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The Fairness Doctrine: Its Limits and Occasions in West Virginia Advertising

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> [T]he *"Content" of a medium is like the juicy piece of meat carried by the burglar to distract the watchdog of the mind.* Marshall McLuhan, Understanding Media: The Extensions of Man, 32 (1966).

McLuhan's statement is a profound insight into the fundamental change in men's lives occasioned by the precise form and character of the means by which men communicate. Nevertheless, is it clear that the content of the media is at most an irrelevant distraction, the media's form being the exclusive means of change? While provocative, the McLuhan thesis cannot constitute the whole truth. The content or substance of broadcaster programming, not only its precise medium or form, must be the concern of the serious-minded viewer. The scope of that concern must be no less than the search for truth in broadcasting.

The fairness doctrine of the FCC is designed to achieve this truth in broadcasting by requiring the broadcasting of issues vital to the public in such a manner that all sides of the issue will be fairly aired thereby enabling the public to make informed decisions regarding those issues. The *raison d'être* of this concept is of further interest in light of the recently announced FCC Notice of Inquiry into the fairness doctrine. The announced purpose of the broad inquiry is to develop "more finely drawn classifications, approaches and policies . . . that will better serve the public interest."[1] The currency of that rule-making proceeding gives fresh import to an analysis of the fairness doctrine: its limits and occasions in West Virginia advertising.

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** M. McLuhan, Understanding Media: The Extensions of Man 32 (1966).

[1] In the Matter of The Handling of Public Issues Under The Fairness Doctrine and The Public Interest Standards of The Communications Act, 30 F.C.C.2d ____ (FCC 71-623, 1971).

I. History of the Fairness Doctrine: A Purpose Unachieved

An historical overview of the origin of the fairness doctrine reveals the reasons behind its existence. The Federal Communications Act of 1934, establishing the FCC as the licensing body for broadcasting,[2] provided that a broadcast license was to be issued, modified, or renewed only as "the public convenience, interest, or necessity"[3] demanded. In its case-by-case exercise of that licensing authority, the FCC has gradually formulated administrative prescriptions relating to the nature and content of broadcast programming.[4] This bundle of program content restrictions, known as the "fairness doctrine," was subsequently given explicit legislative sanction by a 1959 amendment to the Communications Act.[5]

Another rationale of the fairness mandate inheres in the fact that the license revocation power of the FCC is at best an ultimate power limited to an overall review of the broadcaster's performance during the license period. In contrast to the broad sword of revocation, the fairness doctrine is the rapier, invoking immediate relief with respect to a specific controversial issue. Beyond functional considerations, the fairness doctrine is an indicium of the right to freedom of speech, guaranteed the first amendment to the Constitution. Since free speech is "the matrix, the indispensable condition, of nearly every other form of freedom,"[6] it is a right indispensable to the proper functioning of a democratic society. The fairness doctrine is a recognition that the broadcasting media, controlled by a few, differs from other forms of free speech protected by the first amendment and as such requires a new application of that established and well-honored right. In another context, the United States Supreme Court has pointed out that "[w]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world it is impossible that it should be otherwise."[7] In many media through which the right of free speech is exercised and through which the proponents of particular viewpoints vie for

[2] 47 U.S.C. § 301 (1970).
[3] 47 U.S.C. § 307 (1970).
[4] The basic administrative synthesis of those case rulings was *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949), reprinted in 25 P&F Radio Reg. 1901 (1963). [hereinafter cited as Report].
[5] 47 U.S.C. § 315(a) (1970). *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
[6] Palko v. Connecticut, 302 U.S. 319, 327 (1937).
[7] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

listeners, the opportunity to be heard is equally available to each antagonist. It is clear that one individual has the same right and opportunity as another to leaflet homes,[8] to stand on a street corner handing out circulars,[9] or to speak from the public soap box.[10] By contrast, broadcasting is a limited medium. First, frequencies in the radio spectrum are limited.[11] Second, access to broadcast time is controlled by the licensed broadcaster. Thus, when the medium of free speech is a limited resource, such as radio and television, the first amendment guarantee is not that each person has an individual right to broadcast or speak, but rather that all sides of an issue are given a fair airing.[12] Freedom of speech has been held to imply a "marketplace of ideas"[13] where competing views are fairly aired, after which some of those ideas gain acceptance. This first amendment right to have each side of an issue broadcast coincides exactly with what the FCC has declared as "the right of the public to be informed."[14] That being so, the broadcaster functions as a trustee for the entire community, the people as a whole thereby retaining their collective right to have the medium function consistently with the ends and purposes of the first amendment. To that end, a twofold duty is imposed on the broadcaster as proxy for the public: first, he must give adequate coverage to controversies of public importance,[15] and second, he has an "affirmative duty"[16] to program a "balanced presentation."[17] This means "fair and equal" coverage with a "reasonable amount of time" being given to each side,[18] including "prime time periods."[19] Finally, the required balanced presentation must be given at the broadcaster's expense and initiative, if necessary.[20] "Otherwise, station owners and a few networks would have unfettered power to make time available *only* to the highest bidders . . . ."[21]

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[8] Lovell v. City of Griffin, 303 U.S. 444 (1938).
[9] Jamison v. Texas, 318 U.S. 413 (1943).
[10] Hague v. Comm. for Indus. Organization, 307 U.S. 496 (1939).
[11] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969).
[12] *Id.* at 388-89.
[13] *Id.* at 390.
[14] Report, *supra* note 4, at ¶ 6; Cullman Broadcasting Co., Inc., 40 F.C.C. 576, 577 (1963).
[15] Report, *supra* note 4, at ¶ 7; Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 377 (1968); *In re* Friends of the Earth, 24 F.C.C.2d 743, ... (1970).
[16] Report, *supra* note 4, at ¶ 9.
[17] *Id.*
[18] *Id.* at ¶ 7.
[19] *In re* Friends of the Earth, 24 F.C.C.2d 743 (1970).
[20] Cullman Broadcasting Co., Inc., 40 F.C.C. 576 (1963).
[21] Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 392 (1969) (emphasis supplied).

Strangely, the fairness doctrine has been sparsely applied to the advertising sector of broadcasting[22] in stark juxtaposition to its thorough-going application to all other programming, *i.e.*, news,[23] editorials,[24] documentaries,[25] and panel discussions.[26] Yet advertising is the clear instance of the highest bidder buying broadcast time. Therefore, it becomes important to initially ascertain when the fairness doctrine should attach to advertisements and, secondly, how the doctrine, once attached, is to be satisfied. Only by setting standards applicable to both steps can the FCC eliminate the present broadcasting anomaly with respect to first amendment rights where, as in George Orwell's parable, "all . . . [men] are equal; but some [men] are more equal than others."[27] This dipping of the scales of justice has effectively allowed what was originally ordained as a medium of free speech[28] to become a medium of advertising permitting the highest bidder to speak.

II. Attachment of Fairness Doctrine to Advertising: When Does An Issue Become Controversial?

The FCC has held that the fairness doctrine attaches to "any case in which broadcast facilities are used for the discussion of a controversial issue of public importance."[29] While the broadcaster is the self-enforcer of the doctrine in the first instance, having the discretion to determine controversiality, that determination is subject to review by the FCC as to whether the licensee "acted reasonably and in good faith."[30] The phrase "controversial issue of public importance" does not overtly differentiate between advertising and all other types of programming. Without such differentiation, it would appear that advertising should be subject to the fairness doctrine no less than broadcaster-originated programming (whether documentary, panel discussion, news or editorial). Yet the interpretative history of the fairness doctrine has not been so evenhanded, advertising

[22] The famous, though until recently singular, exception to this pattern of application is the "ubiquitous Mr. Banzhaf rule" respecting cigarette advertising. Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921 (1967); Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

[23] *In re* The Spartan Radiocasting Co., 33 F.C.C. 765 (1962).

[24] New Broadcasting Co., 6 P&F Radio Reg. 268 (1950).

[25] Report on "Living Should Be Fun" Inquiry, 33 F.C.C. 101 (1962).

[26] Lamar Life Ins. Co., 18 P&F Radio Reg. 683 (FCC 59-651, 1959).

[27] G. Orwell, Animal Farm, 148 (1946).

[28] Report, *supra* note 4, at ¶ 5.

[29] *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964).

[30] *Id.* at 10416.

having been largely ungoverned by the fairness principle. This initial administrative focus on programming originated by the broadcaster does have some logic, given the legislative history of broadcaster licensing. Prior to 1927, frequency allocation was left entirely in the hands of the private sector, the frequency user having total control over the content and form of his programming.[31] Finally, legislation was passed in 1927 which repudiated the previous policy, substituting the contrary doctrine that frequencies were to be allocated among applicants in a manner responsive to "the public convenience, interest, or necessity."[32] The subsequent history of the Federal Radio Commission and its successor, the FCC, has been one of continual strengthening of that concept as it relates to broadcaster programming. Nevertheless, history is no more than history, and it is argued here that the fairness doctrine should be extended to advertising in its every facet.

Advertising does vary, of course, in content. For the purpose of this analysis, advertisements have been categorized in three subject areas: "issue" ads, "general product" ads, and "institutional" ads.

A. Issue Advertisements

The issue ad is one which directly treats a controversial issue of public importance. In *National Broadcasting Co.*,[33] decided June 30, 1971, the FCC for the first time extended the scope of fairness to an advertisement sponsored by Standard Oil Company of New Jersey which, in the Commission's judgment, directly advanced a viewpoint on the Alaskan pipeline dispute. While the subject ads did not mention the pipeline itself, the Commission found that they did in fact raise issues concerning: (1) the need for developing the oil reserve in Alaska at this time; (2) the ecological effects which may ensue from such development; and (3) the ecological effects which may result from transporting such oil.[34] Finding that these issues were controversial and of public importance, the Commission ruled that fairness broadcasts were required. While *National Broadcasting Co.* is the only case directly applying fairness to issue ads, such an application is reinforced by the following Commission dicta:

> For example, if an announcement sponsored by a coal mining company asserted that strip mining had no harmful

[31] Act of 1912, ch. 287, 37 Stat. 302.
[32] Act of 1927, Ch. 169, § 4, 44 Stat. 1162, 1163.
[33] 40 U.S.L.W. 2047 (F.C.C. 71-704, June 30, 1971).
[34] National Broadcasting Co., ___ F.C.C.2d ___, ___ (1971).

> ecological results, the sponsor would be engaging directly in debate on a controversial issue, and fairness obligations would ensue. Or, if a community were in dispute over closing a factory emitting noxious fumes and an advertisement for a product made in the factory argued that question, fairness would also come into play.[35]

There can be little dispute that the issue ad, now construed to be within the ambit of fairness, includes commercials like "strip mines reclaim the land," "West Virginia mines are safer," or "Carbon United likes clean air, too," or other advertisements that take direct positions on other local controversial issues of public importance in West Virginia.

B. General Product Advertisements

A general product advertisement attempts to sell the product. Observe that the first category of ad does not include within its scope commercials whose theme is "buy oil" or "buy electricity." These are general product advertisements, other examples cited by the FCC being "Join the Dodge Rebellion"[36] or "Put a tiger in your tank."[37] The general product ad may include within its message a statement which directly states a position on a controversial issue of public importance. This bleeding-over would, of course, invoke the fairness principle as to the controversial issue thus directly raised. However, the pure product ad, with the exception of cigarette advertising,[38] has been held by the FCC to categorically fall outside the ambit of fairness.[39] In *In re Friends of the Earth,*[40] the Commission ruled, *inter alia,* that auto and gasoline commercials did not invoke the fairness doctrine for the reason that, while air pollution from automobile exhaust is a vital environmental issue, the general product commercials in question, *i.e.,* "Dodge Rebellion" or "Ford has a better idea," or "put a tiger in your tank," do not directly present one side of a public controversial issue.[41] The complainants argued that, similar to *Banzhaf v. FCC,*[42] in which fairness obligations were

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[35] *In re* Neckritz, 29 F.C.C.2d 807, 812 n. 6 (1971). The appeal was docketed by the 9th Circuit on May 24, 1971.

[36] *In re* Friends of the Earth, 24 F.C.C.2d 743, ___ (1970.)

[37] *Id.*

[38] Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921 (1967).

[39] *In re* Friends of the Earth, 24 F.C.C.2d 743 (1970).

[40] *Id.*

[41] *Id.* at ___.

[42] 405 F.2d 1082 (D.C. Cir. 1968).

invoked against cigarette advertising, the auto ads "imply that the good life is somehow inexorably connected with the use of powerful cars and high-test gasoline."[43] In that context, complainants urged that the ads expressed a point of view on the controversial issue of the health dangers of air pollution. Nevertheless, the Commission rejected that analogy, indicating cigarettes to be a "unique product" with unique adverse health effects.[44] The Commission cautioned that a commercial "could deal *directly* with an issue of public importance; if so, the fairness doctrine is fully applicable."[45] The FCC was apparently applying a standard of remoteness in distinguishing a general product ad which indirectly raises environmental health issues from an advertisement which on its face takes a direct position on a controversial public issue.

The lid on this tight administrative analysis has been blown off by the reversal of the Commission's ruling in *Friends of the Earth v. FCC*[46] by the court of appeals. That court found no substantive difference between the general product ad and the cigarette ruling "[w]hen there is undisputed evidence, as there is here, that the hazards to health *implicit* in air pollution are enlarged and aggravated by such products."[47] Accordingly, the court ruled that the general product ad does invoke the fairness doctrine where, as in the automobile commercials, the product advertised raises environmental health issues. The narrow case ruling in *Friends of the Earth* seems to apply only to environmental health issues raised in the consumption of the product. In light of that apparent limitation and the current FCC re-evaluation of the fairness doctrine, it is important to illustrate why the court of appeals ruling in *Friends of the Earth* should be extended.

A product being advertised for sale in a general product ad may entail environmental health effects in its production, distribution or consumption. Thus, when the consumer buys the product, his purchase inferentially puts his stamp of approval on the product's origin and effects. In addition, that purchase taken *en masse* is used by industry to its own advantage in any environmental battle that occurs. For example, the environmental issues raised by the

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[43] *In re* Friends of the Earth, 24 F.C.C.2d 743, ___ (1970).
[44] *Id.* at ___.
[45] *Id.* at ___ (emphasis supplied).
[46] ___ F.2d ___ (D.C. Cir. 1971).
[47] *Id.* at ___. (emphasis supplied).

siting of electrical power plants in both the "Davis Power Project"[48] and the "Blue Ridge Project"[49] in West Virginia have been publicly countered by the argument that the "energy crisis" demands that the projects be built. If it exists at all, the energy crisis is caused in part by the cumulative purchase and use of electricity by individual consumers. If the public were informed, through fairness doctrine broadcasts, of the air, land and water abuses occasioned by the production of electricity, the public might exercise other options, including:

(1) decrease its energy appetite to diminish the need for new power sitings;

(2) readily accept or even force a price increase for electricity as an acknowledgement that cheap electricity comes from:

(a) the use of cheap coal, usually strip-mined coal, which is in turn cheap because the true social costs, *i.e.*, health,[50] flood control,[51] flood damage,[52] fish and wildlife,[53] are not being borne by the producer; and the use of ecologically faulty air and water pollution abatement equipment which is in turn cheap because the true social costs, including pollution,[54] are again not being borne by the producer; or

(3) force reforms of particular industry practices.

The invocation of the fairness doctrine vis-à-vis the general product ad does not, after all, decide the controversy of whether a power production unit should be built and, if so, on what terms. The doctrine merely requires the broadcasting of all sides so that an informed public decision can be made by each viewer. Without such information, uninformed consumer use can but accrue to the product owner's benefit. Thus, the general product ad constitutes

[48] Applicants' Initial Statement of Environmental Factors, Part III A and B, *In re* Davis Power Project, FPC Project No. 2709 (June 1, 1971).
[49] Applicant's Environmental Statement for the Blue Ridge Project, *In re* FPC Project No. 2317 (Jan. 25, 1971).
[50] Address by Daniel Hale, M.D., The Senior Staff Conference of the Soil and Water Conservation Research Division of the Agriculture Research Service, Sept. 22, 1970.
[51] U.S. SOIL CONSERVATION SERVICE, LAND STABILIZATION PROBLEMS AREA STUDY, COAL RIVER SUB-BASIN AND ADJACENT WATERSHEDS (1969).
[52] *Id.*
[53] U.S. GEOLOGIC SURVEY, INFLUENCES OF STRIP MINING ON THE HYDROLOGIC ENVIRONMENT OF PARTS OF BEAVER CREEK BASIN, KENTUCKY, 1955-66 (1970).
[54] Commoner, Corr & Stamler, *The Causes of Pollution,* ENVIRONMENT, April, 1971.

an insidious form of persuasion, for implicit in its appeal is the attempt not only to sell the product but also to influence public opinion as to the attendant production, manufacture and consumption practices. The advertiser is truly "buying" the issue in every sense of that word. If the constitutional right of the public to be informed is more than a paper right, and if the Supreme Court admonition against selling controversial issues to the "highest bidders"[55] has any meaning, general product advertising must be categorically covered by the purview of the fairness doctrine. Beyond mere legal considerations is the potency of the buying power of the consuming public. It might be boldly suggested that informed housewives can effect the resolution of a controversial issue more than all the politicians combined. The germ of truth in this suggestion is the fact that economic power has an impact commensurate with that of political power. The informed use and influence of the public's buying power is an issue inherent in the application of the fairness doctrine to product advertising and requires that general product ads be subject to the fairness doctrine.

The Commission has in the past justified its policy of withholding the fairness doctrine from a general product ad raising environmental issues on the ground that such issues are "for consideration by the Congress—not this agency which is not, and cannot be the arbiter of such matters."[56] That argument contemplates that broad environmental legislation is peculiarly the task of Congress; yet, this contention is not apropos of the narrow issue here, namely the role of the FCC with respect to commercial advertising. The FCC has the responsibility, according to its own views,[57] as well as that of the courts,[58] to see that controversial issues are broadcast fairly with all sides reasonably represented. The informed public is then theoretically enabled to bring its influence to bear in the halls of government on those same issues. The position of the FCC is, therefore, evasive of the issue. It neatly ignores the fact that controversial issues will not be dealt with by other government agencies unless and until informed public pressure is brought to bear by constituents of government. The FCC fairness principle is the precise instrument by which the public is so informed. Thus the

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[55] Red Lion Broadcasting v. FCC, 395 U.S. 367, 392 (1969).
[56] *In re* Friends of the Earth, 24 F.C.C.2d 743, ___ (1970).
[57] *E.g., Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10415 (1964).
[58] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 385 (1969).

informed use and influence of the public's political power, as well as buying power, is at stake in the application of the fairness doctrine to general product advertisements.

C. Institutional Advertisements

Institutional ads are that category of ad which "sell" not so much the product as the seller of that product. If an institutional ad were to take a direct position on a controversial issue of public importance, it would be an issue ad and, under *National Broadcasting Co.,* within the scope of fairness. The pure institutional ad has, up to now, gone unnoticed by the fairness principle. Why? An institutional ad, like a product ad, may implicitly raise environmental, health or ecological issues. For example, strip mining as an institution is under environmental attack by those seeking its abolition in West Virginia. An ad whose tenor is to increase the goodwill of the industry itself, e.g., "strip mines provide x number of jobs," at the same time implicitly raises a host of environmental issues attendant to the existence of that industry. Similarly, an ad like "the coal industry provides a better way of life" implicitly raises the issue of job health and safety within the coal industry, an environmental dispute of some moment. Indeed, such ads are not "merely institutional advertising," as suggested in a recent FCC decision,[59] but imply the good life in environmental and health terms. Not only may the institutional ad be suggestive of the good life, but it is in fact a sales device instilling in the consumer both "brand recognition" and "brand preference." Anyone who fondly remembers the old "W — standard of excellence!", is going to look twice at Westinghouse products when in the market. Such behavior is consumer testimony that an institutional ad can influence product purchase. When it so happens that the product purchased has controversial environmental after-effects, the application of fairness is no less demanded than in straight product ads. Moreover, some industries have only to sell themselves and not their products. Certain "basic industries" of the nation, including the coal industry of West Virginia, for example, do not necessarily sell products directly to the public at large. The nature of those industries is such that the product, *i.e.,* coal, may be used in the manufacture of secondary or tertiary products which are in turn sold directly to the public at large. It is unlikely then, that a general product ad such as "buy strip mine coal" or "buy coal" would ever appear.

[59] National Broadcasting Co., ___ F.C.C.2d ___ (1971).

Much more likely are ads whose tenor is to increase the goodwill of the industry itself, thereby insuring the sale of that industry's product.

It is submitted, therefore, that the pure institutional ad as a category should be subject to the vigorous purview of the fairness doctrine.

III. Satisfaction of the Fairness Doctrine

Once invoked by a particular advertisement, fairness demands that the other side of the controversy be fairly represented.[60] Cigarette advertising again excepted, the licensee retains discretion as to the format of the fairness broadcast.[61] The practical result of this administrative ruling is that an advertisement may well be answered by a documentary, round-table, news or other non-commercial format. Whereas the advertiser basically controls and edits the advertisement, the fairness reply has in the past remained tightly controlled and edited by the broadcaster,[62] not the representative of the other side.

Returning to McLuhan, his thorough-going analysis of the mass media has made it clear that the form of the presentation of information is as significant as the information itself.[63] One factor the FCC should consider in determining the reasonableness of a broadcaster's fairness doctrine coverage is that, as Commissioner Nicholas Johnson has pointed out, prepared spot ads should be in a class by themselves because of their tremendous effectiveness.[64] A recent court decision has also pointed out that editorial ads are a unique means of communication.[65] Factors which differentiate spots from either news coverage or documentaries support this proposition and argue for the standard that a controversial issue first raised in a commercial should also be answered in a commercial. Spot commercials, occurring during the course of entertaining programs, are probably seen more often and by more people than either news comments or documentaries. This frequency of presentation is

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[60] *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415, 10416 (1964).

[61] *Id.*

[62] Report, *supra* note 4, at ¶ 10.

[63] M. McLuhan, Understanding Media: The Extensions of Man 32 (1966).

[64] *In re* Friends of the Earth, 24 F.C.C.2d 743, ... (1970).

[65] Business Executives' Move for Vietnam Peace v. FCC, CCH Pub.Ut.L.Rep. ¶ 11,229 (D.C. Cir. 1971).

both important and relevant to fairness. In the ruling, *Applicability of the Fairness Doctrine To Cigarette Advertising,* the FCC remarked:

> We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our administration of the Fairness Doctrine. . . . For, while the Fairness Doctrine does not contemplate "equal time," if the presentation of one side of the issue is on a regular continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue.[66]

As the *Banzhaf* court put it, "a man who hears a hundred 'yeses' for each 'no,' when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed."[67] In addition, the type of listener is probably different for a spot than for news broadcasts or documentaries. "[A]n ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act,"[68] whereas an affirmative act is needed to tune into a documentary. The medium itself can be more important than the message.[69] A short commercial, cleverly put together with a ringing jingle, can communicate with much greater effectiveness than many other types of programming. Thus it appears that spot commercials should be added to the repertoire of formats available in meeting the fairness requirement and, indeed, that its use should be required in some instances, for "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[70] Just as long-haired citizens cannot be denied the right to distribute newspapers within a park on the grounds that they could distribute them at the park gate,[71] so spot advertisements should not be denied as a format for presenting a controversial issue just because other formats are available.

The necessity for a balanced presentation of both sides of a

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[66] Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921, 941 (1967).
[67] Banzhaf v. FCC, 405 F.2d 1082, 1099 (D.C. Cir. 1968).
[68] *Id.* at 1100.
[69] M. MCLUHAN, *supra* note 61, at 23-35.
[70] Schneider v. New Jersey, 308 U.S. 147, 163 (1939).
[71] Washington Free Community, Inc. v. Wilson, 40 U.S.L.W. 2117 (D.D.C. Aug. 5, 1971).

controversial issue stems from the marketplace theory — the necessity in a free society for open and fair discussion of all facets of an issue. In the broadcasting media this open discussion — or lack of it — is intricately connected to the economic power of the consuming public.

Commissioner Nicholas Johnson, in dissenting to the decision in *In re Friends of the Earth,*[72] pointed out that the fundamental right at stake is the right of the consumer in a competitive market to make an informed choice on which products he wishes to buy. This would require that the "warts and wrinkles" of products be broadcast as well as their more appealing and glamorous half. Inequalities in economic bargaining power for prime-time commercials should not be allowed to create inequities in the power to communicate over what has been established as a public interest medium.

In order to avoid a de facto abridgement of the first amendment right of freedom of speech, the demand of the Fairness Doctrine—balanced presentation—must be met not haphazardly, but rather within carefully indicated limits. A general policy of avoiding placing any deterrents on free speech is not sufficient for "the difficulty with this negative approach is that not all free speakers have equally loud voices, and success in the marketplace of ideas may go to the advocate who can shout loudest or most often."[73]

While the important factor is the overall fairness of the broadcaster's presentation,[74] this general mandate should not be considered authority to skim over the component parts of that presentation. Persistence in ignoring the peculiarities of radio and television advertising as it relates to first amendment rights can only mean that these rights will be effectively foreclosed.

In appropriate situations a broadcaster should be required to use a wide range of formats for reply time. The FCC has suggested a standard for determining when it would be appropriate to completely ban a commercial — namely, when something as paramount as the public health is involved.[75] Upon other occasions a hazard warning accompanying the commercial may be appropriate, or perhaps a general spot ad describing the warts adhering to some type

[72] *In re* Friends of the Earth, 24 F.C.C.2d 743, ___ (1970).
[73] Banzhaf v. FCC, 405 F.2d 1082, 1102 (D.C. Cir. 1968); Barron, *Access to the Press — A New First Amendment Right,* 80 HARV. L. REV. 1641 (1967).
[74] Report, *supra* note 4, at ¶ 18.
[75] *Notice of Proposed Rule Making,* 32 Fed. Reg. 13162 (1969).

of product or activity (such as strip mining).[76] A retort to this proposed standard setting may well be that broadcaster's discretion is thereby impeded. At least one court has considered this argument and found it wanting:

> In normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different. In news and documentary presentations, for example, the broadcasters' own interests in free speech are very, very strong. The Commission's fairness doctrine properly leaves licensees broad leeway for professional judgment in that area. But in the allocation of advertising time, the broadcasters have no such strong First Amendment interests. Their speech is not at issue; rather, all that is at issue is their decision as to which other parties will be given an opportunity to speak.[77]

Furthermore, setting such standards is akin to the FCC's most traditional duties of keeping watch over the technical quality of the broadcasting. Distribution of the various programming formats, and making sure that the formats are available to all spokesmen, is very analogous to other technical matters the FCC has always surveyed in granting and renewing licenses. Neither is the broadcaster being instructed on what type of programming to use for a particular issue nor on the content of the messages he broadcasts. In all events, freedom of speech, as it pertains to controversial issues broadcast on radio and television, should not be sold to the highest bidder through reserving one of the most effective means of broadcasting communication, namely the commercial, for one side of controversial issues.

Recently the fairness doctrine has been extended to paid editorial advertisements and a broadcaster is currently required to accept some of the monied requests made for time to speak on controversial issues.[78] The court indicated that perhaps the most important first amendment right "is the interest of individuals and groups in effective self-expression."[79] While the narrow ruling of the decision was to strike down a flat ban on all paid editorial advertising,[80] the implication is to further increase the access of monied

[76] Hale, *supra* note 50.
[77] Business Executives' Move for Vietnam Peace v. FCC, CCH Pub.Ut.L.Rep. ¶ 11,229, at 12,846 (D.C. Cir. 1971).
[78] *Id.*
[79] *Id.*, at 12,847.
[80] *Id.*, at 12,855.

interests to broadcasting time. That being the prospect, the case is strengthened for both the extension of the fairness principle to all advertising and the inclusion of the commercial in the format of fairness replies. If monied groups are entitled to broadcast time fashioned according to their own, and not the broadcaster's, choosing, the entitlement of unmonied interests must be no less.

The FCC has full authority to promulgate regulations to that end. There is a statutory mandate directing that the "Commission from time to time, as public convenience, interest, or necessity requires" shall promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this Act . . . ."[81] The Commission is specifically directed to consider the demands of public interest in both granting[82] and reviewing[83] licenses, and this mandate to consider the public interest is a broad one, a power "not niggardly but expansive."[84] The conclusion arrived at in *Red Lion Broadcasting Co.* is

> that the public interest language of the Act authorized the Commission to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgement of the freedom of speech and press, and of censorship . . . .[85]

To avoid an effective abridgement of the first amendment right to freedom of speech, standards must be set in the pending FCC inquiry into the fairness doctrine, within which a broadcaster can exercise his discretion in meeting fairness doctrine obligations. We cannot, like ostriches with heads buried in the technology of the past, attempt to preserve first amendment rights through laissez-faire regulation. Rather, with heads up and eyes open to the peculiar characteristics of modern broadcasting, we must shape the regulations which will preserve freedom of speech.

That means, in summary, that standards must be fashioned to (1) categorically apply the fairness doctrine to all paid advertising and (2) include the spot commercial in the format of fairness broadcasts. Until then, the tantalizing commercial will continue to go unanswered, unfairly so.

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[81] 47 U.S.C. §§ 303 & 303(r) (1970).
[82] 47 U.S.C. §§ 307(a) & 309(a) (1970).
[83] 47 U.S.C. § 307(b) (1970).
[84] National Broadcasting Co. v. United States, 319 U.S. 190, 219 (1943).
[85] 395 U.S. 367, 382 (1969).