LEGAL PROBLEMS IN BROADCASTING

TOOHEY, MARKS, & LUTZKER

LEGAL PROBLEMS IN BROADCASTING

TOOHEY, MARKS, & LUTZKER

LEGAL PROBLEMS IN BROADCASTING

Identification and Analysis of Selected Issues

DANIEL W. TOOHEY
RICHARD D. MARKS
ARNOLD P. LUTZKER

Published by
GREAT PLAINS NATIONAL INSTRUCTIONAL TELEVISION LIBRARY
UNIVERSITY OF NEBRASKA
LINCOLN, NEBRASKA

LEGAL PROBLEMS IN BROADCASTING

DANIEL W. TOOHEY
RICHARD D. MARKS
ARNOLD P. LUTZKER

Library of Congress Catalog Card Number 74–82891

Preface

This book evolved from a manual written for a state public broadcasting network. Our intent was to guide program producers and managers through many of the legal problems inevitably associated with broadcast production. We hoped to provide sufficient detail so that the network's managers and producers could identify legal problems and seek professional legal assistance when necessary.

This book is an expansion of the original goal, and is designed for much wider readership. Broadcast managers and producers may find it helpful, and we hope it will also be an aid in college-level communications courses. Interested laymen should find the book a valuable introduction to the legal problems of broadcast regulation.

Though we have continued the original handbook's emphasis on the problems of noncommercial broadcasting, we were able to treat the problems shared in many areas with commercial radio and television. We considered including explanations of advertising regulation, paid political broadcasts and the like, but concluded that these complicated technical areas were too arcane for our purposes.

We began out of an awareness of a dearth of information and an abundance of misinformation concerning broadcast regulation. We found this especially true among certain public broadcasters whose attentions are preoccupied more with survival than regulation. Even the most obscure and struggling station is beginning to feel a need to know about these regulations.

Federal scrutiny has intensified, reaching into seemingly obscure

and unimportant areas of station operation with its regulatory formulae. Public pressure is also mounting. The dissidents invoking remedies at the federal agency level are legion. Many of the demands these groups bring to the licensee have regulatory repercussions.

So, knowing the rules is knowing the battlefield.

Most of the chapters in this book deal with problems which may find any licensee in conflict with members of his community, with the FCC or the courts acting as referee. Many of these skirmishes are premised on an assumption that the licensee will not know his rights and must, therefore, endure intimidation from many quarters. Certainly that should not be the case, but the tendency to cave in is great where ignorance of regulation leaves the licensee without defense.

One of our important objectives is to deal with selected problems in a realistic way. One of us has referred to this as our intent to convey a "slice of life."

To do this we make liberal use of hypothetical situations which illustrate the points under discussion. Some of these "hypotheticals" are adapted from actual cases. Others are the product of our fertile imaginations. We have tried to portray realistic problems in circumstances familiar to station operation. If you recognize the situations, we have succeeded.

The hypotheticals are, of course, not intended to be exhaustive of any area of the law relating to broadcasting. They simply show how legal problems are inherent in every aspect of broadcasting, and how those who are not on the lookout may find out about such problems only after it is too late.

In some chapters, these situations are integrated with the text more than in others, depending on the subject matter. New details or variations are also introduced. In most cases, the facts have been structured to isolate one or two legal principles; in actuality, life is seldom so simple.

The best we can hope for is to invest the reader with a sensitivity toward these subjects—no more. A cover-to-cover study of this book will acquaint broadcasters or students with principles, but will not equip them to handle legal problems or effect solutions at law.

Part of the sensitivity we wish readers to acquire is knowing when professional help is needed to avoid the tangles and litigation which can result from being oblivious to the rights of others. If the broadcaster cannot anticipate or detect a problem, he or she will be equally unaware of the need for assistance, even though it may be readily available.

We cannot possibly give broadcasters para-legal competence in these areas, but perhaps we can enhance their professionalism with a little knowledge of the law.

We also hope to convey some of our interest in broadcasting and its fascinating legal problems. This is an area of constant evolution. The state of the law, as we have described it, may be different tomorrow. New rules and regulations appear almost daily. Landmark judicial opinions are handed down in rapid succession. Seldom does a year go by without some congressional amendment to the Communications Act.

We would have you regard this book, therefore, as an introduction to communications law, and we hope that your interest continues.

DANIEL W. TOOHEY
RICHARD D. MARKS
ARNOLD P. LUTZKER

Acknowledgment

The authors express their thanks to Jack G. McBride and Ron E. Hull of the University of Nebraska and Station KUON-TV, who commissioned the original manual from which this book evolved and encouraged us to go forward; and to Paul H. Schupbach, Director of the Great Plains National Instructional Television Library at the University of Nebraska, who first saw the makings of a book in the original manual.

We also acknowledge the expert, cheerful assistance of William L. Robinson, "Book Architect" extraordinaire, whose knowledge and energy were indispensable to the project.

Finally, we thank our colleagues in law who supported our efforts with their time, skills, and constructive suggestions. Among them we give special mention to Donald L. Chasen, a former colleague, who made many contributions to the manual from which this book grew.

Legal Problems in Broadcasting

TABLE OF CONTENTS

PREFACE iii
ACKNOWLEDGMENT vii
HOW TO USE THIS BOOK xiii
Working with Hypothetical Fact Situations xiii
Understanding Legal Citation xiv
Further Reading xiv
ABOUT THE AUTHORS xvii
I. FREEDOM OF EXPRESSION AND RELATED ISSUES xix
1. DEFAMATION 1
Elements of Defamation 2
The Statement Must Defame 2
"Publication" 4
Identification of Subject 6
Defenses 7
Absolute Privilege 8
Qualified Privilege 9
Public Interest: *Times v. Sullivan* 10
Actual Malice: Public Officials and Public Figures 11
The *Rosenbloom* Case and Public Issues 12
Truth a Complete Defense 14
Mitigation of Damages 15
Trade Libel 16
Absolute and Qualified Privileges 17

2. THE RIGHT OF PRIVACY 19
Privacy Invasions in Advertising 21
Written Consent 23
Limitations on Right of Privacy 23
Right of Privacy and Defamation 24
3. THE FAIRNESS DOCTRINE AND PERSONAL ATTACK RULES . 27
Statutory Basis 27
Fairness Doctrine Responsibilities 28
Controversial Issues 28
Choice of Issues 31
Factors in Determining Importance of Particular Issues 32
"Accidental" Issue Selection 33
Anticipating "Issues" 35
Balance Defined by Service Area 37
Techniques of Balanced Programming 38
A Station's Options 40
Controversial Issue Programming Often Requires Compromises 42
Personal Attacks and Political Editorials 45
What Constitutes a "Personal Attack"? 47
Deadline for Compliance 49
Exemptions 50
Political Editorials: Time Limits 53
Editing Personal Attacks 53
4. POLITICAL BROADCASTING 55
Reasonable Access for Federal Candidates 57
Consequences of Failure to Provide Time for Non-Federal Candidates 58
The Equal Opportunities Rule 58
Time Limit 59
Notification Not Required 62
Equal Opportunities Exemptions 64
Educational Stations Prohibited from Editorializing 66
The *Zapple* Rule 68
5. NEWS STAGING 69
The "Extrinsic Evidence" Test 70
Force of FCC Guidelines 72
Co-Existence with FCC Guidelines 75
6. OBSCENITY 79
The Legal Standard 79
The Federal Preemption Problem 81
Little Guidance for Broadcasters 82
The FCC and Obscenity 82
Examples of Problem Broadcasts 83
Programming Guidelines and Techniques 85
The Complaint Process 86
Protecting Children 86

Promotion and Warnings 88
The Censorship Prohibition 90
Deleting Objectionable Material 90
Licensee's Power of Censorship 91
Prior Approval of Originator 91
Challenging the FCC 93
7. VIOLENCE 95
The Battle Lines Are Being Drawn 96
Current Research Insufficient 97
Analogy to Cigarette Ads Inappropriate 98
The Long Perspective 99

II. BUSINESS ASPECTS OF PROGRAMMING 101
8. COPYRIGHT 103
Copyright Protection 104
Special Limitations on Musical Copyrights 105
Types of Copyright 105
What Can Be Copyrighted 107
Unprotected Works 109
Statutory Requirements 111
Assuring Copyright Protection 112
Duration of Copyright Protection 113
Transfer of Statutory Copyright 113
Renewal Rights 114
Fair Use Doctrine 115
Permission to Use Copyrighted Material 118
Areas of Special Concern 119
Motion Pictures and Videotape Recordings 119
Sound Recordings 122
CATV and Copyright 124
Reform Appears Likely 125
9. UNFAIR COMPETITION 127
Trademarks 127
Acquiring a Trademark 129
Some Marks Unprotectable 130
Registering Trademarks Under the Lanham Act (The Trademark Act) 132
Protection of a Trademark 134
"Confusing Similarity" 135
State Anti-Dilution and Unfair Competition Laws 136
Geographic and Commercial Limitations 138
Defenses in a Trademark Action 139
10. LOTTERIES 141
Congress Has Prohibited Broadcasting Most Lottery Information 141
Any Scheme Requires Caution 143
News Reports of Lotteries 145
Permissible Content 146

11. FEDERAL INCOME TAXATION 151
Political Broadcasting 151
An Apparent Conflict of Laws 151
Unrelated Business Income 153
The 1954 Code Revisions 153
Donations: Deductions Are Limited 155
Increasing the Deduction 155
The Carry-Forward Provision 157
12. THE USE OF RELEASES AND OTHER STATION INDEMNIFICATION FORMS 159
Purpose of Releases 159
Section 315 and the Candidate's Release Form 163
Anyone Can Sue 164
A Simple Contract for Paid Appearances 166
Forms of Releases 166
APPENDIX 171
Selected Statutes and Regulations 173
Title 47—United States Code 173
Title 18—United States Code 181
Rules and Regulations of the Federal Communications Commission 182
Suggested Legal Reading 189
INDEX 193

How to Use This Book

This book is designed as an introduction and reference to broadcast law for commercial and noncommercial station managers and staff, students of radio and television in college courses, and for general readers.

Its chapters cover many fundamentals of broadcast regulation. Familiarity with these concepts is one of the requisites of informed station operation.

Working with Hypothetical Fact Situations

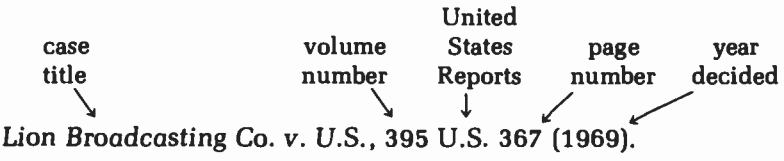
The "hypotheticals" used in almost every chapter illustrate how rules discussed in the text are applied to concrete situations. Readers are urged to conjure up variations of each set of facts. As each element is changed, ask whether the rule still applies or whether it applies in the same way. At what point do changes in the facts require a different result? How can broadcasters identify crucial factual elements to control the legal consequences of their everyday operations?

Analysis of the hypothetical situations by manipulating factual components can easily carry beyond the principles explained in the text. Sometimes the information necessary to unravel a changed set of facts is too detailed or peripheral for inclusion in a book of this kind. Obtaining a concrete answer often may require research and interpretive skills taught only in law schools and refined by legal practice.

Even then, however, knowing limits of interpretation and recognizing the need to seek professional help is important for any broadcast executive.

Understanding Legal Citation

We have provided selected legal citations to important cases and other legal authority so that you can examine these sources if you desire. For example, *Red Lion Broadcasting Co. v. U.S.*, 395 U.S. 367 (1969), should be interpreted thus:



"United States Reports" is the official series in which decisions of the United States Supreme Court are published.

Decisions of the middle-level federal appeals court, the United States Court of Appeals, are reported in "Federal Reporter, Second Series," abbreviated "F.2d". The Court of Appeals is divided into nine numbered geographical circuits plus a special circuit for the District of Columbia. The circuit in which a particular case was decided is listed in the citation: *United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).

Decisions of the Federal Communications Commission are found in the agency's own official reporter, abbreviated "FCC" and "FCC 2d" (first and second series); and in the unofficial "Pike and Fischer Radio Regulation Reporter" (first and second series), cited "P. & F. *Radio* Reg. 2d".

Statutes of the United States are referred to by their popular names, such as The Lanham Act, and are cited in the United States Code Annotated, for example, 15 USCA 1125. The number before "USCA" refers to the title of the Act.

For ease of reference, legal treatises are cited using traditional notation rather than the sometimes confusing legal forms, for example, Melville B. Nimmer, *Nimmer On Copyright* (Albany: M. Bender, 1963), at 195.

Further Reading

The information in this book is oriented toward operations; it is the kind of background a manager or producer needs in day-to-day decision-making. Conversely, the book is not an analysis of FCC or congressional policy or of policy alternatives. Neither is it a guide to

legal remedies available to broadcasters or members of the public. Readers wishing to explore these fields should consult the selected bibliography which follows the text.

A caution: the law of broadcast regulation changes constantly. So, while this volume is meant to be a reference, its currency in some specifics will be affected by the dynamics of the field. Every broadcaster must maintain his own sources of information about changes in the regulatory regime.

The names of people, companies, and cities, as well as the stations, networks, and call letters used in our hypotheticals are meant to be wholly fictitious; any resemblance to actual people, places, or entities is purely coincidental.

About the Authors

DANIEL W. TOOHEY

Daniel W. Toohey is a member of the District of Columbia Bar. He is a native of St. Louis, Missouri, where he received A.B. (1961) and J.D. (1964) degrees from St. Louis University. During undergraduate work, he managed the student-operated radio station at St. Louis University, and during law school he worked as an announcer, producer, and director at Station KETC(TV) in that city. In 1964 and 1965, he was a general attorney with the FCC in Washington, D.C.

He has participated in the production of many law-related television and radio programs, and has served upon many communications law committees of various bar associations. Since 1970, he has been an instructor in seminars on broadcast regulation presented by the National Association of Educational Broadcasters.

His publications include a student note for the St. Louis University Law Journal on an aspect of criminal trial procedure; "Newspaper Ownership of Broadcast Facilities," for the *Federal Communications Bar Journal* (Vol. XV, No. 1, 1966, p. 48); "The Avoidance of Offense: Observations on the Matter of Broadcast Censorship" in the *St. Louis University Law Journal* (Vol. 15, No. 1, Fall, 1970); "Section 399: The Constitution Giveth and Congress Taketh Away" Vol. 6, No. 1 of the *Educational Broadcasting Review*; and "Corporate Underwriting: the Rules of the Game," Vol. 2, No. 2 of the *Public Telecommunications Review*.

Mr. Toohey resides in Bethesda, Maryland.

RICHARD D. MARKS

Richard D. Marks is a member of the District of Columbia Bar. A native of Scarsdale, New York, he took his B.A. (1966) at the University of Virginia and received a J.D. (1969) from Yale University Law School.

While at the University of Virginia, he was Station Manager and President of the student-owned and operated commercial radio station, WUVA. In 1970–71, he served in the United States and Vietnam as a Captain in Military Intelligence.

He is the author of "Broadcasting and Censorship: First Amendment Theory After Red Lion," 38 *George Washington Law Review* 974 (1970).

Mr. Marks, who is a licensed pilot, resides in McLean, Virginia.

ARNOLD P. LUTZKER

Arnold P. Lutzker is a member of the District of Columbia Bar. A native of New York City, he attended The City College of New York, where he received his B.A. magna cum laude in 1968. He received his J.D. cum laude from Harvard Law School in 1971.

From 1971–1972, he served as legislative assistant to Congressman Jonathan B. Bingham. From that vantage point, he followed legal developments in the Congress, with emphasis on domestic issues.

Mr. Lutzker is a resident of Washington, D.C.

I

Freedom of Expression and Related Issues

Chapter 1

Defamation

Defamation, a legal concept whose roots trace back to early English common law, has recently experienced new development in the United States with the Supreme Court's expansion of First Amendment principles involving defamation.

Usually referred to by the terms libel and slander, defamation is "an invasion of the interest in reputation and good name, by communication to others which tends to diminish the esteem in which [an individual] is held."[1] Traditionally, libel and slander are distinguished on the basis that libel is written, and slander, oral. However, the present trend is to classify all defamations which have a permanence of form as libel. By this approach, defamation on radio and television which has been recorded, and therefore has achieved a permanence of form, is libel.

Since radio and television combine elements of both libel (permanence) and slander (oral), a new term has been coined to categorize defamation by broadcast—"defamacast."

Nevertheless, the distinction between libel and slander is more a matter of legal pleading requirements than the substance of the offense. In a court of law, libel and defamacast are generally "actionable per se." For a plaintiff to succeed, he only has to prove that the defamatory statements were written and published or broadcast, and need not

[1]William L. Prosser, *Handbook of the Law of Torts* [hereinafter Prosser], St. Paul: West Publishing Co., 1955, (2d Edition), p. 572.

prove the existence or extent of damage. In most cases of slander, on the other hand, a plaintiff is also required to establish that he has actually been damaged by the statements, and to prove the amount of loss.[2]

Elements of Defamation

The Statement Must Defame

In any action for libel or slander, the plaintiff must establish that the defendant circulated a defamatory statement. Generally, a defamatory statement diminishes an individual's reputation and good name or excites adverse feelings or opinions against him. The defamatory meaning may be apparent on its face, or it may be reasonably inferred by the words and context. "Reasonably inferred" is underscored because a court will accept inferences or innuendoes to establish the defamatory nature of a remark; thus, a statement can defame someone without directly mentioning his name.

Hypothetical 1–1

At a meeting of the executives of Gemflics, Inc., one of Hollywood's largest film companies, the officers discussed the progress of their latest budget picture, Evaporation, *produced by Enunzio Marquee, currently on location in the Sahara Desert. Part of their deliberations included the following discussion:*

Treasurer: I have a telegram from Enunzio saying he's finished Part I and his $5 million budget. He adds tersely "Send more dollars."

Vice President: Enunzio is getting out of hand. We ought to can him and get someone else to finish the job. I never thought he was good anyway and now it turns out he's a damn profligate. And I don't doubt he's embezzling company funds.

President: It's clear we can't let him go on this way, but we've invested too much in Evaporation *to scratch him now. Let's call him back for some straightening out and if he gives us any trouble we'll make it clear he's a wasteful crook.*

Later, the President, still infuriated about Enunzio, told his secretary what transpired and then dictated the following telegram:

Dear Enunzio:

Hold production immediately–you've taken too much

[2]In a few instances, certain slanderous remarks are also actionable per se; these will be discussed below.

money. Request for additional funds impossible. Return to Hollywood immediately for talk.

Gemflics

Later that evening, on television stations across the nation, a syndicated celluloid reporter, Sonia Baubbles, reported:

Dateline Hollywood. Gemflics big budget movie makers are quietly calling Enunzio Marquee a crook. Enunzio was ordered to halt production of his latest extravaganza after the total amount of his budget had been spent. Gemflics plans to call Marquee back for a dressing down, and hopes to persuade him to complete Evaporation on a reduced budget. This should be Enunzio's last picture for Gemflics–and a typically bad one at that. Good luck Gemflics.

Comment:

No fewer than six independent defamatory statements may be gleaned from the hypothetical:

1. The remarks of the Vice President at the board meeting impugned Enunzio's character and depicted him as "a profligate" and "an embezzler."

2. The President, at that meeting, called him a "crook."

3. The discussion between the President and his secretary repeated the defamatory remarks.

4. In dictating the telegram, the President charged Enunzio with "taking" company money.

5. The conversation of Sonia Baubbles and her source as to content of the board meeting discussions constitutes a separate defamation which can only be implied from these facts.

6. Finally, Sonia's own reporting of the incident clearly hurts Enunzio's reputation as a director.

Criticism Not Necessarily Defamatory

Courts have tried to draw a distinction between assertions of fact and opinions in order to limit the wide-ranging implications of defamatory statements. Criticizing someone or indicating that one dislikes another, without suggesting a specific charge, is not defamatory.

Thus, the Vice President's remark that "I never thought he was good anyway" or the broadcast reporter's characterizing *Evaporation* as a "typically bad" Marquee picture, while suggesting negative things about Enunzio, do not reach the level of defamation.

Similarly, although special circumstances may change the character of a remark, one can say that another is "overly cautious with money," that "he led an uneventful life," or that "left his job during a strike," without being liable for defamation.

Nevertheless, the line is often blurred, and to report that someone is "immoral," "does not pay his bills," is "a drunkard," "a crook," "a

bastard" or "has done something dishonorable" may be a basis of liability.[3]

Ridicule, by word, picture, verse or other form, is another common form of defamation.

Further, certain statements which state or imply that one has committed a serious crime, that a woman is unchaste, that someone has a loathsome social disease, or those which derogate someone in his business or trade, are considered so serious an affront to one's reputation that even if they are only spoken (slander), they are actionable per se. Thus, the Vice President's charge that Enunzio embezzled funds would be actionable without proof of actual damages.

"Publication"

The second vital element in defamation is publication. "Publication" may be defined as communication of the defamatory statement to a third party. It can be done intentionally or negligently, but it must be transmitted to someone other than the person defamed, because the cornerstone of liability is damage to one's reputation and good name.

The courts have tended to construe liberally what constitutes publication. For the broadcasting industry, it is quite evident that a statement is "published" when transmitted over the airwaves. In the hypothetical cited above, Ms. Baubbles statement was clearly published. Courts have also held that an employer's act in dictating a letter to his secretary constitutes adequate publication of a defamatory remark. Therefore, not only were the statements in the executive meeting published, but the remarks in the telegram to Enunzio were published when dictated by the President to his secretary.

In the case of newspapers, books or magazines, publication has been held to occur when the material is "released for sale in accord with trade practice," which may be prior to actual release to the public.

Multiple Versus Single Publication Rule

The courts have also faced the issue of how many actionable defamations a statement may generate. At common law, each communication was a libel and thus the basis for a cause of action. This so-called "multiple publication rule" created problems for the mass media with potentially thousands of causes of action for each separate copy of a newspaper or broadcast. To meet this problem, courts in many jurisdictions have adopted a "single publication rule" under which any single, integrated publication, such as one edition of a newpaper, magazine or book, or broadcast, is treated as a unit, giving rise to only one cause of

---

[3]See Prosser, pp. 574–576.

action, regardless of the number of times it is exposed to different people.

Determining when publication actually occurred is important in defamation actions because, not only is that element critical to the plaintiff's case, but it marks the time when the statute of limitations begins to run.

Generally, a party has a limited time within which to bring a defamation suit—usually one to three years. If the statutory time has run its course before the defamed party files suit, he may be denied recovery even for the most damaging defamation. When the action is filed, the defendant is obligated to raise the defense of statute of limitations. If he fails to do so, the plaintiff may recover, because the defense does not extinguish the right to file suit but merely bars the remedy (for example, money damages) from being enforced. However, even in a "single publication" jurisdiction, a distinct repetition of a defamation revives the publication date and gives rise to a separate cause of action which starts the statute of limitations running anew.

Despite the statement of these general principles, application of the "single publication rule" and other aspects of the publication issue to radio and television is not always clear. For example, in a case involving the allegedly defamatory use in a long-running television commercial of a voice similar to the late Bert Lahr's distinctive and well-known voice, the court held that the complaint stated an adequate basis for liability; however, it did not resolve whether repetition of the commercial constituted single or multiple publication.

In another case involving a professor who appeared on a quiz show which was later revealed to have been "fixed" and who claimed damage to his reputation, the court ruled that the statute of limitations started to run not from the time the program was broadcast, but from the time that it became public knowledge that the show was fixed. In short, courts have displayed a flexible attitude toward resolving matters of defamatory publication.

The Liability of Network Affiliates

Those who have only a secondary role in the publication of defamation by another, as in the case of station affiliates exhibiting a network program, may be held accountable only if they knew or should have known the defamatory character of the publication.

Thus, our fictitious director, Mr. Marquee, may consider bringing suit against Sonia Baubbles, her production company, and any television station which carried her syndicated newscast, as well as Gemflics and its officers.

There may, in addition, be responsibility for the publication by another, as in the case of a defamation published by an agent within the

scope of his authority, or with an express or implied authorization to publish.

For example, in the course of a series of newscasts on alleged wrongdoing by high governmental officials during the 1972 Presidential campaign, a network newscaster said that the accountant brother of a White House official helped "launder" Presidential campaign funds, i.e., convert checks into cash before the money was given to the campaign to hide its source of origin. The "laundering" referred to is a violation of federal law.

The news report, written by the reporter, included a picture of the accountant against a photograph of the Watergate complex implying that he was involved in the many-faceted political scandal known generally as "Watergate." In these circumstances, an action would likely include as defendants the reporter and his employer (the network), which would be liable for damages caused by remarks made in the course of the newscaster's employment.

Furthermore, under fundamental communications law principles, each broadcast licensee is responsible for the entire content of its programming. Even if the program was prepared by someone else, borrowed from a film library, or acquired in any other way, the broadcaster may be held liable if defamatory material was broadcast. Thus, each licensee which aired the newscast could also be joined in the suit. Ignorance of the content will not permit the broadcaster to escape liablility.

However, where the broadcaster has no discretion as to programming, as in the case of the federal requirement of providing equal time to political candidates pursuant to Section 315 of the Communications Act, and where he must not exercise any censorship, the broadcaster has been held not liable for damages in a suit for defamation based on the statement of the candidate. This immunity is more thoroughly covered in the chapter on Political Broadcasting.

Identification of Subject

Finally, any party who claims that his reputation has been damaged by a defamatory statement must establish that the remarks referred to him. In most instances, the statements spell out the defamed party clearly. In our first hypothetical, for example, Enunzio Marquee is clearly identified.

Similarly, in the accountant's case the plaintiff is identifiable. But assume that the reported story only revealed that a brother of a White House Official laundered campaign funds. Given a large White House staff, the identification of the libeled brother could prove impossible. Even if the news report referred to him as an accountant, the subject of the defamation would not be adequately pinpointed. However, if addi-

tional details (such as where he worked) established the identity of the person, the identification might be found adequate even though no name was mentioned.

The problems inherent in establishing the subject of a defamatory statement when a group is involved, rather than an individual, poses similar problems:

Hypothetical 1–2

Lightweight boxing champ Jock Lobeldt, in an interview taped for broadcast a week later, was asked why he chose to train out of town instead of at the local gym. He replied, "That's easy. Most of them trainers down there are fairies." A few weeks after the broadcast, one of the six trainers employed at the local gym sued the station for defamation. The licensee's attorney moved to dismiss the trainer's complaint for failure to state a cause of action, since no ascertainable person was identified by the words complained of. The licensee argued that Mr. Lobeldt said "most," not "all" in reference to the trainers; and, that since no specific individuals were named, no individual has a cause of action against the station.

Without reaching the question of whether or not the plaintiff could recover damages in this case or whether he actually had been defamed, the court denied the defendant-licensee's motion. The judge observed that because the libeled group (the trainers) was so small, any individual trainer could sue.

Comment:

While the decision might vary from jurisdiction to jurisdiction, this judge has adopted the modern view. Where the defamation is directed to some members of a small group, suspicion applies to all when no attempt is made to exclude specific persons.

The opposite result would obtain if the gym had employed a large number, say 100 trainers. Then, the modern view would hold that if no circumstances pinpointed the targets of the defamation within a particular group, no individual member of the group would have a cause of action.

Another legal question of degree.

Defenses

Despite the public's interest in maintaining the reputation and good name of individuals, one may be privileged to publish defamation for the protection or furtherance of a public or private interest recognized by the law as entitled to such protection. There are two classes of privilege: absolute and qualified.

Absolute Privilege

An absolute privilege provides total immunity from responsibility, regardless of the defendant's purpose, justification, or the unreasonableness of his conduct.

Hypothetical 1–3

On the morning news, Dan Druther reported to millions of Americans:

The ramifications of the Weathergate proceedings, the United States' judicial and congressional investigation into political campaign wheeling and dealing, continue to unfold at a blistering pace. First, in court today, Chief Prosecutor Simon Pyoor asked defendant Bill Baldman when he intended to start telling the truth. Later, both the prosecution and the defense wrapped up their cases and it was evident that the jury concurred with the prosecutor when it returned a guilty verdict within two hours after adjourning.

One juror told our reporter that the dominant sentiment in the jury room was that the defendant was not telling the truth throughout the entire trial.

Early this morning, the wife of the former Attorney General, Belle Clapper, called her favorite news reporter at API and said, "My husband told me all he knows about one former high White House official and when it comes out, that guy will be in the clink, because he ordered the break-in at the Weathergate Hotel."

And on Capitol Hill, Senate Hearings into campaign practices continues as testimony of high officials resumed. Part of the testimony involved a heated exchange between a Senator and a witness at which the latter charged, "You are just out to enhance your own reputation by destroying the good name of dedicated officials."

The Senator retorted, "You have been primarily responsible for some of the most outrageous and corrupt incidents in American history and you have the audacity to charge anyone with self-serving behavior. You are a political scoundrel, sir, who deserves to roast!"

To refute charges of complicity in covering up the illegal activities conducted during and after the campaign, the witness released the text of a letter written by Baldman to another former White House official in which Baldman acknowledged his role in plotting to undermine the political convention of the opposition party, but rejected categorically any involvement in covering up those and other activities.

Comment:

This hypothetical provides a number of examples of absolute privilege to publish defamatory remarks without being subjected to civil liability. The statements of Prosecutor Pyoor at trial, the remarks of the juror in the jury room

and the denunciations of the witness and the Senator during the course of the legislative proceedings, while defamatory and potentially ruinous to identified persons' reputations, are privileged remarks due to the setting in which they were made.

Additionally, the Baldman letter directly linking the witness to criminal activities constitutes libel; however, since the witness personally released the letter he cannot complain about the damage it might cause to his reputation. The White House official, however, may have a cause of action if it appears that because of that letter he is assumed to have been involved in the criminal activities and participated in the cover-up.

Finally, the remarks of Belle Clapper to the reporter, while connoting criminal behavior on someone's part, fail to identify the subject adequately, and thus no one has an adequate basis upon which to sue. If a person were identified, then Mrs. Clapper would be subject to suit because even though her statement concerned pending litigation and a legislative matter, it was not said in court or before the tribunal.

In general, the following are six settings or situations in which defamatory statements may be made without subjecting the speaker or writer to liability:

1. *Judicial Proceedings:* In order to maintain the integrity of the judicial process, judges in all phases of their work, litigants and their counsel, jurors in the performance of their functions and witnesses, whether they testify voluntarily or not, are absolutely immune from liability for defamatory statements.

2. *Legislative Proceedings:* Legislators performing their lawful functions and witnesses before legislative hearings are accorded immunity, in order to ensure the full freedom of the legislative process.

3. *Executive Communications:* Under the same policy of integrity of process, executive communications within the scope of official duty are absolutely privileged.

4. *Publications Made with the Consent of the Plaintiff:* One who has himself invited or instigated the publication of defamatory words cannot be heard to complain of the resulting damage to his reputation.

5. *Communications Between Husband and Wife:* Because of the confidential relationship between spouses, communications between them are not actionable by third parties.

6. *Political Broadcasts:* When statements are made under the authority of the equal time provision of the Communications Act of 1934 (§315) the broadcaster, who is prohibited from censoring, is not liable for defamation. (See Chapter 4.)

Qualified Privilege

Under a qualified privilege, persons are immune from liability if certain conditions are met. The privilege can be categorized according to the type of interest involved, *individual interest* or *public interest.*

In the case of individual interest, the court looks to whether the statement was made in good faith and whether the conduct of the speaker was reasonable.

In the case of public interest, the court applies a stricter test, namely, whether the speaker uttered the statement with "actual malice," i.e., with knowledge of its falsity or with reckless disregard for its truth or falsity.

Generally, the law recognizes the limited right of an individual to defend himself against defamation. This privilege is akin to the right of self-defense or the defense of property. However, its limits are strictly circumscribed in order to ensure that protection of one's own reputation does not become a giant loophole by which one may make unreasonable, derogatory remarks about another. Therefore, one can call another "a liar" in the context of defending against accusations which he believes unfair; however, one will not be protected by the privilege if he charges his accuser with armed robbery.

Similarly, the law provides a limited privilege in the case of an individual who is under a moral or legal obligation to speak for another. Analogous to the use of force to protect the safety of another, this privilege requires a legal duty or a compelling moral obligation to another before the defamatory remark will be sanctioned. Generally, a special relationship, such as that of parent or employer, is required. Judges are particularly careful to prevent this privilege from sanctioning unnecessary meddling in the affairs of others.

Finally, in business or social circumstances, it is often necessary to speak out against another in order to protect one's mutual interest in a particular matter. Under such circumstances, the communications between those having a common interest, for the protection or advancement of that interest, are privileged. For example, in the Gemflics hypothetical, the derogatory remarks about Enunzio Marquee made by the President and Vice-President at the Executive Board Meeting would be privileged.

The privilege, however, would be lost if the defamation goes beyond the group interest, or if the statement is made to persons who have no reason to receive it. Thus, if either of those parties repeated his remarks to Sonia Baubbles, even if made only in the context of reporting what occurred at the board meeting, the repetition of the statements would not be privileged.

Public Interest: *Times v. Sullivan*[4]

The departure point of any discussion of recent developments con-

[4]"Public interest" here does not refer to the specific statutory requirement in Section 309 of the Communications Act, which is used as a broad statutory standard in broadcast regulation; rather the phrase is a term of art used to refer to newsworthy matters.

cerning qualified privilege in the law of defamation must be *New York Times Company* v. *Sullivan*, 376 U.S. 254 (1964). In that case, the *New York Times* published an editorial advertisement communicating information, expressing opinion, reciting grievances, protesting claimed abuses, and seeking financial support on behalf of the Negro Right to Vote Movement and the Negro Student Movement.

The newspaper was sued by city officials of Montgomery, Alabama, who charged that the newspaper advertisement was libelous. The allegedly libelous statements were the following:

> In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission . . . .
>
> Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now, they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*. . . .

Actual Malice: Public Officials and Public Figures

The plaintiffs were awarded a $500,000 judgment and the newspaper appealed to the Supreme Court, which reversed the lower court. The Supreme Court ruled that the federal constitutional guarantees of freedom of speech and press prohibit a public official from recovering damages for a defamatory falsehood relating to his offical conduct, unless he proves that the statement was made with "actual malice," that is, with knowledge that it was false or in reckless disregard of its falsity.

The standard of actual malice was selected in order to provide the publisher freedom to write on matters of public interest. As the court said: "[F]reedom of expression upon public questions is secured by the First Amendment." *Id.* at 269.

In the ensuing years, the Supreme Court has built upon *New York Times* v. *Sullivan* in several ways: first, it has extended the definition of public officials; second, it has extended the privilege to cover "public figures" and broadened the definition; and third, it has extended the holding to cover private individuals involved in matters of public interest.

Who is a "public official" within the *Times* test is relatively clear. In a recent pronouncement, the Supreme Court said the term covers

anyone who holds a position of sufficient importance that the public at large would be especially interested in the discharge of his duties.

By this definition, the actual malice test has been held applicable to actions brought by mayors, Congressmen, state attorneys general, tax collectors, policemen, county board members, managers of community centers, and clerks in state courts. Former public officials may be within the definition, depending on the nature of their job and the nature of the defamation. Elected officials and candidates for public office are within the definition.

Though first applied to public *officials*, the actual malice test now covers public *figures* or anyone who "thrusts his personality into the vortex of important public controversy" or who "voluntarily and actively involves himself in matters of significant public concern."

The case which established this principle, *Curtis Publishing Company v. Butts*, 388 U.S. 139 (1967), involved a charge by a magazine publisher that the athletic director of the University of Georgia gave strategy information to the coach of the opponent (the University of Alabama) prior to a football game, and thereby "fixed" the game.

Although the story turned out to be false, the Court held that under the First Amendment, unless the newspaper was shown to have printed the story with actual malice, the popular football coach could not recover for the libel.

Since the ruling, the Court has applied the actual malice test to athletes, underworld figures, professors who speak out on public issues, authors, law partners of politicians, and the like. However, the mere fact that a plaintiff was a television performer was held not to bring him within the ambit of the *Times-Butts* rule. Furthermore, former public figures may, with time, step out of the limelight and move outside the *Times-Butts* rule.

The *Rosenbloom* Case and Public Issues

The most recent testament of the Court's commitment to expanding the First Amendment application of the *New York Times* test came in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

The facts of the *Rosenbloom* case merit elaboration:

> In 1963, Rosenbloom was a distributor of nudist magazines in the Philadelphia metropolitan area. During that year, the Philadelphia Police Department began a special enforcement program under the City's obscenity laws in response to citizen complaints.
>
> Police cracked down on newsstands all across town and on one eventful day arrested Rosenbloom as he was delivering some of his magazines to a newsboy. A few days later, the police obtained a warrant to search Rosenbloom's home and seized his inventory of magazines and books. Rosenbloom, who was arrested after his initial

encounter with the police and then released on bail, was arrested once again.

After the second arrest, a police captain telephoned local radio stations and news services to report the arrest of Rosenbloom. One station carried the story every half-hour on its news report, describing Rosenbloom as a peddler of "allegedly obscene books" and as the "main distributor of obscene material in Philadelphia."

Two weeks later, Rosenbloom filed suit against the City and police officials and several local news media. Radio stations reported the suit without mentioning Rosenbloom by name, describing it as the way in which "girlie book peddlers" opposed police crackdowns on obscene literature. The criminal obscenity trail resulted in an acquittal for Rosenbloom; however, that result only fanned the fire of his desire to have his name cleared of the defamatory remarks made by the radio station.

At the trial the station's news director testified that his staff prepared the first story based on the tip from the police captain and, although he couldn't recall the source of the second story, generally they relied on wire service copy and oral reports from previously reliable sources. A local jury returned a verdict in favor of Rosenbloom and awarded damages totalling $750,000. The trial judge reduced this sum to $250,000, but on appeal the verdict was completely reversed. The Supreme Court affirmed that reversal.

For our purposes, the most important aspect of the Supreme Court's ruling was its application of the *New York Times* doctrine to these facts. A private individual was seeking redress against a radio station for defamatory falsehoods in newscasts relating to involvement in events of public or general concern. The Court held that the action could be sustained only on clear and convincing proof that the defamatory falsehood was published with actual malice, that is with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.* at 52.

Thus, the Court recognized the First Amendment's "commitment to robust debate on public issues" and made the subject matter, rather than the subject, the controlling factor. By this extension of the *Times* doctrine, persons voluntarily or *involuntarily* "thrust into the vortex" are covered. Unfortunately, the Court gave no clear guideline as to what is "a matter of public concern" and, in fact, determined to meet the issue on a case-by-case basis.

Publishers, in particular, should be forewarned that not everything the public finds interesting will be held to be a matter of public interest.

Once a Court finds that the *Times* standard is applicable, the issue is whether the defendant published the defamation with actual malice. What constitutes "actual malice," unfortunately, is not always clear. "Knowledge that the statement was false" is a definite test which a jury

can resolve. However, "reckless disregard of whether it was false or not" raises difficulties.

For example, does reliance on a wire service report constitute "reckless disregard of whether it was false or not?" Most Courts would answer no. However, assume that in the Weathergate hypothetical, Belle Clapper, known throughout Washington, D.C. as an outspoken lady who carried a grudge against several White House officials, called her favorite reporter and named Bill Baldman as the gentleman headed for the "clink." If the statement was made months before the Senate and courts began their investigation into the allegedly illegal activities, and with no other corroboration, a broadcaster could be found guilty of "reckless disregard." However, if the statement was made in the context of judicial and legislative investigation into Baldman's White House activities, and Mrs. Clapper's "insider position" as wife of the Attorney-General, it would be difficult to establish "reckless disregard."

Furthermore, a plaintiff cannot meet this legal burden by showing that a reasonably prudent man would have had doubts about the statements (the common law test). Rather, it is necessary to establish that the publisher in fact entertained serious doubts, or given his situation, should have entertained serious doubts, as to the truth of his publication, and that publishing with such doubt shows reckless disregard for truth or falsity. In short, some actual knowledge about the falsity of the report or inexcusable failure to confirm a story on a publisher's part is necessary.

By placing this difficult burden of proof on the plaintiff, the Court has elevated discussion of matters of general concern or public interest to a special level. The publisher has greater freedom to expose news, and the threat of defamation judgments against those who pursue the full exchange of information and ideas is greatly diminished.

Truth a Complete Defense

Truth is an absolute defense to any civil action for defamation, and there can be no recovery if the defendant establishes that his statements were true. Therefore, in the Weathergate hypothetical, if the broadcaster published Belle Clapper's charge against Bill Baldman before any legislative or judicial inquiry had commenced, and if the publisher could establish the truth (not simply that Mrs. Clapper made the statement, but that the substance of the charge was true), there would be no liability.

Frequently, offensive statements mix truth and opinion. For example, in the Gemflics hypothetical, reporter Sonia Baubbles contended "this will be Enunzio's last picture with Gemflics—and a typically bad

one at that." This comment is obviously an admixture of alleged fact and opinion. Nowhere does it appear that Gemflics executives concluded that this will be Enunzio's last picture for them; however, that remark implies that Enunzio is finished as a director, at least as far as Gemflics is concerned, and thereby impugns the professional standing of the director. As such, it would be actionable.

Since Enunzio is a public figure, he would have to establish actual malice in order to recover against Sonia and her television station. Whether Sonia had malicious motives in transmitting the inaccurate remark is not clear; certainly, her opinion that *Evaporation* will be a "typically bad" film implies a definite dislike of Enunzio's work. However, the "typically bad" comment is an opinion, and, therefore, not defamation.

Mitigation of Damages

Although not adequate to avoid liability, the following may be considered by a court in assessing a fair level of damages:

1. Publication of retraction
2. The bad reputation of the plantiff
3. Evidence establishing that the defendant acted with good motives and believed the truth of his remarks.

If a program is broadcast which may have contained defamatory material, the standard practice should be to consider whether a retraction is desirable. Although it may not avoid the suit, retraction places the broadcaster in a better position with the jury, demonstrates good faith, and is always considered when the court assesses damages.

Hypothetical 1–4

In a news item announcing a state lottery winner who was an unskilled laborer living in obscurity, the TV reporter adlibbed this postscript:

> *The money will probably come in handy since Will's been fired from every job he's had.*

The news director asked the newsman about the source of his statement and was told that he had heard one of the bystanders at the interview wisecrack about it and Will had just laughed. The news director ordered a retraction broadcast the following evening by the same reporter in these words:

> *Last night we reported to you in a somewhat flippant way that Will Grubb, the lottery winner, had been fired from every job he's ever had. We really don't know that to be true and we apologize for saying it.*

Mr. Grubb was not content with the retraction. He sued the station

for $10,000 in actual damages and $140,000 in punitive damages. He argued that the newsman, the licensee's employee and agent who was trained to check his sources, acted with malice toward Mr. Grubb by relying on an unsubstantiated source and implying that Mr. Grubb couldn't hold a job. The wisecracking bystander appeared as a witness for Mr. Grubb and testified that he had been joking, and that in fact he knew that Mr. Grubb had had steady employment for the preceding six months. Mr. Grubb's last employer also appeared and testified that Will had been a reliable employee who had been terminated in a general lay-off.

When the defendant's turn came, the licensee's lawyers immediately tried to introduce the evidence that a retraction had been aired within 24 hours, but Mr. Grubb's lawyers objected on the grounds that the retraction probably did not reach the same audience as the defamatory statement and that within the 24 hours before the retraction was announced, the damage had become incurable. The licensee responded by arguing that the retraction demonstrated a lack of malice on the part of the defendent and should be admitted to reduce or mitigate the enormous amount of punitive damages sought by the plaintiff, since punitive damages depend upon a showing of actual malice.

The judge overruled the objection and allowed evidence of the retraction to be admitted. The case went to the jury and Mr. Grubb was eventually awarded a judgment of $2,000.

Comment:

Damages in a defamation case can be substantially mitigated by a timely expression of good faith, in this case a direct retraction. This "taking back" tends to show that the defamatory statement was made by mistake or by error of judgment, not by malice. In this case, the jury apparently felt that the reporter had acted imprudently by not checking his facts and awarded a small judgment to the plaintiff on that basis.

Note: Chapter 3 discusses the Personal Attack Rules, in which the FCC imposes special requirements in cases similar to Mr. Grubb's.

Trade Libel

Trade libel is a cause of action similar to defamation. Trade libel, also known as commercial disparagement, is a false or misleading statement about a competitor's goods which is made to influence or tends to influence the public not to buy the product. Proof of *actual* loss of revenue (special damages) attributable to the false statement is required; therefore, it is more difficult to obtain damages in a trade libel case than in a defamation case.

Trade libel can be distinguished from defamation in that trade libel refers only to goods or services, while defamation refers to an indi-

vidual or his reputation. There may be some difficulty distinguishing the two because, implicitly at least, a statement about a person's product or service makes a statement about that person.

Hypothetical 1–5

As the new car sales season approached, Moon's Chevrolet mounted an ad campaign designed to attack a leading competitor. On several radio stations, Moon's advertised: "Recently, we conducted a study of Fleck's Ford automobiles and discovered that eight out of ten cars tested had defective brakes. When it comes to your family's safety, rely on the best–Moon's Chevrolet."

Comment:

A false statement that a product is dangerous may imply that the seller deliberately sold the dangerous product, and the seller's reputation in the trade might thereby be damaged.

In the above hypothetical, Moon is not only attacking the quality of Fleck's cars, but is implying that Fleck deliberately markets dangerous cars. A court would attempt to determine how direct is the relationship between the statement and the reputation of the individual allegedly attacked; if the relationship is only implicit, as in this hypothetical, the statement will be considered disparagement rather than defamation.

Absolute and Qualified Privileges

The absolute and qualified privileges of defamation also apply to trade libel. In particular, business competitors have a qualified privilege to "puff" or make exaggerated claims about the virtues of their product and to attack their competitors. If, for example, Moon advertised "Our Chevys get more miles per gallon than Fleck's Fords," no cause of action for trade libel would lie because the advertisement fails to state specific facts.

However, in the advertisement alleging defective brakes, specific facts were claimed and thus the charge constitutes trade libel. Generally, if a claim (even a false one) is honestly believed to be true by the claimant, the courts will not hold the defendant liable. However, in our Moon hypothetical, even if the dealer did conduct a study, his claim against Fleck is so serious that he would bear an extremely heavy burden of substantiation.

Proof that specific false allegations were stated with malice are an adequate basis to find for the plaintiff; and where competitors are concerned, antagonistic motivation is rather easy to establish.

Since broadcasters are responsible for all that their stations broadcast, they should be watchful for potential trade libel problems, especially in commercials.

Whenever an ad, a program, or a news story contains a specific claim which places a product in a bad light and encourages shoppers to avoid it, a licensee should require some proof of the claim's authenticity to protect itself against trade libel law suits.

Chapter 2

The Right of Privacy

In all but a few states, the courts will allow an individual to recover for the serious and outrageous invasion of his privacy. The notable exceptions are Rhode Island, Nebraska, Texas, and Wisconsin, the latter three claiming that any official recognition of the right must come from the state legislature and not from the courts.

Despite the absence of judicial recognition of the right of privacy in these states, broadcasters in *all* states must screen their programs for possible invasions of the right of privacy, for if such programs are broadcast outside the home state they may expose the broadcaster or producer to liability in a neighboring state where the right is recognized.

The right of privacy protects against:

1. Interference with one's solitude
2. Publicity given to one's name or likeness
3. Public release of private information
4. Creation of a false public impression
5. Commercial appropriation of elements of one's personality

The action must be founded on publicity in the sense of communication to the public in general or to a large number of people.

Hypothetical 2–1

On his regular morning newscast, Robert Pinpoint reported:

Last night was a nightmare for Melissa Smith, age 12, for Melissa was brutally attacked on her way home from a party and raped. Today she is resting comfortably in Handley Hospital.

And in Chicago today, the visiting French President was seen strolling the streets of that windy city. Chicagoans came out in droves to meet the French dignitary.

Locally, again, we have a report from the Police Department that it has finally broken the two-year old mystery murder on downtown Main Street of John Bodie. As this Police Department film recreating the crime shows, Mr. and Mrs. Bodie were walking down Main Street towards Troubadour Street when a car swerved toward them.

Mr. Bodie was carrying to the bank the cash receipts of his department store for that week—upwards of $50,000—and as they moved to avoid the car, Peter Nudge, a former felon who is still at large, slammed Mr. Bodie over the head with his revolver and tried to grab the bag with the money. When Mr. Bodie resisted, Nudge fired two shots, then jumped in the car of the accomplice and sped away.

Mrs. Bodie collapsed almost immediately from shock. Mr. Bodie died instantly, and Mrs. Bodie was hospitalized for many months thereafter. She has only recently returned to our community and is now living at 15 Peacemont Street.

The Police Department believes Mrs. Bodie will not be able to identify the assailant by sight, but may recall his voice, which had a distinctive lisp.

. . . And now a word about tonight's movie on Channel 9. From a special private film library we will present, The Girl in the Blue Sweatshirt, *a true story of Sally Forth, one of Hollywood's most famous call girls, who was involved in a sensational murder trial of a top Hollywood executive which resulted in—well that will be for you to see. The film has never been seen on TV before, so don't miss it!*

Comment

This news report could result in a multiplicity of lawsuits for invasion of privacy.

First, many states and communities have statutes prohibiting mentioning the name of a rape victim, especially when the person is a minor. Even if there is no statute, the mention of someone's name may constitute an actionable invasion of privacy because of the general notoriety attached to victims of this crime.

Second, assume that when the news station showed a close-up of the French President milling among the people of Chicago, a local resident noticed her husband, Simon, clinging to the arm of a young lady. Simon, who had told his wife he would be in New York on business, was innocently photographed by the station's news photographer. Although Simon may wish to sue the station for invasion of privacy, courts have held that when a person is incidentally photographed, that generally in itself is not an adequate invasion to warrant recovery. The right of privacy, it has been said, protects only the ordinary sensibilities of an individual, and not supersensitivity; thus, ac-

tivities not calculated to embarrass an individual, such as this photographing, are not actionable.

Third, the re-creation of the John Bodie murder raises privacy problems. It has been held that a reenactment of an actual crime is a permissible portrayal of events in the public domain, and not subject to control by the persons involved in the crime. However, by identifying the current address of Mrs. Bodie, who was seriously affected by the murder incident (as evidenced by her prolonged hospitalization), the station opened itself to an action based on invasion of her privacy.

Fourth, the movie The Girl in the Blue Sweatshirt *was based on true events and used the real names of the participants. Assume this movie is shown years after Ms. Forth had given up her notorious life and settled down to a quiet family routine in a suburban setting. In that context, the movie exposé might invade her right of privacy. This question of fact is proper for court determination.*

This brief newscast involved a number of incidents which should have been carefully reviewed to determine the appropriate ways to avoid invading the privacy of non-public persons.

Privacy Invasions in Advertising

Advertising may also result in invasions of privacy. Generally, advertising matters are governed by statute which requires that an invasion be "a use of a person's name or likeness for some *trade* or *advertising* purpose."

Courts have given "use of name of likeness for advertising or trade purposes" a broad reading. For example, a man's name was used to advertise a quiz program which was rigged without his knowledge. The court allowed him to sue for invasion of privacy.

In other cases involving fixed quiz programs, the court winked at rules regulating statutes of limitations, that is, the time within which the suit must be brought, and held that the statute began to run not from the time the advertisement was *televised*, but from the moment it was *discovered* that the program had been fixed. As in defamation, it must be established that the published material which invaded plaintiff's privacy referred specifically to him. Mere identity of names is insufficient; therefore, no cause of action would exist for a person whose name was identical to the one who appeared on the advertisement for the rigged television program.

For public personages, some state courts have held all privacy actions are waived, while other states recognize that commercial exploitation may give rise to a cause of action.

Hypothetical 2–2

At the World Outdoor Olympics, Clark Schpritz captured world

attention by winning several Gold Medals for long-jumping. His victories made him an international sports figure overnight.

Deciding to capitalize on his newly-won fame, Clark announced he would consider advertising contracts for a limited number of products. In a highly publicized venture, he contracted with Styptick Razor Company to market its new electric razor. Soon after he began advertising for Styptick, Neckrash Electric Shave Company notified its dealers that they were to use a life-size picture display of Clark Schpritz in their showrooms. Neckrash's television advertisements were filmed from typical showrooms.

Elsewhere, Joseph Schpritz, a retired salesman who was not related to Clark, opened a sporting goods store called "Schpritz Sports Goods," and advertised on local radio. In Aphasia, Illinois, Surefoot Athletic Company advertised a new line of Surefoot Long-Jumping Shoes on the all-advertising channel of the local CATV system. The ads for the shoes highlighted the shoebox which featured a picture of Schpritz, among others, wearing the shoes in Olympic competition. The picture was taken by a company photographer who was assigned to cover the events for the firm.

In another highly-publicized venture, Clark Schpritz arranged with a poster company to print a poster of him wearing his shoes, his many medals, and a big toothy smile. Dr. Leopold Goode, manufacturer of Goode's toothbrushes, purchased one of these posters and began a television advertising campaign using that poster with the caption "For Whitest Teeth—Goode Is Best."

Enterprising as ever, Schpritz hired a major law firm to sue Neckrash Electric Shaver Company, Schpritz Sporting Goods, Surefoot Athletics, Dr. Goode, the television and radio stations, and the cable system for invasion of privacy. Schpritz hopes that the legal campaign would be as successful for him as the Olympics.

Comment

The right of privacy with respect to advertising is generally governed by state statute. Therefore, Schpritz's rights to relief may vary among states. Schpritz could claim that the various uses of his name and picture constitute a purported endorsement of the products or services to which he does not subscribe and, therefore, his reputation was being exploited improperly and without his permission.

In particular, Neckrash's use of Schpritz' photograph for display and advertising purposes, for a product similar to one which Schpritz actively endorsed, not only constitutes an actionable invasion of his privacy but also dilutes the value of his product endorsement.

Although Joseph Schpritz clearly capitalized on the current fad for Clark Schpritz, he could continue to use his own name for his company. If it was established that the general public was confused as to the quality of the goods he was selling because of its identity with Clark Schpritz, then in order to protect the public a court might require Schpritz to add a qualifying statement

in its store window or in advertising that it is not associated with Clark Schpritz; however, Clark could not prevent Joseph from using "Schpritz" for his own business.

The decisive factual issues concerning Surefoot's shoebox would be the prominence of Schpritz' picture, and whether the picture thereby implied endorsement of the shoes.

As to Dr. Goode, not only could his advertising be an improper use of Schpritz' likeness for display purposes, but if the poster were copyrighted he might be liable for damages under the Copyright Act. (See Chapter 8 on Copyright issues.)

Additionally, the media which broadcast the offending invasion could be forced to share the damages. With this in mind, station managers should consider requiring advertisers to sign an indemnification form, assuring that the advertiser will reimburse the station for any damage payments made as a result of suits based on the advertiser's commercial. While the indemnity does not guarantee full protection, it minimizes the danger to the broadcaster.

Written Consent

In television and elsewhere, the use of the person's picture, name, etc., for advertising purposes, without his consent, may give rise to a cause of action for invasion of privacy. Therefore, consent is always advisable in such instances.

The consent should be written, rather than oral, because some courts will not let oral declarations waive the right of privacy. Also, consent may be revoked or may lapse with time. It is important to specify the length of time for which consent is valid, to assure that it will provide protection for the necessary period. It is also important to declare what uses of the picture, name, biographical data and similar items are covered by the consent. If an unauthorized use is made of a picture, written or oral consent for other purposes will not protect the producer from liability. Suitable release forms are explained in a separate section of this book. (See Chapter 12, Release and Indemnification Forms.)

Limitations on Right of Privacy

The right of privacy is a personal one and thus cannot be enforced by a corporation or other business entity. However, a company may have an exclusive right to its name and business reputation which may give rise to other causes of action, such as infringement of a trademark or defamation. Also, the right of privacy cannot prevent reporting of matters of public interest. Even those who unwittingly or accidentally step into the public limelight may be proper subjects of news stories about their personal lives.

A landmark Supreme Court case in this area, *Time, Inc. v. Hill*, 385

U.S. 374 (1967), involved a *Life* magazine article entitled "True Crime Inspires Tense Play." The story incorrectly reported that the ordeal of James Hill and his family, who were held prisoners by three escaped convicts, was accurately depicted in the play.

Actually, the play was highly fictionalized and, for example, inaccurately portrayed that members of the family were beaten by the convicts. The article greatly distressed the Hills by misinforming the public on the nature of their ordeal.

The Supreme Court rejected the right of the Hills to recover for the false report, on the theory that constitutional guarantees of freedom of speech and press preclude damages in the absence of proof that the defendant published the story with actual malice, that is, with knowledge of its falsity or in reckless disregard of the truth. Thus, it extended the *New York Times v. Sullivan* test—with all its protections for the press—to matters of public interest, and thus matters involving the right of privacy. (See "Qualified Privilege", Page 9 in Chapter 1, on Defamation.)

The question of what is in the "public interest" is generally decided on a case-by-case basis. (The discussion of public interest in relation to defamation is applicable to privacy. Here, again, we are not speaking of the "public interest" in terms of its use as a broad statutory standard in broadcast regulation.)

Thus, the doctrines concerning public figures, as well as newsworthy events, may open the opportunity for more extensive reporting about the private lives of persons in the news. Where there has been a time lapse between the public interest event and the reporting of a personal incident, the courts generally hold that once a person's activities become a matter of public interest, he cannot revert to a private status, or that, under the circumstances, the period of time involved was insufficient to deprive the publisher of his privilege to report newsworthy events.

For example, even though the Hills' ordeal occurred several years prior to the report of the play, the Court found the story to be in the public interest. Where there is substantial fictionalization of the plot, however, a cause of action exists; but if the fictionalization is very elaborate, it may no longer adequately characterize the subject or he may not be identifiable, and thus there may be no invasion of privacy.

Right of Privacy and Defamation

All defamation cases concern public exposure of false matter, and the primary harm is damage to *reputation*. In the right of privacy, the primary damage is *mental distress* from having been exposed to public view. Although injury to reputation may be an element bearing upon

the extent of damage, the published material need not be defamatory on its face or otherwise. In fact, it might even be laudatory and still warrant the plaintiff's recovery.

Frequently, questions of violation of the right of privacy and defamation are raised jointly, as the following hypothetical reveals:

Hypothetical 2–3

While in college, Davy Sprocket was fond of taking candid home movies. His special camera technique enabled him to photograph people without their knowledge. On a number of occasions, he filmed private parties at which certain people smoked pot.

Now disillusioned with marijuana, Davy, as a new member of KUUU's news team, plans to expose the use of pot for what it is to him—degradation of the lowest sort—in a special news feature. Davy splices films to give the impression that everyone at these parties smoked pot. While he knows this is not true, he feels it will emphasize his message.

He also has audio tapes of private conversations made during the parties, and includes some of the recordings in his report; notably there is the following comment by a local university professor: "Why, it's an open secret that Phil Morris smokes the stuff all the time. In fact, he's so stoned, he gets graduate students to teach all his classes."

Davy is pleased with this comment; while he knows it to be false, he has carried a personal vendetta against Professor Morris ever since he received a "D" in "Logic." The station managers review the film and, unaware of any deception, consider it a splendid "exposé."

Comment

Public airing of this film could result in a multiplicity of lawsuits:

Members of the party would have a right of action for invasion of privacy.

Those who did not know they were being filmed, and who were misrepresented as smoking pot, would have the strongest case.

Even those who knew they were being filmed would have a strong case since consenting to being the subject of a home movie is not entering the public arena.

Furthermore, the members of the party who did not smoke pot would have a cause of action for defamation. In fact, if pot were illegal in the state, their claim would be actionable per se, that is, without proof of actual damage.

Professor Morris would have a defamation action against KUUU. The station's claim that the film's publication is in the public interest would fail. Even if the professor is considered as a "public person" under the New York Times test, or if the issue of the effects of marijuana is a matter of public interest under Rosenbloom, the station acted with "actual malice" since the program was presented with the knowledge of its falsity. (Davy's knowledge is imputed to the station, his employer.)

Also, given the controversial nature of the comment of the university pro-

fessor, the producers should have obtained indemnification from him concerning the remarks against Phil Morris.

Chapter 3

The Fairness Doctrine And Personal Attack Rules

The Fairness Doctrine, with its subsidiary Personal Attack Rules, has proven to be a source of great confusion to broadcasters. Since the doctrine is so pervasive and problematic, station managers and program producers must be aware of its nuances, particularly in the area of public affairs programming.

The Fairness Doctrine and Personal Attack Rules are frequently confused with the rules of political broadcasting, because of the myriad interconnections between the two.

For convenience, the Fairness Doctrine and Political Broadcasting (Chapter 4), are presented as two separate sections of this book, but their study should be integrated for a complete picture.

Statutory Basis

The Fairness Doctrine requires that each broadcast station provide balanced or "fair" coverage of controversial issues of public importance in its community. The basis for this command is Section 309 of the Communications Act of 1934, which requires that every licensee operate in "the public interest, convenience, and necessity."

In its 1949 *Report on Editorializing by Broadcast Licensees*, the Commission ruled that licensees could present editorials so long as they presented the other sides of controversial issues as well. The report went beyond editorials, however, and sketched out a general duty to treat a wide range of community public issues.

In 1959, Congress gave its imprimatur to the Fairness Doctrine by enacting the "equal opportunities" rule, Section 315. After providing for equal treatment among candidates on the air, Congress declared:

> Nothing in the foregoing . . . 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 Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Since that time, administrative and judicial expansion of the Fairness Doctrine has made clear that it applies to the totality of a broadcaster's programming, not just news segments or any other specific kinds of programming.

Fairness Doctrine Responsibilities

The Fairness Doctrine imposes two fundamental duties on each radio and television station:

1. To present programming on controversial issues of public importance in the community.
2. To ensure that the coverage is fair, in the sense of being balanced.

Until a short time ago, broadcasters' attention was focused on the second aspect, that of achieving balanced presentations on important issues. The first step, that of issue selection, was committed to licensee discretion with little second-guessing by anyone. Recently, however citizen group activism has led to a slight broadening of "public" participation in the issue selection process.

We will examine the following questions:

What is a "controversial issue of public importance in the community," and how does a licensee decide which issues to cover?

What is the relevant community in which an issue's controversiality should be judged?

How does the licensee achieve "fairness" or balance in its coverage?

Controversial Issues

In any licensee's community there will be scores of controversial issues of public importance. A licensee could exhaust his broadcast week and still cover only a few. The need to select which of the many issues will be covered and the time to be devoted to each is therefore a threshhold problem and a basic responsibility.

Initially, the Fairness Doctrine commits the selection of issues to

good faith exercise of journalistic discretion by the licensee. Bad faith is normally held to be demonstrated only after evidence of several instances of a station's refusing to cover issues in the face of requests for coverage or offers to appear on the air by spokesmen for various sides of issues.

If such refusals can be fitted into a *pattern of abuse of discretion*—a matter of proof which has so far rarely occurred—only then does the Commission consider such drastic sanctions as denial of license renewal.

The Commission may, however, intervene where there is a complaint involving refusal to program on a single issue; but such cases are usually resolved by requesting information concerning the incident from the licensee and then accepting its statement that the issue already was given balanced coverage or that the refusal to cover it at all was based on a good faith exercise of programming discretion.

Hypothetical 3–1

Ralph Green, the newly-elected president of Citizens to Protect Our Trees (CPOT), was incensed at the "public service announcement" he had just seen presented on his local educational television station, WART-TV.

The announcement, under the auspices of the National Tree Association (NTA), was a propaganda message lauding the lumber industry's practice of "clearcutting."

As a concerned conservationist, Ralph was staunchly opposed to clearcutting, which involved a lumber company's removing all at once the trees on a particular hill. The environmental results were terrible. The bald area was subject to erosion, and all the forest creatures which previously lived in the area had to find new forested land. This produced unnatural crowding and further depleted the animal population.

Ralph and CPOT favored the practice of "selective harvesting" over clearcutting. In selective harvesting, a lumber company would go through an area and select the mature trees for cutting. The younger trees would be allowed to grow and could be harvested later. This ensured that the area would have continued tree cover, and in fact promoted forest growth by increasing the amount of soil, air, and light available for the growth of the younger trees.

Ralph thought that WART-TV's carriage of the "public service announcement" was a grave disservice, and his suspicion was confirmed when, upon investigation, he discovered that the National Tree Association was simply a trade organ of the lumber industry.

Ralph called WART-TV's station manager, Lief Verdant, to discuss the issue. Lief maintained that the announcements were supplied gratis by the National Tree Association, and that he would welcome similar announcements from CPOT.

Ralph pointed out that CPOT was not yet a national organization, that its budget was limited, and that they could not possibly produce slick public service spots to match those of the National Tree Association. He offered, instead, to appear on WART-TV to dispute the National Tree Association's announcement. But Mr. Verdant was adamantly against such appearances, since they were contrary to station policy.

"Mr. Green," Verdant said, "we simply don't ever get involved in controversies over our public service announcements. If you want to come on our station and debate the Vietman war or something, we can sure fit you in. But this thing with the trees is just no big deal, and we're not about to start a ruckus over this. You can see what I mean, can't you?"

Green, of course, could not see what Verdant meant at all, but try as he might he could not convince the station manager to change his mind or make an exception. After discussing the problem with some of the other members of CPOT, he decided to complain to the FCC.

Green's complaint read in part:

> *WART-TV has carried the announcements of the National Tree Association, a propaganda organ of the lumber industry, for several months. Not only is this a commercial practice, motivated by the destructive greed of the lumber companies, but it raises a controversial issue of public importance which should be the subject of a full-blown community dialogue on the station. We asked the station to accommodate us on this matter, but they refused to let our spokesman appear on the air. We therefore seek your help in forcing WART-TV to give us time to reply to the lumber industry's insidious propaganda.*

The Commission's Complaints and Compliance Division sent a letter to the station asking its version of the events cited by Green. Mr. Verdant replied:

> *As we understand it, the fairness doctrine gives licensees discretion in determining which programs are controversial issues of public importance in their communities. We do not deem that the matters covered in these public service announcements to be a controversial issue. Further, we believe that our overall programming on ecology and environmental matters adequately covers this and similar issues. We believe we have acted in complete compliance with the letter and spirit of the fairness doctrine.*

Comment:

Unfortunately for Ralph, he had not supplied the FCC with the minimum information necessary to make out a fairness doctrine complaint. The letter he received from the Commission's staff read in part:

> *One of the essential elements the Commission requires from a complainant for establishing a prima facie fairness*

doctrine case is information which substantiates the claim that the station or network broadcast only one side of the issue in its overall programming, and whether the station or network has afforded or plans to afford a reasonable opportunity for the presentation of contrasting viewpoints on that issue. See Alan C. Phelps, *21 FCC 2d 12, 13 (1959).*

You have not presented the Commission with this information, and the licensee has in fact stated that its overall programming on ecology and environmental issues covers all sides of this question. Should you provide the necessary information, further consideration will be given by the Commission to your complaint.

Green was quite disturbed by the letter, for the burden imposed upon CPOT by the Commission's test was almost impossible to meet. At the least they would have to monitor the station for a week or two to determine whether the station's overall programming did indeed cover all sides of this particular issue. Even then they would only have cleared the first hurdle. They would still have to prove that the licensee was unreasonable in deciding that the issue of "clearcutting" was not one of controversial importance in the community.

The Commission also noted that the public service announcements were not improperly carried on a noncommercial station, for they were not "commercial" under the definitions in Section 73.621 of the Commission's Rules.

However, since the public service announcements were furnished by the National Tree Association without charge, but as an inducement to their being broadcast, the station should maintain a list of the chief executive officers or members of the board of directors of the Association on file for public inspection for two years.

This special requirement is specifically provided in Section 73.654(g) of the Rules, relating to sponsorship identification. The same requirement pertains to noncommercial educational FM stations (Section 73.503(d) and 73.289(f) of the Commission's Rules).

Choices of Issues

The licensee's predispositions will, of course, influence the choice of issues to a great extent. Station managers have their personal priorities and political beliefs, and since issue selection is initially and significantly committed to licensee discretion, their beliefs will shape the station's fairness doctrine programming.

On the other hand, no station manager can give full vent to his feelings in this area, for the public's right of suitable access to issues and ideas—a right unequivocally established by the Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) —cannot be frustrated by station executives' personal tastes.

If an issue is sufficiently important (for example, a Presidential election), any licensee which ignores requests for coverage is inviting official inquiry into its willingness or ability to operate in the public interest.

Hypothetical 3–2

One of the prides of Fudheim University, located in the Pacific Northwest, was its noncommercial educational radio station WFUD(FM). The station really added a new dimension to the academic community by broadcasting discussions on various topics of current intellectual interest.

One of WFUD's most popular programs was the Della Applefumpf Show, a discussion program broadcast on weekday afternoons. Della covered a wide range of topics, from astronomy to nutrition. In fact, one day last week her guest was Dr. Silas Herder, a well-known nutritionist. Dr. Herder and Della discussed a wide range of dietary topics, with Dr. Herder advocating the Aristotelian view that dietary moderation was essential. For example, he disparaged "water" and vegetarian diets as particularly harmful. According to Dr. Herder, "if you want to lose weight you should eat less of everything, but not cut out anything–except possibly chocolates, ha ha."

Two days after that broadcast the station received a visit from Louise Greenleaf, a local nut and dedicated vegetarian.

"I was infuriated at Dr. Herder's remarks," she exclaimed, red-faced, "and I think he did tremendous harm to the vegetarian cause. This is an important issue and you people are just treating it cavalierly. I want to get on that Applefumpf show this week, or next week at the latest, and give the vegetarian point of view!"

Of course, nobody at the station, including Della, had any use for Louise, and the last thing they wanted was to let her on the air in any capacity at all. Consequently her request was refused and she complained to the Federal Communications Commission. What result?

Comment:

The FCC will review WFUD's decision not to grant Ms. Greenleaf time on the air. Undoubtedly, they will affirm the station's judgment that the issue of meat-eating versus vegetarianism is not a controversial issue of public importance in the community where Fudheim University is located.

Even though Ms. Greenleaf provided the station and the Commission with citations to proposed legislation, scientific studies, medical reports, and other information dealing with what may be called the "meat versus vegetables question," the Commission will probably find that Ms. Greenleaf's evidence does not support a finding that the issue is one of local controversy. (While her material may show that members of the scientific community hold differing opinions on the subject, that does not demonstrate the existence of a public controversy on an issue of local importance.)

There is thus no basis for second-guessing WFUD's judgment in this case.

Factors in Determining Importance of Particular Issues

The importance of a particular issue can be determined by looking

at a number of factors extrinsic to the station. The governmental interest in a particular problem is a good indicator. On the national level, the significant legislative and executive attention to welfare reform indicates that it is a significant national issue. Locally, the issue of mass transit versus highway expansion is the object of government concern in many areas.

The coverage by other media, usually newspapers and magazines, is also a good reference. For instance, a station which believes corruption in state government is insignificant probably should take another look if the newspapers in its area constantly devote a significant amount of front-page space to the issue.

Requests or petitions by citizens' groups should also influence the station. Citizen requests are, of course, fairly common, while the technique of citizen's petitions has not been used very frequently up to now because of inertia and the difficulty of obtaining signatures.

"Accidental" Issue Selection

Even with the help of outside indicia, a licensee still has wide latitude in selecting controversial issues for treatment. (The licensee's right to make these editorial judgments was emphatically upheld in *CBS* v. *Democratic National Committee*, 412 U.S. 94 (1973), decided by the Supreme Court.)

The licensee's choice is manifested by programming which deals with a particular issue. One result is that a station may inadvertently "select " an issue for treatment—thereby subjecting itself to the Fairness Doctrine's requirements for balanced coverage—by programming which deals with the issue without the licensee's realizing it. The most famous example of this phenomenon is cigarette advertising. The stations which originally aired cigarette advertising had no notion that they were "selecting" a controversial issue for Fairness Doctrine treatment.

In the case of *Banzhaf* v. *FCC*, 405 F.2d 1082 (D.C. Cir. 1968), the broadcasters learned to their dismay that they had presented one side of a controversial issue of public importance, the desirability of cigarette smoking, simply by carrying the commercials. They were, therefore, under an obligation to present spot announcements proclaiming the dangers of smoking.

The test for a station's "selection" of a controversial issue of public importance is only now beginning to emerge, and then only in a preliminary form. We do know that an issue may be projected into controversy and subjected to fairness requirements by many different forms of programming. The old belief that the Fairness Doctrine applied only to news, public affairs, and political broadcasting is obsolete.

A licensee may "select" an issue through editorials, personal attacks or endorsements of candidates (to be covered in the Personal Attack Rules), documentaries, panel discussions, news coverage of various types, religious programming, public service announcements, and commercial announcements. The content of a broadcast segment, not its form of classification for logging purposes, is the deciding factor.

Hypothetical 3–3

A television station licensed to serve a city on the West Coast recently conducted a series of meetings with local community groups to ascertain what community problems, needs, and interests were being inadequately served by the city's broadcast stations. One of the complaints most oft-repeated was that radio and television were not doing enough to ease the local job shortage.

After checking with the Chamber of Commerce, State Employment Bureau, and other sources, the station's manager realized that many jobs were available, but that current market mechanisms were inadequate for matching the right people to the right jobs. He therefore decided to institute a 10-minute daily job information show.

After a week's planning, the show went on the air and was an immediate success. Soon, the program was expanded to 15 minutes with the addition of daily features to explain the job market more fully. Guests from different companies, unions, and employment services were invited to explain their particular functions in the job market.

Things were going well until the station received a complaint from a local viewer who objected to the appearance of union officials on the job show. He claimed that their appearances presented one side of the controversial question of whether union efforts to increase salaries and pensions were hurting the country, and whether the government should reduce the power of unions. He demanded "equal time" to appear and challenge the union presentations.

The station manager feared that turning the job show into a debate forum would seriously damage the show's major purpose of finding jobs for the unemployed. Faced with a threat of a complaint to the FCC if the irate viewer's demand for "equal time" was not met, he called the station's attorney.

Comment:

The attorney will probaly inform the station manager that, at the outset, "equal time" is not at issue at all. "Equal time," more properly labeled "equal opportunities," is applicable only to appearances by legally qualified candidates for public office under Section 315 of the Communications Act (see Chapter 4).

The viewer's request does, however, raise a Fairness Doctrine question. If the union officials have presented one side of a controversial issue of public importance, then the station would have an obligation to present contrasting

viewpoints, though the station has discretion as to exactly how the other views should be aired. They could cover the other side in newscasts or through public affairs programs, and would not have to grant demands for air time by any particular individual.

But before getting to the issue of balanced presentation, the station should consider whether, in fact, the job program has dealt with a controversial issue of public importance. This decision also will require the exercise of station discretion under the Fairness Doctrine, and is reviewable by the FCC only to see whether the station's determination is unreasonable.

In the example, the purpose of the program was to inform the public of the different qualifications for employment, and to discuss general activities of employers, unions, and related services. The station could therefore reasonably conclude that the discussions were not implicit arguments supporting union demands and union power. Rather, the union officials' appearances are more sensibly viewed as related solely to the non-controversial objective of increasing the area's employment.

The station manager can consequently deny air time to the complaining viewer, and also avoid devoting broadcast time to the questions of union conduct and power which the viewer perceived. In all likelihood, this decision would be upheld if the viewer complained to the FCC, although the station would be put to the expense of explaining the basis for its decision.

Anticipating "Issues"

In the area of religious programming, stations may someday be obliged to present coverage on the issue of the existence of a supreme or divine being in order to balance the broadcast of Sunday church services. The Commission faced this problem in 1946, but avoided deciding it on technical grounds. Presumably, a rule that the broadcast of religious services triggers Fairness Doctrine obligations will have a great impact on current programming; but then, so did the cigarette case.

A program producer can predict when his product will create Fairness Doctrine obligations by analyzing the importance and controversiality of the issues presented. Often this will mean determining whether or not the program is exclusively entertainment. The difficulty is that one person's entertainment is another's cause.

The manager or producer must, therefore, attempt to see the program through the eyes of a biased viewer who desires to promote a cause. Obviously, this sort of analysis will not help to define every possible slant or view on a particular topic; but it will help to highlight those which have some measure of acceptance or importance, and which generate Fairness Doctrine questions.

The Commission will take this approach in case of a complaint, since it realizes that the Fairness Doctrine is designed to guarantee access to ideas rather than the right of a particular individual to speak.

Hypothetical 3–4

Charity, Nebraska, is a medium-sized city with a lot of community spirit. At no time is this spirit more apparent than during the annual charity drive for the United Contribution Fund. UCF was established about 10 years ago to consolidate the charitable solicitation activities of the various community service organizations in Charity. This way, givers would only have to respond to a single request for a contribution. This had proved a successful fund-raising method, for the total collected was much greater than all the amounts collected separately by the various community service groups in years past.

Of course, there were always squabbles about the UCF allocation formula. Certain community organizations protested they were not being given a large enough slice of the pie. For the most part, however, these disputes were successfully resolved by negotiation; but last year a coalition of black community service groups had protested that their organizations were not given sufficient funds. Still, Sam Elee, this year's UCF chairman, looked forward to an unprecedented amount of giving.

As part of the UCF campaign, Sam called Frank Nary, the manager of local television station KGIV, for the purpose of arranging publicity for the campaign. KGIV-TV had cooperated in this effort before, and Frank was happy to accommodate Sam's requests. Soon KGIV-TV started carrying a 5-minute recorded announcement by the mayor supporting the UCF drive, and various 60- and 30-second public service announcements which UCF provided. In addition, the UCF drive was given considerable mention on KGIV-TV's news.

But all was not rosy in Charity this year. Sam and Frank were soon contacted by Susan Mosy, the chairperson of a coalition of black community organizations which believed that the UCF allocation formula discriminated against Charity's black community. Susan demanded a renegotiation of the formula and, until that was accomplished, cessation of UCF spots on KGIV-TV.

If UCF and KGIV were unwilling to stop the publicity campaign, Susan demanded reasonable reply time so that she could expound the black coalition's views on the station. Specifically, Susan wanted to discourage giving through UCF and urge that everyone in the community give directly to the charitable organizations of their choice.

Susan's request was brushed aside by both Sam and Frank, who were appalled by her lack of community spirit. Deciding that further discussion was futile, Susan complained to the FCC.

Her complaint began with a general explanation of the UCF controversy and also contained the date and time of a week's broadcasting on KGIV of all the announcements and programs related to the UCF fund. The 5-minute program featuring the mayor and other city officials was run several times during that week, and many public service announcements were shown. In addition, KGIV's extensive news coverage of UCF was described, and the approximate total news

time afforded to explaining UCF's goals was given. Ms. Mosy noted that her coalition's protest had been given only 90 seconds' news coverage on the 6:00 p.m. and 11:00 p.m. broadcasts on one day.

In reply to an inquiry from the FCC concerning Ms. Mosy's complaint, Frank Nary explained that he did not believe the controversy was of public importance in Charity because "the United Contribution Fund is recognized by a vast majority of the community and throughout the United States." Nary also supplied data on two other newscasts, not mentioned by Ms. Mosy, on which the black coalition's criticisms had been aired.

Comment:

Unfortunately for Frank, the Commission's Complaints and Compliance Division will find against KGIV-TV in this instance. They will hold that Susan's coalition had submitted information indicating community interest and local controversy concerning the UCF campaign, particularly on whether people should contribute through UCF or directly to their favorite charities, considering the claims of unfairness in UCF's allocation formula. The Commission's staff will also rule that Susan supplied sufficient detailed information on KGIV's overall programming so that the Commission could reasonably find an imbalance in the station's presentation of contrasting viewpoints on this question.

KGIV-TV will be ordered to explain how it intends to rectify the imbalance in its programming over the next three weeks (the remainder of the UCF campaign). Due to the need to resolve this fairness question immediately, the Commission will take "expedited action"–consulting via telephone and telegraph–to ensure that Susan's viewpoint is given sufficient coverage during the last weeks of the charity drive.

The Commission's immediate action will be limited to a holding that the question of contributing directly to charities or UCF is a controversial issue of public importance in the community.

KGIV-TV still has discretion to cover the various viewpoints as it wishes. That is, the station can invite Susan or other spokespeople on the air, cover Susan's coalition's point of view in its newscasts or use a combination of techniques to achieve balance.

If the station were to maintain its intransigence, however, it is likely the Commission would go further and order that a coalition spokesperson be allowed to appear on the station.

Balance Defined by Service Area

In deciding an issue's importance, a defined community must necessarily be used as a reference. The community is important because matters of concern in one locale may be unimportant in another. The problem of defining the relevant community is complicated by the fact that while broadcast licenses are assigned to particular communities, their stations often cover a greater area. The concerns of black

groups living in an inner city, for example, may be quite different from those of suburban residents.

Can a station licensed to the city ignore programming requests from the suburbs? Can it devote half its time to the needs of inner city blacks and half to the suburbs? The answer, to the extent there is one, was given by the United States Court of Appeals in a recent case:

> *[I]t is clear that a broadcast licensee has an obligation to meet the needs and interests of its entire area of service. This is particularly the case with respect to television stations. Suburban and other outlying areas are not cities of license, although their needs and interests must be met by television stations licensed to central cities.*
>
> *How a broadcast licensee responds to what may be conflicting and competing needs of regional or minority groups remains largely within its discretion. It may not flatly ignore a strongly expressed need; on the other hand, there is no requirement that a station devote 20 percent of its broadcast time to meet the need expressed by 20 percent of its viewing public. Until this problem is addressed in a rulemaking procedure, the scope of FCC review remains whether the licensee has reasonably exercised its discretion. Stone v. FCC, 466 F.2d 316, 328 (D.C. Cir. 1972).*

While the Court of Appeals' opinion gives licensees considerable flexibility, a station must be careful not to exclude the views of any significant population or citizens' group within its area. This does not mean providing each group with automatic access; it does require taking pains to balance programming.

Techniques of Balanced Programming

The Fairness Doctrine does not require that programming on an issue be balanced in any one program. Rather, the station is required to achieve balance in its overall programming over an unspecified period of time. In cases where no complaints are filed and no urgent matters are involved, the three-year license renewal term is often used by the Commission, and then the examination is usually cursory and perfunctory.

Where there is a complaint involving an issue with an element of urgency (as during an election campaign), however, the period allowed for achieving balance is often shorter, and the scrutiny far more intense. Even in the most extreme case, however, there is no requirement that a single program provide balanced coverage in and of itself.

Where the Commission is forced to decide whether coverage has been balanced, it will often resort to a mathematical comparison of time devoted to presenting each side of an issue. While precise equivalence is not required (as it is in political broadcasts under Section 315), a distinct imbalance will often result in a finding that fairness obliga-

tions have not been met. Ratios as low as eight-to-one have been approved, and a four-to-one ratio has been held unfair. Each case must be decided on its facts, and circumstances may sometimes dictate the need to approach equality.

Once a licensee has decided to provide coverage of a particular issue, his first decision is whether he wishes to achieve balance in a single program or spread his treatment of the issue over a longer period. If the issue is likely to be important in his community for a considerable period and can best be covered by presenting the views of a number of spokesmen as developments arise, balance achieved over a substantial period of time is indicated. On the other hand, an issue that is definite in scope and which appears to have developed fully can often be treated in a single, summarizing segment.

Hypothetical 3–5

Noncommercial educational Station WMUG(FM) carries a very popular panel show. Recently, the show had done a series on the city's burgeoning crime problem, particularly with reference to the alarming increase in the city's rate of assaults, robberies, and sexual attacks against women.

On one of these programs a guest, Roger Reason, explained his view that women should not carry concealed guns as protection against muggings. Mr. Reason explained that owning and carrying concealed weapons increased the possibility of shooting accidents at home or on the street. He further stated his opposition in general to people owning or carrying firearms. He suggested several alternate means for women to protect themselves, such as always traveling in pairs and staying at home during the evening hours.

Two days later, Station WMUG(FM) received a request from the Turf Gun Club, a local organization, for "equal time to reply to and refute the slanderous comments made against gun owners and guns by Mr. Roger Reason on your program." The Turf Gun Club insisted that they were entitled to time under the Fairness Doctrine, because Mr. Reason had offered one viewpoint on the controversial issue of gun control.

WMUG's station manager mulled over the Club's request and decided he would not grant it. He believed that the substance of the panel show was related to the crime problem, and he did not want to get the forum sidetracked on the issue of gun control. Upon learning of the station manager's decision, the Gun Club complained to the FCC.

Comment:

The Commission's Complaints and Compliance Division will deny the Gun Club's request. The Club will be informed that the licensee has the responsibility to determine whether a controversial issue of public importance in the

community has been presented and, if so, the best way to air contrasting viewpoints on the issue. The Commission reviews complaints only to see if the licensee acted reasonably and in good faith.

In this case, WMUG informed the Commission that the issue of carrying guns could relate to a number of issues, such as the crime problem (mugging in particular), law enforcement, or gun control. WMUG claimed that Mr. Reason's comments against guns arose in the context of the mugging problem, and that the issue of gun control per se had not been raised on the station.

Since the Commission believed the station's explanation demonstrated a good faith consideration of the Fairness Doctrine issue presented by the Gun Club's complaint, the Club was informed that no further action would be taken on its letter. The Commission noted, however, that if the Club provided specific information about one-sided coverage of the gun control issue in WMUG's overall programming, the complaint would be examined further.

A Station's Options

Another decision best made early in the planning is whether to invite representatives of responsible community groups to present their diverse views or to have the station's staff present those views instead.

The station may decide on a combination approach, with the station presenting one or two sides and spokesmen presenting other viewpoints. This technique is often used where a station receives a program presenting one side of a controversial issue. Where the station wishes to carry a program which does not seek to achieve internal balance, inviting spokesmen who complain about the program's presentation is also the easiest way to achieve balance; it effectively cuts off complaints to the Commission that access has been denied to a particular person or group, and at the same time relieves the licensee and its staff from developing their own programming.

The licensee does have the option, however, to deny requests by listener groups that their spokesman be allowed to appear. Of course, the licensee still carries the burden of providing contrasting views, and in such cases its performance will often be closely followed.

Hypothetical 3–6

For months the city of Zoggesville, Indiana, had been wracked by a series of police and court scandals. The city's newspapers and broadcast stations had uncovered extensive corruption throughout the police department and the court system. As part of its public affairs programming, therefore, noncommercial educational television Station KZOG decided to run a series of panel discussions on the city's court system, focusing on the judges and prominent lawyers, and their roles in the resolution of various legal issues.

During the panel discussions, which were quite frank, the Zoggesville Bar Association came under particular criticism. Disparaging remarks made by panel members were so vicious that Harrison T. Belfrink, the president of the Bar Association, decided he must reply.

Consequently, he contacted KZOG's general manager and demanded an opportunity to appear on the station and refute what he termed "those undignified and, dare I say, scandalous innuendos." KZOG's general manager told Belfrink he would take the matter under advisement, and reply within the next day or two.

Belfrink soon received a letter from KZOG granting his request under the following conditions:

> *KZOG will produce a program containing whatever response you choose, provided:*
>
> *(1) the response does not contain any defamatory or obscene matter or material contrary to law or the FCC's rules;*
>
> *(2) the program will not subject Station KZOG-TV or anyone else to ridicule or public censure;*
>
> *(3) the program will not contain any personal attacks as defined by the FCC;*
>
> *(4) the program will be structured so that Station KZOG-TV will not thereafter be obligated to offer any other person or group time to respond thereto under the Fairness Doctrine.*

Belfrink, his lawyer's antennae aquiver, immediately began thinking of how the station could use these conditions to censor the substance of the strong response he was planning. Indeed, when he called the station manager to discuss exactly how the "guidelines" were to be applied, he quickly found that his suspicions were true; he was not going to be allowed to attack those who earlier had made the most vicious charges against the Bar Association.

"I don't know why you think I'm going to stand for this," exclaimed the exasperated Belfrink. "I'm a lawyer, you know–not some hick just out of the mountains–I'm not going to accept these conditions, and I don't think the FCC will either!"

Since Belfrink had a reputation for bluster, the station manager decided to let the matter stand as it was. Undaunted, Belfrink complained to the FCC.

Comment:

The FCC will rule in Belfrink's favor on three out of four counts. The first condition imposed by KZOG will be considered proper, since the station would be liable as a joint tortfeasor if Belfrink defamed anyone over its facilities.

The second, third, and fourth "guidelines" are unduly restrictive. The general principle under which the Commission operates is that licensees have discretion to impose reasonable limits on Fairness Doctrine replies. For example, licensees may ensure that a Fairness Doctrine reply is responsive to the issues raised in the initial broadcast for which Fairness Doctrine reply oppor-

tunities are being provided. However, a licensee may not impair robust, partisan debate on a Fairness Doctrine issue in the guise of "focusing" the debate or protecting itself from a possible suit for libel or slander.

Considered in this light, both the second and fourth guidelines are too vague to achieve their purpose without allowing the station unreasonable latitude in censoring Belfrink's remarks. Moreover, ridicule and public censure will not subject the station to tort liability, as would defamation. Consequently, ridicule and public censure are within the "robust debate" which the Supreme Court has held is the goal of the First Amendment.

The same is true of the fourth guideline. It is too broad to achieve the legitimate purpose of "focusing" the Fairness Doctrine issue, and therefore gives the station the opportunity to limit Belfrink's robust, partisan response. Further, the aim of the Fairness Doctrine is to encourage debate, and if full exposition of the issue necessarily involves other viewpoints and ideas, the fourth restriction will only serve to prevent a full examination.

The same reasoning applies to the prohibition against personal attacks in guideline "3". Full and frank discussion of the issue simply may require that the character or integrity of an individual or group will be called into question.

The area of Fairness Doctrine responses is difficult, because the licensee is reponsible for all material aired over its facilities. Nevertheless, since KZOG has apparently chosen to fulfill its Fairness Doctrine obligation by allowing a spokesman to appear, it cannot restrict his response except to prevent obscene and defamatory material, and to ensure that the response meets the particular Fairness Doctrine issue involved rather than detouring through unrelated topics.

If necessary, the licensee can require an advance tape or transcript of Belfrink's response, and negotiate with Belfrink if editing appears necessary. This is a realistic way for the licensee to achieve the full protection to which it is entitled, while allowing Belfrink the freest expression possible. (Notice that this technique is specifically forbidden by Section 315 of the Communications Act where the personal appearance of a legally qualified candidate is concerned. See Chapter 4.)

Controversial Issue Programming Often Requires Compromises

Program producers should constantly be aware of the range of problems which controversial issue programming can present to licensees. In trying to make a program more attractive for distribution purposes, producers can attempt to balance the presentation of an issue within that program. If they are successful, the licensee is relieved from further burdens of providing balance either through his own resources or invited spokesmen.

Of course, some producers have a particular viewpoint to expound, and are unwilling to dilute their presentation in an attempt to achieve single-program balance. In that case, they should be aware of the dis-

tribution problems which may be created by licensee reluctance to take on additional fairness burdens. If their program is sufficiently attractive, of course, licensees will be willing to air it regardless of further programming requirements which may result.

Some commercial licensees have, in past years, resisted their obligation to provide viewpoints in contrast to programming already presented, on the ground that they could not find sponsorship either for their own programming or for access by spokesmen from representative groups. In its 1963 *Cullman* ruling, the Commission held that inability to obtain sponsorship did not relieve a licensee from presenting contrasting views once one side of a controversial issue had been broadcast.

The licensee may attempt to obtain sponsorship for an appropriate presentation of opposing viewpoints, but where sponsorship is unavailable and the licensee is unwilling or unable to use its own resources to present the opposing views, it cannot reject an otherwise suitable presentation offered by responsible spokesmen on the ground that the spokesmen are unwilling or unable to pay for the time.

Where presentation of a controversial issue involves spokesmen from two sides, the problem sometimes arises that one side is unwilling to present its views over the air. In that case, a licensee may be reluctant to present programming on the issue at all, since its obligations to provide balanced coverage will be made more difficult by the group's refusal.

Despite the fact that presentation of programming on that issue would require the licensee to use its own resources, the licensee cannot, in a situation where the issue is of cognizable importance in the community, refuse to air the views of the side willing to make the broadcast. The Commission has held that to rule otherwise would endow those on one side of an issue with a veto power over its being broadcast.

Of course, in all but exceptional cases involving very important issues, the licensee can choose whether to cover the issue at all. However, if a licensee should try to justify non-coverage by citing the refusal of spokesmen from one side to appear over the air, the refusal is *prima facie* unreasonable. In short, a licensee which wishes to avoid programming on a controversial issue must be certain to base its refusal on proper grounds, and be able to state those grounds in a correct way.

Hypothetical 3–7

WURP-TV is a network affiliate licensed to the middle-American city of Sandsville, Iowa. Like a lot of cities in Middle-America, Sandsville is basketball crazy. Throughout the winter WURP-TV derives some of its highest ratings from carriage of professional, college,

and even local basketball games. This year, anticipation is especially high because the local high school team, the Sandsville Sheiks, has a good shot at winning the state tournament. The climactic game is to be broadcast on Thursday at 8:30 p.m.

On Tuesday WURP-TV carried the network feed of the President of the United States' State of the Union address. In an effort to balance the President's speech under the Fairness Doctrine, the network has offered reply time to the Senate Majority Leader, who is a member of the opposition party. The network recently instituted the proffer of reply time to Presidential addresses because of tremendous criticism that the President was misusing his access to television and radio for blatantly partisan purposes.

Unfortunately, the network has scheduled the Majority Leader's reply for 8:30 p.m. on Thursday, the same time as the final game of the state basketball tournament. WURP-TV's General Manager, Edgar S. O'Hara, now faces a dilemma.

If he preempts the final game of the state basketball tournament, many viewers will switch channels and the station will receive vociferous complaints. If he fails to run the Majority Leader's reply, he is sure to get complaints from other viewers and local politicians, and may even be the subject of a Fairness Doctrine complaint to the FCC. What to do?

Comment:

Networks follow the practice of balancing their "controversial issue programming" so that affiliate stations will not be subjected to Fairness Doctrine complaints as a result of network carriage. The FCC has ruled that this is an acceptable practice.

To take advantage of the network's balance, however, an affiliate must be prepared to carry almost the entire schedule of the network's informational programming, for a decision not to "clear" a particular show may disrupt the network's careful arrangements. This is especially true for a program, such as the Majority Leader's reply, which is highly partisan and is intended to offset another highly partisan presentation.

However, there is no requirement that WURP-TV carry the Majority Leader's reply at the same time as most other network affiliates. The station has discretion to tape the network's feed and reschedule it at a more convenient time. Therefore, Edgar could carry the basketball tournament live and schedule the Majority Leader's speech for 8:30 p.m. on Friday.

Of course, Friday, at 8:30 p.m. is not the only time at which the reply could be carried. WURP-TV probably would be justified in carrying the speech at 7:30 or 9:00 p.m. on Friday evening if the station's regular program schedule made those times more convenient. But what if WURP-TV carried the reply outside prime time? This would not be a violation of the Fairness Doctrine per se, but might raise a question of the station's good faith compliance with the Fairness Doctrine–and might be difficult to explain in case of a complaint to the FCC. There is an obligation on the station to schedule the reply at a time of comparable attractiveness to the period when the President's speech was broadcast.

Suppose WURP-TV also had a particularly heavy Friday night schedule, and wished to postpone the Majority Leader's speech until the following Monday? The question here is a bit more subtle: Does the intervening weekend vitiate the timeliness of the Majority Leader's broadcast?

The only standard for resolving this question is that of reasonableness, and the particular circumstances of the President's address and the Majority Leader's rebuttal would be important in the determination. If the President had not said anything particularly controversial, delay could well be warranted. If, on the other hand, the President's speech produced several bombshells, quick scheduling of the Majority Leader's response might be essential. Given sufficient controversy, the urgency of the Majority Leader's appearance could persuade the station not to carry the crucial basketball game, despite the tournament's popularity. Analysis of the two speeches would be essential to such a decision.

The guiding principle in approaching such scheduling problems is flexibility. The Fairness Doctrine is not a formula of rigid prescriptions. If it were, there would be grave doubts as to its constitutionality. Indeed, flexibility was one of the important factors cited in the Supreme Court's Red Lion *decision affirming the Doctrine's constitutionality. Concomitantly, an abuse of discretion which is manifested by a pattern of imbalance in programming is cognizable by the Commission and the courts.*

In most cases, a careful analysis of competing factors will lead to a reasonable compromise.

Personal Attacks and Political Editorials

After some years of administering the Fairness Doctrine, the FCC was aware that it did not achieve sufficiently equitable results in situations where an individual or group was attacked over the air or where a station editorially endorsed or opposed a candidate for public office. To remedy these problems the Commission, in 1969, adopted the Personal Attack Rules:

> (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 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 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 spokesman, or those associated with them in the campaign on other such candidates, their authorized spokesman, or persons 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).

NOTE: The Fairness Doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, section 315(a); Public Notice: Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 F.R. 10415. The categories listed in (iii) are the same as those specified in section 315(a) of the Act.

(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 of 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, 73.300, 73.598, 73.679 (1969).

Hypothetical 3–8

The city's educational television station had recently begun an afternoon children's program which quickly became popular with the younger children and, surprisingly, their mothers too. The show consisted of a number of games of skill in which the children participated.

Toward the end of the show, the mothers of the participants–who were invited to the studio along with their youngsters–appeared on camera to chat with the show's host. One of the reasons for the show's instant popularity was that parents got to see their adult friends on the air. Appearing on the show quickly became a status symbol.

The format worked smoothly until one day when little Laury Edmonson and her mother, Lorraine, were on. After a few of the usual innocuous remarks, Mrs. Edmonson suddenly said:

> *By the way, I want to take the opportunity of being on this wonderful show, with so many mothers of school-age children watching, to make some comments about the new principal of Fairchild Elementary School, Mr. Euell Weedemouth. In my opinion, Mr. Weedemouth is a liar and a pervert, and I don't think he should be in charge of a school with young children under any circumstances. In fact, his charac-*

ter is so deficient that I doubt he should be allowed to remain in town. Thank you for being so nice to let me say all these things.

The show's hostess was stunnned, but not as stunned as Mr. Weedemouth when he heard of the broadcast. "I can't believe she said that," he shouted, and then decided that he must clear his name by appearing on the same show the next day. He immediately called the station and demanded the opportunity to reply.

The station was horrified over the entire incident, but wanted to stop things where they were. Although sympathetic to Principal Weedemouth's desire for an opportunity to reply, they were loathe to let the matter escalate.

Was the station required to let Mr. Weedemouth on the air?

Comment:

Strange as it may seem, Mrs. Edmonson's remarks do not constitute a Personal Attack under the Commission's rules.

A Personal Attack is defined as one which occurs "during the presentation of views on a controversial issue of public importance." Apparently, Mr. Weedemouth's being principal of the elementary school is of controversial importance only to Mrs. Edmonson. Consequently, although she certainly attacked Mr. Weedemouth's honesty, character, integrity, and like personal characteristics, he is not entitled to reply if the station wishes to exclude him. Moreover, the Fairness Doctrine does not require a different result, since the doctrine's entire workings are premised on the existence of a public controversy.

The Personal Attack Rules do not, however, diminish the station's potential liability for defamation resulting from Mrs. Edmonson's unexpected proclamation. The station would probably be wise to broadcast a retraction of Mrs. Edmonson's statement as soon as possible.

They might also contemplate negotiating a settlement with Mr. Weedemouth, in which he would be allowed to appear on the air in return for a promise not to sue.

What Constitutes a "Personal Attack"?

Several points concerning the Personal Attack Rules have created some confusion. The most troublesome is the meaning of "attack upon the honesty, character, integrity or like personal qualities of an identified person or group." Such an attack does not occur when a station broadcasts matter disagreeing with the views, political opinions, or other beliefs of such a person or group.

For a Personal Attack, the speaker must impugn a person's character by, for example, alleging that he has engaged in immoral behavior or is dishonest, perverted or untrustworthy.

Moreover, the accusation must apply to a person or group which

can be identified. Thus, to say that "all Europeans" are perverted would not constitute a personal attack because the group "Europeans" is, for practical purposes of the rule's application, indeterminant.

Borderline cases will arise. For example, the Commission has held that calling a nationally-known group "subversive" and "communist" was a Personal Attack in the context of a broadcast which occurred in Georgia.

However, under certain circumstances, such as a broadcast in areas of the Far West or Northeast, the label "communist" or "subversive" might not be taken as a Personal Attack either by the group referred to or the station. The same is true, though possibly in different geographical areas, for the appellation "John Birch Society member." The station must judge whether a particular broadcast is a personal attack under all the circumstances.

Hypothetical 3–9

WBUL(FM) was a noncommercial educational station licensed to a small college community in Southern California. Due to an essentially political dispute over education in general, the community corporation to which the station was licensed was controlled by individuals with definite right-wing propensities. Upon gaining control of the station, they immediately arranged to carry a number of right-wing programs, including "Threat From the Left" featuring Desmond Gladston, a well-known conservative commentator.

Gladston's constant theme was that American education was being undermined by communist and socialist teachers who infiltrated the nation's high schools and colleges. In fact, in one program, Gladston went so far as to charge most of the college professors in the United States with "treason," and gave as examples two local college professors, Sid Trotsky and Sam Castro.

When Professors Trotsky and Castro heard about the show, they immediately complained to the FCC, alleging that they had been personally attacked and that WBUL had failed to offer them reply time or even provide a script or tape as required by the Personal Attack Rules.

In response to an FCC inquiry about the program, WBUL declared that in its judgment the program was not a Personal Attack on Professors Trotsky and Castro. Instead, the station claimed the program simply explained that the views of liberal college professors were doing great harm to the nation.

Comment:

In its reply to WBUL, the FCC said that the station's analysis of the Gladston broadcast was not a reasonable view of the program's impact.

Despite the fact that the charge "treason" was applied to liberal college professors in general, the Commission held that Trotsky and Castro were obviously intended to be examples of that class. Further, a charge of treason was

certainly an attack upon the honesty, character, integrity, or like personal qualities of the professors, and therefore fits the Personal Attack Rules precisely.

WBUL was therefore given 20 days to inform the Commission of the steps it had taken to notify Trotsky and Castro of the time of the broadcast, provide them with a tape or transcript, and offer them reasonable reply opportunities.

Deadline for Compliance

In doubtful cases, the station should comply with the Personal Attack Rules' requirements for supplying a tape or transcript within one week, since the Commission has also held that a licensee may not avoid the Rules' impact simply by claiming that a particular broadcast is not an attack upon the honesty, integrity, character or like personal qualities of an identified person or group when the facts indicate the contrary.

Moreover, in order to prevent the Rules from degenerating into meaninglessness, the Commission has found it necessary to enforce the 7-day requirement strictly and exact penalties (which can be in the form of monetary forfeitures) for failure to meet the deadline. To meet this requirement the station should tape broadcasts which contain potential Personal Attacks, so that if a Personal Attack occurs the staff will not have to go to the time and trouble of assembling a transcript or attempting to write an accurate summary of the broadcast.

Hypothetical 3–10

Lon Gianconda was the closest thing to a political boss in the city of Mount Olive, New Hampshire. Mayoral elections were coming up soon in Mount Olive, and Lon was in the midst of hectic preparation for the campaign. After a long day, he returned home and decided to tune in one of his favorite television programs, Black Forum, *a regular feature of television Station KLUB-TV.*

Lon particularly liked Black Forum *because the program dealt with important issues facing the community. He knew the show had a substantial following among the city's largely disaffected black population. Tonight, in fact, one of the panelists was Samuel Smith, a black activist with a growing reputation.*

The show's topic was the upcoming mayoral race, and Lon–who liked to maintain his behind-the-scenes anonymity–was disturbed to hear his name being brought into the discussion. Shortly thereafter, Smith began describing Lon's political ploys in unflattering terms, calling Lon a "political opportunist."

Lon was incensed, and immediately called the station to protest. As a politician, Lon knew that being called a "political opportunist" on the Black Forum program, by a black community leader, was tantamount to being called a racist.

Lon was also familiar with broadcasting rules, and knew that this was a Personal Attack. He consequently demanded that KLUB-TV furnish him with a tape and transcript of that evening's show and give him an opportunity to respond on the station as soon as possible. When KLUB-TV's management refused his request, Lon immediately sent a formal complaint to the FCC.

Comment:

Unfortunately for Lon, the Commission's staff will rule against his complaint. The Commission will point out that the label "political opportunist" is not of itself an attack on the honesty, character, integrity, or like personal characteristics of an individual, especially a politician.

Moreover, although Lon may believe that Smith's comments had the same effect as his being called a "racist," the Commission would not be justified in deciding that the two appellations were equivalent, especially in view of KLUB-TV's good-faith determination that no such attack had been made.

Even though the general topic of that Black Forum program had been race relations in the context of a political campaign, the term "political opportunist"–without more–could not possibly be construed as the kind of Personal Attack described in the Commission's Rules.

Exemptions

Note the Personal Attack Rules' exemptions for attacks on foreign groups or foreign public figures, attacks made by legally-qualified candidates and their associates, and for bona fide newscasts, news interviews, and on-the-spot coverage of bona fide news events.

Hypothetical 3–11

Sandra Gushe was a fine example of her sex, for she showed that women could succeed in the political system. Sandra was the chairperson of the women's caucus of the state legislature in a large industrial state. She wielded a great amount of political power and, naturally, made quite a few enemies, as would any politician.

One of Representative Gushe's major interests was education, and she developed a practice of holding caucus hearings on educational matters in towns throughout the state.

During a two-day hearing session in Kingsdale City, a commentator on the local educational television station described Ms. Gushe's conduct in running the hearings as "obnoxious," and called her interference in local educational affairs "that of a confirmed nuisance."

When she heard of the broadcast, Sandra phoned the station and demanded an immediate public apology. When the station refused, Sandra complained to the FCC.

Comment:

The FCC respectfully informed Ms. Gushe that she had not been personally attacked according to its rules. The Commission noted that a strong disagreement, even vehemently expressed, is not a Personal Attack in the absence of disparagement of an identified individual's character or integrity. The labels "obnoxious" and "confirmed nuisance" did not fall within this category.

Additionally, the Commission informed Ms. Gushe that it could not tell from the facts she presented whether the comments complained of occurred during a bona fide newscast, news interview, or on-the-spot coverage of a bona fide news event. If the comments were part of such a program, however, the Commission noted that they were specifically exempt under the Personal Attack Rule itself. The purpose of this exemption is to ensure that news reporting will be uninhibited by reporters' doubts concerning allowable limits on accurate descriptions of news events.

Hypothetical 3–12

Station KLIP-TV was located in a state with a substantial Roman Catholic population. One of the most sensitive state issues was a proposal before the legislature to liberalize abortion laws, permitting "abortion on demand."

Reverend Paul C. Evans, Human Life Coordinator in the diocese which included KLIP's city of license, had been an extremely hard-working activist in the forefront of the anti-abortion forces. He had gone around the state making strong speeches equating abortion and murder. His effort had been so intense that he was a constant target for the pro-abortion forces.

One such abortion advocate, William Findlay, appeared on one of KLIP's interview programs and attacked Reverend Evans in harsh tones. Findlay declared that Protestants and Jews "should stand up and say to the Roman Catholic Church–no longer are we going to permit you to call us murderers, for that is completely wrong. . . ."

When he heard about the program, Reverend Evans realized he had been personally attacked, and immediately demanded that KLIP give him an opportunity to respond at the earliest possible time. The station, however, declared that the broadcast was not a Personal Attack and that in any event it was a "bona fide news interview" exempt from the Personal Attack Rule.

Reverend Evans has now complained to the FCC.

Comment:

The FCC will probably hold that Mr. Findlay's comments were not a Personal Attack on Reverend Evans. Although Findlay stated his interpretation of the Catholic Church's position on abortion in a highly argumentative manner, including saying that the Catholic spokesmen had accused abortion advocates of being "murderers," that was not an attack on Reverend Evans' honesty, character or integrity.

In passing, the FCC should explain, however, that the program does not fit the "bona fide news interview" exemption contained in the Personal Attack Rules. The particular program on which Mr. Findlay appeared was designed essentially to give community leaders and news-makers an opportunity to express views on topics of their own choice.

Although a KLIP news commentator was present to discuss these topics with various guests, the selection of topics was, for the most part, under the guests' control. To fit within the bona fide news interview exception, the station must control the program, particularly the selection of issues.

Hypothetical 3–13

Sam "Fishtree" Parker was the beloved mayor of Terra Cottage, Idaho, a rather large town whose major industry was dude ranches. Fishtree, as almost everyone called him (even at city council meetings), had been the mayor about as long as most folks could remember. For the first time in over a decade, however, he was facing an election challenge. The newcomer was Cramer Phonnsbee, a local pharmacist with aspirations far beyond his mortar and pestle.

Because of the interest which Phonnsbee's challenge sparked, WDUM(FM), the town's only radio station, decided to hold a special program on the election. Since the candidates had both appeared on the station, and were scheduled to appear a good deal more before election day, the station decided not to invite the candidates themselves.

To avoid complications from the Commission's Zapple rule (requiring "comparable" time to be given to a candidate's supporters if his opponent's supporters have appeared on the air [see Chapter 4]), WDUM's general manager also decided that he would use panelists who were not officially associated with either candidate's campaign.

About half-way through the special panel program, one of the participants, Raoul Furd, became exasperated with the lack of alarm with which his fellow panelists viewed Phonnsbee's challenge. Raoul had been prejudiced against pharmacists since his youth, due to an early unhappy experience with milk of magnesia.

When his next turn came, Raoul began to lash out at Phonnsbee's lack of experience, inept approach to political issues, and general lack of qualifications to do anything but run a drug store. Warming to his topic, Raoul finally blurted: "Phonnsbee is either inefficient, in that he doesn't know how to get correct information, or he is willing to pander with falsehoods; in either case he is not a worthy candidate for public office."

Of course, Phonnsbee was listening to the show and immediately after it was over called the station to demand reply opportunities to Raoul's personal attack. But WDUM's manager, still trying to avoid getting into an equal time battle (since he realized Phonnsbee's reply would necessitate giving more time to Fishtree), refused to grant any reply opportunity at all.

"Great grizzlies," Phonnsbee shouted into the phone, "don't you

know about the Personal Attack Rule?! Darn it, I'm entitled to reply! You better send me a tape or a transcript quick, or I'll have the FCC all over you!"

But the station manager explained that the Personal Attack Rule specifically exempts attacks made against candidates or during bona fide news interviews. Phonnsbee, who in reality had heard only passing references to the Personal Attack Rule in his short political career, was taken aback. What could he do?

Comment:

If Phonnsbee bothers to check further, he will discover that he is indeed entitled to reply time under the Personal Attack Rule. Raoul Furd's comments, particularly the remark about "pandering with falsehoods," was certainly an attack upon Phonnsbee's honesty, integrity, character or like personal characteristics.

Moreover, it occurred during the panel discussion of the mayoral race, thus satisfying the requirement of the Personal Attack Rule that the attack take place during the discussion of a controversial issue of public importance.

The Personal Attack Rule exemptions relied upon by WDUM's station manager are of no help. The first, about the Personal Attack Rule not applying to attacks made on a legally-qualified candidate, is misstated. The Rule exempts attacks made by legally-qualified candidates or their authorized spokesmen, or associates. Since Raoul was not a candidate, candidate's spokesman or associate, the exemption is inapplicable by its very terms.

The panel discussion also does not fit within the "bona fide news interview" program since it was not regularly scheduled, but rather was produced especially for this election. The criteria for meeting the "bona fide news interview" exception to the Personal Attack Rules are the same as those discussed in Chapter 4 on Political Broadcasting for meeting the "bona fide news interview" exception to Section 315 of the Communications Act (the "equal opportunities" provision).

Political Editorials: Time Limits

As a close reading of the Rules reveals, the time limits for an editorial endorsing or opposing a legally-qualified candidate are different from the normal one-week limit. Such an endorsement or opposition creates an obligation to notify the candidate who is adversely affected within 24 hours.

In cases where the editorial is broadcast within 72 hours before the election, the licensee must notify the adversely affected candidate sufficiently in advance to allow him a reasonable opportunity to prepare and present his response over the air prior to the election.

Editing Personal Attacks

Where a reply to a Personal Attack is involved, the licensee's editorial prerogatives are somewhat circumscribed. The licensee cannot edit

the reply so as to alter its meaning or unnecessarily reduce its expressive force.

Nevertheless, the licensee does have the legal obligation to review every Personal Attack reply for obscene language, lottery information, and potentially defamatory material. Before deleting portions of a Personal Attack reply, the licensee should make a good faith effort to negotiate any changes with the person making the reply (the person who originally was the object of the Personal Attack).

Attempts at arranging negotiations, and the negotiations themselves, should be fully documented in memorandum form, and the records retained until renewal in anticipation of possible Commission inquiry.

If negotiations fail, the licensee should make whatever deletions he feels are reasonably necessary to protect himself from possible suit for defamation or invasion of privacy, and should take similar steps to ensure that he will not be subject to FCC sanction for broadcasting obscenity or lottery information.

In determining reasonableness, the licensee must bear in mind that the Personal Attack Rules were adopted specifically to afford an individualized response by the person attacked. Such a person should therefore be given the maximum amount of freedom of expression consistent with the licensee's ability to protect himself from legal liability. Deleting matter simply because it will offend members of the audience is unjustified.

Chapter 4

Political Broadcasting

Political broadcasting represents one of the most troublesome areas for station executives and program producers. The difficulties of everyday production are compounded by rules of equal and quasi-equal opportunities, fairness, reasonable access, and sponsorship identification, among others. Political broadcasting has a particularly close relationship to the Fairness Doctrine, and the two areas are actually so closely interrelated that it is difficult to explain them separately. For purposes of analysis, political broadcasting will be treated as a separate topic; but the principles explained in Chapter 3, on the Fairness Doctrine, should be read into the discussion.

Hypothetical 4–1

The 1973 elections in Pottsville, Florida, were generating a considerable amount of interest in the community. Even though it was an off-year, the local mayor and city council races were hotly contested and there was a major school bond issue on the ballot. Two citizens committees had even been formed, one opposing, and the other supporting, the bond issue.

WPOT-TV, the local educational station, followed the school bond issue story closely along with other election news. It devoted considerable time to the bond issue in its evening news program during the three weeks preceding election day. About a week before the election, WPOT-TV sent a film crew and a reporter to cover a rally held by the

citizens committee opposing the bond issue. The meeting was quite an event, with musical entertainment, speeches, and a great deal of excitement. The next day, WPOT-TV carried a film report of the rally.

Two days later Mrs. Mary Kinkle, the driving force behind the citizens who were supporting the school bond issue, contacted the station and demanded "equal time" to "reply to that story about all those people who don't want us to have quality education."

The station manager, news director, and program director got together to figure out how to handle Mrs. Kinkle's request. They knew her to be a determined advocate of the school bond cause, and she was also quite important in local civic affairs generally.

Nevertheless, after thinking the matter through and consulting various FCC pamphlets, they decided that Mrs. Kinkle was not entitled to "equal time" or, more properly, equal opportunities because she was not a legally qualified candidate for elective office. Consequently, they turned down her request. She was furious, promising that "You and that station have not heard the last of this by a long shot, and I mean it!"

The election was held and the school bond issue passed. Three weeks later the station received a letter from the Complaints and Compliance Division of the FCC in response to a complaint by Mrs. Kinkle. Even though her side won, she charged that the station had been "grossly negligent in terms of the public interest" in failing adequately to present the pro-bond issue side.

The FCC letter stated that Mrs. Kinkle's complaint seemed to indicate the possibility that WPOT-TV had violated the Fairness Doctrine, and requested additional details about the events surrounding WPOT-TV's decision to turn down an appearance by Mrs. Kinkle's side.

Comment:

The FCC will probably conclude that WPOT-TV did violate the Fairness Doctrine by refusing to give balanced coverage to both sides of the school bond issue.

Since it was on the ballot, the school bond question is almost certainly a "controversial issue of local public importance." Station WPOT-TV had devoted a great deal of time to the anti-school bond side, especially in view of its coverage of the rally sponsored by the committee against the bond issue. The station had carried some stories on its regular newscasts which were devoted to the issue, but its coverage of that rally threw these presentations substantially out of balance in terms of time devoted to the issue and the impact on viewers.

To achieve balance, which is the FCC's measure of fairness, WPOT-TV probably should have devoted additional time to the pro-bond issue side.

Of course, the requirement for balance did not require that WPOT-TV allow Mrs. Kinkle or a spokesman she designated to appear. Under the Fairness Doctrine, the station has a wide range of options in providing balanced coverage. It can broadcast on-the-spot news events, interview proponents of various issues, or invite spokesmen to visit the station and present their own view-

points. Having these options still requires the station to make a choice, and provide some kind of programming on each side of an issue.

By focusing only on the equal opportunities requirements of Section 315 of the Communications Act, the WPOT-TV management completely forgot about their responsibilities under the Fairness Doctrine. The Commission will probably associate Mrs. Kinkle's complaint with the station's file, and review WPOT-TV's overall performance under the Fairness Doctrine at renewal time to ensure that the station has not made a habit of avoiding its Fairness Doctrine responsibilities.

Reasonable Access for Federal Candidates

A number of statutes create the broad outlines of permissible political broadcasting activities on the part of educational and commercial stations. The most recent is Section 312(a) (7) of the Communications Act, which was added by the Federal Election Campaign Act of 1971. It allows the Commission to revoke any station license or construction permit:

> . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for federal elective office on behalf of his candidacy.

Prior to the enactment of the amendment, no commercial or noncommercial station was required to allow any candidate on the air. This option is no longer open, and "reasonable" amounts of time (including some segments in "prime" and "drive" time) must be provided to all candidates for federal elective office.

The new statute does not, however, override existing law to permit noncommercial stations to sell time to candidates; such a practice is still prohibited even if the station is operating on an unreserved channel.

Commercial stations can sell time, provide free time, or do both. However, if the amount of time made available for sale is "reasonable," no free time is required, and vice-versa.

The meaning of "reasonable access" for a particular licensee vis-a-vis a certain federal candidate depends on a mix of factors such as the office in question and number of candidates in the race; the total number of candidates, federal and state, to whom the station believes it should allocate time (which depends, in turn, on the station's coverage area and the number of races being held within it); and the station's availabilities.

The FCC has ruled, however, that it is "unreasonable" for a station to refuse to make available some *program* time (as opposed to spot time) and some *prime* time (including programs and, in certain cases,

spots) to federal candidates, absent the countervailing circumstances of a multiplicity of federal candidates running in the station's service area. The number and length of programs similarly depends on the number of federal candidates running, on whether some important non-federal races also merit offers of program time, and on the station's format. For example, most commercial television stations would have difficulty offering 10-minute political programs without greatly disrupting their normal program schedules.

Consequences of Failure to Provide Time for Non-Federal Candidates

Although the "reasonable access" statute applies only to candidates for federal elective office, Section 309 of the Communications Act, which requires that all broadcasting be conducted in "the public interest, convenience and necessity," imposes a somewhat more ambiguous obligation on licensees with respect to candidates for non-federal office. For example, a mayoral race can be of such importance to a licensee's service area that denying the candidates for that office an opportunity to appear would create a serious question of failure to operate in the public interest.

Such questions are sometimes resolved at renewal time, where they can be extremely troublesome. Under certain circumstances (such as pressure from citizens groups or local political parties) the Commission might elect to resolve them in a cease and desist or revocation proceeding, though such remedies are only speculation at this juncture.

Nevertheless, the increase in effective citizen group activity and the increased willingness of the Commission, courts, and Congress to press for increased access for political expression requires every licensee to be aware of the possibilities.

The Equal Opportunities Rule

Section 315 of the Communications Act requires that once any candidate (federal or non-federal) is given personal access to broadcast facilities, his opponent or opponents must be given "equal opportunities." This statute, popularly known as the "equal time" rule, applies only to the use of broadcast facilities through a *candidate's personal appearance* by voice or image. Any appearance by the candidate is enough, so that a candidate's picture hanging behind an announcer reading a campaign message is sufficient. On the other hand, appearances by a candidate's family, campaign manager, other official supporters or friends do not constitute "uses" under Section 315.

Since a candidate may appear in a spot announcement,[1] (defined informally by the Commission as a broadcast segment under 3-minutes' duration) or a program (defined informally as a segment of 5-minutes or longer), the question of computing the "equal time" to which his opponent is entitled sometimes presents a difficult problem.

The rule used by the Commission's staff is that a candidate's appearance on any spot makes the whole spot a "use," so that its entire duration is counted for purposes of equal time. For a program-length segment, only the actual time during which the candidate appears by voice or image is computed unless the candidate controls the program, is its focus, and appears for a time that is substantial in relation to the length of the whole; then the entire program is a "use." The staff has not committed itself in the borderline area of segments three to five minutes in duration.

Our advice is to count the entire segment for equal opportunities purposes if the candidate appears for a preponderance of the 3- to 5-minute period; if the candidate's appearance is only intermittent, the actual duration of appearance may be used if the station desires to cut down the opponent's equal opportunities entitlements. In order to avoid disputation, however, we recommend the former method.

The reply time to which an opponent is entitled must be "equal" in duration and comparable in attractiveness. A candidate cannot be given exposure in prime viewing hours and his opponent relegated to the early morning or late evening. Comparability is not usually susceptible of mathematical equivalency due to scheduling problems. However, stations must make an effort to provide prime time reply opportunities where the original "uses" were broadcast during prime time. If finer distinctions are readily apparent, such as the scheduling of original "uses" during a particular popular program, the station should make every effort to place the opponent's reply announcements in similar positions.

Time Limit

A candidate must request equal opportunities within 7 days of his opponent's use or his rights arising from that use are forfeited. This

[1]If a commercial station decides to fulfill its political broadcasting obligations in part by sale of spot announcements, it must make its entire spot schedule available to candidates. If it sells 60-, 30-, and 10-second spots, for example, the station cannot restrict politicians to the purchase of only 30-second announcements. Similarily, if the station sells preemptible and run-of-schedule (ROS) spots to commercial clients, it must sell such spots to politicians who request them. (Preemptible and ROS spots typically have lower priority than other classes of spots. If other commercial or political advertisers purchase higher priority spot announcements for the same time periods, thus filling all the time slots available for spots, the preemptible or ROS spots may be moved to a later, less busy place in the schedule, postponed indefinitely, or cancelled.) The subtleties of this requirement are extremely complicated, especially in relation to other aspects of the equal opportunities rule, and can create serious scheduling problems.

rule becomes slightly complicated where more than two candidates are involved.

Suppose A, B, and C are legally qualified candidates running for the same office. A appears on Day 1, and B requests equal time and appears on Day 3. To get equal opportunities, C must make his request on or before Day 8. If he contacts the station on Day 9 he has forefeited his chance, even though the request is within 7 days of B's appearance. This is known as the "first prior use" rule. It means that the first candidates's appearance in a chain reaction sets the 7-day limit for equal opportunities requests, no matter how many other candidates are involved.

Hypothetical 4–2

When Harry Evans took over as news director of noncommercial educational station WDUM (TV) the general manager told him:

> *Harry, the commercial stations in this town are just missing the boat on coverage of local elections. They do all right on the national elections–far better than we could ever do, you can be sure of that–but they don't have the air time to devote to the local races. I want us to fill the gap.*

About a month later, the Town of Fernville held a special election to fill a seat on the School Board which was vacant due to the recent tragic death of one of its members.

Harry immediately sought to make good on his boss's local election policy. He contacted Lamont Schwartz and Zelda Blotnick, the two candidates who were campaigning for the School Board seat.

Harry offered Lamont and Zelda the opportunity to appear together on two half-hour debate programs, which would be aired on Wednesday night of two successive weeks prior to the election. Harry had discussed the feasibility of this sort of arrangement with the station manager, who thought it was a great idea and just what local public service needed.

Zelda was quite agreeable to the appearance, but Lamont disdained Harry's offer, saying "I'm afraid no one watches WDUM anyway, Mr. Evans, and besides that I don't think such a series of joint appearances would do anything to illuminate the issues."

Undaunted, Harry called Zelda back and arranged to interview her on two separate half-hour shows, which would be scheduled as previously planned. "If Schwartz doesn't want to appear, that's his business," Harry said. Zelda agreed, and the first show was taped and run that Wednesday. Next Wednesday morning, Zelda came to WDUM's studios again and taped the second interview for airing that evening.

On Wednesday afternoon, Evans received a telephone call from Schwartz. Schwartz noted that Ms. Blotnick had appeared on WDUM the previous Wednesday evening, and demanded "equal opportunity."

When Harry asked Schwartz why he had changed his mind, Schwartz replied, "That's just the way I feel about it, and I don't have to explain it to you. I just want my 'equal time,' and I'm entitled to it." Evans smelled a rat, and told Schwartz that if he wanted "equal time" to appear on WDUM in response to Ms. Blotnick's last appearance, then Schwartz should be willing to make a joint appearance with Ms. Blotnick on the second program as originally offered.

Even though Ms. Blotnick had already taped the second half-hour interview, Harry was sure he could get her back for a joint appearance if Schwartz would agree. Schwartz, however, refused to commit himself to a joint appearance for the second show. "I'm not interested in talking about any second appearance," he said "All I want is what you owe me in 'equal time' from the show last Wednesday!" Harry said he would call Schwartz back, and went upstairs to consult with the station manager. What should Harry do?

Comment:

Schwartz is entitled to the equal opportunities he has requested. He and Ms. Blotnick are opposing legally-qualified candidates, so that her appearance on WDUM for half an hour constituted a "use" entitling Schwartz to equal opportunities.

Harry can negotiate with Schwartz in an attempt to convince him to accept an interview format similar to Ms. Blotnick's first appearance, but if Schwartz adamantly refuses that kind of format the station must still allow him on the air.

Section 315 specifically provides that a station may not censor a legally qualified candidate's initital or reply "use," and the FCC has ruled that insisting on a particular format is censorship by the station. The station must abandon its "take it or leave it" approach and grant Schwartz one-half hour of air time to do with as he pleases, if that is the way he wishes to appear.

Where an initial "use" is at issue, the station has somewhat more flexibility, especially where non-federal candidates are concerned. It can ask the first candidate whether he is willing to appear in a particular format. However, if the candidate refuses and the station still wants to afford him time on the air, the station cannot insist on control of the appearance in any way. Thus, the station's choice is also one of "take it or leave it." Moreover, after the first candidate's "use," the station is obligated to afford equal opportunities to all legally-qualified opponents, who are entitled to use the time as they wish and need not accept any format suggestions.

Note that Schwartz's request is just within the 7-day period that is specified in Section 315 for requesting reply time. Had Schwartz waited until the next day, Thursday, he would have lost his right to reply to Ms. Blotnick's first appearance.

The situation is not changed because Harry suspects that Schwartz will make another request for equal opportunities to reply to Ms. Blotnick's second interview appearance. The only way that WDUM can deny Schwartz the second reply opportunity is to forego broadcasting the second interview with Ms. Blotnick. This may seem unfair, because it allows Schwartz to avoid debating

his opponent or answering hard questions by a neutral interviewer. Nevertheless, if a station is determined to allow Ms. Blotnick on the air no matter what Schwartz's attitude, Schwartz can insist on reply opportunities and complete control over his own appearances.

Since both of Ms. Blotnick's appearances are on programs (segments over 5-minutes long) which she did not control (though she was the focus of attention), Schwartz is only entitled to reply time equal to the total time of Ms. Blotnick's appearance. In other words, if the camera shifted to the interviewer during some of the time he was asking questions, so that Zelda was neither heard nor seen during that time, the time can be subtracted from the half-hour total to arrive at Schwartz's equal opportunities entitlement. If, however, the camera was positioned so that Ms. Blotnick was seen during the entire time–even if she did not speak during portions of the show while she was being asked questions–then Schwartz is entitled to a full half-hour of equal opportunities.

If Ms. Blotnick had furnished the station with a taped interview program produced under her control, the entire time of the program would be a "use." (This assumes she remained the focus of the show, and that the time of her appearance was substantial in relation to the program's length.) Schwartz would then be entitled to count, for purposes of his own equal opportunities, even those moments when Ms. Blotnick was neither seen nor heard.

Notification Not Required

When a candidate appears on a station, the licensee is under no obligation to notify his opponents and offer them equal opportunities. The rule is triggered only by an opponent's request. Voluntary notification is not, however, precluded.

The only people entitled to equal opportunities under Section 315 are legally-qualified candidates. Whether a candidate is legally-qualified for a particular election is a matter of state law. In doubtful cases, the putative candidate bears the burden of demonstrating his legal qualifications. This is usually done by obtaining a certificate of qualification from the Secretary of State or State Attorney General.

Hypothetical 4–3

Eleanore Acwatain, the Public Affairs Director of noncommercial educational television station KNAD, had believed for a long time that television did an inadequate job of covering political campaigns. Specifically, she was very disturbed that commercial stations allowed candidates to purchase spot announcements to advocate their causes. She believed quite strongly that short announcements did not really give the candidates time for deep discussions of issues, but rather offered an open invitation to indulge in "Madison Avenue" appeals for public support.

Eleanore was determined that her station would not follow commercial television down this dismal path. Consequently, when elec-

tion time rolled around, KNAD established a policy of giving candidates 10-minute blocks of time for critical exposition of election issues. The number of 10-minute blocks which would be allotted to each candidate was determined by the office for which he or she was running.

Two candidates, Samuel Tweed and Wilma Ficker, were running for Governor, and Eleanore was particularly enamored of Mrs. Ficker. They had met several times at political functions, and once or twice at women's liberation group meetings, where Mrs. Ficker was often a speaker.

Eleanore considered Tweed a male chauvinist, because he ran a campaign which virtually ignored Mrs. Ficker. Tweed was well-known throughout the state because he had previously served as a Congressman, and Eleanor believed his campaign strategy was to trade on his image and avoid speaking out on the real issues.

About six weeks before the election, Eleanore sent a letter to Mrs. Ficker offering her three 10-minute blocks per week on KNAD. These broadcasts were to be taped at Mrs. Ficker's convenience and then aired between 7 p.m. and 9 p.m. on week-day evenings. When one of the station's news staff suggested that a similar letter should be sent to Mr. Tweed, Eleanor replied: "That chauvinist does not deserve this kind of opportunity. Anyway, even the 'equal time' rule doesn't require us to let him know about Wilma's broadcast in advance. If he wants time, let him ask for it!"

Mrs. Ficker accepted KNAD's offer, and began taping the spots. They were duly broadcast for four weeks. Then, with just two weeks to go in the campaign, Mr. Tweed found out about Mrs. Ficker's series of 10-minute programs and was infuriated.

He immediately called the station and demanded that he be given "equal time" that is, as much program time as was necessary to match Mrs. Ficker's appearance for the past four weeks and the coming two weeks. Eleanore did some quick figuring and realized that, if she acceded to Tweed's demand, she would have to afford him three hours worth of 10-minute appearances–18 appearances in all, over the next two weeks. "Tough," she thought, "I'm going to give this guy just what he is entitled to, and no more! If he doesn't like it, he can go jump in the lake."

Eleanore returned Tweed's call and informed him that he would be given "equal time" with Mrs. Ficker during the remaining two weeks prior to the election, but had forfeited his right to get "equal time" for any of the 10-minute programs which had been run to that date.

Tweed was furious, but realized he had better take what he could get. He agreed to appear at the station and take three 10-minute programs for each of the last two weeks of the campaign (six programs in all), but told Eleanore that she had better reconsider about giving him time to compensate for Mrs. Ficker's previous appearances, and that she had not heard the last of this. However, Eleanore's decision about "no equal time" for past programs was firm, and KNAD's station manager backed her to the hilt when Eleanore persuaded him that

Tweed was simply trying to use typical male tactics of intimidation.

Two weeks later, Tweed won the election. A week after his victory, Station KNAD received a copy of a letter from Tweed's lawyer to the FCC, complaining about KNAD's political program policies during the recent campaign.

Comment:

Unfortunately for Eleanor, her actions have caused KNAD to violate the "7-day rule." Under this rule, a legally qualified candidate may request equal opportunities to reply to broadcasts of his opponent within 7 days of the opponent's appearance. Tweed made his request at the end of the fourth week of the six-week campaign period. Thus, he was entitled to go back 7 days, to the beginning of the campaign's fourth week.

KNAD should have given Tweed equal opportunity for the last three weeks of the campaign. However, because Tweed was unaware of Mrs. Ficker's broadcasts until so late, the timing of his request would not entitle him to equal opportunity to reply to Mrs. Ficker's first three weeks of broadcasts on KNAD.

The station had an affirmative obligation to schedule three weeks' worth of Tweed's 10-minute programs in the last two weeks of its schedule, even though that would have meant shifting certain other programming around and, in one or two instances, even eliminating planned programming or deferring it until after the election.

The FCC has stated emphatically that when equal opportunities are involved, the station must build sufficient flexibility into its program schedule so that it can accommodate the proper demands for "equal time" made by the legally-qualified opponents of candidates who have already appeared on the station. Commercial stations must also maintain this sort of flexibility in their advertising availabilities through election day.

The Equal Opportunities Provision of the Communications Act, Section 315, is a Congressional mandate which goes to the heart of the country's political process. Consequently, the FCC regards violations of this provision as extremely serious, and may fine KNAD a substantial sum.

Equal Opportunities Exemptions

There are four kinds of programs which are *statutorily* exempt from equal opportunities requirements: bona fide newcasts; bona fide news interview programs; bona fide news documentaries; and on-the-spot coverage of bona fide news events. The appearance of a candidate by voice or image on these programs does not create a right of "equal time" in his opponent. The category of "bona fide news interview" is intended to encompass such programs as "Meet the Press" and "Face the Nation." To qualify as a bona fide news interview, a program must be regularly scheduled, under the control of the station rather than any candidate or independent contractor, and must follow a usual format.

Hypothetical 4–4

For over two and one-half years, WFAT-TV, a noncommmercial educational station, had run a program called "Faces in the News" every Sunday morning. As part of WFAT-TV's coverage of a local campaign for Congressman, the station interviewed the Republican and Democratic candidates on one Saturday before the election.

The format of the program was its usual one, with both guests appearing throughout the show. The interviewer, Dudley Whiplash (known for his snide comments), would ask a question and give each candidate the opportunity to respond. Dudley varied the order in which his guests answered, so that neither one had an unfair advantage. Moreover, Dudley did not let the candidates go off on tangents; he kept a tight rein on their answers and once or twice even cut his guests off when he felt they were going too far afield.

When he saw the program, Mortimer Pinko, Socialist Party Candidate for the Congressional seat, was enraged because he had not been invited to appear on the program. The next day, Monday, he called the station and demanded "equal time."

WFAT-TV's station manager was concerned that allowing Pinko to appear in fulfillment of "equal opportunities" would create many financial problems for the station, because WFAT-TV's community of license was located in Middle America, and Socialists were definitely unpopular. Besides, the station manager had always considered Mortimer somewhat of a loudmouth and rabble-rouser.

Nevertheless, he knew that Pinko was the kind who would send an angry letter to the FCC, so before giving his answer he decided to consult the station's lawyer. Was there any way, he wanted to know, to avoid letting Pinko on the air?

Comment:

WFAT-TV's attorney reviewed the facts and correctly concluded that "Faces in the News" was a bona fide news interview program exempt from the "equal opportunities" requirements of Section 315.

That provision sets forth four exceptions to the "equal time" rule: the appearance of a candidate on a bona fide newscast, bona fide news interview, 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 in on-the-spot coverage of a bona fide news event (including but not limited to political conventions and activities incidental thereto).

"Faces in the News" was a bona fide news interview because the program was regularly scheduled, was under the control of the licensee (as indicated by Dudley's keeping his guests on the track of his questions), and had followed its usual program format. If Dudley had simply let each candidate discourse on his own views for 15 minutes, the program would not have qualified for the "bona fide news interview" exemption.

Nevertheless, WFAT-TV's attorney advised that the station might have an

obligation under the Fairness Doctrine to devote some coverage to Pinko's candidacy. This did not mean that Pinko was to be granted an interview on "Faces in the News" or that he had to appear on any other particular program.

Still, if Pinko's candidacy could conceivably be thought of as a controversial issue of public importance in the community–even if it was not of supreme importance–the station might be wise to devote at least some news coverage to the Socialist Party. The amount of such coverage would be determined by the station's estimate of the Socialist's newsworthiness, a judgment usually made by the news director. This coverage need not be much, but would obviate a later complaint by the Socialist that WFAT-TV had disregarded its fairness obligations completely because of an anti-Socialist bias.

The attorney carefully explained that coverage of the Socialist Party candidacy under the Fairness Doctrine did not even require that Pinko's picture be shown on television. The station might decide to cover it simply by reading a news story about Pinko and the positions he was advocating. In fact, if the WFAT-TV management really believed that Pinko was not at all newsworthy, and that his candidacy was trivial, they could probably get by without mentioning him at all, although they might have to defend their judgment to the FCC should Pinko or the Socialist Party file a complaint at a later date.

Educational Stations Prohibited from Editorializing

Section 399(a) of the Commmunications Act provides that:

> No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.

The constitutionality of this statute is open to serious question. Nevertheless, it is on the books, and unless a station is willing to mount a protracted, expensive legal challenge, its command must be obeyed.

However, the FCC interprets Section 399(a) as narrow in scope. It does not prevent a noncommercial educational station from holding a panel discussion analyzing political candidates, or from presenting documentaries on political topics or candidate interviews. In fact, members of the station's management may, in their individual capacities, present their personal views regarding particular candidates over the station. The personal capacity in which the individual is acting must be clearly stated, and there can be no suggestion that he is speaking for the station's management.

Hypothetical 4–5

Tex Miller was a candidate for U.S. Senator in New Hampshire who believed strongly in the maximum use of the broadcast media to conduct political campaigns. Consequently, Tex told his supporters to make sure that he "gets on every damn-blasted radio and TV in every corner of this state, and that means the ski slopes!" Tex's campaign

workers took him at his word, and diligently pursued every opportunity to get him air time.

One of the stations they approached was WDUL-TV, a community-run noncommercial educational station in the state. WDUL-TV's management was appalled when they heard the request, and were quick to point out that Section 399(a) of the Communications Act (as amended) forbade any noncommercial educational broadcasting station from engaging in editorializing or supporting or opposing any candidate for political office.

Tex's campaign manager got into the dispute personally, first trying a conciliatory approach and then threatening the station with "everything under the sun." Nevertheless, fearful of violating Section 399(a) and losing their license, WDUL-TV's management stood firm.

Tex lost the election, and concluded that one of the big contributing factors to his defeat was his inability to get sufficient exposure on radio and television. Tex was a sore loser with a long memory. Three weeks after his defeat, he sent a letter to the FCC complaining about WDUL-TV.

Comment:

Tex will get sweet revenge. Under the Federal Election Campaign Act of 1971, Section 312(a) (7) was added to the Communications Act. That section provides that the FCC may revoke a station's license because of willful or repeated failure to allow reasonable access to the use of its facilities by a legally qualified candidate for federal elective office on behalf of his candidacy.

Since Tex was running for U.S. Senator, his request comes directly within the purview of this new enactment. Because WDUL-TV is a noncommercial educational station, it could not, of course, sell political advertising time to Tex. It was, however, legally bound to offer him "reasonable" amounts of free time for use on behalf of his candidacy.

Section 399(a) of the Communications Act only prohibits educational broadcasting stations from editorializing or supporting or opposing a political candidate. This refers to the activities of the station's ownership or management. It does not prevent the station from carrying news stories about a candidate, from holding panel discussions analyzing political candidates, or from presenting documentaries on political topics or candidate interviews.

In short, Section 399(a) did not cover the subject of Tex's request, that is, his own appearance on the station to advocate his own cause. The station was completely misguided in relying on Section 399(a) in this situation.

If Tex had been granted the "reasonable" time on WDUL-TV to which he was entitled, then his legally-qualified opponents would also have been entitled to appear under the "equal opportunities" doctrine. To take advantage of their right to equal opportunities they would have had to request the right to appear within 7 days of Tex's appearance. Any of Tex's appearances occurring more than 7 days before his opponents' request would be outside of the operation of the "7-day rule." However, even if Tex's opponents were lax and let the 7-day period expire without a request, they would still be entitled to "reasona-

ble access" simply because they would also, necessarily, have been candidates for federal elective office.

We emphasize that the "reasonable access" provision applies only to candidates for federal elective office. However, if a station excludes all mention of candidates for non-federal office, questions may be raised under the Fairness Doctrine about the station's willingness to cover controversial issues of public importance in its community.

The Zapple Rule

In the years since Section 315 was enacted, the Commission became aware of abuses resulting from the provision's application only to legally-qualified candidates, and not their supporters. Finally, in 1970, the Commission moved to mitigate Section 315's narrow impact.

In *Letter to Nicholas Zapple*, 23 FCC 2d 707 (1970), the Commission extended the Fairness Doctrine as it applied to campaigns by creating a right of "quasi-equal" opportunities for the supporters of legally-qualified candidates.

(The Commission's action probably conflicts with Congress' intent in restricting the scope of Section 315 to legally qualified candidates.. See *Felix v. Westinghouse*, 186 F.2d 1 (1950), *cert. denied*, 341 U.S. 909 (1951). However, no one is likely to challenge the rule in court any time soon.)

Under the *Zapple* rule, a broadcast licensee who sells time to a candidate's supporters during an election period may not decline to sell "comparable" time to supporters of that candidate's opponents. Although the Commission's letter dealt with only the sale of time in this situation, informal consultation with the FCC staff indicates they would apply *Zapple* to situations where free time is made available to a candidate's supporters. That is, an opponent's supporters would have to be provided with comparable free time by the station, although presently there is no official ruling on this point.

"Comparable" time under the *Zapple* rule is usually equal in duration to the original broadcast and requires placement in the schedule at a period of approximately equal attractiveness. Appearances by a candidate's campaign manager, family, supporters, and friends can bring the doctrine into play. Appearances on bona fide newcasts, news interviews, news documentaries or on-the-spot coverage of bona fide news events do not qualify.

There is no 7-day limit on requests for reply time in *Zapple* situations. The licensee probably does not have to honor requests made so late in the campaign or so long after the first candidate's supporter's appearance as to be unreasonable. However, the Commission has not yet ruled on this question.

Chapter 5

News Staging

Congress, the FCC, the networks, and many commentators have expressed concern over the subject of "news staging." The definition of news staging is a loose one, but the essence of the concern is that viewers or listeners will be deliberately misled by distortions perpetrated by seemingly responsible newsmen.

The practices which constitute news staging may best be explained by the following examples:

Displaying the legend "Via Satellite" over a picture which, in fact, is not relayed by satellite.

A newsman asking a rioter to throw another brick through a window because he failed to record on film the throwing of the first brick.

A newsman asking welfare demonstrators to recreate their march in front of a welfare office because he arrived after the demonstration had ended.

Reporting the speech of a presidential candidate by using short clips interspersed with a newsman's commentary and summaries of other parts of the speech.

Editing an interview deliberately to distort the views of the interviewee.

Editing a documentary program to create a deliberate pattern of distortion.

Hypothetical 5–1

Upon his return from covering a spectacular nighttime fire, the ambitious young news reporter learned to his dismay that the cameraman had gotten no usable footage.

Believing that the impact of the story depended upon an "on-the-scene" look, the reporter donned a sou'wester and had himself filmed in front of a rear screen, projecting some stock film footage of an apartment fire, while a sound effects record blared sirens and "fire sounds" under his voice. The result was an amazingly realistic news story, unless the viewer spotted the 1936 fire engines. The facts of the real fire were told, and thanks to the film, they were told in an exciting way.

Since that time, the station's news department has employed this technique whenever technical difficulties, staff shortages or cost factors make it impossible or inconvenient to provide on-the-spot coverage.

The question finally was asked: Is this news staging?

Comment:

So long as the facts of the story are truthfully told and the audience does not receive a deliberately distorted version, this practice would not fall within the broad category of news staging.

However, the practice must be judged by the standards of journalistic integrity as well, and on that score it may represent a serious breach of faith between the media journalist and his audience. The technology of the media is capable of indetectable conjury. While these techniques are useful in the illusions of stagecraft and have considerable entertainment value, they have no place in news programming, unless the media journalist has a low regard for factual reporting.

The "Extrinsic Evidence" Test

The FCC has developed vague criteria for judging whether a charge of news rigging or slanting warrants investigation and, if the charge is found true, justifies revocation or denial of renewal of a station's license. A Commission inquiry or investigation is deemed appropriate where extrinsic evidence materially indicates that a licensee has staged news events.

Extrinsic evidence does not include the typical situation where someone who is quoted on a news program claims that he said something other than what was reported. Allegations that a newsman had been offered a bribe to slant the report of a certain event would be sufficient, however.

The Commission has emphasized that the extrinsic evidence must indicate that a licensee, as differentiated from an employee such as a newsman, is responsible for the staging or distortion. Concomitantly,

the Commission holds licensees responsible for establishing and supervising standards preventing newsmen from staging or distorting news. If a licensee fails to institute and maintain this kind of policy, or is implicated in a deliberate decision to violate a policy once established, then his character qualifications are in doubt.

However, if rigging is done without a licensee's knowledge or permission, the Commission will not investigate the licensee's character qualifications. An egregious case of sloppy supervision by the licensee may, however, lead the Commission to look into the licensee's ability adequately to control its employees.

A summary of the Commission's stand on news staging would be incomplete without emphasizing that the Commission has recognized many difficulties in determining exactly what constitutes prohibited conduct. The Commission has said that, "no Government agency can authenticate the news, nor should it try to do so." The Commission has also shied away from establishing a specific list of "do's and don'ts," and has said that licensees can determine how material can properly be presented to the public by asking the question whether the public will be deceived about a matter of significance.

Hypothetical 5–2

In most interviews, TV stations use one camera, which shoots over the shoulder of the reporter and holds a medium close-up of the interviewee. Once in a while, before or after the interview, the camera will pull back to catch both subjects in a "two-shot" in order to establish the setting. After the interview, the reporter looks into the camera and addresses the same questions to the camera which he has asked of the interviewee.

Back at the studio, the editor arranges the shots so that the reporter (looking at the camera) asks the questions, and the interviewee answers, seen from a different angle. During this exchange, the editor inserts the "establish" shot once or twice at random places. Thus, when the television audience sees the interview, it appears that two or three cameras were used in the filming.

Is this "news staging" in the sense of the FCC's concern?

Comment:

In most cases, the answer is no. We have to say "in most cases" because an extreme case of editing, which affects the content of the story, might force the conclusion that an attempt was made to deceive the viewer. But in this example, the content of the interview as well as its time and place are unaffected by the editing. The interview was face-to-face, it occurred in the setting shown, and the audience saw the actual questions asked and answered. The addition of a little "show-biz" to the mix was harmless, but this procedure calls for a great deal of care on the part of the producer.

Force of FCC Guidelines

Licensees, newsmen, and program producers can approach the problem of news staging in two ways, one truculent and the other submissive. Those who wish to avoid trouble may attempt to follow the Commission's guidelines. While the guidelines may be vague, their spirit is certainly apparent, and policies and practices which follow them can certainly be developed.

The other course is to ignore the guidelines entirely, and govern news operations according to journalistic standards which are developed independently of anything prescribed by the Commission or committees of the House and Senate. This course is open because the Commission's intrusion into the area of news staging is almost certainly in violation of the First Amendment.

The immediate, significant problem with the latter option is that it is potentially expensive, time-consuming, and carries a slight risk that a court would find the Commission's actions consistent with the Constitution. The expenditure of money and time would, of course, be necessitated by any Commission legal action to enforce its ideas concerning news staging.

A brief explanation of the constitutional principles involved in the Commission's news staging doctrine is appropriate here, and can best be accomplished by referring to the list of examples cited earlier in this Chapter (page 69).

In the case of an inappropriate "Via Satellite" legend, the Commission's rules on mechanical reproductions [Sections 73.118 (AM), 73.288 (FM) and 73.653 (TV)] already prohibit a station from engaging in that kind of deception. However, the deception involves only the mechanical source or method of program transmission. There is no possibility that journalistic or political judgments are involved; there is a clear technical standard for the measurement of the truth of the claim.

The second example, in which the newsman asks a rioter to repeat throwing a brick through a window so that he can film it, presents a slightly more difficult case. In this sort of situation, the newsman may be guilty under local law of destruction of property, or even of inciting to riot or aiding and abetting a crime. He can be brought to justice in the courts of the appropriate jurisdiction and the fact of his conviction can be used by the Commission to deny license renewal or revoke a license on the basis of inadequate supervision or character qualifications.

The Commission, however, is not warranted in conducting an independent investigation to determine the newsman's guilt or innocence of a crime under local law, because the Commission's procedures do not provide adequate safeguards required by the Fifth Amendment's

due process of law clause. (For example, the newsman would be entitled to a jury trial in such a case.) If a newsman goes unpunished in this situation, local law enforcement, rather than the Commission, is to blame; and the Commission has no right or legitimate power to attempt to redress a seeming injustice where local authorities fail to act.

The remaining examples, involving the welfare demonstration, interview editing, presidential speech reporting, and the documentary are instances of the exercise of journalistic judgment in which government should never intrude. While some of the techniques may be questionable according to generally accepted journalistic standards, the First Amendment was enacted specifically for the purpose of preventing governmental agencies from deciding between permissible and impermissible journalism.

The newsman who asks the welfare demonstrators momentarily to recreate their earlier march might have thought that was the best technique of reporting the event to his audience. If the government is allowed to preempt the journalist's judgment in that case, no logical reason exists to prevent it from second-guessing an editor's choice of excerpts from a presidential speech, or a news interview or documentary. Given that degree of control over news reporting, government can control the information which reaches the public. Clearly, this result is inconsistent with the First Amendment's purpose of preventing the government from censoring the press.

But if the government is unable to prevent abuses of journalistic discretion, who is to protect the public from deceptive reporting?

Under the First Amendment the answer is clear: the audience is the final arbiter of the credibility of various agencies of the press. The public will quickly learn to rely on those news sources which report the news in consistently accurate fashion, and will abjure those sources which practice deception.

But only the public, in the aggregate, can judge what is accurate interpretation and what is not, for reposing the power anywhere else must inevitably lead to governmental censorship and the loss of political freedom.

Hypothetical 5–3

Leon Gallop had problems, no doubt about it. His noncommercial radio station KSOV(FM) was in constant competition with the city's educational television station KRUS-TV, for audience and community support. That would be tough competition even in a big city, but in the middle-size city where KSOV was located, it was murder.

But this week went far beyond the normal fund-raising tug of war. Leon had internal station problems. For the past month or so, he had been fighting a virtual rebellion among his small news staff, most of

whom wanted to mount an extensive campaign to expose corruption in the city's police department.

Leon really had doubts about how much corruption existed anyway, and he was very concerned that such a controversial story would seriously reduce the financial contributions which he had so slowly built to a sustaining level. But his newsmen just would not listen to reason–they said it was a sellout. Yesterday, three of them had quit. He was now left with just one newsman.

After a frustrating day, Leon came home and turned on television, as he always did, to see what his competitor, KRUS-TV, was doing to the night's news. Leon wouldn't have minded the competition so much, except that KRUS's station manager, Sam Berria, was not particularly good at running a television station. Leon was mortified to see important community support diverted to such a second-rate operation.

The KRUS evening newscast ran its typically inept course until suddenly the KRUS newscaster, Marshall Gerchko, began reading a story about the "mass resignation" of KSOV's news staff earlier that day. Gerchko reported that one of the disgruntled newsmen attributed the departure to Gallop's "editorial censorship," and said Gallop was afraid "to press for the hard facts of the truth."

Leon was so infuriated he immediately phoned KRUS-TV. Berria was not there, so he left the following message: "Your news story about the resignations at KSOV was slanted. I'm surprised that you'd take advantage of a situation like this. I demand that you interview me so that I can give my story on the air." Still fuming, Leon joined his family for supper, and later that night suffered acute indigestion.

The next day, Sam called and offered to send a KRUS newsman over to KSOV to get Leon's side of the story. Leon agreed to the interview, and later that night watched the KRUS newscast from the beginning.

After Marshall Gerchko had read a summary of Leon's position on news policy, a film interview with one of the departed newsmen was shown. The newsman averred that the big issue was the "squelching" of a story about police corruption. Leon was even more infuriated than the night before, because the newsman further implied that Leon had an interest in protecting continued corruption in the police department.

He was so angry he called Berria at home and sputtered, "Sam, this time you've done it–those lies–those smears–and you let that guy run his mouth on the air–I'm complaining to the FCC! You can't get away with this! We'll see how you explain your tasteless news polices to them!"

Comment:

As a result of Leon's letter of complaint to the FCC, the Complaints and Compliance Division requested KRUS-TV to supply detailed information about its news coverage of the walkout by KSOV's news staff.

Although Sam Berria thought the Commission was exceeding its discretion, he decided the information would vindicate his position, so he complied in full by sending scripts of the newscast to the FCC in Washington.

After examining KRUS-TV's scripts, the Commission wrote a letter to Gallop which said in part:

> *With specific regard to your allegation that the station deliberately distorted the news, we have stated that the Commission, as the governmental licensing agent, should take action in the sensitive area of news reporting only when it has substantial extrinsic evidence of deliberate distortion, such as, for example, evidence that a licensee ordered the news to be distorted. No such extrinsic evidence has been adduced to support your contention. Your charge that the broadcast repeated false rumors, half-truths, and innuendos for the purpose of putting KSOV in a bad light is clearly a request for the Commission to review news content and judgment. This is the area the Commission has determined is inappropriate for it to explore.*

Unfortunately for Leon, his only real remedy is to rely on his community's sense of fair play and their estimate of whether KRUS-TV is doing a good job of reporting the news. This is usually less satisfactory than having a federal agency redress an alleged grievance–except when one thinks about the long-term effects of government involvement in this type of dispute.

If Leon is really serious about KRUS-TV's biased presentation of the news, he could complain to the FCC on grounds that KRUS-TV was violating the Fairness Doctrine in its coverage of this particular controversial issue (the issue of KSOV's coziness with corrupt police officials).

In that case, however, Leon would have to show the Commission how KRUS-TV failed in its overall programming to give balanced coverage to both sides of the issue. This is a difficult burden to meet, for it would involve at least some monitoring of KRUS-TV, a project Leon probably does not want to undertake.

News staging is a doctrine of highly limited application; under most circumstances the FCC will not use it as an excuse to review news content.

Co-Existence with FCC Guidelines

The strong constitutional case against the Commission's position on news staging should not lull a producer or licensee into adopting low journalistic standards. The expense and effort of challenging the Commission on news staging will undoubtedly be high. Moreover, in most cases it should be entirely possible for journalists to fulfill their professional responsibilities in complete accord with the Commission's guidelines.

Hypothetical 5–4

> *Station KFLY-TV is licensed to a large city on the East Coast. The city's international airport is a major embarkation and arrival facility for international flights. Recently, despite stringent precautions re-*

quired by federal law for airline security searches, a plane was hijacked by a terrorist who managed to slip past the security guards during boarding operations. Consequently, a great deal of interest has arisen among KFLY's audience as to exactly how such a terrible thing could occur despite the best efforts of the airport's police force.

Penny Queen, KFLY's news director, decided to do a special report on the incident to show where the airport security system was weak and how it could be improved. Early in the morning on the day after the hijacking occurred, Penny called in the station's most eager young news producer, Schuyler Grant.

"Schuyler," she said, "I've decided to do a story for tonight's news that will rip the lid off our so-called airport security system. I want you to take a camera crew to the airport right now, find out just what went wrong yesterday, and do a story that will show exactly what happened. I'll leave the details to your judgment. We'll look at what you've got this afternoon at about five or so. That should give us sufficient time for any editing before the news at six. You leave right now.

"While you're on your way, I'll call the chief of airport security, tell him you're coming, and ask him to give you all the support he can. Be sure to check in with security first," she chuckled, "because they might arrest you."

Schuyler, always eager, took off for the airport immediately. As soon as he got there he went to the airport security office, where Chief Stone of the airport police was waiting.

"Mr. Grant," said Chief Stone, "Penny called and, if it's okay, I'll take you on out to the flight line. That nut yesterday got around our security system by climbing over the fence on the far side of the field dressed as a mechanic. He walked in–it's over two miles–and just got in one of the fuel trucks and headed for the first plane he saw. He even had a fake security badge, so none of the officers stopped him. There's an airplane loading at the same spot now, so I think I can show you everything."

Schuyler was elated at this high degree of cooperation, and he and his crew were quickly taken to the spot where high drama had occurred the previous day. After shooting some scenes of the parked aircraft and the loading operations which were taking place around it, Chief Stone, Schuyler, and the camera crew went on board. Of course they were not stopped, since they were accompanied by the Chief.

On board, the flight crew, headed by Capt. Kirby King, was preparing for the flight, which was still about an hour away from boarding. The flight crew was talking with one of the mechanics, who was in the cockpit to fix a malfunctioning radio receiver. Immediately, Schuyler had an idea.

"Chief, why don't we have Captain King and the mechanic here recreate the scene in the cockpit yesterday. You could take the bullets out of your gun, and the mechanic could hold the empty gun to Captain King's head just like the hijacker did. That would really give

everyone the sense of exactly how it all happened yesterday, including the terrible danger the pilot was in."

The idea had immediate appeal to Captain King, who considered that he cut quite a dashing figure and was not averse to being seen on television. Stanley Barrymost, the mechanic, "thought it would be a gas."

After thinking a minute about having his gun used in the re-creation, the Chief agreed and took all of the bullets out of his pistol. The tense scene was quickly staged, although Schuyler insisted on three takes to be sure that he had all the camera angles he needed.

Schuyler and crew rushed back to the station, arriving around 3:30 since the airport was so far across town. The film was developed as quickly as possible while Schuyler blocked out the story and wrote a rough script.

"No doubt Penny will want to change a lot of this," he muttered to himself, "just like she always does with my copy."

However, when he called Penny's office to tell her he was ready for the editorial conference, her secretary informed him that she had been called to a meeting with the station manager and would probably not be available until almost six, since they were discussing the station's news budget for the coming year.

"Well," he said to himself, "I'll just have to put the story together myself and have it run anyway. I know Penny wants to get it on the air tonight." He did just that, and when he finally left KFLY at 7:45, Penny was still tied up in her meeting.

When Schuyler arrived at work the next morning, there was a cryptic note from Penny on his desk:

> Come up to my office as soon as you get in, and bring the hijacking script with you.

Puzzled, Schuyler grabbed the script and headed upstairs.

As soon as he went through the door to Penny's office, Schuyler knew something was wrong. When she saw him, she said in an angry tone: "We got a lot of complaints about that story last night, including one from the FBI. Some people thought that another hijacking was going on; some thought we happened to have a camera crew there the day before when the hijacking happened. Why didn't you run a 'super' to show that the story was a dramatic re-creation? What's going to happen when the FCC hears about this?"

Comment:

As it turned out, the FCC did receive several complaints concerning KFLY's newscast about the hijacking, and the station was required to send a detailed explanation to Washington justifying the segment.

The station manager and Penny were indignant at having to explain their news judgment to a government agency, but were advised by the station's attorney that although the Commission was on thin ice even requesting information about the newscast, a fight to vindicate the station's First Amendment

right to broadcast the news as it saw fit would be tremendously expensive. The station manager therefore decided that discretion was the better part of valor, and supplied all the information the Commission's Complaints and Compliance Division had requested.

The station explained that Penny, as the news director, had planned an editorial review of the story before it went on the air, but was unable to do so because of an unexpected budget meeting. This was not the station's normal way of operating, it was explained.

Penny declared that if she had had the opportunity to review the story, she would never have allowed it to go on the air as it was, at least not without a slide identifying the cockpit scene as a dramatic re-creation of events from the day before.

The Complaints and Compliance Division was not particularly impressed with KFLY's explanation. They sent the station a letter of admonition which said, in part:

> The licensee, which is responsible for the integrity of its news operation, must clearly inform its news employees of its policy against staging 'news events' and be diligent in taking appropriate steps, either prophylactic or remedial, to implement that policy.

Since there was no extrinsic evidence that the station's management deliberately instituted a policy of "staging" news events, the Commission contemplated no further action on the complaint. But, the letter warned, KFLY should monitor its news operations more closely and make very clear to its employees that newcasts of this type, which were very susceptible to distorted interpretation, could get the station in serious trouble if they were continued, since they would raise questions of the licensee's basic qualifications to operate a broadcast station.

The Commission's letter also directed KFLY's attention to Section 73.1208 of the FCC Rules, which requires an announcement that certain program material has been taped, filmed or recorded.

The announcement must be made at the beginning of any segment, where time is of special significance, or where the public might be misled into believing that the recorded events were occurring simultaneously with the broadcast. (Commercial, promotional, and public service announcements are exempted from the requirement.)

To comply with this rule, Schuyler should indeed have used a "super" slide to indicate that the film was a re-creation of events of the previous day.

Penny and Schuyler were both irate that the FCC would interfere with their news operations; they thought "freedom of the press" protected them from such obvious governmental meddling. Nevertheless, they also knew about the high legal fees involved simply in answering a formal complaint. Penny and Schuyler plan to be much more careful in the future.

Chapter 6

Obscenity

Section 1464 of the Criminal Code, 18 U.S.C. §1464, prohibits the broadcasting of certain language:

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

This statutory prohibition is, of course, only one factor which a producer must weigh when considering the inclusion of possibly controversial material in a program or program series. Even material which is allowable under the statutory standard, either in its initial application by the Commission or after a court test, may sufficiently offend enough viewers to create unacceptable financial consequences for any station which plays it. This is just as true for noncommercial stations, which stand to lose community financial support, as for commercial stations which run the risk of alienating advertisers, either directly or through customer reaction. Throughout the following discussion, therefore, bear in mind the need to apply extra-legal considerations at each stage of the programming decision-making process.

The Legal Standard

The Supreme Court has recently reformulated obscenity standards to make them more restrictive. Even so, many people may still consider the legal standard of obscenity to be somewhat "permissive." The

Court's tendency to shy from regulation makes sense, however, when put in the perspective of First Amendment philosophy.

The basis of the First Amendment's guarantee of freedom of expression and freedom of religion is society's painful experience that suppression of ideas and beliefs is, on balance, harmful in the short- and long-runs. The harm caused by preventing dissemination of ideas is not slight; rather, it very quickly leads to a deterioration of the quality of government and the loss of basic freedoms.

Consequently, the courts are very cautious in approaching any case where there is a potential for suppressing free expression. The presumption underlying all cases in the area of free expression, including obscenity cases, is that it is better to err on the side of permitting too much speech than to cut expression short of its maximum permissible limits. This presumption is very important because most freedom of expression cases do not offer a clear guide for determining the precise point where expression should be prohibited because of its harmful effects on society.

Generally, expression can be prohibited when it presents a clear and present danger of *conduct* (as opposed to thought or expression) which is harmful to society (for example, inciting to riot or yelling "fire" in a crowded theater). Absent a legal showing that it will immediately produce certainly harmful conduct, speech is considered potentially too valuable to limit.

Applying this presumption to the obscenity field, the Court has faced the problem that ideas valuable to society can be expressed in ways which offend many people's sensibilities, mores, and taboos. After all is said and done, the essence of the Court's obscenity opinions is that—except when dealing with "hard core" pornography—it is better to offend people's sensibilities than to risk suppressing expression simply because of its sexual setting.

The most recent re-formulation of the legal test for obscenity was enunciated in *Miller* v. *California*, _____ U.S. _____ (1973), and several related cases. The Court began from the traditional legal notion that "obscenity" is unprotected under the First Amendment because, by definition, it contains so little thought that its prohibition will not impair the "marketplace of ideas." (Whether this assumption will go unchallenged as the years pass is quite open to question.)

Since traditional jurisprudence holds that obscenity can be banned, the Justices further assumed the ability of courts generally to identify sexually-oriented expression which is of little or no value to society. (Again, the Court's experience to date casts grave doubt on this hypothesis.)

In the past, a work had to be proved "utterly without redeeming social value," offensive to a hypothetical nationwide standard of taste,

and shown to appeal to "prurient interest" before it could be condemned as obscene. (See *Roth v. U.S.*, 354 U.S. 476 (1957).) Successful prosecution was almost impossible under this standard, but new modes of arguably valuable expression also flourished.

The *Miller* test similarly has three elements. The work as a whole must, under *local* contemporary community standards, appeal to prurient interest; it must describe, in a patently offensive way under *local* community standards, *sexual conduct specifically described in the obscenity statute*; and it must, as a whole, lack serious literary, artistic, political or scientific value. The last criterion is presumably to be measured by a hypothetical "national standard" established by expert testimony.

By its own words the Court devised this test to proscribe only "hard core" pornography. But as with obscenity in general, one person's legitimate expression is another's "hard core," and zealous prosecutors began immediately to attack magazines and books beyond the obviously intended restricted scope of *Miller*.

Further Supreme Court refinements are imminent, despite the Justices' displeasure at continuous confrontation with this subject matter.

The Federal Preemption Problem

Localism is a major focus of the new test, for the Court declared that people in various parts of the country should not be governed by the relatively relaxed standards of taste prevailing in certain more tolerant cities. The Court condoned different trial results in different geographic areas. A film banned in one jurisdiction might well be held protected in another, though it is yet unclear whether variations will be permitted among local jurisdictions as opposed to states. The Court did not discuss how this lack of uniformity could be implemented in the area of broadcasting.

This Chapter began with the federal obscenity statute covering radio and television. The fact that Congress passed this provision, along with its extensive regulation of most other facets of broadcasting, probably would be held by a court to mean that Congress intended to "preempt" the field of broadcast regulation.

This is a legal term signifying that states would be excluded from any participation in broadcast regulation. In fact, many cases involving states' attempts to regulate facets of radio and television have reached just such a conclusion. Exceptions, where states have been allowed to regulate, are few and usually tightly limited to control of commercial speech, i.e., advertising.

Consequently, in the obscenity area—where there is a specific federal statute—state laws probably have no effect on broadcasters. The

Supreme Court's emphasis on localism in *Miller* is thus unrealistic when applied to the electronic media. Given the nationwide system of distributing broadcast signals, including cross-border reception, networking, and cable television (CATV), the inappositeness of state law would likely prevail even in the absence of a specific federal obscenity prohibition.

But the problem is further complicated because the present federal obscenity law may not meet the minimum specificity requirements of the *Miller* test. The statute fails to define sexual conduct the offensive depiction of which will be obscene. (The statute speaks only of "obscenity," and of specific examples such as a prohibition against showing "manual or oral manipulation of the human female breast.")

Little Guidance for Broadcasters

In short, though Congress has evinced a clear intent to preempt broadcast regulation, its present set of regulatory standards may now, under *Miller*, be unconstitutionally vague. Until Congress revises the statute, the Supreme Court may be forced to contort its own specificity requirements to preserve the statute's constitutionality. This leaves broadcasters with little interim guidance where other than "hard core" expression is at issue.

Since the law is presently hopelessly confused, Congress and the Supreme Court face a considerable task in restoring order. Even if Congress passes a new obscenity law specifically banning the depiction or description on radio and television of certain defined sexual acts, the *Miller* Court's emphasis on localism will probably be impossible to retain.

Congress will almost certainly be forced to recognize the necessity and desirability of national standards of "patent offensiveness" and "appeal to prurient interest." Under such a regime, sexually-oriented expression found acceptable in New York, for example, could be broadcast in Georgia without reference to the latter's local mores.

The most "permissive" standards would prevail, as in pre-*Miller* days. But ironically, broadcasting would then become a more "permissive" medium than motion pictures, which in many states would be subject to restrictive local standards of "offensiveness" and "prurient appeal."

The FCC and Obscenity

In a number of cases the FCC has decided it is not bound by the standard of obscenity which applies to the rest of government. The

Commission believes that broadcasting's unique attributes allow it to prohibit "vulgar or offensive" expression (part of the federal statutory formula) which would be allowed in a newspaper or magazine. In a number of cases, the Commission reacted with disfavor to such diverse programming as the reading of poetry containing four-letter words and sacrilegious allusions, and to a disc jockey's playing sound effects of a toilet flushing.

Since the Communications Act requires the Commission to regulate broadcasting under the "public interest standard," the Commission believes it should apply that standard, rather than the Supreme Court's First Amendment standard, when judging offensive programming. The Commission is quite aggressive about this posture, and has been looking for a licensee willing to test its hypothesis in court. So far, no volunteers.

The Commission's policy rests upon dubious legal grounds. If a test did come, it is very likely that the Commission would be required to follow the constitutional standard of obscenity. The reason is simple: a constitutional standard always takes precedence over a statutory one, such as the "public interest" provision. Nevertheless, until the Courts have had the opportunity to examine the FCC's treatment of "offensive," non-obscene programming, broadcasters and those preparing broadcast material must live with the Commission's apparent misconceptions.

This is not always a disadvantage. For example, in a community with fairly strict moral standards the Commission's rules can often legitimately be used as the reason for not presenting possible offensive programming which is desired by a small group, either within or without the station. (If the issue were fully litigated, we have already opined that the Commission might eventually be bound by "national" standards of "patent offensiveness" and "prurient appeal" which would be as permissive as those of the most tolerant locale, and therefore much more liberal than the standards in a hypothetical middle-America community.)

Examples of Problem Broadcasts

Only a few obscenity problems have arisen in the short history of broadcast regulation. Possibly this is due to economic constraints on exceeding the bounds of community propriety, rather than to a deliberate effort to comply with FCC standards.

What cases there are have involved radio programs. Television, which offers the added opportunity of visual presentation of "vulgar" material, has been extremely timid. While the FCC regularly receives complaints about many television shows such as "All in the Family"

and "Laugh-In," it has never seen fit to pursue such complaints in an official proceeding.

What programming has exceeded the limits of acceptable taste as defined by the FCC? In *Mile High Stations, Inc.*, 28 FCC 795 (1960), the Commission issued a cease and desist order against a station because one of its disc jockeys frequently used the sound effect of a lavatory being flushed and made the following comments:

> In relation to listener's card stating that she took KIMN radio with her wherever she went: 'I wonder where she puts KIMN radio when she takes a bath—I may peek—watch yourself, Charlotte.'
>
> After a commercial for a ladies' clothing shop: 'Somehow or other when he said ladies' fall bags it sounded positively vulgar, didn't it?'

The disc jockey had already been fired when the case came before the Commission for decision, so that the question of revocation, which had been before the Commission at the beginning of proceedings, was dropped.

The Pacifica Foundation, licensee of several noncommercial, educational radio stations, has run into many difficulties with the Commission. For example, the Commission commenced an inquiry into the programming of Station KPFA in Berkeley, California after receiving complaints of "filthy" programming. The station had, among other things, broadcast a discussion by homosexuals concerning homosexuality. Although the Commission decided that this programming was insufficient to deny license renewals for the Pacifica stations, on the ground that such restrictions would limit programming to "only the wholly inoffensive [and] the bland," the very fact of its inquiry had a clear effect on Pacifica's policies. The station took pains to demonstrate its efforts to comply with the FCC notion of "public service," and censored material from some broadcasts.

To emphasize its concern, the Commission granted KPFA's next license renewal for a term of one year only, instead of the usual three years, essentially to afford the station a probationary period during which its programming practices could be closely scrutinized.

When Pacifica later applied for a construction permit for a new station in Houston, the Commission approved the application on condition of favorable resolution of a hearing to determine Pacifica's qualifications to become licensee of a new station in Washington. The hearing is to deal with additional complaints received by the FCC concerning Pacifica's programming, including a panel discussion on its Los Angeles station concerning academic freedom and the dismissal of two college English instructors whose classes had studied the poem "Jehovah's Child." The poem was analyzed by critics and psychologists and read over the air. That portion found particularly offen-

sive by, among others, Commissioner Robert E. Lee, is set forth in the footnote.[1]

In a similar case, *Eastern Educational Radio*, 24 FCC 2d 408 (1970), a noncommercial station in Philadelphia interviewed the leader of a musical group. The singer discussed his views on a number of topics using words such as "shit" and "fuck." The station was fined by the FCC and did not appeal.

The Commission continued this approach in fining WGLD-FM, Oak Park, Illinois, for broadcasting "topless radio" telephone call-in shows. *Sonderling Broadcasting Corp.*, 27 P.&F. *Radio* Reg. 2d 285 (1973). Purporting to apply the *Roth* test (since the FCC decided this case prior to the Supreme Court's *Miller* opinion), the Commission concluded that certain of the broadcasts, particularly those discussing details of oral sex and masturbation, were patently offensive, designed to appeal to prurient interest, and without redeeming social value.

The broadcasts were scheduled during afternoon hours, when children might listen. The Commission also stated that the announcer's coaxing remarks were designed to titillate and exploit the audience, and were therefore "pandering" rather than a serious discussion of sexual topics.

Each of the preceding examples is a case which, if argued through the courts, would almost certainly result in a finding of constitutionally protected speech. However, the licensees chose not to contest the agency's decisions.

Programming Guidelines and Techniques

Broadcasters who are faced with the possibility of dealing with material that is potentially offensive because of its sexually-related content have a number of difficult policy decisions to make. These choices are required at the earliest point in the decision-making pro-

---

[1]In Christ's Name, kindness is sucking the cock
of a turned cheek—Jesus style—Jehovah would
have bitten it off.
Straw legged Cindy . . .
. . . mounts her
own golden daughter on a pay-as-you-go
Zircon and is off
through the American meatgrinder
seeking enlightenment by guru in gas stations
across the country teaching reading by billboard
and arithmetic by credit card. . . .
Then it's New York. . . .
. . . hailing Marys on gold teeth
extracted in Catholic Subway muggings,
she retreats to Convent Dolores, Dolores, Dolores.
Repentent she reconciles testaments:
fucks only Jehovah; sucks only Christ.

cess, and thereafter throughout every phase of production, scheduling, and the mechanical process of playing a program over the air.

One problem every broadcaster faces, the problem with which this section began, is that of community hostility as a result of offensive programming. Whether commercial or noncommercial, each station must risk offending members of its audience in direct proportion to the controversiality of its programming. Of course, even the most bland programming is bound to offend some people, and such items as editorials may cause deep antipathy among a few.

As we approach the area of obscenity, however, there is a point at which contemporary community standards are exceeded and the proportion of the audience offended is likely to increase considerably. At this point, management—often at the highest levels—must decide whether to devote itself to "the free expression of ideas." That phrase has great intellectual appeal, but as an abstract concept it carries little weight among an audience whose moral sensibilities are offended.

The Complaint Process

A second consideration is naturally the FCC's regulatory policy, and the fair probability that any programming exceeding the bounds of what is normally considered "propriety" is likely to be brought to the Commission's attention via a complaint.

At the very least, each complaint requires an explanation to preserve the station's record for license renewal. If the Commission is more disturbed, and wishes to act before renewal time rolls around, more urgent and extensive replies may be necessary. Even if the station successfully explains its activities, the legal expenses alone are significant.

In the case of noncommercial educational stations, there is the added problem of government financing, and the danger that programming on the periphery of current broadcast practice may have an adverse effect on state legislators and Congress.

The management of each station and production facility will come to its own conclusions as to how the balance should be resolved. However the decision is made, various techniques can be used to implement it without creating undue negative consequences.

Protecting Children

If the management decides to present programming with significant sexual content, it should, in the first instance, take care to insulate that programming from viewing by children. Special problems now attend this approach, however, as a result of the *Miller* case.

Before *Miller*, the Supreme Court had approved a separate obscenity

standard for minors. For example, a state could proscribe the sale of "girlie" magazines to minors even though a similar law applied to adults would be unconstitutional. Society's interest in free expression was, in theory, protected so long as dissemination to adults was unimpaired; parents' interests in controlling the upbringing of their children was considered an overriding factor because the exception is clearly limited by the objective standard of age. This distinction has now been cast in considerable doubt by the majority's declaration in *Miller* that the constitution gives no authority to limit minors' access to expression according to a more protective standard than that for adults.

Despite the Court's apparent expressed rejection of separate obscenity rules for minors, the concept will likely remain. It simply has too much utility as applied to all forms of expression, not just broadcasting. Whether the Supreme Court considered these implications or really meant what it seemed to say on the point, there is a good chance that the "double standard" will be resurrected if the Court is squarely presented with the issue. On the basis of this expectation, the use of special obscenity treatment where minors are concerned should be continued until a definitive Supreme Court ruling to the contrary.

Of course, it is always possible for a child to get to a television or radio set, turn it on and partake of the programming. Even strict parental supervision cannot assure that children's viewing will always be restricted to certain hours.

Nevertheless, both the Commission and lower courts have approved measures which reduce the probability that children will be exposed to programming containing sexual matter. Programming in the late evening hours is the most obvious technique. Explicit warnings of the program's content immediately before it is broadcast and at reasonable intervals earlier in the day or week will enable parents effectively to screen the availability of this kind of material and take whatever measures they deem necessary to prevent their children from gaining access to it, if that is their desire.

Hypothetical 6–1

After discussions with his board of directors, the manager of a television station serving a city in Middle America decided to institute a telephone call-in program specifically to discuss sex-related problems. The show was to feature a panel of local doctors, psychiatrists, social workers, and clergy to analyze the problems presented by viewers. The show was to be scheduled at 10:00 p.m. on Wednesday night to minimize the possibility of viewing by children.

The first show seemed very successful. Many more viewers called than could be accommodated during the hour show. Those questions which were communicated over the telephone, while clinical in cer-

tain details, were not presented with crudity or vulgarity, which was the main worry of the station manager and the board of directors. (To prevent gross abuse, the station had installed a tape-delay system for processing the incoming calls. Thus, any out-of-line remarks could be cut off before they ever got on the air.)

The show was not viewed with the same equanimity by Reverend Waldo Montaigne, a local minister who conceived his role in life as suppressing "Godless sexuality wherever and in whomever it occurred."

Early the morning after the first program, Reverend Montaigne was on the telephone to complain to the station manager, and when he got no satisfaction, to the chairman of the station's board of directors. When it became apparent that the station was committed to continuing the program, the Reverend telegraphed a complaint to the FCC in Washington.

Comment:

Almost without doubt, the FCC will order the station to cease carrying the program or modify its content significantly so as to avoid such detailed reference to certain parts of the human body and to sexual acts. The FCC will cite its 1973 "topless radio" decision which imposed a fine on certain "sex talk" programs which the Commission believed were "obscene and indecent broadcasts."

Although the "topless radio" shows in question were presumably designed to be sensationalist, in contrast to the television station's serious intent in exploring sexual problems, the Commission will almost certainly feel it necessary to condemn the broadcasts regardless of the motive behind them. The Commission will probably find that references to such details of sexual life as impotency, frigidity, premature ejaculation, group sex, and so forth, have no place on the air under any circumstances.

Upon checking with the station's lawyers, the board of directors will probably conclude that the issue is not worth fighting, even though under the Supreme Court's most recent obscenity test (announced in the Miller case), the show is protected expression under the First Amendment.

Promotion and Warnings

The material must be promoted, and warnings presented, in a way completely devoid of sexual reference or suggestive content. Any attempt to sensationalize the upcoming program will not only constitute offensive programming in itself but is also likely to be considered "pandering."

In the pre-*Miller* case of *Ginzberg v. U.S.*, 383 U.S. 463 (1966), the Court took the advertiser's own titillating characterization of the work as conclusive evidence of its obscenity, though the work would have been protected if not considered in relation to its advertising. The test was adopted out of concern that a panderer might expose offensive

advertising to citizens who preferred to avoid sexually arousing expression, and especially parents who desired to prevent their children's exposure to the erotic. Therefore, warnings should say only that certain material may be considered unacceptable for viewing by children and may offend the taste of adults.

The warning should state the time and duration of each broadcast, and might refer concerned parents and others to local newspaper or other program schedules for a more complete description. These listings should also avoid any sensationalism. However, a more complete description of the program or programs in question may be necessary to enable potential viewers to make an informed decision as to whether they will tune in.

Writing these announcements is a very delicate task. They should generally risk discouraging viewers rather than creating the expectation that the material may be inoffensive to all but a few.

Any station which expects to present this kind of matter on a regular basis is best advised to develop standard forms of warning for broadcast and insertion in program listings. After a short while, the form will become commonplace, losing any sensational value which might derive exclusively from its newness. The station's audience will quickly learn the kind of programs which the warnings signal, and will act appropriately.

Do not get the impression that taking these steps will immunize any station from FCC scrutiny; but once the decision to present sexually-related material is made, this policy may help assure that the station has taken the *minimum* measures legally required to avoid running afoul of the constitutional standard of obscenity.

A station which embarks on this sort of programming venture will immediately have public relations problems, and the following quote from the Supreme Court's opinion in *Butler* v. *Michigan*, 352 U.S. 380 (1957), may then be helpful.

The case involved a state law prohibiting the sale to adults or children of any book containing language or pictures "tending to the corruption of the morals of youth." Though the statute was designed to protect children, the Court found its effect was to prevent adults from obtaining the books in violation of their constitutional rights. Holding the law unconstitutional, the Court declared:

> The incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual . . . that history has attested as [one of] the indispensable conditions for the maintenance and progress of a free society.

The Court said that protecting children was a legitimate goal, but

any plan which simultaneously prevented adults from obtaining access to ideas was illegal.

The Censorship Prohibition

Complaining citizens should also be informed that the Federal Communications Commission has said that, although certain programs may be offensive to some viewers, those offended "do not have the right, through the Commission's licensing power, to remove such programming from the air." The Commission has also noted that it is prevented by Section 326 of the Communications Act from censoring broadcast material.

The Commission applies these principles to balance its power to penalize broadcasters for obscene, indecent or profane language over the air, looking at the circumstances case-by-case. The Commission has also approved the technique of scheduling "adult" topics late in the evening when the number of minors in the audience is presumably at a minimum.

Deleting Objectionable Material

Whether a station decides to adopt a liberal policy regarding potentially offensive program material, it will almost certainly come to a decision sometime that a particular program or program segment must be deleted because of its offensive nature. Sexual references may or may not be the cause. In any event, once the decision has been made to try to cut the material, the producer (if involved in the original production), or the executives charged with programming decisions, should consider a number of specific points in reaching the final decision of whether or how to effectuate the deletion.

If the programming proposed for cutting deals with a controversial issue of public importance, Fairness Doctrine considerations come immediately into play. If, for example, the program is designed to present a balanced treatment of a particular issue by itself, so that no further programming is necessitated by its broadcast, the deletion must be scrutinized to determine whether the balanced presentation would be upset.

Similarly, if the program is designed to be simply part of a station's overall treatment of a particular issue, those responsible should consider whether deleting the program or a portion of it will affect that overall balance, and if so, to what extent. The material included in this guidebook on the Fairness Doctrine and Personal Attack Rules, Chapter 3, and Section 315 ("equal opportunities"), Chapter 4, will be helpful in determining the balance required.

In a situation which is not governed by the Personal Attack Rules, such as a panel or interview discussion show, the producer or licensee

has fair latitude in editing, although general Fairness Doctrine principles still apply. Thus, possibly obscene, vulgar or libelous remarks may be deleted with almost certain impunity. If a particular speaker restricts himself to a consistently vulgar mode of expression, his remarks can probably be thoroughly edited or removed entirely, even though doing so destroys the effect of his statement for practical purposes.

The Fairness Doctrine interest of balanced coverage here works against the station's interest in not being subjected to liability for libel or punitive action by the FCC. The ultimate responsibility for resolving this tension and making the programming decision rests, of course, with the licensee, who has a non-delegable duty imposed by the Communications Act to control his programming in accordance with the public interest.

Licensee's Power of Censorship

As stressed above, the FCC cannot, at least in theory, use the public interest standard to override constitutional protections of free speech. However, the licensee, in the exercise of his freedom of speech, has the right in certain situations to determine what specific language goes out over his station. (One notable exception is the "no censorship" provision of Section 315's "equal opportunity" rule, which renders the licensee powerless to excise even the most blatant obscenity.)

As a matter of practice there are areas where the licensee's freedom of expression and responsibility to control his own programming give him the power to censor those who broadcast over his facilities and effectively override their freedom of expression. This result is presumably constitutional because the licensee's programming is subject to review for overall fairness.

Moreover, if a licensee's decision to edit appears to have been based on arbitrary or capricious standards or on a policy of excluding views with which the licensee disagrees, questions regarding the licensee's fitness arise not only under the Fairness Doctrine, but under the public interest standard of Section 309 of the Communications Act. A further word of caution: where material is deleted, licensees should either refrain from explaining the reason (such as where the reason is obvious, as in the case of a word or expression which is "beeped out") or disclose by appropriate announcement the true reason for the deletion. Any attempt to deceive the audience, such as by explaining the deletion in terms of "technical problems," is inconsistent with the public interest standard.

Prior Approval of Originator

Stations which receive programs from network sources or through syndication arrangements must further consider the contractual provi-

sions governing distribution. Very often the contract will specify that editing or cutting is to take place only under certain circumstances and requires the prior approval of the program originator.

Notwithstanding anything contained in such contracts, the licensee has a non-delegable duty to control the programming over his station. Understanding this point is essential both for station executives and program producers. Executives should not feel protected by existing agreements, and producers should not feel their product is immunized from cutting or editing once it leaves their hands.

Noncommercial educational stations operating under the Public Broadcasting Service's National Program Service Agreement have a unique problem in this respect, since the Agreement's terms are more stringent than some commercial network agreements. Paragraph 6, "Editing and Cutting," requires a station to seek prior permission from PBS before editing or cutting any network program.

If the station finds offensive material within a program, it may not make any alterations without PBS's prior permission, on the understanding that PBS will not unreasonably withhold permission. Where the station has not had a chance to review the program at least 48 hours prior to the PBS network transmission or where prior permission cannot be obtained because of a local or national emergency, the station may make whatever deletions or alterations it deems necessary in good faith in order to comply with any federal, state or local requirements. The station must then notify PBS of its actions within 24 hours.

It is assumed that PBS will readily consent to timely requests for permission to edit questionable material, and will adjust its relations with program suppliers to give it as much freedom in this regard as possible. Further, where public interest considerations dictate editing potentially offensive material, the action would be defensible under the clause allowing editing that is necessary for compliance with statutory or other regulatory requirements. In order to avoid contractual dispute, however, stations will have to attempt to preview programs as early as possible to facilitate early editing decisions.

Concomitantly, program producers and suppliers must recognize the likelihood that local editing problems may well be created by the inclusion of material which goes beyond community norms.

Depending on their journalistic or artistic goals, producers may delete treatment of questionable topics entirely; substitute a treatment using less explicit terms, particularly where the potential difficulty arises from sexual references; attempt to insert potentially offensive material in such a way that it can be deleted with minimal adverse effects upon the meaning, continuity, and impact of the message; or be prepared to fight a heated and probably—at least in some areas—losing battle to present the material in defiance of local standards as perceived

by station and network executives, interest groups, and members of the public.

Challenging the FCC

A final word of caution. There may be a temptation on the part of program producers or station and network executives to attempt to challenge the FCC's programming requirements in the area of "offensive" or "vulgar" programming. Any such challenge would be extremely time-consuming, expensive, and dangerous in terms of its possible effect upon the public support for any station, whether commercial or noncommercial.

The foregoing discussion should not under any circumstances be taken as a guide to the extremely complex problems which such a challenge would raise. Neither should anyone be misled into thinking that the discussion presents guides to the type of programming upon which a successful challenge could be premised.

Prior consultation with counsel would certainly be required, for the pitfalls are many. They include fines, issuance of cease and desist orders, denial of license renewal, the imposition of criminal penalties, and revocation of license.

Hypothetical 6–2

A noncommercial educational television station in a large Eastern city was preparing to hold a foreign film festival, using several packages of film it had recently been able to obtain with a foundation grant. The series was to be hosted by an eminent film authority who would explain various cinematic trends and analyze the techniques and artistic messages of the foreign film makers whose films would be shown.

During the festival's planning, the host-film critic observed that a number of the films had fairly explicit nude scenes and love scenes which might cause a problem. This led to pre-screening sessions which revealed that some of the films were indeed replete with nudity and sexuality. The film critic pointed out that deleting these scenes would seriously impair the films' artistry and meaning, thus perverting entirely the film festival's concept.

Perplexed, the station manager telephoned the station's attorney. What were the risks, he inquired, and what could be done to mitigate them?

Comment:

If the station decides to go ahead with the film festival, it should schedule the programs in the late evening to minimize the possibility that children will view the shows. The station should also alert the public, via discreet adver-

tisements in newspapers and on the air, that certain content in the films might not be suitable for viewing by children or those adults who disliked viewing "adult" subject matter. The broadcast warnings should appear at various times of the day during the weeks preceding and during the film festival, and just prior to the showing of each film.

These precautions would not, however, immunize the station from adverse action by the FCC. If viewers complained to the FCC, as would be very likely in spite of warning announcements, the Commission would probably request detailed information about the program presentations. Thereafter, the Commission might insist that disputed scenes be deleted or, if that was unacceptable, that the films be dropped entirely despite their artistic and literary merit.

The Commission would probably be exceeding its constitutional authority in these actions, but is so convinced of its rectitude that it would actively be looking for a "test case"–a court confrontation–to establish the limits of scrutiny of sexually-oriented broadcast program content.

Therefore, unless the station was willing to embark on an expensive course of litigation, it had better be prepared to accede to the FCC's pressures if they are applied. Additionally, the station faces the possibility of a monetary forfeiture if the Commission considers the violation of federal obscenity standards sufficiently flagrant. However, since the station could articulate a legitimate artistic motive, the Commission might well be more lenient on the monetary forfeiture question than it was in the "topless radio" case, where the Commission believed it was punishing mere exploitation.

Chapter 7

Violence

Lately a good deal of public concern has been generated over the effects of violence in television programming, especially where children are concerned.

A number of studies of the effects of televised violence upon children have been completed or are under way, including one by a committee under the Surgeon General's supervision.

No definite relationship between television violence and audience behavior, whether the audience is composed of adults or children or both, has been conclusively documented, statistically or otherwise. Nevertheless, disturbing situations have occurred. For example, shortly after a popular detective series carried an episode featuring the gasoline burning of a robbery victim, a similar real-life drama was replayed in a racially tense city. When some television executives saw comparably violent plots in a later episode, they exercised their discretion in refusing to run the program.

The Federal Communications Commission is currently conducting a broad study of children's programming, including the effects of violence. However, the FCC presently has no guidelines which restrain licensees or program producers in this area. Moreover, the Commission has consistently refused to act upon complaints of excessive violence in children's programming, on the basis that no body of evidence has yet been adduced which definitely establishes the behavioral consequences of violence in radio and television.

In terms of broadcast editorial judgments, the decision whether to break into a children's program to report on violent news events, such as a sensational killing or a wartime atrocity, is equally difficult. Certainly, delaying a news report is something most broadcasters, like other journalists, would do only reluctantly; however, if the story breaks during the Saturday morning cartoon show, or another program geared specifically to children, a decision to hold up initial broadcasting may be justified.

Licensees and program producers who desire to use scenes of violence therefore are constrained only by the factors of taste and public relations. If these are of great concern, licensees may be advised to air programs containing violent scenes only in the late evening hours, when it may be safely assumed that the proportion of children in the viewing audience is greatly reduced. Late scheduling is not, however, mandated by any statute, rule or regulation.

The Battle Lines Are Being Drawn

A fight appears to be looming over the effects of televised violence generally, and particularly on children. Concerned government officials, members of Congress, and citizens groups are advocating divers restrictions to reduce violence in broadcasting to an "acceptable" level.

From a legal standpoint, the test for any government limitation on violence in programming is strict. Though many concerned citizens seem to lose sight of the fact, expression concerning violence, in whatever form, is part of free speech protected by the First Amendment. Consequently, courts will permit this speech to be limited only if the government can demonstrate what amounts to a "clear and present danger" resulting immediately and directly from such broadcasts.

Justice Holmes observed that the Constitution did not grant the right to create the "clear and present danger" of a panic by yelling "fire" in a crowded theater. The "clear and present danger test" has been refined through judicial interpretation, and today is usually expressed in the words of the distinguished American jurist, Learned Hand:

> In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.

United States v. *Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *adopted*, 341 U.S. 494, 510 (1950).

This formula underscores the consistent judicial philosophy underlying all First Amendment interpretation. Through long experience, the writers of the Constitution and Bill of Rights believed that dangers created by free speech were far outweighed by the dangers to democratic government resulting from limitations on free expression.

Although this is a clear lesson from history, citizens seeking to achieve specific social reforms often forget it. They believe that their particular limitation is justified as a "good," and will not damage the overall system of free expression. Unfortunately, if each such group had its way, many restrictions on free expression would be imposed, each in the name of one or another arguably attractive social goal. The cumulative result would be the serious diminution of free expression, and grave damage to democratic government would shortly follow.

Current Research Insufficient

Many citizens groups and government officials claim that scientific research conclusively shows the harm arising from televised violence. Yet the research results currently available probably would be insufficient to satisfy the "clear and present danger test."

Careful reading of the research projects indicates that scientists are not yet agreed upon acceptable definitions of "violence" and "violent behavior." They are also unable to define, except in extreme circumstances, those kinds of behavior which supposedly are "bad" or "antisocial." In fact, certain studies of television-induced "violence" focus on behavior which many authorities apparently consider healthy rather than abnormal or "bad."

Additionally, the statistical correlations between viewing televised violence and "antisocial" behavior are too low to demonstrate imminent danger. Part of the problem is that the research techniques in this area are still primitive, and the range of sample populations and behavior very limited.

Scientific research into the nature of violence, its relation to other behavior, and the short- and long-term effects of violence viewing on children will need to go much further before the government will be able to convince a court that expressions of violence can legitimately be limited under the First Amendment.

For example, researchers will be required to do much more than show that some children may become agitated or "aggressive" after viewing scenes of great violence. Undoubtedly, a court would demand conclusive data about the long-term effects of such viewing on children. (Quite possibly, exposure to televised scenes would make future adults more sensitive to the problem of violence—which would be beneficial to society, not harmful.)

The point is not to downgrade the research efforts now underway. The effects of violence on radio and television are obviously complex, and a worthy subject of research. Those at work on the problem face great difficulty, and are moving as quickly as they can.

But appreciation for the problems of research should not be used to obscure the fact that current knowledge of media violence is woefully

insufficient for sweeping conclusions. Of course, this does not prevent many concerned mothers, bureaucrats, scientists, and Members of Congress from drawing conclusions; fortunately, the courts will protect all of us from the imposition of restrictions based on such extremely tentative information.

Even if researchers eventually establish a cause-and-effect relationship between certain violence-viewing and particular criminal incidents, the courts will probably question whether the proper remedy is suppression of the causal program content.

If only a very few people exhibit harmful behavior, for example, the courts may hesitate to deny the programmer's ability to communicate his message to the population at large. Imposition of criminal penalties seems a much more satisfactory approach, especially in light of traditional First Amendment presumptions forbidding restraint of expression but permitting control of disruptive conduct.

Analogy to Cigarette Ads Inappropriate

There has been some attempt to compare proposed restrictions on the televising of violence to the congressional prohibition of broadcast cigarette advertising. The analogy is not apropos.

Under Supreme Court opinions, "commercial" speech may be distinguished analytically from the great body of noncommercial speech that receives the full force of First Amendment protections. Thus, government can regulate advertising as part of its general power to police commercial activity.

Government regulation of "commercial" speech is, however, highly limited. The Supreme Court has held, for example, that "editorial" advertisements—those which promote a cause but for which space is purchased in a newspaper or time is bought on radio or television—are not subject to regulation as "commercials." In other words, the government is able to regulate only advertisements which directly promote the sale of a product or service. Outside these tight limits, the dangers from restricting access of diverse views to "the marketplace of ideas" is too great to permit any government intrusion.

Even in the area of advertising, however, the level of scientific proof required to impose restrictions is much higher than that which has so far been adduced concerning violence in the media. Again, to use the cigarette example, the scientific data assembled to demonstrate the harmful effects of smoking is, statistically, far more conclusive than anything in the violence area. Further, the research definitions of the evils to be prevented in the cigarette case—certain forms of illness—are quite precise compared to the loose, extremely subjective definitions of "antisocial behavior" used in the violence studies.

Since violence in the media is (except in rare cases) not classifiable as "commercial" speech, scientists will be required to provide much more convincing evidence of the dangers of violence viewing than the Government adduced to demonstrate that smoking cigarettes created health problems.

The Long Perspective

We have a long way to go before this result is reached—and it may never be reached. At this stage, we can reasonably expect future research to indicate that society derives significant benefits from media examination of all aspects of violence. In many respects, this will probably apply to children as well as adults.

Meanwhile, those who passionately argue for the quick imposition of limits on programming related to violence might bear in mind the words of Mr. Justice Brandeis, concurring in the case of *Whitney* v. *California*, 274 U.S. 357 (1927):

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. . . .
>
> . . . There must be the probability of serious injury to the state. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly.

II

Business Aspects of Programming

Chapter 8

Copyright

Since its enactment in 1909, the Copyright Law of the United States (Title 17, U.S. Code) has been the subject of voluminous legal interpretation and controversy.

Accordingly, this discussion does not purport to be a detailed treatise on all of the procedural and substantive copyright issues which confront the television and radio producer. Instead the following material is meant only as a basic guideline which should be helpful in a majority of the general day-to-day questions which emanate from this rather esoteric body of law.

For the past several years, Congress has been debating proposed revisions to Title 17 to update the old statute and conform it to modern technological advances. For example, the new law, when enacted, will no doubt contain specific provisions on the subject of videotape, which certainly was not considered by Congress in 1909. When the copyright statute is finally rewritten, many of the subjects covered in this report will have to be revised. In the meantime, the following material will present the current status of the law.

Further, it is suggested that this material serve merely as a guideline for general application to the relatively simple copyright problems which can be expected to occur at regular intervals. Naturally, absent extensive knowledge of the subject, television and radio personnel should refrain from speculating on the legal consequences which might result from their actions with regard to complex copyright problems,

and it is recommended, in such cases, that they obtain the advice of counsel prior to exercising their business judgment.

Copyright Protection

The U.S. Copyright Office defines the term "copyright" as follows:

> A copyright is a form of protection given by the law of the United States [Title 17, U.S. Code] to the authors of literary, dramatic, musical, artistic, and other intellectual works. The owner of a copyright is granted by law certain exclusive rights in his work such as:
> —the right to print, reprint, and copy the work.
> —the right to sell or distribute copies of the work.
> —the right to transform or revise the work by means of dramatization, translation, musical arrangement, or the like.
> —the right to perform and record the work.

The rights granted by the copyright law are not unlimited in scope.

Hypothetical 8–1

It was recently learned that Arthur Arrison, a U.S. Army pilot during World War II, whose aircraft was shot down over the Pacific and who for 30 years has lived on the Pacific Island in touch only with the native islanders, was a prolific writer during that time. In fact, Mr. Arrison wrote one work, which he said was based on 12 poems of Merriweather, entitled Miss Eliza's Triumph, *which is virtually identical to the text and lyrics of a smash 60's Broadway musical,* My Favorite Lady, *by Leopold Lornborne.*

When the text of Miss Eliza's Triumph *was made known, television, movie, and theatrical companies vied for the production rights. The National Broadcasting System (NBS) acquired the copyright to the work and aired it. Musical numbers such as "On the Sidewalk" and "I Pranced, Danced, Entranced" entertained television viewers, much to the consternation of Lornborne and other copyright holders in* My Favorite Lady.

These copyright holders sought advice as to whether they had legal recourse against Mr. Arrison and NBS, but after determining that Arrison was not a fraud, lawyers advised that litigation would not be fruitful.

Comment:

This example highlights the critical element of "originality" for obtaining a copyright. A work will not be denied copyright protection simply because it is substantially similar or even identical to a work previously produced by someone else.[1]

---

[1]Copyright is thus substantially different in nature and scope from another common form of statutory protection, the patent. Although often confused, the two are distinguishable from the standpoint of formal statutory requirements, in that the patent law requires that the subject of the patent be new, useful, and inventive; that is, that it meet a strict level of novelty. Factors such as the time involved in

Therefore, the copyright protection afforded Lornborne could not extend to preventing Mr. Arrison from marketing his independent creation.

Special Limitations on Musical Copyrights

Furthermore, the case of musical compositions presents a special element of limitation on copyright. Recording rights and musical works are limited by the so-called "compulsory license provision" of the Copyright Act, which permits persons to record the work upon payment of certain royalties, after the initial recording has been authorized by the copyright owner. The law requires that a two-cent per use fee be paid to the copyright owner as a means of compensating for use of the work. This compulsory license provision will be further discussed below in the section on sound recordings.

It is critical in the hypothetical discussed above, that Mr. Arrison is not a fraud, because if it were established that he relied on *My Favorite Lady* rather than his own thinking, he would be denied copyright protection, and would be subject to the civil and criminal penalties enforcing the Copyright Act. Additionally, the television company would be subject to civil and criminal liability for its role in assisting the unauthorized use of the copyrighted work.

Types of Copyright

There are two systems of copyright protection available to a qualifying author:

The common law copyright
The statutory copyright

These two systems vary widely in scope and each has a separate set of procedural rules. Generally speaking, it is the act of publication which constitutes the dividing line between the two; thus, when a work is first published, an author's common law copyright protection is extinguished.

The common law copyright is derived from the operation of state law.

Pursuant to this system, there is automatic protection afforded to the author as soon as he creates his work, but it continues only as long as the work remains unpublished, as that term is hereinafter defined. Theoretically, the common law copyright can remain in effect in perpetuity, and it is both created and continued in effect without any action by the author or the Copyright Office. Since common law protection exists only for unpublished works, its practical value is severely

---

developing the patent, its cost, the value of the information, and the chance of others discovering a similar formula or device are critical to the novelty analysis. Thus, if an object has already been patented, no one else can obtain patent protection. As we see, this is not true for copyright protection.

limited. For the most part, the common law copyright operates to insure the author's right to the privacy of his work over the public's right of access, and is most valuable to the author whose scope of distribution does not exceed the confines of his office.

The statutory copyright (Title 17, U.S. Code) is the only meaningful source of protection for the vast majority of authors.

As mentioned above, the statutory copyright arises upon compliance with federal requirements and the act of publication, although there are a few exceptions which will permit statutory copyright of unpublished works.

The term "publication" is thus of critical importance to the author. Unfortunately, this term is nowhere defined in the Copyright Act, although Section 26 of the Act does refer to the date of publication as "the earliest date when copies of the first authorized edition were placed on sale, sold or publicly distributed . . ."

To be on the safe side, though, one should recognize and adhere to the following definition, which is derived from the copious cases on the subject: publication occurs when, by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner even if a sale or other such distribution does not in fact occur.[2]

The distinctions between common law and statutory copyright may be seen by expanding the story of our Pilot Arrison:

Hypothetical 8–2

Upon being discovered by a team of American pilots, Capt. Lewis & Lt. Clark, Arrison bubbled over with joy to meet other English-speaking people.

His discoverers were amazed at his vast collection of literary works. After gleaning the material, they advised him that he would have no trouble in returning to the United States and having his works published. They urged him to leave the material with them, and that they would take care of all his needs.

In addition to Miss Eliza's Triumph, *Arrison had an extensive volume of his memoirs entitled* Alone With the Natives *and a collection of short stories entitled* Pacific Fantasies.

After his return to the United States, Miss Eliza's Triumph *was shown to theatrical companies and prior to its television release, a*

---

[2]Melville B. Nimmer, Nimmer On Copyright (Albany: N. Bender, 1963) at 195. Furthermore, the term "publication" for copyright purposes is significantly different from "publication" for libel or slander purposes. If someone writes libelous matter, it is published for defamation purposes as soon as another person hears or reads it. However, unless the article is sold, given away or otherwise made available to the general public, it would not be published for purposes of statutory copyright protection, and only a common law copyright could reside in the work.

theatrical group staged a performance of the play with the consent of Lewis & Clark. Thereafter, and prior to the television performance, the material was copyrighted.

Arrison soon became a national figure, and was invited to appear on a number of television talk shows. He discussed his memoirs, as well as his short stories, and read extensively from both works on the television programs.

Thereafter, he decided to copyright the works and sought a publisher. He was informed by a number of publishing companies that due to his extensive reading on the air (he charmed audiences with over three-quarters of the stories of his Pacific Fantasies and read over one-half of his memoirs) that the value of the copyright was substantially reduced and worth little, if anything.

Furthermore, the National Broadcasting System, upon learning of the performance of Miss Eliza's Triumph threatened to sue for a reduction in the price they paid for the TV rights claiming Arrison lost the copyright by the performance and that it was, therefore, not worth what NBS contracted to pay.

Comment:

With respect to NBS' claim, it is taking "publication" too literally. Courts have held that a mere performance of a play does not constitute a "divestitive publication." Playwrights are entitled to have plays performed before a limited audience without constituting publication to divest them of copyright protection. If the stage company distributed for sale the text of the play, in addition to performing it, NBS would have a strong argument that the play had been published prior to its television performance.

With respect to the readings on the air, Arrison could argue that brief recitations are performances which do not constitute a divestiture publication. If Arrison read substantial amounts of the works, it might constitute publication.

However, if the television station had a practice of copyrighting all its programs, the station, rather than Arrison, would be the copyright owner of the works. Unless Arrison's television contract protected him, his rights to the work could be lost.

Interestingly, if Lewis & Clark kept a copy of the work Pacific Fantasies, renamed it Tales of the Pacific, and presented it to a magazine publisher who proceeded to print it without copyright protection, Arrison would not lose his copyright in the original version.

Pirated works, even if they are published, do not divest the original copyright holder of his rights in the work. As can be seen, what constitutes "publication" for one work may not constitute "publication" for another.

What Can Be Copyrighted

Section 5 of the Copyright Act enumerates 14 broad classes of works under which statutory copyright may be claimed. The list includes:

books, periodicals, lectures or similar productions prepared for oral delivery, dramatic and dramatico-musical compositions, musical compositions, maps, works of art (or models or designs for works or art), reproductions of works of art, drawings or sculptural works of a scientific or technical character; prints, pictorial illustrations, and commercial prints or labels; motion picture photoplays, motion pictures other than photoplays; and sound recordings, fixed and published after February 15, 1972.

The following is the definition of these classes as they appear in the law:

BOOKS (Class A). Published works of fiction and nonfiction, poems, compilations, composite works, directories, catalogs, annual publications, information in tabular form, and similar text matter, with or without illustrations, that appear as a book, pamphlet, leaflet, card, single page, or the like.

PERIODICALS (Class B). Publications, such as newspapers, magazines, reviews, newsletters, bulletins, and serial publications, that appear under a single title at intervals of less than a year. Also contributions to periodicals, such as stories, cartoons, or columns published in magazines or newpapers.

LECTURES OR SIMILAR PRODUCTIONS PREPARED FOR ORAL DELIVERY (Class C). Unpublished works such as lectures, sermons, addresses, monologs, recording scripts, and certain forms of television and radio scripts.

DRAMATIC AND DRAMATICO-MUSICAL COMPOSITIONS (Class D). Published or unpublished dramatic works such as the acting versions of plays for the stage, for filming, radio, television, and the like, as well as pantomimes, ballets, operas, operettas, etc.

MUSICAL COMPOSITIONS (Class E). Published or unpublished musical compositions (other than dramatico-musical compositions) in the form of visible notation, with or without words. Also new versions of musical compositions, such as adaptations, arrangements, and editing when it represents original authorship. The words of a song, unaccompanied by music, are not registrable in Class E.

MAPS (Class F). Published cartographic representations of area, such as terrestrial maps and atlases, marine charts, celestial maps, and such three-dimensional works as globes and relief models.

WORKS OF ART; MODELS OR DESIGNS FOR WORKS OF ART (Class G). Published or unpublished works of artistic craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as works belonging to the fine arts, such as paintings, drawings, and sculpture.

REPRODUCTIONS OF WORKS OF ART (Class H). Published reproductions of existing works of art in the same or different medium, such as a lithograph, photoengraving, etching, or drawing of a painting, sculpture, or other work of art.

DRAWINGS OF SCULPTURAL WORKS OF A SCIENTIFIC OR TECHNICAL CHARACTER (Class I). Published or unpublished diagrams of models illustrating scientific or technical works, such as an architect's or an engineer's blueprint, plan, or design, a mechanical drawing, an astronomical chart, or an anatomical model.

PHOTOGRAPHS (Class J). Published or unpublished photographic prints and filmstrips, slide films, and individual slides. Photoengravings and other photomechanical reproductions of photographs are registered in Class K.

PRINTS, PICTORIAL ILLUSTRATIONS, AND COMMERCIAL PRINTS OR LABELS (Class K). Published prints or pictorial illustrations, greeting cards, picture postcards, and similar prints produced by means of lithography, photo-engraving, or other methods of reproduction. A print or label, not a trademark, published in connection with the sale or advertisement of articles of merchandise also is registered in this class.

MOTION PICTURES PHOTOPLAYS (Class L). Published or unpublished motion pictures that are dramatic in character, such as feature films, filmed or recorded television plays, short subjects and animated cartoons, musical plays, and similar productions having a plot.

MOTION PICTURES OTHER THAN PHOTOPLAYS (Class M). Published or unpublished non-dramatic motion pictures, such as newsreels, travelogs, training or promotional films, nature studies, and filmed or recorded television programs.

SOUND RECORDINGS (Class N). Works that result from the fixation of a series of musical, spoken, or other sounds. Common examples include recordings of music, drama, narration, or other sounds, as published in the form of phono-records such as discs, tapes, cartridges, cassettes, player piano rolls, or similar material objects from which the sounds can be reproduced either directly or with the aid of a machine or device.

It should be noted however, that because of the greatly expanded number of art forms and media which have evolved since 1909, the list is not a limitation of the subject matter of copyright. Choosing the proper classification for a particular work can result in a more favorable copyright protection since the class is different in scope and degree. However, incorrect classification of an author will not preclude, invalidate or impair statutory rights.

Unprotected Works

Although the various classes of works are subject to broad interpretation, there are several categories of works which are generally ineligible for statutory copyright protection. Generally, the classes include:

1. Titles, names, short phrases and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering, or coloring; mere listings of ingredients of contents.

2. Ideas, plans, methods, systems, or devices, as distinguished from a description or illustration.
3. Works that are designed for recording information and do not in themselves convey information, such as time cards, graph paper, account books, diaries, bank checks, score cards, address books, report forms, and the like.
4. Works consisting entirely of information that is common property and containing no original authorship. For example: standard calendars, height and weight charts, tape measures and rulers, schedules of sporting events, and lists of tables taken from public documents or other common sources.[3]

Thus, if our friend from the Pacific merely thought up the title "My Favorite Lady" and sought to copyright it, his application would be rejected.[4]

Similarly, if the creative genius who dreamed up the idea of a situation comedy for radio or television sought to have his idea copyrighted, his application would be rejected because a mere idea is not protectable; however a situation comedy episode, of course, would be protectable. Further, anyone who invents a better form for providing information for renewing television broadcast licenses would not receive copyright protection for his work. Forms which follow or track a system or process are outside copyright protection.

It should also be noted that some of the 14 categories provide for copyrighting either published or unpublished works. Only the following types of works can be registered for statutory copyright before they have been published: musical compositions, dramas, works of art, drawings and sculptural works of a scientific or technical character, photographs, motion pictures, and works prepared for oral delivery. Although none of these works must be registered in their unpublished form, it may be advantageous to do so. If these works are registered in unpublished form, the law requires that upon publication another registration be made.

On the other hand, the following types of material cannot be registered for statutory protection in unpublished form: books (including short stories, poems and narrative outlines), prints, maps reproductions of works of art, periodicals, and commercial prints and labels. These works secure statutory copyright by the act of publication and by following certain requirements, the most important of which is affixing notice of copyright.[5]

---

[3]*General Information on Copyright*, Circular 1, (Washington Copyright Office, 1969) at 4.

[4]As to his rights in the title as a service mark, see Chapter 9, "Unfair Competition."

[5]General Information on Copyright, *supra*, at 5.

Statutory Requirements

Unlike a common law copyright which requires no formalities, in order to obtain statutory protection, an author or other copyright proprietor must observe several requirements either as a condition of obtaining the copyright, or, if it is obtained, as a condition of invoking the judicial process of enforcement of rights. In addition, *failure to comply with the requisite formalities often results in the "donation" of the particular work to the public domain*, and all chance for copyright is lost forever.

Hypothetical 8–3

Homer Tringle, director of program production at a major Midwestern educational broadcasting facility, recently completed a wildlife film study entitled "One Day in the Life of a Prairie Dog."

Although initially intended solely for use by The Middle America Educational Network, which comprises seven independent stations, the first public airing resulted in such favorable reviews that Homer has been inundated with requests for copies of the film, and is now contemplating selling copies to commercial broadcasters.

Homer never bothered to secure a copyright for the film. When questioned about this, Homer indicated the belief that in his case, copyright could not have provided any additional benefits, and proof of this act was the substantial monetary offers he received for the film.

Pursuant to an offer from Station KUUU-TV, Homer sells a copy of his film for $5,000 and the film is broadcast forthwith.

The program director of KZZZ-TV happens to be watching KUUU-TV's airing of the film and decides to buy a copy from KUUU-TV. The Station Manager of KUUU-TV decides to sell copy of the film to KZZZ-TV for $7,500.

Quite coincidentally, Homer learns of this proposed transaction and immediately contacts the program director of KZZZ-TV to offer the film for $5,000. Although the program director is attracted by Homer's offer, he tells Homer that he is too late, the contract of sale has been signed and delivery is expected the next day.

Homer is now incensed by these circumstances and demands that the Station Manager of KUUU-TV disgorge his profits, which he claims are rightfully his. Naturally, the Station Manager refuses this course of action and, to make matters worse, tells Homer of his plans to sell the film nationwide.

Is there any way to help poor Homer?

Comment:

Homer may be a creative genius, but his imprudent actions have cost him dearly, as he can neither prevent the sale, distribution or broadcast of his "own" film. Under the Copyright Act, Homer, in selling the film to KUUU-TV

without first having secured a copyright, has dedicated and gifted his production to the public. Consequently, although KUUU-TV cannot secure a copyright on the film, they can certainly attempt to market copies and make a profit on the sales.

Assuring Copyright Protection

The various requirements, as they pertain to copyright in general, and the results of failing to adhere to these requirements, are discussed below in chronological order:

The first formal requirement in securing statutory copyright is publication (unless excepted) of the work where a proper copyright notice is affixed in a prescribed position. Failure properly to affix the notice by either the use of an incorrect symbol or by misplacement on the work can be fatal, and the work may be thrown into the public domain.

In general, a copyright notice consists of the word "Copyright," the abbreviation "Copr.," or the copyright symbol which is an encircled letter, "©". In addition proper notice also must include the name of the copyright proprietor, and if the work is a printed literary, musical or dramatic work, the year in which the copyright was secured (which in most instances is the year of first publication.)[6] The precise requirements with respect to form and placement of copyright notice, as these requirements pertain to particular works, will vary, depending upon the nature of the tangible object which embodies the copyrighted work.

Properly affixing copyright notice is accorded significant importance because it is the only way that the public can properly know whether a work can or cannot be copied without subjecting the copier to liability. Those in the broadcasting field must be particularly careful to affix the copyright notice properly. Generally, the notice is affixed to the opening and/or closing reels of a film. However, where a film consists of a number of reels which are subject to independent use (as an hour program consisting of three separable episodes), it is necessary to provide notice on each reel in order to assure adequate protection. Otherwise, if the episodes were released independently, failure to provide notice could result in the loss of copyright protection for that segment.

Once a work has been published with proper notice of copyright, the proprietor traditionally registers and deposits copies with the Copyright Office. This action does not create the copyright, but merely records it and allows the owner to maintain an action for infringement. Although an action for infringement cannot be commenced until registration and deposit, it is sufficient if the proprietor places the material in the mail the same day he files suit.

---

[6]Nimmer, supra note 2, at 304.

Generally, mere delay in complying with the statutory requirements for registration and deposit of a copyrighted work does not effect a forfeiture of the copyright. The statute will allow a copyright holder to commence action until these requirements are met; however, forfeiture of the rights is considered too serious a penalty for mere delay. However, failure to comply with the notification requirement could result in a forfeiture of any copyright.

The deposit requirement varies depending upon the type of work involved. As a general rule, "two complete copies of the best edition thereof then published. . ." must be deposited with the Copyright Office; however, this requirement is subject to broad interpretation. As for unpublished works, the initial requirement calls for one complete copy, and a subsequent deposit at the time of publication. In addition, any deposit with the Copyright Office must be accompanied by a Registration Certificate, which, among other things, classifies the work in one of the 14 categories.

The final statutory requirement is, of course, the payment of filing fees in the amount of $6.00 per deposit.

Duration of Copyright Protection

The term of copyright protection accorded to works under common law is indefinite, since such copyrights can continue in perpetuity absent publication. In contrast to this situation, statutory copyright is of limited duration. Under the Copyright Act, the initial term of copyright is 28 years, usually commencing on the date of first publication (or upon the registration of an unpublished work).

The initial term of copyright may be extended for a renewal period of 28 years, provided a renewal copyright is obtained in accordance with several strict requirements. A successful renewal commencing at the expiration of the initial 28-year term, therefore, results in a total of 56 years of protection.

Transfer of Statutory Copyright

Copyrights may be transferred, assigned, granted, mortgaged, or bequeathed to individuals or corporations by relatively standard and simple contract bequest procedure. The assignment of the copyright must be recorded if the transferee is to receive full rights. Assignment of copyright can create special pitfalls and issues which all parties involved should be aware of.

Hypothetical 8–4

Jonathan Frock, author of the manuscript entitled Edward Alden Pigeon, *a brief novel about the life of a pigeon, copyrighted his book*

and assigned the rights in the novel to Best Book Company by the following instrument:

"I, Jonathan Frock, do hereby assign the copyright of my novel Edward Alden Pigeon to Best Book Company in exchange for $2,000.00."

Best Company published the work which became a smash success rising to the top of the best-seller list within months of its publication. Thereafter, Best assigned the movie rights in the novel to Gemflics, Inc.

Gemflics trained a pigeon to star in the movie and produced a very successful film on the life of Edward Alden Pigeon. Following its initial run, Gemflics assigned the television rights to the movie to the National Broadcasting System.

NBS made certain changes in the sequence of the film and showed it as a nature program running for three distinct and separate episodes. NBS did not provide any additional copyright information on the film other than what Gemflics had placed on the film; therefore, the first reel had the appropriate copyright notice but the second and third reels of the film did not.

Comment:

This assignment process has created a number of legal problems for the individuals involved.

First and foremost is a question of whether by assigning the copyright to Best Book Company, Mr. Frock gave up all rights to derivative works, namely movies and television programs. To have properly protected himself, Mr. Frock should have spelled out in the contract the additional derivative rights which were being transferred.

As the contract stands now, it is ambigious and more information would be needed to determine whether the productions of Gemflics and NBS were unauthorized versions of Frock's novel or whether they were permissible works made pursuant to an assignment. This is particularly important in view of the failure of NBS to provide adequate copyright notice on the second and third episodes. If the assignment encompassed the movie and television rights, as well as the novel rights, NBS' failure to provide adequate copyright notice would be attributable to Frock and as a result, he could not complain if other persons copied those portions of the production which had fallen out of copyright. Of critical importance would be the language of the assignment agreements between NBS and Gemflics and Gemflics and Best Book Company.

Renewal Rights

As a general rule, unless explicitly transferred, renewal rights are exercisable only by the author, if living, and if not, then for the benefit of his widow and surviving children. The reasoning behind this law is the protection of imprudent authors who sold their copyright at an early stage, and who, in doing so, unknowingly relinquished a very profitable asset.

We can attribute this very unusual renewal provision to an overly-paternalistic Supreme Court which described the average author as "congenitally irresponsible . . . [and] frequently . . . sorely pressed for funds. . . ."

Whether this rationale is justified or not, certain exceptions have been enumerated which would vest renewal rights in the proprietor rather than the author.

The most notable exception is works copyrighted by a corporate body, other than an assignee or licensee of the individual author, which basically applies to works derived from mutual contributions by several members of a corporation.

Another exception is works copyrighted by an employer but created by a hired employee. In these instances, one must surmise that the author will theoretically profit from his successes in the form of salary or bonus and thus does not need a second chance to reap the benefits of his creation.

Fair Use Doctrine

Although nowhere mentioned in the Copyright Act, there is unquestionably some kind of privilege to make limited use of copyrighted materials without obtaining permission from the copyright holder. Because the doctrine is nebulous, it is difficult to distill into practical guidelines. Basically, "fair use" is merely a way of describing "insubstantial copying," with "substantiality" depending upon particular circumstances. Recognition of this privileged copying depends upon the following elements:[7]

1. The nature of the plaintiff's authorship and intention (e.g. greater protection is given to works of imagination, like a poem, than to a reference book, meant to be used as source material).
2. The status and purpose of the user (as scholar, reviewer, compiler, or parodist).
3. The extent of the use, both quantitatively and qualitatively.
4. The effect of the use of the copyright owner's interests. Is the use competitive or non-competitive? In either event, is it likely to diminish the value of the copyright?
5. The absence of intent to plagiarize, especially as evidenced by proper acknowledgment of the copyrighted source.

Hypothetical 8–5

The popular television reporter Sonia Baubbles, during her syndi-

[7]Benjamin Kaplan and Ralph S. Brown, Jr., *Cases on Copyright* (Brooklyn: The Foundation Press, Inc., 1960), at 309–310.

cated newscast, after the death of a popular rock songwriter, Janis Poland, noted "She will be forever remembered for her work AIRPLANE MAGIC." Sonia then recited from her memory the text of Airplane Magic. *She went on to discuss the tragic way Miss Poland died and told her viewers how other celebrities reacted to the news.*

Comment:

Since the work Airplane Magic *was under copyright during the newscast, the question is whether Miss Baubbles infringed the copyright in the song or whether her use was somehow permitted by law.*

Under the second element above (purpose of user), it is clear that Sonia's purpose was not to compete with the copyright holder for sales, but rather to provide historical information in the course of reporting news. Therefore, such rendition would constitute "fair use."

Hypothetical 8–6

Dr. Rhineholt Boldt authored a mammoth textbook on the effect of cigarette smoking on the human being. In the course of a one-minute television advertisement by the National Health Insurance Company, one short sentence of Dr. Boldt's book was taken out of context and used by the Company to emphasize the relationship between smoking, cancer, and the human voice.

Comment:

In the context of a one-minute advertisement, this "taking" is both quantitatively and qualitatively insubstantial. If the total advertisement ran only 30 seconds and three long sentences from the book were used, Dr. Boldt could properly argue that the taking was an unfair commercialization and appropriation of his work which infringed his copyright in the text.

Hypothetical 8–7

On a weekly television series "Your Show! Who Knows?" the stars did a skit entitled "One Day in the Life of Ivan Schwartz," a parody of the Russian novel "One Day in the Life of Ivan Denisowitz." The burlesque followed Ivan through his day in a work camp, but consisted solely of slapstick routines with no serious content.

Comment:

As a general rule, when the alleged infringing work is of a different character than the copyrighted work, i.e., a humorous taking from a serious copyrighted work, the courts are lenient with the defendant's use of the material, locale, theme, setting, situation, and even basic bare plot.

Furthermore, a parody is usually permitted to go even to the point of developing the character, title, and some small part of the development of the story, and possibly some small amount of dialogue.

However, the creator of the parody runs a calculated risk that a court may

find the taking too substantial and, therefore, an infringement. Since the defense "I only parodied" the copyrighted material is not a defense per se, the issue is always resolved on the facts of the particular case.

Hypothetical 8–8

WED-TV, an educational television station, prepared a one-half hour documentary on the roots of the American Civil War for its "School of the Airwaves," a television series which provides educational programs which students may view on a "for credit" arrangement with local colleges.

In the program, the producers borrowed heavily from a film made by Didactic Films Associates (DFA) entitled "The Administration of James Buchanan: The Forgotten President." DFA makes educational films for television and school use. Also, 12 photos which originally appeared in the Encyclopedia Anglicana *were used in the documentary, as well as the entire photographic text from a special "collectors" pictorial volume of the Civil War by the* Encyclopedia Anglicana.

By a special arrangement with Mecca Cable Television, Inc., utilizing experimental CATV equipment, WED-TV arranged to have viewers press a button on their receivers which activated duplicating equipment which gave viewers high-quality copies of the special collector photos.

The producer of the films did not obtain copyright permission from any of the above sources.

Comment:

Educational television can make fair use of certain copyrighted works based on their educational stations.

Although the classroom allows for a substantial and unregulated use of copyrighted work, the permissible bounds of television are more circumscribed. While some use of the DFA film would be allowable, a substantial borrowing runs a serious risk of copyright infringement.

Even though scholarly intent is involved, that will not save the program, because it is available to non-students as well as students and competes directly against DFA for an audience. The use of the Encyclopedia Anglicana *photographs raises a question of the substantially of the taking, and while the use of 12 photographs would not infringe upon the massive encyclopedia, the complete taking of the smaller work would infringe the copyright.*

The reproducing ability of the CATV technology raises additional copyright problems which are presently unresolved. Xerox and other reproduction machines allow for substantial copying of protected works. The "fair use" theory has allowed the copier to infringe the work without being subjected to copyright liability. However, it is likely that the Courts or the Congress will attempt to curtail the stampeding infringement of copyrighted works by placing some copyright liability on Xeroxers or other similar copiers.

The unfairness of the current situation is highlighted by the above-example where the CATV technology allowed for reproduction of the collector's edition.

Although this copying provides low-cost educational matter, it substantially diminishes the market of the publisher and allows the cable company or the television station to reap profits unfairly.

Permission to Use Copyrighted Material

Assuming that a particular contemplated use of copyrighted work should exceed the permissible bounds of "fair use," how does one secure permission to use the work?

The answer is simple: Locate the *copyright holder* (his name should appear on the copyright notice) and secure his *written consent.* Often the copyright owner will license another individual or corporation, and this *licensee* will have all of the rights and privileges in the work.

Consequently, tracking down the relevant party may be a time-consuming task, but necessary nonetheless. Even when the copyright holder is finally located, there is no assurance that permission will be granted; naturally, the holder is under no obligation to consent to the utilization of his material.

Because of their status as non-profit organizations, certain materials are automatically available and licensed for use by noncommercial stations. These materials include the following:

AUDIO

CBS EZQ Library. A number of audio-tapes cleared for all use.

Electra Sound Effects Library. Cleared for all use.

Capitol Music Series. Cleared for all use.

ASCAP Music license has expired: Continued use under fair use doctrine.*

BMI/SEAC gratis music licenses are in effect and are valid until revoked.*

VIDEO

U.S. Government Films. Some cleared for TV use.

Visual Dynamics (and other film clip services.) Purchase of desired clip required (non-exclusive use); clearance obtained with purchase.

NET Film Library. Excerpting by special permission at ½ hour rates for full programs.

UPI News pictures from previous contract service. For local use only.

NOTE: Materials not clearable at any price:

National Geographic Films and Photos
Life Magazine Materials
Walt Disney Materials[8]

---

*Not to be re-recorded and distributed.

[8]Lawrence Stone, *Guidelines Concerning the Copyright Law*, 1971, at 7,8.

Areas of Special Concern

Motion Pictures and Videotape Recordings

The Copyright Act distinguishes between motion picture photoplays and motion pictures other than photoplays. The former category includes "published or unpublished motion pictures that are dramatic in character and tell a connected story, such as feature films, filmed television plays, short subjects, and animated cartoons having a plot."[9]

Motion pictures other than photoplays include "published or unpublished nondramatic films, such as newsreels, travelogs, training or promotional films, nature studies, and filmed television programs having no plot."[10] This latter category relates to what are generally called "documentaries," with the inclusion of advertising shorts and news and sports commentaries.

This distinction is important because the Copyright Act seems to provide different standards of infringement for the two types of motion pictures. Although exhibiting a motion picture may not be deemed tantamount to a "publication" for purposes of throwing the work into the public domain, it still may be an infringement if the exhibition occurs without prior consent. The basis most commonly accepted for finding that an unauthorized motion picture exhibition constitutes an infringing act is by regarding it as a "drama" and hence entitled to the public performance rights of a drama. This being the case, protection would not extend to motion pictures other than photoplays which clearly are not dramas. Thus, it is arguable that there is no way to prevent exhibitions of the non-photoplay motion picture.

It would be foolish to rely on this theory in broadcasting non-photoplay motion pictures. There is another line of cases which holds that an exhibition is a "copy" and hence an infringement when the exhibition is unauthorized. This theory has been dubbed the "Ephemeral Copy" doctrine.

Although this rationale is probably no closer to Congress' intent than the "dramatic composition" theory, at least it is consistent and would protect both types of motion pictures without unjustifiable distinctions. Obviously, it was never contemplated that one type of motion picture was more deserving of protection than the other. This theory, incidentally, covers not only public broadcasts of motion pictures, but also private exhibitions of "bootlegged" prints.

Finally, it should be emphasized that an amendment to the Copyright Act in 1952[11] provides yet another route whereby motion

---

[9]37 C.F.R. Sec. 202.15(a) (1959).

[10]37 C.F.R. Sec. 202.15(b) (1959).

[11]Act of July 17, 1952, 66 Stat. 752.

pictures other than photoplays may be protected from unauthorized public exhibitions. Under the amendment the copyright owner of a "nondramatic literary work" is granted the exclusive right "to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may be in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever."

The inclusion of the phrase "any transcription or record" would seem to encompass motion picture film. The crucial question is whether motion pictures other than photoplays are truly "nondramatic literary works." Certainly they are nondramatic; that they may be literary works is debatable.

Assuming that motion pictures other than photoplays are, in fact, within the above provision, by analogy to similar passages it is probable the courts will hold the entire passage controlled by the final clause, and require that an infringement be a performance in public for profit. Although the single exhibition of a nondramatic literary work by a non-profit broadcaster may be deemed a not-for-profit performance, certainly the rental distribution of such a work would violate at least the spirit of the law, if not its very terms.

Is the Statutory Copyright Necessary?

As indicated above, there has always been a disparity between the degree of publication which will be deemed an infringement, and the degree of publication which will divest an unprotected author of his common law copyright.

The creative movie producer encounters copyright problems quite distinct from those facing the exhibitor. For the producer, the principal issue is whether or not to seek statutory protection, and if so, at what stage in the distribution process. This question bears very slight resemblance to the question which confronts the broadcaster, viz., to what extent must the exhibition be cleared by prior consent.

There are no judicial pronouncements on the subject of television broadcast of motion picture films and copyright divestiture. However, by analogy to decisions in the theatrical film realm, it is possible to conclude, with appropriate caution, that broadcast of a film, per se, is not a publication.

Further applying the principles from the theater controversies, it may be said as a general rule that publication of television films occurs when they are publicly sold, or when they are made available for general distribution or syndication to other television stations.

Accordingly, a clear case is presented when a television producer sells or distributes film prints to independent television stations. The difficult question, however, concerns limited distribution to affiliated

stations of a non-profit distribution to social, religious or educational groups. Here, the answer must be surmised on the basis of educated guesswork, perhaps aided by extra-sensory perception.

The probable consequences of distribution to affiliates or charitable institutions will not include the divestiture of common law copyright, though indiscriminate acts of this sort may invite other unanticipated problems. It is most likely that distribution to a definitely selected group for a limited purpose would be deemed a "limited publication," or in another sense, the phenomenon in which a publication is not a publication.

The "limited publication" doctrine was developed in the courts to mitigate the harsh rule that publication divests common law copyright. Thus, for purposes of divestiture, there are two types of publication, general and limited. Whereas the former may be costly to the author because he may lose his common law copyright, the legal burden involved in establishing the latter can result in a comparable financial disaster.

In distinguishing between the two, it should be noted at the outset that the "limited publication" doctrine is never available to immunize an *infringer* if, without authority, he publishes another's work in violation of the author's rights under the statute. The protection afforded by this doctrine serves only the benefit of the imprudent author.

One court has described limited publication as a "publication which communicates the contents of a manuscript to a definitely selected group and for a limited purpose, without the right of diffusion, reproduction, distribution or sale." *White v. Kimmel*, 193 F.2d 744 (9th Cir. 1952). Thus, the circulation by an author of his latest novel to a close group of friends with the express or implied understanding that the copies were not to be copied, duplicated or circulated, was held to be a limited publication. *Id.*

Similarly, an advance distribution of copies to associates of the trade for purposes of review, criticism, or performance was likewise deemed to be a limited publication. *Rushton v. Vitale*, 218 F.2d 434 (2d Cir. 1955).

Although the parameters of the two keys concepts "selected group" and "limited purpose" are quite vague, it is clear that a limited publication must be restrictive both as to people and purpose. In addition, we know that it takes less circulation to constitute publication for purposes of meeting the statutory condition precedent for copyright protection than it does to divest an author of his common law copyright.

Parenthetically, it should be noted that the above conditions could theoretically lead to the anomalous result of an author's concurrently claiming both statutory and common law rights in his work if he has accomplished an investitive but not a divestitive publication.

An author might try to claim the benefit of the Copyright Act for a

period of 56 years and thereafter claim common law rights in the same work in perpetuity—a result which no court in the land would countenance; one of the earliest copyright decisions American law stands for the proposition that once a work acquires a statutory copyright through an investitive publication, all common law rights terminate even in the absence of a divestitive publication. *Wheaton* v. Peters, 33 U.S. (8 Peters) 591 (1834).

Sound Recordings

Prior to the passage of the Sound Recording Act of 1971, which amended the Copyright Act, there was very little protection for persons who produced "sound recordings."[12]

Certainly, the notations and lyrics were amenable to copyright protection under the Copyright Law as "musical compositions." But the actual rendition of the notes and the lyrics and the fixed form (a record or a tape) was not protected.

With advances in the technology of mechanically reproducing sound recordings, certain companies, taking advantage of the booming markets in tapes and records, have attempted to market under private labels records and tapes produced by legitimate recording companies. There are two kinds of such recording companies.

One kind utilizes the compulsory licenses provisions in the Copyright Act by notifying the copyright holder in the music and lyrics, paying the statutory copyright fee and notifying the public that the record has been made from a pre-recorded selection. In short, this kind capitalizes on the absence of copyright protection for the actual rendition fixed on a record.

The other kind of company tapes or records the original without ever notifying the copyright holder or paying the statutory royalty. Although the latter type of company is more appropriately described as "a record pirate," established recording companies, which initially market the records, have attacked both practices as piracy because these rivals take the most successful and popular works and sell them at a cost well below the original producing company's market price.

In recognition of the unfairness created by the absence of federal control, the U.S. Congress passed "The Sound Recording Act of 1971" which gave limited copyright protection to sound recordings. Under the Act, sound recordings fixed between February 15, 1972 and January 1, 1975 are copyrightable.

The Act provides civil penalties for infringement of the copyright,

---

[12] "Sound Recordings" are defined as "works that result in a fixation of a series of musical, spoken or other sounds, but not including the sound accompanying a motion picture." 17 U.S.C. 26.

and criminal penalties for wilful infringement. Since the Sound Recording Act does not apply retroactively, records made before February 15, 1972, cannot be copyrighted. This gap in protection creates a certain dilemma for broadcasters.

Hypothetical 8–9

Stacillia Manaegrue runs a radio station in Illinois. While thumbing through the morning mail one day she noticed a letter from a C. Oliver Percy Youngblood.

Mr. Youngblood was interested in purchasing advertising time in order to help market a new product he was selling, "The Golden Tapes"–tapes of records made since 1960–at remarkably low prices ($2.00 apiece for each 8 track stereo tape). Stacillia was interested in the request for time but recalled reading in "Radio and Record Magazine" about a law concerning sound recordings. She searched through her files and found the back copy which described the requirements of the new copyright law and then wrote the following letter to Mr. Youngblood:

> *We are interested in your request to advertise on our radio station. However, under the copyright law of the United States, we understand that for records made after February 15, 1972, you must have permission from the copyright holder before you can sell such tapes.*
>
> *Therefore, please forward that information to us and we will be happy to air your advertisements concerning those records or tapes. As to tapes of songs made before 1972, we'll be happy to air your advertisements.*
>
> *Enclosed is a copy of our rate card which provides a detailed explanation of our advertising charges. Your may contact me further concerning the times you would be interested in purchasing.*

Comment:

Stacillia's interpretation of the Copyright Act and its lack of protection for works made prior to February 15, 1972, is seriously defective because she failed to consider the implications of state law in the regulation of pirated tapes and records.

Quite a number of states have passed criminal tape piracy acts which make it a crime mechanically to reproduce the record or tape of another and then market it. Also, state courts have provided money damages for unfair competition in cases of tape piracy.

Although a nice legal argument can be made which urges that the copyright field has been preempted by the Federal Government (that is, that the federal regulatory scheme is so pervasive and extensive that it makes it constitutionally impossible for states as well to regulate the field), the Supreme Court in a 1973 opinion, Goldstein v. California 412 U.S. 546 (1973), held that neither the

Constitution nor the Copyright Act prevents states from regulating by means of unfair competition or criminal statutes tape or record piracy of works fixed prior to February 15, 1972.

In consequence, Stacillia could subject her radio station to civil and criminal liability as a party assisting in the violation of the common law rights of the original recording company. A wiser course for Miss Manaegrue would have been to refer the letter from Mr. Youngblood to her attorney for appropriate evaluation.

CATV and Copyright

As background to an appreciation of the problems of CATV and copyright, two Supreme Court cases are important.

In 1931, the landmark case of *Buck* v. *Jewell-LaSalle*, 283 U.S. 191 (1931), first articulated the doctrine of simultaneous multiple performance. In that case, the defendants operated a master radio receiving set which was wired to each of the public and private rooms in their hotel. Without prior permission, the defendants picked up, via their master receiving set, programs broadcast over the air just as any home listener would.

The plaintiff, who was the owner of a copyright on a popular song broadcast over the local radio station, sued both the station and the hotel owners for infringing his copyright by failing to procure permission to "perform" his music.

The Supreme Court was asked to decide the question of whether or not the acts of the hotel proprietors, in entertaining their guests in this matter, constituted a performance of the plaintiff's composition within the meaning of the copyright law. The majority opinion of the Court concluded that the reproduction and amplification of the sound waves by the defendant did, indeed, amount to a performance.

Despite the inadequacies of this particular decision (there are several), the *Jewell-LaSalle* doctrine remained on the books for many years. (It is interesting to note, however, that ASCAP and BMI have never chosen to enforce the doctrine to its logical extreme by insisting that bars, restaurants, and other commercial establishments adhere to the standard imposed upon hotels.)

However, the Supreme Court in *Fortnightly Corporation* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), apparently retreated from its original position. In *Fortnightly*, the Court considered whether a CATV operator infringed a movie company's copyright when its subscribers viewed a copyrighted movie broadcast by a distant television station.

The Court held that the CATV operators do not "perform" the programs they receive and carry in the conventional sense of the term or in the way Congress intended when it enacted the copyright law. It was

argued that if CATV owners were liable for infringement then any apartment house owner who erects an antenna for his tenants might be similarly liable.

The Court also remarked that CATV operators only enhance the viewer's capacity to receive the broadcaster's signals and do not engage in the traditional role of a broadcaster, *i.e.*, selecting and editing programs. Thus, the *Fortnightly* case has permitted CATV systems to take signals of distant stations off the air and send them into subscribers' homes without regard to payment of a fee for the use of the copyrighted material or to agreements between the broadcasting station and the copyright holder.

Arguably, the multiple performance doctrine enunciated in *Jewell-LaSalle* is dead; however, the case was not directly overruled by the Court, but merely dismissed as a "questionable 35-year-old decision."

Reform Appears Likely

Presently, the copyright statute is under review by Congress and reform in the coming years appears likely. CATV is no longer viewed as the passive instrument of communications which the Court in *Fortnightly* described.

CATV's potential to revolutionize communications presents enormous problems for balancing the interests of copyright holders, CATV operators, and the public. For example, it has been suggested that CATV's multi-channel capacity could provide a means for presenting viewers facsimile reproductions of newspapers, magazines, books, documents, etc.; of creating informational retrieval systems; of providing low cost public access, electronic delivery of the mail, shopping by CATV, tickertape information (news, weather and sports), and closed circuit programming, among other things.

The *Fornightly* case cannot be taken for the proposition that all such programming presented on CATV is free of liability due to copyright infringement, because the Court did not face the issue of whether original programming on CATV or the informational services of CATV meet the "performance" requirement of copyright law. To justify liability, the Court could resurrect the precedent of *Jewell-LaSalle*.

At least one Court of Appeals has already taken this position and has held a CATV system liable for copyright infringement where a distant signal (one generally not received by local television sets) is carried. *Columbia Broadcasting System, Inc.* v. *Teleprompter Corp.*, 476 F.2d 388 (2nd Cir., 1973). The Court reasoned that the cable television system, by bringing in distant signals, acts as more than just a passive receiver of the signals and should more properly be described

as "performing" programs in communities which would not ordinarily receive them.

On appeal to the United States Supreme Court, the high court rejected this argument and held that importation of distant signals from one community to another does not constitute a performance under the Copyright Act. *Teleprompter Corporation* v. *Columbia Broadcasting System, Inc*, 415 U.S. 394 (1974).

Nevertheless, a clear case of copyright infringement could exist if a CATV system would carry copyrighted material as part of its local origination obligation. In such event, the cable system acts more like a broadcaster or performer so that liability would attach.

For all television signals carried by CATV, the impact of carriage could increase liability in cases of actual copyright violation. For example, educational stations may in some cases be carried on any system within their own state. Thus, through CATV operations, a particular program which is found to violate a copyright could be transformed from a local program of limited impact to one which reaches millions of viewers across the state. In assessing damages, the courts may look to the reach of the signal, and increase liability accordingly.

These issues and many others are now emerging and some may soon be presented to the courts. If and when they are, before judges impose liability they will likely defer to Congress for a clarification of national policy. But powerful interests on both sides of reform of the Copyright Law have locked Congress into a stalemate, and resolution of the basic policy issues regarding CATV may be years away.

Chapter 9

Unfair Competition

How far an individual may go in using or imitating the work of another is an important question in broadcasting. Copyright places certain limits on using works of another, but many expressions or devices such as titles, names, and symbols are not copyrightable. Frequently, however, where copyright law affords no protection, the law of unfair competition does.

Unfair competition is a broad category which covers a wide variety of legal issues, including trademark law, misappropriation of the work or entitlement of another, and deceptive and false advertising.

Trademarks

A trademark is a symbol or word related to a good or service which points distinctly to an owner or origin and permits exclusive appropriation by one person. Trademarks are governed by state common or statutory law, as well as by a federal law.

The federal statute governing trademarks (The Lanham Act, 15 U.S.C.A. §1051 et seq.) describes the several types of marks:

Trademark, Trade or Commercial Name, Service Mark, Certification Mark, and Collective Mark.[1]

Any mark may be classified as strong, weak or suggestive. A strong mark is an arbitrary name or symbol such as "Kodak." A weak mark is descriptive of the item or is a surname, such as "The Sea Food Shop" or "Samantha's Gang." A suggestive mark combines elements of strong and weak marks—it is not quite arbitrary because it conjures up certain images but it falls short of being descriptive. "Halo" and "Glocoat" are examples.

The mark's strength is relevant to whether it permits exclusive appropriation by one person. The stronger the mark, the more likely one is to obtain protection against all others. Interestingly, trademark case law frequently reflects the tension between those judges who object to any individual's monopolizing a term, and those who support preserving the distinctiveness of trademarks.

In a competitive world, those who have successfully attracted consumers seek to maintain their unique identification. Copyright protection does not extend to brief titles, characters, names, etc. Trademark law, however, provides limited protection for certain qualifying marks in order to limit deception. This enables consumers to rely on a familiar mark as representative of a certain quality. It also limits confusion which could unfairly divert sales, discredit reputation, or even dilute the quality or uniqueness of a mark.

There is no requirement that one register every trademark with the Federal Government. Indeed, the right to use a distinctive mark in a particular market exists under common law, enforceable in state court.

---

[1]As defined in the Trademark Act, 15 U.S.C.A.o § 1127, these marks are as follows:

(a) *Trademark:*

Any word, name, symbol or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others.

(b) *Trade Name and Commercial Name:*

Individual names and surnames, firm names and trade names used by manufacturers, industrialists, merchants, agriculturists, and others to identify their businesses, vocations, or occupations; the names or titles lawfully adopted and used and any manufacturing, industrial, commercial, agricultural, or other organizations engaged in trade or commerce and capable of suing and being sued in a court of law.

(c) *Service Mark:*

A mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others. Titles, character names and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor.

(d) *Certification Mark:*

A mark used upon or in connection with the products or services of one or more persons other than the owner of the mark to certify regional or other origin, material, mode of manufacture, quality, accuracy or other characteristics of such goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.

(e) *Collective Mark:*

A trademark or service mark used by the members of a cooperative, an association or other collective group or organization and includes marks used to indicate membership in a union, an association, or other organization.

However, to obtain a mark protectable anywhere in the nation (when the proper requirements are met), the mark must be registered with the U.S. Patent and Trademark Office.

Acquiring a Trademark

Under the Lanham Act, the only trademarks which are protectable are those which have been "affixed to the product" and "used in commerce."

"Affixation" requires that the word or device have a practical or operative existence and be placed in some manner on an article, or represented as a symbol and so associated with an article, as to indicate ownership.

"Used in commerce" means that one cannot obtain a trademark merely by declaring a property right in a term or symbol. One must actually have employed the mark in some form of commerce.

Furthermore, certain marks (generally weak marks, trade names, service, and certification marks) must have gained "secondary significance" in a defined market. "Secondary significance" refers to long association of a mark with an exclusive source, which the mark then symbolizes to persons in a trade or to the public. In short, it has a unique market reputation or distinctiveness.

Under the trademark statute, distinctiveness may be established by proof of substantially exclusive and continuous use in commerce for five years proceding the date of filing for a certificate of registration.

Hypothetical 9–1

Early in 1955, two educational broadcasters, Kenneth Cookster and Albermarble Clark discussed an idea for a new televison program entitled "Generation." The idea of the program would be to capture the primary themes and events of particular ages. Sir Arthur Brimsby Butterworth was suggested as an ideal narrator.

Prior to the development of the program in concrete form, Salamar Logo produced a situation comedy for television entitled "The Generations." The show turned out to be a puerile comedy based on the conflict between parents and children. The program ran for eight weeks and then was cancelled. Nevertheless, after its second week, Logo filed an application to register the title as a service mark, and registration was accorded in 1956.

Meanwhile, Cookster and Clark carefully nurtured "Generation." In 1960, the program was first aired. The series which was greeted with critical acclaim ran for six years. After its initial run, the production went into syndication and ran for another eight years. In addition, movie houses and schools showed independent episodes frequently. In 1900, based upon advice of counsel the team filed an application for registration of the title as a servicemark.

Late in 1972, Gemflics, Inc., the movie moguls of the 50's and 60's, to bolster sagging profits, decided to produce television shows as a new source of revenue. One project was a series entitled "The Generation"–a fictional representation of the great moments of the 70's.

When the program was first aired, Cookster and Clark charged Gemflics with infringement of their trademark in the title "Generation." Also, Salamar Logo resurrected his interest and claimed the program infringed his old television series.

Comment:

Even though the hypothetical situtation does not involve the rights of Cookster and Clark in the title "Generation" in 1955, it is clear that they obtained no right to the title before it was actually used. Therefore, they could not prevent Logo from entitling his series "The Generations." However, during the decade of the 60's and into the 70's, Cookster and Clark clearly developed the program and presumably, it may be established that they had achieved "secondary significance."

Thus, although the mark is a weak one which would generally be entitled to limited protection, they could obtain an order restraining Gemflics from using the title, whether or not the mark is accepted for registration.

There is a question as to whether it would be accepted for registration because the Trademark Office would note the conflict between the registration of Logo and the application of Cookster and Clark. In that event, a trademark proceeding would likely ensue, testing which party was entitled to registration. Given Logo's absence from the scene for almost 20 years, it is most likely that Cookster and Clark could prevail with the argument that Logo abandoned the registered mark.

Furthermore, if it could be shown that Logo knew about the Cookster and Clark program, his failure to proceed against them earlier would make him guilty of laches, that is, delaying unduly in protecting a legal right, thereby making it inequitable for a court or agency to afford the usual remedies. In this context, it is unlikely Logo could prevail over Gemflics either.

Some Marks Unprotectable

Nevertheless, one is not automatically entitled to protection of a mark merely because he has met the tests of "affixation," "use," and "secondary significance," for certain marks are statutorily or inherently unprotectable. If a mark is purely descriptive, it cannot be registered under the trademark law. Thus, "The 6 O'Clock News" is too descriptive to be protected. However, if the title is more suggestive than descriptive, it may be protected. Under that rationale, the program titles "Face the Press" or "Third Monday" are registerable.

If one creates a new product or service and successfully popularizes its mark, there is a risk that it may become a generic term not entitled to protection, such as "aspirin" and "cellophane."

Geographic terms are not protectable except in rare instances; thus, "Brazilian Coffee" is a geographic and descriptive mark which would not receive protection. However, if the mark used a geographic term in conjunction with other suggestive terms, such as "Dateline: Tulsa," or if there is strong "secondary significance" between a mark and the source which employs a geographic term so that failure to protect could result in serious confusion, the mark will be protected.

Surnames which are weak marks raise particularly hard problems. The more common a surname, the less likely it will be protected in its field or permitted to foreclose use by others in different markets. For example, "Walter Cronkite and the News" may be protected; if another Walter Cronkite appeared on the air in "The Walter Cronkite Show" or "The Cronkite Show," then the use of either title could be enjoined. However, if the producers of "Robert Smith and the News" sought to enjoin the use of "Robert Smith" by another personality, the protection secured, if any, would be very limited. "Cronkite" is a particularly unusual name with strong "secondary significance," while "Smith" is common and, presumably, of weak "secondary significance."

Furthermore, courts are reluctant to enjoin a person from using his own name in his business. Television showman Ed Sullivan was unsuccessful in preventing a small-town television repairman from calling his business "Ed Sullivan Radio and TV Inc." The court stressed that it would not enjoin an individual's use of his own name where there was no intent to deceive and the businesses were noncompetitive.

This case introduces the important problem of extending a mark's protection to another market, either in a geographic or commodity-service sense. This issue will be explored in greater detail shortly.

The doctrine of "secondary significance" has been applied not only to words or symbols but to physical attributes as well. However, only *non-functional aspects* of an article may be protected. Thus, the entire configuration of a product is not protectable under trademark law because as a whole it is functional. Also, if protection were possible, then one could avoid the rigorous tests of patent law and obtain protection from imitation under trademark law. Functional features are generally those which are necessary to the construction of an article in an engineering sense. Merely ornamental or decorative features, which serve no essential function, may be protected.

For example, the shape of a television antenna would be considered functional, and not subject to exclusive appropriation. However, if a station had some ornamental fixture attached to the tower which it used to symbolize its station, and if that ornament had achieved "secondary significance," that is, had come to identify the station in the public's mind, then the ornament would be a protectable mark.

Registering Trademarks Under The Lanham Act (The Trademark Act)

The purpose of the Lanham Act is to afford a procedure whereby individuals may register and protect a trademark. The Act creates two trademark registers in the Patent Office. The *Principal Register* is for trademarks, service marks, collective marks, and certification marks. A *Supplemental Register* is available for certain international marks, and all other marks which cannot be registered upon the Principal Registry and which are not prohibited by statute.

To obtain a Certificate of Registration, the applicant files a written application with the Patent Office stating:

1. The date of applicant's first use of the mark
2. The first use of the mark in commerce
3. The nature of the goods or service used in connection with the mark
4. The mode or manner in which the mark is used
5. That, to the best of the applicant's knowledge and belief, no one else has a right to use the mark or a similar one.

The applicant must also include a drawing of the mark and several facsimiles.

The statute specifically prohibits registration of a mark which:

> (a) Consists of matter which is immoral, deceptive, scandalous, or which may disparage or defame a person or an organization;
>
> (b) Consists of the flag or coat of arms or other insignia of the United States, any State or municipality, or any foreign nation;
>
> (c) Consists of a name, portrait or signature identifying a particular living individual except by his written consent, or the name, signature or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow;
>
> (d) Consists of a mark which so resembles a mark registered in the Patent Office or mark or trade name previously used in the United States by another and not abandoned, as to be likely, when applied to the goods of the applicant, to cause confusion, or mistake, or to deceive.
>
> (e) Consists of a mark which, (1) when applied to the goods of the applicant is merely descriptive or deceptively misdescriptive of them, or (2) when applied to the goods of the applicant is primarily geographically descriptive or deceptively misdescriptive of them, except as indications of regional origin may be registrable under [another provision of this law], or (3) is primarily merely a surname. See 15 U.S.C.A. §1052.

If a mark is accepted for registration, a registration certificate will be issued to its owner. The certificate is important in establishing enforce-

able trademark rights because it is evidence of the validity of the registration, the registrant's ownership of the mark, and his right to exclusive use (subject only to conditions or limitations stated on the certificate).

Anyone who believes he would be damaged by the registration of a mark on the Principal Register may oppose it within 30 days after filing. A verified petition to cancel a registered mark may be filed by anyone who believes he is or will be damaged by the registration.

If the cancellation petition is filed within five years of registration, a challenger may raise a variety of claims, including the five statutory prohibitions cited above. By far, the most common grounds for the filing of a cancellation petition during that time is that the opponent adopted a similar mark before the registrant filed his application. If the challenger proves his claim, then the mark is removed from the registration rolls. Under certain circumstances, (for example, if the challenger proved he used the mark first in interstate commerce) the challenger may then file his own application for registration of the mark.

After a mark has been registered for five years and there are no challenges to it, the statute provides that the right of the registrant to use the mark becomes "incontestable." While that provision does not mean that no one may ever again challenge the mark, it does mean that a challenger's arguments are limited. To cancel a registered mark after five years, one of the following statutory criteria must be established:

1. That the mark has developed into a generic term for a product or service
2. That the mark has been abandoned
3. That the mark is being used to misrepresent the source of the product or service
4. That registration was obtained fraudulently
5. That public notice was never given
6. That the specific statutory prohibitions a, b, or c, listed above were violated.

See 15 U.S.C.A. § 1115b.

In the case of certification marks, a challenge may occur at any time if the registrant:

1. No longer controls the mark
2. Engages in production or marketing of goods or services to which the certification mark is applied
3. Permits its use for purposes other than to certify
4. Discriminately refuses to certify or to continue the certification of any person who maintains proper standards.

By waiting until the five-year period runs its course before challenging a mark, a competitor of the owner of a registered mark may lose

certain rights. For example, assume a registrant decides to enforce his uncontestable right to use the mark against a party who adopted the same mark before the registrant. Generally, the prior user may continue to use his mark within his specific geographical market. However, he may be forced to add distinguishing words, such as "not associated with. . . ." It is important to note that by not challenging the mark before the five years ran its course, the prior user lost the opportunity to cancel the second comer's registration. (See Hypothetical 9–6.)

When a mark has been registered, the owner is entitled to place "®" or "Registered" after it as public notice. (This mark is akin to the "©" or "Copyrighted" symbols.) A registered mark should always be so identified to assure adequate protection. A certificate of registration remains in force for 20 years, and must be renewed after 20 years. The right to renew for periods of 20 years continues indefinitely, as long as the mark remains used in commerce. The statute also requires the registrant to file an affidavit with the Trademark Office, during the sixth year after registration or renewal, that the mark is still in use. Failure to do so could result in cancellation of the registration by the Trademark Office.

Protection of a Trademark

Registration under the Lanham Act ensures a registrant that if anyone uses or imitates a mark in commerce to deceive or confuse the public, the owner of the mark has a cause of action against the infringer. The remedies available are injunction against future use; destruction of the offending material (label, sign, advertisement); and money damages, which may include an accounting of profits of the infringer and up to three times the established losses of the registrant, as well as the costs of the action.

Not all uses of a registered trademark are actionable. In a truthful presentation, one may refer by name to a competitor's mark. For example, a station may announce that according to the Nielsen ratings for a certain week, "Martin Agronski: Evening Edition" outranks "The Merv Griffin Show" and "NBC Reports." Similarly, in marketing a new product which incorporates a brand name product, the seller may use the name of the well-known product. However, one must be careful not to distort facts; if a product involves repackaging or reconditioning a popular brand, the seller must clearly state the fact and not palm off his product as the popular brand. One such case involved a company which reconditioned "Champion Spark Plugs" and sold them with a label which highlighted the word "Champion" while noting that they were "reconditioned."

Also, deliberate or intentional infringement is actionable.

Hypothetical 9–2

A new educational television station serving the three states in the Midwest is about to commence operations. The managers of the station have selected as their newscaster a recent college graduate named Eric Blank. As part of his contract, Eric has agreed to change his last name to Swendergaad and KUUU intends to feature him in a daily presentation called "Eric Swendergaad: Eye on the News." The feature is scheduled opposite the network news programs.

KUUU's managers are aware of one well-known network commentator of the same name; in fact, they are hoping to capitalize on Eric's new name to attract viewers to the station. Also, they are planning a newpaper and magazine ad campaign to publicize the program. These ads will read: "Swendergaad's coming to KUUU . . . See 'Eric Swendergaad: Eye on the News' weekly at 6:30 P.M." To dramatize his "Eye on the News" they include in the advertisement a sketch of an eye which is amazingly similar to the logo of the national network.

Comment:

This case presents a clear intent on the part of the managers of KUUU to advance itself on the trademark of others.

Although individuals generally may use their own name in their business, if the network's Eric Swendergaad sues, he would be able to enjoin KUUU's proposed use of the name "Eric Swendergaad." Further, the network would have a trademark infringement claim against KUUU for the use of the "eye" symbol in the advertisements. It would likely be able to establish damages and, if the logo is properly registered under the Lanham Act, it would be entitled to treble damages because of the intentional nature of the violation.

"Confusing Similarity"

By similar reasoning, when television performers begin a new series after completion of a popular program, producers should take care to avoid viewer confusion with their star's previous show. This has been done, for example, by the producers of "The New Bill Cosby Show," (a predecessor being "The Bill Cosby Show"); The New Dick Van Dyke Show, ("The Dick Van Dyke Show"); and "Here's Lucy" ("I Love Lucy"). This differentiation is essential when the original program was broadcast by another station which has retained rights to that program.

While there is no general prohibition against a competitor's imitating another's mark, "confusing similarity" will not be permitted. Elements of the test of "confusing similarity" include:

1. The likelihood of mistake
2. The overlap of markets (both in a geographic and commodity or service sense), or the potential for expansion into the imitator's market by the owner of the original mark

3. The degree of distinctiveness of the mark
4. The degree of attention paid to marks
5. The length of time the mark has been in use
6. The intent of the competitor in adopting the mark.

In any case, where the imitation is so close to the original that the public is actually misled, the imitator will be required to distinguish the marks. Where a court finds intent to deceive on the part of the imitator, it will not only enjoin the use of the imitation but may assess actual and punitive damages.

State Anti-Dilution and Unfair Competition Laws

Instances of imitation may violate state "anti-dilution" and unfair competition laws, as well as The *Lanham Act*.[2] "Anti-dilution" laws are designed to limit erosion of a mark's distinctiveness or value. Dilution occurs when a mark appears on a multiplicity of products or services of varying quality so that consumers are unable to rely upon the mark as a symbol of definite quality. The injury occurs slowly, and may thus be distinguished from the more immediate injury which The Lanham Act seeks to remedy by the test of "confusing similarity."

The problem of dilution arises whenever the source of a mark lacks actual control over the quality of a product or service employing an identical or imitative mark. Even if the present quality of the imitator's products is superior, the original mark owner would have no control over the future quality. Rather than leave the fate of the mark's effectiveness to the imitator, courts will apply state law to enjoin certain diluting uses, as when Polaroid Corporation successfully enjoined an Illinois refrigerator company from naming itself "Polaroid, Inc."

When two competing marks are not registered, and one source seeks to assert its rights in the mark over the other, some courts turn to

---

[2]In discussing these matters, it is interesting to note that there has been some debate as to whether a state anti-dilution and unfair competition law can constitutionally offer any special trademark protection or whether federal trademark and copyright laws preempt the field.

Preemption proponents cite two Supreme Court cases: Sears, Roebuck & Co. v. *Stiffel Co.*, 376 U.S. 225 (1964), and Compco Corp. v. *Day-Brite Lighting Co.*, 376 U.S. 234 (1964), in which it was held that an article which was unprotectable under the patent or copyright laws could not be protected by state unfair competition laws.

Although the Court recognized state authority to enact labeling laws to prevent deception in marketing, it has been argued that states may not offer trademark protection under anti-dilution or unfair competiton laws for marks otherwise not protected.

Proponents of this argument have suffered a serious—if not fatal—setback in the *Goldstein v. California*, 412 U.S. 546, case, discussed in the Copyright chapter. (See Page 123.) By holding that state piracy laws can regulate uncopyrighted recording works, the Supreme Court announced a rule which gave wide latitude to state legislatures and courts in protecting original works. If anything, the argument for preemption in the copyright field is stronger than in the trademark field because the constitution mandates copyright authority to the federal government. Therefore, those challenging the use of unfair competition laws to regulate trademarks must now square the *Goldstein* precedent with their arguments. Given the recent disposition of the Supreme Court, there is little likelihood that their argument would prevail.

the principles of unfair competition. Unfair competition is a formalized way of referring to an equitable resolution of differences caused by business practices. Generally, trademark principles guide the result.

In one case, comedian Bert Lahr charged unfair competition because an impersonator imitated his distinctive voice (an unregistered mark) in a cartoon commercial. Without deciding the merits of the case, the court held that the complaint stated a cause of action.

The *Lahr* case raises another problem, namely, character copying. The copyright law, in many cases, offers very limited protection for character creations, and authors frequently turn to theories of unfair competition for protection. Assuming a work is copyrighted, copying an author's language to describe a character would infringe the copyright. However, if a character description consists of stock traits, by changing the language, the copyist neutralizes copyright protection.

Unless the character description is very refined and detailed, a court of equity would not enforce the laws of unfair competition to hold an infringement.

Hypothetical 9–3

A television cartoon character known as "Marvelman," having extraordinary and super-human skills (including the ability to fly, to see through objects, and to repel bullets) is created by Sidney Lifter in 1953.

The pictorial representation of the character is that of a strong, young man, with bulging biceps, who wears tights and a cape and has an  *emblazoned on his shirt.*

George Leaves, who created a syndicated newspaper comic strip character with identical skills and an almost identical pictorial representation (including a large  *on his shirt and cape), "Supreme-Man," which first appeared in 1949, sues for copyright infringement and unfair competition.*

Comment:

If the comic strip "Supreme-Man" was properly copyrighted, Leaves could obtain some protection for the pictorial representation of his character. However, the traits themselves would be unprotectable by copyright. While the laws of unfair competition could prevent use of the name "Supreme-Man" by the television character, if the name varies, there would be no recovery for unfair competition.

Hypothetical 9–4

Evan Altersberry is known in the television trade as a "punch up" man. His job is to revise scripts by introducing new characters. When asked his secret, he replied frankly, "I read a lot of books, and lift my favorite characters."

Comment:

Although authors may be indignant, unless the characterization is very finely drawn, Evan is operating within the realm of "fair competition.

Hypothetical 9–5

John Best Seller, who has written a smash novel, signs a contract with WBSS-TV to write a television script based on the book. The television show is a success as well. John decides he wants to make a sequel and offers it to KUUU-TV, a competitor station, for more money.

Comment:

Whether he can get away with the KUUU-TV sale depends primarily on the language of his WBSS-TV contract. If the contract does not cover this situation, Best can rely on the theory that WBSS-TV only obtained rights in the first script and not in the characters. Thus, Best could write a sequel using the same characters and market it as he pleases (again, assuming no contract impediments). However, if WBSS-TV wishes to do a sequel without Best's permission, while he could not stop the station from using the traits of his character, he could prevent the using of the same names.

Geographic and Commercial Limitations

As mentioned, protection of a mark is generally limited to a particular market in both a geographic and commodity-service sense. Thus, a mark protectable in the New York area may be used by another in Nebraska, if the New York owner's products are not sold there and the mark has not achieved "secondary significance."

Similarly, as the *Ed Sullivan* case established, a mark protectable in one business may not be protected in all other fields, particularly if they are noncompetitive. Factors such as the distinctiveness of the term, the chance of entry into the second market, the evidence of purposeful deception, the dilution of the mark, and the confusion to the consumer would be relevant in such an inquiry.

An important effect of the *Lanham Act* is that although one may not be able to enjoin certain uses of a trademark in geographic or business markets outside one's current market, protection will follow once a registered trademark owner moves into another market.

Consequently, if a broadcaster has a protectable title or character in a series which may be carried in other states, or if carriage actually occurs, the title or character may be protected from infringement by those already in the market but with inferior trademark rights. With national network coverage possible, national protection is often easy to acquire.

Defenses in a Trademark Action

When subject to a trademark action, a defendant may raise any of the following defenses or defects of the trademark, that:

1. The use of the mark was truthful or otherwise permissible
2. There was some fraud or misrepresentation in the acquisition of the mark
3. The mark has been abandoned
4. The mark was not properly assigned
5. The mark is merely descriptive or has become a generic term
6. The defendant's mark was properly registered prior to the plantiff's and not abandoned
7. The party charged with infringement is an "innocent prior user."

Hypothetical 9–6

Phinias Bellanthrop, owner of PB Cable, first used the mark "Tomorrow" for a local origination program in Tugslooka, Ind., in May, 1959, but never registered it. A national network, NBS, which has used the same mark nationally since January 1959, registered it in 1964. In 1974, NBS seeks to end Phinias's use of the mark.

Comment:

If Phinias can establish that he did not know of NBS' use of the mark and adopted and used it prior to NBS' registration, he could continue to use the mark in his community.

If there is an overlap of Phinias' and NBS' markets, or if the public is confused as to the source of the program, there is authority for the proposition that NBS' registration would give it a priority over Phinias', which could enable it to end his use of the mark. Authorities are divided on this point, and it has been forcefully argued that the innocent prior user should not be foreclosed in his original market.

Nevertheless, if Phinias wanted to expand into Illinois after knowledge of NBS' registration, he could be foreclosed from using the mark in the new area by an NBS showing that it has entered that market or may enter it sometime in the foreseeable future.

Chapter 10

Lotteries

Congress Has Prohibited Broadcasting Most Lottery Information

Section 1304 of the Criminal Code, 18 U.S.C. §1304, prohibits the broadcasting of lottery information. The statute provides:

> Whoever broadcasts by means of any radio station for which a license is required by law of the United States, or whoever, operating such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> Each day's broadcasting shall constitute a separate offense.

The FCC has adopted rules implementing this provision.

In *American Broadcasting Company* v. *U.S.*, 347 U.S. 284 (1954), the Supreme Court declared that a lottery, as prohibited by Section 1304, has three elements:

1. The requirements of "consideration"
2. The giving away of a valuable prize
3. A method of selection involving the element of chance.

"Consideration" is a legal term which, in this context, has been interpreted to mean requiring payment as a condition of eligibility. Strictly speaking, consideration is present in other contexts where there is the slightest detriment to the participant, such as a viewer's turning on his television set. Since a criminal statute is involved here, however, something a good deal more substantial is required to meet the lottery element requirement.

A "valuable" prize, on the other hand, can be something of very small value. Similarly, a selection process involving chance need not rely on chance alone to fall within the condemnation. A procedure which employs a non-random screening process to narrow the field of eligible contestants before making selection by chance would qualify as a lottery element.

In order to violate the statute, all three lottery elements must be present in a single scheme. Thus, giving away a valuable prize on the basis of a random drawing is not prohibited so long as the field of eligible individuals is not in any way determined by their making a payment. However, even a small payment—for example, a charge of 25 cents to cover postage and handling—would be enough to supply the element of consideration and complete the lottery formula.

Hypothetical 10–1

A financially struggling public broadcasting station proposed to conduct the following promotion schemes:

1. *The names of contributors of $15.00 or more are to be placed in a drum, from which a name will be selected every two weeks on the air. The person whose name is drawn will receive a valuable prize.*
2. *In connection with a community-wide drive for funds, volunteers will conduct a door-to-door campaign. At the conclusion of the campaign, a special program will be presented, awarding the "Volunteer of the Year" a valuable prize. The volunteer will be chosen who collects the most money.*
3. *Members of the audience will be asked to write letters, enclosing $1.00, as a contribution to the station. The letters are to say why the writer supports the station. At the end of a month, the station will select at random a few of the letters, read them on the air, and send each of the writers a special prize.*
4. *Persons who write the station to buy copies of a book, upon which a current program series is based, will receive a slip of paper inserted in each copy. If the slip says "You are a winner," the station will award the person a valuable prize.*

The station intends to broadcast announcements promoting each of these activities in order to stimulate participation. The station

manager suddenly experiences misgivings that some of these schemes may violate the federal statute against lottery broadcasts. If you were the station manager, would you agree?

Comments:

As to Proposals 1, 3 and 4, you should agree. Each of them involves the three elements of lottery: chance, prize, and consideration. Proposal 1 is the clearest case of lottery and is probably incurable without changing the scheme completely.

Proposal 2 avoids the lottery prohibition by selecting the award recipient on the basis of skill rather than chance. In other words, a volunteer could assure himself of winning simply by collecting more than anyone else. That observation suggests a method of rehabilitating Proposal 3.

In Proposal 3, if the scheme were revised so that the letters were not selected at random, but were chosen on merit, the element of skill would replace the element of chance and no lottery would result.

Proposal 4 is also beyond saving. Even though the consideration goes entirely to the purchase price of the book, this type of arrangement has always been held to be sufficient consideration to warrant a finding of lottery violation.

Since Proposals 3 and 4 involve the use of the mails and federal law also forbids use of the mails for lottery purposes, the station could find itself in two kinds of hot water.

Any Scheme Requires Caution

Broadcast stations, including noncommercial stations, typically run into difficulties under the lottery statute in attempting to devise promotional programs. Lotteries are often created inadvertently, and the innocently-conceived scheme is not recognized as a prohibited activity until it is well under way. (For example, an educational station may decide to launch a fund-raising drive with a prize scheme calculated to bring in substantial contributions.)

To avoid embarrassment it is wise to analyze fully every publicity or promotional plan which contains even one of the three elements. If, for example, an element of chance is involved in a promotion, examine it thoroughly to try to find a valuable prize and consideration.

Hypothetical 10–2

Educational Television Station KLOT, located in a middle-sized city in Middle America, has been experiencing financial difficulties for over a year. The station's Board of Directors, meeting to discuss the problem, concluded that the station would have to embark on an aggressive campaign for public support.

The station manager, who sat in on all the Board meetings, suggested that they undertake an auction. Auctions are specifically per-

mitted under the FCC's Rules, and the station manager had conducted one successfully at his previous place of employment.

The auction was scheduled to run for a full week. All of the arrangements were completed, and the station ran promotional announcements for a week leading up to the auction. The auction went so well that by Wednesday the station manager began considering whether there was some way he could express his appreciation to all those who were participating. After all, their help would enable the station to erase a significant part of its accumulated debt and present even more imaginative programming for the coming year.

The station manager decided that he would write the names of all those who participated in the auction on small slips of paper, put them in a hat and select five people who would receive a small box of caramels as a token of the station's appreciation.

The auction promotional announcements were changed to mention that a few viewers would receive boxes of candy to show the station's thanks for support by the entire community. The auction continued for the rest of the week, the names of five participants were selected from a hat, and the boxes of candy were sent as promised.

Two weeks later, the station learned that an irate viewer had asked the FCC to investigate KLOT's auction, especially the awarding of candy as prizes. Sure enough, a letter soon arrived from the FCC requesting information of the details of the auction and the "tokens of appreciation."

Comment:

The auction may have solved KLOT's temporary financial problems, but the station has, indeed, violated Section 1304 of the Criminal Code by broadcasting material promoting a lottery. The three elements of a lottery are present: the recipients of the candy were selected by chance; they paid consideration to be eligible for selection by participating in the auction; and the candy constituted a "valuable prize" even though the monetary value of each box of candy was less than $10.

The station's culpability is mitigated by the fact that the announcements promoting the lottery were not run until the middle of the contest, which indicates that at least a part of the station's motive was indeed to thank those who had participated in the auction.

If the station had a premeditated scheme to increase the auction's attraction using a lottery, the lottery probably would have been announced from the beginning of the auction promotion. Similarly, the slight worth of the "valuable prizes" is an additional mitigating circumstance. However, mitigation is not exculpation, and the station is still awaiting word from the FCC as to whether a fine will be levied.

In addition to the prospects of a fine, KLOT's lawyers have already spent four or five hours assembling the necessary information to answer the FCC's letter. By the time the inquiry has finished, the manager's time, legal costs, and other expenses significantly depleted the donations. So far as the station is

concerned, therefore, the inadvertent lottery was costly, especially since the auction was proceeding so well without the "tokens of appreciation."

Station management has received quite an education about the lottery prohibition, and will review all future promotions to see whether the elements of prize, chance, and consideration are present.

Hypothetical 10–3

Ace director of development Garner Shekels brought a new fund-raising idea to his station manager. He proposed a contest in which any contributor of $50 or more could submit a suggested title for a new series the station was presenting on obscure dialects in New Jersey. The person submitting the best title would receive an attractively bound, 3-volume set of "The Lyric Poetry of the Visigoths."

Subsequently, a disgruntled loser complained to the FCC that this contest had been a lottery, but the FCC found in favor of the licensee, much to Garner's relief.

Comment:

The critical distinction between Garner's scheme and a lottery was its reliance upon the skill of the participant, and not on fortune. The person won who was adjudged to be most clever or creative in suggesting the title. The luck of the draw played no part in determining the winner. Consideration was present: the contribution. Prize was also present: the books. But, so long as all three elements of chance, prize, and consideration were not together in the same scheme, no lottery existed. Had the winning title been chosen "out of a hat," Garner might be in trouble. The station certainly would.

News Reports of Lotteries

Within the past few years, several states have adopted laws creating state-sponsored lotteries. In some of these states, questions were immediately raised by broadcasters as to the extent and nature of the material and information relating to the operation of these lotteries that could be broadcast without running afoul of the provisions of the U.S. Criminal Code and the rules of the Commission.

In September, 1968, at the request of the New York State Broadcasters Association, the Commission issued a ruling expressing its view that the prohibitions of the U.S. Criminal Code and its own rules applied fully to state-sponsored lotteries.

The Commission explained that the statute is directed at material which promotes lotteries, but that the statute did not appear to bar news reports broadcast in the normal good faith coverage of a news event which was reasonably related to the right of the audience to be informed of events in their own communities.

Permissible Content

The Commission later issued a supplementary ruling which sets forth the following guidelines as to the material which a broadcast station could carry relating to state-sponsored lotteries:

1. Legitimate news stories appropriate to broadcasting are permissible. This includes human interest stories on the winners and stories relating to legislative proposals concerning lotteries and the disposition of receipts from lotteries.

2. News reports which provide (a) specific information as to where lottery tickets might be purchased, (b) specific information as to where tickets will be drawn, and (c) long lists of winners and/or prizes are not permissible. News reports about illegal lotteries and other illegal gambling activities are, of course, permissible.

3. Announcements of places where lottery tickets may be purchased, where, how, and when the winning tickets will be drawn, and the amount of the prize are prohibited. Announcements about the distribution of the proceeds of the sale of lottery tickets are not barred if they are a part of a good faith effort to inform the public. Such announcements would be improper if coupled with a plea to buy tickets or other information which promotes a lottery.

4. Advertisements of the usual promotional type would be barred for state-sponsored lotteries.

5. Live broadcasts of the drawing of winning lottery tickets would, in the opinion of the Commission, constitute the direct promotion of a lottery and are, therefore, prohibited. On the other hand, the broadcast of a speech by a public official describing the operation of the lottery and its purpose would not be prohibited.

6. Live interviews with persons holding winning lottery tickets, their reactions to winning and their plans for the use of the prize money are permissible, as long as there is a good faith determination that this information is of interest to the people in the area served.

7. Documentary programs on state-sponsored lotteries, including statements by public officials, prominent citizens, religious leaders, descriptions of the nature of the operation of the lottery and the use of the proceeds are permissible.

8. Editorial comment on state-sponsored lotteries is permissible provided, however, that the editorial does not amount to a direct promotion of the state-sponsored lottery.

9. Panel discussions on the various aspects of the lottery—including those in which proponents and opponents, government officials who administer the lotteries and others participate—are permissible.

10. In a subsequent ruling in 1971, the Commission ruled that the broadcast of winning lottery numbers is not permissible. The Commission reasoned that such proposed broadcast would be helpful to the conduct of the lottery and further would be of interest only to a limited class of people who actually owned tickets.

In 1974, the Maryland state lottery, faced with an increasing accumulation of unclaimed lottery prize money, asked the FCC to rule that announcements could legally be made encouraging winners to claim their prizes. The Commission acceded, but stressed that: (a) the announcements cannot be broadcast more than several times a year; and (b) the announcements must avoid "direct promotion of the state lottery." The announcements could take the form of commercials, public service announcements or news stories. This ruling, of extremely narrow application, recognizes a public interest in assisting state governments to distribute lottery winnings, and concludes, metaphysically, that this will not "directly" promote the lottery. It would not apply to other kinds of lotteries and would probably not permit broadcasters to accept announcements from a supermarket, gas station or soft drink company which was holding unclaimed lottery prizes. Moreover, the Commission would be reluctant to issue declaratory rulings sanctioning announcements in these cases.[1]

As in all elements of broadcast law, doubtful circumstances will arise. Since a criminal statute is involved, do not take chances; consult an attorney.

Hypothetical 10–4

Susan Jones was recently hired as a newscaster by station KNUT in Billingsgate, Pa. About a month after she began work, Susan was assigned to take a film crew to cover the drawing for the first big winner in Pennsylvania's state lottery. (Pennsylvania had enacted a state lottery about six months previously, and the climax of selecting the first $1 million winner had been building ever since.) Susan had been waiting for the chance to cover a really big story, and enthusiastically headed for the state capital with the film crew.

The drawings were held with a great deal of fanfare. First, the Governor spoke for five minutes about the large amount of revenue he expected the lottery to raise during the next decade, and praised his own political foresight at supporting its enactment. He then introduced the Chairman of the State Lottery Commission, Elmer Bonds, who spoke about difficulties in administering the lottery, the method of paying lottery winners so they could avoid paying taxes in the highest brackets, and other general facts about the lottery.

The big moment came, with the Governor drawing the winning number from the large wire drum. The winning number was announced and the ceremony broke up shortly thereafter. Of course, KNUT's crew got all these events on film.

Upon returning to the studio, Susan began blocking out her news story while the film was being developed. As she was doing so, Terry

[1]As of publication, the United States Court of Appeals for the Third Circuit had overturned this rule on First Amendment grounds, holding that announcement of winning ticket numbers had news value, and could, therefore, be broadcast as a news item. The FCC has taken the decision to the Supreme Court and the Court has agreed to hear the case.

White, KNUT's news director, stopped by to see how Susan was doing. After looking over the outline of Susan's story Terry exclaimed: "Remember, Susan, the FCC doesn't let us put all this over the air because some of it involves lotteries! Check the FCC rules and be sure you don't put in anything that will get the station in trouble."

Susan was in a quandary–she'd never heard of any such restrictions. Of the material Susan and the crew filmed, what could go on the air?

Comment:

The FCC allows stations to broadcast news reports of lottery-related events, but not material which is intended only as a lottery promotion and has no news value.

News judgment is mostly a matter of the station's good faith discretion, although the FCC has issued guidelines to cover specific situations. (However, specific guidelines are not contained in the FCC Rules themselves.) For example, stations may not broadcast advertisements of a lottery, live broadcasts or simultaneous accounts of the drawing, and announcements of winning lottery numbers.

In the case of Susan's story, the only thing to be deleted under the FCC's policies is the film of the actual drawing and announcement of the winning lottery ticket.*

The Governor's speech concerning the political and economic desirability of the state lottery, and Mr. Bond's explanation of the lottery's administrative details are all within the range of news items a station could reasonably report.

Susan could even follow up on her first lottery story with an interview of the "big winner," assuming that the interview was treated as a regular news story and not broadcast so frequently as to, in reality, be a promotional announcement for state lottery.

Hypothetical 10–5

Mel Glich was recently appointed public relations director of television station KLOD. Mel's job was to keep in touch with the many civic, fraternal, and charitable organizations in the area. KLOD hoped to draw on the organizations for publicity and support for many of its programming projects.

In the course of his duties, Mel became quite friendly with the officers of many area organizations, including the American Legion. When summer rolled around each year, the Legion sponsored a town fair to raise money for the Legion's activities and various local charities. One of the fair's highlights was a prize drawing, and anyone who attended the fair was eligible.

Mel was given this information and asked whether KLOD could

*See footnote Page 147.

run promotional announcements concerning the event. After investigating, Mel assured himself that the fair was not intended for any commercial purpose but was, indeed, an eleemosynary enterprise. He had a conference with the station manager and they agreed that the station could run promotions for the fair, especially since this would put the station in the good favor of the American Legion.

Suitable promotional announcements were produced and carried by KLOD for the week preceding the fair and the two weeks during which the fair was in progress. The fair was a huge success, the drawing attracted great interest, and when the fair was over the president of the local American Legion Post sent KLOD a letter of appreciation for its fine civic work.

Three days later, KLOD received another letter–from the Chief of the FCC's Complaints and Compliance Division. A listener had complained about the announcements publicizing the fair. From the allegations in the complaint, the FCC concluded that announcements promoting a lottery might have been broadcast, and requested additional information concerning the text of the broadcasts, the times when the announcements were run, and certain details about the drawing itself.

Mel called the American Legion and verified that the prize drawings used only the names of visitors who had registered at booths on the fair grounds and that everyone who entered the fair was required to pay an admission charge. Too late, Mel had the sinking feeling that the three elements of a lottery–prize, chance, and consideration–were present.

Comment:

Mel's sinking feeling was justified, as a quick call to KLOD's lawyer confirmed. Moreover, the station is blameworthy even though at the time of the broadcasts neither Mel nor the station manager was aware that those eligible for the prize drawing were required to pay admission (consideration).

As the lawyer explained, the station should have made an investigation to determine whether or not a lottery was present. They should have been on guard because two of the three lottery elements, selection by chance (the drawing), and the award of a valuable prize, were obvious even from the information originally supplied by the American Legion.

Mel realizes that his job will be a bit more difficult in the future. When groups such as the American Legion approach him with requests for publicity on KLOD, he will have to ask sufficient questions to satisfy himself that the announcements do not pertain to an activity which might be a lottery. Of course, some people will take the inquiry better than others.

However, Mel has now become pretty adept at assuaging sensitive publicity chairmen of local civic organizations. He carefully explains the federal law, and particularly the Rules of the FCC, require the station to be sure that promotional announcements for civic activities do not involve lotteries. Having learned his lesson the hard way, Mel is not about to be burned again.

Chapter 11

Federal Income Taxation

Political Broadcasting

The federal government has traditionally encouraged and subsidized private philanthropy by granting preferred tax status to educational, scientific, religious, and charitable organizations. Such organizations are exempt from federal taxation, and the individual donor, within certain limits, can deduct contributions to them from his personal income.

The other side of this generally favorable treatment is the limitation placed upon these charitable organizations not to engage in political activities, regardless of the net effect of these activities. The failure of an organization to adhere to these limitations can be fatal to its institutional existence. Not only may the organization be taxed on its income, but the donors from the private sector may no longer be able to deduct their contributions.

An Apparent Conflict of Laws

In the realm of educational broadcasting, the single most significant concern in the political activities limitation arises from the Federal

Elections Campaign Act of 1971, which was signed into law on February 7, 1972.

This Act amended the Communications Act of 1934 so that all broadcasting stations, including noncommercial educational stations, must now provide access to their facilities to any person, who is a legally-qualified candidate for any federal elective office, in connection with his campaign for election or nomination. The dilemma arises because of the restriction placed upon educational broadcasters which prohibits them from participating in, or intervening in (*including the publishing or distributing of statements*), any political campaign on behalf of any candidate for public office.

While it remains to be seen exactly how these two incompatible statutes will co-exist, it is most probable that political activities engaged in pursuant to the Federal Elections Campaign Act of 1971 will be treated as an exception to the proscriptions of the Internal Revenue Code.

The tax regulations presently permit charitable organizations to analyze, study, research, and disseminate legislation so long as the organization does not advocate or campaign for the attainment of any particular legislative objectives or attempt to influence passage or defeat. Analogizing the influencing of legislation to the electoral process, it would seem appropriate for a broadcaster to be able to analyze, present, and discuss political candidates and their platforms, so long as the broadcaster refrains from either endorsing or opposing a particular candidate (which the educational broadcaster cannot do in any event, by virtue of Section 399(a) of the Communications Act).

The airing of a candidate's speech would be more like the analysis and study of the candidate and his platform than the advocacy or endorsement of his political posture. This would seem to be especially true in light of the fact that the station would not be volunteering its facilities in furtherance of a candidate's campaign, but rather acting as a conduit for the presentation of vital issues while strictly maintaining a non-partisan position.

The policy considerations underlying this exemption for educational institutions are consistent with the constitutional ideal of a free, democratic society of informed, active citizens. One of the major functions of an educational institution is to engender in pupils (or audience) an understanding of society so that they can effectively participate in it. Thus, even assuming that it is proper for the federal government to avoid subsidizing political activities, the scope of these prohibited activities should be carefully circumscribed so as not to preclude the discussion of relevant political issues.

With this in mind, it is likely that the interpretation finally given the Internal Revenue Code will be compatible with the objectives of the Federal Elections Campaign Act of 1971.

Unrelated Business Income

Prior to 1950, the income of a tax-exempt organization was not taxable, and the organization would not lose its tax-exempt status because of such income if the income was destined for a charitable purpose, notwithstanding the fact that it resulted from a non-exempt activity.

However, under the Revenue Act of 1950, income from unrelated activities of a tax-exempt organization was made taxable, notwithstanding the ultimate destination or utilization of the funds.

The 1954 Code Revisions

This treatment was modified into the extensive statutory modifications known as the Internal Revenue Code of 1954. Pursuant to Section 511 of the new Code, an organization created for charitable, scientific, educational, religious, etc. purposes will be taxed on its "unrelated business taxable income" as if it were not a tax-exempt organization.

Generally, unrelated business taxable income is the gross income derived from the unrelated trade or business, less deductions directly related to the carrying-on of such trade or business and subject to certain minor exceptions, additions, and limitations. Initially, there is a specific deduction of $1,000 so that the otherwise exempt organization will pay no tax on its first $1,000 of unrelated business taxable income. Furthermore, dividends, interest, annuities, royalties, rents from real property, and gains from the sale or exchange of capital assets are not taxed.

The key words in this area are "unrelated trade or business" which are defined in the Internal Revene Code of 1954 as follows:

> Any trade or business (regularly carried on), the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under Section 501. . . .

Like so many of the "explanations" to be found in the Code, the foregoing definition is of dubious value except in the clearest cases. Fortunately, however, there are some additional passages in the Code and numerous examples in the Regulations which offer more concrete indications of the scope of this tax provision.

At the outset, there are three specific businesses the profits from which are exempt from taxation:

1. A business in which substantially all of the work is performed for the organization without compensation to the employees
2. A trade or business carried on primarily for the convenience of the organization's members, students, patients, officers or employees

3. A trade or business which consists of the selling of merchandise which has been received by the organization as gifts or contributions.

With respect to activities which do not come within the scope of these three exceptions, a determination must be made as to whether they are substantially related to the exercise or performance by the organization of its charitable, educational or other objectives.

Consequently, an examination must be made of the particular facts to consider the relationship between the business activities which generate the particular income in question and the accomplishment of the organization's exempt purposes.

Hypothetical 11–1

Recently, the Pacific Area School Television Association received a substantial bequest under the last will of Signor Lasciate Speranza. By the terms of the will, PASTA becomes the sole owner of the Para Bene Meatball Company, a very successful local enterprise. PASTA is a nonprofit corporation which received tax-exempt certification from the Internal Revenue Service when it was organized and became the licensee of a noncommercial educational television and radio station.

The Association relies exclusively upon community fund raising, school support, and service grants for operating funds and has incurred an operating deficit during the last three years. Obviously, Sr. Speranza's bequest holds the promise of financial security for the station, but the meatball company is a profit-making, commercial enterprise which is subject to a variety of corporate and business taxes. PASTA is concerned that, as the parent company of such an enterprise, its tax-exempt status will be threatened, as will its eligibililty to receive charitable contributions entitling the donors to deductions. Should PASTA accept the bequest?

Comment:

From a tax standpoint there is no reason why not, so long as PASTA is willing to pay taxes on the taxable unrelated business income (income exceeding $1,000) derived from the meatball business, and understands that the company is to be treated separately for tax purposes.

As long as the net income after taxes is applied to the operation of the stations as noncommercial educational facilities, the tax-exempt status of the parent would not be threatened, nor would it lose the right to receive contributions deductible by the donor.

Unfortunately, because of the unrelated nature of the two companies, the gross income of the meatball company cannot be offset against the deficits of the licensee.

PASTA has already been approached by a conglomerate which would like to acquire the meatball company after probate matters are concluded. Preliminary indications are that the Association would sell the company at a figure substantially higher than the fair market value of the company at the death of

Signor Speranza. Should PASTA agree to sell the company, it would pay no tax on the difference between the "basis" (fair market value at Speranza's death) and the purchase price.

So, the bequest appears to be a windfall for PASTA.

Donations: Deductions Are Limited

Gifts to public charitable organizations, including noncommercial television stations, are deductible from the donor's gross income for federal income tax purposes. (Since most state income tax laws are closely patterned on the federal code, deductions are permitted for charitable donations. However, both the deductibility and the amount of deduction for state income tax purposes will vary depending upon the facts in each particular case.)

The law imposes a restriction on the amount which individuals and corporations may deduct, and in the case of individuals, the deduction ceiling for gifts to public organizations is no more than 50 percent of the donor's adjusted gross income. In some cases it may be as little as 20 percent. For corporations, the maximum deduction is limited to 5 percent of taxable income.

Whereas under a predecessor law it was possible to deduct the full fair market value of non-monetary gifts (and thereby get a high deduction for a gifted asset of increased value without having paid a tax on the appreciated portion of its worth), the tax laws now impose a third percentage limitation to cover this contingency.

Gifts to public charities of appreciated capital assets held for over six months can be deducted by individuals to the extent of 30 percent of the donor's adjusted gross income, or, in the alternative, the donor may elect to reduce the amount of the deduction by one-half of the appreciation element.

In the case of corporations, the value of gifts of appreciated property must be reduced by 62% percent of the appreciation. If the gift consists of a capital asset which has been held by the donor for less than six months, the deduction is limited to the donor's cost basis in the property, i.e., no part of the appreciation element is deductible.

Increasing the Deduction

There is one exception to the appreciated property rule which permits a more generous deduction. A donor of appreciated property may deduct the full value of the gift to the extent of 50 percent of his adjusted gross income if (1), the recipient of the gift is a publicly supported charity, i.e., not a privately-funded organization; and (2) the property is related in use to the exempt purposed for which the charity was established.

Examples of this exception would include a painting given to a museum or a manuscript to a university library. Conversely, if the donee is a private foundation or a private charity whose exempt purposes are not related to the gift property, the deduction is reduced as described above.

Very often, the giver must choose his beneficiary with care.

Hypothetical 11–2

While strolling through a cluttered antique store, Jack Mazuma spied an iron-bound steamer trunk, rusty with age, which displayed this small sign: "Yours to own, contents unknown, $5.00 cash."

Upon close inspection, Jack found that the locks of the trunk had rusted shut and no amount of pulling and prying could make them budge. Jack's efforts elicited a chorus of tinkles from several nearby kerosene lamps and provoked shivers from a skeleton in a knight's helmet.

With a face reddened both by his exertions and by the reproving gaze of the storekeeper, Jack paid for the trunk and drove off with it strapped to the back of his sporty roadster, fully intending to use the obstinate container as a table in his bachelor's digs.

But after a few days of staring at the unyielding box, something snapped inside Jack. He lifted the trunk to his back, carried it down to his car and once again strapped it onto his nonprotesting conveyance. Dashing back to his rooms, Jack pulled open a bottom drawer and rummaged through its contents. Under several elastic mementoes of his athletic days, Jack found the item he sought.

It was a small parcel containing a quantity of plastic explosive, left over from his days as a student revolutionary. Jack leaped into his car and sped off to a remote meadow outside town.

When Jack lifted his eyebrowless head and blinked lashless eyes in the direction of the blast, he saw nothing but a cloud of smoke. Rising slowly to his feet, he first sought his scattered shoes, then tottered forward as a breeze disclosed the lidless chest. "Just what I needed", muttered Jack, peering inside, "a bunch of old records."

As he prepared to sail one of the ancient discs across the scorched meadow, his eye caught the name on the label and something restrained his arm.

Praising the miracle which had saved the records from destruction, Jack tenderly conveyed his musical cargo to an expert on such things who estimated the recordings, some 50 in all, to be worth $15,000. Two other independent experts agreed. Jack had parlayed $5.00 into a small fortune.

As fate would have it, Jack did not need the money. His annual income was well over $50,000. In fact, "he needed to give away some money," advised his accountant. After some discussion, Jack decided to donate his valued record collection to a charity which would allow him to realize the maximum deduction on his tax return.

Three charities in town heard of Jack's intentions and each sent emissaries to seek his favor. They were:

1. *The city hospital*
2. *A public radio station licensed to a private college*
3. *A community-supported public radio station which derived its income exclusively from community contributions.*

All three were tax-exempt organizations. Jack asked his lawyer, "Does it matter who gets the records?" "Indeed it does," responded the lawyer, "in order to get the full deduction, give the records to the community-supported radio station." Jack complied, and received the full value of the gift as a deduction, because his adjusted gross income exceeded twice the value of the records.

Comment:

Jack's lawyer knew that only the publicly-supported radio station met the criteria for a full value deduction. The station was a publicly supported charity, and the gift related to the purposes for which the station was established.

Had the records gone to the private college station, the criterion of public support would not have been met. Had the records been given to the hospital, a question would have been raised regarding the relationship of the gift to the hospital's founding purposes. Should either question have been resolved against taxpayer Jack, he would have found himself having to settle for a lower deduction, to the extent of only 50 percent of the appraised value since all of the institutions which he considered were tax-exempt organizations.

The "Carry Forward" Provision

Because many wealthy people donate a large percentage (sometimes all) of their income to charities, the Code does provide that gift deductions which exceed the permissible maximum limitations may be carried forward for a period of five years. This provision applies equally to corporations as well as individuals. Thus, if excess contributions are made in one year, they may be used as the basis for deductions in each succeeding year for five years, until finally utilized.

The tax laws presently deal with a tax loophole formerly used by individuals and charities simultaneously to minimize the payment of taxes and benefit a worthy organization.

Prior to 1969, it was a fairly common practice among donors not wishing to give away a valuable piece of property to sell the property to a charity at a bargain price. The effect of this transaction was that the seller-donor would realize some taxable income on the sale, but the difference between the purchase price of the goods and the fair market value was deemed to be a gift to charity, and deductible as such.

Now, the basis available to the seller-donor is that portion of his adjusted basis which the gross profit bears to the fair market value of

the property, thereby taxing the individual on roughly the equivalent of the appreciated element. As for the contribution element, the appreciated property rules apply to limit the available deduction.

As a general rule, a contribution to charity of a legal life estate, a term for years, or anything less than an entire interest in the contributed property is not the proper subject of a tax deduction. Similarly, the Internal Revenue Service has consistently taken the position that no contribution deduction is available for the value of services rendered to charitable institutions, and the courts have generally concurred.

Owing to a dearth of analysis on the distinction between "services" and "property," gifts which tread on this borderline territory must be carefully examined on an individual basis before the deduction is taken.

Chapter 12

The Use of Releases and Other Station Indemnification Forms

Many programs feature persons who are not paid for their appearance. Usually, these are not "performers" in the sense that they are using some special talent which has entertainment value. They may be children in a "peanut gallery," young people on a bandstand-type program, adult members of a civic group, a public figure or a private individual. On occasion, particularly at educational stations, a star performer or athlete may lend his or her talents to a program free of charge.

Most licensees prefer to have a document, usually called a "release," which manifests the person's willingness to appear without payment. However, if a release is not obtained, there is no automatic detriment to the licensee or producer. Not all stations use releases. Most do, however, and they employ an extensive variety of forms. Even the law departments of major networks do not agree on the necessity for releases and the wording of the forms.

There is one exception to this lack of uniformity, which relates to appearances by legally-qualified candidates for public office, in which specific forms are recommended to be used in connection with programs or spot announcements on which the candidate appears. This matter is discussed later in the chapter. (See page 163.)

Purpose of Releases

The basic idea behind the general release or indemnification is threefold:

1. To establish that the person has appeared voluntarily and is willing to be presented on the air
2. To indicate that he or she agreed to appear *gratis*
3. To document that the producer or licensee is free to make certain uses of the program.

There are several other provisions which appear in many standard release forms, but these three basic ideas are what might be termed the essential ingredients. Of the three, probably the most important is the first, which establishes that no invasion of the person's privacy occurred as a result of the appearance.

Many release forms contain a provision which purports to indemnify the station and the licensee against liability arising out of personal injury sustained on the premises during a production. Assume, for example, that one of the occupants of the "peanut gallery" spies a rope, tugs at it, and sandbags a fellow peanut.

If the producer or the licensee can be shown to have acted negligently in allowing the rope to dangle within reach of the inquisitive child, a judgment could be awarded against the negligent party regardless of whether a release was signed. The key to the judgment is the finding of negligence. The law does not permit a person to agree to submit to the negligence of another.

If a person sustains an injury at the station and brings an action to recover damages against the producer or the licensee, a signed release is not critical to a successful defense. The effective defense against such action is a showing that the injured party either contributed to his own injury by not watching where he was going or that the station or producer had exercised the proper degree of care toward the injured person, so that the injury was a product of either the victim's own carelessness, or an instrumentality outside of the defendant's control.

However, certain forms of liability can be avoided or mitigated by means of a properly worded release. Liability arising out of suits for libel or slander, property damage, copyright or trademark infringement, and breach of contract may be successfully avoided.

Prudence dictates, therefore, that in a situation where the producer or licensee feels the use of a release would be warranted, a simple form should be used. There is a great deal more psychology than legal science in the use of releases. If a guest is confronted with a long form replete with "legalese," he or she will be understandably reluctant to sign. Simple language, concisely stated, works much better.

The general release form at the end of this chapter (Page 166) provides easily comprehended language and adequate legal protection for the licensee. Generally, something of this nature should be used whenever it is convenient.

Hypothetical 12–1

Edgar Rice O'Rooney was the author of a series of boys' stories, classics of their genre, which were read by hundreds of thousands of lads with a taste for adventure. Their afternoons and weekends were spent earning the quarters that bought Edgar's books, and that made him a wealthy man.

Edgar lived on the fringes of the arts. He especially enjoyed the company of show business people, many of whose reputations were made in movies based upon Edgar's books. They all loved Edgar, in particular because he personified the contrast between the romantic world of his fiction and the real world of the man himself. Edgar lived a life that would have embarrassed his clean-cut, square-jawed heroes. But he did so discreetly, and there was no reason for his army of readers to doubt that his virtues shone less brightly than those of his creations.

It happened one day that some of Edgar's cronies invited him to appear as guest of honor on a nationally-televised Monk's Club "basting." The idea terrified Edgar, but his publisher (who kept one eye trained on book sales) convinced Edgar that "the public deserved to meet a man they admired so much." Edgar eventually became comfortable with the idea, and as the day drew nearer he began to relish the idea of his television debut.

On the appointed evening Edgar presented himself at the studios, listing to (and from) port, after several "break a leg" toasts among his buddies. As the make-up man went to work, a pretty production assistant shoved a paper under his nose and asked, "Mr. O'Rooney, may we have your autograph on this release?" "To be sure, m'dear," replied Edgar, who signed with a flourish and gave the girl an unfatherly pat.

As the program progressed, Edgar began to feel uneasy, then mortified, then outraged as a gallery of famous comedians took turns lacerating his public image. All in good fun, of course, except for poor Edgar, who heard:

> *"Edgar Rice O'Rooney, the San Francisco effete! The only line he hasn't stolen is the one he used on my secretary! That's the only creative writing he's done for years!"*
>
> *"The reason that O'Rooney's stories are so realistic is that he really knows the criminal mind. In fact, he has one!"*
>
> *"Old Ed uses two ghost writers: Johnny Walker and Jack Daniels. Without 'em he couldn't write a line."*
>
> *And so on.*

Edgar managed to suppress his rage and concluded the program with considerable graciousness.

The next morning his agent called and asked Edgar if he'd seen the papers. A second-page story announced the formation of a group call-

ed "Edgar Rice O'Rooney Stinks" (EROS), which pledged itself to boycotting Edgar's books in light of the preceding evening's revelations concerning his lifestyle. In reality EROS consisted of only two people, a militant librarian and a law professor whose avocation was creating "meaningful and relevant anagrams" (MRAs). Nevertheless the story spread across the continent and each network featured a brief reference to EROS in the evening news. Edgar was furious and called his lawyer.

Edgar's lawyer counselled against suit because he had in fact signed a release and agreed to go on the program, but Edgar would not be appeased. He argued that:

1. He had signed a release under the deliberately-created misimpression that he was giving an autograph.
2. He could not have known what was going to be said about him, and therefore could not consent to such abuse.
3. Had he known he would not have consented.
4. The gibes and taunts, far from harmless jokes, in fact constituted both personal defamation and trade libel (See Chapter I).

"I understand your feelings," said the lawyer, "But my opinion remains unchanged. Have a laugh over it, go on about your business and get back to work on your book or you'll disappoint a lot of kids."

Edgar grumbled a bit, but eventually agreed. Weeks later, when book sales continued at a healthy rate and EROS was forgotten about, Edgar congratulated himself for exceedingly good judgment.

Comment:

At this point in this book, you have read Chapter 1 on Defamation, which plays a significant part in understanding the result here. Place yourself in the position of Edgar's counsel and ask whether you would have given similar advice. What would have been your reasons?

Edgar's lawyer would probably list the following:

1. Edgar had in fact signed the release. It was not the producer's fault that he hadn't read it. Many of us unfortunately sign documents we haven't read. A release similar to the General Release at the end of this chapter would have been an excellent defense tool in these circumstances.
2. Edgar either knew or should have known what was in store for him when he agreed to appear. The format of such programs is almost common knowledge.
3. The proof of damages would have been virtually impossible. A major point for the defense would be to point out that no one takes or believes seriously what is said about a person on a program such as this. Therefore, Edgar could not have been defamed.
4. An action for trade libel would not lie on the facts, unless Edgar could show that what was said about him personally disparaged his books. We also know that no actual loss resulted from what was said.

5. *Edgar would certainly be considered a public figure. Without being able to show actual malice, his suit would fail.*

Lawsuits certainly have been brought on weaker facts. Bear in mind, however, that the law's concern is not to ease the insulted ego or function as a civilized substitute for duelling. Its concern is to compensate for real, proven damages and only in few cases is the plaintiff relieved of the burden to substantiate his claims of loss.

Where appearances by minors are concerned, greater pains should be taken to obtain releases, and the forms should be adapted to provide for the signature of a parent or guardian who consents to each child's appearance. Where appearances by a group of children are involved, a release should be signed by the person in charge, such as the teacher, scoutmaster or group leader. A special form for this purpose is also displayed at the end of the chapter (Page 167).

Section 315 and the Candidate's Release Form

The releases for political candidates—one form for free "uses," another for paid "uses"—are structured to meet the FCC's interpretations of the "no censorship" provision of Section 315 of the Communications Act (the "equal opportunities" provision). The forms require the candidate to guarantee that the time granted to him will be programmed as a "use," which immunizes the station from liability for defamation. They also obligate the candidate not to invite other legally-qualified candidates to appear with him unless the station grants prior approval. The licensee goes out on a fair-sized limb on this provision, but good reasons warrant its use.

There is no precedent specifically approving these releases. Nonetheless, some means of restricting other candidates' appearances is necessary. Under Section 315 the licensee must be allowed to control candidates' access so that the station can comply with the "equal opportunities" provision.

If the censorship prohibition were invoked to defeat this particular access control, the primary intention of the statute—ensuring "equal opportunity"—could be easily defeated. The station would soon run out of available time to redress the constantly generating imbalances.

Prudence suggests that this situation is an implicit exception to Section 315's censorship prohibition, but neither the FCC nor Congress appears to have recognized the problem. For that reason, the licensee who adopts this exception to the "no censorship" rule takes a certain risk. But in defense of such action, the licensee may truthfully assert that otherwise it could not guarantee "equal opportunities."

Further, the candidate agrees to indemnify the producer or station from any liability arising out of his failure to adhere to the requirements that the entire time furnished for his access be a "use." Should a candidate fail to appear on "his" spot, or fail to be the focus of "his"

program, the segment is not a "use" and the station is liable for any defamatory material that is aired.

The indemnity is necessary because (under FCC policy implementing the "no censorship" rule) the producer cannot require a preview or advance script of a candidate's appearance, and therefore has no other method of enforcing the "use" requirement and protecting himself from liability for defamation.

For purchased time, the candidate also agrees to pay any difference between the "lowest unit charge" and the "comparable rate" (see Chapter 4) for any spot or program which is not a "use."

In view of the complicated interpretations of Section 315's "no censorship" provision, the forms for political candidates should not be modified in any way. Since compliance with the terms of the agreement is a reasonable prerequisite to access, no time should be given unless the release has been signed either by the candidate or a properly authorized agent.

Anyone Can Sue

Many proponents view general release forms as an effective means of deterring the filing of law suits. The complaining party, they believe, will be discouraged from bringing an action against the producer or licensee in the belief that having signed a release, he or she has forfeited the right to sue.

However, anyone can sue. No release form can prevent the bringing of an action. The crucial question is whether the suit can be won, and that is where the use of the release may be significant.

Hypothetical 12–2

Three months ago, a producer for an Educational Television Production Center was given the job of supervising a series of programs dealing with various consumer issues. In the preliminary discussions with the Center's Director, it was emphasized that the programs probably would cover controversial issues of public importance, creating a need for balanced presentation throughout the series. The Center's Director wished to avoid defamation problems by keeping the discussions on a general level, without mentioning specific products or commercial establishments wherever possible. Also, she envisioned the format as a series of talks among experts from government, industry, and consumer groups, concentrating on a different product line in each program.

Producer Polly Feemis began assembling her staff, scheduling studio facilities, and contacting the various guests for each program. Fortunately, industry representatives were eager to appear on programs with consumer group advocates to refute or moderate their

claims, so that achieving balance within each program proved to be less a problem than originally thought.

Still, Polly spent a great deal of time analyzing the issues which probably would arise in each program, and preparing analyses which were distributed beforehand to the guests. The analyses focused the guests' attention and set the initial direction for each discussion. They also served as the starting point for pretaping briefings which Polly conducted with the participants.

In the briefings, she made sure the guests understood that balance was a great concern of the producers, and that the time allotted each speaker would be monitored to ensure general equality. Due to late arrivals, the briefings were always rushed, and Polly inevitably fell victim to last-minute crises.

After the first three shows were taped, the Production Center began arranging for their distribution to a number of educational television stations.

Almost immediately, the Center's mangement realized that Polly and her staff had failed to obtain releases from any of the guests. It was decided that, especially because of the potentially controversial nature of the discussions, none of the programs could be aired unless releases were obtained from all participants.

Polly began contacting the guests on the three shows, and obtained releases from all but two of them. One of the industry experts who appeared on the show had taken a long vacation in Europe and for some reason could not be reached through the mail. A guest on the second show was dissatisfied with the course of discussion, and was adamant in refusing to do anything helpful at that stage of the project.

Comment:

As a practical matter, Polly need not regard her failure to obtain releases from every guest as fatal. The series can be presented without delay. But, let us make a few assumptions which might complicate life for the Center later on.

Assume, (a) that the guests appeared without payment, (b) that the series attracts national attention, and (c) that a commercial network wants to buy the series and has a sponsor for it. If the Center were to sell the series and one of the guests who did not sign a release brings an action for a percentage of the profit realized by the Center on the series, Polly's oversight would be more significant.

The avaricious guest is not guaranteed a victory by reason of the absence of a release, but the Center's case is more difficult. There is a good chance that the concessions ordinarily recited in the release can be implied from the guest's conduct, such as his failure to demand payment or to press his claim immediately. His willingness to appear gratis might even be established by reference to his comments on the program.

The point here is that a well-worded release would have made things neater and considerably easier for the Center. On the other hand, if the series comes and goes with little fanfare, the absence of a release will probably never be noticed.

A Simple Contract for Paid Appearances

A release and indemnification in the form of an "Agreement for Program Appearance" is also provided to cover those situtations where someone is given a small stipend for appearing on a program. (See Page 168.) It applies in those situations where no royalties or residuals are involved and a single payment to the performer satisfies the producer's entire obligation of payment to the party.

Reasonable men may disagree on exact wording, style or usage. For the licensee or manager represented by legal counsel, it would be prudent to call on such expert assistance in the preparation of a form specifically tailored to the particular station and its production activities. This assistance will also be helpful in taking into account different provisions of state law which should be reflected in the form to provide maximum legal protection to the producer or licensee.

GENERAL RELEASE

In consideration for participating in or appearing on (title of program), prepared for use by Station (call letters) and (name of licensee or producer) (hereinafter the Producers):

1. I agree that I am to receive no compensation.
2. I release the Producers, their employees, and assigns from any liability for claims by me or anyone else arising out of my participation or appearance on (title of program).
3. I agree that my appearance on or participation in the program confers upon me no ownership rights whatsoever.

_____

(signed)

Minor: (name of child)

Parent or Guardian: (signature)

RELEASE FORM
FOR GROUP OF CHILDREN

In consideration for appearing on (program title), a program produced by (producer or licensee), for station (call letters).

I warrant:

1. that I am in charge of a group of (No.) children, identified as (Brownie Troop 467, Little Beaver Guides or whatever).
2. that the parent or guardian of each child has consented to the child's appearance on this program.

I agree:

1. that the children and I are to receive no compensation;
2. that the producers, their employees, and assigns are released from any liability for claims by me or anyone else arising out of the childrens' participation or appearance on (title).
3. that their appearance or participation on this program confers upon them and me no ownership rights whatsoever.

_____
(signature)

_____
(title)

AGREEMENT FOR PAID APPEARANCE

I authorize the (name of licensee or producer, or both) (hereinafter referred to as Producers) to make use of my appearance on (title of program). I understand that I am to receive $_____ as full and complete compensation for this appearance.

I agree that the Producers are the sole owners of the programs and that I am to receive no additional compensation of any kind as a result of any recordings, rebroadcasts or other uses thereof for all (non)commercial (educational) purposes.

I give the Producers the right to use my name, likeness, and biographical material to publicize both the program and the services of the Producers.

I agree to indemnify and hold harmless the Producers and any radio or TV stations broadcasting the program against any liability, loss or other injury (including reasonable costs and attorney's fees), which I cause either by my appearance or participation, or by the materials I bring for use on the program.

Any dispute arising out of this Agreement shall be governed by the laws of the State (Commonwealth) of _____.

The countersignature below acknowledges the Producer's approval of this Agreement.

_____ _____

Date

_____

Countersigned
for the (name of "Producers")

[Free Use]

AGREEMENT AND INDEMNIFICATION FOR POLITICAL CANDIDATES

In consideration for appearing on the broadcast facilities of _____ ("the station"), I, _____, a legally-qualified candidate (or the agent of such candidate duly authorized to execute this document), hereby guarantee that the entirety of any program or spot announcement furnished by me will be a "use"* under Section 315 of the Communications Act of 1934, as amended. I further guarantee, as a condition of being granted access to these facilities, that no other legally-qualified candidate will appear on any program or spot announcement furnished by me except with the prior written consent of the station.

I agree to indemnify the station and any third parties for all claims or liability arising from the broadcast over the facilities of the station of any spot announcement or program furnished by me, which is not a "use."*

Date_____ Signed _____

(If signed by an agent, show agency and the use of the candidate thus:

_____

as agent for

_____.)

* A "use" under Section 315 of the Communications Act occurs:

1. For spot announcements (segments under three (3) minutes): whenever the candidate appears by voice or image, no matter how brief the appearance.

2. For programs (segments three (3) minutes or longer): whenever the candidate is the focus of the program, in that his appearance is substantial in length in relation to the duration of the whole and integral rather than incidental to the program, and where the program is under his direction and control.

[Paid Use]

AGREEMENT AND INDEMNIFICATION FOR POLITICAL CANDIDATES

In consideration for appearing on the broadcast facilities of _____ ("the station"), I, _____, a legally-qualified candidate (or the agent of such candidate duly authorized to execute this document), hereby guarantee that the entirety of any program or spot announcement furnished by me will be a "use"* under Section 315 of the Communications Act of 1934, as amended. I further guarantee, as a condition to being granted access to these facilities, that no other legally-qualified candidate will appear on any program or spot announcement furnished by me except with the prior written consent of the station.

I agree to indemnify the station and any third parties for all claims or liability arising from the broadcast over the facilities of the station of any spot announcement or program furnished by me, which is not a "use"*

I recognize that the "lowest unit charge" is available only for "uses." If any program or spot announcement covered by this agreement is not a "use," as determined by the station, I agree immediately to pay the "comparable rate" for that segment; and such payment shall be a precondition to further access to the station's broadcast facilites.

Date_____ Signed _____

(If signed by an agent, show agency and the name of the candidate thus: _____, as agent for _____.)

* A "use" under Section 315 of the Communications Act occurs:

1. For spot announcements (segments under three (3) minutes): whenever the candidate appears by voice or image, no matter how brief the appearance.
2. For programs (segments three (3) minutes or longer): whenever the candidate is the focus of the program, in that his appearance is substantial in length in relation to the duration of the whole and integral rather than incidental to the program, and where the program is under his direction and control.

Appendix

Selected Statutes and Regulations

Title 47, United States Code

Section 309
Application for license—
Considerations in granting application

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Petition to deny application; time; contents; reply; findings

(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications

would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

Hearings; intervention; evidence; burden of proof

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Section 312
Administrative sanctions—
Revocation of station license or construction permit

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of Title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

Cease and desist orders

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this chapter, or section 1304, 1343, or 1464 of Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

Order to show cause

(c) Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with re-

spect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appeal before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

Burden of proof

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

Procedure for issuance of cease and desist order

(e) The provisions of section 1008(b) of Title 5 which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

Section 315
Candidates for public office—
Equal opportunities requirement; censorship prohibition; allowance of station use; news appearance exception; public interest; public issues discussion opportunities

(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 this 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.

Broadcast media rates

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

Station use charges upon certification of nonviolation of Federal limitations of expenditures for use of communications media

(c) No station licensee may make any charge for the use of such station by or on behalf of any legally qualified candidate for Federal election office (or for nomination to such office) unless such candidate (or a person specifically authorized by such candidate in writing to do so) certifies to such licensee in writing that the payment of such charge will not violate any limitation specified in paragraph (1), (2), or (3) of section 803(a) of this title, whichever paragraph is applicable.

Station use charges upon certification of nonviolation of State limitations of expenditures for use of communications media; conditions for application of State limitations

(d) If a State by law and expressly—

(1) has provided that a primary or other election for any office of such State or of a political subdivision thereof is subject to this subsection,

(2) has specified a limitation upon total expenditures for the use

of broadcasting stations on behalf of the candidacy of each legally qualified candidate in such election.

(3) has provided in any such law an unequivocal expression of intent to be bound by the provisions of this subsection, and

(4) has stipulated that the amount of such limitation shall not exceed the amount which would be determined for such election under section 803(a) (1) (B) or (a) (2) (B) of this title (whichever is applicable) had such election been an election for a Federal elective office or nomination thereto;

then no station licensee may make any charge for the use of such station by or on behalf of any legally qualified candidate in such election unless such candidate (or person specifically authorized by such candidate in writing to do so) certifies to such licensee in writing that the payment of such charge will not violate such State limitation.

Penalties for violations; provisions of sections 501 through 503 of this title inapplicable

(e) Whoever willfully and knowingly violates the provisions of subsection (c) or (d) of this section shall be punished by a fine not to exceed $5,000 or imprisonment for a period not to exceed five years, or both. The provisions of sections 501 through 503 of this title shall not apply to violations of either such subsection.

Definitions

(f) (1) For the purposes of this section:

(A) The term "broadcasting station" includes a community antenna television system.

(B) The terms "licensee" and "station licensee" when used with respect to a community antenna television system, means the operator of such system.

(C) The term "Federal elective office" means the office of President of the United States, or of Senator or Representative in, or Resident Commissioner or Delegate to, the Congress of the United States.

(2) For purposes of subsections (c) and (d) of this section, the term "legally qualified candidate" means any person who (A) meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate and (B) is eligible under applicable State law to be voted for by the electorate directly or by means of delegates or electors.

Rules and regulations

(g) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Section 317
Annoucement of payment for broadcast—
Disclosure of person furnishing

(a) (1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

Disclosure to station of payments

(b) In any case where a report has been made to a radio station, as required by section 508 of this title, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

Acquiring information from station employees

(c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

Waiver of announcement

(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with

respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

Rules and regulations

(e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Section 326
Censorship

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 conmmunication.

Section 396
Corporation for Public Broadcasting
Congressional Declaration of Policy

Purposes and activities of the Corporation; powers under the District of Columbia Nonprofit Corporation Act

(g) (1) In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a) of this section, the Corporation is authorized to—

(A) facilitate the full development of educational broadcasting in which programs of high quality, obtained from diverse sources, will be made available to noncommercial educational television or radio broadcast stations, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature . . .

Section 399
Editorializing and support of political candidates prohibited; recording of certain programs

(a) No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for political office.

(b) (1) Except as provided in paragraph (2), each licensee which receives assistance under sections 390 to 399 of this title after August 6, 1973 shall retain an audio recording of each of its broadcasts of any program in which any issue of public importance is discussed. Each such recording shall be retained for the sixty-day period beginning on the date on which the licensee broadcasts such program.

(2) The requirements of paragraph (1) shall not apply with re-

spect to licensee's broadcast of a program if an entity designated by the licensee retains an audio recording of each of the licensee's broadcasts of such a program for the period prescribed by paragraph (1).

(3) Each licensee and entity designated by a licensee under paragraph (2) which retains a recording under paragraph (1) or (2) shall, in the period during which such recording is required under such paragraph to be retained, make a copy of such recording available—

(A) to the Commission upon its request, and

(B) to any other person upon payment to the licensee or designated entity (as the case may be) of its reasonable cost of making such copy.

(4) The Commission shall by rule prescribe—

(A) the manner in which recording required by this subsection shall be kept, and

(B) the conditions under which they shall be available to persons other than the Commission.

giving due regard to the goals of eliminating unnecessary expense and effort and minimizing administrative burdens.

Title 18, United States Code

Section 1304
Broadcasting lottery information

Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all or such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Each day's broadcasting shall constitute a separate offense.

Section 1343
Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme

or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Section 1464
Broadcasting obscene language

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.

Rules and Regulations of the Federal Communications Commission

Section 73.119
Sponsored programs, announcement of

(a) When a standard broadcast station transmits any matter for which money, services, or other valuable consideration is either directly or indirectly paid or promised to, or charged or received by, such station, the station shall broadcast an announcement that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied: *Provided, however,* That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(b) The licensee of each standard broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program matter for broadcast, information to enable such licensee to make the announcement required by this section.

(c) In any case where a report (concerning the providing or accepting of valuable consideration by any person for inclusion of any matter in a program intended for broadcasting) has been made to a standard broadcast station, as required by section 508 of the Communications Act of 1934, as amended, of circumstances which would have required an announcement under this section had the consideration been received by such standard broadcast station, an appropriate announcement shall be made by such station.

(d) In the case of any political program or any program involving the discussion of public controversial issues for which any records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a station as an inducement to the broadcasting of such program, an announcement shall be

made both at the beginning and conclusion of such program on which such material or services are used that such records, transcriptions, talent, scripts, or other material or services have been furnished to such station in connection with the broadcasting of such program: *Provided, however*, That only one such announcement need be made in the case of any such program of 5 minutes' duration or less, which announcement may be made either at the beginning or conclusion of the program.

(e) The announcement required by this section shall fully and fairly disclose the true identity of the person or persons by whom or in whose behalf such payment is made or promised, or from whom or in whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished. Where an agent or other person contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known to the station, the announcement shall disclose the identity of the person or persons in whose behalf such agent is acting instead of the name of such agent.

(f) In the case of any program, other than a program advertising commercial products or services, which is sponsored, paid for, or furnished, either in whole or in part, or for which material or services referred to in paragraph (d) of this section are furnished, by a corporation, committee, association, or other unincorporated group, the announcement required by this section shall disclose the name of such corporation, committee, association, or other unincorporated group. In each such case the station shall require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association, or other unincorporated group shall be made available for public inspection at the studios or general offices of one of the standard broadcast stations carrying the program in each community in which the program is broadcast. Such lists shall be kept and made available for a period of 2 years.

(g) In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purposes of this section and only one such announcement need be made at any time during the course of the program.

(h) The announcements otherwise required by section 317 of the Communications Act of 1934, as amended, are waived with respect to the broadcast of "want ad" or classified advertisements sponsored by individuals. The waiver granted in this paragraph shall not extend to classified advertisements or want ads sponsored by any form of business enterprise, corporate or otherwise. Whenever sponsorship an-

nouncements are omitted pursuant to this paragraph the following conditions shall be observed:

(1) The licensee shall maintain a list showing the name, address, and (where available) the telephone number of each advertiser and shall attach this list to the program log for each day's operation; and

(2) Shall make this list available to members of the public who have a legitimate interest in obtaining the information contained in the list.

(i) Commission interpretations in connection with the provisions of this section may be found in the Commission's Public Notice entitled "Applicability of Sponsorship Indentification Rules" (FCC 63–409; 28 F.R. 4732, May 10, 1963) and such supplements thereto as are issued from time to time.

Section 73.120
Broadcasts by candidates for public office

(a) *Definitions.* A "legally qualifed candidate" means any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, State or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for the electorate directly or by means of delegates or electors, and who:

(1) Has qualified for a place on the ballot or

(2) Is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, and (i) has been duly nominated by a political party which is commonly known and regarded as such, or (ii) makes a substantial showing that he is a bona fide condidate for nomination or office, as the case may be.

(b) *General requirements.* No station licensee is required to permit the use of its facilities by any legally qualified candidate for public office, but if any licensee shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other such candidates for that office to use such facilities: *Provided*, That such licensee shall have no power of censorship over the material broadcast by any such candidate.

(c) *Rates and practices.* (1) The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means direct or indirect. A candidate shall, in each case, be charged no more than the rate the station would charge if the candidate were a commercial advertiser whose advertising was directed to promoting its business within the same area as that encompassed by the particular office for which such person is a candidate. All discount

privileges otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates for public office.

(2) In making time available to condidates for public office no licensee shall make any discrimination between candidates in charges, practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for the same public office.

(d) *Records; inspection.* Every licensee shall keep and permit public inspection of a complete record of all requests for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if request is granted. Such records shall be retained for a period of two years.

NOTE: See Section 1.526 of this chapter.

(e) *Time of request.* A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use, giving rise to the right to equal opportunities, occurred: *Provided, however,* That where a person was not a candidate at the time of such first prior use, he shall submit his request within 1 week of the first subsequent use after he has become a legally qualified candidate for the office in question.

(f) *Burden of proof.* A candidate requesting such equal opportunities of the licensee, or complaining of non-compliance to the Commission shall have the burden of proving that he and his opponent are legally qualified candidates for the same public office.

Section 73.503
Licensing requirements and service

The operation of, and the service furnished by noncommercial educational FM broadcast stations shall be governed by the following:

(a) A noncommercial educational FM broadcast station will be licensed only to a nonprofit educational organization and upon showing that the station will be used for the advancement of an educational program.

(1) In determining the eligibility of publicly supported educational organizations, the accreditation of their respective state departments of education shall be taken into consideration.

(2) In determining the eligibility of privately controlled educational organizations, the accreditation of state departments of education and/or recognized regional and national educational accrediting organizations shall be taken into consideration.

(b) Each station may transmit programs directed to specific schools in a system or systems for use in connection with the regular courses as well as routine and administrative material pertaining thereto and may transmit educational, cultural, and entertainment programs to the public.

(c) A noncommercial educational FM broadcast station may broadcast programs produced by, or at the expense of, or furnished by persons other than the licensee, if no other consideration than the furnishing of the program and the costs incidental to its production and broadcast are received by the licensee. The payment of line charges by another station network, or someone other than the licensee of a noncommercial educational FM broadcast station, or general contributions to the operating costs of a station, shall not be considered as being prohibited by this paragraph.

(d) Each station shall furnish a nonprofit and noncommercial broadcast service. Noncommercial educational FM broadcast stations are subject to the provisions of section 73.289 to the extent that they are applicable to the broadcast of programs produced by, or at the expense of, or furnished by others; however, no announcements promoting the sale of a product or service shall be broadcast in connection with any program.

NOTE 1: Announcements of the producing or furnishing of the programs, or the provision of funds for their production, may be made no more than twice, at the opening and at the close of any program, except that where a program lasts longer than 1 hour an announcement may be made at hourly intervals during the program if the last such announcement occurs at least 15 minutes before the announcement at the close of the program. The person or organization furnishing or producing the program, or providing funds for its production, shall be identified by name only, except that in the case of a commercial company having *bona fide* operating divisions or subsidiaries one of which has furnished the program or funds, the division or subsidiary may be mentioned in addition to or instead of the commercial company. No material beyond the company (or division or subsidiary) name shall be included. Upon request for waiver of this provision, the Commission may authorize the inclusion of brief additional descriptive material only when deemed necessary to avoid confusion with another company having the same or a similar name. No mention shall be made of any product or service with which a commercial enterprise being identified has a connection, except to the extent the name of the product or service is the same as that of the enterprise (or division or subsidiary) and is so included. A repeat broadcast of a particular program is considered a separate program for the purpose of this note.

NOTE 2: Announcements may be made of general contributions of a

substantial nature which make possible the broadcast of programs for part, or all, of the day's schedule. Such announcements may be made at the opening and closing of the day or segment, including all of those persons or organizations whose substantial contribtutions are making possible the broadcast day or segment. In addition, one such general contributor may be identified once during each hour of the day or segment. The provisions of Note 1 of this section as to permissible contents apply to announcements under this note.

NOTE 3: The limitations on credit announcements imposed by Notes 1 and 2 of this section shall not apply to program material, the production of which was completed before January 1, 1971, or to other announcements broadcast before January 1, 1971, pursuant to underwriting agreements entered into before November 30, 1970.

NOTE 4: The provisions of Notes 1 and 2 of this section shall not apply during the broadcast times in which "auctions" are held to finance station operation. Credit announcements during "auction" broadcasts may identify particular products or services, but shall not include promotion of such products or services beyond that necessary for the specific auction purpose.

NOTE 5: The numerical limitations on permissible announcements contained in Notes 1 and 2 of his section do not apply to announcements on behalf of noncommercial, non-profit entities, such as the Corporation for Public Broadcasting, State or regional entities, or charitable foundations.

Section 73.1208
Broadcast of taped, filmed, or recorded material

(a) Any taped, filmed or recorded program material in which time is of special significance, or by which an affirmative attempt is made to create the impression that it is occurring simultaneously with the broadcast, shall be announced at the beginning as taped, filmed or recorded. The language of the announcement shall be clear and in terms commonly understood by the public. For television stations, the announcement may be made visually or aurally.

(b) Taped, filmed, or recorded announcements which are of a commercial, promotional or public service nature need not be identified as taped, filmed or recorded.

Suggested Legal Reading

I. Freedom of Expression and Related Issues

Books and Articles:

Emerson, Toward a General Theory of the First Amendment, Random House (New York 1966).

Media and the First Amendment in a Free Society, 60 Georgetown Law Journal 867 (1972).

Marks, *Broadcasting and Censorship: First Amendment Theory After Red Lion*, 38 George Washington Law Review 974 (1970).

Toohey, *Section 399: The Constitution Giveth and Congress Taketh Away*, 6 Educational Broadcasting Review 31 (1972).

Note, *The First Amendment and Regulation of Television News*, 72 Columbia Law Review 746 (1972).

Note, *Morality and the Broadcast Media: a Constitutional Analysis of FCC Regulatory Standards*, 84 Harvard Law Review 664 (1971).

Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 George Washington Law Review 429 (1971).

Robinson, *The FCC and the First Amendment: 40 Years of Radio and Television Regulation*, 52 Minnesota Law Review 67 (1967).

Comment, *The FCC as Fairy Godmother: Improving Children's Television*, 21 UCLA Law Review 1290 (1974).

Note, *Regulation of Program Content by the FCC*, 77 Harvard Law Review 701 (1964).

Cases:

National Broadcasting Co. v. United States, 319 U.S. 190 (1943).
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).
Editorializing by Broadcast Licensees, 13 FCC 1246 (1949).
Miller v. California, 413 U.S. 15 (1973).
New York Times v. Sullivan, 376 U.S. 254 (1964).
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
Time, Inc. v. Hill, 385 U.S. 374 (1967).

II. Business Aspects of Programming

Books and Articles:

Prosser, The Law of Torts, 3rd Ed., West Publishing Company (St. Paul 1964).
Kaplan and Brown, Cases on Copyright, Unfair Competition and Other Topics, The Foundation Press, Inc. (New York 1960).
Note, Sound Recording Act of 1971: An End to Piracy on the High C's?, 40 George Washington Law Review 964 (1972)
Note, *Performer Rights in Copyright*, 59 California Law Review 548 (1971).
Note, *Applicability of Compulsory License Provision to Radio and Television Advertisements*, 18 UCLA Law Review 1126 (1971).
Note, *Cable Compromise: Integration of Federal Copyright and Telecommunications Policies*, 17 Saint Louis University Law Journal 340 (1973).
Developments in the Law of Trademarks and Unfair Competition, 68 Harvard Law Review 814 (1955).
Developments in the Law of Competitive Torts, 77 Harvard Law Review 888 (1964).

Cases:

Fortnightly v. FCC, 392 U.S. 390 (1964).
Goldstein v. California, 412 U.S. 546 (1973).
Sears, Roebuck and Co. v. Stiffel Co., 376 U.S. 225 (1964).
Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

III. Communications Source Material

Jennings, Ralph M., Guide to Understanding Broadcast License Applications and Other FCC Forms, Office of Communications, United Church of Christ, 1972.

Bennett, Robert W., A Lawyer's Source Book: Representing the Audience in Broadcast Proceedings, Office of Communications, United Church of Christ, 1974.

INDEX

"Actual Malice" must be proven by plaintiff in cases involving public official, public figure or public issue, 10–14

Anti-Dilution Laws —
state laws designed to limit erosion of a trademark's distinctiveness or value; utilized by courts to enjoin diluting uses, 136

Appendix, 171–191

Broadcasting Prohibitions —
FCC supplementary ruling provides guidelines as to material about state-sponsored lotteries that may be broadcast, 146–147

most lottery information, or promotion of, 141–149

no noncommercial educational broadcasting station may engage in editorializing or support or oppose any candidate for political office, 66

Section 1464, U. S. Criminal Code, provides up to $10,000 fine, or up to 2-year imprisonment, for broadcasting obscene, indecent, or profane language, 79–91

Broadcast Stations —
apparent conflict between tax law and Federal Election Campaign Act, 151–152

difficult policy decisions must be made when dealing with potentially offensive programming with sexual content; suggested guidelines and techniques include protecting children, promotion and warnings, statutory censorship prohibition, 85–90

FCC has no guidelines to restrain TV programming of violence; controversy on effects of, particularly on children, 95–96

little current guidance on how to deal with obscenity because of confusion arising from legislature and courts, 82

management decisions to delete objectionable material, censor, or edit programming have many legal hazards, such as contractual provisions requiring prior approval of program originator, 90–93

responsible if employee stages or distorts news, or slants report of an event, 70–71

Business Aspects of Programming (Part II), 101–170

CATV and Copyright —
Buck v. Jewell LaSalle, Supreme Court Case (1931), holds hotel owners liable for copyright infringement, 124

Fortnightly Corporation v. United Artists Television, Inc., Supreme Court case (1968) permits CATV operations with no copyright infringement, 124–125

reform appears likely, with the copyright statute under review by Congress; CATV potential to revolutionize communications described, and copyright infringement discussed, 125–126

Copyright, 103–126
and CATV, see CATV and Copyright, 124–126
certain materials automatically available and licensed for use by non-profit organizations and noncommercial stations, 118
Common Law —
derived from operation of state law, exists as automatic protection as long as work remains unpublished, 105–106
definitions of 14 classes of work under which author may claim statutory protection, 108–109
fair use doctrine, permits privileged copying depending on five elements, 115
Law of the United States (Title 17, U. S. Code) enacted in 1909 now being reviewed by Congress to update old statute and conform it to modern technological advances, 103–104
securing permission to use copyrighted material; finding, conferring with copyright owner, 118
types of: common law, statutory, 105–106
unprotected works ineligible for statutory protection, 4 classes generally described, 109–110
Copyright Act —
areas of special concern: motion picture and videotape recordings, discussion on their availability, 119–125
Section 5 of, enumerates 14 broad classes of works under which statutory copyright may be claimed, 107–109
Copyright Protection —
definitions, 104
duration of, 113
Sound Recordings —
in recognition of unfairness created by absence of federal control, Congress passed "The Sound Recording Act of 1971," which gave limited copyright protection, 122–123
Statutory —
only meaningful source of protection for authors, arises upon compliance with federal requirements and act of publication, 106
formalities that must be observed to obtain, 111, 112–113
necessity of, 120–122
renewal rights, 114–115
transfer of, methods, 113
"Defamacast" —
describes defamation by broadcast, 1
Defamation, 1–18
absolute or qualified immunity in certain situations granted to defendants otherwise liable for, examples of, 8–14

broadcast licensee liability, 6

by broadcast, "defamacast," 1

criticism not necessarily defamatory, 3–4

libel and slander, definitions, 1–2

New York Times v. Sullivan, Supreme Court case (1964) enunciated "actual malice test" and established qualified privilege from liability for publications involving public official; doctrine later applied to public figures, public issues, and private individuals, 10–14

plaintiff must prove "actual malice" in cases of public official, public figure or public issue, 11–14

"publication" defined, as related to, 4

"single publication rule," 4–5

statement circulated must defame, 2–3

subject of, must be clearly identified, 6–7

three defense arguments that could reduce damage award in libel case, 15–16

trade libel similar to, requires proof of actual loss of revenue, 16–18

truth a complete defense, 14–15

Equal Opportunities Rule —

candidate's opponent, or opponents, must be given "equal time" to match personal appearances on broadcast facilities, 58–59

four kinds of broadcast programs exempt from requirement: bona fide newscasts, news interviews, news documentaries, on-the-spot coverage of news events, 64

method used to compute "equal time" in duration and attractiveness explained, 58–59

Section 315 (1959) provides that broadcasters give equal treatment to legally qualified candidates for public office, 28

7-day time limit on requests for equal opportunities, or rights are forfeited, 59–60

Fairness Doctrine —

and Personal Attack Rules, 27–54

close relationship of Political Broadcasting to, explained, with suggestion to interrelate Chapters 3 and 4, 55

controversial issue programming often requires compromises — suggestions advanced, 42–43

every broadcast licensee has obligation to meet needs and interests of its entire area of service, 38

extended to the totality of a broadcaster's programming, 28

manager or producer obligated to anticipate "issues" that may require station to provide reply time, 35

Radio/TV station may be required to give balanced coverage of issue "accidentally" selected, 33–34

techniques of balanced programming: balance achieved by spreading issue treatment over extended period, 38–39

with subsidiary Personal Attack Rules, intimately connected to political broadcasting, 27

Federal Communications Commission (FCC) —
challenging the, in the area of "offensive" or "vulgar" programming, may tempt station management but should be cautiously approached, 93

examples of problem broadcasts exceeding limits of acceptable taste, and actions thereon by FCC, 82–85

given authority in Section 312(a) (7) of Communications Act to revoke station licenses for failure to allow access to, or sell time to, legally qualified candidates for federal elective office, 57–58

guidelines issued for broadcast stations on Commission's news staging doctrine, 72–73

has decided it is not bound by the standard of obscenity which applies to rest of government; is quite aggressive in applying "public interest standard" of Communications Act, 82–83

has ruled it is "unreasonable" for a station to refuse to make available some *program* time, and some *prime* time, to federal candidates, 57–58

regulatory policy of, brought into play by complaints that programming is offensive because of sexual content; station management may be required to explain programming decisions to FCC, 86

Federal Election Campaign Act of 1971 —
added amendment to Communications Act [Section 312(a) (7)] that allows FCC to revoke any station license for failure to give reasonable access to legally qualified candidates for federal elective office, 57–58

Federal Income Taxation, 151–158
legal restrictions on gifts to public charitable organizations, and noncommercial stations, extent of allowable deductions, 155–156, 157–158

limitations on charitable organizations engaging in political activities, 151–152

1954 Internal Revenue Code: tax-exempt organizations taxable on unrelated business income, 153–154

profits tax-exempt in three specific businesses, 153–154

provisions of Federal Elections Campaign Act of 1971 on tax exempt station involvement in political campaigns, 151–152

Freedom of Expession and Related Issues (Part I), xix–99

How to Use This Book, xiii–xv
Further Reading, xiv–xv
Understanding Legal Citation, xiv
Working with Hypothetical Fact Situations, xiii–xiv

Infringement —
of trademark or defamation injuring business reputation may give corporation or business entity legal cause of action, 23

Lotteries, 141–149
guidelines in FCC ruling includes both prohibitions and permissible subjects for broadcasts, 146–147
news reports of newsworthy content not completely barred, 145
often created inadvertently, innocently; suspect schemes require analysis, 143
Supreme Court cites three elements of, 141–142

Lottery Information —
broadcasting of, prohibited by Congress, 141

Network Affiliates —
liability in publication of defamation, 5–6

New York Times v. Sullivan, noted Supreme Court defamation case (1964), established "actual malice" test and qualified privilege from liablility for publications involving public officials, 10–14

News Staging, 69–78
co-existence with FCC guidelines possible for journalists in fulfilling professional responsibilities, 75
definitions of, 69
FCC guidelines to explain principles involved in Commission's prohibition, 72–73
FCC has developed vague criteria for investigating charges of news rigging or slanting which would mislead viewers, 70–71
if FCC investigation finds station management guilty of, could mean license revocation or denial of renewal, 70–71

Noncommercial Stations —
educational stations barred from editorializing, supporting, or opposing any candidate for political office, 66
gifts from donors and amount of allowable deduction (with legal restrictions) from federal income taxes, 155–156, 157–158
may use certain audio, video, other copyrighted materials automatically available and licensed to, by contacting U. S. Copyright Office, 118
required, the same as commercial stations, to provide reasonable amounts of time to legally qualified candidates for federal elective office, 57–58

Obscenity, 79–94
does Congress intend, by passing the federal obscenity statute covering radio and television, to "preempt" the field of broadcast regulation? 81–82
examples of problem broadcasts, and actions thereon by FCC, 82–85
FCC has decided it is not bound by the standard of obscenity which applies to rest of government; is aggressive in applying "public interest standard" of Communications Act, 82–83
if station decides to present programming with significant sexual content, must take steps to insulate it from viewing by children, 86–87

In *Miller v. California*, Supreme Court (1973) enunciated legal test for obscenity based on three elements, with objective to proscribe only "hard core" pornography, 80–81

stations which expect to broadcast sexual material must develop acceptable methods of warning devoid of suggestive content to advise parents and others concerned, 88–90

U. S. Criminal Code provides up to $10,000 fine or up to 2-year imprisonment for broadcasting obscene, indecent, or profane language, 79

Personal Attack Rules —

Commission requires that station notify candidate opposed in Political Editorial within 24 hours, 53

and Political Editorials: Commission, in 1969, adopted Personal Attack Rules (included here in detail), 45–46

Commission rules for supplying tape or transcript within 7 days to be enforced, 49

definition; explanation of confusing meanings, 47–48

exemptions for attacks on foreign groups or foreign public figures, 50

station's editorial prerogatives restricted; should not edit reply unless contains obscene language, lottery information, or potentially defamatory material, 53–54

Political Broadcasting, 55–68

close relationship to Fairness Doctrine (Chap. 3) emphasized; both areas closely interrelated, 55

Equal Opportunities Rule analyzed; requirements explained, 58–59

FCC extends Fairness Doctrine to supporters of legally-qualified candidates making them eligible for "comparable" broadcast time (The *Zapple* Rule), 68

noncommercial stations, though prohibited from selling time to candidates, must provide reasonable amounts of time to all candidates for federal elective office, 57–58

represents troublesome area for station executives, program producers, of both commercial and noncommercial stations, 55

statutes make mandatory the obligation to give or sell time to qualified federal candidates, stations may also be obligated to provide time in "the public interest" to candidates for non-federal offices, 58

Preface, iii–v

Privacy —

broadcasters must screen all programs for possible invasions of right of, 19

failure to obtain written consent for use of person's picture, name, etc. for specific purpose may create "privacy" problem for broadcaster, 23

five invasions, the right of, protects against, 19

individual has right to recover for serious and outrageous invasion of, 19–26

invasions in advertising described, 21

New York Times v. Sullivan test, with protections for the press, extended by Supreme Court to matters of public interest involving right of, 24

right a personal one, not enforceable by corporation, or other business entity, 23

right of, not bar to reporting matters of public interest in decision of 1967 Supreme Court case, *Time, Inc. v. Hill*, 23–24

violation of right of, and defamation, raised jointly in some actions, 24–25

Public Charitable Organizations —
donations to, including those to noncommercial stations, deductible from donor's federal income tax — legal restrictions cited, 155–156, 157–158

Publication, as related to defamation, definition of, 4

Radio/TV Stations —
have options in handling diverse views on controversial issues; may invite community group representatives, or have station staff present views; or a combination approach, 40

how they may cover controversial issues, and factors to help station managers decide on particular issues to include, 31, 32–34

may be charged by spokesmen for various sides of an issue with bad faith in failing to cover controversial issues on the air, 28–29

must be constantly aware of citizen group activity, and pressure from the FCC, courts, and Congress to make time available to candidates, 58–59

required to provide balanced or "fair" coverage of controversial issues of public importance under Fairness Doctrine, 27–29

Releases and Other Station Indemnification Forms, 159–170
Agreement and Indemnification for Political Candidates —
Free Use, 169
Paid Use, 170

Agreement for Paid Appearance, 168

anyone can sue, use of release as deterrent to filing of law suits, 164

forms to indemnify station against liability in case of personal injury, 160

General Release, 166

purposes of, 159–160

Release for Group of Children, 167

Section 315, and Candidate's Release Form, 163–164

simple contract for paid appearances, 166

use of properly worded release to avoid suits for libel, slander, property damage, copyright or trademark infringement, breach of contract, 160

(The) Right of Privacy, 19–26

Rosenbloom v. Metromedia, Inc. —
defamation case in Supreme Court (1971) which extends "actual malice" test to public issues, 12–14

Selected Statutes and Regulations, 173–187

Rules and Regulations of the Federal Communications Commission, 182–187

Section 73.119(a) to (i) Sponsored Programs, announcement of, 182–184

Section 73.120(a) to (f) Broadcasts by candidates for public office, 184–185

Section 73.503(a) to (d) (Note 1 to Note 5) requirements and service, 185–187

Section 73.1208(a) (b), Broadcast of taped, filmed, or recorded material, 187

Title 18, United States Code, 181–182

Section 1304, Broadcasting lottery information, 181

Section 1343, Fraud by wire, radio or television, 181–182

Section 1464, Broadcasting obscene language, 182

Title 47, United States Code, 173–181

Section 309(a) Application for license — considerations in granting application, 173

Section 309(d) (1) Petition to deny application; time; contents; reply; findings, 173–174

Section 309(e) Hearings; intervention; evidence; burden of proof, 174

Section 312(a) Administrative sanctions — Revocation of station license or construction permit, 175

Section 312(b) Cease and desist orders, 175

Section 312(c) Order to show cause, 175–176

Section 312(d) Burden of proof, 176

Section 312(e) Procedure for issuance of cease and desist order, 176

Section 315(a) Candidates for Public Office — Equal opportunities requirement; censorship prohibition; allowance of station use; news appearance exception; public interest; public issues discussion opportunities, 176–177

Section 315(b) Broadcast media rates, 177

Section 315(c) Station use charges upon certification of nonviolation of Federal limitations of expenditures for use of communications media, 177

Section 315(d) Station use charges upon certification of nonviolation of State limitations of expenditures for use of communications media; conditions for application of State limitations, 177–178

Section 315(e) Penalties for violations; provisions of Sections 501 through 503 of this title inapplicable, 178

Section 315(f) Definitions, 178

Section 315(g) Rules and regulations, 178

Section 317(a) (1) and (2) Announcement of payment for broadcast — Disclosure of person furnishing, 179

Section 317(b) Disclosure to station of payments, 179

Section 317(c) Acquiring information from station employees, 179

Section 317(d) Waiver of announcement, 179–180

Section 317(e) Rules and Regulations, 180

Section 326 Censorship, 180

Section 326(g) Purposes and activities of the corporation; powers under the District of Columbia Nonprofit Corporation Act, 180

Section 396, Corporation for Public Broadcasting — Congressional Declaration of Policy, 180

Section 399 (a) (b) Editorializing and support of political candidates prohibited; recording of certain programs, 180–181

Service Area —
defined by Court of Appeals in *Stone* v. *FCC*, 38

Suggested Legal Reading —
I Freedom of Expression and Related Issues, 189–190

II Business Aspects of Programming, 190

III Communications Source Material, 190–191

Trade libel, similar to defamation, but requires proof of actual revenue loss, 16–18

Trademark —
Competitor, guilty of intent to deceive with imitation, may be enjoined and assessed actual and punitive damages, 135–136

"Confusing Similarity" not permitted; six elements of detailed, 135–136

definitions of, 127–128

protection of, against infringer, through injunction against infringing use, destruction of the offending material, and money damages, 134

protection of, generally limited to a particular market in both geographic and commodity-service sense, but if business moves into other markets, protection may follow, 138

seven defenses or defects which defendant may raise when subject to an action, 139

some marks unprotectable statutorily or inherently; purely descriptive mark, generic or geographic term cannot be registered, 130–131

state anti-dilution laws designed, to limit erosion of a trademark's distinctiveness or value; utilized by courts to enjoin diluting uses, 136

The Lanham Act —
acquiring a trademark, "affixation," "used in commerce," establishing "secondary significance" or distinctiveness, 129

after mark is registered for five years and not challenged, the right of the registrant to use it becomes "incontestable"; must be renewed every 20 years, 133–134

five prohibitions which specifically prevent registration, 132

procedure for individual to register and protect a trademark explained in detail, 132–134

the mark's strength and value in a competitive world, 127–128

TV Programming Research, scientists not yet agreed on acceptable definitions of "violence" and "violent behavior"; research techniques still primitive, 97–98

Truth, a complete defense in civil action for defamation, 14–15

Unfair Competition —

covers wide variety of legal issues: trademark law, misappropriation of work or entitlement of another, and deceptive and false advertising, 127–139

principles of, used by some courts to resolve differences when two competing trademarks are not registered and one seeks precedence over the other, 136–137

U. S. Supreme Court —

CBS v. Democratic National Committee, licensee's right to make judgments in selecting controversial issues for treatment upheld, 33

in *Miller v. California*, enunciated legal test for obscenity, based on three elements, with objective to proscribe only "hard core" pornography, 80–81

in *Miller v. California*, recently reformulated obscenity standards to make them somewhat more restrictive, 79–81

New York Times v. Sullivan, noted libel case established "actual malice" test and qualified privilege from liability for publication involving public officials, 10–14

Red Lion Broadcasting Co. v. FCC, public's right of suitable access to issues and ideas established, cannot be frustrated by station executives' personal tastes, 31

Rosenbloom v. Metromedia, Inc., defamation case in Supreme Court extends "actual malice" test to public issues, 12–14

three elements of lottery cited in *American Broadcasting Company v. U. S.*, 141–142

Time, Inc. v. Hill, landmark case on right of privacy extends "actual malice" test to certain matters of privacy, 23–24

Violence, 95–99

Violence on TV —

attempts to compare proposed restrictions on prohibition of cigarette advertising, deemed not apropos, 98–99

conflict over "acceptable" levels, runs into free speech protected by First Amendment, 96–97

FCC conducting broad study of children's programming, including effects of; no restraining guidelines yet, 95

noted jurists, Learned Hand, Justice Brandeis, quoted on undesirability of invasion or abridgement of rights of free speech, in comments on restricting televised violence, 96, 99

public concern building over effects of, on children; studies underway, 95–96

(The) Zapple Rule —
FCC extends Fairness Doctrine to make supporters of legally-qualified candidates eligible for "comparable" broadcast time, 68