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Indecency Decisions

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To: Broadcast Clients
From: Michael Shacter
Peter Gutmann

Following weeks of rumors that the Federal Communications Commission would address a backlog of indecency complaints, some of which had been pending since 2002, the Commission issued its decisions on March 15. According to the accompanying press release, the decisions resolved over 300,000 consumer complaints, although researchers have suggested that the vast majority were duplicative and derived from only a few sources. In some areas, the Commission broke new ground, while in others it resolutely ratified and applied prior decisions, dismissing a variety of Constitutional challenges to its existing policies.

In the most significant departures from past practice, the Commission has declared the so-called “s-word” to be presumptively profane and the Commission proposed forfeitures only against the licensee and station whose broadcast of objectionable material was actually the subject of a viewer complaint to the Commission. The latter could be a mixed blessing for broadcasters. On the one hand, an affiliate should not be held liable for a network or syndicated broadcast, if no complaints are lodged against the station. On the negative side, the new policy may provoke a flood of complaints against individual stations.

The Communications Act prohibits the broadcast of obscene, indecent or profane programming. The fullest statement of the Commission’s policies is set forth in a 75-page omnibus decision addressing complaints about approximately 40 programs. The decision begins by discussing the legal bases for the Commission’s standards for analyzing whether programming is indecent, profane or both. The Commission then applies these standards on a case by case basis, finding some that violated Commission standards, others that violated the standards but were excused (mostly because the offensive broadcasts occurred under a former policy that tended to overlook isolated incidents), and yet others that were not deemed to have violated the standards at all.

Most of the decisions involved an indecency analysis. In determining whether a program is indecent, the Commission utilized its existing two-part analysis. First, material alleged to be indecent must describe or depict sexual or excretory organs or activities. Second, a broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium. The determination of what is patently offensive has its own three-part test: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience.

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In addition to assessing whether programming is indecent, the Commission applies a separate test for determining whether language is profane. Unlike the test for indecency, the test for profanity is relatively simple: even an isolated use of the f-word – and now the s-word – in a broadcast is a presumptive violation. The burden then falls on the licensee to show that the broadcast of one of these words is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance. That burden is very high – so far, only a single program, the feature film *Saving Private Ryan*, has been able to meet this standard.

In several of the current decisions, the Commission also considered whether a broadcast was obscene. The assessment of obscenity apparently was prompted not by the material itself, but arose from the specific reference to obscenity in a complaint. Applying the Supreme Court’s relatively high benchmark for this category of speech, none of the broadcasts was found to be obscene.

In addition to the decisions in the omnibus order, the Commission also issued a forfeiture order against CBS and its owned affiliates for the 2004 Super Bowl episode. In 2004, the Commission had proposed a fine but gave CBS an opportunity to defend itself. Although the Commission claimed that it was not applying a strict liability standard (under which there would be no excuses for accidental broadcasts of indecent or profane material), it showed no sympathy to CBS’s explanations that it should be excused because the programming was live and the performers’ indiscretions were unexpected. The Commission rejected those defenses and reaffirmed the initial findings of indecency.

The Super Bowl order included an extensive discussion of Constitutional issues arising in connection with the indecency policy. Although the Commission perfunctorily dismissed CBS’s Constitutional arguments, a court might not be as dismissive. In addition to the obvious concerns under the First Amendment, questions linger under the due process clause that the indecency standard remains vague and overbroad and that a more rigorous and principled approach is required in this delicate area.

While the decisions are replete with thin justification, close calls and inconsistent results, and while falling considerably short of the definitive guidance long sought by broadcasters and the public, some general guidelines can be discerned, including the following:

Misery Loves Company – Until now, there was only one English word (including its variants) that was presumptively profane. In their original *Golden Globe Awards* decision, Commission staff had pardoned Bono’s spontaneous, throwaway remark containing a single profanity as isolated, fleeting, and not a sexual reference, and therefore not actionable. Reacting to considerable outrage, the full Commission reversed that position and held, in essence, that any use of the “f-word” outside the safe harbor (see below) was indeed profane, no matter what the circumstances. Now, the dreaded f-word is joined by the “s-word.” The Commission’s rationale: “We find the “S-Word” to be one of the most vulgar, graphic and explicit words relating to excretory activity in the English language. Use of the “S-Word” invariably invokes a coarse excretory image. ...

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The “S-Word” is ... so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane.” While some might dispute that premise, it seems clear that the Commission is more concerned with the word itself, and its variants, as it found no similar problem with “poop,” which would seem to invoke an even stronger excretory image, as it is rarely used outside of that context (whereas the s-word often is). Much the same can be said for the “f-word,” which seems far more common as an expression of emphasis or disdain than as a clear allusion to sexual intercourse.

13 Undirty Words – Although the “f” and “s” words and their variants are for all intents and purposes strictly forbidden, the Commission appears to continue to permit words such as “suck” when used in non-sexual contexts. The Commission also repeated its prior determination that, in context, 13 other specific words are not sufficiently explicit or graphic to be patently offensive. (We’re not including them here, since we don’t want to set off any spam filter alarms.) No “word” yet on a few others that come to mind, even beyond those cited by the Commission.

Once is Enough – Prior to the Commission’s *Golden Globe* decision, the staff tended to forgive a single, isolated, fleeting and unpredictable use of a profanity. The Commission will now levy a full fine for a single utterance. This contrasts with the indecency analysis, which considers whether a program dwells on or repeats at length the indecent portions.

The Very Safe Harbor – In a number of instances, a complaint cited numerous stations that had broadcast an indecent program segment, but fined only some while fully exonerating the others. The difference was purely geographic—the guilty parties’ broadcasts occurred outside the safe harbor of 10:00 p.m. to 6:00 a.m.

Violence is Something Else – When faced with a complaint that a husband, seemingly about to fondle his wife, pulled out a gun and shot her in the face, the Commission focused exclusively upon the suggestion of sexuality and refused to examine the complainant’s central concern of violence against women, noting that such matters would be considered in its long-pending proceeding to examine media violence and its legal ability to regulate in that area. Thus, so far at least, violent programming is not actionable. At least two of the current Commissioners plan to consider changing that.

Live Broadcasting May Be Dead – In earlier times, the Commission generally pardoned otherwise impermissible indecency or profanity that occurred during news coverage and other live programming (although significantly it has shifted much of its condemnation of the notorious Super Bowl incident from the isolated “wardrobe malfunction” to the more general atmosphere of sleazy lyrics and choreography that pervaded the entire half-time show, which it has come to feel led to the fatal finale). In the Commission’s view the technology for programming delays and editing has evolved to a point where no further distinction should be drawn between live and recorded programming. Thus, broadcasters must find the technological and staffing means to monitor and edit all programming. Indeed, the lesson has already been applied: note how ABC discretely cut off Mick

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Jagger's lead vocal mike to obscure two double-entendre words in the Rolling Stones' halftime show at Superbowl XL last month.

A Warning About Warnings – In a previous case, the Supreme Court had held that parental warnings are not necessarily effective because audiences constantly change stations. Although the Commission suggested that inclusion of a warning might warrant a lower forfeiture under certain circumstances, programs with warnings were not shown any leniency.

It's No Laughing Matter – Although the Commission seemed to take into account the fact that allegedly indecent *Simpsons* and *Family Guy* episodes were cartoon comedies (and thus strayed from explicit depiction that live action might have entailed), the Commission found that an interview segment of a guest in an open-front dress was still indecent even though it was intended as part of a comedy routine.

The Problem with Pixilation – The Commission condemned as ineffective the pixilation of breasts in a “reality” program depicting a pornographic actor's pool party, since viewers could easily discern the nature of the underlying depiction. Similarly, jewelry obscuring an actress's nipples was deemed insufficient to evade a graphic depiction.

So What About Radio? – Although all of these cases involved television, presumably certain analogies may be drawn to exclusively aural depictions, ranging from the Commission's linguistic standards to the efficacy of “bleeping” isolated words or sound effects while the overall sense remains from the surrounding context.

Despite these general trends, there remain some troubling loose ends. For example, the Commission cited several times with approval its prior decision permitting the unedited broadcast of *Saving Private Ryan* laced with soldiers' profanity. Yet, it found that far less frequent use of the very same words in the acclaimed Martin Scorsese documentary *The Blues: Godfathers and Sons* was “vulgar, explicit, graphic, dwelled upon and shocking to the audience” and therefore patently offensive under contemporary community standards for the broadcast medium (and thus indecent). Defenders of the *Blues* documentary had urged that the intent of their program was to provide an educational window into the culture being depicted and the world of the individuals being interviewed. The Commission disagreed and fined a small PBS station. The Commission's only attempt to distinguish the two programs lay in its observations that deleting the offensive words from *Saving Private Ryan* “would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers” whereas the *Blues* film's “purpose could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives.” While distinctions between the nudity approved in *Schlinder's List* and nudity condemned in a more pandering context may be easier to grasp, the cited difference here seems far more elusive and perhaps reflects cultural perception more than a reliable standard to be applied with confidence to future instances.

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It also appears from their separate statements that the Commissioners are not all on board with a unified view of even the cases they have now decided. Commissioner Adelstein dissented in part, seeking to hold all stations broadcasting indecent material accountable, rather than only those cited in a specific complaint. Commissioner Copps insisted that broadcast violence is at least as serious an issue as indecency and urged that an ongoing proceeding be completed. His concerns were echoed by Deborah Taylor Tate, the newest Commissioner, who noted that exoneration of a *Simpsons* episode made little sense, because cartoons, by their nature, appeal to children. She concluded with a hope that the problems can be solved by joint efforts of programmers and the public to promote the creation of positive, educational and inspiring programming but, as with the FCC's decision itself, provided no suggestion as to how to reconcile the often conflicting goals of commercialism, creativity and social value.

A final observation for now: The vast majority of broadcasters are apt to view FCC indecency decisions with indifference or bemusement and consider them irrelevant to their own operations. Yet, there is cause for concern. Any station taking a feed from another source, covering a live event, taking on-air phone calls, conducting live interviews or otherwise broadcasting material not under their full and exclusive control bears a significant risk that unwanted language or visuals could get through. Based on the evolving standards reflected in the recent decisions, in such an event, and were a complaint to be filed, the licensee could be found liable for fines or, if repeated, more severe sanctions. Broadcasters face an increasingly difficult challenge to balance their essential activities against such perils. In the meantime, implementation of robust safeguards seems essential to avoid problems of this type and, if the need arises, to demonstrate to the Commission that the lapse was a genuine accident that could not reasonably have been prevented.

**The Communications Lawyers at
Womble Carlyle Sandridge & Rice, PLLC**

Michael H. Shacter, (202) 857-4494, mshacter@wcsr.com

Peter Gutmann, (202) 857-4532, pgutmann@wcsr.com

Mark Palchick, (202) 857-4411, mpalchick@wcsr.com

Gregg P. Skall, (202) 857-4441, gskall@wcsr.com

John F. Garziglia, (202) 857-4455, jgarziglia@wcsr.com

Vincent A Pepper, (202) 857-4560, vpepper@wcsr.com

Howard J. Barr, (202) 857-4506, hbarr@wcsr.com

Joan D. Stewart, (202) 857-4490, jstewart@wcsr.com

Michael B. Hazzard, (202) 857-4540, mhazzard@wcsr.com

Ross Buntrock, (202) 857-4479, rbuntrock@wcsr.com

Cavan Fabris, (202) 857-4536, cfabris@wcsr.com

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