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## FCC's Crackdown on Broadcast Indecency

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## Body

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**News****FCC's Crackdown on Broadcast Indecency****Procedure**

In the beginning of 2004, the Federal Communications Commission (FCC ) launched a **crackdown** on indecent **broadcast** programming. This has included changes to both its substantive as well as procedural and evidentiary standards for dealing with **indecent** complaints.<sup>1</sup> Although most observers focus on the **FCC's** changes in substantive law, its modifications to procedural and evidentiary rules may be more important on a day-to-day basis-- especially since they are the product not of rulemaking but of low-visibility case law.

The most obvious example of the commission's new substantive policies was **Viacom Television Licensees**, in September 2004. The FCC fined Viacom \$550,000 for airing a half-second image of Janet Jackson's breast.<sup>2</sup> The material came during the halftime show at the 39th annual Super Bowl. During a dance routine, her partner, Justin Timberlake, removed a portion of Ms. Jackson's bustier, exposing her breast to the camera for 19/32 of a second.

The commission found the program to be indecent under a new version of its traditional two-part **indecent** test--that is, (1) a depiction of a sexual or excretory organ or activity, and (2) patent offensiveness...by **broadcast** community standards. In effect, the agency found Viacom responsible for negligence for taking insufficient care to anticipate and eliminate the half-second segment.

The **FCC's** procedural and evidentiary changes are noteworthy. Because they are low-visibility in nature, however, they are often hard to detect or deal with. A short review thus may be helpful.

The commission is not statutorily required to hold a hearing in imposing a fine, rather than in taking away a license. As to a fine, the FCC merely issues a notice of apparent liability. If the agency finds against it, the broadcaster's options are either to pay the fine or refuse to obey the order. At that point, the commission may request the U.S. Department of Justice to bring a civil suit in federal district court to collect the fine--which naturally would require a full hearing. This is not a particularly attractive option for the FCC, since the Justice Department often is concerned with more pressing matters, and in any event, the process of trial and appeal can take years. The delay obviously would have

reduced the visibility and impact of the post-2004 **indecent** cases. Since it costs a broadcaster hundreds of thousands or millions of dollars in legal fees to defend a court proceeding, district court litigation also is not usually a viable route.

The commission has made the process of filing and processing a complaint even more informal than in the past, in several ways. First, an **indecent** complaint may be extremely simple--including a computer-generated form provided by a non-profit advocacy organization such as the Parents Television Council (PTC ). Its Web site includes a boilerplate **indecent** filing, which requires a complainant only to fill in his or her name and address as well as the program at issue; the PTC then sends a copy to each FCC commissioner.<sup>3</sup>

A complainant need not attach a tape, transcript, or other documentation to its filing. Although a 2001 FCC Policy Statement had stated that generally a tape or transcript was necessary,<sup>4</sup> in post-2004 cases the agency has done away with the requirement. Large-market television stations can afford to record all programming. But small radio stations lack the financial or technical resources to do so. In such a case, the proceeding relies solely on each party's description of a **broadcast**. The commission thus decides **indecent** cases without hearings, based upon non-record evidence.

In some cases, the FCC provides little or no factual basis for its decisions.<sup>5</sup> In other situations, the FCC swamps the reader with 20 to 30 pages of privately supplied, unchallenged transcripts without any analysis of the relevant portions.<sup>6</sup> Either too much or too little information makes it difficult to understand the Commission's rationale, in turn making its policies even vaguer penalty.<sup>7</sup> But neither the FCC nor broadcasters have much appetite for hearings.

In addition to a lack of hearings and a limited amount of factual analysis, the commission's rationales for its results provide little detail. Its standard boilerplate opinion consists of two paragraphs describing the nature of the complaint, and four paragraphs--usually identical in each opinion--broadly defining the **FCC's** power to penalize stations for **indecent**. Sometimes the commission adds a page or two of legal and factual analysis, but in many situations it simply relies upon the complaint--usually without a tape or transcript--and finds the material to be indecent or not, and enters an order.<sup>8</sup>

Perhaps for similar reasons, the commission increasingly has used consent decrees with broadcasters after issuing notices of apparent liability. The agency first imposes a fine and then negotiates a settlement. For example, several months after issuing a notice of apparent liability against a broadcaster,<sup>9</sup> the commission announces a consent decree.<sup>10</sup> The consent decree governs not only the fine at issue in the earlier decision, but also other commonly owned stations and other investigations. An agreement often includes terms as to creation of a corporate compliance program.

The commission thus does not find or analyze facts in **indecent** cases. Since it does not require formal pleadings or hold hearings, it has no record and nothing to base traditional fact finding upon. Nevertheless, it routinely draws conclusions, even though they often are based upon nothing more than one party's description of what it believes to be a program's content. This naturally allows the FCC considerable latitude in characterizing facts and relying upon them to reach a result--somewhat different from traditional agency adjudication.

The FCC also has a penchant for piling one inference upon another. If a depiction of non-indecent sexual behavior implies that indecent conduct will follow, the agency has relatively little difficulty in finding improper material.

Similarly, the commission often finds **indecent** even without any sexual depiction. For example, the FCC relies upon innuendo<sup>11</sup> to find **indecent**. When a radio discussion of oral sex included a number of sexual terms as well as sound effects, the agency concluded that even without a sexual depiction a **broadcast** created the impression of

sexual activity.<sup>12</sup> Other cases emphasize the use of simulation, such as pornographic sound effects (women moaning).<sup>13</sup>

Other factors also seem to impact on determinations of **indecentcy**. Although not directly relevant, the FCC has suggested that the types of guests may indicate that a program is indecent. The presence of pornographic movie stars on a **broadcast** seems to be of particular concern.<sup>14</sup> Similarly, at least one commissioner has suggested that prior FCC action against a broadcaster supports a finding of **indecentcy**.<sup>15</sup> Although a party's prior regulatory history may be relevant to its status in many ways--such as character qualifications--it normally has little or no weight in the liability phase of a civil proceeding.

The commission traditionally has recognized several defenses or exculpatory circumstances to excuse **broadcast** of otherwise indecent material. After 2004, however, most of these appear to have disappeared.

The FCC generally took no action against fleeting indecent utterances, on the theory that they were unintentional and had little effect. As the **Golden Globes**<sup>16</sup> case made clear, however, after 2004 this is no longer a valid excuse.

Similarly, the commission forgave indecent language in live coverage, since it was difficult or impossible to screen it out.<sup>17</sup> The FCC did away with this excuse, however, at least in the context of a staged event in which the audience was encouraged to be unruly.<sup>18</sup> **Indecency** in a breaking news story still may be protected.

The demise of the exemptions for fleeting and live utterances requires stations to have fairly sophisticated delay systems, in order to delete even a single indecent word. For video, the equipment costs more than \$1 million and may require five people to operate.

But the FCC seems to have preserved an exemption for material with social value. In **Saving Private Ryan**,<sup>19</sup> the commission approved the ABC television network's **broadcast** of Stephen Spielberg's motion picture by that name on Veteran's Day, 2004, even though the picture contained large numbers of indecent words--including many iterations of fuck. The FCC was rather vague as to its reasons, stating only that it had to consider the full context of the material. The commission emphasized both the patriotic and artistic values of the work. As with so many other **indecentcy** decisions, it contributes to confusion in the area--as witnessed by the fact that 66 ABC affiliates decided not to show the film, even though the **FCC's** Enforcement Bureau had ruled in both 2001 and 2002 that it was not indecent.

In addition, the FCC previously had recognized a defense of reliance upon staff precedents. After 2004, the commission held that unpublished staff opinions were not binding on the Commission, since the staff might have made a mistake.<sup>20</sup> As with so many other policy changes, this too complicates the job of both a broadcaster and its counsel in complying with **indecentcy** regulation.

The **FCC's** post-2004 changes in its procedure, evidence, and defenses have made it easier and faster for it to process **indecentcy** complaints. Even aside from questions as to their impact on free speech, however, whether the changes have positively impacted the nature of the process is impossible to tell.

1. Golden Globe Awards Program, FCC-04-03 (March 18, 2004), available at [www.fcc.gov/eg/Orders/2004/FCC-04-03A1.html](http://www.fcc.gov/eg/Orders/2004/FCC-04-03A1.html), is the seminal opinion in the agency's new policy, by holding that the singer Bono's live, spontaneous use of the word fuck one time was actionable.

2. In re Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, **Broadcast** of the Super Bowl XXXVIII Halftime Show, Sept. 22, 2004, available at <http://merlin.obs.coe.int/redirect.php?id=9324>.

3. [www.parentstv.org](http://www.parentstv.org).
4. Policy Statement, FCC EB-00IH/FCC 01-90, 66 Fed. Reg. 21984 (May 2, 2001) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-01-90A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-01-90A1.doc).
5. E.g., In the Matter of WBDC **BROADCASTING**, INC., FCC 05-37, 20 FCC Rcd 4807 Feb. 25, 2005, available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-05-37A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-37A1.doc).
6. In the Matter of ENTERCOM KANSAS CITY LICENSE, FCC 04-231, 19 FCC Rcd 25011 (Dec. 22, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-231A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-231A1.doc).
7. In the Matter of CAPSTAR TX LIMITED PARTNERSHIP, FCC 04-36, 19 FCC Rcd 4960 (March 18, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-36A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-36A1.doc).
8. E.g., In the Matter of FOX TELEVISION STATIONS, EB-03-1H-0672, 20 FCC Rcd 4800 (Feb. 28, 2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-05-36A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-36A1.doc).
9. In the Matter of CLEAR CHANNEL **BROADCASTING** LICENSES, FCC 04-88, 19 FCC Rcd 6773 (April 8, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-88A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-88A1.doc).
10. In the Matter of CLEAR CHANNEL COMMUNICATIONS, EB-03-0121, 19 FCC Rcd 10880 (June 9, 2004), available at [http://hraun-foss.fcc.gov/edocs\\_public/attachmatch/FCC-04-128A1.doc](http://hraun-foss.fcc.gov/edocs_public/attachmatch/FCC-04-128A1.doc).
11. In the Matter of CAPSTAR TX LIMITED PARTNERSHIP, EB-02-1H-5064-AHB, 19 FCC Rcd 4960 (March 18, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-36A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-36A1.doc).
12. Id.
13. E.g., In the Matter of EMMIS RADIO LICENSE CORPORATION, FCC 04-62, 19 FCC Rcd 6452 (April 8, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-62A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-62A1.doc).
14. Id.
15. In the Matter of Infinity **Broadcasting** Operations, EB-01-1H-0633, 19 FCC Rcd 5032 (March 18, 2004 (Copps, Commissioner, concurring)), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-49A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-49A1.doc).
16. Golden Globe Awards Program, FCC 04-03 (March 18, 2004), available at [www.fcc.gov/eb/Orders/FCC-04-031.html](http://www.fcc.gov/eb/Orders/FCC-04-031.html).
17. In the Matter of Peter Branton, 6 FCC Rcd 610 (1991).
18. In the Matter of INFINITY RADIO LICENSE, FCC 04-48, 19 FCC Rcd 5022 (March 18, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-48A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-48A1.doc).
19. In the Matter of Saving Private Ryan, FCC 05-23, 20 FCC Rcd 4507 (Feb. 28, 2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-05-23A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-23A1.doc).
20. In the Matter of AMFM RADIO LICENSES, FCC 04-35, 19 FCC Rcd 10751 (June 10, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-35A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-35A1.doc); In the Matter of

Infinity **Broadcasting** Operations, FCC 04-49, 19 FCC Rcd 5032 (March 18, 2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-49A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-49A1.doc).

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