Writers Guild of America, West, Inc. v. FCC: A First Amendment Blow to FCC Jawboning

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In modern society, no medium has a greater impact on our daily lives than television.[1] In 1975, television sets operated for an average of nearly seven hours per day in 97% of the homes in America.[2] With nearly 1,000 television stations currently broadcasting in the United States,[3] it is unremarkable that television is the most popular form of entertainment, and the primary news source for 64% of the population.[4] Yet when the first amendment was added to the Constitution, no one had dreamed of television, nor the difficulties that future generations would encounter attempting to conform traditional first amendment concepts to this unique medium.[5]

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1. *See* N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 2, 13-14 (1970); Note, *We Pick 'Em, You Watch 'Em: First Amendment Rights of Television Viewers*, 43 S. CAL. L. REV. 826, 829-31 (1970). *See generally* Johnson, *Freedom to Create: The Implications of Antitrust Policy for Television Programming Content*, 1970 L. & SOC. ORD. 337 (1970).

2. BROADCASTING YEARBOOK A-2 (1975).

3. *Id.*

4. *Id.*

5. There are many cases which clearly apply the first amendment to braodcasting. *See, e.g.*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 121 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-87 (1969); National Broadcasting Co. v. United States, 319 U.S. 190, 226-27 (1943). *See also Report on the Broadcast of Violent, Indecent, and Obscene Material*, 32 RAD. REG. 2D (P&F) 1367, 1369-70 (1975); Sweeney, *Regulation of Television Program Content by the Federal Communication Commission*, 8 U. RICH. L. REV. 233, 235 (1974).

The Supreme Court has held that the fact that communication is for the purpose of entertainment does not lessen its first amendment protection. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952); Winters v. New York, 333 U.S. 507, 510 (1948). However, regulations which would be considered impermissible in other areas of communication have been justified in the area of broadcasting because of the unique problems inherent in the allocation of the spectrum. *See, e.g.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 394 (1969); National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943); text & notes 6-8 *infra*. One commentator notes that "there continues to be very considerable doubt on the part of many, including the FCC, whether the first amendment really has the same scope in the field of radio and television as it does in the case of other communications media." Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 67-68 (1967).. Another commentator makes the fundamental observation that "[b]roadcasting is unique among the mass

Government regulation of broadcasting conflicts with the traditional first amendment doctrine requiring governmental abstinence from regulating speech.[6] Based upon the theory that the scarcity of broadcast frequencies requires government intervention in their allocation and use,[7] a separate area of first amendment law has developed which sanctions regulations which have not been tolerated in other media.[8] Although such regulation in broadcasting is now generally considered permissible, the courts have analyzed the constitutionality of specific broadcast media regulations promulgated by the Federal Communications Commission [FCC] with attention to the first amendment rights of broadcast licensees,[9] those desiring access,[10] and view-

media in America, for it is the only medium subject to direct government regulation and licensing." B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION 88 (1975).

6. J. BARRON, FREEDOM OF THE PRESS FOR WHOM? 126 (1973); Mallamud, *The Broadcast Licensee as Fiduciary: Toward the Enforcement of Discretion*, 1973 DUKE L.J. 89, 94; *see* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 653-67 (1970); text & notes 103-105 *infra*.

7. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 394 (1969); National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943). Although the electromagnetic spectrum is made of a limited number of frequencies, the problem of scarcity of frequencies is no longer as serious as it was once believed to be. The interference between stations operating on adjacent channels which prompted the passage of the Federal Radio Act of 1912, ch. 287, 37 Stat. 302 (repealed 1927), *see* text & notes 59-60 *infra*,is no longer a major obstacle to the addition of stations. Technical advances, including UHF television, have increased the number of available stations which can operate in proximity on the spectrum. *See generally*, M. FRANKLIN, MASS MEDIA LAW 540-44 (1977). In addition, the advent of cable television has increased enormously the number of channels which can be delivered to viewers without interference with broadcast media. *Id.* at 555-67. It is FCC regulation, rather than technical limitations, which is primarily responsible for limiting the number of radio and television stations. So, although scarcity remains the primary rationale for governmental regulation, it is no longer a compelling justification for widespread governmental control. *See generally* Geller, *A Modest Proposal for Modest Reform of the Federal Communications Commission*, 63 GEO. L.J. 705, 707-10 (1975); Minasian, *Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation*, 18 J.L. & ECON. 221, 238-40 (1975).

8. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-401 (1969); Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 584-85 (D.D.C. 1971), *aff'd mem.*, 405 U.S. 1000 (1972); Note, *Reconciling Red Lion and Tornillo; A Consistent Theory of Media Regulation*, 28 STAN. L. REV. 563 (1976). *Compare* 395 U.S. at 386-401 *with* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-58 (1974).

9. *See, e.g.*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110-11 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1967); Citizens Committee v. FCC, 436 F.2d 263, 272 (1970). Although traditional first amendment theory has placed primary importance on the rights of the speaker, *see generally* G. GUNTHER, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 638-52 (1976), in contrast, broadcasting law considers the rights of viewers and those desiring access as well. *See* text & notes 10-13 *infra*. The rationale seems to follow that expressed by the Supreme Court in Associated Press v. United States, 326 U.S. 1 (1945): "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Id.* at 20; *see* National Broadcasting Co. v. United States, 319 U.S. 190, 226-27 (1943); T. EMERSON, *supra* note 6, at 662-63.

10. *See, e.g.*, Columbia Broadcasting Sys. Inc. v. FCC, 412 U.S. 94, 122 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969); Strauss Communications, Inc. v. FCC, 530 F.2d 1001, 1007 (1976). The rights of those desiring access are based both in the first amendment and the Federal Communications Act. Section 315(a) of the Act includes the fairness doctrine, which requires that broadcasters devote a reasonable percentage of time to the coverage of public issues, which must be done fairly, and provide an opportunity for the presentation of contrasting viewpoints. 47 U.S.C. § 315(a) (1970 & Supp. V 1975). Broadcasters are also required to provide air time for persons personally attacked by a licensee to reply. 47 C.F.R. § 73.123 (1976); *see* text & note 92 *infra*. Broadcasters have an additional duty to provide air time for political candidates under the equal time rule. 47 U.S.C. § 315(a) (1970 & Supp. V 1975); *See* text & note 93 *infra*.

ers,[11] whose right to diverse and informative programming is included in the statutory requirement that programming be in the "public interest."[12] The complicated balancing required whenever governmental control of expression through broadcasting collides with the various first amendment rights of licensees, users, and viewers has resulted in a line of cases which define the rights and duties of each of these groups.[13]

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11. Television viewers and radio listeners have first amendment rights to diversity in broadcasting which must be considered by the courts in weighing questions of regulation. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 198 (1973) (Brennan, Marshall, JJ., dissenting); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

12. The public interest requirement is found in sections 307(a) and 309(a) (1970). Both require the FCC to grant licenses to serve the "public convenience, interest, or necessity." *See id.* text & notes 107-27 *infra*. In a programming policy statement issued in 1960, the FCC expressed the view that programming policy is the sole domain of the licensee in its execution of the public interest requirement: "The principal ingredient of such obligation consists of a diligent, positive and continuing effort by the licensee to discover and fulfill the tastes, needs and desires of his service area." *Commission Policy on Programming*, 20 RAD. REG. (P&F) 1901, 1912 (1960). A determination of whether programming is in the public interest is made by the FCC during license granting and renewal procedures. Viewers can have considerable impact on these decisions, and on the resulting licensing decisions. T. EMERSON, *supra* note 6, at 659; Note, *supra* note 1, at 845-47.

There are direct methods by which viewers can express their opinions on program content. These methods are set out in the Broadcast Procedure Manual which outlines the procedures for viewer input to licensees and the FCC through formal and informal complaints. 39 Fed. Reg. 32,288 (1974). This manual was prepared by the FCC in "an effort . . . to outline the respective roles of the broadcast station, the Commission, and the concerned citizen in the establishment and preservation of quality broadcasting services." *Id.* An informal complaint against a broadcasting station can be filed by anyone at any time. *Id.* The FCC received over 61,000 complaints from viewers during 1973. *Id.* There are no specific requirements for an informal complaint but the manual recommends certain procedures for the expeditious handling of complaints and suggests that copies be sent to the licensee involved. *Id.* at 32,289. Informal complaints are especially appropriate during the licensing stage. *Id.* at 32,291; *see* 47 C.F.R. § 1.587 (1976).

Formal complaints may be made in six areas: those involving complaince with the equal time requirements for political candidates, *see* 47 U.S.C. § 315(a) (1970 & Supp. V 1975), the fairness doctrine, *id.*, the personal attack rule, *see* 47 C.F.R. § 73.123(a) (1976), the political editorial rule, *see id.* § 73.123(c), during the licensing or renewal process, *see* 47 U.S.C. § 309(d) (1970); 47 C.F.R. § 1.580(i) (1976), and in a petition for rulemaking, *see* 5 U.S.C. § 553(e) (1976); 47 C.F.R. § 1.401-.407 (1976).

The FCC has always been open to informal viewer complaints, but viewer participation in the formal licensing and renewal procedures took a major step forward in Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966). The court of appeals reversed an FCC decision and held that a public interest group may have standing in license renewal procedures. *Id.* at 1002.

The filing of petitions to deny the renewal of broadcast licenses has become a moderately effective method of viewer input on programming content. *See generally* J. BARRON, *supra* note 6, at 226-48; R. SHAYON, PARTIES OF INTEREST 21-24 (1974). One product of this interaction has been the "citizen's agreement," wherein a citizens group which has filed a petition agrees to withdraw it in return for a promise by the station to meet certain demands. The FCC encourages this practice insofar as it is the product of dialogue between the licensee and the audience, but cautions that licensees may not, through this process, abdicate their role as primary programming decisionmakers, nor may it allow one group to dictate program content and foreclose input from other, less threatening groups of viewers. *In re* Agreements Between Broadcast Licensees and the Public, Report & Order, 35 RAD. REG. 2D (P&F) 1177, 1190-91 (1975); see *In re* Application of KCMC, Inc., 19 F.C.C.2D 109, 109-10 (1969). *See also in re* Matter of Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247-48 (1949).

13. *See, e.g.*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 111 (1973) (the fairness doctrine doesn't require a licensee to give access to private individuals or groups to present their viewpoints); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 (1969) (the requirement that licensees provide airtime for reply by person attacked does not violate the

In a recent case, *Writers Guild of America, West, Inc. v. FCC*,[14] the Federal District Court for the Central District of California dealt with a challenge by television writers, directors, and producers to the National Association of Broadcaster's [NAB] adoption of an amendment to the Television Code.[15] This amendment, known generally as the Family Viewing Policy [FVP], states:

> [E]ntertainment programming inappropriate for viewing by a general family audience should not be broadcast during the first hour of network entertainment programming in prime time and in the immediately preceding hour.[16]

In addition, the amendment requires that advisories be used to alert viewers whenever programs are being broadcast which are inappropriate for family viewing, or which might disturb viewers.[17] The effect of

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first amendment); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477 (2d Cir. 1971) (the prime-time access rule does not violate the first amendment); Citizens Comm. v. FCC, 436 F.2d 263, 269 (D.C. Cir. 1970) (the FCC must consider viewer rights in a format change).

14. 423 F. Supp. 1064 (C.D. Cal. 1976).

15. *Id.* at 1072. The NAB, formed in 1923, is a private organization of radio and television licensees and networks, and is the basic self-regulating organ of the broadcasting industry. *See* Mackey, *The Development of the National Association of Broadcasters*, 1 J. BROADCASTING 305, 320 (1957); Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STAN. L. REV. 1527, 1529 (1975). Membership is voluntary and entitles a member to various services, including a considerable lobbying force for the broadcasting industry. *See* S. HEAD, BROADCASTING IN AMERICA 433 (3d ed. 1976). The NAB promulgates the television and radio codes, which set forth the organization's programming, advertising, and operating standards. *See generally* NATIONAL ASS'N OF BROADCASTERS, THE TELEVISION CODE (insert 1975) *reprinted in* NATIONAL ASS'N OF BROADCASTERS CODE AUTHORITY, BROADCAST SELF-REGULATION (1971) [hereinafter cited as TELEVISION CODE]. For many years, NAB members were not required to subscribe to the Code, but in 1974, the Code was amended to require that all members in the top 100 markets adopt the Code by 1976. Note, *Federal Regulation of Television Broadcasting—Are the Prime Time Access Rule and the Family Viewing Hour in the Public Interest?*, 29 RUTGERS L. REV. 902, 915 n.97 (1976). The NAB returned to its previous policy early in 1977, making Code subscription voluntary once again. *See* BROADCASTING , Mar. 7, 1977, at 18.

Nearly 76% of all television licensees, and 57% of radio licensees are members of the NAB, as are all three national networks. NATIONAL ASS'N OF BROADCASTERS CODE AUTHORITY, CODE NEWS Aug. 1974, at 5. These percentages do not include network affiliates who, while not independent members of the NAB, broadcast network programming which complies with the Code requirements. *See* M. FRANKLIN, *supra* note 7, at 837.

16. TELEVISION CODE, *supra* note 15, at *Program Standards* I.

17. *Id.* Although the Code states a desire to encourage creative programming dealing with significant moral and social issues, *see id.*, its specific program proscriptions often have the opposite effect, encouraging traditional approaches to broadcasting and character portrayals. *See* Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STAN. L. REV. 1527, 1549 (1975). Given the licensee's individual responsibility for program content, the specific limitations of the Television Code may be an impermissible delegation of licensee decisionmaking authority. *Id.* at 1558-59. The FCC, however, has never taken this approach, and several FCC licensing forms request information about whether an applicant relies on a code of program standards. 47 C.F.R. § 73.301, 303, 314, 315 (1977); RAD. REG. (P&F) FINDING AIDS, MASTER INDEX, FORMS ¶¶ 98:301, 303, 314, 315 (1977). In fact, the FCC has not considered the NAB Code an infringement of licensee responsibility, but rather a desirable form of industry self-regulation. *See* REPORT OF THE OFFICE OF NETWORK STUDY, SECOND INTERIM REPORT ON TELEVISION NETWORK PROGRAM PROCUREMENT 424 (1965). One FCC report states that licensee compliance with Code provisions "would go a long way toward correcting the 'abuses' in programing and advertising. . . ." *Id.* This report quotes one licensee as saying that the Code is based upon the assumption that the licensee is solely responsible for what is broadcast, and that the NAB does not attempt to "vary or substitute the judgment of any enforcement body or person for that of the individual licensee." *Id.*

the NAB's adoption of the FVP was to limit licensee discretion in the choice of programming.[18] During the early evening hours only those programs considered suitable for children could be broadcast. Since the NAB was to be the final determiner of suitability, it and not the licensee was controlling program content, contrary to the requirement that licensees may not delegate their programming responsibilities.[19] The *Writers Guild* complaint alleged that the adoption of the FVP by the NAB was the result of impermissible pressure placed upon the broadcasting industry by the FCC, circumventing the normal rulemaking procedures by which federal regulations are required to be made, and violating the first amendment.[20]

The facts of the case reveal a complex plan by the FCC, executed primarily by FCC Chairman Richard Wiley, to pressure the networks into the adoption of a policy which would reduce the amount of violent and sexually explicit programming shown during the early evening hours.[21] The impetus behind this plan came from the Congress, which for many years had been focusing attention on the controversy over

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The mere fact that membership in the NAB is voluntary does not answer the charge that licensee responsibility is being usurped by the NAB. Failure to comply with Code provisions may result in removal of a station's call letters from the list of Code subscribers, and loss of the right to display the NAB Seal of Good Practice. *See* TELEVISION CODE *supra* note 15. Regulations and Procedures III, §§ 2, 4. Such sanctions do not seem to justify continued compliance with Code provisions where they conflict with the licensee's independent judgment. One of the major functions of the Code seems to be to prevent competition among members where adoption of a practice is deemed by the NAB to be a beneficial programming guide. Where a majority of the members of the Code Board agree that a practice should be adopted by the NAB, those members who follow it need not worry that other members will gain a competitive advantage by not complying. For a discussion of the antitrust implications of *Writers Guild* see Note, *Writers Guild v. FCC: Duty of the Networks to Resist Governmental Regulation*, 28 SYRACUSE L. REV. 583, 603-06 (1977). For a general discussion of the antitrust problems inherent in the broadcasting licensing process and network affiliation, see N. JOHNSON, *supra* note 1, at 343-46. *See also* American Fed'n of Television & Radio Artists v. National Ass'n of Broadcasters, 407 F. Supp. 900 (S.D.N.Y. 1976). (NAB rule preventing hosts of children's shows from delivering commercial messages did not violate Sherman Act.)

The refusal of the FCC to inquire into the problem of licensee delegation of responsibility to the NAB has been questioned by at least one court, but no change in FCC policy is evident. In the recent case of Mark v. FCC, 468 F.2d 266 (1st Cir. 1972); *aff'g* 34 F.C.C.2D 434 (1972), the court upheld an FCC finding that an astrologist who had been denied access on NBC because of that network's compliance with the Code, *see* TELEVISION CODE, *supra* note 15 at Program Standards, § 12, had failed to prove that the licensee was not complying with its obligation to program in the public interest. 468 F.2d at 269. The decision was accompanied by a statement which questioned the FCC's assertion that it could not protect against abuses of the individual licensee's responsibility through compliance with the Code: "While it may be good policy . . . that a broadcaster articulate some rationale for its general policies . . . [it is] even more so when there may be a question as to whether the licensee has exercised independent judgment in adopting restrictive policies in concert with others . . . ." *Id.* However, the court in *Writers Guild* held the NAB liable for usurpation of licensee discretion, stating that the NAB "has no First Amendment right to interfere with the rights of the public to independent broadcaster decisionmaking." 423 F. Supp. at 1154. The court found the NAB's right to adopt a code of television conduct does not include a right to force licensee adoption of its views. *Id.*

18. 423 F. Supp. at 1154.
19. *Id.* at 1133-35.
20. *Id.* at 1072-73.
21. *Id.* at 1094.

such programming, especially its effect on children.[22] Congressional concern culminated when the Senate[23] and the House of Representatives[24] both requested that the FCC report on what it intended to do to reduce the number of programs which were unsuitable for viewing by children. Basically, the Congress wanted to know what legislation was needed to empower the FCC to deal effectively with the problem.[25] In response to this, the FCC submitted to Congress the Report on the Broadcast of Violent, Indecent and Obscene Material.[26] Expressing doubts about the ability of the FCC to adopt content regulations consistent with the first amendment,[27] the major focus of the Report was to recommend self-regulation by the broadcasting industry.[28] The FCC made this recommendation only after taking other steps to ensure that self-regulation would in fact occur. Although Chairman Wiley maintained throughout the court proceedings in *Writers Guild* that his role was merely advisory, and that his recommendations were merely suggestions,[29] the pervasive presence of the FCC through Chairman Wiley belies this characterization of his actions.[30] His first action was to request of his staff their recommendations on how to approach the broadcasting industry. They responded by suggesting that the NAB amend the Television Code to reflect concern over program content.[31] Other plans by which pressure could be placed upon the industry were also recommended,[32] emphasizing that such action would be considered by the Commission as being consistent with the "public interest" standard required of licensees.[33]

Although the Chairman felt that the constitutionality of such ac-

22. *See Hearings on Violence on Television Before the Subcomm. on Communications of the House Comm. on Commerce*, 93d Cong., 2nd Sess. (1974); *Hearings in Review of Policy Matters of FCC and Inquiry Into Crime and Violence on Television and a Proposed Study Thereof by the Surgeon General Before the Senate Subcomm. on Communications of the Senate Comm. on Commerce*, 91st Cong., 1st Sess., ser. 91, pt. 6 (1969). *See also* REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 190-210 (1969); REPORT ON THE BROADCAST OF VIOLENT, INDECENT AND OBSCENE MATERIAL, 32 RADIO REG. 2D (P&F) 1367, 1368 (1975).

23. S. REP. No. 1056, 93d Cong., 2nd Sess. 10 (1974).

24. H.R. REP. No. 1139, 93d Cong., 2nd Sess. 15 (1974).

25. 423 F. Supp. 1064, 1095-96.

26. Report on the Broadcast of Violent, Indecent and Obscene Material, 51 F.C.C.2d 418, 32 RAD. REG. 2D (P&F) 1367, 1367 (1975).

27. *Id.* at 419-20, 32 RAD. REG. 2D (P&F) at 1370.

28. *Id.* at 422-24, 32 RAD. REG. 2D (P&F) at 1369. The FCC did recommend one minor statutory enactment. It asked that section 1464 of the Federal Communications Act, 18 U.S.C. § 1464 (1976), be modified to include a prohibition of sexually explicit visual depictions. 51 F.C.C.2d at 424, 32 RAD. REG. 2D (P&F) at 1375.

29. 423 F. Supp. at 1120.

30. *Id.*

31. *Id.* at 1096.

32. *Id.* at 1096-97. These included placing pressure directly on the NAB and administrative remedies such as policy statements and notices of inquiry and proposed rulemaking. Wiley was convinced, however, that formal FCC action presented first amendment and § 326 problems. *Id.*

33. *Id.* See discussion note 12 *supra*.

tivities was questionable,[34] his staff continued to investigate both formal and informal methods of obtaining broadcaster compliance.[35] Wiley undertook the task of letting the broadcasters know the FCC attitude on violent and indecent programs, in a series of speeches and private conversations with key members of the broadcasting industry,[36] emphasizing self-regulation, but with an unmistakable threat of government action should the broadcasters fail to heed his advice.[37] Concerned as he was about the problem, CBS President Arthur Taylor felt that nothing less than industry-wide compliance, with whatever policy was suggested, would suffice to solve the problem.[38] Wiley concurred that industry-wide compliance was essential, and offered to use his in-

34. 423 F. Supp. at 1096.

35. *Id.*

36. A complete discussion of the activities of Wiley and members of the FCC staff can be found in the opinion of the court. *Id.* at 1092-128. They can be summarized as follows: The legal assistant to the Chairman, at Wiley's request, sent a proposal to the NAB Code Review Board requesting that they strengthen their position on television violence. This was considered and rejected by the Board at a meeting on October 1, 1974. *Id.* at 1096. The FCC staff then proposed several alternative formal FCC actions, including notices of inquiry, rulemaking and policy statements, including the suggestion that any action be couched in terms of "public interest." *Id.* at 1096-97. Although Wiley felt any formal action would be of questionable legality, he allowed his staff to continue work on the proposals, knowing that the silent threat of formal action would act as a lever if he encountered network opposition. *Id.* at 1096-97.

On October 10, Wiley delivered a speech to the Illinois Broadcasters Association on the topic of violence and obscenity, reminding broadcasters of their public responsibility, and stating that government action might be the only alternative. *Id.* at 1098. The FCC next arranged a meeting of the Washington representatives of all three networks, at which self-regulation was again emphasized, with the implication of impending government action. *Id.* at 1098-99. After another meeting with network officials individually in New York, NBC and ABC sent proposed policy statements to the FCC for approval. *Id.* at 1101, 1103. The FCC received an extension of the December 31, 1974 deadline for its report to Congress, thus assuring time to complete the self-regulatory scheme before it was endorsed by the FCC. *Id.* at 1105. Wiley was interviewed by the New York Times reiterating his statement of concern, and admitting that the prospect of FCC action would be used in negotiations with the networks. *Id.* When the interview was published, Wiley contacted several network officials, claiming that he had been misquoted, and at the same time restating his belief that industry action must be forthcoming. *Id.* at 1105-07.

CBS then sent a letter to the NAB suggesting amendment of the Television Code, and in January, 1975, the Code Board met to consider its adoption. *Id.* at 1110. When no action was taken, Wiley again met with network representatives and NAB officials, asking them to expedite amendment of the Code before he was required to report to Congress. *Id.* at 1112. Under this pressure from the FCC, the Board passed a resolution recommending that the Code Review Board meet on or before February 15, 1975, the deadline for the FCC report to Congress, to consider the amendment. *Id.* at 1114. Although the three networks disagreed on the terms of the provision, particularly as to whether the NAB would enforce it, no network was willing to block the action in the face of such pressure. *Id.* at 1115.

The FCC Report went to Congress on February 19, 1975. Although formal amendment of the Code was practically assured, Wiley was unwilling to relax his campaign, having committed himself to self-regulation in his report to Congress. He gave two speeches in mid-February, again discussing possible FCC action by pointing to self-regulation as the better solution. *Id.* at 1117-18. He also met with the Association of Independent Television Stations, and stated that their reaction to the NAB proposal would be duly reported to Congress, thus discouraging their opposition. *Id.* at 1118. Soon after, the NAB Television Board adopted the FVP, following the format suggested by the FCC; NAB had reversed its decision of only 4 months before. The broadcasters obviously reasoned that any difficulties encountered under the NAB standard would be minimal in comparison with the action threatened by the FCC. *Id.* at 1120.

37. *Id.* at 1098.

38. *Id.* at 1100.

fluence to extend adoption of any proposed policy to the Public Broadcasting System and independent stations as well.[39]

All three networks set to work on policy statements reflecting Wiley's suggestions, meeting with FCC staffers to determine what exactly would satisfy the FCC.[40] A joint policy statement issued by all three networks was recommended by the FCC,[41] but this suggestion was not followed. Because each network feared that the others might gain a considerable competitive advantage by not complying with the proposed policy, public statements issued by each of the networks were considered insufficient.[42] Instead, it was suggested by CBS that the NAB was the appropriate organization to act as a spokesman for all three networks, and to accomplish industry-wide compliance as well.[43]

When the NAB Code Board met to discuss the proposed amendment to the Television Code, attention focused not on the need for responsible programming suitable for children, but rather on the fear of FCC action should the NAB fail to act.[44] Although initial opposition was great,[45] the FVP as eventually adopted vested enforcement power in the NAB Code Authority.[46] Chairman Wiley had thus succeeded in his attempt to assure industry-wide compliance with the Family Viewing Policy, and felt that this would satisfy the Congress.[47]

Given the substantial involvement of Wiley and members of the FCC staff in the negotiations with the networks and the NAB, the court in *Writers Guild* found sufficient FCC activity to constitute government action to invoke the first amendment.[48] The court stated: "[I]t is clear that the adoption of the family viewing policy was caused substantially by government pressure. The adoption of the policy was not the kind of independent decision required by the First Amendment. Instead the networks served in a surrogate role in achieving the implementation of government policy."[49] The *Writers Guild* court, however, carefully avoided ruling on the constitutionality of the family viewing policy, holding narrowly:

> [T]he First Amendment is not concerned with what broadcasters decide to program; it rather requires that the decision as to what should be broadcast be independently arrived at by the licensee. If the li-

39. *Id.*
40. *Id.* at 1098-100.
41. *Id.* at 1104.
42. *Id.*
43. *Id.* at 1110.
44. *Id.* at 1110-11.
45. *Id.* at 1115-16.
46. *Id.* at 1119.
47. *Id.*
48. *Id.* at 1140.
49. *Id.*

> censee has in good faith adopted a policy which it reasonably believes to conform with the public interest and applicable regulations and if it has adopted it not because of government pressure, but because it believes it to be wise policy, the First Amendment not only permits the decision, but secures it from judicial restraint.[50]

The court stated that, while the desirability of the FVP was not at issue, the method of its adoption clearly was: "[T]he question is who should have the right to decide what shall and shall not be broadcast and how and on what basis should these decisions be made."[51] The court held that the adoption of the FVP by the NAB, fostered by the government and the networks, was a violation of the first amendment.[52] Moreover, the government violated the first amendment and the Administrative Procedure Act [APA][53] through its role in the adoption of the policy.[54]

50. *Id.* The court denied all requested injunctive relief, finding it unnecessary, because there was no possibility that the defendants would ignore the declaratory relief. *Id.* at 1153-55, 1157. The court found that the cause of action for violation of section 326 of the Communications Act of 1934 did not state a claim upon which relief could be granted; there was no formal action by the FCC. 423 F. Supp. at 1161. However, the court found that the adoption of the FVP by the NAB violated the first amendment because of the FCC intervention, and that enforcement by the NAB would be impermissible under the facts of the case before it. *Id.* The declaratory relief included a finding that networks are required to program independently of the pressure of the FCC, and that each of the defendants, public and private, had violated the first amendment. *Id.* at 1155. In addition, the court found that the government defendants had violated the Administrative Procedure Act, 5 U.S.C. § 553 and held the private defendants liable for pecuniary damages to one of the plaintiffs, Tandem Productions, caused by the effects of the FVP adoption. *Id.* at 1162.

51. *Id.* at 1072.

52. *Id.* at 1154-55, 1161. The court rejected the plaintiffs' cause of action against the FCC and the individual commissioners based on section 326 of the Federal Communications Act of 1934, 47 U.S.C. § 326 (1970). The court found that a private cause of action against broadcasters had never been allowed under the Act. 423 F. Supp. at 1084. It also disallowed a private action against the Commission, *id.*, (citing Scripps-Howard Radio v. FCC, 316 U.S. 4, 14 (1942)).

The Court sustained a cause of action against the private defendants for violation of the plaintiffs' first amendment rights, based upon the holding of Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). 423 F. Supp. at 1088. In *Bivens*, the Supreme Court held that a violation of the fourth amendment gave rise to a private cause of action for damages. 403 U.S. at 389. In *Writers Guild*, the court found that violations of the first amendment similarly entitled the plaintiffs to recover damages. 423 F. Supp. at 1089. Although the court recognized that the doctrine of sovereign immunity prevented an award of damages against the government defendants, *id.* at 1158-59, since the FCC and the individual commissioners were acting in their official capacities, the private defendants were found liable for damages despite the court's finding of considerable government influence. *Id.* at 1158. The court stated that the broadcasters were not without free will:

> To be sure, the FCC imposed burdens upon the exercise by the broadcasters of First Amendment rights. The broadcasters had the right and the duty to make independent decisions. Instead of doing so, they took the easy road and capitulated to FCC pressure. No one doubts that the networks could have resisted if they had chosen to do so. They are not quivering or powerless institutions. Instead they freely chose to abdicate the burdens of independent decisionmaking. Moreover the networks willingly entered into a partnership with the FCC for competitive reasons to use the medium of the NAB in order to interfere with the independent judgment of other licensees.

Id. The court, citing Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), found no unfairness in such liability where the governmental participation was not overriding. *Id.* at 1158.

53. *See* 5 U.S.C. §§ 551-59, 571-75, 701-06 (1976).

54. 423 F. Supp. at 1153. Section 4 of the APA requires an agency formulating new regulations to publish a notice of proposed rulemaking in the Federal Register, to provide for participation in the rulemaking by interested parties, and to state the basis and purpose of the rules

Viewed from an historical perspective, the *Writers Guild* decision represents an unprecedented limitation on the exercise of content control by the FCC. This Note will review the history of broadcasting regulation by the Commission and examine the effects on content resulting from both formal and informal regulatory processes. The limitation on the FCC which this decision represents will then be analyzed. The statutory basis of FCC regulation will be discussed, and constitutional analysis will include an examination of both first amendment problems present in the opinion, and the question which *Writers Guild* leaves unanswered—whether individual licensee action is state action for purposes of invoking constitutional protections.

FCC REGULATION OF THE BROADCAST MEDIA

Present governmental regulation of broadcasting has been justified by the scarce nature of the radio spectrum.[55] This concept, resulting in content control, arose only after content-blind regulations proved inadequate.[56] Initial regulation of broadcasting was purely technical in nature. The first congressional enactments regulating radio broadcasting

adopted. 5 U.S.C. § 553 (1976). The court in *Writers Guild* found that the FCC, by placing pressure on the networks and NAB, violated these requirements:

> The record in this case reflects a total disregard of the procedural protections afforded by the APA. Without providing public notice and without affording any opportunity for interested parties to be heard, the Commission, acting through its Chairman, negotiated with powerful industry forces to form new policy for television, new policy which affects millions of lives. The Commission dictated and negotiated this new policy wholly outside the procedures of the Act.

423 F. Supp. at 1151. The court noted that this was not the first time the FCC had been warned about failure to observe rulemaking procedures. *Id.* at 1152 (citing Yale Broadcasting Co. v. FCC, 478 F.2d 594, 599 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973)); Citizens Communications Center v. FCC, 447 F.2d 1201, 1204-05 & n.5 (D.C. Cir. 1971).

55. *See* text & notes 7 *supra*, 56 *infra*.

56. National Broadcasting Co. v. United States, 319 U.S. 190, 211-13 (1943). In *National Broadcasting* the Court gave a much-quoted explanation of the scarcity doctrine and the necessity for content control:

> The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.
>
> . . . .
>
> The Act [of 1934] itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.
>
> The Commission was, however, not left at large in performing this duty. The

were the Wireless Ship Act of 1910,[57] which required passenger ships to carry radio transmitters, and an amendment to the Interstate Commerce Act,[58] passed the same year, which gave the Secretary of Commerce control over interstate broadcasting. The first legislation affecting all broadcasters, however, was the Radio Act of 1912.[59] This Act required that all broadcasters be licensed by the federal government, and allowed licenses to be revoked for violations of the technical requirements of the Act.[60] It did not, however, contain any criteria for the allocation or denial of licenses. The mandatory nature of this licensing scheme is quite consistent with traditional governmental nonintervention with expression.[61] However, under this early statute, the broadcast frequencies were inundated, resulting in complete chaos.[62] No frequencies were reserved by the Act for the exclusive use of broadcasters, so in 1920-21 Herbert Hoover, as the Secretary of Commerce, set aside two frequencies.[63] These were soon overrun with broadcasters, and Hoover began a policy of assigning individual licensees specific frequencies.[64] When the existing frequencies were full, licenses were further restricted to certain hours and power levels.[65] Finally, in one notable case Hoover denied a license renewal on the ground that there was no available space. In *Hoover v. Intercity Radio Co.*,[66] the court of appeals ordered that the license be issued, stating that the Radio Act gave no discretion in the issuance of licenses but only in the regulation of frequencies.[67] In a later case, the Secretary attempted to enforce administrative limitations on power and hours of operation. The court found that this activity was outside the regulatory power granted by Congress.[68]

With his hands completely tied, Hoover joined broadcasters in requesting Congress to revise the Radio Act.[69] Finally, in 1927 Congress

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touchstone provided by Congress was the "public interest, convenience, or necessity"

. . . .

. . . The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license.

Id. at 213-16.

57. Ch. 379, §§ 1-4, 36 Stat. 629 (repealed 1934).

58. Act of June 18, 1910, ch. 309, § 7, 36 Stat. 544 (current version at 49 U.S.C. § 1 (1970)).

59. Ch. 287, §§ 1-11, 37 Stat. 302 (repealed by the Radio Act of Feb. 27, 1927, ch. 169, § 39, 44 Stat. 1174).

60. *Id.*

61. *See* J. BARRON, *supra* note 6; B. OWEN, *supra* note 5, at 104; Note, *supra* note 8, at 566.

62. National Broadcasting Co. v. United States, 319 U.S. 190, 212-13 (1943).

63. G. CHESTER, G. GARRISON, & E. WILLIS, TELEVISION & RADIO 31 (4th ed. 1971); E. KRASNOW & L. LONGLEY, THE POLITICS OF BROADCAST REGULATION 10 (1973).

64. G. CHESTER, G. GARRISON, & E. WILLIS, *supra* note 63, at 31-32.

65. *Id.*

66. 286 F. 1003 (D.C. Cir. 1923), *appeal dismissed*, 266 U.S. 636 (1924).

67. *Id.* at 1006.

68. United States v. Zenith Radio Corp., 12 F.2d 614, 617-68 (N.D. Ill. 1926).

69. U.S. DEP'T OF COMMERCE, MINUTES OF THE OPEN MEETING OF THE DEP'T OF COMMERCE ON RADIO TELEPHONY 1 (1922), *cited in* S. HEAD, *supra* note 15, at 131.

adopted the Federal Radio Act.[70] This Act authorized the creation of the Federal Radio Commission, on an experimental basis, with broad powers over the allocation of licenses. The statute required that "the licensing authority should determine that the public interest, convenience or necessity would be served"[71] before granting a license. This phrase would serve as a basis for revolutionary application of the first amendment to broadcasters. No longer were the rights of the broadcaster the only ones considered. Beginning here, the rights of the public audience were interposed for the first time. The regulation of broadcasting by the government, and its right to choose among competing applicants for broadcast privileges was thus based upon the now familiar "public interest standard."[72] The law was again revised, and regulation made permanent, by the Federal Communications Act of 1934.[73] This Act created the Federal Communications Commission, and granted it regulatory power over both radio and telecommunications.[74] Title III of this Act is nearly identical to its predecessor, the Federal Radio Act, retaining the public interest criterion.[75]

In its role as overseer of the broadcasting industry, the FCC currently is empowered to grant or revoke radio and television licenses,[76] and set policy through its rulemaking procedures.[77] FCC regulations are basically of two types: those of an essentially technical nature, and those dealing with program content.[78] Although both categories are involved in many FCC regulatory actions, it is only the latter which raises constitutional issues.[79]

The grant or renewal of a license by the FCC must, of course, be logically related to the public interest standard imposed by Congress.[80] This requires that the applicant first ascertain the needs of the community he intends to serve,[81] and then provide programming to satisfy

70. Ch. 169, §§ 81-121, 44 Stat. 1162 (1927) (repealed by Act of June 19, 1934, ch. 652, §§ 4-602, 48 Stat. 1102).

71. *Id.* §§ 9,11.

72. The source of the public interest standard as currently applied is found in 47 U.S.C. §§ 307(a), 309(a) (1970 & Supp. V 1975); *see* text & note 12 *supra*, 107-127 *infra*.

73. Ch. 652, §1, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151-609 (1970 & Supp. V. 1975)).

74. *Id.*

75. *Id.* §§ 303, 307(a), 309(a).

76. *Id.* §§ 307, 309, 312; *see* text & notes 80-88 *supra*.

77. 47 U.S.C. § 303 (1970 & Supp. V 1975); 47 C.F.R. §§ 1.401-.407 (1976); *see* 5 U.S.C. §§ 551(5), 553 (1976).

78. *Compare* 47 U.S.C. § 318 (1970) *with id.* § 309(a).

79. *See* Robinson, *supra* note 5, at 86-90; Note, *supra* note 8, at 566-67.

80. Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 258-62 (D.C. Cir. 1974).

81. The FCC has in fact implemented the first approach by requiring licensees or applicants to survey the community they wish to serve to develop information on tastes and interests within the community. This is the so-called "ascertainment" requirement. The Commission has also required the licensee to take reasonable measures to insure the accuracy of information it broadcasts on controversial issues of public importance. . . . These duties are part of the "fairness doctrine."

Id. at 276-77, *see* 39 Fed. Reg. 32,288 (1974) (broadcaster's procedure manual); 36 Fed. Reg.

those needs.[82] The "ascertainment" process began as a means of requiring licensees to meet the specific requirements of each individual community.[83] The process allows considerable viewer input on the question of community needs and recommendations for programming responsive to those needs.[84] This process, however, has lost a great deal of its flexibility, since the FCC recommends categories of programming[85] and the percentages of time to be devoted to each,[86] creating a standardized prescription for renewal. Any substantial deviation can result in a hearing where the applicant must justify his ascertainment[87] and could conceivably result in a license denial.[88]

Rulemaking is the process by which the FCC determines that a problem exists and adopts a method for dealing with it.[89] Most prominent among the controls which have been exerted over licensees through the rulemaking function is the fairness doctrine, which began as an FCC rule and was later codified in the Federal Communications Act.[90] The fairness doctrine requires that a licensee devote a reason-

4,092 (1971) (ascertainment procedures manual); Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, 27 RADIO REG. 2D (P&F) 553 (1973).

82. Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 276 (D.C. Cir. 1974) (Bazelon, J., concurring). *See also* Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, 27 RAD. REG. 2D (P&F) 553 (1973); Inquiry into Local Television Programming Inquiry in Omaha, Nebraska, 1 RAD. REG. 2D (P&F) 1901 (1963); Formulation of Policies Relating to Broadcast Renewal, 3 RAD. REG. (P&F) CURRENT SERV. 53:429 (1971); *In re* Lee Roy McCourry, 2 RAD. REG. 2D (P&F) 895, 901 (1964); *In re* Suburban Broadcasters, 20 RAD. REG. (P&F) 951 (1961), *aff'd sub nom.* Henry v. FCC, 302 F.2d 191 (D.C. Cir.), *cert. denied*, 371 U.S. 821 (1962); Commission Policy on Programming, 20 RAD. REG. (P&F) 1901 (1960).

83. Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 276 (D.C. Cir. 1974) (Bazelon, J., concurring).

84. *See* Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, 27 RAD. REG. 2D (P&F) 553 (1973). *See generally* 47 C.F.R. § 73.1202 (1975).

85. The major elements suggested for programming by the FCC are: local expression, local talent, programs for children, religious programs, educational programs, public affairs, editorialization, politics, agricultural programs, news, weather, sports, market reports, service to minority groups, and entertainment. Commission Policy on Programming, 20 RAD. REG. (P&F) 1901, 1913 (1960); *see* Pierson, *The Need for Modification of Section 326*, 18 FED. COM. B.J. 15, 20 (1963).

86. *See* Formulation of Rules and Policies Relating to Renewal of Broadcast Licenses, 27 RAD. REG. 2D (P&F) 553 (1973).

87. *See In re* Formulation of Rules and Policies Relating to the Renewal of Broadcast Licenses, 43 F.C.C.2D 1 (1973); Inquiry into Local Television Programming in Omaha, Nebraska, 1 RAD. REG. 2D (P&F) 1901 (1973); *In re* Lee Roy McCourry, 2 RAD. REG. 2D (P&F)¶¶ 895, 901 (1964); Goldberg, *A Proposal to Deregulate Broadcast Programming*, 42 GEO. WASH. L. REV. 73 (1973); Pierson, *The Need for Modification of Section 326*, 18 FED. COM. B.J. 15 (1963).

88. We are naive if we think that the licensee of a television station that is worth millions of dollars will take [*sic*] any chances on falling below our numerical floor. If by meeting or exceeding these numbers he is practically assured of license renewal, there can be no doubt as to the course he will follow. By meeting these requirements, he will have precluded the possibility of the public being in a position to have a meaningful impact on his performance.

In re Formulation of Policies Relating to the Comparative Hearing Process, 27 F.C.C. 2d 580, 590 (1971) (dissent). *See also* Goldberg, *supra* note 87.

89. *See* 5 U.S.C. §§ 551(5), 553 (1976); 47 C.F.R. §§ 1.401-.407 (1976); W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 731-37 (6th ed. 1974).

90. 47 U.S.C. § 315(a) (1970 & Supp. V 1975), *as amended by* Communication Act of 1934 Amendment of 1959, Pub. L. 86-274, 73 Stat. 557.

able percentage of broadcast time to coverage of issues of public importance, and requires the licensee to present all sides of such issues fairly.[91] In addition, the FCC oversees other aspects of the fairness doctrine, including regulations on personal attacks made by stations,[92] and the equal time provision.[93] Other FCC controls upon programming through rulemaking are the prime-time access rule,[94] and the network syndication rules.[95] Finally, rounding out its power to regulate broadcasting, the Commission is empowered to issue cease and desist orders,[96] or forfeiture notices,[97] whenever a licensee violates the terms of the Federal Commissions Act [FCA] or the regulations promulgated thereunder. In extreme cases, licenses can be revoked for such violations.[98] However, these remedies are used only as a last resort; the Commission has more often used "jawboning"—persuasion or veiled threats—to obtain the desired results.[99]

Formal FCC Regulation and the First Amendment

Given the extent of regulatory power over expression exercised by the Commission, it is remarkable that the FCA has never been directly challenged as violative of the first amendment.[100] After all, FCC power under the public interest standard is not unlimited; it is subject to the strictures of both the first amendment and section 326 of the FCA,[101] which prohibits FCC censorship or any other interference with

91. *Id.*; 47 C.F.R. § 73.123 (1976).

92. 47 C.F.R. § 73.123 (1976). The personal attack doctrine requires that a station notify and make time available for a reply by any person who is personally criticized by the station in its coverage of controversial public issues. *Id.; see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400-01 (1969) (Supreme Court upheld the constitutionality of this doctrine).

93. 47 U.S.C. §§ 315(a)-(c) (1970 & Supp. V 1975). This provision requires that a licensee who permits a candidate for public office to use a broadcasting station give other candidates for the same office an opportunity to use the station's facilities. It was determined by the Supreme Court in Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), however, that a licensee was not required to give or sell air time to any political candidates. *Id.* at 121-25.

94. 47 C.F.R. § 73.658(k) (1976). This regulation was designed to permit a broader source of early evening programming by preventing licensees from showing only network-originated shows during prime time. *See In re* Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting, 23 F.C.C.2D 382, 18 RAD. REG. 2D 1825, 1846 (1970). This regulation was upheld in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477 (2d Cir. 1971).

95. 47 C.F.R. § 73.658(j) (1976). The regulation limits the rights of networks to syndicate their own programs. This was the Commission's first attempt at direct regulation of networks. It was upheld as reasonably necessary for the effective regulation of licensees in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 487 (2d Cir. 1971).

96. 47 U.S.C. § 312(b) (1970).

97. *Id.* § 503. A forfeiture is a fine prescribed by the Federal Communication Act.

98. *Id.* § 312(a).

99. *See* G. CHESTER, G. GARRISON & E. WILLIS, *supra* note 63, at 123. *See also* Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV, 701, 702-04 (1964).

100. Both the Federal Radio Act and the Federal Communications Act, however, have been upheld as proper exercises of congressional power over commerce. *See* National Broadcasting Co. v. United States, 319 U.S. 190, 214 (1943) (Federal Communications Act); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 282 (1933) (Radio Act of 1927).

101. 47 U.S.C. § 326 (1970).

free expression.[102] If the traditional first amendment ban on government interference with communication were applied to broadcasters as it has been to other mass media, this would limit regulation by the FCC to that of an essentially technical nature,[103] with the Commission having no right to influence program content.[104] Licensees would be free to program, edit, and censor solely in their own judgment.[105]

It became apparent quite early, however, that regulation of broadcasting was not going to be limited to the allocation and regulation of frequencies. The public interest standard upon which regulatory power rests[106] rapidly expanded to limit the independent discretion of licensees, by coupling the right to broadcast with concomitant duties to the public. The key case affirming FCC regulatory power was *National Broadcasting Co. v. United States*.[107] In that case, the Court found that Congress had granted the FCC authority to control broadcasting because it feared "in the absence of governmental control the

102. 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 communications.

Id. This section applies to television as well, since it is transmitted via radio waves.

103. Purely technical regulation which does not attempt to control content would be analogous to the application of time, place, and manner restrictions to expression in other media. In the cases which have applied this theory, regulation of speech is necessary to protect privacy and to allow for the normal use of streets and parks, for example, but is not dependent upon regulating the content of the speech. *See* Adderley v. Florida, 385 U.S. 39, 47 (1966); Poulos v. New Hampshire, 345 U.S. 395, 405 (1953); Cox v. New Hampshire, 312 U.S. 569, 574 (1941). When the content of the speech presents a threat of inciting lawless action, *see* Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969), or is unprotected by the Constitution, as in the case of obscenity, *see* Miller v. California, 413 U.S. 15, 36 (1973), only then can the government step in and regulate the speech based upon its content. In broadcasting, however, content regulation is not subject to the *Brandenburg* criteria. Rather, the entire content of television and radio broadcasting is regulated under the public interest standard. *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-88 (1969). In *Red Lion*, the Supreme 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." *Id.* at 388.

Some feel that regulation of the broadcast industry has gone beyond that necessitated by scarcity of frequencies. See text & note 6 *supra*. Judge Bazelon, in a concurring opinion in Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) expressed this opinion:

> Either a requirement to air that which the journalist does not wish to air, or a denial of a forum (a license) on the basis of the content of proposed or past speech would in any context other than mass communications be an uncontestable denial of freedom of the press.

Id. at 278. *See also* Loevinger, *Free Speech, Fairness, and Fiduciary Duty in Broadcasting*, 34 L. & CONTEMP. PROB. 278, 282-83 (1969).

104. *See, e.g.*, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (Supreme Court held unconstitutional a law requiring newspapers to give a right of reply); Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 135 (9th Cir. 1971) (newspaper could not be forced to accept an advertisement, although protected speech). See text & note 8 *supra*.

105. *But cf.* Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 391 (1973) (a ban on sex-designated help-wanted columns was not an unconstitutional infringement on editorial discretion).

106. *See* text & notes 70-75 *supra*.

107. 319 U.S. 190 (1943). The case held that the FCC could under the FCA, deny licenses to broadcasters having contracts with networks which did not permit rejection of network programs.

public interest might be subordinated to monopolistic domination."[108] The Court found that the "public interest" standard was not an unconstitutionally vague delegation of legislative authority.[109] In words which became the classic justification of governmental interference with broadcasting, the Court said:

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation. . . . The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.[110]

With this case, the Supreme Court began the difficult task of distinguishing between permissible government regulation and impermissible censorship.

In *Red Lion Broadcasting Co. v. FCC*,[111] the Court further defined the scope of the licensee's duty to the public. In that case, which upheld the constitutionality of the personal attack rule[112] of the fairness doctrine,[113] the Court stated:

> [A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. . . . [T]he 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.[114]

The Court stated that the paramount first amendment right was that of the viewing public to diverse programming, and not the right of the broadcaster to determine program content;[115] further, the Court said that "[i]t does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire

108. *Id.* at 219 (quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940)).
109. 319 U.S. at 225-26.
110. *Id.* at 226-27.
111. 395 U.S. 367 (1969). *See* text & note 92 *supra.*
112. 47 C.F.R. § 73.123 (1976). *See* text & note 92 *supra.*
113. 47 U.S.C. § 315(a) (1970 & Supp. V 1975). *See* text & notes 90-93 *supra.*
114. 395 U.S. at 389.
115. *Id.* at 390.

community, obligated to give suitable time and attention to matters of great public concern."[116]

Red Lion stands as a very broad justification of government control.[117] But this permission was not unlimited, as the Court pointed out in *Columbia Broadcasting System, Inc. v. Democratic National Committee* [*CBS*].[118] In upholding an FCC decision allowing licensees to refuse to broadcast any political advertisements, the Court noted that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act."[119] The *CBS* Court further stated that the licensee is granted broad discretion to decide how he will meet his obligations to program in the public interest.[120]

As a result of *National Broadcasting, Red Lion*, and *CBS*, the FCC today exerts considerable control over the broadcasting industry. Neither Congress[121] nor the FCC[122] has ever narrowed this power by strictly defining the public interest standard upon which it is based. One court has refused to define it, stating that such a definition is essentially legislative rather than judicial in nature.[123] Courts have preferred to deal with it on a case-by-case basis, rather than setting forth a limitation by which the FCC must abide.[124] One commentator has argued that this vague standard has hampered effective exercise of regulatory control,[125] another argues that it has resulted in inconsistencies.[126] Others claim that regulation has exceeded that necessitated by scarcity, resulting in impermissible infringement on free speech.[127] Despite these arguments, FCC regulation is neither content-blind technical regulation nor complete content control, but lies somewhere between, with the FCC having considerable latitude in implementing the public interest standard.

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116. *Id.* at 394.
117. *See* Note, note 8 *supra*.
118. 412 U.S. 94, 116 (1973).
119. *Id.* at 110.
120. *Id.* at 111.
121. *See* E. KRASNOW & L. LONGLEY, *supra* note 63, at 17.
122. G. CHESTER, G. GARRISON & E. WILLIS, *supra* note 63, at 122.
123. Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 206 (D.C. Cir.), *cert. denied*, 350 U.S. 1007 (1956).
124. *See* FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953); Carroll Broadcasting Co. v. FCC, 258 F.2d 440, 443-44 (D.C. Cir. 1958); McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C. Cir. 1956); *cert. denied*, 353 U.S. 918 (1957).
125. Sweeney, *supra* note 5, at 235-38.
126. E. KRASNOW & L. LONGLEY, *supra* note 63, at 16.
127. Goldberg, *supra* note 87, at 76; Loevinger, *supra* note 103.

The *Writers Guild* court, however, has placed a considerable limitation on FCC regulations which can be justified under the public interest standard. The court found that, while FCC power to implement the standard is broad, it is not unlimited: "Although the public interest standard has permitted the Commission to regulate (through the licensing process or via direct regulations), no roving power to screen out inappropriate material has been tendered."[128] The court noted that the FCC has made this concession itself in policy statements.[129] The court did not state that the FCC could never implement program standards such as the FVP through formal agency sections.[130] Rather,

128. 423 F. Supp. at 1147.

129. *Id.* (citing Children's Television Report and Policy Statement, 50 F.C.C.2d 1, 3 (1974)); *see* Report on the Broadcast of Violent, Indecent, and Obscene Material, 32 RAD. REG. 2D (P&F) 1367, 1368 (1975); Commission Policy on Programming, 20 RAD. REG. (P&F) 1901, 1911-12 (1960). The facts in *Writers Guild* reveal that Chairman Wiley felt any FCC intervention to be of questionable constitutionality. 423 F. Supp. at 1097 & n.39; *see* discussion notes 27-34 *supra*.

130. 423 F. Supp. at 1149. Analogizing to other broadcasting regulations, the court suggested that, given a proper record and procedures, content regulation of this type could conceivably be justified on the theory that such programming is so injurious to the public as to deny it first amendment protection. *Id.* Such FCC regulation of content would not be unprecedented. Congress has, in a few situations, granted the FCC power to prohibit certain types of programming based on the notion that the expression was not protected speech, or on the theory that the existence of a compelling governmental interest would justify the control. Yet, such congressional intervention is of questionable constitutionality. Present law includes a prohibition of obscene and indecent language, 18 U.S.C. § 1464 (1976), the regulation of lotteries, *id.* §§ 1304, 1307 (1970 & Supp. V 1975), the prohibition against the use of broadcast facilities for fraudulent purposes, *id.* § 1343 (1970), and a prohibition of cigarette advertising, 15 U.S.C. § 1335 (1976). Although the governmental interest in regulating fraud and lotteries has a fairly clear basis in the public interest requirement, regulation in the areas of indecency and advertising rests on less firm constitutional ground.

As an illustration, Congress has given the FCC authority to ban certain language from the airwaves: "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." 18 U.S.C. § 1464 (1976). Although this statute encompasses obscenity, which is outside the protection of the first amendment, Miller v. California, 413 U.S. 15, 23 (1973); Roth v. United States, 354 U.S. 476, 484 (1957), it also prohibits speech which is merely "indecent," and therefore presumably entitled to first amendment protection. *See* Sonderling Broadcasting Corp., 27 RAD. REG. 2D (P&F) 285, 296 (1973) (dissenting opinion), *aff'd sub nom* Illinois Citizen Comm. for Broadcast v. FCC, 515 F.2d 397 (1975) *See also* Cohen v. California, 403 U.S. 15, 26 (1971); Note, *supra* note 15, at 1536-40. In Pacifica Foundation, 32 RAD. REG. 2D (P&F) 1331 (1975), *rev'd sub nom.* Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, — U.S. —, 46 L.W. 5018 (1978), the FCC determined that regulation of even nonobscene material under section 1464 was permissible because of the intrusive nature of the medium. 32 RAD. REG. 2D (P&F) at 1335; *see* Redrup v. New York, 386 U.S. 757, 769 (1957) (Court, in dictum, intimates that even nonobscene materials can be regulated so as to avoid exposure to an unwilling individual). The Commission analogized this exercise of control to nuisance, basing its regulation on the channeling rather than prohibition of speech, 32 RAD. REG. 2D (P&F) at 1336, and suggesting that at the proper time and accompanied by appropriate warnings, such material could be broadcast. *Id.* at 1337.

Upon reviewing this decision, the D.C. Circuit disagreed, finding the FCC order overbroad and vague, and in violation of 47 U.S.C. § 326 (1970) which prohibits FCC censorship. Pacifica Foundation v. FCC, 556 F.2d 9, 18 (D.C. Cir. 1977). The court stated:

> Despite the Commission's professed intentions, the direct effect of its *Order* is to inhibit the free and robust exchange of ideas on a wide range of issues and subjects by means of radio and television communications. In promulgating the *Order* the Commission has ignored both the statute which forbids it to censor radio communications [section 326] and its own previous decisions and orders which leave the question of programming content to the discretion of the licensee.

Id. at 13. In striking down the FCC decision, the court reached the heart of the conflict between

the court stated that, if such a policy were adopted, it would have to be supported by a record showing it was in fact "in the public interest."[131] The court suggested two ways by which the FCC might constitutionally regulate programming unsuitable for children. The first suggestion was that such regulation might be based upon public health grounds: "It may be, for example, that a record could be compiled that would demonstrate that particular types of programming are so demonstrably injurious to the public health that their entitlement to First Amendment protection in the broadcasting medium could properly be questioned."[132] Further, the court suggested that excessive violent programming may not fulfill the licensee's duty to meet the needs of his community, since children are a part of that community.[133] In any case, no such policy may be implemented without compliance with the procedural requirements for agency action.[134]

The *Writers Guild* court went on to note that the FCC is free to suggest ways in which the public interest can be met, yet it rejected any power of the Commission to "accompany its suggestions with vague or

government regulation of broadcasting and the first amendment. In this case, as in *Writers Guild*, the essential problem is how far the FCC can go to regulate program content under the guise of assuring that licensees operate in the public interest. In *Pacifica* and *Writers Guild*, the courts found that the essential protections of the first amendment do not give way under the pressures of the public interest standard. The ban on radio and television cigarette advertising has a questionable constitutional basis as well. It was upheld in Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) *aff'd mem. sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972), on the grounds that it imposed no restriction on the broadcaster's freedom of expression since he was still entitled to air editorial and documentary comments on smoking, *id.* at 584, and, because the speech involved was commercial, it was entitled to a lesser degree of protection. *Id.; see* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942). Additionally, the court determined that Congress, under the public interest requirement, could rationally impose such a regulation. 333 F. Supp. at 586. Recent decisions, however, have indicated that advertising is protected speech entitled to first amendment protection. *See* Bates & O'Steen v. State Bar, 433 U.S. 350, 383 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976); Bigelow v. Virginia, 421 U.S. 809, 821-22 (1975). Although the Court in Virginia State Bd., 425 U.S. at 733, and again in Bates & O'Steen, 433 U.S. 350, 384, specifically avoids the question of advertising regulation in broadcasting, it is clear that the trend of constitutional law is toward the protection of all advertising, and it is arguable that the state's interest in protecting health alone is insufficient to justify a denial of media access to advertisers.

Similarly, it appears questionable that a showing of possible injury to the public health is sufficient to support a programming prohibition such as the FVP. Although the court in *Writers Guild* puts forth this rationale as a possible justification for such regulation, 423 F. Supp. at 1149, it is not at all clear that such a finding would overcome first amendment protection. Aside from the cigarette advertising case, where the decision rested both on health and the historically low level of protection given advertising, such a justification is unprecedented. It should be noted that the district court, in upholding the cigarette advertising ban, specifically stated that FCC regulation of program content cannot be a broad ban of anything which might conceivably be injurious to the public health, but must be drawn narrowly to exclude only unprotected speech. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 585 (D.D.C. 1971), *aff'd mem. sub nom.* Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972). It thus appears that any attempt by either Congress or the FCC to enact a regulation limiting expression as does the FVP could not be constitutionally justifiable as protecting the public health or welfare.

131. 423 F. Supp. at 1150.

132. *Id.* at 1149.

133. *Id.*

134. *Id.* See discussion note 54 *supra*.

explicit threats of regulatory action should broadcasters consider and reject them."[135] In this statement, the court pinpointed an FCC practice which has had enormous effect on broadcasting, although not part of its formal agency action. It is this informal exertion of pressure on licensees which was the central issue in the *Writers Guild* case. This process, by which the FCC lets the industry know what activity it finds acceptable, is known as "jawboning,"[136] or regulation by the "lifted eyebrow" of the FCC.[137]

Informal FCC Regulation—The "Lifted Eyebrow"

As discussed above, the balancing of competing first amendment rights necessarily brings about considerable influence on program content.[138] However, formal FCC action is of limited effectiveness if intervention by the Commission is only permissible when a broadcaster has breached his formally promulgated fiduciary duty.[139] Informal influence on the industry is used more frequently by the FCC, and has a far more insidious effect in chilling broadcaster expression than formal

135. 423 F. Supp. at 1150.

136. *See id.* at 1098.

137. This phrase was originally used in Miami Broadcasting Co. (WQAM), 14 RAD. REG. (P&F) 125 (1956), where Commissioner John C. Doerfer, in a dissent, stated:

> This Commission, as well as all broadcasters, spend a good deal of time and money compiling percentages of various program categories . . . . All this is nonsense if the Commission has no actual sanctioning powers. At best, it amounts to *regulation by the lifted eyebrow*—a wholly inappropriate basis for administrative action.

Id. at 128 (emphasis in original).

138. *See* text & notes 76-127 *supra.*

There has never been a case under the Federal Communications Act where a programming decision has been deemed in violation of the duty to act in the public interest, and has resulted in license revocation or failure to renew. One case decided by the FCC on the grounds of both complaints of viewers about vulgar programs and misrepresentation by the licensee was affirmed by the court of appeals on the issue of misrepresentation alone, totally avoiding the question whether a denial of an application of renewal could constitutionally be based upon programming of a type found offensive to some viewers. Robinson v. FCC, 334 F.2d 534, 536 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964), *aff'g* Palmetto Broadcasting Co., 32 F.C.C.2d 870, 23 RAD. REG. (P&F) 483 (1962).

Under the Federal Radio Act, ch. 169, § 18, 44 Stat. 1170 (repealed 1934) however, licenses were denied because of the type of programming chosen by the licensee. Trinity Methodist Church v. Federal Radio Comm., 62 F.2d 850, 851 (D.C. Cir.), *cert. denied*, 284 U.S. 685 (1932); KFKB Broadcasting Ass'n v. Federal Radio Comm., 47 F.2d 670, 672 (D.C. Cir. 1931). In *Trinity*, the Commission denied renewal of a broadcast license to a minister who utilized his station to air extremist views. 62 F.2d at 851. On appeal, this denial was upheld as being within the power of the Commission to grant licenses in the public interest. *Id.* at 852. In *KFKB*, there was a similar denial of a license to a patent medicine salesman who used the station to promote his products. The court of appeals held that there was no censorship in this denial; the Commission "merely exercised its undoubted right to take note of . . . past conduct," 47 F.2d at 672, in denying license renewal. *See* Robinson, *supra* note 5.

A better view is stated in Pacifica Foundation, 36 F.C.C. 147, 1 RAD. REG. 2D (P&F) 747 (1964), which holds that the FCC cannot, through licensing, keep off the air all programs offensive to some listeners. The Commission has power to keep the airwaves free of only those programs which are in complete disregard of the public interest.

139. *See, e.g.*, Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 125 (1973); National Broadcasting Co. v. FCC, 516 F.2d 1101, 1113-15 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976); Green v. FCC, 447 F.2d 323, 330 (D.C. Cir. 1971).

rulemaking or adjudication. As the *Writers Guild* court noted, this results from the willingness of broadcasters to acquiesce in Commission suggestions.[140] One former FCC Commissioner described the process in this way:

> [A] prudent and responsible broadcaster is likely to be very responsive to the views of FCC commissioners and staff, regardless of his own judgment as to public needs or demands. . . . [T]he fact has become a stereotype of FCC thinking which is reflected in the cliché of "regulation by the lifted eyebrow." This simply indicates recognition of the fact that occasional martyrs or heroes will assert their independence regardless of consequences to themselves; but, in general, people will bend to the will of those who wield power over them, and the independence of individuals and enterprises will be inversely proportional to the power government thus exerts.[141]

Because a licensee is repeatedly subjected to the renewal process wherein his programming decisions must be justified, a broadcaster must be constantly on the lookout for this informal influence by the FCC, and conform his programming to it.[142] Classic examples of the lifted eyebrow technique are found in *Yale Broadcasting Co. v. FCC*[143]

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140. 423 F. Supp. at 1146-47; *see* Goldberg, *supra* note 87, at 76-77; Note, *supra* note 103, at 291.

141. Loevinger, *supra* note 103, at 291.

142. Another former FCC Commissioner, Glen O. Robinson, described the effect of constant license-renewals on program content:

> The effectiveness of the renewal process in influencing a licensee's operations, including his program operations, arises from two facts. First, the *licensee* has the burden of coming forth . . . to show compliance with Commission standards and fulfillment of prior promises; second, this process is routine and relatively frequent, thereby eliminating any doubt that the Commission will scrutinize the actual performance of the station in relation to the performance promised. . . .
>
> It is this *in terroram* aspect of periodic renewal which one former FCC Commissioner labelled "regulation by lifted eyebrow," . . . . A letter to the station from the Commission or even a telephone call to the station's Washington attorney . . . indicating the Commission's "concern" over a particular practice of the licensee and asking for the licensee's justification will generally be all that is necessary to bring the licensee around to the Commission's way of thinking.

Robinson, *supra* note 5, at 119-20 (emphasis in original). Another commentator states:

> [T]he FCC has been drawn into a role of exercising greater and greater influence upon the program judgments and practices of television broadcasters. This expansion of influence has resulted, almost inevitably, from the nature of the license renewal process. In this process, the broadcaster has the burden of showing that he has complied with FCC program standards and fulfilled his prior program promises before his license will be renewed. The mere prospect of losing the license, coupled with the lesser, but more realistic, sanction of having to go through a tedious and expensive renewal hearing, makes the broadcaster vulnerable to governmental power to influence program content. . . . Although some broadcasters may be willing and able to litigate specific actions, . . . most of them have no choice but to accept the FCC's explicit and implicit program regulation. As a result of this vulnerability, renewal procedures and the factors to be considered by the Government before granting renewal have become the principal means used by the FCC to control broadcast programming and operations.

Goldberg, *supra* note 87, at 76-77.

143. 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973).

and the administrative decision in *Sonderling Broadcasting Corp.*[144]

In *Yale*, the FCC, basing its action on the requirement that licensees broadcast in the public interest[145] issued a notice which "suggested" that licensees evaluate the lyrics of songs dealing with drug use to determine whether broadcasting them would be consistent with the public interest.[146] This was followed five weeks later by a list of twenty-two songs which were considered by the FCC staff to be "drug-oriented."[147] As a result, songs on this list were no longer played by radio stations.[148] This was followed by a later order which rescinded the list and reiterated the position that evaluation was to be made solely by the licensee, but which also restated the position that failure to exercise control over material broadcast could result in loss of a license.[149] Dean Burch, then Chairman of the FCC, testifying before a congressional committee, stated that he would vote to revoke the license of a broadcaster who played songs which promoted drug use.[150]

The *Sonderling* case resulted from complaints to Congress and the FCC about sex oriented call-in radio programs.[151] The Commission prepared a notice of apparent liability against Sonderling for violation of section 1464 of the FCA[152] through the broadcast of explicitly sexual material.[153] Soon after this the NAB adopted a resolution condemning such programs[154] at its convention, where Dean Burch delivered a speech urging self-restraint by licensees in this type of programming.[155] Sonderling paid the fine imposed by the Commission, although it was entitled to a trial de novo, deciding that it could not afford to litigate the matter further.[156] A concerned citizens group, however, decided that the decision could not go unchallenged, and petitioned for a return

144. 27 RAD. REG. 2D (P&F) 285 (1973), *aff'd sub nom.* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975).
145. 478 F.2d at 595.
146. *Id.*
147. *Id.* at 603 (Bazelon, C.J., dissenting).
148. *Id.*
149. *Id.* at 603-04.
150. *Id.* at 604.
151. 27 RAD. REG. 2D (P&F) 285 (1973), *aff'd sub nom.* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (1975); *see* Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1121 (1976).
152. 18 U.S.C. § 1464 (1976). Although this section is not within Title 47, it is nevertheless part of the Federal Communications Act.
153. Sonderling Broadcasting Corp., 27 RAD. REG. 2D (P&F) 285 (1973), *aff'd sub nom.* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397 (D.C. Cir. 1975).
154. TELEVISION CODE, *supra* note 15; *see* Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 400 (D.C. Cir. 1975); Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1120-25 (1976). *See also* Note, *Obscenity—Court Upholds the Activities of the Federal Communications Commission in Curtailing Sex-Oriented Talk Shows on Radio*, 25 DRAKE L. REV. 257 (1975).
155. Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 400 (D.C. Cir. 1975); *see* Note, *supra* note 154, at 259.
156. Note, *supra* note 154, at 260; *see* 47 U.S.C. § 504(a) (1970) (any suit by a licensee to recover a fine imposed by the FCC shall be a trial de novo).

of the forfeiture.[157] When the FCC failed to act on this matter, the citizens group sought appellate review, which affirmed the FCC action.[158] Only one judge voted to grant a rehearing, stating that, when faced with a choice between the economic burden of challenging the FCC decision, a licensee will "choose in many cases to avoid controversial speech in order to forestall [economic] injury."[159]

Yale and *Sonderling* are prime examples of how direct agency action can have the indirect effect of limiting programming throughout the entire industry. Indeed, it is ironic that the speech Burch gave to the NAB was found by the court of appeals not to be agency action.[160] It was revealed by testimony in *Writers Guild* that the FCC Commissioners had agreed that a speech would be the appropriate means of obtaining removal of the call-in shows from the air, and that this tactic was often used to effect change in the broadcast industry, in lieu of more formalized agency action.[161]

The danger inherent in such informal agency action is clear. First, it seems contrary to the Federal Communications Act which states that the FCC has no power to censor programming.[162] Second, it is inconsistent with the theory that government control is necessary to promote diversity in broadcast programming.[163] Third, its effect on broadcasting goes far beyond the particular licensee involved, resulting in a chilling effect on expression throughout the broadcast industry. It is, in effect, the implementation of a new FCC policy without any compliance with the requirements of either the FCA or the APA.[164] It cannot be assumed that anyone other than the licensee directly affected

157. Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 401 (D.C. Cir. 1975). *See also* Note, *supra* note 154, at 260-61. The court upheld the right of the citizens group to recover the forfeiture, invoking the right of the public to be informed:

> We uphold Petitioners' standing to vindicate the public's interest. That interest is underscored by the likelihood that the licensee who is directly governed by the order in the forfeiture proceeding will, as here, find the burden too great, in terms of its own interest, to warrant its undertaking the risk and expense involved in contrasting the Commission's action. In comparable situations we have allowed interested parties to intervene where the party that would ordinarily be expected to press the public interest has failed to appeal the initial decision.

515 F.2d at 402; *see* Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966) (listeners are interested parties in FCC licensing actions).

158. 515 F.2d at 401-02.

159. *Id.* at 407.

160. *Id.* at 402. "The speech by Chairman Burch, however, is not a final order of the FCC. Indeed, it is not FCC action at all, but merely represents the unofficial expression of the views of one member of the Commission. It is not a decisional pronouncement affecting legal rights and obligations . . . . It is not 'agency action' for purposes of the Administrative Procedure Act, 5 U.S.C. § 702 (1976)." *Id.*

161. 423 F. Supp. at 1121-22 & n.105.

162. *See* 47 U.S.C. § 326 (1970). *Cf.* Redrup v. New York, 386 U.S. 757, 768 (1967) (some non-obscene but sexually explicit expression is subject to regulation).

163. 423 F. Supp. at 1147.

164. *See id.* at 1152. *See also* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (Court discusses the problem of agency rulemaking which violates the requirements of the APA).

will undertake the economic burden of challenging FCC action; and only in rare circumstances will a licensee undertake such a challenge.[165] Finally, where no formal FCC action takes place, the challenger has the burden of proving that the activity constituted government action.[166]

It is exactly such informal regulation of the broadcast media which the *Writers Guild* court attacked.[167] The court deplored the use by the FCC of suggestion coupled with the threat of agency action.[168] As discussed above, the FCC does not act impermissibly by suggesting ways in which the public interest can best be met.[169] In fact, the court found this to be one of its statutory duties.[170] It is rather the threatened use of the licensing process to enforce adoption of these suggestions which is violative of both the first amendment and the APA:[171]

> The Commission has no right whatsoever to demand or to secure commitments from broadcasters that its suggestions be accepted. It has no right to launch orchestrated campaigns to pressure broadcasters to do what they do not wish to do. Particularly when Commissioners make recommendations in areas where formal regulation would be questionable, it is vital that any suggestion of pressure or the appearance of pressure be scrupulously avoided.[172]

The court recognized that FCC suggestions are automatically accepted in the broadcast industry because of the licensing process, but stated that the solution to this problem is not to prohibit FCC suggestions but rather to prevent retaliatory use of the licensing system whenever such suggestions are refused.[173] The opinion makes clear that licensee independence in program decisionmaking is not to be compromised.[174]

In discussing violation of the APA, the court noted that one of the Act's purposes is to allow public input into the administrative process.[175] The opinion explains that "Congress has decided that respect for agency actions will be enhanced if the public opportunity to participate in the decisionmaking process is not cavalierly denied and that the surest method of determining the public interest is to permit the public

165. Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 407 (D.C. Cir. 1975) (Bazelon, C.J., dissenting).
166. *See* 423 F. Supp. at 1158.
167. 423 F. Supp. at 1153.
168. *Id.* at 1151.
169. *Id.* at 1150. See text & note 135 *supra*.
170. 423 F. Supp. at 1150. The court read 47 U.S.C. § 303(g) (1970) as permitting such suggestions. 423 F. Supp. at 1150. That section requires the Commission to encourage increased and more effective use of broadcasting in the public interest.
171. 423 F. Supp. at 1151.
172. *Id.* at 1150.
173. *Id.*
174. *Id.* at 1150-51.
175. *Id.* at 1151-52.

to be heard . . . ."[176] Finally, the court chided the FCC for believing it could better determine the public interest than by consulting the public itself.[177]

Although the *Writers Guild* court set an admirable standard for broadcasters, it is an impractical one. By holding the networks liable for giving in to the pressure of the FCC in adoption of the FVP,[178] the court demanded that broadcasters guard against any governmental infringement of their independent decisionmaking responsibility.[179] Requiring that licensees act as watchdogs of the very agency upon which they rely for the privilege of broadcasting seems to ignore that it is the FCC which is the final arbiter of the amorphous public interest standard.[180] It is difficult to imagine how the FCC is to administer the licensing process without in some way imposing its own views of the "public interest" on the broadcasters. If the FCC denies or revokes a license because the licensee has failed to meet the needs of its community, surely other licensees will be interested, and indeed, entitled to know what programming the FCC considers suitable. It is this "Catch-22" interaction of the requirements of independence and public interest broadcasting which has permitted FCC influence. Such administrative "jawboning" is likely to continue in the future, despite the attempt by the *Writers Guild* court to separate these functions.

Some further analysis of the relationship between the FCC and the licensee is necessary to determine exactly how to solve this problem of pervasive influence of the government on program content. Certainly one important issue in this area is whether licensee conduct should be considered government action for purposes of invoking first amendment protection.

Writers Guild and the Question of State Action

The strictures of the first amendment apply only to the federal government and, through the operation of the fourteenth amendment, to the states.[181] If an action limiting free expression is taken by a governmental entity itself, the state action requirement is easily satisfied. If, however, the action is taken by a purely private entity or individual,

176. *Id.* at 1152.
177. *Id.*
178. *Id.* at 1161.
179. *Id.* at 1142-43.
180. *See* text & notes 121-127, *supra.*
181. *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 513 (1976); Moose Lodge No. 7 v. Irvis, 407 U.S. 163, 171-72 (1972); Burton v. Wilmington Parking Auth., 365 U.S. 715, 721 (1961); Gitlow v. New York, 268 U.S. 652, 666 (1925); The Civil Rights Cases, 109 U.S. 3, 10 (1883). *See also* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

there is no state action and no first amendment violation.[182] Where there are elements of both governmental activity and private action, the indices of state action become more complex, and it becomes more difficult to determine whether constitutional standards come into play.[183] This problem confronted the court in *Writers Guild*.[184] It was necessary to determine whether the activities of the networks and the NAB were sufficiently imbued with government influence to be considered state action resulting in a violation of the first amendment. The court analyzed the problem as involving three stages of inquiry:

> First, does broadcaster adoption of the family viewing policy constitute a violation of the First Amendment even in the absence of government encouragement or pressure? Second, assuming it does not, does the presence of government encouragement without more vary the result? Third, assuming it does not, does broadcaster adoption of the family viewing policy violate the First Amendment when the decision to do so is substantially motivated by a desire to defuse the consciously exploited threat of government regulation?[185]

In order to fully understand the distinction the court made between these three situations, and to examine both their constitutional basis and their application, it is necessary to examine the roots of the state action theory, and its application to broadcasting.

Traditional State Action Theory

Much state action analysis has taken place in areas other than the first amendment,[186] and analogy from those decisions may not be completely satisfactory. However, even though the Supreme Court has recognized that the presence of state action cannot be determined by a single formula,[187] such cases may yield factors which can be isolated to aid in evaluating a state action question.

At first glance it appears that mere contact or identification with the government will be sufficient to constitute state action. An example of this is *Evans v. Newton*,[188] where the Supreme Court found that a private park had not shed its formerly public nature by transferring ownership to private trustees. The Court found that the character of the park was still sufficiently public to permit application of the equal protection clause of the fourteenth amendment to the park's policy of racial discrimination:[189] "Conduct that is formally 'private' may be-

182. Evans v. Newton, 382 U.S. 296, 299 (1966); *see* Note, *supra* note 181, at 659-61.
183. 423 F. Supp. at 1129; *see* text and notes 186-242 *infra*.
184. 423 F. Supp. at 1129-30.
185. *Id.* at 1130.
186. Note, *supra* note 181, at 656 & nn.1,2.
187. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).
188. 382 U.S. 296 (1966).
189. *Id.* at 301.

come so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[190] A similar approach was taken by the Court in the first amendment context in *Marsh v. Alabama*.[191] In that case, the Court held that the state could not punish a Jehovah's Witness for passing out religious literature in a company-owned town.[192] The Court ruled that the private ownership of the town did not prevent application of the first amendment to its actions: "Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function it is subject to state regulation."[193] This public function rationale was applied again in *Farmer v. Moses*[194] in a suit to enjoin the New York World's Fair Corporation, a private enterprise, from preventing picketing on the fairgrounds.[195] The District Court for the Southern District of New York issued the injunction, saying: "[T]he Fair Corporation and its operations are so impregnated with and supported by state and city action as to place them within the ambit of the Fourteenth Amendment."[196]

In situations where the public function analysis has not been dispositive of the question of government action, other factors have been developed. Three factors which seem relevant to an analysis of broadcasting as state action are: a government grant of monopoly; pervasive government regulation of the industry involved; and government ap-

190. *Id.* at 299.
191. 326 U.S. 501 (1946).
192. *Id.* at 509.
193. *Id.* at 506.

At one time it appeared that *Marsh* would be used by the Supreme Court to broaden the guarantee of public forums for expression. In Amalgamated Food Employees Union No. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), the Court relied on *Marsh* in holding that a privately owned shopping center was the equivalent of a public business district for purposes of free expression. The Court held that the state's trespass law could not be invoked to prevent labor picketing in the center. *Id.* at 319-20. This decision broadened the concept of a public forum, which is a variant of the normal "state action" determination. *See* G. GUNTHER, *supra* note 9, at 824-25. However, in a later decision, Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), the Court limited the *Logan Valley* holding and the effect of the *Marsh* decision considerably. In *Tanner*, the Court held that a private shopping center was only a forum for expression which related to its operation. *Id.* at 565. The final blow to the expansion of the "public forum" concept came in Hudgens v. NLRB, 424 U.S. 507 (1976), in which the Court found that *Tanner* effectively overruled *Logan Valley*. *Id.* at 518. The rationale used by the Court in *Hudgens* is unusual in that it relies on the first amendment in reaching a result which limits free expression. The Court stated: "If a large self-contained shopping center *is* the functional equivalent of a municipality, as *Logan Valley* held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content." *Id.* at 520 (emphasis in original). *See generally* Schauer, *Hudgens v. NLRB and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433 (1977).

The notion that the airways are a public or quasi-public forum has never arisen in broadcasting cases, although the FCA explicitly places ownership of the airwaves in the public. 47 U.S.C. § 301 (1970); *see* Schauer, *supra* at 457-58.

194. 232 F. Supp. 154 (S.D.N.Y. 1964).
195. *Id.* at 155.
196. *Id.* at 158.

proval of the challenged activity.[197] The presence of only one of these factors is generally insufficient to constitute state action.[198] For example, government regulation of the liquor industry was at issue in *Moose Lodge No. 7 v. Irvis*.[199] In that case, appellee challenged the policy of racial discrimination by a private club as violative of the fourteenth amendment.[200] The Court found that the regulatory activities of the state liquor board did not sufficiently implicate the state to constitute state action.[201] Similarly, the governmental grant of a monopoly to operate a public utility was, when considered alone, not sufficient to be considered state action in *Public Utilities Commission v. Pollak*.[202] In *Pollak*, radio broadcasts piped into privately operated buses were challenged as violative of the first amendment.[203] The Supreme Court held, however, that the combination of all three factors—monopoly, government regulation, and specific approval by the regulatory agency of the challenged activity—involved sufficient governmental action for the broadcasts to make constitutional requirements applicable. In particular, the Court found the specific investigation and approval of the challenged practice, or imprimatur, the deciding factor.[204]

The Supreme Court applied these three factors again in *Jackson v. Metropolitan Edison Co.*,[205] finding the action of a privately owned but heavily regulated public utility was not that of the state.[206] The Court found that the company's policy of terminating electrical service without notice or hearing was not in violation of the fourteenth amendment because of the absence of state action. Absent in *Jackson* was any government imprimatur of the challenged action, the deciding factor in *Pollak*.[207] The Court held that mere perfunctory approval of the private action by the corporation commission did not constitute state action.[208]

197. No case sets these three factors out as the key to state action analysis. Such an approach would be inconsistent with the view of the Supreme Court that each case of state action must be determined on its own merits. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). Still, several recent cases dealing with state action in a regulated industry have considered these factors. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 356-57 (1974); Public Utilities Comm'n v. Pollak, 343 U.S. 451, 461-62 (1952); Kuczo v. Western Conn. Broadcasting Co., 424 F. Supp. 1325, 1327-28 (D. Conn. 1976), *rev'd* 566 F.2d 384 (2d Cir. 1977).

198. See text & notes 199-208 *infra*.

199. 407 U.S. 163 (1972).

200. *Id.* at 165.

201. *Id.* at 177.

202. 343 U.S. 451, 462 (1952).

203. *Id.* at 453-54.

204. *Id.* at 462.

205. 419 U.S. 345, 356-57 (1974).

206. *Id.* at 353.

207. *See id.* at 356-57.

208. *Id.* at 357.

State Action in Broadcasting

With the three factors discussed above in view, it is possible to analyze the application of state action theory to broadcasting. The question whether broadcast licensees are bound by the first amendment was addressed by the Court of Appeals for the District of Columbia in *Business Executives' Move for Vietnam Peace [BEMVP] v. FCC*,[209] a case subsequently reversed by the Supreme Court. In *BEMVP*, the court of appeals reversed an FCC finding that a licensee could decline all political announcements without violation of the first amendment. Although licensees were found to be private businesses for many purposes, the court held that they were so entwined with government that they were required to abide by the first amendment.[210] The court found that, although television licensees had a strong first amendment interest in preventing paid political advertisements, the public had an overriding interest in having access to such expression.[211]

BEMVP was reversed by a plurality opinion of the Supreme Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee*,[212] where the Court held that broadcast licensees are not common carriers, and thus are not required to give access to all.[213] Part III of the opinion—joined by only three Justices—also states that broadcast licensee conduct does not constitute state action for purposes of the first amendment; licensees are only bound by the more general statutory requirement that they broadcast in the public interest.[214] Two other Justices felt there was no need to decide the state action issue,[215] and three Justices agreed with the court of appeals that there was sufficient government interaction to bring first amendment stand-

209. 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

210. 450 F.2d at 652, 662, 665.

211. *Id.* at 655, 659.

212. 412 U.S. 94 (1973).

213. *Id.* at 108-09.

214. *Id.* at 119-20. Interestingly, Chief Justice Burger, before his appointment to the Supreme Court, stated:

> [A broadcaster] is not a public utility in the same sense as strictly regulated common carriers or purveyors of power, but neither is it a purely private enterprise like a newspaper or automobile agency. A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the full and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot.

Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966). Although this statement is certainly not a finding of state action in licensees, it is nonetheless a very strong recognition of their statutory responsibility. This opinion was cited by the dissenters in *CBS* as support for a finding of state action. 412 U.S. at 176 (Brennan, Marshall, JJ., dissenting).

215. 412 U.S. at 148 (Blackmun, Powell, JJ., concurring).

ards into application.[216] Since the portion of the opinion dealing with state action is joined by only three members of the Court, it is possible that the question is not closed, and may be approached by the Supreme Court again.

In broadcasting, two of the factors leading to a finding of state action are clearly present: government regulation of licensing and review of licensee decisions, and government grant of monopoly or oligopoly, with severe limitation on entry into the industry.[217] The presence of a governmental imprimatur, however, is less obvious. In their *CBS* dissent, Justices Brennan and Marshall dealt specifically with these factors:

> [T]he public nature of the airwaves, the governmentally created preferred status of broadcast licensees, the pervasive federal regulation of broadcast programming, and the Commission's specific approval of the challenged broadcaster policy combine in this case to bring the promulgation and enforcement of that policy within the orbit of constitutional imperatives.[218]

The plurality opinion in *CBS*, however, focuses on the belief that application of the first amendment to broadcasters would stifle rather than promote free expression. This opinion, written by the Chief Justice, denies that there is a "symbiotic relationship" between the broadcaster and the government which gives rise to a claim of government action.[219]

The question of state action was addressed recently by a federal district court in *Kuczo v. Western Connecticut Broadcasting Co.*[220] The events giving rise to this litigation began when the general manager of the only radio station in Stamford, Connecticut, with the approval of the majority shareholder, reviewed the scripts of paid political advertisements for two of the three candidates for Mayor of Stamford.[221] On several occasions, he ordered the deletion of material he considered in bad taste.[222] The scripts of the third candidate, however, were never reviewed nor edited, and this individual was subsequently elected.[223] After a hearing, the FCC[224] found that the review and censorship of these scripts constituted a flagrant violation of section 315 of the Com-

216. *Id.* at 172 (Brennan, Marshall, JJ., dissenting); *id.* at 150 (Douglas, J., concurring in result).
217. *See id.* at 175 (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969)). *See generally* B. OWEN, *supra* note 5, at 108.
218. 412 U.S. at 173 (Brennan, Marshall, JJ., dissenting).
219. *Id.* at 119.
220. 424 F. Supp. 1325 (D. Conn. 1976), *rev'd* 566 F.2d 384 (2d Cir. 1977).
221. *Id.* at 1326.
222. *Id.*
223. *Id.*
224. *Id.* at 1326-27; 43 F.C.C.2D 730, 28 RAD. REG.2D (P&F) 1091 (1974).

munications Act,[225] for which the licensee was fined.[226] The losing candidates then brought suit against the licensee for alleged violation of their first amendment rights.[227] The defendants moved for summary judgment, claiming there was no government action involved in their conduct.[228]

The court in *Kuczo* denied the motion, finding sufficient government involvement in the censorship to invoke constitutional scrutiny.[229] Conceding that neither the existence of a monopoly nor the presence of government regulation alone is sufficient to constitute government action, the court nonetheless found that such regulation as exists in broadcasting, in concert with the monopoly held by the licensee in Stamford, was sufficient:

> Here the government has ensured that one radio station will have a monopoly of Stamford local airways. . . . Censorship by these stations has the same effect on free speech as would a Stamford local ordinance that censored political broadcasts over local radio stations. Thus, by giving [the licensee] monopoly control over the local airways, federal regulation has invested [the licensee] with the capacity to obstruct free speech in local elections. Monopoly is a prime concern of the first amendment. Having created and preserved the opportunity for abuses that are exactly what the first amendment is designed to prohibit, the government and those who operate under a government license cannot avoid constitutional responsibility simply on the ground that the malefactor was not a government employee.[230]

The court concluded that the activities of the licensee were government action subject to the strictures of the first amendment.[231]

The Court of Appeals for the Second Circuit reversed the district court, holding that there was no government approval of the censorship.[232] Noting that the FCC had imposed a $10,000 fine on the broadcaster for violation of section 315, and had later awarded its li-

225. 47 U.S.C. § 315(a) (1970 & Supp. V. 1975).
226. 424 F. Supp. at 1326.
227. *Id.*
228. *Id.*
229. *Id.* at 1328.
230. *Id.* at 1327.
The court also dealt with the factor of governmental imprimatur of the challenged activity, a factor clearly absent in this instance:
> Although governmental approval is one factor in the state action calculus, it should not be dispositive where the functional nexus between governmental involvement and the constitutional concern is as strong as here. The government has delegated its control over local airways to the radio station. For the frustrated candidate, censorship by the radio station has the same immediate impact on his freedom of speech whether or not government reprisals will ultimately be forthcoming against the censor long after the damage has been done.

Id. at 1328 (citation omitted).
231. *Id.*
232. Kuczo v. Western Conn. Broadcasting, 566 F.2d 384 (2d Cir. 1977).

cense to another applicant, the court stated, ". . . it is difficult to imagine what more the government might have done to disavow or prevent the censorship . . . ."[233] The Court distinguished its holding from *CBS*, stating that the Justices who found government action in that case did so primarily because of the FCC's approval of the challenged conduct.[234] The absence of any government involvement in or approval of the challenged censorship made it purely private and not subject to the first amendment.[235]

Where a government-granted monopoly is as extreme as was the case in *Kuczo*, the finding of the district court of government action even in the absence of imprimatur may be a sensible one. But absolute monopoly in broadcasting is the exception rather than the rule, despite the FCC's prevention of free entry into the industry.[236] The opinion of the court of appeals, reserving as it does the question of whether imprimatur by the FCC will suffice to invoke the first amendment,[237] is more consistent with the holdings of the Supreme Court in cases such as *Pollak*[238] and *Jackson*[239] where the factor of imprimatur was the key to the presence of state action. If the imprimatur analysis is to be applied to broadcasting, there would be no conflict with these earlier cases, and many of the problems feared in applying constitutional standards to broadcasters would be alleviated.[240] Given the presence

233. *Id.* at 388.
234. *Id.*
235. *Id.*
236. *See* B. OWEN, *supra* note 5, at 108.
237. Kuczo v. Western Conn. Broadcasting, 566 F.2d 384, 388 (2d Cir. 1977).
238. Public Util. Comm'n v. Pollak, 343 U.S. 451, 462 (1952).
239. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 356-57 (1974).
240. It is feared by some courts and commentators that application of the first amendment to licensees would act to prevent their exercise of journalistic discretion. For example, in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 548 (1975), municipal theater directors refused the use of the theater for a production of the musical "Hair." The Supreme Court found this regulation of a public form an impermissible prior restraint without the required safeguards. *Id.* at 552. The Court stated: "[T]he danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Id.* at 553. *See also* Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959) (struck down a licensing statute used to prevent exhibition of a movie presenting a morally unfavorable idea). *But cf.* Avins v. Rutgers, State Univ., 385 F.2d 151, 153 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) (where the court upheld the right of a state-supported publication to exercise editorial judgment). Decisions based upon content are made constantly by licensees, and if they were considered bound by the first amendment in all their programming decisions, *Southeastern Promotions* would seem to require some type of judicial review of these decisions. This system is simply not possible in the broadcasting arena, a practicality that has led to the belief that licensee action cannot be considered state action. *See* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 121 (1973); Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972) (arguing that imposition of first amendment restraints on licensees would limit rather than expand free expression). *See generally*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 653-67 (1970). Other commentators believe, however, that licensees should be bound by the first amendment because of their involvement with the government. *See, e.g.*, Note, *A Fair Break for Controversial Speakers: Limitations of the Fairness Doctrine and the Need for Individual Access*, 39 GEO. WASH. L. REV. 532 (1970); Comment, *Freedom of Speech and the Individual's Right of Access to the Airwaves*, 1970 L. & SOC. ORD. 424; Note, *supra* note 1 at 836. See text & notes 241-42 *infra*.

of government regulation and government-granted monopoly or oligopoly, only those policies of individual licensees which are reviewed and approved by the FCC[241] or those which originate by suggestion of the FCC but without formal action, the jawboning situation, would contain sufficient governmental imprimatur to invoke the first amendment.[242] This would leave licensees free to make independent decisions on program content without such action being deemed government action. Application of this standard would solve many of the problems inherent in the *Writers Guild* decision. First, it recognizes the presence and effect of FCC suggestion on the broadcasting industry. Thus, where such suggestion was a motivating factor in licensee action, any resulting decision will be subject to constitutional scrutiny. Second, licensees will be more wary of acquiescing in FCC suggestions, knowing that such an action will result in their actions being considered state action in any constitutional challenge. However, the test leaves licensees free to implement their own ideas to meet the public interest to a greater extent than would a test considering broadcasters government agents for all purposes.

Validity of the FVP Where Licensee Conduct is Government Action

If the imprimatur standard were applied to the adoption of the FVP, the fact that the idea originated with and was approved by the FCC would be sufficient to make its adoption state action, despite the assertion of the *Writers Guild* court that more suggestion would not create state action.[243] The *Writers Guild* court went further, however, and stated that, even assuming that broadcaster conduct constitutes sufficient government action to be subject to the first amendment, independent licensee adoption of a rule like the FVP would not violate the first amendment.[244] Citing *CBS*, the court concluded that if licensee discretion included the right to refuse editorial advertisement,[245]

241. The policy at issue in Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973), see text & notes 180-98 *supra*, was specifically considered and approved by the FCC after the requested access was refused. In re Democratic Nat'l Comm., 25 F.C.C.2d 216 (1970); Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242 (1970). The court of appeals in *BEMVP* specifically held that FCC approval of this licensee policy was sufficient government action to invoke the first amendment. Business Executives Move for Vietnam Peace v. FCC, 450 F.2d 642, 652 (D.C. Cir. 1971) *rev'd sub nom.* Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973). If the imprimatur standard enunciated in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) is applied, this would clearly result in state action, as it cannot be distinguished from the situation in Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952).

242. Applying this standard to the Family Viewing Policy at issue in *Writers Guild*, it is clear that the idea itself and the impetus behind its adoption both came from the FCC. 423 F. Supp. at 1140. Certainly this extensive government approval should invoke the imprimatur standard.

243. 423 F. Supp. at 1150.

244. *Id.* at 1134.

245. *Id.* at 1131 (citing Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 121 (1973)).

then licensees are similarly within their discretion in the adoption of a programming ban such as the FVP.[246] The court stated: "Thus government is authorized to . . . appoint an agent not only with broad discretion to determine who shall and who shall not get access to a vital public medium . . . but also with the sanctioned power to make such decisions on the basis of the content and quality of the material."[247]

The *Writers Guild* court's passing reference to *CBS* is insufficient constitutional analysis. In *CBS*, the Supreme Court approved licensee discretion regarding access, despite sufficient government involvement to invoke the first amendment, but only after applying the traditional test, weighing the competing interests involved—licensee discretion and the right to free expression.[248] The court in *Writers Guild* failed to apply the balancing test. After finding that such a policy would violate the first amendment if initiated by the FCC,[249] the court concluded that licensee adoption of such a policy would be permissible, regardless of the finding of state action.[250] Presumably, if a licensee is bound by the first amendment due to involvement with the government, then it is bound by constitutional requirements just as is the FCC, and only a balancing of the competing interests of licensee discretion and first amendment rights of viewers could determine the constitutionality of the FVP. Similarly, if the imprimatur standard resulted in a finding of state action, the mere desirability of licensee discretion in programming would not always override competing first amendment interests.

CONCLUSION

The *Writers Guild* case epitomizes the confusion existing in broadcasting law over the application of the first amendment. Broadcasting is unlike any other mass media, yet its effect is greater by far than any other medium. If the first amendment requires full discussion of public issues to facilitate the democratic form of government, clarification is essential to dealing adequately with the rights not only of the licensees to be free from government censorship, but the rights of viewers to be free from licensee censorship as well. The problem is acute when licensees succumb to FCC jawboning.

A possible solution to this problem would be the application of the imprimatur standard. Under this analysis, the licensee would necessarily be bound by the first amendment to the same extent as is the

246. 423 F. Supp. at 1131-35.
247. *Id.* at 1132.
248. 412 U.S. at 122-24.
249. 423 F. Supp. at 1140.
250. *Id.* at 1140. "[Content] decisions are inherent to the broadcasting function and constitutionally protected whether or not state action is present." *Id.* at 1135.

government in any situation where its actions are sufficiently tied to or approved by the government. In any other situation, where the licensee acts alone, based upon its own independent judgment, there would be no imprimatur and no government action. *Writers Guild* states that a mere suggestion by the FCC is not impermissible usurpation of licensee discretion. Given, however, the willingness of licensees to follow FCC suggestions, in a variety of situations, perhaps even suggestions by the Commission should satisfy the imprimatur test to invoke the first amendment. In this way, although FCC suggestions would be permissible, and could be adopted by the licensee without any violation of his statutory duty to program independent of FCC pressure, they would nevertheless be subject to the same constitutional standards as if adopted by the FCC itself. FCC jawboning would thus be recognized as a powerful influence in broadcasting and would be required to meet the same standard as any formal FCC action.

Adoption of the FVP by either the FCC or licensees has a considerable impact on the rights of viewers to diversity in programming. Such a policy should be permitted only where there has been a showing that the interests protected by its adoption outweigh those of the public to programming which may not be suitable for children but which nevertheless is protected by the first amendment. Constitutional scrutiny should not be avoided under the guise of licensee discretion, nor should traditional first amendment standards be replaced with the amorphous public interest standard.