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A survey of reasons for proposed legislation limiting liability for defamation by radio and television in Massachusetts

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A SURVEY OF REASONS FOR PROPOSED LEGISLATION LIMITING LIABILITY FOR DEFAMATION BY RADIO AND TELEVISION IN MASSACHUSETTS

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INTRODUCTION

Nature and Scope of the Problem

Statement of the Problem - Attendant with the rapid growth of radio broadcasting in the last thirty years and with television broadcasting more recently, have been the growth of the broadcasting and telecasting industry's problems. One of the most interesting of these problems is that of the "publication" of defamatory matter over these media. Cases of defamation via radio and television are relatively few. However, when they do arise, under the strict liability theory of common law the broadcaster may find himself in an embarrassing and unwarranted position.

Over a period of years there has been developing a trend in state legislation - legislation which is designed to solve some of the many defamation-by-radio-and-television problems. Several states have enacted statutes which generally relieve broadcasters from liability for defamatory remarks published over their facilities by persons other than employees, or those immediately connected with the station, when the licensee could not, by the reasonable use of "due care", have prevented the dissemination of the defamatory matter. Such legislation supplants the common law strict liability theory.

Scope - The intention is to approach this study from the point of view of the broadcast licensee in the hope that it may help to clarify the problem for him and answer some of the many questions with which he finds himself concerned, as well as call to his attention some situations with which he may not be familiar as regards defamation by broadcasting and telecasting. To be covered are Section 315 of the Communications Act of 1934 and its accompanying problems; a review of specific defamation situations under the Massachusetts common law strict liability theory as they affect local stations and their network affiliates; an investigation into and discussion of the existing radio-television defamation statutes and, finally, a review of the proposal of the national representative of the radio and television industry.

Purpose of Study - The purpose of this study is to make an examination into the field of so-called "due care" legislation relating to action for damages against the owners, licensees or operators of radio broadcasting and telecasting stations for defamatory matter uttered over said stations, and to determine whether or not there is a need, under present Massachusetts conditions, to adopt a radio-television libel protective law in this Commonwealth.

Justification - Usually such legislation of the type aforementioned is achieved through the efforts of state associations of radio broadcasters and telecasters. Since

Massachusetts has no such association,[1] and no such radio-television libel protective law, and since there has been no past discussion of this problem as it applies specifically in Massachusetts, it appears that a thorough investigation into this field might be a project which would be of substantial use and value to visual and sound radio broadcasters in this Commonwealth.

Method of Approach - The material for this study was compiled mainly from extensive reading of relative cases, articles and reference material, supplemented by answers to a letter sent to fifty-two Massachusetts broadcasting and telecasting stations. The purpose of said letter was to obtain an expression of the views and feelings of the station operators as to whether or not they favored "due care" legislation.

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1. Similarly without state associations are: Rhode Island, Connecticut, Maine, New Hampshire, Vermont and New York.

DEFINITIONS

Before delving directly into the problems with which this study is to deal, it may be well to devote some brief time and space to the purpose of defining, and providing specific information about, terms which will be used.

A. Section 315 of the Communications Act of 1934

> "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 other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: 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."[1]

Section 315 of the Communications Act of 1934 will be the subject of much future discussion. A prerequisite for the understanding of this discussion is the knowledge of exactly when Section 315 is in effect. Study reveals that Section 315 is in effect only after a broadcast by a legally

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1. The Communications Act of 1934 With Amendments and Index Thereto, Published by the Federal Communications Commission, Revised to September 1, 1948, Section 315, p. 38.

qualified candidate for public office has actually taken place. Stated in a Brief of the National Association of Radio and Television Broadcasters is the following:[1]

> "In an undated legal opinion received by the National Association of Radio and Television Broadcasters from the F.C.C., September 6, 1941, attorneys for the Commission recognized that Section 315 did not come into operation until a legally qualified candidate had made use of the broadcasting station. The opinion stated in part as follows:
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> > "'Section 315 of the Communications Act of 1934, as amended, requires that when a station has permitted use of its facilities by a legally qualified candidate for a particular office that it shall afford equal opportunities to all other legally qualified candidates for that office...'
>
> "Finally, only last year the Circuit Court of Appeals for the Ninth Circuit held this interpretation to be proper. (Weiss v. Los Angeles Broadcasting Co., 163 F. (2nd) 313, (C.C.A. 9)..."
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> ***
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> "Summarizing, the Weiss case held that Section 315 does not come into operation until there are two or more legally qualified candidates for the same public office and a licensee has permitted one such candidate for that office to use a broadcasting station, and another such candidate seeks equal opportunities in the use of the station."

B. Defamation

> "Defamation generally is the publication to one or more persons by words, pictures, signs or any other means of conveying thought, of opinion or information tending either to blacken the memory of an identifiable person who is dead or the reputation of one who is alive and expose him to public hatred, contempt or ri-

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1. Brief of the National Association of Radio and Television Broadcasters, In re Application of Port Huron Broadcasting Company (WHLS), Port Huron, Michigan, For Renewal of License, Docket No. 6987, File No. B2-R-976, May 7, 1948, p. 7.

> dicule. Examples are charges, imputations or innuendoes of crime, immorality, loathsome disease, incompetence in one's trade, business or profession, disloyalty to country, family or friends, etc...."[1]

> "The tort lies not in the hurt to the defamed party's feelings, but in the injury caused his reputation - the feelings toward him entertained by other persons. Thus, it is essential that the defamatory utterance be communicated to someone other than the defamed - that it be 'published'."[2]

C. Differentiation Between Libel and Slander

Before the days of radio and television it was but a small problem to determine whether a defamation was libel or slander. These were two explicit classifications. The old common law ruling held that a defamation which had taken an oral form was slander; a defamation which had taken a written form was libel. "...The label was of considerable significance to the complaining party, for proof of damages was not required of a complainant in libel, the existence of damages being presumed from the mere fact of publication. In slander, however, proof of damage was required in all but a few instances."[3]

> "As to defamation by radio, the trend of judicial opinion has been to hold it to be libel rather than slander. Thus, Hartman v. Winchell, 296 N.Y. 299, 73 N.E.2d 30, 171 A.L.R. 759 (1947), held that the reading of a script over the air is libel, even though the

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1. General Counsel's Office, National Association of Radio and Television Broadcasters, Liability of Broadcasters for Defamation, September 1, 1949, p. 1.
2. Remmers, Donald H., Recent Legislative Trends in Defamation by Radio, Harvard Law Review, Vol. 64, No. 5, March, 1951, p. 727.
3. Ibid.

> listening audience does not know that a script is used. Cf. American Law Institute, Restatement of Torts, Vol. 3, p. 164, Sec. 568, Comment f, (radio broadcast is libel if from prepared script, but depends on circumstances if extemporaneous)."[1]

D. Strict Liability Theory

Under the strict liability theory the simple fact of publication of a defamation subjects its publisher to liability. The fact that the publisher may not have intended ill will is no defence. The fact that the publication may have come about as a result of negligence or carelessness is, likewise, no defence.[2]

> "...It is obvious that this rule is harsh, especially as applied to radio broadcasters who, in many instances have no practical means of preventing defamation, as where they carry a network program or an ad lib live show or a pick-up from outside the studio. Nevertheless, in five of the states in which cases have been decided, strict liability has been imposed. They are Missouri (Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (1934); Nebraska (Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82, 82 A.L.R. 1098 (1932), rule subsequently changed by statute); Oregon (Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127 (1938), rule of strict liability announced but defense of privilege upheld; rule subsequently changed by statute); Washington (Miles v. Louis Wasmer, Inc., 172 Wash. 466 (1933), subsequently changed by statute); Wisconsin (Singlar v. Journal Co., 218 Wis. 263 (1935)). To the contrary are Pennsylvania Summit Hotel Co. v. N.B.C., 336 Pa. 182, 8 A.2d 302, 124 A.L.R. 968 (1939), holding that a station was not liable for ad lib remarks where it exercised due care in the selection of the performer, and, having edited the script, had no reason to believe that a defamatory extemporaneous remark would be made); New Jersey (Kelley v. Hoffman, 137 N.J.L. 695, 61

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1. Liability of Broadcasters, Op cit.
2. Remmers, Op cit.

A.2d 143, 5 A.L.R.2d 951 (1948), holding that a radio station was not liable for defamatory remarks in a script unless it were shown not to have exercised due care); and possibly New York (see Josephson v. Knickerbocker Broadcasting Co., 38 N.Y.S.2d 985 (1942), due care rule applicable to extemporaneous statements).[1]

E. Privileged Broadcasts

A complete defense to a charge of defamation is that the statement broadcast was "privileged". The defense of privilege covers the following:

> "...fair and accurate reports of official or public proceedings, e.g., courts, legislatures, administrative agencies, county and city councils, school boards, and church or club meetings not merely social, but not reports of statements by public officials not made as part of the proceeding (Irwin v. Ashurst..., courtroom broadcast of defense attorney's argument held privileged); ...fair and accurate reports of public records; ...reasonable comment and expressions of opinion, made without malice, personal ill will or spite, about persons of interest to the public or seeking public approval, e.g., public officials and private persons whose activities are of a public nature such as clergymen, political leaders, candidates for office, artists, writers, actors, etc. This principle has even been extended so as to give the station a defense for the broadcast of material which would be actionable as against the speaker himself."[2]

F. Legally Qualified Candidate

In its rules and regulations the Federal Communications Commission has defined a legally qualified candidate as follows:

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1. Liability of Broadcasters, Op cit.
2. Ibid. Broadcasters should see also Part III, Section C, Discussion of Public Issues, in report by F.C.C. entitled Public Service Responsibility of Broadcast Licensees, p. 39.

"Section 3.422 Definitions - A 'legally qualified candidate' means any person who has publicly announced that he is a candidate for nomination by a convention of a political party or for nomination or election in a primary, special, or general election, municipal, county, state or national, and who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors, and who

"(a) has qualified for a place on the ballot or

"(b) is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method and (1) has been dully nominated by a political party which is commonly known and regarded as such, or (2) makes a substantial showing that he is a bona fide candidate for nomination or office, as the case may be."

G. Retractions[1]

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1. See p. 43.

CHAPTER I

SECTION 315 AND POLITICAL LIBEL

One facet of the problem of defamation via radio and television is that of political libel. Directly concerned is Section 315 of the Communications Act of 1934:

> "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 opportunity to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: 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."

At face value Section 315 may seem quite clear and positive. There can be little doubt that Congress had some distinct aims in mind which it hoped would be carried to fulfillment by the enactment of this statute. However, the proof of any piece of legislation comes only with use and interpretation, and clear as it may appear and whatever the aims of the Congress, Section 315 in actual practice has been the cause of great concern, confusion and misunderstanding throughout the broadcasting and telecasting industry.

By this federal regulation a broadcast licensee may not censor any material broadcast over his station by a quali-

fied candidate for public office. At the same time, however, under the common law rule of strict liability,[1] which applies not only in Massachusetts but in many other states as well, should the qualified candidate in the process of utilizing the licensee's facilities, make a defamatory remark, not only would the candidate be held liable but so, too, would the broadcaster be subject to action for damages. The problem here is obvious. Broadcasters are caught in the dilemma of being unable to regulate what may be said over their facilities and at the same time being held as a "partner in crime", so-to-speak, if any tortious statement is uttered. The cases of Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 A.L.R. 1098 (1932) and Rose v. Brown, 58 N.Y.S. 2nd 654 (1945) point up this condition:

> "Under these decisions, if a station would otherwise be liable under state law for the defamation, the fact that it was contained in a political broadcast would be no defense, even though the broadcast was made under the provisions of Section 315."[2]

There is another factor adding to the confusion under this problem. According to the final sentence of Section 315 quoted above, a licensee is not obligated to allow the use of his facilities by any candidate. Yet, elsewhere,[3] the Communications Act states that as a requisite for re-

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1. See p. vii.
2. Liability of Broadcasters, Op. cit., p. 5.
3. Sections 303(f), 307(a), 309(a), 312(b).

ceiving and maintaining his operating license, the broadcaster must operate in the "public interest, convenience and necessity." Many broadcasters feel that they would violate this requisite and thus place their license in jeopardy, by not allowing the use of their facilities by qualified candidates as is their privilege under Section 315. Thus, what appears to be an easy out for the broadcaster - that is, simply not allowing any candidate to use his facilities - in practice only adds to the broadcaster's confusion. This situation has prompted one station manager to say: We are "damned if we do or damned if we don't."[1]

Still a third factor adding to the broadcaster's confusion under Section 315 involves the Smith Act.[2] The latter makes it a federal offense to advocate the overthrow of the United States Government by force and violence. Consider the case of a legally qualified candidate broadcasting such a platform over a radio station. Under Section 315 the station is powerless to deny air time to such a candidate if previously it has granted time to another or other candidates for the same office. And, furthermore, the station cannot even censor such a speech - again under the provisions of Section 315. By the strict liability theory would a station be considered equally as liable as a "co-

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1. Mr. John Parsons, Station Manager, WBRK, Pittsfield, Massachusetts.
2. For an excellent discussion of the Smith Act see Supreme Court Reporter, Vol. 71, United States v. Dennis (341 U.S. 494 - Smith Act), 426, 423.

publisher" for such an offense? And would this type of broadcast be construed as operating in the "public interest, convenience and necessity"? In short, is the Smith Act incompatible with Section 315? These are questions which to date have not been answered. There are many concerned broadcasters, however, who would dearly like to know what the answers will someday be.

That broadcasters are faced with such perplexing issues can be explained in part by the fact that common law rulings on defamation is "a field of tort law formulated in times which could hardly have contemplated modern broadcasting."[1] Further explanation lies in the fact that the Communications Commission has not prescribed satisfactory regulations, as it is empowered to do under the Act,[2] to guide broadcasters in such situations. Indeed, it is the interpretation given to Section 315 by the Communications Commission in its famous Port Huron decision that has served to thoroughly confuse and befuddle broadcast licensees.

By now it is obvious that in discussing this problem two principles must constantly be kept in mind: the power of the licensee under federal statute to censor defamatory matter from political broadcasts, and the liability, under state law, of the licensee for such broadcasts.[3]

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1. Remmers, op. cit.
2. Section 303(r).
3. Brief of the National Association of Radio and Television Broadcasters, op. cit., p. 13.

> "Neither of these questions can be answered independently of the other, for it is inconceivable that the Congress would command conduct violative of state law without protecting licensees from the operation of that law."[1]

In order to understand and make just conclusions attendant with the problem under the law as it stands, it is necessary to gain a thorough knowledge of the following: (1) the ruling by the majority decision of the Federal Communications Commission in the Port Huron case, wherein is contained the crux of the entire issue of political libel and Section 315; (2) the reasoning behind the separate opinion of Commissioner Jones; and (3) the argument prepared and presented by the National Association of Radio and Television Broadcasters in its Brief regarding the Port Huron decision.

In its decree in this case, the Commission traced "the legislative history of Section 315":[2]

> "The legislative history of Section 315 makes it abundantly clear that Congress did not intend licensees to have any right of censorship over political broadcasts. That section was taken over without change from Section 18 of the Radio Act of 1927, 44 Stat., 1162. In the Senate Draft of the bill Section 18 contained both the existing prohibition against any censorship by the licensee and a provision that a licensee 'shall not be liable to criminal or civil action by reason of any uncensored utterances thus broadcast.' See H.R. 9971, Sec. 4, 69th Cong. 1st Sess. as reported with Senate amendments, May 6, 1926. In the course of the Senate debates doubt was expressed principally

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1. Ibid.
2. Federal Communications Commission, Decision in re Application of Port Huron Broadcasting Company (WHLS) Port Huron, Michigan, For Renewal of License, Docket No. 6987, File No. B2-R-976, p. 5.

by Senator Fess of Ohio as to the power of Congress to make provision for a complete exemption from liability. 67 Cong. Rec. 12503. But the Senate debates reveal an unqualified agreement as to the objective to be attained by the section that licensees should be prevented from censoring political speeches. 67 Cong. Rec. 12356, 12502-12505. The bill as passed by the House had contained no provision with respect to political broadcasts and in conference the express provision for absolution from liability was eliminated, although the prohibition against any censorship remained. No reason was given in the conference report (H. Rept. 1886, 69th Cong. 2nd Sess.), nor on the floor of either the House or Senate for the deletion nor was any suggestion made that the elimination of the additional language was in any way meant to weaken or limit the blanket prohibition against any censorship.

"...And Congress has not only failed to change or modify in any respect the blanket prohibition on any censorship of political speeches to correct the alleged deficiencies in the language, but in the Communications Act of 1934 specifically reenacted the language of Section 18 of the Radio Act, without change, although the alleged danger under existing language from actions against licensees for damages arising out of libelous remarks made during the course of a broadcast by a candidate for office was expressly called to Congress' attention during the course of hearings on the Communications Act bill. Accordingly, we are of the opinion that the prohibition of Section 315 against any censorship by licensees of political speeches by candidates for office is absolute, and no exception exists in the case of material which is either libelous or might tend to involve the station in an action for damages. In reaching this conclusion, however, we hold merely that the censorship prohibited under Section 315 of the Communications Act includes the refusal to broadcast a speech by a candidate for public office because of the allegedly libelous or slanderous content of the speech. Nothing in this opinion is intended to indicate that a licensee is necessarily without power to prevent the broadcast of statements or utterances in violation of the provisions of the Communications Act or any other federal law on broadcasts coming within the requirements of Section 315 of the Communications Act."

In the two paragraphs quoted immediately above it is

seen that when Section 315 as it now stands was being considered and drafted by Congress, the attention of the Congressmen was called to the fact that licensees had not been relieved from liability for damages resulting from political broadcasts, and that nevertheless, Section 315 was enacted in its present form. As will be seen later, this point is extremely important in view of the Commission's reasoning and decision in the Port Huron case. Of course, it is quite evident that Congressmen are, or have been at some time or may be at some future date, candidates for public office, and that the present Section 315, affording no relief from liability to broadcasters and allowing no censorship, is directly to the advantage of all legally qualified candidates - including the Congressmen themselves. However, it would hardly seem reasonable to assume that Congress meant to sanction the violation of any law, state or federal, by refusing to allow licensees to delete defamatory matter from broadcasts under the provisions of Section 315. The Communications Act itself states that "no person...shall utter any obscene, indecent, or profane language,"[1] and that "no person...shall knowingly utter... any false or fraudulent signal of distress..."[2] The Brief of the National Association of Radio and Television Broadcasters, cited above, says this:

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1. Section 326.
2. Section 325(a).

> "... Since Sec. 414 of the Act specifically states that its provisions do not abridge but are in addition to existing law, and Sec. 303(r) limits the rule-making power of the Commission to such rules and regulations as are 'not inconsistent with law', it follows that the Congress intended that broadcast licensees prevent the broadcast of material violative of any law, state or federal, as well as of material violative of the Communications Act, and that the Commission's conclusion 'that the prohibition of Section 315 against any censorship by licensees of political speeches by candidates for office is absolute...' is in error."[1]

Commissioner Jones, who concurred with the final majority decision in the Port Huron case but who highly disagreed with much of the majority's reasoning, wrote a separate opinion, as has been noted above.[2] In this opinion he refers expressly to the language of the majority when he says:

> "... The language...of the last two sentences in the paragraph (referring to the paragraph quoted on page 6 above) is without legal effect inasmuch as it merely states that this decision is not intended to indicate that a licensee is necessarily without power to prevent the broadcast of statements which violate the Communications Act or other federal law. There is no finding that a licensee does possess such power and in the absence of such an affirmative interpretation of the word 'censorship', it must be concluded that the finding that the prohibition against censorship by licensees in these matters is 'absolute', is final and all conclusive. Indeed, it appears to me that the addition of the language above referred to serves only to create confusion and to hold forth both promise and threat."[3]

In its Brief,[4] the National Association of Radio and Television Broadcasters also traces the history of Section

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1. p. 12.
2. p. 5.
3. FCC Decision re Port Huron Broadcasting Company, op. cit., p. 16.
4. p. 14.

315 as follows, making comments and observations which are important to our consideration of the problem:

> In "the original House bill, (H.R. 9971, 69th Cong., 1st Sess.) which subsequently became the Radio Act of 1927, ...emphasis was placed not on protecting candidates from censorship by licensees, but on preventing discrimination among candidates.
>
> "With regard to defamation, Representative Blanton undertook to provide federal regulation of defamatory utterances by radio, and offered an amendment making any person who over the radio used 'derogatory language affecting the character and standing of another' liable civilly and criminally, if under the law of the state into which the language was transmitted it amounted to slander or libel. The House, sitting as a Committee of the Whole, adopted the amendment, but later rejected it by a vote of 287 to 57. Thus, it is clear that the House, at the time it passed the bill, rejected any regulation relating to political broadcasts and affirmatively refused to legislate on the subject of defamation by radio.
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> "When the bill was considered in the Senate, it contained two new provisions, added by the Senate Interstate Commerce Committee. Sec. 7 of the bill made it a federal offense knowingly to utter by radio 'any libelous or slanderous communication.' With regard to broadcasts by political candidates and the discussion of public questions, the Senate Committee bill, as reported to the Senate, provided that the licensee, if he permitted the station to be used for such purposes, 'shall make no discrimination...and with respect to said matters...shall be deemed a common carrier.' There was no provision prohibiting private censorship or granting the licensee immunity from actions for defamation. However, when the bill was taken up by the Senate, Senator Dill proposed striking this provision and substituting what is now Sec. 315 with the added provision that the licensee 'shall not be liable to criminal or civil action by reason of any uncensored utterances thus broadcast.' After debate--which was concerned mainly with the advisability of deleting the 'common carrier' phrase and limiting the equal opportunity requirement to political broadcasts by candidates rather than extending it to 'the discussion of any question affecting the public'-- the amendment proposed by Senator Dill was adopted.

"In conference the bill was changed by deleting the provision (first contained in the Senate bill) making it a crime to utter defamation by radio and the provision granting to licensees immunity from responding in damages if political speakers broadcast defamatory matter. The only explanation given for deleting the former was that made by Representative Scott, one of the managers for the House. He said the question had been raised, not as to 'the right of Congress to put it in, but as to where the right of action would attach.' No explanation was given for dropping the immunity-from-liability clause. Representative Scott explained Sec. 18 of the compromise bill--which is identical with Sec. 315 of the present act-- as insuring 'to candidates for public office equal opportunities to use stations', once the station had granted permission to one candidate, but not as compelling a station 'to allow such candidates the use of its facilities.'

"To summarize, it is clear that the Congress was primarily concerned with avoiding discriminatory treatment of political candidates <u>if</u> licensees determined to and did make facilities available to one. ... The primary prohibition placed upon the licensee was that he could not, once having allowed one candidate to speak, discriminate against other candidates.

"It seems...certain that the members of the Conference Committee determined to stay out of the field of defamation and to leave state laws on libel and slander untouched. Certainly the action of Congress in deleting the provision expressly extending immunity can scarcely be construed as an expression of intention that complete immunity is granted. It cannot be supposed that the immunity provision was dropped as superfluous, especially since doubt had been expressed as to the power of Congress to extend immunity, even by special legislation. In fact the rejection of the immunity provision must be taken as clearly intending that there was to be no immunity."

Thus begins to develop the picture of confusion stemming from Section 315 of the Communications Act of 1934. Yet even more perplexing is the following reasoning of the Commission in the <u>Port Huron</u> decision. The quotation follows

from that portion of the majority decision quoted on pages 5 and 6 of this text:

> "The argument has been advanced that such an interpretation of the Act cannot be correct, because it would leave the licensee in the completely untenable position of being forbidden to censor speeches containing libelous or other actionable material and, at the same time, subject to damages for any libelous or actionable material in such broadcasts. But this argument not only has no basis in the legislative history of the Section as explained above, but is based on an assumption of the licensee's liability for the remarks made by the political candidates speaking under the section which we do not believe is tenable. For as we read the provisions of Section 315, the prohibition contained therein against censorship in connection with political broadcasts appears clearly to constitute an occupation of the field by federal authority, which, under the law, would relieve the licensee of responsibility for any libelous matter broadcast in the course of a speech coming within Section 315 irrespective of the provisions of state law. The actual speaker, of course, is completely liable for the contents of his remarks. Section 315 of the Act does not affect this liability in any manner nor protect the speaker against civil actions for libel or slander or criminal prosecutions arising out of his violation of any federal or state law.
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> * * *
>
> "...radio stations under the provisions of the Communications Act in general are given freedom, within the broad limits of their duty to insure that their overall operation is in the public interest, to determine which programs they will carry and which they will not and the exact contents of such programs. But in the case of political broadcasts by candidates for public office, no such freedom is delegated to the station owners. Once they determine to carry broadcasts by a candidate they are obliged to offer, without censorship, equal opportunities to use their facilities to all candidates. The conclusion is inescapable that Congress has occupied the field in connection with responsibility for libelous matter in broadcasts under Section 315.... In the case of the radio station operating under Section 315...the requirement of the federal law is clear that the

> message be broadcast as submitted. Hence, it would appear that the station...is...relieved by operation of federal law from any responsibility for libelous material.[1]

The majority opinion states that to them (the Commission) "it would appear" the station is relieved from liability by operation of federal law. This reasoning is entirely misleading, confusing and unfair to broadcast licensees. The Commission has chosen in the paragraphs quoted on pages 5 and 6 to give a strict and unqualified interpretation to Section 315. Now the Commission, through this immediate opinion and through the wording "it would appear", does a complete turnabout and interprets the law of Congress in a loose manner. Furthermore, according to the Commission's own previous reasoning, if Congress had wished to relieve stations from responsibility for libelous material, it would have done so when the specific language of Section 315 was reenacted from Section 18 of the old Radio Act. This, however, Congress did not choose to do. On this point, then, no other conclusion can be drawn than that the Commission simply did not face the issue at hand.

Commissioner Jones in his separate opinion, however, has faced the issue, and he very clearly points out the consequences:

> "The ruling of the majority in the proposed decision held that the licensee <u>is relieved</u> from financial responsibility for libelous material broadcast by

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1. FCC Decision re Port Huron Broadcasting Company, <u>op. cit.</u>, p. 7.

> candidates. The final decision states that 'it would appear' that this is true. Thus it is clear that there is some doubt in this respect. This being so, it is more than before unreasonable to decide this case in a manner which compels all stations to broadcast libelous material which subjects them to damage suits. If what now 'would appear' to the Commission is otherwise decided by the courts, severe and unnecessary damages will be sustained throughout the radio industry."[1]

The N.A.R.T.B. Brief points out[2] that there never was any indication on the part of the Senate that broadcasters "enjoyed complete immunity--either by reason of any express provision in the statute or because of the operation of some nebulous metaphor such as 'occupied the field.'"

> "The following interchange between Senator White and Chairman Fly plainly reveals that neither of them thought that Congress had effectively 'occupied the field' in this respect:
>
> "'Senator WHITE. I have felt, unless you give some control to the licensee over the spoken words, that certainly the licensee ought to be freed from liability for the spoken words, just so far as we can do it, but I never felt sure what you could do effectively.
>
> "'Mr. FLY. I have here, sir, the makings of a memorandum on that very subject.
>
> "'Senator WHITE. I would be glad to see it. If the lawyers on this committee think it can be done, they will not have any quarrel with me about doing it. I would free the station from liability unless you can give the station an effective control over the words that are spoken. I do not think the station should be liable for things which are beyond its control.
>
> "'Mr. FLY. That is right. And if we remove the control, if this Congress removes the control, then I

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1. Ibid., p. 17.
2. p. 19.

> should think that the State can hardly hold him liable...
>
> "'I will work that up in a memorandum.'"[1]

What "appears" to the Commission to be an occupation of the field by the Congress and what the Congress actually has - or in this case, has not - done, are two very different and highly important factors. The Commission felt that Congress

> "...by federal legislation had 'occupied the field' of defamation in political broadcasts, thus relieving the station from civil liability under the state law. It is obvious that the FCC had to adopt one of two alternatives: hold either that Congress, by providing that 'such licensee shall have no power of censorship,' meant to imply an absolute prohibition on censorship even of libelous or slanderous matter; or that these areas were to be excepted from the definition of 'censorship'. Choosing the former, the FCC felt compelled to state further that the federal legislation had occupied the field and that no civil liability could thus be imposed in a state court on a station which broadcast defamatory political material."[2]

As has previously been noted, however,[3] that which "would appear" to the Commission has been decided to the contrary by the courts. The fact that the defamation was contained in a political broadcast is no defense. The General Counsel's Office of the National Association of Radio and Television Broadcasters most appropriately states in its pamphlet, Liability of Broadcasters for Defamation,[4] that "the Port

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1. Ibid.
2. Remmers, op. cit., p. 747.
3. See p. 2 supra, re Sorenson v. Wood and Rose v. Brown.
4. p. 7.

Huron decision is neither law nor regulation, and indeed has been held not even to be a reviewable 'order'. Houston Post Co. v. United States, 79F. Supp. 199 (1948)." In short, state courts are in no way obliged to the Port Huron decision.

Pending a judgement on the matter by the federal courts, the decision of the state courts will prevail. Should the Supreme Court at some future date decide that the federal legislation has in fact occupied the field, then the state laws will be superseded.[1] However, until the Supreme Court chooses to so decide, or until Congress actually does occupy the field in so many words, the liability of stations under Section 315 will continue to be decided by the state tribunals.

Commissioner Jones' discussion is one of the clearest yet to be submitted on this problem of political libel. His analysis truly has clear and forceful significance. He writes in his separate opinion:[2]

> "The majority freely admit that the Commission has made no rules covering the specific situation; that there has been much confusion over this section; and that the licensee has no specific Commission rule to guide him. This is an admission that the Rules and Regulations are not adequate, and it is obvious that new rules should be adopted to guide all licensees in 'any situation' which might occur under the section. The mandate for the Commission to make rules prescribed by Section 315 to cover specific situations that may arise under the Act is

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1. Remmers, op. cit., p. 748.
2. FCC Decision re Port Huron Broadcasting Company, op. cit., p. 16.

prescribed by Section 303(r) of the Act as follows:

> "'Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter....'

* * *

"It is the duty of this Commission to clarify and not confuse. Licensees are entitled to rules and regulations properly adopted in accordance with the Communications Act and the Administrative Proceedure Act which interpret the word 'censorship' as used in Section 315 so that they might know what to do when any kind of situation is presented to them.

"Therefore, and so long as the word 'censorship' is interpreted as 'absolute' and this interpretation is unqualified by any meaningful finding by the Commission, it must follow that the dicta of the majority decision still directs that any and all candidates as defined by Section 315 and extended by Section 3.422 of the Commissions Rules and Regulations are free to broadcast anything and everything over the broadcast facilities of this country....

"The majority opinion holding that a candidate may broadcast anything and everything in his partisan political speeches is clearly inconsistent with Section 303(r) of the Communications Act in that it doesn't require candidates to abide by the law of the Communications Act as well as other applicable statutes, federal, state and local. Therefore, such 'judicial legislation' exceeds the 'rule-making powers' of the Commission. The reasoning of the majority opinion leads to absurdities and attributes to the Congress intentions wholly foreign to its thoughts and purposes. Certainly, a broadcast by a qualified candidate for public office under existing law presupposes that such candidate will abide by all applicable laws and will, therefore, not commit libel, slander, treason or other high crimes and misdemeanors in high zeal or otherwise. To afford political candidates a double standard whereby the ordinary citizen must abide by the law and a political candidate may break any law is a departure from fundamental principles of statutory construction that is far removed from public interest, convenience and necessity.

* * *

"The Commission still is saying that individual citizens of our country will be denied redress against broadcast stations which are forced by the Commission to be joint libelers for libelous and slanderous broadcasts by candidates which result in personal injury to them. Even if those issues were properly before us for decision rather than pronouncement of dicta, I consider it quite unnecessary and wholly undesireable for the Commission to find as a matter of existing law that a radio broadcast station is relieved by operation of Federal law from any responsibility for libelous material included in a political broadcast carried under Section 315 of the Act. This new legal principle and interpretation of basic law by the majority opinion will be binding upon the entire broadcast industry for an indefinite period of time. Although a number of authorities cited in the majority opinion seem to lend support to their obiter, no case full in point has ever been finally decided. It is reasonable to assume that many political campaigns will be held in the meantime and before the matter of liability is finally decided. Aside from damages to individuals and public institutions, who will suffer monetary damages of undeterminable amounts if the view of the Commission majority in this case is wrong?

"I have grave doubts of the power of this Commission to deal with this subject matter by the regular rule-making proceedure provided by the statute. The commission exercises a regulatory function over those engaged in the business of transmitting intelligence by radio and wire. This regulatory function does not extend to the exercise of authority to deprive a private citizen of redress for personal injuries sustained as a result of a libelous broadcast. The Congress has not specifically invaded the field of civil and criminal liability of a licensee with reference to broadcasting. No specific authority is given to the Commission to create, extend, modify or invalidate state statutes and rights of citizens thereof, respectively. Until such time as the Congress might amend the Act, such determination should be left to the judicial branch of our State and Federal governments when parties are properly before them requiring an adjudication of their rights.

"Slander and libel statutes,, both civil and criminal,

have been enacted by the several states, and civil and criminal actions based thereon fall within the State authority. Defamation by radio broadcasting has been defined as libel by the statutes of some states and as slander by the statutes of other states. The several states have afforded different rights of action for defamation limiting recovery in some cases to actual damages and extending recovery in other cases to punitive damages. A large group of states have statutes which provide that published retraction of defamation by the publisher thereof will mitigate the damages or limit the recovery to actual damages. Although the laws of the several states relating to defamation are not uniform, civil rights of action are granted to their respective citizens and in the absence of a specific invasion in the field by Congress and a specific authority given by Congress to this Commission to create, extend, modify or invalidate State statutes and the rights of citizens thereof, respectively, this Commission cannot act with reference thereto. The majority should consider the Tenth Amendment to the Constitution:

> "'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people.'

"Therefore I conclude that the specifically delegated powers of this Commission cannot be stretched so that this servant of Congress can make such rules and regulations, much less assume to exercise such jurisdiction in a quasi-judicial proceeding.

"Since the parties are not properly before us and the question is not one that is before the Commission for decision in this case, I conclude that the dicta of the majority that the broadcast licensee is relieved from responsibility for libelous material broadcast by political candidates within the meaning of Section 315 of the Act is oblique rule-making to guide all licensees hereafter wherein the Commission does not possess the power in the first instance to make such rules as a part of its rule-making powers and processes.

"The Commission has advocated amendments of Section 315 of the Act to the Congress which would relieve the licensee from liability for libel by candidates broadcasting under Section 315. So far Congress has

> chosen to let the Section remain the same. The majority opinion now enunciates in this proceeding an interpretation of the present Act on all fours with the language of the amendment it apparently felt necessary in the past to be made law by Congressional enactment to reach the results announced in their dicta. In the final analysis the enunciation of this dicta by the majority is oblique rule-making and does not conform to the intent of Congress... ."

Thus has been demonstrated the problem of Section 315 and political libel under the law as it stands. The aims of Congress in creating this statute are evident from the legislative histories of the Section as traced both by the Commission in its Port Huron decision and by the N.A.R.T.B. in its Brief, and presented above. Clearly, Congress was concerned primarily with guaranteeing equal opportunity to all qualified candidates in the use of broadcasting facilities, and with preventing discrimination among candidates by licensees. The "oblique" interpretation which the Commission chose to give to Section 315 in the Port Huron case, has not only resulted in drastic confusion within the broadcasting industry but has had the effect also of putting into the mouth of Congress words which the Congress never actually has spoken. By its own findings the Commission correctly submitted that if Congress had wished to relieve stations from liability under Section 315 the Congress would have done so when the specific language of said Section was taken over from Section 18 of the Radio Act of 1927. Then the Commission turned about and said it "would appear" Congress had relieved stations from responsibility under

Section 315 by its so-called "occupation of the field". In the legislative history of Section 315 as traced by the N. A.R.T.B. Brief it was demonstrated that Congress carefully considered the feasability of specific language relieving broadcasters from liability, and that ultimately such language was not included in the statute.

It may be well to very briefly reiterate at this point the fact that the Communications Commission is not a law-making body. State courts are in no way bound by the Commission's decision in the Port Huron case.

> "This...(circumstance) is fortified by a consideration of the principle of constitutional law evolved by the Supreme Court for the making of adjustments between state and federal authority. That principle is succinctly stated in Illinois Central Railroad Co. v. State Public Utilities Commission where the court said 'that it would never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.'"[1]

Early in the presentation of this problem it was stated that the applicability of both federal and state law must be considered conjointly. Regarding the reconcilliation of these two factors, the Brief of the N.A.R.T.B. reasons the following:[2]

> "...The exercise of the reserved powers of the states is not to be regarded as inconsistent with the exercise of federal power by Sec. 315 where...the two can be reconciled and stand together.

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1. Brief of the N.A.R.T.B., op. cit., p. 22.
2. Ibid., p. 25.

"In this view the Sola case (Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173) falls into its proper place and the phrase 'occupied the field' is displaced by analysis as a basis for decision. That case announces no new principle of law. It merely reiterates the familiar doctrine that in the event of a conflict between state and federal law, the latter must control. But as has been shown, the field of defamation by radio is not 'dominated by the sweep of federal statutes'; on the contrary, Congress has chosen not to dominate it. Hence no conflict has been shown and the basis for the application of the rule is lacking."

CHAPTER II

BROADCASTS NOT OF A POLITICAL NATURE UNDER THE MASSACHUSETTS COMMON LAW STRICT LIABILITY THEORY

The case just studied of defamation in a political broadcast is a special problem unto itself because of the difficulty which has been experienced, as a result of the Federal Communications Commission's interpretation of Section 315, in integrating both federal and state law. However, in this chapter a number of situations will be briefly dealt with which are affected by state law only - that of the common law liability-without-fault theory presently holding in Massachusetts.

The law, it may be pointed out, consists to a large degree of the two ingredients of pure and simple logical reasoning from the facts involved in any case, and common sense. If the broadcaster were to make steady use of these two elements he would find himself correctly answering many questions which at first seem to puzzle him.

Under the rules of libel and slander in Massachusetts, strict liability without fault is imposed upon one who publishes defamatory material. And, logically, all persons who contribute to the creation and publication of the defamation are also liable.[1] With these circumstances in mind,

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1. Socolow, A. Walter, The Law of Radio Broadcasting, Vol. II, (New York, Baker, Voorhis & Co., 1939), p. 858.

plus the accepted fact that to broadcast is to "publish",[1] the consequences in Massachusetts for the following situations[2] may correctly be reasoned.

"Program Script Prepared and Broadcast by an Agent of the Station - No Sponsor"

An "agent" means a person such as an announcer employed by the station licensee or manager. Because the announcer is the station owner or operator's "agent", responsibility for whatever that employee does during the course of his employment may be attributed not only to the employee himself, but also to his employer. "The doctrine of respondeat superior[3] imposes upon the broadcast station full liability for all torts committed by its servants within the scope of their employment."[4] Therefore, under the common law it is obvious that if the announcer (the "agent" or employee) wrote a script and announced it over the air defaming someone, both the announcer and his employer would be liable. Perhaps a third person - a script-writer - wrote the defamatory matter. In such a case all three - the announcer, the script-writer and the employer - would be liable. Even if the announcer ad libed a defamatory statement, that is, deviated from a prepared script, the

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1. See p. v supra.
2. Situations suggested by Remmers, op. cit.
3. "Respondeat Superior" - let the senior or superior (the principle) respond for his agent. From lecture by Richard B. Dellheim, L.L.B., Boston University, March 4, 1953.
4. Socolow, op. cit., p. 856.

station would still be liable also under the law of agency.

> "...where the employee is engaged to express the contents of a script or to speak extemporaneously, a deviation from the script or an unauthorized utterance does not constitute a deviation from the employment. The station is liable for defamation committed by an employee engaged for the same general purpose which gave rise to the tort."[1]

"Program Script Prepared by Either the Agents of the Station or the Advertiser - Sponsored"

There is only one direct conclusion which can be made in this case. Assuming that the script contained a defamation which has been read over the air, not only are the station and its agents liable, but so, too, is the advertiser. The advertiser is, in effect, a lessee of the station's facilities. Therefore, since it was in the sponsor's program that the defamation occured, the sponsor to all intents and purposes contributed to that defamation, and without doubt would be adjudged absolutely liable as a co-contributor.[2]

"Program Script Prepared and Broadcast Wholly or Partially by One Not the Agent of the Station"

This case would seem to be one of the hardest for the station to bear. For here is the case of one entirely unconnected with the station, using the station's facilities, and in the course of such use uttering a defamatory remark. From the observations in the cases above it is not diffi-

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1. Socolow, op. cit., p. 857.
2. As used in this paragraph "sponsor" and "advertiser" are one and the same person or firm.

cult to reason the result here. It has already been stated[1] that under Massachusetts common law rules, strict liability without fault is imposed upon one who contributes to the publication of defamatory matter. Subsequently, even though the one who spoke the defamatory language was completely outside of the station staff, nevertheless the station has contributed to the defamation because its facilities provided the method of publication.

"Defamatory Remarks by One Invited to Speak Extemporaneously"

This is a similar case in point to the one above. Even though outside the station staff, should the extemporaneous speaker utter a defamation, the station as a co-contributor to that defamation would be liable under the Massachusetts strict liability theory. With the Massachusetts law what it is, the only precaution a station could take in such a situation would be either to require that the speaker use a carefully edited script or caution him against defamatory language.

"Sundry Defamations by Intruders"

This situation is not at all difficult to visualize, and in this Commonwealth could well be the cause of great concern to many broadcasters. Numerous radio stations broadcast so-called "special events" and sports programs over

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1. p. 22 supra.

which a defamation could easily take place, even though obviously not so intended by the station. For example, there are football and baseball play-by-play broadcasts and man-on-the-street interviews. These are but three of several instances in which an open microphone might pick up a libelous remark shouted by some onlooker or passerby. This situation presents a formidable problem to the broadcaster which, short of not broadcasting such programs at all, is almost impossible to overcome. Yet under the strict liability theory, Massachusetts broadcasters would be guilty in a court of law for "aiding" in the dissemination and publication of such a defamation.

"Transcribed Programs"

In the case of the transcribed program the broadcaster has little or no excuse for broadcasting a defamatory remark. Such programs, usually recorded on "tape" or disks, can be "edited" before the actual broadcast. Here the radio station's position is similar to that of the newspaper, where the proofreader or editor checks each piece of copy before it is put into print. With such advance opportunity to delete defamatory material, it seems only reasonable that absolute liability should apply.

"Political Broadcasts"

Political broadcasts were dealt with in the foregoing chapter.

Thus far has been discussed defamation problems of a non-

political nature as they affect the local broadcasting station under the Massachusetts strict liability law. To be discussed now are defamation problems which involve not only the local station but also the network with which it may be affiliated. In these situations the problem is elevated one step above the local level where the local affiliate broadcasts defamatory statements originated by the network.

"Program Script Prepared and Broadcast by the Network - Without Sponsor"

From dealing with the situations outlined above it is obvious immediately what the answer to this problem will be. When a local station, broadcasting a defamatory remark in a program originated by its network affiliate, is located in a state holding to the strict liability theory of common law, that local station may be held absolutely liable for the publication of such defamation. There is more to this situation, however, for the complaining party must decide whether he is going to prosecute only the local station or the network or both. The Remmers article cited above, contains a clear discussion of the problems involved in such prosecution:[1]

> "The defamed party who decides to sue the offending network will be met at the outset by several rather formidable obstacles. In many instances, it will be impossible to get service of process on the network in the state in which the suit against the local station is brought, (The networks have no property in most states, the network programs being

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1. p. 751.

> carried to the outlet stations over wires leased from others. Exceptions are to be found in some states in which the networks own the outlet stations. Also, it is understood that the networks maintain liason officers in the more populous states, upon whom service might be had.) so that if the network is to be sued, it will be necessary to carry on the litigation in some distant state. Not the least of the objections to this would be the expense, oftentimes prohibitive, to the complaining party. And there would be further disadvantages. Words which would clearly be found to be defamatory in complainant's home community might bring forth an entirely different response from a jury drawn far from his home locale. (For example, 'damn yankee' carries a connotation in the deep South not appreciated by New Yorkers.) In addition, if the plaintiff sues away from home, he would be deprived in large measure of the benefits of any good name which he had been successful in building in his home community. Further, as a practical matter, he will undoubtedly consider that suit against the network will be likely to bring forth specialized counsel and costly appeals which might be avoided in suit against the local station."

"Program Script Prepared by Network or Advertising Agency, Broadcast by the Network - Sponsored"

This situation is similar to the one discussed immediately above with the added factor that both the advertising agency and the sponsor may be subject to equal liability with the local station and the network as a contributor to the publication of a defamation. The liability of the sponsor has already been noted in connection with local, non-network broadcasts. Usually in such a situation it is the advertising agency which prepares and submits the broadcast copy. Thus the network has ample opportunity to "edit" same for defamatory material. In this case, as with the case of the transcribed programs, absolute liability would not appear unduly harsh.

The following chapter is devoted to further discussion of the liability involved for broadcasting defamatory material originating in other stations.

The cases outlined in this chapter admittedly have had a "negative" quality about them - negative from the point of view of the broadcaster. However, such a presentation is in accord both with the intended approach to this problem of defamation via radio and television and with the actual circumstances as they exist under the Massachusetts strict liability code. Furthermore, such a negative view will serve to emphasize more candidly the future discussion of the attempted solution to these cases,[1] and the problem of defamation as a whole. Several of the states which once similarly held the common law strict liability theory, have enacted so-called "due care" legislation replacing the common law in certain specific instances of defamation via radio and television.

In several of the cases outlined above it was plain to see that although held liable for "contributing" to the publishing of a defamatory statement, the station often was unable to prevent it - even by the exercise of the greatest precaution and scrutiny. In such cases it would seem almost unfair to hold the broadcaster responsible. A. Walter Socolow expresses a similar view when he says:[2]

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1. See Chapter IV.
2. Socolow, op.cit., p. 858.

"The writer is inclined to the view that a broadcast station should be required to exercise due care only, since it cannot reasonably predict deviation from scripts previously submitted to and approved by it. The station does not have as complete and direct control over its program facilities as does the newspaper publisher. It has been urged that broadcast stations should not be considered as publishers of such defamatory remarks but merely as mechanical factors in the process of publication. It seems fair to impose no responsibility upon a broadcast station to use more than due care in transmitting programs of others by means of its facilities.

"So long as the broadcast station actually scrutinizes the contents of a script submitted before broadcast and the defamatory matter is not contained therein, the standard of due care would be satisfied to an extent sufficient to excuse the station from liability for the utterance of defamatory statements in deviation from such a script.

"The due care doctrine can be invoked by the courts only as a departure from the application of the law of libel to broadcast defamation. Although such a departure is within the flexible scope of common law jurisprudence, it would seem that the more efficacious method of achieving this desirable result would be the enactment of legislation by the various states."

CHAPTER III

MULTIPLE PUBLICATION RULE UNDER THE STRICT LIABILITY THEORY

"Network broadcasting" and "radio waves know no state bounds" - these two expressions are at the base of still another problem concerning the transmission of defamatory matter over visual and sound broadcasting stations.

Simultaneous broadcasting over a network of several radio or television stations joined together by wire or other mechanical or electrical means, is today a widely acknowledged method of program transmission. Network broadcasts are often transmitted over what is termed a "nation-wide hookup", meaning that a program might well be heard in all of the forty-eight states at the same time. This practice gives rise to the question of liability when a local station, thus joined to and carrying the program of another originating station, broadcasts defamatory matter contained in such a program. And no small part of this question is that of deciding which state law should apply, the law of the state "where the broadcast originated, ...(the law of the state) where the suit is brought, or the law of some other state in which the defamed party is domiciled?"[1]

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1. Remmers, op. cit., p. 732.

A similar case in point is that which involves a defamatory broadcast over a so-called "clear channel" station, the signal of which may be heard in many states outside of that in which the station is itself located. "Radio waves know no state bounds" means simply that it is physically impossible to determine exactly where a radio wave terminates. With this fact in mind, the possibility cannot be ruled out that the signal of any station, be it "clear channel" or of very low power, might be heard outside of the state wherein such station is located. It is for these reasons, at least in part, that the business of transmitting radio and television programs is considered to be interstate commerce.

In the case of Coffey v. Midland Broadcasting Company (8 F. Supp. 889, (W.D.Mo. 1934)), the court decided that there was no "difference between the defamatory act of the speakers in the local studio and a similar act by one standing in a studio hundreds or thousands of miles distant and connected to the local station by wire."[1] This case definitely establishes that under the strict liability theory a broadcast station is absolutely liable for defamatory material transmitted by it, whether such defamatory matter originated in its own studios or those of some other station connected to it by wire.

With this brief outline in mind, it is not difficult to

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1. Socolow, op. cit., p. 861.

envision the situation which could easily evolve from a defamatory broadcast carried over a "clear channel" station or a "network hookup". Should an individual thus defamed desire to bring suit he might justifiably have a difficult time in deciding under the laws of which state or states so to do - this because the several states have varying laws applicable to defamation. Should a defamatory broadcast be carried by a network of stations, there would be in actuality several separate publications of the defamation, and each local station would be absolutely liable for its publication.

> "Under the traditional 'multiple publication' rule, each separate publication of defamatory matter constitutes a new tort. Thus, the party can bring an action for each publication. Or, since the action for defamation is a transitory one, the defamed can join his separate causes of action and sue on all of them in any one jurisdiction in which he can get service on the defendant."[1]

As was suggested in the preceeding chapter, both of these courses by the plaintiff could lead to great expense, time and difficulty.

This is but another of the problems with which broadcasters and telecasters are faced under the common law theory of strict liability. In the case of Jerome H. Remick and Company v. General Electric Company (16 F.(2d) 829 (S.D. N.Y., 1926)), the opinion was that "liability should not be avoided on the ground that the defamatory statements were

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1. Remmers, op. cit., p. 732.

broadcast by another station and merely transmitted or re-broadcast by the local station."[1] As will be seen in Chapter IV, several of the state legislatures have concluded differently about this problem, feeling that a local station carrying a network program not only puts its trust in the originating station to transmit a non-tortious broadcast, but also has no opportunity to know in advance that defamatory matter will be uttered. These legislatures have enacted statutes which, in such situations, hold only the originating station liable.[2]

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1. Socolow, op. cit., p. 862.
2. See table on p. 99 showing states which hold only originating stations liable.

CHAPTER IV

TRENDS IN LEGISLATION TO RELIEVE BROADCASTERS OF LIABILITY

STATE LEGISLATION

In recent years there has been a significant trend in the field of state legislation regarding defamation by radio and television. Such legislation, often known as "due care" legislation, generally has the effect of protecting radio-television owners and operators from liability for defamatory statements over which they have no control and for which they are not responsible. At the date of this writing, twenty-eight of the forty-eight states have enacted this general type of legislation, with two additional state legislatures[1] currently considering similar statutes. From pages 66 to 96 in the chapter entitled "Appendices and Exhibits", will be found copies of the present twenty-eight statutes arranged in alphabetical order according to states.

Iowa led the way in this type of legislation, when, in the year 1937, the Iowa Legislature enacted the following:

> "The owner, lessee, licensee or operator of a radio broadcasting station, and the agents or employees of any such owner, lessee, licensee or oper-

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1. Texas and Pennsylvania.

> ator,, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a radio broadcast, by one other than such owner,, lessee, licensee, or operator or agent or employee thereof, if such owner, lessee, licensee, operator, agent or employee shall prove the exercise of due care to prevent the publication or utterance of such statement in such broadcast."[1]

Following Iowa's lead, Montana in 1939, Oregon in 1941, Wyoming and Colorado in 1947 and Virginia in 1948, all enacted generally similar legislation. From 1949 to the present, twenty-two more states have followed suit, with Arizona the most recent, the latter's "due care" statute having become law on March 10, 1953.

While for the most part all of these statutes are aimed at the same common goal, nevertheless they do differ somewhat in latitude and design. Donald H. Remmers, in his Harvard Law Review article, Recent Legislative Trends in Defamation by Radio, suggests five headings under which these statutes may be compared.[2] They are: (1) persons exempted from liability, (2) when the exemption is given, (3) due care, (4) political broadcasts and (5) damages. Charts demonstrating how the various state regulations line up under these headings are included in the chapter entitled "Appendices and Exhibits", pages 97 to 105.

Persons Exempted From Liability - Under this heading, as may be seen from the charts noted above, twenty-five of

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1. Iowa Code annotated, Sec. 659.5.
2. pp. 741-745.

the states have relieved from liability the station owner, licensee, operator, and agents and employees of such station owners, licensees and operators. One state, Iowa, includes the term "lessee". The other twenty-four statutes do not. As Mr. Remmers points out, "presumably...(the lessee) would be included in the operator category."[1]

The Maine, Utah and Illinois statutes are something of special cases. The Maine statute, as follows, says:

> "A person shall be responsible for any libel published or uttered in or as a part of a visual or sound radio broadcast, unless he proves on trial that it was broadcast and published without his knowledge, consent or suspicion, and that by reasonable care and diligence he could not have prevented it."[2]

The Utah statute speaks in terms of a "person, firm or corporation owning or operating a radio or television broadcasting station...."[3] Illinois exempts from liability a "person, firm, corporation, or unincorporated or voluntary association, or employee thereof."[4]

Twenty-three of the states extend exemption from liability not only to the owners, operators, licensees and agents or employees thereof of a local station, but also to the owners, licensees, operators and agents and employees thereof of a network of stations.

In a network broadcast, the statutes of Montana, Nevada,

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1. Remmers, op. cit., p. 741.
2. Laws of Maine, 1949, Chapter 134, Sec. 31-A.
3. Utah Code Annotated, 1953, Sec. 45-2-5.
4. Illinois Revised Statutes, 1951, Sec. 404.2, Liability for Libel by Radio, Sec. 179.2.

Utah and California hold only the originating station liable for a defamatory broadcast. These four states relieve from liability the network stations which carry the defamatory broadcast of the originating station. Five states - Florida, Iowa, Illinois, Oregon and Washington - do not extend exemption beyond the local station.

The Illinois and Iowa statutes are the only ones presently in existence which do not include visual or television station owners and operators. This is undoubtedly due to the age of the legislation. However, according to a recent notice in Broadcasting-Telecasting magazine,[1] steps are being taken in Illinois to remedy this situation. A bill has already been passed in the Illinois Senate which would subject television broadcasters to the same libel laws as radio operators. Montana's statute, since amended in 1951, was a similar case in point.

When the Exemption is Given - Excepting for the statutes of Utah, Illinois and Maine wherein the wording is different as has been noted above, the remaining statutes express clearly that "the exemption from strict liability is given the station only if the defamatory words were uttered by one 'other than (the)...owner, lessee, licensee, or operator or agent or employee thereof.'"[2]

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1. Broadcasting-Telecasting, May 11, 1953, p. 66.
2. Remmers, op. cit., p. 742.

Due Care - As may be seen from the charts, eighteen of the existing statutes relieve the station from liability when due care has been exercised to prevent the publication or utterance of the defamation. Thirteen statutes lay upon the complaining party the burden of proof of lack of due care by the station, while California, Colorado, Iowa, Minnesota and Nevada rest the burden of proof of exercise of due care on the owner, lessee, licensee, operator, agent or employee - whoever is being sued. The statutes of Idaho, Illinois, Maine, Maryland, Missouri, Montana, North Carolina, North Dakota, South Carolina and Washington make no mention of the language "due care". Idaho's is a special statute relieving only for political broadcasts, as likewise are the statutes of Missouri, Maryland and South Carolina. The language of the Maine law has previously been presented.[1] North Carolina holds that:

> "The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees...shall not be liable for any defamatory statement published or uttered...unless such owner, licensee or operator shall be guilty of negligence in permitting any such defamatory statement."[2]

The Montana legislation holds that no "...owner, licensee or operator...is liable to any prosecution...except upon proof of malice...."[3]

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1. See p. 37 supra.
2. North Carolina General Statutes, Chapter 99, Section 5.
3. Revised Codes of Montana, 1947, Section 94-2807, as amended by Chapter 13, Laws of 1951.

Thus far the language "due care" has been dealt with at some length. Certainly the question may legitimately be raised as to what exactly constitutes "due care"? Mr. Remmers notes:[1]

> "In the absence of any case law, it is not known just what station conduct will be held to be due care ...
>
> "...It will not be easy for the station to determine what conduct it may engage in and what precautionary measures it must take to assure that it will be held to have exercised due care in compliance with the statute."

This, of course, is a problem for the broadcaster. What constitutes due care has never been specifically defined. Undoubtedly it would be most difficult and practically impossible so to do, for each case is individual unto itself and must be decided according to the facts involved. In such a situation this writer submits that the only solution is for the broadcaster to use intelligence and common sense, and/or seek counsel from his attorney. Perhaps the Brief of the National Association of Radio and Television Broadcasters, prepared in connection with the now familiar Port Huron case, states this thought as well as it can be stated:[2]

> "At the least, it can be expected that broadcast licensees will be held...to a standard of due care in the transmission of messages appropriate to their operations. That standard obviously requires that they refrain from sending messages which, in the light

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1. Remmers, op. cit., pp. 742 and 743.
2. p. 29.

> of their method of operation and of the circumstances of the particular case, they know or should know to be unlawful."

Political Broadcasts - The problems with which licensees are faced in connection with the airing of political broadcasts have already been demonstrated.[1] Very briefly, they are unable to censor such broadcasts due to federal regulation, and at the same time, under the strict liability theory, may be held liable under state law for what is said in such broadcasts. Thus far a total of eighteen states have moved to relieve the licensee from this awkward position. Ten of the laws have the following similar language:

> "In no event...shall any owner, licensee or operator, or the agents or employees of any such owner, licensee or operator of such a station or network of stations, 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."

Michigan, South Carolina, Missouri, California, Colorado, Maine, Maryland and Nevada relieve stations from liability when "by reasons of the provisions of Federal statute or regulation of the Federal Communications Commission" broadcasts by or on behalf of any candidate for public office cannot be censored. Idaho's statute flatly states that:

> "The owner, licensee, or operator of a visual or sound radio broadcasting station, or network of stations, or agents or employees of any such owner, licensee or operator shall not be liable for any damages for any defamatory statement published or uttered in or as a part of any visual or sound radio broadcast by or on

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1. See Chapter I supra.

behalf of any candidate for public office...."[1]

And the South Carolina law relieves from liability in the case of political broadcasts:

> "...provided the...owner, licensee, or operator shall cause to be made at the conclusion of the broadcast the following announcement in substance: 'The broadcast you have just heard was not censored in accord with the immunity from censorship extended legally qualified political candidates.'"[2]

Ten of the states have no specific language in their statutes relieving the station from liability in the case of defamation contained in political broadcasts.

Damages - The twenty-eight states which thus far have enacted the type of legislation under discussion, have provided within such legislation "that the defendant stations shall be liable for some damages."[3] Seven states[4] go beyond this and provide for "actual damages". The language of the Georgia statute provides for "actual, consequential or punitive damages."[5] Mr. Remmers discusses the wording "actual damages" as follows:[6]

> "The use of the term 'actual' seems ill-advised, for its meaning in the field of defamation is far from precise. Presumably, something less is implied than

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1. Legislature of the State of Idaho, Thirty-second Session, An Act Relating to Defamation by Radio and Telecasting, and Exempting Broadcasters Therefrom Under Certain Circumstances.
2. South Carolina, R840, H1764, Section 1.
3. Remmers, op. cit., p. 745.
4. Arizona, Louisiana, Nebraska, Wyoming, Georgia,, Illinois, Maryland.
5. Code of Georgia Annotated, Sec. 105-714.
6. Remmers, op. cit., p. 745.

> 'general damages', which are presumed to follow in the case of libels and certain types of slanders and which include wounded feelings, injury to reputation, and general humiliation among one's friends. If not general, do 'actual' damages consist of 'special damages'? This latter terminology is well known to the law of slander and encompasses those damages of a pecuniary nature, such as loss of business profits, which are proved to have grown out of the slander. If such is the meaning, the statutes under examination severly restrict the damages available to the defamed party since in most cases they will be most difficult to prove."

Some brief mention should be made here of the process of retraction of defamatory language in order to lessen the damages. The General Counsel's Office of the National Association of Radio and Television Broadcasters has this to say about the subject in point:[1]

> "...At last report, three state statutes provided specifically for retractions of radio defamation. In California a retraction broadcast within three weeks after demand prevents the recovery of any damages except those to property, business or occupation. In Indiana the broadcast of a retraction within ten days after notice of the mistake or falsity of the defamatory words prevents the recovery of any but actual damages, defined to mean only damages to character, property, business, trade, profession or occupation.
>
> "In North Carolina the statute is similar to that of Indiana, except that there is no time specified within which a retraction must be made and the term 'actual damages' is not defined."

FEDERAL LEGISLATION

This chapter has thus far been concerned with demonstrating a definite trend in state legislation designed to relieve licensees from responsibility for the broadcast via

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1. Liability of Broadcasters, op. cit., p. 4.

their facilities of defamatory material over which they have no control. Though it could hardly be designated as a trend, there has, nevertheless, been some concrete thought and action given to this same type of relief in the field of Federal legislation also. A brief discussion of such legislation would seem apropos at this point.

The legislation at issue here is that introduced in the House of Representatives (82d Congress, 2d Session) in March, 1952 by Mr. Horan.[1] The purpose of the Horan Bill was "to amend Section 315 of the Communications Act of 1934, with respect to the use of broadcasting facilities by candidates for public office."[2] A copy of the Bill may be seen on page 106 of this text.

In the Port Huron case the view expressed by the Communications Commission on Section 315 held that:

> "...the prohibition of Section 315 against any censorship by licensees of political speeches by candidates for public office is absolute, and no exception exists in the case of material which is either libelous or might tend to involve the station in an action for damages."

The Commission acknowledged the fact that should a licensee, in the case of a defamatory broadcast, comply with this interpretation of Section 315, the licensee would be subject to civil action in the state courts enforcing the common law doctrine of strict liability. The Commission went on

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1. H.R. 7062.
2. Ibid.

to say, however, that it felt the state courts had no jurisdiction in the matter because in their (the Commission's) opinion the Federal government, through the Communications Act of 1934, had "occupied the field". Whether this interpretation by the Commission is right or wrong has thus far not been decided, for neither the highest council in the land - the Supreme Court - nor any statute has definitely stated yes or no whether the Federal legislation has "occupied the field". Therefore, at this point licensees are still between the devil and the sea so-to-speak. The Horan Bill, which was referred to the Committee on Interstate and Foreign Commerce and which was subsequently eliminated in conference between the House and the Senate, would hardly solve all the problems of defamation with which broadcasters are faced. However, should this or a similar bill someday become law, then there will in actuality be a specific "occupation of the field" and licensees will not be held liable for that which they are required by Federal statute to broadcast.

> "The Federal Communications Commission has indicated its belief that legislation along the lines of Representative Horan's proposal is constitutional, and has supported similar legislation in the past. A favorable attitude toward a very similar bill was expressed in an official memorandum submitted during the hearings on S.814. ...The FCC has noted the current proposals with approval."[1]

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1. Legal Memorandum re Horan Bill, (H.R. 7062), National Association of Radio and Television Broadcasters, General Counsel's Office, June 23, 1952, p. 5.

CHAPTER V

THE MASSACHUSETTS SITUATION

The Commonwealth of Massachusetts has no law of the type heretofore discussed specifically relating to defamation by radio and television. In such a situation it may be assumed that the common law rule of strict liability without fault applies.

Libel in Massachusetts has been defined not by statute but by common law. Frank L. Simpson in his book, Massachusetts Law, quotes the following:

> "'...a writing is a libel, if, in view of all relevant circumstances, it discredits the plaintiff in the minds, not of the court, nor of wise, thoughtful and tolerant men, nor of ordinarily reasonable men, but of any considerable and respectable class in the community. The emotions, prejudices and intolerance of mankind must be considered in determining the effect of a publication upon the standing of the plaintiff in the community.'
>
> "Ingalls v. Hastings and Sons Pub. Co., 304 Mass. 31, 22 N.E.2d 657. 'Whether a publication is defamatory or not presents a question as to the meaning of words which differs from that presented when a written contract comes before a court for construction. ... The question, therefore, whether a publication is defamatory or not, being dependent upon the effect produced upon the public, or a considerable part of it, is one particularly fit for trial by jury. ...'"[1]

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1. Simpson, Frank L., Massachusetts Law, (Boston Law Book Company), Section on Torts.

A bulletin prepared by the General Counsel's Office of the National Association of Radio and Television Broadcasters explicitly states the Massachusetts situation and quotes the existing statutes on "retraction of libel" and "evidence in mitigation of damages":

> "The...(Commonwealth) of Massachusetts has...(common law) defining libel...(but it) does...(not) accord any special treatment to newspapers or radio. ...It may be assumed the common law rule of strict liability applies. The case of Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528, cited in notes, 26 L.R.A. 781, 51 L.R.A. 466, 43 L.R.A. (N.S.) 40, 63 A.L.R. 657, holds that if a libel is published in a newspaper owned by co-partners, all the partners are liable for the express malice of one of them. Chapter 231, Sections 93 and 94 provide for mitigation of damages in language probably applicable to radio and television.
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> G.L. (Ter. Ed.) Ch. 93: "Where the defendant in an action for libel, at any time after the publication of the libel hereinafter referred to, either before or after such action is brought, but before the answer is required to be filed therein, gives written notice to the plaintiff or to his attorney of his intention to publish a retraction of the libel, accompanied by a copy of retraction which he intends to publish, and the retraction is published, he may prove such publication and, if the plaintiff does not accept the offer of retraction, the defendant may prove such non-acceptance in mitigation of damages. If within a reasonable time after receiving notice in writing from the plaintiff that he claims to be libelled the defendant makes such offer and publishes a reasonable retraction, and such offer is not accepted, he may prove that the alleged libel was published in good faith and without malice, and, unless the proof is successfully rebutted, the plaintiff shall recover only for such actual damage sustained. No action of slander or libel shall exemplary or punitive damages be allowed, whether because of actual malice or want of good faith or for any other reason. Proof of actual malice shall not enhance the damages recoverable for injury to the plaintiff's reputation.

> G.L. (Ter. Ed.) Ch. 94: "In an action for libel, the defendant may allege and prove in mitigation for damages that the plaintiff already has brought action for or recovered damages for, or has received or has agreed to receive compensation in respect of substantially the same libel as that for which such action is brought. In an action for libel or slander, he may introduce in evidence, in mitigation of damages and in rebuttal of evidence of actual malice, acts of the plaintiff which create a reasonable suspicion that the matters charged against him by the defendant are true."

It should be noted that the N.A.R.T.B. General Counsel has said that Sections 93 and 94 above are <u>probably</u> applicable to radio and television. There is no evidence shown that they really are applicable, nor does the statute specifically mention any particular media.

Such laws which Massachusetts presently possesses, or rather the laws which Massachusetts lacks, create an invitation to trouble for the broadcaster. An irresponsible person can unexpectedly broadcast defamatory material over a licensee's facilities, secure in the knowledge that any action for damages will include not only himself but also the station operator or licensee who has property which can be taken in judgement. If anything, it would seem that such a situation <u>encourages</u> defamation via the airwaves. That broadcasters do not wish to be liable for something they cannot regulate is only logical and sensible.

In Chapter IV it was demonstrated that many of the states, by the adoption of "due care" legislation, have found a reasonable way in which to relieve broadcasters from the

many defamation problems they did not create and over which they often have no control. A pamphlet issued by the National Association of Radio and Television Broadcasters[1] contains a very good discussion of the development of the due care theory, and of the desirability of enacting this theory into law to replace that of common law strict liability with relation to radio and television defamation:

> "...Liability for libel and slander at common law was commonly considered a species of liability without fault. Nevertheless, at an early date, a distinction was drawn between the originators of libel or slander and mere disseminators of it. While the originator remained liable, regardless of fault, the disseminator was only liable if he failed to exercise due care in allowing the defamation to be uttered, published or distributed. Thus distributors of newspapers, books or magazines were not made liable under circumstances in which they could not reasonably check or delete defamatory material.Similarly, proprietors of public halls and auditoriums were not liable for defamatory utterances of speakers who leased or used the premises. Thus, in effect, although liability was supposedly imposed for libel and slander without fault, in actuality a distinction was drawn in favor of those who could not by the exercise of due care have prevented such defamation.
>
> "Even without the aid of...a (due care) statute, ...some jurisdictions have held that radio broadcasters are not liable for defamation where they have exercised due care. They have done so either on the ground that the broadcaster is really a disseminator, or upon the ground that radio dissemination is a new sort of legal wrong, requiring new rules. The opinion of the Pennsylvania Supreme Court in the Summit Hotel case (Summit Hotel Co. v. National Broadcasting Co., (1939), 336 Pa. 182; 8 A.2d 302; 124 A.L.R. 968.), contains an exhaustive review of the legal authorities as well as a convincing argument that radio broadcasters should

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1. Suggested Statement for Use Before State Legislative Committees in Support of the Model Radio Defamation Bill, p. 2. (See Model Defamation Bill, p. 54 below.)

not be made liable if they have exercised due care. In Pennsylvania therefore, a (due care) statute... would not be necessary. The case of Sorenson v. Wood in Nebraska (123 Neb. 348; 243 N.W. 82 (1932); 82 A.L.R. 1098) is one of the cases wherein a contrary view was taken. Four other state courts have taken the same view. Three of these states have since changed the rule by statute....

"It is sometimes charged that (such) a statute... is 'discriminatory' to newspapers. We submit that this is not the case. The statute merely draws a reasonable distinction between the conditions under which newspapers and radio stations operate. Almost without exception, legal commentators and writers have criticized any attempt to apply a newspaper analogy to radio stations in this respect. It is quite true that both newspapers and radio broadcasting are great media of mass communication. They share many problems and many techniques in common. They serve much the same purpose in our democratic society. Both are equally protected by the guarantees of free speech and a free press, which are contained in the First Amendment to the Constitution of the United States. A recognition of these similarities, however, should not blind us to the obvious differences between newspapers and radio operation. In the case of a newspaper, an opportunity is presented to the proofreader and editor to catch, weigh and evaluate defamatory statements. Every word published by a newspaper has been and can be the subject of careful scrutiny, even considering the speed with which a modern newspaper is produced.

"In radio, on the other hand, a broadcaster can put someone on the air with a perfectly proper script, act in complete good faith, and nevertheless, for an aside extemporaneous remark by the speaker, be subject to suit for defamation. In other words, the broadcaster does not have the time or the opportunity to protect himself which are available to the newspaper publisher. The situation of the radio broadcaster is much more analogous to that of the owner of a public hall. As...(was) pointed out previously, the owner of such a hall is not liable for defamation unless he participated in it or failed to exercise due care regarding it. Otherwise, the speaker alone is held liable. It seems only fair and proper that this rule be applied to radio broadcasting....

"A number of states have abolished the common law

> rule to a greater or lesser extent. The legislative trend is clearly in the direction of lessening the harshness of the ordinary common law rules of libel and slander as they apply to radio broadcasting. ... (Such due care) legislation has worked out satisfactorily both from the standpoint of the public and from the standpoint of the radio broadcasting industry."

In the Commonwealth of Massachusetts at the present time are approximately fifty-two broadcasting and telecasting stations either operating or under construction permit.[1] These fifty-two stations were contacted by letter asking for an expression of their opinion as to whether or not they favored the adoption of a radio and television defamation statute in Massachusetts.[2] Twenty-six of the stations saw fit to respond to this query. Of the twenty-six, eighteen responded affirmatively, three negatively, and five made no commitment. Further explanation should be made as to the responses in the latter two categories, however. Of the five respondents who made no commitment two expressed desire to study such a law before saying whether or not they favored legislation of this type; one simply did not commit himself; and from the responses of two it was obvious they had no knowledge of that which was being asked of them. It seemed the only category under which their answers could be filed was the "no commitment" column. Each of the three stations which responded in the negative noted

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1. Figures taken from the 1953 Broadcasting and Telecasting Yearbooks.
2. See table in "Appendices and Exhibits" Chapter showing a list of the stations and their response - pp. 108 to 109.

that they favored such legislation, but only on the federal level.

That more than fifty per cent of the Massachusetts stations did not respond to the above inquiry may be due to one of several reasons: (1) it may be that those who did not answer simply have no interest; (2) it may be that they are simply ignorant of the facts and conditions (there is a strong suspicion that this is so because there is no state association of broadcasters in Massachusetts which would serve to keep the individual licensees informed on such subjects); (3) it may be that many believe instances of defamation by radio to be relatively rare. Of course, the latter may be true, or, on the other hand, the case actually may be that there are more instances of defamation than are commonly recognized, with relatively few of the defamed parties ever realizing they have in fact been defamed, or, upon such realization, ever bothering to prosecute.

One of the affirmative answers noted above indicated concern over a possible conflict between such a state radio and television defamation statute and federal statutes. The federal statute with which the party involved was concerned is Section 315 of the Communications Act. This is obvious evidence of the confusion experienced by broadcasters over this section. However, as has been seen in Chapter I above, there is no conflict between Section 315

and the type of state statute under discussion, and therefore this party's concern is unfounded.

Evidence has been cited in this and previous chapters as to the developing trend in the type of successful state legislation heretofore discussed. The outdatedness and inadequacy of the common law strict liability theory as it relates to defamation by radio and television has been shown. Stated above is the present Massachusetts law covering "mitigation of damages" and "retraction of libel". With a complete lack of specific Massachusetts legislation dealing with radio and television defamation, it is proper to assume that the common law applies to such cases in this Commonwealth.

CHAPTER VI

WHAT THE NATIONAL ASSOCIATION OF RADIO AND TELEVISION BROADCASTERS PROPOSES AS REPRESENTATIVES OF THE INDUSTRY

The problem raised by this study has been the subject of broadcasters' consideration for several years. The National Association of Radio and Television Broadcasters, the trade association to which most broadcasters currently belong, has been active in aiding state associations of broadcasters to obtain the enactment of many of the laws examined and quoted in Chapter IV. Several of those statutes were based on a suggested radio and television state defamation statute drawn up by the General Counsel's Office of the N.A.R.T.B. The language of this suggested statute will immediately be recognized:

NARTB

Suggested Radio and Television Defamation Statute

Section 1. - The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such 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, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in

such broadcast. Provided, however, the exercise of due care shall be construed to include a bona fide compliance with any federal law or the regulation of any federal regulatory agency.

Section 2. - In no event, however, shall any owner, licensee or operator, or the agents or employees of any such owner, licensee or operator of such a station or network of stations, 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.

Section 3. - In any action for damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual damages as he has alleged and proved.

"Basically...(this proposed statute) applies the principles applicable to torts generally to the tort of radio defamation..."[1] While this is not a complicated law it is evident - having studied in Chapter IV the presently existing statutes - that it does not fully cover all the situations such a law should cover. This law provides that the complaining party must prove the licensee failed to use due care to prevent the broadcast of the defamation. Further, the licensee is relieved from liability in connection with political broadcasts, with specific reference to the fact that when a licensee has allowed defamatory material to be broadcast, uncensored, in order to comply with federal law or the requirements of a federal regulatory agency, that licensee shall be considered to have exercised due care.

1. Suggested Radio and Television Defamation Statute, General Counsel's Office, NARTB, p. 2.

The N.A.R.T.B. states that its proposed "bill in no way relieves the actual originator of the defamation from liability."[1] Yet it must be quickly pointed out that the proposed bill does not so state this fact in specific language. It makes no precise reference as to the responsibility of the person who in fact utters the defamatory statement. Nor does it define "privileged broadcasts" or cover the situation of liability for defamatory statements published over a network.

Section 3 of this proposed statute reveals a strong bias. Here the complaining party is limited to only the "actual damages he has alleged and proved," thus setting aside at common law the distinction between libel and slander.[2] As was mentioned in Chapter IV, this language greatly restricts the damages available to the defamed party. While such statutory language may be highly desirable from the point of view of the broadcaster, it is also certain to be detrimental and unfair to the public. Indeed, only seven of the states[3] which have thus far adopted radio-television defamation statutes have specified only "actual damages". Of course, it must be remembered that the N.A.R.T.B. proposed statute was drawn up for and by broadcasters,

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1. Suggested Statement for Use Before State Legislative Committees in Support of the Model Radio Defamation Bill, NARTB General Counsel's Office, October, 1952, p. 1.
2. See p. vi supra.
3. Arizona, Georgia, Illinois, Louisiana, Maryland, Nebraska, Wyoming.

and that in the above seven cases it may at least be suspicioned that there was a strong "lobby" working.

CHAPTER VII

FINDINGS AND CONCLUSIONS

This study has dealt with the questions attendant with the problem of defamation by radio and television under the Massachusetts strict liability theory of common law. Included in this investigation were the issues surrounding Section 315 of the Communications Act of 1934,. a treatment of specific situations wherein it was demonstrated that rules of absolute liability work an injustice upon the broadcaster, and a review of a growing trend of legislation designed to afford fair treatment to both the public and the broadcaster by giving better definition to, and thus alleviating, many radio-television defamation problems.

It was the Port Huron case that made the defamation problem accute with broadcasters. In that case the Federal Communications Commission interpreted Section 315 of the Communications Act to mean that a broadcaster who allowed one candidate for political office to use his broadcasting facilities must allow all other candidates for the same office to use the station facilities, and that the broadcaster could delete nothing which the candidate wished to say even though defamatory on its face. The Commission went on to

add that licensees are relieved of responsibility by the operation of state law for such defamatory broadcasts under Section 315 because of what the Commission called Congress' "occupation of the field". However, the legislative history of the Section clearly demonstrates that Congress did not, either by explicit language or by innuendo, relieve the licensee from liability under federal or state law for such broadcasts. It must therefore be concluded that the interpretation given to Section 315 by the Commission in the Port Huron case is, in part, both inconsistent and incorrect. Furthermore, since the Congress chose specifically not to "occupy the field", state law must apply.

Inasmuch as the Communications Commission is not a legislative body, state courts are in no way bound by its decisions. Thus the effect of the Port Huron decision is to put broadcasters in the unenviable position of being compelled to accept the speeches of political candidates in toto, being unable to edit them without risk of their license with the FCC and yet being responsible in the State courts for any defamatory statements. It is submitted that under these circumstances it is unfair to hold a broadcaster absolutely liable for that which, short of violation of federal statute, he cannot avoid.

In Chapters II and III were demonstrated explicit instances wherein licensees are not freed from liability by

Massachusetts law if they unavoidably permit the broadcast of defamatory or other unlawful material. It is submitted that absolute liability in these cases is unduly severe, and that by taking leave from the common law theory and by finding the station liable only when due care has not been exercised to prevent the publication of the defamation, a result may be obtained which is fair to both the broadcaster and the citizenry. Attesting to such a conclusion is the growing number of radio-television defamation statutes being successfully utilized in an ever increasing number of states.

The stated purpose of this study was to determine whether or not there is a need for a radio-television libel protective law in Massachusetts. Based upon the foregoing evidence, the conclusion must be affirmative. It is therefore submitted that in this Commonwealth a departure from the common law of strict liability as pertains to defamation via radio and television should be made, such departure to take the form of specific legislation. This conclusion is made tangible by the suggestion of specific language for a proposed statute of this class for Massachusetts:[1]

AN ACT

RELATING TO DEFAMATION BY RADIO AND TELEVISION

Be it enacted by the Legislature of the Commonwealth of

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1. This statute is based upon the NARTB Model Statute and upon the state statutes studied in Chapter IV.

Massachusetts:

Section 1. Civil liability of station owners, lessees, licensees, operators, or agents or employees thereof for defamation:

> The owner, lessee, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, lessee, 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, lessee, licensee or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, lessee, licensee, operator, or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

Section 2. Liability for defamatory statements published or uttered over a network of visual or sound radio broadcasting stations:

> If any defamatory statement or matter is published or uttered in or as a part of a broadcast over the facilities of a network of visual or sound radio broadcasting stations, where two or more broadcasting stations were connected together simultaneously or by transcription, film, metal tape or other approved or adopted use for joint operation, the owner, lessee, licensee or operator of any such station or network of stations, and the agents or employees thereof, other than the owner, lessee, licensee or operator of the station, or network of stations, originating such broadcast, and the agents or employees thereof, shall in no event be liable for any damages for any such defamatory statement or matter.

Section 3. Defamatory statements by or on behalf of, or in opposition to, a candidate for public office:

> In no event, however, shall any owner, lessee, licensee or operator of such a visual or sound radio broadcasting station or network of stations, or the agents or employees thereof, be liable for any damages for

any defamatory statement or matter published or uttered by one other than such owner,. lessee, licensee or operator, or agents or employees thereof, in or as a part of a visual or sound radio broadcast by or on behalf of, or in opposition to, any candidate for public office, which statement or matter 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, PROVIDED the said owner, lessee, licensee, operator or agents or employees shall cause to be made at the conclusion of the broadcast the following announcement in substance: "The broadcast you have just heard was not censored in accord with the immunity from censorship extended legally qualified candidates."

Section 4. Damages recoverable for defamatory statements:

In any action against any owner, lessee, licensee, or operator, or the agents or employees of any owner, lessee, licensee or operator, of a visual or sound radio broadcasting station or network of stations for damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual and special damages as he has alleged and proved.

Section 5. Responsibility of persons making defamatory statements:

Nothing contained in this act shall be construed to relieve any person broadcasting over a radio or television station from liability under the law of libel and defamation. Nor shall anything in this act be construed to relieve any owner, lessee, licensee or operator of a visual or sound broadcasting station from liability under the law of libel and defamation on account of any broadcast prepared or made by any such owner, lessee, licensee or operator, or by any agent or employee thereof in the course of his employment.

Section 6. Privileged broadcast not libelous per se, defined:

A privileged broadcast which shall not be considered as libelous, slanderous or defamatory per se, is one made:

1. In the proper discharge of an official duty, when no malice is proved.

2. In any broadcast of or any statement made in any legislative or judicial proceeding, or in any other official proceeding authorized by law, or by the legislative forum rules.

3. By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof, or of a charge or complaint made by any person to a public official, upon which a warrant shall have been issued or an arrest made, or upon an indictment by a grand jury.

4. By a fair and true report, without malice, of the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public or the broadcast of the matter complained of was for the public benefit as outlined in Part III, Section C of the Report by the Federal Communications Commission, Public Service Responsibility of Broadcast Licensees, providing for discussion of public issues.[1]

While it is hoped the foregoing study will prove to be of value to the broadcasters of the Commonwealth of Massachusetts, the writer wishes to note some incidental questions raised herein which were outside the immediate scope of this study, but which could well afford further particularized investigation. For example, there is grave doubt as to the compatibility of Section 315 of the Communications Act and the Smith Act. Examination is needed as to what further rules and regulations are required from the Feder-

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1. Public Service Responsibility of Broadcast Licensees, a Report by the Federal Communications Commission dated March 7, 1946, is also commonly known as the "Blue Book".

al Communications Commission to guide broadcasters in the use of Section 315, for it can hardly be construed as operating in the public interest, convenience and necessity when a broadcaster must allow the use of his facilities by a legally qualified candidate for what he knows or strongly suspects will be a speech containing defamatory utterances. Investigation of these questions could result in worthy contributions not only to Massachusetts broadcasters but to broadcasters on a nationwide scale as well.

CHAPTER VIII

APPENDICES AND EXHIBITS

1. State Defamation Statutes.
2. Charts Demonstrating the Scope of the State Defamation Statutes.
3. The Horan Bill.
4. Letter to Massachusetts Stations.
5. Chart Demonstrating Station Response.
6. Letters From Massachusetts Stations.

ARIZONA

State of Arizona
Senate
Twenty-first Legislature
First Regular Session

CHAPTER 20

SENATE BILL NO. 93

AN ACT

Relating to defamation by radio and television; providing conditions under which an owner, licensee or operator of radio or television broadcasting stations shall be liable for defamatory statements; relating to liability for defamatory statements by or on behalf of candidates for public office, and fixing the measure of damages for defamatory statements published or uttered as a part of a radio or television broadcast.

Be it enacted by the Legislature of the State of Arizona:

Section 1. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such 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, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast. Provided, however, the exercise of due care shall be construed to include a bona fide compliance with any federal law or the regulation of any federal regulatory agency.

Section 2. In no event, however, shall any owner, licensee or operator, or the agents or employees of any such owner, licensee or operator of such a station or network of stations, 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.

Section 3. In any action for damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual damages as he has alleged and proved.

CALIFORNIA

Senate Bill No. 493

CHAPTER 1258

An act to add Section 48.5 to the Civil Code, relating to defamation by radio.

The people of the State of California do enact as follows:

Section 1. Section 48.5 is added to the Civil Code, to read:

48.5. (1) The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement or matter 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, if it shall be alleged and proved by such owner, licensee or operator, or agent or employee thereof, that such owner, licensee or operator, or such agent or employee, has exercised due care to prevent the publication or utterance of such statement or matter in such broadcast.

(2) If any defamatory statement or matter is published or uttered in or as a part of a broadcast over the facilities of a network of visual or sound radio broadcasting stations, the owner, licensee or operator of any such station, or network of stations, and the agents or employees thereof, other than the owner, licensee or operator of the station, or network of stations, originating such broadcast, and the agents or employees thereof, shall in no event be liable for any damages for any such defamatory statement or matter.

(3) In no event, however, shall any owner, licensee or operator of such station or network of stations, or the agents or employees thereof, be liable for any damages for any defamatory statement or matter published or uttered, by one other than such owner, licnesee or operator, or agent or employee thereof, in or as a part of avisual or sound radio broadcast by or on behalf of any candidate for public office, which broadcast cannot be censored by reason of the provisions of federal statute or regulation of the Federal Communications Commission.

(4) As used in this Part 2, the terms "radio," "radio broadcast," and "broadcast," are defined to include both visual and sound radio broadcasting.

(5) Nothing in this section contained shall deprive any such owner, licensee or operator, or the agent or employee thereof, of any rights under any other section of this Part 2.

COLORADO

Chapter 257

DEFAMATION BY RADIO

House Bill No. 74

AN ACT RELATING TO DEFAMATION BY RADIO

Be it Enacted by the General Assembly of the State of Colorado:

Section 1. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations and the agent or employees of any such 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 if in any action brought to recover such damages, such owner, licensee or operator, or agent or employee thereof alleges and proves that he exercised due care to prevent the publication or utterance of such statement in such broadcast; provided, however, that, in no event, shall any owner, licnesee or operator, or the agents or employees of any such owner, licensee or operator of such station or network of stations, be held liable for any damages for any defamatory statement uttered over the facilities of such station or network of stations, by any candidate for public office, or by any other person speaking for, or on behalf, of any candidate for public office where, by any Federal Law, rule or regulation, censorship of such political statements in advance of such utterance or publication is prohibited.

Section 2. The General Assembly hereby finds, determines and declares that this Act is necessary for the immediate preservation of the public peace, health and safety.

Section 3. In the opinion of the General Assembly an emergency exists; therefore, this Act shall take effect and be in force from and after its passage.

FLORIDA

Chapter 770

CIVIL ACTIONS FOR LIBEL

770.04 Civil liability of radio or television broadcasting stations; care to prevent publication or utterance required.

The owner, licensee or operator of a radio or television broadcasting station, and the agents or employees of any such 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 radio or television broadcast, by one other than such owner, licensee or operator, or general agent or employees thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator, general agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcasts, provided, however, the exercise of due care shall be construed to include the bona fide compliance with any federal law or the regulation of any federal regulatory agency.

GEORGIA

Code of Georgia Annotated

Section 105-712 Radio Broadcasting Stations; Liability for Defamatory Statements:

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such 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, unless it shall be alleged and proved by the complaining party that such owner, licensee, operator, or such agent or employee has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

105-713 Same; Liability for Political Broadcasts:

In no event, however, shall any owner, licensee or operator or the agents or employees of any such owner, licnesee or operator of such a station or network of stations 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.

105-714 Same; Damages Allowable:

In any action for damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual, consequential, or punitive damages as have been alleged and proved.

IDAHO

Legislature of the State of Idaho
Thirty-second Session
In the House of Representatives

H. B. No. 51

An Act Relating to Defamation by Radio and Telecasting, and Exempting Broadcasters Therefrom Under Certain Circumstances.

Be It Enacted by the Legislature of the State of Idaho:

Section 1. The owner, licensee or operator of a visual or sound radio broadcasting station, or network of stations, or agents or employees of any such owner, licensee or operator shall not be liable for any damages for any defamatory statement published or uttered in or as a part of any visual or sound radio broadcast by or on behalf of any candidate for public office; PROVIDED, HOWEVER, That this exemption from liability shall not apply to any owner, licensee or operator, or agent or employee of any owner, licensee or operator of such visual or sound radio broadcasting station, or network of stations, when such owner, licensee or operator, or agent or employee of the owner, licensee, or operator of such visual or sound radio broadcasting station is a candidate for public office or speaking on behalf of a candidate for public office.

ILLINOIS

Illinois Revised Statutes - 1951

Section 404.2 Liability for Libel by Radio § 179.2.

Every person, firm, corporation, or unincorporated or voluntary association owning or operating a radio station within the State of Illinois, which shall broadcast a libel by radio, as defined above, directly or indirectly, or by means of electrical or other form of transcription, and every person who shall amliciously and knowingly participate in the publication or the broadcast of such libel, shall be guilty of libel; provided, however, that

(a) No such person, firm, corporation, or unincorporated or voluntary association owning or operating a radio station in the State of Illinois, or employee thereof, shall be found guilty of libel for the broadcast of any defamatory matter of which such person, firm, corporation, or unincorporated or voluntary association or employee thereof had no advance knowledge or opportunity or right to prevent; and

(b) No such person, firm, corporation, unincorporated or voluntary association, or employee thereof, shall be found guilty of libel for any statement uttered over the facilities of such station by any candidate for public office.

IOWA
Iowa Code Annotated

Section 659.5 Defamatory Statement by Radio:

The owner, lessee, licensee or operator of a radio broadcasting station, and the agents or employees of any such owner, lessee, licensee or operator shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a radio broadcast, by one other than such owner, lessee, licensee or operator, or agent, or employee thereof, if such owner, lessee, licensee, operator, agent or employee shall prove the exercise of due care to prevent the publication or utterance of such statement in such broadcast

KANSAS

General Statutes of Kansas Annotated, 1949

CHAPTER 320

Section 60-746a Defamation by means of radio; liability when.

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such 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, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator, or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

LOUISIANA

Act 468 of 1950

An Act relative to defamation by radio; exempting from civil liability the owners, operators and licensees of visual or sound radio broadcasting stations or networks of stations, or the agents or employees thereof, in certain cases; repealing all laws or parts of laws in conflict herewith.

Section 1. Be it enacted by the Legislature of Louisiana, that the owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator, shall not be liable for 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, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

Section 2. That, in no event, shall any owner, licensee or operator, or the agents or employees of any such owner, licensee or operator of such a station or network of stations be held liable for damages for any defamatory statement uttered over the facilities of such station or network by or on behalf of, or in opposition to, any candidate for public office.

Section 3. That, in any action against any owner, licensee or operator, or the agents or employees of any owner, licensee or operator, of a visual or sound radio broadcasting station or network of stations for damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual damages as he may prove.

Section 4. That this Act is not intended to change the responsibility under the laws of this State, of any person or persons for any defamatory utterance made by such person or persons over a visual or sound radio broadcasting station or network of stations.

Section 5. That if any part or parts of this law should be declared to be unconstitutional the remainder shall continue in full force and effect.

*The wording of the enrolled bill appears without the word "any".

MAINE

Public Laws of Maine - 1949

CHAPTER 134

An Act to Establish and Define the Civil Liability of Radio Broadcasters Relative to Libel.

Be it enacted by the People of the State of Maine as follows:

R. S., c. 117, § 31-A, additional. Chapter 117 of the revised statutes is hereby amended by adding thereto a new section to be numbered 31-A and to read as follows:

Section 31-A. Responsibility for libels by radio. A person shall be responsible for any libel published or uttered in or as a part of a visual or sound radio broadcast, unless he proves on trial that it was broadcast and published without his knowledge, consent or suspicion, and that by reasonable care and diligence he could not have prevented it.

In no event, however, shall any person be held liable for any damages for any defamatory statement uttered by another over the facilities of a visual or sound radio station or network by or on behalf of any candidate for public office, or in discussion of any matter referred to referendum, if such person shall have no power of censorship over the material broadcast.

MARYLAND

Laws of Maryland - 1952

Act 75, Section 19A

(A) The owner, licensee or operator of a visual or sound radio station or network of stations, and the agents or employees of any such owner, licensee, or operator shall not be liable for any damages for any defamatory or libelous statement published or uttered over the facilities of such station or network of stations by any candidate for public office as to his particualr opponent or opponents for the particular office he seeks, which publication or utterance cannot be censored by such owner, licensee, or operator under any regulation of the Federal Communications Commission or any statute of the United States.

(B) As to a possibly defamatory or libelous statement made by any such candidate about any person or persons other than an opponent or opponents for the particular office he seeks, any such other person shall be limited and restricted in any suit or suits for defamation or libel brought against such owner, licensee, or operator, or against such agents or employees to such damages as may be compensatory for actual injury suffered; except that upon any proof of actual malice in the part of any such agents or employees in allowing or permitting such statements to be made, punitive damages therefore may be allowed to the person aggrieved against the said owner or licensee, operator, agent or employee.

MICHIGAN

Act No. 221

Public Acts of 1951

An Act relating to actions for damages against the owners, licensees or operators of a radio broadcasting station or network of stations, for defamatory statements.

27.1405 Liability of Visual or Sound Radio Broadcaster For Defamatory Statements Made in or as Part of Broadcast.

Section 1. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such 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, unless it shall be alleged and proved by the complaining party that such owner, licensee, operator, or such agent or employee has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

27.1406 Liability for Defamatroy Statements Made by or on Behalf of Candidate for Public Office.

Section 2. The owner, licensee or operator, or the agents or employees of any such owner, licensee or operator of such a 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.

MINNESOTA

Minnesota Statutes Annotated

544.043 Defense; Defamation by Radio.

In an action for damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast by anyone other than the owner, licensee or operator or agent or employee of any radio broadcasting station or network of stations, the defendant may show in his defense that he used due care to prevent the publication or utterance of such statement.

MISSOURI

Senate Bill No. 276

66TH GENERAL ASSEMBLY

An Act relating to actions for damages against the owner, licensees or operators of a radio broadcasting station or network of stations, for defamatory statements by or on behalf of candidates for public office, with an emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, or the agents or employees of such owner, licensee or operator of such a 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.

Section 2. This act makes clear the law as to the liability of radio broadcasting stations or networks of stations for defamatory statements made by or on behalf of candidates for public office through the facilities of such stations and since free and open discussion of the qualifications of such candidates, both in the primary and general elections to be held during the year 1952, is necessary to enable the voters to intelligently vote at such elections, this act is necessary for the immediate preservation of the public peace, health and safety and an emergency exists within the meaning of the constitution. This act, therefore, shall be in full force and effect from and after its passage and approval.

MONTANA

Revised Codes of Montana 1947 Annotated

64-205 Liability of Owner of Radio Station - Libel.

No person, firm or corporation owning or operating a radio broadcasting station shall be liable under the law of libel and defamation on account of having made its broadcasting facilities available to any person, whether a candidate for public office or any other person for discussion of controversial or any other subjects, in the absence of proof of actual malice on the part of such owner or operator.

64-206 Submission of Copy of Address.

Any person, firm or corporation owning or operating a radio broadcasting station shall have the right but shall not be compelled to require the submission and permanent filing, in such station, of a copy of the complete address or other form of expression, if in words, intended to be broadcast over such station, not more than 48 hours before the time of the intended broadcast thereof.

64-207 Construction of Act - Liability for Radio.

Nothing in this act contained shall be construed to relieve any person broadcasting over a radio station from liability under the law of libel and defamation. Nor shall anything in this act be construed to relieve any person, firm or corporation owning or operating a radio broadcasting station from liability under the law of libel and defamation on account of any broadcast prepared or made by any such person, firm or corporation or by any officer or employee thereof in the course of his employment; and in any case where liability shall exist on account of any broadcast as declared in the first clause of this sentence, in that event where two or more broadcasting stations are connected together simultaneously or by transcription, film, metal tape or other approved or adopted use for joint operation, in the making of such broadcast, such liability shall be confined and limited solely to the person, firm or corporation owning or operating the radio station which originated such broadcast.

64-208 What Communications are Privileged.

A privileged communication is one made:

1. In the proper discharge of an official duty.

2. In any legislative or judicial proceeding or in any other official proceeding authorized by law.

3. In a communication, without malice, to a person interested therein, by one who is also interested or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information.

4. By a fair and true report, without malice, of a judicial, legislative or other public official proceeding or of anything said in the course thereof.

94-2807 Publishing a True Report of Public Proceedings Privileged.

No reporter, editor or proprietor of any newspaper, nor any owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, nor any agent or employee of any such owner, licensee or operator is liable to any prosecution for a fare and true report of any judicial, legislative, or other public official proceedings or of any statement, speech, argument, or debate in the course of the same except upon proof of malice in making such report, which is not implied from the mere fact of publication or broadcast.

NEBRASKA

Legislative Bill 437

An Act relating to radio broadcasting; to limit the liability for damages of the owners, licensees, or operators of visual or sound radio broadcasting stations or networks of such stations, and the agents or employees of any such owners, licensees, or operators, with respect to defamatory statements published or uttered in or as a part of a visual or sound radio broadcast except as prescribed; to relieve any such owner, licensee, or operator and the agents or employees of any such owner, licensee, or operator, from liability for damages for any defamatory statement published or uttered over the facilities of any such station or network by, on behalf of, or against any candidate for public office except as prescribed; and to limit the amount of recoverable damages for any defamatory statement published or uttered in or as a part of any such visual or sound radio broadcast.

Be it enacted by the people of the State of Nebraska,

Section 1. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such 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 an agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator, or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

Section 2. In no event shall any owner, licensee, or operator, or the agents or employees of any such owner, licensee or operator of such a station or network of stations be held liable for any damages for any defamatory statement uttered over the facilities of such station or network by one other than such owner, licensee, or operator, or an agent or employee thereof by, on behalf of, or against any candidate for public office.

Section 3. In any action for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual damages as he has alleged and proved.

NEVADA

Statutes of Nevada, 1951

CHAPTER 230

Section 1. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee, or operator, shall not be liable for any damages for any defamatory statement or matter published or uttered in or as a part of a viual or sound radio broadcast by one other than such owner, licensee or operator, or agent or employee thereof, if it shall be alleged and proved by such owner, licensee or operator, or agent or employee thereof, that such owner, licensee or operator, or such agent or employee, has exercised due care to prevent the publication or utterance of such statement or matter in such broadcast.

Section 2. If any defamatory statement or matter is published or uttered in or as a part of a broadcast over the facilities of a network of visual or sound radio broadcasting stations, the owner, licensee or operator of any such station, or network of stations, and the agents or employees thereof, other than the owner, licensee or operator of the station, or network of stations, originating such broadcast, and the agents or employees thereof, shall in no event be liable for any damages for any such defamatory statement or matter.

Section 3. In no event, however, shall any owner, licensee or operator of such station or network of stations, or the agents or employees thereof, be liable for any damages for any defamatory statement or matter published or uttered, by one other than such owner, licensee or operator, or agent or employee thereof, in or as a part of a visual or sound radio broadcast by or on behalf of any candidate for public office, which broadcast cannot be censored by reason of the provisions of federal statute or regulation of the Federal Communications Commission.

Section 4. All acts and parts of acts in conflict herewith are hereby repealed.

Section 5. This act shall become effective immediately after its passage and approval.

NORTH CAROLINA

General Statutes of North Carolina

CHAPTER 99

99-5 Negligence in Permitting Defamatory Statements by Others Essential to Liability of Operator, etc. of Broadcasting Station.

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such owner, licensee or operator shall not be liable for any damage 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, unless such owner, licensee or operator shall be guilty of negligence in permitting any such defamatory statement.

NORTH DAKOTA

For an Act Relating to Defamation by Radio

Be It Enacted by the Legislative Assembly of the State of North Dakota:

Section 1. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such 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.

OREGON

Oregon Compiled Laws Annotated

CHAPTER 303

An Act relating to the broadcast of defamatory matter over the facilities of radio and television broadcasting stations, and defining the liability therefore.

Be It Enacted by the People of the State of Oregon:

Section 1. The owner, licensee or operator of a radio or television broadcasting station, and the agents or employees of any such 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 radio or television broadcast, by one other than such owner, licensee or operator, or agent or employe thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator, agent or employe, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

SOUTH CAROLINA

R840, H1764

An Act To Relieve Radio Broadcasting Stations From Liability For Defamatory Matter In Certain Cases.

Be it enacted by the General Assembly of the State of South Carolina:

Section 1. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such 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 a candidate for political office in those instances where, under the acts of Congress or the rules and regulations of the Federal Communications Commission, the broadcasting station, or stations, is prohibited from censoring the material broadcast by such candidate, provided the said owner, licensee or operator shall cause to be made at the conclusion of the broadcast the following announcement in substance: "The broadcast you have just heard was not censored in accord with the immunity from censorship extended legally qualified political candidates."

Section 2. All acts or parts of acts inconsistent herewith are hereby repealed.

Section 3. This act shall take effect upon its approval by the Governor.

SOUTH DAKOTA

Relating To Defamation By Radio

CHAPTER 206
(S. B. 32)

An Act Entitled, An Act Relating to the Liability Imposed by Law for Defamation by Means of Radio and the Damages Recoverable Therefor.

Be it enacted by the Legislature of the State of South Dakota:

Section 1. The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such 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, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

UTAH

S. B. No. 134

An Act amending Sections 45-2-5, 45-2-6, 45-2-7, and 45-2-8, Utah Code Annotated 1953, relating to liability for libel, slander, and defamation arising out of radio or television broadcasts and requiring the defamed party to prove lack of due care and repealing Section 45-2-9, Utah Code Annotated 1953, relating to minimizing damages by retracting the statement under certain conditions.

Be it enacted by the Legislature of the State of Utah:

Section 1. Secs. 45-2-5, 45-2-6, 45-2-7, and 45-2-8, Utah Code Annotated 1953, are amended to read:

45-2-5. No person, firm, or corporation owning or operating a radio or television broadcasting station or network of stations shall be liable under the laws of libel, slander or defamation on account of having made its broadcasting facilities or network available to any person, whether a candidate for public office or any other person, or on account of having originated or broadcast a program for discussion of controversial or any other subjects, in the absence of proof of actual malice on the part of such owner or operator. In no event, however, shall any such owner 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.

45-2-6. Any person, firm, or corporation owning or operating a radio or television broadcasting station shall have the right, but shall not be compelled, to require the submission and permanent filing, in such station, of a copy of the complete address, script, or other form of expression, intended to be broadcast over such station before the time of the intended broadcast thereof.

45-2-7. Nothing in this act contained shall be construed to relieve any person broadcasting over a radio or television station from liability under the law of libel, slander, or defamation. Nor shall anything in this act be construed to relieve any person, firm, or corporation owning or operating a radio or television broadcasting station or network from liability under the law of libel, slander, or defamation on account of any broadcast prepared or made by any such person, firm, or corporation or by any officer or employee thereof in the course of his employment. In no event,

however, shall any such person, firm, or corporation be liable for any damages for any defamatory statement or act published or uttered in or as a part of a visual or sound broadcast unless it shall be alleged and proved by the complaining party that such person, firm, or corporation has failed to exercise due care to prevent the publication or utterance of such statement or act in such broadcast. Bona fide compliance with any federal law or the regulation of any federal regulatroy agency shall be deemed to constitute such due care as hereinabove mentioned.

45-2-8. In any case where liability shall exist on account of any broadcast where two or more broadcasting or television stations were connected together simultaneously or by transcription, film, metal tape, or other approved or adapted use for joint operation, in the making of such broadcast, such liability shall be confined and limited solely to the person, firm, or corporation owning or operating the radio or television station which originated such broadcast.

Section 2. Sec. 45-2-9, Utah Code Annotated 1953, is repealed.

VIRGINIA

Code of Virginia, 1950

§ 8-632.1. Defamatory Statements in Radio Broadcast.

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such 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, operator or agent or employee thereof, unless it shall be alleged and proved by the complaining party that such owner, licensee, operator, such agent or employee, failed to exercise due care to prevent the publication or utterance of such statement in such broadcast; provided, however, that in no event shall any owners, licensee or operator, or the agents or employees of any such owner, licensee or operator of such a station or network of stations be held liable for any damages for any defamatory statement broadcast over the facilities of such station or network by or on behalf of any candidate for public office.

(1948, p. 56; Michie Suppl. 1948, §5796b.)

WASHINGTON

Remington's Revised Statutes of Washington, Annotated

998-1. Liability of Owner or Operator.

Where the owner, licensee or operator of a radio or television broadcasting station or the agents or employees thereof, has required a person speaking over said station to submit a written copy of his script prior to such broadcast and has cut such speaker off the air as soon as reasonably possible in the event such speaker deviates from such written script, said owner, licensee or operator or the agents or employees thereof, shall not be liable for any damages, for any defamatory statement published or uttered by such person in or as a part of such radio or television broadcast unless such defamatory statements were contained in said written script.

998-2. Speaker's Liability not Limited.

Nothing herein contained shall be construed as limiting the liability of any speaker or his sponsor or sponsors for defamatory statements made by such speaker in or as a part of any such broadcast.

998-3. Existing Causes of Action not Affected.

This act shall not be applicable to or affect any cause of action existing at the time this act becomes effective.

WEST VIRGINIA

House Bill No. 59

An Act to amend article seven, chapter fifty-five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section fourteen, relating to the duties of visual or sound broadcasting stations or networks to prevent defamatory utterances and the liability therefor.

Be it enacted by the Legislature of West Virginia:

That article seven, chapter fifty-five of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section fourteen to read as follows:

Section 14. Liability of Visual or Sound Broadcasting Stations in Libel Cases.

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such 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, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator or such agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcast.

In no event, however, shall any owner, licensee or operator or the agents or employees of any such owner, licensee or operator of such a station or network of stations be held liable for any damages for any defamatory statement uttered over the facilities of such station or network by any legally qualified candidate for public office.

WYOMING

Wyoming Compiled Statutes 1945, Annotated

Section 3-8203.

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of any such 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, or by one other than such owner, licensee or operator, or agent or employee thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator, such agent or employee, has failed to exercise due care to prevent the publication of utterance of such statement in such broadcast.

Section 3-8204.

In no event, however, shall any owner, licensee or operator or the agents or employees of any such owner, licensee or operator of such a station or network of stations be held liable for any damages for any defamatory statement uttered over the facilities of such station or network by any candidate for public office.

Section 3-8205.

In any action for damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual damages as he has alleged and proved.

States Now Having Statutes
Specifically Covering Defamation by Radio

1. Arizona
2. California
3. Colorado
4. Florida
5. Georgia
6. Iowa
7. Idaho
8. Illinois
9. Kansas
10. Louisiana
11. Maine
12. Maryland
13. Michigan
14. Minnesota
15. Missouri
16. Montana
17. Nebraska
18. Nevada
19. Oregon
20. North Carolina
21. North Dakota
22. South Carolina
23. South Dakota
24. Utah
25. Virginia
26. Washington
27. West Virginia
28. Wyoming

New Jersey - "New Jersey has no state statute upon the specific point of defamation by radio. However, its courts have held that a radio station is not liable for defamatory statements in a script unless it is shown that it has not exercised 'due care'. Kelly v. Hoffman, 137 N.J.L. 695, 61 A.2d 143, 5 A.L.R. 2d 951, (1948)."[1]

New York - "New York has no statute covering the specific point of defamation by radio, presumably the common law rules apply; but see Josephson v. Knickerbocker Broadcasting Co., 38 N.Y.S. 2d 985 (1942) holding the broadcaster liable for extemporaneous defamatory statements only in the absence of 'due care'."[2]

---

1. N.A.R.T.B. General Counsel's Office, May, 1952.
2. Ibid.

Persons Exempted From Liability

Statutes Exempting Owner, Licensee, Operator and Agents or Employees of Such Owner, Licensee or Operator		States Including in Exemption the Term "Lessee"
1. Arizona	14. Montana	1. Iowa
2. California	15. Nebraska	
3. Colorado	16. Nevada	
4. Florida	17. Oregon	All other states
5. Georgia	18. North Carolina	do not include
6. Idaho	19. North Dakota	the term "lessee".
7. Iowa	20. South Carolina	
8. Kansas	21. South Dakota	
9. Louisiana	22. Virginia	
10. Maryland	23. Washington	
11. Michigan	24. West Virginia	
12. Minnesota	25. Wyoming	
13. Missouri		

The statutes of Illinois, Maine and Utah are special cases:

Illinois - exempts from liability a "person, firm, corporation, or unincorporated or voluntary association, or employee thereof."
Maine - - exempts from liability "a person."
Utah - - - exempts from liability a "person, firm or corporation."

Persons Exempted From Liability

Statutes Extending Exemption Beyond Local Station to Include Network of Stations

1. Arizona
2. California
3. Colorado
4. Georgia
5. Idaho
6. Kansas
7. Louisiana
8. Maine
9. Maryland
10. Michigan
11. Minnesota
12. Missouri
13. Montana
14. Nebraska
15. Nevada
16. North Carolina
17. North Dakota
18. South Carolina
19. South Dakota
20. Utah
21. Virginia
22. West Virginia
23. Wyoming

Statutes Not Extending Exemption Beyond Local Station

1. Florida
2. Iowa
3. Illinois
4. Oregon
5. Washington

Statutes Holding Only Originating Station Liable, and Relieving Network Stations Carrying Defamatory Broadcasts of Originating Station

1. California
2. Montana
3. Nevada
4. Utah

Persons Exempted From Liability

Statutes Including Exemption of Visual or Television Stations, or Network of Visual or Television Stations	Statutes Not Including Exemption of Visual or Television Stations, or Network of Visual or Television Stations
1. Arizona	1. Illinois
2. California	2. Iowa
3. Colorado	
4. Florida	
5. Georgia	
6. Idaho	
7. Kansas	
8. Louisiana	
9. Maine	
10. Maryland	
11. Michigan	
12. Minnesota	
13. Missouri	
14. Montana	
15. Nebraska	
16. Nevade	
17. Oregon	
18. North Carolina	
19. North Dakota	
20. South Carolina	
21. South Dakota	
22. Utah	
23. Virginia	
24. Washington	
25. West Virginia	
26. Wyoming	

When Exemption is Given

Exemption From Strict Liability Given When Defamatory Words Uttered by One "Other Than (the)...Owner, Lessee, Licensee, Operator, or Agent or Employee Thereof

1. Arizona
2. California
3. Colorado
4. Florida
5. Georgia
6. Idaho - Applies only to broadcast by candidate for
7. Iowa public office.
8. Kansas
9. Louisiana
10. Maryland - Applies only to broadcast by candidate for
11. Michigan public office.
12. Minnesota
13. Missouri
14. Montana
15. Nebraska
16. Nevada
17. Oregon
18. North Carolina
19. North Dakota
20. South Carolina
21. South Dakota
22. Virginia
23. Washington
24. West Virginia
25. Wyoming

The language of the statutes of Illinois, Maine and Utah differ from that of the statutes listed above, as may be seen by examination of the texts of the legislation of these three states.[1]

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1. See pages 73, 77 and 91 above.

Due Care

Statutes Relieving From Liability When "Due Care" Has Been Exercised

1. Arizona
2. California
3. Colorado
4. Florida
5. Georgia
6. Iowa
7. Kansas
8. Louisiana
9. Michigan
10. Minnesota
11. Nebraska
12. Nevada
13. Oregon
14. South Dakota
15. Utah
16. Virginia
17. West Virginia
18. Wyoming

Statutes in which the language "due care" is not mentioned:

1. Idaho - this statute relieves only for political broadcasts.
2. Illinois
3. Maine - this statute lays burden of proof upon "a person", and uses the language "reasonable care".
4. Maryland - this statute relieves only for political broadcasts.
5. Missouri - this statute relieves only for political broadcasts
6. Montana - this statute uses the language "proof of actual malice".
7. North Carolina - this statute uses the language "guilty of negligence".
8. North Dakota
9. South Carolina - this statute relieves only for political broadcasts.
10. Washington

Due Care

Statutes Placing Burden of Proof of Lack of "Due Care" by Station on Complaining Party

1. Arizona
2. Florida
3. Georgia
4. Kansas
5. Louisiana
6. Michigan
7. Nebraska
8. Oregon
9. South Dakota
10. Utah
11. Virginia
12. West Virginia
13. Wyoming

Statutes Placing Burden of Proof of Use of "Due Care" on Defendant Owner, Lessee, Licensee, Operator, Agent or Employee

1. California
2. Colorado
3. Iowa
4. Minnesota
5. Nevada

Political Broadcasts

Statutes Relieving Station From Liability When Defamation Occurs in Course of Broadcast by Candidate for Public Office	Statutes Not Specifically Relieving Station From Liability When Defamation Occurs in Course of Broadcast by Candidate for Public Office
1. Arizona	1. Florida
2. Georgia	2. Iowa
3. Idaho	3. Kansas
4. Illinois	4. Minnesota
5. Louisiana	5. Montana
6. Nebraska	6. Oregon
7. Utah	7. North Carolina
8. Virginia	8. North Dakota
9. West Virginia	9. South Dakota
10. Wyoming	10. Washington

The language of the following statutes is somewhat different from that of those above in that relief from liability is granted for any defamatory statement made in a broadcast by a candidate for public office, "which broadcast cannot be censored by reason of the provisions of federal statute or regulation of the Federal Communications Commission."

1. California
2. Colorado
3. Maine
4. Maryland
5. Michigan
6. Missouri
7. Nevada
8. South Carolina

Damages

Statutes Providing for Some Damages

1. Arizona
2. California
3. Colorado
4. Florida
5. Georgia
6. Idaho
7. Illinois
8. Iowa
9. Kansas
10. Louisiana
11. Maine
12. Maryland
13. Michigan
14. Minnesota
15. Missouri
16. Montana
17. Nebraska
18. Nevada
19. Oregon
20. North Carolina
21. North Dakota
22. South Carolina
23. South Dakota
24. Utah
25. Virginia
26. Washington
27. West Virginia
28. Wyoming

Statutes Providing for "Actual Damages"

1. Arizona
2. Georgia
3. Illinois
4. Louisiana
5. Maryland
6. Nebraska
7. Wyoming

The Horan Bill

82d Congress
2d Session
H. R. 7062
In the House of Representatives, March 13, 1952
Mr. Horan introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

A bill to amend section 315 of the Communications Act of 1934, with respect to the use of broadcasting facilities by candidates for public office.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 315 of the Communications Act of 1934 (47 U.S.C. 315) is amended to read as follows:

Facilities For Candidates For Public Office

Sec. 315 (a) If any licensee shall permit any legally qualified candidate for any public office in a primary, general, or other election, or any person authorized in writing by such candidate to speak on his behalf, to use a broadcasting station, such licensee shall afford equal opportunities in the use of such broadcasting station to all other such candidates for that office or to persons authorized in writing by such other candidates to speak on their behalf.

(b) The licensee shall have no power to censor the material broadcast by any person who is permitted to use its station in any of the cases enumerated in subsection (a) or who uses such station by reason of any requirement specified in such subsection; and the licensee shall not be liable in any civil or criminal action in any local, State, or Federal court because of any material in such a broadcast, except in case said licensee shall willfully, knowlingly, and with intent to defame participate in such broadcast.

(c) Except to the extent expressly provided in subsection (a), nothing in this section shall impose upon any licensee any obligation to allow the use of its broadcasting station by any person.

(d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Letter to Massachusetts Stations

29 April, 1953
319 Commonwealth Avenue
Boston 16, Massachusetts

Mr.
General Manager, W---
_____ Street
_____, Massachusetts

Dear Mr. _____:

As part of the requirement for my Master's degree at Boston University, I am making a study to determine the need of adopting a radio-television libel protective law in Massachusetts. Such a law would relieve broadcasters of liability for defamatory statements made over their facilities by persons other than employees, when "due care" has been taken by the broadcaster to prevent such statements and to comply with federal laws and with regulations by federal agencies.

As you know, under Section 315 of the Communications Act, a broadcaster cannot censor a political speech made by a qualified candidate for public office; and under the present laws of this Commonwealth you as a broadcaster may be liable for a defamatory remark made in such a speech.

In this survey I am contacting all of the station operators in Massachusetts. I would like to know whether or not you favor such "due care" legislation which would relieve you from the liability created by Section 315 of the Communications Act.

Enclosed is a stamped, addressed envelope to facilitate your reply. Thank you for your thoughtful consideration of this matter.

Yours very truly,

William E. Bagg III

A Table Showing the Response of Massachusetts Radio and Television Stations to a Letter Asking for an Expression of Their Opinion as to Whether or Not They Favored the Adoption of a Radio and Television Defamation Statute in the Commonwealth of Massachusetts**

Station	Response	No Response	Affirmative	Negative	No Commitment
1. WARA	x		x		
2. WBMS	x		x		
3. WBZ	x			x	
4. WCOP		x			
5. WEEI	x				x
6. WHDH	x		x		
7. WLAW*	x				x
8. WMEX	x		x		
9. WNAC	x				x
10. WORL	x				x
11. WBET		x			
12. WVOM		x			
13. WTAO		x			
14. WALE		x			
15. WSAR		x			
16. WEIM		x			
17. WFGM	x		x		
18. WKOX	x		x		
19. WHOB		x			
20. WHAI	x		x		
21. WHAV		x			
22. WHYN	x		x		
23. WREB		x			
24. WCCM	x		x		
25. WCAP		x			
26. WLLH		x			
27. WLYN		x			
28. WHIL	x		x		
29. WBSM	x		x		
30. WNBH		x			
31. WMNB		x			
32. WNAW		x			
33. WHMP		x			
34. WTGR-FM		x			
35. WBEC	x		x		
36. WBRK	x		x		

**A copy of the letter in question may be seen on page 107.
* Now off the air.

Station	Response	No Response	Affirmative	Negative	No Commitment
37. WJDA	x				x
38. WESX		x			
39. WACE	x		x		
40. WJKO		x			
41. WMAS		x			
42. WSPR		x			
43. WPEP		x			
44. WCRB	x		x		
45. WARE		x			
46. WTXL	x			x	
47. WOCB	x			x	
48. WAAB	x		x		
49. WNEB	x		x		
50. WORC		x			
51. WTAG	x		x		
52. WSEE-TV		x			
Total	26	26	18	3	5

This list of stations was taken from the 1953 Broadcasting Yearbook - Directory of AM and FM Radio Stations of the United States, and from the 1953 Telecasting Yearbook - Television Stations in the United States and Construction Permits Granted to February 10, 1953.

Television and FM stations operating under the same call-letters and the same management as their AM affiliates, were not sent separate letters and are not included in the table.

80% of Massachusetts broadcasters replying to this inquiry favored some class of protective legislation concerning radio and television defamation.

The responding letters from the above stations may be seen in the following pages, being presented in the same order as they are here listed.

WARA

I do feel that the FCC regulation, denying censorship to political talks, does place the radio station in jeopardy.

I believe that "due care" would be very helpful.

Very truly yours,

RADIO STATION WARA

Keith S. Field, Manager

WBMS

April 30, 1953

This is to acknowledge your letter of April 29th which I read with great interest.

You may be sure that I am in favor of "due care" legislation which would relieve us from the liability created by Section 315 of the Communications Act.

Thank you for your interest.

Yours very truly,

Norman Furman
Managing Director

WBZ

May 26, 1953

Your letter of April 29, 1953 brings up not only a very good question, but one that is very bothersome to the radio industry. Most radio stations must be considered as in Inter-State Commerce, and therefore, subject to Federal Laws and Regulations.

Although we have no statutes in our Commonwealth relieving the station of liability for actionable utterances by a candidate, several states have, and it is our opinion that this protection is inadequate. For instance, if Massachusetts did have such a law and a candidate broadcast material claimed actionable, over our station, our signal would go into a number of other states, and in these other states we might or might not be held liable.

This brings us to the point where we ask, isn't this a matter which can be corrected in only one place, and that is in our Congress.

Sincerely,

C. S. Young

WEEI

May 14, 1953

We have no strong feelings concerning legislation to relieve broadcasters from liability for defamatory statements made by persons other than employees where "due care" has been taken to prevent such statements.

On the one hand, it seems unfair to subject broadcasters to liability for statements over which they have little or no control.

On the other hand, it is our belief that if broadcasters were relieved entirely from such liability, there might be a relaxation of standards of what would be acceptable for broadcasting. It is often helpful for a broadcaster to be able to point out to a speaker that the speaker himself should use great care in order that he not subject the broadcaster to liability for statements of the speaker.

Very truly yours,

Harvey J. Struthers

WHDH

May 5, 1953

In answer to your letter of April 29, personally I am in favor of a "due care" legislation which would relieve radio and television stations of Massachusetts from the liability created by Section 315 of the Communications Act.

Cordially,

William B. McGrath
Managing Director.

WLAW

May 8, 1953

With regards to the question as to our favoring or disapproving "due care" legislation to relieve Massachusetts stations of the liability presumed to be created by Section 315 of the Communications Act, let me say only that libel and defamatory legislation varies quite a bit in different States. Therefore, until we could study the actual proposed bill, we could not take a position of approving or disapproving.

Obviously, every broadcaster wants to be protected from suit for libel or defamation, but unfortunately some legislative acts written to provide such protection are watered down to a point of offering very little alleviation to the broadcasting station operator.

Yours very truly,

Lambert B. Beeuwkes
General Manager

WMEX

May 2, 1953

Your communication of the 29th of April addressed to Mr. William S. Pote of this station was turned over to me for acknowledgement.

There isn't any question but that the broadcaster needs protection from liability that he is in danger of incurring when his station airs a political talk.

It is quite possible that the recent election ordeal, which saw all House members and one third of the Senate using radio extensively and the most part permitted many of them to "meet up with" TV for the first time, may result in some activity on this subject before too long.

In any event you may be interested to know that prior to February 1950 broadcasters were following the section 315 of the Communications Act which forbade the censoring of all political talks.

In the now celebrated Port Huron case the FCC held that a station may not censor a political broadcast even if it contained libel. It also indicated that the FCC believes the federal law's ban on censorship would supersede state laws against libel.

However, in February of 1950 an Attorney by the name of David H. H. Felix of Philadelphia brought suit against five radio stations in that city charging in his complaint filed in November of 1949 with the Federal District Court there that they all aired a speech which was allegedly a false and malicious publication by broadcast. The complaint alleged that one William Mead, Republican city chairman, speaking on behalf of local GOP candidates during Philadelphia's city election campaign, referred to the Americans for Democratic Action as a

Communist-infested group. Mr. Felix was a member of ADA.

In a brief filed by station KYW, a Westinghouse property, it admitted that the speech was made but contended that there was no liability on it under Section 315 of the Communications Act of 1934 which prohibits censorship of a political speech and requested the Court for dismissal of the suit.

The Court ruled in this case that speeches made by persons speaking on behalf of candidates may be censored and that the ban on censorship extended only to the candidates themselves.

This of course threw further worries on the broadcaster and made it seem imperative that some relief be afforded him since so many campaigns depend upon prominent citizens, speaking in behalf of candidates.

This libel dilemma has become so important in the broadcast industry that many stations hesitate to accept any political broadcasts lest they run the risk of facing libel suits for candidate's remarks.

It is therefore obvious that a measure must be adopted that will make broadcasters more ready to accept political talks, especially since these talks tend, for the most part, to a better informed electorate and no matter how viewed, the present situation places an unfair burden on the broadcasters to force them to make their own private decisions on parties, candidates and issues, when that burden should rightfully be carried by the public.

It doesn't seem gallant to leave you between the libel devil and the law-breaking deep blue sea when your Master's degree is at stake but maybe you have ideas which will not only solve the problem but earn your Degree in so doing.

Best of luck.

Yours very truly,

Lawrence J. Flynn
Commercial Manager

The Yankee Network
(WNAC)

May 20, 1953

This is in answer to your recent letter regarding radio-television libel protective laws.

The problem you raise has been under consideration for a long period of time by broadcasters and is a subject of serious study by the NARTB, which, as you probably know, is the trade association to which most broadcasters belong. I think that a great deal of the information you might need for the study you propose would be readily available at NARTB in Washington and suggest that you contact them, as they are in possession of a broad cross-section type of information which I am sure would be of value to you in your study. For your convenience, their address is:

National Association of Radio and Television
Broadcasters
1771 N Street, N. W.
Washington 6, D. C.

Cordially,

George W. Steffy
Vice President

WORL

May 5, 1953

I am sure that all radio station operators are interested in legislation which would protect them and their property from libel suits.

The particular matter you are pursuing for your thesis is a broad one and has been the subject of much discussion in the radio industry.

As you might well imagine, any legislation that would be drawn on this subject would require thorough study on the part of the radio industry, so I hesitate to state what my opinion on new legislation would be until such time as a thorough study of it was made.

Very truly yours,

Arthur E. Haley
General Manager

WFGM

May 4, 1953

The desirability of a radio-television libel protective law in Massachusetts would seem to me to be self apparent. As it now stands, broadcasters are "damned if they do and damned if they don't" if they desire to carry political programs.

Obviously, where the station cannot censor political speeches, yet may be liable for defamatory statements made in these speeches, it is placing the stations in a position where they may be held liable for material completely beyond their control.

I would personally be heartily in favor of proper legislation which would relieve Massachusetts broadcasters from liability created under Section 315 of the Communications Act.

Yours very truly,

Ansel E. Gridley
President and General Manager

WKOX

May 18, 1953

I hope you will pardon the delay in answering your letter of April 29 regarding the survey mentioned therein.

In answering your inquiry, there is little question in my mind that the present law under Section 315 of the Communications Act places an undue burden on the broadcaster. Therefore, in my opinion, I would most certainly favor "due care" legislation which might seek to bring some relief from reliability created by Section 315.

I trust this is the information you desire and I am very pleased to assist you in your work.

Very truly yours,

Richard E. Adams
Station Manager

WHAI

May 14, 1953

Any law which makes broadcasting equal to other media of public information, both as to protection and to responsibility, is in my mind a good law.

I do not believe that radio should be treated differently than the public press in this respect.

Sincerely,

Radio Station WHAI
John W. Haigis, Jr.
Manager

WHYN

April 30, 1953

In answer to your inquiry of April 29, 1953 we are represented in matters of the law by our N.A.R.T.B. which is a state and national organization and are in no position to do anything but express our personal opinions.

We would like to be relieved of any liability for defamatory statements made on our facilities by persons other than employees. Any change in the laws that would protect us would be welcome.

Sincerely,

Charles N. DeRose
General Manager

WCCM

May 6, 1953

This will acknowledge receipt of your letter to Mr. George H. Jaspert, General Manager of this station.

As Mr. Jaspert is presently on an extended tour of the country and will not return until the first part of June, I will endeavor to answer your question as I feel he would want to answer it.

I believe that he would be most interested in such legislation which would relieve this station, and for that matter, all stations, from the liability created by Section 315 of the Communications Act.

I hope that this will give you the answer and the information that you were looking for.

Sincerely yours,

Daniel B. Ruggles, III
Commercial Manager

WHIL

May 5, 1953

I am very much in favor of the legislation that you support for radio and television broadcasters in your letter of April 29th, 1953.

Today we are a target under the present day laws for lible suits. We as broadcasters operate in the public need, convenience and necessity and should be given some protection.

Very truly yours,

Sherwood J. Tarlow
President

WBSM

May 1, 1953

As your letter indicates, you are aware of the basic aspects of this problem. The most disturbing aspect to the broadcaster is the fact that he is on one hand limited in his right to censor by the FCC and is on the other hand not relieved of legal liability for the content of certain political and labor addresses.

In so far as I am concerned as a broadcaster, my feeling is that this problem cannot be resolved with a "shades of grey" type of legislation. I feel that it is necessary that the broadcaster be controlled by understandable legislation which will thoroughly define his rights and limitations. In other words, we either have to get off the hook or be on it as any other arrangement will create additional chaos in the interpretation of the law.

From what I am able to garner from other broadcasters, the industry would be substantially relieved by "black or white" legislation which rulings then can be used to illustrate our contentions to the time user in the event that questionable material is presented for broadcasting.

I hope that the above comments represent the information you desired to receive and if there are any other specific questions please feel free to write.

Very truly yours,

Otto F. A. Arnold
General Manager

WBEC

May 4, 1953

This is to acknowledge your letter of April 29, 1953.

It is my belief that no media should be held responsible for defamatory remarks on the part of political candidate or others unless proof of conspiracy can be established.

In the past, I attempted to read speeches in advance of broadcast and sometimes it was difficult for me to decide whether or not certain parts might be defamatory. When such matters take so long in courts, there is no reason to expect a small station manager to be able to judge without expert advice and that advice would cost more than the income. Furthermore, a station manager might delete any part only to have the candidate replace it just before air time and after it was once said a station became just as responsible as before.

Accordingly, I am in favor of "due care" legislation which would relieve all media from responsibility.

With kindest personal regards, I remain

Very truly yours,

W. Wendell Budrow
General Manager

WBRK

April 30, 1953

Thank you for your letter of April 29.

Naturally we are interested in any legislation which will extract us from the embarrassing position of being "damned if we do or damned if we don't." It is still not quite clear in the minds of most broadcasters as to whether we are able to turn down controversial political broadcasts on the suspicion of libel. If we cannot, it naturally follows that we don't wish to be held liable in the event of defamatory statements.

I would generally answer your letter in the affirmative. In short, any way in which we could be relieved from the embarrassment of libel suits as a result of politicians who either do not stick to the script or make statements which could be libelous but are impossible for us to check on short notice, would be desirable.

With kindest personal regards, I am

Sincerely yours,

Greylock Broadcasting Company

John T. Parsons
General Manager

WJDA

April 30, 1953

Your letter addressed to Mr. Joseph H. Tobin is being answered by me, in view of the fact that Mr. Tobin is no longer with this organization.

As to a broadcaster's libel protective law in Massachusetts, it is, as you know, a very deep and conflicting question. But I believe that we would be of little help to you, in view of the fact that for wages and hours and other purposes, we are considered as engaged in Interstate Commerce, and for that reason any such state laws would be secondary to the federal laws.

Based on these facts, I doubt that we would have any contribution or suggestion for devising a state law.

Very sincerely yours,

James D. Asher

WACE

WACE would favor such legislation.

R. J. Robinson
WACE Manager

WCRB

April 30, 1953

Re your letter of April 29: WCRB does favor the "due care" legislation.

Hope this info helps you in your thesis.

Cordially,

Charles River Broadcasting Co.

David B. Tucker,
Program Director

WTXL

May 5, 1953

The entire subject of radio and television libel responsibility is a perplexing one. We have long favored an amendment to Section 315 of the Communications Act, which would relieve the broadcaster of entire responsibility for defamatory utterances by persons over whom he has no control. An amendment of the Federal Law would, in my opinion, be preferable to state legislation.

The inter-state nature of radio broadcasting was established by the Courts many years ago. I can see a great deal of confusion arising if the legislatures of the various states were to enter into the complex field of the Communications Law.

I trust that this gives you the information sought in your letter of April 29th.

Very truly,

Lawrence A. Reilly
General Manager

WOCB

May 5, 1953

Certainly we feel very strongly that broadcasting stations should not be in a position of being open to libel and yet legally be unable to do anything to prevent it. Your study seems certainly to have merit.

We are under the impression that legislation is pending before Congress to correct the situation. We also have the feeling that this correction should be a federal matter rather than left to the individual states.

We hope this is the information you desire and wish you luck in your study.

Sincerely,

Radio Stations WOCB/WOCB-FM

Paul Stiles
Manager

WAAB

May 8, 1953

I certainly do favor "due care" legislation which would relieve us from liability created under Section 315 of the Communications Act. It seems very obvious that if we are required to broadcast a political speech and do not have the right to censor it, under law, that we should be relieved of any responsibility for what is said.

As it now stands broadcasters are "the goat" and some relief should be provided.

I am interested to see that you have made this subject the basis for your Master's degree and I hope it comes to the attention of the Commission.

Sincerely,

Wilson Enterprises, Inc.

George F. Wilson

WNEB

April 30, 1953

In answer to your letter of April 29th, Radio Station WNEB most certainly is in favor of the "due care" legislation which you describe.

I note that such legislation has been enacted in other states and I hope that our own Legislature will act favorably.

Very truly yours,

John J. Hurley
General Manager

WTAG

May 26, 1953

This is in reply to your letter of April 29th to Mr. Robert Booth. I trust you will pardon the delay. Mr. Booth and I have both been out of the city for some time.

Naturally, as operators of a radio station, we would be in favor of legislation relieving broadcasters of liability for defamatory statements when "due care" has been exercised.

As a matter of fact, this type of legislation should be federal rather than by states, inasmuch as varying state laws complicate the picture as in the case of network broadcasts. It also would be better to have federal legislation, inasmuch as we operate, as you know, under federal regulations of the FCC.

The matter really calls for careful study rather than a quick yes or no as to favoring a "due care" law. Care must be exercised that the radio station operators are not put in the position of being too free to "censor" material. Whether such a phrase as "due care" can ever be pinned down is doubtful.

I trust I have complied with your request without confusing the issue too much.

Very truly yours,

H. L. Krueger
Station Manager

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