

# Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963

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## I. INTRODUCTION

Anyone watching *American Idol* on the Fox Network during the spring of 2003 would recognize it, and most television, as commercial programming supported by advertisements that periodically interrupted the show. But unbeknown to the audience and even the program's producers was the hidden commercial: the winning contestant had been paid by a clothing manufacturer to wear its jerseys on the air as he survived elimination from the talent contest week after week.<sup>1</sup> The contestant and

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1. Associated Press, *Jersey Makers Say They Paid "Idol" Ruben to Wear 205*, (Aug. 6, 2003), available at [http://www.usatoday.com/life/television/news/2003-08-06-ruben\\_x.htm](http://www.usatoday.com/life/television/news/2003-08-06-ruben_x.htm). According to this report, clothing manufacturer 205 Flava Inc. paid Ruben Studdard at least \$10,000 to wear a jersey featuring the number 205, his hometown area code. Studdard reportedly kept this arrangement secret from American Idol Productions, which had prohibited such deals because they conflicted with sponsors' products. *Id.*

The proliferation of such practices recently prompted a consumer group, Commercial Alert, to petition the FCC for increased enforcement of its sponsorship identification regulations. See Commercial Alert, Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television (filed with FCC, Sept. 30, 2003) available at [www.commercialalert.org/index.php/category\\_id/1/subcategory\\_id/79/article\\_id/191](http://www.commercialalert.org/index.php/category_id/1/subcategory_id/79/article_id/191). The complaint noted that advertisers are increasingly integrating their messages into programming to enhance the credibility of their appeal and to sidestep viewers' ad-zapping technologies such as TiVo. *Id.* at 2. Commercial Alert simultaneously asked the Federal Trade Commission to develop

his corporate sponsor were engaged in one of broadcasting's enduring practices—inserting covert promotions in programming. Similar incidents came to light during the quiz show and payola<sup>2</sup> scandals of 1959-60, which revived interest in a statutory provision enacted in 1927 requiring disclosure of commercial sponsors. In the wake of the scandals, Congress amended the statute,<sup>3</sup> and the Federal Communications Commission (“FCC”) crafted regulations that still govern sponsorship identification today.<sup>4</sup>

The sponsorship identification requirement remains the oldest—and for a long time was the sole—statutory provision dealing directly with broadcast advertising.<sup>5</sup> Although regulators could examine stations' advertising practices on a case-by-case basis as they applied the amorphous public interest standard in issuing and renewing licenses, for the most part policymakers trusted the marketplace. In this line of reasoning adopted by Congress and regulators, stations relying too heavily on advertising or ceding too much control to sponsors would drive their listeners to competing stations more attuned to the public interest.<sup>6</sup> Such regulation by the marketplace, however, worked best when the audience could distinguish a sponsored message from the surrounding programming or recognize programming itself as sponsored content. To this end, broadcast law has always mandated that stations identify content sponsors.

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guidelines for product placement. Commercial Alert, Request for Investigation of Product Placement on Television and for Guidelines to Require Adequate Disclosure of TV Product Placement (filed with FTC, Sept. 30, 2003), *available at* [www.commercialalert.org/index.php/category\\_id/1/subcategory\\_id/79/article\\_id/191](http://www.commercialalert.org/index.php/category_id/1/subcategory_id/79/article_id/191). Both complaints have attachments that reproduce dozens of articles from the popular press and trade journals in advertising, marketing, and broadcasting that explain the forms of product placement and the reasons behind its explosive growth.

2. The term “payola,” first used in the entertainment industry in the 1930s, refers to secret payments to induce someone to use or promote something (e.g., playing a record on the radio). A variant, “plugola,” can be used interchangeably but usually denotes a promotional remark, a plug. Both represent disguised advertising—that is, the audience does not readily recognize the promotional nature of the communication. *See* William Randle, *Payola*, 36 AM. SPEECH 104 (1961).

3. Amendments to Communications Act of 1934, Pub. L. No. 86-752, sec. 8, §§ 317, 508, 74 Stat. 889, 895-97 (1960) (codified at 47 U.S.C. §§ 317, 508 (2000)).

4. The current sponsorship identification rules are found at 47 C.F.R. §§ 73.1212, 73.4242 (2002). For a closely related provision dealing with the disclosure of payments—payola, plugola, and kickbacks—see 47 C.F.R. § 73.4180 (2002). *See also* Political Candidate Authorization Notice and Sponsorship Identification, 47 C.F.R. § 73.4190 (2002).

5. No other provision of broadcast law through the time studied here dealt directly with commercial advertising. *See* FCC, THE COMMUNICATIONS ACT OF 1934: WITH AMENDMENTS AND INDEX THERETO (1971). Another provision obliquely addressed advertising in the form of time sold to political candidates. *See infra* note 17.

6. ROBERT W. MCCHESENEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928-1935, at 27 (1993).

The sponsorship identification rules have come into play in a wide range of programming situations, some not so obvious. The law expansively defines sponsorship to encompass any arrangement in which a station receives consideration, something of value in exchange for broadcasting particular content. When a station sells a block of time for an infomercial—sponsored content that the audience could mistakenly perceive as a show—the arrangement typically requires an announcement. The use of brand-name products on the set or in the plot of a television show requires a sponsorship credit, though the law grants major exemptions. Similarly, radio stations do not have to announce that they received a free CD from a recording company, but if they receive several copies of the same CD for free, different rules would apply. The sponsorship rules have special relevance for game or giveaway shows where contestants win prizes donated by interested parties. A not-so-obvious application of the regulation arises when a station incorporates a video news release furnished by a political candidate into a newscast. It has received content, which is something of value that may have to be disclosed.<sup>7</sup> How the rules apply to a myriad of broadcast situations today depends in large part on the circumstances that spawned them in 1963.

Moreover, the sponsorship identification rules express a basic goal of American communication law and policy: to foster a healthy marketplace of ideas with minimal government intervention. The rules advance this goal by giving audiences contextual information, such as labels or disclosure announcements, to evaluate the messages they consume, while only mildly constraining broadcasters' programming discretion. Nothing is prohibited; the rules simply require public disclosure. The same principle undergirds laws affecting other forms of communication: periodicals delivered by mail have to label as "advertisement" any paid matter that might be mistaken for editorial content,<sup>8</sup> some financial publications have to note their investments in firms touted on their pages,<sup>9</sup> anti-spam laws often require that e-mail messages be identified on the subject line as advertisements,<sup>10</sup> and public communications produced with funds from foreign governments have to disclose this arrangement.<sup>11</sup> These laws all stem from the principle that the public is entitled to know when and by whom it is being persuaded.

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7. See Christian McGrath, *Political Video News Releases: Broadcasters' Obligations Under the Equal-Opportunity Provision and FCC Sponsorship-Identification Regulations*, 1993 U. CHI. LEGAL. F. 313 (1993).

8. 18 U.S.C. § 1734 (2000).

9. 15 U.S.C. § 77q(b) (2000).

10. *E.g.*, WASH. REV. CODE ANN. § 19.190.030 (West Supp. 2003).

11. 22 U.S.C. § 614 (2000).

This Article analyzes the fitful development and administration of the sponsorship identification rules from their creation in 1927 to their amplification in the wake of broadcasting's quiz show and payola scandals. The following Part shows how Congress, in crafting the original rules, anticipated advertising practices that did not materialize in the 1930s and 1940s because of the nature of early broadcast sponsorship. However, as discussed in Part III, the rules proved unexpectedly useful in dealing with a controversy in the 1940s over covert political promotions. Part IV reveals that the FCC failed to apply the rules to broadcast practices that had become commonplace in the 1950s, as the public learned from several 1959-60 investigations of quiz show rigging and payola and plugola—popular names for covert promotions. Part V, the heart of this study, looks at each major change affecting sponsorship identification wrought by the 1960 amendments to the Communications Act and examines the FCC's efforts to prescribe corresponding regulations, which culminated in rules that have changed little since 1963. When, however, the FCC at the same time proposed extending the rules into a domain not covered by the legislation—broadcasters' financial interests—the industry successfully quashed the idea, as discussed in Part VI. The conclusion analyzes the dynamics that produced the 1963 regulations.

## II. THE UNCERTAIN PLACE OF SPONSOR IDENTIFICATION IN EARLY RADIO REGULATION

Congress passed the Radio Act of 1927 (the "Radio Act")<sup>12</sup> to end signal interference that had created chaos on the airwaves.<sup>13</sup> The statute, which dealt extensively with technical matters involved in erecting a regulatory structure, provided little guidance about broadcast content. While prohibiting the newly created Federal Radio Commission ("FRC") from censoring radio communications,<sup>14</sup> the Radio Act obligated stations to "afford equal opportunities" to candidates for public office<sup>15</sup> and required that broadcasters disclose the role of sponsors in programming.<sup>16</sup> But the FRC, and its successor, the FCC, found the sponsorship identification rule

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12. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (repealed 1934).

13. The origins and context of the Radio Act have been widely studied. *See, e.g.*, LOUISE M. BENJAMIN, FREEDOM OF THE AIR AND THE PUBLIC INTEREST: FIRST AMENDMENT RIGHTS IN BROADCASTING TO 1935, at 69-88 (2001); MARVIN R. BENSMAN, THE BEGINNING OF BROADCAST REGULATION IN THE TWENTIETH CENTURY 3-206 (2000); PHILIP T. ROSEN, THE MODERN STENTORS: RADIO BROADCASTERS AND THE FEDERAL GOVERNMENT, 1920-1934, at 1-106 (1980).

14. Radio Act of 1927 § 29.

15. *Id.* § 18.

16. *Id.* § 19.

largely irrelevant in their supervision of radio for nearly twenty years. Congress had crafted the requirement before either the industry or lawmakers understood how radio advertising would develop. The rule, which aimed at disclosing covert sponsorship, seemed incongruous for an industry in which sponsors almost always craved public recognition.

A. *The Statutory Origins of the Sponsorship Identification Requirement*

Of all the provisions that constituted the Radio Act, only Section 19, mandating sponsorship identification, imposed conditions on advertising:

All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, firm, company, or corporation, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person, firm, company, or corporation.<sup>17</sup>

Representative Emanuel Cellar explained that Congress intended the section to prohibit stations from disguising advertising as program content.<sup>18</sup> Cellar argued that the provision did not go far enough. He unsuccessfully pressed for an amendment that would require stations to label such broadcast content as “advertising,” not simply as “paid for” or “furnished by” an interested party.<sup>19</sup>

Congress modeled the sponsor identification provision on an established feature of postal law. Practicing a kind of lesson-drawing,<sup>20</sup> lawmakers anticipated that broadcasters might abuse their privilege of distributing messages over the airwaves in much the same fashion that publishers had long abused their privilege of distributing publications through the mails. In the late 1800s, Congress had encouraged the circulation of magazines by offering highly subsidized postage.<sup>21</sup> The public benefited from access to more information, but by the early 1900s policymakers increasingly complained that the subsidized rates also enriched publishers by underwriting the cost of circulating profit-making advertisements in their magazines. To balance the private and public

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17. *Id.* One other provision, the equal opportunity rule, indirectly imposed a condition on advertising by political candidates. If stations chose to sell or give airtime to a candidate for public office (broadcasters were under no obligation to do so), they had to afford an equal opportunity to opposing candidates for the same office. *Id.* § 18.

18. 67 CONG. REC. 2309 (1926).

19. *Id.* at 5488.

20. See generally RICHARD ROSE, LESSON-DRAWING IN PUBLIC POLICY (1993) (discussing how lawmakers look across policy arenas for models to apply to new situations).

21. See Richard B. Kielbowicz, *Postal Subsidies for the Press and the Business of Mass Culture, 1880-1920*, 64 BUS. HIST. REV. 451 (1990).

benefits produced by this policy, Congress adopted the Newspaper Publicity Act of 1912<sup>22</sup>—the template for broadcasting’s disclosure provision. The Act mandated that publishers profiting from cheap postage label any material readers might mistake for editorial content as “advertising.”<sup>23</sup> The Supreme Court upheld the constitutionality of this disclosure and labeling requirement in 1913.<sup>24</sup>

Drawing lessons from postal policy and applying them to the new medium of broadcasting was more prescient than even Congress realized in 1926-27. In assigning licenses, the FRC and FCC conferred on private broadcasters the right to exploit a valuable public resource—the electromagnetic spectrum—for commercial purposes. Just as the disclosure requirement in postal law conditioned access to privileged mail rates, its analogue in broadcast law conditioned private broadcasters’ use of the public airwaves.<sup>25</sup>

Broadcasters themselves looked to postal law for guidance on appropriate practices for their new medium. The Code of Ethics adopted in 1929 by the National Association of Broadcasters (“NAB”) advised, “Matter which is barred from the mails as fraudulent, deceptive or obscene shall not be broadcast.”<sup>26</sup> The NAB Code also admonished its members to “strictly follow the provisions of the Radio Act of 1927 regarding the clear identification of sponsored or paid-for material.”<sup>27</sup>

The Communications Act of 1934,<sup>28</sup> which created the FCC, put the regulatory regime on more permanent footing and ended any doubts that broadcasting would develop as a predominantly commercial medium in the

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22. Act of Aug. 24, 1912, ch. 389, § 2, 37 Stat. 539, 554 (1912). Compare the disclosure provision of the Radio Act of 1927, quoted *supra* text accompanying note 17, with the following provision of the Newspaper Publicity Act: “That all editorial or other reading matter [i.e., material that resembles an article] published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked as ‘advertisement.’” *Id.*

23. See LINDA LAWSON, TRUTH IN PUBLISHING: FEDERAL REGULATION OF THE PRESS’S BUSINESS PRACTICES, 1880-1920, at 25-44, 106-23 (1993) (discussing disguised advertising practices and the Post Office Department’s efforts to control them).

24. *Lewis Publ’g Co. v. Morgan*, 229 U.S. 288 (1913). The Court upheld the disclosure requirement and other provisions of the Newspaper Publicity Act because they merely conditioned a privilege—the use of the highly subsidized second-class postage rates. The Court rejected the publishers’ argument that the provisions unconstitutionally limited freedom of the press, explaining that publications refusing to comply with the Act could still circulate by mail, just not at the subsidized rates. *Id.* at 308-11.

25. See *id.* at 308-11; Radio Act of 1927, Pub. L. No. 69-632, § 19, 44 Stat. 1162, 1170.

26. NAB Code of Ethics (adopted Mar. 25, 1929), *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING 308 (Frank J. Kahn ed., 1968).

27. *Id.* at 309.

28. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended at scattered sections of 47 U.S.C.).

United States.<sup>29</sup> The sponsorship disclosure provision, reincarnated as Section 317, continued with only immaterial changes in language<sup>30</sup> and did not warrant debate in Congress.<sup>31</sup>

*B. The Requirement's Initial Irrelevance for Regulators*

Regulators found the sponsor identification rule ill-suited to the type of radio advertising that evolved from the 1920s to the 1940s. When stations first went on the air in the early 1920s, they carried institutional or goodwill advertising—announcements acknowledging the public service rendered by the station's owner, typically a newspaper, department store, radio equipment manufacturer, or other entity.<sup>32</sup> Because stations accepted no payment from an outside party, no sponsorship announcement was required.

By the mid-1920s, however, stations began searching for more direct revenue sources to finance the costs of performers and the expense of linking stations in networks. Stations experimented with program sponsorship, selling blocks of time to businesses that produced programs. The businesses mentioned their company name or products but, for the

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29. In enacting the Radio Act of 1927, Congress had expected the FRC to quickly clear up signal interference and then pass out of existence, leaving technical regulation to the Department of Commerce. When the situation proved more complex than anticipated, Congress began extending the FRC's charter until it established the FCC as a continuing regulatory body. Between 1927 and 1934, Congress and public groups began debating the consequences of the increasingly visible commercialization of radio. In adopting the 1934 Act, Congress turned aside a well-organized campaign to reserve a portion of the airwaves for noncommercial uses. For details on these and related matters, see MCCHESENEY, *supra* note 6.

30. Section 317 provided:

All matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.

48 Stat. at 1089. Compare § 317 with § 19 of the Radio Act of 1927, 44 Stat. 1170 (showing that the phrase "firm, company, or corporation" was dropped in two places after the word "person"). But this change is inconsequential as the definitions section of the 1934 Act stipulates that "'Person' includes an individual, partnership, association, joint-stock company, trust, or corporation." Communications Act, § 3(i). The Communications Act also uses the term "radio" to embrace all forms of wireless communication, including television. *Id.* § 3(b).

31. The legislative history does not reveal any discussion of § 317. See A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934 (Max D. Paglin, ed., 1989).

32. See, e.g., ERIK BARNOUW, THE SPONSOR 12 (1978).



most part, refrained from extolling the merits of their goods or services.<sup>33</sup> Even this indirect advertising or trade name publicity aroused considerable opposition among the listening public. Working with advertising agencies, broadcasters conducted a well-orchestrated campaign to cultivate the acceptance of radio advertising by listeners, lawmakers, and potential advertisers still shy about using the new medium.<sup>34</sup>

The line between indirect and direct advertising—mentioning companies or products versus touting them—blurred in the 1930s as advertisers took control of much radio programming, especially popular network shows. Sponsors craved credit for the programming they financed; hence, they repeatedly reminded listeners of their connection with the show. Sponsors' names customarily appeared as part of a program's title, sponsors designed program content to showcase their products (sometimes even working their products into the script), the announcer or key characters often became closely identified with the sponsor's products, and the sponsors obviously crafted any ads that might appear with the programs.<sup>35</sup> These developments prompted a 1932 Senate resolution that expressed "growing dissatisfaction with the present use of radio facilities for the purposes of commercial advertising."<sup>36</sup> In response, the FRC conducted a wide-ranging study of commercial radio advertising.<sup>37</sup> Among its many conclusions, the FRC found that commercial advertising, including direct sales pitches, had become essential sources of revenue to finance programming.<sup>38</sup> Limiting advertising to mere announcements of the sponsors' names "would not . . . be practicable and satisfactory at the present time," the FRC advised Congress.<sup>39</sup>

This model of sponsorship prevailed through radio's heyday—the 1930s and 1940s—and into the first decade of television. Nonsponsored shows, classified as "sustaining" because stations sustained them without

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33. *Id.* at 14-27. According to an early textbook on radio advertising, "[D]irect advertising and pleas for sales on the radio are offensive." ORRIN E. DUNLAP, *ADVERTISING BY RADIO* 119-20 (1928).

34. For an insightful analysis of advertising's gradual acceptance on radio and the campaign behind it, see SUSAN SMULYAN, *THE COMMERCIALIZATION OF AMERICAN BROADCASTING, 1920-1934* (1994).

35. See STEPHEN FOX, *THE MIRROR MAKERS: A HISTORY OF ADVERTISING AND ITS CREATORS* 150-62 (1984). A dozen examples of early 1930s promotional announcements that linked programs with their sponsors are reproduced in FRANK A. ARNOLD, *BROADCAST ADVERTISING* 153-204 (1933).

36. S. RES. 129, 72d Cong. (1932).

37. S. DOC. NO. 72-137 (1932).

38. *Id.* at 36-37.

39. *Id.* at 36. The report reproduced quite a few statements from advertising agencies about the importance of sponsorship, including direct appeals. *Id.* at 164-201.

advertising, provided much of the non-entertainment programming.<sup>40</sup> Because the chief value of the sponsor identification requirement lay in disclosing subtle connections between advertisers and program content, regulators rarely had occasion to invoke it as long as programs were obviously sponsored or not sponsored at all.<sup>41</sup> The emergence of spot advertising—ads from a variety of sponsors placed in and around a show—muddied the sponsor's relation to programming and prompted the FCC in 1939 to remind stations about Section 317 compliance.<sup>42</sup>

### III. SPONSORSHIP IDENTIFICATION AND PUBLIC AFFAIRS PROGRAMS, 1943-58

Identification took care of itself as long as commercial sponsors sought credit for underwriting programs. But groups advocating ideas or promoting candidates—not consumer goods—sometimes preferred to mask sponsorship to increase the apparent credibility of their messages. Controversies surrounding news and political programming resurrected interest in the disclosure law and prompted the FCC in 1944 to issue the first regulations amplifying the statutory language crafted in 1927. These new rules figured centrally in the FCC's only sustained Section 317 enforcement actions before the payola scandal erupted in 1959.

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40. See *id.* at 13-14 (discussing the classification of programs as sponsored or sustaining).

41. This conclusion about the quiescence of the sponsorship identification requirement in the hands of regulators from 1927 to 1944 is based on the following: The industry's leading trade journal reported in 1939 "that since enactment of the law in 1927 there has been no general complaint about the manner in which commercials have been announced with regard to identity of sponsorship either from Congress, the public or the FCC." Sol Taishoff, *FCC Warning Affects Sponsorship Credits*, BROADCASTING, June 1, 1939, at 11 [hereinafter Taishoff]. Neither the FRC nor the FCC amplified the statutory language with regulations until 1944. See *infra* text accompanying notes 53-70. With one exception, the FCC annual reports for this period do not mention Section 317 of the 1934 Act. In the one exception, the FCC notes that it handled three Section 317 complaints in 1939-40. 1940 FCC ANN. REP. 57. The official reporter of FCC decisions for this time period does not mention Section 317. In 1970, the FCC published a special edition of *FCC Reports* compiling "previously unpublished reports and rulings of the Federal Communications Commission of the United States prior to July 1, 1965 concerning sponsorship identification." 40 F.C.C. 1-232 (1970) (quoting title page). The earliest entry in this collection was from 1946. Nor does the unofficial reporter, *Radio Regulation* (Pike & Fischer), carry any decisions from this period. Finally, a comprehensive treatise from the time provides no information beyond the statutory language. 1 A. WALTER SOCOLOW, *THE LAW OF RADIO BROADCASTING* § 252 (1939).

42. See, e.g., 1940 FCC ANN. REP. 57; Taishoff, *supra* note 41, at 11.

A. *Sponsorship Disclosure in Disputes Between Labor and Business*

During the Second World War, radio networks vastly expanded their news operations and added commentators to elucidate complex national and international developments.<sup>43</sup> As radio news shows grew longer, stations ceased carrying them as sustaining programs and sought sponsors. Unlike entertainment shows, where the sponsor's relationship to program content was usually visible to the audience, advertisers' influence over news content was harder to detect. As FCC Chairman James L. Fly explained:

I heard a so-called news program last night. Through the months it has been tending more and more to get away from the news of the day to the philosophies of the particular sponsor. Things like that are done in a somewhat subtle if not over-subtle manner. Only by careful listening do you discover that he is not giving you news or comment on the world news, but is peddling ideas to you from company headquarters.<sup>44</sup>

Labor unions and Democrats complained that the sponsors of network news shows, predominantly large corporations, influenced news analysts' commentaries. One labor leader pointed out that a radio commentator who routinely criticized unions had worked for the National Association of Manufacturers ("NAM").<sup>45</sup>

Unions felt doubly aggrieved because radio stations virtually banned favorable discussions of labor issues while managing to cloak their sponsorship of contrary programming. The NAB Code strongly discouraged stations from selling time for discussions of controversial topics.<sup>46</sup> And, the Code declared, "Discussion—or dramatization—of labor problems on the air is almost always of a controversial nature. Even the so-called facts about labor, such as the American Federation of Labor's audited membership figures, are usually challenged."<sup>47</sup> The same NAB Code, however, found "nothing controversial, . . . whether in the realm of

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43. See DAVID HOLBROOK CULBERT, *NEWS FOR EVERYMAN: RADIO AND FOREIGN AFFAIRS IN THIRTIES AMERICA* (1976).

44. Quoted in Quincy Howe, *Policing the Commentator: A News Analysis*, ATLANTIC, Nov. 1943, at 46.

45. *To Amend the Communications Act of 1934: Hearings on S. 814 Before the Senate Comm. on Interstate Commerce*, 78th Cong. 270-74 (1943) (remarks of R. J. Thomas, president, United Auto Workers) [hereinafter *1943 Hearings*]. The hearings contain similar complaints from other labor leaders. See, e.g., *id.* at 291-98 (remarks of Irving Richter, United Auto Workers); *id.* at 575-88 (remarks of Len DeCaux, publicity director, Congress of Industrial Organizations).

46. "Time for the presentation of controversial issues shall not be sold, except for political broadcasts." NAB Code (1939), quoted in MORRIS L. ERNST, *THE FIRST FREEDOM* 143 (1946).

47. NAB Code (1939), quoted in MORRIS L. ERNST, *THE FIRST FREEDOM* 145 (1946).

‘fact’ or opinion, about business problems,” an FCC Commissioner wrote.<sup>48</sup>

Hence the remarks of a commentator sponsored by a business concern become purged of controversiality by virtue of such sponsorship, even though he may be expressing his opinion (an opinion which his sponsor may, by happy coincidence, often share) on such subjects as rationing, price control, taxation, international affairs—or even labor problems.<sup>49</sup>

Similar strictures in the NAB Code kept consumer groups from getting their messages on the air.<sup>50</sup> In 1945 the FCC largely repudiated the NAB’s efforts to keep labor and consumer groups from purchasing airtime to discuss controversial subjects.<sup>51</sup>

Businesses not only sponsored most radio programs, but their trade groups, notably NAM, also provided radio content passed off as sustaining programs—that is, as material supposedly selected and controlled by the station itself. For instance, some stations carried the NAM series *Businessmen Look to the Future* without acknowledging the source.<sup>52</sup> Listeners to other programs heard simply that a “Citizens Committee” or a “Civic League” provided the broadcast, vague labels that denied the audience an opportunity to evaluate the relationship between a program’s source and its content.<sup>53</sup>

With such disputes in mind, Congress in late 1943 considered expanding the sponsorship disclosure requirement to remove any doubts about its applicability to public affairs programs. The provision, part of a wide-ranging bill that would have overhauled the FCC, proposed that anyone creating or sponsoring radio broadcasts would have to inform stations in writing of the identity of the person or organization “upon whose instance or behalf such broadcast is to be made or conducted.”<sup>54</sup> Also, radio stations would have to announce the identities of these sponsors at the beginning and end of the broadcast.<sup>55</sup> Much of the debate on these provisions turned on the sponsorship of news analysts’ comments and the emerging radio battle between NAM and the Congress of Industrial

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48. Clifford J. Durr, *Freedom of Speech for Whom?*, 8 PUB. OPINION Q. 391, 399 (1944) [hereinafter Durr]. For the industry’s response to Durr’s critical remarks, see *Durr’s Slurs*, BROADCASTING, BROADCAST ADVERTISING, May 15, 1944, at 40.

49. Durr, *supra* note 48, at 399.

50. *Id.* at 400.

51. See United Brdcst. Co., *Decision and Order*, 10 F.C.C. 515, 518 (1945).

52. *FCC Would Label Program Sources*, BROADCASTING, BROADCAST ADVERTISING, Oct. 9, 1944, at 24.

53. *Id.*

54. *1943 Hearings*, *supra* note 45, at 4.

55. *Id.*

Organization (“CIO”).<sup>56</sup> The CIO had just created a political action committee to counter NAM’s well-established public information campaign, which made substantial use of radio.<sup>57</sup> Although the FCC endorsed the legislative provision that would have strengthened the disclosure mandate, Congress failed to pass the bill of which it was a part.<sup>58</sup>

Within a year, however, the FCC moved on its own when the issue reappeared more acutely in connection with the 1944 national elections. The elections pitted a physically and politically weakened Franklin D. Roosevelt against a resurgent Republican Party. The national committees of both parties prerecorded spot announcements and distributed them to state committees for placement on local radio stations.<sup>59</sup> Some stations simply labeled them “political announcements” without identifying the sponsoring organization.<sup>60</sup> Unlabeled announcements broadcast “on behalf of the Republican Party” constituted a ‘fraud on the public since they come over the air not as advertisements but as station announcements,’” Morris L. Ernst, vice chairman of the New York Liberal Party and attorney for the American Civil Liberties Union, telegraphed in a complaint to the FCC.<sup>61</sup> In a brief notice, the FCC reminded all stations that Section 317 applied to spot political announcements and “require[d] a full and fair disclosure of the identity of the person furnishing the consideration for such broadcast.”<sup>62</sup>

Even as the FCC issued this reminder, the Commission was working on a more substantial elaboration of rules to implement Section 317.<sup>63</sup> After three months of deliberations—mostly in the form of consultation with NAB lobbyists—the FCC, in December 1944, adopted the first

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56. *See supra* note 45 (witnesses cited).

57. ELIZABETH A. FONES-WOLF, *SELLING FREE ENTERPRISE: THE BUSINESS ASSAULT ON LABOR AND LIBERALISM, 1945-60*, at 21 (1994); *CIO-PAC Ratings*, BROADCASTING, BROADCAST ADVERTISING, Oct. 2, 1944, at 36. Businesses, mainly working through NAM, had for several years been disseminating information and sponsoring programs that propagated a pro-business (and often anti-labor, anti-New Deal) ideology. Messages were often incorporated in entertainment programs businesses sponsored. *See* RICHARD S. TEDLOW, *KEEPING THE CORPORATE IMAGE: PUBLIC RELATIONS AND BUSINESS, 1900-1950*, at 59-109 (1979); S. H. WALKER & PAUL SKLAR, *BUSINESS FINDS ITS VOICE: MANAGEMENT’S EFFORT TO SELL THE BUSINESS IDEA TO THE PUBLIC 28-31* (1938).

58. *1943 Hearings*, *supra* note 45, at 59 (remarks of Mr. Fly); Bill Bailey, *Legislation ‘Dead’ Says Senator Wheeler*, BROADCASTING, BROADCAST ADVERTISING, June 5, 1944, at 14, 58.

59. *CIO, WHKC Join in FCC Dismissal*, BROADCASTING, BROADCAST ADVERTISING, Oct. 23, 1944, at 11, 59.

60. *Id.* at 11.

61. *Id.*

62. Identification of Sponsors, 9 Fed. Reg. 12,817 (Oct. 25, 1944).

63. Sponsored Programs, 9 Fed. Reg. 11,969 (Sept. 30, 1944).

administrative rules that fleshed out the 1927 and 1934 statutory language.<sup>64</sup> The new rules applied mainly to broadcasts about politics or public affairs and remain largely unaltered today. For such programming, stations that received anything of value, including production assistance (“records, transcriptions, talent, scripts, or other material or services”<sup>65</sup>) had to identify at the beginning and end of the program the nature of the support (shows under five minutes need make only one announcement).<sup>66</sup> Programs supplied by a “corporation, committee, association or other unincorporated group” had to identify the source; furthermore, the names of an organization’s leaders had to be available in a station’s public file.<sup>67</sup> Another rule applied to both commercial and issue broadcasts, though its import was greatest for the latter: when agents placed programming on behalf of a principal, “and such fact is known to the station, the announcement shall disclose the identity” of the originator.<sup>68</sup>

One rule applied strictly to “programs advertising commercial products or services.”<sup>69</sup> For these, “an announcement stating the sponsor’s corporate or trade name or the name of the sponsor’s product” satisfied the identification requirement.<sup>70</sup> The FCC watered down this last requirement after consulting with NAB lawyers. The FCC’s original proposal would have mandated specific language for announcements, stating that a sponsor “paid for or furnished” the program.<sup>71</sup> Broadcasters, joined by the American Association of Advertising Agencies, regarded this language as redundant because sponsors ordinarily mentioned their names throughout a program.<sup>72</sup>

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64. *Sponsorship Case Delay is Requested*, BROADCASTING, BROADCAST ADVERTISING, Oct. 30, 1944, at 14; *Loucks to Appear for NAB at Probe*, BROADCASTING, BROADCAST ADVERTISING, Oct. 30, 1944, at 24.

65. Announcement of Sponsored Programs, 9 Fed. Reg. 14,734, 14,734 (Dec. 12, 1944).

66. Announcement of Sponsored Programs, 9 Fed. Reg. at 14,734. For the current, essentially unchanged, version of the rule, see 47 C.F.R. § 73.1212(d) (2002).

67. Announcement of Sponsored Programs, 9 Fed. Reg. 14,734 (current version at 47 C.F.R. § 73.1212(e)).

68. *Id.* (current version at 47 C.F.R. § 73.1212(e)).

69. *Id.* (current version at 47 C.F.R. § 73.1212(f)).

70. *Id.*

71. Sponsored Programs, 9 Fed. Reg. 11,969, 11,969 (Sept. 30, 1944).

72. *NAB Granted Plea for Delay of Sponsor Identity Hearing*, BROADCASTING, BROADCAST ADVERTISING, Nov. 6, 1944, at 74. According to the trade journal, “If, on the other hand, it is ruled the sponsor identity requires clear-cut mention of company ownership and the like [rather than merely the product or brand], hearings probably will be requested.” *Id.* The FCC thus avoided hearings by modifying the rule accordingly. *FCC Sponsor Rule Language Protested by Broadcasters*, BROADCASTING, BROADCAST ADVERTISING, Nov. 13, 1944, at 64. See also *NAB-FCC Lawyers Agree on Redraft of Sponsor Rule*, BROADCASTING, BROADCAST ADVERTISING, Nov. 20, 1944, at 16 [hereinafter *NAB-FCC Lawyers Agree*].

Overall, this first FCC amplification of the statutory language did little to disturb relations between stations and their principal revenue source, commercial program sponsors. Broadcast interests even welcomed the additional rules governing political and issue programming. According to an NAB attorney, the rules “prevent political parties or organizations seeking to promote a particular idea or philosophy from cloaking its propaganda with the prestige of the particular station making the broadcast, and from leading the public to believe that such idea or philosophy is that of the station rather than” that of the sponsoring organization.<sup>73</sup> Shortly after the FCC adopted the rules, one station did bristle at the burden imposed in ferreting out the true source of funds behind political and issue broadcasts.<sup>74</sup> But the Commission advised that stations should “take all reasonable measures in this connection.”<sup>75</sup> If, for example, “a speaker desires to purchase time at a cost apparently disproportionate to his personal ability to pay, a licensee should make an investigation of the source of the funds to be used for payment.”<sup>76</sup> Furthermore, stations could not adopt blanket bans on such broadcasts to avoid the sometimes difficult task of identifying the true sponsors behind a message.<sup>77</sup>

The FCC’s 1944 sponsor identification rulemaking stemmed partly from general developments in the industry as well as shifts in regulatory philosophy. In the industry, wartime advertisers increasingly used money-saving spot announcements sprinkled in and around programs rather than sponsoring entire shows.<sup>78</sup> Responsibility for the content of the show was not as readily apparent to the audience, raising prospects that the sponsorship rule could be triggered. At the FCC, regulators struggled to find a general stance to take regarding issues of public importance, of which sponsorship identification was but one element. The question had agitated the Commission since the 1930s, and by the mid-1940s the FCC had moved toward the policy that would become the Fairness Doctrine.<sup>79</sup> The FCC’s 1946 report, *Public Service Responsibility of Broadcast Licensees*, addressed the handling of public issues and a range of advertising excesses. “A listener is entitled to know when the program ends

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*FCC Adopts Sponsor Identity Rule*, BROADCASTING, BROADCAST ADVERTISING, Dec. 18, 1944, at 88 (noting in the title’s subheading that “‘Paid For’ Clause Is Out of Compromise Regulation”).

73. Quoted in *NAB-FCC Lawyers Agree*, *supra* note 72, at 16.

74. Albuquerque Brdcast. Co., *Public Notice*, 40 F.C.C. 1 (1946).

75. *Id.*

76. *Id.*

77. *Id.*

78. See CHARLES HULL WOLFE, *MODERN RADIO ADVERTISING* 18-19 (1949).

79. See, e.g., STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 36-41 (1978).

and the advertisement begins,” the report noted in a section on the “intermixture of program and advertising.”<sup>80</sup> It applauded efforts to prohibit broadcast journalists from reading advertisements during their newscasts because listeners might fail to distinguish between the two types of content.<sup>81</sup>

### B. *NAM and TV Coverage of the Kohler Hearings*

The only sustained FCC enforcement of the sponsorship identification rules in the years before the payola scandals stemmed from television news coverage of a long-running labor management dispute. The Kohler Company, manufacturer of bathroom and plumbing fixtures, had battled labor organizers since 1933.<sup>82</sup> The strike became the centerpiece of 1958 investigations conducted by the Senate Select Committee on Improper Activities in the Labor or Management Field.<sup>83</sup> To discredit unions, NAM built a nationwide publicity campaign around information unearthed at the hearings, especially details about labor activities in the Kohler strike.<sup>84</sup> As one element of this effort, NAM assisted television stations in covering the Senate hearings from the business group’s perspective.

The FCC learned that NAM had paid a Washington, D.C., television station to prepare hour-long daily summaries of Senate testimony about the Kohler labor strike.<sup>85</sup> NAM approached television stations and first offered the film for \$475.<sup>86</sup> When stations declined to pay, NAM began furnishing the kinescopes (filmed television programs) without charge.<sup>87</sup> The script accompanying the film identified the Washington station as the program source without indicating NAM’s involvement. The FCC considered an additional complication: Some television stations had no dealings with

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80. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 47 (1946).

81. *Id.* The Commission on Freedom of the Press, which issued its series of reports in 1947, also urged broadcasters to separate advertising from programming in all contexts. *See* LLEWELLYN WHITE, *THE AMERICAN RADIO*, at viii (reprint ed. 1971).

82. *See* WALTER H. UPHOFF, *KOHLER ON STRIKE: THIRTY YEARS OF CONFLICT* (1966).

83. *See* Anthony Baltakis, *On the Defensive: Walter Reuther’s Testimony Before the McClellan Labor Rackets Committee*, 25 MICH. HIST. REV. 47 (1999).

84. FONES-WOLF, *supra* note 57, at 267-69.

85. KSTP, Inc., *Opinion*, 40 F.C.C. 12 (1958) [hereinafter *KSTP Opinion*]. The information in this and the following paragraph is derived largely from the decision involving KSTP in Minneapolis. The Commission, however, prepared decisions on fifteen cases that basically reprise the same information. The sponsorship identification decisions involving NAM and the Kohler hearings are found at 40 F.C.C. 12-38, 40-59, 62-65, 76-85 (1958-60).

86. *KSTP Opinion*, *supra* note 85, at 14.

87. *Id.* at 12.



NAM; they merely picked up the programming through interconnections with stations that originated the telecast. For instance, a Minneapolis station fed the daily summaries to a Fargo, North Dakota, station that, in turn, relayed them to other stations in the state.<sup>88</sup>

In a series of 1958-60 decisions involving at least twenty-eight stations, the FCC addressed several questions about the application of Section 317 and the corresponding regulations.<sup>89</sup> First, the Commission rejected the argument that the regulations' references to "controversial issues" excluded reports of news events.<sup>90</sup> Second, supplying free films to a station constituted "valuable consideration" within the meaning of the statute and was expressly covered by FCC regulations.<sup>91</sup> Third, stations had not exercised due diligence in ascertaining the actual source of the material. "[T]he Commission wishes to emphasize that in connection with material constituting a 'discussion of public controversial issues' or a political discussion, the highest degree of diligence is called for in ascertaining, before the presentation thereof, the actual source responsible for furnishing the material."<sup>92</sup> Thus, the FCC reprimanded stations that dealt directly with NAM for failing "to exercise even ordinary prudence and diligence."<sup>93</sup> The Commission decided that even stations that simply took the telecast feeds from other broadcasters fell short in complying with the regulations.<sup>94</sup> In

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88. *Id.* at 15.

89. 1958 FCC ANN. REP. 122.

90. *KSTP Opinion, supra* note 85, at 13. The issue of Section 317's application to news reports was addressed most directly in Westinghouse Brdcast. Co., *Opinion*, 40 F.C.C. 28 (1958). The Westinghouse station had included clips from the NAM-supplied film in its televised newscasts. The station asserted that this was analogous to using "pictures taken by the station's photographers or available from libraries or other sources." The station insisted that the material used did not constitute a "program" within the meaning of the rules, that there was no "inducement" to broadcast it, and that in any case the Commission's sponsorship identification rules do "not apply to news programs merely reporting events without comment or editorial opinion." *Id.* at 29. The Commission rejected all three assertions, emphasizing that "the station was induced to present portions of the particular material by the fact that it was made available gratis." *Id.*

91. *KSTP Opinion, supra* note 85, at 13. The FCC pointedly quoted Section 3.654(b) of its regulations that for "any political program . . . involving the discussion of public controversial issues for which any films . . . are furnished, either directly or indirectly, to a station as an inducement to the broadcasting of such program, an announcement shall be made." *Id.*

92. *Id.* at 14.

93. *Id.*

94. *E.g., Meyer Brdcast. Co., Opinion*, 40 F.C.C. 20, 22 (1958). In this decision, two North Dakota television stations took the microwave relay feed of the Kohler hearings from another North Dakota station, which had obtained them from a Minneapolis station. Even though the licensee was two steps removed from the station originating the telecast, the Commission was "of the opinion that in the present situation, [the station] did not exercise the degree of diligence required under the circumstances." The Commission explained that

the end, however, the FCC found that none of the stations had willfully violated the regulations and simply noted the incident in the licensees' files for consideration, along with a station's overall performance, as part of license renewals.<sup>95</sup>

*C. Adapting the Rules to the Technologies and Situations of the 1950s*

Apart from the FCC's actions involving the Kohler coverage, only a few minor Section 317 issues dealing with new technologies and broadcast practices arose between 1944 and the 1959 payola scandal.

The sponsorship identification statute had been devised at a time when AM radio stood alone as a commercially viable form of broadcasting. In the late 1940s, the FCC extended the rules to newer broadcast media—FM radio and television.<sup>96</sup> For TV, the FCC decided, “[A]n oral announcement of sponsor identification need not be given if an appropriate visual announcement is being telecast.”<sup>97</sup> Public concerns about the possible use of subliminal television advertising also brought preemptive rulings in 1957 that the practice presented a number of troubling questions and, at a minimum, required clear disclosure to the audience.<sup>98</sup> In addition, the FCC determined that FM stations offering planned music broadcasts on behalf of subscribers needed to identify, on the air, these paying clients as sponsors.<sup>99</sup>

Only once during the 1950s did the FCC flesh out the basic requirements for commercial broadcasts. In 1950, the FCC learned that a number of sponsored programs failed to specifically identify the companies behind the broadcast, using instead a general description of the products they sold to satisfy the announcement requirement. “This program is

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internal evidence in the telecast should have raised questions about the source of the material and prompted a call to the station originating the telecast. *Id.* at 22.

95. *E.g.*, *Storer Brdcast. Co.*, *Opinion*, 40 F.C.C. 24, 27 (1958). In some situations, the FCC considered a station's violation of Section 317 as part of the license renewal process. The outcome was the same. For instance, the FCC granted the renewals for *Storer Broadcasting* and added, “However, the correspondence concerning this matter is being associated with the Commission files for *WJBK-TV* and *WVUE*, for such further consideration as the future operation of the stations may warrant.” *Id.* at 27.

96. 47 C.F.R. § 3.289 (FM), § 3.689 (TV), *reprinted in* 1946 BROADCASTING Y.B. 496, 498, 506 (indicating that the sponsorship identification language is identical for the rules applying to the three media).

97. 1959 FCC ANN. REP. 49.

98. “Subliminal” Advertising and Its Relationship to Section 317 of the Communications Act, *Opinion*, 40 F.C.C. 7 (1957); Use of “Subliminal Perception” Advertising by Television Stations, *Public Notice*, 40 F.C.C. 10 (1957); 1958 FCC ANN. REP. 125.

99. *Station WRLD*, *Public Notice*, 40 F.C.C. 5 (1951).

sponsored by the Sink Man’ or words of similar import which are merely descriptive of the product sold” did not comply with Section 317, the FCC announced.<sup>100</sup> “In all cases the public is entitled to know the name of the company it is being asked to deal with, or at least, the recognized brand name of his product.”<sup>101</sup> Perhaps for the first time, the FCC commented on the purpose behind Section 317: “[I]ts plain intent is to prevent a fraud being perpetrated on the listening public by letting the public know the people with whom they are dealing.”<sup>102</sup>

#### IV. THE 1959-60 PAYOLA AND QUIZ SHOW SCANDALS

During the 1950s, television sets and the commercial culture they purveyed spread into millions of American households while music programming, especially rock ‘n’ roll, reshaped radio. The FCC’s relatively lax enforcement of Section 317 at this time belied sponsors’ success in covertly inserting promotional messages into television and radio programs. The pervasiveness of the practice came to light as a byproduct of the television quiz show scandals. The two scandals—rigged quiz shows on television and hidden sponsorship (especially payola) in radio—merged in the public’s mind to form one image of commercialism’s corrupting influence on broadcasting. Both involved deception but presented distinct policy and legal issues. Quiz shows deceived audiences about the terms of their contests, but viewers could hardly fail to recognize the sponsor’s role when its corporate and product names were bandied throughout a program. With payola, however, the audience could not detect the sponsor’s hand in program content.

##### A. *Discovering and Publicizing Sponsors’ Hidden Influence*

A congressional committee investigating rigged quiz shows became interested in covert sponsorship when it received a letter charging that “commercial bribery has become a prime factor in determining what music is played on many broadcast programs and what musical records the public is surreptitiously induced to buy.”<sup>103</sup> These practices soon became widely known as payola. The House Special Subcommittee on Legislative Oversight consequently broadened its investigation to include payola in

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100. Identification on Brdcast. Station, *Public Notice*, 40 F.C.C. 2 (1950).

101. *Id.* at 3.

102. *Id.* at 2.

103. Letter from Burton Lane, President, American Guild of Authors and Composers, to Robert W. Lishman, Subcommittee Counsel (Oct. 29, 1959), in *Investigation of Television Quiz Shows, Pts 1 & 2: Hearings Before the Spec. Subcomm. on Legislative Oversight of the House Comm. on Interstate and Foreign Commerce*, 86th Cong. 1142 (1959) [hereinafter *Television Quiz Show Hearings*].

broadcasting and other possible Section 317 violations.<sup>104</sup> In relatively short order—late 1959 to summer 1960—several investigations scrutinized different phases of the problem. The Federal Trade Commission (“FTC”) examined payola as an anticompetitive practice in the recording industry,<sup>105</sup> district attorneys in a number of states looked for violations of criminal law such as commercial bribery,<sup>106</sup> the U.S. Attorney General reported on deceptive practices in broadcasting media at the behest of the President,<sup>107</sup> and the FCC scrutinized the role of broadcasters.<sup>108</sup> Congress held additional hearings on proposed revisions of the Communications Act, including changes in the sponsorship identification rules.<sup>109</sup>

The public avidly followed the exposés. Of course, newspapers such as *The New York Times* tracked all the formal investigations.<sup>110</sup> More important in shaping public opinion were colorful accounts about payola in *Look*, *Life*, and other magazines that reached millions of readers.<sup>111</sup>

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104. H.R. REP. NO. 86-1258, at 37 (1960).

105. The FTC filed unfair practices complaints against at least 103 record companies starting in December 1959; the investigations ran into 1961. *FTC May Call Off Dog in Last Payola Cases*, BROADCASTING, Apr. 10, 1961, at 74. See also Barbara Diekhans, *Sing a Song for Sixpence: The 1959-1960 Payola Scandals and Subsequent Legislation 35-38* (1974) (unpublished M.A. thesis, University of Washington) (on file at the University of Washington Library).

106. See Diekhans, *supra* note 105, at 40-41.

107. Rpt. to the President by the Att’y Gen. on Deceptive Practices in Brdcast. Media (Dec. 31, 1959), reprinted in H.R. REP. NO. 86-1258, at 61 (1960) [hereinafter *Deceptive Practices in Broadcasting*].

108. Sponsorship Identification Compliance, 40 F.C.C. 66 (1959) (asking all licensees to report what matter they had broadcast without a sponsorship announcement for which they or any party received consideration since November 1, 1958); Sponsorship Identification of Brdcast. Material, *Public Notice*, 40 F.C.C. 69 (1960) (summarizing the responses from stations received pursuant to preceding inquiry) [hereinafter *Sponsorship Identification Public Notice*]; 1960 FCC ANN. REP. 35-37.

109. *Responsibilities of Broadcasting Licensees and Station Personnel, Pts. 1 & 2: Hearings on Payola and Other Deceptive Practices in the Broadcasting Field Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong. (1960) [hereinafter *Licensees and Station Personnel Hearings*]; *Proposed Amendments to FCC Act of 1934: Hearings on S. 1898 for the Commun. Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 86th Cong. (1960) [hereinafter *Senate Hearings*]; *Communications Act Amendments: Hearings on Conditional Grants, Pregrant Procedure, Local Notice, Local Hearings, Payoffs, Suspension of License, and Deceptive Practices in Broadcasting Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong. (1960) [hereinafter *House Hearings*].

110. For two studies that track the payola coverage by *The New York Times*, see Diekhans, *supra* note 105; KERRY SEGRAVE, *PAYOLA IN THE MUSIC INDUSTRY: A HISTORY, 1880-1991*, at 100-58 (1994).

111. E.g., William Attwood, *The Age of Payola*, LOOK, Mar. 29, 1960, at 35; Ed McKenzie, *A Deejay’s Expose—and Views of the Trade*, LIFE, Nov. 23, 1959, at 46; “Payola”—An Inside Story Told Four Years Ago, U. S. NEWS & WORLD RPT., Dec. 21,

Opinion journals quickly seized on the investigative findings as further evidence of advertising's debasing impact on broadcasting.<sup>112</sup> Trade journals specializing in different segments of the mass media—*Broadcasting*, *Billboard* (music), *Advertising Age*, and *Variety* (film and television production)—thoroughly reported the investigations.<sup>113</sup> Significantly, the trade press kept monitoring the legislative and administrative outcomes of the scandals even after the interest of the popular press had shifted to other stories.

Together, the government investigations and mass media reports tutored the nation about behind-the-scenes practices in radio and especially television.<sup>114</sup> One major lesson the public learned was that sponsors influenced content in ways not readily apparent to viewers and listeners. Indeed, "sponsorship" no longer just indicated that a company underwrote a program or placed spot ads around it; sponsors now included any party maneuvering to influence broadcast content to promote goods or services. This expanded conception of sponsorship raised questions about the reach of Section 317 and the FCC's vigor in enforcing it.

### B. Covert Sponsorship Commonplace in 1950s' Radio and TV

Payola in music programming first piqued investigators' interest in hidden sponsorship, but the focus of the inquiries quickly broadened to embrace hidden promotions in other types of shows.<sup>115</sup>

#### 1. Payola in Music Programming

In one form or another, payola had influenced the music industry since sheet music sales became a profitable business in the 1800s.<sup>116</sup> The practice spread to radio by the 1930s, when some bands took payments to

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1959, at 81; *More Charges on Radio and TV: "Payola" . . . Rigged "Interviews" . . . Fraud . . . Deceit . . . "Freebies,"* U.S. NEWS AND WORLD RPT., Dec. 28, 1959, at 40.

112. E.g., Paul Ackerman, *Payola: Sing a Song for Sixpence*, NATION, Dec. 5, 1959, at 414; Frank R. Pierson, *Gabble, Gabble, Gabble*, NEW REPUBLIC, Feb. 9, 1959, at 30.

113. See almost any issue of these journals from late 1959 through mid-1960 for reports on the unfolding scandals. We rely heavily on *Broadcasting* because of its close attention to the legal implications of the scandals; also, *Broadcasting* followed the issue of sponsorship identification through the lawmaking and rulemaking phases.

114. *What Public Really Thinks of TV*, BROADCASTING, Dec. 21, 1959, at 19.

115. The House Legislative Oversight Subcommittee ended its first round of investigations into quiz shows on November 6, 1959, with the announcement that it would turn its sights on other forms of deception in broadcasting, reportedly payola. *Television Quiz Show Hearings*, *supra* note 103, at 1148-49 (remarks of Committee Chairman Oren Harris). See also CBS, *NBC Cite Quiz Housecleaning*, BROADCASTING, Nov. 9, 1959, at 33; *A Bill of Particulars on Payola*, BROADCASTING, Dec. 21, 1959, at 48.

116. The best overview of payola's history is SEGRAVE, *supra* note 110, at 100-58.

promote particular songs on their radio shows.<sup>117</sup> But payola mushroomed in the 1950s with changes in radio and the music industry. Competition from network television forced radio to reinvent itself, and stations increasingly featured recorded music played by deejays.<sup>118</sup> This, coupled with the growing popularity of rock 'n' roll and the appearance of independent labels challenging the established record houses, fostered a promotional culture in which songs, records, and performers vied with one another to maximize their exposure on radio.<sup>119</sup> Payola afflicted all stages of the music industry, from composers angling to land recording contracts to record promoters bribing deejays for more airtime.<sup>120</sup>

In its most mundane and pervasive form, payola involved a promoter from a record company, a band, or a performance hall inducing someone at a radio station—typically the deejay but sometimes the record librarian or program manager—to play particular music.<sup>121</sup> Besides playing music, deejays worked plugs for upcoming concerts and new records into their on-air patter, a payola variation known as plugola.<sup>122</sup> Witnesses at congressional hearings recounted colorful stories about payments to station personnel. Most were paid in cash—“dead presidents,” in promoters’ jargon—ranging from several dollars to hundreds of dollars per song; some deejays reaped several thousand dollars a year, more than doubling their salaries.<sup>123</sup> Others received lavish gifts, in the form of holiday presents.<sup>124</sup> Record companies dispensed payola wholesale at the 1959 International Radio Programming Seminar and Disc Jockey Convention in Miami Beach.<sup>125</sup>

When music promotion virtuoso Dick Clark appeared before the House committee, lawmakers learned how payola could be formalized in the interlocking business relations of the music and broadcast industries.<sup>126</sup>

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117. *Id.* at 30-54.

118. See PETER FORNATALE & JOSHUA E. MILLS, *RADIO IN THE TELEVISION AGE* 1-92 (1980).

119. *Id.* at 76-99; Diekhans, *supra* note 105, at 6-7.

120. SEGRAVE, *supra* note 110, at 76-99; Diekhans, *supra* note 105, at 12-63.

121. This was the main theme of February 1960 testimony before the House Subcommittee on Legislative Oversight. See *Licensees and Station Personnel Hearings*, *supra* note 109 (testimony of radio deejays and station managers).

122. *Id.* at 95-107 (testimony of Lester Lanin, orchestra leader).

123. *Id.* at 72-75, 80-91, 121-99 (testimony of disc jockeys David Maynard, Joseph Finan, and Wesley Hopkins); see also SEGRAVE, *supra* note 110, at 76-119.

124. *E.g.*, *Licensees and Station Personnel Hearings*, *supra* note 109, at 91-93 (testimony of Alan Dary, disc jockey).

125. *Harris Drums Up Payola Parade: And a Surprised Westinghouse Finds Itself Leading the March*, BROADCASTING, Feb. 15, 1960, at 52, 54.

126. Clark’s appearance at the hearings was widely anticipated and carefully crafted.

The public knew Dick Clark from radio shows and especially from *American Bandstand* carried on ABC-TV.<sup>127</sup> Before the well-publicized hearings, few among the public knew about his involvement in all phases of the music business. Before the payola scandal broke, Dick Clark supposedly had connections with “six small music publishing houses, seven small recording companies, two distributing companies, one record pressing company, two production companies and one talent agency.”<sup>128</sup> Statisticians dueled over evidence purporting to show that the frequency of play or appearance on *American Bandstand* was significantly related to whether Clark had an investment in an artist or song.<sup>129</sup> This evidence “establishes that Mr. Clark pushed songs in which he had an interest,” committee investigators concluded.<sup>130</sup> Clark was hardly alone in cross-promoting the music of one unit through the media of a corporate cousin. Each of the three big networks had related record labels.<sup>131</sup>

Echoing the sentiments of the radio and music industries, Clark expressed surprise about the uproar over payola and denied that he had violated broadcast regulations.<sup>132</sup> Clark did not take money from outside firms to promote songs and groups on the air; he just benefited because his investments soared when music featured on his shows became more popular.<sup>133</sup> Despite deejays’ objections that money did not influence their music selection decisions, radio stations and networks rushed to clean house. Some required station personnel to sign affidavits about their activities, and others fired deejays.<sup>134</sup> ABC forced Clark to divest his

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Committee staff saved his testimony for the end to build interest in its inquiry. Also, the committee allowed Clark to give some of his testimony in closed session. See Diekhans, *supra* note 105, at 27-35.

127. See JOHN A. JACKSON, *AMERICAN BANDSTAND: DICK CLARK AND THE MAKING OF A ROCK ‘N’ ROLL EMPIRE* 1-206 (1997).

128. Diekhans, *supra* note 105, at 28. For a chart of Dick Clark’s music-related business interests prepared by the House committee, see *Licensees and Station Personnel Hearings, Pt. 2*, *supra* note 109, at page facing 1250.

129. *Licensees and Station Personnel Hearings, Pt. 2*, *supra* note 109, at 945-69 (testimony of Bernard Goldstein, statistician retained by Dick Clark), 997-1005 (testimony of Joseph H. Daly, government statistician), 1005-1007 (testimony of Morton Raff, government statistician), 1007-20 (testimony of Joseph L. Tryon, statistician). See also *The Clark-Harris Payola Hop: Hearing Rocks ‘n’ Rolls to Melody of the ‘All-American Boy,’ BROADCASTING*, May 2, 1960, at 58.

130. *Licensees and Station Personnel Hearings, Pt. 2*, *supra* note 109, at 1456 (testimony of Raymond Martin and Rex Sparger, committee staff members).

131. Diekhans, *supra* note 105, at 60.

132. *Licensees and Station Personnel Hearings, Pt. 2*, *supra* note 109, at 1168-1350 (testimony of Dick Clark).

133. JACKSON, *supra* note 127, at 177-90.

134. *Casualty List*, *BROADCASTING*, Nov. 30, 1959, at 30; *Hits Payola Oath*, *BROADCASTING*, Dec. 28, 1959, at 9.

holdings in music enterprises.<sup>135</sup> Station managers reined in deejays by imposing more centralized control over programming, which led, according to some observers, to the rise of formula play lists such as Top 40 formats.<sup>136</sup> The NAB's Standards of Good Radio Practice Committee strengthened its code language on payola.<sup>137</sup>

The FCC's own inquiry revealed that almost all radio stations accepted free records from manufacturers or distributors.<sup>138</sup> In many instances, the Commission found that stations received multiple copies of a recording, which clearly constituted a kind of payment or consideration to promote a song.<sup>139</sup> Furthermore, stations or their personnel often promoted outside activities, especially record hops, on the air without acknowledging the benefits that accrued to the licensee. "[S]uch 'record hops' frequently feature the distribution of records (obtained free or at a substantial reduction in price by the station or its employees) as door prizes. . . ."<sup>140</sup>

## 2. Props and Hidden Commercials in TV

The wide-ranging investigations of 1959 and 1960 revealed that covert promotions had spread far beyond music programs into all phases of broadcasting. Covert promotions other than music payola thrived more on television than on radio and came to light partly as a byproduct of the quiz show investigations. For instance, House investigators examining fixed outcomes on *The \$64,000 Question* discovered that a department store had paid the producer \$10,000 to have an employee appear as a contestant to mention the store on air.<sup>141</sup> The FCC and Congress learned that stations bartered broadcast exposure of a place, product, service, or event in return for transportation, accommodations, or expenses incurred in producing shows on location.<sup>142</sup> The Commission stated:

In such instances, the public may reasonably believe that the licensee considered the place, event, etc., to be of sufficient news or entertainment value so as to justify extraordinary expenditures in order to provide broadcast coverage when, in fact, consideration offered by a

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135. *Dick Clark Gives Up Holdings*, BROADCASTING, Nov. 23, 1959, at 96.

136. *Still Another Week of Trouble*, BROADCASTING, Nov. 30, 1959, at 30-31; Diekhans, *supra* note 105 at 57.

137. *NAB Takes Three Steps Forward*, BROADCASTING, Dec. 21, 1959, at 54-55.

138. *Sponsorship Identification Public Notice*, *supra* note 108, at 70.

139. *Id.*

140. *Id.* at 71.

141. *Television Quiz Show Hearings, Pt. 2*, *supra* note 103, at 927-37 (testimony of Kenneth Hoffer, game show contestant), 937-48 (testimony of David Gottlieb, department store public relations agent), 948-78 (testimony of Max Hess, department store owner); *A Sad End to the Quiz Era*, BROADCASTING, Nov. 9, 1959, at 39, 53-54.

142. *Sponsorship Identification Public Notice*, *supra* note 108 at 73-74.



party . . . was responsible, to a degree, for the decision to broadcast the particular program material.<sup>143</sup>

The Commission rejected the argument that these were “normal business practices,” much like a press junket for the print media.<sup>144</sup>

The Commission also delineated the types of plugs and “sneaky commercials”<sup>145</sup> that violated sponsorship identification rules. Most of the examples involved incorporating displays of brand-name products into various types of shows, including newscasts. This practice is known today as “product placement.” Most of the examples involve product placement, where brand-name products are incorporated into various types of shows, including newscasts. For instance, news shows might receive free use of typewriters in return for televised close-ups of the equipment.<sup>146</sup> Giveaway or game shows thrived by displaying and awarding brand-name products; sometimes the show received promotional fees or goods beyond the prizes (e.g., extra refrigerators) in return for publicizing such products.<sup>147</sup> The FCC determined that teaser announcements—a series of brief, cryptic ads that aroused audience curiosity—often required sponsorship announcements even though that contradicted the tactic.<sup>148</sup> Also, “playing a song from a current motion picture, when such is inspired by an express or implied agreement with a local theater,” contravened the rules.<sup>149</sup> In short, when a station airs content “because of some financial benefit accruing thereby to the licensee, its employees or independent contractors, the listening and viewing public is entitled to the knowledge that such is the case in order that it may view such a commercial presentation in its true context,” the Commission reminded licensees.<sup>150</sup>

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143. *Id.* at 73.

144. *Id.*

145. *Id.* at 74

146. *Id.*

147. *Id.* at 74-75. CBS anticipated the FCC’s crackdown on these practices and tightened its own rules:

[S]o-called free plugs are out, except where “reasonably necessary and natural” for the program. On shows that CBS-TV itself produces or over which it has production-control rights, any prizes given away will be purchased and paid for as part of the programs’ production costs. They will not be accepted in return for on-air credit.

From *CBS More Commandments*, BROADCASTING, Dec. 7, 1959, at 46.

148. *Sponsorship Identification Public Notice*, *supra* note 108, at 75.

149. *Id.*

150. *Id.* at 74.

C. *The FCC's Tardy Attention to the Problem*

Because many of these practices seemingly violated Section 317 of the Communications Act and the 1944 regulations, lawmakers and industry critics repeatedly questioned the FCC's failure to act.<sup>151</sup> By most accounts, payola was hardly an industry secret.<sup>152</sup> The FCC's regulatory torpor in dealing with covert promotions stemmed partly from the agency's institutional culture and partly from rapid changes in broadcast production.

First, the Commission was dominated by Eisenhower appointees disinclined to regulate broadcast content, an ideological bent reinforced by personal and political ties to broadcasters.<sup>153</sup> Not until the Reagan-era deregulation did the FCC pursue an equally laissez-faire approach to broadcast content. A year before the quiz show and payola scandals erupted, a congressional investigation of the major federal regulatory commissions found that the FCC was perhaps the worst in countenancing cozy relations with the industry it supervised.<sup>154</sup> Commissioners routinely accepted gifts (e.g., Thanksgiving turkeys and color television sets) as well as expensive entertainment from stations they licensed.<sup>155</sup> Among the worst offenders was FCC Chairman John C. Doerfer, reprimanded in 1958 by the House Legislative Oversight Subcommittee for accepting favors from Storer Broadcasting when it had business before the Commission.<sup>156</sup> The next year, in the midst of the quiz show and payola hearings, Congress learned that Doerfer had not honored his earlier pledges to lawmakers and,

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151. For instance, the Attorney General declared that the Commission's existing rules applied to the more egregious types of payola and plugola. Deceptive Practices in Broadcasting, *supra* note 107, at 63. See also *Where, May We Ask, Was the FCC?*, CONSUMER RPTS., Jan. 1960, at 9; Shields ReMine, *Payola*, AM. MERCURY, Mar. 1960, at 30.

152. *Television Quiz Show Hearings, Pt. 2*, *supra* note 103, at 1142-44 (appending published accounts from the mid-1950s discussing payola); SEGRAVE, *supra* note 110, at 76-99 (discussing pervasiveness of payola in 1950s and official knowledge of it, including IRS investigations).

153. Lawrence W. Lichty, *Members of the Federal Radio Commission and Federal Communications Commission, 1927-1961*, 6 J. BROADCASTING 23, 25-26 (1962); Lawrence W. Lichty, *The Impact of FRC and FCC Commissioners' Background on the Regulation of Broadcasting*, 6 J. BROADCASTING 97, 105-06 (1962) (finding that a majority of the commissioners serving from 1953 to 1960 believed in minimal FCC scrutiny of broadcast programming practices).

154. See BERNARD SCHWARTZ, *THE PROFESSOR AND THE COMMISSIONS 75-77* (1959) (describing problems at the FCC as the reason why the House Subcommittee on Legislative Oversight picked it as the first of six regulatory agencies to examine; the author was chief counsel to the subcommittee).

155. JAMES L. BAUGHMAN, *TELEVISION'S GUARDIANS: THE FCC AND THE POLITICS OF PROGRAMMING, 1958-1967*, at 13-15 (1985).

156. SCHWARTZ, *supra* note 154, at 91-95.

in fact, had lied about the number of ex parte contacts with Storer.<sup>157</sup> Doerfer resigned in March 1960.<sup>158</sup> President Eisenhower elevated Commissioner Frederick Ford to the chairmanship; he had worked as an FCC lawyer and disagreed with the former chairman on a number of fundamental issues.<sup>159</sup> During Ford's tenure, the Commission took some of the first steps to enforce the disclosure of covert promotions.

Second, had the FCC been inclined to apply the sponsorship identification rules, it would have found that changes in the program-production industry made the discovery of covert promotions more difficult. The old model of television production, with advertisers controlling sponsored shows, began giving way in the mid-1950s to a more diffuse—and harder to control—production process. In this new environment, the film studios, television production firms, and syndicators assumed much of the responsibility for programs that stations aired.<sup>160</sup> Belatedly recognizing that covert promotions could be inserted into programming at any step in the process, the FCC stated, "It has come to the Commission's attention that intentional, indirect references have been made to certain products in syndicated 'interview' and other types of programs. For securing the broadcast of such 'plugs', the producer, program packager or 'public relations' organization receives a fee from the particular sponsor involved."<sup>161</sup> These arrangements deceived the public as well as stations that often unwittingly aired the plugs.

## V. THE INTERPLAY OF CONGRESS, INDUSTRY, AND THE FCC IN REVISING THE RULES

Although deception on quiz shows had attracted the greatest public attention and precipitated the 1959-60 investigations, payola and other forms of hidden commercials constituted the more fundamental and widespread form of deception. Congress found it relatively straightforward to deal with rigging quiz shows in the 1960 Communications Act amendments, as the practice was crude and susceptible to clear-cut legal

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157. BAUGHMAN, *supra* note 155, at 45; *Doerfer Admits Storer 'Lift,'* BROADCASTING, Mar. 7, 1960, at 9.

158. *Doerfer Out, Ford In, Seat Open,* BROADCASTING, Mar. 14, 1960, at 31.

159. The industry's trade journal gave this thumbnail sketch of Chairman Ford: "A career government servant . . . a Republican who rose to a top FCC staff job under a Democratic administration . . . an FCC lawyer . . . a protégé of Attorney General William P. Rogers . . . a commissioner who is 180 degrees apart from the regulatory views of departing FCC Chairman John C. Doerfer. . . ." *Ford: Soft-Spoken but Firm,* BROADCASTING, Mar. 14, 1960, at 34.

160. *See, e.g.,* William Boddy, *Fifties Television: The Industry and Its Critics* 132-54 (1990).

161. *Sponsorship Identification Public Notice,* *supra* note 108, at 74.

remedies.<sup>162</sup> But updating the sponsorship identification rules meant adapting them to an industry that had discovered how to turn nearly every broadcast element into a promotional opportunity.

The 1960 amendments<sup>163</sup> relating to sponsorship identification started with the one-sentence section that had remained materially unchanged since 1927 and expanded it into two multipart sections.<sup>164</sup> The new law simultaneously broadened and narrowed the FCC's authority to require sponsorship announcements. In one of two significant changes, Congress barred the FCC from requiring disclosure for broadcasters' routine use of free records or props. Second, Congress extended the legal obligation to disclose covert promotions beyond the broadcast licensees to parties involved in production. Other changes were less consequential. Congress clarified applicability of Section 317 to programs about public affairs and controversial issues. Finally, the 1960 amendments gave the FCC discretion to develop or suspend rules.

#### A. *No Disclosure for Routine Use of Props and Free Records*

One significant change in Section 317 exempted stations from disclosure announcements for their routine use of free records, props, and services supplied by outside interests.<sup>165</sup> This provision arose out of an unusual sequence of events in the interplay of lawmaking and rulemaking.

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162. See Amendments to the Communications Act of 1934, Pub. L. No. 86-752, sec. 9, § 509, 74 Stat. 889, 897 (1960) (codified as amended at 47 U.S.C. 509 (2000)) (making it unlawful to rig or influence the outcome of broadcast contests of knowledge or intellectual skill).

163. The 1960 Amendments made a number of changes apart from those in the sponsorship identification requirement. Most important, though, Congress did not enact the most far-reaching proposals in the original bills (e.g., empowering the FCC to license the networks). The following discussion of the 1960 Amendments focuses on developments related to sponsorship identification, but it should be noted that large parts of the legislative deliberations dealt with other sections of the Act. See BAUGHMAN, *supra* note 155, at 47-48.

164. The two are Section 317, *Announcement with Respect to Certain Matter Broadcast*, and Section 508, *Disclosure of Certain Payments*. Amendments to the Communications Act of 1934, § 317, and § 508 (codified as amended at 47 U.S.C. 509 (2000)).

165. The amended Section 317 opened with the same language adopted in the 1927 Radio Act and retained in the 1934 Communications Act. Then it added a new sentence:

*Provided*, That "service or other valuable consideration' shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

Amendments to the Communications Act of 1934, Pub. L. No. 86-752, sec. 8, § 317(a)(1), 74 Stat. 889, 895 (1960) (codified at 47 U.S.C. § 317(a)(1) (2000)).

Its application to practices in the complex world of broadcast production required regulators to make fine distinctions.

While Congress was considering rewriting Section 317, the FCC announced how it planned to step up enforcement of the existing statute. On March 16, 1960, the Commission shocked licensees with the announcement that it now considered free records, free props, and other free matter commonly supplied for programming to trigger the Section 317 disclosure requirement.<sup>166</sup> The radio and television industry complained that this interpretation contravened well-established industry practices, and it would clutter music broadcasts with interruptions announcing who provided each recording and television shows with annoying disclosure “crawls” (text indicating the source of material used in a production).<sup>167</sup> Objecting to the FCC’s surprising action, the NAB, joined by the networks and the Federal Communications Bar Association, petitioned the Commission to accept comments, which it agreed to do.<sup>168</sup>

The FCC had issued its March 16 interpretations before the House Commerce Committee, the key player in rewriting Section 317, held its last hearings.<sup>169</sup> The broadcast industry therefore turned to Congress for relief. The Committee consulted with attorneys from the NAB and the three networks in drafting language that narrowed the scope of what needed to be disclosed, effectively overruling the FCC’s new interpretation.<sup>170</sup> The Committee explained that it aimed at “avoiding some of the hardships which have resulted from the Commission’s interpretation of the present language of [S]ection 317.”<sup>171</sup> Broadcasters convinced lawmakers that the disclosure requirement enacted in 1927 had never previously “been so interpreted by the Commission.”<sup>172</sup>

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166. *Sponsorship Identification Public Notice*, *supra* note 108; *see also New Blow at Plugs and Freebies*, BROADCASTING, Mar. 21, 1960, at 55.

167. *Bitter Compliance to FCC Notice*, BROADCASTING, Mar. 28, 1960, at 58 (noting, among many other industry responses, calls for an emergency meeting of the executive committee of the Federal Communications Bar Association); *FCC Should Admit It Goofed*, BROADCASTING, Mar. 28, 1960, at 58 (editorializing against the FCC action); *Payola Proposal Draws Fire*, BROADCASTING, Mar. 28, 1960, at 66.

168. *Sponsorship Identification Public Notice*, *supra* note 108, at 79.

169. *House Hearings*, *supra* note 109.

170. For details about the collaboration between the House committee and broadcasters in rewriting Section 317, *see House Hearings*, *supra* note 109, at 157-63 (testimony of Vincent T. Wasilweski, NAB head of government relations); *A Sec. 317 That’s More Digestible*, BROADCASTING, May 30, 1960, at 46.

171. H. R. REP. NO. 86-1800, at 19 (1960).

172. *Id.*; *see also* VINCENT T. WASILEWSKI, PAYOLA AND GOVERNMENT CONTROLS (Freedom of Information Ctr. Publication No. 30, 1960) (remarks made during 51st Annual Journalism Week at University of Missouri School of Journalism).

By this point, the FCC appeared willing to relent.<sup>173</sup> It had been hammered in the trade press<sup>174</sup> and had received 500 official comments in the proceeding, reportedly one of the largest outpourings ever elicited by a Commission notice.<sup>175</sup> *Broadcasting* editorialized that if the FCC adhered to its March 16 interpretation, then the postal law that inspired Section 317 should be applied to every press release supplied free to newspapers and magazines.<sup>176</sup> Most embarrassing, perhaps, the five commissioners who appeared at the annual NAB convention in April gave four competing interpretations of their month-old notice.<sup>177</sup>

Congress repudiated the FCC's strict interpretation of Section 317 by adding a provision that expressly protected the industry's use of free records and props. How, then, was the FCC to distinguish between free records or props not subject to disclosure and the more "extreme types of 'payola' situations" that, according to the House Commerce Committee, still fell within the scope of Section 317?<sup>178</sup> Congress gave regulators two criteria. First, the matter (a product, property, or service) had to be furnished to the broadcaster "without charge or at a nominal charge" to escape disclosure.<sup>179</sup> Second, the matter could be identified in the programming but only to the extent to "which [it] is reasonably related to the use of such service or property on the broadcast."<sup>180</sup> In such cases, the promotional value to the supplier was incidental and the audience did not need to be informed. But when matter supplied for on-air use was identified in the program beyond the extent needed for the broadcast, the audience deserved to be so informed through an announcement.

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173. By mid-April 1960, the FCC had begun moving toward the industry's position that its reinterpretation of Section 317 may have gone too far. *See House Hearings, supra* note 109, at 26-36 (testimony of FCC Chairman Frederick W. Ford); *FCC, Oren Agree on Plugola 'Rule,' BROADCASTING*, Apr. 18, 1960, at 66. By August, the FCC had embraced the changes in Section 317 that canceled its reinterpretation. *Senate Hearings, supra* note 109, at 30-32 (testimony of FCC Chairman Ford).

174. For a flavor of the industry response, *see, e.g., Sec. 317 Comment: FCC is Told it has 'Gone Too Far This Time,' BROADCASTING*, May 2, 1960, at 64; *Sponsor Rule Under Wide Attack, BROADCASTING*, Apr. 4, 1960, at 86; *Sponsor Rule Views Sought, BROADCASTING*, Apr. 4, 1960, at 9.

175. *Sec. 317 Flood: FCC Inundated as 500 Stations Comment, BROADCASTING*, May 9, 1960, at 64.

176. *Newspapers Please Copy, BROADCASTING*, Apr. 18, 1960, at 120. *See also Is There Newspaper Payola?, BROADCASTING*, May 2, 1960, at 48.

177. *Confusion on 'Plugola' Notice, BROADCASTING*, Apr. 11, 1960, at 52; *It Was A Bewildering Convention, BROADCASTING*, Apr. 11, 1960, at 46.

178. H. R. REP. NO. 86-1800, at 19 (1960).

179. Amendments to the Communications Act of 1934, Pub. L. No. 86-752, sec. 8, § 317(a)(1), 74 Stat. 889, 895 (codified at 47 U.S.C. § 317(a)(1) (2000)).

180. *Id.*

Recognizing that the new law required regulators to make rather fine distinctions, the House Commerce Committee illustrated “the intended effect of this proviso” by supplying in its report twenty-seven examples.<sup>181</sup> Broadcast industry representatives crafted this list of examples working with FCC staff and the House committee. FCC Chairman Ford urged Congress to incorporate it in the legislative history of the Section 317 amendments to provide indisputable evidence of lawmakers’ intent.<sup>182</sup> The Senate Commerce Committee concurred that the House report’s “commentary and specific guidelines . . . are of considerable assistance in determining the meaning of this language.”<sup>183</sup> With this unmistakable legislative signal, the FCC regarded these examples as the touchstone for subsequent rulemaking on the subject.

When the FCC adopted its final sponsorship identification rules in May 1963, the Commission did not deviate from the guidance provided in the 1960 House Report.<sup>184</sup> The FCC retained the House’s twenty-seven “illustrative interpretations” and added nine of its own.<sup>185</sup> Of the nine it added, two slightly fleshed out examples from the House report and the remainder reiterated pre-1960 Commission decisions regarding sponsorship identification.<sup>186</sup> The FCC’s May 1963 interpretations still form the foundation of sponsorship identification rules forty years later.<sup>187</sup>

The key to applying the new provision in Section 317(a)(1) came from analyzing where a questionable situation fell along two dimensions—the amount of consideration involved, and the extent of on-air promotional identification. Where matter supplied for broadcast was high on both dimensions, disclosure was needed; where it was low on both, disclosure was not needed. Where it was high on one dimension and low on the other, close scrutiny would determine the outcome.

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181. H.R. Rep. No. 86-1800, at 20.

182. *Senate Hearings*, *supra* note 109, at 30-31 (testimony of FCC Chairman Ford), 32-33 (remarks of Committee Chairman John Pastore); *Future Guide to Sponsor Identification*, BROADCASTING, Aug. 15, 1960, at 80.

183. SEN. REP. NO. 86-1857, at 5 (1960).

184. Report & Order, 28 Fed. Reg. 4707 (May 9, 1963) (codified at 47 C.F.R. §§ 73.119, 73.289, 73.654, and 73.789) (promulgating the new sponsorship identification rules and providing background on their adoption); Applicability of Sponsorship Identification Rules, *Public Notice*, 40 F.C.C. 141 (1963) (listing the examples intended to help interpret the rules) [hereinafter *Applicability of Sponsorship Identification Rules*].

185. *Applicability of Sponsorship Identification Rules*, *supra* note 184, at 149-51 (examples 28-36).

186. *Id.* at 149 (examples 28 and 29).

187. *See* 47 C.F.R. § 73.1212(i) (2002) (advising readers to consult the 1963 interpretations along with subsequent statements).

## 1. Consideration

Because playing records on the air triggered the payola scandal, the House Commerce Committee singled it out for a separate discussion.<sup>188</sup> Additionally, the Committee noted that “the same principles apply to records as to other property or services furnished for use on or in connection with a broadcast.”<sup>189</sup> When record labels or distributors gave free records to a station or a disc jockey, “No announcement is required unless the supplier furnished more copies of a particular recording than are needed for broadcast purposes.”<sup>190</sup> This responded to concerns stations had raised during the hearings, and it rejected the FCC’s March 1960 interpretation. Multiple copies of the same recording given to a station, however, might well constitute consideration that warranted disclosure.<sup>191</sup> Announcements were needed when a store paid to have its name mentioned or an automobile dealer furnished “a new car, not for broadcast use, in return for broadcast mentions.”<sup>192</sup> As the congressional hearings revealed, quiz and giveaway shows presented many opportunities for plugola: “A perfume manufacturer gives five dozen bottles to the producer of a giveaway show, some of which are to be identified and awarded to winners on the show, the remainder to be retained by the producer.”<sup>193</sup> The bottles given the producer beyond those awarded as prizes constituted consideration, and an announcement was required.<sup>194</sup>

The consideration involved could be substantial and still not trigger disclosure as long as the on-air identification remained incidental. In an example offered by the House committee, “An airplane manufacturer furnishes free transportation to a cast on its new jet model to a remote site, and the arrival of the cast at the site is shown as part of the program.”<sup>195</sup> Even though the broadcast depicts the manufacturer’s name on the fuselage, “[n]o announcement is required because . . . such identification is reasonably related to the use of the service on the program.”<sup>196</sup>

The FCC extrapolated the logic behind this example by liberally construing the statutory language that services or property could be

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188. H.R. REP. NO. 86-1800, at 20 (1960). Unless otherwise noted, the language used in the House report is the same as that adopted by the FCC in the examples accompanying its final rules. See *Applicability of Sponsorship Identification Rules*, *supra* note 184.

189. H.R. REP. NO. 86-1800, at 20 n.3.

190. *Id.* at 20 (example 1).

191. *Id.*

192. *Id.* at 21 (example 8).

193. *Id.* (example 7).

194. *Id.*

195. *Id.* at 23 (example 24(a)).

196. *Id.*



furnished for use on, “*or in connection with*, a broadcast.”<sup>197</sup> In other words, a broadcaster or producer could derive value from off-air uses of the services or property. The FCC offered two illustrations beyond those found in the House report. These new examples grew from conferences Commission staff held with officials from the broadcast networks and the NAB; in fact, the broadcast interests themselves drafted the examples to insulate common industry practices from Section 317 disclosure.<sup>198</sup> In the first example, an automobile manufacturer or dealer gives cars to a television producer for use on programs and for business purposes in connection with production, such as transporting the cast, crew, or executives. As long as the on-air use of the cars was reasonably related to the show, no announcement was required.<sup>199</sup> Similarly, disclosure was not needed when a hotel provided room, board, electricity, and other services to the cast and crew of a show using its premises for a production.<sup>200</sup> On the other hand, if the producer had made personal use of the free cars or free hotel services, this constituted sufficient consideration to trigger Section 317.<sup>201</sup>

## 2. Identification

When a party supplied an item, service, or property to assist in the production of a show, no disclosure was necessary as long as any on-air identification was incidental. This included free books or theater tickets given to reviewers; props, even those clearly identifiable by make or brand; personnel from an organization who appeared as guests on a show; and the use of premises (e.g., a hotel) as the site from which a program would originate.<sup>202</sup>

In deciding what exceeded incidental identification, the House report suggested that regulators consider the type of programming and the conventions that governed it. At what point, for instance, did a deejay’s patter about a recording become plugola? The Committee provided this illustration: If it were in keeping with a program’s format and its disk jockey’s style to say, “Listen to this latest release of performer “X,” a new

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197. Amendments to Communications Act of 1934, Pub. L. No. 86-752, sec. 8, § 317(a)(1), 74 Stat. 889, 895 (codified at 47 U.S.C § 317(a)(1) (2000)) (emphasis added).

198. Amendment of Sections 3.119, 3.289, 3.654, and 3.789 of the Comm’n’s Rules, *Notice of Proposed Rule Making*, 40 F.C.C. 105 (1961) [hereinafter *Amendment of Comm’n’s Rules*.]

199. *Applicability of Sponsorship Identification Rules*, *supra* note 184, at 149 (example 28(a)).

200. *Id.* (example 29(a)).

201. *Id.* (examples 28(b) and 29(b)).

202. H.R. REP. NO. 86-1800, at 22 (1960) (examples 10, 14-16, 19).

singing sensation,” no announcement would be required unless there was some consideration beyond supplying a free recording.<sup>203</sup> In this case, “the identification by the disc jockey is reasonably related to the use of the record on that particular program.”<sup>204</sup>

Similar reasoning applied to television. For instance, if a refrigerator were furnished for use in a dramatic program, mentioning its brand name as part of the dialogue would not fit with the conventions of that genre.<sup>205</sup> On the other hand, a refrigerator furnished as a prize on a game show could appropriately note its brand name, “its cubic content and such other features as serve to indicate the magnitude of the prize. No announcement is required because such identification is reasonably related to the use of the refrigerator on a giveaway show. . . .”<sup>206</sup> But if the show’s host went further, urging the audience to purchase the appliance, the pitch became plugola, warranting disclosure.<sup>207</sup>

The extent to which a product or service was visually identified on television also figured in applying the rules. If a bus company supplied a travel film to a television station, and it fleetingly depicted one of its vehicles in highway scenes, no announcement was required.<sup>208</sup> But if the bus “is shown to an extent disproportionate to the subject matter of the film,” the public should know it was aired for promotional consideration.<sup>209</sup> Similarly, if a manufacturer supplied a piano for a concert and affixed an enlarged insignia of its brand name, an announcement is required if the insignia is televised.<sup>210</sup> But televising a normal insignia during occasional close-ups of the pianist’s hand would not warrant an announcement because “the identification of the brand name is reasonably related to the use of the piano” on the show.<sup>211</sup>

### B. *Disclosure in the Chain of Production*

The original disclosure law addressed situations in which stations collaborated with sponsors to insinuate covert promotions into broadcasts. Presumably, the sponsor benefited by manipulating the audience, and the station received some form of payment. During the 1959-60 hearings, however, station managers repeatedly claimed they did not always know

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203. *Id.* at 21 (example 4).

204. *Id.*

205. *Id.* at 23 (example 22).

206. *Id.* at 23 (example 23(a)).

207. *Id.* at 23 (example 23(b)).

208. *Id.* at 24 (example 26(b)).

209. *Id.* at 24 (example 26 (b)-(c)).

210. *Id.* at 24 (example 27(a)).

211. *Id.* at 24 (example 27(b)).

when their employees accepted consideration in return for on-air promotions. Broadcasters also tried to deflect responsibility by emphasizing how production companies beyond the supervision of station licensees created much of their program content.

The 1960 amendments addressed these situations. The expanded Section 317 required each licensee to “exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program . . . , information to enable such licensee to make the announcement required by this section.”<sup>212</sup> To assist stations in exercising “reasonable diligence,” Congress added an entirely new section to the Communications Act that imposed the disclosure requirement on anyone involved in placing plugs in broadcast programs. Violators were subject to criminal penalties—a maximum \$10,000 fine and a one-year jail term.<sup>213</sup> Section 508 encompassed the whole chain of program production and distribution; any party who paid to insert, or accepted payment to insert, covert promotions had an obligation to report this arrangement to the next party in the chain and ultimately to the broadcasters so they could air an announcement.<sup>214</sup> The provision expressly covered employees as well; they had to “disclose the fact of such acceptance or payment or agreement to” their employers.<sup>215</sup>

Lawmakers recognized that extending regulators’ scrutiny to “intricate inter-relationships involving parties” previously outside the scope of Section 317 presented a number of challenges for the industry and the FCC.<sup>216</sup> With the encouragement of the chairman of the Senate Communications Subcommittee, the FCC conferred with production company representatives.<sup>217</sup> The first meeting, held in Washington between

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212. Amendments to the Communications Act of 1934, Pub. L. No. 86-752, sec. 8, § 317(c), 74 Stat. 889, 896 (1960) (codified as amended at 47 U.S.C. § 317 (2000)).

213. *Id.* § 508 (codified as amended at 47 U.S.C. § 508 (2000)).

214. *Id.* The new law linked Sections 317 and 508:

In any case where a report has been made to a radio station, as required by section 508 of this Act, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

*Id.* § 317(b).

215. *Id.* § 508(a)-(b).

216. Petition for Relief Under Section 317(d) of the Communications Act filed by the Alliance of Television Film Producers, Inc., *Report and Order*, 40 F.C.C. 95, para. 4 (1960) [hereinafter *Alliance of Television Film Producers*].

217. During the floor debate, California Senator Clair Engle relayed concerns expressed by his state’s TV production industry about the reach of the new §§ 317 and 508. Communications Subcommittee Chairman John Pastore assured him that the FCC would meet with producers’ representatives to devise rules that protected reasonable arrangements

FCC staff and the Alliance of Television Film Producers, the Motion Picture Association, and individual production firms, underscored industry concerns about complying with the new law.<sup>218</sup> For instance, “networks and stations are today in a position of being able to demand ‘disclosure’ affidavits from film producers before accepting their product for broadcast,” but the industry needed FCC guidance in dealing with programs and movies already completed.<sup>219</sup> Another uncertainty was whether disclosure would apply to motion pictures filmed for theatrical release that could end up on television years later.<sup>220</sup> Industry representatives also sought assurance that “established, above-board arrangements in the film industry for securing props” would not trigger Section 317.<sup>221</sup> In a November 1960 order, the FCC waived any of its Section 317 interpretations that were inconsistent with the Committee’s report until it developed final rules.<sup>222</sup>

The FCC gleaned even more insights about the pervasiveness of television plugs, and the deals behind them, when it held hearings in Los Angeles as part of a long-running investigation into network programming practices and the power of sponsors.<sup>223</sup> Television production firms, many of them units of film studios, appeared at the hearing. Fleet deals in which an auto manufacturer supplied cars—fifty to sixty Chryslers at 20th Century Fox, for instance—were not unusual.<sup>224</sup> But most of the witnesses from major production firms testified that they limited the use of plugs, partly through monitoring scripts and viewing unedited footage.<sup>225</sup> Plugs could complicate the marketing of shows. Potential sponsors (e.g., Ford) would not want to purchase ads when the surrounding program incorporated plugs for a competing manufacturer (e.g., Chrysler). Producers were especially mindful of this potential conflict as shows increasingly enjoyed second lives as reruns.<sup>226</sup> Unlike the major studios,

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for the use of free materials as props. 106 CONG. REC. 17,624-25 (Aug. 28, 1960). See *Senate Okays Revised Payola Bill*, BROADCASTING, Aug. 29, 1960, at 60.

218. *Does New Law Apply to Film Makers?*, BROADCASTING, Sept. 26, 1960, at 68.

219. *Alliance of Television Film Producers*, *supra* note 216, para. 6.

220. *Id.*

221. *Id.*

222. *Id.*, para. 13.

223. See *Who Controls What in TV Films*, BROADCASTING, Oct. 17, 1960, at 29.

224. *Id.* at 32 (remarks of Peter B. Levathes, president of 20th Century-Fox Television).

225. *Id.* (remarks of William Dozier, vice president in charge of West Coast operations for Screen Gems, a Columbia Pictures subsidiary).

226. *L.A. Hearing Ends with Balky Witnesses*, BROADCASTING, Oct. 31, 1960, at 77-78 (remarks of Adolphe Wenland, public relations agent who placed plugs).

however, independent producers working with small budgets sought the services of agents who could save on prop costs by getting items for free.<sup>227</sup>

Agents specializing in arranging plugs, including one working for Promotions Unlimited, provided the most detailed and colorful testimony. The agents explained that they maintained good relations with writers, directors, and producers to plant plugs for their clients, mostly product manufacturers.<sup>228</sup> Plugs usually took the form of products given away or displayed on audience-participation programs, but gag writers could also be induced to mention products in comedy skits.<sup>229</sup> *Broadcasting* reported that “the person on the program staff responsible for putting the plug into the show would be given a thank-you gift, such as a gift certificate, case of whiskey, or sometimes the client’s product.”<sup>230</sup> Consideration rarely took the form of cash, according to witnesses; when it did, payments averaged \$100 and never exceeded \$600. Some giveaway shows became highly dependent on plugs.<sup>231</sup> When the game show and payola scandals broke, CBS adopted a policy of buying items to give away rather than getting them free from manufacturers. But the network returned to the old practice of trading publicity for products when it realized the costs involved. For instance, CBS spent \$100,000 a year to buy prizes for one program, Art Linkletter’s daily *House Party*.<sup>232</sup>

The FCC signaled the television production industry that it would not use the authority conferred by Section 508 in a draconian fashion.<sup>233</sup> When the Commission issued its proposed rules implementing Sections 317 and 508, it largely followed the guidance provided by the House report and accommodated the established practices of the production industry. Most importantly, producers, as with broadcasters, did not have to bother reporting or disclosing the routine use of props.<sup>234</sup>

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227. *Id.*

228. *FCC Hears About Free Plugs in L.A. Hearing*, BROADCASTING, Mar. 20, 1961, at 79 (remarks of Dick Fishell of Dick Fishell & Associates, and Mary Rothschild of Promotions Unlimited).

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Section 508(f), applying to program producers, was nearly identical to the Section 317 provision, applying to broadcasters, which exempted the routine use of props and other free material from the disclosure requirement. Disclosure was required only where the consideration received was more than nominal and the identification of the product or service was more than incidental or exceeded an “identification which is reasonably related to the use of such service or property in such broadcast or such program.” Amendments to the Communications Act of 1934, Pub. L. No. 86-752, sec. 8, §§ 317(a)(1), 508(f), 74 Stat. 889, 895-97 (1961) (codified as amended at scattered sections of 47 U.S.C. (2000)).

234. *Id.*

The only major point of contention involving program producers that remained was deciding how to treat theatrical films that might end up on television. The House report was silent on this matter. The proposed rules issued in April 1961 started with the presumption that all new films were “produced with the intent that they would at some time be broadcast by television stations.”<sup>235</sup> In other words, they should be treated the same as programs expressly produced for broadcast and thus subject to Sections 317 and 508. Motion picture producers objected, insisting that Congress never intended the disclosure law to reach this far. The movie studios argued that films appeared on television years after their theatrical openings, and it was “inherently improbable that consideration would be paid for a highly conjectural television exposure which would take place at a time when the product or model involved might be obsolete or no longer on the market.”<sup>236</sup> The FCC relented, granting a waiver from Section 317(b) for “feature motion picture films produced initially and primarily for theatre exhibition.”<sup>237</sup>

### C. *Disclosure for Political and Public Affairs Programs*

The 1960 amendments elevated to statute the FCC’s rule imposing stringent disclosure requirements on public affairs broadcasts. Since 1944, FCC rules had treated public affairs and commercial programming differently for Section 317 purposes.<sup>238</sup> Congress wrote the FCC’s 1944 rule into Section 317:

Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films,

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235. *Amendment of Comm’n’s Rules*, *supra* 198, at 106. See also 1962 FCC ANN. REP. 54:

The most controversy is over a section which provides that feature films . . . would be presumed to have been produced for later TV showing. Its adoption would require TV stations which broadcast feature films to comply with the sponsorship identification requirements of [S]ection 317 with respect to any product or service publicized in the film, for which showing money, service, or other valuable consideration had been paid. *Id.*

236. Unnamed motion picture studio *quoted in Movie Producers Hit Anti-Payola Proposals*, BROADCASTING, June 26, 1961, at 88.

237. Announcement of Sponsored Programs, 28 Fed. Reg. 4707, 4717 (May 10, 1963). See also *id.* at 4709-13 (reviewing reasons for the FCC’s decision regarding films); *Sponsor Rules Amended*, BROADCASTING, May 13, 1963, at 50.

238. See *supra* text accompanying notes 42-93 for a discussion of the origins of the 1944 rules.

records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.<sup>239</sup>

Thus, while Congress barred the FCC from requiring disclosure for the routine use of records or props provided free for commercial broadcasts, the FCC retained the option to mandate disclosure for similar material in public affairs shows.<sup>240</sup> This modest change aroused little controversy because the broadcast industry had supported the rule since its adoption in 1944, according to the House report.<sup>241</sup>

In drafting rules to implement this provision, the FCC had to change little.<sup>242</sup> To provide guidance to licensees, the FCC furnished “illustrative interpretations” that abstracted the findings from earlier Section 317 decisions involving controversial issues.<sup>243</sup> The Commission reminded licensees that political broadcasts needed to identify the person or group behind the program, not simply label them “a political announcement,” and that news footage provided free to stations needed to identify the source when the topic involved a major public dispute (e.g., the Kohler series of decisions).<sup>244</sup>

An administrative ruling shortly after the 1960 amendments also made the FCC’s 1963 list of examples. The Commission had refused to waive the sponsorship announcement for short film clips from the national convention of a major religious group.<sup>245</sup> Broadcast stations had agreed to carry the sixty- and ninety-second excerpts for free, and the Churches of

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239. Amendments to the Communications Act of 1934, Pub. L. No. 86-752, sec. 8, § 317(a)(2), 74 Stat. 889, 895 (1961) (codified as amended at 47 U.S.C. § 317 (2000)).

240. H.R. Rep. No. 86-1800, at 24 (1960).

241. *Id.* at 24-25.

242. The only changes between 1944 and 1963 were slightly updated language that reflected the advent of television and a minor additional specification for recordkeeping in connection with groups that furnished material for public affairs broadcasts. *Compare* Announcement of Sponsored Programs, 9 Fed. Reg. 14,734, 14,734 (1944) *with* Announcement of Sponsored Programs, 28 Fed. Reg. 4707, 4715-16 (May 10, 1963).

243. Announcement of Sponsored Programs, 28 Fed. Reg. at 4714-15; *Applicability of Sponsorship Identification Rules*, *supra* note 184, at 144, 150 (example 33), 151 (example 35). For a discussion of the administrative decisions on which these examples were based, see *supra* text accompanying notes 80-93. *See also* Revella M. Bone, 40 F.C.C. 86 (1960) (finding that an anti-union address by a corporation needed the sponsor’s name and not just announcement as a political broadcast).

244. Announcement of Sponsored Programs, 28 Fed. Reg. at 4714-15.

245. Petition for Relief Under Section 317(d) of the Communications Act filed by the Brdcast. and Film Comm’n of the Nat’l Council of the Churches of Christ in the United States of America, *Opinion and Order*, 40 F.C.C. 102, 102-04 (1960) [hereinafter *Nat’l Council of the Churches of Christ*]. This became example 36 in *Applicability of Sponsorship Identification Rules*, *supra* note 184, at 151.

Christ wanted to avoid consuming some of its limited time for the sponsorship announcement.<sup>246</sup> The FCC denied the petition, explaining that the “proposed program matter may involve controversial issues of public importance” and thus was subject to the “more stringent identification announcement requirements.”<sup>247</sup>

Cold War fears about communist influences prompted the FCC in 1962 to remind licensees of their disclosure obligations in dealing with controversial issues. The FCC admonished stations to carry sponsorship identification announcements when broadcasting political material provided by foreign governments.<sup>248</sup> More generally, the notice emphasized that Section 508 obligated stations “to exercise reasonable diligence” in discovering the principals responsible for the controversial matter; announcing the identity of the agents who arranged the broadcast was not enough.<sup>249</sup> Another FCC notice informed stations of specific disclosure requirements for all programs broadcast on behalf of the Communist Party.<sup>250</sup>

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246. *Nat'l Council of the Churches of Christ*, *supra* note 245.

247. *Id.* at 103. The Commission also concluded that the National Counsel of the Churches of Christ did not demonstrate how it would be harmed by complying with Section 317. Sacrificing a few seconds for the sponsorship announcement did not constitute a hardship, the Commission observed, and it even offered a suggestion to resolve the problem: For television presentation, “no time whatever would be lost if Petitioner were to adopt the widespread practice of superimposing the required sponsorship identification over a portion of the film excerpt being broadcast.” *Id.* at 104.

248. The FCC noted “that certain foreign documentary films and other broadcast matter . . . containing political propaganda or controversial matter, sponsored and paid for by foreign governments and distributed by their agents in this country, have been broadcast by licensees without any indication to the public as to the foreign sponsorship involved.” FCC Warns About Brdcast. of Controversial Foreign Matter Without Indicating Foreign Sponsorship, *Public Notice*, 40 F.C.C. 136 (1962) [hereinafter *Brdcast. of Controversial Foreign Matter*]. See also *FCC Warns Broadcasters to Label ‘Alien’ Programs*, BROADCASTING, Aug. 6, 1962, at 62.

249. *Brdcast. of Controversial Foreign Matter*, *supra* note 248, at 136.

250. The Subversive Activities Control Act of 1950 required a specific disclosure announcement preceding any broadcast by an organization “found to be a Communist-action organization within the meaning of that Act.” Subversive Activities Control Act of 1950 Requires Communist Org. Sponsorship to be Identified, *Public Notice*, 40 F.C.C.129 (1962). The FCC notice informed licensees that the Communist Party of the United States had, in fact, been found to be a communist organization. Thus, any program broadcast on behalf of the Party had to be preceded with an announcement: “The following program is sponsored by the Communist Party of the United States, a Communist organization.” *Id.* Although this notice did not expressly mention Section 317 or Section 508, it was part of an FCC collection of materials dealing with Section 317. See generally 40 F.C.C. 1-232 (1946-1965).



#### D. *Latitude to Waive Disclosure Rules*

Mindful of the rapid changes in broadcasting, Congress granted the FCC latitude to waive “the requirement of an announcement” for “any case or class of cases.”<sup>251</sup> In doing so, the FCC was to decide using the “public interest, convenience, or necessity” standard that served as the Commission’s regulatory touchstone.<sup>252</sup> Shortly after the new law took effect, broadcasters began seeking waivers. The FCC granted sponsorship identification waivers for some public service announcements and classified advertising radio shows,<sup>253</sup> but denied them for broadcasting short excerpts of a religious meeting and for public service announcements where the stations received consideration.<sup>254</sup>

### VII. THE FAILED EFFORT TO UNMASK BROADCASTERS’ PROMOTIONS OF THEIR OWN INTERESTS

The 1960 statutory and 1963 regulatory changes stopped well short of threatening broadcasters’ basic interests. At most, the new disclosure rules proved inconvenient at times. In some respects, the new rules even helped broadcasters by discouraging station employees or program producers from burdening shows with product placements—promotions that did not yield revenue for stations and even competed with their advertising. Both Congress and the FCC had worked closely with the industry in crafting a moderate response to the payola scandal, while consumer advocates, who might have sought more, remained largely on the sidelines after the first months of public outrage over the scandals.<sup>255</sup> But

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251. Amendments to the Communications Act of 1934, Pub. L. No. 86-752, sec. 8, § 317(d), 74 Stat. 889, 896 (1960) (codified at 47 U.S.C. 317(d) (2000)).

252. *Id.*

253. So. Calif. Brdcast. Ass’n, Waiver of Section 317 Requirements for Sponsorship Identification under the Communication Act, 40 F.C.C. 137 (1962) (granting waiver for Southern California Broadcasters Association for public service announcements even though it accepted contributions from the beneficiaries of the announcements); Baltimore Radio Show, Waiver of Sponsorship Identification Requirement of Section 317 of the Communications Act, 40 F.C.C. 184 (1963) (granting waiver for program in which individuals call a radio station and describe goods they have for sale).

254. *Nat’l Council of the Churches of Christ, supra* note 245 (denying waiver for Churches of Christ to air sixty- and ninety-second excerpts of its convention without sponsorship identification); Calif. Brdcast. Ass’n, Inquiry Concerning Sponsorship Identification Under Section 317 of the Communications Act, 40 F.C.C. 231 (1965) (denying waiver for public service announcements because the stations would receive something of value, which made the announcements sponsored ads).

255. The FCC’s three-year rulemaking proceeding elicited only fourteen formal comments, nine from industry and five from members of Congress. Radio Broadcast Services, *Report & Order*, 28 Fed. Reg. 4707, 4708 n.2 (May 10, 1963). Similarly, the last round of congressional hearings finalizing the statutory language were dominated by witnesses from industry. The only exceptions were a representative of the ABA’s section on

one FCC initiative, however, did push the boundaries of disclosure and encountered stiff resistance from industry.

The Commission proposed rules that would have required stations to disclose, through on-air announcements, when they benefited “from the broadcast promotion of a service or commodity in which they have a financial interest.”<sup>256</sup> The FCC regarded these rules as an extension of the principle that had long justified sponsorship identification—“the public is entitled to know by whom it is persuaded.”<sup>257</sup> (The FCC commenced this second round of rulemaking on May 11, 1961, just two weeks after it had launched the first.<sup>258</sup>) Traditional sponsorship identification rules applied when a station cooperated in promoting the interests of someone else; the latest proposal applied when stations or networks inserted covert promotions for their own enrichment. For Section 317 purposes, consideration—or its absence—distinguished the two situations. The latter situation involved no consideration in a customary sense because the party controlling programming needed no external inducement to insert the promotional material. “The Commission believes that the public is no less entitled to know of the existence of such benefits and motivations as in the other kind of case where the inducement is created by payments or the furnishing of programs without charge.”<sup>259</sup>

The proposed financial interest rules anticipated situations that arose with increasing conglomerate ownership in the media—different units operating under one corporate umbrella that could cross-promote each other’s interests. As envisioned by the FCC, the rules would apply to stations and networks, anyone with an ownership interest of 10% or more in either, their officers and employees, and on-air personnel.<sup>260</sup> The FCC expected an on-air announcement when any of these parties had “a financial interest in the sale to the public of a service or commodity which is promoted during a broadcast.”<sup>261</sup> To make the financial interest rules

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administrative law and a witness from the ACLU, neither of whom had much to say about Sections 317 and 508. *House Hearings*, *supra* note 109; *Senate Hearings*, *supra* note 109.

256. *Brdcst. Announcement of Fin. Interest of Brdcst. Stations and Networks and Their Principals and Employees in Serv. and Commodities Receiving Brdcst. Promotions*, *Notice of Proposed Rulemaking*, 40 F.C.C. 119, para. 2 (May 11, 1961) [hereinafter *Brdcst. Announcement of Fin. Interest*]. See also *More Examples Cited on Required Mentions*, BROADCASTING, May 15, 1961, at 93.

257. *Brdcst. Announcement of Fin. Interest*, *supra* note 256, at para. 1.

258. *Id.*

259. *Id.*

260. *Id.* para. 4. The proposed rules singled out the networks for special attention, expecting each to “exercise reasonable diligence to ascertain whether any of its owners, officers, directors or employees or any persons appearing on its network programs come within the provisions of . . . this section.”

261. *Id.*

more palatable to industry, the FCC provided exemptions along the lines available to outside sponsors.<sup>262</sup>

The Commission provided thirteen examples—some variations on each other—to illustrate the probable application of the rules. If, for instance, a radio network had an ownership interest in a record label, its announcers could identify songs, composers, bands, and the record manufacturer without disclosing the financial interest “since it is customary to identify musical recordings in this manner.”<sup>263</sup> When announcers commented favorably on such recordings, however, the application of the rule depended on slight distinctions: “Announcement is necessary where such comments are not customarily made, but not necessary if such matter is customarily interpolated in the program format.”<sup>264</sup> Film actors, book authors, and singers could appear on broadcasts without disclosure announcements because their financial interest in creative products sold to the public was “readily apparent” to the audience.<sup>265</sup> Station employees with an interest in a band that performed on a broadcast did not need to disclose their relationship unless “the audience is informed that the band plays at a certain dance hall or other place or is available for engagements.”<sup>266</sup> The Commission also provided a series of examples illustrating how the rules would work when “[t]he parent corporation of a television network is entitled to share in the proceeds of the sale in stores, of a game which is based on a similar game broadcast as a program of that network.”<sup>267</sup>

The industry ridiculed this effort to extend disclosure requirements to broadcasters’ financial interests. A law firm representing sixteen clients posed hypotheticals to the Commission to underscore the alleged absurdity of the rules. A trade journal reported one:

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262. A disclosure announcement was not needed when the broadcaster’s financial interest was “readily apparent” to the audience. *Id.* The Commission also modeled an exemption after the one added by the House to Section 317: “The mere use or mention of a service or commodity during a broadcast shall not constitute its ‘promotion’ . . . if it is identified only to the extent and in a manner ordinarily necessary for broadcast purposes. . . .” *Id.*

263. *Id.* (example (i)).

264. *Id.* (example (ii)).

265. *Id.* (examples (viii)-(xi)).

266. *Id.* (examples (xii) and (xiii)).

267. *Id.* (example (iii)). The financial interest rules would require announcements when the audience was told the game can be bought at stores or the game was awarded as a prize to contestants on the show; in both cases, the FCC noted, the broadcast promotion of the game sold in stores was not necessary to “its performance on the program.” *Id.* (examples (iii) and (iv)). But if “the program on which the game is played is sponsored by the company which manufactures the game and the appropriate sponsorship identification is broadcast,” no additional disclosure of financial interests would be needed. *Id.* (example (v)).

If Shelley Berman does his telephone routine on a tv show (thus possibly “promoting” the use of the phone), does the station on which that routine appears have to make an announcement that its janitor has his lifesavings in 50 shares of AT&T (and thus has a “financial interest” in such promotion)?<sup>268</sup>

Broadcasters raised three principal objections: First, they would have to monitor the ever-shifting financial interests of owners and employees, a burdensome task; second, they “would have to screen all material to make sure no enthusiastic endorsements could be construed as ‘promotion’”; and third, the FCC examples could be interpreted in many ways.<sup>269</sup>

The NAB, working closely with the networks, quickly had the FCC on the defensive. The FCC repeatedly extended the deadline for comments and conferred with industry representatives.<sup>270</sup> At the behest of FCC staff, broadcasters presented a number of counterproposals. Most urged the Commission to attack the problem, if one existed, through existing procedures or more precisely tailored rules. The Commission could, for instance, require broadcasters to submit periodic reports about their financial interests.<sup>271</sup> Alternatively, at license renewal time, the FCC might penalize stations that inserted questionable promotions in their programs.<sup>272</sup> Some covert plugs for stations’ or networks’ financial interests might also constitute unfair trade practices subject to FTC regulations.<sup>273</sup> If necessary to adopt some financial disclosure rules, the broadcasters told the FCC, regulations should be drastically narrowed. For example, announcements could be limited to situations “when the financial interest of licensee or employees is ‘substantial.’”<sup>274</sup> Broadcasters also suggested limiting announcements involving an employee’s financial interests to situations where the employee actually influenced the specific broadcast containing the covert plug.<sup>275</sup>

Although some broadcast representatives asserted that the Commission lacked authority to require financial disclosure announcements, the FCC, nonetheless, had several grounds for believing

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268. *FCC Plugola Rule Termed ‘Impossible,’* BROADCASTING, June 26, 1961, at 70.

269. *Id.*

270. *Payola Deadline Extended,* BROADCASTING, June 12, 1961, at 66; *Industry Group Meets FCC on ‘Plugola’ Rules,* BROADCASTING, July 3, 1961, at 51; *Plugola Extension,* BROADCASTING, Aug. 14, 1961, at 48.

271. *Plugola Comments: General Disapproval Voiced to FCC,* BROADCASTING, Aug. 7, 1961, at 79.

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

otherwise.<sup>276</sup> First, during hearings and on the floor of Congress, lawmakers chastised Dick Clark for plugging performers and records in which he had a financial interest on his show *American Bandstand*.<sup>277</sup> Second, the Attorney General's 1959 report urged that licensees periodically file statements listing a station's and employees' financial interests in enterprises that stood to benefit from on-air promotions.<sup>278</sup> Third, and most important, the House report that signaled congressional intent for Section 317 indicated that the FCC had the authority to enact such rules.<sup>279</sup> Fourth, the 1960 Amendments empowered the Commission to prescribe rules to implement Section 317.<sup>280</sup>

Why then did the FCC pull back? The FCC embarked on the rulemaking two months after Newton Minow joined the Commission as chairman—with the promise of more Kennedy appointees to come. Minow, whose inaugural speech as chairman famously characterized television as “a vast wasteland,” heartened those who longed for more assertive broadcast regulation.<sup>281</sup> Although the proposed rules on financial disclosure fit comfortably with Minow's regulatory philosophy, they became entangled in broader policy initiatives the Commission undertook during his tenure. Most notably, the newly invigorated FCC capitalized on the momentum started by the quiz show and payola investigations to mount a general assault on overcommercialization in broadcasting.<sup>282</sup> When the FCC proposed to adopt firm limits on the allowable amounts of broadcast

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276. *Id.* (reporting claims that FCC lacked authority for this rulemaking).

277. *Licensees and Station Personnel Hearings, Pt. 2, supra* note 109, at 1350-51 (remarks of Committee Chairman Harris); 106 CONG. REC. 14,098 (1960) (remarks of Rep. John Bennett).

278. *Deceptive Practices in Broadcasting, supra* note 107, at 64.

279. H.R. REP. NO. 86-1800, at 19-20 (1960):

Indirect benefits which may accrue to station licensees and their employees or other persons concerned with the selection of programs or program matter for broadcasting by reason of ownership of stock or other interests in companies engaged in the preparation or production of programs or program matter are not covered by section 317, as it is being amended, or by the proposed disclosure provisions. Disclosure of such benefits may be required by the Commission under its general rulemaking powers.

*Id.* (citation omitted).

280. Amendments to the Communications Act of 1934, Pub. L. No. 86-752, sec. 8, § 317(e), 74 Stat. 889, 896 (1960) (codified as amended at 47 U.S.C. § 317 (2000)).

281. See NEWTON N. MINOW, *EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST* (Lawrence Laurent ed., 1964) (collecting speeches Minow delivered as FCC chairman). See generally BAUGHMAN, *supra* note 155, at 57-176 (1985) (analyzing Minow's tenure at the FCC and the policies he pursued).

282. For a convenient overview of the FCC's actions to deal with excessive commercials from Minow's term into the 1970s, see ERWIN G. KRASNOW, LAWRENCE D. LONGLEY & HERBERT A. TERRY, *THE POLITICS OF BROADCAST REGULATION* 192-205 (3rd ed. 1982).

advertising, the industry persuaded Congress to rebuke the Commission.<sup>283</sup> This and other policy thrusts alienated Congress from the Commission and, after Minow unexpectedly stepped down in 1963, the FCC's attempts at wide-ranging regulatory reforms quickly stalled.<sup>284</sup>

### VIII. CONCLUSION

Countless times each day, phrases such as “promotional consideration provided by,” “the following is a paid commercial program,” and similar disclosure statements flicker across television screens. Although few in the audience dwell on these passing oral remarks or fleeting visual credits, they serve as subtle reminders that some program content beyond the obvious advertisements should be regarded as persuasive commercial or political messages. The sponsorship identification requirement obviously did little to keep broadcasting from becoming thoroughly steeped in a culture of commercial promotion,<sup>285</sup> but then limiting content was never its goal. Instead, the requirement had a more modest purpose: informing the audience when and by whom it was being persuaded.

Congress and the FCC created the key features of today's sponsorship identification rules between 1927 and 1963. The spare language of the original statute, borrowed from postal regulations, anticipated a problem—unidentified sponsorship of commercial program content—that did not arise in the early years of radio. The FCC first amplified the statute with regulations in 1944 when labor groups objected to efforts by businesses to covertly insert political messages into programs. The much more public 1959-60 payola and quiz show scandals revealed that broadcast licensees were but one component in a complex web of program production, and the rules were updated accordingly.

Throughout these decades, broadcasters successfully navigated between Congress and the FCC to assure that the rules did not become too burdensome. In 1943, Congress considered strengthening the requirement as part of a wide-ranging bill; when the legislation died, the FCC proposed similar rules through its administrative process. Before adopting the new rules, however, the FCC accommodated industry objections that formal

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283. *See id.* at 195-96 (discussing congressional efforts to stop FCC from establishing limits on advertising).

284. BAUGHMAN, *supra* note 155, at 117-32.

285. Indeed, culture critics, especially those in academia, commonly observe that broadcast programming has long been suffused with promotions that preach a lifestyle of consumption. *See, e.g.*, ROBIN ANDERSEN, CONSUMER CULTURE AND TV PROGRAMMING (1995); LAWRENCE R. SAMUEL, BROUGHT TO YOU BY: POSTWAR TELEVISION ADVERTISING AND THE AMERICAN DREAM (2001).

announcements were not needed when sponsorship of commercial content was readily apparent to the audience. Similarly, the adoption at the same time of stricter disclosure rules for political content suited industry preferences. During the 1950s, radio and television producers institutionalized the practice of accepting free materials from parties who stood to benefit from having their products or services showcased on programs broadcast into millions of households. These industry arrangements took root at a time when the FCC invested little regulatory effort in scrutinizing broadcast content. When the payola and quiz show scandals captured the headlines, the publicly embarrassed FCC initially cracked down on broadcasters' routine use of identifiable commercial material. At the behest of industry, however, Congress in 1960 moved to shield such practices from the disclosure requirement. Other changes in the sponsorship identification statute enacted in 1960 extended the reach of the rules, but even these amendments became law only after close consultation among industry representatives, legislators, and regulators.

The public and courts remained on the sidelines in efforts to shape the sponsorship identification requirement between 1927 and 1963. Indeed, the courts played no role whatsoever, if reported cases are any indication.<sup>286</sup> The outrage registered when the payola scandal came to light did not translate into significant participation by public interest groups in the legislative or rulemaking process. In fact, *Consumer Reports* predicted as much in its February 1960 issue. It warned readers, "neither the FCC nor the Congress will take significant remedial action unless consumers—that is, TV set owners—bring insistent and consistent pressure for reform."<sup>287</sup> In an election year, the magazine explained, lawmakers will curry favor with the industry that controlled access to the airwaves.<sup>288</sup> Although public interest groups testified at some of the early hearings that exposed payola, they concentrated their efforts on seeking structural changes such as establishing a public broadcasting system, increasing the number of

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286. The first reported case dealing centrally with Section 317 came three years after the 1963 regulations. *United States v. WHAS, Inc.*, 253 F. Supp. 603 (W.D. Ky. 1966), *aff'd*, 385 F.2d 784 (6th Cir. 1967). In a 1957 antitrust decision, a court held that railroad interests had violated Section 317 by disguising the sponsorship of antitrucking television programs. This, however, was a small part of the complex decision. *See Noeier Motor Freight, Inc. v. E. R.R. Presidents Conference*, 155 F. Supp. 768, 828 (E.D. Pa. 1957).

287. *Here, We Would Suggest, Is a Program for the FCC*, CONSUMER RPT., Feb. 1960, at 93.

288. *Id.*

television stations in underserved markets, and fighting overcommercialization of the airwaves.<sup>289</sup> This left the policymaking field on sponsorship identification to the broadcasters and regulators who fashioned the rules through the mediation of Congress.

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289. See generally BAUGHMAN, *supra* note 155 (discussing efforts of various groups to alter the structure of broadcasting, especially television).