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# AN INTRODUCTION TO INDECENCY

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.

## Hours of Enforcement

Indecent speech is speech protected by the First Amendment. Courts have ruled that indecency can be "channeled" 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.

## Definition

### 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," "Penis Envy," "Walk with an Erection," "Erotic City," "Jet Boy, Jet Girl," "Makin' Bacon"); DJ banter concerning 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 hiney 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, orgasms, etc.; description or simulation of various sexual acts; and the seven dirty words (shit, fuck, piss, cunt, cocksucker, motherfucker, tits). 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-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.

## Offensiveness

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

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## Approach taken by the FCC

MY STATION IS IN LOS ANGELES. COMMUNITY STANDARDS ARE DIFFERENT THAN IN BELL BUCKLE, TENNESSEE. DOES THAT PROTECT ME?

National Standard

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 Children – No Defense

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 that the FCC will consider is a study which shows that there are no children listening to any station in the market 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 PATTERN 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?

Liability for Song Lyrics

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. SOMEHOW, A CONVERSATION BETWEEN MY DJ AND A CALLER GOT A LITTLE BIT BAWDY. THE COMMISSION WOULDN'T FINE ME FOR THAT, WOULD IT?

Fleeting and Isolated Instances

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 unplanned 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 puts 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?

Innuendo Counts; Humor Doesn't

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 which, in context, is inescapable." WIOD(AM), Miami was fined \$10,000 for airing material such as "Butch Beer," a satiric commercial which, in the Commission's view, contained an "unambiguous .... lesbian 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?

Importance of Context

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 mayoral 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 wiretapped conversation with reputed gangster 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 class. 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 DJ's remarks were essentially news commentary and warned that "while the newsworthy 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, \$27,500 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 SKITS THAT SOME OF THE DRIVE-TIME DJs ENGAGE IN.

Not true. Material may be indecent even if it is not pandering or titillating in nature. Songs such as “Penis Envy,” “Makin’ Bacon,” and “Erotic City,” were held to be indecent because they contained lewd 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 FCC 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 rescind or 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 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.” The Commission will apparently regulate profanity during the same hours as indecency.

Beyond Pandering and Shock Value

Merit is Only One Factor

Complaint Process

#### GOSH (IF I CAN STILL SAY THAT), WHAT ELSE?

Well, possibly violence. The FCC may investigate the effectiveness of the v-chip installed in new TV sets, and explore additional ways of regulating violent content on TV – and possibly radio.

#### HOW DOES THE FCC DETERMINE WHAT FINE TO IMPOSE?

Fines

The FCC has considerable discretion to set fines, and will consider such factors as the extent and gravity of the violation, any history of past offenses and the ability to pay. Currently, the maximum fine for a single violation is \$27,500. This fine can be multiplied if the violation occurs in more than one program, or if a program is aired on more than one station. The Commission has also made it clear that, in the future, it will impose fines for each *utterance* of an indecent word. Thus a single program may now result in multiple fines.

Even more commonly, the Commission has announced that it may, in appropriate circumstances, initiate a proceeding to revoke a broadcast license, and that it may consider indecency violations in deciding whether to renew a broadcast license.

#### WHAT SORT OF PREVENTIVE MEASURES CAN I TAKE?

Remedial Action

Solutions will vary from station to station, but here are a few general suggestions:

- (1) Adopt a station policy about indecent and profane material;
- (2) Educate all on-air and production staff about that policy;
- (3) Screen all recorded material before it is broadcast;
- (4) Institute a delay system for high-risk live broadcasts;
- (5) Investigate any violation of station policy immediately; and
- (6) Take swift disciplinary action if there is a violation of station policy.

#### SHOULD I CALL THE FCC IF I DISCOVER THAT INDECENT MATERIAL HAS AIRED ON OUR STATION OUTSIDE OF THE “SAFE HARBOR” PERIOD?

No. The FCC doesn't ask stations to report indecent broadcasts, but it does expect them to take immediate remedial action. Fines may be substantially reduced if a station can show that it took unprompted disciplinary action against those who aired indecent material.

#### HOW DO I KEEP TRACK OF FCC DECISIONS?

The FCC publishes a useful guide to indecency law and a catalogue of recent indecency decisions on its web site. <http://www.fcc.gov/eb/broadcast/opi.html>.

#### WHAT'S NEXT?

Stay Tuned

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.

*This Indecency Primer is published by Garvey Schubert Barer. It contains information of a general nature that cannot be regarded as legal advice. Please consult a communications attorney if you have questions about the application of the indecency standard to particular situations. You may contact John Crigler by e-mail at [jcrigler@gsblaw.com](mailto:jcrigler@gsblaw.com) or call him at 202-965-7880.*