

Developments in FCC Indecency Regulation — The Big Chill

By Steven A. Lerman

In an unprecedented decision, the Federal Communications Commission (“FCC” or “Commission”) recently warned the broadcasting industry that the broadcast of indecent or obscene programming could result in the revocation of the broadcaster’s license or dramatically increased fines under a new approach to calculating forfeitures. In *Infinity Broadcasting Operations, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 03-71 (rel. Apr. 3, 2003), the Commission found a radio broadcaster apparently liable for the maximum allowable forfeiture for the broadcast of indecent programming and threatened license revocation for future violations. The Commission’s shocking departure from its previous enforcement mechanism represents an additional and significant erosion of the First Amendment rights of broadcasters.

The Precarious Balance: Freedom of Speech, Freedom from Censorship and the Commission’s Indecency Regulation

As a government agency, the Commission is bound to respect and uphold the Constitutional protections afforded by the First Amendment, which states, unequivocally, “Congress shall make no law ... abridging the freedom of speech.”

Section 326 of the Communications Act of 1934 similarly places restraints on the Commission’s authority to regulate the speech of broadcasters:

“Nothing in this Act should be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications.” (47 U.S.C. § 326)

Although these Constitutional and statutory prohibitions would appear to afford broadcasters unfettered freedom of speech, numerous jurisprudential exceptions exist that countervail the absolute protection of speech which the First Amendment and Section 326 appear to provide.¹

A significant restraint on broadcaster speech is embodied in a criminal statute, which prohibits the utterance of “any obscene, indecent or profane language by means of radio communications.” 18 U.S.C. § 1464 (1988). The FCC is responsible for administratively enforcing Section 1464, including regulation of “indecent” material. Unlike obscenity — a narrow category of speech outside the purview of the First Amendment and principally defined by the Supreme Court’s *Miller*² decision — indecent speech encompasses substantially broader material and is entitled to Constitutional protection.

Declining and Channeling Indecency

Since the regulation of indecency is a content-based restriction, it is sustainable only if it advances a “compelling interest” and is implemented by “the least restrictive means.” *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989). The compelling governmental interest in regulating indecency is the protection of children and to that end, the Commission requires broadcasters to “channel” indecent speech to “safe harbor” hours (10:00 p.m. to 6:00 a.m.), during which children are presumed less likely to be in the listening or viewing audience.

The FCC defines indecent speech as

“language or material that, in context, depicts or describes, in terms patently offensive as measured by community standards for the broadcast medium, sexual or excretory activities or organs.”

Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCCR 7999, 8000 (2001) (“Indecency Policy Statement”).

The Supreme Court first addressed the FCC’s regulation of indecent speech in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), a case centered on a George Carlin monologue entitled “Filthy Words” which featured the repetitive and deliberative use of expletives, and in which the Court quoted the Commission’s indecency definition with apparent approval. The Court noted attributes unique to the broadcast media warranting greater governmental

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intrusion into broadcasters' First Amendment freedoms in the indecency context: broadcast media intrudes the sanctity of the home, is uniquely accessible to children and is licensed in the public interest due to the perceived scarcity of the broadcast spectrum. *Pacifica* at 731.

Subsequently, while recognizing the generic definition to be "inherently vague," the United States Court of Appeals for the District of Columbia Circuit upheld the FCC's generic indecency regulatory scheme against Constitutional challenge in the so-called "ACT" series of cases.³

Historically, in light of the courts' narrow holdings in favor of its regulatory scheme, the FCC has proceeded with caution and restraint in its regulation of indecency. The Commission limited sanctions for indecency violations to the imposition of forfeitures, and maintained procedural safeguards to insure that broadcast licensees were afforded the benefits of due process.

One such procedural safeguard was that the Commission initiated indecency proceedings only in response to complaints filed by listeners or viewers and required complainants to include either a tape or transcript of the broadcast in question, recognizing that "given the sensitive nature of these cases and the critical role of context in an indecency determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of indecent programming." Indecency Policy Statement, 16 FCCR 7999, 8015 (2001).

The Erosion of Administrative Prudence: Discarding the Tape or Transcript Requirement

In the past year the Commission has jettisoned its prudent sensitivity to the paramount importance of the First Amendment, making two abrupt changes to its approach to indecency enforcement. First, in May 2002, the FCC effectively gutted its "tape or transcript" requirement. *Infinity Broadcasting Corporation of Los Angeles*, 17 FCCR 9892 (2002).

This case called into question whether a Los Angeles

radio station had aired an edited or unedited version of a sexually oriented song. The station possessed both versions of the song and the disc jockey, who was taking requests when the song aired and therefore did not hear the song, stated that he did not know whether he had mistakenly aired the unedited version. The licensee submitted declarations by its management suggesting that it was likely that the station had in fact broadcast the edited version of the song. The complainant submitted no tape or transcript to bolster her charge against the broadcaster.

Abandoning the approach which it had followed for some twenty-five years, the FCC held that the failure to provide a tape or transcript was not fatal to the processing of an indecency complaint, and credited the uncorroborated recollection of a complainant, thereby effectively adopting a "preponderance of the evidence" standard in determining whether material aired in the absence of a tape or transcript.

The cavalierly discarded tape or transcript requirement was a bedrock procedural protection guaranteeing that the Commission had a "sufficient basis for identifying *prima facie* violations of the statute before requiring broadcasters to respond to complaints." *Infinity Broadcasting Corporation of Pennsylvania*, 3 FCCR 930, 938 (1987). Consequently, and perhaps for the first time, the Commission imposed a forfeiture — in FCC parlance, a fine — in an indecency case on the basis of what *may* have been broadcast, in the face of conflicting evidence about what was *in fact* broadcast.

Further Erosion of Administrative Prudence: Threat of License Revocation

Further tightening the regulatory screws, the Commission's most recent *Notice of Apparent Liability* ("NAL"), mentioned above, constituted yet another dramatic and ominous departure from the historically cautious approach to indecency regulation. There, after concluding that a discussion of several matters on a Detroit radio station constituted an "egregious" violation, the Commission issued an overt

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threat to deploy the ultimate sanction in its regulatory arsenal — the initiation of license revocation proceedings — for future “serious violations” of its indecency regulations. Specifically, the FCC stated:

We take this opportunity to note that given the egregiousness of this violation, additional serious violations by [the licensee] may well lead to the initiation of a revocation proceeding. Moreover, other broadcasters are on notice that the Commission will not hesitate to adopt strong enforcement actions in the future, including the potential initiation of revocation proceedings.

Infinity Broadcasting Operations, Inc., Notice of Apparent Liability for Forfeiture, FCC 03-71, ¶ 13 (rel. Apr. 3, 2003).

Thus, faced with an alleged, isolated violation by one of its licensees and without any evidence of a systemic failure of its historical approach to indecency regulation, the Commission has threatened, for “serious violations” (which remain undefined), to take steps to remove the broadcaster’s right to speak by revoking its license.

The Commission’s threat of license revocation, coupled with its earlier elimination of the “tape or transcript” requirement, constitutes a radical departure from the “least restrictive means” limitation imposed by *Sable*. Moreover, the Commission’s implicit suggestion that there has been a catastrophic failure of its forfeiture-based approach to indecency regulation has no factual support.

In any event, if the Commission is inclined to deviate from its long-standing approach to indecency enforcement, it is inappropriate to do so in the context of an adjudicative proceeding. Instead, a rulemaking proceeding is a far more appropriate procedural mechanism to consider the adoption of this new and far-reaching policy. In the context of a rulemaking, the FCC could more adequately consider all relevant issues and invite the participation of all interested parties to offer their views in a structured, orderly manner. Whether the Commission can be persuaded to abandon its present course remains to be seen. Or heard.

Stay tuned.

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¹ Obscenity is unprotected speech (*Miller v. California*, 413 U.S. 15 (1993)), as is incitement (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)), child pornography, (*New York v. Ferber*, 458 U.S. 747 (1982)), “fighting words” (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)) and defamation (*see e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964)).

² The definitional parameters of obscenity established by the Supreme Court in *Miller* are:

(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary artistic, political, or scientific value.

³ *Action for Children’s Television v. FCC*, 852 F.2d 1332 (DC Cir. 1988) (“*ACT I*”); *Action for Children’s Television v. FCC*, 932 F.2d 1504 (DC Cir. 1991), *cert denied*, 112 S.Ct. 1282 (1992) (“*ACT II*”); *Action for Children’s Television v. FCC*, 58 F.3d 654 (DC Cir. 1995), *cert denied*, 116 S.Ct. 701 (1996) (“*ACT III*”).

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