THE EQUAL OPPORTUNITY DOCTRINE: THE BROADCAST EXECUTIVE WHO CAMPAIGNS FOR POLITICAL OFFICE MAKES HIS OWN STRANGE BEDFELLOW

I. INTRODUCTION

The equal opportunity doctrine[1] exists both to encourage and regulate the use of publicly-licensed broadcasting facilities by political candidates.[2] The Federal Communications Commission's (FCC) policy of encouraging political broadcasting serves the democratic process by educating voters.[3] Regulation,[4] on the

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[1] *See* The Communications Act of 1934, 47 U.S.C. § 315(a) (1982) which states:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—
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> (1) bona fide newscast,
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> (2) bona fide news interview,
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> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
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> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, new documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Id. [hereinafter section 315].

[2] Political Primer 1984, 100 F.C.C.2d 1476, paras. 1-2 at 1476-77 [hereinafter Political Primer].

[3] "[T]he presentation of political broadcasts, while only one of the many elements of service to the public . . . is an important facet, deserving the licensee's closest attention, because of the contribution broadcasting can thus make to an informed electorate—in turn so vital to the proper functioning of our Republic." *In re* Licensee Responsibility as to Political Broadcasts, 15 F.C.C.2d 94 (1968) (citations omitted).

"The equal time rule is meant to facilitate political debate through the media, and requires broadcasters permitting a legally qualified candidate for public office to use its facilities to afford equal time to all other candidates for that office." KVUE, Inc. v. Austin Broadcasting Corp., 709 F.2d 922, 932 n.33 (5th Cir. 1983), *aff'd sub nom.* Texas v. KVUE-TV, Inc., 465 U.S. 1092 (1984) (citations omitted).

[4] The regulated party is not the candidate but the broadcast licensee. The licensee has the power to permit or deny access before any challenge is made. 47 U.S.C. § 312(a)(7) states:

> (a) The Commission may revoke any station license or construction permit—

other hand, is necessary to insure that no candidate in an election is able to gain an unfair advantage[5] over an opponent through excessive access to television and radio.

The equal opportunity doctrine applies to all personal appearances,[6] in which the candidate's visual image or voice is identifiable,[7] and which do not fall under certain bona fide news exemptions.[8] Since recognizability and a positive public image are crucial to a candidate's success, the FCC and the federal courts have construed even nonpolitical appearances as giving rise to equal opportunity.[9] Many entertainers, athletes, and television/radio personalities who have sought public office[10] have had an advantage over other candidates because of an already established, positive public image.[11] Although these images were developed prior to the actual campaign period, appearances made before the campaign period do not invoke equal opportunity responsibilities.[12]

Nonpolitical appearances are encompassed by the equal opportunity doctrine since they may serve to enhance the candidate's personal and political image and recognizability.[13] Equal

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> . . . (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

5 *See infra* note 14.

6 Political Primer, *supra* note 2, para. 34 at 1490. *See infra* notes 115-24 and accompanying text.

7 Political Primer, *supra* note 2, para. 35 at 1492.

8 *See* section 315, *supra* note 1; *see also infra* notes 132-44 and accompanying text.

9 *See* Paulsen v. FCC, 491 F.2d 887 (9th Cir. 1974) (nonpolitical use of a broadcast station by a professional entertainer constituted a "use"); William H. Branch, Memorandum Opinion and Order, 101 F.C.C.2d 901 (1985) (bona-fide news exemptions apply only to the subject of the news and not to the reporter, moderator, or interviewer); Ron Culpepper, Memorandum Opinion and Order, 99 F.C.C.2d 778 (1984) (showing of a Ronald Reagan movie during a campaign period constituted a "use" in the viewing areas in which the movie was seen).

10 Some of the more notable personalities who currently hold office include: President Ronald Reagan (motion picture actor) *Culpepper*, 99 F.C.C.2d at 778; N.Y. Representative Jack Kemp (professional football player) N.Y. Times, April 7, 1987, at A22, col. 1.; Carmel, California Mayor Clint Eastwood (motion picture actor) Witteman, *No More Baby Kissing*, Time, Apr. 6, 1987, at 34. Others include Iowa Representative Fred Grandy (television actor) and N.J. Senator Bill Bradley (professional basketball player).

11 "A candidate who becomes well-known to the public as a personable and popular individual through 'non-political' appearances certainly holds an advantage when he or she does formally discuss political issues to the same public over the same media." *Paulsen*, 491 F.2d at 891.

12 "[M]akeup time is not permitted for broadcasts of opponents made before a requesting party became a candidate." Flory v. FCC, 528 F.2d 124, 128 (7th Cir. 1975); *see* Political Primer, *supra* note 2, para. 80 at 1527. "[T]he intent of Congress [is] to confine special treatment of political discussion to distinct, identifiable periods. Political discussion outside of campaign periods would be subject to general Fairness Doctrine principles." *Id.* para. 93 at 1535.

13 *See Paulsen*, 491 F.2d at 891. Paulsen, a professional comedian, sought the 1972

opportunity law[14] seeks to avoid the development of an unfair advantage by one candidate over another.[15] Crucial to the application of this law is an identifiable appearance, regardless of the broadcast's purpose.[16] However, the equal opportunity law has yet to anticipate a certain class of candidates, who are in a position to gain an unfair advantage through broadcasting without making an identifiable appearance.[17] Broadcast executives are members of this class.[18]

This Note will analyze whether the equal opportunity doctrine[19] and its more generally applied parent, the fairness doctrine,[20] provide any remedies to candidates opposing broadcasters who have access to the airwaves and who can influence and control programming but who do not physically appear on the programs. Current equal opportunity law does not adequately regulate the activities of a broadcaster in the scope of his employment while he concurrently conducts his own political campaign.[21] His programming and content choices can influence public opinion on campaign issues so as to avoid invoking the fairness and equal opportunity doctrines.[22] The 1988 campaign may introduce the first broadcast executive as a presidential can-

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Republican nomination for the Presidency. During the campaign, Paulsen's employer, a television production company, sought a declaratory ruling on whether Paulsen's appearance on the television series "Mouse Factory," to be aired during the campaign period, would invoke equal opportunity responsibilities by the stations which aired the show. The FCC ruled that any appearance by Paulsen would impose equal opportunity obligations. Paulsen appealed, arguing that since he was already well known, his political image would not be enhanced through the "nonpolitical" use in question. However, Judge Wright, writing for the Ninth Circuit, stated that a "less well-exposed candidate could surely benefit from the exposure." *Id.* The court also recognized the impracticability of distinguishing between political and nonpolitical uses. *Id.*

14 "The purpose of Section 315, as shown by the legislative history, is to prevent a candidate from obtaining an unfair advantage over an opposing candidate by broadcasting to the voters . . . where the opposing candidate is denied a chance to broadcast to these voters." *See* Political Primer, *supra* note 2, para. 25 at 1486.

15 *See id.* at 1491 para. 34(e).

16 *See infra* notes 132-44 and accompanying text.

17 *Cf.* Nicholas Zapple, 23 F.C.C.2d 707 (1970). In *Zapple*, supporters of a legally qualified candidate appeared during the course of a campaign, but the candidate did not. If he did, equal opportunity would probably have been invoked. The FCC ruled that although the opposing candidate did not appear, the broadcaster was bound to treat the use by supporters as quasi-political. Therefore, it was an issue of public importance invoking the less strict fairness doctrine. Quasi-political use by supporters has become known as the *Zapple* doctrine. *See infra* notes 125-31 and accompanying text.

18 *See infra* notes 149-68 and accompanying text.

19 *See infra* notes 90-148 and accompanying text.

20 *See infra* notes 29-89 and accompanying text. The fairness doctrine is applied to more general situations than is the equal opportunity doctrine. The fairness doctrine is not confined to people (*i.e.* candidates) and concerns issues of public importance raised during the course of a broadcast.

21 *See infra* notes 149-58 and accompanying text.

22 *See infra* notes 162-68 and accompanying text.

didate.[23] Therefore, analysis of issues raised from a broadcaster's candidacy is important due to potential national consequences.

Parts II and III will examine the fairness and equal opportunity doctrines, with emphasis on what constitutes a use or access.[24] Certain uses, even during a campaign, are exempt from triggering equal opportunity protection for opponents.[25] Part IV will present both the FCC's and the courts' approaches to exempted uses, and will examine whether these approaches may extend to encompass a broadcaster's regular, job-related use of his station.[26] Part IV will also propose that regulation of a broadcaster's ordinary course use of a station during a campaign is necessary as a matter of public policy.[27] Part V will consider alternative methods of regulating broadcaster use: distinguishing between political and nonpolitical use; determining the political benefit derived from nonpolitical use; forcing the broadcast executive to resign his position during the course of a campaign; and establishing open access time to opposing candidates.[28] Finally, this Note will propose that although none of the alternatives present a perfect solution, open access most effectively reduces the broadcaster-candidate's conflict of interest and, consequently, best preserves the spirit of equal opportunity.

II. THE FAIRNESS DOCTRINE

The fairness doctrine requires a broadcast licensee to devote a reasonable percentage of broadcast time to the coverage of important and controversial public issues and to make a good faith effort to present contrasting points of view.[29] Early broadcast regulation, necessary to the basic existence of the industry,

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[23] Dr. Pat Robertson, head of the Christian Broadcasting Network, announced that he is seeking the 1988 Republican nomination for president. N.Y. Times, Oct. 2, 1987, at A16, col. 1. Although Dr. Robertson has appeared in front of the camera as a host of a news and features program, his role as an executive though it has been resigned, not as an on-camera personality, is at issue in this Note. N.Y. Times, Sept. 30, 1987, at A20, col. 4.

[24] *See infra* notes 115-31 and accompanying text.

[25] Exempted uses include various types of bona fide news programming. *See* section 315(a)(1)-(4), *supra* note 1; Political Primer, *supra* note 2 paras. 35-39 at 1492-94; *see also supra* notes 132-44 and accompanying text.

[26] *See infra* notes 132-59 and accompanying text.

[27] *See infra* notes 162-68 and accompanying text.

[28] *See infra* notes 169-79 and accompanying text.

[29] The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 7 (1974) [hereinafter Fairness Report].

spawned creation of both the fairness doctrine and the FCC.[30] Prior to the Radio Act of 1927,[31] broadcasters had the freedom to transmit on any frequency despite the government's existing power to assign frequencies.[32] This laissez-faire approach to regulation failed the radio broadcast industry. Free access to the limited frequency spectrum resulted in broadcast overlap[33] which ultimately defeated the first amendment right of free speech.[34]

The Radio Act of 1927[35] signified a new approach to first amendment compliance—an affirmative one—despite a traditional implied absence of governmental control.[36] By creating the FCC for the purpose of allocation of frequencies through licensing, the government insured free speech, thus avoiding the situation where two or more people speak simultaneously and neither is heard.

> It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. . . .

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30 The FCC was created by the Communications Act of 1934, Pub. L. No. 73-416, ch. 652, 48 Stat. 1064 (codified as amended at 47 U.S.C. § § 151-610 (1982 & Supp. III 1985)). "For the purpose of regulating interstate and foreign commerce in communication by wire and radio . . . there is created a commission to be known as the 'Federal Communications Commission' . . . ." *Id.* § 151.

31 Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064. The Act of 1927 granted the newly formed Federal Radio Commission the authority to allocate frequencies in order to serve the public interest.

32 Radio Communications Act of 1912, ch. 287, 37 Stat. 302, *repealed by* Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064. *See* Hoover v. Intercity Radio Co., 286 F. 1003 (1923), *appeal dismissed per stipulation*, 266 U.S. 236 (1924) (the government was ineffectual in enforcing the Act of 1912 because it was not granted the power to refuse the granting of licenses); *see also* Fairness Report, *supra* note 29, para. 6 at 3; United States v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926) (attempt to penalize broadcaster for using an unauthorized frequency failed).

33 Fairness Report, *supra* note 29, para. 6 at 3, 4. The interference was such that it was analogous to two newspaper publishers overlapping print on the same sheet of newsprint.

34 The first amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

35 Radio Act of 1927, ch. 169, 44 Stat. 1162, *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064.

36 Prior to the Act of 1927, Congress' approach to complying with the first amendment was not to pass any law discouraging free speech. The new affirmative approach was to pass laws encouraging free speech. *See* T. EMERSON, The SYSTEM OF FREEDOM OF EXPRESSION, ch. XVII (1970).

> It is [the] right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.[37]

Both the constitutionality and rationality of the fairness doctrine have withstood challenges on numerous occasions.[38] The public interest standard[39] used in the fairness doctrine was formulated in *Great Lakes Broadcasting Co. v. Federal Radio Commission*.[40] The Federal Radio Commission[41] ruled that the "public interest requires ample play for the free and fair competition of opposing viewpoints and [that] principle applies to all discussion of issues of importance to the public."[42] The government's authority to license stations did not undermine the doctrine's constitutionality. The Supreme Court held that licensing did not violate the first amendment since available frequencies were scarce compared to the volume of those wishing to use frequencies to broadcast.[43]

The rationality of the fairness doctrine was further substanti-

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[37] Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, para. 6 at 1249 (1949).

[38] It has been suggested that "the Commission . . . draw back and consider whether time and technology have so eroded the necessity for governmental imposition of fairness obligations that the doctrine has come to defeat its purposes in a variety of circumstances . . . ." Brandywine-Main Line Radio, Inc. v. FCC, 473 F.2d 16, 80 (D.C. Cir. 1972) (Bazelon, C.J., dissenting). *See also* Kaufman, *Reassessing the Fairness Doctrine*, N.Y. Times, June 19, 1983, § 6 (Magazine), at 16. The FCC position has been that despite the proliferation of available channels through the development and distribution of cable technology, there are still "substantially more individuals who want to broadcast than there are frequencies to allocate." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969).

However, constitutionalilty of the fairness doctrine is under administrative, judicial, and legislative review. Despite Congress' attempt to codify the fairness doctrine, President Reagan vetoed the bill and the FCC voted to abolish the fairness doctrine on first amendment grounds. *See* N.Y. Times, June 21, 1987, at 1, col. 4; *id.*, Aug. 5, 1987, at A1, col. 6. The abolishment of the fairness doctrine is meeting substantial opposition. *See id.*, Aug. 11, 1987, at C16, col. 5; *id.*, Aug. 23, 1987, § 2, at 23, col. 1. Because these events are occurring as this Note is going to press, the fairness doctrine is treated here in the present tense and as if it is still effective.

For a discussion of a possible alternative to the fairness doctrine, see Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982).

[39] Excess focus on broadcast industry profits to the exclusion of the public interest has led to a movement encouraging regulations even more encompassing than the fairness doctrine. "A public-interest standard ought to be applied to ownership and control of a network, 'much in the way that Congress, through the F.C.C., imposes a public licensing standard to own a television station.' " N.Y. Times, Mar. 13, 1987, at C20, col. 3 (quoting Rep. Dennis E. Eckart of Ohio).

[40] 3 F.R.C. Ann. Rep. 32 (1929), *rev'd on other grounds*, 37 F.2d 993, *cert. dismissed*, 281 U.S. 706 (1930).

[41] The Federal Radio Commission was the government's broadcast regulation agency preceeding formation of the FCC. Act of Feb. 23, 1927, ch. 169, 44 Stat. 1162.

[42] *Great Lakes*, 3 F.R.C. Ann. Rep. at 33.

[43] N.B.C. v. United States, 319 U.S. 190 (1943).

ated when the Supreme Court adopted the marketplace of ideas concept:[44] "debate on public issues should be uninhibited, robust, and wide open . . . ."[45] The first amendment encourages dissemination of information from diverse and antagonistic sources.[46]

In the landmark decision, *Red Lion Broadcasting Co. v. FCC*,[47] the Supreme Court furthered the constitutionality of the fairness doctrine and licensing powers with a comprehensive first amendment theory.[48] A unanimous Court held that fairness regulation was an appropriate use of government power.[49] The Court decided that fairness did not operate to diminish speech, but rather, encouraged and increased it. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[50] Concerning the FCC's licensing power, the Court concluded that the basic purposes of the first amendment would be undermined if there were "an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[51]

Despite its vigor in defending the constitutional virtues of fairness, the FCC's policy of enforcement has been one of minimal intrusion.[52]

> Our purpose has merely been to establish general guidelines concerning *minimal* standards of fairness. We firmly believe that the public's need to be informed can best be served through a system in which the individual broadcasters exercise wide journalistic discretion, and in which government's role is limited to a determination of whether the licensee has acted reasonably and in good faith.[53]

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44 New York Times Co. v. Sullivan, 376 U.S. 254 (1964). A goal of the first amendment is to encourage "debate on public issues." *Id.* at 270. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

45 376 U.S. at 270.

46 Associated Press v. United States, 326 U.S. 1, 20 (1945); *see* United States v. Midwest Video Corp., 406 U.S. 649, 667-69 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 384, 390 (1969).

47 395 U.S. 367 (1969).

48 Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public.

Id. at 401 n.28.

49 *Id.* at 390.

50 *Id.*

51 *Id.* at 388.

52 Fairness Report, *supra* note 29, para. 21 at 9 (*citing* Fairness Doctrine Primer, 40 F.C.C. 598, 599 (1964)).

53 *Id.* (emphasis in original).

The FCC has limited its role in fairness cases to one of review[54] and will not initiate any proceedings without first receiving a complaint. When a complaint is filed, the FCC first investigates whether the issue specified has actually been raised in the licensee's programming.[55] In making this determination, the FCC heavily relies upon the licensee's good faith judgment because of the indirect nature in which some issues may be raised.[56]

Second, the FCC determines whether the licensee has properly determined whether the issue raised is "controversial" and of "public importance."[57] Although the amount of media coverage received is certainly a factor in making this determination, it is not conclusive.[58] "Our daily papers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues."[59] Attention from government officials and community leaders are also factors, but the principal test of public importance is the licensee's subjective evaluation of the impact that an issue is likely to have on the public-at-large.[60] The evaluation process considers the existence of a public alternative on the issue and whether that alternative leads to either maintenance or change of important community institutions.[61]

Even general programming may unintentionally and inadvertently raise controversial public issues.[62] "[P]rograms initiated with no thought on the part of the licensee of their possibly controversial

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54 *See id.* para. 29 at 11.

55 *See id.* para. 32 at 12.

56 This problem [of determining whether or not an issue has been raised] may be illustrated by reference to a hypothetical broadcast which takes place during the course of a heated community debate over a school bond issue. The broadcast presents a spokesman who forcefully asserts that new school construction is urgently needed and that there is also a need for substantial increases in teachers' salaries, both principal arguments advanced by proponents of the bond issue. The spokesman, however, does not explicitly mention or advocate passage of the bond issue. In this case, the licensee would be faced with a need to determine whether the spokesman had raised the issue of whether the school bonds should be authorized . . . or whether he had merely raised the question of whether present school facilities and teacher salaries are adequate . . . .

Id. paras. 33-34 at 12, 13. The school bond example illustrates that issues may be raised indirectly or tangentially without being explicitly mentioned.

57 *Id.* para. 36 at 13.

58 *Id.*

59 Healy v. FCC, 460 F.2d 917, 922 (D.C. Cir. 1972).

60 Fairness Report, *supra* note 29, para. 30 at 12.

61 *Id.*

62 The inadvertent raising of a controversial public issue is an important reason, *inter alia*, for this author's advocacy of additional regulation of broadcaster-candidates. *See infra* notes 162-68 and accompanying text.

nature [may] . . . subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views."[63] Regardless of the guidelines for making these determinations, it is important to note that the FCC does not rule on possible errors in fairness judgment; it only determines whether the judgment was made in good faith.[64]

If the licensee determines that a controversial public issue has been presented, the question remains as to how to properly present the opposing viewpoint. If the licensee does not plan to present the opposing viewpoint, he must make a diligent, good faith effort to locate an appropriate spokesman who is willing to make the presentation.[65] He is permitted to seek paid sponsorship of the opposing viewpoint but, if the licensee cannot find paid sponsorship, he must supply the opposing viewpoint himself.[66] This broadcaster responsibility has become known as the Cullman doctrine.

> [W]here the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and *thus leave the public uninformed*—on the ground that he cannot obtain paid sponsorship for that presentation.[67]

However, the licensee is not bound under the Cullman doctrine to give even the most appropriate spokesman any time,[68] paid or free, if in the licensee's good faith opinion, he has adequately presented

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[63] Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, para. 8 at 1251 (1949).

[64] [G]iven the limitless number of potential controversial issues and the varying circumstances in which they might arise, we have not been able to develop detailed criteria which would be appropriate in all cases. For this very practical reason, and for the reason that our role must and should be limited to one of review, we will continue to rely heavily on the reasonable, good faith judgments of our licensees in this area.

Fairness Report, *supra* note 29, para. 29 at 11.

[65] CBS, Inc., 34 F.C.C.2d 773 (1972).

[66] Cullman Broadcasting Co., 40 F.C.C. 576 (1963). Cullman broadcasted a sponsored (paid) program which was critical of a nuclear test ban treaty. Cullman rejected a request from a national organization seeking to present an opposing viewpoint on the grounds that, being a local station, its fairness responsibilities only applied to local organizations. However, no local group was willing to sponsor a program presenting an opposing viewpoint.

[67] *Id.* at 577 (emphasis in original).

[68] The *Cullman* doctrine does not apply to political campaign broadcasting since the most appropriate spokesman, the opposing candidate, must be given equal opportunity. *See infra* notes 91-98 and accompanying text.

the opposing viewpoint in overall programming.[69]

The FCC recognizes that the broadcast industry is commercially supported and that fairness requirements can conflict with revenue generating activities.[70] Any actual infringement is usually small and is balanced by the first amendment interest in "uninhibited, robust, and wide open"[71] public debate.

Broadcasters are held to a higher degree of responsibility to the public than publishers.[72] The distinction is premised upon the way in which each medium distributes its product.[73] Broadcasters have a conditional monopoly on the frequency on which they transmit.[74] Since there is a scarcity of physical resources, only a small number of broadcasters can transmit at any one time.[75] The *Red Lion*[76] court held that when a broadcaster's editorial amounts to an attack on one's personal integrity, that person has a first amendment right to respond using the same medium which carried the attack.[77] In broadcasting, the limited channels available for response are usually controlled by those with economic might.[78] Therefore, in order to promote free speech, it is not unreasonable that if a given broadcast frequency is used for an editorial, it should be made available for a reply of a differing viewpoint.[79]

The first amendment responsibilities of a broadcaster are also greater than those of a publisher because of the public nature of the airwaves.[80] These airwaves, which are the medium for broadcast transmission, are not owned by the broadcasters. Rather, they are licensed because the air belongs to the public.[81] However, first

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69 *See* Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

70 *See* Fairness Report, *supra* note 29, para. 1 at 1-2.

71 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

72 United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (FCC's right to regulate broadcasting by granting licenses was upheld).

73 *See infra* notes 79-81 and accompanying text.

74 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 391 (1969).

75 *But see* Note, *Defining the Relevant Product Market of the New Video Technologies*, 4 CARDOZO ARTS & ENT. L.J. 75 (1985). The development of new technologies, some already in use, has significantly increased the broadcast spectrum. These new methods include digital data compression, time division multiple access, dual polarization, ultrahigh frequency, Multichannel Service, and the proliferation of cable. *Id.*

76 395 U.S. at 367.

77 *Id.* at 391.

78 Business concerns compete to obtain licenses and invest large amounts of capital to operate a station once a license has been obtained. *See id.* at 400.

79 *See* FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978).

80 "We hear a great deal about the freedom of the air. . . . The ether is a public medium, and its use must be for public benefit." Address by Secretary of Commerce Herbert Hoover, Fourth National Radio Conference, 1925, *quoted in*, Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659, 668-69 (1975) [hereinafter *Double Standard*].

81 *Id.*; *see also* United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (FCC's right to regulate broadcasting by granting licenses was upheld).

amendment restrictions on the government do not apply to broadcasters by the virtue of the licensor-licensee relationship.[82]

Newspaper and other forms of print publishing have never been subjected to the same first amendment restrictions as broadcasters.[83] The essential nature of publishing does not create the same monopoly conditions as broadcast technology. In theory, there is no limit to the number of newspapers that can be published and circulated in a given community. One who desires to respond to a newspaper editorial is not nearly as restricted as one who desires to respond to a broadcast editorial using the same medium. Anyone, for the purposes of response, can start a newspaper, use a competitive newspaper, or if economic resources are scarce to the respondent, simply distribute printed pamphlets. In this way, an infinite number of publishers can exist even in a single community.[84]

The government is not nearly as involved in the regulation of the printed press as it is in the broadcast industry.[85] Although, governmental first amendment responsibilities apply to neither industry, at least there is a "superficially appealing" argument of extension to broadcast on a state action theory.[86] In fact, imposing first amendment restrictions on the publishing industry would, in itself, be a violation of the first amendment rights of a publisher to a free press.[87]

In *Miami Herald Publishing Co. v. Tornillo*,[88] a Florida statute[89] requiring a right to reply to press editorials was found unconstitutional. The court explained that the publishing industry does not distribute its product via any publicly owned media such as the air-

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82 CBS v. Democratic Nat'l Comm., 412 U.S. 94, 114-21 (1973).

83 *See id.* (first amendment restrictions on broadcasters); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (lack of first amendment restrictions on newspapers).

84 *But see Double Standard, supra* note 80, at 684-85.

85 *Tornillo*, 418 U.S. at 256; *Red Lion*, 395 U.S. at 392.

86 *CBS*, 412 U.S. at 115 n.14.

87 *Tornillo*, 418 U.S. at 256-57.

88 418 U.S. 241 (1974) (print media, which raises public issues, does not have to grant a right to reply to private parties).

89 Fla. Stat. § 104.38 (1973) (repealed 1975):

> *Newspaper assailing candidate in an election; space for reply*—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable [by fine].

Quoted in Tornillo, 418 U.S. at 244 n.2.

waves. Thus, it is less of an infringement on the public than the distribution of programs on broadcast media.

III. THE EQUAL OPPORTUNITY DOCTRINE

The equal opportunity doctrine, even though it is premised on the same first amendment theories as the fairness doctrine,[90] is applied in a different manner. The fairness doctrine applies to controversial *issues* of public importance.[91] The equal opportunity doctrine applies to *persons* who are candidates for public office.[92] The FCC's policy on enforcement of the fairness doctrine is one of minimal intrusion where determinations are limited to whether a broadcaster has self-enforced his responsibilities in a reasonable manner and in good faith.[93] Enforcement of the equal opportunity doctrine is less subjective, less reliant on broadcaster good faith, and is guided more rigidly by statute.

In the arena of political campaign broadcasting, fairness doctrine analysis applies to instances not covered by, or exempt from, section 315(a).[94] Although a candidate's appearance on an exempt newscast may not obligate a broadcaster to supply equal opportunity to opposing candidates, it may create a responsibility, on the part of the broadcaster, to cover viewpoints in other programming differing from those expressed by the candidate in the exempt newscast.[95]

Equal opportunity can only be invoked when a candidate[96] is legally qualified, otherwise the fairness doctrine is applied.[97] To become legally qualified, a candidate must have: publicly announced his candidacy; be qualified for the office he seeks; *and* (1) have qualified for a place on the ballot or (2) have publicly committed himself to seeking write-in votes, be eligible to receive such write-in votes, and make a substantial showing that he is a

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90 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (to foster "uninhibited, robust, and wide-open" debate on public issues).

91 Political Primer, *supra* note 2, para. 89 at 1533.

92 *Id.*

93 *See supra* notes 53-56 and accompanying text.

94 Controversial public issues, even during the course of a campaign, may be raised without a section 315 appearance. Political Primer, *supra* note 2, para. 92(a) at 1533.

95 *Id.* para. 92(b) at 1534. When fairness is applied, a broadcaster may grant what he, in good faith, feels to be adequate coverage to fringe party candidates. Using a party's previous election results has been held to be a valid criterion for determination of its current candidate's importance to the public. Harvey Michelman (WNBC-TV), 38 F.C.C.2d 374 (1972).

96 The equal opportunity doctrine may be invoked when supporters appear on behalf of the candidate. Nicholas Zapple, 23 F.C.C.2d 707 (1970).

97 Political Primer, *supra* note 2, para. 92 at 1533.

bona fide candidate.[98]

When a broadcaster supplies access to a candidate, the mere fact that the broadcast has been made to the public-at-large is not sufficient notice to opposing candidates that they may be entitled to time.[99] Under FCC regulations,[100] each station must maintain a file of all broadcasts made by, or on behalf of, political candidates.[101] Moreover, this file must be kept open for public inspection.[102]

After making a political file entry, opposing candidates entitled to equal opportunities must request access within seven days of the broadcast.[103] The so-called "seven day rule"[104] aims to prevent creation of an unfair advantage by opposing candidates who might accrue equal opportunity rights only to exercise them close to election time. Requiring candidates to use their access time within seven days after access rights vest, ensures that the access is evenly and fairly distributed, and last minute media blitzes are avoided.[105]

If the opposing candidate makes a timely request, he must be granted equal opportunity.[106] There is thus a higher standard of fair dealing under the equal opportunity doctrine than under the so called "equal time" doctrine.[107] For example, if an opponent is granted equal time, but that time occurs at a time of day when a smaller audience is likely to be attracted, equal opportu-

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98 *Id.* paras. 8-13 at 1480-82.

99 *Id.* para. 101 at 1538-39.

100 47 C.F.R. § 73.1940(d) (1986):

> (d) *Records, inspection.* Every licensee shall keep and permit public inspection of a complete record (political file) of all requests for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. When free time is provided for use by or on behalf of such candidates, a record of the free time provided shall be placed in the political file. All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years.

101 *Id.*

102 *Id.*

103 47 C.F.R. § 73.1940(e) (1986).

104 47 C.F.R. § 73.1940(e) (1986) states that:

> A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use, giving rise to the right of equal opportunities, occurred: *Provided, however,* That where the person was not a candidate at the time of such first prior use, he shall submit his request within 1 week of the first subsequent use after he has become a legally qualified candidate for the office in question.

105 Political Primer, *supra* note 2 para. 79 at 1526.

106 *Id.*

107 "Equal time" is actually a misnomer but is often used when "equal opportunity" is the intended term. Section 315 is not as concerned with the quantity of time as it is with the quality of opportunity. *See id.* para. 89 at 1533.

nity has not been afforded.[108] However, to minimize intrusion, the broadcaster need not precisely duplicate the day of the week, time of day, or program originally granted.[109] In addition, according to section 315(b), altering rate structures, despite compliance with equal time, may violate equal opportunity.[110] In all other respects, the broadcaster must treat candidates equivalently,[111] though not necessarily identically.

It is important to note that, under the fairness doctrine and section 312(a)(7) of the Communications Act,[112] a station may avoid, if acting in good faith, equal opportunity consequences by denying time to all candidates. However, state and local elections, in most cases, are matters of public interest, thereby local stations are obligated to devote time to the non-Federal campaigns which the stations consider important.[113] However, a station may use its judgment in determining which state and local races are of greatest public interest and may refuse to supply time to candidates not involved in those campaigns.[114]

A. *What Constitutes a "Use"*

When a candidate appears on a broadcast, it must be determined whether that appearance constitutes a use giving rise to equal opportunity implications. In general, unless explicitly exempt as a class of bona fide newscasts,[115] any appearance by a candidate, in which the picture or voice of that candidate is likely to be individually identifiable by the audience, has been interpreted to be a use.[116] Even a broadcast on which a candidate

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[108] E.A. Stephens, 11 F.C.C. 61 (1945).

[109] Major General Harry Johnson, 40 F.C.C. 323 (1961); Socialist Workers Party, 40 F.C.C. 256 (1952); Harry Dermer, 40 F.C.C. 407 (1964).

[110] 47 U.S.C. § 315(b) (1982):

> (b) . . . The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign . . . shall not exceed—
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> (1) . . . the lowest unit charge of the station for the same class and amount of time for the same period; and
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> (2) . . . the charges made for comparable use of such station by other users therof.

Id. See also Political Primer, *supra* note 2, paras. 65-70 at 1513-22; KAYS, Inc. (KFEQ), 43 F.C.C.2d 1183 (1973).

[111] D.L. Grace, Esq., 40 F.C.C. 297 (1958) (opposing candidates must be given equal opportunity to utilize production facilities).

[112] 47 U.S.C. § 312(a)(7). For the text of section 312, see *supra* note 4.

[113] Warren J. Moity, Sr. v. TV Station Licensees, 88 F.C.C.2d 580 (1979), *review denied*, F.C.C.2d (FCC 80-438).

[114] Charles Mark Furcolo (WCVB-TV), 48 F.C.C.2d 565 (1974); Lew Breyer, 31 F.C.C.2d 548 (1968).

[115] *See infra* note 141.

[116] Political Primer, *supra* note 2, para. 31 at 1489.

appears for reasons other than on behalf of his candidacy is considered a use.[117] Nonpolitical appearances, even when beyond the control of the candidate, give rise to equal opportunity because of the potential to enhance political image and recognizability. The Ninth Circuit used this rationale in *Paulsen v. FCC*:[118]

> If the Section [315] were invoked only when political issues actually were discussed . . . a station could support one candidate by inviting him or her to appear on numerous shows but strongly discouraging the discussion of political issues. . . . To define such appearances as nonpolitical is to apply a rather narrow and perhaps a bit naive definition of "political." . . . A candidate who becomes well-known to the public as a personable and popular individual through "non-political" appearances certainly holds an advantage when he or she does formally discuss political issues to the same public over the same media.

The *Paulsen* court, although recognizing that nonpolitical appearances can have political consequences, held that determining the quantitative political impact of a nonpolitical appearance would require "highly subjective judgments concerning the content, context, and potential political impact of a candidate's appearance."[119] However, the FCC does agree to waive full rights accrued through continuous nonpolitical broadcasting, such as in *Paulsen*, in return for free spots.[120] These waivers, in effect, are the "highly subjective judgments" the *Paulsen* court sought to avoid.[121]

A candidate must be identifiable in order for an appearance to constitute a use.[122] However, time on camera is not always determinative of the amount of time to which an opposing candidate is entitled. If a candidate makes an appearance at the end of a spot, the whole spot will be considered a use.[123] An entire program will be

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117 For example, a candidate appearing in pursuit of a livelihood, is a use. *See supra* notes 9-13 and accompanying text.

118 491 F.2d 887, 891 (9th Cir. 1974), *quoted in* Political Primer, *supra* note 2, para. 33 at 1490.

119 491 F.2d at 890.

120 WBTW-TV, 5 F.C.C.2d 479 (1966). Fees for spot broadcasting (brief use designed to convey one or two simple messages, *i.e.*, commercial advertising) are considerably more expensive than for continuous (prolonged use designed to develop one or more complex messages, *i.e.*, feature programming). For example, forty-five one-minute spots can cost three times as much as a forty-five minute continuous program. RKO General, Inc., 25 F.C.C.2d 117, 119 (1970).

121 *Paulsen*, 491 F.2d at 890.

122 *Compare* National Urban Coalition, 23 F.C.C.2d 123 (1970) (visibility in crowds does not constitute a use) *with* Carter/Mondale Reelection Committee, Inc., 80 F.C.C.2d 285 (1980) (a drawing of a candidate, if identifiable, constitutes a use) *and* KWWL-TV, 23 F.C.C.2d 758 (1966) (broadcast of a still photograph of candidate constitutes a use).

123 Charles F. Dykas, 35 F.C.C.2d 937 (1972); Radio Station WITL, 54 F.C.C.2d 650

considered a use if "the candidate's personal appearance(s) is substantial in length, integrally involved in the program, and indeed the focus of the program."[124]

Although an appearance is necessary to invoke the equal opportunity remedies of section 315, the FCC ruled in *Nicholas Zapple*,[125] that under the fairness doctrine, remedies may be available even when no candidate appearance is made. Under the *Zapple* or quasi-equal opportunity doctrine, if supporters of a candidate appear on his behalf without making use of his picture or voice, then supporters of the opposing candidate may seek equal opportunity.[126] The broadcaster, however, in granting access to the opponent's supporters, is held to more than the fairness doctrine standard of good faith, and less than the section 315 standard of equal opportunity.[127] The FCC established the "quasi-equal opportunity" doctrine in *Zapple*:

> Where a spokesman for, or a supporter of candidate A, buys time and broadcasts a discussion of the candidates or the campaign issues, there has clearly been the presentation of one side of a controversial issue of public importance. It is equally clear that spokesmen for or supporters of opposing candidate B are not only appropriate, but the logical spokesmen for presenting contrasting views. Therefore, barring unusual circumstances, it would not be reasonable for a licensee to refuse to sell time to spokesmen for or supporters of candidate B comparable to that previously bought on behalf of candidate A.[128]

Zapple combines some but not all of the features of fairness and equal opportunity. Like equal opportunity, *Zapple* only applies to formal campaign periods.[129] Like fairness, though, *Zapple* may only be applied when supporters actually advocate or oppose a candidacy, or important campaign issues.[130] Therefore, broadcasters are

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(1975) (candidate's appearance to make sponsorship announcement rendered entire spot as a use).

124 Political Primer, *supra* note 2, para. 37 at 1493.

125 Nicholas Zapple, 23 F.C.C.2d 707 (1970).

126 *Id.*

127 Fairness would permit an appropriate spokesman but under quasi-equal opportunity, the "natural opposing spokesmen are readily identifiable." Fairness Report, *supra* note 29, para. 86 at 32. Equal opportunity requires time to be given for any nonexempt appearance, even if nonpolitical. Quasi-equal opportunity does not consider nonpolitical appearances by supporters as requiring reciprocation. *See Zapple*, 23 F.C.C.2d at 708.

128 *Id.*

129 CBS, Gaylord Broadcasting Co., Metromedia, Inc., and the Nat'l Assoc. of Broadcasters, Memorandum Opinion and Order, 95 F.C.C.2d 1152 (1983).

130 "[I]n applying *Zapple*, the broadcasters may sometimes be required . . . to determine whether it advocates or opposes a candidate's election." *Id.* at 1164 n.16.

given the burden of distinguishing between political and non-political uses, something the FCC has consciously sought to avoid.[131] *Zapple* has demonstrated that it is reasonable, depending on the case, to apply the flexibility and subjectivity of the fairness doctrine to quasi-equal opportunity situations.

B. *Equal Opportunity Exemptions*

Despite the equal opportunity doctrine's emphasis on an identifiable appearance, certain appearances are exempt as a class of bona fide newscasts.[132] The exemptions were added in the 1959 amendment to section 315(a)[133] in response to the *Lar Daly* case.[134] Lar Daly, a primary candidate for both the democratic and republican nominations for Mayor of Chicago, was granted equal opportunity stemming from the broadcast of newsclips featuring democratic candidate Mayor Richard Daley and republican candidate Timothy Sheehan.[135] The *Lar Daly* decision impeded the normal functioning of broadcast journalism by effectively restricting bona fide news coverage of political candidates, and was inconsistent with the goals of minimal intrusion by the FCC and a free press.[136]

However, a senate report recognized the subjectivity necessary to determine whether a newscast is bona fide and thus granted the FCC the power to make that determination.[137] The FCC, in turn, has allowed broadcaster flexibility, and hence, a free press, by using the good faith standard in deciding whether a

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131 Paulsen v. FCC, 491 F.2d 887 (9th Cir. 1974). The Ninth Circuit and the FCC agreed that a clear test for determining whether a use occurred within the meaning of section 315 ignoring the distinction between political and nonpolitical programming was preferrable to burdening broadcasters with making that determination. "If the section [315] were invoked only when political issues were actually discussed, detailed guidelines would have to be drawn to determine the precise contours of political discussion." *Id.* at 891.

132 *See supra* note 94.

133 *See supra* note 1.

134 Lar Daly, 40 F.C.C. 302 (1959).

135 *Id.*

136 S. REP. No. 562, 86th Cong., 1st Sess. 12, *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2564, 2574 [hereinafter S. REP. No. 562].

137 It is difficult to define with precision what is a newscast, news interview, news documentary, or on-the-spot coverage of a news event or panel discussion. That is why the committee in adopting the language of the proposed legislation gave the Federal Communications Commission full flexibility and complete discretion to examine the facts in each complaint which may be filed with the Commission. In this way the Commission will be able to determine on the facts submitted in each case whether a newscast, news interview, news documentary, on-the-spot coverage of a news event, or panel discussion is bona fide or a "use" of the facilities requiring equal opportunity.

S. REP. No. 562, *supra* note 136, at 13.

newscast is exempt.[138] The burden of demonstrating that a newscast involving a candidate is not newsworthy is on the complainant.[139] However, although the equal opportunity standard may not be met, fairness may be applicable.

News interviews which take place on bona fide news programs are exempt.[140] Appearances on bona fide news interview programs are also exempt.[141] If a candidate is the subject of a news documentary, equal opportunity is invoked.[142] If the candidate is related to the documentary subject, which must be in the bona fide news category, and appears incidentally to the documentary, equal opportunity is not invoked.[143] Under section 315(a)(4), equal opportunity is not invoked when a candidate appears as part of the on-the-spot coverage of bona fide news. This includes political conventions and political debates where candidates, not taking part in the debates, were not required to be given equal opportunity rights.[144]

There are, however, exceptions to the FCC exempt-decision-making approach which seek to avoid creation of an unfair advan-

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138 *See supra* note 63 and accompanying text.

139 Letter to Citizens for Reagan (WCKT-TV), 58 F.C.C.2d 925 (1976) (thirty minute pre-recorded interview shown in five segments with Incumbent and Candidate Ford, prior to Florida primary did not give rise to equal opportunity for Candidate Reagan). "You have failed to submit sufficient evidence of bad faith or unreasonableness on the part of WCKT which would compel us to question its actions . . . you have not shown that the licensee, in deciding to air [the interviews], considered anything other than their newsworthiness." *Id.* at 927. However, evidence of newsworthiness may be inferred from the type of program on which the appearance of the candidate was broadcast. *See* Lar Daly, 40 F.C.C. 314 (1960) (appearance on a "variety program" considered nonexempt).

140 Political Primer, *supra* note 2, para. 42 at 1496.

141 An interview may be a component of a news program which will also contain news presentations in non-interview format. An interview may also appear as part of a news interview program which relies mostly on the interview as its chief means of news presentation. *Id.* paras. 41(a), 42 at 1494, 1496.

> In its rulings on whether a program is a news interview program, the Commission has considered the following factors:
> (i) Whether it is regularly scheduled;
> (ii) How long it has been broadcast;
> (iii) Whether the broadcaster produces and controls the program;
> (iv) Whether the broadcaster's decisions on the format, content and participants are based on his reasonable, good faith journalistic judgment rather than on an intention to advance the candidacy of a particular person;
> (v) Whether selection of persons to be interviewed and topics to be discussed are based on their newsworthiness.

Id. para. 42 at 1496.

Some of the news interview programs which have been exempted are "Meet the Press," "Face the Nation," "Issues and Answers," and "60 Minutes." One-time special interviews have been ruled to be nonexempt. *Id.* paras. 42, 43 at 1496-98.

142 *See id.* para. 47 at 1499.

143 *Id.*; Richard B. Kay, 26 F.C.C.2d 235 (1970).

144 Aspen Institute, 55 F.C.C.2d 697 (1973), *aff'd sub nom.* Chisolm v. FCC, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

tage.[145] If a candidate appears on a domestic station which is generally not receivable in the election area, equal opportunity is not invoked, even if the broadcast would not be otherwise exempt.[146] The minimal effect the broadcast has on the voters in the election area leads to the conclusion that an out-of-area broadcast does not create an unfair advantage.

Thus, an appearance is not the conclusive factor in determining the creation of an unfair advantage. *Zapple* demonstrates that an unfair advantage can be created without an appearance.[147] Section 315 news exemptions and out-of-area broadcasts demonstrate that some appearances, although possibly creating an advantage, are fair in that they are consistent with the free press objectives of the first amendment, and that they are made in good faith.[148] Equal opportunity exists to equalize any unfair advantage that a given broadcast may create, however it is created.

IV. General Programming

A. *Current Interpretation*

The FCC has not yet scrutinized general programming as possibly invoking equal opportunity when that programming is under the control of the broadcaster-candidate. However, equal opportunity has been invoked in some cases where a broadcaster-candidate has been found to have a special duty.

In *WPRY Radio Broadcasters, Inc.*,[149] the candidate was a part owner and station manager of a Florida radio station. The broadcaster-candidate purchased time on his own station for political campaign announcements giving rise to equal opportunity for the opposing candidate.[150] However, the broadcaster-candidate sold time to the opposing candidate at a higher rate than he payed to the station himself, thus denying equal opportunity.[151] The FCC refused to renew WPRY's license and held that when a broadcaster-candidate uses his own station to campaign, he is held to a higher standard in dealing fairly with opposing candidates.[152] The FCC, due to a possible conflict of interest,

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145 *See supra* note 11.
146 Bob White, 87 F.C.C.2d 748 (1980).
147 Nicholas Zapple, 23 F.C.C.2d 707 (1970); *see supra* text accompanying notes 125-31.
148 *See supra* notes 132-46 and accompanying text.
149 40 F.C.C.2d 1183 (1973).
150 *Id.* para. 8 at 1185.
151 *Id.* para. 21 at 1188.
152 *Id.* para. 43 at 1196.

was less willing to rely on the broadcaster's good faith. By recognizing a special duty, the FCC attempted to limit the extra power that a broadcaster-candidate wields.

In *Emerson Stone, Jr.*,[153] a broadcaster, running for the United States Senate, denied access to an opposing candidate who did not request access within seven days of broadcast.[154] The broadcaster-candidate was held to be under a special duty to insure that equal opportunity rules were met by his station.[155] This particular application of the special duty disclosed all personal and political uses of one's own station to opposing candidates.[156] Thus, the seven day rule[157] commences upon the time of disclosure and not at the time of the broadcast.

WPRY and *Emerson Stone* do not extend the instances in which equal opportunity may be invoked, but rather extend the lengths to which broadcasters must go to comply with the doctrine. Also, the weight of an appearance is strong unless the Zapple doctrine is invoked.[158] Therefore, where no appearance is made, general programming would not, under current construction, give rise to equal opportunity, regardless of how germane its content may be to the campaign issues.

The fairness doctrine could act as a check on the broadcaster-candidate's utilization of general programming. If the programming raises controversial issues of public interest, even if not included among campaign issues, fairness dictates the presentation of contrasting views.[159] However, if fairness is invoked, the broadcaster-candidate can take advantage of the FCC's policies of minimal intrusion and reliance on broadcaster good faith to avoid his fairness responsibilities. Even if *WPRY* and *Emerson Stone* were extended to fairness in addition to equal opportunity, only the most controversial and pressing public issues would be presented from both sides. No device would exist to counter the more subtle presentation of positions on issues which could influence the results of an election.

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153 40 F.C.C. 385 (1963).
154 *Id.* para. 1 at 386.
155 *Id.* para. 2 at 387.
156 Under normal circumstances, timely entry in the station's political file is sufficient notice to opposing candidates that the seven day rule has begun to run. *See supra* note 100-06 and accompanying text.
157 *See supra* notes 104-05 and accompanying text.
158 Nicholas Zapple, 23 F.C.C.2d 707 (1970); *see supra* text accompanying notes 95-99.
159 *See supra* note 37 and accompanying text.

B. *Policy Considerations*

Despite the fact that equal opportunity is not likely to be invoked unless an appearance by the candidate is made, certain types of general programming and other broadcast practices[160] which come under the control of a broadcaster, could give rise to an unfair advantage for a candidate. Usually, FCC intervention is unwarranted unless bad faith on the part of the broadcaster could be shown.[161] However, when the broadcaster and the candidate are the same individual, there is a greater duty to deal fairly, and any advantage created, as a matter of public policy, should not go unchecked. Otherwise, the integrity of both the broadcast industry and the democratic election practice would be compromised. The broadcaster-candidate is, by definition, partisan; a conflict of interests that should not be overlooked. "Every reasonable safeguard must and will be established to prevent any partisan broadcaster from abusing this new right. The committee has faith in the maturity of our broadcasters . . . to serve the public interest."[162]

Entertainment broadcasting, for example, could subtly influence voters' views and create an unfair advantage for the broadcaster-candidate. If the broadcaster-candidate opposed passage of gun control legislation and during the course of a campaign he broadcasted programming featuring hunting, an unfair advantage might be created. Religious programming which advocates views with a correlative effect on voters' views on election issues could also create an unfair advantage.[163] News programming can be directed in such a way as to present only one side of an issue and still give the appearance of being unbiased.[164] Explicit biases, such as an editorial, invoke the fairness doctrine. Subtle

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160 *See infra* notes 163-68 and accompanying text.

161 *See infra* note 64 and accompanying text.

162 S. REP. No. 562, *supra* note 136, at 14 (referring to the inclusion of news exemptions in the equal opportunity doctrine).

163 Television evangelists frequently address related political and religious issues such as gay rights, church-state separation, abortion, evolution versus creationism, public school prayer, sex education, and textbook censorship. However, raising these issues can invoke the fairness doctrine. Council on Religion and the Homosexual, Inc. v. The Faith Center, Licensee of KVOF-TV, San Francisco, 68 F.C.C.2d 1500 (1978) (programming opposing gay rights invoked fairness). Where the programming is presented primarily in the format of "church services, devotions, prayers, [or] religious music," the fairness doctrine does not apply. In re Davey Johnson v. Station KHEP, Phoenix, 54 F.C.C.2d 923, 924 (1975). For a good discussion of the fairness doctrine and religious broadcasting, see Gentry, *Broadcast Religion: When Does It Raise Fairness Doctrine Issues?*, 28 J. BROADCASTING 259 (1984); Podesta, *The Necessity of the Fairness Doctrine Given the Religious Right Televangelists*, 28 J. BROADCASTING 271 (1984); Falwell, *Let's Be Fair About Fairness*, 28 J. BROADCASTING 273 (1984).

164 "60 Minutes" has been ruled exempt, but often assumes an advocate's role to

biases may invoke fairness but the broadcaster can hide behind self-enforcement policies by feigning good faith and reasonableness to avoid presenting opposing viewpoints. This should be avoided especially when the integrity of the election process is at stake.

A broadcaster screens advertisers whose messages can influence public opinion.[165] For example, family planning advertising, by its very nature, either advocates or opposes a variety of views on issues of public importance. Similarly, broadcasters hire and fire newscasters. A newscaster with a known public image and political view can interpose that view, which may be favorable to the broadcaster-candidate, into his presentation of the news. Broadcasters have editorial power. A broadcaster may choose to screen editorials on a given issue, without personally appearing, which would tend to promote his candidacy. Although the fairness doctrine would certainly be invoked, the broadcaster-candidate, held to less strict fairness requirements, could easily derive more political benefit in promoting his view than he expends in presenting the opposing view.

The broadcaster-candidate may also create an unfair advantage in the sponsorship of debates.[166] In enacting the section 315 exemptions, Congress was willing to risk broadcaster favoritism in order to create a more informed electorate.[167] It is unlikely, however, that in assuming this risk Congress considered the broadcaster-as-candidate situation.[168]

The broadcaster-candidate has the power, outside of current equal opportunity law, to influence the media which are the most effective in delivering political campaign messages. The possibility for an opportunistic broadcaster-candidate to gain an advantage by exploiting those media must be abated.

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facilitate illustration of the scandal or injustice it attempts to uncover. *See supra* note 141.

165 Fairness Report, *supra* note 29, at 22.

166 *See* Aspen Institute, 55 F.C.C.2d 697 (1975), *aff'd sub nom.* Chisolm v. FCC, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

167 In establishing this category of exemptions from section 315, the committee was aware of the opportunity it affords a broadcaster to feature a favorite candidate. This is a risk the committee feels that is outweighed by the substantial benefits the public will receive through the full use of this dynamic media in political campaigns.

S. REP. No. 562, *supra* note 136, at 14.

168 The legislative history of the 1959 amendment, *id.*, made no mention of broadcaster-candidates. The first broadcaster-candidate case was not decided until four years after the amendment. Emerson Stone, Jr., 40 F.C.C. 385 (1964).

V. Analysis of Possible Solutions

There is no perfect solution to the conflict of interest problems created when a broadcaster doubles as a candidate. There is neither an interpretation of current law nor potential legislation that could perfectly calculate how much opportunity should be given to opposing candidates due to the subtle consequences stemming from the broadcaster-candidate's power. Any possible solution must not intrude too heavily on fairness and equal opportunity. These doctrines should remain viable checks on broadcasters and stimulate distribution of public information.

The term "broadcaster" must be precisely defined to include only those who have the unsupervised power to create an unfair advantage for themselves as candidates. Others who work in the broadcast industry[169] also have the ability to exert influence on the ultimate product which may promote their own candidacies. However, FCC practice would have to become significantly more intrusive and cumbersome to cover this possibility. Final responsiblity, as a matter of policy, should rest with the "broadcaster" and only his candidacy should come under scrutiny because he is ultimately responsible for the broadcast product.

An extreme solution would treat all general programming as giving rise to equal opportunity. However, this would so adversely affect the profitability of a station as to make operation impracticable and it would certainly be a violation of FCC policy.[170] If there was one opposing candidate, the station would have to make one-half of its programming day during campaigns available for equal opportunity. If there were more than one opposing candidate, then a higher percentage of the programming day would have to be made available. Such a construction would be commercially impracticable.

Another possible solution would be to distinguish between political and nonpolitical use, as suggested by the defendant in *Paulsen v. FCC*.[171] The *Paulsen* court rejected that view because of the resulting imprecision in distinguishing between a political and a nonpolitical use, the prohibitive cost in monitoring broadcasts, and the subtle, yet very real, political benefits that can be

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169 Broadcast industry workers also include off-camera personnel such as producers, directors, writers, cameramen, etc.

170 "[T]o a major extent, ours is a commercially-based broadcast system [and a]ny policies adopted by this Commission . . . should be consistent with the maintenance and growth of that system . . . ." Fairness Report, *supra* note 29, at 2.

171 491 F.2d 887, 890 (9th Cir. 1974).

realized from nonpolitical uses.[172]

A related solution would be to determine the political benefit derived from nonpolitical use and compensate by offering political time with an equivalent benefit. However, problems of measurement and monitoring would arise here as well.

Another potential solution would require the broadcaster to resign during the course of his campaign. Consequently, nonappearance general programming would not have to be scrutinized. Forced resignation, though, is open to constitutional attack on equal protection grounds. Resignation would deprive the candidate of his livelihood, and therefore, may render the cost of becoming a candidate too burdensome.[173] Nevertheless, *Paulsen* recognized an exception to the constitutional argument whereby the candidate may be deprived of his livelihood during the course of a campaign if the deprivation achieved a more important governmental objective.[174] The possibility that a broadcaster could use his position unfairly to influence an election may be construed as the superior objective due to the governmental goal of maintaining the integrity of the election process.

This solution, however, does not offer opposing candidates any true compensation. Broadcasters can plan campaign period programming in advance of the campaign period. Congressional intent is not to intrude into pre-campaign considerations but in this situation, pre-campaign decision making affects programming broadcast in the campaign period. This solution only prevents the broadcaster-candidate from altering broadcasting during the campaign but not from deriving benefits from campaign period broadcasting.

A better solution would begin with the premise that perfect compensation to opposing candidates is impracticable, if not unattainable. Any attempt to compensate can merely approach equalization of opportunity. A proposal based on this premise calls for the establishment of an open access period during the campaign for opposing candidates to divide as they would any other opportunity. This solution is analogous to the one proposed by FCC Commissioner Benjamin L. Hooks to handle com-

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172 Recognizability and likability, when derived in a nonpolitical context, also enhance political image. *See supra* notes 9-13, 118-21 and accompanying texts.

173 *See* Bullock v. Carter, 405 U.S. 134 (1972) (Texas statute which required excessive filing fees to enter primaries found unconstitutional); Brown v. Chote, 411 U.S. 452 (1973) (preliminary injunction granted to candidate who was unable to pay California statutory filing fee in light of possibility of prevailing on the merits and that absent injunctive relief, opportunity to be a candidate would be lost).

174 491 F.2d at 892.

mercial announcements which, like general programming, also can subtly give rise to fairness doctrine consequences.[175] Hooks suggested that two percent of customary commercial time be set aside for open access so that "views in contrast to those embraced in commercial messages could be aired."[176]

This open access scheme may be applied to political broadcasting. Granting two percent open access[177] to opposing candidates would tend to counter the inherent conflict of interest created when a broadcaster becomes a candidate. It is not yet clear whether two percent is the perfect counterbalance, if it falls short, or even gives opposing candidates an advantage. The FCC must determine how the time would be dispensed and when it would be broadcast in order to reach the station's average daily audience.[178] Absolute precision has never been the policy of the FCC, the intent of Congress in instituting fairness and equal opportunity.[179] Open access is not a precise solution, but merely an adjustment. It is consistent not only with the spirit of both fairness and equal opportunity, but moreover upholds democratic ideals, limits government intrusion, and minimizes conflicts of interest.

VI. Conclusion

Politics and broadcasting both rely on the art and science of effective communication. In addition, politics utilizes broadcasting as one of its chief means of communication. The fairness and equal opportunity doctrines set guidelines for the political use of broadcast stations. The democratic process is thereby facilitated through the dissemination of information to the public, and also, the power to distribute political views is not abused through the denial of distribution of opposing views.

However, it is the policy of the FCC to rely mostly on broadcasters to regulate both themselves and the politicians who use

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175 Fairness Report, *supra* note 29, at 52-53. Hooks concurred in most part with the Fairness Report but dissented on the handling of commercial advertising. Hooks' position was that the fairness doctrine should not apply in this area and should be replaced by the establishment of an open access period in which views, contrary to those presented in commercial messages, could be aired. *Id.*

176 *Id.* at 53-55. Hooks explained that two percent of commercial time would afford opponents the opportunity to express their views but would "not seriously impair a broadcaster's advertising income." *Id.* at 55. However, it has been suggested that access should be limited to "45 minutes per week for radio, and 35 minutes per week for television." *Id.* at 55 n.8.

177 Two percent of a typical 19 hour programming day is 22.8 minutes.

178 Political Primer, *supra* note 2, para. 54 at 1503.

179 Good faith and minimal intrusion are not intended to be precision policies. *See supra* note 50 and accompanying text; Fairness Report, *supra* note 29, para. 21 at 9.

their facilities. This policy has encouraged public debate but can also be open to misuse by those who wield power on both sides of the equation. The number of broadcasters who have also been candidates is small, but considering how important communication is to both industries, it would not be surprising to see an increase in this type of candidate. Since the FCC relies upon the broadcaster to regulate political power on the airwaves, a conflict of interest arises when a broadcaster and political candidate are the same individual.

A broadcaster-candidate is still subject to the fairness and equal opportunity doctrines, but as the important link in the enforcement process, the broadcaster-candidate can easily avoid his responsibilities. The broadcaster-candidate can also deploy subtle techniques through the use of general programming, selection of advertisers, and other broadcast practices to adjust public opinion in ways beneficial to his candidacy.

There is no perfect resolution of the conflict of interest created when a broadcaster becomes a candidate. An effective approach, however, may be the establishment of an open access period. During open access, candidates opposing the broadcaster-candidate would be allowed to use the broadcaster's station for direct political use so as to counteract any subtle tactics, whether or not intentional, which would tend to promote the broadcaster's candidacy. Open access would augment current political broadcasting rules to which all candidates would still remain subject. The time to be divided by the opposing candidates would have to be studied, but two percent of the broadcast day has been recommended as fair.

Open access upholds democratic ideals, limits government intrusion, minimizes a conflict of interest, and is consistent with the goals of the fairness and equal opportunity doctrines.

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