



Indecency Standards and the Federal Communications

Commission

Christopher Fanning

Rutgers-Newark School of Law

Copyright 2009

Reprinted and distributed by New Jersey Volunteer Lawyers for the Arts, Inc.,
with the permission of the author

Introduction

Broadcast mediums have provided new ways for human beings to express themselves and communicate with each other. However, this technology has certain rules and regulations that, if not followed, can bring some costly results. The most interesting of these rules concerns the broadcast of indecent material. According to the Federal Communications Commission (FCC), they collected

nearly \$8 million in fines from 12 indecency cases in 2004.¹

Therefore, if you ever find yourself in the jurisdiction of the FCC, it is important to know what is actionable and what is decent.

What is the Federal Communications Commission

The FCC was created by Congress as part of the Communications Act of 1934.² The FCC was established to serve as the central authority for the regulation of radio and wire communication.³ Their purpose was to guarantee that the broadcast mediums would be available to everyone in the United States and also to promote national defense, public safety, and interstate commerce.⁴ To meet these goals, Congress gave the FCC many powers and responsibilities including, but not limited to, the ability to classify broadcast stations, assign broadcasters their specific

¹ <http://www.fcc.gov/eb/oip/Welcome.html>.

² <http://www.fcc.gov/aboutus.html>.

³ 47 U.S.C. § 151.

⁴ *Id.*

frequency bands, determine the location of stations and the types of broadcasters that can use those stations, and create rules and regulations for these stations to follow.⁵

Furthermore, the FCC has several ways to reprimand broadcasters for noncompliance. These powers include the ability to revoke a station's licenses⁶, issue cease and desist orders⁷, deny the renewal of broadcasting licenses⁸, and impose fines⁹ against any stations that broadcast material that the FCC deems obscene, indecent or profane. Their authority is supported by a federal statute that makes it illegal to broadcast certain material. This statute says that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined

⁵ 47 U.S.C. § 303.

⁶ 47 U.S.C. § 312(a).

⁷ 47 U.S.C. § 312(b).

⁸ 47 U.S.C. § 307.

⁹ 47 U.S.C. § 503(b)(1)(D).

under this title or imprisoned not more than two years, or both.”¹⁰

According to the statute, there are three levels of prohibited speech; obscene material, indecent material, and profane material.¹¹ The Supreme Court has developed a three part test for obscenity that asks:

“(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest. . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lack serious literary, artistic, political, or scientific value.”¹²

If the material meets all three criteria, it is obscene. Obscene material cannot be broadcast at anytime and is not protected by the First Amendment.¹³ This test generally has only been used to ban hard-core pornography and most likely would not be met simply

¹⁰ 18 U.S.C. § 1464.

¹¹ *Id.*

¹² *Miller v. California*, 413 U.S. 15, 24 (1973).

¹³ *Id.* at 23.

by the use of certain language.¹⁴ However, language alone is capable of fitting the definition of profane or indecent material.

Profane material is defined as being “so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”¹⁵ Profanity is similar to indecency in the manner it is regulated; however, the two levels of prohibited speech have different definitions.

Indecent speech is defined as material that “depicts or describes sexual or excretory organs or activities in terms [that are] patently offensive as measured by contemporary community standards for the broadcast medium.”¹⁶ This kind of speech does not reach the level of obscenity and, therefore, is not completely forbidden. However, indecent material is prohibited from being broadcast “during times of the day when there is a reasonable risk

¹⁴ <http://www.fcc.gov/eb/oip/FAQ.html#TheLaw>.

¹⁵ *Id.*

¹⁶ *Id.*

that children may be in the audience.”¹⁷ Accordingly, federal law has mandated that indecent material is prohibited between the hours of 6 a.m. and 10 p.m.¹⁸

These definitions are helpful, but they still leave a number of questions unanswered. Firstly, how do these regulations and fines gibe with the First Amendment right to free speech? Secondly, what specifically qualifies as “indecent” and “profane” speech?

Freedom of Speech?

The First Amendment to the Constitution states that it is unlawful to make any law that would abridge the freedom of speech and, at first blush, seem to prohibit these penalties. Furthermore, 47 U.S.C. § 326 limits the power of the FCC by clarifying that they do not have “the power of censorship” or the ability to “interfere with the right of free speech. . . .”¹⁹ However,

¹⁷ *Id.*

¹⁸ 47 CFR 73.3999.

¹⁹ 47 U.S.C. § 326.

in *FCC v. Pacifica Foundation* the Supreme Court held that it is constitutional for the FCC to review broadcasts and reprimand stations who use indecent speech.²⁰

Pacifica revolved around the radio broadcast of a comedy record and the FCC ruling that labeled it indecent. In 1973, in the early afternoon, a New York radio station played an uncensored recording of George Carlin's "Dirty Words" monologue.²¹ The monologue contained repeated use of language that Carlin described as words that you definitely would not ever say on public airwaves.²² After reviewing a complaint about the broadcast, the FCC issued a declaratory order that granted the complaint.²³ They ruled that although the radio station would not be sanctioned

²⁰ *FCC v. Pacifica Found.*, 438 U.S. 726, 735 (1975).

²¹ *Id.* At 730.

²² *Id.*

²³ *Id.*

for this incident, they could have been sanctioned.²⁴ Additionally, the complaint would be placed in the station's file and could lead to future sanctions.²⁵

The Supreme Court determined that the FCC's actions did not constitute censorship because they did not stop or edit the broadcast.²⁶ Rather, the FCC had only reviewed a completed broadcast. The Court said that the censorship prohibition "unequivocally denies [the FCC] any power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves. The prohibition, however, has never been construed to deny the [FCC] the power to review the content of completed broadcasts in the performance of its regulatory duties."²⁷ The Court explained that the statute was meant to

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

prevent certain censorship and that there was never any intent “to limit the Commission’s power to regulate the broadcast of obscene, indecent, or profane language.”²⁸

The Court also clarified that there has never been an absolute right to free speech and listed a number of types of speech that are not protected.²⁹ In the instance of broadcasting, the Court explained that the nature of the broadcast mediums is such that it “confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the *First Amendment* rights of an intruder.”³⁰ According to the Supreme Court in *Pacifica*, the broadcast audience “is constantly tuning in and out, [and thus] prior warnings cannot completely protect the listener or viewer from unexpected program

²⁸ *Id.* at 737.

²⁹ *Id.* at 748.

³⁰ *Id.* See also *Rowan v. Post Office Dept.*, 397 U.S. 728, 737 (1970).

content.”³¹ Furthermore, the Court held that broadcast material is unique because of its accessibility to children and, as a result, indecent broadcasting should be given special treatment.³²

What is “indecent” speech?

In *Pacifica*, the Supreme Court clarified that there is a difference between obscene, indecent and profane speech. In their initial ruling, the FCC argued that the broadcast was indecent because it contained the repeated and deliberate use of words that “referred to excretory or sexual activities or organs” during a time of day when children were members of the audience.³³ The radio station contested that the broadcast contained no “prurient appeal” and, therefore, should not be classified as indecent.³⁴ The Court disagreed and held that “prurient appeal” is a part of what makes

³¹ *FCC v. Pacifica Found.*, 438 U.S. at 748.

³² *Id.* at 749.

³³ *Id.* at 739.

³⁴ *Id.*

material obscene, but indecent material refers only “to nonconformance with accepted standards of morality.”³⁵ Thus, material may be indecent without containing any prurient appeal. Despite this clarification, it is still unclear what earns a broadcaster a sanction and what is considered harmless.

Since *Pacifica*, the FCC modified their stance on indecency and attempted to clarify what type of broadcast is actionable. Initially the FCC used an indecency standard that was similar to the standard that was used to determine that Carlin’s monologue was indecent. During that time the FCC held that a broadcast was only indecent if there was a repetitive use of indecent language.³⁶ Under this standard, the FCC said that the use of language resembling a “verbal shock treatment” would be indecent whereas the isolated use of a potentially offensive word would not

³⁵ *Id.* at 740.

³⁶ *In re Application of WGBH Educational Foundation*, 69 F.C.C. 2d 1250, 1254 (1978).

constitute indecency.³⁷

However, nine years later the FCC determined that this standard was too limiting and that the definition of indecency “includes a broader range of material than the seven specific words at issue in *Pacifica*”³⁸ and that their previous approach “ignored an entire category of speech by focusing exclusively on specific words rather than the generic definition of indecency.”³⁹ During this time, the FCC determined that material could only be labeled indecent after looking at the language and its context.⁴⁰ Whether an expression was indecent depended on a number of factors including whether it was vulgar or shocking; the manner in which it was portrayed; if it was isolated or fleeting; if it could be

³⁷ *Id.*

³⁸ *In re Pacifica Foundation Inc.*, 2 FCC Rcd. 2698, 2699 (1987).

³⁹ *In the Matter of Infinity Broadcasting Corporation of Pennsylvania*, 3 FCC Rcd. 930, 930 (1987).

⁴⁰ *In re Pacifica Foundation Inc.*, 2 FCC Rcd. At 2699.

restricted to adults; and if children were in the audience.⁴¹ All of these considerations would be used to help establish the most recent FCC standards for indecency.

What is the current standard for regulating “indecent” speech?

In 2001, the FCC began using a two-pronged approach to determine if sanctioning for indecent broadcasts was appropriate.⁴² First, the speech in question must be indecent. To be indecent “the material must describe or depict sexual or excretory organs or activities.”⁴³ Second, “the broadcast must be patently offensive as measured by contemporary community standards for the broadcast

⁴¹ *In re Infinity Broadcasting Corporation of Pennsylvania*, 3 FCC Rcd. at 931.

⁴² *In the Matter of Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8002 (2001).

⁴³ *Id.*

medium.”⁴⁴ This contemporary community standard is based on “that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.”⁴⁵ The commission explained further that their decisions to punish indecent speech have been based on context and usually depend on:

“(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.”⁴⁶

In 2004, the FCC used this approach to establish that a single use of certain words meets the standard for indecency.⁴⁷ Following

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 8003.

⁴⁷ *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd. 4975, 4978 (2004).

the airing of the Golden Globe Awards on January 19, 2003, the FCC received hundreds of complaints after the lead singer of U2, Bono, commented “this is really, really, fucking brilliant” in response to winning an award for Best Original Song.⁴⁸ After investigating the incident, the FCC agreed with Parents Television Council (PTC) and deemed that the speech was indecent.⁴⁹ The FCC held 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, and therefore falls within the first prong of our indecency definition.”⁵⁰ In regards to the second step of their analysis, the FCC said that the single utterance of the “F-Word” was patently offensive according to the contemporary community standards because “the ‘F-Word’ is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language.

⁴⁸ *Id.* at 4976 n.4.

⁴⁹ *Id.* at 4978.

⁵⁰ *Id.*

Its use invariably invokes a coarse sexual image. The use of the ‘F-Word’ here, on a nationally telecast awards ceremony, was shocking and gratuitous.”⁵¹

In determining that the single use of an “indecent” word can be actionable, the FCC noted that their decision was partly based on the availability of technology that made it possible to prevent or block the offending utterance.⁵² Since broadcasters can easily “block even fleeting words in a live broadcast” without “disproportionately disrupting the message of the speaker or performer” the FCC believed that the broadcast of such language is inexcusable.⁵³

A year later the FCC distinguished Bono’s fleeting use of the “F-Word” from an uncensored airing of the film “Saving Private Ryan” and determined that the violent World War II movie was not

⁵¹ *Id.* at 4979.

⁵² *Id.* at 4980.

⁵³ *Id.*

indecent.⁵⁴ “Saving Private Ryan” graphically depicts the D-Day landing at Normandy Beach and “contains numerous expletives and other potentially offensive language. . . .”⁵⁵ Despite their earlier position that the use of the “F-Word” and any variation of the word had an inherent sexual connotation, the FCC said that “Saving Private Ryan”, was not indecent.⁵⁶ In their decision, the FCC said that they asked “whether the material has any social, scientific or artistic value” and said that if the material does, it “may militate against finding that it was intended to pander titillate or shock.”⁵⁷ Although they did not believe that the social

⁵⁴ *In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan”*, 20 FCC Rcd. 4507, 4514 (2005).

⁵⁵ *Id.* at 4512.

⁵⁶ *Id.*

⁵⁷ *Id.*

commentary in Carlin’s monologue was valuable enough to be protected speech,⁵⁸ the FCC determined that:

“the expletives uttered [in “Saving Private Ryan”] realistically reflect the soldiers’ strong human reactions to, and, often, revulsion at, those unspeakable conditions and the peril in which they find themselves . . . Deleting all of such language or inserting milder language . . . would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers.”⁵⁹

Thus, the FCC ruled that the language in “Saving Private Ryan” was not gratuitous or intended to titillate or shock.⁶⁰ The FCC also noted that the viewing was “not intended as family entertainment.”⁶¹ Furthermore, warnings before and during the

⁵⁸ *FCC v. Pacifica Found.*, 438 U.S. at 742.

⁵⁹ *In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network’s Presentation of the Film “Saving Private Ryan”*, 20 FCC Rcd. at 4513.

⁶⁰ *Id.*

⁶¹ *Id.*

airing of “Saving Private Ryan” had given the viewers ample opportunity to “exercise[] their own judgment.”⁶²

Essentially the FCC has said that a single use of an expletive during a live broadcast of an awards show is actionable, but a violent and expletive-laden World War II film is not indecent. This distinction illustrates the importance that the FCC places on the context of the language. However, it should not be surprising if someone argued that the FCC uses a “know it when I see it” approach to determining if speech is actionably indecent.

Conclusion

If these standards seem confusing and unclear, that is because they are unclear. The FCC even reported that 66 of the 225 stations that are affiliated with ABC decided not to broadcast “Saving Private Ryan.”⁶³ These 66 stations said that, because of previous FCC rulings, they were uncertain as to whether the film contained

⁶² *Id.*

⁶³ *Id.* at 4508.

indecent material.⁶⁴ It is important to remember that potentially indecent speech on television and radio is judged by its context. If you are on television or the radio between the hours of 6 a.m. and 10 p.m.,⁶⁵ it is advisable to err on the side of caution.

###

By reviewing this article, the reader acknowledges that (1) the article contains law that is subject to change after the publication of the article; and (2) the article is intended for informational use only and is not to be construed as a legal opinion or legal advice, in general or with respect to any particular legal matter. This article contains a general overview of the topic and is not intended as legal advice or as a substitute for a consultation with an attorney. If you have further questions about this or any arts-related legal issue, please contact New Jersey Volunteer Lawyers for the Arts at 856-963-6300 or info@njvla.org.

⁶⁴ *Id.*

⁶⁵ 47 CFR 73.3999.