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Special Advisory to Broadcasters  
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## Communications Broadcast Advisory

### Frequently Asked Questions About FCC Regulation of Obscenity, Indecency, and Profanity

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#### General

#### **What is the source of the Commission's authority to limit "obscene," "indecent," and "profane" program material?**

Section 1464 of Title 18 of the United States Code provides that, "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." Section 503 of Title 47 authorizes the FCC to impose such fines. Both television and radio are considered "means of radio communication" for purposes of the statute.

#### **What FCC regulations prohibit "obscene" or "indecent" program material?**

Section 73.3999 of the Commission's Rules provides that: "(a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene," and "(b) No licensee of a radio or television broadcast station shall broadcast on any day between 6 am and 10 pm any material which is indecent."

#### **What Commission regulations prohibit "profane" program material?**

None. There is no specific regulation prohibiting profane program material. However, consistent with the statutory provision discussed above, the Commission has indicated that broadcasting such material is nevertheless prohibited (see below).

#### **What about the First Amendment?**

While the First Amendment protects the freedom of speech, the Supreme Court has found that some material is so devoid of social value that it cannot be characterized as "speech" subject to protection. This category of non-"speech" includes obscenity. While "indecent" material is protected by the First Amendment, the Court has found that compelling governmental interests justify limited restrictions on the material that can be broadcast over the airwaves. Specifically, the Court has cited the scarce nature of the broadcast

spectrum, the pervasiveness of broadcast media, the inability to pre-screen broadcast content, and the potential for broadcast program material to harm children as justifications for the regulation of indecent program material. Some have argued that the regulations themselves or as applied are constitutionally suspect because they are impermissibly vague. We expect to see further litigation in this area.

### **Why aren't cable and satellite subject to the same regulations?**

The Supreme Court has held that the justifications for content regulation of free, over-the-air broadcast media are not as compelling in the cable and satellite context. Specifically, the Court has noted the weaker scarcity rationale when terrestrial "airwaves" are not directly used, the subscription nature of cable and satellite services, and the relative ease with which objectionable program material can be blocked by the viewer or parent.

## **Obscenity**

### **What is "obscene" program material?**

Broadcast material is considered obscene if: (1) an average person, applying contemporary community (local) standards, finds that the material, as a whole, appeals to the prurient interest (i.e. it appeals to sexual or lustful ideas or desires); (2) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

### **What does that really mean?**

The definition of "obscenity" is notoriously vague. Potter Stewart, in discussing the definition of obscene hard-core pornography, famously noted that he might never be able to intelligibly expand on such a definition, although he would know it when he saw it. While such an ill-defined standard is of dubious value, the vast majority of material does not even remotely approach borderline status.

### **Is it ever permissible to broadcast "obscene" program material?**

No.

## **Indecency**

### **What is "indecent" program material?**

"Indecent" program material is program material that, "in context:" (1) depicts or describes sexual or excretory activities or organs and (2) is patently offensive as measured by contemporary community standards for the broadcast medium. Thus, program material can be "indecent" without being "obscene."

### **When is "indecent" program material prohibited?**

"Indecent" program material may not be broadcast between the hours of 6 am and 10 pm.

### **How does the FCC define "patently offensive" program material?**

The FCC will consider the context in which the material was broadcast, as well as three main factors: (1) the explicitness or graphic nature of the description; (2) whether the material is fleeting, or whether it dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material

appears to pander or is used to titillate or shock. In each particular case, the FCC will weigh and balance these three factors (and possibly others); no one factor is dispositive.

### **Aren't there any bright lines between “decent” and “indecent” program material?**

The FCC's fluid use of the three factor test makes it extremely difficult to draw bright lines. However, to draw a broad generalization, the FCC is less likely to tolerate borderline material if it appears to push the envelope for the sake of controversy. On the other hand, the FCC appears more tolerant of potentially indecent material when it is presented in a serious journalistic context rather than in a comedic framework.

### **Does the FCC differentiate between the “contemporary community standards” of different communities?**

No. In assessing potentially indecent program material, the FCC does not derive “contemporary community standards” from local standards, but rather from “contemporary community standards for the broadcast medium.” The same “national community standard” is applied regardless of whether material is broadcast in New York City or Salt Lake City.

### **Can material be “indecent” even if it relies entirely on euphemism, innuendo, or double entendre?**

Yes. The use of euphemism, innuendo, or double entendre can lead to a finding of indecency. Again, the critical factor is the context in which material is broadcast, and whether that context renders the material sufficiently offensive. For example, the FCC fined a broadcaster \$357,500 for the use of euphemisms that clearly referred to sexual activity and were uttered during an on-air contest that rewarded contestants for having sex in public places.

### **Are there certain words that stations should avoid broadcasting?**

Stations should avoid material that contains the “seven dirty words” – shit, piss, fuck, cunt, cocksucker, motherfucker, and tits – and variations of these words. These words were determined to be indecent by the Supreme Court in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). While these words may be permissible in certain contexts, it is unclear whether this is truly the case. In reviewing rock star Bono's use of “fuck” at the Golden Globes, the FCC strongly suggested that the use of that word in virtually any context would be indecent. However, the FCC more recently found that the use of “fuck” in Steven Spielberg's “Saving Private Ryan” was not indecent, given the historic and social context of that film. Given this high level of uncertainty, these words are best avoided if at all possible. Recently, the Commission has ruled that the isolated use of a number of other “dirty” words – including “dick,” “penis,” “testicle,” “vaginal,” “ass,” “bastard,” “bitch,” “hell,” “damn,” “orgasm,” “breast,” “nipples,” “can,” “pissed,” and “crap” – was not impermissible given the context in which these words were used. However, stations should note that the Commission did not immunize the use of these words in all, or even most, situations. As always, context is key.

### **What about references to or depictions of sexual activity?**

Sexual material may be “indecent” depending on its explicitness, length or degree of repetition, and whether the material appears to pander or is used to titillate or shock. Again, context is critical. Thus, full-frontal nudity in the film “Schindler's List” was permitted because of the context in which it was presented, while the reading of excerpts from a *Playboy* interview with Jessica Hahn concerning allegations of rape by the Rev. Jim Bakker was held indecent because the material was presented in a pandering manner, notwithstanding

the fact that the incident was “in the news.” The infamous Janet Jackson breast exposure during the 2004 Super Bowl is another example of material found to be indecent.

### **What about references to or depictions of violent activity?**

To date, violence has not been found “indecent,” yet there has been some discussion of a move in this direction. Therefore, stations should consider whether the airing of particularly violent program material is worth the risk of potential complaints and possible enforcement action.

### **Is there a defense for “social commentary” or political speech?**

A claim that material is “social commentary” or political speech does not provide an absolute defense to indecency. The FCC will weigh the value of the material as one factor in its indecency analysis.

### **What about “indecent” material over which the broadcasting station has no control (i.e. the “indecent” acts of performers or guests)?**

The Commission has frequently noted that stations always have control over content through the use of suitable time-delay technology.

### **Another station broadcast a certain type of material, and the FCC took no action. Does this mean that my station can freely broadcast similar or identical material?**

No. Just because similar material has been broadcast before does not mean that the material is not “indecent.” The definition of “indecency” is fluid and political winds change. Moreover, the FCC only investigates material about which it has received complaints, and may not closely scrutinize all such complaints. Finally, remember that if the material was originally transmitted over a cable or satellite system, that material would not have been subject to the same standards and limitations that apply to free, over-the-air broadcasting.

### **What penalties can the FCC impose when a station broadcasts “indecent” program material?**

At present, the FCC can impose fines of up to \$325,000 per violation for material aired after June 2006, and/or consider the station’s broadcast of “indecent” program material in reviewing the station’s application for license renewal.

### **How does the FCC determine what fine is appropriate?**

The FCC has considerable discretion in determining an appropriate fine if one is imposed, and will normally consider such factors as the extent and gravity of the violation, the station’s history of past offenses, and the station’s ability to pay. The FCC may also multiply the base amount of the fine if the “indecent” program material is broadcast multiple times or on multiple stations. Recently, the FCC has indicated that it will impose fines for each indecent utterance, with the effect that multiple violations may occur within a single program.

### **How can stations limit their potential liability?**

At a minimum, the following material should be avoided between 6 am and 10 pm:

- Profanity, such as the seven dirty words and variations on those words.

- Graphic and explicit discussions of sexual or excretory activities or organs—even through the use of euphemisms, innuendo, or double entendre and without the use of profanity—particularly when used in a manner designed to titillate or shock.
- Profane or sexual gestures, such as “the finger” or grabbing or rubbing one’s crotch, or exposed female breasts, exposed male or female genitalia or buttocks, no matter how brief the exposure.

Stations also may wish to use time-delay technology in order to permit the removal of any inadvertent “indecent” statements or actions prior to their broadcast.

## Profanity

### Is “profane” program material prohibited?

Commission case law on profane speech is limited. However, the Commission recently gave new life to its statutory authority to prohibit “profane” broadcasts. While the Commission did not explain its specific enforcement strategy, or promulgate specific regulations, the Commission has placed broadcasters on notice that in the future the Commission will not limit its definition of profanity to those words and phrases that contain an element of blasphemy. Depending on the context, the Commission will consider “fuck,” and variations thereof, under the definition of profanity and will consider other words or phrases on a case-by-case basis.

### What is “profane” program material?

The Commission has defined “profane” speech as “vulgar, irreverent, or coarse language,” “personally reviling epithets naturally tending to provoke violent resentment, or . . . language so grossly offensive to members of the public who actually hear it as to amount to a nuisance.” The Commission has also indicated that “profanity” is narrower than “indecent” but is broader than “blasphemy.” Recent cases have held that words like “penis,” “bitch,” and “bastard” are not profane.

### When is “profane” program material prohibited?

The prohibition extends to the same time period as the prohibition on “indecent” material: 6 am to 10 pm.

## Conclusion

Law, regulation and policy in this area are extremely complex, and the fines for violations can quickly add up. We are available to review questionable material prior to broadcast. For more information, please contact a member of the firm’s Communications Practice Section.

For further information, please contact:

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