

F.C.C. 71-803

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, }
71-428)

MEMORANDUM OPINION AND ORDER

(Adopted August 4, 1971; Released August 18, 1971)

BY THE COMMISSION: COMMISSIONER BARTLEY ABSTAINING FROM VOTING; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

1. The Commission has before it a petition for reconsideration of its Memorandum Opinion and Order adopted April 16, 1971, FCC 71-428,—FCC 2d—, filed jointly by Yale Broadcasting Company (WYBC-FM), University of the Pacific (KUOP-FM), Steve Leon, National Co-Ordinating Council on Drug Abuse Education and Information, Inc., Mark Gorbulew, Sara Vass, John Gorman, Kenneth P. Currier, Stuart Jackson, James H. Irwin and Charles Laquidara.

2. Our opinion of April 16, 1971 dealt with petitions for reconsideration of our Public Notice of March 5, 1971, 28 FCC 2d 409. Although we stated that our opinion on reconsideration constituted our definitive statement, the present petition alleges that there are inconsistencies between the original Public Notice and the opinion on reconsideration. It also claims that we have not made clear the precise manner in which licensees are to keep themselves informed concerning the records they play, and requests a ruling upon the adequacy of the policy adopted by Yale Broadcasting Company which is set forth at length in the petition. Finally, the petition requests a more definitive statement concerning the nature of Commission review of the licensee's judgment in playing records.

3. We do not believe that any further extended discussion is warranted. We note first that our April 16, 1971 opinion stands as our definitive statement in this area, and see no need to analyze it for alleged inconsistencies with the Public Notice of March 5, 1971. Secondly, we made amply clear upon reconsideration that we were concerned in this area with the maintenance of the "well established concept of licensee responsibility," and that it was this concern that had prompted issuance of the Public Notice. Since this concept has been enunciated again and again and has caused no apparent difficulty of understanding or implementation, and since we do not have before us a particularized situation involving a concrete application of the principle, it would not appear to be useful to attempt any additional

definition.¹ We think our previous opinion was adequately clear in this respect. The same considerations apply to the request for a definition of the Commission's reviewing role. Finally, we decline to rule upon the validity of the policy statement submitted on behalf of Yale Broadcasting Company. This policy statement is presented in the abstract. We are loath to embark upon individual rulings for individual licensees concerning their proposed handling of specific types of programming upon the basis of general policy statements not fleshed out by the licensee's actual operation. In this delicate area, we think it preferable to avoid unnecessary rulings.

4. Accordingly, the petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

In their action today, my colleagues continue to refuse to clarify their actions concerning the responsibilities of licensees who play contemporary music that contains lyrics making references to drugs.

I dissent, because I believe the Commission has missed an opportunity partially to undo the damage it has done in its prior actions. The result is a set of Commission policies which are so vague and overbroad as to continue to be impermissible under the First Amendment.

I dissented to the Commission's first action—a public notice—and my views are set out there in full. 28 F.C.C. 2d 409, 412 (1971). I also dissented to the Commission's attempt to explain its action—the April 16, 1971 order (FCC 71-428)—reconsideration of which is sought by petitioners. In my view the only way the Commission can repair the adverse effect of its public notice is clearly and directly to rescind the notice and reaffirm the First Amendment rights of licensees in the presentation of programming. My colleagues do not agree, and I therefore felt unable to join the very telling and commendable statement of Commissioner Bartley.

Now once again the Commission holds to a discredited action and declines to swallow its pride and admit a mistake. In a rather unusual treatment of a 37-page petition for reconsideration, the Commission declines even to address the substantive issues raised in the petition. The majority's opinion is apparently that its "definitive statement" of April 16 is sufficient answer. I do not agree.

Petitioners ask the Commission for clarification of a number of points. I will treat several.

(1) Petitioners suggest that the Commission's requirements for the exercise of what it calls "licensee responsibility" are vague, and because the requirement is to be considered in the license renewal process, such vagueness can have an inhibiting effect on the licensee's full freedom to choose his programming without the threat of government censorship. In its April order, the Commission said it would not question licensee judgments on particular records, and that all that was

¹ We think it appropriate to point out, however, that petitioners' repeated reference to a pre-screening requirement for each record is an erroneous interpretation of our April 16, 1971 order.

required was "reasonable and good faith attention to the problem"—but then paragraph 8 of the order suggests a detailed review process that would seem to require screening of every record broadcast. The majority's only response to the request for clarification is an ambiguous footnote.

(2) Petitioners ask for clarification of the Commission's standard: lyrics that "promote or glorify" illegal drugs. The majority makes no response. This is an area where particularity and examples are most helpful—if not, indeed, essential—if licensees are not to be inhibited.

(3) Petitioners ask that the Commission set forth the evidentiary rationale implicit in its prior actions—that there is such a relationship between song lyrics and the use of illegal drugs as to justify Commission intrusion of this extraordinary nature. The Commission declines to spell out the evidence justifying its prior actions.

(4) Petitioners submit a concrete proposed policy statement by a Commission licensee, asking whether or not such a station policy complies with Commission policy. I have attached that proposed policy statement as an appendix to this opinion. Finding the proposed policy statement "abstract" and not "fleshed out by the licensee's actual operation" the majority has refused to rule upon it, and concludes: "In this delicate area, we think it preferable to avoid unnecessary rulings." Would that this thought had occurred to my colleagues in March 1971. Since it did not, I think we are now obliged to give at least this much effort to remedying the confusion.

I have only sketched some of the areas where the Commission could have clarified its policies and refused to do so, because the principal problem with the Commission's action is much more general.

The principal effect of threatened governmental sanctions against the exercise of First Amendment freedoms are indirect. Even in a society as free as ours there are natural inhibitions to speaking one's mind in ways likely to alienate actual or potential institutional leaders, employers, friends and neighbors. All incentives encourage conformity, suppression of the uncomfortable truth, and the eventual atrophy of the very powers of perception and analysis upon which individuality (and a vibrant democracy) depend. All too many of those of us who are dependent upon positions in institutions are so busy trying to find out which way the mind is blowing that we don't even need to be told what is expected of us. We certainly don't need to be told twice. And when the President of the company (or the Vice President of the United States, or the Chairman of the FCC) shouts at us and tells us to stop what we're doing it takes an unusually strong (or foolish) person to go on speaking or performing as before—however deeply he feels about it. No matter how urgently we are subsequently assured that all is forgiven and that we are encouraged to "speak our minds" (or that the Administration doesn't intend to censor newsmen and suppress radical dissent, or that the FCC doesn't really mean to ban records) we have already been psychologically inhibited. The First Amendment damage has already been done.

Suppose, for example, a high school principal and teaching staff vote unanimously to ban long hair on high school males. Assume a bold student takes the ruling to court and gets it reversed as uncon-

stitutional, and that it is subsequently withdrawn by the school. How many students—dependent upon that administration and faculty for grades and college entrance recommendations—will choose to exercise their newly found legal rights (and thereby risk the possible antagonism of those upon whom they are dependent)?

So, in this case, there's really no way—under the best of circumstances—that we can get the toothpaste back in the tube once it's been squeezed out all over the wash basin. Broadcasters—courageous and cowardly alike—are a pretty skittish lot. The Administration, and the FCC, know that. Having been told—very loudly and clearly—that powerful people in Washington are interested in their records' song lyrics, all too many will go out of their way to select lyrics designed to please. At that point the Government has succeeded in its purpose; it is then safe to issue all the apologies and rescinding statements necessary to silence the critics.

Under these circumstances the very least we should do, I believe, is to issue a clear and unequivocal repudiation and withdrawal of our March 5 and April 16, 1971 Policy Statement. Even that would fail to undo the havoc we have wrought. That the majority refuses to make even such modest amends is disturbing.

APPENDIX A

STATION POLICY CONCERNING THE BROADCAST OF MUSICAL RECORDINGS

Preamble

The licensee has always endeavored to comply fully with all Commission rules and with the spirit of the First Amendment and will continue to do so in the future. The licensee believes that its primary obligation is to meet the needs and desires of its listening audience. Since its audience is intelligent and sophisticated, the licensee has always attempted to present the highest quality programming. In addition to quality, the listening audience demands that this licensee not shun controversy and present diverse views on the current problems of the day. It demands that the licensee remain informed on the pressing problems of crime, race relations, war, violence, drug abuse, and poverty and that it attempt to program in a manner so as to, in turn, inform its audience.

The licensee endeavors to present a variety of musical programming which is of the highest artistic and creative quality. Our audience demands this of us. On March 5, 1971, and again on April 16, 1971, the Federal Communications Commission issued statements expressing its concern over the indifference of some licensees to musical recordings which "promote or glorify the use of drugs." This licensee has always been aware of the critical problem of drug abuse in the community as well as nationwide. As in other areas, it has responded to the problem by informing its audience of the facts of drug abuse, and presenting programming warning of possible dangers of certain drugs. It has attempted to bring to bear intelligent and responsible comment in this crucial area.

The management and staff of this licensee continually review and evaluate programming for its relevance to current public issues and for its compatibility with the high standards we and our audience have set. This evaluation extends as well to our musical programming. Because our audience demands it, we program a variety of popular music with special concentration upon modern rock, blues, soul, jazz and folk music.

We have been and are aware that certain of this music is controversial and not approved of by certain segments of the American populace. We have been and are aware that certain of the music presents unpopular political, cultural and social ideas through the song's lyrics. Certain of the music refers to the illegal use of drugs. Since these unpopular ideas and the use of illegal drugs has created such controversy, we deem it necessary to formally reiterate our policy with respect to the presentation of musical recordings. This is done to

inform our staff and audience of the position we take with respect to our musical programming and what we require of our staff in satisfying our public obligations. This policy follows:

(a) The licensee believes that music and especially modern popular music is an important form of communication and art, and believes that its responsibilities to the public require it to present the view of the artist without restraint or censorship.

(b) The licensee endeavors to evaluate all its programming for compatibility with the needs and desires of its audience. Among the ways it does so is to employ announcers who are thoroughly familiar with modern recorded music, and who are "in touch" with current tastes and preferences.

(c) The licensee is concerned and aware of the problems of drug abuse and will always attempt to present programming which responds to this issue of current and pressing public concern. Such programming is and will be in the form of news, spot announcements and specific programming directed to this issue.

(d) Modern popular music, including rock music, is a medium of communication for the young. It reflects the cultural aspirations, and the highest and lowest ideals of youth. It is first and foremost the creative expression of the artist who views the world as he sees it and expresses this view through his music. The music is an artistic whole comprised of sound and words. More often than not the lyrics are not as important to the artist's view as is the music. The lyrics become part and parcel of the music and have no independent life of their own.

(e) Censorship of the musical artist is contrary to the policy of this licensee. To censor lyrics because of their verbal content would prevent the audience from enjoyment of other important artistic, cultural and social facets of a particular song. An announcer's obligation as an employee of the licensee is to judge the song on the basis of its overall artistic merit and to present the audience with superior music.

(f) The licensee has determined that emphasizing lyrics over other elements of an artistic musical work for the purpose of not playing it is inconsistent with the nature of the art form and the wishes of our audience who should not be deprived of the right to hear any song as long as it is of superior overall artistic merit.

(g) Because the licensee, in exercising its responsibility in this and other areas of public concern does not permit the censorship of a song because of its lyrics alone, management officials and announcers need not examine the lyrics of records but should treat it as an artistic whole. As a general rule, the announcer will have listened to the record before it is played but this will not be true in all cases. Because of the substantial number of new releases and the already large volume of records already released, it would be overly burdensome for the staff to listen to every cut of every record. The announcer may wish to play new releases after having only heard a small portion of one cut. He may wish to play a song by a particular group which he has not heard. This is consistent with the spontaneity and creativity of programming which this station desires to achieve. The staff's obligation is to program good music in a creative manner. This does not require the announcer to pre-screen songs, specifically listen to lyrics, determine their meaning or decide their social or moral import. He may do so if you wish if such judgment is relevant to the artistic quality of the song or to your program concept. The licensee's obligation with respect to drug abuse will be more appropriately carried out in the forum of other programming. Preconditioning for lyrical content is burdensome, completely unnecessary, and contrary to this station's policy.

(h) The licensee believes that songs, including their lyrics, are protected forms of expression under the First Amendment, and deserve to be heard by our audience without interference. Moreover, it is the obligation of the licensee to be responsive to the First Amendment rights of its audience.

(i) The licensee will continue to supervise announcers' selections of music by selective monitoring as programs are broadcast. By this procedure, management will be able to determine whether the music being played meets its standards and the standards of its audience. The licensee will continue to evaluate and reassess these standards by responding to complaints and request from its listening audience in order to continue to present music of

the highest musical and artistic quality—as judged by the licensee, its listeners, and its announcers.

(j) Announcers are hereby instructed to immediately report to a responsible management official any musical recording which contains illegal speech—such as obscene language, lotteries, and the like. Though it is unlikely that musical recordings will contain such illegal speech, you are reminded that the law prohibits the broadcast of illegal speech and you should endeavor to remain aware of this fact. Such recordings, if you become aware of them prior to broadcast, should not be played unless management has reviewed them. If you, as would be expected, become aware of illegal speech as you play the record or thereafter, the record should not be played again until management has had the opportunity to review it. Except for this obligation, announcers are reminded that they must not concern themselves with the content and meaning of record lyrics, but must devote themselves, as artists, to the musical validity of the work.

(k) The licensee believes that the above Policy comports with the obligations of licensee responsibility. This licensee is always aware of what its programs and is constantly evaluating its response to cultural, political, moral and other public concerns. Our evaluation, as reflected herein, is that our response to illegal drug use will be centered elsewhere and not in the censorship of the musical artist.

31 F.C.C. 2d