



LEVENTHAL SENTER & LERMAN PLLC

To All Broadcast Clients

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## FCC ISSUES NEW RULINGS ON BROADCAST INDECENCY AND PROFANITY

The FCC has released its first decisions in more than a year, and the first under Chairman Martin's direction, addressing the broadcast of allegedly indecent and profane material. The highly anticipated decisions represent the Commission's latest attempt to provide broadcasters with guidance on what is and is not permissible under its indecency and profanity standards. Our reading of the decisions, however, indicates that they are inconsistent even with each other, and primarily serve to underscore the subjective nature of the FCC's enforcement efforts in this confusing area of the law.

A Commission conclusion that a broadcaster has failed to comply with the indecency and profanity laws can have severe consequences. Indeed, millions of dollars in monetary forfeitures were proposed or assessed in the decisions. Moreover, the FCC raised the prospect of indecency or profanity findings being used against stations at the time of license renewal. Broadcasters should exercise extreme care when airing any material that is even arguably indecent or profane. We urge you to consult with us concerning the legality of any questionable programming material before such material is broadcast.

This memorandum summarizes key points made in the decisions, with a focus on the ways the FCC revised its indecency and profanity standards, and on the sometimes inconsistent and subjective manner in which those standards were applied.

The FCC released three decisions, each involving TV broadcasters. The analytical standards used by the Commission, however, apply generally to all broadcasters. The first decision upheld the \$550,000 forfeiture assessed against CBS Corporation for the Super Bowl XXXVIII halftime show featuring Janet Jackson. The second found that CBS affiliated or owned and operated stations are collectively liable for more than \$3.6 million in forfeitures for broadcasting a "teen orgy scene" during a 2004 episode of "Without A Trace." The third decision is an omnibus ruling that addressed complaints involving dozens of television broadcasts, holding some to be actionably indecent or profane and subject to forfeiture, while others were determined not to be actionable.

The omnibus decision adopted several changes to the standards used by the FCC when regulating allegedly indecent or profane material. These changes include:

- **Profanity is limited to sexual or excretory terms** – The FCC cut back on an earlier decision and limited what it deems to constitute "profanity" to a universe of words that are sexual or excretory in nature or are derived from such terms. Removed from the realm of profanity are racial and religious epithets.
- **The "S-word" is inherently excretory in nature and presumptively profane** – The word "shit" and its variations (for example, "bullshit")

were determined to be inherently excretory in nature and thus within the subject matter scope of the FCC's indecency definition. Whether the "S-word" is actually indecent depends on the subject broadcast's context. In addition, the "S-word" and its variations were deemed to be, as are the "F-word" and its variants, presumptively profane.

- **Forfeitures are assessed only against the station that is the subject of a complaint** – In a break from its most recent past, the FCC resurrected an approach from prior years and in several instances proposed a forfeiture only against the licensee of the station that was the subject of a complaint. Apparently, however, the Commission's return to "restraint" in this area can easily be undone by a complainant including call signs of all network affiliates or syndicated stations in a complaint, whether or not he or she actually viewed or listened to a particular station before lodging that complaint.

While the omnibus decision implements some analytical and procedural refinements, the decisions collectively rely largely on prior FCC approaches towards indecency and profanity enforcement. When addressing indecency, the FCC applied the same two-step analysis that it has applied in the past. In step one, the FCC determines whether the material falls within the sexual or excretory subject matter scope of the indecency definition. In step two, the material is examined for patent offensiveness using a series of contextual factors, including: (a) whether the material is graphic and explicit; (b) whether the material dwells on or repeats the sexual or excretory material; and (c) whether the material panders to, titillates or shocks the audience.

As in the past, the results set out in the omnibus decision are sometimes inconsistent and subjective.

For example, a very graphic, explicit and extended discussion of teen sex practices – including frank discussions of "salad tossing" (oral and anal sex) and "rainbow parties" (group oral sex) – avoided an indecency finding because its treatment of the topic on "The Oprah Winfrey Show" was deemed serious and educational. A description of the sex practices was necessary, the FCC concluded, because without them it would have been difficult to educate parents. In contrast, what the FCC deemed to be the graphic depiction of teenagers engaging in various sexual activities during an episode of CBS's "Without A Trace" supported a finding of egregious indecency and maximum forfeitures of \$32,500 per station, despite the absence of nudity in the broadcast. In the estimation of the FCC, the scene was all the more shocking because "it depicts minors engaged in sexual activities" – the very topic that was the subject of the approved Oprah Winfrey broadcast. Moreover, in its "Without A Trace" decision, the FCC expressed its opinion that children in the audience should not be exposed to the material presented. Left unaddressed by the FCC was the potential audience of children viewing "The Oprah Winfrey Show" that was approved.

The recent FCC decisions stressed the importance of context when determining whether complained of material is actionably indecent. Unfortunately, the FCC's analysis of context unavoidably places the agency in the position of making very particularized editorial judgments. Previously, the FCC upheld the use of graphic language in the broadcast of the WWII movie "Saving Private Ryan" because it found that language critical to portraying serious events realistically. Artistic sensibilities, however, were discounted by the FCC in finding that use of the "F-word" and "S-word" in the PBS documentary "The Blues: Godfathers and Sons" was impermissible. The FCC rejected the argument that use of such language was necessary to educate the audience as to the world of blues musicians, determining instead that the use of

coarse language was not “necessary to express any particular viewpoint.” Likewise, the FCC rejected use of the word “bullshit” uttered during an ABC Television Network “NYPD Blue” broadcast. ABC’s claim that the word was necessary for dramatic effect was unavailing, the FCC concluded, because “mere dramatic effect does not justify use of patently offensive expletives during time periods when children are likely to be in the audience.”

Evidence of the subjective nature of indecency enforcement can be found elsewhere in the decisions as well. For example, the FCC cited, without explanation, camera angles and background music as factors determining whether a particular sex scene broadcast was indecent. Humor, too, was treated subjectively: an episode of the “Family Guy” that referenced the word “penis” and related euphemisms and involved a father’s concern that he is not as well-endowed as his son was deemed not sufficiently graphic or pandering to be indecent, in part because “the topic is presented in an indirect, humorous manner;” but the comedic nature of a Spanish-language talk show involving a partially clad female was of no significance in the FCC’s determination that that program was indecent.

Regarding profanity, the FCC refined its standard to include only those words that are sexual or excretory in nature and which amount to a nuisance. Words without any sexual or excretory meaning (for example, “bitch,” “hell,” and “damn”) were deemed presumptively not profane, and words less grossly offensive than the presumptively profane “S-word” and “F-word” (for example, “ass” and “pissed”) were found to be not profane when used in a non-sexual or non-excretory context. More confusing, the FCC determined that, when used in the wrong context, some words or depictions were, by definition, sexual or excretory in nature. For example, the FCC found in particular cases that a woman’s breast is a “sexual organ” and that “ass” is a sexual or

excretory organ, thus satisfying the first step of the indecency analysis.

The FCC stated that even a presumptively profane word can on rare occasions be found not to be profane where it is “demonstrably essential to the nature of an artistic or education work or essential to informing viewers on a matter of public importance.” For support, the FCC relied on the “Saving Private Ryan” rationale discussed in the context of indecency above. However, as in the case of indecency, the artistic and educational discretion reflected in the use of expletives in “The Blues: Godfathers and Sons” offered no defense against a finding that that particular broadcast was profane. Instead, the FCC overrode the artistic vision of the documentary’s director, as it concluded that while “the documentary had an educational purpose, we believe that purpose could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives.”

Furthermore, the FCC introduced a new means of rebutting a profanity presumption that is wholly unrelated to the material’s “essential” artistic, educational or informative nature. The FCC held that a scene from “The Amazing Race 6” that included a brief view of graffiti stating “Fuck Cops!” was not profane. The FCC relied on the fact that because the written version of the expletive was small, out of focus and difficult to read, it did not amount to a nuisance and “would not have been noticed by the average viewer.” The brevity or explicitness of material – as well as a subjective determination of the attentiveness of the “average viewer” – are now relevant for purposes of the profanity analysis.

In separate statements released with the decisions, Chairman Martin and Commissioners Copps and Tate expressed general support for FCC’s latest indecency rulings. Commissioner Copps, however, urged the FCC to accelerate its inquiry into the potential harmful effect of media violence on children, and Commissioner Tate called for

heightened scrutiny of animated programming because of its appeal to children. Commissioner Adelstein, while agreeing with certain aspects of the decisions, disagreed with the Commission's assessment of forfeitures only against the licensees of stations that were the subject of a complaint. Commissioner Adelstein also objected to the Commission's expansion of the scope of words deemed inherently sex-

ual or excretory, irrespective of their common meaning or fleeting nature. He warned that, as the FCC expands its reach in this area, the courts may not uphold the Commission constitutionally limited enforcement authority.

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This memorandum is intended only as a general discussion of these issues and should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. To discuss any of the issues presented here, please contact Dennis Corbett (202.416.6780), Philip Bonomo (202.416.6773), or any other attorney in our office.