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 Issues**

- Is there too much sex and vulgarity on television?
- Should the FCC relax enforcement of its indecency rules?
- Should the FCC regulate indecency on cable TV?

**Background**

**Loss of Innocence**
Radio and TV began pushing sexual boundaries in the 1960s.

**“Chilling” Effect?**
The FCC fined broadcasters $4 million in 2006 for airing graphic sex scenes and “fleeting expletives.”

**Longtime Wait**
Legal challenges by broadcasters brought FCC indecency enforcement to a stand-still after 2006.

**Current Situation**

**FCC’s Full Plate**
Indecency may be less important than other issues.

**Broadcasters’ Woes**
Major broadcast networks are more concerned about sagging ratings than about the FCC’s next moves on indecency.

**Outlook**

**“Heinously Difficult” Job**
The FCC has no easy path on indecency enforcement, but courts may eventually throw the law out.

**Sidebars and Graphics**

- Many Prime-Time Shows Fail Parents’ Group Test
  No program was rated “family friendly” in a recent survey.

- Indecency Complaints to FCC Declined
  Complaints peaked after Janet Jackson’s Super Bowl “wardrobe malfunction” in 2004.

- Indecency Complaints Can Lead to Big Penalties
  CBS’ 2006 drama “Without a Trace” drew $3.6 million in fines.

- FCC’s Indecency Policy: A Work in Progress
  A Supreme Court ruling in June left modification of the policy to the commission.

- TV Violence Remains Unregulated
  “There would be enormous hurdles” in regulating it.

**At Issue**
Should FCC regulation of broadcast indecency be eliminated?

**For Further Research**

- For More Information
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  Additional articles.

- Citing CQ Researcher
  Sample bibliography formats.
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. (See graph, p. 969.)

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.”

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.
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 expulsive,” such as a vulgar word uttered accidentally. 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 award 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

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**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):

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

wrote in *FCC v. Fox Television Stations.*

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. (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.”

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 evolution of television in particular from a supposedly sex-free golden age in the 1950s and ’60s to today’s framer 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.*

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
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 Covares, 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 shock 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.”

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

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,” 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-

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**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.

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**FCC Indecency Penalties, 1993-2010**

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Notices of Apparent Liability (NALs)</th>
<th>$ Amount of NALs</th>
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<tbody>
<tr>
<td>1993</td>
<td>5</td>
<td>$665,000</td>
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<td>0</td>
<td>$0</td>
</tr>
<tr>
<td>2010</td>
<td>1</td>
<td>$25,000</td>
</tr>
</tbody>
</table>

*Includes amounts from three separate consent decrees.

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.”


“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.”


“The 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

“This 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 commission’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 references 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.”

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.

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.

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.

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...”
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 on ABC, 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 again surfaces prominently 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 programing. 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.”

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. 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.

The 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,
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 à 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 to Congress: Take Action on Violence,” Broadcasting & Cable, April 30, 2007, p. 10.


Robert Thompson, director of the Bleier Center for Television and Popular Culture at Syracuse University.
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.

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 law 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.

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.

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 $5 million. Meanwhile, the
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 KSFM 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 determined that a fleeting expletive or image — cannot immunize it from FCC censure," Roberts wrote. In a brief rejoinder, Ginsburg again called for overruling Pacifica.

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. 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
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 Pacifica 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 a 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: “It 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.”
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

**INDECENCY ON TELEVISION**

Continued from p. 980

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**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.

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.

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. Smartphone 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 YouTube.

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 CSPAN 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 Rintel of the Center for Creative Voices cites his own
experience as a screenwriter for television back in the 1980s to demonstrate the impact of the FCCs authority even if only rarely exercised.

Rintelts 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 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 film,” 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 Supreme Court put the ball back in the FCC’s court,” Rintelts 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.”

### Notes


### About the Author

Associate Editor Kenneth Jost graduated from Harvard College and Georgetown University Law Center. He is the author of the Supreme Court Yearbook and The Supreme Court from A to Z (both CQ Press). He was a member of the CQ Researcher team that won the American Bar Association’s 2002 Silver Gavel Award. His previous reports include “Children’s Television” and “The Future of Television.” He is also author of the blog Jost on Justice (http://jostonjustice.blogspot.com).
The Curious Evolution of Sex on Television
from I Love Lucy to South Park (2000), pp. 19 (broadcasting code), 33-37 (“I Love Lucy”), 47 (“Peyton Place”), 48-49 (syphilis). The two-part episode about syphilis was to have been on two dramatic series: “Mr. Novak” and “Dr. Kildare.”


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.


26 For accounts of the two Supreme Court cases, see Kenneth Jost, Supreme Court Yearbook 2008-2009, and Supreme Court Yearbook 2011-2012 (online).


33 See Flint, op. cit. Flint cites no source for the statement.


FOR MORE INFORMATION

American Family Association, 107 Park Gate Dr., Tupelo, MS 38803; 662-844-5086; www.afaf.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.createvoice.org. Advocacy group representing the creative community in support of artistic freedom and diversity.


www.cqresearcher.com
Bibliography

Books


The law school casebook includes a 48-page section detailing the major legal developments at the Federal Communications Commission and in the courts on regulating indecency on broadcast television. Carter is a professor of communication and law at Boston University, Franklin a professor emeritus at Stanford Law School, Sanders an assistant professor of mass communication and law at the University of Minnesota-Twin Cities and Wright a professor of public communications at Syracuse University.


A former television journalist provides a discursive account of television's changing standards and practices regarding sex, from the black-and-white days of the 1950s through the franker and smirker depictions by broadcasters and cable channels in the late 20th century. Includes illustrations.


The book recounts the history of the television networks' “family viewing hour” policy in the 1970s from its adoption under pressure from the FCC through the invalidation of the policy by a federal court and its later “voluntary” readoption by the networks. Cowan was an attorney who advised the Writers Guild of America during the litigation; he later was a law professor at the University of Southern California and is now president of the Annenberg Foundation Trust at Sunnylands in California.


A former Stanford University professor who now heads the advocacy group Common Sense Media forcefully criticizes television and other media for bombarding children with sex, violence and commercialism and recommends steps for parents and citizen activists to counter the media's influence. Includes notes.

Articles


FCC and industry officials are predicting that the agency will begin disposing of the backlog of 1.5 million indecency complaints without providing any broad guidance for broadcasters. For earlier coverage in the respected trade journal, see “No Appetite in Congress to Take Up Broadcast Indecency, Hill Staffers Say” (June 25, 2012) and “Supreme Court Tossing ABC, Fox Indecency Actions Turns Focus Back on FCC” (June 22, 2012).


The veteran Supreme Court reporter says the court's limited decision in FCC v. Fox Television Stations signaled that the FCC's indecency policy would not survive another round before the justices. The site provides a complete history of the litigation with links to legal materials, including all briefs filed with the Supreme Court.


The article traces the history of the case that ended with the Supreme Court's decision in FCC v. Fox Television Stations, analyzes the June 21 ruling and predicts further litigation over the FCC's broadcast-indecency regime. Elwood and White filed an amicus brief in the case on behalf of the Cato Institute and other groups that advocated overturning the court's seminal ruling on the issue, FCC v. Pacifica Foundation (1978).

Reports and Studies


The 34-page report argues that the FCC's “inconsistent and confusing” decisions in indecency cases, combined with the then newly enacted tenfold increase in possible fines for broadcast stations, creates a strong chilling effect on writers, directors and producers of television programming. Rintels is the center's executive director.
Cable Television


The Federal Communications Commission’s indecency regulations are unfair to cable, says an Oklahoma attorney.


TV networks are skirting the rules of indecency to compete with cable television, says a communications professor.

Children


Parents, not the government, should be in charge of protecting their children from television indecency, says a columnist.


Experts say teenagers often adopt the sexual and violent behavior that they watch on reality television shows.


Children should be protected from all forms of broadcast indecency, says the president of the Parents Television Council.

Ratings System


TV content ratings are flawed because many shows aren’t properly rated, says the Parents Television Council.


Television violence and nudity are being presented without a ratings standard on mobile applications aimed at children.


Content ratings are expanding to the Internet streams of shows regularly shown on television.

Regulations


Broadcasters should be able to figure out what’s “indecent” without consulting FCC regulations, says the president of the Family Research Council.


Fox and ABC say tougher FCC indecency regulations against broadcasters are discriminatory.


The Supreme Court has provided little guidance on whether TV indecency standards violate the First Amendment.


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

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