

FCC Adopts Policy Statement On Broadcast Indecency

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More than seven years after committing itself to do so, the Commission has issued a policy statement intended to provide the broadcast industry with guidance relating to Commission interpretation and enforcement of broadcast indecency regulations.

Obscene speech may not be broadcast at any time. Speech which is merely indecent, though, is regulated outside a "safe harbor" of 10:00 p.m. to 6:00 a.m., largely as a means of supporting parental supervision of children (see [Note 1](#)). The principal difference, as reflected in the Commission's policy statement, is more a matter of context rather than the words themselves. However, it must be noted that in order to be considered indecent at all, the material must describe or depict sexual or excretory organs or activities.

The Commission's policy statement provides guidance to determine whether material is indecent with respect to three principal factors:

- **Explicitness versus Indirectness/Implication** - The more explicit or graphic the description or depiction, the greater the likelihood that the Commission will find it patently offensive. Even if the "seven dirty words" or their equivalent are not used, the Commission often will still find indecency from the use of double entendre or innuendo if the sexual or excretory import is easily understood and inescapable. The Commission also notes that in assessing explicitness it will look to the visibility or audibility of the material as aired, but cautions that attempts to obscure objectionable material may not preclude a finding of indecency where at least some of the material is recognizable or understandable.
- **Dwelling/Repetition versus Fleeting Reference** - The Commission notes that repetition and persistent focus on sexual or excretory material can exacerbate the potential offensiveness of a broadcast. In contrast, where sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency. The Commission seems particularly sympathetic to a spontaneous utterance in the context of live programming. However, the Commission is far less forgiving, and tends to find indecency, when even an off-hand remark refers to sexual activities with children.
- **Presentation in a Pandering or Titillating Manner or for Shock Value** - This is the area in which context becomes critical. For example, the Commission's policy statement itself contains several pages of explicit examples, which, if read during an "edgy" morning show, perhaps accompanied by sound effects and derisive laughter, would be deemed indecent, whereas if they were read as part of an educational program or news report likely would be allowed. Most of the instances cited by the Commission in this section of its public notice exonerate programs such as Oprah Winfrey, a discussion of sex education, a National Public Radio report and full frontal nudity in *Schindler's List* but find to be indecent far less explicit descriptions arising in less serious contexts. The Commission specifically rejects humor as a defense to indecency.

The Commission's public notice further addresses its enforcement process. The Commission emphasizes that it does not independently monitor broadcasts for indecent material, but will act only upon a documented complaint received from the public. Such documentation must

include a full or partial tape or transcript of significant excerpts and identification of the date and time of the broadcast over a specific station. Without such threshold material, the Commission will not consider an indecency complaint. If properly documented, and if the Commission believes that enforcement action might be warranted, then the Commission usually seeks input from the licensee before making a preliminary determination and affords the licensee a further opportunity to justify its broadcast before a sanction is issued.

In separate statements, Commissioner Ness urged greater dialogue between listeners and stations and suggested that the industry reinstate a voluntary code of conduct; Commissioner Tristani, though, felt that the Commission's lax enforcement of its existing standards, rather than any need to provide a "how-to" manual, is a more pressing priority to serve the public interest.

Note 1

The supreme court has defined obscene speech by a three-part test

(1) An average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political or scientific value.

Indecency, by contrast, is defined as:

Language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.

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