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STERN PENALTIES: HOW THE FEDERAL COMMUNICATIONS COMMISSION AND CONGRESS LOOK TO CRACKDOWN ON INDECENT BROADCASTING

I. INTRODUCTION

Disc jockeys, news reporters, shock jocks, and political commentators beware. The Federal Communications Commission ("FCC") and Congress have begun a crusade to clean up the airwaves, and you may find yourself without a job if you are not careful.\(^1\) While the FCC is busy handing out record amounts of fines,\(^2\) members of Congress are advocating legislation that will increase the maximum amount of these fines and create additional penalties for indecent broadcasts.\(^3\) The FCC's new attitude has sent shockwaves through the media industry.\(^4\) The sudden rise in inde-

1. See Jeff Jarvis, Can the FCC Shut Howard Up?, The Nation, May 17, 2004, at 11 (reporting Sandra Tsing Loh fired from NPR for accidentally using word "f*ck"); Diane De La Paz, Indecency: Speaking of Standards, News Trib. (Wash.), May 29, 2004, at E1 (discussing firing of "Bubba the Love Sponge"); Stern Faces Realities of Infinity Consent Decree, Dec. 10, 2004, http://www.fmqb.com/Article.asp?id=57588 ("[A]ll it takes is for one [Notice of Apparent Liability] to be issued [by the FCC] and a Viacom employee, such as Stern, would have to be taken off the air immediately while an investigation occurs.").


3. See Sam Brownback, Broadcast Decency, ¶ 8, http://brownback.senate.gov/libroadcast.htm (last visited June 7, 2004) ("We need to enact this legislation quickly to ensure that the Commission's enforcement actions are meaningful deterrents and are no longer ignored as the cost of doing business."). Senator Sam Brownback of Kansas introduced the Broadcast Decency Enforcement Act of 2004 into the United States Senate in order to increase the power of the Federal Communications Commission to levy fines against stations that broadcast indecent material. See id. Citing the 2004 Super Bowl Halftime show, Senator Brownback thinks action is necessary because broadcasters have not taken appropriate measures to police themselves. See id. If broadcasters want to use the nation's public airwaves, says Senator Brownback, they must serve the public interest and not air indecent material during "the hours of 6 am to 10 pm." Id. For a further discussion of the history of the Broadcast Decency Enforcement Act of 2004, see infra notes 51-83 and accompanying text.

4. See Jarvis, supra note 1, at 11 (reporting changes in media industry due to FCC crackdown).

(167)
cency complaints has prompted the FCC and Congress to take action to deter broadcasters from airing indecent material.\(^5\)

The baring of a nipple during the 2004 Super Bowl Halftime show and the utterance of the word “f*cking” during a Golden Globe acceptance speech awoke the slumbering giant: the FCC.\(^6\) Now, with Congress’s support, the FCC has begun imposing millions of dollars in fines that are substantial enough to worry even the largest media ownership companies about their stations’ broadcast content.\(^7\) Some people and groups have hailed the FCC’s fines and Congress’s proposed legislation as ushering in a new era of morality.\(^8\) Others are concerned there will be a chilling effect on free speech and see the moves as a form of government censorship.\(^9\) Furthermore, there is no current or proposed regulation that requires fines to be distributed evenly or at all amongst violators, and


\(^6\) See Jarvis, supra note 1, at 11 (discussing why FCC began increasing regulation of broadcasts and Congress’s attempt to pass new legislation). The two major incidents that prompted the FCC and Congress into action occurred when U2’s lead singer Bono exclaimed “f*cking brilliant” during the Golden Globe Awards and when Janet Jackson bared her nipple during the Super Bowl Halftime show. See id. Both incidents caused a dramatic increase in the number of complaints the FCC received. See id. at 12. FCC chairman Michael Powell’s new stance on government regulation is that he does “not have the luxury of ignoring [his] duty to enforce the [indecency] statute because owners might react with excessive conservatism.” Id. at 14.

\(^7\) See id. at 11 (describing new proposed fine increases for broadcasting indecent materials and Clear Channel dropping Stern from six stations); Hal Boedeker, *TV Feels the Heat of FCC Police, But Why Now?*, ORLANDO SENTINEL, Oct. 18, 2004 (reporting FCC fined Fox $1.2 million); see also Todd Shields, *Unsettling Settlement, MediaWEEK*, June 14, 2004, at 10 (detailing Clear Channel’s $1.75 million settlement payment to FCC to dismiss all pending indecency investigations); FCC & Viacom Settle for $3.5 Million on Outstanding Fines, ¶ 1, Nov. 23, 2004, http://www.fmqb.com/Article.asp?id=55202 (detailing Viacom’s $3.5 million settlement payment to FCC to dismiss all pending indecency investigations).

\(^8\) See Brownback, supra note 3, ¶¶ 8-9 (discussing need for legislation to help regulate broadcasts).

\(^9\) See Jarvis, supra note 1, at 14 (“If the government is going to regulate speech, where’s the line and who’s going to draw it?”). Broadcasters have begun editing the material in their shows out of fear that they will be fined or fired from their jobs. See id. at 11. Shock jock Howard Stern, who rose to popularity in part for the questionable content of his show, was fined “for the first time in six years.” Id. The fines stem from a new wave of morality that is pushing the FCC into regulating broadcasters more strictly. See id. at 14. The fines also led to the *Howard Stern Show* being removed from six radio stations by their owner, Clear Channel, out of fear that there could be sanctions from the FCC. See id. at 11. The FCC is already powerful enough to induce media companies to remove broadcasters, either through penalties or the possibility of penalties, and will only become more powerful if Congress passes legislation that increases the maximum fine amounts. See id. at 13-14. Jarvis writes, “It’s not just about Bono or The Breast. It’s about our First Amendment. It’s about our freedom of speech. It’s about us.” Id. at 15.
has led some broadcasters to believe the fines are a political tool to rid the airwaves of people who question the Bush administration’s views.10

This Comment examines the reasons behind the FCC and Congress’s actions, their relation to the First Amendment, the impact they have had on broadcasters, and the future of broadcasting. Section II discusses the FCC’s creation, history, and power.11 Section II also takes a closer look at the term “indecency” and proposed legislation.12 Section III of this Comment explores the indecency crackdown’s effects on broadcasters and the broadcasters’ concerns.13 Additionally, Section III examines the First Amendment’s relationship to the proposed legislation and alternative methods of enforcing decency standards.14 Finally, Section IV looks at the future of broadcasting, the best method of regulating indecent broadcasts, and important points to consider while achieving this goal.15

II. BACKGROUND

A. The Federal Communications Commission's Establishment, Powers, and Role

Congress established the FCC through the Communications Act of 1934.16 The Communications Act of 1934 gives the FCC the power to regulate radio, interstate telephone, and telegraph com-

10. See id. at 12 (discussing fines imposed by FCC).
11. For a further discussion of the FCC’s creation, history, and power, see infra notes 16-38 and accompanying text.
12. For a further discussion of indecency and the Act, see infra notes 39-83 and accompanying text.
13. For a further discussion of the effects of the indecency crackdown, see infra notes 84-150 and accompanying text.
14. For a further discussion of the First Amendment, Congress’s attempted legislation, and alternative courses of action, see infra notes 151-200 and accompanying text.
15. For a further discussion of the future of broadcasting, see infra notes 201-210 and accompanying text.

[R]egulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . . and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the “Federal Communica-
communications. It also charges the FCC with promoting the "use of radio in the public interest."

The FCC is controlled by a chairman and four commissioners. None of these positions are elected positions. The President has the power to select a chairman, and with Senate approval, appoint commissioners. The House of Representatives also has influence over the FCC because it controls the appropriations process that funds the FCC. As a result, the FCC is highly affected by the political landscape.

Id. Prior to forming the FCC in 1934, Congress formed the Federal Radio Commission ("FRC") in the Radio Act of 1927. See Seth T. Goldsam, "Crucified by the FCC"? Howard Stern, the FCC, and Selective Prosecution, 28 COLUM. J.L. & SOC. PROBS. 203, 206 (1995). The FRC's only purpose was "to deal with problems of radio interference" due to the limited number of frequencies available. Id. at 206. When Congress determined that the FRC needed greater authority to deal with other broadcasting issues, they established the FCC in the Communications Act of 1934. See id. at 206-07. The Communications Act of 1934 "repealed and superseded the Radio Act of 1927 and gave the FCC broad powers to regulate not only radio communications but also interstate telephone and telegraph communications." Id. at 207.


Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall— . . .

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest . . . .

Id.


The FCC is directed by five Commissioners appointed by the President and confirmed by the Senate for 5-year terms, except when filling an unexpired term. The President designates one of the Commissioners to serve as Chairperson. Only three Commissioners may be members of the same political party. None of them can have a financial interest in any Commission-related business.


21. See id. (discussing process by which FCC board is appointed).
Another important characteristic of the FCC is its organizational format. Congress created the FCC as a regulatory agency.\textsuperscript{23} This means that the FCC has "executive, legislative, and judicial functions."\textsuperscript{24} For example, not only does the FCC enforce orders under the Communications Act, but it is also authorized to review its own enforcement decisions.\textsuperscript{25} Other duties of the agency include: adopting administrative rules and regulations,\textsuperscript{26} researching

\textsuperscript{23} See 47 U.S.C. § 151 (2004) ("For the purpose of regulating interstate and foreign commerce in communication . . . there is created a commission to be known as the 'Federal Communications Commission.'" (emphasis added)). The FCC operates as an "independent United States government agency." \textit{See About the FCC.}, ¶ 1, http://www.fcc.gov/aboutus.html (last visited June 7, 2004). The FCC is made up of six operating bureaus and ten staff offices. \textit{See id.} ¶ 4. Some of the bureaus' responsibilities include: educating and informing consumers about telecommunications goods and services; regulating the use of radio spectrum to fulfill the communications needs of businesses, local and state governments, public safety service providers, aircraft and ship operators, and individuals; enforcing the Communications Act; representing the Commission in satellite and international matters; regulating AM, FM radio and television broadcast stations; and creating rules and policies concerning telephone companies. \textit{See id.} ¶¶ 5-10. Some of the staff offices' responsibilities include: presiding over hearings and issuing Initial Decisions; advising the Commission on issues and policies concerning opportunities for ownership and contracting; allocating spectrum for non-government use and providing expert advice on technical issues; serving as chief legal advisor to the bureaus and staff offices; conducting and supervising internal audits and investigations; and developing strategic plans to identify policy objectives for the agency. \textit{See id.}

\textsuperscript{24} Goldsamt, \textit{supra} note 16, at 208. For a further discussion of the FCC's functions, see \textit{supra} note 23.


\begin{quote}
(c) Delegation of functions . . . administrative and judicial review . . . .
\end{quote}

\begin{quote}
(4) Any person aggrieved by any such order, decision, report or action may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe, and every such application shall be passed upon by the Commission. The Commission, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or action made or taken pursuant to any delegation under paragraph (1) . . . .
\end{quote}

\textit{Id.}

\textsuperscript{26} See 47 U.S.C. § 303 (2004) (delineating powers and duties of FCC). The statute states:

\begin{quote}
Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
\end{quote}

\begin{quote}
(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: \textit{Provided, however}, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless the Commission
shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

\dots

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion \dots

\dots

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

Id.


28. See §§ 301(1) – 303(m) (delineating powers and duties of FCC). The statute states:

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

\dots

(l) (1) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to persons who are found to be qualified by the Commission and who otherwise are legally eligible for employment in the United States, \dots

\dots

(m)(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated, or caused, aided, or abetted the violation of, any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

Id.
proposing new legislation, and representing itself in court. The FCC’s fining procedure may surprise some people. The FCC does not employ agents to monitor radio or television for indecent broadcasts, but rather, the FCC is complaint-driven. This means the FCC will not conduct an investigation of an allegedly indecent broadcast unless a listener or viewer takes the necessary steps to file a complaint. This also means that watchdogs, activist groups, and individuals can target specific broadcasters they deem

29. See 47 U.S.C. § 154(k)(4) (2004) (stating duties of FCC). The Commission shall require annual reports to Congress including: "(4) specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable, including all legislative proposals submitted for approval to the Director of the Office of Management and Budget." Id.

30. See FCC Office of General Counsel, http://www.fcc.gov/ogc/ (last visited June 7, 2004) ("The Office of General Counsel of the Federal Communications Commission serves as the chief legal advisor to the Commission and to its various bureaus and offices. The General Counsel also represents the Commission in litigation in federal courts, recommends decisions in adjudicatory matters before the Commission, assists the Commission in its decision making capacity and performs a variety of legal functions regarding internal and other administrative matters.").

31. See Agustin Gurza, Can They Say That?, L.A. TIMES, Aug. 20, 2004, at E1 (stating FCC "counts on listeners to bring complaints"). The FCC only employs twenty investigators, two of whom speak Spanish. See id. Therefore, the FCC is not able to monitor broadcasts on its own, but needs listeners to register complaints about obscene, indecent, or profane broadcasts. See id. If listeners do not bring complaints, the FCC does not take any action. See id. For example, the FCC has not fined Spanish-speaking shock jocks who broadcast during the same hours as Howard Stern, because there have been so few complaints. See id. In fact, "over the last five years only 32 complaints out of almost 1.1 million" were registered against Spanish radio, including two as of April 2004. Id.


Enforcement actions in this area are based on documented complaints received from the public about indecent or obscene broadcasting. The FCC's staff reviews each complaint to determine whether it has sufficient information to suggest that there has been a violation of the obscenity or indecency laws. If it appears that a violation may have occurred, the staff will start an investigation by sending a letter of inquiry to the broadcast station.

If a complaint does not contain information sufficient to determine that a violation may have occurred, the complaint will be dismissed. In such a case, the complainant has the option of re-filing the complaint with additional information, filing a petition for reconsideration of the staff action, or filing an application for review (appeal) to the full Commission.

If the facts and information contained in the complaint suggest that a violation did not occur, then the complaint will be denied. In that situation, the complainant has the option of filing a petition for reconsideration of the staff action or an appeal to the full Commission.

Id. ¶¶ 8-10.
offensive in an effort to remove those broadcasters from the air.\textsuperscript{33} In fact, one individual told media giant Viacom that he will no longer file complaints with the FCC if Howard Stern is fired, thus reducing its potential risk for fines.\textsuperscript{34} These groups, usually a mi-

\textsuperscript{33} See De La Paz, supra note 1, at E1 (showing how individual can target broadcaster); see also Illinois Family Institute: Persistence by David Smith Pays Off as ‘Mancow’ and Emmis Pay $300,000 to Clear Indecency Charges, U.S. Newswire (Chi.), Aug. 12, 2004, available at LEXIS, Nexis Library, U.S. Newswire File (search www.lexis.com; follow “News & Business” hyperlink; then search “U.S. Newswire” and “Emmis Pay $300,000”) [hereinafter Illinois Family Institute] (showing how single individual was responsible for fines); Parent’s Television Council – About Us, http://www.parentstv.org/PTC/aboutus/main.asp (last visited June 7, 2004) [hereinafter PTC - About Us] (“The PTC’s primary mission is to promote and restore responsibility and decency to the entertainment industry in answer to America’s demand for positive, family-oriented television programming.”). The complaint-based format provides individuals and groups with great power by allowing them to target broadcasters they feel are indecent in order to get the FCC to fine these broadcasters, which in some cases results in broadcasters being fired. See De La Paz, supra note 1, at E1. For example, Douglas Vanderlaan became upset when listening to a Bubba the Love Sponge broadcast with his teenage son, because “Bubba was ‘interviewing a woman about her porn website, even suggesting listeners log on to similar sites.’” Id. The FCC told Vanderlaan that he should send in recordings of the objectionable broadcasts, which led Vanderlaan to record the show daily for almost a year. See id. Vanderlaan sent the recordings to the FCC, and eventually the FCC proposed a fine against Bubba’s employer, Clear Channel. See id. Clear Channel then fired Bubba. See id.

David Smith is another example of a single individual targeting a broadcaster. See Illinois Family Institute, supra. David Smith filed 70 complaints against “Mancow’s Morning Madhouse” from November 1998 to November 2003. See id. ¶ 2. This led to a $300,000 settlement between the FCC and Mancow and Mancow’s employer. See id. ¶ 3. Afterwards, David Smith said, “I will continue to monitor certain radio and television programs, including Mancow’s, and will not hesitate to file complaints for broadcast indecency if warranted.” Id. ¶ 6. Additionally, the Executive Director of Illinois Family Institute, Peter LaBarbera, commented that the settlement “show[s] the potential of what one persistent person can do.” Id. ¶ 7.

Meanwhile, organizations such as the Parent’s Television Council (“PTC”) act as a magnet for assembling large numbers of like-minded individuals to achieve their goals. The PTC’s goal is “offering private sector solutions to restore television to its roots as an independent and socially responsible entertainment medium.” PTC – About Us, supra. The PTC provides information and easy to follow links to help individuals file complaints with the FCC and provides “action alerts” to inform people about causes they may not have previously been aware of. See Parent’s Television Council – Because Our Children Are Watching, http://www.parentstv.org/ (last visited June 7, 2004).

\textsuperscript{34} See Jack Thompson to Viacom: Fire Stern, I’ll Leave You Alone, Nov. 15, 2004, http://www.fmqb.com/Article.asp?id=53908 (detailing Jack Thompson’s letter to Viacom’s Chairman, Sumner Redstone). Jack Thompson is a Florida-based attorney and indecency crusader. See id. ¶ 1. He has offered to stop filing FCC complaints against Viacom if Howard Stern is fired. See id. ¶ 2. In his letter to Viacom’s Chairman, Sumner Redstone, he wrote, “You get rid of Stern and you get rid of Jack Thompson. I’ll be much more of a pain than Howard Stern ever was. It’s my job.” Id. His biggest concern is the impact that airing indecent material has on children. See id. ¶ 5. Thompson also threatened a civil suit in his letter claiming Viacom negligently supervised the Howard Stern Show. See id. ¶ 4. Thomp-
nority of the audience, have successfully lobbied the FCC to reverse its ruling not to fine or warn a broadcaster. Recipients of fines may seek relief, but they must first go through the FCC and convince the agency that it made a wrong decision. This procedure has proven to be very problematic for media companies, and many appeals have been unsuccessful. According to the FCC’s Procedural Manual, the agency is supposed to address the concerns of the community as a whole, but in practice, the current fining procedure appears to be a case of giving the squeaky wheel the grease.

35. See Bill McConnell, *F-Word is Now ‘Fight‘*, Broadcasting & Cable, Apr. 19, 2004, at 3 [hereinafter McConnell, *F-Word*] (discussing reversal by FCC in Bono ruling); *see also PTC – About Us, supra* note 33 (listing membership of PTC at “nearly one million members”). At the 2003 Golden Globe Awards show, Bono, the lead singer of U2, exclaimed “f*cking brilliant” during the telecast. See McConnell, *F-Word, supra*, at 3. Six months after the show aired, the FCC ruled that “Bono’s ‘fleeting’ indiscretion during a live show didn’t warrant punishment.” Id. at 73. It was after this ruling that the PTC took action, not when the show had aired. See id. The PTC appealed the ruling, and “the full commission took over the review and reversed the enforcement staff.” Id. Now, the use of “f*ck” in any context is considered indecent. See id.

36. See Goldsamt, *supra* note 16, at 209-10 (“[T]he aggrieved party may petition the FCC for a rehearing . . . [T]he next level of appeal is with the FCC’s Review Board. The Review Board’s decisions may be appealed to the FCC’s Commissioners. After review by the Commissioners, the issue may be appealed to federal court.”(citations omitted)); *see also 47 U.S.C. § 402(b) (2004)* (stating United States Court of Appeals for District of Columbia hears appeals from final FCC decisions); 47 U.S.C. § 405 (2004) (discussing petition for rehearing).


38. See Goldsamt, *supra* note 16, at 208 (quoting Bittner, *supra* note 22, at 52) (“The FCC’s Procedural Manual instructs that the FCC’s duty is to address concerns of the entire community, ‘rather than with the personal preferences or grievances of the individuals.’”).
B. What Qualifies as "Indecent" Broadcasting?

It is a violation of federal law to broadcast any obscene, profane, or indecent material. The FCC currently defines indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by the contemporary community broadcast standards for the broadcast medium, sexual or excretery organs or activities." Many broadcasters complain that the definition of indecent material is so vague they do not know what they can and cannot say on the radio without being fined. The United States Supreme Court has allowed every FCC definition of indecency to remain unchallenged.

The key factors of the indecency test are: the context the language or material is presented in and the contemporary community standards. As an additional reference, the FCC says that indecent

39. See 18 U.S.C. § 1464 (2004) (illustrating law against broadcasting certain material). The statute reads: "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." Id.
40. Parents’ Place, supra note 32, ¶ 3 (defining term indecency).
41. See PRSA Says Increased FCC Fines without Clear Guidelines Endangers Free Expression, ¶ 9, Mar. 3, 2004, http://www.prsa.org/_news/press/pr030304.asp (reporting concerns regarding FCC’s enforcement of Act). Reed Bolton Byrum, the immediate past president of the Public Relations Society of America, commenting on the combination of the Act and current FCC guidelines said, “The problem is that the FCC never has spelled out what’s permissible and what’s not permissible. ‘When in doubt, leave it out’ cannot be an acceptable policy in a democracy that depends on free and open discussion.” Id. Byrum expressed concern that the risk of large fines imposed on small stations would result in a loss of independent broadcasters, leaving only a few large media companies to remain. See id. This could mean that the few remaining entities would be easily controllable by the government. See id.
42. See FCC v. Pacifica Found., 438 U.S. 726, 750-51 (1978) (upholding FCC’s authority to restrict indecency in public broadcasts). Pacifica argued that “the Commission’s construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required ....” Id. at 742.
43. See Parents’ Place, supra note 32, ¶ 11 (“In making indecency determinations, context is key! The FCC staff must analyze what was actually said during the broadcast, the meaning of what was said, and the context in which it was stated.”); EB – Obscene, Profane, & Indecent Broadcasts, ¶ 3, http://www.fcc.gov/eb/
material "contains sexual or excretory references that do not rise to the level of obscenity."\(^{44}\) The distinction is important because obscene speech cannot be broadcasted at any time because it is not protected by the First Amendment.\(^{45}\) Indecent speech, on the other hand, is protected by the First Amendment, and its broadcast use may be restricted, but not banned.\(^{46}\)

In *Sable Communications, Inc. v. FCC*, the Supreme Court held that the First Amendment protects the right of viewers and listeners to view or listen to indecent material at their discretion.\(^{47}\) The Supreme Court in other rulings has upheld "the right of parents to

broadcast/opi.html (last visited June 7, 2004) [hereinafter EB - Obscene] ("[T]he Commission has stated, "The determination as to whether certain programming is patently offensive is not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant.").

44. EB – Obscene, supra note 43, ¶ 3 ("Indecent programming contains sexual or excretory references that do not rise to the level of obscenity."). To determine if material is obscene, it must meet the three prong test from *Miller v. California*, 413 U.S. 15 (1973). *See id.* ¶ 2. First, "an average person, applying contemporary community standards, must find that the material, as a whole, appeals to the prurient interest." *Id.* Second, "the material must depict or describe, in a patently offensive way, sexual conduct specifically defined by applicable law." *Id.* Third, "the material, taken as a whole, must lack serious literary, artistic, political, or scientific value." *Id.*

45. *See* EB – Obscene, supra note 43, ¶ 2 ("Obscene speech is not protected by the First Amendment and cannot be broadcast at any time."). Obscene speech is not protected by the First Amendment because:

All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . .

*Miller*, 413 U.S. at 20 (alteration in original) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

46. *See* EB – Obscene, supra note 43, ¶ 3 ("[T]he courts have held that indecent material is protected by the First Amendment and cannot be banned entirely. It may, however, be restricted in order to avoid its broadcast during times of day when there is a reasonable risk that children may be in the audience."). For a further discussion of the First Amendment’s protection of indecent speech, see infra note 47 and accompanying text.

47. *See* Sable Commc’ns, Inc. v. FCC, 492 U.S. 115, 126 (1989) (holding First Amendment protects indecent speech). The Supreme Court held:

Sexual expression which is indecent but not obscene is protected by the First Amendment . . . . The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest. We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors . . . . It is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends.

*Id.*
protect their children . . . [finding] a compelling state interest in the welfare of our country's youth; and upheld the government's authority to regulate 'the content of constitutionally protected speech . . . to promote a compelling interest . . . .' 48 Combining these principles, the FCC has been allowed to establish a "safe-harbor" period where indecent content cannot be broadcasted or else the violators are subject to penalties. 49 Under current law, indecent broadcasts are restricted to the hours of 10 p.m. to 6 a.m. when the risk of children being part of the listening audience is relatively low. 50

C. Congress Looks to Get Involved

Congress made its first attempt to increase the FCC's authority to penalize radio stations for indecent broadcasts with the Broadcast Decency Enforcement Act of 2004 ("Act"). 51 The Act was introduced by Congressman Fred Upton, the Republican representing

48. Eddythe Wise, A Historical Perspective on the Protection of Children From Broadcast Indecency, 3 VILL. SPORTS & ENT. L.J. 15, 16-17 (1996) (citations omitted) (discussing Supreme Court rulings). In Wisconsin v. Yoder, 406 U.S. 205, 234 (1972), the Supreme Court ruled that States could not compel Amish parents to send their children to attend formal high school because it violated Amish religious beliefs. See Wise, supra, at n.7. In Ginsberg v. New York, 390 U.S. 629, 640 (1968), the Supreme Court found that "the state has an interest in protecting the welfare of children and safeguarding them from abuses which could prevent their 'growth into free and independent well-developed men and citizens.'" Wise, supra, at n.9 (citations omitted). Also, in Sable, 492 U.S. at 126, the Supreme Court upheld the government's authority to regulate "the content of constitutionally protected speech . . . to promote a compelling interest . . . ." See Wise, supra, at n.10.

49. See Action for Children's Television v. FCC, 58 F.3d 654, 665 (D.C. Cir. 1995), cert. denied, 516 U.S. 1043 (1996) (establishing hours where indecent material can be broadcasted and not subject to penalty). The court held:

The Constitution, however, permits restrictions on speech where necessary in order to serve a compelling public interest, provided that they are narrowly tailored. We hold that section 16(a) serves such an interest . . . . Accordingly, we remand this case to the Federal Communications Commission with instructions to limit its ban on the broadcasting of indecent programs to the period from 6:00 a.m. to 10:00 p.m.

Id. at 669-70.

50. See Parents' Place, supra note 32, ¶ 4 ("Consistent with a federal statute and federal court decisions interpreting the indecency statute, the Commission adopted a rule pursuant to which broadcasts — both on television and radio — that fit within the indecency definition and that are aired between 6:00 a.m. and 10:00 p.m. are subject to indecency enforcement action.").

Michigan’s Sixth District, at the behest of FCC Chairman Michael Powell, Powell asked Congress “to increase current penalties for indecency by tenfold,” and Upton responded.

The House of Representatives received the bill on January 21, 2004. The bill was initially a response to Bono’s use of the word “*cking” at the Golden Globe Awards, and not Janet Jackson’s breast-baring incident during the NFL Super Bowl Halftime show that occurred ten days later. The Janet Jackson incident only increased support for the bill.

The initial form of the Act called for a dramatic increase in fines, as well as other penalties. First, it increased the maximum fine from $27,500 to $275,000 for “each violation or each day of a continuing violation” and up to $3 million for “any single act or failure to act.” Next, the Act received several amendments that:


53. Id. ¶ 3 (“It is well past the time that we clean-up our airwaves. FCC Chairman Michael Powell has asked for Congress to increase current penalties for indecency by tenfold, and my bill will do just that,’ said Upton.”).

54. See id. (stating date of introduction of bill).

55. See id. (stating reason for introduction of bill). Fred Upton scheduled the subcommittee hearing to “examine the FCC's broadcast indecency enforcement policies” following the FCC’s decision regarding Bono’s use of the word “*cking” at the Golden Globe Awards. Id. ¶ 4. ‘‘We must erase the myth that the public is becoming desensitized to indecency over our airwaves,’ said Upton. ‘If we do not give the FCC the ammunition it needs to clean up our airwaves, broadcasters will continue to push the envelope.’’ Id. ¶ 5.

56. See Super Bowl Half-Time Gets Surprise View, UPI (Houston), Feb. 1, 2004, available at LEXIS, Nexis Library, UPI File (search www.lexis.com; follow “News & Business” hyperlink; then search “United Press International” and “Super Bowl”) (reporting Janet Jackson incident at Super Bowl Halftime show). At the end of the show, Justin Timberlake removed a portion of Jackson’s form fitting outfit and revealed her breast. See id. CBS apologized for the occurrence and said it was “not anticipated.” Id.

57. See S. 2401, 108th Cong. § 1084 (2004) (listing findings by Congress to support Act). Congress included in its findings that “[i]n 2004, the FCC received over 500,000 indecency complaints in response to the Superbowl [sic] Halftime show . . . . This is the largest number of complaints ever received by the FCC for a single broadcast.” § 1084(c)(2)(C).

58. See H.R. 3717, 108th Cong. (as introduced to House, Jan. 21, 2004) (proposing increase of maximum fine for single violation to $275,000 and increase of maximum fine for continuing violation to $3,000,000).

59. Id. (“[I]f the violator is determined by the Commission under paragraph (1) to have broadcast obscene, indecent, or profane language, the amount of any forfeiture penalty determined under this section shall not exceed $275,000 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 or failure to act.”)
raised the maximum fine to $500,000; allowed fines for non-licen-
sees who willfully or intentionally utter obscene, indecent, or prof-
ane material in a broadcast; provided deadlines for the FCC to re-
spond to complaints; and required the FCC to conduct a license
revocation hearing for any station convicted of violating the Act
three times during the term of the broadcast license.60 An over-
welling majority of the House of Representatives passed this
version of the Act.61

On February 9, 2004, eight days after the Super Bowl, Kansas
Senator Sam Brownback introduced the Act in the Senate.62 The
version introduced in the Senate was the same as the initial version
introduced in the House of Representatives.63 The Senate also
made revisions before it passed the Act.64 The Senate proposed a
scaling fine for violations where the maximum fine for a first viola-
tion would not exceed $275,000, a second violation would not ex-
ceed $375,000, and any subsequent violations would not exceed
$500,000.65 The Senate also amended the Act to include: requiring
the commencement of license revocation proceedings by the FCC
against stations that are three time violators; allowing the FCC to
fine non-licensed violators up to $500,000 if the violator should
have known the obscene, indecent, or profane material would be
broadcasted; and setting a deadline of 270 days for the FCC to re-
spond to complaints.66 The Senate passed the Act almost unani-
mosly without a floor debate,67 and then sent the Act back to the

60. See H.R. 3717, 108th Cong. (2004) (showing final version as amended by
House of Representatives).

61. See Jonathan Krim, House OKs Higher Fines for Indecency in Broadcasts, OR-
lando Sentinel, Mar. 12, 2004, at A3 (reporting Act passed in House of Repre-
sentatives by vote of 391-22).

62. See S. 2056, 108th Cong. (as introduced to Senate, Feb. 9, 2004) (noting
Senator who introduced bill and date of introduction).

63. Compare id. (illustrating initial version of bill in Senate), with H.R. 3717,
108th Cong. (as introduced to House, Jan. 21, 2004) (illustrating initial versions of
bills).


65. See id. § 102 (detailing scaling fine system for violations).

[T]he amount of any forfeiture penalty determined under this subsection
shall not exceed $275,000 for the first violation, $375,000 for the second
violation, and $500,000 for the third and any subsequent violations, with
each utterance constituting a separate violation, except that the amount
assessed a licensee or permittee for any number of violations in a given 24-
hour time period shall not exceed a total of $3,000,000.

Id.

66. See id. §§ 102(b), 104, 106 (containing additional amendments made by
Senate to Act).

House of Representatives for consideration. They repeated this process until both houses came to an agreement.

The final version of the Act was included in Section 1084 of the National Defense Authorization Act for Fiscal Year 2005 ("NDAA"). Congress provided a list of reasons for the Act including: the overall increase in the number of indecency complaints, the more than 500,000 complaints in response to the Super Bowl Halftime show, and that the current levels of fines do not deter large media companies from broadcasting indecent material.

20040706-040332-8018r.htm ("A bill passed through the U.S. Senate 99-1 with no floor debate . . . .").

68. See Legislative Process: How a Senate Bill Becomes a Law, http://www.senate.gov/reference/resources/pdf/legprocessflowchart.pdf (last visited June 7, 2004) [hereinafter Legislative Process] (discussing legislative process of bills). After the Senate passes a bill, the Secretary of the Senate prepares and signs a final copy of the bill, and it is delivered to the House of Representatives. See id. The House of Representatives must pass the bill before it is returned to the Senate. See id. If the House of Representatives passes the bill without any amendments, the Senate can then enroll it and sign it. See id. Finally, the bill is delivered to the White House to be signed into law. See id.

69. See id. (showing that bill can only be enrolled in Senate if it was not amended by House of Representatives).


71. See id. (containing reasons for Act). Congress made the following findings in Section (c):

(2) Over the same period that there has been significant consolidation in the media industry, the number of indecency complaints also has increased dramatically. The largest owners of television and radio broadcast holdings have received the greatest number of indecency complaints and the largest fines, including:

(A) Over 80 percent of the fines proposed by the Federal Communications Commission for indecent broadcasts were against stations owned by two of the top three radio companies. The top radio company alone accounts for over two-thirds of the fines proposed by the FCC;

(B) Two of the largest fines proposed by the FCC were against two of the top three radio companies;

(C) In 2004, the FCC received over 500,000 indecency complaints in response to the Superbowl [sic] Halftime show aired on CBS and produced by MTV, both of which are owned by Viacom. This is the largest number of complaints ever received by the FCC for a single broadcast;

(D) The number of indecency complaints increased from 111 in 2000 to 240,350 in 2003;

(3) Media conglomerates do not consider or reflect local community standards.

(A) The FCC has no record of a television station owned by one of the big four networks (Viacom/CBS, Disney/ABC, News Corp./Fox or GE/NBC) pre-empting national programming for failing to meet community standards;

(B) FCC records show that non-network owned stations have often rejected national network programming found to be indecent and offensive to local community standards;
The Act retained the proposed fine increase of $275,000, and Congress added a new section allowing the FCC to double the fine if certain aggravating factors are present, such as if the offending material was scripted or if the violation occurred during children’s television programming. The total amount of fines a violator could receive in a 24-hour time period remained capped at $3 million; however, if aggravating factors are present, Congress enabled the FCC to reach that amount with four fines instead of seven.

(C) A letter from an owned and operated station manager to a viewer stated that programming decisions are made by network headquarters and not the local owned and operated television station management;

(D) The Parents Television Council has found that the “losers” of network ownership “are the local communities whose standards of decency are being ignored;”

(4) The Senate Commerce Committee has found that the current fines do not deter indecent broadcast because they are merely the cost of doing business for large media companies. Therefore, in order to prevent the continued rise of indecency violations, the FCC’s authority for indecency fines should be increased and further media consolidation should be prevented.

Id. §§ 1084(c)(2)-(4).

72. See id. § 1084(f) (allowing for increased fines when aggravating circumstances exist). The Act provides in Section (f) that 47 U.S.C. § 503(b)(2)(G) be amended to include:

“(G) The Commission may double the amount of any forfeiture penalty (not to exceed $550,000 for the first violation, $750,000 for the second violation, and $1,000,000 for the third or any subsequent violation not to exceed up to $3,000,000 for all violations in a 24-hour time period notwithstanding section 503(b)(2)(C)) if the Commission determines additional factors are present which are aggravating in nature, including –

“(i) whether the material uttered by the violator was recorded or scripted;
“(ii) whether the violator had a reasonable opportunity to review recorded or scripted programming or had a reasonable basis to believe live or unscripted programming would contain obscene, indecent, or profane material;
“(iii) whether the violator failed to block live or unscripted programming;
“(iv) whether the size of the viewing or listening audience of the programming was substantially larger than usual, such as a national or international championship sporting event or awards program; and
“(v) whether the violation occurred during a children’s television program (as defined in subparagraph (F)(vii)).”

Id. § 1084(f).

73. See id. (doubling maximum fines if aggravating circumstances exist). The Act allows the maximum fine to increase from $275,000 to $550,000 for first violations, from $375,000 to $750,000 for second violations, and from $500,000 to $1,000,000 for third violations when aggravating factors are present. See id. Thus, with normal repeat violations, it takes seven violations to reach the maximum limit of $3 million ($275,000 + $375,000 + $500,000 + $500,000 + $500,000 + $500,000 + $500,000). See id. § 1084(d)(2). When the violations are aggravating, the $3 million limit can be reached with four violations ($550,000 + $750,000 + $1,000,000 + $1,000,000). See id. § 1084(f). The addition of this aggravating factors provision
gess also provided a list of factors for the FCC to consider when determining a violator's degree of culpability, such as whether the target audience is primarily comprised of children.\textsuperscript{74} Fears that the Act would be passed into law caused some broadcasters to make preemptive changes.\textsuperscript{75}

Unfortunately for the Act's supporters, a last minute proposal to tie media ownership to the Act caused Congress to cut it from the NDAA shortly before the NDAA passed, and President George W. Bush signed the NDAA into law.\textsuperscript{76} Despite this setback, indecency increases the FCC's deterrence power, as a few violations can result in major penalties.

74. See id. § 1084(f) (listing factors to determine degree of culpability). The Act provides in Section (f) that 47 U.S.C. § 503(b)(2)(F) be amended to include:

"(F) In the case of a violation in which the violator is determined by the Commission under paragraph (1) to have uttered obscene, indecent, or profane material, the Commission shall take into account, in addition to the matters described in subparagraph (E), the following factors with respect to the degree of culpability of the violator:

"(i) Whether the material uttered by the violator was live or recorded, scripted or unscripted.

"(ii) Whether the violator had a reasonable opportunity to review recorded or scripted programming or had a reasonable basis to believe live or unscripted programming would contain obscene, indecent, or profane material.

"(iii) If the violator originated live or unscripted programming, whether a time delay blocking mechanism was implemented for the programming.

"(iv) The size of the viewing or listening audience of the programming.

"(v) Whether the obscene incident or profane language was within live programming not produced by the station licensee or permittee.

"(vi) The size of the market.

"(vii) Whether the violation occurred during a children's television program (as such term is used in the Children’s Television Programming Policy referenced in section 73.4050(c) of the Commission's regulations (47 C.F.R. 73.4050(c)) or during a television program rated TVY, TVY7FV, or TVG under the TV Parental Guidelines as such ratings were approved by the Commission in implementation of section 551 of the Telecommunications Act of 1996, Video Programming Ratings, Report and Order, CS Docket No. 97-55, 13 F.C.C. Rcd. 8232 (1998)), and, with respect to a radio broadcast station licensee, permittee, or applicant, whether the target audience was primarily comprised of, or should reasonably have been expected to be primarily comprised of, children."

Id. § 1084(f)

75. See McConnell, F-Word, supra note 35, at 3 (reporting effect of Act on broadcasters). Since the FCC reversed the Bono decision, broadcasters have made decisions to scrub portions of their programming. See id. For example, ER decided to blur an 80-year-old woman's exposed breast in one scene, many networks have implemented a five-second or longer delay for live shows, PBS deleted a hint of cleavage from a documentary, and radio DJs have been fired. See id. at 3, 73.

cency legislation is not dead. Both Representative Fred Upton and Senator Sam Brownback have reintroduced proposals similar to the Act in their respective houses now that the 2004 elections are over. With support for indecency regulation still strong, the House of Representatives was able to fast track Upton's bill and pass it unchanged a month later by a vote of 389-38. Meanwhile, the Senate is considering a similar bill, but with a maximum penalty of $325,000 per offense rather than $500,000. "Any differences in the two bills [will] have to be resolved before the legislation can go to President Bush for his signature." It remains to be seen whether the final version of the bill will be closer to the Act or to Upton's more aggressive version, but broadcasters should expect

Act of 2004 from the National Defense Authorization Act for Fiscal Year 2005. See id. ¶ 1. The Act was dropped "when a group of Senators pushed to include a provision that would prevent the FCC from relaxing its media ownership rules." Id. ¶ 2. The reason for this was that the group wanted the elements of media ownership and indecency regulation to move together. See id. ¶ 3. Due to the controversial issue of media ownership, Congress was not prepared to pass the Act at that time, even though there was strong support for increasing the fines. See id. ¶ 7.

77. See id. ¶ 1 (noting Congress's plan to revisit issue when it resumed session after 2004 election season).

78. See Upton Putting Decency Bill Back On Table, ¶ 1, Jan. 5, 2005, http://www.fmqb.com/Article.asp?id=60348 (announcing planned reintroduction by Fred Upton in House of Representatives and Sam Brownback in Senate of indecency provisions that died in 2004). Representative Fred Upton planned to submit a bill similar to the Act, but with harsher penalties. See id. ¶ 2. The new version would raise the maximum indecency fine to $500,000 per incident and apply to both stations and individuals, require a license revocation hearing after three violations, impose a 180 day requirement for FCC action in response to a complaint, and remove the current provision that individuals receive a warning and not a fine for a first offense. See id. Senator Sam Brownback was also expected to introduce a new version of the indecency bill in 2005. See id. ¶ 3.


80. See Press Release, Sam Brownback, Brownback, Lieberman Reintroduce Decency Bill (Jan. 26, 2005) (on file with author), available at http://brownback. senate.gov/pressapp/record.cfm?id=2309708&days=365&, (explaining new version of decency bill introduced in Senate). Senator Joe Lieberman commented on the bill saying, "In a media culture that increasingly pushes the envelope on sex and violence, the role of the FCC is to ensure that broadcasters do not cross that line of decency, . . . . This legislation gives the FCC more leverage to do its job by increasing the consequences of violating our broadcasting standards." Id. ¶ 4.

81. Armars, supra note 79, ¶ 9; see also Legislative Process, supra note 68 (discussing legislative process of bills).

to see the number of fines increase once the House of Representatives and the Senate resolve their legislative differences.  

III. ANALYSIS

A. The Broadcast Community Responds to the FCC and the Act

The threats of heavy fines and license revocations led some media companies to take precautionary measures. For instance, several radio broadcasters have begun censoring their own shows in an effort to avoid drawing the ire of the FCC. Perhaps the greatest challenge for everyone involved is determining what content is suitable for broadcast without reducing the programming to a level fit for school children. This does not mean that all media organizations are accepting the new policy changes without a fight.

On April 19, 2004, a coalition of broadcasters, artists' groups, and media organizations filed a petition asking the FCC to reconsider the Bono ruling that any use of the word "f*ck" is indecent.

83. See Experts Expect FCC to "Ramp Up" Indecency Fight, Nov. 5, 2004, http://www.fmqb.com/article.asp?id=50608 ("FCC staffers believe that with the re-election of George W. Bush, as well as indecency crusader Sen. Sam Brownback (R-KS), the number of fines against broadcasters will 'ramp up' in the near future.").

84. See Jarvis, supra note 1, at 11 (discussing measures taken by media companies in response to Act). Due to the possibility of receiving fines, which would be markedly larger if the Act was passed, Clear Channel dropped the Howard Stern Show from six markets. See id. Also, NPR fired broadcaster Sandra Tsing Loh for accidentally using the word "f*ck." See id. These actions took place before the FCC decided whether or not to fine Clear Channel or NPR. See id.

85. See Lynn Smith, Profanity Rules Bother News Shows, L.A. TIMES, May 6, 2004, at C1 ("[M]any stations have adopted time delays to avoid sanctions.").

86. See Jarvis, supra note 1, at 12-13 (reporting that broadcasters are unsure what qualifies as indecent). The FCC has not been enforcing the indecency rules evenly. See id. at 12. Howard Stern has been the target of $2.5 million in fines out of the $4.5 million proposed since 1990. See id. Stern's most recent fine was in regard to sexual colloquialisms used on his show, but other shows using similar language were not fined. See id. at 12-13. For a further discussion comparing the material aired on the Howard Stern Show with the material aired on other shows, see infra notes 122-27 and accompanying text.

87. See Bill McConnell, Get Ready to Rumble, BROADCASTING & CABLE, July 5, 2004, at 1 [hereinafter McConnell, Ready to Rumble] (describing response of media organizations to FCC's current anti-indecency crusade). After Clear Channel removed the Howard Stern Show from six stations, Infinity Broadcasting stepped in and put the show on nine new stations. See id. at 3. Howard Stern held a press conference to announce this news and stated, "This will teach the FCC a lesson, that we don't give up, . . . . We are going to fight back." Id. at 1. The media companies plan to defend themselves by launching counterstrikes "on three key battlegrounds: the FCC, Congress and the courts." Id. at 3.

88. See Broadcasters Strike Back, NEWSDAY (N.Y.), Apr. 20, 2004, at A28 (reporting broadcasters filing petition); see also FCC's Actions on Indecency are Unconstitutional, Groups Charge, PUB. BROADCASTING REP., Apr. 30, 2004, at 5 [hereinafter FCC's Actions] (reporting broadcasters filing petition). "A coalition of more than 20 broadcasters, artists' and media organizations filed a petition asking the Federal
These groups believe that "the FCC has expanded its authority beyond constitutional limits and that broadcasters are being forced into self-censorship." 89 The FCC is supposed to base their rulings on an evaluation of the broadcast under contemporary community standards, 90 a policy that the coalition claims the FCC is not following. 91 Regrettably for the petitioners, the FCC has no response deadline, but the petitioners will be permitted to take their case to court if the petition is eventually denied. 92

CBS-affiliated TV stations have also expressed their concerns to the FCC about the new policies. 93 Prior to the Bono ruling, many broadcasters believed that the use of foul language in a newscast was protected. 94 "The stations have told the FCC that the agency's 'zero tolerance' policy for on-air obscenities holds live news broadcasts to an impossible standard, considering the unpredictable nature of political demonstrations, sports events and other breaking local news stories." 95 The CBS affiliates have said that some stations may be unwilling to take the risk of having their licenses revoked and will stop airing live news broadcasts outside of the safe harbor hours. 96 While many stations have adopted time delays to edit live

Communications Commission to reconsider a profanity ruling that is part of what some commentators have called a new sexual McCarthyism." Broadcasters Strike Back, supra, at A28. Included in the petition are the Screen Actors Guild and the owners of Viacom and Fox Entertainment Group. See id.


90. See Parents' Place, supra note 32 ("The FCC has defined broadcast indecency as 'language or material that, in context, depicts or describes, in terms patentley offensive as measured by contemporary community broadcast standards for the broadcast medium, sexual or excretory organs or activities.'" (emphasis added)).

91. See Broadcasters Strike Back, supra note 88, at A28 ("The FCC is not applying contemporary community standards [to determine if material is indecent], they are trying to change them.").

92. See id. (noting FCC's procedure for reviewing petitions).

93. See Smith, supra note 85, at C1 (reporting concerns of broadcast news stations with new fines and enforcement procedures). These stations feel that unless the FCC makes exceptions for their form of broadcasting, "live news coverage may be an endangered species." Id.

94. See id. ("Since 1991, when the FCC ruled that National Public Radio's broadcast of a John Gotti interview that included multiple obscenities didn't violate indecency rules, broadcasters had assumed that foul language in a newscast was protected.").

95. Id.

96. See id. (identifying concerns of news shows). The Act would provide the FCC with the power to revoke the licenses of repeat offenders, but unlike scripted entertainment programming, most indecency violations are likely to be from people other than the reporters, such as interviewees and people in the background. See id. As Bob Lee, chairman of CBS said, "Do you want to shoot the messenger . . . ?" Id. For example, at the memorial service for ex-football star and marine Pat Tillman who was killed while serving in Afghanistan, some mourners used ob-
broadcasts, this method does not guarantee that indecent content will be kept off the air.\footnote{97 See \textit{id.} (discussing implementation of time delay for live broadcasts). Time delays allow stations to edit the content of their broadcast before it reaches the listener or viewer. \textit{See id.} When something objectionable is said, it is a person’s job to hit a button that removes the dialog from the broadcast. \textit{See id.} This method is not foolproof, however, because there is an element of human error. \textit{See id.} Also, this may be a hardship for small stations because they will have to employ people to fill these positions during all their broadcasting hours. \textit{See id.}}

Broadcasters and media companies want this issue to reach the Supreme Court where they hope to see the FCC’s current indecency regulations struck down.\footnote{98 See McConnell, \textit{Ready to Rumble}, supra note 87, at 3 (reporting goal of those opposed to Act and FCC crackdown).} The foundation for their argument rests on First Amendment rights combined with the belief that the FCC guidelines are “confusing and ambiguous.”\footnote{99 See \textit{id.} (noting basis of argument by those opposed to FCC indecency enforcement). For a further discussion of the First Amendment and constitutionality, see infra notes 151-74 and accompanying text.} A review of the FCC’s recent history shows that it has been very inconsistent in enforcing its indecency policy, and broadcasters do not know what qualifies as indecent material other than the word “\textit{f*ck}.”\footnote{100 See \textit{id.} (recounting various decisions by FCC regarding indecency fines). The only word that the FCC has definitively ruled off-limits is “\textit{f*ck},” which occurred on March 18, 2004. \textit{See id.} Prior to that, the FCC had been inconsistent with fines. \textit{See id.} In January 2002, the FCC rescinded a proposed fine for playing an unedited version of Eminem’s “The Real Slim Shady” on the radio. \textit{See id.} Additionally, in November 2002, the FCC decided to rescind a fine for broadcasting an unedited version of Sarah Jones’s “Your Revolution.” \textit{See id.} During October 2003, the FCC declared Bono’s use of the word “\textit{f*ck}” on live television as “fleeting” and, therefore, “not indecent.” \textit{Id.} As stated above, this decision was reversed after a massive campaign by the PTC that flooded the FCC with a “massive email campaign.” \textit{See id.} Thus, with the FCC regularly proposing and backing away from fines, and conversely not proposing fines and then instituting them, it is difficult for broadcasters to discern any rational method to the FCC’s policies. \textit{See id.}}

Industry lawyers believe that the Bono incident would be a good test case to challenge the FCC’s current policies.\footnote{101 See Jube Shiver Jr., \textit{Test of Decency Rules Likely}, \textit{L.A. Times}, Feb. 22, 2005, at C1 (discussing advantages of using Bono’s Golden Globe incident as legal test case against FCC to force FCC to define indecency rules more clearly).} They argue that in addition to the indecency standards’ vagueness, special interest groups have too much power.\footnote{102 See \textit{id.} (“The murky rules also provide an opening, broadcasters believe, for such groups as the Parents Television Council, a Los Angeles organization responsible for the vast majority of indecency complaints received by the FCC. Critics say the group exerts undue clout in prodding regulators to act on specious cases.”).} The lawyers claim that the FCC’s reversal of the Bono ruling shows that “the FCC was driven...
more by public outcry than by an application of federal rules."^{103} If the Supreme Court does hear such a case, defenders of the First Amendment are confident that the Supreme Court will require the FCC to create more specific guidelines.^{104}

B. The "King of All Media" Speaks Out

Howard Stern ("Stern") may be the most recognizable figure of this indecent broadcasting controversy.^{105} Stern, the self-proclaimed "King of All Media," has been a vocal spokesman for free speech.^{106} Stern believes that the FCC's new indecency crackdown is a "witch hunt."^{107} Despite the extra attention Stern is receiving, he says that he will not give up and plans to fight back.^{108}

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103. Id.

104. See id. (quoting communications lawyer Kurt A. Wimmer that "the government is more vulnerable to an indecency challenge than they've ever been before"); see also McConnell, Ready to Rumble, supra note 87, at 3 ("First Amendment defenders are optimistic that they'll get a favorable hearing at the Supreme Court. Just last week, the high court blocked enforcement of Internet-porn restrictions, ruling that the government must use 'the least restrictive means' to protect children."). First Amendment lawyers are fairly confident because they believe that the constitutionality of the indecency rules has "never been thoroughly challenged." McConnell, Ready to Rumble, supra note 87, at 3. They contend that the 2001 FCC guidelines are too confusing and ambiguous, "which the courts typically condemn." Id.

105. See McConnell, Ready to Rumble, supra note 87, at 1 (noting Howard Stern's role in FCC's indecency crackdown).

106. See id. ("Howard Stern . . . claimed another title: Defender of Free Speech.").


This is not a surprise. This is a follow up to the McCarthy type "witch hunt" of the administration and the activities of this group of presidential appointees in the FCC, led by "Colin Powell Jr." and his band of players.

They and others (a senator from Kansas City to a congresswoman from New Mexico) are expressing and imposing their opinions and rights to tell us all who and what we may listen to and watch and how we should think about our lives. So this is not a surprise.

It is pretty shocking that governmental interference into our rights and free speech takes place in the U.S. It's hard to reconcile this with the "land of the free" and the "home of the brave". I'm sure what's next is the removal of "dirty pictures" like the 20th century German exhibit in a New York City Museum and the erotic literature in our libraries; they too will fall into their category of "evil" as well.

Id. ¶¶ 1-3.

108. See McConnell, Ready to Rumble, supra note 87, at 1 ("[Having the Howard Stern Show played on nine new radio stations] will teach the FCC a lesson, that we don't give up. . . . We are going to fight back.").
Clear Channel removed Stern’s radio show from several markets as a result of the FCC’s crackdown.109 The removal did not last long, however, because Infinity Broadcasting picked the show up on its stations in four of the six markets where Clear Channel dropped it, as well as added it in five new markets.110 Yet, the number of stations broadcasting the Howard Stern Show is only part of the concern.111

Stern feels that the potential for the FCC to impose millions of dollars in fines years after the actual event takes place is too big a burden for broadcasters.112 This pressure led Stern to make an agreement with Sirius Satellite Radio to carry his show once his current contract expires at the end of 2005.113 With this move, Stern will be beyond FCC control because the FCC does not have the power to regulate satellite radio broadcasts.114 Also, the FCC does not have any plans to extend its regulatory power to include satel-

109. See Jarvis, supra note 1, at 11 (indicating Howard Stern Show was dropped by Clear Channel from six stations).
110. See McConnell, Ready to Rumble, supra note 87, at 3 (stating Infinity Broadcasting’s support of Howard Stern).
111. See Jarvis, supra note 1, at 13-14 (discussing other concerns about FCC indecency crackdown and Act). Stern maintains that the fines were really a result of his political criticisms of President George W. Bush. See id. at 13. After the fines were issued, Stern used a lot of his airtime to focus on politics. See id. Stern tried to sway voters away from Bush because he believed that the Act would not be part of a different president’s agenda, and “MTV News [said] Stern could have a bigger impact on the election than Ralph Nader.” Id. at 13. If the FCC continues to fine Stern and imposes the new maximum fines provided by the Act, then Stern’s “political speech will have been forced off the airwaves . . . under government pressure.” Id. Government limitations on free speech are Stern’s greatest concern. See Howard’s Response, supra note 107.
112. See Jarvis, supra note 1, at 13 (describing Stern’s unease about Act if signed into law). The FCC can impose fines years after the acts occurred. See id. Stern could pile up numerous fines, especially with the FCC’s ambiguous guidelines, because much of Stern’s show contains questionable material. See id. Under the Act, these fines could range into the millions before they are aggregated across the number of stations that broadcasted the material. See id. “No company can stand up to this kind of government pressure,” [Stern] says. “I can’t take the pressure that they’re going to fine me personally every day.” Id.
113. See Howard Stern Making Jump to Satellite Radio, Oct. 6, 2004, http://www.msnbc.msn.com/id/6190117 [hereinafter Satellite Radio] (reporting Stern’s contract with Sirius Satellite Radio). On October 6, 2004, Howard Stern announced that he would be leaving his nationally syndicated morning radio show once his contract with Infinity Broadcasting expires. See id. ¶ 3. Stern is making the move to Sirius, because on satellite radio he will be able to “bring my fans my show my way.” Id. ¶ 1. Stern is “tired of the censorship,” and Sirius will broadcast his show in every market across the country. See id. ¶¶ 3-4. Put simply by Stern, “The FCC . . . has stopped me from doing business.” Id. ¶ 6 (ellipsis in original).
114. See id. ¶ 7 (“Like cable television, satellite radio is not subject to federal indecency scrutiny because it is available only to paid subscribers.”).
lite radio broadcasts,\(^\text{115}\) much to the chagrin of terrestrial radio station owners.\(^\text{116}\)

Stern has also claimed that he is being targeted due to his political criticisms of President George W. Bush.\(^\text{117}\) Stern believes that the Bush administration is using its connection with Clear Channel and the FCC to force him off the air.\(^\text{118}\) Stern’s conspiracy theory may be flawed because the legislation has bipartisan support,\(^\text{119}\) and some of Stern’s material contains questionable content that could

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115. See Jennifer C. Kerr, FCC Declines to Censor Satellite Radio, ¶ 2, Dec. 16, 2004, http://www.cbn.com/CBNNews/wire/041216f.asp (discussing FCC rejection of request to impose indecency standards on satellite radio); Powell not Interested in Censoring Satellite Radio, Jan. 7, 2005, http://www.fmqb.com/Article.asp?id=60811 [hereinafter Powell not Interested] (“FCC Chairman Michael Powell said at the Las Vegas Consumer Electronics Show that the U.S. government has no interest in imposing restrictions on satellite radio.”). “Saul Levine, who owns three radio stations in California, asked the commission in October to modify its satellite radio rules to include an indecency provision similar to the one that governs broadcast stations using public airwaves.” Kerr, supra, ¶ 3. In its rejection letter, the FCC wrote: “‘The commission has previously ruled that subscription-based services do not call into play the issue of indecency.’” Id.

116. See Should All Radio Be Created Equal?, Nov. 11, 2004, http://www.fmqb.com/Article.asp?id=55502 [hereinafter Created Equal] (describing Saul Levine’s petition to FCC to include indecency provision in rules governing satellite radio); Powell not Interested, supra note 115 (“Powell dismissed notions that broadcast radio operators will suffer unless satellite radio stations are subjected to the same content restrictions as terrestrial radio.”). Levine argued in his petition that “satellite radio is not heard exclusively by subscribers,” and therefore “it should be subject to the same rules as terrestrial radio.” Created Equal, supra, ¶ 1. Satellite radio’s defense to having indecency regulations imposed on its programming is “that they’re 100% subscription.” Id. Yet as Levine pointed out, satellite radio is made available in some car rentals without any charge or controls on it. See id. So families who rent such equipped vehicles are able to get satellite radio without purchasing a subscription, and this makes it “available to minors.” Id. What Levine fails to note, however, is that an adult is required to rent a car and has the ability to supervise use of the radio. See, e.g., Hertz - Qualifications & Requirements, https://www.hertz.com/rentacar/byr/index.jsp?targetPage=RentalQualificationsView.jsp?KEYWORD=AGE (last visited Oct. 15, 2005). As for adults, they have the option of accepting the known risk of listening to uncensored satellite broadcasts, or they can choose to listen to regular broadcast radio, a CD or tape, or simply nothing at all.

117. See Jarvis, supra note 1, at 13 (discussing Stern’s claim that he is being targeted for his political speech). On February 23, 2004, Stern discussed Al Franken’s book Lies and the Lying Liars Who Tell Them. See id. Stern said “If you read this book, you will never vote for George W. Bush. I think this guy is a religious fanatic and a Jesus freak, and he is just hellbent [sic] on getting some sort of bizarro agenda through.” Id. Stern’s show returned to sexual and racial talk the next day when he interviewed Rick Solomon, the costar in the Paris Hilton sex video. See id. Two days later, Clear Channel dropped Stern’s show from their stations. See id.

118. See id. at 13 (discussing Stern’s accusations against Bush administration).

qualify as indecent under the FCC's current murky guidelines.\textsuperscript{120} There is no denying, however, that the \textit{Howard Stern Show} has seen its share of fines while other allegedly indecent broadcasts have escaped FCC scrutiny.\textsuperscript{121}

Stern maintains a list on his website of several instances where other broadcasters have aired indecent material, and he suggests that visitors report them to the FCC to see if it will respond.\textsuperscript{122} The most shocking instance may be an episode of the \textit{Oprah Winfrey Show} that broadcasted several graphic descriptions of sexual acts.\textsuperscript{123} Stern refrained from playing unedited excerpts of Oprah’s show out of fear he would receive huge fines.\textsuperscript{124} “Oprah was deemed too racy and risky for Stern.”\textsuperscript{125} The content of that \textit{Oprah Winfrey Show} and the content of the \textit{Howard Stern Show} that the FCC fined are strikingly similar.\textsuperscript{126} When asked if the FCC is doing anything

\begin{enumerate}
\item See Jarvis, \textit{supra} note 1, at 13 (discussing Stern’s conspiracy theory and how Stern’s show known for its edgy content).
\item See id., at 12 (stating FCC has proposed “\$4.5 million in fines . . . \$2.5 million of that against Stern (with reports of another \$1.5 million coming) . . .”).
\item See Complain to the FCC, http://www.howardstern.com/fcc.html (last visited June 7, 2004) (listing examples of indecency on other shows that FCC has not fined). The website provides a link to the FCC complaint form and lists the following instances as reportable: Mary J. Blige’s use of the word “sh*t” on \textit{60 Minutes}; \textit{Good Day New York}’s use of the word “F*ck”; Ryan Seacrest’s use of the word “F*ck” on \textit{KIIS-Los Angeles}; graphic sex talk and a guest saying “tits” on the \textit{Oprah Winfrey Show}; Simon Cowell flinging his middle finger; and graphic descriptions of sex on both the \textit{Regular Guys Show} and the \textit{Elliot In The Morning Show}. See id.
\item See id. (listing \textit{Oprah Winfrey Show}’s possible indecency violation).
\item See Richard Roeper, \textit{By FCC Standards, Oprah More Dangerous than Stern}, \textit{Chi. Sun-Times}, Mar. 24, 2004, at 11 (discussing why Stern could not play Oprah clip). “One morning last week, the general manager for the flagship station of Howard Stern’s radio show told Stern not to play an excerpt from ‘Oprah’ because the salacious content could result in a massive fine from the FCC.” \textit{Id.} After examining the Oprah Show transcripts, Roeper sadly believes “the GM made the correct call, given the current reactionary environment.” \textit{Id.}
\item See \textit{Oprah & Howard Transcripts: Oral, Anal & Balloon Knots}, http://www.howardstern.com/oprah.php (last visited June 7, 2004) (detailing content of \textit{Howard Stern Show} that was fined and \textit{Oprah Winfrey Show} that was not fined). The website points out two clips from an \textit{Oprah Winfrey Show}, which the FCC has not fined, and aired on March 18, 2004. They are:
\begin{enumerate}
\item \textbf{Clip One}

  Oprah: Lets [sic] talk about that secret language Michelle.

  Michelle: Yes

  Oprah: I didn’t know any of this

  Michelle: I have yea, I have gotten a whole new vocabulary let me tell ya

  Oprah: I did not know any of this

  Michelle: Salad tossing, cucumbers, lettuce tomatoes ok

  Oprah: ok so so what is a salad toss?

  Michelle: ok a tossed salad is, get ready hold on to your underwear for this one, oral anal sex, So oral sex with the anus is what that would be.

\item \textbf{Clip Two}

  Oprah: I didn’t know any of this

  Michelle: I have yea, I have gotten a whole new vocabulary let me tell ya

  Oprah: I did not know any of this

  Michelle: Salad tossing, cucumbers, lettuce tomatoes ok

  Oprah: ok so so what is a salad toss?

  Michelle: ok a tossed salad is, get ready hold on to your underwear for this one, oral anal sex, So oral sex with the anus is what that would be.
\end{enumerate}
\item Id.
\end{enumerate}
Michelle: a rainbow party is an oral sex party it’s a gathering where oral sex is performed and rainbow comes from all of the girls put on lipstick and each one puts her mouth around the penis of the gentleman or gentlemen who are there to receive favors and makes a mark um in a different place on the penis hence the term rainbow.

Id. Meanwhile, the Howard Stern Show clip from July 26, 2001 that the FCC has only recently fined is:

Howard Stern (“HS”): I said to Mark Wahlberg yesterday, had he ever gotten a blumpkin from a girl and everyone around here is acting like they don’t know what it is.

Robin Quivers (“RQ”): You’re the only nutcase who does.

Male Cast Member (“MV”): I said “blumpkin” on the “Norm Show” and the network censor, we told him we just made the word up. He goes, “that’s definitely not a real word right?” We go, no, no, no. And I said it, I yelled out at a hooker in a cab.

HS: What do you say to her, “how about a blumpkin?”

MV: I go “honey, how much for a blumpkin?”

HS: Right.

MV: And uh the network censor never heard of it. And he goes if you just made it up it’s fine but if it’s a real thing we can’t have it. So it’s aired, it’s been on ABC, it’s like the dirtiest thing ever on television.

HS: Yeah, but nobody knows what it is. A blumpkin? I can explain it cleanly.

RQ: There’s nothing clean about a blumpkin.

HS: Well, a blumpkin is receiving oral sex while you’re sitting on a toilet bowl if you are a man. You’re sitting on a toilet bowl and uh, while you’re evacuating you receive your oral.

RQ: Ick.

HS: And uh, then, what did I say yesterday too you didn’t understand? Balloon knot?

RQ: Yes, I don’t know what that is. Somebody said to me “is that the funniest thing ever?” and I was like “what is that?”

HS: A balloon knot?

RQ: I didn’t want to show my ignorance, I laughed too.

HS: A balloon knot? I’m gonna post these on a web site?

RQ: Yeah, we need a dictionary for this show.

HS: A balloon knot is when you bend over and I can see up right up your old?

RQ: Up the wazoo?

HS: Up the wazoo and uh, you know that’s a balloon knot that you see. That’s called a “balloon knot.”

RQ: Really, I did not know that.

HS: Think about it, it looks like a balloon knot.

RQ: I don’t know. Oh? [Y]ou know what?

HS: Tie up a balloon.

RQ: I’m just thinking of a balloon knot?

MV: It all makes sense, Robin, come on.

HS: And uh, what else did I say? “Nasty Sanchez,” you didn’t know what that was.

RQ: Oh, I don’t even want to know half the time what these things are?

HS: That I’d have to post on the internet.

RQ: ‘Cause there’ve been a number of terms used lately. Would you do? ‘cause KC’s always blurtin’ them out.

HS: “Strawberry shortcake”

RQ: “Strawberry shortcake” I’ve never heard of. “Dirty Sanchez”

HS: “Nasty Sanchez.”

RQ: What is the others KC?
about the Oprah broadcast, FCC Commissioner Michael Powell said "he [could not] discuss individual cases. But . . . 'if there's an Oprah case, it's pending' so it can't be said 'we haven't done it.'" Until the FCC starts taking action against these other broadcasters, the FCC's motives remain questionable.

C. Chairman Michael Powell and the Commissioners

Former FCC Chairman Michael Powell started the FCC's current charge against indecency. Powell, once a large supporter of minimal governmental intrusion, has flip-flopped and now believes that the government should regulate the "public's acceptance or rejection of program content." While Powell claimed the move was in response to his and the public's outrage over the Janet Jackson incident, some believe that it was really an attempt to win

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MV: I heard a new one the other day. It was the "David Copperfield."
HS: That's right.
MV: Okay, do you want to explain it, since I . . . When you're goin' like a dog?
HS: Right.
MV: [I]nd you're about to finish and instead you don't finish, you spit on her and then you turn around and when she turns her face around then you go? So it's kind of like an illusion?
HS: Right.
MV: to David Copperfield.
RQ: Sleight of hand.
HS: Misdirection.
MV: Classic misdirection.
HS: You trick her. There's a million of them, but uh, I'll post them on the web.
RQ: Yes, because people need to know. These aren't in the regular dictionary.

Id. (ellipsis in original).


128. See Brownback, supra note 3, ¶ 7 ("In recent testimony in the House and Senate, FCC Chairman Michael Powell, whose agency is responsible for policing indecent and obscene broadcasts, asked Congress to increase by a factor of 10 the maximum statutory forfeiture amounts specified in the Communications Act.").


130. See id. (indicating claimed reason for FCC's change in policy). Powell targeted the Janet Jackson incident as the reason for the FCC's sudden attack on indecency. See id. Powell "cited the 200,000 complaints to his agency" as an important reason for FCC action. Id. These complaints, though, only represent approximately 0.14% of the viewing audience because the Super Bowl was watched by about 140 million people. See id. With the FCC indecency standard being the "contemporary community broadcast standards," it is difficult to see how the offended 0.14% represent the standards of "an average broadcast viewer or listener
back political favor after his botched effort to deregulate media.\textsuperscript{131} Either way, the Michael Powell of 2004 was far different from the Michael Powell of just a few years prior.\textsuperscript{132}

Powell's stance on governmental involvement was very different before the push to curtail indecent broadcasts.\textsuperscript{133} As an FCC Commissioner, Powell said, "[The] government has been engaged for too long in willful denial in order to subvert the Constitution so that it can impose its speech preferences on the public—exactly the sort of infringement of individual freedom the Constitution was masterfully designed to prevent."\textsuperscript{134} He did not "want the government as [his] nanny."\textsuperscript{135} Powell even received an award from the Media Institute for his defense of the First Amendment.\textsuperscript{136}

When Powell first became FCC Chairman, he continued to support a hands-off approach to government regulation.\textsuperscript{137} Powell believed that the marketplace was the solution for all media-related problems.\textsuperscript{138} Put simply, if people are not buying what is being sold, then the sellers will be driven out of the marketplace.\textsuperscript{139} Powell, however, no longer believes that the marketplace is capable of dealing with indecency\textsuperscript{140} so he set the FCC on a course of regul-

\begin{itemize}
  \item[131.] See Jarvis, supra note 1, at 13 ("It's about FCC chairman Powell's efforts to win back political favor after he mucked up his media deregulation effort and attracted the wrath of the many who apparently hate big American Media."); see also Mink, supra note 129, at 1J ("Powell professed outrage over Jackson's fleeting exposure . . . and shoved aside the issue of media gargantuitis to make way for an indecency crisis.").
  \item[132.] See Jarvis, supra note 1, at 13 ("Powell has flip-flopped on the First Amendment and media regulation."); see also Mink, supra note 129, at 1J ("Powell's hypocrisy is blindingly obvious.").
  \item[133.] See Jarvis, supra note 1, at 13-14 (detailing Powell's original stance on government involvement).
  \item[134.] Id. at 13-14.
  \item[135.] Id. at 14.
  \item[136.] See id. at 14 ("In 1999, [Powell] accepted the Media Institute's Freedom of Speech Award with a stirring defense of the First Amendment: 'We should think twice before allowing the government the discretion to filter information to us as they see fit.'").
  \item[137.] See Mink, supra note 129, at 1J (discussing Powell's original approach to government regulation as FCC Chairman).
  \item[138.] See id. ("Before Feb. 1, the chairman's two-word mantra was 'the marketplace.' Whatever the problem – media concentration, innovation, consumer service, competing claims to bandwidth, new telecommunications technologies, economic viability, price-gouging – the marketplace was the solution.").
  \item[139.] See Roeper, supra note 124, at 11 ("In the free marketplace, you're welcome to say whatever you like, but if the people don't want to buy what you're selling, no whines.").
  \item[140.] See Mink, supra note 129, at 1J ("After Feb. 1, . . . Powell and his fellow travelers declared the marketplace impotent in the one arena where its judgments
\end{itemize}
ing the content of speech. Rather, Powell says he was just carrying out his duty as FCC Chairman.

In January 2005, just one day after President George W. Bush took the oath of office for his second term, Powell announced that he would resign from the FCC in March. His resignation letter read, "Having completed a bold and aggressive agenda, it is time for me to pursue other opportunities . . . ." The news of their exit leaving office delighted some in the media industry, but this enjoyment may be misplaced and short-lived. Chairman Powell was more conservative with fines than FCC Commissioners Kevin Martin, Michael Copps, and Jonathon Adelstein would have been. President George W. Bush was advised to appoint a chairman who would continue Powell’s agenda, and so he selected

should count most and where government meddling should occur least: the public’s acceptance or rejection of program content.

141. See Jarvis, supra note 1, at 14 (discussing Powell’s embracing of government content regulation).

142. See Powell Says FCC is Devising Ways to Deal with 15% Problem, COMMS. DAILY, May 5, 2004, at 2 (explaining Powell’s view on FCC’s actions). Powell does not see anything wrong with the FCC’s new position of regulating content. See id. In response to accusations of censorship, Powell argued semantics. See id. “He said that censorship is prior restraint, such as needing advance approval for content.” Id. He went on to say that it is the FCC’s “duty to respond to public complaints involving indecency over the public airwaves and the Commission went from having 111 complaints in 2000 to 540,000 in 2004.” Id.

143. See Jarvis, supra note 1, at 14 (“I do not have the luxury of ignoring my duty to enforce the statute because owners might react with excessive conservatism.”).


145. Id. ¶ 4.

146. See Peter J. Howe, Powell to Quit Top FCC Post, BOSTON GLOBE, Jan. 22, 2005, at E1 (quoting Howard Stern as saying, “Thank God he’s gone,” and NBC President Jerry A. Zucker, “[Powell’s resignation] gives us hope that there can actually be a new agenda . . . .”).

147. See FCC Commissioner Adelstein: Judgment is a “Regulatory Malfunction.”, ¶¶ 4-7, Sep. 22, 2004, http://www.fmqb.com/article.asp?id=40910 (discussing complaints by three of four FCC Commissioners about inadequacy of fine for Janet Jackson Super Bowl incident); FCC Denies Infinity Appeal, supra note 37, ¶¶ 4-5 (reporting opinions of Commissioners that fine for broadcast of Detroit’s Deminski and Doyle Show on January 9, 2002 was inadequate); KNDD/Seattle Indecency Fine, supra note 37, ¶ 2 (reporting that even though fine for Andy Savage Show was upheld, Commissioner Copps dissented and called penalty inadequate); FCC Fines Radio, Lets TV off the Hook, ¶¶ 2-7, 9, Nov. 25, 2004, http://www.fmqb.com/article.asp?id=55201 (reporting that Commissioners disagreed about whether several complaints dismissed by Powell violated indecency statute).

148. See Howe, supra note 146, at E1 (“Given Bush’s crucial reelection support from so-called red state moral values voters, the new FCC chairman will also be expected to use his pulpit to pressure broadcasters to curb profanity and nudity.”);
Commissioner Kevin Martin to be the next FCC chairman.\textsuperscript{149} It will not be surprising if the amount of fines in 2005 well exceeds the $7.7 million handed out in 2004.\textsuperscript{150}

President Bush Urged to Appoint Anti-Indecency FCC Chairman, \textsuperscript{¶} 1, Feb. 8, 2005, http://www.fmqb.com/Article.asp?id=66358 [hereinafter President Bush Urged] ("In a letter delivered to the White House, President Bush is being urged by more than thirty House Republicans to appoint a new FCC chairman who will take a tough stance on indecent material they feel is permeating the American airwaves."). The full letter sent to the White House reads:

With the resignation of FCC Chairman Michael Powell, there is a unique opportunity to fill this vacancy with someone who will remain strong on enforcement of current indecency standards. We would like to stress our belief in the need for a Chairman who will continue to uphold the laws passed by Congress and continue to crack down on patently offensive material on public airwaves.

Congress and the Administration made great strides over the last four years, under your leadership, in enforcing our nation's obscenity, child pornography, and indecency laws. This material had bombarded our nation's airwaves and the Internet for much too long with little enforcement. While we acknowledge the importance of parental control over children's viewing habits, Hollywood and certain media companies work to ensure that children are exposed to it whether they or their parents like it or not. Yet, under pressure from the enforcement of these laws, they have finally acknowledged that when using the public airwaves, they are not immune from the law.

Specifically within the last year, indecency fines have been enforced by your Administration, sending a clear signal that Americans will no longer stand for such images to invade their homes. While opponents believe that the enforcement of such standards is detrimental, Chairman Powell stated it best when he said, 'Berating citizens who believe in values and reasonable limits is insulting and polarizing and distracts from the legitimate issues of this policy debate.' It is important that these policy debates continue, and include concepts such as issuing fines based upon each utterance, enforcing the prohibition on 'profanity' over the airwaves, and emphasizing industry self-regulation.

The FCC has been entrusted with promoting the public interest with respect to our public airwaves, and as such, should firmly enforce our federal decency laws, applying the plain meaning of the statute, and the Congressional intent behind the statute. The next FCC Chairman will oversee an important time in our nation's history, and they must be ready to aggressively enforce the laws that Congress has passed. We encourage you to nominate an individual of boldness, strength, and vision, who will continue the work already begun. We must not let immorality become normalized, nor federal laws ignored.

Thank you for your continued leadership and we look forward to working with you on this important issue.

President Bush Urged, supra, \textsuperscript{¶} 2-6.

149. See Martin Named FCC Chairman, Mar. 16, 2005, http://www.fmqb.com/article.asp?id=72885 ("President Bush has chosen Kevin Martin to replace Michael Powell as Chairman of the Federal Communications Commission. Martin, a Republican from North Carolina, has served as an FCC Commissioner since 2001."); see also Shiver, supra note 101, at C1 (noting Kevin Martin is "considered tough on indecency").

150. See Lombardo Cites, supra note 2, \textsuperscript{¶} 4 ("[L]ast year the FCC dropped a record $7.7 million in indecency fines against broadcasters . . . .").
D. What about Constitutionality and the First Amendment?

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." Many of the people protesting the FCC crackdown and the Act claim that the FCC is violating the Constitutional guarantee of freedom of speech. These groups maintain that combining legislation like the Act with the FCC crackdown will result in a major chilling effect on free speech. "The [FCC's] harsh new policy has sent shockwaves through the media industry, forcing broadcasters to censor speech that is protected by the First Amendment."

The Supreme Court has upheld the right to broadcast indecent material because the material warrants constitutional protection. Additionally, the Supreme Court has allowed the FCC's rules for indecency to stand. A problem that broadcasters now face is that the FCC does not seem to follow its own established guidelines for determining whether material in a broadcast is indecent. The FCC has declared the word "f*ck" indecent in any context, but according to its own website: "In making indecency determinations, context is key! The FCC staff must analyze what was actually said during the broadcast, the meaning of what was said, and the context in which it was stated." Such contradictions make it difficult for broadcasters to make programming decisions.

152. See FCC's Actions, supra note 88, at 5 (stating constitutional claims against Act).
153. See id. (discussing claimed chilling effect on free speech including NBC Chairman Bob Wright's comment that Act is "just vague and punitive enough to cause talented writers, producers and actors to flee broadcast television"); see also Satellite Radio, supra note 113 (reporting Stern plans to leave broadcast radio due to FCC regulation); Jarvis, supra note 1, at 11 (discussing issue of free speech and chilling effects of Act).
154. FCC's Actions, supra note 88, at 5.
155. See FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) (holding indecent material is entitled to protection under First Amendment). For a further discussion of Pacifica, see supra note 42.
156. See Pacifica, 438 U.S. at 742 (holding that Supreme Court's review was limited to question of whether FCC has authority not FCC's construction of statute).
157. See McConnell, Ready to Rumble, supra note 87, at 3 ("[T]he FCC's 2001 guidelines for broadcast stations are confusing and ambiguous . . . .").
158. See Jarvis, supra note 1, at 12 ("Now the F-word in any context or syntax is officially profane. That is wholly new.").
159. Parents' Place, supra note 32, ¶ 1.
160. See John Eggerton, Freedom Under Fire, BROADCASTING & CABLE, July 5, 2004, at 3 (showing instances of FCC indecisiveness, such as rescission of proposed
Protesters believe that they have a strong case against the guidelines because the fining standards are vague and overly broad.\(^{161}\) This "allows subjective FCC enforcement and forces broadcasters to restrict their expression to what is unquestionably safe."\(^{162}\) If the Supreme Court does hear their case, it will be difficult for the current definition of indecency to survive the analysis used in *Reno v. ACLU*, 521 U.S. 844 (1997), as illustrated below.

In *Reno*, the Supreme Court looked at the Communications Decency Act of 1996 ("CDA") and found it unconstitutional.\(^{163}\) The Supreme Court believed that Congress drafted the CDA in such a manner that it would have a chilling effect on free speech and was so broad that it would punish those who were entitled to constitutional protection.\(^{164}\) The FCC's declaring of the word "f*ck" indecent in any context\(^{165}\) violates *Reno*'s reasoning because anyone using the word is punished regardless of culpability.\(^{166}\) Ad-

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\(^{161}\) See Shiver, *supra* note 101, at C1 (detailing protestors beliefs that if Supreme Court hears them, FCC guidelines will be struck down).

\(^{162}\) *FCC's Actions*, *supra* note 88, at 5 (stating problem with current guidelines).

\(^{163}\) *See Reno*, 521 U.S. at 870-72 (1997) (holding CDA was unconstitutional because it violated First Amendment).

\(^{164}\) *See id.* at 871-72 ("[T]he CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."). The Court went on to say: [T]he CDA thus presents a greater threat of censoring speech that, in fact, falls outside the statute's scope. Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.

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We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

*Id.* at 874.

\(^{165}\) *See McConnell, Ready to Rumble*, *supra* note 87, at 3 (stating only defined ruling set forth by FCC).

\(^{166}\) *See, e.g.*, *Reno*, 521 U.S. at 871-72 (finding statute unconstitutional because constitutionally protected speech can be punished under statute's terms). The *Reno* Court reasoned, "Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our Pacifica opinion, or the consequences of prison rape would not violate the CDA?" *Id.* at 871.
ditionally, the *Reno* Court reiterated that although the speech may be offensive to some, or even to society, that does not mean the speech should be suppressed.167 The *Reno* Court stated that the government may not reduce the content available to the general population to only that which is fit for children,168 and children are a major motivation for the indecency crackdown.169

Unlike the FCC and its definition of indecency, Congress has a strong argument in defense of any legislation it passes that is similar to the Act because Congress can argue the legislation does not regulate the content of speech, but instead only aids the FCC in its enforcement capacity.170 While this is facially true, the reality is that the legislation will be combined with the current FCC guidelines that allow the FCC to regulate the content of speech.171 Fears arising from this combination have been responsible for the firing of broadcasters and the chilling of speech across the nation.172 Thus, any legislation akin to the Act serves the functions of both regulating and burdening speech, regardless of whether the legislation itself contains any specific provision to allow so.173 Therefore, the Supreme Court would likely find the Act, the FCC guidelines, or both, invalid and allow enforcement only by the least restrictive means necessary.174

167. See id. at 875 (quoting FCC v. Pacifica Found., 438 U.S. 726, 745 (1978)) ("Indeed, Pacifica itself admonished that 'the fact that society may find speech offensive is not a sufficient reason for suppressing it'.").

168. See id. (quoting Sable Commc'ns, Inc. v. FCC, 492 U.S. 115, 128 (1989)) ("As we have explained, the Government may not 'reduce the adult population... to reading only what is fit for children'.").

169. See S. 2401, 108th Cong. § 1084(f) (2004) (providing possible aggravating factor if "the violation occurred during a children's television program"); see also Upton Introduces Bill, supra note 52, ¶ 5 ("As a father of two young children, I especially find the increasing amount of filth on our airwaves objectionable.").

170. See S. 2401, 108th Cong. § 1084(b) (2004) ("The purpose of this section is to increase the Federal Communications Commission's (FCC) authority to fine for indecent broadcasts and prevent further relaxation of the media ownership rules in order to stem the rise of indecent programming.").

171. See Jarvis, supra note 1, at 12-13 (stating FCC's ability to regulate content under current rules).

172. See id. at 11 (discussing firing of Sandra Tsing Loh, Clear Channel dropping Stern from six stations, and use of delays during live shows).

173. See id. at 11, 13-14 (noting effect from threat of heavy fines is having on broadcasters and free speech).

174. See Reno v. ACLU, 521 U.S. 844, 874 (1997) (stating if burden on adult speech is present, then it is unacceptable "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve").
E. Are There Other Means to Police Indecency?

When it comes to dealing with potentially offensive content being broadcasted over the air, the usual solution suggested is: if you do not like it, then you should not watch it or listen to it.\textsuperscript{175} This is the "change the channel" theory of regulating indecent material.\textsuperscript{176} Although this theory seems solid because it is grounded in common sense, Justice Stevens, speaking for the plurality in \textit{Pacific}, said that this was not an adequate method of regulation because the harm has already taken place.\textsuperscript{177} Justice Brennan, however, disagreed with this reasoning in his dissenting opinion, because he believed the right to freedom of speech greatly outweighs the minimal harm the broadcast caused.\textsuperscript{178} Until the Supreme Court revisits this issue, other methods of dealing with indecent broadcasts should be examined.\textsuperscript{179}

Former FCC Commissioner Michael Powell suggested that media companies adopt a voluntary code.\textsuperscript{180} From the 1950s\textsuperscript{181}

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\textsuperscript{175} See Jarvis, \textit{supra} note 1, at 14 ("So I like to listen to [Stern]. If you don't, fine. Listen to something else. I won't stop you. Just don't stop me.").
\textsuperscript{176} See Goldsamt, \textit{supra} note 16, at 250-51 (discussing simple non-legislative way to regulate indecent material). Quoting Justice Brennan's dissent in \textit{Pacific}: Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations, or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection.
\textsuperscript{177} See FCC v. \textit{Pacific}, 438 U.S. 726, 748-49 (1978) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.").
\textsuperscript{178} See \textit{id.} at 765-66 (Brennan, J., dissenting) (rejecting majority's holding that individual harm from broadcast outweighs right to freedom of speech). For a further discussion of Justice Brennan's dissent, see supra note 176.
\textsuperscript{179} For a further discussion of alternative methods of dealing with indecency, see \textit{infra} notes 180-200 and accompanying text.
\textsuperscript{180} See Jarvis, \textit{supra} note 1, at 13 ("In his address to the NAB in March . . . FCC chairman Powell urged them -- under threat of gigantic fines -- to adopt a voluntary code: 'It would be in your interest to do so."").
\textsuperscript{181} See De La Paz, \textit{supra} note 1, at E1 (discussing voluntary code of ethics adopted in 1950s).
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through the 1980s, the National Association of Broadcasters followed the Code of Good Practices ("CGP"). The CGP discouraged broadcasting television shows containing sexual relations, religion, and greed. It even "prohibited use of the word 'pregnant.'" There is no suggestion yet concerning how restrictive a new code would be, but if it is anything similar to the CGP, then it will have a huge impact on many popular shows as network television stations will be unable to broadcast them.

A possible solution regarding radio broadcasts is to institute a mandatory rating system similar to what is currently used for television. Radio stations could broadcast warnings about the content of the program each time the program comes back from commercial. Unfortunately, this solution does not solve the problem Justice Stevens identified about people who tune in while the program is in progress.

182. See Jarvis, supra note 1, at 13 (discussing National Association of Broadcasters drop of ethics code due to pressure from Reagan Administration because of constitutional concerns).

183. See id. at 13 (discussing National Association of Broadcasters and CGP).

184. See id. at 14 (recounting topics CGP discouraged).

The code decreed that "illicit sex relations are not treated as commendable." . . . [T]hat "attacks on religion and religious faiths are not allowed" and that clergy "under no circumstances are to be held up to ridicule." . . . "The presentation of cruelty, greed and selfishness as worthy motivations is to be avoided." . . . [And the] "[u]nfair exploitation of others for personal gain shall not be presented as praiseworthy."

185. De La Paz, supra note 1, at E1 (discussing CGP's regulation of broadcasters). Besides prohibiting use of the word "pregnant," the CGP "discouraged the depiction of married couples in bed together." Id.

186. See Jarvis, supra note 1, at 14 (discussing impact CGP will have on current shows if reinstated). Many of today's shows would not pass the CGP standards. See id. at 14. The CGP detests illicit sex relations, which can currently be found on numerous primetime shows and especially on daytime soap operas. See id. Any shows about the current sexual abuse scandal in the Catholic Church would not be allowed under the CGP because they cast clergy in a negative light. See id. Additionally, reality television shows like *Survivor* would run into problems with the CGP because they tend to revolve around greed and selfishness. See id. Finally, the CGP proscribes that shows should not exploit others for personal gain, which is exactly what Donald Trump's hit show *The Apprentice* does. See id. If applied today, the CGP would force broadcasters to take many of the most popular shows off the air, and the content of those that remain would be severely restricted. See id.


188. See FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978) ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.").
Perhaps one of the best alternatives for the FCC to adopt is a policy to inform all broadcasters of the reasoning behind its decisions, both when the FCC issues and does not issue fines. This could be done by posting rulings on the internet or by mailing decisions to media organizations to disseminate amongst their members. Broadcasters would then be better informed as to what constitutes indecency, and they would be able to tailor their shows appropriately. Currently, the only published FCC guidelines for broadcasters are from 2001, which means that they were not created with the FCC’s new stance on indecency in mind.


190. Cf. id. (suggesting FCC mail offenders warning letters and copies of dismissals).

191. See id. (reasoning that by informing and educating broadcasters, they can in turn better protect themselves from committing offenses).


I. Introduction

1. The Commission issues this Policy Statement to provide guidance to the broadcast industry regarding our case law interpreting 18 U.S.C. § 1464 and our enforcement policies with respect to broadcast indecency. This document is divided into five parts. Section I gives an overview of this document. Section II provides the statutory basis for indecency regulation and discusses the judicial history of such regulation. Section III describes the analytical approach the Commission uses in making indecency determinations. This section also presents a comparison of selected rulings intended to illustrate the various factors that have proved significant in resolving indecency complaints. The cited material refers only to broadcast indecency actions and does not include any discussion of case law concerning indecency enforcement actions in other services regulated by this agency such as cable, telephone, or amateur radio. Section IV describes the Commission’s broadcast indecency enforcement process. Section V is the conclusion.

III. Indecency Determinations

A. Analytical Approach

9. In determining whether material is patently offensive, the full context in which the material appeared is critically important. It is not sufficient, for example, to know that explicit sexual terms or descriptions were used, just as it is not sufficient to know only that no such terms or descriptions were used. Explicit language in the context of a bona fide newscast might not be patently offensive, while sexual innuendo that persists and is sufficiently clear to make the sexual meaning inescapable might be. Moreover, contextual determinations are necessarily highly fact-specific, making it difficult to catalog comprehensively all of the possible contextual factors that might exacerbate or mitigate the patent offensiveness of particular material. An analysis of Commission case law reveals that various
Finally, a good alternative for the FCC is for the agency to take control of the monitoring process. Instead of relying on the current complaint-driven process, the FCC could employ people to randomly monitor the airwaves. This would remove the power to start investigations from the hands of special interest groups that routinely file complaints. An additional positive is that this may factors have been consistently considered relevant in indecency determinations. By comparing cases with analogous analytical structures, but different outcomes, we hope to highlight how these factors are applied in varying circumstances and the impact of these variables on a finding of patent offensiveness.

10. The principal factors that have proved significant in our decisions to date are: (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 pande or is used to titillate, or whether the material appears to have been presented for its shock value. In assessing all of the factors, and particularly the third factor, the overall context of the broadcast in which the disputed material appeared is critical. Each indecency case presents its own particular mix of these, and possibly other, factors, which must be balanced to ultimately determine whether the material is patently offensive and therefore indecent. No single factor generally provides the basis for an indecency finding. To illustrate the noted factors, however, and to provide a sense of the weight these considerations have carried in specific factual contexts, a comparison of cases has been organized to provide examples of decisions in which each of these factors has played a particularly significant role, whether exacerbating or mitigating, in the indecency determination made.

11. It should be noted that the brief descriptions and excerpts from broadcasts that are reproduced in this document are intended only as a research tool and should not be taken as a meaningful selection of words and phrases to be evaluated for indecency purposes without the fuller context that the tapes or transcripts provide. The excerpts from broadcasts used in this section have often been shortened or compressed. In order to make the excerpts more readable, however, we have frequently omitted any indication of these ellipses from the text. Moreover, in cases where material was included in a complaint but not specifically cited in the decision based on the complaint, we caution against relying on the omission as if it were of decisional significance. For example, if portions of a voluminous transcript are the object of an enforcement action, those portions not included are not necessarily deemed not indecent. The omissions may be the result of an editing process that attempted to highlight the most significant material within its context. No inference should be drawn regarding the material deleted.

Id. at 7999, 8002-09 (footnotes omitted).


194. See id. (suggesting alternate method of regulation by FCC).

195. See id. at 251 ("Such a policy would help address the problem of having indecency regulation influenced or steered by politically motivated special interest groups, that can flood the FCC with complaints."); see also McConnell, F-Word, supra note 35, at 73 (discussing reversal by FCC in Bono ruling because PTC filed appeal after FCC ruled no fine was necessary).
allow fines to be imposed more evenly across all broadcasters who violate FCC regulations instead of upon a select few.¹⁹⁶ A drawback to this policy is that some indecent broadcasts may go undetected because the FCC cannot monitor every broadcast.¹⁹⁷

On the whole, a proactive FCC that also informs broadcasters of the reasoning behind its decisions may be the best alternative to legislation like the Act.¹⁹⁸ This would reduce the FCC's bias of prosecuting only certain broadcasters,¹⁹⁹ and would help all broadcasters refrain from airing indecent material during restricted hours.²⁰⁰ Until the FCC clarifies its standards or the Supreme Court rules on them directly, it is important that FCC regulation does not result in chilling free speech.

IV. CONCLUSION

With the support of Congress,²⁰¹ the FCC has begun a crackdown on indecent broadcasts.²⁰² Unfortunately for broadcasters

¹⁹⁶. See Roeper, supra note 124, at 11 (discussing how Stern has received most of fines issued by FCC but not other broadcasters despite similarities in broadcasted material).

¹⁹⁷. See Gurza, supra note 31, at E1 (noting FCC only employs twenty investigators).

¹⁹⁸. For a further discussion of the benefits of this alternative method, see supra notes 189-97 and accompanying text.

¹⁹⁹. See Jarvis, supra note 1, at 12 (reporting uneven enforcement of indecency rules, and noting Stern received $2.5 million of fines out of $4.5 million); Goldsamt, supra note 16, at 251 (discussing role special interest groups play in FCC investigations).

²⁰⁰. See Rivera-Sanchez, supra note 189, at 366 (discussing benefits of informing broadcasters of FCC decisions).

²⁰¹. See S. 2401, 108th Cong. § 1084(f) (2004) (attempting to increase fines for indecency violations so consequences are greater and threat of possible fines carries more weight).

²⁰². See Leon Lazaroff & John Cook, CBS Fined $550,000 for Super Bowl Flap, Chi. Trib., Sept. 23, 2004, at C1 (reporting new FCC fines of record amounts); Boedeker, supra note 7 (reporting more FCC fines of record amounts). In September 2004, the FCC began fining television broadcasters for record amounts. See Boedeker, supra note 7. Shortly after proposing a record fine of $550,000 against CBS for the Janet Jackson incident, the FCC proposed a fine of $1.2 million against FOX for an episode of Married by America that aired in April of 2003 and contained scenes of strippers at bachelor and bachelorette parties. See id. This amount was the summation of $7,000 across the 169 FOX affiliates that aired the show. See id. If the Act or similar legislation passes, FCC fines could reach staggering amounts from this aggregation factor. Additionally, the FCC reported 159 complaints about the FOX show, which also was a show seen by far fewer people than the Super Bowl. See id. If Married by America, which not only rated extremely low but was also forgettable to many, is now being targeted with record setting fines by the FCC, then many popular shows may be next. See id. Broadcasters may face tough choices ahead, such as whether to change the content of their shows or move them out of the safe-harbor hours, if the FCC continues their crusade against indecency. See id.
and media companies, there are no precise guidelines available to help them self-regulate.\textsuperscript{203} Congress's attempts to pass legislation that will increase the FCC's maximum fines\textsuperscript{204} created a chilling effect on free speech across the nation.\textsuperscript{205} This pressure led Howard Stern to sign an agreement to leave broadcast radio for satellite radio once his current contract runs out at the end of 2005.\textsuperscript{206}

If the Act, or similar legislation, finally becomes law, it is likely to be struck down on constitutional grounds if its protesters are able to reach the Supreme Court.\textsuperscript{207} As suggested above, the best way for the FCC to achieve its goals may be to change its policies by providing broadcasters with concrete guidelines and enforcing these guidelines evenly.\textsuperscript{208} This would allow broadcasters to make informed decisions in tailoring their material rather than being subject to the FCC's whims and special interest groups' backlash.\textsuperscript{209}

We must be careful with any restraints we put on speech and the amount of power we give to the FCC, for as Michael Powell said in 1999:

I have gained a deep and profound respect for the wisdom of having an unwavering principle that stands at the summit of the Constitution, and holds: 'Government shall make no law abridging the freedom of speech.' . . . Benevolent or not, we did not sign away to a Philosopher-King the responsibility to determine for us, like a caring parent, what messages we should and should not hear.\textsuperscript{210}

\textit{Geoffrey Rosenblat}


\textsuperscript{205} See Jarvis, supra note 1, at 11 (describing chilling effect Act has had across United States).

\textsuperscript{206} See Satellite Radio, supra note 113 (reporting Stern's contract with Sirius Satellite Radio and reasons for leaving).

\textsuperscript{207} See McConnell, Ready to Rumble, supra note 87, at 1 (discussing why Act, in conjunction with FCC's current procedures, is unconstitutional).

\textsuperscript{208} For a further discussion of this alternative method of regulation, see supra notes 189-200 and accompanying text.

\textsuperscript{209} See Goldsamt, supra note 16, at 251 ("Such a policy would help address the problem of having indecency regulation influenced or steered by politically motivated special interest groups, that can flood the FCC with complaints.").

\textsuperscript{210} See Jarvis, supra note 1, at 15 (recounting Powell's speech when he accepted Freedom of Speech Award).