

Two Indecency Bills Vie for Senate Attention

Two competing bills taking a tougher stance on the broadcast of indecent material, one passed by the House and the other generated by the Senate Committee on Commerce, Science and Transportation, are awaiting action by the full Senate. The House bill, H.R. 3717, passed on March 11 by a vote of 391 to 22. Many observers believe that the Senate bill, which is significantly broader than the House bill, is likely to be the one brought to the Senate floor by Majority Leader Bill Frist. The two bodies would then resolve their differences in a conference committee. It is impossible to predict when the Senate will vote on its measure, S. 2056.

The biggest differences between the two bills are that the Senate bill includes provisions (a) temporarily blocking the FCC's June 2, 2003 relaxation of its broadcast ownership rules, and (b) regulating the broadcast of violence on television. The House bill provides that, under certain circumstances, independently owned affiliate stations would not be held liable for indecent material included within programming provided by their networks. In addition, the House bill would require the FCC to treat a single indecency fine as a "serious violation" at license renewal time. The House bill would also allow the Commission, in addition to fines, to require licensees that have broadcast indecent material to broadcast public service announcements that serve the needs of children. The Senate bill does not mirror any of those provisions.

The House bill would raise the maximum penalty for indecency to \$500,000 per violation, while the Senate bill would raise the fine to \$275,000 for a first offense, \$375,000 for a second offense, and \$500,000 for a third offense. The Senate bill also provides that each indecent utterance is a separate violation; thus, three utterances in a single program could garner a fine of \$1.1 million. The Senate bill also would allow the FCC to double the fine

amount for particularly egregious offenses where (a) the broadcaster failed to review or block programming; or (b) the audience is exceptionally large; or (c) indecency is broadcast during children's programming. The bill would cap fines for violations occurring in the same 24-hour period at \$3 million.

The Senate bill also would require the Commission to conduct a study on the efficacy of existing efforts to protect children from violent programming, including the rating system and the V-chip. If the FCC study found the existing measures to be ineffective, the Commission would be required to begin a rulemaking proceeding to prohibit the distribution of violent video programming during the hours when children are reasonably expected to comprise a substantial portion of the audience.

Since final action on these bills is at least several weeks away, broadcasters still have an opportunity to make their views known to their Senators and Representatives. We will, of course, report further as events warrant.

Investigation of February 1, 2004 Superbowl Broadcast Continues

The Commission's investigation of the February broadcast of the Superbowl is continuing. File No. EB-04-IH-0011 contains over 200,000 complaints received by the FCC. Several of the complainants served copies of their complaints on CBS. Ordinarily under the FCC rules, such service would require that the Commission designate the investigation as a restricted proceeding, subject to the FCC's ex parte rules. However, in a Public Notice issued last month, the Enforcement Bureau ruled that the proceeding will remain unrestricted "until such time as further developments (e.g., any issuance of a notice of apparent liability for forfeiture) would render the proceeding restricted."

Commission Reversal of Enforcement Bureau Ruling on the “F-word” Is a Major Change in Law

The FCC’s March 18 reversal of an Enforcement Bureau ruling that the use of the “F-word” by singer Bono was not actionably indecent represents a major change in Commission case law and signals a very different enforcement atmosphere for the months ahead. The Commission, using the plain language of Title 18, Section 1464 of the United States Code, has made clear that it will now take enforcement action not only against indecent material, but also against profane material.

This new enforcement stance will undoubtedly cause concern for most broadcasters since over the past 20 years, what has become acceptable in terms of language in broadcasting may now be deemed by the FCC to be profane, and subject stations to fines or worse. Terms commonly used in many markets such as “dammit” may now be taboo. While it is impossible to predict how far the Commission will go in its prohibition of profanity, most stations will not want to be the one who finds out.

It is important to correctly apply the terms used by the statute. To clarify: obscenity is always prohibited on the air; indecency can only be broadcast between the hours of 10 p.m. and 6 a.m.; and now profanity can only be aired between 10 p.m. and 6 a.m. The Commission’s *Memorandum Opinion and Order* optimistically states that “we do not envision that today’s action will lead to licensees abandoning program material solely over uncertainty surrounding whether the isolated use of a particular word is indecent,” but then later ominously notes that “we recognize that the Commission’s limited case law on profane speech has focused on what is profane in the context of blasphemy, but nothing in those cases suggests . . . that the statutory definition of profane is limited to blasphemy Broadcasters are on notice that the Commission in the future will not limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation, but, depending on the context, will also consider under the definition of ‘profanity’ the ‘F-word’ and those words (or variants thereof) that are as highly offensive as the ‘F-word,’ to the extent such language is broadcast between 6 a.m. and 10 p.m. We will analyze other potentially profane words or phrases on a case-by-case basis.”

We urge broadcasters to exercise prudence in their approach to determining what language is acceptable on the air at their stations, taking into account the time of day of the broadcast, but also other unique market factors. Broadcasters with questions or uncertainty should contact a lawyer in the Group for individual consultation. We will, of course, continue to monitor these developments and report as necessary.

Licensee of Kansas FM Station Fined \$39,000 for Violating Five FCC Rules and Could Face License Revocation

The licensee of a Kansas FM station has been fined \$39,000 for violating five Commission rules: Section 73.1350(a), operating from an unauthorized location; Section 17.51, failing to maintain prescribed obstruction lighting on an antenna structure; Section 11.35(a), failing to install and maintain EAS equipment; Section 73.1125(a), failing to maintain a main studio at an authorized location; and Section 73.3526, failing to maintain a public inspection file.

The Commission noted that the licensee had received a *Notice of Apparent Liability for Forfeiture*, but had not filed a response. The *Forfeiture Order* directs the Enforcement Bureau “to do a follow-up investigation to determine whether [the licensee] has come into compliance and, if [the licensee] has not, to take or recommend further enforcement action as appropriate, including the possibility of initiating a license revocation proceeding.”

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