

Déjà Vu All Over Again  
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The following article contains language that may be unsuitable for younger and more sensitive readers.

And you may ask yourself, “well, how did I get here?”  
-David Byrne/Talking Heads

We’ve been here before.

Once a generation (or slightly more often), political activists and politicians bring broadcast content to the front of the public agenda and propose new restrictions on sexually-oriented and/or violent materials. The Federal Communications Commission has recently issued a striking—but not necessarily surprising—rejection of the 1987-2003 standards used to interpret the statute prohibiting indecent content on radio and television. Meanwhile, Congress is considering legislation that will impact the FCC’s enforcement practices and policies, and will dramatically increase the fines for indecent broadcasts outside of the 10 p.m. to 6 a.m. safe harbor. What does it mean for college broadcasters? (Those of you that are operating only on cable or the Internet can relax, at least for the moment...this discussion applies only to folks with FCC-licensed facilities.)

Opening caveats: First, although I have a substantial academic and practical background in communications law, I am not a lawyer. You should not take this article to be legal advice, or even necessarily applicable to your particular situation. It is nothing more than my very general opinion about this issue based on 25 years of experience with the subject matter. Second, I am only going to deal with issues of language. Although I think the FCC’s recent actions also raise questions about the standards for nudity and other visual sexual expression on television, and the legislation before Congress may potentially open up additional areas of concern, the Commission has not yet specifically addressed those issues and I am less well-versed in that particular area. As far as I know, “Schindler’s List” remains not indecent; various backsides on “NYPD Blue” haven’t been but may be in the future, although it’s not been tested; and we’ll soon know about  $\frac{3}{4}$  of a second of Janet Jackson’s breast in long shot. Finally, this article deals only with the federal legal matters. Obviously, the local standards of the licensee can be (and frequently are) different and more restrictive than the definition of actionably indecent or obscene material.

Please consult with your own attorney for specific advice relevant to your situation.

Before we get to the NBC decision, a brief review is in order. For a more complete and nuanced discussion of the history of indecency enforcement, see the “further reading” section below.

Title 18 of the United States Code, §1464 prohibits the broadcast of obscene, indecent or profane language. The statute was crafted in the disjunctive (“or” rather than “and”) and so from a legal perspective the terms have separate meanings.

The definition of obscenity is controlled by *Miller v. California*, 413 U.S. 15 (1973) and its progeny, and legally obscene content is most easily thought of as really raunchy XXX pornography. It is not likely to appear in a broadcast context. To be obscene, material must meet the following three-prong test: (1) the average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest; (2) the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law; and (3) the material, taken as a whole, must lack serious literary, artistic, political or scientific value (sometimes referred to as the LAPS or SLAPS test).

There is a long and tortured history of indecency enforcement by the FCC. (If you’d like a more detailed discussion, I recommend the three articles listed at the bottom of this article.) Standards have generally lasted for 10 or 20 years before changes in the political winds and the nature of broadcasting have brought about change. For our purposes here, it is enough to note the previous standard had its roots in 1987, when the Commission broke from the bright line “seven dirty words” standard announced in the *Pacifica*

decision. Citing three specific examples, one of which involved the student radio station at UC-Santa Barbara, the FCC announced a “new interpretation” of the indecency statute (thus neatly avoiding the need to go through the formal comment process of a rulemaking). In that Memorandum Opinion, the FCC declared that context was important in finding that a broadcast depicts or describes sexual or excretory functions or organs in a patently offensive manner.

Subsequent notices clarified the change somewhat, explaining that indecency findings would involve at least two fundamental determinations. First, the material alleged to be indecent must describe or depict sexual or excretory organs or activities. Second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium. Note that, as was discussed recently on the CBI listserv, the “community standards” for broadcasting are national, not local...it’s the same standard in Los Angeles and Tupelo, Mississippi. The Commission has articulated three “principal factors” driving their analysis: “(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.”<sup>1</sup> That standard governed the review of all indecency complaints from 1987 until this year.

The facts of the immediate case in question, for those who just tuned in: Upon winning the Golden Globes award for “Best Original Song,” U2 lead singer Bono described the award as “fucking brilliant” in his acceptance speech during the live broadcast on NBC. The FCC received “numerous complaints,” all apparently from individuals associated with the Parents Television Council. The complainants maintained that such language was obscene and/or indecent (the public has an unfortunate tendency to treat the two terms as interchangeable although they have separate and distinct legal meanings), and requested that the Commission levy sanctions against the licensees for broadcasting the subject material. The Enforcement Bureau, however, applying the indecency standard in effect at the time, concluded that the material was not indecent (it is not even close to obscene, under the *Miller* standard). The Bureau relied primarily on two of the three parts of the indecency test, finding that the language used by Bono did not describe, in context, sexual or excretory organs or activities; and that the utterance was fleeting and isolated.

Under pressure from Congress and elsewhere, the full Commission undertook a review of the Bureau’s conclusion and reversed the earlier decision. What does this recent Commission action (as well as legislation pending in Congress) mean for you as a programmer, advisor, or licensee?

***Fuck is never permissible, nor are its variants, even once...maybe.***

I’ll explain the maybe part in a moment. The main point, however, is that the FCC now says 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.”<sup>2</sup> In other words, even when the word is clearly used as an adjective or other modifier having nothing to do with sex (as NBC argued in its response to the Commission in the reconsideration, as an “intensifier”), the FCC will nevertheless treat it as a vulgar synonym for sexual intercourse. This will likely be appeal point number one for NBC and anybody else wishing to challenge the Commission’s action.

In holding that fuck is always indecent, the Commission explicitly repudiated several recent holdings where the Enforcement Bureau found that occurrences such as the NBC broadcast were not indecent under the previous standard. These earlier rulings included examples from other entertainment programming as well

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<sup>1</sup> Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency (“Indecency Policy Statement”), 16 FCC Rcd 7999, 8002 (2001)

<sup>2</sup> *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globes Awards” Program, Memorandum Opinion and Order, available at <http://www.fcc.gov> (2004). *Emphasis added.*

as live sports where field mics had picked up similar language. Those of you doing live sports may wish to carefully consider how you handle crowd and playing surface audio. Likewise, it is probably time to carefully comb through the lyrics of every song you play on the air as even a single utterance, live or recorded, now is actionable.

So, why maybe? The Commission did not specifically discuss news programming, or whether the rejection of the emphasis on context in determining indecency applies to bona fide newscasts, except as a footnote. In 1991, the FCC rejected an indecency complaint against an NPR member station for airing a wiretap surveillance tape in which organized crime boss John Gotti used fuck or a variation 10 times in seven sentences. According to the FCC in that case, “the use of such words in a legitimate news report [was not] gratuitous, pandering, titillating or otherwise ‘patently offensive’ as that term is used in our indecency definition.” In describing Bono’s use of the word was “shocking and gratuitous,” the FCC noted that NBC offered no mitigating defense, contrasting it with the news value of the tape in the Gotti story aired during “All Things Considered.” However, in that same footnote, the Commission also observed that “the fact that a broadcast had a social or political value would [not] necessarily render use of the ‘F-Word’ permissible.”

***Even if the Commission can’t act under an indecency rationale, they are now willing to enforce §1464 under a profanity rationale.***

Although noting that the FCC’s enforcement of the profane section of the statute has been very limited in the past, the Commission now argues that nothing in the statute itself or the relevant case law places any such limit on their actions. In the NBC order, the FCC has placed stations “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.<sup>3</sup>

In addition to potentially being the largest enforcement expansion in this case, I think this change is really about building the legal strategy for the appeals that will surely follow. The dicta in the Supreme Court’s *Pacifica* decision as well as the language in several of the indecency enforcement decisions by the D. C. Circuit Court of Appeals (in particular, the three separate *Action for Children’s Television v. FCC* appeals) suggest that the courts may not look favorably on the Commission’s new interpretation that defines even fleeting occurrences and non-sexual contexts as indecent. The courts have generally upheld the FCC in this area, but only with the understanding the Commission will adopt a very narrow understanding of what constitutes a violation. Previously, the FCC took the position that the statute and its enforcement were constitutionally sound because the Commission would only take action against shocking, graphic material that was repetitive or dwelt at length. The narrow standard and the safe harbor time period (when indecent material would be permitted) were both noted approvingly by the courts in sustaining the FCC. The Commission has now abandoned the first of those. If the court were to find that the FCC’s latest indecency interpretation is constitutionally unsound, the FCC will argue that they nevertheless have the statutory responsibility and authority to sanction stations for profane speech.

I won’t predict how the courts will respond to that argument. Pending the outcome of any appeals of the recent decisions, note two things: the FCC has left open the possibility of including words that are “as highly offensive as the ‘F-Word’” within the meaning of “profane”; and the FCC has not further articulated any clear standard for determining what words meet that test, leaving it “case by case.” Again, I’m not a lawyer, but it seems to me that—unless you want to be one of the test cases—a cautious approach in deciding whether to air particular material might be warranted until the Commission sorts this out.

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<sup>3</sup> In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globes Awards” Program, Memorandum Opinion and Order, available at <http://www.fcc.gov> (2004).

***Each “indecent utterance” is now an actionable instance.***

There’s not much more that really needs to be said here. The statute and FCC rules provide penalties for each “instance.” The FCC has now defined an instance as an individual word or phrase. Under that interpretation, the FCC can assess truly substantial forfeiture amounts by sanctioning each individual word or phrase that they deem indecent (as they have done in recent high six-figure notices of apparent liability issued to Infinity and Clear Channel).

***Congress...a final note***

The “Broadcast Decency Enforcement Act of 2004” passed the House of Representatives by a vote of 391-22 and is pending in the Senate. Although it is at least somewhat likely that the Senate will not move the bill forward or will pass a significantly different version (thus sending the legislation to a conference committee), there are a number of changes that potentially impact stations. You should contact your senators and representatives to make your views known if you have not already done so, especially if they sit on the Commerce Committee or Telecommunications subcommittee in either chamber. Among the provisions in the bill:

- Maximum penalties for each violation would be increased to \$500,000
- The Commission would be required to issue a finding within 180 days of receiving a complaint
- The FCC would be permitted to require stations found to have broadcast material violating §1464 to broadcast children’s public service announcement reaching up to five times the audience estimated to have been reached by the offending broadcast.
- A “three strikes” rule: the FCC would be required to commence a revocation proceeding for any licensee guilty of three §1464 violations within a license period.
- A “sense of the Congress” resolution that television licensees should re-implement the family viewing hour that existed from 1975 to 1983 (when it was declared unconstitutional by the D.C. Circuit Court of Appeals).

In addition to the Commission’s guidelines mentioned in the first footnote, see these articles for more information on the indecency standard through history:

Crigler & Byrnes, “Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy,” *Catholic University Law Review*, vol. 38 (1989), 329. (authored by Pacifica Foundation’s law team, focuses more on the politicking that led to the change than on the change itself)

Milagros Rivera-Sanchez & Michell Ballard, “A Decade of Indecency Enforcement (1987-1997),” *Journalism & Mass Communication Quarterly*, vol. 75 (Spring 1998), 143-153. (discussion of the application of the 1987 standard through the decade)

Milagros Rivera-Sanchez, “Developing An Indecency Standard: The FCC and the Regulation of Offensive Speech 1927-1964,” *Journalism History*, vol. 20 (Spring 1994), 3-14. (pre-Pacifica/Seven Dirty Words history)