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# The FCC's New Indecency Enforcement Policy and Its European Counterparts: A Cautionary Tale

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**THE FCC'S NEW INDECENCY ENFORCEMENT POLICY  
AND ITS EUROPEAN COUNTERPARTS: A CAUTIONARY TALE**

by

Michael Botein\*  
and Dariusz Adamski\*

**INTRODUCTION**

The beginning of 2004 saw an upsurge in the number of complaints filed at the Federal Communications Commission ("FCC") against allegedly "indecent" broadcasting.<sup>9</sup> The FCC reported 111 complaints in 2000, 346 in 2002, 13,922 in 2003, and 1,068,802 in 2004.<sup>10</sup> Although one of the recurring subplots in this area is the possibility that the agency adjusted its reporting methodology to support its enforcement policy—a sort of legal, governmental version of "cooking the books" as in the Enron and WorldCom situations—the numbers have at least facial validity.

Equally unclear are the reasons behind this 10,000-fold increase in the number of complaints over a four-year period. Have North Americans finally shown their latent Puritanism and become ready to clean up their acts — an hypothesis hardly consistent with the high ratings of potboilers like

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<sup>9</sup> For purposes of convenience, this discussion will use the statutory and regulatory language of "indecent." As will be seen in the course of the discussion, however, the legal term does not translate readily into natural language, such as "pornography."

<sup>10</sup> FCC, INDECENCY COMPLAINTS AND NALS: 1993-2004, *at* <http://www.fcc.gov/eb/broadcast/ichart.pdf> (Mar. 5, 2005).

“Desperate Housewives?”<sup>11</sup> Or has there been a sudden lurch to “family values”—a slogan used by both the Democratic and Republican parties during the 2004 campaigns—in a few short years?

Realistically, US society has not undergone a massive sea change in the last decade. North Americans have enjoyed doing and viewing sex since the earliest days of the country. Indeed, even the much-maligned Puritans preached the value and enjoyment of robust sexual activity.<sup>12</sup>

Finally, history indicates that pornography is one of the prime forces behind the development of any new technology. Although Martin Luther’s theses had speedy distribution because of the then-new printing press, the major beneficiaries of the new technology apparently were authors of pornographic literature—including much respected figures such as Rabelais.<sup>13</sup>

The reasons for the change in recent legal treatment of indecency seem to be political rather than moral. US politicians have discovered that while sex sells commercially, anti-indecency<sup>14</sup> policy sells even better politically.

In the context of media regulation, this new direction has taken the form of the Commission’s post-2004 sudden changes in its indecency enforcement policy. While the history of the 20<sup>th</sup> century reflects an FCC basically willing to take a tolerant view of soft-core pornography in broadcasting,<sup>15</sup> this came to a crashing halt in early 2004.

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<sup>11</sup> Allison Romano, *February Roundup; Fox wins; NBC loses*, BROADCASTING & CABLE, Feb. 28, 2005, at 18. As of Spring 2005, this was consistently one of the five highest-rated regularly scheduled programs on broadcast television.

<sup>12</sup> BRUCE C. DANIELS, *PURITANS AT PLAY* (St. Martins Press 1995). The Puritans believed that sex was a necessary part of life, and that women might suffer major psychological damage without regular orgasms—within the confines of a marital relationship, of course.

<sup>13</sup> Peter Johnson, *Pornography Drives Technology: Why Not to Censor the Internet*, 49 FED. COMM. L. J. 217, 220 (1996) (“Rabelais’ boast in Gargantua and Pantragrauel that ‘more copies of it have been sold by the printers in two months than there will be of the Bible in nine years’ was first, probably true, and second, prescient advice to new media: sex sells.”).

<sup>14</sup> For purposes of convenience, the two major opposing groups here are referred to as “anti-indecency” and “pro-choice”—labels adapted from the ongoing U.S. debate over abortion. While the labels are not particularly fair or sympathetic to either side of the debate, they are relatively descriptive.

<sup>15</sup> See discussion *infra* p. 14.

On a national level, this can be dismissed as a form of partisan posturing. In the narrow context of a specialized regulatory agency, however, the tension between crafting decisions necessary to create good public relations and capable of avoiding palpably unjust results has forced the FCC into awkward situations. It has been forced not only to avoid traditional procedural safeguards—such as adjudicatory hearings—but also to change its substantive indecency policy from month to month.

**I.  
HISTORY OF INDECENCY REGULATION**

A.           Early Indecency Policy

Indecency was largely a non-issue in the initial days of US broadcasting. A few stations lost their licenses for improper content—such as references to “pimps” and “prostitutes.” The central factor in these cases, however, was not disfavored language but rather defamatory statements and other types of irresponsible programming and personal attacks.<sup>16</sup> Aside from a few isolated incidents, however, broadcasters were relatively restrained and the Federal Radio Commission—superseded in 1934 by the FCC—was not greatly concerned.

Interestingly enough, there is not and never was a provision in the Communications Act prohibiting indecent broadcasting. Instead, the Commission and the courts have relied upon a provision in the Criminal Code, which makes it a federal crime to transmit “obscene, indecent, or profane” material over radio.<sup>17</sup> The statute gives the Commission no explicit authority to impose sanctions on indecent broadcasting, but the FCC and the courts always have recognized it by implication. Although it may seem anomalous to rely upon a criminal statute for regulatory policy, the FCC never asked for more explicit jurisdiction over indecency in the Communications Act. Today’s Congress presumably would be willing to supply it, in light of its attempt to increase the amount of fines for indecency twenty-fold.<sup>18</sup>

Because of this statutory situation, the Commission never has applied its indecency jurisprudence to cable television, on the theory that cable

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<sup>16</sup>     Trinity Methodist Church, S. v. Fed. Radio Comm’n, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 317 (1933).

<sup>17</sup>     18 U.S.C. § 1464 (2005).

<sup>18</sup>     See discussion of *Super Bowl* case in text at 20.

constitutes communication by wire rather than by radio.<sup>19</sup> For this reason, cable and other multichannel operators offer a substantial amount of soft-core pornography.<sup>20</sup> Similar reasoning also would exempt the new fiberoptic networks planned by telephone local exchange carriers—e.g., Verizon’s “FIOS” or SBC’s “Lightspeed.” In a recent decision declaring cable operators not to be telecommunications common carriers, the US Supreme Court held that transmission of high-speed internet data did not constitute a “telecommunications service.”<sup>21</sup>

This approach makes little pragmatic sense. After all, cable receives much of its programming from satellites, which use the “radio” spectrum. On an ideological level, however, the FCC may have decided that cable does not present offensiveness issues, since by definition a viewer or listener receives the service only if he or she not only affirmatively requests it, but also pays a substantial amount for it.<sup>22</sup> At the same time, neither the radio spectrum nor the offensiveness argument would explain the Commission’s similar hands-off policy for direct broadcast satellites (DBS), which not only use radio waves to deliver programming directly to subscriber, but also carry as many or more pornographic channels as cable.

The Commission’s forbearance approach to broadcast indecency began to change in 1978, after the first Supreme Court case on broadcast indecency, *FCC v. Pacifica Foundation*.<sup>23</sup> The Court there upheld an FCC declaratory order, holding that WBAI(FM) in New York City could have faced liability—i.e., fines, forfeitures, license non-renewal—for broadcasting a recorded monologue by satirist George Carlin entitled “Filthy Words”<sup>24</sup>—basically variations on “shit, piss, fuck, cunt, cocksucker, motherfucker, and

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<sup>19</sup> See discussion *infra* p. 17.

<sup>20</sup> R. Thomas Umstead, *Uncensored Gone Wild*, MULTICHANNEL NEWS, July 18, 2005, at 52(including program titles such as *Bikini Bombshells Exposed*, *Beverly Hills Naked Covergirls*, *Nasty Art Model Search*, *Secret Lives of Nude Centerfolds*, *Amateur Strip night* and *Wild Women Stripper Pole Party*).

<sup>21</sup> Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv., 125 S. Ct. 2688 (2005).

<sup>22</sup> E.g., *Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985).

<sup>23</sup> 438 U.S. 726 (1978).

<sup>24</sup> Mr. Carlin still performs updated versions of this piece in public throughout the United States to highly receptive live audiences.

tits.”<sup>25</sup> The Commission did not impose any sanctions on the station, but rather ordered that its opinion be “associated with the station’s license file”<sup>26</sup>—apparently suggesting that the broadcast could lead to an eventual non-renewal of license. As will be seen,<sup>27</sup> the FCC has followed a pattern of making threatening noises but not acting against broadcast indecency; this may be a means of maximizing political visibility while minimizing potential free speech issues.

Historically, the Commission has had particular trouble with the word “fuck”—regardless of agency’s membership at any given time. As will be seen, a single utterance of the word became talismanic of the FCC’s post-2004 indecency enforcement policy, in the *Golden Globes* case.<sup>28</sup> The reasons for the power of this one word never have been clear.

From the beginning, the FCC’s decision in *Pacifica* was somewhat problematic. The Commission stated that the complainant had been driving through New York City with his “young son” when the monologue was broadcast.<sup>29</sup> In point of fact, the son was 15-years-old, and the father was a board member of Morality in Media—then the major anti-indecency organization in the United States.<sup>30</sup> Moreover, it was and is hard to spend more than a few minutes in New York City without hearing a broad array of curse words in a number of different languages. The state of the facts obviously cast some doubt upon the credibility of the complaint. Indeed, one member of the unanimous FCC panel voting for the opinion later volunteered that it was “probably the worst piece of decision-making in which I ever took part at the Commission.”<sup>31</sup>

Nevertheless, the Supreme Court upheld the Commission’s decision in a 7-2 opinion by Justice Stevens. The Court basically had two grounds.

First, it held that broadcasting was “uniquely pervasive.” The Court

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<sup>25</sup> *Pacifica*, 438 U.S. at 751. Whether all of these words still would qualify as per se indecent language is less than clear, and it does not seem to have passed on the status of “piss” or “tits.”

<sup>26</sup> *Id.* at 730.

<sup>27</sup> See discussion *infra* p. 15.

<sup>28</sup> See discussion *infra* p. 19.

<sup>29</sup> *Pacifica Found. Station*, 56 F.C.C.2d 99 (1975).

<sup>30</sup> *Broadcasting Magazine*, July 10, 1978, at 20.

<sup>31</sup> Confidential interview with former FCC Commissioner, June 13, 1997.

reasoned that “because the broadcast audience is constantly tuning in and out,” warning it about offensive material is impossible.<sup>32</sup> The Court did not consider how little time was necessary to turn off a radio or change a channel—thus providing a means of self-defense. And in 1978, of course, the Court naturally could not take into account technological developments enabling parents to exclude objectionable programming—ranging from the relatively ineffective television “V-Chip”<sup>33</sup> to sophisticated computer-controlled systems.

Second, the Court focused on its assumption that broadcasting was “uniquely accessible to children, even those too young to read.”<sup>34</sup> In fact, this point seems almost identical to the Court’s first one—namely, that exposing children to indecency would lead to a traumatizing innocent young minds. But the Court did not consider a variety of factors—such as the ability to turn off a channel, a parent’s responsibility to supervise children’s media exposure, and future technological developments.

Perhaps the most telling part of the Court’s opinion is its reliance on nuisance law, a form of common law tort. It reasoned that a “nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.”<sup>35</sup>

Dissenting Justices Brennan and Marshall took quite a different view of the issue. They viewed the majority’s result as limiting adults to programming on the level of children, by reducing all content to material suitable for children. They noted that “words generally considered indecent like ‘bullshit’ or ‘fuck’ are considered neither obscene nor derogatory in the Black vernacular...”<sup>36</sup>

The potential ramifications of *Pacifica* seemed to alarm even the Commission. A few months later, under a new chairman the FCC issued an opinion stating that only the repetitive use of the “seven dirty words” would be actionable, and that times after 10:00 PM were a “safe harbor”—a

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<sup>32</sup> *Pacifica*, 438 U.S. at 748.

<sup>33</sup> Peter Johnson, *The Irrelevant V-Chip: An Alternate Theory of TV and Violence*, 4 U.C.L.A. ENT. L. REV. 185 (1997).

<sup>34</sup> *Pacifica*, 438 U.S. at 749.

<sup>35</sup> *Id.* at 750.

<sup>36</sup> *Id.* at 776.

proposition which the Congress eventually confirmed.<sup>37</sup>

B. Broadcast Indecency from *Pacifica* to 2004

For the next few decades, the FCC, the Congress, and the courts feuded over the details of the indecency policy. None of these disputes, however, reached the intensity of the post-2004 imbroglio.

Apparently sensitive to the potential chilling effect of aggressive regulation, during the 1980's and 1990's the Commission treaded very lightly in the area. To a certain extent, the FCC was satisfied with the performance of the then three major broadcast networks. All had and still have "standards and practices" departments, which limited the degree of indecent programming.<sup>38</sup>

Over time, however, some radio broadcasters became more aggressive in their programming. (Cable and other video media were highly explicit from almost the very beginning; as noted, however, they were and are now not covered by the same indecency laws as broadcasting.<sup>39</sup>) Particularly in radio, the audience had new access to sexually explicit material. The result was a growing concern that the mass media were contributing to a general decline in morality and to general degradation of women.<sup>40</sup> Although the number of people concerned probably was relatively small, this period may have begun to mark a change in the previously *laissez faire* approach to broadcast indecency.

In the mid-1980's, the FCC surprised a number of observers by issuing warning letters to three radio stations for broadcasting "shock" material.<sup>41</sup> The Commission held that the material was "patently offensive," but declined to offer a clear legal test in light of the "variables" involved in its determination. On judicial review in the first *Action for Children's Television* ("ACT")

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<sup>37</sup> WGBH Educ. Found., 69 F.C.C.2d 1250, 1254 (1978).

<sup>38</sup> Broad. of Violent, Indecent, and Obscene Material, 51 F.C.C.2d 418 (1975).

<sup>39</sup> See discussion *supra* p. 9.

<sup>40</sup> E.g., ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1979).

<sup>41</sup> Infinity Broad. Corp., 2 F.C.C.R. 2705 (1987); *Pacifica Found., Inc.*, 2 F.C.C.R. 2698 (1987); Regents of the Univ. of Cal. 2 F.C.C.R. 2703 (1987). As in *Pacifica*, the Commission did not fine the stations or impose license renewal sanctions, because its action was novel.



case,<sup>42</sup> the Court of Appeals for the District of Columbia generally upheld the FCC's approach. It agreed with the Commission that the concept of indecency was inherently vague.

Shortly thereafter, in October 1988, the Congress weighed into the dispute by passing a rider (an attachment) to a budget bill, requiring the FCC to prohibit indecency 24 hours a day,<sup>43</sup> and the Commission did so without public notice or comment.<sup>44</sup> The FCC subsequently modified the ban to 6:00 AM-10:00 PM—leaving eight hours at night as a “safe harbor.” This ultimately was upheld in *ACT III*.<sup>45</sup>

With the administrative creation and judicial approval of the safe harbor came a general lessening of the FCC's indecency enforcement program; the issue became less controversial for a number of years. Although the FCC still received some complaints and occasionally issued a warning or a small fine, indecency was not a hot issue—at least until 2004.

## II

### **2004: BACKGROUND TO FCC ENFORCEMENT**

As noted in the Introduction, there may be a number of reasons why a regulatory agency such as the FCC becomes sensitive to a particular issue. In the case of indecency, the driving force does not seem to have been a sea change in public attitudes; most people still were content to watch—or at least allow others to watch—sexually explicit material. Instead, political and other forces seem to have been at work.

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<sup>42</sup> *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988). These cases drew their caption from the fact that the lead petitioning party was Action for Children's Television, a group which had no particular anti-indecency program but which generally sought the improvement of television for young people. Its position as the petitioner in this line of cases was part of a litigation strategy designed to clarify that advocates of children's media rights were not necessarily opposed to sexually oriented material.

<sup>43</sup> Dept. of Commerce Appropriations Act, Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988).

<sup>44</sup> *Enforcement of Prohibitions Against Broadcast Obscenity & Indecency*, 4 F.C.C.Rcd 457 (1988). Under the Administrative Procedure Act, public notice and a comment period were not necessary, since the Commission issues a policy rather than specific rules.

<sup>45</sup> *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995).

First, during the 1990's there was a clear growth in the role and political presence of what sometimes is labeled the "religious right" or "evangelical Christianity." Although numerous organizations and sects became politically active during the last decade, the sheer numbers of supporters is not clear and may not have increased. Some political commentators maintain that the last two US presidential elections were determined by these groups' greater political activity. But no one has produced any hard empirical evidence. The change may have been in the amount of activity rather than of supporters.

Second, there has been an increase in the number and resources of public interest groups with anti-indecency agendas. By far the most outstanding example is the Parents Television Council ("PTC"). Some observers believe that the Council is responsible for up to 99.8 percent of all indecency complaints filed at the FCC.<sup>46</sup> Although at first glance the figure seems somewhat high, it may be credible in light of PTC's strategies. Its almost 1,000,000 (non-paying) members may elect to receive email updates as to programs which the Council believes to be indecent. Moreover, the Council's website<sup>47</sup> makes available a very simple form, which viewers can complete in a few minutes and—with one click of a cursor—email to the FCC.

Moreover, the PTC's revenues have risen to \$6 million<sup>48</sup> in the law few years. The Council has maintained that it is an independent non-partisan not-for-profit corporation. However, it was founded in 1987 as an offshoot of the Media Research Council, an organization devoted to lightening a perceived the liberal bias in US media.<sup>49</sup> To some extent, PTC also may have been helped by the FCC's methods of counting complainants, as discussed below.<sup>50</sup>

Third, the Commission, indirectly, has helped out the anti-indecency

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<sup>46</sup> Todd Shields, *FCC Weighs Olympics Indecency Complaints*, MEDIAWEEK, Dec. 10, 2004.

<sup>47</sup> See [www.parentstv.org](http://www.parentstv.org) (last visited Sept. 10, 2005).

<sup>48</sup> Bob Thompson, *Fighting Indecency, One Bleep at a Time*, WASHINGTON POST, Dec. 9, 2004, at C1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A49907-2004Dec8?>

<sup>49</sup> *Id.*; See also, Bill Berkowitz, *Parents Television Council*, MEDIA TRANSPARENCY, May 11, 2005, at <http://www.mediatransparency.org>.

<sup>50</sup> See discussion *infra* p. 17.

lobby. Ironically, former FCC Chairman Michael K. Powell began his tenure by publicly stating that the agency was out of the indecency enforcement business—for which he received a Freedom of Speech Award from the Media Institute in 2001.<sup>51</sup>

Perhaps more important, however, Mr. Powell also had powerful ties into the Bush-Cheney Administration, in addition to his father's status as US Secretary of State. While serving in the US Army, Mr. Powell was a "policy advisor" to then-Secretary of Defence Richard B. Cheney—later, of course, US Vice President.<sup>52</sup> And Mr. Powell's successor, Chairman Kevin J. Martin, has similar credentials. Before joining the Commission as a member in 2001, he was deputy general counsel to President George W. Bush's first presidential campaign and was particularly active in the recount of votes in Florida.<sup>53</sup>

Like most US federal administrative agencies, by statute the FCC may not have more than a bare majority of members from the same party—in this case, three out of five.<sup>54</sup> As will be seen in the next section, however, on the indecency issue there has been little difference between the Republican majority and the Democratic minority, commissioners Michael Copps and Jonathan S. Adelstein. At first, this may seem anomalous since on many other controversial issues—particularly in the telecommunications area—there were often heated political conflicts between the Republican and Democratic members.<sup>55</sup> Because of the moral and political overtones involved, however, it would have been difficult for any commissioner to support indecency in a political system with an infrastructure of "God, motherhood and apple pie." Also, no FCC member had any realistic option of opposing the agency's enforcement actions—as appeared to be the case in the seminal *Pacifica*

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<sup>51</sup> Steven Labaton, *Indecency On the Air, Evolution at F.C.C.*, N.Y. TIMES, Dec. 23, 2004, at E1.

<sup>52</sup> FCC, BIOGRAPHY OF MICHEAL K. POWELL at <http://www.fcc.gov/commissioners/previous/powell/biography.html> (last modified Mar. 15, 2005).

<sup>53</sup> Stephanie Kirchgaessner, *New FCC Chief Faces Challenge over Decency and Deregulation*, FIN. TIMES, Mar. 17, 2005, at 3; Stephen Labaton, *Deal Maker Named by Bush to Lead F.C.C.*, N.Y. TIMES, Mar. 17, 2005, at C3.

<sup>54</sup> 47 U.S.C. § 208 (1996).

<sup>55</sup> Stephen Labaton, *Powell to Step Down at F.C.C. After Pushing for Deregulation*, N.Y. TIMES, Jan. 22, 2005 at A1.

case.<sup>56</sup>

Finally, indecency became a convenient political target during the new millennium. Again, this is not to suggest that large numbers of disaffected voters saw sexually oriented programming as a cause of the country's various woes. Nevertheless, in the presidential campaign year of 2004, politicians on both sides saw morality as an issue. Some political commentators still view indecency as a "Republican" issue. In truth, however, both the Republican and Democratic parties embraced the rather vague notion of "family values" as prominent parts of their platforms.

A convenient conspiracy theory would be that the Bush-Cheney Administration used its personal ties to both Chairman Powell and then-Commissioner (later Chairman) Martin to emphasize their party's commitment to eradicating indecency. But it would make just as much sense to believe that anti-indecency groups such as the Parents Television Council saw and exploited an opportunity to promote their agendas in an election year. It thus presumably is not an accident that indecency complaints at the Commission rose from 922 in August 2004, to 119,817 in September, to 190,805 in October (a month before the presidential election)—before falling to 7,243 in December.<sup>57</sup> The cause of these statistically wild variations is unclear. Two factors, however, are certain.

First, as discussed above, the resources and activities of anti-indecency public interest groups such as the Parents Television Council increased substantially, from 2002 on. In addition, computer technology and the internet made it increasingly easy for large numbers of Americans to dash off indecency complaints in a few minutes, either individually or as part of a public interest group's mass filing.<sup>58</sup>

Second, in 2003 the FCC staff implemented a little-noticed but

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<sup>56</sup> See discussion *supra* p. 20.

<sup>57</sup> FCC, QUARTERLY REPORT ON INFORMAL CONSUMER INQUIRIES AND COMPLAINTS, FOURTH QUARTER, 2004 (2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-257128A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257128A1.pdf); FCC, QUARTERLY REPORT ON INFORMAL CONSUMER INQUIRIES AND COMPLAINTS, THIRD QUARTER, 2004 (2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-257124A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257124A1.pdf). For reasons not apparent, the two reports—covering the last half of 2004—were released on the same day in 2005.

<sup>58</sup> See discussion *supra* p. 31.

statistically significant change in its method of measuring indecency complaints. In the past, the agency had counted group or form filings as just one complaint. By the beginning of 2004, however, the staff counted every complainant individually—regardless of whether they had composed their own document or provided any supporting documentation.<sup>59</sup> This naturally may have increased the total figures substantially.

Whatever the reason for the increase, the numbers prove little or nothing. If a political party were behind the increase in complaints, it might just as well have been the Democrats—had they been in power and thus controlled the FCC.

The basic history of indecency regulation in Section I indicates that enforcement has been highly sporadic. And as discussed in Section II, during the last decade political and moral forces have developed to increase the likelihood of concern over indecency. Whether this enforcement philosophy continues has yet to be seen. It may be useful, however, to draw some general conclusions as to the juridical nature of the indecency jurisprudence of the Commission.

### III

#### THE FCC'S NEW INDECENCY JURISPRUDENCE

##### A. Origins of the New Jurisprudence: Three Cases of Indecency

The basic parameters of the FCC's indecency test date back to the Supreme Court's *Pacifica* case in 1978.<sup>60</sup> In simplistic terms, a finding of indecency must include two factors:

1. A description or "depiction" of sexual or excretory organs or activities; and
2. A determination that the material was "patently offensive" to the public at large, determined on a national rather than local basis.

Until 2004's flood of decisions, the Commission's only recent attempt

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<sup>59</sup> FCC, QUARTERLY REPORT ON CONSUMER INQUIRIES AND COMPLAINTS, THIRD QUARTER, 2003 (2003), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-241435A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241435A1.pdf).

<sup>60</sup> *See discussion supra* p. 10.

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to explain its policy came in a 2001 *Policy Statement*,<sup>61</sup> issued well before indecency became a highly visible issue. The document was prompted not by any current concerns, but rather by a few individual enforcement actions. Like most general policy statements, it said comparatively little and just restated the two-part test. To a certain extent, however, a few of its assumptions are of interest, if only because they no longer seem to apply—such as almost blanket exemptions for live broadcasts and a general requirement that complaints be supported by a text or transcript.

Although casual observers may date the Commission's new enforcement policy from the *Super Bowl* decision in September 2004, the agency began to send out signals of change with the *Golden Globes* decision in March 2004. The Commission's actions followed the House of Representatives' adoption of a severe anti-indecency bill, which ultimately failed.

In *Golden Globe Awards Program*,<sup>62</sup> the Commission established new definitions of "indecency" and "profanity" on broadcast television. At issue were well-known singer Bono's remarks on an NBC television network program, after he received the 2003 Foreign Press Association's Golden Globe award for "best popular song:" "This is fucking brilliant."

In an opinion by Chairman Powell, the Commission reiterated its traditional two-part test for indecency: (1) a description of "sexual or excretory organs or activities" which (2) is "patently offensive...by [broadcast] community standards." As would be increasingly important, the FCC kept to its long-standing position that a woman's breast was a "sexual organ"—a matter which some may find debatable.

The opinion held that Bono's words were a "depiction" because they had a "sexual connotation." It found them "patently offensive" for several reasons. First, "fucking" was "one of the most vulgar, graphic and explicit descriptions of sexual activities in the English language." Second, "children were expected to be in the audience." Third, NBC was "on notice" of Bono's proclivity for indecency—based upon quotations from an entertainment news website. The Chairman also relied upon a website's reports that Cher, another

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<sup>61</sup> Policy Statement on Broadcast Indecency, 16 F.C.C.R. 7999 (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).

<sup>62</sup> Golden Globe Awards Program, 19 F.C.C.R. 4975 (2004), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-43A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-43A1.doc).

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popular singer, had said “fucking” in a different context—the 2002 Billboard Awards Ceremony. (The connection between two different singers at two separate events two years apart may raise some questions of relevance—at least if judged by traditional evidentiary standards.)

Recognizing that the Commission previously had refused to impose liability upon “isolated or fleeting” uses of indecency, Powell overruled this entire line of cases—dating back more than 15 years. The agency did not make clear what words were within the new ban, referring only to “the F-word and those words (or variants).” This leaves unclear the status of language such as: “shit, piss, cunt, cock...” Again, it points to the almost talismanic quality of the “F-word” to generations of FCC commissioners.<sup>63</sup>

The majority also announced a new interpretation of the statutory prohibition on “profane” broadcasting—which had not been enforced in more than fifty years. Powell held that “fucking” was profane because it was “vulgar and coarse material.”

In the end, the Commission did not fine NBC for the broadcast, on the ground that it had not had sufficient notice of the change in the law. But Commissioners Copps and Martin would have imposed a fine, on the grounds that NBC should have known the material’s indecency and did not make sufficient efforts to censor it—e.g., by means of a five-minute delay if need be. They were not concerned that the technology necessary to establish this long a delay costs hundreds of thousand of dollars per station.

In overruling more than 15 years of prior administrative decisions, the FCC took a very strong position—presumably not because of internal policy, but severe interrogation in appearances before Congressional committees. Moreover, the passage of a House bill increasing indecency fines twenty-fold may have encouraged the Commission to act—even though the Senate failed to pass it.

*Golden Globes* set the stage for a reevaluation of the Commission’s indecency rationale as well as new vigor in its enforcement policy. As many observers expected after the 2004 Super Bowl, a more complete development came with the FCC’s treatment of that broadcast.

In September 2004, the FCC issued a \$550,000 notice of apparent liability against Viacom, Inc., the owner of the CBS and MTV networks, for

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<sup>63</sup> See discussion *supra* p. 15.

airing a program with a half-second image of Ms. Janet Jackson's breast.<sup>64</sup> The material came during the "halftime show" at the 39<sup>th</sup> annual Super Bowl. During a dance routine, her partner, Mr. 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 the *Golden Globes* two-part test. First, it held that the half-second image of Ms. Jackson's breast was a depiction of a "sexual organ." Second, it found that it had "pandered" to viewers, noting briefly that children probably were in the audience.

Chairman Powell had greater difficulty in establishing Viacom's responsibility for the material. Once again, there was no evidentiary hearing. But both Ms. Jackson and Mr. Timberlake stated that they had informed neither CBS nor MTV (the show's producer, also owned by Viacom) of the planned "costume reveal." Nevertheless, the Commission found that CBS and MTV were "well aware of the overall sexual nature of the Jackson/Timberlake segment no took no action to prevent possible indecency." This reliance on the overall sexual orientation of the program is reflected in later decisions, establishing the principle that a general pornographic theme is enough without evidence of particular incidents to prove indecency.<sup>65</sup> It also points up the difficulties of operating without evidentiary hearings, which could have tested Mr. Jackson's and Mr. Timberlake's credibility.

To a very real extent, the FCC seemed to be suggesting that the broadcaster's negligent failure to detect and remedy potential indecency was a basis for liability. Although this rationale has not surfaced so visibly, it raises difficult issues as to both liability and evidence. As discussed in relation to the next case, *Married by America*, it is very easy to build one evidentiary inference upon another—particularly when the Commission consistently avoids holding evidentiary hearings on cases and instead relies solely upon written filings.<sup>66</sup>

The result is to create a new type of liability: negligent indecency. Since the FCC has failed to define the standard of care, elements of breach, or

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<sup>64</sup> Broad. of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19,230 (2004), *available* at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-209A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-209A1.pdf).

<sup>65</sup> See discussion *infra* p. 31.

<sup>66</sup> See discussion *infra* p. 22.



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required causation, however, this standard adds little or no certainty to the law. Although this paper does not purport to deal with the law of torts, this approach seems about as clear as the traditional joke about the tort of “malicious winking.”

As with *Pacifica* in 1978<sup>67</sup> and its radio station warnings in 1987,<sup>68</sup> the Commission imposed only limited sanctions—a fine on only the 20 Viacom “owned and operation” (“O&O”) stations. It absolved roughly 200 independently owned stations of fines. In fact, if the Commission had fined all CBS affiliated stations, the total amount would have been more than \$5,000,000. The agency’s role seemed not to be so much exacting retribution as taking a high-visibility position—which could fit with any of the commonly advanced theories behind the FCC’s crackdown on indecency.<sup>69</sup>

A month after the *Super Bowl* decision, the FCC added further complications by reducing standards for showing indecency, in a notice of apparent liability against the Fox Broadcast Network. In *Fox Broadcasting*,<sup>70</sup> the objectionable content in the program, “Married By America,” was less than clear. The reality show involved a number of single people, who had agreed to date and perhaps marry other single men and women whom they had never met before. The particular program—one of a series—involved bachelor and bachelorette parties for two couples in Las Vegas, Nevada. Although the FCC did not specify the content of the program,<sup>71</sup> it mentioned that it involved roughly six minutes of scenes in which the participants: licked “whipped cream from strippers’ bodies;” “a topless woman with her breasts [blacked out] straddled a man in a sexually suggestive manner;” “two partially clothed female strippers kissed each other above a male;” and “a male stripper was about to put a woman’s hand down the front of his pants.” The Commission acknowledged, that no breasts or sexual acts were shown.

The Commission began with its traditional two-part indecency test, but then went off in new directions as to the tests for both parts. As to the definition of indecency, the Commission stated that about six minutes of the program were “sexually suggestive” — even without any nudity—and “conclude[d] that the broadcast satisfies the first prong of our indecency

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<sup>67</sup> See discussion *supra* p. 10.

<sup>68</sup> See discussion *supra* p. 13.

<sup>69</sup> See discussion *supra* p. 18.

<sup>70</sup> Broad. of the Fox Television Network Program “Married by America,” 19 F.C.C.R. 20,191 (2004).

<sup>71</sup> As usual, there was no evidentiary hearing and no record.

analysis.” The result here, thus, was quite different from both the *Golden Globes* case, in which a participant used the word “fucking,” and the *Super Bowl* decision, in which part of a dancer’s bare breast appeared for half a second.

As to the “patently offensive” issue, the Commission gave little guidance. It stated that “although the nudity was [blacked out], even a child would have known that the strippers were topless and that sexual activity was being shown.”<sup>72</sup>

This analysis creates two problems. First, it involves basing one inference upon another—e.g., what children infer from televised content, in the absence of any empirical evidence. Second, it creates severe operational difficulties for advertisers and producers. For example, when an attractive young couple embraces after using a perfume in an advertisement, it may not be unreasonable to assume that sexual activity is likely to follow. But if that is not stated, there is no factual basis upon which to predict how an agency or court is likely to act in reviewing the material. As discussed later,<sup>73</sup> the Commission has not been clear as to dealing with questions of “innuendo”<sup>74</sup> or other factual assumptions—a situation which is not helped by its failure to hold evidentiary hearings in indecency cases.

Finally, the FCC imposed the forfeiture not just on the Fox Network and its stations, but also upon 150 affiliated stations—a step which it had not taken in *NBC* or *Viacom*. The Commission reasoned that all stations were on notice, since the programs were available on tape.

This brief history indicates how quickly the Commission has changed its indecency jurisprudence since 2004. These cases reflect only the broad strokes of its changes. In addition to these general changes in the definition of indecency liability, however, the FCC has changed the nature of its procedure, evidentiary process, and available defenses—usually without advance notice and often without any clear indication as to the nature of the changes. In the long run, these changes may be the most disruptive.

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<sup>72</sup> See discussion *supra* p. 24. It appears that the deletion of potentially offensive material by itself may be evidence of a pornographic and offensive orientation.

<sup>73</sup> See discussion *infra* p. 27.

<sup>74</sup> See discussion *infra* p. 33.

B. Procedural, Evidentiary, and Defense Issues

As the three cases above indicate, the Commission has been fairly explicit in broadening its definition of actionable indecency. At the same time, however, it has changed a number of details as to how it handles complaints. Although these do not have the high-visibility impact of a \$550,000 fine in *Super Bowl*, they make it easier for the FCC to impose liability and harder for a station to contest it.

1. *Procedure.*

In discussing the FCC's procedure in indecency cases, it is important to remember that the Commission is not statutorily required to hold a hearing in imposing a fine rather than in taking away a license. In a proceeding to deny a renewal, the Communications Act clearly requires the agency to hold a full-blown evidentiary hearing.<sup>75</sup> This is not necessary, however, in imposition of a fine. Instead, the FCC merely issues a "notice of apparent liability." If the agency finds against the broadcaster, its options are either to pay the fine or refuse to obey the order. At that point, the Commission may request the Department of Justice to begin a civil suit in a federal district court to collect the fine—which would give a broadcaster a full judicial hearing. This is not a particularly attractive option for the FCC, since the Department often is concerned with more pressing matters than indecency fines. and in any event the process of trial and appeal can take years. This obviously would have reduced the visibility and impact of the post-2004 indecency cases. Since it costs a broadcaster hundreds of thousands or millions of dollars in legal fees to defend a court proceeding, this is not a viable route for most broadcasters. In the *Super Bowl* case above, a court case probably would have cost Viacom several times the \$550,000 fine.

The Commission has made the process of filing and processing a complaint even more informal than in the past, in several ways. First, an indecency complaint may be extremely simple—including the computer-generated form provided by the Parents Television Council.<sup>76</sup> Indeed, a complainant is not required to send a copy to the targeted station; as a result, a broadcaster's first notice often comes in a letter of inquiry from the FCC. Moreover, a complainant need not attach a tape, transcript, or other first-hand

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<sup>75</sup> 47 U.S.C. § 204 (e)(1996).

<sup>76</sup> See Parents Television Council, FCC Campaign at <http://www.parentstv.org/ptc/fcc/fcccomplaint2.asp> (last visited Sept. 10, 2005).

documentation to its filing. Although the 2001 *Policy Statement* stated that generally a tape or transcript was necessary,<sup>77</sup> in post-2004 cases the agency has done away with such a requirement—with the hearty approval of Commissioner Copps.<sup>78</sup> Lack of a tape or transcript is not a mere procedural nicety. Large-market television stations can afford to make and keep a tape of all programming. But many indecency cases involve relatively small radio stations, for which this is technically and financially more onerous. In such a case, the proceeding relies solely on each party's description of a broadcast, which leaves the Commission little or no evidence to work with.

In many situations, the FCC makes little inquiry into the facts. It often relies just upon the claims in a complaint, without any further inquiry.<sup>79</sup> In other situations, the FCC swamps the reader with 20 or 30 pages of transcript—but without any analysis of the relevant portions.<sup>80</sup> Either too much or too little information makes it difficult for an observer to understand the Commission's rationale—which in turn makes its policies vaguer than necessary. Indeed, even a strong advocate of indecency enforcement, Commissioner Copps, has complained about the lack of full evidentiary hearings, noting that “a [license revocation] hearing would have provided the Commission with the ability to consider what actions the stations took in response to these broadcasts and to decide on the appropriate penalty.”<sup>81</sup> Once again, however, 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 rationale for its results has little detail. Its standard

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<sup>77</sup> Policy Statement, 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).

<sup>78</sup> Capstar TX Ltd. P'ship, 19 F.C.C.R. 4960 (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) (As in several other cases, Commissioner Copps specifically noted that “I am pleased that the Commission is proceeding...without a tape of transcript.”).

<sup>79</sup> *E.g.*, WBDC Broad., Inc., 20 F.C.C.R. 4807 (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).

<sup>80</sup> Entercom Kan. City License, 19 F.C.C.R. 25011 (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).

<sup>81</sup> Capstar TX Ltd. P'ship, 19 F.C.C.R. 4960 (2004); *See also* Infinity Radio License, 19 F.C.C.R. 5022 (2004) (Commissioner Copps, concurring), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-48A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-48A1.doc).

“boilerplate” consists of two paragraphs generally describing the nature of a complaint, and four paragraphs—usually verbatim in each opinion—broadly defining the FCC’s power to penalize stations for indecency. Sometimes the Commission adds a page or two of legal and factual analysis, but in many situations it simply refers to the complaint—which again usually lacks a tape or transcript—finds the material to be indecent or not, and enters an ordering clause.<sup>82</sup>

Finally, the Commission sometimes appears to be dispensing mass justice. In some instances, the FCC has dismissed several dozen complaints in a short opinion, with virtually no factual basis or analysis.<sup>83</sup> This type of broad brush approach became more common in early 2005, as the FCC was flooded with increasing numbers of often identical complaints. As a corollary, however, the huge number of filings often has resulted in substantial delays. In some cases the agency has taken more than two years to issue cursory opinions.<sup>84</sup>

Perhaps for similar reasons, the Commission increasingly has entered into 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>85</sup> the Commission announced that it had reached agreement as to

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<sup>82</sup> *E.g.*, Fox Television Stations, 20 F.C.C.R. 4800 (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). The file number on this case begins with “EB” rather than “FCC.” Even though the opinion was issued by the full Commission, the caption may indicate that the Enforcement Bureau drafted it and the agency merely approved it.

<sup>83</sup> *E.g.*, Complaints by Parents Television Council, 20 F.C.C.R. 1931 (2005), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-279A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-279A1.doc). It may be noteworthy that these complaints came from the PTC. As discussed at the beginning, it appears to have been responsible for virtually all indecency complaints during the last few years. The Commission’s summary denial of 15 complaints in this opinion may reflect its frustration with being inundated with filings.

<sup>84</sup> *E.g.*, Entercom Sacramento License, 19 F.C.C.R. 20129 (2004). The agency took two years and one month to decide this complaint in a 9-page opinion, composed mainly of boilerplate.; *See discussion supra* p. 28.

<sup>85</sup> Clear Channel Broad. Licenses, 19 F.C.C.R. 6773 (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).

a consent decree.<sup>86</sup> The consent decree governed not only the fine at issue in the earlier decision, but also a number of other stations and “investigations.” Moreover, the monetary settlement under the consent decree was almost twice the size of the fine in the prior case. Perhaps more important the agreement included terms as to creation of a corporate compliance program.

Consent decrees are a standard part of US regulatory law, and have been used by agencies in a variety of ways. After all, the largest corporate divestiture in US history—that of American Telephone & Telegraphy Company—was carried out by a consent decree.<sup>87</sup> Nevertheless, the Commission’s recent use of consent decrees raises some possible questions. Negotiating under the threat of an impending fine may be problematical, when the target cannot secure a full evidentiary hearing without refusing to pay and inviting a lawsuit; broadcasters may be more willing to settle than when both parties are anticipating the burdens of an impending lawsuit. In addition, imposition of corporate governance provisions may not be in the public interest, if they are not open to public notice and comment—as is statutorily required, for example, in the settlement of antitrust cases. The fault here may be in the basic statutory framework as to hearings, rather than in the Commission. The future use of consent decrees, however, may be worth monitoring.

## 2. *Evidence*

The Commission does not really find or analyze “facts” in indecency cases, as noted above. Since it does not require formal pleadings or hold hearings, it has no record and thus 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. This has created some problems in terms of an adjudicatory body’s traditional role in finding facts and applying law.

As noted above in the discussion of the *Married by America* case,<sup>88</sup> the FCC has a penchant in indecency cases for piling one inference upon

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<sup>86</sup> Clear Channel Comm, 19 F.C.C.R. 10880 (2004), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-128A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-128A1.doc).

<sup>87</sup> For a brief history, see *United States v. W. Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988), *rev'd in part*, 900 F. 2d 283 (D.C. Cir 1990).

<sup>88</sup> See discussion *supra* p. 22.

another. If it assumes that 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 indecency in the absence of a sexual act, through other content which apparently constitutes an aggravating factor. For example, the FCC relies upon “innuendo”<sup>89</sup> to find indecency. 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 depiction of a sexual act, the broadcast in effect created the impression of sexual activity.<sup>90</sup> Other cases emphasize the use of “simulation,” such as “pornographic sound effects (women moaning).”<sup>91</sup> By comparison, the Commission did not find improper a scene in which a woman clad only in a bath towel attempted to seduce a well-known football player, and then threw herself on him after he agreed—without the towel, but with only her upper back visible on camera.<sup>92</sup>

Other factors also seem to impact on determinations of indecency. Although not directly relevant, the FCC has suggested that the identity of on-air personalities may indicate the indecent nature of a program. The presence of pornographic movie stars on a program seems to be particularly of concern.<sup>93</sup> Similarly, at least one commissioner has suggested that prior FCC action against a broadcaster is support for a finding of indecency.<sup>94</sup> Although a party’s prior regulatory history may be relevant to its status in a variety of ways—such as character qualifications—it normally has little or not weight in the liability phase of a civil proceeding. This presumably does not violate the procedural rights of the US Due Process Clause,<sup>95</sup> but certainly is unusual in US practice.

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<sup>89</sup> Capstar TX Ltd. P’ship, 19 F.C.C.R. 4960 (2004).

<sup>90</sup> *Id.*

<sup>91</sup> *E.g.*, Emmis Radio License Corp. 19 F.C.C.R. 6452 (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).

<sup>92</sup> ABC Television Network’s November 15, 2004, Broad. of “Monday Night Football,”

20 F.C.C.R. 5481 (2005), *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-05-53A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-53A1.doc).

<sup>93</sup> *Id.*

<sup>94</sup> Infinity Broad. Operations, 19 F.C.C.R. 5032 (2004)(Commissioner Copps, 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).

<sup>95</sup> U.S. CONST. amend. V.

3. *Defenses.*

The Commission traditionally has recognized several defenses or exculpatory circumstances to excuse broadcast of otherwise indecent material. In the post-2004 flood of opinions, however, most of these appear to have gone by the wayside.

The FCC traditionally took no action against “fleeting” indecent utterances, on the theory that they were unintentional and had little effect. As the *Golden Globes*<sup>96</sup> case above made quite clear, however, after 2004 this no longer was a valid excuse.

Similarly, the Commission forgave indecent language in live coverage, since it was difficult or impossible to screen it out.<sup>97</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 use indecent language—once again about oral sex—the agency’s bugaboo.<sup>98</sup> Indecency in a breaking news story still may be protected.

The demise of the exemptions for fleeting and live utterances creates serious technological and economic problems for broadcasters. Effectively it requires stations to have fairly sophisticated delay systems, in order to delete even a single indecent word, as was the case in *Golden Globes*. As discussed in Section IV below, these are expensive not only to acquire but also to operate—thus creating a particular problem for relatively small radio stations.

Interestingly enough, the FCC seems to have preserved an exemption for material with social value. In *Saving Private Ryan*,<sup>99</sup> the Commission approved the ABC Television Network’s broadcast of Stephen Spielberg’s motion picture by name on Veteran’s Day 2004, even though the picture contained large numbers of indecent words, including many iterations of “fuck.” The agency was rather vague as to its reasons, stating only that it had

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<sup>96</sup> See discussion *supra* p. 20.

<sup>97</sup> Peter Branton, 6 F.C.C.R. 610 (1991). This involved a live interview with a high-ranking organized crime figure, who used four-letter words as an integral part of his speech.

<sup>98</sup> Infinity Radio License, 19 F.C.C.R. 5022 (2004).

<sup>99</sup> ABC Television Network’s Presentation of the Film “Saving Private Ryan,” 20 F.C.C.R. 4507 (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).



to consider the “full context” of the material. Relying heavily on *Pacifica*,<sup>100</sup> the Commission emphasized both the patriotic and artistic values of the work. In light of Spielberg’s stature in modern culture, the result very well may have been correct. As with so many other indecency decisions, however, it contributes to the 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.

*Saving Private Ryan* also highlights another change in the FCC’s practice. In the past, the FCC generally 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>101</sup> As with so many other changes in its policies, this too complicates the job of both a broadcaster and its lawyers in complying with indecency regulation, since it takes away one more predictor of FCC behavior.

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

#### IV

#### EFFECT OF INDECENCY ENFORCEMENT ON BROADCASTERS

Indecency enforcement inevitably changes how broadcasters do business in several ways—potentially resulting in a chilling effect on broadcast speech. The Commission has not targeted particular producers or stations, although a few FCC members obviously are concerned with the “history” of some broadcasters.<sup>102</sup> Although some observers have criticized FCC decisions such as *Golden Globes* and *Super Bowl* as being unduly oriented towards particular types of programs,<sup>103</sup> the agency does not seem to have targeted particular programs or producers. All of these concerns have their roots in economics, one way or another. None of them is insignificant.

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<sup>100</sup> See discussion *supra* p. 10.

<sup>101</sup> AMFM Radio Licenses, L.L.C., 19 F.C.C.R. 10751 (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); Infinity Broad. Operations, 19 F.C.C.R. 5032 (2004).

<sup>102</sup> Infinity Radio License, 19 F.C.C.R. 5022 (2004) (Opinion of Commissioner Martin).

<sup>103</sup> E.g., Clay Calvert, *The First Amendment, the Media, and the Culture Wars*, 41 CAL. W. L. REV. 325 (2005).

First and most obvious is the cost of the fines. The most important aspect of the fines, however, may be visibility rather than actual economic impact. Until recently, the Commission had imposed relatively few fines, because of its reluctance to penalize broadcasters after new developments in its policies.<sup>104</sup> Moreover, until the *Super Bowl* case, most penalties were small; large broadcasters tended to treat them as just a cost of doing business. And in most cases the legal fees cost more than the fines themselves. As long as fines were isolated incidents, they probably had little effect other than allowing the FCC to show that it was taking action against indecency.

Second, and potentially much more important in the long run, in theory a station could lose its license because of indecent broadcasting. In light of the fact that a network affiliated station in one of the ten largest US markets today has a fair market value of \$500-\$750 million, this obviously is a major concern to investors. This result is relatively unlikely, however, since the Commission rarely has taken away a broadcaster's license as a result of content. The relatively small number of non-renewals in more than 70 years of regulation has been based on either misrepresentations to the Commission or financial misconduct.<sup>105</sup>

Third, on a more realistic day-to-day level, evaluating content for potential indecency liability takes a large amount of time and money. "Standards and practices" broadcast executives review programming and negotiate with producers to change or delete particular material. If a broadcast draws an inquiry from the FCC, corporate and outside counsel must deal with matters ranging from an exchange of letters to a full-blown proceeding, such as those discussed in Section III. Given the extremely high cost of outside lawyers in the United States, one view has it that the Commission creates a "lawyer's relief act" by guaranteeing on-going work for the communications bar. Even a simple proceeding before the full Commission can cost between tens and hundreds of thousands of dollars.

Fourth, technological mechanisms for preventing the broadcast of potentially indecent material during live events are costly. Since the

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<sup>104</sup> See discussion of *Pacifica* and 1987 radio cases *supra* at 15 and 21.

<sup>105</sup> *E.g.*, MICHAEL BOTEIN, REGULATION OF THE ELECTRONIC MASS MEDIA 152-56 (3d ed. 1998)(recounting the two-decade proceeding in which RKO, a major television group owner, ultimately lost several major market VHF television licenses and was forced to sell the remaining stations at distress prices).

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Commission has stated that the live nature of an event is no excuse,<sup>106</sup> broadcasts are under considerable pressure to use “time-delay” technology to allow deletion of potentially indecent material. For radio broadcasters, this is not a prohibitive cost, because of their signals’ low bandwidth and thus eases of storing them for a few seconds.

But any substantial delay in a video environment is extremely complicated and thus expensive. As explained by a senior engineering executive at a major US television network, a post-*Super Bowl* system includes the following human and technical elements. For obvious reasons, the network official provided the following information on a confidential basis:

Generally two people from standards and practices (called “screeners”) are required to police the on air content. Other people often are included to add additional eyes and ears on the live video.

In the case of video delay, typically a “God Shot” is provided in addition to the main venue feed. A God Shot is a general view of the area of the event, and the staff can cut away to it in the event of a potentially indecent scene.

In the case of audio delay, the screener uses headphones with the live audio in one ear and the delayed audio in the other ear. A hand held button is used to squelch the audio when an indecent word is uttered. The equipment includes the following, which includes a second set of all pieces to provide back-up.

1. A delay mechanism for Standard Definition “SD” Video is required for audio and video. The mechanism may either be RAM based

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<sup>106</sup> Infinity Radio License, Inc., 19 F.C.C.R. 5022 (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). The Commission indicated, however that there was an exemption for breaking news, which might be difficult to control.

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or Video Server based. RAM based devices are generally limited to short durations—less than 20 seconds. The delay must allow between 5 and 30 seconds of stored video and audio. \$250,000.

2. A delay mechanism for High Definition “HD” Video is required for most live events today in addition to the SD delay. RAM based devices for HD are very new, and are also limited to roughly 20 seconds. \$350,000.
3. Complete user stations monitoring of the live, delay and God Shot for HD and SD. \$150,000.
4. A separate delay server for offline review with associated audio/video monitoring equipment, to allow using an independent video review source and check it. \$50,000.

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A fully state-of-the-art video time delay system thus costs more than \$750,000 for basic equipment—not including studio space, mobile facilities, furniture, wiring, and other requirements. Moreover, 2 to 4 technicians are necessary to operate the equipment. Although precise cost estimates are not available, the expense of a best efforts compliance program with the Commission’s indecency policy presumably is on the order of almost \$1,000,000 per year.

This may not be a major expense for networks and large group owners—although the transactions costs of creating and maintaining such a system appears to be a continual irritant. But for small television broadcasters—particularly independent and public stations—the expense is prohibitive. Some of them do not even have total budgets in the million-dollar range. If the Commission’s indecency enforcement required these types of expenditures to insure compliance, it might force many smaller stations—precisely those with local and public service programming—off the air. As

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<sup>107</sup> Confidential submission of senior engineering executive (June 30, 2005)(on file with the author).

discussed In Section III(B), some recent consent decrees with large radio broadcasters show a tendency towards these types of requirements.<sup>108</sup>

Much of the concern about the FCC's indecency policies has been with their chilling effect on speech. Despite some isolated large fines, however, the Commission has been careful not to impose direct censorship on particular programs. It has reserved this constitutionally suspect approach to situations—such as the 2004 Super Bowl—in which it wanted to make a highly visible public statement.

More important perhaps is the self-censorship which the FCC has instilled in many broadcasters. It imposes transactions costs, by increasing both internal review and outside attorney fees. Although not directed at any particular content, this may divert both staff time and limited resources from production. The result may be as negative as censuring particular types of content, if smaller stations cannot afford to continue producing diverse and local programming.

## V

### THE EUROPEAN APPROACH

Indecency is of worldwide scope, and obviously the FCC is not the only regulatory authority facing the problem. Its policy stands, however, in stark contrast to that of other countries. It is worth exploring how the European Union (EU) handles the issue, since its contemporary societies are built on similar values as the United States.<sup>109</sup>

The basis for a common EU anti-indecency policy standard is Council Directive 89/552/EEC of October 3, 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member

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<sup>108</sup> See discussion *supra* p. 27.

<sup>109</sup> Ruth Bader Ginsburg, A decent Respect to the Opinions of [Human]kind, Address before the 99th Annual Meeting of the American Society of International Law (Apr. 1, 2005), at <http://www.asil.org/events/AM05/ginsburg050401.html#end1>(The reasoning for such a comparative assessment is convergent with the logic of US Supreme Court Justice, Ruth Ginsburg, who, bearing a broader context in mind, took the position that “we should approach foreign legal materials with sensitivity to our differences and deficiencies, but those differences and deficiencies ... should not lead us to abandon the effort to learn what we can from the experience and good thinking foreign sources may convey.”).

States concerning the pursuit of television broadcasting activities.<sup>110</sup> The current wording of the relevant articles actually derives from Directive 97/36/EC of the European Parliament and of the Council of June 30, 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.<sup>111</sup>

The framework for anti-indecency policy was introduced at the European level through a legislative backdoor. The TVWF Directive is an act of the European Community (EC), an economic node of the EU. Hence, the treaty establishing EC (EC Treaty)<sup>112</sup> does not contain any provision enabling outright intervention in the area of morality, even when the morality concerns hold a protection of minors as their purpose. The latter purpose was therefore shaped as one of exceptions to the Directive's basic principle—freedom of providing broadcast services between member states of the EU. This legally anchored the anti-indecency policy to the economically oriented EC Treaty.

With that in mind, a closer look at the relevant rules of the Directive may be helpful.

A common standard is set in Article 22. It requires that member states “take appropriate measures to ensure that television broadcasts by broadcasters under their jurisdiction do not include any programmes which might seriously impair the physical, mental or moral development of minors, in particular programmes that involve pornography or gratuitous violence.”<sup>113</sup>

Also “other programmes which are likely to impair the physical, mental or moral development of minors” should be eliminated, “except where it is ensured, by selecting the time of the broadcast or by any technical measure, that minors in the area of transmission will not normally hear or see such broadcasts.”<sup>114</sup>

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<sup>110</sup> Council Directive 89/552/EEC, 1989 O.J. (L 298) 23.

<sup>111</sup> Council Directive 97/36/EC, 1997 O.J. (L 202) 60 [hereinafter Television Without Frontiers Directive (TVWF)].

<sup>112</sup> CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 2002 O.J. (C 325) 1.

<sup>113</sup> OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, CONSLEG: 1989L0552 — 30/07/1997, art. 22.1 (1997), at [http://europa.eu.int/eur-lex/en/consleg/pdf/1989/en\\_1989L0552\\_do\\_001.pdf](http://europa.eu.int/eur-lex/en/consleg/pdf/1989/en_1989L0552_do_001.pdf) (last visited Sept. 10, 2005).

<sup>114</sup> See *id.* art. 22.2.

In case of unencoded broadcasts, “any such programmes should be preceded by an acoustic warning” or be “identified by the presence of a visual symbol throughout their duration.”<sup>115</sup>

Therefore, content should be deemed illegal only when, first, it carries the danger of impairing the development of minors and, second, the impact on minors might be serious. If indecent materials fulfill only the first of the two conditions, they are legal, if the “watershed” (i.e., “safe harbor”) timing or appropriate technical solutions are applied. Involvement of pornography and gratuitous violence should in any case be illegal.

Stating this does not, however, really resolve problems about defining the anti-indecency policy in Europe. First, it leaves open institutional questions whether member states or the Community are in a position to decide about the policy. Second, the division between seriously dangerous and moderate materials is unclear at this level, and the border line between the latter and a completely acceptable content is not precise. The substance of the policy is therefore also not resolved.

**A. Institutional aspects**

Of particular significance is the lack of a central enforcement agency defining common obscenity standard in the EU. The jurisdiction of the European Commission (EC Commission)—an executive branch of the EU and the only institution that potentially could be vested with the task — is limited.

The reason for such an institutional arrangement was well expressed by the European Court of Human Rights (ECHR) — the court of last resort established by the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms (Convention)<sup>116</sup> — in its well-known *Handyside* decision<sup>117</sup> of 1976.

The case concerned *The Little Red Schoolbook*, an educational book for children, written by two Danish authors. It contained a twenty-six page section concerning “Sex.”

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<sup>115</sup> See *id.* art. 22.3.

<sup>116</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Eur. available at <http://www.echr.coe.int>.

<sup>117</sup> *Handyside v. United Kingdom*, 1 Eur. Ct. H.R. 737 (1976), available at <http://www.echr.coe.int>.

An English Magistrates' Court issued a summons against the publisher--Mr Handyside--for possession and publication of obscene books for gain, after some readers had complained about its content.

The publisher contended that the book could not be deemed obscene, since it first had been published in Denmark and in several other European countries, raising no obscenity concerns. Additionally, it was not subjected to proceedings in Northern Ireland, the Channel Islands or the Isle of Man. In Scotland, a complaint was brought, but was soon after dismissed on the ground that the accused could not have the necessary mens rea.

The ECHR decision the upheld English courts' discretion, explicitly ruling against a common, substantial European standard. The court stated:

[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject.<sup>118</sup>

Within the EU, there is however a path left for the EC Commission's intervention in the indecency matters—Article 2.a § 2 of the TVWF Directive. On its basis, member states may provisionally derogate from the principle of free trans-border reception of television broadcasts, if some cumulative conditions are fulfilled. The television broadcast must manifestly, seriously and gravely infringe either the Directive's provision on indecency (Article 22) or another one on broadcast containing incitement to hatred (Article 22.a). Moreover, the infringement can not be an isolated exception—at the least, the derogation may be triggered by a second violation during the previous 12 months.

Under another condition, the EC Commission gets involved in the European anti-indecency enforcement policy. After the first infringement (i.e. before the member state undertakes a measure against the broadcaster,) the Commission must be notified in writing of the alleged infringements and the measures intended by the state.<sup>119</sup> It is also a party to compulsory consultations between the broadcaster and the state. Failure of such

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<sup>118</sup> *Id.* § 48.

<sup>119</sup> For this discussion, of less importance is the fact that the broadcaster also is to be notified at that point.



consultations, together with the persistence of the alleged infringement, are preconditions for any further action by the state.

Finally, according to the last two sentences of the Article 2a § 2 of the TVWF Directive:

[T]he Commission shall, within two months following notification of the measures taken by the Member State [sic], take a decision on whether the measures are compatible with Community law. If it decides that they are not, the Member State will be required to put an end to the measures in question as a matter of urgency.<sup>120</sup>

When a member state is about to subject a trans-border broadcast to its anti-indecency policy, the EC Commission holds the last word. This is logical, as it is the Commission's role to supervise the way the member states apply exceptions to the main linchpin of the TVWF Directive – the country of origin principle. Under this, only the state in which the broadcast originates has jurisdiction over the broadcaster. According to the underlying reasoning, comprehensive enforcement of the basic concept of the Directive would be questionable without vesting such a task in the EC Commission.

By reviewing member states' anti-indecency policies, however, the Commission would risk conflicting with them over the relevant standard of morality. Most probably each case would end up before the European Court of Justice (ECJ), a solution not convenient for any party—including the ECJ itself. The EC Commission is therefore very indulgent about measures taken by the member states, avoiding negative positions about the morality standards.

Yet, what makes member states happy does not have to satisfy a station whose broadcast was blocked by the state of its reception on indecency grounds. That happened in the *Danish Satellite TV (DSTV) A/S v. Commission of the European Communities* (known more broadly as *Eurotica Rendez-Vous*.)<sup>121</sup> It was decided by the EC Court of First Instance (CFI) in December of 2000.

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<sup>120</sup> Television Without Frontiers Directive (TVWF), art. 2.

<sup>121</sup> Case T-69/99, *Danish Satellite TV v. Commission*, 2000 E.C.R. II-4039.

The dispute had arisen out of another clash between the harsh attitude towards indecency in Great Britain (particularly England) and the lenient Danish one.

In 1998, the British Government adopted the Foreign Satellite Service Proscription Order 1998 (Order), making it an offence to supply equipment or goods in connection with the Eurotica Rendez-Vous service (broadcast of hard core pornography), to advertise it or to publish its broadcast schedule. Explaining the ground for its action, the government stressed that the broadcast “manifestly, seriously and gravely infringed Article 22 of Directive 89/552 and had done so on a regular basis, including on at least two occasions in the previous 12 months.”<sup>122</sup>

The Commission had been informed properly before the Order was issued, and some time after it went into force had delivered a decision recognizing it as compatible with the Community law. The Order was found nondiscriminatory and appropriate for the purpose of protecting minors. Since there was no way left for the broadcaster—Danish Satellite TV (DSTV) A/S—to challenge the Order on the basis of the British law, the Commission’s decision was brought before CFI. By nullifying it, the court would have opened a way to demand revocation of the Order at the national level.

A decision on the merits of such a case would involve assessing morality standards of different nations—a questionable task. CFI therefore found another way to handle such cases. In reply to the application it stated that the Order existed independently from the later decision of the EC Commission. The latter thus was “limited merely to pronouncing ex post facto on the compatibility with Community law of the Order, which was adopted, independently, by the United Kingdom in the exercise of its discretionary power”<sup>123</sup> and not, as the applicant logically contended, a retroactive authorization of retaining a member state’s national measure. As a result, the application could have been dismissed as inadmissible solely on procedural grounds.

*Eurotica Rendez-Vous* clearly illustrates the complexity of anti-indecency enforcement policy common for EU 25 member states. Weakness of the instruments envisaged by the statutes is one of the factors. But additionally, EC officials realize that they should not interfere with anti-indecency policies at the national level, as long as the member states are

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<sup>122</sup> *Id.* § 5.

<sup>123</sup> *Id.* § 27.

happy with the existing situation.<sup>124</sup> As a result, they are reluctant about using even the soft measures envisaged by the TVWF Directive.

In consequence, anti-indecency policy is predominantly left for the member states—they interpret the very general standard of the TVWF Directive.

There would be hardly any remedy if some of them went as far as FCC did in its post-2004 decisions, particularly because the term “broadcast capable of impairing the development of minors” is more general than the basic US standard for indecency.

But not, even the most conservative ones do.

## **B. Three National standards**

At this point a close look at some of the member states’ concepts of the anti-indecency enforcement policy may be appropriate. Three countries in particular are commonly recognized as the most conservative—Ireland, Poland and United Kingdom—and thus are worth closer inspection. All of them are particularly vulnerable at the point of indecency.

### *1. Ireland*

In Ireland, a radio or television broadcaster can air nothing “which may reasonably be regarded as offending against good taste or decency.”<sup>125</sup> That legal standard can easily accommodate a very far-reaching anti-indecency policy, as “good taste” and “decency” criteria suggest the limit should be quite low.

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<sup>124</sup> CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, 2002 O.J. (C 325) 1, art. 5 (“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”).

<sup>125</sup> Radio and Television Act, 1988, §9(1)(d); *Id.* § 18.1, available at <http://www.irishstatutebook.ie> (Ir.); The Constitution of the land, in paragraph 4.0 Article 6, Section 1, states: “any indecent type of publishing is not allowed, verbally, visually, literally.”

Indeed, enforcement is not lax. In the first half of 2005, the body responsible under Section 24(2)(b) (referring to taste and decency) of the Broadcasting Act 2001<sup>126</sup>--the Broadcasting Complaints Commission (BCC)—upheld six complaints on the ground of indecency and bad taste concerns. Three of them will be discussed here.<sup>127</sup>

Based on the bad taste ground is the case of a TV "newsflash" broadcast, aired half a year before Pope John Paul II's demise, stating that he was clinically dead and that Cardinal Ratzinger was in charge for the time being. After calling the station, the complainant was told it was a joke. He found the joke "distasteful, anti-catholic and insensitive to people suffering from similar diseases."<sup>128</sup> The BCC shared the view, stating that "this sketch was extremely offensive to the Pope, to people and their families and relations with such illnesses and also, to people of religious faith."<sup>129</sup>

Particularly noteworthy for the case is lack of any sexual context, replaced by the category of bad taste, a standard even more difficult to ascertain. It is not a part of the existing US regime, although in its last decisions the FCC seemed to head towards implicitly incorporating bad taste considerations into the indecency criteria.

Generally, in Ireland, sexually oriented material is more likely to be found unacceptably offensive than bad taste content. For sexual depictions, another factor, broadcast timing is of paramount importance. It plays by far less significant role in the case of bad-taste materials.

Two complaints upheld by the BCC might serve as good examples for that.

The first one concerned a promotional piece for a breakfast show, aired at 7:15 A.M. It featured a man boasting in crude terms about having had sex with a number of "Filipino" women as well as a "sister of the Quartermaster of the ...branch of the IRA." BCC upheld the complaint, mainly on the ground that the material made "discriminatory references to

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<sup>126</sup> Broadcasting Act, 2001, *available at* <http://www.irishstatutebook.ie> (last visited Sept. 10, 2005)(Ir.).

<sup>127</sup> All cases decided by the BCC, including full texts, are available at <http://www.bcc.ie/decisions.html>.

<sup>128</sup> BCC, Complaint made by: Fr. Declan Moriarty Ref: 03/05, *at* <http://www.bcc.ie/decisions.html> (Apr. 2005).

<sup>129</sup> *Id.*

women, some of which were also racist, lewd sexual descriptions and puerile male bravado.”<sup>130</sup>

Another complaint referred to a music video, “Call on Me,” where female dancers wore black thong type suits. The complainant found it deliberately sexually orientated and inappropriate for broadcasting at 6.30 P.M. BCC agreed that the content was overtly sexual, absolutely inappropriate for the time of broadcast and therefore offensive.<sup>131</sup>

To some the reasoning may seem controversial, particularly since the border line between acceptable and unacceptable in terms of indecency and bad taste is not clear in Ireland. Among other examples, BCC found nothing wrong in airing a word “arseholery”<sup>132</sup> or a heterosexual woman trying to seduce a homosexual man in a program at 6.00 P.M.<sup>133</sup>

In terms of the FCC’s current enforcement policy, the most important feature of the Irish system is its lack of a legal basis for imposing fines when complaints are upheld.<sup>134</sup> A BCC decision is therefore a mere statement of a violation. A message that a station went wrong in assessing an acceptable standard of indecency apparently is enough. Additionally, without being spurred with fines, broadcasters are less willing to contest the BCC’s decisions.

## 2. *Poland*

Polish anti-indecency law is also strict in wording and ambiguous in practice, leading to a stringent enforcement policy.

The Radio and Broadcasting Act of 29 December 1992<sup>135</sup> refers to the decency standards of the TVWF Directive based on impairment of physical, mental or moral development of minors. While the Directive forbids content

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<sup>130</sup> BCC, Complaint made by: Ms. Veronica Healy Ref: 260/04, at <http://www.bcc.ie/decisions.html> (Apr. 2005).

<sup>131</sup> BCC, Complaint made by: Jonathan Derham Ref: 193/04, at <http://www.bcc.ie/decisions.html> (Jan. 2005).

<sup>132</sup> BCC, Complaint made by: Sam Clements Ref: 68/05, at <http://www.bcc.ie/decisions.html> (June 2005).

<sup>133</sup> BCC, Complaint made by: Marie Clancy Ref: 62/05, at <http://www.bcc.ie/decisions.html> (June 2005).

<sup>134</sup> See Broadcasting Authority (Amendment) Act, 1976, § 4, at <http://www.irishstatutebook.ie> (last visited Sept. 10, 2005).

<sup>135</sup> Official Journal Dziennik Ustaw, No. 7, Item 34 (1993)(with further amendments).

possibly causing serious effects of that sort, the Radio and Broadcasting Act excludes broadcasts threatening physical, mental or moral development of minors,<sup>136</sup> a difference devoid of practical significance. In the exact wording of the Directive, it explicitly makes pornography<sup>137</sup> or exhibiting gratuitous violence<sup>138</sup> illicit, exploring the outer limits of what the TVWF Directive enables nations to prohibit.<sup>139</sup> Indeed, the law also establishes a ban on materials propagating “attitudes and beliefs contrary to the moral values and social interest”<sup>140</sup> or not respecting “religious beliefs of the public and especially the Christian system of values.”<sup>141</sup>

Broadcasts that are “less dangerous” to minors, but which nevertheless may have an adverse impact upon their development may be transmitted only between 11.00 P.M. and 6.00 A.M.<sup>142</sup> The watershed is therefore set at a late hour, compared to other EU member states.

To face bad language in media, broadcasters must “counteract the

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<sup>136</sup> Broadcasting Act of Dec. 29, 1992, art 18.4, (1992), *available at* <http://www.krrit.gov.pl/stronykrrit/angielska/index.htm> [hereinafter Pol. Broad. Act](Pol.).

<sup>137</sup> Prohibition of pornography in radio and broadcasting is a logical consequence of the Polish criminal law, which prohibits both presenting pornography to a person who objects to such presentation and presenting pornography or disseminating it in a way enabling children under 15 to become acquainted (Polish Penal Code, Art. 202 § 1-2 (1997); Official Journal Dziennik Ustaw, No. 88, Item 553 (1999)(with further amendments)). Remarkably, the Code contains no definition of “pornography.”

<sup>138</sup> Pol. Broad. Act, art. 18.4.

<sup>139</sup> For instance, under a very permissive Swedish Radio and Television Act (1996:844), Ch. 6, §2, stating that “programmes containing portrayals of violence of a realistic nature or pornographic images which are broadcast on television must either be preceded by an audio warning, or contain a warning text continuously displayed on screen throughout the broadcast. Such programmes may not be broadcast at times and in a manner that involves a considerable risk that children can see the programmes, unless such broadcast may nonetheless be defended on special grounds.”

<sup>140</sup> Pol. Broad. Act, art. 18.1.

<sup>141</sup> *Id.* art. 18.2.

<sup>142</sup> *Id.* art. 18.5. Additionally they need to be identified graphically (broadcasting) or by the way of an oral announcement (radio) – a common practice in the EU.

vulgarisation of the language used” in the content aired.<sup>143</sup>

An executive regulation<sup>144</sup> elaborates the notion of content with a possible adverse impact upon development of minors,<sup>145</sup> but not dangerous enough to justify a complete ban. Young people under 18 should not watch or listen to depictions of social justifications for aggression, vulgarity, prejudices or negative social stereotypes, treating sex, aggression or breaching moral norms as a source of a success in life, or naturalistic images of sex, pathologic forms of sex or sex as a source of domination. Also, attractive characters should not behave in a vulgar manner. On the other hand, there are no real definitions of content threatening development of minors (the most inappropriate, including pornography).

Legislation with such vague contours but impermissible character may raise concerns about freedom of speech, especially because the regulatory authority—the National Broadcasting Council (Council)—is obliged to impose fines.<sup>146</sup> This approach shows society’s predominantly conservative attitude towards morality and is respected by broadcasters.

The Council generally avoids formal legal proceedings. Sometimes, however, the enforcement regime becomes very severe, leading to concerns about its purposefulness by broadcasters.

One case<sup>147</sup> concerned a radio program, *Ryłkołak Horror Szół*, aired between 10 P.M. and 12 P.M. on a local station. The Council found improper fictitious depictions of eating a carcass or coprophagy as promoting perversion and appreciation for “destruction brought by the Lord of Darkness,” finding “an element of ritual and satanic terminology.” An undoubtedly macabre but fictitious depiction of a woman dying while giving

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<sup>143</sup> Pol. Broad. Act, art. 18.7.

<sup>144</sup> Official Journal *Dziennik Ustaw*, No. 130, Item 1089 (2005). Regulation of the National Broadcasting Council of 23 June 2005 concerning qualifying programs or other broadcasts that might impair physical, psychological or moral development of minors and programs or other broadcasts designed for a given age category of minors, usage of the graphic symbol patterns and announcement formulas.

<sup>145</sup> Annex nr 3, point I.

<sup>146</sup> Pol. Broad. Act, art. 53 § 1.

<sup>147</sup> Decision nr 9/2004 of 5.07.2004 r.; published in: *Krajowa Rada Radiofonii i Telewizji; Biuletyn Informacyjny*, 7-9/2004, p. 84, available at <http://www.krrit.gov.pl>.

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birth to an unidentified alien creature, with typical horror style narration, was held to be obscene. Using the word “leak,” fell into a category of “vulgarisms” and in the Council’s view introducing a music band saying that it is “antichristian” should be deemed as violating religious emotions of listeners. Finally, strongly spoken disregard for a political class was called “nihilism.”

The Council admitted that this kind of material might be acceptable inside a “cameral turpistic cabaret of threat” (whatever it is supposed to mean) but not on a public radio station. Bad taste considerations alone led to such a decision, even though no swearing no pornography was involved.

Though the fine was moderate—3.300 PLZ (about U.S. \$1,000)—another, less formal remedy was available for a program of undoubtedly bad taste and deliberate controversy, but not explicitly indecent. The Council would have done better using it. The remedy is an admonishment demanding the broadcaster to reschedule a program after the watershed at 11:00 at night.

In another decision in March 2004, the Council imposed a fine of 10.000 PLZ (about U.S. \$3,000) on a public TV station for broadcasting between September 2003 and February 2004, at 9.00 P.M., a documentary series titled “Ballad with a slight erotic flavour” (“Ballada o lekkim zabarwieniu erotycznym,”) depicting a society of prostitutes and panders.<sup>148</sup> The Council, after several complaints about the very unclear message of the series, recognised that it had infringed the indecency rules on two main grounds. Contrary to the contentions of the station, it was found to depict perverted behaviours towards women as if they were normal and attractive. Although the documentary was narrated, no comment on this attitude had been supplied. More important, however, the content was broadcast two hours before the watershed. Persistence of the indecent content (22 similar pieces) and its context were therefore crucial. The fact that a topless woman danced was of much less gravity.

The two cases may seem controversial, but they are exceptions to a generally more lenient policy. As in the US, such a situation raises questions about legal stability. On the other hand, under the policy of the Polish regulatory authority, there is nothing to suggest that a spontaneous use of the word “fucking” (as in the *Golden Globes* case) or random nudity (as in the

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<sup>148</sup> Decision nr 2/2004 of 16.03.2004 r.; published in: *Krajowa Rada Radiofonii i Telewizji; Biuletyn Informacyjny*, 3-4/2004, available at <http://www.krrit.gov.pl>.



*Super Bowl* case) would raise any concerns.

Nevertheless, content comparable to the *Fox Broadcasting* case might raise some legal concerns in Poland too. In March 2002, the Council fined a broadcaster of the third “Big Brother” series<sup>149</sup> of about \$100,000. Among the main grounds were “violence and ruthless combat” being “a main engine of the program,”<sup>150</sup> though in fact the most violent game was boxing (with full equipment) ending with one nosebleed. But the Council decided that the show “presents group norms contradictory to morality and the erotic content is separated from the moral responsibility for behaviour related to the erotic sphere of a human life.”<sup>151</sup> Those concerns were instigated after a caress in a bath full of foam between two naked participants, taking place a few times during the week. Though the broadcast remained very implicit, the participants’ admission that it was showing sexual intercourse was enough to stir the Council to act.

After more than a year without a court decision, the broadcaster and the Council reached an amicable solution—the fine was cut in half and 2/3 of it was donated to support a charity foundation supported by the broadcaster.<sup>152</sup> Only about \$15,000 was paid to the state. Such a settlement obviously brought more benefits to the broadcaster than to the Council, suggesting that it was concerned about the probable outcome of the court decision. Indeed, no later reality show has driven the Council to proceed so aggressively. The agency apparently has adjusted its policy towards this kind of programs, becoming more flexible and tolerant.

### 3. *United Kingdom*

The United Kingdom has been changing the legal basis for its anti-indecency policy. Yet, this process should not put much pressure on its enforcement strategy in the near future.

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<sup>149</sup> A reality show. Several participants were isolated in a house under instant observation of TV cameras. Every week participants and viewers were deciding who needed to leave the program. After 100 days the winner was chosen. He was awarded with about \$150,000.

<sup>150</sup> *Krajowa Rada Radiofonii i Telewizji; Biuletyn Informacyjny*, 3-4/2002, p. 60, available at <http://www.krrit.gov.pl>.

<sup>151</sup> *Id.*

<sup>152</sup> Decision nr 9/2003 of 14.10.2003; published in: *Krajowa Rada Radiofonii i Telewizji; Biuletyn Informacyjny*, 10-12/2003, available at <http://www.krrit.gov.pl>.

After the Communications Act was passed in 2003, a new Code of Conduct — Broadcasting Code (Ofcom Code) — for television and radio was adopted, covering standards in programs, sponsorship, fairness and privacy, by the Office of Communications (Ofcom). The Code generally<sup>153</sup> took effect on July 25, 2005, replacing, among others, the Programme Code of Independent Television Commission.<sup>154</sup>

The Ofcom Code forbids most offensive language before the watershed — 9 P.M. in the UK<sup>155</sup> or when children are particularly likely to be listening<sup>156</sup> — and states that other offensive language is allowed when justified by the context, being at the same time infrequent.<sup>157</sup> Only in the most exceptional circumstances is the offensive language allowed in programs made for younger children.<sup>158</sup>

The Ofcom Code uses two types of expressions describing inappropriate language — “most offensive” and “offensive.” But it may not, however, seem to be so in practice, as shown by the Guidance Notes issued by Ofcom for the interpretation of its Code.<sup>159</sup> In fact they do not diverge from previous policy, stating that:

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<sup>153</sup> OFCOM, THE OFCOM BROADCASTING CODE, (2005)[hereinafter OFCOM CODE]. Only the Section 10.17—Financial promotions and investment recommendations—out of this paper’s scope—came into force earlier, on July 1, 2005.

<sup>154</sup> Due to the change in law, ITC ceased to exist from December 2003. Its duties, including issuing the Code, have been assumed by Ofcom.

<sup>155</sup> OFCOM CODE, § 1.4. According to the principle, the content unsuitable for children should not, in general, be shown before 9.00 P.M. or after 5.30 A.M. On premium subscription film services broadcast down to BBFC 15-rated, the watershed is at 8.00 P.M. BBFC 15-rated is the content which can be viewed by children less than 15 years old, according to standards of the British Board of Film Classification. More precise criteria for the classification are available at <http://www.bbfc.co.uk>.

<sup>156</sup> OFCOM CODE, § 1.14.

<sup>157</sup> *Id.* § 1.16.

<sup>158</sup> *Id.* § 1.15.

<sup>159</sup> OFCOM, GUIDANCE NOTES, SECTION ONE: PROTECTING THE UNDER 18S, *at* <http://www.ofcom.org.uk/tv/ifi/guidance/bguidance/guidance1.pdf> (last visited Sept, 10, 2005).

[O]ffensive language is a feature of British life and, in certain contexts, it has an appropriate place in broadcasting. However it raises concerns about harm to children and offence in general. There is a concern that children may imitate offensive language or be upset to hear this language, when their parents or careers have told them it is wrong, before they have worked out their own attitude to its use.

Milder language in the early part of the evening may be acceptable, for example, if mitigated by a humorous context. However, in general, viewers and listeners do not wish to hear frequent or regular use of such language, including profanity, before 2100.<sup>160</sup>

The Code and Guiding Notes shed some light on Ofcom's possible attitude towards incidents like the one *Golden Globes* case. Expressing joy with the F-word should be deemed inappropriate, especially by a rockstar admired by adolescents. Still, when uttered once in a rather innocent context, it seems to remain acceptable according to the Ofcom Code. And for sure no fines would ensue.

A look at the Ofcom's practice of the bad language complaints supports the contention.

In December 2004, at about 10.00 A.M., MTV2 was broadcasting a countdown of "Greatest Singles," during which two members of a rock band presented a short, pre-recorded piece.<sup>161</sup> One incident of swearing was edited, but a few seconds later the same person clearly used the word "fuck," which was not deleted. The morning time of broadcast caused a viewer to submit a complaint to Ofcom.

This incident is similar to *Golden Globes*, although there is a significant difference – the material was pre-recorded and checked before airing. The station therefore could not claim it was surprised by the behavior of the artist and one might have expected the broadcast to be devoid of any

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<sup>160</sup> *Id.* at 4.

<sup>161</sup> Ofcom, *MTV 2's Greatest Singles*, OFCOM BROADCAST BULLETIN, Apr. 25, 2005, at 5, available at [http://www.ofcom.org.uk/tv/obb/prog\\_cb](http://www.ofcom.org.uk/tv/obb/prog_cb).

indecenty.

Realizing that there had been a complaint about the program, MTV broadcast an apology the next weekend, at the same time when the contested material had aired, and it introduced a new requirement for producers to double check this type of content before transmission.

Ofcom stressed that “the use of the word ‘fuck’ was unacceptable for broadcast at that time” and it was “concerned that such content was overlooked when it was included in pre-recorded material.”<sup>162</sup> Yet, no further consequences were drawn, at least partly due to responsiveness of the station.

Among several other complaints upheld by Ofcom in the first half of 2005, two are quite representative and illustrate Ofcom’s enforcement policy.

The first one concerned a pre-recorded dating game with a twist, in which a female contestant had to identify gay men from a selection of single men, to win a cash prize.<sup>163</sup> The program was initially commissioned for transmission on a Friday night, but then repeated on a Saturday morning, after editing its language. One case of the contestant muttering the word “fuck” under her breath had been omitted. However, even though the channel’s presentation department apologized immediately after the program, the Ofcom upheld the complaint. Yet its action was apparently related to a broader context of the case. Just a couple of weeks before the Ofcom had received complaints about two other broadcasts of the station. The complaints had been resolved, but apparently the regulator decided that the fourth chance would be inappropriate.

Swearing, violence and featuring alcohol in a wrestling broadcast at 9:00 A.M. triggered another complaint.<sup>164</sup> It regarded, first, an interview with a wrestler who used the word “fuck.” Second, the material included a wrestling match with, typical for this kind of shows, high degree of violence, “including the use of everyday objects such as tables, chairs, ladders, lights and barbed wire as weapons” and swearing “motherfucker.” Additionally, one of the wrestling teams “made a feature of their supposed ‘alcohol’

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<sup>162</sup> *Id.*

<sup>163</sup> Ofcom, *Playing it Straight*, OFCOM BROADCAST BULLETIN, June 20, 2005, at 4, available at [http://www.ofcom.org.uk/tv/obb/prog\\_cb](http://www.ofcom.org.uk/tv/obb/prog_cb).

<sup>164</sup> Ofcom, *Bam Bam Bigelow Interview/Cage of Death The Wrestling Channel*, OFCOM BROADCAST BULLETIN, May 9, 2005, at 3-4, available at [http://www.ofcom.org.uk/tv/obb/prog\\_cb](http://www.ofcom.org.uk/tv/obb/prog_cb).

consumption before the match began and encouraged the crowd to drink the 'beer' the team carried." Ofcom upheld the complaint, stressing inappropriateness of the air time, particularly that before obtaining its licence, the Wrestling Channel needed to provide the regulator with specific reassurances regarding family viewing and watershed issues.

On the other hand, not every complaint concerning use of bad language ends up being upheld. Many cases have been resolved without finding a violation.

A case of another music star—Sir Elton John—is a good example. He was a guest on an edition of a breakfast show. Believing that he was off-air, he:

[U]sed the word "fucking" when describing how difficult he had found it to get out of bed unusually early that morning to appear on the programme. When Sir Elton realised that his comments had been broadcast, both he and the presenter apologised but later in the interview he mischievously suggested that he had this urge, near 10am, that made him want to say "bollocks" and "bugger." He also asked whether it was acceptable to use the word "wank." Again the presenter apologised for his remarks.<sup>165</sup>

The humorous purpose of using the words and the fact that they were not meant to insult anyone were significant in the outcome. Even more important was the response of BBC. Its apologies (the station also reminded the presenter "of the need for caution in live interviews") alleviated the situation. Yet, even without such "extenuating circumstances," it is hardly possible that a single interview could lead to a fine; penalties are rare, when a breach is particularly serious. An example of the sort will be discussed below.

The Ofcom Code also does not significantly change the regulatory attitude towards sex and nudity.<sup>166</sup> It thus does not incorporate a report on the

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<sup>165</sup> Ofcom, *Chris Moyles*, OFCOM BROADCAST BULLETIN, Feb. 14, 2005, at 7, available at [http://www.ofcom.org.uk/tv/obb/prog\\_cb](http://www.ofcom.org.uk/tv/obb/prog_cb).

<sup>166</sup> OFCOM CODE, § 1.17-18.

issue, published in May 2005 under the aegis of OfTel itself.<sup>167</sup> The report reviewed literature regarding the impact of R18 material (i.e. hard core pornography) on children and adults. Its main conclusion was that R18 might not seriously impair development of minors, although it might influence their moral development.<sup>168</sup> Regardless of the last finding, the report suggested that, according to the research collected, availability of pornography may reduce, more than increase the number of sex crimes. It also undermined any “relationship between the commission of sex crimes and use of pornography at an early age.”<sup>169</sup> As Ofcom was not ready to follow the report, BBFC R18-rated films or their equivalents can not be broadcast also under the new Code.<sup>170</sup>

On the other hand, before the watershed time (or, in case of radio broadcasts, where no watershed exists in the UK, when children are particularly likely to be listening) sexual intercourse may be allowed, but only for a serious educational purpose.<sup>171</sup> The same is true for a discussion on or portrayal of sexual behavior when editorially justified, appropriately limited and inexplicit.<sup>172</sup>

Bearing this in mind, the US *Fox Broadcasting* case may raise some concerns about depicting sexual behavior, but editorial intervention and rather inexplicit ways of presentation apparently would weaken such contentions.

Nudity, which is of particular relevance to the American *Super Bowl* case, must be justified by the context, if broadcast before the watershed.<sup>173</sup> No explicit guidance exists on whether the artistic character of a performance, like Janet Jackson's, can be a justification for nudity; but the fact that the broadcaster was not aware of the plans and the viewers could see the (partial)

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<sup>167</sup> ELLEN HELSPER, OFCOM, R18 MATERIAL: ITS POTENTIAL IMPACT ON PEOPLE UNDER 18 (2005), *available at* <http://www.ofcom.org.uk/research/radio/reports/bcr/r18.pdf>.

<sup>168</sup> *Id.* at 4 (“[T]hrough exposure to pornography young people become more cynical towards traditional relationships (marriage) and become sexually active at a younger age.”).

<sup>169</sup> *Id.*

<sup>170</sup> OFCOM CODE, § 1.24-25. The exceptions, under some conditions, are premium subscription services and pay per view/night services broadcasting ‘adult-sex’ material.

<sup>171</sup> *Id.* § 1.17.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* § 1.18.

nudity only for a blink of an eye are undoubtedly parts of the context that Ofcom would have to take into account.

Enforcement practice in that regard underlines one more feature of the UK's standard—infrequency of fines.

In February 2005, Ofcom imposed a £25,000 penalty on Playboy TV UK/Benelux Limited for an encrypted broadcast on May 1, 2004, at 00:08 A.M. of R18 version material showing “extremely graphic images of real sexual activity including close-ups of genital penetration.”<sup>174</sup> Ofcom found the material clearly breached the Code and rejected Playboy's contention that the compliance failure was a result of human error, because of a lack of adequate training and operational procedures. Playboy's situation was aggravated by the fact that it broadcast at more or less the same time, 18 standard promotional and other material before watershed, an activity found inappropriate. Even though a Code violation had been admitted straightaway and the station contended that it would not be repeated, Ofcom remained concerned about the effectiveness of Playboy's procedures to prevent that kind of material in the future, deciding to prod it with a fine.

In another case, resulting in a financial sanction imposed in June 2005, a broadcaster was found to have shown adult material on an unencrypted music channel and to have breached rules on advertisements.<sup>175</sup> The fine was £18,000 (U.S. \$35,000,) a moderate figure compared to current FCC actions. The distinguishing feature of the case was, however, that the licensee's history of non-compliance (including retaining and producing recordings) together with the repeated and sustained nature of the breaches left Ofcom little leeway as to sanctions.

On the other hand, Ofcom resolved a complaint regarding sexual innuendo and inappropriate pictures and lyrics for the broadcast time (about 5.00 P.M.) of a video accompanying the track *My Neck, My Back* without upholding a complaint.<sup>176</sup> The video featured three women in bikinis washing a truck while being hosed down by firemen. As Ofcom stated: “we also accept

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<sup>174</sup> Ofcom Content Sanctions Committee, *Playboy TV UK* (2005), available at [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/adj-playboytv.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/adj-playboytv.pdf).

<sup>175</sup> Ofcom Content Sanctions Committee, *Video Interactive Television Plc* in respect of its service *Channel U* (2005), available at [http://www.ofcom.org.uk/tv/obb/ocsc\\_adjud/channelu.pdf](http://www.ofcom.org.uk/tv/obb/ocsc_adjud/channelu.pdf).

<sup>176</sup> Ofcom, *Khia 'My Neck, My Back'*, OFCOM BROADCAST BULLETIN, Feb. 28, 2005, at 6-7 available at [http://www.ofcom.org.uk/tv/obb/prog\\_cb](http://www.ofcom.org.uk/tv/obb/prog_cb).

that many modern music videos, particularly for certain music genres, portray women in a way that many viewers may not approve of.” A second chance was given to the broadcaster in the case; one of the main reasons for not finding a breach was the commitment to re-schedule the video for transmission only after 10:00 P.M.

The cases suggest that sexually oriented material may cause a violation, depending on explicitness of content and the broadcaster’s behaviour after the complaint occurs. It is hard to imagine that a single incident can induce Ofcom to issue a fine notice.

In the context of the UK policy, an adoption of a time-delay technology by the British Broadcasting Corporation (“BBC”) is also worth mentioning. For some, the case may serve as a back-up example for the latest policy of FCC. Adoption of the technology was, however, voluntary, with a purpose to protect viewers against “upsetting images”—in this case violence, not sex.<sup>177</sup> The BBC’s move came particularly in reaction to coverage of the Beslan school siege in 2004.<sup>178</sup>

Besides, the BBC is a public broadcaster, with a strong position on the market and a broadcasting policy relying on high moral standards. Particular sensitivity for inappropriate content is a long standing principle and a time-delay technology is its logical consequence. With the FCC’s enforcement policy, of particular significance is the fact that the technology adoption was not a result of a legal proceeding against the broadcaster. Ofcom has expressed no willingness of requiring it.

## CONCLUSION

At first glance, the Commission’s post-2004 indecency enforcement initiative may look like an ideologically inspired radical lurch towards repression of broadcast speech. The FCC has broadened its definition of

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<sup>177</sup> BBC, Coverage of Bomb Injuries (July 8, 2005), at <http://www.bbc.co.uk/complaints/news/2005/07/08/20481.shtml>. For example, the BBC formally apologized to the public for showing gory scenes of injuries after the terrorist subway bombing of July 7, 2005.

<sup>178</sup> Alan Cowell, *BBC to Use Time Delay Device to Weed Out Upsetting Images*, N.Y. TIMES, June 24, 2005, at A4. Like the FCC, the BBC was primarily concerned with the effect of programming on children.



indecently considerably, changed the procedural as well as other rules of the game, and accelerated the processing of complaints many-fold.

This clearly is a political development, in the general sense of the term. Its origin is less than clear. Depending upon one's taste in conspiracy theories, it can be viewed in a number of different ways. The White House may have ordered the FCC to crack down on indecency, during a campaign season in which "family values" were a major issue.<sup>179</sup> Or the new well-funded anti-indecency groups simply may have stormed a not-unwilling Commission with their computer-generated indecency complaints.<sup>180</sup> Or the easy availability of the Internet may have made it increasingly easier to file complaints. Neither these nor other theories are susceptible of easy proof, of course, nor does it probably make much difference in any event. The important issue is in evaluating the effect and the long-term consequences of the new implementation policy.

On an operational level, broadcasters have been thrown into a state of confusion as to compliance with the new enforcement policy, and some have chosen to avoid any potentially improper material.<sup>181</sup> Moreover, the cost of complete compliance may be relatively high, in terms of implementing technology capable for delaying live broadcasts and allowing deletion of offensive material.<sup>182</sup> On the other hand, there is a long history in US broadcasting—particularly radio—of stations largely ignoring the FCC's threats until the agency takes serious action.<sup>183</sup>

Perhaps the biggest problem is that the Commission has been playing fast and loose with traditional indecency concepts to the extent that no one—least of all the FCC—has a clear concept as to what speech is indecent. This has several results, all of which make for bad policy and lawyering. First, since 2004 the Commission has jury-rigged its doctrine to the extent that it no longer seems to have a coherent theory. If it needs to find indecency, it falls

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<sup>179</sup> See discussion *supra* p. 11.

<sup>180</sup> See discussion *supra* p. 19.

<sup>181</sup> As discussed above, one of the most telling signs of this was the decision of 66 ABC affiliates not to broadcast *Saving Private Ryan* in 2004—a blockbuster movie from possibly the world's most renowned producer which had been approved twice before by the FCC's Enforcement Bureau.

<sup>182</sup> See discussion *supra* p. 35.

<sup>183</sup> MICHAEL BOTEIN, *REGULATION OF THE ELECTRONIC MASS MEDIA* 465 (3d ed. 1998). Surveys of rock stations have shown that broadcasters generally disregard FCC directives as to indecency, drug lyrics, and the like—again, until the Commission takes very concrete action.

back on evidentiary constructs such as “innuendo” and the like.<sup>184</sup> If it seeks to avoid imposing liability—as with *Saving Private Ryan*<sup>185</sup>—it finds patriotic or artistic merit.

This leaves broadcasters and their lawyers in a doctrinal void. Stations have no clue as to what constitutes potentially actionable programming, and thus either avoid any vague danger—such as *Saving Private Ryan*—or consult their lawyers. Their lawyers do not have much better ideas, because both the doctrine and the procedure have become so muddled in little more than a year. In that type of situation, of course, the safest approach for an attorney is to advise a broadcaster not to do whatever was proposed. This approach not only avoids unsightly malpractice cases, but also creates more fees than simply declining to give an opinion—particularly since the Commission’s procedure here does not lead to hearings, which would generate substantial legal fees.

Moreover, the Commission is left in the position of having to do something about the continuing flood of indecency complaints. After all, over the last two years it has seen the number of filings increase by several tens of thousands of percent, which naturally eats up resources in processing repetitive complaints and drafting repetitive opinions. But its options are not clear. On the one hand, it cannot simply change its processing policies to exclude computer-generated filings like those promoted by the Parents Television Council;<sup>186</sup> it has been accepting them for too long to begin refusing them. On the other hand, the Commission at some point may need to reduce its administrative workload, as it faces increasingly complex telecommunications matters with an effectively frozen budget. The result may be a slow, natural, and publicly invisible reduction in its commitment to indecency enforcement.

This would be fully consistent with the tortured history of this area. Shortly after the Supreme Court’s *Pacifica* decision, the Commission disavowed any intent to enforce its newly validated indecency jurisdiction.<sup>187</sup> And after issuing a spate of indecency warnings against radio stations in 1987, the FCC quickly backed off an aggressive enforcement role.

The European experience may show that even the most stringent anti-indecency standards do not correspond with current FCC policy. The regulatory authorities of the EU member states are concerned about

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<sup>184</sup> See discussion *supra* p. 31.

<sup>185</sup> See discussion *supra* p. 33.

<sup>186</sup> See discussion *supra* p. 19.

<sup>187</sup> See discussion *supra* p. 14.

audiovisual content inciting to racial and/or religious hatred<sup>188</sup> and discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation<sup>189</sup>--not pornography. Additionally, the main policy document common for all the member states<sup>190</sup> focuses almost entirely on the challenges caused by Internet,<sup>191</sup> insisting on self-regulation instead of a strong enforcement policy. The FCC's 2004 policy would probably gain no support among European regulators.

In thirty years of US indecency policy, the trend has been definitely cyclical — with cycles of brief enforcement and then a hands-off approach until recently.

Good reasons exist for the Commission to return to a forbearance mode.

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<sup>188</sup> CONCLUSIONS OF THE HIGH-LEVEL GROUP OF REGULATORY AUTHORITIES IN THE FIELD OF BROADCASTING, INCITEMENT TO HATRED IN BROADCASTS COMING FROM OUTSIDE OF THE EUROPEAN UNION, *at* [http://europa.eu.int/comm/avpolicy/legis/conclusions\\_regulateurs/conclusions\\_regulateurs\\_fin\\_en.pdf](http://europa.eu.int/comm/avpolicy/legis/conclusions_regulateurs/conclusions_regulateurs_fin_en.pdf) (Mar. 17, 2005).

<sup>189</sup> Proposal for a Recommendation of the European Parliament and of the Council on the protection of minors and human dignity and the right of reply in relation to the competitiveness of the European audiovisual and information services industry, COM(2004)341 final [hereinafter Proposal for a Recommendation].

<sup>190</sup> Council Directive 98/560/EC, 1998 O.J. (L270) 48. Council Recommendation on the development of the competitiveness of the European audiovisual and information services industry by promoting national frameworks aimed at achieving a comparable and effective level of protection of minors and human dignity. It is to be replaced by the Recommendation mentioned at 48.

<sup>191</sup> Proposal for a Recommendation, art. 10 (“Commission noted that the portrayal of the sexes in the media and in advertising raises important questions about the protection of the dignity of men and women, but concluded that it would not be appropriate to address these questions in that proposal.”).