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Broadcasting's Fairness Doctrine- An Illogical Extension of the Red Lion Concept

Broadcasting's Fairness Doctrine—AN ILLOGICAL EXTENSION OF THE RED LION CONCEPT—*Business Executives' Move for Vietnam Peace v. FCC*

Television and radio advertising is fully accepted in our society as part and parcel of the American way of life. The business community of this country spends billions of dollars annually on commercials, attempting to convince Americans that they have an immediate and pressing need for products as diverse as panty hose and snow tires, roll-on deodorant and chain saws. In bad taste to some, boring or amusing to others, one thing these commercials have not been, is controversial. Should the United States Supreme Court uphold a recent District of Columbia Court of Appeals decision, the day may not be far off when in place of our favorite beer or Alka-Seltzer commercial, we may find a short anti-war message, perhaps a pro-busing plug, or even a "get the U.S. out of the U.N." commercial.

In *Business Executives' Move for Vietnam Peace v. FCC*,[1] the appellants sought to buy air time to present an anti-war message to the public. The network refused, giving as its reason a station policy of refusing to sell air time to those who sought to present views which were considered to be controversial in nature. The Federal Communications Commission upheld this refusal. The District of Columbia Court of Appeals reversed, holding that such a policy was an unconstitutional infringement on the first amendment rights of the public.

Television and radio have long been under an obligation to society to air controversial issues of public importance, and to give both sides of these issues fair and impartial treatment. This obligation has often been referred to as the fairness doctrine.[2] Until *BEM*, most networks met their obliga-

[1] 450 F.2d 642 (D.C. Cir. 1971), *cert. granted.* The proposed announcement urged the immediate withdrawal of United States forces from South Vietnam. It featured statements by leading businessmen and retired military officers whose views it was thought would carry great weight with the general public. Essentially the same issue was presented in *Democratic National Committee v. FCC*, a case considered together with *BEM* by the court of appeals. In *DNC*, the committee had requested air time for the purpose of informing the general public of the party's views on current issues. The network's policy of refusing to sell air time to those who sought to present controversial points of view frustrated the committee in this attempt. The party sought a declaratory ruling by the FCC that

> [a] broadcaster may not, as a general policy, refuse to sell time to responsible entities, such as [the Democratic National Committee], for the solicitation of funds and for comment on public issues. *Id.* at 647.

[2] In response to two provisions of the Communications Act, the Federal Communications Commission developed the fairness doctrine. 47 U.S.C. § 307(a) (1970) provides that "[t]he Commission, if public convenience interest, or necessity will be served thereby, . . . shall grant to any applicant therefor a station license provided for by this chapter." 47 U.S.C. § 309(a) (1970) states the Commission shall determine, in the case of

tions under the fairness doctrine by confining the coverage of controversial subjects to news shows and documentaries.[3] The justification for the Government's imposing such an obligation on a privately owned industry is based upon the scarcity of available broadcast frequencies, and the Government's rationing of those which are available to a select few.[4] The holding of a license to broadcast is considered to be a privilege from the Government for which a corresponding obligation to the general public is owed.[5] The constitutionality of the fairness doctrine was recently upheld by the United States Supreme Court in *Red Lion Broadcasting Co. v. FCC.*[6] In order to fully understand the action of the court of appeals in *BEM*, it is necessary to examine the Supreme Court's decision in *Red Lion.*

In an attempt to clarify certain aspects of the fariness doctrine, the FCC had implemented specific rules concerning personal attacks and political editorializing by licensees.[7] In *Red Lion* the constitutionality of these rules

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each application filed with it . . . whether the public interest, convenience and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application . . . shall find that the public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application." Thus the licensee is charged with the responsibility of operating his network or station in the public interest.

The fairness doctrine is an obligation that the licensee owes the general public. In essence the licensee simply is charged with the responsibility of presenting to the public all sides of controversial issues rather than limiting their coverage to only one point of view. *See generally* Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). For a comprehensive discussion on the origins of the fairness doctrine, see Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375-86 (1969). For favorable comment on the fairness doctrine *see* Barron, *Access—The Only Choice for the Media?* 48 TEXAS L. REV. 766 (1970); Barron, *In Defense of "Fairness": A First Amendment Rationale for Broadcasting's "Fairness" Doctrine,* 37 U. COLO. L. REV. 31 (1964). For comment critical of the fairness doctrine, see Kalven, *Broadcasting, Public Policy and the First Amendment,* 10 J. LAW & ECON. 15 (1967); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulations,* 52 MINN. L. REV. 67 (1967).

3 450 F.2d 642, 646 (D.C. Cir. 1971). The reasons for confining the coverage of controversial issues to news shows and documentaries are obvious. The editing that goes into these shows and the degree of control exercised over them by broadcasters insure that cries of "foul" from injured parties under the fairness doctrine are few and far between.

4 *See* National Broadcasting Co. v. United States, 319 U.S. 190, 210-14 (1943).

5 A license to broadcast confers upon the licensee the temporary privilege of using the designated frequencies, not the ownership of them. *See* 47 U.S.C. § 301 (1970). For cases supporting this concept, see Ashbaker Radio Corp. v. FCC, 326 U.S. 327 (1945); Television Corp. v. FCC, 294 F.2d 730, 733 (D.C. Cir. 1961); American Bond & Mortgage Co. v. United States, 52 F.2d 318 (7th Cir. 1931), *cert. denied,* 285 U.S. 538 (1932).

6 395 U.S. 367 (1969).

7 *Id.* at 373-74.

and the fairness doctrine itself were attacked on first amendment grounds.[8] The Supreme Court held that the fairness doctrine and the rules the commission had promulgated under it, had the effect of enhancing rather than abridging freedom of expression, and thus the challenge to the constitutionality of the doctrine failed.[9]

It has long been clear that broadcasting is a medium affected by a first amendment interest.[10] Until the *Red Lion* case, however, it was the first amendment rights of the broadcasters and not those of the viewing public that were considered. The real significance of the *Red Lion* decision is that the Court recognized, for the first time, the existence of a first amendment right in the general public as viewers of television and as listeners of radio "to have the medium function consistently with the ends and purpose of the First Amendment." [11] The court of appeal's decision in *BEM*, if allowed to stand, will radically change the nature of this first amendment interest. In *BEM*, the court held that the public has a constitutionally protected right to utilize the medium as *potential speakers*, by the purchase of advertising time to present their views regardless of whether they are controversial or not.[12]

Initially at least, one's response to that decision might be favorable. It appears fully consistent with the freedom of speech positions set forth by the Supreme Court in *Terminiello v. Chicago*[13] and the later *New York*

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8 The broadcasters alleged that the fairness doctrine and the rules the commission had promulgated under it abridged their constitutional guarantees of free speech. Specifically, they contended that the first amendment gave them the right to use their frequencies in any manner they saw fit and to exclude whomever they should choose. In short, they were claiming the same right to free speech as broadcasters that the constitution grants to individual citizens. *Id.* at 386.

9 "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.

10 *See* United States v. Paramount Pictures, Inc. 334 U.S. 131, 166 (1948). For a discussion of whether the differences in the various characteristics of the media justify differences in the first amendment standards applicable to them, see Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). *See also* Kalven, *Broadcasting Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967); Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947).

11 395 U.S. 367, 390 (1969). To the effect that it is the right of the viewers and listeners and not the right of the broadcasters which must be given primary considerations, see FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 361 (1955); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

12 450 F.2d 642, 655 (1971).

13 337 U.S. 1 (1948).

> . . . [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition

Times Co. v. Sullivan decision.[14] But upon a closer examination, it is evident that the court in *BEM* has carried the guarantees of the first amendment too far. It has opened a Pandora's box which neither the networks nor the FCC are capable of handling. There are three undesirable effects that the court's decision in *BEM* might have upon the communications industry: (1) the decision casts doubt upon the future effectiveness of the reasonableness standard that is utilized to implement the fairness doctrine, (2) the domination of commercial air time by wealthy special interest groups is now possible, and (3) the decision presages the possible application of the fairness doctrine to paid, as well as public air time.

Future Effectiveness of the Reasonableness Test in Doubt

To insure compliance with the fairness doctrine, the FCC has utilized a reasonableness test.[15] If the Commission, in reviewing an alleged violation of the doctrine, finds that the actions of the licensee, from all the surrounding circumstances appear to have been reasonable, they will not interfere with the network's decision. Should the decision not appear to have been a reasonable one, the Commission will order the network to make available certain specific time to the injured party for the purposes of a reply. Thus, the initial decision as to whether air time should be given to a particular point of view is within the discretion of the licensees.[16] It is one of the

> of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, [citation omitted] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil . . . . *Id.* at 4.

[14] 376 U.S. 254, 270 (1964). There is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 270.

[15] *See* Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1255 (1949). *See also* Boalt Hall Student Ass'n, 20 F.C.C.2d 612 (1969); Democratic State Central Comm., 19 F.C.C.2d 833 (1968); Madalyn Murray, 40 F.C.C. 647 (1965).

[16] *See* Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U.L. REV. 1222, 1129 (1970). The reasonableness standard presupposes the networks are in a better position to implement the fairness test than the FCC. Implementation of the doctrine at this level gives the Commisison two distinct advantages. First, it promotes a policy of self-regulation by the industry. It does this by appealing to the broadcaster's sense of professional pride as a journalist. Just as a writer-journalist is urged to make objectivity his goal, television and radio journalists are likewise urged to strive for objectivity and fairness in their electronic reporting. Second, the factual considerations that are necessary to determine whether an issue is controversial or not, can better be made by the licensee than by the FCC. "Greater scrutiny by the Commission would involve the tremendous burden of a time-consuming study of the controversial issues in localities throughout the Nation." *Id.* at 1229.

functions of the FCC to give a review of that discretion when requested. Hence, it is fair to say that it is the networks themselves and not the Commission that have actually implemented the provisions and spirit of the fairness doctrine. This policy of self-regulation by the industry is in jeopardy should the court's decision in *BEM* be allowed to stand.

In *BEM*, the network involved felt that it could best meet its obligation to the public to present both sides of controversial issues by limiting the coverage of these issues to news reports and documentaries. This policy appears to be sound. It is the networks who make the initial decision as to whether coverage should be given a particular event. Faced with the possibility of losing their license to broadcast should they fail to meet their public obligations, the networks closely scrutinize program content to insure that both sides of issues are shown to the public.[17] When there is a request for air time, the networks are guided by the principles of the fairness doctrine in reaching a decision. Since they are obligated to keep the public informed of both sides of important issues it is reasonable to expect that the networks would want to maintain control of the format that is utilized to present controversial viewpoints. In holding that the network's policy was a violation of the constitutional rights of the appellants, the court was in effect saying that the networks are not the best judge as to the format that these controversial views must take.[18]

The court's decision in *BEM* casts doubt on the future effectiveness of the reasonableness test. The test has as its underlying assumption the belief that the networks are in a better position to implement the provisions of the fairness test than either the FCC or the courts.[19] Since the networks are part of the community they serve, and as such are closer to the pulse of the public than a Washington based regulatory agency could be, this assump-

[17] 47 U.S.C. § 312(a)(4) (1970) provides that the FCC may revoke the license of any station "for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter . . . ." The problem is that this remedy, for all intents and purposes is too cumbersome to be of practical value. *See* Robinson, *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 118 (1967).

[18] Further, the *BEM* court, in requiring that some editorial advertising be accepted, has left unanswered several questions. Who will determine whether or not an issue is controversial? Once that determination has been made, would the issue be considered controversial everywhere? How many such commercials must the networks accept to meet this new first amendment obligation to the public? The court seems to suggest these matters should be handled by the FCC. If this is true the court has given the FCC a difficult task. It is submitted that these problems could best be handled by the networks. They are in a better position than the Commission to determine what in their locality is, or is not a controversial issue.

[19] *See* note 16 *supra*.

tion seems valid. The court's decision in *BEM* challenges this assumption by negating the idea that the network should have control over the particular format that controversial points of view should take on television. The inability to control program format or to have portions of that format dictated by the FCC could have serious economic consequences for the television networks.[20]

BEM is a step in the wrong direction. It represents the taking of some control over program content from the networks which in turn would make a policy of self-regulation under the fairness doctrine difficult if not impossible. Actual enforcement of the doctrine would then fall on the FCC. Thus an already overburdened agency would be asked to assume a job that some have called "a task of heroic proportions." [21]

Domination of Commercial Air Time by Wealthy Special Interest Groups Is Possible

Another possible consequence of the court's ruling in *BEM* is that since controversial commercials must now be accepted by the broadcasters, there is nothing to prevent wealthy special interest groups who desire to influence the public from demanding air time.[22] Since *BEM* was decided only recently, this fear remains largely speculative. Theoretically however, there is nothing to stop wealthy groups on the fringes of the American political spectrum from saturating the public with thirty-second spot messages of hate. Air time is expensive.[23] If controversial advertising must be accepted, it undoubtedly will be given to those who can pay for it. Further, if access to television for the purposes of presenting controversial points of view depends solely upon the ability of a party to pay for advertising time, there is reason to believe that well-financed and influential special interest groups will dominate air time to the disadvantage of small, underfinanced groups of concerned citizens whose views on an issue might be contra. As these citizen groups seem unable to match the power of the wealthy lobbyists on

20 *See* Note, *Fairness Doctrine: Television as a Marketplace of Ideas*, 45 N.Y.U.L. REV. 1222, 1241-42 (1970). *But see* N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 65 (1970), to the effect that broadcasters' cries of financial disaster should be taken with a grain of salt.

21 Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 666 (D.C. Cir. 1971) (McGowan, J., dissenting).

22 The real problem, then, is not that editorial advertising will cost money, but that it may be dominated by only one group from one part of the political spectrum. A onesided [*sic*] flood of editorial advertisements could hardly be called "robust wide-open" debate which the people have a right to expect on radio and television. *Id.* at 664. *See also* Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 HARV. L. REV. 768 (1972).

23 The cost of a one-minute commercial on television in 1968 was reported to be $22,000. Time, Vol. 92, July 12, 1968, at 55.

Capitol Hill, it is doubtful that they could match their purchase of broadcast time to present their views. The public could become so disgusted with seeing one-sided advertising that pressure would be brought on the Commission to apply the fairness doctrine to paid as well as public air time. This raises the third and most serious objection to the *BEM* decision.

Application of the Fairness Doctrine to Paid As Well As Public Air Time Is Possible

Since the court in *BEM* has required the broadcasting industry to sell some of its air time to those who seek to present controversial views, it is necessary to consider the implications that this decision might have on the fairness doctrine. It is logical to assume that if licensees are required to sell air time to one point of view, they will also be required to offer to sell an equal amount of time to an opposing point of view.[24] What would happen if the other side could not afford to pay the amount required? Would the fairness doctrine compel the licensee to grant free time to the party for the purposes of a reply? A 1963 Federal Communications Commission ruling indicates that it would. In *Cullman Broadcasting Co.*,[25] a licensee had sold air time to a group advocating opposition to the proposed nuclear test ban treaty. The licensee requested guidance from the Commission as to whether the fairness doctrine required him to offer free time to a group whose views on the issue were contrary to those expressed, but who were financially unable to pay the costs required. The Commission held that the public interest was best served when all sides of controversial issues were presented. Accordingly, should one side not be financially able to purchase air time

[24] Originally the fairness doctrine dealt solely with controversial issues and was not applicable to commercial advertising. Should the requirement that controversial issues be accepted as advertisements be upheld, there is no doubt but that the fairness doctrine would apply to these "controversial" commercials. The doctrine has always been applied to controversies. *See* note 2 *supra*.

Now there is a trend toward applying the doctrine to any commercial advertising where there is the possibility of a "controversy" being present. Two recent cases indicate the extent of that trend. In Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), popularly known as the cigarette advertising case, it was held that the danger to health posed by cigarette smoking meant that stations which carried cigarette advertising were also required to devote a significant amount of broadcast time to the case against cigarette smoking. Until Friends of the Earth v. FCC, 449 F.2d 1164 (D.C. Cir. 1971), it was felt that *Banzhaf* was an exception and that cigarette advertising was the only instance where the fairness doctrine was held to apply to commercial advertising. In *Friends of the Earth*, however, the court held that where a controversial issue is raised by a commercial advertisement, equal time must be given to views which are contra. Thus *Friends of the Earth* answers affirmatively the question of whether or not the fairness doctrine applies to commercial advertising.

[25] 40 F.C.C. 576 (1963).

to present a contrasting point of view, it was the duty of the licensee to offer them free time for purposes of making a reply.[26]

The concept which guided the Commission's ruling in *Cullman* was the belief that the public has the right to be informed of all sides of controversial issues. Behind that concept lies a realization by the Commission that television and radio have the power to influence the minds of their viewers and listeners. The Commission's reasoning appears to be that it is better for neither side of an issue to be presented than for only one side to be heard. With this in mind, it is not difficult to foresee that should the decision in *BEM* be allowed to stand, a real possibility exists that broadcasters may be required to offer free time to financially hard-put members of groups with opposing points of view.

The *BEM* decision, coupled with the *Cullman* ruling, mean that air time which a broadcaster could offer for sale for commercial advertising purposes might have to be given free of charge to impoverished groups with public axes to grind. This could have dire economic consequences for the networks that should not be ignored by the courts. It would have the effect of reducing the licensees' revenues, making it that much more difficult for the network to function efficiently and to meet its other public obligations.[27]

The evolving nature of a democratic society dictates that the concept of freedom of expression, upon which its existence ultimately depends, should have a meaning which is capable of change. This flexibility bears a direct relationship to that society's confidence in itself, its system of government and its elected leaders. So it is not surprising that from time to time, as that confidence ebbs and flows, the courts should read new meaning into the dictates of the first amendment. In the past twenty years, our society's notions of freedom of expreesion have been drastically altered. This alteration has been in the direction of an expansion of the types of speech and various modes of communication which have found protection under the umbrella of the first amendment.

On the whole this expansion of the concept of free expression is laudable. Yet the process of expansion itself is not limitless. For while the fundamental guarantees of the first amendment must remain unchanged, their application to specific situations and modes of communication must necessarily vary depending upon the particular type of speech and the structures of the media utilized. The Supreme Court's recognition in *Red Lion* of a constitutional interest in the general public as viewers of television "to have the medium function consistently with the ends and purposes of the first amendment" [28] was a step in the right direction. The court of appeal's

[26] *Id* at 577.

[27] *See* note 16 *supra*.

[28] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

decision in *BEM* to extend this right to the public as potential speakers as well as viewers was, for the reasons stated above, adventurous and unsound. The wiser approach would have been to evaluate the network's overall performance in meeting its obligation to keep the public fairly informed by the methods it had selected. Should a deficiency in the network's performance then be shown, perhaps a requirement that the networks offer free commercial time to remedy the situation could be justified. If it appeared that the network was meeting its obligations under both the Federal Communications Act and the fairness doctrine, the better course would be to leave the station's policy regarding its commercial time alone. As long as the licensee's duty to the public was being met, the networks themselves, rather than the Federal Communications Commission or the courts, should decide the proper broadcast format.

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