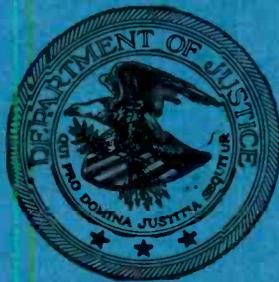


H. Re 15

REPORT
to the
PRESIDENT
by the
ATTORNEY GENERAL
on
DECEPTIVE PRACTICES
in
BROADCASTING MEDIA



DECEMBER 30, 1959

December 30, 1959.

THE PRESIDENT,
The White House.

DEAR MR. PRESIDENT: Some weeks ago you asked me to review the disclosures made in the course of the recent investigations of television quiz programs as well as other deceptive and corrupt practices in radio and television. You requested that I report to you with respect to the nature of the problems involved and what action is being taken or might be taken to resolve those problems.

Since that time, members of the staff of the Department of Justice and I have examined the transcript of hearings before the House Special Subcommittee on Legislative Oversight, discussed the problems with representatives of the appropriate regulatory agencies and the broadcasting industry, and have reviewed the laws under which that industry operates. In addition, we are reviewing the possibility of criminal prosecutions under existing federal laws.

There can be no question as to the great impact of the broadcasting industry, particularly of television, upon this nation. Industry sources indicate that as of March 1959, 44,462,000 of the 51,500,000 households in the United States contained at least one television set, leaving only 7,038,000 households, or 13.7 per cent, without a set. The average home with a set is said to have it turned on for more than five hours a day,

(1)

seven days a week, and television is said to reach over 128,000,000 persons in an average day. The impact of television upon the thinking and the culture of this country is therefore immeasurable. To millions it is a source of relaxation, entertainment, education and information.

The broadcast industry differs in an essential respect from other media of communications. Unlike newspapers or magazines, the acquisition and operation of broadcasting stations cannot be left to the uncontrolled interplay of individual initiative and economic forces. There would be chaos unless a regulatory body determined who could broadcast and what part of the radio spectrum he could use. The Communications Act of 1934, which provides the statutory authority for regulation of the broadcast industry by the FCC, is based in part upon this theory. However, it is well established that the role of federal regulation is not limited to that of "a traffic policeman in the ether."

The privilege of broadcasting to the public is not available to all who desire it. To authorized broadcasters the license issued by the FCC is of substantial economic value. In granting this privilege the government is entitled, as former President Herbert Hoover put it, to compel the applicant "to prove that there is something more than naked commercial selfishness in his purpose." Accordingly, the Communications Act provides that broadcast licenses may only be issued for maximum periods of three years, subject to renewal. Both the original grant and the renewal are made contingent upon a finding that "the public

interest, convenience, and necessity would be served thereby.' In effect, each broadcaster enters into an agreement with the government to serve the public interest in return for the valuable privilege he is granted. He becomes "a 'trustee' for the public" and has a non-delegable duty to serve the public. Matter broadcast, including advertising matter, is the essence of that service.

Because of the requirement that broadcasting serve the public interest and because of its incalculable impact upon public information, attitudes and standards, broadcast licensees must give constant attention to the quality of the matter they broadcast. The report which I am now submitting is primarily concerned with deceptive practices, but, of course, the relationship between these matters, the quality of programs and the public needs they serve is a close one. For example, broadcasters might well, either voluntarily or in accordance with requirements imposed by the Federal Communications Commission, allocate a certain amount of time convenient to listeners to public service programs meeting community needs, these programs to be chosen after a canvass of local needs and resources. While such a practice would be directed primarily at the nature of the service provided, it would also emphasize the public interest in broadcasting and have an impact upon corruption and deceptive practices. Similarly, measures which eliminate deception and corruption will, of necessity, have beneficial effects upon program service generally.

The broadcasting industry, both radio and television, has made great contributions to public service.

However, the disclosures recently made with respect to certain advertising and other practices indicate that "naked commercial selfishness," rather than factors of public service, has too often been the principal motivation for much of the matter that has been broadcast.

If that were all, the problem would be less serious than it is. There is also evidence of widespread corruption and lack of the personal integrity which is so essential to the fabric of American life. The large number of individuals who willingly took part in various phases of the deception is disturbing. Persons from many parts of our country and from many walks of life—the academic world, the ministry, even a minor child who was coached to cheat and conceal—were involved. In fact, one producer testified that none of the large number approached refused to be party to the deception. The District Attorney in New York County is reported to have said that it appears that as many as a hundred of those involved and who testified before a grand jury which was investigating quiz shows testified untruthfully.

I believe that more timely and vigorous action by the regulatory agencies concerned and by the affected industry can operate to eradicate many of the abuses disclosed. As the report which I am transmitting herewith indicates in greater detail, both those agencies and large segments of the industry have recently displayed a quickened sensitivity to the problems and are taking steps to eradicate many of the abuses so far disclosed.

Industry attempts to clean house should be applauded, but it is unlikely that such attempts will be successful unless the appropriate regulatory agencies manifest a continued concern in protecting the public interest and exercise their powers directly and promptly. Within the framework of existing law, I believe that the regulatory agencies can take effective action in addition to the action which they have already undertaken or have indicated they will undertake.

The principal conclusion of this report, I wish to emphasize, is that the Federal Communications Commission and the Federal Trade Commission appear to have authority adequate under existing law to eradicate most, if not all, of the deceptive and corrupt practices in broadcasting which have been disclosed—particularly if the agencies are accorded the full cooperation of the broadcasting industry. Specific examples of how they may use their powers are outlined below and detailed in the accompanying report. The Federal Communications Commission's task would probably be somewhat eased by the enactment of certain changes relating to its authority over broadcasters and also in the area of criminal law. However, it seems premature to recommend any substantial legislative changes until the agencies and the industry have had an adequate opportunity to show the effectiveness of present and recommended action in dealing with the problems under existing authority.

There is a wide variety of possible action which the Federal Communications Commission can take to minimize deceptive programming and advertising practices.

As the accompanying report points out the Commission could, for example, under its existing authority give consideration to taking the following steps:

1. Require broadcast licensees to take appropriate measures (more fully described in the report) so that contests which they broadcast as honest tests of skill or knowledge are produced under circumstances which provide reasonable guarantees that a program is what it purports to be.

2. Require broadcast licensees to take steps to prevent the broadcasting of matter in return for payments or promises of money or other valuable consideration to employees of the licensees without an appropriate sponsorship announcement and provide that information be submitted to the FCC at regular intervals as to the steps each licensee has taken to effectuate this requirement.

3. Require the filing periodically with the FCC by broadcasting licensees, and those of their employees who determine the content of any broadcast program, of reports of financial interests owned by them in any business enterprise, and of the returns received by them from such enterprise, if any of the licensees' programs (apart from those accompanied by an appropriate announcement of commercial sponsorship) is intended to enhance, or has been used to enhance, the sale of any product of the enterprise. This practice would be consistent with financial reporting requirements imposed in the public interest by such statutes as the securities and exchange acts, the recent Labor-Management Reporting and Disclosure Act of 1959, and the Defense Production Act.

4. Adopt a program of more intensive scrutiny of broadcast licensees' practices before license renewals are granted. Such scrutiny should include a comparison of the licensees' performances with the promises as to programming which they made at the time their licenses were granted or last renewed, and also regular spot checks in depth each year (just as the Internal Revenue Service spot checks individual tax returns) of the renewal applications of a number of licensees or of the licensees in a particular community.

Turning to the Federal Trade Commission, that agency is primarily concerned with unfair or deceptive trade practices and unfair methods of competition wherever they appear. It is not concerned with broadcasting as such, but only with broadcasting when it is used as a means to effectuate those prohibited practices. Nevertheless, there is much it can do to eradicate these practices in the field of broadcasting. In addition to the numerous steps it is now taking, it could, for example, give consideration to the following actions:

1. In cases involving false or deceptive advertising the FTC usually proceeds against the advertiser, rather than the broadcaster. However, it has authority to proceed against a broadcaster engaged in the false advertising of foods, drugs, devices or cosmetics. I recommend that it do so in appropriate cases.

2. Institute an industry-wide investigation of television and radio advertising to determine the extent to which false, unfair or deceptive practices—whether

in the form of commercials, false demonstrations, or otherwise—are used to stimulate the sales of products.

3. Call a trade-practice conference for the purpose of drafting a broadcasting advertising guide.

The foregoing suggestions are merely examples of possible additional action which may be taken under existing law by the regulatory agencies concerned. As the recommendations set out above indicate, if the regulatory agencies bring their powers under existing legal authority to bear upon the problems promptly and vigorously much can be accomplished to eradicate the abuses disclosed. I do, however, recommend certain legislation to assist in meeting the problems.

First, under existing law it is a criminal offense for a broadcasting station to broadcast sponsored matter without an appropriate sponsorship announcement. This does not apply in cases in which an employee of a station, rather than the station itself, surreptitiously receives money or other valuable consideration in return for broadcasting matter without any such announcement. The law should be amended to make such action by the employee a federal crime.

Second, as a practical matter, the one sanction expressly conferred by statute upon the Federal Communications Commission for use against a broadcast licensee who fails to operate in the public interest is to withdraw his broadcasting license permanently—a sanction so severe that it has been imposed only rarely. The Federal Communications Commission should be expressly authorized also to impose less severe sanctions for actions violating the Communi-

cations Act or regulations issued pursuant to it. Such sanctions, for example, could include temporary suspension or conditional licenses.

In a sense, the spectacle of corruption in the broadcast industry presents a larger issue which is beyond the area of legislation or law enforcement. Our system of government preserves to each individual the widest latitude of personal freedom. But as Clemenceau once said: "Freedom is nothing in the world but an opportunity for self-discipline." In these times of ferment, when the peoples of the free world look to the United States for responsible leadership, we can ill-afford any relaxation of the high ethical and moral standards which have kept our nation free and strong.

Respectfully,

WILLIAM P. ROGERS,
Attorney General.

Report to the President by the Attorney General on Deceptive Practices In Broadcasting Media

1. *Introduction.* The purpose of this report is to discuss recent disclosures of deceptive practices and corruption in the broadcasting industry, their causes and the means of dealing with them. Such corruption has been revealed by a Congressional investigatory body and by the actions of the broadcasting industry itself. As disclosed so far, the corruption largely relates to deceptive programs, deceptive advertising and to matter broadcast as a result of undercover payments to the employees of broadcasting stations—colloquially called “payola.”

Intimations as to the possible existence of other abuses exist. However, the Congressional investigation which touched off current public concern with the matter is not yet completed. In addition, the Federal Communications Commission has instituted, but not yet completed, a hearing which has offered a forum for criticism and suggestions with respect to all aspects of the operation of the broadcasting industry and its regulation. The Federal Trade Commission is continuing a recently initiated investigation of payola. All of the facts are therefore not yet available.

Nevertheless, recent hearings by the Special Subcommittee on Legislative Oversight of the House

Committee on Interstate and Foreign Commerce have thrown considerable light on one form of deceptive programming, the quiz show. Additional information has been supplied by the action already taken by the Federal Trade Commission and the broadcasting industry relating to payola and by the Commission action relating to certain deceptive advertisements which have been broadcast. Accordingly, some preliminary judgments may be made at this time.

2. *The quiz shows.* Beginning about 1955, a program format known as the "Quiz Show" began to achieve great national popularity on television. In the years following, such programs grew considerably in popularity. The cost to the sponsor of placing such shows on the networks was substantial, being in the order of three or four million dollars annually for each of two of the most popular shows, Twenty-One and The \$64,000 Question. While there were substantial variations in detail, all of these shows had a basic element in common. Contestants chosen from various walks of life were asked questions and received prizes in substantial monetary amounts, depending upon their success in answering questions of increasing difficulty or specialization or upon defeating other individuals in tests of knowledge.

For example, the Twenty-One show involved two contestants and was somewhat similar to the card game of the same name. The master of ceremonies would choose a general category of knowledge, apparently at random. After the category was announced, each contestant would be permitted to de-

side the point value, from one to eleven, of the question he would attempt to answer. The higher the point value the more difficult was the question. The contestant who accumulated 21 points first would be the winner. Alternatively, after a certain number of questions had been answered, a contestant could stop the game on the chance that, although he did not yet have 21 points, he did have more points than his opponent whose score he was not told until the end of the game. Whether the game was terminated in that manner or by one of the contestants reaching 21, the winner would receive \$500.00 per point for the difference between the score he had achieved and the score his opponent had achieved. In the event of a tie, the contestants would start a new game but the point value of winning the next game would be \$1,000. If further ties occurred, the point value would increase by \$500 for each game.

In addition to this program, there were also many other programs, such as the \$64,000 Question, the \$64,000 Challenge, Dotto, Tic-Tac-Dough, the Big Surprise, etc. In each case the basic attraction of the show derived from its being represented as a legitimate and honest test of knowledge. Much effort was made to emphasize this. The questions were represented as having been prepared and brought to the studio under circumstances which would guarantee that no contestant would have advance knowledge of the questions he would be asked. He was supposed to get no help from any source. A favorite manner of emphasizing this aspect of the program was to place the contestant in an "isolation booth" so as to drama-

tize the fact that he was in a position where help would not be feasible. Similarly, on some programs the more difficult questions were drawn from envelopes handed to the master of ceremonies by a vice president of a respected New York bank. The vice president was guarded by two men in the uniform of bank guards, and it was announced that the questions had been removed from the bank's vaults by the vice president and had not been touched by human hands from the time that they were composed by an editorial staff and deposited in the vault until he brought the envelope to the studio to be opened in front of the audience.

The spectacle of the immigrant cobbler expert in opera, the twelve-year old physicist, the chorus girl who knew Shakespeare, the postal clerk who knew everything, and the boyish, young intellectuals with a wide range of general knowledge entranced the listeners. It was clear that the essence of the appeal of these programs was their allegedly unrehearsed nature and the fact that people from all stations in life were repositories of all kinds of information.

However, beginning in 1957, rumors began to circulate to the effect that the quiz shows were "fixed." In April ("Time", April 22, 1957) and August ("Look", August 20, 1957) of that year, articles appeared in national magazines questioning the bonafides of the shows. Even earlier, in December of 1956, a contestant had lodged a complaint with the Federal Trade Commission that the television quiz program entitled "The Big Surprise" was being conducted other than as a true test of skill by the contestants.

The staff of the Commission initiated an investigation of the complaint, but closed out the matter on May 6, 1958, after receiving an affidavit from the executive producer of the show which denied the allegations, and discovering that the program in question had gone off the air.¹ When later questioned as to the reason for discontinuing such an investigation, the Chairman of the Federal Trade Commission indicated that this was the normal procedure where assurances are received that a questioned practice has been removed and "in this instance the assurance went further than usual in that an affidavit of the executive director of the program was secured for the files." Tr. 15.

The Federal Communications Commission's attention was first officially drawn to the possibility that a television quiz program may have been conducted in a deceptive manner on July 31, 1958, when it received an affidavit from a contestant to that effect with respect to "Dotto," a CBS program produced by an independent company.² The Commission then sent let-

¹ Testimony of Earl W. Kintner, Chairman of the Federal Trade Commission. Hearings Before the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce, on "Television Quiz Show Programs", pp. 11-13. References to the hearings are cited hereafter as "Tr.", followed by the pertinent page number or numbers. Mr. Kintner indicated there was a difference of opinion on the staff level of the Commission as to the Federal Trade Commission's jurisdiction over sponsored shows if the show was deceptive but the commercial was not. With respect to FTC supervision of false and misleading radio and television advertising, Mr. Kintner indicated that a monitoring unit on radio and TV advertising had been operating over the past two years within the Bureau of Investigation in the Commission.

² Testimony of John C. Doerfer, Chairman, Federal Communications Commission. Tr. 3.

ters of inquiry to the network concerned and took no further action when assured by the network that it had no previous knowledge of the practice, was looking into the situation, had cancelled the program in question, and had arranged for closer inspection of its programs.³ The Commission conducted no independent investigation, such as questioning the complainant, other contestants, program producers or network staff, but indicated that the problem was part of a general study of network practices which is not yet completed. In September of 1958, a local grand jury was empaneled in New York City under state authority. It investigated the matter for several months. While the jury indicted no one,⁴ it is known that it prepared a presentment. Although the local judge has refused to make the presentment public, he has made a copy of the minutes of the grand jury available for investigative and impeachment purposes to the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce in connection with its current investigation. In response to a request made by the New York Grand Jury for the affidavits submitted to the Federal Communications Commission, and for testimony by a member of the Commission, the FCC indicated it could not comply with such requests while its general study was still pending. Tr. 19-23.

³ In addition the Commission wrote a similar letter of inquiry to the National Broadcasting Company with respect to its quiz programs. Tr. 13-19.

⁴ However, another grand jury subsequently indicated a witness for perjury in his testimony before the original grand jury.

So far, the Subcommittee has held about two weeks of open hearings and the rumors of deception have been amply confirmed. Many witnesses testified that they were intensively briefed before each appearance as a contestant on a quiz show. In some cases they were told beforehand what the questions would be and what the answers to those questions were. They were told what points to choose as well. They were given scripts to memorize and were rehearsed not only in respect to the answers but also as to what might be called the dramatic aspect of their conduct, such as pausing, going back to questions, brow patting, and the like. The testimony indicates that in some cases a technique more subtle than giving the contestants the questions and answers was used to "control" the program. The producers would question the contestants intensively in advance of the show, so that the scope of their knowledge was well understood. The producers' ability to gauge the contestants' knowledge made it possible for them to frame questions so as to keep a contestant who was attractive and would gather a larger audience on the air and to dispose of contestants who did not have such qualifications. In some cases, both techniques were used on the same program. It was also disclosed that the paraphernalia relating to the bank vault was meaningless. After it was decided to ask a contestant a specific question, that question was simply taken down to the bank vault and then produced on the program as planned.

Robert L. Foreman, Executive Vice President of Batton, Barton, Durstine & Osborne, a leading advertising agency, testified that he believed that the exercise of some type of controls on quiz shows should have been known to "anyone with a certain depth of experience" in the television industry (Tr. 645-646). On the other hand, the heads of the networks expressed great shock at the disclosures. Dr. Frank Stanton, the head of CBS, stated "I was completely unaware until August 8, 1958, of any irregularity in the quiz shows on our network." Tr. 1043. Mr. Robert E. Kintner, President of NBC, said "We were merely taken by a small group of deceitful people, * * * ." Tr. 924.

3. *Payola*. As the hearings before the Special Subcommittee on Legislative Oversight approached adjournment on November 7, 1959, evidence of different types of corruption in the broadcasting industry began to accumulate. A Pennsylvania department store owner testified that he had paid \$10,000 in cash to "public relations counselors" in New York in order to get one of his employees on a quiz show as a contestant so that the employee would be able to refer to the store before a national audience.

The networks, the broadcasters and the advertisers began to re-examine the practices in the industry and have themselves disclosed cases in which contestants actually paid for the privilege of appearing on a show. "Disc jockeys" have admitted to accepting payola in order to favor certain records on their programs. Some recording companies regard use of their records on programs, which largely consist of playing popular

records, to be of such great commercial value that they are willing to and do make substantial payments or gifts to the disc jockeys in order to have those records played. A disc jockey who receives such a payment does not disclose that he is being paid to play the record and creates the impression that it is being broadcast because of its merit.

At a public conference held with representatives of the broadcasting industry on December 2, 1959, the Federal Trade Commission disclosed that "payola is under intensive investigation" as a form of commercial bribery or "push money" constituting an unfair and deceptive trade practice. On December 6, 1959, it filed complaints against three record companies and six record distributors. On December 15, 1959, a consent decree was entered in one of the cases. It is understood that the filing of additional complaints is contemplated.

On December 3, 1959, the Federal Communications Commission sent a request to 5,326 broadcast licensees (every AM, FM and TV station) requesting that each supply the Commission with information relating to payola. The request covered payments to each licensee and his employees since November 1, 1958, for any matter broadcast which was not identified by an announcement as being broadcast because of such payment. This information was to have been filed on January 4, 1960, but the FCC extended the time for filing until February 5, 1960. The Commission also requested information as to the internal controls and procedures established by each licensee to provide him with information as to remuneration paid to

others than himself in connection with the preparation and presentation of programs. This information must be filed on January 4, 1960. The results of the requests are not yet available. Nor, at this writing, has the Subcommittee yet held hearings on payola. However, what has already been disclosed makes it likely that the known instances of payola are more than isolated cases.

While at this time payola seems to be used most extensively with respect to records, there is evidence that it is also being used in other aspects of the industry. The payment by the Pennsylvania department store owner to get his employee on a quiz show is one example of the use of payola in a different context. Allegations have been made that ratings are sometimes falsified and that some performers and broadcasting executives have interests for which they are able to obtain favorable publicity over radio and television. With respect to advertising as such, similar problems appear to exist. Since the hearings began, the Federal Trade Commission has initiated three cease and desist proceedings against deceptive commercials which have been broadcast.

4. *Public reaction.* The testimony before the Committee in connection with the quiz shows has shown that school teachers, infants, clergymen and others from many walks of life had been drawn into a gigantic hoax perpetrated upon the nation through the medium of television. Other disclosures have revealed substantial corruption in other aspects of the broadcasting industry. The disclosures have been accompanied by a sense of public shock and disgust.

Questions have been raised universally as to the basic causes and conditions which have permitted such corruption to operate in so potent an industry. In an editorial on Tuesday, November 3, 1959 (p. 30), "the New York Times" stated:

"The one thing that can be salvaged from this sorry situation is an awakened sense of public outrage that may yet force reforms in the industry that made it possible. The Van Doren episode, bad as it is, is but symptomatic of a disease in the radio and television world that frequently permits things to be represented not quite as they are—a disease that can touch the whole gamut of programs from public speeches to private advertising.

Whether through governmental regulation, nonprofit competition, internal reorganization—or perhaps all three—the radio-television industry will have to undergo a drastic reform if it is to regain the confidence of the American public."

The general tenor of this view was repeated in a roundup of national editorial comment. On November 6, 1959, it was reported that the Washington, D.C., Superintendent of Schools stated the revelations would make it harder to control cheating in the schools. He said:

"Education reflects the community. It is part of the social order, * * *.

We have seen demonstrated here massive cheating organized and supported to defraud the American people, * * *.

And yet our young people are expected to observe the highest moral standards—and I hope they will continue to observe them."

Objective evidence indicates that the editorial reaction may reflect the predominant public attitude. A poll conducted by the Gallup Organization, Inc., at the request of one of the broadcasting networks indicates that a higher percentage of the public is aware of the broadcasting crisis than was aware of the military crisis in Quemoy and Matsu, the dispute between Senator McCarthy and the Army, and of Governor Faubus at the height of the integration crisis. Most of the individuals polled feel that television should be more strictly regulated. Of these, however, two-thirds believe that the networks should undertake this function and only one-fifth think the Government should do so. A later poll by Elmo Roper indicated about the same degree of public awareness, but did not expressly report views on regulation.

It is clear that the broadcasting and advertising industries are actively concerned with the problems. One network has already dropped all quiz shows involving large sums of money and has issued detailed instructions as to program practices in order to eliminate deception in all aspects. Another network has instituted what it believes to be an efficient method of policing its programs and employees for the purpose of enforcing rigid standards of honesty. Individual broadcasters have begun to investigate the practices of their employees, and discharges or resignations of employees who have accepted payola have occurred.

In a series of recent meetings the advertising and broadcasting industries have indicated great interest in exploring ways and means of improving commercials both with respect to deception and taste. The

Television Code of the National Association of Broadcasters has recently been amended to provide (1) that no program shall be presented in a manner which would mislead the audience as to any material fact, (2) that quiz and similar programs presented as legitimate contests must in fact be genuine and the results not controlled by collusion or other action which will favor one contestant against another, (3) that news interview programs shall be governed by ethical standards of journalism so that the interviewer will select the questions and that disclosure will be made if restrictions are placed upon the area of questioning or if the person interviewed requires questions to be submitted in advance or participates in the editing of a recording of an interview prior to its being broadcast, (4) that broadcasters shall be alert to prevent the use of properties, commercial products, music, etc., within a program, when such use is dictated by factors other than the requirements of the program, (5) that the acceptance by a producer, talent or other personnel, of cash or other consideration for including such material within a program is forbidden, and (6) that broadcasters are required to use extreme care to prevent false, misleading or deceptive advertising, whether by advertising copy or by demonstration. However, it should be noted that the only method of enforcing the Code is by removal of its Seal of Good Practice from stations which violate it. This is not regarded as a substantial sanction and it is understood that the possibility of establishing more effective sanctions is being canvassed.

The regulatory agencies concerned have also displayed an active interest in the problems which have been presented. The Federal Communications Commission began a public hearing on December 7, 1959, to consider programming and advertising practices for the purpose of determining whether and to what extent they are inimical to the public interest, to determine whether the general standards the Commission has established to guide broadcast licensees in the selection of matter which is broadcast are adequate in the light of existing conditions, to determine whether the Commission's rule-making powers should be used to set out more detailed and precise standards to guide broadcasters, to determine whether the Commission's present policies and procedures relating to review of the performance of licensees in the field of programming and advertising are adequate, and to determine whether existing legal authority is adequate or whether legislation should be recommended to Congress. In effect, the FCC has invited public views as to the whole field of broadcasting and the manner in which it is regulated. It is not expected that the hearing will be concluded until mid-January of 1960.

On December 2, 1959, the Federal Trade Commission held a conference for the purpose of devising "better and faster means of enforcing the present laws to stop false and misleading advertising on television and radio." It has, in addition to the action relating to payola and false advertising already described, increased its monitoring of advertising which is broadcast.

In his testimony before the Legislative Oversight Subcommittee, the Chairman of the Federal Trade Commission explained its current enforcement program in connection with false and misleading radio and TV advertising and its liaison with FCC. He indicated that a monitoring unit on radio and TV advertising had been operating over the past two years within the Bureau of Investigation. He described the unit as consisting of "two attorneys, two other monitors and two secretarial and clerical personnel" (Tr. 31). A subsequent statement of the Chairman, dated November 1, 1959, on the Commission's drive against deceptive television advertising, listed four actions designed to intensify the Commission's policing of television commercials. They included monitoring all national television networks instead of the prior system of selective monitoring, examination of all national TV advertising continuities for the period from November 15 to December 15, more than doubling the radio and TV monitoring staff, and instructions to FTC's nine field offices "to intensify their TV monitoring of network shows." The Chairman also stated that "while the Commission's jurisdiction concerning the conduct of those shows is questionable, there can be no doubt at all that the honesty of TV commercials is very much our concern." He added that policing of commercials that exaggerate, irritate and nauseate "is beyond the authority of the Federal Trade Commission," and explained that FTC did not investigate rigged quiz shows because "the primary jurisdiction for regulation of television and radio industry rests

with the Federal Communications Commission.” Tr. 52.

5. *The quiz shows and the broadcast industry.* Information as to payola and other abuses is not complete enough at this time to permit accurate discussion of the problems. However, sufficient information has been disclosed with respect to the operations of quiz shows to permit a grasp of the factors which led to the widespread rigging. Before this is discussed, it would be well to understand the system of network broadcasting which distributed the shows.

A television network is comprised of a number of television stations each in a contractual relationship with a central operating organization (e.g., NBC, CBS or ABC) which broadcasts programs to stations affiliated with the network.⁵ While each of the television network operating organizations owns some local stations, the network as a whole is built upon a system of individually-owned stations which have the basic responsibility for station operation. The network organization arranges for the physical inter-connection of the affiliated stations by telephone cable and microwave relays. The legal relationship between the network organization and the stations is defined by an affiliation agreement.

The network organization supplies its affiliated stations with a schedule of programs. These programs are sometimes owned and broadcast by the network, they are sometimes broadcast in association with

⁵ See generally, Salant, Fisher and Brooks, “Functions and Practices of a Television Network,” 22 Law and Cont. Problems 584 (1957).

others and jointly-owned, and sometimes they are broadcast and owned by persons outside the network. Such outside producers of programs are known as "independent packagers" of television programs. The network organization finances the operation by selling nationwide broadcast time and programs to national advertisers who are given the opportunity of airing commercial messages on these network programs. Thus the advertisers buy broadcast time and programs offered by the network organization. In turn they are represented by advertising agencies. These are in effect the middlemen between the network and the commercial companies which desire to obtain nationwide publicity for their products by sponsoring programs.

Each station is paid by the network for the use of its time in accordance with the affiliation agreement. Further, network programming tends to develop a large audience circulation on which affiliates base their advertising rates. A large circulation will attract increased income to the stations from non-network sources—national and regional spot advertising and local advertisers.

The national or local advertiser is primarily concerned in publicizing his products so as to produce the greatest sales per dollar spent. He is interested in being connected with the program or programs which will produce the greatest sale per dollar spent. The reason for an advertiser's investment of large sums in television programming is primarily the value he receives for his money in terms of a low unit cost for the sales produced.



The decision of the advertiser to sponsor a particular program is apt to depend primarily on the combination of cost of the medium, the number of homes reached, and the "impact" of the program, i.e., its effectiveness in producing sales. The effort of all major groups involved is, therefore, to maximize the size of a program audience once a commitment to a certain program is made. This major concern of the television industry is clearly illustrated by the testimony before the House Legislative Oversight Committee of Mr. George Abrams, former vice president in charge of advertising of Revlon, Inc., which sponsored the \$64,000 Question and the \$64,000 Challenge. That testimony indicates that the influence of the advertiser on how a program is produced may be extremely strong, notwithstanding contractual provisions to the contrary.⁶ Mr. Abrams was responsible for advertising appearing in all television properties of Revlon, as well as liaison between the producers of programs and the advertising agencies charged with responsibility for the programs. He said:

"The Sixty-Four Thousand Dollar Question and the Sixty-Four Thousand Dollar Challenge were two such properties for which I was responsible.

Directly related to this responsibility was the objective of achieving the highest possible ratings for both programs in order to provide

⁶ Revlon's contract with Entertainment Productions Inc., gave the former very limited powers with respect to the manner in which the \$64,000 Question and the \$64,000 Challenge were produced and presented. Tr. 365.

maximum exposure to the public of the advertising messages contained in these programs.

The television ratings reflected the audience draw of the Sixty-Four Thousand Dollar Question and the Sixty-Four Thousand Dollar Challenge, and for this purpose Revlon purchased overnight telephone survey reports which were charted on a regular basis along with the names of contestants appearing coincident with the recorded ratings.

This charting of the ratings, along with contestant's names enabled us to follow the program's popularity and, in our opinion, also reflected the individual popularity of contestants.

At weekly meetings of the producers, the advertising agency and our own Revlon executives, these ratings charts were studied to determine the reception the public was according to contestants.

I have turned these rating charts over to the New York District Attorney's office.

These charts play an important role in this investigation, in my opinion, because they indicate the week-by-week interest in individual contestants, and were often the starting point of our meeting discussions." (Tr. 797-798.)

The maximal efforts to maintain this public exposure to advertising messages may have resulted in some cases in sponsor direction that certain contestants on programs be removed or retained in relation to their effect on the audience-viewing ratings of the program. Mr. Abrams continued:

“I repeat without any change in my affidavit that those of us present at those weekly meetings knew the popularity status of contestants as determined by ratings and publicity and expressed to the producers our desires for the ultimate disposition of many contestants. (Tr. 803)

* * * * *

In the first year or so of the program, nothing could go wrong, yet as the ratings showed, the declining curve of audience response meant that more striking contestants, higher dollar prizes, and even the use of celebrities was necessary to maintain viewer interest.

I believe the producers felt this pressure and resorted to rigging and fixing to save their property and satisfy the sponsor.” (Tr. 805-806.)

The tacit assumption of all concerned in this process was the direct connection between a highly rated program and increased product sales. This assumption was more than borne out by the history of the Revlon Company’s sales during its period of sponsorship of the \$64,000 Question and Challenge programs.

In 1954 net sales of Revlon were \$33,604,000. Tr. 375. Revlon began sponsorship of the Question program on June 7, 1955. In 1955 net sales of Revlon increased to \$51,647,000.⁷ *Ibid.* At the end of 1956

⁷ Revlon’s “Living Lipstick”, first product advertised on the program, fell 30 days behind orders and shipments to dealers had to be rationed. Within a few months after Revlon started the \$64,000 Question, the company’s closest rival, Hazel Bishop, fell far behind. *Broadcasting Telecasting Magazine*, March 18, 1957, p. 27.

they jumped to \$85,768,000; 1957 net sales were \$95,175,000; and at the conclusion of 1958 Revlon net sales had reached \$110,363,000. The company sponsored this program until November 16, 1958, and sponsored the \$64,000 Challenge with P. Lorillard Co. from October 23, 1955 until September 7, 1958. Tr. 359.

The following questions were asked Mr. Martin Revson, former vice president and director of Revlon, by counsel for the subcommittee:

“MR. LISHMAN. Do you attribute any of this remarkable growth in net sales to the sponsorship of the Sixty-Four Thousand Dollar Question and Challenge?”

MR. REVSON. Yes, sir. (Tr. 376)

* * * * *

MR. LISHMAN. In other words, in 1958 you were twice as good as your nearest competitor?

MR. REVSON. Yes.

MR. LISHMAN. Do you attribute this to the Sixty-Four Thousand Dollar Question and Sixty-Four Thousand Dollar Challenge programs?

MR. REVSON. It helped. It helped. (Tr. 378-379)

Similarly, the sales of products of Pharmaceuticals, Inc., sponsor of the Twenty-One quiz program showed a steady growth during the period of its sponsorship. Net sales of Pharmaceuticals, Inc. in 1956 were approximately \$20 million. In 1957 they reached \$30 million. Sales of Somnex, a sleep inducing product of Pharmaceuticals, Inc. rose 68.9% during a 12-week period preceding February 25, 1957. Sales of

Geritol, the major product advertised on the program, increased 71.4% during a 3-week period preceding February 25, 1957.⁸

The significance of these shows to the advertising sponsor is further indicated by the large amounts expended each week in sponsoring the program:

The CHAIRMAN. Is there any particular secret what you paid them?

Mr. REVSON. Oh, no. It is a matter of record. We have the records we would be happy to—let me put it this way, because I don't remember the exact figures. With the commercials and everything else, I figured the show cost us weekly, time, payments to the producer, and the commercials, about \$75,000 to \$80,000 a week. I think it was around that. (Tr. 412.)

It may be seen from the foregoing that at least part of the broadcasting industry is organized upon an economic base in which advertising revenue operating through the networks, exercises enormous influence upon the programs as well as the commercials ultimately emitted through the facilities of the local broadcasting stations. This system has, of course, produced programs of great benefit to the American public. However, it is obvious that the pressures to use the medium primarily for advertising purposes, rather than for communications purposes, may, as has been the case with the quiz shows, produce quite the opposite results. Therefore some form of regulation of malign influence appears to be necessary. Two regulatory agencies, the Federal Communications

⁸ Broadcasting Telecasting Magazine, *supra*, fn. 7, p. 27.

Commission and the Federal Trade Commission, have the basic responsibility of regulating the industry. The manner in which this regulation is effected is considered below.

6. *Regulation of television by the Federal Communications Commission.* The Communications Act of 1934 (47 U.S.C. 151, *et seq.*) provides the basic authority for federal regulation of the radio broadcasting industry, including television. Under the provisions of the act transmission of signals by radio is prohibited without a license (§ 301), and unlicensed transmission is made a criminal offense (§ 501). The Commission may issue a broadcast license only if it finds that the “public convenience, interest, or necessity will be served thereby” (§ 307(a)), and then only for a maximum period of three years (§ 307(d)). Subsequent extensions may be granted, but also subject to a finding that the “public interest, convenience, and necessity would be served thereby” (*id.*). The Commission has authority to revoke a license because of conditions coming to its attention “which would warrant it in refusing to grant a license or a permit on an original application” (§ 312(a)), but must carry the burden of proof in such a case (§ 312(d)). It also has limited authority to issue cease and desist orders (§ 312(b)). In addition, extensive rule making (§ 303(r)) and investigative authority is conferred upon the Commission (§ 403).

The act therefore establishes a system of private ownership of broadcast stations which may operate under government license only if they do so in the

public interest. The broadcasters have no vested interest in their licenses. Rather, section 301 states that one of the purposes of the act is “to maintain the control of the United States over all the channels of interstate and foreign radio transmission; * * *”, and section 304 provides that each licensee must waive any claim to the use of any particular frequency based on previous use.

Obviously the station owners must secure advertising sponsors if they are to operate successfully. However, they have been given control over a valuable asset which by its nature cannot be made available to all who want it. In return for this privilege, the act makes it their primary duty to operate in the public interest. Commercial sponsorship must be consistent with this duty. In *National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943), the court said:

“The ‘public interest’ to be served under the Communications Act is thus the interest of the listening public in ‘the larger and more effective use of radio’. § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. ‘An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts.’ *Federal Communications Comm’n v. Sanders Radio Station*, 309 U.S. 470, 475.” See also *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137–138 (1940).

Interpreting the *National Broadcasting* and *Pottsville* cases, the Court of Appeals for the Third Circuit has stated:

“It is plain * * * that a radio broadcasting station must operate in the public interest and must be considered a ‘trustee’ for the public.”
McIntire v. Penn Broadcasting Co. of Philadelphia, 151 F. 2d 597, 599 (1945).

It should be emphasized that only individual radio and television stations are licensed, and that the networks themselves are not licensed as such. It has long been established Commission policy, fully sustained by the courts, that each licensee has a non-delegable duty to control and be responsible for the complete operation of its station, including all aspects of programming. While this policy is too firmly established to require extended discussion, it may be noted that in the *National Broadcasting Co.* case, 319 U.S. at 205, the Supreme Court quoted with approval the Commission’s report on chain broadcasting to the effect that

“It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station’s facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency.”

Accordingly, while much advertising and programming is determined by the sponsors, advertisers and networks without consultation with the individual station owner, the latter is legally responsible for the ultimate product which he broadcasts.

To summarize, in return for the privilege of operating on a valuable and limited public frequency, the broadcast licensee (1) must operate in the public interest and (2) is alone responsible for assuring such operation is in the public interest. To be sure, the licensee is entitled to profit from operating a broadcasting station, and advertisers may benefit from the use of the medium. However, under present law operation in the public interest is the only reason for the existence of a broadcasting station. That interest must predominate over the economic interests of the broadcasters or advertisers. The Commission is the public body created especially by Congress to make sure that the licensee meets his vital public interest responsibilities.

Although without direct authority over networks, the Commission may take action having an indirect but definite impact upon them. Section 303(i) empowers the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting." In view of the statutory language, the Commission attempts to regulate networks only indirectly, by regulating the kind of arrangements an individual licensee may enter into with a network. Since about 1943, the Commission has had such regulations in effect, dealing with the exclusivity of affiliation, territorial exclusivity, length of affiliation agreements, option time, the rejection of network programs by affiliates, network ownership of stations, dual network operation, and network control of station rates (47 C.F.R. 3.131-3.138). All the network rules are couched in the same way (i.e., "No license shall be

granted to a * * * broadcast station having * * *"). The Commission's authority to issue the regulations was sustained in the *National Broadcasting Co.* case, and thereafter the same regulations were made applicable to the new broadcast services (i.e., FM and TV) as they developed. See 47 C.F.R. 3.231-3.238, 3.658.

The Commission has one other way—also indirect—of regulating the networks. With the exception of Mutual, all of the radio and television networks own stations and are, therefore, Commission licensees themselves. A licensee's actions as a network may be relevant to his "character" and the "other qualifications of the applicant to operate the station," factors which the act (§ 308(b)) requires to be considered in connection with both original applications and renewals. The Commission may take into account network practices considered inimical to the public interest in its review of network licensees at renewal time. Specifically, it may consider whether the network, in view of such practices, has the requisite qualifications to be a licensee. This is not an entirely satisfactory way of proceeding, since the penalty (denial of several licenses) is so severe that the Commission has characterized it as a "death sentence" and has expressed reluctance to impose it. See *Don Lee Broadcasting System*, 5 Pike & Fisher, R.R. 1179, 1200 (1949).

Section 326 of the Communications Act provides that nothing in that act

“shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted

by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”

In addition, the Supreme Court has stated that radio, together with moving pictures and newspapers, is a medium of communication “whose freedom is guaranteed by the First Amendment.” *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); see also *Superior Films v. Department of Education of Ohio*, 346 U.S. 587, 589 (1954). It has therefore been suggested that both constitutional considerations and the act itself severely limit the action which the Commission may take with respect to the content of what is broadcasted or televised, both programs and advertising.

Before considering whether these statutory and constitutional provisions substantially inhibit the exercise of the Commission’s authority in the field of rule making or licensing, it would be well to emphasize that the Commission has investigatory power with respect to radio and television practices fully as great as that of the Special Subcommittee on Legislative Oversight. Problems of personnel and appropriations aside, it could have conducted precisely the same investigation the Subcommittee has—an investigation which, significantly, has raised no claim of censorship or of invasion of First Amendment rights from any quarter.

The authority of the Subcommittee rests upon the grant conferred upon its parent committee, the House

Committee on Interstate and Foreign Commerce, to investigate, *inter alia*, "Advertising, fair competition and labeling," as well as "[t]he administration and enforcement by departments and agencies of the government of provisions of law relating to subjects which are within the jurisdiction of such committee," H. Res. 56, 86th Congress. 105 Cong. Rec. 1097-8 (Daily edition, Jan. 27, 1959).

This authority appears to be no more than the investigative authority conferred upon the Commission by the Communications Act of 1934. Section 403 of the act gives the Commission

"full authority and power at any time to institute any inquiry, on its own motion, in any case and as to any matter or thing * * * concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act."

In *Federal Communications Commission v. Cohn*, 154 F. Supp. 899, 908 (S.D.N.Y., 1957), the court noted that "Congress has not been niggardly in providing the Federal Communications Commission with ample authority to conduct investigatory proceedings necessary for the execution of its multiple functions." The *Cohn* case involved the current Commission network investigation. The question was whether it could subpoena information from independent producers over whom the Commission admittedly has no regulatory authority whatsoever. Nevertheless, the court held the investigatory and subpoena power

valid and applicable in the circumstances because the “comprehensive powers” conferred on the Commission include broad investigative authority not only with respect to licensing or rule making proceedings, but also for the purpose of “making specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable.” 154 F. Supp. at 905; see also section 154(k)(5) of the Communications Act. And in *Stahlman v. Federal Communications Commission*, 126 F. 2d 124, 127 (C.A.D.C., 1942), the court stated that the Commission’s investigatory authority “includes authority to obtain the information necessary to discharge its proper functions, which would embrace an investigation aimed at the prevention or disclosure of practices contrary to public interest.”

But in any event, a review of existing authority indicates that the Commission may, without running afoul of constitutional or statutory safeguards of freedom of speech, give considerable weight to advertising practices and programming in the context of licensing, rule making or investigative proceedings. It is true that the statutory provision relating to censorship and the First Amendment delineate the outer limits of the Commission’s powers. Yet, within those limits considerable scope is left for effective regulatory action. This would certainly be so with respect to deceptive practices as opposed to problems of taste.

Although the issue has never been squarely passed upon by the Supreme Court, in every case in which the question has been presented, the courts have up-

held the Commission's authority to concern itself with a licensee's program policies and practices. No action by the Commission has ever been held by the courts to constitute censorship or to violate constitutional protections of freedom of speech or of the press. Rather, in a case sustaining the Commission's authority to consider the proposed programming of competing applicants, a federal Court of Appeals stated:⁹

“As to appellant's contention that the Commission's consideration of the proposed programs was a form of censorship, it is true that the Commission cannot choose on the basis of political, economic or social views of an applicant. But in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service. So while the Commission cannot prescribe any type of program (except for prohibitions against ob-

⁹ *Johnston Broadcasting Co. v. Federal Communications Commission*, 175 F. 2d 351, 359 (C.A.D.C., 1949). See also *Bay State Beacon v. Federal Communications Commission*, 171 F. 2d 826, 827 (C.A.D.C., 1948). This principle has been squarely applied in non-comparative situations to sustain denial of renewal because of the nature and substance of programs. *Trinity Methodist Church v. Federal Radio Commission*, 62 F. 2d 850 (C.A.D.C., 1932), certiorari denied 288 U.S. 599 (1933) (station used to attack the Roman Catholic Church, to allude slightly to Jews as a race, to attack judges in cases pending before them); *KFKB Broadcasting Ass'n., Inc. v. Federal Radio Commission*, 47 F. 2d 670 (C.A.D.C., 1931) (station used to prescribe for medical ills, the station receiving a “cut” from the sale of recommended prescriptions). See also *Simmons v. Federal Communications Commission*, 169 F. 2d 670, 671-672 (C.A.D.C., 1948), certiorari denied 335 U.S. 846 (1948); *Independent Broadcasting Co. v. Federal Communications Commission*, 193 F. 2d 900, 902-903 (1951).

scenity, profanity, etc.), it can make a comparison on the basis of public interest and, therefore, of public service. Such a comparison of proposals is not a form of censorship within the meaning of the statute. As we read the Commission's findings, the nature of the views of the applicants was no part of the consideration. The nature of the programs was."

In *Allen B. Dumont Laboratories v. Carroll*, 184 F. 2d 153, 156 (C.A. 3, 1950), certiorari denied 340 U.S. 929 (1951), it was held that Congress had so occupied the field of radio and television communications as to preclude censorship by a state. The court recognized that section 326 of the Communications Act also prohibits the Commission from censoring. Nevertheless, it stated:

"The Act itself demonstrates that Congress was vitally concerned with the nature of the programs broadcast as affecting the public good. It, therefore, dealt directly with the subject matter of the broadcasts which Pennsylvania seeks to regulate here. Congress thus set up a species of 'program control' far broader and more effective than the antique method of censorship which Pennsylvania endeavors to effectuate in the instant case."

As recently as October, 1958, the Court of Appeals for the District of Columbia, in rejecting a claim that a successful applicant, because of its religious orientation, might not properly fill the community's needs, stated:

"Of course should Loyola in the future fall short of the rules and regulations of the Commission in regard to proper programming, the

Commission may always review the matter in a renewal proceeding or otherwise. See *Trinity Methodist Church, South v. Federal Radio Commission*, 1932, 61 App. D.C. 311, 62 F. 2d 850, certiorari denied, 1933, 288 U.S. 599, 53 S. Ct. 317, 77 L. Ed. 975.” *Noe v. Federal Communications Commission*, 260 F. 2d 739, 743 (C.A.D.C., 1958), certiorari denied 359 U.S. 924 (1959).

Whatever the limitations upon the Commission’s authority to deal with programming may be, the prevention of deceptive contests does not appear to approach that limit.¹⁰ There is no question here of

¹⁰ For example, the Supreme Court has sustained the Commission’s power to deny a renewal for a consistent practice of broadcasting illegal lotteries. *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284 (1954). While the Act has been said not to give the Commission “supervisory control” over programs, *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940) (a case concerning economic competition), the Supreme Court recognized in the *National Broadcasting Co.* case that:

“The Commission’s licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of ‘public interest’ were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by [sic] radio, comparative considerations as to the services to be rendered have governed the application of the standard of ‘public interest, convenience, or necessity.’” 319 U.S. at 216–217.

Again, in *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586, 598 (1950), the Court flatly stated, “although the licensee’s business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license.”

interference with taste, religious views, or views on public or any other issues.

Nor is there any doubt that the Commission may consider advertising practices as relevant to the question whether a station is operating in the public interest. *WREC Broadcasting Service*, 10 Pike & Fischer, R.R. 1323, 1358-1359 (1955). In a public notice dated February 21, 1957, the Commission stated:

“The Federal Communications Commission has consistently held that the selection and presentation of program material, including advertising, is the responsibility of the broadcast station licensee, subject to its statutory obligation to operate in the public interest. In fulfilling this obligation, a broadcast station is expected to exercise reasonable care and prudence with respect to advertising copy in order to assure that no material is broadcast which will deceive or mislead the public.” 14 Pike & Fischer, R.R. 1262 (1957).

From the foregoing it appears clear that the Federal Communications Commission has authority to consider deceptive programs and deceptive advertising in connection with its licensing procedures. However, the Commission has used this authority sparingly in recent years. Thus, in 1955, the Commission renewed the license for radio station WOL, even though the latter carried so-called “bait and switch” advertising (advertising in which customers are enticed by a low-priced product for the purpose of switching them to purchases of a higher priced product) condemned by the Federal Trade Commission.

Washington Broadcasting Co., 12 Pike & Fischer, R.R. 105 (1955). The grant was approved by a 4-3 vote. In his dissent Commissioner Lee stated that "I believe it is the Commission's duty * * * to insist upon elimination of such practices [bait and switch advertising] as a condition to renewal [of license]." *Id.* at 106. The majority wrote no opinion.

It is true that licensees are required to submit certain information to the Commission relating both to advertising and programming when they apply for renewals. This includes the logs for a "composite week" arbitrarily chosen by the Commission at the end of the year, together with statistical information classifying programs broadcast during the composite week as sponsored or sustaining, recorded or live, educational, entertainment, etc. Proposals for the next license period are also required. In theory, therefore, the stations are asked what they have done and what they propose to do. However, in a speech delivered to the West Virginia Broadcasters Association on August 28, 1959, Commissioner Ford stated that only six employees review this information and that about 5½ hours time is spent on each renewal. "You can, therefore, see that no real examination is made unless this review discloses discrepancies * * *." We are advised that no television station has ever been required to go to hearing on its renewal application because of programming practices.

Since 1957, the FCC and the FTC have operated under formal liaison procedures covering the furnishing of information by the FTC to the FCC relating to false and misleading radio and TV advertising.

The FTC has referred approximately 20 to 25 stipulations, 50 to 60 complaints, and about 30 to 35 orders to cease and desist to the FCC during the past two years. The FCC Public Notice of February 21, 1957, stated in part that it would advise the stations of the action of the FTC, so that the stations will "be in a position to consider taking action consistent with their operation in the public interest." The notice also stated the selection and presentation of program material, including advertising, is the responsibility of the broadcast station licensee; and that where a finding has been made that particular advertising material is deceptive, its continued broadcasting would raise a serious question as to whether the station is operating in the public interest.

With the exception of the public notice relating to deceptive advertising, the Commission is not known to have taken any action in the way of rule making or public statements to guide television broadcasters, either as to advertising or program content. In 1951 the Commission announced "that a public conference will be scheduled, at a date to be announced later, for the discussion of television broadcasting problems from the viewpoint of the public, the Commission, and industry" and that a "detailed agenda for that conference will be announced later and will relate generally to the role of television in serving the needs and interests of the public." Public Notice, F.C.C. 51-83, January 29, 1951. No such conference has ever been held. As a consequence, in his August 28, 1959, speech Commissioner Ford stated that he knew of no series of adjudications or of public statements

or other general pronouncements "in which the policies of the Commission concerning programs are available."

As a realistic matter, television broadcasters must look to precedents in the field of radio for any guidance. However, that field seems now to be similarly barren of guidelines as to the public service standards which the Commission will enforce.

7. Regulation by the Federal Trade Commission. A basic objective of the Federal Trade Commission is to prevent our business system from being corrupted by unfair or deceptive trade practices. This objective found expression in section 5 of the Federal Trade Commission Act of 1914, as amended (15 U.S.C. § 45), which prohibits the use in commerce of "unfair methods of competition" and "unfair or deceptive acts or practices." The amendments enacted by the Wheeler-Lea Act of 1938 (15 U.S.C. § 52) also were designed to safeguard the consuming public by preventing the dissemination of false or deceptive advertisements of food, drugs, cosmetics, and therapeutic devices. A false advertisement was defined as an unfair or deceptive act or practice within the meaning of section 5 of the Federal Trade Commission Act of 1914.

The act gives the Commission broad power to investigate, to issue complaints against those it believes have been or are using any unlawful method, acts or practices in commerce, to hear such cases pursuant to its formal hearing procedures, and to make determinations as to the legality of the practice charged in the complaint. If the Commission finds that the

practices in question violate the act, it is empowered to issue a cease and desist order which becomes final at the end of sixty days in the event no appeal is taken to a United States Court of Appeals, which is authorized to review the proceeding and to affirm, enforce, modify, or set aside the Commission's order. Civil penalties are provided for the violation of any final cease and desist order. 15 U.S.C. 45, 46. These sanctions are preventative rather than punitive. However, the Wheeler-Lea Act Amendments also provide for criminal penalties for false advertising if the advertising is intended to defraud or mislead.

The Commission ordinarily proceeds against the advertiser rather than the station or the network. However, it may proceed directly against a broadcast licensee or network engaged in the dissemination of false advertising of foods, drugs, devices or cosmetics (15 U.S.C. § 52-55). False advertising would appear to include pictorial deception—visual demonstrations as part of the TV commercial which falsely purport to be a true and accurate representation of the test portrayed,¹¹ as well as verbal misrepresentations (16 U.S.C. § 55(a)(1)).

In addition to formal administrative proceedings leading to mandatory cease and desist orders against

¹¹ On October 30, 1959, the Commission issued a formal complaint against Libby-Owens-Ford Glass Co. and General Motors charging respondents with falsely representing that a TV commercial demonstration was an accurate visual depiction of the disparity between their automobile safety plate glass and that used by their competitors. The complaint alleged that pictures that were supposedly taken through plate glass were actually taken through open windows (Docket 7643).

offenders, the Commission has developed a trade conference practice procedure for the purpose of obtaining voluntary compliance on an industry-wide basis with the trade practice rules developed as a result of the conference. This practice is highlighted in the Commission's Annual Report for 1958:

“A significant development was the Commission's decision to give greater emphasis to encouraging voluntary compliance with the laws it administers. In essence, the new emphasis calls for conspicuously identifying a particular area of false and misleading advertising and then setting forth, for the guidance of all concerned, exactly what the law's requirements are.

* * * The guides augment the existing voluntary compliance program whereby trade practice rules reflecting the law's requirements are promulgated for a particular industry. The trade practice rules provide guidance for an industry at all points covered by the FTC's laws, whereas the guides are directed at particular sore spots.” (pp. 1-2)

As of June 1957, trade practice rules were in effect for 161 different industries (Small Business Administration Bulletin No. 24, June 1957). Under existing trade practice rules, the Federal Trade Commission bars commercial bribery and push money as unfair trade practices. “Commercial bribery” may be defined roughly as giving money or anything of value surreptitiously to employees to influence their employers to deal or to refrain from dealing with the donor's products or those of his competitors. In

“push money,” the employee is paid to push the sale of a particular product without the knowledge and consent of his employer.¹² Obviously then, payola is an unfair trade practice.

Trade practice conference proceedings for an industry may be instituted by the Commission on its own initiative or at the request of an interested person or group. The rules (15 U.S.C.A. 2, Subpart C) would appear to permit participation by other interested government agencies. An official of the Commission, usually one of the commissioners, presides. As stated by Paul M. Cameron, Chief, Trade Practice Conferences Division, FTC, in a speech on the trade practice rules for the cosmetic and toilet preparations industry, dated September 20, 1956:

“* * * The problems of the industry are thoroughly thrashed out and a set of proposed rules is recommended to the Commission by the industry members in attendance at the conference. The Commission takes these recommendations under advisement and releases proposed rules and schedules a public hearing thereon, at which not only members of the industry, but also consumers and other interested parties may present their views. After this public hearing and after careful consideration has been given to all views and available information, the Commission approves and promulgates rules, sending each member of the industry a copy thereof.

Under the trade practice conference plan, problems are worked out and resolved coopera-

¹² See *Trade Practice Rules for the Jewelry Industry*, promulgated June 28, 1957, Rule 13-18.

tively in contrast to the compulsory method of dealing with individual concerns in adversary proceedings. At trade practice conferences the concern is solely with regard to trade practices or methods and not with individual offenders. An industry is regarded as occupying a position comparable to that of "friend of the court" and not that of the accused. Through the proceedings, industry obtains substantial guidance as to the lawfulness and unlawfulness of their activities which is not available from the general language of the statutes. Problems are worked out in a friendly atmosphere and the best thoughts of all concerned are pooled without reservation. The proceedings are designed to bring out all facets of problems and to assure consideration of the views and suggestions of all concerned as to the proper solution—an objective not always possible in the litigation method where the issues may be confined to narrow limits and the contention of the respondent is tailored to his own particular method or products.

The procedure affords the opportunity to industries to wipe the slate clean at a given date—to turn over a new leaf and make a fresh start on the same fair basis of competition * * *."

Accordingly, the FTC has broad authority to take action with respect to false and misleading advertising and to give guidance to industries which wish to improve advertising practices through trade practice conferences. While such conferences usually relate to a specific producing industry, e.g., tires, there ap-

pears to be no legal reason why it should not relate to a means of advertising, such as broadcasting.

The Commission also has authority to undertake an industry-wide investigation¹³ of the extent to which false advertising and unfair or deceptive practices are used on television and radio to promote sales. Such an investigation could include not only a study of the text of TV commercials, but also an examination of the authenticity of visual portrayals and the extent to which test demonstrations are rigged through the use of pictorial deception or otherwise. It would provide the basic information required to aid the FTC in its evaluation of industry proposals and in its determination as to which of these proposals should be incorporated in any advertising guide or rules adopted pursuant to a trade conference. The investigation would also lay the basis for any formal cease and desist proceeding against particularly flagrant deceptions which the FTC might initiate for purposes of clarifying its jurisdiction over merchandising schemes on TV which employ fraud and deception.

8. *Recommendations.* The disclosures relating to the quiz shows and payola make it clear that some reform is necessary. The actions which the broadcasting industry has itself taken are commendable,

¹³ The Chairman testified in part:

“We very often move on our own motion. Usually toward an industry-wide investigation where we get a flood of complaints that indicates that a situation is rife in an industry and then on our own motion we will schedule an industry-wide investigation.” (Tr. 44)

and no doubt it will continue to be alert to further possibilities of improvement. However, an affirmative statutory duty to protect the public interest relating to broadcasting and advertising is placed upon federal regulatory agencies. That duty cannot be transferred to the industry or exercised on the theory that industry self-regulation is by itself adequate. Rather, the vigorous and intelligent exercise of statutory functions would seem to afford the strongest incentive toward industry self-regulation.

Any recommendations for action to correct the abuses in the broadcasting industry which have been disclosed should be formulated in the light of the basic factors which operate in the field. Broadcast licensees have had conferred upon them a highly valuable privilege. In return, each such licensee is expected to operate as a "trustee" for the public". While advertising revenue must continue to serve as the economic base for the industry, it should not be permitted to overwhelm it. As long ago as 1922 Herbert Hoover, then Secretary of Commerce, stated with respect to radio:

"It is inconceivable that we should allow so great a possibility for service, for news, for entertainment, for education, and for vital commercial purposes to be drowned in advertising chatter."¹⁴

The current disclosures have shown that at least at times the pressures of commercialization operate not

¹⁴ Minutes of open meeting of Department of Commerce Conference on Radio Telephony (Washington, D.C., February 27, 28, 1922) pp. 2-3.

only to produce “advertising chatter”, but also to debase program content itself, with demoralizing consequences. Obviously, any broadcast licensee who permits demoralizing and deceptive material to be transmitted over his facilities, whether originated by him, by a network or by some other source, is not fulfilling his obligations as a public trustee. It is clear that existing law is so framed as to give the government substantial means to combat the excesses of commercialization in broadcasting. Those means do not appear to have been used as effectively as they can be.

It is believed that, without approaching problems of censorship, constitutional questions of freedom of speech or of the press, or problems relating to the quality or taste of programs, the Federal Communications Commission has a substantial arsenal of weapons to combat deception and corruption in the broadcasting industry. It is recommended that it give consideration to taking the following action:

- (1) Adopt a set of regulations which would require some guarantees of honesty with respect to matter that is broadcast. For example, it should not be difficult for the FCC to frame a regulation requiring that a licensee take reasonable steps to satisfy himself that any contest which he broadcasts as an honest test of skill or knowledge is produced under circumstances which would tend to guarantee that it is in fact such a program. In the event that contestants are given assistance, the regulation might require these facts to be announced. While such a regulation would probably not prevent all “rigging”, it would focus the licensees’ attention upon their responsibilities.

A regulation of the type here suggested would not differ substantially from a presently existing regulation requiring it to be disclosed that a program is mechanically reproduced where the time element is of importance. 47 C.F.R. 3.653. In addition, such a regulation would probably make it possible to bring to bear the Commission's cease and desist powers under section 312(b) of the act. This provision authorizes the issuance of such an order against any person who has "failed to observe any rule or regulation of the Commission." The cease and desist procedure would be far more effective than the institution of revocation proceedings or waiting until the licensee applies for renewal and then considering the matter as part of his overall performance.

It is significant that the organization of the broadcasting business is such that the individual station licensee was not, as a practical matter, in a position to control or even to know about the rigging of the quiz shows. However, the heads of the networks concerned and some of their principal aides testified at the hearings that they were also completely surprised by the disclosures. The fact that the quiz shows were produced by independent packagers provides the networks with neither a practical excuse—the networks could nevertheless have seen to it that necessary precautions to maintain honesty were taken—nor a legal one. The networks involved are themselves broadcast licensees and are obligated to operate their broadcast facilities in the public interest. The quiz shows were disseminated to affiliated stations which operate sub-

ject to the same obligation. That obligation may not be delegated or transferred.

The affiliated stations have now been put on notice that the fact that they broadcast a network program is not by itself a guarantee that that portion of their operations is in the public interest. A regulation of the type here recommended would emphasize the individual licensee's responsibility.

In order to implement the regulations suggested above, the Commission might also adopt a regulation requiring each licensee to require a warranty that a contest program is what it purports to be, where such a program is obtained from an outside source such as a network. As station operators, the networks are themselves licensees, and they could be required to obtain such warranties when they obtain programs from independent producers. The regulation might also contain a requirement for a liquidated damages provision in the warranty.

(2) Amend the existing regulations concerning announcement of sponsored programs (47 C.F.R. 3.119, 3.289, 3.654) so as to cover payola. Section 317 of the Communications Act and the above-cited Commission regulations require sponsorship announcements only where the valuable consideration for the material broadcast has been received by the station. The listening public should be similarly informed where the broadcast material has been "sponsored" through payments to the employees of the station, for the congressional concern was not with who receives the payment but rather that "[a]ll matter broadcast for

hire shall be announced as paid material” (S. Rept. No. 772, 69th Cong., 1st Sess., p. 4).

The Commission would appear to have ample authority, under its general rule making powers, to adopt regulations which would require licensees to take affirmative steps to prevent the broadcast of matter as the result of payola received by their employees. Such regulations could, for example, provide that each licensee shall take appropriate steps to require his employees to advise him of payments or promises made in return for broadcasting matter, shall make an appropriate sponsorship announcement when advised of any such payment or promise, and shall inform the Commission of the steps he has taken to effectuate this program.

(3) Adopt regulations to cover situations in which a station licensee or an employee of a licensee engaged in the determination of matter which is broadcast, owns an interest in an enterprise which will substantially benefit if the licensee, without appropriate announcements of commercial sponsorship, plays a record made by the enterprise or displays or discusses any other of its products over the air. In such situations direct payment to the licensee or the employee is not necessary since he will benefit indirectly by any broadcast publicity given the product. This situation may not necessarily always be improper or inconsistent with the public interest. In this area it is felt that what is needed is full disclosure so that the propriety of these matters can be explored in the light of known facts and conditions. Pursuant to

its general rule making authority, the Commission could issue regulations requiring the periodic filing of reports by each station and by employees engaged in the determination of matter which is broadcast listing any financial interest owned in a business enterprise the sale of the products of which is likely to be enhanced or has been enhanced by material broadcast over the station. The regulations could also require that there be filed with each report a statement disclosing the financial returns accruing from any such business enterprise. This statement could then form the basis of any investigation or action the agency might deem appropriate.

Such reporting requirements are consistent with financial reporting requirements imposed in the public interest by such statutes as the securities and exchange acts, the recent Labor-Management Reporting and Disclosure Act of 1959 (Public Law 86-257), and the Defense Production Act. Thus, the Securities Act of 1933 (15 U.S.C. § 77aa) requires a registration statement to be accompanied by a schedule showing the amount of securities of the issuer held by its directors, chief executive, and financial and accounting officers, and the remuneration paid by the issuer to its directors and its officers and other persons, naming them whenever the remuneration exceeds \$25,000 per annum. Similar requirements are imposed by the Securities Exchange Act of 1934 (15 U.S.C. § 781) with respect to the registration of a security on a national securities exchange. The Labor-Management Reporting and Disclosure Act of 1959 (Public

Law 86-257, § 202) requires each officer and employee of any labor organization to file with the Secretary of Labor reports listing all financial interests owned by himself, his spouse, or minor child in any employer whose employees are represented by the labor organization, and any income derived from such an employer except as a bona fide employee. The Defense Production Act (50 U.S.C. App. § 2160) requires persons employed by the Government without compensation who obtain exemptions from the conflict of interest statutes to file for publication in the Federal Register a statement of ownership of stocks, bonds, or other financial interests, and at the end of each succeeding six-months' period, a statement showing any changes in such interests.

(4) Adopt a program of more intensive scrutiny of licensees' past performances in connection with renewals. It might be appropriate for the Commission to adopt a system similar to that followed by the Internal Revenue Service which chooses a certain number of returns at random for a spot check in depth. The Commission might follow the same course by requiring narrative and detailed accounts of past operations, and, in addition to acting on specific complaints, choose a certain number of renewal applications or all the licensees in a particular community for close examination, requiring more detailed information where necessary, and setting questionable cases for hearing. The procedure would include consideration of advertising practices, material which has been advertised, and action taken on complaints by the

Federal Trade Commission. The procedure should emphasize a comparison of the licensee's actual performance with the promises he made as to his programs and operations when his license was originally granted or last renewed. The licensees would thus be put on notice that from time to time they might have to give a detailed accounting as to their operation in the public interest.

The Federal Trade Commission is not interested in broadcasting as such. Its concern is with unfair or deceptive trade practices and unfair methods of competition wherever they appear. However, to the extent that broadcasting is used for such purposes there is much it can do. This is demonstrated by the action it has already taken with respect to increased monitoring, deceptive advertising and payola. In addition, it is recommended that it give consideration to taking the following action:

(1) In cases involving false or deceptive advertising or deceptive photography the FTC ordinarily proceeds against the advertiser, rather than the broadcaster. It might consider also proceeding against the broadcaster in appropriate cases involving the false advertising of foods, drugs, devices or cosmetics.

(2) Institute an industry-wide investigation of television and radio advertising to determine the extent to which false, unfair or deceptive practices are used to stimulate the sale of products—whether in the form of commercials, deceptive photography, false demonstrations or otherwise. Such an investigation could include not only a study of the text of commercials,

but also an examination of the authenticity of visual portrayals and the extent to which test demonstrations are rigged.

(3) Call a trade practice conference for the purpose of drafting a broadcasting advertising guide. This procedure would make available the widest industry participation and would provide opportunity for full expression of the industry point of view. At the same time, it could afford those involved in such advertising an opportunity to abandon the practices proscribed by the guide simultaneously, without the competitive inequities resulting from government enforcement on an *ad hoc* basis or from self-regulation by the industry without the sanctions required to make such regulation meaningful. By keeping the rules revised and current, there would be created a technique for continued cooperation between the industry and the government.

It should be emphasized that the foregoing suggestions do not exhaust the possibilities of regulatory action under existing law. The expertise of the agencies concerned should suggest other and possibly more effective action.

As the foregoing recommendations indicate, it is believed that the Federal Communications Commission has adequate authority under existing law to take effective action against the deceptive practices recently disclosed. It is believed, however, that it could be assisted in carrying out its functions by certain additional legislation. Two types of such legislation are here recommended.

First, under existing law, the Federal Communications Commission has only one sanction expressly set forth in the statute which it may impose upon a broadcaster who does not operate in the public interest. It may put him off the air permanently by revoking his license or failing to renew it. This "death sentence" is an extremely drastic sanction which would impose substantial hardships upon the broadcaster and, in some cases, his listeners. Its drastic nature may well explain its sparse use in the past. Legislation should be enacted which would expressly give the Commission authority also to impose milder sanctions for actions violating the act or regulations issued pursuant to it. These could be, for example, suspension or conditional renewal.

Second, sections 317 and 501 of the Communications Act make it a criminal offense for a broadcasting station to broadcast any matter as a result of a promise or payment of money or other valuable consideration to the station unless an appropriate sponsorship announcement is made. This applies only with respect to promises or payments to the station. It does not apply to promises or payments to employees of the station. Therefore the prohibition would apparently not reach the payola case in which an employee, rather than the station itself, is involved. Legislation should be enacted which would also make it a criminal offense for employees of stations to accept payola for material which is broadcast without making arrangements with the broadcaster for an appropriate sponsorship announcement.

As has been indicated above, it is believed that the regulatory agencies concerned have adequate authority under existing law to deal with the abuses which have been disclosed. This would certainly be so if the industry provides the cooperation it appears to be promising. The position of the agencies would be strengthened by enactment of the legislation recommended above. If still further legislation should prove necessary, it would be appropriate to consider at least two additional measures.

First, as earlier explained, the networks, as such, are not regulated by the Federal Communications Commission. This is so even though the individual broadcasters rely upon the networks so heavily for matter broadcast, and the networks are ordinarily in a far better position than the individual licensee to select and control the presentation of that matter. Legislation could be enacted which would place direct regulatory authority over the networks in the FCC.

Second, the Federal Trade Commission lacks authority to restrain the dissemination of false or deceptive advertisements, or to prevent the use of unfair or deceptive trade practices pending issuance of a final administrative order to cease and desist. Under existing law (15 U.S.C. 53), the Commission may seek a temporary injunction only in respect of false advertisements of food, drugs, devices, or cosmetics. It has no power to obtain an injunction temporarily restraining false advertising in any other area of the economy, or in respect of deceptive trade practices, where the damage to the consuming public may be

equally harmful. An unscrupulous advertiser may continue deceiving the public with impunity and with profit pending the final outcome of long and involved administrative proceedings and judicial review which is a matter of right. Accordingly, consideration should be given to legislation which would extend the FTC's authority to institute temporary injunctive proceedings, pending issuance of a cease and desist order, to all false and deceptive advertising and to all unfair and deceptive trade practices under Section 5 of the Act (15 U.S.C. 45).

