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ECOLOGICAL PORNOGRAPHY AND THE MASS MEDIA

In January, 1970, Cal-Standard announced a major breakthrough in pollution control technology—a gasoline additive given the name F-310. Since January, government agencies, ecology groups, and the media have disputed Cal-Standard's implied ecological claims. This Comment explores the legal issues involved whenever a business enterprise chooses to raise issues of public concern in an attempt to increase its profits. Specifically, the fairness doctrine, the public interest standard, and the first amendment are examined to determine whether an ecology-oriented organization may be able to require provision of free reply time when controversial environmental issues are presented from only one point of view in commercial messages.

Social responsibility in advertising has evolved far beyond the national highway safety and "Smokey the Bear" advertising campaigns of the 1950's. The recent tendency of advertisers to become more deeply enmeshed in social issues is exemplified by corporate advertisements which have attempted to show a great deal of sympathy with the ecology movement. Commercials on radio and television reflect industrial awareness of the ecological crisis and a corporate desire to cash in on it. The net effect of this purchased image of industrial concern is to exploit current public outrage and interest in environmental problems by encouraging a society already dazzled by technology to believe that more corporate technology must be the ultimate solution to dirty air, unclean water, and other forms of environmental degradation.

An analysis of the legal problems raised by Standard Oil of California's F-310 advertising campaign illustrates the danger of commercial exploitation for profit of issues of vital public concern. In January, 1970, Cal-Standard's gasoline sales had dropped nearly seven percent from levels of the previous year, and rival Shell had become the biggest seller of gasoline in California, the largest gasoline market in the United States.1 Since January of 1970 Cal-Standard has attempted to regain its market leadership by spending several million dollars on the television advertising of F-310.2 These television commercials, originally shown only in California and Hawaii, feature former astronaut Scott Carpenter as guide and narrator. One ad shows a large balloon, turning black from exhaust while attached to

2. Id. at 22.
the tailpipe of a late model Chevrolet. Another shows the car completely engulfed in a plastic bag filled with black smoke. In a third version, the dirty exhaust is ignited with a blowtorch to indicate that unburned gasoline is going out in the exhaust. In all cases, however, the pollution is cured by “just six tankfuls of Chevron with F-310,” and the now clear plastic bag is the wildest dream come true of smog-weary Californians. Cal-Standard has advertised through the airwaves that their gasoline with F-310 is a “significant contribution toward cleaner air” and that “F-310 turns dirty exhaust into good clean mileage.” In California, Cal-Standard found a receptive market for its F-310 miracle.

These ads are cleverly designed to capitalize on the current public concern about air pollution. The message these ads convey is that Cal-Standard, through the use of technology, has made great headway in solving the air pollution crisis. Most car owners and veteran ad watchers do not have the expertise to know whether these technological developments can indeed remedy the environmental crisis. The effect of this type of advertising campaign may be to induce public complacency and abate public pressure toward concrete solutions of environmental problems.

This Comment will attempt to show that Cal-Standard’s broadcast ads have created a controversy in California and Hawaii because they attempt to exploit the legitimate and necessary public con-
cern about air pollution. It will then argue that when an advertiser attempts to cash in on this public concern, the licensee should be required to inform the public on all aspects of the issues the advertiser raises, with the advertiser bearing the cost if free reply time is granted.\(^\text{10}\)

The legal bases on which the licensee is required to inform the public of all aspects of the issues the advertiser raises are discussed in the first three sections of this Comment. Part I discusses the fairness doctrine which requires the licensees to furnish free reply time in answer to controversial issues of which only one side is raised in a broadcast;\(^\text{11}\) Part II deals with the public interest standard of the Federal Communications Act which requires that listeners be fairly informed of the public health matters discussed on the broadcast media;\(^\text{12}\) Part III proposes that the first amendment requires licensees to sell time for discussion of the environmental view of television commercials discussing these issues, and also asserts that free messages provided under the fairness doctrine or the public interest standard must present environmental views fairly and adequately.\(^\text{13}\)

I

THE FAIRNESS DOCTRINE

The fairness doctrine requires broadcast licensees to present an overall balanced presentation of controversial issues of public importance. In making statements to the effect that F-310 "turns dirty exhaust into good clean mileage,"\(^\text{14}\) Cal-Standard is suggesting to the average viewer that corporate technology is solving the pollution problem. The proposition that technology can solve ecological problems is a controversial issue which is near the heart of the current debate over pollution problems and their solutions. Thus, to the extent that the F-310 ads, or any other advertisements, suggest to the public that solutions are coming through corporate technology, ecology groups should be given free reply time to express their viewpoints on this controversial issue of public importance.\(^\text{15}\)

10. For example, licensees should include in their advertising charges, to advertisers of controversial messages, the cost of the reply time.

11. See text accompanying notes 14-60 infra.

12. See text accompanying notes 66-83 infra.

13. See text accompanying notes 84-135 infra.


15. One potential problem for the FCC and the licensees is identification of all the potential organizations referred to here as "ecology groups." The possibility of more than one point of view in reply could present a problem, but not an insurmountable one. Frivolous points of view can be excluded with appropriate administrative and
In 1949, the Federal Communications Commission (FCC) enunciated the fairness doctrine which requires broadcast licensees to present an overall balanced presentation of controversial issues of public importance. In anticipation of potential problems with multiple points of view, the FCC's policy statement granted licensees broad discretion when selecting an appropriate format and spokesmen for the contrasting viewpoints. This doctrine was later interpreted to require licensees to present a balanced presentation of contrasting views on any controversial issue the licensees chose to raise or discuss.

The only dispute in which the Commission has thus far applied the fairness doctrine to commercial advertising is the cigarette decision, affirmed by the District Court of Appeals for the District of Columbia in Banzhaf v. FCC. The FCC has expressed reluctance to apply the fairness doctrine to advertisements of other products. In Retail Store Employees Union v. FCC, for example, striking judicial review standing as a guarantee that only illogical arguments are rejected. Among the remaining contenders, available reply time could be apportioned. See note 135 infra for further discussion of these problems.

18. Banzhaf v. FCC, 405 F.2d 1082 (C.D. Cir. 1968), cert. denied, 396 U.S. 842 (1969). The Commission has recently recognized that while the broadcaster has considerable discretion in choosing which controversial issues to discuss, a broadcaster may not ignore the "burning issues of the seventies." Thus, the FCC has indicated that even after cigarette advertising ends on broadcast media, broadcasters may still be obligated to discuss the public health threat raised by smoking. Fairness Doctrine Ruling; In re Complaint by Friends of the Earth, 24 F.C.C.2d 743, 751 (1970).
19. In Television Station WCBS-TV, 8 F.C.C.2d 381 (1967), the Commission decided that the fairness doctrine required that broadcast licensees make their facilities available for the responsible expression of contrasting viewpoints on controversial issues of public concern. The complainant argued that in broadcasting the commercial advertising of cigarette manufacturers, WCBS was presenting the point of view that smoking is socially acceptable and desirable, manly, and a necessary part of a rich full life. This was considered one side of a controversial issue of public concern. In Cigarette Advertising, 9 F.C.C.2d 921 (1967), the FCC's expanded ruling, the Commission concluded that not only "the specifics of the Fairness Doctrine," but also the public interest required its decision. Id. at 949. See notes 61-83 and accompanying text infra for further discussion of the requirements of the public interest.
21. The cigarette decision was limited to cigarette commercials and covered no other commercial messages. Television Station WCBS-TV, 8 F.C.C.2d 381 (1967). In Retail Store Employees Union v. FCC, 436 F.2d 248 (D.C. Cir. 1970), the court indicated that it would apply the fairness doctrine to commercial messages outside the scope of the cigarette decision.
22. 436 F.2d 248 (D.C. Cir. 1970). In this case the court remanded the decision denying reply time because there was no full inquiry by the FCC to determine whether improper economic pressure had influenced the licensee's judgment. See text accompanying notes 45-46 infra for a further discussion of this case.
ployees filed a fairness doctrine complaint against stations carrying advertisements by their employer requesting the audience to patronize his store. The Commission felt that since the strike issue was not explicitly discussed in the ads, a controversial issue had not been raised. But on appeal, the Circuit Court of Appeals for the District of Columbia remanded the case to the FCC and indicated that the public was being asked to make a choice in that the implicit message of the commercials was to break the strike by shopping at the store. In a dictum the court stated that application of the fairness doctrine to commercials outside the cigarette situation would be proper. This may indicate a trend of increased willingness on the part of the judiciary to allow expansion of the fairness doctrine to the point of requiring reply time in cases such as the F-310 advertisements.

A. Interpretation and Controversy

The FCC requires licensees to make two determinations when handling fairness complaints. Initially the licensee must determine whether one side of a controversial issue has been presented. If a licensee determines that a controversial issue has been presented he must determine whether he has achieved an overall balanced discussion of the problem. Short spot commercials, however, do not lend themselves to this rather mechanical analysis. Thus, proper administration of the fairness doctrine requires that certain additional procedures should be followed.

When dealing with commercials, the first problem is to determine what is actually discussed; in other words, the licensee must ascertain what message the commercial conveys to the viewers. This analysis can determine whether the listener interprets the explicit and implicit messages of the commercial as advocating a position on a particular issue.

The Federal Trade Commission's legal criterion for evaluating the representation or message that a commercial conveys is the net impression which the advertisement is likely to make upon the general public. Since the general reaction of consumers to a commercial

23. 436 F.2d at 258.
25. Id. at 10419.
27. Charles of the Ritz Distributors Co. v. FTC, 143 F.2d 676, 679-80 (2d Cir. 1944). However, if the advertisement is directed to a particular group, the interpretation is based on the advertisement's probable impact or impression on the particular type of person addressed. Stauffer Laboratories, Inc. v. FTC, 343 F.2d 75, 83 (9th Cir. 1965) (female vanity); Ward Laboratories, Inc. v. FTC, 276 F.2d 952 (2nd Cir. 1960) (male vanity); Stanley Laboratories v. FTC, 38 F.2d 388, 393 (9th Cir. 1943).
is determinative of the view that the ad promotes, an analytical reading or technical construction should not be used to avoid the total thrust of the assertions. The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the listener arises not only from the sum total of what is seen and heard but also from all that is reasonably implied.  

Courts have recognized that a position represented by an advertisement may be implicit rather than explicit. For example, while cigarette commercials never expressly stated that smoking was not harmful, the image created by the ads was that of persons enjoying normal healthy lives while smoking their cigarettes. Therefore, the FCC and the court found an implicit assertion that smoking is a normal and non-dangerous activity. This reasonable and practical criterion has been widely accepted by the courts, in cases involving the Federal Trade Commission, as the best guideline for interpreting ads.

In the cigarette ruling, the most significant application of the fairness doctrine to advertising, the FCC used "the general impression test," adopting it from the Federal Trade Commission. The Federal Trade Commission and the Hawaii State Senate Consumer Protection Committee have both applied the general impression test to Cal-Standard F-310 advertisements and have concluded that television viewers and radio listeners interpret these commercials as conveying the message that F-310 is a significant solution to the air pollution problem.

28. In Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942), the court stated: The law is not made for experts but to protect the public,—that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions. . . . If the Commission, having discretion to deal with these matters, thinks it best to insist on a form of advertising clear enough so that, in the words of the prophet Isaiah, 'wayfaring men, though fools, shall not err therein,' it is not for the courts to revise its judgment. advertisements are intended not 'to be carefully dissected with a dictionary at hand, but rather to produce an impression upon' prospective purchasers. Also see Note, A New Antitoxin to Advertising Artifice—Television Advertising and the FTC, 37 Notre Dame Law. 524, 527 (1962); Note, Developments in the Law of Deceptive Advertising, 80 Harv. L. Rev. 1005, 1043 (1967) (this article discusses the general impression test).


30. Id.

31. See notes 27 & 28 supra.

32. Cigarette Advertising, 9 F.C.C.2d 921, 939 (1967). Further, the Commission noted that it did not have the text of the particular commercials in front of it when it rendered its decision. Rather, it relied on the general evaluation performed by the FTC on the effect of such advertisements. Id. at 946 n.30.


problem. If the licensee initially, and the FCC when reviewing licensee conduct, were required by law to apply "the general impression test" to the F-310 commercials, they should reach a like result.

After the message that the commercial conveys is ascertained, the licensee must determine whether the advocacy in the message is related to a controversial issue of public importance. There are, however, no set standards for determining whether an issue is controversial and thus subject to the fairness doctrine. The Commission should balance factors such as the number of persons affected, the potential consequences for the individual and society at large, the degree of national and local public action, and the interest of the audience in order to evaluate the reasonableness of the licensee's judgment that an issue is not controversial.

The message conveyed by the F-310 commercials should qualify as a controversial issue when measured by these criteria. Since automotive pollution affects the country as a whole, state and federal agencies, citizen groups, and the media have debated the controversial nature of Cal-Standard's claims. Cal-Standard has joined the debate by placing advertisements which attempt to refute assertions of some of its critics. Thus, the F-310 saturation advertising campaign presents only one side of a controversial issue of public importance.

B. Accepted Procedures

Enforcement of the fairness doctrine is dependent on listener initiated complaints. A listener, to complain formally before the Commission, must first contact the licensee and request time to present the opposing viewpoint. Licensees are generally reluctant to grant a listener's request because, in most instances where such a request is granted, the licensees must donate time to fairness respondents. Thus, any granting of reply time to listeners complaining about advertising is hazardous to the economic interests of licensees. There is

35. See text accompanying notes 48-60 infra.
36. See Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701, 709 (1964). This Note goes into a general discussion of the lack of concrete standards of the Commission. Id.
37. See notes 1, 3, 5, & 34 supra.
39. See 29 Fed. Reg. 10416 (1964). FCC reliance on licensee findings presupposes a requirement that the listener ordinarily will have to use his administrative remedy by first complaining to the licensee and then appealing to the FCC before taking his grievance to court.
40. In Cullman Broadcasting Co., the Commission held that the opposing point of view must be expressed at the broadcaster's own expense if sponsorship is unavailable. Id. at 10419-20.
an additional economic detriment in the case of F-310 because the licensee may not only have to offer free reply time but also risks losing an advertiser.\footnote{See Retail Store Employees Union v. FCC, 436 F.2d 248, 256 n.48 (D.C. Cir. 1970). It would seem that if the station voluntarily broadcasts reply messages of views opposing the commercial messages, the advertisers would not be very anxious to give the station their advertising business.}

If the licensee fails to grant reply time, a complaint may be lodged with the FCC. In reviewing the message of a commercial the Commission generally defers to the licensee’s judgment.\footnote{Id.} On the issue of whether a controversy exists, the same is also true, and the Commission will overrule this judgment only if it is unreasonable.\footnote{Id. at 256 n.48.} In most instances the Commission has no choice but to rely totally on the licensee’s judgment since the Commission does not accord complainants a hearing in which they can present witnesses and evidence,\footnote{Fairness Doctrine Ruling; In re Complaint by Friends of the Earth, 24 F.C.C.2d 743 (1970).} and the Commission has no investigative branch to obtain evidence in the local community. Thus the Commission has abdicated its regulatory responsibility with respect to these two key questions, and, worse still, has turned that responsibility over to the licensee which the Commission purportedly regulates.

A poignant illustration of the danger inherent in this situation is the fact that licensee evaluations of listener requests under the fairness doctrine, upon which the FCC relies, are not properly insulated from external economic pressures and licensee self-interest. In \textit{Retail Store Employees Union v. FCC},\footnote{1970 Broadcasting Yearbook A-89.} the court remanded a Commission decision denying reply time because there was no full inquiry by the FCC to determine whether improper economic pressure had influenced the licensee’s judgment. The court held that a favor need not be solicited to be improper and required that the FCC determine whether the licensee’s decision was motivated by an unspoken wish of a major advertising client.\footnote{436 F.2d 248 (D.C. Cir. 1970).} Since licensees might easily surmise that Cal-Standard, among the top 60 television advertisers,\footnote{Id. at 256 n.48.} would not be pleased by adverse publicity broadcast free under the fairness doctrine, any determination against the allowance of reply time is to some extent suspect and should be reviewed by the Commission with no deference to the licensee’s evaluation.
C. Ecology Issues and the Fairness Doctrine

The first time the FCC considered whether general automobile gas advertisements raised environmental issues subject to the fairness doctrine was in the case of *Friends of the Earth*. 48 Friends of the Earth, an ecology group, requested time to present spot ads to reply to gasoline and automobile commercials that made no mention of the adverse environmental consequences of their products. This request was denied by the Commission. 49 The FCC decision recognized environmental problems as a matter of public controversy, but the Commission concluded that general advertisements of products which contribute to pollution do not raise controversial issues. 50 The Commission's rationale was that since a great many products have adverse ecological effects, the grant of reply time to ecology groups would result in the undermining of the present commercial broadcast system. 51 The Commission felt that the public interest is best served by advertiser supported programs on the environment rather than spot advertisements to inform the public on environmental issues in an ad hoc fashion. 52 A weakness of the commission's policy is that the cumulative effect of the advertiser's message is not balanced by programming which the licensee uses to meet his public interest obligation. 53

49. *Id.* at 751.
50. *Id.* at 749.
51. *Id.* at 756. The dissenting opinion of Commissioner Johnson stated that the Commission received no economic information whatsoever on the cost impact of anti-pollution advertisements. The gravamen of the majority decision was preservation of the present commercial television system, however, without the above mentioned economic information it would seem unlikely that they could make a determination as to the impact. *Id.* With respect to the same issue as it was raised in the cigarette decision, the burden of proof was shifted to the licensee to prove that the ads would undermine the commercial broadcasting system. Cigarette Advertising, 9 F.C.C.2d 921, 944 (1967).
52. 24 F.C.C.2d at 749. By only allowing occasional programming to offset the constant barrage of commercials which market commodities that contribute to the pollution problem, the Commission, in effect, reduced the frequency, impact, and amount of resources which the non-commercial ecological point of view could utilize.
53. For example, stations consider that a balanced program on ecological matters was fulfilled by the following programs mentioned in a reply letter to the authors:

However, you may be assured that KGO-TV and ABC are endeavoring to present balanced coverage of the ecological or environmental problems which today confront the nation, including those problems presented by the use of automobiles and gasolines. Programming presented on KGO-TV through the facilities of the ABC Television Network, as well as locally produced programs, have presented representative and contrasting points of view in relation to these important issues. For example, ABC's MISSION POSSIBLE series has recently included the anti-automobile pollution views of several responsible spokesmen, including Ralph Nader, Dr. Charles Schultze and Col. Frank Borman. Mr. Nader also appeared on the August 9th ISSUES AND ANSWERS program, during which he discussed non-polluting propulsion systems for autos. The April 12th episode of ISSUES AND ANSWERS featured three representa-
The impact of commercials spread throughout the broadcast schedule is not analogous to occasional programs because more people will be exposed to the commercials. As Commissioner Johnson has stated: "We must not lose sight of what is fundamentally at issue here: whether our citizens should be told the whole truth about the products they use and consume. Is this not the bedrock of American competitive enterprise and consumer choice in the marketplace?"
Despite the questionable wisdom of the Commission decision concerning general product advertisements, the Commission has recognized that a particular commercial could raise ecological issues which would require reply time.57

Cal-Standard F-310 commercials, unlike the general commercials objected to by the Friends of the Earth, directly raise the gasoline pollution problem. The gas' marketing appeal is based on its contribution to the solution of this problem. In Banzhaf v. FCC, the cigarette ruling in which reply time was granted, the advocatory nature of the commercials was actually less explicit than in the F-310 commercials. The Commission held, however, that although cigarette advertisements did not directly make health claims, the portrayal of cigarette smoking as a desirable habit raised a controversial health issue by implication.58 Since the average viewer could interpret Cal-Standard's F-310 ads as suggesting that technology is solving the pollution problem, one side of a controversial issue has been raised. When a viewer is barraged by numerous such commercials which explicitly raise and exploit a controversial environmental issue, the need for non-commercial information is even clearer than in the subtler cigarette presentations.

II

THE PUBLIC INTEREST STANDARD

The right to reply under the fairness doctrine cannot be considered in a vacuum. Congress intends the Federal Communications Commission to function as more than a referee between conflicting parties in fairness doctrine disputes. Under the Communications Act of 1934, the FCC must insure that licensees operate in the public interest.60 The only guideline supplied by Congress in the 1934 Act was to regulate in furtherance of "public convenience, interest, or necessity."62

The courts have done little to interpret this public interest stand-

56. Fairness Doctrine Ruling; In re Complaint by Friends of the Earth, 24 F.C.C.2d 743 (1970). The FCC gives as examples of general product advertisements, "Join the Dodge rebellion," and "Put a tiger in your tank," etc. Id. at 748.

57. Id. at 749.


59. Id. at 1102. See text accompanying note 30 supra.


62. Id. § 303.
ard. The Commission and the courts have made clear, however, that the content as well as the technical quality of broadcasting are relevant factors.\textsuperscript{63} Furthermore, the United States Supreme Court, lower federal courts, and the Commission have all recognized that the fairness doctrine is but one aspect of the Commission’s overall duty to see that broadcast licensees serve the public “interest, convenience, and necessity.”\textsuperscript{64} Under this standard the Commission must consider the public interest in every decision and ruling that it makes. Therefore, a complete discussion of all the implications of the right to reply under the fairness doctrine must include a consideration of the public interest standard of the Communications Act.\textsuperscript{65}

To gain greater understanding of the amorphous nature of the FCC public interest standard, it can be compared with the standards of other agencies that operate under like mandates. A standard of public convenience and necessity was introduced into the Federal Transportation Act of 1920.\textsuperscript{66} There, the standard was clear because the Act created an agency to authorize new or duplicating railroad construction and line abandonment, and this involved simple economic decisions.\textsuperscript{67} In the Motor Carrier Act of 1935,\textsuperscript{68} and the Civil Aeronautics Act of 1938\textsuperscript{69} the meaning of the standard became more complicated. The process of selecting which applicant could best render the needed service introduced considerations of ability to render service, costs due to other operations, and other factors. The agencies involved were nevertheless able to develop intelligible criteria for selection.\textsuperscript{70} Under the Communications Act the issue is rarely the need for broadcasting service but rather who should render it and in what manner. The public interest standard in broadcasting is filled with so many factors that it is almost drained of meaning.\textsuperscript{71}

\textsuperscript{63} No express grant of authority over programming is mentioned, but the argument that the Commission is restricted to considerations of technical competence was rejected in 1943. National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 215 (1943).
\textsuperscript{64} Retail Store Employees Union v. FCC, 436 F.2d 248, 257 (D.C. Cir. 1970).
\textsuperscript{66} Ch. 91, § 400(18), 41 Stat. 477, as amended, 49 U.S.C. § 1(18) (1964).
\textsuperscript{68} 49 U.S.C. § 309(b) (1964).
\textsuperscript{69} Ch. 601, 52 Stat. 973.
\textsuperscript{70} Friendly, supra note 67, at 1057.
\textsuperscript{71} Id. Some of these other considerations are community needs and interests, program content, etc. Id.
A. Commercials and the Public’s Interests

The real harm in the F-310 commercials is in the fact that if people believe that F-310 works as well as the commercials imply it does, they may not press for the kinds of solutions to environmental problems which require public and private sacrifices. These solutions might include, among others, higher taxes for a greater government research effort, controls on gasoline consumption, and more taxes for mass transit systems. Viewers will instead think that corporate enterprise has done it the easy way. Furthermore, they may overlook other pressing environmental problems, feeling that since industry was capable of solving the problem of air pollution, it is capable of anything. If it can be shown that advertising such as the F-310 campaign is harmful to the public interest in this manner, it is submitted that a duty exists on the part of licensees to serve the public interest by broadcasting the viewpoints of environmental groups regarding the claims made by these commercials.

The Commission has previously applied its public interest mandate to various aspects of commercial advertising. Abuses in advertising, such as overcommercialization and loudness, have been evaluated under the authority vested in the Commission by the public interest standard. The actual content of advertisements has, for the most part, been considered only in cases of obscenity and deception. However, the Commission Blue Book outlines advertisement content that would be contrary to the public interest. For example, the Commission has maintained that an advertising message linked to a patriotic appeal, is an improper appeal to listener patriotism to sell commercial products and therefore a violation of the licensee’s obligation to operate in the public interest. By analogy, if the licensee permits his facilities to be used by advertisers who design commercials to exploit public concern over community problems, then the licensee’s public interest obligation requires him to satisfy community interest by balancing the issues raised by the commercial.

B. Harming the Public Health

Another basis for violation of the public interest standard lies

74. See id. at 112-14 for a discussion of obscenity and deception.
75. Public Service Responsibility of Broadcast Licensees, March 7, 1946, in DOCUMENTS OF AMERICAN BROADCASTING 125 (F. Kahn ed. 1968). This 1946 statement is commonly referred to as the Blue Book.
76. Id. at 192.
in the Commission’s recognition that the public interest standard makes it mandatory that the licensee consider the public health in his programming content. The Commission, in *Friends of the Earth*, specifically stated that environmental degradation is an aspect of the public health that the licensee should consider in fulfilling its public interest obligation.\(^7\)

Because the Commission has a duty to require broadcasters to inform the public about the public health, the commission must require licensees to allow the public to use the public air waves so that it may be informed of the non-commercial side of environmental issues that jeopardize public welfare. The danger of environmental degradation is so great that Congress has enacted the National Environmental Policy Act\(^7\) which can be interpreted to compel the Commission to recognize the environmental aspect of the public interest standard. In support of such an interpretation is a recent court decision, in which the Commission was instructed that the intent of Congress in the field of labor-management relations should be considered by the Commission in its decision.\(^7\) The purpose of Congress is no less exacting in the National Environmental Policy Act which states that the federal government must use all practicable means to maintain a decent environment, and that the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies of the Act.\(^8\)

Licensees must be responsive to community problems and, therefore, they must consider the environmental crisis when planning and evaluating their broadcast schedule.\(^8\) Furthermore, Congressional recognition of the grave danger presented by the environmental crisis requires every federal agency to consider this in interpreting the statutory mandate to operate in the public interest.\(^8\) Because the FCC has failed to provide licensees with any guidelines with which to interpret this Congressional mandate,\(^8\) the protection of the public health

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\(^7\) Fairness Doctrine Ruling; *In re Complaint by Friends of the Earth*, 24 F.C.C.2d 743, 749 (1970).


\(^8\) In Fairness Doctrine Ruling; *In re Complaint by Friends of the Earth*, 24 F.C.C.2d 743 (1970), the Commission never reached the question of whether its obligation under the National Environmental Policy Act could be delegated to the licensee. In any case, assuming that the obligation can be delegated, the FCC's failure to supply licensees with guidelines should result in de novo review of the licensee's judgment.
remains in the discretionary domain of private commercial interests. The Commission should not allow commercial interests to control its duty to protect the public interest. Instead, the Commission should recognize the danger in advertisements that take advantage of public concern over ecological issues, and should allow ecology groups to give their viewpoints on these issues which are so important to public health and safety.

III

THE FIRST AMENDMENT

Having seen the basic legal theories under which ecology groups can press for free reply time, it is now possible to explore a theory that might at least allow these groups to buy advertising time if the request for free time is denied. The implications of the first amendment, when applied to broadcaster conduct, may require that broadcasters be willing to sell advertising time to environmental spokesmen responding to the F-310 ads. Furthermore, the first amendment may demand that the format of a reply under the fairness doctrine or a corrective statement under the public interest standard be equal to the original message in terms of effectiveness of content and reasonable in terms of allocated broadcast time.

A. Access to Broadcast Time

The printed media and the city streets provide a wide variety of outlets for expression and persuasion which are accessible to citizens "without technical skills or deep pockets." Unlike these other media, however, the broadcast forum is unavailable to the vast majority of the public. Because broadcasting frequencies are a limited resource, the demand for frequency space is considerably greater than the frequency availability. Therefore, limited broadcast facilities must accommodate a diversity of community needs. The courts have recognized that the differences between the characteristics of the broadcast and the printed media justify a difference in applications of first amendment standards to broadcasters. However, the courts

87. Id. at 386, 396; FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).
have not yet addressed themselves to the first amendment problems
created by the general limited access to broadcasting technology which
supplanted the unlimited and decentralized print communications
media. First amendment applications to broadcasting are still in the
embryonic stage.\textsuperscript{89} In \textit{Red Lion Broadcasting Co. v. FCC},\textsuperscript{90} the
Supreme Court for the first time recognized that the first amendment
protects the collective rights of the viewing public to suitable access to
social, political, esthetic, moral, and other ideas.\textsuperscript{91} "The rights of the
viewers and listeners, not the right of any particular speaker, is be-
ing protected here."\textsuperscript{92} The extent to which the first amendment re-
quires a licensee to conduct himself as a fiduciary for the public and to
present views representative of the community, which are otherwise
barred from the airwaves, is not yet certain. Recent FCC deci-
sions have held that licensees are not required to accept advertising
dealing with controversial issues\textsuperscript{93} or designed to raise money for vari-
ous political parties.\textsuperscript{94} Further, the Commission has held that dis-
senting Senators have no right to purchase time to debate the Presi-
dent on controversial issues.\textsuperscript{95} The Commission has concluded that
because a licensee is not a common carrier\textsuperscript{96} it is not required to ac-
cept all paying customers.\textsuperscript{97} The Commission's narrow definition of
the licensee's first amendment obligation seems to conflict with the
Supreme Court's rather broad interpretation of that obligation in \textit{Red
Lion}. Several of the recent cases have been appealed but thus far no
judicial determinations have been rendered. It seems likely that
eventually the area will be clarified by judicial decisions more in keep-
ing with \textit{Red Lion}.

The founders of our country conceived the first amendment
as a barrier to government censorship.\textsuperscript{98} In earlier times the impor-

\begin{itemize}
  \item \textsuperscript{89} See articles cited in note 108 \textit{infra}.
  \item \textsuperscript{90} 395 U.S. 367, 390 (1969).
  \item \textsuperscript{91} \textit{Id.}
  \item \textsuperscript{92} \textit{Id.}
  \item \textsuperscript{93} Fairness Doctrine Ruling; \textit{In re} Complaint by Business Executives Move for
Vietnam Peace, 25 F.C.C.2d 242 (1970) (refusal to sell spot time for anti-war commer-
cial upheld).
  \item \textsuperscript{94} Declaratory Ruling; \textit{In re} Democratic National Committee, 25 F.C.C.2d 216
(1970) (licensee's right to refuse to sell time for solicitation of campaign funds upheld).
  \item \textsuperscript{95} Fairness Doctrine Ruling; \textit{In re} Committee for Fair Broadcasting, 25 F.C.C.2d
283, 298 n.24 (1970) (the refusal to sell Senate doves program time to refute Presi-
dent's messages, upheld).
  \item \textsuperscript{96} The Communications Act of 1934 states that a broadcaster should not be
deemed a common carrier. Ch. 652, \S\ 3(h), [1934] 48 Stat. 1066, as amended, 47
F.2d 497, 501 (1st Cir. 1950); McIntire v. Wm. Penn Broadcasting Co. of Phila., 151
F.2d 597, 601 (3d Cir. 1945).
  \item \textsuperscript{97} See notes 93-95 \textit{supra} and accompanying text.
  \item \textsuperscript{98} See, Barron, \textit{Access to the Press—A New First Amendment Right}, 80
Harv. L. Rev. 1641, 1643 (1967).
\end{itemize}
tant forums of public communications were parks, street corners, soap boxes, and town hall meetings. These forums were within the reach of all and were to be protected from government controls. The Supreme Court in recent decisions has recognized the impact of the nature of the forum on the exercise of first amendment rights: The first amendment protects not only the opportunity to speak, but also the opportunity to seek expression through the media with the largest impact. Thus the Second Circuit held in *Wolin v. Port Authority of New York* that distributing anti-war leaflets was permissible in the Port Authority because it was a proper forum to reach a certain audience. Today the federal government licenses, sanctions, and regulates the broadcast media which is the nation’s most important “public forum” for the communication of ideas.

The selection of the material that is presented to the large “semicaptive” television audience is in the hands of a privileged few. The Supreme Court, in order to protect the public from the dangers of a private monopoly of the mass media, has held for the first time that the first amendment prohibits censorship by broadcast licensees who control the public airwaves. The Supreme Court said:

But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently

101. 392 F.2d 83 (2d Cir. 1968). In *Davis v. Francois*, 395 F.2d 730 (5th Cir. 1968) the court recognized that judicial expansion of first amendment rights over the past few decades “has fostered the accompanying doctrine that the individual must be afforded an appropriate ‘public forum’ for his peaceful protest.” Id. at 733. *Progress Report of the National Commission on the Causes and Prevention of Violence* stated that:

one of the minimum requirements for non-violent resolution of divisive social issues is that interested parties be given an opportunity to be heard. In a democratic society where ultimate power resides in the people, access to the mass media is essential for groups desiring peaceful social change. If important, discontented segments of our society are denied the right to be heard, subsequent resort to violence by these groups may perhaps be expected.


102. Ninety-five percent of the sixty million households in the United States are equipped with a television set, and in the average home the set is turned on five hours and forty-five minutes a day. N. Johnson, *How to Talk Back to Your Television Set* (1970).

103. Cf. R. Crossman, *The Politics of Socialism* (1965). “But actually those who control the media of mass communication and the means of destruction (propaganda and the armed forces) are far more powerful today than the owners of the means of production.” Id. at 45.


with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. \[106\]

The scarce public airwaves, temporarily licensed to private individuals, retain their public character. \[107\] Judicial precedent guarantees individual access to public forums for expression of views, \[108\] but a broadcaster too often has free and exclusive use of his limited and powerful broadcast forum. The franchise for this forum is burdened, however, by an enforceable public obligation. \[109\] The licensee may impose reasonable use restrictions such as the “time, place and manner” of the presentation, upon those who would exercise their rights to the forum, but just as certain kinds of speech or types of speakers cannot be barred by the government from public parks and streets, responsible viewpoints cannot be barred from the mass media. \[110\]

**B. Format Equality and Reasonableness**

The best solution to these first amendment problems may be to ban the F-310 commercial announcements and all similar profit motivated appeals to public conscience. Ironically, the radio and television networks and many of the individual licensees have consistently represented to the Commission that they will not sell spot

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106. *Id.* at 390.
107. See note 109 *infra*.
time for noncommercial announcements which deal with controversial issues. Licensees argue that these issues are too complex to be adequately explored in short spot announcements. Further, some licensees fear that controversial spot announcements would result in pre-emption of broadcast frequencies by the financially strong, a situation which would necessarily distort the manner in which issues are presented. The Cal-Standard F-310 commercials exemplify both of these views. But the licensees seem unwilling to follow this policy when products of major advertisers are involved. The F-310 spots do not accurately convey to viewers the nature and extent of Cal-Standard's contribution to complex ecological problems, and they tend to distort and overstate the significance of the F-310 claims.

At this point, however, the commercials have already had their effect, and irreparable damage to the educational effects of ecology groups has been done because of influence effect upon consumers. The most effective rectification of this adverse effect would be achieved by broadcasting the noncommercial viewpoint through the broadcast media. Mere cancellation of future F-310 commercials will not remove this adverse effect. Further, for the following reasons, it is unlikely that the Commission would ban the F-310 advertisements. First, the Commission feels that the commercial system of broadcasting would be adversely affected if controversial spot advertisements were banned. Second, prior screening by the Commission would bring cries of censorship and vest too much power in the Commission. Therefore, the realities of the situation must be examined to develop the most practical relief in the present situation. Spot announcements by opposing spokesmen, broadcast until the effects of the F-310 commercials are neutralized, present one possible solution.

111. Fairness Doctrine Ruling; In re Complaint by Business Executives Move for Vietnam Peace, 25 F.C.C.2d 242 (1970); Declaratory Ruling; In re Democratic National Committee, 25 F.C.C.2d 216, 218 (1970). While it seems improbable that the licensees can continue to ban controversial noncommercial spot announcements when they constitute speech protected by the first amendment, purely commercial speech such as the F-310 ads can be banned. "In the quarter century since Valentine v. Christensen [316 U.S. 52 (1952)], the notion that commercial advertising is not protected by the first amendment has been enshrined among the commonplaces of constitutional law." Note, Developments in the Law: Deceptive Advertising, 80 HARV. L. REV. 1005, 1027 (1967). Thus, the protected first amendment rights of the ecology groups to purchase time in order to inform the public about the environmental crisis can probably be exercised independently of the fairness doctrine.


113. Id.


115. See notes 139 & 140 infra and accompanying text.

Standard's several million dollar television advertising campaign has saturated the forum. Ecology groups will therefore argue that they are entitled to significant exposure of their viewpoints through similar spot announcements rather than through news and discussion coverage. As early as 1949 the Commission recognized that:

In any competition for public acceptance of ideas, the skills and resources of the proponents and opponents will always have some measure of effect in producing the results sought . . . . Assurance of fairness must in the final analysis be achieved by making the microphone available for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation.117

Under the fairness doctrine, however, the Commission allows the licensee wide discretion as to format and spokesmen in presentations of contrasting viewpoints.118 For example, in a fairness complaint involving a televised attack on a state university system by the Governor of California, the Commission found that although the Governor appeared during prime time and had complete control over format, the licensee satisfied his fairness doctrine obligation by offering a student body president the opportunity to appear on a non-prime time panel discussion show.119 The FCC standard for reversal of a licensee's discretion is whether such judgements are reasonable and made in good faith,120 and the FCC does not feel that the licensee's failure to provide an equivalent public forum for all sides of a controversy is reversible error. Thus, the Commission does not require controversial programming to be responded to in like kind, and does not require the licensee to seek out spokesmen of corresponding stature. The courts have noted some of the discrepancies between spot and format programming, 121 though they have not yet squarely addressed themselves to the first amendment issues that format censorship raises.

Although it may be impossible for the Commission to guarantee equally effective formats for contrasting views,122 the first amendment

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120. Madalyn Murray, 40 F.C.C. 647 (1965).
122. For example, after President Nixon's series of televised speeches discussing the Indo-China War there was clearly no one reply spokesman of corresponding public stature. The Senate dove complainants recognized the disparity between their national stature and that of the President, but argued that the Commission should require the li-
may demand that neither the Commission nor the licensee permit the format to prejudice the effectiveness of an opposing point of view when equality of format is possible. The medium, including the way it is utilized, is the message. Because of the close relationship of form and content to the broadcast message, the first amendment ought to be construed to forbid restrictions on form which result in censorship of content. If the public is to receive suitable access to environmental ideas, the licensee must not be allowed to prejudice the effectiveness of noncommercial contrasting viewpoints through format manipulations. Thus, for example, the Commission must allow spot programming to be balanced by spot programming, and not by inclusion in regular program broadcasts. More resources are poured into producing a one minute commercial than any one-minute television program segment, and the impact of these advertisements is greater than programming segments. The court of appeals in Banzhaf recognized the importance of the frequency of presentation of any point of view. The court reasoned:

The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood. A man who hears a hundred 'yeses' for each 'no' when the actual odds lie the other way cannot be realistically deemed adequately informed.

Thus, the Commission required regularity in the presentation of antismoking spots, and also made it mandatory upon the stations to include some spots during prime time.

First amendment format obligations also require that significant amounts of time be devoted to a diversity of contrasting views.

censee to allow them to respond because they felt they were closest in stature to the President. See Fairness Doctrine Ruling; In re Committee for Fair Broadcasting, 25 F.C.C.2d 293 (1970).

123. Under this argument, the FCC's action in Boalt Hall Students Association, 20 F.C.C.2d 612 (1969), would, necessarily, be held unconstitutional. See text accompanying note 119 supra.


The Supreme Court, in *Red Lion*, noted that for the public to be adequately informed, the opposing point of view must originate from persons who actually believe the ideas, defend them in earnest, and are willing to do their utmost for them.\textsuperscript{132} However, under established FCC policy the licensee himself may present the contrasting viewpoint.\textsuperscript{133} The licensee may also choose a reply spokesman of any stature and may decide upon a local rather than a regional or national spokesman.\textsuperscript{134} If viewers are to be truly informed, the source of the reply must command the same credible persuasion as the commercial itself. In the F-310 commercial a popular ex-astronaut and public figure, Scott Carpenter, presented Cal-Standard's side of this controversial issue. The non-commercial ecology groups deserve to have their point of view expressed by their most effective spokesmen.\textsuperscript{135}

IV

EXPEDITED RELIEF

The debate between ecology groups and Cal-Standard is topical and current. Since the exposure period for a typical advertising campaign is rather limited, it is essential that the non-commercial ecological point of view reach the public while the issue is still fresh in their minds. Otherwise, ecology groups will be scrambling for the viewers' attention several months after the audience may believe the issue is moot. By the time the ecology groups reply, advertising may be claiming new technological victories.

A. The Pressing Issue

The novel issue that the F-310 situation presents is that the first

\textsuperscript{132} Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 392 n.18 (1969). See also T. Emerson, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966). "Human judgment is a frail thing. It may err in being subject to emotion, prejudice or personal interest. . . . Hence an individual who seeks knowledge and truth must hear all sides of the question, especially as presented by those who feel strongly and argue militantly for a different view." *Id.* at 7.

\textsuperscript{133} Fairness Doctrine Ruling; In re Complaint by Dorothy Healey, 24 F.C.C.2d 487, 488 (1970).

\textsuperscript{134} 29 Fed. Reg. 10419 (1964).

\textsuperscript{135} The ecology movement is presently composed of a large number of decentralized local community groups, and several organizations which draw financial support and membership from the country at large. For the purpose of responding to local controversial issues such as superhighway construction, the licensees should seek out spokesman at the community level. However, when a national issue of ecological importance such as the SST is raised, the local licensee and networks should seek out a spokesman of national stature. When reply time to national advertising discussing ecological issues is presented, it would appear that only the national organizations would have the financial resources to produce reply spots for television and radio. To the extent that there is a divergency of views among various ecology groups, licensees should be required to seek out representatives of the different groups and apportion the time accordingly.
amendment rights of viewers, not those of the speaker, are arguably being violated. An integral part of any meaningful recognition of such public rights is the provision for rapid and expedited relief. The need to avoid delay in cases like the F-310 situation is emphasized by the nature of the problems that ecology groups deal with. In increasing numbers, reputable scientists are suggesting that a very few years remain in which to find effective solutions to environmental problems. Thus any time lost while ineffective solutions are attempted does irreparable harm to the entire society. If, as many of the ecology groups suggest, F-310 is an ineffective attempt to cure air pollution, the time lost due to impeded efforts to educate the public may cause very tangible damage in the form of an environmental disaster. Thus ecology groups should receive reply time immediately in order to minimize the damage of delayed presentation. In *Environmental Defense Fund, Inc. v. Hardin* the court noted that administrative inaction can be the equivalent of an order denying relief. Inaction in the F-310 controversy for even a few weeks will allow the formation of a false sense of public security that will impede environmental education efforts.


139. In *Miskawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203 (1942), the court said that the object of much modern advertising is “to impregnate the atmosphere of the market with the drawing power of a congenial symbol.” *Id.* at 205. Also, in *Smith V. Chanel, Inc.*, 402 F.2d 562 (9th Cir. 1968), the court explicitly recognized the difference between advertisements which communicate information as to quality or price and advertisements which seek to create a conditioned reflex. *Id.* at 567. The court then said that to the extent that conditional reflex advertising succeeds, the product “is endowed with sales appeal independent of the quality or price of the product to which it is attached; economically irrational elements are introduced into consumer choices, and the trademark owner is insulated from the normal pressures of price and quality competition. In consequence the competitive system fails to perform its function of allocating available resources efficiently.” *Id.* See also J. GALBRATH, *THE NEW INDUSTRIAL STATE* (1967). Galbraith discusses the strategy of the creation of customer loyalty which requires that the customer be educated by comprehensive and repetitive communications creating an image of the product to which the customer automatically responds. *Id.* at 205-06.

140. Advertising, then, attempts to create uncertainty by presenting a claim for a new product (or one not used by the consumer) which is inconsistent with the consumer’s experience with the old product. Studies establish that when perception thus clashes cognition, the “perceiver” (i.e. the public) most
That the effective exercise of the public's first amendment rights is dependent upon the granting of prompt relief and that any delay in the exercise of first amendment rights constitutes an irreparable injury has long been recognized by the judiciary. For example, in *Freedman v. Maryland* the Supreme Court held that the state must afford those who are suffering irreparable injury from a denial of first amendment rights a speedy administrative or judicial right of review. Even though this case protected the distributor's first amendment rights to show a picture so that the exhibitor would not be injured by losing a valuable opportunity to exhibit the picture, it is a logical extension of this ruling to protect the viewers' first amendment rights to see the picture without undue delay. *Freedman* should be interpreted to protect individuals from unduly cumbersome and time consuming procedures before they exercise their first amendment right of expression be they speakers or listeners.

**B. Procedure**

The request for reply time must first be directed to the licensee, who has the opportunity to consider the request for an unspecified period, before it can be filed with the Commission. The Commission generally takes three months to process complaints involving reply time requests. By the time these cumbersome administrative remedies are exhausted the issue may become moot and the right to reply may not be an adequate remedy. In the Cal-Standard F-310


145. Fox example, in this case Chevron may come out with an entirely new product and therefore may no longer market F-310. It is more than likely that F-310 will lose its commercial usefulness just as the Chevron Island Girls lost their usefulness to F-310.
example, by the time the Commission decides the case, the advertising campaign and perhaps the commercial value of the F-310 will no longer be relevant. Furthermore, because the Commission decision can then be appealed to the courts by either side, it is often years before the opposing viewpoint will actually be heard.\textsuperscript{146}

The Commission has acted quickly when necessary. In cases arising under the equal time provision of Section 315,\textsuperscript{147} the Commission renders decision on an expedited basis, for example, from four to twelve days.\textsuperscript{148} As in an equal time complaint, time is of the essence in this type of case.

CONCLUSION

This Comment has explored the legal problems raised by advertisements reflecting industrial awareness of the environmental crisis and corporate willingness to exploit public concern. Using the Cal-Standard F-310 advertising campaign as a case study, several theories would permit ecology groups to present a noncommercial viewpoint over the airwaves in reply to this cultivated image of easy technological solutions.

The ecology groups are probably entitled to free reply time under the fairness doctrine, which states that when one side of a controversial issue of public importance has been aired, the licensee is obligated to provide for contrasting viewpoints; and also under the public interest standard, which obligates the licensee to serve the public interest and to afford reasonable opportunity for the discussion of conflicting views of community concern which affect the general welfare. Even if ecology groups are unsuccessful in getting free reply time, they should be able to purchase spot time to reply to commercials since, under the first amendment, access to the mass media may be guaranteed because it is the most effective public forum for the communication of ideas.

Judging from the \textit{Friends of the Earth} decision, the Commission seems unwilling to extend the cigarette ruling into other commercial areas. The Commission may be reluctant to act in the regulation of

\textsuperscript{146} For instance, the formal complaint in the Cal-Standard F-310 action was filed by the authors on September 24, 1970 and no reply has as yet come forth from the Commission. By the time it will get to the federal court at least one year, if not more, will have passed. A copy of this formal complaint is on file with the \textit{Ecology Law Quarterly}.


\textsuperscript{148} In \textit{In re} Complaint of David Dechter, 15 F.C.C.2d 95 (1968) the FCC replied in four days to a request for political time. In \textit{In re} Complaint of Yates for United States Senator Committee, 40 F.C.C. 368 (1962), the Commissions ruling for a political time request came in twelve days.
advertising without affirmative Federal Trade Commission cooperation 
or guidance. Therefore, a rather narrow or unfavorable Commission 
resolution of the issues presented by the F-310 ads may be in the 
offing. However, recent cases indicate that the courts will reverse 
Commission decisions when they feel that the FCC has not adequately 
considered the public interest and the first amendment considerations 
of its decisions. It is likely that the ecology movement will fare better 
in the courts than with the Commission.

This discussion should be helpful in approaching all commercial 
advertising which is designed to exploit the public conscience over 
social issues. The principles described herein are equally applicable 
to other advertising campaigns dealing with ecological issues, such as 
biodegradable detergents and disposable containers. With increasing 
pressure from ecology groups for opportunities to answer these cam-
paigns, these exercises in ecological pornography may eventually dis-
appear from our presently polluted airwaves.

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