

F.C.C. 71-205

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
 LICENSE RESPONSIBILITY TO REVIEW RECORDS }
 BEFORE THEIR BROADCAST }

MARCH 5, 1971.

The Commission, by Commissioners Burch (Chairman), Robert E. Lee, Johnson, H. Rex Lee, Wells and Houser, with Commissioner Johnson dissenting and issuing a statement, Commissioners Robert E. Lee, H. Rex Lee and Houser issuing statements, and Commissioner Bartley abstaining from voting, issued the following PUBLIC NOTICE.

LICENSEE RESPONSIBILITY TO REVIEW RECORDS BEFORE THEIR
 BROADCAST

A number of complaints received by the Commission concerning the lyrics of records played on broadcasting stations relate to a subject of current and pressing concern: the use of language tending to promote or glorify the use of illegal drugs as marijuana, LSD, "speed", etc. This Notice points up the licensee's long-established responsibilities in this area.

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.¹

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 the 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.

¹ See Public Notice concerning Foreign Language Programs adopted March 22, 1967, FCC 67-368, 9 R.R. 2d 1901.

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.

Action by the Commission February 24, 1971. Commissioners Burch (Chairman), Wells and Robert E. Lee with Commissioner Lee issuing a statement, Commissioners H. Rex Lee and Houser concurring and issuing statements, Commissioner Johnson dissenting and issuing a statement, and Commissioner Bartley abstaining from voting.

STATEMENT OF COMMISSIONER ROBERT E. LEE

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

We are all aware of the deep concern in our local communities with respect to the use of illegal drugs particularly among the younger segment of our population. Public officials, at all levels of government, as well as all interested citizens are attempting to cope with this problem.

It is in this context that I expect the Broadcast Industry to meet its responsibilities of reviewing records before they are played. Obviously, if such records promote the use of illegal drugs, the licensee will exercise appropriate judgment in determining whether the broadcasting of such records is in the public interest.

CONCURRING STATEMENT OF COMMISSIONER H. REX LEE

While the title of the notice seemingly applies to the licensee's responsibility to review all records before they are broadcast, the notice itself is directed solely at records which allegedly use "language tending to promote or glorify the use of illegal drugs. . . ."

Although I am concurring, I would have preferred it if the Commission had not decided to restrict today's notice to so-called "drug lyrics." The Commission may appear to many young people as not being so concerned with other pressing broadcasting problem areas. And to many of these young people (and not just to that segment who use illegal drugs) the Commission may appear as "an ominous government agency" merely out to clamp down on *their* music.

A preferable approach would have been to repeat, with an additional reference to drug abuse of all kinds, our *1960 Program Policy Statement* wherein we stated:

Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. *This includes all programs and advertising material which they present to the public. . . .* This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast material for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community.¹

(Emphasis added.)

¹ *Report and Statement of Policy re: Commission En Banc Programming Inquiry, FCC 60-970. 20 R.R. 1901, 1912-1913 (July 27, 1960).*

Because of the Commission's expressed concern with the drug problem, I would hope that we could initiate action with other appropriate Federal agencies to require a reassessment by pharmaceutical manufacturers, advertisers, and the media, looking toward the reform of advertising practices in the non-prescription drug industry. *Advertising Age* expressed its concern with the increased use of drugs—both the legal and illegal types—when it stated in an editorial:

With an estimated \$289,000,000 being spent annually on TV advertising of medicines, this serious question is being raised: Is the flood of advertising for such medicines so pervasive that it is convincing viewers that there is a medical panacea for any and all of their problems, medical and otherwise? Are we being so consistently bombarded with pills for this and pills for that and pills for the other thing that we have developed a sort of Pavlovian reaction which makes us reach for a pill everytime we are faced with an anxious moment, be it of physical or psychic origin?²

Drug abuse is a serious problem in the United States. It is found in every sector of the population, not merely among the young who listen to hard rock music.

I believe the broadcasting industry has made a good start in helping to discourage illegal drug abuse. Many local radio and television stations and the four networks have broadcast documentaries and specials, carried spot announcements, helped to raise funds for local drug abuse clinics and information centers, and have helped to establish "tie-lines" and "switchboards" where all people can call for free medical and psychological help and guidance. These activities represent "communicating" in the best sense of the word.

My concurrence in this notice, therefore, should not be regarded as a reflection on the good start that I think most broadcasters have made in dealing with this problem. They must continue with even more determination and support from everyone.

CONCURRING STATEMENT OF COMMISSIONER THOMAS HOUSER

I join in the sentiments expressed in the concurring statement of Commissioner Robert Lee and concur in the action taken by the majority.

I take this opportunity, however, to emphasize that the positive action taken by the Commission with regard to popular song lyrics is only a portion of a much larger problem which I intend to bring to the Commission's attention for future deliberation. It is my fear, and the concern of many prominent Americans, that we are rapidly becoming a "pill oriented society". We are constantly bombarded with advertisements which would have us believe that life's problems can be solved by swallowing a pill. We are told by the "pill pushers" that we can "feel brighter" or be "give(n) a lift"—that our tensions will be relieved and that there is a pill for virtually every mood. Our children are told that pills are playful "Pals". Indeed one leading advertising executive advocates using "the idiom of the 18 year old (to) wrap" a "hard" drug sell in "a velvet glove".

To the extent that broadcast media contributes, wittingly or unwittingly, to the drug problem, the Commission is charged with the responsibility of insuring that the public interest will prevail through our recognition of the problem and the consideration of solutions.

² *Advertising Age*, May 11, 1970, p. 24.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

This public notice is an unsuccessfully-disguised effort by the Federal Communications Commission to censor song lyrics that the majority disapproves of; it is an attempt by a group of establishmentarians to determine what youth can say and hear; it is an unconstitutional action by a Federal agency aimed clearly at controlling the content of speech.

Under the guise of assuring that licensees know what lyrics are being aired on their stations, the FCC today gives a loud and clear message: get those "drug lyrics" off the air (and no telling what other subject matter the Commission majority may find offensive), or you may have trouble at license renewal time. The majority today approves a public notice which (1) singles out as "a subject of current and pressing concern: the use of language tending to promote or glorify the illegal use of drugs such as marijuana, LSD, 'speed,' etc.;" (2) emphasizes the importance of "someone in a responsible position . . . knowing the content of the lyrics;" and (3) raises the specter of loss of license unless the "pattern of operation" is such that a "responsible" employee knows the content of song lyrics played on broadcasting stations.

The contrived nature of this offensive against modern music is demonstrated by the fact that, as the majority itself concedes, "the licensee's responsibility for, and duty to exercise adequate control over, the material presented over his station," is "a basic principle" of FCC regulation; it is so basic that today's action is completely unnecessary. Licensees (that is, owners of stations) simply *can't* listen to *everything* broadcast over their stations; they have to delegate responsibility for knowledge of content to their employees; and we can assume under existing regulations that those employees *do* know what is being played. We can also assume that licensees are well aware of the Commission's power to prohibit material that falls within statutory prohibitions and beyond constitutional protection. Why, then, this focus on "language strongly suggestive of, or tending to glorify, the illegal use of drugs . . ."—whatever that means—unless the intention is in fact to censor by threat what cannot be constitutionally prohibited?

Moreover, there is a serious question as to whether the majority is in fact really as concerned about drug abuse as it is in striking out blindly at a form of music which is symbolic of a culture which the majority apparently fears—in part because it totally fails to comprehend it. If the majority were in fact concerned about drug abuse, they surely would not choose to ignore song lyrics "strongly suggestive of, and tending to glorify" the use of alcohol, which is the number one drug abuse problem in this country.

It is common knowledge that drunken drivers kill *each year* nearly as many Americans as have been killed during the entire history of the war in Southeast Asia. There are more alcoholics in San Francisco alone than there are narcotics addicts in the entire country. Kenneth Eaton, Deputy Director of the Division of Alcohol Abuse and Alcoholism at the National Institute of Mental Health, recently declared: "In relative terms, the physical consequences of heavy drinking are far larger and more serious than those of heroin use;" he added

that the likelihood of death in withdrawal from chronic alcoholism is much greater than in withdrawal from heroin addiction.¹ Dr. Robert L. Dupont, Director of the Washington, D.C. Narcotics Treatment Agency, agrees "absolutely" with Eaton:

It's non-controversial.

Heroin as a drug is really quite benign compared to alcohol, which is a poison.

* * * * *

We have two really serious drug problems in Washington, heroin and alcohol.²

I do not think it's the business of the FCC to be discouraging or banning *any* song lyrics. But if the Commission majority is *really* interested in doing something about the drug problems in this country, and is not just striking out at the youth culture, why does it ignore songs like "Day Drinking":

* * * You know we just stopped in for one short snort
 Hey we are out on a binge
 Hey we got no troubles just doing our number
 Day drinking again
 Day drinking again
 I'm starvin' to death
 We've been drinkin' since ten
 Food is fattening
 Ah, but then, booze is happening
 Day drinking again³

or "California Grapevine":

Well I'm sittin' on a bar stool drinkin'
 Somewhere way downtown
 Well my moneys all gone and I been here so long
 I've forgotten why I came to town
 I want to tell you
 Son, I know you're gonna find
 There ain't nothin' any sweeter or wetter than
 they grow on the California Grapevine⁴

or countless other similar lyrics?⁵

¹ *The Washington Post*, Feb. 7, 1971, p. A7, col. 1.

² *Id.*

³ T. T. Hall, "Day Drinking" (© 1970, Newkeys Music, Inc.), *Song Hits*, March 1971, p. 43.

⁴ H. J. Joy, "California Grapevine" (© 1970, Blue Book Music), *Song Hits*, February 1971, p. 43.

Lady I'm looking for a jukebox
 A bar stool that fits my bottom side
 These streets are too dark for walking
 I'm in no condition to ride
 This midnight rider lost his saddle
 And I'm in, no mood, for thinking
 I need some liquid consolation
 This night ain't fit for nothing but drinking.

T. T. Hall, "This Night (Ain't Fit for Nothing But Drinking)" (© 1970, Newkeys Music, Inc.) *Song Hits*, November 1970, p. 41.

Blues sells a lot of booze

Blues sells the booze and so I'm buying

And you gave me these blues

That's why I'm crying and dying

Somewhere, somebody's breaking someone's heart

But I guess they're only doing their part

These people need their jobs who haul and sell

And serve the brews and blues sells an awful lot of booze.

H. X. Lewis, G. Sutton, "Blues Sells a Lot of Booze" (© 1970, Al Gallico Music Corp.) *Song Hits*, March 1971, p. 45.

And my doctor says if I don't quit drinking

It's gonna kill me

But I know a whole lot more old drunks than old doctors.

J. Owen, "Here Come the Elephants" (© 1970, Bluebook Music Co.) *Song Hits*, May 1971, p. 40.

And why has the Commission chosen to focus on record lyrics and yet ignore commercials which use language "tending to glorify the use of drugs generally"? In asking Congress for a study of the effects on the nation's youth of nearly \$300 million worth of annual drug advertising on television, Senator Frank Moss of Utah has said:

The drug culture finds its fullest flowering in the portrait of American society which can be pieced together out of hundreds of thousands of advertisements and commercials. It is advertising which mounts so graphically the message that pills turn rain to sunshine, gloom to joy, depression to euphoria, solve problems, dispel doubt.

Not just pills; cigarette and cigar ads; soft drink, coffee, tea and beer ads—all portray the key to happiness as things to swallow, inhale, chew, drink and eat.⁶ Commissioners Rex Lee and Thomas Houser have expressed similar concerns in this very proceeding. How can anyone possibly justify the FCC's failure to examine the impact of commercials such as the following on television:

(Music) ANNOUNCER: Leave your feeling of tension behind and step into a quiet world. You'll feel calmer, more relaxed with Quiet World. The new modern calmative. Each tablet contains a special calming ingredient plus a tension reliever to let you feel relaxed. More peaceful. So leave your feeling of tension behind with Quiet World. The new modern calmative.⁷

This commercial was broadcast over WCBS-TV in New York at 3:25 p.m. to an audience made up primarily of mothers and children. Why do the majority choose to ignore these gray flannel pushers?⁸

The answer to these questions is simple: the exclusive concern with song lyrics is in reality an effort to harass the youth culture, a crude attempt to suppress the anti-establishment music of the counter-culture and the "movement."

It is a thinly veiled political move. This Administration has, for reasons best known to the President, chosen to divert the American people's attention to "the drug menace," and away from problems like: the growing Southeast Asian war, racial prejudice, inflation, unemployment, hunger, poverty, education, growing urban blight, and so forth. When the broadcasters support this effort they are taking a political stance. Especially is this so when they, simultaneously, keep off the air contrary political views.⁹ When we encourage this trend, we are taking equally political action.

The majority's interest in the whole song lyrics issue was substantially increased by the Defense Department's Drug Briefing, which was originally prepared for a briefing of radio and record executives under the President's auspices at the White House. It is not surprising that the Nixon Administration and the Defense Department, two primary targets of the youth culture, should try to strike back. But it is revealing and somewhat frightening that many of the song lyrics

⁶ *Year of Challenge, Year of Crisis*, The du Pont-Columbia University Survey of Broadcast Journalism 1969-1970, at 88.

⁷ Shown on "To Tell the Truth," WCBS-TV, New York, Sept. 9, 1968, 3:25 p.m.

⁸ It cannot be argued that the illegality of the drugs is the reason behind the majority's action, since the majority says nothing at all about lyrics extolling other illegal activities, such as cohabitation.

⁹ See, *Fairness Doctrine Ruling*, 25 F.C.C. 2d 242, 249 (1970); N. Johnson, "Public Channels and Private Censors," *The Nation* (March 23, 1970) p. 329; N. Johnson, "The Wasteland Revisited," *Playboy* (Dec. 1970), p. 229; N. Johnson, *How to Talk Back to Your Television Set* 71 (1970).

singled out as objectionably pro-drug-use by the White House and Defense Department turn out, in fact, to have nothing whatsoever to do with drugs. They relate instead to social commentary. Thus, the Defense Department spokesmen singled out a song by the Doors which says: "War is out—peace is the new thing." The White House finds alarming another which says:

Itemize the things you covet
As you squander through your life
Bigger cars, bigger houses,
Term insurance for your wife. . . .¹⁰

Is anything that attacks the values of corporate America or the military-industrial-complex now to be interpreted by the FCC and broadcasters as an incitement to drugs?

Beyond the hypocrisy of this blind attack on the youth culture, this action is legally objectionable because it ignores the Supreme Court's ruling that the First Amendment protects speech which has any socially redeeming importance. People differ as to how they feel about the reasonableness of the drug life as a way out of the often absurd qualities of life in a corporate state. I happen to believe in getting high on life—the perpetual high without drugs.¹¹ But no one can argue that the use of drugs—by rich and poor, middle-aged and young—is not a controversial issue of public importance today. How can the FCC possibly outlaw the subject as suitable for artistic comment? How can it possibly repeal the applicability of the fairness doctrine to this subject?

The courts have frequently invalidated licensing schemes which give the licensing agency such unbridled discretion, or which are so broad, that a licensee is deterred from engaging in activity protected by the First Amendment. Thus, in *Weiman v. Updegraff*, 344 U.S. 183, 195 (1952), a case involving loyalty oaths demanded of prospective teachers, the Supreme Court condemned the provision, saying: "It has an unmistakable tendency to chill that free play of spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

As Mr. Justice Black has written:

[A] statute broad enough to support infringement of speech . . . necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others.

Barenblatt v. United States, 360 U.S. 109, 137 (1959) (dissenting opinion). This danger, inherent in the overbroad and necessarily vague action which the Commission takes today, is compounded when it involves the natural sensitivity of those whose very existence depends on the licensing power of the censoring agency.

Simply by announcing its concern with the content of song lyrics as they relate to drugs, the Commission is effectively censoring pro-

¹⁰ Transcript of White House Radio Producers Briefing, Aug. 31, 1970, presented in the same form to the FCC, Dec. 9, 1970, p. 4 and lyrics of appendix, p. 1.

¹¹ See, N. Johnson, "Life Before Death in the Corporate State," Barbara Weinstock Lecture, University of California, Berkeley, California, Nov. 5, 1970 (FCC 57177); N. Johnson, "The Careening of America or How to Talk Back to Your Corporate State," Poynter Fellow Lecture, Yale University, New Haven, Connecticut, March 8, 1971 (FCC 64807).

tected speech. The breadth of the regulation is aggravated by the vagueness of the standard used—"tending to glorify." What does that mean? It could include "Up, Up and Away" sung by the Mormon Tabernacle Choir. Some so-called "drug lyrics" are clearly *discouraging* the use of drugs. Others, while less clear, can most reasonably be read to be opposing drug usage. Many informed people argue that even the programs and public service spots designed to *discourage* drug usage are often as likely to have the opposite effect. How is the poor licensee to know which lyrics are "tending to glorify"? Will he risk his license over such an interpretation?

In *Burstyn v. Wilson*, 343 U.S. 495 (1952), a statute which authorized denial of a license if the licensor concluded that the film reviewed was "sacrilegious" was held by the Supreme Court to be an unconstitutionally overbroad delegation of discretion. The Commission's action today is bound to be interpreted as a threat that the playing of certain song lyrics could threaten license renewals.

Justice Brennan summarized the Supreme Court's concern with actions which have a "chilling effect" on the exercising of rights protected by the First Amendment:

To give these freedoms the necessary "breathing space to survive," . . . [w]e have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to our overriding duty to insulate all individuals from the "chilling effect" upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise.

Walker v. City of Birmingham, 388 U.S. 307, 344-45 (1967) (dissenting opinion) (emphasis added). This is a classic case of Federal agency action which is bound to have a "chilling effect" on the exercise of First Amendment rights.

The Commission's action today will have a chilling effect on the free spirit of our songwriters, because of the caution and timidity which today's action will produce among licensees. It will have a similar effect on the record industry, because of the relationship between the radio play of a record and its economic success. And where, after all, do we get authority to regulate *that* industry by putting pressure on the move to require the printing of lyrics on dust jackets?

We are more dependent upon the creative people in our society than we have ever fully comprehended. "Legalize Freedom" says the latest bumper sticker. Full human flowering requires the opportunity to know, and express creativity, one's most honest-as-possible self. Governments are instituted among men—according to our Declaration of Independence—to promote "life, liberty, and the pursuit of happiness." We seem to have drifted quite a way from that goal. Not only do we need creative freedom to promote individual growth, we also need creative artists to divert social disaster. The artists are our country's outriders. They are out ahead of our caravan, finding the mountain passes and the rivers. They pick up the new vibrations a decade or more before the rest of us, and try to tell us what's about to happen to us as a people—in the form of painting, theater, novels, and in music. In order to function at all, they have to function free. When we start the process of Kafkaesque institutional interference with that

freedom—whether by Big Business or Big Government—we are encouraging, rather than preventing, the decline and fall of the American Empire: its view of the future, and the fulfillment of its people.

I hope the recording and broadcasting industries will have the courage and commitment to respond to this brazen attack upon them with all the enthusiasm it calls for. Given the power of this Commission, I am afraid they may not.

For all these reasons, I dissent.