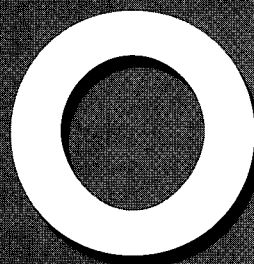


Free Radio Berkeley takes on the FCC—and official history

BY JESSE WALKER



n January 20, 1995, for the first time in the history of the Federal Communications Commission, a federal judge refused to grant the agency an injunction to shut down an unlicensed radio station. The station is Free Radio Berkeley, a low-power FM operation started by broadcast engineer Stephen Dunifer in April 1993. Citing constitutional concerns, U.S. District Court Judge Claudia Wilkin has allowed Dunifer to continue broadcasting until she hears his administrative appeal in late September.

For 43-year-old Dunifer and his attorney, Louis Hiken, the heart of the matter is freedom of speech and democratic access to the airwaves. In a country dominated by media conglomerates, they argue, low-cost, low-power "micro radio" offers the little guy an opportunity to be heard—or would, if the FCC would legalize it. "America is made up of individuals, and they should have a right to speak," says Hiken. "And not just in their living rooms."

For the FCC, the case represents nothing less than a choice between order and chaos. The agency claims that Dunifer's pirate broadcasts have interfered with other stations' signals, and that a less-regulated system would only be an invitation to a complete breakdown of radio order. What Dunifer and other micro broadcasters are doing, says FCC attorney David Silberman, amounts to "anarchy of the airwaves."

The case reverberates far beyond the Bay area and the government's attempt to shut down a lone radio pirate. *United States v. Stephen Paul Dunifer* marks the crossroads where participatory technologies meet governmental controls that stifle the free expression they purport to facilitate. Rogue broadcasters such as Dunifer do more than challenge the FCC's current regulatory powers: They raise serious doubts about a state-sanctioned interpretation of history that views government control as the necessary response to all emergent forms of technology. Far from vindicating government involvement in broadcast licensing, the origins of commercial radio in the 1920s suggest that the state created the very chaos it seeks to enjoin.

In the two years since it was launched, Free Radio Berkeley has increased its airtime from three hours a week to 24 hours a day, attracting about 40 volunteers and a growing listenership in the process. Its music programming isn't all that different from that of a free-form college station, but its spoken-word broadcasts are close to unique. Besides community-oriented news and left-oriented commentary (including programs too controversial for KPFA, the local Pacifica outlet), Free Radio Berkeley offers its listeners frontline reports on other free-radio experiments around the world from Chiapas to Tokyo to Springfield, Illinois.

Dunifer considers his station part of a worldwide movement. He scorns not only corporate radio but also mainstream non-commercial broadcasting, dismissing it for its increasing political correctness and its reliance on government subsidy and corporate underwriting. "If grassroots radio is doing its job, it should be able to support itself," he declares.

Much of what Dunifer calls "grassroots radio" others would call "pirate radio." Pirate radio, of course, has existed for as long as there have been radio regulations to defy. The most famous ether pirates are the Jolly-Roger entrepreneurs behind Radio Caroline, Radio London, and the other offshore stations that challenged the BBC's staid programming in the 1960s with the latest rock sounds. Although the British government eventually drove

***United States v. Stephen Paul
Dunifer reverberates far beyond the
Bay area and the government's
attempt to shut down a lone radio
pirate. The case marks the
crossroads where participatory
technologies meet governmental
controls that stifle the free
expression they purport to
facilitate.***

them off the air, the BBC adopted its own pop programs in response to the competition. Today, within the subculture of short-wave hobbyists, there is a sub-subculture of illegal clandestine broadcasters whose programming ranges from counterculture comedy to neo-Nazi rants.

Micro radio—a blanket label for stations under 30 or so watts of power—is officially sanctioned in some nations, including Italy and Japan, where Sony and other companies sell relatively inexpensive "Community FM Sets" that include all the equipment necessary to start broadcasting. In other countries, such as Argentina, regulatory loopholes allow for a wide range of radio activity. Low-power micro radio, almost by definition, offers listeners material unavailable through other channels. As *Radio World* magazine characterized the Japanese micro broadcasters, "Unlike established radio stations that try to please all tastes, the low-wattage FM stations are doing all sorts of things the large stations would never dream of."

Whether fully legal, semi-legal, or explicitly forbidden, micro radio is often overtly political. In France, for instance, guerrilla stations began broadcasting in 1977; future French President François Mitterand was involved in the Socialist Party's clandestine Radio Riposte. In the former East Bloc, samizdat radio and TV outlets such as East Germany's Kanal X evaded state censorship to present alternative news programming. In Argentina, over 2,000 small FM stations have sprung up in the country's shantytowns and poor rural areas over the last decade, offering community-oriented programming from almost every conceivable political point of view.

In the United States, micro radio remains strictly verboten, even though the technical cost of going on the air—now a couple hundred dollars plus the monthly power bill—has



Lawyer Louis Hiken (left) and micro broadcaster Stephen Dunifer fight FCC claims that Radio Free Berkeley is interfering with licensed stations. "The only people who've complained are the FCC themselves," claims Hiken. "They've driven up right next to the transmitters and reported that they're receiving unlicensed broadcasts on someone else's frequency."

been within most Americans' reach since the mid-1980s. Because of the current regulatory framework, however, the legal cost outstrips the technical one: almost \$3,000 for a license, plus \$100,000 or more in startup costs. And except in Alaska, the FCC doesn't issue licenses to stations below 100 watts, which raises startup and power expenses still further.

The 100-watt rule went into effect in 1980. Although there were several reasons for the change, the most significant was pressure from the Corporation for Public Broadcasting. The CPB persuaded the FCC that eliminating 10-watt Class D non-commercial stations would clear the way for larger, more "professional" National Public Radio-style outfits.

The effect was not only to artificially restrict access to the airwaves, but to ensure that those who did get onto the air, having risked more money in the enterprise, were less likely to experiment or try anything new. The latter problem was compounded by FCC indecency regulations: Programming that raises few eyebrows in a bohemian college town might attract listener complaints in more conservative environs that previously couldn't receive the offending signal.

Anti-micro radio sentiments still run strong among public broadcasters. "I'd like to see some of these pirates get roasted," says Fred Krock, engineering supervisor at KQED, San Francisco's outlet for NPR. "Listeners to this station should have a right to interference-free listening."

Krock neatly summarizes the most powerful argument the FCC and other critics have raised against micro stations: that they interfere with other stations' signals.

But although KQED is one of the stations that the FCC claims

has received interference from Free Radio Berkeley, the KQED legal department says the station itself made no complaint; it must have originated with a listener or, more likely, the FCC itself.

Whatever the source of the complaint, Krock's patience has been drained by past interference problems. Once, he recalls, a religious network's local translator was blocking KQED's signal. Rather than cooperate in fixing the problem, the offending station suggested they resolve the dispute through prayer. If Dunifer is standing in the way of KQED's—or anybody else's—broadcasts, Krock concludes, Free Radio Berkeley should be shut down.

But for Hiken, Dunifer's lawyer, interference is a red herring. "The whole idea of micro radio is to not interfere. It's to communicate with people. If you're a small broadcaster and you go on the same frequency as a major broadcaster, you don't interfere—you get drowned out. If you have bad filtering or bad harmonics, that might be a problem, but that can be fixed."

Beverly Baker, chief of the FCC's Compliance and Information Bureau—the agency's investigative arm—isn't convinced by Hiken's scenario. "If they're both on the same channel, there's also a chance that *both* won't be heard," she argues. Technologically speaking, she's right. A one-watt station might be drowned out; a 30-watt station can cause problems. And Dunifer hasn't been limiting himself to one watt.

Sorting out the interference debate is hard, because there are really two issues at stake. First is the concrete question of whether or not Free Radio Berkeley is regularly interfering with other stations' signals. Dunifer insists that he isn't. Nobody has complained to him about interference, he says. And if they do, he'll immediately shut his transmitter down long enough to fix the problem.

"The only people who've complained are the FCC themselves," claims Hiken. "They've driven up right next to the transmitters and reported that they're receiving unlicensed broadcasts on someone else's frequency."

Hiken's accusation is bolstered by the FCC's response to a Freedom of Information Act request by *The Conspiracy*, the newsletter of the San Francisco Bay Area chapter of the National Lawyers' Guild. In mid-1994, *The Conspiracy* requested the origins, dates, and details of stations' complaints against Dunifer's broadcasts.

In its October 1994 reply, the FCC explained that "several informal inquiries or complaints were received from local broadcast engineer and consultant sources who either saw articles in

BOBBY LAW

the local newspapers, heard the broadcasts themselves, saw one of Mr. Dunifer's flyers, had read Mr. Dunifer's internet postings, or had seen or heard about the Commission's May 1993 monetary forfeiture action issued against Mr. Dunifer." Furthermore, "these contacts were made by telephone or in person,...no written records of the inquiries were made, and...the individuals involved expressly requested confidentiality." In other words, as of October 1994, all the complaints related to the fact that Dunifer was making unlicensed broadcasts, and not to specific instances of interference.

Have there been problems since October? Baker and Silberman of the FCC both cite a recent complaint by KFOG, an "adult rock" station in San Francisco. A telephone conversation with KFOG's program director draws a blank; he suggests I speak with the legal department of the station's parent corporation, Susquehanna, in York, Pennsylvania. There, one lawyer passes me on to another lawyer, who directs me to yet another lawyer, who says he isn't the person I should be speaking with.

Eventually, the origin of the complaint emerges: a letter dated May 2, 1995, sent from Susquehanna Senior Vice President Charles T. Morgan to FCC General Counsel William E. Kennard. The letter—sent from York, not San Francisco—appears to have been prompted by FCC prodding. "The existence," writes Morgan, "of Free Radio Berkeley and other so called 'Pirate Radio' operators in the San Francisco Bay area was a point of discussion at an FCC panel at the recent [April 1995] NAB [National Association of Broadcasters] convention in Las Vegas. Ms. Beverly Baker...was a member of that panel and stated that to her knowledge 'the FCC had not received any complaints concerning these illegal operations.' After this panel discussion, I discussed this matter with members of the Commission's staff who suggested that I direct this letter to you..."

As with the earlier FCC response, the bulk of Morgan's com-

plaints concern the legal status of Free Radio Berkeley, not interference. Most of his evidence involves Dunifer's provision of equipment and advice to other illegal stations, via mail, Internet, and face-to-face workshops. As Morgan says, his primary intent is to document "the existence of these illegal operations and their total disregard for the FCC and its authority...the blatant attitude and complete disregard for federal laws that is apparent in the actions of Stephen Dunifer and his associates."

Nonetheless, Morgan does make some disturbing allegations—not so much his claims of interference (the letter lists just two listener complaints, only one of which involves KFOG), but the assertion that Dunifer simply isn't a micro broadcaster at all. Free Radio Berkeley's transmitting power, claims Morgan, is actually between 100 and 150 watts. Dunifer denies this. The question will no doubt be debated—and possibly resolved—at Dunifer's hearing.

Whether or not this particular pirate is guilty of stepping on other stations' corners of the spectrum, the second question remains: Are micro stations any more likely to block signals than larger outfits?

The answer is straightforward: no. Indeed, Dunifer argues that it's the high-watt operations that are the real problem. "The big stations like KQED can blast the front ends off other stations in the area," claims Dunifer.

KQED engineer Krock approaches the question from another point of view: "As I understand it, what the pirates would like to do is increase the number of broadcast channels in use. The problem with this is that the broadcast allocations in this country are based on allowing the use of inexpensive receivers by the general public. What appears to be a hole in the FM broadcast band may be there to accommodate the shortcomings of inexpensive receiver design. It would be possible to put more stations onto the broadcast band, but that would require the use of more expensive, more sophisticated radios by the public. And I haven't heard any of the pirates suggesting where this money should come from."

In other words, cheap radios may make reception problems more likely. "Most Walkman-type receivers have trouble separating existing FM stations," says Krock.

Hiken doesn't buy it. For one thing, he argues, he and Dunifer aren't necessarily asking for the creation of *more* spectrum space; they'd be happy for the FCC simply to allocate a certain portion of the spectrum for micro radio, much as it reserves part of the spectrum for educational stations such as KQED.

But if Krock wants to play the spectrum-scarcity game, so can Hiken: "If you're going to have a megabroadcaster like KQED, that might preclude not just one, but 25 stations from going on the air. In San Francisco, with its hills, you could have seven micro stations at once on one frequency without interfering with each other." In short, Hiken asks, if you're going to throw someone off the air, why go after Dunifer? KQED is a fatter target.

In fact, a major reallocation of broadcast space is

Big radio stations "might preclude not just one, but 25 stations from going on the air. In San Francisco, with its hills, you could have seven micro stations at once on one frequency without interfering with each other." In short, Hiken asks, if you're going to throw someone off the air, why go after micro radio?

hardly necessary to accommodate both Free Radio Berkeley and a KQED listener's Sony Walkman. In radio, supply can spur demand; consumers purchase new equipment when it makes sense to buy it. When the Japanese government ended its broadcast monopoly in 1950, the market for radio and TV receivers boomed as the new stations produced material audiences wanted. Before, there hadn't been a good reason to spend more. And, of course, as production increased to meet the new demand, prices began to fall.

When the FCC talks about interference, it isn't just attacking one pirate who may or may not be cutting in on other stations' signals. It's raising the specter of chaos. "This opens up such a can of worms," government lawyer Silberman told Judge Wilken after she refused to grant the FCC its injunction. "You're giving carte blanche for this group of people to operate a radio station without a license."

This may seem a bit coy. Hiken and Dunifer are not demanding an end to broadcast licensing—they're trying to undo the 100-watt rule. Still, in interviews, Dunifer does ruminate freely about an FCC-free world. "Anything that comes with a license comes with other baggage," he told *Spin* magazine. "The real issue is that the micro community itself can be self-regulated. If there are disputes, why do we need intervention at the federal level? If someone is being really outrageous, you can resort to simple legal tort action."

Well then: What would the airwaves be like without licensing? Would we have Dunifer's self-regulated spectrum or the chaos described by government officials? The early 1920s, a period in which a substantial number of radio stations had gone on the air but before the Federal Radio Commission—the FCC's predecessor—was

created by the Radio Act of 1927, provides some context.

Traditional histories of the period describe it as a time of radio gone ga-ga. The Department of Commerce handed out licenses without care for spectrum scarcity, the story goes, and the secretary of commerce (at the time, Herbert Hoover) was unable to hold the line against interference. Nineteen twenty-six ushered in what's been called the "Breakdown of the Law" period, during which the airwaves degenerated into complete chaos. Then Congress created the Federal Radio Commission, which undertook the long-overdue task of reducing the number of licenses to fit the available spectrum.

Recent scholarship has shown this history to be almost entirely incorrect. Since Ronald Coase's classic *Journal of Law and Economics* article of 1959, "The Federal Communications Commission," most economists have recognized that a more rational solution to the problems of the "Breakdown of the Law" period would have been to recognize property rights in the broadcast spectrum and treat interference, as Dunifer suggested to *Spin*, as a tort. Newer research—notably, UC-Davis economist (and REASON contributing editor) Thomas Hazlett's 1990 article, "The Rationality of U.S. Regulation of the Broadcast Spectrum," also published in the *Journal of Law and Economics*—has shown that such a property rights-based order had in fact arisen in the '20s, without federal direction.

As soon as the Department of Commerce started handing out licenses, a "priority in use" system of property rights spontaneously emerged, says Hazlett. Broadcasters homesteaded particular frequencies at particular times of the day (24-hour stations were rare then). Spectrum rights were freely tradeable, and freely traded. Some areas adopted, without government prodding, the institution of "silent night," in which local broadcasters would shut down for an evening to allow listeners to tune in to long-distance signals. As the demand for licenses began to exceed supply, problems developed—but they were being dealt with.

"Beginning in September 1921," writes Hazlett, "when the Commerce Department first recognized radio broadcasting as a distinct license category, the department initially allowed just a single frequency (360 meters, or 833.3 kHz) to be used for broadcasting, necessitating complicated time-sharing agreements. (What interference took place during this 1921–23 period was, in essence, an outcome of government control: over 500 broadcasters were 'responsibly' bunching up all at the same point on the spectrum to which they had been directed by the Commerce Department, and operations were not always perfectly synchronized.) When this single channel became scarce, Hoover denied new licenses. The *Intercity* decision [*Hoover v. Intercity Radio Co.*] in February 1923, growing out of just such a denial, determined that the secretary had no authority to withhold a license but did have the legal right to set hours of operation and frequencies."

Meanwhile, established broadcasters, looking for protection against competition, wanted the govern-

The radio market before extensive regulation was not chaotic. When chaos did arrive, it was induced by government policy, not market failure. From the very beginning, broadcast regulation did more to protect established interests and limit programming variety than it did to stave off disorder and protect consumers.

ment to limit the number of new licenses it would issue. They had a friend in Hoover. The groundwork for the "Breakdown of the Law" was laid after the secretary decided, in November 1925, to stop issuing new licenses, arguing that the spectrum was completely filled. He invited a court challenge, and one arrived in April 1926: *United States v. Zenith Radio Corp.* Like *Intercity*, *Zenith* denied Hoover the right to withhold a license. Unlike *Intercity*, however, it denied him discretion over time and wavelength assignment.

Hoover did not appeal the case. Instead, he asked Acting Attorney General William Donovan which District Court decision to follow. On July 8, Donovan came out for *Zenith* and asserted that the government had no authority to define spectrum rights. "Faced with open entry into a scarce resource pool, a classic 'tragedy of the commons' ensued," writes Hazlett. "Stations had to be licensed by the secretary of commerce; once licensed, they were free to roam the dial, select their own transmitting location, choose their desired amplification level, and set their own hours." Hoover had created a crisis, and Congress quickly created the Federal Radio Commission to deal with it.

At the same time, non-regulatory solutions were ignored. In November 1926, for instance, WGN had sued the Oak Leaves Radio Station, claiming that the latter had essentially committed trespass by interfering with its signal. The court ruled in WGN's favor, explicitly basing its decision on homesteaded property rights. But the commission had no use for this approach.

Nor did it have any use for expanding the spectrum to allow more stations to broadcast. This was technically feasible but politically unpalatable to the big broadcasters, who preferred to make room by eliminating their smaller competitors. The industry defeated spectrum expansion by arguing it would require listeners to buy expensive new sets to hear the additional stations. That this might be preferable from a consumer's point of view to not being able to hear the other stations at all was not considered.

In August 1928, the commission announced General Order 40, its spectrum reallocation plan. The effect, as University of Wisconsin historian Robert McChesney argues in his 1993 book *Telecommunications, Mass Media, and Democracy*, was to eliminate most nonprofit stations (about a third of the 1920s radio market) and to nurture the networks. The commission favored "general public service" stations over "propaganda" stations, the latter defined, in McChesney's words, as broadcasters "more interested in spreading their particular viewpoint than in reaching the [broadest] possible audience with whatever programming was most attractive."

Inaugurating a line of thought to which the FCC still hews, the commission argued that there simply wasn't enough "room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether." While this wasn't necessarily true, it nonetheless helped the commission fulfill the big broadcasters' agenda. The National Association of Broadcasters,

**The Federal Radio Commission
(precursor to the FCC) ignored non-
regulatory solutions to conflict. In 1926
WGN sued the Oak Leaves Radio
Station, claiming that the latter had
committed trespass by interfering with
its signal. The court ruled in WGN's favor,
basing its decision on homesteaded
property rights. The commission
had no use for this approach.**

the commercial stations' trade association, was effectively under the control of the two major networks (CBS and NBC), and a revolving-door relationship between the association and the commission was firmly in place. Many commissioners went on to lucrative positions at the networks or the NAB.

In short, the system of the early 1920s was not chaotic. When chaos did arrive, it was induced by government policy, not market failure. Alternatives to regulatory control were ignored. And from the very beginning, broadcast regulation did more to protect established interests and limit programming variety than it did to stave off disorder and protect consumers.

It's not clear whether Stephen Dunifer and Free Radio Berkeley will prevail against the FCC. At press time, his hearing, which has been delayed several times, is scheduled for September 22. Only this much is certain: If he wins, his victory will be a welcome sign for those who would like to see radio become a more open and participatory medium.

Another certainty: Despite the scorn of establishment stations such as KQED, Dunifer and Free Radio Berkeley have their supporters in the "legitimate" radio world. "I think they're great," says Rasta Black, a volunteer at KPOO-FM, an independent community station located on Dunifer's home turf, the San Francisco Bay area.

"They can say a lot of stuff we're not allowed to say—things that we have to keep aware of, that we're not allowed to do," explains Black, who goes on to complain about the cost, in money, paperwork, and time, of meeting FCC regulations.

"They have a lot more freedom, and that's what we'd like to have," he concludes. "Power to the pirates." ❧

Jesse Walker is assistant editor of Liberty.



A Confederacy of Boobs

How special interests, assorted ideologues, and a sensationalist press torpedoed breast implants—and now threaten other medical devices

SCOTT STANTIS