The Changing Face of Broadcaster Responsibility Under the Public Interest Standard

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INTRODUCTION

During the last twenty years, the Federal Communications Commission (FCC) has injected more substance into the "public convenience, interest or necessity" standard of the Federal Communications Act of 1934.1 Because of the FCC's increased involvement with public interest, the duties of broadcast licensees have expanded. This expansion is evidenced by the FCC's adoption of the personal attack rule2 and the political editorializing rule,3 the extension of the fairness doctrine4 to paid announcements,5 the adoption of the quasi-equal opportunities corollary,6 the prime time access rule,7 and the family viewing policy.8 These federally-imposed responsibilities enhance the possibility of governmental infringement of broadcaster free speech. This article presents an overview of broadcaster responsibility under the public interest standard while examining the tension between the broadcaster's First Amendment rights and the FCC's authority flowing from the implementation of that standard.

PUBLIC INTEREST STANDARD

The FCC is empowered to oversee all broadcasting activities to ensure that the rights of the public are safeguarded.9 This emphasis on the public interest began under the Radio Act of 1927,10 which compelled the Radio Commission to consider the scope, character

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2. 47 C.F.R. §§ 73.123(a), (b), 73.300(a), (b), 73.598(a), (b), 73.679(a), (b) (1977); see note 45 infra and accompanying text.
3. 47 C.F.R. §§ 73.123(c), 73.300(c), 73.679(c), 76.209(d) (1977); see note 55 infra and accompanying text.
7. 47 C.F.R. § 73.658(k) (1977); see note 126 infra and accompanying text.
9. 47 U.S.C. §§ 303(a), 307(a), 309(a) (1962) refer to the FCC's standard of "public convenience, interest or necessity" which it must uphold.
and quality of services offered by a licensee to the public. The FCC has expanded the public interest content of its licensing criteria to include such additional elements as the "ability of the licensee to render the best practicable service to the community reached by his broadcasts" and the "maximum diffusion of control of the media of mass communications." These general factors are weighed by the FCC in assessing a broadcaster's performance under the public interest standard.

The FCC requires all broadcasters to be licensed to effectuate its control over their activities in the limited broadcast spectrum. This federal licensing system was found to be essential to the orderly development of broadcasting in National Broadcasting Co. v. United States. Twenty-six years later, the Supreme Court, in Red Lion Broadcasting Co. v. FCC, concluded that licensing was necessary for the maintenance of the public's freedom of expression. The Court also considered licensing essential to assure that broadcasters function consistently with the purposes of the First Amendment since the rights of viewers and listeners are paramount to those of broadcasters.

It is well established that a broadcaster has no ownership interest in its segment of the broadcast spectrum. The FCC merely grants a broadcaster a license for the use of the airwaves. Because the licensee possesses only a temporary privilege to use these airwaves, it is, in effect, a trustee with fiduciary responsibilities to the public. As a trustee of the public airwaves, the licensee has a non-delegable duty to serve the public's interest. Of course, the broadcaster's fiduciary responsibility is not that of a typical trustee since the broadcaster operates in the public interest as well as for its own economic benefit. This responsibility requires the broadcast licensee

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16. Id.
17. Id. at 394; 47 U.S.C. § 301 (1962).
18. Id. at 399; McIntire v. William Penn Broadcasting Co. of Philadelphia, 151 F.2d 597 (3rd Cir. 1945).
to discover and meet the needs of its broadcast area. Only then can the broadcaster serve the public's interest.

FIRST AMENDMENT CONCERN

Although the broadcast licensee has a duty to the public to broadcast in its interest, the licensee still has a First Amendment right to free speech. The possibility of infringement of free speech always exists when the government regulates an area involving this right. Because freedom of speech is a fundamental right, any federal curtailment will be strictly scrutinized. The governmental interest and the reasons therefor will be weighed against the First Amendment interest of the burdened party and the availability of less onerous alternatives. The interests of the broadcaster and the FCC often clash when the FCC acts in the public interest. In articulating the public interest standard, the FCC has developed doctrines governing particular aspects of broadcaster activity. One of the most significant of these aspects is the fairness doctrine.


1. (1) opportunity for local self-expression,
(2) the development and use of local talent,
(3) programs for children,
(4) religious programs,
(5) educational programs,
(6) public affairs programs,
(7) editorialization by licensees,
(8) political broadcasts,
(9) agricultural programs,
(10) [sic] news programs,
(11) weather and market reports,
(12) sports programs,
(13) service to minority groups,
(14) entertainment programs.

44 F.C.C. at 2314.

21. At a minimum, the task of public service requires that the licensee know the content of its programs. Yale Broadcasting Co. v. FCC, 478 F.2d 594, 600 (D.C. Cir. 1973), cert. denied, 414 U.S. 914 (1973).


FAIRNESS DOCTRINE

One of the first principles formulated by the FCC under the public interest standard was the fairness doctrine.27 The FCC defines this doctrine as a two-fold duty: (1) covering public issues of importance to the community served; and (2) presenting opposing viewpoints on such issues in a fair and accurate manner.28 The use of federal authority to compel licensees to broadcast public issues can be viewed as an abridgment of their First Amendment rights to free speech.

A licensee’s discretion in programming is a function of editorial judgment which is protected by the First Amendment.29 However, a fundamental purpose of the First Amendment is to promote “uninhibited, robust and wide-open” debate on public issues,30 preserving and promoting the informed public opinion, necessary for the continued vitality of our democratic society and institutions.31 The public’s right to have broadcasters function consistently with these First Amendment goals is well-recognized.32 Since the FCC is the guardian of the public interest, it is obligated to require broadcasters to provide adequate coverage of public issues.

Essentially, the fairness doctrine was adopted by the FCC to ensure preservation of the public’s rights by broadcasters. This doctrine, which has the approval of both the Supreme Court and Congress,33 applies whenever a viewpoint on an important controversial


The doctrine was applied to license renewals and construction permits under the Radio Act of 1927. Trinity Methodist Church, South v. Federal Radio Comm’n, 62 F.2d 850 (1932), cert. denied, 288 U.S. 599 (1933). At that time, the licensee was under a duty to present the views of others, and to present them fairly, as well as to refrain from expressing its own personal views. Mayflower Broadcasting Co., 8 F.C.C. 333 (1940). The latter requirement has since been deleted under the modern interpretation of the fairness doctrine. Columbia Broadcasting System, Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 111 (1973).


29. FCC Editorializing Report, supra note 4 at 1258.


33. Id. at 385. The Red Lion Court found that the adoption of the fairness doctrine was a legitimate exercise of FCC statutory authority. Congress approved the doctrine when it incorporated it into section 315 of the Communications Act, the “equal time for political candidates” provision. 47 U.S.C. § 315(a) (1978 Supp.).
issue is presented in an obvious and meaningful fashion.\textsuperscript{34} The broadcast licensee must then afford a reasonable opportunity for opponents to express their viewpoints, even if that opportunity means providing free broadcast time.\textsuperscript{35}

Under the fairness doctrine, a broadcaster has broad discretion in the selection, programming and identification of important issues,\textsuperscript{36} subject only to FCC review for good faith and reasonableness.\textsuperscript{37} The FCC views strict compliance with the fairness doctrine as necessary for broadcasting in the public interest.\textsuperscript{38} However, the FCC must maintain a balance between the "preservation of a free competitive broadcast system . . . and the reasonable restriction of that freedom inherent in the public interest standard. . . ."\textsuperscript{39} Besides the inherent limitation on regulating in the "public interest", the express prohibition in section 326 of the Communications Act precludes the FCC from exercising any censorship of the airwaves.\textsuperscript{40} The FCC is in a difficult position since it must refrain from encroaching on broadcaster free speech and yet must regulate the airwaves to prevent pandemonium and promote an "uninhibited

\textsuperscript{34} FCC Fairness Report, supra note 28 at 13. As a practical matter, most fairness complaints concern violations of the second duty requiring licensees to broadcast opposing views on important controversial issues. In re Complaint of Public Communications, Inc., against ABC, et al., 50 F.C.C.2d 395, 397 (1974). As to the first duty requiring the broadcast of important public issues, only one complaint charging its violation has been sustained because the FCC is unwilling to become involved in the subjective selection of public issues for broadcast. In re Complaint of Patsy Mink, 59 F.C.C.2d 987 (1976).

The practical requirements of this doctrine include identifying major viewpoints (FCC Fairness Report, supra note 28 at 15), obtaining partisans of opposing viewpoints (Id.), and determining the percentage of the broadcast day to devote to the discussion of public issues (FCC Editorializing Report, supra note 4 at 1247).

\textsuperscript{35} FCC Fairness Report, supra note 28 at 13-14. Several methods of implementing this doctrine are (1) communication to a group that the broadcaster knows or has reason to know holds a contrasting viewpoint and an offer of the use of his facilities, along with a summary of the original broadcast; (2) consultation with community leaders; or (3) announcements at the beginning or ending of programs that an opportunity will be made available for the expression of opposing viewpoints from responsible individuals.

The obligation to provide free broadcast time after the presentation of one side of a controversial issue is set forth in Cullman Broadcasting Co., 40 F.C.C. 576, 577 (1973) [hereinafter cited as the Cullman Doctrine].

\textsuperscript{36} FCC Editorializing Report, supra note 4 at 1247.

\textsuperscript{37} FCC Fairness Report, supra note 28 at 13.


\textsuperscript{39} FCC 1960 En Banc Report, supra note 20 at 2309.

\textsuperscript{40} 47 U.S.C. § 326 (1962) provides that:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.
marketplace” of ideas.\textsuperscript{41} As the ultimate arbiter of the public interest, the FCC walks a “tightrope” between preserving the First Amendment interests of the public and upholding the editorial independence of the licensee.\textsuperscript{42}

The FCC’s adoption of several specific rules applying the fairness doctrine has intensified conflict between the broadcasters who desire complete independence in their programming discretion and the FCC which seeks adequate control to protect the public. Apart from the infringement of broadcaster discretion, these rules do provide definite guidelines by which licensees may gauge the acceptability of their programming. The first of these rules are the personal attack rule,\textsuperscript{43} and the political editorializing rule.\textsuperscript{44}

**PERSONAL ATTACK RULE AND POLITICAL EDITORIALIZING RULE**

The personal attack rule provides that when an attack on the honesty, character or integrity of a person is made during the presentation of an important, controversial issue, the broadcaster must transmit within one week to the attacked person a transcript of the attack, the date and time of its broadcast, and an offer to respond on the broadcaster’s facilities.\textsuperscript{45} This rule codifies the existing FCC policy of encouraging controversial programs and providing transcripts to attacked persons.\textsuperscript{46} Because the FCC promulgated this

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\item \textsuperscript{41} 395 U.S. 367, 375-76 (1969).
\item \textsuperscript{43} 47 C.F.R. §§ 73.123(a),(b), 73.300(a),(b), 73.598(a),(b), 73.679(a),(b) (1977) represent the same regulations for AM radio, FM radio, noncommercial educational FM radio, and origination cablecasting over cable TV systems, respectively.
\item \textsuperscript{44} 47 C.F.R. §§ 73.123(c), 73.300(c), 73.679(c), 76.209(d) (1977) represent the same regulations for AM radio, FM radio, TV stations, and origination cablecasting over cable TV systems, respectively.
\item \textsuperscript{45} (a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee’s facilities. (b) The provision of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).
\item \textsuperscript{46} 47 C.F.R. § 73.123(a),(b) (1977).
\end{itemize}
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rule under its rule-making authority, violations will subject broadcasters to monetary penalties, as well as administrative sanctions.

Broadcasters are now required to allow rebuttal time to the attacked person. Heretofore, broadcasters had used their discretion in providing opportunities for response to personal attacks even though the FCC had outlined this responsibility in an earlier case. The interest of the public in the availability of rebuttal time for its attacked members is obvious. This rule does not cover attacks by political candidates because they are protected by the equal time provision and the fairness doctrine. Only a slight burden is imposed upon broadcasters who, as fiduciaries, have an overall duty of serving in the public interest. The infringement on broadcaster free speech is minimal since the FCC is only regulating access time to attacked persons after the broadcaster has unqualifiedly exercised its programming discretion. While there is little conflict in this particular area, this rule serves as the foundation for confrontation over other duties.


51. 47 C.F.R. § 73.123(b)(2) (1977). The other exceptions are set forth in (b)(1) and (b)(3).


53. Id. at (a). See also the Note to 47 C.F.R. § 73.679(b) (1977).
Another specific duty under the fairness doctrine which limits the licensee's programming freedom is the political editorializing rule. Under this rule, a licensee broadcasting a political editorial must provide opposing candidates with a transcript or tape of the editorial, the date and time of its broadcast, and an offer of time for the candidates or their spokesmen to respond. If the editorials are to be broadcast within 72 hours of an election, then the broadcaster must comply with these provisions far enough in advance of the election to allow the other candidates a reasonable opportunity to respond. A broadcaster must air endorsements of opposing candidates after it has declared its preference for a legally qualified candidate.

This rule and the personal attack rule were upheld by the Supreme Court as authorized administrative regulations, not violative of a broadcaster's freedom of speech. The Supreme Court stated that the First Amendment did not grant broadcasters the right to prevent others from broadcasting on their facilities or the right to monopolize a scarce resource. This regulation prevents a broadcaster from airing only its own views or making broadcast time available to the highest bidders. It emphasizes that private censorship, as well as governmental, is not countenanced by the First Amendment.

The governmental interest in an informed public requires that responses to personal attacks be allowed and that political opponents of endorsed candidates be given a chance to communicate with the public. This affirmative action by the broadcaster is necessary to comply with the fairness doctrine and hence with the public interest standard. These rules reflect a desire to assure that the public

54. 47 C.F.R. §§73.123(c), 73.300(c), 73.679(c), 76.209(d) (1977).
55. (c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: provided, however, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.
47 C.F.R. § 73.123(c) (1977).
56. Id. at the proviso.
58. Id. at 396.
59. Id. at 389.
60. Id. at 390.
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public perspective is balanced where possible. They impose only a slight burden on broadcaster discretion. Since neither rule prevents a licensee from broadcasting what it deems in the public interest, there is no direct abridgment of a licensee’s free speech. Any indirect infringement can be seen as an incidental effect of FCC regulation of the broadcasting function.61

Commercial Speech

The fairness doctrine has been extended by the FCC to paid announcements which “obviously and meaningfully” present important public issues.62 The distinction between the broadcaster as a political observer and commentator63 and the broadcaster as a guardian of the public forum64 is most pronounced in the area of advertising. The broadcaster must raise revenues in order to preserve this forum for the public’s exercise of its First Amendment rights as well as to maintain a profitable operation. Commercial speech has been accorded First Amendment protection65 but it has not been held to be “wholly undifferentiable” from other forms of speech.66 Regulation, and hence infringement, may be permitted to a greater degree with this type of speech than with the more traditional types.67 Greater broadcaster restrictions may be permissible so that the public will be protected from false, misleading and deceptive advertising. Since verification of the truth of advertisements is easier than verification of the truth in news reporting or political commentaries,68 minor inaccuracies may not be tolerated because of minimal concern with chilling commercial speech.69

61. See Branzburg v. Hayes, 408 U.S. 665, 682-83 (1972) where the Court maintained that incidental burdens imposed on the press are not violative of the First Amendment. Publishers have no special immunities from the application of laws nor special privileges to invade the rights of others. Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937). Similarly, broadcasters incidentally burdened under FCC regulation have no greater First Amendment rights than the press.


64. FCC Editorializing Report, supra note 4 at 1258; see note 15 infra; 412 U.S. at 117.


66. 425 U.S. at 771, n.24. Accord, Mr. Justice Stewart’s concurring opinion, supra, at 779, where he points out that the “differences between commercial price and product advertising . . . and ideologcal communication” permit regulation of the former under the First Amendment but not of the latter. See also Young v. American Mini Theatres, Inc., 427 U.S. 50, 68-69 (1976).

67. Id. at 771-72.

68. Id. at 772.

A further distinction can be made in this area between editorial and commercial advertising. In editorial advertising, which includes political advertising, the broadcaster is acting within its journalistic role as observer and commentator when it is providing a balanced coverage of important public issues. In commercial advertising, the broadcaster is acting as guardian of the public forum since it is promoting the free flow of commercial information, while procuring those funds necessary to support its public interest programming. In order to comply with the fairness doctrine, the broadcaster must monitor three categories of advertisements: editorial, political and commercial.

**EDITORIAL ADVERTISEMENTS**

Editorial advertisements have been defined as commentaries on significant public issues or editorials paid by a sponsor. The FCC maintains that in those cases where the sponsor seeks to play an "obvious and meaningful" role in public debate the fairness doctrine should apply. Institutional advertising, designed to enhance the public image of a sponsor, does not involve public debate and therefore is not subject to the fairness obligation.

The FCC standard for licensees in this area is an objective one: whether the advertisement presents a meaningful statement which "obviously addresses, and advocates a point of view on, a controversial issue of public importance." The licensee's duty concerning editorial advertisements consists of a review of the text of the advertisement, general knowledge of the controversial issues and arguments, and assessment of the probable impact on public debate. This duty may also include providing free air time when paid sponsorship of opposing viewpoints is unavailable. If the relationship between the advertisement and the debate is too tenuous, the fairness doctrine will not apply.

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71. 425 U.S. at 765.
72. FCC Fairness Report, supra note 28 at 22.
73. Id. at 23.
74. Id.
75. Id.
76. Id.
77. In Cullman Broadcasting Co., 40 F.C.C. 576 (1963), the FCC first articulated the broadcaster's duty of providing free air time when paid sponsorship of a contrary viewpoint was unavailable.
When the broadcaster is functioning as a political observer and commentator, the potential for direct conflict with the FCC necessitates meticulous appraisal of all regulation. Since this type of speech is protected by the First Amendment,79 FCC regulation must be circumspect and justified by a significant governmental interest.80 The FCC seeks to ensure the presentation of both sides of an important issue. The fairness doctrine allows the realization of this goal. Content is not being programmed; only the opportunity to communicate differing ideas is being regulated. In this sense, the application of the fairness doctrine to editorial advertisements affects the broadcaster only in its role as guardian of the public forum.

The broadcaster's role as journalist would be curtailed if the FCC were to impose a duty to broadcast all proposed editorials directed to it.81 In Columbia Broadcasting System, Inc. v. Democratic National Committee, the Supreme Court decided that there was no constitutional or statutory right of access to broadcast editorial announcements.82 Unlimited access to the airwaves would be unfair and contrary to the public interest since only the affluent would be able to afford to purchase air time to express their views. On the other hand, if access were free, the FCC would be forced to regulate further the time and manner of broadcasting the editorial announcements. The ultimate result of free access would be more federal involvement in the broadcasting industry than is permitted under the First Amendment or the public interest standard.83 Therefore, licensees must retain their journalistic discretion to be able to select those editorial announcements which they prefer to broadcast, subject only to the duty to provide access time to opposing editorial viewpoints.

Another area where broadcasters must be concerned for the public welfare and their own First Amendment rights is political advertisements. The public interest in the political process is greater than in any other area of broadcaster programming. A licensee would be in breach of its public trust as well as its journalistic duty if it totally refrained from broadcasting political issues. The public interest in political candidates and issues has prompted congressional legisla-

80. Id. at 769-70.
82. Id.
83. Id. at 120.
tion and agency regulation. The duties promulgated therein tend to promote the public interest by requiring broadcasters to provide media access to opposing candidates or their spokesmen. In effect, broadcasters are under a general duty to promote the political welfare of the public.

**Political Advertisements**

The broadcaster's legislative duty is set forth in section 315 of the Communications Act. Under that provision, licensees must provide equal broadcast opportunities to all legally qualified candidates. However, this duty to provide equal opportunities does not extend to candidate appearances on bona fide newscasts, news interviews, news documentaries or on-the-spot coverage of bona fide news events. Those candidate appearances are subject to the fairness doctrine.

The FCC has adopted a corollary to the equal opportunities legislation. This corollary provides that spokesmen for opposing candidates be given comparable air time to present their views on campaign issues after a broadcaster has sold air time to political sup-

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85. Nicholas Zapple, 23 F.C.C.2d 707 (1970); see note 91 infra.
86. See notes 87, 91 infra.
87. (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under the subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.
88. Id.
89. Id.
90. Id.
91. In Nicholas Zapple, 23 F.C.C.2d 707 (1970), the FCC held that broadcasters must allow the political supporters of a campaigning candidate air time comparable to that sold to supporters of an opposing candidate.
REPORTERS OF ONE CAMPAIGNING CANDIDATE. However, this duty to allow quasi-equal opportunities does not extend to providing free broadcast time to supporters of opposing candidates.

The broadcaster as public trustee and political observer must serve the public interest by permitting access to the airwaves for the candidates and their spokesmen, thus functioning consistently with the First Amendment purpose of encouraging an informed populace. This FCC doctrine merely regulates when the broadcaster must allow rebuttal time to political candidates and their spokesmen. It does not control the content of the broadcaster's programs except to the extent that the broadcaster elects to provide air time to a political candidate or his supporter. These duties infringe only slightly on the broadcaster's journalistic discretion concerning programming content. Once it has exercised its discretion to sell air time to particular candidates or spokesmen, then it is obligated to provide equal or comparable time to legally recognized opponents.

The third category of advertisements, commercial, has caused considerable confusion regarding the proper responsibility of the broadcaster under the fairness doctrine. This confusion arises because commercial advertising forms the economic foundation upon which the broadcasting structure is built. The FCC must exercise care when regulating this type of advertising so that it does not undermine that foundation or abridge any rights of this form of commercial speech. As the Commission is required to protect the public interest, it must continually analyze commercial advertising as a potential source of public harm, as well as program sponsorship.

COMMERCIAL ADVERTISEMENTS

In the early days of radio, commercial advertising was not within the ambit of the fairness doctrine. The Federal Radio Commission realized that advertising formed the economic base of the broadcasting system and that any regulation of it beyond volume and character would unreasonably impair the industry's viability. However, this position did not take into account that many commercial advertisements were potentially controversial. In 1967, the

92. *Id.*
93. *Id.* at 708-09; FCC Fairness Report, *supra* note 28 at 31. The broadcaster is also required to give reasonable amounts of broadcast time to federal candidates if they cannot afford it because the public interest in its federal officials is very great. 47 U.S.C. § 312(a)(7) (1978 Supp.).
97. *Id.* at 35.
FCC decided that advertising controversial products, such as cigarettes, warranted application of the fairness doctrine. The FCC found that cigarette advertisements presented an imbalanced image of a controversial issue because they portrayed only the desirability of the product and avoided any mention of potential health hazards.

In 1968, the District of Columbia Circuit in *Banzhaf v. FCC* upheld the FCC ruling which required the licensee to provide a "significant amount of time for the other viewpoint," even though no positive statement concerning the desirability of smoking had been made in the commercials. The court also held that this FCC ruling did not violate the First Amendment since the advertisements constituted only marginal speech and the ruling would achieve nothing more than a marginal "chill" of the licensee's freedom of speech. Furthermore, the FCC ruling did not violate section 326 of the Communications Act because it did not suppress any information nor dictate the content of cigarette advertisements.

According to the FCC, the broadcaster had a duty to identify important public issues presented in commercials and offer reasonable opportunities for rebuttal by responsible individuals.

Three years later in *Friends of the Earth v. FCC*, the District of Columbia Circuit extended the FCC's interpretation of the fairness doctrine to include standard product commercials. The court found that the health hazards created by air pollution from high-powered automobiles and leaded gasoline were analogous to those caused by cigarette smoking. The fairness doctrine was triggered because the automobile advertisements presented only one viewpoint of an existing health controversy. Pursuant to the fairness doctrine the broadcaster was to scrutinize all advertisements for

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98. Television Station WCBS-TV, 8 F.C.C.2d 381 (1967), stay and reconsideration denied, 9 F.C.C.2d 921 (1967).
99. 8 F.C.C.2d at 382; 9 F.C.C.2d at 938.
101. *Id.* at 1102.
102. *Id.* at 1103.
103. Television Station WCBS-TV, 9 F.C.C.2d at 942.
104. *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971). Earlier this court had held that product advertisements by a department store while a boycott and union strike were being staged against it implicitly raised the controversial issue of whether the store should be patronized. Retail Store Employee Union, Local 880, R.I.C.A., v. FCC, 436 F.2d 248 (D.C. Cir. 1970).
105. 449 F.2d at 1169. The Surgeon General's Report on "Motor Vehicles, Air Pollution and Health" (1962) stated that automobile emissions presented significant dangers to human health and survival.
106. 449 F.2d at 1170.
controversial health issues.

The FCC subsequently asserted that its application of the fairness doctrine to cigarette advertising was too mechanical and contrary to the fairness doctrine. Under that approach, the doctrine would be triggered whenever a potential health issue could be discovered in a commercial, despite the lack of any affirmative discussion of that issue. Moreover, the extension of this doctrine to all standard product commercial advertisements raised the prospect of compelling broadcasters to provide free air time when paid sponsors for opposing viewpoints were unavailable. The result of this extension would be broadcaster subsidization of opponents financially unable to present their own views. This result would be unfair to broadcasters and contrary to the public interest. Broadcasters would be hesitant to accept advertising which was more than commonplace.

The purpose of the fairness doctrine is to encourage an informed public. Extension of the doctrine to product advertising unreasonably diverts the attention of the broadcasters from aiding the development of an informed public opinion. Consequently, the FCC repudiated this approach and now requires the broadcast of opposing viewpoints only when commercial advertisements present controversial public issues in an “obviously and meaningfully” manner.

This new approach was upheld recently when a court refused to extend the fairness doctrine to snowmobile advertisements. Controversial issues relating to the use of snowmobiles were not “obviously and meaningfully” presented. This new approach removes the implicit issue from the purview of the fairness doctrine.

The broadcaster’s duty is now less onerous in this area because only obvious discussions of controversial issues will trigger the fairness doctrine. As guardian of the public interest, the broadcaster still has a duty to eliminate false, misleading and deceptive advertising where possible. The broadcaster does not have to scrutinize

108. Id.
109. Id. at 26.
110. Id. This is the same standard that applies when the broadcaster is identifying controversial issues of public importance. Id. at 13.
112. Id.
115. In re Licensee Responsibility with respect to the Broadcast of False, Misleading or Deceptive Advertising, 40 F.C.C. 125, 126 (1961). Specifically, licensees must exercise due care upon receipt of “Advertising Alerts” issued by the FTC concerning advertisements
all advertisements for implied public controversies. Accordingly the free flow of commercial information remains relatively unobstructed.116

**Prime Time Access Rule**

Another area where the FCC is concerned with the free flow of information is local programming during prime time. The FCC promulgated the prime time access rule (PTAR)117 in order to diversify programming sources. The Commission found that licensee responsibility for programming content had become almost completely absorbed by the networks.118 Programming content is one of the primary responsibilities of the broadcast licensee119 and delegation of this responsibility is a breach of the public trust.120 Therefore, the FCC sought to re-emphasize the duties owed the public regarding programming content,121 recognizing that regulation of the content of prime time programming would encroach more directly on broadcaster speech.

The original rule (PTAR I) promulgated by the FCC stated that television stations in the top 50 television markets, with three or more commercial television stations, could not broadcast network programs for more than three hours a day between the hours of 7:00 P.M. and 11:00 P.M. in the Eastern and Pacific Time Zones, and between 6:00 P.M. and 10:00 P.M. in the Central and Mountain Time Zones.122 This rule cleared one hour of television prime time for local programming. PTAR I was upheld by the Second Circuit as a reasonable exercise of FCC authority.123 The court also stated that PTAR I was not a direct restraint on speech since the licensee has no absolute right to broadcast whatever it chooses. It is directed by the Communications Act to subordinate its private interests to the public's interests.124

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120. Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497, 500 (1st Cir. 1950).
123. Mount Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).
124. *Id.* at 477-78.
After subsequent amendment,\textsuperscript{125} PTAR III was adopted by the FCC.\textsuperscript{126} The one-hour access requirement was retained with several
exemptions, which classified certain network programs that could be broadcast in the one-hour cleared access time. The Second Circuit upheld PTAR III on grounds similar to those relied upon in the PTAR I case and found the exemptions not arbitrary or capricious. The exemptions comprised categories of program for which the FCC had been routinely granting waivers from the application of PTAR.

Under PTAR III, broadcasters will increasingly rely on local sources despite their desire to program only network shows. When local sources are unavailable, broadcasters will have the option of programming network material which falls within one of the exemptions. It is clear that public benefit from this rule will outweigh harm to the broadcaster. The public will have greater opportunities for receiving programs of concern to the local community. The broadcaster, as a fiduciary, must respond to the public interest in local activities, even to the extent of curtailing its programming discretion.

Overall, licensee responsibility has been expanded under the public interest standard and the fairness doctrine to include access time for community programming, coverage of opposing viewpoints on important public issues, reasonable opportunities to respond to personal attacks, and political editorials. In the sphere of advertising, a broadcaster's duty now includes presenting contrary viewpoints of controversial issues obviously presented in commercial advertisements and providing comparable broadcast time to spokesmen of campaigning candidates. Expansion of licensee responsibility in the area of programming content has been proposed. The public's interest in the welfare of children may require programming of violent, indecent and sexually-oriented material at times beyond the access of children. Affirmative action in this area is thus far limited to the adoption by the broadcast industry of a "Family Viewing" period. This proposed expansion, more than the other actual duties, would highlight the existing conflict

129. Id. at 541-42. The court did find the no feature film rule arbitrary. Id. at 543.
132. See note 45 supra.
133. See note 55 supra.
134. FCC Fairness Report, supra note 28 at 23.
136. FCC Violence and Obscenity Report, supra note 8 at 422.
between the broadcasters' First Amendment rights and the FCC's authority.

FAMILY VIEWING PERIOD

Under the industry's guidelines, the "Family Viewing" period would consist of the first hour of prime time network entertainment programming and the hour immediately preceding it. During that time, the broadcaster would make reasonable efforts to see that its broadcast material is appropriate for the entire family. Viewer advisories would be visually and aurally broadcast to alert parents that a program during this period may be unsuitable for children. Pursuant to these guidelines, the broadcaster would be required to notify publishers of television listings about programs containing these advisories.

The FCC's campaign for these guidelines resulted from a tremendous increase in the volume of complaints relating to violence and obscenity. In 1972, the Surgeon General's report on the impact of televised violence concluded that televised violence can induce imitation by children and may promote an increase in aggression. The Surgeon General's Committee cautioned that these findings do not support the conclusion that televised violence adversely affects the majority of children. The National Commission on Causes and Prevention of Violence, in its Final Report, stated that a "constant diet of violent behavior" is harmful to the human character, and that televised violence encourages violence in real life and

138. Id.; FCC Violence and Obscenity Report, supra note 8 at 422. This period would be from 7 p.m. to 9 p.m. Eastern time Monday through Saturday. Network programming could begin one-half hour earlier on Sunday.
139. Id.
140. Id. Also, viewer advisories were suggested for later evening programs where the contents might be disturbing to a great number of the viewing public.
141. Id.
142. FCC Violence and Obscenity Report, supra note 8 at 418-19. In 1972, approximately 2000 complaints were received by the FCC whereas in 1974, almost 25,000 complaints were received.
144. Id.
145. Id. The Committee's studies did indicate that violence on television may cause increased aggressiveness in some children, but the size of those groups of children is presently unknown due to the insufficiency of the available data. Id. at Vol. 1, 12. See also The Regulation of Televised Violence, 26 STAN. L. REV. 1291 (1974) for an in-depth discussion of the reports and effects of televised violence.
147. Id. at ch. 8, 199.
may desensitize viewers. The FCC has declared that broadcasters have a special duty to children, and in implementing that duty should design programs to meet their special needs. As public trustees, broadcast licensees are responsible for creating programs which are in the children's best interests. Providing diversified children's programming is one means by which licensees can fulfill their duties.

In 1975, the FCC issued its "Report on the Broadcast of Violent, Indecent and Obscene Material," which discussed the appropriate steps which may be taken to prohibit indecent or obscene material on television and to protect children from violent or sexually-oriented material. The broadcast of obscene and indecent language is prohibited and the FCC is authorized to enforce that provision.

In an effort to eliminate indecent language more effectively from the airwaves, the FCC re-defined "indecent" language to include a nuisance principle, channelling highly suggestive films to later time slots rather than prohibiting them. As re-defined, indecent language is "patently offensive" language, which must not be broadcast at times when there is a reasonable possibility that children are present in the listening audience. The FCC definition was recently

148. Id. at 198-99. In the televised trial of Ronney Zamora in Florida, the defendant Zamora alleged as his defense that he was "intoxicated" by televised violence. See also 2 more teens seized in "TV" car theft case, Chicago Tribune, August 1, 1978, at 12, columns 1 and 2, where teenagers alleged that knowledge of a scheme to steal cars came from a television program.

149. Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 5 (1974). The impact of television upon children has been a primary concern of Action for Children's Television (ACT), a non-profit organization which is seeking to improve children's programming. This organization spurred the FCC into inquiring into children's programs and commercial advertising during those programs.

150. Id. Although the FCC did not adopt ACT's proposals, it did remind broadcasters of their duties to provide diversified programming for pre-school children and to eliminate "host-selling" and to avoid over-commercialization. It did point out that broadcasters will have to separate advertising from programming and to eliminate advertising practices which take advantage of children. Id. at 18.

151. FCC Violence and Obscenity Report, supra note 8 at 418.

152. Id. at 419.

153. 18 U.S.C. § 1464 (1966) provides that:

Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

154. 47 U.S.C. § 312(a) (b), 503 (b)(1)(e) (1978 Supp.) respectively provide that the FCC can revoke a license, issue a cease and desist order or impose a monetary forfeiture for violation of that provision.


156. Id.
upheld by the Supreme Court in *FCC v. Pacifica Foundation*. The Court held that section 326 of the Communications Act, the no-censorship provision, does not prevent the FCC from imposing sanctions upon licensees who violate section 1464 by broadcasting obscene, indecent or profane language. The First Amendment does not prohibit all government regulation of speech, since there are times when speech may be regulated or prohibited by governmental entities. Where children’s interests are involved, more regulation may be deemed necessary.

Regulation of the content of television programming is a sensitive area. The First Amendment and section 326 provide little room for regulatory action in this area. The FCC deems self-regulation by broadcast licensees more desirable than governmental regulation. Although it recognizes that more controls may be necessary for broadcasts affecting children, the FCC is unwilling to become involved in censorship controversies. Nevertheless, the FCC has been willing to regulate the time, place and manner of broadcasting indecent language, but unwilling to regulate the same factors concerning the televising of violent and sexually-oriented programs.

Nonetheless, the FCC has approved the broadcast industry’s guidelines for a “Family Viewing” period because the restriction of certain viewing time to general family audiences does not prohibit diverse adult programming. The guidelines merely postpone that

158. Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.
159. 46 U.S.L.W. at 5021.
162. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), which set forth the incitement to violence exception to the First Amendment.
170. *Id.* at 422.
type of programming to later time slots. A California district court recently held that neither the FCC nor the National Association of Broadcasters (NAB) could pressure individual broadcast licensees into adopting the “Family Viewing” guidelines. The court asserted that adoption of those guidelines by broadcasters using their independent discretion would be permissible. It should be noted that FCC involvement was not countenanced because proper administrative procedures were not followed by the FCC in establishing the family viewing policy. This case can be contrasted with FCC v. Pacifica Foundation, the “filthy words” case, where the Supreme Court permitted regulation of the time and manner of broadcasting indecent material since the FCC had followed the proper procedures. Therefore, it appears that the family viewing period could be formally adopted by the FCC if the proper procedures were followed, because such regulation would control only the time, place and manner of broadcasting and not the contents of the broadcasts. In following the family viewing policy, the broadcaster would be serving the public interest by scheduling programs for various age groups at appropriate times. By enforcing this policy, the FCC would be upholding the public interest while not infringing the broadcaster’s free speech because it would be regulating constitutionally permissible factors.

BREACH OF PUBLIC TRUST—TORT LIABILITY

The broadcast licensee has a duty to broadcast in the public interest, and when it fails to do so it breaches that duty. In the traditional sense, a breach of this public trust usually occurs when the licensee uses its facilities to promote its own private interests, when it delegates its programming responsibilities to others, when

171. Id. at 423.
173. Id.
174. Id. at 1073; See Administrative Procedures Act, 5 U.S.C. § 553 (1977) for the proper administrative procedures.
176. Id. at 5023-24.
180. 47 F.2d at 672.
181. 183 F.2d at 500.
it unreasonably, arbitrarily or in bad faith exercises its discretion under the fairness doctrine or when it refuses to allow reply time pursuant to the personal attack rule. Violations of the foregoing duties usually result in some type of FCC sanction. Where the breach is particularly egregious, the Commission may refuse to renew or even revoke the broadcaster’s license. The FCC also has the authority to issue cease and desist orders, assess forfeitures and penalties, and order any other appropriate sanction.

Although the parameters of FCC remedial authority are set, the boundaries of the public interest standard, which bind both the FCC and broadcasters, are flexible. A trend towards increasing licensee responsibility and liability is discernible from the promulgation of additional broadcast regulations, the extension of the fairness doctrine, and the development of case law.

A recent development in communications law is the imposition of tort damages. In Weirum v. RKO General, Inc., a radio broadcast licensee was found negligent in broadcasting a promotional scheme which caused teenagers to drive recklessly and kill a motorist. The jury had found that the actions of the teenagers, who had followed a travelling disc jockey to win a promotional prize, were foreseeable by the licensee. The California Supreme Court held that the radio station, as the creator of the unreasonable risk of harm to the deceased motorist, was liable for its negligent use of language. The time, place and manner of the radio broadcaster's speech were stressed by the court as a basis for the finding of foreseeability.

This court dismissed the radio broadcaster's First Amendment defense by stating that the real issue in the case was "... civil accountability for the foreseeable results of a broadcast which created an undue risk of harm to the decedent. The First Amendment does not sanction the infliction of physical injury merely because

184. 47 F.2d at 672.
189. See notes 45, 55, 126, supra, and accompanying text.
190. See notes 5, 91, supra, and accompanying text.
192. 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975).
193. Id. at 47, 123 Cal. Rptr. at 472, 539 P.2d at 40.
194. Id. at 47-48, 123 Cal. Rptr. at 472, 539 P.2d at 40-41.
195. Id. at 46, 123 Cal. Rptr. at 477, 539 P.2d at 39.
Liability has also been imposed where a broadcaster deprived an entertainer of his livelihood. In a recent Supreme Court case, a television broadcaster was held liable for televising in its entirety an entertainer's "human cannonball" act without his consent. State law provided for a "right to the publicity value of [a] performance." The Court held that neither the First nor the Fourteenth Amendments immunized a television broadcaster from liability for infringing the individual's right to compensation. The performer did not seek to censor the televised broadcast; he merely sought compensatory damages for loss of part of his livelihood. Publicizing the fact of the human cannonball act was well within the licensee's exercise of programming discretion and within the public interest. Broadcasting the performance in the chosen manner infringed the plaintiff's right to compensation for his work.

Olivia N. v. National Broadcasting Company represents the most controversial extension of a licensee's duty of care. In that case, a California appellate court held that a minor plaintiff who had been "artificially raped" had a right to a jury trial on the question of the wilfullness and negligence of a television licensee and network in broadcasting (during the early evening hours) a movie containing a very violent scene. Four days after the depiction of the "artificial rape" scene in the film "Born Innocent", an eight-year-old girl was "artificially raped" by four adolescent girls who had seen the movie and decided to imitate the rape scene. As the California court noted, the First Amendment generally applies to television broadcasts, but its protection does not extend to all speech. It has been
held that areas of unprotected speech include "libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like." Speech which incites unlawful action is also not protected by the First Amendment.

As noted earlier, broadcast licensees are under a fiduciary duty to the public to broadcast in their interest. The First Amendment does not grant broadcasters a license to inflict physical injuries by their words. Moreover, the First Amendment does not insulate broadcasters from tort liability. In the future, tort damages may be the type of relief awarded where failure to program material particularly stimulating to children in a proper time slot results in a child's physical and psychological injury. It was contended in the "artificial rape" case that there was a substantial likelihood that impressionable children stimulated by the program would imitate its violent rape scene. Various studies conducted indicate that televised violence does have a great impact on children. In contrast with the probability of great harm to children who watch violent films, the licensees and networks who broadcast them have a relatively slight burden of rescheduling. This rescheduling would not inhibit or chill broadcaster First Amendment rights since the rescheduling would only affect the time, place and manner of presenting these films and not their total prohibition. In *FCC v. Pacifica Foundation*, the Supreme Court held that the FCC could sanction a radio station for broadcasting indecent language during the hours when children were most likely to be in the audience. The same rationale should apply when a court is seeking to assess tort damages against a broadcaster for injuries sustained because of a

208. See note 15 supra.
210. Id.
213. See notes 143-48 supra.
broadcast of a violent film during the family viewing time. The foregoing cases point out the necessity of regulating the time, place and manner of broadcasting. As long as no attempt is made to censor the content of the programs broadcasted, regulation of this nature should be upheld.

The crucial problem in this area is the scope of regulation of the time and manner of broadcasting certain programs. Although the FCC maintains that the licensee retains its programming discretion, that agency is the entity that ultimately decides whether the licensee's programming benefits the public interest.

The licensee's interest in its freedom of speech may clash more directly with the FCC interest in the public welfare when the family viewing policy is formally adopted. Because children will be particularly involved in the implementation of this policy, the FCC may deem itself obligated to infringe the broadcaster's rights to some extent. Where the burden on the broadcaster is as slight as rescheduling, the broadcaster may find that the FCC as well as the courts will permit some encroachment on its freedom of speech in pursuit of public interest.

CONCLUSION

Public interest remains the test against which actions of broadcast licensees are measured. That test has been broadly stated but refined by FCC policy statements, reports and regulations, as well as by case law. The public has First Amendment rights which are paramount to those of broadcasters. Government regulations have thus far tended to promote the public's exercise of free speech without greatly infringing similar rights of broadcasters. Broadcasters are realizing that the public interest involves more than merely broadcasting the news, music and sports. Broadcast licensees are caretakers of the public forum, and as such have a constantly changing duty of care to the public. This change is manifested in the expansion of responsibilities imposed on broadcasters, from local programming of community affairs to redress for negligent broadcasting. This expansion can be justified as the natural growth of the public interest. In serving that interest, broadcasters must be willing at times to sacrifice their interests in order to preserve the public's interest.

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