Notre Dame Law Review

Volume 47 | Issue 3 Article 4

2-1-1972

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Recommended Citation
Thomas J. Houser, *Fairness Doctrine--An Historical Perspective*, 47 Notre Dame L. Rev. 550 (1972).
Available at: http://scholarship.law.nd.edu/ndlr/vol47/iss3/4

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THE FAIRNESS DOCTRINE—AN HISTORICAL PERSPECTIVE

*Thomas J. Houser**

I. Introduction

There is an unmistakable trend in this nation toward greater public awareness and participation in the functions of government.[1] Few areas of the public domain have experienced more significant public input than matters coming before the Federal Communications Commission.

An independent agency created by Congress[2] to regulate the use and means of electronic communications, the FCC has been given the responsibility of insuring that the electromagnetic spectrum space allocated to television and radio broadcasting shall be operated to serve the "public interest, convenience, and necessity."[3] Given the proposition that all who may wish to be heard over the airwaves may not be afforded the privilege, the Commission has attempted to develop a policy which will allow for the maximum exposure of divergent views. The policy has come to be known as the Fairness Doctrine.[4] The Fairness Doctrine, in essence, requires that all Commission licensees who choose to air material relating to one side of a controversial issue of public importance, must afford a reasonable opportunity for the expression of opposing viewpoints.[5] The Fairness Doctrine therefore codifies a right-of-reply to issues originally raised by materials selected for broadcast by the station licensee. However, in recent years more groups in our society are asking whether individuals should have a *right-of-access* to a broadcast facility in order to *initiate* discussions of important public issues. Recent court decisions have stated that broadcaster's failure to engage in controversy solely to avoid Fairness Doctrine obligations inhibits broadcasting's important purpose of serving as a medium of free speech.[6] Those courts have indicated that not only may a right-of-access be a valid social proposition, but

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The author would like to acknowledge the valuable contributions made by Dennis J. Helfman and Gregory Sorg in the preparation of this article.

1 One manifestation of this tendency of increasing popular participation in the workings of our government has been the recent ratification of the twenty-seventh amendment to the Constitution, by which millions of new voters will be able to vote in future elections.

2 Federal Communications Act § 1, 47 U.S.C.A. § 1 (1934).

3 Federal Communications Act § 303, 47 U.S.C.A. § 303(f) (1934).

4 In the Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

5 "Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all reasonable positions on matters of sufficient importance to be afforded radio time can radio be maintained as a medium of freedom of speech for the people as a whole." *Id.* at 1250.

6 "A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. . . . Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 389, 392 (1969).

that the guarantees of the First Amendment against prior restraint of speech may make such a right-of-access mandatory.[7]

The implications of recent decisions have led to an important turning point in the role of the FCC and its relationships with broadcasters and the public; for if an individual does have a guaranteed first amendment right-of-access to television and radio facilities, then an entirely new administrative framework will be required to accommodate the freedom. Machinery will have to be created to determine who shall speak, on what issue, for how long, for what price.[8]

The following discussion will review the Fairness Doctrine from an historical perspective and discuss current problems facing the Commission in this area.

II. The Pre-Regulatory Period

Although effective federal regulation of the communications media did not begin until the enactment of the Radio Act of 1927,[9] the Congress had traditionally extended regulatory controls into the area of mass communications under the Commerce Clause,[10] and such authority had been affirmed by the courts.[11] In the case of *Telegraph Co. v. Texas*, the Supreme Court ruled that telegraphic communications were a form of interstate commerce, and thus were subject to Congressional regulation.[12] In a subsequent reaffirmation of this decision, the Court explained the rationale behind Congressional power to regulate commerce: "The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting state legislation."[13]

The Court stated that "it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State Legislation."[14]

7 ". . . the limited nature of broadcast time does not dictate that the individual and group interest in self-expression be brushed aside entirely; it allows for a reasonably regulated 'abridgeable' right to speak." Business Executives Move for Vietnam Peace v. F.C.C., Docket Nos. 24,492 and 24,537, U.S. App. D.C. (August 3, 1971), slip opinion at 23.

8 The Commission has recognized a limited public right-of-access in its cable-television policy. In planning for the age of the "wired city," the Commission has promulgated rules to open new outlets of local expression by trying to insure the development of sufficient channel availability on all CATV systems. With multi-channel capability, a CATV system can set up a public access channel for community members, wherein the public can have a right-of-access to the system to expound their own viewpoints. Letter to Senator Pastore, released August 5, 1971.

9 44 Stat. 1162 (1927). This law replaced the Radio Act of 1912, which because it had addressed itself solely to broadcasting conditions prevalent at the time of its passage, proved to be powerless to deal with the problems casued by the enormous growth experienced by the radio industry during the 1920's.

10 U.S. Const. art. 1 § 8, cl. 3: "The Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States . . ."

11 Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1 (1877); Telegraph Co. v. Texas, 105 U.S. 460 (1881); Western Union Telegraph Co. v. Pendleton, 122 U.S. 347 (1887); International Textbook Co. v. Pigg, 217 U.S. 91 (1910).

12 "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their . . . ways, and their liabilities are in some respects different, but they are . . . commercial pursuits." 105 U.S. 460, 464 (1881).

13 Western Union Telegraph Co. v. Pendleton, 122 U.S. 347, 358 (1887).

14 Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1, 9 (1877). *See also* The Telephone Cases, 126 U.S. 1 (1887); Franklin Telegraph Co. v. Harrison, 145 U.S. 459 (1892); American Express Co. v. United States, 212 U.S. 522 (1909); United States v.

Recognizing the necessity for federal coordination and acting upon court precedent, the Congress passed the Radio Act of 1912.[15] Designed chiefly to eliminate the interference caused by broadcast signals, the Act empowered the Secretary of Commerce and Labor[16] to issue broadcast licenses and assign wavelengths for transmission. However, the Act failed to grant the Secretary sufficient discretionary power to create and enforce new rules of operation required to meet the demands for station authority which experienced enormous growth in the early 1920's.[17] The number of authorized stations soon more than filled the assigned wavelengths and resulted in the use of unauthorized frequencies.[18] Court litigation helped to uncover the defects and inconsistencies of the 1912 Act[19] and effectively destroyed the ability of the Secretary of Commerce to regulate the growing chaos over the airwaves.[20]

Following several key decisions, all attempts by the Secretary at regulation were abandoned. Acting Attorney General Donovan wrote in July, 1926, that "the present legislation is inadequate to cover the art of broadcasting, which has been almost entirely developed since the passage of the 1912 Act. If the present situation requires control, I can only suggest that it be sought in new legislation, carefully adapted to meet the needs of both the present and the future."[21]

The growing confusion over rights to the airwaves,[22] a series of Congressional

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Press Publishing Co., 219 U.S. 1 (1911). Each of these cases defined more clearly individual limitations and Congressional responsibility in the realm of interstate regulation of communications.

15 Act of August 13, 1912, Pub. L. No. 62-264, 37 Stat. 302. This hastily drawn measure was largely motivated by the public outcry that arose during the inquiries into the Titanic disaster (the giant passenger liner which, on her maiden voyage, had struck an iceberg and sunk in the North Atlantic on the night of April 14-15, 1912, with the loss of 1,517 lives). These investigations had disclosed that a nearby ship might have been able to effect the rescue of almost all the Titanic's passengers had her radio operator not gone off duty fifteen minutes prior to the issuance of the Titanic's distress call, and that subsequent rescue efforts had been hampered when ship-to-shore radio communications were effectively jammed by the multitude of signals emanating from the mainland. S. HEAD, BROADCASTING IN AMERICA 126 (1956).

16 Since 1913, the Secretary of Commerce.

17 Between 1920 (the time of the establishment of station KSKA in Pittsburgh and early 1923, some 576 stations had received licenses to broadcast in the United States. F. KAHN, DOCUMENTS OF AMERICAN BROADCASTING 17 (1968).

18 The Radio Act of 1912 specifically stated that licenses for radio stations were to be "granted by the Secretary of Commerce and Labor upon application therefor . . . . Because of this provision, the Secretary was powerless to refuse any applicant for a license for any reason. The lawmakers of 1912 had evidently not foreseen that the broadcast band might become overcrowded in the future as it in fact did become by the mid-1920's.

19 The major defect had been noted long before by the Attorney General in an opinion handed down on November 22, 1912: ". . . the Secretary of Commerce and Labor," he wrote, "is only authorized to deal with the matter as provided in the Act, and is given no general regulative power. . . ." 29 OP. ATT'Y GEN. 579, 581 (1912).

20 Hoover v. Intercity Radio Co., 286 F. 1003 (D.C. Cir. 1923), United States v. Zenith Radio Corporation, 12 F.2d 614 (N.D. Ill. 1926). The Court of Appeals held that while the Secretary's powers had been broad as outlined in Sections 1 and 2 of the Act of 1912, the specifically stated provisions of Section 4 had replaced the broad intended powers with very limited actual ones. "It is axiomatic," the Court rules, "that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. There can be no constructive offenses, and, before a man can be punished, his case must be plainly and unmistakably within the statute." United States v. Zenith Radio Corporation, 12 F.2d 614, 618 (N.D. Ill. 1926).

21 35 OP. ATT'Y GEN. 126, 132 (1926).

22 "In the period of less than a year that elapsed between this decision and the passage of the new Radio Act (of 1927), 200 new broadcast stations took advantage of the moratorium on regulation, and crowded on the air, compounding the bedlam that already existed." S. HEAD, BROADCASTING IN AMERICA 129 (1956).

debates[23] and an urgent appeal from the President[24] finally led to the passage of the Radio Act of 1927. A product essentially of the Fourth Annual Radio Conference (1925), the bill[25] represented a realization that some form of broadcast regulation was necessary. The existing anarchy on the airwaves demonstrated that freedom for all had meant freedom for none.[26]

The Radio Act of 1927 represented a great departure from the limited regulatory power sought in the 1912 Act. Inasmuch as numerous competing applicants were now seeking utilization of limited frequencies, the Act provided a standard to permit the comparative evaluation of competing broadcast aspirants —the standard was set at the "public convenience, interest or necessity."[27] The standard was left to a five-member Federal Radio Commission to define and implement. Almost immediately it became apparent that inherent in the public interest standard was a requirement that the successful applicant provide fairness in the treatment of matters selected for broadcast.[28] In time, this concept was codified in the "Fairness Doctrine"—the formal pronouncement and definition of broadcaster responsibility under the public interest standard.[29]

III. What's Fair?

A major problem facing the Federal Radio Commission as it began its task of "clearing up the broadcast situation"[30] was that of finding ways and means of reducing the number of stations operating on the overcrowded broadcast spectrum. The Commission was aided in this endeavor both by the broad discretionary powers granted to it by the Radio Act of 1927[31] and by the Act's

23 *See* in particular 67 CONG. REC. 5479 (1926).
24 68 CONG. REC. 32, (1926).
25 H.R. REP. No. 9971, 69th Cong., 2d Sess. 1162 (1927).
26 Secretary of Commerce Hoover had remarked at the First National Radio Conference (1922) that "this is one of the few instances that I know of in this country where the public —all of the people interested—are unanimously for an extension of regulatory powers on the part of the government." S. HEAD, BROADCASTING IN AMERICA 130 (1956). In reviewing this period, Justice Groner of the United States Court of Appeals observed that, "Everyone interested in radio legislation approved the principle of limiting the number of broadcasting stations, or, perhaps, it would be more nearly correct to say, recognized the inevitable necessity." Trinity Methodist Church, South v. Federal Radio Commission, 62 F.2d 850, 852 (D.C. Cir. 1932).
27 Radio Act of 1927 (Pub. L. No. 632, 69th Cong., February 23, 1927), Sections 4, 9, and 11. Section 9 states, "The licensing authority, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act."
28 The Commission ruled early that any station that espoused only one point of view on any issues of importance to the public was obviously only furthering the interests of the licensee, and therefore was not operating in the public interest. And the public interest, the Commission said, "requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all discussions of issues of importance to the public." Great Lakes Broadcasting Co., 3 F.R.C. 32, 33 (1929).
29 Report of the Commission in the matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).
30 1 F.R.C. ANN. REPT. 1 (1927).
31 These powers, designed to avoid the pitfalls of particularity that had made the 1912 Act inoperable, have repeatedly been upheld as both Constitutional and proper by the Courts. In *Fed. Radio Comm'n. v. Nelson Brothers Bond and Mortgage Co.,* 289 U.S. 266, 279 (1933), the Supreme Court stated:

> No State lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities. . . .
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> . . . [T]he Congress did not authorize the Commission to act arbitrarily or capriciously

specific prohibitions against an individual broadcaster's having any form of property right to the use of a frequency or wavelength.[32] Once the legality of these powers had been affirmed in the Court,[33] the Commission was able to enforce rules to reallocate frequencies,[34] alter power output and times of station operation,[35] eliminate stations employing inferior or substandard equipment,[36] deny applications to construct new stations,[37] and terminate the operation of stations whose use inherently caused unavoidable or uncontrollable interference.[38]

But the Commission's responsibilities under the "public convenience, interest or necessity" standard went beyond the elimination of technical problems. The

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> in making a redistribution, but only in a reasonable manner to attain a legitimate end. That the Congress had the power to give this authority to delete stations, in view of the limited radio facilities available and the confusion that would result from interferences, is not open to question. Those who operated broadcast stations had no rights superior to the exercise of this power of regulation. *Id.* at 282.

In general, the attitude of the courts towards the Commission in the broad use of its powers has been as it was stated by Justice Frankfurter in his dissenting opinion to *F.C.C. v. NBC,* 319 U.S. 239, 264 (1943):

> We must assume that an agency which Congress has trusted is worthy of the trust. And especially when sitting in judgment upon procedure devised by the Commission for the fair protection of both public and private interests, we must view what the Commission has done with a generous and not a jealous eye.

32 Section 5(h) of the Radio Act of 1927 states in part:

> . . . by the Commission or Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the either as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

Section 11(a) states:

> The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

33 White v. Fed. Radio Comm'n, 29 F.2d 113 (N.D. Ill. 1928); City of New York v. Fed. Radio Comm'n, 59 U.S. App. D.C. 129 (1930).

The issue of whether the denial, non-renewal, or alteration of a broadcast license by the Commission violates the due process guarantee of the fifth and fourteenth amendments has appeared frequently in the courts, and they have held consistently to the view expressed by the Supreme Court that "[i]f the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property, . . . and a right to compensation, on account of such an injury, does not attach under the Constitution." Chicago, Burlington and Quincy Railroad Co. v. Drainage Comm'rs, 200 U.S. 561, 593 (1906). *See also* Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915), Gibson v. United States, 166 U.S. 269 (1897), and Union Bridge Co. v. United States, 204 U.S. 364 (1907), all of which, as the D.C. court noted in *Trinity Methodist Church, South v. Fed. Radio Comm'n,*

> indubitably show adherence to the principle that one who applies for and obtains a grant or permit from a State, or the United States, to make use of a medium of interstate commerce, under the control of and subject to the dominant power of the government, takes such grant or right subject to the exercise of the power of government, in the public interest, to withdraw it without compensation. 62 F.2d 850, 854 (D.C. Cir. 1932).

This view was reiterated by the Supreme Court when it stated in the *Nelson Brothers* case that:

> this Court has had frequent occasion to observe that the power of Congress in the regulation of interstate commerce is not fettered by the necessity of maintaining existing arrangements which would conflict with the execution of its policy, as such a restriction would place the regulation in the hands of private individuals. . . . 289 U.S. 266, 282 (1933).

34 2 F.R.C. ANN. REPT. 17-18, 200-214 (1928), upheld in Great Lakes Broadcasting Co. v. Fed. Radio Comm'n, 37 F.2d 993 (D.C. Cir. 1930).

35 Upheld in City of New York v. Fed. Radio Comm'n, 36 F.2d 115 (D.C. Cir. 1929), and Chicago Federation of Labor v. Fed. Radio Comm'n, 41 F.2d 422 (D.C. Cir. 1930).

36 Upheld in Technical Radio Lab. v. Fed. Radio Comm'n, 36 F.2d 111 (D.C. 1929).

37 Upheld in Ansley v. Fed. Radio Comm'n, 46 F.2d 600 (D.C. Cir. 1930).

38 Upheld in Carrell v. Fed. Radio Comm'n, 36 F.2d 117 (D.C. Cir. 1929).

Commission felt that the scarcity of broadcast frequencies made it essential that the selected licensees not exercise the privilege solely in the furtherance of personal interests.[39] Consequently, any licensee who used his radio facility primarily to espouse the views or interests of any individual or group, was not, in the Commission's view, operating in the public interest, and was thus subject to remedial actions.[40] The courts agreed that this was a proper exercise of Commission power, and held that neither property rights nor the freedom of expression were violated.[41] In fact, the courts held that such Commission action helped to guarantee that radio would remain a medium of free speech.[42]

The Federal Communications Commission[43] adhered to this principle. In *Young People's Association for the Propagation of the Gospel,* acting upon a request to establish a radio station devoted to the teaching of the Fundamentalist Church, the Commission said, in part, that "where the facilities of a station are devoted primarily to one purpose and the station serves as a mouthpiece for a definite group or organization, it cannot be said to be serving the general public."[44]

The Commission's power to oversee the programming policy of a station to the extent that such oversight assures that the public interest will not be subordinated to private ones, was consistently upheld by the courts.[45]

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39 Great Lakes Broadcasting Co., 3 F.R.C. ANN. REPT. 32 (1929).

40 Chicago Federation of Labor, 3 F.R.C. ANN. REPT. 36 (1929).

41 *See* note 33, *supra.*

42 Chicago Federation of Labor v. Fed. Radio Comm'n, 41 F.2d 422 (D.C. Cir. 1930); KFKB Broadcasting Ass'n v. Fed. Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931); Nat. Broadcasting Co. v. United States, 319 U.S. 190 (1943). In the *KFKB* case, the court ruled that the Commission's delving into a station's format and policies was well within the scope of its regulatory powers:

> that the question whether a license should be issued or renewed should be dependent upon a finding of public interest, convenience, or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business but should be of a public character. Obviously, there is no room in the broadcast bank for every business or school of thought. 47 F.2d at 673.

In the *NBC* case, the Supreme Court states bluntly at 215 and 216 that: "The Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic."

43 The Communications Act of 1934 (Pub. L. No. 416, 73rd Cong., June 19, 1934), superseded by the Radio Act of 1927 by adding the regulation of Common Carriers (until then, a function of the Interstate Commerce Commission), to the Commission's other duties. Now containing seven members and called the Federal Communications Commission, the regulatory practices followed by and precedents set by the Federal Radio Commission over radio communications, continued virtually unchanged.

44 Young People's Association for the Propagation of the Gospel, 6 F.C.C. 178, 181 (1940). The report went on to observe that:

> if one group or organization is entitled to a station facility for the dissemination of its principles, then other associations of equal magnitude would be entitled to station licenses on the same grounds. Obviously, there are not a sufficient number of broadcasting channels to give each group a station license. The Commission has accordingly considered that the interests of the listening public are paramount to the interests of the individual applicant in determining whether public interest would best be served by granting an application.

45 Technical Radio Lab. v. Fed. Radio Comm'n, 36 F.2d 111 (D.C. Cir. 1929); KFKB Broadcasting Ass'n v. Fed. Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931); Chicago Federation of Labor v. Fed. Radio Comm'n, 41 F.2d 422 (D.C. Cir. 1930); Trinity Methodist Church, South v. Fed. Radio Comm'n, 62 F.2d 850 (D.C. Cir. 1932); Radio Comm'n v. Nelson Brothers Co., 289 U.S. 266 (1933); Fed. Radio Comm'n v. Broadcasting Co., 309 U.S. 134 (1940); F.C.C. v. Sanders Radio Station, 309 U.S. 470 (1940); Nat. Broadcasting Co. v. United States, 319 U.S. 190 (1943).

Corollary to this stand is that the Commission cannot act as a censorship agency. Radio Act of 1927, Section 29; Communications Act of 1934, Section 326. Nor may it "essay

By the early 1940's the Federal Communications Commission had successfully advanced the theory that individual broadcasters were legally obligated to be fair and balanced in their presentation of public service programming.[46]

IV. When You Don't Say Anything, You Don't Have to Be Fair

Although in its Annual Report of 1940 the Federal Communications Commission noted that a licensee had discretion in deciding who shall appear on the station, the Report cautioned that such decisions had to conform to a still undefined public interest standard.[47] Even though the broadcaster's right to choose his guests was often reiterated by the Commission[48] and upheld by the courts,[49] the absence of a ruling as to exactly what constituted a fair presentation (what he and his guests could say) left the industry in a state of confusion during the 1940's. The result of the ruling was a virtual cessation of editorializing and discussions of important issues over the airwaves.

In late 1940, when the Commission reviewed the renewal of license for station WAAB, Boston, it was brought to the Commission's attention that the station had been broadcasting editorials urging the election of certain candidates, and supporting one side of a public issue. No pretense was made at objective, impartial reporting. While the Commission renewed the license, it stated:

> Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides . . . of important public questions, fairly, objectively and without bias. The public interest—not the private—is paramount. . . .
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> . . . .
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> Responsibility for the conduct of a broadcast station must rest initially with the broadcaster . . . the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented.[50]

to regulate the business of the licensee," F.C.C. v. Sanders Radio Station, 309 U.S. 470, 475 (1940): "The Commission is given no supervisory control of the programs, of business management or of policy." McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 151 F.2d 597, 599 (3rd Cir. 1945): "It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the F.C.C."

46 6 F.C.C. ANN. REPT. 55 (1940) ". . . broadcast stations have the duty of serving public interest, convenience, and necessity. . . . In carrying out the obligation to render a public service, stations are required to furnish well-rounded rather than one-sided discussions of public questions."

47 6 F.C.C. ANN. REPT. 55 (1940). The report further stated that, ". . . broadcast stations have the duty of serving public interest, convenience and necessity. The discretion left to the broadcasters in the selection of who may use the facilities, and the conditions with respect to such use, is subject to this legal requirement."

48 Mayflower Broadcasting Co., 8 F.C.C. 333 at 339 (1941): "Under the American system of broadcasting it is clear that responsibility for the conduct of a broadcast station must rest initially with the broadcaster.

49 McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 151 F.2d 597, 599 (3rd Cir. 1945): "It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the F.C.C." *See* note 23, *supra*.

50 Mayflower Broadcasting Co., 8 F.C.C. 333, at 340.

In brief, the ruling said that a broadcaster could not be an advocate through personal editorials. Although the intent of the *Mayflower* decision was to increase discussion of various issues of public importance, it appears that the broadcasting industry decided to avoid *any* trouble by avoiding *any* discussion of controversial issues.[51]

In mid-1945, a Commission decision sought to resolve the dilemma[52] by stating that it was a licensee's obligation to present controversial issues: "The Commission . . . is of the opinion that the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues . . . is inconsistent with the concept of public interest established by the Communications Act as the criterion of radio regulation. . . ."[53] The Commission not only rejected the practice of avoiding discussions of issues over the air, but affirmatively indicated that a licensee was, in fact, obligated to present such programs if he were to meet his requirements under the public interest standard.[54]

Further elaboration of broadcaster obligations to promote fair discussions of issues soon followed in the Commission's rulings on the separate petitions filed by Robert Scott and Sam Morris in 1946. In the *Scott* case, the Commission took the significant step of ruling that even one side of *popularly accepted ideas* could not be presented. "If freedom of speech is to have meaning," the Commission stated, "it cannot be predicated on the mere popularity or public acceptance of the ideas sought to be advanced. It must be extended as readily to ideas which we disapprove or abhor as to ideas which we approve."[55] In addi-

51 In his separate views to the Commission Report in the *Matter of Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1259 (1949), Commissioner Jones charged that the *Mayflower* decision "fully and completely suppressed and prohibited the licensee from speaking in the future over his facilities in behalf of any cause. All licensees considered this *Mayflower* decision as applicable to each of them." The wartime atmosphere in which it was handed down may have contributed towards the *Mayflower* decision's not being brought into serious question at that time. Limitations of other kinds were placed upon radio during the war for purposes of defense which may have had a tendency to obscure the effects of or lessen the dissatisfaction with the *Mayflower* decision which at any other time might have surfaced. For example, during the Second World War it was unlawful for a radio station to play requested songs for fear they might contain coded messages for saboteurs or others. In addition, the broadcast of weather reports was forbidden both as a precaution against air raids, and as a means of inhibiting the enemy's ability to forecast his own future weather conditions. T. Koop, Weapon of Silence (1946).

52 "For a radio station to refuse to sell time in which an individual may broadcast his views may be censorship but we know of no law which prohibits such a course." McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 151 F.2d 597, 601 (3rd Cir. 1945).

53 In re United Broadcasting Co., 10 F.C.C. 515, 518 (1945). In this decision, the Commission hinted at future licensee obligations, that would be outlined later in the Editorializing Report, when it said, ". . . competent management should be able to meet such problems in the public interest and with fairness to all concerned. The fact that it places an arduous task on management should not be made a reason for evading the issue by a strict rule against the sale of time for any programs of the type mentioned."

54 Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949):

> This affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues has been reaffirmed by this Commission in a long series of decisions. The *United Broadcasting Co.* case emphasized that this duty includes the making of reasonable provision for the discussion of controversial issues of public importance in the community served, and to make sufficient time available for full discussion thereof.

55 In re Petition of Robert Scott, 11 F.C.C. 372, 374 (July 19, 1946). Scott, an atheist, had requested, and was denied, time in which to refute the ideas advanced by religious programming over the stations complained of in his petition. The petition was denied by the Commission because the problem was "broader in scope than the complaint against the particular stations here involved. . . ." *Id.* at 376.

tion, the Commission held that while an issue or personality may not seem to be important, it "may be projected into the realm of controversy by virtue of being attacked. The holders of a belief should not be denied the right to answer attacks upon them or their belief solely because they are few in number."[56]

In its ruling on the petition of Sam Morris,[57] the Commission suggested that even advertising was not beyond the reach of fairness treatment.[58] The Commission held that, while the normal advertising of a product did not usually raise issues of importance, "it must be recognized that under some circumstances it may well do so,"[59] and that, "the fact that the occasion for the controversy happens to be the advertising of a product cannot serve to diminish the duty of the broadcaster to treat it as such an issue."[60]

While the *Scott* and *Morris* decisions elaborated on a broadcaster's obligations, more clarity was necessary in order to insure a full understanding of the requirements. In the light of these compelling needs, the Commission initiated a study to clarify its position, "with respect to the obligations of broadcast licensees in the field of broadcast of news, commentary, and opinion. . . ."[61] The result of this inquiry, a codified Fairness Doctrine, adopted and issued on June 1, 1949, has remained the basis of broadcaster responsibility in this area to date.

V. All's Fair in Love and Politics

The Commission's "Editorializing Report"[62] lifted the eight-year self-imposed ban on editorials. The licensees were told that they, as public trustees, had a twofold obligation to their listeners: to provide adequate coverage of important public issues of interest in the community, and to present both sides of the issues for the public's consideration and acceptance or rejection.[63]

The "Fairness Doctrine" was predicated on the right of the public to be informed as opposed to a right of the Government, broadcast licensees, or individual citizens to broadcast their exclusive views over the airwaves.[64] This concept did limit the discretion of the licensee to some extent,[65] but it also ad-

56 *Id.* at 376. In this decision, the Commission reasserted its view that the public interest required a broadcaster to present discussions of issues of public importance or controversy; and that mere inconvenience could not serve as a reason for avoiding this responsibility:

> The fact that a licensee's duty to make time available for the presentation of opposing views on current controversial issues of public importance may not extend to all possible differences of opinion within the ambit of human contemplation cannot serve as the basis for any rigid policy that time shall be denied for the presentation of views which may have a high degree of unpopularity. The criterion of the public interest in the field of broadcasting clearly precludes a policy of making radio wholly unavailable as a medium for the expression of any view which falls within the scope of the constitutional guarantee of freedom of speech.

57 In re Petition of Sam Morris, 3 Radio Regs. 154 (1946). Morris was a prohibitionist who had sought, and was refused, time to broadcast messages to counter the effects of beer and wine advertisements being broadcast over local radio stations.

58 *Id.* at 155.

59 *Id.*

60 *Id.* at 156.

61 Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

62 *Id.*

63 *Id.* at 1258-59.

64 Thornhill v. Alabama, 310 U.S. 88 (1940); Associated Press v. United States, 326 U.S. 1 (1945). *See also* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1250 (1949).

65 Another limitation on this exercise of discretion is where a personal attack occurred over the broadcaster's facilities. Here, the Commission stated: ". . . for elementary considera-

vanced a more important goal—that of an informed citizenry.[66] The Commission told its licensees that it would provide fairness guidelines on a case-by-case basis.[67]

The "Report" stated that there were different methods for presentation of controversial issues: interviews, discussions, documentaries. When editorializing, broadcasters were cautioned to clearly label such material and offer a balance of contrasting views.[68] The overriding question in editorialization was not whether a broadcaster could present editorials, but whether he could do so fairly:

> The basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and impartial a manner as possible. A licensee would be abusing his position as public trustee of these important means of mass communication were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort presentation of such news. No discussion of the issues involved in any controversy can be fair or in the public interest where such discussion must take place in a climate of false or misleading information concerning the basic facts of the controversy.[69]

Three of the five voting members were unhappy with the Report (the vote was 4-1). Commissioner Jones felt that the doctrine did not repudiate the *Mayflower* decision.[70] Commissioner Webster did not like the wording of the Report because it left him in a "quandary and state of confusion" as to what was required.[71] Commissioner Hennock, the lone dissenter, said that although the

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tions may dictate that time be allocated for a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1252 (1949). It is interesting to note that the personal attack rule, alluded to in *Scott, see* note 55, *supra,* was added to the obligations of a broadcaster in the "Fairness" document. It was later to be formally added to the Commission's rules, *see* note 85, *infra.*

66 Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1250 (1949).

67 The Commission recognized that mistakes could be made, however, they felt that where the licensee's overall record demonstrated "reasonable effort to provide a balanced presentation of comment and opinion on such issues," then the mistakes should not be condemned:

> The question is necessarily one of the reasonableness of the station's actions, not whether any absolute standard of fairness had been achieved. It does not require any appraisal of the merits of the particular issue to determine whether reasonable efforts have been made to present both sides of the question. *Id.* at 1255-56.

68 What is against the public interest is for the licensee "to stack the cards" by a deliberate selection of a spokesman for opposing points of view to favor one viewpoint at the expense of the other, whether or not the views of those spokesmen are identified as the views of the licensee or of others. Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views, or the forcefulness with which the view is expressed, but by making the microphone available, for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1254-55 (1949).

69 *Id.* at 1254-55.

70 *Id.* at 1261. Commissioner Jones also felt that "editorialization is in the public interest not in any policy requirement created by the Commission, but upon the inviolate terms of the first amendment." *Id.* at 1262.

71 *Id.* at 1258. Commissioner Webster, in his additional statements, framed the issues as the "right or privilege of access to the radio microphone." It was his view that no individual has the right to a microphone, for each licensee has the "privilege of and responsibility for" determining who shall be granted access to the medium of radio. That privilege also included the right of denial. *Id.*

rationale behind the doctrine seemed valid, the Commission should not advance a policy it could not police.[72]

Columbia Broadcasting System's Board Chairman, William Paley, hailed the new pro-editorializing policy as a great step forward for broadcasting;[73] however, a *New York Times* editorial told the broadcasters that the FCC Report raised more questions that it answered.[74] Many of these questions remained unanswered for twenty years.[75]

In the ten years subsequent to the Editorializing Report, the "fairness problems" that arose were dealt with on an *ad hoc* basis.[76] One aspect of the general fairness thrust dealt with equality in treatment of political candidates. In a case involving a candidate seeking the office of Mayor of Chicago, the Commission was petitioned to provide for equal time under Section 315[77] of the Communications Act. The candidate, Lar Daly, claimed that his political opponents had been given exposure to the public in station newscasts. The broadcasters felt that Section 315 should not apply to bona fide newscasts; however, the Commission held that Daly was entitled to equal time.[78]

Using the above decision as a catalyst, the United States Senate amended Section 315(a) of the Communications Act to exempt bona fide newscasts from fairness requirements. The added portion reflects reaction to the *Lar Daly* decision and recognized the goals of the Commission's "fairness doctrine."[79]

Some stations presented both sides of controversial issues. Others did not know what to do.[80] Still others attempted to avoid fairness obligations.

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72 *Id.* at 1270.

73 BROADCASTING MAGAZINE, June 21, 1948, at 21.

74 Editorial, New York Times, June 4, 1949, at 12:2. The *Times* was concerned with the ambiguity of the language, as was Commissioner Webster, and the increasing threat of government control over the airwaves.

75 *See* discussion of Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

76 *See* New Broadcasting Co. (WLIB), 6 Radio Regs. 258 (1950); John J. Dempsey, 6 Radio Regs. 615 (1950); Letter to WSOC Broadcasting Co., 17 Radio Regs. 548 (1958); *Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 FED. REG. 10416 (1964).

77 47 U.S.C. § 315(a); Federal Communications Act § 305(a).

78 Lar Daly, 18 Radio Regs. 238 (1959).

79 ... Appearance by a legally qualified candidate on any—

> (1) bona fide newscast,
> (2) bona fide interview,
> (3) bona fide documentary . . . , or
> (4) on-the-spot coverage of bona fide news events . . . ,
>
> shall be deemed to be the 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 news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunities for the discussion of conflicting views on issues of public importance. (Emphasis added.) 47 U.S.C. § 315(a), as amended (1959).

80 Many broadcasters contended that they did not know what their actual obligations were under the "Fairness Doctrine." In an article, Ben Fisher (at that time, head of the ABA's section on Administrative Law) pointed out that the broadcasters were consistently subject to second-guessing when, with the benefit of hindsight, the Commission decided he has failed to exercise the care or diligence required in the presentation of opposing views:

> Perhaps he failed to give sufficient amount of time to the opposing view (the Hon. Chas. L. Murphy, 23 R.R. 953 [1962]); perhaps his decision that certain news and informational programming qualified as "opposing" matter was found deficient (Time Life Broadcasting, Inc., 15 R.R. 2d 737 [1969]); perhaps his apportionment of time in terms of number of exposure or placement during the day was faulty (King, Inc., 15 FCC 2d 829 [1967]); perhaps his choice of opposing spokesman (Alabama Broad-

An example of the attempts to circumvent the Fairness Doctrine occurred during the California gubernatorial election in 1962, where KTTV-TV presented continuous, slanted commentaries by one of their newsmen in support of one gubernatorial candidate. More than 20 of these biased commentaries degraded the opposing party and the opposing candidate. Only twice was the opposing candidate allowed to appear on KTTV, and each time his presentation was followed by a rebuttal.[81]

The Commission ruled that under the Fairness Doctrine, when one commentator attacks one candidate or supports another, the station

> should send a transcript of the pertinent continuity in each program to the appropriate candidates immediately and should offer a comparable opportunity for an appropriate spokesman to answer the broadcast.[82]

The theory of the case was that a continuous opportunity for one side to express their views and a minimal opportunity afforded to opposite views violates the rights of the public to a fair and balanced presentation of the issues.[83]

Based on this and other cases,[84] the Commission ultimately codified a personal attack rule which stated the obligations of a broadcaster who aired a personal attack. The personal attack provision stated specifically that a station airing an attack on the "honesty, integrity, character, or the like qualities" of a person must send a tape or script or accurate summary of the broadcast, a notification as to the time of the broadcast, and an open invitation to respond to the broadcast within one week of the attack, unless it is a political broadcast, then the person must be notified within 24 hours. If an attack is aired within three days of an election, the person attacked must be told of the attack before the actual broadcast.[85]

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casting System, Inc., 17 R.R. 273 [1958]); or the format for the show (University of Houston, 11 FCC 2d 790 [1968]) indicated poor judgment; perhaps, his efforts to find other spokesmen were inadequate (WSOC Broadcasting Company, 17 R.R. 548 [1958]); or, finally, he could discover that matters once not considered controversial were now so considered by the Commission (Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10416 [1964]). Fisher, *The FCC's Role in Regulating Program Content,* 14 VILL. L. REV. 581, 611 (1969).

81 Times-Mirror Broadcasting Company, 24 Radio Regs. 404 (1963).

82 *Id.* at 405-6.

83 *Ibid.*

84 *See* Billing Broadcasting Co., 23 Radio Regs. 951 (1962); Clayton W. Maypoles, 23 Radio Regs. 586 (1962); Letter to Douglas A. Anello, F.C.C. 63-850 (1963).

85 Rulemaking was begun in 31 FED. REG. 5710 (1967) and proposed 32 FED. REG. 10303 (1967). The final form reads as follows:

> 73:123 Personal attacks; political editorials.
>
> (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 one 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 provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign or other such candidates, their authorized spokesman, or persons associated with the candidates in the campaign.
>
> (c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally quali-

Needless to say, industry reaction was not cordial,[86] and many claimed that the Commission had imposed a form of Section 326 censorship.[87]

VI. Fairness and the *Red Lion* Decision

Almost immediately after the Commission released the personal attack rules, they were attacked by the broadcasters as vague and contrary to the first amendment.[88] In the *Red Lion* case, the Supreme Court heard these issues and ruled that both the "Fairness Doctrine" and "personal attack rules" expanded, rather than restricted first amendment rights.[89]

In *Red Lion,* Reverend Billy James Hargis had personally attacked Fred Cook during one program in a series of "Christian Crusades." Mr. Cook wrote WGCB, the licensee which broadcast the attack, and asked for time to respond to Hargis' attack. WGCB suggested that if Mr. Cook could pay for time or find sponsorship he could rebut the personal attack. Cook replied that he didn't feel he had to pay for the broadcast time and petitioned the FCC for Fairness Doctrine consideration.[90] The Commission ordered the station to provide time for Mr. Cook's reply. The station appealed the decision.

On June 9, 1969, the Supreme Court sustained the validity of the Commission's personal attack rules. The Court ruled that broadcasters must make time available at their own expense in order to meet their fairness obligations and at their own initiative if it is not available from other sources.[91] Responding to a contention that fairness rules would discourage the presentation of controversial programming, the Court responded:

> That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of

fied candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the 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 subsection 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.

86 Editorial, TELEVISION AGE (July, 1967).

87 Federal Communications Act § 326, 47 U.S.C.A. § 326 (1934).

88 Radio and Television News Directors Association v. United States, 400 F.2d 1002, 1020 (7th Cir. 1968).

89 Red Lion Broadcasting Co. v. F.C.C. 395 U.S. 367 (1969).

90 . . . having presented a personal attack on an individual's integrity, honesty, or character, the licensee can not bar the response — and thus leave the public uninformed as to his side . . . — simply because sponsorship is not forthcoming.

Letter to Rev. John M. Norris (1965), *cited in* Red Lion Broadcasting Co. v. F.C.C., 381 F.2d 908, 913 (D.C. Cir. 1967).

91 This must be done at the broadcaster's own expense if sponsorship is unavailable. Cullman Broadcasting Co., 25 RR 895 (1963). Moreover the duty must be met by programming obtained at the licensee's own initiative if available from no other source. John J. Dempsey, 6 RR 615 (1950); . . . The Evening News Assn., 6 Radio Regs. 283 (1950).

Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 377-78 (1969).

> using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.[92]

The Court seemed to find an affirmative constitutional obligation to broadcast with fairness:

> It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[93]

After rejecting "scarcity" arguments, the Court pointed out that the demand for broadcast licenses continues to grow and overwhelm their availability; therefore, the privileged who gain outlets must make them available to others if the first amendment goal of dissemination of the widest possible variety of views is to be achieved.[94]

The Court also found that broadcasting is not comparable to the unabridgeable first amendment right to speak, write or publish.[95] The Commission's prohibition of absolute licensee discretion was not considered a denial of the licensee's right to free speech;[96] to the contrary, denial of access to the market place of ideas by either the Government or by a licensee was found to contravene the first amendment: ". . . First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies . . ."[97] and the Commission does not exceed its authority ". . . in interesting itself in general . . . format and . . . kinds of programs broadcast by licensees."[98]

The General Counsel of the Commission, commenting on *Red Lion,* wrote that he did not believe the decision required broadcasters to make their facilities available to anyone who wants to use them:

> *Red Lion* makes clear that Congress could, if it wish, require a licensee to share his microphone or his frequency with others seeking to use it, but in Sec. 3(h) of the Communications Act, Congress did otherwise. . . . That the Court did not intend to carve out new ground is indicated by its reliance on "long administrative practice" . . . , which it cites in support of the various pronouncements in the opinion.[99]

Although many did not read the *Red Lion* case to stand for a right of access,

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92 *Id.* at 393-94.
93 *Id.* at 390.
94 *Id.* at 396-400.
95 *Id.* at 388.
96 *See* NBC v. United States, 319 U.S. 190 (1943).
97 Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 391 (1969).
98 *Id.* at 395.
99 Request bv Reuben B. Robertson III and Ronald L. Winke, 20 Radio Regs. 2d 377, 384-5 (1970). The General Counsel suggested that legislative intent runs counter to a required right-of-access. *See Hearings on Equal Time before a Subcommittee of the House Commerce Committee,* 88th Cong., 1st Sess. (1963).

subsequent Commission and Court cases have clearly recognized a greater right on the part of the general public to participate in broadcast activities.[100] In an effort to protect broadcast licensees from the undue harassment which may have been caused by *Red Lion*, post-*Red Lion* decisions continued to vest wide discretion in the licensee to choose program formats and position representation,[101] and required fairness protection complainants to:

> (a) specify the particular broadcasts in which the controversial issue was presented, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in his *overall programming* has not attempted to present opposing views on the issue.[102] (Emphasis added.)

By requiring this standard of proof, the Commission sought to avoid involving itself directly in matters of broadcast journalism. When a fairness complaint is filed, the Commission asks the following questions of the licensee: (1) Is the issue one of controversial public importance in the viewing area? (2) Has the licensee fulfilled his fairness doctrine obligations by presenting balanced programming on that issue?

Assuming the licensee responds that the issue is not of a controversial nature,[103] the Commission, thereafter, determines merely whether the licensee's judgment was arbitrary or capricious. Assuming the licensee responds affirmatively to the first question, but represents that his station has presented balanced programming on the issue, the Commission then determines whether a good faith balance has been achieved. It should be clear that this evaluation does not lend itself to mathematical precision and therefore has precipitated confusion in some quarters.

VII. Fairness and Beyond

A review of the most current cases in this area indicate that, not only is there continued uncertainty as to the definition of "controversial" and "balanced presentation," but additional questions have been raised regarding the range of applicability of the doctrine. Does the Fairness Doctrine apply to product ad-

100 This trend toward liberalization of access to the media has developed in the consideration of several cases during the past few years, each of which demonstrated the desire of members of the listening and viewing public to secure some control over the policies and practices of previously unfettered broadcast stations. In the cases of *Sunbeam Television Corp. v. F.C.C.*, 243 F.2d 26 (D.C. Cir. 1957) and *Community Broadcasting Co. v. F.C.C.*, 274 F.2d 753 (D.C. Cir. 1960), the D.C. Circuit Court of Appeals held that Commission license renewal procedures should not give unfair advantage to an applicant merely because of his prior operation of a station. In its decision in *Office of Communications of the United Church of Christ v. F.C.C.*, 138 U.S. App. D.C. 112 (1969), the court suggested that the listening public should have the right to participate in the decision making processes of the F.C.C., and in *Citizens Communications Center v. F.C.C.*, Cases Nos. 24,221; 24,471; 24,491; U.S. App. D.C. (slip opinion released June 11, 1971); the court struck down a Commission policy that gave the incumbent applicant for a broadcast license a substantial advantage over any challengers and noted that its ruling restored healthy competition by allowing the public to have a greater voice in who shall run the facilities which the people must rely upon.

101 Dowie A. Crittenden, 18 F.C.C. 2d 499 (1969).

102 Federation of Citizens Associations, 21 F.C.C. 2d 12, 13 (1969).

103 Letter to NBC, 25 F.C.C. 2d 735 (1970).

vertising, to institutional advertising, to political presentations? In each instance, the Commission has proceeded with its case-by-case approach, and has decided policy issues based on the specific facts presented by each case.

In the area of product advertisement,[104] the Commission was presented with allegations by a New York attorney, John F. Banzhaf III, that cigarette use represented a significant health hazard and that, therefore, their promotion through broadcast advertising raised a controversial issue of public importance.[105]

The Commission ruled that the Fairness Doctrine applied[106] and that ruling was affirmed by the courts.[107] Although the Commission stated that the cigarette ruling was unique, the ruling precipitated other complaints claiming that other product commercials should be covered by the "Fairness Doctrine."[108] In *Letter to Gary Soucie*,[109] the Commission held that the cigarette ruling should not apply to the air pollution problem in New York City:

> Were we to adopt a scheme of announcements tracking in a significant radio the ordinary product commercials, the result would be the undermining of the present system, based as it is on such commercials . . . our action must be guided by one standard, the public interest (47 U.S.C. Sec. 303(g)), and on that standard, extention of the cigarette ruling is not in order.[110]

The D. C. Circuit Court of Appeals was not persuaded by the Commission's logic, for on appeal they reversed the Commission's decision in *Soucie* and extended the cigarette ruling to the air pollution problem in New York, stating:

> Commercials which continue to insinuate that the human personality finds greater fulfillment in the large car with the quick get-a-way do, it seems to

104 It is interesting to note that in the Commission's formulation of the Fairness Doctrine in its *Report in Editorializing by Broadcast Licensees*, the F.C.C. made no mention of commercial advertising although the threat of its policy was to assure fair and balanced presentations of issues. While the Commission had advertising in mind before it promulgated the doctrine, via *Sam Morris*, the concept of F.C.C. centered over advertising contrary to the public interest was evident in *KFKB Broadcasting Ass'n v. Fed. Radio Comm'n*, 47 F.2d 670 (D.C. Cir. 1931).

105 Letter from John F. Banzhaf, III to Television Station WCBS-TV, Dec. 1, 1966, *cited in* Banzhaf v. F.C.C., 405 F.2d 1082, 1086 (D.C. Cir. 1968).

106 Television Station WCBS-TV, 8 F.C.C. 2d 381 (1967); Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C. 2d 921 (1967).

107 Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), *cert. den.*, 396 U.S. 842 (1969).

108 San Francisco Women for Peace. 24 F.C.C. 2d 156 (1970); Alan F. Neckritz, 24 F.C.C. 2d 175 (1970); Letter to KNBC, KPIX, KNXT, KRON, KGO, 29 F.C.C. 2d 807 (1971); David Green, 24 F.C.C. 2d 171 (1970), *aff'd*, Green v. F.C.C., case no. 24,470, 24,516 U.S. App. D.C. (slip opinion released June 18, 1971); where the court said:

> We would have thought that the opinions of court and Commission would have made unmistakably clear that it is not every advertisement carrying a controversial message which calls for response through a similar spot announced format. The emphasis, quite to the contrary, was on the uniquely serious and well documented hazards to the public health inherent to cigarette smoking — hazards deeply explored and extensively expounded upon by the other branches of government — which stood at the case of the Banzhaf ruling. Slip Opinion at 20-21.

109 24 F.C.C. 2d 743 (1970).

110 *Id.* at 748-9. The Commission distinguished cigarettes from high-powered autos in three ways: (1) cigarette smoking did not involve a balancing of competing interests — it was a habit, while the auto-air pollution issue is a complex problem. (2) No one proposes to stop promoting or using the fruits of the technological revolution — as they urged to stop using cigarettes. (3) Action can be effectively taken in the area of auto-air pollution, therefore the focus should properly be on action dealing with products that contribute to pollution, not the perpetual advertising aspect. *Id.* at 746.

> us, ventilate a point of view which not only has become controversial but involves an issue of public importance. When there is undisputed evidence as there is here, that the hazards to health implicit in air pollution are enlarged and aggravated by such products, then the parallel with cigarette advertising is exact and the relevance with *Banzhaf* inescapable.[111]

Thus, in the area of product commercials, it appears that the state of the law indicates that product advertising will, under certain circumstances, require fairness treatment and exposure of differing viewpoints.[112]

In the related area of institutional advertising (which includes commercial presentations which do not attempt to sell specific products but generally promote a favorable company image), the law is even more uncertain. Thus, in *Letter to NBC ("Esso Decision")*,[113] the Commission stated that a discussion of an oil company's search for oil and its asserted concern for ecology are controversial issues of public importance, inasmuch as the advertisements involved raised issues concerning (1) the need to develop oil reserves in Alaska, and (2) the ecological effects which could accrue from such development. The Commission applied the Fairness Doctrine but held that the licensee had presented balanced programming on the subject.[114]

In another case involving institutional advertisements, the Commission ruled that the regular advertising for a commercial establishment would not give the striking union a right-of-reply under the Fairness Doctrine, or permit a call for a boycott.[115] However, in an almost identical case, the D. C. Circuit Court remanded a Commission decision which denied a striking union a right-of-reply to 100 commercial messages and over 1,000 spot announcements for the affected department stores stating: "the advertisements did urge the listening public to take one of the two competing sides on the boycott question—they urged the public to patronize the store, i.e., not to boycott it." Elsewhere in the decision it is stated that: "[d]uring the same period, the Union was denied any opportunity beyond a single roundtable broadcast to explain why, in its opinion, the public should not patronize the store."[116] The Court decided that the issues involved deserved a fuller treatment than was afforded by the Commission. Accordingly, they remanded the case to the Commission.[117]

Considerable current case law is also developing in the area of political advertising and presentations.[118] The Commission found that "barring unusual

111 Friends of the Earth v. F.C.C., case no. 24,556, U.S. App. D.C. (slip opinion released August 16, 1971 at p. 12).
112 Letter to KNBC, 29 F.C.C. 2d 807 (1971).
113 Letter to NBC (Esso decision), 30 F.C.C. 2d 643 (1971).
114 Letter to NBC (Esso Case—revisited), 31 F.C.C. 2d 6 (1971).
115 Amalgamated Meat Cutters and Butcher Workmen of North America, 25 F.C.C. 2d 279 (1970).
116 Retail Store Employees U., Local 880 v. F.C.C., 436 F.2d 248, 258 (D.C. Cir. 1970).
117 *Id.* at 259.
118 For the special conditions of political broadcasting the Commission qualified its *Cullman* doctrine (*see* note 4, *supra*) so that:

> The licensee would not be obligated to provide free time to authorized spokesman . . . or those associated with him in the campaign if [the opposition] authorized spokesman . . . or those associated with him in the campaign had used paid time on the licensee's station to criticize the [former candidate] or his position on campaign issues.

Letter to Nicholas Zapple, 23 F.C.C. 2d 707, 709 (1970).

circumstances, it would not be reasonable for a licensee to refuse to sell time to spokesmen for [the opposing side]."[119] From these situations a quasi-equal opportunity obligation was created from which a political party could not be refused time to reply to a presentation of the opposing party.

In the past year, the Commission has had to face many petitions by groups asking for a right-of-reply to the President of the United States. Fourteen United States Senators sought television time to present their anti-war views in reaction to President Nixon's five network telecasts on the Vietnam situation.[120] They were granted a half hour period by NBC, but were refused time by CBS and ABC. It was the Senators contention that:

> . . . the simultaneous dissemination of the President's uninterrupted views by the three major networks in prime time cannot be offset by the internally balanced programs, frequent news presentations regularly broadcast by the network, and the structural interview programs which do not permit participants to deliver prepared statements of position.[121]

At the same time, the Republican National Committee claimed that, if the Democratic National Committee were given time, they should have an opportunity to respond under the Fairness Doctrine.[122] Eleven U. S. Senators also claimed time to respond to views expressed by anti-war Senators.[123] The Commission was forced to determine the extent to which the President's unique position necessitated special treatment under the Fairness Doctrine.

The Commission ruled that the Fairness Doctrine unquestionably applies to Presidential remarks, but that licensees have considerable discretion in discharging their responsibilities under the Fairness Doctrine standard. The Commission avoided a declaration of rigid rules in this area and decided to look at each licensee's performance under these circumstances.

However, in considering the extraordinary circumstances surrounding the President's five addresses to the nation in 1970 and the extensive but fragmented presentation of the other side, the Commission ruled that time had to ". . . be afforded for one more uninterrupted opportunity by an appropriate spokesman to discuss this issue, with the length of time to be determined by the nature of the prior efforts in this area of uninterrupted presentations. . . ."[124] At the same time, the Commission held that CBS had to extend time to the Republican National Committee.[125] The impact of these rulings is twofold: (1) that Presidential appearances are covered by the Fairness Doctrine, but that no quasi-equal opportunity obligation existed to require selling time to the rival party; and (2) that a network is free to put anyone on a program to rebut the President, but if

119 *Id.* at 708.

120 Committee for the Fair Broadcasting of Controversial Issues, 19 Radio Regs. 2d 1103 (1970).

121 *Id.* at 1115-1118.

122 *Id.* at 1110.

123 *Id.* at 1113.

124 *Id.* at 1121.

125 CBS had granted the Democratic National Committee twenty-five minutes to respond to the President's extensive use of the media. The Commission held that this rebuttal was party-oriented rather than issue-oriented, hence the Republicans were able to get rebuttal time. *Id.* at 1124.

politics rather than issues are discussed, the opposing party will have to be given time to respond.

Cases dealing with political presentations have also addressed themselves to the question of the right-of-access to *initiate* discussion of issues of public importance. In *Business Executives Move for Peace in Viet Nam* (BEM), a group desired to protest the war in Indo-China by making one-minute announcements over the airwaves. The station they approached refused to sell them time, and BEM went to the Commission claiming violation of fairness, infringement of the public's right to hear contrasting views, and suppression of their first amendment right of free speech.[126] The Commission denied relief, stressed that broadcasters were not common carriers, and concluded that:

> No particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual or group to present personal views.[127]

A short time later, the Democratic National Committee (DNC) requested a declaratory ruling concerning access to time on broadcast stations and on the validity of the proposition that a ". . . broadcaster may not, as a general policy, refuse to sell time to responsible entities such as DNC, for the solicitation of funds and for comment on public issues."[128] The Commission reiterated its comments in *BEM*, and framed the issue as "whether there is a right-of-access to broadcast facilities by 'responsible entities' over and beyond the fairness doctrine right of the public to be informed."[129] In answering the issue in the negative, the Commission felt that since it had already established that licensees have discretion in selling time to political candidates, it would be inconsistent to find that they have no discretion in selling time for the discussion of controversial issues.[130] The Commission reasoned that not only would the recognition of an unlimited right of access tend to force important programs from the limited television time available, but it would impose common carrier status on broadcast licensees—a situation Congress sought to avoid.[131] In short, the Commission found that viewing licensees as public trustees and fiduciaries was of greater benefit than the concept of a guaranteed right of access for every individual.

Both BEM and DNC appealed the Commission's decision. The D. C. Circuit Court of Appeals reversed the Commission in a decision which implied that individual listeners should be able to buy broadcast time to expound their editorial views on the same basis that advertisers buy time to present commercial messages.[132] Although the holding of the case is specific ("that a flat ban on paid

126 Business Executives Move for Vietnam Peace, 10 Radio Regs. 2d 1053, 1054 (1970).
127 *Id.* at 1056.
128 Democratic National Committee, 18 Radio Regs. 2d 1977, 978 (1970).
129 *Id.* at 985. The reader is again reminded of the difference between a Fairness Doctrine right-of-reply, and the initial presentation of an issue by one other than a broadcaster's — the right-of-access.
130 *Id.* at 987.
131 *Id.* at 989.
132 Business Executives Move for Vietnam Peace v. F.C.C., case nos. 24,492, and 24,537, U.S. App. D.C. (slip opinion released August 3, 1971).

public issue announcements is in violation of the First Amendment, at least when other sorts of paid announcements are accepted")[133] the decision is rich in *dicta* in support of the proposition that the first amendment requires some sort of right-of-access to the media[134] apart from the requirements of the "Fairness Doctrine." The decision is now in the appellate process.

VIII. Conclusion

From even this brief review of current cases, it is not difficult to understand why the "Fairness Doctrine" is currently under review.[135] It should be clear to the reader that a major review of the Fairness Doctrine is mandatory at this time. On June 11, 1971, the Commission issued a Notice of Inquiry which focused on the problems generated by four decades of *ad hoc* application of a fairness policy and seeks comments on the manner in which this most desirable doctrine can be adapted to fit the changing needs of our communications environment. This is not to say that the Commission will not determine ultimately that a case-by-case procedure is the most effective means of satisfying the conflicting claims of access and availability. Thus the Notice states:

> If our policies are sound, they should have stood the test of time and application. If they are not sound—if they unreasonably restrict the journalistic function of broadcasters or permit broadcasters to unreasonably restrict access—the corrective act is called for.[136]

The Commission's inquiry concerns the most fundamental propositions of

133 *Id.* at 4.

134 For example:

> In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different. In news presentations, for example, the broadcaster's own interests in free speech are very, very strong. Red Lion case, at 396.
>
> The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in the area. But in the allocation of advertising time, the broadcasters have no such strong First Amendment interest. Their speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak. *Id.* at 20.
>
> Vigorous, free expression is promoted when members of the public have some opportunity to take the initiative and editorial control into their own hands on the broadcast media. *Id.* at 24.
>
> . . . by requiring that some such advertising be accepted, we leave the Commission and licensees broad latitude to develop "reasonable regulations" which will avoid any possibility of chaos and confusion. *Id.* at 41.
>
> A society already so saturated with commercialism can well afford another outlet for speech on public issues. All that we may lose is some of our apathy. *Id.* at 45.

For a full discussion of the first amendment and its relation to a broadcast right-of-access see Commissioner Johnson's dissent in *BEM,* 19 Radio Regs. 2d 1053, 1060(a)-1060(v) and *DNC,* 19 RR 2d 977, 992(z).

135 *Obligations of Broadcast Licensees Under the Fairness Doctrine,* 35 FED. REG. 7820 (1970); *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act,* F.C.C. Release 71-623 (released June 11, 1971).

136 *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act,* F.C.C. Release 71-623 (released June 11, 1971), at 4.

broadcasting life; a balance will have to be struck betweeen the growing desire of our national citizenry to gain access to mass broadcasting channels, while at the same time, limited frequency availabilities will require a reaffirmation of the trustee relationship which underlies a broadcast licensee's discretion and decision-making function. The purpose of this paper has been to focus on the problems which exist; solutions must await and be the product of lengthy deliberations and experimentation.