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Panel III: Current Status of Time Warner v. City of New York

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Panel III: Current Status of *Time Warner v. City of New York*

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HOLLY SCHEPISI: Our final panel this evening concerns *Time Warner v. City of New York*,[1] a case for which the Second Circuit heard oral arguments earlier today. It is my great pleasure to introduce Professor James Goodale, our moderator for this panel.

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1. 943 F. Supp. 1357 (S.D.N.Y. 1996), *appeal filed*, No. 96-9515 (2d Cir. filed Dec. 18, 1996). The common law and antitrust issues in this dispute were filed separately in the Eastern District of New York. *See* Fox News Network v. Time Warner, Inc., No. 96-4963 (E.D.N.Y. filed Oct. 9, 1996). On May 10, 1997, Judge Weinstein entered an order dismissing the common law claims and transferring the remaining antitrust claims to the Southern District of New York. Fox News Network v. Time Warner, Inc., No. 96-4963 (E.D.N.Y. May 10, 1997) (order transferring litigation to the Southern District of New York).

in 1955 and his J.D. from the University of Chicago in 1958. He is an Adjunct Professor at Fordham Law School and is Of Counsel to Debevoise & Plimpton. Prior to joining Debevoise, Professor Goodale was General Counsel, Senior Vice President, Executive Vice President, and Vice Chairman of the *New York Times*. He takes great interest in the Time Warner case, and, after reviewing his comments from previous symposia, I am sure that he will be as fair as possible to New York City's ("City") position.

Please welcome James Goodale.

MR. GOODALE: Thank you, Holly. Let me introduce the panelists, if I may: David Goldin of the Corporate Counsel's Office; Ned Rosenthal of Frankfurt, Garbus, Klein & Selz; Bob Joffe of Cravath, Swaine & Moore; and Robert Perry of the New York University School of Communications.

What we are going to do is let the panelists who are directly involved in the litigation talk about the two cases: the first, *Time Warner v. City of New York*, which Time Warner has brought against the City of New York; the second, *Fox News Network v. Time Warner*,[2] which involves Rupert Murdoch's antitrust allegation against Time Warner. Before we do do that, however, I would like to provide some background information.

My interest in the Time Warner case was indicated in my introduction; I feel as though I have personally been involved in the case, because I have written a couple of articles on it and I had an intense argument on my television show with a proponent of public access. Somehow, I did not keep my cool in that discussion, but I promise to do so this evening and will be an objective moderator.

This litigation involves public access, generally speaking,

2. Fox News Network v. Time Warner, Inc., No. 96-4963 (E.D.N.Y. filed Oct. 9, 1996).

something that we have many examples of in the City. At least in Manhattan, these channels are known by the acronym PEG: "P" for public; "E" for educational; and "G" for governmental.[3]

The case that Bob Joffe is going to discuss is a so-called governmental case because it involves a governmental channel. I must tell you that this discussion is extremely timely. In fact, the oral argument for the *Time Warner* access case was held this afternoon and I really want to know what happened.

MR. JOFFE: Thanks, Jim. I am afraid we will all have to wait to find out what really happened. We can all speculate and talk about how good our respective arguments were,

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3. *See* Fox News Network v. Time Warner, Inc., No. 96-4963, 1997 WL 177508, at *1-2 (E.D.N.Y. Apr. 10, 1997); Cablevision of R.I. v. Burke, 571 F. Supp. 976, 980 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985). To assure that a cable system provides programming that is responsive to the needs of the local community, the 1984 Cable Act ("Cable Act") authorizes franchising authorities to require operators to set aside an undetermined number of channels for "public, educational and government use." *Time Warner*, 943 F. Supp. at 1367 (quoting 47 U.S.C.A. § 531(a) (West Supp. 1996)); *see also* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C.A. §§ 521-559) (West Supp. 1996)). The statute does not require cable operators to carry such channels. *Id.* The 1984 Cable Act does, however, give a franchise authority the power to require an operator to provide PEG channels. *Id.* The City of New York required Time Warner to set aside nine channels for PEG uses in Manhattan.

PEG channels are different than so-called "leased access" channels. Pursuant to Section 532 of the Cable Act, an operator with more than 36 channels must set aside a certain percentage of channels for use by entities unaffiliated with the operator. 47 U.S.C.A. § 532; *Time Warner*, 943 F. Supp. at 1367 (discussing Section 532). These channels—leased access channels—are available to all unaffiliated programmers. Such programmers must compensate the cable operator for the use of the channel. Time Warner's cable system in New York City, which offers 76-77 channels depending on the particular borough, must set aside 15 percent of the channels on its system for leased access use by unaffiliated commercial programming services. *Id.* at 1367 n.10; *see Fox News Network*, 1997 WL 177508, at *2 (explaining that Time Warner provides New York City with nine stations for PEG use). Four of these channels have been designated for public access and are administered by a non-profit entity independent of the City. *Id.*; *Time Warner*, 943 F. Supp. at 1374. The remaining stations are run by the City. *Fox News Network*, 1997 WL 177508, at *2; *Time Warner*, 943 F. Supp. at 1374.

but as to what really happened, we will have to wait for the Second Circuit's decision.

My topic today is the recent high-profile dispute between the Fox News Network ("Fox News"), a new cable twenty-four-hour news programming service founded by Rupert Murdoch's News Corporation,[4] and Time Warner Cable, a cable operator with approximately 1.1 million subscribers in New York City[5] and another ten million subscribers nationwide.[6]

The crux of the dispute is Time Warner's decision not to enter into a carriage agreement with Fox News prior to the service's launch in October of last year.[7] The dispute has resulted in two separate litigations: one between Time Warner and the City of New York in the Southern District of New York, and the other between Fox News and Time Warner in the Eastern District of New York. The first litigation involves claims by Time Warner against the City of New York under the franchise agreement,[8] the 1984 Cable Act ("Cable

4. *See Fox News Network*, 1997 WL 177508, at *3 ("Fox News is a fledgling all-news cable programming service, based in Manhattan," that is "owned by News Corp., which is controlled by Chairman and C.E.O. Rupert Murdoch."); Verne Gay, *The All-News Wars Heat Up*, NEWSDAY, Oct. 7, 1996, at B4.

5. *Fox-Time Warner Case Heard by 2d Circuit*, NAT'L L.J., Mar. 3, 1997, at B2; Nat Hentoff, *Do Cable TV Viewers Have First Amendment Rights?*, WASH. POST, Nov. 2, 1996, at A23.

6. David Lieberman, *Time Warner Pick's MSNBC Over Fox News*, USA TODAY, Sept. 20, 1996, at B1.

7. *See Fox News Network*, 1997 WL 177508, at *1 ("This case arises from a dispute between Time Warner and Fox over Time Warner's decision not to carry Fox News on its cable channels in New York City, and from the City's subsequent involvement in the controversy."); *Time Warner*, 932 F. Supp. at 1391-96; *see also* Clifford J. Levy, *An Old Friend Called Giuliani and New York's Cable Clash Was On*, N.Y. TIMES, Nov. 4, 1996, at B1, B2; Elizabeth Jensen & Eben Shapiro, *Who Picks What a City Sees? Stay Tuned*, WALL ST. J., Oct. 14, 1996, at B1 (discussing the dispute that led to the *Time Warner* suit). Fox News began service on October 7, 1996. Gay, *supra* note 4, at B4.

8. A "franchise agreement" is a contract between a cable operator and a local government through which the operator is granted authority to lay the cable wires that transmit television signals. *See Fox News Network*, 1997 WL 177508, at *1; *Time Warner*, 943 F. Supp. at 1366 ("Operators negotiate franchise agreements with local governments—'franchising authorities' in the telecommunications

Act"),[9] and the First Amendment.[10] I should also note that Bloomberg News has intervened in this case on the side of the City.[11] The second case involves claims by Fox News against Time Warner for breach of contract,[12] fraud, and promissory estoppel, and for conduct in violation of the antitrust laws, and a counterclaim by Time Warner, under Section 1983 of the Civil Rights Act[13] for conspiring with the City to deprive it of its First Amendment rights.[14]

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lexicon—to obtain the rights-of-way necessary to lay the cable wires."). According to the *Fox News Network* decision, "[p]rior to 1984, the cable industry was regulated primarily at the local level through the franchise process." 1997 WL 177508, at *1.

Time Warner operates the cable systems for northern and southern Manhattan, Brooklyn, Queens, and Staten Island pursuant to franchise agreements entered into with the City in 1983 and 1990. *Id.* at *2. The 1983 agreement relates to the non-Manhattan franchises, while the 1990 agreement covers the Manhattan franchises. *Id.*

9. *See generally* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified at 47 U.S.C.A. §§ 521-559 (West Supp. 1996)). The Cable Act established a national policy for regulation of the cable industry at the federal, state, and local levels. *Fox News Network*, 1997 WL 177508, at *1. Despite this federal legislation—amended by subsequent acts in 1992 and 1996—franchise agreements still determine much of the regulation of the cable industry. *Id.*; *Time Warner*, 943 F. Supp. at 1366.

10. *See generally* Time Warner Cable of New York City v. City of New York, 943 F. Supp. 1357, 1385-1402 (S.D.N.Y. 1996). Judge Cote of the Southern District of New York "declared that the City's actions violated the Cable Act, the franchise agreements, and Time Warner's First Amendment rights." *Fox News Network*, 1997 WL 177508, at *4. The Cable Act safeguards the programming decisions of cable operators under 47 U.S.C.A. § 544(f)(1) (West Supp. 1996), which provides that "[a]ny federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter." *Time Warner*, 943 F. Supp. at 1367 (citing 47 U.S.C.A. § 544(f)(1)).

11. *Time Warner*, 943 F. Supp. at 1364 ("Defendant-intervenor Bloomberg L.P. ('Bloomberg') intervened in the action on October 16, 1996."). Bloomberg is a news service that specializes in covering financial news. *Id.*

12. Prior to the summary judgment hearing on May 15, 1997, brought by Time Warner to dismiss Fox News' common law claims—which Judge Weinstein granted—Fox News agreed to withdraw its breach of contract claim, conceding that the statute of frauds could not be satisfied.

13. 42 U.S.C.A. § 1983 (West Supp. 1996); *see* Neustein v. Orbach, 732 F. Supp. 333 (E.D.N.Y. 1990) ("[A] private party is subject to liability under section 1983 if he conspires with or willfully engages in joint activity with the State or its agents, . . . even if the State agent is immune to liability.") (citations omitted).

14. *See generally* Fox News Network v. Time Warner, Inc., No. 96-4963

Our position is that the City committed an egregious violation of the franchise agreement, the Cable Act, and Time Warner's First Amendment rights by attempting to reverse Time Warner's decision not to enter into a carriage agreement with Fox News, and that Fox News's antitrust theory and the facts do not hold water.[15] It is these two sets of claims on which I will focus.

The facts are as follows: In September 1995, Time Warner publicly announced its intention to merge with Turner Broadcasting Systems ("TBS"), which owns, among other assets, CNN.[16] The proposed merger was extensively investigated and reviewed by the Federal Trade Commission ("FTC") for almost a full year before the Commission initially accepted a consent agreement on September 12, 1996.[17] That order requires Time Warner to make an unaffiliated twenty-four-hour service—that is, neither CNN nor any other service of which it owns an interest—available to fifty percent of its subscribers across the nation by July of 2001.[18]

Anticipating the consent order, Time Warner began negotiations with the two twenty-four-hour news services that were scheduled to launch at the end of 1996 and which met

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(E.D.N.Y. filed Oct. 9, 1996).

15. *Time Warner*, 943 F. Supp. at 1382.

16. *Fox News Network*, 1997 WL 177508, at *2 ("In September, 1995, Time Warner Inc., the corporate parent of the franchisees, and Turner Broadcasting System, Inc. ('Turner'), agreed to merge."); *Time Warner*, 943 F. Supp. at 1375; Appellees' Brief at 9, *Time Warner* (No. 96-9515); *see also* Paul Fahri, *Mogul Wrestling; In the War Between Murdoch and Turner, Similarity Breeds Contempt*, WASH. POST, Nov. 18, 1996, at C1 (reporting that Ted Turner sold TBS to Time Warner in the fall of 1996 for approximately $2.2 billion). Ted Turner, the President and Chairman of TBS, received 11.3% of the shares of Time Warner in the transaction. *Time Warner*, 943 F. Supp. at 1376.

17. Appellees' Brief at 9, *Time Warner* (No. 96-9515); *see also Time Warner*, 943 F. Supp. at 1377 ("On September 12, 1996, Time Warner announced that the FTC had approved Time Warner's merger with Turner.").

18. *See Fox News Network*, 1997 WL 177508, at *2 ("The Consent Decree required by the FTC as a condition of its consent to the merger mandates that Time Warner carry an unaffiliated news service on fifty percent of its cable systems within three years."); *Time Warner*, 943 F. Supp. at 1377-78; Appellees' Brief at 9, *Time Warner* (96-9515).

the criteria approved by the FTC for the purpose of meeting this provision of the consent decree.[19] One news service was MSNBC, a joint venture between NBC and Microsoft; the other was Fox News.[20]

In September of 1996, Time Warner announced that it had decided to satisfy the consent order by carrying MSNBC instead of Fox News.[21] That announcement set off a flurry of activity by Fox. Although Fox once supported the FTC consent order because that order gave it an opportunity to leapfrog in front of other programming services and obtain carriage on Time Warner's cable system, Fox now claimed that Time Warner's merger with TBS was anticompetitive.[22]

On October 9, 1996, Fox filed a complaint in the Eastern District of New York against Time Warner alleging common law and antitrust merger and monopolization claims.[23] The complaint seeks to have Time Warner permanently divest TBS because Fox alleges that the merger enhances Time Warner's incentive to favor its own programming, such as CNN, by denying cable carriage to competing services, such as Fox News.[24]

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19. *Fox News Network*, 1997 WL 177508, at *2; *Time Warner*, 943 F. Supp. at 1378; Appellees' Brief at 9, *Time Warner* (96-9515).

20. *Fox News Network*, 1997 WL 177508, at *2 ("Time Warner anticipated that the Federal Trade Commission ('FTC') would require them to carry an additional, unaffiliated cable news service in order for the merger to receive approval . . . . [and consequently] entered into negotiations with two emerging news services, MSNBC (a joint venture between Microsoft and NBC) and Fox News."); *see* Appellees' Brief at 9, *Time Warner* (96-9515).

21. *Time Warner*, 943 F. Supp. at 1379 ("On September 17, Time Warner notified Rupert Murdoch, Fox's CEO, that it had chosen MSNBC over Fox."); Appellees' Brief at 10, Time Warner, (No. 96-9515).

22. *Time Warner*, 943 F. Supp. at 1379 ("Fox indicated that it was considering filing comments with the FTC opposing the merger as anticompetitive, filing a lawsuit against Time Warner for violations of the antitrust laws, and submitting a petition to the City that the FCRC not approve the merger."); *see also* Jensen & Shapiro, *supra* note 7, at B1.

23. *See generally* Fox News Network v. Time Warner, Inc., No. 96-4963 (E.D.N.Y. filed Oct. 9, 1996).

24. *Id.* Judge Weinstein had bifurcated discovery in the action between the common law and antitrust claims. On May 16, 1997, he ordered that Time War-

Fox News also enlisted the support of the City of New York. On September 20, 1996, Robert Ailes, CEO and Chairman of Fox News and a former political consultant to the Mayor,[25] called the Mayor complaining about Fox News's failed attempt to obtain carriage.[26] Murdoch, the owner of Fox News, also owns the *New York Post* and WNYC Channel 5.[27] The *Post* was an avid supporter of Giuliani in the last mayoral election, and Giuliani's wife works for Fox News, Channel 5.[28]

Without investigating Fox News' allegations of unfair competition,[29] the City devised a plan to pressure Time Warner to carry Fox News.[30] The City's plan involved Crosswalks, five channels on Time Warner's cable systems that the City, pursuant to the Cable Act, required Time Warner to dedicate to PEG—public, education, or governmen-

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ner's summary judgment motion to dismiss Fox News' claims for fraud and promissory estoppel—the contract claim having been dropped—be granted. Fox News Network v. Time Warner, Inc., No. 96-4963 (E.D.N.Y. May 16, 1997).

25. Roger Ailes is the Fox News Chairman and Chief Executive Officer. *Time Warner*, 943 F. Supp. at 1379; *Joe Peyronnin Quits His Post as President of Fledging Fox News*, WALL ST. J., Feb. 23, 1996, at B12; Stephen Keating, *Making Room for Fox News, TCI Shuffles Its Channels*, DENVER POST, Oct. 7, 1996, at B1. Ailes is a long-time television producer and one-time media advisor to President Reagan. *Id.*

26. Appellees' Brief at 13, *Time Warner* (No. 96-9515).

27. Rupert Murdoch is the Chairman and CEO of News Corporation, which owns, among other entities, Fox News. *See supra* note 3; *see also* Appellees' Brief at 13 n.19, *Time Warner* (No. 96-9515); David Firestone, *Time Warner Wins Order Keeping Fox Off City Cable TV*, N.Y. TIMES, Oct. 12, 1996, at P1; Paul Farhi, *Mogul Wrestling; In the War Between Murdoch and Turner, Similarity Breeds Contempt*, WASH. POST, Nov. 18, 1996, at C1 (discussing Murdoch's ownership of the *New York Post*).

28. *See* Harry Berkowitz, *NY Says Its Controls Channels/City's Fight Continues With Time Warner Over Fox News*, NEWSDAY, Oct. 24, 1996, at A59.

29. Time Warner's 1983 ("1983 Agreement") and 1990 ("1990 Agreement") franchise agreements prohibit anticompetitive behavior and allow the City to investigate and rectify such a situation. 1983 Agreement § 3.8.01-.02; 1990 Agreement § 3.8.01-.07; *see Time Warner*, 943 F. Supp. at 1376 (discussing the 1983 and 1990 agreements).

30. *Time Warner*, 943 F. Supp. at 1379-80; *Fox News Network*, 1997 WL 177508, at *3 ("Time Warner alleges that following its decision not to carry Fox News, Fox and the City misused governmental power in an attempt to coerce Time Warner to carry Fox News on Time Warner's New York City cable systems.").

tal—use.[31] To help Fox News, the City proposed that Time Warner move an educational-type programming service from a commercial channel, such as the Discovery Channel or the History Channel, to a Crosswalks channel, which would then free up a commercial channel for Fox News.[32]

On October 1, Time Warner rejected that proposal.[33] The same day, the City turned to an alternate plan and asked Time Warner to consent to placing Fox News directly on Crosswalks.[34] If Time Warner refused, the City threatened to withhold regulatory approval of the Time Warner/TBS merger by the Franchise and Concession Review Committee ("FCRC"),[35] and to refuse to renew Time Warner's franchises in 1998.[36] The FCRC, which is controlled by the Mayor, must

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31. *Fox News Network*, 1997 WL 177508, at *1-2; Appellees' Brief at 7, *Time Warner* (96-9515). The Cable Act permits local governments, known as "franchising authorities," to require cable operators to set aside channels for public, educational, and governmental programming. *Fox News Network*, 1997 WL 177508, at *1.

As part of its franchise agreement with Time Warner, New York City has access to five channels in the upper range of the television dial, known collectively as Crosswalks. Mark Landler, *Giuliani Pressures Time Warner to Transmit a Fox Channel*, N.Y. TIMES, Oct. 5, 1996, at B1. Crosswalks originated in February of 1992. *Time Warner*, 943 F. Supp. at 1373. The channels show a mix of educational programs from the City University of New York, City Hall news conferences, and information about public events. *Id.*

32. *Time Warner*, 943 F. Supp. at 1363, 1379-80; Appellees' Brief at 13, *Time Warner* (No. 96-9515).

33. *Time Warner*, 943 F. Supp. at 1363, 1380; Appellees' Brief at 14, *Time Warner* (No. 96-9515).

34. *Fox News Network*, 1997 WL 177508, at *3 ("Fox decided to provide the City with a modified version of Fox News, with the commercials removed, and the City agreed to carry this programming on a PEG channel until the end of the year.").

35. The FCRC is a city board that oversees franchise matters. *Time Warner*, 943 F. Supp. at 1376 n.15; Appellees' Brief at 11 n.17, *Time Warner* (No. 96-9515). The Mayor controls four of the FCRC's six seats, two directly and two indirectly through the Director of Management and Budget and the Corporation Counsel. *Time Warner*, 943 F. Supp. at 1376 n.15; Appellees' Brief at 11 n.17, *Time Warner* (No. 96-9515) (citing New York City Charter, Ch. 14 § 373). The two remaining seats are held by the Borough President for the borough involved in the franchise dispute. *Id.*

36. According to the Eastern District of New York:

[Time Warner] alleges that Fox conspired unlawfully with City officials

approve any change in control of Time Warner's cable systems in New York City. The City had now belatedly said that such a change might have occurred as a result of the TBS acquisition.[37]

When Time Warner refused to buckle, the City made good on one of its threats: the Mayor issued a statement on October 9 that the FCRC would not approve the merger.[38] After stalling the FCRC process, the City issued Time Warner an ultimatum: either consent to the carriage of Fox News (and by now also Bloomberg) on Crosswalks with commercials, or the City would place those services on the Crosswalks channels without commercials.[39]

> to threaten to derail the approval process for the Time Warner/Turner merger; that Fox conspired with City officials to threaten not to renew Time Warner's franchise agreement with the City; and that Fox conspired with City officials to abuse the City's limited authority over PEG channels to carry Fox News—all in retaliation for Time Warner's decision not to carry Fox News.

Fox News Network, 1997 WL 177508, at *3; *see also id.* ("It is Time Warner's view that after it decided to carry MSNBC, the City indicated that approval of the merger, as well as renewal of its franchise agreements, could be in jeopardy if Time Warner refused to carry Fox News.").

37. *Time Warner*, 943 F. Supp. at 1375. According to the Eastern District of New York:

> A review of the merger was initiated by the New York City Department of Information Technology and Telecommunications ('DoITT'), the agency responsible for administering the City's franchises. Since the franchise agreements require Time Warner to obtain approval from the City before any change of "actual working control" of the franchises, the City needed to determine if the merger required the City's approval, and if so, to determine if it should be granted. Apparently the review process had been proceeding smoothly and favorably until Time Warner decided to carry MSNBC rather than Fox News.

Fox News Network, 1997 WL 177508, at *3. DoITT's responsibility was to make recommendations to the FCRC whether to approve or deny the merger. *Time Warner*, 943 F. Supp. at 1376.

38. *Time Warner*, 943 F. Supp. at 1381 ("[A]t the October 9 meeting of the FCRC, [desiginated FCRC Chair] Muraskin read a lengthy statement from the Mayor, which indicated that the City had not yet had enough time to consider the merger issue and therefore consideration of the merger was deferred."); *see* Paul Moses & Liz Willen, *Merger a No-Go/Says Cable Deal Needs City OK*, NEWSDAY, Oct. 10, 1996, at A7.

39. Appellees' Brief at 18, *Time Warner* (No. 96-9515); *see* Lawrence K. Grossman, *Bullies on the Block; Cable Television in New York City*, COLUM.

The next day, on October 10, 1996, the City began to transmit Bloomberg on Crosswalks without Time Warner's consent.[40] The City's plan was to transmit Fox News the next day.[41] On the evening of October 10, 1996, Time Warner filed a complaint in the lockbox outside the Southern District of New York Courthouse alleging claims under the franchise agreement, the Cable Act, and the First Amendment.[42]

On October 11, 1996, the next day, we appeared before Judge Cote.[43] After hearing arguments both at lunch and later in the evening, and after hearing one witness and looking at the affidavits, Judge Cote granted our motion for a temporary restraining order ("TRO")[44] and later, after much discovery and back-and-forth, which a lot of the people around here in the room today had to suffer through, she granted a preliminary injunction.[45] Judge Cote found that

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JOURNALISM REV., Jan. 11, 1997, at 19.

40. *Time Warner*, 943 F. Supp. at 1364 ("[The City's] campaign culminated on October 10, 1996, when [it] placed Bloomberg Information Television ('BIT') on one of its PEG channels—specifically, a channel set aside for educational or governmental use—and prepared to place Fox News on another PEG channel."); Appellees' Brief at 19, *Time Warner* (No. 96-9515); *see* David Lewis, *Time Warner Wins Timeout; Judge Bars City Ploy for Fox*, DAILY NEWS, Oct. 12, 1996, at 2.

41. *Time Warner*, 943 F. Supp. at 1364.

42. *Id.* ("Time Warner brought this action for preliminary injunction on October 10, 1996."); *see also Fox News Network*, 1997 WL 177508, at *4 ("On October 10, 1996, Time Warner filed suit against the City in the District Court for the Southern District of New York, seeking to enjoin the City from carrying Fox News.").

43. *Time Warner*, 943 F. Supp. at 1364 ("On October 11, 1996, this Court held a hearing on Time Warner's application for a temporary restraining order ('TRO') enjoining the City from continuing to show BIT and from placing Fox News on the Crosswalks Network . . . .").

44. *Time Warner*, 943 F. Supp. at 1364 ("After hearing the parties, this Court granted Time Warner's motion for a TRO."); *see also Fox News Network*, 1997 WL 177508, at *4 ("Judge Cote, in a comprehensive and well reasoned opinion, issued a temporary restraining order followed on November 6, 1996, by a preliminary injunction.").

45. *Time Warner*, 943 F. Supp. at 1403; *see also id.* ("I do find that the City's actions are far beyond acceptable PEG use, that the City acted in contravention of the legislative purposes of the Cable Act, and, specifically, violated provisions relating to PEG use and the editorial autonomy of a cable operator."); *Fox News*

the case "goes to the heart of First Amendment concerns."[46] It "concerns the power of a city to influence, control, and even coerce the programming decisions of an operator of a cable system."[47]

As Jim noted, the City and Bloomberg have appealed that decision.[48] We argued that appeal today before the Second Circuit. Incidentally, it was taped by Court TV for future broadcast.

The case raises a number of interesting issues that I would like to discuss before turning briefly to the antitrust case. I would like to address the three core arguments made by the City on appeal, either in their papers or orally today: first, that the Cable Act gives the City unlimited discretion to program Crosswalks with whatever programming it chooses, including commercial programming such as Fox News; second, that the City is exercising its own First Amendment rights by placing Fox News on Crosswalks; and third, that Time Warner's First Amendment rights are not harmed, or even implicated, by the decisions the City makes when programming Crosswalks.

Turning to the City's first argument involving the Cable Act, the City's contention that it has unbridled discretion to turn Crosswalks into its own private cable system that competes with Time Warner is flatly contrary to the 1984 Cable

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Network, 1997 WL 177508, at *4.

46. *Time Warner*, 943 F. Supp. at 1363; *see also id.* at 1403 ("The City's actions violate longstanding First Amendment principles . . . ."); *id.* at 1364 ("I find that by engaging in an effort to compel Time Warner to alter is constitutionally-protected editorial decision to carry Fox News, the City has violated Time Warner's First Amendment rights."); *Fox News Network*, 1997 WL 177508, at *4 (discussing Judge Cote's decision).

47. *Time Warner*, 943 F. Supp. at 1363; *see also id.* at 1403 ("The City has engaged in a pattern of conduct with the purpose of compelling Time Warner to alter its constitutionally-protected editorial decision not to carry Fox News."); *Fox News Network*, 1997 WL 177508, at *4 (discussing Judge Cote's decision).

48. Ellis Simon, *N.Y. Says It Will Keep Heat on Time Warner*, ELECTRONIC MEDIA, Nov. 11, 1996, at 3.

Act. Section 531 of the Cable Act ("Section 531")[49] expressly limits the City's authority to designating channels for "public, educational, or governmental" uses and to prescribing rules and procedures governing those particular uses.[50] It does not grant the City unbridled discretion to parcel out PEG channels to third parties, such as Fox News.

In 1984, Congress instructed how the PEG channels should be used. I quote from the House Report:

Public access channels are often the video equivalent of the speaker's soapbox or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic medium with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home and by showing the public local government at work.[51]

The City's decision to place Fox News on a PEG channel does not serve any of the purposes for PEG channels identified by Congress.[52] Fox News is a commercial programming

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49. 47 U.S.C.A. § 531.

50. *Id.* While the Cable Act itself does not identify what constitutes "educational" or "governmental" programming, its legislative history offers some indication of how Congress intended these stations to be used. *Fox News Network*, 1997 WL 177508, at *1. According to the House Report:

> PEG channels . . . contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work. [This Bill] continues the policy of allowing cities to specify in cable franchises that channel capacity and other facilities be devoted to such use.

H.R. REP. NO. 934, 98th Cong., 2d Sess. 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667; *see also Fox News Network*, 1997 WL 177508, at *1-2 (discussing the House Report).

51. H.R. REP. NO. 934, *supra* note 50, at 30, *reprinted in* 1984 U.S.C.C.A.N. at 4667.

52. According to the House Report, PEG channels are not intended to be leased for uses unrelated to PEG purposes:

> There is no limitation imposed on a franchising authority's or other government entity's editorial control over or use of channel capacity set-aside for governmental purposes. However, the Committee does not intend that franchising authorities lease governmental channels to

service that competes nationally for distribution to viewers. It does not show local government at work or bring schools into the home.

Let us turn to the City's second argument that asserts First Amendment rights. The City's contention that it is exercising its own First Amendment rights by placing Fox News on PEG channels turns the First Amendment on its head.[53] The City has no First Amendment rights.[54] The First Amendment prohibits the City from favoring one speaker over another based on the content of the speaker's message.[55] It does not authorize the City to engage in such conduct. The First Amendment, which is incorporated by the Fourteenth Amendment, states "Congress shall make no law."[56] It is a check on governmental power; it is not a

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third parties for uses unrelated to the provision of governmental access . . . .

H.R. REP. NO. 934, *supra* note 50, at 46, *reprinted in* 1984 U.S.C.C.A.N. at 4684; *see also Fox News Network*, 1997 WL 177508, at *2 (discussing the House Report).

53. Appellees' Brief at 29, *Time Warner* (No. 96-9515)

54. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("[t]he First Amendment protects the press from governmental interference; it confers no analogous protection on the Government"); AMSAT Cable Ltd. v. Cablevision of Conn. Ltd. Partnership, 6 F.3d 867, 872 (2d Cir. 1993) ("the government may not engage in speech suppression through its own speech"); Creek v. Village of Westhaven, 80 F.3d 186, 192 (7th Cir.) (noting that every court but one has held that municipalities do not have First Amendment rights), *cert. denied*, 117 S. Ct. 180 (1996); Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990) ("When the competing speaker is the government, that speaker is not itself protected by the First Amendment . . . ."); Student Government Ass'n v. Board of Trustees of the Univ. of Mass., 868 F.2d 473, 481 (1st Cir 1989); Estiverne v. Louisiana State Bar Ass'n, 863 F.2d 371, 397 (5th Cir. 1989).

55. Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 528 ("laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference"), *reh'g denied*, 512 U.S. 1278 (1994), *claim dismissed, summ. judgment granted, on remand*, 910 F. Supp. 734 (D.D.C. 1995); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (finding that law favoring news, business, and professional publications is content-based); Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510, 2516 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination . . . .").

56. U.S. CONST. amend. XIV.

source of governmental power.[57] As Judge Cote found, the City was not advancing the values underlying the First Amendment when it placed Fox News on Crosswalks,[58] but courting the favor of a conservative news programming service.

The City's final argument is that Time Warner's First Amendment rights are not harmed by the City's decision to place Fox News on Crosswalks. That argument, I believe, fails for a number of reasons. First, the City's decision to place programming on PEG channels that violates Section 531 necessarily infringes Time Warner's First Amendment rights. By exceeding its authority to place programming on PEG channels, the City has infringed Time Warner's First Amendment right not to speak.[59] The City has a limited easement to use PEG channels on what, after all, is Time Warner's system, which must meet First Amendment scrutiny, just like the Must-Carry rules.[60] Once the City goes be-

57. *See* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 695 (1992) (Kennedy, J. concurring) ("The First Amendment is a limitation on government, not a grant of power."); Riley v. National Fed'n of the Blind of N.C., 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.").

58. *Time Warner*, 943 F. Supp. at 1402-03 ("I find that Time Warner has shown a likelihood of success on the merits of its claim that the City has violated its First Amendment right to exercise editorial discretion.").

59. *Turner*, 114 S. Ct. at 2459 ("Laws that compel speakers to alter or distribute speech bearing a particular message are subject to . . . rigorous scrutiny . . . ."); Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal., 475 U.S. 1, 9 (1986)(plurality opinion) ("Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set.") Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (holding statute unconstitutional because it "[c]ompell[ed] editors or publishers to publish that which 'reason tells them should not be published'").

60. 47 U.S.C.A. § 534(a)-(c); *Turner*, 114 S. Ct. at 2458 (holding that Must-Carry rules requiring cable operators to carry broadcast stations trigger First Amendment scrutiny); *see also Fox News Network*, 1997 WL 177508, at *1 ("Under the complex federal regulatory scheme, cable operators must also retransmit local, over-the-air television programming."); *Time Warner*, 943 F. Supp. at 1374 ("the Manhattan and Staten Island systems air fifteen local broadcast stations, pursuant to the federal must-carry law").

yond those bounds, once it exceeds its limited easement, it infringes Time Warner's right to speak on its own cable system.

Second, Fox News and the City viewed commercial-free carriage on Crosswalks as a temporary arrangement that would pressure Time Warner to carry Fox News on a commercial basis. Thus, the City's use of Crosswalks was a direct attempt to interfere with Time Warner's constitutionally protected editorial discretion.[61] There was also live testimony from a Bloomberg witness at the TRO hearing that he viewed this presence on the Crosswalks channel as temporary for Bloomberg, that their goal was to be commercially carried in New York.

Third, the City's actions create a direct chilling effect on Time Warner's constitutionally protected editorial discretion. If the City is allowed to turn Crosswalks into a competing commercial system of channels, the City's favored cable programming services would be able to negotiate carriage agreements more easily than other cable programming services by credibly threatening that they could obtain carriage on what would become the Mayor's own personal cable system, Crosswalks.

Let me turn now briefly to the antitrust case. I should first mention two outstanding facts about this case that make the very bringing of the complaint quite extraordinary. First, the FTC has just completed an exhaustive investigation of the merger and, as is well known, has issued a consent decree approving the merger.[62] On February 7, a couple of weeks ago, the FTC entered its final approval and rejected those comments opposed to the merger, including the comments of Fox News, which were almost identical to the

61. *Turner*, 114 S. Ct. at 2456 (holding that editorial decisions of cable operators are protected by the First Amendment)

62. *See generally In re* Time Warner, Inc., 62 Fed. Reg. 11,202 (1997); *In re* Time Warner, Inc., No. C-3709, 1997 FTC LEXIS 13 (Feb. 3, 1997).

words in their complaint.

There are several major areas where the consent decree now binds Time Warner, but let me focus on those that most affect Fox: first, Time Warner is prohibited from bundling HBO with CNN, TNT, or WTBS, either in terms of availability, pricing, or other contract terms; second, Time Warner cannot make a carriage decision based on whether a video service is affiliated to it; and third, the FTC required Time Warner Cable to carry a rival twenty-four-hour news channel to CNN.

I would like to note that two of the five Commissioners, Commissioners Azcuenaga and Starek, dissented from the FTC's decision to enter the consent decree, having found no reason to believe there was a violation of law from the original transaction and on the ground that the order was unnecessary.[63] Accordingly, all five Commissioners found that the merger, as rearranged under these terms, passed muster under the antitrust laws.[64]

The second fact that makes Fox's antitrust claims against Time Warner extraordinary is that Time Warner's systems are now carrying, as we speak, a new twenty-four-hour cable rival to CNN—namely, MSNBC. The carriage is ahead of the schedule required by the FTC and is being rolled out to a far higher percentage of subscribers than the FTC required. Moreover, Fox has hardly had a handicapped birth as a programmer. Despite alleging that Time Warner has a stranglehold on cable systems, even without Time Warner, Fox has claimed to have launched to seventeen million homes.

Not only, then, do Fox's legal maneuvers look like sour grapes at not gaining all the cable systems they wanted, but

63. *See generally* Dissenting Statement of Commissioner Mary L. Azcuenaga and Dissenting Statement of Commissioner Roscoe B. Starek, III, *In re* Time Warner, Inc., 1997 FTC LEXIS 13 (Feb. 3, 1997).

64. *Id.*

their tactics also begin to look like a way to position themselves at the head of a queue, ahead of the thirty-odd other programmers all of whom want to be on in New York, including several Turner services for which there is no room at the moment.[65] There is good reason for Fox to want to do this: programming surveys have shown that cable subscribers, at least in New York, have no great desire for more news programming and would prefer to see much of the other programming not yet available. You all know how much news there is in New York, both from the cable services and from the many broadcast services.

Fox's case is an attempt by a disgruntled competitor to use the antitrust laws as a weapon when competition itself is not being harmed, as the law requires.[66] The antitrust laws are premised on a plaintiff's establishing antitrust injury.[67] Indeed, if the mere failure to enter into a carriage agreement was sufficient for such injury, then any news service not chosen—such as Reuters, the BBC, Conus, or Bloomberg—would have an antitrust claim. It cannot be the law that Time Warner Cable is obligated to carry all such news services—or even any—immediately, apart from what the consent decree mandates.

Let me briefly turn to the technical antitrust claims. The "first and most critical task" in analyzing a Section 7[68]

65. *Time Warner*, 943 F. Supp. at 1379 (explaining that approximately 30 programmers, including Sports Illustrated/CNN and Turner Classic Movies, have sought unsuccessfully to be carried full time on Time Warner's cable systems in New York City).

66. The purpose of the antitrust laws is the protection of competition, not competitors. *See* K.M.B. Warehouse Distrib., Inc. v. Walker Mfg. Co., 61 F.3d 123, 127 (2d Cir. 1995).

67. This means not simply showing some injury but showing some legally cognizable injury. The cases are clear that a plaintiff must allege: "(1) injury of the type the antitrust laws were intended to prevent and (2) that flows from that which makes defendant's acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

68. Clayton Act of 1914, ch. 323, § 7, 38 Stat. 730, 731-32 (1914) (codified as amended at 15 U.S.C.A. § 18 (West Supp. 1996)). Section 7 states, in relevant part, "[n]o person . . . shall acquire . . . any part of the stock . . . or any part of the

merger case and a Section 2[69] monopoly case is to define the relevant line of commerce; that is, the relevant product market.[70] Fox's complaint alleges several relevant markets. In particular, there is alleged to be a cable television programming market that excludes broadcast television and an all-news cable television programming market. It is, of course, predictable that a plaintiff will plead overly narrow markets in its complaint in order to produce high market share numbers.[71]

In the video programming and distribution business, such product market definitions are particularly inappropriate. The products that compete here are the provision of news, information, and entertainment to consumers. Consumers make their viewing choices on the appeal of the content, and so the most appropriate product market is one covering all forms of passive visual entertainment.[72] From the

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assets of another person . . ., where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." *Id.*

69. Sherman Anti-Trust Act of 1890, ch. 647, § 2, 26 Stat. 209 (codified as amended at 15 U.S.C.A. § 2 (West Supp. 1996)). Section 2 of the Sherman Act prohibits monopolization, attempts to monopolize, and conspiracies to monopolize. *Id.*

70. FTC v. Owens-Illinois, Inc., 681 F. Supp 27 (D.D.C. 1988), *vacated as moot*, 850 F.2d 694 (D.C. Cir. 1988). According to the FTC, "The purpose of market definition under Section 7 [of the Clayton Act] is to identify those sections of the economy that may be exposed by the challenged acquisition to a substantial lessening of competition." *In re* RR Donnelly & Sons, No. 9243, 1995 FTC LEXIS 215, at *30 (July 21, 1995). Of course, under Section 2 of the Sherman Act, the question is whether there is a dangerous probability of monopolization in the relevant market. *See, e.g.*, United States v. E.I. Du Pont de Nemours, 351 U.S. 377, 404 (1956).

71. Here, it is equally evident that a realistic definition of the product market in which Time Warner and Turner compete should include at least all passive visual entertainment. Narrower markets would "obscure competition . . . where, in fact, competition exists." United States v. Continental Car Co., 378 U.S. 441, 453, 456 (1964) (citation omitted). According to Time Warner, the markets that Fox proposes are highly artificial.

72. Courts have found a single relevant market that consists of all "passive visual entertainment." *See* Satellite Television & Associated Resources, Inc. v. Home Video, Inc., 825 F.2d 1559 (11th Cir. 1987). These cases stand for the simple proposition that the relevant product market includes "those products and

standpoint of the consumer, there are simply no significant gaps in substitutability among the available forms of news, information, and entertainment.[73] Consumers can obtain entertainment programming in general, and video programming in particular, from a range of distribution outlets, including free broadcast television, cable, alternative multichannel video programming distributions ("MVPDs"), which include DBS[74] and MMDS,[75] and video rentals and sales.[76]

Looking very quickly at the horizontal issue, the distribution level is of little import in evaluating the TBS merger. Time Warner and TBS were not principal competitors with each other at the distribution level. CNN and HBO are not close substitutes. Free broadcast television must necessarily be included in calculating the market. It's a closer substitute for either CNN or HBO than they are for each other. Yet, Fox ignores this, and they would have to, because once you include broadcast television, the Time Warner and the Turner shares become so small that there clearly is not an antitrust problem. Fox's markets are clearly gerrymandered.

There is no evidence that the combination of HBO and

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services which are reasonably interchangeable by consumers for the same purpose." *See Satellite Television*, 714 F.2d at 355 (quoting *E.I. Du Pont de Nemours*, 351 U.S. at 395).

73. Courts are skeptical of attempts by plaintiffs to find significant gaps in the chain of substitutes that do not really exist or are not economically meaningful. *See* New York v. Kraft General Foods, Inc., 1995-1 Trade Cas. (CCH) ¶70,911 (S.D.N.Y. 1995); Pennsylvania v. Russell Stover Candies, Inc., 1993-1 Trade Cas. (CCH) ¶70,224 (E.D. Pa. 1993).

74. DBS stands for "direct broadcast satellite." *See* Eric T. Werner, *Something's Gotta Give: Antitrust Consequences of Telephone Companies' Entry into Cable Television*, 43 FED. COM. L.J. 215, 224 n.32 (1991); H. Peter Nesvold, *Communication Breakdown: Developing an Antitrust Model for Multimedia Mergers and Acquisitions*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 781, 822 n.260.

75. MMDS stands for "multi-channel, multi-point distribution systems." Werner, *supra* note 74, at 224 n.32; Nesvold, *supra* note 74, at 822 n.260.

76. *Cf.* Nesvold, *supra* note 74, at 853 (arguing that "the advent of vast and rapid technological changes in the motion picture industry has resulted in substantial ancillary markets for movies," including first-run motion picture exhibition, broadcast, cable, and pay-per-view television, and video cassette rental).

the TBS networks will have a probability of causing anti-competitive effects or monopolization. In any case, the FTC has now precluded any possibility of anticompetitive bundling with its consent decree.

Let us turn to the remaining vertical issues. The only real issue is whether Time Warner's size as a distributor of programming, as well as a supplier of programming to these MVPDs, will create the incentive and ability to reduce competition in the relevant programming markets. Time Warner and TBS combined will not have this effect. The video programming industry, long vertically integrated, is highly competitive and will continue to be so.

The most fundamental aspect of the video programming industry is that cable operators carry networks if they are, or are expected to be, popular. It is in the cable operator's interest to have a diverse mix of programming in order to attract more subscribers, reduce disconnects, compete against MMDS and DBS, and attract advertising revenues and so increase profits.

Time Warner's nationwide share of MVPD subscribers stands at seventeen percent, and its share of MVPD subscribers will be fourteen percent by the year 2000.[77] Time Warner is not a gatekeeper determining the life or death of new programming services. Fox's own launch is evidence of that. In 1996, there were 163 start-up or new networks.[78] Not all, of course, will gain carriage or as much carriage as they like, but programmers are not shriveling on the vine in fear of the combined Time Warner/TBS and know that quality programming that appeals to subscribers is the best guarantee to carriage and success.

In a crowded news field, with no great subscriber enthusiasm for another news channel, where thirty other services,

77. *Cable TV Investor*, Dec. 19, 1995, at 8; *Cable TV Programming*, Mar. 29, 1996, at 1.

78. *See New Network Handbook*, CABLEVISION, Apr. 18, 1996.

including two of Turner's, are waiting to get on in New York, all of Fox's loudly expressed consternation may be seen as driven more by marketing needs than valid antitrust concerns.[79]

Thanks.

MR. GOODALE: David Goldin, now is your chance to tell Mr. Joffe that he is all wet, on the first case anyway. I will tell him he is all wet on the second case.

MR. GOLDIN: That's a fair distribution of labor—I will hold you to it. What I am not going to do, though, is tell Mr. Joffe in any great detail that he's all wet on the facts, although he is. In the interest of saving time, however, I will accept, for the most part, his recitation of the facts as true, though I will caution you not to do likewise. There are, however, two small points that Bob has omitted that are an important part of the story, and one quasi-factual issue that I do have to address to explain the rest of the argument.

In describing what happened during the summer of 1996 between Fox and Time Warner, Bob did not include the part of the story, which you may have seen rehearsed at considerable length in the media, that is a major issue in these cases. This issue was described most recently in an article by Kim Masters and Bryan Burrough in last month's *Vanity Fair*.[80]

The part of the story we have not heard today is the deal Time Warner had with Fox at one time to carry the Fox News channel.[81] That deal was about to be implemented

79. *See supra* note 65 and accompanying text (explaining that approximately 30 programmers are awaiting carriage on Time Warner's system in New York City).

80. Kim Masters & Bryan Burrough, *Cable Guys*, VANITY FAIR, Jan. 1997, at 74.

81. Masters & Burrough, *supra* note 80, at 74; *Unfair Competition Fox News Network v. Time Warner*, BASELINE II INC., Nov. 30, 1996; *see* David Lieberman, *Fox TV Chief Says Time "Lied"*, USA TODAY, Sept. 23, 1996, at 9B; *Fox News Loses Out as MSNBC Moves In; Time Warner's Plans to Expand the Availability of the NBC Cable Channel is Seen as a Setback for Fox*, ORLANDO SENTINEL, Sept. 21, 1996, at C10.

when Ted Turner, then on the verge of becoming Vice Chairman of the merged Time Warner/TBS,[82] approached Time Warner's CEO, Gerald Levin.[83] Turner, who is responsible for CNN and for giving Time Warner/Turner a presence in the twenty-four-hour news cable market, said to Levin: "Wait a second. Doing a deal with Fox is a terrible idea because you are putting a prime competitor on to our cable systems. This would have a predictably adverse impact on CNN, Headline News, and our other ventures in that area. You should not be advancing Fox's interests." Suddenly, Time Warner chose to carry MSNBC instead.[84]

There has been a persistent account that has influenced this and other cases—that the motivation behind the decision to carry MSNBC was that MSNBC would be less of a threat to CNN and the other Time Warner programming services.[85] This is an aspect of the case which has not been discussed, but which I think needs to be recognized to understand what was occurring in New York City and in the country in the fall of 1996.

Second, New York City did not get involved in this case because Roger Ailes and Rupert Murdoch made some phone

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82. Masters & Burrough, *supra* note 80, at 74; Eben Shapiro, *Time Warner and Seagram Break the Ice*, WALL ST. J., Aug. 7, 1996, at A3 (stating that Turner will become Time Warner's vice chairman and largest shareholder); Sallie Hofmeister & Claudia Eller, *Time for a Change; Time Entertainment Chief Sassa to Call Its Quits*, L.A. TIMES, Sept. 17, 1996, at D1; *Ted Turner to Handle Time Warner's Cable Programming*, INFORMATION ACCESS CO., Sept. 30, 1996 (discussing Ted Turner's duties as vice chairman of the to-be-merged Time Warner, Inc.); *see also* Eben Shapiro & Mark Raichaux, *Time Warner, Turner Face New Hurdles as $7.5 Billion Takeover Plan is Unveiled*, WALL ST. J., Sept. 25, 1995, at A3.

83. Masters & Burrough, *supra* note 80, at 74; *see generally* Sallie Hofmeister, *He May Be Working for Someone Else, But He's Still Ted Turner*, L.A. TIMES, Sept. 24, 1996, at D6 (discussing Turner's influence in the decision to carry MSNBC).

84. Masters & Burrough, *supra* note 80, at 74; *see* Elizabeth Sanger, *Cablevision Has Change of Heart, Will Air MSNBC*, NEWSDAY, July 12, 1996, at A51; Elizabeth Corcoran, *A Software Giant's Hard News Hopes; Microsoft, NBC Ready Cable TV-Web Venture*, WASH. POST, June 27, 1996, at D9.

85. Hofmeister, *supra* note 83, at D6; Diane Mermigas, *Murdoch Vows Action Against Time Warner; Says Channel Was Done Deal*, ELECTRONIC MEDIA, Sept. 23, 1996.

calls.[86] New York City got involved because, at the time, it had been working on an economic development deal with Fox. Fox had decided to base its new Fox News Channel in New York City—that being important to the City's economic development agenda, specifically, in terms of the number of jobs that would be generated and, more generally, in terms of the City's identification and public recognition as the country's media and news capital.[87] That deal, on which New York City players had been working for quite some time, depended upon the assumption—which was reasonable for Fox to have been making in light of the facts I just gave you—that Fox would have a news channel on Time Warner Cable that was visible in New York City, where the advertising agencies that Fox was trying to attract reside.

When Fox discovered that, contrary to everything they had been led to believe by Time Warner, they may not be on Time Warner Cable, they realized that that economic development package—the whole project on which they had been working with New York City officials—was in jeopardy. As a result, Fox contacted the City and said, "We have a problem here. The problem is Time Warner."

What does Time Warner say at this point? It says that it has a bottleneck, that there is an issue with channel capacity.[88] It has no problem carrying Fox except it does not have

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86. *See Fox News Network*, 1997 WL 177508, at *3 ("Time Warner asserts that Murdoch, News Corp., and Fox News are political supporters of the current City administration.").

87. According to the *Time Warner* court:

> In June 1996, the City and News America Publishing, the parent company of the Fox News Channel, had concluded negotiations which, according to the City, provide for the retention of 2,212 jobs and the creation of a projected 1,475 jobs. As part of the agreement, new studios for Fox News were to be located in midtown Manhattan. The City reports that it is projected that over 513 of the new jobs attributable to News America would be created through the operation of the Fox News channel.

943 F. Supp. at 1378.

88. At present, cable operators have a limited number of channels available. *See generally* Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Com-*

enough space.[89] This is the context in which the City first becomes involved in discussions with Time Warner about the Fox situation.

Now, I will make good on my promise and will work within the confines of the recitation that Bob has laid out. I will not go through the details of what occurred on September 24 and October 1, who said what at which meeting and with what kind of understanding. We do not need to know that in order to understand the case.

There is, however, one thing that does need to be considered as background: what is a cable system and how does it come into being?[90] In Time Warner's view—the view of a cable system operator—cable systems exist even before they are physically realized in the form of actual cables under actual streets in actual cities. Time Warner claims to have a property interest in its cable system before it enters into negotiations with the franchising authorities by which they actually get to put down cables and the City gets control over PEG channels.[91]

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munications Regulation), 80 MINN. L. REV. 1415, 1462 (1996); *see also* Edward Felsenthal et al., *Justices Uphold "Must Carry" Broadcast Rules*, WALL ST. J. Apr. 1, 1997, at B1.

89. Mark Landler, *Distribution Dispute Ensnarls Cablevision and Classic Sports*, N.Y. TIMES, Mar. 3, 1997, at D1 (explaining how Rupert Murdoch has been unable to persuade Time Warner Inc. to carry his Fox News channel due to channel space scarcity).

90. The Eastern District of New York briefly described the structure of the cable industry as follows:

> The cable industry is comprised of operators and programmers. Operators own the physical assets of the cable system. They obtain the authority to lay the cable wires which transmit the signals by negotiating 'franchise agreements' with local governments. Operators are responsible for managing the provision of cable services. Programmers, in general, produce programs intended for transmission over the cable systems. An operator typically contracts with a programmer if the operator wishes to carry the programming, paying the programmer a set fee per subscriber, per month.

Fox News Network, 1997 WL 177508, at *1; *see also Time Warner*, 943 F. Supp. at 1366 (providing a similar description of the cable industry).

91. *See supra* note 8 and accompanying text (explaining the process by which cable systems are created).

That is a very metaphysical theory. It is a theory in which, in the minds of cable system operators, there are potential cable systems that then spring into existence when those operators enter into negotiations with franchising authorities, such as New York City. Nonetheless, that is not the way it works. What really happens is that there is no cable system until somebody, for instance a cable system operator in a particular area, has a successful negotiation with somebody with the authority to franchise that cable system. Only at that point does the franchising authority contribute its streets, and does the cable system operator contribute its cables, thereby creating a cable system.

In the negotiation process, there is give and take—each side wants to benefit from the deal. The cable system operator wants to install a cable system in order to make money. The franchising authority, typically a city, wants to obtain something to promote the public interest.

The way the city may advance those interests, in addition to receiving franchise fees, is by taking back PEG channels.[92] The PEG channels do not exist prior to the agreement between the franchising authority and the cable system; they are created at the same time as the cable system. There is never a point in time when the cable system owns the PEG channels and then is compelled to give them to the city. There is no reversionary interest; there is no underlying interest; and there is no bottom to the PEG channels that be-

92. *See supra* note 3 (explaining that the City may take back PEG channels as partial consideration for granting a franchise to Time Warner). New York City has required PEG channels on cable systems since 1971. DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO: LAW AND POLICY § 6.04[2], at 6-34.1 (1996).

According to the 1990 franchise agreement between Time Warner and the City:

> Government channels [shall be] used for distributing services by the City or educational institutions for functions or projects related to governmental or educational purposes, including the generation of revenues by activities reasonably related to such uses and purposes.

Fox News Network, 1997 WL 177508, at *2.

longs to Time Warner. The PEG channels are created as the city's property when the cable system is created.[93]

The 1984 Cable Act explicitly recognizes this arrangement,[94] and the cable system operators hate this. As a result, operators have consistently read the 1984 Cable Act in a way that turns the act into precisely what it is not: an effort to reign in the authority of marauding franchise authorities and to protect the small, helpless cable system operators from being ground under.[95] However, that was not Congress's intent at all. Congress's intent in the 1984 Act,[96] and in subsequent legislation,[97] has consistently been to protect anyone, including franchising authorities—in some ways, especially franchising authorities—who could help control the tremendous corporate reach of the cable system operators.[98]

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93. *See supra* note 3 (explaining how PEG channels are created).

94. *See* Cable Communications Policy Act of 1984 § 611, 47 U.S.C.A. § 531(b). Section 531(b) states, in relevant part:

> Authority to require designation for public, educational, or governmental use:
>
> A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

Id.

95. *See, e.g.*, Mary LuCarnevale, *FCC Votes to Examine Cable TV Rules, Beginning the Process of Regulation*, WALL ST. J., Jan. 12, 1990, at A14.

96. H.R. REP NO. 934, *supra* note 50, at 19, *reprinted in* 1984 U.S.C.C.A.N. at 4656; *see also* Pamela B. Gullett, *The 1984 Cable Flip Flop: From Capital Cities Cable Inc. v. Crisp to the Cable Communications Policy Act*, 34 AM. U. L. REV. 557, 581 (1985).

97. *See generally* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.) (deregulating much of the cable industry); Cable Television Consumer Protection and Competition Act of 1992 § 534, 1992 Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended at 47 U.S.C.A. § 521).

98. According to a section of the House Report describing the PEG provisions:

What Congress did in the Cable Act, particularly through Section 531, was to approve the practice of a franchising authority's requiring PEG channels as a condition of granting the franchise.[99] Congress had to say that because after that practice had started—and it started in New York City in the early 1970s with the predecessors to Time Warner's cable systems[100]—the cable system operators had made the argument that granting franchises on the condition of having PEG channels violated federal law because it was preempted. The cable system operators also lobbied to have state legislatures pass laws and state agencies pass regulations that would preempt it. So, Congress intervened and preempted competing state laws and regulations to the limited extent of saying "this practice is permissible." That is what, in particular, Section 531, and, in general, the Cable Act of 1984 are doing.

The D.C. Circuit Court, in a case brought by Time Warner Entertainment against the FCC challenging that provision of the Cable Act as a facial violation of the First Amendment, addressed what prompted legislation in this area.[101] The D.C. Circuit explained that the Cable Act does not establish any prohibitions or rules on what the franchising authorities may do; it is there to permit the franchising authorities to go ahead and to have these negotiations with

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> One of the greatest challenges over the years in establishing communications policy has been assuring access to the electronic media by people other than the licensees or owners of those media. The development of cable television, with its abundance of channels, can provide the public and program providers the meaningful access that, up until now, has been difficult to obtain.

H.R. REP. NO. 934, *supra* note 50, at 30, *reprinted in* 1984 U.S.C.C.A.N. at 4667.

99. 47 U.S.C.A. § 531.

100. *Time Warner*, 943 F. Supp. at 1372 ("New York City broke the path for PEG access, negotiating for municipal channels almost since the beginning of cable services in the City."); *id.* ("Cable franchises awarded in 1970 provided for two 'City Channels.'") (citing Contract Between City of New York and Sterling Information Services, Ltd. (Aug. 18, 1970), at §§ 1(n), 4(b)).

101. Time Warner Co. v. FCC, 93 F.3d 957, 972-73 (D.C. Cir. 1996), *rehearing denied*, 105 F.3d 723 (D.C. Cir. 1997).

the cable system operator.[102]

The model is a free market. The cable system operator comes upon the franchising authority. They are both in a position to deal. Each of them wants something from the other. They can negotiate. Congress has said that one of the things over which they may negotiate is the creation of PEG channels—that is fair game.

Section 531, which Bob Joffe has said sharply limits what New York City can do with PEG channels, contains a very broad provision saying that you may designate those channels, meaning that you can create them; so, you could have channels which are for public, educational, and governmental use. The designation is the creation of the channels. It is the establishment of what that channel is there to do.

The legislative history makes clear repeatedly that the intent was for the municipality to have very broad discretion over what may be done with those channels.[103] However, one caveat expressed in the legislative history is that it was not Congress's intent, according to the House Report, that the channels be leased out to third parties for purposes unrelated to governmental access.[104] In other words, we do not expect people to sell the channel to somebody else. And

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102. *Id.* at 972-73.

103. According to the House Report on this matter:

> [I]t is integral to the concept of the use of PEG channels that such use be free from any editorial control or supervision by the cable operator. . . . There is no limitation imposed on a franchising authority's or other governmental entity's editorial control over or use of channel capacity set-aside for governmental purposes. However, the Committee does not intend that franchising authorities lease governmental channels to third parties for uses unrelated to the provision of governmental access . . . .

H.R. REP NO. 934, *supra* note 50, at 47, *reprinted in* 1984 U.S.C.C.A.N. at 4684. The 1992 Cable Act enacted censorship provisions for indecent programming on PEG channels, 47 U.S.C.A. § 532(h), (j), but this provision was struck down by the Supreme Court on First Amendment grounds. *See* Denver Area Educ. Telecommunications Consortium v. FCC, 116 S. Ct. 2374, 2394 (1996).

104. *Id.*

that, as I will explain, is not remotely what can be said to be happening in this case. The basic idea is broad discretion to the municipality.

What does PEG use mean? That has been a highly controversial point in this case. Bob Joffe has suggested that New York City's argument is flawed when it says "PEG use means that, with respect to the 'G' part, as long as the government is the user, as far as the Cable Act is concerned, the government can do anything that it wants to do." I think that it is clear now, if it was not at the outset, that that is the only interpretation of the provision that makes sense.

We have spent this case litigating over the possibility that what PEG use refers to is the content of PEG channel transmissions and the purpose for which the transmissions are made. What we have found, in forum after forum, is that we have embroiled ourselves in the densest, most Talmudic kind of dissection of whether or not a particular program in a particular context at a particular time can be said to have a governmental or an educational purpose or function.[105]

That is not a recipe for establishing clarity in this area or guiding the courts. Rather, it is a recipe fraught with two particular problems, one of which is what Congress has very specifically said in Section 531(e)—that the cable system operators are not to exercise any editorial discretion.[106]

If you open up the definition of PEG channels as Time Warner would like, you eviscerate that provision, and the cable system operator has a field day challenging every context in which a program appears. It can hamstring the PEG channels by ensuring that any but the blandest uses of them

105. According to Crosswalks' 1995 Policies and Procedures manual, programs that appear on the network may come from non-governmental agencies, but only if "endorsed by a government agency and *in connection with programs containing subject matter directly or indirectly related to the functions of such agency*." CROSSWALKS TELEVISION NETWORK, DEP'T OF INFO. TECH. & TELECOMM., POLICIES AND PROCEDURES 9 (1995) (emphasis added).

106. 47 U.S.C.A. § 531(e).

is going to be subject to potential judicial intervention. When I say "bland uses," I mean bland uses. We have PEG channels around the country that are nothing more than twenty-four-hour displays of bulletin boards announcing when community board meetings are to take place. Congress, as reflected in the legislative history, wanted the PEG channels to move beyond that.[107] Time Warner's argument simply takes us back to it.

I will mention two other brief points about this. We refer to the statute to public, educational, and governmental use.[108] I think it makes much more sense to construe the statute to suppose that when we talk about public use, educational use, and governmental use, we are talking about the same kind of relationship between the adjective and the noun in each instance.

Clearly, when we are discussing public use, we are talking about public access. The way that we know that public use is occurring is by asking whether "the person doing the using is a member of the public." Why should we suppose that it is more difficult to answer the question of whether educational or governmental use is occurring than by asking, "is the person doing the using an educational institution or the government?" What follows from that line of reasoning is that you do not have to engage in the kind of content analysis that has troubled every court which has looked at this.[109]

Judge Cote, I think it is fair to say, ultimately said, "I do not know exactly where the dividing line is. I cannot tell

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107. H.R. REP NO. 934, *supra* note 50, at 19, *reprinted in* 1984 U.S.C.C.A.N. at 4667.

108. 47 U.S.C.A. § 531(e).

109. The House Report addresses such First Amendment concerns: "With regard to the access requirement, cable operators act as a conduit. They do not exercise their editorial discretion over the programming; nor are they prevented or chilled in any way from presenting their own views and programming on the vast majority of channels otherwise available to them." H.R. REP NO. 934, *supra* note 50, at 35, *reprinted in* 1984 U.S.C.C.A.N. at 4672.

you precisely when you are over that line. But, with respect to a claim that you are over the line, I know it when I see it."

In the Court of Appeals today, there were many concerns expressed by Judge Newman[110] whether First Amendment interests are advanced here by engaging in close content analysis of broadcasts, with the potential consequence that you would have a regimen in which somebody goes on public access and the cable system operator could be sitting there monitoring what they are saying, ready to jump into court to get them censored when they cross the line.

Let me turn now to the First Amendment issues and focus on the questions concerning Time Warner's First Amendment rights, because that is where the court's focus was today. I think these are the issues that trouble the Second Circuit the most.

Time Warner has propounded an analogy to limited easements. It has said, in effect, that it only lets New York City use the PEG channels for certain limited purposes. That takes us back to the same issue with which I started—how the PEG channels came into existence. Only if you adopt that kind of theory do you find some kind of reversionary interest, and do you say that the PEG channels, in some underlying sense, belong to Time Warner. It is a peculiar position for Time Warner to be taking—it amounts to, apart from this whole metaphysical business about how the channels begin, Time Warner's saying, "We are the guardians of the purity of the PEG channels. We are the people who are here to make sure that the PEG channels are not abused. We want to see them used for the purpose for which they were intended."

Time Warner does not like PEG channels. Time Warner's goal in life is not to see that PEG channels are used for the purpose for which they are intended. Time Warner's goal in

110. Chief Judge, Second Circuit Court of Appeals.

life is to destroy PEG channels and get rid of them altogether. PEG channels are a drain on Time Warner. It does not want them there. It did not want them there in the legislation in the first place. Time Warner has launched litigation, recently resolved in the D.C. Court of Appeals, claiming that the PEG channel provision is unconstitutional;[111] it wants them as limited as possible because, if it cannot get rid of PEG channels altogether, the next best thing is to have them be no more threatening than billboards announcing community board meetings so that there is not going to be any interesting, disruptive, or competitive programming on them.

When we took the deposition of Time Warner's Senior Vice President for Programming[112] in this case, not only did he suggest that virtually everything that has been proposed to be put on PEG channels here and around the country is in fact impermissible, but he also argued that even something like C-SPAN,[113] even a local C-SPAN that covers City Council hearings, was probably impermissible.[114] He was unwilling to go further than to say that billboards providing you with information about which subways are running late this morning would be permissible. That is essentially Time Warner's perspective and the basis upon which it claims a First Amendment injury.

I will be brief on the two other points that were mentioned under the heading of claimed First Amendment injury. The notion that this was a temporary arrangement to

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111. *See generally* Time Warner Co. v. FCC, 933 F.3d 957 (D.C. Cir. 1996).

112. Time Warner's Senior Vice President of Programming is Fred Dressler. *Time Warner*, 943 F. Supp. at 1365; John M. Higgins & Richard Katz, *Bigwigs Grilled in Fox News War: Fox News Channel*, MULTICHANNEL NEWS, Oct. 21, 1996, at 1.

113. *See* Brian Lamb, *An Accident Victim: Greed is the Culprit; Effects of New Telecommunications Law on C-Span and C-Span2, Non-Profit News and Public Affairs Television*, WASH. MONTHLY, Mar. 1997, at 20.

114. Joe Estrella, *Some Ops PEG Hopes on Local Programming*, MULTICHANNEL NEWS, Mar. 17, 1997, at 76. *But see* S. REP. NO. 102-92, at 52-53 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1185-86 (concluding that public access could create government channels, each providing "a local 'mini-C-SPAN'").

pressure Time Warner raises an issue that attracted the attention of Judge Newman in court this morning. It deals with the question of why the City's actions that pressure Time Warner are automatically a First Amendment violation. Judge Newman said, "Suppose that, instead of putting Fox on Crosswalks, Mayor Giuliani had said, 'I know how I can fix those people at Time Warner for refusing to carry Fox. I am going to hold a press conference every day at which I am going to lambast them and urge that all members of the citizenry ought to be outraged and ought to communicate their displeasure to Time Warner at once.'" And then, Judge Newman said, "So suppose, Time Warner, you got that reaction, everybody is criticizing what you're doing. Has that violated your First Amendment right to decline to carry Fox?"

Time Warner's counsel—not Bob Joffe—said, "No, that would not be a violation because it is not so clear that we actually would be injured. We would still have the discretion not to carry Fox." This is in contrast to the situation in which Fox is on Crosswalks, and in which the claim is that if we put Fox on Crosswalks for a couple of months, so many people are going to become Fox News Channel junkies and are going to be so desperate to continue to watch Fox News Channel that, if an attempt is made to get Fox News Channel off Crosswalks or Fox News Channel itself decides to drop off, then the public is going to rise up in arms and demand that Time Warner take them on.[115] That was the conclusion that Time Warner pressed before the district court.[116]

The district court, I think, looking for some way to work through to a conclusion, accepted it. But there is nothing in the record to indicate that. We have seen the Fox News

115. *Fox News Network*, 1997 WL 177508, at *3 ("Fox and the City allegedly hoped that [their] arrangement [to carry Fox News on Crosswalks without commercials] would allow Fox News to build viewer loyalty, so Time Warner would then be pressured into carrying Fox News.").

116. Appellees' Brief at 65, *Time Warner* (No. 96-9515).

Channel around the country now. The idea that it commands that kind of loyalty and that you can so affect the market is not borne out by any of the facts.

I want to stop at this point and leave some room for questions and leave some room for the others to speak.

MR. GOODALE: In this *Time Warner* case, as distinct from the *Time Warner* antitrust case, Bloomberg News intervened with a claim, I take it, that it too should be on a governmental channel, Channel 74, for example.[117] Ned Rosenthal's firm represented Bloomberg as intervenor, and I'm going to permit him to intervene now.

MR. ROSENTHAL: I am going to be brief so we may address questions from the audience. Let me just tell you very quickly how Bloomberg got involved in this. Bloomberg is a New York-based entity. It provides financial information in a variety of ways,[118] including through its television network.[119] When Bloomberg read in the newspapers that New York City had offered to put Fox News on Crosswalks, Bloomberg contacted the City and said, "Put us on. We are willing to give the City of New York our news information service without commercials for the City to use as long as it wants, in any way it wants to use it."[120] Bloomberg also offered to locally customize that service for the New York City area. Time Warner ran to court, obtained the temporary restraining order and the preliminary injunction that Mr. Joffe described, bumping Bloomberg off the air.[121] It

117. Brief for Intervenor-Appellant at 2, *Time Warner* (96-9515).

118. *See* G. Bruce Knecht, *Bloomberg Buys Back 10% of His Firm From Merrill Lynch for $200 Million*, WALL ST. J., Dec. 17, 1996, at B8 ("Bloomberg provides financial news and analyses through more than 60,000 terminals [and] provides business and general news for television, radio and a number of print publications."); *Dow Jones to Stop Using Bloomberg's Distribution Service*, WALL ST. J., Aug. 17, 1990, at B10 ("Bloomberg distributes prices of financial instruments, including stocks and bonds, and provides analytic features through its terminals.").

119. *See* Knecht, *supra* note 118, at B8; *Big Board Begins Feeding Live Data to Cable Channels*, WALL ST. J., Dec. 13, 1996, at B8.

120. *Time Warner*, 943 F. Supp. at 1378.

air.[121] It was only on the air for a total of eleven hours.[122]

From Bloomberg's perspective, we have to examine this case in a broader context than the other parties. As an intervenor, we may take shots at everybody—with at least some freedom. David Goldin described the PEG scheme and how it comes about. When you go home tonight and turn on your television, the odds are overwhelming that you are going to turn on the Time Warner Cable System.[123] It's essentially the only game in town. A few people might have access to Liberty Cable[124] or one of the direct satellite networks,[125] or some people may still be trying to pull a few stations out of the air with their antennae, but otherwise you must use Time Warner.

The Cable Act was designed to protect all of us from the possible ramifications of having someone control our television lives the way Time Warner would like. As such, the Cable Act contains a variety of provisions that are designed to offer protections for different groups.

For example, there are what are called the Must-Carry provisions.[126] The Must-Carry provisions require the cable operator, Time Warner, to carry the traditional broadcast sta-

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121. *Id.* at 1403.

122. Seena Simon & Betsy Jelisavcic, *Time Warner Wins Order Blocking Fox, Bloomberg*, DENV. POST, Oct. 12, 1996, at D3 (stating that transmissions of Bloomberg on channel 71 stopped about 11 hours after it began).

123. *See* Hentoff, *supra* note 5, at A23 (stating that Time Warner has seven of the nine franchise areas in New York City and reaches a total of approximately 1.1 million households).

124. Liberty Cable was renamed RCN Cable of New York City. *See Cable Notes*, WARREN'S CABLE REG. MONITOR, Mar. 31, 1997, *available in* WESTLAW, 1997 WL 10096627. It now serves 41,000 households. *Id.*

125. The six major operators in the DBS marketplace are DirecTV, USSB, Primestar, EchoStar, AlphaStar, and ASkyB. *See* Kathryn Harris & Maria Atanasov, *Falling Stars; Wall Street has Soured on Direct-Satellite Stocks, and a Shakeout is About to Begin*, FORTUNE, Mar. 17, 1997, at 127; *see also* Mark Robichaux & Bryan Gruley, *Critics Target Murdoch's "Death Star"*, WALL ST. J., Mar. 17, 1997, at B1 (describing Rupert Murdoch's plans to merge his DBS holdings with EchoStar).

126. 47 U.S.C.A. § 534(a)-(c) (West Supp. 1996); *see also* 47 U.S.C.A. § 325(b).

tions—Channel 2,[127] Channel 4,[128] Channel 5,[129] and Channel 7[130] in New York City.[131] The leased access provisions require Time Warner to offer its time to people who come in willing to pay for it.[132]

The PEG provisions require Time Warner—if New York City requires it in its franchise agreement negotiations[133]—to set aside certain channels that will be devoted to public, educational, and governmental use.[134] The public channels are what I think we all would think of as the "Wayne's World"-type channels: people who broadcast from their basements.[135] Some of it is awful and has no production value; some of it may be useful.

Educational and governmental programming has been a whole variety of different things throughout the country. In New York, in the negotiation between Time Warner and New York City, five channels were set aside for educational

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127. WCBS TV, New York. *See generally CBS Television Station in New York Dismisses Several News Staffers*, WALL ST. J., Oct. 3, 1996, at B5.

128. WNBC TV, New York. *See generally* Raymond Sokolov, *Television: Turn On, Tune In, Drop Out*, WALL ST. J., Dec. 30, 1996, at A10.

129. WNYW TV, New York. *See generally Cowles Media's Wall is Chosen as President of WBIS+ TV Station*, WALL ST. J., May 29, 1996, at B10.

130. WABC TV, New York. *See generally Who's News: Disney Names Liss Buena Vista Chairman*, WALL ST. J., Oct. 24, 1996, at B3.

131. The Must Carry option only requires carriage of the broadcast networks if the station opts for that. Most major broadcasters opt for the retransmission consent option requiring some form of compensation for the cable operator's carriage of the broadcast station. *See* Edward Felsenthal et al., *Legal Beat: Justices Uphold "Must Carry" Broadcast Rules*, WALL ST. J., Apr. 1, 1997, at B1.

132. 47 U.S.C.A. § 532.

133. *See supra* note 3 (explaining that the 1984 Cable Act authorizes, but does not require, franchising authorities to incorporate PEG channel access into franchise agreements with cable operators).

134. 47 U.S.C.A. § 531(b).

135. *Five Years Ago This Week*, TAMPA TRIBUNE, Aug. 1, 1996, at 4. "Wayne's World" is a parody of a cable public access program. *Id.* In the sketch, the public access program is broadcast from the Aurora, Illinois basement of its host, Wayne Campbell. *Id.* The "Wayne's World" sketch was first seen on the NBC television program "Saturday Night Live" and was later made into two feature films. *Id.*

and governmental use.[136] Now, I am not going to take this bet, but I almost willing to offer that nobody in this room has ever turned on Crosswalks. Crosswalks is on Channels 71 through 75 of most of your services.[137] I had never turned it on, at least consciously, until this case happened. If you turn on Channel 71, what you are likely to see are OTB races and results.[138] Alternatively, you might see an electronic bulletin board announcing City Council hearings.[139] One of the other channels has oft-repeated, educational-type programming provided by commercial programmers and sponsored by Microsoft[140] or Merrill Lynch.[141] Other channels have job opportunity boards with constantly repeated offerings of positions within New York City.[142] Essentially, there is nothing anybody would ever watch on Crosswalks, unless you are into OTB and you want to place bets, in which case you may be very interested.

Bloomberg came along when it heard about the offer to Fox and offered to put its service on in New York to give the City an opportunity to do something worthwhile with its

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136. *See* Landler, *supra*, note 31, at B1; *see also supra* note 3 (explaining that Time Warner must set aside 15 percent of the its channels for public access and PEG use).

137. *See Time Warner*, 943 F. Supp. at 1372; Barbara D. Phillips, *Remote Control: Around the Cable Dial in 79 Channels*, WALL ST. J., July 26, 1994, at A14.

138. Crosswalks carries the New York Racing Association's "RaceDay" program. John Jeansonne & Paul Moran, *Arena*, NEWDAY, Dec. 2, 1995, at A29; *see also Time Warner*, 943 F. Supp. at 1374 ("Channel 71 shows Off-Track Betting ('OTB') and program listings.").

139. *Time Warner*, 943 F. Supp. at 1374 (explaining that Channel 74, entitled "A Window Into Government," telecasts, among other things, "City Council meetings, programs about health and safety, taxes, and senior citizens").

140. Microsoft produces a weekly program that airs on Crosswalks and features Microsoft products. *See id.* at 1375 ("The City . . . refers to a promotional program provided by Microsoft that gave instructions on the usage of Microsoft products, with the incidental effect of promoting those products."); Nat Hentoff, *Who Owns the First Amendment? The City Has No Power Over Newspapers but Time Warner is a Monopoly*, VILLAGE VOICE, Nov. 19, 1996, at 10.

141. *Time Warner*, 943 F. Supp. at 1374 ("Channel 72, called the 'Opportunity Channel,' airs educational and employment-oriented programs such as English and Spanish GED classes, and other basic skills programs, and job listings.").

142. *Id.*

PEG channels.[143] Throughout the country, there has been a trend among governments with three, four, or five PEG channels, obtained through negotiations with cable operators, to start thinking of better ways to use the channels.[144]

In Colorado, for example, commercial channels are now available on PEG channels.[145] They tend to be educational commercial channels, but they are commercial channels nonetheless. C-SPAN is sometimes shown on the commercial channels. The city governments throughout the country are trying to figure out: "What do we do? We have this available access. We have an opportunity to do something for the public. Let's not just show low-production drivel. Let's show something with some value and some meaning."

It is ironic that Time Warner now argues that putting Fox News or Bloomberg on Crosswalks impairs its First Amendment rights because it must carry programming that it does not want to carry—after all, Time Warner has to carry programming it does not want to carry all the time. It does not

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143. Joe Estrella, *Some Ops PEG Hopes on Local Programming*, MULTICHANNEL NEWS, Mar. 17, 1997, at 76.

144. *Id.*

145. *Time Warner*, 943 F. Supp. at 1372. The *Time Warner* court explained in detail the purpose behind putting commercial programming on PEG channels:

> There is some variation in the use of governmental and educational channels. For example, Aurora, a Denver suburb, airs local news on its governmental channel, many cities air programming for the disabled, and still others air foreign-language programming. These uses, however, arise from a determination that commercial television neglects the needs of certain audiences. The Aurora experience is instructive. In that case, the Aurora City Council decided that local news, which originates in Denver, did not adequately meet the needs of Aurora residents. Therefore, Aurora carries local news programming that does cover news from its community. Other cities reached similar conclusions about the need for foreign-language programming and programming focused on the needs of the disabled community. Although some of these programs contain commercials, to the knowledge of this Court, no city uses its PEG channels to compete with regular commercial channels. Rather, PEG programming that varies from a more traditional use stems from a desire to serve those communities that are not otherwise served, not a desire to enter the commercial fray of cable programming.

Id.

mean that they like what the networks are saying; it has to carry them. Time Warner may make a deal with ESPN to carry a sporting event, but it has no control over the content of that programming. It may have a deal with a leased access channel, but it has no editorial control over the programming.

So, the notion that Time Warner is being forced to carry something that it editorially does not want to carry is nonsense,[146] particularly if you look at it from the point of view of someone like Bloomberg, a news service dedicated to New York with an emphasis on financial news and a deemphasis on crime. Basically, "no O.J." is the rule of thumb.

We find ourselves in the position where Time Warner is crying First Amendment rights, where in fact what has happened is the people of New York City have been deprived of two new news services that they otherwise would be able to see on Crosswalks. They would be able to see Fox News; they would be able to see Bloomberg. The people of New York might not want to watch Fox News or Bloomberg; they might choose to watch one of the numerous other channels on Time Warner, many of which Time Warner and Turner control.[147] The City wanted to offer an alternative, but instead finds itself defending a challenge.

Considering all the complicated legal issues involved, this case would make a great law school exam on irreparable injury: where is the First Amendment harm here? How is Time Warner being harmed? Is Time Warner harmed be-

146. Indeed, a cable operator has no editorial control over PEG channels pursuant to Section 531(e) of the Cable Act. 47 U.S.C.A. § 531(e) ("a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to [the PEG provision]"); *see also Time Warner*, 943 F. Supp. at 1367 (discussing Section 531(e)).

147. *Multichannel News International Guide to U.S. Program Network Connections*, MULTICHANNEL NEWS, Mar. 3, 1997, at 28. Turner's domestic news services include: CNN, CNN International U.S., CNNfn, CNN Airport Net, CNN Headline News, CNN en Espanol, CNNI India, and CNNSI. *Id.* Time Warner owns NY1 News. *Id.*

cause it must carry programming on channels over which it has no editorial control? That simply does not make sense.

Time Warner says it is being coerced into carrying programming, that by New York City's threatening to put Fox News on Crosswalks, the City is forcing Time Warner to carry Fox News on its commercial channels.[148] Well, there is no evidence that Time Warner had any intention of doing that; there is no evidence that it has been harmed; there is no evidence that there has been any specific injury; and there is no evidence of any First Amendment injury.

Time Warner is in a very difficult position. Today, at the oral argument, the Second Circuit very clearly questioned whether Time Warner really has any First Amendment rights in this case and whether the City has violated the Cable Act.[149] Time Warner claims that the Bloomberg and Fox News programming that was put on Crosswalks is not consistent with educational and governmental purposes under the PEG provisions.[150] It is not clear how Time Warner has been injured by that.

This is fundamental preliminary injunction law: a plain-

148. *Time Warner*, 943 F. Supp. at 1394-99.

149. 47 U.S.C.A. § 531.

150. *Time Warner*, 943 F. Supp. at 1385-89; Appellees' Brief at 46-53, *Time Warner* (No. 96-9515). When New York City launched Crosswalks in February 1992, William F. Squadron, Commissioner of the Department of Telecommunications and Energy, characterized the goal of Crosswalks as "us[ing] the cable technology to bring educational, governmental, and public information to the people." William F. Squadron, New York City's Cable Television Network: Statement by the Commissioner, *quoted in Time Warner*, 943 F. Supp. at 1373. Commissioner Squadron elaborated further on the kinds of programs that the City planned to run on Crosswalks:

> [Crosswalks will run] programs devoted to enhancing the quality of life for young people and for senior citizens. It will have job training shows and employment listings. It will offer public safety tips on subjects like crime and fire respond to illness. It will display a bulletin board of government, educational, and cultural activities throughout New York. And, in time, it will cablecast the proceedings of the City Council and the City Planning Commission.

Id.

tiff cannot just claim injury and expect an injunction. The plaintiff must show how it has been hurt.[151] Time Warner has failed to show any type of specific concrete harm. It is speculation, which David Goldin alluded to, that showing Fox News or Bloomberg on Crosswalks is going to create a public clamor for those shows to be shown on commercial channels that Time Warner controls. This is completely without any factual basis in the record and defies rational belief. There are many ways the public might clamor for a station to be on Time Warner's channels. In fact, there have certainly been instances where Time Warner has thrown programming off its commercial channels and the public has been upset about it.[152] There is no evidence that there has been any impact on Time Warner because Time Warner essentially has a monopoly over the cable television system in New York City. Its sole interest is getting subscribers and negotiating with programmers. The idea that somehow there will be a public demand for Bloomberg to be on a commercial channel and that that demand will cause Time Warner some harm is really just made-up speculation that has no place in a First Amendment context.

MR. GOODALE: Thank you. We are going to hear next from Robert Perry of the NYU School of Communications, who appeared as amicus curiae in this case. We are interested in hearing whose side you were on; we know that you appeared on behalf generally of people who wanted to be on public access channels, but we would like to hear how you articulated that position to the court.

MR. PERRY: In the Time Warner case, I represent Media

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151. FED. R. CIV. P. § 64(a); *see generally* Fuentes v. Torres, 807 F.2d 236 (1st Cir. 1986). Courts require that a plaintiff show that: (1) it will suffer irreparable injury if the court does not grant the injunction; (2) the injury threatened outweighs any harm to the defendant if the injunction is issued; (3) the plaintiff is likely to prevail on the merits of its case; and (4) the public interest will not be adversely affected by the issuance of such an injunction. *Id.* at 238.

152. *Cf.* Amylia Wimmer, *County Filing Cable Rate Complaint*, ST. PETERSBURG TIMES, Mar. 6, 1997 at 1.

Access New York ("MANY"), a group which primarily consists of public access producers, but also includes cable subscribers. MANY was formed in the early 1990s to promote access to the electronic media in the New York metropolitan area and elsewhere. MANY supports Time Warner's position in this litigation.[153]

I endorse the diversity of information principle in that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ."[154] I believe that the more programming channels available to the public, the better off we all are. Over the past twenty years, I have worked to promote that principle here in New York City.

Back in the early 1980s, Ted Turner's then-fledgling twenty-four-hour news service, Cable News Network, was denied carriage on the northern Manhattan system. The system was then partially owned by Group W Cable, whose parent company was about to launch an all-news cable service called Satellite News Channel. Turner's Atlanta attorneys representing Cable News Network filed an antitrust lawsuit.[155] At my suggestion, they included a pendent state

153. *Time Warner*, 943 F. Supp. at 1365-66 (noting that MANY submitted a brief supporting Time Warner's position).

154. Associated Press v. United States, 326 U.S. 1, 20 (1945); *see also Time Warner*, 943 F. Supp. at 1367 ("The stated purpose of the [Cable Act] include . . . the assurance that cable systems that cable systems will provide the widest possible diversity of information sources and services to the public . . . .") (citing 47 U.S.C.A. § 521(4) (West Supp. 1996); H.R. REP. NO. 934, *supra* note 50, at 19, *reprinted in* 1984 U.S.C.C.A.N. at 4656 (stating that one of the goals of the 1984 Cable Act was to "provide the widest possible diversity of information services and sources to the public, consistent with the First Amendment's goal of a robust marketplace of ideas").

Local governments had conditioned franchise grants on the provision of PEG access since the 1960s. *Time Warner*, 943 F. Supp. at 1368. According to one commentator, the purpose behind this was to "create a more direct right of access to the video media." BRENNER ET AL., *supra* note 92, § 6.04[1], at 6-34.

155. Cable News Network v. Satellite News Channel, No. C83-436A (N.D. Ga. filed Mar. 3, 1983); *see* Bob Brewin, *The News Battle: Full Court Press*, VILLAGE VOICE, Mar. 15, 1983, at 18.

claim alleging breach of the New York City franchise agreement, which required priority of access to given to unaffiliated programming services.[156] The priority of access provision was not being enforced by the City. The antitrust case was quickly settled when Turner bought out Satellite News Channel.[157]

A few years later, a cable subscriber named Gary Kaskel, who lived in lower Manhattan, called me. Mr. Kaskel was upset that only two movie-oriented pay services were available over Manhattan Cable TV ("MCTV"), the Time-owned cable system then franchised to source lower Manhattan. These two services, HBO and Cinemax, were both owned by Time. I brought an antitrust lawsuit on behalf of Mr. Kaskel's ad hoc group, the New York Citizens Committee on Cable TV.[158] The suit alleged that the defendants, HBO, MCTV, and Time, had monopolized the market for movie-oriented pay cable services in lower Manhattan. It further alleged a breach of MCTV's franchise agreement, which, like Group W Cable's franchise agreement, required that priority of access be given to unaffiliated programming services.[159]

Although this was a "David-versus-Goliath" lawsuit, we survived a motion to dismiss, and ultimately settled the case. As part of the settlement, the defendants agreed to add a non-Time-owned movie-oriented pay service in lower Manhattan, which became Bravo.[160]

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156. Brewin, *supra* note 155, at 18; *see also Turner Files Antitrust Suit Against SNC*, MULTICHANNEL NEWS, Mar. 7, 1983, at 1.

157. *Turner Buys Satellite News Channel From Group W, ABC for $25 Million*, MULTICHANNEL NEWS, Oct. 17, 1983, at 1; *Turner, Group W Seeking Settlement of Lawsuit*, MULTICHANNEL NEWS, Sept. 26, 1983, at 1.

158. New York Citizens Committee on Cable TV V. Manhattan Cable TV, Inc., 651 F. Supp. 802 (S.D.N.Y. 1986).

159. Thomas Morgan, *Manhattan Cable Sued Over Access*, N.Y. TIMES, Jan. 30, 1986, at C20; *Suit Charges Manhattan Cable TV Unfairly Favors Time Inc. Services*, MULTICHANNEL NEWS, Feb. 3, 1986, at 3; *The People v. Time—and the City*, VILLAGE VOICE, Feb. 4, 1986, at 43.

160. New York Citizens Committee on Cable TV v. Manhattan Cable TV, Inc., 651 F. Supp. 802 (S.D.N.Y. 1986); *Manhattan Cable Agrees to Carry Non-Time*

I was greatly concerned about anticompetitive conduct resulting from vertical integration in the cable industry and the adverse effects on diversity of information over cable systems. Despite MANY's concern for diversity of information over cable channels, MANY sided with Time Warner because of the desire to preserve PEG access channels for their intended purposes. Simply put, the City's carriage of Fox News Channel and Bloomberg Television on Crosswalks is not consistent with those purposes.[161] What the City has done is not so much to promote diversity of information, but rather to favor a particular speaker—namely, Rupert Murdock—who is sympathetic and loyal to Mayor Giuliani. I point to other things the City might have done to better promote diversity of information.

For example, there are claims made—although I have not verified the accuracy of them—that Time Warner does not provide the requisite number of leased access channels.[162] I have not heard that the City has investigated these claims. Thus, instead of acting for the benefit of all unaffiliated programming services, they have selected one that is sympathetic to the current administration.

As to the misuse of the government access channels, as David mentioned, these channels are creatures of franchise agreements. Although Time Warner owns the cable system, there is something similar to an easement in these channels, as I suggested to the Supreme Court last term in the Denver Area case.[163]

If one considers the history of governmental access, which I concede is not well documented, one will see that

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Inc. Pays, MULTICHANNEL NEWS, Dec. 7, 1987, at 1; Eleanor Blau, *How Manhattan Cable Agreed to Pick Up Bravo*, N.Y. TIMES, Mar. 26, 1988, at 58.

161. *Amicus Curiae* Brief at 3-11; *Time Warner* (No. 96-9515).

162. Cable operators are required to set aside a certain percentage of channels for use by unaffiliated cable programmers. 47 U.S.C.A. § 532(b).

163. Denver Area Educ. Telecommunications Consortium v. FCC, 116 S. Ct. 2374, 2394 (1996) (Breyer, J., plurality); *id.* at 2410 (Kennedy, J., concurring in part and dissenting in part).

governmental access channels have traditionally served three purposes: (1) to provide a window on local government—a local C-SPAN, for example; (2) to cover local events—ball games, art festivals, etc.; and (3) to provide programming and audiences whose programming needs have been neglected by commercial television.[164]

Until very recently, the governmental access channels in New York City—now known as Crosswalks—have been used exclusively for noncommercial programming serving those purposes.[165] Traditional commercial programming

164. Over 100 cities, including Boston, Chicago, Los Angeles, and New York, require franchised cable operators to set aside channels for governmental access. James Barron, *Municipal Cable Debut: Don't Expect Much Glitz*, N.Y. TIMES, Feb. 4, 1992, at B3. Often called municipal channels, these channels are typically used to keep citizens informed about city government and aware of city services through, for example, live coverage of city council hearings, interviews of elected officials, informational programs on public health initiatives, and electronic community bulletin boards. *See, e.g.*, Davitian, *Town Meeting Television Moves Into the Information Age*, 15 COMMUNITY TELEVISION REV. No. 2, at 13 (1993). It is thus not surprising that municipal channels have been described as "local C-SPANs." *Id.* In many cities, municipal channels have also been used to provide programming for audiences traditionally underserved or neglected by commercial television, including children, the elderly, the disabled, and various ethnic groups. *See, e.g.*, Greenfield, *CITV: A Local Alternative to Traditional Television*, 16 COMMUNITY TELEVISION REV. No. 3, at 11 (1993). In addition, these channels have been extensively used for televised coverage of community events, ranging from high school football games to city-sponsored concerts. *Id.*

The National Association of Telecommunications Officers and Advisors ("NATOA"), which represents local government officials involved in telecommunications, annually issues "Government Programming" awards for the best programming on municipal channels in 36 categories, including: "Profile of a City/County;" "profile of a City/County Department;" "Public/Community Meetings;" "Election Coverage;" "Children;" "Seniors;" "Ethnic Experience;" "Community Events Coverage;" and "Sports Events Coverage." C. POLS ET AL., CABLE FRANCHISING AND REGULATION: A LOCAL GOVERNMENT GUIDE TO THE NEW LAW III-B-3 (1985).

Until recently, however, there has been a consensus among cities that municipal channels are off-limits to "traditionally commercial" programming. *Id.*

165. Municipal channels have existed in New York City almost since inception of cable service in the City. By the early 1980s, Channel L in Manhattan had become "a forum for City officials, municipal agencies, non-profit organizations and community boards to speak directly to New York citizens." MANHATTAN CABLE TV, COMMUNITY PROGRAMMING HANDBOOK 7 (1982). When the City launched Crosswalks in February 1992, William Squadron, then City Commis-

was not carried on those channels. In my opinion, the City's carriage of Fox News Channel and Bloomberg Television—traditionally commercial programming—on Crosswalks breaches the franchise agreement between the City and Time Warner.

Who's First Amendment interests are harmed by this? I have problems with the reversionary argument that Time Warner makes. But I would argue that there are real First Amendment rights harmed by the City's carriage of Fox News Channel on Crosswalks—most notably, those of subscribers. Subscribers are, after all, the third-party beneficiaries of the governmental access provisions in the franchise agreements. Subscribers are the intended recipients of governmental access programming.

In the New York Citizens Committee case, Judge Sweet ruled that cable subscribers had standing as third-party beneficiaries to enforce the priority-of-access provision in that agreement.[166] Likewise, I would argue that cable subscribers have standing to prevent misuse of the governmental access channels under both the franchise agreement and the First Amendment.[167]

The City's carriage of Fox News Channel on Crosswalks may also abridge the First Amendment rights of third-party programmers. By opening up the governmental access channels to third-party programmers, the City arguably converted those channels into a type of forum—a nonpublic forum perhaps, or a public forum. However, the City has been very selective, based upon viewpoint, in deciding which third-party programmers have access to that forum. Such

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sioner of Telecommunications and Energy, made clear that these "noncommercial channels" would provide cable subscribers with a "window on government." Barron, *supra* note 164, at B3; *City Sets Up Cable TV Network for Public*, NEWSDAY, Feb. 4, 1992, at 25.

166. *New York Citizens Committee on Cable TV*, 651 F. Supp. at 815-17.

167. The First Amendment affords protection not only to speakers but also to their audiences. *See, e.g.*, New York Citizens Committee on Cable TV v. Manhattan Cable TV, Inc., 651 F. Supp. 802, 819 (S.D.N.Y. 1986).

viewpoint-based selections are almost always constitutionally impermissible in public, and even non-public, forums.[168]

Finally, let me briefly comment upon the disparagement of governmental access programming. To a large extent, the claim that governmental access programming is inferior is based on myth, not fact. To the extent it is based on fact, the reason why governmental access programming in New York City, in particular, is inferior is because the Giuliani Administration has prevented higher-quality programming from being available.

I refer you to the November 11 issue of the *New York Observer* discussing the firing of Maria Rojas, who had headed up Crosswalks since its inception in 1992.[169] Ms. Rojas had apparently been nominated by the Fund for the City of New York for its Sloan Public Service Award because of the quality and variety of programming that had been made available over Crosswalks. On the day she was to be nominated for the award, Mayor Giuliani had her fired on twenty-four hours' notice. According to the New York Observer, Crosswalks thereafter became a very partisan operation.

So, when I hear that "really there isn't any good programming on Crosswalks to begin with, so why not carry Fox News and Bloomberg on Crosswalks," I think back to the days in the 1980s when cable operators were telling us that there was nothing good on public access channels. The reason public access programming was inferior was because cable operators were either not running, or misplacing, the tapes, and generally making it difficult for public access producers to produce and air their programs.[170]

MR. GOODALE: I want to turn to Mr. Goldin first, and

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168. *Id.* at 817-19.

169. *Even Before Murdoch, Rudy Had Crosswalks in City Crosshairs*, N.Y. OBSERVER, Nov. 11, 1996, at 1 [hereinafter *Even Before Murdoch*].

170. *Id.*

then I want to give Bob Joffe a full turn to respond. As a transition from Mr. Perry's discussion to your argument, I want to ask you: if you put aside all the Talmudic distinctions and arguments, isn't Mr. Perry incorrect in saying that this case is a classic First Amendment violation, the type of violation about which you need not think twice? And hasn't Mayor Giuliani made a choice of speaker for a particular place based on the content of his speech?

MR. GOLDIN: No. I think this is a great case to say you need not think twice, and I think many people have formed opinions without thinking twice, or even without thinking it through the first time.

First, I do not think that there is a body of law which says that when the government is in the business of running a forum—not a public forum, but simply a vehicle for the expression of views—that it must ignore content when it chooses the individuals who speak there. The facts of this case do not support the notion that Fox became the central issue here because of Rupert Murdoch's political support of the Mayor.

However, let us assume that were the case because, for the sake of time, we do not want to debate all the facts of the case. Even then, there are plenty of situations in which the government has an opportunity to select speakers: by virtue of the fact that it runs a television station or a college, or by virtue of the fact that it's sponsoring a public activity, an inauguration, or a hearing. It may use that opportunity in part to select people who have a particular political, artistic, or philosophical point of view, or on any other basis which reflects the content of a particular speaker's speech.

I do not believe that there is a body of law that says that when Kennesaw State College in Georgia decides to have Newt Gingrich teach a course, whatever the ethical problems with his doing that, that that is a First Amendment violation because there is a suggestion that it is his political orienta-

tion which dictated the choice of him as the person to teach the course. Or that when the President of the United States decides that he wants to have a particular poet, Maya Angelou, speak at his inauguration, the fact that he may have found her to be politically, or philosophically *simpatico* entered into the decision does not create a First Amendment violation.[171]

The issue, then, is whether people were prevented from speaking by virtue of their views. That issue can be addressed by looking at one particular time when one particular person spoke. The question to be raised is whether there were people who would have been on Crosswalks, but were systematically prevented from so appearing because the administration did not want to put them on. That record is not in this case; it did not happen. Nobody was aware of anybody, other than Fox and Bloomberg, who wanted to be on Crosswalks.

This is a classic First Amendment case: Time Warner claims that the First Amendment necessarily allows it to sup-

171. Consider, for a current example, the decision in *Finley v. National Endowment for the Arts*, in which the court split over the constitutionality of a provision, 20 U.S.C.A. § 954(d)(1) (West Supp. 1996), requiring the National Endowment for the Arts, in administering federal arts funding, to take into consideration "general standards of decency and respect for the beliefs and values of the American public." 100 F.3d 671, 675 (9th Cir. 1996). The majority held the provision barred by "the First Amendment's prohibition on content- and viewpoint-based restrictions. *Finley*, 100 F.3d at 681 (footnote omitted). The dissent argued that the First Amendment permits such legislative restrictions on the expenditures of funds, given that no suppression of speech, only a failure of subsidy, occurs. *Id.* at 684-91. Whether one takes the statute in question as a categorical content-based prohibition violative of the First Amendment or as a guideline for the preferred use of federal resources that raises no constitutional issue, the *Finley* dissent is surely correct that:

> If Congress hired a sculptor to create a bust for the Capitol, it could tell him to do a bust of Abraham Lincoln, and prohibit him from doing a bust of John Wilkes Booth. Or it could tell the sculptor to make busts only of people who had served in the Senate, or perhaps only of 'great' Senators, despite the vagueness of that criterion.

Id. at 689.

press speech.[172] Judge Cote granted Time Warner's motion for a preliminary injunction and Time Warner proclaimed a victory for the First Amendment. As Murray Kempton commented, "[the First Amendment] had not previously been taken to extend to shutting off two broadcasters. But then, as A. J. Liebling famously said, 'Freedom of the press is guaranteed only to those who own one.'"[173] That's the classic case here.

MR. GOODALE: Bob, you probably have several points you want to make, so I think you ought to feel free to give a full response.

MR. JOFFE: I will try, but I cannot give a full response—David's too good and it would take too long. But let me try first the facts and then some of the law or more theoretical matters.

First of all, there was no deal between Time Warner and Fox—Fox has never produced an agreement that was signed by either party. There obviously is a contract claim in the case. We are in the process of concluding discovery on that issue and will move for summary judgment promptly.[174] I think the evidence will be clear that there never was a deal between Time Warner and Fox.

Second, there is simply no evidence that MSNBC is a weaker competitor than Fox and that Time Warner had any incentive to choose MSNBC for that reason.[175] MSNBC is

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172. Time Warner's argument is that the City is violating its right not to speak. *See supra* note 59 and accompanying text.

173. Murray Kempton, *Watching the Media Monsters Wage War*, NEWSDAY, Oct. 30, 1996, at A44.

174. On May 16, 1997, Judge Weinstein granted Time Warner's motion for summary judgment dismissing Fox's fraud and estoppel claim. Fox News Network v. Time Warner, Inc., No. 96-4963 (E.D.N.Y. May 16, 1997). Fox had earlier withdrawn its contract claim as without legal foundation.

175. According to the *Time Warner* court:

> MSNBC and Fox News were each viable candidates [for satisfying the requirements of the FTC consent decree]. From Time Warner's perspective, MSNBC presented several advantages over Fox News. First, NBC had a reputation in the delivery of news built over decades of work in

owned by Microsoft and General Electric. They make even Murdoch look like relatively small potatoes. NBC has a worldwide reputation as a powerful news service, with people of worldwide reputation, such as Brokaw and others. It is really the Murdoch service that is the less experienced of the two services. If Time Warner were to carry the weaker service, I submit that Fox would have been the service to put on, not MSNBC.

Finally, as to this cooked-up claim about Fox' being carried in New York because of the jobs and so forth, Fox publicly committed to becoming a news service and to being located in New York long before it commenced negotiations with Time Warner. If being on in New York was necessary to its survival, or to its getting started, it would be illogical to publicly commit before opening negotiations for carriage. So, I think that argument is just pretext.

Turning to some of the more interesting legal or theoretical arguments, however, the Supreme Court has made it clear that a cable operator is a First Amendment speaker,[176] just like a newspaper, and thus is fully protected by the First Amendment.[177] The only issue is what level of scrutiny applies to the regulation. For example, if the government came to the *New York Times* and said, "We are going to take some of your space and open it up to other speakers." Now, the Supreme Court ruled in the Must-Carry case[178] that, given

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> the field, while Fox had no established national television news organization. Second, conversion of America's Talking would give MSNBC immediate access to all of those subscribers without the need to enter into new contracts with cable operators. Third, an agreement with MSNBC resolved several outstanding commercial disputes between NBC and Time Warner without the need for litigation.

943 F. Supp. at 1378-79.

176. Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) (citing Leathers v. Medlock, 499 U.S. 444 (1991)).

177. *Id.* ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of speech and press provisions of the First Amendment.").

178. The "Must-Carry Case" is a popular name for *Turner Broadcasting*. *See supra* notes 3, 60, 126-131 and accompanying text (discussing the Must-Carry

the context of that particular case, carrying the broadcast stations is subject to intermediate scrutiny, and remanded the case to the district court because the lower court had not sufficiently examined whether it was justified.[179]

The PEG channels are not a creation of the City. This notion that somehow we sat down and created these channels together is just totally fictitious. PEG channels are Time Warner's property, including the wire, for which it paid to have installed. The channels are as much Time Warner's as the *New York Times* belongs to the *New York Times* before it sells it.

Now, it is true there is disruption when you rip up a street, and the City certainly is entitled to regulate and minimize that disruption. But just because trucks run up Sixth Avenue with the *New York Times* in the back does not give the City the right to regulate what is in the paper. It gives the City the right to say what speed the trucks go. That is essentially the case here.

Now, it is absolutely true that the D.C. Circuit has held that the PEG statute is not unconstitutional on its face,[180] but it has also said that an as-applied challenge has not been raised and is open to anyone.[181] That essentially is one of our arguments here: that the PEG channels, if they are misused, violate Time Warner's First Amendment right.[182] They are Time Warner's property that the City may use only when it acts in accordance with the statute. When it exceeds the statute, the City is infringing on Time Warner's speech. Therefore, it is our First Amendment rights that are at stake.

Moving to the example used in court today, Judge Newman asked my partner whether a First Amendment violation

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rules).

179. *Turner Broadcasting*, 512 U.S. at 668.

180. Time Warner Ent. Co. v. FCC, 93 F.3d 957, 973 (D.C. Cir. 1996).

181. *See id.*

182. Brief for Appellee at 52, Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996) (No. 96-9515(L)).

would follow were the Mayor to hold daily press conferences denouncing Time Warner for not carrying Fox. Well, of course, the answer is no. Why is this different? Because, in this case, the Mayor is not holding press conferences; he is using our channels, which the City has a limited right to use, beyond the way they are allowed to use them. He is using those channels for something other than a PEG purpose under the Cable Act or the way the franchise agreement allows them to be used.[183] Once he goes beyond the permitted use, he is using Time Warner's property. The Mayor is forcing us to speak on those channels in a way not permitted by contract or by law. That is a First Amendment violation.

The second First Amendment violation is this: once you put two news channels on Crosswalks, it greatly diminishes our ability to put other news channels on our commercial channels.[184] There is a limit to how much news you can put on. If Fox and Bloomberg are on Crosswalks, we are less able to put news on our other channels. Now, that is coercion—not because it is merely pressure, like holding a press conference, but rather, because it is misuse of our speaking rights. It is taking our channels and using them in an unpermitted way. That is the difference between what is going on here and the hypothetical Judge Newman gave my partner.

Let me make one last point about Bloomberg. Bloomberg was obviously a cover here. There is no question that Judge Cote found, on ample evidence, that the only reason the City picked Bloomberg was so that it would not be naked and exposed for doing what it was doing—picking a political ally.[185]

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183. 47 U.S.C. § 531.

184. Appellee's Brief at 52, Time Warner Entertainment Co. v. FCC, 93 F.3d 957 (D.C. Cir. 1996) (No. 96-9515(L)).

185. According Judge Cote:

> I . . . find that the City would not have chosen to place BIT on a PEG channel but for its decision to place Fox News on a PEG channel.

Before you are too willing to accept my learned adversary's view that the City can put on whatever it wants, suppose the City has filled all five Crosswalks channels with right-wing Murdoch allies with commercial-like programming, just like Fox News, of one type or another. Does anyone doubt that that would be a violation of proper PEG use? It just seems to me it is not even arguable.

MR. GOODALE: Can we hear from Bloomberg? Are you just a cover?

MR. ROSENTHAL: There is a theory that the City kept Bloomberg in the case to cover up the fact that it chose Fox for improper purposes.[186] There are no improper purposes, but the City says, "We'd better put Bloomberg on or else we'll really look bad." There is no evidence of that or of any deal of that type, but that has been the position from day one in this case.

Let me address what Mr. Joffe just said about the five right-wing channels. First of all, I am not here to defend Fox, and there are big differences between Bloomberg and Fox—among other things, that Michael Bloomberg was clearly not a Giuliani supporter in any way, shape, or form. But let's just assume that the City decided to put five right-wing stations on Crosswalks. There are a lot of things that could happen here.

The public could say, "Hey, wait a minute. What's going on here? The Mayor, who's up for reelection next year, is using Crosswalks channels improperly." The public can say, "I'm not going to vote for the guy anymore. Let's vote for a guy who's going to use the Crosswalks channels for a proper purpose, for putting educational and governmental pro-

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> Bloomberg's request to the City highlighted how selective the City was in its treatment of Fox News, and thus gave the City no alternative but to accommodate Bloomberg.

Time Warner, 943 F. Supp. at 1384.

186. *See Time Warner*, 943 F. Supp. at 1388; *see also* Ellis Simon, *N.Y. Says It Will Keep Heat on Time Warner*, ELECTRONIC MEDIA, Nov. 11, 1996.

gramming on them, what we think is proper." The fact that there may be an objection by the public to putting five right-wing channels on the City's channels does not give Time Warner First Amendment rights.

Also, maybe Mr. Perry or one of his groups says, "Hey, wait a minute. We are the left-wing journalists. We cannot get on Crosswalks anymore. We have gone to Crosswalks, we have said 'put us on the air. We are left-wing.' But no, the City has given it all to right wing. That is not reasonable. It violates the franchising law.[187] We will bring an Article 78[188] proceeding to make the City allocate the Crosswalks channels fairly." That is also a possible scenario. But, there again, it is not Time Warner's position to decide that the City has to use its channels for a particular purpose.

Mr. Joffe talks about stricter intermediate scrutiny here. As an example, one of Time Warner's witnesses in this case was asked, "would it be okay if the City put weather information on Crosswalks?" The witness said, "Let's say only if the weather were related to a high school sporting event, a governmental purpose"—I guess high school sports are educational/governmental in some respects. If the City decided to put local weather on Crosswalks, could Time Warner argue to a court and that the City had to show under a strict scrutiny standard—that there was a compelling reason why it had to put weather on its Crosswalks channels, and there was no less-restrictive way of doing so—or intermediate scrutiny—that it was reasonably tailored to meet the goals? It is absurd to think that Time Warner can challenge every City programming decision because Time Warner feels that somehow this is not what Time Warner wants, when it is clear from the statute[189] these are not Time Warner's channels.

187. 47 U.S.C. § 544.
188. N.Y. CIV. PRAC. L. & R. Art. 78 (McKinney 1996 & Supp. 1997).
189. 47 U.S.C. § 531.

MR. GOODALE: Mr. Perry, I wonder, after hearing that, whether the PEG access scheme, although well-meaning, creates more problems than it solves? I find it a little unusual to think of one who has editorial choice, in the hypothetical posed of five right-wing channels against four left-wing channels or whatever, and that individual is an elected official. That's the way our system has worked for a long time in this country.

One suggestion is that you effectively put the editor up for a popular vote. It seems to me you would have a system where the Editor of the *New York Times*, who uses AP, UPI, or whatever, would be elected every three, four, or five years. I wonder, when we get to this level of discussion, whether the whole public access scheme makes any sense as applied.

MR. PERRY: Let me separate them.

MR. GOODALE: I meant to cover all three.

MR. PERRY: I would separate them because public access channels, as they have traditionally been understood, are supposedly available on a "first-come/first serve" basis.[190] In many, if not all, parts of the City, the channels are administered by community access organizations, such as Manhattan Neighborhood Network. I have a few problems with these community access organizations because I think that they are getting into content-based decisions. But, in

190. *Time Warner*, 943 F. Supp. at 1372 ("Public channels are available to individuals and community groups on a first-come, first-served basis.") (citing Wally Mueller, *Controversial Programming on Cable Television's Public Access Channels: The Limits of Government Response*, 38 DEPAUL L. REV. 1051, 1060 (1989)); Berkshire Cablevision of Rhode Island v. Burke, 571 F. Supp. 976, 980 (D.R.I. 1983), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985) (describing "public" as those channels "available for use by members of "available for use by members of the general public on a first-come, first-served nondiscriminatory basis;" "educational" as channels "available for use by local educational authorities and institutions (including but not limited to school departments, colleges and universities but excluding commercial educational enterprises);" and "government" as channels "available for use by municipal and state government").

theory, public access channels have no editors. They are like traditional public forums: they are the electronic soapbox,[191] so you do not have that problem.

With educational and governmental channels, you do have that problem because some local government institutions will necessarily have to select the programming. I really do not have a problem with making generic decisions on the types of programming that are carried on these channels—local news, weather, etc.; but when you select within that generic category a particular speaker because you like that speaker's viewpoint and you reject other speakers whose viewpoints you dislike, that is when I have a problem.

This was not a point I made in my brief, by the way. It was a point, though, that was made by the New York Civil Liberties Union quite eloquently in their brief below.[192] In order to prevent misuse and preserve educational and governmental access channels for their intended purposes, I think the principle of viewpoint neutrality has to be followed.

Does that answer your question, Jim?

MR. GOODALE: I think it does, and it clarifies my question. Indeed, I slipped by lumping together the three channels—"P" for public, "E" for educational, and "G" for governmental. I think the proper inquiry—in terms of whether

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191. As the House Report explains:

> Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas.

H.R. REP. NO. 934, *supra* note 50, at 30, *reprinted in* 1984 U.S.C.C.A.N. at 4667.

192. *Amicus Curiae* Brief for New York Civil Liberties Union, Time Warner Cable of New York City v. City of New York, 943 F. Supp. 1357 (S.D.N.Y. 1996); *see Time Warner*, 943 F. Supp. at 1365-66 (noting that the New York Civil Liberties Union filed a brief that was supportive in some respects of the positions of Time Warner, the City, and Bloomberg).

they are constitutional—is to split them up the way you have indicated. The problem of speaker preference is eliminated if you have a "first come/first serve" situation.[193]

As you noted, the problem comes with the "E" and the "G" channels—particularly the "G"; once the educational or governmental entity starts making choices, the government is making choices among speakers, which is the problem that I started to put out to the panel.

But what is the answer? I think some people would have thought the governmental access channel may be unconstitutional, no matter how you program the choices.

MR. PERRY: The First Amendment does not protect government speech, but it does not prohibit government speech either. I frankly do not have a problem with the government speaking and enunciating its policies.

MR. GOODALE: I was wondering whether you had any problems, no matter how you hypothesize it, with governmental choice, though, in the governmental channel?

MR. PERRY: I do have a problem when the government, beyond selecting generic categories of programming that will be aired, gets into micromanagement and viewpoint selection or suppression. That's when there is a problem.

MR. GOODALE: Go ahead, Bob.

MR. JOFFE: I do not think this problem really is as enormous as most of the people here have suggested or as Judge Newman seemed concerned might be the case.[194] I do not think every programming decision is going to raise constitutional, statutory, or even franchise issues. Let's face it, there are 9,000 cable systems around the United States. I

193. According to the original cable regulations adopted in 1972, a "public" access channel was one "available without charge on a first-come, first-served nondiscriminatory basis." Cable Television Report and Order, 36 F.C.C.2d 143, 190, *aff'd on recon.*, 36 F.C.C.2d 326 (1972).

194. *See* Liberty Cable Co., Inc. v. City of New York, 60 F.3d 961 (2d Cir. 1995).

cannot imagine how many PEG channels there are when you add them all up.[195] But, as far as I know, this is the first and only case attacking misuse of those PEG channels.[196]

I think most people and most cable systems have a clear picture of what proper PEG use is; they do not stray over the line, and the cable operator has no reason to challenge those choices. In fact, the Cable Act is very clear that if it is proper PEG use, it is none of the cable operator's business.[197] The only time it becomes an issue, whether you call it a constitutional issue, a statutory issue, or a franchise issue is when the municipality goes way over the line. As far as I know, this is it. It has happened once. Hopefully, if the court sets the right decision here, it will not happen very often again, precluding daily, weekly, or monthly trips to the courthouse.[198]

MR. GOODALE: Mr. Goldin, do you want to respond?

MR. GOLDIN: We have been hearing this argument a lot in this case. That is the analytic approach, which says essentially "I do not have a theory; I cannot draw the line, but I will know it when I see it." We do not have an explanation for what is wrong here, either under the statute[199] or the First Amendment. In lieu, what we have is the blanket statement that this is an extreme case, so this is no good. But there is no theory that is attached to that. There is no dividing line.

MR. JOFFE: This is commercial programming. The Fox Channel and the Bloomberg Channel are identical—or virtually, in Bloomberg's case, identical—to the commercial networks sold all around the country. The Fox Network is

195. *But see Time Warner*, 943 F. Supp. at 1367 ("[A]s of 1990, only sixteen percent of all cable systems nationwide had public access, and eleven percent had governmental access.").

196. *Id.* at 1364 ("[T]he exercise of government power at issue here is without precedent.").

197. *See* 47 U.S.C. § 531.

198. *But see Time Warner*, 943 F. Supp. at 1364 ("So long as there remains a limitation on the number of cable channels, and intense competition over access to this valuable resource, there is a potential for a dispute of this nature to rise.").

199. 47 U.S.C. § 544.

sold now to seventeen million subscribers. It's a commercial network. You cannot confuse the Fox Network with PEG programming. You cannot confuse the Bloomberg Network with PEG programming. This is not a "I know it when I see it; I can smell, taste, and feel it." This is simply commercial programming. If the letters P, E, G and the word "commercial" mean anything, they do not mean the same thing. That is the line that David would try to obliterate.

MR. GOLDIN: All right, so this issue of selecting a particular speaker who represents a particular point of view is not the issue at all. It turns out that what we should have been talking about all along is whether or not what was being put on PEG was the same kind of programming that could also be found appearing elsewhere on non-PEG channels. It turns out in this case that, yes it was, and yes it is on PEG channels all around the country.

MR. JOFFE: I think you lose for at least two reasons. One, this is commercial programming, not PEG. But even if it were somehow acceptable PEG programming, when you first try to take that acceptable PEG programming and you threaten Time Warner with all sorts of dire consequences—that it is going to lose its franchise, it is not going to get merger approval, if it does not carry the programming—and, as a favor to your political supporter, you then take what would otherwise be perfectly acceptable programming and you put it onto a PEG channel, even though it might otherwise be acceptable, it is now improper. But in the case at bar, that is not the issue because it is not PEG programming.

MR. PERRY: Let me add that I think there are two First Amendment harms here.[200] First of all, the carriage of Fox News and Bloomberg displaces programming on local government and local events that would otherwise be carried on those channels. Yes, some of that programming would be repeat programming, but repeat programming gets carried

200. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2467 (1994).

on commercial channels all the time. We do not all watch television at the same time, and so there is an audience for this programming that provides a window on local government. That is one harm: the displacement of programming that should be carried on those channels.[201]

The second harm is the preference for certain speakers, certain viewpoints, over other speakers. Now, I have heard it argued that, "Bloomberg and Fox were the only ones that came to us." Well, other programmers did not know the City was receptive to such a deal. Maybe if they had known, they also would have applied. In a sense, then, the selection of Fox and Bloomberg was also the exclusion of these other programmers.[202]

MR. JOFFE: Let me just add one point. There was no neutral process here to select these two channels. It is not like the City put out an RFP and said "would anyone who wants to program these channels please come forward." What they did was, in the dead of night, got a letter from the Fox people and struck a deal with them. Realizing that it might help give them some cover, they hauled in the very innovative and clever Bloomberg. This was all done within the course of a couple of days.

We had thirty other programmers asking for our limited channel space. If the City had put up a sign and said "Apply Here," I assume at least those thirty, if not thirty more, would have signed up; maybe some kind of process could have been worked out with proper PEG programming. But that is not this case.

MR. GOODALE: All right. I want to see how courageous the litigators are. You all were there in court today. Who won?

MR. JOFFE: I will be happy to take my crack at it, and I

201. Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510, 2516 (1995); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 209, 230 (1987).

202. *Rosenberger*, 115 S. Ct. at 2516; *Arkansas Writers' Project*, 481 U.S. at 230.

will not go through the obligatory—and I think each of the speakers should also consider themselves free from the obligatory position that they should have won on all points. If I were to guess where they would come out, I would say they will affirm the decision below on the grounds of the franchise and the Cable Act issues, and they will not reach the constitutional issues, just because courts prefer not to reach such issues if they can avoid them.[203] If they were to wade into those troubled waters, I do not have any doubt they would come out our way.

MR. GOODALE: Mr. Goldin, you are next.

MR. GOLDIN: I agree with what I think Bob is trying to intimate, which is that Time Warner's First Amendment argument is not going over. I think that, for the reasons I was describing before, the court was having considerable difficulty with it. I think that the court was having considerably less difficulty, which is also what Bob is saying, at this stage in their reflections with the franchise agreement and the Cable Act arguments. I suspect that walking into the courtroom they saw those as being stronger arguments.

As the court reflects on those—and this takes us into areas that we really have not discussed today, so I am not going to go through the analysis—I think they will see that there are problems with Time Warner's arguments on those points as well. So, I am cautiously optimistic after today's argument.

MR. GOODALE: Mr. Rosenthal?

MR. ROSENTHAL: I would echo what David said. I think it is pretty clear that the court is not going to rule in favor of Time Warner on the First Amendment issue. The statutory issues and the franchise agreement issues are more difficult. There is also the possibility of a remand to the district court for a full hearing on the question of what is ap-

203. *See Time Warner*, 943 F. Supp. at 1385.

propriate programming on PEG. There could be a remand on the question of whether Time Warner has been damaged. In order to get a preliminary injunction, you are supposed to show irreparable harm.[204] If there is a First Amendment violation, harm is often presumed;[205] without the First Amendment, though, you have to show actual harm.[206] It is not clear Time Warner has shown that.

So, there are a lot of different ways that the court could come out in the middle here, and we may not have seen the end of this case. So, we may be back here a year from now with a full record arguing this again.

MR. GOODALE: Mr. Perry?

MR. PERRY: I sensed that the panel was leaning in Time Warner's favor on the statutory and franchise agreement claims, although, as the other speakers have noted, there is still the question of does that justify a preliminary injunction because of the irreparable harm standard. I also sensed that the panel was skeptical of the First Amendment argument, too.

MR. GOODALE: Well, ladies and gentlemen, what do we have? We have a panel on a case the day that it is argued; we have panelists who actually predicted how it is going to come out. What more could we ask? Thank you for listening.

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204. *Id.* at 1385 (citing NAACP v. Town of East Haven, 70 F.3d 219, 223 (2d Cir. 1995)).

205. Fullilove v. Klutznick, 448 U.S. 448, 507 (1980). As Judge Cote explained: "the assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits. Rather the plaintiff must show 'a chilling effect on free expression.'" *Time Warner*, 943 F. Supp. at 1384-85.

206. *Turner*, 114 S. Ct. at 2469-70 (citations omitted).