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Drug Songs and the Federal Communications Commission

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DRUG SONGS AND THE FEDERAL COMMUNICATIONS COMMISSION

One pill makes you larger
And one pill makes you small
And the ones that mother gives you
Don't do anything at all
Go ask Alice when she's ten feet tall

And if you go chasing rabbits
And you know you're going to fall
Tell them a hookah-smoking caterpillar
Has given you the call
He called Alice when she was just small

When the men on the chessboard
Get up and tell you where you go
And you just had some kind of mushroom
And your mind is moving
Oh go ask Alice, I think she'll know

When logic and proportion
Have fallen solemnly dead
And the white knight is talking backwards
And the red queen says off with their heads
Remember what the doormouse said

Feed your head, feed your head

— “White Rabbit”

Grace Slick

©1967, Copper Penny Music Publishing

I. INTRODUCTION

A “public notice”¹ concerning the broadcasting of drug-related popular songs by radio stations issued from the Federal Communications Commission² on March 5, 1971. While this notice could be generally taken to prohibit the playing of such songs,³ its actual message, upon further analysis, is more complex and less direct.

¹ *In Re* Licensee Responsibility to Review Records Before Their Broadcast, 28 F.C.C. 2d 409 (1971) [hereinafter cited as FCC Notice].

² Hereinafter, FCC.

³ N. Y. Times, April 11, 1971, at 50, col. 3.

This article will examine the notice to ascertain its likely meaning, determine its legal status, and examine three constitutional issues it raises: whether the songs are protected as speech under the first amendment; whether the statement of the prohibition (if that be the import of the notice) is sufficiently precise to avoid due process problem of vagueness; and whether the notice is a kind of prior restraint on freedom of speech and press.

II. MEANING OF THE NOTICE

The notice states that a licensee is responsible for determining whether a particular record depicts the dangers of drug abuse or promotes illegal drug usage, and that failure to make such a judgment, or delegation of the judgment to one not in a responsible position, "raises serious questions as to whether continued operation of the station is in the public interest."⁴ The import of this notice is not at all clear, either from its text or from the standpoint of overall FCC policy on the subject.⁵ Perhaps, as Commissioner H. Rex Lee suggests in his concurring opinion,⁶ the only point in issuing such a notice is to remind licensees of their obligation under existing FCC policy,⁷ and to suggest, if appropriate, that they may not be adequately discharging their duties in relation to this particular class of programming.

But the notice must mean more than this. If the Commission did not disapprove of some of the songs being played,⁸ there would be no purpose in pointing to this policy in this context. Clearly the Commission does disapprove of these songs, and wants licensees to cease broadcasting them. Commissioner Rob-

⁴ FCC Notice at 409.

⁵ The Commission stated in 1960:

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

FCC, Report and Statement of Policy Re: Commission En Banc Programming Inquiry, 20 P&F RADIO REG. 1901, 1912-13 (1960) [hereinafter cited as 1960 Policy Statement].

⁶ FCC Notice at 410.

⁷ See note 5 *supra*.

⁸ Indeed, the notice begins:

A number of complaints received by the Commission concerning the lyrics of records played on broadcasting stations related to the 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.

FCC Notice at 409.

ert E. Lee made this explicit in an accompanying statement, with which Commissioner Houser concurred:

I sincerely hope that the action of the Commission today . . . will discourage, if not eliminate the playing of records which tend to promote and/or glorify the use of illegal drugs. . . .

. . . Obviously, if such records promote the use of illegal drugs, the licensee will exercise appropriate judgement in determining whether the broadcasting of such records is in the public interest.⁹

Similarly, in a dissenting opinion, Commissioner Johnson interprets the notice to say, “[G]et those ‘drug lyrics’ off the air . . . or you may have trouble at license renewal time.”¹⁰

Although determination by a licensee that certain songs promote or glorify drug use does not itself give rise to further obligations, the notice strongly suggests that the Commission believes that such a determination does generate a further obligation. Otherwise, failure to act would not raise serious questions as to whether continued operation of the station is in the public interest. The Commission must expect that licensees will hereafter consider themselves obligated to cease playing such songs, under threat of nonrenewal of their licenses.

III. LEGAL BASIS FOR THE NOTICE

The Communications Act of 1934¹¹ established the FCC, “among other things, to maintain the control of the United States over all the channels of interstate . . . radio transmission. . . .”¹² To carry out this charge, the Commission is granted broad power over electronic signal transmission to promote the “public interest, convenience, or necessity.”¹³ While this is not an unlimited

⁹ FCC Notice at 410.

¹⁰ *Id.* at 412.

¹¹ 47 U.S.C. §§ 151-609 (1970) [hereinafter, the Act].

¹² *Id.* § 301.

¹³ *Id.* § 303. This phrase has never been clearly defined. For instance, Senator Pastore gave it the following definition during a hearing of the Senate Subcommittee on Communications, which he chairs:

What is in the public interest is the lifting up of morals and the spirits of our people. . . . If we do things that are in the gutter and we use language that is gutter language and we talk deity in perversion, how in the name of Heaven can we say that we are serving the public interest.

Hearings on S. 2004 Before the Subcomm. on Communications of the Senate Commerce Comm., 91st Cong., 1st Sess., pt. 2, at 373. This suggests that “public interest, convenience, or necessity” has a very broad meaning and may be highly subjective.

There may be a second statutory requirement, that action by the Commission must serve one or more of the nineteen specific grants of authority in 47 U.S.C. §§ 303(a)-(s) (1970), but there is no court decision directly on this point.

power,¹⁴ it has been liberally construed¹⁵ to give broad powers and a broad range of discretion to the Commission.¹⁶ Aside from the licensing authority,¹⁷ the sections directly relevant to the FCC's authority to issue this notice provide that it shall "generally encourage the larger and more effective use of radio in the public interest,"¹⁸ and "[m]ake such regulations not inconsistent with law as it may deem necessary . . . to carry out the provisions of this chapter."¹⁹

Significantly, in trying to ban the broadcast of drug-related songs, the Commission chose not to proceed under its rule-making powers.²⁰ Instead it invoked its authority under the Act whereby "[u]pon the expiration of a license . . . a renewal of such license may be granted . . . if the Commission finds that public interest, convenience, and necessity would be served thereby."²¹ Most likely this provision was invoked because it would be difficult for the Commission to enforce a rule promulgated under its rule-making powers. Enforcement procedures would require a hearing for each offending station,²² and the Commission would have to prove not only that particular songs were broadcast, but that they "promote or glorify" the use of illegal drugs.²³ While there may be a few such songs, most of the drug-related songs do not explicitly promote or glorify the use of drugs, and such meanings must be drawn out of innuendo, *double*

¹⁴ See, e.g., *FCC v. American Broadcasting Co.*, 347 U.S. 284 (1954), wherein the Court held that giveaway programs on the major networks were not, as a matter of law, lotteries in violation of 18 U.S.C. § 1304 (1970), despite an FCC finding to the contrary, and sustained a district court injunction forbidding the FCC from enforcing a rule against the programs.

¹⁵ See, e.g., *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The FCC had denied a license to Pottsville on the grounds of financial irresponsibility and inadequate representation of local interests in the community. The circuit court of appeals found the first ground to be based on an incorrect reading of Pennsylvania law, and remanded to the FCC for reconsideration. When the FCC subsequently reconsidered the application only in competition with two others for the same license, Pottsville sought and was granted a mandamus by the circuit court of appeals to consider its application alone. The Supreme Court reversed.

¹⁶ See, e.g., *Harbenito Broadcasting Co. v. FCC*, 218 F.2d 28, 33 (D.C. Cir. 1954). The circuit court of appeals upheld as a reasonable use of discretion an FCC modification of a program test permit issued to Harbenito and a delay in issuing a broadcasting license, although all the conditions for it had been met, until the FCC resolved a station interference problem (daytime skywaves).

¹⁷ 47 U.S.C. § 301 (1970).

¹⁸ *Id.* § 303(g).

¹⁹ *Id.* § 303(f).

²⁰ FCC rulemaking is governed by the Administrative Procedure Act which requires: (1) due notice of hearing, (2) opportunity to submit data, (3) concise general statement of basis and purpose of the rule, and (4) publication or service of the rule. 5 U.S.C. §§ 553, 554 (1970).

²¹ 47 U.S.C. § 307(d) (1970).

²² 5 U.S.C. § 554 (1970).

²³ 47 U.S.C. § 312(d) (1970).

entendre, and special lingo.²⁴ For most of these songs, this would be very difficult and costly to prove.²⁵ Thus the FCC chose to rely on its power to renew licenses every three years.

The FCC does not have unlimited authority. In addition to the limitations written into specific grants of power in the Act, it has no power that Congress itself could not exercise, since it is an administrative agent of Congress.²⁶ Furthermore, its statutory authority is limited by section 326 of the Act, which provides:

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

²⁴ *E.g.*,

Do people have a tendency to dump on you?
Does your group have more cavities than theirs?
Do all the hippies seem to get the jump on you?
Do you sleep alone when others sleep in pairs?
Well there's no need to complain,
We'll eliminate your pain.
We can neutralize your brain.
You'll feel just fine now.
Buy a Big Bright Green Pleasure Machine.

Do figures of authority just shoot you down?
Is life within the business world a drag?
Did your boss just mention that you'd better shop around?
To find yourself a more productive bag?
Are you worried and distressed,
Can't seem to get no rest.
Put our product to the test.
You'll feel just fine now.
Buy a Big Bright Green Pleasure Machine.
You better hurry up and order one.
Our limited supply is very nearly gone.

Do you nervously await the blows of cruel fate?
Do your checks bounce higher than a rubber ball?
Are you worried 'cause your girlfriend's just a little late?
Are you looking for a way to chuck it all?
We can end your daily strife
At a reasonable price.
You've seen it advertised in "Life."
You'll feel just fine now.
Buy a Big Bright Green Pleasure Machine

— "The Big Bright Green Pleasure Machine"
Paul Simon

©1966, Paul Simon.

To those in the know, the big bright green pleasure machine is a marijuana cigarette.

²⁵ In a hearing the Commission would have to prove that particular songs were played (on specified days at specified times), and that the lyrics had the proscribed meaning. This would require the Commission to call witnesses who are experts in counterculture.

²⁶ *WOKO, Inc. v. FCC*, 153 F.2d 623, 628 (D.C. Cir. 1946). The court of appeals held that the FCC had acted arbitrarily in ruling that a radio station's failure to inform the Commission of the true beneficial owner of its broadcast license made the station unfit to continue to hold a license. In reversing the FCC's refusal to renew the license, the court held that the FCC may not act arbitrarily and capriciously (unconstitutionally) because Congress, for whom it is an agent, is forbidden from acting unconstitutionally: "the stream cannot rise higher than the source." *Id.*

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.²⁷

This echoes the command of the first amendment. Interpreting this provision in *Farmers Educational and Cooperative v. WDAY, Inc.*,²⁸ the Supreme Court stated: "Expressly applying this country's tradition of free expression to the field of radio broadcasting, Congress has from the first emphatically forbidden the Commission to exercise any power of censorship over radio communication."²⁹ Notwithstanding the first amendment, some restrictions on broadcasting have been upheld in the past, on the grounds that broadcasting channels are scarce, and the Government may make reasonable regulations concerning their use.³⁰ Section 326 limits the scope of such restrictions.³¹

IV. CONSTITUTIONAL ANALYSIS

A. Radio Licensing and the First Amendment

Governmental regulation of the broadcast industry is an anomaly in a system where government has traditionally been prohibited from interfering with the free expression of ideas. There are four reasons³² usually given for such regulation: (1) the

²⁷ 47 U.S.C. § 326 (1970).

²⁸ 360 U.S. 525 (1959). The Court upheld the dismissal of a libel action based on an unedited political speech broadcast pursuant to the equal opportunities doctrine. 47 U.S.C. § 315(a) (1970), on the grounds that the doctrine required that it be broadcast unedited.

²⁹ 360 U.S. at 529.

³⁰ See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), which upheld the FCC's authority over cable television and its order forbidding expansion of such systems pending a hearing; *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220 (D.C. Cir. 1967), which upheld an FCC cease and desist order forbidding a cable television company from retransmitting a signal from outside the television station market area.

In cases not tested in court the FCC has penalized the broadcast of: dirty poems, *Pacifica Foundation*, 36 F.C.C. 147 (1964); suggestive songs, *WREC Broadcast Service*, 19 F.C.C. 1082 (1955); *Tampa Times Co.*, 19 F.C.C. 257 (1955); unethical practice of medicine, *WSCB, Inc.*, 2 F.C.C. 293 (1936); rigged quiz shows, *KWK Radio, Inc.*, 34 F.C.C. 1039 (1963); *Eleven Ten Broadcasting*, 32 F.C.C. 706 (1962).

³¹ There appears to be no decision where a court has invalidated an FCC decision by invoking either section 326 or the first amendment. In *McIntyre v. Wm. Penn Broadcasting Co.*, 151 F.2d 397 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946), the court sustained the radio station's cancellation of a contract with Carl McIntyre, the famous radio evangelist, on the ground that stations have the right to choose their own programming. In *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), the court held that the constitutional freedom of speech is not abridged by an FCC ruling requiring stations broadcasting cigarette advertising to provide time for anti-smoking advertising under the fairness doctrine.

³² These arguments are comprehensively dealt with in Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); Note, *Offensive Speech and the FCC*, 79 YALE L. J. 1343 (1970).

airwaves are publicly owned, (2) use of the airwaves is a privilege, which can be withdrawn if the broadcaster fails to serve the public interest, (3) technical scarcity of channels requires government control of access, (4) radio and television are so powerful that if they were uncontrolled they would inhibit, rather than advance, freedom of speech. These justify some kinds of governmental regulation, including at least a large portion of the FCC's actions. But only unusual circumstances would justify the application of a first amendment standard different from those applied in other areas.³³

The Supreme Court first addressed itself to the relationship between radio licensing and the first amendment protection of freedom of speech in *National Broadcasting Co. v. United States*.³⁴ It there held that the general licensing scheme, limiting the number of radio broadcasters, does not violate freedom of speech, and upheld FCC regulations refusing licenses to network stations bound by contract not to accept programming from other networks.³⁵

Most recently the Court reaffirmed its position in *Red Lion Broadcasting Co. v. FCC*,³⁶ where it stated that "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment."³⁷ In *Red Lion* the Court upheld the "fairness doctrine"³⁸ by stating that Congress or the FCC may constitutionally require radio stations to broadcast the views of people who are attacked in radio broadcasts. Counsel for *Red Lion* argued that radio stations would eliminate the discussion of controversial issues altogether, rather than grant the right of reply. The Court stated that, "[s]uch a result would indeed be a serious matter,"³⁹ but noted that the possibility of such self-censorship was at best speculative, since the communications industry had taken pains to present controversial issues in the past, and gave no indication of an intent to abandon this practice. With regard to drug-related songs, on the other hand, there is no evidence of broadcasters' resolve to preserve freedom of expression.⁴⁰

³³ The fairness doctrine is one such circumstance.

³⁴ 319 U.S. 190 (1943).

³⁵ *Id.* at 226.

³⁶ 395 U.S. 367 (1969). The Court rejected the argument by the broadcaster that the first amendment right of freedom of speech granted the broadcaster an unlimited right of control over what it broadcast, and upheld the fairness doctrine as a legitimate governmentally imposed obligation on broadcasters.

³⁷ *Id.* at 390.

³⁸ 47 U.S.C. § 315(a) (1970).

³⁹ 395 U.S. at 393.

⁴⁰ There are certain economic incentives for radio stations to continue broadcasting

In addition, FCC power over program content appears in its power to choose between competing license applicants on the basis of programming,⁴¹ and to reject a sole applicant if his program plans are inadequate.⁴² But the courts have not completely mapped out limits of FCC power over program content.⁴³

For drug-related songs, none of the above arguments give reason to impose on broadcasters any more restrictive first amendment standard than would be imposed on others.⁴⁴

B. Songs as Protected Speech Within the Meaning of the First Amendment

Speech does not receive absolute protection under the first amendment.⁴⁵ Certain kinds of utterances have been held not to be protected by the first amendment. These include defamatory utterances,⁴⁶ advocacy of violent, forceful or terroristic change,⁴⁷

popular drug-related songs. If such songs are popular, playing them tends to increase the number of listeners, and thus makes it easier for the station to sell advertising or enables it to command higher rates. But a serious threat of license nonrenewal far outweighs the economic incentive actually provided by the drug-related songs.

⁴¹ 47 U.S.C. § 307 (1970). See 47 U.S.C. §§ 307(a)-(d) and § 309(a) (1970), covering both the initial grant and subsequent renewals of broadcast licenses.

⁴² *Pinellas Broadcasting Co. v. FCC*, 230 F.2d 204 (D.C. Cir. 1956).

⁴³ In *Robinson v. FCC*, 334 F.2d 534 (D.C. Cir. 1964), cert. denied, 379 U.S. 843 (1964), where the court of appeals upheld the nonrenewal of a license, the court failed to reach the issue of the application of the first amendment to broadcasting rights, although the case directly presented the issue of whether the broadcast of suggestive songs could be used as a basis for nonrenewal. The court found that the broadcasting company had given false testimony to the FCC, and that this was adequate grounds for nonrenewal. See also the FCC ruling in *Palmetto Broadcasting Co.*, 33 F.C.C. 250 (1962).

⁴⁴ See Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343 (1970).

⁴⁵ While Justices Douglas and Black have argued this position in numerous concurring or dissenting opinions, it has never been accepted by a majority of the Supreme Court. See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 61-62 (1965); *Ginzburg v. United States*, 383 U.S. 463, 476-92 (1966); *Mishkin v. New York*, 383 U.S. 502, 515-18 (1966); *Ginsberg v. New York*, 390 U.S. 629, 650-71 (1968); *Brandenburg v. Ohio*, 395 U.S. 444, 449-57 (1969); *New York Times v. United States*, 403 U.S. 713, 714, 720 (1971).

⁴⁶ Defamation is now actionable only to the extent permitted by *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29 (1971). There a distributor of a nudist magazine sued a radio station for reporting that he had been arrested for possession of obscene literature and that police had seized obscene books from him, and then failing to report that the charges were dismissed. The Supreme Court held that no party may recover for defamation without proving at least negligent falsehood, and if the publication is in an area of legitimate public interest, he must prove malice. Furthermore, the Court held that only actual proven compensatory damages may be recovered; punitive damages were severely restricted, if permitted at all. (This was not at issue, and dicta were divided.)

⁴⁷ See *Dennis v. United States*, 341 U.S. 494 (1951), which upheld convictions under the Smith Act of officers of the Communist Party for conspiring to teach and advocate the overthrow and destruction of the government of the United States with force and violence, and advocating the duty and necessity of bringing about such a change.

blasphemy,⁴⁸ inciting to riot,⁴⁹ obstruction of the administration of justice,⁵⁰ speech tending to corrupt morals, inciting to crime, or disturbing the public peace.⁵¹

Assuming that songs are speech (an assumption that will be examined later⁵²), the most specific ground for prohibiting drug songs is that they advocate the commission of a crime.⁵³ All states have laws against the non-medical use of such drugs as LSD, amphetamines, and heroin.⁵⁴ Any songs which *advocate* the use of such drugs may fall outside the protection of the first amendment.

But there are very few, if any, songs which directly advocate the use of such drugs. The FCC notice itself is directed against songs that "promote or glorify the use of" such drugs.⁵⁵

Only those songs that fail to have aesthetic merit advocate, promote or glorify anything at all.⁵⁶ Anyone who understands real

⁴⁸ See *Maine v. Mockus*, 120 Me. 84, 113 A. 39 (1921), where Mockus was convicted for having made eight statements in Lithuanian which, *inter alia*, impugned the virgin birth of Jesus and characterized religion as deception in a manner to provoke laughter and applause from the audience. He was convicted on the grounds that Christianity is the religion of the United States and of the state of Maine, and that undermining it undermines the efficacy of official oaths and robs them of their sanctity.

Zechariah Chaffee long ago speculated that blasphemy would fail the "clear and present danger" test. Z. CHAFFEE, *FREE SPEECH IN THE UNITED STATES* 523 (1941). Nevertheless, a store owner in Pittsburgh was recently charged with blasphemy for having a poster with the face of Christ reading,

Wanted: for sedition, criminal anarchy, vagrancy and conspiracy to overthrow the establishment. Dresses poorly; said to be carpenter by trade; ill-nourished; associates with common working people, unemployed and bums. Alien; said to be a Jew.

Civil Liberties, September, 1971, at 12, col. 1. Charges were dropped at the hearing.

⁴⁹ See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), upholding a conviction for addressing "fighting words" to an audience; *Feiner v. New York*, 340 U.S. 315 (1951), upholding the conviction of a streetcorner speaker for making a speech tending to incite a crowd to riot.

⁵⁰ See *State v. Harris*, 4 Conn. Cir. 534, 236 A.2d 479 (1967), in which defendant was convicted for arguing loudly with two police officers arresting a drunken stranger.

⁵¹ See *Gitlow v. New York*, 268 U.S. 652 (1925).

⁵² See text accompanying notes 68-75 *infra*.

⁵³ Advocating the commission of a crime is governed by the standard of *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which overturned a conviction under a criminal syndicalism statute of a Ku Klux Klan official who had advocated violent means to bring about political change. The Court held that such advocacy is unprotected only when it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

⁵⁴ See, e.g., MICH. COMP. LAWS ANN. §§ 335.151-.153 (1968). See also 21 U.S.C. §§ 801-966 (1970) which forbid the importation of marijuana, opium, and opium derivatives.

⁵⁵ FCC Notice at 409.

⁵⁶ Songs used in commercials on radio and television are typical. But they succeed only when their artistic merit is slight. When they achieve a moderate amount of artistic merit, then they cease to advocate anything at all, because they take on aesthetic, rather than semantic characteristics, and people begin to respond to them aesthetically, rather than semantically. See E. HANSLICK, *THE BEAUTIFUL IN MUSIC* ch. 2 (7th ed. G. Cohen transl., Library of Liberal Arts ed., 1957); M. BEARDSLEY, *AESTHETICS* § 19 (1958); S. LANGER, *FEELING AND FORM* chs. 4 & 10 (1953); Bullough, "Psychical Distance" as a Factor in Art and an Esthetic Principle, 5 BRIT. J. OF PSYCHOLOGY 87 (1912).

songs as advocating a course of action fails to understand them altogether. While songs do have semantic aspects (a love song is different from a war song), the semantic aspect is disengaged from normal discourse. Aestheticians have consistently maintained that there is a fundamental and characteristic difference between ordinary discourse, of which advocacy is a part, and the arts.⁵⁷ To reinforce this, they have often called works of art "aesthetic objects,"⁵⁸ emphasizing the difference between them and objects of other kinds of interests. In contrast, advocacy, promotion and glorification derive from political interests. Political interests are a part of what aestheticians have called the "practical" world,⁵⁹ which they hold to be separate and distinct from the world of the arts. The arts have no connections with the practical world of the perceiver. To claim that songs glorify and promote the use of drugs, then, is to confuse these two worlds, and to misunderstand songs.

Just as aesthetic and semantic *characteristics* are largely exclusive, aesthetic and semantic *responses* are mutually exclusive: a listener responds one way or the other.⁶⁰ Since rock songs usually have substantial artistic merit, people respond to them aesthetically, and not semantically. But in order to constitute advocacy of using illegal drugs, lyrics would have to be understood semantically, rather than aesthetically. Thus it is incorrect to charge that even the most obviously provocative songs (when their words are written out without the music) do in fact advocate anything at all. If a song does genuinely advocate something, whether buying a particular brand of aspirin or using illegal drugs, then it degenerates into a non-song, ceases to be music and ceases to be played (except as paid advertising).⁶¹ It is highly unlikely that the FCC directed its notice at such musical failures.

Even if some songs are found to *advocate* the use of illegal drugs, it does not follow that they may, ipso facto, be prohibited.

⁵⁷ See, e.g., ARISTOTLE, *Poetics* ch. 6, in THE BASIC WORKS OF ARISTOTLE 1460 (R. McKeon ed. 1941); I. KANT, CRITIQUE OF JUDGMENT §§ 43-45 (J. Meredith transl. 1928); A. SCHOPENHAUR, THE WORLD AS WILL AND IDEA bk. III (R. Haldane & J. Kemp transl. 1883-86); B. CROCE, GUIDE TO AESTHETICS ch. 1 (P. Romanell transl. 1965); S. LANGER, *supra* note 56, at 45.

⁵⁸ See, e.g., S. PEPPER, *Supplementary Essay on the Aesthetic Work of Art*, in THE BASIS OF CRITICISM IN THE ARTS 142 (1949); M. BEARDSLEY, *supra* note 56, at 16; H. ALDRICH, PHILOSOPHY OF ART chs. 1 & 2 (1963); E. GILSON, PAINTING AND REALITY ch. 1 (1958); P. WEISS, THE WORLD OF ART ch. 10 (1961).

⁵⁹ See, e.g., works cited in note 58 *supra*.

⁶⁰ See Urmson, *What Makes a Situation Aesthetic?*, in PROCEEDINGS OF THE ARISTOTELIAN SOCIETY supplementary vol. 31 (1957); Bullough, *supra* note 56; Aldrich, *Back to Aesthetic Experience*, 24 J. OF AESTHETICS AND ART CRITICISM 365 (1966).

⁶¹ S. LANGER, *supra* note 56, ch. 10; M. BEARDSLEY, *supra* note 56, § 19; E. HANSLICK, *supra* note 56, ch. 3.

Advocacy itself is protected by the first amendment, except when it poses a "clear and present danger," sufficient to outweigh the importance of free speech. The "clear and present danger" test derives from *Schenck v. United States*,⁶² and has been most recently formulated in *Brandenburg v. Ohio*⁶³ to be "advocacy . . . directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action."⁶⁴ Even assuming that some songs do promote or glorify the use of illegal drugs, no case has been made out that they bring a likelihood of imminent lawless action. Lacking this, they fail to present a clear and present danger sufficient to permit their prohibition.

The advocacy of ideas, without more, may not be proscribed. This position derives from *Kingsley International Pictures Corp. v. Regents of the Univ. of the State of N.Y.*⁶⁵ in which a statute was declared unconstitutional because it was used to censor a motion picture, *Lady Chatterly's Lover*, which "advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the first Amendment's basic guarantee is of freedom to advocate ideas."⁶⁶ The Supreme Court clearly holds that constitutional protection "is not confined to the expression of ideas that are conventional or shared by a majority."⁶⁷

The foregoing analysis has assumed that songs are *speech* and, as such, protected by the first amendment. But some aestheticians have argued that songs are really music, and as such not speech at all, or even poetry. Susanne Langer, for instance, says that, "[w]hen words and music come together in song, music swallows words,⁶⁸ and, "[i]n a well-wrought song the text is swallowed, hide and hair."⁶⁹ If songs are entirely music, then the fact that they have words is aesthetically unimportant. If this is aesthetically unimportant, then it should also be unimportant for most other purposes, including those of the first amendment. At least, it should follow that songs should be accorded first amendment protection only if, and to the extent that, music in general is protected by the first amendment.

No reported case has directly faced the issue whether music is

⁶² 249 U.S. 47 (1919), upholding convictions under the 1917 Espionage Act for incitement to resist the draft during World War I.

⁶³ 395 U.S. 444 (1969).

⁶⁴ *Id.* at 447.

⁶⁵ 360 U.S. 684 (1959).

⁶⁶ *Id.* at 688.

⁶⁷ *Id.* at 689.

⁶⁸ S. LANGER, *supra* note 56, at 152.

⁶⁹ S. LANGER, *PROBLEMS OF ART* 84 (1957). See also E. GURNEY, *THE POWER OF SOUND* 499 (1880); E. HANSLICK, *supra* note 56, at 41.

protected by the first amendment.⁷⁰ While it is certainly a kind of expression, the first amendment does not protect all kinds of expression.⁷¹ Music differs in a number of ways from speech and press.⁷² Although novels,⁷³ motion pictures,⁷⁴ and live theater productions⁷⁵ have been granted first amendment protection, this protection has not yet been extended to any of the other arts.

Thus whether songs are protected by the first amendment turns on whether they are speech at all. If not, there is no first amendment protection, and the FCC may impose any reasonable regulation. If so, then the FCC must establish a clear and present danger, which in this kind of case would be advocacy intended and likely to incite or produce imminent lawless action. If the latter is the applicable standard, then the FCC has failed to make its case.

C. *The Notice as Void for Vagueness*

If songs are not protected by the first amendment, then the FCC may impose any reasonable regulation on their publication,

⁷⁰ *But cf.* *Winters v. New York*, 333 U.S. 507, 510 (1948), where the Supreme Court said: "The line between the informing and the entertaining is too elusive for the protection of [freedom of speech]." This case is not in point because it involved an allegedly obscene magazine and the entertainment it provided, rather than a work of art. However, Justice Clark quotes it, out of context, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). *Burstyn* struck down a ban of a sacrilegious motion picture. It certainly is quite plausible to argue that for motion pictures and magazines it is impossible to draw the line between informing and entertaining, since both have very important uses of both sorts. But songs, arguably, have no informative use, and thus drawing such a line for songs poses no difficulty at all. Thus these cases do not advance the present inquiry.

⁷¹ No one would pretend that hitting a person in the nose is a constitutionally protected form of expression. While profanity is normally a form of expression, it is not protected. Burning a draft card as a political protest (symbolic speech) has also been denied protection. *United States v. O'Brien*, 391 U.S. 367 (1968).

⁷² Aside from songs, there is no plausibility in arguing that music advocates anything at all. *But Kingsley Pictures* holds that the basic first amendment guarantee is the freedom to advocate *ideas*. 360 U.S. at 688. Furthermore, only those aestheticians who hold a semiotic theory of art (that the purpose of art is communication) claim that music communicates anything at all. *See, e.g.*, S. LANGER, *PHILOSOPHY IN A NEW KEY* 218 (1941); E. HANSLICK, *supra* note 56, at 52; L. TOLSTOY, *WHAT IS ART?* 50 (A. Maude transl. 1960). According to other aestheticians, music does not communicate anything at all. *See, e.g.*, PLATO, *REPUBLIC* bk. 10 (P. Shorey transl.), in *COLLECTED DIALOGUES* 819 (E. Hamilton & H. Cairns eds. 1961); ARISTOTLE, *supra* note 57, § 6; J. REYNOLDS, *DISCOURSES ON ART* 27-29 (1965), M. BEARDSLEY, *supra* note 56, § 30.

⁷³ *See, e.g.*, *Butler v. Michigan*, 352 U.S. 380 (1957); *Smith v. California*, 361 U.S. 147 (1959); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413 (1966); *Redrup v. New York*, 386 U.S. 767 (1967).

⁷⁴ *Kingsley International Pictures Corp. v. Regents of the Univ. of the State of N. Y.*, 360 U.S. 684 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 485 (1952); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968). While the Court has never prohibited motion picture censorship, it has established demanding procedural standards. *See, e.g.*, *Blount v. Rizzi*, 400 U.S. 410 (1971); *Freedman v. Maryland*, *supra*.

⁷⁵ *P.B.I.C., Inc. v. Byrne*, 313 F.Supp. 757 (D. Mass. 1971). This was a declaratory

distribution, performance or broadcast. Without the first amendment arguments, the only case to be made against the FCC notice lies in its vagueness and certain problems regarding due authorization of the notice.

Aside from the due process clauses,⁷⁶ the Supreme Court has developed a first amendment requirement of precision for legislative and administrative standards, the violation of which renders such standards void for vagueness.⁷⁷ For instance, it has found unconstitutionally vague the following film licensing standards: "prejudicial to the best interests of the people of said City;"⁷⁸ "moral, educational or amusing and harmless;"⁷⁹ "immoral" and "tend to corrupt morals;"⁸⁰ and "moral and proper," when contrasted with "cruel, obscene, indecent, or immoral, or such as tend to debase or corrupt morals."⁸¹ In addition, it found unconstitutionally vague for overbreadth a statute that defined "breach of the peace" as being "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquite."⁸² While the Supreme Court has not formulated a precise statement of the constitutional requirement of precision, it is clear that the standard assumed by the FCC notice is unconstitutionally vague if it is at least as vague as any of the above statutes.

The FCC notice is directed against songs that tend to "promote

judgment action against the county district attorney by the producers of the play *Hair* in Boston. The district attorney was prohibited from prosecuting the producers or actors either under a lewd and lascivious behavior statute or under the common law crime of indecency.

⁷⁶ U.S. CONST. amends. V and XIV, § 2.

⁷⁷ All of the cases discussed in this section did involve the fourteenth amendment due process clause, but only insofar as it applied to the states the standards of the first amendment. Thus the vagueness standard here applied derives entirely from the first amendment.

⁷⁸ *Gelling v. Texas*, 343 U.S. 960 (1952). The Court reversed per curiam without opinion a conviction for showing a motion picture after a license had been denied.

⁷⁹ *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587 (1954). The Court reversed per curiam without opinion an administrative order forbidding the showing of a motion picture in Ohio.

⁸⁰ *Commercial Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 346 U.S. 587 (1954), a companion case to *Superior Films*. The Court reversed per curiam without opinion an administrative order refusing a license to a motion picture.

⁸¹ *Holmby Productions, Inc. v. Vaughn*, 350 U.S. 870 (1955). The Court reversed per curiam without opinion a Kansas judgment supporting an administrative order refusing a license to show a motion picture.

⁸² *Cox v. Louisiana*, 379 U.S. 536, 551 (1965). The Court invalidated a breach of the peace conviction resulting from a demonstration by 1,500 Black people on a sidewalk in downtown Baton Rouge, where the defendant urged them to sit in at lunch counters there until they were served. This language was the Louisiana Supreme Court's construal of a statute which specified two elements in breach of the peace: (1) congregating with others with intent to provoke a breach of the peace under circumstances such that it was likely to occur and (2) refusal to move on when so ordered by a law enforcement officer. The United States Supreme Court found the first part of this, even with the construction by the Louisiana Supreme Court, to be unconstitutionally vague.

or glorify the use of illegal drugs.”⁸³ This formulation is arguably at least as vague as the definitions which the Supreme Court has previously held to be unconstitutionally vague. In *Kingsley Pictures*⁸⁴ the Court invalidated a statute prohibiting the licensing of a motion picture that was “immoral . . . or . . . of such a character that its exhibition would tend to corrupt morals,”⁸⁵ which in turn were defined to include any motion picture that “expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.”⁸⁶ Like the statute in *Kingsley Pictures*, the standard announced by the FCC is directed against songs which “promote or glorify” the use of illegal drugs. This is surely no less vague than to present acts as “desirable, acceptable or proper patterns of behavior,” the standard found too vague in *Kingsley Pictures*. In *Interstate Circuit, Inc. v. Dallas*⁸⁷ the Supreme Court invalidated a classification scheme which classified certain motion pictures as not suitable for young persons under sixteen and prohibited them from seeing such pictures unless accompanied by a guardian or spouse.

Although *Kingsley Pictures* and *Interstate Circuit* involved direct censorship boards, vagueness is no less objectionable when the regulation of expression involves classification, rather than direct suppression.⁸⁸ In any event, the FCC notice is much more like direct suppression than classification; the veiled threat is of complete prohibition of broadcast, not a limitation as to listeners. If vagueness is a constitutional infirmity in a classification scheme, it is much more so for the kind of suppression that the FCC notice intends.

It follows from the foregoing analysis that if the FCC notice were a statute, a court could rule it invalid. But it is only a notice to broadcasters relating to renewal of licenses. It is unclear whether this kind of notice is subject to the same requirement of precision which the courts have applied to legislation.

While there is no authority relating directly to the FCC, several analogies to decisions involving statutory schemes go part way toward articulating the standard to be followed with respect to administrative action. Justice Frankfurter declared in his concurring opinion in *Kingsley Pictures* that the standard “must not

⁸³ FCC Notice at 409.

⁸⁴ *Kingsley International Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684 (1959).

⁸⁵ *Id.* at 685.

⁸⁶ *Id.*

⁸⁷ 390 U.S. 676 (1968).

⁸⁸ 390 U.S. at 688.

be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion.”⁸⁹ In his concurring opinion to *Joseph Burstyn, Inc. v. Wilson* he argued that such vagueness offends due process in that,

[w]here licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative. . . . The judiciary has no standards with which to judge the validity of administrative action which necessarily involves, at least in large measure, *subjective determination*.⁹⁰

While *Kingsley Pictures* and *Burstyn* both involved review boards required to give approval to motion pictures before they could be shown, the reasoning cited applies directly to the FCC. A wide discretion is granted by the phrase “promote or glorify.” It gives the Commission no standards at all by which it can make objective determinations whether particular songs promote or glorify the use of drugs. Lack of objective standards encourages erratic administration, and “[i]ndividual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law.”⁹¹ In addition, courts have no standards by which to determine the rightness of a decision made by the FCC.

Thus if the first amendment does apply to songs such as the drug song here in question, the FCC notice, because of its vagueness, violates current standards of precision in regulation. On the other hand, if songs are not protected by the first amendment, a less demanding standard will probably be applied, and the notice may be sufficiently precise to pass muster in the courts.

D. Notice as Prior Restraint

*Near v. Minnesota*⁹² holds that the chief purpose of the first amendment guarantee of freedom of the press is the prevention of prior restraints on publication.⁹³ Any such system of prior re-

⁸⁹ 360 U.S. at 694.

⁹⁰ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 532 (1952) (emphasis added). For holding, see note 70 *supra*.

⁹¹ *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 685, quoting from the concurring opinion of Justice Clark in *Kingsley Pictures*, 360 U.S. at 701. *Interstate Circuit* further holds that even de novo judicial review is insufficient when there are vague standards that do not sufficiently guide the censor. 390 U.S. at 685.

⁹² 283 U.S. 693 (1931). The Supreme Court dissolved an injunction forbidding further publication of a newspaper that had charged public officials with corruption and failure to expose and punish lawbreakers.

⁹³ 283 U.S. at 713.

straints carries a heavy presumption against its constitutionality, and is tolerable only when it operates under judicial superintendence and is subject to an almost immediate judicial determination of its validity.⁹⁴ The non-renewal of a license is certainly a subsequent sanction, but if a license is not renewed pursuant to this threat, it will be for playing the disapproved songs after the threat was given. Thus the threat is prior to the actions to be controlled, and to the extent it induces broadcasters not to play certain songs it acts as prior restraint.

That such threats are effective prior restraints is shown in *Bantam Books v. Sullivan*,⁹⁵ where the Supreme Court invalidated a Rhode Island scheme under which a special state commission sent notices to book distributors informing them that it had found certain books to be objectionable for sale, distribution or display to youths under the age of eighteen. The Commission called the distributors' attention to the fact that it was empowered to recommend prosecution, and indicated that a copy of the notice would be sent to the local police. Local police usually checked with the distributor to see what action he had taken.

Although the FCC notice is distinguishable, its distinguishing characteristics do not make it constitutionally different from the mechanism held to be a prior restraint in *Bantam Books*. Instead of threatening prosecution, the FCC has threatened non-renewal of licenses. For the licensees this is a much stronger sanction than prosecution, because they stand to lose more if their licenses are not renewed than they would if they were found guilty and fined. Whereas in *Bantam Books* the Commission listed the books by name, the FCC did not designate specific song titles. This only makes it more difficult for the radio stations to determine what is prohibited, with the likely result that any errors will be on the side of excessive caution, given the substantial financial stake of the

⁹⁴ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

⁹⁵ 372 U.S. 58 (1963). This position was reaffirmed in *Carroll v. President and Commissioners*, 393 U.S. 175 (1968), where, in setting aside a ten-day ex parte restraining order forbidding an aggressively and militantly racist group from holding a public meeting, the Court emphasizes, at 181, that:

"[A] system of prior restraints of expression comes to this Court bearing a heavy presumption against its Constitutional validity." . . . And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. . . . [A] non-criminal process of prior restraints upon expression "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."

broadcaster in his license.⁹⁶ That the notice acts informally as a threat, and not as a formal rule that subsequent broadcasting of drug songs cease, does not prevent it from being a prior restraint forbidden by the first amendment.

V. CONCLUSION

The March 5, 1971, public notice is indeed a veiled threat to radio broadcasters to stop broadcasting drug-related songs. Its issuance is irregular in that, although the normal procedure in such a circumstance is to issue a rule forbidding the broadcast of such songs, the FCC chose instead to relate the threat to the periodic renewal of broadcasters' licenses, threatening difficulty at renewal time for stations that continue to broadcast such songs.

It is uncertain whether songs are protected by the first amendment guarantees of freedom of speech and press. No court has ruled directly on this point, and songs are sufficiently different from those arts that have been accorded the first amendment protection to put the issue in doubt. If they are so protected, the FCC notice constitutes a prior restraint forbidden by the first amendment. Furthermore, the FCC has not begun to meet the "clear and present danger" test of protected advocacy, and is not able to do so, since songs are of such a nature that they do not advocate anything at all. But even if they were found to advocate the use of illegal drugs, such advocacy is protected for lack of a clear and present danger. In addition, the notice is constitutionally deficient in that it is too vague to measure up to the first amendment standards of precision.

On the other hand, if songs are not protected by the first amendment, then the FCC may make any reasonable regulations, and perhaps the notice will pass constitutional muster.

—*Samuel Bufford*

⁹⁶ In 1960 the average original investment in a radio station by a licensee was more than \$116,000. Calculated from data in FCC, 27th ANNUAL REPORT 63 (1961).