

Summer 2001

The FCC's broadcast news distortion rules: Regulation by drooping eyelid

Chad Raphael

Santa Clara University, craphael@scu.edu

Follow this and additional works at: <http://scholarcommons.scu.edu/comm>



Part of the [Communication Commons](#)

Recommended Citation

Raphael, C. (2001). The FCC's broadcast news distortion rules: Regulation by drooping eyelid. *Communication Law and Policy*, 6, 485-539.

http://dx.doi.org/10.1207/S15326926CLP0603_03

This is an Accepted Manuscript of an article published by Taylor & Francis in *Communication Law and Policy* in 2001, available online:
http://www.tandfonline.com/10.1207/S15326926CLP0603_03

This Article is brought to you for free and open access by the College of Arts & Sciences at Scholar Commons. It has been accepted for inclusion in *Communication* by an authorized administrator of Scholar Commons. For more information, please contact rscroggin@scu.edu.

RAPHAEL, C. (2001). THE FCC'S BROADCAST NEWS DISTORTION RULES: REGULATION BY DROOPING EYELID. *COMMUNICATION LAW AND POLICY*, 6, 485-539.

AUTHOR POST-PRINT VERSION

THE FCC'S BROADCAST NEWS DISTORTION RULES: REGULATION BY DROOPING EYELID

CHAD RAPHAEL*

During the deregulatory era that began in the 1980s, the Federal Communications Commission (FCC) appears to have lifted all content-based regulations from broadcast news. The FCC removed requirements that licensees formally ascertain their communities' needs and provide appropriate news and public affairs, maintain production guidelines for news, and offer some minimum level of public affairs programming.¹ In 1987, the Commission partially repealed the Fairness Doctrine, which had required stations to afford "reasonable opportunity for the presentation of conflicting viewpoints on controversial issues of public importance."² In 2000, the U.S. Court of Appeals for the District of Columbia struck down the FCC's personal attack rule, which directed stations to notify and offer reply time to the targets of character

* Assistant Professor, Communication Department, Santa Clara University. The author thanks Richard Maxwell, Robert M. Entman, the anonymous reviewers of this journal, and especially Laurie Mason, for their comments on earlier drafts.

¹Deregulation of Radio (Part 1 of 2), Report and Order (Proceeding Terminated), 84 F.C.C.2d 968 (1981), *recons.*, Memorandum Opinion and Order, 87 F.C.C.2d 797 (1981), *aff'd in part and remanded in part*, Office of Comm. of United Church of Christ v. FCC, 911 F.2d 803 (D.C. Cir., 1990); Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order, 98 F.C.C.2d 1076 (1984), *recons.*, Memorandum Opinion and Order, 104 F.C.C.2d 358 (1986), *aff'd in part and remanded in part*, Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir., 1987).

²Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 1041 (1964). The Doctrine was partially revoked in Syracuse Peace Council, 2 F.C.C.R. 5043 (1987); *aff'd* Syracuse Peace Council v. F.C.C., 867 F.2d 654 (D.C. Cir., 1989).

attacks during discussions of controversial public issues on the air, and the Commission's political editorializing rule, which required a licensee to offer response time to legally qualified political candidates when it opposed their candidacy or endorsed their opponent on air.³ Even the relaxation of non-content regulations, such as the extension of stations' license terms from three to eight years,⁴ and adoption of rules that make challenges to license renewals by the public or potential competitors almost impossible,⁵ have bolstered broadcasters' editorial rights against outside review.

Given this deregulatory trend, it is remarkable that the Commission has preserved its little-known rules against licensees' deliberately distorting the news. Defined more fully below, these rules prohibit deliberate staging, slanting, and falsifying of news, as well as promotion or suppression of news to serve the licensees' private interests rather than the public interest. Indeed, the FCC has twice reaffirmed its commitment to its distortion policy in this period, declaring in 1986 that since news distortion "goes to the essence of the trust placed in a broadcaster to provide quality service oriented to the needs of its community . . . news staging and news distortion should continue to be treated as 'adverse reflections on an applicant's qualifications to serve the public interest.'"⁶

The distortion rules have drawn scant commentary in the regulatory literature, especially in contrast to the outpouring of debate over their cousin, the Fairness Doctrine. Brief treatments of the rules have noted that they form a narrow exception to the FCC's general policy of

³See *Radio-Television News Directors Assn. v. FCC*, 229 F.3d 269 (D.C. Cir., 2000).

⁴See 47 C.F.R. 73.1020 (2000).

⁵See Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures), 61 Fed. Reg. 18,289 (Apr. 12, 1996) (amending 47 U.S.C. § 309(k)).

avoiding intervention in licensees' editorial judgments⁷, and have discussed the Commission's high evidentiary standard for proving distortion, either expressing concern about the barrier it erects to FCC inquiry⁸, or praising it as a bulwark against the chilling effect on news that frequent Commission probes might create.⁹ In the fullest discussion of how the rules have been applied, former FCC Chief of Broadcast Complaints and Compliance William Ray has reviewed some of the distortion cases decided during his tenure at the Commission in the 1960s and 1970s, criticizing the FCC for failing to enforce its rules against broadcasters.¹⁰ Nor has there been much judicial review and commentary upon the distortion policy. In 1985, the District of Columbia Circuit Court of Appeals upheld it, commenting that the "Commission's practice . . . has given its policy against news distortion an extremely limited scope,"¹¹ but declining to override Congress' and the Commission's powers over this area of broadcast regulation. In a more recent decision, discussed below, the Court of Appeals vacated the Commission's dismissal of a distortion complaint, raising questions about the FCC's commitment to enforcing its policy.¹²

The specter of a regulatory agency closely overseeing the accuracy of broadcast news poses serious First Amendment concerns, but, this article argues, the FCC has treated its distortion policy as a form of symbolic regulation. The Commission's recent inaction on

⁶Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1211-12 (1986). The FCC recently restated its commitment to this policy in Complaints About Broadcast Journalism, 1999 FCC LEXIS 4302 (1999).

⁷See Clay Calvert, *Toxic Television, Editorial Discretion, & The Public Interest: A Rocky Mountain Low*, 21 HASTINGS COMM. & ENT. L.J. 163, 199 (1998).

⁸See Brian C. Murchison, *Misrepresentation and the FCC*, 37 FED. COMM. L.J. 403, 450 (1985).

⁹See Timothy B. Dyk & Ralph E. Goldberg, *The First Amendment and Congressional Investigations of Broadcast Programming*, 3 J.L. & POL. 625, 662 (1987).

¹⁰WILLIAM RAY, FCC: THE UPS AND DOWNS OF RADIO-TV REGULATION 3-31 (1990).

¹¹Galloway v. F.C.C., 778 F.2d 16, 21 (D.C. Cir., 1985).

distortion complaints suggests that it may be quietly orphaning a policy that could help deter deceptive news techniques and mitigate growing conflicts between broadcasters' journalistic and economic interests. Part one offers a contemporary rationale for FCC oversight of news, despite the deregulatory drift of the recent past and First Amendment issues. Part two explains relevant concepts from the theory of symbolic regulation. Part three reviews the definition, origins and codification of the distortion policy. Part four examines whether the distortion rules are symbolic by offering the first systematic, quantitative study of FCC decisions in this area. Part five goes deeper into the record, showing through illustrative cases how the Commission's evidentiary requirements, burden of proof, shifting definition of news, and sometimes arbitrary reasoning impose a near-insurmountable burden on complainants. Part six offers prescriptions for adjusting the policy so that it could be enforced more clearly and easily.

REGULATORY RATIONALE

Reinvigorating the news distortion rules would entail a recommitment to the public interest in broadcast news. There are several reasons why it is still fair to exert public oversight of broadcast news practices in the multi-channel world of cable television and radio, direct broadcast satellite, and the internet. First, spectrum is still scarcer than those who would like to use it, judging from the huge prices that broadcast licenses fetch in the marketplace, and the growth of "pirate" or low-power radio stations that have sprung up to serve local interests in an age of increasingly concentrated and distant ownership.¹³ Each time the Commission issues or

¹²Serafyn v. F.C.C., 149 F.3d 1213 (D.C. Cir., 1998).

¹³In January 2000 the FCC set aside spectrum for 1000 new low-power radio stations to be operated by non-profit groups, such as churches, schools and community organizations. However, Congress drastically curtailed the new allotments in response to objections from the National Association of Broadcasters and National Public Radio that the new stations risked interfering with existing stations' signals. The FCC attributed this resistance to attempts to stave off competition from new entrants in the market. In December 2000 the Commission approved

renews a license it is discriminating between speakers in the marketplace, and it retains an obligation to consider which of them will serve the public interest best. The quality of broadcasters' news programming remains one of the most important criteria for making that decision.

Second, broadcasters enjoy privileged access to the spectrum compared to other commercial users of this public resource, and this preferential treatment grows less defensible in the absence of public service expectations in return. At a time when telecommunications companies pay millions at auction to rent the spectrum for their purposes, broadcasters do not pay fees for using the frequencies given to them and have obtained free transitional frequencies for digital television. The beneficiaries of this remarkably lucrative giveaway, to whom so much of our public discourse has been entrusted, owe the givers responsible news and some public accountability. The basic insight of legal realism still holds: government always acts, even through apparent "inaction," to construct markets and enable the speech of some at the expense of others.¹⁴

Third, there are few other real checks on licensee power at present, as complainants have small recourse to other regulatory measures. In the late 1960s, the Commission justified its narrow application of the distortion policy in part by stating that it was preferable to use the Fairness Doctrine to ensure that all points of view might be heard on disputed issues, rather than

255 of the initial 1200 applications, most in sparsely populated areas. *See* Stephen Labaton, 255 *Licenses Are Awarded For Low-Power FM Radio*, N.Y. TIMES, Dec. 22, 2000, at C5.

¹⁴For recent, and intriguingly different statements of legal realist positions on broadcast regulation, *compare* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993) (drawing on Madisonian and New Deal approaches to speech) *and* THOMAS STREETER, SELLING THE AIR: A CRITIQUE OF THE POLICY OF COMMERCIAL BROADCASTING IN THE UNITED STATES (1996) (drawing on critical legal theory and cultural studies approaches).

for the Commission to decide who was right or wrong.¹⁵ With the demise of the Doctrine, complainants may no longer have any leverage to respond to distorted news on the air. The aggrieved may bring tort suits against broadcasters, but such civil suits cannot assess or compensate the harm to the *public* interest of distorted news, nor can they address such practices as shaping the news to serve the interests of broadcast owners and advertisers.

Fourth, as is shown in this article, the FCC's own distortion rulings suggest that broadcasters have not sufficiently regulated themselves. The Commission placed great faith in broadcasters to investigate and discipline their employees for such transgressions, yet many of its decisions reproach broadcasters for failing to probe allegations in good faith, and are often accompanied by dissents urging stronger FCC sanction against licensees on these grounds. By crafting the distortion rules in the late 1960s, the FCC helped spark CBS to create a set of news standards and practices, and the other networks to follow, but CBS' own top news executives at the time later admitted that these standards were not assiduously followed.¹⁶ The development of the networks' standards fits the general rule that industry self-regulation is most likely to

¹⁵ “[O]verlaying this entire area is the fairness doctrine, which is applicable to the news operation of broadcast licensees and which, in particular situations such as here treated, may call for the presentation of contrasting viewpoints.” *Hunger in America*, 20 F.C.C.2d 143, 151 (1969). *See also* *Mrs. J. R. Paul*, 26 F.C.C.2d 591 (1969) (contrasting potential government censorship in distortion cases with the Fairness Doctrine).

¹⁶ Former CBS News President Richard S. Salant attributed the codification of the network's news standards to FCC pressure. Former CBS Vice President of News, Gordon Manning, has said that the standards were generally ignored by his journalists, and its former Vice President of Political Coverage and Documentaries, Bill Leonard, has said that they were “honored with a wink as with an observance.” SALANT, CBS, AND THE BATTLE FOR THE SOUL OF BROADCAST JOURNALISM: THE MEMOIRS OF RICHARD S. SALANT 8, 176 (Susan & Bill Buzenberg, eds., 1999).

come in response to credible government threats to regulate, and that without that threat, self-regulation is unlikely to meet its purported goals.¹⁷

Most importantly, as the economics of broadcast journalism have changed news has become less political speech or public service offering and more commercial speech, which is less deserving of full First Amendment protection. In the late 1960s, the Commission justified its reluctance to intervene in distortion cases largely because doing so “might tend to discourage broadcast journalism, and might thus be at odds with the very reason for our allocation of so much scarce spectrum space to broadcasting -- our realization of the valuable contribution it can make to an informed electorate.”¹⁸ Today, particularly in television, news is no longer a money-losing public interest obligation, but a profit center, as evidenced by the spread of all news cable channels, local broadcast news, and network prime-time newsmagazines and “reality-based” programming.¹⁹ As the topics and production techniques of news and entertainment programming have become less distinguishable, television journalism’s standards of newsgathering and reporting are widely perceived as in decline.²⁰ Newscasters increasingly

¹⁷See Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM L.J. 711, 758. The failure of the National News Council, which from 1973 to 1984 attempted to provide a review board for public complaints of unfairness and inaccuracy against print and broadcast media, illustrates the tendency of such efforts to wither once the potential for regulation recedes. The Council, made up of public and media representatives, was created in response to growing criticism and investigation of the media in the early 1970s by Congress and the Executive Branch. Resistance from major media organizations, and a lack of funding and public attention eventually doomed the Council. See generally PATRICK BROGAN, *SPIKED: THE SHORT LIFE AND DEATH OF THE NATIONAL NEWS COUNCIL* (1985).

¹⁸Network Coverage of Democratic National Convention (Letter to ABC, et al.), 16 F.C.C.2d 650, 657 (1969).

¹⁹See Chad Raphael, *The Political Economy of Reali-TV* 41 JUMP CUT 102 (1997).

²⁰See BILL KOVACH & TOM ROSENSTIEL, *WARP SPEED: AMERICA IN THE AGE OF MIXED MEDIA* 3-8, 48, 73-74 (1999) (discussing how infotainment has lowered journalistic standards and Americans respect for journalism); see also Ellen Hume, *The New Paradigm for News*, ANNALS AM. ACAD. POL. & SOC. SCI., July 1996, at 141, 144 (discussing tabloid television’s influence on evening news.)

ignore much of the political process, especially at the state and local levels, failing to serve the informational needs of their communities.²¹ As Clay Calvert has argued, the FCC continues to provide

a huge [First Amendment] exemption to broadcasters who choose to label a program as news, even though its primary function is to ‘attract and hold an audience and avoid offending advertisers, audiences, and media owners’ and its value for informing and facilitating democratic self-governance may be marginal. Our standards of what constitutes news have certainly shifted over the years, yet the FCC clings to the notion that a clear dichotomy between news and non-news programming can be maintained . . . As entertainment values swallow up traditional news judgments and a world of infotainment emerges, perhaps it is time to treat all broadcast fare under the same standards rather than carving out a realm of heightened protection for broadcast programs that are dubbed news by a network or local television executive.²²

In an age of market-driven news, a renewed distortion policy could check deception in service to sensationalism and lessen advertiser influence on journalism.²³ In an era of conglomerate ownership of the major television networks and dramatically increasing concentration of radio

²¹See Tom Rosenstiel, et al, *Quality Brings Higher Ratings, But Enterprise is Disappearing* (1998), available at http://www.journalism.org/publ_research/special_rep.html (content analysis by Project for Excellence in Journalism, affiliated with the Columbia University Graduate School of Journalism, finds drop in original, or “enterprise,” reporting at local television news stations); Committee of Concerned Journalists, *Changing Definitions Of News* (1998), available at <http://www.journalism.org/ccj/resources/chdefonews.html> (content analysis finds shift toward lifestyle, celebrity, entertainment and crime/scandal, and away from government and foreign affairs; network news magazines have all but abandoned government, social welfare, education and economics in favor of lifestyle news and news-you-can-use); Rocky Mountain Media Watch, *98 Election Survey* (1998), available at <http://www.bigmedia.org/elect98.html> (content analysis of evening newscasts from 25 states two weeks before election day reveals four times as many political ads as election news stories); Jill Geisler, *Blacked Out*, AM. JOURNALISM REV., May 2000, at 34 (reporting results of nationwide studies of local television news showing low levels of local political coverage).

²²Calvert, *supra* note 7, at 193 (footnotes omitted).

²³See Lawrence Soley, *The Power of the Press Has A Price*, EXTRA!, July 1997, at 11 (survey of broadcast investigative reporters in which over 40% of journalists admitted that advertisers had recently succeeded in influencing a news report). See also Institute for Alternative Journalism, *Bottom Line vs. Top Story: The Synergy Report* (1997), available at <http://www.independentmedia.org/congress/synergy.html> (numerous examples of advertiser intervention in news); see also Neil Hickey, *Money Lust: How Pressure for Profit is Perverting Journalism*, COLUM. JOURNALISM REV., Jul.-Aug. 1998, at 28 (additional examples of advertiser pressures).

station ownership,²⁴ such a policy might check the suppression and promotion of stories to serve licensees' farflung business interests.²⁵ Each of these interventions would enlarge the scope of broadcast speech, rather than curtail it, posing no undue burden on broadcasters' speech rights and offering significant benefits to the public right to receive information.

SYMBOLIC REGULATION

In the U.S., most content-based broadcast regulations ultimately derive from licensees' primary formal obligation to serve the "public interest, convenience and necessity."²⁶ Yet, as Murray Edelman's theory of symbolic regulation maintains, laws and policies that purport to protect the public interest can be repealed in effect by administrative neglect, industry recalcitrance, Congressional and Executive Branch pressure, and budget starvation. However, Edelman argues that "the laws as symbols must stand because they satisfy interests that are very strong indeed: interests that politicians fear will be expressed actively if a large number of voters are led to believe that their shield against a threat has been removed."²⁷ If regulators repeatedly fail to apply rules in ways that challenge the industry, that failure must be managed carefully in

²⁴See Michael J. Aguilar, *Note: Micro Radio: A Small Step in the Return to Localism, Diversity, and Competitiveness in Broadcasting*, 65 BROOKLYN L. REV. 1133, 1163-66 (1999).

²⁵See Steve Weinberg, *Smoking Guns: ABC, Philip Morris and the Infamous Apology*, COLUM. JOURNALISM REV., Nov.-Dec. 1995, at 29 (discussing ABC-Capital Cities management pressure on journalists to apologize for report critical of tobacco company to avoid libel lawsuit during sale of company to Disney). See also Clay Calvert, *Stumbling Down Tobacco Road: Media Self-Censorship And Corporate Capitulation In The War On The Cigarette Industry*, 30 LOYOLA OF LOS ANGELES L. REV. 139 (1996) (on CBS executives' pressure on journalists to suppress report critical of tobacco to avoid feared suit for tortious interference during sale of the company to Westinghouse, and simultaneous acquisition of six tobacco brands); Jim Naureckas, *Corporate Ownership Matters: The Case of NBC*, EXTRA!, Nov. 1995, at 13 (offering examples of parent company General Electric's interventions in NBC News editorial decision making to defend GE's image); Lawrie Mifflin, *An ABC News Reporter Tests the Boundaries of Investigating Disney and Finds Them*, N.Y. TIMES, Oct. 19, 1998, at C8 (discussing corporate pressure on ABC investigative reporter to alter story on pedophiles working at parent company's Disney World); Institute for Alternative Journalism, *supra* note 23; Hickey, *supra* note 23.

²⁶47 U.S.C. § 309 (a) (2000).

policy discourse. FCC decisions often “give the rhetoric to one side and the decision to the other,”²⁸ affirming abstractions such as the “public interest” in vague and hortatory language that assures all involved that citizens' needs have been duly considered in decision making, and that broadcasters must serve them, before clearing the licensee of wrongdoing or applying a regulatory tap on the wrist. If the symbolic aspects of policymaking are rarely acknowledged openly, they play no small part in legitimizing the process.

Similarly, Thomas Streeter has noted how the FCC's long-term inclination to protect broadcasters' claims to the spectrum against competition²⁹ and enlarge their First Amendment rights at the expense of public accountability³⁰ must be cast in the discourse of neutral principles and technical expertise to establish rhetorical distance from industry influence.³¹ Indeed, when the Commission has failed to do so, its critics in the judiciary and even in its own house have sometimes decried the symbolic nature of its oversight.³² If FCC policy decisions are to be accepted by the regulators and the regulated, they must appear disinterested. Policy talk, like news, relies on a myth of expert objectivity. This is not to say that all broadcast regulators have been engaged in a conscious conspiracy against the public. As Streeter argues, the discursive

²⁷MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 37 (1976).

²⁸*Id.* at 39.

²⁹For a recent review of the supporting literature on this point, which has become too voluminous to cite in its entirety, see Charles R. Shipan, *Keeping Competitors Out: Broadcast Regulation from 1927 to 1996*, in *A COMMUNICATIONS CORNUCOPIA* 473-498 (Roger E. Noll & Monroe E. Price eds., 1998).

³⁰See generally Monroe E. Price, *Speech, Structure, and Technology*, 2 *CARDOZO STUD. IN L. & LITERATURE* 113 (1990).

³¹STREETER, *supra* note 14, at 191-93 (1996).

³²For example, the D.C. Circuit Court of Appeals warned the FCC against its “curious neutrality in favor of the licensee” when assigning the burden of proof to complainants and resolving conflicting evidence in favor of the licensee, in *Office of Communications of United Church of Christ v. F.C.C.*, 425 F.2d 543, 547 (D.C. Cir. 1969). Commissioner Nicholas Johnson repeated the phrase in a 1973 dissent involving news distortion charges, deriding the

rules of the policy community themselves come to exert influence over what options can be put forth as “practical” and “realistic,” militating against overt commitments to political-economic interests, actors and ideologies as the basis for rulemaking.³³ This discursive need to transcend particular interests can occasionally open up space for aberrant decisions that challenge industry prerogatives. Once the for-profit, commercially-supported, government-licensed nature of the system is taken as a given, commitments to the public interest and regulatory disinterest sometimes limit what the industry can win from the regulatory apparatus. In addition, even symbolic regulations may exert some small checks on industry by presenting the threat of government intervention, as the Fairness Doctrine sometimes did by giving broadcasting’s critics some leverage to negotiate informally for response time.³⁴

The theory of symbolic regulation would apply when regulators preserve and maintain the appearance of applying a rule that purports to protect the public interest, while avoiding enforcing the rule in such a way as to challenge the industry practices it was meant to address. How might one evaluate evidence of such a theory in a falsifiable manner? Disconfirming evidence would include the abolition of the rule, or its consistent enforcement. Since the Commission’s prohibition of distortion is clearly still on the books, the question turns on the rule’s application. If the distortion rules are symbolic, we would expect to see some investigative activity by the Commission in such cases, but few findings against broadcasters, light penalties, and a lack of fit between the pattern of enforcement and the policy’s stated goals.

FCC for turning the license renewal process into a wasteful “ritual” in which “the result was preordained a long time ago.” *Chronicle Broadcasting*, 40 F.C.C.2d 775, 838 (1973).

³³STREETER, *supra* note 14, at 121, 123.

DEFINING NEWS DISTORTION

In 1949, the FCC expressed its concern for deceptive news in broad terms, stating that

The basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and impartial a manner as possible. A licensee would be abusing his position as public trustee of these important means of mass communications were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news.³⁵

Thus, the Commission initially justified its need to regulate in this area as ensuring the conditions for freewheeling coverage of public affairs, and the contribution it could make to citizen self-governance. Indeed, the Commission wrote that “the very reason for our allocation of so much scarce spectrum space to broadcasting [was] our realization of the valuable contribution it can make to an informed electorate.”³⁶

However, it was not until a series of 1969-1973 decisions that the Commission began to formalize its definition of distortion. The FCC did not do so on its own initiative, but in response to Congressional pressure. Congressional committees and figures investigated a number of distortion claims, and referred their complaints to the Commission in each of these precedent cases.³⁷ In refining its policy, the FCC asserted the gravity of the offense as “a most heinous act

³⁴See FORD ROWAN, BROADCAST FAIRNESS: DOCTRINE, PRACTICE, PROSPECTS 71 (1984). The threat of regulation must be credible if it is to affect informal practice, as it must be to affect self-regulation.

³⁵Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). *See also* KMPC, Station of the Stars, Inc., 14 Fed. Reg. 4831 (1949) (establishing that a licensee’s direction to news personnel to slant the news would raise serious questions about the character qualifications of the licensee).

³⁶Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949). *See also* Selling of the Pentagon, 30 F.C.C.2d 150, 153 (1971).

³⁷The cases included Network Coverage of Democratic National Convention (Letter to ABC), 16 F.C.C.2d 650 (1969) (finding no staging of coverage of demonstrations outside the 1968 Chicago convention, in response to complaints filed by numerous Congresspeople and others); Columbia Broadcasting System, Inc. (WBBM), 18 F.C.C.2d 124 (1969) (finding no staging of a pot party for a report on marijuana use by college students, in response to complaints filed by Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce and others); Hunger in America, 20 F.C.C.2d 143 (1969) (finding no deliberate

against the public interest -- indeed, there is no act more harmful to the public's ability to handle its affairs. In all cases where we may appropriately do so, we shall act to protect the public interest in this important respect.”³⁸ Although the Commission resolutely promised to defend the public interest against distortion, it also raised its countervailing commitment to broadcasters’ freedom of speech, and pledged not to chill it. “But in this democracy, no Government agency can authenticate the news, or should try to do so. We will therefore eschew the censor's role, including efforts to establish news distortion in situations where Government intervention would constitute a worse danger than the possible rigging itself.”³⁹ Thus, in cautioning that it would not be “the national arbiter of the truth,”⁴⁰ the FCC also bid to maintain its discursive neutrality.

The Commission has never laid out a concise statement of what constitutes distortion, but it is possible to fashion a four-part test from its precedent decisions and subsequent actions. In the absence of any of the four elements, the Commission has been unwilling to find distortion, or even to investigate a complaint. First, there must be accusation of deliberate intent to distort the news or mislead the audience. Audience complaints of inaccuracy or disagreement with the broadcaster’s legitimate editorial choices are not enough to trigger FCC scrutiny.⁴¹ Second, distortion must be supported by evidence extrinsic to the broadcast itself. Otherwise, the FCC

deception in misreporting a baby’s cause of death as malnutrition, in response to complaints filed by the House Subcommittee on Appropriations and Congressman Henry Gonzalez); *Selling of the Pentagon*, 30 F.C.C.2d 150 (1971). (finding no deliberate distortion in editing military interviewees’ remarks, in response to complaints filed by chairmen of the House Committee on Interstate and Foreign Commerce and House Committee on Armed Services); and *Hon. Harley O. Staggers*, 25 Rad. Reg. 2d (P&F) 413 (1972) (pledging to investigate CBS for inadequate investigations into charges of news staging, in response to a complaint filed by the chairman of the House Committee on Interstate and Foreign Commerce).

³⁸*Hunger in America*, 20 F.C.C.2d 143, 151 (1969).

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.* at 150-51. *See also* *Hon. Harley O. Staggers*, 25 Rad. Reg. 2d (P&F) 413, 414 (1972); *Letter to ABC*, 16 F.C.C.2d 650, 656 (1969).

will not inquire into "a dispute as to the truth of the event (i.e., a claim that the true facts of the incident are different from those presented)."⁴² Extrinsic evidence might include testimony that "a newsman had been given a bribe, or had offered one to procure some action or statement";⁴³ material such as an outtake or memorandum that clearly showed intentional deception; or testimony from a reporter that s/he was instructed by the owner, manager, or news director of a station to invent or distort a news item.⁴⁴ It may also include "testimony in writing or otherwise, from 'insiders' or persons who have direct personal knowledge of an intentional attempt to falsify the news."⁴⁵ Without such evidence, the FCC will not "enter the quagmire of investigating the credibility of the newsman and the interviewed party,"⁴⁶ which it sees as matters best left to the licensee to investigate. Third, this evidence must show that the distortion was initiated by or known to the licensee or to "its principals, top management, or news management."⁴⁷ Fourth, distortion must involve a significant event, rather than an incidental part of the news. The FCC will not inquire into "inaccurate embellishments concerning peripheral aspects [of reports or] attempts at window dressing which concerned the *manner* of presenting the news [when] the essential facts of the news stories to which these presentational devices related were broadcast in an accurate manner."⁴⁸ In short, "the real criterion . . . is whether the public is deceived about a matter of significance."⁴⁹

⁴²Hunger in America, 20 F.C.C.2d 143, 150-51 (1969).

⁴³*Id.* at 151.

⁴⁴*See* Hunger in America, 20 F.C.C.2d 143, 151 (1969); *see also* Letter to ABC, 16 F.C.C.2d 650, 657 (1969).

⁴⁵Mrs. J. R. Paul, 26 F.C.C.2d 591, 592 (1969).

⁴⁶Hunger in America, 20 F.C.C.2d 143, 151 (1969).

⁴⁷*Id.* at 150.

⁴⁸WPIX, Inc., 68 F.C.C.2d 381, 385-86 (1978).

⁴⁹Hon. Harley O. Staggers, 25 Rad. Reg. 2d (P&F) 413, 420 (1972).

Over the years, the FCC has come to apply this four-part test to a wide range of forms of distortion, including staging (or rigging), slanting, falsification, deception (or misrepresentation), and suppression. In defining impermissible staging, the FCC declared that it would not investigate charges that involved “filming of conduct engaged in because of the knowledge that the cameras are there,”⁵⁰ such as occurred in press conferences or demonstrations, since these activities were not directly under journalists' control. Nor would it investigate “scenes in a documentary which obviously involve such 'staging' as camera direction, lights, action instructions, etc.”⁵¹ Instead, the Commission would limit its inquiries to cases in which “a licensee has staged or culpably distorted the presentation of a news event,”⁵² where staging consisted of “a purportedly significant 'event' which did not in fact occur but rather is 'acted out' at the behest of news personnel.”⁵³

The FCC has not attempted any comparably clear definition of falsification, deception or slanting in relation to news. In practice, the Commission seems to use falsification to refer to any fabrication of facts, such as making up weather readings without checking actual temperatures.⁵⁴ Deception (or misrepresentation) seems to consist of misleading the public about the source of information, such as presenting questions and suggestions written by news staff as if they were posed by viewers, or scripting purportedly spontaneous questions from a studio audience.⁵⁵ It may involve “editing of a taped or filmed interview for the purpose of misrepresenting the views of the person interviewed, and deliberate exclusion of certain aspects of a news event, not because they are deemed lacking in news value, but for the purpose of

⁵⁰*Id.* at 413.

⁵¹Letter to ABC, 16 F.C.C.2d 650, 656 (1969).

⁵²*Id.* at 657.

⁵³*Id.*

⁵⁴*See* Action Radio, Inc., 51 F.C.C.2d 803, 807-8 (1975).

misrepresenting the event.”⁵⁶ Deception may also be found in the packaging of news, including misrepresenting journalists as reporting from the scene of an event, using old video to illustrate current events without disclosure, or misrepresenting the true location shown in video.⁵⁷ By slanting, the Commission seems to mean the use of deliberate inaccuracy to favor one viewpoint, or disfavor another, on a matter of public significance.⁵⁸ Slanting can also refer to the systematic promotion or suppression of stories or viewpoints to serve the licensee’s ideological views or business interests.⁵⁹ The Commission has investigated promotion in cases involving a licensee who directed reporters to mention a Senate candidate positively in each newscast during his campaign in exchange for regulatory favors,⁶⁰ and allegations that station management instructed news staff to increase positive coverage of cities where its parent company was seeking cable television licenses.⁶¹ Suppression is exemplified by a licensee who told news staff to stop coverage of a local tennis tournament because the country club that sponsored it was in arrears on its advertising bill with the station,⁶² and another owner instructing news personnel at his stations to present no favorable news about the late President Roosevelt and his family, or about Jews, and to make no negative mention of the Ku Klux Klan.⁶³ In slanting cases, complainants

⁵⁵ See American Broadcasting Co., Inc., 52 Rad. Reg. 2d (P & F) 1378, 1379 (1982).

⁵⁶ Hon. Harley O. Staggers, 25 Rad. Reg. 2d (P&F) 413 (1972).

⁵⁷ See WPIX, Inc., 68 F.C.C.2d 381, 420-22 (1978).

⁵⁸ See *Selling of the Pentagon*, 30 F.C.C.2d, 150 (1971) (where rearranging the remarks of a military spokesman, allegedly to make him appear evasive, was evaluated as possible slanting.)

⁵⁹ “[T]he Commission believes that deliberate suppression or attempted suppression of news because of the licensee’s private interests, personal opinions or prejudices is a form of ‘rigging,’ ‘slanting,’ or ‘deliberate distortion’ of the overall news presentation of the station.” Michael D. Bramble 58 F.C.C.2d 565, 572 (1976) (citations omitted).

⁶⁰ *Star Stations Of Indiana, Inc.*, 51 F.C.C.2d 114 (1973); *aff’d* 51 F.C.C.2d 95 (1975).

⁶¹ *Chronicle Broadcasting*, 40 F.C.C.2d 839 (1971); *aff’d* 40 F.C.C.2d 775 (1973).

⁶² *Gross Telecasting, Inc.*, 92 F.C.C.2d 248 (1981); *aff’d in part* 92 F.C.C.2d 204 (1982).

⁶³ *KMPC, Station of the Stars, Inc.*, 14 Fed. Reg. 4831 (1949).

must present evidence that the licensee's political views or business interests shaped the news, rather than journalistic judgments of whether material was newsworthy.⁶⁴

Although the Commission sometimes considers distortion complaints on a case-by-case basis, it cannot impose fines for violations, but can only consider them in evaluating the overall character qualifications of broadcasters when they apply for license renewals.⁶⁵ Usually, distortion complaints are accompanied by other issues (most often these were Fairness Doctrine complaints, until the Doctrine's partial repeal in 1987). However, the FCC has stated that it will not hold up license renewals because of a distortion complaint unless there is extrinsic evidence of direct involvement by the licensee,

including its principals, top management, or news management. For example, if it is asserted by a newsman that he was directed by the licensee to slant the news, that would raise serious questions as to the character qualifications of the licensee . . . However, if the allegations of staging, supported by extrinsic evidence, simply involve news employees of the station, we will, in appropriate cases inquire into the matter, but unless our investigation reveals involvement of the licensee or its management there will be no hazard to the station's licensed status. Such improper actions by employees without the knowledge of the licensee may raise questions as to whether the licensee is adequately supervising its employees, but normally will not raise an issue as to the licensee's character qualifications.⁶⁶

Here, the Commission attempted to strike a balance between avoiding inquiries into news that might chill the practice of journalism by threatening a broadcaster's license, while maintaining some incentive for broadcasters to exercise adequate supervision of news personnel. Typically, the Commission has instructed licensees that to avoid negligence, they must craft a policy

⁶⁴Any time a producer, news director or editor decides not to print or broadcast a news story, he is, in a sense, 'suppressing' news. However, the 'news suppression' we are concerned with arises where the licensee's decision is based on private rather than public interests, a determination that must rest largely on questions of intent or motive." *Screen Gems Stations, Inc.*, 46 F.C.C.2d 252, 256 (1974). *See also* *Star Stations Of Indiana, Inc.*, 51 F.C.C.2d 95, 107 (1975).

⁶⁵*Broadcast Hoaxes*, 6 F.C.C.R. 6935 (1991).

⁶⁶*Hunger in America*, 20 F.C.C.2d 143, 150 (1969).

against distortion and communicate it to employees, conduct good faith investigations of distortion complaints and discipline wrongdoing if it exists.⁶⁷

DISTORTION COMPLAINTS, 1969-1999

To assess how the Commission has enforced its policy since codifying it in the late 1960s, this section reports the results of a quantitative analysis of all FCC decisions on distortion released from 1969 through 1999 found in the Lexis “FCC Decisions” database. To minimize missed cases, search terms employed included “news” within two words of “distortion” and its major variants (“staging,” “slanting,” “deception,” “falsification,” and “suppression.”) Duplicate hits and decisions in which the distortion rules were cited only peripherally (e.g., for purposes of contrast or comparison to another policy) were excluded. Judicial decisions reported in the “FCC Decisions” database, but not made by the Commission itself, were also excluded. The FCC’s determination of whether a distortion issue was present in each instance was followed.

Each decision was coded for the specific type of complaint involved, the complainant, whether or not the FCC investigated it, the outcome, rationale, and ultimate penalties assessed. Complaint coding employed the definitions of slanting, staging, etc. derived above from the clearest Commission uses of them, rather than the terms that appeared in each decision, as the Commission sometimes used these terms imprecisely, interchangeably, or in different ways over time. In coding for whether the Commission investigated, a low threshold was used. Although the Commission tended to define an investigation as a hearing or field visit to gather evidence, this study coded as an investigation any level of activity beyond reading the complainant’s claim before dismissing it. This activity might have included as little as reviewing evidence provided

⁶⁷See *Columbia Broadcasting System, Inc. (WBBM)*, 18 F.C.C.2d 124, 136-39 (1969); *Hunger in America*, 20 F.C.C.2d 143, 151 (1969); *Letter to ABC*, 16 F.C.C.2d 650, 657 (1969); *Selling of the Pentagon*, 30 F.C.C.2d 150, 153 (1971).

by the complainant (such as a broadcast transcript or newspaper article), or issuing a letter of inquiry to the licensee. The low threshold was used because of the claim sometimes made that the FCC can intimidate or influence broadcasters simply by expressing a threat or concern, or regulating by “lifted eyebrow.”⁶⁸ Since the study is necessarily restricted to decisions reported in the Lexis database, it does not include any complaints that were quickly dismissed (e.g., for procedural defects, or lack of specificity or evidence,) and that did not show up in the public record at all. If distortion complaints are similar to Fairness Doctrine complaints, the vast majority would have been made through phone calls and letters to the Commission, rejected immediately for insufficient evidence, and never referred to stations or mentioned in the record.⁶⁹

These data only show the Commission’s ruling on the distortion issue in each decision, which was often accompanied by other complaints (e.g., Fairness Doctrine violations, or making misrepresentations to the FCC). The data follow the FCC’s practice of consolidating separate complaints raised about the same station into a single decision. The data include initial decisions as well as any appeals.⁷⁰ In general, the unit of analysis chosen was the decision, not the case, in a good faith effort to capture the maximum number of findings of distortion, even if they were later reversed during the appeals process. This method yielded 120 decisions that emerged from 106 cases. However, in reporting ultimate penalties the case is used as the unit of analysis, since,

⁶⁸See, e.g., Dyk & Goldberg, *supra* note 9, at 634.

⁶⁹In fiscal years 1973 and 1974, after the last major expansion of the Fairness Doctrine, the Commission rejected over 97% of the 4300 fairness complaints it received without forwarding them to licensees. BARRY G. COLE & MAL OETTINGER, *RELUCTANT REGULATORS: THE FCC AND THE BROADCAST AUDIENCE* 123 (1978).

⁷⁰There are three levels of decision making at the FCC. Cases may begin with a hearing before an Administrative Law Judge, who issues an initial ruling. Cases can then be appealed to the Review Board. Finally, the full Commission may grant an application for review. See 47 C.F.R. § 0.341 (2000) (authority of Administrative Law Judges); 47 C.F.R. § 0.361 (2000) (authority of Review Board); 47 C.F.R. § 1.115 (2000) (procedures for filing applications of review with the full Commission).

by definition, these penalties could only come at the end of the appeals process (in no case was a penalty enforced, then reversed on appeal.)

Again, the distortion policy may be considered symbolic regulation if it has generated some investigative activity by the FCC, but few rulings against broadcasters, light penalties, and a record of enforcement that fails to meet the policy's stated goals of protecting the public against deliberately distorted news and protecting broadcasters against unwarranted intrusions on their news judgments.

Outcomes and Penalties

The Commission has rarely held licensees in violation of the distortion rules. Figure 1 displays distortion decisions by presidential administration, showing little difference between the FCC's willingness to find broadcasters' guilty under Republican (1969-1976, 1980-1992) and Democratic (1977-1980, 1993-1999) leadership. Of the 120 reported decisions on distortion in this period, the FCC found against broadcasters in 10.0% (12) of them. These decisions were generated by 8 cases, because several cases generated multiple decisions as they went through the appeals process. The number of reported decisions drops off dramatically after 1976, and there is only one finding of distortion after 1982, when the Reagan-era FCC began to remove content regulations on broadcast news. Again, the rate of findings of distortion is probably overstated here, given the absence of decisions not reported in the public record. The rarity and significance of the Commission's findings suggest that they are more likely to show up in the record than quick dismissals of complaints.

As for penalties, a finding of news distortion alone did not appear to have a major impact on the Commission's evaluation of a broadcaster's character qualifications. In 3 of the 8 cases in which the FCC found a broadcaster guilty, the Commission simply issued letters of

admonishment or censure (the latter is a stronger expression of regulatory disapproval, but it carried no additional penalty in these cases). In 2 other cases, where distortion was compounded by numerous other infractions, the Commission issued short-term license renewals, a form of regulatory probation, but renewed the licenses thereafter. In the final 3 cases, distortion contributed to a host of violations that cost broadcasters their licenses. It is worth reviewing these cases briefly to show the gap between the Commission's sometimes stern rhetorical rebukes of licensees and the generally light penalties assessed – a hallmark of symbolic regulation – and the reasons why the FCC removed licenses in some cases.

Most penalties consisted of issuing letters of admonishment or censure that did not figure heavily in subsequent license renewals, all of which were successful. For example, in 1973 the Commission censured CBS after the network admitted that its owned and operated stations had staged reports, both of them brought to light by a House Commerce Committee Investigations Subcommittee probe. Although the Commission declined to find staging by CBS in four other incidents referred by the Subcommittee, it issued a reprimand because, as the FCC delicately put it, the network "discovered facts of significance only after the Commission confronted it with evidence contrary to its original statements and requested further investigation."⁷¹ This artful phrasing allowed the FCC to avoid finding CBS guilty of making misrepresentations to the Commission, a more serious infraction that has sometimes constituted grounds for removing a broadcast license. Despite finding that the licensee had failed to investigate itself, the Commission declared that since it had no proof that network management knew the reports had been massaged, or had instructed journalists to create the deceptive stories, no further penalties would be assessed.

⁷¹Columbia Broadcasting System, 45 F.C.C.2d 119, 128 (1973).

Similarly, the Commission renewed WABC-TV's license in 1982 despite finding "repeated instances of deceptive programming broadcast by the station," in five different news programs over a two year period. Deceptions included staff members concocting letters and phone calls that were presented on the air as having issued from viewers, supposedly spontaneous questions by members of studio audiences which were prepared by staff members, and fictitious interviews with various people misidentified as members of the public.⁷² After asserting that "ABC must be held fully responsible for the willful conduct and/or disregard for known facts by WABC-TV's highest management-level officials, whose actions or inaction resulted in the repeated instances of public deception,"⁷³ the Commission allowed the network to maintain its license since it had cooperated with the Commission's investigation and disciplined its news personnel.

The final letter of admonishment was issued in 1993 to NBC for staging a segment of a *Dateline NBC* report on unsafe gas tanks in General Motors trucks. The report showed video of what it called an "unscientific" test crash in which a GM truck exploded into flames after being hit from the side. GM's investigation found that NBC producers had rigged the test by attaching incendiary devices to the truck's gas tank. After defending the report for six weeks, NBC finally admitted to staging the explosion, made an on-air apology to GM, fired three producers who contributed to the segment, and eventually dismissed its news president.⁷⁴ The Commission acted so quietly on this matter that it did not enter the letter into the *FCC Record*, the first mention of this action appearing in a 1999 decision rejecting a challenge to NBC's license renewals. In a brief paragraph responding to a petitioner who raised the incident, among others,

⁷²American Broadcasting Co., Inc., 52 Rad. Reg. 2d (P & F) 1378, 1379-80 (1982).

⁷³*Id.* at 1381.

as evidence that the network's character qualifications were lacking, the FCC noted that it had "already reviewed the matter in detail," and found that "the incident involved misjudgments and professional lapses. . . ."⁷⁵ However, the Commission refused to say flatly that a licensee violated its distortion rules, and the complaint had no bearing on its decision to renew NBC's licenses.

Distortion played a small role in jeopardizing two licenses, before the Commission renewed them. In 1975, the FCC shortened the license renewal of station KTLK-FM to one year, in part for repeatedly airing false weather broadcasts that its personnel knew had no basis in fact. However, the Commission also based its decision to discipline KTLK on several other violations, including promotion of a lottery and leaving the station's transmitter unattended. Despite finding extrinsic evidence of management knowledge, the decision equivocated, noting that "all that takes this licensee's conduct from the core of . . . 'willful distortion' . . . is that there is no evidence that the licensee knew the actual temperatures and, for motive, warped that information . . ."⁷⁶ The FCC also designated several of Gross Telecasting's licenses for hearings partly on charges of distortion, and a plethora of other issues, such as "clipping" network broadcasts (whereby an affiliate violates its network contract by shortening network programs to insert more ads), misleading advertisers, and making misrepresentations and lack of candor with the Commission.⁷⁷ The distortion issue turned on whether the broadcaster used undisclosed taped weather broadcasts and whether the licensee told his news staff to suppress coverage of a tennis tournament at a local club (which had been covered in prior years) because the club failed to pay its advertising bill to the station. After an eight year appeals process, the full Commission

⁷⁴See Lyle Denniston, *Deception: Invitation To A Libel Suit*, AM. JOURNALISM REV., Apr. 1993, at 46.

⁷⁵National Broadcasting Co, Inc., 14 F.C.C.R. 9026, 9033 (1999).

⁷⁶Action Radio, Inc., 51 F.C.C.2d 803, 807-8 (1975).

⁷⁷Gross Telecasting, Inc., 92 F.C.C.2d 248 (1981).

reversed an administrative law judge's finding against Gross, rejected the judge's recommendation to remove the broadcaster's license, and granted a short-term license renewal.⁷⁸ The Commission, which had two memos from owner H.F. Gross instructing his Sports Director not to cover the tournament until the club paid up, concluded that the memos "probably had an improper inhibitory effect on WJIM-TV's sports coverage of the Lansing Tennis Club," a circumlocutory way of saying that Gross distorted the news for private business reasons.⁷⁹ However, the Commission whittled down the number of instances in which the ALJ found violations of FCC policy on the other issues, until it could conclude that they "were infrequent or single incidents followed by remedial action."⁸⁰

Findings of distortion did contribute to three license nonrenewals over the thirty year period under study. In *Star Stations*, the Commission stripped several of Star's licenses for conducting fraudulent contests, making misrepresentations to the Commission, offering gifts and favors to the head of a broadcast ratings service, intimidating and harassing employees to prevent them from cooperating with the FCC, committing a felony by making illegal campaign contributions, and distorting news. In relation to news distortion, the FCC found that Star's owner, Don Burden, had used two of his radio stations to promote political candidates through the news, and to make illegal campaign contributions to them. During the 1964 Indiana Senate campaign, Burden directed news personnel at one of his stations to mention positive news of Senator Vance Hartke on every newscast, in exchange for Hartke's assistance in resolving an

⁷⁸Gross Telecasting, Inc., 92 F.C.C.2d 204 (1982).

⁷⁹In one memo Gross wrote: "These people owe us \$1,500, which is a year overdue and are making no effort to pay us. Considering these circumstances, I do not want to give them any publicity on the Club or any of their activities." In another, he wrote: "We are still experiencing problems in collecting from the Lansing Tennis Club. They have not kept the promise they made to me several months ago, and I want absolutely no coverage or news about their Club until I give you a further okay." Gross Telecasting, Inc., 92 F.C.C.2d 204, 224 (1982).

FCC investigation into misleading use of audience ratings to boost advertising rates at Burden's stations. Burden also gave the Senator several thousand dollars of advertising time on the station that was never billed, which constituted an illegal campaign contribution. In 1966, Burden similarly instructed employees at another station to promote Mark Hatfield's candidacy for Senator from Oregon, and to mention only negative news of his opponent. Burden also filtered more illegal campaign contributions through station employees. Here, the Commission was not simply concerned with distortion of the news *per se*, but with Burden's "attempts to use broadcast facilities to subvert the political process"⁸¹ through both the news and the contributions. The ruling found that Star's "newscasts were used as a vehicle to publicize Burden's preferred candidate – not as an exercise of news judgment, but as a deception of the public and to further his private interests."⁸² The ruling also noted that Burden's lying to the Commission, and numerous other violations of its policies listed above, were significant to its decision.⁸³

In the early 1980s, the FCC relied heavily on additional precedents concerning broadcast hoaxes to try to curb a flurry of deceptive radio station promotions.⁸⁴ Here too, the Commission took licenses. The first case involved radio station KIKX, where management staged the kidnapping of a disc jockey as a promotional stunt. By reporting the "kidnapping" in its news

⁸⁰*Id.* at 244.

⁸¹Star Stations Of Indiana, Inc. 51 F.C.C.2d 95, 107 (1975).

⁸²*Id.*

⁸³*Id.*

⁸⁴Acknowledging that "The line that separates news distortions from false news reports rising to the level of hoaxes is often difficult to ascertain," Justin Levine observes that in FCC policy, "a hoax is more likely to cause listeners to take action, while news distortions will not affect an otherwise passive listener. Additionally, the hoax is perpetrated primarily for the purposes of mischievous entertainment, whereas news distortions revolve around the shaping of information." Justin Levine, *A History and Analysis of the Federal*

program, the station violated the news distortion rules as well. Again, the case included multiple allegations, including the station's failure to log commercials properly, to maintain its transmitter according to technical standards, and to operate an adequate equal employment opportunity program.⁸⁵ The FCC also revoked the license of WMJX-FM for airing nine fraudulent and deceptive contests over the span of two years. A promotion that entailed false claims that a disoriented disc jockey had disappeared in Miami, and that the station needed its listeners' help to recover him safely, became the straw that broke the station's back. The disc jockey's "disappearance" was reported on the station's news with management's knowledge.⁸⁶

The Commission's recent actions raise questions about whether the agency has moved from treating the distortion rules as symbolic regulation to orphaning them without public admission or public input. Since 1982, the FCC has issued only one finding of distortion (based on GM's investigation of NBC, not the Commission's, and the network's prior public admission of guilt.) Moreover, in this time period, the FCC has not even held a hearing on, nor conducted a field investigation into, a distortion complaint. It also seems to have begun burying decisions adverse to broadcasters, weakening their future use as precedents. Its 1982 admonishment of WABC was not printed in the *FCC Record*, did not explicitly relate its ruling or rationale to the

Communications Commission's Response to Radio Broadcast Hoaxes, 52 FED. COMM. L.J. 273, 291 (2000).

⁸⁵Walton Broadcasting, Inc. (KIKX), 78 F.C.C.2d, 880 (1976); *aff'd* 78 F.C.C.2d 857; *recon. denied* 83 F.C.C.2d 440 (1980).

⁸⁶WMJX, 85 F.C.C.2d 251, 265-67 (1981). In the early 1990s, the Commission revised its policy on hoaxes, further distinguishing them from news distortions, and narrowing the definition of an impermissible hoax considerably. The Commission also instituted fines for hoaxes for the first time. Previously, hoaxes, like distortion claims, could only be punished by factoring them into an assessment of the overall character qualifications at renewal time, and denying the license. 47 C.F.R. 73.1217 (1998). Levine notes that the Commission has not yet imposed a fine on a broadcaster under the new rules. His study of FCC action in this area concludes that, "compared to the number of documented broadcast hoaxes, it is rare to find the FCC imposing harsh penalties for them." Levine, *supra* note 85, at 320.

news distortion rules, and, despite being adopted on December 8 was not released until two days before Christmas, as if to minimize public attention. The Commission withheld mention of its letter of admonishment to NBC in the GM case from the public record for six years, referring to (but not reprinting) it only when NBC's character was challenged during a license renewal. Despite the FCC's periodic reaffirmation of its policy, it now appears to be up to the courts to force the Commission to take the rules seriously enough to look into any allegations of distortion. This is suggested by a recent case, discussed below, in which the U.S. District Court of Appeals for the District of Columbia for the first time vacated the FCC's dismissal of a distortion complaint and remanded it to the Commission for an investigation. Using the FCC's own stated criteria in its precedent rulings, the Court found that the Commission acted "arbitrarily and capriciously" in its decision not to investigate, forcing the first full FCC inquiry into distortion in sixteen years.⁸⁷

Complaints and Complainants

The vast majority of distortion complaints have concerned slanting (see Table 1.) The high number of slanting charges can probably be attributed to petitioners' tendency to add distortion claims to Fairness Doctrine complaints, as another means of alleging bias in news. It may also have to do with the vagueness of the FCC's definition of slanting, which may suggest to complainants that the Commission is more likely to act on news bias than it has been willing to do.

Although slanting has been the most common charge, these kinds of complaints have been least likely to trigger an investigation by the Commission, and among the least likely to be successful. In contrast, the Commission has been most likely to probe staging claims, which are

⁸⁷Serafyn v. F.C.C., 149 F.3d 1213 (D.C., Cir., 1998).

also the most likely type to succeed. Of all of the types of distortion, slanting charges most appear to trigger the Commission's reluctance to investigate licensee's editorial judgments, since these accusations involve broadcasters using deceptive means to favor a particular viewpoint on a significant public issue. The only findings of slanting came in decisions generated by the long-running *Star Stations* and *Gross Telecasting* cases, in which substantial evidence showed licensees suppressed or promoted news for ideological or business reason. To the extent that the Commission has been willing to find against broadcasters, it has been most likely to do so in staging and deception cases, where it has restricted its focus more to questions of journalistic technique, rather than to the political direction of reporting. These findings fall into two categories. First, there are decisions that emerged in cases where the Commission received broadcasters' prior admissions of staging or deception, either established by Congressional investigation (in the 1973 CBS staging case), or by a corporation targeted in an investigative report (in the GM-NBC staging decision), or by the station's own investigation of its news personnel (in the 1982 WABC deception case). Here, the FCC has done little or no independent investigating of its own, and has assessed no penalty stiffer than censure. Second, there are the two cases involving repeated contest hoaxes, in which the Commission has probed more fully, and has stripped licenses.

Different kinds of complainants have enjoyed varying levels of success in spurring the Commission to investigate claims and find distortion. Although citizens and citizen groups have brought over half of all complaints, they are among the least likely to convince the FCC to investigate and rule against broadcasters. In the lone successful complaint by the public, *Gross Telecasting*, the American Civil Liberties Union (ACLU) was joined by the FCC's Broadcast Bureau in its charges and probe. Many complaints by the public seemed to be less familiar with

the FCC's evidentiary requirements, and tended to lack the legal expertise that was more available to other petitioners. Businesses filing claims against unfavorable reporting also generated a low rate of investigations, and won no rulings. Politicians and candidates for office filed the second largest proportion of complaints, often based on coverage of their own campaigns or policy debates in which they were involved. Political figures also had low rates of sparking investigations and winning decisions. In the only successful complaint by a politician, the chair of the House Commerce Committee's Investigations Subcommittee convinced the Commission to find CBS guilty of distortion in one of the numerous cases the Subcommittee referred the FCC over a four year period. Competing applicants for broadcasters' licenses had somewhat more success at getting the FCC to probe distortion charges when they brought claims in the context of comparative license hearings into qualifications of the incumbent and challenger. Possessing professional legal representation and a strong economic incentive to appeal adverse decisions may explain their relative success. However, they won just two decisions in these cases, both in the marathon *Star Stations* case, in which the FCC's Broadcast Bureau also took a prosecutorial role. Journalists, who generally alleged that management pressured them to slant the news to promote or protect the interests of a parent company or advertisers, convinced the Commission to investigate more often than any complainants besides the Commission itself. Journalists testifying about their own employers could offer extrinsic evidence of distortion more easily than outsiders. Yet the FCC never ultimately found for a reporter, mainly because of the Commission's reluctance to second-guess the editorial discretion of the licensee (discussed later.) The FCC itself emerged as the most successful "complainant" in all respects. In the few decisions in which the Commission's Broadcast Bureau seemed to be the main source of allegations, they were always probed, and broadcasters were always found

liable. Except for the ACLU's involvement in *Star Stations*, there was no mention in the decisions of outside sources who might have alerted the FCC or helped investigate.⁸⁸

Evidence of Symbolic Regulation

The Commission has not ignored distortion complaints and has maintained some low level of investigative action on them, although there has been a considerable drop-off in reported cases and probes since the deregulatory 1980s. The symbolic nature of the FCC's oversight is suggested by the paucity of distortion decisions against broadcasters, and of significant penalties assessed. In addition, if the FCC hopes to check deceptive presentations of political issues, one might expect the Commission to exhibit more concern for charges of slanting than for the more technical issues of staging and deception. The lower investigation and success rates for slanting cases suggest otherwise. The perils of government regulation of speech may be highest in slanting cases, but so too is the public interest in the integrity of the political information it receives. Slanting charges tend to involve accusations of deliberate distortion of political issues, politicians and candidates, including distortion to serve the licensee's ideological or business interests. The Commission has been more willing to find distortion in staging and deception cases, where it has relied on outsiders' investigations and penalized lightly, or in contest hoaxes, where it has probed and sanctioned more aggressively.

The Commission's overriding tendency to rule against complaints filed by outside parties also raises questions about its resolve to enforce the distortion rules. Although the Commission

⁸⁸*WPIX* presented a borderline coding decision. The initial complaint came from a competing applicant, based on information in a published article about the station's news practices. In the appeal of the administrative law judge's initial decision to dismiss, the Broadcast Bureau sided with the new applicant against *WPIX*, but failed to convince the full Commission to find against *WPIX*. However, the Broadcast Bureau seemed to be offering its ruling to the Commissioners rather than intervening on the competing applicant's behalf by

has looked into journalists' complaints about their employers, it has not found one yet that trumps a licensee's editorial rights. The FCC has been less responsive to complaints of distortion brought by others, with the exception of a handful of cases in which the Commission itself took the lead in showing distortion. The Commission has depended primarily on outsiders to alert it to wrongdoing, but it has not been very receptive to their complaints. In sum, the Commission appears to have weighed broadcasters' speech rights more heavily than public accountability in this area. Whether it has done so wisely, and met its twin policy goals of protecting the public and broadcasters, requires more investigation of the means by which the FCC has arrived at these decisions.

THE EXTRINSIC EVIDENCE STANDARD AND BURDEN OF PROOF

As William Ray, the former FCC Chief of Broadcast Complaints and Compliance, has written, "Time after time, after denouncing news rigging or slanting as the most 'heinous' sin of all, the Commission has found some reason for doing nothing. The reason usually advanced is lack of proof that the deed was ordered by the owner or top management."⁸⁹ Indeed, the Commission's most cited reasons for dismissing these complaints are lack of extrinsic evidence of distortion, and inability to show management knowledge or intent (see table 3). Together, these two grounds account for 60% of all reasons for dismissals. The Commission is less likely to cite disconfirming or insufficient evidence, reasons that tend to be associated with deeper investigation and weighing of evidence. The other reasons for dismissal include deeming alleged distortions to be within the bounds of licensees' editorial discretion, and finding procedural errors (such as a more appropriate legal or regulatory forum for the complaint, mootness, or lack

doing additional investigative work, so the FCC was not coded as a complainant here. *See* WPIX, Inc., 68 F.C.C.2d 381, 383 (1978).

⁸⁹RAY, *supra* note 10, at 6.

of specificity). In a handful of instances, the Commission has offered no clear reason for throwing out a complaint.

A recent Court of Appeals ruling in a distortion case demonstrates some of the shortcomings of the Commission's extrinsic evidence standard and its application. The case involved a complaint by Alexander J. Serafyn, a Ukrainian-American, against a 1994 CBS *60 Minutes* report, "The Ugly Face of Freedom," on the revival of anti-Semitism in the Ukraine. In the story, correspondent Morley Safer suggested that contemporary Ukrainians were "genetically anti-Semitic" and "uneducated peasants, deeply superstitious." A Ukrainian rabbi interviewed later objected that his remarks were misedited to give the impression that he thought all Ukrainians were anti-Semites who desired to rid their country of Jews. "CBS overlaid the sound of marching boots on a film clip of Ukrainian Boy Scouts walking to church and introduced it in such a way as to give viewers the impression that they were seeing 'a neo-Nazi, Hitler Youth-like movement.'"⁹⁰ Safer reported that the Ukrainian Galicia Division had helped to round up and execute Jews in 1941, "though this Division was not in fact even formed until 1943 and therefore could not possibly have participated in the deed."⁹¹ The court noted that "perhaps most egregiously, when Ukrainian speakers used the term 'zhyd,' which means simply 'Jew,' they were translated as having said 'kike,' which is a derogatory term."⁹² CBS declined to submit evidence on its behalf, maintaining that any government inquiry into its news practices "offends the protections of a free press."⁹³ The FCC summarily denied the complaint on grounds that Serafyn failed to offer sufficient extrinsic evidence of intent.⁹⁴ The Court rejected the FCC ruling for

⁹⁰Serafyn v. F.C.C., 149 F.3d 1213, 1217 (D.C., Cir., 1998).

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.* at 1218.

⁹⁴WGPR, Inc., 10 F.C.C. 8140, 8146-48 (1995).

misapplying its own evidentiary standard without offering a rationale for doing so⁹⁵, echoing (but not citing) some previous Commissioners' dissents in distortion cases.

Rising Evidentiary Standard for Investigative Hearings

First, the *Serafyn* court objected to the FCC's misapplying its own standard for determining whether a complainant presented a *prima facie* case for a distortion hearing, requiring the petitioner to "'demonstrate' that CBS intended to distort the news rather than merely to 'raise a substantial and material question of fact' about the licensee's intent . . ."⁹⁶

Indeed, the standard of proof imposed on complainants by the FCC, and its reluctance to investigate, seem to have crept upward over time. Shortly after the Commission unanimously rewrote its distortion policy in 1969, Commissioners Kenneth Cox and Nicholas Johnson began to dissent from some decisions on similar grounds as the *Serafyn* court. At this time, the FCC majority seemed to move from saying that it would not hold up a license renewal without extrinsic evidence of management involvement in distortion⁹⁷ to saying that it would not even *investigate* without this evidence. For example, in a 1970 decision, the majority rejected a complaint against WMAL-TV for allegedly suppressing news displaying inter-racial romance. The station had invited a theater group to present an excerpt from the play "The Dutchman," yet refused to tape it, allegedly after discovering that the scene involved a black man and white woman kissing. The theater group accused the station of having a policy against showing

⁹⁵*Serafyn v. F.C.C.*, 149 F.3d 1213, 1218 (D.C., Cir., 1998).

⁹⁶*Id.* at 1220.

⁹⁷In its 1969 precedent ruling *Hunger in America* the Commission wrote: "We wish to make it clear that, in the future, we do not intend to defer action on license renewals because of the pendency of complaints of the kind we have investigated here -- unless the extrinsic evidence of possible deliberate distortion or staging of the news which is brought to our attention, involves the licensee, including its principals, top management, or news management . . . *if the allegations of staging, supported by extrinsic evidence, simply involve news employees of the station, we*

physical intimacy between the races. Citing “conflicting statements from the complainant and the licensee in this case,” the majority wrote that

it is simply not appropriate for the Commission to designate the matter for an evidentiary hearing upon a credibility (demeanor) finding, whether to credit the statement of motive of the licensee. Absent extrinsic evidence going to a policy inconsistent with the public interest . . . [the Commission] will not seek to establish the ‘true’ motives by inference or credibility findings in this sensitive area.⁹⁸

In dissent, Commissioner Cox objected “that our investigation has been inadequate either to resolve the matter or to demonstrate that the dispute cannot be resolved except upon the basis of a judgment as to the credibility of conflicting witnesses.”⁹⁹ Pointing to the theater group’s testimony about why the report was cancelled, Cox maintained that

there is ‘substantial extrinsic evidence of motives inconsistent with the public interest’ in this record. Certainly there is as much as you will ever get short of an admission by a licensee of improper conduct, written policies which are improper or their face, or the example used by the majority: ‘testimony of a station employee concerning his instructions from management.’ Such testimony adverse to his employer would quite probably be disputed by management, but in that case the majority are apparently willing to get into matters of demeanor and credibility.¹⁰⁰

Unwillingness to Consider Evidence as a Whole

In *Serafyn*, the court objected that, in addition to relying on an unreasonably high standard of proof, the FCC seemed to evaluate each piece of evidence individually, deciding that no piece in itself sufficed to show intentional distortion, when it should have asked whether the evidence as a whole was sufficient to warrant an investigation.¹⁰¹ Indeed, when complainants can present extrinsic evidence of deliberate distortions, the Commission tends to atomize and dismiss them as isolated lapses, rather than weigh them as a whole and consider whether they warrant inquiry or penalty. This is especially true of evidence that might establish a pattern or

will, in appropriate cases . . . inquire into the matter . . .” *Hunger in America*, 20 F.C.C.2d 143, 150 (1969) (emphasis added).

⁹⁸*Citizens Communication Center (WMAL)*, 25 F.C.C.2d 705, 707 (1970).

⁹⁹*Id.*

¹⁰⁰*Id.* at 709.

¹⁰¹*Serafyn v. F.C.C.*, 149 F.3d 1213, 1220 (D.C., Cir., 1998) (“In making its decision, the Commission must consider together all the evidence it has.”)

policy of distortion, which would justify a stronger response.¹⁰² The *Serafyn* court found that the Commission wrongly dismissed the complaint for failing to show a pattern of intent to distort by CBS beyond this single story, ignoring potential evidence of such a pattern. The court pointed to complainant’s submission of prior published statements attributed to *60 Minutes* senior reporter Mike Wallace (“You don’t like to baldly lie, but I have”) and executive producer Don Hewitt (justifying journalistic deception because “[i]t’s the small crime vs. the greater good,” and claiming “I wouldn’t make Hitler look bad on the air if I could get a good story.”)¹⁰³

The Commission has rejected stronger evidence of generalized distortion in the past, even when it has agreed to investigate. In 1973, when CBS stations admitted staging two reports, the Commission declined to pursue the matter further by presenting them as isolated incidents. Reiterating its policy that “a pattern of repeated acts of this kind by employees may raise questions as to whether the licensee is adequately supervising its employees,” the Commission concluded that “during the span of years covered by these incidents, the network and stations licensed to it . . . have presented thousands of other news reports or documentaries on which we have received no allegations of staging or deliberate distortion.”¹⁰⁴ However, in the same ruling the Commission dealt with complaints about four other incidents from the House Commerce Committee, declining to act on them on grounds of insufficient evidence, despite exhaustive

¹⁰²Whether the Commission must find a policy or pattern of wrongdoing before acting has itself been a matter of debate. In *Mark Lane*, the majority dismissed a complaint against a TV station for deleting a talk show guest’s anti-military comments, claiming it feared they were defamatory, yet attributing the deletions on the air to “technical difficulties.” The majority said it would not investigate without “substantial extrinsic evidence” of a policy of “discriminatory programming” [citing NBC ‘Today’ Program (Letter to Hon. William H. Harsha), 31 F.C.C.2d 847 (1971)]. In dissent, Commissioner Johnson noted that in the past the FCC had held that one instance of discrimination could abridge the public interest [citing Letter to Albert H. Kramer, 25 F.C.C.2d 705 (1970)]. *Mark Lane*, 37 F.C.C.2d 630, 633, 635 (1972).

¹⁰³*Serafyn v. F.C.C.*, 149 F.3d 1213, 1218 (D.C., Cir., 1998).

¹⁰⁴*Columbia Broadcasting System*, 45 F.C.C.2d 119, 127 (1973).

inquiry by the Committee and the Commission. In addition, the FCC had handled at least five prior complaints about CBS in the previous five years, most referred from Congress. In several of these rulings, the Commission repeatedly took CBS to task for inadequately investigating itself, yet did not consider whether this constituted a pattern of negligent oversight of employees, and always declined to find distortion.¹⁰⁵ Similarly, in *Chronicle Broadcasting*, the complainants objected to the hearing examiner's failure to evaluate the overall picture of Chronicle's actions by "taking each item of alleged news management, analyzing it separately, and ruling on each in favor of Chronicle,"¹⁰⁶ citing the Commission's own rejection of such an approach in previous cases.¹⁰⁷

What would constitute a pattern of deceptive practices? The record sheds little light on this question. The Commission found, in *WMJX* and *Walton*, that hoaxes reported as news over a span of days rose to the level of a pattern, yet declined to question whether repeated accusations against CBS and its failure to investigate them properly over several years exhibited one. In *WPIX*, the Commission could not discern a pattern in over three months of dubious news practices, including over thirty instances of misrepresenting journalists as reporting from the scene of an event, mislabeling film as being delivered "via satellite," using stale video to illustrate "current" events without disclosure, misrepresenting the true location shown in video, and identifying outside journalists as WPIX reporters. The decision found that the "inaccurate

¹⁰⁵See Letter to ABC, 16 F.C.C.2d 650, 659 (1969) (requesting detailed reports of alleged staging incidents from all three networks); Columbia Broadcasting System, Inc. (WBBM), 18 F.C.C.2d 124, 139 (1969) ("Here there has been a serious mistake and an inadequate investigative report to the Commission . . ."); Selling of the Pentagon, 30 F.C.C.2d 150, 153 (1971) (urging the network to engage in "good-faith, earnest self-examination" of its editing practices); Columbia Broadcasting System, 45 F.C.C.2d 119, 128 (1973). ("the evidence indicates inadequate investigations in at least two of the cases").

¹⁰⁶*Chronicle Broadcasting*, 40 F.C.C.2d 775, 789 (1973).

embellishments concerning peripheral aspects of some of [WPIX's] news items were . . . few in number . . .”¹⁰⁸ When the Commission has perceived a pattern of deceptive news, it has sometimes turned to mitigating circumstances, as in the *WABC* case discussed above, in which the FCC admonished the station but renewed its license because the Commission was satisfied with the station's investigation and disciplining of its employees.

Vague, Arbitrary Definition of Extrinsic Evidence

In *Serafyn*, the court observed that “the Commission has not so much defined extrinsic evidence as provided examples of the genre and what lies outside it.”¹⁰⁹ The FCC repeated its longstanding requirement for “‘evidence outside the broadcast itself,’ such as evidence of written or oral instructions from station management, outtakes, or evidence of bribery,”¹¹⁰ or testimony from ‘insiders’ or persons who have direct personal knowledge of intentional distortion. Without such evidence, it would not infer intent to deceive from the broadcast itself. The Commission added that “Extrinsic evidence [must] demonstrate that a broadcaster knew elements of a news story were false or distorted, but nevertheless, proceeded to air such programming.”¹¹¹

In practice, the FCC has treated lightly evidence that seems to fit within its own definition, often refusing to investigate it. It has consistently cast a jaundiced eye on affidavits from news sources and eyewitnesses alleging distortion, sometimes over the dissents of its own members.¹¹² The Commission has not granted much more credence to journalists who have

¹⁰⁷See *The Walmac Co.*, 36 F.C.C. 507, 508 (1964); *Miami Broadcasting Corporation*, 19 F.C.C.2d 651 (1969).

¹⁰⁸*WPIX, Inc.*, 68 F.C.C.2d 381, 385 (1978).

¹⁰⁹*Serafyn v. F.C.C.*, 149 F.3d 1213, 1223 (D.C., Cir., 1998).

¹¹⁰*Id.* at 1219.

¹¹¹*Id.*

¹¹²See *Citizens Communication Center (WMAL)*, 25 F.C.C.2d 705, 709-10, 711-14 (1970) (Commissioners Cox and Johnson, in dissent, opposing majority's refusal to act on affidavit from theater producer contending that play excerpt was censored not because it

testified to distortion, despite its stated openness to information from insiders. In *Chronicle Broadcasting*, it found inconclusive numerous eyewitness and second-hand accounts compiled over several years by a KRON-TV camera operator that station management directed reporters to suppress news that reflected poorly on its parent company's business interests (including coverage of a controversial Joint Operating Agreement granted to the *San Francisco Chronicle* and *San Francisco Examiner*, and strikes against the company's media properties), and slanting reports to provide favorable coverage of communities in which the company was seeking cable television franchises. Among other evidence, the Commission rejected a documentary producer's account of being told by the president to kill a report on political factionalism in one town where Chronicle was seeking a cable license, and sloughed off several memos and the testimony of an assignment editor suggesting that the president directed the station's news director to cover a positive story in another city to improve Chronicle's cable bid.¹¹³

In *Tri-State Broadcasting Co.*, two newscasters alleged that they were fired from their jobs at KTSM-TV for refusing management's orders to slant news to serve the interests of local advertisers and politicians. The FCC dismissed for failure to provide extrinsic evidence of intent, rejecting one reporter's testimony that he was instructed to promote news favorable to

contained adult themes, as station claimed, but because it had a policy against showing news of inter-racial romance; Commission dismissed without seeking affidavits from news personnel present during the incident); *see also* Mark Lane, 37 F.C.C.2d 630, 635 (1972) (Commissioner Johnson, in dissent, objecting to majority's refusal to act on author's affidavit asserting that station deleted his anti-military remarks not because they were defamatory, but because the station disagreed with them; refusing action on a viewer letter from station's files complaining about station's deleting a talk show guest's views on marijuana because they were "unconventional," not due to technical difficulties, as station claimed); *American Broadcasting Co.*, 45 F.C.C.2d 41 (1973) (declining to find extrinsic evidence of staging a high school protest, despite eyewitness letters from press photographer and testimony of school security officer that camera crew directed protesters); *Louisiana Stations*, 7 F.C.C.R. 1503, 1506-7 (1992) (dismissing talk show guest's complaint that his criticisms of used car dealers were suppressed by station to avoid offending advertisers).

advertisers for having “merely set forth his own evaluation of certain news items broadcast by KTSM which, in his view, were not newsworthy.”¹¹⁴ In drawing on the same boilerplate language it often uses when dismissing distortion complaints from the public, the Commission did not seem to accord any additional weight to the news judgment of a journalist, who would appear to be somewhat more responsible for defining what is newsworthy at his station on a day to day basis. Yet a journalist’s testimony that he or she would have covered a story about an advertiser had management not forbidden it, or would not have covered one had management not demanded it, constitutes a special kind of evidence that can illuminate a broadcaster’s intent to slant. If the Commission is concerned with a licensee’s promoting or suppressing news “not as an exercise of news judgment, but as a deception of the public and to further his private interests,”¹¹⁵ then a journalist’s account of management intervention in the news selection process seems to be the most powerful evidence the Commission will get about management’s intentions, short of an admission of guilt. Nonetheless, the Commission has consistently chosen to weigh management’s denials of intent more heavily than journalists’ testimony.¹¹⁶

The *Serafyn* court partly based its finding of arbitrariness on the fact that the FCC has not entirely avoided assessing the content of a report in the past, and inferring intent from it, despite its claims to the contrary. In its precedent ruling in *Hunger in America*, the Commission left

¹¹³Chronicle Broadcasting, 40 F.C.C.2d 775, 799 (1973).

¹¹⁴Tri-State Broadcasting Co., Inc., 59 F.C.C.2d 1240, 1245 (1976). In dismissing, the FCC also pointed to evidence that KTSM did indeed cover allegedly suppressed stories. However, the reporters did not maintain that ongoing stories or subjects were entirely suppressed, but that they were instructed to kill or alter numerous individual reports to protect the station’s interests. The Commission did not address this distinction.

¹¹⁵Star Stations Of Indiana, Inc. 51 F.C.C.2d 95, 107 (1975).

¹¹⁶See Michael D. Bramble 58 F.C.C.2d 565 (1976) (rejecting news director’s complaint that general manager told him not to cover survey of supermarket prices that showed a top advertiser at station had highest prices in town, and dismissed him when he reported it); *see also*

open a door to considering more than extrinsic evidence of management intent “in the unusual case where the matter can be readily and definitely resolved.”¹¹⁷ Although the FCC has rarely peered through that door to find culpability, the court pointed to the *WMJX* hoax case, in which station management admitted knowing that a newscast about “missing” disc jockey Greg Austin was false, but denied intent to deceive the public, saying that the reports were intended as humor. The FCC determined that “newscasts reporting that the ‘Trip’ had put Austin ‘out of touch’ and that he was ‘mind-boggled’ and had ‘wandered off’ were clearly false and deceptive.”¹¹⁸ Rejecting the station’s claim that its news director, who wrote the reports, did not intend the audience to take them as factual, the Commission implicitly concluded that because they were false he intended to deceive rather than entertain. His “asserted lack of intent is not credible,” the Commission wrote, “and the ALJ was entitled to reject his testimony that he was merely taking a ‘writer’s liberty.’”¹¹⁹ The *Serafyn* court analogized: “Here, Serafyn argues that CBS got its facts so wrong that its decision to broadcast them gives rise to the inference that CBS intentionally distorted the news.” The court noted that,

while the Commission certainly may focus upon evidence relevant to intent and exclude all else, the problem is – as the Commission’s past decisions show – that the inaccuracy of a broadcast can sometimes be indicative of the broadcaster’s intent . . . an egregious or obvious error may indeed suggest that the station intended to mislead.¹²⁰

KMAP, Inc. 72 F.C.C.2d 241 (1979) (rejecting two reporters’ complaints that station management told them to suppress news of farm workers union).

¹¹⁷Hunger in America, 20 F.C.C.2d 143, 147 (1969).

¹¹⁸WMJX, 85 F.C.C.2d 251, 265 (1981) (footnote omitted).

¹¹⁹*Id.* at 266 (1981). *See also* Chronicle Broadcasting, 40 F.C.C.2d 775, 792 (1973), in which the Commission did not rule out evaluating the content of news reports relevant to Chronicle’s business interests when deciding whether its news was shaped by self-interested motives. “Such motives can, of course, be inferred from program content,” the Commission wrote. Inferences from content simply cannot be “the sole or primary evidence relied upon.” *See also* Selling of the Pentagon, 30 F.C.C.2d 150, 153 (1971), where the Commission noted that “we can conceive of situations where the documentary evidence of deliberate distortion would be sufficiently strong to require an inquiry – e.g., where a ‘yes’ answer to one question was used to replace a ‘no’ answer to an entirely different question . . .”

¹²⁰*Serafyn v. F.C.C.*, 149 F.3d 1213, 1223 (D.C., Cir., 1998).

Although the court quickly cautioned that it did not expect the FCC to investigate every accusation of inaccuracy, just the egregious and obvious, it seemed to have pushed the Commission to reopen the door to some inference from the news text.

The *Serafyn* court clearly construed the Commission's definition of extrinsic evidence more broadly than the Commission has in recent years. Despite the occasional peek at the broadcast text to infer intent, the FCC has mainly restricted itself to considering the "examples of the genre" it laid out in the late 1960s. In contrast, the court took the FCC to task for giving "illogical or incomplete reasons" for dismissing several examples of extrinsic evidence that might have shed light on whether the producers' intended to mislead their audience.¹²¹ This evidence included letters from interviewees that might have shed light on the producers' state of mind when creating the report (such as an interviewee's letter stating that the CBS producers misled him about the nature of the story). It also included letters from viewers that could help illuminate the gravity of factual errors (such as a letter from a rabbi who explained the correct translation of "zhyd" as "Jew," not "kike.") The evidence also included CBS' refusal to consult an expert on Ukrainian history, who offered his services to the producers. Here, the court rejected the Commission's argument that this refusal could not establish intent to distort because the choice of experts was solely a matter of CBS' editorial discretion, which the FCC will not question. The court maintained that "it is only because the broadcaster has such discretion that its ultimate decision may be probative on the issue of intent."¹²² Before the Commission could throw out this information, it had to explain "why CBS's decision to employ one expert over

¹²¹*Id.* at 1221.

¹²²*Id.* at 1223.

another – or not to employ any expert at all – is not probative on the issue of its intent to distort.”¹²³

The *Serafyn* decision suggests that the Commission has not clarified its definition of extrinsic evidence. Too often, the flexibility of the FCC’s definition seems to be deployed to avoid finding fault. It is not clear whether the definition of extrinsic evidence is limited to the examples laid out in the FCC’s early precedent decisions or not, and in what ways the Commission will or will not infer intent from the broadcast text. The Commission seems unwilling to weigh very heavily journalists’ testimony about their superiors’ intent to slant news.

Unreasonable Burden of Proof

Complainants have almost always shouldered the burden of introducing evidence, and the heavier burden of proving deliberate distortion. They must demonstrate that distortion was initiated by or known to the licensee or to its management. The difficulty of overcoming broadcasters’ denials of intent or knowledge is compounded by complainants’ lack of any right to compel discovery of the requisite extrinsic evidence. In defamation cases, the Supreme Court has recognized that it is unreasonable to require petitioners to show that defendants acted with absolute malice, which necessitates discussion of reporters’ state of mind when preparing a story, without enjoying a right to discovery.¹²⁴ Distortion complainants may wonder why the FCC has not extended the same courtesy to them.

The Commission’s reasoning in a case that stands as an apparent exception to this rule might well be used to abolish the rule. The case was *Chronicle Broadcasting*, in which the

¹²³*Id.* at 1223.

¹²⁴*Herbert v. Lando*, 441 US 153 (1979) (establishing that, because public figures who bring libel suits must prove that journalists exercised reckless or knowing disregard for the truth, plaintiffs must be able to probe a journalist’s state of mind at the time the journalist prepared the disputed report).

Commission shifted the burden of proof to Chronicle because “the principal facts surrounding Chronicle's alleged misconduct were peculiarly within its knowledge since those facts concerned the use of Chronicle's broadcast facilities.”¹²⁵ It is unclear why the allegations in this case, of promoting and suppressing news to favor the business interests of the licensee’s parent company, set it apart from any other news distortion claim in this regard. By definition, any licensee’s *intent* to distort the news to serve private ideological or business interests would appear to be “peculiarly within the licensee’s knowledge” and involve the use of his or her broadcast facilities. The FCC’s “distinction” in this case could as easily become the basis for shifting the burden of proof to licensees in all distortion cases.

More typically, the Commission has justified its inaction by taking licensees’ denials of intent to distort at face value, then dismissing complaints on grounds of conflicting evidence. In doing so, it has often practiced a “curious neutrality in favor of the licensee” when assigning the burden of proof to complainants and resolving contradictory evidence, despite the Circuit Court of Appeals instructions against doing so.¹²⁶ Even in *Chronicle*, as Commissioner Johnson argued in dissent, the FCC seemed to shift the burden of proof back to the complainants, accepting the hearing examiner’s requirement that they show “clear, convincing and unambiguous evidence” of the licensee's motives.¹²⁷ The Commission justified this move by stating that a lower standard might place the FCC “in the role of a censor imputing improper motivation for programming of which it disapproves.”¹²⁸ Johnson countered that the FCC should

¹²⁵Chronicle Broadcasting, 40 F.C.C.2d 775, 791 (1973).

¹²⁶Office of Communications of United Church of Christ v. FCC, 425 F. 2d 543, 547 (D.C. Cir. 1969).

¹²⁷Chronicle Broadcasting, 40 F.C.C.2d 775, 835 (1973).

¹²⁸*Id.* at 792.

place the burden of disproving intent on broadcasters in such cases, and that it could do so without violating licensees' editorial freedom:

[T]hough [the evidence] includes 'speech' to the extent that it involves conversations and management orders, it is surely not subject to First Amendment protections. Such conversations were clandestine. They were surely not designed to encourage debate on public issues. Further, those words which were introduced as evidence were the sort of speech encountered in conspiracy cases where X orders Y to 'take care of' Z. What the majority holds, in effect, is that even if it is clear that X so directed Y, principles of free speech somehow demand that X's motives be established by proof beyond a reasonable doubt. This, I think, is absurd.¹²⁹

Arbitrary Evaluation of Management Responsibility

The Commission's requirement of broadcaster intent or knowledge has created an evidentiary thicket that allows the FCC to avoid finding licensees responsible for distortion. Brian C. Murchison's assessment of the Commission's reluctance to find licensees guilty of making misrepresentations to the FCC can be applied as easily to its timidity in distortion cases. In both kinds of cases, the Commission must find deliberate and knowing deception. "[A]n inquiry based on mental state gives the agency flexibility," observes Murchison.

It affords defense lawyers room to argue the circumstances of each case so that there are virtually no 'precedents' which can command a certain result. Citizen groups alleging misrepresentation plainly do not benefit from the standard, but seem not to have specified the standard itself as a problem -- only the agency's reluctance in ambiguous cases to draw inferences and to make a finding of intentional deception.¹³⁰

In relation to distortion, the Commission tends to use its flexibility to shield broadcast management from responsibility for deceptive news.

On the one hand, the FCC has maintained that

it is well established that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee and that the fulfillment of the public interest requires the free exercise of his independent judgment . . . In addition, broadcast licensees must assume responsibility for all material which is broadcast through their facilities. This responsibility may not be delegated.¹³¹

¹²⁹*Id.* at 836.

¹³⁰Murchison, *supra* note 8, at 415.

¹³¹Michael D. Bramble 58 F.C.C.2d 565, 573 (1976).

The Commission has relied on the ultimate responsibility of the licensee to reject claims to a qualified right of access to the airwaves for journalists once they are hired by a station,¹³² and to news sources once they are invited to speak on a program.¹³³ The FCC has cited this ultimate responsibility in the few cases in which it ruled against broadcasters despite management denials of knowledge or intent to distort. For example, in its second *Star Stations* decision, the FCC decided that even if it lacked evidence that top management knew about slanted campaign coverage, “the same ignorance which protects Star’s character qualifications casts a long shadow across the adequacy of its supervision of the station,”¹³⁴ and this helped tip the balance in favor of a competing license applicant. Note that there is no Catch-22 here for broadcasters. The Commission made it clear in its precedent rulings that broadcasters will not be found negligent if they communicate a policy against distortion to employees, engage in good faith investigations of alleged deception, and take some action if wrongdoing is found.¹³⁵

On the other hand, the Commission has tended to shield licensees from responsibility by attributing distortion to journalists, yet finding management neither responsible nor negligent in

¹³² In *Bramble*, the Commission rejected a journalist’s argument that the First Amendment barred his employer from refusing to broadcast his reports absent a valid journalistic concern. The reporter contended that since the actions of a broadcaster, licensed by the F.C.C. to serve a public function, are extensions of state action, they should be subject to similar constitutional restraints. *Id.* at 572 (1976).

¹³³The FCC repeatedly declined to embrace Commissioners Cox’s and Johnson’s arguments, in dissent, that licensees should not be allowed to censor from a taped program the comments of an invited guest simply because they disagree with the comments. Nor did the majority take up Johnson on his frequent invitations to explore the implications for broadcasting of judicial precedents limiting the power of a private owner of forums traditionally used by the public for communication of views to exercise prior restraints on expression. *See* Citizens Communication Center (WMAL), 25 F.C.C.2d 705, 716 (1970); NBC ‘Today’ Program, 31 F.C.C.2d 847, 855-59 (1971); Mark Lane, 37 F.C.C.2d 630, 637-38 (1972); Student Association Of The State University Of New York, 40 F.C.C.2d 510, 519-21 (1973); National Citizens Committee For Broadcasting, 49 F.C.C.2d 83, 87 (1974).

¹³⁴*Star Stations Of Indiana*, 51 F.C.C.2d 114, 150 (1973).

¹³⁵*See supra* note 67.

overseeing its news personnel. In the *WBBM* precedent, the FCC declared that the reporter who instigated a pot party despite his news director's advice to avoid staging "should not be regarded as the fall guy in this case, but rather the licensee, under established policies, should bear the brunt of responsibility for the matter."¹³⁶ Nonetheless, it did not find *WBBM* management culpable, and assessed no penalty. Nine years later, in *WPIX*, the Commission overrode its Broadcast Bureau Counsel's recommendation to award the station's license to a competing applicant in part on character issues, excusing months of deceptive news practices as "attributable to one employee . . . who was the new, inexperienced producer of the evening news show during the period in which the aberrations occurred."¹³⁷ It seemed to excuse the head of the news department for failing to oversee the producer in part because at the time he "was involved in a large number of planning sessions with other department heads and management [so] it is not surprising that there were some initial difficulties in the news show's operation."¹³⁸

In dissent, three Commissioners objected that by

absolving *WPIX* from responsibility for the acts of the news program producer it selected and clothed with its authority, the majority not only departs from FCC precedent, but also runs afoul of one of the most basic principles of corporate law and administrative law in general. The law clearly requires that *WPIX* be held accountable for [its employees'] acts which resulted in a pattern of deception in violation of the station's public trust.¹³⁹

The dissenters argued that *WPIX* did not carry out its duty to investigate its employees' misconduct, brought to its attention by one of its own news writers' complaints and by an article in *Variety*, for two years, when its license was designated for a hearing by the Commission on these issues and others. The Broadcast Bureau concluded that the station conducted "a meaningless investigation that was intended to conceal rather than reveal the facts, the

¹³⁶Columbia Broadcasting System, Inc. (*WBBM*), 18 F.C.C.2d 124, 136 (1969).

¹³⁷*WPIX, Inc.*, 68 F.C.C.2d 381, 386 (1978)

¹³⁸*Id.* at 384.

¹³⁹*Id.* at 426 (footnote omitted).

employees who brought complaints quit or were fired by the licensee, no other WPIX employee [besides the news producer]... was fired or even reprimanded, and there was no licensee policy or control to prevent the news malpractices.”¹⁴⁰

Short of an admission of knowledge or guilt by management, it is extraordinarily difficult for the FCC to prove either in the corporate setting. As Commissioner Johnson wrote in dissent in *Chronicle Broadcasting*,

It is the rare case, indeed, where a member of the public -- or even a station's cameraman -- will be able to trace back orders from middle-management to the corporation's highest officials. The majority, by requiring that the corporation's highest executives must be proved to have had knowledge of -- and to have condoned -- middle-management conduct, erects an impenetrable shield around the corporate vehicle.¹⁴¹

In another dissent, Johnson observed that “responsibility is already substantially diffused throughout the corporate hierarchies of many large licensees. And when this Commission is alerted to charges of ‘payola,’ or news ‘staging,’ or fraudulent billing, its investigations often run into a blank wall . . . The problem is finding out ‘who's in charge here?’”¹⁴² Indeed, the networks, where layers of management are most dense, have only been found liable for distortion in the admonishment of NBC for staging the GM truck fires, issued after the network admitted it.¹⁴³

Exacerbating the FCC’s difficulty in establishing responsibility in news distortion cases is its shadowy definition of management. The Commission will not act without evidence that distortion was initiated by or known to the licensee or to “its principals, top management, or news management.”¹⁴⁴ Implicating news managers, who are closest on the chain of command to journalists, is a complainant’s best chance to meet this requirement. Yet it is not always clear

¹⁴⁰*Id.* at 427.

¹⁴¹*Chronicle Broadcasting*, 40 F.C.C.2d 775, 835 (1973).

¹⁴²*Star Stations of Indiana, Inc.*, 19 F.C.C.2d 991, 1001 (1969).

¹⁴³The 1973 case involving CBS found distortion in reports created at its owned and operated stations, not in network news. *Columbia Broadcasting System*, 45 F.C.C.2d 119 (1973).

from previous rulings whom the Commission would count as a news manager. In most cases, a station's news director is treated as part of its news management. But in *WPIX* the dissenting Commissioners noted that the majority decision focused entirely on the chief of the news department's actions, ignoring a memo from the news director stating that "the key to rebuilding the news image lies equally in more frequent exposure during the week and in a cleverly designed campaign to create the illusion . . . that WPIX has a fully competitive news gathering facility."¹⁴⁵ The dissenters saw such a campaign as being carried out by the news producer. The Circuit Court, in *Serafyn*, seemed to consider the *60 Minutes* executive producer and senior correspondent to be part of the network's news management,¹⁴⁶ which seems to be a more inclusive definition than the Commission has used thus far.

In practice, the management intent standard seems to give the Commission great latitude to isolate and excuse wrongdoing in the lower organizational echelons, and licenses the power to deny responsibility. The Commission's tendency to allow accountability to dissipate down the long corridors of corporate broadcasters undermines its goal of encouraging licensees to probe themselves and deal honestly with outsiders, including the Commission itself. Again, Murchison's assessment of the Commission's handling of misrepresentation applies to its treatment of distortion. He writes that the FCC

is an agency moving in two different directions: on the one hand, stating a strong policy requiring accuracy and threatening a potent sanction for offenders; on the other hand, developing a definition of liability which allows maximum discretion for appraising individual cases, so that the decision-makers may avoid imposing the sanction.¹⁴⁷

¹⁴⁴Hunger in America, 20 F.C.C.2d 143, 150 (1969).

¹⁴⁵WPIX, Inc., 68 F.C.C.2d 381, 427 (1978).

¹⁴⁶See *Serafyn v. F.C.C.*, 149 F.3d 1213, 1221 (D.C., Cir., 1998).

What's News?

Perhaps the most distressing aspect of the news distortion policy is that the Commission has never offered a clear definition of what it considers news, and what, therefore, it is attempting to regulate. In the 1970s and early 1980s, the Commission applied its distortion rules to a broad range of programming in cases involving a theatrical excerpt banned from a women's morning television program,¹⁴⁷ an anti-war halftime presentation blacked out of a football game,¹⁴⁸ and staff-written questions presented as spontaneous audience remarks in a morning talk show.¹⁴⁹ In a 1974 statement that aimed to resolve whether the rules applied to sporting events, the Commission made no real distinction between the *CBS Evening News* and *Monday Night Football*, when it concluded that,

for purposes of its regulatory policies, the Commission believes it makes no difference whether broadcasts of sports events are considered as news or entertainment. In either case, the Commission has consistently held that it is the licensee's responsibility to refrain from engaging or permitting others to engage in substantial deception of the public by deliberate falsification, distortion or suppression of facts.¹⁵¹

However, the Commission's pendulum now swings too far in the other direction, as it has abruptly begun defining news much more narrowly in recent cases, offering no rationale for this change. In the radio hoax cases in which the FCC revoked licenses it made little distinction between statements that perpetuated the fake kidnappings, whether they were made in newscasts or in disc jockeys' ad-libs between songs.¹⁵² However, in a 1993 case, the FCC dismissed a

¹⁴⁷Murchison, *supra* note 8, at 407.

¹⁴⁸See *Citizens Communication Center (WMAL)*, 25 F.C.C.2d 705 (1970).

¹⁴⁹See *Student Association Of The State University Of New York*, 40 F.C.C.2d 510 (1973).

¹⁵⁰*American Broadcasting Co., Inc.*, 52 Rad. Reg. 2d (P & F) 1378 (1982).

¹⁵¹*Practices Of Licensees And Networks In Connection With Broadcasts Of Sports*, 48 F.C.C.2d 235, 237 (1974).

¹⁵²In *Walton*, the Commission made much of announcements and a faked police actuality about the "kidnapping" that were broadcast between songs and not during a newscast, but taken as news. The FCC asserted that "the significant fact is that the hoax kidnapping announcements were broadcast on the news *and on other programs* and the public was not informed that, in fact,

complaint by a station's news director about a sexual joke made about her by an announcer at a rival station during a call-in segment of a morning program at her own station. The Commission rejected the claim in part because it did not consider the morning, drive-time disc-jockey program to be news.¹⁵³ In the same year, the FCC rejected allegations of news suppression by the Louisiana Consumers League against radio station KRMD, which cut short a live talk show interview with a newspaper columnist who criticized car dealers' trustworthiness and negotiating tactics, after local car dealers who advertised on the station called to complain. KRMD cancelled a planned taped interview with the columnist, and aired editorials accusing the columnist of conducting business in a "dishonest or unethical manner" and maintaining that he "unscrupulously used" the station.¹⁵⁴ The Commission dismissed, stating flatly that the distortion rules did not apply to the "non-news programming at issue in the present case."¹⁵⁵ In these later decisions, the FCC has arbitrarily narrowed the scope of what it considers news.

RESPECTING NEWS, OR TRIVIALIZING IT?

To show that a regulation is symbolic also requires demonstrating that the Commission is failing to meet its stated policy goals. The Commission has identified its overarching aims as protecting the integrity of the political information upon which citizens rely to govern themselves, and avoiding infringing on broadcasters' legitimate news judgments in a way that would chill controversial speech.¹⁵⁶ However, as the FCC stretched the news distortion rules to

it was a hoax" Walton Broadcasting, Inc., 78 F.C.C.2d 880, 958 (1976) (emphasis added). In *WMJX*, the administrative law judge extensively discussed disc jockeys' ad libs under the heading "Newscasts Concerning the 'Find Greg Austin' Contest," finding that the ad libs "were consistent with the newscasts and served to strengthen the impression which they created." *WMJX*, 85 F.C.C.2d 251, 265 (1981).

¹⁵³*EZ Communications, Inc.*, 8 FCC Rcd 2448, 2449 (1993).

¹⁵⁴*Louisiana Stations*, 7 F.C.C.R. 1503, 1506 (1992).

¹⁵⁵*Id.* at 1506.

¹⁵⁶*Hunger in America*, 20 F.C.C.2d 143, 150-51 (1969).

cover a wide range of cases, most often dismissing them, it has suggested other goals as well in the past. This section distinguishes those goals, and whether the Commission's enforcement record has fulfilled them.

The Commission has clearly established, and acted to defend, two aims. First, the FCC has aimed to prevent licensees from using the news to promote contests deceptively, as in the hoax cases. Second, the Commission has drawn on the distortion rules to try to block licensees from using the news (as opposed to editorials) to promote a particular political candidate. Recall that in *Star Stations*, the Commission found against licensee Don Burden because his station's "newscasts were used as a vehicle to publicize Burden's preferred candidate – not as an exercise of news judgment, but as a deception of the public and to further his private interests."¹⁵⁷ Yet it is difficult to see Burden's promotion of candidates as an act of deceiving the public, since the ruling cited no evidence that the stations promised their audience to be neutral in these campaigns. The decision makes more sense as a rejection of the licensee's prerogative to use the news to promote a chosen candidate, particularly, as in the Hartke Senate campaign, when the candidate is touted in return for an anticipated benefit to the licensee's business. Thus, the Commission's goals here seem closer to the political broadcasting rules, which attempt to preserve candidates' fair and equal access to the airwaves.¹⁵⁸

The FCC has extended the distortion rules to other goals as well, although it has almost never enforced them to serve these aims. These have to do with preventing broadcasters from using their stations to serve their private interests, when they conflict with the public interest. First, the FCC has applied the rules to try to curb licensees from entirely suppressing news of

¹⁵⁷Star Stations of Indiana, Inc., 51 F.C.C.2d 95, 107 (1975).

¹⁵⁸47 U.S.C. § 315 (2000).

controversial people, subjects and events for fear of alienating segments of the public.¹⁵⁹

However, it has not ruled against a broadcaster on such grounds.¹⁶⁰ Second, the Commission has also made it clear in a number of distortion cases brought by journalists against their employers that licensees' "refusal to broadcast material -- which otherwise would be broadcast -- because of pressure from an advertiser is an obvious example of subordinating public to private interest."¹⁶¹

Yet the Commission has not acted against a broadcaster for this reason either, typically dismissing allegations that a licensee instructed reporters to cover promotional events created by advertisers, or to kill stories adverse to them, as within the realm of the licensee's news judgment.¹⁶²

Third, the Commission has attempted to prevent broadcasters from promoting or suppressing news to serve their company's direct business interests. Of course, all commercial news is selected to attract an audience for a station's advertisers, indirectly serving the licensee's business. However, the Commission has expressed its concern for bending the news to advance a station's or its parent company's other commercial interests. In one of the contest hoax cases,

¹⁵⁹See *Citizens Communication Center (WMAL)*, 25 F.C.C.2d 705, 707 (1970) (dismissing complaint, but suggesting that a policy against showing news of interpersonal relationships between the races would constitute suppression); *see also* *Student Association Of The State University Of New York*, 40 F.C.C.2d 510, 516 (1973) (dismissing complaint about blacked out anti-war demonstration, but noting that refusing to broadcast valid but controversial ideas for arbitrary or discriminatory reasons would violate the public interest); *KMAP, Inc.* 72 F.C.C.2d 241, 243 (1979) (dismissing complaint, but maintaining that station management may not tell reporters to suppress all news of farm workers union in a farm community).

¹⁶⁰The closest the Commission came was in a 1971 case, in which it designated for hearing the license of a southern radio station in part because it had stated a policy of suppressing news of local black civil rights struggles. However, the Commission did not invoke the distortion rules, instead considering the station's news practices in light of the Fairness Doctrine, the Commission's ban on racially discriminatory programming, and the station's duty to serve the informational needs of its community. *WSNT, INC.*, 27 F.C.C.2d 993 (1971).

¹⁶¹*Michael D. Bramble*, 39 F.C.C.2d 992 (1973).

¹⁶²*See* *Chronicle Broadcasting*, 40 F.C.C.2d 775, 799 (1973); *Tri-State Broadcasting Co., Inc.*, 59 F.C.C.2d 1240, 1244 (1976); *Louisiana Stations*, 7 F.C.C.R. 1503, 1506-7 (1992).

the FCC declared itself more willing to discipline broadcasters for this type of speech, deeming it less worthy of First Amendment protection. The FCC wrote

Where, as here, the danger is manipulation of the news to further the licensee's business interests, rather than manipulation of the news to create a biased or one-sided impression on public issues, there is less potential for censorship and the Commission need not be as hesitant in imposing a sanction.¹⁶³

Yet, aside from the hoax cases and the blacked out tennis tournament in *Gross Telecasting*, the Commission has not sanctioned a licensee for this offense in a distortion case. A divided Commission cleared Chronicle Broadcasting of using the news to advance its cable and other interests,¹⁶⁴ and a similarly split ruling absolved WPIX of misrepresenting its news capabilities by purporting to have a larger news staff, mislabeling film, and so forth.¹⁶⁵ It is not surprising, then, that the administrative law judge in *Gross* seemed to complain that "Commission case law does not provide clear guidelines relative to the airing of news stories or the non-airing of such stories which may directly relate to the owner of the broadcast facility or indirectly relate to its advertisers."¹⁶⁶

Paradoxically, the Commission's professed respect for news, and for licensees' editorial discretion, often restricts it from finding liability for all but the most trivial kinds of complaints. The Commission has poured much investigative effort into finding licensees guilty of falsifying weather temperatures and suppressing coverage of a tennis tournament. Despite the FCC's requirement that distortion concern a matter of significance to the public, the Commission has most often used its ultimate penalty, license revocation, in cases involving contest-related news about the whereabouts of disc jockeys. Although the public may have some interest in full and

¹⁶³WMJX, 85 F.C.C.2d 251, 266 (1981).

¹⁶⁴Chronicle Broadcasting, 40 F.C.C.2d 775, 799 (1973).

¹⁶⁵WPIX, Inc., 68 F.C.C.2d 381 (1978).

¹⁶⁶Gross Telecasting, Inc., 92 F.C.C.2d 248, 412 (1981).

accurate news of weather, sports, and celebrities, these topics are hardly the lifeblood of active citizenship and voting.

The FCC's high burden of proof appears even less to serve the purported goals of the news distortion rules when contrasted with its lower requirements for showing wrongdoing in regard to less important programming. As National Public Radio (NPR) recently argued in an indecency case, there is no need to show management intent or knowledge, or to show a pattern of violations, in this area – “all that is necessary for a forfeiture to be issued for an indecent broadcast is that the material was aired and the Commission found it to be indecent.”¹⁶⁷ Nor does the Commission refrain from being the “arbiter of the truth” in indecency cases when resolving such thorny issues as the standards of the average viewer or listener, and whether a broadcast violated them. As the FCC summarized NPR's argument: “it is incongruous to have a higher level of proof in news distortion cases than in indecency cases since the potential for public harm is much greater in news distortion cases than in indecency cases.”¹⁶⁸ If the FCC still believes that “there is no act more harmful to the public's ability to handle its affairs”¹⁶⁹ than distorting news, the Commission seems more willing to investigate and punish representations of indecent affairs than of public affairs. In addition, the FCC has held licensees more responsible in cases involving false billing of advertisers,¹⁷⁰ rigged contests,¹⁷¹ and stations preferentially

¹⁶⁷NPR Phoenix, 13 F.C.C.R. 14070, 14072 (1998).

¹⁶⁸*Id.*

¹⁶⁹Hunger in America, 20 F.C.C.2d 143, 151 (1969).

¹⁷⁰The dissenters in *WPIX* contrasted the Commission's dismissal in this case with its stronger reprisals for cheating advertisers in *WDXB Broadcasting Co.*, 26 F.C.C.2d 1011 (1971) (forfeiture); *Wharton County Broadcasting Co., Inc.* 25 F.C.C.2d 1029 (1970) (forfeiture); *Empire Broadcasting Corp. (KXXL)*, 63 F.C.C.2d 634 (1977) (short-term renewal and forfeiture); *WEAU, Inc.*, 50 F.C.C.2d 659 (1975) (short-term renewal and forfeiture); *White Mountain Broadcasting Co.*, 60 F.C.C.2d 343 (1976) (license renewal denied); and *WLLE*, 65 F.C.C.2d 774 (1977) (license revoked).

promoting their disc jockeys' outside activities over competitors.¹⁷² In these areas, the FCC has sometimes taken licenses for such offenses, even if licensees were unaware of violations, by citing their failure to exercise adequate supervision of employees. It has been capable of doing so because it has not employed the extrinsic evidence standard and burden of proof used in news distortion cases.

REWRITING THE DISTORTION RULES

Symbolic regulations extend a deceptive promise to the public, in this case that the FCC will act as a bulwark against deliberate distortion of the news. In this policy area, the Commission has shown itself to be the proverbial dog that won't hunt. Enforcement of the distortion rules has been stymied by a lack of regulatory clarity and will. It has also been blocked by licensees' ability to assert their First Amendment rights above the public's right to honest news, and journalists' right to report according to professional standards. Examining the Commission's existing rules reveals many flaws. FCC policy lacks clear definitions of the many kinds of distortion mentioned in past decisions, and of news programming itself. It lacks a consistent and reasonable evidentiary standard. It encourages the FCC to consider evidence of wrongdoing in isolation rather than as a whole, and lacks guidance as to what would constitute a pattern of distortion sufficient to trigger a sanction. The policy's requirement that complainants present extrinsic evidence of management intent erects an almost impossible standard of proof,

¹⁷¹The dissenters in *WPIX* cited *Bremen Radio Co.*, 41 F.C.C.2d 595 (1973) (application for mitigation of forfeiture denied); *Musical Heights, Inc.*, 65 F.C.C.2d 882 (1977) (short-term renewal); *Communico Oceanic Corp.*, 55 F.C.C.2d 733 (1975) (short-term renewal); *Greater Indianapolis Broadcasting Co.*, 44 F.C.C.2d 599 (1973) (short-term renewal); *Santa Rosa Broadcasting Co., Inc.*, 9 F.C.C.2d 644 (1967) (license revoked).

¹⁷²*See* *Waterman Broadcasting Corp. of Texas*, 28 F.C.C.2d 348 (1971) (notice of apparent liability for forfeiture); *see also* *Fuqua Communications, Inc.*, 30 F.C.C.2d 94 (1971) (notice of apparent liability for forfeiture); *see also* *Radio WCMQ, Inc.*, 62 F.C.C.2d 487, 488

putting the burden of proof entirely on complainants, yet offering no right of discovery. The Commission has acted arbitrarily when deciding whether to infer intent to distort from the news text, and whether a program even constitutes news.

In the absence of policy reform, potential complainants would be wise to avoid wasting their resources on fruitless petitions to the FCC, and instead consider other strategies for responding to such reports. Citizen groups, political figures and others might turn to tort remedies and aggressive publicizing of distortions. Journalists forced to promote or suppress reports to serve their employer's politics or bottom line should take note of an investigative reporter's recent court victory, under appeal, against Fox station WTVT. The reporter argued successfully that station management, fearful of libel threats from the drug company Monsanto, fired her for refusing to include in a story the company's false claims in defense of its bovine growth hormone, which is injected in cows to increase milk production. The jury agreed that station managers fired the journalist in retaliation for advising them that she planned to alert the FCC that she was told to falsify her report, in violation of the news distortion rules. The plaintiff sued under a state whistleblower law written to protect employees who give information about their employer's violation of federal law or regulation – probably the first time that the news distortion policy has been used to protect journalists in this way.¹⁷³

Nonetheless, the FCC must act to reinvigorate its news distortion policy, as alternative remedies are insufficient. Whistleblower laws cannot compensate journalists unless they sacrifice their jobs, and possibly their careers, to sue a news organization. Tort suits and

(1976) (licensee “strongly admonished” and told to cease or face “severe administrative sanctions”).

¹⁷³Sarah Schweitzer, *TV Reporter Wins Lawsuit Over Firing From Station*, ST. PETERSBURG TIMES, Aug. 19, 2000, at 1B. For a fuller account of the case from the journalist's

effective public relations often require more resources than are possessed by citizen groups, local political candidates and small businesses. Civil remedies also fail to directly vindicate the *public's* interest in honest journalism and the optimal use of the spectrum by the most qualified licensees possible. The Commission could renew and revise its policy without trampling broadcasters' speech rights by exploring two broad avenues for reform.

First, the FCC should adjust its policy to the realities of today's broadcast news marketplace, in which news is clearly a for-profit enterprise that is less distinguishable from commercial speech, and therefore deserves limited First Amendment protection.¹⁷⁴ The Commission could then borrow from the Federal Trade Commission (FTC) regulations on deceptive advertising to reform its distortion rules. The FTC's three-part definition of deceptive advertising involves a) a representation, omission or practice likely to mislead a consumer who, b) is acting reasonably under the circumstances, when c) the representation, omission or practice is material to the deception.¹⁷⁵ The FTC has applied its policy to a wide variety of practices and texts aimed at drawing public attention to products, persons and organizations (including trading stamps, freebies and product labels).¹⁷⁶ Television news, although not mere advertising, is indeed a free service offered to consumers for the purpose of attracting audiences for advertisements. As this purpose has come to the fore, eclipsing its functions as providing

perspective, *see* Steve Wilson, BGH Bulletin, *available at* [http:// www.foxbghsuit.com/](http://www.foxbghsuit.com/) (last modified Oct. 2000).

¹⁷⁴Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976). *See also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969) ("It is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.")

¹⁷⁵FTC Policy Statement on Deceptive Acts and Practices, 4 Trade Reg. Rep. 13205, 20919 (Oct. 4, 1983).

¹⁷⁶*See* DON R. PEMBER, MASS MEDIA LAW 550 (1999).

political information or offering a public service in exchange for the privilege of using the spectrum, it has become more analogous to the kind of speech regulated by the FTC.

Adapting the FTC standard to apply to news distortion (substituting a reasonable viewer for the FTC's reasonable consumer) would offer many advantages. The FTC's three-part test for deceptive ads would clarify the FCC's definition of staging, falsification and deception in news. It would streamline the handling of such cases and remove an undue burden on complainants by eliminating the need to determine whether journalists or management intended to deceive viewers.¹⁷⁷ As the FTC does when assessing advertisements,¹⁷⁸ the FCC would examine the whole text when deciding whether a representation or practice is likely to mislead, rather than considering evidence in isolation. The FCC could assess the full news report and the series of which it is a part to determine what expectations of reality they create in a reasonable viewer and whether those expectations were violated. This would be an improvement over the Commission's past arbitrariness in including or excluding whole genres of programming as news. Like the FTC, the FCC would more often expect broadcasters to carry the burden of proof that there is a reasonable basis in fact for their claims.¹⁷⁹ The FCC could adopt the FTC's fairer evidentiary standard as well, which may involve seek extrinsic evidence, but does not require

¹⁷⁷The FTC's decision to render intent irrelevant to its analysis was upheld in *FTC v. World Travel Vacation Brokers*, 861 F.2d 1020, 1029 (7th Cir. 1988). Instead, the FTC assesses whether an ad inspires a "likelihood or propensity of deception," a standard upheld in *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976).

¹⁷⁸The FTC policy applies both to express and implied claims in ads. In assessing implied meaning, the FTC can examine internal evidence, such as the contents of the text, as well as the surrounding context and circumstances of the ad. *See Thompson Med. Co.*, 104 F.T.C. 648, 790 (1984).

¹⁷⁹The FTC puts the burden of proof on advertisers when it instructs them to substantiate their claims during an agency investigation. If the FTC sues in court to stop an allegedly deceptive practice, the burden reverts to the Commission. *See PEMBER, supra* note 176, at 560.

it.¹⁸⁰ The FTC's rules give other businesses standing to bring complaints against deceptive ads, because these rules are rooted in part in the recognition that deceptive advertising harms competitors as well as consumers.¹⁸¹ Similarly, the FCC could consider extending standing to broadcasters that are harmed when a competitor attracts audiences using deceptive practices, such as were used in the WPIX case (presenting other organization's reporters as their own, claiming that old file film was current or delivered via satellite, and other attempts to create the illusion of a superior news department.)¹⁸²

The FCC could also follow the FTC in adopting a broader range of penalties than license revocation, including issuing industry guides on permissible claims and practices, seeking voluntary compliance, consent agreements, agency orders, demands for substantiation of claims, corrective programming, injunctions and trade regulation rules. More choice of sanctions would give the FCC the flexibility, and perhaps the courage, to act more often on instances of distortion. The Commission could apply its fullest investigative activity and most potent remedies for distortions that are material to audiences' ability to function as citizens and consumers (including consumers of news.) Coverage of sports and celebrities, which the Commission has spent more energy probing in the past, would receive a lower priority.

The new standard and remedies could help the Commission address some of the current ethical shortcomings of broadcast news that repeatedly make headlines despite broadcasters' promises to correct themselves. For example, undisclosed or ambiguously presented

¹⁸⁰This standard has been upheld in *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 319-21 (7th Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

¹⁸¹See PEMBER, *supra* note 176 at 549.

¹⁸²The recent use of new image-manipulation technology by *CBS Evening News* to electronically obliterate competitor NBC's billboard in Times Square, and cover it with a CBS News billboard, in a live New Year's Eve broadcast in 1999 raises relevant questions. See Alex

reenactments, recreations and product tests have raised a good deal of concern among journalists and commentators.¹⁸³ The Commission needs to establish guidelines for disclosure of these practices that are as clear as the FTC's instructions for advertisements, and a range of penalties appropriate to the harm done to citizens and consumers when they are violated.

However, the FTC standard cannot address many distortions that involve suppression or promotion of news in the licensee's private interest. When corporations censor their own journalists, there is no news text to evaluate, and the public is left unaware of the practice. When journalists select or are told to air stories that cross-promote a parent company's products, there may be no staging or falsification in the report. Nonetheless, both practices violate the Commission's ban on licensees subordinating the public interest in news to their private interest.

Thus, the second avenue of reform that the FCC should explore involves recommitting to itself to a vigorous conflict of interest policy. Here, the Commission need not fear that it is being overly intrusive into licensees' editorial decisions if it restricts its inquiry to the question of whether broadcasters substitute calculations based on their ideological or business interests for their, or their journalists', news judgment. In such cases, the FCC would not be evaluating

Kuczynski, On CBS News, Some of What You See Isn't There, N.Y. TIMES, Jan. 12, 2000, at A1.

¹⁸³See Richard Cohen, *Simulating the News; Can You Depict 'Reported' Testimony About 'Alleged' Events?*, WASH. POST, Feb. 4, 1990, at C5 (discussing ABC evening news presentation of simulated surveillance video of State Department official Felix Bloch passing a briefcase to a Russian spy, seeming to offer evidence that Bloch, who was under suspicion for espionage but never arrested or tried, was guilty); Daniel Schorr, *TV's Tricks Aren't New, Just Standard Fare Of The Trade*, ARIZ. REPUBLIC, Mar. 7, 1993, at C5 (discussing *Dateline NBC* newsmagazine staging of a truck safety test to produce a fiery crash); Howard Kurtz, *Real Cops. Real Crooks. Real Bogus. Fox-TV Stages Some Scenes of Its Wildest Police Chases*, WASH. POST, May 1, 1999, at A1 (discussing undisclosed reenactments and staging of police chases, animal attacks on humans, and so on, in Fox's reality-based programs); Jim Rutenberg & Felicity Barringer, *Apology Highlights ABC Reporter's Contrarian Image*, N.Y. TIMES, Aug. 14, 2000, at C1 (discussing ABC investigative reporter John Stossel's admission that he cited research that did not exist to cast doubt on the safety of organic foods).

whether the broadcaster's news judgment is right or wrong, but whether the broadcaster used or abandoned it.¹⁸⁴ In thinking through this distinction, the Commission could begin with the composite definition of editorial judgment that Randall Bezanson has elicited from a review of recent state and federal case law. He finds the courts using three criteria oriented toward the communicator's purpose to determine whether his or her communication qualifies as editorial judgment worthy of some level of First Amendment protection:

the choice of material (i) must concern information and opinion of current value to the public, or to an undifferentiated audience of interested consumers of non-fictional current information; (ii) must be made independently, oriented to the audience's needs as well as preferences; and (iii) must be grounded on a judgment about the specific content being published. These three criteria aptly describe the paradigmatic qualities of editorial judgments concerning "news" - decisions about public value and need for current information, arrived at independently of government compulsion or coercion, advertiser dictate, or purely self-interested motive. The criteria also effectively steer clear of judicial assessment of value or content . . .¹⁸⁵ (830)

Indeed, the Commission itself has forged some conflict of interest principles in past rulings, although it does not appear to have enforced them of late. In cases involving "plugola" (disc jockeys selecting and promoting recordings in which they have a financial interest) and news commentary, the FCC has established expectations that broadcasters should investigate potential conflicts of interest their employees may have, remedy them, or disclose them on air:

We expect licensees to exercise reasonable diligence to learn whether their employees or those with whom they deal directly in connection with program matter have private financial interests in matters which may affect the selection of program material. If such conflicts of interest exist, the licensee should insulate the persons with such interests from the program selection process or, if this is impossible, exercise special precautions to make sure that the public is not deceived as to the motivation for the broadcast of the program matter.¹⁸⁶

¹⁸⁴ See Randall P. Bezanson *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 761 (1999) ("The Supreme Court has also implicitly recognized that expressive activities of the press that are not the product of editorial judgment are not protected under the press guarantee.")

¹⁸⁵ *Id.* at 830.

¹⁸⁶ In the Matter of Termination of 'Plugola' Rulemaking and Affirmation of Disclosure Requirement, 76 F.C.C.2d 227, 228-29 (1980). See also *Crowell-Collier Broadcasting Corporation*, 14 FCC 2d 358-59 (1966).

Specifically in regard to news, the FCC has written that when a broadcaster editorializes on controversial issues in which it has a financial stake, it is obligated to “reveal to the broadcast audience the extent and nature of its private interest.”¹⁸⁷ The Commission has also established a duty to disclose conflicts of interest in commentaries by a network journalist, the licensee’s obligation to investigate such conflicts on the part of her or his employees, and to remedy them.¹⁸⁸ In addition, the Commission has fined a broadcaster that aired announcements promoting commercial events staged by its management or employees for failing to disclose the station’s financial sponsorship, failing to log the promotions as commercials, and gaining an unfair competitive advantage over rival promoters by charging them regular advertising rates to air similar messages.¹⁸⁹

As media mergers and news sharing agreements entangle broadcast news departments in larger webs of corporate ownership and alliances,¹⁹⁰ the Commission should revise and enforce its conflict of interest principles. The FCC could draw on them to address growing use of news to cross-promote parent company media products¹⁹¹ and affiliated network programs.¹⁹² The

¹⁸⁷Gross Telecasting, Inc., 14 FCC 2d 239-40 (1968) (finding that a station that editorialized about the management of an airport facility where it owned a restaurant should have disclosed its financial interest in the facility).

¹⁸⁸See National Broadcasting Co., 14 FCC 2d 713 (1968) (finding that network erred in failing to stop its anchor-commentator from airing repeated commentaries favoring the interests of the cattle industry, in which he was financially interested.)

¹⁸⁹See KISD, Inc., 22 FCC 2d 833 (1970).

¹⁹⁰See Mike Hoyt, *With 'Strategic Alliances,' the Map Gets Messy*, COL. JOURNALISM REV., Jan.-Feb. 2000, at 72.

¹⁹¹See, e.g., Jenifer Glaser, *Synergy Watch: Coming Distractions*, COL. JOURNALISM REV., Sept.-Oct. 1998, at 13 (discussing promotional stories about Disney films on Disney-owned ABC’s *World News Sunday*); John McManus, *Is it News or an Ad?*, available at <http://www.gradethenews.org/pagesfolder/Millionaire.html> (discussing ABC-owned station’s feature story on the release of a board game based on ABC’s *Who Wants to be a Millionaire?* game show, including offering a web address where the game could be purchased, without disclosing cross-ownership interest).

Commission could resurrect its precedents in this area, but it would need to clarify its policy on the unacceptable nature of various cross-promotions, and explicitly extend its concern for disclosing and mitigating licensees' conflicts of interest outside the narrow context of editorializing. The FCC's stated concern for undisclosed promotions as a form of unfair competition should be applied to news programming designed to promote a licensee's own media holdings. The Commission should also act to curb suppression of news in the corporate interest¹⁹³ by restating and clarifying its ban on censoring news according to the licensee's business concerns and advertiser pressures.

As for journalists, the Commission should explore ways to enforce its requirement that commentators (including pundits and investigative reporters) avoid or disclose financial interests in the issues they cover, and that licensees address potential conflicts that arise. The FCC might address the dubious "speaking fees" that many top journalists receive from industry actors whose interests they cover on a regular basis (without disclosing these payments), appear to compromise these reporters' independence,¹⁹⁴ and may already violate the Commission's policy that "the public is entitled to know by whom it is persuaded."¹⁹⁵

Even these revisions to the Commission's policy will not address the larger ways in which the agenda of commercial news can offer a distorted image of reality to viewers. For

¹⁹²See, e.g., John Carman, *Sunshine State and Strippers During Sweeps*, S.F. CHRON., Dec. 5, 2000, at D1 (discussing NBC-affiliated station's tie-in story on cruises following the station's airing of the film *Titanic*, which claimed that "as a result of the popularity of 'Titanic,' interest in cruising is at a peak!")

¹⁹³See sources cited *supra*, note 23 and 25.

¹⁹⁴See generally HOWARD KURTZ, *HOT AIR: ALL TALK, ALL THE TIME* (1996).

¹⁹⁵In the Matter of Termination of 'Plugola' Rulemaking and Affirmation of Disclosure Requirement, 76 F.C.C.2d 227 (1980).

example, these reforms cannot affect news' tendency to over-represent crime and disasters.¹⁹⁶

The larger failings of market-driven news, like the weather, are much remarked upon, but generate little action. However, if the FCC devoted renewed attention to its distortion policy, it would be one useful step toward restoring the public's stake in what passes for news on the airwaves.

Shortly after the Commission codified its distortion policy in the late 1960s, Commissioner Nicholas Johnson saw that his colleagues were deploying it to protect licensees' ability to censor the views of invited news sources and their own journalists. Concerned with the wide scope of editorial discretion and the narrow band of accountability the FCC had created for licensees, he wrote to his colleagues that "it is long past time for us to begin a general policy review of the existing judicial precedent, past Commission decisions, and general communications and First Amendment policies affecting cases like this."¹⁹⁷ Thirty years later, he is still right.

¹⁹⁶See Carole Kneeland, *A Grueling Standard to Live By*, *Nieman Rep.*, Fall 1996, at 15 (noting that at the same time violent crime rates fell in the 1990s, coverage of it rose in television news). See also Ray Surette, *Media, Crime and Criminal Justice: Images and Realities* 62-63 (1992) (reviewing the literature on crime news, and finding that murder, while the type of violent crime most rarely committed, is the type most often reported.) In a series of petitions to deny licenses of Denver-area television stations, a citizen group attempted to use the distortion rules to address the larger issue of distorted news agendas. Rocky Mountain Media Watch based its petition in part on the distortion rules, arguing that the stations presented "toxic news" that over-represented and sensationalized crime and violence, and failed to cover local and political news. The Commission rejected the petitions, dismissing the distortion complaint on grounds that the group had not shown that any reports were staged or falsified, demonstrating the narrowness of the distortion policy once again. See *Applications for Renewal of Licenses of Television Stations at Denver, Colorado*, 1998 FCC LEXIS 2089 (1998).

¹⁹⁷NBC 'Today' Program, 31 F.C.C.2d 847, 858 (1971).

FCC News Distortion Decisions, 1969-1999

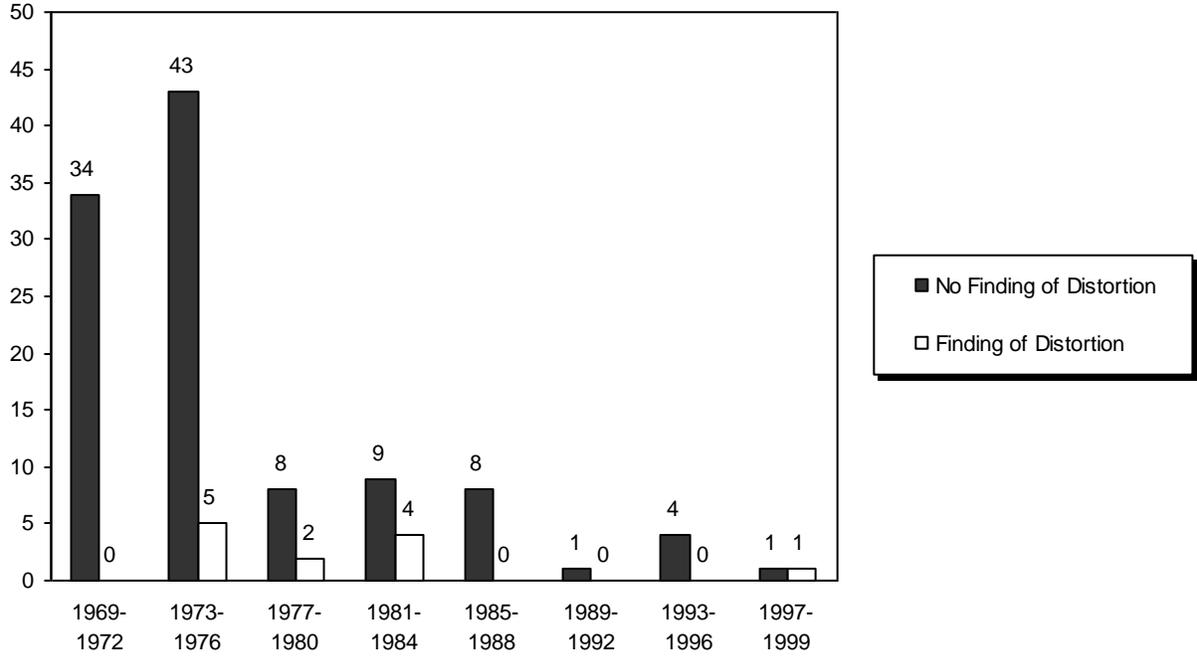


Table 1. Investigation and Success Rates, By Type of Complaint, 1969-1999

Type of Complaint	% of All Complaints	Investigation Rate ^a	Success Rate ^b
Slanting	63.0 % (n = 97)	41.2 % (n = 40)	5.2 % (n = 5)
Falsification	17.5 % (27)	59.3 % (16)	3.7 % (1)
Staging	14.3 % (22)	68.2 % (15)	27.3 % (6)
Deception	5.2 % (8)	50.0 % (4)	12.5 % (1)
Total Complaints	100.0 % (154) ^c	Mean 54.7 % (18.8) Median 54.5 % (15.5)	Mean 12.2 % (3.3) Median 8.9 % (3.0)

^a Represents the ratio of complaints by each type that the FCC investigated to complaints it did not investigate (e.g., the ratio of complaints about slanting that the FCC investigated to complaints about slanting that it did not investigate.)

^b Represents the ratio of complaints by each type that were successful to complaints that were unsuccessful (e.g., the ratio of successful slanting claims to unsuccessful slanting claims.)

^c The number of complaints is higher than the number of total decisions reported in Figure 1 because some decisions involved multiple allegations (e.g., of slanting and staging).

Table 2. Investigation and Success Rates, By Type of Complainant, 1969-1999

Type of Complainant	% of All Complainants	Investigation Rate ^a	Success Rate ^b
Public/Citizen Groups	52.0 % (n = 64)	34.4 % (n = 22)	1.6 % (n = 1)
Politicians/Candidates	20.3 % (25)	36.0 % (9)	4.0 % (1)
FCC	7.3 % (9)	100.0 % (9)	100.0 % (9)
Competing Applicants	7.3 % (9)	42.9 % (5)	22.2 % (2)
Businesses	7.3 % (9)	33.3 % (3)	0.0 % (0)
Journalists	5.7 % (7)	85.7 % (6)	0.0 % (0)
Total Complainants	99.9 % (123) ^c	Mean 55.4 % (9) Median 60.1 % (7)	Mean 21.3 % (2.2) Median 13.1 % (1.5)

^a Represents the ratio of complaints by each type of complainant that the FCC investigated to complaints it did not investigate (e.g., the ratio of complaints made by businesses that the FCC investigated to complaints by businesses that the FCC did not investigate.)

^b Represents the ratio of complaints by each type of complainant that were successful to complaints that were unsuccessful (e.g., the ratio of successful complaints made by businesses to unsuccessful complaints by businesses.)

^c The number of complainants is higher than the number of total decisions reported in Figure 1 because some decisions involved multiple complainants. Total does not equal 100.0 % because of rounding.

Table 3. Reasons Used by FCC to Dismiss Distortion Complaints, 1969-1999

Reasons	% of All Reasons
No Extrinsic Evidence	45.6 % (n = 73)
No Management Knowledge/Intent	14.4 % (23)
Disconfirming Evidence	13.8 % (22)
Licensee Discretion	10.0 % (16)
Procedural Errors	7.5 % (12)
Insufficient Evidence	5.0 % (8)
None	3.7 % (6)
Total Reasons	100.0 % (160) ^a

^a The number of reasons is higher than the number of total decisions reported in Figure 1 because some decisions cited multiple reasons for dismissal.