

**First Amendment Center
Interview Hotsheet
Broadcast Decency Enforcement Act**

Prepared by: Beth Chesterman, FAC Intern (Nashville)
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OVERVIEW:

Under FCC regulations, it is prohibited for broadcasters are prohibited from airing indecent programming from of 6 a.m. to 10 p.m. The Broadcast Decency Enforcement Act signed into law by President Bush in June 2006 increases the fine that can be imposed for broadcasting indecent programming from \$32,500 to \$325,000. Although the broadcasters have not responded directly to the new law, they are challenging the FCC's ability of the FCC to declare programming indecent when the programming aired before certain FCC regulations were instituted. ABC, CBS, NBC Fox and other broadcasters have filed a notice of appeal in federal courts around the country in the hopes of also challenging the ability of the FCC to regulate indecency. However, the FCC recently told a federal court in New York that it wanted to reconsider its indecency rulings in those instances. In addition to legal action, the broadcasters have joined to sponsor TV Watch, a Web site dedicated to monitoring the impact of FCC indecency regulations on television programming.

LEGAL ANALYSIS:

The broadcast of obscene, indecent, or profane material is prohibited by 18 U.S.C. 1464.¹ Indecent material is defined as material that depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.² In 1978 the Supreme Court held in *FCC v. Pacifica Foundation*³ that it is constitutional for the government to restrict the broadcasting of indecent material. The Court wrote that the FCC was justified in regulating indecent material because broadcast television has a "uniquely pervasive presence in the lives of all Americans" and is "uniquely accessible to children."⁴

BACKGROUND:

In 2005, the House passed a more stringent version of what is now the Broadcast Decency Enforcement Act.⁵ Rep. Fred Upton, R-Mich., introduced that bill two weeks

¹ 18 U.S.C. § 1464 (2006)

² *Infinity Broadcasting Corporation of Pennsylvania*, Memorandum Opinion and Order, 2 FCC Rcd 2705 (1987) (citing *Pacifica Foundation*, Memorandum Opinion and Order, 56 FCC 2d 94, 98 (1975), *aff'd sub nom. Pacifica*, 438 U.S. 726).

³ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

⁴ *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978).

⁵ H.R. 310, 109th Cong. (2005).

before Janet Jackson's "wardrobe malfunction" at the 2004 Superbowl.⁶ Upton's bill called for increasing fines up to \$500,000 per infraction and holding artists and talk-show guests liable for their indecent material. It also made it possible for a broadcaster's license to be revoked for such infractions. However, the bill faced bipartisan opposition in the Senate, leading Sen. Sam Brownback, R-Kan., to write a narrower version that only raised fines.⁷ Senate Majority Leader Bill Frist, R-Tenn., was able to fast-track Brownback's version through the Senate, which passed it unanimously in May 2006.⁸ The legislation passed in the House on a 379-35 vote in June 2006. President Bush signed the Broadcast Indecency Enforcement Act into law on June 15, 2006.⁹

LEGISLATION:

Under the Broadcast Decency Enforcement Act, the amount a television network may be fined for broadcasting indecent material is increased from \$32,500 to \$325,000.¹⁰ The act's impact only increases the amount of the fine; it does not change the FCC's definition or regulation of indecent material. Furthermore, because the FCC may regulate only indecent material transmitted over the public airwaves, the act affects only broadcasters, not cable or satellite providers.

If a broadcast program contains several instances of indecent material, the FCC may either impose a fine on the program or fine each instance within the program. However, the act caps the amount that can be fined to \$3 million per incident per day.¹¹ Nonetheless, there is an ongoing debate on whether the phrasing of the act may actually allow the FCC to impose fines greater than the stated \$3 million cap.¹²

RESPONSE BY BROADCASTERS:

In April 2006, ABC, CBS, NBC, Fox and their 800 affiliated stations as well as Hearst-Argyle Television Inc. filed a notice of appeal in various federal courts around the country, including New York and Washington, D.C. The networks are challenging several of the rulings handed down by the FCC in March 2006.¹³

When the FCC handed down its rulings, it issued \$4 million in fines for violating indecency regulations. The FCC also found several programs had violated indecency regulations by using the "f-word" and "s-word" but did not issue fines because the FCC

⁶ Frank Ahrens, *The Price for On-Air Indecency Goes Up; Congress Approves Tenfold Increase in Fines FCC Can Assess*, Washington Post, June 8, 2006, at D01.

⁷ William Triplett, *A Lewd Awakening*, Daily Variety, June 8, 2006, at Pg. 1.

⁸ S. 193, 109th Cong. (2005).

⁹ 120 Stat. 491 (2006).

¹⁰ 120 Stat. 491 (2006).

¹¹ 120 Stat. 491 (2006).

¹² Frank Ahrens, *Networks Sue Over Indecency Rulings; Lawsuits Say FCC Exceeded Authority*, Washington Post, Apr. 15, 2006, at D01.

¹³ Ahrens, *Networks Sue Over Indecency Rulings; Lawsuits Say FCC Exceeded*, at D01.

had not yet issued the Golden Globe Awards Order,¹⁴ which put tighter restrictions on the use of that language, until after those programs aired.¹⁵

The networks are challenging the FCC's rulings against the programs that were found indecent but in which no fine was issued. Those rulings involve a December 2004 episode of the CBS news program "Early Show" in which a contestant from "Survivor: Vanuatu" called another contestant a "bullshitter."¹⁶ The FCC also found that use of the "s-word" during six episodes of ABC's "NYPD Blue" in 2003 was indecent.¹⁷ Nicole Richie's use of the "f-word" and the "s-word" on Fox's 2003 broadcast of the "Billboard Music Awards" were also found to be indecent.¹⁸ Although NBC was not involved in any of the incidents, NBC joined the action because it is fighting a previous FCC decision which declared U2 lead singer Bono's use of the "f-word" during the 2003 Golden Globe awards indecent. The FCC cited the ruling in the Bono incident as precedent for finding the "Early Show," "NYPD Blue," and "Billboard Music Awards" as indecent.

The stations contend that the indecency rules are unfair because they apply only to broadcast networks and not cable or satellite providers, making it harder to compete against those services.¹⁹ Furthermore, they argue that the rules are outdated and no longer serve their original purpose of insulating viewers from indecency because viewers now have easy access to indecent material on cable, satellite and the internet. In addition, they argue that it is unfair for the FCC to declare programs indecent for use of the "f-word" and "s-word" because when programs aired the rule had not yet been created.²⁰

Media observers believe the networks hope the Supreme Court will eventually hear the case and overturn the indecency regulations.²¹ However, on July 5, 2006, the FCC asked the Second Circuit Court of Appeals for 60 days to reconsider its decision to label the programs indecent.²² CBS, NBC and Fox filed motions opposing the FCC's request to review its rulings saying the remand period would put them in a "particularly perilous" situation of not knowing what material may be found indecent. The FCC responded that the networks' argument that it would be damaged by the delay was not credible. Additionally, the FCC accused CBS of violating court rules by citing

¹⁴ *Complaints Against Various Broadcasts Licensees Regarding Their Airing of the "Golden Globe Awards*, Memorandum Opinion and Order, FCC 04-43 (March 18, 2004), <http://www.fcc.gov/eb/Orders/2004/FCC-04-43A1.html>

¹⁵ *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum and Order, FCC 06-17 (March 15, 2006), <http://www.fcc.gov/eb/Orders/2006/FCC-06-17A1.html>

¹⁶ FCC 06-17, *supra*, at 137.

¹⁷ FCC 06-17, *supra*, at 125.

¹⁸ FCC 06-17, *supra*, 112.

¹⁹ Stephen Labaton, *TV Networks, With Few Friends in Power, Sue to Challenge F.C.C.'s Indecency Penalties*, New York Times, Apr. 16, 2006, at Section C, Column 1.

²⁰ *Complaints Against Various Broadcasts Licensees Regarding Their Airing of the "Golden Globe Awards*, Memorandum Opinion and Order, FCC 04-43 (March 18, 2004), <http://www.fcc.gov/eb/Orders/2004/FCC-04-43A1.html>

²¹ Ahrens, *Networks Sue Over Indecency Rulings; Lawsuits Say FCC Exceeded*, at D01.

²² Bloomberg News, *FCC Seeks a Review of Indecency*, July 5, 2006, at <http://www.nytimes.com/2006/07/06/business/media/06fcc.html>.

confidential settlement discussions in its motion. The FCC asked the court to throw out the motion and to sanction CBS and its attorneys.²³

CHILLING EFFECT:

After Janet Jackson's "wardrobe malfunction" at the 2004 Superbowl, networks began to add delays to live broadcasts in order to catch offensive material before it aired. In addition, some broadcasters adopted a "zero tolerance" policy under which on-air talent may be fired for objectionable broadcasts.²⁴

TV Watch, a Web site created by the networks, keeps track of television programs that have been edited or not aired because the broadcasters feared the FCC will issue a fine. The following examples are taken from their Web site, www.televisionwatch.org.²⁵

- A 'clinical' television show about adult health is limited in what topics it can cover because of concerns about FCC fines and disapproval. (*The Washington Post*, "Sex and the Stethoscope: Cable's Heart to Heart," June 4, 2005)
- A third of the country wasn't able to watch *Saving Private Ryan* over Veterans Day when stations refused to air it because of fears of action by the FCC.
- A scene showing Nelson Mandela was deleted from a documentary about South Africa because women in the background participating in traditional dance were partially unclothed.
- The FCC investigated coverage of the Olympic Games opening ceremonies in Athens because nudity used in historical depictions of Greek art and dance appeared in the broadcast.
- Famous centerfold images of Marilyn Monroe and pictures of nude women painted on World War II planes are being screened from PBS's *Antiques Roadshow*, and editors obscured the image of a 50-year-old nude lithograph.
- *The Cotton Club*, *Fargo*, films by Academy Award-winning filmmaker Federico Fellini, the 2004 Tony-Award-winning Best Musical *Avenue Q*, and scenes and dialogue from a "reality" period piece set in the 1880s, *Regency House Party*, were blocked from broadcast on PBS.

²³ Ira Teinowitz, *FCC Accuses Networks of Sham Argument*, TelevisionWeek, July 11, 2006, <http://www.tvweek.com/news.cms?newsId=10342>

²⁴ Ahrens, *The Price for On-Air Indecency Goes Up; Congress Approves Tenfold Increase in Fines FCC Can Assess*, at D01.

²⁵ *Television that was forced to change*, TV Watch, http://www.televisionwatch.org/site/c.hrLQKWPLuF/b.1368203/k.90AC/Saving_Private_Ryan_Nelson_Mandela_Pat_Tillman_Coverage_Changed_for_Fear_of_Fines_.htm

- News footage of stunned onlookers during the attacks of 9/11, of a soldier's language during a bomb blast in Iraq, and a documentary about soldiers' experiences in Iraq have been edited to remove coarse language.
- Phoenix TV stations dropped coverage of a live memorial service for Pat Tillman, the former Arizona football star killed in Afghanistan, because of language used by mournful family members.
- 80% of PBS affiliates rejected broadcast footage from the time leading up to the Iraqi elections and the battle for Fallujah because of explicit language used by the soldiers.
- Popular shows like Emmy Award-winning *N.Y.P.D. Blue* and *ER* have edited important scenes – such as the appearance of an 80-year-old female patient's breast.
- A *Family Guy* episode that aired – without incident – five years ago was edited to remove a view of an animated character's buttocks; in another episode, an animated depiction of a character breast-feeding in public was also altered.
- Broadcasters across the country are changing the way they cover live news events; for example, moving their microphones far away from live crowds to avoid airing potentially offensive comments.
- PBS cut a scene in a documentary, *Emma Goldman*, that showed cleavage, as well as a four-letter word used by Vice President Cheney in a film about the 1994 Rwandan genocide.
- WPRI, a Fox affiliate in Providence, used a five-second delay on its broadcast of a July 4th parade because it feared tipsy attendees might say something indecent.
- Garrison Keillor's national, daily five-minute poetry and history program was canceled by a Kentucky radio program after the word 'breast' was spoken during a reading. After an outcry from the community, the show was reinstated.
- Out of fear of FCC fines, TheWB edited out scenes from *The Bedford Diaries*, a show about college students signed up for a sexual-behavior seminar, of two young women kissing and another opening her jeans. The show's creator refused to delete the scenes.