

[US] Supreme Court upholds must-carry rules

IRIS 1997-4:1/14

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On 31 March 1997, the U.S. Supreme Court ("Court") upheld by a vote of 5-4 the provision of the Cable Television Consumer Protection and Competition Act of 1992 known as the "must-carry" rules. Under the must-carry rules, cable operators are required to reserve a specified portion of their channel capacity for carriage of unaffiliated local broadcast television stations. The number of channels that must be set aside varies with the size of the cable operator, but generally constitutes a third of the operator's channel capacity.

The must-carry rules have three stated purposes: (i) preserving the benefits of free, over the air local broadcast television, (ii) promoting the widespread dissemination of information from a multiplicity of sources, and (iii) promoting fair competition in the television market. In its initial review of the must-carry rules in 1994, the Court determined that the rules were a "content-neutral" restriction on speech -- targeted at the secondary effects of the speech rather than the speech itself -- and thus afforded an "intermediate" level of scrutiny. Under long-developed U.S. judicial doctrine, content-neutral restrictions on speech are constitutional if they further a substantial government purpose in a manner that does not restrict speech substantially more than necessary to serve that government purpose.

In 1994 the Court did not make a final determination on whether the must-carry rules passed constitutional muster. Instead, the Court remanded the case back to the District Court for the District of Columbia for further fact finding, stating that the Court did not have enough information before it to determine whether the government met its burden of proof. After the rules were upheld for the second time by the district court, the rules were again appealed to the Supreme Court.

In the present case, the Court reaffirmed its original finding that the rules addressed a substantial government purpose. In addressing whether the legislation actually furthers the government interest that the rules are meant to address, the Court placed emphasis on the fact that approximately 40% of the country relied solely on broadcast television for video programming. Therefore, the economic health of over the air stations is required to ensure that many viewers receive quality programming from multiple sources.

Congress had determined that a significant number of stations would be denied carriage in the absence of the must-carry rules, and that those broadcast stations

denied carriage will either deteriorate to a substantial degree or fail altogether. The Court determined that it was reasonable for Congress to conclude, and that the record confirmed, that cable operators had the market power and the incentive to drop local broadcast stations in favour of programming in which the vertically integrated cable operators had a greater financial interest. Further, the Court noted that the evidence also suggested that broadcast stations denied carriage lost audience share, and thus advertising revenue, leading to deterioration of programming or failure of the station to survive. The Court also found that the record suggested that the must-carry restrictions amounted to a very limited burden on cable operators. For instance, the record indicates that nearly 95 percent of cable operators did not have to drop any programming in order to fulfil their must carry obligations and that cable operators nation-wide carried 99.8 percent of the programming that they carried before the must-carry rules took effect. Based on the small effect the rules had on the carriage of other stations on cable systems, the Court held that the rules were narrowly tailored to meet the specific intent of the statute and did not constitute an unconstitutional restriction on the cable operators free speech rights.

Turner Broadcasting System, Inc., et al., Appelants c. Federal Communications Commission et al., No. 95-992, 1997 U.S. LEXIS 2078, 65 U.S.L.W. 4208, March 31, 1997.

<http://www.cmcnyls.edu/public/USCases/Turner3.htm>

