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PURITY VERSUS PLUGOLA: A STUDY OF THE FEDERAL COMMUNICATIONS COMMISSION'S SPONSORSHIP IDENTIFICATION RULES

David W. Maher*

INTRODUCTION

The broadcast commercial, deeply imbedded in the communications industry's programming, has been subjected to numerous statutory and administrative rules. The author undertakes a study of the successes and failures of the Federal Communications Commission's administrative scheme with respect to identification of commercial material. Viewing the Commission's repeated pronouncements with bemusement, the author criticizes present and proposed regulations in terms of their practicality for the broadcast industry. In conclusion, Mr. Maher asks for the production of practical, consistent and unambiguous regulations which will aid broadcast development while maintaining the content deserved by the public.

RADIO and television commercials are the price that we pay for "free" radio and television, and they seem to be a price that most Americans are willing to pay. Many have become as much a part of American life and language as any dramatic or literary works. In fact, a number of them show as much quality, by any standard, as many modern dramatic and literary productions. One reason for this is, of course, their cost; a normal television commercial can easily cost as much as \$30,000 to produce, which does not include residual payments to actors or the cost of broadcast station time for airing the commercial.¹

Many people like commercials. A study commissioned by the Columbia Broadcasting System in 1970 showed that 70 percent of those interviewed considered commercials to be a fair price to pay for the entertainment broadcast and 54 percent considered commercials so good that they are more entertaining than the program.

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1. See M. MAYER, ABOUT TELEVISION (1972).

However, 43 percent found commercials generally in poor taste and very annoying, although only 30 percent said they would rather pay a small amount yearly to have television without commercials.²

Given the importance of radio and television commercials in the broadcast industry and the American economy, it is not surprising that the federal government has undertaken to regulate them. This article is a study of the successes and failures of the Federal Communications Commission in one aspect of the administrative law processes that concern broadcast commercials. This is not a treatment of deceptive or unfair advertising or any of the issues that involve the Federal Trade Commission. Rather, the article will concern itself with the Communications Act of 1934 and the regulations, existing and proposed, issued pursuant to the Act relating to the question of sponsorship identification.

From a government regulatory standpoint, commercials in broadcasting had a bad start. In 1925, at the Fourth National Radio Conference, the Secretary of Commerce, Herbert Hoover said that

[W]e can surely agree that no one can raise a cry of deprivation of free speech if he is compelled to prove that there is something more than naked commercial selfishness in his purpose.³

There was and is a substantial body of opinion that agrees with this view, and it has colored all congressional efforts to deal with the problem of regulating the electromagnetic spectrum.

The early history of broadcasting made it clear that some form of governmentally enforced traffic control was needed to prevent electronic chaos. The result might have been legislation that was strictly limited to technical aspects of spectrum allocation. Instead, the Radio Act of 1927 and the Communications Act of 1934 delve deeply into all aspects of programming, directly through provisions such as the equal-time requirements for political candidates, and indirectly through the licensing process and the requirement of service in the "public interest, convenience, and necessity . . ."⁴

The Radio Act and the Communications Act do not, of course, exist in a constitutional vacuum. Both have condemned censorship, and section 326 of the Communications Act is explicit:

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2. See R.T. BOWEN, *TELEVISION AND THE PUBLIC* (1973).
 3. *PROCEEDINGS OF THE FOURTH NATIONAL RADIO CONFERENCE* 7 (1926).
 4. 47 U.S.C. § 309 (1970).

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.⁵

Censorship of commercial speech as used in the Act, however, is not necessarily censorship, according to the Supreme Court. The recent decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*⁶ emphasizes the continuing vitality of Justice Roberts' view that "the Constitution imposes no such restraint on government as respects purely commercial advertising."⁷ On the other hand, Justice Douglas believes "that commercial materials also have First Amendment protection."⁸

In any event, first amendment considerations have not deterred the Federal Communications Commission from making value judgments about the content of commercial material, about permissible amounts of commercial material, and about the substantive topic of this article: identification of commercial material.

A recent expression of the Commission's views can be found in the *Tentative Report and Order* adopted on May 13, 1970 in Docket Number 14119, "In the Matter of Broadcast Announcement of Financial Interests of Broadcast Stations and Networks and Their Principals and Employees in Service and Commodities Receiving Broadcast Promotions." In that *Tentative Report and Order*, the Commission said:

(a) The public interest requires that, insofar as possible, broadcast material be presented on the basis of its own merit, appeal, popularity, or significance, and not because of outside financial interests in that which is presented.

(b) Both the public interest and the provisions and purposes of Section 317 of the Communications Act of 1934, as amended, require that, to the extent such outside financial interests are or may be a factor influencing the selection and presentation of broadcast material, the existence of such interests must be disclosed to the audience, so that it may evaluate the material with this knowledge.⁹

5. 47 U.S.C. § 326 (1970).

6. 413 U.S. 376 (1973).

7. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). See also, Note, *Commercial Speech—An End in Sight to Chrestensen?*, 23 DEPAUL L. REV. 1258 (1974).

8. 413 U.S. at 398 (Douglas, J., dissenting).

9. *Tentative Report and Order*, F.C.C. Doc. No. 14119, at 31, in *Notice of Tentative Report and Order* in Docket No. 14119, May 19, 1970 [hereinafter cited as

This article will examine the extent to which the public interest requirements established by the Commission have been or are capable of being met. The article will deal first with the constitutional and legislative framework applicable, and then with the current and proposed regulations of the Commission.

I. CONSTITUTIONAL AND LEGISLATIVE ASPECTS

The first amendment states clearly and simply that "Congress shall make no law . . . abridging the freedom of speech" ¹⁰ Despite the clarity, the debate over whether the amendment means exactly what it says, "no law," or something less demanding has been resolved, at least for the present, in favor of the latter interpretation. This is especially true with respect to speech activities that take place in a commercial context.

The regulation of the content of commercial advertising is an activity that tests the limits of first amendment protections. To say that an advertiser may not advertise his product, or solicit for sales in a particular manner, is to deny his "freedom of speech," as that phrase is commonly understood, unless there exists some particularly compelling reason to limit his activity. The reasons that have been used as a basis for such denial include, for example, promulgation of false and misleading advertising,¹¹ the issuance of misleading proxy solicitations,¹² and the advertising of such products as contraceptives,¹³ cigarettes,¹⁴ liquor,¹⁵ as well as the services of an optician.¹⁶ In all of these examples, some apparently legitimate

Tentative Report and Order]. P & F RADIO REG. CURRENT SERVICE ¶ 53:295 (1970).

10. U.S. CONST. amend. I.

11. 15 U.S.C. § 45 (1970). See also *Legislation and Administration, A New Antitoxin to Advertising Artifice—Television Advertising and the Federal Trade Commission*, 37 NOTRE DAME LAW. 524 (1962); *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967).

12. SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005 (1971), rehearing denied, 404 U.S. 1064 (1972); SEC v. May, 229 F.2d 123 (2d Cir. 1956).

13. Planned Parenthood Comm. v. Maricopa County, 92 Ariz. 231, 375 P.2d 719 (1962).

14. Packer Corp. v. Utah, 285 U.S. 105 (1932); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), aff'd, 405 U.S. 1000 (1972).

15. Portwood v. Falls City Brewing Co., 318 S.W.2d 535 (Ky. Ct. App. 1958).

16. Williamson v. Lee Optical, 348 U.S. 483 (1955).

legislative purpose was being served. The protection of the public health and welfare was involved either by preventing the dissemination of false or misleading information, a concept related to traditional theories of fraud, or by preventing the dissemination of information that was thought to have some potentially harmful impact upon the public, notwithstanding its factual truth. The former of these motives would seem to be more consistent with the first amendment, which was certainly never intended to condone fraud. The latter motive, however, would not seem to pass constitutional muster in those instances where it subsumes a kind of paternalism that is inconsistent with the style of cognitive free choice that the first amendment seeks to promote.

Much of the legal analysis of advertising regulation has ignored distinctions between proper and improper motives for the limitation of first amendment protections and has been devoted instead to attempts to find distinctions between commercial speech and other "purer" forms of speech:

Commercial advertising might be distinguished from political and social advocacy because the advertiser's motive or purpose appears to be economic gain, or because the advertisement seeks to influence private decisions among economic alternatives. A distinction based on the advertiser's self-serving motive is inadequate, however, for much political and other traditionally protected expression is motivated by self-interest. The distinction between speech influencing private economic decisions and other speech seems more significant.¹⁷

However, the mere introduction of an element of economic self-interest into a communication message would hardly justify a higher degree of regulation than is consistent with the first amendment. For example, books published for profit are not thereby removed from the cloak of first amendment protection,¹⁸ and no one would seriously question that "[t]he value of a free interchange of ideas justifies extending first amendment protection to all political, social, and literary expression, even that disseminated by economic associations or motivated by economic self-interest."¹⁹

Some commentators avoid the conceptual difficulties, created by

17. Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1192 (1965).

18. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

19. *Supra* note 17, at 1194.

their recognition that economics is all-pervasive, by begging the question:

The possibly desirable objectives furthered by advertising would not seem to require its protection by the first amendment, particularly since the primary purpose of commercial advertising is to advance the economic welfare of business enterprises, over which state and federal government enjoy wide powers of regulation.²⁰

Accepting this observation, there still remains the question whether regulation over broadcast licensees by the federal government, regulation that is clearly necessary to prevent chaos in the electromagnetic spectrum, justifies regulation of *advertising* practices. For example, state regulation over corporations that own newspapers has never justified regulation of their advertising policies.

Although the excerpt quoted above does not answer any questions, it does raise yet another basis for distinction between constitutionally permissible and impermissible limitations on speech in advertising. Reference is made to the primary purpose of commercial advertising: the advancement of the economic welfare of business enterprises. This suggests that limitations may more appropriately be placed upon the advertiser than upon the medium through which he expresses himself. The position may be taken that when advertising is a direct part of commercial activity, its speech component is swept aside by the decision to view advertising as simply commercial conduct—which is clearly reachable by the law consistent with the first amendment—except to the degree that speech and commercial activity become so intertwined that the speech component cannot be separated without doing great damage to a commercial operator's right to engage in an activity that is protected constitutionally, such as political activity.²¹

The courts have not pursued these subtleties in their treatment of the first amendment advertising cases. The line of cases reaching from *Valentine v. Chrestensen*²² to *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*²³ simply stands for the

20. *Id.* at 1195.

21. This right must be exercised in good faith, and the protections of the first amendment must not be claimed in order to clothe objectionable commercial activity with the privilege. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (dictum); *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

22. 316 U.S. 52 (1942).

23. 413 U.S. 376 (1973).

proposition that commercial speech is not worthy of the protection accorded other forms of speech by the first amendment. Both the Congress, in its deliberations on legislation, and the Federal Communications Commission, in its interpretation of sections 317 and 326 of the Communications Act, have accepted this proposition wholeheartedly and have framed their respective legislative and regulatory proposals accordingly.

The concept of requiring identification of commercial matter in broadcast programs dates back nearly to the beginning of broadcast regulation. The genesis of section 317 was the congressional hearings leading to the passage of the Radio Act of 1927.²⁴ Section 317, in its original form, was substantially the same as section 19 of the Radio Act.²⁵ Section 19, in turn, was derived from a law passed in 1912 concerning newspaper advertising, a version of which is still in force, providing:

[A]ll editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'Advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars (\$50) nor more than five hundred dollars (\$500).²⁶

There is no report of any fine ever being levied pursuant to this statute.²⁷

24. Radio Act of 1927, ch. 169, §§ 1 *et seq.*, 44 Stat. 1162.

25. The predecessor form read as follows:

All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.

Communications Act of 1934, ch. 652, § 317, 48 Stat. 1089.

26. 37 Stat. 554 (1912). See 39 C.F.R. § 123.7. *Cf.*, 18 U.S.C. §§ 612, 1734 (1970). Section 612 requires identification of the source of writings concerning candidates in federal political campaigns and section 1734 requires publications entered in second class mail to be identified as advertisements if the publisher has received or been promised a valuable consideration.

27. Prior to 1960, there were limited judicial and administrative decisions involving section 317. In 1939, the power of the Commission to adopt regulations implementing section 317 was upheld in *Yankee Network v. FCC*, 107 F.2d 212 (D.C. Cir. 1939). See also *Communist Party of the United States v. Subversive Activities Control Bd.*, 223 F.2d 531 (D.C. Cir. 1954), *rev'd on other grounds*, 351 U.S. 115 (1956); *Noerr Motor Freight v. Eastern R.R. Presidents Conference*, 155 F. Supp. 768 (E.D. Pa. 1957). The Commission, prior to 1960, took the position that the furnishing of program materials such as records and scripts to a broadcaster did

The Communications Act Amendments of 1960²⁸ made many changes in the existing law, most of which were directed at providing for procedures to govern the behavior of license applicants in the period of time preceding a grant.²⁹ The then-current "payola" and quiz program scandals prompted other changes, including the passage of an amended section 317 and a new section 508.³⁰ The

not constitute valuable consideration unless those materials involved controversial issues or political matters. Docket No. 6672, September 29, 1944. In 1958, the Commission warned broadcasters that the supplying of films by the National Association of Manufacturers concerning congressional hearings required an announcement of the sources of the films. Kohler Kinescope Cases, 17 R.R. 553 (1958), 17 R.R. 556a (1958), 17 R.R. 556d (1958).

28. Pub. L. No. 86-752, 74 Stat. 889.

29. The sections of title 47 affected were §§ 154(b), 307(d), 309, 311, 312(a) and (b), 317, 504(a) and (b), 508, and 509.

30. The sections provide as follows:

**ANNOUNCEMENT WITH RESPECT TO CERTAIN
MATTER BROADCAST**

SEC. 317. (a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

(b) In any case where a report has been made to a radio station, as required by section 508 of this Act, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

(c) The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

(d) The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

(e) The Commission shall prescribe appropriate rules and regulations

goal of the amendments, insofar as sections 317 and 508 were concerned, was securing expanded identification of sponsored material in broadcasts. Specifically, the Special Subcommittee on Legislative Oversight recommended the following:

Section 317 should be amended to require announcement of payments made not only to licensees but also to any other individuals or companies for advertising "plugs" on behalf of third parties on sponsored programs. Provision should be made to prohibit payment to any person or company or the receipt by any person or company for the purpose of having in-

to carry out the provisions of this section.

DISCLOSURE OF CERTAIN PAYMENTS

SEC. 508. (a) Subject to subsection (d), any employee of a radio station who accepts or agrees to accept from any person (other than such station), or any person (other than such station) who pays or agrees to pay such employee, any money, service or other valuable consideration for the broadcast of any matter over such station shall, in advance of such broadcast, disclose the fact of such acceptance or agreement to such station.

(b) Subject to subsection (d), any person who, in connection with the production or preparation of any program or program matter which is intended for broadcasting over any radio station, accepts or agrees to accept, or pays or agrees to pay, any money, service or other valuable consideration for the inclusion of any matter as a part of such program or program matter, shall, in advance of such broadcast, disclose the fact of such acceptance or payment or agreement to the payee's employer, or to the person for whom such program or program matter is being produced, or to the licensee of such station over which such program is broadcast.

(c) Subject to subsection (d), any person who supplies to any other person any program or program matter which is intended for broadcasting over any radio station shall, in advance of such broadcast, disclose to such other person any information of which he has knowledge, or which has been disclosed to him, as to any money, service or other valuable consideration which any person has paid or accepted, or has agreed to pay or accept, for the inclusion of any matter as a part of such program or program matter.

(d) The provisions of this section requiring the disclosure of information shall not apply in any case where, because of a waiver made by the Commission under section 317(d), an announcement is not required to be made under section 317.

(e) The inclusion in the program of the announcement required by section 317 shall constitute the disclosure required by this section.

(f) The term "service or other valuable consideration" as used in this section shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast, or for use on a program which is intended for broadcasting over any radio station, unless it is so furnished in consideration for an identification in such broadcast or in such program of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property in such broadcast or such program.

(g) Any person who violates any provision of this section shall, for each such violation, be fined not more than \$10,000 or imprisoned not more than one year, or both.

cluded in a broadcast program any material, whether vocal or visual, without having announcement made on the program that the showing or hearing of such material has been paid for. Criminal penalties shall be imposed upon any person or company who violates this section as amended.³¹

The weakness of the existing legislation was its failure to curb the activities of anyone but licensees.³² It ignored one of the plain realities of broadcasting—that a licensee itself, whether a corporation, partnership or individual proprietor, does not normally make specific decisions on programming, even though the licensee is legally responsible for the decisions. Thus, persons who were not subsumed under the heading “broadcast licensee” could themselves engage in the kind of practices that were forbidden to broadcasters. Realizing that, in practice, a broadcaster’s chance to veto those illegal third party practices was either nonexistent or impractical, Congress chose to go directly to the source of the abuse. The response was the requirement that all program material and announcements that are being paid for, either directly or indirectly, carry with them an identification of just who is paying for them, with certain exceptions.³³

The new section 508 covers persons, other than licensees, who, perhaps independently of the licensee and without the licensee’s knowledge, promoted either a product or a service, for consideration, and failed to disclose the receipt of payment. Section 317(b), in turn, compels the licensee to announce the fact that such a third party arrangement has been made.

Congress’ legislative activity came as a result of Congress’ own investigative activities and as a result of the FCC’s consideration of the

31. COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, SUBCOMMITTEE ON LEGISLATIVE OVERSIGHT, INVESTIGATION OF REGULATORY COMMISSIONS AND AGENCIES, H.R. Rep. No. 1258, 86th Cong., 2d Sess. (1960).

32. The section as it has existed since the Federal Radio Act appears to go only to payments to licensees as such. The fact that licensees now delegate much of their actual programming responsibilities to others makes it imperative that the coverage of section 317 be extended in some appropriate manner to those in fact responsible for the selection or inclusion of broadcast matter.

COMMITTEE ON FOREIGN AND INTERSTATE COMMERCE, H.R. Rep. No. 1800, 86th Cong., 2d Sess. 11-12 (1960).

33. The proviso is found in section 317(a)(1). In addition, the third party problem as it involved the licensee required the licensee to exercise diligence in obtaining the information necessary to comply with the disclosure requirement. 47 U.S.C. § 317(c) (1970).

sponsorship identification problem. The Special Subcommittee on Legislative Oversight made its recommendations based on evidence presented at its hearings on television quiz-shows and payola.³⁴ In response, the FCC attempted to clarify and interpret the existing section 317.³⁵ The FCC's unexpected interpretation would have required a broadcaster to announce the identity of all donors of gifts to the broadcaster if any of the items given were to be exposed in the course of a broadcast. This interpretation would have required a broadcaster to identify, for example, the donor of the gift of a phonograph record broadcast by the station. Since most broadcast stations receive their phonograph records at a reduced or nominal cost, this interpretation would have required an enormous number of sponsorship identification announcements.

The industry urged that a reasonable middle ground be sought, and the resulting legislative action, culminating in the amendments, was aimed at

preventing recurrences of the extreme types of "payola" situations uncovered by the Special Subcommittee on Legislative Oversight, and . . . avoiding some of the hardships which . . . resulted from the Commission's interpretation of the . . . language of section 317 as set forth in the Commission's Public Notice of March 16, 1960.³⁶

Specifically, the so-called "reasonably related" proviso in section 317(a)(1) clarified the law in "gift" situations. The net effect of the proviso, as illustrated extensively in the House Report would be

to exempt from the announcement requirement some of the situations involving the furnishing of services or property to licensees without charge or at a nominal charge for use on or in the connection with broadcasts³⁷

An exception to the proviso is noted in section 317(a)(2), in that the amendments are not intended to effect a change in the Commission's treatment of political programs, or programs involving the dis-

34. COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, SUBCOMMITTEE ON LEGISLATIVE OVERSIGHT, INVESTIGATION OF REGULATORY COMMISSIONS AND AGENCIES, H.R. Rep. No. 1258, 86th Cong., 2d Sess. (1960).

35. Sponsorship Identification of Broadcast Material, FCC 60-239, Public Notice No. 85460 (March 16, 1960).

36. COMMITTEE ON FOREIGN AND INTERSTATE COMMERCE, H.R. Rep. No. 1800, 86th Cong., 2d Sess. 12 (1960).

37. *Id.* at 13.

cussion of controversial issues.³⁸ Announcements in such situations might be required regardless of whether or not paid matter is being broadcast.

II. REGULATORY ASPECTS—EXISTING AND PROPOSED REGULATIONS

Following the passage by Congress in 1960 of the amendments to the Communications Act of 1934, resulting in the amended section 317 and the new section 508, the Commission promulgated new sponsorship identification rules to implement these sections. The regulations applicable to standard broadcast (AM) radio stations,³⁹ FM radio stations,⁴⁰ television stations,⁴¹ international radio stations⁴² and CATV systems⁴³ are identical in substance, except that there is an additional subparagraph in the television regulation providing that the announcements required by section 317(b) of the Communications Act are waived with respect to "feature motion picture films produced initially and primarily for theater exhibition."⁴⁴ The text of what is now section 73.119, which applies to standard broadcast stations, is set forth in the footnote below.⁴⁵

38. See 47 U.S.C. § 315 (1970).

39. 47 C.F.R. § 73.119 (1972).

40. 47 C.F.R. § 73.289 (1972).

41. 47 C.F.R. § 73.654 (1972).

42. 47 C.F.R. § 73.789 (1972).

43. 47 C.F.R. § 76.221 (1972).

44. 47 C.F.R. § 73.654(e) (1972).

45. § 73.119. Sponsored programs, announcement of.—(a) When a standard broadcast station transmits any matter for which money, services, or other valuable consideration is either directly or indirectly paid or promised to, or charged or received by, such station, the station shall broadcast an announcement that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied: provided, however, that "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(b) The licensee of each standard broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program matter for broadcast, information to enable such licensee to make the announcement required by this section.

Included in the legislative history of the amended section 317 were twenty-seven examples selected by Congress to illustrate the

(c) In any case where a report (concerning the providing or accepting of valuable consideration by any person for inclusion of any matter in a program intended for broadcast) has been made to a standard broadcast station as required by Section 508 of the Communications Act of 1934, as amended, of circumstances which would have required an announcement under this section had the consideration been received by such standard broadcast station, an appropriate announcement shall be made by such station.

(d) In the case of any political program or any program involving the discussion of public controversial issues for which any records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a station as an inducement to the broadcasting of such program, an announcement shall be made both at the beginning and conclusion of such program on which such material or services are used that such records, transcriptions, talent, scripts, or other material or services have been furnished to such station in connection with the broadcasting of such program: provided, however, that only one such announcement need be made in the case of any such program of 5 minutes duration or less, which announcement may be made either at the beginning or conclusion of the program.

(e) The announcement required by this section shall fully and fairly disclose the true identity of the person or persons by whom or in whose behalf such payment is made or promised, or from whom or in whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished. Where an agent or other person contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known to the station, the announcement shall disclose the identity of the person or persons in whose behalf such agent is acting instead of the name of such agent.

(f) In the case of any program, other than a program advertising commercial products or services, which is sponsored, paid for, or furnished, either in whole or in part, or for which material or services referred to in paragraph (d) of this section are furnished, by a corporation, committee, association, or other unincorporated group, the announcement required by this section shall disclose the name of such corporation, committee, association, or other unincorporated group. In each such case the station shall require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group shall be made available for public inspection at the studios or general offices of one of the standard broadcast stations carrying the program in each community in which the program is broadcast. Such lists shall be kept and made available for a period of 2 years.

(g) In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purposes of this section and only one such announcement need be made at any time during the course of the program.

intended effect of the proviso clause in section 317(a)(1) regarding "reasonably related" uses.⁴⁶ This was considered necessary because of the Commission's previous efforts at revising its regulations, which would have required a radio station, for example, to announce after the playing of each phonograph record that the record was a gift of XYZ Record Company, or was purchased at a reduced price from XYZ Record Company. The examples selected by Congress made it clear that such things as a refrigerator furnished at no cost as a prop for a dramatic program would not have to be treated as sponsorship for the purposes of section 317, unless there were some use of the prop beyond that reasonably related to its normal use. For example, a long-lasting camera shot on a refrigerator, automobile or piano trademark would remove a use from the reasonably related category. The "reasonably related" language is also included in subparagraph (a) of each revised regulation with nine more illustrative interpretations added by the Commission when it issued the regulations as further elucidation of the phrase.⁴⁷

The new regulations and the thirty-six illustrative interpretations were primarily intended to contend with the problem of "payola." At about the same time, the Commission also undertook to deal with the problem of "plugola" by adopting, on May 11, 1961, a Notice of Proposed Rule Making, "In the Matter of Broadcast Announcement of Financial Interests of Broadcast Stations and Net-

(h) The announcements required by Section 317 of the Communications Act of 1934, as amended, are waived with respect to the broadcast of "want ad" or classified advertisements sponsored by individuals. The waiver granted in this paragraph shall not extend to classified advertisements or want ads sponsored by any form of business enterprise, corporate or otherwise. Whenever sponsorship announcements are omitted pursuant to this paragraph the following conditions shall be observed:

(1) The licensee shall maintain a list showing the name, address and (where available) the telephone number of each advertiser and shall attach this list to the program log for each day's operations; and

(2) shall make this list available to members of the public who have a legitimate interest in obtaining the information contained in the list.

(i) Commission interpretations in connection with the foregoing rules may be found in the Commission's Public Notice entitled "Applicability of Sponsorship Identification Rules" [53:1051, *infra*] and such supplements thereto as are issued from time to time.

46. H.R. Rep. No. 1800. See note 35, *supra*; U.S. Code Cong. & Ad. News 3528-32 (1960).

47. *In re Applicability of Sponsorship Identification Rules*, 40 F.C.C. 141, 151 (1963).

works and Their Principals and Employees in Service and Commodities Receiving Broadcast Promotions," Docket Number 14119.⁴⁸

In a subsequent *Tentative Report and Order* in that docket, issued in May, 1970, the Commission explained how it distinguishes plugola from payola:

"Plugola" (is) the promotion or plugging on the air of goods or services in which someone responsible for including the promotional material in the broadcast, such as the licensee itself or a program performer, has a financial interest.

"Plugola" is distinguishable from "payola" where persons responsible for the selection or presentation of broadcast material present such material (e.g., a particular musical record) in return for payment of consideration by another party.⁴⁹

The Commission explained that its new plugola rules were proposed because it believed that the sponsorship identification rules are not sufficient and because it believed that the public is entitled to know the real interests of those trying to influence it.

With the May, 1970 issuance of the *Tentative Report and Order*, the Commission stated that it had reviewed the record in the proceeding and had tentatively reached certain conclusions (set forth in the *Tentative Report and Order*) including the adoption of a rule concerning plugola and twenty-three examples of its application to specific situations.⁵⁰ The Commission further stated that, before taking final action, it would permit interested parties to file additional comments. As of April, 1974, the Commission had not taken final action.

48. 26 Fed. Reg. 4291 (1961).

49. Tentative Report and Order, P. & F. RADIO REG. CURRENT SERVICE ¶ 53:295, 296-97 & n. 2 (1970).

50. The Appendix of the Tentative Report and Order includes the following provision:

§ 73.1204 Avoidance of 'plugola' and announcement of outside financial interests.

(a) Persons having direct or indirect financial interests in products, services, commodities or performing talent which might be presented or promoted over a station shall be insulated, to the extent possible, from the process of selecting or presenting broadcast material which may involve such products, services, commodities or talent.

(b) If, notwithstanding the provisions of paragraph (a) or where insulation is impossible or inappropriate, presentation or promotion of a product, service, commodity or talent (beyond what is customary with similar things and would have occurred in the absence of the interest) occurs wholly or partly because of the existence of a financial interest, disclosure of the interest shall be made during the course of the program, unless it is otherwise readily apparent from the content of the program.

The following examples of Commission activity in the sponsorship identification area illustrate the difficulties of compliance that have arisen under the existing regulations:

a) *Trade-Out Credits*

A number of questions have arisen regarding "trade-out credits"⁵¹ in audience-participation and quiz shows involving prizes. The Commission stated on May 15, 1969 that it had learned that some stations had not been computing as commercial time "certain kinds of announcements broadcast in return for the receipt of 'money, service or other valuable consideration,' as required by Section 317"⁵² The Commission said that there were circumstances in which networks, program producers or stations had received free transportation, prize merchandise or other goods or services in return for identifications beyond those reasonably related to the use of the service or property in the program. The Commission pointed out that not only do sections 317 and 508 require identification of this material as commercial, but also the regulations of the Commission require that it be logged as commercial time.

On July 16, 1969 the National Association of Broadcasters issued a memorandum to its membership reminding broadcasters of the

(c) In addition to the above requirements, disclosure of a more than nominal financial interest not readily apparent, held by the licensee or any person actually or potentially in a position to include the material in the program, shall be made where the interest is in a performer or performing group, other than a team in a recognized sport, involved in a specific or continuing appearance or performance mentioned on the air, or in the appearance or performance.

(d) The licensee of each station shall exercise reasonable diligence to discover and become aware of the existence of financial interests which may affect the selection or presentation of broadcast material, so as to achieve compliance with paragraphs (a), (b) and (c) of this section. As indicated in the Examples hereinbelow, the reasonable diligence required varies with the circumstances involved.

51. "Trade-out credits" are the listings at the end of a program, typically an audience participation or quiz program in which numerous prizes are awarded, of the suppliers of those prizes. The listing is required because the display of the prizes on the program is normally a use of donated goods beyond a reasonably related use in the program and hence a commercial message. Since the display of prizes may not be perceived as a commercial message by the ordinary viewer, a sponsorship identification message in the form of a trade-out credit is broadcast at the end of the program.

52. Logging and Computation as Commercial Matter, 34 Fed. Reg. 8060 (1969).

Commission notice on May 15, 1969 and adding a few paragraphs of explanation regarding the requirement of treating a trade-out as a commercial message when it is used in return for identification beyond that reasonably related to the use of the service or property. To clarify this matter, the Association quoted two of the examples used by Congress to illustrate its intent in passing section 317.⁵³

The problem was not easily solved, however. On March 13, 1970, the NAB sent a letter to eighty-two program syndicators in an attempt to clarify and seek a common understanding concerning the insertion of trade-out mentions in syndicated programs. The letter referred to "credits or plugs for auto rentals, airlines, hotels and other services which are frequently included in syndicated programs."⁵⁴ The letter pointed out that section 508 has always required the identification of this trade-out commercial matter and concluded by asking the syndicated program producers to cooperate by giving each station advance notice of the amount of trade-out commercial material in their programs.

The question of sponsorship identification of trade-out material remained unresolved. On December 18, 1970, the FCC issued a news release stating that the National Broadcasting Company and the American Broadcasting Company had been notified that their sponsorship identification announcements in certain audience-participation and quiz shows did not meet the requirements of section 317 and the corresponding section of the Commission regulations.⁵⁵ The Commission said that in certain programs "in which program producers or contractors received cash or other considerations to display or promote merchandise or services, the required sponsorship announcements were given only visually and were hard to read because they were superimposed on the studio scene in small type and move too fast to be read by an average viewer."⁵⁶ NBC had used a three-second announcement at the end of each program

53. Letter from National Association of Broadcasters, Legal Department to its Membership, July 16, 1969, copy on file in offices of the *DePaul Law Review*.

54. Letter from National Association of Broadcasters, Legal Department to Program Syndicators, March 13, 1970, copy on file in offices of the *DePaul Law Review*.

55. FCC, News Release, Rep. No. 9561 (December 18, 1970).

56. *Id.* See also American Broadcasting Co., 30 F.C.C.2d 827 (1971); *In re National Broadcasting Co.*, 27 F.C.C.2d 75 (1970).

reading: "Prizes and/or promotional fees furnished by . . . ," followed by the names of the suppliers. ABC had used a three to five-second announcement at the end of each program reading: "Prizes or products mentioned were furnished and/or paid for by the manufacturer or supplier of the products or services identified on this program." The Commission said that these announcements seem to be "designed to obscure rather than to reveal the fact that sponsorship payments have been made to program producers or the network for advertising products or services."⁵⁷ The Commission noted that the exact wording of sponsorship identification would be left to the discretion of stations, but that the announcement should at least state in understandable language that suppliers had paid the network or producers to display or promote their products or services. The Commission went on to suggest that "the video portion of such announcement should be given in letters of sufficient size to be readily legible to an average viewer; should be shown against a background which does not reduce their legibility, and should remain on the screen long enough to be read in full by an average viewer."⁵⁸ The Commission finally asked the networks to submit a statement of their intentions in this matter.⁵⁹

The networks responded by putting into effect new announcements that satisfied the Commission's wishes in regard to the clear identification of prize suppliers who furnished consideration in addition to prizes or who paid promotional fees. An additional question remained: how to log the announcements at the end of the program regarding the suppliers of the prizes? This question is unlike those concerning the identification of commercial material and the logging of commercial time for the mention of the prizes themselves. Rather, it is the question of the logging of time at the end of the program explaining that the material within the program was, for purposes of the Commission's rules, commercial time. The networks, not unnaturally, took the position that an announcement simply pointing out that previous announcements were commercial announcements need not itself be logged as a commercial announcement. The networks pointed to the Commission's own rules regard-

57. *In re National Broadcasting Co.*, 27 F.C.C.2d 75, 76 (1970).

58. *Id.*

59. *Id.*

ing logging, which state, among other things, that "commercial matter" consists of "commercial continuity" and "commercial announcements" and that this is either "the advertising message of a program sponsor" or "any other advertising message for which a charge is made or other consideration received." Since the networks were not paid for the message at the end of a program identifying prize furnishers, they did not wish to log the additional time as commercial time.

The Commission did not accept this argument. On June 16, 1971, it sent a letter to the National Broadcasting Company informing it that:

The identification of the person paying for exposure of a product or service in a quiz show or audience participation program is no less commercial matter when contained in a "crawl" position at the end of a program than when positioned in or in proximity to a commercial spot announcement. The fact that the sponsor's identity is announced at the end of the program, rather than at the time the product or service is advertised, does not change the essential nature of the announcement.⁶⁰

The Commission went on to note that the crawl might also be a form of advertising implicit in the network's contract with the program producer. The Commission also recognized that even the mere mention of the name of a business entity has commercial advantage. The Commission ruled that the credit crawl must be logged as commercial.

b) Performers' Kickbacks

Another sponsorship identification problem arises from "kickbacks" of fees paid to performers. The chance to appear on a popular television program is so attractive to many performers that they are willing to give up part or all of the fees that they would normally receive for an appearance. Such fees are usually set by union contracts and can involve substantial amounts of money.

On June 4, 1970, the FCC issued a public notice condemning undisclosed kickbacks.⁶¹ The Commission described three situations, of which the first is typical. Program producers had arranged

60. Letter from Federal Communications Commission to National Broadcasting Co., June 16, 1971.

61. *In re* Application of Sections 317 and 508 of the Communications Act to "Kickbacks" of Fees Paid to Performers, 23 F.C.C.2d 588 (1970).

for performers to appear on a program for the normal union-scale fee. As a condition of the appearances, however, part or all of the fees were reimbursed to the producers by record companies which employed the performers. In some of these cases, producers did not disclose to stations that any financial consideration was received for a performer's appearance. In many cases, however, a statement at the end of the program was added to the effect that "promotional assistance" or "promotion consideration" had been received from the record company.

The Commission stated that all such situations involved violations of sections 508 and 317 of the Communications Act because the mere mention of the receipt of "promotional assistance" or "promotional consideration" did not meet the requirements of its rules. The Commission also said that certain other types of announcements were insufficient, including "Miss X appeared through the courtesy of Y Recording Co.," "Miss X's appearance was by arrangement with . . .," and "Miss X was brought to you through the cooperation of Y."⁶² It pointed out that in many cases producers or stations had violated provisions of collective bargaining agreements with the unions involved. The Commission concluded that, "At the very least, an audio announcement must be made which states, in essence, that the performer or an identified person acting on his behalf has paid the program producer in order to appear on the program."⁶³

c) *The Program Title That Becomes a Product Name*

The children's program "Mr. Wizard" has presented still another sponsorship identification problem. The National Broadcasting Company asked the Commission for a declaratory ruling regarding the format of a proposed new "Mr. Wizard" program.⁶⁴ One of the commercials scheduled to be broadcast in the program involved mention of a product name "Mr. Wizard." The product also used the name and likeness of the principal performer on the program. NBC offered to limit advertising of this kind of product to one of the commercial openings in the program and also to limit such ad-

62. *Id.* at 589 n.1.

63. *Id.* at 589.

64. FCC, Broadcast Action, Rep. No. 10051 (August 5, 1971).

vertising to thirty to sixty seconds per week of the total of six minutes of commercial time. NBC also stated that the product would not be used or mentioned in any way in the program, that commercial messages for the product would not refer to the program, that there would be a break between the program and the commercial messages with no lead-in relating the two, and that the sets used for the program would be different from those sets used for the commercials. In addition, NBC offered, if necessary, not to accept commercials for the product in which the program performer appeared. The Commission approved this proposal with additional conditions—that not more than one minute of advertising for the product be presented in each broadcast, rather than an average of up to one minute per week; that the principal performer not participate in commercials for the product; and that no advertising be presented for any other product identified with the title of the program or its principal performer.⁶⁵

d) The Public Service Announcement with a Cryptic Message

The meaning of the term “reasonable diligence,” as it is used in section 317(c)—and in subparagraph (b) of the sponsorship identification regulations—has also received attention from the Commission. The National Welfare Rights Organization complained to the FCC that proper sponsorship identification had not been made in a public service announcement about hyperactivity in children broadcast by WSVA-TV in Harrisonburg, Virginia. After Commission investigation, it appeared that the announcement had been produced under a grant from Ciba Pharmaceutical Company and was distributed by the American Academy of Pediatrics. The announcement itself included a statement that it had been produced as a public service by the Academy: Station WSVA-TV had previewed the announcement to assure that it contained no commercial content. WSVA-TV was not informed that Ciba had provided any funds for the announcement. From the Commission’s investigation, it developed that Ciba is a producer of Ritalin, a drug

65. National Broadcasting Co., 22 R.R.2d 593, 594 (1971); FCC, Broadcast Action, Rep. No. 11555 (June 1, 1973).

frequently prescribed for treatment of hyperactivity in children. No mention was made of this drug in the film.

The National Welfare Rights Organization not only asserted that there was improper sponsorship identification, but that, since the use of Ritalin for the treatment of hyperactivity presented a controversial issue, WSVA-TV had violated section 317(a)(2) requiring sponsorship identification of material furnished without charge that discusses a controversial issue. The Organization also asserted that WSVA-TV had not used reasonable diligence to obtain information from the American Academy of Pediatrics regarding the Ciba role in production of the announcement. The Commission, however, held that no identification of Ciba was required in the announcement. The Commission further held that it could not find that WSVA-TV had failed to exercise reasonable diligence. It said that the station had acted properly by pre-screening the announcement without noting anything which would raise questions about proper sponsorship identification. Concluding, the Commission noted that the announcement had been reviewed by a member of the National Institute for Child Health and Human Development, who found that it had "no medically controversial implications."⁶⁶

e) The Sponsor with a Misleading Name

Questions of interpretation have also arisen regarding the provisions of the FCC regulations concerning political programs and programs involving the discussion of controversial public issues. During a 1963 gubernatorial primary in Kentucky involving former Governors A.B. Chandler and Edward T. Breathitt, television station WHAS televised a program entitled "The Chandler Years in Review." The program was identified as a paid political broadcast and its sponsor was identified as the "Committee for Good Government." The program was critical of Chandler's administration and his campaign manager protested the station's failure to identify the "Breathitt for Governor Committee" as the sponsor of the program. It developed that the Committee for Good Government had been formed more than one year prior to the 1963 campaign for local government improvement in Pike County, Kentucky. The actual

66. 17 F.C.C.2d 416 (1969).

funds for the program, however, were supplied by the "Committee for Good Government Representing Ned Breathitt." The contracts and other documents were signed by the Committee for Good Government.

The Commission assessed a forfeiture against WHAS for violation of its regulation section 73.654. The station refused to pay the forfeiture, and the FCC filed a complaint in the United States District Court for the Western District of Kentucky to collect the forfeiture.⁶⁷ The District Court granted the station's Motion for Summary Judgment and the Commission appealed. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court and concluded that WHAS had not violated any provisions of the Communications Act and that the Commission's regulations did not "by their terms require disclosure of the name of the candidate (which the broadcast is intended or seeks to support) in addition to the name of the sponsor of the program."⁶⁸

The court found it significant that the Commission chose to concentrate all its attention on section 73.654(f),⁶⁹ while the court considered section 73.654(g)⁷⁰ more specifically applicable and said that section 73.654(g) could be read as follows: "In case of any program . . . which is sponsored . . . by a . . . committee . . . the announcement required by this section shall disclose the name of such . . . committee."⁷¹ There was recognition by the court that the Commission might not agree with its interpretation and said that nothing in its opinion precluded the Commission "from adopting a Regulation calculated to require a station to make reasonable efforts to go beyond a named 'sponsor' for a political program in order to ascertain the real party in interest for purposes of [sponsorship identification] announcement[s]."⁷²

Four and a half years after the *WHAS* decision, the Commission

67. United States v. WHAS, Inc., 253 F. Supp. 603 (W.D. Ky. 1966).

68. United States v. WHAS, Inc., 385 F.2d 784, 786 (6th Cir. 1967), *citing the court below*, 253 F. Supp. 603, 606 (W.D. Ky. 1966).

69. 47 C.F.R. § 73.654(f), which is identical to section 73.119(e), *see note 45, supra*.

70. 47 C.F.R. § 73.654(g), which is identical to section 73.119(f), *see note 45, supra*.

71. United States v. WHAS, Inc., 385 F.2d 784, 787 (6th Cir. 1967).

72. *Id.* at 788.

undertook the drafting of a regulation such as that suggested by the court in *WHAS*, and on May 17, 1972, issued a Notice of Proposed Rule Making (Docket 19513) to amend and consolidate its various sponsorship identification rules for AM, FM, television, international broadcast stations and cable television systems.⁷³ The Commission's Notice referred specifically to the decision in *United States v. WHAS* and proposed a new single rule for radio, television and cable to carry out the court's suggestion for clearer identification of political sponsors. The proposed rule is set forth below.⁷⁴ The

73. Docket No. 19513, 37 Fed. Reg. 10583 (1972).

74. § 73.1207 Sponsored programs.

(a) When a broadcast station transmits any matter for which money, services, or other valuable consideration is either directly or indirectly paid or promised to, or charged or received by, such station, the station shall broadcast an announcement that such matter is sponsored, paid for, or furnished, either in whole or in part, and by whom or on whose behalf such consideration was supplied: provided, however, that "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(1) For the purposes of this section, the term "sponsored" shall be deemed to have the same meaning as "paid for."

(b) The licensee of each broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program matter for broadcast, information to enable such licensee to make the announcement required by this section.

(c) In any case where a report (concerning the providing or accepting of valuable consideration by any person for inclusion of any matter in a program intended for broadcasting) has been made to a broadcast station, as required by Section 508 of the Communications Act of 1934, as amended, of circumstances which would have required an announcement under this section had the consideration been received by such broadcast station an appropriate announcement shall be made by such station.

(d) In the case of broadcast matter which is or relates to a political broadcast or does or may involve the discussion of public controversial issues for which any films, records, transcriptions, talent, scripts, or other material or services of any kind are furnished, either directly or indirectly, to a station as an inducement to the broadcasting of such matters, an announcement shall be made both at the beginning and conclusion of such broadcast on which such material or services are used that such films, records, transcriptions, talent, scripts, or other material or services have been furnished to such station in connection with the broadcasting of such program: provided, however, that only one such announcement need be made in the case of any such program of 5 minutes' duration or less, either at the beginning or conclusion of the broadcast.

(e) The announcement required by this section shall fully and fairly

Commission has asked for comments on its proposal; as of April, 1974, no further action has been taken.

f) *The Use of "Sponsored by . . ." in Political Broadcasts*

In the period between the *WHAS* decision and the commencement of Docket 19513, problems concerning sponsorship identifica-

disclose the true identity of the person or persons by whom or in whose behalf such payment is made or promised, or from whom or in whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished. Where an agent or other person contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or should be known to the station, the announcement shall disclose the identity of the person or persons in whose behalf such agent is acting instead of the name of such agent. Where the material broadcast is or relates to a political broadcast, or a matter which is or may be a controversial issue of public importance and the person or persons paying for or furnishing the program matter belong to a committee, association or other unincorporated group, the station shall require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association, or other unincorporated group shall be made available for public inspection at the studios or general offices of the station. Such lists shall be kept and made available for a period of two years.

(f) In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purpose of this section and only one such announcement need be made at any time during the course of the program.

(g) The announcements otherwise required by Section 317 of the Communications Act of 1934, as amended, are waived with respect to the broadcast of "want ad" or classified advertisements sponsored by individuals. The waiver granted in this paragraph shall not extend to classified advertisements or want ads sponsored by any form of business enterprise, corporate or otherwise. Whenever sponsorship announcements are omitted pursuant to this paragraph the following conditions shall be observed:

(1) The licensee shall maintain a list showing the name, address, and the telephone number where available of each advertiser and shall attach this list to the program log for each day's operation; and

(2) Shall make this list available to members of the public who have a legitimate interest in obtaining the information contained in the list.

(h) Commission interpretations in connection with the provisions of this section have been summarized in the Commission's Public Notice entitled 'Applicability of Sponsorship Identification Rules,' May 6, 1963, (FCC 63-409, 28 Fed. Reg. 4732, 40 FCC 141) and printed in full in different volumes of the Federal Communications Reports.

(i) The announcements required by Section 317(b) of the Communications Act of 1934, as amended, are waived with respect to feature motion picture films produced initially and primarily for theatre exhibition.

NOTE: The waiver heretofore granted by the Commission in its Report

tion of political broadcasts have continued to plague both broadcasters and the Commission. On October 2, 1970, the Commission issued a Public Notice regarding political broadcasts.⁷⁵ The Commission stated that it had learned that such identifications as "State Citizens For (Candidate's Name), John Smith, Chairman" and "Authority of (Candidate's Name) Committee, John Smith, Treasurer" were being used as the sole sponsorship identification of political announcements and programs. In its Public Notice, the Commission quoted section 317(a)(1) of the Communications Act and advised broadcasters that this requires that political broadcasts must be "so announced in the statutory language." Further, mere mention of the name of the sponsor does not constitute compliance.

This illuminating Notice was followed by a Notice on October 6, 1970, entitled "Sponsorship Identification of Political Broadcasts Clarified."⁷⁶ In it, the Commission stated that it had received a number of inquiries concerning its Notice of October 2 asking whether the use of the phrase "sponsored by" would comply with the statutory obligation. The Commission responded by quoting the applicable sections of the Commission's regulations, section 73.119(a)⁷⁷ and the corresponding paragraphs of the other regulations for FM and television. The FCC concluded that announcements or programs "which state that they were 'sponsored by . . .'"⁷⁸ would comply with the statute and rules.

The area still appears to be one that requires clarification. On June 1, 1973, the Commission issued a Public Notice to all broadcast licensees calling attention once more to the sponsorship identification regulations and in particular the sections applicable to political and controversial material.⁷⁹ The Commission said it had

and Order of November 21, 1960 (FCC 60-1369; 25 FR 11224, Nov. 26, 1960), continues to apply to programs filmed or recorded on or before June 20, 1963 when § 73.654, the predecessor television rule, went into effect.

75. FCC, Public Notice, *Sponsorship Identification—Political Broadcasts*, October 2, 1970.

76. FCC, Public Notice, *Sponsorship Identification of Political Broadcasts Clarified*, October 6, 1970.

77. See note 45, *supra*.

78. See note 75, *supra*.

79. *In re Identification of Source of, or Party Supplying, Certain Broadcast Matter*, 41 F.C.C.2d 333 (1973).

learned that some broadcast licensees were taking prerecorded material furnished by long distance telephone or through tape or film and presenting it in some cases as the work of their own correspondents. The material in fact, however, was furnished by private businesses, trade associations, government departments, agencies and legislators.⁸⁰ The Commission pointed out that false attribution of such material to a station's own news correspondent would raise serious questions regarding the qualifications of a licensee to operate in the public interest. It also pointed out that the existing rules concerning sponsorship identification would, in any event, require that an announcement be made as to the source of any such programming.

III. REGULATORY ASPECTS—ANALYSIS OF PROPOSED REGULATIONS

The preceding examples of administrative action by the FCC, and one court decision, are not an exhaustive portrayal of the complexities of sponsorship identification. Rather, they illustrate the types of problems that broadcasters have faced and the response of the Commission, both in enforcement of its existing regulations and in proposals of new regulations.

In its "plugola" proceeding, Docket 14119, the Commission set forth two goals: (a) that broadcast material be presented on the basis of its own merits and not because of outside financial interests, and (b) that, to the extent outside financial interests are an influence on the presentation of broadcast material, these interests be disclosed to the audience. These two goals are the heart of the sponsorship identification question, and the Commission has expressed them, as it often does in making new regulatory proposals, in terms of the public interest standard. The goals are presented as unarguable; it would be unthinkable to attack them, for to do so would be to take a position against purity of motives and against honesty in broadcasting. However, thirteen years of experience following the amendment of section 317 and the addition of section 508, and the present tentative status of the Commission's regulations

80. Such material is entirely different from the news wire service materials, such as that furnished by the Associated Press and United Press International, for which broadcasters pay substantial amounts.

concerning sponsorship identification demonstrate that the Commission has not found a way to tell its licensees clearly and simply what their obligations are.

An examination of the regulations proposed in Docket 14119 ("plugola") and Docket 19513 ("payola"—the reorganization and consolidation of the existing sponsorship identification rules)⁸¹ shows clearly the difficulties the Commission has created for itself.⁸² Docket 19513, which proposes a new regulation, Section 1207, to replace the existing separate regulations for AM, FM and television, is, in some ways, a step in the right direction. The Commission adopted the suggestion made in 1967 by the court of appeals in the *WHAS* case by tightening up the requirement for the identification of principals. Unfortunately, the Commission overreacted by compelling stations who deal with agents to disclose the identity of the principal not only when the station knows but also when the station *should* know that the agent is acting for a principal. It remains to be seen whether this imposes a different standard of conduct on stations than the "reasonable diligence" established by both the existing and proposed regulations as a standard for obtaining information for other aspects of sponsorship identification announcements. Instead of letting stations wonder about the difference, it would seem appropriate for the Commission to redraft the proposed

81. See proposed section 73.1207, note 74, *supra*.

82. It should be noted that the "plugola" proceeding is not concerned solely with the identification of sponsored materials. A significant part of the proposed rule, subsection (a) requires that persons having financial interests in anything that might be promoted over a station be insulated from the process of selection of material for broadcast. This section makes explicit a requirement that has existed for some time as a matter of Commission policy. In *In re Crowell-Collier Broadcasting Corp.*, 14 F.C.C.2d 358, 8 R.R.2d 1080 (1966), the Commission said:

The Commission has held before, and it is reiterated here, that a licensee has an obligation to exercise special diligence to prevent improper use of its radio facilities when it has employees in a position to influence program content who are also engaged in outside activities which may create a conflict between their private interests and their roles as employees of the station.

The Commission also recently admonished a radio station for permitting its disc jockeys to promote their own personal appearances (non-broadcast) in "a manner which is apparently not in compliance with the Commission's policies and the public interest." The Commission noted that the station had transgressed in two ways. First, the disc jockeys were not controlled in their references to their personal interests, *i.e.*, they were not insulated from the broadcast material selection process. Second, the material broadcast was not logged as commercial time. WBAP, FCC Rep. No. 12081, January 23, 1974.

regulation. In the *WHAS-TV* case, referred to above,⁸³ a similar issue arose when the Commission considered whether or not *WSVA-TV* exercised reasonable diligence in determining who was the sponsor of a public service announcement. The interpretation the Commission placed on the "reasonable diligence" standard in that case was a sensible balancing of the needs of broadcasters and the public. Broadcasters can only hope that it will not be replaced by a standard of "thou shalt know what thou should know."

There are more fundamental difficulties with Dockets 19513 and 14119. There is no reference in either proceeding to the other, nor is there any apparent attempt to harmonize their provisions towards the achievement of the Commission's goals. The demarcation line between payola and plugola is a hazy one at best. The issues are frequently confused, and there is one central aspect to both—the fact that personnel in a position to choose program matter are always, to some extent, exposed to some outside financial influences, simply because they are humans working for a living.

The new section 1207, proposed by Docket 19513, requires sponsorship identification of material transmitted by a station for which "money, services or other valuable consideration is either directly or indirectly paid or promised to, or charged or received by" a station. This requirement, plus the requirements of section 508 of the Communications Act,⁸⁴ plus the reasonable diligence required of a station to obtain information for the required announcements, add up to a more than adequate means of dealing with plugola, as well as payola.

The Commission, however, sees plugola as a problem requiring separate treatment. In its Docket 14119, proposing a new section 1204, the Commission, after stating its general principles concerning insulation from outside financial interests and disclosure of such interests, explains its new rule as follows:

69. In line with these principles, the general requirements of the rule adopted are as follows: persons with outside financial interests, such as disk-jockeys, must be insulated to the extent possible from the selection or presentation of material which might include that in which they have an interest. Even where insulation in the legal sense is not possible—

83. *United States v. WHAS, Inc.*, 385 F.2d 784 (6th Cir. 1967). See textual discussion at note 66, *supra*.

84. 47 U.S.C. § 508 (1970).

for instance, where the interest is that of the licensee itself or a related company, which cannot be "insulated" from what is presented over its station—adequate steps must be taken to insure that the outside interest is not a motivating factor in the selection of presentation of material broadcast. For instance, records issued by an affiliated company should not be presented when they would not have otherwise been played on the basis of merit, appeal or popularity.

70. If these principles are strictly applied and enforced, no "plugola" disclosure announcement is necessary. If they cannot be or are not, or if there is any question as to whether they have been completely effective, an announcement disclosing the interest is required when products, services, commodities or performing talent in which the interest is held are presented or promoted on the air, beyond that which is customary and would have taken place in the absence of the interest, where the interest is (or may have been wholly or partly) the motivation for the presentation or promotion.

71. Irrespective of what is regarded as motivation, an announcement of the interest is required when it is a more than nominal interest in a performer or performers or a performance (other than a team in a recognized sport), there is mention of a specific or continuing performance involving the subject of the interest, and the interest is held by a person actually or potentially in a position to include the mention in the program.

72. No announcement of the interest is required if readily apparent from the content of the program. When required, the announcement shall disclose in general terms all known interests, the holder's relation to the station, and what the interest is in. The announcement, if required, may be made at any time during the program and may be in any form, for example question and answer during an interview program, which discloses to the audience that a present financial interest exists.

73. The licensee shall use due diligence to ascertain the outside financial interests of its employers (as well as itself and related companies), and other program participants, so as to comply with the other provisions of the rule. This varies with the circumstances and type of program, as discussed above and in the examples adopted.⁸⁵

In fairness to the Commission, it must be pointed out that it recognizes that its proposals in Docket 14119 are far reaching and complex. In the closing paragraphs of its *Tentative Report and Order*, the Commission says:

76. *Effective date and compliance.* We are aware that the subject involved here is a complex one, involving a very wide range of situations and concepts, in which over-all regulation is being undertaken for the first time and there are only a limited number of precedents even in individual situations. Therefore, we believe that a degree of latitude in enforcement of the rule is in order and are acting as follows:

85. Tentative Report and Order, P & F RADIO REG. CURRENT SERVICE ¶ 53:295, 322-23 (1970).

77. First, the rule will become effective only on [date to be inserted]. This will give licensees time to review their station operations and determine what changes and steps, if any, are required to insure compliance.

78. Second, in the initial period after the effective date, action looking toward enforcement will be taken only in obvious violation situations. Only in the more flagrant of these will initial action looking toward sanctions be taken; in other cases a letter of warning will issue.⁸⁶

Notwithstanding this recognition of the difficulties it is creating for itself, the Commission has not come to grips with far more serious problems which have been pointed out by the industry.

In a somewhat unusual display of industry unanimity, the three major networks and the National Association of Broadcasters filed joint Comments in response to the Commission's 1970 Notice in Docket 14119. These Comments include a list of six considerations which the commenting parties urged the Commission to weigh carefully:

- I. The Commission should continue to apply the "reasonably related" test established by statute;
- II. The proposed rules will be difficult to interpret and will needlessly add clutter to broadcasts;
- III. A policy statement would be better suited than rules in order to accomplish the Commission's purpose;
- IV. News and public affairs programs should be exempted from the proposed requirements.
- V. The licensee should have the obligation only to exercise reasonable diligence to discover the existence of financial interests likely to be "plugged" on the air.
- VI. Feature films, commercials, and previously recorded programs should be exempt.⁸⁷

These six considerations are a succinct expression of legitimate concerns which are aroused by the Commission's proposed rules. Even though the Commission conceives the problem to be one of "purity" or "honesty" in broadcasting, these considerations deserve to be weighed carefully and discussed by the Commission in a manner different from the lofty moral tone that it has adopted so far.

For example, the NAB and the three networks have asked for the exemption of news and public affairs programs from the proposed requirements regarding identification of plugola. If one's

86. *Id.* at 324.

87. Comments of NAB, ABC, CBS and NBC, Docket No. 14119 at 3, October 15, 1970.

outlook is sanctimonious, it is difficult to conceive of a more outrageous proposal than one which suggests that plugola be *allowed* (or, at any rate, not identified) in news and public affairs programs. In fact, however, the proposal is an eminently sensible one, and it is probably necessary if the Commission is to avoid a serious test of the new regulation's impingement on first amendment rights of broadcasters and their audiences.

The prospect of broadcast news reporters inquiring of all interviewees whether the motives for their statements are in any way commercial is not too far-fetched when the wording of section 1204 is examined. In fact, the Commission clearly expects licensees to be concerned about plugola in news programs. The discussion in Example Number 20, from the list of illustrative examples that accompany section 1204, includes the following: "If 'plugola' appears to occur in spot news programs, inquiry should be made and an announcement made, if needed, on subsequent programs including the same material."⁸⁸

If broadcasters are to function as a news medium in any sense that is comprehended under ordinary first amendment considerations, the dangers of section 1204 are apparent. It is nearly inconceivable that print media reporters and editors could ever be subjected to the kind of detailed and complex administrative guidance that section 1204 would impose on broadcasters. Printed publications using second class postal privileges are subject to a requirement that material that is paid for be identified as an advertisement, but the simple requirements of Title 18, United States Code, section 1734 are hardly comparable to the labyrinth of section 1204 and its twenty-three examples. Newspapers and magazines may from time to time print material that advances undisclosed economic interests; fortunately they have no Federal Newspaper Commission to guard their purity and protect their readers. This kind of loosely administered freedom to print seems more compatible with the goals of the first amendment than the section 1204 approach, even though the writings might be considered "commercial" by some of the tests referred to in Section I of this article.

The Commission should be aware of what life would be like in a world in which plugola is totally exposed. As the NAB and the

88. Notice of Tentative Report and Order, 35 Fed. Reg. 7982, 7984 (1970).

networks have pointed out in their comments, "clutter," the miscellaneous non-program material that is so annoying to audiences, could eventually overpower the programs in order to accommodate the necessary disclosures. The work that would go into the preparation of the disclosures is staggering to contemplate. Speculation about motives, as subjective an issue as can be imagined, would consume enormous amounts of time and energy by broadcasters, but there would be no alternative, because the Commission has framed its proposed rule as a requirement of simple honesty. How could a broadcaster, licensed to serve the public interest, spend anything less than his full energies in assuring the purity of the motives of all his employees?

CONCLUSION

This article has studied an effort by an administrative agency to achieve regulatory goals which are, in essence, as controversial as mom's apple pie. Everyone would like to see broadcast programs presented on their merits alone; if they are not presented on their merits, most people would like to know what hidden influences are at work. Moving from these lofty goals to the workaday problems of writing regulations has proven to be a chore too great for the Federal Communications Commission.

What has occurred should not come as a surprise to students of administrative law, since there exists a closely comparable and equally untractable problem at the same agency. The Fairness Doctrine provides a splendid example of the mischief the Commission can create when it confuses high moral purpose with reasonable regulatory goals.⁸⁹ Even after winning a stunning victory when the Supreme Court upheld the constitutionality of its doctrine,⁹⁰ the Commission is still fighting the same old battles over the practical aspects of its enforcement. One outcome of its administrative overkill is that there is now an indication of weakening judicial support for the doctrine.⁹¹ Needless to say, the Commission has issued a Notice of Proposed Rule Making on the subject.

89. Blake, *Red Lion Broadcasting Co. v. FCC: Fairness and the Emperor's New Clothes*, 23 FED. COM. B.J. 75 (1969).

90. *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).

91. See, e.g., *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 71-79

There will undoubtedly be occasional spectacular news reports from time to time about plugola and payola in broadcast entertainment programs, but the Commission has not shown that its proposed scheme of regulation, unprecedented in its complexity, will either reduce such incidents, or serve to further first amendment goals in one of the most important media of communications. The lack of any demonstrated need for the proposed regulations is underscored by the fact that what abuses there are appear to be violations of existing statutes and Commission regulations.

It is axiomatic that regulations issued by an administrative agency to a regulated industry should provide guidance that is as simple, practical and straight-forward as possible. In addition, the regulations that are issued by the Federal Communications Commission must meet a higher test, that of avoiding interference with freedom of speech, as prescribed both by the first amendment and section 326 of the Communications Act.⁹² As Mr. Justice Brennan observed in *NAACP v. Button*, "Precision of regulation must be the touchstone . . ." in questions involving the adequacy of protection of first amendment rights.⁹³ The regulations issued by the Federal Communications Commission and currently in force relative to sponsorship identification scarcely meet the test of simplicity and practicality, but at least the regulations now in force have a thirteen-year history of interpretation so that broadcasters, as a practical matter, can live with them. The regulations proposed in Dockets 14119 and 19513 would drastically change broadcast programming and the responsibilities of those who create the programming. The proposed regulations are, for the most part, complex, impractical and ambiguous. It is all too clear, moreover, that they will impede the processes of development, selection and production of programming, without corresponding benefits to the public, which increasingly relies on them for news, information and ideas. Both the broadcast industry and the public deserve better from the Commission.

(D.C. Cir. 1972) (Bazelon, J., dissenting); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 148-70 (1973) (Douglas, J., concurring).

92. 47 U.S.C. § 326 (1970).

93. 371 U.S. 415, 438 (1962).