

Regulation of Broadcast Indecency: Background and Legal Analysis

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Summary

Two prominent television events placed increased attention on the Federal Communications Commission (FCC) and the broadcast indecency statute that it enforces. The airing of an expletive by Bono during the 2003 Golden Globe Awards, as well as the "wardrobe malfunction" that occurred during the 2004 Super Bowl halftime show, gave broadcast indecency prominence in the 109th and 110th Congresses, and resulted in the enactment of P.L. 109-235 (2006), which increased the penalties for broadcast indecency by tenfold.

Federal law makes it a crime to utter "any obscene, indecent, or profane language by means of radio communication" (18 U.S.C. §1464). Violators of this statute are subject to fines and imprisonment of up to two years, and the FCC may enforce this provision by forfeiture or revocation of a broadcaster's license. The FCC has found that, for material to be "indecent," it "must describe or depict sexual or excretory organs or activities," and "must be patently offensive as measured by contemporary community standards for the broadcast medium." The federal government's authority to regulate material that is "indecent" but not obscene was upheld by the Supreme Court in *Federal Communications Commission v. Pacifica Foundation*, which found that prohibiting such material during certain times of the day does not violate the First Amendment.

In 1992, Congress enacted P.L. 102-356 (47 U.S.C. §303 note), section 16(a) of which, as interpreted by the courts, requires the FCC to prohibit "indecent" material on broadcast radio and broadcast television from 6 a.m. to 10 p.m. Under P.L. 109-235, "indecent" broadcasts are now subject to a fine of up to "$325,000 for each violation or each day of continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $3,000,000 for any single act or failure to act." Fines may be levied against broadcast stations, but not against broadcast networks. The FCC appears to have the statutory authority to fine performers as well (up to $32,500 per incident), but has taken the position that "[c]ompliance with federal broadcast decency restrictions is the responsibility of the station that chooses to air the programming, not the performers."

The federal restriction on "indecent" material applies only to broadcast media, and this stems from the fact that there are a limited number of broadcast frequencies available and that the Supreme Court, therefore, allows the government to regulate broadcast media more than other media. This report discusses the legal evolution of the FCC's indecency regulations, and provides an overview of how the current regulations have been applied. The final section of the report considers whether prohibiting the broadcast of "indecent" words regardless of context would violate the First Amendment. This question arises because the Supreme Court in *Pacifica* left open the question whether broadcasting an occasional expletive, as in the Bono case, would justify a sanction.

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Introduction

Two prominent television events placed increased attention on the Federal Communications Commission (FCC) and the broadcast indecency statute that it enforces.[1] The airing of an expletive by Bono during the 2003 Golden Globe Awards, as well as the "wardrobe malfunction" that occurred during the 2004 Super Bowl halftime show, gave broadcast indecency prominence in the 109th and 110th Congresses, and resulted in the enactment of P.L. 109-235 (2006), which increased the penalties for broadcast indecency by tenfold.

Federal law makes it a crime to utter "any obscene, indecent, or profane language by means of radio communication" (18 U.S.C. §1464). Violators of this statute are subject to fines and imprisonment of up to two years, and the FCC may enforce this provision by forfeiture or revocation of a broadcaster's license. The FCC has found that, for material to be "indecent," it "must describe or depict sexual or excretory organs or activities," and "must be patently offensive as measured by contemporary community standards for the broadcast medium." The federal government's authority to regulate material that is "indecent" but not obscene was upheld by the Supreme Court in *Federal Communications Commission v. Pacifica Foundation*, which found that prohibiting such material during certain times of the day does not violate the First Amendment.

In 1992, Congress enacted P.L. 102-356 (47 U.S.C. §303 note), section 16(a) of which, as interpreted by the courts, requires the FCC to prohibit "indecent" material on broadcast radio and broadcast television from 6 a.m. to 10 p.m. Under P.L. 109-235, "indecent" broadcasts are now subject to a fine of up to "$325,000 for each violation or each day of continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $3,000,000 for any single act or failure to act." Fines may be levied against broadcast stations, but not against broadcast networks. The FCC appears to have the statutory authority to fine performers as well (up to $32,500 per incident), but has taken the position that "[c]ompliance with federal broadcast decency restrictions is the responsibility of the station that chooses to air the programming, not the performers."

The federal restriction on "indecent" material applies only to broadcast media, and this stems from the fact that there are a limited number of broadcast frequencies available and that the Supreme Court, therefore, allows the government to regulate broadcast media more than other media. It appears likely that a court would find that to apply the FCC's indecency restriction to cable or satellite media would violate the First Amendment.[2]

This report discusses the evolution of the FCC's indecency regulations, provides an overview of how the current regulations have been applied, and examines indecency legislation that was

[1] The FCC's indecency regulations only apply to broadcast radio and television, and not to satellite radio or cable television. The distinction between broadcast and cable television arises in part from the fact that the rationale for regulation of broadcast media—the dual problems of spectrum scarcity and signal interference—do not apply in the context of cable. As a result, regulation of cable television is entitled to heightened First Amendment scrutiny. *See Turner Broadcasting v. Federal Communications Commission*, 512 U.S. 622 (1994). Cable television is also distinguished from broadcast television by the fact that cable involves a voluntary act whereby a subscriber affirmatively chooses to bring the material into his or her home. *See Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985).

[2] See CRS Report RL33170, *Constitutionality of Applying the FCC's Indecency Restriction to Cable Television*, by Henry Cohen.

introduced in the 110th Congress. (The bill that increased penalties is the only such legislation that was enacted.) The final section of this report considers whether prohibiting the broadcast of "indecent" words regardless of context would violate the First Amendment. This issue arises because the Supreme Court in *Pacifica* left open the question of whether broadcasting an occasional expletive, as in the Bono case, would justify a sanction.

Background

On January 19, 2003, broadcast television stations in various parts of the country aired the Golden Globe Awards. During the awards, the singer Bono,[3] in response to winning an award, said, "this is really, really f[***]ing brilliant."[4] In response to this utterance, the FCC received over 230 complaints alleging that the program was obscene or indecent, and requesting that the commission impose sanctions on the licensees for the broadcast of the material in question.[5]

The Enforcement Bureau of the FCC issued a Memorandum Opinion and Order on October 3, 2003, denying the complaints and finding that the broadcast of the Golden Globe Awards including Bono's utterance did not violate federal restrictions regarding the broadcast of obscene and indecent material.[6] The bureau dismissed the complaints primarily because the language in question did not describe or depict sexual or excretory activities or organs. The bureau noted that while "the word 'f[***]ing' may be crude and offensive," it "did not describe sexual or excretory organs or activities. Rather, the performer used the word 'f[***]ing' as an adjective or expletive to emphasize an exclamation."[7] The bureau added that in similar circumstances it "found that offensive language used as an insult rather than as a description of sexual or excretory activity or organs is not within the scope of the commission's prohibition on indecent program content."[8]

The decision of the Enforcement Bureau was met with opposition from a number of organizations and Members of Congress, and an appeal was filed for review by the full commission. FCC Chairman Michael Powell asked the full commission to overturn the Enforcement Bureau's ruling.[9]

On March 18, 2004, the full commission issued a *Memorandum Opinion and Order* granting the application for review and reversing the Enforcement Bureau's earlier opinion.[10] The commission found that the broadcasts of the Golden Globe Awards violated 18 U.S.C. 1464, but declined to impose a forfeiture on the broadcast licensees because the order reverses Commission precedent regarding the broadcast of the "F-word." This decision is discussed in detail below.

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[3] Bono's real name is Paul Hewson.

[4] See *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 F.C.C. Rcd. 19859 (2003).

[5] *Id.* at 2.

[6] *Id.*

[7] *Id.* at 3.

[8] *Id.*

[9] "FCC Chairman Seeks Reversal on Profanity," *Washington Post*, January 14, 2004, at E01.

[10] *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, File No. EB-03-IH-0110 (March 18, 2004).

On February 1, 2004, CBS aired Super Bowl XXXVIII, with a halftime show produced by the MTV network. The show included performers singing and dancing provocatively, and ended with the exposure of the breast of one female performer. The network received numerous complaints regarding the halftime performance, and FCC Chairman Michael Powell initiated a formal investigation into the incident.[11]

On September 22, 2004, the FCC released a *Notice of Apparent Liability for Forfeiture* finding that the airing of the Super Bowl halftime show "apparently violate[d] the federal restrictions regarding the broadcast of indecent material."[12] The *NAL* imposes a forfeiture in the aggregate amount of $550,000 on Viacom Inc., the licensee or ultimate parent of the licensees with regard to whom the complaint was filed.[13] On March 15, 2006, the FCC issued a *Forfeiture Order* imposing a mandatory forfeiture in the amount of $550,000 on CBS for the airing of the 2004 Super Bowl halftime show. CBS appealed to the U.S. Court of Appeals for the Third Circuit, which, in 2008, invalidated the fine, but, in 2009, the Third Circuit's decision was vacated by the Supreme Court.[14] This case is discussed in greater detail below.

Evolution of the FCC's Indecency Regulations

Title 18 of the United States Code makes it unlawful to utter "any obscene, indecent, or profane language by means of radio communication."[15] Violators of this provision are subject to fines or imprisonment of up to two years. The Federal Communications Commission has the authority to enforce this provision by forfeiture or revocation of license.[16] The commission's authority to regulate material that is indecent, but not obscene, was upheld by the Supreme Court in *Federal Communications Commission v. Pacifica Foundation*.[17] In *Pacifica*, the Supreme Court affirmed the commission's order regarding the airing of comedian George Carlin's "Filthy Words" monologue.[18] In that order, the commission determined that the airing of the monologue, which contained certain words that "depicted sexual and excretory activities in a patently offensive manner," at a time "when children were undoubtedly in the audience" was indecent and prohibited by 18 U.S.C. §1464.[19] Pursuant to the Court's decision, whether any such material is "patently offensive" is determined by "contemporary community standards for the broadcast

[11] http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243435A1.pdf.

[12] *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011 (September 22, 2004) http://www.fcc.gov/eb/Orders/2004/FCC-04-209A1.html.

[13] *Id.*

[14] CBS Corp. v. Federal Communications Commission, 535 F.3d 167 (3d Cir. 2008), *vacated and remanded*, No. 08-653 (U.S. May 4, 2009).

[15] 18 U.S.C. §1464. "Radio communication" includes broadcast television, as the term is defined as "the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds." 47 U.S.C. §153(33).

[16] 47 U.S.C. §503(b).

[17] 438 U.S. 726 (1978).

[18] The United States Court of Appeals for the District of Columbia Circuit had reversed the Commission's order. *See* 556 F.2d 9 (D.C. Cir. 1977). The Commission appealed that decision to the Supreme Court, which reversed the lower court's decision.

[19] 438 U.S. at 732.

medium."[20] The Court noted that indecency is "largely a function of context—it cannot be judged in the abstract."[21]

The commission's order in the *Pacifica* case relied partially on a spectrum scarcity argument; that is, that there is a scarcity of spectrum space so the government must license the use of such space in the public interest, and partially on "principles analogous to those found in the law of nuisance."[22] The commission noted that public nuisance law generally aims to channel the offensive behavior rather than to prohibit it outright. For example, in the context of broadcast material, channeling would involve airing potentially offensive material at times when children are less likely to be in the audience. In 1987, the commission rejected the spectrum scarcity argument as a sufficient basis for its regulation of broadcast indecency, but noted that it would continue to rely upon the validity of the public nuisance rationale, including channeling of potentially objectionable material.[23] However, in its 1987 order, the commission also stated that channeling based on a specific time of day was no longer a sufficient means to ensure that children were not in the audience when indecent material aired and warned licensees that indecent material aired after 10 p.m. would be actionable.[24] The commission further clarified its earlier *Pacifica* order, noting that indecent language was not strictly limited to the seven words at issue in the original broadcast in question, and that repeated use of those words was not necessary to find that material in question was indecent.[25]

The commission's 1987 orders were challenged by parties alleging that the commission had changed its indecency standard and that the new standard was unconstitutional. In *Action for Children's Television v. Federal Communications Commission (ACT I)*, the United States Court of Appeals for the District of Columbia Circuit upheld the standard used by the commission to determine whether broadcast material was indecent, but it vacated the commission's order with respect to the channeling of indecent material for redetermination "after a full and fair hearing of the times at which indecent material may be broadcast."[26]

Following the court's decision in *Action for Children's Television (ACT I)*, a rider to the Commerce, Justice, State FY89 Appropriations Act required the FCC to promulgate regulations to ban indecent broadcasts 24 hours a day.[27] The commission followed the congressional mandate and promulgated regulations prohibiting all broadcasts of indecent material.[28] The new regulations were challenged, and the United States Court of Appeals for the District of Columbia Circuit vacated the commission's order.[29] In so doing, the court noted that in *ACT I* it held that the

[20] *Id.*

[21] *Id.* at 742.

[22] *Id.* at 731; *see*, *In the Matter of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM), New York, New York*, 56 F.C.C.2d 94 (1975).

[23] *In the Matter of Pacifica Foundation, Inc. d/b/a Pacifica Radio Los Angeles, California*, 2 F.C.C. Rcd. 2698 (1987). Two other orders handed down the same day articulate the Commission's clarified indecency standard. *See also In the Matter of the Regents of the University of California*, 2 F.C.C. Rcd. 2703 (1987); *In the Matter of Infinity Broadcasting Corporation of Pennsylvania*, 2 F.C.C. Rcd. 2705 (1987).

[24] The Commission noted Arbitron ratings indicating that a number of children remain in the local audience well after 10 p.m. *See* 2 F.C.C. Rcd. 1698, ¶ 16.

[25] 2 F.C.C. Rcd. 2698, ¶¶ 12 and 15.

[26] 852 F.2d 1332, 1344 (1988).

[27] P.L. 100-459, §608.

[28] *Enforcement of Prohibitions Against Broadcast Obscenity and Indecency*, 4 F.C.C. Rcd. 457 (1988).

[29] *Action for Children's Television v. Federal Communications Commission (ACT II)*, 932 F.2d 1504 (1991), *cert.* (continued...)

commission "must identify some reasonable period of time during which indecent material may be broadcast," thus precluding a ban on such broadcasts at all times.[30]

In 1992, Congress enacted the Public Telecommunications Act of 1992, which required the FCC to promulgate regulations to prohibit the broadcasting of indecent material from 6 a.m. to midnight, except for broadcasts by public radio and television stations that go off the air at or before midnight, in which case such stations may broadcast indecent material beginning at 10 p.m.[31] The commission promulgated regulations as mandated in the act.[32] The new regulations were challenged, and a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit subsequently vacated the commission's order implementing the act and held the underlying statute unconstitutional.[33] In its order implementing the act, the FCC set forth three goals to justify the regulations: (1) ensuring that parents have an opportunity to supervise their children's listening and viewing of over-the-air broadcasts; (2) ensuring the well being of minors regardless of supervision; and (3) protecting the right of all members of the public to be free of indecent material in the privacy of their homes.[34] The court rejected the third justification as "insufficient to support a restriction on the broadcasting of constitutionally protected indecent material," but accepted the first two as compelling interests.[35] Despite the finding of compelling interests in the first two, the court found that both Congress and the FCC had failed "to tailor their efforts to advance these interests in a sufficiently narrow way to meet constitutional standards."[36]

Following the decision of the three-judge panel, the commission requested a rehearing *en banc*.[37] The case was reheard on October 19, 1994, and, on June 30, 1995, the full court of appeals held the statute unconstitutional insofar as it prohibited the broadcast of indecent material between the hours of 10 p.m. and midnight on non-public stations.[38] In so doing, the court held that while the channeling of indecent broadcasts between midnight and 6 a.m. "would not unduly burden the First Amendment," the distinction drawn by Congress between public and non-public broadcasters "bears no apparent relationship to the compelling government interests that [the restrictions] are intended to serve."[39] The court remanded the regulations to the FCC with instructions to modify the regulations to permit the broadcast of indecent material on all stations between 10 p.m. and 6 a.m.

(...continued)

denied, 503 U.S. 913 (1992).

[30] *Id.* at 1509.

[31] P.L. 102-356, §16, 47 U.S.C. §303 note.

[32] *In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. 1464*, 8 F.C.C. Rcd. 704 (1993).

[33] *Action for Children's Television v. Federal Communications Commission*, 11 F.3d 170 (D.C. Cir. 1993).

[34] 8 F.C.C. Rcd. at 705-706.

[35] 11 F.3d at 171.

[36] *Id.*

[37] *Action for Children's Television v. Federal Communications Commission*, 15 F.3d 186 (D.C. Cir. 1994).

[38] *Action for Children's Television v. Federal Communications Commission (ACT III)*, 58 F.3d 654 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1043 (1996).

[39] 58 F.3d at 656.

Current Regulations

Following the decision in *ACT III*, the commission modified its indecency regulations to prohibit indecent broadcasts from 6 a.m. to 10 p.m.[40] The modified regulations became effective August 28, 1995.[41] These regulations have been enforced primarily with respect to radio broadcasts and thus have been applied more often to indecent language rather than to images.[42] Under these regulations, broadcasts deemed indecent were subject to a forfeiture of up to $32,500 per violation,[43] with the FCC's considering each utterance of an indecent word as a separate violation, rather than viewing the entire program as a single violation.[44]

Fines may be levied against broadcast stations, but not against broadcast networks. The FCC appears also to have the statutory authority to fine performers for uttering indecent words,[45] but it has taken the position that "[c]ompliance with federal broadcast decency restrictions is the responsibility of the station that chooses to air the programming, not the performers."[46]

On June 15, 2006, the President signed S. 193, 109th Congress, into law, and it became P.L. 109-235, the Broadcast Decency Enforcement Act of 2005. This law increased the penalty for indecent broadcasts tenfold, to $325,000 for each violation, with a maximum of $3 million "for any single act or failure to act." This increased penalty may be levied against "a broadcast station licensee or permittee; or ... an applicant for any broadcast license, permit, certificate, or other instrument or authorization issued by the Commission." If the FCC were to change its policy and

[40] *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. §1464*, 10 F.C.C. Rcd. 10558 (1995); 47 C.F.R. 73.3999(b). Subsection (b) prohibits the broadcast of material which is obscene without any reference to time of day. Broadcast obscenity will not be discussed in this report. For more information on obscenity, see CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*, by Henry Cohen, and CRS Report 98-670, *Obscenity, Child Pornography, and Indecency: Brief Background and Recent Developments*, by Kathleen Ann Ruane.

[41] 60 FR 44439 (August 28, 1995).

[42] Enforcement actions based on televised broadcast indecency are rare. However, the Commission recently issued a *Notice of Apparent Liability* for the broadcast of indecent material during a televised morning news program. During the program, the show's hosts interviewed performers with a production entitled "Puppetry of the Penis," who appeared wearing capes but were otherwise nude. A performer's penis was exposed during the broadcast. *See In the Matter of Young Broadcasting of San Francisco, Inc.*, File No. EB-02-IH-0786 (January 27, 2004). *See also In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003*, File No. EB-03-IH-0162 (October 12, 2004).

[43] Under 47 U.S.C. §503(b)(2)(A), the maximum fine per violation is $25,000. However, the maximum forfeiture amount was increased to $32,500 pursuant to the Debt Collection Improvement Act of 1996, P.L. 104-134, which amended the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990, P.L. 101-410. *See* 47 C.F.R. §1.80.

[44] Regulations set a maximum forfeiture of $325,000 for any single act or failure to act, which arguably limits the forfeiture for a single broadcast. *See* 47 C.F.R. §1.80.

[45] 47 U.S.C. §503(b)(1)(D) provides that the FCC may impose a forfeiture penalty upon any "person" who violates 18 U.S.C. §1464, which makes it a crime to "utter" indecent language. In addition, 47 U.S.C. §503(b)(6)(B) provides that the FCC may not impose a forfeiture penalty on a person who does not hold a broadcast station license if the violation occurred more than one year prior to the date of issuance of the required notice or notice of apparent liability. This suggests that the FCC may fine a performer if the violation occurred within one year of such date.

[46] *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011 (September 22, 2004) http://www.fcc.gov/eb/Orders/2004/FCC-04-209A1.html.

impose fines on performers, it could apparently do so only under the provision (which remains in effect) that authorizes forfeitures of up to $32,500 per violation.[47]

To determine whether broadcast material is in fact indecent, the commission must make two fundamental determinations: (1) that the material alleged to be indecent falls within the subject matter scope of the definition of indecency—the material in question must describe or depict sexual or excretory organs or activities; and (2) that the broadcast is patently offensive as measured by contemporary community standards for the broadcast medium.[48] If the material in question does not fall within the subject matter scope of the indecency definition, or if the broadcast occurred during the "safe harbor" hours (between 10 p.m. and 6 a.m.), the complaint is usually dismissed. However, if the commission determines that the complaint meets the subject matter requirements and was aired outside the "safe harbor" hours, the broadcast in question is evaluated for patent offensiveness. The commission notes that in determining whether material is patently offensive, the full context is very important, and that such determinations are highly fact-specific.

The commission has identified three factors that have been significant in recent decisions in determining whether broadcast material is patently offensive:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.[49]

A discussion of cases that address each of these factors follows.

Explicitness or Graphic Nature of Material

Generally, the more explicit or graphic the description or depiction, the greater the likelihood that the material will be deemed patently offensive and therefore indecent. For example, the commission imposed a forfeiture on a university radio station for airing a rap song that included a line depicting anal intercourse.[50] In that case, the commission determined that the song described sexual activities in graphic terms that were patently offensive and therefore indecent. Since the song was broadcast in the mid-afternoon, there was a reasonable risk that children were in the audience, thus giving rise to the commission's action.[51]

Broadcasts need not be as graphic as the song in the above case to give rise to the imposition of an FCC forfeiture. Broadcasts consisting of double entendres or innuendos may also be deemed indecent if the "sexual or excretory import is unmistakable." The FCC issued a notice of apparent liability and imposed a forfeiture on several stations for airing a song that included the following lines: "I whipped out my Whopper and whispered, Hey, Sweettart, how'd you like to Crunch on

[47] *See* note 42, *supra*.

[48] *See In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, File No. EB-00-IH-0089 (April 6, 2001) http://www.fcc.gov/eb/Orders/2001/fcc01090.html.

[49] *Id.*

[50] *Notice of Apparent Liability, State University of New York*, 8 F.C.C. Rcd. 456 (1993).

[51] *Id.*

my Big Hunk for a Million Dollar Bar? Well, she immediately went down on my Tootsie Roll and you know, it was like pure Almond Joy."[52] The commission determined that the material was indecent even though it used candy bar names to substitute for sexual activities. In one notice concerning the broadcast of the song, the commission stated that "[w]hile the passages arguably consist of double entendre and indirect references, the language used in each passage was understandable and clearly capable of specific sexual meaning and, because of the context, the sexual import was inescapable."[53] The nature of the lyrics, coupled with the fact that the song aired between 6 a.m. and 10 p.m., gave rise to the imposition of a forfeiture.

Dwelling or Repetition of Potentially Offensive Material

Repetition of and persistent focus on a sexual or excretory activity could "exacerbate the potential offensiveness of broadcasts." For example, the FCC issued a notice of apparent liability and imposed a forfeiture on a radio station that broadcast an extensive discussion of flatulence and defecation by radio personality "Bubba, the Love Sponge."[54] Though the broadcast did not contain any expletives, the commission found that the material dwelt on excretory activities and therefore was patently offensive.

While repetition can increase the likelihood that references to sexual or excretory activities are deemed indecent, where such references have been made in passing or are fleeting in nature, the commission has found that the reference was not indecent even when profanity has been used.[55] For example, the commission determined that the following phrase—"The hell I did, I drove mother-f[***]er, oh."—uttered by an announcer during a radio morning show, was not indecent.[56] The commission declined to take action regarding the broadcast because it contained only a "fleeting and isolated utterance ... within the context of live and spontaneous programming."[57] Certain fleeting references may, however, be found indecent where other factors contribute to the broadcast's patent offensiveness. For example, the commission has imposed forfeitures on stations for airing jokes that refer to sexual activities with children.[58]

Pandering or Titillating Nature of Material

In determining whether broadcast material is indecent, the commission also looks to the purpose for which the material is being presented. Indecency findings generally involve material that is presented in a pandering or titillating manner, or material that is presented for the shock value of

[52] *Notice of Apparent Liability, KGB Incorporated*, 7 F.C.C. Rcd. 3207 (1992). *See also Great American Television and Radio Company, Inc.*, 6 F.C.C. Rcd. 3692 (1990); *WIOD, Inc.*, 6 F.C.C. Rcd. 3704 (1989).

[53] 6 F.C.C. Rcd. 3692.

[54] *Notice of Apparent Liability, Citicasters Co.*, 13 F.C.C. Rcd. 22004 (1998).

[55] The Commission has recently indicated that "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent." *In the Matter of Complaints Against Various Broadcast Licensees Regarding the Airing of the "Golden Globe Awards" Program*, File No. EB-03-IH-0110 (March 18, 2004). *See* section entitled "Golden Globe Awards Decision," below.

[56] *L.M. Communications of South Carolina, Inc.*, 7 F.C.C. Rcd. 1595 (1992).

[57] *Id.*

[58] *See Notice of Apparent Liability, Temple Radio, Inc.*, 12 F.C.C. Rcd. 21828 (1997); *Notice of Apparent Liability, EZ New Orleans, Inc.*, 12 F.C.C. Rcd. 4147 (1997).

its language. For example, the commission deemed a radio call-in survey about oral sex to be indecent based in part on the fact that the material was presented in a pandering and titillating manner.[59]

Whether a broadcast is presented in a pandering or titillating manner depends on the context in which the potentially indecent material is presented. Explicit images or graphic language does not necessarily mean that the broadcast is being presented in a pandering or titillating manner. For example, the commission declined to impose a forfeiture on a television station for airing portions of a high school sex education class that included the use of "sex organ models to demonstrate the use of various birth control devices."[60] In dismissing the complaint, the commission held that, "[a]lthough the program dealt with sexual issues, the material presented was clinical or instructional in nature and not presented in a pandering, titillating, or vulgar manner."[61]

Golden Globe Awards Decision

As noted above, on March 18, 2004, the Federal Communications Commission overturned an earlier decision by the commission's Enforcement Bureau regarding the broadcast of the word "f[***]ing" during the 2003 Golden Globe Awards. In the earlier decision, the Enforcement Bureau had found that the broadcast of the program including the utterance did not violate federal restrictions regarding the broadcast of obscene and indecent material.[62] The bureau dismissed the complaints primarily because the language in question did not describe or depict sexual or excretory activities or organs.

In its March 18 *Memorandum Opinion and Order*, the full commission concluded that the broadcast of the Golden Globe Awards did include material that violated prohibitions on the broadcast of indecent and profane material.[63] In reversing the bureau, the commission determined that the "phrase at issue is within the scope of our indecency definition because it does depict or describe sexual activities."[64] Although the commission "recognize[d] NBC's argument that the 'F-Word' here was used 'as an intensifier,'" it nevertheless concluded that, "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."[65]

Upon finding that the phrase in question fell within the first prong of the definition of "indecency," the commission turned to the question of whether the broadcast was patently

[59] *Notice of Apparent Liability, Rusk Corporation, Radio Station KLOL*, 5 F.C.C. Rcd. 6332 (1990).

[60] *In the Matter of Application for Review of the Dismissal of an Indecency Complaint Against King Broadcasting Co.*, 5 F.C.C. Rcd. 2971 (1990).

[61] *Id.*

[62] *Id.*

[63] The Commission declined to impose a forfeiture on the broadcast licensees named in the complaint because they were not "on notice" regarding the new interpretations of the Commission's regulations regarding broadcast indecency and the newly adopted definition of profanity. The Commission also indicated that it will not use its decision in this case adversely against the licensees during the license renewal process.

[64] *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, File No. EB-03-IH-0110 at 4 (March 18, 2004).

[65] *Id.* Similarly, in March, 2006, the FCC decided that "s[***]" has an "inherently excretory connotation" and therefore could not be used from 6 a.m. to 10 p.m. See, *@$#&*% Ken Burns! PBS Scrubbing G.I. Mouths With Soap*, New York Observer, October 2, 2006, p. 1.

offensive under contemporary community standards for the broadcast medium. The commission determined that the broadcast was patently offensive, noting that "[t]he 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language," and that "[t]he use of the 'F-Word' here, on a nationally telecast awards ceremony, was shocking and gratuitous."[66] The commission also rejected "prior Commission and staff action [that] have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon," concluding "that any such interpretation is no longer good law."[67] The commission further clarified its position, stating "that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."[68]

In addition to the determination that the utterance of the word "f[***]ing" during the Golden Globe Awards was indecent, the commission also found, as an independent ground for its decision, that use of the word was "profane" in violation of 18 U.S.C. 1464.[69] In making this determination, the commission cited dictionary definitions of "profanity" as "'vulgar, irreverent, or coarse language,'"[70] and a Seventh Circuit opinion stating that "profanity" is "'construable as denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.'"[71] The commission acknowledged that its limited case law regarding profane speech has focused on profanity in the context of blasphemy, but stated that it would no longer limit its definition of profane speech in such manner. Pursuant to its adoption of this new definition of "profane," the commission stated that, depending on the context, the "'F-Word' and those words (or variants thereof) that are as highly offensive as the 'F-Word'" would be considered "profane" if broadcast between 6 a.m. and 10 p.m.[72] The commission noted that other words would be considered on a case-by-case basis.

Super Bowl Halftime Show Decision

As noted above, on September 22, 2004, the FCC released a *Notice of Apparent Liability for Forfeiture* imposing a $550,000 forfeiture on several Viacom-owned CBS affiliates for the broadcast of the Super Bowl XXXVIII halftime show on February 1, 2004, in which a performer's breast was exposed.[73] The commission determined that the show, which was aired at

[66] *Id*. at 5.

[67] *Id*. at 6. *See* section entitled "Dwelling or Repetition of Potentially Indecent Material," above.

[68] *Id.*

[69] *Id*. at 7. Although in this case the Commission found that the broadcast in question was both indecent and profane, there are certain to be words that could be deemed "profane," but do not fit the Commission's definition of "indecent." Under the newly adopted definition of "profanity," many words could arguably be found "profane" because they provoke "violent resentment" or are otherwise "grossly offensive," but not be found "indecent" because they do not refer to any sexual or excretory activity or organ or even "inherently" have a sexual connotation, as the Commission found the phrase that Bono uttered to have. Presumably, it is these words that the Commission will consider on a case-by-case basis.

[70] *Id*. at 7, citing Black's Law Dictionary 1210 (6th ed. 1990) and American Heritage College Dictionary 1112 (4th ed. 2002).

[71] *Id*., citing *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972).

[72] *Id.*

[73] *Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011 (September 22, 2004) http://www.fcc.gov/eb/Orders/2004/FCC-04-
(continued...)

approximately 8:30 p.m. Eastern Standard Time, violated its restrictions on the broadcast of indecent material.

In its analysis, the commission determined that since the broadcast included a performance that culminated in "on-camera partial nudity," and thus satisfied the first part of the indecency analysis, further scrutiny was warranted to determine whether the broadcast was "patently offensive as measured by contemporary community standards for the broadcast medium."[74] The commission found that the performance in question was "both explicit and graphic," and rejected the licensees' contention that since the exposure was fleeting, lasting only 19/32 of a second, it should not be deemed indecent.[75] In determining whether the material in question was intended to "pander to, titillate and shock the viewing audience," the commission noted that the performer's breast was exposed after another performer sang, "gonna have you naked by the end of this song."[76] The commission found that the song lyrics, coupled with simulated sexual activities during the performance and the exposure of the breast, indicated that the purpose of the performance was to pander to, titillate and shock the audience, and the fact that the actual exposure of the breast was brief, as noted above, was not dispositive.[77]

The commission ordered each Viacom-owned CBS affiliate to pay the statutory maximum forfeiture of $27,500 for the broadcast, for a total forfeiture of $550,000. The forfeiture was imposed on the Viacom-owned affiliates because of Viacom's participation in and planning of the Super Bowl halftime show with MTV networks, another Viacom subsidiary.[78]

Following the issuance of the *Notice of Apparent Liability for Forfeiture*, the affiliates are "afforded a reasonable period of time (usually 30 days from the date of the notice) to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture."[79] CBS filed an opposition to the Notice of Apparent Liability on November 5, 2004. The opposition challenged the forfeiture on various grounds, including that the test for indecency was not met and that the forfeiture violates the First Amendment.

On March 15, 2006, the FCC issued a *Forfeiture Order* imposing a mandatory forfeiture in the amount of $550,000 on CBS for the airing of the 2004 Super Bowl halftime show.[80] CBS appealed to the U.S. Court of Appeals for the Third Circuit, which, on July 21, 2008, invalidated the fine, but, on May 4, 2009, the Supreme Court vacated the Third Circuit's decision.[81] The court's decision is discussed in greater detail below.

(...continued)

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[74] *Id.* at ¶ 11.

[75] *Id.* at ¶ 13.

[76] *Id.* at ¶ 14.

[77] *Id.*

[78] *Id.* at ¶¶ 17 - 24.

[79] 47 C.F.R. §1.80(f)(3).

[80] *In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show*, File No. EB-04-IH-0011, FCC 06-19 (March 15, 2006).

[81] CBS Corp. v. Federal Communications Commission, 535 F.3d 167 (3d Cir. 2008), *vacated and remanded*, No. 08-653 (U.S. May 4, 2009).

Other Recent Enforcement Actions

In addition to the *Order* regarding the 2004 Super Bowl halftime show, the FCC issued several *Notices of Apparent Liability* for various television broadcasts occurring between February 2, 2002, and March 8, 2005.[82]

Of the six programs for which a forfeiture was proposed, two of the complaints were based on the use of "indecent" language, two were based on sexually explicit images, and two programs were cited for both language and sexual innuendo.[83] In determining whether a forfeiture was appropriate, the commission applied the modified analysis first used in the *Golden Globe Awards Order* with respect to language that is deemed "indecent," and in the *Super Bowl Halftime Show Order* regarding sexually explicit imagery.[84]

In addition to the commission's recent actions with respect to televised programming, the commission had previously imposed forfeitures on a number of radio stations for broadcast indecency.[85] We now discuss two of its more recent high-profile actions related to radio programming. Each of these actions resulted in a consent decree between the commission and the broadcaster.

Infinity Broadcasting

On October 2, 2003, the commission issued a *Notice of Apparent Liability* to Infinity Broadcasting for airing portions of the "Opie & Anthony Show" during which the hosts conducted a contest entitled "Sex for Sam" which involved couples having sex in certain "risky" locations throughout New York City in an effort to win a trip.[86] The couples, accompanied by a station employee, were to have sex in as many of the designated locations as possible. They were assigned points based on the nature of the location and the activities in which they engaged. The station aired discussions between the hosts of the show and the station employee accompanying the couples which consisted of descriptions of the sexual activities of the participating couples and the locations in which they engaged in sexual activities. One discussion involved an description of a couple apparently engaging in sexual activities in St. Patrick's Cathedral.

The commission determined that the broadcast made "graphic and explicit references to sexual and excretory organs and activity" despite the fact that colloquial terms, rather than explicit or graphic terms, were used in the descriptions. The commission found that "[t]o the extent that the colloquial terms that the participants used to describe organs and activities could be described as innuendo rather than as direct references, they are nonetheless sufficient to render the material actionably indecent because the 'sexual [and] excretory import' of those references was

[82] *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, FCC 06-17 (March 15, 2006).

[83] *Id.* Also, three of the programs for which forfeitures were proposed were Spanish-language programs.

[84] The Commission found violations, but declined to impose forfeitures with respect to several programs that were aired prior to the Golden Globe Awards Order, at a time when the Commission would not have taken enforcement actions against the isolated use of expletives. *Id.* at ¶¶ 100 - 137.

[85] For a complete list of recent actions related to broadcast indecency, see http://transition.fcc.gov/eb/oip/.

[86] *In the Matter of Infinity Broadcasting, et al.*, EB-02-IH-0685 (October 2, 2003).

'unmistakable.'"[87] The commission also found that the hosts of the show "dwelled at length on and referred repeatedly to sexual or excretory activities and organs," and that "the descriptions of sexual and excretory activity and organs were not in any way isolated and fleeting."[88]

On November 23, 2004, the FCC entered into a consent decree with Infinity regarding the Opie & Anthony *NAL*.[89] Pursuant to the decree, Infinity, a subsidiary of Viacom, agreed to make a voluntary contribution to the United States Treasury in the amount of $3.5 million and to adopt a company-wide compliance plan for the purpose of preventing the broadcast of indecent material. As part of the company-wide plan, Viacom agreed to install delay systems to edit "potentially problematic" live programming and to conduct training with respect to indecency regulations for all of its on-air talent and employees who participate in programming decisions.

Clear Channel Broadcasting

On January 27, 2004, the commission issued a *Notice of Apparent Liability* to Clear Channel Broadcasting for repeated airings of the "Bubba, the Love Sponge" program which included indecent material.[90] The commission found that all the broadcasts in question involved "conversations about such things as oral sex, penises, testicles, masturbation, intercourse, orgasms and breasts."[91] The commission determined that each of the broadcasts in question contained "sufficiently graphic and explicit references," which were generally repeated throughout the broadcast in a pandering and titillating manner.

In one broadcast, the station aired a segment involving skits in which the voices of purported cartoon characters talk about drugs and sex.[92] The skits were inserted between advertisements for Cartoon Network's Friday-night cartoons. The commission determined that "the use of cartoon characters in such a sexually explicit manner during hours of the day when children are likely to be listening is shocking and makes this segment patently offensive."[93] The commission also cited the "calculated and callous nature of the stations' decision to impose this predictably offensive material upon young, vulnerable listeners" as "weighing heavily" in its determination.[94]

On April 8, 2004, the commission released another *Notice of Apparent Liability* against Clear Channel Communications for airing allegedly indecent material during the "Howard Stern Show."[95] For the first time, the commission sought to impose separate statutory maximum

[87] *Id.* at 8.

[88] *Id.* at 9. The Commission noted that the contest portion of the broadcast in question lasted over an hour and was reproduced in a 203-page transcript.

[89] *See In the Matter of Viacom Inc., Infinity Radio Inc., et. al.*, FCC 04-268 (November 23, 2004) http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-268A1.pdf. The decree also covers several other actions pending against Viacom-owned Infinity Radio stations and broadcast television stations, but does not cover the proceedings related to the Super Bowl halftime show discussed *supra*.

[90] *In the Matter of Clear Channel Broadcasting Licenses, Inc., et al.*, File No. EB-02-IH-0261 (January 27, 2004).

[91] *Id.* at 4.

[92] *Id.* at 5.

[93] *Id.* at 6.

[94] *Id.*

[95] *In the Matter of Clear Channel Broadcasting Licensees*, File No. EB-03-IH—159 (April 8, 2004).

forfeitures for each indecent utterance during the program in question, rather than imposing a single fine for the entire program.[96]

The commission entered into a consent decree with Clear Channel on June 9, 2004. The decree requires Clear Channel to make a "voluntary contribution" of $1.75 million to the United States Treasury and outlines "a company-wide compliance plan for the purpose of preventing the broadcast over radio or television of material violative of the indecency laws."[97] As part of the compliance plan, Clear Channel will "conduct training on obscenity and indecency for all on-air talent and employees who materially participate in programming decisions, which will include tutorials regarding material that the FCC does not permit broadcasters to air."[98] The plan also requires Clear Channel to suspend any employee accused of airing, or who materially participates in the decision to air, obscene or indecent material while an investigation is conducted following the issuance of a *Notice of Apparent Liability*. Such employees will be terminated without delay if the *NAL* results in enforcement action by the FCC.

Recent Supreme Court and Appeals Court Decisions

Two major cases were decided by federal courts of appeals in 2007 and 2008. Both cases invalidated forfeiture orders the FCC had issued against broadcasters for transmitting fleeting indecent material over the airwaves. In April of 2009, the Supreme Court overturned the decision of the appeals court in the first case and remanded the case to the Second Circuit for proceedings consistent with the Supreme Court's opinion. The Supreme Court also ordered the decision in the second case to be reconsidered by the Third Circuit. Upon reconsideration, the Second Circuit struck down the FCC's indecency policy for violating the First Amendment. The FCC has appealed that decision to the Supreme Court.

Fox Television Stations, Inc. v. FCC (Supreme Court Decision)

The FCC had taken action against, among other broadcasts, two award shows, described in an Associated Press article as, "a December 9, 2002, broadcast of the Billboard Music Awards in which singer Cher used the phrase, 'F--- 'em,' and a December 10, 2003, Billboard awards show in which reality show star Nicole Richie said: 'Have you ever tried to get cow s--- out of a Prada purse? It's not so f------ simple.'"[99] These incidents raised the same questions that the FCC's action against the Bono expletive raised: whether a fleeting isolated expletive is "indecent" under federal law, and, if so, whether the First Amendment permits the FCC to enforce the law by punishing broadcasters for such utterances.

On June 4, 2007, the U.S. Court of Appeals for the Second Circuit, in a 2-1 decision, found "that the FCC's new policy regarding 'fleeting expletives' represent[ed] a significant departure from

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[96] *See* Statement of Commissioner Michael J. Copps, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-245911A1.pdf, p. 2.

[97] *See In the Matter of Clear Channel Communications, Inc.*, FCC 04-128 (June 9, 2004) at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-128A1.pdf.

[98] *Id.* at 7.

[99] Larry Neumeister, *Appeals court panel grills government lawyer in indecency case*, Associated Press State & Local Wire (December 20, 2006).

positions previously taken by the agency and relied on by the broadcast industry."[100] The court further found "that the FCC ha[d] failed to articulate a reasoned basis for this change in policy. Accordingly, [the court held] that the FCC's new policy regarding 'fleeting expletives' [was] arbitrary and capricious under the Administrative Procedure Act."[101] Having overturned the FCC policy on statutory grounds, the court had no occasion to decide whether it also violated the First Amendment. It explained, however, why it was "skeptical that the Commission can provide a reasonable explanation for its 'fleeting expletive' regime that would pass constitutional muster."[102] The final section of this report examines this aspect of the court's opinion.

On April 28, 2009, the Supreme Court, in a 5-4 ruling, overturned the decision of the Second Circuit.[103] The Court found that the policy shift of the FCC was "entirely rational."[104] The Court found that the Second Circuit had relied on an erroneous interpretation of Supreme Court precedent when measuring the adequacy of the FCC's reasoning for its policy shift. According to the Court, the Second Circuit had applied a heightened standard of review to agency decisions that effect changes in prior policy. The Second Circuit interpreted that Supreme Court precedent to require the agency to articulate "why the new rule effectuates the statute as well or better than the old rule."[105]

The Supreme Court found no basis in its precedent or in the Administrative Procedure Act for such a requirement. The Court explained that the opinion upon which the Second Circuit had relied did not require agencies to articulate reasons for policy changes that were more substantial than those required to adopt a policy in the first instance. The precedent held, rather, that new actions required "a reasoned analysis for the change beyond that which may be required when an agency *does not act* in the first instance."[106] The FCC need not have demonstrated that the reasons for its new policies were better than the reasons for the old one. It was sufficient for the agency to show that the new policy is permissible under the statute; there are good reasons for it; and the agency believes it to be better, "which the conscious change of course adequately indicates."[107]

Applying this standard to the FCC's rule change, the Court found that the FCC's actions were not arbitrary or capricious. The FCC acknowledged that its actions represented a shift from prior policy. The Court also found the agency's reasons for its policy change were "entirely rational," because it was not unreasonable to treat literal and nonliteral uses of expletives in the same way. It was also reasonable, in the Court's estimation, to find even isolated utterances to fit within the

[100] Fox Television Stations, Inc. v. Federal Communications Commission, 489 F.3d 444, 447 (2d Cir. 2007), *reversed and remanded*, 129 S. Ct. 1800 (2009).

[101] *Id.*

[102] *Id.* at 462.

[103] Federal Communications Commission v. Fox Television Stations, Inc., 129 S. Ct. 1800 (2009).

[104] *Id.* at 1812.

[105] *Id.* at 1810 (discussing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Autmobile Ins. Co.*, 463 U.S. 29, 43 (1983)). Justice Breyer, in dissent, disagreed with this interpretation of *State Farm*. He argued that, when an agency changes its rules, it must focus on the fact of the change and explaining the change and its basis, which is more than explaining why the new policy is a good one and in keeping with the statute. It includes answering why the change has occurred. In Justice Breyer's opinion, such a requirement does not create a heightened standard, but applies the same standard to different circumstances. According to Justice Breyer, the FCC's failure to adequately explain why it changed policy directions rendered the policy arbitrary and capricious. Id. at 1829.

[106] *Id.* at 1810 (emphasis in original).

[107] *Id.* at 1811.

definition of indecency. As a result, the Court upheld the FCC's new policy on enforcement of "fleeting expletives." The Court, however, declined to rule on the constitutionality of the policy.[108]

Regarding the issue of constitutionality, the Court noted the dicta of the Second Circuit. The Second Circuit, having overturned the FCC policy on statutory grounds, had no occasion to decide whether it also violated the First Amendment. In dicta, however, it explained why it was "skeptical that the Commission can provide a reasonable explanation for its 'fleeting expletive' regime that would pass constitutional muster."[109]

The court wrote that it was

> sympathetic to the Networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.... We also note that the FCC's indecency test raises the separate constitutional question of whether it permits the FCC to sanction speech based on its subjective view of the merit of that speech. It appears that under the FCC's current indecency regime, any and all uses of an expletive is presumptively indecent and profane with the broadcaster then having to demonstrate to the satisfaction of the Commission, under an unidentified burden of proof, that the expletives were "integral" to the work. In the licensing context, the Supreme Court has cautioned against speech regulations that give too much discretion to government officials.... Finally, we recognize that there is some tension in the law regarding the appropriate level of First Amendment scrutiny. In general, restrictions on First Amendment liberties prompt courts to apply strict scrutiny.... At the same time, however, the Supreme Court has also considered broadcast media exceptional.... Nevertheless, we would be remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television.[110]

With respect to the Second Circuit's dicta regarding the First Amendment question, the Supreme Court wrote,

> It is conceivable that the Commission's orders may cause some broadcasters to avoid certain language that is beyond the Commission's reach under the Constitution. Whether that is so, and, if so, whether it is unconstitutional, will be determined soon enough, perhaps in this very case. Meanwhile, any chilled references to excretory and sexual material "surely lie at the periphery of First Amendment concern," *Pacifica*, 438 U.S., at 743 (plurality opinion of Stevens, J.). We see no reason to abandon our usual procedures in a rush to judgment without a lower court opinion. We decline to address the constitutional questions at this time.[111]

On July 13, 2010, the Second Circuit, as discussed below, invalidated the FCC's policy because the court determined it to be unconstitutionally vague.[112]

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[108] *Id.* at 1819. In a concurring opinion, Justice Thomas suggested that the viability of the precedents supporting the constitutionality of the FCC's indecency policy may be in doubt. Id. at 1819-22. Justice Thomas therefore appears open to the reconsideration of these precedents.

[109] *Id.* at 462.

[110] *Id.* at 463-465.

[111] Federal Communications Commission v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1819 (2009).

[112] Fox Television Stations, Inc. v. Federal Communications Commission, 613 F. 3d 317 (2d Cir. 2010).

CBS Corp. v. FCC

On July 21, 2008, the U.S. Court of Appeals for the Third Circuit issued a unanimous decision to invalidate the FCC's fine against CBS broadcasting station affiliates for the broadcast of the Super Bowl Halftime Show that included a brief instance of partial nudity.[113] The court decided to invalidate the fine because the FCC had acted arbitrarily and capriciously when finding that the brief nudity was actionably indecent.

In its review of the FCC's previous actions in this area, the court noted that the FCC has the power to regulate indecency over the broadcast airwaves, but for much of the FCC's history the agency maintained an exception for fleeting instances of indecency.[114] The commission argued that its policy exempting fleeting instances of indecency over broadcast from enforcement applied only to fleeting indecent language and not to images.[115] The FCC claimed that fleeting indecent images had always been subject to enforcement; therefore, there was no departure from the FCC's previous approach to sanctions regarding such images. As a result, the FCC argued that the agency did not have to articulate a reasoned basis for its shift in policy, and it provided none.

The court examined the FCC's claim that the agency had previously made the distinction between images and language and that indecent fleeting images had always been subject to FCC enforcement.[116] The court found those claims to be unfounded. In its review of the FCC's previous decisions, the court could find no distinction between the way the agency treated fleeting indecent language as opposed to indecent images.[117] The court cited instances in which the FCC declined to issue fines for fleeting indecent images. In declining to institute enforcement actions, the agency had stated that the images were fleeting and covered by its policy of non-enforcement.[118] The court decided, on that basis, that the FCC's decision to consider the fleeting indecent image broadcast during the Halftime Show to be actionable was a shift in the FCC's policy towards the enforcement against such images.

Because the agency had decided to implement a policy shift, the agency was required to articulate a reasoned basis for doing so in order for the departure to be valid under the Administrative Procedure Act.[119] As noted above, the FCC argued that its policy toward fleeting indecent images had not changed. Consequently, the FCC articulated no reason for the shift in policy identified by the court of appeals. Because the FCC provided no basis for its departure from previous enforcement practices, the court held that the deviation from the prior policy of restraining from enforcement against fleeting images was arbitrary and capricious to the extent that it violated the APA.[120] The fine, therefore, could not be imposed on CBS for two reasons. First, the underlying policy shift was invalid, having no reasoned basis. Second, even if the policy had a reasoned basis, the enforcement action against CBS represented the first time that the FCC had articulated

[113] CBS Corp. v. Federal Communications Commission, 535 F.3d 167 (3d Cir. 2008), *vacated and remanded*, No. 08-653 (U.S. May 4, 2009). For a discussion of the incidents giving rise to the FCC's forfeiture order, see the section entitled "Superbowl Half Time Show Decision," *supra.*

[114] *Id.* at 174.

[115] *Id.*

[116] *Id.* at 176-184.

[117] *Id.* at 184.

[118] *Id.* at 184-185.

[119] *Id.* at 188-189.

[120] *Id.* at 189.

its intention to take action against fleeting indecent images (assuming, as the commission argued, that it had not done so in its *Golden Globes* decision). The new policy could not be applied retroactively to fine CBS in this case.[121] The court did not consider whether a policy punishing fleeting indecent images over broadcast television would violate the First Amendment.

The FCC petitioned the Supreme Court for certiorari.[122] On May 4, 2009, the Court granted the petition, vacated the judgment, and remanded the case to the Third Circuit for further consideration in light of the Supreme Court's decision in *FCC v. Fox Television Stations, Inc.*[123]

Fox Television v. FCC (Second Circuit)

As a result of the Supreme Court's decision in *FCC v. Fox Television*, described above, the case was remanded to the Second Circuit Court of Appeals for consideration of whether the FCC's indecency policy violated the First Amendment.[124] On July 13, 2010, a three-judge panel struck down the FCC's indecency policy because the court determined it to be unconstitutionally vague. The panel noted that a law is impermissibly vague "if it does not 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."[125] While the vagueness doctrine does not require perfect clarity, it requires the law to give persons notice of what is prohibited and what is not. The panel found that the FCC's policy lacked such notice because it was impossible to determine what the FCC would find to be 'patently offensive' prior to broadcast, and the application of the exceptions to the FCC's presumptive prohibitions on two particular expletives were equally difficult to predict.

The court reached this conclusion by surveying the FCC's enforcement of its indecency policy, since its amendments of the policy in 2001. The court lists a number of instances, occasionally within the same program, where some words that referred to sexual organs or excretion were patently offensive (bull***t), and other words the referred to sexual organs or excretion were not (d**k and d***head).[126] In surveying the orders determining which expletives were permissible, the court could find no explanation offered by the FCC for why certain words were impermissibly indecent, while others were not.

The FCC argued that because it could not anticipate what broadcasters would say prior to broadcast, flexibility was necessary to determine what was indecent after the fact.[127] The court, however, seemed to find this argument to contribute to its finding that the policy was

[121] *Id.* Upon deciding that the FCC's new policy regarding fleeting images was invalid under the APA, the court was not obligated to reach the second question raised by the case, which was whether CBS had properly been held vicariously liable for the actions of the performers. The court chose, however, to address this question in dicta, and determined that, under two of the FCC's theories of vicarious liability, the fine would have been improperly imposed upon the broadcasters. As to a third FCC theory of vicarious liability, which was that the broadcasters had willfully violated the FCC's regulations by failing to take adequate precautionary measures, the court determined that the definition of "willful" was unclear and remanded the question to the FCC for a decision on that issue. *See* CBS Corp. v. FCC, 535 F.3d 167, 189-209 (3d Cir. 2008).

[122] Petition for Writ of Certiorari, *CBS v. FCC*, No. 08-653.

[123] FCC v. CBS Corp., 129 S. Ct. 2176 (2009).

[124] Fox Television Stations, Inc. v. Federal Communications Commission, 613 F. 3d 317 (2d Cir. 2010).

[125] *Id.* at 327 quoting Farrell v. Burke, 449 F. 3d 470, 485 (2d Cir. 2006)(quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

[126] *Id.* at 330.

[127] *Id.* 331.

impermissibly vague. "If the FCC cannot anticipate what is indecent under its policy, it can hardly expect broadcasters to do so," the court found.[128]

Even where the policy stated a presumptive violation of the indecency policy, the court found the policy to be vague.[129] The FCC has a presumptive prohibition on the use of the words "f***" and "sh**" outside of the safe harbor; however, there are two exceptions: the bona fide news exception and the artistic necessity exception. The court found it difficult to discern when either exception applied. For example, the use of these words in a broadcast of the fictional movie, *Saving Private Ryan*, did not violate the FCC's indecency policy because they fell under the artistic necessity exception. However, the use of these same words in the documentary "The Blues" did violate the policy and did not qualify for the exception. The court asked "how fleeting expletives could be more essential to the 'realism' of a fictional movie than to the 'realism' of interviews with real people about real life events."[130] The court continued, stating "it is hard not to speculate that the FCC simply was more comfortable with the themes in" *Saving Private Ryan*, raising the specter of censorship concerns.[131] The court avoided accusing the FCC of suppressing particular viewpoints, but noted that "nothing would prevent the FCC from applying its indecency policy in a discriminatory manner in the future."[132] The court also pointed out inconsistent applications of the bona fide news exception. The court cited an instance wherein the FCC found the use of one of the presumptively prohibited words to be indecent because it was uttered during a morning news program, only for the FCC to reverse its decision and find that the use of the word was not indecent *because it was used during a morning news program*.[133]

The panel noted that the FCC's policy had a significant chilling effect on the speech of broadcasters and noted a number of programs that broadcasters had refused to air for fear of violating the policy. "By prohibiting all 'patently offensive' references to sex, sexual organs, and excretion without giving adequate guidance as to what 'patently offensive' means, the FCC effectively chills speech, because broadcasters have no way of knowing what the FCC will find offensive."[134] Thus the court struck down the policy.

Notably, the court did not decide whether it was unconstitutional to punish "fleeting expletives" or single uses of an indecent word or image. Instead, the court invalidated the FCC's entire indecency policy as impermissibly vague, a broader decision than might have been expected under the facts of the case.

Current Status

The Supreme Court has agreed to review the decision of the Second Circuit, striking down the FCC's policy as a violation of the First Amendment.[135] Justice Thomas, in his concurring opinion in *Fox Television Stations, Inc. v. FCC*, indicated that he would be open to considering whether a

[128] *Id.*

[129] *Id.*

[130] *Id.* at 332.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 331.

[134] *Id.* at 334.

[135] FCC v. Fox Television, Inc., 2011 U.S. LEXIS 4926 (June 27, 2011).

rule that punishes the single occurrence of indecency is constitutional.[136] The Third Circuit has yet to render its decision on the constitutionality of the FCC's indecency policy in *CBS v. FCC*.

Would Prohibiting the Broadcast of "Indecent" Words Regardless of Context Violate the First Amendment?

Prior to striking down the FCC's most recent indecency policy for vagueness, the Second Circuit analyzed the continued vitality of the Supreme Court's 1978 broadcast indecency case, *Federal Communications Commission v. Pacifica*. In that case, the Supreme Court upheld, against a First Amendment challenge, an action that the FCC took against a radio station for broadcasting a recording of George Carlin's "Filthy Words" monologue at 2 p.m.[137] The Court has not decided a case on the issue of "indecent" speech on broadcast radio or television since then, but it did cite *Pacifica* with approval in 1997, when, in *Reno v. ACLU*, it contrasted regulation of the broadcast media with regulation of the Internet.[138] Nevertheless, the Court in *Reno* did not *hold* that *Pacifica* remains good law, and arguments have been made that the proliferation of cable television channels has rendered archaic *Pacifica*'s denial of full First Amendment rights to broadcast media.

In its most recent opinion in *Fox Television v. FCC*, the Second Circuit questioned the continued application of a special First Amendment standard to broadcasters.[139] One of the original justifications for the lowered broadcast free speech standard was the unique position of broadcast in the United States' media landscape. Broadcast was, according to the *Pacifica* Court, "uniquely accessible to children" and "uniquely pervasive in the lives of all Americans."[140] The Second Circuit found that the same cannot be said today.[141] With the ubiquity of cable, satellite, and the Internet, the Second Circuit found it difficult to hold that broadcasting remains uniquely pervasive. The Second Circuit also pointed out that blocking and filtering technology for broadcasts, like the V-chip, may provide a less restrictive means for managing indecent content over broadcast than the sanctions upheld in *Pacifica* and enforced by the FCC.[142] Nonetheless, the Second Circuit recognized that *Pacifica* remained controlling precedent and applied the standard set forth by the Supreme Court in that case.

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[136] *FCC v. Fox Television*, 129 S. Ct. at 1820 (Thomas J. concurring).

[137] 438 U.S. 726 (1978). The FCC's action was to issue "a declaratory order granting the complaint," and "state that the order would be 'associated with the station's license file,'" which means that the FCC could consider it when it came time for the station's license renewal. *Id.* at 730.

[138] 521 U.S. 844, 868 (1997) (noting that "the history of the extensive regulation of the broadcast medium" and "the scarcity of available frequencies" are factors "not present in cyberspace," and striking down parts of the Communications Decency Act of 1996). The Court also cited *Pacifica* with approval in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-814 (2000), and in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002).

[139] Fox Television Stations, Inc. v. Federal Communications Commission, 613 F. 3d at 325 - 327.

[140] *Pacifica*, 438 U.S. at 748,

[141] *Fox Television*, 613 F.3d at 325.

[142] *Id.* at 326.

Even if *Pacifica* remains valid, *Pacifica* did not hold that the First Amendment permits the ban either of an occasional expletive on broadcast media, or of programs that would not be likely to attract youthful audiences, even if such programs contain "indecent" language. On these points, Justice Stevens wrote for the Court in *Pacifica*:

> It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction.... The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience.[143]

In a footnote to the last sentence of this quotation, the Court added: "Even a prime-time recitation of Geoffrey Chaucer's Miller's Tale would not be likely to command the attention of many children."[144] At the same time, Justice Stevens acknowledged that the Carlin monologue has political content: "The monologue does present a point of view; it attempts to show that the words it uses are 'harmless' and that our attitudes toward them are 'essentially silly.' The Commission objects, [however,] not to this point of view, but to the way in which it is expressed."[145] The Court commented: "If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content—or even to the fact that it satirized contemporary attitudes about four-letter words—First Amendment protection might be required."[146]

There appears to be some tension between this comment and the Court's remark about Chaucer, as any attempt to censor Chaucer would presumably also be based not on its ideas but on the way its ideas are expressed. But, as noted above, the Court's remark about Chaucer was a footnote to its comment that "[t]he content of the program in which the language is used will also affect the composition of the audience." Therefore, the difference that Justice Stevens apparently perceived between Chaucer and Carlin was that, even if both have literary, artistic, or political value, only the latter would be likely to attract a youthful audience. Arguably, then, *Pacifica* would permit the censorship, during certain hours, of the broadcast even of works of art that are likely to attract a youthful audience.[147]

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[143] *Pacifica*, *supra*, 438 U.S. at 750. A federal court of appeals subsequently held unconstitutional a federal statute that banned "indecent" broadcasts 24 hours a day, but, in a later case, the same court upheld the present statute, 47 U.S.C. §303 note, which bans "indecent" broadcasts from 6 a.m. to 10 p.m. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992); Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996).

[144] *Id.* at 750, n.29.

[145] *Id.* at 746 n.22. These two sentences and the text accompanying the next footnote, although part of Justice Stevens' opinion, are in a part of the opinion (IV-B) joined by only two other justices. Every other quotation from *Pacifica* in this report was from a part of the opinion that a majority of the justices joined.

[146] *Id.* at 746.

[147] There also appears to be some tension between, on the one hand, Justice Stevens' distinction in *Pacifica* between a point of view and the way in which it is expressed, and, on the other hand, the Court's statement in *Cohen v. California* "that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated." 403 U.S. 15, 26 (1971) (upholding the First Amendment right, in the corridor of a courthouse, to wear a jacket bearing the words "F[***] the Draft"). Arguably, Carlin's use of "indecent" words not only served an emotive purpose, but served to indicate the (continued...)

If so, this would be contrary to the Court's opposition, in other contexts, to the censorship of works of art. The Court has held that even "materials [that] depict or describe patently offensive 'hard core' sexual conduct," which would otherwise be obscene, may not be prohibited if they have "serious literary, artistic, political, or scientific value."[148] In addition, the "harmful to minors" statutes of the sort that the Supreme Court upheld in *Ginsberg v. New York* generally define "harmful to minors" to parallel the Supreme Court's definition of "obscenity," and thus prohibit distributing to minors only material that lacks serious value for minors.[149] This suggests that, if the FCC or Congress prohibited the broadcast during certain hours of "indecent" words regardless of context, the Court might be troubled by the prohibition's application to works with serious value, even though *Pacifica* allowed the censorship of Carlin's monologue, despite its apparently having serious value.

Yet, Justice Stevens noted a distinction in *Pacifica* between a point of view and the way in which it is expressed, and, though a majority of the justices did not join the part of the opinion that drew this distinction, a majority of the justices, by concurring in *Pacifica*'s holding, indicated that the political (or literary or artistic) content of Carlin's monologue did not prevent its censorship during certain hours on broadcast radio and television. Therefore, it appears that, in deciding the constitutionality of an FCC or a congressional action prohibiting the broadcasting, during certain hours, of material with "indecent" words, the Court might be troubled by its application to works with serious value only if those works would, like Chaucer's, not be likely to attract a substantial youthful audience.

In sum, the Court did not hold that the FCC could prohibit an occasional expletive, and did not hold that the FCC could prohibit offensive words in programs—even prime-time programs—that children would be unlikely to watch or listen to. The Court did not hold that the FCC could *not* take these actions, as the question whether it could was not before the Court. But the Court's language quoted above renders *Pacifica* of uncertain precedential value in deciding whether a ban, during certain hours, on the broadcast of "indecent" words regardless of context would be constitutional.

In the "Filthy Words" monologue, as the Supreme Court described it, George Carlin "began by referring to his thoughts about 'the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever.' He proceeded to list those words and repeat them over and over in a variety of colloquialisms." The FCC, at the time, used essentially the same standard for "indecent" that it uses today: "[T]he concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by

(...continued)

precise words to whose censorship he was objecting. Yet *Pacifica* was decided after *Cohen*, which suggests that *Cohen* does not lessen the precedential value of *Pacifica.*

[148] Miller v. California, 413 U.S. 15, 27, 24 (1973). In addition, in striking down parts of the Communications Decency Act of 1996, the Court expressed concern that the statute may "extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library." *Reno v. ACLU, supra*, 521 U.S. at 878. And, in striking down a federal statute that prohibited child pornography that was produced without the use of an actual child, the Court expressed concern that the statute "prohibits speech despite its serious literary, artistic, political, or scientific value." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246 (2002). In neither of these cases, however, did the Court state that its holding turned on the statute's application to works of serious value.

[149] 390 U.S. 629 (1968).

contemporary community standards for the broadcast medium, sexual or excretory activities and organs."[150]

Most of Carlin's uses of the "filthy words," it appears from reading his monologue, which is included as an appendix to the Court's opinion, seem designed to show the words' multiple uses, apart from describing sexual or excretory activities or organs. Nevertheless, "the Commission concluded that certain words depicted sexual or excretory activities in a patently offensive manner."[151] Therefore, one might argue that, even if, under *Pacifica*, the First Amendment does not protect, during certain hours, the use on broadcast media of words that depict sexual or excretory activities in a patently offensive manner, it nevertheless might protect the use of those same words "as an adjective or expletive to emphasize an exclamation" (to quote the FCC Enforcement Bureau's opinion in the Bono case).

A counterargument might be that, in *Pacifica*, the Court noted that "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."[152] This suggests the possibility that the Court would have ruled the same way in *Pacifica* if the FCC had defined "indecent" loosely enough to include the use of a patently offensive word "as an adjective or expletive to emphasize an exclamation." But this is speculative, as the Court did not so rule. Further, as noted above, Court emphasized the narrowness of its holding, noting that it had "not decided that an occasional expletive ... would justify any sanction."

On what basis did the Court in *Pacifica* find that the FCC's action did not violate the First Amendment? In Part IV-C of opinion, which was joined by a majority of the justices, Justice Stevens wrote:

> [O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity." Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367.
>
> The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. *Rowan v. Post Office Dept.*, 397 U.S. 728.... To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.
>
> Second, broadcasting is uniquely accessible to children, even those too young to read.... Bookstores and motion picture theaters ... may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629, that the government's

[150] *Pacifica*, *supra*, 438 U.S. at 731-732.

[151] *Id.* at 732 (distinguishing "indecent" from "obscene" and "profane" in 18 U.S.C. §1464).

[152] *Id.* at 740.

> interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression.[153]

In sum, the Court held that, on broadcast radio and television, during certain times of day, certain material may be prohibited because (1) it is patently offensive and indecent, and (2) it threatens the well-being of minors and their parents' authority in their own household. This raises the question of the extent to which the Court continues to allow the government (1) to treat broadcast media differently from other media, and (2) to censor speech on the ground that it is patently offensive and indecent, or threatens the well-being of minors and their parents' authority in their own household.

Broadcast Media

In *Red Lion Broadcasting Co. v. FCC*, which the Court cited in the above quotation from *Pacifica*, the Court upheld the FCC's "fairness doctrine," which "imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage."[154] The reason that the Court upheld the imposition of the fairness doctrine on broadcast media, though it would not uphold its imposition on print media, is that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[155] "Licenses to broadcast," the Court added, "do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U.S.C. §301. Unless renewed, they expire within three years. 47 U.S.C. §307(d). The statute mandates the issuance of licenses if the 'public convenience, interest, or necessity will be served thereby.' 47 U.S.C. §307(a)."[156]

The Court in *Red Lion* then noted:

> It is argued that even if at one time the lack of available frequencies for all who wished to use them justified the Government's choice of those who would best serve the public interest ... this condition no longer prevails so that continuing control is not justified. To this there are several answers. Scarcity is not entirely a thing of the past.[157]

With the plethora of cable channels today, has spectrum scarcity now become a thing of the past? In *Turner Broadcasting System, Inc. v. FCC*, the Court held that the scarcity rationale does not apply to cable television:

> [C]able television does not suffer from the inherent limitations that characterize the broadcast medium.... [S]oon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to use the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of a more

[153] *Id.* at 748-750.

[154] 395 U.S. 367, 369 (1969).

[155] *Id.* at 388.

[156] *Id.* at 394.

[157] *Id.* at 396.

> relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.[158]

One might argue that, if the scarcity rationale does not apply to cable television, then it should not apply to broadcast television either, because a person who because of scarcity cannot start a broadcast channel can start a cable channel.[159] But the Court has not ruled on the question; in *Turner* it wrote: "Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence, and see no reason to do so here."[160]

In 1987, however, the FCC abolished the fairness doctrine, on First Amendment grounds, noting that technological developments and advancements in the telecommunications marketplace have provided a basis for the Supreme Court to reconsider its holding in *Red Lion*. The FCC's decision was upheld by the U.S. Court of Appeals for the District of Columbia, and the Supreme Court declined to review the case.[161] The court of appeals did not rule on constitutional grounds, but rather concluded "that the FCC's decision that the fairness doctrine no longer served the public interest was neither arbitrary, capricious nor an abuse of discretion, and [we] are convinced that it would have acted on that finding to terminate the doctrine even in the absence of its belief that the doctrine was no longer constitutional."[162]

But, whether or not spectrum scarcity has become a thing of the past, it apparently would not today justify governmental restrictions on "indecent" speech. This is because, subsequent to the Court in *Turner* declining to question the applicability of the scarcity rationale to broadcast media, a plurality of justices noted, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, that, though spectrum scarcity continued to justify the "structural regulations at issue there [in *Turner*] (the 'must carry' rules), it has little to do with a case that involves the effects of television viewing on children. Those effects are the result of how parents and children view television programming, and how pervasive and intrusive that programming is. In that respect, cable and broadcast television differ little, if at all."[163] The plurality therefore upheld a federal statute that permits cable operators to prohibit indecent material on leased access channels. Thus,

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[158] 512 U.S. 622, 639 (1994). In *Turner*, the Court held that the "must carry" rules, which "require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations," *id*. at 626, were content-neutral and therefore not subject to strict scrutiny. The Court remanded and ultimately upheld the rules. Turner Broadcasting System, Inc., 520 U.S. 180 (1997).

[159] In the court of appeals decision upholding the current statute that bans "indecent" broadcasts from 6 a.m. to 10 p.m., a dissenting judge wrote of "the utterly irrational distinction that Congress has created between *broadcast* and *cable* operators. No one disputes that cable exhibits more and worse indecency than does broadcast. And cable television is certainly pervasive in our country." Action for Children's Television v. FCC, *supra*, 58 F.3d at 671 (emphasis in original) (Edwards, C.J., dissenting).

[160] 512 U.S. at 638 (citation omitted).

[161] Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

[162] *Id.* at 669. In *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430 (8th Cir. 1993) (en banc), the court of appeals held that Congress had not codified the fairness doctrine and that the FCC's decision to eliminate it was a reasonable interpretation of the statutory requirement that licensees operate in the public interest.

[163] 518 U.S. 727, 748 (1996). The plurality added that cable television "is as 'accessible to children' as over-the-air broadcasting, if not more so," has also "established a uniquely pervasive presence in the lives of all Americans," and can also "'confron[t] the citizen' in 'the privacy of the home,' ... with little or no prior warning." *Id*. at 744-745. Justice Souter concurred that "today's plurality opinion rightly observes that the characteristics of broadcast radio that rendered indecency particularly threatening in *Pacifica*, that is, its intrusion into the house and accessibility to children, are also present in the case of cable television. . . ." *Id*. at 776.

it appears that the Court today would not cite spectrum scarcity to justify restrictions on "indecent" material on broadcast media, but it might cite broadcast media's pervasiveness and intrusiveness.

Subsequent to *Denver Area*, in *United States v. Playboy Entertainment Group, Inc.*, the Court held that cable television has full First Amendment protection; that is, content-based restrictions on cable television receive strict scrutiny.[164] Thus, if, as the Court said in *Denver Area*, cable and broadcast media differ little, if at all, with respect to the regulation of "indecent" material, and, if, as the Court said in *Playboy*, cable television receives strict scrutiny, then, arguably, broadcast media would also receive strict scrutiny with regard to restrictions on "indecent" material.[165] It is possible, however, that, if cable and broadcast media differ little, then the Court might apply *Pacifica* to both broadcast and cable, rather than to neither.[166]

As noted above, the Second Circuit questioned the continued vitality of *Pacifica* in its most recent *Fox Television* decision.[167] Justice Thomas also indicated a willingness to reconsider the special lower First Amendment standard applied to broadcasters in his concurrence in the Supreme Court's *Fox Television* decision.[168] It is possible, therefore, that the Supreme Court might be poised to take up the question of the First Amendment standard that should be applied to broadcasters in the near future. In any event, even if the Court were to continue to apply *Pacifica* to restrictions on broadcast media, this does not necessarily mean that it would uphold a ban on the broadcast of "indecent" language regardless of context, as *Pacifica* did not hold that an occasional expletive would justify a sanction.

Strict Scrutiny

What analysis might the Court apply in deciding the constitutionality of a ban on the broadcast of "indecent" language regardless of context? The Court in *Pacifica*, as noted, offered two reasons why the FCC could prohibit offensive speech on broadcast media: "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but in the privacy of the home.... Second, broadcasting is uniquely accessible to children, even those too

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[164] 529 U.S. 803, 813 (2000) (striking down a federal statute that required distributors to fully scramble or fully block signal bleed to non-subscribers to cable channels; "signal bleed" refers to the audio or visual portions of cable television programs that non-subscribers to a cable channel may be able to hear or see despite the fact that the programs have been scrambled to prevent the non-subscribers from hearing or seeing them).

[165] An earlier district court case held that *Pacifica* does not apply to cable television because of several differences between cable and broadcasting. For one, "[i]n the cable medium, the physical scarcity that justifies content regulation in broadcasting is not present." For another, as a subscriber medium, "cable TV is not an intruder but an invitee whose invitation can be carefully circumscribed." Community Television v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985), *aff'd*, 800 F.2d 989 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987) (striking down Utah Cable Television Programming Decency Act). The court of appeals did not discuss the constitutional issue beyond stating that it agreed with the district court's reasons for its holding. 800 F.2d at 991. A summary affirmance by the Supreme Court, as in this case, is "an affirmance of the judgment only," and does not indicate approval of the reasoning of the court below. Mandel v. Bradley, 432 U.S. 173, 176 (1977).

[166] See CRS Report RL33170, *Constitutionality of Applying the FCC's Indecency Restriction to Cable Television*, by Henry Cohen, which concludes that "it appears likely that a court would find that to apply the FCC's indecency restriction to cable television would be unconstitutional."

[167] *Fox Television*, 613 F.3d at 325-327.

[168] *FCC v. Fox Television*, 129 S. Ct. at1820 (Thomas J. concurring).

young to read," and the government has an interest in the "well-being of its youth" and "in supporting 'parents' claim to authority in their own household.'" The first of these reasons apparently refers to adults as well as to children.

Ordinarily, when the government restricts speech, including "indecent" speech, on the basis of its content, the restriction, if challenged, will be found constitutional only if it satisfies "strict scrutiny."[169] This means that the government must prove that the restriction serves "to promote a compelling interest" and is "the least restrictive means to further the articulated interest."[170] The Court in *Pacifica* did not apply this test or any weaker First Amendment test, and did not explain why it did not. Its reason presumably was that the FCC's action restricted speech only on broadcast media. If, however, the Court were not to apply *Pacifica* in determining the constitutionality of a ban, during certain hours, on the broadcast of "indecent" language regardless of context, then it would apparently apply strict scrutiny.

If the Court were to apply strict scrutiny in making this determination, it seems unlikely that it would find the first reason cited in *Pacifica*—sparing citizens, including adults, from patently offensive or indecent words—to constitute a compelling governmental interest. The Court has held that the government may not prohibit the use of offensive words unless they "fall within [a] relatively few categories of instances," such as obscenity, fighting words, or words "thrust upon unwilling or unsuspecting viewers."[171]

If the Court were to apply strict scrutiny in determining the constitutionality of a ban, during certain hours, on the broadcast of "indecent" language regardless of context, it also might not find the second reason cited in *Pacifica*—protecting minors from patently offensive and indecent words and "supporting 'parents' claim to authority in their own household'"—to constitute a compelling governmental interest. When the Court considers the constitutionality of a restriction on speech, it ordinarily—even when the speech lacks full First Amendment protection and the court applies less than strict scrutiny—requires the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[172] With respect to restrictions designed to deny minors access to sexually explicit material, by contrast, the courts appear to assume, without requiring evidence, that such material is harmful to minors, or to consider it "obscene as to minors," even if it is not obscene as to adults, and therefore not entitled to First Amendment protection with respect to

[169] Sable Communications of California v. Federal Communications Commission, 492 U.S. 115 (1989); Action for Children's Television v. FCC, *supra*, 932 F.2d at 1509.

[170] *Id.* at 126.

[171] Cohen v. California, *supra*, 403 U.S. at 19, 21. Under *Pacifica*, broadcast media do thrust words upon unwilling or unsuspecting viewers, but, if a court were to apply strict scrutiny to a ban on the broadcast of "indecent" language regardless of context, then it would not be following *Pacifica*.

[172] *Turner Broadcasting*, *supra*, 512 U.S. at 664 (incidental restriction on speech). *See also*, Edenfield v. Fane, 507 U.S. 761, 770-771 (1993) (restriction on commercial speech); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 392 (2000) (restriction on campaign contributions). In all three of these cases, the government had restricted less-than-fully protected speech, so the Court did not apply strict scrutiny. Because offensive words are apparently entitled to full First Amendment protection (except under *Pacifica* and in the instances cited in *Cohen v. California*, quoted in the text above), it seems all the more likely that the Court, if it applied strict scrutiny instead of *Pacifica* to a challenge to a ban on the broadcast of "indecent" words regardless of context, would require the government to demonstrate that harms it recites are real and that the ban would alleviate these harms in a direct and material way.

minors, whether it is harmful to them or not.[173] In another case, a federal court of appeals, upholding the current statute that bans "indecent" broadcasts from 6 a.m. to 10 p.m., noted

> that the Supreme Court has recognized that the Government's interest in protecting children extends beyond shielding them from physical and psychological harm. The statute that the Court found constitutional in *Ginsberg* sought to protect children from exposure to materials that would "impair [their] *ethical and moral* development.... Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material."

Action for Children's Television v. FCC, *supra*, 58 F.3d at 662 (brackets and italics supplied by the court). A dissenting judge in the case noted that, "[t]here is not one iota of evidence in the record ... to support the claim that exposure to indecency is harmful—indeed, the nature of the alleged 'harm' is never explained." *Id*. at 671 (D.C. Cir. 1995) (Edwards, C.J., dissenting). A word used as a mere adjective or expletive, however, arguably does not constitute sexually oriented material.[174] Therefore, if a court applied strict scrutiny to decide the constitutionality of a ban, during certain hours, on the broadcast of "indecent" words regardless of context, then, in determining the presence of a compelling interest, the court might require the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." This could raise the question, not raised in *Pacifica*, of whether hearing such words is harmful to minors. More precisely, it might raise the question of whether hearing such words on broadcast radio and television is harmful to minors, even in light of the opportunities for minors to hear such words elsewhere. If the government failed to prove that hearing certain words on broadcast radio or television is harmful to minors, then a court would not find a compelling interest in censoring those words and might strike down the law.

[173] Interactive Digital Software Association v. St. Louis County, Missouri, 329 F.3d 954, 959 (8th Cir. 2003). The Supreme Court has "recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards." *Sable*, *supra*, 492 U.S. at 126. The Court has also upheld a state law banning the distribution to minors of "so-called 'girlie' magazines" even as it acknowledged that "[i]t is very doubtful that this finding [that such magazines are "a basic factor in impairing the ethical and moral development of our youth"] expresses an accepted scientific fact." Ginsberg v. New York, *supra*, 390 U.S. at 631, 641. "To sustain state power to exclude [such material from minors]," the Court wrote, "requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." *Id*. at 641. *Ginsberg* thus "invokes the much less exacting 'rational basis' standard of review," rather than strict scrutiny. *Interactive Digital Software Association*, *supra*, 329 F.3d at 959. A federal district court wrote: "We are troubled by the absence of evidence of harm presented both before Congress and before us that the viewing of signal bleed of sexually explicit programming causes harm to children and that the avoidance of this harm can be recognized as a compelling State interest. We recognize that the Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved." Playboy Entertainment Group, Inc. v. United States, 30 F. Supp.2d 702, 716 (D. Del. 1998), *aff'd*, 529 U.S. 803 (2000). The district court therefore found that the statute served a compelling governmental interest, though it held it unconstitutional because it found that the statute did not constitute the least restrictive means to advance the interest. The Supreme Court affirmed on the same ground, apparently assuming the existence of a compelling governmental interest, but finding a less restrictive means that could have been used.

[174] The full Commission's decision in the Bono case stated that "any use of that word or a variation, in any context, inherently has a sexual connotation." But this does not necessarily mean that it is sexually oriented enough to cause the courts to assume without evidence that it is harmful to minors.

It might still uphold the law, however, if it found that the law served the government's interest "in supporting 'parents' claim to authority in their own household,'" and that this is a compelling interest independent from the interest in protecting the well-being of minors. In *Ginsberg v. New York*, the Court referred to the state's interest in the well-being of its youth as "independent" from its interest in supporting "parents' claim to authority in their own household to direct the rearing of their children."[175] The holding in *Ginsberg*, however, did not turn on whether these interests are independent, and one might argue that they are not because the government's interest in supporting parents lies in assisting them in protecting their children from harmful influences. If "indecent" words are not a harmful influence, then, arguably, the government has no interest, sufficient to override the First Amendment, in supporting parents in their efforts to prevent their children's access to them. A judge has also argued that "a law that effectively *bans* all indecent programming ... does not facilitate parental supervision. In my view, my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my ... television. Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from exposure to indecent programming."[176]

If the government could persuade a court that a ban, during certain hours, on the broadcast of "indecent" words regardless of context serves a compelling interest—either in protecting the well-being of minors or in supporting parents' claim to authority—the government would then have to prove that the ban was the least restrictive means to advance that interest. This might raise questions such as whether it is necessary to prohibit particular words on weekdays during school hours, solely to protect pre-school children and children who are home sick some days. In response to this question, the government could note that the broadcast in *Pacifica* was at 2 p.m. on a Tuesday, but was nevertheless considered a "time[ ] of the day when there is a reasonable risk that children may be in the audience."[177] More significantly, however, a court might find a ban too restrictive because it would prohibit the broadcast, between certain hours, of material, including works of art and other material with serious value, that would not attract substantial numbers of youthful viewers or listeners.

In conclusion, it appears that, if a court were to apply strict scrutiny to determine the constitutionality of a ban on the broadcast of "indecent" language regardless of context, then it might require the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." This would mean that the government would have to demonstrate a compelling governmental interest, such as that hearing "indecent" words on broadcast radio and television is harmful to minors, despite the likelihood that minors hear such words elsewhere, or that banning "indecent" words is necessary to support parents' authority in their own household. If the government could not demonstrate a compelling governmental interest, then the court might find the ban unconstitutional. Even if the government could demonstrate a compelling interest, a court might find the ban unconstitutional if it applied to material with serious value, at least if such material would not attract substantial numbers of youthful viewers or listeners.

Whether a court would apply strict scrutiny would depend upon whether, in light of the proliferation of cable television, it finds *Pacifica* to remain applicable to broadcast media. If a court does find that *Pacifica* remains applicable to broadcast media, then the court would be faced

[175] *Ginsberg*, *supra*, 390 at 640, 639. *See also*, Action for Children's Television v. FCC, *supra*, 58 F.3d at 661.

[176] Action for Children's Television v. FCC, *supra*, 58 F.3d at 670 (emphasis in original) (Edwards, C.J., dissenting).

[177] *Pacifica*, *supra*, 438 U.S. at 732.

with questions that *Pacifica* did not decide: whether, on broadcast radio and television during hours when children are likely to be in the audience, the government may prohibit an "indecent" word used as an occasional expletive, or in material that would not attract substantial numbers of youthful viewers or listeners.

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