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An Introduction to Indecency by John Crigler, Garvey Schubert Barer.

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The FCC’s indecency standard is both amorphous and complex. This memo gives some guidance as to its meaning by analyzing the definition of indecency and summarizing FCC rulings.

In 1987, the FCC replaced its “seven dirty words” indecency standard with a “generic” definition of indecency. Since then, the Commission has levied indecency fines mounting to millions of dollars. Recent fines have been as high as $755,000, and pending legislation could push the maximum fine to $3 million or more.

Indecent speech is speech protected by the First Amendment. Courts have ruled that indecency can be “channelized” but not banned. The FCC implements this distinction by enforcing its indecency policy between the hours of 6:00 a.m. and 10:00 p.m. The hours between 10:00 p.m. and 6:00 a.m. are regarded as a “safe harbor” period during which indecent material may be aired without FCC sanction.

WHAT DOES THE FCC CONSIDER TO BE “INDECENT”? The FCC considers a broadcast to be indecent if it contains “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.”

WHAT DOES THAT MEAN? The FCC considers three factors in determining whether material is indecent. The first factor is the explicitness or graphic nature of the material. The issue is whether, in context, the material depicts or describes sexual or excretory organs or activities. Because the meaning of works or images is not always clear, and because the definition of indecency encompasses innuendo and double-entendre, the Commission first seeks to determine whether material has an “unmistakably” sexual or excretory meaning.

The second factor is whether the material dwells on or repeats sexual or excretory matters at length. This factor has been virtually eliminated by the FCC’s ruling that Bono’s use of the “F” word during the Golden Globe Awards was actionably indecent, even though the word was used only in “isolated” and “fleeting” circumstances.

The third factor is whether the material panders, titillates or is used for shock value. It is not necessary that material satisfy all three factors. For example, material that has an “unmistakably sexual” meaning may be indecent even if it is not titillating or pandering in nature.

HOW DO I KNOW IF MATERIAL IS “OFFENSIVE”? Material is offensive if it offends the “average” broadcast viewer or listener. Commission staff, and ultimately the Commissioners themselves, decide what the average person finds offensive. Examples of the Commission’s findings include: popular songs which contain repeated references to sex or sexual organs (e.g., “I Want To Be A Homosexual,” “Puss Eat My,” “Walk with an Erection,” “Jet Boy,” Jet Girl,” “Makin’ Bacon”); DJ Hunter commenting on tabloid sex scandals (e.g., Vanessa Williams’ photographs in Penthouse and a honeymooner whose testicle was caught in a hot tub drain); discussions between DJs and callers concerning intimate sexual questions (e.g., “What makes your lumpy parts tingle?” “What’s the grossest thing you ever put in your mouth?”); dirty jokes or puns (“Liberace was great on the piano but sucked on the organ”); non-clinical references to gay or lesbian sex, masturbation, penis or breast size, sodomy, erections, organs, etc., or description or simulation of various sexual acts; and the seven dirty words (shit, fuck, piss, cunt, cocksucker, motherfucker, tit). References to oral or non-heterosexual sex are typically found to be “patently offensive.” The FCC does not ask for any evidence on the issue of whether material is “offensive.” In one instance, however, it reversed a decision that the hip-hop song, “Your Revolution,” was indecent, based, in part, on evidence that the performer, Sarah Jones, was invited to perform the song in high schools and junior highs.

Hours of Enforcement

- Hours of Enforcement
- How Do I Know If Material Is “Offensive”?
- What Makes That Mean?
- What Does the FCC Consider to Be “Indecency”?
- What Does the FCC Consider to Be “Indecent”?
- What Sort of Preventive Measures Can I Take?
- Remedial Action
- Finest
- What’s Next?
- An Introduction to Indecency

**WHAT’S NEXT?**

Expect more: more FCC rulings, more Congressional authority to regulate content and more severe penalties for violations of content-related regulations. Indecency complaints are likely to increase, as are the sizes of indecency fines. The definition of indecency may be stretched even further, and profanity may emerge as an entirely new form of regulated content. Content regulation is back. Stay tuned.
My station is in Los Angeles. Community standards are different than in Bell Buckle, Tennessee. Does that protect me?

No. The standard applied is a national standard based upon what the Commission believes to be indecent.

My station is completely oriented to an adult audience. If we get a complaint, can’t we simply show that children don’t listen to our station?

No. The FCC has taken the position that all broadcast stations must comply with its indecency policy, no matter what their target audience. The only defense the FCC will consider is a study which shows that there are no children listening to the station at the time the indecent material aired.

The on-air staff at my station really toe the line. We make sure that none of the patter goes too far. Some of the songs that we air are a bit on the racy side, however. The Commission doesn’t fine stations for airing nationally-distributed recordings by well known artists. Does it?

It sure does. It fined a station $25,000 for airing “Candy Wrapper” (a song in which various candy bar names symbolize sexual activities) and the Monty Python song “Sit on my Face,” which contains the lyrics “Sit on my face and tell me that you love me... life can be fine, if we both sixty-nine.” The Commission fined a Las Vegas station $2,000 for airing a Prince song that repeatedly used the word “fuck.”

My station had no intention of airing anything indecent. Somewhere, a conversation between my DJ and a caller got a little bit bawdy. The Commission wouldn’t fine me for that. Would it?

Yes, it would. The Commission has repeatedly rejected arguments that the indecency policy interferes with the spontaneity of talk or call-in shows. Although the Commission has stopped short of requiring that all sources of broadcast programs install delay systems, it has strongly encouraged networks and broadcast stations to “undertake such technological measures,” and has noted that delay/bleeping systems can now block fleeting words with “ease.”

A statement made by the DJ was a one-time thing. He said an offensive word once, realized what he had done and moved on to a totally different topic. Doesn’t the Commission recognize that people are human and might slip up now and then?

That notion now seems quaint. In the past, the Commission dismissed complaints which merely cited the broadcast of isolated words or phrases, and stated that it would “not necessarily” take action against “the isolated use of unequal expletives during live coverage of news or public affairs programs.” Any tolerance the Commission once had for fleeting or isolated instances ended with the Golden Globe decision. That decision guts everyone on notice that even a single occurrence of a single expletive may be a violation of indecency standards.

A DJ at my station never actually used any “dirty” words, but he did a hilarious skit based on Innuendo. The Commission can’t get us for that, can it?

It sure can. Material may be indecent even if it does not contain graphic descriptions of sexual activity. An indirect allusion may be deemed offensive “if it is understandable and clearly capable of a specific sexual or excretory meaning.” For example, a sports event is “inexorable.” "WOHS/MM" was fined for airing material such as “Butch Beer,” a satiric commercial which, in the Commission’s view, contained an “unambiguous ... lewd theme.” A station’s humorous or ironic intent is not a defense. In fact, the Commission has emphasized that the broadcaster’s intent is irrelevant. The only issue is whether the material is or is not indecent.

We broadcast a discussion about the uses of condoms. Some of the language is pretty graphic. Doesn’t the Commission recognize that a station should air programming that in other contexts could be considered indecent?

The Commission’s definition of indecent programming explicitly recognizes that context is important. Material contained in political advertisements, news and public affairs programs has been found not to be offensive because of “context.” For example, the Commission denied a complaint against a political ad in which a female candidate opposed the incumbent’s proposal to buy a clock for the City Hall with the rallying cry, “clocksuckers.” It rejected a complaint against a segment of “All Things Considered” featuring a taped conversation with President John Gotti, in which he repeatedly used variations of the word “fuck.” It also denied a complaint against the telecast of a high school sex education period. But context is not an easily-defined concept, nor a sure-fire defense. The Commission fined a station $4,000 for a program in which two DJs read from and commented on a Playboy interview with Jessica Hahn. In that ruling, it rejected arguments that the DJs’ remarks were innocuous news commentary and warned that “while the newlywielded nature of broadcast material and its presentation in a serious, newsworthy manner would be relevant contextual considerations in an indecency determination, they are not, in themselves, dispositive factors.” The Commission reached a similar conclusion in fining station KRON-TV, San Francisco, $87,500 for an interview with performers in a stage production of “Puppetry of the Penis.” During the interview, included in the morning news program, one of the performers exposed his penis.

I doubt that anybody would tune in to a discussion of safe sex just to get their kicks. I thought that the Commission was only interested in the pandering shrieks that some of the drive-time DJ’s engage in.

Not true. Material may be indecent even if it is not pandering or titillating in nature. Songs such as "Pens Envy," "'Makin' Bacon," and "Erotic City," were held to be indecent because they contained low level sexual references, even though those references may not have been titillating. In one instance, the Commission found that a licensee had aired indecent programming when it broadcast excerpts from a critically acclaimed play about a person dying of AIDS.

Doesn’t the Merit of a Program Count for Something?

The merit of a program is a factor to be assessed in determining whether a program is indecent, but the Commission has said that merit is “simply one of many variables, and it would give this particular variable undue importance if we were to single it out for greater weight or attention than we give other variables.” The Commission refused to issue a declaratory ruling that James Joyce’s Ulysses was not indecent, and denied a complaint against a reading from Ulysses primarily on grounds that the reading occurred in the safe harbor period. No indecency complaint has yet been denied solely on the grounds that the material was meritorious.

How do I know if a complaint has been filed and who’s out to get me?

You may not know the answer to either question. Complaints can be filed anonymously and are not required to be served on the subject of the complaint. If FCC staff determine that the complaint raises an issue of whether indecent material was broadcast, they will send a letter of inquiry asking the station to confirm or refute the allegations made in the complaint.

Then what?

If the Commission concludes that a violation has probably occurred, it issues a Notice of Apparent Liability (“NAL”) which proposes a fine. The station is given a chance to contest the NAL. Based on the station’s response, FCC staff will either modify the NAL, or issue a Forfeiture Order.

How soon after a broadcast does a complaint have to be filed?

When the FCC adopted the expanded definition of indecency in 1987, it said that complaints should be filed “promptly” after the incident. It has not strictly enforced that requirement, however, and has accepted complaints filed more than a year after the incident.

You mean there isn’t any statute of limitations?

There is, but it could be as long as eight years – the length of a license term. The rules prohibit a forfeiture “if the violation occurred more than one year prior to the issuance of the appropriate notice or prior to the commencement of the current license term, whichever is earlier.” In effect, complaints can be filed at any time during an 8-year license term.

Is there a difference between obscenity and indecency? They sound the same to me.

There are several important legal distinctions, but here are the basics. Indecent material (1) need not be pornographic, i.e., it need not appeal to “prurient interests”; (2) the indecency standard is based on “contemporary standards for the broadcast industry,” a national rather than local standard; (3) the indecency law is enforced by the FCC, rather than criminal law authorities; (4) there is no “safe harbor” period for obscenity, i.e., obscenity is not protected by the First Amendment; and (5) the “merit” of a work is an absolute defense to a charge of obscenity, but only one “variable” in the determination of whether the work is indecent.

Is profanity something different from either indecency or obscenity?

Yes. The relevant statute prohibits the broadcast of “obscene, indecent, or profane” material. The FCC’s decision to regulate “profanity” is new, however. In the Golden Globe decision, the Commission found that even if the “F” word used by Bono was not indecent, it was profane, and could be regulated as “vulgar, irreverent or coarse” language. The Commission defined profanity as language that denotes “personally revolting epithets normally tending to provoke violent reaction or denoting language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.” The Commission will apparently regulate profanity during the same hours as indecency.
The Commission’s definition of indecent programming explicitly recognizes that context is important. Material contained in political advertisements, news and public affairs programs has been found not to be offensive because of “context.” For example, the Commission denied a complaint against a political ad in which a presidential candidate opposed the incumbent’s proposal to buy a clock for the City Hall with the rallying cry, “clocksuckers.” The Commission reached a similar conclusion in fining station WBBX for airing excerpts from a critically acclaimed play, Ulysses. Yes, it was indecent. However, the Commission found that the material was presented in a satiric commercial which, in the Commission’s view, contained an “unambiguously ... lewd theme.” A station’s humorous or ironic intent is not a defense. In fact, the Commission has emphasized that the broadcaster’s intent is irrelevant. The only issue is whether the material is or is not indecent.

If the FCC concludes that a violation has probably occurred, it issues a Notice of Apparent Liability (NAL). After the 20-day period for a station to respond, FCC staff will rescind or modify the NAL, or issue a Forfeiture Order. If the FCC concludes that a violation has probably occurred, it issues a Notice of Apparent Liability (NAL). After the 20-day period for a station to respond, FCC staff will rescind or modify the NAL, or issue a Forfeiture Order. However, the Commission does not fine stations for airing nationally-distributed recordings by well-known artists. Does it?

The relevant statute prohibits the broadcast of obscenity, indecency, or profanity. There are several important legal distinctions, but here are the basics. Indecent material (1) need not be pornographic, i.e., it need not appeal to “prurient interests”; (2) the indecency standard is based on “contemporary community standards” as opposed to the subjective standard of the FCC; (3) the indecency law is enforced by the FCC, rather than criminal law authorities; (4) there is no “safe harbor” period for obscenity, i.e., obscenity is not protected by the First Amendment; and (5) the “merit” of a work is an absolute defense to a charge of obscenity, but only one “variable” in the determination of whether the work is indecent.

### Beyond Pandering and Shock Value

The Commission fine a Las Vegas station $2,000 for airing a Prince song that repeatedly used the word “fuck.” In a similar vein, the Commission fined a Las Vegas station $6,600 for airing excerpts from a play during an 8-year license term. No indecency complaint has yet been denied solely on the grounds that the material was meritorious.

### Merit is Only One Factor

Material may be indecent even if it is not pandering or titillating in nature. Songs such as “Penthouse Palace,” “Makin’ Bacon,” and “Erotic City,” were held to be indecent because they contained low sexual references, even though those references may not have been titillating. In one instance, the Commission found that a licensee had aired indecent programming when it broadcast excerpts from a critically acclaimed play about a person dying of AIDS.

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If the FCC concludes that a violation has probably occurred, it issues a Notice of Apparent Liability (NAL). After the 20-day period for a station to respond, FCC staff will rescind or modify the NAL, or issue a Forfeiture Order. When the FCC adopted the expanded definition of indecency in 1987, it said that complaints should be filed “promptly” after the incident. It has not strictly enforced that requirement, however, and has accepted complaints filed more than a year after the incident.

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