

MEMORANDUM

DATE: October 10, 2011
TO: Chairman, Federal Communications Commission
FROM: Samuel Rhea, Commissioner
RE: Statement in Opposition to Proposed Systems of Fines

Disseminating and misrepresenting fiction as fact through broadcast mediums undeniably has the potential to incite violence and mislead the public. Two recent incidents brought to the Commission's attention demonstrate the dangers associated with such journalistic irresponsibility. In both instances, negligent reporting contributed directly to violent actions by individuals or a group. In Oklahoma, a radio program presented rumor as fact while describing the President's purported intentions to outlaw firearms. A listener failed to discern the truth from gross exaggeration and responded with tragic and unjustifiable actions resulting in the deaths of two police officers. In New Jersey, a television reporter's mischaracterization of a controversial court verdict caused widespread confusion, a riotous mob, and millions of dollars in property damage caused by the mob. Both the shooter in Oklahoma and participants of the riot in New Jersey will be held accountable for their actions in courts of law, but no true precedent exists for the punishment of negligent or deceitful broadcasters.

The Federal Communications Commission (FCC) regulates communication by radio, television, wire, satellite and cable in the entire United States.¹ As part of this responsibility, the United States Congress purposed the FCC to promote "safety of life and property" as it pertains

¹ Federal Communications Commission. 2011. What We Do. [FCC.gov](http://www.fcc.gov). <<http://www.fcc.gov/what-we-do>>.

to broadcasting.² A need exists for the oversight of these mediums, which arguably have foremost opinion over current public opinion. The deliberate manipulation of information is a detriment to society and the FCC is within its right to ensure such acts do not occur. However, enforcing regulations that promote safety in broadcasting is logistically difficult and often at odds with liberties guaranteed by the Constitution. The Chairman's suggested policy of creating a new system of fines to preempt such acts would be a landmark overhaul of the FCC's power to regulate broadcasting.

I recommend that the proposed policy should not be implemented. The plan under consideration would unnecessarily constrain the publication of information and potentially stifle the breadth of investigative reporting; actions which frequently bring about positive social change. Enforcement of the proposed system would be impossible to apply fairly. Implementation of the proposed rules would infringe upon the freedom of the press and the individual's right to protected speech. This memorandum provides an explanation for my opinion and an analysis of the consequences of implementing the suggested system.

1. Current Regulation and Proposed Changes

The FCC currently prohibits the broadcasting of hoaxes and false information when the broadcast is likely to cause substantial harm and the broadcaster knows the information is false.³ The new system would expand the scope of this rule by punishing any act of deliberate dishonesty, regardless of consequence. The rules would also add another layer of bureaucratic oversight by implementing a policy that calls for penalizing networks for representing any information as fact without it being "diligently researched." The policy would not only be a

² 47 USC §151.

³ Federal Communications Commission 47 CFR § 73.1217.

drastic expansion of the current system of FCC enforcement, but would also place a heavy burden upon the FCC to evaluate the diligence associated with each broadcast statement.

As a public trust, the press ought to uphold the highest standards of journalistic integrity when reporting information. No laws exist to demand such honesty. The FCC lacks the authority to require the press to adhere to a set of professional ethics. As a mostly unregulated entity, broadcast media can elect to pursue ratings or agendas by means other than truthful reporting. However, any foray by the government into the complete control of media threatens to overstep necessary limitations. The need to review each broadcast for “diligent research” would possibly transform the FCC from a regulatory commission into an Orwellian gatekeeper, controlling the publication of any information. Overhauling the FCC would set a dangerous precedent by mandating the government elect which sources of knowledge are “appropriate” for the citizen.

2. Burden of Proof

The task of proving a deliberate broadcast “lie” would never be comparable to a perjury trial. Journalists report on the experiences of others, and reporting is hearsay by definition. The FCC could never establish an enforceable standard to determine if the reporter had erroneous sources, misread a report, or purposefully lied.

Judgments about lying in journalism are exceptionally hard to apply fairly. In 1962, an Associated Press (AP) correspondent reported from the scene of a riot against desegregation at the University of Mississippi. The reporter observed that Edwin A. Walker was the leader of the violent protest. Mr. Walker disagreed and sued the AP claiming he was not responsible for inciting the mob and that the broadcast was libel. The Court ruled in the favor of the AP, citing

that the news “required immediate dissemination” and while the correspondent may have been negligent, he was not malicious.⁴

The FCC cannot read minds, and establishing intent as a fact is nearly impossible. In rare instances, a paper trail might exist proving that a broadcaster plotted to intentionally misinterpret a news story. This would cause suitable public outcry and the FCC could revoke the network’s license for the broadcast of a hoax, according to current rules. The majority of cases of journalistic dishonesty occur without evidence. In these situations, the suggested system of fines would not be able to distinguish between deliberate manipulation and honest mistakes in coverage without relying upon gross speculation.

News items evolve in such an atypical way that no standard for “diligent research” could be established. Stories are unique to their time period, their location, and the parties involved. Responsible journalism ought to gather evidence on a case-by-case basis, but frequently this fails to occur. The suggested system of fines addresses this problem by creating an official definition of diligent research. No universal standard could be created that applies fairly to all broadcasts as each news story is, by definition, new.

3. Censorship vs. Freedom of the Press and Free Speech

Censorship in the United States applies to a narrow set of instances and is a separate issue from the suggested system of fines. Censorship, as defined by the 1978 Supreme Court decision, *Federal Communications Commission v. Pacifica Foundation*, prohibits the frequent and repetitive use of obscenities.⁵ Laws prohibiting certain words and images from being broadcast specifically protect minors who might otherwise hear or see such material. However, the entire

⁴ Associated Press v. Walker, 389 US 28 (1967).

⁵ Federal Communications Commission v. Pacifica Foundation, 483 US 726 (1978).

population of the United States does not need to be protected from the biased opinions or false analyses of broadcasters, as if children.

By expanding censorship to include any deliberate lie or any instance of poor research presented as fact, the FCC oversteps its Constitutional bounds. The First Amendment is a guarantee of freedom of the press, as interpreted by the US Supreme Court in *New York Times co. v. United States*, is superior to other laws of Congress. The opinion identified the free press as “essential” to democracy.⁶ The decision renders FCC’s mission to promote “safety of life and liberty” as inferior to the First Amendment. Additionally, the concurring justices wrote that the Founding Fathers intended the provision to protect citizens from government. Enactment of these fines would reverse the framework. The notion that the government needs to protect citizens from the press is wholly unconstitutional.

While freedom of the press grants the networks and other outlets the right to publish information and provide opinions, freedom of speech further protects the commentary of the individual reporter. The term, “falsely shouting fire in a crowded theatre” originates from the 1919 Supreme Court decision in *Schenck v. United States*.⁷ In 1969, *Brandenburg v. Ohio* invalidated this ruling by defining the limit of free speech to be speech that causes imminent lawless action.⁸ The FCC derives its authority to punish hoaxes that cause harm from this decision, and it is this ruling that also compels me to argue against the implementation of the new system of fines. The fines would impose significant and new limitations on free speech and endanger protected speech that is not dishonest or without due diligence.

⁶ *New York Times Co. v. United States*, 403 U.S. 713 (1971).

⁷ *Schenck v. U.S.*, 249 U.S. 47 (1919).

⁸ *Brandenburg v. Ohio*, 385 U.S. 44 (1969).

The FCC does not have the capacity to enforce these laws in a fair manner. The FCC will never be able to fulfill a burden of proof to satisfy the punishment of deliberate instances of lying. Additionally, the penalties would be damaging to the journalistic process as well as the ability for reporters to cover controversial topics. Imposing the new system of fines would protect the public from rare instances of broadcast manipulation at the greater expense of civil liberties. The implications of the penalties in focus would be detrimental to the press and subsequently to the general public. I recommend that we maintain our current policy and continue to advocate for journalistic integrity, rather than encroach upon protected speech.