RADIO AND THE LAW

MOSER & LAVINE

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AND THE
LAW

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For a considerable period of time the lawyer's source of reference to matters affecting radio were the decisions of the Federal Communication Commission, the books and articles based on certain of those decisions, and his own theoretical hypothesis of future court decisions.

Slowly, and with an unusual lack of reliance on precedent, the courts are building up a substantive law of radio. As is to be expected, we frequently find a wide divergence of views between state and federal courts, and courts of one state and those of another, on like problems.

As to courts of countries other than the United States, it is indeed an interesting fact to find how closely their decisions follow those of our own Federal Courts.

Twenty years have passed since the enactment of the Radio Act of 1927, and many and varied have been the decisions of the Commissions and the Courts on the subject. It is because of the fact that such decisions have reached a point where we may now draw from them sound principles upon which to base our own judgment, that it is possible to gather together in one volume those decisions that are pertinent to the formation of good judgment in matters affecting the proper interpretation of legal principles of radio law.

In preparing this work, the object has been to bring to the reader every available decision, up to the time of writing, of this country, and the British Empire, affecting radio broadcasting. We have endeavored to examine these decisions in the light of related matters without burdening the reader with historical backgrounds or procedural interpolations.

Consideration of the technical aspects of radio have been deliberately avoided, except as these may affect program content. Requirements for the procurement of station licenses, except as such might affect the material content of a broadcast are likewise omitted. Procedural matters may be gleaned from an examination of the Communications Act of 1934 and publications especially devoted thereto.

CHAPTER I

BROADCASTING AS INTERSTATE COMMERCE

§1. ACT AS BASIC LAW.

So far as any law may be considered the basic law affecting radio, the provisions referring thereto, contained within the Communications Act of 1934, as amended, may be so construed.

The Act as amended is set forth in its entirety in the appendix of this book. Reference to the Act here will be confined to those sections dealing exclusively with radio, and then only to those portions of the Act involving points of import upon which courts have rendered an opinion.

We shall not discuss either the rules and regulations laid down by the Federal Communications Commission or matters of procedure before F.C.C., as these matters have been dealt with in other publications.

The Act itself is, of necessity, of a regulatory nature and must be interpreted for use in ordinary legal practice. Knowledge gained from a simple reading of the Act cannot be used as the basis for procedure to be followed or action to be taken in the defense or prosecution of a law suit involving stations, artists, writers, agents, or the public. Nor can knowledge thus acquired be used in the drafting of agreements or contracts involving radio. However, certain portions of the Act are of such a nature as to give to the reader a foundation upon which to build a structure of understanding.

§2. BROADCASTING—INTERSTATE OR INTRASTATE COMMERCE.

Section 1 of the Act provides in part that the statute was enacted: "For the purpose of regulating interstate and foreign commerce in communication by wire and radio."

The question has been raised upon a number of occasions, as to whether radio broadcasting is a matter of interstate or intrastate commerce.

In the State of New Jersey in 1938[1] the Board of Public Utility Commissioners advised the National Broadcasting Company, that a New Jersey statute required a certificate of public convenience and necessity as a prerequisite to construction of a radio station. NBC countered with the advice that they had received a construction permit from the Federal Communications Commission and declined to comply with the statute of New Jersey. The Board thereupon issued its order to the Company to show cause why it should not desist from construction.

NBC filed an action in the U.S. District Court of New Jersey praying for a restraining order against the Board, contending that the New Jersey Statute was unconstitutional, as legislation affecting radio broadcasting is wholly within the power of Congress.

The defendant Board urged the constitutionality of the statute insofar as it applied to such radio operation as might be considered strictly intrastate commerce, but agreed that plaintiff was engaged in interstate commerce as well.

The court, while holding that it was not required to settle the question because of defendant's admission that plaintiff was engaged in interstate commerce, nevertheless held than plaintiff was subject only to regulation by F.C.C. and not by New Jersey, and granted an injunction against the defendant.

From the facts and findings in this case, it would appear that the New Jersey statute, so far as it affects broadcasting stations, is unconstitutional in its entirety.

There is a grave doubt as to whether it is at all possible to conduct radio transmission without it being either interstate commerce, or constituting an act that might *interfere* with interstate commerce, and hence subject to the conditions of the Communications Act.

It will be noted that the decision in the case just cited was handed down in 1938. In 1934, the City of Atlanta levied a tax

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[1]National Broadcasting Company v. Board of Public Utility Commissioners of New Jersey, 25 F. Supp. 761 (1938).

against the broadcasting station conducted by Oglethorpe University. The University sought to enjoin a prosecution by the city for failure to pay a business license tax.[2]

The plaintiff University conducted a broadcasting station in Atlanta under license by F.C.C. The time of the station was principally occupied with the broadcasting of religious teachings and university training matter. Some time, however, was devoted to commercial broadcasting. Defendant alleged the station was engaged in *intrastate* commerce, while the plaintiff alleged it was engaged in *interstate* commerce. The lower court denied an injunction.

The appellate court held, that the station was engaged in business, hence a license fee imposed by the city was proper. Although granting that the station was engaged in *interstate* commerce as well, the court pointed out that its business was almost entirely *intrastate,* and while the statute could not impose a tax on that portion of its program that was interstate, it could do so on that which was *intrastate.* The decision of the lower court was affirmed.

An appeal taken to the Federal Court was later dismissed by the parties.

The holding in this case is contrary to every other case examined, and is, upon its face, not good law. The idea of creating a dividing line between *inter* and *intra* state commerce in radio is both impractical and virtually impossible.

One of the first cases decided by the Federal Courts on the question of the *inter* or *intra* state character of broadcasting is that of *Whitehurst v. Grimes,* decided by the District Court of Kentucky in 1927.[3]

The city passed an ordinance requiring all persons operating a radio broadcasting station, either amateur or commercial, to pay a license tax, and provided a penalty for failure to do so.

[2]City of Atlanta v. Oglethorpe University, 178 Ga. 379, 173 S.E. 110; appeal dismissed in 295 U.S. 770, 79 L.Ed. 1710, 55 S. Ct. 642; affirmed in 180 Ga. 152, 178 S.E. 156 (1934).

[3]Whitehurst v. Grimes, 21 F. (2d) 787 (1927).

Plaintiff sought to enjoin this ordinance and defendant moved to dismiss the bill.

The court held that the tax sought to be imposed was not a tax on the property of the plaintiff, but on the business of radio broadcasting. The court went on to say that radio communications are all *interstate;* this is so even if they may be intended only for *intrastate* transmission. The reason given was that *interstate* transmission of radio waves might be seriously affected by communication intended only for *intrastate* transmission. There is therefore required a uniform system of regulation and control, and Congress has covered the field by appropriate legislation. The ordinance was held void as an attempt to regulate interstate commerce, and the injunction was granted.

It appears clear from an examination of the decisions in point, that the courts have arrived at a sound basis in their determination of the *intra* or *inter* state category of radio broadcasting. The concensus of decisions hold firmly that radio broadcasting is in *interstate* commerce and thus within Federal Jurisdiction.

In 1942 the District Court for the Southern District of Florida in the case of *Tampa Times v. Burnett*[4] again confirmed this position.

In that case the State attempted to levy a license tax on the Tampa Times in the operation of its broadcasting business. The Tampa Times brought an action in the Federal Court to enjoin collection of the license tax. Plaintiff was licensed to operate under F.C.C.

The court held that plaintiff in its broadcasting business is engaged in interstate commerce, and as such is within the exclusive jurisdiction of the Federal Government.

The court further held that the Communications Act of 1934 pre-empted the field of radio broadcasting and gave the Federal Government such jurisdiction. The attempt of the State of Florida to levy a license on plaintiff in the operation of its

[4]Tampa Times v. Burnett, 45 F. Supp. 166 (1942).

broadcasting business was void and inoperative, and granted plaintiff a permanent injunction.

In *Fishers Blend Radio Station v. Board of Tax Commissioners,*[5] the State of Washington sought to impose a gross income tax against the plaintiff on income received from sale of radio time. The United States Supreme Court, in reversing the decision of the Supreme Court of the State of Washington, held that such tax was unconstitutional since it is a tax on the proceeds of a business derived from interstate commerce.

Looking into the not too distant future, we can see at this point, an extremely interesting question that will undoubtedly arise under an extended use of Frequency Modulation and Television. Will the courts be able to say, as a categorical scientific statement, that there can exist an intrastate broadcast of radio waves? The question is particularly important at this time, and because of its importance is more fully discussed in Chapter XVI.

[5]Fishers Blend Radio Station v. Board of Tax Commissioners, 297 U.S. 650, 80 L.Ed. 956, 56 Sup. Ct. 608 (1936).

Chapter II

PROGRAM CONTROL; PRIVATE AND CODE MESSAGES

§3. Transfer of License.

While this work will not attempt to delve into the processes of acquiring a broadcasting license and construction permit, we must, nevertheless, take cognizance of certain facts relating thereto, as technical requirements for the granting of a construction permit and license affect the control of programs to be broadcast.

Let us assume that an applicant has complied with the requirements for the granting of a license, and has made a satisfactory showing of financial and moral worth, as well as the American citizenship of applicant or of the required number of stockholders and directors of a corporation. A further showing has been made of a need in the community for a new station, that requisite technical skill is available, good program content can be expected, and all other conditions have been met. Upon this showing a license has been granted by the F.C.C., and the station is now ready to begin radio broadcasting.

Having been granted a license, the station owner is desirous of transferring such license to others. This he cannot do without consent and approval of F.C.C.

§4. Transfer of License By Consent.

The Communications Act prohibits the transfer of the license, the frequencies, or control of the station to any persons other than the original licensee without the prior approval of F.C.C. Section 310 (b) of the Act states:

> "The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless

> the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing."

A corollary to the prohibitions against transfers of license or other rights acquired under the Act is the principle that effective control of the programs and their broadcasting must remain with the licensee. Certain rights of financial management and business control may be given by contract to other persons, but ownership of the license, and actual control of the program content and its broadcasting, must always be the responsibility of the persons or corporation to whom the license has been issued.

The Commission has, however, indicated its willingness to avoid hard and fast rules in the interpretation of its regulations. In the matter of *WCBD, Inc.,* of Zion, Ill.[1] an application for transfer of control of a corporation which held a radio license was made to F.C.C. Sometime prior to the making of such application, the applicant had assumed control of operation of the station. The evidence failed to show any intentional bad faith on the part of the transferee. It appeared that at the time of the transfer the new Communications Act had just gone into effect, and there was confusion in the minds of the parties as to the law applicable to such a situation. The F.C.C. regarded the applicants as being better suited to operate the station than their predecessors, under whose management the station was made available to only one creed. In spite of noncompliance with the letter of the law, the originally unauthorized transfer was sanctioned.

§5. Transfer of Financial Control.

Financial difficulties in the operation of a broadcasting station present problems in refinancing not encountered by general business concerns. Any attempt to turn the station over to others who might be more capable of operating it from a financial standpoint, may run afoul of the provisions of the

[1] WCBD, Inc., 3 F.C.C. 467 (1936).

law affecting assignments. However, this situation may be met by the preparation of a carefully worded contract transferring financial control and preserving, at least control over programs, in the original licensee.

In the matter of *Federated Publications, Inc.,*[2] of Battle Creek, Mich., application was made for renewal of license. The radio station was operated as an adjunct of a newspaper, and was consistently losing money. The president of the corporation entered into an agreement granting a former station salesman the right to operate the station. The new manager agreed to carry all expenses, and was entitled to receive all profits of the station. He was to have a completely free rein in its operation except for matters of policy. The contract was renewed on two separate occasions. The F.C.C. held these contracts were an improper delegation of the rights and responsibilities of a licensee. If the terms of these agreements were observed in practice, they would clearly constitute a violation of Section 310 (b) of the Act. The evidence indicated that the terms of the contracts had never been carried out in practice, and the licensee had actually retained general control and supervision over both the programs and the broadcasting. The application for renewal of license was approved.

The foregoing is evidence of the fact that F.C.C. will examine the realities of a situation, and will not bind those involved to the mere wording of a contract in arriving at a determination of the question of whether or not the Act has been violated.

§6. Transfer of Program Control.

If the wording of a contract for management of a station is so phrased as to preserve sufficient control in the licensee, there is no violation of Section 310 (b). Thus in the case of *Southern Broadcasting Corporation v. Carlson,*[3] the defendant held a station license from the F.C.C. Plaintiff and defendant

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[2]Federated Publications, Inc., 9 F.C.C. 150 (1942).

[3]Southern Broadcasting Corp. v. Carlson, 187 La. 823, 175 So. 587; 188 La. 959, 178 So. 505 (1937).

entered into a contract whereby defendant employed the plaintiff corporation to manage the business of the station for a period of five years. The contract stated that the defendant was to remain in control of the station, manage its programs, and to handle all matters involving the station and F.C.C. The plaintiff brought suit to enjoin the defendant from interfering with the management of the station. The defendant asserted that the courts of Louisiana had no jurisdiction over the dispute, alleging that F.C.C. only, had jurisdiction of the determination of such contractual rights. The court held that the contract was not void upon its face, and did not violate the provisions of Section 310 (b) of the Act, and that the Louisiana courts retained jurisdiction over such matters, as the Communications Act was not intended to settle private disputes of this nature.

This contract again came into question in Louisiana in the case of *Day Stores v. Southern Broadcasting Corporation,*[4] and a like decision was rendered.

A broadcasting station may not surrender complete control over the contents of even a particular program to a person who purchases time over the air. In the matter of *KVOS, Inc.,*[5] of Bellingham, Wash., a renewal of license was sought by the applicant. Objection was made to renewal of license on the grounds that a certain news service had made objectionable remarks over the air regarding certain individuals in the community in which the station was situated. F.C.C. considered the fact that several years prior to the filing of the application the station had entered into an agreement with a news service, wherein the news service was to furnish complete coverage for the station, was to purchase time on the air for the broadcast of news, and was to have entire jurisdiction over the contents of such a broadcast. It was provided, however, that the agreement could be terminated at any time by either party. F.C.C.

[4]Day Stores v. Southern Broadcasting Corp., 1 So. (2d) 99 (1941); see also Southern Broadcasting Corp. v. Congregation Agudath Achim Anche Sfard, 1 So. (2d) 102 (1941).

[5]KVOS, Inc., 6 F.C.C. 22 (1938).

stated that it did not look with favor upon such an agreement, but that it could not hold that it was a violation of Section 310 (b) of the Act. The Commission renewed the license, holding in part that there was not sufficient evidence to show that the news broadcasts over the air had contained the allegedly objectionable remarks.

The weight of authority indicates that in such cases the burden is upon those making objection to the granting or renewal of license to present evidence sufficient to sustain such objection.

§7. Control of Foreign Language Broadcasts.

The burden of proper control of the broadcast of programs in a foreign language rests squarely upon the sending station. Special procedure must be inaugurated to insure against departure from the original script submitted and approved by the station. Failure to monitor foreign language broadcasts at the time of transmission may result in objectionable material being broadcast. Under such circumstances the station is held fully responsible, despite any plea of lack of actual knowledge.

In the matter of *United States Broadcasting Corporation,*[6] of Brooklyn, renewal of the license of Station WLTH was refused by the F.C.C. One of the reasons given for this refusal was that the licensee had divested itself of control and supervision over certain foreign language programs by turning such control and supervision over to the program producers. Forty per cent of the total time on the air of this station was devoted to foreign language programs. The F.C.C. stated that although it approves of foreign language broadcasts where these are designed to educate foreign language groups in the principles of government and American institutions, these particular programs were primarily for the purpose of advertising merchandise in an objectionable manner. Hence these programs were not considered to be in the public interest. The Commission remarked that the mere fact that programs

[6]United States Broadcasting Corp., 2 F.C.C. 208 (1935).

are presented in a foreign language does not mean that they should be considered to be of public interest. It is the program content itself which must be examined to determine this factor.

Problems of proper control and supervision of program content exist mainly in small stations which lack sufficient facilities to insure a complete supervision over all material broadcast.

In recent years F.C.C. has insisted that new applicants possess sufficient financial backing and technical facilities in order to guarantee an ability to monitor all types of programs.

§8. Broadcasting Defined.

It has been repeatedly held that radio broadcasting stations are intended as a public service, and their primary function is to serve the public at large. The use of such broadcasting stations for purposes other than this is contrary to the spirit and intention of the Communications Act, the Rules and Regulations of the F.C.C., and the wording of the license issued to each broadcasting station. Section 3 (o) of the Communications Act of 1934 defines "broadcasting" as: "The dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations."

A more precise definition is contained in Section 3.1 of the F.C.C.'s Rules and Regulations, which states: "The term 'standard broadcast station', means a station licensed for the transmission of radio-telephone emissions primarily intended to be received by the general public . . ."

§9. Point to Point Messages Prohibited.

The broadcasting of messages intended for one person or a small group of persons constitutes nothing more than "point-to-point" communication, which is the same service as a telephone or telegraph company performs. A broadcasting station is not intended or licensed to perform the functions of telephone or telegraph companies, hence the broadcasting of private messages is forbidden. The radio public is familiar

with the rule that participants on radio programs are not permitted to transmit private messages during the interview, and greetings such as "Hello, mom", are within the prohibition.

§10. Code Messages Banned.

If broadcasts are intelligible only to a small group of listeners because of the transmission by means of a "code", or similar means of expression, this comes within the meaning of a "private" communication.

In the matter of *Bremer Broadcasting Co.*, of Jersey City, New Jersey[7], one type of broadcast, condemned at a hearing for renewal of license, in this matter, consisted of programs giving horse racing results by means of a "code." Intelligible reception was restricted to a group that had theretofore subscribed to a "scratch sheet" which contained the interpretation of this code. The Commission held that this was not only in violation of its regulations, but was in violation of the station license authorizing broadcasts to the general public, and broadcasts could not be confined to particular individuals or classes thereof. The objectionable program had been discontinued shortly after its inception, and since the general record of the station counterbalanced this incident, the license was renewed.

People v. Harold Belden,[8] was an action by the State of California to abate as a public nuisance the publication of "scratch sheets" and the use of a Mexican broadcasting station to further the activities of "bookies". The court enjoined the defendants from distributing such "scratch sheets" in California. The court likewise enjoined all acts in furtherance of what it termed an illegal conspiracy to broadcast messages which were intelligible only to those possessing the "scratch sheets", and held that this type of broadcasting was contrary to the regulations of the F.C.C.

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[7]Bremer Broadcasting Co., 2 F.C.C. 79 (1935).

[8]People v. Belden, (Unreported) California Superior Court Civil Number 451986 L.A. (1940).

A somewhat similar situation was presented in the matter of *Standard Cahill Co., Inc.,*[9] of New York City. The programs complained of were sponsored by publishers of a racing sheet. The F.C.C. held that such a program was "point-to-point" communication rather than broadcasting, and was of little interest to the general listening public, being confined to those who subscribed to the publication in question.

§11. Messages to Specific Individuals Prohibited.

In the preceding case, and at the same hearing, there came up for consideration another program involving a "Dr. Raboyd", who described himself as a "metaphysician, or psychologist", and who answered questions over the air in connection with the sale of pamphlets. Here too, the Commission held that such actions involved the transmission of individual messages which were not of general interest to the listening public.

The same objection is made to all programs in which fortune tellers or clairvoyants attempt to answer questions of private individuals, whether submitted by such individuals, or concocted by the broadcaster. It is said that this consists in no more or less than the transmission of a message from one individual to a particular listener, and is of no interest to the general public.

In the matter of *Scroggin & Co. Bank,*[10] of St. Joseph, Mo., the F.C.C. held certain broadcasts by two astrologers, who offered advice about business, domestic affairs, health, finance, and investment over the air, to be only the transmission of individual messages that could be of no general interest to the public at large.

Programs in which doctors or others who claimed to have the power of healing and presumed to diagnose the ailments of particular persons submitting questions come under the same objection; that is, they are, aside from their objectionable features, merely the transmission of private messages.

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[9]Standard Cahill Co., Inc., 1 F.C.C. 227 (1935).
[10]Scroggin & Co. Bank, 1 F.C.C. 194 (1935).

§12. Foreign Language Broadcasts as Private Messages.

Foreign language broadcasts are not to be considered in the category of those in which private messages are broadcast to small groups. They are, as a rule, broadcast in areas containing a relatively large percentage of foreign speaking individuals, and serve as a means of education and entertainment.

In the matter of *United States Broadcasting Corporation,*[11] of Brooklyn, the Commission, in denying the application for a renewal of license, stated that the mere fact that such programs are given in a foreign language does not, *ipso facto,* make them of public interest, nor does it place them in the category of "private message broadcasts." The program content itself must be examined in order to determine the status of the broadcast.

§13. Broadcasting of Intercepted Messages.

Aside from the prohibition against broadcast of private communications originating in the broadcast station, the Communications Act, Sec. 605, prohibits the interception of communications and the divulging or publishing of such intercepted messages. The F.C.C. held this section applicable to all broadcasting stations in its decision in the matter of *Knickerbocker Broadcasting Co.,*[12] of New York City, where an order to show cause was issued against the station on the basis of its advertisement that it had intercepted and decoded certain messages sent out by the German and English governments to their ships at sea, and the broadcasting of such alleged messages. Section 605 is applicable to all persons as a protection of the privacy of communications. The station was not deprived of its license, the Commission stating that at the outbreak of World War II news agencies were at fever heat to obtain and transmit to the public war news; and methods were used in its dissemination which would not have

[11]United States Broadcasting Corp., 2 F.C.C. 208 (1935).
[12]Knickerbocker Broadcasting Co., 7 F.C.C. 468 (1939).

been used in ordinary times. Nevertheless, F.C.C. ordered such activities to cease.

Section 605, however, does not prohibit the receiving and broadcasting of radio communications by amateurs or others for the use of the general public, or which relate to ships in distress. Thus in times of emergency, a broadcasting station may do all in its power to assist in the relaying of messages without fear of consequences. Such action would clearly be in the public interest, and not subject to any criticism or statutory punishment.

CHAPTER III

TRANSMISSION TO FOREIGN STATION; RE-BROADCASTING; NETWORK BROADCASTING

§14. WORLD-WIDE ALLOCATION OF FREQUENCIES.

From a reading of the previous chapters it would appear that the United States Government through F.C.C. has the power to allocate frequency bands without restrictions. This, however, is not true. In recent years the United States became an active participant in international conventions for the allocation of world-wide freqeuncy bands, and it is through these conventions that frequency bands on a world wide basis are allotted. The jurisdiction of the United States to control broadcasting services is bound by the limits of its territory, with the single exception of control over American ships at sea.

§15. EXTENDED CONTROL BY UNITED STATES.

In the early stages of broadcasting, considerable difficulty was encountered by the government in dealing with individuals and corporations who by subterfuge attempted to evade governmental control over broadcasting stations. Restrictions on broadcasting in certain neighboring countries were and are not as stringent as those of the United States. One form of attempted evasion was that wherein a station in the United States would send programs by means of telephone wires to certain foreign stations, which would in turn transmit such programs back into the United States. The subterfuge failed by reason of the fact that the Communications Act of 1934, taking cognizance of the situation, specifically provides in Section 325 (b):

> "No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or

delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor."

§16. PERMISSION TO RE-BROADCAST FROM FOREIGN STATIONS.

When application is made for permission to transmit programs to foreign countries for re-broadcast, the Commission will consider the application as though it were an application for station license. It will inquire into the purpose behind the application, and the reasons why such request is being made. In some instances it may well be technically more convenient that the broadcast originate in a foreign country, by reason of a more favorable location for a transmitter site.

Where a foreign outlet is itself an established station, the past program record of the station will be considered as one of the factors in the approval or disapproval of the application.

In the matter of *T. Yount,*[1] of Laredo, Texas, an application was made for permission to broadcast programs to be transmitted or delivered to a foreign radio station. The application was denied on the ground that the applicant was not the sole owner of the proposed service, it appearing that such service was in part owned by the management of the licensee of the foreign radio station. In addition thereto, the applicant failed to disclose his financial qualifications, and evidence of the proposed program service was regarded as unsatisfactory. The Commission, in examining the record of the foreign station involved, found that it had, at various times, caused interference with an American station, and that certain of its programs were highly objectionable.

[1]T. Yount, 2 F.C.C. 200 (1935).

In the matter of *Nellie H.* and *W. C. Morris,*[2] of Eagle Pass, Texas, a similar application was denied on much the same grounds. It was determined that there was no need shown for the proposed service, that the applicants would have no control over the programs to be transmitted, and that the foreign station would restrict the useful night signal of a United States licensee. The Commission made mention of the fact that an American doctor who made a practice of advertising by radio, and an astrologer, had both conducted the station in question.

An applicant for permission to broadcast from a foreign station must consider, not only his own qualifications and past program record, if any, but the program record of the foreign station involved.

§17. Prior Violation Not a Bar.

A prior violation of Section 325 (b), if not committed intentionally, will not necessarily be a bar to the granting of permission by the F.C.C. to transmit by means of a foreign station. In a hearing on the application of *First Baptist Church,*[3] of Pontiac, Mich., the church, which was the owner of a station, requested authority to transmit programs from the applicant's studio in Pontiac over the lines of the telephone company to Windsor, Ontario, Canada, thence to be broadcast over a Canadian station.

It appeared that from 1932 to 1936, the applicant had engaged in a similar practice, but had discontinued upon being warned by F.C.C. that this might be considered as a violation of Section 325 (b) of the Act. The applicant contended that before being warned, it had no knowledge that it might be breaking the law. The programs of applicant were religious in subject matter, and were generally meritorious. The F.C.C. granted the application on the ground that the evidence indicated that the program would be in the public interest. The

[2]W. H. and W. C. Morris, 2 F.C.C. 269 (1936).
[3]First Baptist Church, 6 F.C.C. 771 (1939).

previous violation of the statute was disregarded as being one in which no wilful act was committed by applicant.

§18. Limitations of Section 325 (b) of the Act: Transcriptions.

Considerable question has arisen over the meaning of the wording of this subsection as to whether the words "mechanical or physical reproduction of sound waves" includes the making of phonograph records or electrical transcriptions shipped to a foreign broadcasting station for play-back over the air. If so broad a construction were adopted, it would preclude an American station from making a transcription of a song as rendered by an individual in the United States, and sending the record to a foreign station for play-back over the air. The result of such action would mean a criminal violation of the Act. The United States courts in their decisions have indicated that no such consequences were intended by Congress in the enactment of this statute.

In the case of *United States v. Baker,*[4] the defendant was charged with violating Section 325 (b) of the Act, in that he had made a phonograph record in the United States, and transmitted it to Mexico for re-broadcast over a station close to the border. The defendant claimed that Section 325 (b) of the Act was unconstitutional as an attempted regulation of intrastate commerce. The trial court held that the making of a phonograph record is but the first step of a sender who is engaged in interstate commerce; that the second step is the delivery of the record to the foreign country. The defendant was found guilty.

The appellate court reversed the judgment of conviction against defendant, holding that the wording of this section does not include the sending of phonograph records to a foreign station, and that such action was not a conversion of sound waves into electrical energy.

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[4]U. S. v. Baker, 93F. (2d) 332 (1937); cert. denied, 303 U.S. 642, 82 L.Ed. 1102, 58 S. Ct. 646.

The court further held that the making of a phonograph record did not constitute a "reproduction" as contemplated by the statute, and stated that the meaning of the statute as applied to a prohibition on "reproductions", involves the playing of a phonograph record from an American station, and the later transmission by means of wire of such playing to a foreign station for the purpose of re-broadcasting. The mere making of a record and its shipment to such foreign station is not within the purview of the Act.

§19. Re-Broadcast Without Permission.

The Communications Act gives little protection from infringement or unfair competition by rival radio stations. The single provision of the Act which gives only partial protection from the "piracy" of broadcast material is Section 325 (a) which states: ". . . nor shall any broadcasting station re-broadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."

Where a program is to be re-broadcast by a number of stations on a network re-broadcast, the F.C.C. rules[5] place the responsibility of obtaining permission for such re-broadcasts upon the originating station. Permission must be obtained from the Commission, as well as from the station over which the program was originally broadcast. It is not necessary that each station participating in a network re-broadcast make application, provided that proper approval is obtained by the original re-broadcaster.

The meaning of the word "re-broadcast" has been held to be restricted to the physical re-transmission of the original broadcast. If a person listening to a program later restates the material gleaned from such program by means of a re-broadcast, such re-broadcast is not within the meaning of the statute. The second sending station must actually reproduce the original broadcast in some mechanical manner in order to come within a violation of the Act.

[5]F.C.C. Rules and Regulations, §3.409; also see §§3.291, 3.691 & 3.790.

In the matter of *Newton,*[6] of Jamestown, N. Y., which involved an application for renewal of a license, the F.C.C. in its decision took into consideration the past actions of the applicant station. It found that previous program content had been good except that on one occasion the station had received a World Series baseball broadcast in its studio over its radio receiver and the information received was given to the station announcer, who restated it in a broadcast. The Commission held that this conduct was not in violation of Section 325 (a) as "re-broadcasting" means that a station actually reproduces a signal of another station mechanically or by some similar means, such as by feeding the program directly into the microphone. A restatement of information received over another receiver does not constitute "re-broadcasting." The application for renewal of license was granted.

§20. Network Broadcasting—General.

The discussion of the substantive law of radio broadcasting requires no presentation of technical matters involved in the obtaining of a station license or of administrative regulations pertaining thereto, unless the subject affects program content. Regulations affecting network broadcasting have a direct bearing on and influence the type of programs a station may broadcast, as well as limiting the degree of control which the individual stations may maintain over such programs.

In 1938 the F.C.C. appointed a committee to investigate network broadcasting, and to recommend to the Commission the adoption of such special regulations as the committee might deem necessary for the control of this type of broadcasting. In May of 1941, after extensive hearings, the F.C.C. issued its *"Report On Chain Broadcasting".*[7] This report made recommendations for the adoption of rules and regulations designed to curb the alleged abuses and defects of which the committee complained.

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[6]Newton, 2 F.C.C. 281 (1936).

[7]Report on Chain Broadcasting, Commission Order No. 37, Docket No. 5060 (1941).

Section 303 of the Communications Act of 1934 provides: "the Commission, from time to time, as public convenience, interest, or necessity requires, shall—(1) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting."

Based on this section, the Commission in 1941 adopted and put into effect a set of regulations governing the various aspects of network broadcasting as these affected standard broadcasting stations.[8]

§21. Exclusive Affiliation With National Networks.

In the report of the committee, mention was made of a standard clause in contracts between individual stations and their respective networks. The majority of stations affiliated with national networks were, by reason of such contracts, precluded from broadcasting programs of any other national network. Such restrictions were regarded by the committee and the F.C.C. as interfering with the possible growth of networks generally. It was found that programs of general public interest, such as a World Series, were not available to the public, in certain areas, by reason of the affiliation under exclusive contracts of stations within that area, with networks other than that carrying such broadcast.

Accordingly F.C.C. Rules and Regulations were amended to include Section 3.101, which provides:

> "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization."[9]

In many instances the networks had entered into contracts with affiliated stations wherein the network agreed with a

[8]These chain broadcasting regulations were upheld in National Broadcasting Co. v. United States, 319 U.S. 190, 87 L. Ed. 1344, 63 S. Ct. 997 (1942).

[9]See also §§3.231 and 3.631 of F.C.C. Rules & Regulations.

contracting station in a particular community to furnish its network programs exclusively to such station. One of the objectionable features of this arrangement was that affiliated stations were not obliged to accept all network programs offered. If the network offered a sustaining, as opposed to a commercial network program, the affiliated station had the privilege of refusing to accept, and because of its contract, the network was prevented from offering the program to any other station in the given area. The listening public were the losers.

Section 3.102 of the Rules and Regulations is designed to remedy this situation. The section reads:

> "No license shall be granted to a standard broadcasting station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."[10]

§22. Time Limitation on Network Contracts.

Long term affiliation contracts were regarded by the committee as tending to prevent the growth of the newer networks. The conventional period of affiliation had been set at a five year term on the part of the station to its network. It was customary for the network to have the right of termination of its contracts upon one year's notice. In order to insure

[10] See also §§3.232 and 3.632 of F.C.C. Rules & Regulations.

a shorter maximum period of affiliation with a network, Section 3.103 was adopted and reads:

> "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: Provided, That a contract, arrangement, or understanding for a period up to two years, may be entered into within six months prior to the commencement of such period."[11]

§23. NETWORK OPTIONAL TIME.

Certain provisions in most of their contracts gave the networks the right to call upon their affiliated stations, on a few days advance notice, to broadcast a commercial program on certain days and hours designated as "network optional time." This provision, when abused, had the effect of crippling local programs with commercial sponsors who wanted definite assurance that their program would continue to be heard at a specified time over the local station. This restrictive clause likewise had the effect of limiting new networks seeking an outlet for their programs over stations which were already affiliated with another network. Section 3.104 was designed to curb these abuses, and reads:

> "No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a.m. to 1:00 p.m.; 1:00 p.m. to 6:00 p.m.; 6:00 p.m. to 11:00 p.m.; 11:00 p.m. to 3:00 a.m. Such options may not be exclusive as against other network organizations and

[11] See also §§3.233 and 3.633 of F.C.C. Rules & Regulations.

may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations."[12]

§24. Right of Refusal of Network Programs.

One of the fundamental principles upon which the system of radio licensing in the United States is based is that the individual station shall retain control over the programs it broadcasts, as well as the selection of such programs. Prior to the adoption of Section 3.105 of the Rules and Regulations, many network contracts required the affiliated stations to accept and broadcast all network commercial programs. The only method by which a station might avoid acceptance was by an affirmative showing by the station that its action, in rejecting such a program, was more in the public interest than would be its acceptance. It takes little imagination to see the difficulty of this position. The Commission adopted Section 3.105, which gives more power in practice to the individual station to reject such programs.

The section states that:

"No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing network programs which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance."[13]

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[12]See also §§3.234 and 3.634 of F.C.C. Rules & Regulations.

[13]See also §§3.235 and 3.635 of F.C.C. Rules & Regulations.

§25. MULTIPLE OWNERSHIP OF STATIONS.

It was felt that ownership by networks of more than one station in a given community tended to stifle competition, particularly where there were not enough other stations in that community to serve as outlets for competing networks or local station broadcasting. Objection was raised to multiple ownership of stations in any one metropolitan area by a single network, where such ownerships proved harmful. There were, however, certain situations where, because of existing conditions, multiple ownership was not necessarily harmful, and with this in mind the following prohibition contained in Section 3.106 was adopted:

> "No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."[14]

§26. MULTIPLE OWNERSHIP OF NETWORK.

The report criticized the predominant position of the National Broadcasting System because of the large numbers of stations under its affiliation. NBC was then composed of two networks, the Blue Network and the Red Network. The committee felt that competition would be increased and a more desirable situation would result if these two networks were controlled independently. The divorce of the Red Network from the Blue Network was enforced by means of Section

[14]See also §§3.236 and 3.636 of F.C.C. Rules & Regulations.

3.107 which effectively prohibits a network organization from maintaining more than one network, as follows:

> "No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: Provided, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network."[15]

§27. Rate Fixing.

In an effort to prevent competition for the business of large advertisers, between the affiliated stations themselves and the network, certain provisions were inserted in network contracts with affiliated stations. These provided that if the affiliated station should contract with national advertisers for broadcasting rates that were less than those which the network would receive from like advertisers for the sale of the particular station's time, then in such event the network would have the power to reduce its rate for the time of that particular station in like proportion. The Committee stated that this sort of contractual provision, even if never exercised, had the effect of price fixing in the form of a forced level of rates by individual stations, and tended to lessen competition. In order to eliminate this practice the F.C.C. set forth in Section 3.108, that:

> "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization, under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs."[16]

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[15] See also §§3.237 and 3.637 of F.C.C. Rules & Regulations.
[16] See also §§3.238 and 3.638 of F.C.C. Rules & Regulations.

§28. Network Broadcasting Affecting FM and Television.

Substantially the same provisions affecting network broadcasting are provided for FM (frequency modulated) broadcast stations in Sections 3.231 to 3.238 inclusive, of the F.C.C. Rules and Regulations, and for television broadcast stations in Sections 3.631 to 3.638 inclusive.

Chapter IV
CONTROL OF PROGRAM CONTENT

§29. General.

It is well recognized that the content of programs broadcast is subject to many and varied limitations. While there are specific prohibitions against dissemination of information over the air concerning lotteries, and the use of obscene, indecent, or profane language, these make up only a small part of the material which is considered by governmental authorities to be objectionable for use in broadcasting.

Broadcasting being in interstate commerce, is subject to control by the Federal Government, however, the states have not thereby lost their right to retain jurisdiction over certain matters affecting program content.[1] Under the police power inherent in state governments, they are empowered to regulate broadcasts emanating from within their borders in respect to such matters as use of obscene, indecent, or profane language or seditious utterances made over the air, restricted only by the constitutional guarantees of free speech.

The control of a state over broadcasts originating from within its borders, follows the same principles applied in the control of publication of like material in newspapers. It is clear that liability for criminal acts performed within a state is no less punishable, where uttered over a medium of interstate commerce, than would be the same acts, when confined entirely within the borders of a state. Statutes governing criminal defamation, applicable to radio broadcasts, have been adopted in some states.[2]

§30. State Control Outside Its Boundaries.

Aside from the power of a state to punish acts committed by its own citizens, it ordinarily has no power to punish acts committed beyond its borders.[3] A corollary exists in radio where,

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[1]See Chapter VIII, Defamation by Radio.
[2]Penal Code of California, Sec. 258.
[3]Restatement, Conflict of Laws, §§425 and 426 (1934).

under the police power of a state, it may act to prevent an out of state broadcasting station from committing a nuisance within the state. Thus, a state may attempt to prevent the commission of nuisances within its borders, even though the objectionable broadcast originates in another state or in a foreign country.

The only decision on the subject is that found in the unreported case of *People v. Belden*[4] in an opinion handed down by the Superior Court of the State of California for Los Angeles County, in an action to abate a public nuisance, which case has been referred to in Section 10 in relation to Code messages. There a complaint was filed against the defendants, charging them with printing and distributing, within the State of California a "scratch sheet" containing betting odds and racing information. The records disclosed that one of the defendants operated radio station XELO, located in Mexico. It appeared that this station broadcast daily information, referring to horses by numbers rather than names, and that such information was unintelligible, except to persons holding the objectionable "scratch sheets." The sale of such "scratch sheets" is prohibited at California race-tracks, and their distribution was affected mainly through illegal "bookie agencies."

It was contended by one of the defendants that, as the radio broadcast complained of originated in Mexico, it constituted foreign commerce. Therefore the defendant claimed the California court would be powerless to act.

The court held that it was within its power to enjoin a public nuisance, even if such injunction affected interstate or foreign commerce, the sale of the "scratch sheets" having been made within the State of California. A preliminary injunction was granted, enjoining all acts in California in furtherance of the printing and distribution of the "scratch sheets," and the forwarding from California to the Mexican station of information to be used in broadcasts.

The court further held that, although the acts might be

[4]People v. Belden, (unreported) California Superior Court, Civil Number 451986 L.A. (1940).

legal in Mexico, such fact does not affect the right of the California Court to issue an injunction prohibiting the commission of a nuisance within that state. The commerce clause of the Federal Constitution, said the court, does not deprive a state of its police power to legislate for the benefit of its people, in an effort to prevent deception and fraud in the sale within its borders of articles manufactured elsewhere.

It is noteworthy that the Mexican station, although named as a defendant, was not served with process, and made no appearance in the action. It appears from this decision that the courts of a state are limited in their power to prevent a nuisance from entering the state, but can enjoin the commission of a nuisance within its borders, even though such nuisance originated elsewhere.

Should the foreign broadcasters of the objectionable program thereafter enter the state of California on a visit, during which they commit no acts in furtherance of the nuisance or conspiracy, it is submitted that the California courts should have no power to punish a later violation of its injunction by the broadcasters committed outside its borders, nor could the courts, by injunction or otherwise, prevent the radio waves from entering the state.

§31. State Control Within Its Borders.

State control of a nuisance committed by broadcasters located within the state stands upon firmer ground. Admittedly the federal government does not presume to regulate all of the activities and conduct of broadcasting stations. Therefore, if we subscribe to the doctrine that a radio station, being engaged in interstate commerce, is not subject to control under the police power of the state wherein it is located, it is clear that such stations would be virtually free of regulatory restrictions.

The right of the state government to impose its police power upon broadcasting is in the same category as its right to exercise such power on any matter affecting interstate commerce, and

is restricted to cases wherein its use will not place an unreasonable burden on such commerce.

In the case of *Sportatorium v. State,*[5] the State of Texas brought an action against a number of defendants, to abate an alleged nuisance. The facts disclosed that a Texas statute made it illegal to conduct, in competition for prizes, any personal, physical, or mental endurance contest that would last longer than twenty-four hours. One of the defendants was conducting a dance marathon, which was broadcast over a radio station operated by another of the defendants. The court enjoined all defendants from conducting the marathon, or disseminating by radio or otherwise, any publicity dealing with the contest.

§32. Liability in Several States for Single Act.

Although a state has police power over broadcasts originating within its borders, the question as to what powers it has over broadcasts originating beyond its borders remains to be answered. Assuming that New York has a law dealing with criminal defamation, and a broadcast originating in California is received in New York, is the speaker in California criminally liable in New York?[6] From a practical point of view, it is extremely undesirable that a speaker in California, even though liable, should be subject to simultaneous criminal prosecution in forty-eight states. From a theoretical, as well as a practical point of view, a solution of this problem is not simple. It is a settled rule of the conflict of laws, that a crime or tort may be punishable in one of several states.[7] For example, the shooting of a pistol across a state border may result in a crime punishable in either state.

Cases involving the question of whether there is a separate performance, on each occasion that a commercial establishment

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[5]Sportatorium v. State, 104 S.W. (2d) 912 (1937).
[6]Restatement, Conflict of Laws, §377, and Example 7a, p. 457 (1934).
[7]Restatement, Conflict of Laws, §65 (1934).

makes audible a broadcast to its patrons, hold that each individual reception constitutes a separate performance.[8]

The problem cannot be cured by legislative action. The enactment by Congress of a law covering the entire field of criminal defamation, obscene, indecent, or profane language, seditious utterances, and the like, applicable to radio broadcasting, would not remedy the situation.

Even though the state and federal courts interpreted this question in such a manner as to grant to the states full police power over broadcasts heard within their respective borders regardless of point of origin, we would still be faced with forty-nine separate and varying laws affecting one transmission.[9] The only apparent solution to this problem is a uniform law of defamation and of related matters, affecting broadcasts, coupled with a voluntary agreement that the power of prosecution be vested in the state of origin.

In totalitarian countries, the problem is handled summarily. There, possession of radio receivers is either limited to those who are loyal adherents of the existing government, or the reception of foreign broadcasts is forbidden under stringent penalties. Any attempt by one of the United States to limit the number or type of programs to which its residents may listen, would properly be declared unconstitutional as being in violation of the 14th amendment.

State governments are powerless to enforce any censorship of broadcasts prior to their transmission. An attempt to do so would constitute interference, on the part of such state, with interstate commerce.

It is apparent that the field of radio is less subject to state control than is the realm of literature, where books and magazines may be completely banned, and their possession penalized, if their sale violates the statutes of a state. Air borne transmissions know no state barriers.

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[8]Buck v. Jewell-La Salle, 283 U.S. 191, 75 L. Ed. 971, 51 S. Ct. 410, 76 ALR 1266, 9 Pat. Q. 17 (1931).

[9]Restatement, Conflict of Laws, §428 (1934).

§33. Identification of Sponsors.

In its present form, radio broadcasting in the United States could not exist without paid advertising. Recognizing this fact, F.C.C., with the single exception of matters relating to "international broadcasting stations,"[10] has laid down no specific rules or regulations limiting the type or content of advertising contained in broadcasts. The sole requirement dealing with sponsored programs is that contained in Section 3.409 of F.C.C. Rules and Regulations.[11] There it is provided, that sponsored programs shall include an announcement to the effect that such programs are sponsored in whole or in part, and fully and fairly disclose the identity of the sponsor. The provisions affect not only sponsorship of programs of commercial products and services, but include as well sponsors of political programs or programs involving discussion of public controversial issues for which the station receives a consideration as an inducement to broadcast.

§34. Indirect Control by F.C.C.

While it is specifically provided that F.C.C. shall not censor program content and advertising, the Commission does nevertheless exercise an indirect but powerful restraint thereon. Section 326 of the Communications Act provides:

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

Indirect control is exercised by F.C.C. by the simple expedient of making its opinions known concerning particular forms of radio programs.

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[10]See Chapter XVI.

[11]Also see Section 3.289, 3.789 F.C.C. Rules & Regulations.

The Commission has indicated its disapproval of the following type programs:

(a) Obscene programs or those bordering on obscenity.
(b) Defamation.
(c) Religious or racial intolerance.
(d) Commendation of the use of hard liquor.
(e) False, fraudulent, or misleading advertising.
(f) Fortune telling or similar programs.
(g) Promiscuous solicitation of funds.
(h) Refusal to grant equal broadcasting rights to both sides on controversial issues.
(i) Stations espousal of one side of controversial topics.
(j) Programs depicting tortures.
(k) Excessive suspense in childrens' programs.
(l) Lengthy and frequent advertisements.
(m) Advertisers' interruptions of artistic programs.
(n) Excessive use of records.

The licensee of a station is fully aware of the fact that at the time of hearing on an application for renewal of license, the question of program content will be considered by F.C.C. The possibility of a refusal of their application to renew a license is a most effective reminder to the licensee to regulate and control its program content.

Few applications for renewal of license have been refused. The records indicate that it is only in the rare case, where flagrant violations have been uncovered and conclusive evidence of the stations' complicity in the broadcast of objectionable material proved, that the Commission has refused renewal.

In view of the limited number of channels available in the standard broadcast band, it has been the policy of the Commission to examine each application with minute care, in order to determine the applicant who, in the opinion of the Commission, is in a position to render to the public the best service.

Even though there is only one applicant, if it appears likely that there will be in the future competitors for a particular frequency, the Commission will consider the question of public service in passing upon the application.

§35. Acquisition of Station License.

Two methods are open to the public in the acquisition of radio stations. One is by application to construct, the other by transfer of an existing license. In the former, the first step on the part of an applicant, in an effort to establish a new station, is the filing with F.C.C. of an application for a construction permit. Such application must contain full particulars as to the background of the individual applicant, or, if it be a corporation, then the background of each of its directors. There must be included therein the citizenship of the parties, their financial standing, and technical resources, the proposed program content, and evidence of the availability of a free channel, as well as the need for such a station. The granting of a construction permit is tantamount to the granting of an application for license to operate.

The other method, that of the purchase of an existing station, requires an almost identical form of application, plus complete cooperation on the part of the then owner. In cases of application made to supplant an existing license, it is necessary to submit the strongest possible evidence as to the advantages to be gained by the public under the new management, as compared with that of the present licensee.

In cases where a number of applications have been filed for a particular frequency, each being equal as to all of the necessary qualifications, the Commission, in arriving at its decision, acts contrary to the provisions of Section 326 of the Act, wherein it is provided in effect that the Commission shall not control program content. In such cases, the Commission must examine program content, and renders a decision based on its opinion as to which program would best serve the public interest.

§36. Advertising Outlets as a Basis for New Stations.

The need for additional advertising outlets for the merchants of a particular community is not a controlling, or even a strong factor, in the granting of a permit to establish a new station. Although radio broadcasting is financed by and depends upon paid advertising, such advertising is not regarded as an end in itself.

In the matter of the *Metropolis Company,* of Jacksonville, Fla.[12] an application was made for a construction permit for a new station. In considering the need for such station in the particular community, testimony was introduced as to the then existing facilities, as well as the need of and demand for additional facilities on the part of local business. The applicant contended that there was a lack of advertising time on the existing stations due to the time requirements of chain broadcasts. F.C.C. stated that it would not establish new radio facilities for the sole purpose of giving additional radio advertising outlets to business. In spite of this attitude, the application was granted on the ground that the evidence disclosed a need for additional local programs in the community.

§37. Application for Limited Program Stations.

Applicants who evidence their intention to produce programs that have appeal to the general public are more apt to receive a license than are applicants who submit programs of a limited character. However, it is evident that in large metropolitan areas there is more of a need for stations specializing in certain types of programs, such as classical music, than in smaller communities.

In two hearings on the matter of *Food Terminal Broadcasting Company,* of Cleveland, Ohio,[13] an applicant who was otherwise fully qualified to render broadcasting service in the public interest, was denied a construction permit for a new station

[12]The Metropolis Co., 6 F.C.C. 425 (1938).

[13]Food Terminal Broadcasting Co., 6 F.C.C. 271 (1938); 6 F.C.C. 847 (1939).

on the ground that the proposed program content was too narrow in scope in view of the existing limitations on the number of stations that can broadcast on the air. The applicant proposed to broadcast programs dealing with foodstuffs, with considerable time devoted to the broadcasting of market information, and related subjects. There was no showing that existing stations did not carry a reasonable amount of this type of news.

The Commission held that the public interest would best be served by allocation of facilities to those who will, when the need exists, render a broad public service.

§38. Failure To Abide by Agreements.

Upon a number of occasions an applicant for a construction permit or license has submitted to F.C.C. a satisfactory outline of the proposed programs, and after having been granted a license has disregarded the submitted outline and produced mediocre programs of limited variety. Under such circumstances the Commission has the theoretical power to decline to renew the license of this station for failure to abide by its original application. So far as can be determined, this power has never been invoked.

In the matter of *Cannon System, Ltd.,* of Glendale, Calif.[14] the Commission had before it the hearing of an application for renewal. The original application for a construction permit, heard before the old Federal Radio Commission, contained certain promises regarding programs, which promises were not fulfilled by the applicant.

The applicant had proposed to use, in large part, certain top flight talent available in the community, and assured the Commission that one-third of the broadcasting time would be used for educational and agricultural programs, as well as news, and matters of related public interest. Instead of carrying out its submitted program, the station actually used a large percentage of the program time for commercial announcements.

[14]Cannon System, Ltd., 8 F.C.C. 207 (1940).

Its musical policy was almost entirely confined to the playing of popular phonograph records. The applicant had spent only $2000 a year on "live" talent, while it had represented that it was spending $6000 a year. The application for renewal was granted on the grounds that there was evidence to the effect that the station was presently making efforts to improve its programs, and plans presented indicated a future compliance with the original promises.

On March 7, 1946, the F.C.C. published a report concerning the "Public Service Responsibility of Broadcast Licensees." This report is popularly known as the "Blue Book." Therein the Commission after analyzing program content, gave its opinion as to what it felt was wrong with present day radio broadcasting. In considering the following context, it should be remembered that this chapter is intended to be a presentation of the legal aspects of program content, and the objections that might be raised to the type of programs presented by a station have been its main emphasis. The opinions of the Commission have been set forth hereafter in order to indicate the probable attitude of that body toward applicants presenting evidence of program content.

In its report, the Commission discussed the continued failure of the station involved in the matter of *Cannon System, Ltd.*, supra, to live up to its promises.

It called attention to the fact that situations of this kind are particularly unfair when there is more than one applicant competing for a single available assignment, and the license is granted to one on the basis of promises made relating to program content. If the successful applicant thereafter fails to carry out in material respects the promises made, the result will be that the applicant failing to receive the license has actually been damaged by the false representations of the successful applicant. In order to protect innocent parties, the Commission contended it had a moral obligation to see that successful applicants abide by their agreements, aside from any desire to "reform" the type of programs that are presented.

In its "Blue Book," the Commission called attention to the matter of *Western Gateway Broadcasting Corporation,* of Schenectady, N.Y.,[15] where there were involved two applicants for a single frequency. A license was awarded to one of the applicants on the basis of a better series of proposed programs. It later developed that the successful applicant's performance fell far short of the promises made at the time the license was granted.

Similar examples were cited, involving applicants for increased facilities, as well as for transfer of control of stations, where promises respecting program content, made at the time of the hearing on the original applications, were disregarded in practice.

The report states that the Commission will thereafter pay close attention to the comparison between promises made, and those fulfilled, in arriving at a decision on matters of applications for renewal of license. It is noteworthy, however, that since the time of issuance of this report, no station has been refused a renewal of its license for failure to present acceptable programs.

§39. Sustaining Programs.

Concern was expressed, in the report, over the role of the sustaining program, and the Commission gave, as its opinion of the functions and purposes of such programs, the following five points: 1. To secure for the station or network a means by which in the overall structure of its program service, it can achieve a balanced interpretation of public needs.

2. To provide programs which by their very nature may not be sponsored with propriety.

3. To provide programs for significant minority tastes and interests.

4. To provide programs devoted to the needs and purposes of non-profit organizations.

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[15]Western Gateway Broadcasting Corp., 9 F.C.C. 92 (1942).

5. To provide a field for experiment in new types of programs, secure from the restrictions that obtain with reference to programs in which the advertiser's interest in selling goods predominates.

In considering the type of commercial programs broadcast over networks during daytime hours, the Commission stated it was disturbed to find that the overwhelming percentage of such programs consisted of "soap operas," defining these as "a continuing serial in dramatic form, in which an understanding of today's episode is dependent upon previous listening."

There can be no question but that the networks and individual stations have developed splendid sustaining programs. These far surpass similar radio programs produced elsewhere in the world. However, the Commission has stated that there appears to be a tendency toward the elimination of such programs, in favor of those having sponsors, especially during the most desirable listening hours.

§40. Live v. Transcribed Programs.

No objections were raised to the use of transcription and phonograph records in broadcasting. The advantages of the recorded over the live program appear to be, said the Commission:

1. A means of perpetuating good programs for future rendition.

2. A means of placing programs at convenient hours for the listening public.

3. A means of sharing programs among stations not directly connected by wire lines.

4. A means of affording to the director and actors involved the technical advantages that result from ability to do a "scene" over and over again, until perfection is reached, in the same way as moving picture scenes are repeated in the making.

5. A means of perpetuating for future use "spot events" such as battle scenes.

In this respect attention was called to the fact that use of recorded or transcribed programs, to excess, may result in depriving a community of local "live talent" radio shows, and programs of local interest, a supply of such programs being necessary in order to achieve a balanced service.

§41. Commercial Announcements.

The National Association of Broadcasters has voluntarily set certain schedules prescribing the maximum amount of time that should be devoted to commercial announcements in programs of varying lengths, which schedules have been violated in some instances by individual stations.

There is considerable doubt, says the Report, whether repeated commercial announcements are helpful to the program and the advertiser. There can be no question but that the interests of the program and the advertiser are not parallel in this respect. While a program may suffer in popularity by repeated and objectionable commercial announcements, the sale of the product advertised may increase as a result of the repetitious advertising. Considering only the interests of the advertiser, the latter is correct in doing what he can to increase the sale of his product. However, broadcasting, in its present form, must be considered in relation to the interest of the listening public. Certainly advertising and commercial sponsorship are necessary to our form of broadcasting, yet, says the Report, there should be a balance between the respective interests involved.

One of the more obvious evils of radio advertising is a "piling up" of commercial announcements. A network program may end with its closing announcement; following this comes the "hitch-hike"; then the network "spot" announcement; thereafter the local station puts in its "spot" commercial; next comes the "cow-catcher," and finally the succeeding network program starts out with its first main commercial plug. The fact is that no one gains from this type of advertising. The announcements are so concentrated that the listener is unable to absorb their individual message.

The "middle commercial" presents another controversial problem. News broadcasts are deemed by many to be inappropriately interrupted by commercial announcements.

Much objection is voiced to the "physiological commercial" which has increased in recent years. Discussion over the air of constipation, body odor, stained teeth, headaches, and such, are viewed by some as unsuitable for broadcast purposes. The prominence of such commercials tends to recall the days of patent medicine advertising, and may well cause certain potential advertisers to shun radio broadcasting.

The views expressed by F.C.C. are highly controversial. The radio industry has replied to some of the criticisms, and one station has gone so far as to bring an action to expunge from the "Blue Book" certain references to it.[16] It is not the scope of this work to weigh the comparative merits of the controversy.

Radio is still a growing field. Further experimentation in types of advertising and programs is to be expected. Fixed views about these are dangerous, since the events and conditions of tomorrow may change the general concept of what is or is not desirable from the viewpoint of the listening public, the broadcasting station, and the commercial sponsor.

[16]Station WBAL of Baltimore, Md.

CHAPTER V

ADVERTISING BY THE PROFESSIONS; AND ADVERTISING OF MEDICINAL PRODUCTS

§42. GENERAL.

Deeply imbedded in the history of advertising from its inception, and dominating the field, were the medicine men, the healers, the vendors of patent remedies, with their special brand of ballyhoo. When radio was in its infancy and time became available for advertisers, it was but a natural trend that led the purveyors of medical products and the healers to seek to place their products and names before radio audiences. Here was a medium of advertising eclipsing all others in its psychological phases, the effectiveness of which these men well knew.

Government supervision of radio advertising is necessarily more stringent than that exercised over the advertisements of newspapers or magazines. The reason for this is obvious. Radio is far more amenable to Federal control. The government, through its administrative agencies in the form of the Federal Communications Commission, the Federal Trade Commission, and the Post Office Department, has been highly successful in restricting fraudulent and objectionable advertising by reputed healers and vendors of questionable cure-all remedies.

§43. HEALING BY AIR.

In the matter of *KFKB Broadcasting Association v. Federal Radio Commission*,[1] it appeared that the Commission had denied the application for renewal of a station license in Milford, Kansas, by the applicant corporation, which was entirely controlled by a Dr. Brinkley. From this refusal to renew, an appeal was taken to the courts.

The evidence disclosed that the doctor had formed an association of druggists who dispensed, to the public, preparations consisting of the doctor's formulas. These well-publicized formulas were known to the public by numbers only. Members of

[1]KFKB Broadcasting Assoc. v. Federal Radio Commission, 47 F. (2d) 670 (1931).

ıtion paid a fee to the radio station on the sale of each
ɔn. Dr. Brinkley made a practice of answering ques-
the air, basing his alleged diagnosis on the descrip-
mptoms given by listeners who submitted letters of
the station. His usual prescription included a recom-
ı that the individuals take one or more of his patent

ırt on appeal, held that such prescriptions by a doctor
ıever seen his patients were against the interest of the
ılth, that such broadcasts were private in nature, not
ıt to the general public, but only in the interest of the
regarded the views of the Radio Commission as rea-
ınd not constituting censorship of a program, holding
Commission may take note of an applicant's past con-
ıny ruling on a renewal of the broadcast license. The
of the Commission in denying renewal was affirmed.

ears later Dr. Brinkley tried again. In the matter of
. and *W. C. Morris,*[2] an application was made for
ɔn to broadcast programs from Eagle Pass, Texas, for
sion or delivery to a foreign radio station. The appli-
ıs denied, and one of the reasons advanced by the Com-
for such denial was that programs broadcast by the
f the applicant contained talks by Dr. Brinkley, whose
ènewal had formerly been refused.

ɛ matter of *McGlashan,*[3] where applications for re-
station licenses for construction and for modification
of construction permits were involved, the Commission took under consideration certain programs of one of the stations in Los Angeles County, Cal. One such program was sponsored by the "Electronic Institute", the trade name for the operations of two men, one of whom was a chiropractor. It appeared that advertisements were broadcast to the effect that the first ten persons calling the station would receive a consultation at a fee of one dollar instead of the allegedly usual fee of ten dollars. Ac-

[2]Nellie H. and W. C. Morris, 2 F.C.C. 269 (1936).
[3]McGlashan, 2 F.C.C. 145 (1935).

tually the customary price of an examination had been one dollar, and the statement broadcast was in the category of false advertising.

The evidence likewise disclosed that the electronometer which was advertised as amplifying the body vibrations or waves, could not in fact do so from an electrical standpoint. Testimony showed that one of the two associates had been found guilty of violating the California Medical Practice Act. The Commission held that such programs were definitely inimical to the public welfare. In spite of such evidence the Commission granted a renewal of license.

In the hearing of KMPC, *The Station of the Stars,*[4] of Beverly Hills, Cal., for renewal of license, attention was directed to certain announcements made over the station advertising a so called "Basic Science Institute" and a "Samaritan Institute." The former institution was a chiropractic organization claiming the ability to diagnose physical ailments and prescribe the treatment therefor. One of the promoters of the "Basic Science Institute" had, while associated with a similar organization, and prior to this hearing, been convicted of violating the California Medical Practice Act. The F.C.C. stated it believed that this man's background, coupled with the advertising continuity presented, should have put the station on notice, and that the station should have made a full investigation before accepting and transmitting such advertisements.

The "Samaritan Institute" advertised a forty-eight hour cure for alcoholism. Investigation revealed this institute had in its service individuals who were engaged in the practice of medicine without a license, and that some of its patients had suffered serious physical consequences from the treatment prescribed. F.C.C. found that the station had completely changed its management following these broadcasts, and since its general service was presently satisfactory, the license should be renewed.

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[4]KMPC, The Station of the Stars, 6 F.C.C. 729; 7 F.C.C. 449 (1939).

The matter of *Bremer Broadcasting Company,*[5] of Jersey City, N.J., came before the Commission on an application for renewal of license. It appeared that the station had broadcast certain programs which the Commission found to be contrary to public interest.

One of the programs consisted of discussions by a Dr. Coll, presenting alleged analysis of ailments such as hernia, and ulcers. These analyses were accompanied by offers of free booklets and consultations to listeners suffering from such ailments. Promises of cures without pain or surgery were likewise made.

Large numbers of listeners applied for consultations, but were charged fees contrary to the announced "free examinations." The program later changed the word from free "examination" to free "consultation", which was held to be just as misleading so far as the public was concerned. The Commission found that the station had ordered and effected a discontinuance of these programs, and the application was approved.

Particularly objectionable, generally, are programs by individuals representing themselves to be doctors or possessed of licenses in one of the healing professions, but who are, in fact, charlatans.

A number of radio stations encountered considerable difficulty by reason of certain programs presented by a Dr. Michael, who advertised the products of "Dr. Michael's All Herb Laboratories." This so called doctor had pleaded guilty to violation of the Federal Food and Drug Act, and had been cited by the Post Office Department to show cause why his advertising should not be barred from the mails. The "doctor" had also been convicted of practicing medicine without a license. His programs were held to be not in the public interest in the matter of *WSBC, Inc.,*[6] in that of *Oak Leaves Broadcasting Station,*[7] and in the matter of *Emil Denemark, Inc.,*[8] of Chicago, Ill.

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[5]Bremer Broadcasting Co., 2 F.C.C. 79 (1935).
[6]WSBC Inc., 2 F.C.C. 293 (1936).
[7]Oak Leaves Broadcasting Station, 2 F.C.C. 298 (1936).
[8]Emil Denemark, Inc., 2 F.C.C. 474 (1936).

One of the program sponsors on the station of the *Hammond-Calumet Broadcasting Corporation,*[9] of Hammond, Ind., had unlawfully assumed the title of doctor. Certain of this sponsor's representations were classed as fraudulent in a Post Office Department fraud order.

The station attempted to excuse itself for these broadcasts by claiming that it had not been advised of actions taken against advertisers. The F.C.C. held that such actions were matters of public record. When the situation was called to the attention of the station, it immediately instituted a policy of rejecting medical accounts which fail to furnish copy approved by government agencies. Its license was renewed.

The number of cases involving misuse of broadcasting facilities by some members of the healing professions has, in effect, placed the F.C.C. on notice in such matters. As a result, the Commission has shied away from the granting of licenses to operate stations, where the control appears to be in the hands of doctors, chiropractors and the like, even though it is admitted that many applicants in these categories are deserving. The Commission has been fearful that such ownership might be used to build up the clientele of the owners rather than to broadcast in the public interest.

An application for a construction permit was filed with F.C.C. on behalf of the *Liberty Broadcasting Company,*[10] of Athens, Georgia. The evidence disclosed that the station was to be owned by a partnership, composed of two chiropractors, who had for several years advertised their services over other broadcasting stations in the city of Atlanta.

The former radio program, designed to build up their chiropractic practice, had brought them into conflict with the public health authorities of both the city and state. The station which had carried these broadcasts discontinued them, stating it desired to conform with the policy of Columbia Broadcasting System with reference to programs of this nature. The applica-

[9]Hammond-Calumet Broadcasting Co., 2 F.C.C. 321 (1936).
[10]Liberty Broadcasting Co., 3 F.C.C. 218 (1936).

tion was denied, and as one of the grounds for denial the opinion was expressed that there could be but little doubt that the purpose of this station would be to advertise the owner's practice.

The Commission stated that its experience with doctors owning their own stations had theretofore been poor, and that it would in the future be extremely careful in granting a license to those in the healing professions.

§44. State Control of Medical Advertising.

A number of states have legislated against certain types of advertising by the healing professions. Violators of such statutes are subject to criminal prosecution. In some states, courts have interpreted statutes so that contracts made to further illegal advertising may themselves become tainted and thereby unenforceable.

In *Norman v. Radio Station KRMD*[11] of Shreveport, La., the plaintiff, a chiropractor, entered into a written contract with the defendant radio station for a number of announcements regarding plaintiff's plan to commence practice of his profession in Texas. The town mentioned was situated in Texas just across the state border from Shreveport, La., the town in which the broadcasting station was located. The contract provided that all announcements were subject to the censorship of defendant station. Defendant's attorney had advised it to cancel the contract, as it placed the station in a dangerous position under the applicable laws of Louisiana pertaining to this type of advertising. Plaintiff's action was based on breach of contract, and at the trial thereof he testified that the reason he located his practice in Texas was because he could not comply with the Louisiana Medical Act. Plaintiff showed a substantial loss of earnings as a result of the termination of his contract.

The court held that the evidence did not warrant a judgment for plaintiff. Ordinarily, said the court, in such actions damages would be allowed, but here it was evident that the advertising

[11]Norman v. Radio Station KRMD, 187 So. 831 (1939).

contract was deliberately prepared in an attempt to avoid the laws of Louisiana. Plaintiff's lack of "clean hands" precluded recovery, said the court.

This language seems to be at variance with the facts. The action was one for breach of contract, and was not an action in equity. It is submitted that the court could have justified its decision by a holding that the contract was against the public policy of the State of Louisiana, and could not be enforced in that state.

§45. Advertising By The Clergy.

Members of professions other than those in the healing arts may offend the law of good taste, says F.C.C., by advertising their services over the radio. Indirectly, the Commission has the power to curb such advertising by its approval or disapproval of an application for renewal of license.

In the matters of *United States Broadcasting Corporation*[12] and the *Voice of Brooklyn* of Brooklyn, N. Y.,[13] certain broadcasts by a rabbi were under consideration. Interspersed with religious talks, the rabbi had made a point of advertising the availability of his services for weddings and other occasions. A number of his co-religionists protested this type advertising as offensive to their religious sensibilities. F.C.C. agreed that such a program was offensive, and should be discontinued.

§46. State Control of Ethical Advertising.

Underlying the decisions in these cases is the apparently firm conviction on the part of courts and the F.C.C. that members of the various professions should not advertise in any form. Steps are presently being taken by state governments and professional associations to adopt laws and regulations prohibiting and regulating the advertising by members of professions. Many states now regulate professional advertising by statutory provisions providing penalties for violators. A more effective form of control has been adopted in some states wherein the state places power in the hands of a commission or semi-official board

[12]United States Broadcasting Corp., 2 F.C.C. 208 (1935).
[13]Voice of Brooklyn, 8 F.C.C. 230 (1940).

composed of members of the particular profession. Such power extends to the right of deprivation of the offender's license to practice his profession within the state.

In *Barron v. Board of Dental Examiners of California,*[14] the defendant Board suspended plaintiff's license to practice dentistry. Defendant appealed from the order to the Superior Court, which annulled the Board's ruling, and the Board in turn appealed from the court's finding.

Testimony elicited the fact that the plaintiff was one of a number of dentists charged before the Board with unprofessional conduct involving the employment of "cappers" and "steerers" contrary to the California statute on the subject. The appellate court held that truthful radio broadcasting was not prohibited by the California law, and that such broadcasting did not constitute employment of "cappers" and "steerers" as these terms apply to those who decoy or lure people for the purpose of swindling them. The court held that plantiff's license should be reinstated.

Statutes prohibiting certain forms of advertising may be declared unconstitutional as discriminatory against a particular method of advertisement. For instance, if a statute prohibited advertising in newspapers, and failed to prohibit the same form of advertising by means of broadcasting, its constitutionality, brought into question under the provisions of the constitutional guarantee of equal privileges and immunities, would be in grave doubt.

In *People v. Osborne,*[15] the defendant was charged with violating a city ordinance of Long Beach, Cal., prohibiting the display of barbers' prices or the advertisement of such in any publication, handbill, or notice whatsoever. The ordinance was passed during the heyday of the N.R.A. and emphasized allegedly "unfair business practices". Defendant was convicted of advertising his price visibly on the outside of the building. On

[14]Barron v. Board of Dental Examiners of California, 109 Cal. App. 382, 293 Pac. 144 (1930).

[15]People v. Osborne, 17 Cal. App. (2d) Supp. 771, 59 P. (2d) 1083 (1936).

appeal, the court held that the ordinance was unconstitutional, as it made no prohibition of like advertising if performed by means of radio broadcasting. Such discrimination, said the court, violates the equal privileges and immunities clause, as there is no reasonable classification in putting newpapers and handbills in one category and radio advertising in another. Since this ordinance was passed, said the court, after the advent of radio advertising, the discrimination was even more pronounced. Judgment against the defendant was reversed.

A somewhat similar case is that of *Needham v. Proffett*,[16] which arose in Indiana, where a state statute prohibited advertising in "printed matter" by embalmers and undertakers. Plaintiff sought review by the courts of the revocation of his license by the defendants, who constituted the State Board of Embalmers and Funeral Directors.

Plaintiff was charged with advertising in a newspaper. It was his contention that the statute was unconstitutional as violating the Indiana "equal privileges and immunities clause." The court agreed with this argument, and held the statute unreasonable and unconstitutional in this modern age of radio advertising. Judgment granting plaintiff his license was affirmed.

It is interesting to compare the two previous cases with that of *State v. Packer Corporation*,[17] in which defendant corporation was convicted of violating a Utah statute by displaying a cigarette advertisement upon a billboard. The statute in question prohibited tobacco advertising by billboards or placards, but did not prohibit such in newspapers, magazines, or in radio broadcasting. Defendant urged that the statute was unconstitutional as being unreasonable in its classification of the type of advertising that was punishable.

The Supreme Court of Utah and the Supreme Court of the United States held that this statute was valid, and not discriminatory. The reasoning in the case followed the line that a state may be selective in singling out certain forms of advertising to

[16]Needham v. Proffett, 220 Ind. 265, 41 N.E. (2d) 606 (1942).
[17]State v. Packer Corp. 285 U.S. 105, 76 L. Ed. 643, 52 S.Ct. 273 (1931).

be regulated, since a state may not easily control advertising in newspapers, magazines or over the radio. The United States Supreme Court felt that a state might take cognizance of a difference in evils and adapt its legislation accordingly. Defendant's conviction was affirmed.

§47. Broadcast of Legal Proceedings.

Closely akin to radio advertising by the various professions are those programs that "dispense justice" and "practice law". Radio programs, being designed to instruct, educate, and entertain the listening public, are clearly not adapted to the presentation of legal questions and answers. Since the programs have as their principal aim, from the standpoint of the broadcaster, the holding of the attention of the radio audience, the necessary elements of fairness and justice embodied in a trial or an arbitration proceeding are by-passed or ignored.

There are both legal and ethical objections to the practice of law by a corporation or institution. A radio station comes within this category.

In *Brody v. Owen,*[18] proceedings were instituted to confirm an award of arbitrators in favor of petitioner. The defendant was involved in a controversy with plaintiff, and was invited to appear on a Sunday, before a so-called "Court of Arbitration", which was broadcast over the air. Alone and without witnesses, defendant appeared at the appointed place; and though unable to read English, he was induced to sign a paper purporting to be a register of appearances. A hearing was then held before three arbitrators, which hearing was broadcast over the radio. The defendant was given two minutes to state his defense. At the end of the hearing, the defendant was told that an award of $600 had been made against him.

The court held on appeal that the arbitration agreement was fraudulent, and that the hearing was not a just one. It condemned the practice of broadcasting such proceedings, since the

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[18]Brody v. Owen, 259 App. Div. 720, 18 N.Y.S. (2d) 28 (1940).

conservation of time and the entertainment of the public are likely to take precedence over the administration of justice.

A case of similar import was that wherein the members of the Massachusetts bar sought to enjoin a station from broadcasting "Court" programs. In the trial of the case of *Rosenthal v. Shepard Broadcasting Service,*[19] evidence was introduced to the effect that the defendant station had broadcast programs known as the "Court of Common Troubles", and the "Goodwill Court".

The first program originated in defendant's studio, whereas the "Goodwill Court" was re-broadcast by defendant as part of a national hookup. On both programs it was announced that there was no intention to give legal advice as a substitute for that given by attorneys. Judges from New York and Massachusetts presided over the "trials". Attorneys acted as "conductors" on both programs. Since the commencement of the action, the station had voluntarily discontinued both programs.

The appellate court held that such programs came under the ban of a Massachusetts statute which forbids a corporation from practicing law. The court stated that the program could not even be excused on the basis that it gave a gratuitous service to indigent persons, since the programs had a commercial value, and there was no showing that those who appeared on the program were indigents. The case was dismissed on the grounds that the voluntary discontinuance of the programs now presented only a moot question.

The suitability of actual legal controversies and court trials for radio presentation is still questionable. In the case of *Irwin v. Ashurst,*[20] which was an action for defamation, the plaintiff sought to hold the judge liable on the theory that he became a tortfeasor by permitting a broadcast of the trial to be made from the courtroom. The broadcasting company was made a defendant, on the ground that its immunity was no greater than the conditional privilege of the attorney for the prosecution, who had used the allegedly defamatory language.

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[19]Rosenthal v. Shepard Broadcasting Service, 299 Mass. 286, 12 N.E. (2d) 819, 114 A.L.R. 1502 (1938).

[20]Irwin v. Ashurst, 158 Ore. 61, 74 P. (2d) 1127 (1938).

The court held on appeal that the judge had an absolute privilege from suits for defamation, despite the fact that he permitted the broadcasting of the trial. The appellate court questioned the propriety of permitting a broadcast in a courtroom, but held that such was entirely legal. The broadcasting company avoided liability on the theory that the remarks of the prosecuting attorney were conditionally privileged if relevent to the case.

The broadcast of actual cases or trials in dramatized form is proper and unobjectionable, when these cases are of past trials. The radio now makes effective use of this form of dramatic entertainment, particularly since the literary qualities of a trial can be portrayed without the necessity of a visual presentation.

§48. Broadcasting of Medicinal Products.

The highest standards of truthfulness are demanded in broadcasts advertising medicinal products. Not only must such broadcasts be devoid of misleading information, but a positive duty is placed upon the station itself to make inquiry and determine that there is a reasonable basis for the claims made by the advertisers.

The station may not successfully claim a lack of knowledge as to the false or harmful qualities of the product, nor may it contend that the advertising matter, while fraudulent, was unwittingly so advertised. The fact that a station assumes the benefits in the form of compensation for the broadcast of the product, places upon it a responsibility to protect the listening public against unscrupulous manufacturers of patent medicines.

The F.C.C. has been relatively successful in its efforts to reduce advertising of objectionable medicinal products. The campaign to do away with such advertising was intensified about 1935, and since that time such broadcasts have virtually disappeared from the airways. A potent weapon was added to the forces of government regulation with the adoption of the Pure Food and Drug Act of 1938.

Government control of medicinal advertising and selling is fourfold. The Federal Trade Commission and the Pure Food and

Drug administrators carry on an intensive campaign to curb all fraudulent and misleading advertising of medicinals. The Post Office Department controls the dissemination of printed matter through the mails by the issuance of "fraud orders" directed to those who are deemed responsible for fraudulent advertising. The F.C.C. charges the radio station with constructive knowledge of judicial proceedings and orders issued by all three of these agencies, involving manufacturers or distributors of advertised products accused of violations of governmental regulations.

The *Hammond-Calumet Broadcasting Corporation*[21] of Hammond, Ind., made application for renewal of license. Prior to such time, the station had broadcast programs of "Pur-Erg Laboratories" which was the subject of attack under a Post Office Department fraud order. The station attempted to excuse its acceptance and broadcast of the program by claiming that it had not been advised of the action taken against the advertiser. The F.C.C. called attention to the fact that such actions were matters of public record, and therefore the station is presumed to have such knowledge. The facts disclosed that the station had cancelled the objectionable broadcasts and furnished evidence that it now rejected medical accounts which failed to furnish copy approved by government agencies. The license was renewed.

The matter of *Emil Denemark, Inc.*,[22] of Chicago, Ill., involved a foreign language broadcast featuring health talks of a nature considered inappropriate for broadcasting. The sponsor of this program had pleaded guilty to violating the old Food and Drug Act, and the Post Office Department had issued a fraud order against the sponsor.

The station had, prior to the hearing, voluntarily discontinued another program where a fraud order had been issued, and the Commission regarded this as an indication of the station's good faith. The application for renewal was granted.

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[21]Hammond-Calumet Broadcasting Corp., 2 F.C.C. 321 (1936).
[22]Emil Denemark, Inc., 2 F.C.C. 474 (1936).

In dealing with the broadcasting of medicinal products, a station can at no time feel completely free of possible repercussions. As an instance, in the matter of *Don Lee Broadcasting System*[23] Station KFRC in San Francisco, Cal., had broadcast an advertisement for "Marmola", a weight reducer. The commercial copy presented a series of exaggerated claims. The evidence disclosed that the drug would produce harmful results unless taken under a physician's instruction and supervision.

Prior to the acceptance of the program by the station, it had made inquiries of the Fair Trade Commission, and was advised that although an action against "Marmola" had been dismissed, the station should consider the fact that the drug should be taken only on advice of a physician.

At the same time a similar question arose as to the drug "Congoin" which, like "Marmola" was advertised over the air by the station. Claims made for this product were that it contained certain medicinal properties, whereas the evidence showed that such claims were false. A fraud order had theretofore been issued by the Post Office, but the Commission here held that the station had no actual or constructive notice of such proceedings.

The F.C.C. ruled that a station will be held to the highest degree of responsibility for broadcasts of this type, and must make full and careful investigation of the effects of such products on the purchasers. The license was renewed on the ground that other programs emanating from this station were highly meritorious.

The *Radio Broadcasting Corporation*[24] of Twin Falls, Idaho, was likewise criticized for its broadcasts advertising "Congoin".

In a hearing on the application for renewal of license of *The Journal Company*,[25] of Milwaukee, Wis., the Commission emphasized its findings in the Don Lee case regarding the "Marmola" product, and questioned the broadcasting by The Journal Company of advertisements lauding a product known as "Com-

[23]Don Lee Broadcasting System, 2 F.C.C. 642 (1936).
[24]Radio Broadcasting Corp., 4 F.C.C. 125 (1937).
[25]The Journal Co., 2 F.C.C. 609 (1936).

manders". Claims, shown to be false, pertaining to vitamin content of the product, were made in broadcasts. The F.C.C. held that although the product itself was harmless, the broadcast misled the public and must be stopped.

Teas used for reducing purposes, and herb products, are viewed with grave suspicion. In the following cases the stations were criticized for their broadcasts of such products.

In a hearing involving *The Farmers & Bankers Life Insurance Company,*[26] of Abilene, Kan., evidence was offered to show that certain statements had been made on broadcasts advertising reducing teas to the effect that these teas would reduce weight harmlessly. The statements were shown to be false.

In the matter of *May Seed & Nursery Company,*[27] of York, Nebraska, programs advertising "Texas Crystals" and "Van-Nae Herb Tea" were under attack, and in a hearing on *Oak Leaves Broadcasting Station, Inc.,*[28] of Chicago, Ill., the advertising of the products known as "Herb Tea", "A-G Herbs", "Katro-Lek", and "Pur-Erg" were the subject of considerable criticism.

In all of these cases the products advertised were regarded by the F.C.C. as being of a type unsuitable for radio broadcasting. In none of the instances cited were the licenses of the stations revoked. The warnings of the F.C.C. were sufficient.

The advertising of certain medical apparatus and devices, as well as certain drugs and medicines, has been classified as fraudulent, misleading and harmful.

In a hearing for renewal of license of the *Western Broadcasting Company,*[29] of Los Angeles, Cal., evidence was introduced to the effect that the station had broadcast programs advertising a machine known as the "Electronometer". The broadcast stated that the "Electronometer" was capable of diagnosing human ailments. Testimony and evidence showed that

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[26]The Farmers & Bankers Life Insurance Co., 2 F.C.C. 455 (1936).
[27]May Seed & Nursery Co., 2 F.C.C. 559 (1936).
[28]Oak Leaves Broadcasting Station, Inc., 2 F.C.C. 298 (1936).
[29]Western Broadcasting Co., 3 F.C.C. 179 (1936).

the claims were not only exaggerated, but were false. The license was renewed, the station having cancelled the broadcasts.

Certain forms of advertising have been held to be objectionable to good taste and offensive to the public and banned even though the broadcasts were not fraudulent, misleading, or harmful.

The Knickerbocker Broadcasting Company,[30] of New York City, was confronted in a hearing on an application for renewal of license, with evidence involving its broadcasting of a product known as "Birconjel", on a program entitled "Modern Women's Serenade". During the broadcast there were talks advocating use of the product to avoid the consequences of childbirth or moral impropriety. The program was regarded as offensive and contrary to public interest, and the F.C.C. stated that were it not for the good record of this station, it would deny the application for renewal of license.

From all indications it appears very unlikely that F.C.C. will impose any greater control or restrictions over medicinal advertising than is presently in effect.

It is interesting to note that while in its report, "Public Service Responsibility of Broadcast Licensees",[31] the F.C.C. speaks slightingly of the "physiological commercial", and refers to the increase in the number of broadcasts advertising patent medicines and proprietary remedies, it gives no indication of any action to be taken by it to remedy the situation.

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[30]Knickerbocker Broadcasting Co., 2 F.C.C. 76 (1935).
[31]Public Service Responsibility of Broadcast Licensees, page 46 (Mar. 7, 1946).

CHAPTER VI.

FORTUNE TELLING; LOTTERIES; OBSCENE, INDECENT AND PROFANE LANGUAGE

§49. BROADCASTS OF SEERS.

Radio programs featuring performances by astrologers, fortune tellers, spiritualists, mediums, and those engaged in similar practices have always been the subject of censure by governmental agencies. Evidence of this is found in the fact that most states and municipalities have prohibitions and regulations for the control of fortune tellers and the like. Although this subject is not specifically mentioned in the Communications Act, it is recognized as one not in the interest of the general public.

The vice of such programs is the fact that they prey upon the credulous listeners, and form no suitable subject for radio broadcasts. The general listening public, it may be assumed, says F.C.C., is not interested in the telling of fortunes of particular individuals, and the broadcast of such private prophecies does not serve the bulk of radio listeners.

The fact that many of these programs solicit payment for booklets dealing with astrology, fortune telling, etc., or fees for questions answered, is but an additional objection.

As a result of the attitude of disapproval evidenced by the Commission, stations have refused to permit such broadcasts, and this type of program has virtually disappeared from the airways.

In an application for renewal of license of the *Radio Broadcasting Corporation,*[1] of Twin Falls, Idaho, the F.C.C. brought up the fact that programs of a questionable nature had been broadcast over the station. One of such programs was the "Friendly Thinker". Although the author of the program disclaimed clairvoyant powers, he proceeded to give advice on love, marriage, business, and similar subjects. F.C.C. held that although the listening public was not deceived by such forecasts,

[1]Radio Broadcasting Corp., 4 F.C.C. 125 (1937).

they were, nevertheless, objectionable, since they had a tendency to mislead the public. The programs were discontinued and a renewal of license granted.

The test says F.C.C. is not whether the speaker lays claim to clairvoyant power, but whether such programs have a tendency to harm the public; nor need the public be actually misled for these programs to be regarded as having harmful tendencies. It is apparent from the decisions in such matters that it is not necessary that the program contain elements of a supposed "supernatural", for the broadcast to be objectionable.

In a hearing on an application for renewal of station license by *Scroggin & Company Bank,*[2] of St. Joseph, Mo., the evidence disclosed that for several weeks this station had permitted a "Dr. Richards" to broadcast programs on which the speaker was represented as an "astrologer, psychologist, doctor, and scientist." He answered questions and gave advice on business, domestic affairs, health, finance, investments, love and marriage. He solicited sales for an astrological forecast at the price of $1.00 a forecast.

On another occasion a "Dr. Price", holding himself out to be a "world-famed spiritual psychologist, presented by 'The Spiritual Psychic Science Church' ", gave advice over the station, affecting finance, love, marriage, and vocational guidance. The listeners were requested to write out questions and mail these, together with $1.00 to the station.

It was held that such broadcasts were designed to exploit the credulous, and that they were in fact transmissions of individual messages that could have no general public interest. Since the over-all programs of this station were good, said F.C.C., the license was renewed.

A case similar to the foregoing, was that of *Adelaide Lillian Carrel,*[3] heard on application for renewal of a station license in Ponca City, Oklahoma. The station had broadcast a program by "Nada" wherein the listeners were asked to submit twenty-five

[2]Scroggin & Co. Bank, 1 F.C.C. 194 (1935).
[3]Adelaide Lillian Carrell, 7 F.C.C. 219 (1939).

cents, together with the date of their birth and any two questions, to the broadcasting station, and "Nada" would then answer these questions. The answers to the questions were contained in an astrological horoscope. The program was held not to be in the public interest. The license was renewed on the past good record of the applicant.

Nellie H. and *W. C. Morris,*[4] of Eagle Pass, Texas, and *Standard Cahill Company, Inc.,*[5] of New York City, were likewise criticized for broadcasts involving an "astrologer" and a "metaphysician."

In the cases examined, it was evident that the individuals holding themselves out to be endowed with clairvoyant or supernatural powers and insight, were possessed of neither, and were not equipped to give sound advice on matters of finance or on marital problems.

On its face, such a situation may appear to be perfectly proper, however, there is yet another objection to such a program, and that is the indirect violation of the purpose for which a station is licensed. Each station is licensed to broadcast to the general public. A broadcast giving advice to particular individuals or a particular group of individuals is in fact defeating this purpose.

The question as to when a program is or is not confined to an individual or group of individuals is a question of degree and can only be determined by an examination of the program itself.

§50. Statutory Ban on Lotteries.

Section 316 of the Communications Act of 1934 reads as follows:

> "No person shall broadcast by means of any radio station for which a license is required by any law of the United States, and no person operating any such station shall knowingly permit the broadcasting of, any advertisement of

[4]Nellie H. and W. C. Morris, 2 F.C.C. 269 (1936).
[5]Standard Cahill Co., Inc., 1 F.C.C. 227 (1935).

> or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes. Any person violating any provisions of this section shall, upon conviction thereof, be fined not more than $1,000 or imprisoned not more than one year, or both, for each and every day during which such offense occurs."

Laws dealing with the matter of lotteries are neither new nor novel. The most effective of such laws is the Postal Anti-Lottery Statute,[6] and the preceding section is modeled after such statute.

In order to come within the meaning of "lotteries" as laid down by the F.C.C. and postal authorities, as well as the courts of the country, it is necessary that a program contain all of three particular elements. These are *Consideration, Chance,* and *Prize.*[7]

In the matter of *Horner v. United States,*[8] the court held that, "The question of consideration does not mean that pay shall be directly given for the right to compete. It is only necessary that the person entering the competition shall do something or give up some right . . . That there can be no loss is of no importance."

In this same case it was stated that the very essence of a lottery is chance, the prime attribute of which is its inequality. Where the elements of certainty go hand in hand with the elements of lot and chance in an enterprise offering prizes, the former elements do not destroy the existence or effect of the latter.

The element of prize is present when it appears that the winner receives more than he gives, and that he has not earned the difference between what he has given and what he receives.

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[6]35 Stat. 1129 (1939), 18 U.S. C. Sec. 336.
[7]Public Clearing House v. Coyne, 194 U.S. 497, 48 L. Ed. 1092, 24 S. Ct. 789 (1904). State v. Wong Took, 147 Wash. 190, 265 Pac. 459 (1928).
[8]Horner v. U.S., 147 U.S. 449, 37 L. Ed. 237, 13 S. Ct. 409 (1893).

Courts have generally considered the term lottery to refer to a gambling scheme in which chances are "sold" or given for "value" or a "consideration," in the hope of winning a larger sum or prize.

By way of illustration, assume that a particular radio program offers a prize to the individual sending in the 10,000th postcard describing in glowing terms the product advertised on the program. Apparently, we have but two of the necessary three elements present, those of chance and prize.

Considering this, we might well determine upon the face of the matter that there is, in the plan presented, no lottery. Governmental interpretations hold otherwise.

The Post Office Department interprets the action of the sender as containing the element of consideration, holding that although the sender receives a card without payment of monetary consideration, he is obliged to visit a store to pick up the card and affix a stamp for mailing. The purchase and the placing of the stamp on the card is a consideration. Should the card be postage prepaid, there is, says the Post Office Department, consideration in the act of the sender in visiting a particular store to obtain the card. Thus does the Postal Act complement the Communications Act in determining the status of and preventing an alleged lottery broadcast.

§51. Broadcast of Information Concerning Lotteries.

WRBL Radio Station, Inc.,[9] of Columbus, Georgia, made application for a renewal of license. At that time the question arose as to certain programs in which information concerning lotteries was broadcast.

The station had broadcast advertisements of a "jackpot" lottery, wherein a used car was to be given away to the holder of the lucky ticket. The tickets were issued to each purchaser of a used car from a particular company during a given month. The

[9]WRBL Radio Station, Inc., 2 F.C.C. 687 (1936).

question arose in the hearing as to whether there was any consideration paid for the ticket.

It was held that a consideration exists when a chance on a prize drawing is given along with the purchase of legitimate goods, even though the goods are in fact priced no higher than regularly.

It was further held that it is contrary to public interest for a station to violate even the spirit of the particular lottery statute of the state in which it is located.

F.C.C. granted a renewal of license on the grounds that the station had a meritorious record with this exception, and that on notification it had ceased its broadcasts of the offensive program.

KXL Broadcasters,[10] of Portland, Ore., applied for renewal of license. At the hearing there was presented to the Commission certain facts regarding broadcasts by the station, involving lotteries.

It appeared that the station had permitted the making of announcements concerning the operation of establishments which were, in effect, announcements of a lottery.

The evidence disclosed that in the City of Portland there were in operation certain alleged investment companies known as "Prosperity Clubs". The public was invited to visit these places and to participate in a scheme, represented to be safe and sound, wherein the participants would deposit from one to fifty dollars, and the amount so deposited would determine the "chain" to which the individual depositing the money would be assigned. An average of one dollar per person was immediately deducted, as a "brokerage fee".

When and if twenty-seven persons were assigned to a particular chain, the first person so assigned was entitled to receive twenty-seven times the amount of his deposit. When fifty-four people had deposited the required sum, the second person depositing his money then received twenty-seven dollars, and so

[10]KXL Broadcasters, 4 F.C.C. 186 (1937).

on in multiples of twenty-seven. The police of the City of Portland closed the establishments, and the owners absconded with the money.

The station announcer had urged the public to participate, and had stated that the activities of the "investment companies" were licensed and bonded, such erroneous statements in regard to this lottery being contrary to the provisions of Section 316.

The F.C.C. granted a renewal of license, holding that the services of the station had been generally satisfactory and in the public interest, and although it had permitted the offensive announcements to be made, these were carried by the station for only a few days and then were discontinued.

The Metropolitan Broadcasting Corporation[11] of Brooklyn, N. Y., filed applications for renewal and modification of licenses, and for certain construction permits. At the hearing objections were raised to the approval of the applications. One such objection involved the matter of an association of merchants who gave tickets to individuals making purchases from their several stores, the tickets being numbered. At the end of a designated period the tickets were collected, and at a general drawing, persons holding the "lucky numbers" received prizes.

The station broadcast the names of the persons who could claim their gifts and the numbers of the winning tickets. This was held to be a violation of Section 316 of the Act. The application was denied.

Again in 1941 when an application for license for a new station was presented to F.C.C. in the matter of the *Metropolitan Broadcasting Corporation*,[12] its past history was a deciding factor in the ruling made. One of the applicants for the new station had managed the Metropolitan Broadcasting Corporation's station, when by reason of its activities the station had been refused a renewal of its license by F.C.C., and the evidence presented on the former hearing was offered here, in opposition to the application pending.

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[11]Metropolitan Broadcasting Corp., 5 F.C.C. 501 (1938).
[12]Metropolitan Broadcasting Corp., 8 F.C.C. 557 (1941).

The application for a new station was denied as not in the public interest. Later, modifications, which are of no moment here, were made in the Commission's order.

§52. Criminal Prosecution for Lottery Broadcasts.

A criminal prosecution involving the matter of a lottery was presented in the case of *Horwitz v. United States*.[13] The evidence disclosed that the defendants had caused to be delivered by United States mail certain newspapers and circulars, for delivery within the United States, wherein there appeared articles dealing with lotteries. Additional evidence was introduced based on charges that the defendants operated radio station XED in Mexico, in conjunction with the lottery business.

The defendants solicited, over the radio, the sending of money to the station in payment for lottery chances. They were convicted, and appealed to a higher court.

In confirming the conviction, the appellate court held that it was of no material import that the conspiracy started in Mexico, so long as a part of the business was done in the United States.

While an overt act was committed in Mexico, yet the broadcasting of the information over the Mexican station into the United States induced the sending of the letters containing money to the Mexican station. The conspiracy therefore was partly in the United States, and the fact that the overt act was in Mexico in nowise alleviated the crime. It is not necessary, continued the court, that the overt act, consisting of talking into the radio, be of itself a crime. It is only necessary that there be an overt act.

§53. Obscene, Indecent, and Profane Language.

One of the few positive statutory restrictions of the Communications Act upon program content is the prohibition against the use of obscene, indecent, or profane language in broadcasts.

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[13]Horwitz v. U.S., 63 F. (2d) 706; cert. denied, 289 U.S. 760, 77 L.Ed. 1503, 53 S. Ct. 793 (1933).

Section 326 of the Act states that "no person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication."

The only federal case on the subject is that of *Duncan v. United States*,[14] wherein the defendant was convicted of violating provisions of the 1927 Radio Act prohibiting the broadcasting of obscene, indecent, or profane language by means of radio.

The defendant claimed that because of the provision in the Radio Act denying the Radio Commission any right of censorship, the court had no power to impose a penalty for the use of such language.

This point was disposed of by the court's finding that the statute definitely forbids such language and imposes a penalty for its use.

The defendant then argued that Congress had no power to regulate such matters even though the broadcast be interstate. In answer to this contention, the court held that in regulating interstate commerce Congress may exercise a certain amount of police power, such as is accomplished by the Mann Act, and the prohibitions against the transmission of obscene, indecent, or profane material through the mails.

The langauge used by the defendant, said the court, was neither indecent or obscene, since in order to constitute such in the technical meaning of the statute, the language must be such as is calculated to arouse sexual passion or desires. Here the language was scurrilous and calculated to arouse anger, but was not indecent or obscene.

However, the language was profane, in that it referred to an individual as being "damned". The expression, "By God", was used irreverently, and other language announced the intention of the speaker to call down the curse of God upon certain individuals. On this basis, the judgment of conviction was affirmed.

From an interpretation of the bare language of the court in the preceding case it might be inferred that any language used

[14]Duncan v. U.S., 48 F. (2d) 128; cert. denied, 283 U.S. 863, 75 L.Ed. 1468, 51 S. Ct. 656 (1931).

in a broadcast which included the words "damned", or "By God", would come within the statutory ban. Such an interpretation is too harsh. The case itself dealt with an attack made in a radio speech against an opponent. As such, the language was uncalled for, unnecessary, and apt to be offensive to a large body of listeners.

The question has arisen as to whether the word "damned" or any other mild form of profanity may be used in a broadcast. There have been innumerable instances where the literary sense of a play or other artistic work requires the use of such language. Actually such language has been used on broadcasts without criticism from the authorities.

In a radio presentation of Robert Sherwood's play, "Abe Lincoln of Illinois", the actor impersonating Abe Lincoln says "Damn you" to his crazed and enraged wife. The use of the words in this sense is deemed not to be offensive to a mature audience, and does not come under the statutory prohibition.

The fact that Congress has expressed itself in this realm of interstate commerce does not deprive a state of its inherent power to control the use of objectionable language over broadcasts emanating from within its borders.

While it is conceded that a state has the power to control interstate commerce insofar as it embraces broadcasts by radio of obscene, indecent, or profane language originating from stations within its borders, there is, as has been said, no possible way in which it can control such matters coming into the state from across its borders.

However, the problem of such control by a state is not acute. In monitoring stations F.C.C. will itself pick up objectionable programs, and through its power to refuse to renew a license or its power to issue an order to show cause why a license should not be cancelled, it effectively controls such broadcasts. For the most part, stations themselves are extremely critical in their censorship of scripts containing language that even borders on the suggestive or obscene.

CHAPTER VII.

SOLICITATION OF INSURANCE AND "DOING BUSINESS" IN SEVERAL STATES

§54. STATE CONTROL OF INSURANCE BROADCASTS.

In the absence of fraud, there is no objection to broadcasts soliciting the sale of policies of insurance. This type of advertising is no more objectionable than that of any other legitimate business.

A number of states have adopted statutes prohibiting the advertising or solicitation of insurance by means of radio by companies not qualified to do business within the state. Under such statutes, a station located within the state, and broadcasting programs advertising or soliciting insurance, is subject to prosecution. It is of course obvious, that programs beamed into the state are immune from prosecution.

The only reported case on this subject is that of *People v. International Broadcasting Corporation.*[1] There an action was brought by the State of New York against the defendant company for the broadcasting from New York City, of a program advertising life insurance for a company that was not qualified to do business in that state.

At the time of the broadcasts there was in effect a statute prohibiting anyone from soliciting the sale of policies of any insurance company which had failed to comply with the regulatory provisions of the law. The life insurance company in question had failed to comply with these provisions.

The trial court held that the broadcasting company had not "solicited" insurance but had merely advertised it by playing a recorded program over the air. This is no more, said the court, than is done by a newspaper in running an advertisement for an insurance company. Nor was the defendant broadcasting company guilty of aiding in the placing of insurance, since the steps

[1]People v. International Broadcasting Corp., 143 Misc. 122, 255 N.Y.S. 349 (1931).

taken were merely introductory. Judgment was given in favor of defendants.

The judgment of the trial court was later modified by the New York Court of General Sessions[2] in an opinion that was not officially reported.

The court there held that a state, through its police power, had the right to control radio communications emanating from within its borders. An example of this, continued the court, is the liability of broadcasters for criminal defamation under the statutes of several states.

Even in transportation of goods by interstate railroad, the state may inspect certain articles which pass through its borders though destined for another state. Here the insurance company was engaged in business in New York, and the broadcasting station was aiding in this "doing of business."

However, in the case at bar, there was no evidence that the broadcasts were designed to solicit insurance from the residents of New York. There was no evidence that the company had sold policies to residents of New York as a result of the broadcasts, or that the defendant station had received any inquiries pertaining to the sale of these policies from residents of New York. The judgment for defendants was affirmed.

If we accept the opinion of the court in the preceding case, that an insurance company is "doing business" within a state when it broadcasts a program soliciting the sale of policies, it would follow that the decision is sound. However, such decision again presents the question as to what extent the police power of a state may go in regulating all broadcasts from stations within its borders.

An acknowledgment that the solicitation of insurance policies by radio constitutes "doing business" within a state forces the conclusion that radio advertisers of other products may be "doing business" in states in which their broadcast is heard. If this

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[2]Unreported Decision quoted in full in an article by A. G. Haley—"The Law on Radio Programs", page 10, 75th Congress, 3rd Session, Document No. 137 (1938).

conclusion logically follows, certainly the radio advertiser who requests the listeners to purchase a specific article, on sale in their particular locality, is "doing business" within the states receiving the program.

If such advertisers are "doing business" within a state other than that in which the sending station is located, a conclusion which is extremely doubtful, the corporation sponsoring the program would be subject to service of process in cases where jurisdiction could be obtained over an agent of the foreign corporation.

Are we to assume from the decision of the Appellate Court in the International Broadcasting Corporation case, that had proof been offered that sales were made to residents of New York, the insurance company and the station would have been held liable? That seems to be the only conclusion to be drawn from the court's statements. Fortunately, the Federal courts hold otherwise.

In the case of *Fred Benioff Company v. Benioff,*[3] an action was brought by the plaintiff for both trademark infringement and unfair competition. Plaintiff urged that the federal court had jurisdiction over the cause of action in unfair competition, basing such contention on the fact that his business was advertised by means of radio programs, thus bringing him within the realm of interstate commerce.

The Federal District Court stated that by no stretch of the imagination could plaintiff be said to be engaged in interstate commerce. The mere fact that someone in another state might hear the radio program would not of itself be sufficient to justify a finding that plaintiff was engaged in interstate commerce.

The court used as an analogy an advertiser in newspapers, pointing out that in such instance the advertiser is not considered as being engaged in interstate commerce merely because someone in another state might read that particular newspaper. Plaintiff's cause of action was dismissed for lack of jurisdiction.

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[3]Fred Benioff Co. v. Benioff, 55 F. Supp. 393 (1944).

Since the law on this subject is in conflict, a foreign corporation served with process in such a case would be forced to move to quash service of process and urge its objections before the court of the state wherein service was made.

§55. Service of Process on Foreign Corporations.

Aside from the statutory liability for broadcasts of the advertiser of insurance, a practical problem arises when policy holders seek to sue upon policies purchased as a direct result of such advertising.

In many cases the insurance company, sponsor of the program, is a foreign corporation so far as the jurisdiction of the particular state involved is concerned. In the majority of such instances service of process is impossible.

It is a well settled rule that in order effectively to serve process upon a foreign corporation, that corporation must be "doing business" within the state. Corporations doing an intrastate business are required by most states to qualify within that state, and to appoint as their agent for receipt of service of process, an available state official.

Difficulty arises when an attempt is made to serve a court process upon a corporation that has no principal place of business within the state, and has not complied with state statutes requiring registration.

In the absence of both of the foregoing requirements, it is evident that service made upon a local broadcasting station carrying the program is of questionable value, particularly if such station is merely one of a chain of stations broadcasting the program for a "home" station.

The question of whether a local station sending the program directly, is or is not, the agent of the program sponsor for purposes of service of legal process, is yet undetermined by the courts.

The action of *Selby v. Crown Life Insurance Company*[4] was one in which plaintiff brought suit against defendant insurance company for death benefits, allegedly due under a policy of life insurance.

Plaintiff lived in Missouri, and was induced to apply for the policy in question after listening to a commercial broadcast sponsored by defendants over a radio station situated in Illinois.

Defendant company was an Illinois corporation, not qualified to do business in Missouri. Plaintiff originally wrote defendant company in care of the Illinois radio station. Defendant replied by mailing plaintiff an application blank, which was completed and returned to defendant by plaintiff, and the policy was thereafter delivered to plaintiff by mail from Illinois. Plaintiff served the process upon the defendant company.

Defendant claims that this service was defective, since defendant was not doing business in Missouri, the state in which the action was filed.

The court held on appeal that if an application comes directly to an insurance company without the intermediary aid of an agent, the company's issuance of the policy does not constitute the doing of business in the state from which the application originated.

The judgment of the trial court in favor of defendant was upheld, and the action abated for defective service of process.

Contrary to the judgment rendered in the preceding case was that reached in *Union Mutual Life Company of Iowa v. District Court,*[5] wherein the plaintiff insurance company sought a writ of prohibition to quash service of summons.

Plaintiff was incorporated in Iowa, and had been advertising on radio programs originating from a Colorado station. The action in which summons was served was brought against the company in the State of Colorado.

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[4]Selby v. Crown Life Insurance Co., 189 S.W. (2d) 135 (1945).

[5]Union Mutual Life Co. of Iowa v. District Court, 97 Colo. 108, 47P (2d) 401 (1935); see also Union Mutual Life Co. v. Bailey, 99 Colo. 570, 64P (2d) 1267 (1937).

From the facts, it appeared that the radio station in Colorado had agreed to accept and promptly forward to plaintiff in Des Moines, Iowa, all inquiries received as a result of the broadcasts. For such services, and for broadcasting charges, plaintiff contracted to pay the station one-third of the first year's premiums on each policy sold. As a result of the broadcast, the plaintiff sold a great many policies to residents of the State of Colorado. All policies were written in Des Moines and mailed from there to the insured in Colorado. The policy on the life of plaintiff's decedent, in the original action, defendant's decedent in this action, had been purchased in this manner.

The Insurance Company had employed a claims bureau in Missouri to investigate this claim prior to the time of filing of the original action in Colorado. The claims bureau dispatched an agent to Denver to investigate the matter. This agent had authority from the Insurance Company to negotiate settlement if he deemed it advisable. On the theory that this agent was the agent for the Insurance Company, he was served with process.

The Insurance Company moved to quash such service, and on such motion the court held that plaintiff's method of doing business over the air, and its other activities in the State of Colorado brought it within the category of "doing business in Colorado". It was therefore subject to service of process in that state. The agent served had been vested with sufficient general authority by the Company to permit of service to be made upon him. Quashing of summons was denied.

In the preceding case the insurance company had actually dispatched an agent to the state in question. Whether such agent was an independent contractor cannot be determined from the facts available; however, it must be assumed that the court felt otherwise, and considered the agent as a direct representative of the company. This finding on the part of the court brought the company within the category of one "doing business" in the State of Colorado.

In the Selby case, supra, the broadcasts themselves came from a station in a state other than that in which the action was brought.

§56. NETWORKS "DOING BUSINESS" IN SEVERAL STATES.

As in the preceding matter, there is a conflict of authority over the answer to the question of whether or not a "network" is "doing business" within a particular state when the originating station is in another state, but the broadcast is received in the first state. Inseparable from this is the question dealing with the transmission of an out of state broadcast by affiliated local stations.

Does the mere fact that a broadcast may be heard in states other than that in which it originates constitute "doing business" in each of those states? Or, on the other hand, where an out of state station broadcasts within the state through an affiliated station, is it "doing business" within that state? At this writing the courts have given only conflicting answers to the latter questions.

In *State ex rel Columbia Broadcasting Company v. Superior Court for King County*[6] an application for writ of prohibition was sought in an effort to prevent the courts from taking jurisdiction over applicant in a suit for defamation. Applicant was one of the defendants in such action.

Applicant, Columbia Broadcasting System, was not incorporated or qualified under the law to do business in the State of Washington. Service of process was made upon a local station, which station was an affiliate of the network.

A majority of the court on appeal held that CBS was "doing business" within the State of Washington, basing such findings on the fact that the relation between the local station and CBS, being that of lessee and lessor of radio "time", made the local station the agent of the network for service of process. The

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[6]State ex rel Columbia Broadcasting Co. v. Superior Court, 1 Wash. (2d) 379, 96 P. (2d) 248; 310 U.S. 613, 84 L.Ed. 1389, 60 S. Ct. 1085 (1939); 5 Wash. (2d) 711, 105 P. (2d) 70.

Washington court held that CBS, being engaged in interstate commerce, was "doing business" in Washington.

The case was appealed to the United States Supreme Court. That court vacated the Washington decision as "moot", in a memorandum decision that shed no light on the question.

A contrary result was reached in the case of *Hoffman v. Carter.*[7] There plaintiff sought to recover damages for an allegedly defamatory broadcast made by Boake Carter, a commentator.

Plaintiff joined as defendants the local broadcasting station, Philco Radio, and Philadelphia Storage Battery Company, the latter two corporations being the sponsors of the program in question. Plaintiff likewise sued CBS, the network over which the broadcast was heard.

The last three corporations were, so far as New Jersey was concerned, foreign corporations, not qualified to do business in the State of New Jersey; and on this ground, they moved to set aside service of process.

The court held that CBS was clearly not "doing business" in New Jersey. The fact, said the court, that the local station uses CBS's programs by picking up the energy and transmitting it, is not enough to bring CBS within the category of "doing business" within that state. The further fact that the local station is itself a subsidiary of CBS is likewise insufficient to constitute the "doing of business" by CBS within the state. Service of process was quashed.

These two cases are hopelessly in conflict. It will require further clarification, in the form of more harmonious decisions, to determine the exact status of the questions propounded.

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[7]Hoffman v. Carter, 117 N.J.L. 205, 187 Atl. 576; 188 N.J.L. 379, 192 Atl. 825 (1936).

CHAPTER VIII.

DEFAMATION BY RADIO

§57. GENERAL.

Since radio is now a major factor in the field of public entertainment and the dissemination of news, as well as a forum for the discussion of public questions and the presentation of political speeches, liability of the broadcasting stations for defamation is a matter of serious import.

The broadcasting station is less favorably situated in its ability to protect itself from matters of a defamatory character, uttered over a broadcast, than is the publisher of books or newspapers, who may censor material before publication, and suppress defamatory matter.

The publisher of a newspaper examining the copy submitted, prior to its publication, has ample opportunity to delete objectionable material, or to weigh the risk of printing borderline material. The broadcasting station has, in fact, no form of protection.

While it is true that the station may insist on the right of examination and censorship of scripts, it must still run the risk of a recalcitrant speaker ignoring his script and interjecting defamatory statements. As a last resort under such circumstances the station may "cut" the speaker from the air. Even here such cutting is of necessity accomplished only after the utterance of the defamatory remarks.

A sending station may insure itself against such happenings by means of transcribed broadcasts, prepared and edited prior to its actual transmission. This, however, in nowise protects a relaying station from a possible suit for defamation, based on the broadcasting of a program originating from a network or affiliated station.

§58. DEFAMATION AS LIBEL OR SLANDER.

A division of authority has arisen over the question as to whether the utterance of defamatory material over the air con-

stitutes libel or slander. The practical importance of this question arises in situations where the utterances cannot be brought within the definition of slander *per se*. This is understandable when consideration is given to the fact that if slander *per se* cannot be proved from the statement itself, the injured party is confined to an action in which he must prove special damages, no mean feat at best. The common law distinction between libel and slander has been somewhat blurred by statutory changes.[1]

A solution to the question of whether a defamation uttered over a broadcast constitutes libel or slander cannot be found in basic common law cases on the subject. Some courts have held that such defamation constitutes slander, on the theory that despite the mechanical and electrical means of transmission, that which reaches the ears of the public is still the spoken word.[2]

Some courts have held that such defamation constitutes libel, on the theory that the libelous statements are more widely disseminated and have a greater potentiality to injure, than is the case with slander. For example, say the courts, a few words spoken in anger may reach the ears of only a few onlookers. A printed libel, on the other hand, may be read by thousands of interested readers. Applying this analogy, words spoken over the radio have a potential audience of millions of listeners. A defamation uttered over the air may, therefore, cause more grievous harm to the individual attacked than any other form of publication.[3]

In the action of *Summit Hotel Company v. National Broadcasting Company,*[4] the court before which the case was tried adopted a modern and realistic view of this situation. There, the court said in part, that defamation by radio should receive a different treatment from that accorded the subject under the

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[1]Civil Code of California, Sec. 45, 45a and 46.

[2]Meldrum v. Australian Broadcasting Co., Ltd. (1932) Vict. L.R. 425, 7 Aust. L.J. 257; Locke v. Gibbons, 164 Misc. 877, 299 N.Y.S. 188 (1937).

[3]Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82, 82 A.L.R. 1098; 290 U.S. 599, 78 L. Ed. 527, 54 S. Ct. 209 (1932). Singler v. Journal Co., 218 Wisc. 263, 260 N.W. 431 (1935). Weglein v. Golder, 317 Pa. 437, 177 Atl. 47 (1935).

[4]Summit Hotel Co. v. National Broadcasting Company, 336 Pa. 182, 8 A. (2d) 302, 124 A.L.R. 968 (1939).

old laws of libel and slander, for such is essentially different from the old means of communication.

Legislatures of some states have arbitrarily assigned radio defamation to the field of slander or libel by statutory enactment, dependent upon their mood. While the granting of statutory recognition to the problem is a step in the right direction, it is to be regretted that consideration has not been given to a more uniform designation of matters dealing with these subjects.

§59. Control Over Defamation by F.C.C.

A radio station, having a record of many defamatory utterances, is subject to the probable refusal of a renewal of license by F.C.C. upon the basis that such actions are contrary to public interest.

In *Trinity Methodist Church v. Federal Radio Commission,*[5] the owner of the radio station appealed to the courts from an order of the Federal Radio Commission denying a renewal of license. Although the station was registered in the name of the church, it was actually owned by its minister, Reverend Robert Shuler.

From the facts presented, it appeared that many citizens of Los Angeles had protested to the Commission at the time of the hearing on the application for renewal of license, seeking to have the application denied. The basis of such complaints were that Reverend Shuler had on numerous occasions attacked the Catholic Church, the Jews, labor unions, and certain Los Angeles city bureaus, such as the Bureau of Health. In none of these instances did Reverend Shuler offer to prove the truth of his attacks, but defended himself on the grounds that "these were his sentiments."

The court held that a denial of the right to renew the license did not constitute censorship on the part of the government, nor

[5]Trinity Methodist Church, South v. Federal Radio Commission, 62 F. (2d) 850 (1932); Cert. denied, 284 U. S. 685, 76 L. Ed. 579, 52 S. Ct. 204; 288 U.S. 599, 77 L. Ed. 975, 53 S. Ct. 317.

was it a denial of freedom of speech. Since there are only a limited number of stations that can occupy the radio waves, said the court, the Commission may consider the record of each station in deciding which station shall remain on the air.

In the hearing on an application for renewal of license filed by *KVOS, Inc.*,[6] of Bellingham, Wash., the F.C.C. considered letters written in protest against the station, wherein it was alleged that defamatory statements were made by the agency furnishing the news service for the station. F.C.C. granted the application for renewal of license on the ground that there was no evidence in support of the assertion that a defamation had actually taken place.

In the matter of the *Bellingham Publishing Company,*[7] of Bellingham, Wash., for a permit to construct a new station, it appeared that the applicant was the owner of a newspaper in a certain community, and that officials and private citizens of the community had filed with the F.C.C. a number of statements opposing the granting of a permit. These statements alleged that if the station were established, it would follow the course laid down by the newspaper of libeling citizens of the community. F.C.C. denied the application.

§60. Statutory Liability.

Words spoken over the radio may subject the speaker to criminal penalties as well as to civil pecuniary liability under state law. This is in line with the common law concept of criminal libel or slander. In general, such state criminal statutes require that the words be uttered wilfully and with malice.

Under ordinary circumstances, while the elements of wilfullness and malice may be shown to exist in the mind of the speaker, it would be most difficult to show that such elements were present in the minds of agents of the broadcasting company. Thus a political candidate who uttered slanderous words might be subject to criminal penalties, whereas the broadcasting sta-

[6]KVOS, Inc., 6 F.C.C. 22 (1938).
[7]Bellingham Publishing Company, 6 F.C.C. 31 (1938).

tion would have a complete defense to criminal liability on the grounds of absence of wilfullness or malice on the part of its agents. This is particularly true in the case of a network broadcast relayed by the station sought to be held liable.

The matter of civil pecuniary liability presents an entirely different picture. It seems to be a well established principle that not only is the speaker himself liable for defamatory utterances, but the broadcasting company, and the sponsor are equally so, under the doctrine of *respondeat superior*. In the case of a network broadcast the relaying stations are likewise held to be liable.

§61. Control by Stations Over Defamatory Remarks.

The problem becames acute in the broadcast of political speeches. In *Sorensen v. Wood*,[8] an action for defamation was brought against the speaker and the station over which he had broadcast the allegedly defamatory speech. The speech complained of was a political attack on a rival candidate for office. Based on the utterances, suit was brought against the speaker and the station.

One of the grounds of defense urged by the radio station was that according to the provisions of the Radio Act of 1927, which were substantially re-enacted in the Communications Act of 1934, radio stations have the obligation of providing equal facilities on the air to opposing candidates for a public office, once they have granted such an opportunity to a rival candidate. Since there is this obligation on the part of stations, the argument was made that the stations should be relieved from any liability for defamatory remarks made in any speech over which they have, obviously no control.

The court held that the federal statute gave the broadcasting station no privileged position in the matter of transmission of libelous material, even though the station has no right of censorship.

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[8]Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82, 82 A.L.R. 1098 (1932).

Contrary to the statement of the court, it is submitted that a station has the right to examine and insist on modification of material in political scripts, where such material is actually of a defamatory character. Such action does not constitute censorship on the part of the station, but is merely an elimination of material which in the opinion of the station has no right to go out over the air.

The court held in *Trinity Methodist Church, South v. Federal Radio Commission,*[9] that prevention by the government of the broadcast of defamatory material, by the practical expedient of denying a renewal of license to the offending station, does not constitute censorship. The analogy is clear that the regulation of political script containing defamatory material, by the station itself, would not be an improper censorship.

A further defense offered by the broadcasting station in *Sorensen v. Wood,* supra, was that the radio station is a common carrier and is protected by the traditional exemption of common carriers from liability for defamation.

In answer to this contention, the court held that a broadcasting station was not a common carrier, as it could choose, to a large extent, whom it would permit to broadcast over its facilities.

As to the regulation affecting political broadcasts, a station, said the court, is not absolutely bound to permit broadcasts by candidates. It is only where permission is granted to one candidate for a public office to broadcast that the station must extend the same privilege to his rivals.

The case of *Coffey v. Midland Broadcasting Company,*[10] was an action involving a defamation. The alleged defamation consisted of the utterance over the air of the statement that the plaintiff was an ex-convict who had served time in the penitentiary.

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[9]Trinity Methodist Church, South v. Federal Radio Commission, 62 F. (2d) 850 (1932).

[10]Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (1934).

The words were actually spoken into the microphone in New York City, by an employee of Remington Rand, as part of a radio program put on by Columbia Broadcasting System. The broadcast was transmitted to the local broadcasting studio over telephone lines, and the material went out over the air through the facilities of the local station. The local station had no control over the material broadcast. Its only control lay in the ability of its engineers to cut off the transmission or regulate the volume.

The court held that regardless of good faith and the utmost care on the part of the local broadcasting company, the latter is liable for defamation. Since the broadcasting station, said the court, is not a public carrier, it could not partake of the partial immunity from liability for defamation which a public carrier enjoys. The court regarded the liability of the broadcasting station as being analogous to that of a newspaper, absolute in nature.

The inability of a radio station to prevent defamation was commented upon by the court in *Sorensen v. Wood,* supra. The remarks complained of were interpolated into a political speech. The evidence showed that neither the station nor its employees had seen the script in advance of the broadcast. The court held that the same law of absolute liability for defamation will be applied to both newspapers and radio stations.

In the matter of the *Summit Hotel Company vs. National Broadcasting Company,*[11] it appeared that the defendant had rented its facilities to an advertising agency for transmission of a series of sponsored radio programs over a network broadcast. The program was sponsored by Shell Oil Company. One of the principal performers was Al Jolson. All participants were employed by the advertising agency. The script was prepared in advance, and examined by the defendant network.

On one of the broadcasts emanating from defendant's station in New York City, the name of the plaintiff hotel was men-

[11]Summit Hotel v. National Broadcasting Company, 336 Pa. 182, 8 Atl. (2d) 302, 124 A.L.R. 968 (1939).

tioned, and at that time Al Jolson interjected the remark without warning, " . . . that's a rotten hotel." This remark was not contained in the script. The trial court gave judgment against the defendant network.

On appeal the judgment was reversed, the appellate court stating that it gave scant approval to the doctrine of absolute liability for defamation.

It likewise refused to accept the analogy between the broadcasting station and the newspaper publisher, stating that under the facts of this case, the network had done all that it could to prevent the defamation from going out over the air. A newspaper publisher, continued the court, is merely held to the obligation of ascertaining the truth of the material which he publishes. He is afforded an opportunity in advance of publication of deleting objectionable material.

The court in its decision held that public policy could best be served by relieving the broadcasting company from liability in instances of unpreventable defamation.

The argument has been presented by plaintiffs in several cases that a broadcasting station may indemnify itself against the financial hardship of absolute liability in defamation cases, by the purchase of liability insurance. This would transfer what might be a loss, into a fixed business expense, to be passed on to the advertisers in the form of higher rates for broadcasting facilities.

A statement in the case of *Summit Hotel v. National Broadcasting Company,* supra, effectively answers this contention. The court there stated that the fact that there may be insurance against such liability offers no logical grounds for the imposition of a liability.

The case of *Josephson v. Knickerbocker Broadcasting Company*[12] involved a suit for slander for allegedly defamatory material broadcast over the radio from New York City. The

[12]Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S. (2d) 985 (1942).

plaintiff raised objections to certain affirmative defenses pleaded by defendant broadcasting company. Defendants set forth as part of their affirmative defense that Section 315 of the Communications Act of 1934 prevents discrimination among qualfied candidates for public office in the use of the facilities of a radio station, and the statute precludes censorship by a radio station.

The court held, in regard to the affirmative defense, that since the statute imposes certain obligations, it is only fair to allow corresponding privileges on behalf of the radio station.

A separate affirmative defense of defendant set forth the contention that it had carefully examined the political script beforehand, that the objectionable material was not there at the time, and had been interpolated into the politcal speech without warning.

As to this, the court said that the physical aspects of radio broadcasting warrant a rule that if the station management has used due care in the selection of the lessee of radio time and in the inspection of script, it should not be held liable for extemporaneous defamatory remarks. Plaintiff's motion to strike was denied.

It is obvious that there is a conflict of authority on the question of the liability of a station for the broadcast of defamatory material over which the station has no control.

There can be no doubt that the more forward-looking, and judicially sound view, is that wherein the courts have held that where a station takes the necessary precaution of examining the script prior to a broadcast, it should not be held liable for defamatory material interpolated without warning into the broadcast.

§62. Examination of Script by Station.

In the case of *Voliva v. Station WCBD,*[13] of Zion, Ill., the plaintiff brought suit to enjoin the defendant broadcasting com-

[13]Voliva v. Station WCBD, 313 Ill. App. 177, 39 N.E. (2d) 685 (1942).

pany from enforcing its requirement that plaintiff submit his scripts in advance of a broadcast. Plaintiff was a minister who claimed that the doctrines of his church demanded that he speak extemporaneously without the use of a script, enabling him to receive divine inspiration spontaneously.

It appeared from the evidence that some of plaintiff's speeches were political in nature and contained defamatory utterances. The plaintiff claimed the benefit of a contract allowing him certain time on the air. In further support of his case the plaintiff urged that the conduct of defendant came under the ban of the Communications Act of 1934, which prohibits censorship of radio material.

The court held that defendant's requirement in demanding the submission of scripts in advance did not constitute censorship, within the meaning of the Act, and that this was a reasonable requirement. It denied the injunction.

Under the ordinary contract for the leasing of broadcast time, a radio station cannot arbitrarily prohibit the broadcast on the mere ground that certain material in a script "might" be defamatory.

In the case of *Rose v. Brown,*[14] plaintiff brought an action for a mandatory injunction to compel the defendant broadcasting station located in Rochester, N. Y., to broadcast programs in compliance with its contract. Plaintiff alleges he entered into a contract with defendant for the broadcast of two political speeches. The contract contained a provision that the scripts must be submitted to the station three days in advance of broadcast, and that "all material was subject to the approval of the station manager." Plaintiff submitted his scripts, but was informed that since he represented no legal party that was electing candidates to office, defendant intended to cancel the broadcasts.

Defendant station alleged in defense of the action that the scripts contained material that might be slanderous. The court granted plaintiff a mandatory injunction holding that, when the

[14]Rose v. Brown, 186 Misc. 553, 58 N.Y.S. (2d) 654 (1945).

provisions of the Communications Act concerning discrimination against political candidates are not involved, a radio station may freely select its own programs. This is so, except insofar as the station binds itself by contract.

Here, said the court, it could have refused broadcasting facilities beforehand, but once the station entered into a contract, it was bound, unless it had reasonable grounds for cancellation. The fact that plaintiff was not a member of a party that is electing candidates to public office is not a sufficient ground for rescission.

Since the material in the scripts which were submitted was not in fact slanderous, the station should be compelled to broadcast such material. However, said the court, a station will not be compelled to broadcast a program if the material submitted actually contained slanderous matter.

§63. Conditional Privilege of Broadcasting Station.

In the case of *Irwin v. Ashurst,*[15] it appeared from the evidence that a murder trial was broadcast from a courtroom with the approval and co-operation of the judge. During the closing argument made by one of the attorneys, while commenting upon the testimony of a witness, the attorney referred to the witness as a "dope fiend". The witness brought suit for defamation against the judge, the attorney who had made the statement, and the broadcasting company, on the theory that all who participated in the broadcasts were joint tortfeasors.

The court held that the judge who participated in the broadcast enjoyed absolute immunity, and that such immunity was not lost by his permitting a microphone to be brought into the courtroom. The appellate court questioned the propriety of a trial judge allowing court proceedings to be broadcast over the air.

As to the remarks of the attorney who had made the statement complained of, he was conditionally privileged provided

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[15]Irwin v. Ashurst, 158 Ore. 61, 74 P. (2d) 1127 (1938).

the remarks were in any way relevant to the judicial proceeding in which they were spoken. The remark made here was a comment on the condition of a witness. Since the attorney who spoke the words was privileged, the broadcasting company was held to stand in the same position insofar as the privilege was concerned.

It is submitted that when a broadcasting company is granted permission to broadcast an actual trial, it should be absolutely, rather than conditionally privileged from liability for defamation, similar to the theory of immunity enjoyed by the judge. The broadcasting station under such circumstances should stand in no worse position than the court reporter who prepares a transcript of the proceedings.

This question may well be of importance in the future, should permission be granted to broadcast trials of public importance, such as the war criminals trial at Nurenburg.

The defense of conditional privilege was denied the Knickerbocker Broadcasting Company in the case of *Metropolitan Life Insurance Company v. Knickerbocker Broadcasting Company,*[16] of New York City. Plaintiff, a large insurance company, brought an action against defendant based on certain broadcasts in which "insurance counsellors" who had leased time from defendants, attacked the plaintiff. The "counsellors" were accused of broadcasting statements to the effect that plaintiff was "bleeding policyholders of their hard-earned money," accused plaintiff of charging higher rates than did other companies, and of being engaged in a legalized racket. One of the affirmative defenses offered by defendant was that of a qualified privilege.

The court held that such a defense should be stricken. The complaint set forth the fact that the broadcasting company received compensation from the insurance counsellors for the time used, and therefore, there can be no defense of qualified privilege. Defendant's motive here was commercial and not one indulged in for the public welfare, held the court.

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[16]Metropolitan Life Ins. Co. v. Knickerbocker Broadcasting Co., 172 Misc. 811, 15 N.Y.S. (2d) 193 (1939).

§64. Group Defamation.

From the pleadings and evidence introduced at the original hearing of the action of *Gross v. Cantor,*[17] it appeared that the defendants had printed and circulated a magazine article in which Eddie Cantor stated that all of the radio editors in New York City, with the exception of one, were not honest writers, and used their columns for their own selfish ends.

Plaintiff was a radio editor in New York City and brought this action to recover damages for libel. The action was dismissed in the lower court on the ground that while plaintiff was one of a class referred to in the publication, he was not specifically pointed out.

On appeal plaintiff was able to show that he was not the excepted member of the group. The appellate court held that the publication did not refer to a class so large that no one could have been personally injured by it, and reversed the judgment of dismissal.

§65. Liability for "Altering" Facts.

A broadcasting company is just as liable for the transmission of actionable statements as is a newspaper or magazine for the printing of like matter. Because of its nature, a radio station must necessarily exercise greater care in the transmission of facts, than does a medium of communication such as a newspaper or a magazine.

In the matter of *Haggard v. First National Bank of Mandan,*[18] it appeared that a deputy sheriff had requested the employees of a radio station to broadcast a statement over the air to the effect that the sheriff's office wanted to "hold" a particular driver and car. Instead of broadcasting the statement as given, a station announcer stated that a certain driver was wanted for stealing a car.

Action was brought by plaintiff for damages for instigating the arrest, and for libel based on the erroneous broadcast. The

[17]Gross v. Cantor, 270 N.Y. 93, 200 N.E. 592 (1936).
[18]Haggard v. 1st National Bank of Mandan, 72 N. Dak. 434, 8 N.W. (2d) 5 (1942).

broadcasting station was not named as a defendant. The court held that the defendants were not liable, since it was the broadcasting company whose mistake it was in transmitting the defamatory utterance.

Defamation of an author by distortion of his material in a broadcast was the basis of the action of *Locke v. Gibbons.*[19] It appeared from the pleadings that the plaintiff, a writer of newspaper and radio news material, had prepared a radio script containing a description of the Cincinnati flood. The material was passed on to the then well-known news commentator, Floyd Gibbons, who during the broadcast changed the script by interpolating incidents and descriptions of his own, which plaintiff contended were untrue. Plaintiff alleged that the insertion of such untrue material injured his reputation as an accurate news reporter.

The court dismissed the complaint on the grounds that it failed to state sufficient facts to show slander *per se,* and held that since no special damages were pleaded, plaintiff had stated no cause of action.

In *Locke v. Benton & Bowles,*[20] a companion case to the preceding action, the same plaintiff brought an action against an advertising agency under the same set of facts, on the theory that the interpolation of material by Floyd Gibbons, the employee of the defendant in this action, constituted a defamation of plaintiff's reputation as an accurate reporter.

The trial court held that this action was based on the allegation that the defendant caused false words to be put into the mouth of plaintiff. This allegation differed from the ordinary allegations found in actions based on libel or slander. Under this theory, said the court, there need be no plea of special damages, since this was an aspersion on plaintiff's business.

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[19]Locke v. Gibbons, 164 Misc. 877, 299 N.Y.S. 188; 253 App. Div. 887, 2 N.Y.S. (2d) 1015 (1937).

[20]Locke v. Benton & Bowles, 253 App. Div. 369, 2 N.Y.S. (2d) 150 (1937).

On appeal, the complaint was dismissed on the ground that plaintiff had failed to plead in *haec verba* the words of the broadcast or the content of his script.

§66. TRADE LIBEL.

A broadcasting company may incur liability for a broadcast disparaging a product or a business. In the matter of the *Advance Music Corporation v. American Tobacco Company*,[21] the plaintiff which was the owner of certain music copyrights, brought an action for damages allegedly caused by defendant's failure to place plaintiff's songs in, what plaintiff alleged to be, their proper place on the "Hit Parade".

The program consisted of an arrangement of songs in what purported to be the order of their popularity for a particular week.

Plaintiff contended that its songs should have been given a more favored position on the program than actually received. One cause of action set forth by plaintiff alleged that the defendants were guilty of negligent misrepresentation.

The trial court held that there can be no action for words negligently used unless they are uttered by the speaker to individuals to whom he is bound to speak with care. Plaintiff's complaint was dismissed with leave to amend.

After amendment the complaint set forth that the defendants had deliberately made the alleged false listings. The court on appeal held that in order to recover under the theory of trade libel, plaintiff must have pleaded and proved special damages.

Plaintiff's theory of fraudulent misrepresentation was rejected on the grounds that plaintiff had failed to show that he had relied on the misrepresentations made, or that defendants could have anticipated that he would rely thereon. In New York, the courts will not enjoin a disparagement of property,

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[21]Advance Music Corp. v. American Tobacco Co., 268 App. Div. 707, 53 N.Y.S. (2d) 337; 269 App. Div. 688, 54 N.Y.S. (2d) 390, 944 (1944).

even though other jurisdictions may hold to the contrary, said the court in dismissing the complaint.

The ruling in this case was followed by the Federal court in *Remick Music Corporation v. American Tobacco Company.*[22] The Federal court in the latter case, sitting in the State of New York, was constrained to follow the law of that state, particularly in view of the fact that it acquired jurisdiction only by reason of diversity of citizenship of the parties.

The case of *Fitzpatrick v. Blue Star Auto Stores,*[23] was an action brought by the president of the Chicago Federation of Labor in an effort to recover payments allegedly due under a written contract for broadcasting services. Defendant set up as a defense a breach of contract by plaintiff for alleged disparagement of his business.

The court held that there was an implied promise in a contract for broadcasting services, to the effect that the station would do nothing to interfere with the advertiser's business. Despite the existence of an implied promise not to disparage one's advertisers, the advertiser was not relieved of his obligation to pay for broadcasting service if such service was actually rendered by the station.

The interruption of sponsored programs by "spot announcements", or broadcast of irrelevant material of a doubtful nature can, under certain circumstances, subject a broadcasting station to a civil penalty.

In the case of *Marcus Loew Booking Agency v. Princess Pat,*[24] the plaintiff radio station sought to recover from the defendant advertiser upon a contract for radio time. One of the grounds of defense offered was that plaintiff had disparaged defendant's products, by interrupting its program with "flash" announcements of horse race results. The case was tried before a jury and a verdict given for plaintiffs. The appellate court

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[22]Remick Music Corp. v. American Tobacco Co., 57 F. Supp. 475 (1944).

[23]Fitzpatrick v. Blue Star Auto Stores, 312 Ill. App. 184, 37 N.E. (2d) 928 (1941).

[24]Marcus Loew Booking Agency v. Princess Pat, 141 F. (2d) 152 (1944).

held that the defense offered was without merit in view of the verdict of the jury.

In a dissenting opinion by one of the justices of the Court of Appeals, it was stated that a clause in the advertising contract to the effect that, "station reserves the right to devote part or all the time allotted to the advertiser for the purpose of broadcasting events it deems of special importance or interest", does not permit the interruption of such sponsored programs for ordinary horse-racing results.

The opinion went on to say that these announcements were not made because of their value as news, but because of their relation to betting results, and that such announcements are objectionable to many radio listeners. The dissent drew a distinction between the broadcast made and those involving the announcement of the results of a newsworthy event, such as the Kentucky Derby.

§67. Defamatory Remarks.

It is to be noted that all of the conventional defenses to suits for libel or slander are available to radio stations, advertisers, and advertising agencies in defense of an action for defamation.

In the case of *Rutherford v. Dougherty,*[25] it appeared from the evidence that plaintiff, who was accustomed to talk over the radio on biblical subjects, made a remark, presumably reflecting on defendant's church. The defendant, a clergyman, wrote to the broadcasting station in protest, denouncing the radio talks as amounting to bigotry. In a suit for defamation brought by plaintiff, the court held that such religious controversies and exchange of words do not constitute defamation.

A successful defense to the majority of actions involving slander is that the words complained of do not amount to slander *per se.* It has been repeatedly held that if the words uttered do not constitute slander *per se,* there must then be not only an allegation of special damages, but proof thereof in order for

[25]Rutherford v. Dougherty, 91 F. (2d) 707 (1937).

plaintiff to recover. Proof of special damages in such cases is, at best, extremely difficult.

In some states, where statutes provide that defamation over the radio is libel rather than slander, the common law concept of libel has been modified to require a showing of special damages where the allegedly actionable words do not constitute "libel *per se*". Where this principle prevails, the law of libel and slander are in effect merged.

The uniform adoption by the courts of this principle would be a forward step in effecting a link in the law between libel and slander, with the possibility of speeding legislative consolidation of the two into one law of "defamation."

In the case of *Lynch v. Lyons,*[26] the defendants accused the plaintiff druggist of charging relief workers 10c a check for cashing government relief checks. Plaintiff contended that the statement made over the radio carried an innuendo that defendant was depriving people who were on relief of a part of their weekly stipend. The court on appeal held that these words were not slander *per se* as they did not tend to prejudice plaintiff in his profession as a druggist.

The court held in the case of *Luotto v. Field,*[27] that to call a man a "Pre-Pearl Harbor Fascist" did not constitute "libel *per se*", as such a charge did not effect the profession or skill of plaintiff who was a radio station manager. Since these words referred to a period occurring before hostilities, the court took the view that the statement was not equivalent, as had been contended, to calling plaintiff a traitor.

A network is subject to equal liability with its affiliated stations, the sponsor, and the advertising agency, where any one of the latter is liable for a defamation occurring during a network broadcast.

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[26]Lynch v. Lyons, 303 Mass. 116, 20 N.E. (2d) 953 (1939).

[27]Luotto v. Field, 268 App. Div. 277, 50 N.Y.S. (2d) 849; 294 N.Y. 460, 63 N.E. (2d) 58 (1945).

In the case of *Polakoff v. Hill,*[28] suit was brought for defamation by the attorney for Charles Luciano, whose criminal trial was widely publicized in the United States. The action proceeded against a radio news commentator for a broadcast made several months after the criminal trial had been completed.

In the allegedly offensive broadcast defendant asserted that "Half the crooked lawyers in New York, most of the bail-bondsmen . . . fought for his acquittal . . . " Later in the program defendant said, " . . . his crooked lawyer mouthpieces had been silenced, and so utterly discredited that even their paymasters sneered at them."

The court on appeal reversed the verdict for defendants, and ruled that plaintiff should have received damages.

In *Hryhorijiv (Grigorieff) v. Winchell,* [29] suit was brought against defendants for a broadcast by Walter Winchell, in which Mr. Winchell accused the plaintiff of being a "pro-Nazi", and alleged that the plaintiff was rooming with a friend who was a translator in the War Department.

The court held, on a motion to dismiss the complaint, that such words, if not true, were libel *per se* as they would hold plaintiff up to contempt, disgrace and ridicule in his profession as a lecturer. No record of any further activity by plaintiffs in this case can be found.

In the case of *Coffey v. Midland Broadcasting Company,*[30] plaintiff was accused on a broadcast of being an ex-convict who had served time in the penitentiary. The court held that a good cause of action had been stated by plaintiff against the defendant radio station transmitting the broadcast.

In *Miles v. Louis Wasmer, Inc.,*[31] a political broadcast was made wherein the plaintiff, who was sheriff of Spokane County, was maligned. The broadcast discussed the fact that the sheriff

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[28]Polakoff v. Hill, 261 App. Div. 777, 27 N.Y.S. (2d) 142 (1941).

[29]Hryhorijiv (Grigorieff) v. Winchell, 180 Misc. 574, 45 N.Y.S. (2d) 31; 267 App. Div. 817, 47 N.Y.S. (2d) 102 (1943).

[30]Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (1934).

[31]Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P. (2d) 847 (1933).

had recently auctioned off the stock of a confiscated still and other brewing equipment, stating that such an auction was strange, and that such confiscated material should be destroyed instead of being auctioned. The broadcast implied that the equipment was later re-sold to bootleggers. In a suit for defamation, the court held that both the advertiser and the radio announcer were liable.

In *Metropolitan Life Insurance Company v. Knickerbocker Broadcasting Company,* supra, the court held the language used to be actionable.

§68. Relief for Defamation.

The ordinary relief granted by the courts for actionable defamation is an award of damages in favor of the injured plaintiff. It is most unusual in this type of case for courts to grant injunctive relief. It is quite possible, however, that in certain states a plaintiff might be entitled to and be granted such relief, particularly if the defamation were of a continuing nature and reflected upon the products or business of plaintiff.

To the contrary, in the case of *Lietzman v. Radio Broadcasting Station WCFL,*[32] the plaintiff sought to enjoin the defendants, including a broadcasting station located in Chicago, from continuing broadcasts allegedly slandering plaintiff's business. Such business was operated under the title of "Boston Dental Parlors." The statements made over the air were to the effect that plaintiff's business was not unionized, that the business would not permit collective bargaining, that it was "unfair" to President Roosevelt and the N.R.A.

The court denied the application for injunction on the ground that the plaintiff had an adequate remedy at law and that "equity would not enjoin a libel." No unlawful conspiracy was alleged, and no intimidation or coercion shown in this case.

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[32]Lietzman v. Radio Broadcasting Station WCFL, 282 Ill. App. 203 (1935).

§69. CONTEMPT OF COURT.

A field of liability closely aligned with defamation is that of criminal contempt, based on the uttering of statements or words reflecting on a judge or commenting on a case while that case is still pending. If a broadcast does in fact attack a judge or discuss a pending case in a manner substantially designed to influence the outcome, it is extremely unlikely that the offenders will be able successfully to defend their position. Unlike civil defamation, there is no defense of "truth" for statements which are in fact contemptuous of a court.

In *Ex Parte Shuler,*[33] an application was made by Reverend Robert Shuler for a writ of habeas corpus for his release from confinement for contempt. Charges had been filed before the California Superior Court wherein Shuler was accused of giving radio talks in an effort to influence a certain criminal action then pending, as well as to sway the decision of the judge who was trying the case.

Shuler's defense was to the effect that he was interested in arousing public opinion in a pending suit involving the issuance and sale of Julian Oil Company stock, in which case there was included a charge of bribery against certain Los Angeles officials.

It was held that such remarks over the radio constituted contempt of court, and that the constitutional guarantee of free speech did not give to Shuler the right to interfere with justice. Truth is no defense to this type of contempt.

The matter of *People ex rel Supreme Court v. Albertson,*[34] involved the filing of a complaint against defendant for criminal contempt. The accusation contained a count alleging that in the radio broadcasts made by defendant he had charged the New York Supreme Court Justice, who had presided in a certain corporation lawsuit, with gross misconduct on the bench,

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[33]Ex parte Shuler, 210 Cal. 377, 292 Pac. 481 (1930).

[34]People ex rel Supreme Court v. Albertson, 242 App. Div. 450, 275 N.Y.S. 361 (1939).

of deliberately mishandling the case and of flagrantly failing to be impartial.

The trial court held defendant guilty of contempt, and punished him with a fine and imprisonment. The conviction was appealed, and in reversing the lower court the appellate court held that there is a right to comment freely on a court case once such case is completed.

If a comment affects a judge personally, that judge has his remedy in a civil suit for defamation. The particular words used here, said the court, were an affront to the particular justice involved and not to the judiciary as a whole.

A newspaper or a radio commentator has the right to comment upon cases then in trial or on appeal. The test used in determining whether there is criminal contempt is whether the broadcast is substantially designed to influence the court in its decision of the case.[35]

§70. Conflict of Laws.

An interesting question involving the conflict of laws arises in virtually every case wherein there is presented for consideration the matter of a defamation by radio broadcast. The fact that a broadcast may be heard in several states simultaneously, poses the question of which state's law is applicable. There can be no doubt but that there is a sufficient "publication" in each of the several states wherein the broadcast is heard, as well as in the state in which the originating station is located, on which to base an action for defamation.

The rule laid down under conflict of laws, as applied to torts, is clear that the law of the place where the tort occurs will govern the substantive tort liability. However, in the matter of broadcasts, the problem presented is that of determining the state in which the tort did occur.

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[35]Bridges v. California, 314 U.S. 252, 86 L. Ed. 192, 62 S. Ct. 190, 159 A.L.R. 1346 (1941).

The Restatement, Conflict of Laws, Section 377 (1934) takes the view that in the case of harm to a person's reputation, the place where the words were communicated determines the particular law which should be applied.

This, however, is of little help in solving the problem presented.

A defamatory broadcast originating in New Jersey may be heard in New York as well. Certainly an action may be brought in New Jersey, but the damage is not confined to that state but has spread to New York. In bringing an action in New Jersey can the courts of New Jersey take cognizance of the damage to plaintiff by reason of the defamation having affected him in the State of New York; and if so, in giving a judgment, can they consider the laws of New York?

Should the answer to the foregoing question be to the effect that the New Jersey courts cannot take cognizance of the laws of New York under such circumstances, then the plaintiff is privileged to choose the forum wherein the law is most favorable to his position. Losing his case in one state, may he then bring an action in the other? On the other hand, having been successful in one state, may he then bring an independent action in another?

A conclusion that it is permissible to bring an action in several states for one defamatory statement can only offend the principle that a cause of action is indivisible, and that multiplicity of actions is frowned upon by the courts.

From the foregoing, it appears that the law as it presently stands offers no solution to the problem. *A fortiori,* a new rule of conflict of laws applicable to radio broadcasting is the only answer.

Chapter IX

RIGHT OF PRIVACY

§71. Development of Right of Privacy.

The protection of the right of privacy has had an interesting history in the American courts. It was unknown as a distinct cause of action to the common law of England and the United States until the twentieth century. The fact that a distinct right of action was at last recognized by the courts gives encouragement to the view that the common law is changing with the progress of civilization.

The individual is entitled to protection, where his privacy is invaded by the light of publicity and exploitation, in instances where he should justly be allowed to remain outside the vision of a prying public. It was not until the means of communications such as newspapers, magazines, and broadcasting assumed large proportions in our daily lives that the ordinary individual had to fear that his personality might be unjustly exploited for commercial motives.

The courts of some states have recognized the development of the right of privacy as part of the modern common law. Other states have seen fit to protect these rights by statutory enactment.[1] For the purposes of consolidation the states may be divided into three separate groups: (a) Those states in which no recognition is given to any action growing out of invasion of the right of privacy; (b) those states recognizing such rights, even in the absence of statutory protection; and (c) those states in which there has been enacted specific statutes on the subject.[2]

§72. Truth No Defense to Invasion of Privacy.

Indiscriminate comment affecting members of the public over a radio news broadcast may well subject the commentator, his sponsor, and the broadcasting station to liability for invasion of the right of privacy.

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[1]New York Civil Rights Law, Cahill's Consol. Laws of N.Y., v. 7, Art. 5, 50, 51.
[2]See Wilson v. Onandaga Radio Corp., 175 Misc. 389, 23 N.Y.S. (2d) 654 (1940).

The case of *Elmhurst v. Shoreham Hotel,*[3] was an action filed in the District of Columbia for invasion of right of privacy. The plaintiff alleged that Drew Pearson had, in one of his radio broadcasts, stated that the plaintiff, who was a defendant in the well-publicized Washington "sedition" trial in 1945, was working as a bartender and waiter at the Shoreham Hotel in Washington, D. C. In such occupation, said Drew Pearson, the man was in a position to overhear private conversations of James F. Byrnes, Bernard Baruch and other high government officials.

The plaintiff alleged that because of this broadcast he had lost his position at the Shoreham Hotel. Suit was instituted against the Shoreham Hotel, Drew Pearson, the Blue Network Company, Station WMAL, and O. John Rogge. Mr. Rogge was joined as a defendant on the theory that as special prosecutor in the sedition trial he had instigated the broadcast.

The defendants moved to dismiss on the grounds that plaintiff had failed to state a cause of action in his complaint. The action was dismissed. Plaintiff appealed.

On appeal the court affirmed the dismissal of the action, holding that in jurisdictions where the right of privacy is recognized, the law is well settled that one who becomes involved in the news must pay the price of such publicity by being subjected to news reports concerning his private life. The same rule is applicable to those who unwillingly become involved in a publicized criminal prosecution.

The court held that Drew Pearson had a right freely to comment on the connection of the plaintiff with the sedition trial. The fact that plaintiff was working in a position where he might further his subversive activities, and that comment was made thereon, was not, under the circumstances, a violation of plaintiff's right of privacy.

The question of whether or not the law of the District of Columbia recognized actions for a violation of the right of

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[3]Elmhurst v. Shoreham Hotel, 153 F. (2d) 467 (1946).

privacy was presented for decision, but the court refused, in the light of its findings, to decide this point.

It is apparent that the reason plaintiff in this case did not bring an action for defamation, was because of the fact that the statement broadcast was true.

If a good cause is stated in an action for invasion of the right of privacy, the defense of truth of the publicized statement is not available to the defendants. In jurisdictions recognizing the action of invasion of privacy, an action based thereon is preferable to one based on defamation, provided that the statement complained of is in fact true.

§73. Loss of Right of Privacy.

In the case of *Mau v. Rio Grande Oil, Inc.*,[4] the plaintiff had been held up and shot by a robber. As a result of such injury he became subject to nervous attacks. Defendants produced a radio show entitled "Calling All Cars" in which they broadcast a dramatization of the holdup, and used the plaintiff's name, without his consent.

Plaintiff brought this action for invasion of his right of privacy alleging that when he heard the broadcast, he suffered severe mental anguish, resulting in his losing his position as a chauffeur. Defendants moved to dismiss on the grounds that the complaint failed to state a cause of action. The court denied the motion, holding that the laws of the State of California recognized the action for invasion of the right of privacy.

It is submitted that plaintiff stated no cause of action under these facts. The decision in the case of *Elmhurst v. Shoreham Hotel, supra,* clearly holds that a party, by becoming involved, even unwillingly, in a newsworthy incident, loses a certain measure of his right of privacy. Incidents portraying such an involvement may be portrayed in the news, or dramatized over the radio.

Can it be said that merely because of the fact that a radio program is sponsored, that program has lost the right to com-

[4]Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (1939).

ment on or dramatize incidents of public interest? If such were the fact, then by the same token, newspapers carrying advertising matter would likewise be precluded from such comment. The answer to this question is clearly, no.

In a different category is the use of the name of a celebrity for advertising purposes without the consent of that person. The fact that a celebrity is before the public does not of itself deprive that person of his rights to compensation for the use of his name in advertising. However, should the material used on a broadcast concern items of news concerning the celebrity, there is no right of compensation. The line of distinction is a factual one, and not a question of principle.

For example, in the case of *Uproar Company v. National Broadcasting Company,*[5] the plaintiff had acquired from the comedian, Ed Wynn, an alleged right to publish radio scripts composed by Ed Wynn for his broadcasts for Texaco. The programs featured certain dialogues between Wynn and Graham McNamee, the noted radio announcer. The Uproar Company proposed to advertise its own products by publishing these pamphlets, and sought to enjoin defendants from interfering with such publication.

Texaco, by contract, had the right to the exclusive services of Graham McNamee. Although Ed Wynn had consented to the use of his name by an alleged assignment, Mr. McNamee had given no such consent.

The court held that the plaintiff had no right to invade Graham McNamee's privacy by using his name in these pamphlets without his consent. A consent by McNamee for its use by Texaco did not constitute a consent to its use by another.

§74. Protection of Pseudonym.

Not only will the courts protect the legal name of an individual, but they will likewise protect a stage or professional name. In the case of *Gardella v. Log Cabin Products,*[6] it ap-

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[5]Uproar Co. v. National Broadcasting Co., 81 F. (2d) 373; cert. denied, 298 U. S. 670, 56 S. Ct. 835, 80 L. Ed. 1393, 23 Pat. Q. 254 (1936).

[6]Gardella v. Log Cabin Products, 89 F. (2d) 891 (1937).

peared that the plaintiff had played the role of "Aunt Jemima" on the stage and radio for years, and was known to a large audience by such name. The defendant company had independently and for many years advertised its products under the name of "Aunt Jemima."

Plaintiff brought this action for invasion of right of privacy under the New York Civil Rights statute. An additional cause of action alleged unfair competition. Plaintiff's complaint charged that defendants had sponsored certain radio plays featuring "Aunt Jemima", which character was portrayed in an inferior manner.

The court held that the New York statute did not apply in this case, since the defendants have acquired certain rights to this name, independent of those which plaintiff might possess. The court further said that since plaintiff had adopted such a name for use in her professional career, she had acquired rights in the name, even though it is not her legal or ordinary name. However, such rights were not invaded by these defendants.

From the foregoing it is apparent that there may be co-existing though non-conflicting rights to the use of an identical assumed name.

§75. Protection of Artistic Rights.

The theory has been advanced that a performing artist has the right to restrain the broadcast by others of his interpretative artistic works, without his express or implied permission.

In the case of *Waring v. WDAS Broadcasting Station,*[7] discussed at length in Section 87, the plaintiff sought to enjoin the defendant broadcasting station located in Philadelphia, Pennsylvania, from broadcasting phonograph records which had been recorded by plaintiff's orchestra.

The concurring opinion of the court which held for plaintiff, adopted the theory that an injunction should be granted, since

[7]Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 Atl. 631 (1937).

plaintiff has a right of privacy which had been infringed. The court said that this right of privacy consisted of the right to determine the circumstances under which plaintiff's recorded performance might be played, and that it considered the right of privacy as being broader than any alleged property right in the records.[8]

The right of privacy will unquestionably assume an important role with the advent of a more general use of radio-television.[9]

[8]See Chapter XI.
[9]See Chapter XVI.

CHAPTER X

RIGHTS OF CANDIDATES AND THE PRESENTATION OF PUBLIC ISSUES

§76. THE RADIO AND FREE SPEECH.

Prior to the advent of radio the concept of "free speech" permitted an individual to make public his personal views, provided that such presentation did not conflict with prevailing views of what constituted obscene or seditious utterances, or constitute defamation. The extent of the individual's ability to publish such material depended on the size of his purse. In general, the facilities of the printing press were available to all political or social groups capable of bearing the ultimate expense; while the right of the rostrum was open to all.

Radio broadcasting, as it affects the concept of "free speech," presents unlimited problems. The present limitations on the availability of broadcast frequencies, coupled with the cost of the establishment of a commercial station, hampers the ability of groups or individuals to present their views to the listening public.

The individual or group seeking to reach the radio audience must of necessity do so through existing facilities. Here, the limitation on available time operates as a constraining influence.

The most effective and direct form of expression designed to influence the mass of public opinion, exists in radio broadcasting. However, the practical problem of reaching that audience unavoidably limits the right. In an effort to overcome these problems and to balance conflicting interests, radio stations, F. C. C., and the courts, have given particular attention to their solution.

§77. EQUAL RIGHTS OF CANDIDATES TO BROADCAST.

Under the law, candidates for public office are permitted equal access to broadcasting facilities. To insure this right there was enacted Section 315 of the Communications Act of 1934, which reads as follows:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate."

It will be noted that a station has the right to refuse permission to broadcast to all political candidates. However, if its facilities are opened to one candidate, it is obligatory that all rival candidates for that particular office be given an equal privilege.

F.C.C. regulations[1] define a "legally qualified candidate" as any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state, or national. Within this definition is contained the statement, that such candidate is one who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate, directly or by means of delegates or electors.

There is the further requirement that such a candidate must have qualified for a place on the ballot; or be one who is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or by other method, and in addition has either been duly nominated by a political party which is commonly known and regarded as such, or makes a substantial showing that he is a bona fide candidate for nomination or office, as the case may be.

The regulations further provide that the rates, if any, to be charged all candidates for the same office shall be uniform, and shall not be rebated by any direct or indirect means. The broad-

[1]F.C.C. Rules and Regulations, §§3.422, 3.290 (a) and 3.690 (a).

casting station is not permitted to make any contract or other agreement which would have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for the same office, and all forms of discrimination are barred.[2]

Where political programs are involved, or discussions of public controversial issues for which any consideration or inducement is received by the station, the Rules and Regulations of F.C.C. require that appropriate announcement be made revealing the source of such materials or services.[3] This requirement prevents a station from using a script or transcription prepared by interested parties and presenting one view of a problem, without first advising the public of the fact that such broadcast is so prepared.

In the matter of *Bellingham Broadcasting Company,*[4] of Bellingham, Wash., the petitioners made aplication to F.C.C. for a construction permit for a new station in the City of Bellingham, on facilities presently assigned to Station KVOS of that city. There was evidence presented to the effect that KVOS had denied qualified political candidates an equal opportunity to appear on the air.

The Commission denied the application of petitioners, and in commenting on the questions presented, said that while the evidence of denial of right of equal opportunity to political candidates might be true, this fact alone was not sufficiently strong to justify a denial of the station's application for renewal of license. The Commission stated, however, that the evidence presented would be considered at the time of any future application.

A candidate denied equal access to broadcasting facilities has several remedies. He may seek a mandatory injunction from a court to allow him equal access to the radio station's facilities. He may petition the F. C. C. for relief; or under certain circumstances he may bring an action against the station for damages

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[2]F.C.C. Rules and Regulations §§3.423, 3.290 (c) and 3.690 (c).
[3]F.C.C. Rules and Regulations §§3.409, 3.289 and 3.689.
[4]Bellingham Broadcasting Co., 8 F.C.C. 159 (1940).

caused by the refusal of the station to permit him the use of its facilities, as provided by statute.

§78. RIGHT TO EXAMINE SCRIPT.

The need of precaution on the part of a station, in an effort to prevent the broadcast of defamatory material for which it could be held pecuniarily liable, causes the station to insist upon a submission of scripts before a broadcast.

In the case of *Voliva v. WCBD,*[5] a suit was brought to enjoin the defendant from enforcing its requirement that plaintiff submit, forty-eight hours in advance of broadcast, scripts of proposed broadcasts over defendant's station located in Chicago. The lower court dismissed the complaint and on appeal the appellate court, in upholding the dismissal, said that such conditions imposed by the radio station did not constitute a censorship of broadcasts within the meaning of the Communications Act of 1934.[6] The court further stated that if the defendant station failed to supervise its broadcasts, such action might well be the basis for a refusal by F.C.C. of an application for renewal of station license.

It should be noted that this case does not directly involve an interpretation of the prohibition against censorship on the part of the radio station. Section 315 of the Act applies to the censorship of material broadcast by qualified candidates for public office. There was no claim by the plaintiff that he was a qualified political candidate.

Section 326 of the Act provides as follows: "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication . . ." However, this section only restricts the right of F. C. C. to engage in censorship and does not apply to power of a radio station so to do.

[5]Voliva v. WCBD, 313 Ill. App. 177, 39 N.E. (2d) 685 (1942).
[6]For the facts of this case, see §63.

The case of *Rose v. Brown,*[7] cited and discussed in Section 62, involved the examination of script by a station. The station offered as a defense the matter of its right to examine script. While the court did not decide this question, it did, however, make mention of the right of a station to examine scripts and the right to refuse to broadcast under certain conditions.

Neither this nor the preceding case answers the question as to whether or not a station has the right to delete defamatory material in a broadcast of a bona fide political candidate.

A statute of the State of Florida prohibits the publication or circulation of charges against a candidate for nomination to public office, without serving such a candidate with a copy of the charges at least eighteen days before the primary election.

In *Ex parte Hawthorne,*[8] the petitioners sought a writ of habeas corpus for release from custody based on charges that they had violated the Florida statute by making a certain speech over the radio. The court granted the petition on the ground that this statute is inapplicable to a radio broadcast, as the statute contemplates a "copy" in the form in which such copies are circulated. The requirement of a "copy" as set forth in the statute, said the court, cannot apply to an electrical utterance.

§79. Presentation of Public Topics.

Neither the Communications Act nor the F.C.C. regulations specifically require that the broadcasting facilities of a station be thrown open to the discussion of all questions of public interest. Nor is it required by law that all sides of controversial topics be presented.

However, in cases where there is outright discrimination in favor of or against certain topics, political parties, or social groups, F.C.C. has taken cognizance of such discrimination in its findings affecting the renewal of licenses. It has likewise in passing on an application for a construction permit, considered the question as to whether or not applicants were likely to

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[7]Rose v. Brown, 186 Misc. 553, 58 N.Y.S. (2d) 654 (1945).
[8]Ex parte Hawthorne, 116 Fla. 608, 156 So. 619, 96 A.L.R. 572 (1934).

give fair representation to the opinions and problems of the area in which the proposed station seeks establishment.

Section 303 of the Communications Act states, among other things, that the F.C.C. shall have the power to assign frequencies, regulate stations, etc., *as public convenience, interest, or necessity requires.* Since there are only a limited number of stations that can be established within the existing limitations of radio frequencies, the power to regulate, within the confines of its judgment, as to whether a station is giving proper representation to the opinions and public issues of the area that the station covers, is obvious.

In the hearing of *Mayflower Broadcasting Corporation,*[9] of Boston, Mass., one of the stations concerned sought a renewal of its license. Evidence was introduced that this station had, for over a year, broadcast editorials urging election of various political candidates or supporting one side or another of a public question. There was no attempt on the part of the station to be non-partisan.

The F.C.C. held that a biased presentation of news or controversies, made for the purpose of winning public support to one side or another, was not operation in the public interest, convenience, or necessity. A licensee owes a duty to the public under the Communications Act, to be non-partisan, and to refrain from adopting a biased attitude on public questions. Such an attitude on the part of broadcasting stations is necessary for free speech on the air.

The Commission held that inasmuch as the station involved had, some time previous to this hearing, altered this policy and adopted a non-partisan attitude, the request for renewal of license would be granted.

In the hearing of an application for renewal of station license in the matter of *United Broadcasting Company,*[10] a petition was filed by the United Auto Workers-CIO directed against the

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[9]Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941).
[10]United Broadcasting Co., 10 F.C.C. 515 (1945).

granting by F.C.C. of such renewal of license to Station WHKC of Columbus, Ohio.

The grounds alleged were that this station was throttling free speech and was not operating in the public interest in refusing to sell time to any programs which solicited memberships, or discussed controversial subjects such as race, religion, or politics. The petitioners claimed that the station failed to carry out this purported policy uniformly, applying it only in cases involving those with whom it disagreed.

Later in the proceeding, both the United Auto Workers and the radio station joined in a motion to dismiss the petition, setting forth an agreed statement that at no time did Station WHKC believe that its policy was contrary to the interests of labor. The station agreed that in the future it would consider all applications impartially and would be open minded on all public questions. It stipulated that it would make time available on a "sustaining" basis, or on a paid commercial basis, with equal access to all sides on public questions.

In granting the petition to dismiss, the F.C.C. stated that the past operation of this station, under the policy that no time would be sold for a discussion of controversial issues, is inconsistent with the F.C.C.'s concept of the meaning of "public interest."

It is interesting to note, from the comment of F.C.C. in this case, that it is the Commission's view that a station may not "stand on the sidelines" and refuse time to all comers in matters of public interest, but must take some positive action thereon, where request for such action has been made.

An application before F.C.C. was made by *Bellingham Publishing Company*[11] of Bellingham, Washington, for a construction permit to establish a new station. In opposition to the application, statements were filed by officials and private citizens of the community in which the station was to be located, setting forth that the newspaper published by the applicants had for

[11]Bellingham Publishing Co., 6 F.C.C. 31 (1938).

years catered to special interests to the disadvantage of the community. (See Section 60.)

While the construction permit was denied, the Commission stated that the mere fact that an applicant for a license had theretofore become involved in controversial political issues, is not of itself regarded by F.C.C. as sufficient grounds for denial of an application.

In a hearing on the matter of *Harold H. Thoms,*[12] the applicant sought a construction permit for a station in Ashville, North Carolina. The single question before F.C.C. was that of the character of the applicant. The applicant had theretofore printed, in a newspaper owned by him, an article concerning certain individuals involved in a pending political campaign, which article implied that a "slush fund" had been gathered for this campaign. The article was unsigned.

Both the applicant and his editor were tried and convicted of violating a North Carolina statute, which made it unlawful to publish in any manner an article derogatory to a political candidate, unless such publication was signed by the person by whom it was written, and who was responsible for its being published. A week after the publication of the article the applicant publisher printed a retraction of his prior statements. Since the applicant enjoyed a good reputation in his community, said the F.C.C., his petition would be granted, despite his former conviction.

§80. Religious Broadcasts.

The F.C.C. has indicated, by its attitude, that it looks with favor upon programs of a religious nature, provided that these programs do not attack other faiths, and are not monopolized by one particular group. Were it possible to grant an unrestricted number of radio station licenses, there would be no objection to a station broadcasting programs of only one religious denomination. However, since the F.C.C. must limit the number of

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[12]Harold H. Thoms, 7 F.C.C. 108 (1939).

stations, fairness requires that no one station be monopolized by broadcasts of a single religious group.

In the matter of *Young People's Association for the Propagation of the Gospel,*[13] an application was made for a construction permit for a new station to be located in Philadelphia, Pa. It was planned to use this station for the primary purpose of the dissemination of religious programs to advance the fundamentalist interpretation of the Bible.

In connection with the proposed broadcasts to be disseminated, the facilities of the station were to be open only to those whose beliefs in the interpretation of the Bible coincided with those of the applicant. No restrictions were proposed to be made on the religious beliefs of persons sponsoring programs to be devoted to civic or charitable topics.

The F.C.C. stated that when facilities of a station are confined to one purpose, and the station is a mouthpiece for a particular group or organization, this station cannot be said to be serving in the public interest. If one group is entitled to the facilities of a station for dissemination of its principles, then all faiths should be so entitled.

Since there are not enough available channels to go around, the interests of the listening public must be paramount. F.C.C. further stated that "propaganda" stations are not consistent with the best discussion of public questions and denied the application.

An application for transfer of license of station *WCBD*[14] of Zion, Ill., was made before the Commission. In approving such transfer, F.C.C. considered the fact that the former owner, Wilbur Glenn Voliva, had managed the station and confined the right to broadcast to one creed only. Such action was regarded as highly objectionable. As the application specifically set forth that under the new management the station would be open to all creeds, the request for transfer was granted.

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[13]Young People's Association for the Propagation of the Gospel, 6 F.C.C. 178 (1938).

[14]WCBD, Inc., 3 F.C.C. 467 (1936).

The courts have heretofore failed to intervene in questions involving a determination as to what constitutes fair treatment of religious groups who seek to obtain radio time. In the case of *McIntire v. William Penn Broadcasting Company,*[15] an action was brought by several religious groups against defendant station located in Philadelphia, Pa., to prevent cancellation of their broadcasting contracts.

The plaintiffs held contracts for the broadcasts of religious programs for which they were prepared to pay. These contracts contained certain clauses permitting the station to cancel upon two weeks notice in writing. Defendant actually devoted one-fifth of its available radio time to religious programs.

The theory on which plaintiffs sought to enforce their contracts was that the defendant, in terminating these contracts, and in refusing the plaintiffs an opportunity to bid competitively with other religious groups for radio time, had illegally discriminated against them. Such a policy, said plaintiffs, was invalid, being contrary to the Communications Act, and discriminatory in giving free time on the air to some religious programs.

The court dismissed the complaint, holding that although radio stations operate in the public interest, they have complete choice of programs subject to the equal rights of political candidates. The F.C.C. has the power to pass upon unfair treatment to potential broadcasters. In the present instance it had approved cancellation of the contracts. The court further held that a station may, if the F.C.C. permits, and if such conduct is not contrary to the anti-trust laws, sell or refuse to sell radio time to whomever it pleases. A radio station is not a public utility.

§81. Municipally Owned Stations.

Radio stations owned and operated by a municipality have been the source of considerable contention. Such stations, by their very nature, are open to the charge that those in political

[15]McIntire v. William Penn Broadcasting Co., 151 F. (2d) 597 (1945).

power are using them to promote their own selfish interests. Ordinarily the statute or ordinance under which the municipal station is established and by authority of which funds are made available for its operation, precludes use of these stations for private or "political" purposes, in the narrow meaning of the word.

In the case of *Fletcher v. Hylan,*[16] a group of taxpayers of New York City sought to restrain the defendants, who were New York City officials, including the mayor, from using Station WNYC for broadcasting of alleged political propaganda.

Station WNYC was set up under authority of statute and ordinance to serve as a city instrumentality. It was originally designed for use by the various departments of the city, such as the police and fire departments.

The court held that the fact that general speeches and comment were made over the station was consistent with the statutory establishment of this broadcasting facility. It could not be said that public moneys were being spent for other than city purposes. Any further restrictions on its use must come from the legislative bodies, as the use of this station to disseminate general information is within the authority of defendants.

However, there are limits to such use, as broadcasts involving discourse on political subjects cannot be justified under statutory authority. The evidence disclosed that one defendant, Mayor Hylan, had made certain speeches of a political nature pertaining to a personal controversy in which he had an interest as a private citizen. The court enjoined such speeches.

While it is generally recognized that purely political speeches have no place on a municipally owned radio station, the problem as to what will be considered a program of a public nature, sufficient to justify the expenditure of public funds, remains to be solved.

The question arises as to whether broadcasts of important activities of religious groups are to be considered "private"

[16]Fletcher v. Hylan, 125 Misc. 489, 211 N.Y.S. 397, 727 (1925); see also Stone v. State, ex rel Mobile Broadcasting Corp., 223 Ala. 426, 136 So. 727 (1931).

rather than "public" in nature. The propriety of such broadcasts has been the subject of several bitter controversies in the New York courts.

In the case of *Ford v. Walker,*[17] the plaintiff brought an action as a taxpayer against Mayor James Walker of New York City, to restrain Station WNYC from broadcasting proceedings at unofficial and private gatherings, which were allegedly in the interest of a private religious group. The trial court dismissed the complaint. The appellate court reversed the lower court, holding that plaintiff had stated a good cause of action. The language used in some of the briefs was held to be of a bigoted nature and the briefs were ordered to be stricken.

The identical question was decided upon its merits in *Lewis v. La Guardia.*[18] This was an action by a taxpayer against Mayor La Guardia of New York City to restrain Station WNYC from broadcasting proceedings at Communion Breakfasts of the Holy Name Societies. These societies consisted of Catholic employees of the various city departments.

The court denied an injunction, holding that these broadcasts were not made for the interests of a private organization, but were made in the interest of the listening public. The breakfasts themselves and the speeches were in no sense religious ceremonies. The breakfasts were held at hotels and not in churches. Some of the speeches were made by prominent citizens who were non-Catholics. There was evidence before the court that a similar Protestant organization was allowed time over this station. There was nothing to show any discrimination.

§82. Power of F.C.C. to Prevent Discrimination.

The Commission has declined to lay down general rules affecting the types of public issues and similar subjects that may be discussed over a broadcast. In the event of complaints, how-

[17]Ford v. Walker, 227 App. Div. 416, 237 N.Y.S. 545 (1929).
[18]Lewis v. La Guardia, 172 Misc. 82, 14 N.Y.S. (2d) 463; 282 N.Y. 757, 27 N.E. (2d) 44 (1939).

ever, the F.C.C. takes cognizance of such matters in the light of the particular facts then under consideration. The total time devoted to a discussion of public issues is considered of prime importance. An adequate amount of time should, said the Commission, be made available by stations for this type of program, and this matter will be one for consideration in determining the decision on an application for renewal of license.[19]

Any group desiring radio time, in order to broadcast its views, must seek permission from the station itself. If denied such permission, then its only recourse is by petition to the F.C.C. for relief from the allegedly discriminatory treatment. If the Commission finds that there is merit to such a petition, it can only use its influence to persuade the radio station to permit such broadcasts. It has no actual power to compel a compliance in such matters.

The only weapon of F.C.C. is its power to refuse to renew licenses of stations failing to serve the public interest. This threat is potent enough in itself. Stations are much more inclined to follow the wishes of the Commission than to risk possible forfeiture of licenses. By assuming and maintaining a completely unbiased position, F.C.C. can well serve as an important bulwark in the preservation of free speech and the protection of civil rights.

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[19]Public Service Responsibility of Broadcast Licensees, Mar. 7, 1946 (The "Blue Book").

CHAPTER XI

UNFAIR COMPETITION

§83. GENERAL.

The question of unfair competition has been a continuous source of controversy in the field of radio law. Legal concepts embracing unfair competition become ephemeral when an attempt is made to define them. Although certain of their roots lie deep within the common law, the practical application of this phase of jurisprudence is scarcely fifty years of age.

Federal statutory law has accounted for some of the tenets in this field. Statutes such as the Sherman Act, the Clayton Act, and the Pure Food and Drug Act of 1938 have furnished us with a foundation upon which to build our present concepts. State enactments on similar subjects have tended toward the defining of illegal contracts and those contracts that may be contrary to public policy.

The difficulty is that the essence of this branch of the law depends upon what is meant by "fair" competition, "fair" trade, and "fair" practices. The concept of what is "fair" presently depends too much on the underlying philosophy and opinions of the judge, attorney, business man, or legislator concerned in determining the question.[1] It is hoped that at sometime in the future the courts will crystallize their decisions, so that there may be gleaned from them a uniform and understandable concept of unfair competition. At the present time we can only grope along extracting general principles from the decisions on cases determining particular facts. The findings of the courts are almost as varied as the facts of the cases before them.

§84. UNAUTHORIZED APPROPRIATION OF ANOTHER'S EFFORTS.

It is a well established principle of the law of unfair competition that a person cannot "palm off" the goods of a competitor as those of his own. Conversely, he cannot "pass off" his own

[1]See Chapter XIV for discussion of Unfair Competition affecting literary rights.

goods as those of a competitor. It is not uncommon to find individuals and firms adopting the use of a competitor's name for a product, or the firm name of the competitor as their own. Upon proof of such facts, an injunction will issue and damages are recoverable.

The use of another's trade-mark or trade name creates a right of action for unfair competition, apart from any statutory right of action for infringement of a trade-mark.[2]

Where there is no "passing off" of a competitor's goods, but there is a use of the ideas, labor, efforts, or skill of another to gain an advantage for the user, there is a remedy in an action based on unfair competition.

The leading case on unfair appropriation of the efforts of another is that of *International News Service v. Associated Press.*[3] From the facts it appeared that the plaintiff news agency sought to restrain the defendant from obtaining its news from bulletin boards and early editions of members of plaintiff's association of newspapers. The plaintiff contended that such action constituted a violation of its property rights, and was unfair competition. The parties conceded that there can be no copyright of news as such. The defendant asserted that even if there could be a property right in news, as such, all rights are lost upon publication.

The United States Supreme Court, in granting an injunction against defendant, stated in the majority opinion, that defendant had "reaped where it had not sown," and that the actions of defendant would be considered unfair competition since they were contrary to good conscience. The court held that plaintiff had not abandoned all its rights upon publication. Abandonment, said the court, is a question of intent, and the entire set-up of plaintiff's organization negated any such intent. The fact that there was no "palming off" here was not material. The entire system of defendant in its acquisition of this news was a false

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[2]See Chapter XII for discussion of Trade-Mark and Trade Names.

[3]International News Service v. Associated Press, 248 U.S. 215, 63 L. Ed. 211, 39 S. Ct. 68, 2 A.L.R. 293 (1918).

representation to the public that defendant had fathered such news itself.

Justice Holmes, in a concurring opinion, said that the only ground of complaint should be that there was an implied misstatement by defendant that it had gathered the news itself. If defendant were to give credit for this appropriation to the plaintiff, then Justice Holmes felt that the defendant would be free to use this news as it had done.

In a dissenting opinion, Justice Brandeis stated that he believed there was no actionable unfair competition here, since there was no common law property right in news as such. Nor was there any breach of trust or confidence under these facts. Since the law had sanctioned such appropriation of property, Justice Brandeis believed that it was up to Congress or the various legislatures to change the law in this respect.

Many judges have chosen to follow this dissenting opinion rather than the majority view.

The application of this opinion to the field of radio first occurred in the case of *Associated Press v. KVOS.*[4] There the plaintiff news agency sought to restrain the defendant broadcasting station of Bellingham, Wash., from systematically buying copies of regular editions of three of plaintiff's members, and reading news items from these papers over the radio. The plaintiff did not claim any rights by reason of copyright or any contractual breach, but asserted that this "piracy" was unfair competition.

The trial court attempted to differentiate between the case of the *International News Service v. Associated Press* and this case, by stating that the former case was limited to its facts, while here there was no direct competition between the broadcasting station and the news gathering agency, even though both plaintiff and defendant compete for the business profits of advertisers.

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[4]Associated Press v. KVOS, 299 U.S. 269, 81 L.Ed. 182, 57 S. Ct. 197 (1934); See KVOS v. Associated Press, 13 F. Supp. 910 (1936).

On appeal to the circuit court, this decision was reversed in favor of plaintiff. The circuit court held that since both plaintiff and defendant are competing for advertising income in the same manner by seeking to furnish news, that defendant's conduct constitutes unfair competition. The fact that the radio distributes the news faster and is "free" to its listeners makes defendant's competition with plaintiff the more deadly, said the court.

The case was appealed to the United States Supreme Court which dismissed the action for lack of jurisdiction. Plaintiff had alleged that its business was damaged in excess of $3000, a necessary element in order to maintain federal jurisdiction, but had failed to prove this controverted issue in court. The Supreme Court specifically stated that it refused to decide the question as to whether the doctrine of the International News Service case was applicable.

It is submitted that the reasoning of the circuit court was correct in holding that there was sufficient competition for the conduct to be actionable.

Recent cases emphasize the element of "unfairness" rather than the element of "competition." It is obvious that in the world of business the worth of one's product may be greatly diminished by the unfair practices of another, even though the appropriator is not in the same line of business or in direct competition. The trend seems to be to protect business from unfair practice without interjecting a technical distinction between businesses in direct or indirect competition.

§85. Basis for Injunctive Relief.

One who presents a public event has the exclusive right to broadcast that event to the public and to prevent its broadcast without consent of the producer.

The application for and granting of an injunction against a competitive broadcast may be predicated upon any one of the following grounds.

The first is based on the theory that those presenting the event have a property or similar interest in the story or presentation. An attempt to broadcast such event from the place of its origin by others is a taking or infringement of the rights of the producer.

The second ground is based on the theory that the sponsor of a public event or entertainment retains a certain right of privacy. He may allow spectators to view the event, but this license does not extend to those who themselves seek commercial exploitation of the presentation.

Perhaps the soundest basis upon which to justify the protection of the sponsor's interests is that the broadcast of the performance by a third person would be a reaping of the benefits of the labor and efforts of another and thus constitute unfair competition. Under this latter theory there need be no showing of infringement of a property right or interest. The right to do business in a particular manner, rather than the property of the business, is protected under this theory. Since there is considerable doubt as to whether news or news events themselves constitute property interests, the theory of unfair competition obviates the necessity of a contest on doubtful grounds.

§86. Attempted Appropriation of Broadcast Rights.

In the case of *Twentieth Century Sporting Club v. Transradio Press Service*,[5] it appeared that the promoters of the Louis-Farr fight in Yankee Stadium had granted the National Broadcasting Company the exclusive right of broadcasting the fight from the ringside. NBC allotted this time to an advertiser. Defendants advertised, before the fight, that they would broadcast up to the minute descriptions of the fight. The evidence disclosed that defendants intended to "obtain tips" from the ringside broadcast as to the progress of the fight and to verify this by independent "watchers" who were to be present at the fight. The promoters, the network, and the advertiser brought

[5]Twentieth Century Sporting Club v. Transradio Press Service, 165 Misc. 71, 300 N.Y.S. 159 (1937).

suit to restrain the defendants from interfering with their exclusive rights to broadcast.

The court granted an injunction against the threatened broadcast, holding that plaintiffs and defendants were in direct competition with each other. Were defendants permitted to proceed, their broadcast would be an unlawful appropriation of plaintiffs' property. The court further held that a re-broadcasting by paraphrase or by adoption of the text would fall within the ban set out in the case of *International News Service v. Associated Press, supra.*

Reference here was made to an infringement of plaintiffs' property rights. This language may well be questioned in view of the holding in *International News Service v. Associated Press* that there is no property right in news as such. The news as such was not being protected by the court here. The right to conduct a broadcast from one's own premises is itself a right which is entitled to receive protection, independent of the news value of the event.

A similar situation was considered by the federal court in the case of the *Pittsburgh Athletic Company v. KQV Broadcasting Company*[6] of Pittsburgh, Pa. The owner of the Pittsburgh "Pirates" had granted to the General Mills Corporation the exclusive right to broadcast all the games played by his team.

Defendants proceeded to broadcast the games played on the home field of the club, contending that it had a legal right to station observers at the field and broadcast therefrom. The owner of the team and the General Mills Corporation brought this action to restrain defendant from continuing such broadcasts.

The court held that the owner of the team had an exclusive property right to broadcast these games, which it had in turn passed on to the plaintiff advertiser. Plaintiffs possessed, said the court, a legitimate right to capitalize on the broadcast of these games, and defendant's conduct constituted unfair competition, and a violation of plaintiffs' property rights.

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[6]Pittsburgh Athletic Co. v. KQV Broadcasting Co., 24 F. Supp. 490 (1938).

The court further held that the communication of the news of baseball games over the air is not a general publication and does not destroy the property rights involved. Defendant claimed that it was not competing with the plaintiffs, since the defendant received no compensation for these broadcasts. The court held that the fact that no revenues were directly received by defendant for such broadcasts did not change the situation. The injunction was granted.

The fact that the competing broadcasting company is not "palming off" its broadcast is not important in these cases. The element of unlawful appropriation of another's efforts must be emphasized. In *Mutual Broadcasting System, Incorporated v. Muzak Corporation,*[7] the Mutual Broadcasting System and the Gillette Company had acquired, by contract with Judge Landis, the exclusive right to broadcast the 1941 World Series between the New York Yankees and the Brooklyn Dodgers. They had paid for this right the sum of $100,000. Defendant proceeded to pick up the broadcast by means of a conventional radio receiver in its studio and transmit such broadcast over telephone wire to its broadcasting system.

Plaintiffs brought this suit seeking to restrain defendant's actions. The defendant contended that there was no encroachment on the rights of plaintiffs, since there was no attempt to "palm off," and that defendant was giving to the public plaintiffs' broadcast exactly as it came over the air, without elimination of any material, including commercial announcements. The court held that defendant's actions constituted unfair competition, and were enjoinable under the doctrine of *International News Service v. Associated Press, supra.*

An interesting situation was presented in an Australian case. It appeared from the facts in the case of *Victoria Park Racing & Recreation Grounds, Ltd. v. Taylor,*[8] that plaintiff was the owner of a race track and had refused to grant permission to anyone to

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[7]Mutual Broadcasting System, Inc. v. Muzak Corp., 177 Misc. 489, 30 N.Y.S. (2d) 419 (1941).

[8]Victoria Park Racing & Recreation Grounds, Ltd. v. Taylor, 43 Argus L.R. 597, 11 Aus. L.J. 197, 58 C.L.R. 479 (1936).

broadcast a description or information regarding horse races conducted at its track. About twenty minutes before each race, the starting positions of the horses were announced upon notice boards, and after the race the results were posted on these boards.

One of the defendants had erected a tower on land adjoining the race track, such land being the property of another defendant. From this tower, the agents of defendants, by using field glasses to see the starting positions and results as posted, and by observing the races as they were actually in progress, broadcast a detailed description of each race. Plaintiff sought an injunction, contending that this conduct interfered with its business, that it was an unreasonable use of defendants' land, and that defendants' actions constituted a nuisance.

The court held that there was no interference with plaintiff's rights, but only competition with them, and that there was no nuisance, since a person has a right to look over someone else's fence without infringing any right of privacy. Nor was there, said the court, any "copyright" under the Australian law in the information posted on the bulletin boards. Nor, continued the court, was there an appropriation of plaintiff's property or any contractual rights involved. The court disapproved of the majority opinion in the American case of *International News Service v. Associated Press, supra,* and adopted the minority opinion therein. The action was dismissed.

This case should be viewed with caution by American readers. Under the English common law, the subject of unfair competition and the rights of privacy are not as well developed as they are under our jurisprudence. The British courts give scant attention to common law literary and similar rights, which, it is believed, were destroyed by the all-inclusive British Copyright Acts.

§87. Rights of Performing Artists.

Performers of artistic or musical works are afforded scant protection under our law. The singer of a song or the leader of

an orchestra has no protection under the copyright laws for the particular interpretative performance rendered. The writer of the music is protected under the Copyright Act, but the performer, who adds artistic, unique, and intangible values to the music by an interpretative performance is limited in his ability to prevent later infringements of such performance.

This interpretative performance may be recorded for sale to the public, and the performing artist may receive compensation or royalties from the sale of such records, but there is considerable controversy as to whether such artist may preclude further commercial use of these records by future purchasers.

A group of performing artists sought to establish their rights, and to restrain unfair appropriation of their artistic efforts by others, in a series of cases which received their basis in the case of *Waring v. WDAS Broadcasting Station.*[9]

In that case, the plaintiff sought to enjoin the defendant broadcasting company of Philadelphia, Pa., from the broadcast of phonograph records which had been recorded by plaintiff's orchestra. Plaintiff was the leader of "Waring's Pennsylvanians," an orchestra which, it was contended, gave unique interpretative performances. Plaintiff recorded two phonograph records for Victor Company, and at the time of recordation it was agreed that each record sold to the public should bear a label, "not licensed for radio broadcasting." Defendant broadcasting station purchased several of plaintiff's records in a store, which records were clearly marked, "not licensed for radio broadcasting." In spite of this, defendant proceeded to broadcast such records.

The court granted plaintiff an injunction against the broadcasting of these records over the air, in what the court recognized as a case of first impression. It was held that plaintiff's orchestra was unique in its artistry and to that extent possesses common law property rights in its rendition. Each member of the orchestra possessed such rights, but since plaintiff was the

[9]Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 Atl. 631 (1937).

owner of 90% of the stock in the orchestra, equity would disregard the non-joinder of the orchestra corporation. A performance by plaintiff in making a recording did not constitute such a general publication as would divest plaintiff of his rights.

The objection was made by defendant that plaintiff could not keep such property rights since there may be no servitudes placed upon the sale of chattels, as in the case of the sale of real property. The court disagreed with this view, and stated that the cases denying the right of servitudes on the sale of chattels are based on price fixing agreements, and provisions that they shall be used only in conjunction with the vendor's goods. Such restrictions are against public policy. The court held that servitudes upon the sale of chattels should be allowed when public policy is not violated, and that the restrictions placed on the use of these records were not unreasonable or in restraint of trade.

In addition to the foregoing, there was considered the question of unfair competition, as affording additional relief to plaintiff. The repeated playing of these records over the air, said the court, tended to diminish the value of plaintiff's services in "live" performances, and would result in plaintiff being in "competition" with himself when giving "live" radio broadcasts. The court felt that there was an appropriation of the products of another's labor or talent, and stated that the courts will protect against such appropriation under the doctrine of *International News Service v. Associated Press, supra,* even though there was no deception of the public and no "passing off." Plaintiff's request for an injunction was granted.

The concurring opinion in this case based plaintiff's right to injunction on his right to privacy. Such interpretation is considerably broader than a mere property right. The concurring judge stated that he felt the theory of unfair competition should be rejected in this case.

Protection of the rights of performing artists was granted by the federal court in the case of *Waring v. Dunlea.*[10] Defendant

[10]Waring v. Dunlea, 26 F. Supp. 338 (1939).

broadcasting company had played over the air certain electrical transcriptions of musical interpretations of Fred Waring's orchestra. Notice appeared on the records that such were to be used only on the "Ford Motor Program," and were limited to such use by distributors. The transcriptions were not offered for sale to the public. Defendant was not one of the distributors of these records, nor did it broadcast the "Ford Motor Program."

The court held that plaintiff had created, by his efforts, a distinctive style in interpretation of the music, and possessed such an interest in his unique rendition that it was a distinct and separate property right. Rights in personal property may be divided among the various interest-holders as is done in the case of real property, and the plaintiff may enjoin an unauthorized performance.

Performance over the air by plaintiff did not constitute such a performance as to divest him of his rights. Since plaintiff's restrictions on the use of his property right are not so unreasonable as to be against public policy, said the court, these rights will be protected. The injunction was granted.

An effort was made by performing artists to assert this right in the case of *National Association of Performing Artists v. William Penn Broadcasting Company*[11] of Philadelphia, Pa. The plaintiff society sought to restrain defendants, on radio broadcasts, from using records of interpretative performances of members of plaintiff's society. The case was removed from a Pennsylvania state court to a federal district court sitting in Pennsylvania, on the ground of diversity of citizenship. The plaintiff sought to remand the case on the ground that the advertisers of these programs, who were joined as defendants, were citizens of the same state as plaintiff. The court refused to remand, on the basis that no cause of action was stated against the advertisers.

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[11]National Association of Performing Artists v. William Penn Broadcasting Co., 38 F. Supp. 531 (1941).

Since, admittedly, the advertisers had no control over the particular records played on the program, the plaintiff could maintain no action against them. The court, however, regarded the principle as "well settled" that a performer who makes a phonograph record may affix a notice of restriction and thereby restrain its use for broadcasting purposes.

There exists a division of authority among the various jurisdictions on the question of the rights of performing artists. Prior to the opinon rendered in the case of *Waring v. WDAS, supra,* a New York trial court considered the question in *Crumit v. Marcus Loew Booking Agency.*[12] This was an action by a performing artist to restrain a broadcasting station from playing certain records over the air. These records had been recorded by the plaintiff, as an interpretative artist, and had been stamped, "Not to be Used for Radio Broadcasting."

The trial court held that, in the absence of any evidence of a contractual agreement between the performing artist and the manufacturer of the records, that restrictions were to be attached to the records, and in the absence of a showing that defendant radio station had any knowledge of such a restriction, the court would not recognize any rights of the performing artist to affix any servitudes upon the sale of these records.

This case is distinguishable from that of *Waring v. WDAS, supra,* in that in the latter case there was a clear showing by the plaintiff orchestra leader that he had entered into an agreement with the manufacturer of the records that such records were to be sold for the use of the general public, and not for broadcasting purposes.

It will be remembered that in *Waring v. WDAS* the court held that Fred Waring not only retained certain property rights in the records, but also could restrain their performance over the air upon the basis of unfair competition.

The court in the *Crumit v. Marcus Loew Booking Agency* case considered only the aspect of affixing a servitude upon the

[12]Crumit v. Marcus Loew Booking Agency, 162 Misc. 225, 293 N.Y.S. 63 (1936).

sale of records, and did not rule on the basis of unfair competition.

In the case of *R.C.A. Manufacturing Company v. Whiteman,*[13] the plaintiff, a record manufacturing company, sought to restrain Paul Whiteman, the orchestra leader, from licensing records for broadcasting, and to restrain other defendants from the use for broadcasting purposes of records produced by the plaintiff company. Paul Whiteman had originally filed suit against a broadcasting station to restrain the use of any records made by him. The record company intervened in such action. Paul Whiteman based his action upon the ground that he had produced a performance unique in character, and had the right to restrain any unauthorized use thereof.

The trial court and the record company conceded that Whiteman had common law rights in such records; however, the court felt that the record manufacturer had concurrent rights which were entitled to protection. Although the recording company was regarded as possessing no common law artistic rights in the records because of the part it played in their production, yet it did possess the right to license such records concurrently with the right of the artists. An injunction was granted the record company.

On appeal, the Circuit Court of Appeals rejected the entire doctrine of the rights of a performing artist. It refused to impose any servitude upon the sale of phonograph records. This latter opinion recognized that the law in Pennsylvania was contrary to its holding by reason of the decision in the case of *Waring v. WDAS, supra,* with which case this court disagreed.

Referring to the doctrine of the case of *International News Service v. Associated Press, supra,* the court here stated that the finding therein should be followed only to the extent of its applicable facts. The basis for the rejection of the rights of performing artists in their production was the feeling of the court that if such rights deserve protection, the legislatures and

[13]R.C.A. Mfg. Co. v. Whiteman, 114 F. (2d) 86, 46 Pat. Q. 324; cert. denied, 311 U.S. 712, 85 L.Ed. 463, 61 S. Ct. 393 (1939).

Congress are empowered to enact statutory provisions granting that protection.

In the preceding cases no question of copyright infringement arose. It is to be assumed, therefore, that the broadcaster had obtained a license from the copyright owner of the music before the records were played over the air.

§88. False Statements Reflecting on Another's Products.

The owner of a product has the right to restrain another from making false statements concerning his business or products, on radio broadcasts. Under certain conditions, the wronged party has a right of action at law for "trade libel." Broader than this action for libel is the right to protect a business from false statements by enjoining the offending party in an action based on unfair competition.

In the case of *Woods v. Peffer,*[14] the facts disclosed that the testator of plaintiff had been engaged in the electrical appliance business in Sacramento, California. On the death of the testator, certain refrigerators were sold to the defendant, who was engaged in a similar business in Stockton, California, a town located about fifty miles distant from Sacramento. The defendant broadcast over the air that it had acquired the entire stock of refrigerators of plaintiff's business. Plaintiff sought to restrain this broadcast on the theory of unfair competition.

The court held that it is not necessary that there be actual market competition between the parties, but that the law of unfair competition extends its protection to instances where a party fraudulently seeks to sell his goods as those of another. The court found there was actual competition here, as the two cities were only fifty miles apart, and purchasers of electrical appliances were very apt to travel that distance in shopping for refrigerators.

No damages were awarded to plaintiff since, said the court, defendant's broadcast of such false information was unwit-

[14]Woods v. Peffer, 55 Cal. App. (2d) 116, 130 P. (2d) 220 (1942).

tingly done, as defendant was of the honest opinion that such statements were true.

The doctrine laid down in the preceding case is applicable as well to cases involving matters of a literary, artistic, or musical nature.

In the case of *Advance Music Corporation v. American Tobacco Company,*[15] the facts of which are set forth in Section 66, the plaintiff had brought an action for unfair competition against defendant.

The New York appellate court held that there was no competition between the plaintiff song publisher and the defendant radio advertiser, and that no cause of action for unfair competition could be stated. The complaint was dismissed by the court.

An action based on a similar set of facts was presented in the case of *Remick Music Corporation v. American Tobacco Company,*[16] where the federal court sitting in New York stated that although the plaintiff music publisher and the defendant radio advertiser were engaged in different businesses, the actions of defendant do in reality affect plaintiff's business. The popularity of the songs involved affects the plaintiff's standing with band leaders and motion picture companies, as well as the sales of sheet music.

The court felt that if the songs were entitled to a particular place on the "Hit Parade" defendant should put them in that place and that failure to do so could be considered a deception of the public.

Nevertheless, said the court, it was bound by the prior New York state decision in the case of *Advance Music Corporation v. American Tobacco Company, supra.* Under the doctrine that the federal courts must follow the law of the state in which they are sitting in cases where federal jurisdiction is based upon

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[15]Advance Music Corp. v. American Tobacco Co., 268 App. Div. 707, 53 N.Y.S. (2d) 337 (1944).

[16]Remick Music Corp. v. American Tobacco Co., 57 F. Supp. 475 (1944).

diversity of citizenship of the litigants, the federal court had no choice but to hold that no cause of action for unfair competition was stated in this action.

§89. COMPETITION.

Between the reasoning of the two decisions, that of the federal court is believed to be the sounder. The fact that an advertiser may injure an individual by the dissemination of false information regarding the other's products should be sufficient "competition" to maintain an action for unfair competition.

An earlier New York court, in the case of *Twentieth Century Sporting Club v. Transradio Press Service, supra,* held that where a broadcasting company sought to interfere with the exclusive right of another advertiser to broadcast a particular event, the defendant broadcasting company and its clients were in direct competition with the plaintiff advertiser.

While the facts in the Remick case and the Advance Music Company case differ from those in the Twentieth Century Sporting Club case, in that there was no showing that either of the plaintiffs in the former cases were themselves engaged in advertising their products over the air, there is no difference in principle.

In the Remick and Advance Music Company cases all parties were engaged in advertising the same product to the public, namely, songs, the defendants in those cases using the songs as a means of advertising their products. To that extent they should be regarded as competitors.

It is submitted that the principles of unfair competition should be used broadly by the courts in an effort to protect those who are injured by the unfair tactics of another. The principles should be applied when it clearly appears that one has by means of deception or unconscionable appropriation of the skill and efforts of another, placed the other at a disadvantage.

CHAPTER XII

TRADE-MARKS AND TRADE NAMES

§90. TRADE-MARK ACT OF 1946.

While some trade-marks and all trade names are afforded substantial protection under the federal and the common law, there are certain identifying symbols connected with the advertising of particular products that cry for protection against the activities of unfair competitors.

Prior to July 5, 1947, a trade-mark was defined as a mark identifying the ownership or origin of an article of merchandise or service. Under the federal statutes then in existence, a trade-mark could be a name, symbol, figure, form, device, word, or combination of words, affixed to the goods by the seller or manufacturer, to distinguish such goods from those sold by other persons.

On July 5, 1947, a new federal trade-mark statute became effective.[1] Under this statute, a firm or person that sells or manufactures no goods but provides a service, can register its mark as the identification of the service rendered. Such registration is available, as well, for use by an advertising or a broadcasting service.

With the liberalization of the type of marks that may be registered, and the types of business that may make such registration, the new law on trade-marks is of considerable significance in the field of broadcasting. No positive statement as to how far these service marks may go can be made at this time. It is possible that the statute will go so far as to protect sounds used as identifying symbols on radio programs.

The new statute gives additional protection to those who have continuously used a particular identifying symbol. Continuous use of a trade-mark for a period of five years results in its uncontestability. Advantages of trade-mark registration include those gained by reason of federal jurisdiction, as well

[1] 60 Stat. 427, 15 U.S.C. App. §1051 (Supp. 1946).

as the fact that registration establishes prima facie evidence that the registrant is the owner of the trade-mark. In addition to these, there is the advantage given to a plaintiff in actions involving infringement of the possibility of recovery of greater damages under a statute than would be recoverable in a common law action.

Rights may, however, be preserved and protected without registration of a trade-mark. A name that is descriptive of a business, a product, or a service, may, by continued association, acquire a secondary meaning in the mind of the public. If such use and association can be shown, the common law will protect that name against unfair competition, on the basis that it is a "trade name."

While it is true that a "trade-mark" can be included in the meaning of a "trade name," a trade name is broader in scope than is a trade-mark. A trade name is properly termed a "non-technical mark." The new statute on trade-marks, the Lanham Act of 1946, so liberalizes the concept of trade-marks that the scope of trade-marks and trade names is now almost parallel.

§91. Trade-Marks and Trade Names As Property.

In the cases referred to here on this subject, the same principles are applicable in most instances to trade-marks and trade names. It is not unusual, as will be seen, to find that relief has been sought to protect one particular name and symbol as both a trade name and a trade-mark. The principles of unfair competition as set forth in Chapter XI are applicable to the matter of trade names as well.

In view of the nature of this subject and its diversified application, each case must be considered in the light of the facts involved in order to determine the principles affecting the subject. There are few set principles that can be applied generally.

In the case of *Feldman v. Amos and Andy*,[2] it appeared that the plaintiffs were radio entertainers who, since 1928, had presented plays under the name of "Amos 'n Andy" over the radio,

[2]Feldman v. Amos and Andy, 68 F. (2d) 746 (1934).

and were known by such names to millions of listeners. They had licensed the use of this combination of words to various manufacturers who had used them as trade-marks for their various products.

Defendant, a manufacturer of work clothes, attempted to register the trade-mark, "Amos 'n Andy" for workshirts manufacured by him. The latter contended that the fanciful name of plaintiffs was not a firm name within the meaning of the trade-mark statutes. The Examiner of Trade-mark Interferences and the Commissioner of Patents denied defendant the right to this registration.

Upon appeal to the courts, the decision of the Patent Office was affirmed. The court held that the name of a "firm," such as that of Amos 'n Andy, is the plaintiff's property, even if fanciful, and that the law will protect such a right.

The court speaks of this trade name or trade-mark of plaintiffs as being "property." Not all courts regard a trade name or trade-mark as a property right. In the field of unfair competition, and rights of literary and artistic property, some decisions have been made to hinge on whether or not a property or non-property right is involved. Such a test, it seems, is fruitless. It clearly involves "putting the cart before the horse." The law gives certain rights, privileges, and immunities to trade-marks, trade names, ideas, common law literary property and the like. Are they to be considered as "property" merely because the law will protect them? Perhaps so, under certain circumstances, however, it would be faulty logic to say that the law will grant protection to these interests *because* they are property. In such event the rights of persons would be dependent upon mere definition and not upon reality.

The concept of property may well be regarded as a "bundle" of rights, privileges, powers and immunities which the law will protect. If the "bundle" is too small, we need no longer refer to it as being "property," but may call it by a less embrasive name such as an "interest" or "right." Not all property "bundles" are of the same size. For example, all property is not

assignable, taxable, or inheritable. Whether we choose to call a particular collection of rights, privileges, and immunities "property," and dignify it by such a title or not, should not affect the protection the law is willing to give to the holder.

Slight benefit is gained by classifying a trade-mark as property. It cannot be assigned without an assignment of the business with which it is connected. To call a trade-mark "property" neither adds to nor detracts from its actual status in law, but tends to confuse and confound what might otherwise be a clear concept.

§92. Protection of Radio Program Titles.

The title of a radio program continuously used by a particular sponsor or owner, to the point where its association in the minds of the listening public is synonymous with the owner, is protected against infringement by the law of unfair competition. Courts have defended such rights by injunction and in some cases by an award for damages against the infringer.

In *Golenpaul v. Rosett,*[3] the originators and owners of the radio program "Information Please" sought to enjoin the defendants from using that combination of words as the title of a radio magazine. It appeared from the evidence that this title had been used by the plaintiffs on a radio program since 1938. The defendants claimed that two years prior to the inception of plaintiffs' program they had published a magazine called "Information Please," but had discontinued it for lack of money. The magazine had a limited distribution. The defendants testified that they had no intent to abandon such magazine, but produced no evidence indicating an intent to continue its publication.

The court in granting plaintiffs' injunction, held that the renewed publication of this magazine after the original abandonment was unfair competition. It commented on the fact that the language of earlier cases held that magazines may only be regarded as "competing" with magazines, and not with radio

[3]Golenpaul v. Rosett, 174 Misc. 114, 18 N.Y.S. (2d) 889 (1940).

programs; however, the law of unfair competition as it is presently interpreted, places its stress on "unfairness" rather than "competition."

The court further held that even if the phrase "Information Please" had been associated with the magazine of the defendants, the rights gained had been lost by abandonment. The cases on abandonment of a trade-mark or trade name state that not only must there be non-use, but there must also be an intent to abandon. In this respect, the court could not depend on defendants' statements alone as to their intent, as under such circumstances there would never be a finding of abandonment.

It is clear from the foregoing that the use of a trade name or trade-mark must not only be extensive, but must be continuous in nature in order to avoid a holding of abandonment.

In the case of *Time, Inc. v. Barshay,*[4] the plaintiff, publishers of the magazine "Time", had sponsored broadcasts known as "The March of Time." These programs presented in dramatic form the outstanding news events of the week. Plaintiff had theretofore obtained a trade-mark for its magazine. Defendant was engaged in the sale of phonograph records in series form, called "The Voice of Time", which records were reproductions of speeches of different types that had been previously broadcast over the air on various programs. Plaintiff sought to restrain the use of the name "The Voice of Time" on the ground that it was an infringement of plaintiff's trade-mark and constituted unfair competition.

The court held that plaintiff had built up extensive good will for its product by means of its radio program, and the phrase "The March of Time" had acquired a secondary meaning to the public, as connoting plaintiff's advertising program. It regarded defendant's conduct as an infringement of plaintiff's trade-mark and as unfair competition, since members of the radio audience might be led to believe that they were listening to speeches made over plaintiff's programs. If this were so,

[4]Time, Inc. v. Barshay, 27 F. Supp. 870 (1939).

it would constitute a "passing off", which would be restrainable. An injunction against defendant was issued.

§93. Protection of Station Call Letters.

The rights of a broadcasting station to a name, even though such name consists merely of call letters, was affirmed in the case of *Bamberger Broadcasting Service, Inc. v. Orloff.*[5] The evidence disclosed that plaintiff, the owner of a department store, had operated Station WOR in the State of New Jersey, since 1922. Defendant since 1937 had conducted a retail printing establishment in New York under the trade name of "W.O.R. Printing Company."

Plaintiff sought to enjoin defendant from using the letters "W.O.R." in connection with his business, and to require defendant to account for profits realized and damages sustained by plaintiff on account of this allegedly unfair competition. Defendant urged that he was a non-competitor of the plaintiff, that his business was in the State of New York, whereas the broadcasting station was in New Jersey, and that the plaintiff had no inherent right to these letters, since under its license from the F.C.C. the letters could be changed by that Commission, or plaintiff could lose its license.

The court granted plaintiff an injunction, holding that the use of a trade-name by a non-competitor may not only destroy its identifying qualities, but might also destroy the normal potentialities of expansion. It was sufficient to show that the plaintiff's good will was likely to be endangered by defendant's use of plaintiff's name. It is no longer necessary to allege and prove direct competition between the products of defendant and plaintiff, said the court. Referring to plaintiff's license to use these call letters, the court stated that although it was true that plaintiff might lose its station license, thereby making its rights in the name "W.O.R." worthless, this is true of any business operated under a license.

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[5]Bamberger Broadcasting Service, Inc. v. Orloff, 44 F. Supp. 904 (1942).

It should be noted that the right to protection of a trade name extends throughout the area in which the plaintiff does business, even though such area shall embrace points distant from the particular locale of the original and continuous user.

A decision of similar import was handed down in the case of the *Great Atlantic & Pacific Tea Company v. A. & P. Radio Stores.*[6] The plaintiff, a large distributor and retailer of grocery products, had been known colloquially for many years as the "A & P." It had used these letters as a brand or trade-mark on many of its products, as a name on its stores, and in radio advertising. Defendant was in the new and second hand radio, refrigerator, and washing machine business, and had used the phrase "A & P" on its store windows. Plaintiff sought to restrain defendant corporation from using these letters.

Defendants contended that the letters "A & P" represented the initials of Messrs. Aronberg and Podolsky, who were the incorporators and active managers of the corporation.

The court found that there was no credible evidence of any actual confusion in the mind of the public in defendant's use of this phrase, but restrained its use by defendant on the ground of unfair competition. Although it was conceded that defendant was not actually diverting customers and trade away from the plaintiff, the court held that plaintiff's potentialities for expanson were threatened, and that plaintiff's reputation might be tarnished.

§94. Extension of Rights to Products.

The rights included in a trade name may extend to products other than the original products sold or manufactured by the owner of the trade name. His right of expansion is considered by the courts where protection is sought for the use of the trade name when applied to additional products produced by him.

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[6]Great Atlantic & Pacific Tea Co. v. A. & P. Radio Stores, 20 F. Supp. 703 (1937).

In the case of *Victor Radio Corporation v. Radio-Victor Corporation of America,*[7] it appeared that the plaintiff corporation, organized in 1922, sold radio sets under the registered name of "Vict-Ra-Phone." It advertised under the name of "Victor Senior" and "Victor Junior" and used as its device a globe on which appeared the slogan, "The World's Voice." The plaintiff ceased to do business in 1923, quit its premises, and at the time of the hearing maintained only a nominal office. It was at that time unknown in the radio business.

The predecessor of the defendant, the Victor Talking Machine Corporation, was organized in 1901 to manufacture devices for reproducing and transmitting sound. It commenced experimentation in radio in 1922. In 1929 the defendant took over the old Victor Corporation and added the name "Victor" to its own name and products.

The court held that the defendant had a right to enjoin the use of the word "Victor" by the plaintiff, rather than vice versa. Applying the doctrine of prior use, the defendant's use antedated that of the plaintiff by twenty-one years. Radio sets, said the court, so closely resemble talking machines, that there is no doubt but that the old Victor Corporation and the defendant, which claims under it, have the exclusive rights to the use of the name. In enjoining plaintiff's use of the name, the court held that the plaintiff here had sought, by its use of the name, to benefit from defendant's prior use thereof.

§95. Secondary Meaning of Names.

Some corporations have established a right to the use of a trade name by means of radio advertising only. In the cases of *Town Hall, Inc. v. Associated Town Halls*[8] and *Town Hall, Inc. v. Franklin,*[9] it appeared that plaintiff, a non-profit membership corporation, had used the phrase, "Town Hall" since 1921 as a means of identification. In 1938 it took the name, "Town Hall, Inc." as its title. Its purpose was the dissemina-

[7]Victor Radio Corp. v. Radio-Victor Corp. of America, 140 Misc. 198, 250 N.Y.S. 204 (1931).
[8]Town Hall, Inc. v. Associated Town Halls, 44 F. Supp. 315 (1941).
[9]Town Hall, Inc. v. Franklin, 174 Misc. 17, 19 N.Y.S. (2d) 670 (1940).

tion of different views on public questions for the education of the public, and in line with this purpose it had broadcast a radio program over a national network, entitled, "America's Town Meeting of the Air." It used the phrase, "Town Hall", on its stationery and registered this name in the Patent Office as a trade-mark. Defendant was organized as a corporation to furnish lectures to the public under the name of "Associated Town Halls", and plaintiff sought to restrain the use of this name by defendant.

In both cases the respective courts held that the phrase "Town Hall" as used by plaintiff was more than a generic name. By continued and widespread usage, this phrase has obtained a secondary meaning in the mind of the public. Both courts enjoined the use of this name in the United States by defendants.

A phrase may have a general meaning in its primary sense or definition, and by extensive and continuous usage it may gather unto itself a secondary meaning in the minds of the public. Under such circumstances a trade name has been established.

In *Bill's Gay Nineties, Inc. v. Fisher,*[10] the plaintiff sought to restrain the defendant from using in connection with a competing restaurant the name "Gay Nineties." Plaintiff, the prior user, had widely advertised this name over radio programs and elsewhere. The defendant asserted that the phrase "Gay Nineties" describes a period in our history, and could not be regarded as a protectable trade name.

The court held that the name "Gay Nineties" had acquired a secondary meaning in connection with plaintiff's business through wide advertising, and although plaintiff's and defendant's places of business were situated in different boroughs, the court granted plaintiff an injunction against defendant.

In order to acquire the dignity of a "trade name", a word or phrase must be known to a goodly portion of the public. With-

[10]Bill's Gay Nineties, Inc. v. Fisher, 180 Misc. 721, 41 N.Y.S. (2d) 234 (1943).

out this there can be no showing of unfair competition. Particularly in the case of words having a generic meaning, must there be an extensive use strong enough to establish a secondary meaning entitling its user to protection.

In *Blish v. National Broadcasting Company,*[11] the plaintiff alleged that its corporation, known as "Sons & Daughters of Uncle Sam", was founded in 1936 as a patriotic organization, and that it had composed a patriotic program called "Sons & Daughters of Uncle Sam," depicting events in American history. Plaintiffs complained that in 1942 defendant network broadcast a program known as "Daughters of Uncle Sam" which embodied a patriotic object and scope similar to that of plaintiff corporation. Action was brought for infringement of copyright of plaintiff's insignia and for unfair competition.

The trial court, in dismissing the complaint, held that "Uncle Sam" was a descriptive term commonly used to describe the United States and not an original term, and that a copyright is not issuable except for such original term. In rejecting the theory of unfair competition, the court did so on the ground that there was nothing in plaintiff's complaint to indicate such a general knowledge on the part of the public of the existence of this corporation to justify a finding of a secondary meaning.

§96. Protection of Fictitious Names.

Protection of trade names is not limited to products or services, but extends to the names of individuals, when such names are associated with a product, service, business, or program. Not only may the actual name of the individual be protected, but his professional name, stage name, pen name, or nickname may likewise be protected.

In the case of the *Premier-Pabst Corporation v. Elm City Brewing Company,*[12] the evidence disclosed that the plaintiff had been in the brewing business for many years and had advertised extensively over the radio on programs conducted by

[11]Blish v. National Broadcasting Co., 49 F. Supp. 346 (1942).
[12]Premier-Pabst Corp. v. Elm City Brewing Co., 9 F. Supp. 754 (1935).

Ben Bernie, the orchestra leader, who was known as the "Old Maestro." Plaintiff had engaged the exclusive services of Ben Bernie, so far as radio was concerned. In his travels, Ben Bernie continued to advertise the products of the plaintiff, and considerable sums of money had been expended in linking up the names of Ben Bernie and his soubriquet, the "Old Maestro", with plaintiff's products. Defendant had recently gone into the business of brewing and had adopted the name of "Olde Maestro Brew" as the trade name for its products. Plaintiff sought to restrain such use.

The court held that plaintiff had acquired the right to the phrase "Old Maestro" by its contract with Ben Bernie. Defendant's acts, said the court, tended to deceive the public, and constituted unfair competition. Defendant was enjoined from the use of the name, "Olde Maestro Brew."

Not infrequently there may exist concurrent rights to the use of a trade name or trade-mark. In such a situation, both of the users may possess restricted rights to the use of a single name or phrase. Should one of the owners attempt to "pass off" his goods by trading on the name of his competitor, the one injured acquires a right of action.

In the case of *Gardella v. Log Cabin Products,*[13] the facts of which are set forth in Section 74, the court held that both plaintiff and defendant were entitled to the use of the name "Aunt Jemima" by reasons of extensive use, and absence of proof of deception.

Names of characters created on radio programs and thereafter used in conjunction with the products of the sponsor of the program are entitled to protection. There is no question but that the continuous use of a trade name of a fictional character on the radio, in connection with a sponsor's products, entitles the sponsor to enjoin its use by a competitor. Difficulty arises when it becomes necessary to consider the rights of the artist portraying the part of the fictional character to use such name after he has severed his connection with the program

[13]Gardella v. Log Cabin Products, 89 F. (2d) 891 (1937).

sponsor. Actually, the sponsor retains the right to the use of the name in connection with its products. However, the radio artist may describe himself as the former "Joe Doakes" or the former "Anne Oakley."

The case of the *Lone Ranger, Inc. v. Cox*[14] is an example of the protection afforded a sponsor in the use of a fictitious name. There the plaintiff had presented a series of original radio dramas entitled, "The Lone Ranger," and claimed exclusive rights to all trade-marks, trade names, copyrights, and associated phrases connected with the program. Plaintiff had granted a license to a motion picture company to produce a picture entitled, "The Lone Ranger", starring Lee Powell in the title role. Thereafter, Lee Powell was employed by the defendant circus company, which billed and advertised him as, "Lee Powell, the Original Lone Ranger of Talking Pictures." Plaintiff brought this action for infringement of copyright and trade-mark and for unfair competition.

The trial court held that the copyright protected only the method of expression and not the idea, nor did such copyright protect the title of the work. It refused to hold that the defendant's actions constituted unfair competition, as the business of plaintiff and defendant were not competitive. The court further held that there was no showing of deception, since Lee Powell made no attempt to claim that he was the "Lone Ranger" of radio fame.

On appeal this decision was reversed on the ground that there was enjoinable unfair competition. The appellate court refused to confine the meaning of unfair competition to the mere "palming off" of goods, but considered the phrase "Lone Ranger" to be protectable as a trade name, and held that the defendant had infringed plaintiff's rights by its method of advertising.

This decision should be compared with the result reached in *Burrus Mills & Elevator Company v. Wills.*[15] In that case the

[14]Lone Ranger, Inc. v. Cox, 124 F. (2d) 650, 52 Pat. Q. 146 (1942).
[15]Burrus Mill & Elevator Co. v. Wills, 85 S.W. (2d) 851 (1935).

plaintiff, a flour manufacturer, had engaged the services of the defendants to sing and play over its radio program. Defendants were advertised and announced as the "Light Crust Doughboys." The words "Light Crust" had been used as a trade-mark by plaintiff for some time. After terminating their services with plaintiff, the defendants broadcast over another program where they identified themselves as, "Formerly the Light Crust Doughboys."

Plaintiff sought to restrain the use of this name. In its findings the court held that it found no evidence of fraud or misstatement in defendants' use of the phrase, "Light Crust Doughboys", where it was joined with the qualifying word, "formerly . . . " Further, plaintiff had failed to show that defendants' advertising implied in any manner that plaintiff was sponsoring or authorizing the program. In denying the request for an injunction the court said that a retiring partner or employee has a right to advertise his former connection, and cannot be enjoined therefrom.

Although the facts in the latter case are distinguishable from those of *Lone Ranger, Inc. v. Cox, supra,* the language of the two cases is in conflict. The rights of a radio performer to advertise his present performance by his former character name or role remains in doubt.

§97. Right of Assignment.

Inherent rights in trade-marks or trade names are not so clearly defined as are those affecting other forms of property. Neither trade names nor trade-marks are assignable in gross. They must be sold or assigned concurrently with the sale or assignment of the business with which they are identified, or with a substantial portion thereof.

In *American Broadcasting Company v. Wahl Company,*[16] the plaintiff broadcasting company brought an action against defendants for infringement of trade-mark and for unfair com-

[16]American Broadcasting Co. v. Wahl Co., 121 F. (2d) 412, 50 Pat. Q. 156 (1941).

petition. Plaintiff alleged ownership of an original radio quiz program entitled, "Double or Nothing", stating that it had broadcast this program on certain dates, and thereafter that the defendant had broadcast a substantially similar radio quiz program called, "Take It or Leave It", which plaintiff alleged was an infringement. Plaintiff claimed a license of the trade-mark, "Double or Nothing" from the original owner of the program.

The court held that there is no right to assign a trade-mark or trade name in gross without a transfer of the business to which the trade-mark or trade name is attached.

While the action was dismissed for lack of federal jurisdiction, the court, nevertheless, held that there was no unfair competition here, nor was there infringement of a trade-mark.

§98. State Statutes.

Statutory provisions for the registration of trade-marks exist in most of the states. Compliance with the varying requirements of these statutes is mandatory in each instance, if protection is sought. The advantages of such a registration are twofold. Registration serves as evidence of prior use, and the statutory penalties imposed for infringement are, in most instances, greater than those recoverable as damages in actions based on common law rights.

CHAPTER XIII
COPYRIGHT

§99. SOURCE OF PROTECTION OF RADIO MATERIAL.

The principal source of protection of literary and artistic rights lies in a compliance with the provisions of the Copyright Act of 1909.[1] Under this Act an author or artist is granted certain exclusive privileges affecting his literary or artistic property. An infringement of these exclusive privileges gives the copyright owner the right to bring an action for injunction and statutory damages in the federal court against the infringer.

Except for registration of unpublished works under Section 11, the Act requires a "publication" of the work coupled with a notice of copyright and the depositing of two copies of the work accompanied by the statutory fees, with the Register of Copyrights at Washington, D. C.

Aside from the limited protection afforded by an action in unfair competition, and the protection afforded by contract, common law rights are lost by the publication or copyright of a literary or artistic work.

The principle is well established that a radio broadcast is not a publication within the meaning of the Copyright Act.[2] However, radio scripts and broadcast material may be protected, in appropriate cases, by the common law rights of literary and artistic property, without the necessity of resorting to the Copyright Act. If a radio program is merely "broadcast", this is not a "publication" of the script, and the owner retains his rights to common law protection.

Radio scripts ordinarily come under the classification of Section 5 (d) of the Copyright Act, covering "dramatic or dramatico-musical compositions." Musical broadcasts come under the heading of Section 5 (e) covering "musical compositions."

The rules applied to the interpretation of copyright law affecting literary and artistic property in general are applicable

[1]Copyright Act of 1909, 35 Stat. 1075, 17 U.S.C. (1940).
[2]Uproar Co. v. National Broadcasting Co., 81 F. (2d) 373 (1936).

as well to material broadcast over the radio. However, the advent of radio has created new problems, requiring a fresh point of view on the part of the courts, separate and apart from any consideration of judicial interpretation of legislative intent. When Congress enacted the Copyright Act in 1909 radio broadcasting was but a means of point to point communication, confined almost exclusively to ships at sea. Statutory language applicable to an earlier period must now be interpreted to fit a twentieth century creation.

Musical compositions make up the greater part of the copyrightable radio material. Registration of songs by copyright is absolutely essential in order to assure to the composers protection of their rights after publication. Their broad field of use makes songs particularly vulnerable to infringement. In contrast, radio scripts are often not adaptable for any other media. Since these scripts are seldom published, the securing of a copyright is not a necessity, as the common law property rights remain with the "unpublished" radio script.[3]

§100. Public Performance for Profit.

Unlike the protection given to dramatic compositions, that given to musical compositions is limited to public performances for profit. Section 1 (e) of the Copyright Act provides: "That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right . . . (e) To perform the copyrighted work publicly for profit if it be a musical composition; . . . "

The determination of what constitutes a "public performance for profit" has presented an interesting question in the history of radio law. Paid advertising was unknown in the early stages of radio. The issue of public performance for profit was in considerable doubt in the first years of radio broadcasting, as the profit motive was not so discernable as it is with contemporary radio programs.

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[3]See Chapter XIV.

The question was first litigated in the case of *M. Witmark & Sons v. L. Bamberger & Company*[4] where the owner of the copyrighted song "Mother Machree" sued defendant, a large department store, for infringement of copyright for the playing of the song over defendant's broadcasting station. Defendant claimed that this was not infringement, as it was not a "public performance for profit." Defendant contended that the Station WOR, located in New York City, produced and sustained its own programs with no outside contribution in the form of paid advertising.

The court held for the plaintiff on the basis of earlier decisions to the effect that the playing of a song by a paid performer was "for profit" even though the audience paid no admission fee. Though defendant makes no direct charge for the music, it receives an indirect profit through the radio sales department of its store. The store is likewise afforded the opportunity of having its name publicized over the air. "If the music did not pay," said the court, "it would be given up."

Defendant argued that plaintiff should not be heard to complain, since its song was receiving free publicity. The court's reply to this was that a copyright owner has the privilege of choosing the advertisers of his songs. Plaintiff was granted an injunction.

A case almost identical in point of facts was presented in the matter of *Jerome H. Remick & Company v. American Automobile Accessories*.[5] The plaintiff sought to enjoin the defendant, a manufacturer and distributor of radio parts, who conducted a broadcasting station, from playing plaintiff's copyrighted song "Dreamy Melody." The trial court agreed with defendant's claim that this radio broadcast was not a "public performance for profit", and refused to follow the precedent of *Whitmark v. Bamberger, supra.*

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[4]M. Witmark & Sons v. L. Bamberger & Co., 291 Fed. 776 (1923).

[5]Jerome H. Remick & Co. v. American Automobile Accessories, 5 F. (2d) 411, 40 A.L.R. 1511 (1925); cert. denied, 269 U.S. 556, 70 L. Ed. 409, 46 S. Ct. 19.

On appeal this attempt at originality on the part of the trial court was not well taken.

The appellate court held that despite the fact that radio was not developed at the time the Copyright Act of 1909 was enacted, the Copyright Act applies to new situations such as radio broadcasting. Conceding the fact that the radio listeners do not gather together in one place, it is nevertheless a "public" performance, as radio broadcasting is intended to reach the public. This was a performance for "profit," even though no admission fee was charged, since there was an indirect commercial advantage to be gained by the defendant. Judgment for the defendant was reversed.

§101. Radio "Performance" Construed.

In the two preceding cases there was little serious doubt but that under the facts presented, the rendition of a song by an employee of a radio station without permission of the copyright owner, was a performance of some sort, whether "for profit" or not. If we change the facts and consider a situation where the singer has permission to sing a copyrighted song, and sings it over a radio station which has received no such permission, the problem becomes more difficult, particularly if the singer is not in the employ of the broadcasting station.

The first case in which the question of a radio performance arose was presented in the matter of *Jerome H. Remick & Company v. General Electric Company.*[6] This was an action involving a radio broadcast of a copyrighted song, made without permission of the copyright owner. From the complaint, the court was unable to determine whether or not the person who actually sang the song had a license from plaintiff.

The trial court in its dictum said that if a broadcasting studio broadcasts a program on behalf of an individual who had received permission from the copyright owner to render the performance publicly, then the broadcaster is not infringing, since it acts only as a mechanical means of transmitting the song to

[6]Jerome H. Remick & Co. v. General Electric Co., 4 F. (2d) 160 (1924).

the public. The court felt that a broadcast was not an independent rendition of a song, as there was but one "performance". It required plaintiff to amend its complaint by reason of several defective allegations.

Two years later the case came before the court on an amended complaint.[7] The court regarded the subject in a different light and ruled that a broadcaster renders more extensive services than that of merely enabling others to hear a song. He must operate the radio instruments which are under his control. Such action makes him a participant in the infringement of the copyright. On the other hand, said the court, those who listen to the song over the air do not "perform" and therefore do not infringe.

The opinion was expressed that if a private rehearsal featuring a copyrighted song were broadcast without permission of those conducting the rehearsal, this would constitute a public performance for profit, so far as the broadcaster was concerned. The broadcaster would be liable for infringement, while those conducting the rehearsal would not.

The presence or absence of the public in the broadcast studio at the time of the broadcast is immaterial, as such broadcast is still a "public performance." The court granted an injunction and assessed damages for plaintiff.

The preceding case is the foundation for the present day opinion that the mechanical transmission over the air of a rendition is separate and apart from the "performance" in the broadcasting studio. It is the basis for the rule now enforced by various associations of copyright owners that a broadcasting studio must have a license to perform copyrighted works prior to any broadcast of such works. The license granted by these associations is broad enough to cover the "performance" over the air, the "performance" in the studio, and the "performance" of the artist rendering the copyrighted material.

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[7]Jerome H. Remick & Co. v. General Electric Co., 16 F. (2d) 829 (1926).

Is the license granted to a broadcasting studio by a copyright owner sufficiently broad so that it includes within its grant of privilege those who receive the broadcast through their radio receiving sets? The court in the second hearing of the case of *Jerome H. Remick & Company v. General Electric Company, supra,* held that those who listen to a song over the air do not "perform" and therefore do not infringe. However, assuming that the receiving set of an individual is so situated that the broadcast material is heard by the public in a place of business, does the license granted the broadcasting station extend to such "performance"?

In the case of *Buck v. Debaum,*[8] the evidence disclosed that the plaintiff was president of ASCAP and that ASCAP had previously granted a license to a radio station to broadcast a copyrighted song. The defendant, a cafe owner in the City of Los Angeles, had installed a radio receiver in his place of business, and it was his practice to "tune in" such receiving set to musical programs for the entertainment of his customers.

It was plaintiff's contention that while the association had licensed broadcasting stations to publicly perform their works, such licenses extended only to those who "picked up" the broadcast for their private uses, and did not include those who installed radio sets in public places.

The trial court disagreed with this contention, and held that such use was impliedly licensed by plaintiff. The court further held that those who merely actuate electrical instrumentalities do not perform. A performance takes place only in the studio of the radio station, while the operator of a receiving set neither contributes nor adds to the performance, even though his act of turning the dial is voluntary.

The issue was finally settled by the Supreme Court of the United States in the companion cases of *Buck v. Duncan*[9] and *Buck v. Jewell La Salle Realty Company.* [10] In those cases plain-

[8]Buck v. Debaum, 40 F. (2d) 734 (1929).
[9]Buck v. Duncan, 283 U.S. 191, 75 L. Ed. 971, 51 S. Ct. 416, 9 Pat. Q. 17 (1931).
[10]Buck v. Jewell La Salle Realty Co., 283 U.S. 202, 75 L. Ed. 978, 51 S. Ct. 407, 76 A.L.R. 1266, 9 Pat. Q. 22 (1931).

tiff sought an injunction and damages against defendants for alleged copyright infringements of two songs, the copyrights of which were held by plaintiff. One of the defendants operated a hotel and maintained a master radio set by means of which it furnished music simultaneously to guests in its public rooms, as well as to guests in its private rooms.

The trial court held that the hotel was not "performing" in the sense used in the Copyright Act, but was only providing a means by which listeners could hear a performance over the radio. This, said the court, was different from the playing of a phonograph record, which itself constitutes a distinct performance. There was but one performance here, and this took place at the broadcasting studio which was licensed to play the songs in question. Reception of music by a radio receiver is not a performance. Judgment was rendered for defendants.

On appeal, the circuit court certified the questions of what constituted a "performance", and the measure of damages for multiple copyright infringements, to the Supreme Court of the United States.

The Supreme Court held that nothing in the Copyright Act prevents a single rendition of a copyrighted work from resulting in several performances. Since intention to infringe is not an element of infringement, no consideration need be given to the question of intention.

The defendant argued that there was no difference between the reception of a broadcast and listening to music played in the distance. The court disagreed with this analogy and felt that on scientific grounds alone there was a new performance when the radio waves were converted into sound waves by a radio receiver, holding that radio waves themselves are not audible, but first must be "rectified" by a radio receiver. This was a public performance for profit, since the installation and use of these sets provided entertainment for the guests and benefited defendants businesswise.

The Supreme Court held that the statute binds the trial court to render a minimum judgment of ten dollars for each infringement with a minimum of two hundred fifty dollars and a maximum of five thousand dollars where no actual damages are shown. The judgment of the lower court was reversed and the cases were remanded to the trial court for the fixing of damages.

The practical result of this decision is not only interesting but slightly confounding. Damages in amount of two hundred fifty dollars may be assessed against a radio station found guilty of infringement, although the broadcast complained of may be picked up by a million receivers, yet a hotel which in turn picks up the broadcast and distributes it to one hundred individuals could be assessed five thousand dollars.

The respective decision of the courts in the cases of *Buck v. Debaum and Buck v. Jewell La Salle Realty Company, supra,* are conflicting in their reasoning on the question as to whether or not the receiving of a broadcast constitutes a performance. However, they may be distinguished on their facts. In the former case, the broadcasting station had been granted a license from ASCAP to broadcast the copyrighted work, the court holding therein that the terms of the license included the restaurant owner. In *Buck v. Jewell La Salle,* the broadcasting station had received no permission to broadcast the copyrighted songs, and the question of implied permission of the hotel to "perform" was not involved.

ASCAP later modified its licenses by restricting the right of performance to the broadcasting station and its talent.

The entire issue was settled in the case of *Society of European Stage Authors and Composers v. New York Hotel Statler,*[11] where a license granted to a broadcasting station to broadcast copyrighted material was restricted in its scope to the particular station licensee. A broadcasting company, having first obtained

[11]Society of European Stage Authors and Composers v. New York Hotel Statler, 19 F. Supp. 1 (1937).

plaintiff's permission, broadcast over the air a program containing a copyrighted song. The defendant hotel, without obtaining permission from the plaintiff, had received the broadcast and relayed it to the guests of the hotel by means of two central radio receivers.

The plaintiff sought to enjoin defendant hotel from receiving the song over its sets. Defendant had made this music available to its guests in two hundred of the private rooms of the hotel. There was no volume control on the sets in the guests' rooms, but merely a knob by which a guest might select either of two programs available. Defendant stipulated that it had installed the sets in its rooms to make the hotel a more attractive and desirable place.

The court held that the only difference between these facts and the situation in *Buck v. Jewell La Salle Realty Company, supra,* was that in the present case the music was not played in the public rooms but only in the private guest rooms. This fact created no difference in the applicable principle of law. The license given by plaintiff to the broadcasting station, said the court, did not extend to the use which the defendant made of these broadcasts; and since this was a performance for profit, an injunction and damages would be granted to plaintiff.

§102. Programs for Profit.

Implicit in the early cases of *M. Witmark & Sons v. L. Bamberger & Company* and *Jerome H. Remick & Company v. American Automobile Accessories, supra,* is the principle that as to a commercial radio station, there is no difference between a "sustaining" program and a "commercial" program insofar as the meaning of a performance for "profit" is concerned.

A radio station supports "sustaining" programs for its ultimate gain. In order to advance its worth, it is necessary that a station remain on the air for continuous periods of time. Failure to sell all of the time necessary to accomplish this purpose requires a "fill in" with a sustaining program. Good sustaining programs add to the quality and reputation of a station. Sus-

taining programs are the "shop windows" of a station's available programs, and open time. Each of the foregoing have commercial significance. A sustaining program is in fact a "paying" program from the standpoint of good business, just as surely as a sponsored program pays the advertiser. It therefore follows that copyrighted music broadcast over a sustaining program without permission of the copyright owner is as much of an infringement as though it were played on a sponsored program.

The question has arisen as to when music played over a station operating on a non-profit basis becomes a performance for profit. It was answered in the case of the *Associated Music Publishers v. Debs Memorial Radio Fund.*[12] Plaintiff, the holder of a copyright, sued defendant radio station and its manager for the broadcasting of a copyrighted song over the station facilities without prior permission. The broadcast was in the form of a record program, and was played on sustaining time with no commercial announcements.

Defendant station claimed that the broadcast was not a "public performance for profit" and that the program complained of was merely a reproduction from a phonograph record purchased in the ordinary channels of trade. The station was owned by defendant, a non-profit corporation organized for educational and civic activities. It was operated primarily as an open forum for discussion of public questions. Some revenue had been derived from a limited use of its facilities by advertisers, although the station regularly showed an operating deficit.

The court held that even though it was not intended that the defendant corporation show a profit, there was no contention raised that it was a public or a charitable corporation. The rule is well settled that the playing of a musical composition on a sustaining program of a commercial station is an infringement. One-third of defendant station's time was devoted to commercial programs, and the rule affecting commercial stations is extended to apply to this type of station.

[12]Associated Music Publishers v. Debs Memorial Radio Fund, 141 F. (2d) 852, 61 Pat. Q. 161; cert. denied, 323 U.S. 766, 89 L. Ed. 613, 65 S. Ct. 120 (1944).

The court held that the Copyright Act extends its protection to a broadcast of a phonograph record so far as the owner's rights are concerned. The individual defendant who acted as manager of the station and exercised his judgment in choosing the music broadcast was equally responsible as an infringer, and both were held liable for infringement.

§103. Foreign Cases Involving Public Performance for Profit.

Infringement of copyrights affecting unauthorized broadcasts of music is not an action peculiar to the United States. While it is true that the system of broadcasting followed in foreign countries is not comparable with that of this country, there are, nevertheless, rights of private ownership in copyrights granted to individuals which are protectable from infringement.

While the British copyright acts differ from our own, there is a similarity between those of the British and those of the United States in their treatment of infringement of a musical copyright. Theirs, like ours, grant protection to a copyright owner from an unauthorized use of his music in a "public performance for profit". The British courts have followed in their findings precedents laid down in cases of similar nature decided in the United States.

In the case of *Chappel & Company, Ltd. v. Associated Radio Company of Australia, Ltd.*,[13] the plaintiff alleged that it owned certain copyrights, and that defendant company had broadcast these songs without permission of the plaintiff copyright owner. The Australian court held that such conduct amounted to a "public performance for profit" within the meaning of the Australian Copyright Act of 1912. The court considered that this was a public performance despite the fact that the listeners were not gathered together in one place, and adopting the reasoning of the case of *Remick v. American Automobile Accessories Company*,[14] granted plaintiff an injunction.

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[13]Chappel & Co., Ltd. v. Associated Radio Co. of Australia, Ltd. (1929) Vict. L.R. 350 (Aus.).

[14]Remick v. American Automobile Accessories Co., 5 F. (2d) 411, 40 A.L.R. 1511 (1925). Supra, §100.

A similar decision was reached by the courts of England in the case of *Messager v. British Broadcasting Company.*[15] There the plaintiff sought to restrain the defendant from infringing plaintiff's copyright of an opera. The broadcast had been transmitted from defendant's private broadcasting studio from which the public was excluded. The trial court after commenting on the fact that this was a case of first impression in the United Kingdom, applied the rule of *Chappel & Company, Ltd. v. Associated Radio Company of Australia, supra,* and the American case of *Remick v. American Automobile Accessories Company, supra,* and granted judgment for plaintiff. On appeal before the House of Lords, while the reasoning of the trial court was approved, the decision was reversed on the ground that plaintiff had, by contract, granted defendants certain rights to the opera which precluded judgment in favor of plaintiff.

In *Australasian Performing Rights Association, Ltd. v. 3 DB Broadcasting Company, Ltd.,*[16] the plaintiffs, who owned the sole right of performing certain works in public, claimed that their musical copyrights had been infringed. Defendants contended that under the Australian Copyright Act the sole right of performing these records in public was vested in the manufacturer of the records.

The court held that although the rights of a copyright owner in a record were subordinate to those of the manufacturer, if the manufacturer waived his right to sue, then the owner of the copyright might bring an action to restrain its use without permission. The sale of such a record gives a right of private performance only.

In the case of *Performing Rights Society v. Hammond B. Brewery Company,*[17] the defendant owner of a hotel, had installed a radio receiver on its premises. Music was played over the receiving sets for the entertainment of its customers, and

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[15]Messager v. British Broadcasting Co. (1929) A.C. 151 (H. L. Eng.).

[16]Australasian Performing Rights Association, Ltd. v. 3 DB Broadcasting Co., Ltd. (1929) Vict. L.R. 107 (Aus.).

[17]Performing Rights Society v. Hammond B. Brewery Co., 50 Times L.R. 16 (Eng. 1933).

plaintiff sought to restrain infringement of its copyright. A license had been granted by plaintiff to the BBC to perform this music, but no license had ever been given to defendant. The hotel claimed that there was but one performance which took place at the studios of BBC.

The court on appeal adopted the reasoning of the case of *Buck v. Jewell La Salle Realty Company, supra,* holding that defendant gave a performance of this music, even if it had no power to select the program. The license which plaintiff granted to the broadcasting company did not extend to the use by defendant. Judgment was given for plaintiff.

An example of the lengths to which the English courts have gone in holding that music played over a receiving set and made audible to the public constitutes an infringement, is found in the case of *Performing Rights Society v. Camelo.*[18] The evidence in this case disclosed that a loud speaker had been placed in a private room adjoining a public restaurant. Arrangement of the room was such that the door between the two rooms was frequently opened for the purpose of serving the guests in the restaurant. The music received was audible in the restaurant. Plaintiff, as the holder of copyrights, sued the defendant for infringement of copyrighted music.

The court held that the facts presented constituted a public performance for profit within the meaning of the English Copyright Act. When a wireless set reproduces the music within the area in which it stands, the ensuing performance takes place wherever that music is audible. However, while the court refused to commit itself as to liability for all possible situations that might suggest themselves to the imagination, it nevertheless held that defendant's acts justified judgment for the plaintiff.

The principles laid down in the case of *Buck v. Jewell La Salle Realty Company, supra,* were adopted in the case of *Canadian*

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[18]Performing Rights Society v. Camelo, 3 All Eng. L. R. (1936) 557 (Ch. D., Eng.).

Performing Right Society v. Ford Hotel,[19] a case involving identical facts.

§104. Regulation of Copyright Monopolies.

The extensive use of musical programs by radio stations gave impetus to the organization of groups of copyright owners into associations in an effort to protect its members from infringements. Upon payment of certain fees, blanket licenses to perform are granted to stations by these associations. The power of these associations of copyright owners grew to a point where certain states sought to restrict their activities on the grounds that they were monopolistic and against the public interest. Nebraska was one of the states which enacted a statute regulating monopolies in the field of musical compositions.

In the case of *Buck v. Swanson,*[20] the president of ASCAP sought to enjoin the enforcement of the Nebraska statute on the ground of unconstitutionality. The trial court agreed with the plaintiff and held that this statute went beyond the "police powers" of a state since it compelled the plaintiff to offer songs for sale in a particular manner. A state, said the court, may prohibit a monopoly, but may not require an organization to offer its copyrights for sale in any particular manner. On appeal, the United States Supreme Court reversed the judgment and dismissed the action upon technical grounds.

§105. Broadcasts of Novels and Poems Not Infringement.

Certain performances of copyrighted works may be broadcast without permission of the copyright owner and without fear of infringement.

Under the Act, musical compositions, lectures, sermons, addresses, and the like, cannot be performed in public for a profit

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[19]Canadian Performing Right Society v. Ford Hotel, 73 Quebec L.R. 18, 2 D.L.R. 391 (Can. 1935).

[20]Buck v. Swanson, 313 U.S. 406, 85 L. Ed. 1426, 61 S. Ct. 969, 49 Pat. Q. 474 (1939). See also, Savannah Broadcasting Co. v. Society of European Stage, Authors and Composers, 56 Ga. App. 125, 192 S.E. 236 (1937).

without permission of the copyright owner. Dramas are protected from being performed publicly. The dramatization of a book is an infringement, according to statutory language, but there is no statutory ban on the mere reading of a novel or a poem over the air.

In the case of *Kreymborg v. Durante,*[21] the plaintiff had written three original poems which were published in a copyrighted book of verse. A year later he wrote a play and incorporated the three poems in the play, which was itself published in book form and copyrighted. The plaintiff claimed that the defendant, Jimmy Durante, performed the three poems both in a play and upon a radio broadcast without permission, and that such was a copyright infringement.

The court held that under the Copyright Act protection against public performance of copyrighted works is afforded only in cases of a drama, musical composition, lecture, sermon, address, or similar production. Other copyrighted works may be recited in public for profit without infringement. This point was recognized by the court as of importance now that radio broadcasting of novels and poems is widespread.

Except for the sections heretofore referred to, an author has no protection against any other performance. The incorporation of the poems by plaintiff into his later copyrighted play was immaterial, since the play would not be infringed by the recitation of poems which were first published in book form. The complaint was dismissed.

On reargument of the motion to dismiss, the plaintiff claimed that the poems were dramatic compositions and were entitled to protection. It was urged that poems could be classed as "similar productions" and would therefore be in the category of lectures, sermons, or addresses, within the meaning of the Act.

The court disagreed with plaintiff's contention, and held that a lecture, sermon, and an address have one feature in common in that they are intended primarily for oral delivery to an audi-

[21]Kreymborg v. Durante, 22 Pat. Q. 248 (1934).

ence. In general, poems are not so intended. Where poems are first spoken or rendered at public gatherings, they might be classified as an address and entitled to protection.

In this case plaintiff's poems were first published in book form. Although a poem may have dramatic possibilities, these poems were not in dramatic form and could not be protected under the section of the Act offering protection to dramatic works. The court stated that it was up to Congress to make any necessary changes in the Act. Motion to dismiss the complaint was granted.

This question was again considered in *Michelson v. Shell Union Oil Corporation,*[22] where plaintiff brought an action claiming that the defendant had performed certain of plaintiff's copyrighted advertising material over a radio broadcast. The defendant moved to strike all references in the complaint to the alleged infringement on the theory that a mere reading of plaintiff's advertising script over the radio could not constitute a copyright infringement.

In deciding this procedural point, the trial court held that there are property rights in a script used for radio broadcasts. The court expressed its reluctance to accept defendant's theory, since if such were true, defendant would acquire certain property rights in an otherwise copyrighted and protected literary work. In denying defendant's motion to strike, the court stated that such motion was premature, as this was a matter to be settled by a trial on the merits.

It is submitted that the ruling of the court was proper, since an advertising script in most cases constitutes a dramatic work, being designed for presentation by performers in dramatic form. If the advertising script be merely recitative in form, it may well be considered an "address or similar production" and entitled to copyright protection. A radio script does not fall in the class of a novel or poem or similar work.

The ruling in the foregoing case emphasizes the necessity for the pleading of multiple causes of action in cases involving copy-

[22]Michelson v. Shell Union Oil Corp., 1 F.R.D. 183 (1940).

rights, unfair competition, and the like. While the decision in the preceding case is in line with the law and the facts, it is believed that had the plaintiff incorporated in his complaint a cause alleging unfair competition, careful consideration would have been given to this contention.

§106. Unauthorized Use of Fictional Characters.

An owner may seek protection not only for the performance of a copyrighted work over the air, but for "piracy" where the material contained in the copyrighted work has been copied.

An action for unfair competition may be available to an author in instances where the fictional characters, incidents, or name of his literary creation is used by another in a radio broadcast. In suitable cases, protection may be afforded by the Copyright Act itself.

In the case of *Cole v. Allen*,[23] the plaintiff complained in a suit for unfair competition and copyright infringement that the defendants, including the radio comedian Fred Allen, had broadcast a radio performance freely using a character called "Charlie Chan". The defendant sought particulars as to the specific literary material and episodes, allegedly taken from plaintiff's numerous books and motion pictures dealing with "Charlie Chan."

The court held on the hearing of this motion that the defendants were entitled to full particuars to enable them to properly prepare their answers to the alleged copyright infringement. A complaint in a copyright case must be accompanied by a copy of the infringing work and a copy of the work alleged to have been infringed, or the absence of such copies satisfactorily explained.

§107. Rights of Employee to Copyright.

Controversies frequently arise between the author of a work composed for radio broadcasting and his employer. A decision as to which of the two is entitled to the rights of ownership,

[23]Cole v. Allen, 3 F.R.D. 236 (1942).

whether the work is copyrighted or not, depends upon the ordinary principles of agency law.

In the case of *Brown v. Mollé Company,*[24] the defendant, a manufacturer of shaving cream, engaged an advertising agency to produce a radio program. The agency employed plaintiff to "build" the proposed show. As the program's theme song, plaintiff took the well-known "Caisson Song" of West Point, using the music of the song, but supplying words calculated to advertise defendant's product. Plaintiff directed the program for a period of time, but later left to take other employment. The performances of the song continued without any protest from plaintiff. Thereafter plaintiff tried to copyright the words of the song, giving credit for the music to its composer, and subsequently brought this action for infringement.

The court held that the copyright obtained by plaintiff covered only the words, as the music was either in the public domain or was the property of its composer who had never consented to this use.

While the words were plaintiff's production, said the court, they belonged to the advertising agency for whom plaintiff held the copyright in trust. The words were written especially for defendant's program, and plaintiff had not considered the song as his individual property at the time it was written. Judgment was entered for defendant.

§108. Infringement of Musical Composition.

The question as to whether or not a song played over a broadcast was taken from a previously copyrighted musical composition is one of the most difficult problems in copyright law.

In the case of *Arnstein v. Broadcast Music Corporation,*[25] the plaintiff claimed that his copyrighted composition was infringed by the publication and broadcast of defendant's song, "I Hear a Rhapsody." Plaintiff had submitted his composition to the de-

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[24]Brown v. Mollé Co., 20 F. Supp. 135 (1937).

[25]Arnstein v. Broadcast Music Corp., 137 F. (2d) 410, 58 Pat. Q. 451 (1942).

fendant prior to the publication of defendant's song, although defendant contended that its song had been independently composed. Plaintiff admitted that the two songs did not sound alike if played from beginning to end, but if the songs were analyzed that a similarity would appear.

The court held that the two songs did not sound alike to the lay observer. Musical infringement must be based on more than adoption of a few measures here and there. Music is written for the multitude and not for the experts. There must be a substantial appropriation, said the court, in order to constitute an infringement. With the relatively few musical intervals that exist, and the vast amount of music in the public domain, it is rash to say that a certain sequence is copied from a particular song.

The court in granting judgment for defendant, held that there was a lack of proof here that the composer of defendant's song had actual access to plaintiff's music at the time of its composition.

§109. Protection of Radio Program Compilations.

Not only may a radio program itself be copyrighted, but publications containing lists of radio programs are subject to the protection of the Copyright Act. Section 5 (a) of the Copyright Act covers "Books, including composite and cyclopaedic works, directories, gazetteers, and *other compilations.*"

The English courts extended such protection to program lists in the case of *British Broadcasting Company v. Wireless League Gazette Publishing Company.*[26] The plaintiff had been given the exclusive license to broadcast radio programs in the United Kingdom. It began the weekly publication of the "Radio Times", which contained advance information of the daily programs to be broadcast. The publication of such information involved considerable work and expense. Defendants copied and published much of the material from this "Radio Times", and plaintiff sued for infringement.

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[26]British Broadcasting Co. v. Wireless League Gazette Publishing Co. (1926) 1 Ch. 433 (Eng.).

It was held that there was copyrightable material in the compilation of advance daily programs, and the Copyright Act of England applied in this case. The court stated that it was not so much concerned with originality of ideas, but was concerned with expression of thought. An injunction was granted.

We should approach British cases on the subject of copyright with caution, since their law differs radically from our own in important respects. Under British law it is the publication which is important. The filing of copies of the published material with a central copyright office, and the issuance of a certificate of copyright are not required.

§110. Copyright of Unpublished Work.

Publication of certain types of literary and artistic property is not a necessity prerequisite to registration under the United States Copyright Act of 1909. Section 11 of the Act grants protection to works of which no copies are reproduced for sale, the only requirement being the depositing with the Register of Copyrights of a copy of such work, together with a claim of copyright. This form of copyright is limited, however, to such works as a "lecture or similar production, or a dramatic, musical, or dramatico-musical composition . . . " If the work is later reproduced in copies for sale, the more formal provisions of the Act must be followed.

The protection granted under this informal method of copyright is of importance in the field of radio, since seldom is a radio script "published", within the meaning of the statute.[27] The fact that a script is almost indiscriminately distributed to potential purchasers makes some form of protection imperative. The depositing of the script with the Register of Copyrights, together with a claim of copyright before such distribution, is an added protection afforded its author.

The advantage of registration of unpublished radio scripts under the provisions of Section 11 of the Copyright Act was

[27]Uproar Co. v. National Broadcasting Co., 81 F. (2d) 373 (1936).

demonstrated in the case of *Marx v. United States,*[28] where Groucho and Chico Marx were convicted of infringing, and aiding and abetting the infringement of a copyrighted radio script. Two authors of a radio script which had been copyrighted under Section 11 of the Act, placed the original script with an agent in an effort to obtain a sponsor. The agent mailed the script to Groucho Marx, who evidenced his interest in his reply to the agent. A conference was held with the authors, the Marx Brothers, and the latters' "gag writer", and mention was made during this conference of the fact that the script had been copyrighted. No action was taken as a result of the conference.

A year later the defendants broadcast a script in which there were included in altered but recognizable form, materials from the script submitted by the two authors. The defendant Marx Brothers claimed that they had completely forgotten the submitted material at the time of their broadcast, and that they had paid their "gag man" for this material.

The court held that the defendants were guilty of "piracy" of the material used, and that defendants' actions were not accidental. The evidence in the case disclosed a deposit of the material in accordance with Section 11 of the Act. The court held that a deposit of a single copy of a radio script which was the first episode of a proposed radio serial program constituted a compliance with the requirement of Section 11.

The defendants contended that Section 11 was unconstitutional as being indefinite in its language in that it failed to indicate the length of term of such a copyright. The court held that Section 11 will be construed as granting a copyright for twenty-eight years from the date of deposit. The conviction was affirmed.

The foregoing case illustrates the fact that in certain instances the owner of a copyright can be protected under the criminal as well as the civil processes of the Federal courts. Section 28 of the Copyright Act punishes as a misdeameanor the acts of a

[28]Marx v. United States, 96 F. (2d) 204 (1938).

person who willfully and for profit, infringes a copyright secured under that statute. Ordinarily the imposition of civil liability affords a sufficient and more advantageous means of protection to the plaintiff in the form of damages for infringement.

Copyright is but one form of protection of the literary content of radio programs. Not only is the material actually broadcast subject to such protection, but material taken from such broadcast and recognizable as such is protected under the theory of "piracy." The Copyright Act does not and was not designed to protect the ideas that are the foundation upon which a program is constructed.

Chapter XIV

COMMON LAW LITERARY AND ARTISTIC PROPERTY RIGHTS

§111. Property Interests in Common Law Rights.

Although protection of literary and artistic property rights under the Copyright Act is granted only to those whose material comes within the scope of the Act and who fulfill the statutory requirements for publication, filing of copies, and the payment of fees, there remain certain literary and artistic rights, which while not copyrightable, yet may be afforded protection.

Material, not theretofore communicated to the general public, even though copyrightable under the statute, may receive protection under the common law.

Publication of a work divests the author of any protection he may theretofore have had under common law rights. The fundamental principle of common law literary property rights is that a *general* publication constitutes a dedication to the public, and all common law protection is thereby lost.

In order to effect an abandonment of common law rights, there must be a *general* as distinguished from a *special* publication of the work. A distribution of books or pamphlets to the public at large is an example of what is meant by *general* publication. The mere performance of a literary work does not constitute a *general* publication.

In the case of *Uproar Company v. National Broadcasting Company,*[1] it was held that the rendering of a performance of an uncopyrighted script before a microphone is not an abandonment, nor is it a dedication of the work to the public. It therefore follows that uncopyrighted broadcast scripts may be performed over the air without fear of loss of common law rights.

Common law literary rights lack an accurate or even a convenient descriptive title. Certain of their aspects are clearly

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[1]Uproar Co. v. National Broadcasting Co., 81 F. (2d) 373 (1936).

matters of property right. An uncopyrighted, unpublished manuscript is property to the same effect as though it were copyrighted. The physical manuscript itself and the literary form of its material are property rights which may be protected in the same manner as is intangible personal property.

When we consider the less concrete manifestations of literary rights such as an idea or an artistic concept, the classification of these as property becomes less certain. Ideas and ephemeral concepts have been classified as property by some judicial definitions and statutory provisions. The California Civil Code grants to products of the mind the characteristics of property; Section 980 of the Code provides:

> "The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product and the representations or expressions thereof made by him remain in his possession."

It makes no difference whether we refer to ideas and other products of the mind as being property interests, or whether we regard them as mere rights which the law will protect, since modern courts of equity grant injunctive relief in cases embracing rights other than those involving property interests. The classification of products of the mind as "property" or "non-property" should be considered as affecting only the form and not the substance of the protection which the law affords.[2]

Common law literary rights may be transferred by contract or assignment in like manner with other forms of intangible personal property. Unlike the rights embodied in a trade-mark and trade name, literary rights may be transferred independently of the sale or transfer of any business or interest of the owner.

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[2]See §91.

§112. Partnerships and Joint Ventures in Literary Products.

Partnerships and joint ventures may be formed to create a literary product and to share in the profits of its sale. If two or more persons agree to collaborate in the creation or utilization of a literary work, a joint venture will be implied in law, even in the absence of an express agreement.

In the case of *Carlson v. Phillips*,[3] suit was brought by an author against his collaborator for one half of the profits from the sale of a radio serial show on the ground that there existed between them a joint venture. Defendant denied that there was a joint venture and attempted to prove that the plaintiff was inexperienced as an author, that the audition script was so badly prepared by the plaintiff that defendant had to completely revise the material, and that defendant had repudiated any association before the final sale of the show.

The appellate court reversed a dismissal of the complaint, holding that where two or more persons collaborate in producing a literary work, or engage in a joint venture to share the profits thereof, the law will imply a contract even in the absence of an express agreement. Here plaintiff and defendant had agreed to collaborate on the work and a repudiation of the contract or partnership will not relieve defendant's liability to plaintiff for one half of the profits.

If a joint venture for the production or exploitation of a literary work has been formed, an inequality of contribution of the co-authors is immaterial. In the case of *Lyon v. McQuarrie*,[4] the plaintiff, one of two partners, brought suit for an accounting of profits. Defendant, a theatrical man, had produced a vaudeville act entitled, "Do You Want to be an Actor." He had approached the plaintiff, who was a businessman and his close friend, and sought his aid in selling this act as a radio show. The production was later sold in the name of the defendant, and he thereafter repudiated his agreement with plaintiff.

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[3]Carlson v. Phillips, 326 Ill. App. 594, 63 N.E. (2d) 193 (1945).
[4]Lyon v. McQuarrie, 46 Cal. App. (2d) 119, 115 P. (2d) 594 (1941).

The court held that the absence of complete control over the product did not negative evidence that a partnership existed. The fact that the contracts of sale were in the name of the defendant goes only to the weight of the evidence of the existence or non-existence of a partnership. When the idea was reduced to the concrete form of a radio play, that production was the subject of private ownership, and was a partnership asset which defendant had transferred to the partnership. On this basis, the court held that plaintiff was entitled to recover his share of the profits.

If one of the members of a joint venture should misrepresent the contribution which he is able to make to the production of a radio show, the other associates have the right to rescind the agreement. A joint venturer who contributes nothing of value to a radio production has no right to share in the profits.

In the case of *Dunn v. Stringer,*[5] it appeared that the plaintiffs sought to rescind a written contract of association between the plaintiffs and the defendant which provided for collaboration on the production and marketing of a series of stories for radio broadcasting. Plaintiffs alleged that at the time of entering into the written contract, the defendant had falsely represented that he was possessed of unlimited authentic facts and material, and could furnish plaintiffs with historical data and real incidents suitable for dramatization. Evidence showed that two radio serials entitled, "The Unbelievable" and "The Secret City" were produced and marketed by the plaintiffs, but that the manuscripts prepared by the defendant were useless, and not in the form contemplated by the contract. The plaintiffs had offered to rescind and restore the defendant to the status quo, but this offer was refused.

The trial court held that defendant's scripts were valueless, in fact plagiarized from other works, and that the plaintiffs were entitled to recission. Although the lower court ruled that the plaintiffs need not restore the physical manuscripts to the de-

[5]Dunn v. Stringer, 41 Cal. App. (2d) 638, 107 P. (2d) 411 (1940).

fendant, as these were valueless, the appellate court modified this judgment to the extent that the manuscripts should be returned to the defendant whose property they were. The contract was rescinded, and the court held defendant was entitled to none of the profits.

§113. Authors' Rights in Past Production.

Frequent disputes have arisen over the question of the ownership of literary property created by its author while employed by another. Whether literary products thus created belong to the author or to his employer depends on the terms and conditions of this employment. In the absence of a written contract on the subject, the object of the employment and the surrounding circumstances must be examined. If the literary production was created before its author entered the employment, it will be assumed that property rights are to be retained by the author.[6]

The rights of an author and producer in the script of a radio production after its broadcast were defined in part in the case of *Uproar Company v. National Broadcasting Company, supra.* In this case, the plaintiff claimed the right by assignment from the comedian, Ed Wynn, to publish in pamphlet form the latter's broadcast scripts which were part of a broadcasting program presented by the defendant sponsor. Plaintiff sought to restrain defendants from interfering with the publication of this pamphlet. Ed Wynn's contract with the sponsor, in addition to providing for his services, provided that he furnish the scripts for the broadcasts. Plaintiff moved to strike the defense of their prior contract rights.

The trial court held that the defendants had acquired the rights to these scripts, and that plaintiff's conduct in seeking to publish them constituted unfair competition.

The appellate court modified this judgment and held that Wynn's contract called for nothing more than his personal services, and that there was nothing in this contract to indicate the sponsor regarded the scripts as being of any value after their

[6]See Chapter XV.

performance. However, the court stated that notwithstanding the rights Ed Wynn retained in these scripts, his contract contained an implied covenant that he would not weaken the value of that contract. Assignment of these scripts to plaintiff would, the court felt, weaken the value of the contract during its life, and therefore the defendants still retained a right to interfere with plaintiff's publication of the scripts.

When an employee is hired to write a radio production, such literary products become the property of the employer, unless the employee retains such rights by contract. In *Phillips v. WGN, Inc.*,[7] the plaintiff was hired by the defendants for the preparation and broadcast of radio programs. The author prepared a radio serial known as "Painted Dreams", which was produced first as a sustaining and later as a commercially sponsored program. Without the knowledge of the broadcasting company, the plaintiff filed the first ten scripts for copyright. After plaintiff was discharged, the defendants continued to produce the serial. Plaintiff brought suit to restrain defendants from broadcasting the program and for damages for unfair competition.

The court held that the oral contract of employment gave no indication as to the final disposition of the literary property. However, the weight of evidence showed that plaintiff was employed by defendants to perform particular services for which she had little experience prior to such employment, and any talent which she later acquired was developed while working for the defendants. This lack of prior experience was indicative of the fact that the literary products were to be the property of the broadcasting station and the program sponsor. Since plaintiff had "sold" the radio scripts in advance to the plaintiff, the court denied her any relief.

While this decision arrives at the same result, yet it is felt that the court should have followed the general rule applied in cases of production of an article or thing by one in the employ of an-

[7]Phillips v. WGN, Inc., 307 Ill. App. 1, 29 N.E. (2d) 849 (1940).

other, if such article or thing produced is within the scope of employment. Where such circumstances exist it has been and is the rule that the product is the property of the employer unless there be a very definite contract to the contrary.

§114. Protection of "Moral" Rights.

Continental law in addition to other forms of protection grants what may be termed "moral" rights to authors, as distinguished from our own legal rights. These "moral" rights include such matters as the right of an author to have his work published without change to the point of mutilation. Likewise, any conduct on the part of a publisher which tends to diminish the literary reputation of the author, comes within the term "moral" rights.

The opinion has been voiced that the laws of the United States do not recognize the theory of "moral" rights as presented by continental law. This, however, is not exactly true. An examination of the decisions will indicate that while the courts do not give to their decisions the title of "moral" rights, yet the result is in fact in point with that obtained under continental law.

The author of a literary work does not lose all of his rights even though he sells or assigns his literary production to another. If a script is broadcast in a manner that would adversely affect the literary reputation of its author, a suit for damages for libel may be brought against its producer. The right which the author retains in his work is not a property right, but is in effect the same "moral" right recognized under continental law, and is not lost by sale or assignment of the literary product.

The right of the author of a radio script to sue for damages to his reputation caused by mutilation of his script in broadcasting was recognized in the companion cases of *Locke v. Gibbons,*[8] and *Locke v. Benton & Bowles,*[9] discussed in Section 65.

Both of the courts recognized that if this action were properly pleaded, the author could recover for damages, provided that the

[8]Locke v. Gibbons, 253 App. Div. 887, 2 N.Y.S. (2d) 1015 (1937).
[9]Locke v. Benton & Bowles, 253 App. Div. 369, 2 N.Y.S. (2d) 150 (1937).

radio listeners had understood from the broadcast that the author of the script had stated those things which were later discovered to be false and ridiculous. Because of technical defects in the pleadings, the complaints were dismissed.

Even though there be no sale or assignment of literary or artistic property, producers of products of the mind have the right to protect such properties from inferior imitations that will tend to lessen their value. In the case of *Gardella v. Log Cabin Products,*[10] discussed at length in Section 96, the plaintiff sought to restrain an allegedly inferior portrayal of the character "Aunt Jemima" presented by the defendants on a radio program. Plaintiff claimed that as she was associated in the minds of a large portion of the radio listening audience as the actress who portrayed "Aunt Jemima" on the stage and radio, that an inferior performance of this role would tend to lessen the value of her performance, and constituted unfair competition.

The court in its decision recognized the existence of such rights and stated that these rights would be protected in appropriate cases, but that under the facts presented in this case, the defendant had a prior and independent right to advertise its products on the radio by use of the character "Aunt Jemima".[11]

The right of a performing artist to protect himself from an inferior performance of his own interpretative works was recognized by the court in the case of *Waring v. WDAS Broadcasting Station,* discussed at length in Section 87. The orchestra leader, Fred Waring, claimed that the playing of phonograph records of performances of his orchestra which had been recorded years before this suit, tended to weaken the value of his present reputation with the radio public. It was contended that these phonograph records were made at a time when the orchestra had not reached its present high standards, and that playing them over the air at this time without permission constituted an unfair

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[10]Gardella v. Log Cabin Products, 89 F. (2d) 291 (1937).

[11]See also Prouty v. National Broadcasting Company, infra §117.

performance which cheapened the value of plaintiff's artistic performance.

The court held that the broadcast of older and inferior phonograph records without the permission of the performing artist constituted unfair competition for which the plaintiff could recover.

§115. News As Literary Property.

News items in themselves do not constitute common law literary property. In the cases of the *International News Service v. Associated Press* and *Associated Press v. KVOS, supra,* Section 84, the courts recognized that news as such is not the subject of literary property, although acts of a competitor in using news items may constitute unfair competition. On a similar basis the content of newspaper articles may not be copyrighted. However, news items may be written in a literary style so that the form in which they are presented may be regarded as literary property.

In the case of *Jenkins v. News Syndicate Company,*[12] the evidence disclosed that the plaintiff was requested by the New York Daily News to write several articles concerning "New York Society", in particular articles involving debuts and parties. Plaintiff alleged that she had conferred with representatives of the defendant newspaper regarding the content of the articles, but that the newspaper proceeded to publish an article containing only the form and substance of plaintiff's views and ideas on the subject.

On a motion to dismiss plaintiff's complaint for failure to state a cause of action, the court held that the plaintiff's material should not be classed merely as "news", as this work was literary property, something more than news, and hence could be protected.

§116. Originality.

There must be a certain amount of originality in any product of the mind if it is to be considered common law property,

[12]Jenkins v. News Syndicate Co., 128 Misc. 284, 219 N.Y.S. 196 (1926).

although the idea or written expression need not be entirely novel. There can be no property right in the multiplication table, and material entirely in the public domain cannot be considered as literary property any more than it can be the subject of a copyright. The court aptly said in the case of *Jenkins v. News Syndicate Company, supra,* the fact that plaintiff's ideas on the subject of debutantes' parties and New York society were not entirely novel does not matter, since very few things in the literary world are entirely novel or original.

In *Buckley v. Music Corporation of America,*[13] plaintiff alleged, in an action for infringement of common law literary property, that he had written a radio program continuity containing an original idea; that the continuity, while in manuscript form, had never been published; that he had submitted the script to defendant in an attempt to negotiate a commercial sponsorship of the program; and that defendant, without authority of plaintiff, broadcast a radio program using certain material contained in plaintiff's script. The defendant objected to this pleading on the ground that plaintiff had failed to show in what manner his script was original, and asked for further particulars. The court denied defendant's request, holding that it is most difficult to show how any literary material is original.

§117. Protection of Ideas Under the Law of Unfair Competition.

There are no statutory provisions for the protection of an idea. However, an idea may be protected in an action based on common law rights.

If material is taken from a copyrighted literary work and embodied in another book, this "piracy" constitutes *infringement* which is punishable under the Copyright Act. If only the idea is utilized by another, there is no statutory penalty. A copyright protects the literary form of ideas, not the ideas themselves. A theft of the *form* of a literary work or a part thereof

[13]Buckley v. Music Corp. of America, 2 F.R.D. 328 (1942).

is an *infringement,* while an actual theft of the *idea* upon which the form is based is not an infringement.

The difference is not as complex as it has been made to appear, nor is the mere fact that the theft of an idea is not an infringement sufficient of itself to preclude relief for such theft.

The assertion is often encountered that there is no common law property right in mere ideas, and that ideas will be protected only if they have been reduced to a concrete manifestation.[14] This assertion is not in accord with the recent decisions, nor does it have any basis in logic.

The view that there may be no common law property in mere ideas deserves closer analysis. This erroneous concept probably had its origin in the fact that it is not possible to copyright an idea.

The leading American case on the protection of an idea is that of *Fisher v. Star Company.*[15] The evidence disclosed that the plaintiff had published in various newspapers since 1907 a a comic strip known as "Mutt and Jeff". Many of these cartoons had been copyrighted. The plaintiff was widely known to millions of readers as the author of this comic strip and as the originator of the characters of "Mutt and Jeff". At one time he had sold certain of these cartoons to the defendant which was engaged in the business of furnishing cartoons to American newspapers, but the contract between them had been terminated long prior to the happening of the incidents leading up to the filing of this action.

Plaintiff alleged in this suit for unfair competition that defendant had caused its employees to draw cartoons resembling "Mutt and Jeff", and had labeled such characters "Mutt" and "Jeff". Plaintiff sought to restrain this conduct under the common law, and made no attempt to rely on copyright or trademark statutes. Defendant prior to this action had copyrighted the cartoons in question.

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[14]Bowen v. Yankee Network, 46 F. Supp. 62 (1942).
[15]Fisher v. Star Co., 231 N.Y. 414, 132 N.E. 133, 19 A.L.R. 937 (1921).

The court held that a cartoonist acquires a peculiar interest in the comic characters he originates, and that defendant's conduct would tend to deceive the reading public. The decision adopted the view that if a civil right not unlawful or contrary to public policy has acquired a peculiar value, it becomes a property right which is entitled to protection as such. The defendant, in view of plaintiff's former rights, had acquired no property right in the idea or characters, even though defendant's cartoons were in fact copyrighted. No claim was made by defendants that the employment of plaintiff by defendant caused any of plaintiff's ideas to be transferred or assigned to defendant. The court granted an injunction against defendant's actions.

The interesting aspect of this case from the standpoint of radio is that Fisher was trying to protect from appropriation by another, an idea which was embodied in a continuing series of cartoons. This action is one quite distinct from an action for plagiarism of common law or copyrighted works, since there was no claim that the continuity or incidents portrayed were lifted from Fisher's cartoons. The underlying idea and characters were themselves the subject of protection by the court.

It should be noted that the court in the Fisher case relied on the doctrine of unfair competition holding that defendant's conduct therein constituted a "passing off" and a deception of the public. In the later case of *Bixby v. Dawson*,[16] which arose in the same jurisdiction as that of the Fisher case, the court arrived at a contrary conclusion; however, the "passing off" in this later case was never clearly proved.

In the Bixby case the plaintiff, a writer of radio scripts, sold his material to the defendant who broadcast a program on the National Broadcasting Company network. Although plaintiff was later discharged, the defendant continued the program under the same name, and used the same characters but portrayed these characters in incidents different from those outlined in the scripts written by plaintiff. The writer brought an

[16]Bixby v. Dawson, 277 N.Y. 718, 12 N.E. (2d) 819 (1938).

action to restrain the further broadcast of this radio program, contending that it constituted unfair competition.

The court held that the plaintiff was not known to the general public as the author of the scripts, and because of this fact defendant's actions did not constitute a "passing off" upon the public or unfair competition. The court failed to consider the question of whether or not plaintiff's contract with defendant had divested him of his property rights in the underlying ideas of the series of programs, but chose to rely on the reasoning that if the public was not deceived, the plaintiff could retain no protectable rights in the ideas.

The case of *Prouty v. National Broadcasting Company,*[17] involved a suit in which plaintiff alleged that she was the author and owner of the copyrighted novel, "Stella Dallas"; that she contemplated writing a sequel in which the character "Stella Dallas" would take a prominent part; that her work had a substantial present value as a work of art; that the defendant intended to broadcast a radio program for commercial purposes, without plaintiff's consent, involving supposed episodes in the life of the character "Stella Dallas" in the same role as that fictional character was portrayed in plaintiff's novel; that these proposed skits would constitute a reduction in artistic and literary quality from the novel; that defendant was misappropriating plaintiff's title, "Stella Dallas", and the good will attached thereto; and that both plaintiff's reputation as an author and the work itself would suffer from these performances.

The defendant moved to dismiss the complaint on the grounds that it stated no cause of action, contending that there was no competition between the author of a novel and the owner of a broadcasting station.

The court held that if plaintiff's allegations were true, she should be afforded protection on the ground of unfair competition. The absence of the element of *competition* is not fatal to plaintiff's claim, for unfair competition rests on the broader

[17]Prouty v. National Broadcasting Co., 26 F. Supp. 265, 42 Pat. Q. 7 (1939).

basis of *unfairness* rather than on the basis of *competition*. It is the injury to the author and the fraud upon the public that constitute the real offense. The motion to dismiss was denied.

A different view was expressed in the case of *American Broadcasting Company v. Wahl Company*,[18] which case involved a number of causes of action, among which was the claim that the defendant was engaging in unfair competition by its presentation of the radio quiz program entitled "Take It or Leave It". (See Section 97 for further facts.)

The Federal District Court held that no cause of action was stated as plaintiff had failed to plead any similarity between the two programs. The court said that there could be no valid copyright in an idea, plan or scheme for a program. On appeal it was held that the trial court had no jurisdiction in the matter since no federal question was involved, and no diversity of citizenship was shown. The entire action was dismissed.

It is submitted that had the plaintiff set forth in its pleadings proper allegations showing that the underlying ideas of the two programs were substantially the same, and that the defendant had appropriated these ideas from plaintiff's program, the court would have been in a position to give a different interpretation to the situation, providing that it assumed jurisdiction of the case. As it is, the court's opinion is only dictum at best, since it held that it had no jurisdiction over the proceedings.

§118. Refusal of Courts to Protect Ideas.

Many courts have sedulously avoided the granting of judgments protecting an *idea*. However, some tribunals recognize the fact that the law should provide safeguards under appropriate circumstances, but have surrounded the granting of such rights with particular restrictions. In the realm of radio entertainment, the underlying idea upon which a series of programs are built is often of far greater value than the literary material

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[18]American Broadcasting Co. v. Wahl Co., 121 F. (2d) 412, 50 Pat. Q. 156 (1940).

contained in the actual scripts. In the field of advertising, the importance of the idea as overshadowing the actual word content has created problems which the courts have but recently considered.

In a number of instances plaintiffs have been successful in protecting their ideas where a contractual arrangement has existed between themselves and the defendants. In other instances, they have been denied protection. An example of the difficulties encountered in this type of action is well-illustrated in the case of *Rodriguez v. Western Union Telegraph Company*.[19] There the plaintiff sought to recover damages for the appropriation of his plan for radio communication to be furnished to the public. In addition, plaintiff sought to recover for breach of an express oral contract in which defendant allegedly agreed to pay for the use of this idea.

The trial court gave judgment for plaintiff. On appeal, the court in reversing the judgment held that plaintiff's alleged idea or plan could not be made the subject of a property right in the absence of its protection by contract prior to its disclosure, and that the supposed contract was too indefinite for enforcement by the courts.

Of like effect was the judgment rendered in the case of *Bowen v. Yankee Network, Inc.*[20] There the plaintiff brought an action against the network and the Wrigley Company for appropriation of an idea for a radio program. Plaintiff alleged that he had conceived a new idea for a show to be entitled "Radio Presentation", and that he presented the plan in manuscript form to an agent of the Wrigley Company; that the agent examined the script, obtained a knowledge of its contents, and returned it after some delay; that Wrigley Company disclosed the plan to the network, which thereupon caused a radio production to be prepared called "Spreading New England", which contained all the features and ideas set forth in plaintiff's show; and that this

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[19]Rodriguez v. Western Union Telegraph Co., 285 N.Y. 667, 34 N.E. (2d) 375 (1940).

[20]Bowen v. Yankee Network, Inc., 46 F. Supp. 62 (1942).

show was presented on the air to advertise products of the Wrigley Company. Defendant moved to dismiss the complaint as stating no cause of action.

The court held that the complaint should be dismissed since there was no allegation that defendants had secured the idea wrongfully, but merely a statement that plaintiff had submitted the idea to defendant's agent voluntarily, and that an appropriation subsequently took place. There was no allegation of any breach of trust. The court admitted that plaintiff could have protected his idea by means of a contract, but since he had failed to do so, he had upon its communication lost all rights in the idea.

In the case of *Grombach Productions v. Waring,*[21] the facts disclosed that the plaintiff originated and forwarded to defendants for examination a radio script. The script was entitled "Your Song" with an alternate title of "Stop, Look, and Listen." In the plan for the program it was provided that the radio audience was to be solicited to write in to the sponsor the name of a song which associated itself with some experience in the writer's life. Plaintiff alleged that he had communicated this idea to an agent of Fred Waring, and that defendant had appropriated the idea and used it over the air in identical form.

The plaintiff set up three causes of action: first, that defendant had appropriated the idea without paying for it; second, that defendant had breached an express contract to pay for the use of the idea; and third, that plaintiff had submitted the plan to defendant in conformance with a well-established custom in the advertising and radio world for the sole purposes of having defendant either procure a sponsor or engage plaintiff's services to produce the show.

At the trial, Fred Waring testified that the agent to whom plaintiff had communicated the idea had not passed it on to him. The jury awarded plaintiff a judgment, finding that there was an implied contract between the parties.

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[21]Grombach Productions v. Waring, 293 N.Y. 609, 59 N.E. (2d) 425 (1945).

The appellate court reversed this judgment, holding that plaintiff's idea differed widely from the idea underlying the program which defendant actually broadcast, and found that there was no evidence indicating an implied contract. The court said that an alleged custom of the trade cannot create a contract where none existed between the parties, and that the gratuitous disclosure by plaintiff to defendant's agent imposes no relationship of trust.

The foregoing cases contain language difficult to accept in the light of reality. The courts speak of a gratuitous disclosure of ideas as implying no contractual relation. When an author submits a radio production to an agent, sponsor, or station, he does so with one object only. He seeks no praise or words of counsel, but desires only to sell his plan to one who is in a position to exploit the idea. The person receiving the plan is well aware of this objective, particularly if he is associated with radio business in any of its aspects, and should certainly be bound by such knowledge. To hold other than this is a straining of the bounds of credulity.

§119. Protection of Ideas by Courts Under Theory of Implied Contract.

Contrary to the opinion of the courts referred to in the preceding section, many courts have given support to the view that an appropriation of ideas will not be countenanced where circumstances are such as to indicate the existence of an implied contract between the parties. Decisions to this effect are not limited to the field of radio.

In the case of *Jenkins v. News Syndicate Company, supra,* the plaintiff alleged in her first cause of action that the defendant, publisher of the New York Daily News, had requested her to write several articles concerning New York society and debutantes' affairs; she thereafter conferred with a representative of defendant regarding a plan for these articles. Negotiations were later broken off, but in spite of this, defendants published an article which contained the substance of plaintiff's ideas. The

second cause of action asserted that the ideas had been reduced to writing by plaintiff and appropriated by the newspaper. Defendant moved to dismiss the complaint.

The trial court refused defendant's motion to dismiss, holding that while these ideas would not be protected as news, there being no protectable rights in news as such, they would be protected as literary property. By offering to purchase these ideas, defendant induced plaintiff to disclose that which she could sell, and the newspaper is therefore obligated to pay for their use.

An excellent example of this progressive view is found in the case of *Liggett & Myers Company v. Meyer.*[22] In that case, the plaintiff sought reasonable compensation for a utilization of his idea by the defendant tobacco company. The complaint alleged that plaintiff had submitted an idea in a letter sent to the tobacco company, and that the idea was adaptable for a bill-board advertisement. The idea, said the plaintiff, consisted of a suggestion that two well-dressed men be portrayed as talking to each other, one man to offer the other a cigarette from a package, and the second man to refuse this offer with the words, "No thanks, I smoke Chesterfields." Plaintiff alleged that defendant accepted this offer by publishing a similar advertisement in the newspapers. Judgment in the trial court was for the plaintiff.

The appellate court affirmed this judgment, and stated: "We think the complaint sufficient in these respects. This is a common law action. The rules of the common law are continually changing and expanding with the progress of the society in which it prevails. It does not lag behind, but adapts itself to the conditions of the present so that the ends of justice may be reached. While we recognize that an abstract idea as such may not be the subject of a property right, yet, when it takes upon itself the concrete form which we find in the instant case, it is our opinion that it then becomes a property right subject to sale. Of

[22]Liggett & Myers Co. v. Meyer, 101 Ind. App. 420, 194 N.E. 206 (1935).

course, it must be something novel and new; in other words, one cannot claim any right in the multiplication table."

It has been said that, "If the owner has reduced the abstract idea to a concrete form, explaining and describing its practical use and application before communicating it and prior to the appropriation by the defendant, he may recover upon an implied contract."[23]

There can be little quarrel with the language of cases which recognize that ideas can be protected. In one respect the reasoning is subject to question. The condition is laid down that the abstract idea must first be reduced to a concrete form before protection will be granted. Should not the question as to whether the idea is sufficiently concrete to be delineated by the court be a consideration of evidence rather than a test of substantive law? If an idea is too vague to be comprehended by a court, then little weight can be given to an assertion that a vague ephemeral scheme has been wrongfully appropriated by another. The limitation that the idea must be reduced to concrete form should not be understood to refer to putting the idea in a writing or drawing. An idea can be formulated in the mind and described verbally with sufficient exactitude to meet the test of a skeptical court. To lay down the requirement that an idea must be reduced to writing would place the shackles of requirements, similar to the law of copyright, upon the doctrine that ideas may be protected by the law.

Refusal of the court to grant protection to an idea not reduced to a concrete form occured in the case of *Stone v. Liggett & Myers Tobacco Company.*[24] The plaintiff alleged that she had written certain radio continuities and submitted these in manuscript form to the defendant tobacco company. She prepared, at defendant's request, a rough script to demonstrate the adaptability of her composition for motion pictures. She claimed that defendant thereafter produced certain motion pic-

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[23]Law of Copyright and Literary Property, Horace G. Ball (1944) §227, p. 505.

[24]Stone v. Liggett & Myers Tobacco Co., 260 App. Div. 450, 23 N.Y.S. (2d) 210 (1940).

tures advertising its cigarettes, which motion pictures were based upon and adapted from plaintiff's compositions.

The first cause of action of the complaint was for infringement of plaintiff's common law literary property; the second cause alleged that plaintiff had conceived an original idea, put it in a script in rough form, and that defendants thereafter wrongfully appropriated such idea. The trial court held that the idea involved had been reduced to a concrete and tangible form by the plaintiff, and that both causes of action were well pleaded.

The appellate court took the opposite view, stating that the second cause of action alleged the appropriation of an idea not reduced to concrete form, and that defendant's motion to strike this second cause of action would be granted. The court said that "It is familiar law that owing to the difficulties of enforcing such rights, the courts have uniformly refused to assume to protect property in ideas that have not been reduced to concrete form."

Some objection can be voiced to this decision on the basis that the composition of a radio script in outline form should be a sufficient "reduction to concrete form" to justify protection. It is interesting to find that this court recognizes that the objection to enforcing protection for ideas not reduced to concrete form is not a theoretical proposition, but is a practical disinclination to recognize a contract where it is too difficult for the court to determine the actual content of the ideas.

The case of *Healy v. R. H. Macy & Company,*[25] again confirms the opinion that ideas are protectable. In that action plaintiff brought suit to recover the reasonable value of slogans and ideas for a Christmas advertising campaign, allegedly appropriated by the defendant department store. Plaintiff had originated several slogans such as "A Macy Christmas, Means a Happy New Year," and "A Macy, Macy Christmas and a Happy New Year," and presented plans for the utilization of

[25]Healy v. R. H. Macy & Co., 277 N.Y. 681, 14 N.E. (2d) 388 (1937).

these slogans to defendant, which they used. Defendant claimed that its own advertising department originated the entire plan, including the slogans. The jury brought in a verdict for $2,500 in favor of plaintiff, however the trial court set the judgment aside as being against the weight of evidence. Plaintiff appealed.

The appellate court reversed the lower court and held in favor of plaintiff, taking the view that there was sufficient evidence to support a verdict in his favor.

In the case of *American Mint Corporation v. Ex-Lax, Inc.*,[26] plaintiff alleged in one of its causes of action that it was experienced in the manufacture and processing of compressed candy tablets; that prior to this time, the defendant Ex-Lax Company had no experience with the manufacture of candy tablets, and that at the request of defendant plaintiff gave advice, suggestions and ideas with respect to the design of a tablet, number of candies to be included in each package, the size of the package, its wrappings, labelling and boxing; that defendant accepted such ideas and utilized them in its manufacture and marketing of "Jests" tablets. Plaintiff sought $25,000 as the reasonable value of its services. Defendant asked for judgment on the pleadings, claiming that there was no express contract between the parties for payment even if the ideas were adopted. The trial court held for defendant in this respect, and dismissed this cause of action.

The appellate court reversed this finding, and held that a good cause of action had been stated. The court took the position that while there was no express agreement for payment, it was only fair to assume that there was an implied understanding between the parties that plaintiff was to be compensated.

An interesting feature of this case is the fact that there was no mention or contention made that the ideas were communicated in written form.

It appears from the majority of decisions that so long as the court is able to determine that there was an actual or im-

[26]American Mint Corp. v. Ex-Lax, Inc., 263 App. Div. 89, 31 N.Y.S. (2d) 708 (1941).

plied contractual relationship between the parties, there need be no determination of the existence or non-existence of property rights in an idea.

In the case of *Brunner v. Stix*,[27] the plaintiff alleged that he had devised a plan for an employees' sales campaign and contest and had offered the plan to the defendant department store as a means of increasing its business. The plan consisted of a prize contest for the defendant's employees, and plaintiff contended that he had spent several years of work in reducing the plan to writing. Judgment was entered for plaintiff, and the defendant appealed.

The appellate court in affirming the decision, found that while plaintiff did not claim the transfer of any property right, he did claim the benefit of a contract for the use of his plan. It was held that an express contract existed between the parties for payment for the use of an idea which had been reduced to writing, and disclosed to defendant.

The outstanding case from the viewpoint of the protection granted for the use of ideas embodied in a radio script is that of *Cole v. Phillips H. Lord, Inc.*[28] The evidence disclosed that the plaintiff, a writer, actor and radio director, had entered the employ of the defendant advertising agency. Plaintiff delivered certain radio scripts to another employee of defendant at the time of commencing his work, for the purpose of having his scripts available should there be a possibility of their sale. One of these scripts consisted of a combination of ideas for a radio show or series of shows, which would bear the title "Racketeers & Company," or "137 Centre Street." Plaintiff claimed that these ideas were appropriated by defendant in its own radio production entitled "Mr. District Attorney." Four causes of action were alleged.

1. An express agreement to pay the reasonable value of plaintiff's creation;

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[27]Brunner v. Stix, 352 Mo. 1225, 181 S.W. (2d) 643 (1944).

[28]Cole v. Phillips H. Lord, Inc., 262 App. Div. 116, 28 N.Y.S. (2d) 404 (1941).

2. An implied agreement to pay for the same;
3. An implied agreement based upon custom;
4. An agreement implied in law to compensate plaintiff for the appropriation and use of his property.

The case was tried before a jury; however, on motion of the defendant the trial court held that plaintiff had failed to prove the elements of an express contract, that the plan sued upon lacked novelty or originality, and that defendant had developed its own plan entirely independent of that submitted by plaintiff. Plaintiff appealed.

The appellate court held that there was a conflict of evidence on these questions. If the two programs possessed the same underlying idea, the jury would have been entitled to find that plaintiff was the originator of the idea. The court went on to say that the theory "that a property right exists with respect to a combination of ideas evolved into a program, as distinguished from rights to particular scripts, finds support in defendant's own course of conduct. When it transferred any rights to 'Mr. District Attorney,' it sold not scripts, but the basic idea."

The appellate court further found that disinterested witnesses had "established that in the radio field there is a well-recognized right to an original idea or combination of ideas, set forth in a formula for a program. Such program contemplates an indefinite number of broadcasts in a series. Each broadcast has a script which represents the dialogue and 'business' of that particular broadcast. The idea or the combination of ideas formulated into the program remains constant, whereas, of course, the script varies in each separate broadcast." For this reason, plaintiff had stated a good cause of action based on "custom" of the radio industry.

Judgment of the trial court was reversed, the court holding further that "we are also of the opinion that plaintiff established a case for the jury's consideration on the theory of implied contract. So far as plaintiff was concerned, the agreement was

fully executed. He had delivered his program formula under circumstances requiring good faith on the part of the defendant. If it was used, he had a right to its reasonable value as determined by the jury. The relationship was one of trust and confidence."

To the same effect was the decision in the case of *Yadkoe v. Fields*.[29] This case involved a situation in which the plaintiff had composed certain literary ideas consisting of a "snake story" and other humorous incidents peculiarly suited for use by W. C. Fields, the comedian. The material was submitted to W. C. Fields by means of letters. In plaintiff's first letter, he said, "Whatever you think the enclosed radio script is worth is O.K. with me, Bill." Fields replied to this letter, stating that he liked the material very much, but that he would not commit himself on any definite terms of compensation. Thereafter defendant in several radio performances used a portion of this material as well as the idea embodied in the "snake story." Plaintiff brought suit for the reasonable worth of his products on the basis of an implied contract.

Judgment was rendered for the plaintiff by the trial court. On appeal the court affirmed this judgment, holding that the circumstances of the transaction would raise an obligation to pay for the material if used. In so holding the court said: "To uphold the contention that no liability attached to the use of respondent's material would be to hold that where literary material is offered and accepted under circumstances implying an agreement to pay therefor the ideas embodied in the material could be taken therefrom and used with impunity as long as the concrete expressions of the author were not employed. Such a conclusion lacks authority even in the cases cited by appellant."

The view that there could be property rights in mere abstract ideas was questioned by the court in this case. However, it recognized the fact that if the idea is expressed in concrete form it is entitled to protection. It is a question of fact as to

[29]Yadkoe v. Fields, 66 Cal. App. (2d) 150, 151 P. (2d) 906 (1944).

whether or not an idea has been reduced to concrete form. Based on the facts in this case, the court took the position that since the fundamental ideas embodied in plaintiff's letters had been used, these ideas were entitled to protection by the law.

There need be no solicitation on the part of the user of the script or idea, or even an express acceptance thereof. The use of such material under circumstances that would raise an obligation to pay is sufficient to create a contract implied in law which is enforceable in the courts.

In the case of *Thompson v. Famous Players Lasky Corporation,*[30] the plaintiff sought to enjoin the production and presentation of a motion picture, and to recover compensation therefrom. It appeared that she had sent an uncopyrighted scenario and synopsis to the defendant studio by mail for acceptance and purchase, but heard nothing more about the matter until the film involved was exhibited to the public. The plaintiff alleged that the picture as exhibited had the same name and plot as her scenario, and that both the incidents portrayed and the characters closely resembled her work. Defendant moved to dismiss the complaint on the grounds that it failed to state a cause of action.

The court held that common law literary property rights will be afforded protection until there has been a general publication. Since there was no general publication here, the court took the position that it would assume that an implied contract existed for the payment of the use of this property.

§120. Actions for Services Rendered as Additional Protection for Ideas.

In the preceding cases the courts granted judgment to those who had submitted literary material to another for purposes of examination and prospective future commercial use, on the basis of a contractual obligation either express or implied. In addition to the foregoing, courts have held that under appropriate cir-

[30]Thompson v. Famous Players Lasky Corp., 3 F. (2d) 707 (1925).

cumstances a contract for the use of the services of an author will be implied, irrespective of any property rights that may exist in the literary material created.

In the case of *How. J. Ryan v. Century Brewing Association,*[31] the evidence disclosed that defendant was about to begin the manufacture of beer and solicited suggestions for an advertising campaign from various advertising agencies including the plaintiff. Plaintiff prepared and submitted several ideas among which was the slogan "The Beer of the Century." Attached to the submitted material by plaintiff was a warning that it could not be used except under special arrangement.

A firm other than that of plaintiff was engaged by defendant to conduct its campaign and one of the slogans actually used was the phrase "The Beer of the Century." Plaintiff brought this action against defendant for services rendered. The case was tried before a jury which returned a verdict for plaintiff in amount of $7,500 for services rendered in conceiving the idea and presenting it to defendant. Defendant appealed from this verdict alleging that there could be no property right in an idea once it had been disclosed to the public.

The appellate court in confirming the judgment held that the action was not one based on the value of the property used, but rather on the value of plaintiff's services. In considering the amount of the verdict, the appellate court stated that it was within the province of the jury in finding for plaintiff to take into consideration plaintiff's background, experience, and overhead expenses.

§121. Protection of Ideas Under Fiduciary Relationship.

When a script is entrusted to a radio station or an advertiser for possible future use, the relationship of bailor and bailee may be created. If thereafter the script or a part thereof is used for

[31]How. J. Ryan v. Century Brewing Association, 185 Wash. 600, 55 P. (2d) 1053, 104 A.L.R. 1353 (1936).

commercial purposes, the bailor may bring an action for conversion of the literary property and for an accounting.

In the case of *Hollywood Motion Picture Equipment Company v. Furer,*[32] it was alleged by plaintiff that it had delivered to defendant's machine shop certain patterns for a microphone which had been invented for use in sound recording. It was agreed at the time of delivery that defendants would make castings from these patterns for plaintiff only. The defendant manufactured several castings and offered them to the trade without the consent of the inventor. No question of patent infringement was involved. Plaintiff sought to enjoin defendant from selling these castings, and for accounting of profits for sales already made. The trial court refused to admit any evidence for the plaintiff on the ground that the complaint stated no cause of action.

On appeal the appellate court reversed the trial court, and held that where a bailee has accepted the object of bailment under definite terms for the benefit of the bailor that a relation of confidence arises which should remain inviolate. The fact that the invention was not really "secret" but was actually in the public domain was not material, as the bailee was bound by his contract. Any use by the bailee contrary to his contract is a conversion for which he is liable.

The appellate court further said: "While the inventor of any product of the mind may forfeit his ownership thereof when it becomes known to the public, yet such forfeiture does not deprive the author of his right to make contracts with reference to his product. Neither does he yield his right to have such contracts protected by the courts where a confidential relationship has been created on the basis of the inventor's secret."

When a confidential relationship exists between the author of a literary idea and one to whom he entrusts this idea, the author will ordinarily be allowed to recover for any wrongful appropriation of his idea.

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[32]Hollywood Motion Picture Equipment Co. v. Furer, 16 Cal. (2d) 184, 105 P. (2d) 299 (1940).

In the case of *Brookins v. National Refining Company,*[33] it appeared that the plaintiff had originated an advertising scheme which he called the "En-Ar-Co Automobile Tour Game." The scheme consisted of devices useful in the advertising of petroleum products. While in the employ of defendant refining company, he had disclosed his plan in outline form to an officer of the company. He was encouraged to go ahead with its development, and was informed that if his plan could be used, he would be paid its reasonable value. Plaintiff assigned his rights in any prospective patents or copyrights of the plan to the defendant corporation, as he was about to enter the army in the first World War. When plaintiff returned from the war he was denied any rights in the plan, and the corporation refused to re-employ him. Suit was brought, and the trial court directed a verdict in favor of defendant.

On appeal the court held that plaintiff's actions did not reveal an abandonment of his rights to this plan or any release of such rights. The court said that plaintiff should be allowed to take his case to the jury, and that he was entitled to recover damages if his case be proved.

§122. ACTIONS.

Progressive courts have in recent years laid a foundation upon which the law protecting the rights in ideas is being gradually formulated. The difficulties remaining consist in clearing away the dead language of earlier decisions that repeat phrases not applicable to the world of today, and in persuading courts to recognize the facts as they presently exist.

Ideas are protectable. In appropriate situations an idea may be protected under the law of unfair competition where no legal relationship exists between the parties. In other situations an idea is protectable if there exists a legal relationship between the parties, contractual in nature where the creator of the idea may sue under an express or implied contract, or for services rendered. If a fiduciary relation exists, an appropriate remedy is an action for conversion or accounting.

[33]Brookins v. National Refining Co., 26 Ohio App. 546, 160 N.E. 97 (1927).

Chapter XV

CONTRACTS; EMPLOYEE RELATIONS

§123. General.

Agreements and contract between broadcasting stations, advertising agencies, sponsors and employees of broadcasting companies, follow in the main those encountered in general business practice.

The fact that particular trade names are given to contracts between the station, the sponsor, or the advertising agency, namely "sponsors" or "facilities" contract, and the artist and the station, namely "artists" contract, in nowise changes the fundamental complexion of the basic contract.

The law of contracts by any other name is still the law of contracts as applied to broadcasting stations, networks or those dealing with them.

As in other business relations, special provisions affecting the particular type of business must be considered and embodied in any contract involving that business. So in the business of radio broadcasting consideration must be given to the rules and regulations laid down by F.C.C. affecting time to be sold, right of the sponsor to control his own program, contract renewals based on the renewal of a station license by F.C.C., the right of "censorship" of program material through an examination of script and like matters.

§124. "Cutting" Program Without Cause.

An interesting feature of contracts between a network and a sponsor, and one that has heretofore been given little consideration in the drafting of contracts between the network and sponsor, is that involving the position of a sponsor, who contracts for time on a particular network embracing a given number of stations, when one or more stations of that network refuse to transmit his program. To date no such case has been reported. However, a sponsor that has obligated himself to

pay a network upwards of $100,000.00 for a series of broadcasts including the talent, may have a perfectly legitimate action against a network for failure to perform under such circumstances. Consideration should be given to this in the drafting of all network contracts.

In the spring of 1947 an incident occured which attracted nationwide attention involving a question closely related to the foregoing. Fred Allen, the radio comedian, in one of his Sunday night broadcasts was "cut off" the air by the control engineer of the National Broadcasting Company network. The reason given was that he was about to make a slighting remark regarding certain executives of the network. The remark was given wide publicity and was not defamatory from a legal standpoint. Two other comedians who were about to refer to the situation on their respective programs were likewise "cut-off" the air. The time involved in the "dead" period was, under ordinary circumstances, negligible. However, broadcast time, considered even in seconds, is of no small moment from either the monetary or time viewpoint. Programs are written and planned to split-second timing; costs of minutes on the air are impressive.

Under the conventional network contracts a station or network has little power of censorship. They may insist on an examination of a script but have no greater power of censorship than the wording of their contract and statutory regulation permits.

If on examination of the script the network finds therein material that is of a defamatory character, it is privileged to "cut" such material, provided the author of the script refuses so to do. Harmless quips, jokes, or "wisecracks" aimed at an individual do not come within the category of defamatory remarks, and the mere "opinion" of a network employee that a remark may offend a particular individual is no protection against an action on a contract to recover for time paid for and not furnished.

§125. Furnishing Time on Particular Station.

Where a station or network obligates itself to deliver a specified and particular number of minutes of time on its own or affiliated stations, it is bound by the very terms of its contract to do so or face a suit for breach of contract.

The case of *Pearce v. Puget Sound Broadcasting Company,*[1] is an example of a failure to deliver time on a particular station. In that case the plaintiffs, who were engaged in the radio advertising business, entered into a written contract with the defendant, owners of Station KVI located in Seattle, Washington. The contract required defendants to furnish to plaintiffs certain broadcasting time over its station and to broadcast an original program known as "The Thrift Home of the Air." The program was designed to appeal to housewives.

Sometime after the inception of the program defendants acquired a second station, KOL, also located in Seattle and thereupon changed Station KVI into a station serving Tacoma, Washington. Shortly thereafter the defendants requested plaintiff to use KOL for its program, and plaintiffs agreed, conditionally.

At a later date the defendants wrote several letters to plaintiffs advising them that Station KOL would not continue the original contract to broadcast in Seattle, but that Station KVI in Tacoma would fulfill the contract. Plaintiffs brought suit for breach of contract, alleging that the contract was made and intended to apply to broadcasts to be made over a Seattle station, and that failure to so broadcast would materially affect the advertisers and the listening public.

The defendants countered with the claim that the plaintiffs had failed to pay the rental charges for broadcasts made for several months past, and under its contract it had a right to cancel.

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[1]Pearce v. Puget Sound Broadcasting Co., 170 Wash. 472, 16 P. (2d) 843 (1932).

The case was tried before a jury which found that Station KOL had adopted the original contract with KVI and had breached its terms. Defendant appealed from this judgment.

The appellate court in affirming the judgment held that defendant had breached its contract by changing plaintiffs' period of time on the air. The court further found that the damages awarded were clearly shown in that the program "Thrift Home of the Air" had become an established program, and its effectiveness was injured by the change in time and station.

§126. Change of Time.

As in all matters affecting a new industry, experience is the only teacher. Today station and network contracts with producers, sponsors and agencies contain a clause protecting the station on change of time. The clause is simple but effective, and is usually in the following form: "We reserve the right to change the time of the broadcasts to meet our program and scheduling requirements. In the event a change is necessary, a mutually acceptable time will be agreed upon."

An agency contracting for a sponsor with a station or network may be held liable to the network for time contracted and unpaid for by the agency's client. Under such circumstances the agency may in turn collect from the client.

A case in point is that of *Lockwood-Shackelford Advertising Agency v. Troll.*[2] This was an action to recover certain sums allegedly due plaintiff advertising agency for radio time involved in the broadcast of a series of programs contracted for by defendant through plaintiff. The plaintiff had originally contracted for a particular time of broadcast. Thereafter, the station requested a change in broadcast time. Plaintiff, on being advised of the change, contacted defendant and advised him thereof. Defendant made no protest and permitted the program to continue for a period of about a week at which time he gave plaintiff notice of termination. Plaintiff sued to recover the

[2]Lockwood-Shackelford Advertising Agency v. Troll, (unreported) Superior Court of California L.A. Civil App. 5560 (1943).

sums due under the original advertising contract with defendant, and defendant set up as a defense the change in time.

The lower court in giving judgment for plaintiff found that defendant, after notification, had permitted the program to continue and had accepted the benefits therefrom for a week before giving notice of cancellation.

On appeal it was held that the trial court was justified in finding that the relation between plaintiff and defendant, whether that of agent or independent contractor, had not been breached by plaintiff. It was further held that in the absence of pleading or proof of damages by plaintiff, the latter could not use the change in time as a means of denying his contractual liability to plaintiff. In addition to which, defendant had accepted the benefits of such change before giving notice of termination. Judgment for plaintiff was affirmed.

§127. INDEFINITE CONTRACTS.

Indefinite contracts are always open to attack. In the field of radio it is necessary for the courts to consider the technical meaning of words used in the trade. Most businesses have their own particular "jargon" applicable to certain trade practices or materials used in the trade. Radio is replete with terms wholly unfamiliar to one not closely associated with the industry, for instance the term "package." To a radio-wise individual the word "package" refers to a complete radio show ready for broadcast, that is—the script, writers, actors, master of ceremonies, where one is required, and the announcer.

The term "inquiry" refers to the letters received by a station or sponsor from listeners seeking information about the article sponsored on a particular program. As late as the year 1935 courts considered the word "inquiry" to be so indefinite as to cause a court to find that a contract containing the word was so vague as to be unenforceable.

From the facts in the case of *Reiser Company v. Baltimore Radio Show,*[3] it appeared that the plaintiff was a manufacturer

[3]Reiser Co. v. Baltimore Radio Show, 169 Md. 306, 181 Atl. 465 (1935).

of toilet articles. Through his advertising agency he had made a contract with the defendant, owner of a radio station, wherein the defendant agreed to transmit 26 broadcasts featuring plaintiff's products. The original contract contained a clause to the effect that all agreements between the parties were included in that contract, and that there were no other agreements or understandings between them.

Sometime after the signing of the agreement an agent for the advertising company conducted some correspondence with the defendant which purportedly resulted in a change in the terms of the agreement to the effect that the defendant agreed to furnish plaintiff a minimum of "300 inquiries per week." In return for this concession defendant contended that it was given the privilege of cancelling the contract on four weeks notice, in addition to receiving a percentage on all inquiries.

The broadcasts failed to produce 300 inquiries per week, and defendant refused to continue what it termed "free broadcasts." Plaintiff brought suit against defendant to recover money it had paid for advertising services on the theory that it had contracted for a guaranteed number of inquiries per week, which it had never received.

Defendant set up as a defense that the original written contract contained all of the terms of the agreement between the parties. Defendant further contended that even assuming the later letters could be considered as a part of the contract, they were too indefinite to constitute a valid contract, and the consideration set forth therein was illusory.

The trial court found for defendant. Plaintiff appealed.

The appellate court held that the defendant had ratified the subsequent amendments made by the letters, and that this constituted the complete contract. However, said the court, the word "inquiries" was subject to question in the court's mind. The word is so vague that the court could not determine what the parties meant by the phrase "guarantee 300 inquiries per

week." This being the case, the contract was invalid and unenforceable. Judgment for defendant was affirmed.

§128. CANCELLATION CLAUSES.

In spite of the fact that those engaged in radio broadcasting have gained in experience during the years, it will be found that most contracts with stations and networks have failed to consider sufficiently the matter of cancellation. This same situation is true of contracts between the agency and the sponsor.

Network contracts for "package" shows are ordinarily on a 13, 26, or 52 week basis with no cancellation clause except that embodied in the general clause allowing cancellation of an individual commercial broadcast caused by the necessity of broadcasting an event of general public interest, or the usual exemption in case of strike, failure of facilities, and act of God.

In the drafting of contracts between the station and a sponsor or agency, whether the contract is being drafted for one or the other, consideration given to this phase may save a lawsuit at a later date.

It is of course true, that certain contracts between stations and advertisers or sponsors do contain cancellation clauses in case of failure of the sponsor to pay for the time alloted, as well as containing an option to cancel at the end of a specified period of time. The latter provision was found in a contract involved in the case of *McIntire v. Wm. Penn Broadcasting Company,*[4] which case has been referred to heretofore in Section 80 in reference to religious broadcasts.

In that case it appeared that the plaintiff represented a group of clergymen as well as an organization called the Young People's Church of the Air. The defendant was owner of Station WPEN in Philadelphia. It operated the station under the then usual short term license granted by F.C.C. The matter involved in this action had been laid before F.C.C. which had

[4]McIntire v. Wm. Penn Broadcasting Co., 151 F. (2d) 597 (1945).

ruled in favor of the defendant. Plaintiffs then brought this action.

The plaintiffs had for some time past been in the habit of signing contracts with defendant for the broadcasting of its program. They had always paid their bills. The programs were strictly religious in nature, and at least one-fifth of the available time of the station was devoted to such programs. Each contract signed contained a two week cancellation provision. Expiration dates of all contracts were set for a date prior to Easter Sunday, 1945. Defendant notified plaintiffs that it would not renew its contract, but agreed that plaintiffs would be allowed time over the Easter week period. Contracts with certain other religious groups were continued in force.

Plaintiffs brought this action on the theory that in terminating the contracts and refusing to permit plaintiffs to bid competitively with other religious broadcasters for broadcasting time, defendants were illegally discriminating against plaintiffs, and that the notices of cancellation were illegal as being contrary to the Communication Act of 1934. In addition thereto, plaintiffs alleged that the policy of defendant to give free time to some religious groups and to sell it to others was contrary to the first amendment of the Constitution. For good measure there was added the allegation that the cancellation clause in the contract was without consideration and indefinite.

The court in its finding held that the cancellation clauses contained in the contract were valid in Pennsylvania where the contract was made. Further, the radio station must operate in the public interest and is a "trustee" for the public. Choice of programs rests entirely within the discretion of the station. While F.C.C. had the power to pass on any unfair treatment by the station against the plaintiffs, it had found that the station had a right to cancel the contracts.

The court held that there was no showing that a cause of action existed under any of the Federal anti-trust laws, and the station could, provided F.C.C. and the anti-trust laws per-

mitted it, sell time to whomsoever it pleased. The first amendment to the Constitution, said the court, applied to Congress and the government, and was not applicable to private censorship. The refusal of a radio station to sell time to a particular group or individual may in effect constitute a form of censorship against which there is no statutory prohibition. A radio station is not a public utility, and is not subject to control as such. The plaintiffs' complaint was dismissed.

Failure to include a cancellation clause in a contract resulted in a lawsuit in the case of *Bamberger Broadcasting Service v. William Irving Hamilton.*[5] Plaintiff brought an action against defendant for damages, and based upon the complaint and answer moved for a summary judgment.

It appeared that the defendant advertising agency had entered into three separate contracts with plaintiff on behalf of one of defendant's clients whereby plaintiff agreed to broadcast a certain program over its station for a specified period of time. The contracts specified the weekly rate for the services and provided for an annual rebate. The first two contracts contained cancellation clauses, but the last contract contained no such clause. The term provided for in the first two contracts had elapsed, and they were automatically cancelled. The president of defendant company notified plaintiff that the contract would be cancelled as of a particular date, but defendant continued the broadcasts beyond that date and brought this suit for damages upon defendant's refusal to pay for the broadcasts.

Among other things, the defendant alleged that even though the last contract contained no cancellation clause, such right to cancel must be inferred from the previous contracts and the custom and usages of the business.

The court held that the latter contract was not ambiguous, and permitted of nothing to be read into it. Moreover, since defendant had failed to prove a custom and usage, if such did exist, judgment must be given for plaintiff.

[5]Bamberger Broadcasting Service v. William Irving Hamilton, 33 F. Supp. 273 (1940).

It would seem that the right to cancel a contract between an agency and a commercial sponsor for failure of the latter to pay for the time on the air would be a foregone conclusion. However, here again it must be remembered that the wording of the contract and the action taken to enforce the terms or protect its intendment are the important features.

In the case of *Phillips Roofing Company v. Maryland Broadcasting Company,*[6] the plaintiff filed a bill seeking to enjoin the defendant Station WITH in Baltimore from interfering with the broadcasting of plaintiff's program over defendant's radio station during the life of the contract then existing between the parties.

The terms of the contract provided, among other things, that plaintiff was to pay for the advertising broadcasts before the twentieth day of each month during the term of the contract. Time was declared to be of the essence, and the station reserved the right to cancel the contract at any time in event of a default by the advertiser. The advertiser was delinquent in payments in two successive months, and the station protested the delinquency. In the third month the payment was several days late, and the station cancelled the contract. Plaintiff alleged it was then ready, able and willing to pay.

The trial court dismissed the bill. Plaintiff appealed.

The appellate court held that while equity will not regard time as of the essence unless the parties have expressly made it such, this contract did so provide. The facts indicated that plaintiff had mailed the last payment to the defendant several days prior to the 20th of the month, but the check was not received until after that date by defendants. The court further held that the acceptance of the late payments in the prior cases would constitute a waiver of the time element, but that the defendant had indicated a refusal to waive delay by its request for prompt payment in the future. However, in view of the fact that the delay occurring in the receipt by defendant of the last check was an excusable one,

[6]Phillips Roofing Co. v. Maryland Broadcasting Co., 40 Atl. (2d) 298 (1944).

equity will not step in to cancel the contract. The trial court's dismissal of the bill was reversed.

The advantage of a "saving" clause permitting interruptions of sponsored programs is found in the case of *Marcus Loew Booking Agency v. Princess Pat, et al.*[7]

An action was brought by the plaintiff against the defendant Princess Pat to recover money due on a contract to broadcast advertising matter for Princess Pat. The advertising agency for Princess Pat was also joined as a party defendant on the theory that as it had signed the contract for Princess Pat, it too was responsible to defendant for payments due under the contract.

The defendant Princess Pat set forth as one of its defenses that the plaintiff and not the defendant had breached the contract in that the plaintiff had for some time past interjected into defendant's broadcasts announcements of the results of horse racing events.

The only dispute as to the facts was the question of whether the defendants were aware of these "flash" interruptions which had been in effect since the inception of the program. Plaintiff contended that defendant was fully aware of the facts and had never protested the activity, but had paid its bills for the first five weeks without protest.

The contract between the parties contained a clause to the effect that "The station reserves the right to devote part or all the time allotted to the advertiser for the purpose of broadcasting events it deems to be of special importance or interest."

The agency defendant moved for a directed verdict against it. This motion was denied, and judgment was entered for plaintiff. Defendants appealed.

The appellate court found that the contract between the parties contained no clauses providing for payment by the agency, nor did the agency promise to pay, and it was therefore not bound by the contract. The judgment of the lower court was reversed on

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[7]Marcus Loew Booking Agency v. Princess Pat, et al., 141 F. (2d) 152 (1944).

this ground, and it was stated that the motion to dismiss made by the agency defendant should have been granted. However, the appellate court affirmed the lower court's judgment in favor of plaintiff.

The dissenting opinion is of particular interest. In voicing dissent it was said in effect that attention is called to the clause in the contract to the effect that "The station reserves the right to devote part or all the time allotted to the advertiser for the purpose of broadcasting events it deems to be of special importance or interest." Using the rule, said the dissenting opinion, of "the expression of a particular thing in a contract excludes all others," this excludes the right of plaintiff to interrupt defendant's use of time for all other things.

The dissenting opinion further said that the trial court should have held that news of horse racing and betting odds is not of special importance or interest, and this question should never have been presented to the jury. Emphasis of racing is not on the winning horse, but on gambling. The running of the Kentucky Derby, however, might be considered as an event of special importance sufficient to justify interruption under the contract.

Not infrequently a station or network is forced to cancel or shorten a particular program. Under such circumstances, the courts have been more inclined to order a refund or reduction in rate for the unused period of time rather than to decree a cancellation.

Rarely will a station deliberately and without cause shorten or cancel a broadcast and use the time for other purposes. Where such a situation does occur, the courts take an entirely different view of the situation, as reflected in the case of *Barney's Clothes, Inc. v. WBO Broadcasting Corporation*[8] of New York City. In that case the plaintiff, a clothing merchant, brought suit against defendants, setting forth in his complaint nine separate causes of action based on breach of contract.

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[8]Barneys Clothes, Inc. v. WBO Broadcasting Corp., 253 App. Div. 889, 3 N.Y.S. (2d) 205 (1937); but see, World Broadcasting System v. Eagle Broadcasting Co., 162 S.W. (2d) 463 (1942).

Plaintiff alleged that he had entered into a contract with defendant wherein defendant had agreed to broadcast plaintiff's program at a specified period of time and for an agreed number of minutes for each program, in addition to broadcasting certain spot announcements. Although the plaintiff had paid in full for the services to be rendered, the defendant, it was alleged, had shortened the program and limited the number of announcements below the agreed number. When plaintiff discovered this situation he brought suit to recover the full amount paid. Defendant moved to dismiss the action.

The court held the covenants of the contract were interdependent, and in order for defendant to receive payment he must show full performance. The complaint being based on a deliberate rather than an excusable act on the part of defendant, the plaintiff may recover the full amount paid. Motion to dismiss was denied.

An advertiser contended that the broadcaster had interfered with his business by making defamatory remarks about the business, and on such basis refused to pay for the broadcasts in accordance with his contract, and attempted to cancel same. He was nevertheless bound to make such payments if he permitted the broadcasts to continue, held the court in the case of *Fitzpatrick v. Blue Star Auto Stores.*[9]

A station cannot cancel a contract on the arbitrary opinion of an employee that the material contained in the script might be slanderous or libelous, merely because the contract contained a clause that "all material is subject to the approval of the station manager," said the court in the case of *Rose v. Brown.*[10] If the submitted material was in fact harmless, the station is obliged to present the broadcast in accordance with the terms of its contract.

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[9]Fitzpatrick v. Blue Star Auto Stores, 312 Ill. App. 184, 37 N.E. (2d) 928 (1941).

[10]Rose v. Brown, 186 Misc. 553, 58 N.Y.S. (2d) 654 (1945).

§129. Specific Performance of Contracts.

Specific performance of a contract involving broadcasting facilities has been considered by appellate courts on several occasions. In each of the instances the circumstances surrounding the action were somewhat out of the ordinary, leaving doubt as to whether the remedy of specific performance would be available under an ordinary contractual relationship.

In the case of *Daily States Publishing Company v. Uhalt,*[11] an action was brought to specifically enforce a contract by enjoining its breach. A written contract between the parties provided that the plaintiff was to devote space in its newspapers to the publicizing of defendant's radio station. Defendant in turn agreed not to permit any other newspaper to use the station's facilities for broadcasting purposes and to grant plaintiff the right to use the station at any time for the broadcasting of sports events, news and the like. Defendant sought to terminate the contract. Plaintiff brought this action on the theory that the contract was irrevocable so long as defendants owned the station.

The court held that the contract set up a joint venture which could be terminated at will upon reasonable notice. Further, specific enforcement would not be granted where such enforcement would require the continuous supervision of a series of acts.

In the case of *First Mission Covenant Church of Rockford v. Rockford Broadcasters,*[12] the plaintiff brought an action against defendants for specific performance of a contract to broadcast plaintiff's church services without cost to plaintiff.

The facts disclosed that in 1923 the pastor of the plaintiff church owned a radio station. He turned the station over to plaintiff in 1924, and in 1927 it was returned to him. As a part of the condition of the return of the station to the pastor, a resolution was set up providing that the station was to be

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[11]Daily States Publishing Co. v. Uhalt, 169 La. 893, 126 So. 228 (1930).

[12]First Mission Covenant Church of Rockford v. Rockford Broadcasters, 324 Ill. App. 8, 56 N.E. (2d) 632 (1944).

returned to the pastor on condition that the church would receive free time on the air for all its services. The pastor agreed to this and continued to give the required free time on the air to the church until the defendant corporation was organized. This corporation consisted of the pastor and certain trustees of the church. The corporation was organized for profit. The pastor assigned the station to the corporation in return for stock in the corporation.

The corporation entered into a written agreement with the pastor that the church would continue to have free time on the air. Gradually the time allotted the church was cut by the corporation, and the plaintiffs sued.

The court held that although there was consideration for the contract, this was not a case for specific performance as there was a lack of mutuality in the agreement. The agreement, said the court, was indefinite as to time. If specific performance were allowed, it would require continuous supervision and direction by the court which the court would not undertake.

A case of similar import was that of *Churchill Evangelistic Association, Incorporated v. Columbia Broadcasting System.*[13]

§130. Facilities Contracts.

Consideration should be given to facilities contracts made either directly between the advertiser and the station or indirectly between the agency representing the advertiser and the station.

Where a station makes a contract directly with the agency it has a twofold protection. The station may recover under the contract against the agency and may in the same action join the advertiser.

The tendency toward simplification of contracts is aptly displayed in the majority of instances involving facilities con-

[13]Churchill Evangelistic Ass'n., Inc. v. Columbia Broadcasting System. 236 App. Div., 624, 260 N.Y.S. 451 (1932).

tracts. The contract is ordinarily made with the agent "for broadcasting time . . . for furthering the interests of the advertiser". The company (station) agrees to broadcast the program on specified days at "approximately" the time agreed upon, furnishing such studios as it deems advisable, as well as the advisory services of its program department and its mail receiving department.

The usual clauses as to failure to broadcast by reason of acts of God, strikes, and federal, state, or municipal laws or regulations are included. Where a change in broadcasting time is made necessary, the company agrees to give only reasonable notice, and reserves for itself the right to interrupt the program for events of public importance, and to reduce charges accordingly. The company further agrees that it will pay to the agency or advertiser out of pocket expenses for failure of the company to broadcast.

The company reserves in all of its contracts the right to edit and modify the continuity "to the extent that it conforms with public interest and company policy." Such a clause is indefinite in its phraseology, and is subject to interpretation by the courts.[14]

One outstanding omission in such contracts involving networks is the failure to include therein protection for the network, in case of failure of an affiliated station to carry the broadcast contracted for, by reason of differences between the company and the affiliated station.

"Package show" contracts with producers contain much the same language as do the facilities contracts, except of course there is added thereto details of the "series", the manner of production, and the specific parties to be engaged on the program.

The length of time and right of cancellation by the company is clearly set forth, but no right is here given to the owner

[14]See §78.

of the package show to cancel. Special features affecting a particular program are included in the master contract.

Television rights are carefully protected on behalf of the station. Employee relations are referred to, and the right of the company or the sponsor to use the biography and likeness of all parties participating in the "show" is granted to the company. Right to recordings and repeats are likewise granted to the company.

Controversies are referred to arbitration rather than left to an initial court determination.

Where a "package show" is sold to a station or network there usually follows after the agreement with the original station or network, a contract with the advertiser or his agency.

In such contracts the terms closely follow those between the producer of the "show" and the station, except that there are added clauses affecting the total cost of the production and the length of the original series. Right of cancellation is given to the sponsor at specified intervals after notice in writing prior to the expiration of the specified period.

Extension of the contract is likewise provided for, as are the rights of the sponsor to make "cow-catcher" and "hitch-hike" announcements.

The producer assumes all liability for his employees and agrees to indemnify the sponsor against all actions that might involve the program.

The sponsor is granted the right to use the name of the program during its sponsorship of the program only, and as in the case of the station, the sponsor is given the right to use the names, pictures and biographies of all participants in the show.

The simplicity of these contracts is the primary reason for the fact that few actions involving such matters have ever reached the courts.

§131. Employees' Sales Contracts.

Not quite so simple are the legal implications of employer-employee relations, particularly where no written contract exists.

Where the question of oral contracts is concerned, the final decision rests squarely on the facts of the case at issue. The opinion of the court is the determining factor.

In the case of *Brea v. McGlashan,*[15] it was alleged that the plaintiff and defendant had entered into an oral contract under the terms of which the defendant owner of Station KGFJ in Los Angeles, California, had hired plaintiff to solicit radio advertising contracts for him.

Plaintiff contended that for such services she was to receive 25% of the amount paid by advertisers that she procured. Plaintiff further alleged that she had procured several accounts on this basis, among which were the accounts of the May Company and Weaver-Jackson. The complaint, among other matters, set forth a count requesting an accounting on the grounds that plaintiff had no knowledge as to the amount paid for radio time by the advertisers procured by her. In support of her position the plaintiff alleged that defendant, after ascertaining that plaintiff had obtained oral commitments from the merchants involved, had acted unfairly in that he then sent other agents to these merchants and obtained written contracts from them in an attempt to deprive plaintiff of her commissions.

The defendant attacked the complaint on the grounds that it stated no cause of action. The court entered judgment for the plaintiff, and defendant appealed.

On appeal the court held that the statement of a cause of action for accounting was sufficient as alleging a relationship necessitating an accounting. It was not necessary for plaintiff to allege in her complaint facts already within the knowledge of the defendant such as the terms of the contracts

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[15]Brea v. McGlashan, 3 Cal. App. (2d) 454, 39 P. (2d) 877 (1934).

actually entered into between defendant and the advertisers or how these contracts were negotiated and procured. The trial court had found that two accounts were "procured" through plaintiff's efforts, even though the final contracts were made by others than the plaintiff. The word "procured", said the court, does not mean the final consummation of an agreement. Plaintiff is entitled to recover percentages on such contracts as she "procured". Judgment of the lower court in favor of plaintiff was affirmed.

A case somewhat similar in its facts was that of *Taylor v. Educational Broadcasting Corporation,*[16] where the plaintiff brought suit for commissions on an alleged contract and for personal services and damages for breach of contract.

The evidence disclosed that plaintiff was a radio advertising agent, and that defendant was the owner of Station KROW in Oakland, California. It appeared that plaintiff and defendant had entered into a written contract whereby defendant employed plaintiff as agent to negotiate with a certain newspaper for the purchase of time over Station KROW. A contract was entered into through the efforts of plaintiff, wherein the newspaper agreed to purchase time on defendant's station for a period of six months with an option of renewal for an additional six months at certain specified rates. In line with the contract with the newspaper the contract between plaintiff and defendant was changed giving plaintiff the right to commissions should the newspaper exercise its option. Over a period of years other contracts were made with the newspaper.

After a time the defendant station notified the plaintiff to the effect that "plaintiff had failed to service the account" as required by his contract of employment, and that defendant would in the future deal with another agent, and plaintiff's contract was therefore rescinded. The newspaper entered into

[16]Taylor v. Educational Broadcasting Corp., 34 Cal. App. (2d) 680, 94 P. (2d) 377 (1939).

a new oral contract with the station through a different agent, and plaintiff brought this action.

The trial court found in favor of defendant and plaintiff appealed. On appeal the court held that the inference to be drawn from the contract between plaintiff and defendant was that plaintiff was employed to sell the defendant's services to the newspaper and not to re-sell them at a later date. The clause to be considered was that existing in the contract between plaintiff and defendant at the time of the original agreement with the newspaper. Evidence of usage is not admissable to show a meaning contrary to the words of the instrument itself where such meaning is clear from the wording of the agreement. Judgment for defendant was affirmed.

§132. Oral Contracts for Personal Services.

An interesting case from the standpoint of interpretation of oral contracts is that of *Hopper v. Lennen & Mitchel, Incorporated.*[17]

In that action plaintiff filed a complaint consisting of four separate causes of action. The suit was filed in the Superior Court of California and removed to the Federal District Court on the grounds of diversity of citizenship.

The action was based on an anticipatory breach of contract, and plaintiff sought damages therein.

The first cause of action alleged an oral agreement wherein plaintiff was to render certain services on the radio for a number of twenty-six weekly periods. Defendant agency retained the right to cancel the contract upon notice to defendant four weeks prior to the ending of any twenty-six week period.

The second cause of action was in effect identical with the first cause, except that it alleged the defendant agency had entered into the contract on behalf of the defendant Jergens

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[17]Hopper v. Lennen & Mitchel, Inc., 146 F. (2d) 364, 161 A.L.R. 282 (1944); see also, Copeland v. Hill, 126 S.W. (2d) 567 (1939); and National Broadcasting Co. v. Twentieth Century Sporting Club, 29 N.Y.S. (2d) 945 (1941).

Company, and that both the agency and Jergens Company had failed to abide by the contract.

The third cause of action alleged radio services by the plaintiff Hedda Hopper under another oral contract; and the fourth cause of action set forth that the defendant Jergens had induced the defendant agency to breach its contract with plaintiff by bringing pressure on creditors of plaintiff in an effort to injure plaintiff in her business.

The defendants filed a motion to dismiss the complaint on the grounds that verbal agreements are unenforceable in California when they cannot be performed within a year of their making, being therefore within the Statute of Frauds of that state.

As a further ground to dismiss, defendants alleged that the contracts were too indefinite and uncertain to be enforceable, in that the supposed contracts made no mention as to when, where, or for how long a period each week plaintiff was to give her services; or what she was to do on the program, or who was to prepare her scripts and the like.

The plaintiff contended that the contract had reference to a program already in existence, and that the alleged defects were cured by the allegations of the first two causes of action which contained more definite statements of broadcast terms than did the third cause of action.

The court held that a contract which by its general terms is not to be performed within one year cannot avoid the Statute of Frauds merely because it may be defeated by a given event.

The court further held that the third cause of action alleging services under an oral contract was sufficient to constitute the pleading of a valid contract, stating that the parties may introduce evidence of the terms commonly inserted in contracts of this sort. However, the fourth cause of action indicated that a confidential relationship existed between the defendant agency and Jergens, and therefore Jergens had a justifiable reason to cause defendant agency to breach its contract.

The court granted the motion to dismiss the first, second, and fourth counts on the ground that they stated no cause of action but denied the motion as to the third count.

An appeal was taken to the Circuit Court of Appeals. This court called attention to the fact that the plaintiff contended the contract was one that could be performed within one year. Defendants sought dismissal on the grounds that the contract was for more than one year and therefore unenforceable under the Statute of Frauds of California. In this regard the Circuit Court stated there is a division of opinion on the subject; and California follows the minority rule that if a contract by its terms can be performed within a year, it is not within the Statute of Frauds. The California rule was followed, and the motion to dismiss was denied.

The suit was later dismissed by the parties.

§133. Specific Performance of Personal Service Contracts.

Actions to enforce personal service contracts are in fact brought, it may be said, in reverse.

Since a court cannot compel an individual to render personal services to another even though he has contracted to do so, it must enforce its orders in such cases by enjoining the individual from rendering personal services to others.

As an instance, in the case of *Rooney v. Weeks*,[18] the plaintiff brought an action to restrain the defendant under a negative stipulation in a contract for personal services from working for others during the term of the contract. In addition thereto, the plaintiff sought damages for breach of contract.

The defendant alleged in his answer that plaintiff had violated the contract.

The evidence disclosed that plaintiff conducted a radio advertising business and had entered into a contract with defendant for his services as the head of an orchestra, as musical director

[18]Rooney v. Weeks, 290 Mass. 18, 194 N.E. 666 (1935).

and as vocalist. Under the terms of the contract defendant agreed to work for no one else during the life of the contract. The contract further contained a clause to the effect that if defendant's services were not satisfactory, plaintiff could discharge him without liability.

During the life of the contract defendant engaged in activities in the form of broadcasts and musical engagements for others. Such activities conflicted with his work for plaintiff, who agreed that defendant might relinquish his position as orchestra leader on plaintiff's program. This agreement was later revoked by plaintiff, but defendant ignored such revocation and continued to render services to others.

The court in its decision commented on the meaning of the provision in the contract referring to defendant's "satisfactory" services and stated that this term must be construed as meaning "reasonably" satisfactory and not "personally" satisfactory to plaintiff. Further, said the court, there is nothing in the contract from which it could be implied that plaintiff should keep defendant at work or that this was essential to his reputation as a vocalist or musician. Nor, said the court, was there any evidence of custom or usage to support such an implication. Judgment was rendered for plaintiff.

In actions to enjoin a party to a contract for exclusive personal services the courts have held that it must appear that the services for which an injunction is sought are such as interfere with, or are similar to, those embraced in the contract between the parties.

In the case of *J. Walter Thompson Company v. Winchell,*[19] the plaintiff advertising agency which had entered into a contract with defendant Walter Winchell as the principal, brought an action to enjoin the defendant from performing under a contract covering the use of Winchell's name and picture on advertisements endorsing certain hotels and restaurants. The

[19] J. Walter Thompson Co. v. Walter Winchell, 244 App. Div. 195, 278 N.Y.S. 781 (1935).

ads were to be in a series of thirteen and were to be distributed throughout the United States. At the time of the filing of the action plaintiff sought a temporary injunction pending the trial of the case.

Plaintiff took the position that it had a contract with the defendant Winchell for his exclusive services on radio in a program for Jergens. Defendant, said plaintiff, had agreed in that contract not to perform on any other program during the term thereof. In addition, defendant had given Jergens the right to use his name and picture in their advertisements.

The defendant advertising agency had contracted with Winchell on behalf of another advertiser to permit the latter to use Winchell's name and picture. Plaintiff protested this contract and notified defendants in writing of their objection, the notice being received after the series of ads complained of had begun. The trial court granted plaintiff an injunction. An appeal from this order was taken.

On appeal the court held that it was not clear as to whether performance of defendant advertiser's contract would interfere with performance of plaintiff's contract.

However, there was no allegation of bad faith on the part of defendants, and the latter are not liable for interference with plaintiff's contract in the absence of such bad faith, tortious conduct or fraud. This was not a case, said the court, where the employee performs similar services for substantially the same kind of business. The plaintiffs could not show irreparable damage since Winchell did not indorse any products in connection with the contract with defendant advertiser.

The order of the trial court granting the injunction was reversed.

§134. Reasonable Value of Services Rendered.

Broadcasting companies, particularly networks, will often engage the services of individuals as musical directors or orchestra leaders. Under such conditions a contract for those

services is entered into between the company and the employee. Provisions of that type of contract frequently include one wherein the employee will receive a certain percentage for each individual commercial broadcast on which the employee works.

In order to "tie up" a particular commercial advertiser the company will on occasion agree that the services of the orchestra leader or director will be "thrown in" without charge.

Such a situation prevailed in the case of *Straub v. Buffalo Broadcasting Company*[20] where the court held that even though the company defendant made no charge to the advertiser for plaintiff's services, plaintiff was nevertheless entitled to recover for the reasonable value of such services rendered.

§135. Labor Disputes.

One of the most widely publicized actions of its kind was that involving the *United States v. American Federation of Musicians*.[21] The United States sought to enjoin the defendants from certain activities allegedly against the Sherman Anti-trust Act.

The defendants, with a membership of about 140,000, comprise virtually all of the musicians in the United States who perform for hire. The defendants were charged with conspiracy in restraint of trade involving the making of phonograph records, electrical transcriptions and radio broadcasts. They were likewise charged with eliminating competition between "canned music" and "live music" on the basis that they had agreed, among other things, to prevent radio stations from broadcasting recorded musical compositions and to prevent the sale of phonograph records to such stations by requiring the manufacturer to boycott all distributors who sold records to them. They were further charged with attempting to eliminate all performances of musical compositions over the air except those

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[20]Straub v. Buffalo Broadcasting Co., 289 N.Y.S. 1020 (1936).

[21]United States v. American Federation of Musicians 318 U.S. 741, 87 L. Ed. 1120, 63 S. Ct. 665 (1943); see also, Yankee Network v. Gibbs, 295 Mass. 56, 3 N.E. (2d) 228 (1936).

broadcast by members of the defendant organization, and with requiring stations to hire unnecessary "stand by" musicians.

It was alleged that James Petrillo had notified the National Broadcasting Company that it must cancel the Interlochen High School Orchestra broadcasts. He had further ordered the A.F. of M. bands to boycott all Don Lee Broadcasting System stations in order to force Station KFRC in San Francisco, California, to hire a larger and more expensive orchestra.

The government took the position that the exemption of labor from anti-trust laws is limited to controversies involving "terms and conditions of employment".

The court held that the case unquestionably involved or grew out of a dispute in relation to a condition of employment and was one contemplated by the Norris-LaGuardia Act.

Under this statute the court had no right to grant an injunction and therefore had no jurisdiction over the matter.

On appeal to the Supreme Court the decision of the lower court was affirmed.

In the case of *United States v. Petrillo,*[22] the defendant was charged with violating Section 506 of the Communications Act of 1934 (commonly known as the Lea Act.) Under the provisions of this Act, it is unlawful for any person to use threats or coercion to compel any licensed radio station to employ a greater number of persons than is needed.

The action was dismissed by a Federal District Court on the grounds that the amendment to the Communications Act was unconstitutional. The trial court held that the statute violated the First, Fifth, and Thirteenth Amendments to the Constitution in that it is indefinite and uncertain, restricts freedom of speech and peaceful picketing, and is an unreasonable classification between broadcasting employees and others.

An appeal was taken by the government directly to the Supreme Court.

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[22]United States v. Petrillo,—U.S.—, 91 L. Ed. 1403, 67 S. Ct. 1538—(June 23, 1947).

The Supreme Court of the United States, in reversing the judgment of the trial court, held that the Lea Act was constitutional. The majority opinion held that the language used in the statute was sufficiently definite to define a criminal offense. The fact, said the court, that the Act singles out broadcasting employees for regulation does not violate equal protection of the laws, since Congress can legislate against certain evils and leave others unregulated.

In passing upon the question of whether picketing constituted "coercion" as charged by the government, the court held that although peaceful picketing is a legitimate labor weapon, the use of picketing as a weapon to accomplish an illegal objective is subject to legislative restraint.

The question as to whether the statute forced employees to work against their will, contrary to the Thirteenth Amendment, was not decided, as it was declared to be not in issue in this case.

Three members of the court dissented on the ground that the phrase in the Lea Act which forbids compelling a licensee "to employ . . . any person or persons in excess of the number of employees needed by such license to perform actual services" is too vague in its language. The dissent further stated that a determination of the scope of such language is something for which common experience and legal precedents furnish no guide. For this reason it was their opinion that a more precise definition should be afforded by the statute to meet constitutional requirements.

§136. Ownership of Material Created While Employed.

No matter what precautions may be taken, there is always the possibility of a suit. The protection afforded by a written contract, while not avoiding a suit, will go far toward making the outcome less uncertain for the individual who has abided thereby.

In the case of *Brown v. Molle' Company,*[23] the facts of which are set forth at length in Section 107, it appeared that plaintiff had written the words to a song while in the employ of defendant's agent, which song was included in defendant's radio show.

Plaintiff later left the employ of the agent and attempted to claim the song as his copyrighted property.

The court in its decision said in part that while the words to the song were in fact plaintiff's production, they belonged to the agency in trust. Plaintiff, said the court, having written the words to the song especially for defendant's program, could not consider them as his individual property. Where an employee creates someting as part of his duties under his employment, the thing created belongs to the employer.

The court in the case of *Phillips v. WGN, Incorporated,*[24] arrived at the identical conclusion.

The case of *Kantel v. Grant,*[25] arising in Canada, arrived at a conclusion contrary to the foregoing cases. In this respect it must be remembered that under British copyright law there need be no registration such as is required under our statutes.

§137. Fair Labor Standards Act.

Several actions have been brought against stations and producers of radio shows for wages due under the Fair Labor Standards Act. In such actions the courts have held that the employees were engaged in interstate commerce and therefore properly came within the statutory provisions of the Act.

In *Reck v. Zarnocay,*[26] the plaintiff brought an action against "Sammy Kaye", for wages allegedly due under the Fair Labor Standards Act. The principal question involved was whether the plaintiff was engaged in interstate commerce and in the "production of goods for interstate commerce" within the mean-

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[23]Brown v. Molle' Co., 20 F. Supp. 135 (1937).
[24]Phillips v. WGN, Inc., 307 Ill. App. 1, 29 N.E. (2d) 849 (1940).
[25]Kantel v. Grant, Canada Law R. (Exch. Ct. 1933) 84.
[26]Reck v. Zarnocay, 264 App. Div. 520, 36 N.Y.S. (2d) 394 (1942).

ing of the Act. Plaintiff was engaged in loading and unloading equipment and baggage of the defendant's band on regular interstate tours and in the packing and manufacturing of phonograph records recorded by the band, which were shipped from one state to another for distribution.

The court held plaintiff's work was so closely aligned to interstate commerce as to be practically a part of it, and he was therefore entitled to judgment.

In the case of *Wilson v. Shuman,*[27] the plaintiff, a clerical worker engaged in timing and placing programs on defendant's station, sued for wages due. The court held that plaintiff was engaged in interstate commerce and entitled to recover under the Fair Labor Standards Act.

§138. Workmen's Compensation Statutes.

Recovery by employees under the various Workmen's Compensation statutes hinges on the facts of the case regarding the course of employment of the injured individual. There are no special provisions affecting radio advertisers or stations as employers, except that it is to be noted that where an individual is employed on a strictly commission basis he is nevertheless entitled to protection under the statutes.

Courts have confirmed this position in the cases of *Fischer v. Stephens College of Columbia*[28] and *Bronson v. National Battery Broadcasting Company.*[29] In the latter case the decision was rendered in favor of the defendant on the grounds that the deceased was not engaged on business for the employer at the time of his death.

§139. Service Agencies for Broadcasting Stations.

Radio broadcasting services present problems peculiarly their own. Contracts for such services should be broad and all inclusive.

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[27]Wilson v. Shuman, 140 F. (2d) 644 (1944).
[28]Fischer v. Stephens College of Columbia, 47 S.W. (2d) 1101 (1932).
[29]Bronson v. National Battery Broadcasting Co., 200 Minn. 237, 273 N.W. 681 (1937).

In the case of *Radio News Association, Inc. v. Eagle Broadcasting Company,*[30] the plaintiff news service agency brought an action against the defendant radio station for a balance allegedly due under a contract wherein the plaintiff had agreed to sell and deliver, and defendant had agreed to buy and accept a regular news service prepared and transmitted to defendant's station by plaintiff over short wave radio.

Defendant alleged that certain of plaintiff's transmissions were not received and refused to pay for these.

Plaintiff made a showing that it had used diligent efforts to secure adequate transmission facilities and suitable radio frequencies for such transmission and claimed that it had not guaranteed reception by defendant in case of factors beyond its control. The trial court found in favor of defendants.

Plaintiff appealed, and the appellate court held that the contract between the parties expressly provided that the plaintiff did not guarantee reception by defendant. The latter, said the court, may have suffered a hardship because of the wording of the contract, but defendant had sought no reformation of the contract nor had it pleaded failure of consideration. The judgment of the lower court was reversed.

The case of *King Features Syndicate v. Valley Broadcasting Company*[31] involved the forced removal of the defendant station in Mexico from one point to another and the subsequent refusal of the station to accept the services of the plaintiff. The court held that a specific provision in the contract between the parties provided that the agreement was subject to all the rules of the United States and the Mexican Federal Communications Commissions. Since this clause covered the circumstances of the move, the defendant was relieved of its obligation to accept plaintiff's services.

Where a station that has contracted for the services of a news agency refuses to continue with its contract, such agency

[30]Radio News Association, Inc. v. Eagle Broadcasting Co., 144 S.W. (2d) 915 (1940).

[31]King Features Syndicate v. Valley Broadcasting Co., 133 F. (2d) 127 (1943).

has three remedies. These remedies were specifically set forth in the decision in the case of *King Features Syndicate v. KMTR Radio Corporation.*[32] There the court pointed out that the plaintiff (1) may treat the contract as rescinded and recover in an action on *quantum meruit*, so far as the services furnished were concerned; or (2) he may treat the contract as one continuing in existence for the benefit of both parties, he being ready, able and willing to perform; or (3) he may treat the breach as putting an end to the contract for all purposes and sue for the profits lost by the organization as a result of the breach.

If the service agency elects to sue for loss of profits, it must be prepared to prove such loss caused by the breach of contract.

In the case of *King Features Syndicate v. Cape Cod Broadcasting Company,*[33] an award of nominal damages only was granted to plaintiff, by reason of an insufficient showing at the trial as to the amount of profits lost by it due to the cancellation of the contract.

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[32]King Features Syndicate v. KMTR Radio Corp., 29 Cal. App. (2d) 247, 84 P. (2d) 322 (1938).

[33]King Features Syndicate v. Cape Cod Broadcasting Co., 318 Mass. 783, 64 N.E. (2d) 925 (1945).

CHAPTER XVI

TELEVISION, FREQUENCY MODULATED (FM) AND INTERNATIONAL BROADCASTING STATIONS

§140. STATE CONTROL OF TELEVISION AND FM STATIONS.

Today the average radio listener hears programs exclusively within the range of what is known as the standard broadcast band, extending from 550 to 1600 kilocycles. Occasionally he listens to a short wave broadcast on the international broadcast band, covering a range from 6,000 to 21,700 kilocycles. The future promises a wider use of the radio spectrum.

Experimentation in the field of television is fast approaching the stage of regular transmission by stations and reception by the public. Well past the experimental stage is the development of "frequency modulation" broadcasting as opposed to "amplitude modulation". Research in the field of FM has disclosed a number of advantages to be gained by its use, among which is the virtual elimination of static with a resultant improvement in the fidelity of reception.

For technical reasons, both television and FM broadcasting require relatively wide channels for their operation. While a standard broadcasting station requires a band width of ten kilocycles, an FM station is permitted a band width of 200 kilocycles. Due to the width of the channel the present day standard broadcast band and the short wave band are inadequate for FM or television stations. Because of these factors FM and television stations have been assigned frequencies in the "very high frequency" range. For example, FM broadcast stations were assigned frequencies extending from 88.1 megacycles to 107.9 megacycles, while television broadcasting stations have been assigned frequencies of a range beyond both the standard and FM bands.

Radio waves in the "very high frequency" range behave differently than do waves of the standard and short wave bands.

For practical purposes these "very high frequency" waves may be "picked up" only by receiving stations which are in "the line of sight" of the transmitting antenna. A better understanding can be had of what is meant by "the line of sight" if the reader will imagine a searchlight as being situated upon a hill which can be seen only if he is in a position to see the top of the hill on which the searchlight is situated; the reader would then be in "the line of sight".

The importance of this characteristic is that antennas for FM or television stations should be situated in such topographic areas as will afford an unobstructed "view" of the territory to be served. Interference with "line of sight" means interference with transmission, and as a result such stations have a limited radius of efficient transmission.

Because of the interference extant in the natural contours of the terrain, FM or television stations cannot reach such distant territories as are presently served by the standard broadcast or short wave stations. However, the use of "repeater" stations will broaden this field. It therefore follows that there must be a proportionately greater number of such stations in order to serve a particular community.

The fact that FM and television stations have a limited range of operations presupposes the idea of greater control by state and municipal governments. For example, if an FM station were situated in a valley where it could not be heard in practice outside of that valley, and certainly could not be heard outside the borders of the state wherein it was located, would it then be within the power of the state to tax such stations on the theory that their business is one falling within the meaning of *intrastate commerce?*

Even if it were possible to show that the waves from an FM station were not crossing a state's borders, it would be an almost impossible task to prove that such station "might not interfere with interstate commerce."

Assume that scientific proof could be offered to the effect that a given FM station does not interfere with the transmission of programs of a station engaged in interstate broadcasting. It still cannot be said that it is impossible for the radio waves from this FM station to be received outside the borders of its home state. If an FM station were situated on Pike's Peak in Colorado, theoretically it would be possible to hear this station in Florida.

Should the courts take a contrary view, the judge so deciding must base his decision on speculative, highly technical and conflicting evidence of the topographical and physical possibilities involved.

It is submitted that all radio broadcasting should be regarded as amenable to congressional jurisdiction, and consequently immune from state control except as relates to the police powers of a state.[1]

§141. Monopolies.

Since at the present time antenna sites for FM or television stations must be situated in a position overlooking the territory intended to be served, there has been a general effort to "tie up" desirable locations. The F.C.C., noting this trend, has made efforts to prevent the "cornering" of such locations by a few operators. The Commission has established the rule that a license will not be granted or renewed for stations owning or controlling a site particularly situated for this type of broadcasting when such station has refused to make a portion thereof available to other licensees who have no comparable site at their disposal.[2] The foregoing requirement applies only where an exclusive use would unduly restrict competition within a given area. Under the conditions stated, an FM or television station must share the use of a particularly desirable antenna site or chance the loss of its license.

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[1]See Chapter I.

[2]F.C.C. Rules and Regulations §§3.239 and 3.639.

In the F.C.C. "Report on Chain Broadcasting",[3] the Commission looked with disfavor on the ownership of more than one station by a network. Since it later had the opportunity to create license requirements for a new type of radio broadcasting, it prohibited any person from owning or controlling more than one FM or television station covering substantially the same service area.[4]

In addition, the rules prohibit the ownership or control of more than one FM or television station located in different service areas except upon a showing that such multiple ownership would foster competition or provide distinct and separate services. It is provided that such multiple ownership shall not result in a concentration of control that would be inconsistent with public interest, convenience or necessity. The rules provide that the Commission will consider the ownership or control of more than six FM or television stations by one person as being inconsistent with public interest, convenience, or necessity.

§142. International Broadcasting Stations.

Broadcasting programs transmitted to foreign countries are so transmitted by means of international broadcast stations. These stations must be specifically licensed for the transmission of broadcast programs for international public reception, and frequencies between 6000 and 21,700 kilocycles have been assigned for this purpose.

Special requirements are laid down by the Commission for these stations in respect to the programs which they may transmit.[5] The stations are permitted to "render only an international broadcast service which will reflect the culture of this country and which will promote international good will, understanding, and cooperation." Programs intended for and directed to audiences in the continental United States do not meet the requirements for an international program.

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[3]Report on Chain Broadcasting, Commission Order No. 37, Docket No. 5060 (1941).
[4]F.C.C. Rules and Regulations §§3.240 and 3.640.
[5]F.C.C. Rules and Regulations §§3.778 and 3.789.

The Rules and Regulations of the F.C.C. permit commercially sponsored programs to be broadcast over international stations, provided the program gives nothing more than the name of its sponsor and the name and general nature of the product or service advertised. The product must be sold or about to be sold on the open market in the countries to which the program is beamed. Since specific foreign countries are intended to be reached by international broadcasts, the use of directional antennas are mandatory.

Section 326 of the Act provides that no regulation or condition shall be fixed by the Commission that shall interfere with the right of free speech by means of radio communication. The regulation concerning the permissible content of international broadcasts appears to be in direct contravention of this section. The fact that these broadcasts are considered to be in foreign commerce as opposed to interstate commerce in nowise broadens the power of the Commission, and a broadening of such powers is a matter resting solely within the power of Congress. While there has been no legal objections raised by international broadcasting stations to this unauthorized assumption of power by the Commission, this may be explained by the fact that heretofore such stations have been subsidized by the government. It is anticipated that the withdrawal of such subsidy may well bring the question before the courts.

§143. Censorship of Television.

New problems in the field of substantive law are presented by the advent of television. Each advancement of science carries in its wake new services and uses for the public. Television greatly expands the scope of radio entertainment presently offered. Through the media of television, the listening public can see that which is being presented, and programs featuring plays and dramas will predominate.

Television presents the same difficulties of "censorship" as confront the moving picture industry. The scantiness of costumes, length of embraces, the type of characters that can be

portrayed upon the television screen are problems that do not occur in the field of standard broadcasting.

The F.C.C. is powerless to interfere beforehand with the broadcast of what it might deem to be objectionable television scripts. While Section 326 of the Communications Act explicitly prohibits the utterance of any obscene, indecent or profane language by means of radio communication, the wording of this section does not extend to the broadcasting of visual images.[6]

The Commission has the power to suspend the license of one who violates the standards of public interest by the broadcasting of an indecent performance. It may likewise refuse to renew the license of a station which has failed to act in the public interest. Should the situation present itself, Congress will doubtless enact statutes for the control of visual indecencies.

As in the case of standard broadcasts where an examination of a proposed script alleviates difficulties, just so will the television broadcaster examine the script to insure against the broadcasting of material that might be objectionable to federal or state authorities. The station has but its own standard of conduct upon which to base its decision; however, as in the case of objectionable standard broadcasts, the Commission reserves the right to express its opinion in the form of an objection to a particular type of program. The power of the Commission to refuse a renewal holds sufficient moral persuasion to effect an indirect censorship.

Having in mind the question of a standard of conduct for all types of radio programs, the directors of the National Association of Broadcasters submitted on the 19th day of September, 1947, a proposed code of standard practice for the radio industry. This code has neither been accepted nor rejected by the Association at large as of the date of publication of this volume. The tentative date of the code has been set as February 1, 1948. Opposition from within as well as from without

[6]See §53.

the Association to its adoption presupposes vital changes in the proposed code.

State boards of censors may in the future, attempt to subject television broadcasts to review in a manner almost identical with that of the motion picture industry. In the case of motion pictures, conflict with various state standards has been met by the creation of an industry-wide board of review which examines photoplays before release to the public and passes upon their fitness. The board of review lays down standards which the producer may follow in conforming his picture to the acceptable standards of the different states.

Should the necessity arise, a similar industry-wide unofficial board might solve the problem.

State governments have the same police powers over television as they possess over any other form of interstate commerce entering their borders. This police power may be exercised to the extent that it does not become an unreasonable burden upon interstate commerce. A state has the power to abate and punish as a public nuisance a television broadcast of an indecent nature just as effectively as it can prohibit and penalize the introduction of obscene literature into the state.

The practical difficulty confronting the state in the case of television is that it has no power to control an out-of-state broadcast received within its borders, except to the extent that such station uses local facilities in aid of its broadcast.

§144. Anticipated Problems of Television.

The outstanding advantage of television over other forms of broadcasting lies in the fact that events of public interest may be seen as well as heard in the home at the time of their occurrence; however, this very feature is fraught with difficulty.

Where a television broadcast is made from a public area there is danger of involvement with the rights of privacy of those of the public who may be accidently portrayed on the television

screen.[7] Those present at public events have impliedly waived their right of privacy to the extent that they may be photographed as part of the general audience or their image reflected upon a television screen without recourse. However, if the face of one individual, not otherwise a public figure, is singled out for special treatment or commercial exploitation, then that individual's right of privacy is infringed.

A television broadcast *per se* cannot be copyrighted. At the time of the adoption of the Copyright Act of 1909 television was unheard of, and was therefore not included within any of the provisions of the Act. However, the script or the scenario used in the broadcast may be registered under its appropriate classification in the same manner as is an ordinary radio broadcasting script. This will afford sufficient protection from those who seek to appropriate the broadcast in its literary or visual form.

It is anticipated that the use of trade-marks identifying advertised products will become more prevalent as visual advertising takes its place in television. In this respect the new Trade Mark Act of 1946, which liberalizes the names and symbols that may be registered under the act will give ample protection to such advertisers.

The F.C.C. has anticipated and provided for the control of some of the major problems that will undoubtedly arise on the advent of a general use of television and frequency modulation. Since new conditions bring new problems, it is to be expected that the Commission as well as the licensees will be confronted with issues of a legal nature reminiscent of those encountered by standard broadcasters of the early twenties.

Although television is presently in use, its application is limited, and as yet there have been no court decisions dealing with this field of communication. This chapter has been written in an anticipatory spirit, and the problems presented and dis-

[7] See Chapter IX.

cussed are those which in all likelihood will face the stations, the advertiser, the Commission, and the courts.

The fact that the number of FM stations will be tenfold the present number of standard broadcasting stations presents possibilities not yet envisioned.

Science is only at the threshold of the uses to which radio may be applied. It is the responsibility of jurisprudence to follow closely each new development, and by its carefully considered rulings, lead those involved, through the maze of legal problems which the future in this field will undoubtedly unfold.

GLOSSARY

AMATEUR STATION: A radio station operated by a duly authorized person interested in radio technique solely with a personal aim and without pecuniary interest.

AMPLITUDE MODULATION: A system of modulation where the amplitude of the radio signal varies in proportion to the amplitude of the modulating signal.

ANNOUNCEMENT: An interjection which contains the station's messages, call letters, or slogans; also pertaining to advertisements.

ANNOUNCER: An individual employed by a station or sponsor to broadcast announcements, advertisements, and introductory remarks on a program.

ANTENNA: That portion of the radio transmitting or receiving equipment which is used both to propogate radio waves into the air, or to receive the transmitted waves.

AUTHORIZED BAND: The frequency band or width of the frequency band within which the emissions of a station shall be confined. Its width comprises the "communication band" and twice the "frequency tolerance."

AUTHORIZED, LICENSED, ASSIGNED FREQUENCY: The carrier frequency assigned to a station by the Commission and specified in the instrument of authorization.

AUTHORIZED OR LICENSED POWER: The power assigned to a radio station by the Commission and specified in the instrument of authorization.

BROADCAST DAY: That period of time between local sunrise and twelve midnight local standard time.

BROADCASTING: The dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

CALL LETTERS: The combination of letters or letters and numerals assigned by F.C.C. license to serve as the designation of a particular radio station.

CARRIER FREQUENCY: The frequency of the carrier wave.

CARRIER WAVE:

(a) In a frequency stabilized system, the sinusoidal component of a modulated wave whose frequency is independent of the modulating wave; or

(b) The output of the transmitter when the modulating wave is made zero; or

(c) A wave generated at a point in the transmitting system and subsequently modulated by the signal; or

(d) A wave generated locally at the receiving terminal which when combined with the sidebands in a suitable detector produces the modulating wave.

CHAIN BROADCASTING: Simultaneous broadcasting of an identical program by two or more connected stations. (This designation has been supplanted by the term "network.")

CLASS I STATION: A dominant station operating on a clear channel and designed to render primary and secondary service over an extended area and at relatively long distances.

CLASS II STATION: A secondary station which operates on a clear channel and designed to render service over a primary service area which is limited by and subject to such interference as may be received from Class I stations.

CLASS III STATION: A station which operates on a regional channel and designed to render service primarily to a metropolitan district and the rural area contiguous thereto.

CLASS IV STATION: A station operating on a local channel and designed to render service primarily to a city or town and the suburban and rural areas contiguous thereto.

CLEAR CHANNEL: A channel on which the dominant station or stations render service over wide areas and which are cleared of objectionable interference within their primary service areas and over all or a substantial portion of their secondary service areas.

COMMERCIAL ANNOUNCEMENT: That portion of a program devoted to commercial advertising.

COMMERCIAL PROGRAM: A program paid for by a sponsor other than the transmitting station.

COMMON CARRIER: Any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign transmission of energy; a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

COMMUNICATION BAND: The frequency band or width of the frequency band required for the type of emission authorized.

CORPORATION: Any corporation, joint stock company, or association.

COW-CATCHER: A short announcement preceding the opening advertisement of a program which usually advertises a subsidiary product of the program sponsor.

CYCLES, KILOCYCLES, MEGACYCLES: The term "cycles," "kilocycles" (thousand cycles), and "megacycles" (million cycles) are ordinarily construed to refer to cycles, kilocycles, megacycles per second, respectively. This refers to the frequency of the radio waves.

DAYTIME: That period of time between local sunrise and local sunset.

DIRECTIONAL ANTENNA: An antenna system arranged so as to restrict the signal strength of a station in certain directions or to increase the signal strength in other directions. This is used either to protect neighboring stations from interference, or to increase the coverage of a particular service area.

DOMINANT STATION: A Class I station operating on a clear channel.

FACILITIES: The entire radio and electrical equipment used by a station or network.

FIDELITY: The quality of being able to reproduce sound (or image) in close approximation to the original.

FIELD STRENGTH: The electrical intensity of a radio wave at a given distance from the transmitting station, usually measured in millivolts per meter.

FM BROADCAST BAND: The band of frequencies extending from 88 to 108 megacycles, which includes those assigned to non-commercial education broadcasting.

FM BROADCAST CHANNEL: A band of frequencies 200 kilocycles wide. It is designated by its center frequency. Channels for FM broadcast stations begin at 88.1 megacycles and continue in successive steps of 200 kilocycles to and including 107.9 megacycles.

FM BROADCAST STATION: A station employing frequency modulation in the FM broadcast band and licensed primarily for the transmission or radiotelephone emissions intended to be received by the general public.

FREQUENCY: The number of cycles of a wave recurring in a unit of time.

FREQUENCY MODULATION: A system of modulation where the radio frequency varies in proportion to the amplitude of the modulating signal, and the radio frequency is independent of the frequency of the modulating signal.

FOREIGN COMMUNICATION: Communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States.

GROUND WAVE: A radio wave which is transmitted along and follows the earth's surface.

HITCHHIKE: A short announcement following the main closing advertisement of a program usually advertising a subsidiary product of the program sponsor.

INTERFERENCE: Static, conflicting signals, etc. which prevent or tend to prevent proper reception of a signal.

INQUIRIES: Letters or calls received by a station or sponsor from listeners seeking information about the article sponsored on a particular program, or responding to a request made on the program for such letters or calls.

INTERNATIONAL BROADCAST STATION: A station licensed for the transmission of broadcast programs for international public reception.

INTERSTATE COMMUNICATION: Communication or transmission (1) from any State, Territory or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, to any other State, Territory or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Philippine Islands or the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not include wire communication between points within the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

IONOSPHERE: The layers of ionized particles situated above the earth's atmosphere which reflect and refract radio skywaves. (Also known as the Kennelly-Heaviside layer.)

LEGALLY QUALIFIED CANDIDATE: Any person who has publicly announced that he is a candidate for nomination by a conven-

tion of a political party or for nomination or election in a primary, special, or general election, municipal, county, state or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who

(a) has qualified for a place on the ballot or

(b) is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, and (1) has been duly nominated by a political party which is commonly known and regarded as such, or (2) makes a substantial showing that he is a bona fide candidate for nomination or office, as the case may be.

LICENSEE: The holder of a radio station license granted or continued in force under authority of the Communications Act.

LISTENING AREA: The territory within which the signal from a transmitting station can be heard effectively.

LIVE PROGRAM: A performance by persons simultaneous with the transmission thereof, in contrast to a transcribed program.

LOCAL CHANNEL: A channel on which several stations may operate with power not in excess of 250 watts. The primary service area of a station operating on any such channel may be limited as a consequence of interference to a given field intensity contour.

LOCAL PROGRAM: A performance originating within a local station, in contrast to a network program.

MAIN STUDIO: As to any station, the studio from which the majority of its local programs originate, and/or from which a majority of its station announcements are made of programs originating at remote points.

MODULATION: The process of changing the amplitude or frequency of the transmitted radio frequency wave by means of an audio-frequency signal, so that the resultant signal can be rectified and an audio-frequency be produced in the receiver of the transmitted wave.

MONITORING: The act of station personnel in "censoring" a program for material content and sound effect, during the transmission.

NETWORK: A system of affiliated stations banded together to facilitate the simultaneous broadcasting of an identical program by two or more connected stations.

NETWORK PROGRAM: A program simultaneously broadcast by two or more connected stations.

NIGHTTIME: The period of time between local sunset and twelve midnight local standard time.

OPERATING FREQUENCY: The carrier frequency that is actually generated by a station.

OPERATING POWER: The power that is actually supplied to the radio station antenna.

PACKAGE: A complete radio show consisting of all necessary scripts, writers, actors, master of ceremonies, where one is required, announcer and producer. All expenses are carried by the owner of the package and the sale price covers the entire "package" with the exception of cost of radio time.

PERMITTEE: The holder of a radio station construction permit.

PERSON: An individual, partnership, association, joint-stock company, trust, or corporation.

RADIO COMMUNICATION: The transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

RADIO SPECTRUM: The entire number of frequencies available for radio utilization.

RADIO STATION: A station equipped to engage in radio communication or radio transmission of energy. A station includes all apparatus used at a particular location for one class of service.

REBROADCAST: The reception by radio of the program of a radio station, and the simultaneous or subsequent retransmission of such program by a broadcast station. In case a program is transmitted from its point of origin to a broadcast station entirely by telephone facilities in which a section of such transmission is by radio, the broadcasting of this program is not considered a rebroadcast.

RECEIVER: The radio apparatus which serves to detect a radio signal, and thereafter to convert the radio frequency waves into audio (or video) frequency waves that can be heard (or seen) by the human ear (or eye).

REGIONAL CHANNEL: A channel on which several stations may operate with powers not in excess of five kilowatts. The primary

service area of a station operating on any such channel may be limited as a consequence of interference to a given field intensity contour.

REGIONAL NETWORK: A network which includes selected stations in a given geographical area.

SCRIPT: The written representation of the content and sequence in which words, music, or sound effects occur on a radio program.

SECONDARY STATION: Any station except a Class I station operating on a clear channel.

SERVICE AREAS:

(a) The "primary service area" of a broadcast station is the area in which the ground wave is not subject to objectionable interference or objectionable fading.

(b) The "secondary service area" of a broadcast station is the area served by the sky wave and not subject to objectionable interference. The signal is subject to intermittent variations in intensity.

(c) The "intermittent service area" of a broadcast station is the area receiving service from the ground wave but beyond the primary service area and subject to some interference and fading.

The term "service area" as applied to FM broadcasting means the service resulting from an assigned effective radiated power and antenna height above average terrain.

SIGNAL: The entire body of sound (or image) received from any broadcast.

SIGNAL STRENGTH: The intensity of the signal at a given distance from the transmitting station.

SKIP DISTANCE: That portion of the earth's surface within which a broadcast is not discernible. In the transmission of short waves the skywaves are said to "bounce", striking the earth at intermittent points. The areas between the points of contact with the earth are free of radio waves and without means of reception.

SKY WAVE: A radio wave which is transmitted skyward and is then reflected by the ionosphere toward the earth.

SOAP OPERA: A continuing serial in dramatic form in which an understanding of today's episode is dependent upon previous listening.

SPOT ANNOUNCEMENT: A short wave advertisement which is broadcast independently by a station, in contrast to an advertisement made over a network program.

STANDARD BROADCAST BAND: The band of frequencies extending from 550 to 1600 kilocycles, inclusive, both 550 kilocycles and 1600 kilocycles being carrier frequencies of broadcast channels.

STANDARD BROADCAST CHANNEL: The band of frequencies occupied by the carrier and two side bands of broadcast signal with the carrier frequency at the center. Channels are designated by their assigned carrier frequencies.

STANDARD BROADCAST STATION: A station licensed for the transmission of radiotelephone emissions primarily intended to be received by the general public and operated on a channel in the band 550-1600 kilocycles, inclusive.

STATION-BREAK: A short announcement by the individual station presented in the interval between two programs.

SUNRISE AND SUNSET: The average time of sunrise and sunset is specified in the license of a broadcast station, for each particular location and during any particular month.

SUSTAINING PROGRAM: A program paid for and supported by the transmitting station.

TELEVISION: A system of communication in which transient visual images of moving or fixed objects are transmitted for reception by visual observation.

TRANSCRIBED PROGRAM: A broadcast of a program previously recorded by means of transcription, in contrast to a live program.

TRANSCRIPTION: A recording of high fidelity produced especially for broadcast purposes.

TRANSMISSION OF ENERGY BY RADIO: Includes transmission and all instrumentalities, facilities, and services incidental to such transmission.

TRANSMITTER: The radio apparatus which serves to convert the sound (or image) into radio frequency waves, and to broadcast these waves into the air.

UNITED STATES: The several States and Territories, the District of Columbia, and the possessions of the United States, but not including the Philippine Islands or the Canal Zone.

USEFUL RADIO SPECTRUM: The total number of frequencies or wavelengths which may be used for the transmission of energy, communications, or signals by radio.

WATT, KILOWATT: ("kilowatt" equals one thousand watts.) Units of power, or work done per second.

WAVE LENGTH: The distance between the beginning and ending of a single cycle of a radio wave.

WIRE COMMUNICATION: The transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services, (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

COMMUNICATIONS ACT OF 1934, AS AMENDED

Being an Act to provide for the regulation of interstate and foreign communication by wire or radio, and for other purposes

TITLE I—GENERAL PROVISIONS

PURPOSES OF ACT; CREATION OF FEDERAL COMMUNICATIONS COMMISSION

SEC. 1. For the purposes of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

APPLICATION OF ACT

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Philippine Islands or the Canal Zone, or to wire or radio communication or transmission wholly within the Philippine Islands or the Canal Zone.

(b) Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier; except, that sections 201 to 205 of this

Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clause (2).

DEFINITIONS

SEC. 3. For the purposes of this Act, unless the context otherwise requires —

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services, (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(c) "Licensee" means the holder of a radio station license granted or continued in force under authority of this Act.

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone) or the District of Columbia, (2) from or to the United States to or from the Philippine Islands or the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not include wire communication between points within the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(f) "Foreign communication" or "foreign transmission" means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States.

(g) "United States" means the several States and Territories, the District of Columbia, and the possession of the United States, but does not include the Philippine Islands or the Canal Zone.

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

(i) "Person" includes an individual, partnership, association, joint-stock company, trust, or corporation.

(j) "Corporation" includes any corporation, joint-stock company, or association.

(k) "Radio station" or "station" means a station equipped to engage in radio communication or radio transmission of energy.

(l) "Mobile station" means a radio-communication station capable of being moved and which ordinarily does move.

(m) "Land station" means a station other than a mobile station, used for radio communication with mobile stations.

(n) "Mobile service" means the radio-communication service carried on between mobile stations and land stations, and by mobile stations communicating among themselves.

(o) "Broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

(p) "Chain broadcasting" means simultaneous broadcasting of an identical program by two or more connected stations.

(q) "Amateur station" means a radio station operated by a duly authorized person interested in radio technique solely with a personal aim and without pecuniary interest.

(r) "Telephone exchange service" means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge.

(s) "Telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

(t) "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

(u) "Connecting carrier" means a carrier described in clause (2) of section 2 (b).

(v) "State" includes the District of Columbia and the Territories and possessions.

(w) (1) "Ship" or "vessel" includes every description of watercraft or other artificial contrivance, except aircraft, used or capable of being used as a means of transportation on water, whether or not it is actually afloat.

(2) A ship shall be considered a passenger ship if it carries or is licensed or certificated to carry more than twelve passengers.

(3) A cargo ship means any ship not a passenger ship.

(4) A passenger is any person carried on board a ship or vessel except (1) the officers and crew actually employed to man and operate the ship, (2) person employed to carry on the business of the ship, and (3) persons on board a ship when they are carried, either because of the obligation laid upon the master to carry shipwrecked, distressed, or other persons in like or similar situations or by reason of any circumstance over which neither the master, the owner, nor the charterer (if any) has control.

(x) "Auto-alarm" on a foreign ship means an automatic alarm receiver which has been approved by the country to which the ship belongs, provided the United States and the country to which the ship belongs are both parties to the same treaty, convention, or agreement prescribing the requirements for such apparatus. "Auto-alarm" on a ship of the United States subject to the provisions of part II of title III of this Act means an automatic alarm receiver complying with law and approved by the Commission. Nothing in this Act or in any other provision of law shall be construed to require the recognition of an auto-alarm as complying with part II of title III of this Act, on a foreign ship subject to such part, whose country of origin is not a party to a treaty, convention, or agreement with the United States in regard to such apparatus.

(y) (1) For the purpose of part II of title III, a "qualified operator" or "operator" on a foreign ship means a person holding a certificate as such complying with the provisions of the General Radio Regulations annexed to the International Tele-communication Convention in force, or complying with an agreement or treaty between the United States and the country to which the ship belongs.

(2) For the purpose of part II of title III, a "qualified operator" or "operator" on a ship of the United States means a person holding a radio operator's license of the proper class, as prescribed and issued by the Commission.

(z) "Harbor" or "port" means any place to which ships may resort for shelter or to load or unload passengers or goods, or to obtain fuel, water,

or supplies. This term shall apply to such places whether proclaimed public or not and whether natural or artificial.

(aa) "Safety convention" means the International Convention for the Safety of Life at Sea in force and the regulations referred to therein.

PROVISIONS RELATING TO THE COMMISSION

SEC. 4 (a) The Federal Communications Commission (in this Act referred to as the "Commission") shall be composed of seven commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman.

(b) Each member of the Commission shall be a citizen of the United States. No member of the Commission or person in its employ shall be financially interested in the manufacture or sale of radio apparatus or of apparatus for wire or radio communication; in communication by wire or radio or in radio transmission of energy; in any company furnishing services or such apparatus to any company engaged in communication by wire or radio or to any company manufacturing or selling apparatus used for communication by wire or radio; or in any company owning stocks, bonds, or other securities of any such company; nor be in the employ of or hold any official relation to any person subject to any of the provisions of this Act, nor own stocks, bonds, or other securities of any corporation subject to any of the provisions of this Act. Such commissioners shall not engage in any other business, vocation, or employment. Not more than four commissioners shall be members of the same political party.

(c) The commissioners first appointed under this Act shall continue in office for the terms of one, two, three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years; except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he succeeds. No vacancy in the Commission shall impair the right of the remaining commissioners to exercise all the powers of the Commission.

(d) Each commissioner shall receive an annual salary of $10,000 payable in monthly installments.

(e) The principal office of the Commission shall be in the District of Columbia, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States.

(f) (1) Without regard to the civil-service laws or the Classification Act of 1923, as amended, (1) the Commission may appoint and prescribe

the duties and fix the salaries of a secretary, a director for each division, a chief engineer and not more than three assistants, a chief accountant and not more than three assistants, a general counsel and not more than three assistants, and temporary counsel designated by the Commission for the performance of special services; and (2) each commissioner may appoint and prescribe the duties of a secretary at an annual salary not to exceed $4,000. The general counsel and the chief engineer and the chief accountant shall each receive an annual salary of not to exceed $9,000; the secretary shall receive an annual salary of not to exceed $7,500; the director of each division shall receive an annual salary of not to exceed $7,500; and no assistant shall receive an annual salary in excess of $7,500. The Commission shall have authority, subject to the provisions of the civil-service laws and the Classification Act of 1923, as amended, to appoint such other officers, engineers, accountants, inspectors, attorneys, examiners, and other employees as are necessary in the execution of its functions.

(2) The Commission shall fix a reasonable rate of extra compensation for overtime services of inspectors in charge and radio inspectors of the Field Division of the Engineering Department of the Federal Communications Commission, who may be required to remain on duty between the hours of 5 o'clock postmeridian and 8 o'clock antemeridian or on Sundays or holidays to perform services in connection with the inspection of ship radio equipment and apparatus for the purposes of part II of title III of this Act, on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond 5 o'clock postmeridian (but not to exceed two and one-half day's pay for the full period from 5 o'clock postmeridian to 8 o'clock antemeridian) and two additional days' pay for Sunday or holiday duty. The said extra compensation for overtime services shall be paid by the master, owner, or agent of such vessel to the local United States collector of customs or his representative, who shall deposit such collection into the Treasury of the United States to an appropriately designated receipt account: Provided, That the amounts of such collections received by the said collector of customs or his representatives shall be covered into the Treasury as miscellaneous receipts; and the payments of such extra compensation to the several employees entitled thereto shall be made from the annual appropriations for salaries and expenses of the Commission: Provided further, That to the extent that the annual appropriations which are hereby authorized to be made from the general fund of the Treasury are insufficient, there are hereby authorized to be appropriated from the general fund of the Treasury such additional amounts as may be necessary to the extent that the amounts of such receipts are in excess of the amounts appropriated: Provided further, That such extra compensation shall be paid if such field employees have been ordered to report for duty and have so reported whether the actual inspection of

the radio equipment or apparatus takes place or not: And provided further, That in those ports where customary working hours are other than those hereinabove mentioned, the inspectors in charge are vested with authority to regulate the hours of such employees so as to agree with prevailing working hours in said ports where inspections are to be made, but nothing contained in this proviso shall be construed in any manner to alter the length of a working day for the inspectors in charge and radio inspectors or the overtime pay herein fixed.

(g) The Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for office supplies, law books, periodicals, and books of reference, and for printing and binding) as may be necessary for the execution of the functions vested in the Commission and as from time to time may be appropriated for by Congress. All expenditures of the Commission, including all necessary expenses for transportation incurred by the commissioners or by their employees, under their orders, in making any investigation or upon any official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission or by such other member or officer thereof as may be designated by the Commission for that purpose.

(h) Four members of the Commission shall constitute a quorum thereof. The Commission shall have an official seal which shall be judicially noticed.

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

(k) The Commission shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy, together with such recommendations as to additional legislation relating thereto as the

Commission may deem necessary: Provided, That the Commission shall make a special report not later than February 1, 1935, recommending such amendments to this Act as it deems desirable in the public interest: Provided further, That each year, at the beginning of the session of the Congress, the Commission shall report to the Congress whether or not any new wire or radio communication legislation is required better to insure safety of life and property. If any such new legislation is considered necessary the Commission shall make specific recommendations thereof to the Congress.

(l) All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier or licensee that may have been complained of.

(m) The Commission shall provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof.

(n) Rates of compensation of persons appointed under this section shall be subject to the reduction applicable to officers and employees of the Federal Government generally.

(o) For the purpose of obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life and property, the Commission shall investigate and study all phases of the problem and the best methods of obtaining the cooperation and coordination of these systems.

DIVISIONS OF THE COMMISSION

SEC. 5 (a) The Commission is hereby authorized by its order to divide the members thereof into not more than three divisions, each to consist of not less than three members. Any commissioner may be assigned to and may serve upon such division or divisions as the Commission may direct, and each division shall choose its own chairman. In case of a vacancy in any division, or of absence or inability to serve thereon of any commissioner thereto assigned, the chairman of the Commission or any commissioner designated by him for that purpose may temporarily serve on said division until the Commission shall otherwise order.

(b) The Commission may by order direct that any of its work, business, or functions arising under this Act, or under any other Act

of Congress, or in respect of any matter which has been or may be referred to the Commission by Congress or by either branch thereof, be assigned or referred to any of said divisions for action thereon, and may by order at any time amend, modify, supplement, or rescind any such direction. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Commission.

(c) In conformity with and subject to the order or orders of the Commission in the premises, each division so constituted shall have power and authority by a majority thereof to hear and determine, order, certify, report, or otherwise act as to any of said work, business, or functions so assigned or referred to it for action by the Commission, and in respect thereof the division shall have all the jurisdiction and powers now or then conferred by law upon the Commission and be subject to the same duties and obligations. Any order, decision, or report made or other action taken by any of said divisions in respect of any matters so assigned or referred to it shall have the same force and effect, and may be made, evidenced, and enforced in the same manner as if made, or taken by the Commission, subject to rehearing by the Commission as provided in section 405 of this Act for rehearing cases decided by the Commission. The secretary and seal of the Commission shall be the secretary and seal of each division thereof.

(d) Nothing in this section contained, or done pursuant thereto, shall be deemed to divest the Commission of any of its powers.

(e) The Commission is hereby authorized by its order to assign or refer any portion of its work, business, or functions arising under this or any other Act of Congress or referred to it by Congress, or either branch thereof, to an individual commissioner, or to a board composed of an employee or employees of the Commission, to be designated by such order, for action thereon, and by its order at any time to amend, modify, supplement, or rescind any such assignment or reference: Provided, however, That this authority shall not extend to investigations instituted upon the Commission's own motion or, without the consent of the parties thereto, to contested proceedings involving the taking of testimony at public hearings, or to investigations specifically required by this Act. All such orders shall take effect forthwith and remain in effect until otherwise ordered by the Commission. In case of the absence or inability for any other reason to act of any such individual commissioner or employee designated to serve upon any such board, the chairman of the Commission may designate another commissioner or employee, as the case may be, to serve temporarily until the Commission shall otherwise order. In conformity with and subject to the order or orders of

the Commission in the premises, any such individual commissioner, or board acting by a majority thereof, shall have power and authority to hear and determine, order, certify, report, or otherwise act as to any of said work, business, or functions so assigned or referred to him or it for action by the Commission and in respect thereof shall have all the jurisdiction and powers now or then conferred by law upon the Commission and be subject to the same duties and obligations. Any order, decision, or report made or other action taken by any such individual commissioner or board in respect of any matters so assigned or referred shall have the same force and effect, and may be made, evidenced, and enforced in the same manner as if made or taken by the Commission. Any party affected by any order, decision, or report of any such individual commissioner or board may file a petition for rehearing by the Commission or a division thereof and every such petition shall be passed upon by the Commission or a division thereof. Any action by a division upon such a petition shall itself be subject to rehearing by the Commission, as provided in section 405 of this Act and in sub-section (c). The Commission may make and amend rules for the conduct of proceedings before such individual commissioner or board and for the rehearing of such action before a division of the Commission or the Commission. The secretary and seal of the Commission shall be the secretary and seal of such individual commissioner or board.

TITLE II — COMMON CARRIERS

SERVICE AND CHARGES

SEC. 201. (a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications; Provided further, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

DISCRIMINATION AND PREFERENCES

SEC. 202 (a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any

particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of wires in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $500 for each such offense and $25 for each and every day of the continuance of such offense.

SCHEDULES OF CHARGES

SEC. 203 (a) Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after thirty days' notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe; but the Commission may, in its discretion and for good cause shown, modify the requirements made by or under authority of this section in particular instances or by a general order applicable to special circumstances or conditions.

(c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection

therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $500 for each such offense, and $25 for each and every day of the continuance of such offense.

HEARING AS TO LAWFULNESS OF NEW CHARGES; SUSPENSION

SEC. 204. Whenever there is filed with Commission any new charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, but not for a longer period than three months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed change of charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased charges as by its decision shall be found not justified. At any hearing involving a charge increased, or sought to be increased, after the organization of the Com-

mission, the burden of proof to show that the increased charge, or proposed increased charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

COMMISSION AUTHORIZED TO PRESCRIBE JUST AND REASONABLE CHARGES

SEC. 205. (a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

LIABILITY OF CARRIERS FOR DAMAGES

SEC. 206. In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

RECOVERY OF DAMAGES

SEC. 207. Any person claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

COMPLAINTS TO THE COMMISSION

SEC. 208. Any person, any body politic or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating such complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

ORDERS FOR PAYMENT OF MONEY

SEC. 209. If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

FRANKS AND PASSES

SEC. 210. (a) Nothing in this Act or in any other provision of law shall be construed to prohibit common carriers from issuing or giving franks to, or exchanging franks with each other for the use of, their officers, agents, employees, and their families, or, subject to such rules as the Commission may prescribe, from issuing, giving, or exchanging

franks and passes to or with other common carriers not subject to the provisions of this Act, for the use of their officers, agents, employees, and their families. The term "employees," as used in this section, shall include furloughed, pensioned, and superannuated employees.

(b) Nothing in this Act or in any other provision of law shall be construed to prohibit common carriers from rendering to any agency of the Government free service in connection with the preparation of the national defense: Provided, That such free service may be rendered only in accordance with such rules and regulations as the Commission may prescribe therefor.

COPIES OF CONTRACTS TO BE FILED

SEC. 211. (a) Every carrier subject to this Act shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this Act, in relation to any traffic affected by the provisions of this Act to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

INTERLOCKING DIRECTORATES—OFFICIALS DEALING IN SECURITIES

SEC. 212. After sixty days from the enactment of this Act it shall be unlawful for any person to hold the position of officer or director of more than one carrier subject to this Act, unless such holding shall have been authorized by order of the Commission, upon due showing in form and manner prescribed by the Commission, that neither public nor private interests will be adversely affected thereby. After this section takes effect it shall be unlawful for any officer or director of any such carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of such carrier from any funds properly included in capital account.

VALUATION OF CARRIER PROPERTY

SEC. 213. (a) The Commission may from time to time, as may be necessary for the proper administration of this Act, and after opportunity for hearing, make a valuation of all or of any part of the property

owned, or used by any carrier subject to this Act, as of such date as the Commission may fix.

(b) The Commission may at any time require any such carrier to file with the Commission an inventory of all or of any part of the property owned or used by said carrier, which inventory shall show the units of said property classified in such detail, and in such manner, as the Commission shall direct, and shall show the estimated cost of reproduction new of said units, and their reproduction cost new less depreciation, as of such date as the Commission may direct; and such carrier shall file such inventory within such reasonable time as the Commission by order shall require.

(c) The Commission may at any time require any such carrier to file with the Commission a statement showing the original cost at the time of dedication to the public use of all or of any part of the property owned or used by said carrier. For the showing of such original cost said property shall be classified, and the original cost shall be defined, in such manner as the Commission may prescribe; and if any part of such cost cannot be determined from accounting or other records, the portion of the property for which such cost cannot be determined shall be reported to the Commission; and, if the Commission shall so direct, the original cost thereof shall be estimated in such manner as the Commission may prescribe. If the carrier owning the property at the time such original cost is reported shall have paid more or less than the original cost to acquire the same, the amount of such cost of acquisition, and any facts which the Commission may require in connection therewith, shall be reported with such original cost. The report made by a carrier under this paragraph shall show the source or sources from which the original cost reported was obtained, and such other information as to the manner in which the report was prepared, as the Commission shall require.

(d) Nothing shall be included in the original cost reported for the property of any carrier under paragraph (c) of this section on account of any easement, license, or franchise granted by the United States or by any State or political subdivision thereof, beyond the reasonable necessary expense lawfully incurred in obtaining such easement, license, or franchise from the public authority aforesaid, which expense shall be reported separately from all other costs in such detail as the Commission may require; and nothing shall be included in any valuation of the property of any carrier made by the Commission on account of any such easement, license, or franchise, beyond such reasonable necessary expense lawfully incurred as aforesaid.

(e) The Commission shall keep itself informed of all new construction, extensions, improvements, retirements, or other changes in the condition, quantity, use, and classification of the property of common carriers, and of the cost of all additions and betterments thereto and of all changes in the investment therein, and may keep itself informed of current changes in costs and values of carrier properties.

(f) For the purpose of enabling the Commission to make a valuation of any of the property of any such carrier, or to find the original cost of such property, or to find any other facts concerning the same which are required for use by the Commission, it shall be the duty of each such carrier to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and to cooperate with and aid the Commission in the work of making any such valuation or finding in such manner and to such extent as the Commission may require and direct, and all rules and regulations made by the Commission for the purpose of administering this section shall have the full force and effect of law. Unless otherwise ordered by the Commission, with the reasons therefor, the records and data of the Commission shall be open to the inspection and examination of the public. The Commission, in making any such valuation, shall be free to adopt any method of valuation which shall be lawful.

(g) Notwithstanding any provision of this Act the Interstate Commerce Commission, if requested to do so by the Commission, shall complete, at the earliest practicable date, such valuation of properties of carriers subject to this Act as are now in progress, and shall thereafter transfer to the Commission the records relating thereto.

(h) Nothing in this section shall impair or diminish the powers of any State commission.

EXTENSION OF LINES

SEC. 214. (a) No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended

line: Provided, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 or 222 of this Act: Provided further, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: Provided, however, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of War, the Secretary of the Navy, and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension,

acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall forfeit to the United States $100 for each day during which such refusal or neglect continues.

TRANSACTIONS RELATING TO SERVICES, EQUIPMENT, AND SO FORTH

SEC. 215. (a) The Commission shall examine into transactions entered into by any common carrier which relate to the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier and/or which may affect the charges made or to be made and/or the services rendered or to be rendered by such carrier, in wire or radio communication subject to this Act, and shall report to the Congress whether any such transactions have affected or are likely to affect adversely the ability of the carrier to render adequate service to the public, or may result in any undue or unreasonable increase in charges or in the maintenance of undue or unreasonable charges for such service; and in order to fully examine into such transactions the Commission shall have access to and the right of inspection and examination of all accounts, records and memoranda, including all documents, papers, and correspondence now or hereafter existing, of persons furnishing such equipment, supplies, research, services, finances, credit, or personnel. The Commission shall include in its report its recommendations for necessary legislation in

connection with such transactions, and shall report specifically whether in its opinion legislation should be enacted (1) authorizing the Commission to declare any such transactions void or to permit such transactions to be carried out subject to such modification of their terms and conditions as the Commission shall deem desirable in the public interest; and/or (2) subjecting such transactions to the approval of the Commission where the person furnishing or seeking to furnish the equipment, supplies, research, services, finances, credit, or personnel is a person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier; and/or (3) authorizing the Commission to require that all or any transactions of carriers involving the furnishing of equipment, supplies, research, services, finances, credit, or personnel to such carrier be upon competitive bids on such terms and conditions and subject to such regulations as it shall prescribe as necessary in the public interest.

(b) The Commission shall investigate the methods by which and the extent to which wire telephone companies are furnishing wire telegraph service and wire telegraph companies are furnishing wire telephone service, and shall report its findings to Congress, together with its recommendation as to whether additional legislation on this subject is desirable.

(c) The Commission shall examine all contracts of common carriers subject to this Act which prevent the other party thereto from dealing with another common carrier subject to this Act, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable.

APPLICATION OF ACT TO RECEIVERS AND TRUSTEES

SEC. 216. The provisions of this Act shall apply to all receivers and operating trustees of carriers subject to this Act to the same extent that it applies to carriers.

LIABILITY OF CARRIER FOR ACTS AND OMISSIONS OF AGENTS

SEC. 217. In construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or user as well as that of the person.

INQUIRIES INTO MANAGEMENT

SEC. 218. The Commission may inquire into the management of the business of all carriers subject to this Act, and shall keep itself informed as to the manner and method in which the same is conducted and as to technical developments and improvements in wire and radio communication and radio transmission of energy to the end that the benefits of new inventions and developments may be made available to the people of the United States. The Commission may obtain from such carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created.

ANNUAL AND OTHER REPORTS

SEC. 219. (a) The Commission is authorized to require annual reports under oath from all carriers subject to this Act, and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with any such carrier, to prescribe the manner in which such reports shall be made, and to inquire from such persons specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amount and privileges of each class of stock, the amounts paid therefor, and the manner of payment for the same; the dividends paid and the surplus fund, if any; the number of stockholders (and the names of the thirty largest holders of each class of stock and the amount held by each; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the names of all officers and directors and the amount of salary, bonus, and all other compensation paid to each; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to charges or regulations concerning charges, or agreements, arrangements, or contracts affecting the same, as the Commission may require.

(b) Such reports shall be for such twelve months' period as the Commission shall designate and shall be filed with the Commission at its office in Washington within three months after the close of the year for

which the report is made, unless additional time is granted in any case by the Commission; and if any person subject to the provisions of this section shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission, for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such person shall forfeit to the United States the sum of $100 for each and every day it shall continue to be in default with respect thereto. The Commission may by general or special orders require any such carriers to file monthly reports of earnings and expenses and to file periodical and/or special reports concerning any matters with respect to which the Commission is authorized or required by law to act; and such periodical or special reports shall be under oath whenever the Commission so requires. If any such carrier shall fail to make and file any such periodical or special report within the time fixed by the Commission, it shall be subject to the forfeitures above provided.

ACCOUNTS, RECORDS, AND MEMORANDA; DEPRECIATION CHARGES

SEC. 220. (a) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys.

(b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. Such carriers shall not, after the Commission has prescribed the classes of property for which depreciation charges may be included, charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or, after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.

(c) The Commission shall at all times have access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry and the Commission may suspend a charge or credit pending submission of proof by such person. Any provision of law prohibiting the disclosure of the contents of messages or communications shall not be deemed to prohibit the disclosure of any matter in accordance with the provisions of this section.

(d) In case of failure or refusal on the part of any such carrier to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, memoranda, documents, papers, and correspondence as are kept to the inspection of the Commission or any of its authorized agents, such carrier shall forfeit to the United States the sum of $500 for each day of the continuance of each such offense.

(e) Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by any such carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records or memoranda of all facts and transactions appertaining to the business of the carrier, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction, to a fine of not less than $1,000 nor more than $5,000 or imprisonment for a term of not less than one year nor more than three years, or both such fine and imprisonment: Provided, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, or documents which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved.

(f) No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

(g) After the Commission has prescribed the forms and manner of keeping of accounts, records, and memoranda to be kept by any person as herein provided, it shall be unlawful for such person to keep any other accounts, records, or memoranda than those so prescribed or such as may be approved by the Commission or to keep the accounts in any other man-

ner than that prescribed or approved by the Commission. Notice of alterations by the Commission in the required manner or form of keeping accounts shall be given to such persons by the Commission at least six months before the same are to take effect.

(h) The Commission may classify carriers subject to this Act and prescribe different requirements under this section for different classes of carriers, and may, if it deems such action consistent with the public interest, except the carriers of any particular class or classes in any State from any of the requirements under this section in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates.

(i) The Commission, before prescribing any requirements as to accounts, records, or memoranda, shall notify each State Commission having jurisdiction with respect to any carrier involved, and shall give reasonable opportunity to each such commission to present its views, and shall receive and consider such views and recommendations.

(j) The Commission shall investigate and report to Congress as to the need for legislation to define further or harmonize the powers of the Commission and of State commissions with respect to matters to which this section relates.

SPECIAL PROVISIONS RELATING TO TELEPHONE COMPANIES

SEC. 221. (a) Upon application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this Act, the Commission shall fix a time and place for a public hearing upon such application and shall thereupon give reasonable notice in writing to the Governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State Commission having jurisdiction over telephone companies, and to such other persons as it may deem advisable. After such public hearing, if the Commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction unlawful shall not apply. Nothing in this subsection shall be construed as in anywise limiting or restricting the powers of the several States to control and regulate telephone companies.

(b) Nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire telephone exchange service, even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State Commission or by local government authority.

(c) For the purpose of administering this Act as to carriers engaged in wire telephone communication, the Commission may classify the property of any such carrier used for wire telephone communication, and determine what property of said carrier shall be considered as used in interstate or foreign telephone toll service. Such classification shall be made after hearing, upon notice to the carrier, the State commission (or the Governor, if the State has no State commission) of any State in which the property of said carrier is located and such other persons as the Commission may prescribe.

(d) In making a valuation of the property of any wire telephone carrier the Commission, after making the classification authorized in this section, may in its discretion value only that part of the property of such carrier determined to be used in interstate or foreign telephone toll service.

CONSOLIDATIONS AND MERGERS OF TELEGRAPH CARRIERS

SEC. 222. (a) As used in this section—

(1) The term "consolidation or merger" includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease, or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or of the control thereof, in exchange for its own securities, or otherwise.

(2) The term "domestic telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(3) The term "international telegraph carrier" means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

(4) The term "consolidated or merged carrier" means any carrier by wire or radio which acquires or operates the properties and facilities unified and integrated by consolidation or merger.

(5) The term "domestic telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland, and terminate or originate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland, and includes acceptance, transmission, reception, or delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into and points of destination within, the continental United States with respect to record communications by wire or radio which either originate or terminate outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, and also includes the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States: Provided, That nothing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States.

(6) The term "international telegraph operations" includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, but does not include acceptance, transmission, reception, and delivery performed within the continental United States between points of origin within and points of exist from, and between points of entry into, and points of destination within the continental United States with respect to such communications, or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States.

(7) The terms "domestic telegraph properties" and "domestic telegraph facilities" mean properties and facilities, respectively, used or to be used in domestic telegraph operations.

(8) The term "employee" or "employees" (i) shall include any individual who is absent from active service because of furlough, illness, or leave of absence, except that there shall be no obligation upon the consolidated or merged carrier to re-employ any employee who is absent because of furlough, except in accordance with the terms of his furlough, and (ii) shall not include any employee of any carrier which is a party to a consoli-

dation or merger pursuant to this section to the extent that he is employed in any business which such carrier continues to operate independently of the consolidation or merger.

(9) The term "representative" includes any individual or labor organization.

(10) The term "continental United States" means the several States and the District of Columbia.

(b) (1) It shall be lawful, upon application to and approval by the Commission as hereinafter provided, for any two or more domestic telegraph carriers to effect a consolidation or merger; and for any domestic telegraph carrier, as a part of such consolidation or merger or thereafter, to acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any carrier which is not primarily a telegraph carrier: Provided, That except as provided in paragraph (2) of this subsection, no domestic telegraph carrier shall effect a consolidation or merger with any international telegraph carrier, and no international telegraph carrier shall effect a consolidation or merger with any domestic telegraph carrier.

(2) As a part of any such consolidation or merger, or thereafter upon application to and approval by the Commission as hereinafter provided, the consolidated or merged carrier may acquire all or any part of the domestic telegraph properties, domestic telegraph facilities, or domestic telegraph operations of any international telegraph carrier.

(c) (1) Whenever any consolidation or merger is proposed under subsection (b) of this section, the telegraph carrier or telegraph carriers seeking authority therefor shall submit an application to the Commission, and thereupon the Commission shall order a public hearing to be held with respect to such application and shall give reasonable notice thereof, in writing, and an opportunity to be heard, to the Governor of each of the States in which any of the physical property involved in such proposed consolidation or merger is situated, to the Secretary of State, the Secretary of War, the Attorney General of the United States, the Secretary of the Navy, representatives of employees where represented by bargaining representatives known to the Commission, and to such other persons as the Commission may deem advisable. If, after such public hearing, the Commission finds that the proposed consolidation or merger, or an amended proposal for consolidation or merger, (1) is authorized by subsection (a) of this section, (2) conforms to all other applicable provisions of this section, (3) is in the public interest, the Commission shall enter an order approving and authorizing such consolidation or merger, and thereupon any law or laws making consolidations and mergers unlawful shall not apply to the proposed consolidation or merger. In finding whether any proposed

consolidation or merger is in the public interest, the Commission shall give due consideration, among other things, to the financial soundness of the carrier resulting from such consolidation or merger.

(2) Any proposed consolidation or merger of domestic telegraph carriers shall provide for the divestment of the international telegraph operations therefore carried on by any party to the consolidation or merger, within a reasonable time to be fixed by the Commission, after the consideration for the property to be divested is found by the Commission to be commensurate with its value, and as soon as the legal obligations, if any, of the carrier to be so divested will permit. The Commission shall require at the time of the approval of such consolidation or merger that any such party excercise due diligence in bringing about such divestment as promptly as it reasonably can.

(d) No proposed consolidation or merger of telegraph carriers pursuant to this section shall be approved by the Commission if, as a result of such consolidation or merger, more than one-fifth of the capital stock of any carrier which is subject to the jurisdiction of the Commission will be owned or controlled, or voted, directly or indirectly, (1) by any alien or the representative of an alien, (2) by any foreign government or the representative thereof, (3) by any corporation organized under the laws of any foreign government, or (4) by any corporation of which any officer or director is an alien, or of which more than one-fifth of the capital stock is owned or controlled, or voted, directly or indirectly, by any alien or the representative of any alien, by any foreign government or the representative thereof, or by any corporation organized under the laws of a foreign government.

(e) (1) In the case of any consolidation or merger of telegraph carriers pursuant to this section, the consolidated or merged carrier shall, except as provided in paragraph (2) of this subsection, distribute among the international telegraph carriers, telegraph traffic by wire or radio destined to points without the continental United States, and divide the charges for such traffic, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: Provided, however, That in case the interested carriers shall fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection.

(2) In the case of any consolidation or merger pursuant to this section of telegraph carriers which, immediately prior to such consolidation or merger, interchanged traffic with telegraph carriers in a contiguous foreign country, the consolidated or merged carrier shall distribute among such foreign telegraph carriers, telegraph traffic by wire or radio destined to points in such contiguous foreign country and shall divide the charges therefor, in accordance with such just, reasonable, and equitable formula in the public interest as the interested carriers shall agree upon and the Commission shall approve: Provided, however, That in case the interested carriers should fail to agree upon a formula which the Commission approves as above provided, the Commission, after due notice and hearing, shall prescribe in its order approving and authorizing the proposed consolidation or merger a formula which it finds will be just, reasonable, equitable, and in the public interest, will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers, and will effectuate the purposes of this subsection. As used in this paragraph, the term "contiguous foreign country" means Canada, Mexico, or Newfoundland.

(3) Whenever, upon a complaint or upon its own initiative and after a full hearing, the Commission finds that any such distribution of telegraph traffic among telegraph carriers, or any such division of charges for such traffic, which is being made or which is proposed to be made, is or will be unjust, unreasonable, or inequitable, or not in the public interest, the Commission shall by order prescribe the distribution of such telegraph traffic, or the division of charges therefor, which will be just, reasonable, equitable, and in the public interest, and will be, so far as is consistent with the public interest, in accordance with the existing contractual rights of the carriers.

(4) For the purposes of this subsection, the international telegraph operations of any domestic telegraph carrier shall be considered to be the the operations of an independent international telegraph carrier, and the domestic telegraph operations of any international telegraph carrier shall be considered to be the operations of an independent domestic telegraph carrier.

(f) (1) Each employee of any carrier which is a party to a consolidation or merger pursuant to this section who was employed by such carrier immediately preceding the approval of such consolidation or merger, and whose period of employment began on or before March 1, 1941, shall be employed by the carrier resulting from such consolidation or merger for a period of not less than four years from the date of the approval of such consolidation or merger, and during such period no such employee shall, without his consent, have his compensation reduced or be assigned to work

which is inconsistent with his past training and experience in the telegraph industry.

(2) If any employee of any carrier which is a party to any such consolidation or merger, who was employed by such carrier immediately preceding the approval of such consolidation or merger, and whose period of employment began after March 1, 1941, is discharged as a consequence of such consolidation or merger by the carrier resulting therefrom, within four years from the date of approval of the consolidation or merger, such carrier shall pay such employee at the time he is discharged severance pay in cash equal to the amount of salary or compensation he would have received during the full four-week period immediately preceding such discharge at the rate of compensation or salary payable to him during such period, multiplied by the number of years he has been continuously employed immediately preceding such discharge by one or another of such carriers who were parties to such consolidation or merger, but in no case shall any such employee receive less severance pay than the amount of salary or compensation he would have received at such rate if he were employed during such full four-week period: Provided, however, That such severance pay shall not be required to be paid to any employee who is discharged after the expiration of a period, following the date of approval of the consolidation or merger, equal to the aggregate period during which such employee was in the employ, prior to such date of approval, of one or more of the carriers which are parties to the consolidation or merger.

(3) For a period of four years after the date of approval of any such consolidation or merger, any employee of any carrier which is a party to such consolidation or merger who was such an employee on such date of approval, and who is discharged as a result of such consolidation or merger, shall have a preferential hiring and employment status for any position for which he is qualified by training and experience over any person who has not theretofore been an employee of any such carrier.

(4) If any employee is transferred from one community to another, as a result of any such consolidation or merger, the carrier resulting therefrom shall pay, in addition to such employee's regular compensation as an employee of such carrier, the actual traveling expenses of such employee and his family, including the cost of packing, crating, drayage, and transportation of household goods and personal effects.

(5) In the case of any consolidation or merger pursuant to this section, the consolidated or merged carrier shall accord to every employee or former employee, or representative or beneficiary of an employee or former employee, of any carrier which is a party to such consolidation or merger, the same pension, health, disability, or death insurance benefits, as were provided for

prior to the date of approval of the consolidation or merger, under any agreement or plan of any carrier which is a party to the consolidation or merger which covered the greatest number of the employees affected by the consolidation or merger; except that in any case in which, prior to the date of approval of the consolidation or merger, an individual has exercised his right of retirement, or any right to health, disability, or death insurance benefits has accrued under any agreement or plan of any carrier which is a party to the consolidation or merger, pension, health, disability, or death insurance benefits, as the case may be, shall be accorded in conformity with the agreement or plan under which such individual exercised such right of retirement or under which such right to benefits accrued. For purposes of determining and according the rights and benefits specified in this paragraph, any period spent in the employ of the carrier of which such individual was an employee at the time of the consolidation or merger shall be considered to have been spent in the employ of the consolidated or merged carrier. The application for approval of any consolidation or merger under this section shall contain a guaranty by the proposed consolidated carrier that there will be no impairment of any of the rights or benefits specified in this paragraph.

(6) Any employee who, since August 27, 1940, has left a position, other than a temporary position, in the employ of any carrier which is a party to any such consolidation or merger, for the purpose of entering the military or naval forces of the United States, shall be considered to have been in the employ of such carrier during the time he is a member of such forces, and upon making an application for employment with the consolidated or merged carrier within forty days from the time he is relieved from service in any of such forces under honorable conditions, such former employee shall be employed by the consolidated or merged carrier and entitled to the benefits to which he would have been entitled if he had been employed by one of such carriers during all of such period of service with such forces; except that this paragraph shall not require the consolidated or merged carrier, in the case of any such individual, to pay compensation or to accord health, disability, or death insurance benefits, for the period during which he was a member of such forces. If any such former employee is disabled and because of such disability is no longer qualified to perform the duties of his former position but otherwise meets the requirements for employment, he shall be given such available employment at an appropriate rate of compensation as he is able to perform and to which his service credit shall entitle him.

(7) No employee of any carrier which is a party to any such consolidation or merger shall, without his consent, have his compensation reduced, or (except as provided in paragraph (2) and paragraph (8) of this sub-

section) be discharged or furloughed during the four-year period after the date of the approval of such consolidation or merger. No such employee shall, without his consent, have his compensation reduced, or be discharged or furloughed, in contemplation of such consolidation and merger, during the six-month period immediately preceding such approval.

(8) Nothing contained in this subsection shall be construed to prevent the discharge of any employee for insubordination, incompetency, or any other similar cause.

(9) All employees of any carrier resulting from any such consolidation or merger, with respect to their hours of employment, shall retain the rights provided by any collective bargaining agreement in force and effect upon the date of approval of such consolidation or merger until such agreement is terminated, executed, or superseded. Notwithstanding any other provision of this Act, any agreement not prohibited by law pertaining to the protection of employees may hereafter be entered into by such consolidated or merged carrier and the duly authorized representative or representatives of its employees selected according to existing law.

(10) For purposes of enforcement or protection of rights, privileges, and immunities granted or guaranteed under this subsection, the employees of any such consolidated or merged carrier shall be entitled to the same remedies as are provided by the National Labor Relations Act in the case of employees covered by that Act; and the National Labor Relations Board and the courts of the United States (including the courts of the District of Columbia) shall have jurisdiction and power to enforce and protect such rights, privileges, and immunities in the same manner as in the case of enforcement of the provisions of the National Labor Relations Act.

(11) Nothing contained in this subsection shall apply to any employee of any carrier which is a party to any such consolidation or merger whose compensation is at the rate of more than $5,000 per annum.

(12) Notwithstanding the provisions of paragraphs (1) and (7), the protection afforded therein for the period of four years from the date of approval of the consolidation or merger shall not, in the case of any particular employee, continue for a longer period, following such date of approval, than the aggregate period during which such employee was in the employ, prior to such date of approval, of one or more of the carriers which are parties to the consolidation or merger. As used in paragraphs (1), (2), and (7), the term "compensation" shall not include compensation attributable to overtime not guaranteed by collective bargaining agreements.

TITLE III — PROVISIONS RELATING TO RADIO

PART I — GENERAL PROVISIONS

LICENSE FOR RADIO COMMUNICATION OR TRANSMISSION OF ENERGY

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in the Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communication, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

SEC. 302. (repealed)

GENERAL POWERS OF COMMISSION

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock or to modify such regulations in its discretion;

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) Has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) Has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) Has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) Has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) False or deceptive signals or communications, or

(2) A call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) Has willfully or maliciously interfered with any other radio communications or signals; or

(F) Has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission

may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

WAIVER BY LICENSEE

SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

GOVERNMENT-OWNED STATIONS

SEC. 305. (a) Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 301 and 303 of this Act. All such Government stations shall use such frequencies as shall be assigned to each or to each class by the President. All such stations, except stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal relating to Government business, shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the Commission may prescribe.

(b) Radio stations on board vessels of the United States Shipping Board Bureau or the United States Shipping Board Merchant Fleet Corporation or the Inland and Coastwise Waterways Service shall be subject to the provisions of this title.

(c) All stations owned and operated by the United States, except mobile stations of the Army of the United States, and all other stations on land and sea, shall have special call letters designated by the Commission.

FOREIGN SHIPS

SEC. 306. Section 301 of this Act shall not apply to any person sending radio communications or signals on a foreign ship while the same is within the jurisdiction of the United States, but such communications or signals shall be transmitted only in accordance with such regulations designed to prevent interference as may be promulgated under the authority of this Act.

ALLOCATION OF FACILITIES; TERM OF LICENSES

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) The Commission shall study the proposal that Congress by statute allocate fixed percentages of radio broadcasting facilities to particular types or kinds of non-profit radio programs or to persons identified with particular types or kinds of non-profit activities, and shall report to Congress, not later than February 1, 1935, its recommendations together with the reasons for the same.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of the license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license.

APPLICATIONS FOR LICENSES; CONDITIONS IN LICENSE FOR FOREIGN COMMUNICATION

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: Provided, however, That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States may be issued under such conditions as the Commission may impose, without such formal application Such licenses, however, shall in no case be for a longer term than three months: Provided further, That the Commission may issue by cable, telegraph, ar radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled "An Act relating to the landing and the operation of submarine cables in the United States", approved May 24, 1921.

HEARINGS ON APPLICATION FOR LICENSES; FORM OF LICENSES; CONDITIONS ATTACHED TO LICENSES

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would

be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

LIMITATION ON HOLDING AND TRANSFER OF LICENSES

SEC. 310. (a) The station license required hereby shall not be granted to or held by—

(1) Any alien or the representative of any alien;

(2) Any foreign government or the representative thereof;

(3) Any corporation organized under the laws of any foreign government;

(4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

Nothing in this subsection shall prevent the licensing of radio apparatus on board any vessel, aircraft, or other mobile station of the United States when the installation and use of such apparatus is required by Act of Congress or any treaty to which the United States is a party.

(b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

REFUSAL OF LICENSES AND PERMITS IN CERTAIN CASES

SEC. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation.

REVOCATION OF LICENSES

SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a

treaty ratified by the United States: Provided, however, That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: Provided, however, That no such order of modification shall become final until the holder of such outstanding license or permit shall have been notified in writing of the proposed action and the grounds or reasons therefor and shall have been given reasonable opportunity to show cause why such an order of modification should not issue.

APPLICATION OF ANTITRUST LAWS

SEC. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: Provided, however, That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court.

PRESERVATION OF COMPETITION IN COMMERCE

SEC. 314. After the effective date of this Act no person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire energy, communications, or signals by radio in accordance with the terms of the license issued under this Act, shall by purchase, lease, construction, or otherwise, directly or indirectly, acquire, own, control, or operate any cable or wire telegraph or telephone line or system between any place in any State, Territory, or possession of the United States or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such cable, wire, telegraph, or telephone line or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce; nor shall any person engaged directly, or indirectly through any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such person, or through an agent, or otherwise, in the business of transmitting and/or receiving for hire messages by any cable, wire, telegraph, or telephone line or system (a) between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any other State, Territory, or possession of the United States; or (b) between any place in any State, Territory, or possession of the United States, or the District of Columbia, and any place in any foreign country, by purchase, lease, construction, or otherwise, directly or indirectly acquire, own, control, or operate any station or the apparatus therein, or any system for transmitting and/or receiving radio communications or signals between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or shall acquire, own, or control any part of the stock or other capital share or any interest in the physical property and/or other assets of any such radio station, apparatus, or system, if in either case the purpose is and/or the effect thereof may be to substantially lessen competition or to restrain commerce between any place in any State, Territory, or possession of the United States, or in the District of Columbia, and any place in any foreign country, or unlawfully to create monopoly in any line of commerce.

FACILITIES FOR CANDIDATES FOR PUBLIC OFFICE

SEC. 315. If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

LOTTERIES AND OTHER SIMILAR SCHEMES

SEC. 316. No person shall broadcast by means of any radio station for which a license is required by any law of the United States, and no person operating any such station shall knowingly permit the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes. Any person violating any provision of this section shall, upon conviction thereof, be fined not more than $1,000 or imprisoned not more than one year, or both, for each and every day during which such offense occurs.

ANNOUNCEMENT THAT MATTER IS PAID FOR

SEC. 317. 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.

OPERATION OF TRANSMITTING APPARATUS

SEC. 318. The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission: Provided, however, That the Commission if it shall find that the public interest, convenience, or necessity will be served thereby may waive or modify the foregoing provisions of this section for the operation of any station except (1) stations for which licensed operators are

required by international agreement, (2) stations for which licensed operators are required for safety purposes, (3) stations engaged in broadcasting, and (4) stations operated as common carriers on frequencies below thirty thousand kilocycles: Provided further, That the Commission shall have power to make special regulations governing the granting of licenses for the use of automatic radio devices and for the operation of such devices.

CONSTRUCTION PERMITS

SEC. 319. (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued ofter this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forefeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee. The rights under any such permit shall not be assigned or otherwise transferred to any person without the approval of the Commission. A permit for construction shall not be required for Government stations, amateur stations, or stations upon mobile vessels, railroad rolling stock, or aircraft. Upon the completion of any station for the construction or continued construction of which a permit has been granted, and upon it being made to appear to the Commission that all the terms, conditions, and obligations set forth in the application and permit have been fully met, and that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission shall issue a

license to the lawful holder of said permit for the operation of said station. Said license shall conform generally to the terms of said permit.

DESIGNATION OF STATIONS LIABLE TO INTERFERE WITH DISTRESS SIGNALS

SEC. 320. The Commission is authorized to designate from time to time radio stations the communications or signals of which, in its opinion, are liable to interfere with the transmission or reception of distress signals of ships. Such stations are required to keep a licensed radio operator listening in on the frequencies designated for signals of distress and radio communications relating thereto during the entire period the transmitter of such station is in operation.

DISTRESS SIGNALS AND COMMUNICATIONS

SEC. 321. (a) The transmitting set in a radio station on shipboard may be adjusted in such manner as to produce a maximum of radiation, irrespective of the amount of interference which may thus be caused, when such station is sending radio communications or signals of distress and radio communications relating thereto.

(b) All radio stations, including Government stations and stations on board of foreign vessels when within the territorial waters of the United States, shall give absolute priority to radio communications or signals relating to ships in distress; shall cease all sending on frequencies which will interfere with hearing a radio communication or signal of distress, and, except when engaged in answering or aiding the ship in distress, shall refrain from sending any radio communications or signals until there is assurance that no interference will be caused with the radio communications or signals relating thereto, and shall assist the vessel in distress, so far as possible, by complying with its instructions.

INTERCOMMUNICATION IN MOBILE SERVICE

SEC. 322. Every land station open to general public service between the coast and vessels or aircraft at sea shall, within the scope of its normal operations, be bound to exchange radio communications or signals with any ship or aircraft station at sea; and each station on shipboard or aircraft at sea shall, within the scope of its normal operations, be bound to exchange radio communications or signals with any other station on shipboard or aircraft at sea or with any land station open to general public service between the coast and vessels or aircraft as sea: Provided, That such exchange of radio communication shall be without distinction as to radio systems or instruments adopted by each station.

INTERFERENCE BETWEEN GOVERNMENT AND COMMERCIAL STATIONS

SEC. 323. (a) At all places where Government and private or commercial radio stations on land operate in such close proximity that interference with the work of Government stations cannot be avoided when the they are operating simultaneously, such private or commercial stations as do interfere with the transmission or reception of radio communications or signals by the Government stations concerned shall not use their transmitters during the first fifteen minutes of each hour, local standard time.

(b) The Government stations for which the above-mentioned division of time is established shall transmit radio communications or signals only during the first fifteen minutes of each hour, local standard time, except in case of signals or radio communications relating to vessels in distress and vessel requests for information as to course, location, or compass direction.

USE OF MINIMUM POWER

SEC. 324. In all circumstances, except in case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communication desired.

FALSE DISTRESS SIGNALS; REBROADCASTING; STUDIOS OF FOREIGN STATIONS

SEC. 325. (a) No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

(b) No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States, without first obtaining a permit from the Commission upon proper application therefor.

(c) Such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be

subject to the requirements of section 309 hereof with respect to applications for station licenses or renewal or modification thereof, and the license or permission so granted shall be revocable for false statements in the application so required or when the Commission, after hearings, shall find its continuation no longer in the public interest.

CENSORSHIP; INDECENT LANGUAGE

SEC. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

USE OF NAVAL STATIONS FOR COMMERCIAL MESSAGES

SEC. 327. The Secretary of the Navy is hereby authorized, unless restrained by international agreement, under the terms and conditions and at rates prescribed by him, which rates shall be just and reasonable, and which, upon complaint, shall be subject to review and revision by the Commission, to use all radio stations and apparatus, wherever located, owned by the United States and under the control of the Navy Department, (a) for the reception and transmission of press messages offered by any newspaper published in the United States, its Territories or possessions, or published by citizens of the United States in foreign countries, or by any press association of the United States, and (b) for the reception and transmission of private commercial messages between ships, between ship and shore, between localities in Alaska and between Alaska and the continental United States: Provided, That the rates fixed for the reception and transmission of all such messages, other than press messages between the Pacific coast of the United States, Hawaii, Alaska, Guam, American Samoa, the Philippine Islands, and the Orient, and between the United States and the Virgin Islands, shall not be less than the rates charged by privately owned and operated stations for like messages and service; Provided further, That the right to use such stations for any of the purposes named in this section shall terminate and cease as between any countries or localities or between any locality and privately operated ships whenever privately owned and operated stations are capable of meeting the normal communication requirements between such countries or localities or between any locality and privately operated ships, and the Commission shall have notified the Secretary of the Navy thereof.

SPECIAL PROVISION AS TO PHILIPPINE ISLANDS AND CANAL ZONE

SEC. 328. This title shall not apply to the Philippine Islands or to the Canal Zone. In international radio matters the Philippine Islands and the Canal Zone shall be represented by the Secretary of State.

ADMINISTRATION OF RADIO LAWS IN TERRITORIES AND POSSESSIONS

SEC. 329. The Commission is authorized to designate any officer or employee of any other department of the Government on duty in any Territory or possession of the United States to render therein such service in connection with the administration of this Act as the Commission may prescribe and also to designate any officer or employee of any other department of the Government to render such services at any place within the United States in connection with the administration of title III of this Act as may be necessary: Provided, That such designation shall be approved by the head of the department in which such person is employed.

PART II—RADIO EQUIPMENT AND RADIO OPERATORS ON BOARD SHIP

SHIP RADIO INSTALLATIONS AND OPERATIONS

SEC. 351. (a) Except as provided in section 352 hereof, it shall be unlawful—

(1) For any ship of the United States, other than a cargo ship of less than sixteen hundred gross tons, to be navigated in the open sea outside of a harbor or port, or for any ship of the United States or any foreign country, other than a cargo ship of less than sixteen hundred gross tons, to leave or attempt to leave any harbor or port of the United States for a voyage in the open sea, unless such ship is equipped with an efficient radio installation in operating condition, in charge of and operated by a qualified operator or operators, adequately installed and protected so as to insure proper operation, and so as not to endanger the ship and radio installation, as hereinafter provided, and in the case of a ship of the United States, unless there is on board a valid station license issued in accordance with this Act;

(2) For any passenger ship of the United States of five thousand gross tons, or over, to be navigated outside of a harbor or port, in the open sea, or for any such ship of the United States or any foreign country to leave or attempt to leave any harbor or port of the United States for a voyage in the open sea, unless such ship is equipped with an efficient radio direction finder apparatus (radio compass) properly adjusted in operating condition as hereinafter provided, which apparatus is approved by the Commission;

(b) A ship which is not subject to the provisions of this part at the time of its departure on a voyage shall not become subject to such provisions on account of any deviation from its intended voyage due to stress of weather or any other cause over which neither the master, the owner, nor the charterer (if any) has control.

SEC. 352. (a) The provisions of this part shall not apply to—

(1) A ship of war;

(2) A ship of the United States belonging to and operated by the Government, except a ship of the United States Maritime Commission, the Inland and Coastwise Waterways Service, or the Panama Railroad Company;

(3) A foreign ship belonging to a country which is a party to the Safety Convention and which ship carries a valid certificate exempting said ship from the radio provisions of that Convention, or which ship con-

forms to the radio requirements of such Convention or Regulations and has on board a valid certificate to that effect;

(4) Yachts of less than six hundred gross tons not subject to the radio provisions of the Safety Convention;

(5) Vessels in tow;

(6) A vessel navigating solely on the Great Lakes, or on any bays, sounds, rivers, or protected waters within the jurisdiction of the United States, or to a vessel leaving or attempting to leave any harbor or port of the United States for a voyage solely on the Great Lakes, or on any bays, sounds, rivers, or protected waters within the jurisdiction of the United States.

(b) The Commission may, if it considers that the route or the conditions of the voyage or other circumstances are such as to render a radio installation unreasonable or unnecessary for the purposes of this part, exempt from the provisions of this part any ship, or any class of ships, which falls within any of the following descriptions:

(1) Passenger ships which in the course of their voyage do not go more than twenty nautical miles from the nearest land or more than two hundred nautical miles between two consecutive ports;

(2) Cargo ships which in the course of their voyage do not go more than one hundred and fifty nautical miles from the nearest land;

(3) Passenger vessels of less than one hundred gross tons not subject to the radio provisions of the Safety Convention;

(4) Sailing ships.

OPERATORS, WATCHES, AUTO-ALARM

SEC. 353. (a) Each cargo ship required by this part to be fitted with a radio installation and which is not fitted with an auto-alarm, and each passenger ship required by this part to be fitted with a radio installation, shall, for safety purposes, carry at least two qualified operators.

(b) A cargo ship, required by this part to be fitted with a radio installation, which is fitted with an auto-alarm in accordance with this title, shall, for safety purposes, carry at least one qualified operator who shall have had at least six months' previous service in the aggregate as a qualified operator in a station on board a ship or ships of the United States, but during the emergency proclaimed by the President on September 8, 1939, to exist, but not after the termination of such emergency or such earlier date as Congress by concurrent resolution may designate, the aforesaid requirement of six months' previous service may be suspended or modified by regulation or order of the Commission for successive periods of not more than six months' duration.

(c) Each ship of the United States required by this part to be fitted with a radio installation shall, while being navigated outside a harbor or port, keep a continuous watch by means of qualified operators: Provided, however, That in lieu thereof on a cargo ship fitted with an auto-alarm in proper operating condition, a watch of at least eight hours per day, in the aggregate, shall be maintained by means of a qualified operator.

(d) The Commission shall, when it finds it necessary for safety purposes, have authority to prescribe the particular hours of watch on a ship of the United States required by this part to be fitted with a radio installation.

(e) On all ships of the United States fitted with an auto-alarm, said apparatus shall be in operation at all times while the ship is being navigated outside of a harbor or port when the operator is not on watch.

TECHNICAL REQUIREMENTS

SEC. 354. The radio installation and the radio direction-finding apparatus required by section 351 of this part shall comply with the following requirements:

(a) The radio installation shall comprise a main and an emergency or reserve installation: Provided, however, That on a cargo ship, if the main installation complies also with all the requirements of an emergency or reserve installation, the emergency or reserve installation may be omitted.

(b) The ship's radio operating room and the emergency or reserve installation shall be placed in the upper part of the ship in a position of the greatest possible safety and as high as practicable above the deepest load water line, and the location of such room or rooms shall be approved by the Bureau of Marine Inspection and Navigation, Department of Commerce.

(c) The main and emergency or reserve installations shall be capable of transmitting and receiving on the frequencies and types of waves designated by the Commission pursuant to law for the purpose of distress and safety of navigation.

(d) The main installation shall have a normal transmitting and receiving range of at least two hundred nautical miles, that is to say, it must be capable of transmitting and receiving clearly perceptible signals from ship to ship over a range of at least two hundred nautical miles by day under normal conditions and circumstances.

(e) Sufficient power shall be available at all times to operate the main radio installation efficiently under normal conditions over the range specified in subsection (d) of this section.

(f) The emergency or reserve installation shall include a source of energy independent of the propelling power of the ship and of any other electrical system and shall be capable of being put into operation rapidly and of working for at least six continuous hours. For the emergency or reserve installation, the normal range as defined in subsection (d) of this section shall be at least one hundred nautical miles.

(g) There shall be provided between the bridge of the ship and the radio room, and between the bridge and the location of the direction finding apparatus, when the direction finding apparatus is not located on the bridge an efficient means of communication independent of any other communication system of the ship.

(h) The direction finding apparatus shall be efficient and capable of receiving clearly perceptible radio signals and of taking bearings from which the true bearing and direction may be be determined. It shall be capable of receiving signals on the frequencies prescribed for distress, direction finding, and radio beacons by the General Radio Regulations annexed to the International Telecommunication Convention in force and in new installations after the effective date of this part, such other frequencies as the Commission may for safety purposes designate.

LIFEBOATS

SEC. 355. Every motor lifeboat, required to be equipped with radio by treaty or convention to which the United States is a party, by statute, or by regulation made in conformity with a treaty, convention, or statute, shall be fitted with an efficient radio installation under such rules and regulations as the Commission may find necessary to promote the safety of life.

APPROVAL OF INSTALLATIONS

SEC. 356. (a) Insofar as is necessary to carry out the purposes and requirements of this part, the Commission shall have authority, for any ship subject to this part—

(1) To approve the details as to the location and manner of installations of the equipment required by this part or of equipment necessitated by reason of the purposes and requirements of this part.

(2) To approve installations, apparatus, and spare parts necessary to comply with the purposes and requirements of this part.

(3) To prescribe such additional equipment as may be determined to be necessary to supplement that specified herein, for the proper functioning of the radio installation installed in accordance with this part or for the proper conduct of radio communication in time of emergency or distress.

TRANSMISSION OF INFORMATION

SEC. 357. (a) The master of every ship of the United States equipped with radio transmitting apparatus, on meeting with dangerous ice, a dangerous derelict, a tropical storm, or any other direct danger to navigation, shall cause to be transmitted all pertinent information relating thereto, to ships in the vicinity and to the appropriate authorities, in accordance with rules and regulations issued by the Commission, which authorities of the United States shall, when they consider it necessary, promptly bring the information received by them to the knowledge of those concerned and foreign authorities interested.

(b) No charge shall be made by any ship or station in the mobile service of the United States for the transmission, receipt, or relay of the information designated in subsection (a) originating on a ship of the United States or of a foreign country.

(c) The transmission by any ship of the United States, made in compliance with subsection (a), to any station which imposes a charge for the reception, relay, or forwarding of the required information, shall be free of cost to the ship concerned and any communication charges incurred by the ship for transmission, relay, or forwarding of the information may be certified to the Commission for reimbursement out of moneys appropriated to the Commission for that purpose.

(d) No charge shall be made by any ship or station in the mobile service of the United States for the transmission of distress messages and replies thereto in connection with situations involving the safety of life and property at sea.

(e) Notwithstanding any other provision of law, any station or carrier may render free service in connection with situations involving the safety of life and property, including hydrographic reports, weather reports, reports regarding aids to navigation and medical assistance to injured or sick persons on ships and aircraft at sea. All free service permitted by this subsection shall be subject to such rules and regulations as the Commission may prescribe, which rules may limit such free service to the extent which the Commission finds desirable in the public interest.

AUTHORITY OF MASTER

SEC. 358. The radio installation, the operators, the regulation of their watches, the transmission and receipt of messages, and the radio service of the ship except as they may be regulated by law or international agreement, or by rules and regulations made in pursuance thereof, shall in the case of a ship of the United States be under the supreme control of the master.

CERTIFICATES

SEC. 359. (a) Each vessel of the United States to which the safety convention applies shall comply with the radio and communication provisions of said convention at all times while the vessel is in use, in addition to all other requirements of law, and have on board an appropriate certificate as prescribed by the safety convention.

(b) Appropriate certificates concerning the radio particulars provided for in said convention shall be issued to any vessel of the United States which is subject to the radio provisions of the safety convention and is found by the Commission to comply therewith. Such certificates shall be issued by the Department of Commerce, or whatever other agency is authorized by law so to do, upon request of the Commission made after proper inspection or determination of the facts. If the holder of such certificate violates the provisions of the safety convention, or of this Act, or the rules, regulations, or conditions prescribed by the Commission, and if the effective administration of the safety convention or of this part so requires, the Commission, after hearing in accordance with law, is authorized to request the modification or cancellation of such certificate. Upon receipt of such request the Department of Commerce, or whatever other agency is authorized by law to do so, shall modify or cancel the certificate in accord therewith. The Commission is authorized to issue, modify, or cancel such certificates in the event that no other agency is authorized to do so.

INSPECTION

SEC. 360. (a) In addition to any other provisions required to be included in a radio station license, the station license of each ship of the United States subject to this title shall include particulars with reference to the items specifically required by this title.

(b) Every ship of the United States, subject to this part, shall have the equipment and apparatus prescribed therein, inspected at least once each year by the Commission. If, after such inspection, the Commission is satisfied that all relevant provisions of this Act and the station license have been complied with, that fact shall be certified to on the station license by the Commission. The Commission shall make such additional inspections at frequent intervals as may be necessary to insure compliance with the requirements of this Act.

CONTROL BY COMMISSION

SEC. 361. Nothing in this title shall be interpreted as lessening in any degree the control of the Commission over all matters connected with the radio equipment and its operation on shipboard and its decision and deter-

mination in regard to the radio requirements, installations, or exemptions from prescribed radio requirements shall be final, subject only to review in accordance with law.

FORFEITURES

SEC. 362. The following forfeitures shall apply to this part, in addition to the penalties and forfeitures provided by title V of this Act:

(a) Any ship that leaves or attempts to leave any harbor or port of the United States in violation of the provisions of this part, or the rules and regulations of the Commission made in pursuance thereof, or any ship of the United States that is navigated outside of any harbor or port in violation of any of the provisions of this part, or the rules and regulations of the Commission made in pursuance thereof, shall forfeit to the United States the sum of $500, recoverable by way of suit or libel. Each such departure or attempted departure, and in the case of a ship of the United States each day during which such navigation occurs shall constitute a separate offense.

(b) Every willful failure on the part of the master of a ship of the United States to enforce or to comply with the provisions of this Act or the rules and regulations of the Commission as to equipment, operators, watches, or radio service shall cause him to forfeit to the United States the sum of $100.

TITLE IV — PROCEDURAL AND ADMINISTRATIVE PROVISIONS

JURISDICTION TO ENFORCE ACT AND ORDERS OF COMMISSION

SEC. 401. (a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this Act by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this Act.

(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it for them obedience to the same.

(c) Upon the request of the Commission it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States.

(d) The provisions of the Expediting Act, approved February 11, 1903, as amended, and of section 238 (1) of the Judicial Code, as amended, shall be held to apply to any suit in equity arising under Title II of this Act, wherein the United States is complainant.

PROCEEDINGS TO ENFORCE OR SET ASIDE THE COMMISSION'S ORDERS—APPEAL IN CERTAIN CASES

SEC. 402. (a) The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Com-

mission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license) and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commission. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: Provided, however, That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

INQUIRY BY COMMISSION ON ITS OWN MOTION

SEC. 403. The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

REPORTS OF INVESTIGATIONS

SEC. 404. Whenever an investigation shall be made by the Commission it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

REHEARING BEFORE COMMISSION

SEC. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear: Provided, however, That in the case of a decision, order, or requirement made under title III, the time within which application for rehearing may be made shall be limited to twenty days after the effective date thereof, and such application may be made by any party or any person aggrieved or whose interests are adversely affected thereby. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted, the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination, shall be subject to the same provisions as an original order.

MANDAMUS TO COMPEL FURNISHING OF FACILITIES

SEC. 406. The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this Act, of any of the provisions of this Act which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or

transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ: Provided, That if any question of fact as to the proper compensation to the carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper pending the determination of the question of fact: Provided further, That the remedy hereby given by writ of mandamus shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this Act.

PETITION FOR ENFORCEMENT OF ORDER FOR PAYMENT OF MONEY

SEC. 407. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the line of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be prima facie evidence of the facts therein stated, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

ORDERS NOT FOR PAYMENT OF MONEY—WHEN EFFECTIVE

SEC. 408. Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days after service of the order, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

GENERAL PROVISIONS RELATING TO PROCEEDINGS— WITNESSES AND DEPOSITIONS

SEC. 409. (a) Any member or examiner of the Commission, or the director of any division, when duly designated by the Commission for such purpose, may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Commission; except that in the administration of title III an examiner may not be authorized to exercise such powers with respect to a matter involving (1) a change of policy by the Commission, (2) the revocation of a station license, (3) new devices or developments in radio, or (4) a new kind of use of frequencies. In all cases heard by an examiner the Commission shall hear oral arguments on request of either party.

(b) For the purposes of this Act the Commission shall have the power to require by subpena the attendance and testimony of witnesses and the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(d) Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any common carrier or licensee or other person, issue an order requiring such common carrier, licensee, or other person to appear before the Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(e) The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any United States

commissioner, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor, or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided.

(f) Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction and shall, after it has been reduced to writing, be subscribed by the deponent.

(g) If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(h) Witnesses whose depositions are taken as authorized in this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(i) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeitures; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(j) Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, schedules of charges, contracts, agreements, and documents, if in his power to do so, in obedience to the subpena, or lawful requirement of the Commission, shall be guilty of a misdemeanor and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

USE OF JOINT BOARDS—COOPERATION WITH STATE COMMISSIONS

SEC. 410. (a) The Commission may refer any matter arising in the administration of this Act to a joint board to be composed of a member, or of an equal number of members, as determined by the Commission, from each of the States in which the wire or radio communication affected by or involved in the proceeding takes place or is proposed, and any such board shall be vested with the same powers and be subject to the same duties and liabilities as in the case of a member of the Commission when designated by the Commission to hold a hearing as hereinbefore authorized. The action of a joint board shall have such force and effect and its proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The joint board member or members for each State shall be nominated by the State commission of the State or by the Governor if there is no State commission, and appointed by the Federal Communications Commission. The Commission shall have discretion to reject any nominee. Joint board members shall receive such allowances for expenses as the Commission shall provide.

(b) The Commission may confer with any State commission having regulatory jurisdiction with respect to carriers, regarding the relationship between rate structures, accounts, charges, practices, classifications, and regulations of carriers subject to the jurisdiction of such State commission and of the Commission; and the Commission is authorized under such rules and regulations as it shall prescribe to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this Act to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

JOINDER OF PARTIES

SEC. 411. (a) In any proceeding for the enforcement of the provisions of this Act, whether such proceeding be instituted before the Commission

or be begun originally in any district court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers.

(b) In any suit for the enforcement of an order for the payment of money all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit, the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

DOCUMENTS FILED TO BE PUBLIC RECORDS—USE IN PROCEEDINGS

SEC. 412. The copies of schedules of charges, classifications, and of all contracts, agreements, and arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual or other reports of carriers and other persons made to the Commission as required under the provisions of this Act shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of and extracts from any of said schedules, classifications, contracts, agreements, arrangements, or reports, made public records as aforesaid, certified by the Secretary, under the Commission's seal, shall be received in evidence with like effect as the originals: Provided, That the Commission may, if the public interest will be served thereby, keep confidential any contract, agreement, or arrangement relating to foreign wire or radio communication when the publication of such contract, agreement, or arrangement would place American communication companies at a disadvantage in meeting the competition of foreign communication companies.

DESIGNATION OF AGENT FOR SERVICE

SEC. 413. It shall be the duty of every carrier subject to this Act, within sixty days after the taking effect of this Act, to designate in writing an agent in the District of Columbia, upon whom service of all notices and process and all orders, decisions, and requirements of the Commission may be made for and on behalf of said carrier in any proceeding or suit pending before the Commission, and to file such designation in the office of the secretary of the Commission, which designation may from time to time be changed by like writing similarly filed; and thereupon service of all notices and process and orders, decisions, and requirements of the Commission may be made upon such carrier by leaving a copy thereof with such designated agent at his office or usual place of residence in the District of Columbia, with like effect as if made personally upon such carrier, and in default of such designation of such agent, service of any notice or other process in any proceeding before said Commission, or of any order, decision, or requirement of the Commission, may be made by posting such notice, process, order, requirement, or decision in the office of the secretary of the Commission.

REMEDIES IN THIS ACT NOT EXCLUSIVE

SEC. 414. Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

LIMITATIONS AS TO ACTIONS

SEC. 415. (a) All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun within one year from the time the cause of action accrues, and not after.

(b) All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within one year from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

(c) For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within one year from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the one-year period of limitation said period shall be extended to include one year from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

(d) If on or before expiration of the period of limitation in subsection (b) or (c) a carrier begins action under subsection (a) for recovery of lawful charges in respect of the same service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

(e) The cause of action in respect of the transmission of a message shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after.

(f) A petition for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

(g) The term "overcharges" as used in this section shall be deemed to mean charges for services in excess of those applicable thereto under the schedules of charges lawfully on file with the Commission.

PROVISIONS RELATING TO ORDERS

SEC. 416. (a) Every order of the Commission shall be forthwith served upon the designated agent of the carrier in the city of Washington or in such other manner as may be provided by law.

(b) Except as otherwise provided in this Act, the Commission is hereby authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

(c) It shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with such orders so long as the same shall remain in effect.

TITLE V — PENAL PROVISIONS — FORFEITURES

GENERAL PENALTY

SEC. 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

VIOLATIONS OF RULES, REGULATIONS, AND SO FORTH

SEC. 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

FORFEITURE IN CASES OF REBATES AND OFFSETS

SEC. 503. Any person who shall deliver messages for interstate or foreign transmission to any carrier, or for whom as sender or receiver, any such carrier shall transmit any interstate or foreign wire or radio communication, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transmission of such messages as fixed by the schedules of charges provided for in this Act, shall in addition to any other penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times

the total value of such consideration, so received or accepted, or both, as the case may be.

PROVISIONS RELATING TO FORFEITURES

SEC. 504. (a) The forfeitures provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the person or carrier has its principal operating office or in any district through which the line or system of the carrier runs: Provided, That in the case of forfeiture by a ship, said forfeiture may also be recoverable by way of libel in any district in which such ship shall arrive or depart. Such forfeitures shall be in addition to any other general or specific penalties herein provided. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this Act. The costs and expenses of such prosecutions shall be paid from the appropriation for the expenses of the courts of the United States.

(b) The forfeitures imposed by title III, part II of this Act shall be subject to remission or mitigation by the Commission, upon application therefor, under such regulations and methods of ascertaining the facts as may seem to it advisable, and, if suit has been instituted, the Attorney General, upon request of the Commission, shall direct the discontinuance of any prosecution to recover such forfeitures: Provided, however, That no forfeiture shall be remitted or mitigated after determination by a court of competent jurisdiction.

VENUE OF OFFENSES

SEC. 505. The trial of any offense under this Act shall be in the district in which it is committed; or if the offense is committed upon the high seas, or out of jurisdiction of any particular State or district, the trial shall be in the district where the offender may be found or into which he shall be first brought. Whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

COERCIVE PRACTICES AFFECTING BROADCASTING

SEC. 506. (a) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation, or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel, or constrain a licensee—

(1) to employ or agree to employ, in connection with the conduct of the broadcasting business of such licensee, any person or persons in excess of the number of employees needed by such licensee to perform actual services; or

(2) to pay or give or to agree to pay or give any money or other thing of value in lieu of giving, or on account of failure to give, employment to any person or persons, in connection with the conduct of the broadcasting business of such licensee, in excess of the number of employees needed by such licensee to perform actual services; or

(3) to pay or agree to pay more than once for services performed in connection with the conduct of the broadcasting business of such licensee; or

(4) to pay or give or agree to pay or give any money or other thing of value for services, in connection with the conduct of the broadcasting business of such licensee, which are not to be performed; or

(5) to refrain, or agree to refrain, from broadcasting or from permitting the broadcasting of a noncommercial educational or cultural program in connection with which the participants receive no money or other thing of value for their services, other than their actual expenses, and such licensee neither pays nor gives any money or other thing of value for the privilege of broadcasting such program nor receives any money or other thing of value on account of the broadcasting of such program; or

(6) to refrain, or agree to refrain, from broadcasting or permitting the broadcasting of any radio communication originating outside the United States.

(b) It shall be unlawful, by the use or express or implied threat of the use of force, violence, intimidation or duress, or by the use or express or implied threat of the use of other means, to coerce, compel or constrain or attempt to coerce, compel or constrain a licensee or any other person—

(1) to pay or agree to pay any exaction for the privilege of, or on account of, producing, preparing, manufacturing, selling, buying, renting, operating, using, or maintaining recordings, transcriptions, or mechanical, chemical, or electrical reproductions, or any other articles, equipment, machines, or materials, used or intended to be used in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or

(2) to accede to or impose any restriction upon such production, preparation, manufacture, sale, purchase, rental, operation, use, or maintenance, if such restriction is for the purpose of preventing or limiting the use of such articles, equipment, machines, or materials in broadcasting or in the production, preparation, performance, or presentation of a program or programs for broadcasting; or

(3) to pay or agree to pay any exaction on account of the broadcasting, by means of recordings or transcriptions, of a program previously broadcast, payment having been made, or agreed to be made, for the services actually rendered in the performance of such program.

(c) The provisions of subsection (a) or (b) of this section shall not be held to make unlawful the enforcement or attempted enforcement, by means lawfully employed, of any contract right heretofore or hereafter existing or of any legal obligation heretofore or hereafter incurred or assumed.

(d) Whoever willfully violates any provision of subsection (a) or (b) of this section shall, upon conviction thereof, be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or both.

(e) As used in this section the term "licensee" includes the owner or owners, and the person or persons having control or management, of the radio station in respect of which a station license was granted.

TITLE VI — MISCELLANEOUS PROVISIONS

TRANSFER TO COMMISSION OF DUTIES, POWERS, AND FUNCTIONS UNDER EXISTING LAW

SEC. 601. (a) All duties, powers, and functions of the Interstate Commerce Commission under the Act of August 7, 1888 (25 stat. 382), relating to operation of telegraph lines by railroad and telegraph companies granted Government aid in the construction of their lines, are hereby imposed upon and vested in the Commission: Provided, That such transfer of duties, powers, and functions shall not be construed to affect the duties, powers, functions, or jurisdiction of the Interstate Commerce Commission under, or to interfere with or prevent the enforcement of, the Interstate Commerce Act and all Acts amendatory thereof or supplemental thereto.

(b) All duties, powers, and functions of the Postmaster General with respect to telegraph companies and telegraph lines under any existing provision of law are hereby imposed upon and vested in the Commission.

REPEALS AND AMENDMENTS

SEC. 602. (a) The Radio Act of 1927, as amended, is hereby repealed.

(b) The provisions of the Interstate Commerce Act, as amended, insofar as they relate to communication by wire or wireless, or to telegraph, telephone, or cable companies operating by wire or wireless, except the last proviso of section 1 (5) and the provisions of section 1 (7) are hereby repealed.

(c) The last sentence of section 2 of the Act entitled "An Act relating to the landing and operation of submarine cables in the United States", approved May 27, 1921, is amended to read as follows: "Nothing herein contained shall be construed to limit the power and jurisdiction of the Federal Communication Commission with respect to the transmission of messages."

(d) The first paragraph of section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, is amended to read as follows:

"SEC. 11. That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy;

in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:"

(e) Such part or parts of the Act entitled "An Act to require apparatus and operators for radio communication on certain ocean steamers", approved June 24, 1910, as amended, as relate to the ocean and to steamers navigating thereon, are hereby repealed. In all other respects said Act shall continue in full force and effect. The Commission is requested and directed to make a special study of the radio requirements necessary or desirable for safety purposes for ships navigating the Great Lakes and the inland waters of the United States, and to report its recommendations, and the reasons therefor, to the Congress as soon as practicable but not later than January 1, 1941.

TRANSFER OF EMPLOYEES, RECORDS, PROPERTY, AND APPROPRIATIONS

SEC. 603. (a) All officers and employees of the Federal Radio Commission (except the members thereof, whose offices are hereby abolished) whose services in the judgment of the Commission are necessary to the efficient operation of the Commission are hereby transferred to the Commission, without change in classification or compensation; except that the Commission may provide for the adjustment of such classification or compensation to conform to the duties to which such officers and employees may be assigned.

(b) There are hereby transferred to the jurisdiction and control of the Commission (1) all records and property (including office furniture and equipment, and including monitoring radio stations) under the jurisdiction of the Federal Radio Commission, and (2) all records under the jurisdiction of the Interstate Commerce Commission and of the Postmaster General relating to the duties, powers, and functions imposed upon and vested in the Commission by this Act.

(c) All appropriations and unexpended balances of appropriations available for expenditure by the Federal Radio Commission shall be available for expenditure by the Commission for any and all objects of expenditure authorized by this Act in the discretion of the Commission, without regard to the requirement of apportionment under the Antideficiency Act of February 27, 1906.

EFFECT OF TRANSFERS, REPEALS, AND AMENDMENTS

SEC. 604. (a) All orders, determinations, rules, regulations, permits, contracts, licenses, and privileges which have been issued, made, or granted

by the Interstate Commerce Commission, the Federal Radio Commission, or the Postmaster General, under any provision of law repealed or amended by this Act or in the exercise of duties, powers, or functions transferred to the Commission by this Act, and which are in effect at the time this section takes effect, shall continue in effect until modified, terminated, superseded, or repealed by the Commission or by operation of law.

(b) Any proceeding, hearing, or investigation commenced or pending before the Federal Radio Commission, the Interstate Commerce Commission, or the Postmaster General, at the time of the organization of the Commission, shall be continued by the Commission in the same manner as though originally commenced before the Commission, if such proceeding, hearing, or investigation (1) involves the administration of duties, powers, and functions transferred to the Commission by this Act, or (2) involves the exercise of jurisdiction similar to that granted to the Commission under the provisions of this Act.

(c) All records transferred to the Commission under this Act shall be available for use by the Commission to the same extent as if such records were originally records of the Commission. All final valuations and determinations of depreciation charges by the Interstate Commerce Commission with respect to common carriers engaged in radio or wire communication, and all orders of the Interstate Commerce Commission with respect to such valuations and determinations, shall have the same force and effect as though made by the Commission under this Act.

(d) The provisions of this Act shall not affect suits commenced prior to the date of the organization of the Commission; and all such suits shall be continued, proceedings therein had, appeals therein taken and judgments therein rendered, in the same manner and with the same effect as if this Act had not been passed. No suit, action, or other proceeding lawfully commenced by or against any agency or officer of the United States, in relation to the discharge of official duties, shall abate by reason of any transfer of authority, power, and duties from such agency or officer to the Commission under the provisions of this Act, but the court, upon motion or supplemental petition filed at any time within twelve months after such transfer, showing the necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the Commission.

UNAUTHORIZED PUBLICATION OF COMMUNICATIONS

SEC. 605. No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance,

purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

WAR EMERGENCY — POWERS OF PRESIDENT

SEC. 606. (a) During the continuance of a war in which the United States is engaged, the President is authorized, if he finds it necessary for the national defense and security, to direct that such communications as in his judgment may be essential to the national defense and security shall have preference or priority with any carrier subject to this Act. He may give these directions at and for such times as he may determine, and may modify, change, suspend, or annul them and for any such purpose he is hereby authorized to issue orders directly, or through such person or persons as he designates for the purpose, or through the Commission. Any carrier complying with any such order or direction for preference or priority herein authorized shall be exempt from any and all provisions in existing law imposing civil or criminal penalties, obligations, or liabilities upon carriers by reason of giving preference or priority in compliance with such order or direction.

(b) It shall be unlawful for any person during any war in which the United States is engaged to knowingly or willfully, by physical force or

intimidation by threats of physical force, obstruct or retard or aid in obstructing or retarding interstate or foreign communication by radio or wire. The President is hereby authorized, whenever in his judgment the public interest requires, to employ the armed forces of the United States to prevent any such obstruction or retardation of communication: Provided, That nothing in this section shall be construed to repeal, modify, or affect either section 6 or section 20 of an Act entitled "An Act to supplement existing law against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914.

(c) Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the Commission, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owner.

(d) Upon proclamation by the President that there exists a state or threat of war involving the United States, the President, if he deems it necessary in the interest of the national security and defense, may, during a period ending not later than six months after the termination of such state or threat of war and not later than such earlier date as the Congress by concurrent resolution may designate, (1) suspend or amend the rules and regulations applicable to any or all facilities or stations for wire communication within the jurisdiction of the United States as prescribed by the Commission, (2) cause the closing of any facility or station for wire communication and the removal therefrom of its apparatus and equipment, or (3) authorize the use or control of any such facility or station and its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners.

(e) The President shall ascertain the just compensation for such use or control and certify the amount ascertained to Congress for appropriation and payment to the person entitled thereto. If the amount so certified is unsatisfactory to the person entitled thereto, such person shall be paid only 75 per centum of the amount and shall be entitled to sue the United States to recover such further sum as added to such payment of 75 per centum will make such amount as will be just compensation for the use and control. Such suit shall be brought in the manner provided by paragraph 20 of section 24, or by section 145, of the Judicial Code, as amended.

(f) Nothing in subsection (c) or (d) shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by any communication system or systems.

(g) Nothing in subsection (c) or (d) shall be construed to authorize the President to make any amendment to the rules and regulations of the Commission which the Commission would not be authorized by law to make; and nothing in subsection (d) shall be construed to authorize the President to take any action the force and effect of which shall continue beyond the date after which taking of such action would not have been authorized.

(h) During the continuance of the war in which the United States is now engaged and for a period ending not later than six months after the termination of such war or such earlier date as the Congress by concurrent resolution may designate—

(1) section 201 (b) of the Act shall not be construed as permitting or requiring the furnishing of reports of the positions of ships by common carriers subject to provisions of this Act; such reports may be furnished by such common carriers only pursuant to such rules and regulations as may be promulgated by the Secretary of the Navy;

(2) section 306 shall not be construed to permit the transmission of communications or signals by a foreign ship when the same is within the jurisdiction of the United States except pursuant to such rules and regulations as may be promulgated by the Secretary of the Navy;

(3) section 318 shall not be construed as preventing the emergency or temporary operation of the transmitting apparatus of radio stations for which licensed operators are required by international agreement or for safety purposes by any member of the armed forces of the United States, or upon aircraft by any person pursuant to direction of the military and naval authorities of the United States;

(4) section 321 (b) shall not be construed as establishing any priority for distress messages over military message traffic determined by the Secretary of the Navy to require priority in transmission in the effective prosecution of the war;

(5) intercommunication by radio stations in the mobile service as provided for in section 322 shall be conducted only in such manner and at such times as may be authorized by the Secretary of the Navy;

(6) nothing contained in part II of title III of the Act shall be construed as preventing the military and naval authorities of the United States from ordering the emergency movement of ships at such times and under such circumstances as they may deem necessary in the effective prosecution of the war.

EFFECTIVE DATE OF ACT

SEC. 607. This Act shall take effect upon the organization of the Commission, except that this section and section 1 and 4 shall take effect July 1, 1934. The Commission shall be deemed to be organized upon such date as four members of the Commission have taken office.

SEPARABILITY CLAUSE

SEC. 608. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

SHORT TITLE

SEC. 609. This Act may be cited as the "Communications Act of 1934."

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