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DRUG LYRICS, THE FCC AND THE FIRST AMENDMENT

I. INTRODUCTION

In the late 1950's, a nimble-fingered black guitarslinger from Chicago sold nearly a million copies of a phonograph record which taunted: "Roll Over Beethoven, dig these rhythm and blues."[1] Chuck Berry was acknowledging an explosive two or three year-old musical form which popularly became known as "rock and roll". During the last two decades, this billion dollar-a-year phenomenon[2] has generated a staggering impact on youth. Essentially iconoclastic[3] in its embryonic years and consistently identified with rebellious attitudes towards sex[4] and other moral issues, this "profoundly subversive"[5] music was adopted as the "sounds of the American cultural revolution."[6]

Opposition was inevitable. Negative reactions ranged from the apathetic disgust of some critics[7] to vigorous condemnation by civic

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1. "Roll Over Beethoven" by Chuck Berry, copyright 1956, Arc Music Corp.

2. In the early 1920's, the record business was enjoying a 100 million dollar-a-year sales profit, but the economic depression at the close of that decade reduced the amount by more than ninety percent. In 1933 the figure was a dismal six million dollars, but by the 1940's it had multiplied seven-fold in a resurgence effected by the success of the "big bands". Sales exceeded 200 million at mid-point in the 1950's, and the rock and roll boom tripled the figure in four years. C. GILLETT, THE SOUND OF THE CITY 3, 48 (1970) [hereinafter cited as GILLETT]. In 1966, the industry grossed almost 900 million dollars. Peyser, *The Music of Sound or, the Beatles and the Beatless*, in THE AGE OF ROCK 130 (J. Eisen ed. 1969) [hereinafter cited as AGE OF ROCK]. Today, the annual sum exceeds the one billion dollar mark. AGE OF ROCK xiii (1969).

3. *See* Newman, *I Used to Think I Was Really Ugly*, in AGE OF ROCK, *supra* note 2, at 104:

> When a pop audience blows its top it is, in fact, indulging in a communal act of defiance against a set of values which it feels to be unnecessarily and intolerably restrictive. It is a group protest against a society which it regards as impersonal, mechanistic and money-bound.

See generally Mooney, *Popular Music Since the 1920's: The Significance of Shifting Taste*, in AGE OF ROCK, *supra* note 2, at 25-29.

4. Since its inception, rock music has been a communicative vehicle through which various attitudes toward sex have been expressed. *See generally* N. COHN, ROCK FROM THE BEGINNING 4-5, 12-15, 107, 135 (1970); P. WILLIAMS, OUTLAW BLUES 93-99 (1969).

5. AGE OF ROCK, *supra* note 2, at xv.

6. *Id.* *See also* GILLETT, *supra* note 2, at 18.

7. *See, e.g.*, GILLETT, *supra* note 2, at 21, wherein the author notes syndicated critic John Crosby's terse denouncement of Elvis Presley as an "unspeakably untalented and vulgar young entertainer."

officials[8] and clergymen.[9] The self-imposed censorship of record companies extended to the liner notes printed on album jackets.[10] The more repressive measures included the banning of songs from radio and television airwaves,[11] the burning of undesirable records,[12] and the prohibition of concerts.[13]

The rock culture's retaliation to this censorial repression was an adroit counterattack. Critic A. G. Aronowitz observed:

> While American radio kept busy trying to keep its turntable clean of records that dealt with sex and drugs, American songwriters kept busy outwitting the censors with lyrics that had double, triple and sometimes multiple meanings.[14]

Of the myriad social developments which unraveled contemporaneously with the growth of rock and roll, probably the most disturbing has been the recent deluge of illegal narcotics upon the schools and homes in all regions of the country.[15] The current Administration estimates that it directs roughly twice the amount of funds toward narcotics control as did its predecessor.[16] Notable governmental officials postulate that the simultaneous dissemination of drugs and rock music is evidence of a cause-and-effect correlation.[17] Some song lyrics are

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8. *See, e.g.*, Peyser, *The Music of Sound or, the Beatles and the Beatless*, in AGE OF ROCK, *supra* note 2, at 127, wherein the author notes that Beatle John Lennon's assessment of religious hypocrisy ("We're more popular than Jesus now") caused mayors across the nation to ban Beatle concerts in their cities.

9. *See, e.g.*, GILLETT, *supra* note 2, at 21, noting that rock and roll was viewed by some southern churchmen as a plot devised by the NAACP to corrupt white southern youth.

10. When singer Frank Zappa desired to print controversial lyrics on the album liner of one of his MGM records, the company's legal department ruled against it. Kofsky, *Frank Zappa Interview*, in AGE OF ROCK, *supra* note 2, at 260-61.

11. GILLETT, *supra* note 2, at 22. In 1966, England's Rolling Stones released a single entitled "Let's Spend the Night Together" by Mick Jagger & Keith Richards, copyright 1966, Gideon Music, Inc. Most American stations responded initially by broadcasting only the less controversial flip side—"Ruby Tuesday". Ed Sullivan, prior to a performance of "Let's Spend the Night Together" on his Sunday evening television show, insisted that the title lyric be mumbled. Aronowitz, *A Family Album*, in AGE OF ROCK, *supra* note 2, at 195.

12. C. BELZ, THE STORY OF ROCK 56 (1969).

13. *See* N. COHN, ROCK FROM THE BEGINNING 14 (1970); note 8 *supra*.

14. Aronowitz, *A Family Album*, in AGE OF ROCK, *supra* note 2, at 195.

15. *See* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE (1967); Lang, *The President's Crime Commission Task Force Report on Narcotics and Drug Abuse: A Critique of The Apologia*, 43 NOTRE DAME LAW. 847 (1968).

16. Address by Vice-President Agnew, Nevada Republican Dinner, Las Vegas, Nevada, Sept. 14, 1970.

17. *Id.* The Vice-President claims that "in too many of the lyrics, the message of

alleged to "promote or glorify the use of illegal drugs."[18] Consequently, on March 5, 1971, the Federal Communications Commission, pursuant to the authority granted under the Communications Act of 1934[19] to regulate broadcasting in the public interest,[20] distributed Public Notice 71-205 to all radio broadcast licensees.[21] In an attempt to discourage or eliminate the airing of "drug lyrics", Notice 71-205 provides that a licensee must interpret the meaning of the verbal content of all songs prior to their broadcast and determine "[w]hether a particular record depicts the dangers of drug abuse, or, to the contrary, promotes such illegal drug usage. . . ."[22] Since the administrative standard of "public interest" is cited throughout the document, the radio industry could only conclude that a lack of cooperation would inevitably place various stations' broadcast licenses in danger of revocation or non-renewal.

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the drug culture is purveyed. We should listen more carefully to popular music, because . . . at its worst it is blatant drug-culture propaganda."

18. Public Notice 71-205 re Licensee Responsibility to Review Records Before Their Broadcast, 28 F.C.C.2d 409 (1971) [*see* note 21 *infra*].

19. Communications Act of 1934, ch. 652, § 301, 48 Stat. 1081, *as amended*, 47 U.S.C. § 301 *et seq.* (1970).

20. *Id.* § 303.

21. Public Notice 71-205 re Licensee Responsibility to Review Records Before Their Broadcast, 28 F.C.C.2d 409-10 (1971) [hereinafter cited as Notice 71-205]:

> 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. This Notice points up the licensee's long-established responsibilities in this area.
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> Whether a particular record depicts the dangers of drug abuse, or, to the contrary, promotes such illegal drug usage is a question for the judgment of the licensee. The thrust of this Notice is simply that the licensee must make that judgment and cannot properly follow a policy of playing such records without someone in a responsible position (i.e., a management level executive at the station) knowing the content of the lyrics. Such a pattern of operation is clearly a violation of the basic principle of the licensee's responsibility for, and duty to exercise adequate control over, the broadcast material presented over his station. It raises serious questions as to whether continued operation of the station is in the public interest, just as in the case of a failure to exercise adequate control over foreign-language programs.
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> In short, we expect broadcast licensees to ascertain, before broadcast, the words or lyrics of recorded musical or spoken selections played on their stations. Just as in the case of foreign-language broadcasts, this may also entail reasonable efforts to ascertain the meaning of words or phrases used in the lyrics. While this duty may be delegated by licensees to responsible employees, the licensee remains fully responsible for its fulfillment.
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> Thus, here as in so many other areas, it is a question of responsible, good faith action by the public trustee to whom the frequency has been licensed. No more, but certainly no less, is called for. [Issued by the Commission—Commissioners Burch (Chairman), Well, and Robert E. Lee, with Commissioner Lee issuing a separate statement. *Id.* at 410. Commissioners H. Rex Lee and Houser concurred and issued separate statements. *Id.* at 410-11. Commissioner Johnson dissented and issued a separate statement. *Id.* at 412-17.]

22. *Id.*

The purpose of this Comment is to explore the binding effect which Notice 71-205 has had upon the broadcasting industry. Applicable First Amendment principles will be set forth and discussed and it will be shown that several of these principles operate to invalidate the Notice as an excessive and overbroad restraint on speech.

II. THE FCC AND FREEDOM OF SPEECH

The First Amendment provides in part that: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."[23] This guarantee has been held to apply to print,[24] films,[25] broadcasting[26] and other media.[27] Though the concept of free speech is not without bounds,[28] one approach ostensibly infers the contrary. This is the

23. U.S. CONST. amend. I.

24. Near v. Minnesota, 283 U.S. 697, 707 (1931); Overseas Media Corp. v. McNamara, 259 F. Supp. 162, 163 (D.D.C. 1966), *overruled on other grounds*, 385 F.2d 308 (D.C. Cir. 1967).

25. Burstyn v. Wilson, 343 U.S. 495, 501-02 (1952).

26. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969); U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 476 (2d Cir. 1971); *see* American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 284 (1954); Note, *The Public Domain and A Right of Access: Affect Upon the Broadcast Media*, 3 LOY. L.A. L. REV. 451 (1970).

27. *See* Superior Films v. Department of Educ., 346 U.S. 587, 589 (1954) (concurring opinion), wherein Justice Douglas noted that "the First Amendment draws no distinction between the various methods of communicating ideas." This is not to say, however, that differences in media are not without constitutional significance. The manner in which expression is disseminated to listeners or viewers may prove to be a determinative factor in adjudicating First Amendment issues. *See* Kalven, *Broadcasting, Public Policy And the First Amendment*, 10 J. LAW & ECON. 15, 33-35 (1967); text accompanying notes 65-80 *infra*. Other forms of communication to which the First Amendment has been adjudged to apply include personal letters and other correspondence (Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970)); the right to receive information and ideas (American Civil Liberties Union of Virginia, Inc. v. Radford College, 315 F. Supp. 893 (W.D. Va. 1970)); and live theatre productions (P.B.I.C., Inc. v. Byrne, 313 F. Supp. 757 (D. Mass. 1970)).

28. The concept that First Amendment freedoms must be subjected to broad public objectives such as general order and safety is well established. However, such subordination may occur only under narrowly drawn administrative procedures. *See* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) (only a material and substantial disruption of discipline would justify restraint upon expression of ideas by students); United States v. Vigil, 431 F.2d 1037 (10th Cir. 1970) *and* Abernathy v. Conroy, 429 F.2d 1170, 1176 (4th Cir. 1970) (violence is not accorded First Amendment protection, even though it constitutes symbolic or expressive conduct); Sill v. Penn State Univ., 318 F. Supp. 608, 615-16 (M.D. Pa. 1970) (students may express their opinions so long as speech or conduct does not create a serious disruption of school discipline; the First Amendment does not require that persons may speak at any time, at any place, in any manner they choose); Eisner v. Stamford Bd.

absolutist position,[29] often ascribed to Justice Black[30] but never widely implemented by the Supreme Court. While absolutism entails an a priori assertion of constitutional sanctuary, such protection nevertheless may be qualified or denied to certain categories of expression such as public obscenity,[31] libel,[32] and threatening or "fighting expressions".[33] However, attempts to establish precise classes of speech to which a formula may be mechanically administered have been overshadowed by a stubborn conviction that only a case-by-case treatment will maintain these liberties in a true perspective. Since the circumstances surrounding a particular statement may be such that speech is denied constitutional safeguards which would otherwise have been afforded had those circumstances been different, the expression is usually judged within the context of the specific factual situation.[34] There are sev-

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of Educ., 314 F. Supp. 832, 835 (D. Conn. 1970) (in the face of reasonable regulations specifically shown to be constitutionally valid, intrusions upon free speech are permissible).

29. A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 17, 67-77 (1948); Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUPREME CT. REV. 245, 256.

30. *See* Cahn, *Justice Black and The First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. REV. 549 (1962); McBride, *Mr. Justice Black And His Qualified Absolutes*, 2 LOY. L.A. L. REV. 37 (1969).

31. *See* United States v. Thirty-Seven Photographs, 402 U.S. 363, 373-74 (1971) (statute providing for pre-hearing seizure of obscene material upheld upon construction that it requires judicial administrative action within specified time limits; Congress has power within Constitution to remove obscenity from channels of commerce); Stanley v. Georgia, 394 U.S. 557, 568 (1969) (while public distribution of obscenity is not within the ambit of constitutionally protected speech or press, mere *private* possession of obscene matter cannot constitutionally be made a crime); Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity is not within the area of constitutionally protected speech or press).

32. Beauharnais v. Illinois, 343 U.S. 250 (1952). Defamatory speech is protected, however, when it is directed against public figures or persons who are engaged in newsworthy conduct, unless it can be shown that the statement was actually false and that it was published with actual knowledge of the falsity or with reckless disregard of whether or not it was false. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See* Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

33. Watts v. United States, 394 U.S. 705 (1969) (upholding federal legislation making criminal a true threat, uttered knowingly and willingly, of physical violence to the President); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (derisive "fighting" words in public can be forbidden by statute); *cf.* Gooding v. Wilson, 40 U.S.L.W. 4329 (U.S. March 21, 1972) (state statute held unconstitutionally vague and overbroad in that it had not been narrowed by state courts to apply only to fighting words).

34. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); Schenck v. United States,

eral theories concerning the criteria under which a set of facts could constitute sufficient grounds for dissociating the speech from the sweeping ambit of the First Amendment's shelter,[35] and where the issue is "speech plus conduct" instead of "pure speech," the activity

249 U.S. 47, 52 (1919). The constitutional significance of the factual context in which statements are made is particularly crucial where the statements are accompanied by acts. *Cf.* Gregory v. City of Chicago, 394 U.S. 111 (1969) (invalidating a criminal conviction following an orderly civil rights demonstration); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (criminal conviction invalidated following a peaceful attempt by Blacks to use segregated facilities); Edwards v. South Carolina, 372 U.S. 229, 236-37 (1963) (same); Cantwell v. Connecticut, 310 U.S. 296, 303-04, 306-08 (1940) (same—religious conviction).

35. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 134 (1959) (balancing test); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) *and* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943) (preferred position test); Schenck v. United States, 249 U.S. 47, 52 (1919) (clear and present danger test).

Justice Holmes' clear and present danger test is among the oldest of theories addressing the significance of the circumstances in which the speech occurs:

> [T]he character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. *Id.*

This standard was later delineated as turning upon the imminency of the danger. Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting). In Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis and Holmes, JJ., concurring), Justice Brandeis concluded that "[o]nly an emergency can justify repression [of speech]." More recently, in Brandenburg v. Ohio, 395 U.S. 444 (1969), the Court considered the protections encircling the advocacy of illegal conduct and determined that such rights of advocacy would be suspended only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. The clear and present danger test is still employed in its original phraseology (*see, e.g.*, Honey v. Goodman, 432 F.2d 333, 338 (6th Cir. 1970)), and is widely employed to determine the constitutional status of incendiary statements. *See, e.g.*, Ascheim v. Quinlan, 314 F. Supp. 685, 689 (W.D. Pa. 1970) (First Amendment does not apply to violent conduct or to incitement to such action); People v. Winston, 64 Misc. 2d 150, 314 N.Y.S.2d 489 (1970) (upholding the constitutionality of a statute which forbids incitement to riot).

The preferred position approach requires that any legislation infringing upon the First Amendment liberties must be overwhelmingly justifiable rather than merely supportable of some legitimate public objective. Formulation of the concept is often credited to Justice Stone's opinion in United States v. Carolene Products Co., 304 U.S. 144, 152 (1938); A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 512-16 (1956). The term "preferred position" was first used by the Court in Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943), adopting the phrase as it was employed in Justice Stone's dissent in Jones v. Opelika, 316 U.S. 584, 608 (1942).

The balancing approach is essentially a rationalization for allowing legislative enactments to rest undisturbed. By this approach the Court weighs the interests of the individual and the government and, in the balancing, if the interest of the state is compelling "the balance . . . must be struck in favor of the latter. . . ." Barenblatt v. United States, 360 U.S. 109, 134 (1959). *See* Thornhill v. Alabama, 310 U.S. 88, 95-96, 105-06 (1940) (applying the balancing test in striking down an anti-picketing statute—no compelling state interest).

has been held subject to regulation as to the "time, place, and manner" of the demonstration.[36]

A. FCC Regulation in the Public Interest

While the First Amendment expressly constrains the exertion of power by Congress, its mandate has been extended to the states[37] and, of particular interest here, to the Federal Communications Commission.[38] The inevitability of some governmental control of speech communicated through the medium of radio emanates from the fact that there exist more license applicants than available frequencies.[39] Nevertheless, licensees enjoy the full panoply of liberties guaranteed by the First Amendment.[40] The reconciliation of these polar considerations is a task which, despite official policy statements and court interpretations, remains unresolved.

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36. *See, e.g.*, Adderley v. Florida, 385 U.S. 39 (1966) (trespass statute not overly broad as to trespassers who refused to leave upon request); Cox v. Louisiana, 379 U.S. 536 (1965) (statute prohibiting parades and meetings unconstitutional because not narrowly limited to time, place and manner); Cox v. New Hampshire, 312 U.S. 569 (1941) (license tax sustained where license narrowly construed so that it could only be refused for considerations of time, place and manner); *cf.* Fortune v. Molpus, 431 F.2d 799 (5th Cir. 1970).

Notice 71-205 focuses upon the freedom of expression through broadcasting, which is an activity of pure speech since it entails none of the conduct—*e.g.*, traffic disruption or public disturbance—which characterized the "time, place and manner" decisions.

37. Fiske v. Kansas, 274 U.S. 380, 386-87 (1927) (state statute which inhibits speech is violative of due process); *see* Gitlow v. New York, 268 U.S. 652 (1925); Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

38. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-95 (1969); Banzhaf v. FCC, 405 F.2d 1082, 1099-1103 (D.C. Cir. 1968); *see* Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967) [hereinafter cited as Robinson].

The First Amendment is also applicable to the broadcasters themselves, insofar as their actions tend to unreasonably stifle the full and free expression of views of the public. Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *cert. granted*, 40 U.S.L.W. 3415 (U.S. Feb. 29, 1972) (No. 864). See text accompanying notes 48-86 *infra*.

39. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388 (1969); National Broadcasting Co. v. United States, 319 U.S. 190, 226-27 (1943); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470, 477 (2d Cir. 1971).

40. *See* United States v. Paramount Pictures Inc., 334 U.S. 134, 166 (1948). Licensees may be somewhat restricted, however, by the very nature of program dissemination. See text accompanying notes 52-67 *infra*. *Cf.* Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 649 (D.C. Cir. 1971) (footnote omitted):

> It has always been clear that the broadcast media . . . are affected by strong First Amendment interests. Yet the nature of those interests has not been so clear; an evolution of constitutional principles in this area is still very much in progress.

The FCC derives its authority from the Communications Act of 1934,[41] and the extent of its control over program content is delineated by both statute and case law.[42] "Public interest" is the administrative guideline under which all FCC programming control is exercised.[43] On its face, "public interest" is an indefinite yardstick and the courts have had little success in defining its boundaries. At the very least, however, it has been interpreted to require that the Commission must not perform arbitrarily or capriciously or operate beyond constitutional and statutory bounds.[44]

41. Communications Act of 1934, ch. 652, § 301, 48 Stat. 1081, *as amended*, 47 U.S.C. § 301 et seq. (1970).

42. Statutory language makes criminal any broadcasting which: (1) imparts gambling information, 18 U.S.C. § 1304 (1970); (2) perpetrates fraud, *id.* § 1343; (3) airs obscene language, *id.* § 1464; or encourages or furthers a riot, *id.* § 2101.

The Communications Act vests extensive sanctioning power in the FCC when a violation of sections 1304, 1343 or 1464 of Title 18 has occurred. 47 U.S.C. §§ 312 (a)(6), (b)(6), 503(b)(1)(E) (1970). Palmetto Broadcasting Co., 33 F.C.C. 250, 255-58, 23 P & F RADIO REG. 483, 485e-85h (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964).

43. The standard is employed in granting the original broadcast license, 47 U.S.C. § 307(a) (1970); in renewing such license, *id.* § 307(d); and in transferring station control to a new licensee, *id.* § 310(b).

44. McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957). The Supreme Court broadly observed that public interest is "the interest of the listening public in 'the larger and more effective use of radio.'" National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943), *quoting* 47 U.S.C. § 303(g) (1970).

The FCC has supplementally attempted to clarify the meaning of public interest. In 1946, the FCC issued the *Blue Book*, a document summarizing four "program service factors." FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 55 (1946). In issuing and renewing licenses, the FCC proposed to consider: (1) the applicant's maintenance of a balanced format, (2) whether the licensee proferred a local live program, (3) whether the licensee aired public matters and current events discussions, and (4) lack of advertising excess.

A more explicit catalogue of broadcasting criteria was established in 1960, when the Commission designated fourteen program categories considered necessary to ensure a "balanced" general scheme:

> (1) opportunity for local self-expression, (2) development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorializing, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups and (14) entertainment. Commission Policy on Programming, 20 P & F RADIO REG. 1901 (1960).

Nevertheless, FCC attempts to create balanced programming formats are criticized for producing an opposite effect. *See* Robinson, *supra* note 38, at 121-22.

The concern for greater relevance to community needs resulted in a 1968 statement which outlined procedures under which a station could ascertain local program requirements and modify its format accordingly. The four factors deemed significant by the Commission were: (1) documentation of the applicant's efforts to determine the needs of the local community, (2) suggestions he has received, (3) his appraisal of those

In the shadow of this uncertain touchstone, the FCC grants and renews broadcast licenses. In the renewal proceeding, the burden to demonstrate compliance with formulated policy falls upon the applicant.[45] Thus, the renewal system furnishes a more potent device for supervising programming schemes than does the harsh measure of license revocation under which the Commission sustains the burden of showing non-compliance.[46] However, while the renewal procedure itself may be theoretically ideal, its day-to-day operations is woefully inept.[47] Its strength lies in the broadcasters' fear of displeasing the Commission rather than in effective enforcement to accurately ensure programming in the public interest.[48]

B. Licensees and the First Amendment Rights of the Public

It has long been held that the freedoms of speech and press entail protection not only for the speaker or publisher but for the listener or reader as well.[49] The public's "right to know" has, in some cases, out-

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suggestions, (4) how he attempts to actualize the worthy ideas through policy modification. Ascertainment of Community Needs by Broadcast Applicants, 13 P & F RADIO REG. 2d 1903 (1968). In 1970, the degree to which these community needs must be served was elevated from minimal to "substantial". Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 18 P & F RADIO REG. 2d 1901 (1970).

For a study of the constitutional inadequacy of the public interest standard, see Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664, 694-99 (1971).

45. Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1007 (D.C. Cir. 1966). The court explained that "[l]ike public officials charged with a public trust, a renewal applicant . . . must literally 'run on his record.'" *Id.*

46. 47 U.S.C. § 312(d) (1970).

47. Applications are considered in an administrative fantasyland where a handful of lawyers and program analysts are charged with the responsibility of reviewing approximately 2,400 applications annually, each of which consists of a "plethora of forms". Pember, *The Broadcaster and the Public Interest: A Proposal to Replace An Unfaithful Servant*, 4 LOY. L.A. L. REV. 83, 90 (1971), *citing Inside the FCC*, TELEVISION AGE, Aug. 25, 1969, at 72.

48. A memorandum from the Commission regarding its "attention" to some possible format deficiency is frequently sufficient to effect an immediate conformity to FCC "suggestions". *See* Pierson, *The Need For Modification Of Section 326*, 18 FED. COM. B.J. 15, 19-20 (1963) wherein the author notes:

> On occasion [the licensee] is almost directly threatened with costly litigation unless program proposals are changed. . . . To deny that this constraint exists is to indulge in pure myth. To say that . . . an applicant proposes or "promises" programs on the basis of his independent judgment of the needs and wants of his area compounds the myth.

Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664, 666-69 (1971).

49. Griswold v. Connecticut, 381 U.S. 479, 482 (1965), *citing* Martin v. City of Struthers, 319 U.S. 141, 143 (1943). In Joseph v. FCC, 404 F.2d 207, 211 (D.C.

weighed the application of libel laws,[50] the right of privacy,[51] and the individual's interest in the safeguarding of his professional reputation.[52] In 1949, the FCC characterized the public's right to be informed as "the foundation stone of the American system of broadcasting."[53] Nevertheless, until recently, most efforts to effectively subordinate the interests of the licensees to those of the public have failed.[54]

In *Red Lion Broadcasting Co. v. FCC*[55] the Supreme Court delineated for the first time a set of principles with which to balance the conflicting First Amendment rights of listeners and broadcasters. In affirming the FCC's authority to prescribe rules regarding campaign editorials and on-the-air personal attacks, the Court went beyond the vague rights "to know" and "to be informed" and recognized a public right to "receive suitable access to social, political, aesthetic, moral, and other ideas and experiences. . . ."[56] While declining to enumerate further the guarantees involved, the Court held that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[57] Licensees are to be considered as proxies for their listeners, "obligated to give suitable time and attention to matters of great public concern."[58]

Cir. 1968), the court noted that public interest demands the "widest possible dissemination of information from diverse and antagonistic sources," *quoting* Associated Press v. United States, 326 U.S. 1, 20 (1945). *See also* Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

50. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

51. Time, Inc. v. Hill, 385 U.S. 374, 387-88 (1967).

52. Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

53. Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

54. *E.g.*, Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497, 501 (1st Cir. 1950) (defendant radio station held not affected by constitutional restrictions against the abridgment of speech since "this Amendment limits only the action of Congress or of agencies . . . and not private corporations. . . ." *Accord*, McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 151 F.2d 597, 601 (3d Cir. 1945).

55. 395 U.S. 367 (1969). *See* Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970), for an excellent analysis of possible future developments in the public's rights with respect to broadcasters.

56. 395 U.S. at 390.

57. *Id.* *See* Thomas v. Collins, 323 U.S. 516 (1945) (upholding laborers' right to hear speech of union organizer); Brooks v. Auburn Univ., 296 F. Supp. 188, 192 (M.D. Ala. 1969) (upholding right of students to hear controversial political speaker).

58. 395 U.S. at 394. The Court also referred to a licensee as a "fiduciary with obligations to present those views and voices which are representative of his community . . . ." *Id.* at 389. In Office of Communications of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966), the court complains that "[a]fter nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach

Other courts have refused to limit the rights of listeners to the language of *Red Lion*. Noting that the scope of the Court's task was relatively narrow in that case, the Court of Appeals for the District of Columbia Circuit in *Business Executives' Move for Vietnam Peace v. FCC*[59] recently delineated two additional rights in the course of determining that a licensee's prohibition of all paid announcements concerning controversial public issues was in violation of the First Amendment. The first concerns the *method* of broadcasting controversial opinions, as separate from the issue of the discussion's *content*. Recognizing the need for an " 'uninhibited marketplace of ideas' "[60] the court concluded that the exchange of views must be " 'robust and wide-open.' "[61] The broadcasters were cautioned against excluding any discussion of topics merely because they " 'invite dispute [since freedom of speech] may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' "[62] The second public right added by the court is significant in that it concerns topics outside the categories of current events and public debate. This is the interest of "individuals and groups in effective self-expression."[63] The licensee's duty is to make available his facilities so that the need for the communication of individual views will be fulfilled.[64]

C. *The Obscenity Standard*

It is now clear that the broadcaster, as a public servant, has at the least an affirmative duty to ensure that listeners are exposed to a wide diversification of opinion with respect to both public and private af-

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of duty." *See* Note, *The Public Domain And a Right of Access: Effect Upon the Broadcast Media*, 3 LOY. L.A. L. REV. 451, 459-61 (1970).

59. 450 F.2d 642 (D.C. Cir. 1971), *cert. granted*, 40 U.S.L.W. 3415 (U.S. Feb. 29, 1972). The circuit court recognized that *Red Lion* utilized the public's rights in *upholding* legislative and administrative activity already instituted, a problem less sweeping than the issue of attacking FCC policy, 450 F.2d at 650.

60. 450 F.2d at 655, *quoting* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

61. 450 F.2d at 655, *quoting* National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 207 (D.C. Cir. 1969).

62. 450 F.2d at 666, *quoting* Terminiello v. Chicago, 337 U.S. 1, 4 (1949). While the court was careful to confine its actual decision to the listeners' free speech interests in the licensee's allocation of advertising time (450 F.2d at 654), it made clear that the principles of *Red Lion* and the additional rights discussed in the instant case are applicable to non-advertising time as well. *Id.* at 655 n.32.

63. 450 F.2d at 655.

64. *Id.*

fairs, even if the topics are so volatile that their broadcast creates a "condition of unrest." However, mere recognition of the listener's right and the licensee's duty is not determinative of the full scope of FCC regulatory power. The character of a specific media will also be indicative of the degree of regulation permissible in light of First Amendment freedoms.[65] Dissemination factors have been held to justify restrictions in three areas: the original licensing scheme (necessitated by the limited number of broadcast frequencies),[66] the telecasts of trials,[67] and the broadcast of obscenity.[68] This last category entails recognition of the fact that reception of programming is a more passive occurrence than participation in other forms of mass communication. The FCC has declared that

> *it is crucial to bear in mind the difference between radio and other media.* Unlike a book which requires the deliberate act of purchasing and reading (or a motion picture where admission to public exhibition must be actively sought), broadcasting is disseminated generally to the

65. In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969), the Supreme Court stated that "differences in the characteristics of media justify differences in the First Amendment standards applied to them." For a "compendium of views", the Court cited FREEDOM AND RESPONSIBILITY IN BROADCASTING (J. Coons ed. 1961), and made additional reference to M. ERNST, THE FIRST FREEDOM 125-80 (1946); T. ROBINSON, RADIO NETWORKS AND THE FEDERAL GOVERNMENT 75-87 (1943); and Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967), who notes that in Burstyn v. Wilson, 343 U.S. 495 (1952), the Court rejected the contention that motion pictures differ from other media as to First Amendment application. The *Burstyn* Court stated, however, that "[e]ach method tends to present its own peculiar problems." *Id.* at 503. Kovacs v. Cooper, 336 U.S. 77, 96-97 (1949), represents a further judicial expression of the differences between the various forms of communication. Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954) and United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948), again affirm the concept that the extent of First Amendment protection may vary from media to media.

66. See text accompanying notes 38-48 *supra.*

67. Estes v. Texas, 381 U.S. 532 (1965). There, Justice Clark declared: "It is said, however, that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom. . . . This is a misconception of the rights of the press." *Id.* at 539. The Justice listed many situations in which the presence of television equipment and crews "might cause actual unfairness": impact on prospective jurors, distractions affecting litigants, jury, counsel and judge, a diminishing of the quality of testimony from publicity-conscious witnesses (causing memory lapse, overdramatization, etc.), political implications (if the judge is an elected official) and "mental—if not physical—harassment". *Id.* at 544-49. *Accord,* Sheppard v. Maxwell, 384 U.S. 333, 352-53 (1966).

68. *See* Robinson v. FCC, 334 F.2d 534 (D.C. Cir. 1964), *cert. denied,* 379 U.S. 843 (1964); Pacifica Foundation, 36 F.C.C. 147, 1 P & F RADIO REG. 2d 747 (1964).

Additionally, section 1464 of title 18 of the *United States Code* prohibits radio broadcasting of "any obscene, indecent or profane language." 18 U.S.C. § 1464 (1970).

> public . . . under circumstances where reception requires no activity of this nature. Thus, it comes directly into the home . . . without advance warning of its content.[69]

In addition to this "captive audience" theory, cases involving the broadcast of obscenity must consider the rights and interests of minors. Since rock radio audiences consist in large measure of youths, the extent to which their freedoms of speech i.e., rights to know and to receive information, differ from those of adults becomes particularly significant. The First Amendment status of minors has been considered not only in the area of obscenity but also in situations involving the rights of students to speak and to demonstrate on school grounds. A leading free speech decision, *Tinker v. Des Moines Independent Community School District*,[70] addressed the rights of students to express their views as compared to the rights and duties of education administrators to conduct the operation of their institutions. The Supreme Court expressed the conviction that students are afforded full eligibility to First Amendment rights.[71] In prescribing criteria for permissible restrictions, lower courts have determined that only a material and substantial disruption of discipline would justify restraint upon expression of ideas.[72] As Justice Stewart summarized in *Tinker* (although he did not himself adhere to the conviction): "[S]chool discipline aside, the First Amendment rights of children are co-extensive with those of adults."[73]

In the obscenity area, when minors are involved, the government's regulatory power is recognized to be more extensive than such authority over adults.[74] The Supreme Court has formulated legislative

69. Eastern Educational Radio, 24 F.C.C.2d 408, 411, 18 P & F RADIO REG. 2d 860, 864 (1970) (emphasis in original); Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664, 680-86 (1971).

70. 393 U.S. 503 (1969).

71. *Id.* at 511.

72. *See, e.g.*, Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966); Dunn v. Tyler Independent School Dist., 327 F. Supp. 528, 532 (2d Cir. 1971). *See also* Lee v. Board of Regents, 441 F.2d 1257, 1260 (7th Cir. 1971); Katz v. McAulay, 438 F.2d 1058, 1060 (2d Cir. 1971); Jones v. Board of Regents of Univ. of Arizona, 436 F.2d 618, 621 (9th Cir. 1970); Crews v. Cloncs, 432 F.2d 1259, 1265 (7th Cir. 1970).

73. Tinker v. Des Moines Independent School Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring).

74. Ginsberg v. New York, 390 U.S. 629, 638 (1968). *See* Emerson, *Toward A General Theory Of The First Amendment*, 72 YALE L.J. 877, 939 (1963); Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 75. *See generally* Prince v. Massachusetts, 321 U.S. 158, 170 (1944); Comment, *Exclusion of Children from Violent Movies*, 67 COLUM. L. REV. 1149, 1159-60 (1967); Note, *Constitutional*

standards under which this broader range of control over minors may be executed. In *Ginsberg v. New York,*[75] the Court held that the state has an interest " 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.' "[76] The determinative criterion was whether exposure to the materials in question constituted such an abuse.[77] Recognizing the great difficulty or impossibility in obtaining precise and irrefutable evidence proving the harmful effects of obscenity, the Court required "only that we be able to say that it was not irrational for the legislature to find that exposure [to the questionable material] is harmful to minors."[78]

This broad and permissive standard, however, has never been applied outside the area of obscenity. In fact, the fifth circuit has held that the societal interest which justifies censorship on behalf of minors is not all-inclusive:

> [T]he long history of the misuse of the censorship power convinces us that the standard for classification must be *restricted to the control of obscenity.* . . . While we recognize the interest of society in protecting children, we find even the *child's freedom of speech too precious to be subjected to the whim of the censor.* . . .[79]

Moreover, it is submitted that should the *Ginsberg* standard be extended in an attempt to justify Notice 71-205, the FCC edict would fail to meet this liberal test because of the complete dearth of evidence that lyrics may cause drug usage and in light of the available sources which indicate the contrary.[80]

D. The Imminency Standard

Advocacy of illegal conduct is protected under the First Amendment

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Problems in Obscenity Legislation Protecting Children, 54 GEO. L.J. 1379 (1966).

A primary rationale for permitting greater authority over minors is found in the traditional notions concerning the need for parental control in directing the upbringing of children. Ginsberg v. New York, 390 U.S. 629, 640 (1968); People v. Kahan, 15 N.Y.2d 311, 206 N.E.2d 333, 334 (1965) (Fuld, J., concurring). However, should this power be used in such a manner so as to restrict adults as well as children, the action will be deemed to infringe upon the due process guaranty of the Fourteenth Amendment. Butler v. Michigan, 352 U.S. 380, 383-84 (1957).

75. 390 U.S. 629 (1968).

76. *Id.* at 640-41.

77. *Id.* at 641. *See also* Meyer v. Nebraska, 262 U.S. 402-03 (1923).

78. 390 U.S. at 641.

79. Interstate Circuit, Inc. v. City of Dallas, 366 F.2d 590, 598-99 (5th Cir. 1966) (emphasis added). *See* Comment, *Exclusion of Children from Violent Movies,* 67 COLUM. L. REV. 1149, 1155-68 (1967).

80. See text accompanying notes 82-84 *infra.*

until the point where it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[81] To restrict "drug lyrics" some reasonable cause-and-effect relationship between lyrics and such illegal activity must exist. Yet nowhere in Notice 71-205 does the Commission declare or imply this causal link. Instead, the Notice appears to rest upon an unspoken administrative assumption which is by no means beyond contention. The Executive Director of the National Coordinating Council on Drug Abuse and Education, Inc.,[82] has declared that he and his staff

> have made a thorough search of all known and available studies in this and related areas and . . . have been unable to find any scientific study to substantiate in any manner a conclusion that there is a cause and effect relationship between song lyrics and drug abuse.[83]

The same conclusion was reached by the Director of the Federal Bureau of Narcotics and Dangerous Drugs.[84]

There is no doubt that the use of narcotics entails tragic consequences, the mitigation of which irrefutably comprises a valid governmental objective. Further, it is reasonably arguable that a clear advocacy of drug use by an influential celebrity may tend to have at least some sanctioning effect upon an extremely impressionable young listener. Nevertheless, since there has been no causal link discovered between the restricted speech and the evil sought to be curtailed, and since the nature of radio has not been held to justify restraints outside of the triad of general categories previously noted,[85] Notice 71-205 must be considered to be at the least an edict of questionable constitutional validity.

E. Governmental Regulation of Speech: Administrative Standards

Critical to our system of jurisprudence is the maxim that courts alone

81. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

82. The Council is a non-profit entity whose membership includes over ninety diverse organizations such as the ABA, American Legion, the AMA, Red Cross, Boy Scouts of America, Department of Defense, CORE, NAACP, International Ass'n of Chiefs of Police, the FDA, and the YMCA.

83. Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction, Affidavit of Peter G. Hammond, Executive Director of the National Coordinating Council on Drug Abuse and Education Inc., at 2, Yale Broadcasting Co. v. FCC, Civil No. 71-1780 (D.D.C., filed Feb. 7, 1972) [hereinafter cited as *Yale*].

84. Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction, Exhibit 4, Appendix G, in *Yale, supra* note 83. Director John E. Ingersoll stated that he doubts that popular songs with drug lyrics have caused narcotics abuse among listeners, adding that no one has ever seriously suggested that drinking songs are a cause of alcoholism. He said that the FCC had not asked his opinion prior to the issuance of Public Notice 71-205.

85. *See* notes 66-68 *supra* and accompanying text.

possess the competency to adjudge the nature of speech as to its constitutional status.[86] Decades ago, Chief Justice Hughes perceived that although administrative bodies should be empowered to perform a broad range of factual determinations, independent judicial scrutiny must ensue when constitutional issues are at stake.[87] Current adherence to this principle is demonstrated by numerous decisions.[88] In *Freedman v. Maryland*,[89] Justice Brennan, writing for the Court, affirmed that:

> The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.[90]

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86. *See* Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 520 (1970) [hereinafter cited as Monaghan].

87. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 88-89 (1965). Monaghan, *supra* note 86, at 520-21 n.13 notes:

> Mr. Justice Brennan's suggestion [in Manual Enterprises v. Day, 370 U.S. 478 (1962)] that the first amendment itself demanded a judicial determination of whether speech was protected avoided the problems that have plagued earlier judicial efforts to establish a doctrine that certain issues could not be withdrawn from independent judicial judgment. . . . The general problem . . . reached its judicial zenith in Crowell v. Benson, 285 U.S. 22 (1932). There, Chief Justice Hughes . . . relied on the article III grant of "judicial power" to hold that de novo, independent judicial review must exist with respect to "facts" previously found by an administrative agency which are "constitutional" or "jurisdictional" in nature . . . .

Since the doctrines espoused in *Crowell* became clouded by subsequent decisions (*see* Hart, *The Power of Congress To Limit The Jurisdiction of the Federal Courts: An Exercise in Dialetic*, 66 HARV. L. REV. 1362, 1374-79 (1953)), Manual Enterprises v. Day, *supra*, rested upon First Amendment principles and not upon the Article III doctrine expressed by Chief Justice Hughes. Monaghan, *supra* note 86, at 520-21 n.13.

88. *E.g.*, State v. Scott, 460 S.W.2d 103, 108-09 (1970), where a Texas court, quoting United States v. Thirty-Seven Photographs, 309 F. Supp. 36 (C.D. Cal. 1970), determined that:

> 'Any system of censorship must contain, at the minimum, the following procedural safeguards if it is not to contravene the First and Fifth Amendments, (1) any restraint prior to judicial determination can be imposed only briefly, and (2) the censor in a specified brief period will go to court.'

See Holding v. Nesbitt, 259 F. Supp. 694, 699-70 (W.D. Okla. 1966); United States v. One Book Entitled "The Adventures of Father Silas", 249 F. Supp. 911, 920 n.16 (S.D.N.Y. 1966); Embassy Pictures Corp. v. Hudson, 242 F. Supp. 975, 977-78 (W. D. Tenn. 1965); United States v. One Carton Positive Motion Picture Film, 248 F. Supp. 373, 376-77 (S.D.N.Y. 1965).

89. 380 U.S. 51 (1965).

90. *Id.* at 58. *Freedman* involved a prosecution under a state law which prohibited the exhibition of motion pictures without first obtaining a license. The Supreme Court set aside the statute as unconstitutional since (1) upon refusal of an application for such a permit, the burden of instituting judicial proceedings fell upon the exhibitor; (2) once the censor had disallowed issuance of a license, the film was banned pending a court's interpretation; and (3) there was no time limit as to when the judicial decision had to be made. *Id.* at 58-60.

Perhaps this precept for courtroom review is grounded upon the inherent functional disparities between judicial and administrative processes. Long tenure customarily disengages the jurist from immediate political influence whereas the agency official enjoys no such insulation. The role of the administrator "is not that of the impartial adjudicator but that of the expert—a perspective which necessarily gives an administrative agency a narrow and restricted viewpoint" of matters within the purview of its activity.[91]

In specifying the range of FCC functions, the Communications Act makes express provision for the issue of censorship. Section 326 decrees that:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall *interfere* with the right of free speech by means of radio communication.[92]

An additional safeguard was provided in a 1948 Senate Committee Report which interpreted section 326 as

> [making] clear that the Commission has *absolutely no power of censorship over radio communications* and that it cannot impose *any* regulation or condition which would interfere with the right of free speech by radio.[93]

A granting of those liberties already proclaimed under the Bill of Rights would constitute a legislative redundancy. Since the definition of "censorship" as used in section 326 was defined by the Supreme Court as "*any* examination of thought or expression in order to prevent publication of 'objectionable' material,"[94] it is at least arguable that in enacting the section Congress was resolved to ordain interdictions

91. Monaghan, *supra* note 86, at 523.

92. 47 U.S.C. § 326 (1970) (emphasis added).

93. S. REP. No. 1567, 80th Cong., 2d Sess. 14 (1948) (emphasis added).

94. Farmers Union v. WDAY, 360 U.S. 525, 527 (1959) (emphasis added). In National Ass'n of Theatre Owners v. FCC, 420 F.2d 194, 207 (D.C. Cir. 1969), it was held that the Commission possesses the authority to provide for nationwide subscription television, and that it must administer "a scarce communications resource, the broadcast spectrum, in such a manner that the great objectives incorporated in the first amendment are realized and debate on public issues is 'uninhibited, robust, and wide-open.'" *Id.* at 207, *quoting* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Such administration would provide exposure "to a wide variety of 'social, political, esthetic, moral, and other ideas and experiences.'" 420 F.2d at 207, *quoting* Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 390 (1969). The circuit court cautioned that "the Commission must avoid the perils of both inaction and overzealousness . . . and of censorship which would allow the government to control the ideas communicated to the public." 420 F.2d at 207.

against curbs upon free speech which would supplement the guaranty of the First Amendment. Congress may not "abridge" and the FCC may not "interfere" with the right of free speech. The latter prohibition seems patently more stringent, since by definition[95] and under judicial interpretation,[96] the word "interfere" has been given a more generic interpretation than "abridge".

1. Notice 71-205: An Embodiment of Excessive Administrative Censorship

While the Commission does not directly refer to censorship in the text of Notice 71-205, it nevertheless professes to "point up"[97] a broadcaster's duties regarding drug lyrics, a topic "of current and pressing concern."[98] Non-compliance "raises serious questions as to whether continued operation of the station is in the public interest . . . ."[99] The implication is simple and explicit; the broadcaster receives fair warning: your license is at stake.

Previous cases have investigated the practical consequences of similar notices. In *Bantam Books, Inc. v. Sullivan,*[100] the Supreme Court determined that restraints by administrative fiat upon that which has been judicially termed "pure speech"[101] are forbidden by the First Amendment. A state obscenity commission had dispatched notices to booksellers containing lists of publications found to be objectionable, accompanied by a note stating that the titles were also being sent to

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95. WEBSTER'S THIRD NEW INT'L DICTIONARY 1178 (ed. 1966):
Interfere . . . : to come in collision: to be in opposition: to run at cross-purpose: CLASH . . . . *Id.*
abridge . . . : to diminish (as a right) by reducing; the danger of *abridging* the liberties of the people . . . . *Id.* at 6.

96. *See* Schermerhorn v. Local 1625, Retail Clerks Int'l Ass'n, 141 So. 2d 269 (Fla. 1962) (involving labor union conflicts over issue of whether paying sums to union equal in amount to membership dues abridged the right to work) where the word "abridge" was held to mean "anything which imposes a charge or expense upon the free exercise of a right. . . ." *Id.* at 276; Piegts v. Local 437, Amalgamated Meat Cutters Butchers' Workmen of North America, 228 La. 131, 81 So. 2d 835 (1955).
For judicial definitions of "interfere", *see* People *ex rel.* Benefit Ass'n of Railway Employees v. Miner, 387 Ill. 393, 56 N.E.2d 353 (1944), where "interfere" was construed by the court to connote intermeddling, interposing, taking part in or entering into the concerns of others. *Id.* at 356; Highway Trailer Co. v. Janesville Electric Co., 204 N.W. 773 (Wisc. 1925).

97. Notice 71-205, *supra* note 21 , at ¶ 1.

98. *Id.*

99. *Id.* at ¶ 2.

100. 372 U.S. 58 (1963).

101. See text accompanying notes 28-36 *supra.*

local law enforcement agencies.[102] Several recipients contended in protest that this issuance constituted "a scheme of governmental censorship devoid of the constitutionally required safeguards for state regulation of obscenity. . . ."[103] The Court concurred, and struck down both the commission's enabling law and its mode of operation. The circulars were characterized as containing four features vitiating their content: (1) they were phrased essentially as edicts; (2) they were reasonably understood to be such by the recipients; (3) they were invariably followed up by police visitations; and (4) their practical effect was to force the booksellers to remove the objectionable books from circulation.[104] The Justices concluded that the notices clearly constituted instruments of regulation.[105]

Strong analogies exist between the *Bantam* notices and Notice 71-205. First, the latter is phrased virtually as an order, containing these directives in its text and concurring opinions:

> [The licensee] cannot properly follow a policy of playing such records without . . . knowing the content of the lyrics . . . . [Non-compliance] raises serious questions as to whether continued operation of the station is in the public interest . . . .[106]
>
> I sincerely hope that [the Notice] . . . will discourage, if not *eliminate the playing* of records which tend to promote and/or glorify the use of illegal drugs. . . . I expect the Broadcast Industry to meet its responsibilities of reviewing records. . . . Obviously . . . the licensee will exercise appropriate judgment in determining whether the broadcasting of such records is in the public interest.[107]

A dissent to 71-205 viewed the Notice as "an unsuccessfully disguised effort . . . to censor song lyrics . . . aimed clearly at controlling the content of speech."[108] Second, 71-205 was interpreted by the broad-

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102. 372 U.S. at 61-63. The notices stated in part:

> The [Commissioners] have reviewed the following publications and . . . have declared they are completely objectionable for sale, distribution or display for youths . . . .
>
> The Chiefs of Police have been given the names of the aforementioned magazines with the order that they are not to be sold, distributed or displayed to youths . . . .
>
> The Attorney General will act for us in case of non-compliance. The Commissioners trust that you will cooperate . . . . *Id.* at 62 n.5.

103. *Id.* at 64.

104. *Id.* at 68.

105. *Id.* at 69.

106. Notice 71-205, *supra* note 21, at ¶ 2.

107. 28 F.C.C.2d at 410 (H.R. Lee, Comm'r, concurring) (emphasis added).

108. *Id.* at 412 (Johnson, Comm'r, dissenting). Commissioner Johnson attacked the Notice as a blatant censorial action by "establishmentarians" against the youth culture. Claiming that the licensees cannot meet the factual burdens imposed, the

casters as constituting "censorship . . . by fear of license revocation."[109] A survey of the reaction among licensees concluded that most stations perceive the Notice as an effort to exclude certain songs from the airwaves.[110] Finally, as in *Bantam*, 71-205 initiated the rejection of material formerly designated to be appropriate. One owner confiscated his station's record library and eliminated all Bob Dylan songs "because the management could not interpret the lyrics."[111] Only fifteen albums were ultimately approved for broadcast. He then informed announcers that any infringement would cause an immediate conversion of format from progressive rock to "easy listening."[112] Another station required its announcers to sign statements promising not to air any record deemed unsuitable by the executives.[113] Probably the most common response has been the extensive banning of records through the circulation of "do-not-play" lists.[114] These memoranda often include popular tunes which have been aired many times before[115] and

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Commissioner concluded that the Notice is an unconstitutionally "crude attempt to suppress the anti-establishment music of the counterculture. . . ." *Id.* at 414.

109. *See, e.g.*, Affidavit of J.H. Irwin, Director of Broadcasting, KUOP-FM, Stockton, Calif., in *Yale, supra* note 83, at 4.

110. Affidavit of Douglas Wachholz, law student, in *Yale, supra* note 83, at 4, 20-21. This document contains the findings of a verified telephone survey of thirteen East Coast radio stations, conducted in March, 1971. The primary objective of the interviews was to ascertain the response by radio managers and announcers to Public Notice 71-205. The named individuals agreed to speak "for the record" with knowledge of the probable publication of their remarks. Mr. Wachholz concluded:

> Most stations view (the Notice) as an attempt to censor certain drug lyrics . . . . The stations all feel they are "playing with fire" by broadcasting many record lyrics and some frankly state that the trouble isn't worth it. *Id.*

111. Affidavit of John Gorman, former announcer and program consultant, WNTN, Newton, Mass., in *Yale, supra* note 83, at 2.

112. *Id.* at 2.

113. Zito, *Drug-Lyric Notice Rocks Radio*, The Washington Post, Mar. 21, 1971, at H-7, referring to WMBD-FM, Baltimore, Md.

114. *Id.* At WDAS-FM, Philadelphia, Pa., the number of unsuitable songs rose from thirteen to over five hundred in one week; at WHMC-AM, Gaithersburg, Md., several songs, including "Casey Jones", were banned. *Id.*

115. For example, the Washington Post noted:

> You may never again hear "With A Little Help From My Friends" on your favorite radio station. The song appears on the Beatles' "Sgt. Pepper's Lonely Hearts Club Band" LP, probably the single most important rock recording ever produced in terms of both the widespread attention it received and the influence it exerted on rock as a musical form. The album has sold over 3 million copies in this country alone . . . and the song has been broadcast thousands of times. *Id.*

See Affidavit of Steve Leon, former Program Director, WDAS-FM, Philadelphia, Pa., in *Yale, supra* note 83, at 3 wherein Mr. Leon lists songs banned as including "White Rabbit" (Jefferson Airplane), "I Am the Walrus" (Beatles), and "One Toke Over The Line" (Brewer & Shipley); Affidavit of Douglas Wachholz, in *Yale, supra* note 83, at 17-18 wherein Mr. Wachholz lists songs banned by WHBG, Harrisonburg, Va., including "Lucy In The Sky With Diamonds" (Beatles), "Coming Into Los An-

even songs which are violently anti-drug.[116]

2. Notice 71-205: An Excessive Burden and Prior Restraint

The *Bantam* Court held that the state had subjected the dissemination of printed matter to a "system of prior administrative restraints."[117] The constitutional infirmity of the obscenity commission's operation was three-fold: (1) the state failed to provide for judicial supervision of the formulation of restrictions, (2) there was no assurance that the restraints, once imposed, were then subject to judicial corroboration or review, and (3) the mandate was vague and uninformative.[118] The result was that an administrative body was establishing a restraint upon speech. The "system of informal censorship", therefore, was held to violate the First Amendment as applied to the states by virtue of the Fourteenth Amendment.[119] These same defects exist with respect to Public Notice 71-205. There is neither a stipulation for judicial superintendence of the establishment of restrictions which truncate program content, nor is provision made for judicial review of the application of administrative restraints. Instead, licensees are presented with a vague and ambiguous document and are expected to conduct their programs in accordance with its prescriptions.

Brief consideration of broadcast systems exposes the magnitude of the burdens left in the wake of Notice 71-205. The Notice directs *inter alia* that licensees shall determine the connotation of all lyrics antecedent to broadcast,[120] an exaction which prefatorily necessitates the ascertainment and interpretation of the words themselves. The order

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geles" (Arlo Guthrie), "With a Little Help From My Friends" (Beatles), "Mr. Tambourine Man" (Bob Dylan, The Byrds).

116. Affidavit of Douglas Wachholz, in *Yale, supra* note 83, at 17-19 reports that several Eastern stations pulled "The Pusher" (by Steppenwolf), some of the lyrics of which are contained in the text accompanying notes 198-99 *infra*. He notes the exclusion of "Snowblind Friend", recorded by the same group, discussed in the text accompanying notes 200-03 *infra*.

117. 372 U.S. at 70.

118. *Id.* at 70-71. The effect of these deficiencies was that there existed "no safeguards whatever against the suppression of . . . constitutionally protected . . . matter." *Id.* at 70. The prior administrative restraint ensued

> since the Commission is not a judicial body and its decisions to list particular publications as objectionable do not follow judicial determinations that such publications may lawfully be banned. Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. *Id.*

See also New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

119. 372 U.S. at 71.

120. Notice 71-205, *supra* note 21, at ¶ 3.

is unreasonable. A typical rock radio station acquires an enormous number of new records, usually fifty to one hundred albums in a seven-day period, in addition to scores of "singles".[121] A standard album contains from ten to fourteen songs. Therefore, a licensee may have to consider as many as fifteen hundred separate tunes *each week* and perhaps sixty or seventy thousand songs in one year. In view of this massive influx of recordings, disc jockeys often spend only ten to twenty seconds hearing each new release.[122] When it is recognized that station libraries ordinarily contain as many as five or six thousand records,[123] it becomes apparent that listening to this volume of material in its entirety would be a herculean task. Experienced radio employees estimate that one individual would spend over two years reviewing a typical station library,[124] and that to embrace both the library and new releases would require "four extra staff members six months just to keep current."[125] In addition, a broadcaster may rely heavily or even exclusively upon the private collections of staffers.[126]

Compounding these problems is the fact that a multitude of records would require more than one hearing to guarantee a meticulous determination of the words, since the volume of the recorded instruments may be relatively high. "[M]any rock bands use voice almost as an additional instrument—for its sound quality and texture, not for words."[127] Since a modern rock anthem may consist of eight or more recorded tracks, the primary voice may be simultaneously competing with a full orchestra, a choir, a rock band, other voices—talking, singing, chanting or shouting (perhaps recorded backwards)—

121. Affidavit of Mark Gorbulew, rock announcer and Program Director, WHFS-FM, Wash., D.C., in *Yale, supra* note 83, at 2. Mr. Gorbulew notes that most "serious" rock stations receive up to 100 long play (33 1/3 rpm) records per week, plus "dozens or hundreds" of singles (45 rpm).

122. *Id.* at 3.

123. Affidavit of J.H. Irwin, in *Yale, supra* note 83, at 10 wherein it is stated that KUOP-FM, Stockton, Calif., has a library of 2,000 progressive rock albums. Affidavit of Steve Leon, in *Yale, supra* note 83, at 4 wherein it is estimated that WDAS, Philadelphia possesses "at least 7,000 albums". Affidavit of Mark Gorbulew, in *Yale, supra* note 83, at 2 wherein Mr. Gorbulew cites WABC-FM, New York, estimating its total from 4,000 to 5,000 records. Affidavit of Charles Laquidara, rock announcer, KPPC-AM, Pasadena, Calif., and WBCN-FM, Boston, Mass., in *Yale, supra* note 83, at 3 wherein he estimates that WBCN's albums number from 4,000 to 6,000.

124. Affidavit of Stuart Jackson, Chairman, Yale Broadcasting Co., New Haven, Conn., in *Yale, supra* note 83, at 2.

125. Affidavit of Charles Laquidara, in *Yale, supra* note 83, at 3.

126. Affidavit of Mark Gorbulew, in *Yale, supra* note 83, at 3-4 wherein the figure is placed at over ninety percent for some stations.

127. *Id.* at 6.

plus countless sound effects, all deliberately arranged and engineered to create a massive total impact. A less complex but equally bewildering obstacle is that the lyrics may be intentionally slurred by the singer. One station's rock music director and several associates were required to listen to the relatively uncomplicated arrangement of "White Rabbit"[128] recorded by Jefferson Airplane for more than thirty minutes before ascertaining all of the words.[129]

Since many stations do not have the personnel or technical equipment to handle the increased listening burdens,[130] record companies are often requested to provide printed sheets containing the words to all songs distributed for broadcast.[131] Other stations employ secretaries who primarily listen to new shipments of records and prepare lyric sheets.[132] The supplementary expenses and efforts necessitated by the circulation of these printings is at least indirectly imputable to the FCC. However, even a total resolution of the listening quandary would not eradicate the insoluable dilemma arising from the order requiring determination of the *meaning* of lyrics. The problem is multiplied by the inherent ambiguities in the art itself.

Justice Brennan, speaking for the majority in *Speiser v. Randall,*[133] stated that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn".

128. "White Rabbit" by Gracie Slick, copyright 1967, Copperpenny Music Pub. Co.

129. Affidavit of Mark Gorbulew, in *Yale, supra* note 83, at 7. Referring to the song "I Am the Walrus" (Beatles), the affiant noted that he had unsuccessfully attempted to ascertain some of the words. Additionally, he stated that a fearful Program Director might "easily decide not to second-guess the FCC, and ban the record." *Id.*

130. *Id.* All stations possess a main broadcasting facility for on-the-air programming; most have a second studio for producing advertisements. During a typical day, both studios are in constant use. There is no convenient place to conduct the pre-screening of new records when they arrive unless the station has a third outlet. Thus, Notice 71-205 could force smaller stations (and student-operated facilities) to obtain additional equipment. *Id.* at 3.

131. Hall, *Storz Follows FCC Rule—Demands Lyric With Disc* in BILLBOARD MAGAZINE, April 3, 1971, at 1, col. 3. Stations requiring lyric sheets include: WDGY, Minneapolis, KXOX, St. Louis, KOMA, Oklahoma City, WTIX, New Orleans, WQAM, Miami, WHB, Kansas City, and WING, Dayton. The Program Director of KOIL, Omaha, is quoted as saying that he would not play any tune with "questionable lyrics" and that he would "flat tell the record company we won't play the record until we get the lyrics." *Id.*

132. *Id.* Stenographers compile lyric sheets at WTOB, Winston-Salem, WSGN, Birmingham, WKIX, Raleigh, and WPGC, Washington, D.C.

133. 357 U.S. 513, 525 (1958) (statute which denied tax exemption to persons who refuse to sign a statement on tax returns that they do not advocate the overthrow of the Government, held violative of Fourteenth Amendment due process in that it placed burden of proof on taxpayer).

This canon is clearly ignored, however, in 71-205's dictate requiring "reasonable efforts to ascertain the meaning of words or phrases used in the lyrics."[134] A predominant hallmark of music is its pliable nature, its susceptibility to variable interpretations. The vast dissemination of rock owes much to the fact that due to multiple meanings a single song may be suited to the tastes of what would otherwise constitute disparate listening groups. "A song, after all, is not a speech. Like any work of art, it bounces back different meanings to different people at different times, as life shines new light upon it."[135] Beatle Paul McCartney agreed, saying:

> We write songs; we know what we mean by them. But in a week someone else says something about it, says that it means that as well, and you can't deny it. Things take on millions of meanings. I don't understand it.[136]

The Vice-President of the United States cautioned that much of popular music is "blatant drug-culture propaganda."[137] Illustrating his point, he referred to "Acid Queen"[138] by The Who. The lyrics read in part:

> I'm the gypsy, the Acid Queen . . . pay before we start. . . .
> I'm the gypsy, the Acid Queen . . . I'll tear your soul apart. . . .
> My work is done now, look at him . . .
> his head it shakes, his fingers clutch, watch his body writhe . . .
> I'm guaranteed to break your little heart. . . .

It is difficult to envision a more glaring recognition of the allegedly ravaging consequences of the use of LSD. Nevertheless, the Vice-President reproached these and other lyrics, charging that "these songs present the use of drugs in such an attractive light that for the impressionable, 'turning on' becomes the natural and even the approved thing to do."[139]

The interpretation of lyric meanings is no less a perplexing chore for seasoned disc jockeys. Subsequent to the publication of the Notice,

134. Notice 71-205, *supra* note 21, at ¶ 3.

135. P. SEEGER, A ROCK ANTHOLOGY: WHEN THE MODE OF THE MUSIC CHANGES 1 (1971).

136. A. Aldridge, *Beatles Not All That Turned On*, in THE AGE OF ROCK 138 (J. Eisen ed. 1969).

137. Address by Vice-President Agnew, Nevada Republican Dinner, Las Vegas, Nevada, Sept. 14, 1970.

138. "Acid Queen" by Peter Townsend, copyright 1969, Essex Music. The author is quoted as declaring, "Drugs are harmful mentally, spiritually, and physically . . . ." ROLLING STONE MAGAZINE, Nov. 26, 1970, at 25.

139. Address by Vice-President Agnew, Nevada Republican Dinner, Las Vegas, Nevada, Sept. 14, 1970.

three different radio stations considered the same song. One decided to continue playing it, another placed it in the ambiguous status of "under review", and the third took it off the air.[140] Yet this is not an isolated instance of confusion. Alarmed broadcasters, protesting the issuance of Notice 71-205, have cited scores of records composed of unfathomable lyrics.[141]

Even if a musical or poetic phrase were to have only one meaning (an improbable occurrence), further inquiries may linger. The song may contain obvious satire, such as "The Pause of Mr. Clause":[142]

Let's get Santa Clause 'cause
Santa Clause has a red suit,
He's a communist;
And a beard and a long hair,
Must be a pacifist.
What's in that pipe he's smoking?
Mister Clause sneaks in your house at night,
He must be a dope fiend to put you up-tight.[143]

Does the implication of the pipe's content subject the song to Notice

140. BROADCASTING MAGAZINE, Mar. 22, 1971, at 73. The song is "What About Me?" by J.O. Farrel, copyright 1967, Quicksilver Music.

141. Affidavit of J.H. Irwin, in *Yale, supra* note 83, at 7 discusses several Beatle hits, including "Let It Be" (is the reference to Mother Mary a religious one, or is "Mary" a code for marijuana?); "Hey Jude" (is the mention of the phrase "under your skin" in fact a clever message urging the use of a hypodermic needle for narcotics consumption?); "Lucy In The Sky With Diamonds" (are the first letters of the title words a reference to LSD? If the song is about drugs, does it tend to promote, or glorify, drug use?).

For a non-drug interpretation of Beatle lyrics, *see* R. Poirier, *Learning From The Beatles*, in THE AGE OF ROCK 160, 174 (J. Eisen ed. 1969). The argument is presented that Beatle lyrics serve to illustrate that the arts or the news media can influence one's vision of the world to a degree as exciting as any drug-induced experience. For example, "Lucy In The Sky With Diamonds" suggests that the listener can "picture" himself on a "trip" without actually taking such a trip himself. "The Beatles won't be reduced to drugs when they mean, intend, and enact so much more." Mr. Poirier quotes Beatle George Harrison as telling the *Los Angeles Free Press* that LSD "is not the answer, definitely not the answer." *Id.*

In Yale Broadcasting Company v. FCC, Civil No. 71-1780 (D.D.C., filed Feb. 7, 1971), the following persons, alarmed by the Notice, joined as party plaintiffs: Steve Leon, formerly of WDAS-FM and WDAS-AM, Philadelphia; Mark Gorbulew, veteran of two New York stations and another in Washington, D.C.; Sara Vass, also of New York and Washington, D.C. radio experience; John Gorman and Kenneth Currier, formerly of WNTN, Newton, Mass.; James Irwin, KUOP-FM, Stockton, Calif.; and Charles Laquidara, formerly with KPPC-AM & FM, Los Angeles, and WBCN-FM, Boston.

142. "The Pause of Mister Clause" by Arlo Guthrie, copyright 1969, Appleseed Music, Inc.

143. *Id.*

71-205 as "language tending to promote or glorify the use of illegal drugs such as marijuana . . ."? Reasonable minds certainly must differ in answering this query. Additionally, the literary categories of fiction, fantasy, legend, imagery, and mythology, all suggest by definition an escape from reality through the employment of allusions and imagery. Licensees now will have to determine the status of these ancient lyrical techniques which are so abundant in the popular records of the 1960's and 1970's. Consider this verse:

> Then take me disappearing through the smoke rings of my mind
> Down the foggy ruins of time, far past the frozen leaves
> The haunted frightened trees out to the windy beach
> Far from the twisted reach of crazy sorrow
> Yes, to dance beneath the diamond sky with one hand wavin' free
> Silhouetted by the sea, circled by the circus sands
> With all memory and fate driven deep beneath the waves
> Let me forget about today until tomorrow
> Hey, Mister Tambourine Man, play a song for me . . . .[144]

Is this in fact "blatant drugculture propaganda"?

The preceding illustrations of lyrics which may well be within the ambit of Notice 71-205 are reminiscent of the excessive burdens which constituted the determinative factor of the Supreme Court's ruling in *Smith v. California.*[145] There, a bookstore owner had been convicted of the sale of obscene publications under a state statute which in effect held him strictly liable for the content of the thousands of books and magazines contained within his shop. The Court recognized that obscene material is excluded from the shield of First Amendment safeguards and that prohibition of its dissemination comprised a justifiable state interest. However, the overwhelming operational requirement of pre-screening the entire inventory of a bookstore was adjudged to be a virtually impossible task. An unlawful restraint was thus imposed upon the proprietor's freedom to conduct his business, since he would restrict himself to selling only those publications which he had personally inspected. In order to operate his establishment at its fullest capacity, the owner would be required to be aware of the contents of every book in the shop. As the Court concluded, "[i]t would be altogether unreasonable to demand so near an approach to omniscience."[146] Recognizing that the right to publish and distribute books is

144. "Mr. Tambourine Man" by Bob Dylan, copyright 1964, M. Witmark & Sons. The Wachholz Affidavit, in *Yale, supra* note 83, at 18 notes that WHBG, Harrisonburg, Va., took the song off the air following promulgation of the Notice.

145. 361 U.S. 147, 153-54 (1959).

146. *Id.* at 153, *quoting* The King v. Ewart, 25 N.Z.L.R. 709, 729 (C.A. 1905).

a clearly protected First Amendment freedom and that the role of the bookseller is a crucial one, the Court held that the ordinance violated the Due Process Clause of the Fourteenth Amendment which secures the freedom of the press against state abridgment. The effect of a prior restraint upon the public at large is as opprobrious as its restriction upon the distributor or speaker.[147] As summarized in *Smith,* "the bookseller's burden would become the public's burden,"[148] because the public's access to reading matter would be abridged.

There exists a striking similarity between the factual and legal context of *Smith* and Public Notice 71-205. The burden of listening to thousands of records and tapes is cardinally analogous to the duty of examining as many books and magazines. Furthermore, the declared restrictive criterion of "tending to promote or glorify the use of illegal drugs" is no less undecipherable a standard than the enshrouded definition of obscenity,[149] as demonstrated by the radio industry's chaotic reaction to the FCC's mandate. Wincing from the same kind of uncertainty and fear as befell the booksellers under the legislation invalidated in *Smith,*[150] the radio licensees have tended to abridge playlist content to include only those records which feature unambiguous words. The impenetrable riddle of decoding lyrics yields a profusion of marginal situations and borderline cases. This predicament has resulted in a "take no chances" attitude. Questionable tunes, some of them enormously popular, are eliminated[151] since, as one Program Director stated: "[I]f it's not clear, or it's marginal, then

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The Court reports that the requirement of scienter in prosecutions for the distribution of obscene matter was established at common law. 361 U.S. at 153 n.9, *citing* Attorney General v. Simpson, 93 Ir. L.T.R. 33, 37-38 (Dist. Ct. 1958); *but cf.* Obscene Publications Act, 1959, 7 & 8 Eliz. 2, c. 66 § 2(5); ALI MODEL PENAL CODE § 207.10(7).

147. See text accompanying notes 49-65 *supra.*

148. 361 U.S. at 153.

149. The Supreme Court's assessment of the status of the obscenity definition in numerous cases reflects a futile exercise in attempting to define the indefinable. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (concurring opinion), for a vivid illustration of judicial confusion.

150. *See* text accompanying notes 145-148 *supra.*

151. Interviewer Wachholz concluded that the reaction of the stations "was to eliminate any and all songs with uncertain lyrics." Wachholz Affidavit, in *Yale, supra* note 83, at 21. A spokesman for WANV, Waynesboro, Va., is quoted as saying, "If it's marginal, we won't play it . . . . I'm in a quandry over what to play." *Id.* at 7.

Zito, *Drug-Lyric Notice Rocks Radio,* The Washington Post, Mar. 21, 1971, at H-7 quotes local WMAL's station manager as saying that he could not decide whether he would continue to play "With A Little Help From My Friends" by the Beatles, since "[i]t's on one of those fine lines."

we've got to protect ourselves and we won't play the song . . . I don't know what to do."[152]

After considering the Commission's Notice, a West Coast Director of Broadcasting speculated that "[t]he ultimate loser in all this will be the public interest",[153] a conclusion grounded upon his knowledge of the character and prevailing attitudes of much of the broadcast industry. A typical progressive rock station shares little in common with the slick, rigidly-programmed "Top 40" shows.[154] There is an absence of both the ubiquitous "hard-sell" advertisements and the loud, ceaseless, rapid-fire gibberish so common among "bubble gum" formats aimed at the youngest of record buyers and listeners. Perhaps the most distinctive quality of a progressive station is the creative freedom exhibited by individual announcers. You may hear Bach, Dylan, Presley—all aired on the same show, interspersed with casual impromptu comments from an announcer who had chosen each record only moments before playing it. There are many programs with this personal, more communicative relationship between broadcaster and listener. As a result, the frequent anti-drug public service messages broadcast in such programs are taken quite seriously. A Boston radio personality notes that since the audience identified with the announcer, and since the programming and commercials were straightforward and credible, the listeners would give attention and consideration to the warnings concerning the dangers of narcotics.[155]

Public Notice 71-205 is widely viewed as a demoralizing and repressive threat to the spontaneity enjoyed by so many stations,[156] and it is thought that the exclusion of songs containing vague and thus questionable lyrics will destroy this credible programming and personal communication.[157] Others protest that the threat of censorship is an insurmountable impediment to the pursuit of creative broad-

152. Affidavit of Douglas Wachholz, in *Yale, supra* note 83, at 7, *quoting* an executive of WHBG, Harrisonburg, Va.

153. Affidavit of J.H. Irwin, in *Yale, supra* note 83, at 14.

154. C. BELZ, THE STORY OF ROCK 117 (1969); *see also* Shearer, *Captain Pimple Cream's Fiendish Plot*, in THE AGE OF ROCK 357 (J. Eisen ed. 1969).

155. Affidavit of Charles Laquidara, in *Yale, supra* note 83, at 2.

156. *See, e.g.*, Affidavit of J.H. Irwin, in *Yale, supra* note 83, at 12-13:

> Perhaps the most tragic victim of this Public Notice is the atmosphere of freedom and self-determination [previously existing]. . . . [The Notice causes] a sense of repression which has been—and continues to be—severely damaging to the morale of the staff . . . [they are in] constant fear of losing their positions . . . [and] we fear to allow them to exercise their individual judgment without constant review and monitoring.

157. Affidavit of Steve Leon, in *Yale, supra* note 83, at 5.

casting.[158] Added to this de facto abrogation of a generally informal technique, there also exist the grievances arising from the denial of public access to many records which are not played on the more mechanically-programmed "Top 40" stations.[159]

In *Anti-Defamation League of B'nai B'rith,*[160] an administrative decision expressly based upon the "overriding policy considerations" of *Smith,* the Commission itself refused to impose a prescreening obligation upon a licensee who had been accused of having knowingly broadcast anti-Semitic material. Petitioners had contended that station executives were charged with the responsibility to investigate and verify the correctness of all program material, a process which would eliminate offensive matter.[161] This proposition was determined to be without merit. The Commission declared that the approach advocated by plaintiffs would create a "serious and substantial restraint on free speech."[162] Verification requirements would inhibit the airing of discussion concerning controversial public issues. This is particularly true in regard to smaller stations where the costs and time necessitated by investigation would constitute formidable obstacles. Further, there had been no showing of consequences harmful to the public interest.[163]

Each of the Commission's reasons for the judgment in *Anti-Defamation League of B'nai B'rith* pertains to the effects of Notice 71-205. First, significant inhibition of controversial issue programming has occurred,[164] and second, smaller broadcast facilities face shortages of

158. *Id.* at 3.

159. Affidavit of Douglas Wachholz, in *Yale, supra* note 83, at 4 reports that all of the stations interviewed were "Top-40" or "middle-of-the-road" as opposed to progressive stations. Among the hit songs banned by these various stations are: "One Toke Over The Line" (Brewer & Shipley), "Lucy In The Sky With Diamonds" (Beatles), "The Pusher" (Steppenwolf) (see text accompanying notes 198-199 *infra*), "Eight Miles High" (Byrds), "Coming Into Los Angeles" (Arlo Guthrie), "With A Little Help From My Friends" (Beatles), "Mr. Tambourine Man" (Bob Dylan, Byrds) (see text accompanying notes 143-144 *supra*), "White Rabbit" (Jefferson Airplane) (see text accompanying notes 128-129 *supra*), "Truckin'" (Grateful Dead), "Puff The Magic Dragon" (Peter, Paul, and Mary), "Snowblind Friend" (Steppenwolf) (see text accompanying notes 200-202 *infra*).

160. 6 F.C.C.2d 385 (1967), *aff'd sub nom.* Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169 (D.C. Cir. 1968).

161. 6 F.C.C.2d at 385-86.

162. *Id.* at 386.

163. *Id.*

164. Affidavit of Steve Leon, in *Yale, supra* note 83, at 4 notes that a Philadelphia station had been servicing the college communities with the programming of notices and bulletins regarding diverse topics including politics, sex, drugs, music, education, etc. Personal interviews were conducted, and informative comments were broadcast by radio personalities. Subsequent to Notice 71-205, these efforts were curtailed.

the supplementary funds and equipment necessary to execute the Notice's requirements.[165] Further, there is no indication that lyrics have any causal effect upon narcotics abuses.[166] In other words, there has been no showing of consequences adverse to the listening public.[167]

F. Censorship By Threat

Blatant censorship need not exist in order to bring First Amendment protections into effect. Even though a commission may be restricted to informal sanctions such as "coercion, persuasion, and intimidation",[168] a court may still, "look through forms to the substance" and recognize that informal censorship may inhibit circulation of materials to the same extent as overt prohibition.[169] Threats of prosecution or of license revocation have been enjoined in many instances.[170]

The *Bantam* Court perceived that official threats to initiate criminal proceedings are not casually neglected by the person threatened,[171] and while no criminal charges are included among the penalties for non-compliance with Notice 71-205, the broadcasters are still "running scared."[172] Persons may abandon the exercise of their constitutional freedoms in the face of potential forfeiture, be it through criminal prosecution or license revocation, since the threat of retribution may deter as surely as the actual imposition of criminal sanctions.[173]

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165. Affidavit of Mark Gorbulew, in *Yale, supra* note 83, at 3. *See* note 130 *supra.*

166. See text accompanying notes 81-84 *supra.*

167. The Commission makes reference to complaints received from some persons regarding the airing of drug lyrics, but there is no mention of any established or alleged harm which has resulted from such broadcasting. *See* Notice 71-205, *supra* note 21.

168. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963).

169. *Id.*

170. *Id.* at n.8 and cases cited therein.

171. Bantam Books, Inc. v. Sullivan, 372 U.S. at 67. *Accord,* Muller v. Conlisk, 429 F.2d 901, 903 (7th Cir. 1970) (mere threat of imposition of sanctions against free speech is a sufficient present infringement to warrant redress).

172. Zito, *Drug-Lyric Notice Rocks Radio,* The Washington Post, Mar. 21, 1971, at H-7.

173. NAACP v. Button, 371 U.S. 415, 433 (1963). In *Button,* a civil rights group was charged with violating a Virginia statute which prohibited the fomenting of sham litigation through the solicitation of "test cases". In setting aside the law as being susceptible to extensive and improper construction, the Court said:

> The threat of sanctions may deter . . . [the exercise of First Amendment rights] almost as potently as the actual application of sanctions. *Cf. Smith v. California,* [361 U.S. 147], 151-154 (1959); *Speiser v. Randall,* 357 U.S. 513, 526 1958).

Accord, Dombrowski v. Pfister, 380 U.S. 479, 487 (1965); Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

Public Notice 71-205 grounds its authority upon "licensee responsibility,"[174] but as the appellate court noted in *Anti-Defamation League*:

> Talk of "responsibility" of a broadcaster in this connection is simply a euphemism for self-censorship. . . . Attempts to impose such schemes . . . have been found as unconstitutional as more direct censorship efforts . . . .[175]

It is manifest that Public Notice 71-205 is an instrument of censorship by threat. In the context of 71-205, "licensee responsibility" is in fact a euphemism for censorship, a realization shared by announcers,[176] station management officials,[177] professional groups,[178] the courts[179] and the FCC itself.[180]

G. Overbreadth and Vagueness

It is well established that the freedoms of speech and press may be abridged by an encroachment even less explicit than censorship by threat. This conviction is embodied in case law under the companion doctrines of overbreadth and vagueness. An overbroad restriction steps beyond legitimately proscribed activity into forbidden realms of constitutionally protected speech.[181] The entire content of a law that

174. Notice 71-205, *supra* note 21.

175. 403 F.2d 169, 172 (D.C. Cir. 1968). See text accompanying notes 162-68 *supra.*

176. Affidavit of Douglas Wachholz, in *Yale, supra* note 83, documents reactions of spokesmen at the following Virginia broadcast stations:

WINA, Charlottesville: "[T]he FCC is saying, 'Even though this isn't a regulation, you had better watch yourself, because we will ask you questions about it [songs with drug lyrics] next time your license comes up for renewal.' " *Id.* at 9-10.
WLEE, Richmond: "The government made it very plain that they are looking for a scapegoat . . . and will withdraw the license of any violator." *Id.* at 9.
WANV, Waynesboro: "[The president] is worried about losing his license." *Id.* at 6-7.
WHBG, Harrisonburg: "The threat of taking away your license is certainly there." *Id.*
WROV, Roanoke: "[Y]our renewal will be scrutinized more carefully unless you comply." *Id.* at 8.
WEEL, Fairfax: "License renewal comes up in 1972, and everybody is holding their breath." *Id.* at 10.

177. *Id.*

178. The Authors League of America, Inc., asked the FCC to reconsider its Notice, since it felt that the inevitable result would be a self-censorship of fully protected lyrics. BROADCASTING MAGAZINE, Mar. 22, 1971, at 74.

179. Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 172 (D.C. Cir. 1968), *aff'g* 6 F.C.C.2d 385 (1967). See text accompanying notes 162-68 *supra.*

180. Anti-Defamation League of B'nai B'rith, 6 F.C.C.2d 385, 398 (1967) (concurring statement). It was former Commissioner Loevinger who successfully argued to the Court of Appeals that "[t]alk of 'responsibility' . . . is simply a euphemism for self-censorship." *Id.*

181. The Supreme Court, in Winters v. New York, 333 U.S. 507, 509 (1948), said

is overbroad on its face may be rendered nugatory. Perhaps the most favored juristic description of the rudimentary vice of overbreadth is that it imposes a "chilling effect" upon the exercise of First Amendment freedoms in that it creates an overreaction.[182] This overreaction induces an individual response which " 'steer[s] far wider [of] the unlawful zone' "[183] than is necessary for compliance. Such an ominous reaction arises in the wake of overly broad regulation because "fear of a wrong guess" is likely to cause abstention from constitutionally protected activity.[184]

Numerous cases previously cited in the discussion of prior restraint

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that a law which was indefinite to the extent that it could be interpreted as permitting the punishment of "incidents fairly within the protection of the guarantee of free speech" is invalid on its face. Landry v. Daley, 280 F. Supp. 938 (N.D. Ill. 1968), *rev'd in part on other grounds sub nom.* Boyle v. Landry, 401 U.S. 77 (1971), involved a provision of the Illinois Mob Action Statute which defined "mob action" as the assembly of at least two people to commit an "unlawful act". In holding the law vague and overbroad, the court explained,

> The concept of overbreadth . . . rests on principles of substantive due process which forbid the prohibition of certain individual freedoms. The primary issue is not reasonable notice or adequate standards, although these issues may be involved. Rather the issue is whether the language of the statute, given its normal meaning, is so broad that its sanctions may apply to conduct protected by the Constitution. *Id.* at 951 (footnotes omitted).

The court added,

> [T]he requirements of clarity, definiteness, and narrow scope are most strictly observed when a statute places a possible limitation upon First Amendment rights. *Id.* at 952.

See Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

182. Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring), contains the Supreme Court's first use of the term in a constitutional sense. In Dombrowski v. Pfister, 380 U.S. 479 (1965), the Court determined that a threatened prosecution warranted federal interdiction in the state criminal process where the statute was imprecisely defined, a conclusion which constituted an adjustment in the general policy of abstention from such interference. The threats were viewed as harassment to discourage petitioners from exercising their civil rights, and the facial infirmity of the state law, which was adjudged to be "susceptible of sweeping and improper application," justified the equitable intervention. *Id.* at 482. *But cf.* Younger v. Harris, 401 U.S. 37 (1971).

The chilling effect is a signal, a warning that there exists impermissible overbreadth in the language of a statute or ordinance. It is not in itself necessarily sufficient grounds upon which a law may be invalidated. In some decisions, upon discovery of a chilling effect, the Court has concluded that alone it creates no requirement for setting aside the law. In these cases, the Court has taken the further step of applying the balancing test. See note 35 *supra*. Examples are Barenblatt v. United States, 360 U.S. 109, 125-34 (1959) and Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 90-91 (1961). *See* Note, *The Chilling Effect In Constitutional Law*, 69 COLUM. L. REV. 808, 822-30 (1969).

183. New York Times v. Sullivan, 376 U.S. 254, 279 (1964), *quoting* Speiser v. Randall, 357 U.S. 513, 526 (1958).

184. Barenblatt v. United States, 360 U.S. 109, 137 (1959) (Black, J., dissenting).

and censorship were also adjudicated under principles of overbreadth. One such example is *Smith v. California*[185] which, relying upon *Winters v. New York*,[186] declared that the standards for precision may be more stringent if the statute in question could potentially inhibit the free dissemination of ideas.

The conceptual link between overbreadth and its chilling effect is one of cause-and-effect. That is, the regulation plainly trespasses outside proper bounds and chills protected communication. However, a chilling effect may develop even in the absence of an expressly stated intrusion. If the statute is vague, so that it *might* extend to, and deter, legitimate speech, then the infirmity may be equally reprehensible.[187] Governmental action is unconstitutionally vague when it establishes a criterion of protected and unprotected expression in such an ambiguous fashion that "men of common intelligence must necessarily guess at its meaning and differ as to its application."[188] The Supreme Court has extended the constitutional requirement that Congress may not enact overbroad or vague legislation to FCC promulgated regulations.[189]

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185. 361 U.S. 147 (1959).

186. 333 U.S. 507 (1948). A New York penal law was construed by the State Court of Appeals to ban dissemination of materials containing stories or reports of lust or bloodshed "so massed as to become vehicles for inciting violent and depraved crimes . . . ." *Id.* at 513. In holding the law so vague and indefinite as to be unconstitutional, the Supreme Court asserted that "[m]en of common intelligence cannot be required to guess at the meaning" of criminal laws. *Id.* at 515 (citing cases therein). The indefiniteness may arise from the inability to discern the persons within the scope of the law (Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939)), or in the inability to formulate a standard under which guilt may be determined (United States v. Cohen Grocery Co., 255 U.S. 81, 89-93 (1921)).

187. Stromberg v. California, 283 U.S. 359 (1931). The Court noted that the statute in issue "might be construed as embracing conduct which the State could not constitutionally prohibit." *Id.* at 369. A law which might include as illegal the "peaceful and orderly opposition to government . . . is repugnant to the guaranty of liberty contained in the Fourteenth Amendment." *Id.* *See* Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

188. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (decided on due process grounds); *Accord*, Landry v. Daley, 280 F. Supp. 938, 951 (N.D. Ill. 1968), *rev'd in part on other grounds sub nom.* Boyle v. Landry, 401 U.S. 77 (1971). In *Landry* the Court set forth guidelines to be utilized in "determining whether a state regulation meets [the] standards of clarity and narrowness." *Id.* at 952. Enumerated were:

> (1) whether a substantial interest worthy of protection is identified or apparent from the language of the statute; (2) whether the terms of the regulation are susceptible to objective measurement by men of common intelligence. *Id.* at 952-53 (footnotes omitted).

189. *See* Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 395-96 (1969). *Accord*, National Ass'n of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969),

It is apparent that overbreadth and vagueness rest upon a common jurisprudential pedestal. When free speech is at stake, "[p]recision of regulation must be the touchstone . . . ."[190] In First Amendment cases, the two concepts have been almost totally consolidated.[191] Though vagueness is cloaked more often in the idiom of Fourteenth Amendment due process while overbreadth is frequently articulated in terms of First Amendment implications, the Supreme Court applies the kindred doctrines interchangeably.[192]

It is submitted that Notice 71-205 is patently vague and overbroad. 71-205 does not expressly prohibit the airing of any specific record. Instead it directs a pre-broadcast ascertainment of lyrics calling for a determinative interpretation of whether the meaning comprises a pro-drug message. Furthermore, it states that if station executives are not cognizant of the broadcast of such records, then "serious questions [will arise] as to whether continued operation of the station is in the public interest. . . ."[193] The Notice's lone dissenting opinion is more forthright:

> 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 . . . or you may have trouble at license renewal time.[194]

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cert. denied, 397 U.S. 922 (1970) wherein the court stated: "The Commission must be cautious in the manner in which it acts; regulations which are vague and overbroad create a risk of chilling free speech." *Id.* at 208.

190. NAACP v. Button, 371 U.S. 415, 438 (1963); *accord*, Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 682-83 (1968) (stating that "[t]he vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing." *Id.* at 683). An exhaustive survey of the principles of overbreadth and vagueness is beyond the scope of this Comment. *See* Note, *The Chilling Effect In Constitutional Law*, 69 COLUM. L. REV. 808 (1969); Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970); Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

191. Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 873 (1970).

192. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965):

> [The law] denied due process because it was unduly vague, uncertain and broad . . . . This overly broad statute also creates a "danger zone" within which protected expression may be inhibited. . . . Even the prospect of ultimate failure of [threatened] prosecutions by no means dispels their chilling effect on protected expression. *Id.* at 494 (citations omitted).

NAACP v. Button, 371 U.S. 415 (1963):

> The objectionable quality of vagueness and overbreadth . . . [depends] upon the danger of tolerating, in the area of First Amendment freedoms, the existence [of a penal statute] susceptible of sweeping and improper application. *Id.* at 432-33.

193. Notice 71-205, *supra* note 21, at ¶ 2.

194. 28 F.C.C.2d at 412 (Johnson, Comm'r, dissenting).

Chaos has resulted because no one, not even veteran disc jockeys with years of experience in rock music, seems to know what is meant by "reasonable efforts to ascertain the meaning of words" which may be "tending to promote or glorify" narcotics. A great many programming experts find the entire Notice disquietingly nebulous.[195] On its face the Notice leaves unanswered a decisive question. After a licensee has fulfilled his specified duties of ascertainment and judgment, what course is he then to take? The FCC only instructs him that "it is a question of responsible, good faith action. . . . No more, but certainly no less, is called for."[196]

A peculiarly ironic consequence of the Notice has been the banning of anti-drug records,[197] (as well as those which are pro-drug and even non-drug).[198] For example, "The Pusher", sung by Steppenwolf, contains this total denunciation of hard drugs:

I've seen a lot of people walkin' 'round
with tombstones in their eyes,

195. Affidavit of J.H. Irwin, in *Yale, supra* note 83:

> [The Notice is] impractical [and] disconcertingly vague. . . . We are assured that whether or not a song does indeed promote or glorify such usage [of drugs] is a matter for our judgment as a licensee, *but we must* make the judgment. . . . What constitutes a word, phrase or lyric which tends to "promote or glorify" the illegal drugs? *Id.* at 4-5.

Affidavit of Stuart Jackson, in *Yale, supra* note 83:

> I view this notice as being vague, imprecise, and not subject to a clear understanding. It offers no standards. . . . *Id.* at 1.

Affidavit of Douglas Wachholz, in *Yale, supra* note 83:

> None of the stations felt they were able to tell which song lyrics tended to "promote" or "glorify" the illegal use of drugs. *Id.* at 21.

Affidavit of Steve Leon, in *Yale, supra* note 83:

> I have been involved in "rock" music and radio broadcasting for over five years. . . . [D]espite my experience . . . I could not tell in many cases whether or not a record "tended to promote or glorify" the illegal use of drugs. *Id.* at 1-2.

196. Notice 71-205, *supra* note 21, at ¶ 4.

197. See text accompanying notes 138-39 *supra*, and notes 115 *supra* and 198 *infra*, for a discussion of the banning of anti-drug songs and for excerpted samples of lyrics.

198. Affidavit of John Gorman, in *Yale, supra* note 83, relates that at WNTN in Newton, Massachusetts, a post-Notice 71-205 directive was issued to the effect that only material contained within the station library was to be considered suitable for airplay, despite the fact that antecedent to the Notice the majority of the station's music was from private collections. Afterwards, the station library was screened by the management and only *one* vocal group, King Crimson, was determined to be appropriate. All other approved material consisted of instrumental recordings. Albums rejected included *all* Jefferson Airplane songs, *all* Bob Dylan songs and "Tommy" (the enormously popular rock opera by The Who). The affiant was dismissed from his employment, asserting that:

> [T]he track I aired on WNTN was . . . from an album . . . by the Wildcat Jug Band. . . . The album was brought into the station by weekend newsman Kenneth Currier. Mr. Currier was also terminated at WNTN for bringing the album to the station. The track aired had no connection with drugs whatsoever. *Id.* at 2.

but the pusher don't care if you live or die.
God damn the pusher, Goddamn I say, the pusher . . .
The pusher is a monster, that guy he not a natural man . . .
The pusher will ruin your body, Lord he will lead your mind to sleep.
If I were the President of this land,
You know I would declare total war on the pusher man. . . .[199]

A record company recently distributed "Snowblind Friend"[200] with an accompanying notice which announced in huge capital letters: "SNOW IS COCAINE/'SNOW BLIND FRIEND' IS AN ANTI-DRUG SONG THAT PUTS ONE OF TODAY'S MAJOR PROBLEMS INTO PERSPECTIVE. . . ."[201] The song recounts the agonizing tale of a drug addict found lying on a sidewalk. He has spent his only money in purchasing cocaine. He is blind and he is dying. Following the lyrics, the circular continues, "WE SINCERELY HOPE YOU PLAY IT." Influenced by Notice 71-205, several licensees decided against airing the record because of the drug references.[202] This is not a unique instance and other anti-drug songs confront censorship for the same or similar reasons.[203]

Mindful of the general imbroglio created by the Notice's ambiguities, the FCC acknowledged that elucidation of 71-205 was imperative. Responding to various petitions,[204] the Commission drafted Memorandum Opinion and Order 71-428.[205] Unfortunately, the document only clouds the issues further. Order 71-428 "adheres fully" to the descriptive policy embodied in the initial Notice, while purporting to clarify the cryptic references to the burdensome operational duties. The Order

199. "The Pusher" by Hoyt Axton, copyright 1969, Lady Jane Music-BMI.

200. Hoyt Axton, copyright 1968, Lady Jane Music-BMI.

201. *Id.*

202. Affidavit of Douglas Wachholz, in *Yale, supra* note 83, at 18-19, lists several licensees which eliminated the song from playlists due to the FCC's Notice.

203. See text accompanying notes 136-41 *supra*. *See* note 141 *supra* for a reference to non-drug interpretations of Beatle lyrics and suggested anti-drug Beatle attitudes.

204. *See* F.C.C. Memorandum Opinion and Order 71-428, 31 F.C.C.2d 377 (1971) [hereinafter cited as Order 71-428]:

> The Commission has before it petitions for reconsideration of [Notice 71-205] . . . filed by the Federal Communications Bar Association; Pierson, Ball & Dowd on behalf of Dick Broadcasting, Inc., Lee Enterprises, Inc., RKO General, Inc., and Time-Life Broadcast, Inc.; the Recording Industry Association of America (RIAA) . . . and Pacifica Foundation. . . . *Id.* at 377. (footnotes omitted).

205. *Id.* at 380, wherein the FCC declared:

> [W]e are not calling for an extensive investigation of each such record. We recognized in the *ADL* [Anti-Defamation League, *see* text accompanying notes 160-63, *supra*] case . . . that imposition of any undue verification process "could significantly inhibit the presentation of controversial issue programming". . . . [W]hat is required is simply reasonable and good faith attention to the problem. We would conclude this aspect as we did in [Notice 71-205]: "Thus, here as in so many other areas, it is a question of responsible, good faith action by the public trustee. . . . No more, but certainly no less is called for."

states: "[W]e are not calling for an extensive investigation. . . ."[206] However, what the Commission *is* calling for remains indiscernible. Paragraph 4 of Order 71-428 says:

> [N]othing in the prior Notice stated, directly or indirectly, that a licensee is barred from presenting a particular type of record. On the contrary, the Notice made clear that selection of records was a matter for the licensee's judgment.[207]

However, paragraph 7 continues:

> [T]he Commission concedes that it . . . did make clear in the Notice that the broadcaster could jeopardize his license by failing to exercise licensee responsibility in this area.[208]

Within the confines of a single document, licensees are told that the Commission cannot review lyrics but that the broadcaster risks loss of his permit if he does not perform such review himself. As questioned by one protesting announcer, "Why must we do what the Commission cannot?"[209] Another obvious question is that if the privilege to continue in the conduct of one's livelihood is at stake, how much of the "licensee's judgment" is actually involved?

The Memorandum Opinion and Order has not proved to be an explicative contribution. Station managers have stated that they are still unclear as to their responsibilities and every bit as apprehensive regarding the status of their licenses.[210] A post-memorandum survey affirms that the broadcasters fear the Commission to such a degree that they will initiate any action to avoid its displeasure, even though they are uncertain as to the nature of the requirements.[211]

Confronted with petitions filed by complaining licensees,[212] the

206. *Id.*

207. *Id.* at 378.

208. *Id.* at 379.

209. Yale Broadcasting Co. v. FCC, Civil No. 71-1780 (D.D.C., filed May 17, 1971), Petition for Clarification and Reconsideration and Request for Declaratory Ruling, Affidavit of J.H. Irwin at 1.

210. Yale Broadcasting Co. v. FCC, Civil No. 71-1780 (D.D.C., filed May 17, 1971), Petition for Clarification and Reconsideration and Request for Declaratory Ruling, Affidavit of Douglas Wachholz at 2. All stations contacted feel that records must be closely scrutinized, but many are uncertain as to what this entails. Some think pre-screening is still required, while others believe that they may safely conduct a review while a record is being played on the air. Many of the broadcasters feel that the outcry from the industry and the questionable constitutional status of 71-205 forced the FCC to attempt to "cover up" their intentions. Typical comments recited in the Wachholz Exhibit revealed that the subsequent Memo was of little aid. *Id.*

211. *Id.* at 10.

212. Yale Broadcasting Co. v. FCC, Civil No. 71-1780 (D.D.C., filed May 17,

FCC nevertheless declined in Order 71-803 to rule upon the questions presented. "We do not believe that any further extended discussion is warranted. . . . [W]e see no need to analyze it [71-428] for alleged inconsistencies with [71-205]. . . ."[213] This Memorandum is itself the subject of current litigation.[214]

The numerous episodes of overreaction and confusion after the FCC action abundantly illustrate the urgency of the crisis existing amid the petitions and memoranda. The Commission's innuendo pertaining to license renewal wreaked an impact so concussive that apprehensive broadcasters have exaggerated their compliance to grievous proportions. The General Manager of a Maryland station ordered the screening of the recorded library "with those tracks containing illegal material obliterated to prevent accidental use."[215] A Massachusetts newscaster, unconnected with musical broadcasts, was instructed to "tone down" his commentaries and avoid controversial and radical topics. He was later terminated from his position after bringing a personal album to the studio,[216] and the employee who subsequently played the record (which had no drug lyrics of any sort) was among the numbers dismissed from various stations.[217] One station ultimately notified employees of "an immediate ban on all music containing lyrics even remotely dealing with politics, sex, and to a minor degree, ecology."[218]

III. CONCLUSION

The FCC has patently overstepped valid constitutional restraints in its promulgation of Notice 71-205. In framing the two classes of songs which "depict the dangers of drug abuse" and those which "to the contrary, promote such illegal drug usage,"[219] the FCC has fallen embarrassingly short of demonstrating that the latter "is directed to in-

1971), Petition for Clarification and Reconsideration and Request for Declaratory Ruling.

213. F.C.C. Memorandum Opinion and Order 71-803, 31 F.C.C.2d 385 (1971).

214. Yale Broadcasting Co. v. FCC, Civil No. 71-1780 (D.D.C., filed Sept. 28, 1971), Petition for Review of FCC, Sept. 28, 1971.

215. Affidavit of W. Goodhart, formerly of WHFS-FM, Bethesda, Md., in *Yale, supra* note 83, at 2.

216. Affidavit of Kenneth F. Currier, formerly of WNTN, Newton, Massachusetts, in *Yale, supra* note 83, at 1-2.

217. Affidavit of Steve Leon, in *Yale, supra* note 83, at 4; Affidavit of John Gorman, in *Yale, supra* note 83, at 2.

218. Affidavit of John Gorman, in *Yale, supra* note 83, at 2.

219. Notice 71-205, *supra* note 21, at ¶ 2.

citing or producing imminent lawless action and is likely to incite or produce such action."[220] Moreover, 71-205 violates the Communication Act's prohibition of censorship, both as defined by the Supreme Court[221] and by Congress.[222] Even if drug lyrics are properly the subject of regulation, the Public Notice and succeeding endeavors at explanation are nevertheless unconstitutionally vague since it is patent that professional broadcasters must necessarily guess at their meaning and differ as to their application.[223] The chilling effect upon protected speech is manifested through widespread overreaction.

In dissenting to 71-803, Commissioner Nicholas Johnson suggested that the majority should "swallow its pride and admit a mistake".[224] But after one Notice, one attempt to explain it, and a final refusal to discuss the issues further, it is apparent that the disentangling of these problems will only be achieved in the courtroom.

TOM WHEELER*

220. See text accompanying notes 80-84 *supra.*

221. See text accompanying notes 93-94 *supra.*

222. See text accompanying notes 92-99 *supra.*

223. See text accompanying notes 192-211 *supra.*

224. 31 F.C.C.2d 385, 386 (Johnson, Comm'r, dissenting).

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