

You Said What? The Perils of Content-Based Regulation of Public Broadcast Underwriting Acknowledgments

Andrew D. Cotlar*

I.	STATUTORY AND ADMINISTRATIVE PROHIBITIONS AGAINST THE BROADCAST OF ADVERTISEMENTS.....	49
II.	INCONSISTENCY IN IDENTIFYING QUALITATIVE OR COMPARATIVE DESCRIPTIONS	54
III.	THE FIRST AMENDMENT IMPACT OF INCONSISTENT CONTENT- BASED ENFORCEMENT	62
IV.	A NEW APPROACH: TIME LIMITS WITHOUT CONTENT REGULATION	65
V.	CONCLUSION	67

Public broadcast stations in the United States are forbidden to air promotional announcements in exchange for payment from commercial entities.¹ However, under the FCC’s sponsorship rules, these stations must acknowledge any financial contribution from donors that support particular programs.² Consequentially, public broadcast stations must broadcast

* J.D., Pennsylvania State University, Dickinson School of Law; M.A. University of Wisconsin—Madison; Formerly Associate General Counsel, Association of Public Television Stations. The views stated in this Article are solely those of the Author and do not reflect the views of the Association of Public Television Stations. The Author also wishes to thank Karen H. Cotlar for her kind support and loving patience.

1. See 47 U.S.C. § 399b(a)–(b) (2000).

2. 47 C.F.R. § 73.1212(a) (2005). A station’s announcement obligations are triggered “[w]hen a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by

information—so-called “underwriting” acknowledgements—regarding those individuals and companies that fund particular programs without promoting the goods and services offered by those donors. In particular, the FCC has interpreted this to prohibit the following: (a) qualitative or comparative descriptions; (b) price information; (c) calls to action; or (d) inducements to buy, sell, rent, or lease.³ From a legal point of view, these sets of prohibitions distinguish underwriting announcements aired on public broadcast stations from commercial messages aired on their commercial counterparts.

As modern advertising practices quickly move away from the traditional model of comparing the quality of an advertiser’s product with its competing products toward “image spots” (where claims about the product are frequently absent), the FCC rules tend to look more and more like an anachronism. To illustrate, many commercial spots can be seamlessly transferred (sometimes with little or no editing) to serve as underwriting spots in a way that seems to blur in the public mind the distinction between commercials and nonpromotional underwriting acknowledgement. While the FCC has attempted to maintain the conceptual distinction between promotional and nonpromotional depictions, it has struggled to apply its traditional notion of what it means to be promotional within the context of this evolution in advertising practice.

As a result, many noncommercial educational licensees find it difficult to apply the FCC’s four categories of prohibited expression, because FCC enforcement has been less than a model of clarity. While the prohibition against providing price information, calls to action, or inducements to buy, sell, rent, or lease are fairly straightforward, a careful analysis of how the FCC determines whether certain content is qualitative or comparative yields the unmistakable conclusion that the entire process has become a clear lesson in the perils of content-based regulation. Stations therefore frequently lack a clear directive to guide their decisionmaking, leading many stations to act either too cautiously or not cautiously enough. Indeed, stations must rely on the FCC’s own, often quite subjective, understanding of the context in which certain words are uttered, resulting in confusing results and inconsistent enforcement.

What follows is an inconsistent and opaque enforcement system that subjects nonprofit entities to potentially economically crippling fines and impinges on the editorial integrity that is the hallmark of their First Amendment liberties. This Article concludes that Congress should revise

such station” *Id.* See also 47 U.S.C. § 317(a)–(b) (2000).

3. Noncommercial Nature of Educ. Brdcast. Stations, *Public Notice*, 7 F.C.C.R. 827, 827–28 (1986) [hereinafter *Educ. Brdcast. Public Notice*].

the prohibition on promotional messages in favor of allowing limited commercial content—namely, eliminating any restrictions on content as long as announcements do not interrupt programming and are limited in length. This solution would get the FCC out of the business of content-analysis, would preserve the integrity of public broadcasting, and would be consistent with what surveys demonstrate is the public’s attitude toward commercialism in the nonprofit media.

Part I of this Article examines the statutory and administrative prohibitions against the broadcast of advertisements on public broadcast stations. Part II demonstrates how the prohibitions are inconsistently applied, thus leading to a standard that is difficult to follow. This part further explains how the FCC has unsuccessfully attempted to apply its traditional rules to the context of new advertising techniques. Part III explains why this inconsistent enforcement of content-based regulation, coupled with the potential for substantial fines, has the potential to interfere with the First Amendment liberties of public broadcasters. Lastly, Part IV proposes a legislative solution that allows limited commercialization on public broadcast stations without either compromising the integrity of the service or requiring the examination of content by governmental agencies.

I. STATUTORY AND ADMINISTRATIVE PROHIBITIONS AGAINST THE BROADCAST OF ADVERTISEMENTS

Section 399b of the Communications Act states that “[n]o public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.”⁴ An “advertisement” is defined by the Act as:

- any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended—
- (1) to promote any service, facility, or product offered by any person engaged in such offering for profit;
 - (2) to express the views of any person with respect to any matter of public importance or interest; or
 - (3) to support or oppose any candidate for political office.⁵

The Commission has incorporated the ban on advertisements into its rules as well, stating:

Each station shall furnish a nonprofit and noncommercial broadcast service. . . . No promotional announcements on behalf of for profit entities shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees. However, acknowledgements of contributions can be

4. 47 U.S.C. § 399b(b)(2).

5. § 399b(a).

made. The scheduling of any announcements and acknowledgements may not interrupt regular programming.⁶

As the language above indicates, FCC rules generally track the statutory language. FCC rules forbid public television stations from accepting something of value—“consideration”⁷—in exchange for broadcasting promotional announcements on behalf of *for-profit* entities. This includes not only money but also goods, services, facilities, and in some limited circumstances, the programming itself.⁸ Public television stations are, however, permitted to accept something of value in exchange for broadcasting promotional announcements on behalf of *nonprofit* organizations.⁹ And public television stations are allowed to promote the sponsored events of for-profit entities, such as concerts, if the station receives no economic benefit in exchange for the promotion.¹⁰ The ban on commercial advertisements extends to the on-air acknowledgment of donor contributions, which must announce the source of funding for programs.¹¹

6. 47 C.F.R. § 73.621(e) (2000) (emphasis omitted).

7. *Id.* Strictly speaking, Section 399b speaks only of programming transmitted in exchange for “remuneration”—a much narrower concept that relates only to the proffering of money. To my knowledge, the FCC has never addressed this difference between its use of the term “consideration” and Section 399b’s use of the term “remuneration.” See 47 U.S.C. § 399b(b)(1).

8. Note that “consideration” may be present even if the licensee *indirectly* receives payment from a for-profit sponsor. See R.J.’s Late Night Entm’t Corp., *Memorandum Opinion and Order*, 16 F.C.C.R. 12452, para. 7 (2001) [hereinafter *R.J.’s Late Night Memorandum Opinion*] (finding indirect consideration was received when licensee broadcast live-feed of show produced by another entity that included prohibited announcements; in that case the program itself is the consideration).

9. “[P]romotional announcements on behalf of nonprofit organizations (including their services, facilities, or products), do not qualify as ‘advertisements’ and are generally not prohibited.” Chicago Educ. TV Ass’n, *Letter*, 10 F.C.C.R. 12018, 12018, 1 Comm. Reg. (P & F) 1110 (1995). See also *R.J.’s Late Night Memorandum Opinion*, *supra* note 8, at n.2.

10. Under Section 399b of the Act:

noncommercial broadcasters are generally prohibited from broadcasting messages that promote the products, services or businesses of for-profit entities, if made in exchange for remuneration. However, where ‘economic consideration’ is not the basis for the broadcast of particular announcements, noncommercial stations may broadcast messages promoting local ‘transitory events,’ such as movies, plays, concerts, etc., including ticket prices and information, so that listeners may be informed as to local happenings.

Isothermal Cmty. Coll., *Memorandum Opinion and Order*, 16 F.C.C.R. 21360, para. 5 (2001) (holding that receiving event tickets from the for-profit in exchange for the announcement was a form of economic consideration, even if used for promotional giveaways and donor premiums, and thus promotions constituted prohibited advertising), *modified by Memorandum Opinion and Order*, 17 F.C.C.R. 22666 (2002). See also Calvary Bible Coll., *Memorandum Opinion and Order*, 17 F.C.C.R. 19144, para. 8 (2002) [hereinafter *Calvary Bible Coll. Memorandum Opinion and Order*] (holding that where station receives donations in exchange for announcement of for-profit-sponsored public event, it does not fall under the “transitory events” exception).

11. See *Educ. Brdcast. Public Notice*, *supra* note 3, at 827, 828.

Such acknowledgments must be made for identification purposes only¹² and should not promote the contributor's products, services, or company, nor should they interrupt programming.¹³ For violations of its underwriting regulations and policies, the FCC has imposed sanctions on stations ranging from a letter of admonishment to substantial fines, called "forfeitures."¹⁴

Precisely what distinguishes a "promotional" underwriting announcement from one that merely identifies the sponsor has been the subject of a number of FCC orders and a variety of administrative rulings.¹⁵

12. The FCC has stated that licensees should ensure that underwriting announcements actually identify the sponsors as station underwriters; the lack of such identification is considered improper. *Minority TV Project, Inc., Notice of Apparent Liability for Forfeiture*, 17 F.C.C.R. 15646, para. 29 (2002) [hereinafter *Minority TV Project*].

13. 47 U.S.C. § 399a(a)–(b) (2000). Regarding the interruption of programming, however, the Commission has allowed underwriting announcements to occur at natural breaks in "longer" programs and around discrete units within a half-hour program. The FCC allowed a 90-second segment appearing 19–20 minutes into a half-hour program of the *Nightly Business Report* preceding a segment called the *Reuters Report*, where that segment was a stand-alone program unit broadcast by stations that did not choose to insert a local segment. The Commission has also allowed underwriting announcements to be made during intermissions of music broadcasts and in other circumstances where there is no interruption of regular programming. The Commission has cautioned, though, that programs should not be designed to provide apparently natural breaks in order to accommodate underwriting announcements. *See* Letter from Roy Stewart, NBR Enterprises, to Christopher W. Ogden (Apr. 13, 1992) (quoting from Public Broadcasting Amendments Act of 1981, H.R. REP. NO. 97-82, 97th Cong., 1st Sess., at 24 (1981)) (on file with author); *Minority TV Project, supra* note 12, at para. 28. ("[E]ven if a noncommercial licensee takes several breaks per half-hour segment to run underwriting announcements, this does not, by itself, demonstrate a violation of Section 399A(b).").

14. The base forfeiture amount for a violation of the noncommercial underwriting restrictions is \$2,000. 47 C.F.R. § 1.80(b)(4), note to para. (b)(4) (2005); Forfeiture Policy Statement, *Report and Order*, 12 F.C.C.R. 17087, 17115 (1997), *reconsideration denied*, *Memorandum Opinion and Order*, 15 F.C.C.R. 303 (1999); and *Window to the World Commun., Inc., Forfeiture Order*, 15 F.C.C.R. 10025, para. 3 (2000) [hereinafter *Window to the World Commun.*]. The FCC will assess a forfeiture against a station for willful or repeated failure to comply with any provision of the Communications Act of 1934 as amended or with any rule, regulation, or order issued by the FCC. 47 C.F.R. § 1.80(a)(2). In determining the amount of a forfeiture, the FCC will take into account the "nature, circumstances, extent and gravity of the violations" as well as "the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." *Id.* at § 1.80(b)(4). *See also* 47 U.S.C. § 503(b)(2)(D). "The term 'willful' means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules." *EchoStar Satellite Corp., Notice of Apparent Liability for Forfeiture*, 15 F.C.C.R. 5557, para. 7 (2000).

15. *See* Amendment of Those Provisions of Part 73 of the Comm'n Rules, *Memorandum Opinion and Order*, 26 F.C.C.2d 339 (1970); Comm'n Policy Concerning the Noncommercial Nature of Educ. Brdcast. Stations, *First Report and Notice of Proposed Rulemaking*, 69 F.C.C.2d 200 (1978); Comm'n Policy Concerning the Noncommercial Nature of Educ. Brdcast. Stations, *Second Report and Order*, 86 F.C.C.2d 141 (1981); Comm'n Policy Concerning the Noncommercial Nature of Educ. Brdcast. Stations, *Memorandum Opinion and Order*, 90 F.C.C.2d 895 (1982) [hereinafter *Educ. Brdcast.*].

From these orders and rulings, the FCC has established that announcements containing one or more of the following are not permissible: (a) qualitative or comparative descriptions (e.g., “reliable,” “convenient,” “best”), (b) price information (e.g., “\$34 for a haircut”), (c) calls to action (e.g., “Stop by our showroom to see a model”), or (d) inducements to buy, sell, rent, or lease (e.g., “special gift for the first 50 visitors,” “financing is available”).¹⁶

However, since the passage of the Public Broadcasting Amendments of 1981,¹⁷ which liberalized underwriting practices, the FCC has allowed the practice of what is prosaically called “enhanced underwriting,” authorizing noncommercial educational stations to acknowledge corporate donors by including (1) “logograms”¹⁸ or slogans that “identify and do not promote,” (2) information regarding the location (including the telephone number) of the donor, (3) “value neutral descriptions of a product line or service,” and (4) “brand and trade names and product or service listings.”¹⁹ Nevertheless, the FCC has emphasized that such announcements could not include qualitative or comparative language such as found in most advertisements,²⁰ nor should they “promote the contributor’s products, services or company.”²¹

Memorandum Opinion and Order of 1982]; Comm’n Policy Concerning the Noncommercial Nature of Educ. Brdcast. Stations, *Memorandum Opinion and Order*, 97 F.C.C.2d 255 (1984) [hereinafter *Educ. Brdcast. Memorandum Opinion and Order of 1984*]; Comm’n Policy Concerning the Noncommercial Nature of Educ. Brdcast. Stations, *Public Notice*, 7 F.C.C.R. 827 (1986). Additionally, the FCC operates a Web site that provides useful background publications, citations, and contact information on underwriting. See FCC, COMM’N POLICY CONCERNING THE NONCOMMERCIAL NATURE OF EDUC. BRDCST., <http://www.fcc.gov/mb/audio/nature.html> (last visited Sept. 27, 2006). See also Kenneth M. Scheibel, Jr., Remarks at the National Public Radio Conference: Know When to Say No: Underwriting Controversies (May 15, 1999), <http://www.fcc.gov/mb/audio/decdoc/letter/1999-05-15-underwriting.html> (giving an unofficial view of an FCC Senior Attorney Advisor from the Mass Media Bureau Enforcement Division who has worked on major underwriting issues). In addition, a simplified yet comprehensive description of FCC rules on underwriting acknowledgements is available. ANDREW D. COTLAR, THE PUBLIC TV LEGAL SURVIVAL GUIDE 81–91 (Ass’n of Pub. TV Stations 3d ed. 2003).

16. *Educ. Brdcast. Public Notice*, *supra* note 3, at 827, 828.

17. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1231, 97th Cong., 1st Sess. (1981) (codified as amended at 47 U.S.C. §§ 399a and 399b (2000)). See also H.R. Rep. No. 97-82 (1981).

18. Logograms are defined as “any aural or visual letters or words, or any symbol or sign, which is used for the exclusive purpose of identifying any corporation, company, or other organization, and which is not used for the purpose of promoting the products, services, or facilities of such corporation, company, or other organization.” 47 U.S.C. § 399a(a).

19. *Educ. Brdcast. Memorandum Opinion and Order of 1984*, *supra* note 15, at para. 13. But see Minority TV Project, *supra* note 12, at para. 20 (implying that announcement of a toll-free number could in some circumstances be promotional).

20. *Educ. Brdcast. Memorandum Opinion and Order of 1984*, *supra* note 15, at para. 13.

21. *Educ. Brdcast. Public Notice*, *supra* note 3, at 827.

Since 1986, the FCC has preferred to develop its standards on a case-by-case basis through the issuance of advisory opinions, warning letters (some unpublished), and informal adjudication.²² Most recently, the FCC has increasingly used the consent decree as a means to enforce its underwriting rules.²³ The FCC has recognized throughout enforcement of its rules that because it may be difficult at times to distinguish between announcements that promote and those that merely identify, it only requires that licensees make reasonable good faith judgments to determine into which category underwriting announcements may fall.²⁴ This policy would seem to favor licensees by giving them much-needed flexibility in allowing them to accept or reject certain underwriting acknowledgments without being second-guessed by the federal government.

II. INCONSISTENCY IN IDENTIFYING QUALITATIVE OR COMPARATIVE DESCRIPTIONS

Despite this flexibility, however, many noncommercial educational licensees find it difficult to apply the FCC's four categories of prohibited expression, as FCC enforcement has been less than a model of clarity.

22. *Educ. Brdcast. Public Notice*, *supra* note 3, at 827–28.

23. *See, e.g.*, Brevard Youth Educ. Brdcast. Corp., *Order*, DA 05-444 (2005) (adopting consent decree for radio station violations of Section 399b of the Communications Act of 1934, as amended); WVRM, Inc., *Order*, DA 05-537 (2005) (adopting consent decree for radio station violations of 399b).

24. *Educ. Brdcast. Memorandum Opinion and Order of 1982*, *supra* note 15, at para. 26. This standard was reiterated in *Educ. Brdcast. Public Notice*, *supra* note 3, at 827. *See also* Penfold Commun. Inc., *Memorandum Opinion and Order and Forfeiture Order*, 13 F.C.C.R. 23731, para. 7 (1998); Petition of Xavier Univ., *Memorandum Opinion and Order*, 5 F.C.C.R. 4920, paras. 5–6 (1990) [hereinafter *Xavier Univ. Memorandum Opinion and Order*] (applying a good faith standard to overrule letter of admonition where station created four-member underwriting screening committee and a daily FAX submission review method, and where licensee took immediate action to correct underwriting lapse); *Window to the World Commun.*, *supra* note 14, at para. 3 (applying the Xavier University “good faith” standard to reduce forfeiture); *R.J.’s Late Night Memorandum Opinion*, *supra* note 8, at paras. 3–6 (where language broadcast is not clearly promotional, Commission will expect licensee to rely on its “reasonable, good faith judgment” and monetary sanction not necessary where licensee later established a three-person screening team); S.R.I. Pub. Radio Brdcast., Inc., *Notice of Apparent Liability for Forfeiture*, 15 F.C.C.R. 8115, para. 6 (2000) [hereinafter S.R.I. Pub. Radio Brdcast., Inc.] (holding that good faith is not exhibited when no attempt is made to rectify the breach and that reliance on the practice of other local noncommercial educational stations “in no way excuses or mitigates the apparent instant violations”). However, the FCC does not consider good faith reliance on PBS guidelines as a mitigating excuse for apparent underwriting violations; the only external advice the station may justifiably rely upon is advice sought from the FCC itself and then strictly followed. *See* Minority TV Project, *supra* note 12, at para. 24. In addition, the FCC does not excuse inadvertent violations under its good faith standard. *See* Minority TV Project, *supra* note 12, at para. 12. When evaluating foreign-language announcements, the FCC will accept as reliable those translations that are rendered “by linguists who are sensitive to the native speaker’s intent” Minority TV Project, *supra* note 12, at para. 8.

While the prohibition against providing price information,²⁵ calls to action,²⁶ or inducements to buy, sell, rent, or lease²⁷ are fairly straightforward, a careful analysis of how the FCC determines whether certain content is qualitative or comparative yields the unmistakable conclusion

25. Any underwriting announcement that disseminates price information about an underwriter's products or services, that implies information about such prices, or that provides information that is reasonably related to price is considered suspect by the Commission. In addition to specific dollar amounts and percentages, qualitative language describing rates as well as information regarding manner of payment and affordability of purchases is not allowed. For example, "\$24 for a haircut, massage for \$30 for men and women, and 30% discount for perms." Letter to WNYE-TV, 9 F.C.C.R. 5321 (Sept. 19, 1994). Another prohibition includes the phrase "7.7% interest rate available now." *Educ. Brdcast. Public Notice*, *supra* note 3, at 828. Other examples include: "We provide the pleasure in convenience and the wisdom of thrift"; "free"; "discount sale"; "inventory sale"; and "big sale." Letter to WNYE-TV, 9 F.C.C.R. 5321 (Sept. 19, 1994). The Commission has also held that announcements that stating "financing is available," Letter to KUNV-FM, July 10, 1989 (unpublished) (on file with author), and "[I]f his client does not recover damages, he does not collect a fee," both disseminate price information even though no specific figures are mentioned. Letter to KRTM-FM, 8 F.C.C.R. 1 (Dec. 23, 1992). *See also* Agape Brdcast. Found., *Notice of Apparent Liability for a Forfeiture*, 13 F.C.C.R. 13154 (1998) [hereinafter *Agape Brdcast. Found. Notice*] ("all you can eat" advertisement implies price information).

26. While the Commission allows value neutral descriptions of for-profit entities, including location information and telephone numbers, it does not allow stations to encourage viewers to call or stop by the sponsor's place of business, even if it is to thank them for supporting the program. For instance, the following "calls-to-action" have been prohibited: "Stop by our showroom to see a model"; "Try product X next time you buy oil"; "If you're shopping for furniture, please come to [sponsor's name]." *Educ. Brdcast. Public Notice*, *supra* note 3, at 828; *Minority TV Project*, *supra* note 12, at para. 26.

27. The Commission has prohibited language in underwriting announcements that provides an inducement to buy, sell, rent, or lease, even if the inducement is provided free of charge. For instance, announcements that promise "Six months' free service," "A bonus available this week," or a "Special gift for the first 50 visitors" have all been prohibited by the Commission. *Educ. Brdcast. Public Notice*, *supra* note 3, at 828; *Minority TV Project*, *supra* note 12, at para. 20 (in context of discussing frequent flier mileage plan, the possibility of obtaining "free" tickets is an inducement to purchase). Moreover, announcements that "financing is available," in addition to providing prohibited pricing information, also create disallowed inducements. Letter to KUNV-FM, *supra* note 25. Finally, language that promises guarantees can also violate the prohibition against inducements. Letter to KRTM-FM, *supra* note 25 ("guarantees that four tires will be installed in 20 minutes or less."). *See also* *Minority TV Project*, *supra* note 12, at para. 25. In addition, the FCC has recently stated that announcements that attempt to "conjure up feelings that we could all identify with" (e.g., through imaginative scenarios or other promotional dialogue) essentially reveal that the intent is to distinguish and promote their respective underwriters from competitors. The FCC has held that this amounts to an attempt to "induce patronage" of the underwriter's business through "descriptive, qualitative references." *Tri-State Inspirational Brdcast. Corp.*, *Memorandum Opinion and Order*, 16 F.C.C.R. 16800, para. 6 (2001). [hereinafter *Tri-State Inspirational*] These include descriptions of scenarios, such as the fiancée disappointed with her engagement ring, or a description of the anticipation of receiving gifts during the holidays. This also includes statements regarding how people generally love certain things (e.g., meeting new, friendly faces, appreciating fine furniture, and other items). *Id.*, *Appendix*, paras. 3-6.

that the entire process has become a clear lesson in the perils of content-based regulation.

As a result, stations frequently lack a clear directive to guide their decisionmaking, leading many stations to act either too cautiously or not cautiously enough. Indeed, stations must rely on the FCC's own, often subjective, understanding of the context in which certain words are uttered. This results in confusing and inconsistent enforcement.

An examination of the following chart, which sets forth a number of FCC underwriting decisions, amply demonstrates the subjective nature of the judgments being made and the difficulty of predicting FCC enforcement.

Prohibited

- “Colors more vivid,”²⁸
- “Images more realistic than ever,”²⁹
- “[S]ee more, get more.”³⁰
- “The best, fastest most comfortable way to Poland,”³¹
- “best airline in the world.”³²
- “Providing quick connection and clear sound bringing you closer to Korea, for international long distance service.”³³
- “Reliable,” “excellent,” “dependable.”³⁴
- “Efficient, economical, dependable, dedicated, prompt, fair price, reliable and excellent.”³⁵
- “[A] leading provider of credit and other business services.”
“Providing an opportunity to save on brokerage commission.”³⁶
- “The only full security luxury condominium,”³⁷

28. Letter to Window to the World Commun. (WTTW-TV), *Notice of Apparent Liability*, 12 F.C.C.R. 20239, 20240 (1997) [hereinafter Letter to WTTW-TV].

29. *Id.*

30. Minority TV Project, *supra* note 12, at para. 13.

31. Letter to Frank Sobrino (WNYE-TV), Sept. 6, 1995 (unpublished) (on file with author).

32. Minority TV Project, *supra* note 12, at para. 20.

33. Kenneth Bates, *Letter*, 7 F.C.C.R. 6864, 6864 (1992) [hereinafter *Kenneth Bates Letter*] (qualitative description).

34. Letter to WBHL, *Notice of Apparent Liability*, 7 F.C.C.R. 5123, 5123 (1992).

35. *Id.* (“These descriptions are comparative or qualitative, and otherwise exceed the identification-only purpose of underwriting acknowledgments by generally promoting the sale of goods and/or services of forprofit entities.”)

36. Letter to WGBH-FM, November 29, 1988 (unpublished) (on file with author).

37. Letter to KUNV-FM, *supra* note 25 (“only” suggests comparisons and “luxury” is qualitative). *But see Agape Brdcast. Found. Notice*, *supra* note 25, at 13154–13155, which held that “the *only* store . . . where you can find . . .” the product was promotional because it was comparative and was combined with a description of features and attributes of the product. If “only” is used to indicate the store has the only goods of an identified kind

- “the only quality SUV with On Star.”³⁸
- “Very accommodating,” “delightfully honest,” “quality financial services,” “number one,”³⁹
- “Freedom of choice,”⁴⁰
- “More choices.”⁴¹
- “Friendly efficient crew . . . are always there when you need them most.”⁴²
- “[R]eliable performance and affordability. . . . known for its consistency.”⁴³
- “Acquir[ing] diamonds directly from the diamond cutter.”⁴⁴
- “Has name-brand musical instruments and sound equipment.”⁴⁵
- “Convenient drive-through window.”⁴⁶
- “revolutionary dual display functions.”⁴⁷
- “pretty to catch my fancy. . . strong. . . sharp. . . beautiful safety design. . . detailed lines, gorgeous power acceleration.”⁴⁸
- “romantic, soft [] and gentl[e] . . . you don’t want to leave.”⁴⁹
- “easy and fast.”⁵⁰
- “new Sentricon Baiting System”⁵¹

within a geographic area, however, it is not promotional or comparative. *Id.* at 13154 (“In your announcement for Blue Suede Shoe, ‘a leather goods and music store,’ the word ‘only’ appears in context to reflect the store’s status as the sole source of various goods in a specific geographic area, rather than a claim that it is the ‘best’ among competing merchants. Hence, we agree that use of the word ‘only’ does not in and of itself render this announcement promotional.”).

38. Minority TV Project, *supra* note 12, at para. 17.

39. Letter to KRTM-FM, *supra* note 25.

40. Letter to KRTM-FM, *supra* note 25.

41. Letter to KRTM-FM, *supra* note 25.

42. Russellville Educ. Brdest. Found., *Notice of Apparent Liability for a Forfeiture*, DA 99-1280, June 29, 1999, http://www.fcc.gov/Bureaus/Mass_Media/Orders/1999/da991280.txt.

43. *Id.*

44. Tri-State Inspirational, *supra* note 27, at para. 6 (admonishment) (stating that a distinction between the jeweler who gets his diamonds directly from the cutter from those that do not is excessively qualitative).

45. Tri-State Inspirational, *supra* note 27, at para. 6. (“[the] characterization of an underwriter’s inventory as ‘name-brand’ seeks to cast its products in a favorable light and is not value-neutral.”) (citation omitted).

46. Tri-State Inspirational, *supra* note 27, at para. 6. (citing Letter from the Chief, Investigations and Hearings Division, Enforcement Bureau, to Station WLRY(FM) (April 5, 2000) (where descriptions of underwriting pharmacy as “provid[ing] the same service as major chains without the long wait” was found impermissible)).

47. Minority TV Project, *supra* note 12, at para. 13.

48. Minority TV Project, *supra* note 12, at para. 22.

49. Minority TV Project, *supra* note 12, at para. 26.

50. Minority TV Project, *supra* note 12, at para. 26.

51. Tri-State Inspirational, *supra* note 27, at para 6.

- “is a member of the Professional Photographers of America”⁵²
- “biggest variety of undershirts, polos, short and long sleeve oxford shirts”⁵³
- “[t]he people that know most about embroidery and printing”⁵⁴
- “greatest bakery in Kissimmee”⁵⁵
- “famous frappe”⁵⁶
- “established dealer in Central Florida for the past ten years”⁵⁷
- “installation services in twenty four hours”⁵⁸

Permitted:

- “Creative services for advertising, marketing, and training. . . . Creative material is the stock and trade of all advertising agencies.”⁵⁹
- “Fresh and original foods,” (The underwriter was a grocery and “fresh and original” merely distinguished the underwriter’s products from other types of food, e.g., French food or home-made food).⁶⁰
- “Daily lunch specials” (This merely referred to the restaurant’s luncheon offerings).⁶¹
- “Professional equipment and supplies” (Merely refers to the general type of merchandise offered).⁶²
- Offer[ing] “home style food” and “bakes [its] pies daily” (Refers to products in general categorical fashion).⁶³
- “An intelligent four-wheel drive system” (Same).⁶⁴
- Surgery “never has to be unpleasant.” (Statement does “not appear

52. *Calvary Bible Coll. Memorandum Opinion and Order*, *supra* note 10, at para. 9 (“suggests a favorable professional qualification or comparative distinction.”).

53. *Caguas Educ. TV, Inc., Notice of Apparent Liability for Forfeiture*, DA 05-725, para. 7 (2005) [hereinafter *Caguas Educ.*] (impermissibly comparative).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Hispanic Brdcast. Sys., Inc., Notice of Apparent Liability for Forfeiture*, DA 05-349, para. 9 (2005) [hereinafter *Hispanic Brdcast. Sys.*].

58. *Id.*

59. *Xavier Univ. Memorandum Opinion and Order*, *supra* note 24, at 4920. *But see* Penfold Communs., *Memorandum Opinion and Order and Forfeiture Order*, DA, 98-2407 para. 8 (1998) (statements that sponsor had “oldest” establishment or that it offered a “warranty,” even if true are still promotional).

60. *Xavier Univ. Memorandum Opinion and Order*, *supra* note 24, at para. 5.

61. *Family Vision Ministries, Inc., Memorandum Opinion and Order*, 18 F.C.C.R. 1418, at n.5 (2003) [hereinafter *Family Vision Ministries*].

62. *Id.*

63. *Id.*

64. *Id.*

to distinguish the underwriter's medical skills from those of other oral surgeons.")⁶⁵

- "Only" (if "only" is used to indicate the store has the only goods of an identified kind within a geographic area, however, it is not promotional or comparative).⁶⁶

While it is true that the FCC evaluates the context of the prohibited statement, rather than relying on a list of prohibited words, when one compares the rulings on similar or identical words, the explanation for the results is frequently less than satisfying. One searches in vain for a unifying principle underlying these decisions that could govern station action. For instance, regarding the word "professional," the FCC has stated that it is prohibited to state that a sponsor "is a member of the Professional Photographers of America" because it suggests a favorable professional qualification or comparative distinction.⁶⁷ However, the FCC has also stated that a sponsor may state it provides "professional equipment and supplies," because this merely refers to the general type of merchandise offered.⁶⁸ Similarly, the FCC has prohibited sponsors from labeling their products or services as "pretty," "beautiful," or "gorgeous," while allowing sponsors to use the word "intelligent"—both in the context of describing the qualities of automobiles.⁶⁹ In addition, one searches in vain for the common consistent principle underlying the decision to ban "name-brand"⁷⁰ while allowing products to be labeled "home-style" or "fresh and original."⁷¹

In other instances, the FCC has articulated a principle that, while compelling from a theoretical point of view, is exceedingly difficult to implement in practice. The FCC has also struggled to explain when it is proper to use the word "only." In this regard, it has said that one may not say "the only store where you can find" a product, because this is comparative if combined with a description of features and attributes of the product. If "only" is used to indicate the store has the only goods of an identified kind within a geographic area, however, it is not promotional or comparative.⁷²

65. *Id.*

66. *Agape Brdcst. Found. Notice*, *supra* note 25, at 13155.

67. *Calvary Bible Coll. Memorandum Opinion and Order*, *supra* note 10, at para. 9.

68. *Family Vision Ministries*, *supra* note 61.

69. *Compare* *Minority TV Project*, *supra* note 12, at para. 22 ("pretty," "beautiful," "gorgeous") *with* *Family Vision Ministries*, *supra* note 61, at n.5 ("intelligent").

70. *Tri-State Inspirational*, *supra* note 27, at para. 6.

71. *Xavier Univ. Memorandum Opinion and Order*, *supra* note 24, at para. 5.

72. *Agape Brdcst. Found. Notice*, *supra* note 25, at 13155.

In addition, the FCC has added an additional layer of complexity where long-standing slogans are involved. Where otherwise qualitative or comparative words are used as part of long-standing company slogans, the words have been held to identify and not to promote.⁷³ For instance, the Commission has stated that DuPont's slogan "Makers of Better Things for Better Living" is more of an established slogan than a promotional statement.⁷⁴ And the statement that A.G. Edwards provided "exceptional service" was also accepted as an established corporate slogan that employed in its context was nonpromotional.⁷⁵ In addition, the FCC has also accepted statements of longevity, such as "Serving . . . consulting needs for over 75 years" and "A Cincinnati based law firm in its 36th year," because these references described the firms and did not necessarily make a qualitative statement regarding experience.⁷⁶ But, by the same token, the FCC has also *rejected* statements of longevity, such as when it examined the statement that a business was an "established dealer in Central Florida for the past ten years."⁷⁷

In addition, and adding to the complexity, the FCC has also held that "the use of comparative, qualitative descriptive language is not rendered non-promotional . . . merely because the message conveyed is factually accurate."⁷⁸ Hypothetically, if a product were described as winning awards for "best automobile" or for "consistent consumer satisfaction," this would be prohibited even if it were true.

As any casual observer may note, modern advertising practice has been evolving from the traditional model of comparing the quality of an advertiser's product with its competitor towards the increasing use of "image spots." In these image spots, claims about the product are frequently wholly absent. As a result, many commercial spots can be seamlessly transferred (sometimes with little or no editing) to serve as underwriting spots on noncommercial broadcast stations. In the public mind, this tends to blur the distinction between commercials and non-

73. *Educ. Brdst. Public Notice*, *supra* note 3, at 827.

74. Letter to Jim Metzner, Oct. 23, 1989 (unpublished) (on file with author).

75. Letter WTTW-TV, *supra* note 28, at n.2.

76. *Xavier Univ. Memorandum Opinion and Order*, *supra* note 24, at 4920.

77. *Hispanic Brdst. Sys.*, *supra* note 57, at para. 9.

78. S.R.I. Public Radio Brdst., Inc., *supra* note 24, at para. 6. For instance, a reference to the underwriter having "kept up with [changing] technology" is prohibited. *Tri-State Inspirational*, *supra* note 27, at para. 6 (citation omitted) (use of phrase "ICAR gold-class certification" to describe an underwriter's service qualifications was found to be impermissible). *See also* *Minority TV Project*, *supra* note 12, at para. 22 ("five-star safety rating in government crash tests four years in a row" was factually verifiable but also nonpromotional); *Calvary Bible Coll. Memorandum Opinion and Order*, *supra* note 10, at para. 9 (description of proprietor as being a member of the Professional Photographers of America suggested a professional qualification or comparative distinction).

promotional underwriting acknowledgements. As a result, the FCC rules barring comparative and qualitative statements tend to look more and more like an anachronism. While the FCC has attempted to maintain the conceptual distinction between promotional and non-promotional depictions, it has struggled to apply its traditional notion of what it means to be promotional within the context of this evolution in advertising practice.

For instance, the Commission has held that when an announcement depicts the demonstration, use, consumption of, and customers' apparent satisfaction with, the underwriter's products, the message is qualitative and promotional. It has stated:

Because identification is a key aspect of the enhanced underwriting policy, 'visual depictions of specific products' are permitted, but visual announcements that dwell heavily on the qualitative aspects of a business or product exceed the function of identification. Commission policy allows visual depictions for purposes of identification—not for publicizing product uses and qualities. Announcements employing conventional commercial advertising techniques intended to persuade, rather than merely identify, are promotional.

In this regard, the depiction of a smiling flight attendant serving food to a smiling patron in the passenger compartment of the underwriter's airplane has been held to be excessively promotional.⁸⁰ Similarly, the depiction of ten different views of various consumers enjoying the product has also been held to be excessively promotional.⁸¹ Also, the FCC held impermissible a depiction-montage of twelve different views of the day in the life of a woman wearing a product associated with the underwriter.⁸²

Nevertheless, in a recent decision the FCC restated the importance of evaluating the entire context of an announcement, including both its textual and visual aspects, and stated again that "announcements [that] heavily dwell on their underwriters' products or services at length, both visually and textually, focusing on their salutary qualities, and featur[ing] their customers' approving responses" are unacceptably promotional.⁸³ For instance, an announcement that "dwelled" on images of an SUV

79. *Letter to Kenneth Bates*, *supra* note 33, at 6865. The Commission in this letter also stated that "[a]lthough the separate PBS standards are not binding on the Commission . . . PBS guidelines, with certain limited exceptions, state that 'products depicted in video should not be shown in use or in operation.'" *Id.* Since the issuance of this letter, PBS standards have been relaxed to permit some product "demonstrations" where the depiction of the consumer is "incidental" or "minimal." See Funding Standards and Practices, Rule 3: How-To Programs, http://www.pbs.org/producers/guidelines/uwcredits_3.html (last visited Nov. 10, 2006).

80. *Letter to WNYE-TV*, *supra* note 25.

81. *Letter to Kenneth Bates*, *supra* note 33, at 6864–65.

82. *Id.* at 6865.

83. *Minority TV Project*, *supra* note 12, at para. 15.

automobile in use, allegedly focusing on its special navigation and entertainment features, was deemed impermissible.⁸⁴ In addition, a “farcical” depiction of a grandson enjoying tea that his encouraging grandfather explained will make him smarter was deemed too promotional.⁸⁵ Similarly, an announcement featuring an airliner being prepared for flight by a busy crew that labored happily, singing soothing lyrics (e.g., “fill sky with love”) was deemed too promotional, because it presented the airline as “a competent, harmoniously-run carrier and an inviting host to potential travelers.”⁸⁶

Thus, when evaluating visual depictions of products that are not associated with any qualitative/comparative statements, price information, calls to action, or incentives to purchase, the FCC now must examine whether a particular depiction of a product “dwells heavily” on the qualitative aspects of the business or product. Similarly, the FCC now must analyze a visual depiction to see if it employs “conventional advertising techniques.” Moreover, these evaluations must be sensitive to a close examination of the context in which the visual depictions appear. All of these tools of analysis lead the FCC even deeper into the thickets of content analysis, a task for which it is ill-suited.

III. THE FIRST AMENDMENT IMPACT OF INCONSISTENT CONTENT-BASED ENFORCEMENT

This inconsistent enforcement of content-based regulation, coupled with the potential for substantial fines, leads to an unnecessary interference with the First Amendment liberties of public broadcasters.

In general, federal courts have consistently found that the purpose of public broadcasting depends on maintaining its editorial independence.⁸⁷ For instance, in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), the U.S. Supreme Court held that a public television station was not required to invite all candidates to a televised candidate debate if, in its editorial judgment, the excluded individual was not a viable candidate. The Court reasoned that public television stations were not public fora, open to all, but that “[p]ublic and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial

84. Minority TV Project, *supra* note 12, at para. 16.

85. Minority TV Project, *supra* note 12, at para. 21.

86. Minority TV Project, *supra* note 12, at para. 21.

87. See generally Andrew D. Cotlar, *Say Cheese: The Constitutionality of State-Mandated Free Airtime on Public Broadcasting Stations in Wisconsin*, 56 FED. COMM. L.J. 55 (2003) (critiquing a Wisconsin statute requiring public broadcasting networks to give political candidates free advertising as damaging to principles of public broadcasting).

discretion in the selection and presentation of their programming.”⁸⁸ In *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), the Court struck down a federal law that forbade public broadcasters from editorializing, reasoning that because “Congress’ commitment to the principle that because local [public] stations are the ‘bedrock of the system,’ their independence from governmental interference and control must be fully guaranteed.”⁸⁹ In *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982), the Fifth Circuit held that individual viewers of two state-chartered public television stations lacked a First Amendment right to compel the stations to broadcast a previously scheduled program which the licensees decided to cancel.⁹⁰ In reaching this conclusion, the Court reasoned that in light of the broadcaster’s editorial discretion and the FCC’s regulation of the industry, it was clear “the First Amendment rights of public television viewers are adequately protected under a system where the broadcast licensee has sole programming discretion but is under an obligation to serve the public interest.”⁹¹ Lastly, in *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978), the D.C. Circuit invalidated federal law and regulation requiring public broadcasters to make audio recordings of all broadcasts in which any issue of public importance was discussed. The Court reasoned that “noncommercial licensees are fully protected by the First Amendment,” and that “the existence of public support does not render the licensees vulnerable to interference by the federal government without regard to or restraint by the First Amendment,” because the federal government “cannot condition receipt of . . . funds on acceptance of conditions which could not otherwise be constitutionally imposed.”⁹²

The First Amendment liberties that public broadcasters enjoy do not disappear when they acknowledge their financial supporters. In *Knights of the Ku Klux Klan v. Curators of the University of Missouri*, 203 F.3d 1085 (8th Cir. 2000), for instance, the Eighth Circuit held that a public radio

88. *Ark. Educ. Television Comm’n.*, 523 U.S. at 673.

89. *League of Women Voters*, 468 U.S. at 389.

90. *Muir*, 688 F.2d at 1035.

91. *Id.* at 1041.

92. *Community-Service Brdcast.*, 593 F.2d at 1110 (citations omitted). The Court further stated:

Thus the Government cannot control the content or selection of programs to be broadcast over noncommercial television any more than it can control programs broadcast over commercial television; in making such decisions—which are at issue in this case—noncommercial broadcasters, no less than their commercial counterparts, are entitled to invoke the protection of the First Amendment and to place upon the Government the burden of justifying any practice which restricts free decisionmaking.

Id. (footnotes omitted).

station was not required under the First Amendment to broadcast underwriting announcements submitted by the Ku Klux Klan, because requiring public broadcast stations to accept program sponsorship from all sources would “surely intrude upon the editorial discretion which Congress delegated.”⁹³ In this regard, a noncommercial broadcast station’s editorial discretion is not diminished when it acknowledges its underwriting support. In making such announcements, it is not speaking for another, but rather speaking on its own behalf.⁹⁴ As a result, it has full constitutional protections against content-based governmental interference with its speech.

As demonstrated above, the regulation and enforcement of Section 399b necessarily requires the FCC to engage in content-based analysis and decisionmaking. In explaining what restrictions on free speech are content-based, as compared to content-neutral restrictions, the United States Supreme Court has repeatedly held that content-based restrictions either distinguish favored speech from disfavored speech based on the views expressed or require governmental authorities to examine the content of the speech.⁹⁵ Conversely, “laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.”⁹⁶ Clearly, the FCC has demonstrated a pattern of enforcement that disfavors speech that promotes the products or services of underwriters, while apparently favoring speech of a more neutral import. In doing so, it must necessarily engage in an intrusive analysis that examines the content of the speech being regulated.

Moreover, content-based decisionmaking by the federal government is made even more suspect by the inconsistent and sometimes arbitrary nature of enforcement of what must necessarily be a vague standard. As the U.S. Supreme Court has stated in *National Endowment for the Arts v. Finley*, 554 U.S. 569 (1998), “Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards.”⁹⁷ Indeed, it is an important principle of First Amendment

93. *Ku Klux Klan*, 203 F.3d at 1095.

94. *Id.* at 1093.

95. *Turner Brdcast. Sys. v. FCC*, 512 U.S. 622, 642–43 (1994), *aff’d*, 520 U.S. 180 (1997); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Boos v. Barry*, 485 U.S. 312, 318–19 (1988); *Miami Herald Publ’g v. Tornillo*, 418 U.S. 241, 256 (1974); *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 13 (1986); *FCC v. League of Women Voters of California*, 468 U.S. 364, 383–84 (1984).

96. *Turner Brdcast. Sys.*, 512 U.S. at 643. *See also* *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981); *Boehner v. McDermott*, 191 F.3d 463, 467 (D.C. Cir. 1999); *Time Warner Entm’t v. FCC*, 93 F.3d 957, 977 (D.C. Cir. 1996); *Satellite Brdcast. & Commun. Ass’n v. FCC*, 275 F.3d 337, 354 (4th Cir. 2001).

97. *Finley*, 524 U.S. at 588 (citing *NAACP v. Button*, 371 U.S. 415, 432–33 (1963)).

analysis that a statute or regulation is unconstitutionally vague if it either fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits or authorizes or encourages arbitrary or discriminatory enforcement.⁹⁸ In this regard, as discussed above, there is substantial evidence that the administrative enforcement of Section 399b has been inconsistent and apparently arbitrary to the extent that it is often difficult to predict which statements may be allowed and which prohibited. Accordingly, a strong case can be made that the state of enforcement of Section 399b at present may violate the First Amendment.

Lastly, the impact of arbitrary enforcement is hardly negligible. Forfeiture and consent decree amounts can range from as small as \$2,000⁹⁹ to as high as \$8,000-10,000.¹⁰⁰ The impact of this substantial fine can have a harmful effect on nonprofit broadcast operations, and in some instances where the station's operating budget is small, can be even financially crippling.

IV. A NEW APPROACH: TIME LIMITS WITHOUT CONTENT REGULATION

To address these problems, Congress should revise the prohibition on promotional messages by allowing limited commercial content. In particular, Congress should eliminate any restrictions on content, as long as announcements do not interrupt programming and are limited in length. Congress could also limit the total number of minutes during which advertisements are broadcast between programs.

This solution would be content-neutral inasmuch as it regulates the placement and timing of advertisements, rather than demanding an examination of content. Consequentially, it would get the FCC out of the business of content analysis and the unpredictable and seemingly arbitrary enforcement of current rules.

Moreover, this reform would in no way interfere with the integrity of public broadcasting. First, this proposal is not designed to replace public

See also Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 130 (1992) (“A government regulation that allows arbitrary application is ‘inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.’”) (citing *Heffron*, 452 U.S. at 649).

98. *Hill v. Colo.*, 530 U.S. 703, 732 (2000) (citing *Chicago v. Morales*, 527 U.S. 41, 56–57 (1999)).

99. *See* 47 C.F.R. § 1.80(b)(4).

100. Minority TV Project, *supra* note 12, at paras. 15–16 (\$7,500 forfeiture); Hispanic Brdcast. Sys., *supra* note 57, at para. 1 (\$8,000 forfeiture); Caguas Educ., *supra* note 53, at para. 1 (\$10,000 forfeiture); WVRM, Inc., *Order*, 20 F.C.C.R. 4964, para. 13 (2005) (\$10,000 voluntary contribution to Treasury pursuant to consent decree).

financing, state funding, or individual donations, but to supplement these diverse sources of funding. Thus, what corporate influence might be felt on programming as a result of pressure from advertisers will be mitigated by the insulation a public broadcaster would enjoy by virtue of other funding sources.

Second, it should be noted that there is no evidence that the presence of corporate advertisement in its more traditional form would present any more of a challenge to station editorial policy than the status quo. In this regard, in either circumstance, corporations can and do exercise influence through the money they provide. The nature of the message they convey to the public is irrelevant to this point.

Third, as far as the public's perception is concerned, there is evidence that the public will tolerate some commercial matter on public broadcasting as long as it is limited in duration and does not interrupt programming. For instance, in the early 1980s, the Temporary Commission on Alternative Financing for Public Telecommunications ("TCAF"), a commission chartered by the 1981 Public Broadcasting Amendments, examined a limited experiment whereby selected public television stations were permitted by law to broadcast advertisements under circumscribed conditions. In its report to Congress in 1983, the TCAF concluded that there was "no negative impact on viewing patterns, numbers of subscribers, or contributions" and no "advertising-related effects on programming."¹⁰¹ It concluded further, that if Congress were to allow advertising, it should do so only if advertising were limited in duration and placement.¹⁰² It is unlikely, therefore, that public broadcast stations would face a precipitous drop in individual donations as a result of limited commercial messages being broadcast.

Finally, it should be noted that a number of established Public Service Broadcasters ("PSBs") in Western European countries allow limited advertising while also receiving financial support from the state.¹⁰³ For example, the German PSBs, ZDF and ARD, as well as the PSBs in Ireland, the Netherlands, Austria, France, Italy, Greece, Denmark, Spain, Portugal, and Belgium all accept limited advertising.¹⁰⁴ In addition, the Canadian Broadcasting Corporation also relies on a mix of public financial support

101. TEMP. COMM'N ON ALTERNATIVE FIN., REPORT TO CONGRESS, EXECUTIVE SUMMARY, Oct 1, 1983, *available at* <http://www.current.org/pbpb/fcc/TCAFsumm83.html>.

102. *Id.*

103. "In most countries in Europe, state broadcasters are funded through a mix of advertising and public money, either through a license fee or directly from the government." Wikipedia.com, Public Broadcasting (2006), http://en.wikipedia.org/wiki/Public_broadcasting (last visited Nov. 10, 2006).

104. Carole Tongue, *The Future of Public Service Television in a Multi-channel Digital Age*, July 11, 1996, www.poptel.org.uk/carole-tongue/pubs/psb_b.html.

and limited advertising revenue.¹⁰⁵ There is no evidence that this compromises their public service mission, and there is little reason to think that a similar approach in the United States would entail any different results.

V. CONCLUSION

The current regulation of underwriting announcements by the FCC clearly demonstrates the perils of content-based regulation by a governmental agency. Because enforcement is inconsistent and arbitrary, it is often difficult for a public broadcast licensee to predict with reasonable certainty which announcements are acceptable and which are not. Consequentially, FCC enforcement harms the First Amendment liberties of public broadcast licensees, which are subject to potentially crippling fines for noncompliance. This Article respectfully suggests that Congress step in to address this problem by revising the prohibition on promotional messages to allow limited commercial content. In particular, Congress should eliminate any restrictions on content, as long as announcements do not interrupt programming and are limited in length. In addition, Congress could also limit the total number of minutes during which advertisements are broadcast between programs. This action would liberate public broadcasters from the yoke of arbitrary enforcement and would neither compromise the integrity of public broadcasting operations nor interfere with the legitimate expectations of the public.

105. See CBC-Radio Canada, 2003–2004 Annual Report, Financial Pages, *available at* http://www.cbc.radio-canada.ca/annualreports/2003-2004/pdf/CBC_2003-2004_annual_report_e.pdf.

