Liability of Broadcasters

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Radio and television play an important part in American life today. Nowhere is this part greater than in political campaigns where the speakers may have an audience in the millions. A speaker is of course responsible for what he says, and if he makes any defamatory and false statements, he is subject to the ordinary rules of slander and libel. If the statement is made over the radio,[1] the defamed individual's reputation is hurt in the estimation of a much larger group of people than would be the case if the statement were made elsewhere. Since the radio station made this increased damage possible by furnishing its facilities to the speaker, one solution would be to hold the station liable in defamation. If this were accepted, the next question would be whether the station could protect itself by prohibiting the utterance of defamatory remarks. In most instances this would take care of the interests of the station, but many think that it would involve an undue restriction upon the right of free speech. It may be a close question as to whether statements are defamatory or not and it may not be good policy to leave such issues to the judgment of the station owner. But if he can be held liable for defamatory remarks, and if he cannot control what is said over the station, he is on the horns of a dilemma.

The Federal Communications Act provides:

> SEC. 315 (a). If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all such other candidates for that office in the use of such broadcasting station: Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

The statute originated as Section 18 of the Radio Act of 1927, and was taken over verbatim in the Communications Act of 1934. As indicated in the note, no material change was made in this

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[1] The term "radio," as used in this discussion, includes television. The new Ohio statute deals with the liability of "the owner, licensee, or operator of a visual or sound radio broadcasting station."

section in 1952.[2]

A leading case in the early days of radio construed this section of the radio act and held that "the prohibition of censorship of material broadcast over the radio station of a licensee merely prevents the licensee from censoring the words as to their political and partisan trend but does not give a licensee any privilege to join and assist in the publication of a libel nor grant any immunity from the consequences of such action. The federal radio act confers no privilege to broadcasting stations to publish defamatory utterances."[3]

As a result of this approach many stations censored political speeches and many complaints to the Federal Communications Commission turned on the question whether the statements in the script were libelous.[4] Finally, in a case involving the renewal of a broadcasting license, the commission said: "The case raises squarely one of the most crucial problems with respect to political broadcasts under Section 315 of the act, namely, whether or not the provision of the section denying the licensee the right to censor the 'material' of a broadcast within the meaning of Section 315 prohibits the station from censoring or deleting material in radio speeches by candidates for public office which they might reasonably believe to be libelous or to subject their station to an action for damages." The commission said the legislative history of Section 315 makes it clear that Congress did not intend licensees to have any right of censorship over political broadcasts, and held that "the censorship prohibited under Section 315 of the Communications Act includes the refusal to broadcast a speech or part of a speech by a candidate for public office because of the allegedly libelous or slanderous content of the speech."[5]

The commission was not impressed by the argument that its holding would subject the station to liability for defamation because it construed Section 315 as indicating an occupation of the field by federal authority which would relieve the owner of any

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[2] PUB. L. 554 (1952) amending the Communications Act of 1934. There is no change in the original act as far as this paragraph is concerned except that the earlier act contained the words "and the Commission shall make rules and regulations to carry this provision into effect" after "broadcasting station" in the middle of the paragraph. Such a statement is made in 315(c) of the recent act.

[3] Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932).

[4] "This is a question which has proved to be perplexing over the years to Congress, the Commission, and the broadcasters themselves. **** Most of the complaints received by the Commission concerning alleged violations of Section 315 concern instances in which the station has insisted on the deletion of matter which it alleged might subject the station to suits for damages." In re Port Huron Broadcasting Co., 12 F.C.C. 1069, 1072 (1948).

[5] In re Port Huron Broadcasting Co., 12 F.C.C. 1069 (1948).

liability in defamation regardless of state laws. This confidence was not shared by everybody, and bills were introduced in many legislatures to protect the station owner from liability for defamation in such situations. While there was some statutory support before this case was decided, most of the laws were enacted in the sessions of 1949 and 1951.

Section 2739.02(A), newly enacted by the Ohio Legislature, provides that "the owner, licensee, or operator of a visual or sound radio broadcasting station or network of stations, shall not be liable for any damages for any defamatory statement uttered over the facilities of such station or network by or on behalf of any candidate for public office where such statement is not subject to censorship or control by reason of any federal statute or any ruling or order of the Federal Communications Commission made pursuant thereto" but that it shall not apply if the owner is a candidate or speaker on behalf of a candidate.

Several states now have similar statutes,[6] while others provide: "In no event, however, shall any owner, licensee or operator ****** be held liable for any damages for any defamatory statement uttered over the facilities of such station or network by or on behalf of any candidate for public office."[7]

Of course, the speaker is liable for defamatory remarks over the radio, whether he is himself a candidate, or speaking on behalf of one. But the station or the network whose facilities make possible the carrying of the remarks to millions is excused. It would seem unfair to hold the station if it were compelled to carry these remarks. If the *Port Huron* case is correctly decided, the statutes follow as a natural corollary.[8] In that case the commission was forced to choose between the advantages of free speech, with the public being permitted to hear over the radio what the candidates wanted to bring before them on the one hand, and the possible loss to an innocent station owner, or an increased damage to the individual attacked on the other. The holding of the Commission that the station owner could not delete the words of the speaker is certainly in accord with the specific language of § 315 (a) "such licensee shall have no power of censorship over the material broadcast." But its constitutionality may yet be tested by the courts.

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[6] Among these are Maine, C.134, R.S. 117, 31A; Maryland, Art. 75, 19A; Michigan § 27.1405; Missouri § 537.105; South Carolina Act No. 778 of 1952 S.C. Acts.

[7] For instance, Georgia § 105-713; Nebraska § 86-602; Louisiana § 45-1352; Wyoming § 3-8204.

[8] There may be some question as to how complete a protection these state statutes are. For, as said by Chief Justice Hughes twenty years ago, "No state lines divide the radio waves and national regulation is not only appropriate but essential to the efficient use of radio facilities." Federal Radio Commission v. Nelson Bros., 289 U.S. 266, 279 (1933).

The next paragraph of the new Ohio act is not limited to political broadcasts. It applies to anything said over the air. Section 315 (a) is not applicable here and there is nothing to prevent the operator from deleting matters from prepared scripts if he considers it objectionable. A conflict has arisen in other states as to the extent of liability of the operator, and paragraph B of the Ohio Statute, as well as similar statutes in other states, attempts to resolve that common law problem.

Defamation is an absolute tort. It is not dependent upon negligence. Publishers of newspapers are generally held liable for defamatory statements although there was no intent to defame the plaintiff and no knowledge that the communication was or could be understood to be defamatory.[9] The same rule has been applied to radio stations.[10] But because operators of such stations have more difficulty in controlling everything that is said over the air, some courts have refused to hold them liable in the absence of negligence.[11] The Restatement of Torts has failed to take any position on this issue.[12]

A considerable number of states now have statutes holding the operator of a radio station not liable for defamatory statements uttered by others, "unless it shall be alleged and proved by the complaining party that such owner **** has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast."[13] A somewhat smaller number of states place the burden of showing freedom from negligence upon the owner or operator of a radio station.[14] The new Ohio statute is in accord with the latter group. It provides:

"(B) The owner, licensee, or operator shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast by one other than such owner, licensee or operator, or agent or employee thereof,

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[9] Cassidy v. Daily Mirror Newspaper, 2 K.B. 331 (1929); Petransky v. Repository Printing Co., 51 Ohio App. 306, 200 N.E. 647 (1935).

[10] Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82; Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (1934).

[11] Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 8A.2d 302 (1939); Kelly v. Hoffman, 137 N.J.L. 695, 61 A. 2d 143 (1948).

[12] SEC. 577, CAVEAT: "The Institute expresses no opinion as to whether the proprietors of a radio broadcasting station are relieved from liability for a defamatory broadcast by a person not in their employ if they could not have prevented the publication by the exercise of reasonable care, or whether, as an original publisher, they are liable irrespective of the precautions taken to prevent the defamatory publication."

[13] Among these are Georgia, § 105-712; Kansas, § 60-746a; Michigan, § 27.1405; Nebraska, § 86-601.

[14] For example, Iowa § 659.5; Maine, C. 134, R. S. 117, 31A; Minnesota, § 544.043.

if it shall be proved by such owner, licensee or operator, that he exercised reasonable care to prevent the publication or utterance of such statement in such broadcast."

Placing the burden of proof upon the defendant might have raised serious constitutional questions a generation ago.[15] But such a practice is not uncommon today.[16]

The new Ohio act has been numbered 2739.03 and so it will appear in the Revised Code after 2739.01 and 2739.02 (formerly 11341 and 11342). The first of these sections deals with the requirements of an action for libel or slander, and the second with defenses to libel and slander. There has been considerable difficulty in determining which tort is involved in statements over the radio. Under the old distinction that libel is what is seen, and slander is what is heard, the latter would seem to be more applicable.[17] But since libel is regarded as the more serious of the two, some courts have felt that the wide dissemination given such remarks should lead to a stricter responsibility.[18] The distinction has also been made to turn upon whether the remarks were extemporaneous or read from a script.[19] A few Western states[20] attempted to solve the problem by legislation, but were as far from agreement as the cases. The framers of § 2739.03 cannot be accused of rushing into this difficulty. The new act provides that the owners, licensees or operators shall not be liable for certain "defamatory" statements, an adjective that obviously includes both libelous and slanderous remarks.

In 1913 a law was enacted which provided that if a newspaper company printed any false statement about an individual or organization, it should upon the demand of the aggrieved person, print the truth concerning such statements which the person might offer to it.[21] This and allied topics became Section 6319 of the Revised Statutes under the heading, "Newspapers." The 1953 revision of the statutes has transferred the subject matter to the field of slander

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[15] *Cf.* Byers v. The Meridian Printing Co., 84 Ohio St. 408 (1911).

[16] *Cf.* Securities Act, 15 U.S.C.A. § 77a *et seq.*

[17] Locke v. Gibbons, 164 Misc. 877, 299 N.Y.S. 188; Remington v. Bentley, 88 Fed. Supp. 166 (1949) (extemporaneous remark on television); Meldrum v. Australian Broadcasting Co., Vict. L. R. 425 (1932).

[18] *Cf.* Restatement of Torts § 568(3) "The area of dissemination, the deliberate and premeditated character of the publication, and the persistence of the defamatory conduct are factors to be considered in determining whether a publication is a libel rather than a slander"; Sorenson v. Wood, note 3, *supra.*

[19] Hartman v. Winchell, 296 N.Y. 296, 73 N.E. 2d 30 (1947); 9 OHIO ST. L. J. 179.

[20] California, North Dakota, Oregon, Washington.

[21] 103 v. 854.

and libel, so that § 6319-3 has become § 2739.13. The new radio act imposes the same duty upon broadcasting stations as § 2739.13 does upon newspapers, and in fact § 2739.03 (C) is almost identical with § 2739.13 except for the substitution of broadcasting station for newspaper company.

Making allowance for the difference between broadcasting and printing we find § 2739.03 (D) very similar to § 2739.14 (6319-4). Whenever demand is made for the broadcast of a statement under division (C) of this section, the station shall broadcast the same within forty-eight hours. It shall be done without additions or omissions in as prominent a manner and time as the original broadcast. It shall be done without charge. It may be proved as a mitigating circumstance to reduce damages.

The remaining paragraphs, E, F and G of § 2739.03 are comparable to §§ 2739.15 and .16 (6319-5 and 6). Statements that stations are compelled to broadcast must be sworn to, and false swearing is punishable. The station is not liable for anything in such a statement. The station shall not refuse or fail to broadcast any true statement as required by division (C). Any person responsible for refusing to broadcast as required shall be fined. The prosecuting attorney shall investigate complaints and upon reasonable cause shall prosecute offenders. The penalties are now grouped in § 2739.99, paragraph F being added there to provide for violations of 2739.03.