

A CAN OF WORMS

Pirate Radio as Public Intransigence on the Public Airwaves

by

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Preface

A short note on terms: throughout this thesis I use the term “unlicensed broadcasting” as a generic distinction for the activity chronicled herein. It is cumbersome, but fortunately synonyms are available. However, they are limited in number. This leads to a potential dilemma involving some unlicensed broadcasters and the avoidance of certain “negative” connotations used commonly in the vernacular: to wit, “pirate.” The reasoning behind this distinction rests on the firm belief that unlicensed broadcasters, if technically responsible, are not actually stealing anything. While I do not personally subscribe to this perspective, I see the merit in its reasoning, and I bear no malice toward the unlicensed broadcasters or stations tagged as “pirates” in this text for the sake of linguistic variation.

Chapter 1. Unlicensed Broadcasting As Radio History

Radio regulation in the United States hinges on the notion of a government agency granting conditional use of a collectively-held yet limited resource - the radio spectrum - with the intent that it be used in the public interest. Those chosen to exercise use of the radio spectrum receive licenses to broadcast. Over time, the requirements for obtaining and keeping a broadcast license have changed with the development of new technologies and other mass media outlets, and the amount of government intervention in the actual business of broadcasting has diminished. Yet the license requirement itself remains the same: you can't be on the air without one.

Although the public, via legislation and regulation promulgated in its name, is said to "own" the airwaves, this is true only in a symbolic or rhetorical sense. The reality is that radio is restricted to the "professionals." There is an onerous financial burden involved with applying for a radio license and maintaining a station under the conditions set forth in it, which drastically limits public access to the airwaves at the base level. For the most part radio station ownership is outside the reach of anyone with less than six or seven figures to invest in it (even more in the largest markets). U.S. radio tilts heavily toward the commercial model, and the business can be a cutthroat one; industry consolidation has had a highly inflationary effect on the price of stations for sale. National Public Radio openly courts a demography, somewhat antithetical to its name. Community radio stations exist, but their strength is puny relative to the 13,000+ stations that outflank them.

Where is the public on "the public airwaves?" A tenacious citizen might get a shot at a microphone to say something they think important for others to hear, provided they position themselves strategically at a news event or luck into a spot on a public affairs program; their chance for access increases if they're willing to pay for the time to speak. Talk radio, which at least requires direct interaction with the public, is problematically characterized as true public access to the airwaves. The scope of discourse is strictly predetermined and the public is constantly at the mercy of the call screener and host, who can dump callers in mid-sentence if they wish.

It makes for a curious situation: the public is purported to "own" the airwaves, yet it has no basic, literal right of use to the resource itself. The federal government, which functions as the

gatekeeper for access to radio broadcasting through the license mechanism, has traditionally translated the public's stake in the airwaves as a right to listen, a right to receive - not a right to transmit. Regardless of this disconnect, the myth of "the public airwaves" as literal refuses to die.

There have been several well-documented struggles involving speech and the right of access to radio; these play themselves out quite regularly in a first amendment frame, balancing a broadcast licensee's right to speak (to program as it chooses fit) versus a listener's right to hear (this can range from the right to hear a multiplicity of perspectives to the right of protection from offensive content). The subjects studied in this thesis interpret the concept of "the public airwaves" in an earnestly unconventional manner. In doing so they have "exercised a right" that, at least from a review of legislative and judicial intent, does not exist. The law, in fact, calls their activity a crime, for which they have been subjected to various and confusing degrees of adjudication and punishment.

Unlicensed broadcasters have, throughout the history of radio, challenged the mechanism by which access to the airwaves is restricted - the license. Broadcasting sans license challenges the government to enforce its authority as ultimate gatekeeper to the airwaves. These skirmishes between unlicensed broadcasters and the government (played out both in the field and in the courts) have not been well-documented, yet they have been instrumental in testing and defining the actual boundaries of government authority over radio broadcasting.

Ever since there have been licenses there have been broadcasters who ignored them. However, unlicensed broadcasters, by and large, do not believe there should be no radio licenses. In fact, the majority of them would probably disagree with the idea of a totally license-free radio spectrum. Their perspectives generally fall into two camps: either the government's licensing authority does not apply to their specific operations, or the government *should* license their operations but unlawfully precludes the opportunity.

Many who have broadcast without a license, especially in the last 15 years, have done so specifically to advance a literal interpretation of "the public airwaves." However, among the thousands that have engaged in this illegal activity, only a fraction have actively stood up for themselves when prosecuted by the government. A smaller number have taken the initiative to engage in preemptive defense from persecution. Sadly, for all the effort expended on these cases, the courts have yet to seriously address their merits.

This thesis traces the history of citizen challenges to federal radio licensing authority, as documented by the federal courts, Federal Communications Commission (FCC) and by unlicensed broadcasters themselves. While these challenges have been generally unsuccessful, in selected unique circumstances the arguments of unlicensed broadcasters have been taken seriously enough to incrementally change the licensing system or temporarily undermine the government's enforcement powers against unlicensed broadcasting itself. More importantly, acts of unlicensed broadcasting have imbued the myth of the public airwaves with a sense of reality: the government may have the law on its side when it comes to the license requirement, but it has consistently lacked the long arm to enforce it. This situation creates a large window of opportunity for unlicensed broadcasting to not only exist but grow as a phenomenon over time. It signifies that actual government control of the radio spectrum is weaker than the law would lead one to believe.

The depressing record of formal challenges to federal radio licensing authority is partly the fault of a stacked jurisprudential deck. It is difficult enough to simply raise the challenge: the FCC has an array of enforcement tools at its disposal, and the method and mode of prosecution it selects can restrict the avenues available for an unlicensed broadcaster's defense. If the unlicensed broadcaster does not follow every step of the FCC's administrative appeals process, any further challenge in federal court may be disqualified before the merits of their case are considered. Among those cases where the merits have at least been noted, all but a handful have been discounted or dismissed with efficiently creative legal reasoning. Even so, federal radio licensing authority seems far from impervious: the diverse range of arguments used to challenge it - and the gymnastics employed to justify the status quo - suggest potential for future challenges. Ultimately, citizen challenges to federal broadcast license authority are important because they represent a public drive to assert self-representation and control over a resource regulated in its name; it helps remind the regulators that the nebulous "public interest" it pays lip service to does indeed exist and is always willing take matters into its own hands if necessary.

A. Scope of Study

The study of unlicensed broadcasting has been mostly ignored by communications scholars. The number of publications devoted to the subject easily fit into a backpack. All have examined the phenomenon in incidental form, covering selected cases, stations, or "eras" of

unlicensed broadcast activity. The “big picture” history of unlicensed broadcasting in the United States has not yet been written. What follows represents a small step in that direction. Its primary focus is on the legal history of pirate radio, not its accomplishments as a sociological or political phenomenon. Hopefully this study helps infer future research along those lines.¹

For the purposes of this thesis the review of legal material was restricted by the imposition of two general parameters. The first involved limiting the review of federal court documents to those cases specifically involving unlicensed broadcasting, with broadcasting defined as operation on one of the three standard broadcast radio bands (AM, FM, or shortwave). Unlicensed operation also occurs on two-way radio services like amateur (ham) and citizen’s band (CB) radio, but the regulatory structure of these services classifies their transmissions as not intended for general public consumption, so they do not technically qualify as broadcasting services. Subsequently the method and form of legal challenges resulting from unlicensed operation in these services do not have the same implications for government licensing authority as those raised by unlicensed broadcasters.² The second parameter is a consequence of the first: citizen challenges to federal communications regulation have taken myriad forms over the years, part and parcel of a larger struggle for citizen access to the regulatory process. Our review stays limited to those challenges directly involving the act of unlicensed broadcasting: while the struggle over access to the airwaves conducted within the regulatory process is often a struggle to influence the government’s licensing authority by proxy, challenges involving unlicensed broadcasting directly attack the licensing mechanism itself.³

As a work of history this thesis is written primarily in narrative form, using decisions of the federal courts, FCC documentation, previous personal research, and secondary materials. The research was organized along the lines of two sub-narratives: one explores the development of the controlling law(s) governing federal broadcast licensing authority while the other traces the general activity of unlicensed broadcasters with an eye toward the government’s effectiveness in silencing them. Weaving the two together produces the master narrative and resultant conclusions about the disconnect between the state of the law and its real-world implications; an inversion to the distinction between “the public interest” fundamental to the regulation of radio and the public’s general exclusion from actual participation in the medium.

Most of the chapters in this thesis revolve around specific periods defined by significant developments in each sub-narrative. As a basic rule, the legal narrative (involving actual cases of unlicensed broadcasting adjudicated in the federal courts or at the FCC) is primary as it represents the most important factor in the perception of the inviolability of the broadcast license requirement. The secondary narrative (tracing unlicensed broadcast activity and the FCC's field enforcement efforts) does not support this perception. Here the work of others who have studied the phenomenon is extremely helpful.

B. Organizational Outline of Chapters

Following Chapter One, this introduction to our study and a review of the limited literature available on the subject, Chapter Two provides an institutional overview of the current regulatory environment which unlicensed broadcasting contravenes. The FCC's administrative process for enforcing prohibitions on pirate radio is outlined, with emphasis on the challenging and cumbersome nature of this process. Special note is made of the dearth of information available from the agency on this particular subject. Because it deals only with matters of administrative law, the FCC's "adjudication" of penalties involving unlicensed broadcasting defaults to a zero-tolerance stance on the issue. The implications for an unlicensed broadcaster who attempts to navigate the FCC's appeals process is illustrated by a review of recent cases published in the *FCC Record*. The chapter concludes with an introduction to the practical effectiveness of the FCC's field operations, which stands in contrast to the authority projected by the agency's enabling statutes.

Chapter Three represents the true start of the narrative-weaving and examines the initial federal attempts to develop radio license authority from 1912 to 1927. During radio's early years the Department of Commerce labored under significant legal restrictions that greatly diminished its power to regulate access to the airwaves. The resultant "chaos," however, bears the influence of government as both victim and perpetrator. The legislative overhaul borne from this period, which delegated powers of radio licensing to a specific expert administration, strengthened the government's licensing authority but was crafted under the influence of agents and agencies that, in many ways, acted counter to the public interest. This is important, because it was "the public interest" that was used as political justification to revamp the regulatory process. From the flaws of these formative years came the "access" debates in all their forms, as conducted both within

the licensing process and outside it.

Chapter Four is divided into three sections. The first section roughly covers unlicensed broadcasting between 1927 and 1942 and highlights the process by which the courts and FCC (*née* Federal Radio Commission) constructed the justification for federal licensing authority in the face of initial challenges. The dominant nature of the challenges here were jurisdictional; questions about the FRC/FCC's ability to license as a function of interstate commerce are explored in depth. The second section examines the development and refinement of this licensing authority bounded between the years 1943 and 1969. They represent the years in which the Supreme Court handed down decisions which constitute the bedrock of government authority to license radio, unto this day, by validating a regulatory philosophy based on the concept of spectrum scarcity. Although neither case dealt with the issue of unlicensed broadcasting directly, their reasoning along the lines of government licensing authority with respect to the first amendment have all but precluded the effective use of this constitutional defense, which justifies their critical analysis. Surprisingly, the FCC's enforcement effectiveness against pirate radio is less than stellar during this period, erratic in its application of the law around the country. The third section of Chapter Four carries the narrative from 1970 to 1989 - a period which saw unique legal challenges brought by radio pirates, some of whom resurrected the jurisdictional question as a matter of international law. The FCC's general record of success in court continues to solidify, while simultaneously an unprecedented wave of unlicensed broadcast activity begins to take shape.

Chapter Five focuses on this new wave of unlicensed broadcaster - the microradio station - and the intensity with which it challenges the FCC's licensing authority. Unlike prior unlicensed broadcasters, whose general analysis of FCC regulation basically stopped at risk assessment, microbroadcasters make the act of civil disobedience against the licensing regulations part of their *raison d'être*. They also loosely coordinate their operations and legal defenses on a national scale. Early microbroadcasters - who appeared on the scene in the late 1980s - carried this political impetus quite strongly. When one of them, Stephen Dunifer, was finally engaged by the government in the early 1990s, he laid out a defense whose level of complexity and zeal as an attack on the system of radio licensing gave the court - and the FCC -

unprecedented pause. The series of temporary setbacks to the FCC's enforcement powers that ensued in the Dunifer case assisted in the proliferation of microradio stations and gave mettle to similarly creative legal battles brought by other microbroadcasters, who experimented with loophole-splunking to varying degrees of success and failure. As the primary narrative unfolds the FCC finally recognizes this unlicensed activity as a nationwide campaign of sorts, and the agency's uncoordinated field response is examined.

Chapter Six canvasses the FCC's proposal to license a new class of low power FM radio station, partially in response to the growth of unlicensed microbroadcasting. This process becomes highly politicized and by the time a new low power FM (LPFM) radio service is made available in 2000 it is Congress who establishes its parameters. In doing so it banned unlicensed broadcasters from participation. A new "post-LPFM" wave of microradio stations continues the definitional struggle over the public airwaves: it mingles surviving early stations with newer, tactically-savvier outlets. Together they continue to expose the aforementioned lack of a long arm behind the law. A dual strategy of coordinating station operations to undermine or delay the enforcement process coupled with collaborative exploration of legal conditions in light of the new LPFM rules suggests a vibrant future for the phenomenon of unlicensed broadcasting.

Chapter Seven summarizes the narrative to its present condition and concludes by examining the potential for change in the federal radio licensing system via the act of broadcasting without one. Opportunities remain for legal argument that might be further explored: many consider Dunifer's case to be a benchmark, but the real test case hasn't happened yet. Finally, the state of the FCC's field enforcement efforts against microbroadcasters is updated to the present and projections are made of possible avenues the agency and others may take to try and stop the proliferation of pirate stations, many of whom now have some rudimentary knowledge of (and subsequent empowerment to resist) the FCC's enforcement protocols.

Is there a real possibility of fundamental change in the radio licensing process or - perish the thought - a full-scale revolution in the licensing system as we know it today? Case law would tend to say no, but the FCC itself has, over the course of its administrative history and under various influences, shown a willingness and occasional eagerness to rethink the licensing mechanism and the doctrine under which it operates. Unlicensed broadcasters embody this notion of change most directly by simply existing - their struggle represents an small yet

important role played by members of the public in the history of radio broadcasting and its regulation.

C. Overview of Source Material

Other scholarly projects that address the phenomenon of unlicensed broadcasting in the United States from any sort of legal/historical perspective are scarce. A total of one book, two dissertations, two master's theses, and one undergraduate honors thesis have touched on the phenomenon in this manner.⁴ In supplement, a total of eight books have been published for popular consumption which involve unlicensed broadcasting as their primary subject material. The intent of this section is to provide a brief overview of this "source material" and how it affects this thesis.

All of these sources tend to focus on specific stations, cases, or time periods involving unlicensed broadcasting and therefore all lack a sense of context in relation to the general historical condition of unlicensed broadcasting in the United States. However, for a project such as this one they are invaluable for two specific reasons. The first is that those which deal in legal specificity provide a great amount of detail and help to avoid the treading of similar ground here. They are generally deferred to as constituting the authoritative record of the incident, station, or personality at the center of study. Secondly, these works provide some of the most important threads from which the secondary narrative of this thesis is written. While each work is limited in scope, when they are interwoven a surprising tapestry of evidence suggesting historically consistent unlicensed activity results. As such, they are cited throughout many of these chapters.

Let us first dispense with the single scholarly book: Lawrence Soley's *Free Radio: Electronic Civil Disobedience* (1999) is underwhelming in several respects. The problems begin with Soley's initial division of unlicensed broadcasting into classes of operation, instead of examining the phenomenon as a whole. He assigns stations to four primary categories: clandestine (operated for revolutionary political purposes, often with tacit sponsorship of a political group), pirate (primarily shortwave broadcasters who provide specialized niche entertainment programming with a veneer of politics); micropower (low power FM stations whose presence on the air is an open challenge to radio licensing laws), and "ghost" stations (transmissions which deliberately attempt to interrupt another broadcast).⁵

The problem with Soley's classifications is that they are arbitrary and conflictual: for example, micropower station operators may be cognizant of the political nature of their act but their motivations may be closer to those Soley links to the shortwave "pirate," or vice versa. In addition, most U.S. microradio stations cast themselves in the role of stewards of the public airwaves and strive to avoid interference with any other radio signal. Consequently they would not under any circumstances conduct a "ghost" broadcast. It is difficult to maintain the rubric of "electronic civil disobedience" with two of Soley's four classifications working at such cross-purposes. This structural flaw directs Soley to write a string of vignettes as opposed to a real narrative about the phenomenon of unlicensed broadcasting, which diminishes the historical significance of the work. Despite these issues Soley's research into the popular press coverage of unlicensed broadcasters, especially those of the modern microradio movement (discussed here in Chapters Five and Six) provides plenty of documentary fodder to work with.

Both dissertations written on the subject of unlicensed broadcasting are focused on specific moments in its history. The first is Steven P. Phipps' *The Federal Government and Radio Piracy*, published at the University of Missouri-Columbia in 1986. Phipps' general conclusion from an examination of three cases involving FCC enforcement actions against unlicensed broadcasters is that the government's authority to limit access to the airwaves is clearly defined as a legal issue. In this sense, the lack of breadth in the historical context brings out a conclusion opposed to the one set forth here. It may be because Phipps picked three unique cases in which the FCC suffered no significant challenge to its authority, which cements the perception that the licensing mechanism is breach-proof. However, Phipps does chip away slightly at this illusion by noting the near-constant presence of "pirates" on the American airwaves following the most recent of his three cases (1974) and the FCC's generally limited enforcement strategy. Phipps' dissertation was published before the modern microradio movement; its development (and the associated legal challenges it has raised) further whittles down perceptions of an FCC with impervious authority to enforce the broadcast license requirement.

Andy Opel published *Micro Radio and the FCC: Media Activism and the Struggle Over Broadcast Policy* at the University of North Carolina-Chapel Hill in 2001. This is a primarily sociological study of unlicensed FM broadcast activity during the 1990s and the subsequent push

for a legal low power radio service it engendered. Microbroadcast activity is construed as a subcomponent of a larger movement of media activism which crystallized around the turn of the twenty-first century. Opel draws heavily on the archives of a long-running microradio e-mail list to examine the dialogue of people engaged in unlicensed broadcasting and projects this dialogue as a sample of discourse happening nationally along the lines of activism within issues of broadcast policy reform. There is a danger in using such sources as foundations for such work. Mailing lists like the one Opel examined tend to be closed systems with protocols and dynamics not immediately apparent to the non-participant observer. As such they often provide space for theoretical or personal discussions that are not necessarily meant to be read as policy debate. To the outside observer, making distinctions between the type of dialogue taking place can be difficult, and misinterpretations can occur.⁶ Regardless, Opel's general characterization of microradio activists as working toward opening the use of the airwaves for those who supposedly own them, and the evidence brought forth in support, usefully elucidates the concept of the public airwaves in the literal sense.

Ted Coopman wrote an outstanding master's thesis at San Jose State University in 1995. *Sailing the Spectrum from Pirates to Micro Broadcasters: A Case Study of Micro Broadcasting in the San Francisco Bay Area* provides a comprehensive examination of the legal challenges raised by early unlicensed microbroadcasters and the FCC's response to these challenges. Coopman interviewed FCC officials for his thesis and conducted a review of FCC documents involving unlicensed broadcasting. He was the first to unearth concrete evidence that the FCC did not recognize the political dimensions of microradio activity, and he details the tactics and strategies of key regional players in this nascent arm of a national movement for media democracy. Coopman focuses a great deal on the case of Stephen Dunifer and attended some of his court hearings. This provides an unmatched level of detail about the case and its implications for government broadcast license authority. More importantly, Coopman has been the most prolific of the academics when it comes to drawing on his work for subsequent projects; his thesis has formed the backbone for several conference presentations and journal articles, and among these he has branched out to explore how unlicensed microbroadcasters began to coordinate along regional and then national lines throughout the 1990s.

The only negative to Coopman's work is that it lacks a strong historical context and is

especially thin on providing this context in the legal domain, almost to the point of dismissiveness about the history of unlicensed broadcasting prior to the mid-1980s. Whereas Coopman posits microradio as a radical development involving citizen challenge to communications policy, this thesis treats it as an evolution in a radical challenge whose history is concomitant to that of the licensing mechanism itself. Coopman's work also predates the entire battle over LPFM and the resultant legal fallout.

Finally there are two theses which provide additional source material. Peter Brinson's undergraduate honor's thesis in Sociology for the New College of Florida, *The Free Radio Movement, Its Impact on Radio, and Implications for Democracy in Media* (2002), is worth noting for the large amount of ethnographic work it contains. Brinson toured parts of the United States, visited several unlicensed microradio stations, and interviewed people involved with them. His work provides a rich collection of stories and sentiments from unlicensed broadcasters who employ a variety of organizational constructs and operational patterns. From these Brinson examines how these stations have worked, in a manner similar to Opel's dissertation, to bring the concept of the public sphere to fruition on the airwaves.⁷ Likewise, Lisa Nalbandian's recently completed master's thesis at the University of Wisconsin-Milwaukee, *Interference: Pirate Radio and its Value to the Public Sphere* (2003) revolves around a smaller case study of three unlicensed FM stations in Wisconsin and Minnesota and their motivations for defying the license rules. It, too, is framed within the theory of the public sphere and how unlicensed broadcasters work to manifest it.

In the realm of popular publications, the eight titles available fall into three rough categories: autobiographies, hobbyist publications, and treatises. Among the autobiographies there are three: Allan Weiner's *Access to the Airwaves: My Fight for Free Radio* (1997) chronicles his 20-plus year involvement in various unlicensed radio stations. Richard Edmonson's *Rising Up: Class Warfare From the Streets to the Airwaves* (2000) weaves Edmonson's creation and operation of San Francisco Liberation Radio with his experiences of homelessness and general anti-capitalist commentary on the social and political values of the United States. Weiner is at heart a tinkerer - he is more enamored with the technical intricacies of radio than with its politics, but his experiences (and the FCC harassment he suffered as a result) have done much to strengthen his sense of a literal and active public interest in the airwaves.

Edmonson, long-experienced in radical activism, approaches the subject confrontationally. His connections to the vibrant microradio incubator of the Bay Area also shed important light on the sentiments of those who practice this particular form of electronic civil disobedience. The final autobiography, Sue Carpenter's memoir about running hipster pirates KPBJ in San Francisco and KBLT in Los Angeles during the mid to late-1990s, *40 Watts from Nowhere: A Journey into Pirate Radio* (2004) is light on the politics but full of detail about KBLT's unexpectedly meteoric rise to fame in L.A. and the people that made it so popular. Although Carpenter attempts to maintain a nonpolitical demeanor to her tale, in the end even she takes pride for "play[ing] a part to change the rules," and is "satisfied to have become, in a way, a sort of Stephen Dunifer."⁸

In the hobbyist category are two books written by Andrew Yoder: *Pirate Radio Stations* (2002) and *Pirate Radio Operations* (co-authored by Earl T. Gray, 1997). Yoder is primarily an AM and shortwave enthusiast, which leads him to give short shrift to the large amount of unlicensed broadcasting that takes place on the FM band. While the latest (third) edition of *Pirate Radio Stations* includes new chapters on microradio and LPFM, as well as a significant biographical sketch-directory of stations Yoder has heard or researched,⁹ it generally covers no new ground.¹⁰ Yoder also provides a rudimentary analysis of FCC enforcement strategy against pirate radio stations, which draws from hobby publications dedicated to shortwave pirate listening and his own personal experience;¹¹ this was quite helpful in the weaving here of a bigger picture with regard to FCC enforcement policy and its execution.

Three treatises have been published involving unlicensed broadcasting. *Seizing the Airwaves: A Free Radio Handbook* (1998) is a collection of essays and interview transcripts with people involved in the modern microradio movement. Co-edited by Stephen Dunifer, it encapsulates several of the arguments (both legal and sociopolitical) offered by some of the high-profile radical activists who have engaged in this activity over the last 15 years. *Microradio & Democracy: (Low) Power to the People* (1999), written by Greg Ruggiero (also an unlicensed broadcaster), is closer to a pamphlet than a book. A straight-up polemic, Ruggiero agitates for a more literal definition of the public airwaves and ties the activities of microradio stations into the struggles of larger social movements for populist change like the Zapatistas. Rounding out this

category is Jesse Walker's *Rebels on the Air: An Alternative History of Radio in America* (2001). Walker's book is only partially concerned with unlicensed broadcasting as part of a more general history of alternative, citizen-defined uses the airwaves have been put to outside of the dominant commercial and public broadcasting models.¹² The premise suggests the public has multiple rights to the airwaves, including the right to cross the boundary between producer and consumer. Unqualified support abounds for literal public access to the airwaves. However, the story as told by Walker is tinted with a libertarian preachiness that distracts from what is otherwise a well-told work of alternative broadcast history. All of these books are valuable for the anecdotal details and popular press coverage they chronicle and constitute important threads of the tapestry woven here.

In conclusion, special mention must be made about the use of electronic sources in this thesis. While the academy continues to frown on the use of electronic sources, especially as primary research material, it seems to do so based primarily on a belief that the potential volatility of electronic sources makes them somehow less authoritative. This may unfairly taint the legitimacy of research conducted on independent and interventionist media, many types of which are found exclusively online, and especially the modern microradio movement, where some of the most exhaustive research exists in electronic form only.¹³ The FCC itself constitutes an important source in this regard. With this in mind, the traditional caveat about electronic sources still applies, but it should be tempered by the fact that electronic sources are employed only where more acceptably-tangible material is either inferior or nonexistent.

What follows is presented with the hope that this line of study be further explored and that this project helps chart some territory for future exploration. If anything, it is presented as an echo from a clarion call to engage in original research on U.S. broadcast history with an emphasis on critical structural analysis.¹⁴

Notes to Chapter 1

1. One cannot avoid these factors coming into play at times throughout the history of unlicensed broadcasting, but I have endeavored to keep these lines of thought as distinct as possible from the legal history as it has been mapped here.

2. Exceptions to this rule occur when cases involving unlicensed non-broadcast radio operation are used in the adjudication of cases that fall within our purview.

3. Exceptions may be made for cases where considerations of the fundamental licensing mechanism take place. These are typically tangential to the issues at bar but can still be illuminating, in that they occasionally contain further regulatory/judicial elucidation of the logic behind the license regulations.

4. Some of these have spawned journal articles, which are cited throughout where appropriate.

5. Lawrence Soley, *Free Radio: Electronic Civil Disobedience* (Boulder, CO: Westview Press, 1999), p. 2-3.

6. It is undisputed that many of the “key players” in the rise of microradio and the push for legal low-power FM community stations contributed to the mailing list Opel examined. However, not every e-mail was sent in the spirit of a broadcast policy discussion. I was highly surprised to find a message from myself quoted in this dissertation. Some of the conclusions attributed to my quote did not mesh with my intent when I wrote the message (which was actually a contribution toward what one might otherwise call a “flame war”). As a participant in the thread Opel dissected, I interpret it quite differently than he did as an outside observer not fully versed in the dynamics between list participants. See Opel, p. 112-113.

7. Brinson is now a Ph.D. student in Sociology at UW-Madison. His offering of research materials for this thesis was incredibly generous and is gratefully acknowledged.

8. Sue Carpenter, *40 Watts From Nowhere: A Journey Into Pirate Radio* (New York: Scribner, 2004), p. 222.

9. See Andrew Yoder, *Pirate Radio Stations: Tuning in to Underground Broadcasts in the Air and Online* (New York: McGraw-Hill, 2002), p. 66-110.

10. Disclaimer: my online research and writing on these issues, which at the time of *Pirate Radio Stations*' most recent publication was paid for and hosted by a dot-com, constitutes a source used by Yoder in these new chapters.

11. See *In the Matter of Andrew R. Yoder, Chambersburg, Pennsylvania*, 74 RR 2d 1392 (1994).

12. For example, the book also includes a short digression into Citizen's Band (CB) broadcasting and an overview of the struggles within the Pacifica network of stations.

13. Several citations, especially in Chapter 6, come from previous personal research. Having written and reported on microradio and LPFM for the last seven years, covering the issue much as a beat reporter would, I have come to find that in some instances the only authoritative record is my own. Using previous personal research in this manner affords the opportunity to take shortcuts through some of the microradio and LPFM saga which would unnecessarily bloat the pages here. Although this research may be archived electronically, its volatility is actually quite low, as I now own my own domain and make a regular habit of weeding out and updating/replacing broken links to other electronic sources.

14. Robert W. McChesney, "Communication for the Hell of It: The Triviality of U.S. Broadcasting History," *Journal of Broadcasting & Electronic Media* 40, no. 4 (1996): 540-552.

Chapter 2. Contemporary Treatment of Unlicensed Broadcasting

The FCC has never articulated a very specific policy with regard to unlicensed broadcasting beyond a blanket commitment to enforce the law requiring a license. Since it is a cardinal violation of the Communications Act the FCC tends to take such behavior relatively seriously, punishing those offenders it can catch through a selection of enforcement tools at its disposal. These range from administrative sanctions like fines to seizure and forfeiture of equipment,¹ injunctive relief, and criminal charges.²

An unlicensed broadcaster's avenues to challenge these enforcement actions vary depending on which method of enforcement is chosen by the FCC. The district courts have jurisdiction to enforce the application of FCC enforcement orders,³ although the avenue of challenge to FCC *regulations* begins at the courts of appeal.⁴ Appeals of enforcement orders that are preceded by official cease and desist notices is limited to the D.C. Circuit only,⁵ as are cases of unlicensed broadcasting which began with the filing of a license application or waiver.⁶ But the FCC need not (and often does not) issue a cease and desist notice before moving forward with an injunction, forfeiture or any other enforcement effort, and a pirate station need not telegraph its intent before taking to the airwaves. This places the initiation of most court cases involving unlicensed broadcasting in the domain of the district courts.

The FCC's protocol for dealing with unlicensed broadcasting utilizes a system of escalating punishment. Once field agents confirm the presence of an unauthorized radio signal they will triangulate its location and attempt to make contact with the station operator. An official Notice of Violation (NOV) is usually served first, either in person or via certified mail, requiring a response to an FCC field office within 10 days. The FCC takes responses to a NOV very seriously: if the respondent is truthful and forthright, takes responsibility for their transgressions and offers adequate explanation and contrition, the FCC may reduce or waive the penalty. Responses that gloss over or contradict the FCC's initial findings, and non-responses, all but guarantee further punishment.⁷

If an unlicensed broadcaster continues operations following the service of a warning notice, the FCC may proceed in a variety of directions. If the infraction is serious enough the agency can move quickly and decisively to take the station off the air. This involves securing a

warrant to seize the unlicensed transmitter and executing a station raid with the help of Federal Marshals.⁸ In the majority of cases, however, the FCC proceeds along a more sedate course: a Notice of Apparent Liability (NAL) is served on the station, threatening a monetary forfeiture and requiring response within 30 days.⁹ Escalation continues with a Forfeiture Notice, requiring payment of a fine within 30 days. If payment is not received, collection may be referred to the Department of Justice for further civil proceedings.¹⁰

Another enforcement option open to the FCC is the use of injunctions through the district courts against broadcasters themselves; this may be exercised in lieu of or as supplement to the forfeiture or seizure process, depending on the circumstances of a specific case. In extreme cases, where all other enforcement tools have been exhausted without effect, the FCC can press for criminal prosecution, again with the assistance of the Department of Justice. It is important to emphasize that the FCC may mix and match these enforcement tools to suit its needs; for example, if an unlicensed broadcaster returns to the air with a replacement transmitter after a seizure, the FCC may still pursue a forfeiture, seek an injunction, or institute criminal proceedings, or any combination thereof.

Of all the enforcement tools at its disposal, the FCC is most likely to pursue monetary forfeitures to force unlicensed radio stations off the air. Actually traveling to pirate radio stations and seizing transmitters is a time and manpower-intensive effort that taps resources the FCC does not have. Forfeitures have also recently gotten more severe: just a dozen years ago the average fine for a first offense involving unlicensed broadcasting ranged between \$750 and \$1,000;¹¹ today the base fine begins at \$10,000. However, the threat diminishes upon demonstration of inability to pay, and the FCC regularly reduces or cancels fines when such claims are made and proven.¹²

Regardless of which tools are employed, the FCC's enforcement process often stretches out over the course of months or years from initial contact to final punishment. The agency basically engages the unlicensed broadcaster in a long series of administrative correspondence before any actual muscle is brought to bear to stop the violation itself. In some cases, this lengthy enforcement process can afford unlicensed broadcasters the ability to muster community and other support, empowering a defense of the station which can further extend not only the

enforcement process itself but the broadcaster's overall time on the air. Of the several stations that have engaged the FCC in the courts, most have managed to stay on the air until the issuance of an injunction or other terminal judgment.¹³

The instruments to ultimately enforce the FCC's licensing authority reside outside the FCC itself. It must resort to the Department of Justice to collect forfeitures and throw people in jail, and it must persuade a district court judge to enjoin an unlicensed broadcaster. The DOJ's responsibilities to prosecute lawbreakers are vast but its time and resources are limited, and the FCC is but one of several agencies that rely on the DOJ's legal services. Pursuing injunctions allows the FCC to keep the case under the control of its own counsel but they, too, have limited means.

A. Real-World Constraints on FCC Enforcement

Not only is the FCC forced to rely on other agencies to provide its muscle, but its resources in the field - those who identify and initiate enforcement cases - have never been very strong on their own. Their lack of police powers limits their activities to observation and advice; FCC field agents may suggest that a pirate go off the air, but unless they can bluff their way into convincing the broadcaster to let them inspect and/or seize the transmitter, their initial contact with an unlicensed radio station may have no effect at all.

Of the approximately 2,000 people directly employed by the FCC, about 315 are assigned to the Enforcement Bureau.¹⁴ Over the course of the last ten years, at least one-third of the Bureau's staff has been based at the FCC's headquarters in Washington, D.C.¹⁵ The Enforcement Bureau itself comprises eight divisions, of which three are delegated to field activity and divide the country into three regional jurisdictions. Within these three regions there are a total of 25 field offices based in 19 states and Puerto Rico.¹⁶ As exact numbers are unavailable, a crude division of labor based on the framework outlined above yields a coarse average of four Enforcement Bureau field personnel for each state; this is more realistically divided as eight employees per field office, concentrated among 19 states.¹⁷

All field offices are not created equal. The FCC has three tiers of field presence: the Regional, District, and Resident Agent office. Other Enforcement Bureau divisions may have personnel based in field offices, but only certain qualified staff conduct field inspections. This

further limits the field inspection presence of each field office to a relative handful of agents; and the smallest field outpost, the Resident Agent office, may only comprise one or two people to begin with. It must be remembered that these people are responsible for enforcing the entire gamut of FCC regulations, not just a prohibition on unlicensed broadcasting. Therefore, the amount of time the FCC can actually devote to finding - much less prosecuting - unlicensed broadcasting is quite small relative to other enforcement demands. As a result the FCC responds to complaints about unlicensed broadcasters but does not actively hunt them down, unless the violation is so high-profile as to not be safely ignored.¹⁸

Much of the FCC's organizational structure and sheer workload are often determined by priorities outside its own purview. Partly a creature of politics, the FCC often focuses its enforcement efforts on subjects in the news or on the minds of its prime constituents which, for the most case, are the industries it regulates. This can lead to erratic enforcement with respect to unlicensed broadcasting. Ted Coopman, who interviewed several field employees of the FCC, found that collective cognizance of pirate radio as an enforcement issue didn't seem to exist in the agency before 1995.¹⁹ Daniel Emrick, then chief of the agency's enforcement arm, opined that unlicensed broadcasting on the AM or FM bands was generally not worth prosecuting.²⁰ Emrick's attitude has some institutional precedent: six years previously, FCC officials claimed they were "not at all concerned about sporadic pirates not causing actual harm" and viewed instances of unlicensed broadcasting as individual aberrations.²¹ They differentiated the severity of the violation based on the band in which the broadcasts took place: shortwave was considered the most "dangerous" place to be a pirate because of the potential for interference with international broadcasters and military-band communications.²² Even so, enforcement efforts on the shortwave bands have been historically spotty at best, save for a major sweep in 1985 which involved 16 station raids in 12 states.²³

This trend changed in the 1990s as unlicensed FM broadcast activity increased dramatically, inevitably bringing more cases to the attention of the FCC - but helpful nudges from the broadcast industry certainly didn't hurt. At its annual convention in 1998 the National Association of Broadcasters held a panel discussion on pirate radio and organized a neighborhood watch-style program whereby local broadcasters would scan their dials and report

unlicensed activity to the FCC.²⁴ The result was remarkable: the number of documented enforcement actions against unlicensed stations tripled that year,²⁵ and the FCC was quite public about the crackdown and its catalyst.²⁶

Yet the FCC remains at the mercy of bureaucratic inertia. Perpetually understaffed and underfunded, enforcement agents in the field have never been utilized to their maximum potential. A 1978 report from the General Accounting Office examined the role of field agents in the FCC and found that as new communications technologies have developed the agency's workload has increased, making for ever-busier field agents. There was also little centralized direction or opportunity for feedback from the field about operational and regulatory effectiveness.²⁷ The GAO noted field personnel's "austere" set of tools²⁸ and summarized their attitude toward their job as: "It is better to provide some enforcement service to more people than to provide the best service to a limited number of people."²⁹ The report also noted that enthusiasm within the ranks of U.S. Attorneys varied widely for pursuing communications-related cases, which led FCC field offices to tailor their enforcement activities based on the receptiveness of their local DOJ colleagues.³⁰ Not much has changed since 1978: as recently as 1999 FCC officials described the cooperation of U.S. Attorneys in enforcement cases as ranging from "difficult to impossible."³¹

This has significant impacts on the efficacy of the agency's most favored enforcement tool against unlicensed broadcasting - the monetary forfeiture. A report from FCC Inspector General H. Walker Feaster III in 2000 analyzed the agency's growing backlog of civil monetary forfeiture cases and discovered successful collections on less than one-quarter of them, with many going uncollected because the statute of limitations had lapsed. Feaster traced the problem to a lack of coherent policy among the agency's bureaus on matters involving forfeitures, as well as institutional resistance from the Department of Justice to pursue such cases.³² Of those fines turned over to the DOJ for collection, Barry Cole and Mal Oettinger found that most get settled out of court for "about three-quarters" of the original amount; U.S. Attorneys do not like taking chances with an FCC-inspired case in a "local court...unfamiliar with broadcasting regulation."³³

Informal audits of six field offices in 1999 found field agents hamstrung by 1970s-era equipment and a lack of travel funds.³⁴ Of those field offices that did get in on busting pirates,

“employees...spoke favorably of their experience and the constructive nature of the work...However, such work appears to be the exception rather than the rule...”³⁵ The resource and staffing problems appear to be getting worse for the Enforcement Bureau, which warned in 2002 that it could lose nearly half its field agents to retirement by 2006.³⁶

An overwhelming burden of responsibilities combined with inefficient organization, wide latitude given to agents in the field, and the continued basic perception of pirate radio stations as single-case short-term phenomena leaves the FCC with no overall grasp on the success of its enforcement efforts against unlicensed broadcasting. This has become especially clear over the last five years, during which Commissioners and high-level Enforcement Bureau staff have spoken publicly on the issue of pirate radio. In a 1998 speech to the National Association of Broadcasters’ Radio Convention, Chairman William Kennard claimed the agency shut down more than 250 unlicensed radio stations: this was “more aggressive...than any FCC in history.”³⁷ Two years later, the Enforcement Bureau reported silencing 180 unlicensed radio stations between November 8, 1999 and November 7, 2000: “This is the highest number ever achieved.”³⁸ The contradiction played itself out again in 2002, when Enforcement Bureau Deputy Chief Linda Blair told Commissioners they had shut down 460 pirate stations in the last three years when just three months prior the official tally was counted closer to 500.³⁹ The truth may never be known, because the FCC doesn’t appear to keep track, choosing instead to assert its authority and frame its effectiveness with a degree of flexibility dependent on the political or publicity conditions of the moment.

B. Engagement at the Administrative Level

In cases where an unlicensed broadcaster proffers formal challenge to the FCC, the courts are more likely to discuss the merits of the challenge if the broadcaster has exhausted the available administrative remedies, such as petitioning the reconsideration of an FCC order⁴⁰ or applying for a license waiver.⁴¹ The waiver option, however, is theoretical only, as the FCC considers asking for a license waiver tantamount to asking for permission to broadcast without a license.⁴² Failing to exhaust all available administrative appeals gives the courts a way to dismiss the case without having to fully consider its merits.⁴³

Finding documentation on cases of FCC enforcement is not an easy task, as the agency

can be quite selective about the information it releases. A limited number of cases involving unlicensed broadcasting are archived in the *FCC Record*, *FCC Reports*, or Pike & Fischer's *Radio* (now *Communications*) *Regulation*. Further complicating matters, the tools used in enforcement generate different sorts of paper trails. Cases involving forfeitures can usually be traced to a published Notice of Apparent Liability and any petitions for reconsideration filed by the unlicensed broadcaster. Station raids involving equipment seizures leave hardly any paper trail at all, save the initial arrest warrant for the transmitter, which is not usually made public unless the broadcaster challenges the action or the FCC issues a news release about the raid. As a result, nearly all well-documented FCC administrative decisions involve forfeitures and/or formal cease and desist orders, the latter usually related to a station raid or injunction effort. An effect of the agency's disorganization noted earlier is that its record keeping is generally scattered and cumbersome to search, especially with cases that can stretch over several years. The FCC's problem with public information has been the subject of critical Congressional inquiry, so this is not a problem unique to niche researchers.⁴⁴

To its credit, the FCC was an early adopter of the Internet among government agencies and now makes a huge volume of data and records available through more than a dozen online databases, some of them containing records dating as far back as 1996. However, these databases are also quite cumbersome to search, more properly designed for users who do daily business with the agency than for the casual inquisitor. They are also neither complete nor fully cross-referenced.

For the purposes of this section, our review of FCC administrative decisions is primarily confined to cases within the last five to ten years. This is in part due to the difficulties of document collection outlined above (the agency's online databases provide a more thorough record of the most recent cases). Additionally, the FCC has dealt with significantly more cases of unlicensed broadcasting during this period of time than it has in any previous period. Since the development of unlicensed broadcasting as an institutional issue for the FCC is also relatively new, studying the cases during this period offers the chance to study the best-articulated methodology yet developed by the agency for handling the pirate radio phenomenon.

In contrast to its actions in the field, the FCC's administrative dispatch of unlicensed broadcasting cases is relatively invariable. It follows very closely all statutory guidelines for the

finding of fact and the determination of appropriate penalty. For the most part, once there are findings of fact the momentum to carry the process through is sufficient enough to derail all challenges except those involving mitigation of the pending punishment. Even more importantly, there is no latitude given to any notion that the FCC's licensing authority may be weakened or invalid in particular cases; such rebuttals are either ignored or dismissed outright. It is actually a rarity to find the FCC justifying itself in its administrative decisions. As the function of administrative law is to expedite the function of regulation, the premise that the regulations are valid is an obvious one.

The only instances where the FCC displays leniency are those where an unlicensed broadcaster admits guilt and can demonstrate hardship to mitigate the punishment. There have been several recent examples of this practice. Thomas Brothers, a college student in Berkley, Michigan was fined \$10,000 in June, 2002 for broadcasting on 88.3 MHz for several months without a license.⁴⁵ Brothers filed a petition for reconsideration admitting to the violation and provided financial documentation proving his inability to pay the fine; by December the FCC had rescinded it.⁴⁶ Similarly, Jeffrey Alan Petrey of Princeton, West Virginia was threatened with a \$10,000 fine on July 30, 2001 for broadcasting on the FM band without a license. Petrey responded a week later with documentation regarding his inability to pay; the FCC canceled proceedings in December.⁴⁷ The Rev. Dr. Philius Nicholas received a \$10,000 Notice of Apparent Liability in January, 2002 for operating an unlicensed FM radio station in Brooklyn, New York.⁴⁸ As the pastor of a small church, he explained he was trying to use the radio to evangelize; his petition for reconsideration and three years' worth of tax returns convinced the FCC to reduce the fine to \$1,000.⁴⁹

The administrative decision process itself is usually so rigid beyond findings of fact that arguments an unlicensed broadcaster might make in their own defense - whether thoughtful or absurd - are swept aside with a sense of detachment. Variations in reasoning occur dependent on how the enforcement process has played itself out to its present point (for example, whether initial contacts between the station operator and field agents were cordial or confrontational), but the operative reasoning behind all decisions boils down to: rules exist, they were broken, and now a price must be paid. Edwin Valentin's \$5,000 fine serves as a good illustration: initially

visited in 1997 by field agents for operating “Musical Radio” in Detroit, Michigan, Valentin responded to initial contact with constitutional questions about the FCC licensing scheme - not with any particular argument other than that the need for a license interfered with his perceived free speech rights. The FCC quickly rejected the challenge out of hand, noting Valentin had never attempted to apply for a license, and formalized his forfeiture in 1998.⁵⁰ Valentin petitioned for review, and the FCC succinctly affirmed its original decision: “Rev. Valentin has not filed for (let alone received) a Commission license. He intentionally broke the law.”⁵¹ Another Spanish-speaking pirate in Detroit got similar treatment: in October, 1997 field agents found the location of unlicensed FM broadcasts on 106.3 MHz and spoke with Edwin Raices, who told them the station was officially chartered with the state as a partnership and provided the documentation to prove it. The FCC replied that a state corporate charter was no substitute for a broadcast license and threatened a \$5,000 fine in November. Raices responded claiming he didn’t mean to break any rules, had not caused any interference, and decreased transmitter power. The FCC disagreed on the claim of willfulness, termed the interference issue “irrelevant,” and followed through on its forfeiture threat in 1998.⁵²

When agents attempted to inspect Mark H. Fulling’s unlicensed FM station in Garden City, Kansas on August 26, 1998, Fulling did not allow it. The Kansas City field office followed up with an \$8,000 Notice of Apparent Liability one week later. Fulling acknowledged the violation but disputed the penalty, citing the high quality of his transmitting equipment and lack of demonstrable interference. The FCC was more than happy to make the forfeiture official in April, 1999, interpreting Fulling’s response as little more than an admission of guilt.⁵³ Fulling’s informal appeal of the forfeiture charged the FCC with procedural violations in the administration of his case. Things finally sorted out in March, 2000 when the FCC affirmed the forfeiture. It based its decision on Fulling’s prior admission of guilt and also noted that it was going out of its way to take the case this far, as Fulling’s response to the forfeiture had not been properly filed as a petition for reconsideration.⁵⁴

An interesting subset of administrative challenges to the FCC has occurred in the last decade involving “constitutionalists” or “state’s rights” advocates who come from a long history of questioning the jurisdiction and authority of federal government agencies. Unfortunately, their

spirit of defiance does nothing for the futility of their gestures. Alan Leonard Brockway is a case in point: fined \$17,000 in 2001 for “willful and repeated” violations of the Communications Act,⁵⁵ he was hit with a larger penalty in part for refusing to allow agents to inspect his station. Brockway’s initial petition for reconsideration was denied.⁵⁶ In a second petition for review he laid out an argument which the FCC, in another denial, called “nothing relevant to the issues in this proceeding,” but which presumably had something to do with a challenge to the scope of judicial and quasi-judicial power assumed by government agencies, as the Commission cites *Marbury v. Madison*⁵⁷ and *Heiner v. Donnan*⁵⁸ as two of Brockway’s legal references.⁵⁹

Richard I. Rowland’s challenge did not fare any better: issued a Notice of Apparent Liability in October, 2000 for unlicensed FM broadcasts in Longwood, Florida, Rowland responded with a demand for tax documents from the FCC as proof that it had the power to issue fines against him. He also sent the Tampa field office “copies of state constitutions, the Magna Carta, the Mayflower Compact, and his birth certificate.” The FCC was wholly unmoved and issued a forfeiture notice in February, 2001.⁶⁰ It finally secured a civil judgment to collect the fine from a federal judge in Orlando in 2003.⁶¹

In Leander, Texas, Keith Perry broadcast satellite-fed programming via FM transmitter from his home beginning in February, 1997. A complaint from the Texas Association of Broadcasters got the FCC involved and a field inspection took place that March. The visit was followed up by a Notice of Violation mailed to Perry. He replied with a refusal to shut down and several counterclaims, such as,

[T]he FCC has no power to regulate FM broadcast stations operating with transmitter power of less than 100 watts; Agents...trespassed on his property and illegally parked their vehicle in front of his home; the FCC has no authority to inspect unlicensed stations; Agent...had no authority to operate the transmitter while conducting his tests; the agents slandered Keith Perry to the Leander Police Department; and insufficient postage was placed on the warning letter.⁶²

After a trip back to Leander to confirm the continuing violation, the FCC initiated cease and desist and forfeiture proceedings against Perry on April 6, 1998. He responded on May 1 with a letter, later rejected by Administrative Law Judge Arthur I. Steinberg as too informal to constitute a proper reply, but which stated a willingness to negotiate with the FCC provided hearings be held in Austin.⁶³ Perry also continued to challenge the FCC’s jurisdictional authority,

resting his case on a form letter he received as the result of a separate inquiry in April which “purport[ed] to disclaim federal jurisdiction over all intrastate radio communications.”⁶⁴ The FCC declared these arguments untimely, defective, and moot, and moved ahead with a cease and desist order and \$11,000 fine in December, 1998.

It might even be said that such “constitutionalist” resistance brings down harsher punishment. While criminal convictions and actual prison sentences for the crime of unlicensed broadcasting are very rare, a significant proportion of them have involved such advocates. For example, Mark A. Rabenold was first contacted by the FCC in August, 1997 for broadcasting on 105.1 MHz in Oroville, WA without a license. He refused to let agents inspect his station. The FCC issued an Order to Show Cause and Notice of Opportunity for Hearing, the initial step toward a cease and desist order, in 1998.⁶⁵ In the proceedings which followed the FCC reports Rabenold responded to its initial notice with a “COMMERCIAL AFFIDAVIT,” in which he said, in part: “Your papers were received, but not accepted, and are refused for cause without dishonor and without recourse to me and returned herewith because they are irregular, unauthorized, incomplete, and void process.”⁶⁶ Rabenold ignored the order and continued broadcasts of “North Valley Radio” with five watts of power. A short time later he added a second transmitter to service another town nearby. Armed with a cease-and-desist order, the FCC pressed for contempt of court charges. In February, 2001, Rabenold was arrested and thrown in the county jail; at a federal district court hearing he acted as his own attorney and disputed the authority of both the FCC and the presiding judge, who sentenced him to six months unless he agreed to turn off his radio stations.⁶⁷ Rabenold languished behind bars for two months before capitulating.⁶⁸

The weakness of the FCC’s field presence directly affects the administrative side of its enforcement process. A good example of external pressures driving timely and effective resolution of unlicensed broadcasting cases involves Lewis Arnold of Chewelah, Washington. Armed with a one-watt transmitter on 95.3 MHz, Arnold did not consider himself a threat to commercial stations in the area. Eric Carpenter, general manager of 1,000-watt KCVL-AM and 3,000-watt KCRK-FM in Colville, WA - some 20 miles distant from Chewelah - felt differently. In a June 26, 1997 complaint to the Seattle, WA FCC field office, “Carpenter alleged that the

unauthorized station caused economic harm and interference to the reception of his station [KCRK].”⁶⁹ He followed up with a phone call a week and a half later that identified Arnold as the station operator; the FCC shot off a warning letter. Field agents from Seattle then visited the station in August. Arnold voluntarily allowed inspection and the agents repeated the prohibition on broadcasting without a license. Three days after that visit, Carpenter wrote the FCC to let them know Arnold was back on the air. He called Seattle on September 9 to follow up. Agents finally traveled back to Chewelah in March, 1998 and confirmed Carpenter's complaints. The FCC finally closed out the case in December, 1998 with a cease and desist order and \$11,000 fine, which Arnold never bothered to challenge.⁷⁰ Persistence pays off - in this case at the price of a year and a half’s worth of patience.

Further illustration of the variability of the FCC’s enforcement mien can be found in the case of Frank Bartholomew, who may be the only unlicensed broadcaster to be punished by the FCC, but not for the primary act. Bartholomew was visited twice in October, 1997 by FCC agents who monitored his low power FM station’s signal over a 288-square mile area in and around Fredricksburg, Pennsylvania. On both occasions Bartholomew refused to identify himself nor did he allow agents to inspect his transmitter. Bartholomew received a \$17,000 Notice of Apparent Liability in December. His response claimed that his transmissions were within legal power limits. In May, 1998, the FCC rejected Bartholomew’s response and formalized his fine - but only for \$2,000. The forfeiture was meant to stress the seriousness of refusing the agents’ knock: “The Commission's authority to inspect radio facilities is a cornerstone of the FCC's ability to ensure compliance with the Communications Act and FCC rules...Inspection is critical to ensure that serious interference concerns, especially regarding safety of life matters, can be resolved quickly.”⁷¹ The fact that in Bartholomew’s case these concerns did not exist (the FCC produced no evidence suggesting interference was an issue) does not seem to matter. In reducing the fine to \$2,000, the FCC effectively punished Bartholomew not for broadcasting without a license, but for refusing agents entry to inspect his station; that violation was, in the eyes of Compliance Division Chief Pamela Harrison, the single one “we cannot ignore.”⁷²

Finally, enforcement actions involving two stations in Naples, Florida highlight how the FCC’s case-by-case approach to unlicensed broadcasting can undermine efficient policing of the

airwaves. They both involve Spanish-language broadcasters: the first was “Tropical Estereo 107.5FM,” which received a visit from FCC field agents on April 19, 2002. Its operator, Octavio Sarmiento, told them he’d submitted an application for a low power FM station license just two weeks earlier, although it was later discovered that he’d used the wrong form. The agents told him unlicensed operation was illegal and advised him to shut down. They came back the following day and heard the station again, taped its signal, and issued a Notice of Apparent Liability for \$10,000 in June. Sarmiento’s response demanded a bill of particulars from the FCC about the evidence it had surrounding his continued broadcasts, supplemented with affidavits from five station employees and 25 listeners who all claimed the station hadn’t been on the air April 20. In closing, Sarmiento asked for a reduction in the size of the proposed forfeiture, claiming to have been duped by a scam artist named Disonio Lombardi - from whom he was “leasing” the station - into believing it was legal to operate.⁷³ The FCC formalized Sarmiento’s forfeiture in December, 2002, citing the tapes made by field agents as irrefutable evidence that willful and repeated violation had occurred. It also picked apart his scam defense, noting his erroneously-filed LPFM application belied his status as an ignorant victim.⁷⁴

There is, however, more to the scam scenario than meets the eye. The reason why the FCC came back to Naples on April 20, 2002 - and caught Octavio Sarmiento, Jr. in the act again - was because of complaints about broadcasts involving another pirate station, “Mission Posible 105.1 MHz.” This one was traced to the Tree of Life Church, where Richard Muñoz identified himself to agents as the station’s operator. Muñoz initially shut the station down in the presence of the FCC, only to start up again 10 days later. The following month, agents came back to Naples and found “Mision Posible” back on the air. A Notice of Apparent Liability to Muñoz followed in June.⁷⁵ Muñoz’s response also painted him the victim of fraud: he “agreed to purchase 50% of the radio station” from one Daniel Morisma in late 2001. Muñoz also claimed that Morisma advised him not to worry about the FCC’s visits.⁷⁶ The FCC followed through with a monetary forfeiture, calling the loss of Muñoz’s \$15,000 investment in the station “unfortunate” but no excuse for breaking the law.⁷⁷ After pleading poverty, the FCC reduced his fine to \$2,000.⁷⁸

What makes this case particularly interesting is that Octavio Sarmiento, in his own

defense, also mentioned dealings with Daniel Morisma. Sarmiento initially leased air time from Morisma for “Tropical Estereo” on 105.1 MHz in December of 2001. Sarmiento further stated that after he found out out Morisma had no license for the station he terminated the lease agreement.⁷⁹ Richard Muñoz appears to have been Morisma’s next victim. There is no record of the FCC making the connection between these cases and investigating Morisma himself, who was clearly the enabler for the unlicensed broadcasts in both (and probably more) instances. Nor is there any record of investigation into Disonio Lombardi, who snared Octavio Sarmiento, Jr. a second time with a very similar scam for “Tropical Estereo 107.5,” and who also probably had other victims.

Although a quasi-regular administrative caseload involving unlicensed broadcasting is a relatively recent development for the FCC, the agency’s had to deal with such cases throughout its entire history. It has developed its ability to be so dismissive with administrative challenges from unlicensed broadcasters thanks to the creative latitude of FCC field agents and federal judges which have upheld their authority in the face of most challenges. Yet the FCC’s ability to exercise its authority is fairly weak, due to the lack of time and resources available to enforce the license requirement. The discrepancy between the administrative and judicial support for FCC licensing authority and the agency’s ability to effectively exercise it creates a window of opportunity that, despite evolutions in the law and political conditions, has sustained citizen challenges to government licensing in the form of unlicensed broadcasting. These acts have carved out spaces of autonomy throughout U.S. radio history where “the public” has acted on sentiments of spectrum ownership.

Notes to Chapter 2

1. 47 U.S.C. § 510 (2000).
2. 47 U.S.C. § 501 (2000) sets the maximum criminal penalty for violations of the Communications Act at one year of imprisonment.
3. 47 U.S.C. § 401(a) (2000).
4. 47 U.S.C. § 402(b) (2000).
5. 47 U.S.C. § 402(b)(7) (2000). This twist to the path for judicial challenges was added as an amendment to the Communications Act in 1959. See Robert Sears McMahon, *Federal Regulation of the Radio and Television Broadcast Industry in the United States, 1927-1959* (New York: Arno Press, 1979), p. 227.
6. 47 U.S.C. § 402(b)(1) (2000).
7. John R. Bittner, *Broadcast Law and Regulation* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1982), p. 44.
8. The FCC's field agents themselves have no police powers, and therefore cannot execute warrants without the assistance of a peace officer. Any police agency will serve in a pinch, provided the jurisdictional command agrees to release officers to the task of backing up the FCC. For its part, the agency's Enforcement Bureau claims, falsely, that its agents can ignore the Fourth Amendment: see Q #3, FCC Enforcement Bureau, *Inspection Fact Sheet*, July 5, 2001 (August 9, 2003), <http://www.fcc.gov/eb/inspect.html>. The FCC has begun sending its field agents for rudimentary police training at the Federal Law Enforcement Training Center in New Mexico; see *January 2003 Presentation* by Bureau Chief David Solomon, January 15, 2003 (August 9, 2003), <http://www.fcc.gov/eb/reports/Jan2003.html>. In 1993 the Commission also endowed its field agents with authority to issue administrative subpoenas in the course of investigations, citing cases of unlicensed broadcasting as an impetus, but that authority is rarely invoked. See *In the Matter of Authority to Issue Subpoenas*, 8 FCC Rcd 8763 (Fld. Op. Bur. 1993).

9. The FCC's power to issue forfeitures derives from 47 U.S.C. § 503 (2000), which sets the maximum fines for violations of the Communications Act. This enforcement tool was endowed by an act of Congress in 1960 and expanded in 1978. For most of its history the agency determined forfeiture amounts on a case-by-case basis but discovered this process was time-consuming and erratic. In 1991 the FCC issued its own directive refining the forfeiture process; it established base fine amounts for violations to be adjusted upward or downward depending on the severity and egregiousness of the specific case at hand. See *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991); pet. recon. denied, 7 FCC Rcd 5339 (1992). After further tweaking in 1993 (8 FCC Rcd 6215 (1993)), the FCC's forfeiture policy was vacated on challenge by the D.C. Circuit Court of Appeals, primarily for failing to follow the proper administrative procedures for major rule changes, like allowing adequate opportunity for public comment: see *United States Telephone Association v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). The policy was then rewritten in 1997: see *In the Matter of The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997); pet. recon. denied, 15 FCC Rcd 303 (1999).

47 U.S.C. § 503(b)(2)(D) requires the FCC "to take into account the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require."

10. Pursuant to 47 U.S.C. § 504(a) (2000).

11. Steven P. Phipps, "Unlicensed Broadcasting in the US: The Official Policy of the FCC," *Journal of Broadcasting & Electronic Media* 2 (Spring 1990): 138.

12. Ted Coopman, "FCC Enforcement Difficulties with Unlicensed Micro Radio," *Journal of Broadcasting & Electronic Media* 43, no. 4 (Fall 1999): 593.

13. This does not necessarily end an unlicensed broadcaster's participation in pirate radio. There have been two confirmed cases where persons silenced by an injunction returned to the air: the first was Stephen Dunifer, who appeared on a microradio station set up in Seattle's Independent Media Center during the WTO protests of 1999, while his injunction was on appeal: see Kevin Keyser, *Free Radio: A Video Documentary* (Independent release, 2000); video clip available online at <http://www.diymedia.net/video/real/wto.ram>. The second was "Reckless," enjoined in 2000 as a broadcaster with Free Radio Austin. She participated in the "mosquito fleet" of microbroadcasters that protested the National Association of Broadcasters' annual radio convention in 2002. See John Anderson, "Audio from the Mosquito Fleet," *DIYmedia.net*, September 29, 2002, <http://www.diymedia.net/audio/mfaudio.htm>. It should be noted that whether Dunifer or Reckless actually deployed and/or operated transmitters at these events is unknown.

14. See Appendix C, "Program Staffing Allocations," *FCC Fiscal Year 2004 Budget Estimates*, February, 2003, p. 75 (August 10, 2003), http://www.fcc.gov/Reports/fcc2004budget_appendix_c.pdf. This number is unchanged from FY 2003.

15. Coopman, "FCC Enforcement Difficulties," p. 591.

16. FCC Enforcement Bureau, *Organizational Structure*, July 31, 2003 (August 10, 2003), <http://www.fcc.gov/eb/eb.pdf>.

17. Of course, the actual geographic distribution of FCC field agents is not uniform: they tend to congregate around the most urbanized areas of the U.S., where broadcast activity (and other activity that falls within the agency's purview) is highest.

18. Coopman, "FCC Enforcement Difficulties," p. 585.

19. See Ted Coopman, "Conclusions," *Sailing the Spectrum from Pirates to Micro Broadcasters: A Case Study of Micro Broadcasting in the San Francisco Bay Area*, (San Jose, CA: Unpublished master's thesis, San Jose State University, 1995), online at *Rogue Communication* (August 8, 2003), <http://www.roguecom.com/rogueradio/conclusions.html>.

20. Ted Coopman, "Hardware Handshake: Listserv forms Backbone of National Free Radio Network," *American Communication Journal* 3, no. 3 (2000) (August 9, 2003), http://acjournal.org/holdings/vol3/Iss3/articles/ted_coopman.htm.

21. Phipps.

22. See Coopman, "Literature Review," *Sailing the Spectrum* (August 8, 2003), <http://www.roguecom.com/rogueradio/litreview.html>.

23. Andrew Yoder, *Pirate Radio: The Incredible Saga of America's Underground, Illegal Broadcasters* (Solana Beach, California: HighText Publications, 1996), p. 52-56. Yoder goes on to note that by 1988-89, there were more shortwave pirates on the air than ever before.

24. Coopman, "FCC Enforcement Difficulties," p. 583.

25. Anderson, "Enforcement Action Database," *DIYmedia.net*, <http://www.diymedia.net/fccwatch/ead.htm>.

26. Jesse Walker, *Rebels on the Air: An Alternative History of Radio in America* (New York: New York University Press, 2001), p. 247-249.

27. General Accounting Office, *The Role of Field Operations in the Federal Communications Commission's Regulatory Structure* (Washington, D.C.: Government Printing Office, August 18, 1978).

28. Id., p. 12-13.

29. Id., p. 17.

30. Id., p. 23.

31. Coopman, "FCC Enforcement Difficulties," p. 592-593.

32. FCC Inspector General, *Report on Audit of the Federal Communications Commission (FCC) Civil Monetary Penalty Program*, August 1, 2000 (December 1, 2003), http://www.fcc.gov/Bureaus/Inspector_General/Reports/civilmonetary.pdf.

33. Barry Cole and Mal Oettinger, *Reluctant Regulators: The FCC and the Broadcast Audience* (Reading, MA: Addison-Wesley Publishing Company, 1978), p. 100.

34. FCC Inspector General, *FY 1999 Field Inspection Program – Summary Inspection Report*, January 21, 2000 (August 19, 2003), http://www.fcc.gov/Bureaus/Inspector_General/Reports/fy99fieldinspection.pdf.

35. *Id.*, p. 2.

36. FCC Enforcement Bureau, *Year Two Progress Report*, January 17, 2002 (February 5, 2004), <http://www.fcc.gov/eb/reports/progres.pdf>, p. 3.

37. William Kennard, “Remarks to NAB Radio Convention, Seattle, Washington, October 16, 1998” (December 14, 2003), <http://www.fcc.gov/Speeches/Kennard/spwek832.txt>.

38. FCC Enforcement Bureau, *Year One Progress Report*, November 2, 2001 (December 14, 2003), <http://www.fcc.gov/eb/annual/yearone.html>.

39. Anderson, “FCC Enforcement Bureau: Year Three Progress Report,” *DIYmedia.net*, October 10, 2002, <http://www.diymedia.net/audio/mp3fceb02.htm>.

40. Pursuant to 47 C.F.R. 1.106 (2002).

41. Pursuant to 47 C.F.R. 1.3 (2002).

42. *Hippolito Cuevas*, 13 FCC Rcd 25289 (Mass Med. Bur. 1998).

43. Walter A. Socolow, *The Law of Radio Broadcasting* (New York: Baker, Voorhis & Co., 1939), p. 171.

44. See Committee on Government Operations, *The FCC Public Reference Rooms Are a Mess*, H.R. Rep. No. 100-749 (1988).

45. *In the Matter of Thomas A. Brothers, Berkley, Michigan*, 17 FCC Rcd 10550 (Enf. Bur. 2002).

46. *In the Matter of Thomas A. Brothers, Berkley, Michigan*, 17 FCC Rcd 26125 (Enf. Bur. 2002).

47. *Jeffrey Alan Petrey*, 16 FCC Rcd. 22088 (Enf. Bur. 2001).

48. *Rev. Dr. Philius Nicholas*, 17 FCC Rcd 10530 (Enf. Bur. 2002).

49. *Rev. Dr. Philius Nicholas*, 17 FCC Rcd 23779 (Enf. Bur. 2002).

50. *Edwin Valentin d/b/a Musical Radio*, 13 FCC Rcd 5099 (Compl. & Inf. Bur. 1998).

51. *Edwin Valentin d/b/a Musical Radio*, 15 FCC Rcd 5255 (Enf. Bur. 2000) at 5256.

52. *Edwin Raices Andres Rivera Regis d/b/a R & R Communications*, 13 FCC Rcd 4656 (Comp. Inf. Bur. 1998); pet. recon. denied, 13 FCC Rcd 24210 (Comp. Inf. Bur. 1998).

53. *Mark H. Fulling, Garden City, Kansas*, 15 FCC Rcd 6020 (Enf. Bur. 2000).

54. *Id.* at 6021.

55. *In the Matter of Alan-Leonard Brockway, Kalispell, Montana*, 16 FCC Rcd 10937 (Enf. Bur. 2001).

56. *In the Matter of Alan-Leonard Brockway, Kalispell, Montana*, 16 FCC Rcd 13191 (Enf. Bur. 2001).

57. 5 U.S. 137 (1803).

58. 285 U.S. 312 (1932).

59. *In the Matter of Alan-Leonard Brockway, Kalispell, Montana*, 17 FCC Rcd 433 (Enf. Bur. 2002).

60. *In the Matter of Richard I. Rowland, Longwood, Florida*, 16 FCC Rcd 2992 (Enf. Bur. 2001).

61. See “Federal District Court Orders Civil Judgment Against Richard I. Rowland for Unlicensed Radio Operation,” FCC news release #236551, issued July 15, 2003.

62. *Keith Perry*, FCC 98-062 (Comp. Inf. Bur. 1998).

63. *Keith Perry*, 14 FCC Rcd 1263 (Comp. Inf. Bur. 1998) at 1264.

64. *Id.*; The FCC said in its defense “that his question was misunderstood and answered inaccurately.”

65. *Mark A. Rabenold, Oroville, Washington*, FCC-98-63 (Comp. Inf. Bur. 1998).

66. *Mark A. Rabenold*, 14 FCC Rcd 1261 (Comp. Inf. Bur. 1998).

67. John Craig, “Unlicensed radio stations' owner sent back to jail; six-month sentence will be lifted when illegal stations taken off air,” *Spokane Spokesman-Review*, March 8, 2001, p. B4.

68. Ron C. Judd, “A Tiny Town Shouts ‘Whoa!’ to Patriot Act,” *Seattle Times*, August 10, 2003, Fourth Edition, p. A1.

69. *Lewis B. Arnold*, 13 FCC Rcd 10618 (Comp. Inf. Bur. 1998).

70. *Lewis B. Arnold*, FCC-98-326 (Comp. Inf. Bur. 1998).

71. *Frank J. Bartholomew*, 13 FCC Rcd 13160 (Comp. Inf. Bur. 1998) at 13161.

72. *Id.*

73. *Octavio Sarmiento, Jr., Naples, FL*, 17 FCC Rcd 25277 (Enf. Bur. 2002).

74. *Id.* at 25281.

75. *Richard Muñoz*, 17 FCC Rcd 21132 (Enf. Bur. 2002).

76. *Id.* at 21133.

77. *Id.*

78. *Richard Muñoz*, 18 FCC Rcd. 6333 (Enf. Bur. 2003).

79. *Octavio Sarmiento, Jr.*, *supra* note 73.

Chapter 3. Early Radio Licensing Authority: A Crisis of Confidence

A. 1912-1927: Undermined from the Inside

Federal regulation of radio arguably begins with the Radio Act of 1912, passed at the behest of the United States Navy, which was most interested in an efficient use of the new “wireless” technology for communicating with ships at sea. Remarkably, there exists no record of any concern about or deliberation of the government’s power to license speech on the airwaves;¹ the undertaking was framed pragmatically, as the technology was still new and of limited use. The enabling clause for federal radio licensing is found in Section 1 of the Act, which requires that “a person, company, or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication” without a license. It was also intended to cover the use of ship-to-shore radio and required a license for any vessel “engaged in interstate commerce.”²

The Act endowed authority to the government to restrict access to the airwaves via the license mechanism - but it was severely undercut by the fact that a license, once applied for, had to be granted. Less than four months after the Act’s passage did this dilemma arise: it involved a New York company openly controlled by German capital that had applied for a radio license. The Secretary of Commerce and Labor was inclined to deny the license on the grounds that it might be used by interests hostile to the United States (the start of World War I was less than two years away), but a memorandum from the Department of Justice on the scope of the Secretary’s license authority all but dismantled the mechanism as a tool for bona-fide spectrum organization and regulation:

The statute does not undertake to exclude from its benefits domestic corporations whose stock is owned or controlled by foreigners. Unless, therefore, you have some discretion in issuing licenses under the act to the persons or corporations named as its beneficiaries, *you have no authority to refuse a license to a domestic corporation on the ground that it is owned and controlled by foreigners...*It is also apparent therefrom that that supervision and control is taken to Congress upon itself, and that *the Secretary of Commerce and Labor is only authorized to deal with the matter as provided in the act, and is given no general regulative power in respect thereto* [emphasis added].³

So long as an applicant fit into an eligible category of licensee (“a person, company, or corporation within the jurisdiction of the United States”), the Department of Commerce and Labor was statutorily mandated to award a license to the applicant.

Amateur radio enthusiasts played a large role in the development of the medium of radio communication, and even before they stumbled upon broadcasting⁴ they accounted for a majority of the radio traffic in the United States in the years prior to 1920. During this time of tentative federal licensing authority amateurs found themselves frequently in conflict with the U.S. Navy, the ether’s other primary user. Amateurs could be fairly recalcitrant about their right of access to the airwaves. Amateurs had been into radio before there were radio licenses. Imbued with a pioneer spirit, many were enthralled with exploration of the medium and unconcerned with bureaucratic details like licensing. This is not to say that amateurs boycotted the license requirement en masse: there is no documented estimate available on how many amateurs operated without licenses, but they surely existed.

The 1912 Act was also an unfunded mandate: the Department of Commerce had no real resources with which to enforce it.⁵ Erik Barnouw chronicled the perspective of Edgar S. Love, former chief engineer of station WWJ in Detroit. As an amateur, Love was well aware of the Radio Act and its license requirement, “but felt it wasn’t meant for him. Among his friends ‘nobody...knew anything about licensing.’ And nothing happened.”⁶ Another amateur operator, Stanley R. Manning, regularly interfered with the ability of the Brooklyn Navy Yard to talk to ships at sea: “They wanted me to lay off when they were on the air. I wasn’t perturbed about it because there weren’t any laws, rules or regulations in those days. All they could do was ask me to be careful about it, which naturally I was, too.”⁷ Susan Douglas notes even those amateur operators with licenses bent the rules liberally - often spurred by a desire to avoid interference to their Navy brethren - and regularly transmitted on unauthorized wavelengths for clearer communications.⁸

The development of broadcasting as the dominant public model of use for radio happened almost entirely by accident, according to Susan Smulyan. She credits amateur operators and their experiments with non-Morse messages as a significant catalyst in the adoption of radio technology - helping to lay the foundation for what would later become known as “the listening

public.”⁹ As broadcasting grew in popularity the number of broadcast license applications increased. The Secretary of Commerce had no choice but to grant them. These were the first rumbles of the coming “chaos” described by many radio historians - but it was a mess of the government’s own making, caused by its own self-restrictions.

The spectrum allocation plans of the time only allowed for the use of a handful of wavelengths. Stations competed between themselves for intelligible airtime. The fledgling broadcasters adapted, and many stations moved to spots above or below the “official” wavelength mandated by their government license in order to reduce interference between each other. Some stations made moves of opportunity; these occurred without coordination. This behavior might mitigate interference between some stations, but it could also cause new problems with others.

By 1922 the wavelengths (both official and unofficial) were packed with signals and the government felt compelled to exercise more control over the situation than it had previously. Part of this came from political pressures: radio was becoming a victim of its own success and as its listener base expanded so did complaints about interference. No longer the domain of the technical-minded, radio now attracted followers in high places, like Packard Motors president Henry P. Joy, who petitioned Commerce Secretary Herbert Hoover to do something about the static - much of which, Joy noted, came from stations operated by the U.S. Navy: “Other interferences exist but when the chief offender is the Government itself against its own regulations and the international conventions, how can we well expect that others will conform.”¹⁰

Hoover’s response was to freeze all license applications and renewals and summarily reject all newcomers with the explanation that interference precluded licensing any new stations. This initial freeze introduced the doctrine of spectrum scarcity into the licensing arena, which advanced the premise (still held to this day) that the radio spectrum has limits to the number of voices that can speak on it. Scarcity of spectrum also endowed radio licenses with something akin to a property value.

Barnouw observes that a healthy traffic in licenses developed after this decree: “The Department of Commerce, far from discouraging it, furthered it by a policy it adopted. ‘We take

the position,' a Commerce Department spokesman told a Senate committee, 'that the license ran to the apparatus, and if there is no good reason to the contrary we will recognize that sale and license the new owner of the apparatus.'"¹¹ This only worsened the spectrum rush underway. Now that official permission to broadcast carried value, entrepreneurs snapped up licenses and rushed stations onto the air in the hopes of selling these stations (as "developed property," so to speak) to more established media interests.

When the Intercity Radio Company in New York had its license renewal denied in 1923 as a result of Hoover's new scarcity-based licensing policy, it sought relief from the Secretary's decision in the D.C. Circuit Court of Appeals. A three-judge panel, citing the 1912 Justice Department memorandum on federal licensing authority and Congressional discussion on the meaning of the Radio Act, dismissed Hoover's interference excuse. The only real issue at hand, wrote the court, was the government's denial of a license to an eligible applicant.¹² The court did not dispute that interference existed, but it did not see Hoover's duty to be the prevention of interference on radio - an impossible task. Instead, Hoover was directed to minimize the amount of interference between licensees. The mere fact that interference existed did not create grounds for restricting license availability, said the D.C. Circuit, although it did limit "the extent of the privilege [of broadcasting] granted to the licensee."¹³ Intercity's license was renewed, which on its face was a defeat for Hoover; yet the court had endorsed the concept of scarcity as a basis for radio regulation, which was an important step toward the "reform" seen later in the decade.

Forced again to license all comers, the Department of Commerce turned its attention to enforcement of proper spectrum use among licensees. As with the amateur radio operators, the government discovered a surprising devil-may-care attitude among broadcasters once they had license in hand. Like the amateurs, broadcast radio stations moved off their assigned wavelengths and increased power as they addressed interference issues on their own. Sometimes they never reported these changes to Washington, or at best communicated them after the fact, as did C.W. Horn, operations director of Philadelphia heritage station KDKA, in his belated 1920s "request" to the Department of Commerce for a power increase: "[O]ur comparatively lengthy experience has shown us that the power of 1000 watts is not sufficient to give this station a constant and efficient transmitting radius of several hundred miles under all conditions....in fact,

we have been using more than 1000 watts for some time and there has been no objection.”¹⁴

At least Mr. Horn was diplomatic about the transgression. Eccentric evangelist Aimee Semple McPherson, who broadcast from Los Angeles on practically any wavelength she pleased, was warned repeatedly to stop hopping around the dial. Her case escalated to a rare visit from a Department of Commerce radio inspector. Incensed at the intrusion, McPherson shot off a vitriolic telegram to Secretary Hoover, ordering his “MINIONS OF SATAN” to leave her alone. McPherson claimed her wavelengths were selected by divine inspiration, and “WHEN I OFFER MY PRAYERS TO HIM I MUST FIT INTO HIS WAVE RECEPTION.”¹⁵

Things only got worse for federal licensing authority when what limited regulatory oversight the Department of Commerce exercised was torpedoed in 1926, opening the way for the aforementioned “chaos” to bloom. The Zenith Corporation, which operated a radio station in Mt. Prospect, Illinois, repeatedly broadcast on a wavelength not proscribed by its license. When the Department of Commerce moved to prosecute Zenith a federal court again declared the government’s licensing authority impotent beyond the act of issuance. Since the Radio Act of 1912 never defined the criteria under which stations could share broadcast wavelengths and set broadcast times, the court held that Zenith had not violated any rule under which the Department of Commerce had the authority to punish it.¹⁶ The premise outlined in *Zenith* was swiftly incorporated into the government’s own interpretation of its licensing authority, in the form of a Department of Justice memorandum issued less than 90 days after the *Zenith* decision. The memorandum construed the *Intercity* and *Zenith* cases to again leave the government with the simple authority to issue licenses and no power to dictate what stations did with them.¹⁷

With this development, and Hoover’s injection of value to radio licenses via the introduction of the concept of spectrum scarcity, the conditions for “chaos” were set. There was now a financial incentive to drown out competition,¹⁸ and a diminution of federal authority to stop it; stations jockeyed for the best wavelength. Many stations also dramatically increased their power, sometimes to burn through what interference they experienced, but also to stomp on lower-power competitors.¹⁹ Francis Chase, Jr. reports that between July and December 105 new stations took to the air, 94 others modified their operations and notified the Department of Commerce, and “many of the station managers, who no longer felt themselves under the

department's supervision, made such changes without consulting or notifying anybody."²⁰ Stations who practiced this behavior were dubbed "squatters" or "wave-pirates," although they were indeed licensed.²¹ Secretary Hoover pleaded with broadcasters to respect the terms of their licenses, but with little effect: two weeks after his initial appeal, a speech he gave in Minneapolis was aired by a local wave-pirate, much to the amusement of the local press.²² The judicial neutering of Hoover and the Commerce Department prompted calls for a significant overhaul of the law to strengthen government control over the airwaves through the license mechanism.²³ Attempts were made by listener's groups and amateur radio clubs in cities around the country to organize boycotts and other punitive actions against "wave-pirates" and other stations that caused interference; some of these efforts saw limited success but they never were strong or sustainable enough to enforce responsible behavior among broadcast licensees.²⁴

While the "chaos" was primarily due to an overabundance of licensed stations, there were some elements of unlicensed broadcasting that entered the public consciousness, and disapprovingly at that. One involved a well-publicized hoax involving unlicensed broadcasters who spoiled the results of a radio industry-sponsored distance listening contest in 1926. Another were the "rum runners" who diverted Coast Guard patrol boats with fake ship distress calls to smuggle liquor into the country with less fear of interdiction.²⁵ Even so, the impact of these stations on the move to tighten regulation of radio was far outweighed by the amount of interference generated by licensed "wave pirates," the intensity of which even caused diplomatic heartburn between the United States and its neighbors; these international complaints may have been the tipping point at which Congress was forced to act.²⁶

B. 1927/34 Legislation, "Public interest, convenience, and necessity," and "Access" to the Airwaves

Faced with total collapse on the authority front, Hoover all but begged Congress to step in and overhaul radio regulation. But was he really as impotent as he claimed? It has been suggested that Hoover "failed to appeal the *Zenith* decision because he wanted chaos to reign. He had been asking Congress for legislation granting the Commerce Department greater power over broadcasting over several years....Hoover issued licenses to all applicants so as to cause unhappiness in the industry and Congress, therefore making his proposals more attractive."²⁷

There were other catalysts for congressional action. In 1926 A state court in Illinois enjoined a new radio station from operating too closely to the wavelength used by WGN. The decision subscribed to the philosophy that incumbent broadcasters like WGN, having invested time and money in building up their facilities and audiences, had a vested property right in the radio spectrum, which could be infringed by interloping newcomers.²⁸ With its reasoning the Illinois decision threatened to shift regulation of the airwaves from the federal to the state level; within a month of its release Congress passed a resolution “declaring all private claims to the ‘ether’ invalid and requiring all broadcasters to sign waivers giving up any such rights.”²⁹

All of this activity set the stage for passage of the Radio Act of 1927,³⁰ which endowed the Department of Commerce with more specific powers of control over radio licenses. The enabling clause involving licensing reflects this change over the 1912 law, directing regulation “to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.”³¹ The 1927 Act created the Federal Radio Commission (FRC) to execute the broadcast spectrum overhaul, formally marking the entry of an “expert” government entity into the regulatory mix. The somewhat wobbly structure of the FRC and a later need to consolidate telecommunications regulation into a single agency led to the creation of the Federal Communications Commission (FCC) in 1934, with the passage of the Communications Act that year. For the purposes of this thesis, the difference between the two with respect to the basic license authority assumed by the government is negligible.³²

While the Radio Act prohibited the FRC from engaging in censorship per se,³³ it directed the FRC to regulate use of the airwaves in a manner consistent with “the public interest, convenience, and necessity.”³⁴ The struggle over what this standard is and how to best live up to it has afflicted the agency since its inception. The irony here is that there wasn’t much thought given to what a public interest standard for radio regulation actually should be. At least one FCC Chairman, Newton Minow, tracked down the the Radio Act’s author, Senator Clarence C. Dill (D-WA), and pointedly posed this question. Dill replied with an honest answer: the decision was made out of convenience and necessity more than interest. He just happened to have a lawyer on

his staff with prior experience at the Interstate Commerce Commission, “where they regulated public utilities and railroads, and the statutory standard of the Interstate Commerce Act was the public interest, convenience, and necessity. That sounded pretty good, and we couldn’t think of anything else...”³⁵ The Radio Act itself cribbed heavily from legislation regulating other public utilities, a symptom of the rush to get legislation in place that would give the government the authority it needed to stop the “chaos.”³⁶ With nothing left to go on but this language, the FCC has wrestled with defining the standard through a process of educated assumptions refined by adjudication. There is, however, some evidence that radio regulators, as early as the mid-1920s, had developed their own hazy conceptions of a “public interest,” which occasionally surfaced in memoranda justifying the denial of certain radio license applicants.³⁷ Just how “public interest” was defined at that early stage was often based on the individual circumstances of the applicant and the person processing the licensing application - far from a tangible standard for policy making.

Minow might have asked Dill why he felt such a standard was necessary at all: it had been clear long before the Act’s passage that the development of radio broadcasting was going to be left to the “professionals.” Amateurs themselves were cut out of broadcasting during the embryonic years of the 1920s, when the mode was turned over almost exclusively to those with commercial interests. Thomas Streeter provides the best synopsis:

This crucial action was largely accomplished in the months immediately after the creation of Westinghouse’s KDKA in the fall of 1920, with little fanfare. On January 11, 1921, Secretary of Commerce Hoover prohibited amateurs from ‘broadcast[ing] weather reports, market reports, music, concerts, speeches, news or similar information’ and on September 15 of that year, Commerce began licensing broadcast stations as ‘limited commercial stations’ on a wavelength designated for such purpose. The policy was clear: amateurs were forced to choose between abandoning broadcasting or abandoning the amateur community by turning themselves into ‘licensed commercial stations.’³⁸

Susan Douglas describes the amateur-centric early listening audience as “active, committed, and participatory,”³⁹ suggesting solid roots for a sense of access entitlement among the listening public. Once amateurs were taken out of the broadcast arena, the only noncommercial forces left to exert any influence over the regulatory development of radio broadcasting were educational institutions who had stations of their own, having embraced the medium as a tool for mass and distance education. Robert McChesney has written extensively on how these institutions were

divided and their political influence on Congress diluted by the fledgling yet powerful commercial broadcast lobby during the forging of the Radio and Communication Acts.⁴⁰ Others who have studied this critical period of radio history hint that an outright “quid pro quo was made” - a right of public access to the airwaves was traded for speech restrictions on commercial broadcasters to make the takeover more palatable.⁴¹ Susan Smulyan suggests that the commercialization of radio was an unnatural act made possible only through a constant campaign of public relations and political lobbying by the broadcast industry during those crucially formative regulatory years.⁴² This campaign fended off early attempts by citizen advocacy groups seeking to de-commercialize radio; the industry employed tactics ranging from the subtle (providing curriculum on broadcasting for use in schools) to the dirty (investigations and smear campaigns targeting noncommercial agitators).⁴³

Streeter prefers to frame this course of events not as a coup but as a “triumph of...corporate liberalism,”⁴⁴ yet it is undoubtedly clear that the commercial aspect of radio broadcasting was ingrained into the fabric of its regulation well before the Radio Act in both form and political function (although Senator Dill himself personally loathed advertising).⁴⁵ Another significant factor affecting the development of a long-term licensing structure was the government’s penchant for granting fewer licenses for higher-power stations, which some have argued was an inefficient yet politically-expedient manner of managing the radio spectrum.⁴⁶ But it was the framing of radio as a business the did the most damage to notions of public access to the airwaves. This became clear when the FRC set forth its first interpretation of the public interest standard, which made Hoover’s scarcity rationale central to the way it would license stations. More importantly, it cast the public right of access to the airwaves as passive: “The commission is convinced that the interest of the broadcast listener is of superior importance to that of the broadcaster and that it is better that there should be a few less broadcasters than that the listening public should suffer from undue interference.”⁴⁷

Thus the status quo was born: there would be a limited number of voices available on the radio, and the stage was already set for the commercial dominance of those voices. No matter that alternative regulatory solutions were proposed and discarded with little consideration, or that this policy moved forward without an actual determination into what *other* factors besides the

proliferation of radio stations caused the “chaos” of the 1920s.⁴⁸ Tension from the lack of public access was first deemed “censorship” by members of the public: it did not take long before newly-minted radio regulators had ample documentation of people and groups with “minority” viewpoints denied airtime. These denials had roots both in the licensing process itself and in the self-censorship of predominantly commercial licensees acting in their own best interests.⁴⁹ A sense of open skepticism over the apparent political favoritism that permeated the licensing process was not far behind.⁵⁰

It is important not to confuse many of the “access” debates that take place within the regulatory structure with the notion of a literal right of access to the airwaves; the structure itself mandates the public’s passivity. Concepts of “public interest” and “access” are diminished when used simply as symbolic or rhetorical foils to deflect change in the status quo.⁵¹ Joseph M. Foley has summarized this inherent quandary most succinctly:

Over the years the view has evolved that the rights of the listeners are best served by creating an environment in which they can obtain diverse programming. They are not allowed direct access to the airwaves. Rather they must depend on the broadcast licensees to provide programming for them. The result of this is that the listeners can only be served if the broadcaster decide [sic] to do so.⁵²

Agitation for greater public access to the airwaves can be accomplished by means other than lobbying regulators for conditions on licensees that the public will never directly control. Another dimension of the access struggle occurs when heightened sentiments of public ownership of the airwaves meets a perceived dereliction in the regulator’s duty to manage use the airwaves in the public interest. Coupled with a healthy disregard for the scarcity rationale, this culminates in the act of unlicensed broadcasting.

Notes to Chapter 3

1. Charles H. Tillinghast, *American Broadcast Regulation and the First Amendment: Another Look* (Ames, IA: Iowa State University Press, 2000), p. 18.
2. *The Radio Act of 1912*, Public Law 624, 62nd Congress, August 13, 1912, Sec. 1.
3. United States Department of Justice, "Radio Communication - Issuance of Licenses," *Official Opinions of the Attorneys General of the United States, Advising the President and Heads of Departments, In Relation to Their Official Duties* 29 (November 22, 1912), p. 580-581.
4. See Susan J. Douglas, "Amateur Operators and American Broadcasting: Shaping the Future of Radio," in Joseph J. Corn, ed., *Imagining Tomorrow: History, Technology and the American Future* (Cambridge, MA: The MIT Press, 1986), p. 52-53, in which it is noted that KDKA - widely credited as a pioneer of broadcast radio - got its start in an employee's garage as an amateur station.
5. Tillinghast, p. 21-22.
6. Erik Barnouw, *A Tower in Babel, A History of Broadcasting in the United States, vol. 1* (New York: Oxford University Press, 1966), p. 32-33.
7. Quoted in Barnouw, p. 29.
8. Susan J. Douglas, *Inventing American Broadcasting, 1899-1922* (Baltimore: The Johns Hopkins University Press, 1987), p. 292.
9. Susan Smulyan, *Selling Radio: The Commercialization of American Broadcasting, 1920-1934* (Washington, D.C.: Smithsonian Institution Press, 1994), p. 12-14.
10. Marvin Robert Bensman, *The Regulation of Radio Broadcasting by the Department of Commerce, 1921-1927* (Madison: Unpublished Ph.D. dissertation, University of Wisconsin-Madison, 1969), p. 101-102.
11. Quoted in Barnouw, p. 174.
12. *Hoover v. Intercity Radio Co., Inc*, 286 F. 1003 (D.C. Cir. 1923); Writ of Error dismissed, 266 U.S. 636 (1924).
13. *Id.* at 1006-1007.
14. Quoted in Bensman, p. 247.
15. Quoted in *Id.*, p. 179-180.
16. *United States v. Zenith Radio Corporation, et al.*, 12 F.2d 614 (N.D. Illinois, E.D. 1926).
17. Department of Justice, "Federal Regulation of Radio Broadcasting," *Attorney General's Opinions* 35 (1926), p. 126-132.

18. Thomas Streeeter, *Selling the Air: A Critique of the Policy of Commercial Broadcasting in the United States* (Chicago: University of Chicago Press, 1996), p. 95-96.
19. Walter B. Emery, *Broadcasting and Government: Responsibilities and Regulations* (East Lansing, MI: Michigan State University Press, 1971), p. 23.
20. Francis Chase, Jr., *Sound and Fury: An Informal History of Broadcasting* (New York: Harper & Brothers Publishers, 1942), p. 22-23.
21. Ventura Free Press, *Empire of the Air* (Ventura, CA: Ventura Free Press, 1952), p. 50-52.
22. Bensman, p. 331-332.
23. Some have suggested this pattern of behavior - regulation "as responses to crises" - has plagued the FCC throughout its history. See Stuart N. Brotman, *Communications Law and Practice*, § 2.01 [2][b] at para. 4 (2003). Others attribute this behavior to a more sinister source: the political and bureaucratic influences inherent to a regulatory body working in such close concert with the industries it regulates. See Ron Garay, "The FCC and the U.S. Court of Appeals: Telecommunications Policy by Judicial Decree?," *Journal of Broadcasting* 23, no. 3 (Summer 1979): 312-313.
24. Marvin R. Bensman, "The Zenith-WJAZ Case and the Chaos of 1926-27," *Journal of Broadcasting* 14, no. 4 (Fall 1970): 433-434.
25. Steven P. Phipps, *The Federal Government and Radio Piracy* (Columbia, MO: Ph.D. dissertation, University of Missouri-Columbia, 1986), p. 41-43.
26. *Id.*, p. 54.
27. Matthew L. Spitzer, "The Constitutionality of Licensing Broadcasters," *New York University Law Review* 64 (1989):1046.
28. *Tribune Co. v. Oak Leaves Broadcasting Station*, 68 Cong. Rec. 216 (1926).
29. *Joint resolution limiting the time for which licenses for radio transmission may be granted, and for other purposes*, Public Resolution 47, 69th Congress, 2nd sess., December 8, 1926.
30. Radio Act of 1927, Public Law 632, 69th Congress, 2nd sess., February 23, 1927.
31. *Id.*, Sec. 1.
32. For comparative purposes, see Title III, Part 1, Sec. 301 of the Act, codified as 47 U.S.C. § 301 (2000).
33. *Radio Act of 1927*, Sec. 29, codified as 47 U.S.C. § 326 (2000).
34. *Radio Act of 1927*, Sec. 4, codified as 47 U.S.C. § 303 (2000); although the phrase makes its first appearance here, it crops up repeatedly throughout subsequent sections.

35. Quoted by Minow in Henry S. Ashmore, *Fear in the Air* (New York: W.W. Norton & Co., 1973), p. 30-31.

36. See Mark A. Franklin and David A. Anderson, *Cases and Materials on Mass Media Law*, 4th ed. (Westbury, NY: Foundation Press, Inc., 1990).

37. Jora R. Minasian, "The Political Economy of Broadcasting in the 1920s," *Journal of Law and Economics* 12 (1969): 398.

38. Streeter, p. 87-88.

39. Douglas, "Amateur Operators and American Broadcasting," p. 49.

40. See Robert W. McChesney, *Telecommunications, Mass Media, and Democracy: The Battle for the Control of U.S. Broadcasting, 1928-1935* (New York: Oxford University Press, 1993).

41. Walker, p. 32.

42. Smulyan, p. 71-81.

43. Id., p. 139-142.

44. Streeter, p. 79.

45. See Donald G. Godfrey, "Senator Dill and the 1927 Radio Act," *Journal of Broadcasting* 23, no. 4 (Fall 1979): 477-489.

46. Steven Phipps, "'Order Out of Chaos: A Reexamination of the Historical Basis for the Scarcity of Channels Concept,'" *Journal of Broadcasting and Electronic Media* 45, no. 1 (2001): 59-61.

47. Federal Radio Commission, *Federal Radio Commission Statement Relative to Public Interest, Convenience, or Necessity*, 2 FRC Ann. Rep. 166 (1928), p. 167.

48. See Phipps, "'Order Out of Chaos,'" p. 63-68, in which he lists the reluctance to open new wavelengths to radio broadcasting, poorly-maintained broadcasting equipment (by both commercial and amateur stations), and various technical problems with the primitive radio receivers of the time as just a few of the other potential causes of widespread interference in radio's early days. The effects of these other variables on the actual "chaos" experienced at the time has never been objectively documented.

49. See H.B. Summers, ed., *Radio Censorship* (New York: The H.W. Wilson Company, 1939).

50. Spitzer, *supra* note 27, at 1048-1050. Throughout this article Spitzer argues that this “revisionist history,” which casts Congress and the Department of Commerce as restricting public access to the airwaves by design, strengthens the theoretical possibility that the courts could declare the entire licensing system unconstitutional. However, Spitzer also admits that it would be difficult to undo decades of entrenched regulatory structure, especially based on the premise of a new historical context; and there has been no adequate alternative yet proposed that allows the government to address first amendment-based content regulation concerns in a manner superior to the current scarcity-based rationale.

51. Erwin G. Krasnow, Lawrence D. Longley, and Herbert A. Terry, *The Politics of Broadcast Regulation, Third Edition* (New York: St. Martin’s Press, 1982), p. 140.

52. Joseph M. Foley, “Value and Policy Issues in the Marketplace for Broadcast Licenses,” in Sven B Lundstedt, ed., *Telecommunications, Values, and the Public Interest* (Norwood, NJ: Ablex Publishing Corporation, 1990), p. 265.

Chapter 4. Legal Refinement of FCC Licensing Authority

The creation of the Federal Radio Commission may have made it politically clear that the federal government was in charge of the airwaves, but it did not hinder challenges to the new licensing regime. The FRC's first crisis of authority occurred less than a year after its establishment. It began in Detroit, where the city had conducted a successful experiment using two-way radio for police communications. The results showed so much potential that the Michigan state police made immediate plans to roll out its own radio network. It applied to the FRC for the requisite licenses; the FRC scheduled the applications for a hearing. Governor Fred W. Green, a Republican not accustomed to delay, ordered construction of the network to begin immediately. The FRC threatened to intervene to prevent any use of the police radio system; Governor Green ordered the state police to arrest any federal official who might step foot in Michigan to interfere. After a personal lobbying trip to Washington under the twin banners of state's rights and public safety, the FRC acquiesced and expedited Michigan's radio licenses.¹ This same tactic was applied with success in pre-FRC days as well: WCFL, Chicago's historic labor radio station, began under a similar specter of piracy. The Department of Commerce initially denied the Chicago Federation of Labor's request for a license but the CFL went ahead with station construction and vowed to take to the air regardless of federal approval. WCFL made its broadcast debut within the law.²

Among the FRC's initial business were cease-and-desist orders to some 164 wave-pirates - stations licensed, but operating out-of-bounds. Yet the fledgling agency was quite malleable to political massage: "if a station sent a lawyer, or a Congressman interceded, a compromise usually resulted."³ In a 1930 commentary, *Radio Broadcast* magazine lamented this informal yet widespread practice and momentarily mocked the use of the nebulous public interest standard as a ploy for gaming the new licensing system. "All one must do, apparently, is gather unto himself a couple of Congressmen, visit the most weak-kneed commissioner available, make a few grand statements about service to the public, and some way, regardless of the general good of the listener, will be found to accommodate the pleading station."⁴

This does not mean the FRC was completely unassertive. Its 1928 victory in *White v. Radio Commission*⁵ affirmed the FRC's fundamental legality as a regulator with properly-

delegated authority; as to the constitutionality of the Radio Act itself, the Seventh Circuit Court of Appeals found no dispute with the new system. The case also formally nullified among the judiciary the notion of a property right for incumbent broadcasters to their wavelengths.⁶

Initial challenges specifically directed at federal broadcast licensing authority were jurisdictional in nature: they revolved around distinctions between intra- and interstate commerce, of which the federal government has authority over the latter alone. When the American Bond and Mortgage company declared its intent to continue operation of its radio station in Homewood, Illinois past the expiration of its license in 1928, it did so on the claim that the station was not engaged in interstate commerce and was therefore outside the FRC's regulatory jurisdiction. Judge James H. Wilkerson dismissed American Bond's challenge and granted the FCC an injunction against the station on the basis of two reasoned premises. The first was that the airwaves were akin to a national natural resource and as such fell under federal regulatory control in order to preserve their most effective use.⁷ Secondly, while not all radio stations may transmit over state lines, enough do to make the condition of interstate (federal) regulatory jurisdiction generally applicable to all who use the medium:

[T]he full control of Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. The execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter.⁸

Thus where interstate and intrastate commerce may be perceived to coexist, federal authority dominates by default. Wilkerson also echoed the FRC's initial interpretation of the Radio Act's public interest clause, which held the public right of access to the airwaves as passive only: "The rights of the individual broadcaster must give way to the paramount interest of the millions of the receiving public, who are entitled to have the waves sent out by broadcasting stations classified and arranged in such a way that the benefits resulting from this great scientific discovery may not be impaired or destroyed."⁹ American Bond's subsequent appeals failed with little new discussion, save for the fact that it had failed to fully avail itself of the FRC's administrative appeals process - adding a procedural violation to the list of reasons for its defeat.¹⁰

In 1933 the Supreme Court first addressed the FRC's licensing authority directly in a case involving two radio stations in Illinois whose licenses were revoked in order to accommodate the

placement of a new station in Indiana.¹¹ The FRC's power to modify and revoke licenses, said the Court, clearly stemmed from the Radio Act's mandate to function in the public interest, convenience, and necessity - which the FRC was reasonably free to define.¹² This decision is important to the regulatory history of radio but its vague wording discourages interpretation as a wholesale endorsement of the FRC. It may be most important for certifying the Radio Act's public interest standard as a source of FRC authority - in all its glorious nebulosity.

The cases discussed to this point have involved people and stations who challenged the government's authority within the context of the licensing process. Unlicensed activity existed, and the FRC felt compelled to assert its authority as gatekeeper to a limited resource. The authority to decide who uses the airwaves is reciprocated by an authority to keep those off the air who don't belong there. The FRC needed to prove this authority as well; it did so with its first criminal prosecution for unlicensed broadcasting in 1930.

British-born George Fellowes ran an unlicensed AM station in St. Louis and could be considered a very early pioneer of talk radio.¹³ He also coincidentally refused to recognize *any* radio licensing authority, federal or otherwise. This made it difficult for his court-appointed attorney to fashion a constructive defense, although he apparently did as best as he could: the result was a laborious attempt to scientifically prove the airwaves unregulable. District Court Judge Charles B. Faris grew impatient with this strategy and reportedly reached his boiling point when the defense put forth a motion to enter textbooks on radio propagation theory as case exhibits.¹⁴ Fellowes was a convenient target as he was well-known to the authorities and was in fact already wending his way through the deportation appeals process.¹⁵ The FRC's case against him was otherwise solid: field inspectors in Missouri and Illinois had set up a quasi-sting where one called in to Fellowes' station and broadcast greetings to the other. Both testified at trial to taking part in the unlicensed interstate broadcast.¹⁶ Fellowes was convicted and sentenced to a year in prison, although the sentence was waived after he agreed to leave the country.¹⁷

During sentencing, Judge Faris reasserted the notion of federal jurisdiction over the airwaves, albeit more out of faith than any particular fact: "This is a necessary statute. I don't believe radio could be properly useful unless some regulation of this sort were enforced to stop every Tim, Dick and Harry from getting on the air...It is a peculiar law and, I repeat, a necessary

law and a good law.”¹⁸ The actual FRC and court records of this important case no longer seem to exist, despite repeated attempts to find them; what we know today comes from press coverage.¹⁹ While the *Fellowes* case was an unqualified vindication of the FCC’s enforcement authority, it did not guarantee the FCC’s unqualified success in court: in 1932 the criminal conviction of Cecil Molyneaux for broadcasting without a license was thrown out on appeal for lack of evidence.²⁰

Early unlicensed broadcasters made thoughtful and spirited challenges to FRC/FCC authority in the civil courts by parsing the intra/interstate jurisdictional question as it applied to radio. One early civil dispute was *United States v. Gregg et al.*,²¹ where the Federal Radio Commission had moved to silence “The Voice of Labor,” a very small AM radio station broadcasting from a hotel in downtown Houston, Texas. The three men behind the operation admitted they had no license to broadcast, but they argued they didn’t need one because they were not engaged in interstate commerce: their signal was so weak that it could not be heard outside the state. Even though this may have been true, the court reasoned the station might still interfere with the reception of other licensed stations broadcasting *into* Texas from elsewhere. So, although The Voice of Labor itself did not directly engage in interstate commerce, it affected other entities licensed to do so, which empowered the FRC to shut it down: “That it is reasonable will be seen by reflecting that a sufficient number of unlicensed and unregulated intrastate radio broadcasting stations, such as is defendants’, broadcasting on different frequencies in each community, could and would not only interfere with, but destroy, *all* interstate broadcasting.”²²

Gregg strongly reflected the now-common premise of scarcity as a wellspring of federal authority to regulate the airwaves, but not all decisions issued in this era were as logical. The 1942 case of *United States v. Betteridge et al.*²³ pitted the government against two men who used a small radio transmitter in a criminal conspiracy to defraud racetrack betting operations in Ohio. Their scheme sited one man at the victim track watching the races, equipped with a five-watt transmitter. He would provide live updates of races in progress to a listening partner stationed near the betting window, who would slip in wagers on likely winners just before bets closed on each race. The government’s criminal prosecution of the case hinged on the fact that the conspiracy involved unlicensed broadcasting. In their defense, the men argued they did not

“knowingly and willfully intend” to broadcast across state lines - a requisite condition for the imposition of federal jurisdiction and (more importantly for their immediate predicament) criminal charges. The court found the men guilty and dismissed the jurisdictional angle of their defense by citing *Whitehurst v. Grimes* - which involved a local municipality’s authority to tax licensed amateur radio operators, not a challenge to federal license authority itself.²⁴ Issues of context aside, the operative reasoning *Betteridge* finds in *Whitehurst* is barely developed: “Radio communications are all interstate. This is so, though they may be intended only for intrastate communication. Such communications admit of and require a uniform system of regulation and control throughout the United States, and Congress has covered the field by appropriate legislation.”²⁵

Nascent federal broadcast regulators may have been strengthened by their successes in court, but they were not able to extend that strength to field enforcement efforts, where a handful of field agents attempted to deal with license-free stations and found compromise - not compliance - to be a more pragmatic pursuit. The story of WUMS (“We’re Unknown Mysterious Station”), which first broadcast from a ferry boat on the Ohio River in 1925, is quite illustrative. According to Andrew Yoder, WUMS began as an emergency communications tool employed only during flooding conditions, when it would broadcast river reports and the ferry’s schedule of emergency supply runs. The FRC - and later the FCC - repeatedly inspected the station, but operator David Thomas pointed to the “thousands of dollars (and maybe lives) that had been saved because of his activities,” which tended to send the non-confrontational agents away. During its most active periods WUMS broadcast on as many as five different frequencies, covering the AM and shortwave bands. The FCC finally prosecuted Thomas for unlicensed broadcasting in 1948: he was convicted criminally but never sentenced.²⁶

There was one pirate station the Federal Radio Commission could not handle by itself. RXKR began broadcasts from a floating casino off the coast of southern California in 1933; the ship and its station were both licensed by the Republic of Panama. RXKR used so much power that it blanketed the AM dial with interference heard throughout the U.S. and Canada. FRC warnings and threats did little; diplomatic pressure got Panama to successfully cancel RXKR’s license but the station announced it would continue broadcasting unless it was paid an

outrageous sum to stop. It took three months before the U.S. Coast Guard intervened, boarded and seized the ship, and silenced the noise.²⁷

The onset of World War II certainly had a chilling effect on unlicensed broadcasting, as out-of-place radio activity could be considered a sign of potential enemy espionage. Yet the phenomenon did not stop completely: a college student in Iowa exploited the wartime paranoia in a broadcast hoax that drove the FCC crazy for months. He taunted the U.S. military and ended every transmission with “Heil Hitler!” The FCC eventually raided the student and seized his equipment, but the prosecution ended there, even though the nature of the broadcasts coupled with the contemporary public sentiment could have easily led to more serious punishment.²⁸

The formative years of federal regulatory authority over the airwaves are marked by weak, jurisdictionally-based challenges to that authority. Court decisions of the period generally endorse FRC/FCC licensing power and take the concept of scarcity as an article of faith to justify the endorsement. The judicial tentativeness with regard to cases of unlicensed broadcasting is likely due to a lack of controlling precedent specific to the nature of the challenge. This would change in 1943, when the Supreme Court somewhat inadvertently provided one which still resonates.

A. Bedrocks Established in Case Law, 1943-1969

In 1941 the FCC promulgated new rules designed to leverage the agency’s licensing authority against broadcast networks in hopes of curtailing what the agency saw as abusive programming practices perpetrated against affiliate stations. The FCC’s Report and Order on “chain broadcasting” effectively declared several provisions in standard network affiliate contracts adverse to those stations’ ability to serve the public interest. The FCC made it known that radio stations who continued to abide by such network-lopsided agreements would receive detrimental consideration come times of license review and renewal.²⁹

These policies were designed to cause one of two outcomes: affiliate stations would bolt from the networks en masse in order to save their licenses, or the networks would revise their contracts to make them more equitable in terms of affiliate control over programming. The latter prevailed, but not before broadcast interests, led by the National Broadcasting Company (NBC), made a serious effort at judicial relief. The networks attacked the new chain broadcasting rules

on several fronts; most notable were claims that the agency overstepped its bounds of statutory authority and violated the networks' first amendment rights by using the licensing mechanism to influence programming decisions.

The Supreme Court split 5-2 in *NBC v. United States*³⁰ and upheld the FCC's new rules. Writing for the majority Justice Felix Frankfurter endorsed the FCC's approach to curbing the power of the networks. He saved their first amendment challenge for last:

The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.³¹

While *NBC v. United States* is best known for its historical impact on the influence of radio networks over the development of commercial broadcasting, it has also become a particularly useful foil for fending off challenges to the FCC's licensing authority, and particularly when such challenges are raised in the context of unlicensed broadcasting. Frankfurter's final conclusion - specifically, "The right of free speech does not include...the right to use the facilities of radio without a license," has been cited by nearly every court which has subsequently upheld the FCC's authority in the face of unlicensed challenge; it is omnipresent where such cases raise first amendment questions.

Frankfurter's words carry powerful meaning as a pronouncement of the Supreme Court. This is so because of the judicial practice of *stare decisis*, which requires that "courts owing obedience to the court that rendered the initial decision must also adhere to the announced legal principle."³²

Prima facie, the *NBC* decision provides the FCC with unassailable authority to implement and enforce licensing rules as it sees fit, and would seem to reject any tenable claim of a public right of access to the airwaves. The premise of spectrum scarcity weighs heavily on the Court's reasoning. However, there is a familiarly niggling aspect of vagueness to Frankfurter's words: is he stating a point of law or echoing a commonly-held belief? Charles Tillinghast believes this distinction is very important - so much so that it changes the implications of the case as

controlling precedent:

Any understanding of this opinion must start with examining the briefs of the parties...to determine exactly what issues they presented for the Court's decision. Such an examination reveals that [no appellant] raised any question concerning constitutionality of the licensing scheme of the Communications Act....

In light of the parties' briefs, the last-quoted conclusion of the Court seems clearly to constitute no more than restatement...of the virtual stipulation of the parties. That is also true of virtually all the Court's statements that might be read as upholding the constitutionality of licensing. That the Court would have made such an important decision as finding the licensing requirement constitutionally valid in the absence of argument in briefs, in the absence of a lower-court decision dealing with the question, and in the absence of any argument of counsel, is simply not credible.³³

Had NBC et al. attacked the constitutionality of licensing itself as a part of its challenge to the chain broadcasting rules, Frankfurter's statement would meet all legal standards for interpretation as a rule of law, properly applicable as precedent in cases that challenge the constitutionality of broadcast licensing. Tillinghast's point is that NBC et al. did not argue that: they attacked the FCC's *use* of its licensing authority *in the specific context* of chain broadcasting - which changes the frame of Frankfurter's first amendment conclusions in *NBC* to "what lawyers call 'dicta,' or commentary that is not part of the holding of the case."³⁴ As a general rule courts are required to follow precedent, but they are not required to follow dicta.³⁵

The *NBC* dicta assumed the trappings of precedent with the Supreme Court's 1969 decision in *Red Lion Broadcasting Co., Inc., v. FCC.*³⁶ This case involved a challenge to the FCC's fairness doctrine rules,³⁷ which required broadcast licensees to provide reply time to political candidates endorsed or personally attacked over the air. Red Lion et al. rested its challenge along a similar argumentative line to the *NBC* case, claiming the FCC had unconstitutionally leveraged its licensing authority to influence programming. Writing for a seven-member majority, Justice Byron White upheld the fairness doctrine and added another general endorsement of the federal broadcast licensing scheme. He did so by striking a distinction between broadcasting and other forms of media, using the premise of scarcity as the separator:

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish...only a few can be licensed and the rest must be barred from the airwaves...

This has been the consistent view of the Court...No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech." *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943).³⁸

That White singled out broadcasting for a differing level of first amendment protection than other forms of media has troubled law and communications scholars ever since. Tillinghast is one of them:

In...*Red Lion Broadcasting Co., Inc. v. FCC*, the Court averred that there is no First Amendment right to broadcast, citing the NBC case as authority. As in the NBC case, no party in *Red Lion* claimed that the licensing system under the Communications Act is unconstitutional. So the Court's opinion in *Red Lion* assumes that the licensing system is valid, just as in the other[s]...Therefore any statement by the Court to the effect that licensing is valid in the face of a First Amendment attack is dictum.³⁹

If the FCC's contemporary legal justification for the mechanism of licensing were a dictum cake, with the *NBC* decision as the bottom layer and *Red Lion* at the top, the icing holding it together is the scarcity rationale. Both decisions pay homage to a shared historical interpretation of the conditions that led to the formation of contemporary licensing policy; both invoke the "chaos" of the 1920s to rationalize this interpretation. Amplifying Tillinghast's concerns with these decisions on points of legal procedure are historical concerns: both further the misperception that the lack of an effective licensing mechanism alone precipitated the chaos and forced the adoption of the contemporary policy.

In the intervening years between these two important decisions the FCC found itself in court against more unlicensed broadcasters. Its record was less than stellar, but the fault lies more with blunders than substantive argumentative weakness. In 1948, a man in Miami, Florida sentenced to six months imprisonment for unlicensed broadcasting had his conviction reversed on appeal because the government's indictment did not clearly specify which section of the Communications Act he had violated.⁴⁰ In 1949, the FCC busted another racehorse-betting conspiracy involving an unlicensed radio transmitter and several men were convicted; these were also overturned on appeal by what the government later admitted was an illegal search and seizure.⁴¹

There is unlicensed broadcast case from this period stands alone from all others past or present: its challenge to FCC licensing policy was wholly victorious and forced change in the

system toward increased public access to the airwaves. This unique turn of events occurred during the mid-1950s and grew from a dispute over television service to the town of Bridgeport, Washington. Regional topography cut Bridgeport off from reception of TV signals from nearby cities - until some town residents incorporated a small organization to finance the construction and placement of two unlicensed booster transmitters on higher ground nearby. These transmitters relayed two TV channels from Spokane into Bridgeport. When the FCC found out about the unlicensed boosters it issued a cease and desist order to the community group, which appealed to the D.C. Circuit Court for relief. The court reversed the FCC's order in 1957.⁴²

In its decision, the D.C. Circuit pained for a way to legalize the operation of Bridgeport's boosters while remaining respectful to the FCC's licensing authority. It found a hook in the Communication Act's mandate that the FCC regulate "so as to make available, as far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and worldwide wire and radio communication service."⁴³ It reasoned the onus fell on the FCC in the instant case to develop more regulatory flexibility to deal with unique situations like those in Bridgeport, so that "all the people of the United States' may receive service through a licensed station."⁴⁴ As a result, the FCC expanded its licensing of TV booster stations and three legal boosters serve Bridgeport today.⁴⁵

Even with Supreme Court endorsement of the licensing regime, the FCC continued to find it difficult to translate its authority into effective enforcement. The 1960s saw shortwave piracy flourish: one new station was classical-format "WBBH" in New Brunswick, New Jersey. The well-produced station claimed to broadcast with top-of-the-line gear from the "Courtland School of Music." FCC agents tracked the station to the bedroom of an 18-year old broadcasting with a low-end amateur radio transceiver nearly a decade old. The teen lost his transceiver but suffered nothing further.⁴⁶ An unlicensed station in Delaware, calling itself WFTC, began sporadic broadcasts in 1964 that were to last for 24 years. The FCC was apparently well aware of the station's operation but could never seem to find it.⁴⁷ Pirate radio also factored into the "long hot summers" of the 1960s; Soley provides evidence of stations on the air at the time spouting incendiary rhetoric.⁴⁸ The FCC's general field perspective on pirate radio still cast the phenomenon as a nuisance and met limited success in its efforts against unlicensed stations. The

disparity between the law and reality gave pirates ample room to flourish.

B. FCC License Authority and Enforcement Effectiveness, 1970-1989

With the intra/interstate line of challenge now mostly exhausted,⁴⁹ unlicensed broadcasters searching for loopholes around the requirement of an FCC license looked in new directions. Two specific cases of unlicensed broadcasting during this period stand out for the national attention they received and the platform they selected to broadcast from.

Reverend Carl McIntire took to the sea in 1973 after losing the license to FM radio station WXUR in Media, Pennsylvania for violations of the FCC's fairness doctrine rules.⁵⁰ McIntire, a Presbyterian minister, held forth from a biblically right-wing perspective on his syndicated program, *The Twentieth Century Reformation Hour*, which had more than 600 affiliates. Some of them also ran into FCC troubles for airing McIntire's fundamentalist propaganda.⁵¹ In its decision upholding the FCC's revocation of WXUR's license, the D.C. Circuit Court painted McIntire - not the government - as the party most abusive of the first amendment in the dispute.⁵²

McIntire was not willing to go quietly: on September 19, 1973, at the age of 67, he began broadcasting from "Radio Free America." McIntire's new radio station was onboard the former minesweeper MV *Oceanic*, anchored off the coast of New Jersey just beyond the internationally-recognized three-mile border considered territorial waters.⁵³ Although the station only broadcast for a few hours it caused interference to two licensed stations - one in New Jersey, the other in Utah - and the FCC filed a civil suit to shut it down.⁵⁴ On October 25, the U.S. District Court of New Jersey granted a temporary injunction against Radio Free America. It noted that McIntire's broadcasts might have emanated from international waters but his fishing vessel was registered in America - which placed activities conducted onboard the *Oceanic* under the jurisdiction of U.S. law.⁵⁵ In supplement the court cited Article 7, Section 1(1) of the International Telecommunications Convention of 1959, which prohibits broadcast stations on ships at sea.⁵⁶

The following year, as hearings were held to make the injunction permanent, McIntire tried the "doctrine of unclean hands" as a defense. The government itself conducts unlicensed broadcasting operations overseas as part of various overt and covert intelligence operations; McIntire argued this duplicity robbed the government of authority to prosecute him for violations

of a law it also ignored. The court rejected this appeal as a misapplication of the doctrine.⁵⁷ Not that it mattered to the Reverend, who saw the *MV Oceanic* get repossessed before the case concluded.⁵⁸

McIntire had the means at his disposal to physically locate his station outside the legal boundaries of U.S. territory and defend his actions in court.⁵⁹ He revived jurisdictional questions of authority the FCC had long presumed resolved. It was, unfortunately, a bold strategic move laced with tactical errors: McIntire used a vessel registered in the United States; he may have sparked a strong FCC reaction by hinting at violence toward any attempt to shut him down;⁶⁰ and his motivation for defiance - more along the lines of freedom of religion than freedom of speech - may have contorted his perception of the law in such a way as to weaken the arguments he put forth.⁶¹

Allan Weiner would attempt to replicate McIntire's sea borne strategy in the 1980s. Weiner's pirate career began in 1968 at the age of 15 with broadcasts from his parents' home in Yonkers, New York involving a 100-watt self-modified shortwave transmitter.⁶² Repeated visits from the FCC only seemed to stimulate Weiner and his tinkerer-friends: by 1971 they had built the "Falling Star Network," a cluster of four pirate stations in Yonkers - three AM and one FM.⁶³ That year the FCC and Federal Marshals raided the stations and arrested Weiner and longtime co-conspirator Joseph J. Ferraro as the ringleaders of the network; both were sentenced to a year's probation.⁶⁴

The experience moved Weiner and Ferraro to write the FCC about their frustrating inability to obtain a broadcast license. The sentiments articulated were familiar: they evoked a deep-seated sense of public access to the airwaves and a desire to see the medium put to more noncommercial uses:

We are not disputing...your right to assign channels and set aside bands for the prevention of interference. We certainly, however, are disputing your right to reserve broadcasting for the well-to-do only....We started this whole thing because we love radio as an artistic and creative medium, and to bring freedom to the airwaves....We have chosen our operating frequencies especially so as not to cause interference with any other stations. However, as human beings and citizens of the United States and the world, we have a right to use the airwaves put there by whoever or whatever created the universe, and use them as we will. This is our freedom, this is our right.⁶⁵

Weiner turned his passion and engineering skill toward the construction of licensed radio stations

and by the early 1980s held licenses to three (two FM and one AM) in Presque Isle, Maine.⁶⁶ He still could not shake the pirate side, as evidenced by the FCC's discovery of a fourth, unlicensed (AM) signal emanating from the property. Threatened with the loss of his licenses, Weiner was scared straight once again until he sold the Maine stations in 1986.⁶⁷

Weiner used the proceeds of the sale to reinvigorate his freeform broadcast dreams, free from the restrictiveness of commercialism - and licensing. He purchased the MV *Sarah*, a fishing vessel with Honduran registry, and contacted many of his friends from the Falling Star Network. The assembled crew had the cumulative experience of 11 pirate stations between them.⁶⁸ On July 23, 1987, amid massive media hype and with Weiner (minus \$120,000) on board, "Radio New York International" took to the air on AM, FM and shortwave from a location four and a half miles off the coast of Long Island. It broadcast for about a week and was heard from Florida to Michigan,⁶⁹ until the Coast Guard boarded the *Sarah* and impounded her. Weiner and DJ Ivan Rothstein were arrested and charged with felonies for "conspiring to impede the FCC," then released on bail.⁷⁰ Weiner claims he was arrested with vague justification: "The first question I asked was 'Excuse me, sir, but what international law are we being arrested under?' The Coast Guard man promptly stated that he did not know which law it was, but it was some international law."⁷¹

The FCC claimed RNI violated Article 30, Section 1(1) of the Radio Regulations of the International Telecommunications Convention of 1982, which prohibits broadcasting from ships at sea.⁷² This violation, said the FCC, was a criminal act, punishable by up to five years' imprisonment and a \$250,000 fine.⁷³ Weiner's preliminary press and legal maneuverings argued he was exercising a "constitutional right to freedom of expressing over the public forum of the airwaves...[and]...access to unused and open broadcast frequencies for the purpose of disseminating their views to the public." He blamed the lack of "reasonable and narrowly drawn" federal regulations for forcing his broadcasts offshore.⁷⁴ In late August, just hours before the grand jury was to convene, the government dropped all charges. The FCC says Weiner agreed not to broadcast without a license again; Weiner says he made no such promise and the dismissal came as a pleasant surprise.⁷⁵

Preparations began anew to ready the *Sarah* for another round of broadcasts at sea; she

was moved to Boston for an overhaul. But when she attempted to leave Boston Harbor in July, 1988, the Coast Guard issued a port order keeping the ship docked until it could undergo additional insurance and safety examinations. According to Weiner, “The Coast Guard was enforcing regulations that should only apply to fishing vessels and vessels that move cargo. The MV *Sarah* was refitted to be a floating barge with a radio station on it. But as always, bureaucrats were good at being bureaucrats.”⁷⁶ After more than a month of wrangling - during which the ship’s registry was inexplicably transferred from Honduras to Maine - the *Sarah* was allowed to leave Boston and headed back to station off Long Island. Radio New York International returned to the airwaves on the AM dial on October 14, 1988.

The FCC’s response was fast: it had a temporary restraining order in three days and a Coast Guard cutter standing by to enforce it. Weiner signed off rather than risk another boarding. During court arguments October 21 against a permanent injunction, Weiner and his co-defendants again challenged the FCC’s jurisdiction in international waters. On December 13, District Judge John J. McNaught ruled for the FCC:⁷⁷ as in the case of McIntire, the *Sarah*’s American registry sealed the deal. McNaught also agreed that the International Telecommunication Convention imbued the United States with powers to sanction or stop broadcasters outside U.S. territory that interfere with domestic stations provided “the rights of foreign nations are not, thus, infringed by the application of United States Law.”⁷⁸ Two weeks after Weiner’s injunction, President Ronald Reagan signed an executive order expanding the U.S. territorial sea buffer from three to 12 miles.⁷⁹ Some have suggested the Weiner case granted the FCC authority to regulate any radio station whose signal can be heard in the United States, regardless of where the broadcasts originate; the FCC has never seen fit to test this potential.⁸⁰ The MV *Sarah* met a spectacular end in 1994, sharing time on the silver screen with Tommy Lee Jones and Jeff Bridges as the explosive set piece in the finale to *Blown Away*.⁸¹

Allan Weiner and Carl McIntire were hardly alone in their unlicensed endeavors during the 1970s and 80s; they just happen to be the most popular exemplars of pirates on the air at the time.⁸² There were others who tangled with the FCC in court, although they too suffered defeats. The Tenth Circuit further buried intra/interstate distinctions involving radio when it upheld a criminal conviction for unlicensed CB operation in 1981.⁸³ The ruling formally dismissed the

need for the FCC to show empirical evidence that an unlicensed radio signal crosses state lines: “Requiring the prosecuting authorities to monitor defendant’s signal from a point outside the state in order to sustain his conviction seems to us to impose a greater burden than the statute contemplates.”⁸⁴ A 1989 injunction against “La Voz de Alpha 66,” which broadcast from Miami on the aviation frequency 6666.6 KHz, was a slam-dunk for the FCC: the station did not even bother to defend itself.⁸⁵

Yet, as in previous periods, the reality in the field diverged from the picture of impenetrable FCC authority painted by law. An explosion of pirate activity began in the 1970s and continued into the 1980s, with stations cropping up on the AM, FM and shortwave bands. In 1975 a popular AM pirate in New York City rose to the FCC’s notice: WCPR had a talk radio format and took live phone calls, quite rare for pirates who, for the most part, eschewed disclosure of direct contact information over the air. Further investigation discovered the broadcasters utilized closed loops in the telephone system - lines normally reserved for telephone company diagnostics. Calls to the station were routed through an apartment junction box, but the FCC couldn’t pinpoint the station to a specific dwelling. Agents fell back on indirect attempts to shut the station down: they worked with the telephone company to jam the pirates’ impromptu phone lines with busy signals. This cat-and-mouse game continued for more than a year until WCPR’s location was pinpointed and a raid flat-lined the station.⁸⁶

The motivations of John Calabaro, one of WCPR’s founders, sound remarkably similar to Allan Weiner’s:

Radio had become so huge. It was a multimillion dollar business, and Brooklyn, which is bigger than most cities, had no local programming. The number one reason we went on the air was there was no open phone-in radio shows...there was no local call-in show. There were national talk shows – we could tune into Larry King on sixteen separate places on the dial – but there were no local talk shows.⁸⁷

The popularity of WCPR and others, like WHOT and KSUN, offered local alternatives to a perceived malaise in commercial radio and made New York a hotbed of unlicensed activity: in 1982-83 alone some 20 pirate stations were on the air there.⁸⁸

KDOR, one of the first well-known AM pirates on the West Coast, began in 1978 and ran a format very similar to commercial music stations. Record labels even treated KDOR like any other station and provided promotional copies of albums for fresh content. Its owner, Dick

Dorwart, aspired to a career in commercial radio but was afflicted by *osteogenesis imperfecta* (“brittle bones disease”), which made that impossible. He started his own station to fulfill his personal dream. Dorwart was never fined or raided: the FCC just sent him strongly-worded warning letters whenever his broadcasts became “too regular.” KDOR finally hung up the microphone in 1981 without incident.⁸⁹ Similarly, Jolly Roger Radio in Bloomington, Indiana, managed to broadcast for a full decade before the station was raided in 1980; the legally-blind broadcaster behind the operation and two volunteers were let off with probation and fined \$250.⁹⁰

Articles written in pirate radio enthusiast publications during this period began to seriously explore the FCC enforcement process, which by the mid-1980s was characterized as almost cordial.⁹¹ Shortwave pirate broadcasting especially occurred with impunity: at least a dozen stations could be heard regularly nationwide. Those caught by the FCC received average fines of \$750, and only then after repeated warnings or in cases where interference problems were alleged.⁹² Pirates also began to proliferate on the FM dial as well. WTPS 104.5 FM began broadcasting without a license to a few Milwaukee neighborhoods in 1982: by 1984, after various format iterations, it was voted the sixth-most listened to station in the entire city.⁹³ In Cleveland, Ohio, 40-watt FM pirate WKEY took to the air in 1988 and left the air in 1989 after unwelcome attention from the FCC - spurred by its ranking in the Cleveland Arbitron ratings book.⁹⁴

Until the 1980s unlicensed broadcasting was primarily found on the AM and shortwave broadcast bands. This would change, ironically, after the FCC abolished licenses for FM radio stations under 100 watts. These “Class D” licenses were initially established in 1948 and geared principally toward educational institutions like high schools and colleges, where the FCC hoped they would serve as a laboratories of sorts and provide on-air training opportunities for budding broadcasters.⁹⁵ The relationship of education to broadcasting changed radically in the 1960s, however, with the drive to create a national public broadcasting service, which culminated in the passage of the Public Broadcasting Act of 1967.⁹⁶

The development of National Public Radio rested partially on the premise that universities would serve as host sites for NPR stations; this meant significantly boosting the power of educational stations to serve the size of audience that Congress and NPR had in mind.

The shift in policy now cast Class D FM stations as an inefficient use of the broadcast spectrum, and the FCC promulgated rules following the Public Broadcasting Act's passage to phase out all Class D licenses (save those in Alaska) after June 1, 1980.⁹⁷ Increased government-directed development (and funding) of public radio might have been perpetuated by noble ideas but the strings attached to the funds - coupled with the move to kill off Class D licenses - further dimmed the limited potential for literal public access to the airwaves.

To this point in the narrative, if case law is used as the indicator, the FCC and its licensing regime stood on firm ground. The FCC's field enforcement activity and effectiveness, however, remained scattered and incoherent, of little obvious deterrent value. Many (if not most) unlicensed broadcasters articulated passionate yet relatively vague notions of speech freedom that incorporated a right of public access to the radio dial as an impetus for contravening the license requirement. Serving an under-served community was the noble reason *du jour*, and while most (if not all) unlicensed broadcasters knew their activities were illegal they apparently did not contemplate the consequences beyond (favorable) risk assessment.

When FCC field agents made initial contact with two low power FM radio stations in 1985 and 1987 - the first in California, the second in Illinois - they did not realize at the time they were witnessing the birth of a new wave of unlicensed broadcasting in America. These broadcasters explicitly politicized the act of broadcasting without a license and challenged FCC enforcement efforts with a level of coordination and complexity the agency had never seen before and was ill-prepared to deal with. The legal repercussions of this "microradio movement" would become a significant point of debate surrounding federal radio licensing policy as the 20th century came to a close and the 21st began.

Notes to Chapter 4

1. Ventura Free Press, p. 63-64.
2. Phipps, *The Federal Government and Radio Piracy*, p. 47-48.
3. Barnouw, p. 215.
4. Quoted in Barnouw, p. 217.
5. 29 F.2d 113 (1928).
6. Phipps, p. 97-98.
7. *United States v. American Bond & Mortgage Co. et al.*, 31 F.2d 448 at 454 (N.D. Illinois, E.D. 1929).
8. *Id.* at 455.
9. *Id.* at 456.
10. *American Bond & Mortg. Co. v. United States*, 52 F.2d 318 (7th Cir. 1931); reh'g denied, 52 F.2d 318 (7th Cir. 1931); cert. denied, 285 U.S. 538 (1932).
11. *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933).
12. *Id.* at 285.
13. Phipps, p. 104-105.
14. Phipps, "Unlicensed Broadcasting and the Federal Radio Commission: The 1930 George W. Fellowes Challenge," *Journalism Quarterly* 68, no. 4 (Winter 1991): 825-826.
15. Phipps, *The Federal Government and Radio Piracy*, p. 106-107.
16. *Id.*, p. 112.
17. Walker, p. 34.
18. Phipps, p. 121.
19. See Phipps, "Unlicensed Broadcasting (Fellowes)," p. 824, n. 1.
20. *United States v. Molyneaux et al.*, 55 F.2d 912 (2nd Cir. 1932).
21. 5 F. Supp. 848 (S.D. Tex. 1934).
22. *Id.* at 857.
23. 43 F. Supp. 53 (N.D. Ohio 1942).

24. 21 F.2d 787 (E.D. Ky. 1927).
25. *Id.*
26. Yoder, *Pirate Radio Stations: Tuning Into Underground Broadcasts in the Air and Online* (New York: McGraw-Hill, 2002), p. 8-10.
27. Walker, p. 174.
28. Yoder, p. 10.
29. See Federal Communications Commission, *Report on Chain Broadcasting*, FCC Order No. 37, Docket No. 5060 (May 1941).
30. 319 U.S. 190 (1943).
31. *Id.* at 226-227.
32. Paul W. Werner, "The Straits of Stare Decisis and the Utah Court of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over-Application," *Brigham Young University Law Review* (1994): 640.
33. Tillinghast, p. 64.
34. *Id.*, p. 126.
35. While this distinction would seem to allow courts a somewhat liberal latitude in the application of precedent decisions, it is not commonly exercised. The general practice of stare decisis tends for lower courts to treat decisions rendered at higher levels, as a whole, as controlling precedent. As a rule, those who seek to challenge the misapplication of dicta as controlling precedent must successfully separate the precedent from the dicta for the court's consideration - no simple task; see Werner at 648.
36. 395 U.S. 367 (1969).
37. A collection of FCC rules and rule statements now codified as 47 U.S.C § 315 (2002).
38. 395 U.S. 367, 388-389 (1969).
39. Tillinghast, p. 127.
40. *Campbell v. United States*, 167 F.2d. 451 (5th Cir. 1948).
41. *Casey et al. v. United States*, 343 U.S. 808 (1952).
42. *C.J. Community Services, Inc. v. FCC*, 246 F.2d 660 (1957).
43. Quoting 47 U.S.C. § 151(1) (1934).
44. 246 F.2d at 663.

45. See online FCC license data for (May 1, 2003): K07BC, <http://www.fcc.gov/fcc-bin/tvq?call=K07BC>; K11AS, <http://www.fcc.gov/fcc-bin/tvq?call=K11AS>; and K13DL, <http://www.fcc.gov/fcc-bin/tvq?call=K13DL>.

46. Yoder, p. 12-13.

47. Soley, p. 57.

48. Phipps, *The Federal Government and Radio Piracy*, p. 10.

49. There was, however, an interesting twist on this line of debate during this period in the form of *California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986). It restricted the FCC's ability to directly regulate intrastate commerce, specifically with regard to services provided on FM radio subcarrier channels. In 1983 the FCC authorized the implementation of non-broadcast services on subcarrier channels (like data and paging signals). This decision preempted any state and local regulations which it found interfered with the implementation of the new subcarrier services. The state of California challenged the ruling, and the D.C. Circuit Court of Appeals partly reversed the FCC's decision - upholding its right to license the transmission facilities themselves - but firmly planted the regulation of intrastate common carrier radio services in the domain of state and local authority. *California v. FCC* is a unique foray into the intra/interstate commerce question but it did not diminish the FCC's licensing authority in any way: you can't have subcarriers without a parent FM signal.

50. See *Brandywine-Maine Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973).

51. Yoder, p. 158-59.

52. Phipps, p. 130-131.

53. Donald Janson, "'Pirate' Ship Begins Broadcast Off Jersey," *New York Times*, September 20, 1973, p. 51.

54. Phipps, "Unlicensed Broadcasting in the US," p. 141.

55. *FCC v. Reverend Carl McIntire, et al.*, 365 F. Supp. 618 (D.N.J. 1973).

56. 12 U.S.T. & O.I.A. 2377, 2480 (1961).

57. *FCC v. Reverend Carl McIntire et al.*, 370 F. Supp. 1301 (D.N.J. 1974).

58. Douglas A. Boyd, "Radio Free America: The U.S. Government's Reaction to Pirate Radio," *Central States Speech Journal* 34 (1983): 207-208.

59. McIntire was represented by Benedict P. Cottone, former general counsel of the FCC from 1952-1959. Cottone was not necessarily opposed to the Reverend's adventure, but he reportedly wished for more time to prepare an effective defense against his old agency. See Donald Janson, "Fundamentalist Plans to Set Up Pirate Station off New Jersey," *New York Times*, June 25, 1973, p. 69, 73.

60. Phipps, *The Federal Government and Radio Piracy*, p. 135.

61. *Id.*, p. 136-142.

62. Allan H. Weiner and Anita McCormick, *Access to the Airwaves: My Fight for Free Radio* (Port Townsend, WA: Loompanics Unlimited, 1997), p. 24-39.

63. *Id.*, p. 46-65.

64. Walker, p. 203.

65. Weiner and McCormick, p. 68-69.

66. *Id.*, p. 103-109.

67. *Id.*, p. 120-123.

68. Yoder, p. 162-163.

69. Phipps, "Unlicensed Broadcasting in the US," p. 143.

70. *Id.*, p. 144.

71. Weiner and McCormick, p. 153.

72. In Weiner's prosecution the United States emphasized its respect for international law by actually asking the government of Honduras for permission before raiding the MV *Sarah*. Had the United States actually followed the ITC to the letter, the proper procedure would have placed enforcement duties upon the International Frequency Registration Board. One could say the U.S. neglected to exhaust its international administrative remedies before imposing its own judgment: a misapplication of international law to fit the needs of the moment. See Howard A. Bender, "The Case of the Sarah: A Testing Ground for the Regulation of Radio Piracy in the United States," *Fordham International Law Journal* 12 (1988-1989): 78-83.

73. Phipps, p. 144.

74. *Id.*, p. 145.

75. Weiner and McCormick, p. 166.

76. *Id.*, p. 177.

77. *United States of America v. Allan H. Weiner, Joseph Paul Ferraro, Randall Ripley a/k/a Randi Steele, Hank Hayes, Richard Hertz, John Hungerford, and John Doe, all d/b/a Radio New York International ("RNI")*, 701 F. Supp. 14 (Mass. 1988), *aff'd.*, 887 F.2d 259 (1st Cir. 1989).

78. 701 F. Supp. at 17.

79. Weiner and McCormick, p. 186.

80. Phipps, p. 146.

81. Yoder, p. 167.

82. From the perspective of offshore unlicensed broadcasting and the jurisdictional questions of the phenomenon, the United States was late to the party. European countries, especially Great Britain and the Netherlands, spent the 1960s dealing with a spate of offshore pirate stations, which culminated in various domestic legislation and specific international agreements to deal with the problem. On the side of the pirates was Article 19 of the United Nations' *Declaration of Human Rights*, which guaranteed all people a right to both produce and consume media. See Delbert D. Smith, "Pirate Broadcasting," *Southern California Law Review* 41 (1967-68): 769-815 and H.F. van Panhuys and Manno J. van Emde Boas, "Legal Aspects of Pirate Broadcasting: A Dutch Approach," *American Journal of International Law* 60 (1966): 303-341 for detailed analysis of the development and use of international and domestic law during Europe's offshore pirate decade.

83. *United States of America v. Clarence P. Brown*, 661 F.2d 855 (10th Cir. 1981).

84. *Id.* at 856.

85. *United States of America v. Diego Medina, Mario Esteves, Sara Martinez Castro, all d/b/a Alpha 66 Organizacion Revolucionaria Cubana and La Voz de Alpha 66*, 718 F. Supp. 928 (S.D. CA 1989).

86. Yoder, p. 20-22.

87. Soley, p. 58.

88. *Id.*, p. 68.

89. Yoder, p. 28-29.

90. Soley, p. 56-57.

91. Phipps, *The Federal Government and Radio Piracy*, p. 5.

92. *Id.*, p. 7.

93. Lisa Nalbandian, *Interference: Pirate Radio and its Value to the Public Sphere* (Milwaukee: Unpublished master's thesis, University of Wisconsin-Milwaukee, 2003), chap. 2, p. 18-19.

94. Soley, p. 62.

95. *Id.*, p. 39.

96. See 47 U.S.C. § 396 (2002).

97. See 47 C.F.R. § 73.512 (2000).

Chapter 5. Microradio: Focused Challenge to the Licensing Regime

Walter Dunn put Zoom Black Magic Radio on the air in Fresno, California in 1985 with no designs on launching a grassroots movement of electronic civil disobedience. Dunn recognized that Fresno's disenfranchised had no station that served their needs; as a result their thoughts and concerns were all but absent from the local media. He took steps to rectify the situation by starting an unlicensed low power FM station. Zoom Black Magic Radio featured "grassroots music, militant talk, and ads for black businesses."¹ The station proved more popular than Dunn, who went by the moniker "Black Rose" on the air, had expected: it was the buzz of Fresno for two years until the FCC raided the station and fined Dunn \$2,000. He was unwilling to quit in the face of repression and disappoint the station's surprisingly large audience; he acquired a trailer, moved it to a shopping mall parking lot, and reestablished his broadcasts from there. Police soon stopped by and asked him to leave - not because of FCC pressure, but because of the traffic congestion caused by a seemingly endless stream of listeners stopping by the station.² Several years - and two raids - later, and Zoom Black Magic Radio would simply fade away, never to pay its fine.³

As Walter Dunn was positioning his trailer in the parking lot, a blind man in Springfield, Illinois heard the story of Zoom Black Magic and contemplated how radio might help him break his own media blackout. Mbanna Kantako (born Dewayne Readus) was not always sightless - the final blow, literally, came one night in 1983 while Kantako DJed at a party raided by Springfield police. Police brutality was a large problem in Springfield during the 1980s; Kantako's family and others in the John Hay Homes housing project regularly witnessed harassment that would often lead to beatings and, in some unfortunate cases, deaths. Not only was this violence mostly ignored by the city, birthplace of Abraham Lincoln, but it was given scant coverage by Springfield's mainstream media.

With the help of friends and family, WTRA (so named for the John Hay Homes Tenant's Rights Association) took to the airwaves on November 25, 1987 with one watt of power at 107.1 on the FM dial. The station's dual purpose: provide an information conduit for police brutality reports among Springfield's black community and protest the planned demolition of the John Hay Homes.⁴ The name would later change to Black Liberation Radio as the brutality coverage

grew.

Black Liberation Radio became well-known to the city of Springfield for its relentless criticism of the police. Much of this came in the form of street-level broadcast reports on police violence - either from victims themselves or from callers witnessing the violence as it happened. A network of community “correspondents” developed who carried portable tape recorders to document police action for later playback on the air; those who complained to cops about their treatment were told to “go and tell your radio station.”⁵ A year and a half of broadcasting later - in April, 1989 - the FCC paid Mbanna Kantako a visit and fined him \$750. After some initial downtime and research, Kantako called a press conference, announced his refusal to pay the fine, turned his transmitter back on, and demanded that the police arrest him (they refused).⁶

In his return to the air, Kantako cast unlicensed broadcasting as an act of protest against a system of government he deemed inherently unjust, as exemplified by the conditions in Springfield: “We weren’t around when they made those laws about licensing...we were sitting in the back of the bus somewhere. So why should we be responsible to obey laws that oppress us?”⁷ In March, 1990, a federal court ordered Kantako to cease broadcasting.⁸ He did not. Black Liberation Radio accomplished its initial mission: acts of police brutality subsided under constant public exposure - at least in the community that suffered the bulk of it.⁹ Buoyed by success, Kantako changed the station’s name to Human Rights Radio and turned its focus toward a more general critique of mainstream, white-dominated American society. He brought his children on the air to help analyze news coverage and read books, developing a resource of community education and empowerment.

A. Stephen Dunifer and Free Radio Berkeley’s “Can of Worms”

Dunn and Kantako, in turn, inspired an anarchist in Berkeley, California. Stephen Dunifer was disgusted by the corporate media’s apparent genuflection to the government during its coverage of the first Gulf War. Dunifer connected several dots on his own to further the model of unlicensed broadcasting as act of civil disobedience. Not only had he had heard about Kantako’s use of what he called “microradio” to affect change in his community, but he had also learned about a media revolution in Belgium during the late 1970s and early 1980s, in which anarchists helped “liberate” the country’s FM dial for community radio stations through the proliferation of

unlicensed broadcasting.¹⁰ Dunifer was also cognizant of the demise of Class D FM licenses and thought it an abrogation of the government's ability to regulate the airwaves in the in the public interest.

With experience as an electronics technician, it was not difficult for Dunifer to design his own low-power FM transmitter circuit and build a matching antenna. In June of 1992 Free Radio Berkeley began broadcasts; Dunifer initially backpacked the equipment up into the surrounding hills for each program.¹¹ The station settled into a regular schedule and more permanent location the following April. Yet Dunifer was not satisfied with just one station on the air: he hoped from the start to engage the FCC in a challenge to its licensing policy in a manner similar to what had happened in Belgium; the proliferation of microradio stations was integral to this making this happen.¹² Dunifer began mass-producing FM transmitter kits which he sold via mail-order to interested activists around the country. These would hopefully sow the seeds for a mass movement of electronic civil disobedience that would grow and create what Dunifer called an "ungovernable" situation on the airwaves. Note that "ungovernable" does not mean "chaos": Dunifer did not advocate interference to licensed stations. His goal was to force change in the licensing system and carve out space for more public involvement in broadcasting. Key to making this happen were strong convictions in a literal public right of access to the airwaves and direct action.

Free Radio Berkeley kits were rugged and Dunifer advocated mobility: he could pump 10 watts out of his backpack. Mobility had tactical importance because it made it more difficult for the FCC to track a station down.¹³ The general idea was to demonstrate that Class D-type FM station licenses were still viable in the "modern" world of broadcast radio and, more importantly, that enough open space still existed on the FM dial for Class D-type stations to exist. By the summer of 1993, San Francisco would have its own microradio station across the bay,¹⁴ and stations proliferated along the California coast. By March, 1995 Dunifer claimed to have shipped more than 400 transmitter kits to domestic customers. He also supplied transmitters to the United Nations for use in developing countries and worked on the ground with revolutionaries in Haiti and Mexico to establish their own microradio stations.¹⁵

The FCC commenced the enforcement process against Stephen Dunifer and Free Radio

Berkeley in May, 1993 with a \$20,000 Notice of Apparent Liability; this was formalized as an official forfeiture in June.¹⁶ Dunifer fortunately had ready and willing legal aid in his own backyard, in the form of attorneys Peter Franck, Louis Hiken, and Alan Korn. The three had formed the National Lawyers' Guild's Committee on Democratic Communications (NLG CDC) partially to come to the defense of Mbanna Kantako. However, Kantako was more interested in broadcasting than a legal battle, and a brief the trio had written in support of his station in 1990 had gone unfiled when Kantako declined to pursue court action. For nearly five years they refined their thoughts and arguments.¹⁷ When the FCC finally filed for an injunction to silence Free Radio Berkeley in December, 1994 - after 18 months on the air - they were ready.

Dunifer's response to the FCC did not dispute the fact that he was broadcasting without a license, or even necessarily that he had a right to broadcast without one. Instead he raised several affirmative defenses to the FCC's motion, including the claim that the FCC's (relatively) recent ban on low power FM radio stations violated the first amendment. Generally speaking, the more powerful the radio station, the more expensive it is to build and maintain. When the FCC eliminated Class D licenses it destroyed the last publicly-affordable direct access to broadcasting there was. Dunifer's defense challenged the FCC rules as written but was careful not to challenge the FCC's authority per se: "The FCC likens itself to a traffic cop or safety patrol and the electromagnetic spectrum to a highway. Driving is a privilege, not a right, and rules of the road are needed....[T]he spectrum, held in trust for the American people by the government, is like a highway everyone paid taxes to build, but only the richest five percent of the population can drive on it..."¹⁸ What Dunifer argued for was not the abolition of licensing but rather an expansion of policy to include more non-profit and public use. The FCC responded to Dunifer's claims with little more than a reassertion of its statutory authority to regulate the airwaves, which had worked well in previous cases, and basically ignored the articulate questions he raised.

On January 20, 1995, both sides met in front of District Court Judge Claudia Wilken for oral argument on the FCC's motion for an injunction. Ted Coopman was there, and his report suggests the FCC considered the case closed. First amendment challenges like these had long been decided in the government's favor by the courts; the seldom-blemished legal history involving challenges to the FCC's general authority to regulate in a self-defined "public interest"

was cited in further support. Additionally, FCC attorney David Silberman deemed Dunifer's ongoing violation of the licensing regime a form of "irreparable harm" to the regulatory structure, and demanded Free Radio Berkeley be silenced immediately.¹⁹

NLGCDC attorney Louis Hiken then spoke on Dunifer's behalf: "[T]he Commission's rules, which did not provide for licensing of a stand-alone transmitter under 100 watts, were overly restrictive and constituted a total ban against micro broadcasting. Therefore, Hiken said the rules violated Dunifer's First Amendment right to free speech."²⁰ Key to this assertion was the fact that FCC rules still allowed for the use of FM transmitters under 100 watts - but they are strictly limited to rebroadcasting signals from a parent station.²¹ In fact, FCC rules specifically require that these "translator stations" *not* run local programming.²² In essence, the rules as written still technically allowed "microradio" to exist but the abolition of the Class D license cut the public from *any* hope of access to it: "Thus...the Commission's failure to establish regulations for [legal microradio] violated its mandate to create a regulatory scheme that was the least restrictive in terms of state interest....Hiken contended that the precedents stated by Silberman had no bearing on Dunifer's case because they did not deal with micro radio and the challenging of regulatory schemes."²³

Though Judge Wilken believed the government had the prevailing argument, Dunifer's was more compelling. She refused to issue the injunction until the FCC addressed Dunifer's more substantive claims. She also wanted more proof that Dunifer's station caused "irreparable harm" mandating sanction at the level of an injunction (although no interference had been documented). It was tantamount to asking the FCC to justify licensing policies that precluded the existence of microradio stations like Dunifer's.²⁴ It was clearly not prepared to do that. It took a moment before the FCC's Silberman realized the proceedings had deviated from the norm. Then he pleaded with Judge Wilken in open court to reconsider.

Your Honor, this opens up such a can of worms. You don't realize. I mean it. Your Honor, what would happen would be that you've given carte blanche to this group of people who think they can operate a radio station without a license. If Your Honor were to issue the injunction the status quo would be maintained because the Communications Act prohibition against operating without a license would be protected, whereas the Defendant and others who want to broadcast could go forward, and then seek to change the rules.²⁵

In his earlier argument Silberman called forth the specter of “chaos” if Dunifer’s reasoning was even granted a semblance of validity: “[T]o allow and not to enjoin this kind of operation, the court should consider that in doing so it encourages continuing violations not only by the defendant, but by those who would also see this as a signal that the law is not going to be enforced.”²⁶

From Silberman’s reaction one would think the sky had fallen at the FCC; yet it would be more than a year before it responded to Wilken’s ruling. When it did, it did not address any of Dunifer’s arguments. Instead the FCC now claimed Wilken lacked jurisdiction to consider such challenges to its authority: the District Court had power to enforce the law but *not* to address challenges to the regulations, a function the FCC considered exclusive to the Courts of Appeal. The National Association of Broadcasters also got involved in the *Dunifer* case; it filed an amicus brief in support of the prohibition on unlicensed broadcasting and assigned one of its attorneys to “work with” Silberman.²⁷ The NAB, in the FCC’s stead, attempted to justify the abolition of Class D licensing as though it were some kind of business decision: “If we treat preclusion [preventing interference between radio stations] as a cost and service [the area reached by a station’s signal] as a benefit, the cost/benefit ratio improves with power, but the ratio is very poor for low powered stations.”²⁸ Thus, the NAB argued that low power broadcasting was an inefficient use of spectrum, and not in the public interest - although to do so it had to overlook the fact that Dunifer’s microradio station covered a potential audience of tens to hundreds of thousands of people, hardly an empirical insignificance.

Judge Wilken again denied an injunction, citing a 1994 federal court decision involving an unlicensed broadcaster in Arizona who raised affirmative defenses similar to Dunifer’s. In that case, the Ninth Circuit Court of Appeals ruled that the District Courts *were* a proper venue for hearing such challenges.²⁹ Wilken again requested the FCC directly address Dunifer’s claims.³⁰ The FCC tried a second dodge: Dunifer did not have standing to attack the constitutionality of the FCC’s licensing procedures because he had never applied for a license or license waiver. It was an old but effective refrain - failure to exhaust all administrative remedies forfeits challenge to their underlying regulation. This one stuck. Judge Wilken granted the injunction in 1998 and it was subsequently upheld on appeal.³¹

The FCC's multiyear trial-and-error odyssey in *Dunifer* - which seemingly suspended the FCC's authority to silence Free Radio Berkeley - was a catalyst that spurred many unlicensed microbroadcasters to action. Other microbroadcasters launched similar court battles during the 1990s, and although the final conclusions of law reached in *Dunifer* were used to silence them as well, some cases took turns which helped reinforce the perception of a "grey area" in the law, as first articulated by the FCC.

It is not coincidental that the FCC found itself under attack in this manner just as the Internet was beginning to flourish as a public communications tool. Microradio activists were among the early adopters: they established e-mail lists to exchange operational and technical tips as well as catch up on FCC policy and enforcement news. A later list focused solely on the discussion of microradio-related legal cases, which allowed attorneys representing broadcasters around the country to collaborate and coordinate their work.³²

B. Other Notable Microradio Cases

Microradio cases in the wake of *Dunifer* did not necessarily follow its constitutional lead; microbroadcasters have put forth a variety of arguments to justify their operation and/or advocate for the opportunity to become legal. Reaction from the courts has been relatively uniform: spectrum scarcity is invoked in the name of preserving order, or "technicalities" are employed *Dunifer*-style to kill the challenge without addressing its merit(s). Jerry Szoka, who ran the popular "Grid Radio" out of his Cleveland nightclub, fell into both traps. In 1999, after losing administrative appeals on a cease and desist order issued against him, Szoka filed a petition for reconsideration, which the FCC denied. He continued to broadcast; the FCC moved for an injunction, which was granted in 2000. On appeal, Szoka's defense almost completely followed the *Dunifer* line.³³ Whereas Szoka *had* exhausted his administrative appeals, the Sixth Circuit still found a way to deny addressing his constitutional claims: it cited the Federal Code placing challenges to FCC rules in the exclusive domain of the D.C. Circuit and washed its hands of the matter.³⁴ Szoka took his case to the D.C. Circuit: it killed his case on scarcity grounds.³⁵ The court *did* recognize the futility of attempting to apply for a license that did not exist, but it nonetheless rejected his pleas with echoes of *NBC* and *Red Lion*, noting that "absent clear congressional or judicial signals that the microbroadcasting ban was unlawful, or unequivocal

evidence that Grid Radio's circumstances warranted differential application of the ban, we think the Commission could continue to enforce the ban and the chaos-averting licensing regime."³⁶

Alan Freed, operator of "Beat Radio," an unlicensed FM station in Minneapolis that broadcast from June to November of 1996, found himself sandbagged by the variability of the FCC's enforcement and appeals processes, which stymied his attempts to raise a constitutional defense. Freed was first served a cease and desist order; then Beat Radio was raided. Freed filed a challenge to the seizure of his equipment, arguing that the FCC's ban on low power FM radio stations and its enforcement protocols against unlicensed broadcasters were unconstitutional on first, fifth (due process) and fourteenth (equal protection) amendment grounds. The district court denied Freed's claim without addressing the constitutional questions; those were deferred to the Courts of Appeal.³⁷ The Eighth Circuit affirmed the District Court's decision and also rejected Freed's constitutional defenses without considering their merits,³⁸ it noted Freed's lack of follow-through on administrative appeals precluded "an end run blocked by the statutory channels provided for his constitutional claims."³⁹

"Steal This Radio"'s flamboyant lawsuit against the FCC failed as a challenge to the agency's authority, but it did manage to strike a small blow for privacy rights. It was also unique for showing initiative: after three years on the air serving New York's Lower East Side a coalition of STR DJs and listeners preemptively sued the FCC in 1998, following a threatening visit to the station from a field agent. Early in the proceedings the government moved to dismiss the suit on the grounds that some plaintiffs used fake names (STR listeners used their real names in the lawsuit but the DJs assumed monikers like "DJ Thomas Paine" and "DJ Carlos Rising"). District Judge Michael B. Mukasey allowed the case to proceed: "A decision to allow plaintiffs to proceed in pseudonym leaves the government no worse off than it was before this action was filed. The government is free to investigate the identities of plaintiffs and it provides no reason plaintiffs' right to court access automatically requires a waiver of anonymity."⁴⁰

STR's lawsuit took a shotgun approach to the FCC's licensing authority: some claims alleged the Communications Act was unconstitutional because it gave the FCC overbroad latitude to restrict access to the airwaves via the licensing mechanism; one claim specifically attacked the practice of auctioning off commercial radio licenses for limiting "free expression"

only to those who can afford it. Another posited the radio spectrum as a public forum, which necessitated the strictest scrutiny of government attempts to regulate it; under this analysis, the broadcast licensing regime was overly restrictive and therefore unconstitutional. Judge Mukasey first noted the jurisdictional issues at hand, which left him free to dismiss STR's suit and enjoin its plaintiffs from further broadcasts. Then he savaged their claims. Steal This Radio's open display of lawlessness coupled with the scarcity rationale were enough to doom their case, although Mukasey's ultimate reasoning disqualified them based on the preemptive nature of their lawsuit - they had no standing to seek redress for harm not yet suffered, irrespective of whether the rights in question exist.⁴¹

On appeal, the Second Circuit affirmed the injunction against Steal This Radio. It also dismissed the need for the FCC to actually demonstrate "irreparable harm" in every unlicensed broadcasting case, dismantling one leg of the *Dunifer* defense in the process. Whereas Judge Wilken initially interpreted the standard of "irreparable harm" to mean evidence that Free Radio Berkeley interfered somehow with other stations in the area, the Second Circuit set a dramatically lower standard: "[T]he Government sufficiently showed irreparable harm simply by establishing that plaintiffs were broadcasting without a license. Such unlicensed broadcasting threatens the FCC's orderly allocation of scarce resources and the clear communication of current and future licensees. No further showing of irreparable harm was necessary...."⁴²

There are a few bright exceptions to these circuitous failures. Reverend Rick Strawcutter, an outspoken member of the Michigan patriot militia movement, put "Radio Free Lenawee" on the air in Adrian, MI in November, 1996 - for which the FCC paid him a visit less than two weeks later. Strawcutter conducted an even-toned campaign of correspondence with the agency, in which he voluntarily agreed to shut his station down upon any receipt of interference complaints. At the same time he maintained that the FCC's preclusion against licensing local FM stations at power levels of less than 100 watts constituted a prior restraint to his freedom of speech.

In 1997 the government filed for a warrant to seize Strawcutter's transmitter. He responded with a counterclaim certifying he had exhausted all administrative relief and asked the court to deny the warrant. The FCC's motion was dismissed without prejudice 1998: the court

identified discrepancies in the FCC's enforcement actions against Strawcutter. For example, the agency failed to serve Strawcutter with an official cease and desist order before moving to arrest his equipment, a step required by the enforcement regulations:⁴³ According to District Judge Julian A. Cook, Jr., "Although the Government's argument has a visceral appeal, its attempt to place upon Strawcutter the responsibility for the absence of an FCC order is in reality a disingenuous sleight of hand."⁴⁴ If the FCC wanted to silence Strawcutter it would have to follow its own procedure properly: in the interim Radio Free Lenawee returned to the airwaves.

The FCC appealed the *Strawcutter* decision to the Sixth Circuit, which reversed the dismissal in 2000 citing the scarcity doctrine.⁴⁵ An injunction followed,⁴⁶ but as in *Dunifer*, the period between the FCC's setback in *Strawcutter* and its reversal of fortune allowed Radio Free Lenawee to enjoy more than two years of uninterrupted, license-free broadcasting, during which time the station upgraded its power and expanded its coverage.

A microbroadcaster's defense has not needed a constitutional foundation to find short-lived victory in court. Some have applied constitutional principles tangentially, usually through the guise of intervening legislation. "Radio Vida," an unlicensed FM radio station started in 1998 from the Iglesia Pentecostal Church in Lancaster, Pennsylvania, employed the Religious Freedom Restoration Act (RFRA) in its legal defense.⁴⁷ When the FCC seized its broadcast equipment, Radio Vida appealed for its return based on the damage done to the church's ability to evangelize - damage done by the government in contravention of the RFRA. District Judge Harvey Bartle, III agreed at least in part; he reversed the seizure and initially denied the FCC an injunction against the station:⁴⁸ "The seizure was not the least restrictive means of furthering any compelling interest of the government....We emphasize that our ruling should not be interpreted as authorizing Radio Vida to operate without a license. In addition, it does not prevent the government from seeking injunctive relief should Radio Vida resume broadcasting without a license."⁴⁹ A separate civil action initiated by Radio Vida and another religious pirate in Lancaster, seeking protection from further FCC enforcement, did not succeed; that case was tossed via the "jurisdictional wiggle" placing responsibility for regulatory challenges with the Courts of Appeal.⁵⁰ Subsequent RFRA-based defenses proffered by two other unlicensed broadcasters based in Hispanic Pentecostal churches have been struck down by courts who respectfully

declined to follow Judge Bartle's initial premise of a conflict between radio licensing and freedom of religion.⁵¹

The most unique non-constitutional challenge to FCC authority to-date involved Roy Neset, who operated an unlicensed FM radio station on his North Dakota farm. Inspections by FCC agents in 1997 and 1998 proved Neset's transmissions were powerful enough to require a license and began proceedings to shut the station down. While Neset did incorporate the first amendment into his defense against an injunction, it was wholly secondary to his assertion that the FCC did business in violation of the Paperwork Reduction Act;⁵² namely, that the agency had not applied to the Office of Management and Budget for the proper "control numbers" under which to lawfully publish its rules and forms. Devoid of this requirement, Neset argued, the FCC's entire licensing system did not meet the PRA's statutory definition of a regulation; extend this logic and a license to broadcast becomes optional. This argumentative line, which makes *Dunifer* look like a simple redress of grievances, nonetheless shared an identical fate: because Roy Neset never exhausted the administrative process he was denied standing to raise his challenge.⁵³ Neset re-framed his defense on appeal to invoke free speech and due process in an attempt to have the FCC's administrative justice system declared unconstitutional. The Eighth Circuit did not bite.⁵⁴

C. Microradio and FCC Field Enforcement

Although the microradio cases of the 1990s represent an unprecedented flurry of court activity with regard to unlicensed broadcasting, the FCC did not grasp the notion that the phenomenon was nationwide - and growing - until several years after the fact. Ted Coopman's extensive research into the FCC's enforcement efforts in California and on the *Dunifer* case suggest the agency handled the growing amount of unlicensed broadcasting as an administrative matter and, as the record in *Dunifer* illustrates, it was mostly oblivious to the more substantive questions microbroadcasters raised about the licensing regime.⁵⁵

Other influences on the FCC during the 1990s both encouraged the growth of microradio and hampered the FCC's response to it. The decade saw several agency reorganizations, including at least two which revamped the structure of field offices; these changes essentially regionalized the FCC's presence around the country and, in simple terms, left fewer field agents

covering larger territorial jurisdictions. The passage of the Telecommunications Act of 1996 imposed several new enforcement duties (most notably involving telephony, like the investigation of charges of “slamming” and “cramming,” and the regulation of a plethora of new data services) onto an already under-funded and -staffed agency.⁵⁶

From the perspective of microradio activists, the Telecom Act and the significant consolidation it precipitated in the radio industry highlighted the government’s mistreatment of a limited and precious public resource as a simple commodity. Many disaffected by these changes found an outlet in microradio, swelling the ranks of broadcasters and listener-supporters. Some stations, like Philadelphia’s Radio Mutiny, whose collective founders had no real radio experience between them, initially began with the mind to spice up a bland local radio dial; microbroadcasting grew into a political mission only after contact with FCC enforcement agents.⁵⁷ Others, like Free Radio Memphis, picked up immediately on the political nature of the “microradio movement” and followed in Dunifer’s footsteps as troops in a radio revolt, advocating the recognition of a literal right of access to the airwaves.⁵⁸ Absent a dictate from Washington to make such cases a priority, FCC field staff appear to have been left to their own devices with regard to the handling of them. In historically typical form, the bureaucracy that is the FCC ground on during the 1990s: unlicensed broadcasters were generally handled with visits from field agents followed by warning letters and monetary forfeitures. As noted previously in Chapter 2, cases often stretched on for months or years, and the FCC’s follow-through on the collection of forfeitures was abysmal.

Online collaboration allowed microbroadcasters to share and compare information on the enforcement tactics employed against them. From the direct action perspective, they discovered their foe was mostly a paper tiger: the enforcement process thus demystified and found to be scattershot at best, conditions were ripe for further proliferation of pirate stations. No longer could field agents bluff and bluster their way into a search and transmitter seizure; savvy microbroadcasters alternately ignored or needled FCC personnel, depending on the tenor of the contact between the two groups.⁵⁹ Where the older school of radio pirate would run and hide from the knock at the door, FCC agents discovered a resurgence of recalcitrance at Freak Radio Santa Cruz in 2000: station members followed agents down the street with cameras.⁶⁰

Mbanna Kantako eventually got into the habit of having a loaded tape recorder handy for encounters with the FCC; when Human Rights Radio was raided in September, 2000 (after 13 years on the air, a federal injunction, and still in arrears on the original \$250 fine), the whole Kantako family followed the multi-jurisdictional team around their home for more than half an hour, berating them for their adherence to “an unjust law.”⁶¹ Kantako was back on the air with a donated replacement transmitter in less than a month; a second raid silenced him for five months until he acquired a third transmitter.⁶² Coopman has documented cases where microbroadcasters’ cyber-pleas for mutual aid and replacement gear following a raid were fulfilled within a matter of days.⁶³

FCC agents, wholly unaccustomed to this level of resistance, exercised their latitude in dealing with pirate stations to various degrees. If provoked, enforcement could be tenacious and severe: microradio station raids were often the roughest justice of all. At the seizure of Radio Mutiny in Philadelphia on June 22, 1998, FCC enforcement chief Richard Lee personally led the bust. While the station was off the air at the time, Lee was the last voice to grace Radio Mutiny as he powered up the transmitter himself to announce the station’s demise.⁶⁴

The execution of raids on 16 stations in Florida on November 19, 1997, and other actions nationwide throughout that month - part of the FCC’s first-ever documented nationwide sweep for pirates (dubbed “Operation Gangplank”)⁶⁵ - threatened increased militarism in enforcement.⁶⁶ At the home of “Tampa’s Party Pirate” 102.1 FM, Doug Brewer awoke to SWAT police in full body armor waving automatic weapons at him, his wife, and his cat. They were held at gunpoint for 12 hours while the FCC and Federal Marshals ransacked his home, confiscated most of the electronics they could find, and damaged his roof while dismantling his antenna tower.⁶⁷ Brewer had long been a public nuisance to the FCC, having unsuccessfully challenged a \$1,000 forfeiture issued in 1996 on a technicality (the Forfeiture Order cited the wrong regulations that Brewer was accused of violating),⁶⁸ and was well-known for belligerence on the air and to FCC inspectors.⁶⁹ That may have made his bust somewhat personal: a *Wall Street Journal* story on microradio published just a month before the raids in Florida used Brewer as its colorful hook. The story also featured Ralph Barlow, director of the Tampa FCC District Office, picking up Brewer’s gauntlet: “Sooner or later I’ll nail him.”⁷⁰

Following the raid Brewer laid low for two years and ignored his fine; then the Party Pirate went back on the air. While one hand flipped the FCC the bird the other filed an application for a temporary experimental station license. As the paperwork worked through the system field agents in Tampa set up a sting involving Brewer's (legitimate) two-way radio business. An undercover agent bought a fully-assembled 20-watt FM transmitter for \$560. The transmitter was not certified by the FCC, which made it illegal to market domestically.⁷¹ The sting netted Brewer an additional \$10,000 fine.⁷² Then the FCC revoked Brewer's amateur radio licenses and fined him another \$11,000 for good measure.⁷³

Another microbroadcaster hit in the 16-station Florida raid spree, Lonnie Kobres, endured even harsher treatment. Kobres ran Lutz Community Radio for several years out of his home and broadcast both local and syndicated talk radio programs. A self-identified "Christian Patriot," Kobres' response to FCC contact was to deny their authority, based mainly on the intra-interstate commerce distinctions of yore. After a station raid in 1996 Kobres returned to the airwaves more defiant than before. As part of the sweep in 1997 Kobres was indicted on 14 counts of unlicensed broadcasting. He first attempted to defend himself but acquiesced to representation for his jury trial.⁷⁴ On February 25, 1998 the jury returned a verdict of guilty.⁷⁵ Kobres was sentenced to six months of home detention with electronic monitoring, three years of probation, and fined more than \$8,000⁷⁶ - the first person since George Fellowes to be criminally convicted of unlicensed broadcasting, and the first ever to do the time for the crime.⁷⁷

In exceptional circumstances the FCC can demonstrate something akin to ingenuity in resolving cases of unlicensed broadcasting without all of the messy and time-consuming steps of its regular enforcement process, especially if it fails to find an actual person to pin a violation on. In early 1999 the collective behind Free Radio Austin (Texas) sent the FCC a letter requesting a license waiver to operate their 70-watt FM station; after no response, the station went on the air sans license in April. It lasted less than two months before an FCC agent showed up and demanded the transmitter, which the volunteer on-air at the time willingly relinquished. Free Radio Austin acquired a replacement and broadcasts resumed in August. More than a year of relatively peaceful operations ensued: the FCC sent certified letters to the address where the station was based but the correspondence was refused. A field agent from Houston made four

trips to Austin during this period to monitor the station and verify its location.

On October 10, 2000 a team of Federal Marshals raided Free Radio Austin. The rebound took three days: volunteers regrouped, found replacement gear, moved to a new location, and resumed broadcasts unbowed. The FCC and Federal Marshals returned on November 6. They found the transmitter buried in the backyard, sealed inside an oil-filled pot encased in a crypt of cement covered with steel rebar.⁷⁸ It took several hours (and borrowed shovels) before the FCC completed the day's mission. As agents dug their own hole a crowd of Free Radio Austin supporters watched, jeered, and chanted, "Congress shall make no law abridging the freedom of speech" from the other side of a neighbor's fence.⁷⁹

The FCC did not take the humiliation lightly. Less than a week after the raid, three members of the Free Radio Austin collective were served with papers announcing the FCC's pursuit of an injunction against them and "any and all John and Mary Does found operating an unlicensed station on 97.1 MHz."⁸⁰ A temporary injunction was issued November 13, 2000, and by February, 2001 the FCC had it made permanent as an amendment to routine proceedings finalizing the seizure of the station's equipment; those permanently enjoined did not find out until after the fact. Fighting the underhanded move carried the risk of outing other members of the station collective, and rather than face that potential consequence Free Radio Austin conceded the case.⁸¹

John Winston, the FCC's number-two man for enforcement, admitted by late 1997 that complaints about unlicensed broadcasting had "greatly increased"⁸² yet field enforcement efforts were still sporadic and slow, so much so that at least one complainant in Ohio got his case resolved only after threatening an appeal to state courts for relief.⁸³ Secure in the sanctity of the law, the FCC went through its typical motions of dealing with unlicensed broadcasters in the 1990s and, even though it forced several high-profile microradio activists off the air, it barely made a dent in the proliferation of stations. This would begin to change in 1998, first on the enforcement front, as the FCC concertedly stepped up field activities against pirate radio at the behest of the broadcast industry.⁸⁴ At a meeting on January 12, 1998 the National Association of Broadcasters' Radio Board of Directors approved a resolution that became known to microradio activists as a "declaration of war." It read in part:

These unlicensed broadcast facilities undermine the Communications Act...and often cause interference to broadcast and other radio services, such as air navigation. We commend the enforcement efforts of the FCC and Department of Justice and urge additional enforcement activities including the creation of a task force within the D.O.J. We stand ready to support the government's effort to eliminate unlicensed radio broadcast stations in the United States.⁸⁵

The charge of causing interference to aircraft was grossly alarmist. The vast majority of microradio station operators took great pains to prevent interference problems. Such technical specificity resonates with notions of responsible stewardship and use of a public resource: minimizing the risk of interference also reduces the chance of complaints to the FCC, thereby increasing operational longevity.⁸⁶ But the smears continued: popular pirate KBLT in Los Angeles was profiled on the CBS Evening News that April, as part of a segment called “Lie, Cheat, Steal” which portrayed a seediness about pirate radio that was far from honest.⁸⁷ Some licensed broadcasters even took enforcement into their own hands: in November, 1998 “Black Cat Radio” was raided while broadcasting from parking garage at the University of Memphis by campus security operating at the behest of a local NPR affiliate, whose engineer personally confiscated the pirates’ transmitter.⁸⁸

In response to the NAB resolution, microradio activists redoubled their efforts to spread the knowledge and technology of microradio around the country. This culminated in a mostly-symbolic “march on Washington” on October 5, 1998. More than 100 people turned out with puppetry and backpack-transmitters to broadcast from in front of the headquarters of the FCC and NAB.⁸⁹ At NAB HQ someone ran down the organization’s flag and sent the skull and crossbones up the pole; two people were briefly detained by police for the stunt.⁹⁰

The relatively sophisticated level of coordination and flexibility demonstrated by microbroadcasters greatly assisted in the proliferation of unlicensed stations and put pressure on the FCC to control their spread - which it utterly failed to do. Strings of court victories had no bearing on effective enforcement. This incongruity could not continue. The agency was caught flat-footed by the politicization of unlicensed broadcasting. The radio industry would not get the national pirate purge it hoped for. Instead it found itself on desperate defense against a drive to lend microradio some legitimacy. It would take an act of Congress to prevent that from happening.

Notes to Chapter 5

1. Walker, p. 208.
2. Soley, p. 66-67.
3. Black Rose, "Zoomin' - Zoom Black Magic Radio - The Story of Zoom," *Rock Out Censorship*, circa 1994 (September 14, 2003), <http://www.theroc.org/roc-mag/textarch/roc-16/roc16-06.htm>.
4. Ron Sakolsky, "Frequencies of Resistance: The Rise of the Free Radio Movement," in Ron Sakolsky and Stephen Dunifer, eds., *Seizing the Airwaves: A Free Radio Handbook* (San Francisco: AK Press, 1998), p. 69-70.
5. Soley, p. 74.
6. Walker, p. 209-210.
7. Quoted in Ron Sakolsky, "Zoom Black Magic Liberation Radio: The birth of the micro-radio movement in the USA," in Bruce Girard, ed., *A Passion for Radio: Radio Waves and Community* (Montréal: Black Rose Books, 1992), p. 87.
8. Soley, p. 75.
9. Walker, p. 212-213.
10. Coopman, "Herding Cats: Anarchism, Organization and Free Radio," paper presented at the Western States Communication Association Annual Convention, Sacramento, CA, February 25-29, 2000, *Rogue Radio Research* (August 6, 2003), <http://www.roguecom.com/rogueradio/herdingcats.html>.
11. Walker, p. 216.
12. Soley, p. 88.
13. Coopman, "FCC Enforcement Difficulties," p. 592.
14. Richard Edmonson, *Rising Up: Class Warfare in America from the Streets to the Airwaves* (San Francisco: Librad Press, 2000), p. 99-100.
15. Coopman, "Free Radio vs. the FCC: A Case Study of Micro Broadcasting," Paper presented in the Mass Communication Division at the annual meeting of the National Communication Association, Chicago, IL, November, 1997 (August 6, 2003), <http://www.roguecom.com/rogueradio/casestudy.html>.
16. Walker, p. 218.
17. Soley, p. 76.

18. Coopman, "Pirates to Micro Broadcasters: The Rise of the Micro Radio Movement," paper presented at the Western States Communication Association convention, Monterey California, 1997, *Rogue Radio Research* (August 8, 2003), <http://www.roguecom.com/rogueradio/TCoopman.html>.

19. Id.

20. Id.

21. See 47 C.F.R. § 74.1231 (2003) et. seq.

22. 47 C.F.R. § 74.1231(f-h) (2003).

23. Coopman, "Pirates to Micro Broadcasters."

24. *Memorandum and Order Denying Plaintiff's Motion for Preliminary Injunction and Staying This Action*, No. C 94-03542 CW (N.D. Cal. 1995) (May 4, 2003), <http://www.nlgcdc.org/briefs/dunifer.txt>.

25. Edmonson, p. 254.

26. Id., p. 252.

27. See Id., p. 255, and Soley, p. 121, where NAB attorney Jack Goodman calls the license function restricting public access to the airwaves "the absolute bedrock of FCC regulation."

28. Edmonson, p. 245.

29. *William Leigh Dougan v. FCC*, 21 F.3d 1488 (9th Cir. 1994); Dougan was ultimately fined \$17,500 for unlicensed broadcasting but it is unclear whether the FCC actually collected on the forfeiture.

30. National Lawyer's Guild Committee on Democratic Communications, "Free Radio Berkeley Wins Round in Court," *DIYmedia.net*, November 13, 1997 (May 4, 2003), <http://www.diymedia.net/feature/micro/f111397.htm>.

31. *United States of America v. Stephen Paul Dunifer*, 997 F. Supp. 1235 (N.D. Cal. 1998); aff'd, 219 F.3d 1004 (9th Cir. 2000). Incidentally, the Ninth Circuit affirmed the decision on different grounds than Wilken's. It put more weight on the FCC's assertion that constitutional challenges to broadcasting regulations properly belong under the jurisdiction of the Courts of Appeal. Since Dunifer was the only person affected by the ruling, other station volunteers regrouped and established Berkeley Liberation Radio, which remains active despite at least one subsequent station raid. Another microradio station in the Berkeley area, "Radio Sonida," broadcasts only on weekends; it's also run by a former Free Radio Berkeley DJ. See Marcelo Ballve, "'Pirate' Radio in the Barrio," *Pacific News Service* via *AlterNet*, December 30, 2003 (January 19, 2004), <http://www.alternet.org/story.html?StoryID=17449>.

32. Coopman, "Hardware Handshake: Listserv forms Backbone of National Free Radio Network," *American Communication Journal* 3 (2000) (August 9, 2003), http://acjournal.org/holdings/vol3/Iss3/articles/ted_coopman.htm.

33. See 47 C.F.R. § 73.512, which phased out the licensing of FM stations operating at power levels of less than 100 watts, except in Alaska, after June 1, 1980.

34. *United States of America v. Jerry Szoka*, 260 F.3d 516 (6th Cir. 2001).

35. *Grid Radio and Jerry Szoka v. Federal Communications Commission*, 278 F.3d 1314 (D.C. Cir. 2002); cert. denied, 123 S. Ct. 82 (2002). The NAB felt compelled to intervene with a brief in this case as well.

36. *Id.* at 1322.

37. *United States of America v. Any and all radio station equipment, radio frequency power amplifiers, radio frequency test equipment associated or used in connection with the transmission at 97.7 MHz, located at 1400 Laurel Avenue, Apartment 1109, Minneapolis, MN 55403*, 976 F. Supp. 1255 (D. Minn. 1997).

38. *United States of America v. Any and All Radio Station Transmission Equipment, Radio Frequency Power Amplifiers, Radio Frequency Test Equipment, and any other equipment associated with or used in connection with the transmission at 97.7 MHz, located at 1400 Laurel Avenue, Apartment 1109, Minneapolis, MN 55403*, 207 F.3d 458 (8th Cir. 2000); reh'g denied, 2000 U.S. App. LEXIS 15698 (July 5, 2000); cert. denied, 531 U.S. 1071 (2001).

39. *Id.* at 463.

40. *Free Speech et al. v. Reno et al.*, 1999 U.S. Dist. LEXIS 912 (1999) at 9.

41. *Free Speech et al. v. Reno and FCC*, 1999 U.S. Dist. LEXIS 3058 (S.D. N.Y. 1999); aff'd, 200 F.3d 63 (2nd Cir. 1999).

42. 200 F.3d at 65.

43. *United States of America v. Any and All Radio Station Transmission Equipment, et al., Located at 2903 Bent Oak Highway, Adrian, Michigan*, 19 F. Supp. 2d 738 (E.D. Mich. 1998).

44. *Id.* at 746.

45. *United States of America v. Any and All Radio Station Transmission Equipment (Strawcutter), United States of America v. Any and All Radio Station Transmission Equipment (Maquina Musical)*, 204 F.3d 658 (6th Cir. 2000).

46. Paul Wetter, "Strawcutter ordered off the air -- again," *Adrian Daily Telegram*, October 6, 2001 (May 3, 2003), online at <http://radiofreenawee.freeservers.com/telegram1.html>.

47. 42 U.S.C. § 2000bb et seq.

48. *United States of America v. Any and All Radio Station Transmission Equipment, Radio Frequency Power Amplifiers, and Any Other Equipment Associated With or Used in Connection With the Transmission at 106.3 MHz., Located at 103 Locust Street, Lancaster, Pennsylvania*, 1999 U.S. Dist. LEXIS 13967 (E.D. Penn. 1999).

49. *Id.* at 14, 15.

50. *Radio Luz et al. v. FCC et al., Radio Vida, et al. v. FCC et al.*, 88 F. Supp. 2d 372 (E.D. Penn. 1999); *aff'd*, 213 F.3d 629 (3rd Cir. 2000).

51. See *United States of America v. Any and All Radio Station Equipment, Radio Frequency Power Amplifiers, Radio Frequency Test Equipment and Any Other Equipment Associated With or Used in Connection With Any Radio Transmissions on Frequency 93.1 MHz Located at 200 Griggs Street, S.W., Grand Rapids, Michigan*, 1999 U.S. Dist. LEXIS 18846 (W.D. Michigan 1999), and *United States of America v. Any and All Radio Station Equipment, Radio Frequency Power Amplifiers, Radio Frequency Test Equipment and Any Other Equipment Associated With or Used in Connection With Any Radio Transmissions on the Frequency of 95.1 MHz Located at 2151 Jerome Avenue, 2nd Floor Bronx, New York 10453*, 99 F. Supp. 2d 414 (S.D. N.Y. 2000).

52. Codified at 44 U.S.C. § 3501 (2000).

53. *United States of America vs. Roy Neset*, 10 F. Supp. 2d 1113 (D. N.D. 1998).

54. *United States of America v. Roy Neset*, 235 F.3d 415 (8th Cir. 2000); *reh'g denied*, 2001 U.S. App. LEXIS 5559 (2001); *cert. denied*, 534 U.S. 824 (2001).

55. Coopman, "FCC Enforcement Difficulties," p. 591.

56. *Id.*, p. 582.

57. See Peter Brinson, *The Free Radio Movement, Its Impact on Radio, and Implications for Democracy in Media* (Sarasota, FL: Undergraduate honor's thesis in Sociology, New College of Florida, 2002), p. 73-79.

58. *Id.*, p. 84-90.

59. Coopman, p. 595.

60. V-Man, "Free Radio Santa Cruz 96.3 FM Visited by FCC; Stays On Air in Defiance," *MA Infoshop News Kiosk*, January 16, 2000 (January 13, 2004), <http://www.infoshop.org/news5/radio1.html>.

61. Kantako's recording of this raid can be heard online: see "The Federal Raid on Human Rights Radio," October 5, 2000 (January 13, 2004), <http://www.radio4all.net/proginform.php?id=2146>. Within a month Kantako had a replacement transmitter and was back on the air.

62. The FCC has yet to return.

63. Coopman, "Pirates to Micro Broadcasters."

64. Walker, p. 225-226.

65. Carpenter, p. 187-189.

66. Florida, especially southern Florida, has long been a hot spot of unlicensed broadcast activity in the United States. Many of these stations do not have politics at heart and therefore do not widely communicate with microradio activists around the country. Instead, most of Florida's pirates are generally set up to serve specific (often ethnic) communities with information and entertainment of a more indigenous fare than what can typically be found on your local Clear Channel station cluster. Many of these outlets are commercial in nature, running advertisements for neighborhood establishments. Some stations even host public events for listeners. This is an area of tragically little exploration, almost as if south Florida were an enclave of activity separate from the rest of the country: little is known about the stations themselves and the whos or whys behind them. See Carpenter, p. 113-121 and Walker, p. 236-238.

67. Alexander Cockburn, "Free Radio, Crazy Cops, and Broken Windows," *The Nation*, vol. 265, iss. 20 (December 15, 1997), p. 9. Ted Coopman notes these raids occurred just a week after Judge Wilken denied the FCC summary judgment in the *Dunifer* case, implying that they may have been coordinated as a show of force to dispel the notion that the agency's court setback somehow legitimized microbroadcasting. See Coopman, "FCC Enforcement Difficulties," p. 586.

68. *In the Matter of Leslie D. Brewer Tampa, Florida*, 12 FCC Rcd 13490 (August 29, 1997).

69. See "L.D. Brewer Photo Gallery" (January 13, 2004), <http://www.ldbrewer.com/pirate/pirate/gallery/index.html> for Brewer's own station scrapbook, including the custom live-remote van and a candid shot of FCC field agents on the prowl.

70. Quoted in Bruce Orwall, "Mr. Brewer the Pirate Doesn't Rule Waves, He Just Makes Them," *Wall Street Journal*, October 21, 1997, p. A1.

71. Just because a transmitter may be non-certified does not necessarily mean it will generate interference. The process of FCC certification is expensive, involving a regimen of engineering proofs and laboratory testing. Vendors of fully-assembled broadcast transmitters, if they desire to sell to licensed U.S. broadcasters, must submit their equipment for certification. There are several establishments, many of them located overseas, content to sell their non-certified yet high-quality transmitters and transmitter kits to other markets.

72. *In the Matter of Leslie D. Brewer, Tampa, Florida 33617*, FCC DA 00-475 (March 3, 2000).

73. *In the Matter of Leslie D. Brewer, Licensee of Amateur Radio Station and General Class Operator License KC4HAZ, Licensee of Station KAE1170 in the General Mobile Radio Service, Tampa, Florida*, FCC DA 01-1489, EB DOCKET NO. 01-61 (June 26, 2001).

74. On the second day of his three-day trial, Kobres' attorney actually submitted three motions for dismissal. One dealt with the inter/intrastate commerce issue; the second alleged the FCC's licensing procedures were not properly promulgated as administrative rules, in violation of the Administrative Procedures Act (5 U.S.C. §552 et. seq.); and the third claimed FCC license documents were not properly marked as government forms, in violation of the Paperwork Reduction Act (*a la* Roy Neset's case in North Dakota). The motions were summarily dismissed. Kobres has posted the text to all three, as well as other relevant materials from the case and his previous 1996 run-in with the FCC at his personal web site, *Criminalgovernment.com* (January 14, 2004), <http://www.criminalgovernment.com/docs/>.

75. Sarah Foster, "'Pirate' broadcaster guilty on 14 counts," *WorldNetDaily*, February 27, 1998 (January 14, 2004), http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=16580.

76. Carolyn Frankhanel, "The First Low-power Broadcaster Ever Receives Criminal Sentence," *Grass Roots Journal*, July 14, 1998 (January 15, 2004), online at http://www.criminalgovernment.com/docs/lk/lk_1.html.

77. Kobres' appeal to the 11th Circuit was denied in an unpublished per curiam decision; see Lonnie Kobres, "U.S. Court of Appeals Ignores Law in Vindictive Prosecution of Politically Incorrect," *Criminalgovernment.com* (January 14, 2004), <http://www.criminalgovernment.com/docs/lk/appeal.html>.

78. The underground installation was filmed for a documentary video produced on the microradio movement. The specific clip can be viewed online; see Anderson, "Free Radio - A Documentary Video," *DIYmedia.net*, <http://www.diymedia.net/video/real/fratx.ram>.

79. This entire episode was also caught on camera, both by home videographers and at least one local television station who sent a crew following a tip from a Free Radio Austin volunteer. The last five minutes of Free Radio Austin's broadcast was also taped: as an off-the-hook phone haunts the background you can clearly hear the sound of Federal Marshals smashing in a window to gain entry to the studio. Jerry Chamkis, the broadcaster on the air at the time, spends several several minutes prior to the forced entry begging to see the search warrant. See V-Man, "Freak Radio: Raid on Free Radio Austin," *Radio4all.net*, October 10, 2000 (February 25, 2004), <http://www.radio4all.net/proginfo.php?id=2172>.

80. Emily Pyle, "The Death and Life of Free Radio," *Austin Chronicle*, vol. 20, no. 43, June 22, 2001 (January 15, 2004), http://www.austinchronicle.com/issues/dispatch/2001-06-22/pols_feature.html.

81. Free Radio Austin Collective, "Open Letter from the Free Radio Austin Collective," *Austin Chronicle*, vol. 20, no. 17, December 22, 2000 (January 15, 2004), http://www.austinchronicle.com/issues/dispatch/2000-12-22/pols_naked4.html.

82. Quoted in Jim Hanas, "Making Waves," *Memphis Flyer*, November 27, 1997, p. 17.

83. See Walker, p. 220-221, which details the case of FM pirate “Radio Maranatha” in Cleveland and complaints of interference to WKSU, the NPR affiliate at Kent State: “[WKSU]’s attorney approached the FCC and said it had three days to enforce the law...[otherwise] the Kent station would apply for a temporary restraining order from the Cuyahoga County courts, thus transferring jurisdiction from Washington to Ohio. Almost instantly, the FCC made its move, and in March [1998] Maranatha left the air.”

84. See Chapter 2, n. 25 and supporting text.

85. Stephen Dunifer, “NAB’s Declaration of War,” *Radio4all.org*, January 25, 1998 (January 14, 2004), <http://www.radio4all.org/news/nabwar.html>. The NAB had panel discussions on pirate radio at its conventions in both 1997 and 98. *Dunifer* attorney Louis Hiken spoke at the 1998 gathering to a cordial yet critical audience; see Louis Hiken, “Broadcasting, the Constitution, and Democracy,” paper presented at the National Association of Broadcasters Annual Convention, Las Vegas, Nevada, April 6, 1998, (April 2, 2004), <http://www.radio4all.org/news/nabdoc.html>.

86. While the FCC did attempt to adopt this line as well, an excellent report published by Fairness and Accuracy in Reporting shot the spin down before it fully took root. Two journalists filed a Freedom of Information Act request with the Federal Aviation Administration asking for any documentation of broadcast-related interference to air traffic communications. It turned up nothing involving pirates, but they did receive a mountain of documentation about regular problems with interference from licensed stations. See Tracy Jake Siska and Dharma Bilotta-Dailey, “FCC’s Interference Argument Grounded,” *Extra!*, January/February 1999 (February 3, 2004), <http://www.fair.org/extra/9901/faa.html>.

Interference to aircraft communications by broadcast radio stations is a long-standing issue, but they are not the only culprit; interference also occurs from improperly shielded electric motors on industrial machinery, garage door openers, inadequately-grounded power lines, and even clandestine transmitters at the Pentagon, which once caused massive interference to FAA ground control at Washington, D.C.’s National Airport. See Institute of Electrical and Electronics Engineers and Electronic Industries Association, Joint Technical Advisory Committee, *Spectrum Engineering - The Key to Progress* (New York: Institute of Electrical and Electronics Engineers, 1968), Supp.1, p. 49-54.

Id. at Supp. 7, p. 30 contains a gem about the U.S. military’s reactivation of “a high-powered transmitter on the West Coast” in 1965 which caused “garage doors [to go] berserk over an area covering seven states every time the transmitter was keyed,” which further balances the perspective on microradio’s relative potential to cause significant interference concerns. This issue is more thoroughly explored in Chapter 6.

87. See Carpenter, p. 175-178.

88. Brinson, p. 94-95.

89. See Mike Fluggenock’s excellent multimedia report on the protest, “Against FCC/NAB suppression of community radio, Washington, DC 10.05.98,” *Mikey’zine*, n.d. (January 16, 2004), <http://www.sinkers.org/microradio/>.

90. The NAB never did get its flag back.

Chapter 6. The FCC and LPFM

As the tripartite war of words between the radio industry, microbroadcasters, and the FCC reached fever pitch during the 1990s, two petitions for rulemaking were submitted to the FCC seeking the legalization of a new class of low-power community radio stations.¹ The first was filed in July of 1997. Its authors, Nickolaus and Judith Leggett and Don Schellhardt, had no prior broadcasting experience but recognized the changes that had swept the radio landscape in the wake of the 1996 Telecom Act. They wanted an alternative to “the current situation, where broadcasting is limited to wealthy corporations. The only direct citizen access provided currently on broadcast radio is an occasional minute or two on talk radio.”² Their petition asked the FCC to reserve one AM and one FM channel across the nation for “microstations” operating at power levels of one watt or less. They could be commercial or noncommercial, and would have license terms running five years, with the cost of a license and renewal pegged at \$50. No single entity could own more than five microstations.³

The second petition for rulemaking was filed in February, 1998 by J. Rodger Skinner, Jr., founder of TRA Communications Consultants, Inc. Skinner, a successful broadcast engineer and low-power television station owner in Florida, stood to lose his LPTV station during television’s (still-ongoing) transition to digital. “LPFM,” as Skinner called it, would not only keep him in the station ownership game but might work to counterbalance the increasing consolidation of radio generally. He also suggested an LPFM service as a potential relief valve for the growing phenomenon of unlicensed microradio: while he did not condone the practice, “it should be noted that there are large numbers of people all across America taking to the airwaves, knowingly risking fines and censure, and even criminal charges...just to be heard....This fact speaks volumes and clearly demonstrates the demand for this new broadcast service.”⁴ Later, Skinner would refer to his LPFM proposal as a “win-win situation” for broadcasters, both licensed and otherwise: “[T]hose serious about getting heard on the airwaves will have an outlet. Corporate broadcasters and the NAB can continue doing their thing and the FCC can take pride in providing a much needed service...The bulk of the “pirate radio” problem will disappear since they will be happily broadcasting (legally) and providing interesting listening alternatives and much needed localism along the way.”⁵

Technically, Skinner's proposal called for three tiers of LPFM stations, ranging in power levels from 50 to 3,000 watts. Local ownership would be required; the amount of regulatory oversight would increase with each tier; stations could be commercial or noncommercial in nature but would be sited only on frequencies in the commercial FM spectrum (92.1 MHz and above).⁶ Most controversial was Skinner's proposal to eliminate second and third adjacent-channel restrictions on the placement of FM stations. The explanation which follows is overly simplistic but adequate for the purpose: under FCC broadcast interference rules for full-service FM radio stations, proposals for new stations had to conform to rules that would minimize the risk of interference between the new station and stations located on the dial as many as three channels away from the selected frequency.⁷ For example, in a hypothetical community, if a broadcaster wanted to apply for a license on 95.1 MHz, he/she would have to demonstrate that their station would not interfere with nearby stations located at 94.5, 94.7, 94.9, 95.3, 95.5, and 95.7 MHz - three channels above and below the proposed frequency. Given the crowded nature of the FM dial in most urban areas of the country, it would be nearly impossible to site many new LPFM stations without modifying these rules.

Skinner justified this modification using the FCC's own regulatory history. He crafted what was essentially a literature review of FCC rulemakings, court cases, and other policy proceedings to demonstrate how the agency has incrementally relaxed (and in some cases directly ignored) third and sometimes even second-adjacent FM channel protection rules, a trend whose genesis Skinner tracked to 1962.⁸ If the FCC adopted Skinner's suggestion to its extreme, our hypothetical LPFM station on 95.1 would only have to worry about protecting those stations one channel away on the FM dial (94.9 and 95.3 MHz). The net effect of this potential change would open up FM channels currently precluded from use by full-power stations, including possible frequencies in large cities. Ultimately Skinner estimated any additional interference from an LPFM station would be "very small...around the immediate vicinity of the LPFM transmitter site and based on the low power being used [it] would be a very small area indeed, probably in the neighborhood of a hundred feet or less, if at all."⁹

The FCC's initial circulation of these petitions for public comment generated an incredible flurry of responses from both the public and the broadcast establishment. The general

tenor of comments from the public enthusiastically favored the plan; they mostly cited consolidation in the radio industry along with a resultant perceived lack of diversity and localism in programming choices. The Leggetts and Schellhardt amended their petition through this comment process to request a suspension of enforcement efforts against microbroadcasters pending the outcome of any proposed rulemaking.¹⁰ Some current and former unlicensed broadcasters also filed comments in support of a new low power radio service, with a few noting that they had already demonstrated both its need and efficacy.¹¹ Those opposed included, predictably, the National Association of Broadcasters and 43 state broadcasters' associations, who fretted over the potential for interference from the new stations, the administrative and enforcement burden LPFM would create for the FCC, and concerns involving radio's transition to digital broadcasting. They were echoed by the likes of National Public Radio and broadcast companies both large and small, some of whom believed the legalization of a low power radio service would somehow legitimize and "reward" the microradio movement that had grown over the decade.¹²

As the issue was now both popular and political, FCC staff carefully digested the comments and issued a Notice of Proposed Rulemaking on January 28, 1999.¹³ In it the agency initially proposed three classes of LPFM stations, defined by power: the top range would be limited to 1,000 watts, the second to 100, and the third (dubbed "microradio") would function at 1 to 10 watts. It proposed meeting Skinner halfway on relaxing FM channel spacing rules: only third-adjacent channel restrictions would be waived initially but second-adjacent channel spacing was left open for further consideration. The FCC acknowledged that several full-power FM stations were already grandfathered onto frequencies where the second-adjacent channel was occupied and "we had not received any complaints of interference....We found only a small risk of interference in that context, which was outweighed by improved service."¹⁴ The FCC also generally favored local control and a national cap on station ownership, as well as a minimal level of service (defined both by broadcast hours and programming content). There was even an olive branch for microradio activists: "We seek comment on the propriety of accepting as licensees...parties who may have broadcast illegally but have promptly ceased operation when advised by the Commission to do so, or who voluntarily cease operations within ten days of the

publication of the summary of this *Notice* in the *Federal Register*.”¹⁵

Public comment on the LPFM proposal again flew fast and furious; during 1999 several thousand comments were filed, smashing all previous records for public input on any policy initiative in the FCC’s history. Like the initial round(s), these comments ran heavily in favor of the new service. They came mostly from members of the public, amateur and unlicensed radio operators, and many independent commercial and community broadcasters. Opposition spewed forth from the NAB, NPR, and higher-level members of the radio industry - broadcast station owners, executives, and managers. They harped on the supposed danger of interference: a concern the FCC had already considered and dismissed as *de minimis*. Both friend and foe produced reams of technical study to supplement their positions, and as often happens in policy battles involving esoterica, each side used different measurement standards for determining the interference potential of an LPFM station. Those in favor presented evidence suggesting a minimal risk of static while those opposed worked the math to present the worst-case scenario.¹⁶

A. Congressional Meddling Into LPFM

Momentum was definitely in favor of the FCC’s approval of some sort of legalized microradio; incumbent broadcast interests sensed this and began mobilizing politically beyond the FCC. Within a month of its initial Notice of Proposed Rulemaking on LPFM in January, 1999, letters began arriving at Chairman William Kennard’s office from members of Congress weighing in on both sides of the issue. Pro-industry forces in the House of Representatives introduced the “Radio Broadcasting Preservation Act”¹⁷ (RBPA) on November 17, 1999 - before the FCC had even voted on its rulemaking. The RBPA was initially written in such a manner as to preclude the FCC from enacting any LPFM service at all and would have rolled back any service implemented before Congress had its say.

The Federal Communications Commission moved forward with LPFM on January 20, 2000, when it released its first Report & Order outlining the rules for the new service.¹⁸ In partial capitulation to pressure from incumbent broadcasters on the issue of interference, LPFM stations would be exempt from third-adjacent channel spacing rules but second-adjacent channel restrictions would be maintained, and LPFM stations were capped at a maximum power of 100 watts. After reviewing the multiple interference studies and conducting its own tests, the FCC

judged the risk of potential interference under this scaled-back plan to be so minimal as to be far outweighed by the benefit of the additional programming the new stations would make available. In addition, LPFM stations would also be strictly noncommercial, and applicants would be awarded licenses based in part on promises to broadcast a minimum number of hours of local programming. After it doled out an inaugural round of 100-watt licenses the FCC planned to implement a second tier of LPFM stations operating at 10 watts or less. On the question of unlicensed broadcasting, the Commission stuck to its qualified offer of amnesty to microradio activists:

We are persuaded to...accept a low power applicant, who, if at some time broadcast illegally, certifies, under penalty of perjury, that: (1) it voluntarily ceased engaging in the unlicensed operation of any station no later than February 26, 1999, without specific direction to terminate by the FCC; or (2) it ceased engaging in the unlicensed operation of any facility within 24 hours of being advised by the Commission to do so.¹⁹

The Commission itself split 3-2 along party lines to green-light LPFM. Chairman William Kennard, a Democrat, hailed the proposal as a positive step toward counteracting the effects of consolidation within the radio industry, and chided public and commercial broadcasters for their overblown concerns about interference: “I’m skeptical when concerns like administrative expense and convenience are invoked to justify the exclusion of new competitors and new services from the marketplace.□That’s like saying that were not going to issue any more drivers licenses because there are too many speeders on the road - it just doesn’t make sense.”²⁰ The most vehement opposition came from Republican Commissioner Harold Furchtgott-Roth, who portrayed the rulemaking as an FCC capitulating to a campaign of electronic civil disobedience, discarding years of spectrum management policy in the process: “I don’t have any expectation that this proceeding will lead to the diminution of the pirate problem that we have today....I fear, at the end of the day, a lot of expectations have been raised - a lot of expectations that will not be met.”²¹ And Michael Powell, who would succeed Kennard as Chairman, split his LPFM vote:²²“We regularly consider the economics of our actions on licensees...while [LPFM stations] will not be direct competitors for advertising dollars to existing commercial stations, they can threaten the economic health of the stations in meaningful ways.”²³

Following the FCC vote to re-legalize microradio, the gloves came off on Capitol Hill. Sponsors of the Radio Broadcasting Preservation Act pushed the legislative override closer to a

vote. Instrumental to this was a hearing held in February of 2000 in front of the House Telecommunications Subcommittee, whose chair and vice-chair were original sponsors of the bill. While testimony was given both for and against the LPFM service, the most notable presentation came from industry witnesses, and they hyped the claims of interference to a preposterous degree. They used a laptop computer to construct samples of simulated LPFM interference, which they played to the Subcommittee with great fanfare as a realistic portrayal of the likely result radio listeners would experience from the addition of LPFM signals to the FM dial.²⁴ Copies of these audio samples were burned onto CDs and hand-delivered to every member of Congress, along with reams of lobbying materials.²⁵

On April 13, 2000, the Radio Broadcasting Preservation Act came to a vote on the House floor and was approved 274-110.²⁶ To bring the bill this far, however, incumbent broadcasters also compromised. The version approved by the House would not kill LPFM outright - but it would reestablish all the interference protection and channel spacing rules the FCC had waived to create more space for LPFM stations. Whereas the FCC's original LPFM plan contained the potential for thousands of new stations, the revised RBPA curtailed that by well more than half. Not surprisingly, the nation's urban areas suffered most. The House also directed the FCC to conduct a special study of LPFM interference and report its results back to Congress, who would hold final authority over any future expansion of LPFM - a somewhat unprecedented legislative interest in telecommunications regulatory minutiae.²⁷ Debate on the House floor ranged from threats for a Department of Justice investigation into the FCC for illegal lobbying against a rollback of LPFM (the agency had issued a "fact sheet" disputing misinformation distributed by NAB lobbyists)²⁸ to pleas for a presidential veto.²⁹

The Senate proved a more difficult sell: the Radio Broadcasting Preservation Act stalled at 36 cosponsors, and by September the NAB turned its efforts to attaching its bill as a rider to appropriations legislation.³⁰ As the 2000 general election drew nearer, LPFM became a contentious factor in some tight races. A group in Minnesota called Americans for Radio Diversity ran full-page newspaper ads in October chastising Senator Rod Grams (R-MN) for sponsoring the Radio Broadcasting Preservation Act. A week later the NAB, Minnesota Broadcasters Association, and Minnesota Public Radio financed a counter-advert supporting

Grams and the lobbying against LPFM.³¹ The NAB also began preemptive legal action; it filed a federal suit to block the implementation of the LPFM service on the grounds that the FCC did not adequately consider the potential interference threat it presented.³²

The lame duck session of the 106th Congress ground on. During closed-door committee negotiations the Radio Broadcasting Preservation Act was further revised and attached to an appropriations bill funding the Department of Commerce; that legislation cleared the House and Senate with ease.³³ In a moment of humility before the vote, Senator John McCain (R-AZ) stood on the Senate floor and lamented the legislative injustice about to be done:³⁴

I stand before these community-based organizations, these religious organizations, these people throughout these small communities all over America and say: I apologize.□ apologize to you for this action behind closed doors - that we're going to deprive you of a voice, of a very small FM radio station....I say to the National Association of Broadcasters and National Public Radio, shame on you.³⁵

Not only did Congress tighten restrictions on the placement of stations, but an additional provision prohibited the FCC from awarding an LPFM station to anyone who had previously broadcast without a license.³⁶ Microradio activists who conducted electronic civil disobedience were shut out from the fruits of their own risky resistance.³⁷

B. Microradio Challenges to the LPFM Rules

At least one microbroadcaster did not take the congressional excommunication from legalized microradio lying down. Greg Ruggiero, a previously pseudonymously-named plaintiff in Steal This Radio's lawsuit against the FCC, filed a petition for review with the D.C. Circuit Court of Appeals in 2001 that challenged the validity of the FCC's LPFM rules as amended based on the clause that barred microradio activists from participation. Ruggiero argued that the "pirate ban" amounted to an unconstitutional prior restraint on a class of people involved in political speech.³⁸

In a 2-1 decision, the D.C. Circuit vacated the "no pirates" provision of the FCC's LPFM rules.³⁹ "Finding nothing in the [Communications] Act, its legislative history, or the record before us to justify the character qualification provision's unique and draconian sanction for broadcast piracy," wrote Circuit Judge David Tatel for the majority, "nor to explain why a more limited restriction would not achieve Congress's objective, we hold that the provision and its

implementing regulation fail to meet this standard and are therefore unconstitutional.”⁴⁰

This decision stood for several months until the D.C. Circuit granted a rehearing en banc in early 2002; as a part of this process it vacated its initial ruling.⁴¹ In a 7-1 decision issued in 2003 the court reversed itself.⁴² The majority opinion, written by Chief Judge Douglas H. Ginsburg, reasoned that Ruggiero wanted the court to use a level of scrutiny on the LPFM rules more appropriate for content-based speech restrictions, which he did not feel were applicable to the case.⁴³ Ginsburg also ridiculed Ruggiero’s assertion that the anti-pirate clause was unconstitutional, calling the claim “nonsense on stilts”⁴⁴ - the judge interpreted the ban as a lawful extension of the Communications Act’s license requirement and resultant prohibition on pirate radio, in furtherance of the government’s long-stated (and legally defensible) goal of regulating the airwaves with an eye toward minimizing interference. Circuit Judge Tatel, now the lone dissenter, echoed his initial opinion:

The question here is whether unlicensed broadcasters, many of whom have already been punished for their misdeeds, may be subjected to a unique and draconian sanction that automatically and forever bars them--unlike any other violator of the Communications Act or regulations--from applying for low power licenses regardless of either the circumstances of their offenses or evidence that they can nevertheless operate in the public interest.⁴⁵

Tatel also did not believe that the pirate ban would substantially further the government’s interest with respect to its prohibition on unlicensed broadcasting: “If the threat of automatic and lifetime disqualification is insufficient to deter someone from broadcasting, that person is unlikely to experience a sudden change of heart simply because Congress retroactively extended an identical ban to microbroadcasters who operated illegally prior to [the creation of the LPFM service].⁴⁶

As is the case with 47 U.S.C. §301 itself, the FCC’s new LPFM rules have been more impressive on paper than in practice. At least one microradio station awaits dialogue with the FCC toward licensure. Joe Ptak, the founder of Micro Kind Radio in San Marcos, Texas, embraced microradio as an extension of prior free speech activism.⁴⁷ He wrote to the FCC requesting a license around the time he first put Micro Kind on the air in 1997, but the check he included (to cover processing costs) was returned.⁴⁸ The FCC fined Ptak \$11,000 in July, 1998: he responded with more correspondence which asserted general rights to freedom of speech, access to the airwaves, and his place in a larger movement of electronic civil disobedience

toward those goals. The FCC reaffirmed the fine on June 9, 1999 and dismissed Ptak's arguments. On the issue of microbroadcasting itself, the FCC noted the LPFM rulemaking then in-progress: "[The rulemaking is] in recognition of the growth in radio ownership consolidation over the past few years...and in response to the increasing public demand for additional outlets of public expression which could expand the diversity of voices. The proposed rules...are totally separate from the Commission's repeated efforts, as here, to terminate all unlicensed radio operations."⁴⁹

Undaunted, Ptak and David Huff, founder of microradio station Canyon Lake (TX) Radio, sued the FCC in federal court, seeking relief from further punishment. They broadly challenged the constitutionality of the FCC's licensing system, including the anti-pirate provision of the new LPFM rules. It took more than a year for the case to proceed to a hearing, and in the weeks beforehand the FCC persuaded District Judge Fred Biery to issue a temporary injunction against Ptak. Micro Kind voluntarily left the air on September 1, 2000 pending the outcome of its lawsuit.

They are still waiting. On September 29, 2000, Ptak, Huff, and the FCC met in Biery's San Antonio courtroom. According to Huff, after statements from both sides, "Judge Biery described plaintiffs Huff and Ptak as Modern-day Thomas Pa[i]nes" and suggested the parties work together to find some way to accommodate Micro Kind and Canyon Lake Radio within the LPFM service.⁵⁰ The FCC never followed through on Biery's suggestion - although it has neither moved to collect Ptak's forfeiture nor seek summary judgment to make his injunction permanent. So long as Micro Kind remains off the air, it would seem, the FCC is content to leave the case in limbo.

Similarly fortuitous twists of legal circumstance befell Prayze FM in Bloomfield, Connecticut: it began broadcasting in November of 1996 and had its first contact with the FCC four months later. A follow-up letter in January, 1998 warned the station to cease broadcasting; Prayze's founders responded in February with a lawsuit of their own. It claimed the lack of a licensing mechanism for FM stations of under 100 watts constituted a form of prior restraint. The FCC countersued and the cases were consolidated. A preliminary injunction was issued against Prayze in September, 1998; Prayze moved for a stay, which was denied in November. In the

interim, the station's founders applied to the FCC for an experimental radio license.⁵¹

Upon appeal to the Second Circuit in 1999, the injunction was vacated on the grounds that it was defective, devoid of findings of fact and improperly specified.⁵² The respite lasted less than a month before the District court issued a new injunction,⁵³ but the station returned to the air in defiance, claiming immunity on a technicality: if Second Circuit had retained jurisdiction in the case, the District court did not have the authority to issue new rulings like a revised injunction.⁵⁴ The FCC pressed for contempt proceedings against Prayze's founders, which were suspended in January, 2000 as the case returned to the Second Circuit.⁵⁵ A three-judge panel heard arguments in March, where again Prayze attacked the FCC's licensing rules on prior restraint grounds. The initial injunction was affirmed in June after the panel decided Prayze fell into the *Dunifer* trap - failing to exhaust administrative remedies before raising its regulatory challenge.⁵⁶

Back at the District court level, when the FCC moved for summary judgment in 2001, Judge Warren Eginton denied it. The passage of the Radio Broadcasting Protection Act - and specifically its anti-pirate provision - made it conceivable that any administrative remedies had been closed off to Prayze FM and its founders, which would give new standing to further explore the merits of its challenge to the license regime.⁵⁷ Craig Perra, one of the station's attorneys, thought Prayze might find more solid legal footing on fourteenth amendment (due process) rather than first amendment (prior restraint) grounds going forward: the station's possibility of obtaining a license waiver was chimerical. "The process, as we know it, is non existent," explained Perra. "There's no waiver form, there's no applications, there's no procedure for a waiver, they've never granted a waiver, there's no case law or administrative law governing waivers - they just don't exist."⁵⁸ Prayze ultimately decided to abandon its lawsuit citing lack of funds, but it is back on the air - on a subcarrier audio signal to a local TV station - which requires no license.⁵⁹

At least one microbroadcaster has successfully navigated both FCC enforcement and the LPFM licensing process - a situation Congress supposedly forbade. James Dispoto was fined \$2,000 in 1999 for operating an unlicensed radio station on 96.3 MHz from his parents' home in Ocala, Florida.⁶⁰ Dispoto challenged the forfeiture and pleaded an inability to pay. The FCC

affirmed the fine, however, after field agents surfing the World Wide Web found Megamix96.com - a site maintained by Dispoto that carried advertisements and sold station merchandise.⁶¹ Megamix96.com remains online, but now advertises “WJND-LP....Megamix 100.7, Ocala’s Dance Music Station”⁶² and the domain name is registered to Dispoto’s mother, Elaine. The 93-watt LPFM license of WJND-LP is held in the name of the “Pimeria Inglesia Bautista Hispanic Association.”⁶³ The FCC issued the station its construction permit in May, 2002⁶⁴ and its call sign the following month.⁶⁵ WJND-LP began initial broadcasts in January, 2003 from the Dispoto home, with in James in complete charge of programming. After broadcasting for several months, the station went off the air in the fall following a zoning dispute with Marion County over its antenna tower; WJND-LP can remain dark for up to a year before it must forfeit its license.⁶⁶ Most importantly, though, it *is* licensed.

C. Unlicensed Broadcasting in a post-LPFM world

If the FCC initially embarked upon the legalization of LPFM with the goal of dampening the microradio movement, it failed. While some of the high-profile figures involved in the proliferation of unlicensed microradio during the 1990s turned their attention full-time to the implementation and expansion of the new service,⁶⁷ they are being replaced by others disenchanted by the subversion of democracy that curtailed it. Some of these are people who first got interested in low-power radio through the FCC’s rulemaking only to be burned by congressional intervention: blowback from telecommunications policy manipulation at the behest of special interests detrimental to “the public interest.” Others, like Radio One Austin, took to the air before the FCC had finalized the details of LPFM, out of disgust at the incremental curtailment of the proposal.⁶⁸

“Monk,” the founder of KBFR (Boulder Free Radio) in Boulder, Colorado, closely followed the FCC’s progress toward legalized microradio, to the point of purchasing broadcast equipment shortly after the Commission’s January 20, 2000 vote.⁶⁹ At that point the FCC’s database of LPFM channels showed at least one available frequency in the Boulder area, and Monk prepared to apply for it. Over the following year, Monk witnessed the legislative evisceration of LPFM; suddenly there were no frequencies available in Boulder. In protest of the lost opportunity Monk decided to broadcast anyway.⁷⁰ KBFR first went on the air in 2001 and

since then has had multiple visits and warnings from the FCC.⁷¹

KBFR began with resistance in mind and it has developed into one of the tactically-savviest microradio operations in the country. The station's transmission equipment is kept in a van or moved around between various residences; whenever the FCC makes contact the gear moves to a preselected "clean" location, which so far has stymied the FCC's ability to pin down a responsible party.⁷² The studio is also physically disconnected from the transmitter, which further insulates the most valuable asset of any pirate station - its people - from harm. Using broadband Internet connections and wireless networking technology, KBFR's studio essentially webcasts to a computer wired into a transmitter. From a (as yet untested) legal standpoint, those producing the programming on KBFR have no control over what others might do with its perfectly legal online audio stream; broadcasting requires a license, but webcasting does not. To date KBFR has experienced no level of enforcement higher than pesky visits from FCC agents based out of Denver. The station now holds fundraisers at a local venue where bands play for its benefit and it is preparing to release a compilation of live performances recorded "from the van."⁷³

A more symbolic yet unprecedented level of coordinated microbroadcast protest occurred during the NAB's 2002 Radio Convention in Seattle, Washington. Dozens of activists from around the country converged on the city and set up multiple pirate stations during the convention. The "Mosquito Fleet" provided a field demonstration of the restrictiveness of the FCC's LPFM rules.⁷⁴ Unlicensed stations occupied 11 FM channels over the course of five days in metropolitan Seattle using transmitters ranging in power from 20 to 100 watts; this included a six-station anti-Clear Channel/NAB simulcast on the convention's opening day. All of the frequencies used were at least third-adjacent to a licensed FM station in the local area, technically off-limits to LPFM stations. Some microbroadcasters even operated just two channels away from local stations - validating the original scope of LPFM as initially considered by the FCC in 1999. Listener-conspirators infiltrated the lobby of the NAB convention site with portable receivers to give radio industry managers and executives a taste of pirate radio, live and direct. Although the FCC has a District Office in Seattle, there was no contact between field agents and the "Mosquito Fleet," nor were there any reports of interference from the mass

microbroadcasts.⁷⁵

A new round of legal challenges from microbroadcasters are shaping up as well, some from stations that predate the FCC's LPFM rulemaking. One involves San Francisco Liberation Radio ("SFLR"), begun during the days of Free Radio Berkeley. The station received its first visit from FCC field agent David Doon on September 22, 1993, while SFLR founder Richard Edmonson broadcast from his camper atop Potero Hill. Agent Doon called for backup from the local police who treated the incident like a felony stop. Edmonson was detained for an hour, then released without charges. As he left an SFPD officer asked Edmonson for the station's frequency one last time - in the spirit of an interested listener who might be tuning in later.⁷⁶

Between 1993 and 1998, Edmonson was repeatedly threatened with a fine; the station was visited by FCC agents multiple times and raided at least once.⁷⁷ However, after Judge Claudia Wilken's June, 1998 decision ended Stephen Dunifer's run on the air, SFLR shut down while Edmonson and his attorneys digested the legal development.⁷⁸ During the downtime Edmonson filed an application seeking a license or license waiver for Liberation Radio.⁷⁹ The self-imposed hiatus lasted nearly eight months - just two weeks past the FCC's January, 1999 decision to pursue an LPFM rulemaking. Citing inadequacies with the proposal, SFLR returned to the air: "We are disappointed...In designating micro stations, and so-called "LP-100" stations, with "secondary" status, the Commission appears to be contemplating a regulatory framework in which the future of such stations--particularly those in urban areas--will constantly be in doubt and subject to the whims of their larger neighbors on the dial."⁸⁰ A flurry of renewed postal posturing and periodic agent visits to the station followed, until the formal creation of the LPFM service in 2000. That June, when the license application filing window for California opened up, SFLR duly went through the motions of requesting a license.⁸¹

Nobody heard from the FCC again for three years, until agents left a Notice of Violation with station volunteers on July 2, 2003. Concerned that the renewed attention was a sign of worse punishment on the horizon, SFLR volunteers petitioned members of the San Francisco Board of Supervisors to pass a resolution endorsing the station and its struggle with the FCC. This it did unanimously on August 19.⁸² It did not mince words:

The Board of Supervisors of the City and County of San Francisco urges the Federal

Communications Commission not to interfere with the functioning of San Francisco Liberation Radio 93.7 FM; and be it

FURTHER RESOLVED, The Board of Supervisors of the City and County of San Francisco urges federal, state and local law enforcement officials to refrain from activities that prevent [SFLR]...from providing healthy democratic local media in the San Francisco Bay Area.⁸³

The FCC did not take the hint: it raided Liberation Radio again on October 15, 2003. More than two dozen police officers participated in the raid - nearly half of them from the SFPD.⁸⁴

Currently San Francisco Liberation Radio is off the air, the longest imposed period of silence for the station since it began broadcasting more than 10 years ago. In the meantime it is holding benefit fundraisers for its legal defense and equipment replacement funds. At an April 30, 2004 hearing on a motion to reclaim its seized equipment, SFLR attorney Mark Vermeulen argued the FCC's October raid occurred without adequate warning, depriving the station's volunteers of constitutionally-protected due process rights. District court Judge Susan Illston "took the station's request to dismiss the seizure under submission, but gave no indication when she would rule."⁸⁵

By contrast, radio free brattleboro's broadcast life span also predates LPFM, but it only came to the rapt attention of the FCC very recently, and its enforcement case appears to be escalating relatively rapidly. The 10-watt Vermont station was founded in July, 1998 by organizers with a local teen center to give adolescents an outlet for creative expression within the greater community. It was later moved to an apartment complex in downtown Brattleboro (population 12,000), and opened to the general public, where it broadcast for nearly five unmolested years.⁸⁶

rfb (station volunteers prefer its name uncapitalized), in the eyes of the residents of Brattleboro, is an incontestably integral part of the community. When the Brattleboro Public Library was forced to sacrifice its valuable Chelsea House Folklore Center collection of bluegrass, blues, and folk LPs for space to expand, it donated the collection to radio free brattleboro.⁸⁷ Television and film writer/director Henry (Peter) Tewksbury⁸⁸ retired from Hollywood to Brattleboro, where he became manager of cheeses at the Brattleboro Food Co-Op and authored a book on his new line of work.⁸⁹ Until his illness and death in 2003, he had a regular program on radio free brattleboro, where he would read aloud great works of fiction.⁹⁰

FCC agents first visited rfb on June 24, 2003. The station's 70+ volunteers were more startled than fearful. They spent six weeks off the air considering their next move. The catalyst to return to the air was the warning letter the agents had left behind. The letter asked the station to produce its "license or authority to broadcast" to avoid further penalty. rfb seized on latter part of the demand and, through its well-defined collective governance process, took the position that some *other* authority to broadcast existed separate from an FCC license. The station felt an onus to define that authority in order to remain on the air without one.

rfb resumed broadcasting in August, 2003 and launched petition drives both locally and via the Internet. Together they have collected more than 3,000 signatures. When FCC agents returned on September 4 and asked to see rfb's "license or authority to broadcast," volunteers in the studio shouted through the locked door, "The people of Brattleboro ha[ve] authorized us to do so," and offered to produce copies of the petitions. After shoving a warning letter through a mail slot threatening further enforcement action within 10 days, the agents turned to leave. By this point local citizens had heard (first on the air, then by word-of-mouth) that the FCC was in town. Some gathered near the station and shouted "Shame!" as the agents walked back to their car.⁹¹

That encounter may have caused the FCC to reconsider its enforcement tactics. On January 8, 2004, rfb received a letter and phone call from the U.S. Attorney's Office in Burlington. They advised the station to cease broadcasting or face legal action from the FCC.⁹² Between the FCC's last visit and the U.S. Attorney's contact the station won lukewarm support from the Brattleboro Town Selectboard: it approved a resolution favoring the expansion of community radio but avoided direct endorsement of rfb's unlicensed status.⁹³ rfb's volunteers had also submitted enough qualified signatures to put the question of "authority to operate" directly to the citizens of Brattleboro, in the form of a non-binding referendum: "Shall the voters of Brattleboro give to radio free brattleboro (rfb) authority to broadcast until such a time that a Low-Power FM license is issued to radio free brattleboro or to another non-profit, locally based, community group which is prepared to offer to the Town of Brattleboro diverse, all-access, non-commercial, community radio?"⁹⁴

Further correspondence flowed between the FCC and rfb via its local attorney, James

Maxwell, with the assistance of attorneys from the National Lawyer's Guild.⁹⁵ The station's primary complaint was the FCC's sloth with regard to the rollout of the LPFM service. radio free brattleboro, which only broadcast with 10 watts, had hoped to apply for an as-yet nonexistent 10-watt LPFM license.⁹⁶ Maxwell also noted rfb would have most likely been denied a license due to the anti-pirate clause in the rules mandated by Congress and summarized the station's efforts to demonstrate an alternate authority to broadcast.⁹⁷

On February 19, 2004, the FCC moved for an injunction to shut the station down. rfb filed its own suit against the FCC the same day; it restated its initial grievances and requested judicial relief from "seizure of Plaintiffs' microradio stations, confiscating their broadcast equipment, or otherwise interfering with their microradio broadcasts without prior notice and an opportunity to be heard on the issue of why an Order permitting the seizure of their microradio station equipment should not issue."⁹⁸

On March 2, 2004, voters in Brattleboro approved the rfb referendum of support by a margin just shy of two to one.⁹⁹ Two weeks later the FCC and rfb squared off in court. The result, so far, is a *Dunifer*-esque victory: District Judge J. Garvan Murtha denied the FCC its injunction, apparently swayed by the station's articulate concerns about the licensing process and its strong community support. The FCC's and rfb's cases have been consolidated; the brief-and-rebuttal process extends through May. Judge Murtha specifically asked both sides for more detail on their perspectives with regard to the licensing regime and its impact on public access to the airwaves.¹⁰⁰

Other microradio stations have embarked upon radically different loophole-spelunking missions within the FCC regulations themselves. After several months of trouble-free unlicensed broadcasting, Free Radio San Diego (CA) informed the FCC of its existence via letter in April, 2003. It claimed authority to operate under 47 C.F.R. § 73.3542, provides for emergency temporary authority "to serve the public interest" in "extraordinary circumstances." These include "emergencies involving danger to life and property; a national emergency proclaimed by the President or the Congress of the U.S.A and; the continuance of any war in which the United States is engaged, and where such action is necessary for the national defense or security or otherwise in furtherance of the war effort."¹⁰¹ Citing the existence of several

unexpired presidential declarations of national emergency, the current “informal” Wars on Terror and Drugs, and the need for more news than what a hyper-consolidated radio industry and NPR provide, the station requested its letter be considered an informal application for license per the cited provision. Two visits from field agents followed almost immediately - one in May and another in June - but the FCC has been MIA ever since.¹⁰²

In counterpoint, the FCC has fined and shut down dozens (it claims hundreds) of stations not mentioned here over the last few years, and within the last year it has expressed at least a symbolic intention to “get tough” on pirate broadcasting. The most poignant examples are the criminal convictions of two unlicensed broadcasters in 2003. On February 5, Benjamin Leroy Carter was sentenced to 18 months of probation - four of them on home confinement - and 50 hours of community service for his unlicensed FM broadcasts in Orlando, Florida.¹⁰³ This was followed in May by the sentencing of Rayon Sherwin Payne to nine months in prison followed by probation and community service, also for unlicensed broadcasting in Orlando.¹⁰⁴ While the Payne case is especially serious because it represents the first bona-fide prison sentence handed down for broadcasting without a license, it does not appear to be representative of a nationwide enforcement trend: both cases arose from the national pirate radio hotspot of Florida and involved the same U.S. Magistrate.

In 2002, FCC Enforcement Bureau Deputy Chief Linda Blair signaled that some attempt to streamline the enforcement process against unlicensed broadcasters had begun. In her October presentation of the Bureau’s Year Three Progress Report, during a brief summary of work on the unlicensed broadcasting front, Blair remarked, “We have also enhanced our enforcement efforts by focusing more on situations where there are patterns of violations rather than isolated violations, and we have focused on taking more forfeiture actions in appropriate cases, rather than simply issuing warnings.”¹⁰⁵ Since the FCC’s scattershot documentation makes it impossible to verify at this point whether it now actually skips the warning step, the only indicator is an inspection of forfeitures. In 2003 the FCC issued \$185,000 worth of fines to 17 unlicensed broadcasters - an impressive fivefold dollar increase from 2002 figures.¹⁰⁶ However, as noted previously in Chapter 2, the agency’s forfeiture collection rate diminishes the significance of this enforcement effort - somewhat akin to Enron booking revenue it never collected.

As if the activity documented herein is not enough to belie FCC claims of success against the proliferation of unlicensed stations, perhaps a few final examples that invoke the tired cliché about change and continuity will tip the reader's scales. Freak Radio Santa Cruz has yet to suffer significant enforcement action since it began broadcasts some nine years ago; Berkeley Liberation Radio, the progeny of Stephen Dunifer and Free Radio Berkeley, remains on the air despite visits, raids and threats of fines; and Mbanna Kantako's Human Rights Radio remains live and defiant after a decade and a half-plus on the air without a license. Note we have not even explored the unlicensed radio activity that thrives around the nation on the AM and shortwave bands - where no reported enforcement efforts have occurred since 1998.¹⁰⁷

Currently there are some 300+ LPFM stations on the air¹⁰⁸ and more license applications are pending from the FCC's initial filing windows in 2000. Yet for every station on the air right now there is an applicant or potential applicant who was denied because of congressional sabotage to the service. In addition, a good number of LPFM stations do not function under the public access community radio model as envisioned by many of the service's original proponents and the microradio movement; instead they are translator-like stations run by religious broadcast networks and relay programming from a central studio for most (if not all) of the day.¹⁰⁹ Some state Departments of Transportation have also taken a liking to LPFM and applied for networks of stations to augment preexisting Traveler's Information Service (TIS) signals previously limited to the AM band.

There is some hope that the damage done to LPFM by Congress can be mitigated. A comprehensive field analysis of the contentious interference issue, mandated by Congress and performed under contract to the FCC by the MITRE Corporation, seems to vindicate the FCC's initial technical parameters for the service. Consultant engineers set up multiple 1 to 100-watt test LPFM transmitters in communities around the country and broadcast with temporary authorization on (presently-verboten) third-adjacent channels from local FM stations. They advertised their plans in local newspapers and on those FM stations located nearest on the dial to the frequency where the tests would occur. They asked listeners to call a toll-free hotline to report any interference they heard. The public comment window was open for four weeks at each test site.¹¹⁰ No reports of interference from the test LPFM stations were received, although people

did complain about interference between incumbent full-power FM radio stations.¹¹¹

After several hundred pages of data and analysis MITRE concluded that “existing third-adjacent channel distance restrictions should be waived to allow LPFM operation at locations that meet all other FCC requirements,” subject to a few modifications to the FCC’s minimum-distance separation rules for FM stations. It also recommended the FCC not bother studying the economic impact of LPFM stations - deemed so miniscule as to be unworthy of the effort to quantify.¹¹²

None of this would be known were it not for a Freedom of Information Act request filed with the FCC by several LPFM advocates.¹¹³ The “MITRE report” was supposed to be completed by 2001 but did not get finished until early 2003 and upon receipt the FCC did nothing with it.¹¹⁴ The FOIA requesters learned privately of the report’s existence and demanded its publication that spring; the FCC at first ignored them completely. In July - one day after threats of judicial or congressional intervention into the matter - the FCC released the MITRE study. There was no corresponding public notice and it was only made available electronically to those who could find it within the agency’s complicated Electronic Comment Filing System (ECFS) - described by one journalist as a “cyberspace back alley.”¹¹⁵

On February 19, 2004 - the same day the FCC and radio free brattleboro sued each other - the agency formally recommended Congress expand the LPFM service back to its original technical parameters as defined in 2000.¹¹⁶ Notably, the recommendation contains no language about removing the anti-pirate clause Congress wrote into the rules. Given the current makeup of the FCC and the political atmosphere in Washington, D.C. on media issues generally, it is unclear whether the LPFM service will be allowed to reach its full potential. Half a loaf may be better than none, but as it stands now unlicensed microbroadcasters continue to enjoy nearly exclusive domain in America’s major cities. While the estimates of unlicensed FM stations nationwide varies greatly (depending on whom you ask), there’s at least one pirate on the air for every newly-licensed kin - and the “reform” may have actually inspired yet another generation of radical broadcaster.

Notes to Chapter 6

1. There were actually more than two but these were the first, and for the purposes of the FCC's final rulemaking on low power FM radio these most influenced its outcome and collected the greatest amount of public comment.

2. Nickolaus E. Leggett, Judith F. Leggett, and Donald J. Schellhardt, Esq., *Petition for a Microstation Radio Broadcasting Service*, p. 1-2, available online (January 16, 2004) at http://www.fcc.gov/Bureaus/Mass_Media/Filings/rm9208.pdf.

3. *Id.*, p. 7-9.

4. J. Rodger Skinner, Jr., *Proposal for Creation of the Low Power FM (LPFM) Broadcast Service*, p. 3, available online (January 16, 2004) at http://www.fcc.gov/Bureaus/Mass_Media/Filings/rm9242.pdf.

5. *Id.*, p. 8.

6. *Id.*, p. 10-11.

7. A point of clarification: "frequency" and "channel" are essentially interchangeable terms here. Although the FCC has mapped FM frequencies to channels, the use of the term "channel" in the context of radio is essentially limited to those doing business with the FCC. In agency vernacular, the FM band ranges from Channel 200 (87.9 MHz) to Channel 300 (107.9 MHz). Each two kilohertz step on the FM dial corresponds to a channel within this range. See Dale Bickel, "Why Do FM Frequencies End in an Odd Decimal?," *Federal Communications Commission*, online at (March 16, 2004) <http://www.fcc.gov/mb/audio/bickel/oddno.html>. Channel 200 (87.9 MHz) is not typically regarded as an FM channel but there are two stations presently licensed to use it.

8. Skinner, p. 14-17.

9. *Id.*, p. 17.

10. See Don Schellhardt, "Special Comments Requesting a Suspension of Microbroadcasting Prosecutions," April 25, 1998, available online (March 16, 2004) at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=2049530001 (p. 1-25) and http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=2049530002 (p. 26-29).

11. Philip Tymon, "Those In Favor," *DIYmedia.net*, July 5, 1998, <http://www.diymedia.net/feature/lpfm/f070598.htm>.

12. Tymon, "Those Opposed," *DIYmedia.net*, July 12, 1998, <http://www.diymedia.net/feature/lpfm/f071298.htm>.

13. *Notice of Proposed Rulemaking in the Creation of a Low Power Radio Service*, 14 FCC Rcd 2471 (February 3, 1999).

14. See *Notice of Proposed Rulemaking in the Creation of a Low Power Radio Service*, FCC-99-6, February 3, 1999, p. 20.

15. *Id.*, p. 27-28. Note also that before offering up the amnesty provision, the FCC spends several paragraphs reciting the unlawful nature of unlicensed broadcasting and its ultimate authority in this regard, going so far as to revive the “aircraft interference” canard.

16. The NAB’s initial technical study, for example, weighed in at more than 500 pages alone.

17. Radio Broadcasting Preservation Act, 106th Cong., 1st sess., H.R. 3439, November 17, 1999.

18. 15 FCC Rcd 2205 (2000), now codified as 47 C.F.R. § 73.801 et. seq. (2002).

19. See *In the Matter of Creation of a Low Power FM Radio Service*, FCC-00-19, January 27, 2000, p. 22.

20. Quoted in Anderson, “FCC Approves LPFM: How They Voted: William Kennard,” *DIYmedia.net*, January 20, 2000, <http://www.diymedia.net/feature/f012000d.htm>.

21. Quoted in Anderson, “FCC Approves LPFM,” *DIYmedia.net*, January 20, 2000, <http://www.diymedia.net/feature/f012000g.htm>. I actually had a chance to speak to Furchtgott-Roth about the LPFM service and its connection to microradio during a visit to the UW-Madison campus just two days before the LPFM vote. Even at that late date Furchtgott-Roth did not seem cognizant of a national movement of unlicensed broadcasting: “You know, all that activity’s in Florida, anyway...Politically, the pirates aren’t driving this proposal.” See Anderson, “A Chat With Harold,” *DIYmedia.net*, January 18, 2000, <http://www.diymedia.net/feature/lpfm/f011800.htm> et. seq.

22. The FCC’s vote on LPFM has been reported alternately as 4-1 or 3-2. Powell’s split vote - approving and opposing in part - is the reason behind this confusion.

23. Quoted in Anderson, “FCC Approves LPFM,” *DIYmedia.net*, January 20, 2000, <http://www.diymedia.net/feature/f012000h.htm>.

24. See Anderson, “Calling the Bluff,” *DIYmedia.net*, March 25, 2000, <http://www.diymedia.net/feature/lpfm/f032500.htm>.

25. In 1999 the NAB produced an “anti-LPFM lobbying kit” for member broadcasters to use in their own contacts with Congress: interference had long been decided as the stick that would be used to beat LPFM to death. A complete copy of the lobbying kit was leaked and published online by Alan Freed, formerly of Beat Radio in Minneapolis. See “NAB Anti-LPFM Kit @ www.beatworld.com,” *Beat Radio* (January 17, 2004), <http://www.beatworld.com/NAB/NABindex.html>. In the kit, the NAB proclaimed LPFM to be “the single biggest issue to hit the radio industry in the last few decades” (p. 2).

26. See Clerk of the House of Representatives, “Final Vote Results for Roll Call 130,” April 13, 2000, available online (March 16, 2004) at <http://clerk.house.gov/cgi-bin/vote.asp?year=2000&rollnumber=130>.

27. Radio Broadcasting Preservation Act, 106th Cong., 1st sess., H.R. 3439 EH, April 13, 2000.

28. See Federal Communications Commission, "Low Power FM Radio Service: Allegations and Facts," *FCC.gov*, March 29, 2000 (January 17, 2004), http://www.fcc.gov/Bureaus/Mass_Media/Factsheets/lpfmfact032900.html.

29. Anderson, "Halfway Dead (V)," *DIYmedia.net*, April 13, 2000, <http://www.diymedia.net/feature/f041300d.htm>.

30. Anderson, "Senate Moves to Kill," *DIYmedia.net*, September 20, 2000, <http://www.diymedia.net/feature/lpfm/f091200.htm>.

31. See Alan Freed, "Ex-Senator Grams' \$7,000 Bright Idea," *Beatworld.com*, October 8, 2000 (March 16, 2004), <http://www.beatworld.com/gramsad.html>, and Minnesota Broadcasters Association, Minnesota Public Radio, and National Association of Broadcasters, "What if you tuned to your favorite radio station and heard nothing but INTERFERENCE?," advertisement published on October 15, 2000, available online (March 16, 2004) at <http://www.beatworld.com/images/adlie101500.gif>.

32. Anderson, "Moment of Truth," *DIYmedia.net*, November 28, 2000, <http://www.diymedia.net/feature/lpfm/f112800.htm>.

33. See Arthur Martin, "Which Public, Whose Interest? The FCC, the Public Interest, and Low Power Radio," *San Diego Law Review* 38 (Fall 2001): 1195-1196.

34. McCain's opposition to the anti-LPFM legislation may have been motivated more by a self-perceived slight than by democratic drive. The Radio Broadcasting Preservation Act completely bypassed the Senate Commerce Committee, of which McCain is chairman. No committee chair likes legislation normally within their domain to be voted on without their stamp of approval. In his defense, McCain did introduce a less-destructive alternative to the Radio Broadcasting Preservation Act (see "McCain: Low Power FM Radio Must Move Forward," *U.S. Senator John McCain*, June 8, 2000 (January 19, 2004), http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=886); it idled and died at the end of the session.

35. Senate, Senator McCain of Arizona speaking on behalf of the Low-Power FM Radio Service, 106th Cong., 2nd sess. *Congressional Record* (October 26, 2000), available online via *Thomas.loc.gov* (March 16, 2004), p. S11100-S11101.

36. See 47 C.F.R. § 73.854 (2002).

37. It should be noted that while the FCC initially downplayed the influence of unlicensed microbroadcasting on its decision to implement LPFM, Chairman William Kennard later admitted its effort was noticed. In an interview for a video produced and distributed by a pro-LPFM advocacy organization Kennard remarked, "Many, many people around the country helped to inspire the idea of low-power FM radio. Churches, community groups, and even some organizations that were broadcasting illegally - so-called 'pirate radio' operators. Clearly there's a need out there for people who want to use the airwaves for democracy, to speak to their communities, to provide information and entertainment to their communities that are not being met by the commercial broadcast industry." See United Church of Christ, Microradio Implementation Project, *LPFM: The People's Voice*, April 6, 2001, at 4:23, available online (January 17, 2004) at <http://www.microradio.org/mr040601.htm>.

38. *Creation of a Low Power Radio Serv.*, 15 FCC Rcd 2205 (2000).

39. *Greg Ruggiero v. FCC*, 278 F.3d 1323 (D.C. Cir. 2002).

40. *Id.*, from (April 28, 2003)
<http://pacer.cadc.uscourts.gov/common/opinions/200202/00-1100a.txt>.

41. 2002 U.S. App. LEXIS 9065 (D.C. Cir. 2002).

42. *Greg Ruggiero v. FCC*, 317 F.3d 239 (D.C. Cir. 2003); cert. denied, 124 S. Ct. 62 (October 6, 2003).

43. *Id.* at 243-244.

44. *Id.* at 246.

45. *Id.* at 253.

46. *Id.* at 258.

47. See *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992); reh'g denied, 974 F.2d 169 (5th Cir. 1992); cert. denied, 506 U.S. 1087 (1993), which upheld the *Hays County Guardian's* right of distribution on the campus of Southwest Texas State University. The *Guardian* was a project of Ptak's that predates Micro Kind Radio; in his correspondence with the FCC Ptak characterized the station as an offshoot of the paper.

48. See *In the Matter of Joseph Frank Ptak, San Marcos, Texas*, 13 FCC Rcd 22168 (July 6, 1998), online (January 19, 2004) at <http://www.fcc.gov/Bureaus/Compliance/Orders/1998/fcc98d2.txt>.

49. See *In re: Joseph Frank Ptak, San Marcos, Texas*, 14 FCC Rcd 9317 (June 9, 1999), online (January 19, 2004) at <http://www.fcc.gov/Bureaus/Compliance/Orders/1999/fcc99131.txt>.

50. David Huff, "Texas Community Radio Stations Challenge FCC and Atty. General Janet Reno in US District Court," *San Francisco Independent Media Center*, September 29, 2000 (January 19, 2004), <http://www.indybay.org/news/2000/10/470.php>.

51. Pursuant to 47 C.F.R. § 74.102; the FCC denied the license application in 2000.

52. *Prayze FM aka Incom, LLC, Mark Blake, and Loretta Spivey v. FCC*, 1999 U.S. App. LEXIS 26444 (2nd Cir. 1999).

53. *Prayze FM aka Incom, LLC and Mark Blake v. FCC*, 83 F. Supp. 2d 293 (D. Conn. 1999).

54. Per *United States v. Jacobson*, 15 F.3d 19, 22 (2nd Cir. 1994).

55. *Prayze FM aka Incom, LLC, Mark Blake, and Loretta Spivey v. FCC*, 2000 U.S. App. LEXIS 17527 (2nd Cir. 2000).

56. *Prayze FM, aka Incom, L.L.C., Mark Blake and Loretta Spivey v. FCC*, 214 F.3d 245 (2nd Cir. 2000). Of particular note was the panel's efforts to avoid addressing the merits of Prayze's challenges: "Indeed, we do not even decide Prayze's facial challenge. We merely conclude that the FCC has shown a likelihood of prevailing sufficient to justify the preliminary relief granted by the district court. As a result, our holding, like any ruling on a preliminary injunction, does not preclude a different resolution of Prayze's facial challenge on a more fully developed record." *Id.* at 253.

57. *Prayze FM, aka Incom, L.L.C., Mark Blake and Loretta Spivey v. FCC*, 2001 U.S. Dist. LEXIS 25310 (D. Conn. 2001).

58. Quoted in Anderson, "LPFM in Court," *DIYmedia.net*, June 19, 2001, <http://www.diymedia.net/feature/lpfm/f061901.htm>.

59. See "Prayze FM: Frequently Asked Questions," *Prayze FM* (January 19, 2004), http://www.prayzefm.com/aboutus_faq.htm.

60. *James N. Dispoto, Ocala, Florida*, 14 FCC Rcd 3347 (Comp. Inf. Bur. 1999).

61. *James N. Dispoto*, 15 FCC Rcd 10171 (Enf. Bur. 2000).

62. See *Megamix 96* (December 30, 2003), <http://www.megamix96.com>.

63. Per the FCC's *FM Query* database (August 20, 2003), <http://www.fcc.gov/fcc-bin/fmq?call=WJND-LP>.

64. Per the FCC's *CBDS Public Access* database (August 20, 2003), http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/cdb/publicacc/prod/sta_det.pl?Facility_id=133600.

65. Per the FCC's *CBDS Public Access* database (August 20, 2003), http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/cdb/publicacc/prod/call_hist.pl?Facility_id=133600&Callsign=WJND-LP.

66. See Steven Ray Haberlin, "Off the Air: Family Fighting to Keep Radio Station Alive," *Ocala (FL) Star Banner*, January 2, 2004 (January 19, 2004), <http://www.starbanner.com/apps/pbcs.dll/article?AID=/20040102/NEWS/201020391/1009/BUSINESS>.

67. For example, the Prometheus Radio Project has been a leader in the rollout of LPFM stations. It is a group devoted to helping people navigate the FCC LPFM licensing process, and has assisted several stations with technical design and construction work. Prometheus has literally built several LPFM stations around the country from the ground up. Prometheus was founded by “Pete triDish” (Dylan Wrynn), who got his start in microradio as a founder of Radio Mutiny - the Philadelphia station Richard Lee had to turn on to shut down. See “Our Pirate Past,” *Prometheus Radio Project* (March 16, 2004), <http://www.prometheusradio.org/pirate.shtml>.

68. Brinson, p. 104-106. In an unusual twist, the FCC took just three weeks to move on Radio One Austin, possibly because of the consternation fellow Free Radio Austin had already caused the agency; a short five months later Federal Marshals raided Radio One. See *Id.*, p. 112-114.

69. Han Winogrand, “Pirate Radio: Underground Station On Road from Feds,” *Boulder Weekly*, September 6, 2001 (January 17, 2004), <http://www.boulderweekly.com/archive/090601/coverstory.html>.

70. Michael Roberts, “The Making of a Pirate,” *Denver Westword*, October 4, 2001 (January 17, 2004), <http://www.westword.com/issues/2001-10-04/message.html/1/index.html>.

71. P.W. Miller, “Can’t Keep a Good Monk Down,” *Boulder Weekly*, July 18, 2002 (January 17, 2004), <http://www.boulderweekly.com/archive/071802/buzzlead.html>.

72. Jon Caldara, “Avast, maties! Corsairs of the airwaves here,” *Boulder Daily Camera*, January 4, 2004 (January 17, 2004), http://www.bouldernews.com/bdc/opinion_columnists/article/0,1713,BDC_2490_2548762,00.html.

73. Monk initially outlined the depth and complexity of KBFR’s operations in a series of personal e-mails, but since then he has been building a similar public resource about KBFR’s operational strategy and tactics via web log: See *Media Freedom & Pirate Radio* (January 17, 2004), <http://freemedia.blogspot.com/>.

74. According to the LPFM channel spacing and interference protection rules (as amended) there are no open frequencies in Seattle.

75. The synopsis of the events presented here is just a very brief summary of the operational analysis and multimedia field notes found at Anderson, “Mosquito Fleet Stings NAB,” *DIYmedia.net*, September 24, 2002, <http://www.diymedia.net/feature/fmosquitofleet02.htm> et. seq.

76. Edmonson, p. 148-154.

77. Throughout the tit-for-tat, SFLR’s attorneys (from their experience with *Dunifer*) kept up a steady stream of correspondence with the FCC, filing responses (and, where necessary, appeals) to the agency’s enforcement efforts. See Peter Franck, “Letter to Supervisors,” *San Francisco Liberation Radio*, July 29, 2003 (January 19, 2004), <http://www.liberationradio.net/articles/statements/2003-07-letters.php>.

78. Edmonson, "SFLR Shuts Down Due to Court Injunction; 93.7 FM Now Silent Over West San Francisco," *San Francisco Liberation Radio*, June 29, 1988 (January 19, 2004), <http://www.liberationradio.net/articles/statements/pr1.php>.

79. Edmonson, "SFLR Applies for FCC License," *San Francisco Liberation Radio*, December 15, 1998 (January 19, 2004), <http://www.liberationradio.net/articles/statements/license.php>. The application was later returned.

80. See Edmonson, "San Francisco Liberation Radio Returns to the Airwaves," *San Francisco Liberation Radio*, February 8, 1999 (January 19, 2004), <http://www.liberationradio.net/articles/statements/pr2.php>.

81. Per the FCC's *CBDS Public Access* database (January 20, 2004), http://svartifoss2.fcc.gov/cgi-bin/ws.exe/prod/cdb/pubacc/prod/app_det.pl?Application_id=501221. The application was dismissed on April 4, 2001 without notice, according to SFLR attorney Peter Franck.

82. See Anderson, "San Francisco to FCC: Hands Off SFLR," *DIYmedia.net*, August 19, 2003, <http://www.diymedia.net/archive/0803.htm#081903>.

83. See City and County of San Francisco Board of Supervisors, "Resolution supporting San Francisco Liberation Radio 93.7 FM and urging Federal, State, and Local officials to support policies and practices that encourage diverse local noncommercial media," No. 552-03, File No. 031252, *San Francisco SFGov*, August 19, 2003 (January 20, 2004), <http://www.sfgov.org/site/uploadedfiles/bdsupvrs/resolutions03/r0552-03.pdf>.

84. See Anderson, "Liberation Radio Raid Update," *DIYmedia.net*, October 17, 2003, <http://www.diymedia.net/archive/1003.htm#101703>. Also worth noting here is that the Department of State held a much higher opinion of the station than the FCC: it had been recommending San Francisco Liberation Radio as a model for community radio stations in developing countries and had even sponsored station visits for delegates from several West African countries and a former Soviet republic.

85. Ron Harris, "San Francisco radio pirates challenge FCC equipment seizure," *Associated Press State & Local Wire*, April 30, 2004, BC cycle.

86. From Paul Riisman, "Interview with Sara Longsmith of Radio Free Brattleboro," *Mediageek*, October 17, 2003, available online (December 1, 2003) at <http://mediageek.cu.groogroo.com/sound/2003/mg101703-64k.mp3>, at 10:26.

87. *Id.*

88. Probably best known for the television series *My Three Sons* (1960) and *Father Knows Best* (1964); d. February 20, 2003.

89. See Henry Tewksbury, *The Cheeses of Vermont: A Gourmet Guide to Vermont's Artisanal Cheesemakers* (Woodstock, VT: The Countryman Press, 2002).

90. See Anderson, "Radio Free Brattleboro: A True Community Resource," *DIYmedia.net*, July 4, 2003, <http://www.diymedia.net/archive/0703.htm#070403>.

91. See Anderson, "Stimulus/Response Goes Coast-to-Coast: FCC Visits Vermont," *DIYmedia.net*, September 5, 2003, <http://www.diymedia.net/archive/0903.htm#090503>.

92. Associated Press, "FCC warns radio to stop broadcasting," *Associated Press State & Local Wire*, January 16, 2004, BC cycle.

93. Lise, "Selectboard Says They Support rfb; Votes 4-1 Against Them," *ibrattleboro.com*, November 18, 2003 (January 20, 2004), <http://www.ibrattleboro.com/article.php?story=20031118225910798>. The headline is misleading (and it misled the author of n. 92, below): radio free brattleboro's original, more strongly-worded resolution of support submitted for Selectboard consideration was substituted with a significantly watered-down version, reportedly on recommendation of the town attorney. He felt the matter was outside the town's purview.

94. Associated Press, "radio free brattleboro seeks voters' support," *Associated Press State & Local Wire*, December 27, 2003, BC cycle, sec. State and Regional. Its certification was affirmed on January 22, 2004.

95. Larry Hildes, one of the *Dunifer* attorneys, is also involved in rfb's defense.

96. An application for a 100-watt LPFM station is pending in Brattleboro, filed by Vermont Earth Works, Inc.; per the FCC's LPFM applications database (January 22, 2004), <http://www.fcc.gov/fcc-bin/fmq?list=0&facid=134542>. radio free brattleboro currently broadcasts on the frequency applied for by this potential station, but has promised to move channels if the applicant receives its license or authority to broadcast before rfb's case is resolved.

97. James Maxwell, "Re: radio free brattleboro," *107.9fm radio free brattleboro*, January 14, 2004 (January 22, 2004), http://www.rfb.fm/news_events/maxwellletter.html.

98. James Maxwell, esq., and Lawrence A. Hildes, esq., "Complaint for Injunctive Relief Prohibiting Ex Parte Seizure or Micro Broadcast Equipment," February 19, 2004, available online at *107.9 radio free brattleboro* (March 16, 2004), http://www.rfb.fm/news_events/injunction.html.

99. See Anonymous, "Radio Free Brattleboro Wins Local Authority to Broadcast," *ibrattleboro.com*, March 8, 2004 (March 16, 2004), <http://www.ibrattleboro.com/article.php?story=20040308114633929> et seq.

100. See crotke, "rfb - Inside the Courtroom," *ibrattleboro.com*, March 15, 2004 (March 16, 2004), <http://www.ibrattleboro.com/article.php?story=20040315150830609> et seq.

101. 47 C.F.R. § 73.3542 (a) (2000).

102. The “Mosquito Fleet” that operated in Seattle during the NAB Radio Convention in 2002 had pre-prepared letters ready to counter any visits from FCC agents. The letters, which cited the same C.F.R. code (albeit in more tongue-in-cheek fashion), simply contained blank spaces where each station operator could fill in the appropriate technical characteristics for their station, if it became necessary. See “Application to Construct a microFM Station,” in Second Adjacent Microbroadcasters’ Association, *SAMBA Listening Guide*, p. 23-24, available online at <http://www.diymedia.net/stuff/sambazine.pdf>.

103. FCC Enforcement Bureau, “Unlicensed Radio Operator Benjamin Leroy Carter, aka Malik ‘Copafeel’ Abdul, Sentenced to 18 Months Probation, 4 Months of Which Will be Served as Home Confinement,” news release issued February 10, 2003, available online (January 24, 2004) at http://www.fcc.gov/eb/News_Releases/DOC-231068A1.html. Carter’s case began in 1999 - a four-year turnaround time.

104. FCC Enforcement Bureau, “Rayon Sherwin ‘Junior’ Payne Sentenced to Prison for Unlicensed Radio Operation,” news release issued May 12, 2003, available online (January 24, 2004) at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-234292A1.txt. Payne’s case also began in 1999.

105. Quoted in Anderson, “FCC Enforcement Bureau: Year Three Progress Report,” *DIYmedia.net*, October 10, 2002, <http://www.diymedia.net/audio/mp3fcceb02.htm>.

106. See Anderson, “FCC Enforcement Action Summary: 2002,” *DIYmedia.net*, <http://www.diymedia.net/fccwatch/eadsum02.htm>, and “FCC Enforcement Action Summary: 2003,” *DIYmedia.net*, <http://www.diymedia.net/fccwatch/eadsum03.htm>. In 2002, seven unlicensed broadcasters made it to the forfeiture stage of enforcement and were collectively billed \$33,000 for their troubles.

107. Yoder, p. 287. The FCC’s presence on the AM and shortwave bands has remained in absentia in the two years between between the publication of Yoder and this thesis, with the exception of a case involving one Steve Anderson (no relation), who’s in hotter water now for more serious crimes. See Anderson, “Kentucky Shortwave Militia Pirate Arrested in North Carolina,” *DIYmedia.net*, November 23, 2002, <http://www.diymedia.net/archive/1102.htm#112302>.

108. REC Networks, “300th LPFM Station On the Air,” *recnet.com*, January 11, 2004 (January 24, 2004), <http://www.recnet.com/cgi-bin/recnews.cgi?read=134>.

109. See Anderson, “Shenanigans Afoot With LPFM - Beware of Calvary Chapel,” *DIYmedia.net*, January 2, 2003, <http://www.diymedia.net/archive/0103.htm#010603>.

110. Comsearch, *Field Test Plan: LPFM Third-Adjacent Channel Interference Analysis*, October 29, 2002, p. 34, available online at <http://www.diymedia.net/stuff/lpfmrept2.pdf>.

111. Comsearch, *Field Measurement Data: LPFM Third-Adjacent Channel Interference Analysis*, March 31, 2003, p. 153-156, available online at <http://www.diymedia.net/stuff/lpfmrept4.pdf>.

112. MITRE Corporation, *Experimental Measurements of the Third-Adjacent Channel Impacts of Low-Power FM Stations, vol. 1 (Final Report)*, May 2003, p. 5-3 - 5-5 (148-150), available online at <http://www.diymedia.net/stuff/lpfrmrept1.pdf>.

113. Myself included.

114. See Don Schellhardt, "Re: Freedom of Information Act Request For Results of Interference Tests for Low Power FM," *Amherst Alliance*, May 21, 2003 (January 24, 2004), <http://www.amherstalliance.org/filings/foia-request.pdf>.

115. Michael Roberts, "Power Up," *Denver Westword*, September 25, 2003 (January 24, 2004), <http://www.westword.com/issues/2003-09-25/message.html/1/index.html>. The FCC never directly contacted any of the FOIA requesters directly to announce its release; we tripped over it, too.

116. Federal Communications Commission, *Report to Congress on the Low Power FM Interference Testing Program, Pub.L. No. 106-553*, February 19, 2004, available online (March 16, 2004) at <http://www.fcc.gov/fcc-bin/audio/DOC-244128A1.pdf>.

Chapter 7. Conclusions

The phenomenon of unlicensed broadcasting in the United States is intrinsic to the history of government radio licensing itself. It is not just a recent fad, nor is it best portrayed by those pirates who snatch the largest headlines. Additionally, the history of unlicensed broadcasting involves commonly-held ideals by many if not most of its participants, one of which is a strong belief in a right of public access to radio. Their acts, in contravention of legislative and regulatory intent, have in effect literalized the figurative “public airwaves.” engendered by the public interest clause at the heart of the law. They have made active something historically intended only to be passive. This is a key point of contention in the myriad iterations of struggle involving the representation of “the public interest” in the regulation of media - pirate radio just happens to walk its talk.

Congress and the courts agree on the necessity of a licensing system for the purposes of broadcasting and other usage of radio frequency spectrum; this principle remains successfully unchallenged. However, most unlicensed broadcasters have not set out to tear down the licensing regime: they stand outside it looking in. Nobody likes being a fugitive; it’s stressful and taps energy that could be spent making better radio. The unacceptable alternative is silence.

Those members of the public who lay literal claim to the airwaves actually find very little to stop them. The agency of government in charge of the broadcast radio licensing system is quite secure in its regulatory authority, but it lacks the ability to effectively exercise that authority. The government, in fact has never had the ability to effectively enforce the license requirement for radio broadcasting and it probably never will. This allows unlicensed broadcasting the opportunity to exist and even flourish at times when political and social conditions are especially ripe.

If caught, an unlicensed broadcaster faces an uncertain future. A plethora of variables affect how much punishment they might face; consistency is not the FCC’s strong suit. The lack of ability to enforce the license requirement, by extension, hampers the government’s ability to effectively sanction those it does catch; real enforcement is arduous and sometimes nothing more than a hollow gesture.

Serious, coordinated, and sustained legal challenge to the government’s broadcast licensing authority is a relatively recent development in the phenomenon of pirate radio. Until

the proliferation of microradio stations, legal arguments proffered in resistance to FCC enforcement tended to focus on specific details of the case at hand; thus the challenges raised were not truly systemic to the licensing regime. This has changed as the act itself has become more politicized in nature, a central tenet to the microradio movement. The logical starting point for legal challenges has been the first amendment and associated issues involving freedom of speech. Repeatedly these arguments have failed to affect the status quo, thanks to the regulatory premise of spectrum scarcity, which imposes limits on the number of broadcasters allowed on the air in any given locale. This premise denies the realization of a common right of access.

Yet unlicensed broadcasting continues, mostly unabated.

Although the disconnect between law and reality is significant, chaos does not reign on the airwaves. Why not? The obvious answer is that knowledge of this paradox is not commonly known. Even if it were, though, it is unlikely that every “Tom, Dick and Harry” would fire up their own transmitter. Not every member of the public wants to broadcast, and those who do want to be heard. “Chaos” would not benefit them, and they know it. The *perceived risk* of interference from unlicensed broadcasting factors heavily into its history, especially with regard to court battles - but actual interference does not. When the FCC claims it must silence an unlicensed broadcaster to avoid jeopardizing the “chaos-averting” system of licensing it administers it speaks symbolically, denying the actual history of the pirate phenomenon and, by extension, its primary grievance.

The record of successful assertion of a right of access to the airwaves may be most dismal in the judicial arena, yet these challenges will continue to be made because the potential impact of a victory - the legitimation of a right exercised but not recognized - is worth the risk of losing. Even losing cases have value: they chart pitfalls and force innovation to the resistance. The relative newness of the challenge to the licensing regime on a systemic level - by unlicensed broadcasters motivated to defend themselves for the sake of “the public interest” rather than simply to save their own skins - suggests an active future in this regard.

How susceptible is the law to change via the judicial avenue? At this stage there is a better sense of what does not work than what might. Unlicensed broadcasters who attempt a legal defense of their actions essentially undertake the task of accomplishing the impossible: convincing a court to acknowledge a public stake in the airwaves denied by the fundamental

principles of governing regulation. The fact that illegality is involved as a matter of course has its own obvious disadvantages. Here the FCC has tremendous support for maintaining the status quo. Unlicensed broadcasting is widespread because the FCC is all but powerless to stop it completely - but if a pirate is truly serious about challenging the FCC they must first telegraph their intent to break the law; suffer the consequences; and only *then* may they possibly find traction in the courts. By that point, tarred as a lawbreaker, claims that the law itself may be unjust fall on nearly deaf ears.

As this narrative explains, there have been several exceptions to this general pattern - cases that were ultimately losers but won enough along the way to make a difference. The vast majority failed in their efforts not because of insufficient merit; procedural and jurisdictional pitfalls befell them. Eventually there will come a case where these evasions will themselves fail. Additionally the structure of the federal courts introduces an element of chance to this game: sympathetic judges at the district level have the ability to stymie the FCC's enforcement process. When these instances occur they indirectly sanction the temporary autonomy of the unlicensed broadcaster; a situation the Communications Act says should not be, but there it is.

Pending cases involving San Francisco Liberation Radio and radio free brattleboro demonstrate how the evolution of legal challenge to the licensing regime is taking place. Both stations undeniably hold dear the right of free speech - but they have not made the first amendment the centerpiece of their legal arguments. Of all the microradio stations to come before the courts, SFLR has best attempted to exhaust its administrative remedies; whether the attempt has been good enough remains to be seen.¹ rfb's chosen strategy has loose ties to the jurisdictional challenges of old: if the FCC fails to embrace a public demand for access then perhaps there is a way to provide that access independent of FCC involvement. It is the more radical of the two challenges and one the FCC has historically taken great pains to quash, as it contains real potential to curtail government authority over the airwaves - as opposed to those challengers who ask only for an expansion of the regulatory environment to include them (like the creation of LPFM).

Other avenues of legal challenge remain to be explored. Charles Tillinghast's discovery of dicta in the *NBC* and *Red Lion* decisions, at first glance, seems monumental. But the process of validating dicta for practical legal purposes is lengthy and onerous; the fact that this gaffe has

gone on for so long somewhat transforms the dicta to something else - something unlikely to be culled from several decades of regulatory and judicial history.² There will be permutations of the defenses offered currently by rfb and SFLR, which will continue the exploration of other constitutional pegs on which to anchor challenges to the license regime. Alternate non-constitutional strategies may involve deeper critical analysis of other aspects of radio regulation, although making predictions in this area is tricky for a non-lawyer. Just before he lost his free speech-based court case in 1998, Stephen Dunifer ruminated on the possibility of challenging the FCC to justify the application of non-broadcast portions of its radio rules in its enforcement efforts against unlicensed microradio stations.³ Such approaches may not contain the same potential to force change upon the licensing regime directly, but weakening an already insubstantial enforcement system has benefits of its own. It was in part the proliferation of microradio that brought the FCC around to LPFM in the first place.

Yet the speech component of this struggle will not fade away. This is in large part due to the concept of spectrum scarcity central to the regulatory/judicial mindset. Although scarcity has a popular image as infallible, libertarian-minded legal scholars began attacking this precept ten years before the Supreme Court reaffirmed it in *Red Lion*.⁴ In recent years these debates have branched out in their application to specific facets of licensing, and at least two legal scholars have cast theoretical challenges to the concept of spectrum scarcity within a first amendment frame and in the specific context of unlicensed broadcasting.⁵ Both argue that the historical rationale for applying the concept of spectrum scarcity to radio licensing is flawed and developments in technology and economics make it a somewhat outdated regulatory concept; today scarcity hinders the maximum use of spectrum for maximum speech value. In a sense the libertarian academic critique is more radical than the typical unlicensed broadcaster's: many pirates simply want a place in the licensing regime itself while the libertarian goal is to replace the existing regime with something new and minimally interventionist at its core.

The FCC itself has, at times, demonstrated a willingness to rethink the concept of scarcity in the context of licensing. When it eliminated the fairness doctrine rules in 1985, it cited the "growth of traditional broadcast facilities" and the emergence of other media outlets as reasons for its repeal.⁶ In later debates over this decision the FCC would even downplay the importance

of the scarcity rationale: it noted that every commodity has a relative scarcity - which at least at the theoretical level makes the airwaves no more or less scarce than a printing press with a limited supply of paper and ink.⁷ More recently, one sitting Commissioner has informally endorsed microradio as a way for citizens to assert themselves in present disputes over revisions to the FCC's media ownership rules.⁸ In at least one instance the Supreme Court has expressed a willingness to reconsider the scarcity rationale, although it will not do so unless given "some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."⁹

It may not have to wait for long: in 2003 the FCC and National Telecommunications and Information Administration (manager of spectrum exclusively used by the government) began implementation of a "Presidential Spectrum Policy Initiative" which may result in a dramatic overhaul of spectrum allocational and management practices.¹⁰ In preparation for this initiative the FCC convened a "Spectrum Policy Task Force" in 2002 to "provide specific recommendations to the Commission for ways in which to evolve the current 'command and control' approach to spectrum policy into a more integrated, market-oriented approach that provides greater regulatory certainty, while minimizing regulatory intervention."¹¹ These activities (and several others omitted from this brief synopsis), as well as the ongoing influences of various political and economic forces on the FCC, portray the value of scarcity to government regulators quite differently from the way it is invoked as gospel in the context of unlicensed broadcasting.

Other outside pressures exist which may have an effect on the future exercise of government authority over the airwaves. Licensed broadcasters in Florida have long complained about the inordinate amount of pirate stations in the region and have recently taken matters into their own hands. In the summer of 2003, NPR affiliate WXEL-FM in Boynton Beach enlisted the support of Broward County in the raids of two unlicensed stations in Ft. Lauderdale and Lauderdale Lakes. Sheriff's deputies, fire marshals, and building inspectors paid surprise visits to the stations and found municipal and county code violations that allowed them to close down the buildings they operated from.¹² Amateur radio enthusiasts have since begun working with broadcasters to unmask pirates, and for-hire signal-trackers do swift business in Florida.¹³ The

stakes went even higher this spring when the Florida Association of Broadcasters successfully lobbied the state legislature to criminalize unlicensed broadcasting at the state level. Sheriff's departments and other state and local law enforcement may now investigate and prosecute pirate radio cases; interference of any sort with any licensed radio station is punishable as a third-degree felony, meriting up to five years in prison and/or a \$5,000 fine.¹⁴ The FCC has frowned upon potential jurisdictional transfers of power in the past, but this may motivate the agency to heighten its enforcement efforts in the state (at least temporarily, until complaints die down). Given the special circumstances in Florida, the FCC may even be grateful for the assistance.

Independent of these prognostications, the status quo is likely to remain, which ironically makes the future bright for the unlicensed broadcaster. The cycle is somewhat predictable: Scarcity remains a paramount regulatory ideal until further notice, precluding the recognition of a public right of access to radio; yet the FCC lacks the resources necessary to effectively enforce this license requirement; which means unlicensed broadcasting may continue with relative impunity, until stations get caught (if ever). If they put up a fight...go back to step one.

This activity demonstrates two important lessons radio regulators would be wise to take to heart. The first is that the spectrum is less scarce than current rules interpret it to be. The historically consistent existence of relatively interference-free unlicensed broadcasting proves this quite empirically. The second lesson is that the will of the public will sometimes override regulatory statute, especially when that statute claims to regulate in the public interest but a sufficient portion of the public believes it does not. Unlicensed broadcasters by and large understand the emperor's nakedness: "the public airwaves" are mythical unless the public takes steps to demand that the term stand for something more than lip service. Providing nationally-substantive public access to the airwaves may be the only solution to bring the law into synchronicity with reality. Legislators, regulators and the judiciary may resist this, but so long as they do there will be "public" willing and able to force the issue.

A. Recommendations for Further Research

This thesis presents but a sketch of the phenomenon of unlicensed broadcasting and its agency on the public interest stage; there is much more work to do to document the phenomenon itself; especially its ebbs and flows, which undoubtedly have stories of their own to tell. At best this thesis has provided a connect-the-dots outline of the pirate radio phenomenon throughout

radio history. A good place to begin a documentary project of this sort would be with the source material used by the authors who have already partially undertaken this task - those whose work proved so useful here.

Much more information remains to be plumbed from the records of the federal courts and the FCC. A comprehensive scouring of federal court records could be undertaken to examine the history of adjudication involving Sec. 301 violations of the Communications Act; detailed research involving the transcripts of hearings and the briefs filed in such cases would most definitely shed more light on the sentiments behind unlicensed broadcast activity and the FCC's response to such challenges, not to mention further evidence of broadcast industry complicity in the maintenance of the status quo. The federal courts are not uniform in their release of information, so any further research must be well-planned and yet flexible enough to deal with the real and potential availability of documentation unique to each court.

Tracking the history of unlicensed broadcasting via FCC documentation is likely to be even more daunting, encompassing a battery of Freedom of Information Act Requests, interviews with various FCC personnel, trips to FCC headquarters in Washington, D.C., and even potentially to various field offices for hands-on access to hard-to-find records and correspondence that may not be centrally archived. Given the extremely disorganized nature of FCC records in general, coupled with the secretly selective nature with which the agency seems to collect and release information on unlicensed broadcasting, this will not be easy. The simplest place to start here, like further research involving the courts, would be with a thorough scouring of the *FCC Record* and other appropriate agency databases to glean what public information may be hiding in plain sight. A deep review of the thousands of public comments filed in the LPFM rulemaking would definitely add a new level of detail to that aspect of the narrative, both from the perspective of a public notion of access to the airwaves and the broadcast/public radio synergy that fought to keep legalized microradio off the air. One might even expand this review to Congress in search of inter-membership or constituent correspondence that could help illustrate these points. Regardless of its scope this aspect of future research will require healthy amounts of persistence and a sleuth's perceptive in order to work with fragmented yet valuable scraps of information intermittently pried from the government's documentary maw.

Another possible avenue for fleshing out the phenomenon of unlicensed broadcasting

involves a wide review of the popular, hobbyist and broadcast trade presses for coverage of stations and broadcasters. Soley et al. have only scratched the surface; selecting the parameters of an effort such as this are better left to another day but the fruits are worth serious contemplation. Finally, additional ethnographic-style research a la Brinson and Nalbandian offer an excellent opportunity to probe the phenomenon from the inside. There is much to learn from the organizational and operational models adopted by different stations, and these evolve to accommodate changes in the enforcement environment and the social, political, and economic conditions that influence it. Studies of this type also provide direct articulation of public sentiments about the public interest and its meaning in the context of access to media. Much of the previous personal research conducted prior to this thesis was based on just this type of data collection, and large archives of e-mail, mailing list, and other online correspondence between and among pirates remain wholly untapped at present.

We have seen the way in which the FCC is presumed to regulate with impunity in the context of licensing, yet this presumption is tested by the phenomenon of unlicensed broadcasting. While this thesis presents an extreme example of the regulatory disconnect with the real world, others undoubtedly exist. There were several related issues identified during research but not explored here worthy of future treatment - like a possible discrepancy in the FCC's treatment of Sec. 301 violations based on the content disseminated and the violator's political or economic intentions. Further exploration of the ongoing legal-academic deconstruction of the scarcity rationale would definitely be helpful to flesh out the legal aspects of this narrative. Radio's transition to digital - the last of the analog media to make the move - has also just begun. This has significant implications over questions of access to the airwaves and regulation in the public interest. The development and implementation of a proprietary digital broadcast architecture - and the sordid history of its adoption to-date - awaits similar critical analysis. Digital audio broadcasting will affect notions of access in ways that remain totally unexplored; this includes unlicensed broadcasting's ability to make the technological evolution and/or stand as analog echoes in a communicative architecture nearly primed for radical transformation.

Most study of the FCC and broadcasting to date has primarily focused on internal and/or political machinations with respect to their impact on the American public as a mostly-undefined

and passive mass. Research that helps to identify and explore areas either within or beyond the regulatory environment where real opportunities for public access to media as producer and participant may be found *enables* communication - key to the academic pursuit itself. This is a goal communications scholars sometimes take for granted or choose to overlook because of its challenging implications. The scope in this instance was admittedly ambitious, but not so much if considered an effective outline for future inspection of the little-known but very real extralegal side of American radio history and its connections to the larger world of independent and interventionist media.

Notes to Chapter 7

1. See Anderson, "SF Liberation Radio's Day in Court," *DIYmedia.net*, May 1, 2004, <http://www.diymedia.net/archive/0504.htm#050104> for further discussion on this aspect of the case.
2. For a more eloquent articulation of this sentiment see William N. Eskridge, Jr., "Overruling Statutory Precedents," *Georgetown Law Journal* 76 (April, 1988): 1361-1435. Another factor to consider is "judicial candor"; for an introduction to this topic see Nicholas S. Zeppos, "Judicial Candor and Statutory Interpretation," *Georgetown Law Journal* 78 (December, 1989): 353-413.
3. See Dunifer, "Stephen Dunifer's Briefing Paper," *DIYmedia.net*, April 17, 1998, <http://www.diymedia.net/feature/micro/f041798.htm>.
4. See R.H. Coase, "The Federal Communications Commission," *Journal of Law & Economics* 2 (October, 1959): 1-40.
5. See Stuart Minor Benjamin, "The Logic of Scarcity: Idle Spectrum as First Amendment Violation," *Duke Law Journal* 52 (October, 2002): 1-111, and Michael J. Aguilar, "Micro Radio: A Small Step in the Return to Localism, Diversity, and Competitiveness in Broadcasting," *Brooklyn Law Review* 65 (Winter, 1999): 1133-1175.
6. *Report Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 143 (1985).
7. See *In re Syracuse Peace Council*, 2 FCC Rcd 5043 (1987) at 5055.
8. Anderson, "Adelstein on Microradio: 'Go For It,'" *Be the Media! Blog*, November 10, 2003 (March 18, 2004), <http://www.wisconsinite.net/bethemediablog/archives/000075.html>.
9. *FCC v. League of Women Voters of Southern California Et Al.*, 468 U.S. 364 (1984) at 376.
10. See *NTIA Spectrum Reform Website* (March 18, 2004), <http://spectrumreform.ntia.doc.gov>.
11. Federal Communications Commission, "About the Spectrum Policy Task Force," *FCC.gov*, March 15, 2004 (March 18, 2004), <http://www.fcc.gov/sptf/>.
12. Joseph Mann, "Legal Stations Fire Broadside at Pirates: Complaints to Authorities Sometimes Take Years to Pursue a Conviction," *South Florida Sun-Sentinel*, August 3, 2003, p. 1G.
13. See Eliot Kleinberg, "Sleuths Go to Great Wavelengths to Catch Rogue Radio Stations," *Palm Beach Post*, February 9, 2004, p. 1B.
14. See Eliot Kleinberg, "Radio Piracy Becomes Felony," *Palm Beach Post*, May 2, 2004, sec. Local; legislation and legislative history of this initiative available at [flsenate.gov](http://www.flsenate.gov) (May 3, 2004), http://www.flsenate.gov/session/index.cfm?Mode=Bills&SubMenu=1&BI_Mode=ViewBillInfo&BillNum=2714&Year=2004&Chamber=Senate.

Bibliographic Index

This thesis draws on a multiplicity of sources for its narrative. In the interests of the reader inclined to pursue additional research the master bibliography of this thesis is composed of several components which organize citations, references, and consulted works for further review by source. It is by no means a comprehensive list.

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