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The FCC's Latest Indecency Rulings – Wardrobe Malfunctions and Beyond

By: Rick Chessen and Christopher Tygh

On March 15, 2006, the Federal Communications Commission issued a series of indecency rulings covering dozens of television programs broadcast between 2002 and 2005. The best-known programming under review was Janet Jackson's "break-out" performance during the 2004 Super Bowl half-time show. Decisions involving less well-known programming, however, broke new ground in the area of actionable language that may hold even more significance for practitioners.

The regulatory regime

Section 1464 of the U.S. Criminal Code bars the broadcasting of any obscene, indecent, or profane language. While the Department of Justice is responsible for prosecuting criminal violations of the statute, the FCC has administrative enforcement responsibility.

Obscene speech is not protected by the First Amendment and cannot be broadcast at any time. Indecent speech, on the other hand, is protect-

ed and therefore cannot be banned entirely. The airing of indecent material may be restricted, however, when there is a reasonable risk that children may be in the audience. Consistent with these concepts, the FCC has established a "safe harbor" between the hours of 10:00 p.m. and 6:00 a.m. during which the prohibition on indecent or profane speech will not be enforced.

"The FCC found that the use of expletives 'may have made some contribution to the authentic feel of the program,' but concluded that the purpose 'could have been fulfilled without them'"

The FCC defines broadcast indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities." Profanity includes "language that denot[es] certain of those personally reviling

epithets that naturally tend 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 FCC does not independently monitor radio and television broadcasts for improper content. Enforcement is based on complaints from the public. The FCC may revoke a broadcast station's license, impose a monetary forfeiture, or issue a warning to the station. License revocations for obscenity or indecency violations are extremely rare. Fines are more common. The base forfeiture amount for the broadcast of obscene, indecent, or profane material is \$7,000 per violation, although the FCC can adjust the base amount upward or downward. Currently, the maximum fine the FCC may impose for a violation is \$32,500. However, the Senate recently passed unanimously a bill that would raise the maximum fine to \$325,000. A pending House bill carries steeper fines—up to \$500,000 per violation—and

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possible license revocation if three violations occur in a broadcast.

Below are some key points from the FCC's recent decisions.

The "S-Word" joins the "F-Word"

In 2004, the FCC found that the single use of the "F-Word" by the singer Bono during an acceptance speech at the *Golden Globes Awards* was indecent and presumptively profane. In its recent decisions, the FCC extended those findings to the "S-Word" as well.

First, the FCC found that the "S-Word" meets the test for indecent content, in that it (1) has an inherently excretory connotation, just as the "F-Word" has an inherently sexual one, and (2) is patently offensive as "one of the most vulgar, graphic, and explicit words relating to excretory activity in the English language," similar to the "F-Word" and sexual activity.

The FCC also found the "S-Word" to be presumptively profane. According to the FCC, the "S-Word" is a vulgar excretory term "so grossly offensive to members of the public that it amounts to a nuisance and is presumptively profane. Like the 'F-Word,' it is one of the most offensive words in the English language, the broadcast of which is likely to shock the viewer and disturb the peace and quiet of the home."

Derivatives count too

The FCC clarified that derivatives of the "F-Word" and the "S-Word" are also actionable. Thus, an interview on the CBS *Early Show* of a "Survivor" cast member referring to a fellow contestant as a "bullshitter" was found actionable, as was use of the term "bullshit" on an episode of *NYPD Blue*. The FCC

recognized that the context in which terms like these were used may imply a different meaning than sexual or excretory activity, but their use "invariably invokes a coarse excretory image, even when its meaning is not the literal one." These derivatives were also found patently offensive and thus were found to be indecent.

By contrast, the FCC found the terms "dick" and "dickhead" used in the same *NYPD Blue* episode to be non-actionable. While the FCC stated that those terms met the first prong of the indecency definition as references to a sexual organ, it found that they did not rise to the same level of offensiveness as the "F-Word" or the "S-Word."

Isolated use no longer a defense

The FCC acknowledged that there may have been past precedent indicating that the isolated use of an offensive word would not be actionable. The FCC stated that the issue was clarified in the 2004 *Golden Globes Order*, however, where it found 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."

The FCC took this potential confusion into account in proposing sanctions. For programming that aired prior to the *Golden Globes Order*, the FCC imposed sanctions only where the "F-Word" or "S-Word" was used repeatedly. By contrast, the FCC declined to impose sanctions on programs with isolated uses of these expletives. The FCC stressed that this leniency applied only because the programming aired prior to the release of the *Golden Globes Order* and that

ordinarily a forfeiture would have been imposed.

Distinguishing *Saving Private Ryan*

The FCC acknowledged that "in rare contexts" language may be found not to be actionable "where it is demonstrably essential to the nature of an artistic or educational work or essential to informing viewers on a matter of public importance." For instance, the FCC noted that deleting the "F-Word" or the "S-Word" from *Saving Private Ryan* "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers."

The FCC found that this standard had not been met in the cases before it. For instance, the FCC examined a documentary on blues music that contained repeated use of the "F-Word" and the "S-Word." Although the station claimed that the words had been used so that the program would accurately reflect the views of those being interviewed, the FCC found that the program's educational purpose "could have been fulfilled and all views expressed without the repeated broadcast of expletives." Likewise, the FCC recognized that the use of expletives in an episode of *NYPD Blue* "may have made some contribution to the authentic feel of the program," but nevertheless concluded that that purpose "could have been fulfilled without them."

Enforcement only against stations receiving complaints

In a departure from precedent, the FCC imposed sanctions only against the stations whose broadcasts were actually the subject of a consumer complaint to the FCC. In

the past, the FCC would investigate which stations aired the offensive material and impose sanctions on all of them.

Indecent visual imagery

Among the programming found to contain actionable visual imagery:

- The *Our Sons and Daughters* episode of the “Without a Trace” depicting scenes of teenagers in various stages of undress (although not nude) engaging in sexual activities. This decision resulted in the largest overall fine among the decisions – over \$3.6 million against CBS affiliates.
- The *Pool Party* episode of “The Surreal Life 2” containing several pixilated views of nude breasts as well as other sexual images and innuendo.
- A Spanish-language movie depicting a woman being attacked and raped in a public restroom.
- A Spanish-language talk show involving a female guest wearing a low-cut dress that exposed her breasts. Although the woman’s nipples were covered with jewelry, that did not render the depiction of her breasts insufficiently graphic.

What is not indecent

Among the programming the FCC found *not* actionable:

- An episode of “Will and Grace” in which two characters touch Grace’s breast area to enhance her appearance for a date.
- An episode of “The Oprah Winfrey Show” which contained a frank discussion of teenage sexual practices.

- An episode of “The Amazing Race 6” that briefly displayed the words “Fuck Cops!” on the side of a bus the contestants were boarding.
- Various programs containing terms such as “hell,” “damn,” “bitch,” “pissed off,” “up yours,” “ass,” “for Christ’s sake,” “kiss my ass,” “fire his ass,” “ass is huge,” “wiping his ass,” “penis,” and “wang.” While some of these terms may refer to sexual or excretory organs or activities, and may in some contexts contribute to a finding of indecency, their use in these particular programs were not patently offensive.

Janet Jackson redux

The FCC upheld its \$550,000 fine against CBS arising out of Janet Jackson’s performance at the 2004 Super Bowl. The FCC affirmed its previous decision that only CBS-owned affiliates should be held responsible because other affiliates did not play a role in producing the halftime show and could not have anticipated that CBS’s production would involve partial nudity.

The FCC also found that CBS failed to take adequate precautions, such as instituting a video delay in addition to an audio delay, requiring the performers to agree to conform to the script, or investigating the choreographer’s pre-show statement that the performance would include “shocking moments”:

Under these circumstances, we believe that CBS can and should be held responsible for the patently offensive material that it broadcast to a nationwide audience. A

contrary result would permit a broadcast licensee to stage a show that ‘pushes the envelope,’ send that show out over the air waves, knowingly taking the risk that performers will engage in offensive unscripted acts or use offensive unscripted language, and then disavow responsibility – leaving no one legally responsible for the result.

Finally, the FCC rejected CBS’s constitutional argument that, given the dramatic changes in the media landscape, indecency regulation aimed only at broadcasters can no longer be sustained under the First Amendment. The FCC noted that the *Reno* Court expressly recognized the “special justifications for regulation of the broadcast media,” citing *Red Lion* and *Pacifica*. In late May, the FCC denied CBS’s petition for reconsideration of the \$550,000 fine, thereby exhausting CBS’s administrative relief.

Two separate court appeals of the indecency decisions were filed in mid-April. CBS and Fox are seeking review in the U.S. Court of Appeals for the Second Circuit, contending that the decisions are “unconstitutional, contrary to the relevant statutes, arbitrary and capricious and contrary to law.” NBC has filed to intervene in the Second Circuit litigation. ABC and Hearst-Argyle Television filed a similar appeal in the U.S. Court of Appeals for the D.C. Circuit, which has been consolidated with the CBS/Fox case in the Second Circuit. ⚖️

Rick Chessen and Christopher Tygh practice in the Washington, D.C. office of Sheppard, Mullin, Richter & Hampton LLP.