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The FCC's Fairness Doctrine in Operation

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be restricted to the limited goal it was designed to achieve—providing care and treatment to the incompetent defendant until such time as he is fit to proceed to trial.[107]

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THE FCC's FAIRNESS DOCTRINE IN OPERATION

I. THE PROBLEM

The Office of Complaints and Compliance of the Federal Communications Commission received a complaint on February 26, 1970, filed by Donald Jelinek on behalf of the San Francisco Women for Peace, the G.I. Association, and The Resistance against radio stations KSFO, KCBS, and and others in the San Francisco Bay area. According to Mr. Jelinek, "[t]he complaint arises from the refusal by the above-named licensees to broadcast public service announcements expressing a viewpoint opposed to the viewpoint expressed in public service announcements sponsored by various branches of the United States' armed forces."[1]

The following is an example of the United States' armed forces spots that have been repeatedly broadcast by the licensees and that inspired the petioners to act:

> We understand you're looking for a man's job. Well we may just have one. Who are we? We've been in business since 1775. We're located in close to 200 places around the world. We'll pay while we are training you. Give you 30 days off per year. Give you a chance to continue your education. And we'll build you a man. We'll build you a marine. And that man and that marine will be you. Ask a marine.[2]

The position taken by the petitioners is that "by their vary nature, the military-sponsored recruitment announcements suggest that military service is desirable—a contention whose controversy is certainly heightened

107. As Vann and Morganforth have concluded

> If it is necessary to justify or change our theory of punishment or the methods utilized in the process of imprisonment let us face up to these needs as a society. We suggest that we are not 'helping' these persons by finding an alternative method for removing them from society and, in effect, imprisoning them. We further suggest that in attempting to develop and practice a concept of fairness, due process in the administration of justice, we have developed a practice which is a denial of the very due process we are trying to emulate.

Vann & Morganforth, *The Psychiatrist as Judge: A Second Look at the Competence to Stand Trial*, 43 U. DET. L.J. 1, 11-12 (1965).

1. Complaint to the F.C.C. on behalf of San Francisco Women For Peace, #C2-1625 (Feb. 26, 1970).

2. *Id.*

by the Vietnam War, but not exclusively dependent on it: there are advantages and disadvantages to joining the military during peacetime as during a war such as the one in Vietnam."[3] To present an opposing view, or, at least to lead listeners to information concerning that opposing view, the peitioners had submitted spots to licensees illustrated by the following:

> Attention all men of draft age. What are you planning to do about the draft? It is not generally known, but the Selective Service Law does provide many deferments to which you may be entitled. If the Army is not your bag, and you feel you may be eligible for a deferment, do something about it now. Phone 642-1431 for free information. Draft counsellors and attorneys are available throughout the Bay area. Again that number is 642-1431.[4]

Letters to the licensees requesting time for the broadcast of these spots alleged that recruitment announcements presented only the view that military life was desirable. Further the letters alleged that the licensee had not given equally effective coverage to the undesirability of military life (the overwhelming likelihood of being sent to Vietnam, the danger to physical and mental well-being, the possibility of being required to compromise one's individual moral principles), nor to the position, held by senators of both major parties and subject to vigorous debate among religious leaders and the press, that much of the current United States military involvement is contrary to the national interest. Thus, given the controversy and public concern over the life of the soldier in today's United States armed forces and the repeated broadcast of spots only favoring military induction, the petitioners claimed a right under the fairness doctrine to reasonable opportunity to respond over the licensee's facilities.

In answering this claim, the various licensees offered the following arguments: 1) If there is an issue, we have covered it in our general programming as required under the fairness doctrine. 2) No issue has been raised by the recruitment spots concerning the draft, induction, the Vietnam War, conscientious objection because those spots have dealt only with voluntary enlistment. Thus, there is no question of balancing interests in our programming under the fairness doctrine. 3) We specialize in classical music and do not get involved in controversial issues. 4) Most all public service announcements can be said to involve "controversial issues." How far do you expect to extend the fairness doctrine?

Subsequently, the complaint filed with the FCC charged that:

> Inasmuch as KSFO and KCBS [and the others] consistently broadcast public service announcements presenting only one side of a

3. *Id.*
4. *Id.*

> controversial issue of public importance and have consistently refused to broadcast public service announcements with opposing views on the same controversial issue, they have failed to fulfill their legal obligation under the Fairness Doctrine.[5]

The focus of this comment will be the nature of a licensee's obligation to provide fair broadcasting of controversial issues under the fairness doctrine. This question will require an inquiry into the general powers and limitations of the FCC under the Communications Act of 1934, the development of the so-called "fairness doctrine" in the broadcast industry, and the relation of its most recent formulation to the first amendment and the possibility of granting access rights to the airwaves.

II. The Character of the FCC and the Evolution of its Fairness Policy

Under the Communications Act of 1934, the FCC was committed to "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities for the purpose of national defense, [and] for the purpose of promoting safety of life and property . . . ."[6] In employing its general licensing and rule-making power, the FCC was to act in furtherance of the public convenience, interest, or necessity.[7] Specific application of this authority takes various forms: 1) comparative hearings in determining which applicant is most likely to be capable of serving the public interest and therefore most deserving of a license; 2) the issuance of an enforcement letter to a station stating the Commission's view on how to deal with a particular complaint; 3) the issuance of a "cease and desist" order where a licensee has failed to operate substantially as set forth in his license and the rules of the FCC; and 4) revocation of a license for false statements, willful and repeated violation of provisions of license, the Communications Act, an FCC rule, or a cease and desist order.[8] However, by section 326 of the Act,

> [n]othing in this act shall be understood or construed to give the Commission the power of censorship over . . . 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.[9]

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5. *Id.*
6. Communications Act of 1934, 47 U.S.C. § 151 (1964).
7. *Id.* §§ 307(a), (d).
8. *Id.* § 312.
9. *Id.* § 326.

An early trace of the fairness doctrine sentiment is found in *Great Lakes Broadcasting* decided immediately following enactment of the Radio Act of 1927, where the "public interest" in regulating the air frequencies was viewed in terms of "requiring ample play for the free and fair competition of opposing views . . . in all discussions of issues of importance to the public."[10] In 1930, at the hearings before the Senate Committee on Interstate Commerce prior to the enactment of the Communications Act of 1934, Senator Dill commented that, aside from the right of political candidates to acquire equal radio time for campaigning (a provision that was codified in section 315 of the Act), the FCC had the potential power to require a licensee to give at least "fair" time to representatives of views opposed to those expressed on or by the station on a major public question—representatives not necessarily chosen by the licensee as spokesman for the opposing view. Ultimately, he hoped this requisite would cause broadcasters to assume an affirmative duty to seek out and air controversy.[11] Subsequent efforts by legislators to impose such a definitive duty (by establishing firm standards as to the percentage of program time devoted to discussion of public issues, and a clearer policy as to what constituted programming in the public interest) have failed.[12] Instead, after unsuccessfully experimenting in *Mayflower Broadcasting Co.*[13] with a complete ban on licensee editorializing to ensure that the air waves remained public, the FCC attempted to create its own version of an affirmative duty in its *Report on Editorializing by Broadcast Licensees* of 1949.[14]

The 1949 Report is considered the key formulation of the fairness doctrine. It recognizes the potential contribution of radio to the general first amendment policy of developing "an informed public opinion through public dissemination of news and ideas concerning the vital public issues of the day."[15] Consequently, the FCC established the "necessity for licensees to devote a reasonable percentage of their broadcast time to . . . programs devoted to the consideration and discussion of public issues of interest in the community. . . ."[16] The duty of the licensee is founded on the principle that "it is the right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views

10. Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32, 33 (1929) [3rd Annual Report of Federal Radio Commission].

11. *Hearings on S. 6 Before the Senate Committee on Interstate Commerce,* 71st Cong., 2d Sess., at 1616 (1930).

12. *See* Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation,* 30 GEO. WASH. L. REV. 1, 38-39 (1961).

13. 8 F.C.C. 333 (1944).

14. 13 F.C.C. 1246 (1949).

15. *Id.* at 1249.

16. *Id.*

on any matter, which is the foundation stone of the American system of broadcasting."[17] The maintenance of radio as a medium of free speech will be dependent upon the licensee's fair, reasonable discretion in programming. Although the FCC rejected an approach that would either 1) oblige the licensee to ensure fair presentation of all sides before *any* time is allotted for an issue or 2) state that the licensee's sole obligation is to refrain from suppressing or excluding any responsible point of view from access, it wished to establish an "affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues" over and beyond the obligation to furnish reasonable opportunity for a particular view when it is demanded.[18] The definition of "controversial" or "vital public matters," "reasonable opportunity" and the licensee's "fair discretion" was left to the "good faith judgment" of the licensee. He was charged with the responsibility of establishing a reasonable balance of interests in his programming of a particular issue; he would not be penalized, however, when his license came up for renewal for an isolated infraction of the fairness doctrine that was an honest mistake. The licensee's performance under the fairness doctrine would be judged according to the licensee's demonstrated concern and service to the public interest.

The 1959 amendment to section 315 of the Communications Act incorporated the fairness doctrine. Following a statement that the licensee was exempt from providing "equal time" to political candidates when they appeared in bona fide newscasts, news interviews, news documentaries, or on-the-spot coverage of news events, the amendment adds:

> Nothing in the foregoing sentence shall be construed as relieving broadcasters [in their presentation of newscasts, news interviews, etc.,] from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[19]

The general development of the fairness doctrine is represented in FCC case history by holdings such as: "the broadcaster must give adequate coverage to public issues;"[20] "coverage must be fair in that it accurately reflects the opposing views;"[21] coverage must be accomplished "at the broadcaster's own expense if sponsorship is unavailable;"[22] a "licensee may not delegate his responsibility to others, and particularly not to an advo-

17. *Id.*
18. *Id* at 1251.
19. Communications Act of 1934, 47 U.S.C. § 315 (a) (4) (1964).
20. United Broadcasting Co., 10 F.C.C. 515 (1945).
21. New Broadcasting Co., 6 P & F RADIO REG. 258 (1950).
22. Cullman Broadcasting Co., 40 F.C.C. 516 (1963).

cate of one particular viewpoint;"[23] and where a licensee has editorialized as to a controversial issue and rejected, as inappropriate, a spokesman of an opposing view "it is incumbent upon [him] . . . to renew and intensify [his] efforts to obtain an appropriate spokesman."[24]

Problems have arisen, however, in applying a standard of fairness based on the judgment of a licensee. Occasionally the Commission has sent warnings of its discontent with the balancing of interests in a licensee's programming; but it has never issued a cease and desist order for violation of the fairness doctrine nor has it failed to renew a license on the basis of a specific violation. The reason is that the FCC has not found definite and consistent criteria upon which to judge fair programming in the public interest that are clearly within the limits set by the censorship clause of the Communications Act.

Lamar Life Insurance Co. provides an illustration of this inadequacy in the fairness doctrine.[25] In 1957, WLBT-TV presented a panel discussion on "The Little Rock Crisis." The participants, all white and allegedly representative of the segregationist point of view, spoke of "what the Negro wants and doesn't want," and the NAACP requested time over WLBT-TV facilities to present the Negro position on behalf of a group of Mississippi Negroes. The request was denied. Responding to an FCC inquiry, the station answered in part, that *it* did not regard the matter presented as controversial because the participants merely urged the citizens to remain calm. The Commission admitted that if that was all that was involved, the existence of a question as to fair presentation was unlikely. On the other hand, said the FCC, if partisan views *were* expressed, the station would be obliged to present the opposing viewpoint. The FCC could apply no meaningful criteria to the issue of whether or not partisan views were expressed; it fell back upon the policy that "presentation of program material lies solely with the licensee and the Commission cannot determine what particular program he may or may not broadcast; . . . the licensee has the responsibility for seeing that his authorized facilities are not used to misinform the public."[26]

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23. REPORT ON "LIVING SHOULD BE FUN," 33 F.C.C. 101, 107 (1962). In this case licensees had been broadcasting a syndicated program in which a nutritionist offered comment and advice on diet and health. Many of the programs raised controversial issues. Though the nutritionist had promised to be fair in the presentation of his views and to solicit response from opposing spokesmen, the FCC held that the licensee was not entitled under the fairness doctrine to rely on an assumed built-in fairness. If, for example, the spokesmen of views opposed to the nutritionist refused to appear on the air it was the licensee's responsibility to insure a balance through other means.

24. *In re* Richard Ruff, 19 F.C.C.2d 838, 839 (1969).

25. Lamar Life Insurance Co., 18 P & F RADIO REG. 683 (1959).

26. *Id.* at 684.

A similar ruling by the FCC arose in *Cullman Broadcasting Co.*[27] The station had broadcast a program, "Life Line," critical of the Nuclear Test Ban Treaty, and refused time to a group with an opposing view. The FCC stated that where the licensee, in good faith, "has achieved a balanced presentation of contrasting views, either by affording time to a particular group of persons of its own choice or through its own programming, the licensee's obligations under the fairness doctrine—to inform the public—have been met."[28] Consequently the groups request for an opportunity to reply was denied.

The consistent use of vague, inarticulate language by the FCC in applying the fairness doctrine has brought severe criticism. Professor Barron suggests that

> if the licensee does not editorialize and simply refuses or neglects to program a particular disputed and important public issue, he has in practical effect removed himself from the operation of the rule.
>
> As long as a significant amount of broadcast time has been devoted to public issue programming the licensee need not fear reprisal by the Commission when he seeks license renewal.[29]

Thus, according to Barron, rather than encourage the licensee to assume an affirmative duty generally to broadcast controversial issues, the fairness doctrine's only practical application has been to the performance of a licensee when confronted with a demand for time to reply to a view he has already broadcast. Even then, the enforcement of a duty is limited by the licensee's defense of acting within his reasonable discretion.

It has been said that under the present licensing scheme and application of the fairness doctrine, the licensees are, in effect, permitted

> to open or close access to their broadcast facilities according to their own personal predilections. . . . [The] tendency is reinforced by the circumstances that licensees profit in the first instance by pleasing advertisers of mass marketed products. Thus they can be expected to avoid ideas and personalities that might arouse the aversion of a large number of potential viewers. . . . [T]he effect of the present structure is to favor the broadcasting of views currently popular with the majority or substantial minorities, especially those views which support vested interests.[30]

Consequently, as Barron concludes, in a government effort to restrain overpowering and oppressive individual or group expression in favor of the broadcast of a multiplicity of views, the fairness doctrine, as it has

27. 40 F.C.C. 516 (1963).
28. *Id.* at 577.
29. Barron, *supra* note 12, at 20.
30. *The Supreme Court, 1968 Term,* 83 HARV. L. REV. 7, 140-41 (1969).

been enunciated in the 1949 Report, the 1959 amendment, and various cases, does not effectively impose an affirmative duty to cover controversy and may indeed have contributed to a blandness and narrowness of scope in serving the public interest.

The application of such a doctrine that is ill-defined in scope poses a serious dilemma. On the one hand it may cause licensees to seek ways of avoiding any legal obligation to cover controversial issues and, on the other hand, may allow them discretion to yield to economic pressures in programming. This raises questions as to the viability of the fairness doctrine and the first amendment policy of encouraging the broadest dissemination of views and ideas to develop a well informed society.

III. Recent Formulations of the Fairness Doctrine

The most recent statement of the fairness doctrine is found in the Supreme Court's decision in *Red Lion Broadcasting Co. v. FCC*.[31] An analysis of the Court's treatment of the problem of access to the licensee's facilities in this case offers more refined criteria upon which to base an affirmative legal obligation on the licensee.

The precise issue in *Red Lion* involved the validity of the FCC's 1967 rules dealing with the broadcast of personal attacks in the context of controversial public issues and political editorials.

These rules require that: a licensee, before broadcasting a party's attack on another person, provide the person to be attacked with certain notice of the broadcast, a script, tape or summary of the broadcast, and an offer of a reasonable opportunity to respond over the licensee's facilities; a licensee, within a certain time period after broadcasting an editorial endorsing or opposing a candidate for office, send a script or tape of the editorial to the other qualified candidate (s) or to the candidate whom he has criticized and offer a reasonable opportunity to respond over the licensee's facilities.[32]

The rules are considered part of the fairness doctrine insofar as they reflect the general duties laid down by the 1949 *Report on Editorializing*, the 1959 amendment to the Communications Act and major FCC decisions.[33] The Court concludes that, by enacting the rules, the FCC has zeroed in on a specialized aspect of the general fairness doctrine to find that "adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the

31. 395 U.S. 367 (1969).
32. 47 C.F.R. § 73.300 (1970).
33. *E.g.*, Cullman Broadcasting Co., 40 F.C.C. 516 (1968); New Broadcasting Co., 6 P & F Radio Reg. 258 (1950); United Broadcasting Co., 10 F.C.C. 515 (1945).

response in the hands of the station which has attacked their candidates, endorsed their opponents, or carried a personal attack upon them."[34]

The Court held that the rules are within the general rule-making powers of the FCC and in pursuance of the Commission's obligation to consider the demands of the public interest in the course of granting licenses. The 1959 amendment to section 315 was interpreted to have "authorized the Commission to require licensees to use their stations for discussion of public issues . . . [and] the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgement of the freedom of speech and press, and of the censorship proscribed by section 326 of the Act."[35]

The Court conceded that "the Communications Act is not notable for the precision of its substantive standards . . . "[36] and then proposed that:

> . . . in this respect, the explicit provisions of § 315, and the doctrine, and rules at issue here which are closely modeled upon that section, are far more explicit than the generalized 'public interest' standard in which the Commission ordinarily finds its sole guidance.[37]

Thus it cannot be said that the rules on personal attack and political editorials, reflecting a concern for the most relevant and effective presentation of views, go beyond the FCC's power to insure service of the "public interest" by licensees.

Regarding the issue of whether the FCC rules in question fostered an unconstitutional restraint on the freedom of speech and press of broadcasters, the Court stated that, because of the limited availability of frequencies, the Government has a legitimate power to limit the number of licensees and, more importantly, once a person has been awarded a license "there is nothing in the first amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."[38] Extending this policy, the Court added:

> It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government

34. 395 U.S. 367, 379 (1969).
35. *Id.* at 382.
36. *Id.* at 385.
37. *Id.* at 385-86.
38. *Id* .at 389.

> itself or a private licensee. Associated Press v. United States, 326 U.S. 1, 20 (1945); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experience which is crucial here.[39]

Given these general principles the Court found the rules on personal attack and political editorials consistent with the first amendment. Without such rules the licensee would have the power to give access to only the highest bidder or the spokesman with whom he agrees and thus communicate only a narrow or personally selected range of views on issues, people, or political candidates. "Freedom of the press from governmental interference under the first amendment does not sanction repression of that freedom by private interests."[40]

Finally, the Court commented on the possibility (however remote) that in the face of these specialized fairness doctrine rules, the licensee might attempt to avoid any broadcast of personal attack or political editorial and thereby defeat the general purpose of the fairness doctrine. In the event of "self-censoring," the Court reaffirmed the validity of the FCC's power to deny the renewal of a license on the grounds that the licensee failed to present representative community views on controversial issues or, in other words, that he failed to operate in the public interest.

While the holding in *Red Lion* was officially limited to affirming the constitutionality of the fairness doctrine and validating the FCC's personal attack and political editorial rules, it seems that the Supreme Court's interest in a general right of access for views which might not otherwise be heard indicates an awareness of an existing evil in broadcasting—the broadcaster's susceptibility to outside pressures resulting in one-sidedness or self-censorship. Significantly, the Court recognized that on some occasions the "reasonable" discretion allowed the licensee under the fairness doctrine may not serve adequately to present all sides of a public question in the most informative way—either because of his desire to avoid controversy and accompanying obligations or his capitulation to economic pressures.

It is significant to note, at this point, that the *Red Lion* opinion suggests two different approaches to the concept of fairness in broadcasting. First, the Court, in supporting the rules in question, may have been strictly concerned with bolstering the effectiveness of the fairness doctrine in ensuring the widest possible dissemination of views and ideas. Secondly, the Court may have been looking forward to a new first amendment right of access of citizens to the airwaves, independent of the fairness doctrine

39. *Id.* at 390.

40. *Id.* at 392, *quoting from* Associated Press v. United States, 326 U.S. 1, 20 (1945).

and its reliance on good faith judgments of broadcasters. By the latter approach the paramount right of the viewers and listeners to have their views represented in the general balance of interests would be replaced by a more aggressive individual right to be heard.

Further discussion of the possible impact of *Red Lion* on the fairness doctrine and the development of criteria upon which to base a licensee's affirmative legal duty requires an analysis of *Banzahf v. FCC.*[41]

An issue raised in *Banzahf* was whether public service announcements designed to discredit the image of the smoker implicit in smoking commercials have a right of access to broadcast facilities under the fairness doctrine. Is it a form of speech that is in the public interest and thus protected by the first amendment; will its introduction into the airwaves constitute an abridgement of the cigarette industry's right to speak of its product, and will the ordering of such broadcasts by the FCC constitute censorship or a breach of the licensee's freedom of speech and press?

The District of Columbia Circuit Court of Appeals in *Banzahf* held that, 1) "promoting the sale of a product is not ordinarily associated with any of the interests [that] the first amendment seeks to protect . . ."[42] and that, 2) the anti-smoking spots fall into the realm of protected speech. It is speech affecting the general political process and contributing to the exchange of ideas and provision of information on matters of public importance and thus it is in the public interest to be broadcast.

Banzahf, a private citizen, complained that the repeated broadcast of cigarette advertisements, depicting the smoker as young, virile, adventurous, and healthy, constituted implicit commentary on the desirability of smoking. This has raised a controversial issue, he said, and thereby necessitates an affirmative duty of the licensee to provide adequate coverage of the view opposed to smoking. The licensee's defense was that he had, in good faith, incorporated the anti-smoking sentiment elsewhere in his programming (including a few free Cancer Society spots), thus striking a balance of interests and satisfying his obligation under the fairness doctrine.

In its opinion, the court upheld an FCC order that WCBS devote a "significant amount" of broadcast time to the anti-smoking view over and above the balance of coverage already performed. The FCC had officially left the type of programming and the amount and nature of time given up to the reasonable judgment of the licensee; but the Commission also *suggested* that a reasonable means of accomplishing the increased coverage might be the broadcasting of a number of Cancer Society and HEW public service announcements each week.

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41. 405 F.2d 1082 (D.C. Cir. 1968).
42. *Id.* at 1101.

Rather than limit itself to the jargon of the traditional fairness doctrine: "good faith judgment," "reasonable balance," "reasonable opportunity," etc., the court found that the

> ruling is really a simple and practical one, required by the public interest. The licensee who has a duty to 'operate in the public interest' . . . is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. . . .[43]

Thus, in the view of the legislative history of the Cigarette Labeling Act,[44] which fully documents the danger to a large portion of the public, the obligation to effectively present the side opposed to smoking "stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility."[45]

The court concluded that:

> The Commission could reasonably determine the news broadcasts, private and governmental educational programs, the information provided by other media, and the prescribed warnings on each cigarette pack inadequately inform the public of the extent to which its life and health are most probably in jeopardy. The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood.[46]

In *Banzahf,* it is conceded that the pro-smoking sentiment found in commercials may not really raise substantial arguments for a major public debate or controversy; (the general fairness doctrine has not been invoked in the past when such a controversy is lacking).[47] Nevertheless, the court found that, though the FCC can neither claim expertise in deciding questions of public health nor the power to "condemn every broadcast which

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43. *Id.* at 1092-93, *quoting from* Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921, 949 (1967).

44. Federal Cigarette Labeling & Advertising Act of 1965, 15 U.S.C. § 1331 (Supp. 1966).

45. 405 F.2d 1082, 1093 (D.C. Cir. 1968), *quoting from* Applicability of the Fairness Doctrine to Cigarette Advertising, 9 F.C.C.2d 921, 949 (1967).

46. 405 F.2d at 1098-99.

47. [W]e do not think protracted discussion of the fairness doctrine will materially advance our inquiry. . . . [E]ven if incorporated into the fairness doctrine, the ruling before us is . . . a novel application. In only one instance has the Commission previously held the advertising of a consumer product subject to the rule that broadcasters' presentation of controversial public issues must be fair and balanced.

We also note that elsewhere the Commission has been hesitant to invoke the fairness doctrine where a controversial issue is raised only by implication.

Id. at 1091-92. *See also* Letter to Mrs. M. Murray, 40 F.C.C. 647 (1965).

might, without arbitrariness or caprice, be thought to pose some danger to public health," the special public interest in informing the public as to the near proof beyond a reasonable doubt of a danger to the lives of a large sector of society warrants the granting of special access to the airwaves to the Cancer Society and HEW. The licensee, operating with the broad discretion afforded him by the traditional fairness doctrine, had not met the affirmative duty required of him under this particular public interest.

Commenting generally on the efficiency of the fairness doctrine in the past the court stated that:

> If the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a balanced presentation of controversial issues may be to insure no presentation or no vigorous presentation at all. But where, as here, one party to a debate [the cigarette companies] has a financial clout and a compelling economic interest in the presentation of one side unmatched by its opponent, and where the public stake in the argument is no less than life itself—we think the purpose of rugged debate is served, not hindered, by an attempt to redress the balance.[48]

Finally, as in *Red Lion,* the *Banzahf* opinion suggests two different approaches to the concept of fairness in broadcasting. First, the court, in affirming the FCC order to broadcast anti-smoking spots, may have been seeking to bolster the validity of the fairness doctrine by infusing a new specificity into the public interest standard for this case and hereby more clearly define the licensee's obligation. Secondly, the court may have been trying to shed the "esoteric requirements" of the doctrine (including the licensee's right to reasonable, good faith discretion in programming and balancing interests) and find an independent basis for the right of the anti-smoking view to be heard.

IV. The Possibility of a New First Amendment Right of Access Independent of the Fairness Doctrine

In conjunction with his observations on the problems of access to the airwaves, Mr. Justice White, in the majority opinion in *Red Lion* stated that "it is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail. . . . "[49] This statement was supported by a citation to *New York Times Co. v. Sullivan,*[50] raising the possibility that a first amendment right of access may be emerging.

48. 405 F.2d 1082, 1102-03 (D.C. Cir. 1968).
49. 395 U.S. 367, 390 (1969).
50. 376 U.S. 254 (1964) [hereinafter referred to as *New York Times*].

In *New York Times,* an Alabama libel judgment against the *Times* newspaper was reversed on first amendment grounds that there is a ". . . profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open. . . ."[51] Though the advertisement attack on a public official was of a libelous nature, it was considered by the Court "an expression of grievance and protest on one of the major public issues of our time . . ."[52] and, therefore, clearly qualifying for constitutional protection. The Court concluded that "constitutional protection does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered."[53] Consequently, a "central meaning of the First Amendment" is found in the principle that "seditious libel cannot be the subject of government sanction" in a free society.[54]

In contrast to policies implicit in the 1798 Sedition Act and the Alabama law on civil libel in question, the Supreme Court found support for ". . . the privilege of the citizen-critic of government . . ." and declared that, absent actual malice, "it is as much his duty to criticize as it is the official's duty to administer."[55]

Commitment to robust, uninhibited and wide-open discussion, freedom of society based on freedom from seditious libel laws, and the duty of the citizen-critic are notions that caused Professor Kalven to consider the *New York Times* opinion a major liberating event for the first amendment. It is "an invitation to follow a dialectic progression from public official, to government policy, to public policy, to matters in the public domain. . . . [I]f the Court accepts the invitation, it will slowly work out for itself the theory of free speech that Alexander Meiklejohn has been offering us for some fifteen years now."[56]

> In a democracy, the citizen as a ruler is our most important public official.[57]
>
> . . . [N]o suggestion of policy shall be denied a hearing because it is on one side of the issue rather than the other. . . . These conflicting views may be expressed, must be expressed, not because they are valid but because they are relevant.[58]

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51. *Id.* at 270.
52. *Id.* at 271.
53. *Id.*
54. Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment,* in THE SUPREME COURT REVIEW 191, 209 (P. Kurland ed. 1964). *See* New York Times Co. v. Sullivan, 376 U.S. 254, 273, 275, 279 (1964).
55. 376 U.S. 254, 282 (1964).
56. Kalven, *supra* note 54, at 221.
57. A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 34-36 (2d ed. 1965).
58. *Id.* at 26-28.

Regardless of how one judges the impact of *New York Times* on the scope of the first amendment, it is probably safe to conclude that it somewhat discredited the old notions on the freedom of speech and its general limitations: "balancing the interest in freedom against the social interest sought by inhibiting communication,"[59] (as in applying the "clear and present danger" test to speech in the interest of national stability and security). More specifically, the decision lessened the threat of legal penalty on the newspaper writer for failing to print what was considered absolutely "true" and "fair" to all interested parties; the opinion encouraged individuals to make a more aggressive effort to be heard.

The goals of fairness, reaching the truth, and providing the opportunity to be heard on the airwaves go to the heart of the fairness doctrine. Historically, however, the doctrine's success in encouraging the broadest dissemination of views and informed public participation in debate has been limited. With the fairness doctrine the FCC has attempted, on the one hand, to induce broadcasters to open up their facilities to discussion of controversial issues, but, on the other, it has balanced this interest with the need to avoid government intervention in free press by allowing the broadcaster to exercise his own judgment as to the fairness of programming.

The *Red Lion* opinion recognizes some of the deficiencies in this laissez-faire balancing technique in broadcasting. By citing *New York Times,* the Court may be suggesting that the marketplace-of-ideas concept takes on a more "uninhibited, robust, and wide-open" character; therefore, the court may be finding a "central meaning of the First Amendment" in the principle that no licensee has the right to deny access to his facilities to any view or voice in a free society. Perhaps the Court is demonstrating a new concern for the manner in which an idea is expressed, that is, a concern that it be expressed by the most effective spokesman, that it be able to reach the most relevant audience, and that it is given a chance to actively compete in the marketplace-of-ideas.[60]

Similarly, *Banzahf* recognized that current performance under the fairness doctrine may not insure that the public is adequately informed about controversial issues, particularly since the broadcaster is subject to powerful economic pressure from the cigarette industry. Thus, an individual's right as a citizen-critic to be heard may go beyond the right to reply to a personal attack or to have a view represented in a controversial debate under the fairness doctrine.

Professor Barron has stated that "modern realities have demonstrated that the goals of the First Amendment can be fully achieved only by im-

59. Kalven, *supra* note 54, at 215.

60. *Accord,* Abrams v. United States, 250 U.S. 616, 630 (1919) (Mr. Justice Holmes, dissenting).

posing an affirmative duty on the owners of the media and government to provide access for protest."[61] Indeed, several recent cases in lower federal courts have dealt with the importance of access to a particular forum. *Kissinger v. New York City Transit Authority*[62] dealt with the refusal by the New York City Transit Authority and the New York Subways Advertising Co., Inc., to allow members of Students for a Democratic Society (SDS) to put up posters in the subway stations opposing the Vietnam War, although the organization had offered to pay the regular price and there was space available. The Authority and the advertising company argued that there were space limitations, the posters were too provocative, and they would cause disturbances and vandalism. District Court Judge Bonsal ruled that since posters involving ideological matters had previously been accepted, the posters in question could not be rejected merely for their controversial nature. The judge also seemed to outlaw the banning of all politically controversial advertising in the subway as a legitimate escape from the affirmative obligation to provide access: "a state may not unduly suppress free communication of views . . . under the guise of conserving desirable conditions."[63]

Wolin v. Port of New York Authority[64] arose from the denial by the Port of New York Authority to permit two anti-Vietnam War organizations to distribute leaflets in the main concourse and passageways of the Port of New York Authority Terminal Building. The court held that they were entitled to distribute leaflets as long as they did not substantially hinder the traffic flow, on the grounds that if "property [is] essentially dedicated to the public use, the citizen's fundamental right freely to express his views in a public place must be recognized. . . ."[65] Judge Mansfield also commented: "Nor does the fact a person might impart his ideas effectively in another place provide any reason for denying a person's right to manifest his views in a spot of his own choosing."[66]

Affirming the judgment, Judge Kaufman added that sometimes the forum selected for protest is the object of the protest and at other times, it is selected because that is "where the relevant audience may be found."[67] An anti-war group has "a constitutionally cognizable interest in reaching a broad audience."[68] Barron concludes from these cases:

61. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969).

62. 274 F. Supp. 438 (S.D.N.Y. 1967).

63. *Id.* at 443, *quoting from* Cantwell v. State of Connecticut, 310 U.S. 296, 308 (1939).

64. 268 F. Supp. 855 (S.D.N.Y. 1967).

65. *Id.* at 859.

66. *Id.* at 863.

67. Wolin v. Port of New York Authority, 392 F.2d 83, 90 (2d Cir. 1968).

68. *Id.* at 94.

> Creating a constitutionally cognizable right to access certainly is a more sensitive response to first amendment problems that [*sic*] the laissez-faire 'market place of ideas' concept, which assumed that if the dissenter could speak or write somewhere, [or if his view was 'reasonably' covered in the general programming of a 'good faith' licensee], society at large somehow would find the message and respond to it.[69]

The Supreme Court has, itself, recognized the relevance of particular forums to first amendment policies. In *Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[70] an informational picket line had formed in a privately owned shopping plaza and had been enjoined from further activity by the Court of Common Pleas of Blair County, Pennsylvania, on trespass grounds. Recognizing that the shopping plaza served as perhaps the most effective suburban forum for airing controversy over certain issues (including working conditions, prices, and hiring practices) the Court held that private ownership was not itself a bar to the exercise of first amendment rights. The Court apparently viewed the plaza as "quasi-public" in nature and, as Barron suggests, seemed to go along with the idea in *Wolin* that ". . . wherever there are public facilities through which large numbers of people can be easily reached, there is a right of access to those facilities by groups interested in using them for purposes of political expression."[71]

It is not unreasonable that the airwaves be viewed as such a quasi-public forum through which large numbers of people can be easily reached. With this in mind, the hint of a first amendment right of access to the airwaves emerging from *Red Lion* and *Banzahf* seems more conceivable.

Though the fairness doctrine was originally designed to encourage an affirmative duty to seek out and broadcast controversial issues of public importance, the opinions in *Red Lion* and *Banzahf* reflect the view that the FCC's concern with preserving the full discretion of the licensee in programming has not contributed to the effective promotion of the fairness goals. The opinions indicate, at least, a concern that a more comprehensive and enforceable duty be imposed on the licensee.

The duty might be defined in terms of a public interest that no individual be denied the right of access to a licensee's facilities on the grounds that his views are objectionable or inflammatory; an individual has a right to express his opinion on a public question as he finds most effective, not as a broadcaster reasonably believes to be fair. The FCC, in turn, as a guardian of the public interest and first amendment rights of free ex-

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69. Barron, *supra* note 61, at 491.
70. 391 U.S. 308 (1968).
71. Barron, *supra* note 61, at 494.

pression over the airwaves (quasi-public in nature) is entitled to ensure the duty of the licensee and the right of the spokesman without violating the first amendment or the censorship clause of the Communications Act.

V. The Jelinek Complaint

The petition filed with the FCC by Mr. Jelinek was essentially a complaint that the discretion allowed the licensee in programming pro and anti-military or Vietnam War sentiment has wrought no vigorous or effective presentation of the anti-military induction view. The purpose of rugged debate has not been served because of the political and economic clout and compelling interest of the Government in the presentation of one side unmatched by its opponent; the public stake in the argument is life itself. The federal government, states the complaint, "does not own the public airwaves, any more than the licensees do: the airwaves are owned by the people. Controversial issues expressed by government agencies or government officials have as much right to be challenged under the fairness doctrine as any other views."[72]

The complaint first established the relevance of the fairness doctrine to the case by arguing that, insofar as the licensee voluntarily chose to broadcast a particular free public service announcement that favors one side of a controversial issue, he has, in effect, editorialized as to that issue;[73] he is therefore bound by a legal obligation to provide reasonable opportunity for broadcasting an opposing public service announcement over his facilities.

To establish the controversial nature of the issue, whether participation in the armed forces is desirable, the complaint offered evidence of the issue's involvement in the general political process: there is nationwide dispute over United States' involvement in Vietnam and there is growing concern over the physical and mental harm that military life may cause. It is no longer generally accepted, for example, that the military builds men and trains leaders. In fact, Dr. Bourne, a former Army medical officer in Vietnam has stated that:

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72. Complaint to the F.C.C. on behalf of San Francisco Women For Peace, #C2-1625 (Feb. 26, 1970).

73. Mr. Jelinek explains in the complaint that, with the exception of the unique case of smoking commercials in *Banzhaf*, the broadcast of commercial spots is normally presumed to be neutral, the licensee's only inducement to broadcast commercials being financial gain. When the licensee broadcasts free public service announcements, however, the presumption of neutrality is destroyed.

> While the right to officially confer manliness is an indispensable part of the military reward system, and particularly of basic training, it is largely a deception, for military life offers not the attributes of mature manhood, but more nearly a permanent attenuation of adolescence.[74]

If the argument for a reasonable opportunity to reply to the armed forces spots had ceased at this point, the FCC might have more understandably, in the context of the history of the fairness doctrine, responded as it did that:

1) The licensee has not acted without reason in deciding that military recruitment spots do not raise a controversial issue.[75]
2) Even if the recruitment spots are "inextricably intertwined" with the concededly controversial conduct of the war in Vietnam and the Selective Service draft, "there is no indication that any of the stations against whom the complaint was filed have failed to treat the issues of Vietnam and the draft . . . in conformance with the fairness doctrine."[76]
3) "Under the fairness doctrine, it is the licensee's obligation in the first instance to make a determination regarding the controversial nature of an issue and whether an issue, if it is controversial, is one of public importance. Unless the licensee's judgment is shown to be unreasonable, the Commission will not upset the judgment of the licensee."[77]

The petitioners claimed, however, that while the precise selection and timing of the anti-induction material may be left to the discretion of the

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74. P. Bourne, Psycho-Social Phenomena Observed in Basic Training with Implications for Later Personality Effects 102, American Orthopsychiatric Ass'n Annual Meeting, April, 1969.

75. *In re* Complaint on behalf of San Francisco Women For Peace, 24 F.C.C.2d 156, 157, 158 (1970).

76. *Id.* at 158.

77. *Id.* at 157. *See also* Letter to Judy Collins, 24 F.C.C.2d 741 (1970), in which the FCC responded to a complaint filed by the well-known folk singer, Judy Collins.

Miss Collins appeared on ABC's "Dick Cavett Show" on February 6, 1970. Her comments with regard to various controversial issues raised in the pending "Chicago Seven" trial were cut from the broadcast. She complained that her right of free speech had been unduly restricted and that the broadcast had acted inappropriately under the fairness doctrine.

The FCC replied that it was satisfied with the reasonableness of discretion employed by the broadcaster and ABC's general policy of eliminating speech that may prejudice pending litigation and threaten the American legal process as a whole. The FCC stated that "the Communications Act of 1934 states in section 3(h) that a broadcaster shall not be deemed a common carrier and therefore is not obligated to accept any program matter which may be offered to him for broadcast. The licensee may establish standards governing the acceptability of broadcast material and is free to exercise his discretion in deleting portions of programs." *Id.* at 741.

The FCC also remarked that ". . . the protection afforded freedom of speech in the Constitution does not guarantee to any person the use of any particular platform, microphone or other means for the expression of his views." *Id.*

licensee, the FCC should, in this case, order the granting of "substantially equivalent" time to present the anti-induction view with a recommendation, similar to that in the anti-smoking case, that a reasonable means of discharging this responsibility would be the broadcast of several anti-military induction public service announcements each week. To this end the scope of the complaint's argument was broadened. It questioned the effectiveness of the fairness doctrine in insuring that broadcasting be operated in the true public interest and challenged the FCC to recognize more realistic criteria upon which to establish a licensee's affirmative duty.

Though the armed forces' public service announcements address themselves only to voluntary enlistment and do not specify any views as to the war in Vietnam, the morality of warfare, or the induction system, it was the contention of the petitioners that, like the cigarette advertisements in the *Banzahf* case, the armed forces' spots serve as a type of propaganda that may cause hesitance on the part of a potential draftee to question the image created. Armed forces' spots, in contrast to the discussion programs or newscasts in which the anti-military induction view has been allegedly covered, may be designed to induce a specific psychological effect through their content and repetition. They are broadcast uncontested and without the infusion of attempted objectivity and balance by moderators or reporters. Thus, if the potential draftee is the slightest bit unsure of his manliness or capability to succeed and he listens to the recruitment spots, he may never consider the alternatives to enlistment or involuntary induction that are open to him. His choice to join the military or be drafted may not be the product of an independent, informed judgment. This result is hardly consistent with the supposed effort to preserve a truly uninhibited and wide-open marketplace-of-ideas.

The complaint quoted the opinion in *Red Lion* as to the public's first amendment right to be informed and the fairness doctrine's goal of encouraging robust and uninhibited discussion. From this basis, it might be argued on behalf of the petitioners that the FCC should conclude, as it did in the anti-smoking case, that the current coverage of the military induction and Vietnam War issues has inadequately informed the public of the extent to which its life and health are threatened by participation in the armed forces; the mere fact that anti-military and deferment information has been available, or even that it is actually heard or read does not mean that it is effectively understood. Consequently, (as the FCC had ruled in *Red Lion* and *Banzahf*), the licensee should be required to share his facilities with a particular group or individual who is more directly involved and likely to inform the public effectively.

Anticipating difficulty in convincing the FCC that discussion of the issue concerning the desirability of military life warrants constitutional

protection as a matter of public importance, Jelinek drew an analogy to the special public interest standard (independent of the fairness doctrine) used in the *Banzahf* case: Aside from public controversy over current United States' military activity and scientific evidence as to the harmful effects of military life, Congress, in enacting its Selective Service Act,[78] has recognized that the military may not be desirable in several cases. The Act provides deferments and exemptions for certain age groups, for education, for certain physical or mental idiosyncracies that may be worsened or cause death in military activity, and for particular religious or moral convictions that the individual may be forced to compromise in warfare. Thus, in light of a specialized congressionally-mandated interest in the health and welfare of a large sector of society (potential draftees and returning veterans), the FCC, argued Jelinek, should require a distinct obligation on the part of a licensee that goes beyond his allegedly "fair" performance under the fairness doctrine.

The FCC neither considered the complaint as encouraging the application under the fairness doctrine of more definitive criteria, nor as a suggestion that new first amendment grounds, independent of the doctrine, serve as a foundation for the licensee's legal obligation to provide access and an individual's right of access, generally. The Commission maintained a passive role and limited its review to the overall service of the licensee to the public interest. The complaint's allegations as to the inadequacy of the current coverage of anti-induction views and as to the licensee's ability, through his "reasonable" discretion, to avoid a special public interest may point to inherent flaws in the operation of the fairness doctrine under this type of direction. The question remains, however, which approach might best in the long run serve to facilitate the type of access in question and contribute to the development of a truly wide-open and informative public forum.

The anti-induction spots offer a direct challenge to the United States' present policy of defense and national security. The announcements are designed to induce potential draftees to seriously question the nature of their role as American citizens and patriots. In a sense, the announcements encourage young men to assume the duties of "citizen-critic" in a truly robust, uninhibited, wide-open society. As Mr. Jelinek explained, "controversial issues expressed by government agencies or government officials have as much right to be challenged under the fairness doctrine as any other views."[79]

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78. Military Selective Service Act of 1967, 50 U.S.C. App. § 454 (1967).

79. Complaint to the F.C.C. on behalf of San Francisco Women For Peace, #C2-1625 (Feb. 26, 1970).

Theoretically, the fairness doctrine *does* incorporate expression opposed to government policies, but, as we have seen in this case, the Commission refused to apply the doctrine so as to force a licensee to grant the increased access demanded.

The FCC is interested in facilitating the broadest dissemination of views and ideas but it is also committed to protecting the freedom of the broadcaster and, most importantly, to balancing the interests of society in public discussion—contributing to the stability of society. The fairness doctrine is burdened with satisfying all of these goals. It establishes a duty of the commercial licensee to seek out and cover controversial issues of public importance and imposes a vague standard of fairness and objectivity on the licensee's programming. This general standard in conjunction with his equally vague power of reasonable discretion has been shown to have a moderating or stabilizing effect on programming. In a case where a type of speech or its manner of presentation appears to the licensee to be inconsistent with the public interest because of its political or economic ramifications, for example, he need not permit access to that speech or he may present the view that it represents in a more objective and balanced form than was requested. Under the fairness doctrine, the licensee is obliged to maintain this balance. The interest of the federal government and its agencies in maintaining a stable, ordered society, combined with the licensee's efforts to satisfy the FCC's standard of fairness and the audience, and sponsor's taste has imposed a limit to the freedom of individual citizens to speak and be heard. The fairness doctrine has contributed to and permitted the existence of self-censorship in broadcasting. Given this condition, the occasional infusion of specific rules on the sharing of radio facilities under the fairness doctrine (as discussed in *Red Lion*) or of special scientifically-documented, congressionally-mandated definitions of the public interest (as found in *Banzahf*) will most likely not provide a truly robust, uninhibited, and wide-open forum for public discussion. Mr. Jelinek's case for requiring access to the defendants' facilities might find more solid and constructive ground in the realm of an individual first amendment right of access to the airwaves.

If the FCC had recognized the possibility and necessity of a newly emerging first amendment right of access to the airwaves from the cases discussed above, it might have ordered the granting of "substantially equivalent" time to the anti-induction view and required the broadcast of several public service announcements each week on the following grounds:

1) Suitable access to "social, political, esthetic, moral and other ideas and experiences" must be provided.[80] The FCC is entitled to rule

80. 395 U.S. 367, 389 (1969).

as the "public convenience, necessity, and interest require."[81] It is in the public interest that discussion of matters of importance and controversy be "robust, uninhibited, and wide-open."[82]

2) The anti-induction groups in question have a "constitutionally cognizable interest" in reaching a broad audience effectively.[83] The licensee should not be allowed to deny access to a speaker merely on the grounds that his expression might be disturbing or provocative;[84] nor should the availability of other forums serve as a reason to deny a spokesman his choice of the airwaves.[85] Since the airwaves are of a quasi-public nature, capable of reaching large numbers of people, they must be open to parties offering political expression.[86]

3) When the possibility arises that information and views on an issue of public importance or controversy are not being disseminated by the most effective spokesmen to the most relevant audience, it is the right of the viewers and listeners to receive the information and the right of the citizen-critic to be heard, not the right of the broadcaster to strike a balance of interests, that is paramount.[87]

VI. Conclusion

Given the FCC's record in passing on complaints arising under the fairness doctrine it was predictably unlikely that a majority of its members would find that either: 1) a special public interest had arisen (as in *Banzahf*) so significant as to require access over and above that which has "reasonably" been provided by the licensee, or 2) that a new individual right of access had emerged from the *Red Lion* case such as to prohibit the licensee from denying access to the petitioners. The Commission fell back on the traditional policy of the doctrine that the identification and coverage of controversial issues be left to the good faith discretion of the licensee and that the FCC's role be limited to a general review of his performance in the public interest. Jelinek's complaint was consequently denied. The only concession made by the Commission was that their decision did not "imply that nothing connected with a public service announcement could bear upon a controversial issue of public importance."[88]

The continuing use of a vague standard of conduct for the licensee and an equally illusive standard of review for the Commission in the fair-

81. Communications Act of 1934, 47 U.S.C. §§ 307 (a), (d) (1964).
82. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
83. Wolin v. Port of New York Authority, 392 F.2d 83, 94 (2d Cir. 1968).
84. Kissinger v. New York Transit Authority, 274 F. Supp. 438, 442 (S.D.N.Y. 1967).
85. Wolin v. Port of New York Authority, 392 F.2d 83, 91 (2d Cir. 1968).
86. Food Employees Local v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968).
87. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); New York Times Co. v. Sullivan, 376 U.S. 254, 282 (1964).
88. 24 F.C.C.2d 156, 158 (1970).

ness policy allows the FCC, in its administrative discretion, to avoid enforcing any definitive legal obligation on the broadcaster, whether it be in the context of the fairness doctrine or an independent first amendment right of access. Under current policy, then, the FCC might feel compelled to penalize a licensee or refuse to renew his license only where he has been grossly unreasonable or arbitrary in his programming practices and has clearly, and in bad faith, acted to the detriment of the public interest. Consequently, with respect to most access complaints the FCC may remain disentangled from the conflict and simply issue a statement that the licensee had acted within his reasonable discretion. By the same token, because of the Commission's limited involvement and its application of a policy of only general fairness guidelines it is unlikely that a court, lacking definitive and specific legal standards of conduct, would review the Commission's decision unless there was evidence of gross irrationality on the part of the Commission or the licensee.

Perhaps if the FCC were to render the licensee's obligation to operate under the fairness doctrine a more exact one, the Commission would necessarily assume a more aggressive role in implementing its fairness policies. The FCC would then not always rely on licensee's reasonable discretion and good faith judgment in passing on a complaint; it might decide, for example, that, though the licensee's decision to deny certain access was not grossly unreasonable or arbitrary, the Commission's view of the public interest in the case necessitated granting the type of access requested or at least more extensive coverage of an issue than had been planned by the licensee. Questions regarding the effectiveness of the dissemination of information and the appropriateness of the spokesmen in representing sides to a particular controversial issue would be raised whereas they would most likely not be under the traditional standards of the fairness doctrine. By the same token, if a complaint were denied by a "final action" of the Commission under the revised and more particularized policy, a court might find more grounds for review in attacking irregularities in the FCC's implementation of that policy. To carry this analysis one final step, it might be argued that the increased involvement of the FCC in implementing a policy of fairness and its composite standards of conduct, leading to expanded reviewability of the Commission's treatment of complaints, would also cause the courts to take notice of inherent flaws in the fairness doctrine and to begin to consider the need for a type of access that is self-executing, independent of any government agency policy.

It is arguable that the Supreme Court in *Red Lion* has already alluded to this possibility. While the FCC, in responding to new complaints, may not choose to so construe the Court's holding, it has on occasion since *Jelinek* applied the language of the *Red Lion* opinion in such a way as

to indicate at least the assumption of a more active role in determining whether the good faith licensee is actually and realistically serving the public interest in his presentation of a particular controversial issue. In August, 1970, for example, the Commission rejected a request by the Democratic National Committee for a declaratory judgment to the effect that "responsible entities" had a first amendment right to access for solicitation of funds and comment on public issues.[89] The Commission also denied special access to the Committee for discussion of public issues under the fairness doctrine. But in upholding the licensee's reasonable behavior in this situation, the FCC added new specificity to the character of the discretionary task of the broadcaster. Citing the authority of *Red Lion,* the FCC stated that the licensee as a public trustee must " . . . present representative community views and voices on controversial issues which are of importance to his listeners. This means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner would run counter to the 'profound national commitment that debate on public issues should be uninhibited, robust, and wide-open.' "[90]

Later in the month the Commission replied to such groups as the Committee for the Fair Broadcasting of Controversial Issues, Business Executives Move for Vietnam Peace, and Fourteen United States Senators.[91] They had argued that the networks or licensees had not achieved fairness in view of the number of Presidential prime time and uninterrupted broadcasts on the Indo-China War and the complainants' efforts to present the contrasting view.[92]

While the Commission again specifically rejected allegations that a first amendment right of access had emerged from the *Red Lion* decision, it construed the holdings to require the imposition of seemingly clearer and more stringent standards of behavior on the broadcaster.

> In stressing that the licensee has considerable discretion in discharging his fairness obligation, we do not mean to imply that that discretion is absolute. . . . [*W*]*e will intervene if the showing establishes that the licensee has acted unreasonably.* . . . [I]t is patently unreasonable for a licensee consistently to present one side in prime time and to relegate the contrasting viewpoint to periods outside prime time. Similarly, there can be an imbalance

89. *In re* Democratic National Committee, 25 F.C.C.2d 216 (1970).
90. *Id.* at 222-23.
91. *In re* Complaint of Committee for Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283 (1970).
92. *Id.* at 296.

> from the sheer weight on one side as against the other. But there is no mathematical formula on any of these questions. What is called for is a judgment on the facts of each case. . . .[93]

The Commission concluded that while in theory the objectives of the fairness doctrine ought to have been satisfied upon the good faith, non arbitrary judgment of the licensee, the practicalities of the situation dictated that effective presentation of contrasting views to the Indo-China policy required one more opportunity for an uninterrupted prime time presentation by an appropriate spokesman on the three networks.[94] Consequently, the Commission intervened.

In granting the increased access in this case the Commission insisted that, not only did the licensee's privilege to broadcast depend upon strict adherence to the fairness doctrine,[95] but compliance with the agency's fairness policy could be accomplished only by operating "reasonably and realistically" under the circumstances.[96]

In the meantime the FCC issued a Notice of Proposed Rule-Making in May, 1970. It offers ". . . a modest further step in promoting access to the broadcast media."[97] With the *Red Lion* decision as its authority the Commission suggests that the licensee be required to be "truly an expert on his community's problems and interest;" that he be able to actively encourage debate by recruiting those "who deeply believe in the cause for which they speak" in the event that those persons do not voluntarily appear and request access.[98]

In these recent cases and the proposed rule-making, the FCC emphasizes that it is not straying from the basic fairness doctrine principles of the 1949 *Report on Editorializing by Broadcast Licensees* and the 1959 amendment to section 315 of the Communication Act. However, by adding a practical element to the notion of fairness and the right of the public to be adequately informed, the FCC may be abandoning its passive reliance on the good faith and rationality of the broadcaster to identify controversial issues and provide effective access to appropriate spokesmen with only the public interest in mind. The Commission may also be substituting its general review of the licensee's performance under the fairness doctrine with a particularistic analysis of the reasonableness and practicality of his actions under each set of circumstances. In other words, whereas the licensee, as a student of the public interest (under the traditional implementation of the doctrine), could survive with a general knowledge and

93. *Id.* at 292-93 (emphasis added).
94. *Id.* at 298.
95. *Id.* at 292.
96. *Id.* at 298.
97. 35 Fed. Reg. 7820, 7821 (1970).
98. *Id.*

average performance, he may now be called upon to act as an "expert" public trustee.

It is not clear how helpful this possible trend in the operation of the fairness doctrine could be in another *Jelinek* complaint. An admission by the Commission that a public service announcement might raise a controversial issue and invoke fairness policies and the adoption of tighter control over fairness questions and the discretion of licensees may still not solve the problems of reconciling the individual's or group's interest in access, the right of the public to be adequately informed, the interests of the broadcaster as a businessman, and the practice of administrative discretion in a government regulatory agency.

Certainly the groups represented by Jelinek have little or no administrative or judicial remedy under the traditional standards of the fairness doctrine as long as the licensee demonstrated some reason in his actions. But under a more aggressive approach to fairness by the FCC the risk exists that administrative discretion will not consistently serve the interest of the public. It is not inconceivable, therefore, that when an act of the Commission is challenged on the basis of first amendment rights, either that of the public to be informed or that of the individual or group to speak, a court will take notice of harmful inconsistencies in the implementation of the fairness doctrine and consider a doctrine of "pure access," an independent first amendment right of access to the airwaves in all or in selected areas of broadcasting.

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