

Indecency Update - Three Important Rulings

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Late last week, the Federal Communications Commission issued rulings in three pending indecency cases. As had been anticipated, two of the rulings suggest harsher future enforcement. The third, though, provides a surprising yet important exception.

After a year of investigation and deliberation, the Commission has recommended that Clear Channel and Infinity be fined for broadcasts that attracted significant attention to the FCC's enforcement of its indecency policies. The first and more notorious of the two cases involved the "Opie & Anthony Show" originated by WNEW(FM), New York City during afternoon drive, when the hosts conducted a "Sex for Sam" contest in which points were awarded for having sex in risky public locations. According to the FCC's description, the broadcast involved descriptions and discussions of sexual activities of five couples, as reported by a station "spotter." The on-air incidents occurred in a toy store, in an elevator at Rockefeller Center when four children were present, and in Saint Patrick's Cathedral during a religious service. Infinity admitted that the program was broadcast both over WNEW and 12 other affiliates but denied that it was obscene or indecent. Even so, Infinity conceded that the broadcast was contrary to its own programming standards, cancelled the program and suspended responsible personnel.

The second situation involved broadcasts on May 7 and 8, 2002 during the morning drive time "Elliott in the Morning" program on Clear Channel's WWDC-FM, Washington. The first day's broadcast presented telephone interviews with two female students at a Catholic high school who described a variety of sexual acts which they claimed to have performed in and around the school. They were suspended that afternoon. The next morning's broadcast continued in a similar vein, and contained numerous sacrilegious references and speculation as to the sexual practices of school administrators. Clear Channel admitted the broadcast but asserted that it was not actionably indecent under Commission policies.

The Commission analyzed both cases under its standard for indecency - the broadcast material must describe or depict sexual or excretory organs or activities and must be patently offensive as measured by contemporary community standards for the broadcast media. Since neither licensee disputed that its broadcasts described sexual activity, the Commission turned to interpretation of the second factor. The Commission emphasized that the determination of patent offensiveness depends upon the full context in which the material appears. The Commission applied three principal factors to this contextual analysis: (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 appears to pander or is used to titillate or shock.

In applying these factors, the Commission found that while certain euphemisms or colloquial terms were used, such innuendo nonetheless was sufficient to render the terms' sexual import unmistakable such that "there is no non-sexual meaning that a listener could possibly have attributed to these terms." The Commission noted that the Clear Channel broadcast was replete with loud sound effects which reinforced the clear sexual reference of the banter. The Commission found the second factor to have been satisfied by the sheer length of each broadcast. Finally, the Commission determined that the broadcasts were intended to pander and shock listeners, and particularly those of a young age whom the indecency laws are intended to protect. It found that the Clear Channel program was clearly

targeted toward students in a school setting and that the Infinity show involved "locations plainly chosen to expose sexual conduct to unwitting, unwilling and potentially vulnerable observers" in "a transparent attempt to shock those witnesses and, in turn, the program's listeners."

The Commission proceeded to impose the maximum fines which it felt was within its authority. The base fine for the transmission of indecent or obscene materials is \$7,000, which the Commission raised to \$27,500 per violation, given the exacerbating factors which emerged from its review of the entire record. In addition to the egregious nature, planning and extensive length of the broadcasts, the Commission cited both licensees' recent histories of other indecent broadcasts to justify imposition of the maximum forfeiture amount. Clear Channel was fined \$55,000 (applying the \$27,500 maximum for each of the two days) and Infinity \$357,500 (reflecting the one broadcast over each of 13 stations).^[1]

Three of the five FCC Commissioners released separate statements which are quite revealing. Commissioner Copps issued a vigorous dissent, calling for revocation of station licenses. He stated:

Neither of these cases is a difficult call. Both are outrageous and both were run by stations whose owners knew better and whose parent companies have had previous indecent broadcasts brought before this Commission. ...I defy anyone to argue that a \$27,500 fine to each of the stations owned by a multi-billion dollar conglomerate is adequate to address this clear violation of federal law. Infinity/Viacom could pay this entire fine by tacking just one more commercial onto one of its prime-time TV shows and probably pocket a profit to boot. Some punishment!

Commissioner Copps further noted that Infinity had already paid fines of \$1.7 million to settle past indecency cases and as part of its settlement had agreed to take steps to prevent further broadcasts of indecent material.

If this situation does not meet the majority's test for repeated violators, I fail to understand what would. The message to licensees is clear. Even egregious repeated violations will not result in revocation of a license. Rather they will result only in a financial penalty that doesn't even rise to a serious cost of doing business.

Commissioner Copps has been quite vocal in urging the Commission to take stronger action against broadcast indecency. Before writing off his outrage as the harmless venting of a frustrated regulator, it is important to note that both Commissioners Martin and Adelstein, while endorsing the current fines, had harsh words of their own. Thus, Commissioner Martin stated that he would have proposed a higher fine and suggested that in future cases a separate violation might be found "each time the show's hosts started talking about an indecent topic or had a separate distinct conversation." Commissioner Adelstein agreed and stated that he would not hesitate to consider revocation proceedings for serious violations that follow the explicit warnings which he feels that the Commission has now given to the industry. Thus, three of the five Commissioners are on record as favoring far more severe penalties for future incidents of indecency.

A footnote of sorts arises from a third case involving the televised broadcast of the "Golden Globe Awards" over 90 stations on January 19, 2003 during which the performer Bono uttered the "f-word" while expressing his enthusiasm for his award. Hundreds of parents complained. The Commission found that this was not indecent, however, since it was fleeting and since the word was used as an adjective or expletive to emphasize an exclamation, rather than as a description of sexual or excretory activity or organs. The Commission concluded that the use of the word was crude and offensive but, in the context of the broadcast, did not fall within the scope of its prohibition of indecent content. Thus, the occasional use of even one of the "seven dirty words" as an isolated insult or point of emphasis would appear to be permitted. Please note, however, that this third decision was issued by the chief of the Commission's Enforcement Bureau and may not necessarily reflect the views of the full Commission.

Note

[\[1\]](#) In both instances, the Commission summarily rejected allegations that the broadcasts were obscene, noting that they were not "sufficiently graphic or explicit to be deemed obscene under pertinent federal law and precedent." The applicable "Miller" standard requires that to be obscene "the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law," which is generally interpreted to require explicit representation of genitals or sexual acts.

If you wish to discuss the import of these cases, please contact [Peter Gutmann](#) or a member of the [Womble Carlyle Telecommunications Practice Group](#).