

Pay Television and Property Rights

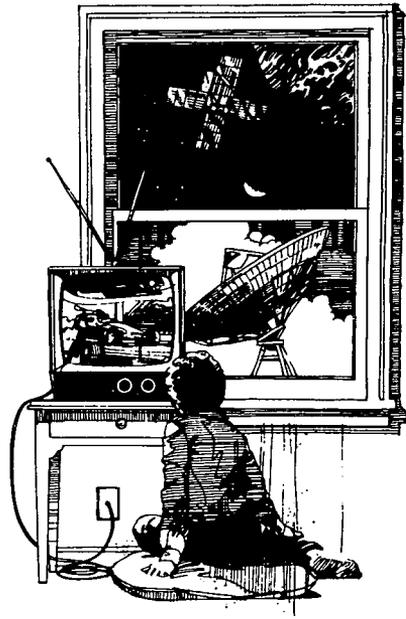
by Joseph S. Fulda

An increasing number of American homes, recently estimated by *U.S. News and World Report* as perhaps 100,000, are now equipped with special antennae, decoders, converters, and other electronic gadgetry capable of receiving the signals from pay television satellites or earthbound microwave transmitters.

Faced with such a large number of potential clients who prefer to freeload, the pay TV industry has begun to fight back. Arguing that the unauthorized reception of their signals is a violation of their property rights, the industry convinced the FCC to issue an injunction prohibiting such reception. A Federal circuit court of appeals upheld the order, thus stamping into law the common notion that these freeloaders are "pirates of the air" or "basement thieves."

Looking at the matter on its face, there is ample reason to be suspicious. First, Federal courts have not shown overmuch concern for the property rights of corporations, preferring instead long and learned disquisitions on "the public good" and the exact meaning of "a taking." As for the regulatory agencies, they have been—until very recently—downright hostile to the very concept of private property (i.e., that ownership implies control). Second, there is no greater protection of personal liberty than the rights of private property. An abridgment of liberty in the name of property rights is thus automatically suspect.

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Examining the matter in more detail, it is clear that broadcast frequencies, commonly referred to as "airwaves," are real property. Like other real property, they are properly acquired by appropriation and continuous possession and use over a period of years, not by government distribution.

Now real property cannot be stolen, but it can be illegally occupied. This is known as trespass, the prevention of which is properly a function of government, part of its mandate to secure our rights.

In considering how one illegally occupies a broadcast frequency, we must distinguish be-

tween transmission and reception. When one transmits on another's frequency, he is indeed a broadcast pirate for he illegally occupies that which is someone else's. It makes no difference that the offender may broadcast from his basement. (Is the man who launches a missile into his neighbor's yard any less guilty because he owns the launch pad?)

When one receives another's transmission in the privacy of his home, however, he neither damages nor occupies the broadcaster's real property and has not violated anyone's rights. If the broadcaster chooses to dump what economists call positive externalities, such as the entertainment emanating from his airwaves, on another's private property, the property owner is free to take advantage of this. One must distinguish between the airwaves, the real property that the broadcaster owns, and the programs, the positive externalities the freeloader enjoys, despite the fact that the latter originate from the former.

Harvard philosopher Robert Nozick makes a similar point in his landmark *Anarchy, State, and Utopia* in disputing the idea that someone's positive behavior toward me necessarily requires reciprocation or compensation, even when he acts voluntarily and without my contractual agreement to pay. The core of this idea is that all freeloading is theft, an idea that can be easily adapted to justify all manner of anti-libertarian state endeavors. Nozick asks whether a man who throws books into my yard from his can demand payment. Here it is from his yard (real property he owns) that the books (analogous to positive externalities) enter my yard (real property I own).

Although it may be felt that airwaves and programs are somehow different from yards and books, in practice we are quite ready to grant the similarity. Is there anyone who would claim that a CB radio buff who demands payment after being entertaining for a bit is entitled to use the coercive apparatus of the state to exact it? Pay television companies differ from the CB user only in that they entertain professionally, at considerable expense, and for their livelihood. But if the greater extent of the freeloading is all that separates the two cases, then if one is not theft, neither is the other.

If anything, programs and airwaves present

an even weaker case for mandatory compensation than the likes of books and yards. Consider the case of a man's apples falling into his neighbor's yard. Leaving aside the separate question of whether such placement (of the tree and/or apples) can be enjoined or whether rent (compensation for the negative externalities) can be exacted, the man is entitled to the return of his apples. He has lost personal property which can be restored to him. But programs dissipate as they are watched, and at the show's end the broadcaster has whatever he had before. Put plainly, there is neither anything to return nor anything that was lost. Only when lost income is the result of some rights-violating activity is compensation in order; lost income cannot be used as the basis of a claim for compensation.

At the heart of the confusion lie several mistaken analogies. First, there is the sentiment expressed by Assistant FCC Counsel Norman Blumenthal, "It's like sneaking into the movie theater." Not at all. It's rather like viewing a drive-in movie from your living-room window or watching your neighbor's Fourth of July fireworks display from the comfort of your backyard hammock. In each case, you receive benefits without payment, but without fault, for to be a thief you must positively violate someone's domain by aggressing, intimidating, deceiving, or the like. In none of these cases does any such rights-violating activity occur.

Now there is a parallel to the movie house sneak: someone who attaches a feed to a cable company's line. This we do not defend, for the connection illegally occupies part of the cable. This is *taking* rather than being *given* and demonstrates the possibility of being a bona fide thief in reception as well as in transmission.

Second and quite similar is the notion that our case rests on the ease with which this sort of freeloading may be perpetrated. Again this is not so. We do not plead the liberal notion that "If you leave the door open, you invite theft," but rather the libertarian notion that not all freeloading is theft. If one were to enter an unguarded home, he would illegally occupy another's real property and indeed would be guilty of trespass. That is precisely why the relative ease of basement transmission on owned frequencies is no defense. As we have shown,

however, the case with reception is different: here the "home" has not been entered at all and no trespass has occurred.

But the notion persists that airwaves are somehow different from other real properties. Let us return to the case of the fireworks display. Is there any philosophical difference between a visible air display dumped on you and an invisible electromagnetic-wave display which carries the programs you capture on your screen? The necessary use of complex receiving equipment in the latter case is surely philosophically irrelevant. If your house was some distance away from the drive-in and you watched with a telescope, would you then be a thief or a "movie pirate"? "Do burglars' tools make the burglary?" we might well respond!

By broadening the rights of pay television companies (after many years of deliberately strangling them), the FCC weakens the individual's right to use his property in entirely permissible ways. This is always the case when new "rights" are granted by the state. Why should we expect airwaves to be any different?

Having said this, we should note that service providers with built-in positive externalities such as these are not as defenseless as is often claimed. The drive-in can erect a wall, the next-door neighbor can make his display contingent on his neighbor's contribution, and the pay television companies can and are building increasingly sophisticated and impenetrable electronic "fences."

Should broadcasters shield their transmissions? Morally, the question has no answer: they have the right to do so or not to do so as they choose. Financially, they should do so if and only if the added cost of the protective equipment used in both transmission and reception will lose them fewer subscribers than they will gain by welcoming some erstwhile free-loaders. This becomes a moral consideration only if there is a fiduciary trust, as in a publicly owned corporation. If the market dictates, however, that the shielding is not worth the costs, no one should expect the state to shoulder them. The state already undertakes a multitude of unproductive activities. Why one more? □

Nobody's Property

People do not effectively "own" the airwaves simply because they are public property. While this "people's ownership" may be true in a strict legal sense, it is not true in practice. At present, the airwaves hardly belong to anybody. The government does not really own them fully because their use has been allocated to private broadcasting by the Communications Act. Yet, the private broadcasters are not owners either—they simply have three-year licenses. Thus, everybody's ownership rights have been diluted. It is a stalemate that ought to be broken—and it can be by removing the airwaves from their special "public property" classification.

In discussing the possibility of removing Federal control of the airwaves, one quickly finds himself swept into a narrow "either-or" argument. Either we have Federal licensing and control, the argument goes, or we face broadcasting anarchy. After all, governments have to provide policemen to direct traffic, don't they?

The fallacy of the argument is in its assumption that we have a choice only between Federal control and chaos. Even persons who are quite suspicious of any kind of Federal control of broadcasting cannot see other alternatives. We must remember that this Federal control has existed ever since broadcasting's infancy, so the idea of liberating the airwaves has had little consideration. Ownership of the airwaves has been a government monopoly, to be shared sparingly with others. So long as this monopolistic ownership goes on unchallenged, there is little chance that the roots of broadcasting's problems will be touched. —MELVIN D. BARGER

IDEAS
ON
LIBERTY



Privatizing Federal Programs

by Hans F. Sennholz

Most attempts at Federal budget cutting fail. Powerful interest groups stand in the way and fight to safeguard their entitlements and favorite programs. By contrast, taxpayers offer little opposition. Program costs are spread thinly among millions of taxpayers, amounting to a few dollars per capita. While the costs are dispersed, benefits are concentrated, providing an important guidepost for politicians. It indicates that they have nothing to gain, but much to lose from opposing particular spending programs.

Because of all the pro-spending incentives, few programs are ever terminated or even reduced. Federal spending rises continuously and Federal debt increases with no end in sight. Some observers despair over the democratic process, but many are convinced that there is a better tactic for spending control—"privatization."

Privatization transfers services from government agencies to private producers. The efficiency gains that flow from competitive enterprise are to be used to cut spending.¹ Privatization is also said to pay rich political dividends. It creates powerful groups of providers and beneficiaries who profit from the programs. They may be mobilized to support privatization and build a coalition for decisive spending cuts.²

At the present there is no coalition for spending reductions; but we do sense a pow-

erful movement for privatization in all corners of politics, from the extreme right to the radical left. On the left, it may spring from the search for new government programs and the need for new sources of revenue. On the right, it may be a new version of the old vision of individual freedom and enterprise, or merely a natural reaction to more than ten thousand off-budget government enterprises that have sprung from local, state, and federal governments in recent years.

No matter what the motive powers may be, the movement should ring an immediate alarm with all friends of genuine privatization and put them on the alert about the actual meaning of privatization. If so many reformers agree on an economic program, it is likely to be either empty and meaningless or vague and fuzzy. In this case, "privatization" has at least seven different meanings and many more connotations that permit everyone to endorse it:

1. Federal assets may be sold at market prices to individuals who acquire unhampered ownership and control of the assets.
2. Federal assets may be sold at bargain prices to favored individuals.
3. Federal assets, such as Amtrak, may be sold to individuals who remain under the jurisdiction of regulatory authorities.
4. No assets are sold, but private contractors are engaged to bolster expensive and unsatisfactory services of government enterprises, such as the Postal Service.
5. Private contractors are engaged to assist

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