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Curbing Deception: Why the FCC Should Establish Formal News Distortion Regulations for Broadcast Programming

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ABSTRACT:
This paper argues that the FCC should revise the current news distortion doctrine to prevent deliberate attempts by licensees to mislead the audience. To address this issue, past FCC regulations, outcomes from prior distortion claims and related court decisions are examined. The resulting analysis serves as the foundation for the revised definition of news distortion and accompanying evidentiary standard offered here. Traditional arguments against content-based broadcast regulations, such as those raised in regards to the Fairness Doctrine, are considered in light of the changes being recommended. Finally, the work of C. Edwin Baker, who argued that governments are justified in crafting regulation designed to advance the communication order within today's commercial media environment, is used to build support for the revised distortion doctrine being proposed.

I. Introduction

In the United States there are currently no formal, written rules that prevent broadcasters from knowingly lying on-air. While this statement may seem surprising given the number of broadcast regulations that exist, the FCC has never actually published its news distortion policy as a regulation with definitive elements and defenses.[2] As a result, a handful of radio and television news programs have emerged that seem to intentionally mislead viewers by knowingly presenting misinformation as cold-hard facts. Most problematic are those news programs that present factual inaccuracies as objective truths.

Citing these very concerns, Canadian regulators made a decision in early 2011 to uphold a law that forbids lying on broadcast news.[3] The law was identified by Parliament's Standing Joint Committee for the Scrutiny of Regulations as not being in line with the Canadian Charter of Rights and Freedoms. The issue was opened for public comment and over 3,500 citizens responded to the question of whether the current law, which requires that "a licenser may not broadcast...any false or misleading news,"[4] be narrowed to "news that the licensee knows is false or misleading

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[2] New World Communications of Tampa, Inc. v. Akre, 866 So. 2d 1231, 1234 (Fla. App. 2003).
[3] *See* John Doyle, *'False or Misleading News' Only Part of TV's Murky Future*, GLOBE & MAIL, Feb. 13, 2011, available at: http://www.theglobeandmail.com/news/arts/television/john-doyle/false-or-misleading-news-only-part-of-tvs-murky-future/article1899625/.
[4] *See* Robert F. Kennedy, Jr., *Regulators Reject Proposal That Would Bring Fox-Style News to Canada*, HUFFINGTON POST, Feb. 28, 2011, available at: http://www.huffingtonpost.com/robert-f-kennedy-jr/fox-news-will-not-be-moving-into-canada-after-all_b_829473.html.

and that endangers or is likely to endanger the lives, health or safety of the public."[5] Of those who commented, only eight were in favor of narrowing the law to punish only false or misleading news that may endanger the public. Instead, Canadian citizens overwhelmingly supported regulation that prevented newscasters from broadcasting any misleading information. In fact, the provision has been cited as the reason that Fox News and right wing talk radio have been shut out of Canada almost entirely.[6]

Concerns about commercial media entities abusing their privilege through the presentation of misinformation are very real, as are the potential implications. For example, the use of the public airwaves to intentionally disseminate factual inaccuracies may limit individuals' ability to effectively participate in self-government or social change as a result of not having complete or accurate information. To address this issue, the Federal Communications Commission (FCC) should establish formal regulations to prevent broadcasters and cablecasters from distorting the news. In the past, the FCC has said, "rigging or slanting the news is a most heinous act against the public interest."[7] However, as one court noted, the commission's current news distortion policy has never been formally established as a law, rule or regulation.[8]

Therefore, this paper seeks to develop refined news distortion regulations and ensure that the doctrine proposed does not succumb to the same arguments that have deemed past content-based regulation unconstitutional. To do this, part II begins by exploring the rationale for current broadcast and cable content regulations. Part II also looks at content-based broadcast regulations, first generally and then specifically at those regulations that apply directly to news programming. In addition, this section examines the current news distortion doctrine, paying particular attention to how the FCC has handled distortion complaints over time.

Part III of the paper discusses the rulings courts have made in cases that have challenged the doctrine and then synthesizes the suggestions from those cases, as well as the FCC's historical approach to handling distortion claims. Part IV then offers a refined definition for news distortion along with a proposed evidentiary standard. Part V discusses the benefits of the proposed regulations and also addresses the concerns raised by opposing arguments. The paper concludes with the argument that

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[5] CANADIAN RADIO-TELEVISION AND TELECOMMUNICATIONS COMMISSION, BROADCASTING REGULATORY POLICY CRTC 2011-308 (2011).
[6] *See* Robert F. Kennedy, Jr., *Regulators Reject Proposal That Would Bring Fox-Style News to Canada*, HUFFINGTON POST, Feb. 28, 2011, available at: http://www.huffingtonpost.com/robert-f-kennedy-jr/fox-news-will-not-be-moving-into-canada-after-all_b_829473.html.
[7] Hunger in America, 20 F.C.C.2d 143, 151(1969).
[8] New World Communications of Tampa, Inc. v. Akre, 866 So. 2d 1231, 1234 (Fla. App. 2003).

establishing formal news distortion regulations like those proposed here would demonstrate a recommitment by the FCC to place the public interest over the economic interests of multinational media corporations.

II. Broadcast Regulations

Traditionally, the primary justification for regulating broadcast content has been spectrum scarcity.[9] The finite nature of the spectrum, the United States Supreme Court has said, justifies regulation of broadcasters.[10] Unlike print or digital media, which can be created and distributed by anyone with funds to do so, broadcast and cable programming are subject to certain regulations in exchange for permission to transmit signals over the public airwaves. The reason broadcast and radio content are treated differently is because of the finite nature of the spectrum. While the Internet may, like cable, use fiber optic cables and public streets or sidewalks to reach our homes, the medium itself is available to almost anyone who would like to access it. There are minimal barriers to starting a web site, or a print publication for that matter. However, there is not enough space on the electromagnetic spectrum for everyone who would like to own a television or radio station.[11] The select few given the privilege of holding a broadcast license are subject to certain rules, which do not apply to print or online expression.[12] Despite the emergence of cable and satellite television, which does increase spectrum availability, the Supreme Court has said that it would not alter its spectrum scarcity rationale "without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[13]

In addition to spectrum scarcity, courts also justify regulation of television and radio because broadcast media have a greater influence – a "special impact" – on audiences than print media.[14] For example, according to traffic measurement site, Quantcast, Facebook reaches an average of about 140 million people per month in the United States.[15] On the other hand, the 2012 Super Bowl boasted an estimated

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[9] The electromagnetic spectrum used by broadcasters to transmit signals is a publicly owned resource with limited space available. Therefore, only a certain number of radio and television stations in a geographic area may use the public's airwaves without causing interference with one another. *See* National Broadcasting Co. v. FCC, 319 U.S. 190 (1943).
[10] *See id.*
[11] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 391 (1969).
[12] *Id.* at 393.
[13] FCC v. League of Women Voters, 468 U.S. 364, 376n.11 (1984).
[14] *See* Robinson v. American Broadcasting Co., 441 F.2d 1396, 1399 (6th Cir. 1971).

[15] FACEBOOK SITE VISITS, https://www.quantcast.com/facebook.com (last visited Jan. 21, 2013).

111 million viewers in the U.S. in a single day.[16] Thus, the influence of a given broadcast program is often characterized as greater than an Internet site or print publication because of the sheer number of people exposed.

The public interest standard is also cited as a central justification for regulating broadcasters. In addition to creating the FCC to oversee the licensing of radio and later television broadcast stations, the Communications Act of 1934 also established that the public's interest should be paramount to stations' interests. Specifically, the Act says that federal regulation should be guided not by broadcasters' demands, but instead by the "public interest, convenience and necessity."[17] Until the massive deregulation of the broadcast industry in the 1980s, the public interest standard was often cited by the FCC – along with spectrum scarcity – as the reason for adopting regulations.[18] Today, the FCC is well within its rights to mandate that broadcasters continue to serve in the public's interest, convenience and necessity.[19]

While broadcast media have been regulated since their emergence in the early 20th century,[20] cable television was not initially viewed by the FCC as under its regulatory jurisdiction. However, in 1962 the FCC claimed that some CATV operators were using microwave transmitters to get signals from stations to cable system antennas, meaning they too were using the spectrum. This culminated with *U.S. v. Southwestern Cable*,[21] in which the Supreme Court agreed that the FCC had ancillary jurisdiction over cable. This jurisdiction was made permanent when Congress adopted the Cable Communications Policy Act of 1984.

A. Content-Based Regulations

In order to maintain the privilege of license renewal, broadcasters and in some cases, cablecasters, must abide by FCC regulations regarding the content of their programming. Although different sets of rules regarding content and programming apply to broadcast and cable television, there are some areas of overlap. For example, cable television operators who originate programming are, like broadcasters, subject to rules regarding political advertising. Section 315's equal opportunity requirement applies when a legally qualified political candidate uses a broadcast or cable system to advertise.[22] In addition, there are also laws in place that limit commercial time before,

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[16] Super Bowl Sets Ratings Record Again, ESPN.COM (Feb. 6, 2012), http://espn.go.com/nfl/playoffs/2011/story/_/id/7546470/2012-super-bowl-new-york-giants-new-england-patriots-sets-ratings-record-3rd-straight-year.
[17] *Id.* § 309(a).
[18] *Id.* § 309(a).
[19] Communications Act of 1934, 47 U.S.C. § 309(a) (1994).
[20] Pub. L. 264, 27 Stat. 302 (1912).
[21] United States v. Southwestern Cable Co., 392 U.S. 157 (1968).
[22] 47 U.S.C. § 315 (1934).

during and after children's programming on both cable and broadcast television.[23]

Several other content-based federal regulations also apply to both broadcast and cable television operations, including stipulations regarding lotteries and contests, sponsorship identification and even cigarette advertising.[24] The most strident of these is obscene speech, which is not protected by the First Amendment. Broadcasters and cablecasters are prohibited from airing obscene programming at any time.

Indecency, however, is another matter. Indecency regulations have traditionally been applied to broadcast content only and not to cable. Because cable is invited into the home – unlike broadcast radio or television, which is said to be pervasive - the courts and FCC have determined that it need not be regulated for indecent material because parents may prevent their children from viewing controversial content simply by choosing not to subscribe. However, this inquiry holds that because cable technology utilizes public space (such as sidewalks and streets under which fiber optic cable has been laid) for its transmission, it too should be subject to the narrowly drawn content-based regulations proposed here.

Along these lines, this inquiry will need to consider the recent decision by the United States Court of Appeals for the Second Circuit, which deemed current indecency regulations to be unconstitutional. [25] In July 2010, the Second Circuit struck down the FCC's indecency policy, meaning that currently, indecent material is permitted on both broadcast and cable television.[26] In a unanimous decision, the court said that the FCC's current policy created "a chilling effect that goes far beyond the fleeting expletives at issue" because it left broadcasters without a reliable guide to what the commission would find offensive.[27]

Notably, the court made clear that it was not preventing federal regulation of broadcast standards, but instead said only that the current policy as it is written fails constitutional scrutiny. The FCC has appealed the case to the Supreme Court. Regardless of the outcome of that decision, the concerns raised by the Second Circuit point to the need for any content-based regulation, including those being proposed here, to meet the requirements of strict scrutiny. Part V of this paper will consider in-depth the claim that media specific regulations will have a chilling effect on licensees.

Finally, no review of current content-based regulations, especially those that apply to both cable and broadcast programming, would be complete without addressing the role of the First Amendment in the regulatory process. The First

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[23] Children's Television Act, Pub. L. 101-437, 104 Stat. 996 (1990).
[24] *See* Federal Communications Commission, Cable Television Fact Sheet (2000) available at: (http://www.fcc.gov/mb/facts/csgen.html) (last visited Nov. 8, 2010).
[25] Fox Television Stations, Inc. v. FCC, 613 F.3d 317, 319 (2d Cir. 2010).
[26] *Id.*
[27] *Id.*

Amendment and Section 326 of the Communications Act of 1934 prevent Congress and the FCC respectively from censoring broadcasters. The FCC does not, therefore, monitor particular programs or particular performers, but rather enforces regulations in response to complaints. In fact, FCC and court records show that the FCC has only revoked a handful of licenses since broadcast law was established in 1934.[28] Moreover, the FCC has not taken a major action of that kind in more than 20 years.[29] The hope is that with new, clearly defined regulations, the FCC and more importantly, viewers, will have a path for recourse if broadcasters engage in intentional news distortion.

B. Content-Based News Regulations

Since the demise of the fairness doctrine in 1987, there are no regulatory standards regarding balance or accuracy that apply to cable news. Prior to the FCC's decision to change the rules, a decision that was upheld by a federal appellate court in 1989,[30] the fairness doctrine mandated that radio and television broadcasters, and eventually cablecasters who originated content, air programs about issues affecting the public and present a variety of viewpoints, especially regarding controversial issues.[31] Although it was not necessary for broadcasters to include multiple perspectives in a particular program, the station's overall programming landscape needed to include a wide range of diverse viewpoints. [32]

Challenged in the landmark *Red Lion* case as unconstitutional under the First Amendment, the Supreme Court decided then that spectrum scarcity justified the FCC's requirement that broadcasters present multiple viewpoints.[33] Print media, the Court said, do not have the same right-of-reply. The Court justified its decision by noting that the spectrum prevents everyone who wants to broadcast from doing so.[34] However, in an era of sweeping telecommunications deregulation that took place during the 1980s, the FCC repealed the doctrine on grounds that it violated broadcasters' First Amendment rights. The commission claimed that the policy was causing broadcasters to censor themselves. In essence, the fairness doctrine was accused of having a chilling effect on broadcasters. According to the FCC,

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[28] FCC Unlikely to Revoke Broadcast Licenses for Fox, Andrew Feinberg, THE HILL BLOG (Jan. 21, 2013, 1:37 PM), http://thehill.com/blogs/hillicon-valley/technology/227039-fcc-unlikely-to-revoke-broadcasting-licenses-for-fox-say-experts.
[29] *Id.*
[30] Syracuse Peace Council v. FCC, 867 F.2d 654 (10th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).
[31] Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).
[32] *Id.*
[33] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 391 (1969).

broadcasters were choosing not to present discussions about important public issues, rather than be burdened with the task of presenting multiple viewpoints.[35] The FCC's decision to eliminate the doctrine was upheld by a federal appellate court in 1989.[36]

Although the fairness doctrine has been rescinded and no other regulatory standards exist to monitor news coverage, the threat of a defamation lawsuit may encourage news outlets to report events accurately. An area of civil tort law, defamation, which involves the damage of one's reputation by another, encompasses the legal categories of libel, slander and false light. These areas of law consist of rules designed to provide recourse for individuals whose reputation has been damaged by the inaccurate reporting of a particular news outlet.[37] The major difference between libel and distortion is that libel is concerned with an individual's reputation, whereas news distortion is focused on significant events.[38]

Any proposed content-based regulation of news should address the potential chilling effect it may have. This inquiry will consider the concerns raised by the FCC as well as the judiciary regarding the First Amendment issues associated with relevant content-based regulations, including the fairness doctrine as well as the regulation of indecency. While journalists may include a commitment to "seek truth and report it as fully as possible" in their own professional codes of ethics,[39] there are currently very few guidelines set forth by the FCC to establish truth telling as an essential part of news programming. Currently, only a handful of loosely defined regulations regarding accuracy exist, none of which apply to cable news. It is therefore necessary to develop a refined news distortion doctrine to prevent intentional efforts by licensees' to mislead their audience.

C. News Distortion Doctrine

Although the fairness doctrine has been rescinded, the FCC maintains a position, as it did in 1949, that a licensee would be abusing its position as a public trustee if it were to "withhold news or facts concerning a controversy or to slant or distort the presentation of such news."[40] The commission's current news distortion policy was developed in a series of cases beginning in 1969, with the *Hunger in America* case.[41] In response to complaints regarding a CBS program featuring video footage of

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[35] *See* Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 169 (1985).
[36] Syracuse Peace Council, 867 F.2d 654.
[37] New York Times v. Sullivan, 376 U.S. 254, 270-272 (1964).
[38] *Id.*
[39] Society of Professional Journalists, Code of Ethics (1996), available at: (http://www.spj.org/ethicscode.asp) (last visited Dec. 12, 2010).
[40] Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).
[41] Hunger in America, 20 F.C.C.2d 143, 151(1969).

an infant that the program falsely claimed was suffering of malnutrition, the FCC established that "rigging or slanting the news is a most heinous act against the public interest – indeed there is no act more harmful to the public's ability to handle its affairs."[42] The FCC said that in all instances where it was appropriate to do so, they would act to protect the public interest in this important respect, but also – in a nod to First Amendment concerns – noted that in a democracy no government agency can authenticate the news or should try to do so.[43] Moreover, the FCC has been careful since the *Hunger in America* case to delineate between deliberate distortion and mere inaccuracy or difference of opinion.[44]

Under current guidelines, the FCC will investigate a station for news distortion if it receives documented evidence of distortion. This may include testimony or other documentation from individuals with "direct personal knowledge that a licensee or its management engaged in the intentional falsification of the news. Of particular concern would be evidence of station management instructing employees to falsify the news."[45] However, absent such a compelling showing, the commission will not intervene.[46]

While these guidelines provide the general thrust of what the FCC regards as distortion, the agency has never clearly defined the term, or the policy. Instead, the current understanding of distortion has been established through the adjudicatory process in decisions resolving challenges to broadcasters' licenses. Despite this, communication professor Chad Raphael claims it is possible to develop a four-part test from precedents and subsequent agency actions regarding what constitutes distortion in the eyes of the commission.[47] Absent any of the four elements included in Raphael's test, the FCC has historically been unwilling to find distortion, or at times even investigate claims.[48] These factors include:

1. An accusation of deliberate intent to distort news or mislead the audience. This does not include disagreement with legitimate editorial choices.
2. Accusation must be supported by evidence extrinsic to broadcast itself.

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *See* Federal Communications Commission, *The Public and Broadcasting: How to Get the Most Service From Your Local Station*, (2008) available at: (http://www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html) (last visited Oct. 25, 2010).
[46] *See id.*
[47] Chad Raphael, *The FCC's Broadcast News Distortion Rules: Regulation by Drooping Eyelid,* 6 COMMLAW CONSPECTUS 485, 495 (2001).
[48] *Id.* at 496.

3. This evidence must show that the distortion was initiated or known by the licensee, top management or news management.
4. Distortion must involve a significant event, rather than an incidental part of the news.

News distortion claims can be generally categorized into accusations involving staging, falsification, deception, slanting and suppression. These elements can be defined using an amalgam of information derived from various FCC decisions as well as judgments rendered in relevant cases. In terms of staging or rigging, for example, the FCC has said it will limit its investigation to those cases in which a licensee has staged or culpably distorted the presentation of a news event.[49] The commission has here attempted to establish a clear definition for enforcement by noting specifically that news conferences and the "stage managing" associated with the technological elements of news production, such as lighting or sound, are not the agency's concern. Instead, the commission views its proper area of concern to be with "those activities that are not a matter of journalistic judgment or gray area, but rather constitute the deliberate portrayal of a significant event that did not in fact occur but rather is acted out at the behest of news personnel." [50]

Unfortunately, the commission has not provided a similar definition for falsification, deception, suppression or slanting of news. Falsification, for example, seems to refer to any fabrication of facts, such as making up witnesses or even weather reports.[51] Deception involves misleading the public about the source of information. Presenting a video news release developed by a public relations agency as a package put together by a television station employee is considered deception, an issue the FCC cracked down on in 2005 when it unanimously clarified rules applying to broadcasters, saying they must disclose to the viewer the origins of video news releases.[52]

Deception may also be found in the packaging of the news, such as editing reports so as to misrepresent the event.[53] Using stock footage to make it seem as if a reporter is covering an event live, when in fact the reporter is in the studio, would also constitute deception.

Suppression entails the unjustified stifling of broadcast content. For example, the FCC investigated radio station KMPC when it received a complaint that the

[49] Network Coverage of Democratic National Convention (Letter to ABC), 16 F.C.C.2d 650, 657 (1969).
[50] Hon. Harley O. Staggers, 25 Rad. Reg. 2d (P & F) 413, 414 (1972).
[51] Action Radio, Inc., 51 F.C.C.2d 803, 807–08 (1975).
[52] *See* Frank Ahrens, *Broadcasters Must Reveal Video Clips' Sources, FCC Says*, WASH. POST, Apr. 14, 2005, at A2.
[53] Hon. Harley O. Staggers, 25 Rad. Reg. 2d (P & F) 413 (1972).

owner of the station was instructing his staff not to present any favorable news about the late President Roosevelt or Jewish people, or to present any unfavorable news about the Ku Klux Klan.[54]

Slanting, in the eyes of the commission "seems to mean the use of deliberate inaccuracy to favor one viewpoint, or disfavor another on a matter of public significance."[55] Often included along with fairness doctrine claims, accusations of slanting have tended to involve news coverage that was misleading, unfair or incomplete.[56]

It is important to note here that the FCC cannot impose fines for violations involving distortion. Currently, distortion complaints may only be taken into consideration as part of the commission's evaluation of the broadcaster's overall character in the license renewal process. The commission has also said that it will not delay license renewal simply because of distortion complaints without extrinsic evidence of direct involvement by the licensee, top management or news managers.[57] However, the notion of what constitutes extrinsic evidence is, as challenges to the regulation demonstrate, only opaquely understood by both the FCC and the courts and needs to be clarified further to ensure the effective application of any current or revised distortion doctrine.

III. Challenges to the News Distortion Doctrine

Given the myriad of requirements that historically have needed to be met for the FCC to even pursue a distortion complaint, it is no surprise that only a small number of these cases have ever been investigated by the commission. In a comprehensive quantitative analysis of distortion complaints leveled against broadcasters from 1969-1999 and the FCC's responses, Raphael uncovered only 12 findings of distortion out of the 120 total decisions rendered during that 30-year time frame, including those made on appeal.[58] The majority of these complaints specifically involved accusations of slanting, as distortion charges were often included in fairness doctrine complaints filed prior to its abolishment in the late 1980s.

Penalties for distortion findings have ranged from letters of admonishment to the issuance of short-term license renewals as a form of probation. In only three of the twelve cases where the FCC found a broadcaster guilty of distortion - along with a

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[54] KMPC, Station of the Stars, Inc., 14 Fed. Reg. 4831 (1949).
[55] Selling of the Pentagon, 30 F.C.C.2d, 150 (1971) (investigating the rearranging of the remarks of a military spokesman, allegedly to make him appear evasive, as possible slanting).
[56] Letter to ABC, 16 F.C.C.2d 650, 657 (1969).
[57] Hunger in America, 20 F.C.C.2d 143, 151(1969).
[58] Raphael, *supra* note 38, at 501.

host of other infractions - was the broadcasters' license revoked or not renewed.[59]

For example, several Star Stations' licenses were rescinded for a range of problematic behaviors - from conducting fraudulent contests to making illegal campaign contributions.[60] Included among these charges was distortion. In essence, the owner of Star Stations had instructed his employees to promote a particular candidate and mention only negative news about the candidate's opponent. According to the commission, this, along with illegal campaign contributions provided in the form of free airtime, amounted to an attempt on the part of the station owner to "use broadcast facilities to subvert the political process."[61]

Only in extreme cases such as this was license revocation an issue. More often, broadcasters were given a slap on the wrist and *most* often, complaints of distortion were not pursued because of lack of evidence.[62] Overall, the FCC has demonstrated a general unwillingness to actively pursue penalties for distortion, which is a factor that should be taken into consideration in any effort to develop a more clearly defined doctrine.

Given the FCC's long-standing reluctance to pursue allegations of news distortion, the courts have often had to intervene. Within the entire body of decisions regarding news distortion complaints, there are a handful of cases that illustrate major shortcomings in the application of the current, undefined policy. In addition, the decisions in these cases also serve to illustrate the judiciary's opinion regarding what an appropriate news distortion policy might look like.

A. *Galloway v. FCC (1985)*

In *Galloway v. FCC*, the court affirmed the decision of the FCC that complaints leveled by Carl Galloway against CBS, specifically the program *60 minutes,* did not demonstrate a violation of the FCC's personal attack or news distortion rules as Galloway claimed.[63]

In addition to bringing a libel suit against CBS, that he eventually lost, Galloway filed a complaint with the FCC alleging that CBS had intentionally distorted a news report about insurance fraud. In the report, Galloway was alleged to have falsified medical documents for that purpose.[64] The United States Court of Appeals for the Tenth Circuit agreed with the FCC that the distortion was not

[59] *Id.* at 502.
[60] *Id.* at 505.
[61] Star Stations of Indiana, Inc. 51 F.C.C.2d 95, 107 (1975).
[62] Raphael, *supra* note 38, at 502.
[63] Galloway v. FCC, 778 F.2d 16, 20 (10th Cir. 1985).
[64] *Id.* at 18.

significant. The court said that the way the interviews in question were presented merely reflected justified editorial choices on the part of *60 Minutes* producers.[65]

Noteworthy here is the court's clear indication that it was not concerned with gray areas of journalistic judgment but rather deliberate portrayals of significant events that didn't actually occur but instead have been "acted out" in some way by news personnel. The key element to be considered, according to the court in the Galloway case, was whether the distortion or staging in question was deliberately intended to mislead.[66]

While the evidence in this case seems to fully support the court's decision, the argument presented by Galloway's attorneys regarding the unreasonable burden of proof associated with these kinds of claims is also worth noting. Specifically, Galloway argued that even if the decision in his case was consistent with the commission's stated policies, the commission's threshold requirements for complaints "are so excessive that, as a practical matter, they are unreachable and have produced a *de facto* nullification of a valid Act of Congress."[67] As the court noted, the distortion policy was not actually part of the fairness doctrine, which is the "Act of Congress" we can assume Galloway's petitioner is incorrectly referring to. However, in its response to this assertion the D.C. Court of Appeals stated that perhaps a broader public interest standard would justify a stricter policy.

The decision rendered in the *Galloway* case raises three important points for consideration in the development of a revised news distortion doctrine. First, is the court's stated position that the standard for distortion or slanting should be whether or not the distortion was intended to mislead. In addition, the petitioner's (somewhat inaccurate) reference to the threshold requirements for complaints does rightly ask whether the nature of evidence required to bring forth a valid complaint is reasonable. Finally, the court here did for the first but not last time, acknowledge that perhaps a stricter policy was warranted.

B. *Serafyn v. FCC (1998)*

In 1994 the CBS program *60 Minutes* once again became the subject of a news distortion controversy when it produced and aired a segment called, "The Ugly Face of Freedom," about the Ukraine, formerly a Soviet Republic. The program upset many viewers, who complained that the segment gave the incorrect impression that all Ukrainians harbored negative feelings toward Jewish people. For example, the segment suggested that Ukrainians were "genetically anti-Semitic," and "uneducated

[65] *Id.* at 18.
[66] *Id.* at 19.
[67] *Id.* at 22.

peasants" who were "deeply superstitious."[68] Most problematic, according to the offended viewers, was the fact that the *60 Minutes* producers had incorrectly translated the Ukrainian word for "Jew," which is "zhyd," as "kike," which is a derogatory term. However, these were not the only infractions or inaccuracies identified.

After several viewers sent letters of complaint to CBS, which despite the company's claims to the contrary, went unanswered, Alexander Serafyn, an American of Ukrainian ancestry, petitioned the FCC to re-evaluate CBS's broadcast license status on the grounds that the *60 Minutes* program in question had distorted the news and therefore CBS had failed to serve the public interest. Despite submitted evidence that included the broadcast itself, interview outtakes, documentation showing CBS denied an offer for help by a professor of Ukrainian history, and various other items, the FCC denied Serafyn's petition without a hearing.

In denying Serafyn's initial request, the commission said that he had failed to meet the extrinsic evidence standard required to elevate the allegations to the level of "substantial and material." However, the commission also said that Serafyn had not demonstrated that CBS intended to distort the news (implying that the evidence was in fact substantial enough to warrant at least an internal review of the allegations).

Upon Serafyn's appeal, the Tenth Circuit said that in requiring Serafyn to demonstrate that CBS intended to distort the news rather than merely to raise a substantial and material question of fact about the licensee's intent, the commission misapplied its own standard.[69] Due to the agency's failure to apply the correct standard or provide a reasonable explanation regarding the reasoning behind its decision, the court vacated the matter and remanded it back to the FCC for further proceedings.[70] The court instructed the agency to reconsider its vaguely established evidentiary standard and in doing so, called into question the agency's overall approach to responding to news distortion complaints.

In addition to criticizing the established evidentiary standard, the *Serafyn* opinion questioned the FCC's analytic method for evaluating claims, its narrow interpretation of extrinsic evidence and its dismissive approach to dealing with evidence the court viewed as appropriate to consider.[71] While the D.C. Circuit certainly did not articulate a revised distortion policy for the agency, the opinion does clearly outline areas of recommended improvement and increased clarity, especially in regards to the extrinsic evidence standard, which should be taken into consideration as part of any proposed news distortion policy.

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[68] Serafyn v. FCC, 149 F.3d 1213, 1217 (10th Cir. 1998).
[69] *Id.* at 1219.
[70] *Id.* at 1220.
[71] Lilly Levi, *Reporting the Official Truth: The Revival of the FCC's News Distortion Policy,* 78 WASH. U. L.Q. 1005, 1020 (2000).

C. *New World Communications of Tampa, Inc. v. Akre (2003)*

The most recent news distortion case demonstrates the importance of formalizing the current doctrine so that relevant complaints may be brought forward and considered. The Second Circuit's decision in favor of the television station charged with distortion highlighted the difficulty of pursuing claims in the absence of formal regulations.[72]

In the late 1990s, Jane Akre and her husband were hired as reporters by WTVT-TV in Florida to work on a story about synthetic bovine growth hormone. Throughout the duration of their employment, the couple had ongoing disagreements with station management regarding the content of the story. Akre and her husband, Steve Wilson, felt that managers at the station were continually working to shift the focus of the story to favor the Florida based manufacturer of the growth hormone.

Eventually, the tension escalated and Akre and her husband were fired because of the ongoing disagreements. Upon their departure, the station made a decision to edit the story compiled by Akre in a way that she claimed distorted the news in favor of the bovine growth hormone manufacturer. Akre filed a claim under the whistle-blower's statute, claiming that the station had illegally edited the finished report and was thus in violation of the FCC's news distortion policy. A jury agreed and found that WTVT-TV had violated Florida's whistle-blower statute and awarded Akre with damages. However, the Second Circuit reversed that judgment and ruled in favor of the television station on the grounds that the FCC's news distortion policy was not a "law, rule, or regulation" that the whistle blower's statute required be violated before a claim could be made.[73]

IV. Defining the News Distortion Doctrine

Taken together, the *Galloway, Serafyn* and *Akre* decisions, along with the FCC's demonstrated reluctance to pursue distortion complaints, point to deficiencies in the current doctrine. As the court in *Akre* established, the news distortion policy is not, at present, a "law, rule, or regulation,"[74] a fact that makes it difficult for even the FCC to effectively apply its own rule. As the Tenth Circuit suggested in the *Serafyn* decision, the agency's overall approach to handling news distortion complaints should in fact be reconsidered.[75] Thus, these decisions establish a clear call on the part of the judiciary for the FCC to formalize the current regulations.

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[72] New World Communications of Tampa, Inc. v. Akre, 866 So. 2d 1231, 1234 (Fla. App. 2003).
[73] *Id.*
[74] *Id.*
[75] Serafyn v. FCC, 149 F.3d 1213 (D.C. Cir. 1998).

In addition, the *Galloway* decision makes clear that any attempt to regulate distortion should focus only on content that is deliberately intended to mislead.[76] Moreover, it is also important to consider the judgment handed down by the Tenth Circuit in the *Serafyn* case. Here, the court said that it should not be the responsibility of the complaining party to *prove* that the news in question in a particular case was misleading. Rather, the evidence extrinsic to the broadcast that is presented by the complaining citizen need only raise a "substantial and material" question of fact about the licensee's intent. From there it is the role of the FCC to review the evidence presented and determine whether the complaint should be investigated further and ultimately, taken into serious consideration during the process of license renewal.

Looking more specifically at the standard for extrinsic evidence, in *Serafyn* the Tenth Circuit said that in failing to consider factual inaccuracies, especially in regards to the potential multiple meanings of the translation of the term, "zhyd," the commission erred.

> "The court noted that a factual inaccuracy could have raised an inference of intent to distort, and found that the commission erred insofar as it categorically eliminated factual inaccuracies from consideration as part of its determination of intent. When the word chosen by a translator was an inflammatory term, the commission could have considered the fact that a licensee did not assure itself of the accuracy of the translation in reaching its conclusion about the broadcaster's intent. The court determined that the commission was unreasonable in dismissing the charge without an explanation. The court concluded that the commission acted arbitrarily and capriciously in denying the first petition without analyzing more precisely the evidence it presented, but that it reasonably held that the network did not, through its statements to an affiliate, make a misrepresentation to the commission."[77]

It seems here that in their overview of the case, the Tenth Circuit is saying quite simply that there are matters of factual accuracy associated with broadcast journalism and that it is not only possible but also preferable for the FCC to consider factual inaccuracies in its determination of a licensee's intent.

A. Proposed News Distortion Definition and Revised Regulations

The guidelines outlined above serve to inform the news distortion regulations presented here. The proposed regulations are derived directly from case law and take seriously the courts instructions regarding revisions to the current approach for handling distortion claims. First, news distortion should be defined as:

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[76] Galloway v. FCC, 778 F.2d 16, 21 (D.C. Cir. 1985).
[77] Serafyn v. FCC, 149 F.3d 1213, 1214 (D.C. Cir. 1998).

> "Any effort on the part of a licensee, station management or news management to deliberately and intentionally mislead the audience through the presentation of factual inaccuracies regarding significant events covered in broadcast and cable television news programming."

Before discussing the standard of evidence that must be met in order for a distortion claim to move forward, it is first necessary to define the subjective terms used in the proposed definition. Borrowing language from a policy statement offered by the Federal Trade Commission regarding its own efforts to regulate deceptive advertising, the term mislead will be defined as "a representation, omission or practice regarding a significant event that is likely to misinform the consumer."[78] Moreover, the phrase broadcast and cable news programming applies not only to hard news, but also entertainment news and sports. In fact, the only exception would be programs such as *The Daily Show* or *The Colbert Report*, which would be exempt because of their satirical nature. Here distortion should borrow directly from libel law and assume that works of parody, satire and rhetorical hyperbole – works that are unbelievable and could not be construed as fact – are generally immune from prosecution.[79]

Moreover, for a distortion claim to be pursued, evidence extrinsic to the broadcast must be presented. Taking into consideration the recommendations of the *Galloway* and *Serafyn* courts, the following standard of evidence should be established:

1. Evidence submitted as part of a news distortion claim need not *demonstrate* that the licensee, station management or news management *intended* to distort the news or mislead the audience. Rather, the evidence must merely "raise a substantial and material question of fact"[80] about the licensee or station management's ability to serve the public interest.
2. Evidence that disproves the factual inaccuracy of information presented in the broadcast is considered extrinsic evidence and will be considered by the commission.
3. However, in order to be pursued, evidence extrinsic to the broadcast that indicates the licensee, station management or news management deliberately and knowingly intended to mislead the audience must also be presented.

In order for the FCC to pursue a claim, all three prongs of this standard must be met. The first prong of the standard holds that evidence submitted as part of a news distortion claim does not need to prove that a broadcaster intentionally tried to mislead the audience. Instead, it only needs to call into question whether the licensee is serving the public's interest. The second element of the standard allows the court to

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[78] 103 F.T.C. 110, 174 (1984), *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm.
[79] Hustler Magazine v. Falwell, 485 U.S. 46 (1988).
[80] Serafyn v. FCC, 149 F.3d 1213, 1220 (10th Cir. 1998).

take into account any evidence that shows the broadcasters knowingly distorted information in order to mislead the viewer or listener. Finally, the third prong of the standard requires evidence extrinsic to the broadcast be presented to demonstrate that station management deliberately and knowingly mislead viewers by presenting misinformation as the truth. Evidence of a mistake by broadcasters, or several mistakes for that matter, on the, which may be likely given the demands associated with the 24-hour news cycle, are insufficient to meet the third prong of the proposed evidentiary standard.

By establishing a clear evidentiary standard, the FCC would be required to investigate a fire when presented with evidence of smoke, rather than the current approach, which requires proof of fire before an incident it can be investigated.[81] In addition, the emphasis here on the broadcaster's intent to mislead should help ensure that claims regarding erroneous mistakes or disagreements about valid editorial choices are excluded from serious consideration. As stated previously, it is not the goal of the proposed policy to establish government oversight of the press. Instead, by clearly defining what is considered distortion that is as narrowly drawn as possible, the proposed regulations should indicate to broadcast journalists that knowingly misleading an audience is not permitted and give viewers an opportunity for recourse if they feel they've been intentionally misled by broadcasters.

B. Applying the Proposed Distortion Regulations to Broadcast and Cable News

The regulations proposed here should be applied to both cable and broadcast television. The commission, along with the judiciary and the legislature, agreed that there are key areas that warrant regulation regardless of whether the content is transmitted via broadcast or cable technology. These include regulations regarding equal opportunity, commercial content during children's television programming, sponsorship identification and certain categories of commercial content, such as cigarette advertising. Much like the government has a compelling interest to limit children's exposure to commercial content, so too does the government have a compelling interest to prevent commercial media entities from using the megaphone they've been handed to intentionally and knowingly disseminate misinformation. A far cry from government censorship, the proposed regulations would apply only to broadcasters and cablecasters who, unlike print or web journalists, have agreed to serve the public's best interest in exchange for the privilege of being awarded space on the spectrum.

V. Arguments For and Against Refined Distortion Doctrine

[81] *Id.*

A. Benefits of Revised News Distortion Regulations

The news distortion regulations proposed here address many of the concerns raised by members of the judiciary in cases related to the doctrine. By adopting clearly defined distortion regulations, the FCC would for the first time establish a formal "law, rule or regulation," for news distortion, which the Second Circuit identified in the *Akre* case to be a prerequisite for making a claim.[82]

Moreover, the proposed regulations also take into consideration the importance placed on intent in the *Galloway* decision.[83] Here, the court held that attempts to regulate broadcasting must focus on content that is deliberately intended to mislead.[84] As a result, the definition of news distortion offered here specifically references attempts by a licensee or station management to "deliberately and intentionally mislead the audience." This distinction should make clear that the commission's focus is not on accidental or erroneous factual mistakes in news broadcasts. Instead, the inclusion of the terms "deliberate" and "intentional" delineate that only claims regarding purposeful efforts to mislead that will warrant an investigation.

Many of the recommendations offered in the *Serafyn* decision are also addressed in the distortion regulations being advanced here. For example, the Tenth Circuit concluded in the *Serafyn* case that evidence presented in support of a claim need only raise a "substantial and material" question of fact regarding the licensee's ability to serve the public interest.[85] It was not, the court said, the responsibility of the individual or organization bringing forth the complaint to prove that intentional distortion had occurred.[86] In order to minimize the confusion around the evidentiary standard, which was problematized by the *Serafyn* decision, the regulations proposed here attempt to outline a definitive evidentiary standard that clearly defines the conditions that must be met in order for a claim to be considered.

The evidentiary standard put forward here also incorporates the recommendation from the *Serafyn* court that claims of factual inaccuracy within a broadcast be considered relevant evidence.[87] In addition, the proposed standard mandates that evidence extrinsic to the broadcast indicating that a licensee deliberately intended to mislead the audience is required for a claim to be investigated. In the past, the FCC has been reluctant to pursue claims that do not

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[82] New World Communications of Tampa, Inc. v. Akre, 866 So. 2d 1231, 1234 (Fla. App. 2003).
[83] Galloway v. FCC, 778 F.2d 16 (10th Cir. 1985).
[84] *Id.* at 21.
[85] Serafyn v. FCC, 149 F.3d 1213, 1220 (10th Cir. 1998).
[86] *Id*. at 1221.
[87] *Id.* at 1234.

include this type of evidence.[88] Maintaining this standard will prevent the commission from being asked to second-guess relevant editorial choices and instead keep the focus on intentional efforts to mislead.

The revised regulations also attempt to take into account the precedent set forth by the commission in its handling of distortion claims over time. In addition to a prolonged focus on intent, as well as the extrinsic evidence requirement, the FCC has maintained that only claims regarding significant news events be pursued.[89] For this reason the proposed definition of distortion refers specifically to the presentation of factual inaccuracies regarding "significant events covered in broadcast and cable television news programming."

In addition to incorporating the recommendations from the *Galloway, Serafyn* and *Akre* decisions, along with the FCC's past approach to handling distortion claims, the revised regulations seek to ensure that broadcasters continue to operate in the public's interest. Although it has long been established that the public's interest should be paramount to stations' interests,[90] the demand for profit placed on media companies may lead some organizations to make commercial concerns their top priority. Therefore, regulation is needed to ensure that those given the privilege of holding a broadcast license operate in the public's interest, convenience and necessity, as mandated by the 1927 Radio Act and the 1934 Communications Act.[91] In enacting both of these laws, Congress said that it wanted the public's interest to come before stations' interest. Given the commercial nature of today's broadcast media, it seems unlikely that broadcasters would consistently place the public's interest above their own. Therefore, rules are needed to ensure that those requirements are fulfilled.

First Amendment scholar, C. Edwin Baker, addressed the commercial nature of media organizations and content-based regulation of the press. In accordance with his autonomy-focused interpretation of free speech, Baker argued that individual autonomy be placed over the interests of collective entities, which include media entities.[92] While he recognized the preferred position of the press endowed to it by the First Amendment, Baker noted that the government has always engaged in regulation to advance a desirable communications order. Over time, this has included the promotion of viewpoint diversity, quality discourse, education and ease of participation. According to Baker, "a democracy concerned with promoting collective

[88] Raphael, *supra* note 38, at 496.
[89] Raphael, *supra* note 38, at 497.
[90] 47 U.S.C. § 309(a) (1994).
[91] 47 U.S.C. § 309(a).
[92] C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses,* 1994 SUP. CT. REV. 57, 62 (1994).

conceptions of the good arguably requires this form of regulation."[93]

For Baker, the legitimacy of a democracy's concern with the effective functioning of the communications order offers prima facie support for regulation.[94] The Supreme Court agreed at least in part with this position when it upheld the fairness doctrine in the *Red Lion* case.[95] Here, the court said that the government was justified in its efforts to regulate because its objective was to improve the flow of communication. The same is true here. The proposed news distortion regulations are designed to improve rather than inhibit the functioning of the press. Deliberate attempts to mislead an audience can only undermine the current system of press, and perhaps more importantly, the ability to self-govern. By prohibiting the abuse of the privilege afforded to broadcast media, the revised regulations should help to ensure the accuracy of information presented. This is, as Baker argues, a justifiable concern for any democracy.

Moreover, Baker noted that "since only instrumental arguments could be the basis of objecting to media-specific structural regulation, presumably the argument must be that an appropriate distrust of government's motives or wisdom in enacting structural regulation combined with a sufficient lack of confidence in courts' ability to identify cases where the law undermines rather than aids press performance outweigh the potential gains to media performance from media-specific, content-based laws. Although such a conclusion is possible, neither American history nor prior judicial judgments supports such a negative view."[96]

Finally, Baker said the lack of historical or judicial support for the view that government and courts cannot be trusted to effectively identify those regulations that undermine press performance is unfounded.[97] Instead, media-specific laws like those proposed here, could support the press in performing its constitutional roles.[98]

B. Addressing Opposing Arguments

To ensure that the proposed distortion regulations are constitutional, this inquiry must address arguments against revising the current policy. Specifically, concerns associated with the changes recommended in the *Serafyn* decision will be analyzed.

Next, issues raised in past decisions about content-based broadcast regulation must be explored. In particular, the demise of the fairness doctrine, as well as the

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[93] *Id.*at 81.
[94] *Id.*
[95] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 391 (1969).
[96] Baker, *supra* note 92, at 82.
[97] *Id.*
[98] *Id.* at 81.

Second Circuit's recent decision regarding the unconstitutionality of the FCC's indecency policy, will be discussed. Analyzing the proposed distortion regulations in terms of the problems associated with other content-based regulations should demonstrate how the policy offered here either avoids or addresses these concerns.

1. Arguments Against a Revised News Distortion Policy

Responding to the recommendations made by the Tenth Circuit in the *Serafyn* decision, legal scholar and former CBS counselor, Lilly Levi, has advanced several relevant concerns regarding any effort to refine the current news distortion policy.[99]

First, Levi has argued that formalizing the current distortion regulations would permit the FCC to second-guess broadcasters' editorial choices in news programming, allowing negative inferences to be drawn about a reporter's refusal to consult interested parties' "experts."[100] This issue seems valid in light of the fact that the plaintiff in the *Serafyn* case included CBS's failure to consult a professor of Ukrainian history as one of the eight items of evidence presented.[101] While it is possible that claims filed under the revised regulations may continue to take issue with a broadcaster's failure to consult a particular source, that alone is not enough to warrant an investigation. Instead, the evidentiary standard outlined requires that evidence that the licensee, station management or news management knowingly intended to mislead the audience be presented. By maintaining this long-standing requirement, the revised distortion regulations keep the FCC from having to concern themselves with relevant editorial decisions.

Next, Levi has problematized the fact that a revised approach to regulating news distortion may give undue weight to certain types of circumstantial evidence in claims, such as viewers reactions after the fact.[102] Once again, while viewers' reactions may indeed be included in a complaint, absent evidence of intentional efforts on the part of the licensee to mislead the audience, a claim may not be pursued under the revised guidelines.

Finally, Levi has argued that a more tightly crafted news distortion doctrine would allow the FCC to draw subjective inferences about a broadcaster's intent to distort versus "obvious" or "egregious" errors.[103] Levi has said that such judgments in virtually any case entail the authoritative selection of "truths." While the potential for the FCC to misinterpret evidence of an error as distortion is possible, that same possibility exists in all cases in which a governmental agency is asked to impose

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[99] Levi, *supra* note 62.
[100] *Id.* at 1029.
[101] Serafyn v. FCC, 149 F.3d 1213, 1218 (10th Cir. 1998).
[102] Levi, *supra* note 62, at 1006.
[103] *Id*.

regulations. For example, it is possible that the Securities and Exchange Commission may make a mistake in evaluating whether a financial advisor intentionally misleads a client regarding a stock trade. However, the potential risk for misinterpretation should not prevent all forms of government regulation designed to advance the public's interest.

2. Arguments Against Content-Based Broadcast Regulation

It is likely that those who have opposed content-based regulation of broadcast programming in the past will take issue with the constitutionality of the revised distortion regulations presented here. Therefore, this inquiry will seek to address the arguments associated with previous content-based broadcast regulations – particularly those that have been deemed unconstitutional. Doing so should help to establish how the proposed regulations escape or address the concerns that have been raised.

The first and most controversial of these content-based regulations to be examined is the fairness doctrine. One of the primary arguments against the fairness doctrine was that it had a chilling affect on broadcasters.[104] According to the FCC *1985 Fairness Report*, the doctrine caused broadcasters to restrict their coverage of controversial issues.[105] Rather than be burdened with the task of presenting multiple viewpoints, broadcasters were choosing not to present discussions about important public issues.

Unlike the fairness doctrine, which mandated that broadcasters air programs about issues affecting the public and present a variety of viewpoints about controversial issues,[106] the proposed regulations do not make any requirements regarding how news should be covered. There is no imaginary scorecard being kept by the FCC to determine whether coverage has been balanced or diverse. In fact, failure to present a balanced perspective falls squarely outside the scope of the revised distortion doctrine. Instead, the regulations presented here seek only to offer a narrowly drawn, clear rule that prohibits licensees from abusing the broadcast privilege through efforts to intentionally mislead viewers.

Like the fairness doctrine, the FCC's current indecency policy was also accused of having a chilling effect on broadcasters. In 2010, the Second Circuit Court of Appeals said that the indecency policy created "a chilling effect that goes far beyond the fleeting expletives at issue" because it left broadcasters without a reliable guide to

[104] Rosel Hyde, *Action Repealing the Fairness Doctrine: A Revolution in Broadcast Regulation,* 38 SYRACUSE L. REV. 1175, 1181 (1988).
[105] *See* Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143, 169 (1985).
[106] Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949).

what the commission would find offensive.[107] Specifically, the court said that by "prohibiting all 'patently offensive' references to sex, sexual organs, and excretion without giving adequate guidance as to what 'patently offensive' means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive."[108]

Notably, the court made clear that it was not preventing federal regulation of broadcast standards, but instead said only that the current policy as it is written failed constitutional scrutiny. The court added that the FCC might be able to create a new, constitutional policy.[109]

Still, the accusations of a chilling effect on speech leveled at previous broadcast regulations makes it essential to consider whether the proposed policy will put the government in a position to monitor and / or silence unwanted or controversial speech. Here, it is important to note that the FCC does not currently, nor would it under the proposed regulations, monitor broadcast content in order to identify and punish offenders. Instead, the FCC responds to complaints received from the public about the media. Therefore concerns that the government via the FCC would be monitoring the free press are inaccurate. In addition, even a valid news distortion claim would not automatically result in a station's license removal. Instead, it would simply be taken into consideration during the renewal process. Finally, as the FCC's own track record indicates, stations are at a very low risk of losing their licenses.[110] At the very least, the proposed regulations may serve as a deterrent to broadcasters currently engaging in the practice of news distortion.

VI. Conclusion

The proposal offered here has attempted to take into consideration the FCC's past treatment of news distortion, along with decisions from relevant cases, to craft a policy that seeks to curb intentional efforts by licensees to deliberately mislead the viewing or listening audience. Moreover, the evidentiary standard put forward seeks to minimize confusion regarding the type of evidence that must be presented in order for a claim to be pursued. Although the standard offered here does allow evidence regarding factual inaccuracies to be considered, as recommended by the Tenth Circuit in the *Serafyn* decision,[111] it also requires that evidence extrinsic to the program indicating a licensee deliberately intended to mislead the audience be presented.

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[107] *See* Fox Television Stations, Inc. v. FCC, 613 F.3d 317 (2d Cir. 2010).
[108] *See id.*
[109] *See id.*
[110] Raphael, *supra* note 38, at 502.
[111] Serafyn v. FCC, 149 F.3d 1213, 1218 (10th Cir. 1998).

Recognizing the First Amendment rights of broadcasters and cablecasters, this proposal has also sought to recognize concerns about the potential chilling effect that any content-based regulation may have on the press. However, it should be noted that unlike the fairness doctrine, for example, the regulations proposed here do not seek to determine for members of the media which news events should be covered or how those stories should be presented. Instead, the distortion definition offered here seeks only to prevent intentional efforts to mislead the audience. Moreover, the extrinsic evidence requirement included in the proposed regulations specifically addresses concerns regarding a potential chilling effect by establishing that the content of a program, no matter how inaccurate, cannot on its own provide sufficient evidence to advance a claim. Without evidence extrinsic to the broadcast that demonstrates a licensee or member of news management engaged in efforts to intentionally misrepresent a significant news event, by instructing staff members to lie for example, a distortion claim may not be brought forward.

By specifying exactly what is being prohibited, the revised regulations formalize a doctrine that has loosely been established over time through the adjudicatory process. In doing so, it provides a structured process for viable claims to be brought forward and considered. Adopting a formal definition of news distortion and an accompanying evidentiary standard like those proposed here, would demonstrate a much-needed and renewed commitment on the part of the FCC to protect the public's interest over the economic interests of multinational media corporations. As Baker noted, regulations designed to improve rather than inhibit the functioning of the press rightly place greater importance on individual autonomy and the ability to participate in social change than on the First Amendment rights of media entities.[112] As such, media-specific regulations like those proposed here may actually increase the extent to which the press is able to fulfill its constitutional roles.[113] Thus, the proposed news distortion regulations should be adopted in order to improve the way the current press system functions and to encourage radio and television news programs to better serve the public's interest.

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[112] Baker, *supra* note 84, at 81.
[113] *Id.* at 82.