

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-314

In re

Amendment of Part 73
Regarding Broadcast Hoaxes

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 14, 1992;

Released: June 12, 1992

By the Commission:

INTRODUCTION

1. This *Report and Order* amends the Commission's Rules to expressly prohibit the broadcast of hoaxes that are harmful to the public. Specifically, we adopt a rule that will prohibit a broadcast licensee or permittee from knowingly broadcasting false information concerning a crime or catastrophe if it is foreseeable that broadcast of the information will cause substantial public harm, and broadcast of the information does in fact directly cause substantial public harm. This rule will provide the Commission with greater enforcement flexibility by subjecting licensees that perpetrate harmful hoaxes to possible forfeitures, in addition to other applicable penalties. In deference to First Amendment concerns, we have crafted the rule narrowly, restricting only those hoaxes most likely to result in substantial public harm.

2. *Background.* Recently, serious broadcast hoaxes have occurred where the stations involved fabricated stories concerning a crime or catastrophe that alarmed the public and resulted in the needless diversion of public safety or law enforcement resources.¹ Because hoaxes of this nature are inconsistent with the public interest, we initiated a *Notice of Proposed Rule Making* ("*Notice*") to determine whether the Commission should adopt a rule specifically prohibiting such conduct.² Under existing policies, the Commission has limited recourse against a licensee that

perpetrates hoaxes.³ In most cases, the Commission can either issue a letter of admonition, which may be considered on renewal or sale of the station or, in extreme cases, it can revoke a station's license.⁴ A rule, by contrast, offers greater enforcement flexibility by permitting the Commission to levy fines against the violators. We therefore sought comment on how a hoax rule might be crafted without causing an undue chilling effect on broadcast speech.

Issue Analysis

3. *Proposal.* Our *Notice* suggested a narrowly crafted rule that would result in licensee liability only if three elements were present. First, we proposed that the licensee must know that the material broadcast is false. Because this element would normally implicate dramatizations, which are by nature fictitious, we sought comment on whether other aspects of the rule would sufficiently protect such programming from undue scrutiny. We also suggested limiting the rule to false reports of crimes and catastrophes.

4. Second, we proposed that the hoax must directly cause immediate, substantial and actual public harm. The *Notice* sought comment on what should constitute "public harm," as well as possible definitions for the terms "immediate," "substantial" and "actual." For example, we suggested that the "substantiality" of the harm might be measured in terms of how "widespread" the harm is (*e.g.*, whether there was widespread diversion of law enforcement and public safety authorities from their duties), or it might be measured in terms of the severity of the damage resulting from the harm.

5. Third, we proposed that the public harm flowing from the hoax be foreseeable. Our *Notice* indicated that to avoid unreasonable chilling effects on broadcasters, we could consider public harm foreseeable only if the licensee could expect, with a "significant degree of certainty," that such harm would occur as a result of the hoax. We sought comment on factors determinative of foreseeability, such as the timing and content of the broadcast, as well as the number of public complaints received concerning the broadcast. We also invited comment on whether broadcasters should have the right to presume that the public will behave in a rational manner.

6. *Comments.* Comments were filed by CBS, Inc. ("CBS"), Haley, Bader & Potts ("Haley"), National Association of Broadcasters ("NAB"), National Public Radio ("NPR"), and reply comments were filed by NBC, Inc. ("NBC").⁵ All five parties oppose instituting an anti-hoax rule. The commenters argue that adoption of such a rule

¹ See *Letter to KSLX-FM*, (MMB, dated October 2, 1989) (station admonished for false report that station had been taken hostage); *Letter to WCCC-AM/FM*, (MMB, dated July 26, 1990) (station admonished for false report of nearby volcanic eruption); *Letter to KROQ-FM*, 6 FCC Rcd 7262 (1991) (station admonished for murder confession hoax); *Letter to WALE-AM*, 7 FCC Rcd 2345 (MMB 1992) (station admonished for false report that station employee had been shot).

² *Notice of Proposed Rule Making* in MM Docket No. 91-314, 6 FCC Rcd 6935 (1991).

³ The Commission eliminated a policy against "scare announcements" in 1985. See *Fourth Order Eliminating Unnecessary Broadcast Regulations*, 57 RR 2d 939 (1985). The Commission retained, however, other continuing policies intended to ensure that each licensee complies with its basic obligation to broadcast in the public interest, such as the policy

against news staging. These policies may be invoked to sanction (although not fine) licensees that perpetrate hoaxes. See, *e.g.*, *Letter to KROQ-FM*, 6 FCC Rcd 7262 (1991) (public interest obligation); *WMJX Inc.*, 85 FCC 2d 251 (1981) (news staging policy). Our decision here leaves intact all existing policies. See *infra* note 17.

⁴ In one recent hoax, the Commission assessed a \$25,000 forfeiture against a licensee for violation of the Communication Act's prohibition on the transmission of false distress communications. In that case, the licensee reported a mock nuclear attack on the United States and aired a siren similar to the Emergency Broadcast System signal. See *Letter to KSHE-FM*, 6 FCC 2d 2289 (1991).

⁵ An additional informal comment was filed by David H. Atkins, who simply expressed support for imposing fines on stations that engage in hoaxes.

is unnecessary because harmful hoax incidents are rare and there are already adequate deterrents to such conduct. In particular, they contend that existing Commission policies adequately discourage responsible broadcasters from engaging in harmful hoaxes. CBS, for example, believes the Commission should not underestimate the effect of a letter of admonition, which may adversely affect a licensee's chances for renewal.⁶ In addition, Haley, NAB and NBC point out that hoax perpetrators may be subject to criminal and civil penalties, which effectively discourage and punish irresponsible broadcast pranks.⁷ Audience reaction to such pranks is yet another deterrent.⁸ According to NBC, a broadcast station's credibility with the public is certain to be hurt by such conduct, which could translate into the licensee losing significant audience share.⁹

7. The commenters also question whether such a rule can be crafted to avoid First Amendment infirmities. For example, these commenters are concerned that vague and overbroad definitions of "falsity," "public harm" and "foreseeability" could inhibit broadcasters' programming decisions. In this regard, CBS, NPR, and NBC are especially concerned that the rule might implicate legitimate fictional program material, and they therefore request that we exempt dramatizations from any final rule.¹⁰ CBS and NPR are more amenable to a narrower rule prohibiting only broadcast hoaxes involving false reports of crimes or catastrophes.¹¹ Haley believes a hoax rule based on the tort principles of harm and foreseeability is overly intrusive because it forces broadcasters to perform complex content evaluation before airing programming.¹² To avoid this problem, Haley suggests that the Commission adopt a specific policy against hoaxes, rather than a rule.¹³

DECISION

8. We will adopt a rule against hoaxes, but restrict that rule to incidents involving the false report of a crime or catastrophe.¹⁴ Accordingly, we are amending Part 73 of our Rules as set forth in Appendix A. Contrary to commenters' assertions that a rule is unnecessary because harmful hoaxes occur infrequently, we believe that this regulation is needed to contend with and deter serious hoaxes that pose a substantial threat to the public safety and welfare. A rule will give us greater enforcement flexibility to deal with harmful hoaxes by allowing us to subject licensees perpetrating these hoaxes to a range of monetary fines.¹⁵ In recent cases, we have been limited to only two types of penalties — admonition and license revocation or non-renewal.¹⁶ This rule will provide us with the option of imposing an intermediate sanction, one which has more deterrence value than admonition but which is less drastic than license revocation or non-renewal.¹⁷

9. In addition, we believe that the rule is sufficiently narrow to avoid any adverse impact on broadcast speech. In this regard, it is not our intent to restrict harmless pranks, or to deter broadcasts that might upset some listeners but do not pose a substantial threat to public health or safety. We instead focus on a narrow category of cases — those involving the false report of a crime or catastrophe — which present the greatest potential for substantial public harm. Moreover, within this narrow category of cases, we restrict the reach of the rule even further by holding licensees liable only when they know the report to be false and can foresee that the report will, and does in fact, result in substantial public harm.¹⁸ We believe that these careful restraints should sufficiently address our concerns without causing an undue chilling effect on broadcast speech. We also believe that the rule, as drawn, is fully consistent with First Amendment principles.

⁶ CBS Comments at 3-4.

⁷ Haley Comments at 2; NAB Comments at 1-2; NBC Reply Comments at 4.

⁸ NBC Reply Comments at 3-4.

⁹ CBS noted that the licensee had no direct knowledge of the hoax in at least two of the recent cases. According to CBS, in both cases the licensees, upon learning of the hoaxes, promptly took appropriate disciplinary measures and made on-air apologies for the incidents. CBS Comments at 2. See *Letter to KROQ-FM*, 6 FCC Rcd 7262 (1991); *Letter to KSHE-FM*, 6 FCC Rcd 2289 (1991).

¹⁰ CBS Comments at 5; NPR Comments at 4; NBC Reply Comments at 6.

¹¹ CBS Comments at 5; NPR Comments at 4.

¹² Haley Comments at 7.

¹³ Haley Comments at 11.

¹⁴ A "crimes and catastrophes" standard encompasses the kinds of harmful hoaxes that have raised the most public concern to date. For purposes of our rule, a "crime" is defined as any act or omission that makes the offender subject to criminal punishment by law. A "catastrophe" is defined as a disaster or imminent disaster involving a violent or sudden event affecting the public.

¹⁵ Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.*, gives the Commission authority to fine any broadcaster who willfully or repeatedly violates any rule, regulation or order. See 47 U.S.C. § 503(b). Congress recently increased the amount of these forfeiture fines.

Accordingly, a broadcaster can be fined up to \$25,000 for each violation, or each day of a continuing violation, except that the amount for a continuing violation cannot exceed \$250,000. See Omnibus Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2131 (effective Dec. 19, 1989).

¹⁶ We decline to follow Haley's approach and adopt a policy rather than a rule. A policy statement would not augment our enforcement powers in this area. We would still be limited to the penalties of admonition and license revocation or non-renewal, with no ability to assess forfeitures where appropriate.

¹⁷ We do not intend by our adoption of a specific rule addressing harmful hoaxes to displace our existing range of remedies for false programming that is not covered by this rule. We will continue to enforce other appropriate policies against licensees perpetrating harmful hoaxes (e.g., news staging policy). In this regard, we note that false programming may be actionable as a violation of a licensee's public interest obligations, even if it falls outside of the strict requirements of the new rule.

¹⁸ We do not believe that a hoax rule based on tort principles is overly intrusive, as Haley suggested. Indeed, tort concepts such as knowledge, foreseeability and harm are employed to ensure that the rule is fair, balanced and not overly restrictive of speech. In practice, we do not think that broadcasters will find application of these principles to be burdensome. See *infra*, para. 11.

10. In this latter regard, the Supreme Court has recognized that speech may be subject to government regulation if the regulation is narrowly tailored to further a compelling government interest and is the least restrictive means of furthering that interest. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). We believe that our rule would meet this exacting test. First, the rule is narrowly tailored to curtail only hoaxes involving the false report of a crime or catastrophe when the licensee knows the report is false and can foresee that the report will, and it does in fact, result in substantial public harm. Thus, the rule cannot be considered to be overly broad.¹⁹ Second, the government has a compelling interest in preventing substantial public harm, such as the substantial diversion of police and emergency resources from their duties. Finally, the Commission has chosen the least restrictive means by which it may effectively and precisely further its interest of preventing substantial public harm.

11. Moreover, contrary to the concerns expressed by the commenters, a bedrock principle of First Amendment doctrine holds that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."²⁰ Thus, for example, the Supreme Court has never imposed a constitutional bar to regulating speech that threatens to cause imminent lawless action.²¹ Similarly, the First Amendment does not preclude civil liability for broadcasts that create a foreseeable risk of personal injury. See *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 123 Cal. Rptr. 468 (1975).²² The broadcast speech in these cases is closely analogous to the hoax programming which we seek to preclude and the courts have not found a First Amendment bar to imposing liability in such cases. In each instance, the speech at issue must create a foreseeable risk of substantial harm and such harm must, in fact, result. We now examine each element of the rule in greater detail.

12. *Licensee Knowledge of Falsity of Crime or Catastrophe.* In order to incur liability, a licensee must have known that the broadcast concerning a crime or catastrophe was false. To this end, a licensee will be held accountable for the actions of its employees. Such accountability is a well established Commission principle.²³ More-

over, accountability encourages licensees to make employees aware of the hoax proscription and to police their actions. Some commenters argue that prompt and appropriate corrective action on the part of the licensee should be a factor in assessing liability. Although our general policy is not to consider such remedial actions in determining whether a rule violation has in fact occurred,²⁴ we do note that a licensee's overall conduct in connection with such a violation is always assessed in determining the appropriate sanction and could, in certain circumstances, result in a decision that no sanction is warranted.²⁵ Finally, we have taken steps to ensure that this element of our rule does not implicate legitimate dramatic or other fictional programming. Thus, as explained below in our discussion on foreseeability, we are instituting a presumption that will effectively remove fictional material accompanied by disclaimer from liability.

13. *Foreseeability of the Substantial Public Harm.* For a hoax to be actionable, the substantial public harm that results from the broadcast must be foreseeable. We believe that a foreseeability test is needed to avoid imposing unreasonable or chilling constraints on broadcast speech. For purposes of this rule, the public harm will be deemed foreseeable if the licensee could expect with a significant degree of certainty that substantial harm would occur. We will presume, and will accord broadcasters the right to presume, that the public will behave in a rational manner. We will not hold broadcasters accountable for unreasonable or unpredictable public conduct.

14. Also, we believe that the nature of the broadcast will be the single greatest determinant of foreseeability. Thus, the more inherently unbelievable the broadcast, the more certain broadcasters can be that substantial public harm is unforeseeable. By contrast, the timing of the broadcast will not necessarily determine foreseeability, although it may be one factor that is considered. Thus, for example, if substantial harm results from a very realistic broadcast hoax, we will not conclude that the harm was unforeseeable simply because the program aired on April Fool's Day. Other factors, such as the number of public

¹⁹ To buttress the specific scope of the rule, we presume that legitimate fictitious or dramatic programming, when accompanied by an appropriate disclaimer, does not create a risk of foreseeable harm. See *infra* para. 15. This tailoring of the rule is consistent with cases that have examined First Amendment implications of imposing civil liability on dramatic programming. Cf. *Zamora v. CBS*, 480 F. Supp. 199, 206 (S. D. Fla. 1979); *Olivia N. v. NBC*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981).

²⁰ *Schenck v. United States*, 249 U.S. 48, 57 (1919).

²¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See also *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976) (televised threats of political assassination punishable without violating First Amendment); *United States v. Irving*, 509 F.2d 1325 (5th Cir. 1975) (false threat of hijacking punishable without violating First Amendment). Cf. *Miller v. California*, 413 U.S. 15 (1973) (obscene materials); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (false or deceptive advertising).

²² In *Weirum*, the California Supreme Court upheld a jury verdict against a radio station, finding that a radio contest negligently caused listeners to drive recklessly, resulting in a motorist's death. The broadcasts actively and repeatedly encour-

aged listeners to speed to announced locations. Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner. *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 123 Cal. Rptr. 468 (1975). See also *Olivia N. v. NBC*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1981) (distinguishing *Weirum* as involving a broadcast that urged listeners to act in an inherently dangerous manner).

²³ See, e.g., *Empire Broadcasting Corp.*, 25 FCC 2d 68 (1970) (holding licensee accountable for actions of employees who violated technical and program log requirements).

²⁴ See, e.g., *Letter to WALE-AM*, 7 FCC Red 2345 (MMB 1992) (admonishing licensee for hoax despite prompt disciplinary and remedial action).

²⁵ The Commission recently set standards for assessing forfeitures and indicated that certain criteria (e.g., good faith or voluntary disclosure, history of overall compliance) may be taken into consideration and could result in a reduction in the amount of the fine imposed. See *Policy Statement on Standards for Assessing Forfeitures*, 6 FCC Red 4695, 4700 (1991), *recon. denied*, *Memorandum Opinion and Order in Standards for Assessing Forfeitures*, released June 4, 1992, FCC 92-212.

complaints received about the broadcast, may also be relevant to determine whether the station's action should have been foreseeable.

15. We are also mindful of commenters' concern that legitimate fictitious programming might be implicated by our rule, since all fiction is, by definition, "false" programming. Therefore, one situation in which we will presume that programming otherwise subject to this rule will pose no foreseeable harm is if the programming is accompanied by a disclaimer. To qualify for this presumption, disclaimers must clearly label the broadcast as a fiction and be presented in a way that is reasonable under the circumstances.²⁶

16. *Direct Causation of Substantial Public Harm.* Finally, the hoax must in fact directly cause substantial public harm. "Public harm" will include damage to the health or safety of the general public, diversion of law enforcement or other public health or safety authorities from their duties and damage to property. In all cases, the public harm must be substantial. The public harm must also begin immediately after the broadcast and result in actual damage.²⁷

17. Several commenters asked us to define public harm in more concrete terms. In particular, they were concerned with how we would measure the "substantiality" of the public harm. Rather than adopt a particular benchmark or definition by which we will assess "substantial" public harm, we have decided to leave this determination to the factual context of each case. In general, however, a broadcast concerning an imaginary danger that diverts local police and emergency resources from their duties, causes widespread public disorder or harms the health or safety of the general public, would most likely inflict substantial public harm. By contrast, a broadcast hoax that results in no more than a few questions to the police or complaints to the station would probably not impose substantial public harm. Clearly, we are concerned with public harm that is more than nominal in nature.

CONCLUSION

18. By this *Report and Order*, we adopt a rule specifically prohibiting licensees from knowingly engaging in hoaxes involving a false report of a crime or catastrophe when it is foreseeable that the report will, and does in fact, result in substantial public harm. These hoaxes endanger the public health, safety and welfare and are inconsistent with licensee public interest obligations. This hoax rule will give us greater regulatory flexibility by providing us with the sanction of forfeitures, which is less drastic than license revocation or non-renewal, but which has more deterrence value than admonition. The rule is also narrowly tailored so that it will not unduly inhibit broadcast speech.

²⁶ For example, indicia of reasonableness would include airing disclaimers at the beginning and end of a program and ensuring that no more than 15 minutes elapses between disclaimers during a program. We do not, of course, intend to impose a requirement that *all* fictional works must now include disclaimers. Rather, disclaimers would be necessary only in those programs that would otherwise meet all elements of the rule. For

ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 4 and 303 of the Communications Act of 1934, 47 U.S.C. Section 154 and 303, as amended, Part 73 of the Commissions Rules IS AMENDED as set forth below in Appendix A.

20. IT IS FURTHER ORDERED that the amendments to 47 C.F.R. Part 73 adopted in this *Report and Order* will be effective 30 days after publication in the Federal Register.

21. IT IS FURTHER ORDERED that this proceeding is terminated.

22. Further information on this proceeding may be obtained by contacting Kathleen O'Brien Ham, Mass Media Bureau at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Appendix A

Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

2. Section 73.1217, Broadcast hoaxes, is added to Part 73 to read as follows:

§ 73.1217 Broadcast hoaxes.

No licensee or permittee of any broadcast station shall broadcast false information concerning a crime or a catastrophe if (a) the licensee knows this information is false, (b) it is foreseeable that broadcast of the information will cause substantial public harm, and (c) broadcast of the information does in fact directly cause substantial public harm. Any programming accompanied by a disclaimer will be presumed not to pose foreseeable harm if the disclaimer clearly characterizes the program as a fiction and is presented in a way that is reasonable under the circumstances.

NOTE 1:

For purposes of this rule, "public harm" must begin immediately, and cause direct and actual damage to property or to the health or safety of the general public, or diversion of law enforcement or other public health and safety authorities from their duties. The public harm will

example, a fictional work that is not reasonably susceptible to being understood as a report of a crime or catastrophe would not need a disclaimer.

²⁷ By "immediate," we mean that the harm would have to occur contemporaneously or shortly after the broadcast. By "actual" damage, we mean that there must be injury in fact; the mere threat of harm is not sufficient.

be deemed foreseeable if the licensee could expect with a significant degree of certainty that public harm would occur. A "crime" is any act or omission that makes the offender subject to criminal punishment by law. A "catastrophe" is a disaster or imminent disaster involving violent or sudden event affecting the public.