Musical Expression and First Amendment Considerations

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MUSICAL EXPRESSION AND FIRST AMENDMENT CONSIDERATIONS

INTRODUCTION

The Federal Communications Commission's series of encounters with the problem of drug-oriented lyrics in popular music have produced three official Commission edicts, one court of appeals decision, a denial of certiorari, a certain amount of licensee jitteriness, and considerable confusion. The drama began on March 5, 1971, when the FCC issued a Public Notice entitled Licensee Responsibility to Review Records Before Their Broadcast.¹ This Notice was initially directed at requiring licensees to ascertain the contents of their programmed records and to be aware that lyrics that tended to glorify drug usage were not highly favored.² The Commission, sensing that it had confused the issue somewhat, moved to clarify matters by issuing a Memorandum Opinion and Order.³ In that Order the Commission cautioned licensees against interpreting the initial Notice as a ban on particular songs, but reiterated two items of importance: that the licensee is ultimately responsible for material that it broadcasts and that a broadcaster might jeopardize its license by failing to exercise licensee responsibility.⁴

In August, 1971, several irate parties sought still further clarification of the initial Public Notice, especially the various terms employed such as "licensee responsibility," "promote or glorify," etc. The August Memorandum Opinion and Order⁵ dealt with these requests in relatively short order. The Commission thought the matter required no further comment, and also refused to consider the merits of a statement of station


². This theme, and corollary issue is more fully developed later in this comment. Suffice it to say at this point, however, that the effect the notice had upon the broadcast industry was considerable. Compare BROADCASTING, Mar. 8, 1971, at 10 (a meekly worded news report) with Coast to Coast Flap Over Drug Lyrics, BROADCASTING, Mar. 22, 1971, at 73 (a full-blown news story, complete with commentary). Reaction time: 14 days.


⁴. Id. at 379, 21 P & F RADIO REG. 2d at 1702.

⁵. 31 F.C.C.2d 385, 22 P & F RADIO REG. 2d 1808 (1971).
policy proffered by The Yale Broadcasting Company. The Court of Appeals for the District of Columbia saw no difficulty with any of the orders and the Supreme Court denied certiorari. And so the matter would seem to rest, except for two unresolved related issues that call for further inquiry. First, the Notices raise the threshold question of whether lyrics and music are protected speech. Second, as observed by Commissioner Nicholas Johnson, the Commission's attempt to curtail the air play of certain items—some occasionally charged with political content—could chill certain protected expression. This Comment will review and analyze the administrative and judicial history of the Notices and suggest that lyrics and music be accorded protection under the first amendment.

The Notices

The problem was initially presented by the Commission as a reflection of complaints it had received.

A number of complaints received by the Commission concerning the lyrics of records played on broadcasting stations relate to a subject of current and pressing concern: the use of language tending to promote or glorify the use of illegal drugs such as marijuana, LSD, “speed”, etc.

The context in which this First Notice was issued, and the backdrop which gives meaning to the Commission's repeated conceptions of what the broadcaster's programming duties are, was one of general licensee responsibility. The 1960 Network Programming Inquiry established the basic duty:

Broadcasting licensees must assume responsibility for all material which is

6. This item proved to be less troublesome to the FCC than the parties who proffered it—Yale Broadcasting Company. They pursued the matter through the court of appeals and as far through the Supreme Court as seven justices would allow. See discussion in text accompanying note 39 infra.


10. The fact that these fears were ignored is not altogether surprising, owing to Commissioner Johnson's low level of credibility with his fellow commissioners.

11. First Notice, 28 F.C.C.2d 409, 21 P & F RADIO REG. 2d 1576 (1971). It is interesting to note that after the dust settled, the industry had reacted so completely that at least one commentator was moved to observe, perhaps incorrectly, that the issue had seemed to have died down. Rather, the success of the Notice, if translated into widespread compliance, created an issue of crucial importance.

The drug-lyrics issue seems to have abated. The Commission has received few complaints about such material in recent months, and the commission has never moved against a broadcaster as a result of his airing drug-related lyrics. Supreme Court Backs FCC on Drug Lyrics, BROADCASTING, Oct. 22, 1973, at 41.

broadcast through their facilities. This includes all programs and advertising material which they present to the public . . . . This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast matter for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community.\(^\text{13}\)

It was in this context that the First Notice appeared, at least that was the way in which Commissioner H. Rex Lee perceived it.\(^\text{14}\) However, it is somewhat inaccurate to say that the 1971 Notice merely rearticulated the 1960 policy statement. The 1960 statement dealt with a broad topic, the advisability of suggesting qualitative programming standards and the problem of ascertaining audience needs in terms of the public interest standard. The single paragraph reference to local responsibility for programming was directed at issues quite different from those encountered in the drug-lyric context. Rather, these remarks were intended to remind licensees that their operation in the public interest must necessarily take into account some assessment of local needs and interests.\(^\text{15}\) The intent of this statement was clearly connected to the overall context of the 1960 Statement—\textit{i.e.}, ascertainment of local needs—and nothing more.\(^\text{16}\) Such statements of administrative policy may well have interstices, but none that courts should feel compelled to fill.\(^\text{17}\)

The First Notice alerted licensees to three specific programming duties in relation to drug-oriented lyrics: (1) that licensees should make "reasonable efforts" to determine the meaning of music containing drug-

\(^\text{13}\) \textit{Id.} at 7295. The elusive "public interest convenience and necessity" is a magic phrase that crops up regularly throughout the Communications Act. 47 U.S.C. §§ 151, \textit{et seq.} (1970). No license or permit is granted or renewed without the Commission's satisfaction that the grant or renewal will serve this standard.

\(^\text{14}\) Indeed, characterizing the First Notice as nothing more than a reminder—a refinement and articulation of pre-existing duties—would have eliminated certain difficulties. First Notice, 28 F.C.C.2d at 410, 21 \textit{P & F RADIO REG.} 2d at 1577. The court of appeals concurred in this characterization. \textit{Yale Broadcasting Co. v. FCC}, 478 F.2d 594, 595 (D.C. Cir. 1973).

\(^\text{15}\) The quoted excerpt from the 1960 Policy Statement does not tell the whole story. It continues:

\[\text{The broadcaster is obligated to make a positive, diligent and continuing effort in good faith, to determine the tastes, needs and desires of the public in his community and to provide programming to meet those needs and interests. This again, is a duty personal to the licensee and may not be avoided by delegation of the responsibility to others.}\]


\(^\text{17}\) Statutes invariably have gaps in meaning that courts are compelled to fill. \textit{See H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION LAW} 121-30 (tent. ed. 1958).
oriented lyrics before broadcasting them;\(^1\) (2) that this knowledge must be in the hands of some management executive of the licensee; (3) and that this same executive—or in any event, some responsible official—should then make the decision as to whether or not the particular selection should be played.

Why was this initial Notice issued? The first paragraph of the Notice provides some guidance in its reference to the Commission's receipt of "[a] number of complaints . . ." about drug-oriented music.\(^1\) The fact that the Defense Department had made available to the Commission a list of twenty-two songs that it thought suspect may have had something to do with the Commission's action.\(^2\) In any event, and whatever the motivating force behind the Notice, it was interpreted as a no-nonsense edict: stop drug-lyrics.\(^3\) Commissioner Robert E. Lee left no room for doubt:

I sincerely hope that the action of the Commission today in releasing a "Public Notice" with respect to Licensee Responsibility to Review Records Before Their Broadcast will discourage, if not eliminate the broadcasting of records which tend to promote and/or glorify the use of illegal drugs.

Obviously, if such records promote the use of illegal drugs, the licensee will exercise appropriate judgment in determining whether the broadcasting of such records is in the public interest.\(^4\)

And Commissioner Johnson, in dissent, sounded his own alarm:

Under the guise of assuring that licensees know what lyrics are being aired on their stations, the FCC today gives a loud and clear message: get those

\(^{18}\) It is curious to note that the Commission considered song lyrics to be as readily decipherable as foreign language programming. First Notice, 28 F.C.C.2d 409 n.1, 21 P & F RADIO REG. 2d 1576 n.1 (1971).

\(^{19}\) 28 F.C.C.2d 409, 21 P & F RADIO REG. 2d 1576 (1971).

\(^{20}\) See New York Times, Mar. 28, 1971, at 41, col. 1; Ups and Downs of Drug Lyrics, BROADCASTING, Apr. 19, 1971, at 28. The list is an intriguing one, containing songs with frank drug-oriented overtones, songs with strong anti-drug messages, songs of total innocence and at least one song that was included for no apparent reason other than the fact that its title happens to contain, in well-shrouded form, the acronym for a well-known hallucinogen. The list: "I Get By With A Little Help From My Friends," "Cocaine Blues," "White Rabbit," "Acid Queen," "The Virgin Fugs," "The New Amphetamine Shriek," "The Alphabet Song," "I Like Marijuana," "Hashing," "Walking in Space," "Heroin," "Fire Poem," "Don't Step on the Grass," "Velvet Cave," "Cloud Nine," "The Pusher," "Tambourine Man," "Puff the Magic Dragon," "Eight Miles High," "Acapulco Gold," "Along Comes Mary," "Happiness is a Warm Gun," "Mellow Yellow," "Lucy in the Sky With Diamonds." It is also interesting to note that Commissioner Johnson thought that the Commission's concern with drug-lyrics was unnecessarily confining—that the Notice might also have dealt with other drug problems—alcohol abuses and over the counter drugs. See 28 F.C.C.2d at 412, 21 P & F RADIO REG. 2d at 1580-82.

\(^{21}\) The industry's reaction was typically jittery, and is discussed at p. 147 infra.

\(^{22}\) 28 F.C.C.2d at 410, 21 P & F RADIO REG. 2d at 1577.
“drug lyrics” off the air (and no telling what other subject matter the Commission majority may find offensive), or you may have trouble at license renewal time.23

The ambiguous First Notice sent the industry into a small panic. To have said that the Notice did not effect a ban on certain music may have been true but in light of the Damoclean sword of license renewal, extreme reactions were no surprise. If some licensees were confused they did not let on, but simply swung the ax, as appropriate.24 Many in broadcasting rebelled at the very thought of curtailing air-play of certain songs, thinking it an inappropriate method for dealing with an acknowledged problem.25 Finally, the only consensus was confusion:

The consensus among progressive rock stations . . . was that the Commission's Notice is vague as to what it wants of its licensees, and does not offer specific guidelines and strictures.26

Anxious to end the confusion, the Commission issued a Second Notice,27 which it styled as its “definitive statement in this respect.”28 The Commission made three general observations that it hoped would have a settling effect: (1) that the First Notice should not have been construed to be a direct prohibition of any particular type of record, but rather that the Commission’s only direct imposition of will would occur in the renewal context;29 (2) that there would be no active reprisals;
and (3) that there nevertheless did exist an affirmative responsibility on the part of licensees to (a) know a record's contents, (b) judge the record's suitability for broadcast, and (c) be prepared to sink or swim by these decisions at renewal time. With these reassurances, the Commission next moved to suggest specific behaviors. It suggested that no pre-screening would be required, but that a licensee might discharge its duty to give "reasonable and good faith attention to the problem" by (1) pre-screening selections, (2) monitoring selections as they are played, and (3) responding to public complaints regarding certain selections.

And so, it seemed, the confusion came to an end. Commissioner H. Rex Lee thought the matter well disposed of, and construed the "action to mean the Commission is merely reaffirming its 1960 Program Policy Statement covering the general area of licensee responsibility." In this Second Notice, the familiar hobgoblin of "clear and present danger" made an appearance. The context in which it appeared, curiously, was one of reassurance—stating that no attempt to review or condemn the judgment of any licensee could legally occur unless a particular item of programming content constituted a "clear and present danger." The reference was unelaborated, with the Commission making no indication as to what would and would not pass the clear and present danger test. The lack of elaboration was especially ironic in a notice issued to clarify matters.

Yet a third—and in many ways the most important—Commission ac-

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The Administration and the FCC know that. Having been told—very loudly and clearly—that powerful people in Washington are interested in their records' song lyrics, all too many will go out of their way to select lyrics designed to please. At that point the Government has succeeded in its purpose; it is then safe to issue all the apologies and rescinding statements necessary to silence the critics.


30. 31 F.C.C.2d at 380, 21 P & F RADIO REG. 2d at 1703.

31. Id. at 382, 21 P & F RADIO REG. 2d at 1705.


tion took place on August 4, 1971. Several parties petitioned for reconsideration of the Second Notice—the clarification. Not surprisingly, especially since the Commission had styled its Second Notice as its “definitive statement”—the Commission refused to modify any of the observations made in the Second Notice. The Commission took to scolding the petitioners, pointing out that all it had wanted to do was to enunciate the familiar concept of licensee responsibility. Seeing all of the issues presented to it as obvious and capable of easy understanding and application, the Commission demurred. Swift along, though, was an added complication—the statement of Programming Policy issued by the Yale Broadcasting Company and submitted to the Commission for its consideration. The Commission refused to consider it for reasons of administrative economy and because it saw a certain danger in making any definitive statements on issues that had not yet been fully developed. The Yale statement presented a series of observations, most of which, however, seemed to be very pointed in nature and not at all general. Of eleven paragraphs, only two dealt with specific licensee behaviors—selective monitoring of records, and announcer instruction to notify management of traditionally offensive material in records, i.e., obscenity, lotteries, etc.

Yale Broadcasting Company v. FCC

The scene next shifted to the Court of Appeals for the District of Columbia, where the parties to the Third Notice mounted a substantive attack on the first two Notices. The petitioners voiced three major objections: (1) that the Commission's action imposed an unconstitutional burden on a broadcaster's freedom of speech; (2) that the notices imposed new duties upon broadcasters without the benefit of a rule-


36. In so doing, the Commission noted that there was no pre-screening requirement. Id. at 386 n.1, 22 P & F Radio Reg. 2d at 1809 n.1.

37. "We are loath to embark upon individual rulings for individual licensees concerning their proposed handling of specific types of programming upon the basis of general policy statements not fleshed out by the licensee's actual operation." Id. at 386, 22 P & F Radio Reg. 2d at 1809.

38. The Policy Statement is appended to Commissioner Johnson's dissent. Id. at 388, 22 P & F Radio Reg. 2d at 1811.

making proceeding; and that the notices involved vague language and that the FCC abused its discretion by refusing clarification.

The Burdens

The petitioners claimed that pre-screening imposed a great burden upon licensees. The petitioners claimed this burden was unconstitutional in light of Smith v. California and the court rejected their contention noting that Smith involved circumstances and burdens easily distinguishable from those attendant to broadcast licensees. The court pointed out that a broadcast licensee's pre-screening burden could in no way be compared to a bookseller's burden of inspecting each of many thousand volumes on his shelves and that, as the Commission indicated, pre-screening was not the only way to acquire the requisite knowledge.

The court's short disposition of the burden analogy does not adequately dispose of the petitioners' claim. The court's rejection of the analogy ignores the qualitative onerousness of the requirement above and beyond the comparison of the relative physical burdens.

There was, through all, a reaffirmation of the licensee's duty to know what it broadcasts. The Commission's requirements, the court said, were just one way of ensuring that licensees have this knowledge.

No New Duties

The court chose to accept the Commission's characterization of the Notices as merely rearticulating pre-existing duties. Had the Commis-

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40. The industry's conception of these duties was that licensees were required to do the following: (1) Listen to each record; (2) decipher its lyrics; (3) understand its lyrics; (4) decide if a particular song pertains to drug usage; (5) determine if playing the song will serve the public interest. FCC Holds Fast: Stations Must Rule on Drug Lyrics, BROADCASTING, Oct. 30, 1972, at 39.


42. The case involved a Los Angeles obscenity ordinance making it illegal to possess obscene matter in a bookstore. Liability was imposed without any requirement of knowledge by the bookseller of the contents of the materials. The conviction of the bookseller under the ordinance was overturned on the ground that holding him strictly liable for knowing the contents of his wares, and the complementary requirement that he ascertain the contents of what he sells, would chill the distribution of protected as well as unprotected works.

43. The "food" cases make interesting reading, but poor analogies. See, e.g., United States v. Balint, 258 U.S. 250 (1922). In this discussion, the Court in Smith briefly brought up the notion of self-censorship, but decided it would be inappropriate: "the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller." Smith v. California, 361 U.S. 147, 152-53 (1959). Self-censorship can have damaging effects on broadcasting as well.
sion imposed new duties on licensees through the Notices, its action would have been subjected to the debate and scrutiny of a rulemaking proceeding. Though the court never said so in so many words, it must necessarily have characterized the Commission’s action as pursuant to a “general statement of policy,” and therefore exempt from rulemaking procedures under the Administrative Procedure Act. The distinction between such exempt statements of policy and rulemaking is generally clear, but where, as in this case, the industry to whom the statement is meant to apply so consistently construed the Commission’s statement as though they were strict prescriptions of required activity, within the meaning of the APA, perhaps the Commission had achieved all of the benefits of rulemaking with none of the burdens. Since, as Commissioner Johnson recognized, broadcasters as a group are quick to fall into line at the first sign of even a lifted eyebrow, and since the Commission must have been aware of the industry’s skittishness, the Notices could have been considered ipso facto rulemaking. The only difficulty with this construction is the obvious one—any time the Commission so much as says “boo,” a rulemaking proceeding would have to be initiated. The relative benefits and burdens of such an approach are, at best, unclear.

The court went on to point to the 1960 Network Programming Inquiry as indicative of the general overall standard of licensee responsibility, and to say that periodic prods to deficient licensees are proper.

How Vague Is Vague?

The petitioners complained that the Commission’s Order was unconstitutionally vague, and that, given this defect, the Commission abused its discretion by failing to clarify it. The court characterized this two-pronged argument as the weakest of all the petitioners’ arguments. While reality may have had no bearing upon the grace of petitioners’ arguments, the fact was that the industry—that group to which the Notices were to have had meaning—was confused as to what was being required of it. While broadcasters may be a nervous lot, they are probably also individuals of common intelligence, capable of understanding any set of behavioral guidelines. Therefore, the effect the Notices had

47. See discussion at note 13 supra.
48. See note 26 supra.
The court was not moved. Conceding that the void-for-vagueness doctrine applied "with full force to the broadcast industry," the court professed admiration for the Commission's efforts in explaining the "nature and degree of knowledge expected of broadcasters . . . . [T]he court had no difficulty understanding what the Commission expected of its licensees." This admiration, unexpected as it may have been, was understandable once the conceptual roots for the court's conclusion had been adequately unearthed. If, as the court accepted it, the 1960 Policy Statement could be construed to serve as a basis for the Notices, the logical justification became the same as that used by the Commission. From that point—(and at the same time ignoring the quasi-rulemaking features of the Notices and the extreme reaction of the industry)—the process of understanding what the Commission meant in its carefully chosen words might have been easy enough—had it occurred in a vacuum. Understanding the words said may have been (and may be) one thing, but assessing the effects of these words upon the industry is quite another.

The second prong of petitioners' vagueness claim cited the Commission for abusing its discretion in failing to make some declaration on the propriety of Yale Broadcasting's statement. Here the court stood on more solid ground. The Yale Broadcasting statement had little in it worthy of comment. What might have been worthy of comment was what remained unsaid—that Yale Broadcasting had no intention of toeing the drug-lyric line. It would have been difficult, without a more concrete set of facts, to make a definitive declaration as to the state of Yale Broadcasting's compliance.

A Dissent

Chief Judge Bazelon's statement in favor of granting a rehearing en
banc sua spoute\textsuperscript{54} developed a series of interrelated observations. It is given that the courts—and especially the Circuit Court for the District of Columbia in relation to broadcast regulation and the “public interest” standard—have a great responsibility to protect first amendment interests. The proper discharge of that responsibility, Bazelon argued, should have included an effort by the court to assess “the impact of these directives, not merely their language.”\textsuperscript{55} Such an assessment, he continued, would have been all the more appropriate in light of the public interest standard, and in a situation that presented self-censorship problems.\textsuperscript{56}

In many ways, a regulation that calls for or results in self-censorship, while appearing to be relatively less harmful than officially imposed sanctions that contain specific proscriptions, is possible more insidious since it can accomplish its purpose indirectly:

A regulation of communication may run afoul of the constitution not because it is aimed directly at the speech but because in operation it may trigger a set of behavioral consequences which amount in effect to people censoring themselves in order to avoid trouble with the law. The idea has appeared in several cases, and, while the court has not yet addressed a major opinion to it, it has all the earmarks of a seminal concept.\textsuperscript{57}

The harm that self-censorship inflicts upon speech of any kind, but most especially broadcasting, is the introduction of timidity. By seeking out the inoffensive, the neutral, or the non-controversial, a broadcaster

\textsuperscript{55} 478 F.2d at 605.
\textsuperscript{56} See In re Complaint of Anti-Defamation League of B'nai B'rith Against Station KTYM, Inglewood, Calif., 6 F.C.C.2d 385, 398 (1967) (Commissioner Loevinger, concurring).

Talk of “responsibility” of a broadcaster in this connection is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments. Since the imposition of the duty of such “responsibility” involves Commission compulsion to perform the function of selection and exclusion and Commission supervision of the manner in which that function is performed, the Commission still retains the ultimate power to determine what is and what is not permitted on the air (emphasis added).

\textsuperscript{57} Kalven, “Uninhibited, Robust and Wide-Open”—A Note on Free Speech and the Warren Court, 67 Mich. L. Rev. 289, 297 (1968). The cases Professor Kalven referred to are: Time, Inc., v. Hill, 385 U.S. 374 (1962); Smith v. California, 361 U.S. 147 (1959) (discussed in text accompanying note 43 supra), and Speiser v. Randall, 357 U.S. 513 (1958), all three of which were, incidentally, authored by Justice Brennan.
may be assured of the security of his license, but may, at the same time, deny to the public material that may have lasting importance. 58

Judge Bazelon's two concluding queries present important issues which will be more fully developed later in this comment: do songs deserve first amendment protection and is there a demonstrable connection between drug-oriented lyrics and illegal activities? 59

**Towards Protection of Music**

Far from being a tempest in an administrative teapot, the Notices present important issues—among them a first amendment threat that is difficult to ignore. The temptation to nod sleepily at yet another example of childish Commission activity—to watch amusedly at an attempt to tie another rag to the kite called "the public interest convenience and

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58. As an example, the Supreme Court has recognized that a broadcaster is not compelled to accept paid editorial advertisements. Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). The Supreme Court's affirmance of the broadcasters' right to refuse, while perhaps fair in an ultimate sense, ignores the trustee role that the broadcaster occupies. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). If all broadcast outlets refuse to enter the fray, how is this denial of a voice to be characterized? It no doubt matters little to the purveyor of the editorial message that licensees fear fairness repercussions and thus refuse to sell time to those with a highly charged political message. The result though, is clear: timidity, with Court blessing may prevent a message from being heard even without any assessment of possible harms. See also Hutchinson & Clark, Self-Censorship in Broadcasting—The Cowardly Lions, 18 N.Y.L.F. 1 (1972); Comment, Right of Access to Broadcasting: The Supreme Court Takes a Dim View, 62 GEO. L.J. 355 (1973). For discussion of self-censorship in the film industry see Ayer, Bate & Herman, Self-Censorship in the Movie-Industry: An Historical Perspective on Law and Social Change, 1970 Wis. L. Rev. 791.

59. One last gasp was issued by Justice Douglas in his dissent to the Supreme Court's denial of certiorari. He touched on the problem of adverse psychological impact caused by the initial orders, specifically citing Commissioner Dean Burch's attitude toward a non-complying licensee: "I know what I would do, I would probably vote to take the license away." 414 U.S. 914 (1973), citing Hearings on the Effect of the Promotion and Advertising of Over-the-Counter Drugs on Competition, Small Business, and Health and Welfare of the Public, before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business, 92d Cong., 1st Sess. pt. 2, at 734-36 (1971).
necessity"—must be overcome. The context in which this threat should be analyzed is a familiar one—government regulation of broadcast speech; specifically, regulation of program content.

Program Content

The traditional reach of program content regulation\(^60\) has extended to control of obscenity,\(^61\) lotteries,\(^62\) broadcast of gambling information,\(^63\) fraudulent contests,\(^64\) and fraudulent gift shows.\(^65\)

The context in which the Commission exercises its control, such as it is, can vary. Most likely, it will show up in a renewal proceeding\(^66\) but could just as easily—much to the horror of an offending licensee—show up in a revocation proceeding,\(^67\) in a request for a cease and desist order,\(^68\) in a suspension proceeding,\(^69\) or pursuant to a forfeiture assessment.\(^70\) The Commission's concern is that licensees present broad programming in the public interest,\(^71\) but at the same time, the Commission

60. See Note, Regulation of Program Content by the FCC, 77 Harv. L. Rev. 701 (1964).
64. KWK, Inc., 34 F.C.C. 1039, aff'd, KWK Radio, Inc. v. FCC, 337 F.2d 540 (D.C. Cir.), cert. denied, 380 U.S. 910 (1964). This case is especially relevant due to one of its inherent issues—that the fact that program material is presented without prior station-manager approval will not absolve the licensee of responsibility.
71. That standard demanding representation in some manner of most, but not necessarily all, of the following programming areas: local self expression, development of local talent, children's programming, religious programming, educational programming, public affairs programming, editorialization by licensees, political broadcasts, agricultural programming, news, weather and markets, sports, minority programming and (ironically, last in order, but first in the hearts of broadcasters) entertainment. Network Programming Policy, 25 Fed. Reg. 7291, 7295 (1960).
is reluctant to examine programming content under the microscope, believing "that attempted detailed comparison of individual programs would necessarily have the ultimate effect of substituting the Commission's administrative for management's operating judgment."\(^{72}\)

Aside from its concern over relatively simple matters of program content, the Commission's involvement in questions of "equal time" and the "fairness doctrine" has carried it into areas of great public concern. In requiring that licensees provide candidates for elective office with equal opportunities to purchase time\(^{73}\) and mandating that issues charged with public importance be given balanced treatment, the Commission has, knowingly or otherwise, created considerable impact on a licensee's programming choices. The fact that Commission regulation has had such an effect on broadcast speech must necessarily lead to the conclusion that broadcasting must occupy a unique first amendment position.

**Fairness**

It is "idle to point an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish,"\(^{74}\) no doubt due to the physical peculiarities attendant to the broadcast phenomenon.\(^{75}\) Different media of expression are accorded different first amendment treatment, and the traditional distinctions are well known.\(^{76}\) In the case of broadcasting, at least three reasons for

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\(^{72}\) In re Mike M. Vukelich, 22 F.C.C. 891, 914 (1957). It is helpful to point out that the Commission has managed to suspend this reluctance—with specific reference to songs—at least once. Tampa Times Co., 19 F.C.C. 257, 10 P & F Radio Reg. (1955).

\(^{73}\) 47 U.S.C.A. § 315(b) (Supp. 1973). Contrary to the popular misconception, the so-called "equal time" provision does no more than assure a political competitor the opportunity to purchase time at the lowest comparable per-unit charge for the same class and amount of time as was purchased by any other competitor. The provision is by no means a "give-away." See Wick, The Federal Election Campaign Act of 1971 and Political Broadcast Reform, 22 DePaul L. Rev. 582 (1973). For an interesting treatment of the equal time provision and the issue of censorship, see Farmer's Union v. WDAY, 360 U.S. 525 (1959).


distinct first amendment treatment have been suggested:77

(1) Impact. Great reliance in terms of decision-making and news-event exposure is placed on broadcast media. The great role that these media play in the lives of their audience, therefore, justifies more careful regulation.78

(2) Privilege. A second rationale is rooted in the observation that broadcast licenses are granted as a matter of privilege, not conferred as a matter of right.79

(3) Scarcity. The third rationale, the basis for much of the reasoning behind such concepts as the fairness doctrine, exists because the natural resource of the electromagnetic spectrum can only accommodate a limited number of broadcasters.80

It was the fact that the broadcast spectrum was limited that urged the first regulation of radio.81 Recognizing that access to the airwaves would be limited by the laws of physics, the Supreme Court itself recognized that each licensee has a duty to present an outlet for local views,82 as a logical extension of the licensees' fairness duties.


78. Id. at 766. While it is admitted that the impact theory smacks a good deal of the "this is bad for you—don't listen—and you, shut up" school of paternalistic prior restraint, it is not impossible to conceive of facts where imposed silence, for example, might not be improper. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968); Ginzburg v. United States, 383 U.S. 463 (1966).

79. The right-privilege distinction has generated much commentary for a relationship that appears to be so simple. See Hohfeld, Fundamental Legal Conceptions as Applied to Judicial Reasoning, 23 YALE L.J. 16 (1913) and 26 YALE L.J. 710 (1917). As Hohfeld envisioned it, a power (privilege) was exercised in relation to some manner of liability, which exposed one who exercised the power to either pleasant or unpleasant consequences. There is no question that the broadcaster's day-to-day activities fit under this description, more than they do under the concept of the "right," which has as its jural correlative the duty—that is, the performance by someone else of some affirmative act directly related to the protected right. The only right that the broadcaster would seem to have in this context is the right to first amendment protection when his activities warrant such protection by the courts. For a more detailed discussion of Hohfeld's "eight fundamental legal conceptions," see H. HART & A. SACKS, THE LEGAL PROCESS; BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 141-55 (tent. ed. 1958).


82. "There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct
The fairness doctrine is a two-fold concept with a turbulent history. The first prong of the requirement, that licensees provide balanced discussion of controversial issues, is one of long standing and has been subject to repeated Commission consideration. The fairness doctrine makes no specific demands upon licensees other than to require them to present balanced coverage. The only specific kinds of programming requirements occur as incident to a particular topic of public importance. For example, declaration of smoking as an issue of public importance required that licensees provide time for anti-smoking messages. The requirement is no more specific than that. Identifying an issue of public importance, though, is not so simple. For example, once the ban on broadcast cigarette advertising became effective, the question of cigarette smoking ceased to be controversial.

The second prong requires licensees actively to seek out and present controversial issues in a fair manner. Apparently this affirmative requirement—which here merges with the balance requirement—fades for certain issues, such as the Viet-Nam War. The Supreme Court has held that a licensee is under no compulsion to accept paid advertisements directed against American involvement in Southeast Asia.

himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969).


84. At one time, overall balance was the requirement:
[The Fairness] responsibility usually is of the generic kind and thus, in the absence of unusual circumstances, is not exercised with regard to particular situations but rather in terms of operating policies of stations as viewed over a reasonable period of time. This, in the past, has meant review of filed complaints, in connection with the applications made each three year period for renewal of station licenses. Network Programming Inquiry, 25 Fed. Reg. 7291, 7294 (1960). More recently, the standard has been applied on an issue-by-issue basis. See Goldberg, A Proposal to Deregulate Broadcast Programming, 42 Geo. Wash. L. Rev. 73, 88 (1973). Most recently, proposed legislation would slide back toward the overall balance standard. See H.R. 3854, 93d Cong., 1st Sess. (1973).


86. See Larus & Brother Co. v. FCC, 447 F.2d 876 (4th Cir. 1971).


The so-called commercial speech doctrine is a body of case law which permits regulation of advertising. The leading case under this doctrine is Valentine v. Chrestensen, 316 U.S. 52 (1942), which held that the traditional first amendment restrictions on government regulation of speech activities did not apply to purely
MUSICAL EXPRESSION

Music As Speech

Once the traditional regulatory context is understood, and more specifically, once the extent to which the Commission can impinge upon first amendment rights is understood, a consideration of music's first amendment role takes on more meaning. If music is not protectible, then the discussion of the propriety of the Commission's Notices can end here. Otherwise, the Commission would have to show, as Chief Judge Bazelon suggested\(^9\) that the regulation of drug lyrics bears some reasonable relationship to the eradication of the specific evil—drug abuse.

Characterizing music as expression capable of first amendment protection is a task of deceptively great difficulty. While the lyric portion of a song is clearly speech within any conception of the word, some have argued that the combination of lyric and music together constitute something largely different from either component standing alone and, therefore, not susceptible of first amendment protection. These arguments, however, do not represent the exclusive view of aesthetiticians.\(^9\) Discussing music in its generic form for the present,\(^9\) the greatest problems are encountered in conceiving of music as expression. It is submitted that since music serves a considerable social function and at the same time represents an important mode of artistic expression—added to the fact that lyrics, to the extent that they can be communicated in a broadcast context, deserve traditional first amendment protection—it should be characterized as protectible under the first amendment.

As a traditional art form, music provides—as all art does—a social ordering function:

> Art orders social experience through creating forms which all, artist and public alike, use to communicate so that they can act together.\(^9\)

Artistic expression provides a context for the confrontation of ideas; conflict engenders dialogue; dialogue results in communication; communication leads to understanding.\(^9\)

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\(^9\) As a traditional art form, music provides—as all art does—a social ordering function: "Art orders social experience through creating forms which all, artist and public alike, use to communicate so that they can act together." Artistic expression provides a context for the confrontation of ideas; conflict engenders dialogue; dialogue results in communication; communication leads to understanding.

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89. 478 F.2d at 605.

90. See Comment, Drug Songs and the Federal Communications Commission, 5 U. Mich. J.L. Reform 334, 342 (1972). This point is more fully developed later in this Comment.

91. It is conceded that "music" subsumes within it more than lyrics alone and music alone. The combination is more than either component alone; certainly not less.


93. The process can be described as part of the "drama of social hierarchy."
The function of music in society is, therefore, of great importance, but the question remains as to whether its acknowledged importance lifts it into the glow of first amendment protection.

The traditional ambit of first amendment protection is familiar. Protection extends to books,\textsuperscript{94} public speeches,\textsuperscript{95} solicitation,\textsuperscript{96} labor organizing activities,\textsuperscript{97} broadcasting,\textsuperscript{98} films,\textsuperscript{99} use of sound trucks,\textsuperscript{100} picketing,\textsuperscript{101} parades and demonstrations,\textsuperscript{102} symbolic protests,\textsuperscript{103} and litigation.\textsuperscript{104} Each incorporates some element of communication, or represents some activity, both of which are protected, and both of which somehow represent "speech" of one form or another.

But what is speech? Does it merely require the transfer of meaning through the use of symbols? Or does it require something more—some level of information—before it can be called "speech"? One commentator is willing to make a threshold observation that would support characterizing music as "speech":

Speech, in the limited oral sense, is a species of communication. The other processes . . .—writing, miming, filming—are other species. Communication, in a broad sense, is the transfer of messages. By messages I mean \textit{any patterned output} no matter how primitive the patterning, from simple exclamatory directions to highly complex ideational structures.\textsuperscript{105}

It is difficult to imagine a mode of communication that is more elegantly patterned and ordered than music.\textsuperscript{108}
Analysis of songs suggests a bifurcated approach—words and music must be analyzed, as a whole, or individually. If words and music merge—as it is suggested they do—with the words taking on secondary importance and being obscured by the tones of music, it is grandly inconsistent to be concerned about suppressing verbal messages that, in essence, do not exist. At the same time, if the words survive their marriage with music, they then have an existence of their own—as words—and can no more be suppressed than a poem or short story.107

Aestheticians that rebel against acceptance of an efficient fusion of music and language108 encounter their primary difficulty in assessing the ability of a listener to synthesize both musical and verbal expression simultaneously. They, therefore, think that understanding and appreciation of one mode must necessarily vary in inverse proportion to the attention paid to the other. This observation ignores the opportunity for repeated listening and consequent complementary understanding. Hence, it is possible to hear a selection twice—one for words, and once for music. While aesthetic appreciation of the whole may suffer, understanding of the parts—specifically the verbal part—may be enhanced.

While verbal expression has the acknowledged capacity to communicate and, where appropriate, is accorded first amendment protection, according the same protection to pure music would seem to encounter some difficulty, but none that is insurmountable. A work of pure music can express and—more importantly—convey feeling and emotion. Beginning with the conception in the mind of the composer,109 the idea can be expressed as rhythm, melody, harmony and all of the other intricate devices of musical expression.110 Indeed, it has been suggested that

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107. The concern about paying attention to the words is a matter of importance if only because understandable words would seem to be essential in order for a song to glorify or promote drug use. At least one commentator has perceived a song's ability to advocate an idea as varying in inverse proportion to its artistic merit.

Songs used in commercials on radio and television are typical. But they succeed only when their artistic merit is slight. When they achieve a moderate amount of artistic merit, then they cease to advocate anything at all, because they take on aesthetic, rather than semantic characteristics, and people begin to respond to them aesthetically, rather than semantically.


109. This phenomenon may be rooted in (1) a literary text—a mass, anthem, etc.; (2) a literary idea—operas, oratorios; (3) an ideal; or (4) an impulse. D. Cooke, The Language of Music 168 (1959).

110. The views of Edward Hanslick, who refused to accept the notion that any
just as words serve as symbols for concepts, music also serves to convey meaning and concepts that cannot be borne by words.

All the arts, after their fashion, serve the purpose of communication—essentially, the purpose of language. All, indeed, strive for and often reach the vividness of metaphor, the most vivid of linguistic devices for communication. Music, originating in the region of consciousness where the meaning of experience is felt, has an almost unique aptness for metaphoric utterance.

To say that any expression that lacks words cannot be protected merely because a handful of examples of it feature a clearly separable conduct component is to commit the sin of over-inclusion. The example of nonverbal conduct—the punch-in-the-nose, with its connotations, or even clear denotations of personal dislike is not equivalent to the Sinfonia Antartica merely because each achieves some level of expression in a nonverbal manner. While the former example may be rather casually excluded from first amendment protection, the latter is not so easily dismissed, if for no other reason, that it contains something—albeit difficult to quantify—worthy of protection. That a punch-in-the-nose may be delivered in a characteristic, attractive or even praiseworthy manner is undeniable. Nevertheless, its mission is singular and less artistic than the symphony. It is this quantum of artistic expression—something different from "symbolic speech"—that merits protection. In addition, if music—in either the fused or the singular sense—has the capacity to advocate ideas in any way, the first amendment protects it.

If songs and their constituent parts, lyrics and music, are protectible, then any regulation of what the broadcaster chooses to broadcast must not offend first amendment restrictions, specifically the "clear and pres-
ent danger” test. The standard demands a highly compelling logical relationship—that the evil will be removed by the suppression of the speech must necessarily follow. Nevertheless, those linking drug-lyrics with drug use express strong doubt as to the strength of the causal chain. The connection is conjectural. Without more compelling evidence that promotion or glorification of drug use in song lyrics results in more drug use, the Commission’s urgings—with the effect of rules—lack the logical force needed to be constitutionally permissible.

CONCLUSION

The drug problem nevertheless does persist. Its solution is certainly beyond the scope of this comment, but two observations are in order. First, drug abuse can be more fruitfully attacked by regulating those activities that are more directly related to it. There is no question that licensees must operate in the public interest. Likewise, there is no question that advocacy of illegal drug usage (or perhaps even legal drug usage that may be just as harmful) does not comport with this duty. But it is quite another matter to go so far as to suppress a medium of artistic expression to eradicate the evil. Broadcasters could sooner suppress automobile advertisements that glorify high-performance and high-speed driving in order to preserve lives on the highway.  


119. The case of Herndon v. Lowry, 301 U.S. 242 (1937) involved distribution of Communist-oriented handbills. The standard upon which the criminal defendant was convicted was thus: Forcible action must have been contemplated but it would be sufficient to sustain a conviction if the accused intended that an insurrection “should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce.” Id. at 254-55. Not surprisingly, this standard was held to be too vague. Read another way, the standard might convict someone where the probability of connecting prohibited activity with a precedent exhortation was low. The standard lacked formal predictive precision. It is this manner of regulation that the first amendment will not allow.

120. See Yale Broadcasting Co. v. FCC, 478 F.2d 594, 606 n.24 (D.C. Cir. 1973): The only evidence in the record on this point [whether the songs at issue had a demonstrable connection with illegal activities] is the statement of the Director of The Bureau of Narcotics and Dangerous Drugs expressing strong doubt that there is any connection between “drug-oriented song lyrics” and the use of drugs. The New York Times, March 28, 1971, p.41, c.1.

Second, the more desirable alternative to suppression is to rely on affirmative licensee action. Most licensees have responded to the problem in a manner that surely comports with the public interest standard. They have aired spot announcements and other program material seeking to remedy drug abuse.

To say that the Federal Communications Commission frequently overreacts is something of an understatement. It is, some would say thankfully, a unique regulatory agency, at once capable of highly sophisticated reasoning and at the same time capable of petty exercises in confusion. No more complex observation need be made other than to say that the law of broadcasting involves interesting—frequently vital—issues of first amendment expression. The Federal Communications Commission's activities in this area are at times inconsistent and surprising, but rarely dull.

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