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Clarification of Indecency Decisions

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To: Broadcast Clients
From: Peter Gutmann

The Federal Communications Commission has issued an order that provides a more detailed analysis of two of the fines it had levied in its omnibus March 2006 television indecency decisions. As had been widely expected, the Commission's current reasoning largely parallels and reinforces its earlier ruling but provides further guidance in applying its currently-applicable policies in this difficult area. Even so, two of the cases were decided on new and potentially far-reaching bases.

The new order addresses only four of the 38 programs involved in the omnibus decision. The Commission had found each of the four programs to have violated its prohibitions against airing indecent and profane material, but had declined to take any further action, since its policies at the time of the broadcasts tended to overlook an isolated expletive. Even so, the affected networks appealed the Commission's decision on both substantive and procedural grounds. The Commission agreed that the stations had been denied an opportunity to present their views, and obtained a court remand that afforded an additional two months to obtain and consider responses. The new order was adopted and immediately released on the 60th day.

The most extensive analysis concerns the Fox prime-time broadcast of the "2003 Billboard Music Awards" program. (Please note that the ensuing discussion uses euphemisms for the "dirty words" considered by the Commission – not to reflect our squeamishness, but rather to avoid triggering content-based email filters.) In an exchange with costar Paris Hilton, who had cautioned her to "remember, this is a live show, watch the bad language," Nicole Richie said: "Why do they even call it 'the Simple Life?' Have you ever tried to get cow sh-- out of a Prada purse? It's not so f---ing simple." Fox contended that the dialogue was not indecent.

The Commission's indecency analysis requires two fundamental determinations. First, the subject matter must describe or depict sexual or excretory organs or activities. Fox argued that while the "s-word" had been used in an excretory context, the "f-word" had been used purely for emphasis. The Commission disagreed, stating that, given its core meaning, even when the "f-word" is not used literally any use of the word has an inherent sexual connotation.

The second indecency determination requires that the material be patently offensive as measured by contemporary community standards for the broadcast medium. That assessment, in turn, requires a contextual analysis comprising three principal factors. The Commission treated two of them together – the explicitness or graphic nature of the description and whether the

material panders to, titillates or shocks the audience – and marshaled several arguments. First, even aside from its March ruling that the “s-word” is presumptively graphic and shocking, it found that the combined use of both words here would certainly qualify. Second, it cited Ms. Hilton’s “watch the bad language” warning as an indication of a pandering intent. Third, it noted that Fox did not even attempt to raise any justification for Ms. Richie’s comments. Fourth, the Commission cited Nielsen ratings data that 23% of the show’s audience was under 18 and 11% under 11. Finally, the Commission noted that there were no warnings to viewers that the show might contain material highly unsuitable for children, other than its PG(DL) rating, which, appearing only at the beginning and once in the middle of the two-hour program, would not have put viewers on notice of such vulgar language. (In a lengthy footnote, the Commission cited several studies critical of the television ratings system’s inaccurate labeling and inadequacy to flag coarse language.)

The final factor to find broadcast material patently offensive is whether it dwells on or repeats the descriptions at length. The Commission effectively disregarded this factor by disavowing earlier cases that had explored and relied upon it, finding instead that even a fleeting and isolated use of offensive language is actionable. Its rationale here was boosted by a finding that Ms. Richie’s confident and fluid delivery of the lines, and her use of multiple offensive words, deflected any suggestion that the language was a spontaneous slip of the tongue. Previously, the Commission had suggested that expletives had to be repeated to be indecent but that descriptions or depictions of sexual or excretory functions did not need to be. Now, though, the Commission appears to be moving away from that distinction. Thus, the Commission completed this section of its analysis by suggesting that an absence of repetition would no longer be a decisive factor in indecency analyses.

The Commission concluded its indecency analysis with a number of observations. First, the Commission noted that the networks’ own standards generally prohibit broadcast of the “f-” and “s-words” even during the safe harbor (10 PM to 6 AM), and thus demonstrate the networks’ recognition that the words are rarely appropriate for broadcast. Second, the Commission noted that the original script used the words “pig crap” and “freaking,” which it deemed a reflection of the producers’ lack of reasonable judgment, responsibility and sensitivity to public needs. Third, the Commission suggested that Fox should have heightened its vigilance, since Ms. Richie had a propensity to use vulgar language (as evidenced by nine bleeped words in the three most recent episodes of “The Simple Life”). Fourth, the Commission dismissed as unreasonable Fox’s attempt to blame the failure of its tape delay system on employee error, since a similar lapse had occurred in the previous year’s Billboard Awards show (see below). The Commission appeared to leave the door slightly open to exonerating a broadcaster genuinely taken by surprise in a context in which indecency could not reasonably have been expected. Even so, the Commission distinguished coverage of genuine breaking news from an event like an awards show, whose value would not have been impaired by a more extensive tape delay.

The Commission next applied a profanity analysis. In its March order, the Commission had added the “s-word” to its previous conclusion that the “f-word” was so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. The only exception mentioned by the Commission is where the terms are “demonstratively essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance.” The Commission noted that Fox did not even contend that Ms. Richie’s profane

language met any part of that standard. Consequently, the Commission found her language profane and therefore actionable even without regard to an indecency analysis.

Despite the Commission's findings of indecency and profanity, it did not impose a sanction, but only due to a procedural technicality – the court's remand had specifically afforded the Commission an additional two months to enter a "final or appealable order." Yet to assess a forfeiture the Commission would have had to first issue a notice of apparent liability which is neither final nor appealable, as it requires a further opportunity for the licensee to respond and only then would be ripe for a final decision.

The Commission applied similar reasoning and reached comparable conclusions for the 2002 "Billboard Music Awards" show, in which Cher, while accepting an award, had stated: "People have been telling me I'm on the way out every year, right? So, f--- 'em."

The two remaining cases were resolved on grounds different from those in the omnibus decision. In a 2004 edition of the CBS Morning "Early Show," a "Survivor" runner-up had called the winner a "bullsh---er." In its omnibus decision, the Commission had found the single use of the word to have been both indecent and profane but declined a sanction on the ground that under previous guidelines this single fleeting use would have been overlooked. Now, though, the Commission exonerated the show on a far different ground – it deferred to CBS' contention that the segment was a *bona fide* news interview, insofar as the overall program was produced by CBS news and addressed a variety of other topics that morning, including a number which clearly fell under the rubric of news programming. The Commission concluded that while the coarse language could have offended viewers, in the context of a news interview it was not actionable. In a partial dissent, Commissioner Adelstein questioned whether a licensee's characterization of an "infotainment" program was plausible and cautioned that deference to such claims would be prone to abuse.

The final case involved several "NYPD Blue" episodes containing the "s-word." Here, too, the Commission earlier had found the gratuitous uses of indecent and profane language on a national network broadcast to warrant a forfeiture, but due to Commission tolerance of isolated utterances under then-applicable standards did not impose a sanction. In response, the licensee had noted that only a single complaint had been filed by a Virginia resident, who had mentioned broadcast only on a Kansas City affiliate. The Commission dismissed the complaint consistent with the current enforcement policy that it had announced in its omnibus order. There, the Commission held that it would only sanction the licensee of a station upon complaint by one of the station's own viewers. The Commission justified the policy as an appropriate balance between vindicating local viewer interests and preserving limited Commission resources, while exercising First Amendment restraint. In his partial dissent, Commissioner Adelstein questioned the logic of the new policy and its consequences, in light of the Commission's mandate to enforce its rules to protect children on a national basis.

While the new decision mostly solidifies the reasoning behind the Commission's earlier order, it does provide the most extensive glimpse yet into the Commission's current approach to claims of broadcast indecency. For now, any broadcast of either the "f-" or "s-words" or their derivatives outside the safe harbor would seem to trigger a presumption that they are inherently indecent and profane. Seemingly the only exceptions would entail broadcast as part of genuine

news coverage or if the words are deemed essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance, although these standards are so abstract as to discourage reliance with any degree of confidence. The Commission's extensive analysis of the 2003 Billboard Awards show, together with its observations, tends to suggest the dangers of live programming, the need to ensure adequate delay systems and monitoring, the need for heightened care in light of the nature of the programming or the reputation of the participants, the futility of standardized warnings, and the need to guard against potentially indecent language in all programming in which children comprise a substantial segment of the audience.

The final chapter in the on-going saga of the Commission's indecency regulation is yet to be written, as Fox already has stated that it plans to pursue its judicial appeal. So stay tuned ...

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