CHAPTER 4

Access

Recall the basic model of communication introduced in CHAPTER 1: POWER. A sender encodes a message onto a signal, which is transmitted across a channel and then decoded back into the message by the receiver. All communication technologies enable this process. What happens, however, when a player essential to some communicative process who has control over some "choke point" refuses to participate? Is it just tough luck? Or could it be that certain players in certain circumstances must participate whether they like it or not? In other words, might the law force them to provide *access* to their system? Under what circumstances should such access be mandated? And is it lawful to do so?

A. Broadcast TV

To locate the choke points in any communications service, it is important to understand the structural relationships among multiple firms who cooperate to provide the service. In the case of broadcast, these firms can be usefully categorized into three stylized layers: production, large-scale distribution, and last-leg connection.

Let's run through a concrete example of the television show *Scandal*. First, someone has to create the content—a television production company such as ShondaLand. Next,

someone has to distribute the program nationally—a broadcast network such as Disney–ABC Domestic Television. Finally, someone has to broadcast the program locally for viewer consumption—a local broadcast station such as KABC-TV, the ABC-owned-and-operated station in Los Angeles. Access could be denied at each layer.

Layer	Industry Player
1. Production	Studio
2. Large-scale Distribution	Broadcast Network
3. Last-leg Connection	Local Station

1. Access to the Station: Fairness Doctrine

Let's focus on the choke point on *layer 3: last-leg connection*. Suppose that you are the leader of a small libertarian reading group called "Books for Freedom." One day, while you are watching broadcast television, you hear a news commentator mock "Books for Freedom," calling you a bunch of right wing lunatics. You are deeply insulted, and you think that your group and its maverick mission have been badly mischaracterized. You call up the broadcast station and complain vigorously. You ask for time to tell the audience what the real truth is. Oozing elitist contempt, the broadcast station manager says "Buzz off!"

You think to yourself that the broadcast spectrum is a public resource. Why should this one station be able to monopolize that resource and broadcast nasty opinions about your organization with no chance for rebuttal? Isn't it only fair that you be given access to the local TV station, in some reasonable and limited manner, to reply?

The doctrine. We were briefly introduced to the fairness doctrine back in CHAPTER 2: ENTRY, when we examined the justifications for regulating broadcast entry and studied *Red Lion*.* Originally adopted in 1949, the doctrine comprised two separate requirements. First, broadcasters were required to cover important and controversial issues, especially if they were relevant to the community they served. Second, broadcasters were required to provide reasonable opportunities for contrasting and dissenting views on the controversial topics covered.† The first requirement was hardly an issue: Covering controversy was something broadcasters naturally did, and the FCC rarely complained. By contrast, the second requirement led to specific access (or right of reply) claims that generated complex litigation, as in *Red Lion*.

In 1967, partly codifying and partly extending the fairness doctrine, the FCC adopted specific regulations pertaining to personal attacks and political editorials. The *personal attack rules* required that during the airing of controversial issues of public significance, if an "attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group," the station must give timely notice to the attacked person or group and a reasonable opportunity to respond.‡ The *political editorial rules* required that if a licensee endorses or opposes a legally qualified candidate in a televised editorial, then that candidate must receive timely notice and be given a reasonable opportunity to respond.§

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* *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

† *See Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949).

‡ *See* 47 C.F.R. § 73.1920 (repealed).

§ *See* 47 C.F.R. § 73.1930 (repealed).

In addition to these FCC policies and regulations, specific federal statutory provisions forced equal access requirements on broadcasters for qualifying political candidates. As a threshold matter, broadcasters must provide a *reasonable opportunity* for federal political candidates to purchase access.* In addition, Congress passed *equal access* provisions, codified at 47 U.S.C. § 315, which basically require a licensee to provide equal broadcast opportunities to all candidates for a political office if any one candidate has been allowed to use the station.† Finally, political candidates are given some price protections and must be charged the "*lowest unit charge*" for a comparable broadcast spot within a recent time period.‡ These three statutory provisions are sometimes called the political broadcasting requirements.

In *Red Lion*, the Supreme Court—emphasizing spectrum scarcity and the public ownership of the airwaves—upheld the constitutionality of the fairness doctrine, as well as the personal attack and political editorial rules. In its analysis, the court also spoke approvingly of the statutory equal access provisions, whose constitutionality was upheld a decade earlier.§

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* *See* 47 U.S.C. § 312(a)(7). This section authorizes the FCC to revoke the license of any station "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." *See also* 47 C.F.R. § 73.1944 ("reasonable access" implementing regulations).

† *See* § 315(a). *See also* 47 C.F.R. § 73.1941 ("equal opportunities" implementing regulations).

‡ *See* § 315(b). *See also* 47 C.F.R. § 73.1942 ("candidate rates" implementing regulations).

§ *See* Farmers Educ. & Coop. Union v. WDAY, 360 U.S. 525 (1959).