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## ADVOCACY ADVERTISING: A QUESTION OF FAIRNESS AND THE REASONABLE AGENCY

Broadcasting occupies a unique niche in first amendment law. While reiterating that radio and television share the constitutional protections guaranteed the press,<sup>1</sup> the courts have sanctioned governmental intrusions into broadcasters' operations which would clearly be unlawful if attempted against newspapers.<sup>2</sup> Foremost of these anomalous intrusions is the fairness doctrine promulgated by the Federal Communications Commission (FCC) which requires a broadcast licensee to present contrasting views on any controversial issue of public importance covered in his programming.<sup>3</sup> The unobjectionable goal of this policy is to insure that all sides are treated fairly by licensees.<sup>4</sup> In application, however, the doctrine places the Commission in the constitutionally uncomfortable position of judging broadcast content for bias.<sup>5</sup>

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1. See, e.g., *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

2. Compare *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (FCC may require broadcaster to give reply time to victim of personal attack in his programming) with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (state statute requiring newspaper to give space to political candidate attacked in its pages is an unconstitutional intrusion into editorial discretion). See also *FCC v. National Citizens Comm. for Broadcasting*, 98 S. Ct. 2096, 2114-15 (1978).

3. The Commission's fairness doctrine actually imposes a two-fold duty. First, "the broadcaster must devote a reasonable percentage of . . . broadcast time to the coverage of public issues" and second, "his coverage of these issues must be fair in the sense that it provides opportunity for the presentation of contrasting points of view." *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act (Fairness Report)*, 48 F.C.C. 2d 1, 7 (1974). See *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949). The FCC, however, has seldom investigated a licensee for failing to cover issues. See *Patsy Mink*, 59 F.C.C. 2d 987 (1976).

4. See *Report on Editorializing*, 13 F.C.C. 1246, 1250 (1949).

5. Appreciating the difficulty of this position, the FCC is prepared to give the judgments of the licensee a great deal of deference, confining its inquiry to whether the broadcaster's conclusions are reasonable and in good faith. *Fairness Report*, 48 F.C.C. 2d 1, 13 (1974). Further, even if a licensee is found to have aired biased programming, the manner in which other views are presented is left entirely to his discretion. *Id.* at 14. In spite of this deference broadcasters complain that the fairness doctrine inhibits the presentation of public issues on the air since a station can never be sure how many other opinions must be accommodated after a controversial broadcast. See SPECIAL SUBCOMM. ON INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, THE FAIRNESS DOC-

The delicacy of this task can become most acute when a controversial issue is raised in an advertisement. Broadcasters generally screen out commercials which obviously advocate controversial positions.<sup>6</sup> Businesses, however, have increasingly turned to so-called "advocacy advertising"<sup>7</sup> to sell their social and economic ideas as well as their products. Therefore, they must tailor their advertising to slip past a licensee's initial scrutiny.<sup>8</sup> In response to fairness complaints raised by these commercials, the FCC has not been hesitant to find fairness violations,<sup>9</sup> despite its announced position that it will not disturb a broadcaster's reasonable inter-

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TRINE AND RELATED ISSUES, H. REP. NO. 91-257, 91st Cong., 1st Sess. (1969) (hereinafter cited as HOUSE FAIRNESS DOCTRINE REPORT) (remarks of Dr. Frank Stanton, President of CBS). Legal commentators have had a more fundamental dispute with the doctrine, seeing it as an impermissible government intrusion into the prerogatives of the broadcaster. See Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213; Robinson, *The FCC and the First Amendment: Observations on 40 years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967). Professor Robinson, author of the last cited article, is now an FCC Commissioner, but his views on the doctrine do not seem to have changed. See *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 58 F.C.C. 2d 691 (1976) [*hereinafter* Reconsideration of Fairness Report] (remarks of Commissioner Robinson, dissenting). There have also been recent moves in Congress to modify the fairness doctrine. For example, Senator Proxmire has introduced a bill that would abolish the doctrine altogether. See S. 22, 95th Cong., 1st Sess. (1977). The proposed Communications Act of 1978 would also abandon the fairness doctrine but would replace it with a somewhat similar "equity principle". See H.R. 13015, 95th Cong., 2d Sess. § 434(a)(2) (1978).

6. Several licensees have alluded to this practice when accused of airing advocacy commercials. See, e.g., *Energy Action Comm., Inc.*, 64 F.C.C. 2d 787, 792 (1977); *Wilderness Soc'y*, 30 F.C.C. 2d 643, 644, *reconsidered*, 31 F.C.C. 2d 729 (1971). To some extent, these policies appear to be a reaction to the possible fairness complaints such commercials might inspire. In order to allay these fears, the Mobil Oil Corporation offered to purchase air time for its critics if a network would run the company's advocacy commercials. No network accepted the offer. See F. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 118-20 (1976).

7. Advertising has long been used by businesses in order to project a favorable image to the public. A general decline in the public's confidence in business in recent years has made such advertising all the more necessary. The consumers movement, anti-pollution laws and the energy crisis have put American business in an increasingly defensive posture. See Note, *The Regulation of Corporate Image Advertising*, 59 MINN. L. REV. 189, 191 (1974). Rather than confine their efforts to merely touting their social responsibility or whatever may be necessary to build a good public image in the current political climate, many corporations actively have begun taking stances on issues and editorializing about them in the media. See Weaver, *Corporations are Defending Themselves with the Wrong Weapon*, *FORTUNE*, June 1977 at 187; Ross, *Public Relations Isn't Kid-Glove Stuff at Mobil*, *FORTUNE*, Sept. 1976 at 106.

8. The bulk of advocacy advertising is carried in the less restrictive print media. A corporation, however, may run toned-down versions of its ads on television to reinforce the hard-sell of its other advertisements. See, e.g., *Energy Action Comm. Inc.*, 64 F.C.C. 2d 787, 789 (1977); *Wilderness Soc'y*, 30 F.C.C. 2d 643, 645 (1971).

9. See *Public Media Center*, 59 F.C.C. 2d 494 (1976), *reconsideration denied*, 64 F.C.C. 2d 615 (1977); *Energy Action Comm., Inc.*, 64 F.C.C. 2d 787 (1977).

pretation of such advertisements as non-controversial.<sup>10</sup>

The differing treatment accorded print and electronic media is usually explained as a consequence of the limited range of frequencies available for broadcasting.<sup>11</sup> Since the number of potential stations is finite, some of those who might want to broadcast will be denied access to the airwaves. The Communications Act requires that the choice among competing applicants for broadcast licenses must be made according to who will best serve the public interest.<sup>12</sup> Early in its regulation of electronic media, the FCC decided that the public interest would not be served by the licensee who monopolized the airwaves with a particular point of view.<sup>13</sup> Therefore, it made the objective treatment of issues a condition of licensing.

The Commission's interpretation of its duties received a broad endorsement in *Red Lion Broadcasting Co. v. FCC*.<sup>14</sup> The Supreme Court emphasized that the public's right to be informed was an important element of the public interest standard and, in some circumstances, outweighed the licensee's interest in expressing his views.<sup>15</sup> In a subsequent case, the Court seemed to give a new dimension to the rights of broadcasters and may have shifted the first amendment balance espoused in *Red Lion*.<sup>16</sup> This thinking seems to have swayed the circuit courts hearing appeals of FCC decisions, since they have subsequently called for the Commission to

10. See Fairness Report, 48 F.C.C. 2d 1, 24 (1974).

11. See *NBC v. United States*, 319 U.S. 190, 226-27 (1943). Other justifications for the regulation of content in broadcasting have been offered but have not gained widespread acceptance. Judge Bazelon of the District of Columbia Circuit has suggested that a different first amendment approach might be permissible, because broadcasting's pervasive impact requires the unwilling listener to take affirmative action to avoid what he does not wish to hear. See *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir.), cert. denied, 396 U.S. 842 (1969). To some extent, the Supreme Court relied on the intrusive nature of radio in upholding special restrictions on indecent language in broadcasting. See *FCC v. Pacifica Foundation*, 98 S. Ct. 3026, 3040 (1978).

12. 47 U.S.C. § 307 (1970).

13. See *Mayflower Broadcasting Co.*, 8 F.C.C. 333 (1941); *Great Lakes Broadcasting Co. v. Federal Radio Comm'n*, 3 F.R.C. ANN. REP. 32 (1929), rev'd on other grounds, 37 F.2d 993 (D.C. Cir.), cert. denied, 281 U.S. 706 (1930).

14. 395 U.S. 367 (1969).

15. "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." *Id.* at 390.

16. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). See Comment, *The Regulation of Competing First Amendment Rights: A New Fairness Doctrine Balance After CBS*, 122 U. PENN. L. REV. 1283 (1974); notes 57-60 and accompanying text *infra*. Despite the uncertainty introduced by *CBS*, the Supreme Court has not abandoned the *Red Lion* interpretation of broadcasters' speech rights. The Court has most recently used the case to uphold the FCC's cross-ownership rules forbidding newspaper owners from holding broadcast licenses in their main circulation areas. See *FCC v. Nat'l Citizen's Comm. for Broadcasting*, 98 S. Ct. 2096, 2114-15 (1978).

play a more limited role in fairness cases.<sup>17</sup>

The FCC has, at least ostensibly, always sought the most limited role possible in imposing the fairness obligations. Its first formal articulation of the doctrine amounted to little more than a statement of agency preference with scant reference to the manner of application or enforcement of the policy.<sup>18</sup> Subsequent fairness decisions did little to clarify the doctrine, since the Commission dealt with each case on an ad hoc basis to avoid the appearance of imposing standards on licensee judgment.<sup>19</sup> This approach, however, eventually backfired. In trying to make sense out of the seemingly random fairness decisions, the circuit courts extended the doctrine into areas in which the FCC would have preferred not to venture, particularly in applying the fairness doctrine to product commercials.<sup>20</sup>

To stem the distortion of its doctrine, the Commission began a long-range inquiry into the problem<sup>21</sup> and, in 1974, issued the *Fairness Report*<sup>22</sup> which evaluated the fairness doctrine generally and paid particular attention to the use of the doctrine in advertising. The FCC announced that only commercials which obviously took a position in a controversy would give rise to a fairness obligation.<sup>23</sup> Recognizing the subtlety of advertising, however, the Commission left open the possibility that a commercial might obviously address an issue without explicitly mentioning it.<sup>24</sup> At the same time, the Commission averred that it would not disturb the reasonable, good faith judgment of a licensee<sup>25</sup> when the thrust of an advertisement is open to interpretation. Given the circuit court narrowing of the agency's role in the fairness doctrine, the Commission's review of a broadcaster's judgment would seem even more limited. Since the *Fairness*

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17. See *Georgia Power Project v. FCC*, 559 F.2d 237 (5th Cir. 1977); *Straus Communications, Inc. v. FCC*, 530 F.2d 1001 (D.C. Cir. 1976); *NBC v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976).

18. See Report on Editorializing, 13 F.C.C. 1246, 1270 (1949) (dissenting views of Commissioner Hennock). See notes 37-40 and accompanying text *infra*.

19. *Id.* at 1251.

20. See *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971); *Retail Store Employees Union v. FCC*, 436 F.2d 248 (D.C. Cir. 1970).

21. See Notice of Inquiry, 30 F.C.C. 2d 26 (1971); notes 75-77 and accompanying text *infra*.

22. 48 F.C.C. 2d 1 (1974).

23. *Id.* at 26.

24. *Id.* at 23. In the Commission's formulation, this would be true when the advertisement expressed views closely paralleling the views of partisans on an issue. As an example, the FCC used an oil company ad which asserted that rapid development of Alaskan oil reserves was necessary to meet the country's energy demands. Since this was an argument in favor of building the Alaskan pipeline, the commercial would take a position on that issue. *Id.* See *Wilderness Soc'y*, 30 F.C.C. 2d 643 (1971).

25. *Fairness Report*, 48 F.C.C. 2d at 24.

*Report*, the FCC has nonetheless questioned the judgments of several broadcasters who have aired arguably controversial commercials.

## I. THE SEARCH FOR GOVERNMENT REGULATION WITHOUT GOVERNMENT INTERFERENCE

### A. *The Development of the Fairness Doctrine*

At one time, broadcasting was, for all practical purposes, totally unregulated.<sup>26</sup> The airwaves were open to anyone with the desire and finances to build a radio transmitter. The result, as might be expected, was chaos. Stations switched frequencies and boosted transmitter power at will, regardless of whether they interfered with other broadcasters.<sup>27</sup> The situation cried out for supervision and Congress responded with the Radio Act of 1927, which gave the Secretary of Commerce the authority to prevent interference between stations by licensing them to specific frequencies.<sup>28</sup>

Even at that early date, Congress recognized that broadcasters were entitled to first amendment protection.<sup>29</sup> Congress, however, was also mindful of the power of the broadcaster to mold public opinion and particularly frightened at the prospect of a licensee giving a favored candidate an inordinate amount of exposure around election time.<sup>30</sup> Accordingly, the Radio Act contained a provision which limited broadcaster freedom by requiring that equal time be made available to opponents, should a candidate be allowed to use station facilities.<sup>31</sup>

While Congress also appreciated the danger inherent in giving a government agency extensive control over a communications medium,<sup>32</sup> it none-

26. Congress had passed the Radio Act of 1912, ch. 287, 37 Stat. 302 (later repealed, it was codified at 47 U.S.C. §§ 51-63), giving the Secretary of Commerce the power to license and regulate radio stations. His authority to license, however, was interpreted as purely ministerial and he was compelled to grant licenses even though there were no available frequencies. *See Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923), *cert. dismissed*, 266 U.S. 636 (1924). A later case determined that Congress had withheld from the Secretary the power to make radio regulations. *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926).

27. *See Robinson*, *supra* note 5, at 69-70.

28. Ch. 169, 44 Stat. 1162 (1927) (current version at 47 U.S.C. §§ 301-99 (1970)).

29. *See* 67 CONG. REC. 5480 (1926) (remarks of Reps. White & LaGuardia). The Radio Act contained a provision that nothing in the statute could be construed as permitting censorship of broadcasters. Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162 (1927) (current version at 47 U.S.C. § 315 (1970)).

30. *See* H. R. REP. NO. 404, 69th Cong., 1st Sess. (1926).

31. *See* Radio Act of 1927, ch. 169, § 18, 44 Stat. 1162 (1927) (current version at 47 U.S.C. § 315 (1970)).

32. The previous two Congresses had tried to pass radio legislation but had failed because of disagreements over how much power the regulatory body should have. *See* H. R. REP. NO. 464, 69th Cong., 1st Sess. (1926).

theless conferred wide discretion on the Secretary and the Federal Radio Commission in licensing stations. Borrowing from the Transportation Act of 1920,<sup>33</sup> the Radio Act made "public interest, convenience, and necessity"<sup>34</sup> the broad standard by which licensees would be judged. Aware of Congress' political misgivings, the Commission stated in an early opinion that allowing "only a one-sided presentation of the political issues of a campaign would contravene this public interest standard."<sup>35</sup> The forerunner of the FCC thus began an independent policy of fairness in broadcasting that has continued.<sup>36</sup>

The Commission took a progressively stricter view of opinionating on the airwaves after its first policy statement. The constrictive trend became most apparent in 1940 when the FCC ruled that broadcasters could not editorialize at all on the air.<sup>37</sup> Although the ruling went unchallenged, the Commission changed the policy in 1949 when it released the *Report on Editorializing by Broadcast Licensees*.<sup>38</sup> Reversing its previous rulings, the FCC announced that the presentation of opinions was not inconsistent with the broadcaster's duty to the public interest.<sup>39</sup>

The Commission, however, was still unwilling to give licensees free rein. The *Report on Editorializing* described the right of the public to be informed as a dominant component of the public interest standard.<sup>40</sup> In order to accommodate this interest, the FCC imposed a general requirement of fairness in the treatment of issues.<sup>41</sup> A licensee who presented an editorial would be obliged to seek out proponents of contrasting view-

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33. Ch. 91, § 402(18), 41 Stat. 456 (1920) (current version at 49 U.S.C. § 1(18) (1970)). See F. FRIENDLY, *supra* note 6, at 19.

34. Radio Act of 1927, ch. 169, § 4, 44 Stat. 1162 (1927) (current version at 47 U.S.C. § 307(d) (1970)).

35. *Great Lakes Broadcasting Co. v. Federal Radio Comm'n*, 3 F.R.C. ANN. REP. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

36. The Radio Act of 1927 was repealed and reenacted as Title III of the Communications Act, 47 U.S.C. §§ 301-99 (1970). At the same time, the Federal Radio Commission became part of the Federal Communications Commission, but the FRC's policies were continued.

37. See *Mayflower Broadcasting Co.*, 8 F.C.C. 333 (1941). *Mayflower*, applying for a license held by the Yankee Network, charged that Yankee had broadcast editorials urging the election of certain candidates. The Commission stated that it was against the public interest for a licensee to use his broadcast facilities for his own partisan ends and only renewed Yankee's license after it promised to refrain from editorializing.

38. 13 F.C.C. 1246 (1949).

39. *Id.* at 1252-53.

40. The Commission based this theoretical interest on *Associated Press v. United States*, 326 U.S. 1 (1945), in which the Supreme Court had stated that the goal of the first amendment was the "widest possible dissemination of information from diverse and antagonistic sources" and had held that the federal government could act affirmatively to insure that private combinations did not impede this flow. *Id.* at 20.

41. *Report on Editorializing*, 13 F.C.C. 1246, 1257-58 (1949).

points and ensure that these opinions were heard.<sup>42</sup> The Commission planned to enforce this obligation by evaluating the broadcaster's overall handling of issues when his license came before the agency for renewal or modification.<sup>43</sup>

Once again the Commission's licensing standard escaped judicial scrutiny. The fairness doctrine did, however, gain an added measure of respectability in 1959 when Congress amended the equal time provision of the Communications Act.<sup>44</sup> Reacting to a controversial section 315 ruling by the FCC,<sup>45</sup> Congress altered the Act to exempt appearances on bona fide newscasts from the equal time requirement.<sup>46</sup> Still suspicious of broadcasters, however, Congress added the caveat that the amendment in no way absolved broadcasters from their general obligation to treat candidates and issues fairly, an apparent recognition of the agency's fairness doctrine.<sup>47</sup>

Despite its new importance, the fairness doctrine remained a poorly understood and frequently ignored obligation. To remind licensees of its

42. *Id.* at 1251. Even at this first formulation of the fairness doctrine, it was assailed as overly vague and infringing on the free speech rights of broadcasters. *Id.* at 1259-70 (views of Commissioner Jones).

43. *Id.* at 1255. In 1962, the FCC changed this policy and began judging fairness problems as they arose. See *FCC v. NBC*, 516 F.2d 1101, 1115 & n.54 (1974), *cert. denied*, 424 U.S. 910 (1976); *Honorable Oren Harris*, 40 F.C.C. 582 (1963).

44. Act of September 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557 (codified at 47 U.S.C. § 315 (1970)).

45. In its original form § 315 read "if any license 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 . . ." ch. 652, § 315, 48 Stat. 1088 (1934). Lar Daly, a candidate in a Chicago mayoral primary, complained that several television stations in his area had carried news stories of his opponent, incumbent Richard Daley, greeting foreign dignitaries and kicking off the annual March of Dimes Drive. The FCC ruled that these were "uses" within the meaning of § 315 and ordered the stations to give Lar Daly equal time. See *Interpretive Opinion*, 26 F.C.C. 715, 741-43 (1959).

46. The amendments exempted from § 315's equal time requirements any "(1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary . . . , or (4) on-the-spot coverage of bona fide news events." 47 U.S.C. § 315(a) (1970).

47. "Nothing in the foregoing . . . shall be construed as relieving broadcasters . . . from the obligation . . . to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. § 315(a) (1970). The purpose of this caveat was made clear in the committee report on the bill which stated "the committee is not unmindful that the class of programs being exempted from the equal time requirements would offer a temptation as well as an opportunity for a broadcaster to push his favorite candidate and exclude others." S. REP. NO. 562, 86th Cong., 1st Sess. 10 (1959). As a further precaution, the amendments provided that Congress would examine a broadcaster's performance under the new law and reconsider the amendment if necessary. See Pub. L. No. 86-274, § 2(a), 73 Stat. 557 (1959). A Freedom of Communication Subcommittee was set up to monitor licensees and make recommendations. See S. Res. 305, 86th Cong., 2d Sess., 106 CONG. REC. 12516-22 (1960). The subcommittee recommended no changes. See 108 CONG. REC. 7006-10 (1962).



requirements, the FCC distributed a digest of fairness rulings called the *Fairness Primer*.<sup>48</sup> Although the digest did clarify the main issues in a fairness inquiry—whether the broadcast has raised a controversial issue of public importance and whether the licensee has presented only one side of that issue without offering reasonable opportunity for presentation of contrasting viewpoints—the *Primer* also revealed the ad hoc approach to adjudication of fairness disputes.<sup>49</sup>

To achieve uniformity, the FCC used the *Fairness Primer* to publicize more formal requirements on licensees. Whenever a broadcaster engaged in a personal or political attack over the air, he would have to provide a transcript of the program to the person attacked as well as give him an opportunity to reply.<sup>50</sup> It was in this form that the fairness doctrine was finally challenged in court, and the Commission could not have asked for a better vehicle for winning approval of its policy.

The specific violation involved a broadcast by the Reverend Billy James Hargis in which the right-wing fundamentalist vilified an author of an article about him.<sup>51</sup> The station failed to send the required transcripts or offer rebuttal time and refused to do so even after the author complained.<sup>52</sup> On being informed of the matter, the FCC sent a letter to the licensee admonishing him that he had violated the fairness doctrine. The broad-

48. 40 F.C.C. 598 (1964). Fairness violations had generally been a matter between the Commission and the licensee. During the early sixties, however, a number of Deep South broadcasters had been using their stations to present segregationist views and totally ignored the viewpoints of blacks. See *Columbus Broadcasting Co.*, 40 F.C.C. 568 (1963); *Rebel Broadcasting Co.*, 40 F.C.C. 566 (1963); *Lamar Life Broadcasting Co.*, 40 F.C.C. 556 (1963). Concerned over the flaunting of its rules, the FCC sent a Public Notice to all licensees reminding them of the basic requirements of the fairness doctrine. See *Stations' Responsibilities Under the Fairness Doctrine*, 40 F.C.C. 571 (1963). Because of the complexity of the policy, however, the FCC found it necessary to issue the more detailed *Fairness Primer*.

49. The *Fairness Primer* reported rulings that had held such subjects as fluoridation and the nutritive qualities of white bread controversial, but it did not attempt to explain those findings. Some of the rulings are particularly obscure. In one instance, the Commission staff ruled that a program attacking Communism did not require the broadcaster to present the contrasting views of Communists but did oblige him to seek out those who had differing views on how to combat Communism. 40 F.C.C. 598, 603-04.

50. *Id.* at 610-14. See 47 C.F.R. §§ 73.123, .300, .679 (1977).

51. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 371, n.2 (1969). A great deal of Red Lion's programming consisted of right-wing commentary like that of Hargis. Air time for these shows was purchased by their producers, thereby providing the station with revenue. See F. FRIENDLY, *supra* note 6, at 1-11.

52. The broadcaster argued that since the author had originally attacked Hargis in print, the station did not owe him a reply. See *Red Lion Broadcasting Co.*, 1 F.C.C. 2d 1587 (1965), *aff'd*, 395 U.S. 367 (1969). The victim of the attack, Fred Cook, had heard of the broadcast and contacted each of the stations which had carried it. Although many of the stations refused his request for reply time, Red Lion was the only broadcaster that Cook pursued. See F. FRIENDLY, *supra* note 6, at 43-44.

caster appealed the letter to the Supreme Court, but in *Red Lion Broadcasting Co. v. FCC*,<sup>53</sup> the Court found nothing objectionable in the Commission's action. Reviewing the legislative history of the 1959 equal time amendments, the *Red Lion* Court held as a matter of law that Congress had approved the FCC's interpretation of the public interest standard in them.<sup>54</sup> The Court was also able to find no constitutional defect in imposing a general requirement of fairness on broadcasters.<sup>55</sup> It refused to accept the view that broadcasters had unbridgeable first amendment rights<sup>56</sup> and held that the fairness doctrine served the greater value that a multiplicity of voices should be heard.<sup>57</sup>

By placing the public's right to be informed above any speech interests of broadcasters, *Red Lion* seemed to suggest that all significant viewpoints should command access to the airwaves as a matter of right.<sup>58</sup> This reasoning led the District of Columbia Circuit to rule that a licensee could not refuse to sell air time for political announcements.<sup>59</sup> In *CBS, Inc. v. Dem-*

53. 395 U.S. 367 (1969). The Commission had been upheld by the District of Columbia Circuit in *Red Lion Broadcasting Co. v. FCC*, 381 F.2d 908 (D.C. Cir. 1967), *aff'd*, 395 U.S. 367 (1969). The FCC's personal attack rules were, however, held unconstitutional by the Seventh Circuit in another case. *Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002 (7th Cir. 1968), *rev'd*, 395 U.S. 367 (1969). The two cases were joined together in *Red Lion*.

54. 395 U.S. at 380-84.

55. *Id.* at 385. The Court noted, moreover, that the purpose behind § 315 could be subverted by allowing persons other than a candidate to appear, were it not for the duties imposed by the fairness doctrine. *Id.* at 382-83.

56. "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable first amendment right to broadcast comparable to the right of every individual to speak, write, or publish." *Id.* at 388.

57. *Id.* at 390.

58. Several groups petitioned the FCC for rulings that a licensee could not impose a flat ban on advertisements that advocated a position on issues. The Commission ruled that a broadcaster was not required to accept all advertising, as broadcasters are not common carriers. *Democratic Nat'l Comm.*, 29 F.C.C. 2d 216 (1970) and *Business Executives Move for Vietnam Peace*, 25 F.C.C. 2d 242 (1970), *joined & aff'd sub nom. CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). See 47 U.S.C. § 153(h)(1970); Jaffee, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972).

59. *Business Executives Move for Vietnam Peace v. FCC*, 450 F.2d 642, 650 (D.C. Cir. 1971), *rev'd sub nom. CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). The court specifically held that a broadcaster could not refuse to air editorial advertisements when he already has accepted other types of advertising. 450 F.2d at 646. Because the Commission required such bans, the broadcasters' actions were viewed as state action. 450 F.2d at 651-52. Rejection of advertising for its specific speech content was thus seen as an impermissible discrimination based on the exercise of constitutionally protected rights. 450 F.2d at 654-58. The opinion noted the first amendment rights of broadcasters as a countervailing interest but considered its weight minimal when only the selection of advertising was involved. 450 F.2d at 664.

ocratic National Committee,<sup>60</sup> however, the Supreme Court rejected this argument. Examining the history of radio regulation, the Court concluded that Congress intended broadcasters to have as much journalistic freedom as possible.<sup>61</sup> Although licensees have a duty under *Red Lion* to inform the public, the manner in which this is accomplished should be determined by the broadcaster.<sup>62</sup> A right of access would undermine journalistic freedom<sup>63</sup> and would inevitably draw the FCC into an unhealthy supervision of broadcast operations.<sup>64</sup>

Despite its recognition of *Red Lion*, CBS precipitated an erosion of the fairness doctrine.<sup>65</sup> The decision's emphasis on the rights of broadcasters left little room for the Commission to dispute their judgments. This new relationship was sharply illustrated by the District of Columbia Circuit in *NBC v. FCC*.<sup>66</sup> The case grew out of a complaint that an NBC documentary had attacked all private pension plans.<sup>67</sup> NBC responded that the broadcast had merely chronicled some of the problems involved in pensions without passing any overall judgment.<sup>68</sup> After reviewing the program, however, the Commission concluded that "it would strain the most 'permissive standard of reasonableness' past the breaking point to imply that the program was confined to such a limited examination."<sup>69</sup> In spite of this extreme characterization, the circuit court still ruled on appeal that the network's contention was too reasonable to be questioned by the agency.<sup>70</sup> Subsequent fairness cases have echoed this deferential treat-

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60. 412 U.S. 94 (1973).

61. Chief Justice Burger, writing for the Court, felt that one of the basic purposes of the Communications Act was to insure that broadcasters have broad discretion in the treatment of issues. *Id.* at 110.

62. *Id.* at 111. The public's right to be informed is a strong competing interest, but it was not seen as an absolute and, accordingly, must be balanced. *Id.* at 102. *Cf.* 412 U.S. at 124, in which the Court discussed the role of the broadcaster when the fairness doctrine applies to editorial advertising.

63. *Id.* at 124. Since a broadcaster would still have to insure that all viewpoints were presented on his station, a considerable part of the broadcast day would have to be reserved for balancing out the views expressed in editorial advertisements. *Id.*

64. *Id.* at 126-30. The Chief Justice was further concerned that any system of access would be heavily weighted in favor of the wealthy who could afford to buy air time. *Id.* at 123-24.

65. See Comment, *Growing Deference to the Broadcaster's First Amendment Rights*, 1976 ANN. SURVEY AM. L. 399.

66. 516 F.2d 1101 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976).

67. Accuracy in Media, Inc., 40 F.C.C. 2d 958 [Broadcast Bur.] *reconsideration denied*, 44 F.C.C. 2d 1027 (1973), *vacated*, 516 F.2d 1101 (D.C. Cir. 1974).

68. 516 F.2d at 959.

69. Accuracy in Media, Inc., 44 F.C.C. 2d 1027, 1040 (1973).

70. *NBC v. FCC*, 516 F.2d 1101, 1125-26 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976). The *NBC* case was ultimately vacated as moot with the passage of pension reform laws. *Id.* at 1180-81. Subsequent opinions, however, have cited *NBC* for its interpretation

ment of broadcasters' interpretations.<sup>71</sup>

### B. Fairness and Commercials

Although practically every aspect of the fairness doctrine has stimulated debate, the use of the policy in connection with advertising has resulted in an unusual amount of controversy. Long before it actually applied the fairness doctrine to an advertisement, the Commission considered the possibility that a commercial message could raise the obligation to present contrasting viewpoints.<sup>72</sup> The delay, however, did not breed caution, for the first fairness ruling dealing with advertising was one of the FCC's most radical. John Banzhaf petitioned the Commission for a ruling that cigarette commercials raised the controversial issue of the propriety of smoking and, because of the unique presentation involved, fairness required the broadcast of an equal number of anti-smoking spots.<sup>73</sup> The FCC refused to acquiesce in all of Banzhaf's thinking, but nevertheless did rule that cigarette advertising in general raised a public health controversy, and that a licensee who did not air some sort of anti-smoking programming would be delinquent in his duties to the public interest.<sup>74</sup>

The impact of the decision was not lost on environmentalists and other special interest groups that petitioned the Commission to make similar rulings regarding other products.<sup>75</sup> The FCC adamantly maintained, however, that the cigarette ruling was *sui generis* and refused their requests.<sup>76</sup> Nevertheless, much to the Commission's chagrin, the District of Columbia Circuit was unable to see any significant differences in the products involved, and held that advertisements for high-powered cars and high-octane gasoline raised environmental issues about which broadcasters were

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of the fairness doctrine. *See* *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1008 n.16 (D.C. Cir. 1976).

71. The D.C. Circuit has called for a higher degree of scrutiny in fairness decisions than is usually applied by courts in reviewing agency determinations. *See* *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1011 (D.C. Cir. 1976). Conversely, other courts have stated that when the Commission has upheld a licensee's judgment, reversal will only come in the most unusual cases. *Georgia Power Project v. FCC*, 559 F.2d 237, 240 (5th Cir. 1977).

72. *See* *Sam Morris*, 11 F.C.C. 197 (1946).

73. *WCBS-TV*, 8 F.C.C. 2d 381, *reconsideration denied*, 9 F.C.C. 2d 921 (1967), *aff'd sub nom.* *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir.), *cert. denied*, 396 U.S. 842 (1968).

74. 8 F.C.C. 2d at 382. The Commission declared at the time that it knew of no other product which aroused the same governmental health concerns. *See* *WCBS-TV*, 9 F.C.C. 2d 921, 943 (1967). The FCC's resolution of the complaint was upheld in *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir.), *cert. denied*, 396 U.S. 842 (1968).

75. *See* *Alan F. Neckritz*, 29 F.C.C. 2d 807 (1971) (gasoline); *Friends of the Earth*, 24 F.C.C. 2d 743 (1970) (high-test gasoline and high-performance automobiles).

76. 29 F.C.C. 2d 807.

obliged to present contrasting views.<sup>77</sup>

The FCC did not concur with these holdings,<sup>78</sup> but instead announced that it was beginning a broad inquiry into all aspects of the fairness doctrine, with particular attention to product advertising.<sup>79</sup> The announcement caused enough uncertainty among the circuit courts to prevent further extensions of the doctrine in commercial cases.<sup>80</sup> Meanwhile, the Commission set about finding applications of the fairness doctrine with which it felt more comfortable.

The first advertising fairness violation found after the Notice of Inquiry indicated the direction in which the FCC would go. Unlike the advertisements in previous cases, the Esso commercial involved was aimed at creating a favorable public image for the advertiser. The advertisement discussed the technological problems of drilling for oil in the Arctic cold and the progress Esso was making in protecting the tundra environment.<sup>81</sup> Wilderness Society, the complainant in the case, asserted that the ads urged quick construction of the Alaska pipeline, although this argument could only be inferred from the commercials.<sup>82</sup> To make the connection, the Society pointed to various print ads that Esso had run which were more openly advocacy.<sup>83</sup> Surprisingly, the Commission did not seem to demand any more in the way of proof before agreeing that the Esso com-

77. *See Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971). The D.C. Circuit seemed to extend the fairness doctrine beyond product commercials with public health consequences when it instructed the Commission to hold a hearing on whether advertisements urging patronage of a department store raised a controversial issue when a union local was organizing a boycott of that store. *See Retail Store Employees Union v. FCC*, 436 F.2d 248 (D.C. Cir. 1970).

78. The Commission reconsidered the *Neckritz* complaint after the *Friends of the Earth* decision but refused to follow the opinion. *See Alan F. Neckritz*, 37 F.C.C. 2d 528 (1972).

79. Notice of Inquiry, 30 F.C.C. 2d 26 (1971).

80. *E.g. Neckritz v. FCC*, 502 F.2d 411, 419 (D.C. Cir. 1974). Commissioner Johnson charged that the Notice of Inquiry was solely an attempt to delay pending court decisions. Notice of Inquiry, 30 F.C.C. 2d 26, 35 (1970) (Johnson concurring).

81. *See Wilderness Soc'y*, 30 F.C.C. 2d 643, *reconsidered*, 31 F.C.C. 2d 729 (1971).

82. The complaint involved three Esso commercials aired during "Meet the Press." The first ad explained some of the costs involved in drilling on the North Slope of Alaska, but argued that the costs were well worth it because of the need for oil. The second asserted that Esso's experience in drilling in the Canadian Arctic had taught it how to search for oil without harming the environment. In the third commercial, Esso told of certain grasses it had developed to replant in construction areas. Wilderness Society claimed that these advertisements raised "(1) the need of developing Alaskan oil reserves quickly and (2) the capability of the oil companies to develop and transport that oil without environmental damage." 30 F.C.C. 2d at 643-44. NBC, which carried the ads, argued that the commercials were indistinguishable from advertisements to which the FCC had refused to extend the fairness doctrine in *Friends of the Earth*, 24 F.C.C. 2d 743 (1970). *See Wilderness Soc'y*, 30 F.C.C. 2d at 644.

83. *Id.* at 645.

mercials presented a viewpoint on a controversial issue. The FCC further held that the balanced treatment of the pipeline issue in other programming did not offset the views expressed in the commercials.<sup>84</sup> Accordingly, it required the network which broadcast the ads to show what steps it would take to balance the presentation.<sup>85</sup>

On rehearing, however, the Commission seemed to retreat from its position, ruling that an eight minute interview with an environmentalist on the "Today" show adequately balanced out the views expressed in the series of ads.<sup>86</sup> Subsequent advertisement decisions demanded increasingly stringent documentation of controversiality,<sup>87</sup> and seemed to put the burden entirely on the complainant to prove that the licensee had never presented contrasting views on the subject.<sup>88</sup>

## II. THE "EDITORIAL ADVERTISEMENT"

Although the long-awaited *Fairness Report*<sup>89</sup> did not herald any substantial change in the treatment of commercials, it did clarify the position the FCC had been taking. The Commission would no longer consider fairness complaints in connection with straight product commercials because these advertisements did not discuss controversial issues in any meaningful way.<sup>90</sup> The *Report*, however, recognized that some commercials did consist of direct commentary on issues and held out the possibility of applying the fairness doctrine to them. The FCC further noted that many of these "editorial advertisements" did not explicitly address the issues on which they commented.<sup>91</sup> Using the Esso commercials from *Wil-*

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84. *Id.* at 646.

85. *Id.*

86. 31 F.C.C. 2d 729, 733 (1971).

87. *See* Dr. John DeTar, 32 F.C.C. 2d 933 (1972). Complainant tried to show that announcements advocating family planning raised the issue of whether overpopulation was a serious threat in the United States. The Commission ruled, however, that the articles produced on the subject showed nothing more than a conflict between experts. *Id.* at 934.

88. *See* Wilderness Soc'y, 41 F.C.C. 2d 103 (1973). The FCC Broadcast Bureau had rejected a complaint by the Society because it had failed to prove that the network had not broadcast contrasting views. Perhaps relying on its own experience, the Wilderness Society charged that the FCC was demanding a higher level of documentation than in previous cases. *Id.* at 104. The Commission, however, insisted that it used the same standard in every case. *Id.* at 106. *See generally* Simmons, *Commercial Advertising and the Fairness Doctrine: The New F.C.C. Policy in Perspective*, 75 COLUM. L. REV. 1083, 1089-1100 (1975); Comment, *supra* note 15, at 1293-1310.

89. 48 F.C.C. 2d 1 (1974).

90. *Id.* at 24-26. The Commission has been upheld in imposing this limitation on fairness complaints. *See* Nat'l Citizen's Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 98 S. Ct. 2820 (1978).

91. 48 F.C.C. 2d 1, 22-23.

*derness Society* as an example,<sup>92</sup> the Commission explained that a test in these instances would be whether the advertisement expressed views closely paralleling those held by partisans on an issue.<sup>93</sup> The FCC cautioned, however, that no matter how close the views were, it would not dispute the reasonable, good faith judgment of a licensee that no controversial issue was raised.<sup>94</sup>

Subsequent to issuance of the *Fairness Report*, the Commission's position was further clarified in two cases. In the first, the Public Media Center brought a complaint against thirteen Northern California radio stations for airing several Pacific Gas and Electric Company spots.<sup>95</sup> The ads asserted that nuclear power plants were environmentally safe and that it was imperative that they be developed as soon as possible in order to meet the demand for energy.<sup>96</sup> Public Media Center asserted that since Californians were being asked to sign petitions to put nuclear construction to a referendum at the time, the advertisements made it more difficult for referendum proponents to gather signatures.<sup>97</sup> Several of the accused licensees countered that the commercials did not meaningfully address the issue. One offered that nuclear power could not be considered controversial in its service area since the issue had not been mentioned by community leaders in ascertainment surveys.<sup>98</sup> The Commission, swayed by the complainants' evidence of "vigorous" debate over the issue both in Congress and in the state, ruled that the broadcasters could not reasonably contend that the subject was not controversial.<sup>99</sup>

In *Energy Action Committee, Inc.*<sup>100</sup> the judgment was a bit more diffi-

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92. *Id.* at 23. See note 79 and accompanying text, *supra*.

93. *Id.* at 24.

94. The Commission indicated that it was not interested in a "subjective judgment as to the advertiser's actual intentions" but in "obvious participation in public debate." Accordingly, it only asked licensees to make a "common" sense judgment about the thrust of the ad and would only rule against them when "the facts are so clear that the only reasonable conclusion would be to view the 'advertisement' as a presentation on one side of a specific public issue." 48 F.C.C. 2d at 23-24. See Simmons, *supra* note 85, at 1102-03.

95. Public Media Center, 59 F.C.C. 2d 494 (1976), *reconsideration denied*, 64 F.C.C. 2d 615 (1977).

96. 59 F.C.C. 2d at 495.

97. *Id.*

98. *Id.* at 515. Seven of the thirteen licensees contended that the ads did not take a position on a controversial issue. *Id.* at 499-509. It was difficult for them, however, to argue that the announcements were noncontroversial, since each one carried the tag line "Nuclear power. It isn't the power source of the future. It's the solution to the electrical energy problem now." *Id.* at 513.

99. *Id.* at 514-15. The Commission decided whether the ads meaningfully and obviously addressed the issue by reference to arguments made by opponents of nuclear power. The licensees' interpretation was given no discernable weight in the analysis. *Id.*

100. 64 F.C.C. 2d 787 (1977).

cult to make. The Texaco commercial at issue claimed that the company was able to operate economically and efficiently because it was involved in all phases of gasoline marketing from oil drilling to retailing.<sup>101</sup> Energy Action Committee complained that the commercials raised a controversial issue of public importance, since they presented the same arguments made by opponents of oil company divestiture<sup>102</sup> at a time when Congress was debating a bill to require divestiture.

None of the broadcasters named in the complaint denied that divestiture was a controversial issue. Instead they argued that the spot was merely an institutional advertisement designed to foster a favorable public image for the oil company and its operations.<sup>103</sup> Energy Action Committee, however, submitted records indicating that the arguments of anti-divestiture advocates closely paralleled the views expressed in the ad,<sup>104</sup> convincing the FCC that the spot was indeed partisan.<sup>105</sup> Accordingly, the Commission ordered the broadcasters who had not given extensive coverage to the issue to detail their plans for balancing the views expressed in the commercial.<sup>106</sup>

In neither case did the FCC require the complainants to document their contention that the broadcasters had not devoted air time to the discussion of contrasting views in their overall programming. Their burden of proof was satisfied merely by offering affidavits to the effect that some of their members were regular viewers or listeners and had not heard or seen opposing views covered.<sup>107</sup> The Commission then put the onus on the licensee to document any broadcast that would fulfill the fairness obligation.

### III. THE PROBLEM OF GOOD FAITH AND REASONABLENESS

Although the *Fairness Report* declined to offer specific FCC guidelines for invoking the doctrine,<sup>108</sup> some requirements for a successful fairness

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101. *Id.* at 787-88.

102. *Id.* at 789. Divestiture would require large, vertically-integrated oil companies to sell off those portions of their operations, such as retailing or refining, that could be run independently.

103. *Id.* at 790-92.

104. *Id.* at 789.

105. *Id.* at 801. The Commission noted that the ad referred to companies "like Texaco" in extolling the virtues of vertical integration, but allowed that even without this reference it would consider the ad partisan. *Id.*

106. *Id.* at 803. Commissioner White dissented, noting that the Commission was giving more weight to the advertiser's "alleged intent" than to the licensee's judgment. *Id.* at 804.

107. *In Public Media Center*, one of the licensees demanded that the Commission divulge the names of these persons to ascertain whether they really were local listeners, but the FCC refused. 64 F.C.C. 2d 615, 625 (1977).

108. The FCC reiterated its contention from the original Report on Editorializing that "there can be no one all-embracing formula" for insuring the balanced presentation of is-



complaint emerge from the subsequent cases. An issue is apparently controversial if it is connected with or the subject of legislation or referendum.<sup>109</sup> Whether a particular advertisement takes a position on an issue can be determined by reference to the statements of partisans on issues or to other ads that the advertiser has run.<sup>110</sup> A complainant can provide a reasonable basis for believing that a licensee has not adequately covered an issue by swearing that he, as a regular viewer, has not seen all sides aired.<sup>111</sup> Satisfaction of these criteria will put the burden on the licensee to prove that the issue is not controversial or that he has treated it fairly in his overall programming.

But the process by which the Commission decides the main issue in a fairness inquiry involving an advertisement remains cloudy. Even after a complainant establishes that the views expressed in an advertisement closely parallel views held by partisans on an issue, there is still the question of whether the commercial is such an obvious attempt at editorializing that the licensee cannot reasonably offer another interpretation.<sup>112</sup> A broadcaster inadvertently may air a subtly drawn editorial advertisement. When placed in the context of the debate surrounding a controversial issue, the advocatory nature of commercials, such as the Texaco ad in *Energy Action Committee, Inc.*,<sup>113</sup> may indeed seem obvious. Standing alone as they do when the broadcaster decides whether to air them, these advertisements may seem like ordinary institutional spots.

This dilemma, of course, would not excuse a licensee from his public interest obligations. If a broadcaster has allowed his station to be used as a partisan soapbox, then, under *Red Lion*, he should inform his audience of all other relevant viewpoints.<sup>114</sup> After *CBS* and *NBC*, however, it is uncertain how much latitude the FCC has in enforcing this requirement.

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sues. Fairness Report, 48 F.C.C. 2d 1, 9 (1974) (quoting Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1251 (1949)).

109. See *Public Media Center*, 64 F.C.C. 2d 615, 626 (1977). The Commission will look at a number of factors in determining whether a specific issue is a controversial issue of public importance requiring a balance of viewpoints. Public importance is based on the impact of an issue on the community as a whole and can be gauged from the amount of attention which the issue has received from the media and government officials. Fairness Report, 48 F.C.C. 2d 1, 11-12 (1974). Controversy depends on the amount of debate an issue arouses within the community. *Id.* at 12. The Commission, however, has only extended a presumption of controversy to subjects of legislation.

110. See *Public Media Center*, 59 F.C.C. 2d 494 (1976), *reconsideration denied*, 64 F.C.C. 2d 615 (1977); *Energy Action Comm., Inc.*, 64 F.C.C. 2d 787 (1977); Fairness Report, 48 F.C.C. 2d 1, 24 (1974).

111. See note 104 and accompanying text, *supra*.

112. See Fairness Report, 48 F.C.C. 2d 1, 24 (1974).

113. See note 98 and accompanying text, *supra*.

114. See notes 50-54 and accompanying text, *supra*.

*CBS* clearly established that the selection of advertising stands on the same footing as news judgments.<sup>115</sup> A broadcaster's representations about the non-controversiality or non-bias of a commercial should be given the same deference accorded the network's representations in *NBC*.<sup>116</sup>

Although the Commission has continually maintained that it will not disturb a licensee's reasonable, good faith interpretation of a commercial,<sup>117</sup> its implementation of this standard has not been as deferential as *NBC* would require. Those cases in which the FCC has disputed a broadcaster's claims have apparently turned on the amount of evidence complainants have offered to link the views expressed in commercials with those of advocates.<sup>118</sup> In a less rigorous inquiry, this comparison might reliably indicate whether a contention is reasonable. The post-*CBS* fairness cases suggest, however, that a higher degree of unreasonableness must be proven, perhaps to the point of showing bad faith on the part of the licensee.<sup>119</sup>

The FCC has used the deferential *NBC* standard in other fairness cases,<sup>120</sup> but it seems reluctant to do so when handling complaints involving editorial commercials. There may be some justifications for this treatment. Paid editorials present problems not encountered in other programming. The views expressed in such commercials will usually re-

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115. This is particularly true in broadcasting, since under the fairness doctrine, the commercials aired may determine the substance of other programming. See *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973). The same argument can be made for the publishing media, since space devoted to advertising will mean less space for editorial matter. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974).

116. In *NBC*, the District of Columbia Circuit suggested that a licensee's judgments in a fairness inquiry were entitled to the same presumption of regularity which courts accord administrative agency decisions. See *NBC v. FCC*, 516 F.2d 1101, 1120 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976).

117. See *Reconsideration of Fairness Report*, 58 F.C.C. 2d 691, 697 (1976); *Fairness Report*, 48 F.C.C. 2d 1, 9 (1974).

118. See notes 96, 102 & accompanying text, *supra*.

119. The District of Columbia Circuit characterized the FCC's role as "correcting the licensee for abuse of discretion". *NBC v. FCC*, 516 F.2d 1101, 1120 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976) (emphasis in original). A subsequent District of Columbia Circuit case involving the personal attack rule required the FCC not only to respect the licensee's judgments as to whether a controversial issue had been raised, but also specified that it should defer to the broadcaster's interpretation of the rule. See *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1010-11 (D.C. Cir. 1976); Comment, *supra* note 62, at 409-10. This treatment has led at least one court to describe the Commission's scope of review as a "bad faith standard." See *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064, 1148 (C.D. Cal. 1976).

120. See, e.g., *NBC*, 52 F.C.C. 2d 273 (1975), *aff'd sub nom. National Organization of Women v. FCC*, 555 F.2d 1002 (D.C. Cir. 1977).

flect the interests of those who can afford them.<sup>121</sup> Large advertisers are, moreover, in a position to pressure commercial broadcasters into carrying their advocacy ads. Stricter FCC enforcement of the fairness doctrine in this context protects the public by preventing the airwaves from being dominated by one point of view and protects broadcasters by enabling them to resist advertisers without losing their business.<sup>122</sup>

#### IV. CONCLUSION

There is certainly much that can be said in favor of the fairness doctrine. By seeking to encourage the objectivity that always has been a goal of journalism, the doctrine will stimulate broadcasters to provide even-handed coverage of important issues. Were it not for the fairness doctrine, some points of view might never be aired. The doctrine, moreover, is maturing. Objective enforcement standards are rising out of the former confusion. Ultimately the fairness obligation will become better understood and more closely observed by broadcasters.

But there is still much about the doctrine that is disturbing. Despite the guidelines which the Commission has formulated, the outcome of a fairness inquiry still depends on how the FCC views the broadcast involved. No matter how controversial the subject or what the motives of the advertiser may be, the core issue remains whether the licensee has reasonably concluded that the commercial did not take sides. The question of reasonableness does not lend itself readily to standardized judgments. That the government acts as sole arbiter of the issue exacerbates the problems associated with such inherent arbitrariness. As long as the decision rests with the agency, there is always the risk that the doctrine will be used to censor, ultimately restricting, rather than expanding, the broadcast of necessary viewpoints on the airways.

*James C. Stewart*

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121. This is at least one of the reservations which the Supreme Court had about the paid access system in *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. at 123.

122. Some broadcasters favor continuation of the fairness doctrine because of this. See HOUSE FAIRNESS DOCTRINE REPORT, *supra* note 5, at 25.