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Telecommunications: Greater Freedom for FCC Licensees in Choice of Program Content

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TELECOMMUNICATIONS: GREATER FREEDOM FOR FCC LICENSEES IN CHOICE OF PROGRAM CONTENT

Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977)

Upon receiving a listener complaint that radio station WBAI was broadcasting obscene material,[1] the Federal Communications Commission, relying on section 1464 of the federal criminal code,[2] issued a declaratory order[3] finding that WBAI had broadcast "indecent" language[4] and banning these words from future broadcasts.[5] The FCC later issued a memorandum and order attempting to explain the original declaratory order.[6] Pacifica Foundation, the operator of station WBAI,[7] appealed the declaratory order, and the District of Columbia

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1. In October, 1973, a New York City radio station played an excerpt from social satirist George Carlin's record album "George Carlin, Occupation: Foole," which was "almost entirely devoted to the use of seven four-letter words depicting sexual or excretory organs and activities." 556 F.2d 9, 11 (D.C. Cir. 1977). The album was played as part of an afternoon program concerned with society's attitudes about language. Before playing the album, the station warned the listening audience that some of the language might be found offensive. *Id.*

2. 18 U.S.C. §1464 (1970): "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." The Commission further justified its decision by 47 U.S.C. §303 (1970), which states: "Except as otherwise provided in this Chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall:

. . . .

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest . . . ."

3. Pacifica Foundation, 32 RAD. REG. 2D (P & F) 1331 (1975).

4. According to the Commission, "indecent" language was that which "describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is reasonable risk that children may be in the audience." 556 F.2d at 11.

5. *Id.* No penalty, however, was assessed against WBAI for playing the Carlin album. Pacifica Foundation, 32 RAD. REG. 2D (P & F) 1331, 1337 (1975).

6. The memorandum and order, Pacifica Foundation, 36 RAD. REG. 2D (P & F) 1008 (1976), stated that the Commission had not meant to impose a complete ban on "indecent" words, but had merely intended to restrict the broadcast of these words to hours when children were least likely to be part of the audience. "Indecent" language might be allowed on the air during these hours if listening adults were warned as to the contents of what was to be played and "if the language in context had serious literary, artistic, political or scientific value." 556 F.2d at 13. The Commission also ruled that a licensee could not be held responsible for "indecent" language coming from live broadcasts of newsmaking events and that the decision to broadcast such language at times when children were least likely to be part of the audience was left to the discretion of the licensee. *Id.*

7. *Id.* at 11. This organization "operates a number of noncommercial, educational radio stations." Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664, 667 (1971). In the past, several of these stations, including WBAI, have been investigated for broadcasting four-letter words. WBAI's license was renewed by the FCC for a full term despite this investigation. Other Pacifica stations were not so fortunate and received a renewal of only one year rather than the usual three years. At the end of this one-year period, however, the stations' licenses were renewed for a full term. Jack Straw Memorial Foundation, 21 F.C.C.2d 833, 835-36 (1970) (Cox, Comm'r, dissenting). The FCC later investigated WBAI because of listener complaints that the station

Circuit overturned the Commission's order and HELD, that the order was censorship and thus prohibited by section 326 of the Communications Act of 1934.[8]

Both the Communications Act of 1934 and its predecessor, the Radio Act of 1927,[9] contained express prohibitions against censorship. These acts, however, also gave the Commission broad powers to enforce section 1464, prohibiting obscene, indecent, or profane language from radio broadcast, and to enforce the requirement that licensees broadcast in the public interest.[10] Throughout the history of communications legislation, courts have struggled to reconcile these seemingly inconsistent provisions.[11]

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was broadcasting anti-Semitic material but no penalties were imposed. United Fed'n of Teachers, 17 F.C.C.2d 204 (1969).

8. 556 F.2d at 18. 47 U.S.C. §326 (1970) reads: "Nothing in this Chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

9. Section 29 of the Radio Act of 1927, ch. 169, §29, 44 Stat. 1166 (1927), prohibited censorship. The FCC's predecessor, the Federal Radio Commission, enforced the 1927 Act.

10. For the text of §1464, see note 2 *supra*. The obscenity provision of §1464 was first a part of §29 of the Radio Act of 1927 and later became the last sentence of §326 of the Communications Act of 1934, ch. 652, tit. III, §326, 48 Stat. 1091 (1934) (current version at 47 U.S.C. §326 (1970)). In 1948 this provision was removed from §326 and placed in the criminal code, Pub. L. No. 772, ch. 645, §1464, 62 Stat. 769 (1948) (codified at 18 U.S.C. §1464 (1970)). Comment, *Broadcasting Obscene Language: The Federal Communications Commission and Section 1464 Violations*, 1974 ARIZ. ST. L.J. 457, 458 n.7. The penalties for violations of §1464, see note 2 *supra*, are criminal sanctions that can be enforced by the Justice Department. In addition to these penalties, "[V]iolation of Section 1464 may result in administrative sanctions for Commission licensees. Thus, Congress has empowered the Commission to revoke licenses, 47 USC §312(a), issue cease and desist orders, 47 USC §312(b), or impose forfeitures, 47 USC §503(b)(1)(E), for conduct which would be in violation of Section 1464." Sonderling Broadcasting Corp., 27 RAD. REG. 2D (P & F) 1508, 1509-10 (1973). It has been suggested that the FCC under §503(b)(1)(E) has no power to determine violations of §1464 and can only assess forfeitures against licensees previously found guilty of §1464 violations by Justice Department prosecutions. *See* Comment, *supra* at 466-70.

The power of the Commission to ensure that licensees broadcast in the public interest is found in 47 U.S.C. §307(d) (1970), which provides: "Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby." A similar provision was included in §11 of the Radio Act of 1927, ch. 652, §601, 48 Stat. 1101 (1927). The Commission has used this section to deny license renewals to licensees whose program content, taken as a whole, was not in the public interest. See note 25 *infra*.

The courts have recognized that the term "public interest" is inherently vague and have cautioned the FCC that: "Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vaguish, penumbral bounds expressed by the standard of 'public interest.'" FCC v. RCA Communications, Inc., 346 U.S. 86, 91 (1953).

11. It has been suggested that this is impossible: "Therefore, it seems impossible to reconcile the FCC's arguments that it has the power to determine who is a violator of section 1464 and that section 1464 prohibits more than just the constitutionally held 'obscene,' with the section 326 prohibition against FCC censorship." Comment, *supra* note 10, at 471.

Although courts have been hesitant to find an implicit power to censor in legislative regulation of communications,[12] early decisions resolved the conflict in favor of the Commission's enforcement powers.[13] The Commission and the courts left the choice of program content to the discretion of the station,[14] but, when license decisions were involved, past or proposed programming was a proper factor for Commission consideration.[15] The 1968 decision, *Banzhaf v. FCC*,[16] defined the permissible scope of Commission inquiry into program content. In *Banzhaf* the District of Columbia Circuit affirmed an FCC decision that required all radio and television stations broadcasting cigarette commercials to carry announcements showing possible dangers of cigarette use.[17] This decision was based on the "fairness doctrine"[18] and the requirement that

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12. Hannegan v. Esquire, Inc., 327 U.S. 146, 151 (1946).

13. *See, e.g.*, KFKB Broadcasting Ass'n v. Federal Radio Comm'n, 47 F.2d 670 (D.C. Cir. 1931) (license renewal application denied since station was not broadcasting in the public interest, but was broadcasting in a medical advice program for the private benefit of a doctor who prescribed drugs made from his own formulas).

14. McIntire v. William Penn Broadcasting Co., 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). After the radio station cancelled its paid religious programming in order to carry free religious broadcasts, the promoters of the cancelled programs claimed that the radio station was acting as a censor. The court stated that even if this charge were true, the government had no power to command FCC licensees to carry certain programming. *Id.* at 601.

15. Johnston Broadcasting Co. v. FCC, 175 F.2d 351 (D.C. Cir. 1949); Simmons v. FCC, 169 F.2d 670 (D.C. Cir.), *cert. denied*, 335 U.S. 846 (1948). In *Johnston* two applicants applied for license to broadcast on the same frequency. The Commission granted the license to the only applicant who had expressed a willingness to broadcast controversial programs and programs of contemporary community interest. As to whether this was censorship, the court stated: "[W]hile the Commission cannot prescribe any type of program (except for prohibitions against obscenity, profanity, etc.), it can make a comparison on the basis of public interest and, therefore, of public service. Such a comparison of proposals is not a form of censorship within the meaning of the statute." 175 F.2d at 359.

In *Simmons* a licensee had applied to increase the power of his station and to change the station's broadcast frequency. The request was refused on the grounds that it was against the public interest. The Commission argued that the licensee's refusal to broadcast local programming when network programming was available indicated that the station would not serve the special needs of its listening area. The appellant claimed that this was censorship, but the court stated: "[C]ensorship would be a curious term to apply to the requirement that licensees select their own programs by applying their own judgment to the conditions that arise from time to time." 169 F.2d at 672. For a similar case concerning programming to fit the needs of a station's listening area, see Henry v. FCC, 302 F.2d 191 (D.C. Cir.), *cert. denied*, 371 U.S. 821 (1962).

16. Television Station WCBS-TV, 8 F.C.C.2d 381, *aff'd on rehearing*, 9 F.C.C.2d 921 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom.* Tobacco Inst., Inc. v. FCC, 396 U.S. 842 (1969).

17. Congress later outlawed cigarette commercials on all electronic media, and the Supreme Court upheld the ban in Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971), *aff'd*, 405 U.S. 1000 (1972).

18. "The fairness doctrine in broadcasting requires licensees to devote a reasonable percentage of broadcast time to coverage of public issues and to present such issues fairly by broadcasting contrasting points of view." Barrow, *The Fairness Doctrine: A Double Standard for Electronic and Print Media*, 26 HASTINGS L.J. 659, 659 (1975). For detailed discussions of the fairness doctrine, see Red Lion Broadcasting Co. v. FCC, 366 U.S. 367 (1969); Note, *Constitutional Ramifications of a Repeal of the Fairness Doctrine*, 64 GEO. L.J. 1293 (1976);

licensees broadcast in the public interest. The court, however, also cautioned the FCC that rulings that certain programs or commercials were not in the public interest closely resembled censorship.[19] Furthermore, the court stated that " 'public interest' is too vague a criterion for administrative action unless it is narrowed by definable standards."[20]

Other attempts to influence the Commission to take action against licensees on the basis of specific programs not in the public interest had not been as successful as *Banzhaf*. In an earlier decision, *Anti-Defamation League of B'Nai B'Rith v. FCC*,[21] the District of Columbia Circuit upheld the FCC's decision to renew a broadcaster's license despite a complaint against programs not in the public interest.[22] Fearing media self-censorship,[23] the court believed that licensees would avoid broadcasting controversial programs in order to prevent possible FCC reprisal when the station had to apply for a new license.[24] *Oliver R. Grace*[25] and other post-*Banzhaf* rulings[26] upheld the principles that

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Comment, *Power in the Marketplace of Ideas: The Fairness Doctrine and the First Amendment*, 52 TEX. L. REV. 727 (1974).

19. "The power to refuse a license on grounds of past or proposed programming necessarily entails some power to define the stations' public interest obligations with respect to programming. It is this power to specify material which the public interest requires or forbids to be broadcast that carries the seeds of the general authority to censor denied by the Communications Act and the First Amendment alike." Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968), *cert. denied sub nom.* Tobacco Inst., Inc. v. FCC, 396 U.S. 842 (1969).

20. *Id.* at 1096. The court also warned: "[W]e emphasize that our cautious approval of this particular decision does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the 'public interest' or even the 'public health.' " *Id.* at 1099.

21. 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969) (affirming the Commission's renewal of a license despite claims that broadcasts of anti-Semitic material were in violation of the public interest; licensee's programming as a whole did not violate the public interest).

22. In *Anti-Defamation League* the Court defined censorship as "*any* examination of thought or expression in order to prevent publication of 'objectionable' material." *Id.* at 171 (citing Farmers Educ. & Coop. Union of America v. WDAY, 360 U.S. 525, 527 (1959)).

23. *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Smith v. California, 361 U.S. 147 (1959).

24. 403 F.2d at 170-72. The court felt, however, that programming taken as a whole that was not in the public interest could be considered in license renewal decisions. *Id.* at 172. In making this assertion, however, the court apparently ignored that its decision might also lead to self-censorship by making stations hesitant to carry a significant amount of controversial programming.

25. 18 RAD. REG. 2D (P & F) 1071 (1970). "[T]here can be no governmental arbiter of taste in the broadcast field." *Id.* at 1073. *Oliver R. Grace* involved a petition complaint that " 'the great majority of broadcast programs are devoted to vulgarity and violence,' without 'due regard for sensitivity, intelligence and taste.' " *Id.* at 1072. The complaint also asked for increased licensee response to the public interest. *Id.* In answer, the Commission indicated that past failure to broadcast in the public interest was considered in license renewal applications. *Id.* The Commission, however, later stated: "The charge that the broadcast programs are 'vulgar' . . . is not properly cognizable by this Government agency, in light of the proscription against censorship." *Id.* at 1073. Taking into account that the complaint charged that a "great majority of broadcast programs" were not in the public interest, *id.* at 1071, this statement appears to contradict the earlier statement and to indicate that the FCC could not fail to renew a station's license simply because most of its programming was "vulgar" and not

licensees were responsible for choosing which material to broadcast and that the Commission could not prohibit or force licensees to carry certain programs.

While proclaiming that licensees were free to select their own programming, the Commission noted exceptions to this rule[27] and punished broadcasters for carrying "obscene, indecent, or profane language" in violation of section 1464 and for not programming in the public interest. In *WUHY-FM Eastern Education Radio*[28] and *Sonderling Broadcasting Corp.*,[29] the Commission denied that it had attempted either to prevent "provocative or unpopular programming which may offend some listeners"[30] or "to censor all sexual material off the air."[31] The FCC, however, specifically reserved the power to enforce broadcast laws such as section 1464 by banning obscene language.[32] Furthermore, the Commission disclaimed responsibility for the cancellation of programs resulting from its enforcement measures. Such an extreme reaction, the agency reasoned, was the licensee's prerogative but was not mandated by the Commission.[33]

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in the public interest. Most cases take the view that the Commission can refuse to renew a license on the basis that the station's programming taken as a whole violates the public interest. Anti-Defamation League of B'Nai B'Rith v. FCC, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969) (renewal granted); Pacifica Foundation, 36 F.C.C. 147 (1964) (renewal granted); Palmetto Broadcasting Co., 33 F.C.C. 250 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964) (renewal denied); Mile High Stations, Inc., 28 F.C.C. 795 (1960) (license not revoked but cease and desist order issued); WBNX Broadcasting Co., 12 F.C.C. 837 (1948) (evidence that programming violates public interest could be taken into consideration); Farmers & Bankers Life Ins. Co., 2 F.C.C. 455 (1936) (renewal granted). *But see* Pierson, *The Need for Modification of Section 326*, 18 FED. COM. B.J. 15 (1963).

26. Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976); Meredith Corp., 25 RAD. REG. 2D (P & F) 428 (1972); Jack Straw Memorial Foundation, 21 RAD. REG. 2D (P & F) 505 (1971).

27. "It [the FCC] readily concedes that it is precluded from examining a program for taste or content, unless the recognized exceptions to consorship apply: for example, obscenity . . . programs inciting to riots . . . etc." En banc Programming Inquiry, 44 F.C.C. 2303, 2310 (1960).

28. 18 RAD. REG. 2D (P & F) 860 (1970). The Commission found the station liable for a forfeiture of $100 for the broadcast of an interview with Jerry Garcia of "The Grateful Dead" rock band that was filled with four-letter words.

29. 27 RAD. REG. 2D (P & F) 1508 (1973). The FCC found a licensee liable for a $2,000 forfeiture for violating §1464 by broadcasting obscene and indecent language during its "topless raido" sexually explicit talk shows.

30. WUHY-FM E. Educ. Radio, 18 RAD. REG. 2D (P & F) at 862.

31. Sonderling Broadcasting Corp., 27 RAD. REG. 2D (P & F) at 1516.

32. *Id.* at 1517.

33. "If the licensee goes beyond the requirements of the law and drops sexual material altogether, as Sonderling says he did here, that is an act of licensee judgment . . . . That decision was Sonderling's and we insist that it was not mandated by anything we said in our Notice of Apparent Liability." *Id.* For opposing views on FCC decisions and other Commission practices leading to self-censorship, see Illinois Citizens Comm. for Broadcasting v. FCC, 515 F.2d 397, 407 (D.C. Cir. 1975) (Bazelon, C.J., explaining why he would grant rehearing en banc); Yale Broadcasting Co. v. FCC, 478 F.2d 594, 603 (D.C. Cir.) (Bazelon, C.J., explaining why he would grant rehearing en banc, sua sponte), *cert. denied*, 414 U.S. 914 (1973); WUHY-FM E. Educ. Radio, 18 RAD. REG. 2D (P & F) at 871 (Cox, Comm'r, concurring in part and dissenting in part); Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J.L. & ECON. 15, 19-23 (1967); Note, *supra* note 7, at 666-69 (discusses earlier cases con-

In the instant case, Judge Tamm, writing for the court, found the Commission's prohibition against the broadcast of "indecent" language to be censorship and thus prohibited by section 326.[34] The court rejected the Commission's contention that the order did not effectively prohibit the broadcast of the "indecent" language because such programs were now being channeled into hours when the fewest children would be listening.[35] In the court's view, the order had a censorship effect because one million children remain in broadcast audiences until late at night.[36] Furthermore, many radio stations are not on the air during the few hours of the day when a significant number of children would not be listening and when "indecent" material could be broadcast.[37] The court noted that the FCC, acknowledging its lack of power to censor, previously had left to licensees the determination whether to broadcast "indecent" language.[38] Judge Tamm suggested that the Commission should return to this standard even if it resulted in some offensive material being broadcast during hours when children were likely to be in the listening audience.[39]

Because Judge Tamm found section 326 dispositive,[40] his finding that the broadcast of the "indecent" language could not be prohibited without violating the first amendment was mere dicta.[41] Chief Judge Bazelon, in a concurring opinion, interpreted this as an indication that the broadcast of these words could not be prohibited even if they were found to be obscene and thus un-

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cerning Pacifica Foundation); Note, *Filthy Words, the FCC, and the First Amendment: Regulating Broadcast Obscenity*, 61 VA. L. REV. 579, 605-07 (1975).

34. 556 F.2d at 14.

35. *Id.* For the Commission's definition of "indecent" language, see note 4 *supra*. Application of this definition of "indecent" language "proscribes the uncensored broadcast of many of the great works of literature including Shakespearian plays and contemporary plays which have won critical acclaim, the works of renowned classical and contemporary poets and writers, and passages from the *Bible*." *Id.*

36. *Id.*

37. "Section 326 of the Communications Act specifically prohibits the FCC from interfering with licensee discretion in programming. . . . Such interference is exactly what the *Order* calls for.

. . . .

In an effort to sustain the validity of its *Order* the Commission labels its prospective ban a channeling mechanism. The label is unimportant, the effect of the *Order* is critical. The effect is that of censorship and that is beyond the mandate of the FCC." *Id.* Further indications that the Commission's order was, in effect, censorship are found in Chief Judge Bazelon's concurring opinion. Approximately one-half of the country's AM radio stations (2,294 out of 4,488) go off the air and only one-fourth of viewer households are still watching television at midnight when stations would be able to broadcast "indecent language." *Id.* at 20 nn.5 & 6.

38. *Id.* at 14-15. *See, e.g.*, Report on Broadcast of Violent, Indecent, and Obscene Material, 32 RAD. REG. 2D (P & F) 1367 (1975); Jack Straw Memorial Foundation, 21 RAD. REG. 2D (P & F) 505 (1971); Oliver R. Grace, 18 RAD. REG. 2D (P & F) 1071 (1970).

39. "To whatever extent we err, or the Commission errs in balancing its duties, it must be in favor of preserving the values of free expression and freedom from governmental interference in matters of taste." 556 F.2d at 18.

40. *Id.* at 15.

41. *Id.* at 15-16. A claim by the FCC that the unique characteristics of the broadcast medium justified an exemption from first amendment requirements was rejected. *Id.* at 16-18. For a discussion of the unique characteristics of the broadcast medium, see note 47 *infra*.

protected by the first amendment.[42] Citing *Illinois Citizens Committee for Broadcasting v. FCC*,[43] Chief Judge Bazelon disagreed with this view,[44] stating: "Thus, to determine whether the Commission may regulate speech within its definition of 'indecent,' it is necessary to determine first whether such speech would be protected by the Constitution in other media; and if so, whether the unique character of broadcasting justifies the proposed expansion of government speech control."[45] Applying this formula, however, Bazelon concluded that the "indecent" material was not obscene under the present Supreme Court test, *Miller v. California*,[46] and that unique characteristics of the broadcast medium did not merit a separate category of speech subject to Commission regulation.[47]

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42. It is not clear whether Chief Judge Bazelon's interpretation of Judge Tamm's opinion is accurate. In his opinion Judge Tamm stated: "Under its mandate to promote the public interest, the Commission may promulgate rules on a variety of matters, including broadcast programming. However, any such actions by the Commission must be carefully tailored to meet the requirements of the First Amendment, as Congress has explicitly mandated in section 326 of the Communications Act." 556 F.2d at 15. This statement gave no indication that the censorship provision of §326 provided broadcasters with greater freedom than that provided by the first amendment.

43. 515 F.2d 397 (D.C. Cir. 1975). The Commission imposed a forfeiture against Sonderling Broadcasting Corporation for violation of §1464. See note 29 *supra* and accompanying text. Station listeners, claiming deprivation "of listening alternatives in violation of their rights under the First Amendment," appealed the forfeiture when Sonderling failed to do so. *Id.* at 401. The court affirmed the Commission decision solely on the basis that the station had broadcast obscene material under present Supreme Court tests. *Id.* at 403-06. Because this material was obscene, it was not protected by the first amendment, and there was nothing improper about the Commission's decision. There was no discussion of any impact that §326 might have had on the court's ruling.

44. "However, determining that the Commission has violated the literal command of §326 does not, as Judge Tamm assumes, end the matter. Although the language of §326 is very broad, the scope of that section is apparently limited by 18 U.S.C. 1464 and 47 U.S.C. 503(b)(1). . . . The clear implication [in *Illinois Citizens Comm. for Broadcasting*] is that §326 does not provide greater protection of speech than the First Amendment, at least with respect to offensive speech. If the court had thought otherwise, it could not have upheld the forfeiture simply by finding that the speech in question was unprotected under the First Amendment." 556 F.2d at 20.

45. *Id.* For a discussion of broadcasting's unique characteristics, see note 47 *infra*.

46. 413 U.S. 15 (1973). The *Miller* test is composed of the following elements: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (citations omitted). Although *Miller* decided regulation of obscenity by the states, its test was applied to federal law in a companion case, United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 129-30 (1973). After applying the *Miller* test to the FCC's "indecent" language, Chief Judge Bazelon stated: "The Commission's definition of indecent speech that may be freely regulated thus goes well beyond *Miller* and is prima facie unconstitutional . . . ." 556 F.2d at 23.

47. *Id.* at 24-29. Chief Judge Bazelon examined each of the unique characteristics that the Commission believed to preclude the broadcast medium from being "subject to the same analysis [concerning obscenity] that might be appropriate for other, less intrusive forms of expression." Pacifica Foundation, 32 RAD. REG. 2D (P & F) 1331, 1335 (1975). The FCC feared that "indecent" language "may offend the privacy interests of unconsenting adults in their

Although arguments can be advanced for adopting the Commission's view,[48] the court's opinion is sound in its indication that the FCC cannot avoid the requirements of section 326 merely by paying lip service to the licensee's freedom to choose program content. Past rulings and public statements of commissioners, while acknowledging the licensee's responsibility for programming, often led to self-censorship.[49] In the instant case, Judge Tamm looked beyond the "channeling" label and saw the actual effect of the Commission's prohibition against "indecent" language. Instead of merely "channeling" the language, the order would deprive listeners of hearing some Shakespearean plays and even certain Bible stories.[50]

While encouraging the courts to engage in closer scrutiny of future FCC rulings and preventing abuses of power by the Commission, the instant case left undefined the scope of the censorship provision of section 326. Although Judge Tamm's literal interpretation of this provision[51] finds some support in the legislative history of section 326,[52] it does not have the support of precedent. Both *Illinois Citizens Committee for Broadcasting*[53] and *Johnston Broadcasting Co. v. FCC*[54] indicate that licensees have no right to broadcast obscenity. This supports Chief Judge Bazelon's belief that the protection given licensees by

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homes." 556 F.2d at 25. Chief Judge Bazelon did not find this argument persuasive: "Although a person *can* claim a greater privacy interest when at home, that interest is reduced when he 'opens up his home' by turning on the radio." *Id.* at 27. The Commission was also alarmed that children in the radio audience might be exposed to "indecent" language. *Id.* Chief Judge Bazelon rejected this argument for two reasons. First, adults who had "normal sleeping habits will be limited to programs 'fit for children.'" *Id.* Second, the Commission ignored the fact that children enjoy the benefit of a large portion of the first amendment protection granted to adults. *Id.* at 28. The FCC also felt that the "natural scarcity of broadcast channels" justified restraints on broadcasters' freedom of speech. *Id.* at 29. Chief Judge Bazelon, however, failed to accept this argument and stated: "The ban on censorship in 47 U.S.C. §326 reflects a Congressional judgment that scarcity does not justify content regulation." *Id.*

48. Dissenting, Judge Leventhal stated that children's easy access to radios justified the prohibition of "indecent" language, at least in the early afternoon when children were most likely to be in the listening audience and least likely to be subject to parental control. *Id.* at 30-37.

49. See note 33 *supra*.

50. 556 F.2d at 14.

51. See note 42 *supra* and accompanying text.

52. Section 29 of the Radio Act of 1927 "did not originally appear in the bill, H.R. 9971, which was ultimately enacted. Representative White, its draftsman, in answer to a query about protecting free speech, stated, 'Personally I felt that we could go no further than the Federal Constitution goes in that respect. The pending bill gives the Secretary [of Commerce] no power of interfering with freedom of speech in any degree.' . . . The section was the result of a Senate amendment." Note, *The Freedom of Radio Speech*, 46 HARV. L. REV. 987, 990 n.26 (1933) (quoting 67 CONG. REC. 5480 (1926)). A Senate Report dealing with the 1948 amendment to §326 asserted: "[S]ection 326 . . . makes clear that the Commission has absolutely no power of censorship over radio communications. . . ." 556 F.2d at 19 n.4 (quoting S. Rep. No. 1567, 80th Cong., 2d Sess. 13,014 (1948)). This Senate Report appears to coincide with Judge Tamm's view.

53. See note 43 *supra* and accompanying text.

54. 175 F.2d 351 (D.C. Cir. 1949). See note 15 *supra*.