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Indecency on Television

Should the FCC crack down or give up?

The protracted legal fight over broadcast indecency is continuing after the Supreme Court wiped out penalties against three TV networks but left the constitutionality of the Federal Communications Commission's policy unresolved. Now, the FCC faces pressures from broadcasters and free-speech advocates on one side and anti-indecency groups on the other over how to deal with a backlog of 1.5 million pending complaints about sex and vulgarity on radio and television. Federal law prohibits obscenity, indecency or profanity on broadcast channels, though not on cable or satellite systems. The FCC tightened its policy in recent years to prohibit even a "fleeting" use of the F- or S-word and began imposing costly penalties against stations in indecency cases. Broadcasters say the policy limits their ability to compete with cable systems, but anti-indecency groups say over-the-air television should be kept as family-friendly as possible. Many legal experts say, however, that the proliferation of other media may lead the courts eventually to strike down the law.



The prime-time CBS show "How I Met Your Mother" is rated by the Parents Television Council, an anti-indecency advocacy group, as "inappropriate for youngsters" because of its "heavy" sexual content.

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Indecency on Television

BY KENNETH JOST

THE ISSUES

The Fox television network's hit animated comedy "Family Guy" prides itself on "outrageous humor" and a "cult status" among millions of fans nationwide. But on March 8, 2009, the Emmy-nominated show went so far over the top that nearly 180,000 non-fans complained to the Federal Communications Commission (FCC) that the program violated the federal law against indecency on broadcast radio or television.

As part of a convoluted plot, the early prime-time show that Sunday included a depiction of bestiality — a horse licking the bare behind of the taste-challenged patriarch Peter Baker — and a gay orgy scene with one graphic term unsuitable for straight company.

The anti-indecency advocacy group Parents Television Council rose up in indignation on its website. "This is the kind of 'entertainment' Fox thinks is ideal for your kids to see on a Sunday night cartoon," the e-alert read. Website visitors were provided links to file a complaint with the FCC, contact their local Fox station or make a donation to the council.

The council's Internet alarm apparently paid off, according to figures from the FCC, the federal agency that regulates broadcasters and to a lesser degree other telecommunications services. The commission received 179,997 indecency complaints that month — compared to only 505 in the previous month.¹ (See *graph*, p. 969.)



Getty Images/Christopher Polk

M.I.A. performs at halftime during the Super Bowl in Indianapolis last Feb. 5. When the British singer raised her middle finger at the crowd, some TV stations used taped delays to block the gesture, but it appeared on many other stations, intensifying calls by anti-indecency advocacy groups for more stringent policing of indecency on TV by the Federal Communications Commission.

For broadcasters, the parents group has been an unwelcome thorn in the side since its formation in 1995. "I don't think we're ever going to please the Parents Television Council," says Dennis Wharton, executive vice president for communications at the National Association of Broadcasters (NAB). "We respect what they do," Wharton continues. "But let's not kid ourselves. They use these campaigns to bring in more revenue for their cause."

The council's leaders bristle at the insinuation that the complaints are not

genuine. "The broadcast networks and their surrogates like to pretend that these are ginned up," says Dan Isett, the council's Washington-based director of public policy. "We can't force anybody to file a complaint."

The complaints against the "Family Guy" episode have now lain with the FCC for more than three years, part of an estimated backlog of 1.5 million complaints left unacted on during a protracted legal challenge to the agency's indecency policy. The legal uncertainty continues despite a Supreme Court decision on June 21 that threw out indecency rulings in three separate cases against the Fox and ABC networks but left a constitutional challenge to the FCC policy unresolved.















The decision marked the Supreme Court's first substantive ruling on the issue since 1978, when it tenuously upheld the agency's power to penalize broadcasters for indecency aired when children were likely to be in the audience. The earlier ruling, *FCC v. Pacifica Foundation*, upheld the FCC's decision to reprimand a New York City radio station for a mid-afternoon

broadcast of a recorded monologue by the late comedian George Carlin that satirized what he described as seven "filthy words" that "you couldn't say on the public airwaves."²

The FCC's authority stems from the very first law regulating radio broadcasting in 1927. The provision, as added to the U.S. criminal code in 1948, said that anyone who "utters any obscene, indecent, or profane language by means of radio communication" can be punished by up to two years' imprisonment and a fine of up to \$10,000.

Many Prime-Time Shows Fail Parents' Group Test

The Parents Television Council's "Family Guide to Prime Time Television" rates programs by color: red for those "unsuitable for children" because of "gratuitous sex, explicit dialogue, violent content or obscene language"; yellow for those "inappropriate for youngsters" because of "adult-oriented themes and dialogues"; and green for "family-friendly" programs that promote "responsible themes and traditional values." In the last week of October, no prime-time program was rated green, though some — such as sports programs — were unrated. Here are the council's ratings for some of the most popular programs (broadcast times, Eastern time zone):

Program (Network, Time)	Rating	Description
America's Next Top Model (CW/reality: 8 pm Friday)		Foul language "common"; sex discussed
The Big Bang Theory (CBS: 8 pm Thursday)		"Frequent sexual content"
Criminal Minds (CBS: 10 pm Wednesday)		Violence "frequent," "often extreme"
Dancing With the Stars (ABC: 8 pm, Monday, Tuesday)		"Harsh" language; "suggestive" dancing
Family Guy (Fox: 9 pm Sunday)		"Vile, offensive content"
How I Met Your Mother (CBS: 8:30 pm Monday)		"Heavy" sexual content
Modern Family (ABC: 9 pm Wednesday)		"Innuendo and mild references to sex"
Person of Interest (CBS: 9 pm Thursday)		Violence; "ambiguous morality"
The Simpsons (Fox: 8:30 pm Sunday)		"Steadily more graphic" over time
Two and a Half Men (CBS: 8:30 pm Thursday)		"Constant barrage" of sexual scenes, jokes
30 Rock (NBC: 8 pm Thursday)		"Sexual innuendo and language"
The Voice (NBC: 8 pm Monday, Tuesday)		"Sexual innuendo and references"
 Red  Yellow		

Source: Parents Television Council, www.parentstv.org/PTC/familyguide/weekly.asp

Congress in 2006 raised the fine that the FCC could levy against an individual station to \$325,000 per violation or a maximum of \$3 million for a continuing violation.

For 25 years, the FCC treated the *Pacifica* case as authorizing it to punish radio or television broadcasters only for extended or repetitive vulgarity or sexual material, not for brief nudity or

what came to be called a "fleeting expletive," such as a vulgar word uttered accidentally.³ But the commission shifted its stance in March 2004 to permit a sanction for a single use of the F-word. A later decision extended the same prohibition to any use of the S-word. (See box, p. 972.)

The policy change came six weeks after the halftime show at the 2004 Super Bowl provoked a contentious national debate about nudity on television. Viewers of the musical extravaganza that night caught a glimpse of the singer Janet Jackson's exposed right breast after fellow pop star Justin Timberlake dislodged one side of her bustier. Jackson famously blamed the incident on a "wardrobe malfunction." Both CBS, which broadcast the show, and MTV, which produced it, apologized, but the FCC in September 2004 fined CBS stations a total of \$550,000 for the incident. (See *FCC enforcement record*, p. 971.)

The Supreme Court rejected the FCC's effort to uphold the fine against CBS in a brief order on June 29. That action came eight days after the court had similarly rejected FCC pleas to uphold the indecency findings against Fox and ABC.

The Fox cases stemmed from seemingly unscripted uses of the F- and S-words by entertainers during live broadcasts of separate music awards programs in 2002 and 2003. The ABC case stemmed from brief nudity in a 2003 episode of the police drama "NYPD Blue." ABC stations were fined a total of \$1.24 million for the incident; the Fox stations were only warned.

In rejecting the FCC's effort to uphold the fines and warnings, however, the Supreme Court said broadcasters had no advance notice of the more restrictive policy. "The Commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent," Justice Anthony M. Kennedy

wrote in *FCC v. Fox Television Stations*.⁴

The broadcasters had urged the court to go further, however. They wanted the justices to rule the “fleeting expletive” policy itself unconstitutionally vague or prohibit the FCC from punishing sexual depictions and language altogether unless the material met the stricter definition of legal obscenity. Instead, Kennedy closed his opinion for seven justices by saying it was up to the FCC to decide whether to modify its policy — and up to the courts to rule on any future enforcement actions. In a separate opinion concurring in the result, Justice Ruth Bader Ginsburg called for overruling *Pacifica*, a position urged in a brief filed on behalf of a bipartisan group of six former FCC officials.⁵ (See “*At Issue*,” p. 981.)

The decision disappointed broadcasters and many media law experts who had hoped for a more definitive ruling. “There’s still a lack of clarity, obviously, given the non-decision decision that came from the court,” says the NAB’s Wharton. But the parents group cheered what it viewed as an affirmation of the FCC’s underlying policy. “From our perspective, it was a pretty complete win,” says Isett. “It was a status quo ruling that took everything back to where we had been.”

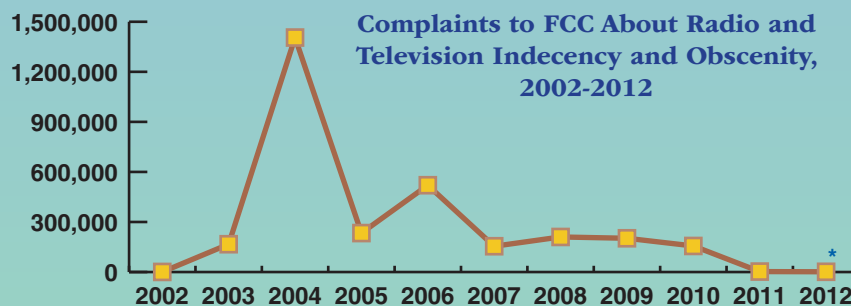
The five FCC commissioners all responded to the court’s decision by promising, with varying emphasis, to enforce the law. Four months later, however, the only hint of action from the agency is a Sept. 21 directive by the current FCC chairman, Julius Genachowski, that the agency’s enforcement bureau focus on “the strongest cases that involve egregious indecency violations.”⁶

The mountain of pending complaints reflects the success of the Parents Television Council in mobilizing viewers and listeners concerned about sex and vulgarity on television and radio. The public concern in turn reflects the

Indecency Complaints to FCC Declined

Indecency complaints received by the Federal Communications Commission (FCC) peaked in 2004 at more than 1.4 million after many Super Bowl viewers objected to singer Janet Jackson’s “wardrobe malfunction” during the game’s halftime show. The number of complaints plummeted in 2005 because the FCC dismissed many complaints that did not fall within FCC guidelines. Complaints rose in 2006 after advocacy groups urged their members to flood the FCC with objections against particular shows. The number of complaints sent to the agency fell significantly in 2011 and 2012 as a legal battle over the constitutionality of the FCC’s policy was moving toward the Supreme Court. The court’s ruling in late June threw out penalties in three cases but left the legal issue unresolved.

No. of complaints



* January-June 2012

Source: “Quarterly Reports — Consumer Inquiries and Complaints,” FCC, 2012

evolution of television in particular from a supposedly sex-free golden age in the 1950s and ’60s to today’s franker and more frequent depictions of sex.

Sex now is discussed and depicted on television matter-of-factly — whether marital, premarital or extra-marital. Bedroom scenes are frequent, pajamas a thing of the past and gays and lesbians out of the closet. “A lot of the advocacy groups would like television to be like it was in the 1950s,” says Robert Thompson, a professor of popular culture and director of the Bleier Center for Television and Popular Culture at Syracuse University.

The FCC’s indecency authority extends, however, only to over-the-air radio and television broadcasters, not to cable television with its much looser standards or to the Internet, video games, mobile

apps and other media. “Broadcast indecency enforcement feels largely irrelevant today,” says Paul Gallant, a media industry analyst in Washington with the investment firm Guggenheim Partners.

Some industry observers say the competition from new media is helping to drive decency standards down to a low common denominator. “Sex sells,” as James P. Steyer, head of the children’s advocacy group Common Sense Media, wrote in his book *The Other Parent*.⁷

Both the Parents Television Council and Common Sense Media rate many of the prime-time programs on broadcast television as unsuitable for youngsters. (See chart, p. 968.) Both groups say that sex as well as violence on TV harms impressionable young viewers. “Children become sexually interested

INDECENCY ON TELEVISION

and sexually active at younger ages,” says Isett. “If kids are encouraged to be sexually active younger, that has a long-term effect.”

Many experts disagree. “The media follow changing social norms and mores rather than leading,” says Frank Couvares, a professor of history and American studies at Amherst College in Massachusetts. “I’m very skeptical that if you let the media broadcast certain kinds of images or words, it’s going to significantly corrupt or change morals.”

As media companies, media critics and media experts await the FCC’s next moves, here are some of the questions being debated:

Is there too much sex and vulgarity on television?

Parents looking for family-friendly programming on prime-time television are pretty much out of luck, according to the Parents Television Council. The council’s color-coded guide to the broadcast networks’ prime-time schedules rates the vast majority of programs either red (“unsuitable for children”) or yellow (“may be inappropriate for youngsters”). Some shows, including sports programs, are unrated, but in the last full week of October not a single program was green-lighted as “promoting responsible themes and traditional values.”

The council’s reports over the years have documented what it calls a shocking increase in sex and vulgarity on television. A report at the start of the fall 2010 television season found a roughly 70 percent increase in profanity on the five commercial networks

compared to five years earlier; the report counted bleeped use of the F- or S-words and unbleeped anatomical references such as “balls” and “boobs.”⁸

“The amount of adult content has gone up year after year for years,” says the council’s Isett. “There is simply



Fox Television’s animated comedy hit “Family Guy” is embraced by millions of fans — and reviled by others — for its “outrageous humor.” The show’s March 8, 2009, episode, which included a gay orgy scene, drew nearly 180,000 complaints that the program violated the federal law against broadcast indecency. The complaints have now lain with the FCC for more than three years, part of an estimated backlog of 1.5 million complaints unacted upon during a protracted legal challenge to the agency’s indecency policy.

© Fox Broadcasting

more of this type of content than there ever was before.”

Other advocates and experts generally agree on the trend, but they view it with less alarm and question the government’s role in dealing with the issue. “There are a lot of things that are on television that I am not comfortable with,” says Syracuse University professor Thompson. “But to regulate the content of a medium because you and your kids find it offensive or because you don’t want your kids to watch is not a very good argument.”

“There’s more acceptance of violent and sexual imagery in popular culture than there used to be,” says Alan Simpson, Common Sense Media’s vice president of public policy. “But it’s also in part a competition for viewers.”

Jonathan Rintels, executive director of the Center for Creative Voices, an organization representing writers and other professionals in the creative community, similarly sees changing tastes among viewers as a reason for more sex and graphic language on TV. “The reason we

have it is it’s in demand,” Rintels says. As a parent himself, Rintels views government regulation as contributing to “parental complacency” about what their children see. “It’s given parents a false sense of security that something off-color won’t reach their children when they’re watching television,” he says.

Broadcasters acknowledge the change in TV offerings but accuse other media of purveying more sex than they do. “It would be naïve of us not to concede that the envelope moves,” says the NAB’s Wharton, “but we often

get lumped in with programs that air on other platforms: cable, pay cable and satellite. We don’t have naked people cavorting across the screen.”

In any event, Wharton says viewers should be free to decide for themselves what to watch or listen to. “We’re not living in a ‘Leave It to Beaver’ world anymore,” he says. “The proper approach is to let parents decide what’s appropriate for their kids to watch or hear on the radio.”

The cable industry — with no indecency regulation — similarly emphasizes customer tastes and customer choice over any governmental role. “We provide programming of interest to a broad variety of people,” says Jill Luckett, senior vice president for program network policy at the National Cable and Telecommunications Association (NCTA). “There’s something for

everyone. That includes a wide variety of networks and genres, including what some people would find inappropriate for their families but also a lot of children and family programming for everyone.”

The laissez-faire approach does not come naturally, however, to government officials. Members of Congress seized on the Super Bowl broadcast within a week to criticize CBS and begin pushing legislation to increase penalties for broadcast indecency. “Some broadcasters are engaged in a race to the bottom,” Rep. Fred Upton, a Michigan Republican and chair of the House Commerce Subcommittee on Telecommunications and the Internet, said as he opened a hearing on his legislation to raise fines for indecency.

FCC Chairman Michael Powell used the same metaphor to describe broadcasters’ changed practices. The Super Bowl broadcast “is just the latest example in a growing list of deplorable incidents over the nation’s airwaves,” Powell told the subcommittee. “We must take action to protect our nation’s children.”⁹

Despite the tough talk, the FCC has been something of a paper tiger on the indecency enforcement front. The commission got big news coverage in March 2006 when it imposed penalties totaling about \$4 million in seven indecency cases, but the omnibus order rejected indecency complaints in 17 others.

Still, Thompson sees the clamor about indecency as irrational. “The idea that a great communication medium like television in a country like the United States is actually having a conversation about an exposed breast, I find amusing,” he says.

Should the FCC relax enforcement of its indecency rules?

The Public Broadcasting Service (PBS) garnered attention and appreciative reviews in fall 2003 for a seven-part documentary series, “The Blues,”

Indecency Complaints Can Lead to Big Penalties

The Federal Communications Commission issues Notices of Apparent Liability (NALs) when it finds television or radio stations liable for indecency violations. The number of NALs hit a peak of 12 in 2004, and total penalties nearly topped \$8 million. Television licensees of the Fox reality show “Married by America” were fined about \$1.2 million that year. Similarly, three media companies — Viacom, Clear Channel and Emmis — agreed to consent decrees totaling nearly \$4.3 million that same year. Penalties totaled about \$4 million in 2006 when licensees of the CBS drama “Without a Trace” were ordered to pay \$3.6 million.

FCC Indecency Penalties, 1993-2010

Year	Number of Notices of Apparent Liability (NALs)	\$ Amount of NALs
1993	5	\$665,000
1994	7	\$674,500
1995	1	\$4,000
1996	3	\$25,500
1997	7	\$35,500
1998	6	\$40,000
1999	3	\$49,000
2000	7	\$48,000
2001	7	\$91,000
2002	7	\$99,400
2003	3	\$440,000
2004	12	\$7,928,080*
2005	0	\$0
2006	7	\$3,962,500
2007	0	\$0
2008	0	\$0
2009	0	\$0
2010	1	\$25,000

* Includes amounts from three separate consent decrees.

Sources: “Indecency Complaints and NALs: 1993-2006,” FCC, 2010

executive-produced by the acclaimed director Martin Scorsese. Two-and-a-half years later, however, a small public television station in San Mateo, Calif., landed in trouble with the FCC for having broadcast one of the programs that contained what the agency determined to be “gratuitous” use of the S- and F-words.

The FCC in March 2006 fined San Mateo Community College, the licensee for station KCSM, \$15,000 for violating the federal ban on broadcast indecency. The penalty was part of nearly \$4 million in fines that the FCC imposed on seven broadcasters as it resolved complaints in 28 cases altogether. The Parents Television Coun-

FCC's Indecency Policy: A Work in Progress

The Federal Communications Commission has authority under the Communications Act of 1934 to prohibit “obscene, indecent, or profane language” on broadcast radio or television. The Supreme Court upheld the FCC’s power to penalize broadcasters for violating the ban in a case involving repeated use of seven vulgar words. The FCC in 2004 ruled that the prohibition also applies to a single use of the F-word — a so-called “fleeting expletive.” After a protracted legal battle, the Supreme Court in June ruled that the stricter policy could not be applied to earlier broadcasts. The court left it up to the FCC to decide whether to modify the policy. Here are excerpts from key laws, FCC pronouncements and court rulings on broadcast indecency:

“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both.”
18 U.S. Code § 1464 (enacted 1948)

Broadcast indecency is defined as follows: “Language or material that depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.”
New Indecency Enforcement Standards, 2 F.C.C.Rcd. 2726 (1987)

“We now clarify . . . that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent.”
In re “Golden Globe Awards,” 19 F.C.C.Rcd. 4975 (2004)

“[T]he amount of any forfeiture penalty determined under this subsection [for a broadcast licensee or applicant] shall not exceed \$325,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$3,000,000 for any single act of failure to act.”
Broadcast Decency Enforcement Act of 2006

“[T]his opinion leaves the Commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements. And it leaves the courts free to review the current policy or any modified policy in light of its content and application.”
FCC v. Fox Television Stations, U.S. Supreme Court (2012)

cil applauded the crackdown, but KCSM and other penalized broadcasters vowed to appeal. And in a partial dissent, FCC Commissioner Jonathan Adelstein sharply criticized the finding on “The Blues,” contrasting it with the com-

mission’s earlier no-indecency rulings on the World War II movies “Saving Private Ryan” and “Schindler’s List” despite their graphic language or nudity.¹⁰

The FCC’s indecency enforcement came to a virtual halt after the 2006

order as broadcasters, including KCSM, challenged the actions in court. The commission’s only major cases were seven-figure, nudity-related penalties against ABC stations for the “NYPD Blue” episode and against 169 Fox stations for an April 2003 episode of “Married by America” that featured male and female strippers. Now, the Supreme Court’s decision in the long-running Fox case clears the way for the FCC to take on the huge backlog of complaints that have continued to pile up.

The Parents Television Council is eager for the FCC to get to work even if many of the complaints are on their face invalid. “It’s time to adjudicate this enormous backlog,” says Isett. “What the Supreme Court said is that the networks didn’t have ample notice” of the change in FCC policy in March 2004, Isett explains. “There’s no question that they haven’t had advance notice now.”

Broadcasters similarly want the backlog reduced, but for different reasons. Hundreds of license renewals for stations have been held up because of pending indecency complaints, the NAB’s Wharton explains. Many of the complaints can be dismissed readily, Wharton says, because they are too old or because they relate to programs aired during the 10 p.m. to 6 a.m. “safe harbor” period for adult viewers when the indecency regulation does not apply. “I’m sure there are defective cases, cases that don’t meet the very narrow definition of indecency,” Isett acknowledges from the other side, “but some of them surely do.”

The FCC commissioners appear to agree on the goal, but they spoke only in generalities after the Supreme Court’s decision. Chairman Genachowski, a Democrat appointed by President Obama at the start of his term in 2009, vowed to “carry out Congress’s directive to protect young TV viewers” in a manner “[c]onsistent with First Amendment principles.” The commission’s senior Republican, Robert McDowell, called on the commission

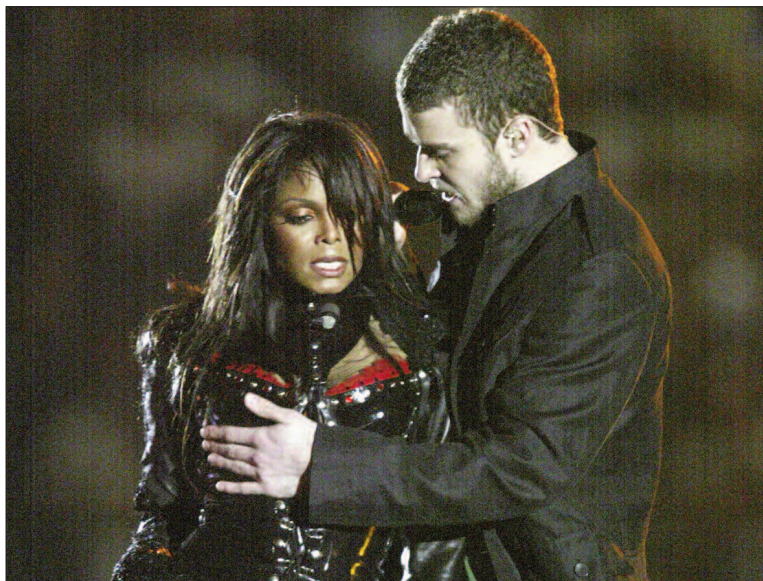
to act “expeditiously . . . to put an end to years of litigation and uncertainty.”

The uncertainty about the FCC’s definition of indecency is one of the major criticisms of its policy advanced by broadcasters and their free-speech-oriented allies. “Unless we know what’s safe and what’s not safe, we can’t comply,” says Rintels with the Center for Creative Voices. Critics note that even though the F- and S-words are treated as presumptively indecent, other ref-

erences to sexual or excretory organs are not. “It seems utterly arbitrary under current FCC practice,” Rintels says.

Fox and ABC emphasized what they called the vagueness of the FCC’s policy in their legal arguments before the Supreme Court. So did other groups. As one example, the Reporters Committee for Freedom of the Press acknowledged that the FCC had created an exception for “bona fide newscasts,” but argued that the exception is “unworkable” because of “the increased blurring of the distinction between news and entertainment programming.” In its brief, the NAB contended that broadcasters “are left to guess at how the policy will apply to them.”

Isett at the Parents Television Council mocks the argument. “It’s a very recent phenomenon that broadcasters have decided that they don’t understand the rules,” he says. “There are tests, and they make a lot of sense,” Isett concludes. “The idea that broadcasters are absolutely clueless doesn’t hold water.”



Getty Images/Donald Miralle

Janet Jackson ignited a national debate about nudity on TV after a so-called “wardrobe malfunction” briefly exposed one of her breasts during her Super Bowl halftime performance with Justin Timberlake in Houston on Feb. 1, 2004. Both CBS, which broadcast the show, and MTV, which produced it, apologized, but the FCC in September 2004 fined CBS stations a total of \$550,000 for broadcasting the incident. The penalty was thrown out in the courts.

For its part, Common Sense Media supports the FCC’s role in regulating indecency. “We’ve given a lot of money and a lot of benefit to broadcasters,” Simpson says. “They’re using public airwaves, aren’t there still public obligations that go with that?” But he also stresses parents’ role in monitoring their children’s viewing habits. “Parents are the essential players,” he says.

Should the FCC regulate indecency on cable television?

Online film reviewer James Berardinelli fondly recalls sneaking peeks at *Playboy* magazine as a teenager in the 1980s. But he got his real guilty pleasures thanks to a neighbor who gave him the run of his cable-wired house on Friday nights. There, beyond parental supervision, Berardinelli regularly tuned in to “Cinemax After Dark,” the soft-porn channel created by HBO in 1984 that now runs seven nights a week.¹¹

Before the Internet, cable was for porn — hard and soft — as well as mainstream programming with not-so-

fleeting glimpses of nudity and sexual activity that could not be shown on broadcast channels. Today, cable channels, especially premium pay channels such as HBO and Showtime, continue to offer more skin and more salty language than broadcast stations, at least in part because the FCC has no power to regulate indecency on cable.

The cable industry defends its regulation-free status. “Cable is a private subscription service that doesn’t use the government’s airwaves to transmit programming that’s available to all,” says Brian Dietz, NCTA’s vice president for communication. “Customers

make a choice to subscribe to cable. The industry is built on an entirely different model than broadcasting.”

Broadcasters bristle at living under FCC regulation that does not cover their cable competitors. “It’s serious why we should be singled out when 85 percent of all homes get broadcast programming through a pay TV platform,” says the NAB’s Wharton. Broadcasters would prefer “responsible self-regulation” by both industries, Wharton says, but he adds: “If it’s good for broadcasting, why shouldn’t it apply to other media outlets?”

Historically, the indecency law does not apply to cable for the simple reason that cable was not invented until the late 1940s and did not reach a majority of U.S. households until the 1980s. At the time of the Supreme Court’s ruling in the *Pacifica* case in 1978, cable service was not “pervasive” nor “uniquely accessible to children” — the two factors that the court cited in upholding the indecency regulation for broadcasters.

Today, media watchers note what TV viewers know from their daily lives: For cable-subscribing households, there is no practical difference between a broadcast channel and a cable channel. “Parents don’t make the distinction as to whether [programming] is coming from broadcasting or cable,” says Simpson with Common Sense Media.

“The idea that parents can place a kid in front of a television set and leave them without supervision and expect they will only be watching shows that don’t have any potential for off-color material is not justified,” says Rintels with the Center for Creative Voices. “Nearly 90 percent of Americans subscribe to cable television, and in cable those rules don’t apply.”

The legal distinction remains, however. Michael Schooler, a deputy general counsel with the NCTA, explains that the Supreme Court has twice struck down federal laws aimed at regulating sexually explicit material on cable. Schooler says the court noted in both cases that there were less restrictive ways to limit children’s access to sexually explicit material. He points to moves supported by industry such as use of the so-called “v-chip” to block age-inappropriate programs and ratings advisories to identify programs with sexual, violent or other questionable content.

The cable industry came under pressure as Congress considered legislation to crack down on indecency on television after the 2004 Super Bowl episode. A proposal to extend the indecency regulations to cable operators’ expanded basic subscription offerings failed on an 11-12 vote in the Senate Commerce Committee on March 9 even as the panel voted to increase penalties for broadcasters and subject performers to indecency penalties as well.¹²

Two committee leaders — Chairman John McCain, Republican of Arizona, and ranking Democrat Ernest Hollings of South Carolina — floated a narrower proposal to help subscribers screen out indecent

programming. The proposal would have required cable operators to offer “a la carte pricing” plans that allow customers to subscribe on a per-channel basis instead of choosing among bundled service packages. A consortium of independent cable channels warned that the proposal could result in fewer choices and higher prices for subscribers. Hollings withdrew the proposal without seeking a vote, saying the issue would have complicated passage of the main bill.¹³

The cable industry continues to warn that a la carte pricing would reduce diversity in programming. After he became FCC chairman in 2005, Kevin Martin pushed a narrower proposal to require cable systems to offer customers an indecency-free “family tier” subscription package. Some cable companies promised to offer such plans, in part to kill interest in a la carte pricing or ward off mandated family-tier packages.

NCTA officials say some cable companies continue to offer such plans, but Isett with the Parents Television Council — which favors the idea — says the plans are not promoted. “It sort of exists in some markets to some extent,” he says. “There’s no market for it, and they don’t market it even if there were.”

With cable exempted from indecency regulation, Rintels says the reasons for regulating broadcasters simply fail. “The growth of cable really negates this whole idea that the government can create an environment in which parents can rely on television not to be off-color at any moment,” he says. ■

BACKGROUND

Loss of Innocence

Congress gave the FCC authority to regulate indecency when it established the commission in 1934. The power went unused, however, until

the 1960s when first radio and then television began pushing the sexual boundaries for mass entertainment media. With the FCC’s encouragement, the existing three commercial television networks adopted a “family viewing hour” policy in the 1970s that reserved the first hour of the prime-time schedule for programs suitable for children. Meanwhile, several challenges to sexually explicit material on talk radio culminated with the Supreme Court’s *Pacifica* decision in 1978 upholding the FCC’s authority to penalize broadcasters for indecency on programming aired when children were likely to be in the audience.¹⁴

The Communications Act of 1934 established the FCC with broad but undefined power to regulate what was then only radio broadcasting “in the public interest, convenience, and necessity.” The act’s Section 326 prohibited the commission from exercising any power of censorship but did authorize it to prohibit “obscene, indecent, or profane language.” In 1948, the prohibition was recodified as a stand-alone provision in the U.S. criminal code, with punishment of up to two years’ imprisonment or a fine of up to \$10,000 per violation. The commission also had the power to punish obscenity, indecency or profanity with administrative fines up to a maximum of \$10,000; the amount was raised in 1994 and again in 2006 to its present level of \$325,000 per violation.

As television emerged in the 1950s as the nation’s dominant entertainment medium, broadcasters treated sexual matters with kid gloves. A voluntary code of conduct adopted in 1951 called on broadcasters not to “emphasize anatomical details indecently” and to use “good taste and delicacy” in depicting locations “closely associated with sexual life or with sexual sin.” Lucy Ricardo, the ditzy character played by Lucille Ball, gave birth to little Ricky on the hit situation-comedy “I Love

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Chronology

Before 1960

Sex is treated gingerly on radio, television.

1934

Communications Act of 1934 creates Federal Communications Commission to regulate radio (later, television); Section 326 prohibits “obscene, indecent, or profane” language on broadcasts.

1948

Prohibition against obscenity, indecency or profanity enacted in U.S. criminal code, with penalty of up to two years’ imprisonment and/or up to \$10,000 fine.

1950s

Television becomes dominant entertainment medium; broadcasters adopt voluntary ethics code requiring “good taste and delicacy” in treating sexual matters.

1960s-1970s

Television becomes more venturesome on sexual matters; “topless radio” draws FCC’s attention; Supreme Court upholds FCC authority over indecency.

1964

FCC rejects indecency complaints against Pacifica radio stations for sex-related programs. . . . Racy prime-time soap opera “Peyton Place” debuts on ABC, runs five seasons.

1971

Blue-collar situation comedy “All in the Family” debuts; breaks taboos on sexual matters; runs eight seasons on CBS.

1973

FCC fines Illinois radio station \$2,000 for discussion of oral sex

on call-in show; federal appeals court upholds decision in 1974.

1975

Three major TV networks, under pressure from FCC, adopt “Family Viewing Hour” policy; federal judge cites FCC pressure in invalidating policy in 1976; networks readopt it “voluntarily.”

1978

Supreme Court upholds FCC authority to penalize stations for indecency when children likely to be in audience; decision backs FCC warning to Pacifica station in New York City for broadcasting George Carlin monologue “Seven Filthy Words.”

1980s-1990s

Radio, TV bust through limits on sexual matters; FCC, courts settle on late-night “safe harbor” for adult-oriented programming.

1985

Shock-jock Howard Stern signs with Infinity Broadcasting; morning talk show wins top ratings in national syndication.

1989

“The Simpsons” debuts on Fox network; graphic content increases over time.

1993

Federal appeals court bars FCC indecency enforcement from 10 p.m. to 6 a.m. to ensure adults have access to legally protected material; ruling comes after years of back and forth between FCC, Congress and courts.

1995

Infinity Broadcasting fined \$1.7 million over complaints about Howard Stern show. . . . Parents Television Council founded.

2000-Present

FCC, Congress crack down on indecency; long legal challenge over “fleeting expletives” ends inconclusively at Supreme Court.

2001

FCC says context, multiple factors important in indecency cases.

2004

Janet Jackson’s breast briefly exposed in Super Bowl halftime show (Feb. 1); episode becomes cause célèbre. . . . FCC, in shift, says isolated use of F-word is indecent (March 18). . . . CBS stations fined \$550,000 for Super Bowl broadcast (Sept. 22).

2006

FCC imposes \$4 million in fines in indecency cases; CBS stations hit for \$3.6 million for graphic sex scene in “Without a Trace”; Fox network warned for fleeting expletives by Cher, Nicole Richie on Billboard Music Awards programs in 2002, 2003. . . . Broadcast Decency Enforcement Act raises maximum fine for indecency to \$325,000 per violation (June 15).

2009

Supreme Court says FCC acted properly in adopting ban on “fleeting expletives”; sends *Fox* case back for ruling on constitutional challenge (April 28); FCC penalty against ABC for brief nudity in “NYPD Blue” later added to case.

2012

Supreme Court throws out penalties against Fox, ABC; lack of notice cited; constitutional issue unresolved (June 21); penalty in Super Bowl case thrown out eight days later, but Chief Justice Roberts says FCC policy stands. . . . FCC faces backlog of 1.5 million indecency complaints.

Violence on TV Remains Unregulated

“There would be enormous hurdles” in regulating it.

Five years ago, the Federal Communications Commission unanimously approved a report concluding that the agency could regulate violence on television if Congress gave it that authority. Lawmakers on communications policy applauded the report, but Congress has never acted on the proposal.

Today, the issue appears largely dormant at the FCC and on Capitol Hill. The two major industry groups, the National Association of Broadcasters and the National Cable and Telecommunications Association, continue to oppose any government regulation of violent programming. And the Parents Television Council, a leading critic of both sex and violence on television, itself favors other approaches to the problem.

“There would be enormous hurdles” to government regulation of violence on TV, says Dan Isett, the council’s director of public policy. Isett says the council instead favors pressuring advertisers not to support programs with excessively violent content.

Broadcasters say regulating violence would be even more difficult for the FCC than trying to police sex-related indecency. “It’s really difficult to define,” says Dennis Wharton, the National Association of Broadcasters’ (NAB) executive vice president for communication. “Are we talking about ‘Three Stooges’ violence or Arnold Schwarzenegger violence or ‘Sopranos’-like violence?” (“The Sopranos” was a critically acclaimed HBO

series, now in syndication, about an organized crime leader and his family.)

The FCC ducked the problem of how to define violence when it approved the report on TV violence on April 26, 2007. Despite acknowledged “obstacles,” the 38-page report concluded that “Congress likely has the ability and authority to craft a sustainable definition.” The report also endorsed studies finding that exposure to violence on television “can increase aggressive behavior in children, at least in the short term.”¹

The FCC action, endorsed in separate statements by each of the five commissioners, came three months after the Parents Television Council had published its own report documenting what it characterized as a nearly eightfold increase in violence on broadcast television over the previous eight years.² The council has not published a more recent study, but Isett says the trend continues. “There’s still an enormous amount of violent content on broadcast television,” he says.

NAB’s Wharton disagrees. Violence is “far less explicit than what you find on pay-TV platforms,” he says. “You don’t find ‘Sopranos’-like violence on broadcast television. We don’t air explicitly violent Hollywood movies uncut.”

In the 2007 report, the FCC said that use of the v-chip to block objectionable programming and the industry rating system for designating violent programs had been “ineffective.” Instead,

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Lucy” without using the word “pregnant” over seven episodes. Into the 1960s, TV families were all but invariably intact, children angelic and mostly asexual and marital bedrooms furnished with twin beds. ABC’s risqué prime-time soap opera “Peyton Place,” which debuted in 1964, presaged changing policies, with its bed-hopping among married partners. In the same year, however, NBC shelved as “inappropriate for family viewing” an already-produced two-part dramatic episode about a teenager who contracts syphilis.¹⁵

Radio became the first indecency battleground, beginning in the mid 1960s. In 1964 the FCC rejected indecency complaints filed by listeners challenging renewal of the Pacifica Foundation’s liberal radio stations; five programs drew complaints, including readings by authors and a discussion about gay life

among eight homosexuals. Six years later, however, the commission fined the Philadelphia educational station WHUY \$100 for an obscenity-laced interview with Jerry Garcia, leader of the acid rock band the Grateful Dead. In a more substantive action, the commission in 1973 imposed a \$2,000 penalty on an Illinois radio station for a call-in talk show — the genre was then known as “topless radio” — that included vivid discussion of oral sex. The federal appeals court in Washington in 1974 upheld the commission’s finding that the program was obscene.¹⁶

Television, meanwhile, was in the beginning of a paradigm shift on indecency, marked by the 1971 debut of the hit situation comedy “All in the Family,” a program sprinkled with ethnic and sexual references and bathroom humor. As the three networks pushed the envelope on sex and violence, pub-

lic and official concern grew. FCC Chairman Richard Wiley used his office to push the networks into adopting a “family viewing policy” that set aside the first hour of prime time for programs appropriate for all ages. The policy bumped “All in the Family” from its 8 p.m. Saturday time slot, helping to prompt producer Norman Lear along with the Writers Guild of America to challenge it as a government-induced free-speech violation. A federal judge in Los Angeles sustained the challenge in 1976, but the networks responded by adopting it again.¹⁷

The indecency issue reached the Supreme Court in a case stemming from a single complaint about the broadcast of Carlin’s “filthy words” monologue by WBAI, the Pacifica radio station in New York City. The complainant was a New York man who heard the program one afternoon while

the report urged broadcasters to voluntarily keep violent programming out of the first hour of the prime-time schedule, when small children are likely to be watching, or limit violent programming overall.

For cable and satellite systems, the FCC report said customers should be given greater freedom to “select the channels they want to pay for and to opt out of those that they do not.” The cable industry has strongly opposed so-called a la carte pricing, saying that the current practice of bundled subscription packages allows more diversity in programming at more affordable cost.

Robert Thompson, a professor of popular culture and director of the Bleier Center for Television and Popular Culture at Syracuse University, seconds the NAB’s view that critics overstate the amount of violence on broadcast television. “Yes, we have all these ‘CSIs,’ where all these people die,” he says. “But when one compares it to the movies or video games



Shows such as “CSI” are tame compared to movies and cable shows, says Robert Thompson, director of the Bleier Center for Television and Popular Culture at Syracuse University.

or for that matter cable or pay-cable, I think the level of violence on broadcast TV is quaint.”

But Alan Simpson, vice president for policy for the children’s advocacy group Common Sense Media, says that even if violence is not graphically presented, children can be affected by the sight of bodies. “Gore is pretty scary for young kids,” Simpson says. “If you’re talking about a 5-year-old or 7-year-old, seeing the results of a murder is pretty scary. Your young kids are going to have nightmares.”

— Kenneth Jost

¹ See “Violent Programming on Television and Its Impact on Children,” April 26, 2007, http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-50A1.doc. For coverage, see John Eggerton, “FCC to Congress: Take Action on Violence,” *Broadcasting & Cable*, April 30, 2007, p. 10.

² See Parents Television Council, “Dying to Entertain: Violence on Prime Time Broadcast Television 1998-2006,” January 2007, www.parentstv.org/ptc/publications/reports/violencestudy/DyingtoEntertain.pdf.

driving in his car with his young son. The FCC found the program indecent and entered a reprimand in the station’s file. On a 5-4 vote, the Supreme Court upheld the FCC’s action. For the majority, Justice John Paul Stevens said broadcasters could be penalized for what would be legally protected sex-related material in other media because broadcasting had “a uniquely pervasive presence in the lives of all Americans” and was “uniquely accessible to children, even those too young to read.” In a dissent, Justice William J. Brennan Jr. chided the majority justices for “their fragile sensibilities.”¹⁸

Only a few days later, the FCC gave broadcasters an encouraging signal by renewing the license of the Boston public television station WGBH despite a pending indecency complaint by the advocacy group Morality in Media. Speaking to New England broad-

casters, FCC Chairman Charles Ferris depicted the Carlin case as limited. The case “should show that the FCC is not going to become a censor,” Ferris said. “And hopefully it will prevent an outpouring of audience complaints based on occasional words.”¹⁹

“Chilling” Effect?

The FCC did nothing at first with its officially validated authority over broadcast indecency, but it moved toward a more aggressive stance beginning in the late 1980s under pressure from citizens’ groups. A succession of court cases in the 1990s eventually established a safe harbor for broadcast indecency between 10 p.m. and 6 a.m. but left the anti-indecency rule in place for the rest of the day. After the turn of the century, the FCC stiffened

its position — first by ruling that a single “fleeting expletive” could be penalized and then by imposing fines totaling millions of dollars on programs found to be indecent.

From the 1980s on, the sexual revolution has been broadcast with fewer and fewer limits on radio and on both broadcast and cable television. “Shock jock” talk radio programs — exemplified by the flamboyantly raunchy Howard Stern — featured franker and franker discussions of sexual matters. The major commercial broadcasters, including the boundary-defying Fox network created in 1986, made sex an all but constant theme on many situation comedies — for example, “That 70’s Show” — and such prime-time dramas as “L.A. Law” and “NYPD Blue.” Fox also broke new ground with sexual themes on its animated shows, first “The Simpsons” and later “Family Guy.” Cable television went

INDECENCY ON TELEVISION

further, with such sex-saturated programs as MTV's reality show "Real World," HBO's smash hit comedy "Sex and the City" and Showtime's "Queer as Folk."

The FCC responded to the change in media practices in fits and starts. The commission took on radio first. In coordinated rulings in April 1987, the commission found two stations and Stern's Infinity Broadcasting Network guilty of indecency but, because of the change in enforcement policy, withheld any penalty and issued only a warning for the stations' files. On appeal, the D.C. Circuit Court in 1988 vacated the two decisions involving late-night programs but upheld the commission's finding against Infinity for Stern's daytime program. The appeals court ruling effectively required the FCC to establish a "safe harbor" time period for indecency when children are not in the audience.

Congress responded by passing a law requiring the commission to prohibit indecency around the clock. The FCC obliged, but the appeals court in 1991 ruled the law unconstitutional. The court relied on a Supreme Court decision in 1989 that safeguarded adults' right to access non-obscene material on so-called "dial-a-porn" phone services. Congress stepped in again, enacting a law that established a midnight to 6 a.m. safe harbor for commercial stations and 10 p.m. to 6 a.m. for public broadcasters. In a final appeal, the D.C. Circuit

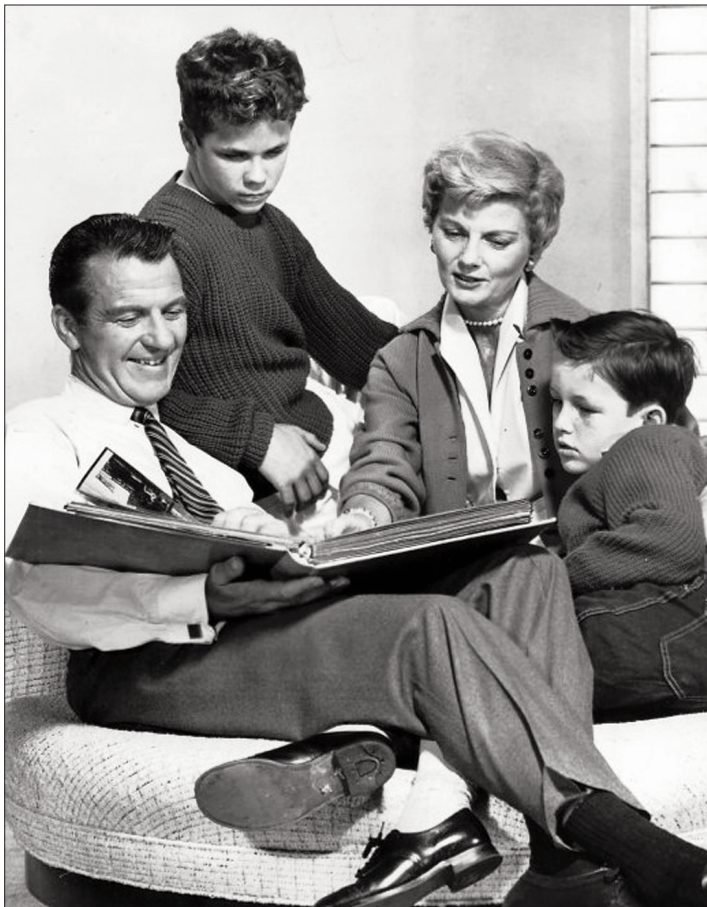
in 1993 found no basis for the distinction and effectively required the FCC to recognize the 10 p.m. to 6 a.m. safe harbor now in effect.²⁰

Congress also tried to limit children's access to sexual material on cable television and the Internet, but the Supreme Court blocked major provisions of the laws enacted. In 1996 the court invalidated a provision of a 1992

of 1996 a provision requiring that pay cable channels with sex-related programming be "scrambled" to avoid unintended access for children. The law also included a complex of provisions aimed at preventing children's access to sexually explicit material on the Internet. The court ruled the Internet law unconstitutional the very next year; Congress' rewrite was eventually struck down as well after a drawn out appellate battle. The Supreme Court ruled the scrambling provision unconstitutional in 2000.²¹

The FCC's continuing battles with shock radio resulted in a \$1.7 million penalty against Infinity, agreed to by the broadcaster, in 1995 and a new \$375,000 fine in 2003 for 13 stations that broadcast a live description of a couple having sex in St. Patrick's Cathedral in New York City. Meanwhile, as part of a settlement with Evergreen Media, the FCC in 2001 issued a policy statement aimed at giving broadcasters guidance on the indecency rules. The guidelines cited three factors as "significant" on the issue: whether the material was explicit or graphic, whether it dwelt on or repeated sexual depictions, and whether the material was used to pander or titillate. Broadcasters generally found the guidance still too vague.²²

The issue came to a head beginning in 2004 after the uproar over the Super Bowl halftime show. Congress initiated hearings that led two years later to legislation raising the penalty for indecency to \$325,000 per violation or a maximum of \$3 million. Meanwhile, the



"Leave It to Beaver," a popular TV situation comedy in the late 1950s and early '60s, avoided sexual matters, like other shows of the period. A voluntary code of conduct adopted in 1951 called on broadcasters to use "good taste and delicacy" in depicting locations "closely associated with sexual life or with sexual sin." Into the 1960s, TV families were all but invariably intact, children angelic and mostly asexual and marital bedrooms furnished with twin beds.

ABC Television

commission, reversing its previous policy, released its decision on March 18 holding that a single use of the F-word could be ruled indecent. The shift came on a complaint against NBC for the use of the word as an adjective by the singer Bono during the 2003 broadcast of the Golden Globes award program. Citing the change, the commission decided not to impose a fine.²³

By contrast, the FCC later that year imposed stiff fines on several broadcasters; the cases included a \$1.75 million fine against the Clear Channel radio network, agreed to by the network, for programming that included Howard Stern's show and a \$3.5 million fine in November against Viacom for sex-related programming on several stations in its Infinity Broadcasting chain. In a well-publicized protest, Stern left over-the-air broadcasting for the subscription satellite radio network Sirius XM. And in September the commission imposed a \$550,000 fine against CBS stations for the Super Bowl broadcast.²⁴

Two years later, the commission on March 15, 2006, imposed fines totaling about \$4 million as it disposed of "hundreds of thousands" of complaints in decisions that penalized some broadcasters, withheld fines in some other cases and cleared broadcasters in many others. The biggest penalty hit 111 CBS stations for \$32,500 apiece for a December 2004 broadcast of a program, "Without a Trace," that included a graphic sex scene. No penalties were imposed in two prominent cases that figured in the later Supreme Court litigation: use of the F-word by the singer Cher in the 2002 "Billboard Music Awards" program and ad-libbed patter with both the F- and S-words by the TV personality Nicole Richie in the same program a year later. Of the other cases with fines, four dealt with sexual themes; the fifth was the penalty against KCSM in San Mateo for its broadcast of "The Blues: Godfathers and Sons."

In a statement, FCC Chairman Martin said the decisions "demonstrate the

Commission's continued commitment to enforcing the law prohibiting the airing of obscene, indecent, and profane material." TV writer-producer Steven Bochco of "L.A. Law" and "NYPD Blue" fame called the FCC action "goddamn chilling."²⁵

Long-time Wait

The FCC's indecency enforcement came to a virtual standstill after 2006 as broadcasters and free-speech advocates challenged the fleeting expletive policy in two successive trips to the U.S. Supreme Court. The federal appeals court in New York City twice struck down the policy — first for administrative law reasons and then, after getting the case back from the Supreme Court, on constitutional grounds. The justices appeared divided along liberal-conservative lines during the court's second round of arguments in January. But they reached a unanimous decision on June 21 to throw out the sanctions against Fox and ABC while leaving it up to the FCC to modify the policy or keep it as is.²⁶

Despite the legal challenges, broadcasters responded to the FCC's crackdown to ward off potential penalties and curry public favor in the seemingly changed environment. Networks and stations instituted brief tape delays on live broadcasts to guard against unscripted expletives. Broadcasters also generally defended their programs, insisting that they strove to avoid giving offense even while adapting to changing public standards on language and sex. For its part, however, the Parents Television Council viewed broadcasters as driving standards down. In successive reports, the council documented increases in profanity on prime-time TV, in what it called the "sexualization" of teen-aged girls, and in depictions of sex, drugs and profanity on prime-time animated programs on cable channels.

The broadcasters' challenge to the FCC's crackdown went up and down the federal court system twice before the Supreme Court's ruling in June. In an initial detour, the FCC decided to drop two no-fine cases from its 2006 order: one against CBS's "Early Show" for use of the S-word by a cast member from the program "Survivor," and the other against ABC's "NYPD Blue" for use of the F- and S-words in various episodes. With the case pared down to Fox's two broadcasts of the "Billboard Music Awards," the Second U.S. Circuit Court of Appeals issued a limited ruling in June 2007 holding that the FCC had failed to justify its changed policy of treating a single, fleeting expletive as indecent.

The Supreme Court agreed to hear the FCC's appeal seeking to reinstate the policy. By a 5-4 vote, the court held on April 28, 2009, that the commission had adequate grounds for the changed policy. For the majority, Justice Antonin Scalia said the FCC could reasonably consider "more stringent broadcast regulation" helpful to parents because of the "pervasiveness of foul language" and "the coarsening of public entertainment in other media such as cable." Two of the justices in the majority, Kennedy and Clarence Thomas, voiced reservations about the ruling. And among the four dissenters was Stevens, who had authored the *Pacifica* decision three decades earlier. The stricter policy would never have been accepted at that time, Stevens said.

The court sent the case back to the Second Circuit to rule on Fox's constitutional challenge. In July 2010, the appeals court ruled that the FCC policy was unconstitutionally vague. The judges said the FCC gave broadcasters too little guidance on what words would be found offensive and adopted exceptions with "little rhyme or reason." In the meantime, the FCC in February 2008 had ruled the Feb. 23, 2003, episode of "NYPD Blue" indecent because of an opening shower scene

with a female character's bare breast and buttocks visible. The commission fined 45 ABC affiliates \$27,500 apiece for a total of \$1,237,500. A separate Second Circuit panel in January 2011 applied the court's ruling from the Fox case to throw the penalty out.

The FCC appealed the Fox and ABC cases to the Supreme Court, which heard the cases together on Jan. 10, 2011. Once again, conservative justices, including Chief Justice John G. Roberts Jr., appeared to support the FCC's policy, while liberal justices voiced doubts. (Justice Sonia Sotomayor recused herself; she had been on the Second Circuit when the Fox case was before that court.) Roberts, part of the majority in the earlier case, suggested the government had good reason to set aside "a few channels" where children would not be exposed to the F- or S-words or nudity. Ginsburg, a dissenter in the earlier ruling, said the FCC had been arbitrary in recognizing exceptions for some programs — she mentioned "Saving Private Ryan" and "Schindler's List" — but not others.

The court's decision on June 21 was short — only 18 pages — and anticlimactic. Writing for seven justices, Kennedy said the networks had "no notice . . . that a fleeting expletive or a brief shot of nudity could be found actionably indecent." Ruling solely on due process grounds, the court passed over the issues of whether the FCC's policy was too vague or whether *Pacifica* should be overruled. The commission was free, Kennedy continued, to modify the policy "in light of its determination of the public interest and applicable legal requirements." But he added pointedly that the courts would still be free to review the policy, whether modified or unchanged. Ginsburg wrote separately to call for overruling *Pacifica*.

Eight days later, the court on June 29 turned aside the FCC's effort to salvage the penalties against CBS for the Super Bowl halftime show. But

Roberts took the opportunity to emphasize that the FCC's policy remained intact. "It is now clear that the brevity of an indecent broadcast — be it word or image — cannot immunize it from FCC censure," Roberts wrote. In a brief rejoinder, Ginsburg again called for overruling *Pacifica*. ■

CURRENT SITUATION

FCC's Full Plate

The FCC is beginning to work on a mountain of indecency complaints with no direct guidance from the Supreme Court, unresolved doubts about its current policy and an agenda of other pressing telecommunications issues.

The commission has no official count of the number of complaints or the subjects of the complaints, according to spokesman Justin Cole. But McDowell, a Republican appointed by President George W. Bush in 2006 and reappointed by Obama in 2009, put the number at 1.5 million in a statement following the Supreme Court's decision in June. McDowell said the complaints involve 9,700 broadcasts and affect 700 pending license renewal applications.²⁷

The indecency issue moved up on the FCC's agenda under two Bush-appointed chairmen: Powell, who led the response to the 2004 Super Bowl broadcast, and then Martin. It has not been a priority for Genachowski, a technology-oriented lawyer and businessman who took office on June 29, 2009. "Right now, the FCC seems to be focused on other priorities," says Amy Sanders, an assistant professor at the University of Minnesota Law School in Minneapolis who is researching the history of the FCC's indecency regulation.

Despite the attention received by the Fox and ABC cases, the FCC since 2000 has rejected more indecency complaints than it has sustained, according to an unofficial count of cases on the commission's website.²⁸ The commission lists 41 "notices of apparent liability," including the omnibus March 2006 order, which sustained complaints on the Fox and ABC programs and seven others. Listed on a separate page are 17 "complaint denial orders," including two orders on Jan. 24, 2005, that rejected complaints filed by the Parents Television Council against 40 programs in all. The March 2006 order rejected complaints in 17 cases — bringing the number of cases turned down to 72.

Of the 50 sustained complaints, more than half appear to involve local radio stations that broadcast shock-jock sex talk or songs with X-rated lyrics. The penalties imposed ranged from \$7,000 to \$27,500. The FCC began imposing bigger penalties in 2003 with the \$357,500 penalty against Infinity Broadcasting for the Aug. 15, 2002, "Opie and Anthony" program that included a listener's account of having sex in St. Patrick's Cathedral in New York City. Other six-figure penalties were imposed in 2004 for stations that broadcast "Bubba the Love Sponge" and the "Howard Stern Show."

The first big penalty in a TV case came in October 2004 against Fox stations that broadcast a "Married by America" program that the FCC said "featured strippers and various sexual situations." The 169 stations were fined \$1,183,000 in all.

Many of the rejected complaints were filed against programs with sexually suggestive scenes or dialogues but with no nudity and no use of the F- or S-words. Other anatomical language passed muster with the FCC, including "dick" and "ass," as did profanity such as "hell" and "damn." And when it rejected a complaint against stations that broadcast "Saving Private

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At Issue:

Should FCC regulation of broadcast indecency be eliminated?



BERIN SZOKA
*PRESIDENT, TECHFREEDOM, A TECH
POLICY THINK TANK*

WRITTEN FOR *CQ RESEARCHER*, NOVEMBER 2012

does the First Amendment permit the FCC to censor “indecent” content on daytime broadcast TV — the occasional curse word or brief glimpses of a bare butt? The Supreme Court has now twice struck down the FCC’s indecency standards as unconstitutionally vague. But each time, the Court has dodged the hard question: Should broadcasters have the same First Amendment rights as, say, cable operators or website publishers to offer content that some might find offensive — but isn’t obscene (pornographic)?

The Court created a special exception to the First Amendment’s protection of free speech in its 1978 *Pacific* decision because it deemed broadcasting (1) “uniquely pervasive in the lives of Americans” and (2) “uniquely accessible to children” — i.e., parents had little control over what their children could watch on TV. But today, less than 8-15 percent of American households rely on over-the-air broadcasting. Most use cable, FiOS, satellites or Internet services like Hulu. While broadcasting might have been considered an “intruder in the home” in 1978, these modern services are very much invited guests — and so, the Court has held, cannot be censored.

Today, parents can choose from, and filter, a range of video programming options unimaginable in 1978. A variety of tools empower parents to decide what broadcast content their children can access. Since 2000, every television larger than 13 inches has come with the v-chip. This free technology empowers parents to block content based on ratings that include age-based designations as well as several specific content descriptors (coarse language, sex, violence, etc.). A wide variety of other tools have empowered parents, such as DVD players, digital video recorders and video-on-demand services. Parents can now build, and even pre-screen, libraries of preferred programming for their children. Similar tools are available for cable content, video games, movies and the Internet.

It’s only a matter of time before the Supreme Court ends the FCC’s censorship of broadcasting, just as it ended cable indecency censorship back in 2000, when it held:

“[I]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act . . . Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.”



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broadcast decency law has existed since the dawn of the medium for one purpose alone: to protect children from material that is clearly inappropriate or even harmful to them. Broadcasters, in exchange for free use of the publicly owned airwaves, must abide by the law, which simply channels patently offensive sexual or excretory content to the times of day when children are much less likely to be in the audience.

In 1996, Congress required that most televisions be equipped with a v-chip that families could use to block programming based on a rating assigned to that program by the networks themselves. Unfortunately, the conflict of interest inherent in the existing system has yielded poor results for families. Study after study conducted by the Parents Television Council and others has concluded that there are major inconsistencies in the application of the TV ratings system. Inaccuracies abound, and those inaccuracies yield only one result: More graphic content is consistently misrated as appropriate for a younger audience.

When the rating applied to a program is inaccurate, the v-chip cannot work as intended, leaving even the most diligent parents without the tools necessary to enforce their own rules about media content. Even worse, the TV Parental Guidelines Monitoring Board, designated to field consumer complaints about the TV ratings system, meets only in private, and its membership is not publicly available. Clearly, this is a system in dire need of reform.

The Communications Act of 1934, which created the FCC, mentions the “public interest” well over 100 times. Do the broadcast networks and their allies expect the American people to believe that unlimited indecent content, broadcast over the airwaves that they own, in front of their own children, is in their interest?

For years, the networks argued in federal court that broadcast decency law should be overturned and that they should have free rein to air unlimited indecent material at any time of day, no matter the audience. However, the Supreme Court ruled against them last summer, for the second time, and left the time-honored law intact.

The focus now shifts back to the FCC, where more than 1.5 million indecency complaints have languished. There has been no enforcement of broadcast decency law for years, and with no further legal challenges to the law, the time for the FCC to act is now.

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Ryan,” the commission specifically found that the rough language was “not gratuitous.”

The FCC’s case-by-case adjudication leaves broadcasters at sea, according to Douglas Linder, a First Amendment expert at the University of Missouri Law School in Kansas City. “They haven’t provided the kind of guidance that broadcasters have been looking for,” Linder says. “Broadcasters just want to know what they can do, what they cannot do.”

Clearing out the backlog of cases could take a year or longer even though many can be disposed of quickly, according to Rosemary Harold, a communications lawyer in Washington and former media legal adviser to McDowell. Some of the complaints, she says, are too old; others fall outside the FCC’s jurisdiction, such as complaints about depictions of violence or complaints against programs on cable. She suggests the commission also should dismiss cases that involve “fleeting expletives” or “fleeting body parts.” With those cases out of the way, Harold says, the commission should set a goal of resolving the remaining cases within 12 months and issue enforcement updates periodically while moving toward that goal.

Like Sanders, Harold says the indecency issue ranks low on the FCC’s list of priorities. “I wouldn’t say it’s

in the top three issues that any one of the FCC commissioners gets excited about,” Harold says. Genachowski has focused his attention on a national broadband plan that includes reallocating airwaves for mobile communications and overhauling



ABC/Adam Taylor

ABC’s prime-time show “Dancing With the Stars” rates a yellow warning — “inappropriate for youngsters” — from the Parents Television Council’s “Family Guide to Prime Time Television” because of its “bawdy” language and “suggestive” dancing. No programs rated in late October (not counting sports shows) received green (“family friendly”) designations.

the fund that now supports phone service to one to help subsidize access to broadband.

Harold also agrees with Linder and Sanders that the long-term constitutionality of the FCC’s authority over broadcast indecency is very much in doubt. But she says the FCC has no choice but to enforce the law as long as it is on the books. “Unless and until a court puts it out of its misery, it’s going to be in this business for a while,” Harold says.

Broadcasters’ Woes

The major broadcast television networks are greeting the fall season with more concern about sagging ratings and bearish investors than about the FCC’s next moves on indecency.

The big four networks — ABC, CBS, Fox and NBC — drew 15 percent fewer viewers in the age 18-49 demographic in the first two weeks of the 2012/2013 season than they drew in the same period for the previous year, according to the Nielsen rating service. The overall decline among all adults was put at 11 percent.²⁹

Prominent media industry analysts cited the declines in cautionary reports for investors. “There is little doubt that early 2012/2013 network results have been disappointing,” Michael Nathanson, an analyst with Nomura Securities, said in a report. Anthony DiClemente of Barclays Equity Research blamed the decline on weaknesses in the new prime-time offerings. “Without top-quality new programs to augment the success of past hits, we believe aggregate network ratings have suffered,” DiClemente wrote.³⁰

In terms of audience, broadcasters, who are subject to the FCC’s indecency authority, continue to enjoy a substantial lead over cable channels, which are not regulated. The top 20 prime-time programs on the broadcast networks during the week of Oct. 22-28 all drew at least 11 million viewers; the top-rated program, CBS’s crime drama “NCIS,” had 17.7 million viewers. The top-rated cable program, Fox News Channel’s broadcast of the presidential

debate, drew 11.5 million viewers; ESPN's "Sunday Night Football" had 10.7 million. Cable's leading dramatic offering is AMC's "The Walking Dead," broadcast on Sunday nights, which had 10.5 million viewers that week.³¹

Despite the broadcasters' audience advantage, Syracuse University professor Thompson says cable channels enjoy a creative edge because they have no indecency police looking over their shoulders. "You've got this flowering of wonderful programs on cable," Thompson says, citing HBO's "The Wire," Showtime's "Dexter" and AMC's "Breaking Bad" as examples.

"Most of these programs are filled with language, sexuality and other things that are at the center of indecency rules," Thompson says. "Broadcasters have to rely on stupid reality shows to get their audience or double entendres and that kind of coded stuff," he continues. "The indecency rule encourages a lot of what we get on broadcast television."

Financial analyst Gallant agrees, to an extent. "Broadcasters are handicapped in competing for audience by the indecency limits," he says. But he predicts that broadcasters would continue to show restraint even if the indecency rules are overturned. "There's a certain kind of limit that the public has come to expect of broadcasters," Gallant says.

The new season's ratings slump is a snapshot of what may be a broader, overall decline in television viewing, especially among young people. In May 2012, Nielsen reported that for the last three months of 2011 the average American with a TV set at home spent 153 hours and 19 minutes per month watching television the traditional way — rather than on a computer or tablet. That represented a decline of 46 minutes — or 0.5 percent — from the same period in 2010. The decline was sharper among viewers age 12-17: a 5 percent drop from about 105 hours to 100 hours.³²

Nielsen says its ratings capture the vast majority of television viewers, but

harder-to-measure nontraditional viewing is evidently on the rise. Broadcasters sought to play down the significance of the new season's rating slump by pointing to the growing practice of using digital video recorders (DVRs) to record and watch a program after its original broadcast. Recorded viewing can increase a show's audience, in some cases it is said, by as much as 50 percent.³³

Mobile viewing may become an even more important factor. Smart-phone manufacturers are competing with each other on the quality of video their devices can deliver. The broadcast networks are catching on, reminding viewers that their programs can also be watched on computers and tablets. But mobile video also means that broadcasters have even more competition for viewers — from video-producing new media such as *Huffington Post* to the video-sharing website You Tube.

The increasingly crowded video marketplace underlines what broadcasters feel to be the unfairness of being singled out for indecency regulation, according to the NAB's Wharton. "Given the fragmentation of the audience, given the competition, given the fact that broadcasters and only broadcasters are subject to these rules, over time there is a very good chance that the courts will eliminate these rules altogether," he says. ■

OUTLOOK

"Heinously Difficult" Job

Michael Powell was at a neighbor's house watching the 2004 Super Bowl halftime show when he saw something that was not supposed to be seen on broadcast television. More than 100 million other viewers also saw Janet Jackson's exposed right breast, but the glimpse of something shocking had special meaning for the

chairman of the FCC. "Tomorrow's going to really suck," Powell told his wife after he got back home. "And it did."

Recalling the crackdown-launching episode on a C-SPAN program with two other former FCC chairmen — fellow Republican Martin and Reed Hundt, the Democratic-appointed chair in the mid-1990s — Powell said he never much cared for the commission's role as anti-indecency enforcer. "The problem is the job proves heinously difficult to do because it's fraught with ambiguity and subjective choices and trying to maintain consistency of decisions across ever-changing content," Powell remarked. "I never found it a particularly enjoyable part of the job in any way, shape or form."

Hundt quickly agreed. "I don't think anybody ever did," he said. Tellingly, Martin, who became identified with the indecency issue during his tenure, let Hundt's remark pass.³⁴

Like the job or not, the FCC appears to have no choice at present but to begin whittling down a huge backlog of indecency complaints one way or another. The courts may look askance at the FCC's existing policy, but the commission's congressional overseers seem unlikely to let the agency off the hook. "Indecency is an issue that no public official wants to be on the wrong side of," says media industry analyst Gallant. "Washington will probably continue to make all the appropriate noises about how indecency enforcement continues to be important policy."

Other experts, however, say the role is totally unimportant given the proliferation of media choices for 21st-century viewers. "If you banned [indecency] from broadcasting, it would be on the Internet," says Amherst professor Couvares. "It's like trying to hold back the tide," he adds. "Not that I don't sympathize with parents who would like to hold back the tide."

The FCC's enforcement record to date hardly suggests an agency hell-bent to police the airwaves. But Rintels with the Center for Creative Voices cites his own

experience as a screenwriter for television back in the 1980s to demonstrate the impact of the FCC's authority even if only rarely exercised.

Rintels was one of the writers of the critically acclaimed made-for-TV movie "Lena: My 100 Children," an account of a Holocaust survivor's search for missing family members. He recalls that producers decided not to show concentration camp prisoners fully nude. "Would it have more strongly conveyed the horror and impacted people more deeply?" he asks today. "We'll never know."

The FCC confronted the issue in 1997 when a Michigan viewer complained about the depiction of full-frontal nudity in the broadcast of the Holocaust movie "Schindler's List." FCC staff quickly rejected the complaint, but the viewer asked for reconsideration. The full commission took more than two years before formally rejecting the complaint. The five-page order concluded that the broadcast was not indecent based on "the subject matter of the film, the manner of its presentation, and the warnings that accompanied the broadcast of this film."³⁵

"The Supreme Court put the ball back in the FCC's court," Rintels says. "They're going to have to determine what rules they want to apply. This will be a battle that will be fought in court for many, many more years unless the FCC comes up with some rules that will provide real clarity as to what they will and will not consider violations of indecency rules." ■

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¹⁰ See "Complaints Regarding Various Television Broadcasts Between Feb. 2, 2005, and March 8, 2005," March 15, 2006, <http://transition.fcc.gov/eb/Orders/2006/FCC-06-17A1.html>; "Complaints Against Various Television Licensees Concerning Their December 31, 2004 Broadcast of the Program 'Without a Trace,'" March 15, 2006, <http://transition.fcc.gov/eb/Orders/2006/FCC-06-18A1.html>. For coverage, see Julie Bosman, "TV Stations Fined Over CBS Show Deemed to Be Indecent," *The New York Times*, March 16, 2006, p. C2.

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¹⁵ See Louis Chunovic, *One Foot on the Floor:*

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¹⁶ The cases are *Pacifica Foundation*, 36 F.C.C. 147 (1964), *Eastern Educational Radio* (WHUY-FM), 24 F.C.C. 2d 408 (1970), *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1974), discussed in Carter, *et al.*, *op. cit.*, pp. 486-489.

¹⁷ For a full account, see Geoffrey Cowan, *See No Evil: The Backstage Battle over Sex and Violence in Television* (1979).

¹⁸ The majority included Chief Justice Warren E. Burger and Associate Justices Harry A. Blackmun, Lewis F. Powell Jr., William H. Rehnquist and Stevens. Brennan's dissent was joined by Justice Thurgood Marshall. Separately, four justices — Potter Stewart, Brennan, Byron R. White and Marshall — argued in a dissent written by Stewart that the term indecent “should properly be read as meaning no more than ‘obscene.’ ”

¹⁹ Quoted in Cowan, *op. cit.*, p. 286.

²⁰ The Supreme Court's decision is *Sable Communications v. FCC*, 492 U.S. 115 (1989). The D.C. Circuit's three decisions are all entitled *Action for Children's Television v. FCC*, abbreviated as *ACT I*, *ACT II* and *ACT III*.

²¹ The Supreme Court cases are *Denver Area Educational Television Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); and *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000).

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FOR MORE INFORMATION

American Family Association, 107 Park Gate Dr., Tupelo, MS 38803; 662-844-5036; www.afa.net. Christian advocacy organization that promotes morality in popular culture, including television.

Bleier Center for Television and Popular Culture, S.I. Newhouse School of Public Communications, Syracuse University, Syracuse, NY 13244-2100; 315-443-4077; <http://tvcenter.syr.edu>. A leading academic center for scholarship, commentary and education in the areas of television and popular culture.

Center for Creative Voices in Media, P.O. Box 331, Keswick, VA 22947; 202-903-4081; www.creativevoices.us. Advocacy group representing the creative community in support of artistic freedom and diversity.

Common Sense Media, 650 Townsend St., Suite 435, San Francisco, CA 94103; 415-553-6728; www.common SenseMedia.org/. Nonprofit organization seeking to improve lives of kids and families through information, education and advocacy.

Family Research Council, 801 G St., N.W., Washington, DC 20001; 800-225-4008; www.frc.org. Advocacy group seeking to advance faith, family and freedom in public policy and culture from a Christian worldview.

Media Access Project, 1625 K St., N.W., Washington, DC 20006; 202-232-4300; www.mediaccess.org. Nonprofit public interest law firm and advocacy organization.

National Association of Broadcasters, 1771 N St., N.W., Washington, DC 20036; 202-429-5300; www.nab.org. Trade association for radio and television broadcasters.

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³⁴ “The Communicators: Former FCC Chairmen Reed Hundt, Michael Powell, and Kevin Martin,” C-SPAN, Oct. 29, 2010, www.c-span.org/Events/Former-FCC-Chairmen-Reed-Hundt-Michael-Powell-and-Kevin-Martin/19249/.

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The Next Step:

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Children

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Kang, Cecilia, "Mobile Apps Lack Ratings Standards," *The Washington Post*, Oct. 15, 2011, p. A1.

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Wyatt, Edward, "Can You Say That on TV? Broadcasters Aren't Sure," *The New York Times*, June 22, 2012, p. B6.

Broadcasters have little grasp of what constitutes indecency because the FCC has not pursued many complaints.

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