United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1181

BRANDYWINE-MAIN LINE RADIO, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

GREATER PHILADELPHIA COUNCIL OF CHURCHES, ET AL., INTERVENORS

Appeal from the Federal Communications Commission

Decided September 25, 1972

Messrs. Benedict P. Cottone and *Eugene F. Mullin,* with whom *Mr. John C. Eldridge* was on the brief, for appellant.

Mr. Joseph A. Marino, Associate General Counsel, Federal Communications Commission, for appellee. *Messrs. Richard E. Wiley,* General Counsel at the time the brief was filed, *John H. Conlin,* Associate General Counsel at the time the brief was filed, and *Miss Katrina Renouf,* Counsel, Federal Communications Commission, at the time the brief was filed, were on the brief for appellee.

Messrs. Thomas Schattenfield, Michael Valder and *David Tillotson* were on the brief for intervenors.

Before BAZELON, *Chief Judge,* and WRIGHT and TAMM, *Circuit Judges.*

Opinion for Court by TAMM, *Circuit Judge.*

Concurring Opinion by WRIGHT, *Circuit Judge* at p. 92.

TAMM, *Circuit Judge:* We hold no freedom more inviolable than our precious first amendment right to freedom of speech. Free and unfettered debate has been a cornerstone of our Republic for almost two hundred years. Any attempt to silence those who would speak, no matter how unpopular their opinions, no matter how controversial their views, must be met with immovable opposition by those who cherish our basic freedoms and hold them dear.

> [T]he peculiar evil of silencing the expression of opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[1]

This is the setting in which we must consider the dispute arising from the refusal of the Federal Communications Commission (hereinafter "the Commission") to renew the broadcast license of Brandywine-Main Line Radio, Inc. (hereinafter either "Brandywine" or "WXUR") as licensee of radio stations WXUR and WXUR-FM, located in Media, Pennsylvania.[2] Yet, even in light of the extremely high standard which we have set in this case, we must affirm the opinion of the Commission.

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[1] J. MILL, ON LIBERTY, *quoted in* Buckley v. Meng, 35 Misc. 2d 467, 474, 230 N.Y.S.2d 924, 932 (Sup. Ct. 1962).

[2] Despite the fact that two stations, WXUR and WXUR-FM,

I. Factual Background

A. *Early Operation of WXUR*

Brandywine was licensed to operate WXUR in 1962 by the Commission after a determination that such license would be beneficial in serving the public interest. WXUR-AM is a daytime standard broadcast station while WXUR-FM is a full-time station. The two stations are the sole stations in Media, Pennsylvania. As has been known to happen, Brandywine suffered financial reverses and the stockholders expressed an interest in selling the company in 1964. Contemporaneously, Station WVCH, located in Chester, Pennsylvania (a town which neighbors Media) elected to terminate broadcasting *20th Century Reformation Hour,* the program produced by Dr. Carl McIntire.[3]

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are involved in this suit, any reference to "WXUR" will be employed to designate both the AM and FM frequencies, unless otherwise indicated.

[3] Dr. McIntire testified at the hearing for license renewal that:

> I received notice [from WVCH] informing me the program would be terminated and we made a very great issue of it publicly here and committees were organized to see if it couldn't be continued. The reason given for [cancellation], as given to us, was that it was the advice of the attorneys in Washington in connection with their FCC problems that led them to put me off.

When asked how he had obtained this information, McIntire continued:

> It was obtained by a committee that went by the pressures [*sic*] that were built up as to just what was the reason Dr. McIntire was being removed and when we found this difficulty with the FCC or with its attorneys in connection with the FCC, the same problem confronted me as I sought to get on the other stations in the community. When we found that we were virtually blacked out and that our views, our opinions were not going to be aired in the community, we became interested in purchasing a

This event left Rev. McIntire with no outlet for his program in the Philadelphia broadcast market. It is understandable, therefore, that when Dr. McIntire learned that WXUR might be available, the Faith Theological Seminary [4] (hereinafter "the Seminary") entered into an agreement to purchase Brandywine's stockholders' interests in October, 1964. The Seminary filed an application with the Commission seeking approval for the proposed purchase of Brandywine's stock and for Commission approval for the Seminary's proposed operation of WXUR.

B. *The Transfer Application*

In its proposal to the Commission the Seminary stated that it would continue the station's general format of broadcasting entertainment, talk shows and short newscasts, and in addition, two one-hour religious programs would be broadcast each weekday; [5] the station would also broadcast religious programs until noon on Sunday.[6] The terms of the Seminary application sought Commission permission to operate "for the principal purpose of broadcasting the Gospel of our Lord and Saviour Jesus Christ, for the defense of the Gospel, and for the purposes set forth in the Charter of Incorporation." This application was not

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station or being a part of a purchase in some way so that a program such as mine could be aired in the community. J.A. Vol. V, 4236-37.

[4] Faith Theological Seminary is located in Elkins Park, Pennsylvania, near Philadelphia. Reverend McIntire presided over the Seminary's Board of Directors at the time the offer to purchase Brandywine was tendered.

[5] These two programs were *Missionary Hour* and *Gospel Hour*.

[6] The Sunday morning programs were entitled: *It's Sunday Morning, Dedication, The Church at Work, Men's Hour, Church Service* and *Sunday U.S.A.*

without opposition, however, as some fifteen community groups and a number of individuals and churches within the community made their opposition known to the Commission.[7] The Commission noted that it also received communications from many individuals and churches who were proponents of the transfer. As the Commission noted "[t]he complaints [opposing the transfer application] are based on the relationship to the transferee of the Reverend Carl McIntire, President of the Board of Directors of Faith Theological Seminary, Inc." [8]

The major concern of the opponents to the transfer was that the station would be incapable of providing for a balanced presentation of opposing views in light of McIntire's connection with the Seminary and in view of his radio programs and publications.

> The main thrust of the complaints concerning Rev. McIntire is that, in his radio programs and publications, he has made false and misleading statements and deliberate distortions of the facts relating to various public issues such as race relations, religious

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[7] The following groups and individuals were among those opposed to the transfer application: the Greater Philadelphia Area Committee for UNICEF, the National Association for the Advancement of Colored People, the Anti-Defamation League of B'nai B'rith, the Pennsylvania Southeast Conference of the United Church of Christ, the Presbytery of Philadelphia, the National Urban League, the Greater Philadelphia Council of Churches, the Jewish Community Relations Council, the New Jersey Council of Churches, the Philadelphia Council of the AFL-CIO, the American Baptist Convention, the Eastern Pennsylvania Synod of the Lutheran Church in America, the Philadelphia Baptist Association, and the Executive Committee of the Catholic Interracial Council of New York.

[8] In re Application of George E. Borst, et al., 4 P & F Radio Reg.2d 697, 698 (March 19, 1965) (hereinafter "Borst Decision").

> unity, foreign aid, etc; that he has made "intemperate" attacks on other religious denominations and leaders, various organizations, governmental agencies, political figures and international organizations; and that such expressions are irresponsible and a divisive force in the community and help create a climate of fear, prejudice and distrust of democratic institutions. It is also alleged that, in light of his record of "partisan and extremist" views on various public issues, he lacks the degree of social and public responsibility demanded of broadcast licensees and that these views will carry over into the operation of the stations in view of his connection with the transferee. It is alleged, finally, that a serious question is thus raised, in light of his views, whether he is or will be able to bring about a balanced presentation of opposing views or whether he will place his personal views above the station's public interest obligations.[9]

While the applications for transfer were still pending, the Commission communicated with the Seminary with regard to various aspects of the application and with particular interest as to whether station "facilities would be available to other faiths for the presentation of religious programs, and, if so, under what conditions or circumstances." The Seminary responded by filing an amendment to the original application which included an exhibit which stated the Seminary's intent to "make time available on an equal and non-discriminatory basis to all religious faiths requesting time for the presentation of religious programs." [10] To further insure balance in the area of religious broadcasting the Seminary's amendment provided for a half-hour program on Sunday to be known as *Interfaith Forum*.[11]

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[9] *Id.* at ¶ 2.

[10] J.A. Vol. II, 120-27.

[11] The amendment described *Interfaith Forum* as a program in which ministers or representatives of different faiths

C. *Commission Approval of Transfer*

The Commission's Memorandum Opinion and Order[12] granting the transfer application was forthcoming on March 19, 1965.[13] This opinion, known as the *Borst Decision,* summarized the nature of the complaints received[14] opposing the Seminary's application. The Commission continued by expressing that, as a matter of policy,

> [t]he Commission is wisely forbidden from choosing "among applicants upon the basis of their political, economic or social views. . ." As Mr. Justice Douglas stated:
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> > "The strength of our [broadcasting] system is in the dignity, resourcefulness and the intelligence of our people. Our confidence is in their ability to make the wisest choice. That system cannot flourish if regimentation takes hold." [15]

The Decision noted that Dr. McIntire represented that his relationship with WXUR would be as that of a broadcaster and that management decisions would be left to three other

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will be invited to participate in round-table discussions of religious principles and tenets as related to current social problems. Every effort will be made to obtain varried participation from week to week to assure the greatest possible balance of views on the subjects of discussion.

J.A. Vol. II, 127.

[12] *Supra,* note 8.

[13] The Commission was not unanimous in its action. Commissioner Hyde concurred in the result only. Commissioner Cox dissented in the belief that the application should have been designated for a hearing. Commissioner Loevinger concurred, especially expressing his displeasure with the Commission's action in concerning itself with McIntire's views.

[14] *See* text at note 9, *supra.*

[15] Borst Decision, *supra,* at ¶ 3. Citations omitted.

members of the Seminary's Board who would constitute the Board of Brandywine.[16] Despite all of this the Commission did consider the basic fear of the application's opponents that the station would be under Dr. McIntire's influence and that it would not give full and fair treatment to divergent views on controversial issues as required by both standards of public interest and the Commission's fairness doctrine.[17] The Commission's ultimate conclusion was that a hearing on the transfer application was unnecessary because of the in-depth representations, contained in the application, to fully comply with the station's acknowledged obligations in the fairness arena.[18]

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[16] *See* letter of Carl McIntire to E. William Henry, Chairman of the Federal Communications Commission. In this letter Rev. McIntire stated:

> It is constantly being alleged that I am buying the station. You know, of course, that it is the corporation of the Seminary of which I am a member and am presently the president of the corporation. . . . I want you to know that I have no financial interest in any way in this sale. Moreover, I own no radio station and have no financial interest in any radio station in the country or anywhere else.

J.A. Vol. II, 140. While Rev. McIntire was not the president of the Seminary he did list a large number of other associations on the transfer application. He is listed as Pastor of the Bible Presbyterian Church of Collingswood, New Jersey; President of the Board of Trustees of Shelton College, Cape May, New Jersey; Vice-President of Independent Board of Presbyterian Foreign Missions; President, Christian Beacon Press, Inc., Collingswood, New Jersey; President and editor of the Christian Beacon; and member of the Board of Directors of Highland College, Pasadena, California.

Borst Decision, *supra*, at fn. 2.

[17] The fairness doctrine has been codified at 47 U.S.C. § 315 (1970).

[18] Question 7 of the Broadcast Application (Statement of

The *Borst Decision* went to great lengths to reinforce and reiterate the transferee's duties and obligations under both

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Program Service of Broadcast Applicant) requires the applicant to make

> . . . a narrative statement on the policy to be pursued with respect to making time available for the discussion of public issues, including illustrations of the types of programs to be broadcast and the methods of selection of subjects and participants.

Faith Theological Seminary responded in the following terms: "Equal opportunity will be afforded to opposing viewpoints on controversial public issues." J.A. Vol. II, 111.

In the Commission Statement of AM or FM Program Service question 16 inquires:

> In connection with the applicant's proposed public affairs programming describe its policy with respect to making time available for the discussion of public issues and the method of selecting subjects and participants.

The Seminary replied by stating:

> Opportunity on equal terms to opposing viewpoints on controversial public issues. Subjects will not be selected by station but will be those either presented by sponsors or by members of listening audience calling in on "Freedom of Speech" program. Replies to controversial views expressed on sponsored programs will be by spokesmen equally qualified as spokesmen on sponsored program.

J.A. Vol. II, 138.

Finally, consider the following from the above form:

> 29. State the methods by which applicant undertakes to keep informed of the requirements of the Communications Act and the Commission's Rules and Regulations, and a description of the procedures established to acquaint applicant's employees and agents with such requirements and to ensure their compliance.
>
> Employees are required to be familiar with FCC rules applicable to their duties. Copies of FCC rules are kept at station. FCC notices are posted on bulletin board. Washington counsel is consulted on doubtful questions.

J.A. Vol. II, 139a.

the fairness doctrine and the personal attack corollary. The Commission took notice of Brandywine's written submission that equal opportunity would be afforded to opposing viewpoints on controversial public issues [19] but nonetheless felt constrained to

> [s]pecifically direct attention to our ruling in *Cullman Broadcasting Co.*, FCC 63-849 [requiring presentation of conflicting views at licensee expense if advocates willing to pay for broadcast time cannot be found] and to our personal attack principle (see *Public Notice of July 1, 1964, Applicability of the Fairness Doctrine, Part E*) the licensee is required to operate in accordance with these requirements, and unless immediately informed to the contrary, we take the licensee's representation to encompass these requirements.[20]

The Commission expressed the view that Dr. McIntire's record of offering free response time for either an opportunity to debate some issue or respond to some attack "[would] not suffice to discharge the fairness responsibilities of a licensee carrying the broadcasts in question." [21]

The Commission made every effort to assuage the fears of Brandywine's opponents that WXUR would become a medium over which McIntire could express his personal views to the exclusion of the views of the listening public. The Commission reprinted the following detailed programming promise from the Brandywine application:

> It will be the policy of the transferee to make time available on an equal and nondiscriminatory basis to all religious faiths. . . . In other words, the same terms

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[19] *Id.* at 138.

[20] Borst Decision, *supra*, at ¶ 8, fn. 2a.

[21] *Id.* at ¶ 8, fn. 3, *citing* Report on "Living Should Be Fun" Inquiry, 33 F.C.C. 101, 107 (1962).

> and conditions will be applicable to all faiths . . . as will be applicable to the religious faith . . . [of] the transferee. . . . It will be the policy to make time available to religious faiths equally. . . . However, . . . a half hour will be available and utilized on Sundays . . . for an Interfaith Forum program, in which ministers or representatives of different faiths will be invited to participate in round-table discussions of religious principles and tenets as related to current social problems.
>
> Every effort will be made to obtain varied participation from week to week to assure the greatest possible balance of views on the subjects of discussion. The transferee will invite the cooperation of recognized ministerial associations in the Greater Philadelphia area to present their recommendations as to participants and subjects of discussion on this program and in the event of failure to obtain such cooperation, the transferee will extend invitations to, and make sincere efforts to obtain participation by, individual churches and faiths in a manner which will assure, to the fullest extent possible, fair and equal representation of varying views.[22]

The Commission granted Brandywine's application for transfer with one final warning to the Seminary broadcast group.

> In reaching this determination, we have relied upon the specific representations by the transferee indicating awareness of a licensee's responsibilities. In any event, this grant is subject to the same conditions applicable to all broadcast grants . . . [including, among itemized conditions] . . . that [Brandywine] will abide by the requirements of the fairness doctrine (see [Fairness Primer]).[23]

The new management began broadcast operations on April 29, 1965.

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[22] *Id.* at ¶ 9.

[23] *Id.* at ¶ 10.

D. *The License Period*

Brandywine's initial license period ran from April 29, 1965, through August 1, 1966.[24] It is important for this court to examine WXUR's operations during this period as these operations are the actual predicate of the action before us.

When the new management group assumed broadcast control on April 29, 1965, they began making substantial changes in the station's program format, despite the fact that these changes were not indicated in the proposed program format as presented by the Seminary in the transfer application. In addition, one of the programs on which the Commission placed the greatest reliance in granting the application, *Interfaith Dialogue*, did not first appear on WXUR until November 28, 1965, some seven months after the Seminary assumed control of the station.[25] The Commis-

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[24] In re Applications of Brandywine-Main Line Radio, Inc. for renewal of licenses of Stations WXUR and WXUR-FM, Media, Pennsylvania, 9 P & F Radio Reg.2d 126 (1967) (hereinafter "Designation Order").

[25] With reference to *Interfaith Dialogue* the Commission made the following observation:

> Not only was the program not put on at all for almost seven months, but when it was, Brandywine patently failed to carry out the important promise to "make every effort" to get a varied participation. The moderator of the first broadcast was Norris himself. His guests were his pastor from York, Pennsylvania, the Reverend Albany, and George McDonald, a fellow trustee of the American Patriotic News organization. (Tr. 3635-3636.) From the second broadcast on December 5, 1965, through April 1966, the moderator was Seminary faculty member Dr. Gary Cohen. (Tr. 5480, 5596.) On the second (December 5, 1965) broadcast of Inter-faith Dialogue, Dr. Cohen interviewed William Broadwick, an engineer at WXUR and

sion enumerated a partial listing of programs which did appear in the early license period although not included in the Seminary's amended "Typical Program Schedule." On May 3, 1965, WXUR broadcast *Lifeline* and *Manion Forum; Behind the Headlines* on May 4, 1965; *Howard Kershner's Commentary* on May 5, 1965; *Independent Americans* on May 6, 1965; *The Dan Smoot Report* on May 7, 1965; *Church League of America* on May 8, 1965; and *Christian Crusade* on June 14, 1965.[26] In this regard, it is interesting to note

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a Seminary student. (WXUR Exh. 49A, Tr. 5514-5519.) Cohen interviewed Broadwick again on the third (December 12, 1965) broadcast. (*Ibid.*) On the fourth (December 19, 1965) broadcast, Cohen interviewed Donald Carpenter, another Seminary student (*Ibid.*), and on the fifth broadcast Cohen interviewed the Reverend A. Franklin Faucett, the Seminary's Registrar. (*Ibid.*) None of these broadcasts complied with the Seminary transfer application representation that the program would consist of "round-table" discussions by representatives of "different faiths." (Appendix D; Bur. Exh. 5.) From that time on, although not as completely taken up by Seminary people, the program clearly did not live up to its promise. The Examiner found it woefully inadequate, and we agree.

In Re Applications of Brandywine-Main Line Radio, Inc. for Renewal of Licenses of Stations WXUR and WXUR-FM, Media, Pennsylvania, 24 F.C.C.2d 18, 29 (1970) (hereinafter "July Decision").

[26] *Id.* at ¶ 30. The Commission continued by stating:

These programs, covering controversial issues as they do, are not merely changes in title from the programs deleted from the schedule, which mainly included programs classified as of the "entertainment" type. We may assume that the applicant failed to include these programs because of the opposition to its application, erroneously believing that the inclusions would have affected our action. *What is important to us is the willingness to withhold from us the Seminary's intentions with respect to a substantial amount of programming, for it is clear that the*

the admission by John H. Norris, the station's manager, that "as soon as the F.C.C. said that . . . [the Seminary] could take the Station over," he commenced making arrangements for broadcast of the above programs.[27] All of these programs shared one common characteristic: they were devoted almost solely to coverage and discussion of viewpoints on controversial issues of public importance. Personal attacks on the honesty, integrity and character of both groups and individuals were, unfortunately, not infrequent.[28]

Seven months after the Seminary commenced operation of WXUR, the station was the subject of public condemnation by the Media Borough Council [29] and the House of

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intention to carry the programs predated the acquisition of control and we were never informed of it.

Id. (emphasis added, footnote omitted).

[27] Tr. 3727-28. This is despite the directly contradictory evidence offered by Norris some five weeks earlier to the effect that the new programs, which he termed the "Nine Hate Clubs" of the air, were added by him *in anticipation* of a sponsors' boycott. This was not the only inconsistency in the record and is, in fact, one of the less serious discrepancies before us. July Decision, *supra*, at 31.

[28] *See generally* Initial Decision of Hearing Examiner, 24 F.C.C.2d 42, 106 (1970) (hereinafter "Initial Decision").

[29] The Minutes of a meeting held on November 18, 1965, of the Media Borough Council, reflect the following:

> Mrs. Austin protested to Council about a program on WXUR, which she feels promotes hate and dissension by attacking minority groups. This program is called "Freedom of Speech".
>
> She considers this a malicious act and a disgrace to the citizens of Media.
>
> Mr. Reed stated that a letter should be written to the Federal Communications Commission.
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> On motion of Mr. Baker, seconded by Mr. Loughran, a

Representatives of the Pennsylvania General Assembly.[30]

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letter be written to the F.C.C. about this allegedly biased program of radio station WXUR. So ordered.

J.A. Vol. II, 145e.

The program which caused this furor was entitled *Freedom of Speech*, moderated by Thomas Livezey. *Freedom of Speech* was a telephone call-in show where Livezey would begin the program by reading a newspaper article or an editorial or by making a short statement and then opening the microphones to people calling in. Livezey frequently made "race baiting" comments on the air and was particularly livid in his comments regarding minority groups. Livezey often cut callers off abruptly when they opposed a position which he espoused. On November 24, 1965, Howard F. Reed, Jr., Solicitor, Borough of Media, sent a communique to Commission Chairman Henry on behalf of the Borough Council. In this letter he expressed the concern of the Council with regard to *Freedom of Speech* and commented:

> Within the context of free speech, we do, . . . believe that any radio program inviting the general public to respond by telephone should receive *with equal treatment* all calls placed. We do believe that without some regulation by the Commission, this type of radio program, which is somewhat widespread in its use, can become deceptive, in fact tend to invite controversy unnecessarily, and derogate free speech; most of all, because any program of this type must necessarily involve controls and limitations not inherent in other media of communication, nor so open to public hearing.

J.A. Vol. II, 145f.

On November 19, 1965, one day after the Media Borough Council resolution was passed, Livezey was removed from his position as moderator of *Freedom of Speech*. At a meeting of the Council held on January 20, 1966, a motion was made, following a presentation by representatives of WXUR, stating that "a letter be sent to the F.C.C. stating that the objectionable features of [*Freedom of Speech*] have been largely eliminated." J.A. Vol. II, 145g. A letter to that effect was sent to the F.C.C. by Solicitor Reed on February 2, 1966. J.A. Vol. II, 145h.

[30] The matter of WXUR's broadcasting policy was brought

The Seminary's Broadcast Board attempted to soothe some of the ruffled nerves created by the *Freedom of Speech* program,[31] and continued its attempts at rehabilitating the station's image by introducing *Inter-Faith Dialogue,* promised in the January 1965 amendment to Brandywine's transfer application, on November 28, 1965.[32]

WXUR was required to file its renewal application by early May, 1966. They were sent the necessary "renewal packet" early in 1966 by the Commission. At this time WXUR was also continuing to receive more specific communications from the Commission relating to complaints it had received from individuals, community groups and local governmental bodies. The record discloses that WXUR made attempts at this time to once again enhance

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before the House of Representatives of the Pennsylvania General Assembly in the form of House Resolution 160 on December 14, 1965. In pertinent part the Resolution stated that

> [t]he only issue is whether the Reverend McIntire exercises the degree of social and public responsibility which the law demands of a broadcast licensee. There is a serious question whether Radio Station WXUR, under the operational control of Reverend McIntire, is giving the balanced presentation of opposing viewpoints required of broadcast licensees; therefore be it
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> RESOLVED, That the House of Representatives of the Commonwealth of Pennsylvania requests the Federal Communications Commission to investigate Radio Station WXUR, in Media, Pennsylvania to determine whether or not it is complying with the requirements of a broadcast licensee; and be it further
>
> RESOLVED, That a copy of this resolution be sent to the Federal Communications Commission.

J.A. Vol. II, 145a & b.

[31] *See* note 29, *supra.*

[32] J.A. Vol. II, 209.

its public image by attempting to produce several programs containing contrasting viewpoints on controversial issues of public importance. Each of these programs were carefully detailed in Brandywine's renewal application filed May 3, 1966.[33] That application would have, if granted, provided Brandywine a license for a three-year period from August 1, 1966, through July 31, 1969. Based on Brandywine's operating record from March 17, 1965, through the May 3, 1966, filing date, nineteen parties opposed the renewal application and urged the Commission to deny Brandywine's application.[34] This opposition was in the form of a joint pleading filed with the Commission on July 19, 1966.

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[33] J.A. Vol. II, 207-33.

[34] The challengers were the AFL-CIO of Pennsylvania, the American Baptist Convention Division of Evangelism, the Delaware Valley Council of the American Jewish Congress, the Anti-Defamation League of B'nai B'rith, the Board of Social Ministry of the Lutheran Synod of Eastern Pennsylvania, B'rith Sholom, the Catholic Community Relations Council, the Catholic Star Herald, the Fellowship Commission, the Greater Philadelphia Council of Churches, the Jewish Community Relations Council of Greater Philadelphia, the Jewish Labor Committee, the Media Fellowship House, the Media Chapter of the NAACP, the New Jersey Council of Churches, the Philadelphia Urban League, the U.S. Section of the Women's International League for Peace and Freedom, the American Jewish Committee, and the Rev. Donald G. Huston, Pastor, First Presbyterian Church of Lower Marion.

In addition, various persons and organizations, *viz.*, the Greater Philadelphia Branch of the American Civil Liberties Union, the House of Representatives of the General Assembly of Pennsylvania, the Unitarian Church of Delaware County, the Pennsylvania Council of Churches and the Media Borough Council, wrote the Commission "requesting an investigation of, or hearing on Brandywine's programming." July Decision, *supra*, at ¶ 1, fn. 3.

After considering the submissions of the parties the Commission found that substantial questions did exist as to

> whether the applicant has met the conditions set forth in the Commission's . . . [Transfer Order] . . . during its license period from April 29, 1965 to August 1, 1966; . . . whether the applicant fully and candidly advised the Commission of its program plans in connection with its [transfer] application . . .; the applicant's efforts to comply with the Commission's Fairness Doctrine, including the personal attack principle; and . . . whether the applicant has used the facilities of its stations to serve the sectarian and political views of its principals and to raise funds for their support rather than to serve the community generally, and whether this was misrepresented to the Commission in its application for acquisition of control of these stations. In the latter connection, the Commission notes the charges that the applicant has operated stations WXUR and WXUR-FM, as a divisive force in the community by disparaging racial and religious groups and by castigating and vilifying persons and groups espousing views on public controversial issues different from those of the applicant.[35]

The Commission adopted a number of issues for hearing of which four remain pertinent to these proceedings:

- To determine whether the applicant failed to inform the Commission fully of its program plans in connection with its application for acquisition of control of Stations WXUR and WXUR-FM;
- To determine whether the applicant has complied with the Fairness Doctrine and Section 315 of the Act by affording a reasonable opportunity for the discussion of conflicting views on issues of public importance during its license period;
- To determine whether during its license period the applicant has complied with the personal attack principle of the Fairness Doctrine by furnishing

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[35] Designation Order, *supra*, at ¶ 4.

> copies of pertinent tapes, continuities or summaries to persons or groups attacked, with specific offers of the stations' facilities for responses, where discussions of controversial public issues have involved personal attacks;
>
> • To determine whether the applicant in connection with its application for transfer of control of Stations WXUR and WXUR-FM misrepresented to the Commission its program plans.[36]

The Commission designated the WXUR renewal application for hearing stating that it was

> unable to determine that a grant of these renewal applications would serve the public interest, convenience, and necessity. In order to insure that a full record is made detailing all pertinent and relevant facts concerning the applicant's operations of stations WXUR and WXUR-FM and its representations concerning such application, an evidentiary hearing is required.[37]

E. *The Hearing*

Hearing Examiner H. Gifford Irion called the evidentiary hearing to order on October 2, 1967, in Media, Pennsylvania.[38] The hearings recessed for over three months on December 15, 1967, after the bulk of the Intervenor's and

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[36] *Id.*

[37] *Id.*

[38] The transcript reveals that WXUR undertook additional palliative measures on this date by introducing a new program entitled *Right, Left and Center* on its FM frequency. The program, which was designed to show left, right and middle-of-the-road philosophies, lasted only a short time. The Commission did not consider the program, nor will this court, since it did not commence for more than a year after the license renewal issue arose and was thus *totally* outside the license period. *See* J.A. Vol. V, 2529-32.

Broadcast Bureau's evidence had been submitted, to allow Brandywine to prepare its case. The Brandywine presentation began on March 20, 1968.[39] The record of the hearings

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[39] The court must comment on the conduct of Brandywine's counsel, Mr. Cottone, during the course of the hearing. We comment because his behavior, on more than one occasion during the course of the hearing, was injudicious, rude, impudent and directly obstructive to the proceedings before the examiner. The record before the court is replete with one instance after another of obstreperous behavior on Mr. Cottone's part. A few examples from the record will suffice.

BY MR. SCHATTENFIELD:

Q: I will show you what has been marked for identification as Intervenor's Exhibits 77 and 78 and ask you if they embody the positions you have taken with respect to UNICEF.

MR. COTTONE: Object. Let him identify them first. I object to the question.

MR. SCHATTENFIELD: Can I finish the question?

PRESIDING EXAMINER: Mr. Cottone, let him finish. We can move along faster if you stop the useless interruptions.

MR. COTTONE: I resent you stating "useless interruptions"; I have a right to raise evidentiary objections as I see fit. If you do not understand the objections, that is another point.

PRESIDING EXAMINER: I can't rule on them unless I know what the question is.

J.A. Vol. V, tr. 4383-84.

MR. COTTONE: Let the record show when that remark was made by the Hearing Examiner, there was a moan from the audience.

PRESIDING EXAMINER: I am trying to get along without these perpetual interruptions. The witness has been handling himself well in giving a lucid account of everything and a forthright account. Could we go forward with the questions and answers. I sustain the objection. Let us not go over the pamphlets again.

MR. COTTONE: Now may I look at them?

closed on June 26, 1968, after a compilation of a nearly 8,000 page record and several hundred exhibits.

F. *The Initial Decision*

Hearing Examiner Irion released his Initial Decision on December 13, 1968. This very lengthy examination of the case [40] was most thorough with regard to findings of fact, however, the high quality of fact finding led the examiner to only irrational conclusions and findings of law. Intervenors have termed this decision "a whitewash of Brandywine's performance as a licensee" [41]—this court must con-

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MR. SCHATTENFIELD: What?

MR. COTTONE: May I look at them now?

MR. SCHATTENFIELD: Are you implying I didn't give them to you before?

MR. COTTONE: No; I said, before, I didn't want to look at them, but now may I look at them?

J.A. Vol. V, tr. 4387-88.

MR. SCHATTENFIELD: Did you ever take any position with respect to the Panamanian Treaty?

MR. COTTONE: Pandemonium treaty?

MR. SCHATTENFIELD: I was not referring to you, Mr. Cottone.

MR. COTTONE: That is clever, but please tell me what you said.

J.A. Vol. V, tr. 4396.

Perhaps Mr. Cottone's actions can be explained as "performing" for the home-town crowd. However, the court will not mute itself to such popcorn and peanuts antics, designed to create a circus-like atmosphere, which would permeate the proceedings. The attitude displayed by counsel borders on the contemptuous and we therefore refuse to let it go unnoticed.

[40] The *Initial Decision* was 97 pages long. It contained 275 paragraphs of findings and 54 paragraphs of conclusions.

[41] Brief for Intervenors at 12.

cur in that assessment. Several examples will make this clear.

1. *Presentation of Contrasting Viewpoints on Controversial Issues.* Hearing Examiner Irion found that WXUR should be excused from complying with the fairness doctrine because of the small staff retained by the station. Secondly, he found that programming on WXUR was balanced by the programming of other licensees in the Philadelphia market. Both of these conclusions are clearly erroneous. The fairness doctrine applies to *all* licensees, while area wide programming is not a valid consideration in determining whether a licensee has complied with the fairness requirements. *See Green v. F.C.C.*[42]

2. *Personal Attack Violations.* The Examiner made numerous findings against WXUR for failure to comply with the personal attack principle of the fairness doctrine. However, his conclusions fail to recommend any sanctions for these numerous violations. It is not necessary for this court to prepare a line-by-line analysis and refutation of the Examiner's decision; nor would it be prudent for us to do so as the Commission has issued its own detailed opinion reversing the Examiner. Nonetheless we are sufficiently disturbed by the Examiner's final conclusion to pause for a moment to reflect and comment. Examiner Irion concluded by saying:

> Thus the decision must be shaped by ultimate objectives rather than by isolated instances of error. This will not be an invitation to carelessness or disregard

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[42] Green v. F.C.C., 144 U.S. App. D.C. 353, 447 F.2d 323 (1971), wherein this court stated: "that a licensee charged with violation of the Fairness Doctrine may [not] seek absolution by reference to compliance with it by other licensees." Through some stroke of the imagination Brandywine cites the *Green* decision to the court for exactly the opposite proposition.

> of the ethical principles involved in the personal attack rules since punishment by forfeiture will always await the transgressor but, in the unusual circumstances of this case, Draconian justice is inadvisable.[43]

It is clear to this court, as it was to the Commission, that the Examiner began his herculean opinion by determining both his conclusion and ultimate disposition of this case. Rather than suiting his conclusions to "let the punishment fit the crime", he chose to adopt a benevolent stance ill-suited to the facts in this case. The *Initial Decision* allows appearance to tyrannize over truth. The facts surrounding Brandywine's operation of WXUR are neither so pliant nor sufficiently malleable to allow for the conclusions of the Examiner.

The opinion did contain a number of findings adverse to Brandywine; however, the licensee failed to file exceptions as to any of these matters.[44] Both intervenors and the Broadcast Bureau of the Commission filed extensive exceptions.

G. *The Commission's Decision*

The Commission refused to adopt the Hearing Examiner's *Initial Opinion* and adopted its own opinion on July 7, 1970 in which it denied the licensee's application for re-

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[43] Initial Decision, *supra*, 24 F.C.C.2d at 139.

[44] Section 1.277 of the Commission's Rules and Regulations requires that exceptions be taken from adverse findings to preserve any objections on appeal.

> (a) Each exception to an initial decision or to any part of the record or proceeding in any case, including rulings upon motions or objections, shall point out with particularity alleged errors in the decision or ruling and shall contain specific references to the page or pages . . . on which the exception is based. *Any objection not saved by exception pursuant to this section is waived.* . . .

47 C.F.R. § 1.277(a) (1972) (emphasis supplied).

newal after an independent review of the record. In its review the Commission drew adverse conclusions with reference to Brandywine's compliance with the fairness doctrine,[45] compliance with the personal attack principle,[46] and also with reference to the manner in which Brandywine misrepresented its program plans to the Commission.[47] Let us examine the Commission's reasoning in each area separately.

1. *The Fairness Doctrine*

The fairness doctrine was, in the Commission's view, the central aspect of the litigation. The reason for this is axiomatic—prior to issuing Brandywine's initial license a tremendous amount of concern was expressed to the Commission by numerous parties, each fearing that WXUR would fail to comply with the doctrine. Brandywine's response to these fears was clear and apparently forthright—it had promised at the time of the transfer application to fully comply with the doctrine.[48] In point of fact, the decision of the Commission had "reiterated the necessity that a licensee serve the public interest by adherence to the Fairness Doctrine, including the personal attack principle." [49]

The Commission proceeded to review the record, including fifteen days of monitored broadcasts,[50] and concluded

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[45] July Decision, *supra*, at ¶¶ 8-14.

[46] *Id.* at ¶¶ 18-22.

[47] *Id.* at ¶¶ 23-32.

[48] *See* pp. 10-11, *supra*.

[49] July Decision, *supra*, at ¶ 8.

[50] After receiving a large number of complaints from listeners about alleged programming abuses, the Broadcast Bureau monitored broadcasts on WXUR for eight consecutive

"that Brandywine under its new ownership did not make reasonable efforts to comply with the Fairness Doctrine during the license period." [51] The Commission discovered, as a result of studying the submissions based on the monitored periods, that WXUR had failed to comply in a number of instances in which one side of an issue was broadcast

> during these periods without presenting any opposing viewpoints on any but one of these issues, and with an insignificant presentation on that issue, despite the fact that such controversial issue programming was a substantial part of WXUR's total programming.[52]

Additionally, the Commission found that WXUR had failed to affirmatively come forth with the requisite responsive evidence necessary to illustrate Brandywine's efforts to assure compliance with both the fairness doctrine and the personal attack principles, as promised in the initial transfer application. The Commission found that:

> Brandywine failed to establish any regular procedure for previewing, monitoring or reviewing its broadcasts, and thus did not regularly know what views were being presented on controversial issues of public importance. Despite the *prima facie* evidence presented by the other parties on this issue, Brandywine did not respond with any further review of its treatment of such controversial issues, either for the full license period or any smaller reasonable segment of time. Furthermore it made no showing of public announcements inviting the presentation of contrasting views at the times the issues in Appendix A (or others) were discussed, nor of any other adequate action to encourage the presentation of contrasting viewpoints on these issues. [53] Brandywine relies upon certain call-in

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days in the middle of the license period. The intervenors taped seven other consecutive days, also during the license period.

[51] July Decision, *supra*, at ¶ 9.

[52] *Id. See also* Appendix A to the July Decision, *supra*.

[53] We believe that remedial action subsequent to the time

> and interview programs as meeting its fairness obligations. However, our review of the record shows that these programs were inadequate to this purpose because they either were not directed at obtaining opposing views on the issues (*i.e.*, speakers were not secured or presented in connection with these issues), or were so conducted as to discourage the presentation of views not shared by their moderators.[54]

WXUR contended that Rev. McIntire had undertaken substantive efforts to assure compliance with the fairness doctrine. This submission took the form of letters which evidenced unaccepted invitations to appear on the *20th Century Reformation Hour*. The Commission rejected this would-be indicia of compliance since "these were not invitations by the licensee and, more important, they do not constitute adequate invitations to present contrasting views on the issues set forth in Appendix A."[55] Similarly, the Commission rejected the suggestion that the licensee's fairness obligations could be met by the existence of a daily one-hour call-in program, entitled *Freedom of Speech*, on which a listener could comment briefly on any topic he wished.[56] "On the contrary," the Commission stated, "its operation demonstrates a failure to provide a fair forum by a licensee specifically on notice of its responsibilities in the fairness area."[57] This was especially true since, from

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when Brandywine's renewal was put in doubt is not entitled to weight. See *Immaculate Conception Church of Los Angeles v. Federal Communications Commission*, 116 U.S.App.D.C. 73, 320 F.2d 795, *cert. denied*, 375 U.S. 904. (Footnote renumbered).

[54] July Decision, *supra*, at ¶ 10.

[55] July Decision, *supra*, at ¶ 11. *See* particularly fn.9 for the reasons that these invitations were viewed as being inadequate.

[56] *Id.*

[57] *Id.*

the inception of the program until the replacement of Thomas Livezey as moderator, after the adverse resolution of the Media Borough Council,[58] the program

> was conducted so as to discourage viewpoints with which [the moderator] disagreed. From the outset he both cut off and insulted callers who did not share his views. This conduct, for which Brandywine is of course responsible, is patently inconsistent with the requirement of fairness.[59]

Likewise, the Commission rejected two other daily programs as examples of efforts to provide the required balance. The first of these was *Delaware County Today*[60] on which the moderator dealt with those opposed to his views by "rough[ing them] up" and by "forc[ing them] to give their views in an antagonistic setting."[61] The second program on which WXUR sought to rely was *Radio Free Philadelphia*.[62] The commencement of this program was shortly after Brandywine filed its renewal application with the Commission and shortly prior to the filing of the petitions to deny. Therefore, the program had a very brief period of relevance to this proceeding.[63]

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[58] See p. 14, *supra*.

[59] July Decision, *supra*, at ¶ 11.

[60] A daily interview program which lasted from 30 to 45 minutes a day.

[61] July Decision, *supra*, at ¶ 12. The Commission specifically rejected the Examiner's contention that WXUR should be given credit toward balance for invitations extended on this program, but refused, by those fearing to be "roughed up." *Id.*

[62] This program commenced in May 1966 and appeared twice each week. Brandywine has failed, however, to indicate when relevant views were broadcast.

[63] The moderator of this program was of no significant assistance at the hearing. He was uncertain as to what matters

The Commission indicated that a detailed discussion of these programs and issues was necessary

> both because they are critical to resolution of the fairness issue in this case and because the Examiner neither tied his view that WXUR had put on all shades of the political spectrum to the station's treatment of particular controversial issues nor made a distinction between the pre- and post-renewal date programming. *We are not concerned with the social, political, or religious philosophy of the licensee or any person using its facilities.* Our interest is in the right of the public to a reasonable opportunity to hear contrasting views on controversial issues; whether this right has been accorded by the licensee can be determined only in the context of issues, not by generalized political labels. In the face of particular attention being drawn to the necessity for fairness at the time control of the station was transferred, the record shows no reasonable attempt to meet the station's obligations in this area. See *Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949).[64]

The Commission refused to give weight to the Examiner's conclusion that WXUR's small staff in some way exculpated the station for its failure to achieve balance in fairness.

> The objective of the Fairness Doctrine is to protect the listeners' right of access to information about all sides of controversial issues of public importance. No

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were discussed and when they had been under discussion. There was no identification by any other party as to the content, time, or relevance of material broadcast on this program. July Decision, *supra,* at ¶ 13.

[64] We also note that brief references to what someone had said (usually based upon a press report), used as the basis of an attack upon the statement (see, *e.g.*, Bureau Exh. 1-B, pp. 23-25), do not constitute a fair opportunity for the presentation of an opposing view.

Id. at ¶ 15 (footnote renumbered).

> showing has been made of inability to comply with fairness requirements because of financial limitations.[65]

The Commission was also unmoved by Brandywine's "alleged delegation of Fairness Doctrine responsibilities to the sponsors or producers of the programs it broadcast. (Tr. 7874-75)." [66]

> Fairness Doctrine responsibilities may not be delegated. *Editorializing by Broadcast Licensees,* 13 F.C.C. at 1248; see also *"Living Should Be Fun,"* 33 F.C.C. 101, 107(1962) . . . . [T]he ultimate responsibility for compliance with the Fairness Doctrine rests with the licensee. Norris [the General Manager] must have known this if he understood the Doctrine as thoroughly as he claimed. (See Tr. 1664-65 and 1880-82.) In any event, we have not found that any delegee adequately performed these functions.[67]

The Commission concluded its consideration of this topic by finding that Brandywine "was indifferent to its affirmative obligation 'to encourage and implement the broadcast of all sides of controversial public issues' (paragraph 9, *Editorializing by Broadcast Licensees,* 13 F.C.C. at 1251), and indeed it was hostile to such broadcasts." [68]

2. *Personal Attack Principle*

It was clear to the Commission, as it was to Examiner Irion, that WXUR "repeatedly violated the personal attack principle." [69] This was in spite of specific instructions from the Commission to Brandywine at the time that the initial transfer application was approved. This court need not recount these violations seriatim as the

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[65] *Id.* at ¶ 16.

[66] *Id.*

[67] *Id.*

[68] *Id.* at ¶ 17.

[69] *Id.* at ¶ 18.

Commission has already done so for us.[70] The Commission continued by noting that the Examiner had found additional attacks, as to which no exceptions were taken by Brandywine; however, the Commission found it unnecessary to "adopt all of the Examiner's findings in this respect," because recitation of "indisputable examples is sufficient." [71]

Subsequent to the attacks in issue in the case at bar the personal attack principle was codified into a formal rule.[72] Under the terms of the rule the Commission exempted bona-fide newscasts, bona-fide interviews, and on-the-spot coverage of bona-fide news events from the earlier reply requirements of the principle. Examination discloses that none of these exemptions prove applicable to the attacks broadcast by Brandywine and hence, "Brandywine was . . . obligated to comply with the personal attack principle in regard to each one of the personal attacks." [73] In each case the Commission found that Brandywine failed to give notice to the party attacked as required; they failed to send the required copies of transcripts, tapes or summaries; and similarly, they failed to offer an opportunity to reply to the aggrieved party as required. More dispositive, however, was the fact that:

> Brandywine had not established any procedures to insure compliance. (Tr. 1662-1670.) For example, Brandywine did not arrange to know either before

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[70] *See* Appendix B to the July Decision wherein the Commission enumerates the personal attacks made while discussing controversial public issues, *viz.*, the Vietnam War, issues relating to civil liberties, and issues relating to the loyalty of federal officials.

[71] July Decision, *supra*, at ¶ 19.

[72] Procedures in the Event of a Personal Attack, 12 F.C.C. 2d 250 (1968).

[73] July Decision, *supra*, at ¶ 20.

or at the time of broadcast whether a given broadcast contained any personal attacks. (*Ibid.*) Brandywine was therefore incapable of sending transcripts, tapes or summaries of the broadcasts to those attacked either prior to or at the time of the broadcast.[74]

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[74] *Id.*

This leads to one of the fundamental difficulties with this case, *i.e.*, Brandywine's apparent refusal to undertake the necessary steps to insure compliance in the personal attack area. We reprint the following transcript excerpt to exemplify this point. Mr. Schattenfield is examining Mr. Norris, the station manager.

Q. Do you have someone listen to the tape prior to its being run?

A. I mentioned previously that we don't censor the broadcast.

Q. I didn't say censor. I said listen.

A. That would be censoring.

* * * * * *

Q. You don't listen to each tape before it is broadcast as a standard, do you?

A. No, that is impossible. I am only one individual.

Q. Do you have procedures at the station so that somebody listens to the tapes?

A. On Pastor Bob and some of the local ones. I believe Pastor Bob is on only one station, WXUR. There are other broadcasters that are on just this station.

Q. But he doesn't have a tape?

A. He doesn't have a tape. It is done live.

Q. On those programs you receive on tape, is it a standard operating procedure for you or someone under your direction to listen to them?

A. Not standard, we take it like we would on a network.

Q. Is it standard procedure for you to have someone monitor it while they are on the air?

MR. COTTONE: That question has been asked and answered.

Again, the station's argument to the effect that its small staff excused it from performing in this area was unpersuasive. The Examiner was willing to excuse WXUR since those attacked often showed no concern; however, the principle was never geared at protecting persons from personal abuse, but rather "to enable the listening public to hear expositions of the various positions taken by responsible individuals and groups on important disputed issues." [75]

The Commission concluded that "Brandywine simply ignored its plain duty to the public" and that this conduct was "particularly reprehensible in light of the fact that

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PRESIDING EXAMINER: I don't believe that precise question was asked. If it was I don't remember.

THE WITNESS: While it is on the air we didn't say to the announcers or the person on the air, "You must listen to that." I believe most of our help do listen to the programs.

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Q. Is it standard operating procedure for the station to assign someone to listen to each program as it is broadcast, each taped program as it is broadcast over WXUR, to determine whether positions are taken with respect to controversial issues and/or whether statements have been made which may be construed as attacks on individuals or groups?

A. Not in every case.

Tr. 1699-1701.

Thus the record is clear. Norris openly admitted that he either was physically incapable of personally dealing with personal attack problems or that the station was incapable of dealing with them. In addition, and of greater moment to this proceeding, was Norris' attitude that attempts at compliance would be tantamount to censorship. This obstinate and obdurate approach is indicative of a schematic design to frustrate compliance in this critical area.

[75] July Decision, *supra*, at ¶ 21; 13 F.C.C. at 1249 and Red Lion Broadcasting Co., Inc. v. F.C.C., 395 U.S. 367 (1969).

the licensee had been cautioned at the outset concerning its duties in this area." [76]

3. *Representations as to Programming*

The Commission noted that an independent basis for denying the Brandywine renewal application was WXUR's utter failure to live up to its original representations concerning its program plans. The much-touted *Interfaith Forum*,[77] which was designed to promote open discussion concerning matters of modern-day religion, did not appear until November 28, 1965, ten days after the Media Borough Council's resolution, despite the fact that the program was promised specifically in Brandywine's January 25, 1965 transfer application amendment.[78] When *Interfaith Forum* did finally make its belated debut it did not fulfill its advertised purpose to "'make every effort' to get a varied participation." The show never took the form of the promised round-table discussion but was an interview show on which students or faculty of the Faith Theological Seminary simply interviewed fellow seminarians. Brandywine sought to explain this away by claiming that the Greater Philadelphia Council of Churches had deliberately boycotted the program; yet, there is no support for this proposition in the record.[79]

Brandywine's actual programming practices were far more objectionable than the singular failure of *Interfaith Forum* to appear. From the very inception of Brandywine's control of WXUR there was a marked deviation from the original programming representations made to

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[76] *Id.* at ¶ 22.

[77] For a description of this program see p. 6-7, *supra*.

[78] July Decision, *supra*, at ¶ 25.

[79] *Id.* at ¶¶ 26-28.

the Commission. Between April 29, 1965 and May 8, 1965 WXUR replaced a number of promised programs, mostly classified as "entertainment," with seven new programs.[80] The Commission found, and logic dictates that this court agree, that the plans for each of these programs predated the actual transfer. These changes must be viewed as substantial inasmuch as they differed significantly from those programs which they were replacing and were a departure from the general format promised in the Brandywine transfer application: *i.e.*, programming designed "for the purpose of broadcasting the Gospel of Our Lord and Savior Jesus Christ, for the defense of the Gospel and for the purposes set forth in the Seminary's Charter of Incorporation." [81]

The Commission refused to accept station manager Norris' representation that these new programs, for which sponsors allegedly purchased time from WXUR, were born of economic necessity in response to an alleged boycott on the part of commercial advertisers. Despite Brandywine's assertion that this action was in anticipation of the boycott, seven of the eight programs listed in footnote 80 were on the air between four and nine days after Brandywine's assumption of control.[82] Three of these programs were sponsored by an organization called the "American Patriotic News", which never paid any sponsorship fees to WXUR. As Norris was a trustee of the "American Patriotic News" and station manager of WXUR, it is safe to assume that he was aware that these

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[80] In order of appearance the new programs were entitled: *Lifeline; Manion Forum; Behind the Headlines; Howard Kershner's Commentary; Independent Americans; The Dan Smoot Report;* and *Church League of America.*

[81] J.A. Vol. II, 99.

[82] July Decision, *supra,* at ¶ 31.

three programs were generating no income. The Commission concluded that the Faith Theological Seminary

> [failed to apprise us] fully concerning program plans, and also a significant departure from an express representation concerning the fair treatment of all religious faiths [*sic*]. In view of the circumstances, these failures can not be laid to inadvertence. They must be considered a conscious course of conduct.[83]

The Commission closed its 23-page opinion by stating:

> We conclude upon an evaluation of all the relevant and material evidence contained in the hearing record, that renewals of the WXUR and WXUR-FM licenses should not be granted. The record demonstrates that Brandywine failed to provide reasonable opportunities for the presentation of contrasting views on controversial issues of public importance, that it ignored the personal attack principle of the Fairness Doctrine, that the applicant's representations as to the manner in which the station would be operated were not adhered to, that no adequate efforts were made to keep the station attuned to the community's or area's needs and interests, and that no showing has been made that it was, in fact, so attuned. *Any one of these violations would alone be sufficient to require denying the renewals here, and the violations are rendered even more serious by the fact that we carefully drew the Seminary's attention to a licensee's responsibilities before we approved transfer of the stations to its ownership and control.*[84]

On August 6, 1970 Brandywine filed a motion to reconsider with the Commission.

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[83] *Id.* at ¶ 32. The Commission also considered the attention Brandywine had given to community needs and interests. However, since this ground for denial was deleted in the Commission's opinion on reconsideration, we do not discuss those findings here. Interested parties are directed to ¶¶ 33-38 of the July Decision, *supra.*

[84] *Id.* at ¶ 39 (emphasis supplied).

H. *Commission's Opinion on Reconsideration*

The Commission released its Memorandum Opinion and Order [85] denying Brandywine's request for reconsideration on February 11, 1971. The central theme raised by Brandywine constituted an assertion that the Commission's July Decision extended the concept of the fairness doctrine to an unconstitutional brink in that the July Decision was predicated upon "a disapproval of the content of the programs on WXUR." The Commission commented:

> Our decision was based solely upon fairness concepts whose constitutional validity has been sustained by the Supreme Court in *Red Lion Broadcasting Co., Inc. v. F.C.C.*, 395 U.S. 367 (1969) and in no sense upon any Commission attitude toward the content of any view expressed over Brandywine's facilities.[86]

The Commission expressed the view that Brandywine's failure to meet the affirmative duty set forth in *Red Lion Broadcasting Co., Inc. v. F.C.C.*[87] to "offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on the station",[88] was not beyond the pale of constitutional reach by the Commission, merely by demonstrating the existence of offers of time during which the proponents of contrasting views were harassed. The Commission stressed that this was a matter of presentation and not one of content.

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[85] In Re Applications of Brandywine-Main Line Radio, Inc. For Renewal of Licenses of Stations WXUR and WXUR-FM, Media, Pa., 27 F.C.C.2d 565 (1971) (hereinafter the "February Decision").

[86] *Id.* at ¶ 4.

[87] 395 U.S. 367 (1969).

[88] 395 U.S. at 391.

> [W]e did not hold that . . . there was anything wrong *per se* in harassing conduct by a moderator, but only that Brandywine could not rely for its achievement of fairness upon a program where one side was singled out for harassment.[89]

The Commission proceeded to consider each of the issues which Brandywine raised and concluded by reaffirming the majority of its earlier views. Let us consider each issue separately as we did with regard to the *July Decision.*

1. *The Fairness Issue*

In its petition for reconsideration Brandywine in no way challenged the Commission's earlier finding that despite Brandywine's initial representation and despite the Commission's strong warning in the transfer decision, "Brandywine had taken no steps to encourage the presentation of contrasting views on several issues of public importance where it had presented one side on each of these issues." [90] Brandywine contended that it had broadcast material on certain news, interview, and call-in shows which, although never considered by the Commission, did satisfy the fairness doctrine requirements as to these issues. The Commission began by reminding the licensee

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[89] February Decision, *supra*, at ¶ 4, fn. 1. The Commission continued by stating:

> We do not agree with Brandywine that our finding that fairness could not be achieved in a one-sidedly hostile setting was unfairly considered in the absence of a "warning" ruling. We have recently enunciated the same position in another case, *Butte Broadcasting Co.*, 22 FCC2d 7 (1970), and we cannot accept the view that it is the sort of ruling which a licensee could not be expected to anticipate in the absence of a prior precedent.

Id.

[90] *Id.* at ¶ 5.

that its affirmative duties in the fairness arena would not be satisfied

> by leaving the expression of contrasting views to such happenstance as the remarks of an unknown person on a call-in program, or to the possibility that a pertinent question will be asked on a general interview program unannounced as dealing with any particular issue and not presenting a guest selected as a responsible spokesman of a contrasting view.[91]

The Commission did not stop at this juncture but rather continued on to re-examine the material cited by petitioners and determined that this material was not "an expression of conflicting viewpoints in a reasonable ratio which might make a denial of renewal inappropriate."[92] The Commission commenced with an evidentiary point—the affirmative cases presented by the intervenors and the Broadcast Bureau, based on the two weeks of monitored programming, placed an evidentiary burden on Brandywine which could not be satisfied merely by demonstrating "some instances of the expression of opposing views in other time periods without also taking account of any further expression of the original views in such other time periods."[93] Brandywine failed to produce any evidence concerning what was broadcast during the periods they cited to the Commission except for those specific matters on which Brandywine relied. The Commission went on to say:

> In the face of the *prima facie* showing that its treatment of certain issues was unfair, Brandywine clearly was required to show how it encouraged the presentation of opposing views, or at least that the presentation of such views constituted a reasonable

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[91] *Id.* at ¶ 6.

[92] *Id.*

[93] *Id.* at ¶ 7.

> proportion to the time devoted to the issues, either throughout the license period or, at the minimum, during some other representative period of time. . . . Therefore, we adhere to our conclusion that Brandywine failed not only to seek some balance of opposing views but to carry opposing views in any fair ratio.[94]

Brandywine attempted to have the Commission exclude certain broadcast statements by Dr. McIntire since they were "religious."[95] The decision on which this attempt was founded was without relevance. The *Murray Letter*, on which Brandywine sought to rely, only held that devotional services were not a controversial issue within the scope and meaning of the fairness doctrine; but "[t]he fairness doctrine extends to all expressions of views on controversial issues of public importance, whether or not they may be deemed religious views by some persons."[96] This holding, the Commission stated, "is no more an abridgement of freedom of religion than of freedom of speech, an issue already decided by the Supreme Court in *Red Lion Broadcasting Co., supra.*"[97]

Brandywine charged that the Commission had neglected to consider various invitations to certain spokesmen. The Commission replied by commenting that "Brandywine mistakes our disagreement with its arguments for failure to consider them."[98] The Commission once again detailed its reasons for finding the Brandywine invitations inade-

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[94] *Id.*

[95] Brandywine sought to base this argument, which the Commission rejected, on Madalyn Murray, 40 F.C.C. 647 (1965).

[96] February Decision, *supra*, at ¶ 11.

[97] *Id.*

[98] *Id.* at ¶ 12.

quate. It also discounted McIntire's sundry invitations since they did not emanate from the licensee as the law requires. The Commission noted that its action was based primarily on the inadequacy of the various offers and once again spoke to Brandywine's practice of delegating its responsibilities under the fairness doctrine:

> Certainly if Dr. McIntire had made adequate invitations corresponding to the issues and had succeeded in getting spokesmen with opposing viewpoints to speak on his program, Brandywine would have been able to rely upon this success in complying with the fairness doctrine. However, the converse does not obtain. Brandywine cannot absolve itself from failure to comply by merely pointing to Dr. McIntire's abortive efforts. Dr. McIntire's inadequate invitations and failure to get acceptances do not discharge Brandywine from its fairness duties. As we stated in the decision, "the ultimate responsibility of compliance with the fairness doctrine rests with the licensee." [99]

On the positive side of the scale, the Commission decided that based on materials broadcast outside of the monitored weeks that WXUR "should be given the benefit of the doubt" [100] with regard to its coverage of the Vietnam War issue. However, the Commission found that with reference to issues relating to federal administration policy and activities, civil rights and liberties, United States foreign relations, the proposed New Jersey group

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[99] *Id.* at ¶ 13. The Commission, in response to an allegation that the same reasoning applies to networks, stated:

> [I]f the network presents both sides of a controversial issue, the affiliates which carry these broadcasts are not obligated to do more; but if the network fails to present opposing views, the affiliate is not thereby excused from its obligation to do so.

Id.

[100] *Id.* at ¶ 7, fn. 6.

defamation law, major news media, and loyalty of federal officials, that the citations submitted by Brandywine were either inadequate, inaccurate, lacking or insufficient in light of the balance of one-sided broadcast presentation.[101]

2. *Personal Attack Principle*

Brandywine attempted to escape the evidentiary burden placed on it by the Commission by claiming that the standards imposed by the Commission were too vague. The Commission dealt with this allegation by stating:

> Brandywine contends that our judgment that it carried personal attacks without notifying the persons attacked of their right to respond is without evidentiary support and that we have no clear definition of "honesty, character, integrity or like personal qualities" against which to measure Brandywine's actions. However, the Supreme Court has sustained the rules against the charge of vagueness in *Red Lion Broadcasting Co., supra,* and we think that the attacks made over WXUR (see Appendix B of our decision) were such that no reasonable doubt exists as to their proper characterization. Brandywine further charges that we have not explained why the attacks were not made during exempt news broadcasts. Putting aside the fact that Brandywine does not in fact assert that the attacks were made during bona fide news programs—something it should do if it believes we were in error—we think it plain that they were not. Brandywine did not introduce these programs when they were broadcast as newscasts and they consisted entirely of comments not commonly considered to be news reporting.[102]

In addition, the Commission rejected Brandywine's argument that an adverse finding with respect to the per-

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[101] *Id.*

[102] *Id.* at ¶ 14.

sonal attack principle was inconsistent with other Commission rulings in this area.[103] The Commission also ruled that a 1969 finding by its Broadcast Bureau was not inconsistent with its ruling concerning certain remarks, not at issue in the case, broadcast by Brandywine. The Commission held the 1969 staff decision to be correct.

> In any event, what is important here is not whether there may be a reasonable doubt as to the correctness of the staff ruling in another situation, but rather whether there was such a doubt about the comments . . . in this case. We do not believe that Brandywine could have had such a doubt; nevertheless, it failed to follow the requirements of the rules.[104]

The final contention in this area, which the Commission also rejected, was that the Commission's decision constituted an unconstitutional *ex post facto* approach to the July, 1967 personal attack rules. The reason that the Commission rejected this contention was that the rules codified precepts which were already in effect and which Brandywine had specifically been made aware of by the Commission's transfer order.[105]

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[103] Brandywine sought to draw an analogy to the case of In re Complaint by Mrs. Dorothy Healey, 24 F.C.C.2d 487 (1970) which involved an exemption for a bona fide newscast or to the case of Station WAVA, 14 P & F Radio Reg.2d 180 (1968) wherein the Commission held there was no attack upon

> "honesty, integrity, character, or like personal qualities" to say: "as the field is now drawn, only Hubert Humphrey, a product of New Deal thinking, and Richard Nixon, a product of the Eisenhower years, probably are incapable of establishing any meaningful liaison with this generation."

February Decision, *supra*, at ¶ 15.

[104] *Id.* at ¶ 16.

[105] *Id.* at ¶ 17.

3. *Representations Concerning Program Plans*

Once again, the Commission stressed that its concern was not with title changes being made to the program schedule but to Brandywine's "willingness to withhold [its] intentions with respect to a substantial amount of programming." [106] The action taken against Brandywine had nothing to do with program content; it was aimed against WXUR solely because of its failure to "candidly advise us and the public of its intentions." [107] The Commission determined that its concern was not based on WXUR's motive but rather its conduct.

> "The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones." *F.C.C. v. WOKO, Inc.*, 329 U.S. 223, 227 (1946). [108]

The Commission concluded the *February Decision* by deleting its adverse findings in the *July Decision* as to the issue of ascertainment of community needs [109] and found,

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[106] *Id.* at ¶ 18.

[107] *Id.* at ¶¶ 18-19.

[108] *Id.* at ¶ 18.

[109] *Id. at* ¶¶ 20-27. In his statement concurring in part and dissenting in part, Commissioner Nicholas Johnson dissented from this finding. He stated:

> There is little question in my mind that Brandywine has failed, and failed dismally, in its duty under the standards set out above to ascertain its community's needs for broadcast service.

He continued:

> In sum, I see no good reason in this case to suddenly retreat from our earlier more sensible analysis of the Fairness and Ascertainment issues—even given the fact

still again, "that Brandywine is not entitled to renewal of licenses of WXUR and WXUR-FM." [110]

Brandywine has taken the instant appeal from these findings.

II. The Fairness Doctrine

The requirements of the fairness doctrine are by no means regulations of recent advent. Not only is the concept of the doctrine an established historical fact in the broadcast industry but the doctrine itself has been little changed over the years. The purpose of the doctrine is to assure that when controversial issues of public importance are aired on radio and television frequencies that fair coverage be given to both sides of issues presented. The doctrine is a "common law development" which has evolved from a long line of rulings by the Commission on a case by case basis. As Justice White pointed out in *Red Lion*, the doctrine "is distinct from the statutory requirement of § 315 of the Communications Act [111] that

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that we could still revoke the WXUR licenses on other well-founded grounds.

February Decision, *supra*, 27 F.C.C.2d at 579 (Johnson, concurring in part, dissenting in part).

[110] *Id.* at ¶ 27.

[111] Communications Act of 1934, Tit. III, 48 Stat. 1081, as amended, 47 U.S.C. § 301 *et seq.* Section 315 now reads:

315. Candidates for public office; facilities; rules

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station

equal time be allotted all qualified candidates for public office." [112] In 1967 the Commission codified two corollaries of the doctrine—the personal attack doctrine and the rules relating to political editorializing.[113]

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by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Red Lion Broadcasting Co., Inc. v. F.C.C., *supra*, 395 U.S. at 370 (footnote renumbered).

[112] *Id.*, 395 U.S. at 369-70.

[113] Shortly after the original *Red Lion* litigation commenced the Commission published its Notice of Proposed Rule Making, 31 Fed. Reg. 5710, in which it sought to make its personal attack doctrine more precise and more readily enforceable. In addition, the Commission sought to clarify the rules relating to political editorializing by licensees. These rules were

The Supreme Court's opinion in *Red Lion* went to great lengths at setting out the history of the birth of the fair-

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adopted, 32 Fed. Reg. 10303, and have been amended several times. They currently read as follows:

¶ 73.123 Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (b) (3), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (b) (2), above. See, section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 F.R. 10415. The categories listed in (b) (3) are the same as those specified in section 315(a) of the Act.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates,

ness doctrine and its related regulations. We shall review that material here because of its critical importance to the case at bar.

The government was not always engaged in the regulation of broadcast frequencies. In fact, it was only out of dire necessity and sheer confusion, accompanied by utter chaos, that the government entered into a role of broadcast regulation.[114] Indeed, it was not until 1927 that

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the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.
[32 F.R. 10305, July 13, 1967, as amended at 33 F.R. 5364, Apr. 4, 1968]

47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1972).

[114] Because of this chaos, a series of National Radio Conferences was held between 1922 and 1925, at which it was resolved that regulation of the radio spectrum by the Federal Government was essential and that regulatory power should be utilized to ensure that allocation of this limited resource would be made only to those who would serve the public interest. The 1923 Conference expressed the opinion that the Radio Communications Act of 1912, 37 Stat. 302, conferred upon the Secretary of Commerce the power to regulate frequencies and hours of operation, but when Secretary Hoover sought to implement this claimed power by penalizing the Zenith Radio Corporation for operating on an unauthorized frequency, the 1912 Act was held not to permit enforcement. *United States*

responsibility for the assignment and allocation of radio frequencies was assumed by the government.

> It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard.[115] Consequently, the Federal Radio Commis-

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v. Zenith Radio Corporation, 12 F.2d 614 (D.C.N.D. Ill. 1926). Cf. *Hoover v. Intercity Radio Co.*, 52 App. D.C. 339, 286 F. 1003 (1923) (Secretary had no power to deny licenses, but was empowered to assign frequencies). An opinion issued by the Attorney General at Hoover's request confirmed the impotence of the Secretary under the 1912 Act. 35 Op. Atty. Gen. 126 (1926). Hoover thereafter appealed to the radio industry to regulate itself, but his appeal went largely unheeded. See generally L. Schmeckebier, The Federal Radio Commission 1-14 (1932).

Red Lion Broadcasting v. F.C.C., *supra*, 395 U.S. at 375-76, fn. 4.

[115] Congressman White, a sponsor of the bill enacted as the Radio Act of 1927, commented upon the need for new legislation:

"We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual. . . . The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting

sion was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity." [116]

The Court continued:

> Very shortly thereafter the Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies . . . to all discussions of issues of importance to the public." *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32, 33 (1929), rev'd on other grounds, 59 App. D. C. 197, 37 F.2d 993, cert. dismissed, 281 U. S. 706 (1930). This doctrine was applied through denial of license renewals or construction permits, both by the FRC, *Trinity Methodist Church, South* v. *FRC*, 61 App. D. C. 311, 62 F. 2d 850 (1932), cert. denied, 288 U. S. 599 (1933), and its successor FCC, *Young People's Association for the Propagation of the Gospel*, 6 F. C. C. 178 (1938). After an extended period during which the licensee was obliged not only to cover and to cover fairly the views of others, but also to refrain from expressing his own personal views, *Mayflower Broadcasting Corp.*, 8 F. C. C. 333 (1940), the latter limitation on the licensee was abandoned and the doctrine developed into its present form.
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> There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949). The broadcaster must give adequate coverage to public issues, *United Broadcasting Co.*, 10 F. C. C. 515 (1945), and coverage must be fair in that it accurately reflects the opposing views. *New Broadcasting Co.*, 6 P & F Radio Reg. 258 (1950). This

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privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479.

395 U.S. at 376, fn. 5 (footnote renumbered).

[116] Radio Act of 1927, § 4, 44 Stat. 1163. See generally Davis, The Radio Act of 1927, 13 Va. L. Rev. 611 (1927).

395 U.S. at 377, fn. 6 (footnote renumbered).

must be done at the broadcaster's own expense if sponsorship is unavailable. *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963). Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); see *Metropolitan Broadcasting Corp.*, 19 P & F Radio Reg. 602 (1960); *The Evening News Assn.*, 6 P & F Radio Reg. 283 (1950). The Federal Radio Commission had imposed these two basic duties on broadcasters since the outset, *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32 (1929), rev'd on other grounds, 59 App. D. C. 197, 37 F.2d 993, cert. dismissed, 281 U. S. 706 (1930); *Chicago Federation of Labor* v. *FRC*, 3 F. R. C. Ann. Rep. 36 (1929), aff'd, 59 App. D. C. 333, 41 F. 2d 422 (1930); *KFKB Broadcasting Assn.* v. *FRC*, 60 App. D. C. 79, 47 F. 2d 670 (1931), and in particular respects the personal attack rules and regulations at issue here have spelled them out in greater detail.[117]

Having laid the necessary historical predicate we can turn our attention to the law of the fairness doctrine.

The need for radio regulation has not seriously been questioned in over fifty years. As much as our historical study shows a need for this regulation, there has been a concomitant need for a fairness doctrine. America has turned away from its town meeting and processes of rural decision making. This is the electronic age—an age in which communications systems relay information to an eager public in fractions of milli-seconds. Information has become the stock and trade of our informed public. So too has our method of getting information changed in the last half century. We are shifting our emphasis from the printed media to the electronic media. Radio and television consume massive portions of America's time. Because of this we must assure that the public be given

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[117] 395 U.S. at 377-78.

access to varied information so that they may remain an intelligent and viable group—free to choose from the options available to them—free to make a choice. In a recent appearance before the Senate Subcommittee on Communications, Nicholas Johnson, a Commissioner of the F.C.C., expressed the need of the American people for which the Commission has undertaken to provide. This parable states the problems involved so succinctly that we reprint it in full:

> Once upon a time there was a nation great in ideals and industrialization. It had businesses everywhere —and unsurpassed military might. Yet its greatest strength lay in its ideological foundation. This nation professed to be governed by the consent of its citizens. To ensure the successful functioning of this unique experiment in government, free education, libraries and full information were provided to all, so that this nation's two-hundred million governors, through wide-open debate, might govern themselves wisely. But as the years slipped by, the people spent more and more of their time in their air conditioned homes watching television, and less and less time listening to speakers in the public parks, attending town meetings, and reading handbills on the streets. Meanwhile, the number and importance of crucial issues were growing, and the need for well informed governors became paramount. Thus it was the great debate about the great debate began.
>
> Everyone had his own theory of how to reverse this trend and return the democratic dialogue to the people, who were all at home watching their television sets. Some advocated letters, petitions, press conferences and picketing, but they had little success. Attention shifted to those who advocated bombing, burning, shooting and looting, because before and after the televising of such activities it was usually possible to present a short message, however distorted, concerning the merits of the controversy that generated such outrageous conduct. Then a third group came along. It said, "Let us simply go

> to the broadcasters peacefully, ask them for the time to present our concerns—we will even pay them." But the broadcasters politely explained that there was no time available for the discussion of public issues—such as war, life and politics—because the time all had to be used for programs and announcements necessary to the very difficult but essential task of inducing consumers to buy useless, joyless, and sometimes harmful products. Yet these patient and patriotic students, businessmen, and Senators were not deterred. They continued to preach the doctrine of "working within the system." "The Government," they said, "will treat us fairly. There is reason and justice in our land. Surely a democratic people need not be violent to be heard." And so it was that they came to the Federal Communications Commission . . . .[118]

In the past months this court, and several other circuit courts, have examined the fairness doctrine on several occasions, sometimes at great lengths.[119] It is clear to this court, therefore, that what we are about to state, with reference to the law in this area, is merely repetitive of our prior efforts. Nothing which we state here is new; however, it is our hope that through our efforts we will be able to instruct appellants as to the proper standard of

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[118] *Hearings on S.J.Res. 209 before the Subcom. on Communications of the Senate Committee on Commerce,* 91st Cong., 2d Sess. 155 (1970) (Statement of Commissioner Nicholas Johnson).

[119] *See, e.g.,* M. Goldseker Real Estate Co. v. F.C.C., 456 F.2d 919 (4th Cir. 1972); Dorothy Healey v. F.C.C., No. 24,630 (D.C.Cir. March 3, 1972); Democratic National Committee v. F.C.C., No. 71-1637 (D.C. Cir. February 2, 1972); Columbia Broadcasting System, Inc. v. F.C.C., —— U.S. App. D.C. ——, 454 F.2d 1018 (1971); Larus & Brother Company v. F.C.C., 447 F.2d 876 (4th Cir. 1971); Green v. F.C.C., 144 U.S. App. D.C. 353, 447 F.2d 323 (1971); Neckritz v. F.C.C., 446 F.2d 501 (9th Cir. 1971).

the law and that we will allay any lingering doubts that appellants may have as to our consideration of the pertinent authorities.

The Commission's most recent elaboration on the fairness doctrine came following the *Red Lion* decision. In *In the Matter of Obligations of Broadcast Licensees Under the Fairness Doctrine*[120] the Commission posited:

> The fairness doctrine was evolved as a policy under the public interest standard in a series of cases, given its definitive policy statement in the Commission's 1949 *Editorializing Report* (13 F.C.C. 1246), and codified into the Communications Act of 1959. See section 315(a) 47 U.S.C. 315(a); *Red Lion Broadcasting Company, Inc. v. Federal Communications Commission, supra.* It requires the broadcast licensee to afford reasonable opportunity for the discussion of conflicting viewpoints on controversial issues of public importance. The Commission early determined that if the fairness doctrine were to achieve its most salutary purpose, an affirmative obligation in this respect must be imposed upon the licensee . . . .
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> * * * *
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> The Commission's general approach to this facet of the fairness doctrine is set forth in a 1964 ruling, *Letter to Mid-Florida Television Corporation,* 40 F.C.C. 620, 621 (1964):
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> > . . . The Commission does not seek to establish a rigid formula for compliance with the fairness doctrine. The mechanics of achieving fairness will necessarily vary with the circumstances, and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a

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[120] 23 F.C.C.2d 27 (1970).

> variety of methods, and often combinations of various methods . . . .[121]

This court made it clear in *Democratic National Committee v. F.C.C.* that "[t]he importance of the fairness doctrine is neither academic nor is it an administrative nicety. As the Commission stated: 'The keystone of the fairness doctrine and of the public interest is the right of the public to be informed—to have presented to it the 'conflicting views of issues of public importance'.'"[122] The proposition of the fairness doctrine is easy to understand, and to accept, when one considers that because of the finite number of broadcast frequencies available "they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public interest and has assumed the obligation of presenting important public questions fairly and without bias."[123] Because of the evident importance of the doctrine "it is the manifest intention of the Commission to maintain it as a viable instrument in protecting the right of the public to be fully informed on controversial issues."[124]

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[121] *Id.*, 23 F.C.C.2d at 28.

[122] *Supra*, slip op. at 15-16, *citing* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10416, 10418, 40 F.C.C. 598, 604 (1964). *See also* Letter to Cullman Broadcasting Co., 40 F.C.C. 576 (1963).

[123] S.REP.NO. 562, 86th Cong., 1st Sess. 9 (1959).

[124] On June 9, 1971 the Commission adopted a Notice of Inquiry *In the Matter of The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 30 F.C.C.2d 26 (1971). In the words of the Commission:

> The purpose of this Notice is to institute a broad-ranging inquiry into the efficacy of the fairness doctrine and other Commission public interest policies, in light of current demands for access to the broad-

The fairness doctrine is not subject to a formulistic application. Meeting the obligations can only be achieved by seeking out balance in broadcast coverage. Precise mathematic equality is neither required nor desirable. The cornerstone of the doctrine is good faith and licensee discretion.

> [T]he licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming.[125]

This is an area in which the Commission has exercised a substantial degree of restraint.

> In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above program-

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> cast media to consider issues of public concern. It is important to stress that we are not hereby disparaging any of the *ad hoc* rulings that we have made in these areas. Rather, we feel the time has come for an overview to determine whether the policies derived largely from these rulings should be retained intact or, in lesser or greater degree, modified. . . . Interested parties may address [any aspect of the problem.]
>
> Thus, it is clear that the Commission is seeking to maintain the efficacy of the doctrine while guaranteeing adequate access to the public on controversial issues. It is encouraging to note that the Commission has sought widespread in-put in formulating its thinking in this crucially important area.

Democratic National Committee v. F.C.C., *supra*, slip op. at 16 (footnote renumbered).

[125] Applicability of the Fairness Doctrine, *supra*, 29 Fed. Reg. at 10416, 40 F.C.C. at 599.

> ming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the "equal opportunities" requirement.[126]

Licensees seeking to meet the requirements imposed by the doctrine must be mindful of Congressional intent. It was never intended by either Congress, or the Commission, that the doctrine work toward suppression of the discussion of controversial issues. To the contrary the intent of the drafters was to "[require] the discussion of conflicting views on issues of public importance." [127]

The Supreme Court spelled out the duties of the licensee in the clearest possible terms in *Red Lion.*

> The broadcaster must give adequate coverage to public issues, . . . and coverage must be fair in that it accurately reflects the opposing views. . . . This must be done at the broadcaster's own expense if sponsor-

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[126] *Id.* This same general theme was espoused by the Commission much earlier in Editorializing by Broadcast Licensee, 13 F.C.C. 1246 (1949):

> It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced representation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesman for each point of view.

Id. at 1251.

[127] Loevinger, *Free Speech, Fairness and Fiduciary Duty in Broadcasting,* 34 LAW AND CONTEMP. PROB. 278, 285 (1969).

> ship is unavailable. . . . Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source.[128]

Let us pause for a moment to reflect on the *Red Lion* litigation. The case arose out of an alleged breach of the personal attack doctrine. The attack came in the form of an opinionated broadcast by Rev. Billy Hargis, who also frequently broadcast on WXUR. Red Lion, which was managed by John H. Norris, the station manager of WXUR, failed to meet the requirements of the Commission which a licensee must follow in the event of a personal attack. These requirements, which are set out in *Times-Mirror Broadcasting Co.*,[129] call upon the licensee to send a tape, transcript or summary of the broadcast containing the attack to the wronged party. The licensee is required to offer the aggrieved party an opportunity to respond and must see that this opportunity be made without regard as to whether the response time will be paid for. In the opinion of this court in *Red Lion*[130] we went to great lengths to set out all of the correspondence between the Commission and Norris. Our account runs on for pages. Yet despite all of the instruction received by Norris he remained incapable of, or unwilling to, comply with the requirements in either *Red Lion* or the case currently under consideration.

The recent cases in our jurisdiction are more than adequate in setting out the current state of the law. In *Green v. F.C.C.*,[131] a case involving requests for time to oppose military enlistment on the air waves,

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[128] Red Lion, *supra*, 395 U.S. at 377-78.

[129] 24 P & F Radio Reg. 404 (1962).

[130] 127 U.S.App.D.C. 129, 381 F.2d 908 (1967).

[131] *Supra*, note 119.

Judge Wilkey wrote that the doctrine did not require identical treatment for differing viewpoints of controversial issues, "as this would place an onerous and impractical burden on the licensees." *Green v. F.C.C., supra,* —— U.S.App.D.C. at ——, 447 F.2d at 328. In addition we made it clear that unlike those corrollaries to the doctrine that create equal-opportunities situations the doctrine itself does not create a right for any person or group to be granted time. "[T]he licensees may exercise their judgment as to what material is presented and by whom. . . . The fairness doctrine is issue-oriented, and it would be sufficient if each licensee could show that the point of view advocated by petitioner . . . had been or was being presented on its station by others." *Id.* In our opinion in *Business Executives' Move for Vietnam Peace v. F.C.C., supra,* we held that "[u]nder the permissive 'reasonableness' standard of the fairness doctrine, acceptance of [a] particular format is by no means compulsory." *Id.,* slip op. at 8. Thus, in opinion after opinion, the Commission and the courts have stressed the wide degree of discretion available under the fairness doctrine and we have clearly stated time after time, *ad infinitum ad nauseam,* that the key to the doctrine is no mystical formula but rather the exercise of reasonable standards by the licensee. *See also Neckritz v. F.C.C.,* 446 F.2d 501, 502 (9th Cir. 1971).[132]

We reiterate—all that is required is balance; equal opportunities, except as specifically provided in § 315, are not required. We believe that imposing an absolute equal time standard for controversial issues would work to the detriment of the established intent of Congress and the Commission. As the Commission has previously noted:

We have long stressed the different manner in which

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[132] Democratic National Committee, *supra,* slip op. at 22.

the "equal opportunities" and fairness requirements of Section 315 operate. The former is applicable only to uses of station facilities by candidates for public office and calls for *equal* treatment—as to the amount of time to be afforded, the nature of the time slot, etc. It thus works with virtually mathematical precision.[133]

The Commission continued:

In 1959 Congress codified the fairness doctrine, by in-

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[133] Committee for the Fair Broadcasting of Controversial Issues, 25 F.C.C.2d 283, 291 (1970) (emphasis in the original). In Committee for Fair Broadcasting, *supra*, 25 F.C.C.2d at 292, the Commission explained its reasons for supporting the doctrine:

> We do not believe that any extended discussion is needed as to why the licensee is afforded so much discretion under the fairness doctrine. In our judgment, based on decades of experience in this field, this is the only sound way to proceed as a general policy. A contrary approach of equal opportunities, applying to controversial issues generally the specific equal opportunities requirements for political candidates would in practice not be workable. It would inhibit, rather than promote, the discussion and presentation of controversial issues in the various broadcast program formats (e.g., newscasts; interviews, documentaries). For it is just not practicable to require equality with respect to the large number of issues dealt with in a great variety of programs on a daily and continuing basis. Further, it would involve this Commission much too deeply in broadcast journalism; we would indeed become virtually a part of the broadcasting "fourth estate," overseeing thousands of complaints that some issue had not been given "equal treatment." We do not believe that the profound national commitment to the principle that debate on public issues should be "uninhibited, robust, wide-open" (*New York Times Co. v. Sullivan*, 376 U.S. 254, 270) would be promoted by a general policy of requiring equal treatment on all such issues, with governmental intervention to insure such mathematical equality.

(Footnote omitted.)

> serting the provision in Section 315(a) that broadcast licensees "must operate in the public interest and . . . afford reasonable opportunity for the discussion of conflicting views on controversial issues of public importance." The conference report makes clear that this was a Congressional "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934" (H.Rep. No. 1069, 86th Cong., 1st Sess., p.5 (1959)). . . . And, finally, the Supreme Court's opinion in *Red Lion* significantly recognizes the *Editorializing Report* as the statement of the basic principles embodied in the fairness doctrine. *See Red Lion supra,* at pp. 384-386.[134]

The ultimate test in this area is reasonableness. "The critical issue is whether the sum total of the licensee's efforts, taking into account his plans when the issue is a continuing one can be said to constitute a reasonable opportunity to inform the public on the contrasting viewpoint—one that is fair in the circumstances." [135]

As the Fourth Circuit pointed out recently, the first line for deciding fairness cases is the good faith of the licensee.[136] It is, therefore, here that we must begin our analysis.

The record of Brandywine-Main Line Radio is bleak in the area of good faith. At best, Brandywine's record is indicative of a lack of regard for fairness principles; at worst, it shows an utter disdain for Commission rulings and ignores its own responsibilities as a broadcaster and its representations to the Commission. At the very outset Brandywine was informed by the Commission, in the *Borst*

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[134] *Id.* at 293 (emphasis in original). *See generally* 67 CONG. REC. 12502-04.

[135] *Id.* at 295.

[136] Larus & Brother Company v. F.C.C., *supra,* 447 F.2d at 879.

Decision, of the obligations of the licensee under both the fairness doctrine and the personal attack principle. This action was made necessary in the first instance because of the fear of so many in the community. It is apparent now that this fear was warranted and well founded. During the entire license period Brandywine willfully chose to disregard Commission mandate. With more brazen bravado than brains, Brandywine went on an independent frolic broadcasting what it chose, in any terms it chose, abusing those who dared differ with its viewpoints. This record is replete with example after example of one sided presentation on issues of controversial importance to the public. It is not necessary for this court to recount these matters again here. The Commission has amply done so and the record supports their contentions to the penultimate degree.

Rev. McIntire's attitude toward the fairness doctrine and the rights of the public in general is made clear by considering the following excerpts from an exchange of correspondence between McIntire and Albert J. Zack, Director of Public Relations for the AFL-CIO. Let us first consider this excerpt in a letter from Zack to McIntire, sent on November 5, 1965, in response to McIntire's invitation for Zack to appear on *20th Century Reformation Hour*:

> Day after day, program after program, you expound a point of view which is not only contrary to mine, and that of most Americans, but which grossly offends the concepts of Christian ethics. You now propose to set everything right by asking me to come to Collingswood and speak in reply to anything you may say concerning me.
>
> It simply will not do, Dr. McIntire. This not only does not meet the legal definition of "fairness"; but it does not meet the far more significant standards set by the conscience of men.
>
> No, I will not come to Collingswood, though it is otherwise a pleasant town. I will not give credence to

your argument that one appearance by an opponent answering anything you may say is adequate to balance your incessant drumfire of disunion and hate.

If you wish, we will supply you with a tape or tapes of full program length telling the truth about the trade union movement and its policies, which you can alternate with your own daily commentaries, on your time —which, let us remember, is my time, too, since [the] air belongs to us all.[137]

Dr. McIntire replied on November 13, 1965 in these terms:

You have completely misrepresented and misunderstood my invitation, as I did not imply even that your appearance in response to your attack upon me would "set everything right." As to the FCC's "fairness doctrine" and its legal definition, *the FCC has made it plain that this so-called fairness doctrine comes into play on a specific broadcast only when an individual's character and integrity are attacked, but a discussion of one's views and the position which he holds in our national life is a proper and legitimate subject for debate* under the protections of the guarantees of freedom of speech and the free exercise of religion in the First Amendment. My offer to you actually went beyond any "legal" definition of fairness. . . .

. . . .

. . . Radio stations are privately owned and it is possible in the dissemination of radio for private interests to contract for the time—which the 20th Century Reformation Hour has done. This time, for which we pay, is ours and not yours; nor does it belong to both of us with an obligation upon me to share it equally with you. It would appear to me that you have what I would call a rather socialistic view in this regard.[138]

We could give many more examples from the weighty record in this case, however, we fail to see what purpose

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[137] J.A. Vol. IV, 812.

[138] J.A. Vol. IV, 813-14 (emphasis supplied).

that would serve. The exchange cited above makes it clear that McIntire either did not understand the fairness doctrine or chose to merely ignore it by twisting the law to meet his own requirements. McIntire attributes the requirements of the doctrine to the personal attack rules. Certainly, the doctrine is not so limited as this would imply. The doctrine requires balance when dealing with controverisal issues of public importance. This is the extent of fairness.

Throughout the pendency of these proceedings appellants have attempted to obfuscate the actual issues in this case by injecting a smoke-screen issue relating to McIntire and his *20th Century Reformation Hour*. Throughout the record we find references to stations cancelling the McIntire program because of the requirements of the fairness doctrine and, indeed, the suggestion is infused more than once that the Commission was "out to get" the Reverend. Certainly, none of this is central to the case at bar and little of it is relevant. These incantations amount to childish prattle. By cloaking these charges in the clothing of the first amendment [139] McIntire attempts to conjure right which the Constitution simply does not provide. As Alexander Hamilton said in another setting:

> To judge from the conduct of the opposite parties, we shall be led to conclude that they will mutually hope to evince the justness of their opinions, and to increase the number of their converts by the loudness of their declarations and the bitterness of their invectives.[140]

This is what we have here. At the risk of assisting Rev. McIntire in his bid for self-martyrdom, we note that his behavior is reminiscent of that of a not so legendary knight-

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[139] We consider appellant's first amendment contentions in Section V, *infra*.

[140] A. HAMILTON, THE FEDERALIST PAPERS, No. 1.

errant named Quixote—who engaged himself by riding against otherwise harmless wind-mills. The actions taken by the Commission with reference to both Rev. McIntire and WXUR are more than supported by the record. Attempting to place the blame on the Commission for the shortcomings of the broadcaster and/or the licensee will not do. It would do the parties well to remember that:

> The fault, dear Brutus, is not in our stars,
> But in ourselves, that we are underlings.[141]

Left to their own wiles, Brandywine and Dr. McIntire would set the fairness doctrine to rest in a not so solemn sepulchre without regard for the right of the community to be fully informed. This record could not support the Commission's findings in this area more strongly.

III. Personal Attack Doctrine

The law in this area is well settled. Whenever there is an attack made on a person or group in the context of a controversial issue of public importance the individual attacked has a right to respond. The right is extended on the basis of two separate lines of authority—the holdings in *Red Lion* and *Times-Mirror Broadcasting Co.*, and on the basis of the Commission's regulations.[142]

> These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ

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[141] W. Shakespeare, Julius Ceasar, Act 1, Sc. 2, line 134.

[142] 47 C.F.R. § 73.123 (1972).

> from the preceding fairness doctrine. The simple fact that the attacked men or unendorsed candidates may respond themselves or through agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.[143]

The Supreme Court laid to rest any existing challenges as to the Commission's authority in enacting regulations under the personal attack doctrine in *Red Lion*.[144] Congress has given a mandate to the "Commission from time to time, as public convenience, interest, or necessity requires" to enact "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter . . . ."[145] The demands of public interest are prime considerations for the Commission in granting licenses,[146] renewing licenses,[147] and modifying them.[148] Additionally, station operation must be carried out in the public interest.[149]

> This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943), whose validity we have long upheld. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *FCC v. RCA*

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[143] 395 U.S. at 378-79.

[144] *Id.* at 379-86.

[145] 47 U.S.C. §§ 303, 303(r) (1970).

[146] 47 U.S.C. §§ 307(a), 309(a) (1970).

[147] 47 U.S.C. § 307 (1970).

[148] *Id.*

[149] 47 U.S.C. § 307(d) (1970).

> *Communications, Inc.*, 346 U.S. 86, 90 (1953); *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933). It is broad enough to encompass these regulations.[150]

As the Supreme Court has held specifically that the personal attack "regulations . . . are [not] beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves 'the public interest,'" [151] this leaves us only to examine the adequacy of the Commission's holding in the instant case.[152]

The facts in this case indicate, as the Commission found, that the licensee demonstrated complete disregard for the rules in this area. There are instances on the record where the licensee totally failed to give any notification to persons attacked,[153] in other cases there were failures to send tapes, transcripts, or summaries.[154] The Commission found, adopting the Examiner's decision, that

> [m]anagement did very little to comply with the mandate of the rules in supplying tapes or summaries. Usually the individual was obliged to request a tape and, even then, he had difficulty.[155]

This is a demonstration of Brandywine's degree of compliance in regard to personal attacks. We have reviewed the alleged attacks in this case and find many instances of attacks upon honesty, character, integrity and other personal qualities of given persons or groups in the course of

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[150] 395 U.S. at 380.

[151] *Id.* at 386.

[152] For a description of the Commission's factual findings see pp. 29-33, 41-42, *supra*.

[153] *See, e.g.*, J.A. Vol. II, 236a.

[154] July Decision, *supra*, at ¶ 18.

[155] *Id.*

discussion of controversial issues of public importance. Yet we find that the licensee did not send tapes, that it did not send transcripts, that it did not send summaries. Is this the responsible behavior of an earnest licensee?

As was the case with regard to the fairness doctrine, Brandywine was informed of its responsibilities in personal attack situations by the Commission at the time of approving the initial tranfer. Brandywine represented to the Commission that they understood and would abide by the responsibilities placed on them. As the Commission stated:

> The unavoidable conclusion is that Brandywine simply ignored its plain duty to the public. . . . We note here again that these violations, although they would warrant the same conclusion in any event, are particularly reprehensible in light of the fact that the licensee had been cautioned at the outset concerning its duties in this area.[156]

Brandywine has attempted to pass its obligations in this area to those who purchase time from the licensee. The law is clear in this regard. The obligation rests squarely on the shoulders of the licensee. The fact that the licensee decided to act in avoidance of this obligation by seeking to delegate a non-delegable duty is another indicia of Brandywine's failings under the law. We fully understand Brandywine's two pronged defense in this area. Firstly, Brandywine claims it is incapable of screening tapes prior to broadcast because of the small size of its staff. We note that small staffs in no way exculpate licensees from their affirmative duties. Brandywine would be incapable of operating without an engineer; similarly, a person suitable to protect the rights of the listening public is a necessity for a licensee. This is part of the expense of operating a radio station. Any economic argument to the contrary loses sight of the purposes of Commission regulation.

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[156] *Id.* at ¶ 22.

Brandywine's second assertion is even less valid. John Norris testified that the station did not have anyone listen to program tapes prior to broadcast as this act would constitute censorship.[157] This argument offends the sensibilities of the court for various reasons. This is *prima facie* evidence that despite the numerous and lengthy assertions of the licensee to the Commission, Brandywine never intended to comply with the personal attack rules. Any representation to the contrary on the part of the licensees can only be said to constitute a gratuitous design intended to lull the Commission into a feeling of security. Brandywine has dealt with the Commission in a setting which not only lacked good faith but was also meant to defraud the Commission with regard to the licensee's actual intentions in this area. Brandywine was aware of the personal attack rules, it acknowledged responsibility under them and then chose to disregard them under a guise claiming that the rules constituted licensee censorship. Such maneuvering has proven to be not so wise gamesmanship on the part of licensee. Brandywine's abuses in this area are so blatant as to be sufficient to shock the conscience of the court. The Commission had every justification for its findings in regard to the personal attack rules.

IV. Brandywine's Program Representations

This aspect of the case, while not the most troublesome, is clearly the most disturbing to the court. The facts in this area, as with the other areas of this case, were clearly set out by the Commission.[158] Brandywine made extensive representations to the Commission about the types of programs to be broadcast, as well as providing specific titles. Variation from the typical program schedule presented

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[157] *See* footnote 74, *supra.*

[158] For a discussion of the pertinent facts *see* pp. 33-35 and 43-44, *supra.*

would not have been fatal if the changes had proven relatively minor or had they been implemented in good faith. Unfortunately, but not surprisingly, neither was the case.

The changes which took place on WXUR within the very first days following the transfer show a common design on the part of the licensee to engage in deceit and trickery in obtaining a broadcast license. Within nine days a totally unexpected group of seven programs, each of a nature different than those on the typical program schedule, were on the air. These programs, which Norris characterized as the "Hate Clubs of the Air," replaced programs which were predominantly entertainment oriented. The speed with which these changes took place can lead the court to one conclusion, and one conclusion only—Brandywine intended to place these controversial programs on the air from the first but feared to so inform the Commission lest the transfer application be denied. This approach was foolish. As the Commission stated in the *Borst Decision* and as we stated earlier in this opinion,

> [t]he Commission is wisely forbidden from choosing "among applicants on the basis of their political, economic or social views." [159]

The initial representation to the Commission was obviously "a best foot forward" effort by the licensee. The licensee feared that the truth would keep the license from being granted to it. Therefore, Brandywine sought through subterfuge to gain its license and then proceed to broadcast the type of material it believed to be most suitable—the type of material which would forward the ends of the fundamentalist movement—in utter disregard for either the public or their earlier representations to the Commission.

The second misrepresentation concerns *Interfaith Forum.*

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[159] *See* note 15, *supra.*

We have previously described the show at length [160] and need not reiterate here. The facts are simple—when it appeared from Commission inquiry that a more balanced approach to the question of religion was necessary the principal parties at Brandywine devised this program. The record shows that only after being censured by the local government did the licensee make any effort for this program to be broadcast, and even when it finally found its way to the airwaves its content was without resemblance to those representations made to the Commission. This was never an interfaith dialogue but rather an interview program of students and faculty at the Faith Theological Seminary. We find no fault with such a program but we fail to see how it complies with Brandywine's representations for dialogue between the faiths.

The applicable legal standard here was laid down by the Supreme Court over twenty-five years ago. In another communications case the Court said:

> The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones.[161]

This is dispositive of this issue.

This is a case in which the blind need for a radio outlet in the Philadelphia market has led men experienced in the broadcast industry to misrepresent the facts and to attempt to deceive a regulatory body all to a single end—propagation on the media of their philosophic dogma. These men may have possessed the highest aims for their cause but these aims were blind to the needs of the general public. Misrepresentations conceived to win a soap-box from which

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[160] This program is described at pp. 10-11, *supra*.

[161] F.C.C. v. WOKO, Inc., 329 U.S. 223, 227 (1946).

to shout ones views are the basest over-exaggeration of the liberties guaranteed in the first amendment. Since the airwaves are a scarce commodity and have been deemed a public trust it is easy for us to see that Dr. McIntire and his followers have every right for their views to be broadcast. Their right to operate a radio station is no different than the rights of any other group in America. Their rights are neither superior nor inferior. In seeking a broadcast station they had to meet the same requirements as anyone else seeking a license. The first of these requirements is candor and honesty in representations to the Commission. Their dismal failure in this regard is evidenced by this 8,000 page record. These men, with their hearts bent toward deliberate and premeditated deception, cannot be said to have dealt fairly with the Commission or the people in the Philadelphia area. Their statements constitute a series of heinous misrepresentations which, even without the other factors in this case, would be ample justification for the Commission to refuse to renew the broadcast license.

V. First Amendment Considerations

The most serious aspect of this case relates to the basic freedoms of speech and press which are essential guarantees of the first amendment. This is the area of greatest concern to the court. Any shortcomings in this area would necessitate our reversing the decision of the Commission. Not only must the Commission take a hard-look at the case in this light but so must this court.

A. *Historical Perspective*

1. *Freedoms of Speech and Free Press*

The original draft of the federal Constiution was, curiously enough, silent on the question of freedom of the press. We say "curiously" because among the burning

issues of the revolution and the colonial quest for freedom were the plight of Peter Zenger, who had been denied this right, and the issue of taxation of the press. So great was the concern of America that Alexander Hamilton was prompted to write the following:

> On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two: in the first place, I observe, that there is not a syllable concerning it in the constitution of this State; in the next, I contend, that whatever has been said about it in that or any other State amounts to nothing. What signifies a declaration, that "the liberty of the press shall be inviolably preserved"? What is the liberty of the press? [162]

The response to Hamilton's complaint was not long in coming. This wrong was remedied almost immediately by the first amendment to the Constitution.

AMENDMENT 1

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The following passage from Blackstone's *Commentaries* is most instructive:

> The liberty of the press is, indeed, essential to the nature of a free state; but this consists in laying no *previous* restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or

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[162] A. HAMILTON, FEDERALIST PAPERS, No. 84.

> illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge in all controverted points in learning, religion and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundation of civil liberty. Thus the will of the individuals is still left free; the abuse only of the free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects.[163]

This was the common law in Blackstone's time. The framers of the first amendment were devoid of any intent to change the common law in this respect. Mr. Justice Frankfurter provides an excellent lesson in his opinion in *Dennis*.[164]

> The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. The Massachusetts Constitution of 1780 guaranteed free speech; yet there are records of convictions for at least three political libels obtained between 1799 and 1803. The Pennsylvania Constitution of 1790 and the Delaware Constitution of 1792 expressly imposed liability for abuse of the right of free speech. Madison's own State put on its books in 1792 a statute

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[163] 4 W. BLACKSTONE, COMMENTARIES, *151-52 (emphasis in original) (footnote omitted).

[164] Dennis v. United States, 341 U.S. 494 (1951).

confining the abusive exercise of the right of utterance. And it deserves to be noted that in writing to John Adams's wife, Jefferson did not rest his condemnation of the Sedition Act of 1798 on his belief on unrestrained utterance as to political matter. The First Amendment, he argued, "reflected a limitation upon Federal power, leaving the right to enforce restrictions on speech to the States. * * *[165] "The law is perfectly well settled," this Court said over fifty years ago, "that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed."[166] That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years.[167]

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[165] *Id.*, 341 U.S. at 521-22 (footnotes omitted).

[166] *Id.*, 341 U.S. at 524, *citing* Robertson v. Baldwin, 165 U.S. 275, 281 (1897).

[167] *Id.*, *citing* Gompers v. United States, 233 U.S. 604, 610 (1914).

While the courts have from an early date taken a hand in crystallizing American conceptions of freedom of speech and press into law, it is scarcely in the manner or to the extent which they are frequently assumed to have done. The great initial problem in this realm of constitutional liberty was to get rid of the common law of "seditious libel" which operated to put persons in authority beyond the reach of public criticism. The first step in this direction was taken in the famous, or infamous, Sedition Act of 1798, which admitted the defense of truth in prosecu-

This situation was not even thought to have been altered by the fourteenth amendment until relatively recently. Speaking for the Court in 1907, Mr. Justice Holmes stated:

> We leave undecided the question whether there is

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tion brought under it, and submitted the general issue of defendant's guilt to the jury. But the substantive doctrine of "seditious libel" the Act of 1798 still retained, a circumstance which put several critics of President Adams in jail, and thereby considerably aided Jefferson's election as President in 1800. Once in office, nevertheless, Jefferson himself appealed to the discredited principle against partisan critics. Writing his friend Governor McKean of Pennsylvania in 1803 [about] such critics, Jefferson said: "The federalists having failed in destroying freedom of the press by their gag-law, seem to have attacked it in an opposite direction; that is by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of all credit. * * * This is a dangerous state of things, and the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this, if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses. Not a general prosecution, for that would look like persecution; but a selected one." Works (Ford ed., 1905), IX 451-52.

In the *Memorial Edition* of Jefferson's works this letter is not included; nor apparently was it known to the Honorable Josephus Daniels, whose enthusiastic introduction to one of these volumes makes Jefferson out to have been the father of freedom of speech and press in this country, if not throughout the world. The sober truth is that it was that arch enemy of Jefferson and of democracy, Alexander Hamilton, who made the greatest single contribution toward rescuing this particular freedom as a political weapon from the coils and toils of the common law, and that in connection with one of Jefferson's "selected prosecutions." I refer to Hamilton's manytimes quoted formula in the Croswell case in 1804: "The liberty of the press is the right to publish with impunity, truth,

> to be found in the Fourteenth Amendment a prohibition similar to that in the First. But even if we were to assume that freedom of speech and freedom of the press were protected from abridgment on the part not only of the United States but also of the States, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practiced by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." *Commonwealth v. Blanding,* 3 Pick, 304, 313, 314; *Respublica v. Oswald,* 1 Dallas 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth v. Blanding, ubi sup.;* 4 Bl. Com. 150.[168]

This would appear to be an unqualified endorsement of the views espoused by Blackstone. However, Justice Holmes remarked in the same opinion, "There is no constitutional

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with good motives, for justifiable ends though reflecting on government, magistracy, or individuals." People *v.* Crosswell, 3 Johns. (N.Y.) 337. Equipped with this brocard our State courts working in co-operation with juries, whose attitude usually reflected the robustiousness of American political discussion before the Civil War, gradually wrote into the common law of the States the principles of "qualified privilege," which is a notification to plaintiffs in libel suits that if they are unlucky enough to be officeholders or office seekers, they must be prepared to shoulder the almost impossible burden of showing defendant's "special malice." Cooley, *Constitutional Limitations,* Chap. XII: Dawson, *Freedom of the Press, A Study of the Doctrine of "Qualified Privilege"* (1924). Corwin, *Liberty Against Government,* 157-59 n. 65 (1948).

[168] Patterson v. Colorado, 205 U.S. 454, 462 (1907) (emphasis in the original).

right to have all general propositions of law once adopted remain unchanged." [169] As late as 1922, the Court, speaking through Mr. Justice Pitney, stated: "[N]either the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restriction about 'freedom of speech' or the 'liberty of silence'. . . ." [170]

Eventually the citizens of this country were given those long sought protections for substantive personal rights. This was achieved by identifying these rights with "liberty" which States were without power to abridge without due process of law. This disclosure was made quite casually by the Supreme Court in the landmark decision of *Gitlow v. New York*.[171] "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." [172] Within two years this *dictum* became accepted doctrine as to freedom of speech.[173] Four years later freedom of the press was incorporated.[174]

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[169] *Id.*, 205 U.S. at 461.

[170] Prudential Insurance Co. v. Cheek, 259 U.S. 530, 543 (1922).

[171] 268 U.S. 652 (1925). In this case the Court affirmed Gitlow's conviction for violating a New York statute which prohibited advocating criminal anarchy.

[172] *Id.*, 268 U.S. at 666.

[173] Fiske v. Kansas, 274 U.S. 380 (1927).

[174] Near v. Minnesota, 283 U.S. 697 (1931).
The fourteenth amendment has also been extended to the first amendment guarantees of freedom of religion, Cantwell v. Connecticut, 310 U.S. 296 (1940), and the right of peaceable assembly, DeJonge v. Oregon, 299 U.S. 353 (1937).

2. *Censorship*

Let us also consider the first amendment and the concept of censorship—an implicit issue in this case.

Mr. Justice Murphy asserted in *Chaplinsky v. New Hampshire*:[175]

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighted by the social interest in order and morality.[176]

Similarly, in *Board of Education v. Barnette*[177] Mr. Justice Jackson established it as "a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish."[178]

Significantly, those cases which have sanctioned previous restraints of the utterances of specific individuals have not involved restraints by administrative action, but rather judicial restraints. It was a prime objective of those seeking to ban previous restraints to outlaw censorship which could be accomplished through licensing. It was in

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[175] 315 U.S. 568 (1942).

[176] *Id.*, 315 U.S. at 571-72 (footnotes omitted).

[177] 319 U.S. 624 (1943).

[178] *Id.*, 319 U.S. at 633.

this setting that John Milton directed his offensive in his *Appeal for the Liberty of Unlicensed Printing.* Freedom of the press was, in the beginning, a right to publish "*without* a license what formerly could be published only *with* one." [179] Today, as well, nothing is more likely to give rise to judicial condemnation than a licensing requirement. Only in those cases in which the licensing officer's authority is so limited as to make discrimination against utterances which he disapproves of impossible [180] will the court refrain from interfering. The Supreme Court has even gone so far as to strike down licensing ordinances with respect to forms of communication which are totally forbidden.[181] More pertinently to the case at bar, in the area of radio broadcasting, where the very physical limitations of the medium make this form of communication unavailable to all who would utilize it, the Court has sanctioned the Commission's power of selective licensing.[182] On the other hand, it had been the Court's position until recently, with regard to motion pictures, that the state's power to license, and therefore, to censor, films to be shown locally was unrestricted as "a business pure and simple, originated and conducted for profit," and "not to be re-

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[179] Lovell v. Griffin, 303 U.S. 444, 451 (1938) (emphasis in the original) (footnote omitted).

[180] Chaplinsky v. New Hampshire, *supra;* Cox v. New Hampshire, 312 U.S. 569 (1941).

[181] Lovell v. Griffin, *supra;* Hague v. C.I.O., 307 U.S. 496, 516 (1939); Schneider v. State, 308 U.S. 147 (1939); Cantwell v. Connecticut, *supra;* Largent v. Texas, 318 U.S. 418 (1943); Thomas v. Collins, 323 U.S. 516, 538 (1945); Saia v. New York, 334 U.S. 558 (1948).

[182] Radio Commission v. Nelson Bros. Co., 289 U.S. 266 (1933); Communications Commission v. N.B.C., 319 U.S. 239 (1943).

garded, . . . as part of the press of the country or as organs of public opinion." [183] This doctrine, established in 1915, was altered by the Court in 1948. Mr. Justice Douglas stated that the Court's position had become a very different one. "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." [184]

It would be remiss for us to move on without noting that there are areas where the federal government has, at one time or another, placed restraints on both freedoms of speech and press. These areas include, or have included, censorship of the mails, *e.g.*, fraud orders and obscenity; regulation of business and labor activities; regulation of political activities by federal employees; legislation to protect the armed forces and the war power; loyalty regulations; the Smith Act; and the registration of subversive organizations.

B. *The First Amendment and Red Lion*

The rights of free speech and free press coupled with the fairness doctrine and the Supreme Court's *Red Lion* decision, is one of the most written-about areas in the law today.[185] The first amendment issue was dealt with by the

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[183] Mutual Film Corp. v. Ohio Indus'l Comm., 236 U.S. 230, 244 (1915).

[184] United States v. Paramount Pictures, 334 U.S. 131, 166 (1948).

[185] It would be impossible to provide a complete bibliography of law review materials in the space available here. At the risk of omitting far more than we can include we call the reader's attention to the following: Symposium, *Media and the First Amendment in a Free Society*, 60 GEO. L.J. 871-1099, particularly, 1031-44 (1972); Johnson & Westen, *A Twentieth Century Soapbox: The Right to Purchase Radio and Television Time*, 57 VA. L. REV. 574 (1971); Note, *Fairness Doc-*

Supreme Court in part three of the *Red Lion* decision.[186] The Court explained the broadcaster's contentions as follows:

> Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.[187]

These first amendment challenges were rejected by the Court unanimously.[188] In fact, Mr. Justice White found that the Commission's application of the fairness doctrine enhances rather than abridges the freedoms of speech and press.[189] As we noted previously, one of those points emphasized by the Court was "the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views . . . ." [190]

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trine: Television as a Marketplace of Ideas, 45 N.Y.U.L. REV. 1222 (1970); Cahill, *"Fairness"* and the FCC, 21 FED. COMM. B.J. 17 (1967); Lynd, *Banzhaf v. FCC: Public Interest and the Fairness Doctrine,* 23 FED. COMM. B.J. 39 (1969); Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal,* 47 N.Y.U.L. REV. 83 (1972); Note, *We Pick 'Em, You Watch 'Em: First Amendment Rights of Television Viewers,* 43 S.CAL. L. REV. 826 (1970); Note, *Free Speech and the Mass Media,* 57 VA. L. REV. 636 (1971).

[186] 395 U.S. at 386-401.

[187] *Id.* at 386.

[188] Mr. Justice Douglas did not participate in the disposition of the case.

[189] 395 U.S. at 393-94.

[190] *Id.,* 395 U.S. at 400.

In direct response to the first amendment claims raised by the broadcasters the Court stated:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . . 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 itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.[191]

The Court found, and of course we agree, that it would be "a serious matter" if the requirements imposed by the Commission would in effect induce the licensee to censor themselves thereby making their coverage of controversial public issues "ineffective." However, the Court deemed this to be merely a speculative possibility. In fact the Court determined that if licensees

> should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.[192]

The Court was careful to point out that its rejection of the broadcaster's claim was not an absolute one. The Court found that there could be instances in which more substantial first amendment questions were raised than in *Red Lion*. For example, the Court found no evidence of Commission "refusal to permit the broadcaster to carry

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[191] *Id.*, 395 U.S. at 388-90.

[192] *Id.*, 395 U.S. at 393-94.

a particular program," or "of the official government view dominating public broadcasting." [193]

C. *The Post Red Lion Era*

In the short time that has passed since the *Red Lion* case, there has been an ever growing number of cases decided concerning the fairness doctrine, broadcasting, and the first amendment. We have already considered many of these cases during the course of our discussion of the fairness doctrine. Thus, a lengthy exposition here is unwarranted and unnecessary. For the most part these cases have relied primarily, as they must, on *Red Lion* and have added little to the shape of the law.

One opinion which did provide instructional enlightenment in the first amendment area is Judge Wright's scholarly opinion in *Business Executives' Move for Vietnam Peace v. F.C.C.*[194] Judge Wright addressed the issue of the uncertainty of the scope of the first amendment's impact on the broadcast media:

> It has always been clear that the broadcast media—so vital to communication in our society—are affected by strong First Amendment interests.[195] Yet the nature of those interests has not been so clear; and evolution of constitutional principles in this area is still very much in progress. [*Red Lion*] justified the Commission's interference with broadcasters' free speech by invoking specifically constitutional rights of the gen-

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[193] *Id.*, 395 U.S. at 396.

[194] 146 U.S.App.D.C. 181, 450 F.2d 642 (1971).

[195] *See, e.g.*, United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948). Congress itself has prohibited any interference by the Commission with "the right of free speech by means of radio communication." 47 U.S.C. § 326 (1964).

Id., 146 U.S.App. D.C. at 188, 450 F.2d at 649 (footnote renumbered).

> eral public which, it said, underlie and support the fairness doctrine rules at issue. Issuing what must become a clarion call for a new public concern and activism regarding the broadcast media, the Court stated that "the people as a whole retain their . . . collective right to have the medium function consistently with the ends and purposes of the First Amendment." [196] It went on to say:
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> "... The right of free speech of a broadcaster ... does not embrace a right to snuff out the free speech of others. ...
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> • • • • •
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> ... [A] licensee has no constitutional right ... to monopolize a radio frequency to the exclusion of his fellow citizens. ...
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> ... It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." [197]

Even in light of the later cases *Red Lion* remains the definitive opinion in the area. Therefore, we can only stress, once again, the Court's language in that case. As we said in *Democratic National Committee v. F.C.C.*:[198]

> According to the Court in [*Red Lion*], the primary concern in the broadcast industry is "the First Amendment goal of producing an informed public capable of conducting its own affairs." [199]

We expressed this same view in the following terms:

> In our view, the essential basis for any fairness doctrine, no matter with what specificity the standards

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[196] *Id.*, 146 U.S.App. D.C. at 188-89, 450 F.2d at 649-50, *citing* 395 U.S. at 390 (footnote renumbered).

[197] *Id.*, 146 U.S.App. D.C. at 189, 450 F.2d at 650, *citing* 395 U.S. at 387, 389, 390.

[198] *Supra.*

[199] *Id.*, slip op. at 35, *citing* 395 U.S. at 392.

are defined, is that *the American public must not be left uninformed.*[200]

Anything else on this point would be superflous.

D. *The Prohibition Against Censorship*

It was John Stuart Mill who wrote:

> [Censorship] is as noxious, or more noxious, when exerted in accordance with public opinion, than when in opposition to it. If all mankind minus one were of one opinion, and only one person were of a contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.[201]

These views are central to the thoughts of all who hold dear our fundamental liberties. Wisely, therefore, Congress has specifically forbidden the Commission from engaging in any actions which would constitute censorship.

> **§ 326. Censorship.**
>
> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.[202]

It has been held that this section denied the power to censor to the states in the same terms as it denied the power to censor to the federal government;[203] and similarly that the licensee shall have the sole power in choos-

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[200] Green v. F.C.C., *supra*, 144 U.S.App. D.C. at 359, 447 F.2d at 329 (emphasis in the original).

[201] J. MILL, ON LIBERTY 274.

[202] 47 U.S.C. § 326 (1970).

[203] Allen B. Dumont Laboratories v. Carroll, 184 F.2d 153 (3rd Cir. 1950), *cert. denied*, 340 U.S. 929 (1951).

ing programs.[204] However, this court has held that the Commission's public interest rulings, with reference to specific program content, do not invariably constitute "censorship" within the confines of § 326.[205] We have also held that not every condition imposed by the Commission on a licensee constitutes interference with free speech.[206]

The deep seated commitment which the courts and commission share for this concept can hardly be classified as ephemeral. The prohibition from censorship has been and will continue to be carefully guarded by those charged with the responsibility of protecting our basic freedoms. Yet, despite the guarantees there are those who fear government licensing of broadcasting and believe that it constitutes a threat to freedom of information. One such person is media commentator Walter Cronkite:

> That brings me to what I consider the greatest threat to freedom of information: the Government licensing of broadcasting. Broadcast news today is not free. Because it is operated by an industry that is beholden to the Government for its right to exist, its freedom has been curtailed by fiat, by assumption, and by intimidation and harassment.
>
> Broadcasting's freedom has been curtailed by fiat through rulings of the Supreme Court. The Court has stated that as long as we are licensed by the Government, we are not as free as the printed press and therefore not eligible in the same manner for the first amendment guarantees. The father of all such re-

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[204] McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 151 F.2d 597 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

[205] Banzhaf v. F.C.C., 132 U.S.App. D.C. 14, 405 F.2d 1082 (1968), *cert. denied*, 396 U.S. 842 (1969); Carter Mountain Transmission Corp. v. F.C.C., 116 U.S.App. D.C. 93, 321 F.2d 359 (1963), *cert. denied*, 375 U.S. 951 (1964).

[206] Idaho Microwave, Inc. v. F.C.C., 122 U.S.App. D.C. 253, 352 F.2d 729 (1965).

strictive rulings is the decision in *National Broadcasting Co. v. United States,* where the Court found that freedom of utterance was abridged to anyone who wanted to use the limited facilities of radio. The Court went on to find that radio was unlike other modes of expression in that it was not available to all. It was this unique characteristic that distinguished the radio from other forms of expression and made it a subject of government regulation. More recently, the Supreme Court's ruling in *Red Lion Broadcasting Co. v. FCC* upheld the "personal attack rule" and found that where substantially more individuals wish to broadcast than there are frequencies available to allocate, it is idle to attempt to establish an unabridgeable first amendment right to broadcast comparable to the right of each individual to speak, write, or publish.

Stripped of this constitutional protection, broadcast news stands naked before those in power, now or in the future, who, for whatever motive, would like to see its freedom restrained.[207]

While we do not agree with Mr. Cronkite's conclusions, we do share his concern. Journalists and broadcasters have no monopoly over concern with censorship. The courts, and indeed the American public as a whole, have a tremendous stake in a free press and an informed citizenry. Yet, how can the citizenry remain informed if broadcasters are permitted to espouse their own views only without attempting to fully inform the public? This is the issue of good faith which, unfortunately, a small number of broadcasters refuse to exercise.

E. *Brandywine and the First Amendment*

Under the state of the law as it exists today, we can find no infirmity with the Commission's findings or con-

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[207] Cronkite, *Introduction to Part III: Points of Conflict—Legal Issues Confronting Media Today,* 60 GEO. L.J. 1001, 1003-04 (1972).

clusions in light of the first amendment. Commission findings in this area are in a relatively narrow sphere. The alleged violations of fairness and personal attack rules are fully documented. The abuses are flagrant. The sanctions borne of the litigation were based on continuous refusals by the licensee to meet its obligations. This is not a case in which the Commission is acting on an isolated mistake, or two, in the course of a three year license period. This is a case of deliberate and continuing disregard in a short time period spanning only several months. The Commission has made no attempt to influence WXUR's programming or censor its programming in general or specifically. Had the licensee met the obligations required of it we have no reason to believe that Brandywine would have met with any difficulty. The law places requirements on licensees as fiduciaries. Failure to live up to the trust placed in the hands of the fiduciary requires that a more responsible trustee be found. This is not the public's attempt to silence the trustee—it is the trustee's attempt to silence the public. This is not the public censoring the trustee—it is the trustee censoring the public. Attempting to impose the blame on the Commission for its own shortcomings can only be likened to the spoiled child's tantrum at being refused a request by an otherwise overly-benevolent parent.

As in the *Red Lion* case, we note that other questions in this area could pose more serious first amendment problems. Since such questions are not at issue here there is no need to hypothecate upon them.

VI. Sanctions

In light of the extensive violations found by the Commission in the areas of the fairness doctrine, the personal attack rules, and misrepresentation of program plans, the Commission refused to renew Brandywine's license. The Commission, while finding that its action would have been

justified when based on any of these areas, chose to base its opinion on a consideration of Brandywine's total performance.

As the Commission stated in *Letter to Honorable Oren Harris,*[208] the question of whether the licensee is operating in the public interest, the established standard for license renewal,[209] is determined at the time of renewal. At this time the Commission must take the licensee's total performance into account, including its adherence to the fairness doctrine. Of course, the prime consideration must come back to the effectiveness of the licensee in his role as trustee for the public.

As Judge Wright points out in *Citizens Communications Center v. F.C.C.*:[210]

> The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.
>
> Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public.

Cf., Greater Boston Television Corp. v. F.C.C.,[211] "[The Federal Communications Act] does not reflect the same concern for 'security of certificate' that appears in other laws."[212] Both *Greater Boston* and *Citizens Communica-*

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[208] 40 F.C.C. 582 (1963).

[209] 47 U.S.C. §§ 307(a), (d) (1970).

[210] 145 U.S.App. D.C. 32, 40 fn. 23, 447 F.2d 1201, 1209 fn. 23 (1971), *quoting* F.C.C. v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

[211] 143 U.S.App. D.C. 383, 444 F.2d 841 (1970).

[212] *Id.*, 143 U.S. App. D.C. at 896, 444 F.2d at 854.

tions make it clear that the Commission can act to provide assurances of better broadcasting by taking licenses from those who fail to provide for the public interest.

> The Commission need not be confined to the technique of exercising regulatory surveillance to assure that licensees will discharge duties imposed upon them, perhaps grudgingly and perhaps to the minimum required. It may also seek in the public interest to certify as licensees those who would speak out with fresh voice, would most naturally initiate, encourage and expand diversity of approach and viewpoint.[213]

Judge Leventhal recently enunciated the standard for reviewing decisions of regulatory agencies in these terms:

> We recognized the tension between the doctrine of judicial restraint, which requires of us considerable deference to agency decisions, and the practical necessities of judicial review, which require a minimum standard of articulation, so that we may discern the path which the Commission took on the way to its result. We acknowledged the impossibility of framing a universally applicable formula "for deciding when an agency . . . has crossed the line from the tolerably terse to the intolerably mute . . . ." [214]

The Commission's opinion in this case exemplifies the type of findings which this court would like to see in all its cases. The opinion is complete, thorough, thoughtful and carefully based on the law. The sanction imposed by the Commission is fully supported by the record. We can find no justification for upsetting a sanction so well substantiated by the record and the findings of the Commission.

Of course, as we have previously pointed out, these

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[213] *Id.*, 143 U.S. App. D.C. at 402, 444 F.2d at 860.

[214] WAIT Radio v. F.C.C., No. 24,762 (D.C. Cir. March 20, 1972), slip op. at 3.

sanctions did not befall Brandywine by surprise. The *Borst Decision* contained a warning to the licensee designed to alert him to the Commission's expectations; this warning was acknowledged by the licensee. The Commission can only inform and advise as to the law; it cannot coerce a licensee to comply.

VII. Conclusion

Finally, we come to the end of our long journey. Yet, we take a brief moment to comment on the path we have travelled. Appellants requested at oral argument that the court not rely alone on the cold submissions in the pleadings, but that we carefully review the entire record in this case. We have done so fastidiously—we have left no corner unturned; no fact has gone unconsidered. What we found teaches many lessons.

Appellants have blazed a trail marked by empty promises and valueless verbiage. They have attempted to prevail by wearing down both Commission and court. However, those charged with protecting the precious rights of the public will not, and cannot, be exhausted by a group of recalcitrants who attempt to cajole and bully. Freedom of speech is not an empty slogan or a rallying cry—nor can it be snatched from the hands of the American people by an outpouring of emotional indignation. Freedom of speech is a truth that we have long held to be self-evident; we refuse to sit by idly and watch that truth snuffed out by a group of overly-zealous men whose sole interest is filling the airwaves with their own views to the exclusion of the views of all others. Dr. McIntire and his followers have every right to air their views; but so do the balance of our two-hundred-and-ten-million people.

Brandywine was given every opportunity to succeed in the broadcast endeavor on which it set out. The Commission fulfilled its duty in granting the initial license al-

though it may have proven more popular and expedient to bow to the protestations of Brandywine's detractors. The Commission forewarned Brandywine about its fairness doctrine and its personal attack rules and made every effort to explain them. Despite the Commission's sanguine outlook it was soon evident that Brandywine refused to comply with those requirements, which are designed to serve the public interest and the broadcast audience. Commission good faith was interpreted as an act of weakness.

The first amendment was never intended to protect the few while providing them with a sacrosanct sword and shield with which they could injure the many. Censorship and press inhibition do not sit well with this court when engaged in by either the Commission or by a defiant licensee. The most serious wrong in this case was the denial of an open and free airwave to the people of Philadelphia and its environs.

Consequently, the opinion of the Federal Communications Commission is

Affirmed.

WRIGHT, *Circuit Judge, concurring*: Judge Tamm's opinion contains a careful articulation of the facts of this case and an excellent exposition of the applicable law. While I am not necessarily in agreement with all his appraisals of the actions of the people concerned with this litigation, including counsel and the hearing examiner, I concur in his decision affirming the Commission on the ground that substantial evidence supports the Commission's finding that appellant misrepresented its program plans and thus consciously deceived the Commission. This finding was a separate ground for denial of renewal by the Commission.

If this case did not involve an unpopular fundamentalist

preacher, for me it would be an easy one indeed. The application to transfer the WXUR license was granted on specific representations of appellant as to programming and with a special warning that appellant must comply with its responsibilities under the law as a public licensee. The Commission felt that a special warning was required because opponents of the transfer, representing a substantial segment of the public served by the license, strongly argued that appellant, if granted the license, would not comply with the law. In spite of the warning and the circumstances surrounding the transfer generally, appellant proceeded to treat its public license as though it were its private property unencumbered by public obligations. It not only deceived the Commission as to its programming, but it ignored the Commission's warning with respect to fairness in the operation of the station. In effect it simply defied the Commission. Under the circumstances the Commission's action unquestionably has substantial support in the record. *Universal Camera Corp* v. *N.L.R.B.*, 340 U.S. 474 (1951).

But because the Commission's ruling has the possible effect of suppressing the ventilation of views with which there might be substantial disagreement, its action in denying renewal of the license requires particularly careful scrutiny. As Judge Tamm's opinion makes clear, in such a case it is not enough simply to find that substantial evidence in the record taken as a whole supports the Commission and there was no abuse of discretion. In these circumstances the court itself should make its own evaluation of the evidence to insure that First Amendment freedoms of the licensee and the public are fully and fairly taken into account in the decision making process. *See Jacobellis* v. *Ohio*, 378 U.S. 184, 187-190 (1964); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964); *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951); *Bridges* v. *California*, 314 U.S. 252, 271 (1941). So doing, I cannot say that the Com-

mission erred in denying the renewal application in this case.

Chief Judge Bazelon concurs in affirming the decision of the FCC solely on the ground that the licensee deliberately withheld information about its programming plans. A full statement of his views will issue at a later date.

SUPREME COURT OF THE UNITED STATES

Nos. 2 AND 717.—OCTOBER TERM, 1968.

Red Lion Broadcasting Co., Inc., etc., et al., Petitioners, v. Federal Communications Commission et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.
United States et al., Petitioners, v. Radio Television News Directors Association, et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 9, 1969.]

MR. JUSTICE WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act[1]

[1] Communications Act of 1934, Tit. III, c. 652, 48 Stat. 1081, as amended, 47 U. S. C. § 301 *et seq.* Section 315 now reads:

"315. Candidates for public office; facilities; rules.

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that

that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in ~~the~~ form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. *Red Lion* involves the application of the fairness doctrine to a particular broadcast, and *RTNDA* arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the *Red Lion* litigation had begun.

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office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newcast,

"(2) bona fide news interview,

"(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

"shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

"(b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

"(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

I.

A.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by Reverend Billy James Hargis as part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater—Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for fabricating false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater."[2] When Cook heard of the broadcast he

[2] According to the record, Hargis asserted that his broadcast included the following statement:

"Now, this paperback book by Fred J. Cook is entitled, 'GOLDWATER—EXTREMIST ON THE RIGHT.' Who is Cook? Cook was fired from the New York World Telegram after he made a false charge publicly on television against an un-named official of the New York City government. New York publishers and NEWSWEEK Magazine for December 7, 1959, showed that Fred Cook and his pal, Eugene Gleason, had made up the whole story and this confession was made to New York District Attorney, Frank Hogan. After losing his job, Cook went to work for the left-wing publication, THE NATION, one of the most scurrilous publications of the left which has championed many communist causes over many years. Its editor, Carry McWilliams, has been affiliated with many communist enterprises, scores of which have been cited as subversive by the Attorney General of the U. S. or by other government agencies . . . . Now, among other things Fred Cook wrote for THE NATION, was an article absolving Alger Hiss of any wrong doing . . . there was a 208 page attack on the FBI and J. Edgar Hoover; another attack by Mr. Cook was on the Central Intelligence Agency . . . now this is the man who wrote the book to smear and destroy Barry Goldwater called 'Barry Goldwater—Extremist Of The Right!'"

concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia,[5] the FCC's position was upheld as constitutional and otherwise proper. 381 F. 2d 908 (1967).

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[5] The Court of Appeals initially dismissed the petition for want of a reviewable order, later reversing itself en banc upon argument by the Government that the FCC rule used here, which permits it to issue "a declaratory ruling terminating a controversy or removing uncertainty," 47 CFR § 1.2, was in fact justified by the Administrative Procedure Act. That Act permits an adjudicating agency, "in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." § 5, 60 Stat. 239, 5 U. S. C. § 1004 (d). In this case, the FCC could have determined the question of Red Lion's liability to a cease-and-desist order or license revocation, 47 U. S. C. § 312, for failure to comply with the license's condition that the station be operated "in the public interest," or for failure to obey a requirement of operation in the public interest implicit in the ability of the FCC to revoke licenses for conditions justifying the denial of an initial license, 47 U. S. C. § 312 (a) (2), and the statutory requirement that the public interest be served in granting and renewing licenses, 47 U. S. C. §§ 307 (a), (d). Since the FCC could have adjudicated these questions it could, under the Administrative Procedure Act, have issued a declaratory order in the course of its adjudication which would have been subject to judicial review. Although the FCC did not comply with all of the formalities for an adjudicative proceeding in this case, the petitioner itself adopted as its own the Government's position that this was a reviewable order, waiving any objection it might have had to the procedure of the adjudication.

B.

Not long after the *Red Lion* litigation was begun, the FCC issued a Notice of Proposed Rule Making, 31 Fed. Reg. 5710, with an eye to making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and also to specify its rules relating to political editorials. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed, 32 Fed. Reg. 10303. Twice amended, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362, the rules were held unconstitutional in the *RTNDA* litigation by the Court of Appeals for the Seventh Circuit on review of the rule-making proceeding as abridging the freedoms of speech and press. 400 F. 2d 1002 (1968).

As they now stand amended, the regulations read as follows:

"Personal attacks; political editorials.

"(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

"(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons

associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

"NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See Section 315 (a) of the Act, 47 U. S. C. 315 (a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315 (a) of the Act.

"(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).

C.

Believing that the specific application of the fairness doctrine in *Red Lion*, and the promulgation of the regulations in *RTNDA*, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press protected by the First Amendment, we hold them valid and constitutional, reversing the judgment below in *RTNDA* and affirming the judgment below in *Red Lion*.

II.

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the *Red Lion* case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own.

A.

Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos.[4]

[4] Because of this chaos, a series of National Radio Conferences was held between 1922 and 1925, at which it was resolved that regulation of the radio spectrum by the Federal Government was essential and that regulatory power should be utilized to ensure that allocation of this limited resource would be made only to those who would serve the public interest. The 1923 Conference expressed the opinion that the Radio Act of 1912, c. 287, 37 Stat. 302, conferred upon the Secretary of Commerce the power to regulate frequencies and hours of operation, but when Secretary Hoover sought to implement this claimed power by penalizing the Zenith Radio Corporation for operating on an unauthorized frequency, the 1912 Act was held not to permit enforcement. *United States* v. *Zenith Radio Corporation*, 12 F. 2d 614 (D. C. N. D. Ill. 1926). Compare *Hoover* v. *Intercity Radio Co.*, 286 F. 1003 (C. A. D. C. Cir. 1923) (Secretary had no power to deny licenses, but was empowered to assign frequencies). An opinion issued by the Attorney General at Hoover's request con-

It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacaphony of competing voices, none of which could be clearly and predictably heard.[5] Consequently, the Federal Radio Commission was established to allocate frequencies among competing applicants in a manner responsive to the public "convenience, interest, or necessity."[6]

Very shortly thereafter the Commission expressed its view that the "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all

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firmed the impotence of the Secretary under the 1912 Act. 35 Op. Atty. Gen. 126 (1926). Hoover thereafter appealed to the radio industry to regulate itself, but his appeal went largely unheeded. See generally L. Schmeckebier, The Federal Radio Commission 1–14 (1932).

[5] Congressman White, a sponsor of the bill enacted as the Radio Act of 1927, commented upon the need for new legislation:

"We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912 law that anyone who will may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual. . . . The recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest, or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served." 67 Cong. Rec. 5479.

[6] Radio Act of 1927, c. 169, § 4, 44 Stat. 1162, 1163. See generally, Davis, The Radio Act of 1927, 13 Va. L. Rev. 611 (1927).

discussions of issues of importance to the public." *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32, 33 (1929), rev'd on other grounds, 37 F. 2d 993, cert. dismissed, 281 U. S. 706 (1930). This doctrine was applied through denial of license renewals or construction permits, both by the FRC, *Trinity Methodist Church, South* v. *FRC*, 62 F. 2d 850 (C. A. D. C. Cir. 1932), cert. denied, 288 U. S. 599 (1933), and its successor FCC, *Young People's Association for the Propagation of the Gospel*, 6 F. C. C. 178 (1938). After an extended period during which the licensee was obliged not only to cover and to cover fairly the views of others, but also to refrain from expressing his own personal views, *Mayflower Broadcasting Corp.*, 8 F. C. C. 333 (1941), the latter limitation on the licensee was abandoned and the doctrine developed into its present form.

There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees, 13 F. C. C. 1246 (1949). The broadcaster must give adequate coverage to public issues, *United Broadcasting Co.*, 10 F. C. C. 515 (1945), and coverage must be fair in that it accurately reflects the opposing views. *New Broadcasting Co.*, 6 P & F Radio Reg. 258 (1950). This must be done at the broadcaster's own expense if sponsorship is unavailable. *Cullman Broadcasting Co.*, 25 P & F Radio Reg. 895 (1963). Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source. *John J. Dempsey*, 6 P & F Radio Reg. 615 (1950); see *Metropolitan Broadcasting Corp.*, 19 P & F Radio Reg. 602 (1959); *The Evening News Assn.*, 6 P & F Radio Reg. 283 (1950). The Federal Radio Commission had imposed these two basic duties on broadcasters since the outset, *Great Lakes Broadcasting Co.*, 3 F. R. C. Ann. Rep. 32 (1929), rev'd on other grounds, 37 F. 2d 993, cert. denied, 281 U. S. 706 (1930); *Chicago Federation of Labor* v. *FRC*, 3 F. R. C. Ann. Rep. 36

(1929), aff'd 41 F. 2d 422 (C. A. D. C. Cir. 1930); *KFKB Broadcasting Assn.* v. *FRC*, 47 F. 2d 670 (C. A. D. C. Cir. 1931), and in particular respects the personal attack rules and regulations at issue here have spelled them out in greater detail.

When a personal attack has been made on a figure involved in a public issue, both the doctrine of cases such as *Red Lion* and *Times-Mirror Broadcasting Co.*, 24 P & F Radio Reg. 404 (1962), and also the 1967 regulations at issue in *RTNDA* require that the individual attacked himself be offered an opportunity to respond. Likewise, where one candidate is endorsed in a political editorial, the other candidates must themselves be offered reply time to use personally or through a spokesman. These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side. But insofar as there is an obligation of the broadcaster to see that both sides are presented, and insofar as that is an affirmative obligation, the personal attack doctrine and regulations do not differ from preceding fairness doctrine. The simple fact that the attacked men or unendorsed candidates may respond themselves or through agents is not a critical distinction, and indeed, it is not unreasonable for the FCC to conclude that the objective of adequate presentation of all sides may best be served by allowing those most closely affected to make the response, rather than leaving the response in the hands of the station which has attacked their candidacies, endorsed their opponents, or carried a personal attack upon them.

B.

The statutory authority of the FCC to promulgate these regulations derives from the mandate to the "Commission from time to time, as public convenience, in-

terest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter . . . ." 47 U. S. C. § 303 and § 303 (r).[7] The Commission is specifically directed to consider the demands of the public interest in the course of granting licenses, 47 U. S. C. §§ 307 (a), 309 (a); renewing them, 47 U. S. C. § 307; and modifying them. *Ibid.* Moreover, the FCC has included among the conditions of the Red Lion license itself the requirement that operation of the station be carried out in the public interest, 47 U. S. C. § 309 (h). This mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power "not niggardly but expansive," *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 219 (1943), whose validity we have long upheld. *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940); *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 90 (1953); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933). It is broad enough to encompass these regulations.

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[7] As early as 1930, Senator Dill expressed the view that the Federal Radio Commission had the power to make regulations requiring a licensee to afford an opportunity for presentation of the other side on "public questions." Hearings before the Senate Committee on Interstate Commerce on S. 6, 71st Cong., 2d Sess., at 1616 (1930):

"Senator DILL. Then you are suggesting that the provision of the statute that now requires a station to give equal opportunity to candidates for office shall be applied to all public questions?

"Commissioner ROBINSON. Of course, I think in the legal concept the law requires it now. I do not see that there is any need to legislate about it. It will evolve one of these days. Somebody will go into court and say, 'I am entitled to this opportunity,' and he will get it.

"Senator DILL. Has the Commission considered the question of making regulations requiring the stations to do that?

"Commissioner ROBINSON. Oh, no.

"Senator DILL. It would be within the power of the commission, I think, to make regulations on that subject."

The fairness doctrine finds specific recognition in statutory form, is in part modeled on explicit statutory provisions relating to political candidates, and is approvingly reflected in legislative history.

In 1959 the Congress amended the statutory requirement of § 315 that equal time be accorded each political candidate to except certain appearances on news programs, but added that this constituted no exception "*from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*" Act of September 14, 1959, § 1, 73 Stat. 557, amending 47 U. S. C. § 315 (a) (emphasis added). This language makes it very plain that Congress, in 1959, announced that the phrase "public interest," which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues. In other words, the amendment vindicated the FCC's general view that the fairness doctrine inhered in the public interest standard. Subsequent legislation enacted into law and declaring the intent of an earlier statute is entitled to great weight in statutory construction.[8] And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong,[9] especially when Congress has

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[8] *Federal Housing Administration* v. *Darlington, Inc.*, 358 U. S. 84, 90 (1958); *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 541 (1962) (separate opinion of MR. JUSTICE HARLAN, joined by MR. JUSTICE BRENNAN and MR. JUSTICE STEWART). This principle is a venerable one. *Alexander* v. *Alexandria*, 5 Cranch 1 (1809); *United States* v. *Freeman*, 3 How. 556 (1845); *Stockdale* v. *The Insurance Companies*, 20 Wall. 323 (1873).

[9] *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965); *Udall* v. *Tallman*, 380 U. S. 1, 16–18 (1965); *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 199 (1955); *Hastings & D. R. Co.* v. *Whitney*, 132

refused to alter the administrative construction.[10] Here, the Congress has not just kept its silence by refusing to overturn the administrative construction,[11] but has ratified it with positive legislation. Thirty years of consistent administrative construction left undisturbed by Congress until 1959, when that construction was expressly accepted, reinforce the natural conclusion that the public interest language of the Act authorized the Commission

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U. S. 357, 366 (1889); *United States* v. *Burlington & M. River R. Co.*, 98 U. S. 334, 341 (1878); *United States* v. *Alexander*, 12 Wall. 177, 179–181 (1871); *Surgett* v. *Lapice*, 8 How. 48, 68 (1850).

[10] *Zemel* v. *Rusk*, 381 U. S. 1, 11–12 (1965); *United States* v. *Bergh*, 352 U. S. 40, 46–47 (1956); *Allstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16–17 (1953); *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345 (1932).

[11] An attempt to limit sharply the FCC's power to interfere with programming practices failed to emerge from Committee in 1943. S. 814, 87th Cong., 1st Sess., 4 (1943). See Hearings on S. 814 before the Senate Committee on Interstate Commerce, 78th Cong., 1st Sess. (1943). Also, attempts specifically to enact the doctrine failed in the Radio Act of 1927, 67 Cong. Rec. 12505 (1926) (agreeing to amendment proposed by Senator Dill eliminating coverage of "question affecting the public"), and a similar proposal in the Communications Act of 1934 was accepted by the Senate, 78 Cong. Rec. 8854 (1939); see S. Rep. No. 781, 73d Cong., 2d Sess., 8 (1934), but was not included in the bill reported by the House Committee, see H. R. Rep. No. 1850, 73d Cong., 2d Sess. (1934). The attempt which came nearest success was a bill, H. R. 7716, 72d Cong., 1st Sess. (1932), passed by Congress but pocket vetoed by the President in 1933, which would have extended "equal opportunities" whenever a public question was to be voted on at an election or by a government agency. H. R. Rep. No. 2106, 72d Cong., 2d Sess., 6 (1933). In any event, unsuccessful attempts at legislation are not the best of guides to legislative intent. *Fogarty* v. *United States*, 340 U. S. 8, 13–14 (1950); *United States* v. *United Mine Workers*, 330 U. S. 258, 281–282 (1947). A review of some of the legislative history over the years, drawing a somewhat different conclusion, is found in Staff of the House Committee on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine, 90th Cong., 2d Sess. (Comm. Print. 1968). This inconclusive history was, of course, superseded by the specific statutory language added in 1959.

to require licensees to use their stations for discussion of public issues, and that the FCC is free to implement this requirement by reasonable rules and regulations which fall short of abridgment of the freedom of speech and press, and of the censorship proscribed by § 326 of the Act.[12]

The objectives of § 315 themselves could readily be circumvented but for the complementary fairness doctrine ratified by § 315. The section applies only to campaign appearances by candidates, and not by family, friends, campaign managers, or other supporters. Without the fairness doctrine, then, a licensee could ban all campaign appearances by candidates themselves from the air [13] and proceed to deliver over his station entirely to the supporters of one slate of candidates, to the exclusion of all others. In this way the broadcaster could have a far greater impact on the favored candidacy than he could by simply allowing a spot appearance by the candidate himself. It is the fairness doctrine as an aspect of the obligation to operate in the public interest, rather than § 315, which prohibits the broadcaster from taking such a step.

The legislative history reinforces this view of the effect of the 1959 amendment. Even before the language relevant here was added, the Senate report on amending § 315 noted that "broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust. Every licensee who is fortunate in obtaining a license is mandated to operate in the public

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[12] "§ 326. Censorship.

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

[13] John P. Crommelin, 19 P & F Radio Reg. 1392 (1960).

interest and has assumed the obligation of presenting important public questions fairly and without bias." S. Rep. No. 562, 86th Cong., 1st Sess., 8–9 (1959). See also, specifically adverting to Federal Communications Commission doctrine, *id.*, at 13.

Rather than leave this approval solely in the legislative history, Senator Proxmire suggested an amendment to make it part of the Act. 105 Cong. Rec. 14457. This amendment, which Senator Pastore, a manager of the bill and Chairman of the Senate Committee considered "rather surplusage," 105 Cong. Rec. 14462, constituted a positive statement of doctrine [14] and was altered to the present merely approving language in the conference committee. In explaining the language to the Senate after the committee changes, Senator Pastore said: "We insisted that the provision remain in the bill, to be a continuing reminder and admonition to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country." 105 Cong. Rec. 17830. Senator Scott, another Senate manager, added that "It is intended to encompass all legitimate areas of public importance which are controversial," not just politics. 105 Cong. Rec. 17831.

It is true that the personal attack aspect of the fairness doctrine was not actually adjudicated until after 1959,

[14] The Proxmire amendment read: "[B]ut nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible." 105 Cong. Rec. 14457.

so that Congress then did not have those rules specifically before it. However, the obligation to offer time to reply to a personal attack was presaged by the FCC's 1949 Report on Editorializing, which the FCC views as the principal summary ~~of~~ its *ratio decidendi* in cases in this area:

> "In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as . . . whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." 13 F. C. C., at 1251–1252.

When the Congress ratified the FCC's implication of a fairness doctrine in 1959 it did not, of course, approve every past decision or pronouncement by the Commission on this subject, or give it a completely free hand for the future. The statutory authority does not go so far. But we cannot say that when a station publishes a personal attack or endorses a political candidate, it is a misconstruction of the public interest standard to require the station to offer time for a response rather than to leave the response entirely within the control of the station which has attacked either the candidacies or the men who wish to reply in their own defense. When a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar

device where personal attacks or political editorials are broadcast by a radio or television station.

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority. The Communications Act is not notable for the precision of its substantive standards and 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, and which we have held a broad but adequate standard before. *FCC* v. *RCA Communications, Inc.*, 346 U. S. 86, 90 (1953); *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216–217 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (1933). We cannot say that the FCC's declaratory ruling in *Red Lion*, or the regulations at issue in *RTNDA*, are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves "the public interest."

III.

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment

grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

A.

Although broadcasting is clearly a medium affected by a First Amendment interest, *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 166 (1948), differences in the characteristics of new media justify differences in the First Amendment standards applied to them.[15] *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503 (1952). For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions

[15] The general problems raised by a technology which supplants atomized, relatively informal communication with mass media as a prime source of national cohesion and news were discussed at considerable length by Zechariah Chafee in Government and Mass Communications (1947). Debate on the particular implications of this view for the broadcasting industry has continued unabated. A compendium of views appears in Freedom and Responsibility in Broadcasting (Coons ed.) (1961). See also Kalven, Broadcasting, Public Policy, and the First Amendment, 10 J. of Law and Econ. 15 (1967); Ernst, The First Freedom 125–180 (1946); Robinson, Radio Networks and the Federal Government, especially at 75–87 (1943). The considerations which the newest technology brings to bear on the particular problem of this litigation are concisely explored by Louis Jaffe in The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and the Local Service Obligation; Implications of Technological Change (U. S. Government Printing Office 1968).

are reasonable and applied without discrimination. *Kovacs* v. *Cooper*, 336 U. S. 77 (1949).

Just as the Government may limit the use of sound amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934,[16] as the Court has noted at length before. *National Broadcasting Co.* v. *United States*, 319 U. S.

[16] The range of controls which have in fact been imposed over the last 40 years, without giving rise to successful constitutional challenge in this Court, is discussed in Emery, Broadcasting and Government: Responsibilities and Regulations (1961); Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964).

190, 210–214 (1943). It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Goverment to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airways. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to delete existing stations. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 (1933). No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." *National Broadcasting Co.* v. *U. S.*, 319 U. S. 190, 227 (1943).

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. 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.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communications." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 475 (1940); *FCC* v. *Allentown Broadcasting Corp.*, 349 U. S. 358, 361–362 (1955); Z. Chafee, Government and Mass Communications 546 (1947). 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 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). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). See Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1 (1965). It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

B.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time-sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of

Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements. That provision, which has been part of the law since 1927, Radio Act of 1927, c. 169, § 18, 44 Stat. 1162, 1170, has been held valid by this Court as an obligation of the licensee relieving him of any power in any way to prevent or censor the broadcast, and thus insulating him from liability for defamation. The constitutionality of the statute under the First Amendment was unquestioned.[17] *Farmers Educ. & Coop. Union* v. *WDAY*, 360 U. S. 525 (1959).

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public.[18] Otherwise, station owners and a few net-

[17] This has not prevented vigorous argument from developing on the constitutionality of the ancillary FCC doctrines. Compare Barrow, The Equal Opportunities and Fairness Doctrine in Broadcasting: Pillars in the Forum of Democracy, 37 U. Cin. L. Rev. 447 (1968), with Robinson, The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation, 52 Minn. L. Rev. 67 (1967), and Sullivan, Editorials and Controversy: The Broadcaster's Dilemma, 32 Geo. Wash. L. Rev. 719 (1964).

[18] The expression of views opposing those which broadcasters permit to be aired in the first place need not be confided solely to the broadcasters themselves as proxies. "Nor is it enough that he should hear the arguments of his adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them." J. S. Mill, On Liberty 32 (R. McCallum ed. 1947).

works would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press* v. *U. S.*, 326 U. S. 1, 20 (1944).

C.

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts in this regard.[18] It would be better if the FCC's encouragement

[18] The President of the Columbia Broadcasting System has recently declared that despite the Government, "we are determined to continue covering controversial issues as a public service, and exercising our own independent news judgment and enterprise. I, for one, refuse to allow that judgment and enterprise to be affected by official intimidation." Stanton, Keynote Address, Sigma Delta Chi National

were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U. S. C. § 301. Unless renewed, they expire within three years. 47 U. S. C. § 307 (d). The statute mandates the issuance of licenses if the "public convenience, interest or necessity will be served thereby." 47 U. S. C. § 307 (a). In applying this

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Convention, Atlanta, Georgia, November 21, 1968. Problems of news coverage from the broadcaster's viewpoint are surveyed in Wood, Electronic Journalism (1967).

standard the Commission for 40 years has been choosing licensees based in part on their program proposals. In *F. R. C.* v. *Nelson Bros. Bond and Mortgage Co.*, 289 U. S. 266, 279 (1933), the Court noted that in "view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses." In determining how best to allocate frequencies, the Federal Radio Commission considered the needs of competing communities and the programs offered by competing stations to meet those needs; moreover, if needs or programs shifted, the Commission could alter its allocations to reflect those shifts. *Id.*, at 285. In the same vein, in *F. C. C.* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137–138 (1940), the Court noted that the statutory standard was a supple instrument to effect congressional desires "to maintain . . . a grip on the dynamic aspects of radio transmission" and to allay fears that "in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." Three years later the Court considered the validity of the Commission's chain broadcasting regulations, which among other things forbade stations from devoting too much time to network programs in order that there be suitable opportunity for local programs serving local needs. The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees. *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943).

D.

The litigants embellish their first amendment arguments with the contention that the regulations are so

vague that their duties are impossible to discern. Of this point it is enough to say that, judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the regulations; there was nothing vague about the FCC's specific ruling in *Red Lion* that Fred Cook should be provided an opportunity to reply. The regulations at issue in *RTNDA* could be employed in precisely the same way as the fairness doctrine was in *Red Lion*. Moreover, the FCC itself has recognized that the applicability of its regulations to situations beyond the scope of past cases may be questionable, 32 Fed. Reg. 10303, 10304 and n. 6, and will not impose sanctions in such cases without warning. We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, *United States* v. *Sullivan*, 332 U. S. 689, 694 (1948), but will deal with those problems if and when they arise.

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airways; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious first amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment

when they require a radio or television station to give reply time to answer personal attacks and political editorials.

E.

It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest by acting as proxy for those who would present differing views, or by giving the latter access directly to broadcast facilities, this condition no longer prevails so that continuing control is not justified. To this there are several answers.

Scarcity is not entirely a thing of the past. Advances in technology, such as microwave transmission, have led to more efficient utilization of the frequency spectrum, but uses for that spectrum have also grown apace.[20] Portions of the spectrum must be reserved for vital uses unconnected with human communication, such as radio-navigational aids used by aircraft and vessels. Conflicts have even emerged between such vital functions as defense preparedness and experimentation in methods of averting midair collisions through radio warning devices.[21] "Land mobile services" such as police, ambulance, fire department, public utility, and other communications systems have been occupying an increasingly crowded

[20] Current discussions of the frequency allocation problem appear in Telecommunication Science Panel, Commerce Technical Advisory Board, U. S. Department of Commerce, Electromagnetic Spectrum Utilization—The Silent Crisis (1966); Joint Technical Advisory Comm., Institute of Electrical and Electronics Engineers & Electronic Industries Assn., Radio Spectrum Utilization (1964); Note, The Crisis in Electromagnetic Frequency Spectrum Allocation, 53 Iowa L. Rev. 437 (1967). A recently released study is the Final Report of the President's Task Force on Communications Policy (1968).

[21] *Bendix Aviation Corp.* v. *FCC*, 272 F. 2d 533 (C. A. D. C. Cir. 1959), cert. denied, 361 U. S. 965 (1960).

portion of the frequency spectrum [22] and there are, apart from licensed amateur radio operators' equipment, 5,000,000 transmitters operated on the "citizens' band" which is also increasingly congested.[23] Among the various uses for radio frequency space, including marine, aviation, amateur, military, and common carrier users, there are easily enough claimants to permit use of the whole with an even smaller allocation to broadcast radio and television uses than now exists.

Comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past. The radio spectrum has become so congested that at times it has been necessary to suspend new applications.[24] The very high frequency television spectrum is, in the country's major markets, almost entirely occupied, although space reserved for ultra high frequency television transmission, which is a relatively recent development as a commercially viable alternative, has not yet been completely filled.[25]

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, make it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity

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[22] 1968 FCC Annual Report 65–69.

[23] New limitations on these users, who can also lay claim to First Amendment protection, were sustained against First Amendment attack with the comment, "Here is truly a situation where if everybody could say anything, many could saying nothing." *Lafayette Radio Electronic Corp.* v. *United States*, 345 F. 2d 278, 281 (1965). Accord, *California Citizens Band Assn.* v. *United States*, 375 F. 2d 43 (C. A. 9th Cir. 1967), cert. denied, 389 U. S. 844 (1967).

[24] *Kessler* v. *FCC*, 326 F. 2d 673 (C. A. D. C. Cir. 1963).

[25] In a table prepared by the FCC on the basis of statistics current as of August 31, 1968, VHF and UHF channels allocated to

impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which wise planning is essential.[26] This does not mean, of course, that every possible

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and those available in the top 100 market areas for television are set forth:

COMMERCIAL

Market Areas	*Channels Allocated*		*Channels On the Air, Authorized, or Applied for*		*Available Channels*	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10.....	40	45	40	44	0	1
Top 50.....	157	163	157	136	0	27
Top 100.....	264	297	264	213	0	84

NONCOMMERCIAL

Market Areas	*Channels Reserved*		*Channels On the Air, Authorized, or Applied for*		*Available Channels*	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10.....	7	17	7	16	0	1
Top 50.....	21	79	20	47	1	32
Top 100.....	35	138	34	69	1	69

1968 FCC Annual Report 132–135.

[26] RTNDA argues that these regulations should be held invalid for failure of the FCC to make specific findings in the rule-making proceeding relating to these factual questions. Presumably the fairness doctrine and the personal attack decisions themselves, such as *Red Lion*, should fall for the same reason. But this argument ignores the fact that these regulations are no more than the detailed specification of certain consequences of long-standing rules, the need for which was recognized by the Congress on the factual predicate of scarcity made plain in 1927, recognized by this Court in the 1943 *National Broadcasting Co.* case, and reaffirmed by the Congress as recently as 1959. "If the number of radio and television stations were not limited by available frequencies, the committee would have no hesitation in removing completely the present provision

render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest.

In view of the prevalence of scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.[28] The judgment of the Court of Appeals in *Red Lion* is ~~reversed~~ and that in *RTNDA* ~~affirmed~~ and the causes remanded for proceedings consistent with this opinion.

affirmed

reversed

It is so ordered.

Not having heard oral argument in these cases, MR. JUSTICE DOUGLAS took no part in the Court's decision.

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[28] We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support. Hence, it is said, the fairness doctrine or its equivalent is essential to satisfy the claims of those excluded and of the public generally. A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public. Cf. *Citizens Publishing Co.* v. *United States*, 393 U. S. — (1969).

wavelength must be occupied at every hour by some vital use in order to sustain the congressional judgment. The substantial capital investment required for many uses, in addition to the potentiality for confusion and interference inherent in any scheme for continuous kaleidoscopic reallocation of all available space may make this unfeasible. The allocation need not be made at such a breakneck pace that the objectives of the allocation are themselves imperiled.[27]

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to-

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regarding equal time and urge the right of each broadcaster to follow his own conscience . . . . However, broadcast frequencies are limited and, therefore, they have been necessarily considered a public trust." S. Rep. No. 562, 86th Cong., 1st Sess., 8–9 (1959). In light of this history, the opportunity which the broadcasters have had to address the FCC and show that somehow the situation had radically changed, undercutting the validity of the congressional judgment, and their failure to adduce any convincing evidence of that in the record here, we cannot consider the absence of more detailed findings below to be determinative.

[27] The "airwaves [need not] be filled at the earliest possible moment in all circumstances, without due regard for these important factors." *Community Broadcasting Co.* v. *FCC*, 274 F. 2d 753, 763 (C. A. D. C. Cir. 1960). Accord, enforcing the fairness doctrine, *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994, 1009 (C. A. D. C. Cir. 1966).

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TELEPROMPTER CORP. ET AL. *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72–1628. Argued January 7, 1974—Decided March 4, 1974*

Several creators and producers of copyrighted television programs brought this suit claiming that defendants had infringed their copyrights by intercepting broadcast transmissions of copyrighted material and rechanneling these programs through various community antenna television (CATV) systems to paying subscribers. The District Court dismissed the complaint on the ground that the cause of action was barred by this Court's decision in *Fortnightly Corp. v. United Artists Television Corp.*, 392 U. S. 390. On appeal, the Court of Appeals divided CATV systems into two categories for copyright purposes: (1) those where the broadcast signal was already "in the community" served by the system, and could be received there either by a community antenna or by standard rooftop or other antennae belonging to the owners of television sets; and (2) those where the systems imported "distant signals" from broadcasters so far away from the CATV community that the foregoing local facilities could not normally receive adequate signals. Holding that CATV reception and retransmission of non-"distant" signals do not constitute copyright infringement, but that reception and retransmission of "distant" signals amount to a "performance" and thus constitute copyright infringement, the court affirmed as to those systems in the first category, but reversed and remanded as to the remaining systems. *Held:*

1. The development and implementation, since the *Fortnightly* decision, of new functions of CATV systems—program origination,

*Together with No. 72–1633, *Columbia Broadcasting System, Inc., et al.* v. *Teleprompter Corp. et al.*, also on certiorari to the same court.

sale of commercials, and interconnection with other CATV systems—even though they may allow the systems to compete more effectively with the broadcasters for the television market, do not convert the entire CATV operation, regardless of distance from the broadcasting station, into a "broadcast function," thus subjecting the CATV operators to copyright infringement liability, but are extraneous to a determination of such liability, since in none of these functions is there any nexus with the CATV operators' reception and rechanneling of the broadcasters' copyrighted materials. Pp. 7–10.

2. The importation of "distant" signals from one community into another does not constitute a "performance" under the Copyright Act. Pp. 10–19.

(a) By importing signals which could not normally be received with current technology in the community it serves, a CATV system does not, for copyright purposes, alter the function it performs for its subscribers, but the reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer. P. 13.

(b) Even in exercising its limited freedom to choose among various "distant" broadcasting stations, a CATV operator cannot be viewed as "selecting" broadcast signals, since when it chooses which broadcast signals to rechannel, its creative function is then extinguished and it thereafter "simply carr[ies], without editing, whatever programs [it] receive[s]." *Fortnightly Corp.* v. *United Artists Television Corp.*, *supra*, at 400. Nor does a CATV system importing "distant" signals procure and propagate them to the public, since it is not engaged in converting the sights and sounds of an event or a program into electronic signals available to the public, the signals it receives and rechannels having already been "released to the public" even though not normally available to the specific segment of the public served by the CATV system. Pp. 14–15.

(c) The fact that there have been shifts in current business and commercial relationships in the communications industry as a result of the CATV systems' importation of "distant" signals, does not entail copyright infringement liability, since by extending the range of viewability of a broadcast program, the CATV systems do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity

Syllabus

or labor from advertisers on the basis of all viewers who watch the particular program. Pp. 15–19.

476 F. 2d 338, affirmed in part, reversed in part, and remanded to District Court.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BURGER, C. J., joined. BLACKMUN, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 72–1628 AND 72–1633

Teleprompter Corporation et al., Petitioners, 72–1628 *v.* Columbia Broadcasting System, Inc., et al.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.
Columbia Broadcasting System, Inc., et al., Petitioners, 72–1633 *v.* Teleprompter Corporation et al.	

[March 4, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

The plaintiffs in this litigation, creators and producers of televised programs copyrighted under the provisions of the Copyright Act of 1909, as amended, 17 U. S. C. § 1 *et seq.*, commenced suit in 1964 in the United States District Court for the Southern District of New York, claiming that the defendants had infringed their copyrights by intercepting broadcast transmissions of copyrighted material and rechanneling these programs through various community antenna television (CATV) systems to paying subscribers.[1] The suit was initially

[1] The exclusive rights of copyright owners are specified in § 1 of the Copyright Act:

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

stayed by agreement of the parties, pending this Court's decision in *Fortnightly Corp.* v. *United Artists Television Corp.*, 392 U. S. 290. In that case, decided in 1968, we

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"(a) To print, reprint, publish, copy, and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art.

"(c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; and

"(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced." 17 U. S. C. § 1

held that the reception and distribution of television broadcasts by the CATV systems there involved did not constitute a "performance" within the meaning of the Copyright Act, and thus did not amount to copyright infringement.[2] After that decision the plaintiffs in the present litigation filed supplemental pleadings in which they sought to distinguish the five CATV systems challenged here from those whose operations had been found not to constitute copyright infringement in *Fortnightly*.[3] The District Court subsequently dismissed the complaint on the ground that the plaintiffs' cause of action was barred by the *Fortnightly* decision. 355 F. Supp. 618. On appeal to the United States Court of Appeals for the Second Circuit, the judgment was affirmed in part and reversed in part, and the case was remanded to the District Court for further proceedings. 476 F. 2d 338. Both the plaintiffs and the defendants petitioned for certiorari, and, because of the seemingly important ques-

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[2] Although the Copyright Act does not contain an explicit definition of infringement, it is settled that unauthorized use of copyrighted material inconsistent with the "exclusive rights" enumerated in § 1, constitutes copyright infringement under federal law. See M. Nimmer, Copyright § 100, at 376 (1972). Use of copyrighted material not in conflict with a right secured by § 1, however, no matter how widespread, is not copyright infringement. "The fundamental [is] that 'use' is not the same thing as 'infringement,' that use short of infringement is to be encouraged . . . ." B. Kaplan, An Unhurried View of Copyright 57 (1967).

It appears to be conceded that liability in this case depends entirely on whether the defendants did "perform" the copyrighted works. Teleprompter has not contended in this Court that, if it did "perform" the material, its performance was not "in public" within the meaning of § 1 (c) of the Act (nondramatic literary works) or "publicly" under § 1 (d) (dramatic works). Cf. *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390, 395 n. 13.

[3] The plaintiffs' amended complaints also contained allegations of additional copyright infringements on various dates in 1969 and 1971.

tions of federal law involved, we granted both petitions. 414 U. S. 817.

I

The complaint alleged that copyright infringements occurred on certain dates at each of five illustrative CATV systems located in Elmira, New York; Farmington, New Mexico; Rawlins, Wyoming; Great Falls, Montana; and New York City. The operations of these systems typically involved the reception of broadcast beams by means of special television antennae owned and operated by Teleprompter, transmission of these electronic signals by means of cable or a combination of cable and point-to-point microwave [4] to the homes of

[4] The Court of Appeals in this case described the differences between point-to-point microwave transmission and broadcasting in the following terms:

"A microwave link involves the transmission of signals through the air. However, microwave transmission in itself is not broadcasting. A broadcast signal, according to 47 U. S. C. § 153 (o), is transmitted by a broadcaster for '[reception] by the public.' In the case of microwave, the signal is focused and transmitted in a narrow beam aimed with precision at the receiving points. Thus, microwave transmission is point-to-point communication. The receiving antenna must be in the path of the signal beam. If the transmission must cover a considerable distance, the microwave signal is transmitted to the first receiving point from which it is retransmitted to another receiving point, and this process is repeated until the signal reaches the point from which it is distributed by cable to subscribers." 476 F. 2d 338, 343 n. 6.

The plaintiffs argued in the District Court and in the Court of Appeals that "the use of microwave, in and of itself, is sufficient to make a CATV system functionally equivalent to a broadcaster and thus subject to copyright liability . . . ." *Id.*, at 348–349. This contention was rejected by the Court of Appeals on the ground that microwave transmission "is merely an alternative, more economical in some circumstances, to cable in transmitting a broadcast signal from one point in a CATV system to another," *id.*, at 349, and the argument has not been renewed in this Court.

subscribers, and the conversion of the electromagnetic signals into images and sounds by means of the subscribers' own television sets.[5] In some cases the distance between the point of original transmission and the ultimate viewer was relatively great—in one instance more than 450 miles—and reception of the signals of those stations by means of an ordinary rooftop antenna, even an extremely high one, would have been impossible because of the curvature of the earth and other topographical factors. In others, the original broadcast was relatively close to the customers' receiving sets and could normally have been received by means of standard television equipment. Between these extremes were systems involving intermediate distances where the broadcast signals could have been received by the customers' own television antennae only intermittently, imperfectly, and sporadically.[6]

Among the various actual and potential CATV operations described at trial the Court of Appeals discerned, for copyright purposes, two distinct categories. One category included situations where the broadcast signal was already "in the community" served by a CATV system, and could be received there either by standard rooftop or other antennae belonging to the owners of

[5] For general descriptions of CATV systems and their operation, see *United States* v. *Southwestern Cable Co.*, 392 U. S. 157; M. Seiden, An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry (1965); Note, Regulation of Community Antenna Television, 70 Col. L. Rev. 837 (1970); Note, The Wire Mire: The FCC and CATV, 79 Harv. L. Rev. 366 (1965).

[6] In two of the cities involved in this suit signals not normally receivable by household sets because of distance or terrain could be received by rooftop antennae because of the use by the broadcasting stations of "translators," under license from the Federal Communications Commission, which rebroadcast a specific station's signals. See 476 F. 2d, at 344 & n. 7.

television sets or by a community antenna erected in or adjacent to the community. Such CATV systems, the court found, performed essentially the same function as the CATV systems in *Fortnightly* in that they "no more than enhance the viewer's capacity to receive the broadcaster's signals," 392 U. S., at 399. The second category included situations where the CATV systems imported "distant signals" from broadcasters so far away from the CATV community that neither rooftop nor community antennae located in or near the locality could normally receive signals capable of providing acceptable images.

The Court of Appeals determined that "[w]hen a CATV system is performing this second function of distributing signals that are beyond the range of local antennas, . . . to this extent, it is functionally equivalent to a broadcaster and thus should be deemed to 'perform' the programming distributed to subscribers on these imported signals." 476 F. 2d, at 349. The Court of Appeals found that in two of the operations challenged in the complaint—those in Elmira and New York City—the signals received and rechanneled by the CATV systems were not "distant signals," and as to these claims the court affirmed the District Court's dismissal of the complaint. As to the three remaining systems, the case was remanded for further findings in order to apply the appellate court's test for determining whether or not the signals were "distant."[7] In No. 72–1633 the plaintiffs

[7] The Court of Appeals acknowledged that a determination of what is a "distant signal" was "difficult," and "that a precise judicial definition of a distant signal is not possible." *Id.*, at 350. FCC regulations at one time provided that for regulatory purposes a distant signal was one "which is extended or received beyond the Grade B contour of the station." 47 CFR § 74.1101 (i), (1971) (removed 37 Fed. Reg. 3278, Feb. 12, 1972). A Grade B contour was defined as a line along which good reception may be expected 90% of the time at 50% of the locations. *United States* v. *South-*

ask this Court to reverse the determination of the Court of Appeals that CATV reception and retransmission of signals that are not "distant" do not constitute copyright infringement. In No. 72-1628, the defendants ask us to reverse the appellate court's determination that reception and retransmission of "distant" signals amount to a "performance," and thus constitute copyright infringement on the part of the CATV systems.

II

We turn first to the assertions of the petitioners in No. 72-1633 that irrespective of the distance from the broadcasting station, the reception and retransmission of its signal by a CATV system constitute a "performance" of a copyrighted work. These petitioners contend that a number of significant developments in the technology and actual operations of CATV systems mandate a reassessment of the conclusion reached in *Fortnightly* that CATV systems act only as an extension of a television set's function of converting into images and sounds the signals made available by the broadcasters to the public. In *Fortnightly* this Court reviewed earlier cases in the federal courts and determined that while analogies to the functions of performer and viewer envisioned by the Congress in 1909—that of live or filmed performances

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western Cable Television Co., supra, 392 U. S., at 163, n. 16. The Court of Appeals recognized that "this definition [is] unsuitable for copyright purposes because . . . any definition phrased in terms of what can be received in area homes using rooftop antennas would fly in the face of the mandate of *Fortnightly*." 476 F. 2d, at 350. The court found instead that "it is easier to state what is not a distant signal than to state what is a distant signal. Accordingly, we have concluded that any signal capable of projecting, without relay or retransmittal an acceptable image that a CATV system receives off-the-air during a substantial portion of the time by means of an antenna erected in or adjacent to the CATV community is not a distant signal." *Id.*, at 351 (footnote omitted).

watched by audiences—were necessarily imperfect, a simple line could be drawn: "Broadcasters perform. Viewers do not perform." 392 U. S., at 398 (footnotes omitted). Analysis of the function played by CATV systems and comparison with those of broadcasters and viewers convinced the Court that CATV systems fall "on the viewer's side of the line." *Id.*, at 399 (footnote omitted).

> "The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry." *Id.*, at 400–401 (footnotes omitted).

The petitioners claim that certain basic changes in the operation of CATV systems that have occurred since *Fortnightly* bring the systems in question here over to the broadcasters' "side of the line." In particular, they emphasize three developments that have taken place in the few years since the *Fortnightly* decision. First, they point out that many CATV systems, including some of those challenged here, originate programs wholly independent of the programs that they receive off-the-air from broadcasters and rechannel to their subscribers.[8]

[8] Program origination initially consisted of simple arrangements on spare channels using automated cameras providing time, weather, news ticker, or stock ticker information, and aural systems with music or news announcements. The function has been expanded

It is undisputed that such CATV systems "perform" those programs which they produce and program on their own; but it is contended that, in addition, the engagement in such original programming converts the entire CATV operation into a "broadcast function," and thus a "performance" under the Copyright Act. Second, these petitioners assert that Teleprompter, unlike the CATV operators sued in *Fortnightly*, sells advertising time to commercial interests wishing to sell goods or services in the localities served by its CATV systems. The sale of such commercials, they point out, was considered in the *Fortnightly* opinion as a function characteristically performed by broadcasters. 392 U. S., at 400 n. 28, citing *Intermountain Broadcasting & Television Corp.* v. *Idaho Microwave, Inc.*, 196 F. Supp. 315, 325. Finally, they contend that by engaging in interconnection with other CATV systems—whereby one CATV system that originates a program sells the right to redistribute it to other CATV systems that carry it simultaneously to their own subscribers—the CATV operators have similarly transferred their functions into that of broadcasters, thus subjecting themselves to copyright infringement liability.[9]

The copyright significance of each of these functions—program origination, sale of commercials, and interconnection—suffers from the same logical flaw: in none of

to include coverage of sports and other live events, news services, moving picture films, and specially created dramatic and non-dramatic programs. See FCC, First Report and Order, 20 FCC 2d 201 (1969); *United States* v. *Midwest Video Corp.*, 406 U. S. 649.

[9] The Court of Appeals limited its discussion of interconnection among CATV systems to two instances of live coverage of championship heavyweight boxing contests. While the respondents contend that additional examples of interconnection were presented in the trial testimony, they do not suggest that material copyrighted by anyone other than the CATV operators was carried by any such interconnection, and thus the exact number of such instances is of no significance.

these operations is there any nexus with the defendants' reception and rechannelling of the broadcasters' copyrighted materials. As the Court of Appeals observed with respect to program origination, "[e]ven though the origination service and the reception service are sold as a package to the subscribers, they remain separate and different operations, and we cannot sensibly say that the system becomes a 'performer' of the broadcast programming when it offers both origination and reception services, but remains a non-performer when it offers only the latter." 476 F. 2d, at 347. Similarly, none of the programs accompanying advertisements sold by CATV or carried via an interconnection arrangement among CATV systems involved material copyrighted by the petitioners.[10]

For these reasons we hold that the Court of Appeals was correct in determining that the development and implementation of these new functions, even though they may allow CATV systems to compete more effectively with the broadcasters for the television market, are simply extraneous to a determination of copyright infringement liability with respect to the reception and retransmission of broadcasters' programs.

III

In No. 72-1628 Teleprompter and its subsidiary, Conley Electronics Corp., seek a reversal of that portion of the Court of Appeals' judgment that determined that the importation of "distant" signals from one community into another constitutes a "performance" under the Copy-

[10] While the technology apparently exists whereby a CATV system could retransmit to its subscribers broadcast programs taken off-the-air but substitute its own commercials for those appearing in the broadcast, none of the instances of claimed infringement involved such a process.

right Act. In concluding that rechanneling of "distant" signals constitutes copyright infringement while a similar operation with respect to more nearby signals does not, the court relied in part on a description of CATV operations contained in this Court's opinion in *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, announced a week before the decision in *Fortnightly:*

> "CATV systems perform either or both of two functions. First, they may supplement broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible; and second, they may transmit to subscribers the signal of distant stations entirely beyond the range of local antennae." 392 U. S., at 163.

The Court in *Southwestern Cable*, however, was faced with conflicting assertions concerning the jurisdiction of the Federal Communications Commission to regulate in the public interest the operations of CATV systems. Insofar as the language quoted had other than a purely descriptive purpose, it was related only to the issue of regulatory authority of the Commission. In that context it did not and could not purport to create any separation of functions with significance for copyright purposes.[11]

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[11] The FCC has consistently contended that it is without power to alter rights emanating from other sources, including the Copyright Act. In 1966 it indicated that its proposed rules regulating CATV operations would not "affect in any way the pending copyrights suit, involving matters entirely beyond [the FCC's] jurisdiction." Second Report and Order, Community Antenna Television Systems, 2 FCC 2d 725, 768. This position is consistent with the terms of the Communications Act of 1934, the source of the Commission's regulatory power, which provides, in part:

"Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but

In the briefs and at oral argument various rationales for the distinction adopted by the Court of Appeals have been advanced. The first, on which the court itself relied, is the assertion that by importing signals from distant communities the CATV systems do considerably more than "enhance the viewer's capacity to receive the broadcaster's signals," *Fortnightly, supra,* 392 U. S., at 399, and instead "bring signals into the community that would not otherwise be receivable on an antenna, even a large community antenna, erected in that area." 476 F. 2d, at 349. In concluding that such importation transformed the CATV systems into performers, the Court of Appeals misconceived the thrust of this Court's opinion in *Fortnightly.*

In the *Fortnightly* case the Court of Appeals had concluded that a determination of whether an electronic function constituted a copyright "performance" should depend on "how much did the [CATV system] do to bring about the viewing and hearing of a copyrighted work." 377 F. 2d 872, 877. This quantitative approach was squarely rejected by this Court:

> "[M]ere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting . . . . Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in

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provisions of this chapter are in addition to such remedies." 47 U. S. C. § 414.

Thus, it is highly unlikely that the "distant signal" definition adopted by the Commission or a differentiation of function based on such a definition was intended to or could have copyright significance. Indeed, as noted, the Court of Appeals in the present case found that the Commission's definition off a "distant signal" was unsatisfactory for determining if a "performance" under the Copyright Act had occurred. See n. 7, *supra.*

the total process of television broadcasting and reception." 392 U. S., at 397.

By importing signals that could not normally be received with current technology in the community it serves, a CATV system does not, for copyright purposes, alter the function it performs for its subscribers. When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program. The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so. The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.

In *Fortnightly* the Court reasoned that "[i]f an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set," 392 U. S., at 400, and concluded that "[t]he only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur." *Ibid.* In the case of importation of "distant signals," the function is essentially the same. While the ability or inclination of an individual to erect his own antenna might decrease with respect to distant signals because of the increased cost of bringing the signal to his home, his status as a "non-performer" would remain unchanged. Similarly, a CATV system does not lose its status as a nonbroadcaster, and thus a non-"performer" for copyright purposes, when the signals it carries are those from distant rather than local sources.

It is further argued that when a CATV operator increases the number of broadcast signals that it may

receive and redistribute, it exercises certain elements of choice and selection among alternative sources and that this exercise brings it within scope of the broadcaster function. It is pointed out that some of the CATV systems importing signals from relatively distant sources could with equal ease and cost have decided to import signals from other stations at no greater distance from the communities they serve. In some instances, the CATV system here involved "leapfrogged" nearer broadcasting stations in order to receive and rechannel more distant programs.[12] By choosing among the alternative broadcasting stations, it is said, a CATV system functions much like a network affiliate which chooses the mix of national and local program material it will broadcast.

The distinct functions played by broadcasters and CATV systems were described in *Fortnightly* in the following terms:

> "Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers." 392 U. S., at 400.

Even in exercising its limited freedom to choose among various broadcasting stations, a CATV operator simply cannot be viewed as "selecting," "procuring," or "propagating" broadcast signals as those terms were used in *Fortnightly*. When a local broadcasting station selects

Bcstrs have legal right to select or reject, incl editing of conte (?) - cable opera has the right t select or reject distant signal programming

[12] For example, it was represented in a brief before this Court that the Farmington, New Mexico CATV system imported signals from a Los Angeles station even though 113 other stations were closer or equidistant, including a number which, unlike the Los Angeles station, were in the same time zone as the Farmington community.

a program to be broadcast at a certain time, it is exercising a creative choice among the many possible programs available from the national network with which it is affiliated, from copyright holders of new or rerun motion pictures, or from its own facilities to generate and produce entirely original program material. The alternatives are myriad, and the creative possibilities limited only by scope of imagination and financial considerations. An operator of a CATV system, however, makes a choice as to which broadcast signals to rechannel to its subscribers, and its creative function is then extinguished. Thereafter it "merely carr[ies], without editing, whatever programs [it] receive[s]." *Ibid.* Moreover, a CATV system importing "distant" signals does not procure programs and propagate them to the public, since it is not engaged in converting the sights and sounds of an event or a program into electronic signals available to the public. The electronic signals it receives and rechannels have already been "released to the public" even though they may not be normally available to the specific segment of the public served by the CATV system.

not entirely true

Finally, it is contended that importation of "distant" signals should entail copyright infringement liability because of the deleterious impact of such retransmission upon the economics and market structure of copyright licensing. When a copyright holder first licenses a copyrighted program to be shown on broadcast television, he typically cannot expect to recoup his entire investment from a single broadcast. Rather, after a program has had a "first run" on the major broadcasting networks, it is often later syndicated to affiliates and independent stations for "second run" propagation to secondary markets. The copyright holders argue that if CATV systems are allowed to import programs and rechannel them into secondary markets they will dilute the profitability of

later syndications, since viewer appeal, as measured by various rating systems, diminishes with each successive showing in a given market. We are told that in order to ensure "the general benefits derived by the public from the labors of authors." *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127, and "the incentive to further efforts for the same important objects," *id.*, at 128, citing *Kendall* v. *Winsor*, 62 U. S. (21 How.) 322, 328, current licensing relationships must be maintained.

In the television industry, however, the commercial relations between the copyright holders and the licensees on the one hand and the viewing public on the other are such that dilution or dislocation of markets does not have the direct economic or copyright significance that this argument ascribes to it. Unlike propagators of other copyrighted material, such as those who sell books, perform live dramatic productions, or project motion pictures to live audiences, holders of copyrights for television programs or their licensees are not paid directly by those who ultimately enjoy the publication of the material—that is, the television viewers—but by advertisers who use the drawing power of the copyrighted material to promote their goods and services. Such advertisers typically pay the broadcasters a fee for each transmission of an advertisement based on an estimate of the expected number and characteristics of the viewers who will watch the program. While, as members of the general public, the viewers indirectly pay for the privilege of viewing copyrighted material through increased prices for the goods and services of the advertisers, they are not involved in a direct economic relationship with the copyright holders or their licensees.[13]

[13] Some commentators have suggested that if CATV systems must pay license fees for the privilege of retransmitting copyrighted broadcast programs, the CATV subscribers will in effect be paying twice for the privilege of seeing such programs: first through in-

By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor. When a broadcaster transmits a program under license from the copyright holder it has no control over the segment of the population which may view the program—the broadcaster cannot beam the program exclusively to the young or to the old, only to women or only to men—but rather he gets paid by advertisers on the basis of all viewers who watch the program. The use of CATV does not significantly alter this situation. Instead of basing advertising fees on the number of viewers within the range of direct transmission plus those who may receive "local signals" via a CATV system, broadcasters whose reception ranges have been extended by means of "distant signal" CATV rechanneling will merely have a different and larger viewer market.[14] From the point of view of the broadcasters, such market extension may mark a reallocation of the potential number of viewers each station may reach, a fact of no direct concern under the Copyright Act. From the point of view of the copyright holders, such market changes will mean that the

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creased prices for the goods and services of the advertisers who pay for the television broadcasts and a second time in the increased cost of the CATV service. Note, CATV and Copyright Liability: On a Clear Day You Can See Forever, 52 Va. L. Rev. 1505, 1515 (1966); Note, CATV and Copyright Liability, 80 Harv. L. Rev. 1514, 1522–1523 (1967). See n. 15, *infra*.

[14] Testimony and exhibits introduced in the District Court indicate that the major rating services include in their compilations statistics concerning the entire number of viewers of a particular program, including those who receive the broadcast via "distant" transmission over CATV systems. The weight given such statistics by advertisers who bid for broadcast time and pay the fees which support the broadcasting industry was not, however, established. See n. 15, *infra*.

compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the CATV market.[15]

[15] It is contended that copyright holders will necessarily suffer a net loss from the dissemination of their copyrighted material if license-free use of "distant signal" importation is permitted. It is said that importation of copyrighted material into a secondary market will result in a loss in the secondary market without increasing revenues from the extended primary market on a scale sufficient to compensate for that loss. The assumption is that local advertisers supporting "first run" programs will be unlikely to pay significantly higher fees on the basis of additional viewers in a "distant" market because such viewers will typically have no commercial interest in the goods and services sold by purely local advertisers. For discussion of the possible impact of CATV "distant signal" importation on advertiser markets for broadcast television, see Note, *supra*, 52 Va. L. Rev., at 1513–1516; Note, *supra*, 80 Harv. L. Rev., at 1522–1525. The Court of Appeals noted that "[n]o evidence was presented in the court below to show that regional or local advertisers would be willing to pay greater fees because the sponsored program will be exhibited in some distant market, or that national advertisers would pay more for the relatively minor increase in audience size that CATV carriage would yield for a network program," and concluded that "[i]ndeed, economics and common sense would impel one to an opposite conclusion." 476 F. 2d, at 342 n. 2. Thus, no specific findings of fact were made concerning the precise impact of "distant signal" retransmission on the value of program copyrights. But such a showing would be of very little relevance to the copyright question we decide here. At issue in this case is the limited question of whether CATV transmission of "distant" signals constitutes a "performance" under the Copyright Act. While securing compensation to the holders of copyrights was an essential purpose of that Act, freezing existing economic arrangements for doing so was not. It has been suggested that the best theoretical approach to the problem might be "[a] rule which called for compensation to copyright holders only for the actual advertising time 'wasted' on local advertisers unwilling to pay for the increase in audience size brought about by the cable transmission," Note, 87 Harv. L. Rev. 665, 675 n. 32 (1974). But such a rule would entail extended factfinding and a legislative, rather

These shifts in current business and commercial relationships, while of significance with respect to the organization and growth of the communications industry, simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field, must be left to Congress.[16]

The judgment of the Court of Appeals is affirmed in part and reversed in part, and these cases are remanded to the District Court with directions to reinstate its judgment.

It is so ordered.

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than a judicial, judgment. In any event, a determination of the best alternative structure for providing compensation to copyright holders, or a prediction of the possible evolution in the relationship between advertising markets and the television medium, is beyond the competence of this Court.

[16] The pre-*Fortnightly* history of efforts to update the Copyright Act to deal with technological developments such as CATV was reviewed in the *Fortnightly* opinion at 392 U. S., at 396 n. 17. At that time legislative action to revise the copyright laws so as to resolve copyright problems posed by CATV was of such apparent imminence that the Solicitor General initially suggested to this Court that it defer judicial resolution of the *Fortnightly* case in order to allow a speedy completion of pending legislative proceedings. Those legislative activities, however, did not bear fruit, apparently because of the diversity and delicacy of the interests affected by the CATV problem. See 117 Cong. Rec. 2001 (Feb. 8, 1971) (remarks of Sen. McClellan). Further attempts at revision in the 91st Congress, S. 542, and the 92d Congress, S. 644, met with a similar lack of success. At present, Senate hearings in the Subcommittee on Patents, Trademarks and Copyrights have been held on a bill that would amend the Copyright Act, S. 1361, but the bill has not yet been reported out of that subcommittee. A companion bill has been introduced in the House of Representatives, H. R. 8186 and referred to Judiciary Committee No. 3, but no hearings have yet been scheduled

SUPREME COURT OF THE UNITED STATES

Nos. 72–1628 AND 72–1633

Teleprompter Corporation et al., Petitioners,
72–1628 *v.*
Columbia Broadcasting System, Inc., et al.

Columbia Broadcasting System, Inc., et al., Petitioners,
72–1633 *v.*
Teleprompter Corporation et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 4, 1974]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

The Court today makes an extraordinary excursion into the legislative field. In *United Artists Television, Inc.* v. *Fortnightly Corp.*, 392 U. S. 390, the lower courts had found infringement of the copyright, but this Court reversed holding that the CATV systems in *Fortnightly* were merely a "reception service," were "on the viewer's side of the line" *id.*, at 399, and therefore did not infringe the copyright act. They performed by cable, reaching into towns which could not receive a TV signal due, say, to surrounding mountains and expanded the reach of the TV signal within the confines of the area which a broadcaster's telecast reached.

Whatever one thinks of *Fortnightly*, we should not take the next step necessary to give immunity to the present CATV organizations. Unlike those involved in *Fortnightly*, the present CATV's are functionally the equivalent to a regular broadcaster. TV waves travel in straight

lines, thus reaching a limited area on the earth's curved surface. This scientific fact has created for regulatory purposes separate television markets.[1] Those whose telecast has covered one market or geographic area are under *Fortnightly* estopped to say that one who through CATV reaches by cable remote hidden valleys in that area. infringe the broadcaster's copyright. But the CATV's in the present case go hundreds of miles, erect receiving stations or towers that pick up the programs of distant broadcasters, and carry them by cable into a wholly different area.

In any realistic practical sense the importation of these remote programs into the new and different market is performing a broadcast function by the cable device. Respondents in the present case exercised their copyright privileges and licensed performance of their works to particular broadcasters for telecast in the distant market. Petitioners were not among those licensees. Yet they are granted use of the copyright material without payment of any fees.

The Copyright Act. 17 U. S. C. § 1 (c) and (d), gives the owner of a copyright "the exclusive right" to present the creation "in public for profit" and to control the manner or method by which it is "reproduced." A CATV that builds an antenna to pick up telecasts in Area B and then transmits it by cable to Area A is

[1] The Communications Act of 1934, §§ 303 (c), (d), (h), empowered the FCC to: "[A]ssign frequencies for each individual station," "determine the power which each station shall use," "[d]etermine the location of . . . individual stations," and "[h]ave authority to establish areas or zones to be served by any station." 47 U. S. C. §§ 303 (c), (d), and (h). Pursuant to these powers and others granted it by the Communications Act, the FCC has supervised the establishment and maintenance of a nationwide system of local radio and television broadcasting stations, each with primary responsibility to a particular community.

reproducing the copyright work not pursuant to a license from the owner of the copyright but by theft. That is not "encouragement to the production of literary (or artistic) works of lasting benefit to the world" that we extolled in *Mazer* v. *Stein*, 347 U. S. 201, 219. Today's decision is at war with what Chief Justice Hughes, speaking for the Court in *Fox Film Corporation* v. *Doyal*, 286 U. S. 123, 130, described as the aim of Congress:

> "Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit and forms the basis for extensive and profitable business enterprises. The advantage to the public is gained merely from the carrying out of the general policy in making such grants and not from any direct interest which the Government has in the use of the property which is the subject of the grants."

The CATV system involved in the present case performs somewhat like a network-affiliated broadcast station which imports network programs originated in distant telecast centers by microwave, off-the-air cable, precisely as petitioners do here.[2] Petitioner in picking up these distant signals is not managing a simple antenna reception service. It goes hundreds of miles from the community it desires to serve, erects a receiving station and then selects the programs from TV and radio stations in that distant area which it desires to distribute in its own distant market. If "function" is the key test as *Fortnightly* says, then functionally speaking petitioners are broadcasters; and their acts of piracy are flagrant

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[2] Farmington, New Mexicco, into which petitioners pipe programs stolen from Los Angeles is 600 miles away; and petitioner developed an intricate hookup "over twenty-three steps over a roundabout, 1300 mile route to establish the link." See 355 F. Supp., at 622.

violations of the Copyright Act. The original broadcaster is the licensor of his copyright and it is by virtue of that license that, say, a Los Angeles station is enabled lawfully to make its broadcasts. Petitioner receives today a license-free importation of programs from the Los Angeles market into Farmington, New Mexico, a distant second market. Petitioners not only rebroadcast the pirated copyright programs; they themselves—unlike those in *Fortnightly*—originate programs and finance their original programs[3] and their pirated programs by sales of time to advertisers. That is the way the owner of these copyrighted programs receives value for his copyrights. CATV does the same thing; but it makes its fortunes through advertising rates based in part upon pirated copyright programs. The Court says this is "a fact of no direct concern under the Copyright Act"; but the statement is itself the refutation of its truth. Rechanneling by CATV of the pirated programs robs the copyright owner of his chance for monetary rewards through advertising rates[4] on rebroadcasts in the distant area and gives those monetary rewards to the group that has pirated the copyright.

We are advised by an *amicus* brief of the Motion Picture Association that films from TV telecasts are being imported by CATV into their own markets in competition with the same pictures licensed to TV stations in the area into which the CATV—a nonpaying pirate of the films—imports them. It would be difficult to imagine a more flagrant violation of the Copyright Act. Since

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[3] *Cable Television Report and Order*, 36 F. C. C. 2d 143, 290. And see *Rules re Micro-wave Served CATV*, 38 F. C. C. 683 (1965); *Cable Television Report and Order*, 36 F. C. C. 2d 148 (1972); *Radio Signals, Importation by Cable Television*, 36 F. C. C. 2d 630.

[4] We sustained the Commission's authority to require CATV to originate programs in a 5–4 decision in 1972. *United States* v. *Midwest Video Corp.*, 406 U. S. 649.

the Copyright Act is our only guide to law and justice in this case, it is difficult to see why CATV systems are free of copyright license fees, when they import programs from distant stations and transmit them to their paying customers in a distant market. That result reads the Copyright Act out of existence for CATV. That may or may not be desirable public policy. But it is a legislative decision that not even a rampant judicial activism should entertain.

There is nothing in the Communications Act that qualifies, limits, modifies, or makes exception to the Copyright Act.

"Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but provisions of this chapter are in addition to such remedies." Moreover the Federal Communications Commission has realized that it can "neither resolve, nor avoid" the problem under the Copyright Act, when it comes to CATV.[5]

On January 14, 1974, the Cabinet Committee on Cable Communications headed by Clay T. Whitehead made its report to the President. That report emphasizes the need for the free flow of information in a society that honors "freedom of expression"; and it emphasizes that CATV is a means to that end and that CATV is so

[5] The Solicitor General in his brief in the *Fortnightly* case urged that the cable transmission of other station's programs into distant markets be subject to copyright protection:

". . . much of the advertising which accompanies the performance of copyrighted works, such as motion pictures, is directed solely at potential viewers who are within the station's normal service area—'local' advertising and 'national spot' advertising both fall within that category. Such advertisers do not necessarily derive any significant commercial benefit from CATV carriage of the sponsored programs outside of the market ordinarily served by the particular station, and accordingly may be unwilling to pay additional amounts for such expanded coverage."

closely "linked to electronic data processing, telephone, television and radio broadcasting, the motion picture and music industries, and communication satellites" *id.*, pp. 5–6, as to require "a consistent and coherent national policy" *id.*, 6. The Report rejects the regulatory framework of the Federal Communications Commission because it creates "the constant danger of unwarranted governmental influence or control over what people see and hear on television broadcast programming" *id.*, 7. The Report opts for a limitation of "the number of channels over which the cable operator has control of program content and to require that the bulk of channels be leased to others." *Ibid.*

The Report recognizes that "copyright liability" is an important phase of the new regulatory program the Committee envisages, *id.*, 14. The pirating of copyrights sanctioned by today's decision is anathema to the philosophy of this Report:

> ". . . Both equity and the incentives necessary for the free and competitive supply of programs require a system in which program retailers using cable channels negotiate and pay for the right to use programs and other copyrighted information. Individual or industry-wide negotiations for a license, or right, to use copyrighted material are the rule in all the other media and should be the rule in the cable industry.
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> "As a matter of communications policy, rather than copyright policy, the program retailer who distributes television broadcast signals in addition to those provided by the cable operator should be subject to full copyright liability for such retransmissions. However, given the reasonable expectations created by current regulatory policy, the cable operator should be entitled to a non-negotiated, blanket

license, conferred by statute, to cover his own retransmission of broadcast signals."

The Whitehead Commission Report has of course no technical, legal bearing on the issue before us. But it strongly indicates how important to legislation is the sanctity of the copyright and how opposed to ethical business systems is the pirating of copyright materials. The Court can reach the result it achieves today only by "legislating" important features of the Copyright Act out of existence. As stated by THE CHIEF JUSTICE in *United States* v. *Midwest Video Corp.*, *supra*, at 676, "The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the Courts."

That counsel means that if we do not override *Fortnightly*, we should limit it to its precise facts and leave any extension or modification to the Congress.

SUPREME COURT OF THE UNITED STATES

No. 72–1628

Teleprompter Corporation et al., Petitioners, *v.* Columbia Broadcasting System, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 4, 1974]

MR. JUSTICE BLACKMUN, dissenting.

I was not on the Court when *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U. S. 390 (1968), was decided. Were that case presented for the first time today, I would be in full agreement with what Mr. Justice Fortas said in dissent. I would join his unanswered—and, for me, unanswerable—reliance on Mr. Justice Brandeis' unanimous opinion in *Buck* v. *Jewell-LaSalle Realty Corp.*, 283 U. S. 191 (1931). But *Fortnightly* has been decided, and today the Court adheres to the principles it enunciated and to the simplistic basis* on which it rests.

With *Fortnightly* on the books, I, as MR. JUSTICE DOUGLAS, would confine it "to its precise facts and leave any extension or modification to the Congress." *Ante*, p. —. The United States Court of Appeals for the Second Circuit decided the present case as best it could with the difficulties inherent in, and flowing from, *Fortnightly* and the Copyright Act, and within such elbow-room as was left for it to consider the expanding technology of modern-day CATV. Judge Lumbard's opinion, at 476 F. 2d 338, presents an imaginative and well-reasoned solution without transgressing upon the restrictive parameters of *Fortnightly*. I am in agreement with that opinion and would therefore affirm the judgment.

*"Broadcasters perform. Viewers do not perform." 392 U. S., at 398 (footnotes omitted).