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fashion into a three-dimensional figure. THE AMERICAN HERITAGE DICTIONARY (2d ed. 1982).

27. N.Y. TIMES, Jan. 1, 1991, § 1, at 17.

28. *Id.* Sculpture was defined in the earlier (1987) bill as: "any three-dimensional fine art object cast, fabricated or carved in multiple from a mold, model, cast, form or other prototype."

29. N.Y. ARTS & CULT. AFF. LAW § 15.01-2.

30. *Id.*

31. See note 21, *supra.*

32. The message is: "Article fifteen of the New York Arts and Cultural Affairs law provides for disclosure in writing of certain information concerning multiples ... of sculpture when sold for more than $1500, prior to effecting a sale of them. This law requires disclosure of such matters as the identity of the artist, the artist's signature, the medium, whether the multiple is a reproduction, the time when the multiple was produced, use of the master which produced the multiple, and the number of multiples in a 'limited edition.' If a prospective purchaser so requests, the information shall be transmitted to him prior to the payment or the delivery of such an art multiple, this information will be supplied at the time of or prior to delivery, in which case the purchaser is entitled to a refund if, for reasons related to matter contained in such information, he returns the multiple substantially in the condition in which received, within thirty days of receiving it. In addition, if after payment and delivery, it is ascertained that the information provided is incorrect the purchaser may be entitled to certain remedies." N.Y. ARTS & CULT. AFF. LAW § 15.01-2.

33. *Id.* at § 15.01-3.

34. *Id.* at § 14.05-1.

35. *Id.* at §§ 14.06-1, 2. Moreover, the subsection provides that art merchants possess duplicate records going back only 10 years.

36. *Id.*

37. *Id.* at § 14.05-2.

38. *Id.* at § 14.05-3.

39. *Id.* at § 15.17.

40. N.Y. PENAL LAW § 170.45 (McKinney 1988)

41. Douglass G. Boshkoff, *Art and Law, at Home and Abroad*, 64 IND. L.J. 83 (1988).

42. *Id.*

43. The Art World and the Law: forum committee on the entertainment & sports industries, pp. 29-30 (American Bar Assoc. 1987), adopts a checklist as part of its study materials for a program held at the Museum of Modern Art.

44. N.Y. ARTS & CULT. AFF. LAW § 14.08-9.

Recent Developments in Federal Broadcast Indecency Regulation

Introduction

The latest controversy over what may be broadcast over the public airwaves centers on the federal government's attempt to ban indecent broadcasts 24 hours a day. Prior to 1987 the rules regulating indecent broadcasting, in effect since 1978, drew little attention.[1] "Indecent" was relatively clearly defined and the hours when such broadcasts are allowed were clear. In 1987 the Federal Communications Commission broadened its definition of indecent material and narrowed the time when it would allow indecent broadcasts.[2] The Court of Appeals for the District of Columbia upheld the constitutionality of the new definition of indecency but struck down the shortening of the hours during which such material could be broadcast.[3] The F.C.C., responding to a directive of Congress, then imposed a 24 hour ban on indecent programming.[4] The same Court of Appeals stayed enforcement of the ban and ordered the F.C.C. to develop a record which would support the 24 hour ban before the court would rule on the merits of the ban.[5] The F.C.C. complied with the order and submitted its findings to the court.[6] A three judge panel struck down the 24 hour ban, and in August of 1991 the court refused to rehear the case *en banc.*[7]

Between 1987 and 1990 the F.C.C. increased its newly defined ban on indecent broadcasts during daytime hours.[8] It has done so in reliance on a Supreme Court case that explicitly allows the F.C.C. to channel indecent broadcasts to nighttime hours.[9] Recently, however, the Commission has not initiated any actions for indecent broadcasts. With the court challenges to its new policy decided, it is unclear whether or not the Commission will step up enforcement once again.

This update will briefly review the actions of the Commission and Congress which precipitated the most recent court case. It will also give illustrations of formal F.C.C. sanctions and investigations that have taken place as a result of the Commission's efforts to enforce indecency regulations. Finally, this update will attempt to assist the reader in predicting the likelihood of future action to restrict indecent broadcasts now that the Court of Appeals has rejected the 24 hour ban.

Regulations On Indecent Broadcasts

Since 1934, a federal statute has made it a crime to utter obscene or indecent language by means of broadcast communication.[10] However, the law was seldom invoked and the Supreme Court never ruled on its constitutionality until the *Pacifica* case of 1978.[11] That case arose when the F.C.C. attempted to sanction a radio station for broadcasting George Carlin's "*Seven Dirty Words*" routine during the early afternoon.[12] In *Pacifica*, the Supreme Court upheld the authority of the F.C.C. to sanction a broadcaster for airing obscene material at any time and indecent material during daytime hours.[13] The Court seemed to define indecent material as ". . . patently offensive words dealing with sex and excretion . . . ."[14] The Court affirmed the F.C.C.'s authority to channel such broadcasts to non-daytime hours.[15] Immediately after the decision, the F.C.C. announced it would only enforce the indecency prohibition when the broadcast: 1) in-

cluded the repeated use of one of the seven "dirty words" used by the broadcaster in *Pacifica*[16]; and, 2)aired before 10 p.m.[17] This definition, while not crystal clear, at least assured broadcasters that if they avoided the seven words they could also avoid F.C.C. sanctions.

In 1987, the Commission, under pressure from religious and conservative groups, reexamined its indecency policy.[18] After scrurinizing its policy, the Commission announced it intended to continue to use the *Pacifica* court's definition of indecency.[19] However, the Commission would no longer require that one of the seven dirty words be used before it would label material indecent.[20] The F.C.C. also shortened the time during which it would allow such broadcasts (the safe harbor) to hours between midnight and 6 a.m.[21] In the case known as *ACT I*, a group of broadcasters challenged the F.C.C.'s new interpretation of what constitutes indecency and challenged the shortening of the safe harbor.[22] The Court of Appeals for the District of Columbia upheld the legality of the new application of the indecency label as permissible under *Pacifica*.[23] The Court reiterated the underpinnings of *Pacifica* when it said a content-based restriction on speech may be justified if the regulation is a precisely drawn means of serving a compelling state interest; in these cases, the interest in protecting children from indecent material.[24] Regarding the safe harbor, the Court noted the factors that the F.C.C. must consider when implementing channeling rules:

> 1) the government, which has a compelling interest in protecting children from indecent material; 2) parents, who are entitled to decide whether their children are exposed to such material if it is aired; 3) broadcasters, who are entitled to air such material at times of day when there is not a reasonable risk that children may be in the audience; and 4) adult listeners who have a right to see and hear programming that is inappropriate for children but not obscene.[25]

The court then held that, given the importance of balancing these interests, the F.C.C. acted without an adequate record to support the safe harbor change and the change was therefore invalid.[26]

About two months after the court decided *ACT I*, Congress approved a measure introduced by Senator Jesse Helms directing the F.C.C. to enforce the 1934 ban on indecent broadcasting 24 hours a day.[27] The F.C.C. dutifully adopted a rule banning all indecent broadcasts, thereby abolishing the safe harbor.[28] The Court of Appeals stayed enforcement of the new rule, citing *ACT I*, in the case known as *ACT II*.[29] The Court directed the F.C.C. to develop an evidentiary record to support the 24 hour ban before it would rule on the legality of the ban.[30] The F.C.C. subsequently asked the public for comments on the rule to help it determine: whether or not the ban served the compelling interest of protecting children; who should be classified as children; what were the viewing and listening habits of children; and whether or not there was a narrower method available to serve the compelling interest of protecting children.[31]

The F.C.C. studied the public comments it received and prepared a report justifying its previous action imposing the 24 hour ban.[32] The report defined children, for broadcast indecency standards, as those 17 years old and under.[33] It went on to justify the total ban as the most narrowly tailored means available to serve the compelling interest of protecting these children given their largely uncontrolable viewing and listening habits and the limits of using technology to keep broadcasts from them.[34] The Commission filed the report with the Court of Appeals.

The case was argued on January 28, 1991.[35] The court appeared openly hostile to the F.C.C.'s conclusion that the 24 hour ban was tailored narrowly enough to survive constitutional scrutiny.[36] In May of 1991, as many observers had predicted, the Court struck down the 24 hour ban.[38] In that decision, known as *ACT II*, the Court again upheld the Commission's definition of indecent against void for vagueness and overbreadth challenges.[39] The Court also reiterated that indecent broadcasts were entitled to first amendment protection and the F.C.C. must allow reasonable safe harbor hours for indecent broadcasts.[40] Finding the 24 hour ban a violation of this requirement, the Court struck it down and directed the F.C.C. to begin proceedings that would, after a full and fair hearing, lead to the establishment of a safe harbor.[41] The Court also subsequently denied the Commission's request to rehear the case *en banc*.[42]

Outlook for Future Regulations

As the background information reveals, the changes in broadcast indecency regulations consist of two trends. One trend is toward channeling indecent broadcasts away from children. The second trend is toward labeling more material indecent. The first trend, channeling indecent material to the hours when less children are in the audience, reached its apex when the F.C.C. imposed a 24 hour ban on indecent programs. Now that the ban has been struck down, the future of the safe harbor is

in doubt. Since *ACT I*, the Commission has been enforcing the safe harbor hours the Supreme Court seemed to approve of in *Pacifica* when it allowed the Commission to sanction a broadcaster for airing indecent material during the early afternoon.[43] The F.C.C. and the Solicitor General have discussed whether or not to appeal *ACT II* to the Supreme Court and the Solicitor General has been give until December 16, 1991 to file an appeal.[44] The Commission will not decide whether to begin proceedings to define a new safe harbor or continue enforcing the pre-*ACT I* hours until a decision on the appeal is made.[45] Senator Helms' office, which introduced the 24 hour ban, had no comment on the case and has no immediate plans to reintroduce similar legislation.[46]

This issue, what the appropriate safe harbor hours should be, has never been satisfactorily addressed. Following *Pacifica*, the F.C.C. adopted the 10 p.m. to 8 a.m. safe harbor without public comment.[47] When it changed the safe harbor from midnight to 6 a.m., it did so in such an abrupt manner that even the courts agreed it acted arbitrarily.[48] Then, before it had a chance to reevaluate the policy, Congress forced the Commission to arbitrarily abolish the safe harbor and impose a 24 hour ban.[49] Right now the only guidance available to broadcasters is the Supreme Court's directive that content based restrictions on speech be narrowly tailored to meet a compelling state interest.[50] The second trend, narrowing what may be broadcast by labeling more material indecent, apparently has stalled. The last time the F.C.C. sanctioned a broadcaster for indecency was in early 1991 and that was for radio broadcasts in 1987 and 1989.[51] The Commission has also never sanctioned or formally threatened to sanction a television broadcaster for violating its new indecency regulations. Obscenity is still completely banned, but now the scope of what is indecent has been expanded.[52] The F.C.C. has accomplished this by expanding its definition of indecent beyond the seven "dirty words" in the *Pacifica* case.[53] Much to the dismay of broadcasters,[54] the Commission's broadened definition of indecent seems immune to constitutional challenges and there is no move afoot at the Commission or in Congress to provide broadcasters with a definitive or clear definition of indecent. Therefore, prohibited indecent material is now all material that involves references to sex or excretion in a patently offensive manner.[55] Whether or not a particular broadcast is patently offensive must be determined on a case by case basis.[56]

Under the case by case approach, material is not immunized from being labeled indecent merely because it has serious merit to it.[57] A broadcast's literary, artistic, political, and/or scientific value is only one factor to be used when judging the material.[58] The trier of fact must also consider factors such as the vulgar or shocking nature of the material, whether the offensive material was fleeting or isolated, and the manner in which it was presented.[59]

Impact of Indecency Regulations on Broadcasting

To date, the F.C.C. has only fined "shock radio" type programs for violating its 1987 interpretation of banned indecency.[61] The Commission deemed these broadcasts patently offensive based on the broadcast's thinly veiled references to unconventional sexual activity and/or pandering references to sex organs.[62] For instance, the most recent fine was inposed for a series of afternoon broadcasts during which the disc jockeys described a former Miss America engaged in oral sex, a parody song entitled "*Kiddie Porn*," and a joke alluding to anal intercourse among homosexuals.[63]

The F.C.C. has not yet declared a news program indecent, although it did review a complaint against one.[64] In that case a listener complained about National Public Radio's broadcast of an "*All Things Considered*" segment that included a tape recording of alleged mobster John Gotti.[65] On the tape the word "fuck" or "fucking" is used ten times. Although it did not find this news broadcast indecent, the Commission has twice refused to adopt a blanket exemption to its indecency standard for bona fide news programs.[66]

One might be tempted to say the F.C.C.'s new policy will only affect disk jockeys of the "shock radio" variety, but the Commission in one case found a more traditional cultural presentation indecent.[67] In that case, after 10 p.m., a California radio station broadcast excerpts from the play *Jerker*.[68] The play dramatized the reflections of a man dying from AIDS.[69] The dialogue included his bitter observations on the immorality of the Vietnam war and graphic references to homosexual sex.[70] Despite the play's redeeming social value, the Commission labeled it indecent.[71] The threat that recognized cultural presentations, and even news programs, might draw a fine from the F.C.C. obviously has a chilling effect on what broadcasters choose to air.

Conclusion

The recent changes in the regulation of indecent broadcasts will have a potentially chilling effect on free speech. Even without the 24 hour ban, any channeling into safe harbor hours makes it harder

for adults to have access to what the F.C.C. considers indecent broadcasts. The Commission's vague definition of indecent also limits society's exposure to protected speech because broadcasters fear being sanctioned for indecent broadcasts. This self censorship tends to reduce programming to its least objectional, and probably least relevant, form. The danger will continue as long as the F.C.C. arbitrarily sanctions broadcasters for airing what it deems to be indecent. Ω

John T. Longo

1. Action for Children's Television v. F.C.C., 852 F.2d 1332, 1333 (D.C. Cir. 1988).
2. *In re* Infinity Broadcasting Corp. of Pennsylvania, 64 Rad. Reg. 2d 1202 (P & F) (1987).
3. *Action for Children's Television*, 852 F.2d at 1344.
4. 53 Fed. Reg. 52,425 (1988).
5. Order, Action for Children's Television v. F.C.C., No. 88-1916 (D.C. Cir. filed Jan. 23, 1989)(*per curiam*).
6. Report of the Commission, 5 F.C.C. Rec. No. 17 (Aug. 6, 1990).
7. Action for Children's Television v. Federal Communications Commission, 932 F.2d 1504, 1510 (D.C. Cir. 1991).
8. Crigler & Byrnes, *Decency Redux: The Curious History of The New FCC Broadcast Indecency Policy*, 38 CATH. U.L. REV. 329, 330 (1989).
9. F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978).
10. 18 U.S.C. § 1464 (June 25, 1948) (replacing Act of June 19, 1934, ch 652, § 326, 501, 48 Stat. 1091).
11. Censorship, indecent language, Rad. Reg. 2d DIGEST § 10:326 (1991).
12. *Pacifica*, 438 U.S. at 729-730.
13. *Id.* at 745, 751.
14. *Id.* at 745.
15. *Id.* at 751.
16. The seven words were: Shit, fuck, piss, cunt, cocksucker, motherfucker, and tits. *See Pacifica*, 438 U.S. at 751.
17. WGBH Educ. Found., 69 F.C.C.2d 1250 (1978).
18. Crigler & Byrnes, *Decency Redux: The Curious History of The New FCC Broadcast Indecency Policy*, 38 CATH. U.L. REV. 329, 344 (1989).
19. Indecency Enforcement Standards, 62 Rad. Reg. 2d (P & F) 1218 (1987).
20. *Id.*
21. *Id.*
22. Action for Children's Television v. F.C.C., 852 F. 2d at 1333.
23. *Id.* at 1339.
24. *Id.* at 1340.
25. *Id.* at 1343.
26. *Id.*
27. Department of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. 100-459, § 608 (October 1, 1988).
28. 47 C.F.R. § 73.3999 (1990).
29. *Action for Children's Television*, 932 F.2d at 1507.
30. *Id.*
31. Broadcast Services; Enforcement of Prohibitions Against Broadcast Indecency, 54 Fed. Reg. 52,801 (1989).
32. Report of the Commission, 5 F.C.C. Rec. No. 17, at § 5297 (Aug. 6, 1990).
33. *Id.* at 5300.
34. *Id.* at 5302.
35. *Action for Children's Television*, 932 F.2d at 1504.
36. *Indecency Ban Comes Under Fire*, BROADCASTING, Feb. 4, 1991, at 40.
37. *Id.*
38. *Action for Children's Television*, 932 F.2d at 1508.
39. *Id.*
40. *Id.*
41. *Id.* at 1510.
42. *Id.* at 1504.
43. *Pacifica*, 438 U.S. at 751.
44. Telephone Interview with Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission (November 22, 1991).
45. *Id.*
46. Telephone Interview with Eric Lungren, Press Assistant, Office of U.S. Senator Jesse Helms (September 11, 1991).
47. WGBH Educ. Found., 69 F.C.C.2d 1250 (1978).
48. *Action for Children's Television*, 852 F. 2d at 1333.
49. Department of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. 100-459, § 608 (October 1, 1988).
50. Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989).
51. 5 F.C.C. Rec. No. 25, at 7291.
52. *In re* Infinity Broadcasting, 62 Rad. Reg. 2d at 211.
53. *Id.*
54. *See Strike Four*, BROADCASTING, September 2, 1991, at 58.
55. *Action for Children's Television*, 852 F.2d at 1339.
56. *Id.* at 1333.
57. *Id.* at 1339.
58. Supporters of this policy point out the purpose of these restrictions is to protect children and children may be damaged by worthy as well as unworthy indecent broadcasts.
59. *In re* Infinity Broadcasting, 64 Rad. Reg. 2d at 211.
60. Reconsideration Order, 3 F.C.C. Rec. at 932.
61. *See* Letter, *Pacifica Foundation, Inc.*, 62 Rad. Reg. 2d (P & F) 1191 (1987); Letter, *Infinity Broadcasting Corp. of Pennsylvania*, 62 Rad. Reg. 2d (P & F) 1202 (1987); Letter, *Evergreen Media Corp. of Chicago*, 66 Rad. Reg. 2d (P & F) 1555 (Aug. 24, 1989); Letter, *Great American TV and Radio Co., Inc.*, 66 Rad. Reg 2d (P & F) 1557 (Aug. 24, 1989); Letter, *Narragansett Broadcasting Co. of California, Inc.*, 67 Rad. Reg. 2d (P & H) 1506 (June 18, 1990); Letter, *Mel Karmazin*, 5 F.C.C. Rec. No.25, at 7291 (Released Dec. 7, 1990).
62. *FCC Fines Chicago Station Over Indecency*, BROADCASTING, Feb. 4, 1991, at 40.
63. Letter, *Evergreen Media Corp. of Chicago*, 66 Rad. Reg. 2d (P & F) 1555-1557 (August 24, 1989).
64. *Id.*
65. *The Dissenting Voice of Ervin Duggan*, BROADCASTING, February 4, 1991, at 41.
66. *Id.*
67. *Id.*
68. Crigler and Byrnes, *Decency Redux: The Curious History of The New FC Broadcast Indecency Policy*, 38 CATH. U.L. REV. at 333.
69. *Id.*
70. *Id.*
71. *Id.* at 334.
72. *Id.*

The Commission did not sanction the broadcaster, though, because the station could not have known the 10 p.m. safe harbor had been abolished.