

4-1-1976

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Recommended Citation

Crisp, Donna Helen (1976) "Music the Universal Healer: First Amendment Protection - Real or Illusory," *North Carolina Central Law Review*: Vol. 7 : No. 2 , Article 8.
Available at: <https://archives.law.nccu.edu/ncclr/vol7/iss2/8>

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argument against the death penalty is that the modern American criminal justice system is too imprecise a system to use capital punishment as a surgical tool to excise the tumor of crime and violence.

JAMES T. BRYAN III

Music The Universal Healer:

First Amendment Protection—Real or Illusory?

I. INTRODUCTION

The central importance of musical expression in civilized society has long been proclaimed. Longfellow said, "Music is the universal language of mankind." Milton said "Such sweet compulsion doth in music lie." Shakespeare said, "The man that hath no music in himself, nor is not moved with concord of sweet sounds is fit for treasons, stratagems and spoils." Carlyle said:

Music is well said to be the speech of angels; in fact, nothing among the utterances allowed to man, is felt to be so Divine. It brings us near to the Infinite; we look for moments across the cloudy elements into the eternal light, when song leads and inspires us. Serious nations, all nations that can listen to the mandate of nature, have prized song and music as a vehicle for worship, for prophecy, and for whatsoever in them was Divine.

Surely judicial notice can be taken of the fact that not one of these men could ever seriously have contemplated the seemingly inexorable entanglement that has evolved and presently exists concerning our first amendment guaranty of freedom of speech and musical expression in the broadcast media. This article will examine musical expression and how it is viewed by the Federal Communications Commission, as well as the relationship between music and the first amendment's freedom of speech. More specifically, this discussion will focus on three areas: (1) a general history and background of the FCC and the broadcast media; (2) the FCC's involvement with musical expression in the broadcast media; and (3) first amendment protection of musical expression.

**II. THE FCC AND THE BROADCAST MEDIA:
A GENERAL BACKGROUND**

At the turn of the century, radio was confined to wireless telegraphy (largely for marine purposes), and code communication was possible

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only for fairly short distances. By the 1920's private radio use had burgeoned, creating chaos in the limited number of broadcasting frequencies. Before the existence of any broadcast regulation, radio stations began to operate when and where they desired, with only personal discretion exercised in terms of the frequency used or the amount of power involved. Radio frequencies were wasted because "with everybody on the air, nobody could be heard."¹ It was out of this cacaphony that Congress moved legislatively to effectuate some semblance of order in the field of broadcasting through the Radio Act of 1927.²

This 1927 Act established the Federal Radio Commission, whose chief purpose concerned the allocation of frequencies among aspiring applicants.³ Succeeding the Radio Act of 1927 was the Communications Act of 1934⁴ (the "Act" or the "Communications Act"), an attempt to regulate more effectively the field of broadcasting. This Act established the Federal Communications Commission (the "Commission"), devolving upon it the power to assign frequencies by issuing licenses among competing applicants.⁵

Under the Communications Act, the FCC was to carry out its licensing function in consonance with the "public interest, convenience, or necessity."⁶ Thus the FCC bestows and renews three-year licenses to broadcasters for use over certain frequencies in certain areas. By statute,⁷ the standard of "public interest, convenience, or necessity" supposedly governs the granting of licenses,⁸ the renewal of licenses,⁹ and the revocation of licenses.¹⁰

While, to a certain extent, program content regulation is authorized by the Communications Act, that Act also provides for comprehensive regulatory control, specifically precluding censorship. The key wording of the censorship section is as follows:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications

1. *NBC v. United States*, 319 U.S. 190, 212 (1943).

2. 47 U.S.C. §§ 81-83 (1964). (See generally, for the legislative history of the Radio Act of 1927, 44 Stat. 1162; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940).)

3. With the establishment of this new federal agency, the power to regulate radio frequencies and hours was no longer vested in the Secretary of Commerce who had held it by authority of the Radio Communications Act of 1912, 37 Stat. 302.

4. 47 U.S.C. §§ 151-609 (1970).

5. *Id.* § 307 (a), (d) (See Radio Act of 1927, ch. 169, § 9, 44 Stat. 1166).

6. 47 U.S.C. § 307 (a) (1970).

7. The Communications Act of 1934. 47 U.S.C. §§ 151-609 (1970).

8. *Id.* § 309 (a).

9. *Id.* § 307 (d).

10. *Id.* § 312(a) (2).

or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commissions which shall interfere with the right of free speech by means of radio communication.¹¹

This censorship section of the Communications Act appears on its face to be in conformity with the first amendment.¹² In *Farmers Educational and Cooperative v. WDAY, Inc.*,¹³ the Court stated that in "(e)xpressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over the radio communication."¹⁴

Philosophically, the Communications Act and the FCC perceive the public airwaves as just that—public. In this sense, the Commission views broadcasting frequencies as dedicated to serving the public interest by imposing on the licensee the duty of "public trustee."¹⁵ It is this public interest standard which is the principal source of the FCC's content regulation authority; and it should be noted that broadcast licensees are specifically viewed as "public trustees" and not as "common carriers."¹⁶

In viewing broadcast licensees as "public trustees," the Commission has maintained a dominant theme of protecting the public interest throughout its regulatory scheme. This theme, which has evolved gradually over the life of the federal regulation of broadcasting, is the Commission's "Fairness Doctrine".¹⁷

11. *Id.* § 326.

12. U.S. Const. Amend. I. provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press"

13. 360 U.S. 525 (1959).

14. *Id.* at 529.

15. The licensee is given "the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of public concern" *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969). The Communications Act of 1934, 47 U.S.C. § 309 (h) (1970).

16. The Communications Act of 1934, 47 U.S.C. § 153 (h) (1970), commonly referred to as "Section 3 (h)", states that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." The legislative history of the Radio Act of 1927 (*see FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940)) reveals that, in the area of discussion of public issues, Congress decided to allow broad journalistic discretion for the licensee. Congress specifically dealt with, and rejected, the argument that broadcasting facilities should be open on a nonselective basis to anyone wishing to discuss public issues.

17. In 1959, Congress amended Section 315 of the Communications Act to give statutory approval to the Fairness Doctrine, originally enacted as the Act of September 14, 1959, Section 1, 73 Stat. 557, as amended, 47 U.S.C. § 315(a). For a summary of the development and nature of the Fairness Doctrine, *see Red Lion Broadcasting Co. v. FCC*, *supra* note 15, at 375-386.

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The predecessor of the Fairness Doctrine is found in *Mayflower Broadcasting Corp.*¹⁸ In that decision, the FCC found that a broadcast licensee may present another person's political ideas in an objective and impartial way, but, in the best interest of the public, may not present his own personal views.¹⁹ The Commission's position in *Mayflower* was effectively reversed eight years later in a report entitled "Editorializing by Broadcast Licensee",²⁰ in which the Commission sanctioned the right of a broadcast licensee to editorialize on the condition that the licensee provide "a reasonable opportunity for the presentation of all responsible positions."²¹

It should be noted that this report was the Commission's first comprehensive attempt to distinguish the broadcast media from the press. As public trustee, the licensee was to decide what should be broadcast and by whom; and the decision was to be made in accordance with the public's first amendment interest in free, open debate. The Commission elaborated as follows:

Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time can radio be maintained as a medium of freedom of speech for the people as a whole. These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public.²²

In addition to giving the broadcaster the right to editorialize, the Commission also dealt in its report²³ with the approach a broadcast licensee should take in the treatment of controversial issues. Accenting "fairness" above all, the Commission set forth two obligations for the licensee. First, the broadcaster was obligated to discuss controversial public issues, though not necessarily in an editorializing manner. Second, the broadcaster had the affirmative duty not only to seek and ascertain all pertinent viewpoints on a given public issue, but to provide an opportunity for the presentation of opposing or contrasting opinions.²⁴

These two fundamental responsibilities placed upon the broadcast licensee constitute what is known as the Fairness Doctrine and, accord-

18. 8 FCC 333 (1941).

19. *Id.*

20. 13 FCC 1246 (1949).

21. *Id.* at 1250.

22. *Id.*

23. *Id.*

24. *Id.*

ingly, broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance. The basic principle underlying these responsibilities is the “. . . right of the public to be informed, rather than any right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular view on any matter. . . .”²⁵

It is this public interest standard which leads the FCC to circumvent full consideration of the first amendment interest. Although Section 326 of the Communications Act proscribes the Commission from using any censorship power, a federal criminal statute (Section 1464)²⁶ prohibits the broadcast of “any obscene, indecent, or profane language.”²⁷ However, because it prefers to avoid first amendment questions, the Commission is naturally hesitant to respond to complaints of offensiveness by invoking Section 1464.²⁸ If it invoked Section 1464, the FCC would be forced to deal with the first amendment; the Commission prefers to concern itself with the Fairness Doctrine—the “public interest” standard—when evaluating the program content of broadcast licensees.

The Commission’s most potent tool in the operation of its regulatory scheme is its power to refuse a license renewal. The Commission denied the renewal of a license to a radio station in *Palmetto Broadcasting Co.*²⁹ Although the Commission’s attempt at qualitative regulation of offensive programming did not reach judicial review on the merits,³⁰ the FCC denied the license renewal on the basis of its having received complaints that the announcer had used “offensive and patently vulgar” speech. Making no attempt in any constitutional sense to determine whether the speech complained of was in fact obscene, the FCC concluded that the licensee was not operating his radio station in the “public

25. *Id.* at 1249.

26. 18 U.S.C. § 1464 (1964).

27. *Id.*

28. The Commission sends a form letter (FCC Form 100, at 3-4) to complainers of certain programming in which the following is stated:

The broadcast of obscene, indecent, or profane language is prohibited by a federal criminal statute. Although the Department of Justice is responsible for prosecution of federal law violations, the Commission is authorized to impose certain sanctions on broadcast licensees for violation of this statute, including revocation of license or the imposition of a monetary forfeiture. However, both the Commission and the Department of Justice are governed by decisions of the courts as to what constitutes obscenity, and the broadcast of material which may be offensive to many persons would not necessarily be held by the courts to violate the statute.

29. 33 FCC 250, 23 P & F Radio Reg. 483 (1962), *aff’d sub. nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 843 (1964).

30. It was found that the licensee has falsely claimed to the FCC that he was unaware of his announcer’s material and complaints stemming from said material.

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interest" and presumed that the licensee did not meet its obligation to fulfill "the needs of the areas and populations served by the station."³¹

Although the FCC rarely denies a license renewal, it may issue a warning that carries with it the implicit threat of refusal to renew, or, under its licensing authority, the Commission (or a competing applicant³² or a petitioner-to-deny)³³ may force the licensee to go through the process of a hearing.³⁴ The Commission also has the power to issue cease and desist orders,³⁵ levy fines and forfeitures,³⁶ suspend a license,³⁷ and revoke a license³⁸ for specific violations.

The extent to which the Commission can regulate program content of the broadcasting media is a vexing subject. In the past, the FCC has regulated program content in connection with the control of lotteries,³⁹ obscenity,⁴⁰ gambling information,⁴¹ and fraudulent gift shows.⁴² In cases not tested in court, the Commission has penalized the broadcast of dirty poems,⁴³ suggestive songs,⁴⁴ unethical practice of medicine⁴⁵ and rigged quiz shows.⁴⁶

III. THE FIRST AMENDMENT AND THE FCC: HOW DOES MUSIC FIT IN?

The FCC's involvement with musical expression in the broadcast media is not only fairly new, but presents sensitive questions of an uncertain outcome. The extent to which drugs became enmeshed with

31. 33 FCC at 251, 23 P & F Radio Reg. at 485a. See also FCC Form 100, *supra* note 28, at 1:

(No) application for a broadcasting license will be granted unless the Commission finds that the public interest, convenience and necessity will be served by such a grant, and . . . the 'principal ingredient of the licensee's obligation to operate his station in the public interest is the diligent, positive, and continuing effort by the licensee to discover and fulfill the tastes, needs, and desires of his community or service area, for broadcast service.'

32. 47 U.S.C. § 309 (e) (1970).

33. *Id.* § 309 (d).

34. See Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 118-27 (1967).

35. 47 U.S.C. § 312 (b) (1970).

36. *Id.* § 503 (b).

37. *Id.* § 303 (m).

38. *Id.* § 312 (a).

39. 18 U.S.C. § 1304 (1970).

40. *Id.* § 1464.

41. *Id.* § 1084.

42. *Id.* § 509.

43. Pacifica Foundation, 36 FCC 147 (1964).

44. WREC Broadcast Service, 19 FCC 1082 (1955); Tampa Times Co., 19 FCC 257 (1955).

45. WSCB, Inc., 2 FCC 293 (1936).

46. KIK Radio, Inc., 34 FCC 1039 (1963); Eleven Ten Broadcasting, 32 FCC 706 (1962).

society—the so-called “drug culture” being at its peak in the late 1960’s—created a new direction fraught with conflict for the FCC. The phenomenon of drugs in middle class America came to be reflected in the field of popular music, giving impetus to the Commission’s role in the conflict between the first amendment and musical expression.

This conflict between our first amendment freedom of speech and the FCC’s control of musical expression over the broadcast media is best exemplified by an examination of several official Commission edicts and the consequent confusion.

It can be said that the first official entry into this area of controversy occurred in March, 1971, when the FCC issued a Public Notice entitled “Licensee Responsibility to Review Records Before Their Broadcast” (“first notice”).⁴⁷ In essence, this first notice required broadcasters to determine whether a particular piece of music “promoted” or “glorified” the use of illegal drugs. The notice was issued because 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 as marijuana, LSD, ‘speed’, etc.”⁴⁸ Licensees were put on notice that “reasonable efforts” should be made prior to broadcasting to determine the meaning of drug-oriented lyrics; that knowledge so gained through this initial screening process must be in the hands of the licensee’s management executive; and that this executive or some other responsible official should then decide whether the song should be broadcast.

The Communications Act of 1934⁴⁹ established the FCC and gave the Commission broad powers to regulate the broadcasting media in the “public interest, convenience, or necessity.”⁵⁰ While this power is not unlimited,⁵¹ it has traditionally been construed literally,⁵² so as to provide the Commission with wide discretion “generally [to] encourage the larger and more effective use of radio in the public interest”⁵³ and make “. . . such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter. . . .”⁵⁴

The Commission’s first notice was received by the broadcasting media as ambiguous and rather threatening. Although the notice did not

47. 28 FCC 2d 409, 21 P & F Radio Reg. 2d 1576 (1971).

48. *Id.*

49. 47 U.S.C. § 151-609 (1970).

50. *Id.* § 303.

51. *See generally* FCC v. American Broadcasting Co., 347 U.S. 284 (1954).

52. *See generally* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

53. 47 U.S.C. 303 (g) (1970).

54. *Id.* § 303 (f).

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constitute a ban per se on certain music, it did in fact undeniably create a nexus between the musical selections licensees chose to air and the inevitable license renewal which takes place every three years. Curiously enough, the Defense Department had made available a list of allegedly "suspect" songs to the Commission.⁵⁵

Because the FCC relies on the "public interest" standard in considering a license renewal, naturally the licensee's programming content has, at least potentially, great impact on the license renewal process. Certainly the broadcasting media was justified in feeling threatened by the first notice. Despite their confusion, licensees did interpret the Commission's notice as one warning against the broadcasting of "drug-lyrics." Commissioner Lee stated:

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 playing of records which tend to promote and/or glorify the use of illegal drugs.⁵⁶

Commissioner Johnson's dissent affirmed the "message" inherent in the first notice when he stated:

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 "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.⁵⁷

To abate the confusion created by their first notice, the Commission issued a second notice⁵⁸ as a "definitive statement"⁵⁹ in this area. It should be noted that the Commission's "1960 Network Programming Inquiry"⁶⁰ established a basic licensee duty against which the first and second notices were framed. The pertinent portion follows:

55. 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 includes the following songs:

"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," and "Lucy in the Sky With Diamonds."

56. *License Responsibility to Review Records Before Their Broadcast*, 28 FCC 2d 409, 410; 21 P & F Radio Reg. 2d 1576, 1577 (1971).

57. *Id.* at 412; 21 P & F Radio Reg. 2d at 1579.

58. "Review of Records on Drugs," 31 FCC 2d 377; 31 P & F Radio Reg. 2d 1698 (1971).

59. 31 FCC 2d at 378; 21 P & F Radio Reg. 2d at 1700.

60. 25 Fed. Reg. 7291 (1960) and or "FCC Report and Statement of Policy Re: Commission En Banc Programming Inquiry," 20 P & F Radio Reg. 1901 (1960).

Broadcasting licensees must assume responsibility for all material which is 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 schedules consonant with operating in the public interest in his community (T)he 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.⁶¹

The Commission made several generalizations in their second notice which were intended, supposedly, to clear up any misunderstanding which had resulted from the first notice. The Commission stated that its first notice was not intended as any direct prohibition of any particular kind of music; that there were to be no active reprisals; and that licensees still had the affirmative duty to (1) be familiar with a record's contents, (2) determine the record's broadcast suitability, and (3) be prepared to justify their decisions at license renewal time. Along with this statement, the Commission further suggested that a licensee's duty to give "reasonable and good faith attention to the problem"⁶² might include the pre-screening of musical selections and a system of monitoring while the music was being played, as well as a responsiveness to the public's complaints regarding specific records.

Although this second notice was intended as a "definitive" clarification of the first notice, the Commission still left unclear what was meant by "promote" or "glorify". More importantly, after issuing its second notice, the FCC remained unresponsive to the question of what action was required of a broadcaster to discover the nature of lyrics in certain drug-oriented songs.

It is significant that the Commission did not proceed under its rule-making powers in attempting to ban the broadcast of drug-lyric-oriented music.⁶³ These powers are governed by the Administrative Procedure Act⁶⁴ which requires, *inter alia*: due notice of hearing; an opportunity to submit data; a concise general statement of the basis and purpose of the rule; and publication or service of the rule.⁶⁵ Instead of using its rule-

61. 25 Fed. Reg. at 7295; 20 P & F Radio Reg. at 1912-13.

62. 31 FCC 2d 377, 380; 21 P & F Radio Reg. 2d 1698, 1703 (1971).

63. The FCC is limited in its authority by virtue of limitations written into specific grants of power in the Communications Act; certainly the Commission has no power that Congress does not have: It is an administrative agent of Congress.

64. 5 U.S.C. §§ 500-76 (1970).

65. *Id.* §§ 553-54.

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making power, the Commission issued its first and second notices under the authority set forth in the Communications Act whereby "(u)pon the expiration of a license . . . a renewal of such license may be granted . . . if the Commission finds that public interest, convenience, and necessity would be served thereby."⁶⁶

Had the Commission chosen to act according to its rule-making powers, enforcement procedures would have required a hearing for each "offender."⁶⁷ Also, the Commission would have needed to prove not only that specific songs were in fact broadcasted, but that these songs "promoted or glorified" the use of illegal drugs.⁶⁸

In the aftermath of these confusing first and second notices, several parties, among them Yale Broadcasting Company (Yale),⁶⁹ petitioned for clarification of the second notice. The FCC responded by reiterating that its second notice was a "definitive" clarification, adding that its intent and purpose had been to reappraise the broadcasting media of the familiar concept of licensee responsibility.⁷⁰ Thus, the Commission demurred, and in so doing, noted that there was no pre-screening requirement.⁷¹

The drama was intensified when Yale submitted to the Commission a statement of programming policy concerning the broadcast of musical recordings in an attempt to gain a declaratory ruling as to whether Yale's broadcasting plan fulfilled the directives of the first and second notices. The Commission refused to consider Yale's statement, stating "(W)e 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."⁷²

When Yale was unable to gain any firm guidelines by which to protect its license, Yale appealed (pursuant to Section 402 of the Communications Act of 1934)⁷³ to the United States Court of Appeals for the District of Columbia in *Yale Broadcasting Co. v. FCC*.⁷⁴ The Court was asked to adjudicate the following issues: (1) whether the

66. 47 U.S.C. § 307 (d) (1970).

67. 5 U.S.C. § 554 (1970).

68. 47 U.S.C. § 312 (d) (1970).

69. The parties included Yale Broadcasting Company, University of the Pacific, Steve Leon, National Co-Ordinating Council on Drug Abuse Education and Information, Inc., Mark Gorbulew, Sara Vass, John Gorman, Kermeth P. Gurrier, Stuart Jackson, James H. Irwin, and Charles Laquidara.

70. *In re Licensee Responsibility to Review Records Before Their Broadcast*, 31 FCC 2d 385; 22 P & F Radio Reg. 2d 1808 (1971).

71. *Id.* at 386 n.1; 22 P & F Radio Reg. 2d at 1809 n.1.

72. *Id.* at 386; 22 P & F Radio Reg. 2d at 1809.

73. 47 U.S.C. § 402 (b) (1970).

74. 478 F.2d 594 (1973).

Commission's action imposed an unconstitutional burden on a broadcaster's freedom of speech;⁷⁵ (2) whether the notices imposed new duties on broadcasters in violation of proper administrative rule-making procedure;⁷⁶ and (3) whether the notices involved unconstitutionally vague language.⁷⁷ Before dealing directly with the issues raised in *Yale*, the Court stated that, while the first notice had indeed been misconstrued, the second notice constituted the Commission's definitive statement on the subject, and consequently ". . . it becomes fairly simple to understand what the FCC asks of its licensee."⁷⁸ Noting that the FCC was ". . . not asking broadcasters to decipher every syllable . . .,"⁷⁹ the Court stated that the broadcaster should ". . . know what he can reasonably be expected to know in light of the nature of the music being broadcast."⁸⁰

The petitioners' claim in *Yale* was framed in light of *Smith v. California*,⁸¹ as to this claim—that the FCC notices placed an unconstitutional burden on petitioners—the Court noted that *Smith* was factually distinguishable from the situation in *Yale*.⁸² The Court held that in no way could a broadcast licensee's pre-screening burden be compared to a bookseller's burden to inspect each of a multitude of books. Adding that pre-screening was not the only method to be utilized in gaining the requisite knowledge (as the Commission had indicated), the Court reaffirmed the licensee's duty to know what it broadcasts. Significantly in the *Smith* case the Supreme Court held that a state cannot impose a self-censorship burden on a bookseller under the threat of criminal liability for selling literature which is allegedly obscene. Following *Smith*, the FCC's decision not to impose a pre-screening burden on its licensees was upheld in *Anti-Defamation League of B'nai B'rith v. FCC*.⁸³ Thus, the decisions in *Smith* and *B'nai B'rith* followed a long line of cases holding that mandated self-censorship is no more constitutional than direct censorship.

In *Yale* the Court dealt with the issue whether the FCC had improperly imposed new duties on licensees. The Court held that the Commission's notices were just a reminder to a licensee of his responsibility to broadcast in the public interest. If in issuing its notices the FCC was

75. *Id.* at 597.

76. *Id.* at 599.

77. *Id.* at 601.

78. *Id.* at 596.

79. *Id.* at 597.

80. *Id.*

81. 361 U.S. 147 (1959).

82. The *Smith* case involved an obscenity ordinance which made it illegal to possess obscene matter in a bookstore. The ordinance invoked liability without any requirement of knowledge on the part of the bookseller pertaining to the contents of the materials he was selling.

83. 403 F.2d 169 (D.C. Cir. 1968).

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imposing a new duty rather than interpreting or applying a rule already in existence, its actions would be subject to public debate and scrutiny of the rule-making proceedings. The Administrative Procedure Act requires the Commission to provide interested parties with notice and an opportunity to participate in rule-making procedures before it adopts any rule of substantive impact and scope.⁸⁴ In holding that the FCC's notices were but a rearticulation of pre-existing duties, the Court must have characterized the Commission's notices as being pursuant to a "general statement of policy" and thereby exempt from the Administrative Procedure Act's rule-making procedures.⁸⁵

Finally, in considering whether the Commission's directives were impermissably vague, the Court in *Yale* stated that it felt the Commission's efforts were effective and adequate in explaining the "nature and degree of knowledge expected of broadcasters. . . ."⁸⁶ The Court held that the FCC's notices not only made clear the Commission's intention but further provided examples of acceptable behavior without limiting the manner of compliance to those cited in the examples.⁸⁷ Following the Court's decision, *B'nai B'rith* moved for rehearing en banc sua sponte. The motion was denied, but Chief Bazelon dissented, stating the view that the District Court for the District of Columbia had a particularly strong responsibility to protect first amendment interests in relation to broadcast regulation and the "public interest", and that the Court did not live up to this responsibility when it failed to assess "the impact of these directives, not merely their language."⁸⁸ Judge Bazelon stated that the Court had avoided and left unanswered several significant issues which the *Yale* case had presented, two of them whether a song is a constitutionally protected form of speech and whether there is any demonstrable connection between certain songs and illegal activities.⁸⁹

Thus, the *Yale* case was closed with the most important questions left unanswered. The Court failed to view the notices in the full context of the Commission's action, and in light of the broadcasting industry's confused and frightened reaction to them. There can be no doubt that the FCC notices imposed self-censorship on broadcast licensees in regard to music planned for broadcast, for it has long been recognized that, when the threat of criminal or administrative sanction exists, the mere existence of the threat can affect the threatened party as much as the sanction itself.⁹⁰

84. 5 U.S.C. § 551 (4) (1970).

85. *Id.* § 553 (b) (3) (A).

86. 478 F.2d at 601.

87. *Id.*

88. 478 F.2d at 605.

89. *Id.* at 606.

90. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 419 (1942).

Certainly the “chilling effect” inherent in a regulation which calls for or results in self-censorship can be as harmful as an officially imposed sanction. Although the Court felt the *Yale* case was brought prematurely,⁹¹ it remains a fact that as soon as broadcasting licensees adhered to the notices’ directives they incurred first amendment injury.⁹² Not only is such an injury to first amendment rights real, it should have been judicially reviewed in such a way as to answer the questions which prompted the judicial review in the first place.

IV. MUSICAL EXPRESSION AND THE FIRST AMENDMENT

Although our system of government has traditionally been prohibited from interfering with the free expression of ideas, the FCC’s regulation of the broadcast media has always represented an atypical and somewhat irregular approach to the right to free speech. The traditional basis for the type of regulation which governs the broadcasting industry has consisted of four considerations: (1) government control is necessary, given the limited access due to scarcity of technical channels;⁹³ (2) the public owns the airwaves; (3) the use of these publicly owned airwaves is a privilege and not a right; and (4) the “power” implicit in radio and television necessitates government control.

There can be no doubt that government regulation is a necessary and important factor in how the broadcasting media operates; consequently, the FCC should control the media in a manner designed to protect and advance this country’s precious freedom of speech rather than to inhibit or suppress it.

The relationship between radio licensing and the first amendment protection of freedom of speech was first dealt with in *National Broadcasting Co. v. United States*⁹⁴ (NBC) where the Supreme Court upheld FCC’s regulations refusing licenses to network stations already bound by contract not to accept programming from other networks. The Court held that the Commission’s licensing scheme is necessary to limit the number of radio broadcasters, and that such a licensing plan does not violate freedom of speech.

The Supreme Court later reaffirmed in *Red Lion Broadcasting Co. v.*

91. 478 F.2d at 605.

92. “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.” Kalven, *Uninhibited, Robust and Wide-Open—A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289, 297 (1968). One of the cases Kalven referred to is the *Smith* case, which was basic to a portion of the Court’s rationale in the *Yale* case.

93. See note 99 *infra*.

94. 319 U.S. 190 (1943).

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FCC⁹⁵ its position taken in *NBC* when it rejected a broadcaster's argument that the first amendment right of free speech gave the broadcaster an unlimited control over what it broadcasts, and upheld the Fairness Doctrine as a legitimate, governmentally imposed obligation on broadcasters. The Court held unequivocally that the intent of Congress was to give the FCC power to regulate program content.⁹⁶ Because all people who possess the desire and the finances to communicate by television or radio cannot be satisfactorily accommodated, the Court said ". . . it is idle to posit an unabridgeable first amendment right to broadcast comparable to the right of every individual to speak, write, or publish."⁹⁷ Although ". . . the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the first amendment,"⁹⁸ the Court was careful to emphasize that the broadcast media pose unique and special problems not present in the traditional free speech case, due to the inherent physical limitations in broadcasting frequencies. The Court based much of its analysis on the fact that broadcast frequencies are a scarce resource.⁹⁹

Throughout its opinion in *Red Lion*, the Court upheld the Fairness Doctrine¹⁰⁰ as one which enhances rather than abridges the freedoms of speech and press. The Court reasoned that, because a successful license applicant has no constitutional right to the license, he therefore has no constitutional right to monopolize the frequency, nor can he thereby assert a first amendment objection against the government's decision to prohibit monopoly by obliging the licensee to present representative community views on controversial subjects.¹⁰¹ Justifying the use of the Fairness Doctrine as the most effective tool for fostering competition of ideas in the broadcast media, the Court was adamant in

95. 395 U.S. 367 (1969). (Justice White wrote for a unanimous Court.)

96. *Id.* at 379-86.

97. 395 U.S. at 388.

98. *Id.* at 390.

99. It should be noted that CATV (Community Antenna Television) can provide forty or more channels; however, political and economic complications have produced much delay in realizing certain technological possibilities. See generally R. Noll, M. Peck & J. McGowan, *Economic Aspects of Television Regulation*, 151-207 (1973).

100. The Fairness Doctrine "requires that when a licensee presents one side of a controversial issue of public importance, he must afford a reasonable opportunity for the presentation of contrasting views." Public Notice 70-598, Nicholas Zapple, 23 FCC 2d 707 (1970). The licensee in *Red Lion* challenged the constitutionality of the Fairness Doctrine on four grounds: (1) that Section 315 of the Communications Act (the chief statutory authority for the Fairness Doctrine) constituted an unconstitutional delegation of legislative power; (2) that the Fairness Doctrine was unconstitutionally vague; (3) that the Fairness Doctrine infringed on the ninth and tenth amendments insofar as the Doctrine violated the licensee's right to engage in political activity and insofar as the Doctrine infringed upon powers reserved to the people; and (4) that the Fairness Doctrine violated the first amendment. The Court rejected each ground.

101. 395 U.S. at 389.

maintaining that the relevant first amendment rights are those of the viewers and listeners—"the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."¹⁰²

Although the official reasoning for the Fairness Doctrine in *Red Lion* rested on the "scarcity" of broadcast frequencies, the Court's rationale connecting this "scarcity" to the first amendment and the FCC is weak in that "scarcity" alone can explain only the need to limit the use of each broadcasting frequency to prevent interference. This weakness is exemplified in noting with particularity certain portions of the Court's opinion.

The Court held that the FCC's personal attack and political editorializing rules are not ". . . inconsistent with the first amendment goal of producing an informed public" because, absent the Fairness Doctrine, ". . . station owners and a few networks would have unfettered power to make time available to the highest bidders, and to permit on the air only those with whom they agreed."¹⁰³ It would seem that licensee audience power and not "scarcity" is the problem the Court was addressing in *Red Lion* when it wove the Fairness Doctrine through its discussion of the FCC's regulatory scheme as that scheme relates to the first amendment in the broadcast media.

In *Columbia Broadcasting System, Inc. v. Democratic National Committee*¹⁰⁴ the Court picked up where it left off in *Red Lion*. In *CBS* the Court held that neither the "public interest" standard of the Communications Act nor the first amendment afforded the public a right to limited access by purchase of editorial advertising time if the broadcasters chose to sell and if the FCC refused to force the broadcasters to sell. The issue at stake in *CBS* involved "power" in the marketplace of ideas: "(t)he question here is not whether there is to be discussion of controversial issues of public importance on the broadcast media, but rather who shall determine what issues are to be discussed by whom, and when."¹⁰⁵

The Court preferred the Fairness Doctrine as a vehicle for regulation on the ground that it allocated the "power" more responsibly than any other existing approach.

From the *NBC* case through the *CBS* case, the Supreme Court was preoccupied with the "power" of the media in its treatment of the relationship between the broadcast media and the first amendment. Although these cases do not speak directly to the issue of musical expression and its relationship to the first amendment's freedom of

102. *Id.* at 390.

103. *Id.* at 392.

104. 412 U.S. 94 (1973) (The Court split six ways in this decision).

105. *Id.* at 130.

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speech, Justice Douglas's concurring opinion in the *CBS* case presents some profound thought in this area. Justice Douglas stated:

My conclusion is that the TV and radio stand in the same protected position under the first amendment as do newspapers and magazines. The philosophy of the first amendment requires that result, for the fear that Madison and Jefferson had of government intrusion perhaps even more relevant to TV and radio than it is to newspapers and other like publications. . . . If a broadcast licensee is not engaged in governmental action for purposes of the first amendment, I fail to see how constitutionally we can treat TV and the radio differently than we treat newspapers. . . .

. . . (T)he prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against government. The essential scheme of our Constitution and Bill of Rights was to take government off the backs of people And it is anathema to the first amendment to allow government any role of censorship over newspapers, magazines, books, art, music, TV, radio or any other aspect of the press. There is unhappiness in some circles at the impotence of government. But if there is to be a change, let it come by constitutional amendment. The Commission has an important role to play in curbing monopolistic practices, in keeping channels free from interference, in opening up new channels as technology develops. But it has no power of censorship. It is said, of course, that government can control the broadcasters because their channels are in the public domain in the sense that they use the airspace that is the common heritage of all the people. But parks are also in the public domain. Yet the people who speak there do not come under government censorship. . . . It is the tradition of Hyde Park not the tradition of the censor, that is reflected in the first amendment. TV and radio broadcasters are a vital part of the press; and since the first amendment allows no government control over it, I would leave this segment of the press to its devices.

Licenses are, of course, restricted in time and while, in my view, Congress has the power to make each license limited to a fixed term and nonreviewable, there is no power to deny renewals for editorial ideological reasons. The reason is that the first amendment gives no preference to one school of thought over the others. The Court in today's decision by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the first amendment. . . .¹⁰⁶

106. *Id.* at 148-63.

V. CONCLUSION

In looking at the effect the Commission's regulatory scheme has had on broadcast "speech", there can be no question that broadcasting occupies a unique first amendment position. But just what is this position?

The first amendment does not provide absolute protection for speech. Certain kinds of speech have been held not to be protected by the first amendment. These include inciting to riot,¹⁰⁷ advocacy of violent, forceful or terroristic change,¹⁰⁸ defamatory utterances,¹⁰⁹ blasphemy,¹¹⁰ speech tending to corrupt morals, inciting to crime, or disturbing the public peace,¹¹¹ and obstruction of the administration of justice.¹¹² First amendment protection does, however, extend to public speeches,¹¹³ labor organization activities,¹¹⁴ films,¹¹⁵ books,¹¹⁶ solicitation,¹¹⁷ use of sound trucks,¹¹⁸ broadcasting,¹¹⁹ symbolic protests,¹²⁰ litigation,¹²¹ parades and demonstrations,¹²² picketing,¹²³ and live theatre productions.¹²⁴

How then does music relate to the First Amendment? Although songs have semantic aspects, the lyrics of a song are not the semantics of speech in the usual sense. For when words are interwoven into a piece of music, the "speech" of the music takes on the special definition. What is this definition?

107. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); and *Fiener v. New York*, 340 U.S. 312 (1951).

108. See *Dennis v. United States*, 341 U.S. 494 (1951).

109. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

110. See *Maine v. Mokus*, 120 Me. 84; 113 A. 39 (1921).

111. See *Gitlow v. New York*, 268 U.S. 652 (1925).

112. See *State v. Harris*, 4 Conn. Cir. 534; 236 A.2d 479 (1967).

113. See *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

114. See *Amalgamated Food Employees Union Local v. Logan Valley Plaza*, 391 U.S. 308 (1968); and *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

115. See *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961). But, see also *Miller v. California*, 413 U.S. 1 (1973) and *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973).

116. See *United States v. One Book Entitled "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933); *aff'd*, 72 F.2d 705 (2d Cir. 1934). But see also *Miller v. California*, 413 U.S. 1 (1973); and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

117. See *Martin v. City of Struthers*, 319 U.S. 141 (1943).

118. See *Saia v. New York*, 334 U.S. 558 (1948).

119. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

120. See *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1965).

121. See *NAACP v. Button*, 371 U.S. 415 (1963).

122. See *Cox v. Louisiana*, 379 U.S. 536 (1965).

123. See *International Brotherhood of Teamsters Union v. Vogt*, 354 U.S. 284 (1957).

124. See *P.B.I.C., Inc. v. Byrne*, 313 F. Supp. 757 (D.C. Mass. 1971).

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The question of whether musical expression is protected by the first amendment has never been answered in any reported case.¹²⁵ Whether musical expression is protected by the first amendment depends upon whether music is considered to be speech. If music is not speech, then it follows that it is subject to no first amendment protection. Thus the FCC may, in the "public interest", impose its regulatory scheme upon musical expression.

There is no question that the ways in which the Commission has dealt with musical expression has caused much consternation in the broadcasting media. The FCC's first and second notices mark the beginning of at least an "official" recognition that the relationship between our first amendment's freedom of speech and music is obscure at best.

Music is a sensitive, indefinable and precious form of communication. It would seem a tragic and absurd waste of time and effort for our government to pursue what could be a decades-long battle determining just how musical expression fits into our Constitution. Hopefully, it will not be necessary even to ascertain some finite statement about what can or cannot be broadcast in terms of music. Perhaps the "let well enough alone" philosophy should prevail in this area. But hopes and dreams do not fashion the living organism that is our government. And based upon prior experience, it is not unlikely that future conflict regarding music, the FCC and the first amendment will materialize.

If music is to endure a battle with our government's administrative agencies and court system, the result, in this writer's opinion should be that musical expression will be afforded full first amendment protection. If music cannot be reconciled with the freedom of speech in the first amendment, the constitutional amendment route may be necessary, as Justice Douglas has suggested in a general sense.¹²⁶

Hopefully, our government will be particularly cautious and sensitive when it concerns itself with that most universal form of communication: music. Music is fragile and delicate and ethereal as is life. Life is everything. And music is life.

DONNA HELEN CRISP

125. The *Yale* case presented this question to a court that left the question as unanswered as if it had never been asked.

126. See note 106, *supra*.