

F.C.C. 71-428

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LICENSEE RESPONSIBILITY TO REVIEW RECORDS
BEFORE THEIR BROADCAST (F.C.C. 71-205)

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1971; Released April 16, 1971)

BY THE COMMISSION: COMMISSIONERS BARTLEY, H. REX LEE AND WELLS CONCURRING AND ISSUING STATEMENTS; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT (See F.C.C. 71-803 for Commissioner Johnson's statement).

1. The Commission has before it petitions for reconsideration of its Public Notice of March 5, 1971, FCC 71-205, entitled "Licensee Responsibility to Review Records Before Their Broadcast", 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),¹ and Pacifica Foundation.² The latter also submitted a petition for stay. In view of this latter request and the considerations in the next paragraph, we agree that there is a need for expedited action, and therefore go directly to the merits, without summarizing the petition.

2. The Commission's public notice of March 5 stated, in most pertinent part:

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.

The Notice thus simply reflected the well established concept of licensee responsibility. However, as the petitions point up, it was widely reported in the press as a directive by the Commission not to play certain kinds of records. (E.G., "Stations Told to Halt Drug-Oriented Music", Associated Press, The Washington Evening Star, March 6, 1971; "FCC Bars Broadcasting of Drug-Linked Lyrics", United Press International, The Washington Post, March 7, 1971). Since the purpose of a public notice is to inform the industry and public of a Commission policy, it follows that where a notice is so erroneously

¹ RIAA's Motion for Acceptance of Pleading in Excess of Page Limitation IS GRANTED.

² We also take note that a Petition for Reconsideration was filed late by the Stern Community Law Firm and also a Memorandum of the Authors League of America, Inc. in support of RIAA's Petition for Reconsideration. These materials were received during our determination on this Memorandum Opinion and Order.

depicted, we should appropriately call attention to the error. We do so in this Memorandum Opinion and Order. While it adheres fully to the above noted established policy of licensee responsibility, this opinion treats the matter in greater detail and thus constitutes the Commission's definitive statement in this respect.

3. As the Notice stated at the outset, the Commission has received a number of complaints concerning the broadcast of records with lyrics tending to promote or glorify the use of illegal drugs. The Commission's own experience indicated that there was some tendency by broadcasters to be indifferent to the matter of licensee responsibility in this area because all that is involved is the playing of a record. The Commission therefore believed it appropriate to point up that the licensee's responsibility for the material broadcast over his facilities extends to records. Clearly, in a time when there is an epidemic of illegal drug use—when thousands of young lives are being destroyed by use of drugs like heroin, methedrine ("speed"), cocaine—the licensee should not be indifferent to the question of whether his facilities are being used to promote the illegal use of harmful drugs.

4. But nothing 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. Some records point up drug dangers, some may glorify drugs, some may simply reflect the drug scene as it is today. Here, as in so many programming areas, it is often a most difficult judgment whether a record promotes drug usage. Licensees could reasonably and understandably reach differing judgments as to a particular record. We stress that such an evaluation process is one solely for the licensee. The Commission cannot properly make or review such individual licensee judgments. Indeed, at renewal time our function is solely limited to a review of whether a licensee's programming efforts, on an overall basis, have been in the public interest. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 Pike & Fischer, Radio Regulation 1901 (1960); *In re Pacifica Foundation*, 36 FCC 147, 149 (1964).

5. Any attempt to review or condemn a licensee's judgment to play a particular record is, as indicated, beyond the scope of federal regulatory authority with perhaps the exception of the so-called "clear and present danger" test. In this connection, in *Anti-Defamation League of B'Nai B'rith against Radio Station KTYM*, 4 FCC 2d 190, 191, 6 FCC 2d 385 (1967),³ the Commission stated:

It is the judgment of the Commission, as it has been the judgment of those who drafted our Constitution and of the overwhelming majority of our legislators and judges over the years, that the public interest is best served by permitting the expression of any views that do not involve "a clear and present danger of serious substantive evil that rises far above public convenience, annoyance or unrest."⁴ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

³ *Aff'd*, *Anti-Defamation League v. FCC*, 403 F. 2d 169 (C.A.D.C., 1968), cert. denied, 394 U.S. 930 (1969).

⁴ Similarly, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court struck down the conviction of a Ku Klux Klan leader for advocating violence at a KKK rally, stating (at p. 447):

These later [Supreme Court] decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

6. The question of formulating a definitive concrete standard is not presented in this matter. For, we hold, based on our experience and the complaints received, that whether to play a particular record in this area does not raise an issue as to which the Government may intervene. That is the reason why the Commission has not referred a single complaint concerning the playing of records with drug lyrics to licensees for their comments;⁵ instead, we have informed the complainants of the provisions of Section 326. There could be extraordinary, unforeseen circumstances where the stringent requirements of the "clear and present danger" test might be met in this field. No one can today write a constitutional blueprint for every possible future happenstance and changed circumstance. It is sufficient to hold that we do not now perceive such a problem, based upon our present experience, and that our prior Notice and this Opinion are not premised upon it.

7. The Commission did make clear in the Notice that the broadcaster could jeopardize his license by failing to exercise licensee responsibility in this area. Except as to broadcasts by political candidates, the licensee is responsible for the material broadcast over his facilities. That obviously calls for a reasonable degree and exercise of responsibility. It is nonsense to assert that the licensee can be indifferent to this responsibility. If a person approaches a station to buy time to attack his neighbor, or simply to let loose a torrent of vile language, he will not be presented. While these are egregious examples of the need for licensee responsibility, the plain fact is that the licensee is not a common carrier—that the Act makes him a public trustee who is called upon to make thousands of programming judgments over his license term. The thrust of the Notice is simply that this concept of licensee responsibility extends to the question of records which may promote or glorify the use of illegal drugs.⁶ A licensee should know whether his facilities are being used to present again and again a record which urges youth to take heroin or cocaine—that it is a wonderful, joyous experience. This example is egregious, but it serves to point up the obvious bedrock policy of the *responsible* public trustee. The point is that such records are not withdrawn from the area of licensee responsibility.

8. Nor are the mechanics of licensee responsibility difficult or onerous. Again, it may be desirable to proceed by analogy. Licensees instruct their employees that before presenting taped material containing questionable language (i.e., of an indecent or obscene nature), the matter should be brought to the attention of a responsible management official (see *Eastern Educational Radio*, 24 FCC 2d 408, 414 (1970)). We note that this is the policy of petitioner Pacifica. See *In re*

⁵ It has come to our attention that pursuant to a request by a broadcasting station's news department, a Commission employee furnished it with the titles of some songs which had been among those included in a presentation to the Commission some months ago by the Department of the Army. The song titles, furnished in response to the station's inquiry, comprised, as was made clear to the station at the time, "A partial list of song titles brought to the attention of the FCC in connection with the subject of so-called drug-oriented song lyrics." We wish to make it clear that such list does not represent any official or even unofficial pronouncement by the Commission, and will not be circulated, utilized or applied by us in any manner whatsoever. The Commission has made no judgment on any song and most emphatically has not compiled or issued any list of songs which it believes should not be broadcast. Nor does it intend to do so in the future.

⁶ We thus fully agree with the FCBA position that the Commission should make clear ". . . it was announcing a policy dealing solely with licensee responsibility to be familiar with what the licensee is broadcasting and that it did not intend to pass judgment on the desirability of broadcasting any song . . ." (p. 8, FCBA petition).

Pacifica Foundation, 36 FCC 147, 150 (1964). Further, while such material might be presented once in a series part of which has been screened and approved, its presentation is then picked up, either by complaint or station personnel, and a judgment made as to further presentation. So also here, disc jockeys could be instructed that where there is a question as to whether a record promotes the illegal drug usage, a responsible management official should be notified so he can exercise his judgment. It may be that a record which raises an issue in this respect is played once, but then the station personnel who have heard it will be in a position to bring it to the attention of the appropriate management official for his judgment. Finally, we are not calling for an extensive investigation of each such record. We recognized in the *ADL* case, *supra*, that imposition of any undue verification process "could significantly inhibit the presentation of controversial issue programming" (6 FCC 2d at p. 386); cf. *The Washington Post v. Keogh*, 365 F. 2d 965 (C.A.D.C., 1966). That is equally so here. Therefore, what is required is simply reasonable and good faith attention to the problem. We would conclude this aspect as we did in the prior Notice.

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.

9. We think that the foregoing is dispositive of the major arguments presented. The licensee is not a book store, but a public trustee of an inherently limited resource who is fully responsible for its operation in the public interest. We have made clear that we are not seeking through a euphemism, license responsibility, to effect the wholly improper result of barring certain kinds of speech. We have imposed no onerous requirements in this respect, and have further stressed that the judgment whether to play a particular record is to be made by the licensee alone. We have noted the arguments that some licensees have dropped all records referring to drugs—in erroneous reaction to our Notice. If that is the case, we trust that with the issuance of this opinion such licensees will cease such grossly inappropriate policy and rather will make a judgment based on the particular record. Finally, to the argument that suggests impropriety in our issuance of a Notice concerning the need for licensee responsibility in the area of records promoting drugs, the short answer is set forth in par. 3, *supra*—that this is an area of great concern in view of the epidemic proportions of the problem, that we had numerous complaints, and that we had some indication of licensee indifference because all that is involved is the playing of records. We have in the past issued similar Notices when there was indifference to the policy of licensee responsibility in other areas. See, e.g., Public Notice concerning Foreign Language Programs adopted March 22, 1967, FCC 67-368, 9 R.R. 2d 1901. Of course, the policy of licensee responsibility is applicable generally, but that does not mean that we cannot issue appropriate Notices when there is an indicated need therefor.

10. An argument is also advanced as to the necessity for rule making notice under the Administrative Procedure Act. But our Notice

establishes no new rule or indeed even a new policy. It reiterates an established bedrock policy—licensee responsibility. If this opinion were withdrawn, licensees would still be required to observe that policy based on scores of prior decisions. We therefore do not perceive how the rule making notice requirements of the APA are at all applicable here.

11. As a final point, we wish to stress that the issue of drug lyrics is but one facet of the overall drug problem, and it would be unfortunate if it were to be blown out of proportion. For, consideration of this aspect is, of course, not the be-all and end-all of what a broadcaster can do to serve the public interest in this important area. The public generally is now aware of the existence of the drug abuse problem. The alert has been sounded, and broadcasters have played an important role in informing the public. The present challenge and opportunity, for those broadcasters who wish to help, is to inform our citizens as to what can be done to find solutions to the problem of drug abuse. Indeed, because the drug problem is complex, and fraught with emotion, there is the possibility of a good deal of misinformation being circulated. Broadcasters who develop their own materials and programs relating to drug abuse could, if they wish, consult with experts in the field, both in the public and private sectors to insure the accuracy and reliability of their programming. In short, we believe that licensees can play a constructive role in helping the nation seek solutions to the drug problem, just as many of them have done, through public service time, in alerting the nation to the existence of the problem.

12. Accordingly, the request of Pacifica for stay IS DENIED, in view of the above discussion. The requests of the petitioners IS GRANTED to the extent reflected above (see, e.g., footnote 6, *supra*; pp. 9-10, Pierson, Ball & Dowd petition), and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,

BEN F. WAPLE, *Secretary*.

31 F.C.C. 2d

CONCURRING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

This Memorandum Opinion and Order purports to return to the situation prior to release of the Public Notice of March 5, 1971.

To the extent that it does so, I concur in the action here taken.

CONCURRING OPINION OF COMMISSIONER H. REX LEE

I originally concurred in the Public Notice concerning the broadcast of recorded lyrics tending to promote or glorify the use of drugs because I strongly believed that every licensee should be reminded of the general responsibility for program material. However, I did have some concern that the Notice might be misunderstood, and so stated in my concurring statement. This has happened. The Notice has attracted a wide divergence of opinion and considerable confusion about its meaning.

I am concurring in this Order because it supersedes and clarifies the meaning of the original Public Notice. I construe this action to mean the Commission is merely reaffirming its *1960 Program Policy Statement* covering the general area of licensee responsibility. In my view this reaffirmation has the effect of notifying the broadcasting industry that recorded music and musical lyrics are not being singled out for separate or different treatment than the licensee is generally required to accord all broadcast programming. I do not believe the Commission ever intended more, nor that it now intends some higher degree of control which requires broadcast licensees to assess their programming with an eye to what they believe the Commission may or may not want broadcast.

CONCURRING STATEMENT OF COMMISSIONER ROBERT WELLS

I joined in the initial public notice concerning drug lyrics. I did not interpret it as an attempt to censor. That is not the role of the Commission. This is so stated by law. I intended the notice to be a restatement of the long established principle that licensees are responsible for knowing what they broadcast. The press reporting of the notice was generally inaccurate and reaction of the affected industries was overstated. I concur in this Memorandum Opinion and Order which I trust will clarify the public notice.

It should be apparent to licensees and to the Commission that the mere task of distinguishing which records do, in fact, glorify the use of drugs is an impossible assignment. Interpretations are too varied for any agency or individual to attempt to be the arbiter of the public taste. For those who would find sinister motives of a governmental agency in this document, let me call particular attention to Paragraph 4 which says in part, "We stress that such an evaluation process (selection of records to be played) is one solely for the licensee. The Commission cannot properly make or review such individual licensee judgments."