Copyright Warning and Restrictions

Title 17, United States Code of the copyright law of the United States governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions, the New Jersey Institute of Technology (NJIT), Robert W. Van Houten Library is authorized to furnish a photocopy or other reproduction on the condition that either is not to be "*used for any purpose other than private study, scholarship, or research.*" If a person makes a request for or later uses a photocopy or reproduction for purposes in excess of "fair use", that user may be liable for copyright infringement.

Fair Use Guidelines

Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

American Broadcasting and the First Amendment

LUCAS A. POWE, JR.

1987

UNIVERSITY OF CALIFORNIA PRESS
Berkeley Los Angeles London

States. It is hard to think of Brinkley's popular radio quackery as a respectable relative of the print medium: whereas newspapers and magazines were attempting serious discussion of the news, the medicine men and entertainers of radio, by contrast, were aiming to alleviate the boredom of the public and exploit its naïveté. Congress and the Federal Radio Commission mirrored the views of thoughtful Americans in recognizing the profound difference between the two media, a perception buttressed by a 1915 Supreme Court decision stating out-of-hand that motion pictures, including newsreels, were not part of the press. At the beginning of the broadcast era, just making the distinction was sufficient analysis.

With time, however, simply "knowing" there was a difference proved inadequate. More than simple assertion was necessary to sustain the point. Two major Supreme Court cases, *NBC v. United States* in 1943 and then *Red Lion Broadcasting v. FCC* in 1969, set forth the modern theory of differences between the two media. Furthermore, *Red Lion,* as the Supreme Court's leading decision detailing the constitutional status of broadcasting, went on to articulate a "new" First Amendment, one befitting this "new" method of communication. The rationale and explanation of the "new" First Amendment take us through chapter 3 and establish unequivocally that the protections extended to the print medium would not be fully available for broadcasters. The remainder of the book will look at the consequences of that decision.

1
A DIFFERENT MEDIUM

"Back in the Tennessee Mountains, where I come from, they would not allow city doctors to strip young girls seeking restaurant employment."[1] The Reverend Bob Shuler made that observation blasting the Los Angeles Board of Public Health. It was but one example of the style that earned him his nickname "Fighting Bob"—a "scrapper for God," as he summed up his career in a farewell sermon to his Trinity Methodist Congregation in 1953.[2]

Shuler was a rigid moralist with an intense dislike for vice, especially prostitution and alcohol, the twin evils of the era of Prohibition. During an early ministry in Austin, Texas, he energetically worked to dry up Texas counties but also concluded that political and civic corruption were important targets for his wrath. And he had plenty of that; he was one of those men who cannot sit quietly by when something around him meets with his disapproval. A transfer to a debt-ridden church in Los Angeles in 1920 gave him a virtually unlimited array of targets, for, like many other American cities during Prohibition, Los Angeles was mired in corruption.

In 1926 a wealthy widow from Berkeley, impressed after hearing some of Shuler's indignant sermons, gave him $25,000 to purchase a better forum. KGEF, a one-kilowatt station broadcasting twenty-three and one-quarter hours

a week on a shared frequency, was born. The license was granted in the name of Shuler's Trinity Methodist Church, and Shuler's sermons were broadcast each Sunday. Shuler took two additional hours of airtime for himself, one on Tuesday and one on Thursday evening, for the "Bob Shuler Question Hour" and "Bob Shuler's Civic Talk." It was during these two hours that Shuler waged war on local corruption. In so doing, he built a vast audience for his small station, which within a few years was rated the fourth most popular in the market. Commercial stations were unable to sell time opposite Shuler's two evening programs. A recent study states that he had an audience of six hundred thousand listening to him lash out at an imperfect world.[3]

Shuler's application for renewal of KGEF's license in September 1930 stated that KGEF had "thrown the pitiless spotlight of publicity on corrupt public officials, and on agencies of immorality, thereby gladly gaining their enmity and open threats to bring pressure to bear to 'get' this station's license." He was right. The Federal Radio Commission decided to hold a hearing on the renewal. The chief hearing examiner was sent to Los Angeles and presided over a sixteen-day hearing where for the first time in the Commission's short three-year history an outside party was allowed to handle the opposition to a licensee. Indeed, the opposition's counsel was a former city prosecutor whom Shuler had driven from office.[4]

The hearing procedure placed Shuler on the defensive. He was confronted with a thousand typewritten pages of his on-the-air statements taken down in shorthand or by mechanical devices over a three-year period. The hearing thus provided a replay of Shuler's charges: the mayor let a gangster run the city and once had the course of a boulevard changed so that it would run past the gangster's property; the chief of police protected the underworld by allowing

commercialized vice to flourish even when informed of where the illegal activities were occurring; the police framed the head of the Morals Efficiency Association and killed a woman to cover the frame-up; the district attorney and his chief deputy took bribes; the bar association wanted to elect judges who would go easy on vice. Also included were attacks on the Catholic religion, some disparaging remarks about Jews, and finally, an incident in which Shuler allegedly stated that if a prominent (unnamed) figure did not give him one hundred dollars, "I will go on the air next Tuesday night and tell what I know about him." Interestingly, in many cases Shuler's side of the story was compelling. The chief of police had resigned, and the mayor had chosen not to run for reelection. Shuler's story of the murder cover-up was corroborated and uncontradicted. The hundred-dollar story (which allegedly brought forth several contributions), according to Shuler, was a humorous reference to a member of the Trinity congregation whose name he had mentioned minutes earlier in the context of a fund drive at the church. The member in question corroborated Shuler.[5]

Two convictions for contempt of court—for critically commenting during his radio programs on pending court cases—could not be explained away as easily, although today the convictions would be instantly overturned as based on perfectly legitimate exercises of the right to criticize governing agencies, even courts.

The chief hearing examiner ruled in favor of renewing KGEF's license, but the opponents appealed to the full Commission, where their challenge was sustained. KGEF was ordered off the air, effective immediately. The principal thrust of the FRC decision against Shuler was that he used his station as a forum for outrageous and unfounded attacks on public officials. This view comes out clearly in the

Commission statement prepared for the judicial appeal to the D.C. Circuit:

> [Shuler] has repeatedly made attacks upon public officials and courts which have not only been bitter and personal in their nature, but often times based upon ignorance of fact for which little effort has been made to ascertain the truth thereof. . . .
>
> [Shuler] has vigorously attacked by name all organizations, political parties, public officials, and individuals whom he has conceived to be moral enemies of society or foes of the proper enforcement of the law. He has believed it his duty to denounce by name any enterprise, organization, or individual he personally thinks is dishonest or untrustworthy. Shuler testified that it was his purpose "to try and make it hard for the bad man to do wrong in the community."[6]

The Commission's overall conclusion was that Shuler's broadcasts "were sensational rather than instructive."[7]

The Commission attempted to capitalize on the *Shuler* case by convincing the courts to sustain its power to regulate broadcasting on the widest possible grounds. It had refused to renew Shuler's license because it disapproved strongly of his attacks on public officials. There could be no way around the issue, and the Commission intended a frontal victory.

It put forward a two-pronged argument. First, broadcast speech was not "speech" within the meaning of the First Amendment—that is, nothing said over the air was entitled to any First Amendment protection. Second, Commission scrutiny of programming to determine if it was in the public interest did not constitute censorship within the meaning of the no-censorship provision of the Radio Act, section 29; accordingly, a Commission determination that a licensee's programming did not serve the public interest would justify termination of the right to broadcast. The Commission won the second argument, but no decision was made on the first, as the D.C. Circuit never reached the issue.

The beginning of the court's opinion is somewhat ambiguous, possibly because of indecision about how to deal with the Commission's argument that the First Amendment has no place in broadcasting. The opinion stated that it would not "stop to review the cases construing the depth and breadth" of freedom of speech. This was partly because it was clear that the "constitutional guarantee should be given liberal and comprehensive construction," but it is no doubt also relevant that the court concluded that Shuler's case had nothing to do with freedom of speech.

Here the court turned to the Commission's arguments. Knocking a station off the air was "merely the application of the regulatory power of Congress in a field within the scope of its legislative authority." The First Amendment does not bar the government from refusing to renew a "license to one who has abused it" by broadcasting "defamatory and untrue matter." From the court's perspective, it was clear that the Commission had the duty to scrutinize a licensee's past programming in order to ascertain whether future programming was likely to be in the public interest. Yet that scrutiny could be focused exclusively on offending programming, with no attention given to overall programming. There was no indication that either the Commission or the court cared what went out over KGEF during the 86 percent of airtime that Shuler did not have the mike. If there was offending programming, good programming simply could not balance the injury.[8]

Once the court concluded that the Commission had the duty to refuse to renew a license to a station that so exceeded the bounds of propriety, treatment of Shuler's argument that taking away the license violated the no-censorship provision of the Radio Act was perfunctory. The court felt this argument bordered on the frivolous and concluded that the facts "abundantly" sustained the Commission's conclusion that Shuler's programming was not in the public in-

terest. It would be horrible if this "great [new] science" of broadcasting were used in the way Shuler used his station. Fortunately, no censorship had been involved:

> [Shuler] may continue to indulge his strictures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve . . . but he may not, we think, demand, of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe.[9]

Both the court and the Commission had concluded that Shuler's broadcasts exceeded all bounds of propriety. He concentrated on the wrong material and expressed his views in a defamatory way; public officials ought not to have their reputations sullied so easily. It evidently did not occur to the court or the Commission that "Fighting Bob" was basically correct. Although intemperate and all too willing to provide a wide audience with unfounded rumors of wrongdoing, Shuler was hardly off target. There was ample corruption in Los Angeles, and Shuler was highlighting it; not surprisingly, those earning their livings off the corruption were hardly pleased by his broadcasts. By their success within the legal system, those very people were able to silence an important voice demanding reform.

Shuler requested that the Supreme Court review his case and return his license. The Court refused, as always without opinion.[10] This was not because the Supreme Court had concluded that critics of local corruption using defamatory and heightened rhetoric could be silenced. Far from it. Just before Shuler lost in the D.C. Circuit Jay Near was winning a major victory in the Supreme Court.[11]

Near was the publisher of the *Saturday Press,* a Minneapolis weekly. Because of his scurrilous articles attacking local corruption, he had been the first test of Minnesota's

Gag Law of 1924.[12] In 1927 the *Saturday Press* had printed a series of articles charging "in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties."[13] The paper was charged and convicted under the Gag Law as a "malicious, scandalous, and defamatory" publication.[14] Under the statute, such publications were public nuisances, and their abatement by means of local suits was the hoped-for outcome of the law. On conviction, the paper was perpetually enjoined from issuing any publication whatsoever that was a malicious, scandalous, or defamatory newspaper, as defined by law. In *Near v. Minnesota,* however, the Supreme Court reversed that conviction, in the first major Supreme Court case wherein a First Amendment claim prevailed.

The Court's essential point in *Near* seems obvious today: Minnesota was engaging in censorship. But this fact was not as obvious in 1931—and therein lies the significance of *Near.* The Court's analysis begins by separating the statute in *Near* from more usual statutes. It was not a defamation law, because remedies for libel were available and unaffected by the Gag Law's passage. Nor was it a law to protect private citizens from the press, as the facts involved charging public officials with neglect of their duties. Nor was the statute concerned with false charges, because truth was not a defense unless the publisher could also show that the material was published with good motives and for justifiable ends.

Once it was clear what the statute wasn't, it was also pretty clear what it was. The Minnesota Supreme Court had pointed out that it was not a criminal libel statute, because such statutes do not result in "efficient repression or suppression of the evils of scandal"[15]—something the Gag Law did. The law was in fact an efficient suppression scheme in which, after the initial court order, subsequent enforcement

was by contempt—that is, tried only to a judge without a jury, and in all probability to the judge who issued the permanent injunction in the first place. It is the subsequent enforcement that constitutes the "effective censorship."[16] Should the publishers resume publication they would run the risk that any article published might run afoul of the terms of the injunction, which was written in the terms of the statutory language. And those terms were nowhere defined: not in the statute, not in the injunction.

The Supreme Court, through Chief Justice Hughes, determined that the Minnesota statute was analogous to the infamous prior licensing, that is, requiring a publisher to seek permission of a censor prior to publication. From the Court's perspective, if Near had the right to publish the first attacks on the officials without censorship, it followed that, because he had exercised the right to publish in the first place, he did not lose the right to publish subsequently. Furthermore, if a prior restraint were proper, it could have been exercised before Near published any of his attacks. However, the Constitution forbids prior restraints except in the most limited circumstances (such as publishing the sailing dates of troop ships, the court suggested).[17] Finally, although attacks on public officials who are attempting to faithfully discharge their duties are unfortunate and deserve the severest condemnation by public opinion, the Court found that

> the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasize the primary need of a vigilant and courageous press, especially in great cities.[18]

That liberty of the press might be abused could not make less necessary the press's immunity from censorship when it

was dealing with allegations of official misconduct. As Vincent Blasi would note fifty years later, the emphasis is on the fact that the Gag Law, as applied, suppressed criticism of public officials, and Chief Justice Hughes rightly sounded the theme that the government must not attempt to censor charges of misconduct and malfeasances of those charged with governing.[19]

It is difficult to ignore the similarities between what happened to Near and what happened to Shuler. Near was enjoined, Shuler stripped of his station—and thereby forbidden to continue. Each attacked public officials for dereliction of duty and so was perceived locally as a scandalmonger. Neither was sued for libel by the affected officials. Near was enjoined because his articles were supposedly "malicious, scandalous, and defamatory"; Shuler's license was not renewed because his broadcasts were "sensational rather than instructive." Near could not publish without fear of a judge's constant oversight; Shuler could not broadcast—period. And, although no court knew it then—or likely would have believed it—both Near and Shuler made charges that carried more than a little truth to them. They were shrill, undisciplined, alone, but they both screamed corruption and demanded that responsible officials act.

In the case of Jay Near, the Supreme Court knew that censorship of criticism of government officials was at stake. Not so for Bob Shuler. *Near,* decided a year earlier, was seen as having no relevance to Shuler when the D.C. Circuit decided the case, and when Shuler requested that the Supreme Court review his case, the Court declined. Although there may be many reasons for the Supreme Court to decide not to review a case, the principal one is that the case was rightly decided by the lower court. It is impossible to say for sure, but the overwhelming likelihood is that the Supreme Court left Shuler alone for precisely that reason: the court of appeals had gotten it right. How that could be so is the subject of the next chapter.

2

DR. BRINKLEY AND THE PEEP SHOW IMAGE

The short answer to why Near and Shuler received different treatment is found in the Federal Radio Commission's major argument to the D.C. Circuit: broadcasting was not included under the First Amendment. Americans simply perceived broadcasting to be different from publishing a newspaper.

Unlike the positions argued on many agency trips to a reviewing court, the Commission's legal argument had not been created on the spot to fit the facts of a questionable case. Almost from the inception of the FRC, once it began the tough task of deciding who should broadcast and who should not, the Commission determined that it must look at the programming on the air. And "look at" meant evaluate critically. If Fighting Bob Shuler had praised the mayor of Los Angeles and the chief of police and had urged his listeners to back these officials fully, he would have continued as the licensee of KGEF. The Commission had already pointed this way when it stripped two Chicago stations of their licenses to share a frequency, giving the frequency instead to a Gary, Indiana, station (as part of an effort to move stations to states with fewer radio operations) and in the process noting the Gary station's service to the immigrant community, with programs that were "musical, educational

and instructive in their nature and [that stressed] loyalty to the community and the Nation." Its facilities were offered free to the "local police department and to all fraternal, charitable and religious organizations" in the area.[1]

Of course, Shuler's criticisms and the Main Street boosterism that characterized the Chicago-Gary move were not at all alike. The Commission members had no trouble reaching a decision in either case, however: since the First Amendment had nothing to do with their actions, they could not violate it. As the Commission expressed it in its Second Annual Report in 1928, "The Commission is unable to see that the guarantee of freedom of speech has anything to do with entertainment programs as such."[2] That conclusion was not startling in the slightest. Few, if any, Americans would have disagreed. Just as adults today would hotly and easily deny that a child is having a First Amendment experience playing Pac-Man, so the adults of 1928 knew that radio was not included under the First Amendment. The perception of radio as a thing apart could be justified and illustrated in a number of ways, but the famous "goat gland doctor" of Milford, Kansas, John R. Brinkley, probably illustrates the point better than anyone.

Although Milford was but a tiny hamlet west of the present-day Fort Riley, connected by a dirt road to Junction City, its radio station KFKB was one of the most powerful in the United States, blanketing the area between the Rockies and the Mississippi, but extending far beyond. It was also one of the most popular stations in the nation, as illustrated by its having won *Radio Digest*'s nationwide listeners' poll in 1929 by a four-to-one margin over the runner-up.[3] This overwhelming popularity was due to the fine combination of fundamentalist theology and medical information provided by Brinkley, a small, dapper, bespectacled doctor who sported a Vandyke and diamonds. When Dr. Brinkley, the licensee, would intone into the microphone, "Greetings to

my friends in Kansas and everywhere," radio's most successful medicine man was about to increase his revenues.[4]

Brinkley, the doctor, and KFKB, the station, were inseparable, from their successes to their defeats. Brinkley had settled in Milford before the end of World War I to practice medicine in one of the eight states that would recognize his degree from Eclectic Medical University of Kansas City.[5] Within a year after his arrival he had performed the first of the hundreds of operations that soon earned him his nickname, the "goat doctor." To pep up the declining male sex life, Brinkley would implant the gonads of a young Ozark goat in the patient's scrotum. In the early days the patient would supply his own goat, but as time passed and "successes" accumulated, the Milford operations took on a higher price—$750—and a more professional air.[6] Thus, just as a good seafood restaurant will have a lobster tank from which customers can choose their dinners, so in Milford the patient could pick, from among many, his donor goat.

By 1928 Brinkley's hospital was grossing $150,000, and Milford had electricity and a promise of pavement to Junction City.[7] KFKB's popularity ensured its prosperity as well. This prosperity had been assisted in part by a change in emphasis. Whereas the number of likely recipients of goat glands is limited, enlargement of the prostate could potentially affect any man over forty. That was an audience more of Brinkley's dimension, and his medical business focused increasingly on the prostate. Not content to rely on a single medium for communication, Brinkley flooded the mails with circulars addressed to "the prostate man."[8] Like his smooth radio presentations, these pamphlets were designed to convince the recipient that he had a problem and that, fortunately, Brinkley was in a position to solve it. "It certainly behooves a man who has an enlarged prostate to consider it, and we are indeed glad to hear from such men for we are convinced we can render him a real, genuine and lasting service."[9] A superb detail man, Brinkley also provided easy directions on how to get to Milford.

KFKB was a happy adjunct to Brinkley's promotion. A typical day would find Brinkley on the air twice (after lunch and after dinner) to speak on medical problems. The evening discussion was a gland lecture, explaining the male change of life. "Our bodies are not holding up as well as those of our forefathers did. . . . Enlargement of the prostate is on the increase"[10]—a situation that he could correct.

Brinkley's other program was his "Medical Question Box," a program that grew out of the ever-increasing daily mail. Usually he would pick up some letters on his way to the mike, leaf through them, and make an instant diagnosis.[11] On the air he would read the listener's symptoms, quickly give the diagnosis, and then prescribe the medicine required.

> Here's one from Tillie. She says she had an operation, had some trouble ten years ago. I think the operation was unnecessary, and it isn't very good sense to have an ovary removed with the expectation of motherhood resulting therefrom. My advice to you is to use Women's Tonic numbers 50, 67, and 61. This combination will do for you what you desire if any combination will, after three months' persistent use.

Or

> Now here is a letter from a dear mother—a dear little mother who holds to her breast a babe of nine months. She should take number 2 and number 16 and—yes—number 17 and she will be helped. Brinkley's 2, 16, and 17. If her druggist hasn't got them, she should write and order them from the Milford Drug Company, Milford, Kansas, and they will be sent to you, Mother, collect. May the Lord guard and protect you, Mother. The postage will be prepaid.[12]

As the use of numbers rather than names on the "Medical Question Box" illustrates, Brinkley had expanded into the pharmacy business. Indeed, he had even organized a National Dr. Brinkley Pharmaceutical Association, which would fill listeners' "prescriptions." The numbers also usefully concealed the common agents, such as aspirin and castor oil, that he would prescribe. At a dollar a sale kickback to Brinkley, this adjunct brought in hundreds of thousands of dollars. No small thinking here.[13]

But no small enemies, either. Between his constant attacks on doctors, his unorthodox practice, and his financial successes, he had managed to curry the wrath of organized medicine. In 1930 he faced a two-pronged attack on his operations: in Topeka, the Kansas Board of Medical Examiners put at issue his right to practice; and in Washington, D.C., the Federal Radio Commission challenged his right to broadcast. On Friday, June 13, 1930, he effectively lost both battles.[14] The Kansas Supreme Court turned away his efforts to enjoin the medical board proceeding, and the FRC, finding the operation of KFKB a "mere" adjunct to his medical practice and hospital and insufficiently attuned to the needs of Kansas—making wheat grow, not prostates shrink—refused to renew his license.[15] His enemies had found allies. Goat gland recipients may have been too embarrassed to talk, but not so disgruntled prostate patients and pharmaceutical customers.

Still, Brinkley was not without supporters and resources. In a stunning effort begun in late September after the ballot was printed, Brinkley ran as a write-in candidate for governor of Kansas—and may even have "won." Unfortunately, he lacked poll watchers, and somewhere between ten thousand and fifty thousand of his votes were thrown out. In the middle of those figures was the margin of defeat. (He also polled twenty thousand write-ins in the Oklahoma election.)[16]

Brinkley was down but not out. He acquired a Mexican border station with even more power than KFKB and began phoning his broadcasts across the Rio Grande. With so many loyal followers, it was just like the old days. Eventually he moved his operations to Del Rio, Texas, just across the border from his powerful station XER.[17] But Texas provided only a temporary respite from his adversaries. In 1938 he lost a libel suit against a prominent AMA doctor on his new home ground, which disillusioned him about Del Rio, leading him to make an ill-conceived move to Little Rock, where huge claims by Uncle Sam for back taxes awaited him.[18] An unhappy bankruptcy would have been the end result but for a timely move back to Del Rio, where the liberal exemptions under Texas law could be put to good use as he saved his diamonds from creditors.

Events were taking their toll, however. In 1941, after years of effort, the U.S. government finally succeeded in silencing the flamboyant pioneer when Mexico agreed to knock him off the air. A few days later he suffered a heart attack, and within a year, at the age of fifty-six, he was dead.[19]

The demise of KFKB, however popular the station was with the American listening public, was entirely predictable once the Commission turned its attention to the perceived value of the programming offered. Furthermore, Dr. Brinkley could not be taken as a part of the press tradition no matter how hard one argued. And it was not just Brinkley: no one using radio was a part of that tradition—a fact Shuler would soon learn.

Yet the Commission was not on a frolic. The idea being expressed—that radio was an entertainment medium and that since entertainment was not entitled to First Amendment protection neither was radio—could be traced directly to a U.S. Supreme Court decision of a little more than a decade earlier. The Supreme Court's syllogism, although referring to a different medium, was effectively indistinguish-

able: entertainment is not part of the First Amendment; motion pictures are entertainment; therefore, motion pictures are not entitled to First Amendment protection.

In 1915, Mutual Film Corporation came to the Court in a trio of cases involving two state censorship commissions for motion pictures.[20] Mutual was a major film distributor, its output including a weekly news film, "Mutual Weekly," and the censorship commissions would at a minimum impose uncertainty, delays, and costs on Mutual's business. The cases, which were diversity-of-citizenship actions in federal court,[21] raised a number of challenges to the censorship commissions. The most significant of these challenges was that the statutes involved infringed the liberty of speech, opinion, and the press guaranteed by both the applicable state constitutions and the federal Constitution. The Supreme Court did not choke on the word "censorship"; it used it unhesitatingly. And it found nothing wrong with censorship of motion pictures.

In the lead case, from Ohio, the Court ignored Mutual's reliance on the federal Constitution (probably from legitimate doubt whether it was applicable to a state statute restricting freedom of speech)[22] and concentrated instead on the applicable provision of the Ohio constitution guaranteeing freedom of speech and press. The Court began with what for the era was an unusual acknowledgment that freedom of speech was an important value:

> We need not pause to dilate upon the freedom of opinion and its expression, and whether by speech, writing or printing. They are too certain to need discussion—of such conceded value as to need no supporting praise. Nor can there be any doubt of their breadth nor that their underlying safeguard is, to use the words of another, "that opinion is free and that conduct alone is amendable to the law."[23]

But however great freedom of speech was, moving pictures were not included within the principle. They might be

mediums of thought, but so too were a lot of other things—such as "shows and spectacles." And the Court was convinced the latter could claim no protection. "The first impulse of the mind is to reject the contention. We immediately feel that the argument is wrong or strained." The initial impulse was also the final conclusion. "Judicial sense" supports "common sense" in rejecting the conclusion that motion pictures were part of freedom of expression. "It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion."[24] In the Kansas case, the result was identical. To the argument that the statute "violates the bill of rights of the United States and of the State of Kansas," the Court tersely responded that censorship of motion pictures did not "abridge the liberty of opinion."[25]

Thus in the first cases involving a new technology that claimed the protections of freedom of speech, the Court almost summarily rejected the argument. These were not newspapers: they were much closer to circus acts. And no one thought making a tiger jump through a flaming hoop had anything to do with the traditions of John Milton and John Peter Zenger. When the problems of radio arose a little more than a decade later, an identical conclusion was carried over. Radio programming was entertainment and thus no part of the exposition of ideas entitled to the protection of the First Amendment.

The point was so obvious that it really needed no discussion. When it was discussed, as Alexander Meiklejohn did near the end of his seminal work on freedom of expression, it was to the same effect. Meiklejohn felt it necessary to devote a concluding section of his "Reflections" chapter specifically to stating that radio had no claim to the principles of freedom of speech to which he attached his "passionate de-

votion." Radio had "failed" in its promise to assist in our national education; it was engaged in making money, not in "enlarging and enriching human communication." Because in Meiklejohn's view the First Amendment was intended "only to make men free to say what, as citizens, they think, what they believe, about the general welfare," radio flunked the test and forfeited its claim to protection.[26]

Most often, of course, no discussion was needed to reach the same conclusions. Common sense dictated the difference between a newspaper and a radio station. Perhaps the political scientist V. O. Key, Jr., put it best: the owners of broadcast stations were the "lineal descendants of operators of music halls and peep shows."[27] Thus a First Amendment protecting John R. Brinkley would be as seriously out of whack as a First Amendment protecting the Ringling Brothers Circus or any like "spectacle." Broadcasting passed into our legal and then judicial systems without so much as a pause—from a circus, to the goat gland doctor, to Fighting Bob Shuler. Differences in speech content there may have been, but these were irrelevant. The media themselves simply were not within the system of freedom of expression. And that is why the Supreme Court saw no point in reviewing Shuler's case. That he should lose was obvious. Common sense.

3

THE SUPREME COURT SPEAKS: *NBC* AND *RED LION*

The governing principle, whether overt or *sub silentio,* that radio, as an entertainment medium, was excluded from First Amendment protections could dominate only so long as both broadcasting and First Amendment doctrine remained embryonic. When broadcasting began to engage in serious debate (as distinguished from Shuler's inveighing), or when First Amendment theory was pushed to deal with issues involving serious literary works, such as *Ulysses,* an analysis more sophisticated than the "broadcasting is entertainment and not protected speech" litany became necessary to justify the separation of broadcasting from the print traditions. The new justification was introduced by the Supreme Court in 1943 in *NBC v. United States*[1] and elaborated extensively a quarter of a century later in *Red Lion Broadcasting v. FCC.*[2]

Gone was the FRC (now the Federal Communications Commission) claim that broadcasting was unworthy of First Amendment protections. In its place had sprung up a newer and more elaborate version of the same claim: broadcasting was entitled to some First Amendment protections, but its special characteristics demanded a different First Amendment, one regulated by the federal government. The difference in the form of the argument, however, could not dis-