

TELEVISION PROGRAMMING—ITS LEGAL LIMITATIONS

The advisable degree of limitation on program content has long been a controversial point among leaders in radio and television. Justin Miller, president of the National Association of Broadcasters, has steadily attacked existing controls as gross limitations on the right of free speech.¹ Others have lamented that the present restraints are "networks of inadequacy."² FCC Chairman Wayne Coy has publicly decried the lack of control.³

In recent months the din has diminished. The lull, at least as to television, may readily be ascribed to the currently-enforced FCC "freeze", which rejects all applications for television channels pending hearings and decisions by the Commission determining from a technical viewpoint the proper method of channel allocation. Since competition for channels is precluded, the Commission has few opportunities to express itself on program restraints. One might well imagine, however, that as the "freeze" begins to thaw, as it undoubtedly must in the near future, temperatures in television circles and in the Commission will rise commensurately, and that advocates on either side will again attack, hammer and tong, the problem of program limitations. It is not the purpose of this writing to support either side of the controversy, but rather to summarize briefly the limitations that do exist, outside the conscience of the advertiser, the better judgment of the station, and the dial-twisting ability of the public.

It may be profitably observed at the outset that legal boundaries are seldom high stone walls. More often they

¹ See 9 F.R.D. 217 (1949).

² 57 *Yale L. J.* 275 (1948); Edward Lamb, owner of WICU and WTVN, "Anarchy in TV?", *New York Times*, Sunday, April 2, 1950: Sec. 2, p. 9.

³ His most recent blast directed specifically at television was his address before the Oklahoma Radio Conference, excerpts reported in *New York Times*, March 15, 1950. The chairman, making obvious references to Arthur Godfrey, lashed out at comedians peddling "livery stable humor" and observed that "radio and television carry him straight into the home without having taken the precaution to see that he is housebroken."

are indistinct lines in shifting sands. In television law is this especially true. Few cases and fewer statutes refer specifically to television. Rules must evolve from not altogether perfect analogies to radio and newspaper law. In many areas there is room for innovation; in others, logic requires that old rules be re-applied. Standards do exist, however, which give rise to a forecast of what limitations the law will place on television programming. They may be roughly grouped as: federal statutory restraints, the law of defamation, the right of privacy, and FCC program controls. The leading forces opposing such limitations are the constitutional guarantee of free speech and statutory and case law deterrents to censorship by the states and the FCC.

Federal Statutory Restraints

Perhaps the clearest boundaries are those prescribed by Federal statutes.

(1) Broadcasts concerning lotteries are governed by the Criminal Code,⁴ which provides that whoever broadcasts "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than \$1,000, or imprisoned not more than one year, or both. Each day's broadcasting shall constitute a separate offense."

Exactly what constitutes a lottery under this section remains doubtful. The Commission, following judicial interpretations of the postal lottery laws, has found the elements of a lottery to be "chance, prize and consideration."⁵ The difficulty in determining whether any given scheme is a lottery or not stems from the various meanings that may be assigned to "chance" and to "consideration".

In the law of contracts, consideration may arise when there is a benefit to the promisor, though there be no at-

⁴ 62 Stat. 763; 18 USCA, Sec. 1304, formerly Sec. 316, *Communications Act of 1934*.

⁵ *In re WRBL Radio Station, Inc.*, 2 F.C.C. 687 (1936).

tendant legal detriment to the promisee. Actually the promisor-advertiser in a gift enterprise realizes an advertising benefit, and a court could easily find consideration where a merchant freely distributes to the public coupons good for a can of beans. But the lottery laws are penal, and therefore strictly construed. Thus a mere benefit to the advertiser has been held insufficient under the statute.⁶ On the other hand, the slightest action on the part of the promisee-contestant, such as the mailing of a label, might constitute a legal detriment and, hence, give rise to consideration.⁷ Generally, however, the technical niceties of consideration have not been indulged in. The Solicitor of the Post Office Department in February, 1947, interpreting a statute with identical wording, suggested that consideration, in the lottery sense of the word, is present only when the questioned scheme involves "for example, the payment of money for the purchase of merchandise, chance or admission ticket, or as payment on account, or requires an expenditure of substantial effort or time. On the other hand, if it is required merely that one's name be registered at a store in order to be eligible for the prize, consideration is not deemed to be present . . ."⁸

A definition of chance is equally troublesome. Pure chance is seldom encountered. Yet, experience teaches that skill is seldom the sole criterion in any contest, no matter how strictly the contest is supervised. Thus, whether "chance" is present boils down to a comparison of how *much* chance and how *little* skill is involved in a particular scheme.

Although faced in the past with relatively few lottery questions, the FCC has termed as violative of the lottery provisions "bank night schemes",⁹ so-called "Prosperity Clubs" operating on a variation of the chain-letter principle,¹⁰ and the giving of raffle tickets with purchases.¹¹ Where a format involved the reading of a question and

⁶ *Affiliated Enterprises v. Gruber*, 86 F.2d 953 (1st Cir. 1936).

⁷ *Brooklyn Daily Eagle v. Voorhis*, 181 Fed. 579 (E. D. N. Y. 1910).

⁸ *Warner, Radio and Television Law*, p. 344 (1948).

⁹ *In re WRBL Radio Station, Inc.*, 2 F.C.C. 687 (1936).

¹⁰ *In re KXL Broadcasters*, 4 F.C.C. 186 (1937).

¹¹ *In re Metropolitan Broadcasting Co.*, 5 F.C.C. 501 (1938).

an answer, the picking at random of a telephone number, followed by asking the same question to the person answering, the Commission decided that too little skill and too much chance was involved. "The predominant distinction between winners and non-winners is that the former had been prepared by listening to the program whereas the latter had not so prepared."¹² A like finding was made as to a program which consisted of drawing at random letters of the alphabet, reading them on the air, and awarding a prize to the first person skillful enough to spell his name with the letters broadcast. There too the Commission determined that the endurance of the listener in staying by his radio outweighed his skill in spelling his name.¹³

In March of 1940, five programs savoring of lottery were given an administrative green light following a conclusion by the Department of Justice that none violated the lottery provisions.¹⁴ Two were of the "Pot o' Gold" variety, where telephone numbers were drawn by chance and the person called was awarded a prize simply for answering his phone. Technical consideration might be found in the benefit to the good will of the promissor, or in the detriment to the winner in answering his phone. The determination was, however, that the winner really had to do nothing and that there was insufficient consideration for this purpose.¹⁵ Two others, involving the identification of songs played over the air, required sufficient skill to rule out a finding of chance. In the light of the 1948 decisions noted above,¹⁶ failure to prosecute because of the fifth program, "Sears Grab Bag", is more difficult to understand. Numbered slips were drawn from a box in front of a store and read on the air. If the holder happened to be listening and called the station, a prize was awarded to him. If he was not listening, the prize went to the listener holding the number nearest to the one drawn. Chance and prize were obviously present.

¹² *In re Northern Virginia Broadcasters, Inc.*, 4 R.R. 660 (1948).

¹³ *In re Coastal Broadcasting Co.*, 4 R.R. 751 (1948).

¹⁴ 4 *Fed. Com. Bar J.* 195 (1940).

¹⁵ This position was later affirmed in a tax case holding that the prize on "Pot o' Gold" was not income, but a gift, since the winner had "done nothing." *Washburn v. Commissioner*, 5 T.C. 1333 (1945).

¹⁶ Notes 12 and 13, *supra*.

Moreover, the winner had to be a listener. On just such a finding, the Commission ruled "consideration" in the 1948 cases. From the 1948 decisions and the administrative scowl in the direction of "give-away" programs¹⁷ it is arguable that the Commission's concept of consideration is becoming more technical, and that a chance may still be a chance though mingled with a degree of skill. On the other hand, the cases may be distinguishable on the ground that the program reviewed in 1940 required only a small amount of listening time of the winner, while those condemned in 1948 required an "expenditure of substantial effort or time."¹⁸

(2) The criminal code further provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000, or imprisoned not more than two years, or both."¹⁹ This section has been invoked where a broadcaster himself used

¹⁷ See *In re Commercial Radio Equipment Co.*, 11 F.C.C. 451, 465 (1946). In view of happenings elsewhere in the hemisphere, broadcasters in the United States should be grateful that our government has been content with a scowl. In May, 1950, the Minister of Communications in Argentina outlawed question-and-answer programs. 11 *Fed. Com. Bar J.* 181 (1950).

¹⁸ See note 8, *supra*. Several broadcasters, particularly those in Nebraska and Wisconsin, have felt the pinch of state lottery laws. The Attorney General of Nebraska, in an opinion handed down November 17, 1949, ruled that "Musical Tune-O", a game somewhat akin to bingo, but played by matching numbers on a bingo card with songs played over local stations, violated the Nebraska lottery laws. In June, 1950, the Attorney General of Wisconsin ruled that a program which awarded cash prizes to the holder of "the lucky social security number" was illegal under Wisconsin lottery laws. In his opinion handed down October 18, 1950, he ruled that a number of "give-aways", notably the network program, "Stop the Music", were violative of Wisconsin lottery provisions. Of the recognized lottery elements—chance, prize and consideration—prize was obviously present. The Attorney General found chance in the fact that so little skill was required. He found consideration in the benefit to the promisor in enticement of a listening audience. See discussion in 11 *Fed. Com. Bar J.* 167, *et seq.* (1950). Although broadcasters have never entertained much concern for state lottery laws, these opinions may be indicative of a trend, particularly since "give-aways" have borne the brunt of so much public criticism. The Federal statute, 18 USCA, Sec. 1304, does not preclude the operation of state lottery laws.

¹⁹ 62 Stat. 769; 18 USCA, Sec. 1464, formerly Sec. 326, *Communications Act of 1934*.

such expressions as "by God" and "the curse of God",²⁰ and where a program entitled "Modern Women's Serenade" advised listeners "in terms unequivocal, that through the use of a particular medical or chemical compound, they might avoid the consequences either of child-birth or moral impropriety."²¹ In 1938, the Commission cited several stations for broadcasting Eugene O'Neill's "Beyond the Horizon" without deleting such expressions as "damn", "hell", and "for God's sake". After a wave of public criticism, it reconsidered the action and granted renewals to the cited stations.²² Radio's most publicized indecent feature, the Mae West version of the story of Adam and Eve, brought a letter of censure from the FCC, a public apology from NBC and its affiliated stations. Subsequently all networks banned her from the air.²³

(3) Advertising matter concerning new drugs is governed by the Federal Food, Drug, and Cosmetic Act.²⁴ Section 331 (1) prohibits the using "in any advertising relating to such a drug, of any representation that an application with respect to such drug is effective under section 355, or that such drug complies with the provisions of such section." Section 355 sets out as requirements for making effective an application that tests prove that the drug is safe under the conditions prescribed for its use and that manufacturing and packaging controls are adequate to preserve its identity, strength, quality and purity. A violator is subject to a fine of not more than \$1000, imprisonment for not more than one year, or both, for the first offense. Exceptions to the penalties, based on good faith and prescribed in Sec. 333(c), do not apply to the prohibition against false advertising. Nevertheless, a careful telecaster can remain on safe ground with comparative ease. The prohibition of the act relates only to "new drugs". Liability is incurred only if the advertising matter represents either (1) that the new drug enjoys an application

²⁰ *Duncan v. United States*, 48 F.2d 128, 132 (9th Cir. 1931).

²¹ *In re Knickerbocker Broadcasting Co., Inc.*, 2 F.C.C. 76, 77 (1933).

²² *Warner, op. cit. supra*, note 8, at 339.

²³ *Ibid.*

²⁴ 64 Stat. 20, 54 Stat. 1237; 21 USCA, Secs. 331, 333, 355.

made effective by the Federal Security Administrator, or (2) that the drug complies with the provisions of section 355. Exclusion of these two claims would seem to protect the station from criminal liability. A safer course would consist of a communication to the Commissioner of Food and Drugs or to the Federal Security Administrator regarding the status of any drug for which time is requested.

(4) 52 Stat. 114; 15 USCA, Sec. 52 prohibits the dissemination of false advertising likely to induce the purchase of food, drugs, devices or cosmetics. Under 15 USCA, Sec. 54, a station is not criminally liable unless it refuses on request to furnish the Federal Trade Commission the name and address of the advertiser. Similarly, 53 Stat. 1282; 7 USCA Sec. 1575 makes it unlawful for any person to disseminate false advertising concerning seed. Under the terms of the section, a station is liable only if it refuses to reveal the name and address of the advertiser to the Secretary of Agriculture.

Defamation

The law of defamation, as applied to radio, has produced patterns of irreconcilable case law and divergent statutes in the several states. There is little hope that television can do more than stir again the already muddied waters. Courts have been beset with the common law idea that defamation is libel if written and slander if spoken; that slander is not actionable without proof of special damage unless it imputes a serious crime, certain loathsome diseases, unfitness for one's calling, or, in some states, unchastity in a woman.²⁵ Faced with the difficulty of proving special damage of a pecuniary nature,²⁶ plaintiffs soon came to attack defamation over the air as libel. Such urgings found willing judicial ears in Nebraska and Missouri,²⁷ where the courts termed defamation by radio actionable without proof of special damage. In New York an extemporaneous remark has been held to be slander,²⁸ while a

²⁵ Prosser, *Handbook of the Law of Torts*, Ch. 17, Sec. 92 (1941).

²⁶ *Ibid.*

²⁷ *Sorensen v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932); *Coffey v. Midland Broadcasting Co.*, 8 F.Supp. 889 (Mo. 1934).

²⁸ *Locke v. Gibbons*, 164 Misc. 877, 299 N.Y.S. 188 (1937).

defamatory statement read from a written script is libel.²⁹ Although the majority of the New York court declined to reach the point, Justice Fuld, concurring in the latter case, suggested that the distinguishing factor between written and extemporaneous remarks, when broadcast, was unimportant and that both should be held to be libel.

New Jersey and Pennsylvania have held that a station is not liable for defamatory remarks of one not in its employ if it could not have prevented broadcast by the exercise of reasonable care.³⁰ The New Jersey court felt that the position of a radio station is analogous to that of a disseminator or bookseller, who is generally held liable only when negligent.

Many states have enacted general libel and slander laws. Florida, Iowa and Washington make stations liable only if negligent.³¹ Montana provides that they shall not be liable absent proof of actual malice.³² Indiana provides for no liability where the publication is made in good faith and a retraction is made within a stated period.³³ North Carolina and California deny punitive damages where a retraction is broadcast.³⁴ Illinois and Virginia render radio, and presumably television, immune from liability for defamation by a political candidate.³⁵ Statutes in other states, though

²⁹ *Hartmann v. Winchell*, 296 N.Y. 296, 73 N.E.2d 30 (1947).

³⁰ *Summit Hotel Co. v. National Broadcasting Company*, 336 Pa. 182, 8 A.2d 302 (1939); *Kelly v. Hoffmar*, 137 N.J.L. 695, 61 A.2d 143 (1948).

³¹ Fla.Stat. Ann., sec. 770.03 (1944); Iowa Code, sec. 659.5 (1946); Wash.Rev.Stat., sec. 998-1 (Rem.Supp. 1943).

³² Mont.Rev.Code, sec. 5694.1.

³³ Ind.Stat. Ann., sec. 2-518 (Burns 1946).

³⁴ N.C.Gen.Stat., Sec. 99-1, 99-2 (1943); Cal.Civ.Code, sec 48a. The California statute survived constitutional attack in April of 1950 when *Werner v. Southern California Associated Newspaper*, 216 P.2d 825 (1950), reversed a contrary holding of the lower court. North Carolina upheld its statute in *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904), while the statute referred only to defamation by newspapers. No case has ruled on the constitutionality of the statute since its amendment to refer to radio and television. Indeed, it is arguable that a retraction by radio or television is not as effective as a newspaper retraction, since largely the same group reads a given newspaper day after day, while the audience of a radio or television station is subject to great fluctuation. It is submitted, however, that the reasoning of the North Carolina court would equally apply to the statute as amended.

³⁵ Ill.Stat. Ann., c. 38, sec. 404.1-2 (Smith-Hurd Supp., 1948); 1942 Va.Code, sec. 576h (Supp. 1948).

not specifically mentioning radio and television, may be broad enough to include both.

The average broadcaster's concern over the problem of defamation was intensified by the Commission's celebrated *Port Huron* decision,³⁶ in which it was declared that Sec. 315 of the Communications Act³⁷ precludes the censorship and deletion of material from political broadcasts. The Commission further concluded that state laws must be suspended as to all speeches coming under Sec. 315, citing the supremacy clause of the Constitution. Thus broadcasters found themselves faced with unhappy alternatives. If they allowed a defamatory statement in a politician's speech to go uncensored, they ran the risk of an adverse ruling by a state court unwilling to accept the rationale of the FCC. If they censored the speech for defamatory material, the Commission's edict had been violated.

To date, the Commission's position in the *Port Huron* case has found little support in Congress or in the courts.³⁸ It is arguable that Congress does have the power to override state law in this respect, as a corollary to its power over interstate commerce. Whether Congress has so acted in passing Sec. 315 is however open to serious question. Whether the Commission will enforce the *Port Huron* dictum is another pertinent consideration. In the *Port Huron* case itself, the broadcaster's application for renewal was granted despite his censorship of political broadcasts for deletion of defamatory matter. No later FCC decision has denied an application on the basis of *Port Huron*. It has been suggested that enforcement is not forthcoming.³⁹

What at first appeared to be an impending showdown on

³⁶ *Port Huron Broadcasting Co. (WHLS) 4 R.R. 1 (1948).*

³⁷ 48 Stat. 1088; 47 USCA, Sec. 315: "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, and the Commission shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate."

³⁸ *H. Rept. No. 2461, 80th Cong. 2d Sess., 1948, p. 2.*

³⁹ See Warner, *op cit. supra* note 8, 1949 Supp., pp. 80-81.

the matter arose from the 1949 campaign in Philadelphia. A plaintiff brought suit for libel against several Philadelphia radio stations because of references to him in radio speeches by the chairman of the Republican Central Committee. Applying the Pennsylvania rule that a station is liable only if it is at fault,⁴⁰ the court granted summary judgment for the defendant, reasoning that Sec. 315 precluded censorship and that the station could not have been at fault by adhering to the law.⁴¹ The problem of Sec. 315 versus state defamation laws appeared to have been squarely met, at least as to those states following the Pennsylvania rule of no absolute liability. On appeal,⁴² however, the Court of Appeals for the Third Circuit pointed out that the reasoning of the District Court had been for naught, that the speaker had not been a candidate, and was therefore not included in the provisions of Sec. 315. Since Sec. 315 did not preclude censorship of this speaker's script, it offered no protection to the defendant stations. The judgment was reversed and the holding of the District Court as to Sec. 315 and Pennsylvania libel laws died aborning.

Right of Privacy

Tracing its origin to a law review article,⁴³ the right of privacy has blossomed in sixty years into a generally recognized "right to be left alone." In three states, New York, Utah and Virginia, the right is protected by statute.⁴⁴ The New York statute terms, in Sec. 50, the use "for advertising purposes, or for the purposes of trade [of] the name, portrait or picture of any living person" without written consent, a misdemeanor; and provides in Sec. 51 that the person whose privacy has been invaded may sue for an injunction and for damages. The effectiveness of the statute in

⁴⁰ See note 31, *supra*.

⁴¹ *Felix v. Westinghouse Radio Stations, Inc.*, 89 F.Supp. 740 (E. D. Pa. 1950).

⁴² *Felix v. Westinghouse Radio Stations, Inc.*, 19 L.W. 2276, F.2d (3rd Cir. 1950).

⁴³ Warren and Brandeis, "*The Right of Privacy*", 4 *Harv. L. R.* 193 (1890).

⁴⁴ N.Y. Civil Rights Law: 8 McKinney Laws, Sec. 50,51; Va.Code Ann., Sec. 5782; Utah Rev.Stat. 103-4-7 to 103-4-9.

New York has been somewhat decreased by the fact that it has been strictly construed as penal when Sec. 50 is invoked,⁴⁵ and as in derogation of the common law when Sec. 51 is invoked.⁴⁶ At least one plaintiff has recovered under its provisions, however, on a complaint arising out of a telecast. The act of a professional entertainer, performing between halves at a professional football game in Washington, D. C. was relayed to New York by coaxial cable and there televised. Since the re-broadcast occurred and was received in New York, he was allowed recovery under Sec. 51 of the New York statute.⁴²

As compared with the New York law, the Utah and Virginia statutes have been more liberally worded and construed. Virginia extends protection to the names and pictures of deceased persons, but like New York, limits the scope of the right to "advertising purposes, or for the purposes of trade."⁴⁸ The Utah provisions are almost identical, except that the right is extended in favor of deceased persons and public institutions.⁴⁹

In most other states the right of privacy exists without the aid of statutes. Only four states other than New York have specifically determined that no such right exists at common law: Wisconsin, Washington, Rhode Island and

⁴⁵ People on Complaint of Stern v. Robert R. McBride & Co., 159 Misc. 5, 228 N.Y.S. 501 (1936).

⁴⁶ Wilson v. Brown, 189 Misc. 79, 73 N.Y.S.2d 587 (1947). Passage of the statute had been prompted by Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 63 N.E. 442 (1902), denying the existence of the right of privacy at common law.

⁴⁷ Gaultier v. Pro-Football, Inc., 6 R.R. 2024 (New York City Court, June 27, 1950); commented on in 11 *Fed.Com. Bar J.* 95 (1950). Whereas this action was brought on the basis of invasion of the right of privacy, it might well be contended that a property right had also been violated. Although his performance was doubtlessly received in other states, this plaintiff was content to sue only in New York. Multi-state invasion of the right of privacy and, indeed, multi-state defamation as well have given rise to perplexing and largely unsolved problems in conflict of laws. See Note, 60 *Harv. L.R.* 941 (1947), characterizing the state of the law on both points "a vacuum".

⁴⁸ Note 44, *supra*.

⁴⁹ *Ibid.*

possibly Michigan.⁵⁰ Whereas all statutes on the right of privacy limit their protection to instances of use for trade purposes or in advertising, no such restrictions have been applied as a matter of common law. All states, however, recognize two principal limitations on the right of privacy: consent and the public interest. No right of privacy exists in favor of a public figure, at least as to matters of legitimate public interest.⁵¹ And even where the right does exist, it may be waived by consent. Consent may be expressed or implied from conduct,⁵² but in New York and Utah, by statute,⁵³ only written consent suffices. The New York court seems to have quietly closed one eye to the requirement of a writing.⁵⁴

FCC Controls On Program Content

On the face of the Communications Act, the FCC has no power over program content other than that provided in the sections concerning lotteries and profanity, now removed to the Federal criminal code, the prohibition in Sec. 325 against rebroadcasting without the consent of the original broadcaster, and the requirement in Sec. 317 that sponsors be identified. Its power has arisen from the practical consideration that the phenomenon of interference does exist and that only a limited number of stations can effectively transmit on the available wave lengths. By Sec. 307(a) of the Communications Act, the Commission must choose between applicants on the basis of "public interest, convenience, and necessity." In determining which of several applicants will best serve the "public interest, convenience, and necessity", the Commission may look first at financial and technical qualifications but ultimately must consider the respective proposals for program service. Once

⁵⁰ *Judevine v. Benzies-Montayne Fuel and Whse. Co.*, 222 Wis. 512 269 N.W. 295 (1936); *Hillman v. Star Pub. Co.*, 64 Wash. 691, 117 P. 594 (1911); *Henry v. Cherry & Webb*, 30 R.I. 14, 73 A. 97 (1909); *Atkinson v. John E. Doherty Co.*, 121 Mich. 372, 80 N.W. 285 (1899).

⁵¹ *Sidis v. F-R Publishing Co.*, 113 F.2d 806 (1940).

⁵² *Marek v. Zanol Products Co.*, 298 Mass. 1, 9 N.E.2d 393 (1937); *Peterson v. KMTR Radio Corp.*, Los Angeles Sup. Ct., No. 557,555 (1949).

⁵³ Note 44, *supra*.

⁵⁴ See *Swenke v. Pathe News*, 16 F.Supp. 746, 748 (1936).

a broadcaster has won his construction permit and license to operate and has begun operations, his concern with FCC program standards intensifies. He has no vested right in "his" frequency.⁵⁵ He must arrange his broadcast schedule in such a fashion that when, three years later, he applies for a renewal of his license, he can show, as against others greedy for the frequency or disgusted with his policies, that he has truly broadcast in the public interest, convenience and necessity. The issue may arise in other proceedings: as when a nearby station requests an increase in power or in broadcast hours, or when a citizen who has been denied time on the station petitions for a revocation of the station license. Thus the industry is forced constantly to strive to remain within the nebulous boundary of "public interest, convenience, and necessity."

In a land accustomed to volumes of rules, regulations and interpretations, the FCC has done surprisingly little to define its program standards. Its announced policy is to refuse to consider whether a proposed program will be deemed proper.⁵⁶ It has preferred to wait until the hearing on an application or petition to determine whether the over-all programming of an applicant is in the public interest. Officially, Commission decisions furnish the only guides. As a matter of practicality, the industry learned early to listen intently to the out-of-school remarks of the commissioners themselves⁵⁷ and to read carefully FCC publications.⁵⁸ Until comparatively recent times, the Commission announced, officially and unofficially, only negative standards. The recent trend is toward affirmative requirements in programming.

Negative standards have arisen following the labelling of the following types of programs "contrary to the public interest":

⁵⁵ Often he seems to have much, much less. See opinion of Frankfurter, J., in *National Broadcasting Company v. United States*, 319 U.S. 190 (1942); *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945). 48 *Stat.* 1083, 47 USCA, Sec. 304 expressly requires waiver of any right that a licensee might assert to a frequency.

⁵⁶ *In re Goodman*, 4 R.R. 98 (1948).

⁵⁷ See e.g., the remarks of Chairman Coy, note 3, *supra*.

⁵⁸ Like the "Blue Book", *Public Service Responsibility of Broadcast Licensees*, report by the FCC of March 7, 1946.

- (1) Astrological and fortune telling programs. In re Scroggin and Co. Bank, 1 F.C.C. 194 (1935).
- (2) False or misleading advertising, especially in regard to medicines or curative treatments. In re McGlashan, 2 F.C.C. 145 (1935); Farmers and Bankers Life Ins. Co., 2 F.C.C. 455 (1936).
- (3) Programs attacking and vilifying individuals. Trinity Methodist Church South v. F.R.C., 62 F.2d 850 (1932), certiorari denied, 288 U. S. 599 (1933).
- (4) Defamatory statements. In re KVOS, Inc., 6 F.C.C. 22 (1938).
- (5) Suggestive programs bordering on obscenity. In re Knickerbocker Broadcasting Co., Inc., 2 F.C.C. 76 (1935).
- (6) Commercialized religion. In re United States Broadcasting Corp., 2 F.C.C. 208 (1935).
- (7) Program used for editorializing station policy. In re Mayflower Broadcasting Co., 8 F.C.C. 333 (1940).
- (8) Broadcasting lottery information. In re Metropolitan Broadcasting Co., 5 F.C.C. 501 (1938).
- (9) Continuous broadcast of network programs. In re Allen T. Simmons, 11 F.C.C. 1160 (1947), aff'd 169 F.2d 670, certiorari denied 335 U. S. 846 (1948).

Despite the oft-satisfied desire of quiz program participants to shout, "Hello Mom!", the transmission of messages directed to individuals, or "point-to-point communications", is ruled out by two considerations. First, the Commission has long held that such messages are inconsistent with the "terms of the station license and the regulations under which the licenses are issued" in that they cannot reasonably be said to have any general interest for the public.⁵⁹ Moreover, such communications are inconsistent with the allocation of frequencies scheme of the International Radiotelegraph Convention of 1927.⁶⁰ Special frequencies outside the standard bands are set aside for such service and it is provided in Art. 5, Sec. 12 of the General Regulations annexed to the Convention that "a station shall not be permitted to use a frequency other than that allocated, as stated above,

⁵⁹ *In re Scroggin and Co. Bank*, 1 F.C.C. 194 (1935).

⁶⁰ 45 Stat. 2837.

for a service between fixed points." Although the title of the convention would seem to indicate that it applies only to radio, it applies with equal force to television, since by its terms, radio communication is deemed to include transmission of "writing, signs, signals, pictures, and sounds of all kinds by means of Hertzian waves."⁶¹

Recent FCC decisions and publications have outlined affirmative program policies. For example, the Commission has ruled that the public interest demands that stations allow time for the discussion of controversial issues. Prior to 1945, the NAB code⁶² provided that no time should be sold for the presentation of public controversial issues, with the exception of political broadcasts and the public forum type of programs. The industry stand was effectively reversed by *In re United Broadcasting Co.*,⁶³ which held that "the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues . . . is inconsistent with the concept of public interest . . ." Immediately the industry was faced with the problem of accurately defining a "public controversy."

The first administrative guide-post evolved from the petition of Rev. Sam Morris, acting on behalf of the National Temperance and Prohibition Council and requesting the Commission to deny the application for renewal of KRLD on the ground that the station had carried liquor advertisements, but had not allowed time for broadcasts counseling abstinence.⁶⁴ The petition was denied on the ground that the problem was not confined to KRLD and that one station should not be singled out for punishment, absent an "urgent ground for selecting it rather than another." The opinion took pains to point out, however, that the station had erred in its refusal to sell time to petitioner. It termed the consumption of alcoholic beverages a public controversial question, and added that the issue might be raised by advertisement as well as in any other manner.

⁶¹ 45 Stat. 2337, Art. 1.

⁶² "Standards of Commercial Practice", National Association of Broadcasters (1944), pp. 3-4.

⁶³ 10 F.C.C. 515 (1945).

⁶⁴ *In re Morris*, 11 F.C.C. 197 (1946).

A few months later, the Commission considered the petition of Robert Harold Scott for the revocation of the licenses of KQW, KPO and KFRC.⁶⁵ Petitioner alleged that he was an atheist; that the named stations had frequently carried religious programs, but had denied him the use of their facilities for proposed atheistic broadcasts expounding his side of what he termed a public controversial issue. The petition was dismissed on the same ground as the Morris petition, *supra*. Again, however, the opinion sought to establish guides for the industry. Whether it succeeded is arguable. The Interim Report of the Select Committee to Investigate the Federal Communications Commission described the *Scott* opinion as "unintelligible and impossible of clear and unambiguous interpretation".⁶⁶ Though not entirely lucid, the opinion does point the way in some respects. After declaring that every idea does not rise to the dignity of a public controversy merely because a number of persons hold it, the opinion suggests that adherents to a belief should be able to answer attacks even though they are few in number. The opinion recognizes that much lies in the discretion of the broadcaster, but asserts that he should consider "the extent of the interest of the people in his service area in a particular subject to be discussed, as well as the qualifications of the person selected to discuss it."⁶⁷

The FCC position in requiring the airing of controversial issues has been seriously questioned, particularly in the aforementioned Interim Report,⁶⁸ on the ground that the only public controversies which must be broadcast are political broadcasts covered by Sec. 315 of the Communications Act. The report charges that Commission action outside Sec. 315 is "quasi-judicial legislation".

Ironically, Commission action on Sec. 315 itself was criticized in the same report, particularly the *Port Huron* decision.⁶⁹ In essence, the section requires that if a licensee permits a legally qualified candidate for public office to use

⁶⁵ *In re Scott*, 11 F.C.C. 372 (1946).

⁶⁶ H. Rept. No. 2461, 80th Cong., 2d Sess., 1948, p. 2.

⁶⁷ 11 F.C.C. 372, 376 (1946).

⁶⁸ Note 66, *supra*, p. 3.

⁶⁹ *In re Port Huron Broadcasting Co. (WHLS)*, 4 R.R. 1 (1948). See discussion in section on defamation, *supra*.

broadcast facilities, he must afford equal opportunities to all other candidates for the same office. A proviso declares that the station shall have no power of censorship, and that "no obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate."⁷⁰ Thus, by the clear wording of the statute, it would seem that a licensee is under no obligation to extend his facilities to any candidate, but having allowed one to use them, he must afford equal opportunities to his opponents. The proviso, however, has met with strange administrative interpretation. The clause regarding censorship has been held strong enough to override state laws on defamation.⁷¹ The clause negating a duty to extend facilities to *any* candidates may have been abrogated in effect by *In re Rainey*.⁷² There a candidate for governor in the Texas primary complained of the policies of four stations comprising the Texas Quality Network in restricting the amount of time available for political broadcasts. The Commission found no violation of Sec. 315, in that time had not previously been sold to other candidates, but suggested that earlier decisions requiring free discussion of public controversies might require the broadcast of political addresses, especially if the candidate had been the subject of attack by a newspaper "connected" with the station. Specifically, it was determined that the restrictions placed by the Texas Quality Network "do not appear to bear a reasonable relationship to the needs or public interest in the particular campaign." Thus a licensee who leans too heavily on a literal reading of the last clause of Sec. 315 may find that he has failed to air a public controversy or has otherwise run counter to the public interest.

A new twist in affirmative controls was furnished by a recent Commission letter to WLIB. The station had openly advocated the adoption of FEPC. The letter asserted that WLIB must not only allow time to holders of opposing views, but that it has "an affirmative duty to seek out, aid and encourage the broadcast of opposing views on controversial questions."⁷³

⁷⁰ 48 Stat. 1088; 47 USCA, Sec. 315, set out in full in note 37, *supra*.

⁷¹ *In re Port Huron Broadcasting Co. (WHLS)*, 4 R.R. 1 (1948).

⁷² 11 F.C.C. 898 (1947).

⁷³ Reported in *N. Y. Times*, April 16, 1950, Sec. 2, p. 12.

On March 7, 1946, the Commission issued the now-famous "Blue Book", entitled "Public Service Responsibility of Broadcast Licensees". Though not official "agency action" and hence not subject to judicial review,⁷⁴ the Blue Book presented to the industry concepts it well knew would be applied in subsequent determinations of "public interest, convenience and necessity." In it the Commission denounced advertising excesses, concluding that "one standard of operation in the public interest is a reasonable proportion of time devoted to sustaining programs."⁷⁵ Assigned reasons were (1) the carrying of sustaining programs leads to a well-balanced program structure; (2) provides time for programs inappropriate for sponsorship; (3) provides time for programs serving significant minority tastes and interests, (4) provides time for non-profit organizations, and (5) provides time for experiment and unfettered artistic self-expression. Affirmative standards announced were the carrying of local live programs and programs devoted to the discussion of public issues. Like other affirmative controls announced by the Commission, the Blue Book soon drew Congressional fire.⁷⁶

Forces Opposing Program Controls—

The proponents of relaxed controls early learned to rise and cry, "Free speech!" Seldom has the cry been rewarded with judicial victories. One obstacle is the fact that a great portion of the Commission's directives are embodied in dicta, unofficial remarks, and publications such as the Blue Book.⁷⁷ None are "agency action" and none are subject to judicial review.⁷⁸ Furthermore, the Commission has stead-

⁷⁴ *Hearst Radio, Inc. v. Federal Communications Commission*, 167 F.2d 225 (D.C. Cir. 1948).

⁷⁵ "Public Service Responsibility of Broadcast Licensees", p. 55.

⁷⁶ Final Report of Select Committee to Investigate the Federal Communications Commission, H. Rept. 2479, 80th Cong., 2nd Sess. For a warm condemnation of "thought control" by the FCC, see remarks of Senator Bridges of March 30, 1950, and April 20, 1950, reported in 96 *Cong. Rec.* A2502, A2995.

⁷⁷ For a criticism of this condition and a plea that judicial review be extended, see Miller in 9 F.R.D. 217 (1949).

⁷⁸ *Hearst Radio, Inc. v. Federal Communications Commission*, 167 F.2d 225 (D.C. Cir. 1948).

fastly engaged in the commendable legal stratagem of choosing its own battlefield. The Commission has never denied the force of the First Amendment to the Constitution or of Sec. 326 of the Communications Act, denying to the Commission any power of censorship. It controverts no Supreme Court decisions on the point.⁷⁹ The FCC position is simply that when inconsistent applications are presented to it and the respective applicants are equally well qualified legally, technically, and financially, it must, as a practical matter, turn to program service to determine which would better serve the public interest. In theory, the position is logical and sound. The contention of the industry is that the matter is not so simple: that in fact the Commission applies its program standards in cases where there are no opposing applications for the same facilities reciting equal legal, technical, and financial qualifications; and that in so doing, its action is a prior restraint on programming.

To date, however, the industry has found little ammunition capable of inflicting serious damage to the Commission's position. The courts upheld the right of the Federal Radio Commission to refuse an application for renewal on grounds of poor program policies as early as 1931.⁸⁰ A year later it was held, in reference to such action, that "this is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the First Amendment, or an impairment of their free exercise."⁸¹ The FCC stand was reinforced by Mr. Justice Frankfurter in *National Broadcasting Co. v United States*,⁸² when he recognized that radio, by its nature, is not open to all, and that regulation of this sort is derived from necessity.

⁷⁹ As, for example, the statement of Justice Roberts in *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940): "The Commission is given no supervisory control of programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and the financial ability to make good use of the assigned channel."

⁸⁰ *KFKB Broadcasting Ass'n., Inc. v. Federal Radio Commission*, 47 F.2d 670 (D.C. Cir. 1931).

⁸¹ *Trinity Methodist Church South v. Federal Radio Commission*, 62 F.2d 850 (D. C. Cir. 1932) *cert. den.* 288 U.S. 559 (1933).

⁸² 319 U.S. 190 (1942).

As the courts refuse to contract FCC control over program content, Congress has managed to rumble, but do little more.⁸³ Just what limitations do exist as to Commission action in the field remain to be seen.

The television industry may find comfort in a recent decision which holds that censorship of program content is not a matter for state action.⁸⁴ The Pennsylvania State Board of Censors issued a regulation requiring that all films to be televised within the state be submitted to the board for approval. In an action by Dumont and four other corporations for a declaratory judgment, the court held the action of the board invalid on the ground that Congress had occupied the field by passing the Communications Act of 1934 and that such censorship constituted an undue and unreasonable burden on interstate commerce.

Conclusions

Despite clamor to the contrary, the television industry is beset by a complex pattern of limitations on programming. Federal statutes prohibit the broadcast of lottery information, profane or indecent language, and false advertising concerning certain products. State statutes and case law on defamation impose civil and criminal liability in varying degrees. The right of privacy restricts the number of subjects toward which a television camera can be safely pointed. Commission controls, both announced and hinted, point to fairly obvious negative standards and to the less obvious affirmative requirements concerning public controversial

⁸³ See *Interim and Final Reports of Select Committee to Investigate the Federal Communications Commission*, H. Rept. 2461, 2479, 80th Cong., 2d Sess., 1948; remarks of Senator Bridges, 96 *Cong. Rec.* A2502, A2995 (1950). The Senate refused to strengthen, at least, the FCC position when S.Res. 246, announcing that it is the sense of the Senate that nothing in the *Communications Act* should limit the FCC when considering "public interest" on renewal applications, died in committee. 94 *Cong. Rec.* 6749 (1948).

⁸⁴ *Allen B. Dumont Laboratories v. Carroll*, 86 F.Supp. 813 E.D. Pa. 1949, *Aff'd.* 184 F.2d 153 (3rd Cir. 1950). For an accurate prediction of the result while the case was pending, see Bergson in 10 *Fed. Bar J.* 151 (1949).

issues, political broadcasts, sustaining programs and local live programs.

The controls themselves are somewhat limited by constitutional guarantees of free speech, statutory denial of the right of censorship by the FCC, and judicial denial of the right of censorship by the states. With deference to Chairman Coy's assertion that television neglects "house-breaking",⁸⁵ it is submitted that the industry is more than housebroken when it operates within the numerous limitations imposed upon it by law.

J. CARLTON FLEMING.

⁸⁵ Note 3, *supra*.