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## A History and Analysis of the Federal Communications Commission's Response to Radio Broadcast Hoaxes

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KFI-AM 640

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# A History and Analysis of the Federal Communications Commission's Response to Radio Broadcast Hoaxes

Justin Levine\*

I. INTRODUCTION: LAWS OF MISREPRESENTATION AND THE UNIQUE STATUS OF RADIO .....	274
II. EARLY DEVELOPMENTS IN BROADCAST HOAX LAW .....	276
III. THE PUBLIC INTEREST: POST-WAR OF THE WORLDS DEVELOPMENTS AND EXAMPLES .....	286
IV. DEREGULATION: REDEFINING THE APPROACH? .....	298
V. TURNING POINT: GENESIS OF THE MODERN REGULATION .....	301

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VI. ANALYSIS OF 47 C.F.R. § 73.1217.....	311
VII. BALANCING PRIORITIES: CONTENT CONTROL IN LIGHT OF COMPETING CONSIDERATIONS.....	318
VIII. CONCLUSION.....	320

## I. INTRODUCTION: LAWS OF MISREPRESENTATION AND THE UNIQUE STATUS OF RADIO

In explaining the limits of protection under the First Amendment, Supreme Court Justice Oliver Wendell Holmes once wrote: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."<sup>1</sup> This famous dictum has often been cited to underscore the fact that free speech will not be a viable defense when such speech is used to perpetrate a fraud or misrepresentation that is relied upon by others. When Holmes first scripted his observation in 1919, radio and the electronic mass media were still in their infancy. The next year would see the start of the very first broadcast radio station in the United States.<sup>2</sup> Few had heard of commercial radio broadcasts up to that point. The creation of the Federal Communications Commission (FCC) was still fourteen years away.<sup>3</sup>

With the advent of commercial broadcasting, the challenges of balancing free speech with the interests of protecting the public from potentially harmful frauds raised to new levels. The theater in which one can shout "fire" is no longer confined to a single locale. The venue now ranges in size from individuals, to communities, to the entire global village.

Since its inception, the FCC struggled in deciding where to draw the line regarding broadcast hoaxes. On the one hand, the FCC has sought to enforce regulations which ensure that the airwaves are used, among other reasons, "for the purpose of promoting safety of life and property."<sup>4</sup> On the other hand, the FCC has been reluctant to dictate the content of broadcasters, lest it stifle the vibrancy of the media in reaching its potential to fulfill artistic, informational, and cultural needs.<sup>5</sup>

When it comes to perpetrating hoaxes, no medium other than the Internet has been as prolific as the radio. Not only is radio pervasive, it can

1. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

2. The honors went to KDKA in Pittsburgh, Pennsylvania. See *A Science Odyssey: People and Discoveries: KDKA Begins to Broadcast* (visited Sept. 22, 1999) <<http://www.pbs.org/wgbh/aso/databank/entries/dt20ra.html>>.

3. See MURRAY EDELMAN, *THE LICENSING OF RADIO SERVICES IN THE UNITED STATES, 1927 TO 1947: A STUDY IN ADMINISTRATIVE FORMULATION OF POLICY* 6-7 (1950).

4. 47 U.S.C. § 151 (1994).

5. See 47 U.S.C. § 326 (1994).

have profound effects on its listeners. Author Tim Crook explained the primary reason why radio can have such a unique effect:

[R]adio was the first electronic medium of mass entertainment and radio is a more psychological medium. Its relationship with its audience is based on an emotional and imaginative bond. In 1997[.], radio has not lost its importance as a huge and significant source for news and entertainment[.] and the opportunity to hoodwink the audience is as strong as it has ever been.

Certainly, the opportunity to mislead an audience exists in other mediums. Television and print media are equally capable of misleading consumers if the producers of their content are determined to do so. Additionally, the relatively unregulated Internet is fertile ground for various types of fraud and misinformation. However, certain limitations on other media technologies prevent them from having the same impact as radio. Print is not as immediate as radio. For instance, it is hard to imagine a newspaper displaying the headline, "Community Church Is Burning Now as Reader Is Reading this Paper." Whether the text is from newspapers or the Internet, it can only convey events that have taken place in the past or make predictions about the future. Television can have a more immediate impact, but viewing television requires an information consumer to be in a passive state. Few productive actions can be achieved simultaneously while watching television.

One of the reasons radio remains an effective hoax medium is its unique ability to engage audiences while they are involved in different tasks. For instance, people can receive radio information while they are driving to work, washing dishes, typing, jogging, showering, or performing any number of tasks. In terms of portability, radio remains second only to newspapers in its ability to follow the audience throughout their daily lives. Visual media—such as print, television, and the Internet—require the undivided attention of a static viewer in order to receive information.<sup>7</sup> This unique difference gives radio the opportunity to maximize the impact of a hoax by allowing gullible listeners to immediately act on the information they receive.

Because radio remains the only medium that combines the elements of immediacy, portability, psychological impacts on the imagination, and the ability to reach listeners throughout their daily routines, it remains the most conducive for perpetrating hoaxes on unsuspecting audiences. While hoaxes, frauds, and misrepresentations have occurred on all types of mass

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6. Tim Crook, *The Psychological Power of Radio* (visited Sept. 20, 1999) <<http://www.irdp.co.uk/hoax.htm>>.

7. Adventurous drivers have been observed trying to read newspapers and drive at the same time. The corresponding decline in their driving habits speaks for itself.

media, cases demonstrate that radio remains one of the most effective means for their execution.

## II. EARLY DEVELOPMENTS IN BROADCAST HOAX LAW

The earliest regulations of radio indicate that authorities were certainly aware of some of the possible dangers that the medium posed as far as hoaxes were concerned. The Radio Act of 1912<sup>8</sup> provided in section 7, "[t]hat a person, company, or corporation within the jurisdiction of the United States shall not knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent distress signal or call or false or fraudulent signal, call, or other radiogram of any kind."<sup>9</sup> The updated Radio Act of 1927 (1927 Act)<sup>10</sup> carried over the provision outlawing any false distress signal using the radio waves.<sup>11</sup> Such problems apparently merited an even higher concern than the general interference between broadcasting signals, which in turn was not truly rectified until the early 1930s.<sup>12</sup>

Congress again overhauled radio regulation with the Communications Act of 1934 (1934 Act).<sup>13</sup> That year, Congress repealed the false distress section of the 1927 Act and transferred its contents to section 325(a) of the 1934 Act, which is still in force today.<sup>14</sup> The provision states: "No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto . . . ."<sup>15</sup>

The scope of the 1934 provisions is considerably narrower than the 1912 regulations. Had the 1912 statute barring false radio signals "of any kind" remained in effect, the regulation of content on radio stations might have taken a very different course. As it happened, Congress limited itself to prohibiting false "distress signals."

Regulators of the radio waves seemed to have anticipated early on how basic variations of falsely shouting fire in a theater would translate to the new age of mass media. However, no one was prepared for the kind of phenomena created in the late 1930s when CBS broadcast to an unsuspecting nation a radio drama concerning an alien invasion.

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8. ch. 287, 37 Stat. 302.

9. *Id.* § 7, 37 Stat. 302, 308.

10. ch. 169, 44 Stat. 1162.

11. *See id.* § 28, 44 Stat. 1162, 1172.

12. *See* 47 U.S.C. § 301 (1994).

13. ch. 652, 48 Stat. 1064, 1091 (codified as amended at scattered sections 47 U.S.C.).

14. *See id.* § 325.

15. 47 U.S.C. § 325(a) (1994).

On the night of Sunday, October 30, 1938, Orson Welles, along with cohorts from the Mercury Theater, performed a loose radio adaptation of *War of the Worlds*, an H.G. Wells novel concerning a Martian invasion.<sup>16</sup> WABC broadcast the program live from 8:00 to 9:00 P.M.,<sup>17</sup> as well as the CBS national network, consisting of over 151 stations throughout the country.<sup>18</sup> The broadcast differed from previous typical radio drama styles of the day. After an introductory speech by Orson Welles, explaining the fictional nature of the broadcast, the program then simulated an announcer who purported to bring the listeners live music from an orchestra in the Park Plaza in New York, along with weather reports.<sup>19</sup> The station then played actual orchestral music, only to be interrupted by a separate announcer with a breaking "news bulletin":

Ladies and gentlemen, we interrupt our program of dance music to bring you a special bulletin from the Intercontinental Radio News. At [twenty] minutes before 8 [P.M.], central time, Professor Farrell of the Mount Jennings Observatory, Chicago, Ill., reports observing several explosions of incandescent gas, occurring at regular intervals on the planet Mars.<sup>20</sup>

A brief return to music simulating a live orchestral performance followed the news announcement.<sup>21</sup> The pattern repeated itself with updated breaking announcements reporting meteors striking the earth and interviews with "astronomers" from Princeton Observatory.<sup>22</sup> The broadcast later moved to a simulated live newscast from the scene of the meteor landing where a reporter described monsters emerging from the debris and attacking.<sup>23</sup> Sounds of crashing microphones and moments of silence added to the realism.<sup>24</sup> Reports of deaths along with interviews of state militia officers and Washington officials were heard before the middle break of the program, which reiterated the fictional nature of the broadcast for the first time since its start.<sup>25</sup>

Despite the announcements made before the end of the broadcast

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16. See *Radio Listeners in Panic, Taking War Drama as Fact*, N.Y. TIMES, Oct. 31, 1938, at 1.

17. See *id.* The time refers to Eastern Standard Time. The CBS affiliates throughout the country broadcast the program simultaneously in their respective time zones.

18. See Ted Pease, *I'll Take Martians over Media Illiteracy*, HERALD J. (Utah), Nov. 10, 1996, at 10.

19. See *Excerpts From the 'War' Broadcast*, N.Y. TIMES, Nov. 1, 1938, at 26.

20. *Id.*

21. See *id.*

22. See *id.*

23. See *id.*

24. See *id.*

25. See *id.*

intended to assure audiences of its fictional nature, panic gripped segments of the nation.<sup>26</sup> Listeners did not realize that they were hearing a dramatization. Families rushed out of their homes, traffic jams clogged the streets, church services were disrupted, and chaos ensued from people trying to flee phantom Martians from the sky.<sup>27</sup> The *New York Times* reported that hospitals treated people for shock and hysteria, while police switchboards were so swamped with calls that they could not conduct regular business.<sup>28</sup>

CBS and Welles offered regrets that they had caused such a reaction.<sup>29</sup> Welles denied rumors that the program was a publicity stunt

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26. See *id.*; *FCC to Scan Script of 'War' Broadcast*, N.Y. TIMES, Nov. 1, 1938, at 1. Estimates on the size of the audience tuned in to *War of the Worlds* range from 6 to 12 million listeners. One Princeton University study concluded that as many as one million people actually believed that what they heard was real. See SUSAN J. DOUGLAS, LISTENING IN 165 (citing HADLEY CANTRIL, *THE INVASION FROM MARS* (1940)). Other estimates claim that up to 1,750,000 people were frightened enough by the broadcast to take some form of action. See ORSON WELLES & PETER BOGDANOVICH, *THIS IS ORSON WELLES* 346 (Jonathan Rosenbaum ed., 1992). In terms of the share of the total radio audience, *War of the Worlds* pulled in only about four percent of the available listeners. The extent of the panic could have been far greater if the production had not been competing against the vastly popular *Edgar Bergen and Charlie McCarthy Show* which brought in 34% of the audience that evening. See Walter J. Beaupre, *When Mars Invaded Radio: The Broadcast of the Century* (visited Sept. 20, 1999) <<http://users.aol.com/edwardelec/artwb007.html>>.

27. See *Radio Listeners in Panic, Taking War Drama as Fact*, *supra* note 16, at 1.

28. See *id.* at 4. In an insightful essay entitled *The Psychological Power of Radio*, Tim Crook suggests that the newspaper accounts of the event exaggerated the degree of the panic. See Crook, *supra* note 6. Crook postulates that newspapers had ample motive to slant the coverage because, by the late 1930s, the relatively new medium of radio had become a threat to the print media in its competition for advertising revenue. See *id.* Indeed, the week following the *War of the Worlds* broadcast, *Time* magazine admitted that: "[I]n the U.S. the press, no friend to radio, treated it as a public outrage." "Boo!", *TIME*, Nov. 7, 1938, at 40.

Welles himself lamented the fact that newspapers ran headlines concerning lawsuits totaling \$12 million which supposedly stemmed from the broadcast. When such lawsuits never materialized, Welles maintained that the papers made up the lawsuit headlines because of competitive envy from radio advertising. However, nothing in Welles's statements questioned the extent of the panic or the newspapers' coverage of the event outside of the stories concerning the lawsuits. Welles even noted that 20 minutes into the program, the radio control room was filled with "very bewildered cops." WELLES & BOGDANOVICH, *supra* note 26, at 18-19.

There are few independent historical accounts of the severity of the *War of the Worlds* panic, except for the newspaper reports during the weeks following the broadcast. The papers identified many frightened interviewees by name in their stories. The anecdotal nature of such reporting makes it difficult to objectively assess the true extent and intensity of the panic. While no confirmed deaths stemmed from the incident, at the very least, the *War of the Worlds* hysteria forced many cities to divert considerable resources from their law enforcement, media, and municipal services to cope with the fallout from the program.

29. In later years, Welles admitted that he "merrily anticipated" the type of reaction to the broadcast, indicating that he intended to fool the public from the start. However, he also claimed to be flabbergasted by the scale of the program's effect. "We began to realize,"

designed to promote Mercury Theater productions.<sup>30</sup> He pointed to four factors that should have tipped listeners off to reality: (1) the opening announcement set the show one year in the future (1939); (2) the broadcast took place during the regular Mercury Theater broadcast slot which was announced and described in all the newspapers; (3) a total of four announcements were made describing the fictional nature of the show, with one such announcement falling in the middle of the broadcast; and (4) the familiarity of the American myth regarding an invasion from Mars.<sup>31</sup> Welles further explained:

Far from expecting the radio audience to take the program as fact rather than as a fictional presentation, we feared that the classic H. G. Wells story, which has served as inspiration for so many moving pictures, radio serials[,] and even comic strips might appear too old fashioned for modern consumption. We can only suppose that the special nature of radio, which is often heard in fragments, or in parts disconnected from the whole, has led to this misunderstanding.<sup>32</sup>

The incident was a clear indication of the power of radio and how it differed from other media. Unlike films, people did not necessarily experience the show from the start but rather listened in at various times to different segments. As a result, many did not hear the strategically placed announcements assuring the listeners that the show was fake. The listing in the newspaper that advertised the show obviously did not have an immediate impact, unlike the broadcast itself. The economic and political zeitgeist of 1938 was the final ingredient which allowed a nation to believe the warnings from their radios that the Martians were coming.<sup>33</sup>

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Welles noted, "as we plowed on with the destruction of New Jersey, that the extent of our American lunatic fringe had been underestimated." WELLES & BOGDANOVICH, *supra* note 26, at 18-19.

30. See *FCC to Scan Script of 'War' Broadcast*, *supra* note 26, at 26.

31. See *id.*

32. *FCC to Investigate Mars Radio Program*, ASSOCIATED PRESS (New York), Oct. 31, 1938, reprinted in (visited Sept. 21, 1999) <<http://www.war-of-the-worlds.org/Radio/Newspapers/Oct31/FCC.html>>.

33. In 1938, *Time* magazine declared:

[T]he only explanation for the badly panicked thousands—who evidently had neither given themselves the pleasure of familiarizing themselves with the Wells's famous book nor had the wit to confirm or deny the catastrophe by dialing another station—is that recent concern over a possible European Armageddon has badly spooked the U. S. public.

"Boo!", *supra* note 28, at 40. Although this off-the-cuff analysis by *Time's* editors was adopted as common wisdom by several analysts, sociologists, and other dedicated readers of the magazine, the fact remains that this explanation was hardly the only reason for the phenomena associated with the program. Without more tangible evidence, it is dubious to suggest that this was even the primary cause of the panic.

It is always appropriate to consider the reactions of society within the context of the times that were in existence. However, *Time* gives too little credit to the cleverness of



While the aforementioned provisions in the Radio Acts of 1912 and 1927 indicated that the FCC contemplated the possibility of using the radio to send a false distress signal, it was clearly caught off guard by *War of the Worlds*. The rise of radio networks now allowed broadcasts to be heard simultaneously throughout the nation. The result was the first case of a single broadcaster triggering a nationwide panic.

FCC Chairman Frank R. McNinch called the airing of the program "regrettable," but the FCC was unsure of what steps to take.<sup>34</sup> A basic obstacle that confronted the commissioners was the fact that no rule seemed to apply. The problem had nothing to do with their primary duties of preventing station interference or monopoly ownership within the broadcast industry. This was clearly not a case of obscene programming, nor could it even be termed indecent. Section 326 of the 1934 Act explicitly prohibited the FCC from regulating the content of individual programs by stating:

Nothing in this Act shall be understood or construed to give the [FCC] the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the [FCC] which shall interfere with the right of free speech by means of radio communication.<sup>35</sup>

The *New York Times* summed up the FCC's role by reporting: "The usual practice of the [FCC] is not to investigate broadcasts unless formal demands for an inquiry are made, but the [FCC] has the power, officials pointed out, to initiate proceedings where the public interest seems to warrant official action."<sup>36</sup> After receiving twelve formal protests against the *War of the Worlds* program the day after it was performed, Chairman McNinch promised prompt consideration of the matter.<sup>37</sup> The majority

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Welles and the show itself. To this day, it is remarkable how well the broadcast stands up in terms of its level of realism in capturing the chaos of an unfolding "live news event," even one as improbable as a Martian landing.

Probably the easiest explanation to explain the panic was the simple fact that, at the time, nothing like *War of the Words* had ever been done. People were still unsure how to approach a new medium that was increasingly dominating the distribution of news and information. Since radio was the first electronic mass media, the public had widespread access to it in their homes. At the time, few inventions were comparable to the radio (unlike television, which came along well after the debates concerning radio's place in society). When viewed in this context, it is easier to understand how people could be fooled, at least once, when they had never before been fooled.

34. *FCC Is Perplexed on Steps to Take*, N.Y. TIMES, Nov. 1, 1938, at 16.

35. Communications Act of 1934, ch. 652 § 326, 48 Stat. 1064, 1091. This is verbatim language carried over from section 29 of the Radio Act of 1927. See Radio Act of 1927, ch. 169 § 29, 44 Stat. 1162, 1172.

36. *Washington May Act*, N.Y. TIMES, Oct. 31, 1938, at 4.

37. See *FCC Is Perplexed on Steps to Take*, *supra* note 34, at 26.

feeling within the FCC, however, was to avoid any hasty action, lest it be construed as censoring program material.<sup>38</sup> Commissioner T.A.M. Craven made the following cautionary note:

[T]he [FCC] should proceed carefully in order that it will not discourage the presentation by radio of the dramatic arts. It is essential that we encourage radio to make use of the dramatic arts and the artists of this country. The public does not want a "spineless" radio.

It is also my opinion that, in any case, isolated instances of poor programming service do not necessarily justify the revocation of a station's license, particularly when such station<sup>39</sup> has an otherwise excellent record of good public service. I do not include in this category, however, criminal action by broadcasting station licensees.<sup>40</sup>

At the time, if any pressure was to be put on stations in preventing such a panic in the future, it would have to be done indirectly through the FCC's practice of refusing to renew station licenses for programs or actions that were not deemed to be in the "public interest."<sup>41</sup> The public interest cauldron was often used by the FCC to judge the total activities that a station engaged in, even when they might have fallen outside the parameters of an explicit regulatory ban. However, even though license renewals were less certain for incumbent broadcasters in the 1930s than they are today, some in the FCC indicated doubts as to how much weight it would put on *The War of the Worlds* when determining if a station was satisfying the public interest during a license renewal hearing. Commissioner Paul E. Walker pointed out that, "probably the broadcasters are as anxious to straighten things out as anybody."<sup>42</sup> Commissioner George Henry Payne struck a more actionable tone in proclaiming:

People who have material broadcast into their homes without warnings have a right to protection. Too many broadcasters have insisted that they could broadcast anything they liked, contending that they were protected by the prohibition of censorship. Certainly when people are injured morally, physically, spiritually[,] and psychically, they have

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38. *See id.*

39. It is unclear if Commissioner Craven referred to any specific station in this remark. It could be a reference to WABC—the station in New York where *War of the Worlds* originated. However, given the fact that it was carried by a live simulcast over the CBS radio network, any number of stations could have been singled out for airing the same program. This fact further points out the difficulty that regulators faced in the age of networks.

40. *FCC Is Perplexed on Steps to Take*, *supra* note 34, at 26.

41. *See id.* This *New York Times* article on November 1, 1938, indicates that such renewals were issued every six months. *See id.* The term was later increased to every three years and then to every five years. *See* 47 U.S.C. § 307(c) (1994). Today, the renewal term is every eight years following congressional modifications of section 307(d) of the Communications Act of 1934. *See* 47 U.S.C. § 307(c)(1) (Supp. III 1997).

42. *FCC Is Perplexed on Steps to Take*, *supra* note 34, at 26 (citation omitted).

just as much right to complain as if the laws against obscenity and indecency were violated.<sup>43</sup>

Other commissioners refused to comment. The FCC promised an inquiry and requested a copy of the *War of the Worlds* script from CBS in order to study it.<sup>44</sup>

The investigation concerning *War of the Worlds* coincided with a broader FCC hearing into problems concerning network broadcasting as a whole. Chairman McNinch invited the heads of the then three major broadcasting networks to discuss the use of the news term "flash" in radio programming. In explaining the reasons for the summit, Chairman McNinch stated:

I have heard the opinion often expressed within the industry as well as outside that the practice of using "flash," as well as "bulletin," is overworked and results in misleading the public. It is hoped and believed that a discussion on this subject may lead to a clearer differentiation between bonafide news matter of first rank importance and that which is of only ordinary importance or which finds place in dramatics or advertising.<sup>45</sup>

The concerned network heads expressed relief at the informal nature of the summit and made a good faith agreement to confine the use of the term "flash" in broadcasts to only those items of serious (and nonfictional) importance.<sup>46</sup>

Shortly thereafter, Chairman McNinch delivered a speech to the National Association of Broadcasters convention on November 19, 1938, entitled "What Our Investigation Means to Broadcasters."<sup>47</sup> He suggested that the best guidance on program standards would come from the public opinion of the listeners, rather than the broadcasters or the FCC itself.<sup>48</sup> He further stressed that broadcast station licensees were in the position of trustees, with the American public being the fiduciaries of the trust.<sup>49</sup> The major networks carried Chairman McNinch's remarks live over the radio, including CBS, the same network which broadcast *War of the Worlds*.<sup>50</sup>

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43. *Mars Monsters Broadcast Will Not Be Repeated*, ASSOCIATED PRESS (Washington), Nov. 1, 1938, reprinted in (visited Sept. 21, 1999) <<http://war-of-the-worlds.org/Radio/Newspapers/Nov01/No-Repeat.html>>.

44. See *FCC to Scan Script of 'War' Broadcast*, *supra* note 26, at 1.

45. *Radio Chain Heads Called*, INS (Washington), Nov. 7, 1938, reprinted in (visited Sept. 21, 1999) <<http://war-of-the-worlds.org/Radio/Newspapers/Nov07/Heads.html>>.

46. See *id.*

47. See EDELMAN, *supra* note 3, at 83.

48. See *id.*

49. See *Address by Chairman Frank R. McNinch*, FED. COMM. BAR J., Nov. 1938, at 14.

50. See *id.*

If Chairman McNinch's position in dealing with the aftermath from *War of the Worlds* favored self-regulation by the broadcast industry, those of U.S. Senator Clyde L. Herring from Iowa represented the other side of the spectrum. The day after the broadcast, Senator Herring stated that Welles's drama was proof that radio needed "control by the government."<sup>51</sup> Furthermore, the Senator claimed that he had prepared a bill for the then upcoming legislative session that would have allowed the FCC to screen and veto every radio program before it was broadcast.<sup>52</sup> Senator Herring's remarks represented one of the most unabashed calls for direct government control of the airwaves by a U.S. official in the electronic media age.

The previous years saw a rising chorus of criticism towards radio programming, which was described by many as being increasingly indecent and incendiary.<sup>53</sup> *War of the Worlds* brought the debate concerning radio censorship to a new level of intensity.

Despite the often antagonistic relationships between newspapers and radio, most of the print editorials tended to favor the self-regulation approach. Among the more unequivocal editorials came from the *New York Daily News*, excerpts of which stated,

[M]ail delivery yesterday morning brought 191 letters, and the bulk of these concerned Sunday evening's nation-wide "invasion from Mars" radio scare.

Practically all our correspondents were in a rage when they wrote. About half of them were mad at the people who were hoaxed into taking the broadcast seriously; the other half were mad at Orson Welles, who put on the "War of the Worlds" radio rendition of H. G. Wells's novel of the same title, for having done the job so vividly and convincingly.

We can't work up a mad against either of these targets.

....

The only parties to the excitement that we're mad at are the [FCC], for making such a fuss about it, and Senator Clyde L. Herring (Dem., Iowa), who has seized the incident as a pretext for renewing his drive for government radio censorship.

We wish the FCC would relax and go back to sleep. We hope the next Congress, and as many Congresses thereafter as necessary, will smack flat all radio censorship bills with the avalanche of "NO's" they

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51. *FCC to Investigate Mars Radio Program*, UNITED PRESS (Des Moines), Oct. 31, 1938, reprinted in (visited Sept. 21, 1999) <<http://war-of-the-worlds.org/Radio/Newspapers/Oct31/FCC.html>>.

52. See *id.*

53. Among the most often cited examples include a 1937 broadcast involving Mae West and Don Ameche portraying Adam and Eve in a Bible parody, as well as a 1938 Sunday show from Father Charles E. Coughlin in Detroit which critics described as being anti-Semitic in nature.

deserve in a free-speech, free-press, free-religion, free-assemblage country.<sup>54</sup>

Published sentiments such as these no doubt emboldened officials within the FCC who favored the self-regulation approach. Congress did not adopt Senator Herring's proposals nor those of any others who favored broader and more direct government control over radio content.<sup>55</sup>

In the months that followed the rally against government restrictions on programming, Senator Herring's stance on the issue developed more flexibility and nuance. In March 1939, Senator Herring authored an article entitled *Is Radio Censorship Necessary?*, where he stated:

There has been a reluctance on the part of government to impose federal censorship, and it is quite certain that it will be resorted to only if other means of bringing about voluntary censorship fail.

Just as I am a staunch believer in the capacity of business to run itself and to set up, voluntarily, fair trade and labor practices for the governing of industry by management, so I believe that the radio industry is able to regulate itself.

The radio companies should voluntarily establish a code of ethics binding upon all broadcasters. This would at once obviate the necessity of further efforts at governmental control and, I believe, produce results infinitely more satisfactory from the standpoint of both the industry and the public. . . .

....

One of the most important questions constantly before broadcasters is: What should be allowable in public speeches, political and otherwise, delivered over the radio? The broadcasting companies have endeavored to keep a check on this type of radio presentation as well as dramatic productions, which by their nature might be misleading to radio listeners, such as Orson Welles[']s presentation of "The Men from Mars," [sic] and the "Adam and Eve" [sic] sketch for which Mae West has been so severely censored and for which, I understand, she was only responsible for reading the lines. The scripts in both instances were the products of other minds and ample opportunity should have been afforded for the ascertaining of public reactions before the public presentations were made.<sup>56</sup>

In the debate over radio censorship that followed *War of the Worlds*,

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54. *Radio Must Not Be Censored*, N.Y. DAILY NEWS, Nov. 3, 1938, editorial.

55. Not only were such proposals rejected, but it also should be noted that in searching the indices of the *Congressional Record* for all years covering Clyde L. Herring's term as Senator (1937-43), there is nothing to indicate that he even offered such a bill on the Senate floor. One can only speculate as to why this was so. Perhaps the editorials of the newspapers swayed the Senator and his allies, or, perhaps Senator Herring's statement about his drafted bill was a mere posturing attempt to prod the FCC to take a more active role in the problems concerning station programming.

56. Hon. Clyde L. Herring, *Is Radio Censorship Necessary?*, in RADIO CENSORSHIP 221, 222-24 (H.B. Summers ed., 1939).

it seemed as though the proponents of self-regulation had clearly gained the upper hand in both the halls of Congress and the FCC. Throughout the debate, radio networks themselves did everything they could to show that self-regulation could indeed work. This resulted in a period of programming shaped by network executives who practically walked on eggshells so as not to upset any potential radio critics. One periodical observed at the time:

On guard against government censorship, radio has clamped its own hand over its mouth in a self-censorship as rigid as, if not more rigid than, anything the government could order.

The jitters began with Mae West's burlesque of the Garden of Eden, and reached chronic proportions with Orson Welles's recent "War of the Worlds" [sic] debacle. Today broadcasters are scared silly. Their every decision is dictated by fear—fear of a club held over their heads by a handful of political appointees in Washington, the [FCC], who, in turn, are at the whim of any Nice Nelly in the country.<sup>57</sup>

Popular radio entertainer Fred Allen wished to perform a humorous commentary on his show concerning the *War of the Worlds* scare and the reaction to it. His script contained the following:

In view of the recent happenings in radio, I think it would be better, before we start, if I made a sort of announcement . . . Ladies and Gentlemen, before this radio presentation starts, I would like to announce that this is a comedy program. Any dialogue or sound-effects heard during the next hour will be purely imaginary and will have no relation to any living sounds. If you hear a phone ringing, like this (telephone rings), do not pick up your receiver. If you hear a knock, like this (door knock), do not run to open your door. Ignore everything you hear on this program. Just sit back and relax. Nothing is going to happen. And to prove that the offering is positively crammed with nothing, we plunge instantly into the latest news of the week.<sup>58</sup>

Allen never got to deliver his disclaimer. The program editor for NBC cut the sequence, feeling that the *War of the Worlds* nerves were still too raw at the time.<sup>59</sup> If radio had not become "spineless," it had at least willingly jettisoned a few of its vertebrae in order to head off the prospect of full government control.

The FCC completed its formal investigation into the *War of the Worlds* in just over one month from the date of the broadcast. On December 5, 1938, the FCC issued a press release regarding its decision on the matter. The release itself concisely summarized the further events and conclusions surrounding the investigation, and is thus reprinted here in full:

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57. Earl Sparling, *Radio Gets the Jitters*, AM. MAG., Mar. 1939, at 42.

58. *Id.* at 43

59. *See id.*

The [FCC] announced today that in its judgment steps taken by [CBS] since the Orson Welles 'Mercury Theater on the Air' [sic] program on October 30 are sufficient to protect the public interest. Accordingly complaints received regarding this program will not be taken into account in considering the renewals of licenses of stations which carried the broadcast.<sup>60</sup>

The [FCC] stated that, while it is regrettable that the broadcast alarmed a substantial number of people, there appeared to be no likelihood of a repetition of the incident and no occasion for action by the [FCC].

In reaching this determination, the [FCC] had before it a statement by Mr. W. B. Lewis, Vice President in charge of [p]rograms, of the [CBS], expressing regret that some listeners 'mistook fantasy for fact' and saying in part, 'In order that this may not happen again, the Program Department hereafter will not use the technique of a simulated news broadcast within a dramatization when the circumstances of the broadcast could cause immediate alarm to numbers of listeners.'

The [FCC] had also heard a transcript of the program and had been informed regarding a number of communications concerning it. It was made known that the [FCC] received 372 protests against the broadcast, while 255 letters and petitions favoring it were received. Counting those who signed petitions, those who expressed themselves as favorable to the broadcast numbered approximately 350.<sup>61</sup>

The press release concluded the investigation into *War of the Worlds*. However, the broadcast would continue to reverberate in subsequent decades in the debate concerning hoax regulations.<sup>62</sup>

### III. THE PUBLIC INTEREST: POST-WAR OF THE WORLDS DEVELOPMENTS AND EXAMPLES

Although no direct regulatory controls came out of the *War of the Worlds* scare, that is not to say that the FCC forgot the incident. Many subsequent policy statements made it clear that the FCC looked down upon broadcasting generally deceptive materials. In 1960, the FCC met for an *en*

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60. Although the FCC did not revoke any licenses over the *War of the Worlds* incident, its reference to licenses of stations that carried the broadcast suggests that it considered individual stations to be ultimately responsible for the programming of their affiliated networks under a form of *respondeat superior* theory.

61. *Commission's Decision as to Orson Welles'[s] Broadcast*, FED. COMM. BAR J., Nov. 1938, at 15-16.

62. Years later, Welles was once again on a radio network reading from the works of Walt Whitman when an announcement that Japan attacked Pearl Harbor interrupted the broadcast. Much of the audience recalled the *War of the Worlds* broadcast, suspected that Welles was up to his old tricks, and refused to believe that the announcement was in fact real. President Roosevelt later wired Welles to suggest the inherent dangers involved in "crying wolf." See WELLES & BOGDANOVICH, *supra* note 26, at 20.

*banc* programming inquiry to discuss the current state of broadcast programming in the wake of scandals involving fixed quiz shows and allegations of payola. The FCC used the occasion to make the broader observation that:

Prior to the *en banc* hearing, the [FCC] had made its position clear that, in fulfilling its obligation to operate in the public interest, a broadcast station is expected to exercise reasonable care and prudence with respect to its broadcast material in order to assure that no matter is broadcast which will deceive or mislead the public.<sup>63</sup>

While specifically proposed regulations concerning payola and predetermined contests were soon forthcoming, the FCC did not address the issue of possible deceptions within the context of dramatic shows.

Almost thirty years after the *War of the Worlds* broadcast, the FCC, in a somewhat cursory manner, issued a statement that briefly mentioned the problem of dramatic hoaxes. In February 1966, after receiving numerous complaints on the matter, the FCC adopted a public notice concerning the handling of contests and promotions that adversely affect the public interest.<sup>64</sup> The notice primarily concerned itself with contests and promotions that caused disruptions—such as treasure hunts, which resulted in annoying phone calls by listeners to uninvolved third parties, traffic congestion, or damage to property necessitating the divergence of police from their other duties.<sup>65</sup> Although most of the examples cited did not involve hoaxes or deceptive behaviors, the FCC included the following among the list of promotions deemed to have an adverse effect on the public interest:

The broadcast of "scare" announcements or headlines which either are untrue or are worded in such a way as to mislead and frighten the public: e.g., a sudden announcement delivered in a tone of excitement to the effect that "amoebas" were invading a certain city, implying that the amoebas were dangerous creatures.<sup>66</sup>

The FCC concluded the statement by summarizing that: "[c]ontests or promotions which result in consequences such as these raise serious question as to the sense of responsibility of the broadcast licensee involved."<sup>67</sup>

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63. *Report and Statement of Policy Res: en banc Programming Inquiry*, 44 F.C.C. 2303, 2304 (1960).

64. The FCC's notice did not list any references to the specific instances involving complaints or the stations involved. As a result, it is difficult to trace the surrounding circumstances that prompted the policy notice in a more precise manner.

65. *See* Contests and Promotions Which Adversely Affect the Public Interest, *Public Notice*, 2 F.C.C.2d 464, 6 Rad. Reg.2d (P & F) 671 (1966).

66. *Id.* at 464.

67. *Id.*



In 1974, the specter of the *War of the Worlds* resurfaced when station WPRO in Providence, Rhode Island, broadcast an updated version of the drama that struck close to the original *War of the Worlds* script but substituted location names that were more familiar to Providence citizens. WPRO broadcast the show on October 30, 1974, the same night as the original *War of the Worlds* performed thirty-six years earlier. Although one might think that by 1974 the American public would have been more skeptical about news reports of a Martian invasion, the show still managed to panic many listeners. Even though the level of anxiety caused by WPRO's *War of the Worlds* was not nearly as great as when Orson Welles performed it, the program still generated over one hundred calls to the station and over eighty calls to the police.<sup>68</sup> The fire department, local telephone company, as well as other television and radio stations complained that they were overwhelmed by the number of calls concerning "the disaster."<sup>69</sup>

Letters to the FCC told of tales concerning people who drove at high speeds in order to get home and protect their families while altering their normal travel routes in order to avoid the areas mentioned in the show. One letter admitted: "We are not alarmists or gullible people but in the hour that we listened we were so afraid we called neighbors and our parents to warn them. . . ."<sup>70</sup>

Despite WPRO's defense that the level of damage caused was slight and that various announcements were made both before and during the program that informed listeners of its dramatic nature, the FCC issued a formal reprimand to the station.<sup>71</sup> WPRO also claimed that there was no specific FCC policies that prevented them from airing dramas such as *War of the Worlds*. The FCC used the occasion to clarify its public notice of 1966:

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68. Unlike Welles's broadcast, WPRO's program was only broadcast to the community that could reach their Rhode Island signal. The CBS network carried Orson Welles's broadcast throughout the country. WPRO aired the show from 11:00 P.M. until midnight, while Welles's drama began at 8:00 P.M. (East Coast Time), a time when more listeners were awake. In an era when people had less entertainment choices (e.g., television), a larger, less fractured audience tuned into radio.

69. See Complaints Concerning Capital Cities Comm., Inc., East Providence, R.I., *Complaint*, 54 F.C.C.2d 1035, 1035 n.1, 34 Rad. Reg.2d (P & F) 1016, 1016 n.1 (1975) [hereinafter *Complaint*].

70. *Id.* at 1037 n.5.

71. *Id.* at 1038. To the observers who would be more skeptical about broadcasts concerning Martian invasions, the exchange offered moments of unintended humor, such as this FCC retort to an attempted defense by WPRO: "As to your statement that 'The War of the Worlds' [sic] caused no gathering of people at 'the landing site' it would be reasonable to assume that the last place that those people misled by the broadcast would want to gather is at the Martian landing site." *Id.* at 1037.

In [the station's response] you state that as far as you are aware, there is no rule or policy directly in point that purports to establish standards governing the content of radio dramas; and that the [FCC]'s Public Notice, 'Contests and Promotions Which Adversely Affect the Public Interest,' deals with the questions of disruption and alarm caused by "contests and other promotional ventures," but does not purport to deal with serious radio drama. Although the Public Notice to which you refer is couched in terms of contests and promotions, it does serve to indicate types of broadcasts adverse to the public interest. An example cited in that Notice is as follows:

The broadcast of "scare" announcements or headlines which either are untrue or are worded in such a way as to mislead and frighten the public: e.g., a sudden announcement delivered in the tone of excitement to the effect that "amoebas" were invading a certain city, implying that the amoebas were dangerous creatures.

*Parts of the "War of the Worlds" [sic] broadcast appears to fall within the example above.*<sup>72</sup>

Although various FCC officials expressed great concerns over Orson Welles's *War of the Worlds* in 1938 and implied that broadcasters should discourage such programming, the WPRO reprimand letter represented the first time that the FCC had formally gone on record to state that the *War of the Worlds* style of broadcasting was specifically adverse to the public interest.

Commissioner Abbott Washburn offered a brief dissenting statement concerning the decision to reprimand WPRO. Washburn wrote:

Anytime the [FCC] intrudes into the presentation of a radio or television drama it should do so with the utmost caution.

If there is any doubt as to whether the listening public could recognize this program for what it was, a radio drama, I believe the [FCC] should avoid an official sanction against the licensee. Here the number of complaints was not large and the precautions taken by the licensee were not in my opinion unreasonable. I therefore dissent.<sup>73</sup>

Despite the reprimand, WPRO's broadcasting license remained intact. Actual instances of a station's license being jeopardized for participating in a broadcast hoax are rare; however, a few past cases are worth noting.

In 1975, station KTLK-FM in Denver had its license renewal period shortened to one year in part because it broadcast false weather reports that the announcers knew had no factual basis. The FCC distinguished cases of willful distortions from biased news judgments. In its report on KTLK's license renewal hearing, it stated:

This activity, albeit on a lower plane, falls on the periphery of the type

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72. *Id.* at 1035-36 (citation omitted) (emphasis added).

73. *Id.* at 1038 (Commissioner Washburn, dissenting).

of "nonfact" reporting we referred to as "staged", or "pseudo-event" in *Democratic National Convention Television Coverage*.<sup>74</sup> In that case we said that "... we do not sit to review the broadcaster's news judgment, [or] the quality of his news..." On the other hand we are concerned with a willful distortion of news. All that takes this licensee's conduct from the core of the "willful distortion" to which we were above referring is that there is no evidence that the licensee knew the actual temperatures and, for motive, warped that information, and although we have said that "[we] do not sit as a review body of the 'truth' concerning news events," *where, as here, there is the clearest evidence of reckless disregard for truth in a licensee's own news practices and the broadcast in no way smacks of a "commentary" type of presentation, public interest questions are raised.*<sup>75</sup>

The action against KTLK stemmed from additional factors such as the promotion of a lottery (in violation of 18 U.S.C. § 1304), and the violation of the FCC's rules regarding leaving the station's transmitter unattended.<sup>76</sup> However, the fact that the FCC singled out the false weather

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74. The FCC's reference to the coverage of the Democratic National Convention refers to a 1969 report concerning the possible scope of FCC jurisdiction over allegations of staged events during news coverage of the Chicago riots outside the convention halls in 1968. Allegations included news crews encouraging protesters to confront the police as cameras began to roll, a cameraman gathering together burning trash in a pile and then deliberately lit a "Welcome to Chicago" sign afire in order to film it for dramatic effect, and an allegedly injured protester holding a bandage to his head as he was being filmed but later dropped the bandage and walked away as soon as the cameras stopped. *See Complaints Concerning Network Coverage of the Democratic National Convention*, 16 F.C.C.2d 650, 16 Rad. Reg.2d (P & F) 791 (1969).

75. Application of Action Radio, Inc. for Renewal of License of Radio Station KTLK, Denver, Colo., *Decision*, 51 F.C.C.2d 803, para. 13, 33 Rad. Reg.2d (P & F) 51 (1975) (footnote and citations omitted) (emphasis added). The line that separates news distortions from false news reports rising to the level of hoaxes is often difficult to ascertain. Specifying such distinctions could be a topic unto itself. Generally speaking however, 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. For the purposes of surveying broadcast hoax law, it shall suffice to point out that the FCC attempted to make such distinctions. *See Amendment of Part 73 of the FCC's Rules Regarding Broadcast Hoaxes, Notice of Proposed Rule Making*, 6 F.C.C.R. 6935, 6935 n.3 (1991). Also, one should distinguish between news staging, wherein the broadcaster instigates a real and actual news event that would not have otherwise occurred, and news hoaxes, which report on events that have not occurred in fact. For more general information on this aspect of the discussion, see Complaint Concerning the CBS Program "The Selling of the Pentagon," 30 F.C.C.2d 150, 21 Rad. Reg.2d (P & F) 912 (1971); Complaint by Mrs. J.R. Paul, Houston, Tex. Concerning Fairness Doctrine Re Network's Coverage of President's Vietnam Address, 26 F.C.C.2d 591, 20 Rad. Reg.2d (P & F) 1223 (1969); Complaint Covering CBS Program, "Hunger in America" [sic], 20 F.C.C.2d 143, 17 Rad. Reg.2d (P & F) 674 (1969); Complaints Concerning Network Coverage of the Democratic National Convention, 16 F.C.C.2d 650, 15 Rad. Reg.2d (P & F) 791 (1969).

76. *See* Application of Action Radio Inc., for Renewal of License of Radio Station KTLK, Denver, Colo., *Decision*, 51 F.C.C.2d 803, para. 2, 33 Rad. Reg.2d (P & F) 51

incident in the license renewal hearing and grouped it in the same category of behaviors such as promoting a lottery, along with its concerns over the inadequate supervision of station operations, clearly indicated the FCC's indirect censoring power under the "public interest" rubric when a broadcaster disseminated knowingly false information.

Notably, the FCC did *not* revoke the KTLK license. It merely shortened KTLK's license period to one year, after which the station would resubmit its application to an additional license hearing.<sup>77</sup> Even when program content is deemed to be against the public interest, the FCC remains sensitive to the specter of censorship and will often refrain from revoking a license in its entirety unless such problems are continuous. In 1980, however, a broadcast hoax managed to play a significant role in getting a station's license taken away for good.

In 1974, station KIKX-FM in Tucson, Arizona, designed a promotion centering around a staged kidnapping of their new morning disc jockey Arthur Gropen. The original plan called for Gropen to disappear from a remote broadcast site and reappear in Miami. The general idea had been devised with the help of Dennis Forsythe, the station's general manager. On Saturday, January 19, 1974, the program director and news personnel reported regularly scheduled newscasts concerning Gropen's kidnapping. Details of a suspect profile and vehicle were used, along with a fake police sound bite. Forsythe was at a golf tournament that weekend and had no contact with the station regarding the execution of the promotion.

The public flooded the phone lines calling the station and the police about the incident. Upon learning of the hoax, police complained to the station that the gimmick was tying up their phone lines. A local TV station then got wind of the incident and announced the kidnapping as a hoax. Unfazed, KIKX broadcast a rebuttal, insisting that the kidnapping was in fact genuine. Despite growing concern among the station's staff as to the direction of the promotion, the program director allowed it to continue. When Forsythe was contacted over the weekend about the situation, he was not told about the complaints by the police. As a result, he authorized the promotion to continue but directed that the term "kidnapping" not be used and that no reference to the promotion be used in the station's newscasts.

It was not until Forsythe arrived back at the station on Monday that he learned of the details surrounding the incident. KIKX had broadcast that

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(1975).

77. In the course of the following year, KTLK managed to correct and prevent the violations that the FCC brought to the station's attention. The license of KTLK was then reinstated to its full term. *See* Application by Action Radio, Inc., Denver, Colo. for renewal of License for Station KTLK, 62 F.C.C.2d 349, 349 (1976).

Gropen had disappeared for three consecutive days. After speaking to the police, Forsythe called John Walton, owner and President of Walton Broadcasting, Inc., the company that in turn owned the station's license. After Forsythe gave Walton a brief sketch of the incident, Walton felt he could trust him to handle the situation and made no further inquiries. On Tuesday, January 22, Forsythe learned that the FCC was going to investigate the stunt. KIKX officially canceled the promotion the following day and repeatedly broadcast messages from Forsythe and Walton, apologizing to the listeners and police.<sup>78</sup>

The FCC conducted the license renewal hearing for KIKX in 1976. Several rule violations were listed against the station including: a failure to log commercial spots properly, technical violations concerning maintenance of its transmitter, failure to maintain an effective equal employment opportunity program, and a concern that Walton did not properly supervise the station management as an absentee owner who attempted to run the station from outside of Arizona. However, the most serious charge against the station was the Gropen kidnapping hoax. Administrative law judge Thomas B. Fitzpatrick ruled that renewing a license to Walton Broadcasting would "not serve the public interest, convenience and necessity."<sup>79</sup>

In reaching this conclusion, Judge Fitzpatrick rejected the contention that the hoax was a spur of the moment stunt by the program director. Evidence pointed to the fact that some of station's personnel were told of the kidnapping plan eleven days before its execution. Judge Fitzpatrick underscored Forsythe's decision to remain at the golf tournament while the station carried out the hoax as evidence of a lack of managerial concern in the station's operation. Summarizing the reasons for his decisions, Judge Fitzpatrick stated:

The broadcast of the hoax kidnapping on newscasts and continually during the broadcast day, represents a type of station operation which one would have hoped that broadcast industry had long since relegated to total oblivion. Certainly, station promotions have their place in appropriate broadcast operation. However, such promotions must not be permitted to deteriorate to the point of deception and chicanery, as was the case here. This hoax on the listening public was conceived by Forsythe in a cynical fashion and played upon the credulity and humanity of the KIKX listeners. That the public was both shocked and concerned by the purported "kidnapping" is amply evidenced by the numerous phone calls to the station and to the police. The program

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78. See Application of Walton Brdcast., Inc. (KIKX), Tucson, Ariz. for Renewal of License, *Decision*, 78 F.C.C.2d 857, paras. 5-12, 47 Rad. Reg.2d (P & F) 1233 (1980) [hereinafter *Arizona License Decision*].

79. *Id.* at para. 2.

format of KIKX was such that it catered to a young and impressionable audience. All the announcements of the "kidnapping" had the ring of authenticity. The fact that a number of people questioned police officer Sedlmayr while he was attending the University of Arizona basketball game Saturday evening evidences the depth of their concern of what they thought was the kidnapping of a popular disc jockey. Forsythe's arrogant disregard of the sensibilities of the listening public cannot be too strenuously condemned. This whole incident was unnecessary and unpardonable, and the licensee, which delegated to Forsythe supervision over the operation of station KIKX, must be held responsible. Only by holding a licensee responsible for the operation and management of a station and only by insisting that it bear the responsibility for the actions of its station manager can there be any reasonable assurance of responsible station operation and management in the public interest.<sup>80</sup>

Furthermore, Judge Fitzpatrick categorically rejected Walton's argument that the event should not be categorized as a deception because the station had planned to eventually reveal the truth from the idea's inception. The terse response to this defense pointed out:

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, it was a hoax, for a period of five days. To argue that one can deceive the public, and incite their concern by misrepresenting that a kidnapping had occurred and that it is not staging the news because it was later to be announced that Gropen was safe and sound in Florida, is specious and is rejected.<sup>81</sup>

Walton appealed to the FCC, which denied the appeal in 1980. The ruling pointed to the lack of control that Walton exhibited over his staff which allowed the hoax to continue. The decision not only emphasized the concern over broadcast hoaxes, but also the policy of encouraging license holders to have a more hands-on approach as to how their stations are run.<sup>82</sup>

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80. Walton Broadcasting, Inc. (KIKX), Tucson, Ariz. for Renewal of License, *Initial Decision of Administrative Law Judge Thomas B. Fitzpatrick*, 78 F.C.C.2d 880, at para. 5, 34 Rad. Reg.2d (P & F) (1976) (footnote omitted).

81. *Id.* at para. 7 (footnote omitted).

82. See Application of Walton Broadcasting, Inc. (KIKX), Tucson, Ariz. for Renewal of License, *Memorandum Opinion and Order*, 83 F.C.C.2d 440, para. 6, 48 Rad. Reg.2d (P & F) 1006 (1980) [hereinafter *Arizona License Memorandum Opinion and Order*]. The FCC also raised serious concerns regarding the lack of equal employment opportunity (EEO) or "affirmative action" programs at KIKX. However, this was not a deciding factor in the choice to deny the license. The FCC stated in the decision:

We also find that Walton's failure to have an effective EEO program, its failure to comply with the [FCC]'s EEO Rules during the 1971-1974 license term, and the misstatements in its 1974 renewal application with respect to the effectiveness of its EEO program, absent consideration of Walton's postdesignation EEO efforts, would constitute a separate and independent ground for denial of its renewal application. Because we hold that the licensee's failure to exercise adequate

In its appeal, Walton Broadcasting cited decisions regarding *WJPD, Inc.*,<sup>83</sup> and *Janus Broadcasting Co.*,<sup>84</sup> as examples of similar conduct which did not result in a license revocation. The FCC distinguished these cases from the KIKX incident. The *WJPD, Inc.* case involved a station manager who engaged in fraudulent billing practices for four years because the licensee failed to monitor the station's billing. However, the FCC found that there was no clear indication of misconduct to the license holder who had taken good faith steps to prevent such actions. While the licensee showed a lack of diligence, his failure to uncover the station manager's actions did not rise to gross negligence and his subsequent preventive measures mitigated in his favor.

The *Janus Broadcasting Co.* investigation concerned a single instance of misconduct involving a rigged contest on station WGNE-FM in Panama City, Florida. The actual licensees were unaware of the contest when it began and ordered it to cease as soon as they learned that it was in fact fixed. During the initial inquiry by the FCC, one of the licensees misled investigators by claiming that he was not aware of any instances of rigged contests. He soon recanted his misstatement, however, claiming that he did not intend to deceive the FCC but decided to take the easy way out and avoid admitting what he felt was a minor error.<sup>85</sup>

The FCC's decision regarding KIKX distinguished *Janus Broadcasting Co.* by pointing out that the station in that case had only a single incident of misconduct and misrepresentation, which did not involve any serious repercussions.<sup>86</sup> In contrast, KIKX staged a hoax that lasted several days, interfered with police operations, and alarmed the audience.<sup>87</sup> The hoax did not stop in light of concerns from police, callers, and local

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control with respect to the hoax incident is a sufficient ground for denial of renewal, we need not reach the question whether its postlicense term EEO record should be considered in mitigation of our finding that renewal denial was warranted on the EEO issue.

*Arizona License Decision*, 78 F.C.C.2d 857, para. 4, 47 Rad. Reg.2d (P & F) 1233 (1980).

83. Revocation of the License *WJPD, Inc.* 79 F.C.C.2d 115, 47 Rad. Reg.2d (P & F) 1423 (1980).

84. Frederick Leonard Lindholm, Donald George McCoy, General Partners and David Arvid Johnson, Limited Partner, d/b/a Janus Brdcst. Co. for Renewal of License of Radio Station WGNE Panama City Beach, Fla. and for Renewal of Main & SCA License of Radio Station WGNE-FM Panama City, Fla., *Decision*, 78 F.C.C.2d 788, 47 Rad. Reg.2d (P & F) 805 (1980) [hereinafter *Decision*].

85. *See id.* at paras. 6-7.

86. *Arizona License Memorandum Opinion and Order*, 83 F.C.C.2d 440, para. 6, 48 Rad. Reg.2d (P & F) 1006.

87. *See id.*

television stations.<sup>88</sup>

Notably, the decision to uphold the license revocation of KIKX was not unanimous. Commissioner Anne P. Jones issued a dissent, joined by Commissioner James H. Quello. Commissioner Jones stated that she felt the FCC:

Overreacted to a brief ill-conceived promotion conducted by this licensee some seven years ago. The promotion surely deserves condemnation, but I can not agree that it justifies nonrenewal of this license.

....

In a case such as this the operative question is whether the facts show that the licensee cannot be trusted in the future to operate in the public interest. In my view the facts here make no such showing. At most, they indicate that over a period of about four days Walton's supervision and control of KIKX was inadequate to prevent [sic] an ill-conceived promotion which caused some concern to the public and the police. The licensee has now tightened his control to guard against any such deviation from operation in the public interest in the future.

I do not condone either this promotion or the slippage of supervision and control which allowed it to occur. I cannot, however, agree that this brief, apparently aberrant operation of KIKX justifies nonrenewal of its license.<sup>89</sup>

The dissent points to the fact that decisions regarding how to approach broadcast hoaxes were not unanimous. However, in light of the knowledge of the deception by the station's management, coupled with a lack of diligence by the licensee to take preventive steps, KIKX became one of the few stations to have its license permanently revoked due to a broadcast hoax.

A similar case involving WMJX-FM in Miami closely followed the KIKX incident. After being admonished by the FCC in 1973 for engaging in fraudulent contests,<sup>90</sup> the station broadcast a series of news reports stating that disc jockey Greg Austin was lost in the Bermuda Triangle. The reports continued after station personnel were aware of Austin's safe landing on the Florida coast. However, the station's news reporter was instructed to keep running the story of the disappearance in order to

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88. *See id.* at para. 5.

89. *Id.* at 443-44 (Commissioner Jones, dissenting).

90. One particular contest that initiated an FCC investigation involved a promotion called "Magnum One," where the station led contest winners to believe that they had received part of a corporation with valuable assets. It turned out that the corporation itself was a shell with little or no assets. Following the FCC's admonishment, the station made assurances to the FCC that steps would be taken to prevent such deceptive practices in the future. *See Investigation of Bartell Brdcast. of Fla., Inc. (Station WMYQ-FM) Miami Beach, Fla. Concerning Contest*, 51 F.C.C.2d 2 (1974).



promote the "Find Greg Austin Contest."<sup>91</sup>

Administrative Law Judge Thomas B. Fitzpatrick, the same judge who revoked the license of KIKX, presided over the license renewal hearing of WMJX. Once again, Judge Fitzpatrick refused to renew the license in light of the station's misconduct.<sup>92</sup>

In upholding Fitzpatrick's decision to revoke the license of WMJX, the FCC stated:

The lack of evidence regarding actual harm, and the fact that numerous prizes [for the deceptive contests] were actually awarded do not constitute mitigating circumstances. Those cases in which the [FCC] either imposed a short term renewal or issued an admonishment involved only one contest irregularity. The record here, by comparison, demonstrates false newscasts in connection with one contest promotion . . . and repeated misconduct in nine contests over a two year period.<sup>93</sup>

The FCC further noted that the hoaxes and fake contests involved the station's top management and the licensee's parent corporation delegated top management's authority.<sup>94</sup> As to the station's claim that it should receive First Amendment protection for good faith mistakes, the FCC retorted, "it is sufficient to note that these were not good faith mistakes. WMJX, Inc., has already received one lesser sanction, and its failure even to abide by express representations made to the [FCC] chills any expectation that the licensee can be trusted in the future."<sup>95</sup>

Attorneys for WMJX also attempted to compare its behavior with that of Denver's KTLK and the false weather reports broadcast.<sup>96</sup> They noted that KTLK merely received a shortened license renewal period for its conduct, while the FCC revoked WMJX's license for what was being described as similar behavior.<sup>97</sup> The FCC quickly distinguished WMJX's case from others by observing:

The [FCC] decisions and First Amendment cases upon which WMJX, Inc., relies do not preclude a denial of renewal[.] In *Action Radio, Inc.* the licensee's meritorious programming record, when weighed against the gravity of the misconduct, was deemed sufficient to allow a short-term renewal. WMJX, Inc., never requested consideration of its programming as a mitigating factor, and the misconduct here was far more egregious. To the extent WMJX, Inc.,

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91. Application of WMJX, Inc. WMJX-FM Miami, Fla. for Renewal of License, *Decision*, 85 F.C.C.2d 251, paras. 1-16, 48 Rad. Reg.2d (P & F) 1339 (1981).

92. *See id.* at para. 2.

93. *See id.* at para. 37.

94. *See id.* at para. 39.

95. *Id.* at para. 41 (footnote omitted). The lesser sanction that the FCC referred to is the admonishment stemming from the "Magnum One" contest. *See supra* note 90.

96. *See id.*

97. *See id.*

relies upon the proposition announced in *Bluegrass Broadcasting Corp.*, regarding the unforeseen aberrational conduct of a long term and trusted employee, we note that the licensee was more than once alerted to possible contest irregularities during the period Como, Logan, and Clifton managed the station. *Oil Shale Broadcasting Company*, is also distinguishable. It involved one contest which was prearranged by station employees, with a negligent failure in supervision and control and no knowledge on the part of the principals. The record here, in contrast, demonstrates numerous contest irregularities over a protracted period of time, involvement therein by top management of the station and the licensee's parent corporation. It also involved actual knowledge on the part of a corporate officer who was responsible for station operations and who was grossly negligent in failing to exercise minimal supervision and control over the various contests and promotions.<sup>98</sup>

The decision to punish a station for hoaxes or deceptive incidents turns on very fact intensive and contextual considerations. KIKX and WMJX should be contrasted with another "kidnapping" incident involving station KITE in San Antonio, Texas. The license holder of KITE had helped to stage an on-air kidnapping of its morning show host as part of a station promotion. During its license renewal hearing, the licensee argued that no one listening to the broadcast could have taken it seriously.<sup>99</sup> During a challenge to the license renewal, the FCC's finding reinforced that contention:

Toni Walsh, the female member of the *Tom and Toni Show*, was abducted by the Happy Jazz Band of San Antonio, amid much tooting of trumpets, flashing of hired photographers' cameras, and general hilarity. The stunt had been broadly hinted at all week, and it was carried off as a stunt, not as a real experience.

Our review of the results of an investigation conducted by the [FCC]'s staff does not bear out [the challenger's] contentions that the promotional stunt created widespread disorder, necessitating the diversion of police from other duties. The [FCC] received a total of two complaints regarding the licensee's prank—one from the petitioner and the other from an individual listener, who only momentarily thought the "kidnapping" was real. Furthermore, in response to [FCC] staff inquiries, the police departments of Terrell Hills and San Antonio reported that the "kidnapping" did not disrupt their normal routines. No police personnel were diverted from regular duties. In view of the foregoing, it is clear that the petitioner has failed

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98. *Id.* at para. 41 (footnotes omitted).

99. See Application of Doubleday Brdcast. Co., for Renewal of License for Station KITE, San Antonio, Tex., *Memorandum and Order*, 56 F.C.C.2d 333, para. 16, 35 Rad. Reg.2d (P & F) 775 (1975). Although the precise date of the incident was not provided, based on the date of KITE's license renewal motions, the kidnapping most likely occurred sometime between 1972 and 1974.

to show that KITE's promotional gimmick adversely affected the public interest.<sup>100</sup>

Contrasting the KITE promotion from those involving KIKX and WMJX provides a list of factors that would cause the FCC to be more likely to take action. First, the broadcast must be inherently believable. Pranks that are obvious in nature will not trigger disciplinary action. Particularly significant in that respect is the amount of disruption that was actually caused to a communities' law enforcement or emergency services. In the context of hoaxes, the "public interest" is often defined in terms of the level of intrusion imposed upon third parties such as police, firemen, or traffic controllers. However, WMJX shows that actual harm may not always be necessary in the case of repeated violations involving deceptive contests or promotions. Single instances of misconduct will not likely invoke the FCC's wrath when no actual harm is done, much like the *Janus Broadcasting* incident. However, when a station continues proscribed conduct after it has been warned, the lack of harm caused is less likely to be an effective defense. In such instances, the FCC looks to the level of involvement by upper management and how it reflects on their diligence in operating the station in a hands-on manner consistent with stated public policy. The KIKX and WMJX cases contained such circumstances that triggered the FCC's extra scrutiny and thus harsher punishment. In spite of those notable instances, it is rare for the FCC to revoke a station's license for engaging in a broadcast hoax.

#### IV. DEREGULATION: REDEFINING THE APPROACH?

Somewhat ironically, the actions against KIKX and WMJX came at the starting cusp of a general trend towards the deregulation of radio. What began in 1978 as an informal study of the possibility of radio deregulation culminated in official proceedings by the FCC in 1981 to eliminate regulations deemed to be unnecessary, starting with areas such as program log requirements, restrictions on commercial time, and nonentertainment program guidelines. A general policy of good faith by the broadcaster to serve the public interest in its discretion replaced the unnecessary regulation. The FCC explained:

In taking the actions outlined above we have relieved radio broadcasters of substantial burdens but have also given them added responsibility—the responsibility to determine how best to serve their public without the [FCC] providing detailed requirements on how to go about doing so. We are confident that they are up to the task before

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100. *Id.* at paras. 16-17 (citation omitted).

them.<sup>101</sup>

Broadcast deregulation continued throughout the 1980s concerning all areas of the industry, including programming guidelines. In 1985, the FCC decided to eliminate the official policy adopted in 1966 concerning contests and promotions that adversely affect the public interest. In explaining the reasons for eliminating the policy, the FCC pointed to state laws that were adequate alternatives to deal with any problems:

[C]ontests and promotions resulting in traffic congestion or other public disorder can all be ably handled at the local level through both civil means (e.g., actions for trespass, personal injury, private nuisance, invasion of privacy, or injunctive relief) and criminal means (e.g., disturbing the peace or public nuisance), possibly resulting in damages or fines.<sup>102</sup>

Additionally, the policy change pointed to the fact that having to caution a station from announcing an obvious hoax, such as an invasion by amoebas, was an "overreaction" on the FCC's part and constituted "regulatory overkill."<sup>103</sup>

However, an important footnote in the policy change announcement was a clear indication that stations would not be allowed to engage in an "anything goes" style of programming. A caveat to the amoeba example reemphasized that "a current broadcast of a program such as "War of the Worlds", [sic] without cautionary language, would violate [FCC] policies—i.e., both our general policy requiring licensees to program their stations in the public interest, and our more specific policy against deliberate distortion or falsification of programming."<sup>104</sup>

The juxtaposition of this footnote with the description of having to caution against an amoeba invasion as an "overreaction" reemphasized the policy touched upon in the KITE renewal hearing—that a broadcast hoax must be reasonably believable before it will prompt the FCC to act. The problem remained: what might be believable to one generation or community might not be believable to another. In the 1990s, many would scoff in amusement when they hear a radio show reporting a Martian attack. However, America in 1938 was more susceptible to believe such a story in the midst of the Depression and war anxieties. The *War of the Worlds* broadcast by WPRO showed that certain communities were still prone to such fears in the mid-1970s. Could such a prank be successfully

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101. Deregulation of Radio, *Report and Order (Proceeding Terminated)*, 84 F.C.C.2d 968, para. 10, 49 Rad. Reg.2d (P & F) 1 (1981).

102. FCC Notices: Elimination of Unnecessary Broadcast Policies, 50 Fed. Reg. 6246, 6248 (1985), 57 Rad. Reg.2d (P & F) 939 (1985) (footnote omitted).

103. *Id.*

104. *Id.* at 6248 n.11 (citation omitted).

pulled off even today? Changes in the zeitgeist shape both how the public and the FCC react to stunts involving broadcast hoaxes. Such shifts in society would make it difficult for broadcasters and observers to predict audience reactions with a strong degree of certainty.

Despite the rare instances of license revocations for repeated violations, the primary FCC reaction to hoaxes has been an admonishment. Admonishments serve as a slap on the wrist to a station. However, they also put a station on notice that it should refrain from such behavior in the future, lest it jeopardize their license at the next renewal hearing. Typical examples of such cases include KSLX-FM in Scottsdale, Arizona, which had broadcast an April Fool's Day joke that the station had been taken hostage by Indians.<sup>105</sup> The hoax resulted in a number of calls to the police as well as the 911 operators. However, because the joke was a one-time incident and the licensee instituted station policies to prevent such hoaxes in the future, no further action was taken beyond an admonishment.<sup>106</sup>

Similar considerations prevented the FCC from taking more serious actions against WCCM-FM in Hartford, Connecticut, after it falsely broadcast that a volcano had erupted nearby. Like other such stunts, police received a large number of calls from the announcement, which also caused a traffic jam.<sup>107</sup>

The FCC is powerless to levy a fine against a station unless there is a specific regulation prohibiting the disfavored conduct.<sup>108</sup> For many years, the only tools available to the FCC to discourage hoaxes were either a letter of admonishment or revocation of the station's license. Such actions were felt to be either too light of a punishment or too harsh, depending on the circumstances of the incident under review. In the early 1990s, a number of well-publicized hoaxes convinced the FCC to attempt a new direction.

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105. Officials at the FCC indicated to the Author that a disproportionate number of such one-time hoax incidents occur on April Fool's Day.

106. See STEVEN A. LERMAN ET AL., PREVENTING THE BROADCASTING OF HOAXES AND OTHER FALSE OR DECEPTIVE PROGRAMMING: A REVIEW OF LEGAL PRINCIPLES AND SUGGESTED GUIDELINES AND PROCEDURES TO BE IMPLEMENTED BY BROADCAST LICENSEES 5 (1992) (referencing FCC Letter of Admonishment Ref. No. 8310-TD, C6-220 (Oct. 2, 1989)). Leventhal, Senter & Lerman prepared this source in a pamphlet for Infinity Broadcasting following the new FCC regulations concerning broadcast hoaxes passed in 1992. Infinity Broadcasting was the license holder for KROQ-FM in Pasadena, California, a station that played an important role in inspiring the FCC to craft the 1992 regulations.

107. See *id.* (citing FCC Letter of Admonishment Ref. No. 8310-TD, C5-820 (July 26, 1990)).

108. See, e.g., Liability of Montachusett Brdcst. Inc., Licensee of Radio Station WXLO(FM) Fitchburg, Mass. for a Forfeiture, *Memorandum Opinion and Order*, 7 F.C.C.R. 3594, para. 5, 71 Rad. Reg.2d (P & F) 26 (1992) [hereinafter *Forfeiture Memorandum Opinion and Order*].

## V. TURNING POINT: GENESIS OF THE MODERN REGULATION

During the morning of January 29, 1991, Disc Jockey John Ulett of station KSHE-FM in Crestwood, Missouri, interrupted the music programming with a ten-second broadcast tone followed by an announcer's voice stating, "Ladies and gentlemen, we are experiencing technical difficulties. Please stand b—."<sup>109</sup> The announcement was then cut off by the sound of an air raid siren which continued underneath the broadcast of a second voice stating: "Attention, attention. This is an official civil defense warning. This is not a test. The United States is under nuclear attack."<sup>110</sup> Various sound effects of screams, explosions, and a repeat of the broadcast tone were then heard before the original announcer returned to explain that they expected to resume normal broadcasting shortly. True to his word, the station's music then returned.<sup>111</sup>

As previously indicated, broadcast hoaxes are often a product of the age. In this case, KSHE broadcast the phony nuclear attack two weeks after the start of the Persian Gulf War. Calls concerning the incident flooded the station. Two hours after the hoax aired, Ulett returned to the microphone and admitted that he faked the program and that he merely wanted to make a statement concerning nuclear war.<sup>112</sup> The station subsequently aired an official disclaimer and apology that afternoon and repeated it throughout the day.<sup>113</sup> KSHE repeated its regrets in the local news the following day. Although the stunt did not cause the amount of actual disruptions that occurred from other station hoaxes in the past, the FCC clearly was not amused.

The FCC immediately launched an investigation into the KSHE incident.<sup>114</sup> Unlike the fact pattern involving the KIKX license revocation, Ulett created the hoax announcement without the management's knowledge. In contrast to the weekend long publicity stunt from KIKX, the hoax lasted for little more than two hours before the station aired retractions and apologies. In addition, there was no record of any significant disruptions in law enforcement activities. Upon learning of the incident, the station's management suspended Ulett for one week without pay and instituted formal policies to prevent such events in the future.

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109. See Letter from Donna R. Searcy, Secretary, FCC, to Emmis Broadcasting Co., Licensee, KSHE (FM) (Apr. 24, 1991), 6 F.C.C.R. 2289, 2289, 69 Rad. Reg.2d (P & F) 155 (1991) [hereinafter *Letter*].

110. *Id.*

111. See *id.*

112. See *id.* It is unclear whether Ulett's admission was voluntary or if he was forced to explain the hoax by the station management.

113. See *id.*

114. See *id.*

Nonetheless, the FCC felt compelled to act. A letter from the FCC to the station indicated that "[a]t a time when the United States was at war, and the public was in a heightened state of alert and anxiety about the possibility of terrorist violence and other dangers, your January 29, 1991, broadcast obviously had the potential to create widespread panic."<sup>115</sup> The KSHE broadcast is a telling example of the "zeitgeist fluxes" that can cause the FCC to act in different ways to hoaxes perpetuated in different contexts. Apparently, the backdrop of the Gulf War compelled the FCC to act upon hearing a simulated nuclear attack perpetuated on the airwaves.<sup>116</sup>

A notable segment of the FCC's letter referenced the first major hoax that the regulatory agency confronted by repeating a section of the 1985 deregulation memo almost verbatim:

We emphasize that the [FCC]'s policies regarding a broadcaster's general obligation to program in the public interest and a broadcaster's specific obligation to refrain from deliberate distortion or falsification of programming, remain in force.

In this general connection, we note that a current broadcast of a program such as "War of the Worlds," [sic] without cautionary language, would violate [FCC] policies—i.e., both our general policy requiring licensees to program their stations in the public interest, and our more specific policy against deliberate distortion or falsification of programming.<sup>117</sup>

The FCC did not want to let the station get away with a mere admonishment. However, the revocation of its license was clearly not in order either. Instead, the FCC characterized the hoax as a false distress signal prohibited by section 325(a) of the 1934 Act. To help justify its

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115. Letter, 6 F.C.C.R. 2289, 2289, 69 Rad. Reg.2d (P & F) 155 (1991).

116. See *id.* In an interesting side note to the KSHE incident, one source at the FCC told this Author in 1998 about a rumor concerning the uproar caused by the station. The rumor indicated that a close relative of then FCC Commissioner Al Sikes was in Missouri at the time of the nuclear attack broadcast. The relative allegedly heard the broadcast and called Commissioner Sikes personally to complain, sparking the FCC's efforts to pass a new regulation against broadcast hoaxes. When contacted about this story, Commissioner Sikes admitted that he had a daughter who lived in St. Louis at the time who may have heard the broadcast, but he did not recall hearing from her at the time. Commissioner Sikes indicated that he thought he remembered hearing that Robert Pettit, General Counsel of the FCC at the time, may have received a call from a relative concerning KSHE. Mr. Pettit confirmed that he in fact received a call concerning KSHE from his sister, who also lived in St. Louis at the time. However, he did not believe she heard the actual broadcast itself, but rather believed that she had only heard news accounts of the broadcast in the St. Louis area. Both Commissioner Sikes and Pettit stressed that the FCC received many calls from various sources complaining about the KSHE broadcast, and the fact that relatives of top FCC officials were in St. Louis at the time of the incident played no part in shaping their actions. The various St. Louis news accounts of the KSHE incident prior to the FCC's actions seem to support their contentions.

117. *Id.* (citations omitted).

characterization, the FCC pointed to the use of a broadcast tone which invoked a comparison to the Emergency Broadcast System (EBS) signal which stations air in the midst of emergencies:

To the extent that listeners understood the tone was used to "cry wolf," the integrity of the Emergency Broadcast System [EBS] (see 47 C.F.R. § 73.901 et seq.) has been undermined. Moreover, broadcast of the tone, even if not a true EBS tone, conflicts with the clear underlying purpose of the procedures in [s]ections 73.909 and 73.910 of the [r]ules, which are designed to ensure prior authentication of a true national emergency before activation of the tone for emergency cuing.<sup>118</sup>

The FCC's letter to KSHE ended with a footnote stating: "Due to the serious harm to the public which can be caused by broadcasts that mimic EBS tones, the [FCC] plans to release a public notice which highlights this case and the importance of compliance with our EBS Rules."<sup>119</sup>

With a specific broadcast law violation that it could point to, the FCC fined KSHE twenty-five thousand dollars. Ulett termed the entire incident as "embarrassing."<sup>120</sup> In addition to his week's suspension from the station, the broadcaster was also fired from his eight-year post as the St. Louis Cardinals' public-address announcer.<sup>121</sup>

The same month that FCC issued KSHE its fine for the nuclear attack hoax, a second incident involving station KROQ-FM in Los Angeles garnered widespread attention. The genesis of the KROQ hoax developed in June 1990 when hosts Kevin Ryder and Gene Baxter of the *Kevin and Bean* morning show hosted a program entitled *Confess Your Crime*. Baxter and Ryan asked callers to phone-in and confess any mild transgressions that they committed.<sup>122</sup> In the midst of the show, an anonymous caller came on the air to reluctantly announce that he killed his girlfriend after finding her sleeping with another man. After the hosts suggested that they put him in touch with someone who could help, the caller hung up. Calls poured into the station inquiring if the call was a joke. Baxter and Ryder insisted that it was not a fabrication.<sup>123</sup>

The show caught the attention of the L.A. County Sheriff's Department, which was looking to solve a number of unsolved murders

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118. *Id.* at 2290 (footnote omitted).

119. *Id.* at 2290 n.1.

120. John M. McGuire, *No Fooling!*, ST. LOUIS POST-DISPATCH EVERYDAY MAGAZINE, Apr. 1, 1997, at D1, available at 1997 WL 3332772.

121. *See id.* Ulett returned to the *Post* two years later. *See id.*

122. Various confessions included stealing bowling balls, running over cats, and having sex with both a girlfriend and her mother. *See* Steve Weinstein, *Deejays Confess to Being Shaken up by Caller*, L.A. TIMES, June 14, 1990, at F10.

123. *See id.*



with similar facts to the caller's confession. The station turned over a tape of the broadcast to help facilitate the Sheriff's Department with its investigations. Months worth of inquiries went by before the incident was exposed in April 1991 as indeed being a hoax. The caller was a fellow broadcaster Doug Roberts, a friend of Ryder and Baxter.<sup>124</sup>

The public was outraged upon learning the truth. News stories profiled the furious parents of murdered daughters who were awaiting the then hopeful outcomes of their unsolved cases. The L.A. County Sheriff's Department billed the station for over twelve thousand dollars to cover the costs of their wasted murder investigations.<sup>125</sup> The Infinity Broadcasting Corp.—license holder for KROQ—suspended Baxter, Ryder, and Roberts for five days without pay, directed each of them to perform 149 hours of community service, and forced them to pay the Sheriff's bill out of their pockets.<sup>126</sup> Once again, the FCC quickly got into the fray.

Program director Jeff Wyatt of KPWR-FM in Los Angeles summed up the industry's reaction to news of the FCC investigation:

I don't think anybody's scared at all about this until they see how the FCC reacts. If it amounts to a hand slap, a letter of reprimand, who cares? If it's a letter of reprimand, [KPWR morning deejay] Jay Thomas is going to have a murderer on the air live tomorrow. If they do something drastic like take their license away, that's a message. A \$20,000 fine—that's a message.<sup>127</sup>

At the end of its investigation, the FCC chose not to send the kind of message that Wyatt described, perhaps in part because it felt it did not have the proper tools to do so. Unlike the KSHE incident, an on-air murder confession could not be construed as a false distress signal by any credible means. Although the FCC could always admonish a station or revoke its license for violations of broad and general policies concerning the public interest, it was powerless to levy a fine without a violation of a specific statute or regulation.<sup>128</sup> Here, the only option outside of admonishing the

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124. KROQ actually hired Roberts shortly after his fake call, but long before the hoax was eventually exposed.

125. See Sheriff's Dept. Bills KROQ \$12,000 for Hoax, L.A. TIMES, May 1, 1991, at F2.

126. See KROQ Receives a Slap on the Wrist for Hoax, L.A. TIMES, Dec. 4, 1991, at F7.

127. Claudia Puig, *Will KROQ Get away with "Murder"?*, L.A. TIMES, Apr. 22, 1991, at F1.

128. See *Forfeiture Memorandum Opinion and Order*, 7 F.C.C.R. 3594, para. 5, 71 Rad. Reg.2d (P & F) 26 (1992). The Montachusett Broadcasting incident concerned a five-thousand-dollar fine levied against WXLO-FM for violating section 73.1206, which prohibits the broadcasting of telephone conversations without permission of all parties to the conversation, unless they should otherwise be aware that they are on-the-air. In its defense, WXLO contended that the fine was unduly harsh in light of the fact that the FCC merely admonished KROQ for perpetuating a hoax that was to be considered a far more serious offense than the behavior with which they were accused. In response to this argument, Roy

station was to revoke its license. Despite past cases such as KIKX, the FCC was still reluctant to institute its harshest penalty against an isolated incident. Thus in the end, the FCC gave KROQ a letter of admonishment.<sup>129</sup>

In explaining its decision, the FCC pointed to the following facts:

Station KROQ-FM's broadcast of the hoax murder confession was a spontaneous, isolated event, orchestrated solely by certain on-air personnel, who subsequently engaged in a coverup. Neither station management nor the licensee knew, or had any reason to suspect, that the broadcast was actually a hoax. Further, upon learning that the broadcast was a hoax, management promptly effectuated disciplinary and remedial action.<sup>130</sup>

Despite the admonishment, the FCC and segments of the public were left with a sense of frustration following the KROQ incident. The concern was exacerbated by an incident in July of 1991 involving station WALE-AM in Providence, Rhode Island. After a prompting from talk show host Steve White, the station's news director, Thomas Moriarty, announced over the air that White had been "shot in the head" while outside the station on a break.<sup>131</sup> The station announced that the report had been a hoax a mere ten minutes after Moriarty finished his "news story."<sup>132</sup> In the meantime however, several police cruisers along with a lieutenant and a sergeant rushed to the scene where they were met by several members of the media who were trying to obtain information about the shooting.<sup>133</sup> Station management was not involved in the planning of the deception.<sup>134</sup> The station issued apologies throughout the day, offered to reimburse the police for all costs and promptly fired all those involved in the incident. Just as it

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J. Stewart, Chief of the FCC's Mass Media Bureau wrote,

The two cases cannot be compared. Simply, the subject case involves a violation of a [FCC] rule whereas the KROQ-FM case does not. In the KROQ-FM matter, only a violation of a [FCC] policy, for which no forfeiture may be imposed, was involved. In a case where a hoax broadcast occurred *and* the [FCC] was able to establish that a violation of the Communications Act was also involved, a \$25,000 forfeiture was assessed.

*Id.* at para. 5 (citing Letter Apr. 24, 1991, 6 F.C.C.R. 2289, 69 Rad. Reg.2d (P & F) 155 (1991)) (emphasis added).

129. See Letter from Donna R. Searcy, Secretary, FCC, to Lyle Reeb, General Manager, Radio Station KROQ-FM (Dec. 4, 1991) 6 F.C.C.R. 7262, 7262.

130. *Id.* (footnote omitted).

131. See Letter from Edythe Wise, Chief, Complainants and Investigations Branch Enforcement Division Mass Media Bureau, to Frank Battaglia, President, North American Broadcasting Co., Inc. Licensee, Radio Station WALE-AM (Mar. 24, 1992) 7 F.C.C.R. 2345, 2345 70 Rad. Reg.2d (P & F) 1329.

132. See *id.*

133. See *id.*

134. See *id.*

had with KROQ, the FCC admonished WALE.<sup>135</sup>

By November 1991, the FCC was ready for action. It drafted a notice of a proposed rule which read as follows:

No licensee of any broadcast station shall broadcast information or other material it knows to be false if its foreseeable that broadcast of the information could cause substantial public harm, and if broadcast of the information does in fact directly cause substantial public harm.

Note 1:

For purposes of this rule, "public harm" is immediate, substantial and actual damage to the health and safety of the general public or to property, or substantial diversion of law enforcement or other public safety authorities from their duties.

Note 2:

The public harm will be deemed foreseeable if the licensee could expect with a significant degree of certainty that public harm would occur. Foreseeability will not be inferred from warnings or disclaimers associated with the broadcast. Lack of foreseeability may be determined in light of factors such as the content of the broadcast or the timing of the broadcast (e.g., April Fool's Day or Halloween).<sup>136</sup>

The proposed rule had three requirements that would trigger sanctions: (1) the licensee must have known that the broadcast material was false; (2) the hoax must have directly caused immediate, substantial, and actual public harm; and (3) the public harm must have been foreseeable.

Before making a final decision on the proposed regulation, the FCC sought comments from broadcasters and the public on any aspect of the rule. However, the FCC asked for explicit advice in the following areas: (1) whether elements of the rule were adequate to prevent dramatizations from unnecessary scrutiny; (2) whether the phrases "public harm," "immediate," and "substantial" should be construed broadly or narrowly; (3) whether determining the existence of substantial public harm should be based on how widespread the harm is or on how severe it is, regardless of how many are affected; (4) whether actual harm or the mere threat of harm should be required in order to trigger sanctions; (5) whether laws of various jurisdictions make such a rule unnecessary; and (6) what factors should help determine whether or not public harm is foreseeable.<sup>137</sup> Additionally, the FCC asked for more general comments regarding First Amendment concerns, including whether or not the rule might be vague, overbroad, or restrictive.<sup>138</sup>

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135. *See id.*

136. Amendment of Part 73 of the FCC's Rules Regarding Brdcast. Hoaxes, *Notice of Proposed Rule Making*, 6 F.C.C.R. 6935, para. 7 (Nov. 14, 1991).

137. *See id.* at paras. 2-6.

138. *See id.* at paras. 1-6.

Along with the notice of the proposed rule, Commissioner James H. Quello, the same commissioner who dissented from the KIKX license revocation in 1980, offered a separate statement, which begins as follows:

I welcome this proceeding given the number of high-profile broadcast hoaxes during the past year. Generally, I do not see how the public interest is served by a broadcast that does nothing more than scare or alarm the audience for the mere thrill of it. We should be able to draft a rule to deal with such situations.

At the same time, I recognize that direct regulation of broadcast content is inherently sensitive. It may be difficult to craft a rule that can encompass real abuses without stifling creative programming. *We therefore must take care that any rule on hoaxes not prevent the broadcast of programs such as Orson Wells'[s] [sic] "War of the Worlds," [sic] which is widely recognized as a classic of American radio.*<sup>139</sup>

In the context of the rule proposal, as well as the FCC's actions from the previous fifty-plus years, the importance of Commissioner Quello's statement should not be underestimated. The FCC previously stated on more than one occasion that the *War of the Worlds* conflicted with the generalized policy of promoting broadcasting within the public interest. Now that the FCC was about to consider a concrete regulation involving hoaxes, a prominent Commissioner had gone on record to state that *War of the Worlds* was nothing short of an American classic that needed to be protected in a free broadcasting environment.<sup>140</sup>

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139. *Id.* at 6937 (emphasis added).

140. *See id.* During his 23-plus years as an FCC Commissioner, James Quello became one of the FCC's most consistent and stalwart critics when it came to regulations concerning broadcasting content. This was perhaps due in part to the fact that Commissioner Quello was one of the few agency commissioners to have had an extensive career in broadcasting before being appointed to the FCC in 1974. Prior to his appointment as Commissioner, Quello spent 29 years in virtually every aspect of radio broadcasting. His career began in 1945, starting in the promotions department of WXYZ in Detroit. Two years later, he moved to the cross-town rival WJR. In 1964, Capitol Cities Broadcasting bought out WJR and made Quello General Manager of the station, as well as Vice President of the parent corporation.

Quello was inducted into the Radio Hall of Fame in 1996. Upon receiving this honor, the ceremony's presenter of awards, Edward F. McLaughlin stated: "Because he was so thoroughly *regulated* as a broadcaster, James Quello has become a more empathic *regulator* as an FCC Commissioner. His was perhaps the perfect appointment . . . as America moved into the age of deregulation—a phenomenon of which he has been an outspoken champion." Rich Samuels, *1996 Radio Hall of Fame* (visited Oct. 3, 1999) <<http://www.mcs.net/~richsam/nbcmm/rhof/rhof96sc.html>>.

In later years, Quello even questioned the FCC's power to revoke broadcast licenses. "It is such a drastic step," he stated. "No one should have the power to bankrupt a company. I voted to revoke 81 licenses. I regretted it." Telephone Interview with James H. Quello, Former FCC Commissioner (Sept. 3, 1998). He suggested one possible alternative to revocations would be to force an offending licensee to sell its license to a minority owner at a sizable discount. *See id.*

The dichotomy underscores the struggle that the FCC faced in dealing with the problem from the start. The differing factual context for each case involving broadcast hoaxes helped to make the FCC's actions appear somewhat erratic at times. However, Commissioner Quello's admission indicates that, much like 1938, there was still a struggle within the FCC itself regarding attempts at developing a more broad-based philosophy to deal with the hoax question.<sup>141</sup> Commissioner Quello echoed the cautious approach espoused by fellow former Commissioners Anne P. Jones, Abbott Washburn, and T.A.M. Craven. Others thought that the dangers presented by the hoax problem were too great to continue a tepid enforcement policy and felt that measures more far reaching in scope were necessary.

The FCC seemed well aware of the tightrope it walked in crafting a new rule. From the outset of the dialogue, it was clear that the FCC did not wish to overreach with its proposal. Attempting to allay the immediate fears of many broadcasters, the FCC stated:

It is not our intent to address harmless pranks, or to deter broadcasts that might upset some listeners but do not pose a substantial threat to public health and safety. We have specifically rejected a regulatory approach that could be characterized as an "overreaction." For example, we do not intend to reach incidents such as the April Fool's joke perpetrated recently by a station, which announced that one of the stars of the city's National Football League team had been traded. While this prank undoubtedly distressed some football fans, it is our intent to focus on a narrow category of cases that present the potential for substantial public harm.<sup>142</sup>

Five organizations responded to the invitation to comment on the proposed hoax regulation: CBS, NBC, National Public Radio, the National Association of Broadcasters, and the law firm of Haley, Bader & Potts.<sup>143</sup> Each organization questioned the need for such a rule. If the FCC passed such a regulation despite their concerns, many of the groups asked that it be tailored as narrowly as possible in order to avoid First Amendment concerns and chilling effects on the broadcasters' programming.

A passage from the Haley, Bader & Potts commentary best illustrates

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141. In 1998, when asked to recount the debate concerning broadcast hoaxes, neither former Commissioner Quello nor former FCC Chairman Sikes could recall any specific details outside of the written record. Quello pointed out that the federal open meetings law (the so-called "Sunshine Act" passed in 1976) prevented the commissioners from discussing the subjects of rule making with each other outside of an open public meeting. *See* Government in the Sunshine Act, 5 U.S.C. § 552(b) (1994).

142. Amendment of Part 73 of the Comm'n's Rules Regarding Broadcast Hoaxes, *Notice of Proposed Rule Making*, 6 F.C.C.R. 6935, para. 2 (1991) (citations omitted).

143. Haley, Bader & Potts is a Washington, D.C. based firm established in 1939, which specializes in communications law and represents various broadcasting entities.

the collective concerns found in the responses:

Although we believe the public interest compels [FCC] regulatory oversight of broadcast hoaxes, we question the need for a rule, for four reasons. First, the isolated incidents to which the NPRM [Notice of Proposed Rule Making] refers do not appear to require industry-wide regulation by rule. Second, as the NPRM points out, the elements of a rule would necessarily involve the [FCC] in program content judgements, which would impinge upon First Amendment considerations. Third, adoption of the rule in the name of regulatory flexibility, to enable the [FCC] to impose a monetary forfeiture, is an expediency which is outweighed both by the infrequent incidences of hoaxes and by First Amendment considerations. Fourth, the kind of hoax which causes the results upon which the NPRM focuses—damage to public safety and health, diversion of law enforcement resources, and damage to property—is sufficiently serious an abuse of the public interest to call into question the licensee's basic qualifications, whether at renewal time, upon a sale of the station, or in a revocation proceeding. Contemporaneous enforcement, however, is better left to sanction under local law, where actual damages are available to rectify actual harm.<sup>144</sup>

Other concerns centered on the problems inherent in the vague language used in the proposal. It was argued that broadcasters would have a difficult time determining just what kind of program would cause harm that was truly "foreseeable."<sup>145</sup> Additional criticism was leveled at the vagueness of the phrase "substantial public harm" which, it was argued, would allow unfettered subjective judgments by the FCC rather than objective standards.<sup>146</sup> NBC emphasized the free market consequences of losing public credibility and audience share if a station engaged in damaging hoaxes thus arguing against the need for additional regulations.<sup>147</sup>

The FCC ultimately rejected the arguments that an additional regulation was unnecessary, though it was mindful of the concerns raised by the First Amendment. Therefore, the FCC adopted a more narrowly tailored rule on May 14, 1992, which remains the current regulation today.

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144. Comments of Haley, Bader & Potts, Amendment of Part 73 of the Comm'n's Rules Regarding Brdcast. Hoaxes at 2, MM Docket No. 91-314 (Jan. 2, 1992). John Wells King drafted the comments on behalf of Haley, Bader & Potts.

145. See *id.* at 6-7.

146. See Comments of the National Association of Broadcasters at 3, Amendment of Part 73 of the Comm'n's Rules Regarding Brdcast. Hoaxes, MM Docket No. 91-314 (Jan. 2, 1992). Henry L. Baumann & Steven A. Bookshester drafted the comments on behalf of the National Association of Broadcasters.

147. See Reply Comments on Notice of Proposed Rulemaking at 3-4, Amendment of Part 73 of the Comm'n's Rules Regarding Brdcast. Hoaxes, MM Docket No. 91-314 (Feb. 3, 1992). Howard Monderer & Jane E. Genster drafted the reply comments on behalf of the National Broadcasting Co.

Section 73.1217 of Title 47 of the *Code of Federal Regulations* now reads:

No licensee or permittee of any broadcast station shall broadcast false information concerning a crime or catastrophe if:

- (a) The licensee knows this information is false;
- (b) It is foreseeable that the broadcast of the information will cause substantial public harm, and
- (c) Broadcast of the information does in fact cause substantial public harm.

Any programming accompanied by a disclaimer will be presumed not to pose foreseeable harm if the disclaimer clearly characterizes the program as a fiction and is presented in a way that is reasonable under the circumstances.

Note: For purposes of this rule, "public harm" must begin immediately, and cause direct and actual damage to property or to the health or safety of the general public, or diversion of law enforcement or other public health and safety authorities from their duties. The public harm will be deemed foreseeable if the licensee could expect with a significant degree of certainty that public harm would occur. A "crime" is any act or omission that makes the offender subject to criminal punishment by law. A "catastrophe" is a disaster or imminent disaster involving [a] violent or sudden event affecting the public.<sup>148</sup>

Section 503(b) of the 1934 Act as amended allows the FCC to issue fines for any willful or repeated violation of a regulation by a broadcast station licensee.<sup>149</sup> Armed with the new 1992 regulation, it seemed as though the FCC was prepared to launch a new era in the containment of broadcast hoaxes.

Or was it? To date, FCC enforcement officials have confirmed that not a single broadcaster has ever been cited under 47 C.F.R. § 73.1217, nor has there been any license revocations stemming from hoaxes since the

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148. 47 C.F.R. § 73.1217 (1998).

149. See 47 U.S.C. § 503(b) (Supp. II 1996). The statutory language of section 503(b)(2)(A) of the Act specifies that the amount of such fine can be up to \$25,000 for each violation or each day of a continuing violation, provided that the total fine does not exceed \$250,000 for each act. However, the Debt Collection Improvement Act of 1996 required all federal agencies to adjust their civil penalty amounts every four years in order to account for inflation. See 28 U.S.C. § 2461(d) (Supp. III 1997). The FCC thereby allowed for a fine of up to \$27,500 for each violation with a cap of \$275,000 in forfeitures stemming from each act. See *Amendment of Section 1.80 of the Comm'n's Rules* (visited Oct. 2, 1999) <<http://www.fcc.gov/Bureaus/Miscellaneous/Orders/1997/fcc97002.txt>>. The base fine for a violation of the hoax rule is seven thousand dollars, which is then adjusted after the consideration of several factors involving the severity of the violation. For a review of FCC policy regarding assessments of forfeiture amounts, see Commissioners Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, *Report and Order*, 12 F.C.C.R. 17,087, para. 2 n.3, 8 Comm. Reg. (P & F) 1314 (1997); Policy Statement on Standards for Assessing Forfeitures, *Policy Statement*, 6 F.C.C.R. 4695, para. 5, 69 Rad. Reg.2d (P & F) 823 (1991).

regulation's passage. This statistic could be interpreted as anecdotal evidence that the number of serious station hoaxes has abated in recent years, perhaps attesting to the regulation's effectiveness as a deterrent. It could also indicate, however, that the FCC continues to be wary of program content regulations and construes any rules concerning them in a rather narrow fashion.

Whether the new rule represented a harsher stance by the FCC in their regulation of broadcast hoaxes is ultimately a matter of perspective. Had the FCC been able to give KROQ a hefty fine for its murder confession hoax, the station would certainly have considered that to be a tougher penalty than the admonishment it received.<sup>150</sup> However, stations such as KIKX and WMJX certainly would have welcomed such a fine if it would have served as an alternative to a revocation of their respective licenses.<sup>151</sup> Ultimately, section 73.1217 merely represented an additional option for the FCC to employ in their increasing frustration with the hoax problem.

## VI. ANALYSIS OF 47 C.F.R. § 73.1217

Given the absence of any case law dealing with the relatively new broadcast hoax rule, it is impossible to predict for certain how it might be applied to factual contexts. However, when one considers the FCC comments, past actions, and recent hoax incidents that have not resulted in forfeitures under section 73.1217, certain broad observations can be drawn.

The current regulation contains four prongs: (1) the false information must concern a *crime* or *catastrophe*; (2) the *licensee* must *know* the information is false; (3) it must be *foreseeable* that broadcasting the false information will cause substantial public harm; and (4) broadcasting the false information must cause *substantial public harm in fact*.<sup>152</sup> All four prongs must be satisfied before a violation of the regulation can be said to have occurred.<sup>153</sup>

The first prong limits the scope of the rule to hoaxes concerning "crimes" or "catastrophes." This is substantially narrower than the scope of the rule originally proposed, which encompassed all subject matters concerning false material and information. In explaining the change, the FCC reiterated the fact that "it is not our intent to restrict harmless pranks,

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150. See Letter from Donna R. Searcy, Secretary, FCC, to Lyle Reeb, General Manager, Radio Station KROQ-FM (Dec. 4, 1991) 6 F.C.C.R. 7262, 7262.

151. See Petition for Reconsideration of Denial of License, *Memorandum Opinion and Order*, 83 F.C.C.2d 440, 48 Rad. Reg.2d (P & F) 1006 (1980); WMJX, Inc. for Renewal of License, *Memorandum Opinion and Order*, 85 F.C.C.2d 251, 48 Rad. Reg.2d (P & F) 1139 (1981).

152. See 47 C.F.R. § 73.1217 (1998).

153. See *id.*



or to deter broadcasts that might upset some listeners but do not pose a substantial threat to public safety.”<sup>154</sup> The crimes and catastrophes prong limited the rule’s scope so as to soothe the concerns of broadcasters that the regulation would scrutinize any dramatized work but would also allow for a direct response to cases such as KSHE and KROQ. As stated in the note to the regulation, a “crime” is defined as “any act or omission that makes the offender subject to criminal punishment by law.”<sup>155</sup> Thus, potentially, applications of the hoax rule could turn on the variations of state law jurisdictions with separate criminal statute provisions, though murder confessions, such as the KROQ example, would presumably apply uniformly.

The linking of the word “crime” with “catastrophe” within the first prong seems to imply that the FCC directed the regulation at violent or serious crimes. If one were to use the broader interpretation suggesting a hoax ban on any crimes, then the state jurisdictional difference would become significant. For instance, one would be able to devise a hoax revolving around legal prostitution in Nevada and not fall under the regulation, while the same hoax in other states would satisfy the criteria of the regulation’s first prong. Though, presumably, the less serious a hoax crime, the less likely it would be to portend or cause “substantial public harm” as required by prongs (3) and (4).

A “catastrophe” is defined as “a disaster or imminent disaster involving [a] violent or sudden event affecting the public.”<sup>156</sup> No doubt the FCC formed this definition with the KSHE nuclear attack in mind. It is less clear, however, how broad the definition could be interpreted. A Martian attack could certainly be characterized as a catastrophe by Earthlings who do not care to share the Earth with our alien brethren. Likely, the phrase would be used for descriptions of events that are widespread, such as brush fires, floods, biological disasters, earthquakes, hurricanes, and so forth.

Not all events causing mass disruptions can be considered a catastrophe under the regulation’s definition. For instance, consider a hoax which involved a supposed landing of the Discovery space shuttle. On April Fools’ Day 1993, KGB-FM in San Diego told its listeners that the shuttle was being diverted from Edwards Air Force Base to Montgomery Field, a small airport in the middle of a crowded residential and commercial district of the city. Although no shuttle flight was in progress that day, over one thousand people arrived at the airport at the alleged

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154. Amendment of Part 73 Regarding Brdcast. Hoaxes, *Report and Order (Proceeding Terminated)*, 7 F.C.C.R. 4106, para. 9, 70 Rad. Reg.2d (P & F) 1383 (1992).

155. 47 C.F.R. § 73.1217 note (1998).

156. *See id.*

landing time, tying up its traffic for hours and diverting police units.<sup>157</sup> Although the viewing of a space shuttle landing could cause a large segment of a city to divert its attentions, it could not be considered a "disaster" by any reasonable definition of the term. Since the hoax did not concern a crime or catastrophe, 47 C.F.R. § 73.1217 could not apply.<sup>158</sup>

The KGB incident illustrates the limitations of the regulation. The "crime or catastrophe" prong serves to limit its application even though the actual amount of public harm caused by a phantom shuttle landing may be greater than the amount of actual harm caused by a bogus kidnapping. However, note that 47 C.F.R. § 73.1217 is a tool to be used in addition to the FCC's broader powers to regulate what is in the public interest. The rule does not replace the FCC's inherent power to revoke licenses or admonish stations. Instead, it compliments its already existing powers. Thus stations should not hope to plan harmful hoaxes that fall outside of the specific regulation and believe that they could escape the FCC's scrutiny.

Another typical example illustrating how the regulation is limited in its application involved sports-talk station XTRA in San Diego where two hosts claimed to be interviewing ABC's Dan Dierdorf. In fact, the interviewee was an impersonator acting as though he was intoxicated.<sup>159</sup> While the real Dierdorf contemplated pursuing individual legal action against the station, this remained another scenario in which 47 C.F.R. § 73.1217 would not apply since no crime or catastrophe was involved.<sup>160</sup>

The second prong of the regulation states that the licensee must know that the information concerning the crime or catastrophe is false. Although the rule specifically refers to the licensee, FCC regulations have rarely

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157. See Michael Granberry, *April Fools' Hoax No Joke in San Diego*, LOS ANGELES TIMES, Apr. 2, 1993, at A26.

158. Norman Goldstein, the FCC's Enforcement Chief of Mass Media Complaints, indicated that he would not pursue a case such as this—not even to include a letter of censure to the station. He stated simply: "The FCC does not regulate content." Interview with Norman Goldstein, FCC Chief of Complaints & Political Programming Branch, Enforcement Div., Mass Media Bureau, in Washington D.C. (Mar. 12, 1998). However, a police spokesman for San Diego claimed that KGB would be billed for the police manpower hours needed to clear the traffic jam, and that the City Attorney would become involved if it refused to pay. See Granberry, *supra* note 157, at A26. Stations would be wise to remember that federal officials are not all that they have to worry about when assessing the consequences of their programming.

159. Larry Stewart, *Dierdorf Interview Fake, Anger Real*, LOS ANGELES TIMES, Nov. 13, 1996, at C4.

160. This assumes that no California statute involving public drunkenness would apply under a broad interpretation of the regulation's first prong. If such a statute were to apply, the other remaining prongs of the regulation would still need to be satisfied—an unlikely event in this particular scenario.

limited the phrase to the actual holder of the license. The term "licensee" can also refer to various employees of the station, as well as corporate officials if the license holder is a corporate entity. In a variety of situations, a licensee will be held responsible for the actions of its employees under a *respondeat superior* theory.<sup>161</sup> To have otherwise would not provide any incentive for a license holder to supervise his staff. Stations could then easily subvert any policy and regulatory requirements by merely shielding the license holder from having any direct, hands-on operations at the broadcast facility.

License holders argued that when one takes prompt corrective action subsequent to a violation, such actions should be considered by the FCC in assessing liability. To this theory, the FCC responded:

Although our general policy is not to consider such remedial actions in determining whether a rule violation has in fact occurred, we do note that a licensee's overall conduct in connection with such a violation is always assessed in determining the appropriate sanction and could, in certain circumstances, result in a decision that no sanction is warranted.<sup>162</sup>

The KROQ incident provides an example of this principle in action. Neither the licensee nor management had knowledge of the murder confession hoax when perpetrated by the on-air staff. As soon as KROQ discovered the hoax, it swiftly punished those involved and instituted official station policies to prevent such a reoccurrence.

There are no hard and fast rules to determine mitigating factors when liability is imputed to a licensee. However, a comparison between the KROQ and KIKX incidents provides a relatively clear example of the distinctions to be made. Recall that for the KIKX "kidnapping," the station's general manager helped to create the stunt and neglected to supervise its execution until the hoax had already spun out of control. Many on the station's staff knew of the plan well before the broadcast. In contrast, KROQ's management was left completely in the dark. Only the on-air talent planned and executed the phony confession. Once the hoax was discovered, management acted immediately to stem the damage.

Another question that remains unanswered from the second prong concerns what *kind* of knowledge is required. Certainly *actual* knowledge

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161. See, e.g., Application of WMJX-FM, Miami, Fla. for Renewal of License, *Decision*, 85 F.C.C.2d 251, para. 39, 48 Rad. Reg.2d (P & F) 1339 (1981); *Arizona License Decision*, 78 F.C.C.2d 857, para. 24, 47 Rad. Reg.2d (P & F) 1233 (1980); *Liability of Empire Brdcast. Corp., License of Radio Station KFLN, Baker, Mont. for Forfeiture, Memorandum and Opinion Order*, 25 F.C.C.2d 68, 19 Rad. Reg.2d 1191 (1970).

162. Amendment of Part 73 Regarding Brdcast. Hoaxes, *Report and Order (Proceeding Terminated)*, 7 F.C.C.R. 4106, para. 12, 70 Rad. Reg.2d (P & F) 1385 (1992) (footnote omitted).

on the part of the licensee or his employees will satisfy the second prong. What is left unclear, however, is if there are any situations where *implied* knowledge may be imputed to the broadcasters. The only certainty is that there is no strict liability involved. Use of a strict liability threshold would effectively end the talk radio format since callers are able to turn the tables on the broadcasters and perform hoaxes of their own. One such example involved a call by a couple to KLOS-FM in Los Angeles who proceeded to get into an on-air fight and request a divorce after the man accused his "wife" of cheating on him with his friend. The call turned out to be placed by an Air Force sergeant and two work cohorts who assumed the roles of his wife and friend, resulting in a public embarrassment to the station.<sup>163</sup> Given the nature of call-in shows, the required level of knowledge would need to be at least *substantially implied*, if not *actual*, in order to trigger liability under the hoax rule. Otherwise, interactive radio formats would be chilled considerably.

The third prong requires that it be foreseeable that the hoax broadcast will produce substantial public harm.<sup>164</sup> This remains perhaps the most vague and controversial of the prongs. Many questions and considerations are raised in determining "foreseeability."

First, what is the effect of program disclaimers in the foreseeability test? This question is alluded to in the body of the regulation itself. It states: "Any programming accompanied by a disclaimer will be presumed not to pose foreseeable harm if the disclaimer clearly characterizes the program as a fiction and is presented in a way that is reasonable under the circumstances."<sup>165</sup> This seems to indicate that if a hoax broadcast contains a disclaimer as to its dramatic nature, at the very least, the burden of proof will shift from the broadcaster to the FCC to prove that the harm was in fact foreseeable. As the note to the regulation states, the amount of foreseeability must comport itself with a "*significant* degree of certainty."<sup>166</sup> It is by no means clear, however, that such a disclaimer would constitute an absolute defense. It is equally unclear what quantity and type of disclaimers would be "reasonable under the circumstances."<sup>167</sup>

Recall that *War of the Worlds* had four such disclaimers, yet they did not prevent the widespread panic. The reason behind this problem is that radio audiences do not necessarily tune in to a program at its start. Unlike

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163. See Claudia Puig, "Mark and Brian" Get Burned by a Hoax Call, LOS ANGELES TIMES, Dec. 18, 1989, at F1.

164. See 47 C.F.R. § 73.1217 (1998).

165. See *id.*

166. *Id.* at note (emphasis added).

167. *Id.*

the audiences for other media—such as movies—radio listeners are continually tuning in and out of a program's content throughout all points in its transmission. As a result, commuters who turn on their car radio twenty minutes past the hour do not immediately have a context for what they are listening to. Thus any disclaimer aired within the first third of a one-hour program will be completely ineffective to such listeners.

The FCC offered some of its own guidelines of reasonableness which stated that:

[I]ndicia of reasonableness would include airing disclaimers at the beginning and end of a program and ensuring that no more than [fifteen] minutes elapses between disclaimers during a program. We do not intend to impose a requirement that all fictional works must now include disclaimers. Rather, disclaimers would be necessary only in those programs that would otherwise meet all elements of the rule.<sup>168</sup>

It is unclear if disclaimers timed more than fifteen minutes apart would be less reasonable, or if the FCC intended to fix fifteen minutes as a specific benchmark. Many radio programs are short skits and do not adhere to a complete one-hour time clock schedule. Fifteen minute intervals would clearly be ineffective and inappropriate under many circumstances, such as the one time nuclear alert from KSHE or an intermittent announcement of a false space shuttle landing.

The FCC has pointed to other factors that will be considered in determining foreseeability. Such factors include the timing of the broadcast (e.g., April Fools' Day, when the audience might be on reasonable notice to expect a hoax) and the "number of public complaints received about the broadcast."<sup>169</sup> This last factor is perplexing in that it suggests that foreseeability can be determined in *hindsight*, which contradicts the meaning and purpose of the term. This also implies that a station will not be held responsible for the few odd listeners who have particularly low thresholds of gullibility. All such circumstances are not determinative but are merely considerations used in the foreseeability prong.

The single greatest determinant in assessing foreseeability is the nature of the broadcast itself. The more inherently believable and realistic a program is, the greater the likelihood that foreseeable harm will be imputed.<sup>170</sup> Unfortunately, this analysis is still susceptible to problems. What is inherently believable to one audience may strike another as an example of naive gullibility. Radio listeners today might chuckle at the

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168. Broadcast Services; Brdcast. Hoaxes, 57 Fed. Reg. 28,638, 28,640 (1992) (codified at 47 C.F.R. pt. 73).

169. Amendment of Part 73 Regarding Brdcast. Hoaxes, *Report and Order (Proceeding Terminated)*, 7 F.C.C.R. 4106, para. 14, 70 Rad. Reg.2d (P & F) 1383 (1992).

170. See *id.*

notion that anyone could believe a Martian invasion occurring. Yet for many in 1938, the fear was all too real. Even the updated 1974 Martian landings portrayed WPRO proved that some could still be fooled in limited circumstances.

The FCC itself suggested that a broadcast concerning an invasion of amoebas did not warrant a disclaimer since it was inherently unbelievable. However, what if such a broadcast came during the outbreak of a war involving biological weapons? Would people still react to the broadcast in the same context? As the KSHE incident during the Gulf War showed, people's sensitivities change with the events that surround them. The "zeitgeist factor" remains unresolved. The only guidance the FCC provides is to point out that "[w]e will presume, and will accord broadcasters the right to presume, that the public will behave in a rational manner. We will not hold broadcasters accountable for unreasonable or unpredictable public conduct."<sup>171</sup>

The final prong of the regulation holds that the hoax must in fact cause substantial public harm. Once again, some raise concern regarding the precise meaning of "substantial public harm." The note to the regulation provides the primary guidance by holding that "'public harm' must begin immediately, and cause direct and actual damage to property or to the health or safety of the general public, or diversion of law enforcement or other public health and safety authorities from their duties."<sup>172</sup> The "diversion of law enforcement" provision is an obvious response to previous cases such as KIKX and KROQ. Notably though, the requirement that the public harm begin immediately suggests that a fact pattern similar to the KROQ hoax might escape the rule. The diversion of sheriff's deputies during the KROQ incident was not immediate but rather a gradual escalated action spread out over several months.<sup>173</sup>

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171. Amendment of Part 73 Regarding Brdcast. Hoaxes, *Report and Order (Proceeding Terminated)*, 7 F.C.C.R. 4106, para. 13, 70 Rad. Reg.2d (P & F) 1383 (1992). More than one managing veteran of a radio station may have cause to question the presumption that the public will behave in a rational manner. Recall Orson Welles's observation concerning his *War of the Worlds* broadcast: "We began to realize, as we plowed on with the destruction of New Jersey, that the extent of our American lunatic fringe had been underestimated." WELLES & BOGDANOVICH, *supra* note 26, at 18-19.

172. See 47 C.F.R. § 73.1217 note (1998).

173. See Claudia Puig, *KROQ Deejaays Faked Murder Confession—Sheriff's Dept.*, LOS ANGELES TIMES, Apr. 11, 1991, at F1. A surprising admission came to this Author by the FCC's Enforcement Chief of Mass Media Complaints, Norman Goldstein, who claimed that it was unclear if the KROQ hoax would result in violation of the regulation, despite the fact that the FCC specifically cited KROQ in justifying its new rule. See Amendment of Part 73 Regarding Brdcast. Hoaxes, *Report and Order*, 7 F.C.C.R. 4106, para. 17, 70 Rad. Reg.2d (P & F) 1383 (1992); Goldstein, *supra* note 158.

The FCC also noted that a hoax resulting in no more than a few complaints to the police will not satisfy the prong, even if the police are annoyed by having to take the calls.<sup>174</sup> It seems that the level of disruption must significantly hinder law enforcement from otherwise carrying out its duties. Nominal or de minimus harms will not suffice.

Also left unresolved by the "substantial public harm in fact" prong is whether or not substantial public harm refers to the *intensity* of the harm or the *widespread nature* of the harm. Would a hoax that directly results in the death of one person be judged differently than a hoax which causes one thousand people to run out into the rain and catch colds? No specific guidance is given for this question, although both factors are likely to be considered.

The only specific indication is provided in the note to the regulation, which states that public harm must cause "actual damage to property or to the health or safety of the general public."<sup>175</sup> Bruised egos and embarrassment on the part of listeners obviously does not count. Beyond that, the FCC only declared that "[r]ather than adopt a particular benchmark or definition by which we will assess 'substantial' public harm, we have decided to leave this determination to the factual context of each case."<sup>176</sup> This style of determination could be described as an appropriate summary of the FCC's response to the hoax controversy as a whole.

## VII. BALANCING PRIORITIES: CONTENT CONTROL IN LIGHT OF COMPETING CONSIDERATIONS

The reluctance to increase the enforcement against broadcast hoaxes in recent years most likely stems from two factors: the fear of treading on broadcasters' First Amendment rights and the potency of the argument that other laws already exist to deal with such problems. Each time the FCC issues regulations regarding programming content, it must balance its mandate to require that stations serve the public interest, along with competing concerns of censorship, as found in the First Amendment and section 326 of the 1934 Act, which in fact prevents the FCC from having the power to censor radio broadcasts.<sup>177</sup>

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174. See Amendment of Part 73 Regarding Brdcast. Hoaxes, *Report and Order*, 7 F.C.C.R. 4106, para. 17, 70 Rad. Reg.2d (P & F) 1383.

175. 47 C.F.R. § 73.1217 note (1998).

176. Amendment of Part 73 Regarding Brdcast. Hoaxes, *Report and Order*, 7 F.C.C.R. 4106, para. 17, 70 Rad. Reg.2d (P & F) 1383.

177. See 47 U.S.C. § 326 (1998). The FCC's mandate to ensure that stations serve the public interest can be found in sections 303 and 307 of the Act, among others. For a broad based overview on how the FCC approaches the censorship/public interest tension, see *Report and Statement of Policy Res: Commission en banc Programming Inquiry*, 44 F.C.C.

The FCC can justifiably rely on the fact that the Supreme Court has never struck down a regulation prohibiting speech that threatens to cause "imminent lawless action."<sup>178</sup> The current approach by the Court was developed in *Brandenburg v. Ohio*<sup>179</sup> when it stated:

[T]he constitutional guarantees of free speech and free press do not permit a [s]tate to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>180</sup>

In a concurring opinion, Justice Douglas further elaborated on the distinction between protected and unprotected speech:

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theater.

This is, however, a classic case where speech is brigaded with action. They are indeed inseparable and a prosecution can be launched for the overt acts actually caused.<sup>181</sup>

Even apart from the *Brandenburg* standards of censorship, which are most often strictly construed, the Court has also afforded less free speech protections for the broadcast media as compared to other forms of speech. In *Red Lion Broadcasting Co. v. FCC*,<sup>182</sup> Justice White made the following observation in upholding the FCC's regulations relating to political editorials:

Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them

Just as the [g]overnment may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized speech, so may the [g]overnment limit the use of broadcast equipment.<sup>183</sup>

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2303 (1960).

178. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (false or deceptive advertising); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation); *Miller v. California*, 413 U.S. 15 (1973) (obscene materials); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976) (holding that televised threats of political assassination punishable did not violate First Amendment); *United States v. Irving*, 509 F.2d 1325 (5th Cir. 1975) (finding that false threat of hijacking punishable did not violate First Amendment).

179. 395 U.S. 444 (1969).

180. *Id.* at 447.

181. *Id.* at 456-57 (Douglas, J., concurring) (citations omitted).

182. 395 U.S. 367 (1969).

183. *Id.* at 386-87 (footnote and citations omitted).



### VIII. CONCLUSION

Even though tangible restrictions exist through the *Brandenburg* and *Red Lion* doctrines, any such regulation "must be viewed in the light of less drastic means for achieving the same purpose."<sup>184</sup> Otherwise, it will be struck down as being overly broad when faced with the subsection of strict scrutiny by the Court. Compared to the number of documented broadcast hoaxes, it is rare to find the FCC imposing harsh penalties for them. When it has however, no station ever successfully raised a First Amendment defense. Justice Holmes' famous dicta that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic"<sup>185</sup> still holds true today.

It is also true that a variety of laws apart from regulation section 73.1217 remain in force to deal with broadcast hoaxes. Even if a hoax did not meet the criteria specified in the four prongs of section 73.1217, the specific nature of the hoax may render it vulnerable to other laws and regulations such as section 325(a) of the 1934 Act, as amended, (prohibiting false distress signals), section 73.909 (prohibiting the broadcast of the Emergency Broadcast System tone in absence of an actual emergency or official test), or broader criminal statutes covering public endangerment.

As previously indicated, the number of state civil and common laws that still exist to allow an individual a private right of action against a station that broadcasts a hoax are too numerous to list. A nonexclusive list includes libel, rights of privacy, intentional infliction of emotional distress, and so forth. The context of each hoax needs to be determined to assess which causes of civil action might apply. Such laws remain as effective checks on a broadcast licensee's programming discretion.

As with indecency and other content-related regulations, the FCC always struggled to find a balance between preventing "spineless" radio and ensuring that programming comports with the public interest when dealing with broadcast hoaxes. Regulation 47 C.F.R. § 73.1217, prohibiting certain kinds of hoaxes, provides another tool to give the FCC flexibility in finding that balance. Yet, on a broader level, it often remains torn on how and when to apply its tools. Much like the rest of the nation, the FCC might not know how to react to the next Martian invasion until well after they have landed.

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184. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

185. *Schenck v. United States*, 249 U.S. 47, 52 (1919).