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“But now all the stations are silenced, ’cause they ain’t got a government license”^{*}

Why Unlicensed Broadcasting Should Not Be a Crime

By Jesse Walker[†]

Broadcasting has come a long way since the pioneer punk band The Clash blasted Britain’s radio regulators with that line in 1979, but in some American state capitals, lawmakers seem stuck in the 1970s.

In the state of Florida, operating an unlicensed radio station—already a federal misdemeanor—is now a third-degree felony, punishable by up to five years in prison and up to \$5,000 in fines, under a law in effect since July 2004. There were approximately 18 arrests under the new statute in 2005, and at least one conviction (though in that case the accused plea bargained to a lesser charge).¹ This strong-arm approach may soon be coming to other states. In January, New Jersey enacted a similar bill, making it a fourth-degree felony to produce “a radio transmission of energy in this State unless the person obtains a license, or an exemption from licensure, from the Federal Communications Commission.” Under the Garden State statute, unlicensed broadcasters can be fined up to \$10,000 and imprisoned for up to 18 months.

There are some genuine problems associated with some—though not all—unlicensed broadcasting: Careless operators have been known to interfere with other radio transmissions, in effect trespassing on somebody else’s airwaves.² But even acknowledging that, laws like those in New Jersey and Florida are deeply wrongheaded for several reasons:

^{*} The Clash, “Capital Radio One,” *The Cost of Living E.P.*, CBS, UK, 1979.

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1. *The penalties are disproportionate to the offense.* Even when pirate broadcasting causes problems, making it a felony is akin to sending a SWAT team to enforce an anti-littering law.

2. *The laws penalize not just interference, but technically sound operations that serve genuine public needs.* A wide array of civic organizations and small-scale entrepreneurs run these stations, and some of them have been transmitting for years. The program content ranges from foreign-language formats aimed at immigrant communities to music that is more closely tuned to local preferences than you will find on some of their larger, licensed competitors.

3. *The laws increase political control of the airwaves.* At a time when serious economists and engineers are debating ways to open the marketplace and loosen the government's hold on the ether, these measures mark a step in the wrong direction: toward stricter, less flexible regulatory controls. A better approach would be to remove the entry barriers that prevent these small businesses and community groups from broadcasting legally, while reserving penalties for those who cause significant interference to other users of the spectrum.

Let's take a closer look at each point:

Disproportionate Penalties. For the most part, unlicensed broadcasting is a victimless crime. When there *is* a victim—when a pirate signal interferes with somebody else's transmission—it's the rough equivalent of the neighbor whose trash spills out of his garbage can and attracts some pests to your yard. It's a nuisance, but it doesn't merit five years in jail.

Such penalties are especially alarming considering how broadly the Florida statute is worded. Under the law, you may not:

(a) Make, or cause to be made, a radio transmission in this state unless the person obtains a license or an exemption from licensure from the Federal Communications Commission under 47 U.S.C. s. 301, or other applicable federal law or regulation; or

(b) Do any act, whether direct or indirect, to cause an unlicensed radio transmission to, or interference with, a public or commercial radio station licensed by the Federal Communications Commission or to enable the radio transmission or interference to occur.

This language prompted a protest from the American Radio Relay League, the nation's leading organization of ham-radio operators—a group not ordinarily inclined to sympathize with pirates. “The Statute is not limited to broadcast stations, though broadcast radio stations appear to be the focus of the protected class under this Statute,” the group pointed out in a filing with the FCC. “Nor is it clear what constitutes

‘interference.’”³ Enforced to the letter of the law, the measure could make a felon out of somebody whose garage door opener, home wireless network, or cordless phone causes some tiny local interference with a broadcast signal. Obviously, the police have no plans to enforce the law that strictly. But the mere possibility indicates the sloppiness with which the bill was composed.

Because the offense involved is so petty, defenders of the Florida statute have taken to wildly exaggerating the threat posed by unlicensed broadcasts and broadcasters. One approach is to draw a rhetorical association between radio piracy and more serious crimes. “Because there’s such a low cost involved in setting up a pirate radio station,” the bill’s sponsor, state Rep. David Rivera (R-Miami) argued, “someone can go to Radio Shack, buy some inexpensive radio equipment, and literally communicate gang messages on different frequencies that gang members driving in a car or listening at home can hear.”⁴

There are indeed some violent criminals involved in pirate broadcasting—particularly in Florida, where the number of unlicensed stations is unusually large—just as some criminals are, unfortunately, sometimes employed by legal radio stations.⁵ But there is no inherent link between unlicensed broadcasting and serious crime, and no evidence that a majority of the Florida stations are run by crooks.

Indeed, it’s entirely possible that Florida’s pirate radio community has done more to prevent crime than to advance it. For example, in 1993, the unlicensed hip hop station Bass 91.9 FM was widely credited with helping keep calm among Miami’s African American community during the trial of a Hispanic police officer who had killed a black biker.⁶ The station’s DJs even participated in a series of police-sponsored concerts dubbed “Jammin’ with the Man.” In 1999, I visited Hot 97.7, a community station run by an ex-con who had turned his life around and attracted admiration from some unexpected quarters. The beat cop on his block, Sgt. Frank Dean, praised the man’s influence and attested that he “keeps these kids employed”; he didn’t condone broadcasting without a license, but he had nothing but praise for this particular station.⁷

At any rate, anyone demonstrably guilty of a serious crime can be punished for that crime; there’s no need to make a felony of his radio activities to put him away. Indeed, the Broward Sheriff’s Office claimed in July 2004 that it had already shut down a dozen stations over the previous year and a half, just by arresting the broadcasters for other offenses.⁸

Defenders of the Florida and New Jersey laws have also attempted to make a public safety argument for the measures. In its weaker forms, this entails arguing, as various spokespeople for the Florida Association of Broadcasters have done repeatedly, that unlicensed broadcasts “could frustrate an Amber Alert or interfere in a weather emergency.”⁹ Of course, there is nothing special about an Amber Alert or a weather emergency that would make it susceptible to interference; they are just two of the many things a rock, talk, or country station might be transmitting on a particular day when a pirate signal happens to waft into the way. It sounds more grave to cite potential

“interference” to an Amber Alert than to, say, a Brooks & Dunn song, but it’s ultimately the same complaint. Moreover, in actual practice, as opposed to fear-mongering industry rhetoric, there are several cases nationwide in which unlicensed stations kept broadcasting useful information during a weather disaster after their licensed counterparts were knocked off the air.¹⁰

A more worrisome argument contends that pirate broadcasts could interfere with air traffic communications, an argument buttressed by the fact that, in April 2004, federal authorities shut down a Florida station whose broadcasts really did bleed into air traffic signals. One supporter of the bill told *The Miami Herald* that “there is a chance that people could die” if unlicensed radio continues unchecked.¹¹ But if policy makers take this threat seriously, the Florida approach seems especially misguided. While cases of unlicensed operations interfering with air traffic talk are rare—and there are no recorded reports at all of a pirate broadcast causing a crash—there have been several cases of *licensed* stations producing such interference.¹² When a legal station butts into air-ground communications, of course, the authorities know whom to alert that his transmissions might be putting passengers at risk. Not so when the offender is a semi-clandestine illicit broadcaster. Which makes more sense: to make the offender a potential felon, giving him an incentive to dive further underground, or let him broadcast legally, with a publicly available phone number and address?

That isn’t a purely hypothetical scenario. According to *The Miami Herald*, pilots in the area have recently received interference from a rap-oriented pirate in Opa-locka called Da Streetz. The problem persisted intermittently for a month before investigators were able to trace where the signal was coming from—and when they arrived there, the paper reports, they found “three computers, a monitor, a mixing board, a stereo compressor, a microphone, a two-deck CD player, a telephone, a DSL modem, two stereo speakers, three gray three-ring binders and 10 cases filled with CDs. But no radio transmitter. And no disc jockey.”¹³

Filling a Public Need. From the broadcast lobby’s rhetoric, one would think that unlicensed operators are nothing but gangsters polluting the airwaves with vulgarity. In fact, they are a colorful collection of broadcasters with one thing in common: The FCC’s entry barriers prevent them from getting a license. Florida’s pirate scene—arguably the biggest in the country—has been around for over two decades; it has included stations devoted to Haitian, Jamaican, Greek, and Russian immigrants; to left-wing and right-wing jeremiads; to Christianity and Judaism; to rap, reggae, and gospel music; to the biker subculture. Far from lacking an audience, the local hip hop pirates have been known to break local hits. (When record companies started to notice that some of their output was selling well in Miami without any airplay on the legal stations, they started sending their new releases to the pirates as well.)¹⁴

Many of these unlicensed stations offer formats that simply cannot be heard elsewhere on the Florida airwaves. Other formats *can* be heard elsewhere, but the pirates believe, in the long American tradition of entrepreneurial upstarts, that they can do a better job. The drive to shut them down is motivated not merely by anger at interference and respect for

existing laws, but by the fear of competition. “It’s been a big problem for us,” one unusually frank program director of a licensed station told the South Florida *Sun-Sentinel*. “Many of the pirates use the same format that we do and we lose a lot of advertising revenue to them.”¹⁵

There is clearly room for more stations on the local airwaves than current FCC regulations allow—otherwise there wouldn’t be so many operations able to broadcast without causing real interference.¹⁶ Public policy should aim to accommodate as many of these voices as possible, not snuff them out.

Control of the Airwaves. Such an accommodation would mean loosening regulators’ control of the airwaves. While Florida and New Jersey politicians debate how to increase the government’s control of the electromagnetic spectrum, economists and engineers are debating how to *ease* it, with some taking the traditional free market position that the spectrum should be divided into tradable private property¹⁷ and others favoring some form of self-regulating commons.¹⁸

State legislators cannot change FCC rules, of course. But the one silver lining to these laws is that they advance the idea that telecommunications policy doesn’t have to be set in Washington, D.C. One FCC official told the *Sun-Sentinel* that, “Under this new law, we don’t have to be called at all.”¹⁹ I suspect that was meant as a joke, but it’s a telling one. Imagine what might have happened if Florida had taken telecom law into its own hands in a rather different way.

It’s already a misdemeanor in Florida, and other states, to intentionally interfere with public safety channels—the radio frequencies used by police, firemen, ambulances, and the like. The state could have extended a similar idea to the AM and FM bands, ignoring the issue of whether the broadcaster has a license or exemption from the federal government and simply making it a civil offense to create substantial interference. That would have avoided the wildly disproportionate penalties embedded in the law that was adopted instead; it would have limited the punishment to broadcasters who actually jam other stations’ signals; and it would have been a step towards a more private order, in which interference is seen as trespassing and is treated as a tort.

The Florida Association of Broadcasters and the New Jersey Broadcasters Association aren’t likely to get behind a reform like that—after all, it wouldn’t do anything to reduce their competition—but local governments around the country have already rallied around unlicensed stations that serve their communities while defying the FCC, and they have sympathizers in several statehouses. Now that the radio protectionists have taken their fight to the state legislatures, it might be time for the advocates of radio freedom to do the same.

Notes

1. The arrest statistics come from the Criminal History Database, Florida Department of Law Enforcement. The man who plea bargained, Panagiotis Frangiskakis, didn’t actually operate a radio station; he was the broadcasters’ landlord. According to John Anderson’s invaluable weblog DIYmedia.net, “he received a

sentence including a year's probation and 25 hours of community service. The court also ordered him to destroy his tower and make two charitable contributions totaling \$2,850—the amount he made in rent from the pirates.” See diymedia.net/archive/1205.htm#121405.

2. See, for example, Kevin Deutsch, “2 pirate radio stations must sign off,” *The Miami Herald*, July 2, 2005, describing the first arrests under the new Florida law. The arrestees’ stations allegedly interfered with WKPX, a legal station run by high school students.

3. American Radio Relay League, Request for Declaratory Ruling, February 25, 2005

4. Jonathan Abel, “Pirate Stations Under Attack,” *The Miami Herald*, July 21, 2004.

5. For some examples of the latter, see Fredric Dannen, *Hit Men: Power Brokers and Fast Money Inside the Music Business*, second edition, Vintage Books, 1991.

6. Tony Pugh, “BASS-FM Gets a Warm Reception,” *The Miami Herald*, June 6, 1993.

7. Jesse Walker, *Rebels on the Air: An Alternative History of Radio in America*, NYU Press, 2001, p. 237. For more on Hot 97.7, see Michael W. Lynch, “Dead Air,” *Reason*, August-September 1999.

8. Abel.

9. See, for example, Amy Tardiff, “Florida toughens law on pirate radio,” *Morning Edition*, National Public Radio, December 27, 2005. On that occasion the line was recited by FAB attorney Reggie Garcia.

10. For one example, see Walker, p. 232.

11. Roy Pressman, quoted in Abel.

12. Tracy Jake Siska and Dharma Bilotta-Dailey, “FCC's Interference Argument Grounded,” *Extra!*, January/February 1999. Siska and Bilotta-Dailey “filed a Freedom of Information Act (FOIA) request with the Federal Aviation Administration for any paperwork that related to cases of air traffic communications interference by radio stations, licensed or unlicensed...between January 1, 1990 and May 15, 1998.” Of the incidents they uncovered, only one involved an unlicensed station.

13. David Ovalle, “Pirate radio’s hip hop tunes finding way to pilots' ears,” *The Miami Herald*, March 19, 2006.

14. Sarah Ferguson, “Radio Free Florida,” *Vibe*, November 1998.

15. Alexandra Navarro Clifton, “South Florida broadcasters mull new pirating law,” *Sun-Sentinel*, July 21, 2004.

16. In the late 1990s, the FCC moved to license a new class of low-power FM stations in order to allow more small-scale outlets onto the air. Unfortunately, the plan—already far more limited than it needed to be—was almost immediately stunted by the Radio Preservation Act of 2000, which drastically shrank the number of new stations being permitted and ensured the ones that did appear would emerge only in rural areas.

17. The classic arguments for this position include Ronald Coase, “The Federal Communications Commission,” *Journal of Law and Economics*, October 1959; Arthur Devany, Ros Eckert, Charles Meyers, Donald O’Hara, and Richard Scott, “A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study,” *Stanford Law Review*, June 1969; and Thomas W. Hazlett, “The Rationality of U.S. Regulation of the Broadcast Spectrum,” *Journal of Law and Economics*, April 1990.

18. Different variations of this idea have been advanced by Yochai Benkler, George Gilder, Eli Noam, and Kevin Werbach, among others. For a lucid example, see Benkler, "Some Economics of Wireless Communications," *Harvard Journal of Law & Technology*, Fall 2002. The best-known propertarian critique of their position is Thomas W. Hazlett, "The Wireless Craze, The Unlimited Bandwidth Myth, The Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's 'Big Joke': An Essay on Airwave Allocation Policy," *Harvard Journal of Law & Technology*, Spring 2001.

19. Ralph Barlow, quoted in Clifton.