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In the Dark: A Consumer Perspective on FCC Broadcast Indecency Denials

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In the Dark: A Consumer Perspective on FCC Broadcast Indecency Denials

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I.	INTRODUCTION	68
II.	INDECENCY DETERMINATION PROCEDURES	72
	A. <i>How the FCC Determines Indecency</i>	72
	B. <i>The Broadcast Decency Enforcement Act</i>	73
	C. <i>The Complaint Process</i>	74
II.	ANALYSIS OF THE COMPLAINTS	75
	A. <i>Method</i>	75
	B. <i>Analysis</i>	76
	1. <i>Medium Targeted</i>	78

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2.	Geographical Distribution.....	79
3.	Categories: Sexual Content.....	80
4.	Categories: Profanity.....	81
5.	Categories: Sex-Related Products.....	82
6.	Categories: Lyrics.....	83
7.	Categories: Homosexuality.....	84
8.	Ads and Promotions.....	84
9.	Time Lapse Between Initiation of Complaint and FCC Response.....	85
C.	<i>FCC Grounds for Denial/Dismissal</i>	85
D.	<i>Discussion of the Data</i>	88
III.	RECENT FCC ACTIONS.....	89
A.	<i>The Omnibus Order</i>	89
B.	<i>The Second Circuit Case</i>	90
1.	The Majority Opinion.....	91
2.	The Dissent.....	93
3.	The FCC's Response.....	94
C.	<i>Protecting Children from Indecent Programming Act</i>	94
D.	<i>Discussion</i>	95
IV.	OTHER RECOMMENDATIONS.....	95
V.	CONCLUSIONS AND SUGGESTIONS.....	99
A.	<i>The FCC Must Create and Publicize Clear, Defensible Indecency Guidelines</i>	102
B.	<i>The FCC Must Respond More Quickly to Complaints</i>	103
C.	<i>The FCC Must Manage Complaints and Complainants and Provide Clarity in Responses</i>	104
D.	<i>Conclusion</i>	108

I. INTRODUCTION

A father in the Jacksonville, Florida, area is dismayed to find that there is profanity on the cartoons *King of the Hill*, *Futurama*, and *The Simpsons* that his children watch on WAWS-TV, his local Fox affiliate, at 7:00 p.m.¹ He emails a complaint to the Federal Communications

1. See Broadcast Complaint against WAWS-TV, File No. EB-03-IH-0448 B89 (FCC Sept. 23, 2003) (on file with authors). All complaints in this document were obtained using a Freedom of Information Act request. The FCC redacts identifying information from complaints under the personal privacy exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(6) (2002). The letter and number following the Enforcement Bureau (EB) number is a reference to the eight PDF files (A-H) sent by the FCC in response to the FOIA request and the page number of that file.

Commission (“FCC”), demanding that the FCC “do [its] job and put a schering [sic] halt to the cussing in [any] cartoon form what so ever [sic].”²

The father then waits 204 days (from September 23, 2003, when he filed the complaint, to the April 14, 2004 FCC response) to learn that the FCC has denied his complaint. In a form letter nearly two pages long that is filled with legal and U.S. Code citations, he learns that he has not provided the FCC with sufficient context to make a determination of indecency. The FCC says it will reconsider his complaint if he refiles it with additional information:

You may provide such information in the form of a significant excerpt of the broadcast or a full or partial tape or transcript of each broadcast. In whatever form the information is provided, it is important that it is sufficiently detailed to allow us to ascertain the actual words and language used during the broadcasts.³

Seven months after the fact, the father is unlikely to have kept any recordings he may have of the offending content, if he made recordings at all.

A mother in Houston is concerned to discover that her teenage daughter’s favorite TV show, *America’s Next Top Model*, contains questions from the host to the models concerning their sexual activity, including questions about their virginity and the strangest places they had sex.⁴ She is upset by this series of questions and writes not only to the UPN network to protest, but to the FCC to file an indecency complaint, lamenting “all the unnecessary nudity and foul language on television nowadays.”⁵ She waits 159 days (from February 20, 2004, to July 28, 2004) to receive a very similar form letter, again filled with legal citations, in which the Commission concludes that the content of the broadcast was “not sufficiently graphic and explicit to be deemed indecent”⁶ and is encouraged to use the V-Chip to block content she does not want her daughter to see.⁷ However, any questions she may have about what *would* be considered “sufficiently graphic and explicit” enough to be deemed indecent remain unanswered.

In the time since Janet Jackson’s breast was bared during the 2004 Super Bowl halftime show and the phrase “wardrobe malfunction” was

2. *Id.*

3. Letter from William D. Freedman, Deputy Chief, Enforcement Bureau, File No. EB-03-IH-0448 B86 (FCC Apr. 14, 2004) (on file with authors).

4. See Broadcast Complaint against KTXH-TV, File No. EB-03-IH-0243 E43 (FCC Feb. 20, 2004) (on file with authors).

5. *Id.*

6. Letter from William D. Freedman, Deputy Chief, Enforcement Bureau, File No. EB-03-IH-0243 E41 (FCC July 28, 2004) (on file with authors).

7. See *id.*

introduced into the nation's lexicon, indecency has taken a front seat in both public concern and lawmakers' dockets. In spite of the outcry and the assessing of some fines, however, the FCC has vacillated on its indecency definitions, and both law and policy are currently unsettled.

While various policy actions (e.g., the FCC's March 2006 announcement of fines,⁸ the Second Circuit's 2007 opinion overturning the FCC's indecency definition,⁹ and the Broadcast Decency Enforcement Act¹⁰ and other proposed acts) continue to keep broadcast indecency in the public eye, these high-profile rulings are only the tip of the iceberg. FCC Chairman Kevin Martin has said that while the FCC used to receive hundreds of indecency complaints each year, it now receives hundreds of thousands (the vast majority is form letters or emails prompted by activist groups).¹¹ Most are denied, and it is primarily the denials of individual complaints (not those from activist groups) that are the subject of this research.

Many authors have written on recent indecency developments.¹² Some have called for clearer indecency guidelines,¹³ while others have concluded that the FCC should get out of indecency enforcement altogether.¹⁴ Chairman Martin has made his own recommendations for revival of family viewing hours and the creation of family-friendly tiers of channels on cable.¹⁵ This Article takes a different approach to FCC indecency enforcement: it seeks to gain an understanding of the FCC

8. *In re Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 2664 (2006).

9. *Fox Television Stations v. FCC*, 489 F.3d 444 (2d Cir. 2007).

10. Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491, 491 (2005).

11. See Kevin J. Martin, Chairman, FCC, Remarks Before the Committee on Commerce, Science, and Transportation 1 (Feb. 11, 2004), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-243865A2.pdf.

12. See generally Section IV *infra*.

13. See, e.g., Milagros Rivera-Sanchez & Michelle Ballard, *A Decade of Indecency Enforcement: A Study of How the Federal Communications Commission Assesses Indecency Fines*, 75 JOUR. & MASS COMM. Q. 143 (1988); Geoffrey Rosenblat, *Stern Penalties: How the Federal Communications Commission and Congress Look to Crackdown on Indecent Broadcasting*, 13 VILL. SPORTS & ENT. L.J. 167 (2006); Michael J. Cohen, *Have You No Sense of Decency? An Examination of the Effect of Traditional Values and Family-Oriented Organizations on Twenty-First Century Broadcast Indecency Standards*, 30 SETON HALL LEGIS. J. 113 (2005).

14. See, e.g., Ian J. Antonoff, *You Don't Like It...Change the (Expletive Deleted) Channel!: An Analysis of the Constitutional Issues That Plague FCC Enforcement Actions and a Proposal for Deregulation In Favor of Direct Consumer Control*, 15 SETON HALL J. SPORTS & ENT. L. 253 (2005); Matthew C. Holohan, *Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341 (2005).

15. See Kevin J. Martin, Chairman, FCC, Remarks Before Congress (June 14, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-274169A1.pdf.

indecent complaint process from consumers' perspectives through an analysis of 261 indecent complaints denied by the FCC in 2004.¹⁶ Through our analysis of these complaints, we conclude that the way in which the FCC processes complaints and provides feedback concerning indecent material does not serve the public interest, convenience, and necessity.¹⁷

On its extensive Web site,¹⁸ the FCC provides basic statistics that give a general overview of the complaints received each calendar year.¹⁹ According to these numbers, the Commission received over 1.4 million complaints in 2004 regarding 314 programs (145 radio, 140 television, and 29 cable).²⁰ However, the FCC's statistics provide no details about the targeted programs or complainants' concerns. This Article provides those details as reflected in a sample of 261 analyzed complaints. The number of complaints that we examined is much smaller than the 1.4 million cited for 2004 because many complaints were generated as a result of Janet Jackson's Super Bowl "wardrobe malfunction," which accounted for over a half million of the indecent complaints received. The complaints analyzed in this Article were mostly from individuals, not activist group members, and did not concern the Janet Jackson incident.

We assume *arguendo* that the FCC will not immediately step out of indecent enforcement, though the Second Circuit's recent dicta suggest that the current indecent regime may not survive constitutional scrutiny.²¹ By examining the experience of over 200 consumers, many of whom complained of their own volition, we focus our attention on the ways in which the FCC might improve its indecent consideration process, from acceptance of complaints to more rapid communication with complainants. If the FCC remains active in indecent enforcement, we believe adjustments in both its methods and indecent definitions are essential.

16. The 1,030-page database of these complaints would ordinarily cost \$8,000 to \$10,000 for redaction expenses; however, because the data had already been redacted for another request, the authors were able to obtain the information at no cost. The costs for denied indecent complaints in 2005 would be between \$12,000 and \$15,000. To the authors' knowledge, this is the first time an analysis has been made of this type of data.

17. 47 U.S.C. § 303 (2000) ("[T]he Commission, from time to time, as public convenience, interest, or necessity requires, shall" carry out duties such as band assignment, classifications, and apparatus regulation.).

18. Federal Communications Commission Home Page, <http://www.fcc.gov> (last visited Nov. 6, 2007) [hereinafter FCC Home Page].

19. Indecent Complaints and NALs: 1993-2006, <http://www.fcc.gov/eb/oip/ComplStatChart.pdf> (last visited Oct. 11, 2007).

20. *Id.*

21. Fox Television Stations v. FCC, 489 F.3d 444, 464 (2d Cir. 2007) ("Indeed, we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of a broadcast indecenty.").

Part II of this study focuses on indecency determination procedures. Part III is an examination and discussion of the 261 consumer complaints denied by the FCC in 2004. Part IV reviews the recent FCC *Omnibus Order* and the 2007 Second Circuit opinion to determine whether they address issues raised in the data. Part V examines other commentators' perspectives and positions this work within the field of research, followed by Part VI's suggestions for changes.

II. INDECENCY DETERMINATION PROCEDURES

A. *How the FCC Determines Indecency*

Federal indecency law prohibits the utterance of "any obscene, indecent, or profane language by means of radio communication"²² and permits both a fine and possible jail time.²³

In 1978, in *FCC v. Pacifica Foundation*,²⁴ the Supreme Court upheld the application of the indecency statute during afternoon hours.²⁵ The case concerned a radio monologue by comic George Carlin, which discusses seven "filthy" words.²⁶ The Court held that broadcasts need not be determined to be obscene to be regulated²⁷ and that the factors to be considered in regulating indecent broadcast speech include the time of day in which the speech was broadcast, the context in which the indecent speech occurs, and the likely audience for the speech.²⁸ In accordance with that holding, the FCC mandated that indecent speech may be broadcast during "safe harbor" hours, 10 p.m. to 6 a.m., when children are less likely to be in the audience.²⁹

The FCC has since developed guidelines to determine what material qualifies as indecent. On its consumer Web site, the FCC defines indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities."³⁰ The FCC

22. 18 U.S.C. § 1464 (2000).

23. *Id.*

24. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

25. *See id.* at 738.

26. *See id.* at 729.

27. *See id.* at 738.

28. *See id.* at 750.

29. Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (1992); Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464, Report and Order, 8 F.C.C.R. 704, para. 3 (1993).

30. Obscene, Profane, and Indecent Broadcasts: FCC Consumer Facts, <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last visited Nov. 6, 2007).

also uses several other criteria, focused primarily on the context of the broadcast, to determine whether broadcast content qualifies as indecent:

The principal factors that have proved significant in our decisions to date are: (1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value*. In assessing all of the factors, and particularly the third factor, the overall context of the broadcast in which the disputed material appeared is critical.³¹

Thus, a sexual situation that occurs within the broadcast of a Shakespeare play would be less likely to be deemed indecent than a morning radio show's description of sexual foreplay, intended to shock the audience (and perhaps increase the show's market share).

The FCC exercises considerable discretion in determining whether a broadcast is indecent. For example, an expletive such as the "F-word" may or may not be considered indecent, depending on the context. In 2004, the FCC changed its mind on whether the F-word was indecent in all cases, stating that no matter the context in which the F-word was broadcast, it would always be considered indecent.³² However, as will be discussed below, the Second Circuit disagreed, leaving the status of the F-word and other so-called "fleeting expletives" unclear.³³ The FCC has been unwilling to label programming indecent without an examination of the context in which the alleged indecency occurred. In our analysis, thirty-six of the 261 complaints were denied as a result of complainants not providing sufficient context for the FCC to make a determination of indecency.

B. The Broadcast Decency Enforcement Act

In the ensuing storm of controversy following the Janet Jackson Super Bowl incident, the FCC and the courts have not been the only government agencies acting in the indecency arena. The Broadcast Decency

31. Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464, 16 F.C.C.R. 7999, para. 10 (2001) [hereinafter *Industry Guidance Policy Statement*] (emphasis in original). See also *Obscenity, Indecency & Profanity—Frequently Asked Questions*, <http://www.fcc.gov/eb/oip/FAQ.html> (last visited Oct. 11, 2007) ("In our assessment of whether material is 'patently offensive,' context is critical. The FCC looks at three primary factors when analyzing broadcast material: (1) whether the description or depiction is explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander or is used to titillate or shock. No single factor is determinative.")

32. See *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, paras. 16-17 (2004) [hereinafter *Golden Globes*].

33. See *infra* Section III. B and accompanying text.

Enforcement Act was signed in 2006 and raised by tenfold the maximum penalty that the FCC can levy for indecency violations from \$32,500 to \$325,000.³⁴ President George W. Bush, signing the legislation into law, recognized that the fines previously allowed were accepted by some broadcasters as a cost of doing business: "The problem we have is that the maximum penalty that the FCC can impose under current law is just \$32,500 per violation. And for some broadcasters, this amount is meaningless. It's relatively painless for them when they violate decency standards."³⁵ At this writing, no broadcasters have yet been fined at the higher rate.

C. *The Complaint Process*

The FCC does not actively seek out indecent broadcasting but rather relies on complaints from consumers to consider whether or not to launch an investigation. The Commission's Enforcement Bureau was established in 1999 to handle consumer indecency complaints (among other duties); prior to 1999, indecency complaints were handled by the Mass Media Bureau.³⁶ In October 2005, the FCC revamped its broadcast indecency Web site to include a flowchart showing how complaints move through the process.³⁷

According to this flowchart, when a complaint is filed, it is logged and its allegations are analyzed.³⁸ Additional information may be requested, and once all information is in, appropriate action is determined, either denying the complaint or issuing a Notice of Apparent Liability for Forfeiture to the offending station owner.³⁹ Any decision can be petitioned for reconsideration.⁴⁰ Any response is analyzed, and a final determination is made to either deny the complaint or issue a Forfeiture Order addressing the complaint.⁴¹ Complainants may also petition for reconsideration by the

34. Broadcast Decency Enforcement Act of 2005, Pub. L. No. 109-235, § 2, 120 Stat. 491, 491 (2005).

35. Press Release, Office of the Press Secretary President Signs the Broadcast Decency Enforcement Act of 2005 (June 15, 2006) *available* at <http://www.whitehouse.gov/news/releases/2006/06/20060615-1.html>.

36. FCC, Media Bureau, <http://www.fcc.gov/mb/> (last visited Oct. 11, 2007) ("The Media Bureau develops, recommends and administers the policy and licensing programs relating to electronic media, including cable television, broadcast television, and radio in the United States and its territories.").

37. How the FCC Resolves Obscenity/Indecency/Profanity Complaints, <http://www.fcc.gov/eb/oip/flow.pdf> (last visited Nov. 6, 2007).

38. *See id.*

39. *See id.*

40. *See id.*

41. *See id.*

full Commission of a complaint denied by the Bureau.⁴² All complaints discussed in this Article were denied by the Enforcement Bureau. The records obtained in the database, however, do not show if a complainant requested reconsideration of the denial by the full FCC.

It is under the standards and procedures described in this section that indecency determinations were made in 2004 (except for the maximum fine amount set in 2006). We turn now to a discussion of the complaints.

II. ANALYSIS OF THE COMPLAINTS

Denied indecency complaints were obtained via a Freedom of Information Act ("FOIA") request with the FCC for all denied complaints from 2004,⁴³ the year of the infamous Janet Jackson "wardrobe malfunction." The 1,030-page redacted database included complaints received by the FCC in 2003 to which the FCC did not respond until 2004; there are probably complaints generated in 2004 to which the FCC did not respond until 2005. The Commission notes on its Web site that there are carryover complaints from year to year.⁴⁴ Although likely incomplete, the sample is a reasonable set of data for individual consumer indecency complaints for the year 2004, particularly since few of the complaints in the database were generated through activist groups such as the Los Angeles-based Parents Television Council ("PTC").

A. Method

The database provided by the FCC was in electronic form and included both original complaints and the Commission responses. The complaints were coded for type of medium (radio or television), state and region from which the complaint originated, type of complaint, and FCC rationale for denial. The number of complaints examined (261) is but a fraction of the 1.4 million complaints received in 2004. As only denied complaints were requested, this database would not have included the Super Bowl incident (over a half million complaints, according to FCC sources),⁴⁵ other indecency cases in which the broadcaster was found liable, and any complaints still in process or under consideration at the Commission. The authors did not request individual records from the FCC; the FOIA request asked for denied indecency complaints from 2004, and the agency provided the records examined in this study. To put the 2004

42. *See id.*

43. 5 U.S.C. § 552 (2000).

44. *See* FCC Home Page, *supra* note 18.

45. Todd Shields, *Activists Dominate Content Complaints*, MEDIAWEEK, Dec. 6, 2004, at 4-5, available at http://www.parentstv.org/PTC/news/2004/indecency_mediaweek.htm.

number into context, the FCC reported that it received 166,683 complaints in 2003, 1,405,419 complaints in 2004, and 233,531 complaints in 2005.⁴⁶

The files from the FCC were not a neat aggregation of complaints and denials. It was sometimes difficult to determine the subject of the complaints. A few complaints could only be analyzed by the Commission's response to them, as the complaint itself was not included. Some letters were not only unclear in their content but also in their presentation; some were faxed copies of handwritten notes that were all but illegible. The analysis below represents a best effort to decipher a complex group of documents.

B. Analysis

Most of the complaints analyzed were from individuals; however, seventeen were identifiable by their letterhead as originating from members of the PTC, the Los Angeles-based, anti-indecency organization, which prompted the outpouring of complaints following the Janet Jackson Super Bowl halftime show incident and which continues to encourage member complaints. It has been suggested that over ninety-nine percent of total 2003 complaints were generated by the PTC.⁴⁷ While most complainants were not identified in any meaningful way (223 were unknown, as the FCC redacts identifying information before making the complaints public), thirty-one mentioned their children or grandchildren in the complaint, so it may be assumed that they are parents, grandparents, or guardians.

While none of the complaints were form letters, some were filed using an online form (though the source of the form was not apparent in the record).⁴⁸ Several were handwritten on either blank or lined tablet paper,⁴⁹ and several included Biblical scripture quotes.⁵⁰ A number reflected well-informed viewers and listeners who demonstrated knowledge of indecency or obscenity definitions.⁵¹

46. FCC Home Page, *supra* note 18. As will be discussed later, 2004 was the year in which the FCC changed its complaint counting procedures. See *infra* Section V. B. of this Article.

47. Shields, *supra* note 45.

48. See, e.g., Broadcast Complaint against KMJ(AM), File No. EB-04-IH-0257 E68 (FCC June 25, 2004) (on file with authors).

49. See, e.g., Broadcast Complaint against WPIX(TV), File No. EB-04-IH-0332 F20 (FCC July 27, 2004) (on file with authors) (letter to FCC handwritten on a blank sheet of paper with a travel brochure image apparent in the corner).

50. See, e.g., Broadcast Complaint against Q107-FM, File No. EB-04-IH-0513 H30 (FCC July 28, 2004) (on file with authors) (quoting *Romans* 10:9, 13) ("If you confess with your mouth 'Jesus as Lord' and believe in your heart that God has raised Him from the dead you shall be saved...for whoever shall call upon the Name of the Lord shall be saved.").

51. See, e.g., Broadcast Complaint against KCTV5, File No. EB number unclear C14 (FCC Nov. 7, 2003) (complainant provides three-part obscenity test as laid out in *Miller v.*

The FCC’s denial letter to every complainant included an information sheet that discussed the law with respect to indecent and obscene broadcasts and the Commission’s enforcement procedures (though this sheet was not included in the files received). The letters closed with a sentence encouraging complainants to convey their concerns directly to station management “because this can be an effective method to influence a station’s programming decisions.”⁵² Interestingly, several complainants claimed to have done this even before they received the FCC’s suggestion.⁵³ They included in their complaints the correspondence with which they had engaged the broadcaster prior to filing their complaints. For example, one parent wrote to National Broadcasting Company (“NBC”) to complain about clips from *Sex in the City* shown on *The Today Show*.⁵⁴ After receiving no response from NBC, the parent then filed a complaint with the FCC, attaching a copy of the letter to NBC.

Table 1 provides a breakdown of the complaints analyzed for this study. Selected portions of this breakdown are discussed in detail below.

Table 1: Summary of Complaints Analyzed

Type of Medium Targeted	Television: 143 Radio: 115 Unknown: 3
Geographical Regions	West: 53 California, Colorado, Nevada, Oregon, Utah, Washington, Wyoming Mid-Atlantic: 45 District of Columbia, Maryland, New Jersey, New York, Pennsylvania South: 44 Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, Tennessee Midwest: 33 Illinois, Indiana, Kansas, Michigan, Minnesota, Ohio Southwest: 20 Arizona, New Mexico, Oklahoma, Texas New England: 12 Connecticut, Massachusetts, New Hampshire Unknown: 54

California, 413 U.S. 15, 23-25 (1973)) (on file with authors).

52. See, e.g., Letter from William D. Freedman, Deputy Chief, Enforcement Bureau, File No. EB-04-IH-0339 F37 (FCC Dec. 7, 2004) (on file with authors).

53. See, e.g., Broadcast Complaint against KING-TV, File No. EB-04-IH-0421 G41 (FCC Feb. 23, 2004) (on file with authors).

54. See *id.*

Categories of Complaints	General Sexual Content: 86 Profanity: 74 Nudity: 23 Lyrics: 17 Sex Product: 14 Homosexual Content: 9 Indecent Political Commentary: 4 Gestures/Physical Indecency: 4 Violence: 4 Other: 4 Racial Epithet: 3 Cartoons: 2 Pedophilia: 2 Religious References: 2 Unknown: 13
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1. Medium Targeted

Of the 261 complaints denied, television was involved in more than half (143 complaints), while radio received 115. Three complaints did not specify the medium to which the complaint applied. In general, radio complaints centered on DJ comments that contained profanity or referred to sexual activity, or talk shows where profanity was used by guests. In general, most complaints about television centered on specific shows, including some network programs (*Whoopi*,⁵⁵ *Dateline*,⁵⁶ *Las Vegas*⁵⁷) and some syndicated shows (*Jerry Springer*,⁵⁸ *Oprah*⁵⁹). For radio, morning shows were often targeted; *Bubba the Love Sponge*⁶⁰ (now on SIRIUS satellite radio⁶¹ and thus outside the scope of FCC regulation) was named

55. Broadcast Complaint against NBC, File No. EB-04-IH-0239 E32 (FCC Apr. 1, 2004) (on file with authors); Broadcast Complaint against NBC, File No. EB-03-IH-0693 C123 (FCC Oct. 16, 2003) (on file with authors).

56. Broadcast Complaint against NBC, File No. EB-04-IH-0240 E36 (FCC Mar. 23, 2004) (on file with authors); Broadcast Complaint against NBC, File No. EB-04-IH-0595 H61 (FCC Apr. 16, 2004) (on file with authors).

57. Broadcast Complaint against KXAS-TV, File No. EB-04-IH-0364 F54 (FCC Feb. 17, 2004) (on file with authors).

58. Broadcast Complaint against WBAL-TV, File No. EB-04-IH-0449 G87 (FCC Mar. 3, 2004) (complaint about partially clothed individuals) (on file with authors).

59. Broadcast Complaint against WFMG-TV, File No. EB-04-IH-0561 H36 (FCC June 23, 2004) (complaint about promotion about plastic surgery showing a topless woman) (on file with authors).

60. Broadcast Complaint against WJRR, File No. EB-03-IH-0632 A58 (FCC Nov. 18, 2003) (complaint about "Open discussion of Breasts and Male Penis [sic]") (on file with authors).

61. See Mike Piazza, *Meet Bubba the Love Sponge*, SIRIUS Satellite Radio, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/Page&c=FlexContent&cid=1134268004439> (last visited Sept. 27, 2007) ("The FCC basically made me into a martyr, made an example out of me, and because of that, and because of Howard [Stern] believing

in several complaints. Jamie White and Danny Bonaduce's morning radio show garnered eleven complaints,⁶² and Rush Limbaugh's talk show received two complaints, one for profanity⁶³ and one for a tasteless joke the complainant called pedophilic.⁶⁴ *Imus in the Morning*⁶⁵ (dismissed from the Columbia Broadcasting System ("CBS") radio in April 2007 for racist comments⁶⁶) and Howard Stern⁶⁷ (prior to his move to satellite radio) were the subject of two complaints each.

2. Geographical Distribution

Over twenty percent of the complaints came from unknown locations (fifty-four), with a similar number (fifty-three) from residents in Western states (California, Colorado, Nevada, Oregon, Utah, Washington, Wyoming).

Very few patterns can be identified in the geographical distributions. Most complaints appear to be from large cities, yet there are some small cities represented (e.g., Janesville, Wisconsin;⁶⁸ Keene, New Hampshire;⁶⁹ Churubusco, Indiana;⁷⁰ Homewood, Alabama⁷¹). Most complainants provided some identification of the call letters or station about which they were complaining; only ten percent (twenty-six) of the denied complaints

in me, our show is going to be more successful than it ever has been.”).

62. See, e.g., Broadcast Complaint against KYSR, File No. EB-03-IH-0511 A38 (FCC Oct. 8, 2003) (on file with authors).

63. See Broadcast Complaint against WBAP-AM, File No. EB-04-IH-0194 D130 (FCC Mar. 23, 2004 (complaint about Limbaugh's use of the term "addadictomy" in reference to a sex change operation) (on file with authors).

64. See Broadcast Complaint against WRVA-AM, File No. EB-04-IH-0424 G48 (FCC Mar. 15, 2004) (on file with authors).

65. See Broadcast Complaint against KNFO-FM, File No. EB-04-IH-0442 G71 (FCC June 6, 2004) (complaint about suggestion that Guantanamo prisoners' genitals be run through a pasta machine) (on file with authors); Broadcast Complaint against KFXX-AM, File No. EB-04-IH-0255 E60 (FCC June 25, 2004) (complaint against the word "shit") (on file with authors).

66. See *CBS Fires Don Imus Over Racial Slur*, <http://www.cbsnews.com/stories/2007/04/12/national/main2675273.shtml> (last visited Oct. 11, 2007).

67. See Broadcast Complaint against unnamed stations, File No. EB-03-IH-0706 C149 (FCC Oct. 19, 2003) (general complaint against Stern and other "shock jocks" without information on specific situation) (on file with authors); Broadcast Complaint against WBGG-FM, File No. EB-03-IH-0159 A16 (FCC Apr. 9, 2003) (complaint about discussion with sound effects of anal sex) (on file with authors).

68. See Broadcast Complaint against WBUW-TV, File No. EB-04-IH-0378 F65 (FCC Sept. 2004) (on file with authors).

69. See Broadcast Complaint against WKNE-FM, File No. EB-03-IH-0434 B65 (FCC Sept. 21, 2003) (on file with authors).

70. See Broadcast Complaint against WNHT-FM, File No. EB-04-IH-0120 D98 (FCC Mar. 4, 2004) (on file with authors).

71. See Broadcast Complaint against WTTO-TV, File No. EB-03-IH-0634 C77 (FCC Nov. 25, 2003) (on file with authors).

contained no identification. Denver radio station KYSR-FM received the most complaints per station with ten, and all of those were against the Jamie and Danny morning radio show and were filed by the PTC or its members. The KYSR complaints are a small example of what some commentators noted below: the possibility that a special interest group can monopolize the complaint process.⁷²

3. Categories: Sexual Content

About one-third of the complaints (eighty-six) referred to sexual content as the basis for the complaint, with an additional nine percent (twenty-three) complaining about nudity and four complaining about gestures and physical indecency (such as giving “the finger”).⁷³ Complainants were extremely concerned about portrayals of what they considered deviant sexual activity, reinforcing their concerns with quotes such as “[p]lease help this country get back its decency,”⁷⁴ and “I know we have freedom of expresion [sic], but not this kind of bulgar [sic], obscene [sic], or porno[graphic material].”⁷⁵

A complaint was categorized as concerning “general sexual content” when it contained general references to sex without suggesting anything more specific. For example, one complainant categorized the whole show *Two and a Half Men* as “disgusting.”⁷⁶ A complaint about the show *Skin* was also categorized as a general sexual content complaint:

Hello, I would just like to inform you that I think the new tv show “Skin” is completely appalling! I think it has gone over the line of good and decent tevelsion [sic] programming, and I believe that it should be canceled! No wonder we have more and more sex addicts that turn into rapist [sic] and murderers, and with this show it will only help feed their addiction, and intrigue pre-teens and teenagers into watching programs [sic] such as “Skin,” and then later on end up seeing a porn video.⁷⁷

In this case, as in many others, the complaint was not targeting nudity, profanity, or any other legally actionable trait of programming. The FCC

72. See, e.g., Antonoff, *supra* note 14.

73. Broadcast Complaint against WFLD-TV, File No. EB-04-IH-0101 D85 (FCC Mar. 24, 2004) (complaint that “American Idol” judge Simon Cowell “flipped off” a contestant) (on file with authors).

74. Broadcast Complaint against NBC, File No. EB-04-IH-0240 E36 (FCC Mar. 23, 2004) (on file with authors).

75. Broadcast Complaint against Univision, File No. EB-04-IH-0229 E13 (FCC Jan. 30, 2004) (on file with authors).

76. Broadcast Complaint against CBS, File No. EB-04-IH-0580 H52 (FCC May 26, 2004) (on file with authors).

77. Broadcast Complaint against WNUV-TV, File No. EB-03-IH-570 C53 (FCC Oct. 20, 2003) (on file with authors).

tended to deny these complaints by informing the complainant that it had insufficient information to determine indecency or that in context the material was not sufficiently graphic or sustained.⁷⁸

Examples of complaints in the nudity category included a complaint about *That 70's Show* where it was alleged that one of the characters wore a see-through blouse,⁷⁹ as well as a complaint about a TV news show that featured "Northern Nudes" with a full-screen naked female body.⁸⁰ Another complaint featured an ad for "Natural Bras," which contained "multiple images of near-naked breasts, being pushed together to make cleavage, and shows the differences between A, B, C and D sized breasts."⁸¹

4. Categories: Profanity

We separated complaints that targeted profanity not within music. Many complainants were concerned about profanity, with over a quarter (seventy-four) citing use of the F-word as well as uses of an expletive for excrement and slang terms for various body parts. Several of the complaints about profanity pointed out that stations should have a delay mechanism in place which would allow them to bleep out such words. For example, a listener complained about hearing on C-SPAN a caller ask the host, "when did you first get fucked?"⁸² One complainant said that on the show *Frasier*, a character said "shit" in French, with the English translation appearing as a closed caption along the bottom of the screen.⁸³ A radio listener claimed that on Laura Ingraham's radio show, one of the hosts asked Ingraham about political commentator Tucker Carlson's relationship with pop star Britney Spears ("Did Tucker get to fuck her?").⁸⁴

Three of the complaints about Spanish-language stations cited profanity, one of which claimed: "Too many wrong things are happening in our society which hurt our youth. We need to take a stand on the things that matter."⁸⁵

78. See, e.g., Letter from William D. Freedman, Deputy Chief, Enforcement Bureau, File No. EB-04-IH-0174 D104 (FCC June 4, 2004) (on file with authors).

79. See Broadcast Complaint against WDRB-TV, File No. EB-04-IH-0428 G55 (FCC Aug. 25, 2004) (on file with authors).

80. See Broadcast Complaint against KARE-TV, File No. EB-04-IH-0584 H56 (FCC Oct. 4, 2004) (on file with authors).

81. Broadcast Complaint against WSBK-TV, File No. EB-04-IH-0050 D41 (FCC Dec. 22, 2003) (on file with authors).

82. Broadcast Complaint against WCSPN-FM, File No. EB-04-IH-0263 E77 (FCC Mar. 25, 2004) (on file with authors).

83. See Broadcast Complaint against KUSA-TV, File No. EB-04-IH-0405 F76 (FCC May 3, 2004) (on file with authors).

84. Broadcast Complaint against WTNT-AM, File No. EB-04-IH-0366 F57 (FCC Mar. 5, 2004) (on file with authors).

85. Broadcast Complaint against KSCA-FM and KLAX-FM, File No. EB-04-IH-0320

It is important to note that the status of the F-word, alleged to be indecent by many complainants, remains uncertain. As will be discussed in detail below, the FCC overturned its own earlier decisions considering "fleeting expletives" to be not indecent;⁸⁶ the Second Circuit subsequently rejected the agency's claim that every occurrence of the F-word "invariably invokes a coarse sexual image."⁸⁷ The Solicitor General obtained an extension to file a petition for *certiorari* to the Supreme Court until November 1, 2007, indicating the government's decision to appeal the Second Circuit's decision.⁸⁸

5. Categories: Sex-Related Products

A number of complaints (fourteen) were about commercials for sex-related products, specifically sexual enhancement drugs. Complaints cited explicit language—for example, "erections"⁸⁹—heard by children. Several sexual-enhancement products such as Levitra⁹⁰ or Viberex⁹¹ showed up in complaints. There were four complaints about the *Girls Gone Wild* video series,⁹² in which young women are shown naked with animated stars over their private parts.

It is obvious from complaints about product advertisements and promotions (thirty-five) for upcoming shows that parents are particularly concerned about the environment that catches them off-guard when material they consider inappropriate airs during supposedly family-friendly shows. Several complainants pointed out that these ads were inappropriate for viewing or listening outside "safe harbor" hours, particularly when they were included during newscasts or sporting events. One complainant pointed out that a radio ad for a sexual enhancement product, which discussed postponing of a climax and reliability dependent upon frequency of sex, aired at 2 p.m. when the complainant's twelve-year-old daughter

F2 (FCC Mar. 15, 2004) (on file with authors).

86. See *Golden Globes*, *supra* note 32, at para. 17.

87. *Id.* at para. 9.

88. See Supreme Court Docket for 07A155, available at <http://www.supremecourtus.gov/docket/07a155.htm> (last visited Nov. 6, 2007).

89. Broadcast Complaint against numerous broadcast companies, File No. EB-04-IH-0189 D120 (FCC May 18, 2004) (on file with authors).

90. Broadcast Complaint against WTNH-TV, File No. EB-04-IH-0197 D140 (FCC May 25, 2004) (on file with authors).

91. Broadcast Complaint against WPHT-AM, File No. EB-03-IH-0660 C114 (FCC Oct. 7, 2003) (on file with authors). "Viberex" does not show up on any Internet searches; the complainant may have heard "Veromax," another sexual enhancement product, and confused the spelling.

92. See, e.g., Broadcast Complaint against WXXV-TV, File No. EB-04-IH-0082 D64 (FCC Mar. 5, 2004) (on file with authors).

was in the car and was so embarrassed that “she reached up and turned the station.”⁹³

Several mentioned specifically that teens were likely to be in the audience during sporting events. One complainant stated, “[y]ou took cigarette and liquor off because it was supposedly bad for us [sic] are you going to tell me teaching kids and others that sex is okay for them, I think not.”⁹⁴ Two complainants quoted directly from radio ads, pointing out that one begins with the question, “how would you like to have better sex[?]”,⁹⁵ while another opens with, “[d]o you have trouble during sex postponing your climax?”⁹⁶

6. Categories: Lyrics

Many individuals (seventeen) complained about songs with indecent, profane, or inappropriate lyrics. One complainant, who sent a letter to President George W. Bush and a copy to the FCC, was upset about an AM radio station airing the song, “War is Hell on the Home Front Too,” suggesting that its lyrics supported infidelity and citing it as “demeaning and deplorable to our servicemen overseas and their wives here at home.”⁹⁷

Another complaint specifically cited the song, “She Hates Me” by Puddle of Mudd, stating it contained the chorus, “[s]he fucking hates me,” and asking the FCC, “[w]hat are you going to do about it?”⁹⁸ And a parent with four young children targeted the Nine Inch Nails’ song “Closer,” with its lyric “I want to fuck you like an animal.”⁹⁹

Five of the seventeen complaints concerned with lyrical indecency were denied on the grounds that they were broadcast outside of the “safe harbor” time slot (10 p.m. to 6 a.m.). One such complaint was concerned both with the broadcast use of profane lyrics and the station featuring the same music on its Web site for download. The complainant wrote: “It really disturbs me that this material is played on the air and then put up on

93. Broadcast Complaint against WBZY-FM, File No. EB-04-IH-0444 G74 (FCC July 29, 2004) (on file with authors).

94. Broadcast Complaint against unspecified television stations, File No. EB-04-IH-0476 G92 (FCC May 30, 2004) (on file with authors).

95. Broadcast Complaint against WPHT-AM, *supra* note 91.

96. Broadcast Complaint against WBZY-FM, *supra* note 93.

97. Broadcast Complaint against KUPL-AM, File No. EB-04-IH-0264 E83 (FCC Feb. 4, 2004) (on file with authors).

98. Broadcast Complaint against WEBN-FM, File No. EB-03-IH-0400 A32 (FCC Aug. 30, 2003) (on file with authors).

99. Broadcast Complaint against WLZX-FM, File No. EB-03-IH-0479 B113 (FCC Sept. 23, 2003) (on file with authors).

a website [sic] for anyone to download, regardless of age, at anytime. This has to be illegal and violate FCC laws."¹⁰⁰

7. Categories: Homosexuality

A small number of complaints (nine) targeted homosexual themes. One complaint cited a *Jerry Springer* show that had women kissing,¹⁰¹ another alleged that the talk show *The View* showed a lesbian kiss.¹⁰² A promo for the show *Will and Grace* featured "the two main characters that [sic] are gay...in bed with each other;" the complainant called the promo "filth" and exclaimed, "[t]ry explaining that to a child!"¹⁰³ Another complainant said that *Queer Eye for the Straight Guy* had as its premise that "[h]omosexual men are smarter and cooler than heterosexual men!"¹⁰⁴

8. Ads and Promotions

The thirty-five complaints (twenty-five for television, ten for radio) about advertising and promotions were evenly divided, with eighteen for ads and seventeen for station or network promotional announcements. Promotional announcements (or "promos") are the ads stations or networks run to promote upcoming shows, many of which contain footage from the show itself. Many ads were for sexual enhancement products (eight) or for the video series *Girls Gone Wild* (four). Additional ad complaints ranged from an ad for a local restaurant featuring customers using the F-word (partially bleeped)¹⁰⁵ to an ad for an insurance company featuring a woman in a bikini distracting her male neighbor.¹⁰⁶

Most radio station promotion complaints centered on contests or DJ antics, with three of the six radio complaints about the same Pittsburgh station contest which offered a trip for two to a Nevada brothel.¹⁰⁷ Most television promo complaints centered on network teasers for upcoming

100. Broadcast Complaint against WRUW-FM, File No. EB-03-IH-0509 B129 (FCC Sept. 14, 2003) (on file with authors).

101. See Broadcast Complaint against WOLO-TV, File No. EB-04-IH-0107 D94 (FCC May 21, 2004) (on file with authors).

102. See Broadcast Complaint against KABC-TV, File No. EB-03-IH-0496 B126 (FCC Sept. 4, 2003) (on file with authors).

103. Broadcast Complaint against NBC, File No. EB-03-IH-0397 B33 (FCC Sept. 23, 2003) (on file with authors).

104. Broadcast Complaint against NBC, File No. EB-03-IH-0701 C142 (FCC Feb. 12, 2004) (on file with authors).

105. Broadcast Complaint against WTPA-FM, File No. EB-03-IH-0652 C101 (FCC Oct. 28, 2003) (on file with authors).

106. Broadcast Complaint against NBC and Fox, File No. EB-04-IH-0305 E109 (FCC May 22, 2004) (on file with authors).

107. See, e.g., Complaint against WRRK-FM, File No. EB-04-IH-0322 F8 (FCC Feb. 17, 2004) (on file with authors).

shows (*Coupling*,¹⁰⁸ *Elimidate*,¹⁰⁹ *WWE Smackdown*,¹¹⁰ *King of Queens*¹¹¹) which featured sexually suggestive activity or language. Complainants often cited the fact that sexually suggestive promos are shown during family-friendly programming (such as a *King of Queens* promo shown during the game show *Jeopardy!*).¹¹²

9. Time Lapse Between Initiation of Complaint and FCC Response

Of the 261 complaints in this study, 185 did not provide sufficient information to determine both the date of the original complaint and the Commission's response. Of the seventy-six complaints with both complaint and response dates, FCC response time ranged from eighteen days to 706 days (nearly two years) between the complaint and the response. The median number of days was 163, or almost five and a half months.¹¹³

C. FCC Grounds for Denial/Dismissal

Table 2 provides a breakdown of denial grounds for complaints (N=261) analyzed for this study.

Table 2: FCC Reasons for Denying Indecency Complaints

Categories of Denials	Not Sufficiently Graphic or Sustained: 115 Not Indecent: 37 Insufficient Information: 36 Covered by Consent Decree: 35 Safe Harbor: 23 Other: 6 No Authority Over Media: 4 Unknown: 5
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108. Broadcast Complaint against WAGA-TV, File No. EB-03-IH-0442 B73 (FCC Sept 23, 2003) (on file with authors).

109. Broadcast Complaint against WCIU-TV, File No. EB-03-IH-0207 A141 (FCC June 1, 2003) (on file with authors).

110. Broadcast Complaint against WUTB-TV, File No. EB-04-IH-0339 F39 (FCC July 29, 2004) (on file with authors).

111. Broadcast Complaint against WSBK-TV, File No. EB-04-IH-0641 H90 (FCC Nov. 9, 2004) (on file with authors).

112. *Id.*

113. The number of days between complaint and response was calculated with the DATEDIF function in Excel. See Pearson Consulting Software's explanation of the function available at <http://www.cpearson.com/excel/datedif.htm> (last visited Nov. 6, 2007). We chose to feature the median number of days, despite the fact that the average number of days—193 days, or nearly six and a half months—is higher. The median value minimizes the impact of outliers and more closely approximates the time most complainants wait for a response. See Robert Niles, *Median*, available at <http://www.robertniles.com/stats/median.shtml> (last visited Nov. 6, 2007).

Of the 261 complaints, thirty-five were dismissed because of Commission consent decrees against Clear Channel or other media networks or chains. These complaints primarily concerned profanity and sexual references on radio stations. Each complaint that was dismissed under the provisions of a consent decree received additional information from the FCC explaining the consent decree and outlining its conditions.

Of the remaining 226 complaints, about half (115) were denied on the basis of not being sufficiently graphic and/or sustained. The FCC letter to complainants stated specifically:

We recognize that the material that you have cited may well be offensive to you, and we have analyzed your complaint carefully. However, your complaint does not provide us with the basis by which we may take action.

Specifically, the material in your complaint, in context, is not sufficiently graphic and/or sustained to meet the Commission's standard for indecency.¹¹⁴

This statement seems to be the FCC's default rationale when it wishes to deny a complaint that it does not have a more specific reason to deny, such as a finding that the content is not indecent or that it was broadcast outside "safe harbor" hours. The FCC gave this response to complaints as diverse as a radio host's use of the phrase "get a sore rectum,"¹¹⁵ a comment on Don Imus's morning show that the prisoners at Guantanamo Bay should have their "genitals [put] through a pasta machine,"¹¹⁶ a *Girls Gone Wild* video advertisement;¹¹⁷ profanity and sexual content in the song "Holidae In,"¹¹⁸ a George Lopez show that used the Spanish term "puta" ("whore");¹¹⁹ a *Days of Our Lives* soap opera broadcast where a dead body fell out of a piñata;¹²⁰ the use of the word "tits" on *Oprah*;¹²¹ nudity on the

114. See, e.g., Letter from William D. Freedman, Deputy Chief, Enforcement Bureau, File No. EB-03-IH-0562 H37 (FCC Dec. 30, 2004) (on file with authors).

115. Broadcast Complaint against WBAY-TV, File No. EB-04-IH-0022 D22 (FCC Jan. 7, 2004) (on file with authors).

116. Broadcast Complaint against KNFO-FM, File No. EB-04-IH-0442 G71 (FCC June 6, 2004) (on file with authors).

117. Complaint against WNOL-TV, File No. EB-04-IH-0054 D47 (FCC Mar. 4, 2004) (on file with authors).

118. Broadcast Complaint against KSEQ-FM, File No. EB-03-IH-0658 C110 (FCC Nov. 9, 2003) (on file with authors).

119. Broadcast Complaint against KTRK-TV, File No. EB-03-IH-0453 B107 (FCC Sept. 23, 2003) (on file with authors).

120. Broadcast Complaint against NBC, File No. EB-04-IH-0019 D19 (FCC Dec. 30, 2003) (on file with authors).

121. Broadcast Complaint against Unknown Television Station, File No. EB-04-IH-0204 D156 (FCC May 21, 2004) (on file with authors).

show *Survivor*,¹²² a nude picture of Marilyn Monroe on PBS's *Antiques Roadshow*,¹²³ and a Dr. Laura radio broadcast discussion of orgasms.¹²⁴

The Commission may have meant that the complained-of incident or language was either brief or insignificant enough not to warrant a finding of indecency. However, the diversity of complaints to which this denial was applied might suggest that the FCC has other criteria in mind. This record does not reflect a more precise meaning to that denial.

The FCC denied thirty-seven complaints as "not indecent." In some cases, complaints did not meet the standard to be considered indecent because of disputes as to whether the "complained-of material" was actually broadcast. Other reasons for these types of denials included the subject matter failing to stand alone in determining indecency,¹²⁵ lacking reference to "sexual or excretory organs or activities,"¹²⁶ or not meeting the three-pronged test used by the agency to determine indecency.¹²⁷

Insufficient information was cited as grounds for denying many (thirty-six) of these complaints. In most instances, complainants failed to give complete information, such as station call letters, date of incident, time of incident, or specific details about the objectionable material. The FCC's response letter invited complainants to resubmit their complaint with the specific detail needed.¹²⁸

The "safe harbor" ruling was grounds for dismissing twenty-three complaints. "Safe harbor" refers to the 10 p.m. to 6 a.m. time period when broadcasters need not limit sexual or profane activity since children are less likely to be in the audience.¹²⁹ The twenty-three complaints dismissed for this reason complained about content broadcast after 10 p.m. and before 6 a.m.¹³⁰

122. Broadcast Complaint against CBS, File No. EB-03-IH-0109 A99 (FCC Feb. 28, 2003) (on file with authors).

123. Broadcast Complaint against KSPS-TV, File No. EB-03-IH-0089 A85 (FCC Feb. 15, 2003) (on file with authors).

124. See Broadcast Complaint against WTNT-AM, *supra* note 84.

125. See, e.g., Letter from William Davenport, Chief, Investigations and Hearings Division, File No. EB-03-IH-0209 A142 (FCC no date) (on file with authors) (complaint about *Fear Factor* producer mentioning an upcoming show where contestants would milk goats with their mouths).

126. See, e.g., Letter from William Davenport, Chief, Investigations and Hearings Division, File No. EB-03-IH-0451 B98 (FCC July 13, 2004) (on file with authors) (complaint about use of the term "SOB" on *Enterprise*).

127. See, e.g., Letter from William D. Freedman, Deputy Chief, Enforcement Bureau, File No. EB-03-IH-0182 A120 (FCC Dec. 9, 2004) (on file with authors).

128. See, e.g., Letter from William D. Freedman, *supra* note 3.

129. 47 C.F.R. § 73.3999(b): Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene and indecent material) ("safe harbor" hours set at 10:00 p.m. to 6:00 a.m.).

130. See, e.g., Broadcast Complaint against KPFT-FM, File No. EB-04-IH-0034 F27

Four complaints were dismissed by the Commission because it lacked authority over the broadcast cited. These included complaints against a satellite radio station¹³¹ and a Canadian radio station.¹³²

Six complaints were dismissed for “other” reasons, such as improper complaint submission¹³³ or because the agency claimed that the complaint fell under the First Amendment and Section 326 of the Communications Act of 1934, which prohibited the Commission from “censoring broadcast material and interfering with broadcasters’ freedom of expression.”¹³⁴ There was one complaint that was dismissed because the complainant withdrew the original complaint.¹³⁵

Finally, five denied complaints lacked FCC denial letters in the database, so they could not be categorized.

D. Discussion of the Data

The analysis revealed several major areas of concern for complainants. First, the denial letters do not reveal the FCC’s decision-making process; the same handful of rationales is given for a wide variety of indecency issues. There are no obvious patterns in the relationship between complaint and denial. The stock responses also generally do not provide complainants with any detail about why their particular complaint was denied. The phrase “not sufficiently graphic and/or sustained” in particular was applied to a diversity of complaints without additional explanation and does not provide useful information to a concerned viewer or listener. After reading this letter, a complainant knows neither the specific reason behind the denial nor what content might trigger either a denial or a finding of indecency in the future.

(FCC June 30, 2004) (on file with authors) (complaint that a hip-hop radio program broadcast between 3 a.m. and 6 a.m. was indecent).

131. Broadcast Complaint against FCUK-FM, File No. EB-04-IH-0294 E93 (FCC Apr. 16, 2004) (on file with authors) (Interestingly, the complainant was complaining in advance about content he/she *knew* would be broadcast, not which he/she had heard.).

132. Broadcast Complaint against CIMX-FM, File No. EB-03-IH-0202 A130 (FCC Apr. 23, 2003) (on file with authors) (station licensed in Canada).

133. Broadcast Complaint against 88.5 FM, File No. EB-04-IH-0626 H79 (FCC Sept. 13, 2004) (on file with authors) (FCC communicated with complainant to instruct him and his wife how to file a proper complaint; complainant said that the FCC had enough information; FCC closed complaint).

134. Broadcast Complaint against WDBZ-AM, File No. EB-04-IH-0079 D55 (FCC Feb. 26, 2004) (on file with authors) (complaint about racist comments held to be non-actionable).

135. Letter from William D. Freedman, Deputy Chief, Enforcement Bureau, File No. EB-04-IH-0313 E121 (FCC Dec. 16, 2004) (on file with authors) (withdrawing complaint against WXZZ-FM).

In addition, the time lapse between the complaint and the agency's response is lengthy. When the FCC finds that it does not have enough information to make a determination, it can communicate an offer to consider the complaint again with additional information. Reconsideration occurs many months after the original complaint was filed, when a complainant is unlikely to have retained additional information about the broadcast.

III. RECENT FCC ACTIONS

While our sample is comprised of complaints denied in 2004, it is important to examine recent FCC actions to determine whether the Commission has addressed the issues that we found in the 2004 complaints. As will be demonstrated, most of the concerns raised by our analysis remain unaddressed by these new developments.

A. *The Omnibus Order*

On March 15, 2006, the FCC issued several orders (the largest called the "*Omnibus Order*"¹³⁶) containing both its first Notices of Apparent Liability ("NALs") for indecency violations since December 2004 and notices that while several broadcasts were judged indecent, they were not assigned forfeiture. The NALs, notices of fines issued by the FCC when it finds a broadcaster in violation of agency rules, named programming such as *The Surreal Life 2*¹³⁷ and *Without a Trace*¹³⁸ in violation of FCC indecency rules. A community college noncommercial television station was fined for broadcasting a PBS documentary produced by filmmaker Martin Scorsese called *The Blues: Godfathers and Sons*,¹³⁹ which contained profanity. The FCC also reaffirmed its fine of \$550,000 against CBS for Janet Jackson's "wardrobe malfunction" episode during the 2004 Super Bowl halftime show.¹⁴⁰ Together, these three NALs totaled fines of \$3.6 million and are still under appeal at the time of this writing.

However, the FCC considered four broadcasts to be indecent but not subject to forfeiture.

136. Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, *Notices of Apparent Liability and Memorandum Opinion and Order*, 21 F.C.C.R. 2664 (2006) [hereinafter *Omnibus Order*].

137. *Id.* at paras. 22-32.

138. Complaints Against Various Television Licensees Concerning their Broadcast of the Program "Without A Trace," December 31, 2004, *Notices of Apparent Liability and Memorandum Opinion and Order*, 21 F.C.C.R. 3110 (2006).

139. *Omnibus Order*, *supra* note 136, at paras. 72-86.

140. Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, *Notice of Apparent Liability and Forfeiture*, 19 F.C.C.R. 19230 (2004).

2002 Billboard Music Awards: In her acceptance speech, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em."

2003 Billboard Music Awards: Nicole Richie, a presenter on the show, stated: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."

NYPD Blue: In various episodes, Detective Andy Sipowicz and other characters used certain expletives including "bullshit," "dick," and "dickhead."

The Early Show: During a live interview of a contestant on CBS's reality show *Survivor: Vanuatu*, the interviewee referred to a fellow contestant as a "bullshitter."¹⁴¹

These broadcasts did not warrant fines because they had occurred prior to the FCC's decision in *Golden Globes* which determined that the F-word was presumptively indecent.¹⁴²

The broadcasters facing fines filed an appeal of the *Omnibus Order* to the Second Circuit, and the FCC requested a voluntary remand, which was granted.¹⁴³ After taking comments, the FCC released a new order ("*Remand Order*") on November 6, 2006.¹⁴⁴ In the order, the Commission vacated the indecency finding against *NYPD Blue* on a procedural issue¹⁴⁵ and against *The Early Show* because the alleged profanity took place during a bona fide news interview.¹⁴⁶

The FCC let stand the indecency findings against the two *Billboard Music Awards* shows, noting that, "[g]iven the core meaning of the 'F-Word,' any use of that word has a sexual connotation even if the word is not used literally. Indeed, the first dictionary definition of the 'F-Word' is sexual in nature"¹⁴⁷—a position established in a 2004 decision, where the musician Bono used the F-word in accepting an award from the Golden Globes.¹⁴⁸

B. *The Second Circuit Case*

Fox, CBS, and NBC appealed the *Remand Order* to the Second Circuit, alleging that the FCC's new stance that "fleeting expletives" are actionable is a dramatic policy shift that was adopted without a reasonable

141. *Fox Television Stations v. FCC*, 489 F.3d 444, 452 (2d Cir. 2007).

142. *Id.*

143. *Id.* at 453-54.

144. Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, *Order*, 21 F.C.C.R. 13299 (2006).

145. *Id.* at paras. 75-77.

146. *Id.* at paras. 69-72.

147. *Id.* at para. 16.

148. *Golden Globes*, *supra* note 32, at para. 1.

explanation, resulting in a violation of the Administrative Procedure Act's requirement that agency decisions cannot be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹⁴⁹

1. The Majority Opinion

The Second Circuit decided the case in June 2007, with Judge Pooler writing for a 2-1 majority.¹⁵⁰ The FCC's "fleeting expletive" policy was found to be a significant departure from its previous policy for profanity and was not accompanied by a reasoned explanation.¹⁵¹ Thus, the Commission's changed policy violated the Administrative Procedure Act because it was "arbitrary and capricious."¹⁵²

Judge Pooler expanded the holding of the case beyond the two *Billboard Music Awards* expletives directly at issue, noting that the policy at issue was one that had been developed in the Commission's 2004 *Golden Globes* decision.¹⁵³ In a reversal of the original Enforcement Bureau finding in the case, the full Commission said that "given the core meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation"¹⁵⁴ and therefore would satisfy the first element of the FCC's current indecency definition (graphic and explicit element). Thus, Judge Pooler said that the *Golden Globes* policy is correctly under consideration, and if that policy is found invalid, so are the two *Billboard Music Awards* decisions.¹⁵⁵

Judge Pooler turned next to the Administrative Procedure Act, noting that the FCC had changed its policy with its *Golden Globes* decision¹⁵⁶ and as such must have valid reasons for so doing. She rejected the FCC's "first blow" argument (from *Pacifica*, where the Supreme Court likened turning off the radio after hearing profanity to leaving a fight after the first blow has landed¹⁵⁷), claiming that the agency "provides no reasonable

149. 5 U.S.C. § 706(2)(A). The networks raised a host of other objections to the FCC's *Remand Order* that were not necessary for the case's resolution. *Fox*, 489 F.3d at 454-56. These included the arbitrariness of the FCC's community standards analysis; the FCC's lack of finding of *scierter*; problems with the FCC's "profane" definition; the overall vagueness of the FCC's indecency regime; and other administrative and constitutional issues. As the court reached a decision based on its agreement with the first issue, the others did not need to be resolved.

150. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 446.

151. *Id.* at 446-47.

152. *Id.* at 447.

153. *Golden Globes*, *supra* note 32, at para. 3 n.4. Bono said, "[t]his is really, really, fucking brilliant."

154. *Id.* at para. 8.

155. *Fox*, 489 F.3d at 454.

156. *Id.* at 455.

157. *Id.* at 457-58 (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978)).

explanation for why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between Pacifica and Golden Globes."¹⁵⁸

Moreover, the "first blow" theory does not reflect what the FCC's actual policies are. In oral argument, Judge Pooler said that the FCC claimed that such isolated utterances in newscasts (e.g., in *The Early Show*) or in another context deemed artistically or journalistically necessary—such as a broadcast of the court's proceedings in this case—would be acceptable.¹⁵⁹ Yet, children are still taking the "first blow" of the profanity in these programs. The judge also rejected the notion in *Golden Globe* that any occurrence of the F-word is necessarily sexual in nature:

This [interpretation] defies any common-sense understanding of these words, which, as the general public well knows, are often used in everyday conversation without any "sexual or excretory" meaning. Bono's exclamation that his victory at the Golden Globe Awards was "really, really fucking brilliant" is a prime example of a non-literal use of the "F-Word" that has no sexual connotation.¹⁶⁰

The indecency definition has not changed, Judge Pooler said, yet the FCC has not sufficiently explained how a single, isolated expletive would satisfy the first element of the definition.¹⁶¹

Finally, Judge Pooler noted that the Commission had not offered any evidence on how a "fleeting expletive" could be harmful, particularly when children hear far more expletives than they did in the 1970's when indecency was first regulated.¹⁶² Nor had the FCC offered explanations of how the new "fleeting expletives" policy would address the "problem" of expletives heard by children.¹⁶³ The judge also dispensed with the agency's new "profanity" approach by noting a lack of evidence of a problem or issue, a lack of explanation as to why a new definition of profanity would address current issues, and a lack of explanation of why profanity enforcement should not be part of the existent indecency and obscenity enforcement.¹⁶⁴

Having found the "fleeting expletives" policy void under the Administrative Procedure Act, Judge Pooler did not need to reach the other issues raised by the networks. However, she did address a few of them in dicta following the reversal of the policy, focusing on the vagueness of the indecency regime. She was sympathetic to "the Networks' contention that

158. *Id.* at 458.

159. *Id.*

160. *Id.* at 459.

161. *Id.* at 460.

162. *Id.* at 461.

163. *Id.*

164. *Id.* at 462.

the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague,"¹⁶⁵ and to the argument that the "FCC's 'patently offensive as measured by contemporary community standards' indecency test coupled with its 'artistic necessity' exception fails to provide the clarity required by the Constitution, creates an undue chilling effect on free speech, and requires broadcasters to 'steer far wider of the unlawful zone.'"¹⁶⁶ She suggested that the changing face of electronic media makes it harder to assert that the broadcast medium is uniquely pervasive and accessible to children, and therefore "strict scrutiny may properly apply in the context of regulating broadcast television"¹⁶⁷—a standard that would significantly raise the government's burden of proof in assessing indecency.

Perhaps most damning to the Commission's indecency definition, Judge Pooler noted that a definition of indecency for the Internet that failed to pass constitutional muster is identical to that offered by the FCC for regulation of indecency on broadcast television.¹⁶⁸ Thus, the judge concluded, "we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of a broadcast indecency."¹⁶⁹

2. The Dissent

While the majority opinion was a ringing endorsement of the networks' position that the FCC's "fleeting expletives" regulatory scheme was void, the lone dissenter in the case, Judge Pierre Leval, disagreed, believing that the Commission had provided a "reasoned explanation" for its indecency definition changes.¹⁷⁰ Leval argued that the FCC was exercising lawful discretion in changing the definition and that it made clear in the *Golden Globe* decision that it was departing from its previous standards and offered in that decision an explanation for the change (the F-word is in all cases to be considered sexual in nature).¹⁷¹

Judge Leval also interpreted the inconsistencies in the FCC's application of the indecency standard as attempts to "reconcile conflicting values"¹⁷² rather than as "undefined, indiscernible, inconsistent, and

165. *Id.* at 463.

166. *Id.*

167. *Id.* at 465.

168. *Id.* at 464 (citing definition from *Reno v. ACLU*, 521 U.S. 844, 860 (1997)).

169. *Id.*

170. *Id.* at 467.

171. *Id.* at 470.

172. *Id.* at 471.

consequently, unconstitutionally vague”¹⁷³ as claimed by Judge Pooler. Thus, said Judge Leval:

What we have is at most a difference of opinion between a court and an agency. Because of the deference courts must give to the reasoning of a duly authorized administrative agency in matters within the agency’s competence, a court’s disagreement with the Commission on this question is of no consequence.¹⁷⁴

Therefore, Leval concluded that the FCC was not arbitrary and capricious in its policy change and that the current policy should stand.

3. The FCC’s Response

Two FCC commissioners issued news releases following the announcement of the Second Circuit’s decision. FCC Chairman Kevin Martin expressed fears that the entertainment industry would take the decision as an open invitation for more profanity: “If ever there was an appropriate time for Commission action, this was it. If we can’t restrict the use of the words ‘fuck’ and ‘shit’ during prime time, Hollywood will be able to say anything they want, whenever they want.”¹⁷⁵ He called on Congress to consider “content-neutral solutions to give parents more tools and consumers generally more control and choice over programming coming into their homes,”¹⁷⁶ suggesting that à la carte programming options would give consumers those choices.

Commissioner Michael J. Copps (normally a sharp critic of the Chairman) echoed Martin’s disappointment, warning broadcasters that the FCC would enforce the indecency statute against any who would consider this a “green light to send more gratuitous sex and violence into our homes”¹⁷⁷ Moreover, Copps said, the Commission’s duty to protect children might result in the need for the agency to appeal the decision.¹⁷⁸

C. *Protecting Children from Indecent Programming Act*

The Senate quickly responded to the Second Circuit’s decision by proposing a bill requiring the FCC to consider single words or images

173. *Id.* at 463.

174. *Id.* at 473.

175. Press Release, Federal Communications Commission, Statement of FCC Chairman Kevin Martin On 2nd Circuit Court of Appeals Indecency Decision (June 4, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273602A1.pdf.

176. *Id.*

177. Press Release, Federal Communications Commission, Commissioner Copps Disappointed in Court Decision on Indecency Complaints (June 4, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-273599A1.pdf.

178. *Id.*

indecent in the Protecting Children from Indecent Programming Act.¹⁷⁹ Chairman Martin issued a press release, claiming that “members of Congress stated once again what we on the Commission and every parent already knows; even a single word or image can indeed be indecent.”¹⁸⁰ As of this writing, the bill has passed the Senate Committee on Science, Commerce, and Transportation but has not progressed further.

D. Discussion

While the FCC is prohibited by the Second Circuit to consider “fleeting expletives” indecent at this writing, nothing in the decision or in the proposed congressional act addresses the timeliness of the FCC’s responses, the correspondence between the FCC and indecency complainants, or the remainder of the FCC’s indecency definition. Judge Pooler’s dicta, although very critical of current indecency definitions, does not carry the force of law.

IV. OTHER RECOMMENDATIONS

Current governmental indecency activity does not address the consumer perspective on the complaint process. Moreover, many legal scholars have discussed the challenges facing indecency regulation without considering the impact on consumers.

This study, while not the first review of complaints to the FCC, is the first systematic review of denied consumer indecency complaints where the analysts had copies of the actual complaint and the Commission’s response letter. In 1997, thirty-one complaints against radio indecency between 1989 and 1995 were aggregated and evaluated.¹⁸¹ The author determined that the FCC was consistent in the application of its rules against expletives but that its rules were less consistently applied in the area of sexual or excretory activities¹⁸² and suggested that it would be difficult to predict how the FCC would rule on an indecency claim.¹⁸³

While they did not detail specific complaints, as is done in this study, scholars did evaluate the Commission’s levy of indecency fines between 1987 and 1997 for consistency: the authors found that between 1989 and

179. Protecting Children from Indecent Programming Act, S. 1780, 110th Cong. (2007).

180. Press Release, Federal Communications Commission, Press Statement by FCC Chairman Kevin J. Martin on Passage of ‘Protecting Children from Indecent Programming Act’ in Senate Committee (July 19, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-275374A1.pdf.

181. Milagros Rivera-Sanchez, *How Far Is Too Far? The Line Between “Offensive” and “Indecent” Speech*, 49 FED. COMM. L.J. 327, 331 (1997).

182. *Id.* at 364.

183. *Id.* at 366.

1992, fines of \$2,000 per incident were common but rose after 1992.¹⁸⁴ The authors concluded that the Commission must show flexibility because of the nature of indecent programming, including variations in theme, offensiveness, and explicitness.¹⁸⁵ Others have echoed the call for concrete indecency guidelines and consistent enforcement of those guidelines.¹⁸⁶

Two former FCC chairs have also weighed in on the indecency debate. Richard Wiley, Chairman from 1974 to 1977, suggested that context should be central in FCC determinations of indecency, and the agency should be restrained in its indecency findings.¹⁸⁷ Reed Hundt, Chairman from 1993 to 1997, added his voice to the call for restraint, noting that the Commission's recent concentrated efforts on indecency may be enforcing political restraints on free speech.¹⁸⁸

While consumers obviously have a very different purpose and agenda than broadcasters when it comes to the Commission's mandate for enforcing indecency standards, some of the consumers in our study who waited nearly a year for a response to their complaint may agree with commentators who have offered suggestions for revamping the indecency regime. Broadcasters could raise a constitutional challenge to the FCC under a legal doctrine called the Non-Delegation Doctrine, arguing that "Congress may not completely delegate its lawmaking power to another branch of government, because Article I of the United States Constitution 'vests "all" legislative power in Congress.'"¹⁸⁹ Broadcasters could also support new legislation that would mandate bifurcated review by the FCC: regulations that do not affect constitutional rights under one standard and regulations that do (such as indecency) under a second, more rigorous

184. Rivera-Sanchez & Ballard, *supra* note 13, at 150.

185. *Id.*

186. See, e.g., Rosenblat, *supra* note 13; Cohen, *supra* note 13, at 143 ("Before meaningful progress can be made, the legislature needs to provide clear guidelines for the FCC to follow in making indecency determinations, independent from the influence of socially conservative organizations.").

187. Richard E. Wiley & Lawrence W. Secrest, *Recent Developments in Program Content Regulation*, 57 FED. COMM. L.J. 236, 242 (2005).

188. Reed Hundt, *Regulating Indecency: The Federal Communication Commission's Threat to the First Amendment*, 2005 DUKE L. & TECH. REV. 13, ¶¶ 24-25 (2005), <http://www.law.duke.edu/journals/dltr/articles/pdf/2005dltr0013.pdf>. See also Samantha Mortlock, *What the [Expletive Deleted] Is a Broadcaster to Do? The Conflict Between Political Access Rules and the Broadcast Indecency Prohibition*, 14 GEO. MASON L. REV. 193, 195 (2006) (suggesting that broadcasts of campaign advertisements should be immune from indecency charges).

189. Shilpa Mathew, *The Fear-Causing Commission and Its Reign of Terror: Examining the Constitutionality of the FCC's Authority to Regulate Speech Under the First Amendment*, 26 LOY. L.A. ENT. L. REV. 107, 122-23 (2005) (quoting CHRISTOPHER N. MAY & ALLAN IDES, *CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM* 273 (Aspen 3rd ed. 2004)).

standard.¹⁹⁰ One scholar suggests that communitarian ideals might help close a gap in First Amendment jurisprudence as an additional element of the scarcity rationale,¹⁹¹ as the existing rationale does not adequately protect children.¹⁹² Still another author, recognizing the inconsistencies and inherent delays in FCC indecency enforcement, recommends adding a special board to the FCC to determine indecency based on a straight application of whatever current standards the FCC has.¹⁹³

In 2003, the Clean Airwaves Act was introduced,¹⁹⁴ a response to Bono's profanity on the Golden Globe Awards show. This bill would have amended Section 1464 to punish particular profane words.¹⁹⁵ At least one commentator suggested in 2005 that this act would have been inconsistent with then-current indecency regulations.¹⁹⁶ This act, while covering more words and addressing profanity rather than indecency, is similar to the proposed Protecting Children from Indecent Programming Act in that it singles out individual words.

Other common themes in current legal scholarship about FCC indecency enforcement include calls for more marketplace rather than FCC control of indecent programming and concerns that technological advances (and the multiplication of services available in most households) have outmoded traditional FCC broadcast enforcement rules and techniques. It has been suggested that children's television rules,¹⁹⁷ FCC indecency

190. *Id.* at 128-29.

191. Joshua B. Gordon, *Pacifica is Dead. Long Live Pacifica: Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451, 1488-89 (2006).

192. "Communitarian obligations . . . may contribute to a new argument structure that provides a plausible, logical alternative in a changed society that strives to adequately serve its common good." *Id.* at 1498.

193. B. Chad Bungard, *Indecent Exposure: An Economic Approach to Removing the Boob from the Tube*, 13 UCLA ENT. L. REV. 187, 218-22 (2006) (based on the economic-based Condorcet Jury Theorem, a theory attempting to determine the best size of a deliberative body).

194. H.R. 3687, 108th Cong. (2003).

195. *Id.* As used in this section, the term 'profane', used with respect to language, includes the words 'shit', 'piss', 'fuck', 'cunt', 'asshole', and the phrases 'cock sucker', and 'mother fucker', and 'ass hole', compound use (including hyphenated compounds) of such words and phrases with each other or with other words or phrases, and other grammatical forms of such words and phrases (including verb, adjective, gerund, participle, and infinitive forms). *Id.* The more recent *Protecting Children from Indecent Programming Act* would require the FCC to consider particular single words to be indecent—it does not address the profanity element of the statute.

196. Stephanie L. Reinhart, *The Dirty Words You Cannot Say on Television: Does the First Amendment Prohibit Congress From Banning All Use of Certain Words?*, 2005 U. ILL. L. REV. 989, 1012-14 (2005).

197. *See generally* Adam Candebub, *Creating a More Child-Friendly Broadcast Media*, 2005 MICH. ST. L. REV. 911 (2005).

regulations,¹⁹⁸ and the V-Chip have all had limited utility in protecting children and that a market-based approach would better address parental concerns.¹⁹⁹ Other authors recommend that the FCC should require disclosure of all advertising sponsorship for programming and should let consumers put pressure on advertisers to stop supporting programs they find objectionable.²⁰⁰

It has been asserted that the FCC's indecency regulations violate the First Amendment because they are overbroad and arbitrarily applied.²⁰¹ FCC content regulation is no longer needed because private interest groups like the PTC are a check on broadcast indecency, and technological advances that make content available through avenues beyond the Commission's jurisdiction, like cable and satellite, promote an inappropriate double standard.²⁰² Following that suggestion, a proposal was advanced that stated that current indecency regulations have been made obsolete by technological advances²⁰³ and that recommended a revisiting of the FCC's enforcement procedures in light of current communications technology.²⁰⁴ Instead of regulating indecency, another

198. Craig R. Smith, *Violence as Indecency: Pacifica's Open Door Policy*, 2 FIU L. REV. 75, 92 (2007) (calling for the overturn of *Pacifica* as necessary to prevent censorship of violent programming).

199. Noelle Coates, *The Fear Factor: How FCC Fines Are Chilling Free Speech*, 14 WM. & MARY BILL RTS. J. 775, 804 (2005) ("Allowing viewers to make their own decisions about what they do or do not watch achieves the same effect as the fines, for the content that is broadcast is determined ultimately by the viewers and the commercial advertisers that seek their attention.").

200. Keith S. Brown & Adam Candeub, *The Law and Economics of Wardrobe Malfunction*, 2005 BYU L. REV. 1463, 1466-67 (2005) (arguing that advertisers drive media markets). See also Faith Sparr, *From Carlin's Seven Dirty Words to Bono's One Dirty Word: A Look at the FCC's Ever-Expanding Indecency Enforcement Role*, 3 FIRST AMEND. L. REV. 207, 251 (2005) ("[T]he difficulty in allowing a small governmental body influenced by politics and societal whims to judge the value of speech protected by the First Amendment is probably best summarized by Justice Harlan's admonition: 'it is nevertheless often true that one man's vulgarity is another's lyric.'" (quoting *Cohen v. California*, 403 U.S. 15, 25 (1971))).

201. Antonoff, *supra* note 14, at 273.

202. *Id.* at 274 ("As we advance technologically, less and less communication is being subjected to what effectively amounts to government censorship.").

203. Holohan, *supra* note 14, at 366-67.

204. See *id.* at 368-69. See also Gregory B. Phillips, *Indecent Content on Satellite Radio: Should the FCC Step In?*, 26 LOY. L.A. ENT. L. REV. 237, 277-85 (2005/2006) (calling for fewer regulations on satellite radio content). But see Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, 30 S. ILL. U. L.J. 243, 271 (2006) (suggesting that it is likely that the FCC will attempt to extend indecency regulation on satellite and cable programming, despite the unlikelihood that such regulations will be found constitutional).

author suggested that the FCC should only enforce obscenity violations and let the marketplace monitor indecent content.²⁰⁵

On the other hand, at least one commentator maintained that the FCC has many issues to combat even when regulating just indecency: it is a reactive organization that can be hijacked by groups like the PTC,²⁰⁶ and its indecency standards are too vague.²⁰⁷ The marketplace should be the final arbiter of what is acceptable:

Allowing viewers to make their own decisions about what they do or do not watch achieves the same effect as the fines, for the content that is broadcast is determined ultimately by the viewers and the commercial advertisers that seek their attention. When the viewers become bored, horrified, or repulsed, they turn the channel. When enough do so, the broadcaster gets the hint and alters the content in an effort to keep both the viewers and the advertisers. Accordingly, it is the marketplace, not the government, that controls the content and the individual, not the government, who chooses what to watch.²⁰⁸

Many of these commentators raise valid points. However, none of them takes the perspective offered in this study: what the consumer experiences when he or she files a complaint with the FCC. As will be discussed below, this perspective reveals additional issues not touched upon in previous analyses.

V. CONCLUSIONS AND SUGGESTIONS

If this sample of complaints is any indication, Americans cannot always clearly articulate what they find indecent, as indicated by both the variety and general nature of many complaints. To paraphrase Justice Potter Stewart's famous adage about obscenity, they may not be able to define indecency, but they know it when they see it²⁰⁹—or hear it. However, it is clear that profanity in lyrics, conversation, or dialogue, along with sexual material and nudity, are of major concern to these American viewers and listeners who took the time to write a letter or note of complaint to the agency many thought could stop or prevent such programming.

The sample suggests that many Americans lack understanding of the functions or regulatory powers of the FCC. Many complainants call on the

205. Brian J. Rooder, *Broadcast Indecency Regulation in the Era of the "Wardrobe Malfunction": Has the FCC Grown Too Big for Its Britches?*, 74 *FORDHAM L. REV.* 871, 905-06 (2005).

206. Coates, *supra* note 199, at 779.

207. *Id.* at 789-801.

208. *Id.* at 804.

209. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("But I know it [obscenity] when I see it, and the motion picture involved in this case is not that.").

FCC to “put a **stop** to this nonsense,”²¹⁰ or to fulfill its “obligation to the public to do its part to keep this type of programming off the public airways,”²¹¹ implying that the FCC has the power to simply tell broadcasters not to air certain material. Some cite a general decline in morality in the country²¹² and express concern that indecency in broadcast programming is responsible for declining moral standards; specifically, it will lead young people to “[watch] porn video[s].”²¹³

In light of the high-profile indecency cases with which it has dealt in recent years, the Commission is faced with a public relations (if not a political) problem. While many may have applauded the final FCC decision on the 2004 Super Bowl incident, the complaints showed continued doubt about the Commission’s ability to keep the airwaves clean. Complainants expressed mixed feelings about the FCC. Some complainants were very positive, ending their letters with “keep up the good work,”²¹⁴ and “[t]hank you for your efforts in assuring that our children are protected from obscene and indecent programming.”²¹⁵ The FCC got kudos from one complainant: “I was very proud of the stand that you guys made immediately following the Super Bowl. You made it clear that those types of actions will not be tolerated!”²¹⁶ One complainant noted, “[t]he American people have recently made our voice clear to the FCC. And [the] FCC has been responding.”²¹⁷

However, it was far more common for complainants to express displeasure with the FCC. One complaint assaulted the FCC for its original *Golden Globes* decision, where it said that Bono’s use of the F-word was not indecent.²¹⁸ The complainant said that he or she was not shocked by this because the FCC is a “toothless lion.”²¹⁹ This complainant concluded,

210. Broadcast Complaint against WRRK-FM, File No. EB-04-IH-0322 F12 (FCC Feb. 10, 2004) (on file with authors).

211. Broadcast Complaint against Fox, File No. EB-04-IH-0256 E65 (FCC June 11, 2004) (on file with authors).

212. See, e.g., Broadcast Complaint against WNBC-TV, File No. EB-03-IH-0553 C30 (FCC Oct. 28, 2003) (on file with authors) (complaint about *Fear Factor*—“I am no longer proud of the society in which I live. Something needs to be done about this wonton [sic] pursuit of money by TV executives.”).

213. See Broadcast Complaint against WNUV-TV, *supra* note 77.

214. Broadcast Complaint against UPN, File No. EB-04-IH-0243 E43 (Feb. 20, 2004) (on file with authors).

215. Broadcast Complaint against WFXT-TV, File No. EB-04-IH-0420 G34 (Mar. 17, 2004) (on file with authors).

216. See Broadcast Complaint against WRUW-FM, *supra* note 100.

217. Broadcast Complaint against KSUA-FM, File No. EB-04-IH-0415 G28 (Mar. 28, 2004) (on file with authors).

218. Broadcast Complaint against WNYW-TV, File No. EB-03-IH-0645 C95 (Nov. 22, 2003) (on file with the authors).

219. *Id.*

“[w]e blame the FCC for a lot of the bad behavior of our children to-day [sic].”²²⁰ Another complainant said, “[a]s a citizen, I am increasingly disgusted with the offensive programming the FCC is allowing on television. I am also concerned at the radio programs that you are targeting, while ignoring others.”²²¹

In the complaint cited in the Introduction to this Article, a father complaining about cursing in cartoons such as *Futurama* and *King of the Hill* claimed that he had to tell his children when he refused to let them watch the cartoons that “sorry kids but the fcc [sic] is not doing their job and they are letting the networks get away with nasty talk.”²²² He added, “you people at the fcc [sic] are doing a sorry job.”²²³ Another complainant chastised, “[i]f the FCC can’t do something about this station you are useless and what do you do anyway? I pay a lot of tax dollars for governmental agency’s [sic] and my taxes are being wasted if smut like this is not removed off the airwaves.”²²⁴ One complainant called the FCC “goons.”²²⁵

Some of this invective, no doubt, reflects frustration with the content of broadcast TV and radio. However, these comments also make clear not only a lack of understanding of how the FCC works (the Commission cannot “target” radio stations; it must wait for complaints to come to it) but also how it evaluates and punishes indecent broadcasts. Many complainants also attempted to put the burden on the FCC to hunt down programming that they have suggested is indecent; for example, a complainant claimed that the word “bullshit” had been broadcast during *60 Minutes* and gave the FCC detailed directions on how to obtain a transcript or tape.²²⁶

As noted above, a recommendation by some scholars examining the FCC’s indecency regulatory model was to encourage the FCC to get out of indecency regulation entirely and let the marketplace decide what content is permissible and what is not.²²⁷ We agree with this recommendation, given how many complaints the agency receives and how quickly networks change their programming. The FCC, overwhelmed with millions of

220. *Id.*

221. Broadcast Complaint against NBC, *supra* note 56.

222. Broadcast Complaint against WAWS-TV, *supra* note 1.

223. *Id.*

224. Broadcast Complaint against Chicago radio station 104.7, File No. EB-04-IH-0036 D35 (Jan. 20, 2004) (on file with authors).

225. Broadcast Complaint against Unknown Television Station, *supra* note 121, at D160. (complainant charged that Oprah should be fined as much as anyone else for her guest’s use of the word “tits”).

226. Broadcast Complaint against WSFB-TV, File No. EB-03-IH-0101 A95 (Feb. 23, 2003) (on file with authors).

227. *See, e.g.,* Coates, *supra* note 199, at 804.

complaints, cannot possibly keep up with the marketplace's shifting standards. Its significant backlog of investigations and lengthy response time adds to the problem. However, such a change seems unlikely, at least in the foreseeable future, given both political and social pressure for cleaner airwaves. The complaints reflect an expectation that government should participate in managing offensive content on broadcast television and radio. Therefore, we make the following recommendations.

A. The FCC Must Create and Publicize Clear, Defensible Indecency Guidelines

The FCC uses the vague phrase “in context, not sufficiently graphic or sustained” when it cannot describe to complainants more specifically why a complaint should not be upheld—referring to elements of its articulated indecency standards.²²⁸ This generic phrase does little to tell researchers or broadcasters what would be sufficient to render a scene, phrase, or image indecent. How much and what kind of context is necessary? What is “sufficiently graphic?” And what about the “sustained” requirement: is there a time limit? Does a scene or language have to go on past a certain undetermined point before the FCC will deem it indecent? It is admittedly difficult to craft appropriate guidelines for indecency that are easily applicable and understandable, as each complaint will raise its own concerns and context, and broadcasters—and citizens—should be wary of any government attempt to define what is appropriate.

It is beyond the purpose of this study to suggest particular revisions to the indecency guidelines. But, at minimum, the FCC should revise its indecency guidelines to include more specific, understandable, and measurable elements to help broadcasters and the public understand what content is off-limits. The agency did this in 2001 in its industry guidelines,²²⁹ but that document may be obsolete in the aftermath of the Second Circuit's decision and the Commission's own subsequent revisions of its policies. As these 2004 denials indicate, there appears to be a broad spectrum of enforcement standards whose application is unclear. The FCC's challenge will be to create guidelines that will pass constitutional muster. As the Second Circuit has suggested, it is not unreasonable to consider that the concerns that have driven FCC indecency regulation (the pervasive nature of broadcasting and its unique accessibility to children) may no longer be compelling in an era where eighty-five percent of American homes with television sets have cable or satellite

228. See *Industry Guidance Policy Statement*, *supra* note 31, at para. 10. See also *Obscenity, Indecency & Profanity—Frequently Asked Questions*, *supra* note 31.

229. See *Industry Guidance Policy Statement*, *supra* note 31, at para. 10.

subscriptions,²³⁰ which are beyond the reach of existing indecency enforcement.

The FCC should also provide additional publicity about its guidelines and how they will be enforced. In addition to its fact sheet and its Web site, the agency should make an effort to educate parents through various community outreach efforts to opinion leaders as well as groups such as parent-teacher associations, the Special Supplemental Nutrition Program for Women, Infants, and Children (“WIC”)²³¹ and other government assistance agencies, and daycare centers. Working through partnerships with toy manufacturers and retail outlets presents another opportunity to disseminate information. The FCC can also develop public service announcements to publicize its indecency definitions and information requirements to help reduce the number of complaints that come in without sufficient information for a determination.

The agency should also be prepared for legal challenges to the constitutionality of any guidelines it suggests. As the Second Circuit decision indicates, some legal definitions of indecency may not pass constitutional muster.²³²

B. The FCC Must Respond More Quickly to Complaints

The FCC’s Web site says that the FCC will “striv[e] to address every complaint within 9 months of its receipt.”²³³ While this study suggests that the FCC generally does meet this goal (an average of about five and a half months between initial contact and FCC response), the interval of time between initial complaint and FCC response might contribute to the public’s frustration, and it certainly does not bode well for the FCC’s enforcement policies—particularly when some complainants wait for over a year merely to be asked for additional information. FCC Chairman Martin agrees: “It doesn’t matter how tough our fining authority is if we don’t actually enforce the rules. Consumers should not have to wait years to have their complaints heard.”²³⁴

230. Alan Greenblatt, *Television’s Future*, 17 CQ RESEARCHER 145, 148 (2007).

231. See About WIC, <http://www.fns.usda.gov/wic/aboutwic/> (last visited Nov. 6, 2007).

232. Former FCC Chairman Michael Powell has suggested that it is dangerous to request government to produce a “Red Book” of what broadcasters can and cannot say on the air. See, e.g., Michael Powell, Remarks at the NAB Summit on Responsible Programming (Mar. 31, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-245663A1.pdf. However, the guidelines the FCC is currently using are difficult to understand and interpret. We do not call for the FCC to create a list of forbidden words; rather, we ask for clearer and more applicable guidelines.

233. Obscenity, Indecency & Profanity – Frequently Asked Questions, <http://www.fcc.gov/eb/oip/FAQ.html> (last visited Nov. 6, 2007).

234. Martin, *supra* note 11, at 3-4.

As noted above, the median number of days between a complaint and a response from the FCC in this sample is 163 days. There is precedent for faster communication between the government and its constituents: the FOIA, for example, requires agencies to let requesters know if the request can be filled within twenty working days (essentially, a calendar month).²³⁵ The FCC should adopt and implement shorter and clear guidelines for communication with complainants—even if it seeks additional information so the best determination can be made. At minimum, complaints that require additional information should be addressed within two weeks and returned to the complainants with a request for that information. The twenty day response deadline mandated by FOIA should be adopted for indecency responses as well.

C. The FCC Must Manage Complaints and Complainants and Provide Clarity in Responses

The FCC faces several challenges in dealing with complainants and complaints. As some have alleged, the ease of Internet complaint filing lends itself to large and growing numbers of complaints from very few sources.²³⁶ In fact, CBS complained to the FCC that most of the indecency complaints the FCC received about the December 31, 2004 rerun of *Without a Trace*, which resulted in a finding of indecency and over \$3 million in fines, originated from the PTC and the American Family Association.²³⁷ Further, CBS claimed that only two of those 4211 complainants had actually watched the broadcast and then only from a clip posted on the PTC Web site.²³⁸ The original showing of the *Without a Trace* episode generated no complaints; complaints only began on January 12, 2005, when the PTC sent an email alert to its membership.²³⁹

Interestingly, the PTC had earlier called for a congressional investigation of the FCC to determine whether the FCC's complaint accounting processes were accurate.²⁴⁰ Then-President L. Brent Bozell chastised: "The FCC needs to count each and every complaint, regardless if

235. 5 U.S.C. § 552(a)(6)(A)(1) (2000).

236. See generally *PTC Drives Spike in Smut Gripes*, BROADCASTING & CABLE, Nov. 14, 2005, at 12 (demonstrating the PTC's ability to single-handedly raise complaint totals at the FCC). The PTC apparently prides itself on the number of complaints it generates. See Press Release, Parents Television Council, PTC Calls for Congressional Investigation of FCC (Dec. 7, 2004), <http://www.parentstv.org/PTC/publications/release/2004/1207.asp>.

237. See Todd Shields, *CBS Stations: Indecency Complaints Invalid*, MEDIAWEEK, June 13, 2006, available at http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1002652454.

238. *Id.*

239. *Id.*

240. Parents Television Council, *supra* note 236.

the majority complaining are PTC members. When one million people come together under one roof to voice their concerns, it's not one person complaining, it's one million people complaining."²⁴¹

But are those one million people Bozell references really one million disparate individuals who just happen to be offended by the same content or are they being steered by a handful of activist organizations? Surely some individuals have filed numerous complaints. How should the FCC handle those complaints? One study found that the FCC tallies its indecency complaints differently than it does complaints in other areas,²⁴² suggesting that the agency understands that the number of indecency complaints is often artificially inflated.²⁴³ In fact, the author of this study alleges that the FCC itself acknowledges that 97 percent of the over 13,000 complaints filed in 2002 targeted only four specific programs, and in 2003, 99.8 percent of the more than 240,000 complaints were against nine programs.²⁴⁴

The study suggests that several changes that the FCC made in tallying complaints created the suddenly huge complaint numbers. These changes included counting Web users complaining about the same programming as individuals, rather than as a group,²⁴⁵ and counting multiple identical complaints to different FCC offices as individuals rather than as a group.²⁴⁶ These changes were made quietly, the author says, and without the usual public comments that accompany such shifts in policy.²⁴⁷ Moreover, no other complaints are counted in the same way that the FCC counts indecency complaints.²⁴⁸ Thus, the author asserts, "[i]t is becoming increasingly apparent that this statistic-gathering process has become highly politicized and, as a result, fails to serve as an accurate gauge for public policy analysis or decision-making in this area."²⁴⁹

The PTC also has offered on its Web site precreated complaint forms that its members may fill out and send to the FCC, available for use for

241. *Id.*

242. Adam Thierer, *Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process*, PROGRESS ON POINT (The Progress and Freedom Foundation, Washington, D.C.), Nov. 2005, at 1, available at <http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf>.

243. *Id.*

244. *Id.* at 3.

245. *Id.* at 5.

246. *Id.* at 7 ("This means that since the first quarter of 2004, the FCC has been counting identical indecency complaints multiple times according to how many Commissioner's [sic] offices and other divisions receive the complaints. Consequently, some indecency complaints might be inflated by a factor of 6 or 7. . . .").

247. *Id.* at 8.

248. *Id.*

249. *Id.* at 11.

months following the broadcast, whether or not they saw the broadcast in question. For example, the PTC offers a complaint form that members may fill out with their personal information regarding a Fox broadcast of an NFL game between the New Orleans Saints and the Philadelphia Eagles.²⁵⁰ The complaint included a screen capture (not a broadcast clip) of a woman wearing a T-shirt printed with the words “Fuck Da Eagles.”²⁵¹ The broadcast took place on January 13, 2007, but at this writing (October 2007) the Web site was still available and active.

If individuals did not actually see the broadcast in question, should the FCC accept their complaints? The networks would probably suggest, as did CBS in its criticism about the *Without a Trace* complaints, that individuals should actually see or hear a broadcast before they can claim harm.²⁵² The FCC should impose a time limit after which it will not consider indecency complaints. For example, the agency could refuse to accept complaints after a month has passed from the complained-about broadcast. This policy would limit the number of complaints from Web sites like the PTC’s football site, where complaints can be filed months after the broadcast by individuals who never saw or heard it, while not affecting legitimate complaints.

Regardless of how the FCC chooses to measure or count its complaints, it must create, implement, and enforce a policy on how to do so. The FCC must determine whether the number of complaints received about a particular show should matter in its determination of whether to investigate the program fully.²⁵³ The Janet Jackson incident suggests that the number of complaints does make a difference—such a policy should be explicit.

One of the additional challenges the FCC will face, if it continues to be a reactive agency, is to encourage complainants to provide sufficient information. On its Web site, it provides FCC Form 475B for filing obscene, profane, and/or indecent material complaints,²⁵⁴ which requests specific information from the complainant, such as date and time of broadcast, network, call sign, city, and state where viewed/heard,

250. File An Official FCC Indecency Complaint Against Fox, <https://www.parentstv.org/ptc/action/FoxFootball/main.asp> (last visited Nov. 6, 2007).

251. *Id.*

252. See Shields, *supra* note 237.

253. Former Chairman Michael Powell has suggested that his push for more and stronger indecency enforcement came from the increased number of complaints the FCC receives. See Michael Powell, Remarks at the National Association of Broadcasters Convention, (Apr. 20, 2004), at 1, 3, 13-14, available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-246876A1.pdf.

254. Federal Communications Commission – Obscene, Profane, and/or Indecent Material Complaint Form – (FCC Form 475B), <http://svartifoss2.fcc.gov/cib/fcc475B.cfm>.

program/DJ/song name, and other information that would help the FCC identify the alleged indecent broadcasting more precisely. The FCC's Web form could be programmed to reject complaints that do not include sufficient information and prompt the complainant to provide additional descriptions or context (thereby reducing the number of complaints that cannot be assessed for lack of information). The form could also limit the times that can be entered to non-safe harbor hours, or at least notify complainants when they type in a time within safe harbor hours that the FCC will probably reject the complaint on those grounds.

The PTC's Web site offers a similar Web-based complaint filing service, with the addition that the PTC will forward the complaint to the FCC and a copy to the complainant, including a suggestion that the complainant print out the complaint and mail it to the FCC "to make sure that they don't 'lose' your complaint that is sent via email."²⁵⁵ (In the FCC's new complaint counting method, these complaints may be counted twice, thus doubling the number of complaints against programming the PTC targets.) The PTC's complaint form already limits the time range that can be entered from 6 a.m. to 9:30 p.m.: the complainant is unable to select safe harbor hours.²⁵⁶ The PTC's form also includes a way for complainants to look up the call signs of the offending radio or television station and additionally reminds complainants to "describe specific dialogue and/or events surrounding the incident. . . ."²⁵⁷

However, since many of the complaints in this sample came in without the use of any form—complainants simply wrote the FCC a letter exhorting them to do something—lack of information will continue to be a problem. As noted above, as part of its efforts to reduce the time lag between complaint and response, the FCC should reject all complaints that do not provide sufficient context for it to make a determination of indecency and return them to their authors for more clarification within two weeks.

The FCC addressed most of the complaints in our sample with one of several different form letters. The formats of the letters were similar: a summary of the complaint, a declaration that the FCC did not find it indecent, a statement of FCC authority in the area, the legal definition of indecency and safe harbor hours, a short phrase dispensing with the issue (such as "in context, not sufficiently graphic and/or sustained") or a claim that insufficient evidence was submitted to make an indecency finding, a suggestion that V-Chip or other technology could assist parents in

255. File An FCC Broadcast Indecency Complaint, <https://www.parentstv.org/PTC/fcc/fcccomplaint.asp> (last visited Nov. 6, 2007).

256. *Id.*

257. *Id.*

monitoring what their children watch, and a mention that a fact sheet on indecency was enclosed (though not provided in the materials under review).

While the research materials did not reveal any complainant follow-up with the FCC on any of the complaints in the database, it is clear from the context of their letters that many individuals are simply average people without legal training for whom the letter would mean little other than the denial. Explaining indecency denials in a way average Americans can understand is a difficult task, but one that is necessary given the uncertainty of the current definition. At minimum, the FCC should articulate to individual complainants more of the rationale behind its findings. Simply stating that a complained-about broadcast is not sufficiently graphic or that the indecency is not suitably sustained reveals virtually nothing.

D. Conclusion

FCC Chairman Martin has, since 2003, recommended a two-prong broadcast and cable industry solution: a "Family Viewing" broadcast hour and family-friendly tiers on cable.²⁵⁸ Under these plans, broadcasters would devote the first hour of primetime programming to family-friendly programming,²⁵⁹ and cable would provide "an exclusively family-friendly programming package as an alternative to the 'expanded basic' on cable. . . ."²⁶⁰ Martin identified the Disney Channel, Nickelodeon, the ABC Family channel, the Discovery Channel, the History Channel, and the Hallmark Channel as family-friendly.²⁶¹ In June 2007, Martin spoke at the House introduction of The Family and Consumer Choice Act of 2007,²⁶² a bill that would apply broadcast indecency standards to cable and mandate family-friendly cable tiers,²⁶³ and lamented the fact that nothing had happened on

258. Kevin J. Martin, *Family-Friendly Programming: Providing More Tools for Parents*, 55 FED. COMM. L.J. 553, 554 (2003).

259. *Id.* at 560.

260. *Id.* at 562. Martin suggested a way in which cable providers could offer this service: "The existing package or 'tier' could remain the same; the operator could merely select certain family-friendly channels from the existing tier and *also* offer them as a standalone 'family-friendly' alternative package." *Id.* at n. 35 (emphasis in original).

261. *Id.* at 561.

262. Family and Consumer Choice Act of 2007, H.R. 2738, 110th Cong. (2007).

263. *Id.* at § 642(a) ("Not later than 270 days after the date of enactment of this section, the Commission shall initiate and conclude a rulemaking to adopt measures to protect children from indecent video programming carried by a multichannel video programming distributor."). See also the proposed amendment to 47 U.S.C. 551, § 642(a)(2)(A)(i)(I-II):

In accordance with the indecency and profanity policies and standards applied by the Commission to broadcasters, as such policies and standards are modified from time to time, not transmit any material that is indecent or profane on any channel in the expanded basic tier of such distributor between the hours of 6 a.m. and 10 p.m., in the Eastern or Pacific Time Zones; or the hours of 5 a.m. and 9 p.m., in

his recommendations; in fact, he encouraged Senate action after the Second Circuit's decision:

Your efforts today are even more important in the wake of the Second Circuit Court's recent decision which may make it more difficult for the FCC to enforce restrictions on objectionable language broadcast over the public airwaves. We need a content-neutral solution that puts power in the hands of America's parents and avoids first amendment [sic] concerns. As I have said before, there is a right to free speech, but there is no constitutional right to be paid for speech.²⁶⁴

Martin continues to call for congressional intervention in the form of mandates for family-friendly hours and cable tiers.²⁶⁵

It is clear from congressional and FCC actions that indecency is not an issue that is either easily resolvable or likely to go away quietly. Nor is it likely that the public will allow the issue to fade, given the growth of cable and the need for broadcasters to provide edgier content to compete. However, unless the FCC clarifies its standards for indecency, responds to both broadcasters and complainants in a timely manner, and manages complainants and the complaint process consistently, both broadcasters and consumers of broadcast television and radio will continue to be left in the dark in their attempts to understand broadcast indecency enforcement.

the Central or Mountain Time Zones.

Id. The bill, at the time of this writing, has not passed the House Committee on Energy and Commerce.

264. Martin, *supra* note 15.

265. See Martin, *supra* note 175.

