

ARTICLES

"Fleeting Expletives" and Sports Broadcasts: A Legal Nightmare Needs a Safe Harbor

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In recent years, the Federal Communications Commission (FCC) has made it a priority to restrict indecent material from the broadcast airwaves.¹ Through its administrative rulemaking powers the agency promulgated a more expansive definition of what constitutes indecency to include "fleeting expletives," one-time uses of vulgarisms without any context or repetition. This policy, enacted in part by rising public complaints about program content and by the personal views of the two most recent FCC chairmen, Michael Powell and Kevin Martin, resulted in more aggressive enforcement against those broadcasters who violated the new policy.²

The new definition not only increased the types of programs subject to indecency determinations, but legislation passed by Congress and signed by

1. See 47 U.S.C. §303 (2008). See *In the Matter of Industry Guidance On the Commission's Case Law Interpreting 18 U.S.C. §1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001) (Policy Statement providing guidance to broadcast licensees regarding compliance with the Commission's indecency regulations. Numerous examples of indecent broadcasts used as examples); *In the Matter of Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd 13299 (2006) (addressing complaints alleging that four television programs contained indecent and/or profane material and concluding that comments made by Nicole Richie during "The 2003 Billboard Music Awards" and by Cher during the "The 2002 Billboard Music Awards" are indecent); *In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability*, 19 FCC Rcd 19230 (2004) (the "wardrobe malfunction" incident revealing Janet Jackson's breast for one half second during the Super Bowl halftime show).

2. See Matthew C. Holohan, *Note, Politics, Technology, & Indecency: Rethinking Broadcast Regulation in the 21st Century*, 20 BERKELEY TECH. L.J. 341 (2005) (noting the impact of the Parents Television Council, a family values organization in marshalling support to enforcement indecency more aggressively); David Zurawik, *FCC Slaps CBS with \$3.5 Million Record Fine; Spate of Sanctions Signals Tough Stance*, THE BALTIMORE SUN, March 16, 2006, at 1A.

the President significantly increased the fines the agency could impose for violators.³ By both of these actions, broadcasters faced the prospect of more programming subject to greater punishment.

Until a recent ruling by the U.S. Court of Appeals for the Second Circuit which temporarily vacated the rules,⁴ radio and television broadcasters have taken defensive measures not to incur the wrath of the FCC. The banning of the broadcast of the acclaimed documentary "9/11" by certain local stations, and the editing of scenes in the film "Saving Private Ryan" due to the language used, are just two examples of actions to avoid the ire of the commission.⁵ The victory in the Second Circuit is potentially a temporary one, since the U.S. Justice Department sought and was granted certiorari for the case to be heard in the U.S. Supreme Court,⁶ while at the same time the FCC is attempting to redress the court's objections to the rules.⁷ Until the question of the validity of the indecency standard is resolved, broadcasters will face an uncertain regulatory landscape.

While the most high-publicized cases involved indecency fines against so-called "Shock Jocks" such as Howard Stern, the FCC's redefinition of indecency has potentially adverse implications for broadcasters of live sporting events. What if an athlete protests a referee's call, loses his temper and utters an expletive, which is picked up by on-the-field microphones? Or, what happens when fans yell four-letter words and sexually suggestive phrases that are picked up during a live broadcast and heard by millions? The FCC's "fleeting expletive" definition means that the use of a single four-letter word can be indecent without any context or circumstances. This de facto strict liability standard gives broadcasters of live events the prospect of FCC hearings, the potential for significant fines and the possibility (albeit remote) of a loss of license.

3. See Broadcast Decency Enforcement Act of 2005, 47 U.S.C. §503(b)(2) (2008) (raising the maximum fine to \$325,000 per occurrence, from the previous \$32,500).

4. Fox v. FCC, 489 F.3d 444 (2d Cir. 2007).

5. Although no action was taken in either case, the FCC did consider whether the language in "Saving Private Ryan" was indecent. It ultimately determined that the use of "fuck" was not indecent. See *Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan,"* 20 FCC Rcd 5616 (2005).

6. See John Eggerton, *FCC to Challenge Profanity Decision in Supreme Court*, BROADCASTING AND CABLE, Sept. 26, 2007, <http://www.broadcastingcable.com/article/CA6483656.html>; See U.S. Supreme Court Order List: 552 U.S., March 17, 2008, <http://www.supremecourt.us/orders/courtorders/031708pzor.pdf>.

7. *Id.*

The legal and practical issues facing sports broadcasters serve as the focus of this article. Part I outlines the regulatory structure of broadcasting and how indecency fits into that regimen. Part II discusses the applicability of the present indecency/profanity standard on how sporting events are broadcast. Part III proposes solutions to the problem.

PART I: REGULATORY STRUCTURE OF BROADCASTING – THE UNIQUENESS OF 'INDECENCY'

The Road to *Pacifica*

"Indecency" is a concept unique to broadcasting. It does not exist in print, cable, satellite or the Internet. Central to its creation is the regulatory bedrock of radio and television broadcasting in the United States: the licensing requirements mandated in the 1934 Communications Act.⁸ This legislation requires all broadcasters to obtain a license to broadcast on a given electromagnetic spectrum. To obtain and maintain the license, the broadcast licensee is required under §309 of the Act to operate in the "public interest, convenience and necessity"⁹ an ill-defined concept that served as the foundation of the FCC's ability to promulgate administrative regulations over radio, television, telephone and later, cable and satellite.¹⁰

At one time, the FCC took the "public interest" obligation seriously and used its regulatory powers to deny licenses to broadcasters who failed to adhere, in the agency's view, to that standard.¹¹ That power was ultimately upheld in two Supreme Court opinions¹² as well as several Federal appeals

8. See 47 U.S.C. §307 (2008).

9. *Id.* at §309(a).

10. See 47 U.S.C. §151 (2008).

11. See Mark Conrad, *The Demise of the Fairness Doctrine: A Blow for Public Access*, 41 FED. COMM. L.J. 161, 166 (1989). See e.g. *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969) (holding that Communications Act and prior court decisions require broadcasters to operate in the public interest, allowing FCC to restrain licensees because the right of the viewers and listeners "is paramount" to broadcasters).

12. See *NBC, Inc. et al v. United States et. al.*, 319 U.S. 190 (1943); *Red Lion Broadcasting Co., Inc.*, 395 U.S. 367 (1969). NBC concerned the power of the FCC under the public interest standard, to promulgate regulations designed to correct the abuses disclosed by its investigation of radio network affiliations known as "chain broadcasting." In upholding this power, the court concluded that "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *Id.* at 226; *Red Lion* involved the constitutionality of the "fairness doctrine" a rule which

court rulings.¹³ In the last quarter-century, a deregulatory philosophy has taken hold, often, but not exclusively, led by Republican-dominated FCC commissioners who have felt that the marketplace is the best arbiter of determining the public interest.¹⁴ In the last decade that trend has continued, through both Democratic and Republican administrations, aided by the passage of the 1996 Communications Act which required that the FCC consider rules loosening ownership limitations both nationally and locally.¹⁵ However, a notable exception to the laissez-faire trend was the more aggressive policing of indecent broadcasts.

The prohibition against indecency is found in a criminal statute, 18 U.S.C. §1464, which states: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."¹⁶ Although the wording seems

required access for those expressing differing issues of public concern as a mandated response to editorial opinions. The Supreme Court upheld the rules, as a proper exercise of the "public interest" standard which did not violate the First Amendment due to the "scarce" nature of the radio airwaves. *Id.* at 394.

It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect.

Id.

13. See *Brandywine-Mail Line Radio v. FCC*, 473 F. 2d 16 (D.C. Cir. 1973) (ruling that radio station WXUR's continuous violations of the personal attack rules mandated the denial of its request for a renewed license); *Great Lakes Broadcasting v. FCC*, 37 F.2d 993 (D.C. Cir. 1930) (court denied application for full-time license since radio station performed "comparatively limited public service." rendered by the station); *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) (Court overturned commission by rejecting renewal of a license to television station that engaged in discriminatory programming).

14. See Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982) (authors argue for a national policy accounting for market forces in radio and television to accommodate First Amendment rights of operators of commercial stations. The authors propose that trusteeship model of broadcast regulation yield to a deregulated marketplace approach. The authors conclude that broadcasters best serve the public by responding to market forces rather than governmental directives); See also *Prometheus Radio Project v. FCC*, 373 F.3d 372, 384 (3d Cir. 2004) (court explains the deregulatory trend in the 1980s and 1990s in discussing challenges to rules favoring greater concentration of ownership of television, radio and newspapers).

15. Telecommunications Act of 1996, 47 U.S.C. §161 (2008).

16. Broadcasting Obscene Language, 18 U.S.C. §1464 (1976).

straightforward, it has to be squared with a seemingly contrary statute, 47 U.S.C. §326, a section of the 1934 Communications Act, which prohibits the FCC from acting as a censor of radio broadcasts.¹⁷ Unlike obscenity, which can be banned because it has no First Amendment protection, indecent communications are considered "speech" and subject to a certain level of First Amendment protection.¹⁸ To negotiate this murky territory, it was up to the FCC, cognizant of anti-censorship provisions of §326, to define what constituted indecency and what limitations may be imposed on such speech.

Pacifica

For at least the last 30 years, the FCC has defined indecency as "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."¹⁹ However, until 1987, the FCC limited enforcement to the use of specified vulgar words as a violation of indecency, despite the fact that the above definition covered more ground. The so-called "Seven Dirty Words" standard revolved around the particular facts of *FCC v. Pacifica Foundation*,²⁰ the only broadcast indecency case heard by the Supreme Court. In *Pacifica*, the Supreme Court upheld the FCC's determination that comedian George Carlin's twelve-minute monologue, titled "Filthy Words," broadcast on a non-commercial station during the afternoon hours when, presumably, children were in the audience, was indecent and sanctionable because it was broadcast during daytime hours.²¹

A closer reading of the opinion demonstrates divisions in approach and application. The majority opinion was joined in full by only three justices,

17. 47 U.S.C. §326 (2008). §326, titled "Censorship," states:

Nothing in this act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

18. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 744 & 746 (1978) ("The words of the Carlin monologue are unquestionably "speech" within the meaning of the First Amendment." and "Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment.").

19. 18 U.S.C. §1464 (2008).

20. See *FCC*, 438 U.S. 726.

21. The case involved a monologue by comedian George Carlin, which included words you "definitely wouldn't say, ever" on the public airwaves. *Id.* at 751. They were: shit, fuck, piss, cunt, cocksucker, motherfucker and tits. *Id.*

while two others concurred.²² The court upheld the FCC's definition of indecency (the statute offered no definition), but the five justices differed on what value to place on such speech. The three justices spoke of the fact that certain protected speech is not "essential to the exposition of ideas" and are subject to regulation.²³ On that point the other two justices parted company and felt that this discussion was misplaced.²⁴ They focused on the repetitive nature of the words (which were used consistently and frequently) and the exposure to children.²⁵ The majority opinion also accepted the prevailing view that all forms of communication, broadcasting has the most limited First Amendment protection.²⁶ Among the reasons for regulating indecent broadcasting is the "uniquely pervasive presence that medium of expression occupies."²⁷ Broadcasts extend into the privacy of the home and it is impossible to completely avoid those that are patently offensive.²⁸ Also, the opinion added, broadcasting is "uniquely accessible" to children.²⁹

The majority in *Pacifica* differentiated indecency from the obscenity standard found in *Miller v. California*,³⁰ which defines obscenity as communications in which an average person, applying contemporary community standards finds

- that the work, taken as a whole, appeals to the prurient interest,
- the work depicts or describes, in a patently offensive way, sexual conduct or excretory functions defined by applicable state law, and

22. Justices Stevens wrote the majority opinion, in which Chief Justice Burger and Justice Rehnquist joined in full and Justices Blackmun and Powell joined in part. *Id.*

23. *Id.* at 746.

24. *Id.* at 761 (Powell, J. Concurring).

25. *Id.* at 757-58.

26. *Id.* at 748.

We have long recognized that each medium of expression presents special First Amendment problems. [citations omitted] And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity.

Id.

27. *Id.* at 749.

28. *Id.* at 748.

29. *Id.* at 748-50.

30. *Miller v. California*, 413 U.S. 15 (1973).

- the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.³¹

A major difference between obscene and indecent speech is found in the last element. Indecent speech contains some artistic, political or educational value, with some level of First Amendment protection, while obscene speech does not. Therefore, obscenity can be banned outright in any medium, while indecent speech cannot be banned; it can only be restricted.

Post-Pacifica

Pacifica was notable in that it addressed a broader reading of the FCC's definition. In part due to the fractious opinions, it was best for the majority to focus on the FCC's application, rather than the definition. In addition to the narrow "seven-dirty word" application, the FCC also employed a "safe harbor" defense, permitting indecent broadcasts between 10:00 PM and 6:00 AM on the premise that few children would be listening.³² Because of this limited definition and the safe harbor defense, relatively few occurrences of indecency occurred over the next decade.

After that period of restraint, the FCC became more aggressive in indecency enforcement.³³ Two possible reasons are cited. First, during the 1980s, political pressure from conservative religious organizations was felt by the FCC and, possibly in response to picketing and threats, the commission commenced actions against radio stations for airing content deemed indecent despite the lack of the "seven dirty words,"³⁴ and second, the content of some

31. *Id.* The exact test is:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole. . . appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24-25.

32. *New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees*, 2 FCC Rcd 2726 (1987).

33. For a good discussion of this period, see Faith Sparr, *From Carlin's Seven Dirty Words to Bono's One Dirty Word: A Look at the FCC's Ever-Expanding Indecency Enforcement Role*, 3 FIRST AMEND. L. REV. 207 (2005).

34. See John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329 (1989). Some of the information arose from a Freedom of Information Act request.

broadcasts simply became racier.³⁵ In 1987, it issued fines against three stations³⁶ and in so doing the FCC utilized the "generic definition" of indecency, rather than the more limited "seven dirty words" approach utilized in the years immediately after the *Pacifica* ruling.³⁷ This approach resulted in more broadcasts subject to indecency determinations.

The FCC also limited the "safe harbor" period by using midnight, rather than 10:00 PM as the triggering point. Although the courts upheld the FCC's use of the "generic definition" they rejected the changing of the safe harbor period.³⁸ Subsequent legislative attempts to impose a 24-hour ban on indecent broadcasts were declared unconstitutional.³⁹ Presently, the 10:00 PM – 6:00 AM standard remains in effect.⁴⁰

The 1980s also saw a change of public tastes. The rise of "shock jocks" and their style of broadcasting resulted in a number of indecency fines.⁴¹ Part of the increase in indecency awareness arises from their style of broadcasting – brash, insulting, willing to go as far they can to offend and titillate. Sometimes, shock jocks' remarks involve sports commentary or discussion, as was the case when a popular DJ insulted a women's college basketball team

35. See Bill Kenworthy, *Timeline: Broadcast Decency*, First Amendment Center, <http://www.firstamendmentcenter.org/about.aspx?id=17491> (last visited Dec. 18, 2007).

36. See *In the Matter of Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987). For example, one involved a "traditional" complaint involving an early evening, non-commercial radio broadcast of a program which allegedly contained a narration and song lyrics utilizing words and phrases such as "eat shit," "mother-fucker" and "fuck the U.S.A." *Id.*

37. See *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd 2726 (1987).

38. See *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (FCC's definition of indecent broadcast material was not constitutionally overbroad, but also determined that the Commission did not present sufficient evidence to warrant moving the safe harbor from 10:00 PM to midnight); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (Stay on Congressionally mandated 24-hour ban, remanding action to the FCC for hearings).

39. See *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (24 ban on indecent broadcasts ruled unconstitutional. Elimination of the nighttime "safe harbor" period was not sufficiently carefully tailored to the government's interest in safeguarding minors.); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (Court instructed respondent to revise its regulation to set the safe harbor back between 10:00 p.m. and 6:00 a.m., as there was no apparent relationship between broadcasts and the compelling government interest to protect minors. The statute was not narrowly tailored in light of Congress's failure to explain how the disparate treatment accorded to certain public stations was related to the government's compelling interest in protecting the well-being of minors.)

40. See 47 C.F.R. §73.3999 (2008).

41. See *New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees*, 2 FCC Rcd 2726 (1987).

who lost the NCAA championship game by calling them "nappy-headed hos."⁴²

The Bush FCC

Indecency enforcement generally abated during the Clinton era FCC, but came back with a vengeance in the George W. Bush years.⁴³ One method of tightening enforcement to combat what President Bush considered the "extremely lax" attitude of broadcasters was to sign the Broadcast Decency Enforcement Act allowing the FCC to fine broadcasters up to \$325,000 each incident.⁴⁴ President Bush stated that the increase was necessary to stop the indecency trend in broadcast programming, noting that "the language is becoming coarser during the times when it's more likely children will be watching television. . .it's. . .a bad sign."⁴⁵

The second method involved his appointments to the FCC – former chair Michael Powell and present chair Kevin Martin. Both expressed concerns with the state of indecent broadcasts, but Martin was tougher in his criticism than his predecessor.⁴⁶ The result: the years 2003 and 2004 were watersheds for indecency enforcement. Two highly-publicized broadcasts brought the issue squarely into the political arena. One was the now infamous Super Bowl XXXVIII halftime show, where an audience of 100 million viewed singer Justin Timberlake grabbing co-performer Janet Jackson's outfit, revealing her right breast for just over one-half second. The FCC mandated an indecency ruling and resulting fines of \$550,000 to the network and its affiliates.⁴⁷ Although the "wardrobe malfunction" incident occurred during a sports broadcast, it was not sports-related. Rather, it constituted an entertainment program within the event. Presently, CBS and other parties have appealed the

42. See *Networks Condemn Remarks by Imus*, N.Y. TIMES, Apr. 7, 2007, at B7.

43. Associated Press, *Bush Signs Broadcast Decency Law*, CBS NEWS, June 15, 2006, <http://www.cbsnews.com/stories/2006/06/15/politics/main1717562.shtml>.

44. See 47 U.S.C. §503(b)(2) (2008).

45. Associated Press, *supra* note 43.

46. See Todd Shields, *New FCC Chair Kevin Martin Talks Tough*, RADIO MONITOR, March 21, 2005, <http://www.allbusiness.com/services/motion-pictures/4462469-1.html>.

47. See *In the Matter of Complaints Against Various Television Licensees Concerning Their February 1, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, Notice of Apparent Liability*, 19 FCC Rcd 19230.

FCC's determination to the U.S. Court of Appeals for the Third Circuit,⁴⁸ arguing that the fines and the application of the law unconstitutionally chill protected speech.⁴⁹

But the more important case from a doctrinal standpoint occurred one year earlier than the Super Bowl incident. During the "Golden Globe" Awards broadcast on NBC, Bono, the lead singer for the rock group U2, used an expletive in an off-hand manner while making an acceptance speech.⁵⁰ The phrase in question: "this is really, really fucking brilliant" was a spontaneous expression of excitement and joy at winning the award.⁵¹ However, the FCC, acting on viewer complaints, did not recognize the singular celebratory mood and concluded that the statement involved "material in violation of the applicable indecency and profanity prohibitions."⁵² The consideration of a single, albeit, uncouth word, could result in heavy fines for NBC and each of its affiliated stations that carried the statements. Although the broadcast of the expletive occurred during a non-sports event, is it just the kind of unplanned circumstance that may happen during live sports competition.

What makes the *Golden Globe* case troubling was the reasoning behind the commission's determination. In its order, the commissioners reversed an earlier opinion by the chief of the FCC's enforcement bureau that an isolated and unanticipated use of a word like "fuck" was not indecent and concluded that the use of such a word by itself was "highly offensive" to fit the indecency standard. That earlier order unequivocally concluded that the term did not fit into the generic definition of indecency since it did not describe sexual or excretory organs and was "fleeting and isolated."⁵³ It noted "the performer used the word "fucking" as an adjective or expletive to emphasize an exclamation. He noted: "Indeed, in similar circumstances, we have found that offensive language used as an insult rather than as a description of sexual or

48. See Jeff Horwitz, *Third Circuit to Hear CBS' Appeal Over Indecency Fine for Janet Jackson's Super Bowl Stunt*, LEGAL TIMES, Sept. 10, 2007, <http://www.mediaaccess.org/news/2007%20News/0910LegalTimes.pdf>.

49. *Id.*

50. See Alexandra Jacobs & Maria Russo, *@#%*! It's a Four-Letter Summer*, NEW YORK OBSERVER, July 7, 2003, p. 1, sec. 5.

51. See *Standards of Decency Evolve With the Times*, TELEVISION WEEK, June 11, 2007, p. 11.

52. *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order*, 19 FCC Rcd 4975 (2004).

53. See *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd 19859 (2003).

excretory activity or organs is not within the scope of the Commission's prohibition of indecent program content."⁵⁴

In its order, the full commission concluded otherwise. Employing a three-part test, the FCC analyzed

(1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.⁵⁵

This standard was nothing new – it paraphrases the generic definition of indecency noted earlier. At first glance, it seems that the context of the use of the word was not repetitive and was not used to titillate. But in a novel, and troubling application, the Commission opined that the core meaning of the "f-word," is sexual and that "any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition."⁵⁶

Noting that the use of the word was "shocking and gratuitous" during a nationally televised awards ceremony, the commission's order took a paternalistic tone.⁵⁷ "If the Commission were routinely not to take action against isolated and gratuitous uses of such language on broadcasts when children were expected to be in the audience, this would likely lead to more widespread use of the offensive language."⁵⁸ In another twist, the commissioners noted that the term also was deemed "profane" under §1464, an application used only in cases involving blasphemy.⁵⁹ Fishing for a justification for this argument, the opinion cited a 1972 Seventh Circuit

54. *Id.* at 19861.

55. *See In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order*, 19 FCC Rcd at 4978.

56. *Id.* at 4980.

57. *Id.* at 4979.

58. *Id.* at 4980. The order also stated:

Neither Congress nor the courts have ever indicated that broadcasters should be given free rein to air any vulgar language, including isolated and gratuitous instances of vulgar language. The fact that the use of this word may have been unintentional is irrelevant; it still has the same effect of exposing children to indecent language."

Id.

59. *Id.* at 4981.

opinion that considered vulgar speech a nuisance, despite other judicial opinions that questioned this view.⁶⁰

The opinion added that NBC was "on notice" that this utterance could occur during a live broadcast and that there was technology available to delay the broadcast.⁶¹ It therefore concluded that any prior contrary determinations were "no longer good law."⁶² Yet, admitting that the broadcast would not have been indecent or profane under existing precedent, the FCC did not fine NBC or any of its affiliates.⁶³

The "fleeting expletives" standard was challenged by a number of broadcasters, including CBS and NBC, along with some local broadcast licenses in the U.S. Court of Appeals for the Second Circuit. In an opinion dated June 4, 2007, the court ordered the FCC rules vacated and remanded the matter to the commission to try to further justify the rules.⁶⁴ Although the panel's reasoning centered around the administrative law principles, rather than constitutional ones, at least two of the three judges were skeptical whether the FCC could justify those rules to overcome a First Amendment claim.⁶⁵

The 2-1 opinion in *Fox v. FCC* criticized the commission for rendering an arbitrary change of policy without adequate explanation.⁶⁶ The majority rejected the FCC's argument that the new policy was based on concern that the public cannot control the "first blow."⁶⁷ The court stated:

The FCC's decision. . . is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation. Such evidence

60. See *Tallman v. U.S.*, 465 F.2d 282, 286 (7th Cir. 1972); See also *United States v Simpson*, 561 F.2d 53 (7th Cir. 1977) (court called into question nuisance rationale for regulation of offensive speech set forth in *Tallman*; *Fox v. FCC*, 489 F.3d 444 (*Tallman* court's brief reference to "profane" "suggested" that there may be a construction of "profane" that could pass constitutional scrutiny, but should not be dispositive. But the *Fox* court states: "Tallman concerned a prosecution for obscenity, not profanity, and thus the *Tallman* court had no occasion to determine conclusively how profane should be interpreted.").

61. See *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd at 4982.

62. *Id.* at 4980.

63. *Id.* at 4982.

64. See *Fox v. FCC*, 489 F.3d 444 n.4 (2007).

65. *Id.* at 462-63.

66. *Id.* at 462.

67. *Id.* at 458.

would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech.⁶⁸

Also, the court did not accept the FCC's view that it made no difference whether the words were used to describe of sexual or excretory functions or were used just in a more general manner.⁶⁹ In a pointed rebuttal to this argument, the majority cited as specific examples President Bush's use of the "shit" in an aside to British Prime Minister Tony Blair, and Vice President Cheney's use of the "fuck" on the Senate floor while attacking an opposing Senator.⁷⁰ It would be difficult, to say the least, for those words, in such a context, to conjure sexual or excretory meanings.

On a tangential point, the court also addressed the attempt of the commission to include "profanity" by expanding the definition of the term to include "language so grossly offensive to members of the public who actually hear it as to amount to a nuisance."⁷¹ Before the FCC adopted the "fleeting expletive" standard, profanity was not a part of the regulatory scheme and the courts adhered to a traditional definition of "sacrilege" or attack on religion, but not on expletives.⁷²

Because the basis for the change of policy was not adequately explained, the court vacated the 2003 policy and requested that the commission further justify it. Although the court did not have to address the Constitutional question because of the lack of justification in the FCC's claims, the majority expressed skepticism whether the commission could provide a valid, reasoned explanation for its "fleeting expletive" standard to pass constitutional muster.⁷³ Even the dissenting judge, who felt that the explanations of the FCC were adequate for the rule change, did not rule out the possibility that the rules could be deemed unconstitutional on the merits.⁷⁴

68. *Id.* at 461.

69. *Id.* at 459.

70. *Id.* at 460. The words in question were "Fuck yourself" and they were addressed to Senator Patrick Leahy.

71. See *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, Memorandum Opinion and Order*, 19 FCC Rcd at 4981.

72. *Id.* at 466.

73. *Id.* at 466 n.11.

74. *Id.* at 471 (Leval, J. dissenting).

After the Second Circuit's ruling, the FCC decided not to pursue an *en banc* appeal to the full panel of the court,⁷⁵ but instead, the Department of Justice made a certiorari petition to the Supreme Court, which was accepted.⁷⁶ The acceptance of certiorari means that the case is headed for argument in the fall of 2008 with a ruling sometime in 2009. Prior to that, Congress attempted to codify the FCC's standard. A bill passed by the Senate Commerce Committee would mandate that the FCC "maintain a policy that a single word or image may constitute indecent programming."⁷⁷

PART II: THE APPLICABILITY OF THE 'FLEETING EXPLETIVE' STANDARD TO SPORTS BROADCASTS

Sports broadcasts pose unique challenges for broadcasters, cablecasters and satellite providers. One is the random nature of the events. Unlike a rehearsed and recorded program whereby errors and problems can be remedied by retakes and editing, most sports events are live broadcasts. Live broadcasts bring unpredictability and drama. The only other kind of programming that displays some similarity is breaking news.

Unlike soap operas and situation comedies, sports exist apart from television and radio. Each sport has its rules, traditions, nature and character. Sports competitions are played in front of and for paying customers.⁷⁸ Unlike entertainment or news programs, broadcasters or their affiliated production companies do not "own" the sport, but rather negotiate a licensing right to broadcast it. Obtaining those licensing rights are often expensive, as are the costs to produce the event or events. The revised standards for indecency pose great risks for sports broadcasters. Much like the spontaneous declaration by Bono during the Golden Globe awards, microphones can pick up fans chanting expletives in the stands or athletes cursing other athletes or officials.

75. See J. Eggerton, *FCC Takes a Pass On Full-Court Profanity Appeal*, BROADCASTING AND CABLE, July 30, 2007, at 16.

76. See *Federal Communications Commission v. Fox Television Stations*, 128 S. Ct. 1647 (2008).

77. See *Protecting Children from Indecent Programming Act*, S. 1780, 110th Cong. §2 (2007).

Section 16 of the Public Telecommunications Act of 1992 (47 U.S.C. 303) is amended by adding at the end thereof the following: (c) "SINGLE WORD OF IMAGE POLICY – In administering the regulations promulgated under subsection (a), the Commission shall maintain a policy that a single word or image may constitute indecent programming.

As of March 2008, no further action has occurred.

78. See Museum of Broadcast Communications, *Sports and Television*, <http://www.museum.tv/archives/etv/S/htmlS/sportsandte/sportsandte.htm> (last visited May 24, 2007).

Let's examine several scenarios. A hockey game is being broadcast on radio from an arena. The broadcast location is at center ice about 20 rows from ice level. That broadcast area is not enclosed because doing so would block the view of patrons and result in a loss of seats for the facility. So, we have a play-by-play broadcaster, one (or possibly two) analysts, a producer and live microphones that pick up the reactions of the crowd. After a controversial penalty assessment, certain fans start chanting "bullshit" and "fuck." These terms are picked up by the microphone and broadcast live.

Another scenario involves an on-field or on-court microphone picking up players yelling at players and coaches from the opposing team. Some players call the opposing coach a "cocksucker." This is also heard on the broadcast.

A third situation may occur when a broadcaster accidentally utters the word "fuck" during a broadcast of a baseball game.

These problems are not entirely hypothetical. In 2001, a broadcast picked up the audio of a baseball player using the word "motherfucker" during a playoff game.⁷⁹ Also in 2001, an NFL player's use of the same word during the introduction ceremonies of the Super Bowl was heard.⁸⁰ In both cases, the commission rejected claims of indecency under the pre-Bono standards.⁸¹ NFL star Michael Irvin uttered a curse word during the NFC championship trophy presentation.⁸² John McEnroe, whose talent and hard work was sometimes matched by his temper and salty tongue, would have created headaches for broadcasters. Taking just one example, McEnroe admits to yelling "shut the fuck up" into the headset of an NBC cameraman.⁸³ It is safe to say that under post-Bono standards, the "isolated and fleeting" words would

79. See *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd at 4980

80. *Id.*

81. *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd 19859.

82. See Jennifer Frey, *The Curse of Locker Room Language*, THE WASHINGTON POST, Jan. 21, 1996, at D17.

83. See Clay Calvert, *Bono, The Culture Wars and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity*, 28 SEATTLE U. L. REV. 61 (2004). This article also notes other examples of McEnroe's on-court language. Additionally, it analogizes the Bono situation squarely in the realm of an unrehearsed sports broadcast ("to the extent the FCC has made notice of the possibility of offensive language a factor in its indecency determination calculus, networks should take caution with all live sports broadcasts").

constitute indecency. Dale Earnhardt Jr., for example, uttered an expletive on NBC after he won a major NASCAR event.⁸⁴

Written four-letter words may be broadcast as well. During the 2006-07 NFL season, during a game between the New Orleans Saints and Philadelphia Eagles, Fox broadcast a fan wearing a shirt titled "FUCK DA EAGLES" drawn in the Saints team colors. This resulted in a complaint to the FCC and an offer by Maxim magazine to do a photo shoot of the fan.⁸⁵ The network apologized three days later.⁸⁶

College football games have had their share of profane language. As one writer noted: "Profane chants are nothing new in college athletics. From the Rocky Mountains to the Great Lakes, sports fans have filled venues with vulgar and abusive language and gestures."⁸⁷ Sometimes, such language can come from fans using profane words during their "fights songs," or ad hoc chants. Even the Little League World Series contained a four-letter word moment. In August 2006, the f-word was picked up by a live microphone near the dugout and broadcast during a game between a Staten Island, New York team and a team from Illinois.⁸⁸ One of the Staten Island players could be heard saying on the ESPN 2 telecast saying "one fucking run."⁸⁹ The cable network then instituted a five-second delay, but even that did not help, as another profanity was broadcast, despite the delay.⁹⁰

Broadcasters and commentators have also peppered their broadcasts with improper language. John Feinstein, a commentator for a Navy – Duke football

84. See R. Sandomir, *Feeling Heat, NBC Has a Delay Reaction to Earnhardt*, N.Y. TIMES, Oct. 8, 2004, at D1.

85. See William Triplett, *Decency Flap at Fox*, DAILY VARIETY, Jan. 17, 2007, at 6. See also *F Da Eagles*, www.youtube.com/watch?v=KJgIFGbe1xg (last visited May 5, 2008). The fan, Heather Rothstein, was given a photo shoot in Maxim magazine. See *F Da Eagles Heather*, http://www.maximonline.com/girls_of_maxim/pictures_and_bio/1262/FckDaEaglesHeather.girl (last visited May 5, 2008).

86. See John Eggerton, *Fox Apologizes for On-Air Profanity*, BROADCASTING AND CABLE, Jan. 16, 2007, <http://www.broadcastingcable.com/article/CA6407826.html>.

87. See Marissa DeCuir, *Schools Try Hard to Foil Fans' Curses*, USA TODAY, Oct. 31, 2007, http://www.usatoday.com/sports/college/football/2007-10-31-fan-behavior_N.htm.

88. See Marie Anderson, *Invasion of Dugout Privacy*, CHICAGO SUN-TIMES, Aug. 24, 2006, at 32.

89. See Marc Berman, *Mother Not Upset Over Coach's Slap*, NEW YORK POST, Aug. 23, 2004, at 60.

90. See John Eggerton, *Watch Your @\$%ing Language!: Little Leaguers, Janet and Serious Documentarians All Share a Common Problem*, BROADCASTING AND CABLE, Aug. 28, 2006, at 12.

game was heard saying the same word when criticizing a referee's call in 2005.⁹¹ Wilbur King, the longtime voice of the Golden State Warriors, may have been the only broadcaster whose team was penalized because of an expletive he used on the air to describe a referee's call. With a reputation of a "referee-baiter," he frequently criticized referees for what he believed were poor calls. During a game in 1968, after several calls had gone against the Warriors, King took off his headset cupped his hands and yelled a certain expletive at the referee, after he thought he had turned off his microphone. However, the crowd microphone was on and the word was broadcast.⁹²

In August 2004, a sports anchor was fired by KEYE in Austin, TX for uttering an expletive on a taped segment that was never meant to air. The tape was made Monday night for Tuesday's early morning news. When Robert Flores muttered the "fuck" after a loud noise in the studio, he assumed the subsequent re-take was taped over the flub. Instead, it somehow survived and wound up days later, on the air on KEYE's Thursday morning news.⁹³

In its *Golden Globes* determination, the FCC noted that "one way broadcasters can easily ensure that they are not subject to enforcement action under our decision today is to adopt and successfully implement a delay/bleeping system for live broadcasts."⁹⁴ Indeed, the use of delays has become more prevalent as a method of preventing indecent words from getting on the air. An increasing number of sporting events have delay time, such as the NCAA basketball tournament, the Super Bowl and certain segments of NFL games.⁹⁵

But the broadcast delay system is not perfect nor is it cheap. Utilizing a 5- or 10-second delay involves expensive hardware and extra personnel.⁹⁶ If

91. See *Feinstein To Stay After Cursing College Officials*, THE POST AND COURIER (Charleston, SC), Oct. 5, 2005, at 2C.

92. See *Bill King*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Bill_King (last visited Sept. 27, 2007). The Warriors were assessed a technical foul and the team owner was fined by the FCC.

93. See Diane Holloway, *Expletive costs job of sports anchor*, THE AUSTIN AMERICAN STATESMAN, Aug. 24, 2004, at B1.

94. See *In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd 19859.

95. See Bill Carter, *Pushed on Obscenity, Networks Turn to Delays, Even on Sports*, N.Y. TIMES, March 15, 2004, at C1.

96. For example, Clear Channel broadcasting, the nation's largest radio network, invested more than \$500,000 in delay gear in the shadow of the Janet Jackson incident for any station that airs live callers or broadcasts that are deemed "potentially sensitive." See Chuck Taylor, *If In Doubt. . . Dump*,

someone on the air uses an obscenity, the operator hits the dump button and deletes that segment. While the word or phrase is deleted from the broadcast, what actually goes out over the air is "normally seamless." There are no "bleeps" because the system is designed to automatically rebuild the delay period by using a "time squeeze" algorithm that chops the tiny bits of silence between words.⁹⁷

Although the short delay involves a computerized hard drive (with memory in the tetrabytes), it requires a broadcast technician to hear the real-time broadcast while also hearing what is delayed. If a profanity is stated, that monitor must push a button deleting the word five or ten seconds afterward. If the broadcast is simultaneously broadcast in another language, another monitor is needed. Additional monitors are also needed for high-definition broadcasts. Although the equipment itself may not be that expensive,⁹⁸ the process is, especially on television. Because it is so labor-intensive (with technicians on duty to monitor both analog and high-definition broadcasts), television networks have to be judicious in determining whether it is worth the cost. For local television and radio stations that operate on a more limited budget, such an arrangement is rarely utilized because it is so expensive.

Since indecency is not defined in the "Broadcasting Obscene Language" statute,⁹⁹ but rather interpreted through FCC policy, the burden is on the commission to adequately justify its policy. If the agency decides to change the scope of indecency through policy change, the reasons for the change must be adequately explained. If not, courts, like the Second Circuit in *Fox*, will be skeptical. The only area specifically regulated by statute is the punishment. As noted earlier, legislation resulting in a ten-fold increase in the fines to \$325,000 per occurrence exacerbates the chilling effect of the any broadened standards imposed by the FCC.¹⁰⁰

Although the focus of past FCC enforcement has not been in sports, the commission was not unaware of the issue. According to one report, in 2006 the agency requested 30 tapes from broadcasters that might include vulgar

BILLBOARD RADIO MONITOR, Feb. 18, 2005, <http://www.allbusiness.com/services/motion-figures/4487614-1.html>.

97. *Id.*

98. For radio, consoles may cost between \$2,000 and \$4,000. See Frank Ahrens, *Six-Figure Fines For Four-Letter Words Worry Broadcasters*, WASHINGTON POST, July 11, 2006 at A01.

99. See 18 U.S.C. §1464 (2008).

100. See Broadcast Decency Enforcement Act of 2005, 47 U.S.C. 503(b) (2008); See also Horwitz, *supra* note 48.

remarks from unruly spectators, coaches and athletes at live sporting events.¹⁰¹ The tapes included live broadcasts of football games and NASCAR races where the participants or the crowds used expletives.¹⁰² Another problem is that the V-Chip, a device found in all television receivers built after 1999 does not apply to sports broadcasts. The V-chip (the V stands for "violence"), utilizes a rating system for programs based on the level of violence, sexual language and conduct of a television program and thereby permitting parents to control the kind of programs their children watch.¹⁰³

The difference in policy between indecency and television violence also illustrates the dilemma. The FCC has been much slower in addressing violence on television than indecency. It undertook a Notice of Inquiry on the issue of television violence and its effect on children in 2004 after pressure from a number of House and Senate members,¹⁰⁴ and released a report in 2007.¹⁰⁵ Noting the potential constructional problems, the commission did not propose a definition, much less a rule. It encouraged cable operators to offer packages for parents to "opt-in" for channels that may be less violent.¹⁰⁶ Yet, it inferred that sports channels would not be considered violent.¹⁰⁷ Also, the V-chip's ratings exempt sports broadcasts.¹⁰⁸

101. See Thomas G. Krattenmaker, *Commentary, The Telecommunications Act of 1996*, 29 CONN. L. REV. 123 (1996) ("Although this is not stated in the new Act, we all know that the V-chip proposal is not aimed at the most violent fare on television – sports (especially football) and news coverage of crime, war, and terrorism." *Id.* at 171.).

102. See *FCC Checks Live Tapes for Dirty Words*, HOLLYWOOD REPORTER, July 12, 2006, <http://www.msnbc.msn.com/id/13826339/>. One broadcast executive was quoted "It looks like they want to end live broadcast TV. We already know that they aren't afraid to go after news."

103. See *In the Matter of Implementation of Section 551 of the Telecommunications Act of 1996; Video Programming Ratings*, 13 FCC Rcd 8232 (1998). The Guidelines will apply to all television programming except for news, sports, and unedited MPAA rated movies on premium cable channels. *Id.* at 8235.

104. See *In the Matter of Violent Television Programming And Its Impact on Children*, 22 FCC Rcd 7929 (2007)

105. *Id.*

106. *Id.* at 21.

107. The report stated: "A family that wants to watch sports [emphasis added], movies, news and children's programming can receive 15 free channels plus a selection of 11 additional digital channels including ESPN, HBO, CNN Headline News, National Geographic, Animal Planet and Discovery for \$27.50 per month." *Id.* at 21.

108. The creation of the V-chip evolved section 551 of the 1996 Telecommunications Act, which encouraged the broadcast and cable industry to "establish voluntary rules for rating programming that contains sexual, violent or other indecent material about which parents should be informed before it is displayed to children, and to voluntarily broadcast signals containing these ratings." Telecommunications Act of 1996, 47 U.S.C. §551(b) (2008).

At this time, the Supreme Court's grant of certiorari puts the remand order on hold. It also gives the high court the opportunity to decide the case in one of two ways. The more limited approach is to decide whether the FCC's explanations justifying the "fleeting expletive" standard complies with administrative law. The broader approach is to tackle the First Amendment question. If the court chooses the first option, then it remands the case back to the trial court for resolution, but opens the likely possibility for a subsequent appeal on the Constitutional issues. If the Supreme Court considers the First Amendment issues, then it will determine a more final ruling, without the likelihood of a second appeal.

SOLUTIONS

Since the legal parameters of what constitutes indecency are not settled, the potential problems for broadcasters of live sporting events are significant. What solutions can be found? They include non judicial proposals such as internal rules to determinations redefining the constitutional parameters of indecency. The following discussions outline each proposed solution and the advantages and disadvantages of each.

Internal Codes of Conduct

Given that particular sports are controlled by sports leagues or governing bodies, these organizations are in the position of delineating standards of conduct for their members. For example, a governing body may enact rules that prohibit competitors, coaches and other administrative personnel from saying or doing anything that could violate the prevailing indecency standards during any competition or exhibition event that is broadcast live. Violators could be subject to suspension, fines or both, depending on the severity and frequency of the offense.

For example, NASCAR has implemented safeguards for the "unexpected" and emotional speech of all drivers and crews.¹⁰⁹ It has warned all of its drivers and crews that the use of profane language can result in fines and point

All television receivers sold after Jan. 1, 2000, are required to have V-chips. *See V-Chip: Viewing Television Responsibly*, <http://www.fcc.gov/vchip/> (last visited March 15, 2008). However, the problem with this regimen is that as a live and unpredictable event, there is no one to screen the content of a sports broadcast.

109. See George Varga, *The Year That Janet Jackson Changed Television*, COPLEYS NEWS SERVICE, Dec. 29, 2004.

penalties.¹¹⁰ In 1999, a crew chief for a NASCAR driver uttered an expletive while speaking to his driver on a two-way radio which was picked up on a nationwide ESPN broadcast, and was fined \$5,000 by NASCAR.¹¹¹ This is a good example of a league taking the matter into its own hands to avoid FCC action.

Other leagues have taken different approaches. Even if a particular league did not have a specific anti-expletive policies, the more general "best interests of the sport" clause could similarly be used, coupled with appropriate sections of the league's respective collective bargaining agreement.¹¹² For example, former Los Angeles Lakers star Shaquille O'Neal cursed twice in a post-game interview with KCAL-TV in Los Angeles. The FCC did not take any action, but the NBA suspended O'Neal for one game and fined him \$295,000.¹¹³

The National Collegiate Athletic Association (NCAA) recently announced it will enforce a "no cursing rule" for college coaches in an effort to limit profanity during matches. Although not directly applicable to sports broadcasts, the rule will, in effect, limit the use of such language and decrease the possibility of it being picked up during a game.¹¹⁴ Outside of the NCAA, a number of individual colleges and universities have instituted bans on cursing. Examples are the University of Florida, Boston University and the University of Washington.¹¹⁵ However, the success of such efforts has been mixed. After Virginia Tech prevented its band from playing a song to which students yelled sexually suggestive chants, one student said: "I'm going to keep yelling it at

110. Chris Jenkins, *Drivers Warned About Objectionable Language*, USA TODAY, March 16, 2004, http://www.usatoday.com/sports/motor/nascar/2004-03-15-swearing_x.htm.

111. Jim Short, *Jarrett: Listen Carefully*, PRESS ENTERPRISE, April 30, 2000, at S04.

112. See MAJOR LEAGUE BASEBALL CONSTITUTION, §2(a) & (b) (2005); NATIONAL FOOTBALL LEAGUE CONSTITUTION AND BY-LAWS, art. VIII (1999); NATIONAL BASKETBALL ASSOCIATION CONSTITUTION AND BY-LAWS, §35(d) (1989); BASIC AGREEMENT BETWEEN MAJOR LEAGUE BASEBALL AND THE MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, art. XI (2006) (Grievance Procedure—stating the arbitrability of the commissioner's action involving the "preservation of the integrity of, or the maintenance of public confidence in, the game of baseball"); NFL COLLECTIVE BARGAINING AGREEMENT, 2002-2008, art. XI (2002).

113. See Allison Romano, *Reporting Live. Very Carefully: Fearful of Costly FCC Fines, News Directors Ponder the Risks of Reporting from the Field, Where the Unexpected Can Happen*, BROADCASTING AND CABLE, July 4, 2005, <http://www.broadcastingcable.com/article/CA623019.html>.

114. See Jeff Rabjohns, *NCAA Swears It Will Put a Stop to Coaches' Cursing*, LOUISVILLE COURIER-JOURNAL, Oct. 22, 2007, at 1.

115. See Marissa DeCuir, *Schools Try Hard to Foil Fans' Curses*, USA TODAY, Oct. 31, 2007, http://www.usatoday.com/sports/college/football/2007-10-31-fan-behavior_N.htm.

every game. And louder."¹¹⁶ One alumnus wrote a letter to the school newspaper stating that he would not donate to the athletics department until the censorship stopped.¹¹⁷ An LSU student opined that "[the chants] are big traditions. . . If they stop these chants, new ones will come."¹¹⁸

The problem with relying on internal codes of conduct is that enforcement is beyond the reach of broadcasters and does not insulate them from FCC fines. The broadcasts receive an indirect benefit because the codes of conduct may give athletes and coaches pause before engaging in such language, but there is no guarantee. Moreover, even if the sanctions are enforced, no immunity exists for the broadcaster. If the inappropriate language is heard and transmitted through the broadcast, the licensee and the network are still responsible and still subject to FCC fines. More fundamentally, internal enforcement does not address the problematic approach by the FCC in redefining indecency.

Eliminating the Present Indecency Standard

The easiest but most unlikely solution would be to eliminate the indecency standard altogether. This could be done in one of two ways. One would be to repeal 18 U.S.C. §1464, the statute creating the regulatory regimen limiting indecency. Such an act leaves indecent speech with greater protection. Given that Congress has been more willing to restrict indecency than to deregulate it¹¹⁹ such an act is politically unlikely. A less difficult, but still unlikely move would be to redefine "indecency" to mean the same as "obscenity," under §1464, a view that was embraced by the dissent in *Pacifica*.¹²⁰ If that change were adopted, it would place indecency in the context of the *Miller* test,¹²¹ a much more onerous standard to overcome. Such a change requires either a rewrite (or repeal) of the statute, or a Supreme Court reversal of *Pacifica*.

The grant of certiorari opens up these possibilities. If the Supreme Court tackles the First Amendment challenge, it could eliminate indecency as an independent concept, but more likely, the Court will question whether the FCC can regulate indecency via the non-contextual "fleeting expletive" standard.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See Action for Children's Television*, 932 F.2d 1504 (invalidating Congressional mandate that FCC block indecent programs at all times of day and night on the grounds that it was overbroad).

120. *See Pacifica*, 438 U.S. at 778 (Stewart, J. dissenting).

121. *See Miller*, 413 U.S. at 431.

Another approach would be for the courts to abandon the basic rubric of broadcast regulation, the scarcity rationale.¹²² The scarcity rationale provides the legal basis for the FCC to impose certain content regulations that would be prohibited in other media like print, cable and Internet.¹²³ The Supreme Court has not addressed this question since 1984.¹²⁴

However, technological changes may undercut the foundations of the regulatory basis for indecency. Although the Supreme Court has concluded that broadcasting is subject to more content regulation than other medium, due to the inherent "scarcity" of the airwaves and its easy accessibility to children,¹²⁵ what if better screening and filtering were available to control the medium? What if television receivers could have their own "five-second" delay/beep? Or more fundamentally, what if a future Supreme Court concludes that the "scarcity" rationale no longer exists? With multi-channel operators and high-definition television any indecent regulations may have a harder time finding judicial acceptance.¹²⁶

A Sports "Safe Harbor"

The above discussion is largely theoretical. Indecency restrictions still exist and will likely continue to exist. Although this issue is still in flux, assuming that the FCC's post-Bono "fleeting expletive" definition of indecency remains in some form, or a court remands to the FCC to modify the rule to comport with the administrative law deficiencies found in the *Fox* ruling, sports broadcasters may still incur the wrath of the FCC. The best solution is to create an administrative or statutory "safe harbor" to protect broadcasters from inadvertent uses of indecent or profane language.

As noted earlier in this article, the FCC has imposed a "safe harbor" from the indecency rules for late-night broadcasts, where children are not likely to be listening.¹²⁷ Akin to a qualified privilege and somewhat more limited than

122. See *Red Lion Broadcasting*, 395 U.S. 367 (1969), discussed in note 12.

123. See *NBC*, 319 U.S. 190; *Red Lion Broadcasting Co.*, 395 U.S. 367.

124. See *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

125. See *Red Lion Broadcasting*, 395 U.S. at 396 (upheld the Fairness Doctrine, a right of reply regulation, from constitutional attack); See also *Pacifica*, 438 U.S. at 770 n.2.

126. See David Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 223 (discussing how the emergence of new technologies negates the scarcity rationale). See also Fowler & Brenner, *supra* note 14.

127. See *New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees*, 2 FCC Rcd 2726.

a blanket exemption, safe harbors are conditional limitations of liability and are also utilized in certain areas of intellectual property law as well.¹²⁸

Both Congress and the FCC have the power to create a regulatory "sports safe harbor" that would insulate broadcasters from unintended words or utterances coming from athletes, coaching staff or fans. It could be phrased as follows:

Any expletive considered indecent or profane under 18 U.S.C. §1464 of the U.S. Code occurring during a live sports broadcast, including, but not limited to utterances by athletes, coaches, management personnel or fans during the event, which includes pre-game and post-game events, shall be subject to a safe harbor and immune from liability as long as the following conditions are met:

Section 1: Definitions:

(A) "Live Sports" shall be defined as the transmission of a real-time event that involves competition between groups or individuals who engage in competition in the hope of victory. The competition may involve physical and/or mental strength and capacity among individuals or teams.

(B) "Broadcast" shall be defined as the dissemination of a radio or television communications by a licensed television or radio station or network intended to be received by the public.¹²⁹ In the event that Congress or the Federal Communications Commission extends broadcast indecency standards to non-broadcast media such as cable television, satellite broadcasting or any other medium now known or developed in the future, the provisions of section two would apply to that medium.

(C) "Broadcaster" shall be defined as any radio or television licensee which broadcasts.

(D) "Indecency" shall be defined as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast

128. See Digital Millennium Copyright Act, 17 U.S.C. §512 (2008) (which protects Online Service Providers [OSPs] from copyright liability for postings if the following conditions are met: (1) the OSP has no knowledge or financial benefit from the infringing activity; (2) is quickly removed from the OSP after notification).

129. A broadcast licensee is deemed to be an over the air television or radio station. See 47 U.S.C. §301 (2008).

medium, sexual or excretory organs or activities. If a court or the Federal Communications Commission redefines or otherwise changes this definition, then the prevailing definition would govern this provision.

Section 2: Safe Harbor Provision:

A broadcaster will not be liable for monetary fines or equitable remedies, including a loss of its license under 18 U.S.C. §1464 or Broadcast Decency Enforcement Act of 2005. The immunity from indecency determination applies if:

- (A) The sports event is in real-time, not subject to a time-delay or any rebroadcast;
- (B) The expletives are not uttered by the on-air broadcasters, producers, production assistants or any other members of the broadcast team;
- (C) The on-air broadcasters, producers, production assistants or any other members of the broadcast team have taken reasonable steps to avoid encouraging the use of such language, such as involving the audience for the sports event by communicating, holding up signs or chanting slogans or any other interaction that results in the use of indecent language;
- (D) The on-air broadcasters, producers, production assistants or any other members of the broadcast team have taken reasonable steps to avoid encouraging the use of such language by athletes, coaches, managers, general managers, team owners, league officials, such as interactions with the coaches;

Section 3: Obscenity, Defamation and other non-indecent speech

Section 2 of this Act does not apply to communications deemed obscene, defamatory or speech that involves an invasion of privacy.

A statutory immunity protects broadcasters in several important ways. First, it gives consistency to an area marked in recent years by political pressures, policy changes and litigation. Second, it seems a reasonable compromise between the protection of broadcasters and the needs of the public. Further, it only involves live sports broadcasts – programming subject to the risks of such speech for the reasons stated in this article. It treats broadcasters as passive conduits of such language. If the broadcasters aides or

abets in its dissemination, the immunity is inapplicable (as noted in section two of the proposed safe harbor).

CONCLUSION

The nature of live sports broadcasts poses a serious risk of indecency determinations and fines to broadcasters as live broadcasts are unplanned and spontaneous. The present law and regulations governing indecency does not provide a reasonable defense for broadcasters who are caught disseminating such language over the air. The FCC's whims and the heavy fines imposed by Congress add to this risk.

Complicating the situation is the legal status of broadcast indecency. Although it is possible that the Supreme Court will revisit this issue and resolve the interpretation and doctrinal issues, the uncertainty of the timing of a ruling and the ultimate conclusion, requires stability and assurance that sports broadcasters receive statutory protection from the imposition of aggressive FCC enforcement and the resulting serious fines. It makes more sense to ensure protection for sports broadcasters through a safe harbor immunity as outlined above. That would provide sports broadcasters regulatory certainty and legal fairness.

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