BIRTH OF CORPORATE HOLLYWOOD* 28 (2001).

<sup>167</sup> See Harold L. Erickson, *CBS Corporation*, *ENCYCLOPEDIA BRITANNICA*, <http://www.britannica.com/topic/CBS-Corporation>, (last visited Jan. 31, 2016).

<sup>168</sup> ROBERT REED & MAXINE REED, *THE ENCYCLOPEDIA OF TELEVISION, CABLE, AND VIDEO* 408 (1992).

<sup>169</sup> Kenneth R. Clark, *Broadcasting Legend William S. Paley, 89, Guided CBS More Than 50 Years*, *CHICAGO TRIBUNE* (Oct. 28, 1990), [http://articles.chicagotribune.com/1990-10-28/news/9003300213\\_1\\_mr-paley-william-s-paley-united-independent-broadcasters](http://articles.chicagotribune.com/1990-10-28/news/9003300213_1_mr-paley-william-s-paley-united-independent-broadcasters).



de-Nazification of German media.”<sup>170</sup> As later summarized in his obituary, “Paley served first with the Office of War Information and then, with the rank of colonel, as deputy chief of psychological warfare under Gen. Dwight Eisenhower.”<sup>171</sup> Eisenhower later recommended that Paley be placed in an oversight position for the U.S. post-war psychological warfare campaign.<sup>172</sup>

The two men who led NBC and CBS had strong personal and professional relationships with the leaders in the U.S. military and political establishment. The growth of radio coverage of the news effort became an essential part of the war effort.<sup>173</sup> Radio became “America’s dominant wartime entertainment medium . . . .”<sup>174</sup> Sarnoff’s support for the technology was essential to win the war and Paley’s active involvement in psychological warfare that protected U.S. troop landings at Normandy gave each man tremendous personal importance to the government.

As American politics shifted from the war footing of the Second World War to the anti-communist hysteria of the Cold War, Sarnoff and Paley were far more trustworthy than the motion pic-

<sup>170</sup> TOM MASCARO, *INTO THE FRAY: HOW NBC'S WASHINGTON DOCUMENTARY UNIT REINVENTED THE NEWS* 20 (2012).

<sup>171</sup> Kenneth R. Clark, *Broadcasting Legend William S. Paley, 89, Guided CBS More Than 50 Years*, CHICAGO TRIBUNE (Oct. 28, 1990), [http://articles.chicagotribune.com/1990-10-28/news/9003300213\\_1\\_mr-paley-william-s-paley-united-independent-broadcasters](http://articles.chicagotribune.com/1990-10-28/news/9003300213_1_mr-paley-william-s-paley-united-independent-broadcasters).

<sup>172</sup> ALFRED H. PADDOCK, JR., U.S. ARMY SPECIAL WARFARE, ITS ORIGINS: PSYCHOLOGICAL AND UNCONVENTIONAL WARFARE 1941-1952 50-51 (2002) (to head up a psychological warfare unit, Eisenhower wrote the Army suggesting Brigadier General Robert McClure “who had extensive experience in this field during the war in Europe” and who “was closely associated with Bill Paley and others of similar qualifications.”)

<sup>173</sup> See generally GERD HORTEN, *RADIO GOES TO WAR: THE CULTURAL POLITICS OF PROPAGANDA DURING WORLD WAR II* 41-45 (2003); R. LEROY BANNERMAN, *WORLD WAR II: THE RADIO WAR: RADIO REFLECTIONS OF THE USA HOME FRONT* 67 (2013) (discussing Paley’s radio messages sent throughout Europe).

<sup>174</sup> BOB BATCHELOR, *AMERICAN POP: POPULAR CULTURE DECADE BY DECADE: POPULAR CULTURE DECADE BY DECADE 186* (2009) (“During World War II radio broadcasts . . . played an integral role in America’s predominant national attitude of unity as it entered World War II.”).

ture studio heads who failed to control the Hollywood Ten and continued to fuel FBI fears of communist infiltration. The radio broadcasters had the technology, creative talent, and regulatory support to wrest the future of visual story-telling away from the motion picture industry.

### V. The Television Market of the Golden Age

The leadership of CBS and NBC during World War II was insufficient, however, to guarantee that these two companies would continue to dominate broadcasting. Prior to the U.S. declaration of war in 1941, the FCC was actively pursuing concerns regarding the monopolistic tendencies of the broadcast networks or “chain broadcasters.”<sup>175</sup> The target of much of this concern was, in fact, RCA.<sup>176</sup> The consequence of the chain broadcaster proceedings resulted in NBC being forced to divest itself of its second broadcast network, the Blue network.<sup>177</sup> “The Chain Broadcasting Rules mostly regulated the large national radio networks, CBS and NBC, in their behavior with regard to local stations, in particular, the networks’ control of individual broadcasters’ decisions.”<sup>178</sup>

The FCC also enacted a rule which prohibited the national broadcasting networks from requiring exclusivity as a condition of

<sup>175</sup> See BRINSON, *supra* note 150 at 51–52; CHAIN BROADCASTING REPORT, *supra* note 37.

<sup>176</sup> BRINSON, *supra* note 150 at 37 (“Faced with trying to strike a balance between encouraging the development of television without simultaneously strengthening RCA’s concentration of power, the FCC reached a decision that almost managed to accomplish both” regarding rules related to television receiver standards designed to promote technological innovation rather than to lock in RCA’s lead in commercialization).

<sup>177</sup> CHAIN BROADCASTING REPORT, *supra* note 37. See *Nat’l Broad. Co. v. U.S.*, 319 U.S. 190 (1943).

<sup>178</sup> Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy’s Future*, 41 U.C. DAVIS LAW REV. 1547, 1557 (2008). See also SARNOFF, *supra* note 14, at 55 (ironically, these rules were very consistent with the position taken by Sarnoff in 1924, when he was first conceiving the network system. “A few superpower stations . . . would enable all units to send out the same program simultaneously. . . . On the other hand, [the] smaller stations could continue to send out their individual programs, as at present, when they so desired.”)

carrying network content.<sup>179</sup> The ruling “was designed to ‘prevent monopoly and perpetuation of the control of various broadcasting stations.’”<sup>180</sup> Both NBC and CBS brought an action to overturn the rule,<sup>181</sup> but smaller broadcasting groups welcomed the FCC efforts to limit NBC and CBS.<sup>182</sup>

The FCC continued to be the champion of individual stations and small networks as it extended rules prohibiting concentrations of ownership.<sup>183</sup> “In the 1950s, the FCC . . . adopted what became known as the “Rule of Seven,” which limited common ownership to seven FM, seven AM, and seven TV stations nationally (up to five of which could be VHF stations).”<sup>184</sup> The Rule of Seven created the potential for ABC, the former NBC-Blue network, Farnsworth Television, or other competitors to emerge as national broadcasters, and it kept the system of locally owned and operated stations operating as licensed affiliates of the broadcast networks rather than transforming all the stations into wholly owned and operated stations under NBC or CBS control.

Despite the congressional distrust, during this time, the studios were watching and dabbling in the television market. Paramount had an early investment stake in CBS but it never had any pro-

<sup>179</sup> See SUSAN BRINSON, *THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION, 1941–60* 52 (2004)

<sup>180</sup> *Radio Chains Ask Court Void FCC License Ruling*, CHI. DAILY TRIB., Oct. 31, 1941, at 33 (quoting F.C.C.).

<sup>181</sup> *Id.*

<sup>182</sup> See BRINSON, *supra* note 150 at 51–52.

<sup>183</sup> See 1944 FEDERAL COMMUNICATIONS COMMISSION TENTH ANNUAL REPORT 10-11 (1944). In re Amendment of Sections 3.35, 3.240 & 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM & Television Broad. Stations, 18 F.C.C. 288, 295–96 (1953). Candeub, *supra* note 178 at 1555–1556.

<sup>184</sup> Candeub, *supra* note 178 at 1555–1556. See also In re Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broad. Stations, 18 F.C.C. 288, 294, 297 (1953) (adopting ownership limit on AM stations). In this order, the limit was set at five television stations. One year later, it was changed to seven. Report and Order, 43 F.C.C. 2797, 2798, 2800–01 (1954).

gramming authority.<sup>185</sup> In addition, “[i]n 1938, Paramount purchased substantial ownership interests in the Alan B. DuMont Laboratories Company . . . as well as forming a subsidiary called Television Productions, Inc.”<sup>186</sup> Paramount Pictures was an active participant in early television development, though history is unclear whether its efforts were designed to further the industry or slow its progress.<sup>187</sup> Nonetheless by 1948, Paramount and its partner DuMont had sufficient stations and programs to be a viable competitor to NBC and CBS.<sup>188</sup>

Nor was Paramount the first media conglomerate to be in both radio and film. Again it was David Sarnoff who in 1928 moved into the motion picture production business.<sup>189</sup> Driven by the need to get RCA’s audio system adopted as one of the technologies for motion picture sound, RCA acquired rights from Keith-Albee-

<sup>185</sup> See CHAIN BROADCASTING REPORT, *supra* note 37.

<sup>186</sup> Janet Wasko, *Hollywood and Television in the 1950s: The Roots of Diversification*, in HISTORY OF THE AMERICAN CINEMA 128 (2003).

<sup>187</sup> Clarke Ingram, *Introduction*, DUMONT TELEVISION NETWORK, <http://www.dumontnetwork.com/2.html> (last visited Jan. 31, 2016).

Needing additional funds to continue his research, Dr. DuMont sold an interest in his fledgling company to Paramount Pictures in 1939. DuMont's involvement with Paramount ultimately proved to be a big mistake. Eager to hinder the development of television, which it perceived as a serious threat to the motion picture industry, Paramount thwarted DuMont's plans on many occasions. In later years, Paramount even owned and operated its own TV stations, which competed with DuMont's own affiliates.

<sup>188</sup> Wasko, *supra* note 186. (“By the end of the 1940s, Paramount was distributing filmed television programs to a few stations through its Paramount Television Network, with plans to develop a full-fledged network. Although additional station ownership was planned, the FCC denied Paramount and DuMont's claim that they were separate companies and they were forced to adhere to the FCC limit of five stations.”).

<sup>189</sup> See MAURICE ESTABROOKS, ELECTRONIC TECHNOLOGY, CORPORATE STRATEGY, AND WORLD TRANSFORMATION 31 (1995).

Orpheum, the Film Booking Office, and Pathé.<sup>190</sup> The merged company, Radio-Keith-Orpheum (“RKO”), provided RCA with a technological platform in motion picture manufacture, a division dedicated to sound motion picture production, and a distribution deal with The Walt Disney Company—one of the few other movie studios that embraced television.<sup>191</sup> So although RCA was the preeminent radio company, its manufacturing business and motion picture business allowed it a unique position to straddle all these competing industries.<sup>192</sup>

The FCC pattern was to develop rather ad hoc determinations based on particular companies or applications and later translate those rulings into policy.<sup>193</sup> While tensions regarding Communist sympathizers were occurring within the FCC itself,<sup>194</sup> these concerns were also playing across the broadcasters and film companies. It is against this backdrop that a new federal agency begins to shape the evolution of television.

Developed from the staffing of the Office of Strategic Services (“OSS”),<sup>195</sup> the Central Intelligence Agency (“CIA”) was author-

<sup>190</sup> James P. Snyder, *The RKO Story*, OLD RADIO, <http://www.ldradio.com/archives/prog/rko.pdf> (last visited Jan. 31, 2016) (“RCA purchased its way into the motion picture business to have an outlet for its new variable density optical sound-on-film system, RCA Photophone. All of the major studios . . . had already signed exclusive contracts to use the other sound-on-film system, AT&T Western Electric division's Westrex . . . system.”).

<sup>191</sup> *See id.*

<sup>192</sup> *See* ESTABROOKS, *supra* note 189, at 31–32.

<sup>193</sup> *See* Candeub, *supra* note 178, at 1556 (“the FCC used diversification of ownership informally on a case-by-case basis, laying the groundwork for adoption of an across-the-board rule. In general, the FCC’s rules . . . followed a tortuous path of unofficial licensing practices that developed into formal rules and then changed again under various political pressures.”).

<sup>194</sup> *See* BRINSON, *supra* note 150 at 51–52.

<sup>195</sup> The Office of Strategic Services itself evolved from a short-lived, civilian department. “The office of the Coordinator of Information [(COI)] constituted the nation’s first peacetime, nondepartmental intelligence organization.” After the U.S. entrance into WWII, “[t]he remainder of COI then became the Office of Strategic Services (OSS) on 13 June 1942. The change of name to OSS marked the loss of the ‘white’ propaganda mission, but it also fulfilled Donovan’s wish for a title that reflected his sense of the ‘strategic’ importance of intelligence and

ized by Congress in 1947 as a response to the Cold War concerns.<sup>196</sup> The CIA operations included the active responsibility for running spies, for conducting paramilitary operations, engaging in psychological warfare, and providing analysis.<sup>197</sup>

The role of psychological warfare directly involved the activities of journalists (and later artists) throughout World War II and later during the conflicts of the Cold War and police action in Vietnam.

“No doubt important to the high regard officials came to hold of the OSS is the advocacy of it provided by United States General Dwight David Eisenhower.”<sup>198</sup> Eisenhower came to believe in the importance of psychological warfare as a tool in the “military arsenal.”<sup>199</sup> Some of the media resources were covert, while others were acknowledged content produced on behalf of the U.S. Gov-

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clandestine operations in modern war.” COI Came First, CENTRAL INTELLIGENCE AGENCY (Jun. 28, 2008 01:09 PM),

<https://www.cia.gov/library/publications/intelligence-history/oss/art02.htm>.

<sup>196</sup> See National Security Act, Pub. L. No. 80-253, 61 Stat. 495 (1947) (codified at 50 U.S.C. §§ 401-405 (2015)); Sherri J. Conrad, *Executive Order 12,333: “Unleashing” the Cia Violates the Leash Law*, 70 CORNELL L. REV. 968, 990 (1985)

<sup>197</sup> NOTES FROM OUR ATTIC: A CURATOR’S POCKET HISTORY OF THE CIA, CENTRAL INTELLIGENCE AGENCY 29–30 (2014), available at <https://www.cia.gov/library/publications/resources/a-curators-pocket-history-of-the-cia/Curator%20Pocket%20History%20CIA.pdf> [hereinafter CIA POCKET HISTORY].

CIA took over an organization that had grown out of the OSS, the Office of Special Operations, which was mainly responsible for running spies. In 1948, the National Security Council created the Office of Policy Coordination (OPC) to conduct paramilitary and psychological warfare, two more OSS functions. OPC first operated under joint CIA-State Department supervision before becoming an integral part of CIA in 1950.

<sup>198</sup> ROBERT J. KODOSKY, *PSYCHOLOGICAL OPERATIONS AMERICAN STYLE: THE JOINT UNITED STATES PUBLIC 68* (2007) (“Eisenhower overcame his “soldierly distrust . . . watching [OSS] spread rumors he deemed as effective throughout first North Africa and then Europe.”)

<sup>199</sup> *Id.*

ernment, such as Voice of America, “which played a major role in broadcasting propaganda during World War II and the Cold War.... During the war, the major news networks NBC and CBS produced programs for the VOA, continuing to supply some 40 percent of their programming through 1946–47.”<sup>200</sup>

While [President Harry S.] Truman acknowledged the importance of propaganda as a peacetime instrument of foreign policy, it was primarily the Cold War that institutionalized propaganda as a permanent instrument of U.S. foreign policy. A widespread belief developed that the United States was losing the “war of ideas” to the Soviet Union’s supposedly superior propaganda apparatus. As Cold War tensions intensified, the United States gradually expanded its propaganda capabilities.

In 1948, the information program received permanent legislative sanction with the passage of the Smith-Mundt Act—the first legislative charter for a peacetime propaganda program. The act gave the State Department jurisdiction over both international information operations and cultural and educational exchange programs. Additional propaganda activities were conducted by the newly created Central Intelligence Agency, the economic assistance agencies (forerunners to the Agency for International Development), and the armed forces, especially the army.<sup>201</sup>

President Truman continued to expand the role of psychological warfare during the last days of his administration and these pol-

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<sup>200</sup> RODNEY CARLISLE, *ENCYCLOPEDIA OF INTELLIGENCE AND COUNTERINTELLIGENCE* 354–55 (2015).

<sup>201</sup> *Propaganda–Cold War*, *ENCYCLOPEDIA OF THE NEW AMERICAN NATION*, <http://www.americanforeignrelations.com/O-W/Propaganda-Cold-war.html#ixzz3w6PUAEpS> (last visited Jan 31, 2016).

icies were then greatly expanded by President Eisenhower.<sup>202</sup> As the CIA grew, its role in shaping the struggle with the Soviet Union took on greater urgency for Eisenhower.

Our aim in the Cold War is not conquering of territory or subjugation by force. Our aim is more subtle, more pervasive, more complete. We are trying to get the world, by peaceful means, to believe the truth. That truth is that Americans want a world at peace, a world in which all people shall have opportunity for maximum individual development. The means we shall employ to spread this truth are often called ‘psychological.’ Don’t be afraid of that term just because it’s a five-dollar, five-syllable word. ‘Psychological warfare’ is the struggle for the minds and wills of men.”<sup>203</sup>

The imperative of the expanded cultural cold war required a strong relationship between the covert government operators and the legitimate creators of content.<sup>204</sup> Noted journalist Carl Bernstein reported in 1977 that “more than 400 American journalists who in the past twenty-five years have secretly carried out assignments for the Central Intelligence Agency, according to documents on file at CIA headquarters.”<sup>205</sup> “Some media organizations provided “cover” for CIA personnel overseas by allowing CIA officers to pose as reporters, while others used stringers or freelancers who also worked part-time for the CIA. Other journalists received occasional gifts or reimbursements from the CIA in exchange for information.”<sup>206</sup>

<sup>202</sup> See FRANCES STONOR SAUNDERS, *THE CULTURAL COLD WAR* 147–48 (1999).

<sup>203</sup> *Id.*; NIAL FERGUSON, *KISSINGER: 1923–1968: THE IDEALIST* Ch. 8 (2015).

<sup>204</sup> See SAUNDERS, *supra* note 202, at 105–08 (“Acquiring a niche in the competitive market-place of Cold War culture required a substantial investment.”).

<sup>205</sup> Carl Bernstein, *The CIA and the Media*, *ROLLING STONE*, Oct. 20, 1977, at 55, available at [http://www.carlbernstein.com/magazine\\_cia\\_and\\_media.php](http://www.carlbernstein.com/magazine_cia_and_media.php).

<sup>206</sup> KATHRYN S. OLMSTED, *CHALLENGING THE SECRET GOVERNMENT: THE POST-WATERGATE INVESTIGATIONS OF THE CIA AND FBI* 21 (1996) (“The number of journalists and news organizations that helped the CIA is hotly



Bernstein's expose built upon declassified hearing of the Church Committee Report,<sup>207</sup> revealing the longstanding interrelations between the CIA and the news media. Of the many news outlets two stood out, the New York Times and CBS.<sup>208</sup> The CBS relationship was, in large part, a personal one built from the relationship between Paley and CIA director Allen Dulles.

CBS was unquestionably the CIA's most valuable broadcasting asset. CBS president William Paley and Allen Dulles enjoyed an easy working and social relationship. Over the years, the network provided cover for CIA employees, including at least one well-known foreign correspondent and several stringers; it supplied outtakes of newsfilm to the CIA; established a formal channel of communication between the Washington bureau chief and the Agency; gave the Agency access to the CBS newsfilm library; and allowed reports by CBS correspondents to the Washington and New York newsrooms to be routinely monitored by the CIA. Once a year during the 1950s and early 1960s, CBS correspondents joined the CIA hierarchy for private dinners and briefings.<sup>209</sup>

Paley's personal "friendship with CIA Director Dulles is now known to have been one of the most influential and significant in the communications industry. . . ." <sup>210</sup> Paley was not quick to admit

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contested, partly because of the secrecy of the records and partly because of definitional battles over what it meant to "work" for the agency.").

<sup>207</sup> FINAL REPORT OF THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK 1, S. REP. NO. 755, 94th Cong., 2d Sess. 71, 128 (1976) [hereinafter CHURCH COMMITTEE REPORT].

<sup>208</sup> Bernstein, *supra* note 205, at 205.

<sup>209</sup> Carl Bernstein, *The CIA and the Media*, ROLLING STONE, Oct. 20, 1977, at 55, available at [http://www.carlbernstein.com/magazine\\_cia\\_and\\_media.php](http://www.carlbernstein.com/magazine_cia_and_media.php).

<sup>210</sup> DEBORAH DAVIS, KATHARINE THE GREAT: KATHARINE GRAHAM AND THE WASHINGTON POST 175 (2d Ed. 1987).

his role, but he was proud of it.<sup>211</sup> “He provided cover for CIA agents, supplied out-takes of news film, permitted the debriefing of reporters, and in many ways set the standard for the cooperation between the CIA and major broadcast companies which lasted until the mid-1970s.”<sup>212</sup>

Although the practice of collaboration between the CIA and news media was officially ended in 1976 by CIA director George Bush (later U.S. President), the practices had waned during the more tumultuous period of the late 1960’s and early 1970’s.<sup>213</sup> “The most active period of CIA-media cooperation had been in the cold-war days of the 1950s . . . .”<sup>214</sup> In 1977, Paley even acknowledged his personal role in assisting the CIA while others within the CBS news division admitted various types of involvement.<sup>215</sup>

There is no overt, documented link between the license renewal system and the CIA, but it is hard to imagine that the FCC, struggling in the 1950s with an internal anti-Communist investigations and a highly politically engaged set of FCC Commissioners<sup>216</sup> were not influenced toward those broadcasters that had been so

<sup>211</sup> See Daniel Schorr, *The CIA at CBS: Cloak-and-Camera at Black Rock*, NEW YORK MAG., Sept. 26, 1977, at 40.

<sup>212</sup> DEBORAH DAVIS, KATHARINE THE GREAT: KATHARINE GRAHAM AND THE WASHINGTON POST 175 (2d Ed. 1987).

<sup>213</sup> Schorr, *supra* note 21, at 40.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 42. Paley acknowledged his own role in helping the CIA, at least in part:

"I cooperated with them, was helpful to them a few times on a very personal basis, and nothing whatsoever to do with CBS . . . I was approached as somebody who could cooperate with them to their advantage. And this was back in the early fifties, when the cold war was at its height and when I didn't hesitate for a second to say, 'Okay, it's reasonable, I'll do it.' "

<sup>216</sup> The FCC had other issues regarding influence peddling. Chairman John Doerfer was indicted in 1958 “on charges of conspiring to influence the award for a television channel in Miami to Public Service TV, Incorporated, a subsidiary of National Airlines.” GEORGE KOHN, *THE NEW ENCYCLOPEDIA OF AMERICAN SCANDAL* 111 (2000).

supportive during World War II and the ongoing Cold War and diligently rooting out those potential licensees who had communist leanings.<sup>217</sup> As Professor Coase noted, “[w]hat seems clear is that a newspaper which has an editorial policy approved of by the Commission is more likely to obtain a radio or television license than one that does not.”<sup>218</sup> The FCC often used informal procedures and letters to shape licensees behavior without resort to public actions.<sup>219</sup>

In addition, there was another calculus at play — the relationship between new reporting and political sensitivity.

As the 1950s began, the Cold War was producing a domestic backlash, McCarthyism, and an accompanying political sterility—creating stories CBS's star reporters insisted on covering. Television was arriving as a new national medium and the greatest advertising vehicle in history. Thus the political threat generated by serious newsmen doing their job coincided with the proliferation of commercial profits beyond the imagination of anyone at CBS. . . . The very reporters who made CBS so respectable during the war now threatened the network's commercial success. . . . Year by year, as CBS News became more controversial and

<sup>217</sup> See, e.g., *Radio Program Controls: A Network of Inadequacy*, 57 *YALE L.J.* 275, 294 (1947) (“Representative, democratic government hypothesizes an electorate jealous of its freedom and possessed of information sufficient to make its policy decisions. Apparently, however, theoretical recognition of these conditions far exceeds their operational significance.”).

<sup>218</sup> Coase, *supra* note 40, at 11 (Coase also noted the consequence of this relationship: “The threat to freedom of the process in its strictest sense is evident.”). See also *WBNX Broad. Co.*, 12 *F.C.C.* 805 (1948).

<sup>219</sup> See, e.g., Lili Levi, *The FCC's Regulation of Indecency*, 7 *FIRST REPORTS* 1, 10–11 (2008) (noting formal indecency regulations did not emerge until 1970, perhaps because of “the cultural conformity of the 1950s, the private codes of conduct adopted by the National Association of Broadcasters, the FCC’s ability to address the issue of indecency indirectly, under other regulatory rationales, or some combination of factors . . .”).

more troublesome to its superiors, it also became a smaller and smaller part of the corporation.<sup>220</sup>

## VI. Making New Markets – the CIA’s Influence on Culture

As Professor Coase acknowledges “[i]t is difficult for someone outside the broadcasting industry to assess the extent to which programming has been affected by the views and actions of the Commission.”<sup>221</sup> While television was fast growing to become the dominant cultural medium in the 1950s, the CIA and its allies were involved in other areas of psychological and cultural warfare.<sup>222</sup> These examples also serve to show how the heavy, hidden hand of the government has sometimes supplanted the invisible hand of the market and the interest of the public.

The hallmark of the program was the development of the Congress for Cultural Freedom, a CIA-funded front organization dedicated to promoting U.S. cultural organizations in Europe.<sup>223</sup> The Congress for Cultural Freedom “helped to solidify CIA’s emerging strategy of promoting the non-Communist left—the strategy that would soon become the theoretical foundation of the Agency’s political operations against Communism over the next two decades.”<sup>224</sup>

The efforts of the CIA-funded cultural organization were quite robust. The CIA “published more than twenty prestigious magazines, held art exhibitions, operated a news and feature service, organized high-profile international conferences, published numerous books, and sponsored public performances by musicians and artists.”<sup>225</sup> The CIA was more than a mere participant in the devel-

<sup>220</sup> Halberstam, *supra* note 9.

<sup>221</sup> Coase, *supra* note 40, at 12.

<sup>222</sup> See CHURCH COMMITTEE REPORT, *supra* note 207; SAUNDERS, *supra* note 202, at 353–358.

<sup>223</sup> See *Propaganda-Cold War*, *supra* note 173.

<sup>224</sup> *Origins of the Congress for Cultural Freedom, 1949-50, Cultural Cold War*, CENTRAL INTELLIGENCE AGENCY (Jun. 27, 2008 09:48 AM), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/95unclass/Warner.html#ftl>.

<sup>225</sup> *Propaganda-Cold War*, *supra* note 173.

opment of these literary works. The publications produced or financed by the CIA included both the Paris Review and the Partisan Review, both highly influential intellectual journals.<sup>226</sup> The CIA created the International Organizations Division (“IOD”) under the direction of Tom Braden. The activities included a highly influential 1952 European tour by the Boston Symphony Orchestra.<sup>227</sup>

Among the various cultural markets created by the CIA, the most influential was the creation of the expressionist art market, wholly invented and promulgated as a psychological warfare propaganda strategy.<sup>228</sup> “In the manner of a Renaissance prince — except that it acted secretly — the CIA fostered and promoted American Abstract Expressionist painting around the world for more than 20 years.”<sup>229</sup>

The CIA did not invent abstract expressionism,<sup>230</sup> but the CIA and its supporters were instrumental in creating the market for it. Donald Jameson was the CIA staff member responsible for promoting the field directly on behalf of the CIA.<sup>231</sup> Abstract expressionism was well suited to serve as a counterpoint to Soviet-

<sup>226</sup> SAUNDERS, *supra* note 202, at 158–164, 246.

<sup>227</sup> See Thomas M. Troy, Jr., *The Cultural Cold War: The CIA and the World of Arts and Letters, Intelligence in Recent Public Literature*, CENTRAL INTELLIGENCE AGENCY (Jun. 27, 2008, 07:22 AM), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol46no1/article08.html>.

<sup>228</sup> See Frances Stonor Saunders, *Modern Art was CIA 'Weapon'*, INDEPENDENT (Oct. 21, 1995), <http://www.independent.co.uk/news/world/modern-art-was-cia-weapon-1578808.html>.

<sup>229</sup> *Id.*

<sup>230</sup> See BONNIE CLEARWATER, *THE ROTHKO BOOK* 26-27 (2007) (“The Ten” expressionist artists came together in 1935 in what became Gallery Secession promoting an art form opposed to both social realism and geometric abstractionism.)

<sup>231</sup> *Id.* (“Regarding Abstract Expressionism, I'd love to be able to say that the CIA invented it just to see what happens in New York and downtown SoHo tomorrow!” he joked. “But I think that what we did really was to recognise the difference.”).

promoted Social Realism, an increasingly rigid and stylized formalistic form.<sup>232</sup>

The CIA did not need to be the actual market-maker for abstract expressionism. Instead it needed a partner in the private sector who shared its philosophy and goals.<sup>233</sup> During World War II, Nelson Rockefeller part of the Inter-American Affairs office, “responsible for propaganda in Latin America.”<sup>234</sup> After World War II, Nelson Rockefeller, among other roles, served as the president of the Museum of Modern Art (“MoMA”) in New York (and later Vice President of the United States).<sup>235</sup> MoMA had been co-founded by Nelson Rockefeller’s mother Abby Aldrich Rockefeller.<sup>236</sup> Tom Braden, who had been appointed head of the CIA’s International Organizations Division, was serving as a MoMA board member and its executive secretary.<sup>237</sup>

Rockefeller also served in the Eisenhower administration. In both his personal art collection and through the auspices of MoMA, Rockefeller was one of the significant market makers for expressionist art in the 1950’s.<sup>238</sup> “Rockefeller was one of the biggest backers of Abstract Expressionism (which he called “free enterprise painting”). His museum was contracted to the Congress for

<sup>232</sup> See SAUNDERS, *supra* note 202, at 255–257.

<sup>233</sup> An earlier attempt to purchase artworks directly and tour a collection, the 1946 Advancing American Art show met with a uniformly poor reception in both Europe and Washington, D.C. See Louis Menand, *Unpopular Front, American art and the Cold War*, NEW YORKER, Oct. 17, 2005, at 32–33 available at <http://www.newyorker.com/magazine/2005/10/17/unpopular-front>.

<sup>234</sup> RODNEY CARLISLE, *ENCYCLOPEDIA OF INTELLIGENCE AND COUNTERINTELLIGENCE* 354–55 (2015).

<sup>235</sup> *Museum of Modern Art*, THE ART STORY, <http://www.theartstory.org/museum-moma.htm#sthash.qiLVrZC2.dpuf>, (last visited Jan. 31, 2016) (“In 1939, Nelson Rockefeller (son to Abby and John D.) was appointed as MoMA’s new president.”)

<sup>236</sup> Jeffrey Frank, *Big Spender, Nelson Rockefeller’s Grand Ambitions*, NEW YORKER (Oct. 13, 2014), <http://www.newyorker.com/magazine/2014/10/13/big-spender-2>.

<sup>237</sup> See Saunders, *supra* note 228. BRIAN KANNARD, *STEINBECK: CITIZEN SPY* 31–32 (2013).

<sup>238</sup> See Saunders, *supra* note 228; KANNARD, *supra* note 237, at 31–32.

Cultural Freedom to organise and curate most of its important art shows.”<sup>239</sup> Perhaps even more important was fellow MoMA board member and CBS president, William S. Paley.<sup>240</sup> Other exhibits and many other CIA activities funding cultural events and programs utilized the Rockefeller Foundation to launder the funds and hide the involvement of the government.<sup>241</sup>

In retrospect, MoMA may not have required the CIA to promote its agenda of discovering, curating, and presenting new artists, and MoMA hesitates to acknowledge any overt relationship between the museum and the government.<sup>242</sup> But of course, like all markets, at the time the marketplace is being funded, the financial need is very significant. After the market is mature, a sufficient number of other purchasers have joined the market and it becomes self-sustaining.

Purchases by Rockefeller, Paley, and MoMA represented the acquisition of thousands of works.<sup>243</sup> The prominence of the purchasers and the aggressive promotion and display of these works was intended to create attention to the United States as the preeminent site of avant garde artwork and to shift the focus of the creative community from Europe to the United States. As MoMA breathlessly explains “Abstract Expressionism developed during the vibrant post-World War II years when New York City became

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<sup>239</sup> JAN GOLDMAN, *THE CENTRAL INTELLIGENCE AGENCY, AN ENCYCLOPEDIA OF COVERT OPS, INTELLIGENCE GATHERING, AND SPIES* 82 (2015). *See also*, Mike Harman, *The Cultural Cold War: Corporate and State Intervention in the Arts*, LIBCOM (Sept. 11 2006 15:07), <https://libcom.org/history/articles/cultural-cold-war> (the phrase “free enterprise art”).

<sup>240</sup> *See* WILLIAM RUBIN & MATTHEW ARMSTRONG, *THE WILLIAM S. PALEY COLLECTION: A TASTE FOR MODERNISM* ix–x (1992).

<sup>241</sup> *See* CHURCH COMMITTEE REPORT, *supra* note 207.

<sup>242</sup> *See* KANNARD, *supra* note 237, at 31–32.

<sup>243</sup> *See*, e.g., WALTER ROTH, *AVENGERS AND DEFENDERS: GLIMPSES OF CHICAGO'S JEWISH PAST* 64–65 (“[Paley] died on October 6, 1990. He left his magnificent art collection, was valued at several hundreds of millions of dollars, to the William S. Paley Foundation, which in turn gave the collection to the New York Museum of Modern Art”).

the center of a cultural transformation unprecedented in American history.”<sup>244</sup>

The intersection of interests between Nelson Rockefeller, William S. Paley, the museum they controlled, and the government they supported aligned to create a market for U.S. artworks that created a powerful narrative which served the psychological warfare goals of the American government.<sup>245</sup> The hand was indeed invisible, but not initially because of free market interests. At play was the outstretched arm of government manipulation and interference. The Ten, Jackson Pollack, and the other artists who benefited from the government funding and private support of Rockefeller and Paley may have fared no worse had the CIA not been interested, but it is likely the funds and international support helped define this market through its “unprecedented transformation.”<sup>246</sup>

The art market was certainly not the only market affected by the CIA. In fine art, news broadcasting, literary publications, the CIA made an international difference. Through its partners in corporate America and in the elite nonprofit foundation community, the network promoted by the CIA had a direct effect on the rise of America as a global culture and the shape of both television and expressionist art.<sup>247</sup> The full extent of this interaction remains in documentation that has yet to be declassified.<sup>248</sup>

<sup>244</sup> ANN TEMKIN, *ABSTRACT EXPRESSIONISM AT THE MUSEUM OF MODERN ART* 7 (2010).

<sup>245</sup> See Saunders, *supra* note 228, at 264–265.

<sup>246</sup> See TEMKIN, *supra* note 244, at 7.

<sup>247</sup> See CIA *POCKET HISTORY*, *supra* note 197 at 42; Saunders, *supra* note 228, at 252–301.

<sup>248</sup> See generally CIA *POCKET HISTORY*, *supra* note 197 at 42. The CIA readily acknowledges many of these incidents. Regarding the publications supported by the CIA, the story of Doctor Zhivago is particularly telling:

Renowned Russian author Boris Pasternak won the 1958 Nobel Prize in Literature for his “lyrical poetry and . . . epic” writing, particularly in his masterpiece *Doctor Zhivago*, a love story set against the backdrop of the Russian Revolution. So-



Recent scholarship has highlighted the “rich relationship between modern art and television in its formative years in the United States.”<sup>249</sup> The works of modern art both appeared on television and influenced its content.<sup>250</sup> Led by William Paley’s CBS, the television network hired such artists as Andy Warhol and Richard Avedon “to create publicity station IDs, on-screen title art, and other visual attractions.”<sup>251</sup> Given Paley’s influence on broadcast advertising, it is not surprising that the influence of the modern art movement was on the advertising content even more than the TV programming itself.<sup>252</sup> “[A]dvertising turned out to be the hallmark of artistic experimentation.”<sup>253</sup>

The reason for modern arts influence on the Golden Age of television is likely a combination of influences.<sup>254</sup> From the perspective of government influence, the promotion of modern art reinforced the CIA’s goals of promoting the genre and undermining the influence of the Social Realism movement.<sup>255</sup> From the

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viet authorities suppressed the book as “a malicious libel of the USSR.” In 2008, a broadcaster and literary historian named Ivan Tolstoy, himself the scion of a famous Russian literary family, published a book alleging that the CIA had secretly arranged for the publication of a limited-run, Russian-language edition of Doctor Zhivago. According to The Washington Post, Tolstoy concluded that “Pasternak’s novel became a tool that was used by the United States to teach the Soviet Union a lesson.” He argued that it was part of an ongoing US campaign to promote authors who told the truth about the harsh realities of life in the Soviet Union. CIA declassified its activities related to Doctor Zhivago in 2014.

<sup>249</sup> MAURICE BERGER & LYNN SPIGEL, *REVOLUTION OF THE EYE: MODERN ART AND THE BIRTH OF AMERICAN TELEVISION* ix (2014).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at XIII.

<sup>252</sup> *See id.*

<sup>253</sup> *Id.* *See also* Halberstam, *supra* note 9; BERGER & SPIGEL, *supra* note 249, at 222–226 (“The cultural contacts between [TV commercial] directors, intellectuals, poets, novelists, graphic artists, musicians, and filmmakers provided a context in which advertising critics developed their own auteur system.”).

<sup>254</sup> *See* BERGER & SPIGEL, *supra* note 249, at 221–28.

<sup>255</sup> *See* Saunders, *supra* note 228, at 262.

perspective of the broadcasters, modern art was fresh, new, and creative — natural resource for the newest medium. For the artists in both television and art, these were new media that both needed to be explored. The relationship was symbiotic and explosive.<sup>256</sup>

## VII. Implications for Understanding Markets and anticipating the New Media

The market originally regulated by the Communications Act of 1934 had grown by the 1950's to become one of the most influential in world history. “By the early-mid 1950s, as television erupted on the American landscape, joining and surpassing radio broadcasting in its ubiquity and inescapability, mass culture theorists became even more concerned about the debilitating effects of mediated messages on American individualism and intellectualism.”<sup>257</sup>

The changes wrought by television were profound and being steered by hands that were molding the messages and reshaping the cultural norms. “In some ways it is obvious that ideas and cultures evolve — that is, changes are gradual and build on what went before. Ideas spread from one place to another and from one person to another.”<sup>258</sup> Marshall McLuhan summed up the transition simply enough: “Taken in the long run, the medium is the message.”<sup>259</sup> The fear of broadcast's universal power, combined with the rela-

<sup>256</sup> See BERGER & SPIGEL, *supra* note 249, at 221–28.

<sup>257</sup> BRINSON, *supra* note 150 at 18.

<sup>258</sup> SUSAN BLACKMORE, *THE MEME MACHINE* 24 (2000).

<sup>259</sup> MARSHALL MCLUHAN & STEPHANIE MCLUHAN, *UNDERSTANDING ME: LECTURES AND INTERVIEWS* 3 (2005).

So that when, by group action, a society evolves a new medium like print or telegraph or photo or radio, it has earned the right to express a new message. And when we tell the young that this new message is a threat to the old message or medium, we are telling them that all we are striving to do in our united social and technical lives is destructive of all that they hold dear. The young can only conclude that we are not serious. And this is the meaning of their decline of attention.

tively few corporations involved in the broadcast industry repeatedly raised concerns about who was controlling the message. For governments fearful of competition and goals of hegemonic world dominance, television was a legitimate theatre of war.<sup>260</sup>

Congress and the courts initially ignored the First Amendment and then later transitioned to an assumption that that First Amendment goals were achieved by active FCC review instead of a marketplace free of government intervention.<sup>261</sup> As explained in *FCC v. Pottsville Broadcasting Company*,<sup>262</sup> there has been a “widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.”<sup>263</sup>

Professor Coase challenged this fundamental assumption, suggesting instead that the government’s primary role as regulator is to make the marketplace efficient. From this vantage point, there is no governmental interest in who is creating the content made available to the public.<sup>264</sup> Coase expanded on this position by

<sup>260</sup> See United States Information and Educational Exchange Act of 1948, P.L. 402 Pub. L. No. 80-402, 62 Stat. 6 (1948). Allen W. Palmer & Edward L. Carter, *The Smith-Mundt Act's Ban on Domestic Propaganda: An Analysis of the Cold War Statute Limiting Access to Public Diplomacy*, 11 COMM. L. & POL'Y 1, 34 (2006).

<sup>261</sup> See, e.g., *F.C.C. v. Pottsville Broad. Co.*, 309 U.S. 134, 137–38 (1940) (upholding regulation of broadcast without application of the First Amendment); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367 (1969) (upholding regulation of broadcast under the First Amendment because of the scarcity of spectrum which makes regulation essential).

<sup>262</sup> *F.C.C. v. Pottsville Broad. Co.*, 309 U.S. 134 (1940).

<sup>263</sup> *Id.* at 137.

<sup>264</sup> See Coase, *supra* note 40, at 17-18.

This “novel theory (novel with Adam Smith) is, of course, that the allocation of resources should be determined by the forces of the market rather than as a result of government decisions. Quite apart from the malallocations which are the result of political pressures, an administrative agency which attempts to perform the function normally carried out by the pricing mechanism operates under two handicaps. First of all, it lacks the precise monetary measure of benefit and cost provided by

pointing to a history of FCC actions he characterized as mild and unlikely to affect broadcaster content. Professor Brinson's research described in *THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION, 1941–1960*<sup>265</sup> directly contradicts Professor Coase's supposition that "it would seem improbable that the Commission's cautious approach would intimidate many station owners."<sup>266</sup> Both the broadcasters and the FCC regulators were intimidated by the anti-Communist threats and purges.

While Professor Coase was incorrect regarding the influence of the FCC, that does not mean he was wrong that the public interest standard of the Federal Communications Act was less evenhanded than a marketplace driven solely by selling licenses to the highest bidder.<sup>267</sup> An auction-based market has the obvious risk of market consolidation, but there is a solution to this concern as well.

Coase suggests specific rules to restrict the number of stations any one operator can own or operate.<sup>268</sup> Rather than more amorphous rules about the public interest, limitation on ownership get directly at the concern of market concentration. Such rules have, in

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the market. Second, it cannot, by the nature of things, be in possession of all the relevant information possessed by the managers of every business which uses or might use radio frequencies, to say nothing of the preferences of consumers for the various goods and services in the production of which radio frequencies could be used.

<sup>265</sup> See generally BRINSON, *supra* note 150.

<sup>266</sup> Coase, *supra* note 40, at 12.

<sup>267</sup> See Thomas W. Hazlett et. al., *Radio Spectrum and the Disruptive Clarity of Ronald Coase*, 54 J.L. & ECON. 125, 129 (2011).

Coase confronted the Supreme Court's "misunderstanding of the nature of the problem" and made a remarkable discovery. First, the limited nature of frequencies simply suggested a scarcity constraint. Countless other scarce resources were efficiently allocated by the price system. Second, whatever spectrum use rights were assigned to wireless users could be assigned by auctions rather than fiat. (quoting Coase, *supra* note 40 at 14).

<sup>268</sup> See *id.* at 16–17.

fact, been adopted by the FCC and continue to limit the number of stations a network can control in the aggregate across the country or in a particular market.<sup>269</sup>

The concern of market dominance during the pre-war period was a concern that RCA—and later its radio networks under NBC—would dominate the marketplace. As CBS grew to become a worthy competitor to NBC, the fear grew of the potential duopoly. Unlike the oil industry referenced by Coase, or the agricultural production studied by Adam Smith, a significant portion of the public's news and information was under the control of only William Paley and David Sarnoff. The power held by the networks to select news stories and shape the public narrative was a tremendous source of influence.<sup>270</sup>

“The news automatically becomes the real world for the TV user and is not a substitute for reality, but is itself an immediate reality.”<sup>271</sup> At CBS, Edward R. Murrow had been the voice shaping the U.S. understanding of World War II.<sup>272</sup> Later, his successor

<sup>269</sup> See 2014 Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Further Notice of Proposed Rulemaking and Report and Order, 29 FCC Rcd 4371, 4527–4545, ¶¶ 340–372 (2014).

<sup>270</sup> See Kristine A. Oswald, *Mass Media and the Transformation of American Politics*, 77 MARQ. L. REV. 385, 392–393 (1994) (“If a tree falls in the forest, and the media are not there to cover it, has the tree really fallen? . . . By deciding what is ‘news,’ the media create their own definition of ‘reality’ for the public.”); Colin Vandell, *Words Signifying Nothing? The Evolution of S 315(a) in an Age of Deregulation and Its Effect on Television News Coverage of Presidential Elections*, 27 HASTINGS COMM. & ENT L.J. 443, 444 (2005) (“The electronic media—a ‘small and unelected elite’—play a substantial role in influencing the choice of elected leaders in the United States.”); Christa Corrine McLintock, *The Destruction of Media Diversity, or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media*, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 574 (2004) (“While the power of media influence, over nearly all aspects of modern life from morality to politics is surprising, the alarming issue is not the growing media power itself, but the centralized media power nexus that has resulted.”).

<sup>271</sup> ERIC MCLUHAN & FRANK ZINGRONE, *ESSENTIAL MCLUHAN* 272 (1995)

<sup>272</sup> OLSON & CLOUD, *supra* note 144, at 387 (“In their day their influence was enormous. But their medium was radio, and their day was short.”).

Walter Cronkite was considered by many to have changed the U.S. role in Vietnam when he publicly announced his opposition to the war.<sup>273</sup> More than the politicians and statesmen of the twentieth century, broadcast journalists shaped the nature of our society.

Had the government's fear of an oligopoly been the only concern, then an auction to distribute spectrum combined with limits on market concentration and cross ownership would have been sufficient. But the CIA's involvement with the production of culture changed the calculus.

As a theoretical issue, the government was entirely correct to identify the use of art, culture, and media as the means to wage the Cold War.<sup>274</sup>

By the end of World War II, the technologies of the first modern information revolution had had a massive impact on the way people lived and worked; on the way that businesses and governments conducted their affairs; and on the way that

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<sup>273</sup> See JAMES W. ROMAN, FROM DAYTIME TO PRIMETIME: THE HISTORY OF AMERICAN TELEVISION PROGRAMS 253 (2005). *Final Words: Cronkite's Vietnam Commentary*, NPR, <http://www.npr.org/templates/story/story.php?storyId=106775685>, (last visited Jan. 31, 2016).

To say that we are mired in stalemate seems the only realistic, if unsatisfactory conclusion. On the off chance that military and political analysts are right, in the next few months we must test the enemy's intentions, in case this is indeed his last big gasp before negotiations. But it is increasingly clear to this reporter that the only rational way out then will be to negotiate, not as victors, but as an honorable people who lived up to their pledge to defend democracy, and did the best they could. This is Walter Cronkite. Good night.

<sup>274</sup> See MARSHALL MCLUHAN, THE GUTENBERG GALAXY 222 (1967) (“[I]t is nationalism, far more than any other expression of human gregariousness, which has come to the fore in modern times . . . The citizen armies of Cromwell and Napoleon were the ideal manifestations of the new technology.”).

wars were fought and peace was pursued. With their efforts to communicate less hampered by distance, time, and location than ever before, people knew more about what was happening nearby and far away than they had in the past, factored this knowledge into decisions that they made, and changed their perspectives on local, national, and international affairs.<sup>275</sup>

The government anticipated the continued influence of the media that shaped the Cold War. The United States was going to take no chances in managing this transition.<sup>276</sup>

The approach was consistent with classical economics. The prerequisites for a functional market established by Smith also provide for a significant governmental hand in shaping the marketplace under certain conditions. Smith recognized the state's role in protecting society through the "defense of the territory," among other roles for the government.<sup>277</sup> Without overstating the CIA's case, it can be understood that a healthy pro-governmental agenda by the U.S. media would play a significant role in thwarting the expansion of the Communist and Socialist influences in Europe.<sup>278</sup>

<sup>275</sup> ALBERTS & PAPP, *supra* note 63, at 21.

<sup>276</sup> See G. John Ikenberry & Charles A. Kupchan, *Socialization and Hegemonic Power*, 44 INT'L ORGANIZATION, 283, 301 (1990) ("After World War II, U.S. officials were more successful in embedding a set of norms among European elites.").

<sup>277</sup> GEOFFREY INGHAM, CAPITALISM: WITH A NEW POSTSCRIPT ON THE FINANCIAL CRISIS AND ITS AFTERMATH (2008) (other reasons for government participation in the market are to provide necessary public goods that would not be produced by individuals under normal market conditions, and to uphold the rule of law).

<sup>278</sup> See, e.g., *VOA in the Postwar Years*, INSIDE VOICE OF AMERICA (Jan. 18, 2016 12:09 P.M.), <http://www.insidevoa.com/content/a-13-34-2007-post-wwii-history-111602679/177529.html> ("With the outbreak of the Korean War in 1950, VOA added new language services and developed plans to construct transmitter complexes on both the east and west coasts of the United States. By mid-1951, VOA's broadcasts expanded to forty-five languages, and nearly 400 hours weekly on the air.").

This was a market demand that made spectrum auctions unattractive.

The “cacophony of competing voices”<sup>279</sup> feared by the government were not merely the competition from commercial actors but rather the fear that one or more of the broadcasters could become the mouthpiece for the Soviet Union or one of the left-leaning allies in Europe.

Under the classical understanding of markets by Adam Smith, the government was correct in manipulating the broadcast market for the defense of the realm. Coase challenged this position by identifying the growing role of the First Amendment as a limitation of the government. The very slow expansion of the First Amendment, however, had certainly not reached the government during the early years of television and the covert nature of the CIA’s involvement made any limitation difficult to enforce.<sup>280</sup> Moreover, the HUAC’s influence was designed to intimidate and interfere with the individuals who worked in the broadcast and entertainment industries rather than to regulate openly the content on the airwaves or the broadcasters who held those licenses in public trust. The manipulation by the HUAC and the CIA should have been the target for reform. Such manipulation would likely extend into any spectrum auction just as readily as it did in the public licensing process of the FCC.

The goal of efficiency presented by Professor Coase may have had the salutary effect of stripping Congress and the CIA of their undisclosed agendas. At least on the face of the proposal, an open auction would eliminate the manipulation of the public interest doctrine to benefit those corporations which most aggressively bowed to the political pressure of Congressional committees or those which acted most cooperatively in furthering covert political goals.

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<sup>279</sup> *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 376 (1969).

<sup>280</sup> *See, e.g., F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (continuing to enforce FCC broadcast regulations); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978).



At the same time, there remains the ability of these forces to manipulate any process. If the federal government chose to award a multi-billion dollar military contract to a particular broadcaster so that it had the financial resources to outbid all others for broadcast licenses, the government could achieve the same level of control with even less of an appearance of public oversight. In the end, so long as the government controls the allocation of broadcast spectrum it has the tools to assure that those resources are held in the hands of the companies it most desires.

The history of monopolists vying for control over the scarce resource of broadcast spectrum could seem quaint in an age of virtually unlimited and unregulated Internet content.<sup>281</sup> But many of the forces that were at work during the beginnings of the Cold War have not disappeared. The Voice of America, which originated to push Allies propaganda to Nazi-held Europe continues to broadcast today.<sup>282</sup> In fact, a decades old prohibition of U.S. broadcasting government propaganda into the U.S. was eliminated in 2013, permitting the federal government to directly promote a federal agenda as a U.S. broadcaster.<sup>283</sup>

<sup>281</sup> See *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 659-660 (2004) (upholding Internet service providers challenge to the Child Online Protection Act as a violation of the First Amendment). See generally Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1816 (1995) (“The new system will reduce the role of the record stores and the labels, but the other sources of information, such as reviewers, will remain.”); Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 501 (1999) (“The Court has not fully repudiated Red Lion, although it has struggled to balance its First Amendment objectives with governmental control of the content offered by media providers.”); Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1559 (2012) (“Given the amplifying character of the Internet and social media, and in light of the decline in authority of the institutional press, there is good reason to be concerned about the impact of uncorrected inaccuracy.”).

<sup>282</sup> *About VOA*, INSIDE VOICE OF AMERICA, [http://www.insidevoa.com/info/about\\_us/1673.html](http://www.insidevoa.com/info/about_us/1673.html), (last visited Jan. 31, 2016) (“VOA will present the policies of the United States clearly and effectively, and will also present responsible discussions and opinions on these policies.”).

<sup>283</sup> John Hudson, *U.S. Repeals Propaganda Ban, Spreads Government-Made News to Americans*, FOREIGN POLICY (July 14, 2013, 7:06 PM),

The factual history provides a powerful counter-narrative to the idealized rhetoric of the First Amendment. These tropes often drive Free Speech jurisprudence as well as theoretical models of the First Amendment marketplace.<sup>284</sup> Whether this is Justice Holmes declaring that “the best test of truth is the power of the thought to get itself accepted in the competition of the market”<sup>285</sup> or Justice Brandeis declaring that “[t]he fitting remedy for evil counsels is good ones,”<sup>286</sup> there is little the market can do from covert manipulation until that manipulation is made public.

In debates ranging from Net Neutrality standards<sup>287</sup> to U.S. patent policy,<sup>288</sup> today’s innovators at Google, Apple, Microsoft, and Amazon are playing by the same playbook as their predecessors at Edison Labs, RCA, and CBS. GE, a founding partner of RCA, con-

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<http://foreignpolicy.com/2013/07/14/u-s-repeals-propaganda-ban-spreads-government-made-news-to-americans/> (reporting the Smith-Mundt Modernization Act of 2012 was passed under the 2013 National Defense Authorization Act).

<sup>284</sup> See Volokh, *supra* note 281, at 1846 (“These premises may often be true, but sometimes they simply aren’t. Sometimes the supporters of a thought have millions of dollars, while opponents are too poor to compete effectively. Some markets are monopolized by one speaker, for instance a single cable system.”).

<sup>285</sup> *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>286</sup> *Whitney v. Cali.*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

<sup>287</sup> See *Verizon v. F.C.C.*, 740 F.3d 623, 628 (D.C. Cir. 2014) (addressing the FCC “effort to compel broadband providers to treat all Internet traffic the same regardless of source—or to require, as it is popularly known, ‘net neutrality.’”); Protecting and Promoting the Open Internet, GN Docket No. 14-28, Feb. 26, 2015, (released Mar. 12, 2015), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0312/FCC-15-24A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf). C. Douglas Jarrett, *The Federal Communications Commission's Network Neutrality Order*, 71 BUS. LAW. 373, 379 (2016).

<sup>288</sup> See Issie Lapowsky, *What Tech Giants Are Spending Millions Lobbying For*, WIRED (July 23, 2015, 7:00 AM), <http://www.wired.com/2015/07/google-facebook-amazon-lobbying/>, (“In the second quarter of 2015, Google spent a whopping \$4.62 million on lobbying efforts. That’s just slightly less than the \$5.47 million they spent in the first quarter, but it still makes the search giant the third largest corporate lobbyist.”); Gene Quinn & Steve Brachmann, *Google Collects Patents While Lobbying Against Them*, IP WATCHDOG (May 3, 2015), <http://www.ipwatchdog.com/2015/05/03/google-collects-patents-while-lobbying-against-them/id=57302/>.

tinues to be a dominant corporate player in these markets more than a century after it started.<sup>289</sup>

Any regulatory system must anticipate both the use and the misuse to which it will be put. As Justice Holmes famously summarized the common law, “[t]he life of the law has not been logic: it has been experience.”<sup>290</sup> The experience of television’s emergence as the world’s dominant medium is one of powerful voices and even more powerful manipulation. “Upon this point a page of history is worth a volume of logic.”<sup>291</sup> The names will change and the corporate entities will merge and reform, but the battle for control of the medium will continue.

### Conclusion

Perhaps the story of television regulation would best be told as a Shakespearean history, with each man a merchant prince vying for control of the kingdom.<sup>292</sup>

As Thomas Edison over-reached with the Motion Picture Patents Company, Hollywood studios rose in concert to wrest control of domestic film production, building a West Coast empire. A young David Sarnoff emerged from the mundane world of telegraphy to seek dominance in radio and television broadcast, both in technology and in content. His chief competitor was William Paley, another upstart seeking to emerge through radio. Hollywood

<sup>289</sup> Steve Lohr, *G.E. is Moving Headquarters to Boston and into the Digital Era*, N.Y. TIMES, Jan. 14, 2016, at B1 (G.E. predicting it “would be a ‘top 10 software company’ by 2020”).

<sup>290</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark D. Howe ed., Belknap Press 1963) (1881). See generally Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 123 (1992).

<sup>291</sup> *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

<sup>292</sup> A more fitting literary reference may be GEORGE R. R. MARTIN, *A GAME OF THRONES* (1996) (each player in the film and television monopoly fights associated with one of the literary houses: Paley as House Lannister, Sarnoff as House Baratheon, Edison house Greyjoy, Farnsworth house Tully, and Goldwyn and Meyer houses Tyrell and Stark).

did not see a worthy opponent in radio and waited too long. Instead, Hollywood's moguls sought for monopoly power amongst themselves and failed to control their star-studded world of political and social excess.

As war arose, Hollywood was distrusted by the government. Sarnoff and Paley each moved to support the Allies. Sarnoff's growing dominance of technology was matched by Paley's ingenious development of broadcast journalism and his voracious campaigns to steal Sarnoff's talent away from NBC and onto CBS. At the same time, unbeknown to the public, Paley—and to a lesser extent Sarnoff—had partnered with the government to use their media empires to dominate the countries struggling to rebuild after World War II, enriching Paley and Sarnoff while granting their adopted nation world domination throughout the end of the twentieth century. Their competition, their regulator, and their own organizations would all suffer from the attacks of the HUAC, but the network broadcasters would survive less damaged than the others.

CBS rose to become the most powerful and most profitable broadcaster in the world, eclipsing even NBC and RCA. Paley sits as Chairman of CBS as well as president of the Museum of Modern Art. The CIA stands at his side. Through both highly respected institutions, he transforms the culture of the world. As the Golden Age of television rises and sets, CBS and its competitors at NBC, ABC, and DuMont reshaped the world.

The covert Cold War fought using broadcasting, modern art, and journalism has been increasingly documented. But the intersection of that covert history with the role of the HUAC requires that lawyers and regulators reconceive the broadcast marketplace

in terms of its actual landscape rather than the idealized marketplace of ideas.

The understanding Professor Coase brought to the FCC licensing regime in 1959 echoes the original conceptualization that Adam Smith first brought to agrarian and commodity markets over a century earlier. Even then, Smith recognized that the government's interest in national defense would play a more important role to transform or recast a market for which the government had such interest.

More than a mere play of history or tragedy, the story of television's origins belie a surprising convergence of monopoly, invention, regulation, and personality. The situations were unique to their time and place. But in the global battle for media domination of the twenty-first century, the patterns of history and the potential for this history to be repeated requires all media students to study this history and carefully scrutinize the industry for the faint but omnipresent fingerprints of the invisible hands continuing to shape our news, entertainment, politics, and culture.

